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INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING LAND AND MARITIME DELIMITATION AND SOVEREIGNTY OVER ISLANDS

(GABON/EQUATORIAL GUINEA)

REJOINDER

VOLUME I

6 March 2023

[Translation by the Registry]

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INTRODUCTION

1. In accordance with the Court's Order of 6 May 2022, the Republic of Equatorial Guinea (hereinafter "Equatorial Guinea") filed its Reply on 5 October 2022. Pursuant to the same Order, the Gabonese Republic (hereinafter "Gabon") was required to file a rejoinder by 6 March 2023 at the latest. This Rejoinder is submitted in accordance with that decision.

2. While reasserting the positions adopted in its Counter-Memorial, for which it will furnish additional supporting documents, Gabon will endeavour in this Rejoinder to respond to the inaccuracies and errors identified in the Reply, while also refuting the many baseless claims of Equatorial Guinea.

3. As a preliminary matter, Gabon notes that the Parties have entrusted the Court with a task that is clearly defined in the Special Agreement, namely to determine which "legal titles, treaties and international conventions 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". Yet Equatorial Guinea struggles to identify clearly the titles on which it relies. In its submissions, it lists an assortment of alleged bases in no particular order, leaving it to Gabon and the Court to decipher for themselves whether they are invoked separately or cumulatively. This approach attests to the weakness of Equatorial Guinea's position. In contrast, Gabon's submissions are clear and in accordance with the Special Agreement. They identify the legal titles, treaties and conventions that have the force of law between the Parties in so far as they concern the land and maritime boundaries and sovereignty over the islands in dispute.

4. As regards the subject of the dispute and the identification of the relevant titles (**Chapter I**), Gabon will demonstrate that Equatorial Guinea confuses the various meanings of "legal title" with the one envisaged in the Special Agreement, and that it equates the possibility of a title (entitlement) with the legal title itself. Gabon will recall that, pursuant to the Special Agreement of 15 November 2016, the Parties can only invoke legal titles. In particular, it will be shown that *effectivités* do not fall into this category and are therefore irrelevant.

5. With respect to the Bata Convention, Equatorial Guinea does not deny that this instrument exists. As this Rejoinder will argue, this is because it is untenable to contend otherwise in light of the evidence before the Court (**Chapter II**), including that submitted by Equatorial Guinea. However, Equatorial Guinea seeks in vain to cast doubt on the validity and binding force of the Bata Convention by invoking the subsequent conduct of the Parties. Although it has dispensed with the estoppel-based argument put forward in its Memorial, the new arguments it raises are no more convincing.

6. As regards the legal titles that have the force of law in respect of the land boundary (**Chapter III**), Gabon reaffirms that the Bata Convention is such a title and fixes the land boundary between the two States. Since the Bata Convention describes the boundary in terms almost identical to those used to describe the boundary established by the colonial Powers in Article 4 of the Paris Convention, the text of Article 4 continues to reflect that title in part. Furthermore, despite Equatorial Guinea's attempts to negate the provisions of the Paris Convention, the colonial Powers never approved any changes to it. Equatorial Guinea's claims of modifications "in practice" and its reliance on so-called *infra legem effectivités* remain entirely unfounded in law and fact.

7. As regards title to sovereignty over the islands (**Chapter IV**), Gabon first notes that Equatorial Guinea has failed to establish its title over the islands in dispute, since the evidence on

which it relies can no more constitute a legal title than can the alleged *effectivités* presented. Since neither France nor Spain regarded the Paris Convention as giving title to the islands in dispute, the Bata Convention is the only legal title with the force of law between the Parties in this regard. Moreover, Gabon has never renounced this title; on the contrary, it has firmly and consistently asserted its rights over Mbanié, Cocotiers and Conga.

8. In fact, Equatorial Guinea has great difficulty identifying the prevailing title for its island claims. Its submissions refer to "the succession by the Republic of Equatorial Guinea to the title held by Spain on 12 October 1968", and no fewer than six separate elements of very different natures are listed to explain the Spanish title: a treaty, four pieces of Spanish domestic legislation and Spain's alleged effective occupation of the islands in dispute. Equatorial Guinea's silence on the nature of its alleged title is no doubt due to the fact that none of these elements can constitute a title with the force of law between the Parties as regards sovereignty over Mbanié, Cocotiers and Conga. In contrast, Gabon's position is clear: the Bata Convention definitively resolves the sovereignty dispute that existed in respect of those islands between France and Spain during the colonial period and between Gabon and Equatorial Guinea after their respective independence. Since then, Gabon has continuously exercised sovereignty over that group of islands and there is thus nothing to suggest that it has renounced its conventional title.

9. As regards the legal title relating to the maritime boundary (**Chapter V**), Equatorial Guinea's latest written pleading shows that the Parties agree in one fundamental respect: where an agreement exists between the Parties on maritime delimitation, that title prevails over any other instrument that might serve to delimit their common maritime boundary. That is now established. On the other hand, the Parties disagree in two respects: first, whether such a delimitation agreement exists, and, second, whether there are other legal titles with the force of law between them. In 1974, Gabon and Equatorial Guinea concluded the Bata Convention, delimiting their common maritime boundary along a line parallel to the 1° north parallel of latitude and creating enclaves around the Equatorial Guinean islands of Corisco, Elobey Grande and Elobey Chico, which lie to the south of that line and therefore in Gabon's maritime area. The Bata Convention is thus the legal title with the force of law between the Parties as regards their maritime delimitation.

10. The alleged titles invoked by Equatorial Guinea, namely the Paris Convention, the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS") and customary international law, are not legal titles with the force of law between the Parties. In its Reply, Equatorial Guinea's demonstrations are flawed and unconvincing. The alleged titles concerned are either silent on the maritime delimitation (for example the Paris Convention, which simply establishes the land boundary terminus), or merely evidence of the possibility of a title (entitlement) (for example UNCLOS and customary international law), but in no way a title in themselves. The alleged titles invoked by Equatorial Guinea are not titles with the force of law between the Parties as regards the maritime delimitation and they are not capable of becoming so, whatever view the Court takes of the Bata Convention. Indeed, in the unlikely event of the Court finding that the Bata Convention is not a legal title with the force of law between the Parties in so far as it concerns maritime delimitation, the elements invoked by Equatorial Guinea would still not be titles within the meaning of the Special Agreement, and the Court would have no choice but to find that there is no legal title with the force of law between the Parties as regards their maritime boundary.

11. Finally, this Rejoinder contains Gabon's submissions and a list of annexes. It is accompanied by 60 annexes, reproduced in Volume II.

CHAPTER I
THE SUBJECT OF THE DISPUTE: IDENTIFICATION OF THE RELEVANT LEGAL TITLES

1.1 Article 1 of the Special Agreement of 15 November 2016 reads as follows:

"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."

1.2 These provisions — and in particular paragraph 1, which defines the dispute — must be interpreted by applying the rules set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, whose customary status is recognized by both Parties[1].

1.3 It is true that, as Equatorial Guinea asserts,

"Equatorial Guinea and Gabon are in agreement that the purpose of the Special Agreement is for the Court to resolve completely the Parties' dispute regarding the applicable legal titles, treaties and international conventions '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'."[2]

1.4 Nevertheless, the Parties profoundly disagree about the extent of this "agreement".

1.5 In its Memorial, Equatorial Guinea made only very general statements about the meaning of the Special Agreement of 15 November 2016 and simply asserted that:

"The Special Agreement determines the Court's jurisdiction, which extends to deciding which of the legal titles, treaties and international conventions ('Legal Titles')

[1] REG, Vol. I, para. 2.7.

[2] *Ibid*., para. 2.15.

invoked by either Party, in the Special Agreement or in the course of these proceedings, have the force of law between the Parties."[3]

1.6 Gabon, for its part, paid particular attention in its Counter-Memorial to the terms of Article 1 of the Special Agreement and demonstrated:

(a) that this provision allows the Parties to invoke "legal titles", in the sense of documentary evidence;

(b) that any such evidence of sovereignty or sovereign rights, as expressly stated in the Special Agreement, may only take the form of "treaties and international conventions"; and

(c) that more generally, neither *effectivités* nor an entitlement can be equated to "legal titles" within the meaning of the Special Agreement[4].

1.7 This prompted Equatorial Guinea to devote a little more time in its Reply to its understanding of the terms of Article 1, paragraph 1, of the Special Agreement. First, it claims that there is agreement between the Parties — which proves to be nothing more than a superficial agreement — about the task entrusted to the Court by the Special Agreement[5]. It then misrepresents Gabon's position by claiming that the latter is asking the Court to limit its jurisdiction to deciding only whether the Bata Convention is a legal title having the force of law between the Parties "in so far as [it] concern[s] the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga"[6]. Equatorial Guinea also argues that "[i]t is therefore erroneous to suggest, as Gabon does on the basis of an artificial distinction between title and entitlement, that certain juridical facts should not count as legal title"[7]. Later in its Reply, Equatorial Guinea revisits at length the role of *effectivités* in the resolution of the present dispute[8].

1.8 In this chapter, in response to those allegations, Gabon will revisit the subject of the Special Agreement and the task entrusted to the Court (**I**); it will then reiterate how "legal titles, treaties and . . . conventions" should be understood within the meaning of the Special Agreement (**II**), reasserting its position that *effectivités* have no role to play in resolving the dispute before the Court (**III**).

I. The subject of the dispute submitted to the Court by the Special Agreement

1.9 In its Memorial, Equatorial Guinea had very little to say about the definition of the dispute contained in Article 1 of the Special Agreement[9]. Content to reproduce the terms of the Special Agreement almost word-for-word, it asserted:

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[3] MEG, Vol. I, para. 1.4.

[4] See CMG, Vol. I, Chap. V, part II.

[5] REG, Vol. I, paras. 2.1-2.3.

[6] *Ibid*., paras. 2.4-2.6.

[7] *Ibid*., para. 2.22 (fn. omitted).

[8] *Ibid*., paras. 5.2-5.6.

[9] See above, para. 1.1.

> "The 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."[10]

1.10 Unfortunately, rather than standing by this — correct — assertion and drawing the necessary conclusions, Equatorial Guinea refuted it throughout its Memorial. It followed this statement with a factual account of the disputes (in the plural) between the two States concerning the land and maritime delimitation, on the one hand, and sovereignty over the islands, on the other. Despite intermittently claiming to be acting in strict compliance with the Special Agreement[11], Equatorial Guinea invited the Court to pronounce on facts and legal arguments far outside the limited mandate conferred on it by the Parties.

1.11 This misleading presentation prompted Gabon, in its Counter-Memorial, to revisit the scope of the task entrusted to the Court. The Special Agreement does not ask the Court to resolve delimitation disputes or a dispute concerning sovereignty over the islands, but simply to settle a *preliminary* dispute about the legal titles with the force of law between the Parties in so far as they concern the delimitation of their common boundary and the attribution of sovereignty over certain islands[12].

1.12 In its Reply, Equatorial Guinea addresses the subject of the dispute before the Court in greater detail. It asserts, first, that the Parties agree on the scope of the mandate conferred on the Court, declaring that "[i]t has set out the facts in the Memorial exclusively for the purpose of establishing the legal titles, treaties and conventions that Equatorial Guinea invokes under Article 1 of the Special Agreement"[13].

1.13 However, Equatorial Guinea confuses the situation once again when it contends that "the Parties agree that the Special Agreement asks the Court to decide on the *legal effect* of titles, treaties and international conventions invoked by them"[14], and when it postulates that the Court should verify "the nature and effect" of the Bata Convention[15]. Gabon struggles to understand the meaning and scope that Equatorial Guinea gives to the terms "legal effect" and "nature", which are much used by the latter in its Reply to describe the mandate conferred on the Court by the Special Agreement[16] (even though, despite what it claims[17], these expressions appear neither in its Memorial nor anywhere in the text of the Special Agreement).

1.14 Next, distorting Gabon's position, Equatorial Guinea posits that "[t]he Special Agreement does not limit the Court's Jurisdiction to deciding only whether the Document Gabon presented in 2003 is a Legal Title having the Force of Law between the Parties"[18] and that "Gabon's interpretation

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

[11] *Ibid*., paras. 7.8 and 7.20.

[12] See CMG, Vol. I, Chap. V, part I, paras. 5.5 *et seq*.

[13] REG, Vol. I, para. 2.3.

[14] *Ibid*., p. 6 (emphasis added).

[15] *Ibid*., para. 2.6.

[16] *Ibid*., paras. 2.1, 3.6, 3.81, 4.57.

[17] *Ibid*., para. 2.1.

[18] REG, Vol. I, p. 7.

of the Special Agreement seek[s] to limit the Court's task to merely answering one 'yes' or 'no' question, regarding the nature and effect, if any, of the document presented in 2003 (which it calls the 'Bata Convention')"[19].

1.15 This is not an accurate representation of the position of Gabon, which does not deny that the Parties to the dispute before the Court may invoke several legal titles. Gabon simply notes that one of the legal titles it invokes, the Bata Convention, supersedes the others in so far as it reaffirms them in part, makes slight adjustments to them and fills any gaps they may contain.

1.16 Moreover, Article 1, paragraph 1, of the Special Agreement simply states that the Court is called upon to determine which "legal titles, treaties and international conventions invoked by the Parties" have the force of law between them. Although Equatorial Guinea is invited, just like Gabon, to submit all "legal titles, treaties and international conventions" which it considers relevant within the meaning of the Special Agreement, there is nothing to suggest that the Court is obliged to find that *several* legal titles have the force of law between the Parties as regards the delimitation of their common land and maritime boundaries, since one such title is sufficient to respond to the questions of which it is seised. Logically, the Court cannot uphold several titles if those titles contradict one another. In fact, it is not even obliged to uphold one, should it find that none of the legal titles invoked by the Parties has the force of law for the purposes defined in the Special Agreement.

1.17 In its Counter-Memorial, Gabon listed a number of earlier cases showing, by analogy, how the Special Agreement should be interpreted here[20]. Among those precedents, the *North Sea Continental Shelf* cases are particularly helpful in clarifying the duties the Court is required to perform. In those cases, in which Judgments were rendered in 1969, the parties asked the Court to identify the rules applicable to the delimitation of their continental shelf. The Court responded by stating in particular that:

> "(A) the use of the equidistance method of delimitation [is] not . . . obligatory as between the Parties; and
>
> (B) there [is] no other single method of delimitation the use of which is in all circumstances obligatory"[21].

Despite finding no clear or established rule for the delimitation of continental shelves, the Court nevertheless completely resolved the disputes submitted to it.

1.18 In the present case, the Court is not called on to determine the rules applicable to the delimitation, but to identify which legal titles that may be invoked by the Parties in the context of their broader dispute have the force of law. Just as in the *Continental Shelf* cases, the Court could, for instance, "completely"[22] resolve the dispute submitted to it by finding that none of the legal titles invoked by the Parties has the force of law as regards, for example, sovereignty over the islands of Mbanié, Cocotiers and Conga or the delimitation of the two States' maritime boundary. In that event, were the Court to uphold Equatorial Guinea's position that the 1900 Paris Convention "did not create

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[19] *Ibid*., para. 2.6. See also *ibid*., paras. 2.12 and 2.20.

[20] CMG, Vol. I, paras. 5.16 *et seq*.

[21] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 53, para. 101.

[22] REG, Vol. I, para. 2.15.

new or separate legal title to [the] islands"[23], while simultaneously refusing to recognize the Bata Convention as having the force of law between the Parties in respect of the delimitation of their common boundary, it would be for the Parties to negotiate with a view to concluding a new agreement, just as they did for the Special Agreement whereby they were able to submit their dispute concerning the legal titles applicable to the delimitation of their boundaries.

II. The definition of "legal titles" within the meaning of the Special Agreement

1.19 Unlike in its Memorial, Equatorial Guinea discusses in its Reply the meaning to be attributed to the concept of "legal titles" mentioned in the Special Agreement. In so doing, it fails to distinguish between the source (or possibility) of a title (entitlement) and the title itself (**A**), and construes (too) broadly the concept of "legal titles", which is nevertheless limited to conventional titles by Article 1, paragraph 1, of the Special Agreement (**B**).

A. The confusion created by Equatorial Guinea between the possibility of a title (entitlement) and the title itself

1.20 Equatorial Guinea contends in its Reply that "Gabon is wrong in dismissing, for example, State succession as a source of legal title, when this is plainly a process under international law by which titles belonging to the previous sovereign pass over to the successor State"[24]. According to Equatorial Guinea, "[s]uccession is both the source of the rights of the successor State and a legal title"[25].

1.21 These statements are a good illustration of another confusion maintained by Equatorial Guinea. As Gabon has already shown in its Counter-Memorial,

> "Equatorial Guinea . . . 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"[26].

1.22 In support of its position, Equatorial Guinea quotes Basdevant's *Dictionnaire de la terminologie du droit international*, which defines "title" as a "[t]erm which, taken in the sense of *legal title*, means any fact, act or situation which is the cause and basis of a right"[27]. This definition sits in Basdevant's dictionary alongside another, which has not been reproduced by Equatorial Guinea: "[d]ocument invoked with a view to establishing the existence of a right or status"[28].

1.23 The *Dictionnaire Salmon*, for its part, reproduces the latter definition under letter C ("proof of title") and proposes two further alternative definitions for the term "title": "A. Cause, basis, substantive source of a right. In this case, one may speak of 'cause of title'"; and "B. Legal

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[23] *Ibid*., para. 4.5.

[24] *Ibid*., para. 2.22.

[25] *Ibid*., para. 2.23.

[26] CMG, Vol. I, para. 5.81.

[27] REG, Vol. I, para. 2.24; J. Basdevant, *Dictionnaire de la terminologie du droit international*, Paris, Sirey (1960), p. 604.

[28] J. Basedevant, *op. cit.* (REG, Vol. V, Ann. 59), p. 605.

operation constituting a mode by which a right is attributed. In this case, one may speak of 'mode of title'"[29]. These definitions vary, but Equatorial Guinea's understanding of the term "title" does not square with any of them. They suppose in turn:

(a) "cause of title" (*negotium juris*) — that the title invoked is the direct source of the sovereignty or sovereign rights asserted by a State in respect of a given land or maritime area;

(b) "proof of title" (*instrumentum*) — that the title claimed is supported/demonstrated by a document with an intrinsic value under international law;

(c) "mode of title" — that the title forming the source of the sovereign rights is conferred by the operation in question.

1.24 The Court considered the concept of title in the *Burkina Faso/Mali* case:

> "The 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'"[30].

1.25 These two meanings correspond to the definitions of "cause of title" and "proof of title".

1.26 As far as the attribution of territory and delimitation are concerned, the "cause of title" is the source of a State's sovereign rights in respect of a given area, i.e. the means of establishing sovereignty or a boundary. As for "proof of title", the Court stated in the same judgment that this concerned any "document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights"[31]. However, not all the documents to which the Parties may refer have this intrinsic legal force; this is particularly true of maps, at least when not annexed to a treaty document[32].

1.27 "Mode of title" must be considered separately. It refers solely to the mode of operation by which sovereign rights may be acquired or claimed. Such "mode of title" may take various forms, including State succession and *uti possidetis juris*.

1.28 Hence, Equatorial Guinea can only establish that it succeeded by one means or another to the rights of Spain if it is able to demonstrate that one or more legal titles were held by the colonial Power before Equatorial Guinea became independent. Anything else would render the "legal titles"

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[29] J. Salmon, *Dictionnaire de droit international public*, Bruylant, Bruxelles (2001), p. 1084.

[30] *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.

[31] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 582, para. 54 (emphasis added *[sic]*). 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.

[32] CMG, Vol. I, para. 5.88.

mentioned in Article 1, paragraph 1, of the Special Agreement empty shells of indeterminate content, and would in no way enable the dispute before the Court to be resolved.

1.29 It is in this sense alone that the Court likened succession to a title in the *Salvador/Honduras* case, which is quoted by Equatorial Guinea, not without some confusion:

> "[T]he 'title' of El Salvador or of Honduras to the areas in dispute, in the sense of the source of their rights at the international level is, as both Parties recognize, that of succession of the two States to the Spanish Crown in relation to its colonial territories; the extent of territory to which each State succeeded being determined by the *uti possidetis juris* of 1821."[33]

1.30 This truncated passage does not have the general scope that Equatorial Guinea seeks to attribute to it. In its entirety, it reads as follows:

> "*In one sense*, the 'title' of El Salvador or of Honduras to the areas in dispute, in the sense of the source of their rights at the international level is, as both Parties recognize, that of succession of the two States to the Spanish Crown in relation to its colonial territories; the extent of territory to which each State succeeded being determined by the *uti possidetis juris* of 1821."[34]

1.31 On the basis of this passage, it appears that succession could, "in one sense", be seen as a "title". But the very general conclusion that Equatorial Guinea draws from this is far too hasty[35].

1.32 In the *Salvador/Honduras* case, the Court was not asked to rule on only the applicable titles, as it is in this case, but

> "1. [t]o delimit the boundary line in the zones or sections not described in Article 16 of the General Treaty of Peace of 30 October 1980[; and]
>
> 2. [t]o determine the legal situation of the islands and maritime spaces."[36]

1.33 Although the Court likened "succession" to a "title" when it proceeded to delimit the land boundary between El Salvador and Honduras, it nevertheless immediately sought to determine the actual title or basis of the right upon which one or other of the parties could rely to justify its claims over the disputed territory. It stated after the passage mentioned by Equatorial Guinea:

> "Secondly, . . . a 'title' might be furnished by, for example, a Spanish Royal Decree attributing certain areas to one of those [units]. As already noted, neither Party has been able to base its claim to a specific boundary line on any 'titles' of this kind applicable to the land frontier."[37]

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[33] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 389, para. 45, quoted in English in REG, Vol. I, para. 2.23.

[34] Emphasis added.

[35] REG, Vol. I, para. 2.22.

[36] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 357, para. 3.

[37] *Ibid*., p. 389, para. 45.

1.34 This distinction between the mode of attribution of a title and the legal title itself held by a State over a land or maritime area can be seen in other judgments of the Court. In its Counter-Memorial, Gabon referred to the case concerning the *Territorial and Maritime Dispute* between Nicaragua and Colombia. In that case, the Court confirmed 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'"[38]. However, the Court went on to state, still in accordance with that rule, that it was "concerned in [those] proceedings only with . . . Colombian entitlements", and thus refused to consider that the rule in itself constituted a title[39].

1.35 Other examples can be given of instances in which the Court has identified the distinction to be made between the "legal title" or right of a State and its source or the means by which it is created or transmitted (entitlement). In the *Nicaragua* v. *Honduras* case, the Court declared that it was:

> "thus of the view that the Honduran authorities issued fishing permits with the belief that they had a legal entitlement to the maritime areas around the islands, derived from Honduran title over those islands."[40]

1.36 In other words, the Court made a clear distinction between, on the one hand, the legal title that Honduras believed it held over those islands and, on the other, the potential rights that Honduras might have in respect of the surrounding maritime areas as a result.

1.37 In succeeding a predecessor State, a successor State may of course potentially accede to sovereign rights in respect of a given territory. However, according to the widely accepted definition of succession of States, this expression covers only "the replacement of one State by another in the responsibility for the international relations of territory"[41]. Succession therefore concerns only the means by which a right (in this instance, a territorial title) is transmitted, and it cannot as such constitute either the title itself or proof of its existence. From time to time, Equatorial Guinea helpfully distinguishes between "legal title" and "succession", such as when it claims, for example, that "[a]fter its independence in 1968, Equatorial Guinea continued to administer the Utamboni River Area consistent with the legal title it inherited from Spain"[42]. The succession of States is not a title in itself: it is the principle that allows a *pre-existing* title to pass over to a new holder, who "inherits" it — the title remains the same; it is its holder that changes.

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[38] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 674, para. 140, p. 680, para. 151. See also *ibid*., p. 674, para. 140.

[39] CMG, Vol. I, para. 5.82, referring to *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 674, para. 140 and p. 680, para. 151. See also *ibid*., p. 692, para. 181.

[40] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 718, para. 195.

[41] Vienna Convention on Succession of States in respect of Treaties, 23 Aug. 1978, Vienna, United Nations, *Treaty Series* (UNTS), Vol. 1946, p. 3, Art. 2, para. 1 (b); Vienna Convention on Succession of States in respect of State Property, Archives and Debts, 8 Apr. 1983, Vienna, United Nations, *Official Records of the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts*, Vol. II, Art. 2, para. 1 (a). See also United Nations General Assembly resolution 55/153, [30 Jan. 2001], *Annex: Nationality of natural persons in relation to the succession of States*, Art. 2 (a); *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 598, para. 399.

[42] REG, Vol. I, para. 5.48.

1.38 The same is true, *mutatis mutandis*, of the similar kind of confusion that Equatorial Guinea creates around the principle of *uti possidetis juris*, in equating "the principle of respect for boundaries inherited from their colonial predecessors" with a legal title[43].

1.39 Moreover, Equatorial Guinea contradicts itself when it claims, for example, that:

> "*Uti possidetis juris* thus gave permanence to the boundary established in the 1919 Agreement and the report of the 1901 Commission, in the same way that it gave permanence to the administrative limits of Spain in the Americas and France in Africa"[44].

Equatorial Guinea therefore considers the only valid legal titles to be the alleged Agreement of 1919 and the report of the 1901 Commission — which Gabon disputes[45] — and not, rightly, the principle of *uti possidetis juris* itself[46].

1.40 The confusion fabricated by Equatorial Guinea is even more apparent when it relies on "the application of international treaties regarding the law of the sea, notably UNCLOS"[47]. It states in this regard that:

> "under both UNCLOS and customary international law, the Parties' titles and entitlement to the territorial sea, exclusive economic zone, and continental shelf emanate from their titles to insular and continental land territory.[48] These titles unquestionably 'concern' the delimitation of their maritime boundary. As numerous international courts and tribunals have recognized, 'the land dominates the sea'"[49].

1.41 Here too, Equatorial Guinea is seeking to establish the basis of a claim to a title (entitlement) as the title itself. In other words, Equatorial Guinea recognizes that (once established) the title of a State over a given territory allows that State to *claim*, in the adjacent maritime area, a territorial sea, an exclusive economic zone and a continental shelf. But there is nothing automatic about this process: these areas must still be delimited or, in the case of the continental shelf, delineated; the titles to sovereignty or to the sovereign rights of the coastal State in respect of these areas are to be constituted by the agreement that the States concerned must conclude to that end, or by the legally binding decision of a judicial or arbitral body[50]. UNCLOS itself cannot therefore be established as a legal title or as evidence thereof.

1.42 Gabon's interpretation of Article 1 of the Special Agreement is largely confirmed by the context in which the terms of this provision appear and by the context, object and purpose of the Special Agreement as a whole. "An arbitration agreement . . . is an agreement between States which

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[43] *Ibid*., para. 3.66.

[44] *Ibid*., para. 5.66. See also *ibid*., para. 3.67.

[45] See below, paras. 3.51-3.61.

[46] REG, Vol. I, para. 5.48.

[47] *Ibid*., para. 3.67.

[48] *Ibid*., fn. 456: "See Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J Reports 1984, p. 245, para. 103".

[49] *Ibid*., para. 6.10. See also, more generally, paras. 6.7-6.11.

[50] See in particular the United Nations Convention on the Law of the Sea, 10 Dec. 1982, Montego, *UNTS*, Vol. 1834, No. 31363, Arts. 74, 83.

must be interpreted in accordance with the general rules of international law governing the interpretation of treaties" which form part of the rules of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties[51].

1.43 As Gabon has already pointed out[52], the immediate context of Article 1, paragraph 1, of the Special Agreement consists first and foremost of the three other paragraphs of that article, which are relevant for the interpretation of paragraph 1. Paragraphs 2 and 3 mention only two "legal titles", both treaties, which are documentary evidence of the existence of a State's sovereignty over a territory or of its sovereign rights in respect of a maritime area. Listed as "legal titles" which might be invoked as 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" are thus the Paris Convention of 27 June 1900 and the Bata Convention of 12 September 1974, easily encompassed by the phrase "treaties and . . . conventions" which appears after "legal titles" in paragraph 1. Paragraphs 2, 3 and 4 of Article 1 of the Special Agreement were included solely for the purpose of implementing paragraph 1, as illustrated by the phrase "to this end" which appears between paragraphs 1 and 2. It is therefore in the light of this restrictive wording that paragraphs 2 and 4 must be interpreted.

1.44 Furthermore, the very object and purpose of the Special Agreement is to enable the dispute (in the singular) between the Parties to be resolved. This dispute, Gabon recalls, is concerned exclusively with the disagreement about which "legal 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 the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga".

1.45 Equating succession to a legal title — in other words, to a document establishing the legitimacy of the sovereignty claimed — cannot therefore relieve Equatorial Guinea of the need to demonstrate the *prior* existence of the title which is said to have been transmitted. Equatorial Guinea cannot claim that Spain transmitted legal titles to it, if Spain's rights have not been established: *nemo potest plus iuris transferre quam ipse habeat*[53]. Moreover, as Article 1, paragraph 1, of the Special Agreement provides, the Parties are invited to submit to the Court only "legal titles, treaties and international conventions" that have the force of law.

B. The "legal titles, treaties and international conventions" that can be invoked by the Parties

1.46 In its Counter-Memorial, Gabon paid particular attention to the meaning to be attributed to the phrase "legal titles, treaties and international conventions". As it showed, the phrase "treaties and international conventions" offers an important clarification as to how the term "legal titles", immediately preceding it in the same provision, should be understood[54]. Equatorial Guinea has disputed this interpretation in its Reply, but has failed to provide any convincing evidence.

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[51] *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, p. 69, para. 48.

[52] See above, para. 1.2.

[53] *Island of Palmas* case, 4 Apr. 1988, *Reports of International Arbitration Awards* (RIAA), Vol. II, p. 842; French translation in *Revue Générale de droit international public*, Vol. XLII, 1935, p. 164.

[54] CMG, Vol. I, para. 5.70.

1.47 According to Equatorial Guinea, Gabon's interpretation of Article 1, paragraph 1, of the Special Agreement is

> "obviously contrary to the text of the Special Agreement, which lists distinct sources of legal rights that the Court must assess: legal titles, in addition to treaties and international conventions. There is nothing in the text that indicates or implies that 'treaties and international conventions' are intended to constitute the only sources of the 'legal titles' referred to in Article 1(1). There are many possible formulations the drafters could have used to express this intention, had it been the case, but they chose not to use them."[55]

1.48 In support of its position, Equatorial Guinea contends that

> "[t]he Court has repeatedly ruled that the interpretation of a special agreement must not render any of its provisions 'devoid of purport or effect'. If, as Gabon asserts, 'legal titles' means only 'treaties and international conventions', the term 'legal titles' would be deprived of any 'purport or effect'. The drafters of the Special Agreement could have referred to 'treaties and international conventions' without mentioning 'legal titles', but that is not what they chose to do. Rather, they included the latter term, which in common usage and international law has a different and broader meaning than 'treaties and conventions'."[56]

1.49 Like Equatorial Guinea, Gabon considers that the interpretation of the Special Agreement, as an international treaty, requires each of the terms used therein to have a distinct meaning[57]. Gabon's position respects this: the Parties may invoke various "legal titles", within the meaning of that term as clarified by the phrase "treaties and international conventions". The Parties could have chosen simply to refer to "treaties and international conventions", but in so doing would have extended the subject of the dispute, since not all "treaties and international conventions" are "legal titles"[58]. The Parties could also have chosen to use only the term "legal titles" — they chose, however, to add the phrase "treaties and international conventions", thereby clarifying (and, at the same time, restricting) the titles that may be invoked by the Parties in this case.

1.50 Conversely, the principle of *effet utile* for the purposes of interpretation undermines the position advanced by Equatorial Guinea: if, by including the term "legal titles" in Article 1, paragraph 1, of the Special Agreement, the Parties had intended to permit the invoking of any title, they would not have added "treaties and international conventions" immediately thereafter, since these are, quite obviously, among the legal titles which may be invoked. It is the alternative interpretation of this provision put forward by Equatorial Guinea that deprives of any useful effect the inclusion of this term in Article 1, paragraph 1, of the Special Agreement, which has exactly the same meaning whether or not it is accompanied by the phrase "treaties and international conventions".

1.51 Equatorial Guinea claims that "Gabon's interpretation in effect rewrites the text of Article 1 by eliminating the term 'legal title'"[59]. The rewriting is actually being done by Equatorial

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[55] REG, Vol. I, para. 2.11.

[56] *Ibid*., para. 2.12; fn. omitted.

[57] *Ibid*., para. 2.10.

[58] See above, para. 1.43.

[59] REG, Vol. I, para. 2.11.

Guinea, which even admits as much when it states that "the Court must assess: legal titles, *in addition to* treaties and international conventions"[60], even though the phrase "in addition to" does not appear in Article 1, paragraph 1, of the Special Agreement.

1.52 Moreover, Equatorial Guinea disregards the context and general structure of the Special Agreement which Gabon described in its Counter-Memorial[61]. Its interpretation of Article 1, paragraph 1, of the Special Agreement is confirmed by paragraphs 2 and 3 of that article. Hence the only things mentioned as "legal titles" having the force of law between the Parties as regards their common land and maritime boundary and sovereignty over the islands of Mbanié, Cocotiers and Conga are the 1900 Paris Convention and the 1974 Bata Convention, for Gabon, and the 1900 Paris Convention, for Equatorial Guinea — both of which are instruments of a purely conventional nature — which suggests that, when the Special Agreement was under discussion, Equatorial Guinea was not thinking about the succession of States or the principle of *uti possidetis* or UNCLOS, the many pseudo-titles "discovered" *ex post* when it realized that the Paris Convention did not allow for the subsequent resolution of all the boundary and island disputes between the Parties.

1.53 The *travaux préparatoires*, as relevant evidence for confirming the interpretation of the Special Agreement[62], also support Gabon's interpretation. Thus, in a Note addressed to the United Nations mediator in March 2001, Gabon drew attention to the fact that "the Parties themselves have resolved these matters by agreement. The dispute between them should be limited to their acceptance of the titles' relevance for the sole purposes of their normal application". In the same Note, Gabon went on to state that it "could not agree to any wording about the subject of the dispute to be submitted to the Court which would usurp this understanding"[63]. Moreover, an earlier version of Article 1, paragraph 1, of the Special Agreement provided that:

> "The Court is requested to determine whether the legal titles 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 exercise of sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga, and the delimitation of their common boundaries."[64]

1.54 Article 1, paragraph 1, of the draft Special Agreement mentioned only "legal titles", without further clarification.

1.55 Following this draft agreement of 19 January 2016, Gabon put forward new wording for Article 1 of the Special Agreement. This proposal sought, among other things, to include the phrase "treaties and international conventions" after "legal titles"[65]. The very purpose of Gabon's proposal,

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[60] *Ibid*. (emphasis added).

[61] CMG, Vol. I, para. 5.70.

[62] *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, p. 69, para. 48; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41.

[63] Commission for the Gabon/Equatorial Guinea Dispute, Observations of the Gabonese delegation on the new draft Article 1 regarding the subject of the dispute as put to the Parties at the end of the final mediation session, Geneva, 29-30 Mar. 2001 (RG, Vol. II, Ann. 52), p. 4, para. 7.1.2.

[64] See Note of Luigi Condorelli, 21 July 2011 (RG, Vol. II, Ann. 54) reproducing the draft Special Agreement as suggested in the letter of the Mediator dated 13 July 2011. See also Note of Luigi Condorelli, 30 Apr. 2012 (RG, Vol. II, Ann. 55) reproducing the draft Special Agreement as annexed to the letter of the Mediator of 26 Apr. 2012. See also Draft Special Agreement, 31 Oct. 2013 (RG, Vol. II, Ann. 56); Draft Special Agreement, 19 Jan. 2016 (RG, Vol. II, Ann. 57).

[65] Draft Special Agreement, 19 Jan. 2016 (RG, Vol. II, Ann. 57).

which was to become the wording used in the Special Agreement, was to clarify the category of legal titles that could be invoked by the Parties, limiting them to treaties and conventions alone.

III. *Effectivités* are irrelevant for the purposes of the present dispute

1.56 Despite the limitations on the titles that may be invoked by the Parties under the Special Agreement, Equatorial Guinea pays them no heed, invoking *effectivités* at every opportunity so that they become the alpha and the omega of the "titles" on which it relies, and making them say something they do not. Article 1, paragraph 1, of the Special Agreement refers only to legal titles, however, and makes no mention of *effectivités*. And, as Equatorial Guinea acknowledges[66], "*effectivités*" are not comparable to "legal titles". Equatorial Guinea clearly recognizes this, in particular by systematically adding the phrase *infra legem* to its references to *effectivités*[67]; by Equatorial Guinea's own admission, therefore, *effectivités* can by definition be *infra titulum* only.

1.57 This distinction between the two concepts is reflected more generally in the Judgment of the Chamber of the Court in *Burkina Faso/Mali*, on which Equatorial Guinea largely relies, and in which the Court very clearly distinguishes between legal titles and *effectivités*:

> "As the Court has repeatedly made clear, the legal relationship between *effectivités* and legal title 'must be drawn among several eventualities':
>
> (i) 'where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title';
>
> (ii) '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';
>
> (iii) where 'the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration'; and
>
> (iv) where 'the legal title is not capable of showing exactly the territorial expanse to which it relates', '*effectivités* can then play an essential role in showing how the title is interpreted in practice'"[68].

1.58 Each of these four hypotheses calls for a brief comment in view of the specific circumstances of the present case, it being recalled that the Special Agreement only authorizes the Court to rule on the relevance of the *legal titles* on which the Parties rely.

1.59 Claiming that it is demonstrating the first hypothesis (confirmatory *effectivités*), Equatorial Guinea refers back to its Memorial:

> "the Memorial documented numerous unchallenged administrative acts and agreements — *infra legem effectivités* — during the colonial period and after

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[66] See below, para. 1.57.

[67] See, in particular, REG, Vol. I, paras. 5.2-5.5, 5.33, 5.37; MEG, Vol. I, paras. 6.32, 6.33, 6.35, 6.37, 6.38, 6.40.

[68] REG, Vol. I, para. 5.3, quoting the Court's Judgment in the case concerning *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 586-587, para. 63. The quotations from the *Frontier Dispute* case are included in French in the original text. They appear in English in Equatorial Guinea's Reply.

independence, which confirmed the agreed adjustments, or gave rise to a separate source of legal title"[69].

1.60 Equatorial Guinea presents those "agreed adjustments" as "based on Article 8 and A[ppendix No.] 1 of the [1900 Paris] Convention prior to the independence of Equatorial Guinea and Gabon"[70]. It goes without saying, however, that they could only be "confirmed by *effectivités*", whatever those *effectivités* may be, if the alleged "adjustments" were made in accordance with the Paris Convention. As Gabon has already demonstrated[71] — and to which subject it will return below, in the chapter on the legal title that has the force of law between the Parties as regards the delimitation of their common land boundary[72] — no subsequent modification was made to the Paris Convention confirming a change to the land boundary between the two States.

1.61 Moreover, to illustrate these confirmatory *effectivités*, Equatorial Guinea mentions at length a range of evidence presented as "*infra legem effectivités*". Thus, reference is made to a draft treaty from 1966 whose object is not boundary delimitation and which was neither ratified nor applied by Gabon or Spain[73], the existence of a church[74] and even forestry concessions[75]. Discussions regarding the veracity of these elements and their presentation aside[76], it is difficult to see how they would constitute *effectivités*.

1.62 As for the claim that these alleged *infra legem effectivités* "gave rise to a separate source of legal title", this runs counter to the second "*Burkina Faso/Mali*" hypothesis, which does not allow *effectivités* alone to contradict a title as defined above[77]. It is also in direct contradiction with the Court's position in the *Burkina Faso/Niger* case, in which the Court reaffirmed that "[w]hile an *effectivité* may enable an obscure or ambiguous legal title to be interpreted, it cannot contradict the applicable title"[78]. Indeed, if that were the case, it would no longer be *infra legem* but, quite clearly, *contra legem*. Only the clear and mutual consent of the two Parties could transform these *contra legem effectivités* into *infra legem effectivités*.

1.63 Aware of this requirement of consent and having to acknowledge the clear lack of a relevant agreement outside the Paris and Bata Conventions, Equatorial Guinea thus seeks to argue that *infra legem effectivités* may establish the existence of the acquiescence of first France and then Gabon[79]. In so doing, Equatorial Guinea is not simply invoking *effectivités* as confirmation of the existence of a title, but wrongly equating those purported *effectivités* with titles. It is thus disregarding the principles that it has itself nevertheless recalled earlier in its Reply: *effectivités* cannot be treated as titles, and when *effectivités* contradict a title, the title prevails. As previously established by the

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[69] *Ibid*., Vol. I, para. 5.2.

[70] See, in particular, REG, Vol. I, paras. 2.19, 5.4.

[71] CMG, Vol. I, paras. 1.41 *et seq*., 7.28 *et seq*.

[72] See below, paras. 3.23-3.61.

[73] REG, Vol. I, paras. 5.38 *et seq*., 5.69-5.70. See also CMG, Vol. I, para. 2.56; below, para. 3.48.

[74] REG, Vol. I, para. 5.86.

[75] *Ibid*., para. 5.45. See also below, para. 3.48.

[76] See below, paras. 3.23-3.61.

[77] See above, para. 1.57.

[78] *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 79, para. 78. See also *ibid*., para. 79. See *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 120, para. 47, and pp. 148-149, para. 141.

[79] REG, Vol. I, para. 5.51.

1922 Arbitral Award in the boundary dispute between Colombia and Venezuela, "[e]ncroachments and untimely attempts at colonization from the other side of the boundary, as well as *de facto* occupations, [are] without importance and without consequence in law"[80].

1.64 Equatorial Guinea's position is in complete contradiction with the second hypothesis put forward by the Court: "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"[81]. In founding the existence of France's and Gabon's acquiescence on alleged *infra legem effectivités*, Equatorial Guinea is wrongly equating titles with *effectivités* and disregarding the primacy of the former over the latter.

1.65 Moreover, the Court has previously rejected a similar argument as part of the *Cameroon* v. *Nigeria* case. Having established the existence of a title concerning the delimitation of the boundary between those two States, the Court found that the *effectivités* invoked by Nigeria in support of its argument that there was acquiescence to a modification could be regarded only as *contra legem effectivités* which could not displace the title[82].

1.66 Likewise, in the *Libya/Chad* case, the Court considered that

> "the effectiveness of occupation of the relevant areas in the past, and the question whether it was constant, peaceful and acknowledged, are not matters for determination in this case . . . The 1955 Treaty completely determined the boundary between Libya and Chad."[83]

1.67 The same is true in this case, in which the Parties agree on the existence of the 1900 Paris Convention and on its characterization as a legal title with the force of law between them; the alleged subsequent *effectivités* invoked by Equatorial Guinea to the south of the 1° north parallel of latitude and to the east of the 9° east of Paris meridian, if established, would therefore be only *contra legem effectivités* incapable of constituting a new title taking the place of the Paris Convention.

1.68 Regarding the third hypothesis envisaged by the 1986 Judgment, the Chamber of the Court considered that where "the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration"[84]. Despite the difficulty in determining how "taken into consideration" should be understood, Gabon does not in any way question this position; nevertheless, it should be noted that this hypothesis does not fall within the framework of the task entrusted to the Court in the Special Agreement. As the preamble and Article 1 state, the dispute exclusively concerns the identification of the legal titles having the force of law between the Parties. The Court is not required to examine the existence, relevance and relative strength of *effectivités* which could remedy the lack

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[80] Arbitral Award of 24 Mar. 1922, *Affaire des frontières Colombo-vénézuéliennes (Colombia* v. *Venezuela)*, *RIAA*, Vol. I, p. 228.

[81] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 586-587, para. 63.

[82] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 351, para. 64.

[83] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 38, para. 76. See also *Minquiers and Ecrehos (France/United Kingdom), Judgment, I.C.J. Reports 1953*, p. 67; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 678, para. 127.

[84] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 586-587, para. 63.

of a legal title[85]. If it were to consider that, in this case, there is no legal title that has the force of law between the Parties as regards the delimitation of their common land and maritime boundaries and sovereignty over the islands, it would be confined to making such a finding and to referring the Parties to peaceful means of settling their dispute.

1.69 Even though the alleged *infra legem effectivités* cannot confirm the existence or take the place of a title, Equatorial Guinea contends that such evidence could be used for the interpretation in practice of the titles having the force of law between the Parties in the fourth hypothesis envisaged in the 1986 Judgment, according to which, where "the legal title is not capable of showing exactly the territorial expanse to which it relates", "*effectivités* can then play an essential role in showing how the title is interpreted in practice"[86]. However, it is not a question of interpretation here; Equatorial Guinea is relying on *effectivités* to justify, on the pretext of interpretation, a *change* to the conventional title which established abstract lines, and which is now said to fix natural limits for the delimitation of the boundary between the two States.

1.70 Equatorial Guinea claims that the Parties "disagree on the territorial areas covered by their legal titles"[87]. To get around this purported uncertainty, it invokes all the *infra legem effectivités* previously mentioned, and maps[88]. Unless the latter are annexed to the text of a treaty, thereby becoming part of the treaty[89] — which is not the case for the maps in question — neither constitutes a title. Consequently, this fourth hypothesis calls for the same observations as the one before it: neither the *effectivités* nor the maps constitute evidence that the Court can take into consideration in settling the dispute submitted to it by the Parties.

1.71 Gabon does not deny that there is a land and boundary dispute between the Parties concerning the areas covered by the legal titles on which the Parties rely[90]. Here too, however, as regards the task entrusted to the Court in the Special Agreement, Gabon and Equatorial Guinea have not empowered the Court to take a position on that dispute; they have simply asked it to determine which "legal titles" 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"[91].

1.72 The most compelling illustration of Equatorial Guinea's attempts to equate the discussion on *effectivités* to a delimitation dispute is to be found in Chapter 5 of its Reply. In the section entitled "Continuous and Unchallenged *Infra Legem Effectivités*", Equatorial Guinea presents what it describes as *effectivités*, which it then illustrates on various sketch-maps purportedly showing what the land boundary would look like, were the Court to accept the alleged *effectivités* presented to it by Equatorial Guinea[92]. In so doing, Equatorial Guinea is transforming the dispute regarding the determination of which legal titles have the force of law between the Parties in so far as they concern

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[85] See above, paras. 1.9-1.18.

[86] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 586-587, para. 63.

[87] REG, Vol. I, para. 5.4. See also *ibid*., para. 4.2.

[88] See in particular MEG, Vol. II, figures 3.11, 3.12, 3.13. See also REG, Vol. II, figures R5.5 and R5.6.

[89] *Sovereignty over Certain Frontier Land (Belgium/Netherlands), Judgment, I.C.J. Reports 1959*, p. 220. See also CMG, Vol. I, para. 5.88.

[90] CMG, Vol. I, paras. 5.6, 5.35 and 5.48.

[91] See in this regard the statements put forward on this subject by Gabon in its Counter-Memorial not disputed by Equatorial Guinea (CMG, Vol. I, paras. 5.5-5.55).

[92] See in particular Equatorial Guinea's figures R5.10 and R5.11.

the delimitation of their land boundary into an outright delimitation dispute. For the reasons set out in this chapter[93], and those already put forward in its Counter-Memorial[94], Gabon considers that the Court does not have jurisdiction to settle such a dispute.

Conclusion

1.73 It follows from the above that:

(a) whatever the confusion created by Equatorial Guinea between the possibility of a title or the means by which it is transmitted (entitlement) and the title itself, Equatorial Guinea is obliged to demonstrate the existence of a title over all the land and island territories and over the maritime boundary, as mentioned in the Special Agreement of 15 November 2016;

(b) as agreed by the Parties in Article 1, paragraph 1, of the Special Agreement, the Parties are invited to present all "legal titles, treaties and international conventions" having the force of law between them in so far as they concern the delimitation of their common boundary and sovereignty over Mbanié, Cocotiers and Conga. They have complete freedom to this end, within the confines of this wording — confines which do not allow for the inclusion of *effectivités*.

[93] See above, paras. 1.9-1.18.

[94] CMG, Vol. I, Chap. V.I.A.

CHAPTER II
THE BATA CONVENTION HAS THE FORCE OF LAW BETWEEN THE PARTIES

2.1 In its Counter-Memorial, Gabon demonstrated: *(a)* the existence of the Bata Convention, a certified copy of which was sent to the Ambassador of France to Gabon in October 1974; and *(b)* that the Bata Convention is a treaty which is binding on the Parties[95]. These two questions are distinct: one is factual and the other legal. Nevertheless, Equatorial Guinea confuses the two. Thus, while arguing in its Reply that the Bata Convention is not a "final and binding treaty establishing legal titles"[96], it repeatedly calls into question the Convention's very existence. The Court must therefore first determine whether the Bata Convention exists, by examining the body of evidence corroborating its existence (**I**). Should it answer this question in the affirmative, it must then decide the separate question whether the Bata Convention is a treaty, by assessing the Parties' intent as reflected in the text of the Convention and the circumstances of its adoption (**II**).

2.2 By way of a preface to its argument, Equatorial Guinea lists "twelve propositions [that] appear not to be disputed by Gabon" concerning the Bata Convention[97]. This list contains several false or misleading representations of Gabon's position. These need to be corrected.

(a) Contrary to what Equatorial Guinea claims, Gabon does not "bear[] the evidential burden of proving the authenticity of the document"[98]. In accordance with the principle of *onus probandi incumbit actori*, it is in fact the duty of the party that asserts certain facts to establish the existence of such facts. Therefore, if Equatorial Guinea has doubts about the authenticity of the 1974 certified copy of the Bata Convention submitted to the Court by Gabon, it is incumbent on Equatorial Guinea to prove that the document is inauthentic[99].

(b) Equatorial Guinea asserts that "no original of the document has ever been produced"[100]. Although it is true that it has not been possible to locate an original copy of the Convention, the certified copy on which Gabon bases its argument is the one sent by President Bongo to the French Ambassador to Gabon on 28 October 1974[101]. It is thus not of "dubious origin" as Equatorial Guinea claims[102]. In the covering letter, President Bongo confirms that he has enclosed "two

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[95] CMG, Vol. I, Chap. VI.

[96] REG, Vol. I, p. 28.

[97] *Ibid*., para. 3.7.

[98] *Ibid*., para. 3.7(1).

[99] CMG, Vol. I, para. 6.25 and citations: *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 centred 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."

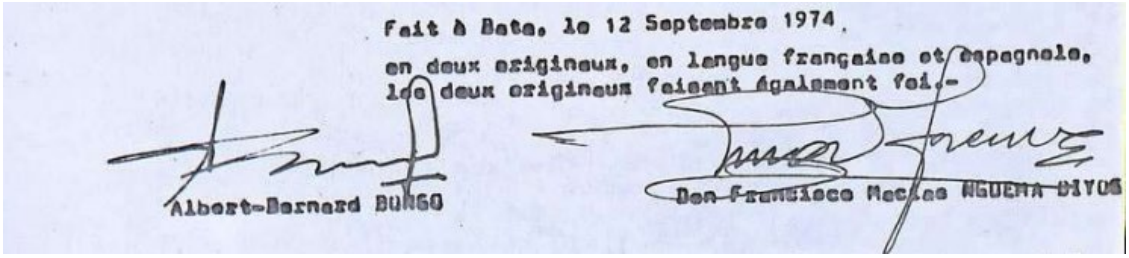
[100] REG, Vol. I, para. 3.7(3).

[101] Letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155).

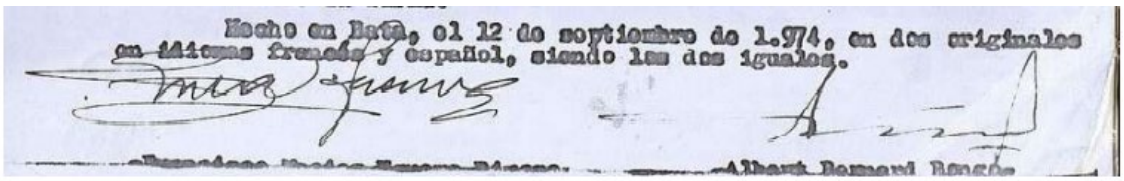
[102] REG, Vol. I, para. 3.7(5).

certified copies, in French and Spanish, of the boundary convention that President [Macías] Nguema Biyoghe and I signed at Bata on 12 September of this year"[103].

(c) Equatorial Guinea attempts to cast doubt on the reliability of the certified copy submitted to the Court by Gabon, noting that "the Spanish version is cut off at the bottom of the signature page such that the names of the signatories and anything written below the signatures is not shown"[104]. While the names of the signatories are partially cut off in the certified copy of the Spanish version of the Convention[105], the signatures and initials of both Presidents are nevertheless clearly visible in both versions (as shown below)[106].



French version



Spanish version

(d) Equatorial Guinea continues to argue that "there are material differences between the alleged photocopies of the document on which Gabon now seeks to rely"[107]. However, it is the certified copy of the signed original of the Convention in French and Spanish, sent by the President of Gabon to the Ambassador of France to Gabon in 1974[108], on which Gabon relies, and not the retyped version later submitted to the Secretariat of the United Nations[109] (nor any other copy of the Bata Convention).

(e) Equatorial Guinea also claims, without explanation, that there are "material differences . . . as between the French and Spanish versions of the document". These differences are not "material",

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[103] Letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155).

[104] REG, Vol. I, para. 3.7(3).

[105] *Ibid*.

[106] Letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155).

[107] REG, Vol. I, para. 3.7(4).

[108] Letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155).

[109] CMG, Vol. I, fn. 507.

but minor. They have no bearing on the existence of the Bata Convention or its validity[110]. Under the Convention, the two versions, "in the French and Spanish languages, [are] equally authentic".

(f) Furthermore, Equatorial Guinea wrongly states that Gabon does not deny that "the document presented by Gabon, rather than reflecting a final agreement on the Parties' disputed sovereignty and boundary issues, contains material provisions requiring the Parties to take specific steps to resolve these issues"[111]. However, in its Counter-Memorial, Gabon showed that the provisions of the Bata Convention are clear, final and of immediate effect[112]. As Gabon demonstrated in its Counter-Memorial and will further demonstrate below[113], the mere fact that the delimitation recorded in the Convention was subject to a subsequent demarcation does not affect that instrument's binding force.

(g) Equatorial Guinea is wrong in contending that the lack of parliamentary ratification of the Bata Convention confirms that "Gabon understood that no treaty has been concluded"[114]. On the contrary: as stated in the Counter-Memorial, President Bongo declared 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"[115]. The absence of parliamentary ratification is thus merely the result of President Bongo's interpretation of Gabon's constitutional provisions. It is without consequence at the international level.

(h) Equatorial Guinea's allegation that "Gabon falsely represented to the UN Secretary-General that the Parties had no reservations or objections to the document despite the fact that Equatorial Guinea had protested its authenticity from the moment that Gabon first presented it on 23 May 2003"[116] is equally inadmissible. The letter sent by Gabon to the Secretary-General certified that no reservation, declaration or objection was made during the signing of the Bata Convention, under Article 5, paragraph 5, of the Regulations to give effect to Article 102 of the Charter of the United Nations[117]. Equatorial Guinea does not claim to have made any such reservation or declaration during the signing.

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[110] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, *UNTS*, Vol. 1155, No. 18232, p. 331, Art. 33. ("When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.")

[111] REG, Vol. I, para. 3.7(7).

[112] CMG, Vol. I, paras. 6.36-6.53.

[113] *Ibid*. See also below, paras. 2.24-2.25, 3.2-3.18.

[114] REG, Vol. I, para. 3.7(9).

[115] See 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.

[116] REG, Vol. I, para. 3.7(10).

[117] Resolution 97(1) of the United Nations General Assembly, 14 Dec. 1946, modified by resolutions 364-B (IV), 482 (V), 33/141-A and 73/210, adopted by the General Assembly on 1 Dec. 1949, 12 Dec. 1950, 19 Dec. 1978, 20 Dec. 2018 and 9 Dec. 2021, respectively ("In the case of multilateral treaties or agreements, the certifying statement shall include, in addition to the information described in paragraph 4 of this article: (a) A list of all the parties to the treaty or international agreement, indicating the date of deposit of each party's instrument of consent to be bound, the nature of such instrument (ratification, approval, acceptance, accession, etcetera) and the date of entry into force of the treaty for each party; and (b) A certification that it includes all reservations or declarations made by parties thereto.").

I. The Bata Convention exists

2.3 In its Reply, Equatorial Guinea does not deny that the Bata Convention exists, or at least not explicitly, as it did in 2004[118]. It merely contends that Gabon has failed to prove the document's authenticity[119]. However, as Gabon stated in its Counter-Memorial, the Convention's authenticity is established by the signatures and initials of the two Presidents under the rules codified in the Vienna Convention on the Law of Treaties[120]. If Equatorial Guinea objects to the document's admission because it believes it to be inauthentic, it is incumbent on Equatorial Guinea to prove this inauthenticity[121].

2.4 Equatorial Guinea seeks to reverse the burden of proof because it is untenable to argue that the Bata Convention does not exist or is inauthentic, in view of the evidence before the Court.

2.5 *First*, the certified copy of the Bata Convention was sent by President Bongo to the Ambassador of France to Gabon in the month following its conclusion and has been held ever since in the archives of the French Ministry of Foreign Affairs[122]. Equatorial Guinea does not dispute the authenticity of the letter. It clearly had access to the French archives while preparing its Reply and was therefore able to consult the original document and its attachment. Despite this, it seeks to diminish the letter's probative value by describing it as "a letter from President Bongo to the French Ambassador in Gabon of 28 October 1974 by which he transmits to the Ambassador a photocopy of a document he calls a 'convention'"[123]. Equatorial Guinea fails to state, however, that Gabon did not unilaterally decide to call this document a "convention": the word appears at the top of the document appended to the letter. That document is the Bata Convention, on which Gabon relies.

2.6 *Second*, the signatures of the two Presidents which appear on the certified copy of the Bata Convention match those affixed to other documents from the same era, the existence and authenticity of which are not in dispute[124]. Equatorial Guinea does not contest this fact.

2.7 *Third*, contrary to Equatorial Guinea's argument[125], there is an array of indirect evidence corroborating the existence of the Bata Convention[126]. In particular, Equatorial Guinea has included in the case file a letter dated 25 February 1977 from the Spanish Embassy in Gabon, which undeniably confirms the Convention's existence. The Spanish Ambassador writes that he is enclosing

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[118] Objection relating to the authenticity of the Convention: Equatorial Guinea, 7 Apr. 2004 (MEG, Vol. VII, Ann. 219).

[119] REG, Vol. I, para. 3.38.

[120] CMG, Vol. I, para. 6.26.

[121] *Ibid.*, para. 6.25 and citations.

[122] Letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155).

[123] REG, Vol. I, para. 3.9(iii).

[124] CMG, Vol. I, para. 6.12. See e.g. 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).

[125] REG, Vol. I, paras. 3.14 *et seq*.

[126] See CMG, Vol. I, paras. 6.10-6.23.

a copy of the instrument, explaining that the Convention had been "signed but not publicized"[127]. Despite Gabon's best efforts, it has not been able to locate that letter or its attachments in the Spanish archives[128]. Contrary to Equatorial Guinea's assertions, the letter in no way indicates that Gabon's Minister for Foreign Affairs had declared that the Bata Convention "has fallen by the wayside for now"[129]. In fact, this remark is merely the opinion of the Spanish Ambassador to Gabon, and not that of a Gabonese representative. In any event, the comment confirms the existence of the Bata Convention.

2.8 Moreover, Gabon appended to its Counter-Memorial an audiovisual report from 1974 containing images of President Bongo's visit to Equatorial Guinea. Equatorial Guinea disputes the relevance of this footage on the ground that the Bata Convention is not mentioned in it[130]. It claims that the report "merely refers to talks between President Macias and President Bongo, which reportedly did no more than make it *possible* to 'definitively resolve' the sovereignty and boundary disputes"[131]. Equatorial Guinea's position is contradicted by the report, which confirms that the boundary dispute between the two States was resolved during the presidential visit:

> "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."[132]

2.9 Gabon also furnished an article from the newspaper *L'Union* from 20 September 1974 which corroborates the existence of the Bata Convention. According to Equatorial Guinea, this article confirms that "what was produced at the conclusion of that meeting, if anything, was nothing more than a 'final communiqué'"[133]. However, the *L'Union* article includes an excerpt from the final communiqué signed by the two States; that final communiqué makes reference to the "sign[ing of] a convention on the delimitation of the land and maritime boundaries between the Gabonese Republic and the Republic of Equatorial Guinea"[134]. The same final communiqué was also reproduced in a letter of 25 September 1974 by the Spanish Ambassador to Gabon[135]. It can thus be concluded that both a final communiqué and the Bata Convention were signed on 12 September 1974. Despite

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[127] Letter No. 84 from the Director-General of the Spanish Ministry of Foreign Affairs to the Ambassador of Spain to Equatorial Guinea, 25 Feb. 1977 (REG, Vol. IV, Ann. 44), transmitting Letter No. 85 from the Spanish Ambassador to Libreville to the Spanish Minister for Foreign Affairs (Equatorial Guinea's translation of the Spanish: "acuerdo firmado, que no se dió a la publicidad"). It should be noted that, under Gabonese constitutional law, the publication of international treaties and agreements merely grants those instruments precedence over internal laws (See Constitutional Law No. 1/61 promulgating the Constitution of the Gabonese Republic, 21 Feb. 1961 (RG, Vol. II, Ann. 7, Art. 54).

[128] Note Verbale No. 1514 from the Spanish Ministry of Foreign Affairs, 30 Nov. 2022 (RG, Vol. II, Ann. 58); Note Verbale No. 0613/23/ARGRERPGOMT/CABCMD/og from the Embassy of Gabon in Spain, 25 Jan. 2023 (RG, Vol. II, Ann. 59); Note Verbale No. 1/14 from the Spanish Ministry of Foreign Affairs, 14 Feb. 2023 (RG, Vol. II, Ann. 60).

[129] REG, Vol. I, para. 3.56; Letter No. 84 from the Director-General of the Spanish Ministry of Foreign Affairs to the Ambassador of Spain to Equatorial Guinea, 25 Feb. 1977 (REG, Vol. IV, Ann. 44) (Equatorial Guinea's translation of the original Spanish: "Ha quedado en agua de borrajas, por ahora").

[130] REG, Vol. I, para. 3.10.

[131] *Ibid.*, para. 3.10.

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

[133] REG, Vol. I, para. 3.12.

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

[135] Letter No. 191 from the Ambassador of Spain to Gabon to the Spanish Ministry of Foreign Affairs, 25 Sept. 1974 (RG, Vol. II, Ann. 45).

Equatorial Guinea's denials[136], it is therefore evident that President Bongo was indeed referring to the Bata Convention and not to a final communiqué in his letter of 28 October 1974 to the French Ambassador to Gabon[137].

2.10 Contrary to what Equatorial Guinea claims, the Bata Convention's existence is also corroborated by numerous pieces of diplomatic correspondence from the time. These either explicitly refer to or describe the substance of the treaty concluded between the Parties on 12 September 1974. In particular, in addition to the correspondence described in Gabon's Counter-Memorial[138], the signing of the Bata Convention was also relayed in Spanish diplomatic correspondence from the time. For example, in a letter dated 10 October 1974, the Spanish Ambassador to Libreville confirmed that a boundary agreement between Equatorial Guinea and Gabon had been signed during President Bongo's visit to Bata on 12 September 1974[139]. He also recounted statements made by the Ambassador of Equatorial Guinea to Gabon, Clemente Ateba Nso, who confirmed that Equatorial Guinea had renounced the border dispute between the two States[140].

2.11 Similarly, in October 1974, the Spanish Ambassador to Malabo reported that President Macías Nguema had expressed his gratitude to Spain "for having discovered the existence of a Gabonese enclave beyond the first parallel, in the area of Medouneu (Acurenán district), information of which he was unaware and which he ha[d] been able to use in his negotiations with the Gabonese president"[141]. This is reflected in the Bata Convention, Article 2 of which provides for an exchange of land areas along the boundary in the area of Medouneu.

2.12 The Bata Convention is also mentioned in a 1984 information note sent by the French Embassy in Malabo to the Ministry of Foreign Affairs of Equatorial Guinea[142]. This note, sent further to a request for information from the President of Equatorial Guinea, stated: "The maritime limits set between Equatorial Guinea and Gabon are those fixed by the Convention of 12 September 1974"[143]. Gabon is not aware of any response from Equatorial Guinea to this Note Verbale. Nevertheless, the note confirms that Equatorial Guinea could not have been "taken completely by surprise"[144] in May 2003, when Gabon reminded it of the existence and content of the Convention.

2.13 In its Reply, Equatorial Guinea seeks to reinterpret to its advantage the diplomatic exchanges from that time. It maintains, for example, that Gabon cannot rely on two diplomatic cables — French and US — reporting on the statement made by President Bongo on his return from Bata in September 1974, since they "do no more than report on the same unilateral statement by

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[136] REG, Vol. I, para. 3.13.

[137] Letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155).

[138] See CMG, Vol. I, paras. 3.17-3.25.

[139] Letter No. 209 from the Ambassador of Spain to Gabon to the Spanish Ministry of Foreign Affairs, 10 Oct. 1974 (RG, Vol. II, Ann. 47).

[140] *Ibid*.

[141] Letter No. 568/74 from the Ambassador of Spain to Equatorial Guinea to the Spanish Minister for Foreign Affairs, 9 Oct. 1974 (RG, Vol. II, Ann. 46). Translation of the original Spanish: "Por haberle descubierto la existencia de un enclave gabonés por encima del paralelo 1, en la zona de Medoune (distrito de Acurenán), información que ignoraba y que ha permitido utilizarla en sus negociaciones con el Presidente Gabonés".

[142] Note Verbale No. 83/AL/84 from the Embassy of France in Malabo to the Ministry of Foreign Affairs of Equatorial Guinea, 22 Mar. 1984 (RG, Vol. II, Ann. 49).

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

[144] REG, Vol. I, para. 3.7(12).

President Bongo at his press conference at Libreville Airport"[145]. However, these accounts corroborate the substance of President Bongo's declaration as reported by the newspaper *L'Union*. Therefore, Gabon has every right to rely on them. In addition, the United States diplomatic cable not only relays President Bongo's statement, it also reports that a "French Embassy source says agreement acknowledges Gabonese rights to Mbagne island in exchange for concessions by Gabon along its northwest border area"[146]. This description is in keeping with the agreement reflected in the Bata Convention.

2.14 Equatorial Guinea also denies that President Macías Nguema's speech to representatives of the diplomatic corps in October 1974 confirms the existence of the Bata Convention[147]. It claims that this speech shows that a land boundary agreement was signed on the condition that compensation would be paid[148]. However, during the speech, the President of Equatorial Guinea confirmed that "Bongo has categorically refused to grant any type of compensation" and that this refusal "would not result in any problem to Equatorial Guinea"[149]. Equatorial Guinea also disregards the fact that its President's description of the reciprocal concessions is in line with the Bata Convention and thus confirms its existence. In particular, the President of Equatorial Guinea recognized that:

(a) The two Heads of State had discussed the question of boundaries at Bata[150].

(b) The two Presidents had agreed to "an exchange of territories with an equal surface area"[151]. This exchange is provided for in Article 2 of the Bata Convention. The report of the British authorities on the speech in question confirms that this agreement about an exchange of territories resolved the dispute relating to the land boundary[152].

(c) Equatorial Guinea "had completely relinquished its sovereign rights over M'Banie, Cocotier and Conga"[153]. This agreement is recorded in Article 3 of the Bata Convention.

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[145] *Ibid*., para. 3.14.

[146] Telegram No. 1139 from the United States Embassy in Cameroon to the US Secretary of State, 14 Sept. 1974 (CMG, Vol. V, Ann. 149).

[147] REG, Vol. I, para. 3.18.

[148] *Ibid*.

[149] Letter No. 582/74 from the First Secretary of the Spanish Embassy in Malabo to the Spanish Ministry of Foreign Affairs, 16 Oct. 1974 (REG, Vol. IV, Ann. 40). Equatorial Guinea's translation of the original Spanish: "Bongo se ha negado rotundamente a cualquier tipo de compensación" and "que esto no supone ningún problema para Guinea Ecuatorial".

[150] 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) ("It was because the [Gabonese experts] had failed to reach agreement with their counterparts from Equatorial Guinea in Malabo that the matter was raised in Bata at the level of the two Heads of State."). See also Letter No. 582/74 from the First Secretary of the Spanish Embassy in Malabo to the Spanish Ministry of Foreign Affairs, 16 Oct. 1974 (REG, Vol. IV, Ann. 40).

[151] 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 October 1974 (CMG, Vol. V, Ann. 153), p. 4.

[152] Summary of the address given by President Macías Nguema to members of the diplomatic corps, 13 Oct. 1974, Foreign and Commonwealth Office (REG, Vol. IV, Ann. 32); Letter from the Chargé d'affaires of the Spanish Embassy in Malabo to the Spanish Ministry of Foreign Affairs, 16 Oct. 1974 (REG, Vol. IV, Ann. 40).

[153] 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). See also Summary of the address given by President Macías Nguema to members of the diplomatic corps, 13 Oct. 1974, Foreign and Commonwealth Office (REG, Vol. IV, Ann. 32); Letter from the Chargé d'affaires of the Spanish Embassy in Malabo to the Spanish Ministry of Foreign Affairs, 16 Oct. 1974 (REG, Vol. IV, Ann. 40) ("With respect to *Islet of Mbañe,* President Macias asserted that he had already ceded it to Gabon").

(d) Equatorial Guinea had consented to "grant Gabonese vessels a right of innocent passage through its territorial waters, in exchange for the same treatment for its vessels in Gabonese territorial waters"[154]. This description is in line with Article 5 of the Bata Convention.

2.15 President Macías Nguema's attempt to cast doubt on the binding force of the agreement, notably as regards the maritime boundary, cannot deny the existence of the Convention or contradict the clear terms employed by the Parties therein[155].

2.16 Equatorial Guinea also claims that the letter of the French Ambassador to Gabon of 7 November 1974 "evidences more of a disagreement between the two Parties, and their failure to conclude a treaty"[156]. Yet in that letter, the French Ambassador reported in unequivocal terms on what had been said by President Bongo: "it had . . . been possible to draw up an agreement and for the two Heads of State to sign a convention, dated 12 September"[157]. Furthermore, contrary to Equatorial Guinea's contention[158], the description of the agreement given by President Bongo and reported in that letter matches the one given by the President of Equatorial Guinea in October 1974[159]. Indeed, the Gabonese President confirmed that sovereignty over Mbanié had been accorded to Gabon and that exchanges of territories had been agreed along the land boundary[160].

2.17 Similarly, the United States diplomatic cable of 29 April 1975 confirms that an agreement was concluded between Gabon and Equatorial Guinea in 1974[161]. To argue the contrary, Equatorial Guinea focuses on a single sentence in the document which reads "Gabonese-Equatorial Guinean border problem [is] far from solved and may indeed be heating up"[162]. It fails to mention, however, that according to the United States Ambassador, this dispute was due to the fact that "[Macías] feels last year's 'settlement' was imposed upon him by Bongo" and that the "maritime bound[a]ry settlement [was] also very shaky"[163]. The post-1974 boundary dispute between the Parties thus has its origins in Equatorial Guinea's questioning of the Bata Convention. This position is supported by the letter of the French Ambassador to Equatorial Guinea of 28 November 1976, in which he confirmed that the Bata Convention had been signed, but described difficulties in the relations between the two States[164].

2.18 Finally, Equatorial Guinea relies on certain diplomatic correspondence which suggests that no agreement was concluded during the meeting between the two Presidents in September

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[154] 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.

[155] See below, paras. 2.23-2.31.

[156] REG, Vol. I, para. 3.22.

[157] 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.

[158] REG, Vol. I, para. 3.22.

[159] See above, para. 2.14.

[160] See 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.

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

[162] REG, Vol. I, para. 3.25.

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

[164] 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)

1974[165]. The majority of this correspondence was sent by the French and Spanish Ambassadors stationed in Equatorial Guinea, where the political climate was opaque[166]. They frequently complained about how difficult it was to obtain information on the negotiations between the two States[167]. Indeed, the evidence before the Court suggests that neither Ambassador was aware of the actual text of the Bata Convention until the end of 1976 and the beginning of 1977, respectively[168]. Their professed ignorance at the end of 1974 has no bearing on the existence of the Bata Convention; what is more, in diplomatic correspondence of 1979, the French Embassy in Equatorial Guinea confirmed that the Convention existed. On 7 November 1979, the French Ambassador wrote:

> "To my knowledge, the convention of 12 September 1974 is still in force. Indeed, the new authorities made clear from the beginning that they intended to respect the treaties and conventions signed by the previous régime and would only seek their revision if the interests of the country warranted it."[169]

2.19 In any event, the few documents that cast doubt on the existence of the Bata Convention must be considered in the light of the vast body of evidence before the Court. For example, the undated report of unknown authorship from the French Embassy in Gabon, which states that in 1974 a draft agreement "was, in the end, not signed", cannot undermine the existence of the Bata Convention[170]. It is contradicted by numerous documents, emanating in particular from the French Embassy in Gabon, which confirm that the Bata Convention was signed[171], and, above all, by the certified copy of the document signed by the two Heads of State[172].

II. The Bata Convention is a treaty that is binding between the Parties

2.20 In its Counter-Memorial, Gabon demonstrated that the Bata Convention is a treaty under international law because: *(a)* it satisfies the conditions for the conclusion of a treaty under international law as set out in the Vienna Convention; and *(b)* the text of the Convention and the context in which it was concluded confirm the clear and unequivocal intent of the Parties to be bound under international law[173].

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[165] REG, Vol. I, paras. 3.15-3.17, 3.31; 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); Letter from the Spanish Ambassador to Malabo to the Spanish Ministry of Foreign Affairs 25 Sept. 1974 (REG, Vol. IV, Ann. 34).

[166] See e.g. Letter from the Spanish Ambassador to Malabo to the Spanish Ministry of Foreign Affairs, 25 Sept. 1974 (REG, Vol. IV, Ann. 34); Letter from the French Ambassador to Malabo to the French Ministry of Foreign Affairs, 17 Sept. 1974 (REG Vol. IV, Ann. 33). See also Information note from the Gabonese police sent to the French Ministry of Foreign Affairs, 13 July 1972 (RG, Vol. II, Ann. 20).

[167] See e.g. Letter No. 524/74 from the Ambassador of Spain to Equatorial Guinea to the Spanish Ministry of Foreign Affairs, 2 Oct. 1974 (REG, Vol. IV, Ann. 38).

[168] Letter No. 84 from the Director-General of the Spanish Ministry of Foreign Affairs to the Spanish Ambassador to Malabo, 25 Feb. 1977 (REG, Vol. IV, Ann. 44).

[169] Telegram No. 269/72 from the Embassy of France in Malabo to the Ministry of Foreign Affairs, 7 Nov. 1979 (RG, Vol. II, Ann. 48).

[170] REG, Vol. I, para. 3.36.

[171] See e.g. Letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155); 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); 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).

[172] 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).

[173] CMG, Vol. I, Chap. VI(III).

2.21 In its Reply, Equatorial Guinea maintains that the Bata Convention is not a binding instrument establishing a legal title. Equatorial Guinea's argument is centred on its interpretation of the circumstances in which the Bata Convention was concluded[174] and the conduct of the Parties after it was signed[175]. It claims that the evidence presented by Gabon is insufficient "to support its allegation that on 12 September 1974 the Parties concluded a final and binding agreement"[176]. Equatorial Guinea fails to mention, however, that foremost among the evidence put forward by Gabon is the certified copy of the Convention.

2.22 In accordance with the Court's jurisprudence[177], the *binding force* of the Convention is established by the very text of that instrument (**A**) and by the circumstances in which it was concluded (**B**). This binding force is not and cannot be undermined by the subsequent conduct of the Parties (**C**).

A. The text of the Bata Convention

2.23 The intention of the parties is the principal factor by which a non-legally binding instrument may be distinguished from a treaty[178]. This intention is inferred primarily from the terms used by the parties in the instrument in question[179]. Equatorial Guinea does not and cannot contest this fundamental rule of interpretation. However, it disregards the clear and unequivocal terms contained in the Bata Convention[180]. In its Reply, Equatorial Guinea makes no mention of the following elements, in particular:

(a) The instrument is entitled "Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon".

(b) Its preamble recalls that the Parties "[c]onside[r] that treaties and conventions constitute an important means of developing peaceful cooperation between nations, irrespective of their political regimes", and "[d]esir[e] to lay firm foundations for peace between their two countries, notably by definitively establishing their common land and maritime frontiers".

(c) The Parties are designated "High Contracting Parties" in the Convention.

(d) Under the Convention, each Party "cedes" land areas to the other.

(e) The Parties "recognize" Gabon's sovereignty over the island of Mbanié and Equatorial Guinea's sovereignty over the Elobey Islands and the island of Corisco.

(f) The two States agree to grant guarantees and facilities to each other's ships on a reciprocal basis and to conclude arrangements relating to border relations, as provided for in the Paris Convention.

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[174] REG, Vol. I, Chap. 3(I).

[175] *Ibid*., Chap. 3(II).

[176] *Ibid*., para. 3.9.

[177] *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.

[178] CMG, Vol. I, paras. 6.32-6.33.

[179] *Ibid.*, para. 6.35.

[180] See *ibid*., paras. 6.36-6.53.

(g) The Bata Convention also contains final clauses of the type characteristic of treaties, including the possibility to settle disputes in accordance with Article 33 of the Charter of the United Nations, the place and date of signature, the number of original copies and the language versions, both of which, it is stated, are equally authentic.

2.24 Disregarding these provisions, which are difficult to overlook, Equatorial Guinea claims that the Bata Convention cannot be a treaty because "it required the Parties to take additional steps to resolve the territorial issues and conclusively establish their boundaries"[181]. Nevertheless, Equatorial Guinea accepts Professor Shaw's contention that "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"[182]. The Parties' disagreement is about the existence of a boundary delimitation within the Bata Convention.

2.25 "Delimitation" is the process of describing a boundary line in words before that line is marked on the ground[183]. The Bata Convention undeniably describes the Parties' common boundaries.

(a) Articles 1 and 2 describe the land boundary between the two States. In particular, they set out the starting-point of the boundary line and its course in relation to specific lines of latitude and longitude[184]. As stated in the Counter-Memorial and in Chapter III below[185], these articles merely envisage a subsequent demarcation exercise aimed at determining the "precise" land areas "ceded" by each Party under Article 2 of the Convention, and the "marking" of the boundaries[186].

(b) Article 4 describes the maritime boundary by reference to a line of latitude and by establishing the starting-point of the boundary. It also provides for water areas of the precise dimensions stated. Equatorial Guinea does not dispute that this article describes a boundary, but it claims that the boundary is not final owing to the *nota bene*[187]. Contrary to what Equatorial Guinea contends, the *nota bene* does not state that Article 4 of the Bata Convention "was a placeholder for an agreement yet to be reached"[188]. It envisages a "new text", which would modify and replace Article 4. The *nota bene* is thus nothing more than an agreement between the Parties to conclude a further agreement. The fact remains that, when the Bata Convention was signed, the Parties were nonetheless in agreement about the initial text of Article 4, which describes in unequivocal terms the maritime boundary between the two States. There is nothing to suggest that the Parties wished to deprive this article of binding force until it was modified. This conclusion is in keeping

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[181] REG, Vol. I, para. 3.38.

[182] *Ibid.,* para. 3.45.

[183] R. Jennings, A. Watts, *Oppenheim's International Law*, p. 662.

[184] Letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155).

[185] See below, paras. 3.2-3.18.

[186] Equatorial Guinea wrongly contends that the French version of Article 8 refers to the "physical delimitation" rather than the "marking of the frontiers". See Letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155).

[187] REG, Vol. I, para. 3.43.

[188] *Ibid.*, para. 3.44.

with the Court's reasoning in the *Libya/Chad* case[189]. In any event, the *nota bene,* which refers to Article 4 alone, cannot undermine the binding force of the Bata Convention as a whole.

2.26 Nor do the other arguments raised by Equatorial Guinea concerning the text of the Bata Convention cast doubt on the objective intention of the Parties to conclude a treaty.

2.27 *First*, disregarding the Court's jurisprudence[190], Equatorial Guinea asserts that the provisions of the Bata Convention concerning the instrument's entry into force do not confirm that the Parties intended it to be binding[191]. It refers in this regard to the statements made by President Macías Nguema, as relayed by Equatorial Guinea's Minister for Foreign Affairs in 1984. According to the latter, the President added a handwritten note to the Convention at its signing, stating "that this text is not valid until it has been ratified by the national assemblies of both countries"[192]. Not only are these statements — made ten years after the Convention was signed and five years after the fall from power of one of the Presidents who signed it — ambiguous, but they are also completely unfounded and contradict the text of Article 10 of the Bata Convention, the only authentic text, which provides that "[t]he present Convention shall enter into force on the date of signature thereof". Consequently, these statements are not a determining factor as regards either the intention of the Parties in 1974 or the legal value of the Convention, especially since this handwritten note does not appear in the certified copy of the instrument.

2.28 Equatorial Guinea also insinuates that this alleged note was cut out of the Spanish version of the Convention. It states that "[i]t is thus more than coincidental that *every copy of the Spanish version of the document is cut off on the last page, before the full signature line"*[193]. This insinuation is not credible. It is only the names of the signatories that are partially cut off in the text of the Spanish version of the certified copy of the Bata Convention[194]. For the rest, the Spanish version is in keeping with and contains all the provisions appearing in the French version.

2.29 *Second*, Equatorial Guinea contends that the signatures of the Presidents of Gabon and Equatorial Guinea cannot denote their intention to conclude a treaty, because they did not have "the constitutional authority to conclude such an agreement"[195]. As in the *Qatar/Bahrain* case, there is no evidence in the case file that would "justify deducing from any disregard by [the Parties] of [their] constitutional rules relating to the conclusion of treaties that [they] did not intend to conclude, and did not consider that [they] had concluded, an instrument of that kind"[196]. In any event, as the Court

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[189] Equatorial Guinea disputes the relevance of this case to the present proceedings, arguing that, unlike the 1995 treaty at issue in the *Libya/Chad* case, the Bata Convention is not final and establishes neither a territorial régime nor boundaries. Gabon has demonstrated the contrary in its Counter-Memorial and in this pleading.

[190] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 21, para. 42.

[191] REG, Vol. I, para. 3.51.

[192] 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).

[193] REG, Vol. I, para. 3.51.

[194] See above, para. 2.2(c).

[195] REG, Vol. I, para. 3.52.

[196] *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.

ruled, "[no] such intention, even if shown to exist, [could] prevail over the actual terms of the instrument in question"[197].

2.30 Moreover, the law of treaties as codified by the Vienna Convention expressly recognizes that a treaty may be validly concluded by a State, even if there has been a violation of a provision of its internal law[198]. Consequently, the constitutional provisions of Gabon and Equatorial Guinea are irrelevant in discerning the objective intention of the Parties in concluding the Convention. Nor do they affect the validity of the Bata Convention[199]. The signatures of the two Presidents attest to the intention of the Heads of State to engage their respective States at the international level.

2.31 *Third*, Equatorial Guinea claims that the handwritten modifications to the French version, replacing the word "treaty" with "convention", "cas[t] further doubt on the alleged finality of this purported 'agreement'"[200]. Equatorial Guinea's position is unfounded. Each handwritten note is duly initialled, thereby confirming the consent of both Presidents to these modifications. As Equatorial Guinea recognizes, "'convention' and 'treaty' are normally used interchangeably in international law"[201]. In addition, these initialled modifications are in keeping with the description of the Bata Convention given by President Bongo to the Ambassador of France to Gabon in 1974[202].

B. The circumstances in which the Bata Convention was concluded

2.32 The relevance of the "circumstances in which [the Bata Convention] was drawn up" is not disputed by the Parties[203]. In its Reply, Equatorial Guinea accepts that following a number of border incidents between 1970 and 1974, in particular along the land boundary, Presidents Bongo and Macías Nguema met from 9 to 12 September 1974[204]. While Equatorial Guinea's description of these events is inaccurate[205], the Parties nevertheless agree that the purpose of the visit to Equatorial Guinea in September 1974 by the Gabonese Head of State was to settle the territorial disputes between the two States[206].

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[197] *Ibid*.

[198] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, *UNTS*, Vol. 1155, No. 18232, p. 331, Art. 46.

[199] Under Article 46 of the Vienna Convention, Equatorial Guinea cannot invoke Gabonese internal law to question the validity of the Bata Convention. Nor can it invoke its own internal law because it has not demonstrated that there was a "manifest" violation "concern[ing] a rule of its internal law of fundamental importance" such as could invalidate its consent to the treaty (Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, *UNTS*, Vol. 1155, No. 18232, p. 331, Art. 46). See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 430, para. 265; *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, pp. 23-34, para. 48.

[200] REG, Vol. I, para. 3.55.

[201] *Ibid*.

[202] President Bongo declared that "it 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 (CMG, Vol. V, Ann. 156), p. 3.

[203] *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*, p. 121, para. 23.

[204] REG, Vol. I, para. 3.5.

[205] See in this regard CMG, Vol. I, paras. 2.49-2.59.

[206] REG, Vol. I, para. 3.5.

2.33 Nonetheless, Equatorial Guinea makes no mention of the negotiations that were entered into by the two States from 1970 onwards with the aim of delimiting their common boundaries[207]. The Bata Convention must be assessed in this context: it is the result of negotiations between Gabon and Equatorial Guinea which began after the latter's independence.

2.34 Thus, in June 1970, representatives of Gabon and Equatorial Guinea expressed a desire to establish their maritime boundary "in accordance with the principles of international law"[208]. Spain had already expressed such a desire before Equatorial Guinea's independence[209]. Numerous meetings between the authorities of Gabon and Equatorial Guinea were held on the subject of maritime delimitation. As Gabon explained in its Counter-Memorial, three meetings took place between February 1971 and June 1972, but it did not prove possible to conclude an agreement[210]. An incident on Mbanié in 1972 breathed new life into the negotiations between the two States. A meeting was held in Dar-es-Salam in September 1972, during which a quadripartite commission charged with facilitating the peaceful resolution of the boundary dispute between the two States was created[211]. This commission met in Kinshasa in September 1972 and in Brazzaville in November 1972[212]. Incidents along the land boundary, in particular in the spring of 1974, led the Presidents to meet once more[213]. This time they agreed to establish "a joint commission charged with verifying and definitively establishing, along its entire length, the course of the mainland boundary between Gabon and Equatorial Guinea"[214].

2.35 In the context of these negotiations, Equatorial Guinea held legal consultations with the USSR and sought the help of Spanish experts, including experts in international law[215]. Gabon likewise developed its position on the maritime boundary on the basis of the principles of international law[216]. The intention of both States to reach an agreement under international law is thus clear from these negotiations.

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[207] See Letter No. 156 from the Embassy of Spain in Gabon to the Spanish Ministry of Foreign Affairs, 23 June 1970 (RG, Vol. II, Ann. 13).

[208] 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. II, 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).

[209] Letter from the Director-General of the Spanish Ministry of Foreign Affairs to the Spanish Minister for Foreign Affairs, 11 May 1966 (RG, Vol. II, Ann. 8); Information note from the Spanish Ministry of Foreign Affairs, 8 July 1996 (RG, Vol. II, Ann. 9); Note Verbale No. 04564/MAE/SG from the Gabonese Ministry of Foreign Affairs to the Spanish Ministry of Foreign Affairs, 11 Sept. 1967 (RG, Vol. II, Ann. 10); Letter No. 585 from the Embassy of Spain in Gabon to the Spanish Ministry of Foreign Affairs, 3 Dec. 1968 (RG, Vol. II, Ann. 11); Letter from the Director-General of the Spanish Ministry of Foreign Affairs to the Spanish chargé d'affaires in Equatorial Guinea, 16 Dec. 1968 (RG, Vol. II, Ann. 12).

[210] CMG, Vol. I, paras. 2.45-2.47. See also Telegram No. 16 from the Embassy of France in Equatorial Guinea to the French Ministry of Foreign Affairs, 13 Feb. 1971 (RG, Vol. II, Ann. 14); Letter No. 118 from the Embassy of Spain in Gabon to the Spanish Minister for Foreign Affairs, 29 June 1972 (RG, Vol. II, Ann. 19).

[211] CMG, Vol. I, para. 2.51.

[212] *Ibid.*, paras. 2.52-2.54.

[213] *Ibid.*, paras. 2.57-2.59.

[214] 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). See also CMG, Vol. I, para. 3.4.

[215] 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). See also Letter No. 6 from the Embassy of Spain in Libreville to the Spanish Ministry of Foreign Affairs, 12 Apr. 1972 (RG, Vol. II, Ann. 18); Telegram No. 72 from the Embassy of Spain in Equatorial Guinea to the Spanish Ministry of Foreign Affairs, 5 Apr. 1972 (RG, Vol. II, Ann. 17).

[216] CMG, Vol. I, para. 3.6.

C. The subsequent conduct of the Parties does not affect the binding force of the Bata Convention

2.36 While Equatorial Guinea does not contest the relevance of the circumstances in which the Bata Convention was drawn up, none of the evidence it invokes relates to them. Indeed, it relies solely on the diplomatic correspondence recounting what happened *after* the Bata Convention was signed[217]. In accordance with the jurisprudence of the Court, the subsequent conduct of the parties to a treaty, including statements made after its signing by one of the parties, cannot call into question the terms of a treaty when those terms clearly provide for mutual undertakings[218]. Consequently, Equatorial Guinea cannot seek to rely on the subsequent conduct of the Parties, and even less so on the diplomatic correspondence of ambassadors of third States, in order to cast doubt on the binding nature of the Bata Convention[219].

2.37 In any event, the subsequent conduct of the Parties is in fact in keeping with the Bata Convention. In particular, whereas between 1970 and 1974 relations between the two States were punctuated by numerous meetings and visits between the two Heads of State aimed at resolving the boundary dispute, these meetings ceased once the Bata Convention had been signed, thus attesting to the settlement of the dispute. The only discussions that took place were those provided for in Article 7 of the Convention. Pursuant to this provision, a meeting was held on 23 September 1974 between the commissions of Gabon and Equatorial Guinea in order to determine the limits of the land areas ceded by both Parties along the land boundary[220]. The failure of these negotiations does not affect the legally binding nature of the Bata Convention.

2.38 Furthermore, the documents on which Equatorial Guinea relies cast no doubt on the binding force of the Bata Convention. Some merely illustrate President Macías Nguema's desire to call the agreement into question after its conclusion[221].

2.39 Others show that their authors lacked access to reliable information, particularly the ambassadors stationed in Malabo. This is especially true in the case of the letter of the French Ambassador to Equatorial Guinea of 17 September 1974. Equatorial Guinea claims that "the French Ambassador thus reported to Paris that no final and binding agreement had been reached on 12 September 1974"[222]. However, the French Ambassador confirmed that he had received only a very small amount of information about President Bongo's visit[223]. In particular, he stated that

> "in Malabo, where we are deprived of any written press and where the radio is broadcasting more and more in the Fang dialect, as of September 17 no one had the

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[217] REG, Vol. I, paras. 3.28-3.37.

[218] *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.

[219] REG, Vol. I, para. 3.81.

[220] Letter No. 509/74 from the Spanish Ambassador to Malabo to the Spanish Ministry of Foreign Affairs, 25 Sept. 1974 (REG, Vol. IV, Ann. 34); Letter No. 125 from the Spanish Ambassador to Malabo to the Spanish Ministry of Foreign Affairs, 27 Sept. 1974 (REG, Vol. IV, Ann. 35).

[221] It is clear from the evidence in the case file that President Macías Nguema regretted concluding the Convention. See e.g., 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).

[222] REG, Vol. I, para. 3.30.

[223] Letter from the Ambassador of France to Malabo to the French Ministry of Foreign Affairs, 17 Sept. 1974 (REG Vol. IV, Ann. 33) ("No information filtered through concerning the meetings that the two heads of state were in principle to have during the late morning and the private lunch").

> slightest indication of the result of this state visit and concerning the decisions that it may have brought with it"[224].

He further observed that he could only convey information "with reservations" owing to the "very suspicious silence that the Equatorial Guinean government continues to maintain, and of which the official radio has not even recounted the purely formal aspects of the end of the state visit"[225]. Likewise, the Spanish Ambassador to Equatorial Guinea confirmed that "no public information about this matter had been provided as of yet, this was due to the fact that they were attempting to resolve the problem amicably and do not like to publicly air these petty disagreements"[226].

2.40 In its Reply, Equatorial Guinea's argument is also largely based on its assertion that "at no point during those twenty-four years did either Party rely on, or even mention, the document Gabon presented in 2003"[227]. Although Equatorial Guinea mentioned the principle of estoppel in its Memorial[228], it seems to have abandoned this argument in its Reply. For the first time, it asserts that, through this alleged silence, Gabon acquiesced to the Bata Convention's lack of binding force[229]. On this basis, Equatorial Guinea claims that Gabon is "precluded from relying on that document for the purpose of seeking to establish legal title within the meaning of Article 1 of the Special Agreement"[230].

2.41 In support of its argument, Equatorial Guinea invokes the Court's decision in the *Temple of Preah Vihear* case. It asserts that "[t]he Court has held that the subsequent conduct of the Parties may be determinative of whether a treaty constitutes a valid legal title"[231]. However, in that case, the Court ruled on Thailand's acquiescence not to the existence or validity of the 1904 Treaty between France and Siam, which was not in dispute, but to France's sovereignty over the temple and its vicinity[232].

2.42 In contrast, Equatorial Guinea's argument is founded on Gabon's acquiescence not to the modification of a boundary at a given location, but to the lack of binding force of a treaty, namely the Bata Convention. However, the conditions for the termination and suspension of treaties are strictly codified in Articles 54 to 62 of the Vienna Convention on the Law of Treaties. Pursuant to these rules, the termination of a treaty, in the absence of a special provision to this end, may take place "by consent of all the parties after consultation with the other contracting States"[233]. Equatorial

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[224] *Ibid*.

[225] *Ibid*.

[226] Letter No. 509/74 from the Spanish Ambassador to Malabo to the Spanish Ministry of Foreign Affairs, 25 Sept. 1974 (REG, Vol. IV, Ann. 34); Letter No. 125 from the Spanish Ambassador to Malabo to the Spanish Ministry of Foreign Affairs, 27 Sept. 1974 (REG, Vol. IV, Ann. 35). Equatorial Guinea's translation of the Spanish: "hasta ahora no se había suministrado información sobre este tema con carácter público, ello se debía a que se estaban tratando de arreglar amigablemente el problema y no les gustaba airear públicamente estas pequeñas diferencias".

[227] REG, Vol. I, para. 3.59.

[228] MEG, Vol. I, fn. 367.

[229] REG, Vol. I, para. 3.81.

[230] *Ibid*.

[231] REG, Vol. I, fn. 170.

[232] *Temple of Preah Vihear (Cambodia* v. *Thailand), Preliminary Objections, Judgment, I.C.J. Reports 1961*, pp. 31-32.

[233] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, *UNTS*, Vol. 1155, No. 18232, pp. 344-345, Art. 54.

Guinea has demonstrated neither the consent of the Parties in any form, nor the existence of consultations.

2.43 In any event, Equatorial Guinea cannot conclude from the fact that no express mention was made of the Bata Convention in the relations between the Parties that Gabon has acquiesced to the termination of that Convention, because Gabon's conduct has always been in keeping with the Convention's provisions. In particular, Gabon has objected to any attempt by Equatorial Guinea to challenge the Bata *acquis*.

2.44 As far as the islands are concerned, Gabon has contested every attempt to encroach on its sovereignty over Mbanié, Cocotiers and Conga[234]. It has also repeatedly reiterated its sovereignty over Mbanié, which it has used as a maritime base point[235]. Since Gabon has acted in accordance with the Bata Convention, notably as regards its sovereignty over the islands, the absence of express reference to the Bata Convention in the discussions between the Parties cannot undermine that instrument's binding force.

2.45 As regards the land boundary, the Bata Convention in large part formally recognized a situation that already existed on the ground[236]. While Gabon prudently chose to maintain the status quo, in particular along the Kie River, pending the demarcation provided for in the Bata Convention, it by no means relinquished its sovereignty over those territories[237].

2.46 Nor can the mere fact that the Parties continued to negotiate the delimitation of their land and maritime boundaries after the conclusion of the Bata Convention constitute the purported acquiescence. In this regard, Equatorial Guinea makes much of the statements by the former Gabonese Minister for Foreign Affairs, Jean Ping, about the negotiations that followed the signing of the Bata Convention. The statements made by Mr Ping, who did not actually take part in the negotiations, in no way contradict Gabon's position. On the contrary, in an interview of 29 September 2006, appended by Equatorial Guinea to its Reply, he confirmed that the 1972 negotiations between the two States had "resulted in the signature, on September 12, 1974 in Bata, of the Agreement delimiting the land and maritime borders between Gabon and Equatorial Guinea", and that this Convention "regulates, globally and clearly, the essence of the questions that are the subject of the dispute"[238]. The fact that the assumption of power by the current President of Equatorial Guinea triggered "a new cycle of negotiations" and the *resurgence* of a dispute (suggesting it had previously been settled) regarding sovereignty over the islands off the coast of Gabon cannot undermine the validity of the Bata Convention or the boundary it delimits.

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[234] Translation of Letter No. 412/90/Amb/Gab/DB from the Embassy of Gabon in London to the Secretary of State for Foreign Affairs and the Commonwealth, 28 June 1990 (REG, Vol. IV, Ann. 47); Note Verbale No. 00251/AMBAG/GE/99 from the Embassy of Gabon in Equatorial Guinea to the Ministry of Foreign Affairs of Equatorial Guinea, 23 Sept. 1999 (REG, Vol. IV, Ann. 48); REG, Vol. I, paras. 3.73-3.75.

[235] Decree No. 2066/PR/MHCUCDM of Gabon, *Official Journal of the Gabonese Republic* No. 48/52-385, Dec. 1992 (REG, Vol. V, Ann. 54); REG, Vol. I, para. 3.74. See also J.D. Geslin, "The Island Coveted by All", *Jeune Afrique L'Intelligent,* 10-23 Aug. 2003 (REG, Vol. V, Ann. 64); REG, Vol. I, para. 3.78. See also Telegram No. 805 from the Embassy of France in Gabon to the French Ministry of Foreign Affairs, 11 Sept. 1984 (RG, Vol. II, Ann. 50).

[236] CMG, Vol. I, paras. 6.67, 7.19.

[237] 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). See also below, paras. 3.19-3.22.

[238] J. Ping, "Gabon: History of the talks between Gabon and Equatorial Guinea on Mbanié Island", 29 Sept. 2006 (REG, Vol. V, Ann. 65).

Conclusion

2.47 It is clear from the above that:

(a) The Bata Convention exists and its text is authentic. Its existence is irrefutably established by the certified copy of the Convention that Gabon has submitted to the Court. It is further confirmed by an array of evidence, including certain evidence presented to the Court by Equatorial Guinea.

(b) The Bata Convention is a binding instrument under international law. Its binding force is clear from the terms used by the Parties and cannot unilaterally be called into question by certain subsequent statements made by the President of Equatorial Guinea. Equatorial Guinea has not established that there are any grounds for the termination or suspension of this treaty, and indeed no such grounds exist. Therefore, the Bata Convention has the force of law between the Parties.

CHAPTER III
THE LEGAL TITLES IN RESPECT OF THE LAND BOUNDARY

3.1 Equatorial Guinea contends in its Reply that the Bata Convention was not intended to delimit the land boundary. However, Article 1 of this Convention simply reproduces, almost word for word, the description of the land boundary contained in Article 4 of the Paris Convention. While the Paris Convention — as Equatorial Guinea rightly confirms — delimited the land boundary between Río Muni and Gabon, so too does the Bata Convention, making a few adjustments to that boundary in its Article 2. It is therefore a legal title with the force of law between the Parties as regards the delimitation of their land boundary (**I**). By proceeding in this way, Equatorial Guinea and Gabon also confirmed in 1974 that no modifications were made to the land boundary established by the Paris Convention prior to this date. Indeed, contrary to what Equatorial Guinea claims, no such modifications were ever approved under the terms of the Paris Convention by either the colonial Powers or the Parties. Consequently, the other titles invoked by Equatorial Guinea, including the modifications allegedly made "in practice", have no basis in law or fact (**II**).

I. The Bata Convention is a legal title concerning the delimitation of the land boundary

3.2 In its Reply, Equatorial Guinea disputes the binding force of the Bata Convention and denies that the Convention is a legal title delimiting the land boundary. In a single sentence it asserts that "Gabon's reliance on that document [the Bata Convention] is misplaced, however, since . . . it does not have the force of law between the Parties"[239]. As has been shown above, this allegation of Equatorial Guinea is entirely baseless[240].

3.3 In addition to the separate question of the Bata Convention's binding force, Equatorial Guinea also disputes that the Convention was intended to delimit the land boundary. Nonetheless, it makes no attempt to refute Gabon's arguments in this regard[241], neglecting even to mention them. It simply claims repeatedly that the Bata Convention "fails to delimit the continental territory pertaining to, or to be ceded to, either of the Parties"[242].

3.4 This position leads Equatorial Guinea to make contradictory assertions. If it accepts — as it expressly does — that the Paris Convention "described the course of the agreed boundary between the Spanish territory of Río Muni and neighbouring French territory"[243], it cannot deny that the Bata Convention, in both form and substance, is an equivalent legal title as regards the delimitation of the land boundary.

3.5 Save for a few purely editorial changes and the inclusion of the reservation referring to Article 2 in Article 1 of the Bata Convention, Article 4 of the Paris Convention and Article 1 of the Bata Convention are identical:

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[239] REG, Vol. I, para. 5.5.

[240] See above, paras. 2.20-2.47.

[241] CMG, Vol. I, paras. 7.5-7.14.

[242] REG, Vol. I, para. 3.42. See also paras. 3.38 and 3.41.

[243] MEG, Vol. I, para. 3.36. See also CMG, Vol. I, para. 7.17, and REG, Vol. I, paras. 5.1 and 5.4.

Article 4 of the Paris Convention	Article 1 of the Bata Convention
"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).	"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 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."	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."

3.6 These two provisions "describe the boundary line in words"[244], and they do so in the same way. If, as Equatorial Guinea contends and Gabon accepts,

> "Article 4 of the [1900 Paris] Convention described the course of the land boundary between the Spanish territory of Río Muni and French Congo, as running along the thalweg of the Muni and Utamboni Rivers near the coast and then along the line of latitude 1 degree North . . . until turning north to follow the line of longitude 9 degrees East of Paris . . . to the boundary with German Kameroon"[245],

then it follows that Article 1 of the Bata Convention describes the same boundary.

3.7 Equatorial Guinea also accepts that Article 8 and Appendix No. 1 of the Paris Convention established the procedure for the *demarcation* of the boundary delimited under Article 4[246]. The fact that this procedure was never completed[247] — which Equatorial Guinea does not dispute — does not alter the purpose of Article 4 of the Paris Convention. That provision still defines the boundary. As recalled in the Counter-Memorial[248], providing for a means of precisely demarcating the boundary

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[244] REG, Vol. I, para. 3.41.

[245] MEG, Vol. I, para. 3.19.

[246] *Ibid.* ("The 1900 Convention, in Article 8 and A[ppendix No.] 1, provided that the exact boundary would be demarcated by the two States' commissioners or local delegates"). See also REG, Vol. I, para. 3.41 ("The document presented in 2003 does not even deal with demarcation, since no agreement on delimitation was reached. The Parties did not 'describe the boundary line in words', as Oppenheim posits. In the case of Equatorial Guinea and Gabon, the delimitation of the boundary was yet to be completed in the future, as confirmed by the plain language of relevant provisions conspicuously ignored by Gabon.").

[247] See CMG, Vol. I, paras. 1.42-1.50.

[248] *Ibid.*, para. 7.12.

"equally presupposes a frontier already regarded as essentially delimited"[249]. Equatorial Guinea is therefore right not to challenge the status of Article 4 of the Paris Convention as a legal title.

3.8 Nevertheless, Equatorial Guinea continues to regard Article 8 of the Bata Convention, concerning the "marking of the frontiers" ("*matérialisation des frontières*" in French), as evidence that the Convention did not delimit the land boundary between the two States. In its view, this provision "requires the precise boundary to be *subsequently* defined by representatives of Gabon and Equatorial Guinea"[250]. That is simply untrue.

3.9 The French version of Article 8 of the Bata Convention provides that:

> "La *matérialisation* des frontières sera faite par une équipe composée des représentants des deux pays, en nombre égal, avec au besoin le concours ou la participation de techniciens et observateurs de l'Organisation de l'Unité Africaine ou de toute autre organisme international, choisis d'un commun accord."[251]

3.10 The Spanish version also uses the phrase "materialisación de las fronteras"[252]. The professional translators employed by Equatorial Guinea have consistently translated this as "materialization of the boundaries"[253]. In the translation produced by the United Nations and reproduced in the *Treaty Series*, the phrase "marking of the frontiers" is used[254]. The terms employed and procedure envisaged for the "marking of the frontiers" suggest that it is a demarcation, i.e. the laying of boundary markers on the ground. It would be incongruous, to say the least, to leave a team of representatives, observers and technicians from an international organization with the responsibility of delimiting a new boundary between two States.

3.11 As Equatorial Guinea itself acknowledges, "there could be no demarcation without prior delimitation"[255]. Accordingly, Article 8 of the Bata Convention confirms that the parties considered their boundary to be sufficiently defined to proceed with its demarcation on the ground.

3.12 Consequently, the parties to the Bata Convention defined the boundary in Article 1 of that instrument just as the colonial Powers had done previously, in Article 4 of the Paris Convention. In other words, in adopting the Bata Convention, Equatorial Guinea and Gabon confirmed the delimitation of their land boundary as established by the Paris Convention, and did not ratify any modifications purportedly made prior to 1974[256]. Although the Bata Convention supersedes the Paris Convention and constitutes the legal title having the force of law between the Parties as regards the

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[249] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 340, para. 49. See also p. 359, para. 84.

[250] REG, Vol. I, para. 3.42 (emphasis in the original); MEG, Vol. I, para. 7.19.

[251] Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon, 12 Sept. 1974, appended to the Letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155) (emphasis added). (In *UNTS*: "*The marking of the frontiers shall be carried out by a team composed of representatives of the two countries in equal number, with the aid or participation, as necessary, of technical experts and observers from the Organization of African Unity or some other mutually agreed international body*.")

[252] *Ibid*.

[253] MEG, Vol. VII, Anns. 214, 215, 216 and 217.

[254] *UNTS*, Vol. 2248, p. 102 (I-40037).

[255] REG, Vol. I, para. 3.42.

[256] See also below, paras. 3.23-3.61.

delimitation of their common land boundary, it nonetheless confirms that the text of the 1900 Convention continues to reflect[257], at least in part, the legal title applicable to that boundary[258]. In the unlikely event that the Court should fail to recognize the Bata Convention's status as a legal title with the force of law as regards the delimitation of the land boundary, Article 4 of the Paris Convention, whose text is identical to that of Article 1 of the Bata Convention, would constitute such a title.

3.13 Indeed, it is because the Parties considered in 1974 that the text of Article 4 of the Paris Convention determined the boundary with the force of law in their bilateral relations that they proceeded to adjust and modify that boundary in the areas identified in Article 2 of the Bata Convention[259]. In so doing, they confirmed that no modifications had been made to the Paris Convention between 1900 and 1974, and that any future modifications would require a new delimitation agreement to be reached.

3.14 The adjustments made in Article 2 of the Bata Convention to the boundary thus defined in its Article 1 do not alter the fact that the 1974 Convention is a legal title as regards the delimitation of the land boundary. While it is true that Article 2 does not describe the course of the boundary resulting from the territorial exchanges agreed between Gabon and Equatorial Guinea in the areas of Medouneu, Ebebiyin ("carrefour international"), Ngong and Allen, it does however identify the land areas ceded on either side of the boundary in sufficient detail to conclude that the parties had in fact delimited that boundary. In its Counter-Memorial, Gabon showed that the authorities of Equatorial Guinea and Gabon had a precise understanding of the extent of the ceded territories[260], and in sketch-map No. 3.1, reproduced below, it depicted the course of the land boundary resulting from Articles 1 and 2 of the Bata Convention combined[261].

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[257] See below, paras. 3.13-3.16.

[258] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 37, paras. 72-73.

[259] See Letter No. 524/74 from the Spanish Ambassador to Malabo to the Spanish Ministry of Foreign Affairs, 2 Oct. 1974 (REG, Vol. IV, Ann. 38); 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); Letter No. 568/74 from the Ambassador of Spain to Equatorial Guinea to the Spanish Minister for Foreign Affairs, 9 Oct. 1974 (RG, Vol. II, Ann. 46); Summary of the address delivered by President Macías Nguema to the members of the diplomatic corps on 13 Oct. 1974, Foreign and Commonwealth Office (REG, Vol. IV, Ann. 32); 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); 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).

[260] CMG, Vol. I, para. 7.11.

[261] CMG, Vol. II, sketch-map No. 3.1, p. 103.

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

3.15 Equatorial Guinea saw no need to comment on these explanations. It simply accuses Gabon of "conspicuously ignor[ing]"[262] the provisions of Article 7 of the Bata Convention[263]. This article, which is discussed at length in the Counter-Memorial[264], states:

> "Protocols shall be drawn up, on the one hand, 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 and, on the other, to specify procedures for the application of the present Convention."[265]

3.16 Contrary to what Equatorial Guinea alleges, this provision, interpreted in accordance with the ordinary meaning of its terms and in its context, shows that the parties did indeed establish the entire boundary, including in the areas affected by the territorial exchanges. The cession of "land areas" under Article 2 is not contingent on the adoption of the protocols provided for in Article 7. Such protocols were merely intended to determine the surface area and precise boundaries of the ceded territories. Similarly, the procedures for the application of the Convention — which the parties agreed to set out in a protocol — are just that: application procedures covering a number of matters, such as the fate of the populations living in the ceded "land areas" and the practical implementation of the navigation and fishing rights recognized under Article 5 of the Convention. They have neither

[262] REG, Vol. I, para. 3.41.

[263] *Ibid*.

[264] CMG, Vol. I, paras. 6.40 and 7.11.

[265] Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon, 12 Sept. 1974, appended to the Letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155).

the aim nor the effect of modifying the Bata Convention or the definition of the boundary as determined by the combined effect of Articles 1 and 2.

3.17 Moreover, the preamble of the Bata Convention confirms that the parties did not wish to defer the delimitation of their boundary or of certain parts of it. The two Presidents declared that they "[d]esir[ed] to lay firm foundations for peace between their two countries, notably by definitively establishing their common land and maritime frontiers"[266]. The title of the Convention also demonstrates that the parties intended it to be an instrument "delimiting the land and maritime frontiers of Equatorial Guinea and Gabon" ("delimitando las fronteras terrestres y marítimas de la Guinea Ecuatorial y del Gabón").

3.18 Contrary to what Equatorial Guinea claims, the object and purpose of the Bata Convention was thus to establish the boundaries *definitively*. That is what the parties did[267].

3.19 Equatorial Guinea nonetheless attempts to deprive this legal title of any effect by claiming that "Equatorial Guinea has continued to administer and exercise sovereignty over all the disputed territory allegedly ceded to Gabon under that instrument"[268]. It states in this regard that it "[ha]s done so not only without protest by Gabon, but, in some areas, with Gabon's active cooperation and consent"[269]. It does not fall within the Court's jurisdiction in the present proceedings to establish whether the Parties have in fact upheld or, as the case may be, disregarded the legal title. The task entrusted to the Court by the Parties is simply to identify the relevant legal titles[270]. It is precisely because the Parties have persistently encountered difficulties in this regard that they have bestowed this task on the Court, so that they might subsequently resume their negotiations — or have recourse to other means of settling their further disputes — on a legally sound footing.

3.20 In any event, the so-called *effectivités* invoked by Equatorial Guinea are not based on any legal title[271] and thus continue to have no bearing on the dispute before the Court[272]. What is more, they in no way confirm Equatorial Guinea's claims, either in fact or law. To give just one example, the 2007 Agreement on the joint construction of several crossings in the area of Mongomo and Ebebiyin[273], by which Equatorial Guinea sets great store[274], does not mention the boundary line or allow any conclusions to be drawn about the boundary. On the contrary, how responsibility for the construction of the crossings is shared between the parties is not determined by whether those crossings are located on the territory of Gabon or Equatorial Guinea. The 2007 Agreement merely

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[266] *Ibid*.

[267] CMG, Vol. I, para. 7.13. See also 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.

[268] REG, Vol. I, para. 3.82.

[269] *Ibid*.

[270] See above, paras. 1.9-1.16.

[271] See below, paras. 3.23-3.61.

[272] See above, paras. 1.56-1.72.

[273] 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), Art. 1 ("The present agreement is concluded with a view to the construction of a boundary bridge and a section of paved road with crossings between the two countries.").

[274] REG, Vol. I, paras. 5.71-5.74.

states that Equatorial Guinea will cover the cost of building the bridge to the east of Mongomo[275], while the cost of building the road and crossings to the east of Ebebiyin will be borne by both States equally[276]. The two States also reached an agreement on construction methods and on the procedure for the joint approval of the crossings[277]. There is thus nothing in the 2007 Agreement or in the construction and inauguration of these crossings to suggest any form of recognition by the parties of a boundary "following the Kie River"[278].

3.21 *A fortiori*, under no circumstances can the "expeditions" organized by the authorities of Equatorial Guinea and carried out with their counsel and experts in 2021 and 2022[279] — thus after the present proceedings were instituted — constitute *effectivités* or relevant evidence.

3.22 For these reasons, the Bata Convention, which has the force of law between the Parties[280], constitutes a legal title relating to the delimitation of the land boundary. It sufficiently determines the land boundary between the two States. Moreover, it confirms that no modifications were made to the Paris Convention prior to 1974 and that, to the extent that the parties did not make the boundary adjustments considered necessary and appropriate in Article 2 of the Bata Convention, the text of the 1900 Convention continues to reflect the legal title applicable to the land boundary[281].

II. The alleged modifications of the Paris Convention invoked by Equatorial Guinea have no basis in law or fact

3.23 Despite the detailed explanations given by Gabon in this regard[282], and the clear terms of the task entrusted to the Court under Article 1 of the Special Agreement[283], Equatorial Guinea continues to claim, first, that France and Spain modified the 1900 Convention through their conduct, and, second, that the so-called *infra legem effectivités* "constitute additional sources of its legal title to territory in the Utamboni River and Kie River Areas"[284]. In other words, Equatorial Guinea claims that these *effectivités* are variously a source of legal title, an additional title, and evidence confirming the alleged modifications made by the colonial Powers to the Paris Convention[285].

3.24 This carefully sown confusion has but one objective: to ensure that alleged *effectivités* prevail over the text of the Paris Convention.

3.25 Before the Bata Convention was signed, Equatorial Guinea endeavoured to obtain from the former administering Power evidence to substantiate modifications to the Paris Convention which

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[275] 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), Art. 7.

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

[277] *Ibid.*, Arts. 4 to 8.

[278] REG, Vol. I, para. 5.82.

[279] Declaration of HE Domingo Mba Esono, President of the Sub-Technical Commission of the Special Borders Commission, 25 Sept. 2022 (REG, Vol. III, Ann. 5).

[280] See above, paras. 2.20-2.46. See also, CMG, Vol. I, paras. 6.1-6.76.

[281] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 37, paras. 72-73.

[282] CMG, Vol. I, para. 7.18.

[283] See above, paras. 1.9-1.18 and 1.46.

[284] REG, Vol. I, para. 5.4. See also *ibid.*, para. 5.51.

[285] See above, paras. 1.56-1.72.

would explain the inconsistencies on the ground[286]. It could not find any. Therefore, as the documents in the case file show, Equatorial Guinea, by its President's own admission, had no choice other than to recognize the rectilinear boundaries determined by the text of the Paris Convention[287]. In partially reproducing the description of the land boundary contained in Article 4 of the Paris Convention, the Bata Convention confirms that no modifications were made prior to its signature[288].

3.26 The so-called *effectivités* that Equatorial Guinea invokes before the Court clearly diverge from the delimitation lines constituted by the 1° north parallel of latitude and the 9° east of Paris meridian adopted under the Paris Convention. They thus run counter to the applicable legal title and could only constitute, in the absence of a legal title, *contra legem effectivités*[289]. As Equatorial Guinea itself acknowledges[290]:

> "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."[291]

3.27 To get around this, Equatorial Guinea attempts — not without some difficulty — to fabricate a pseudo-legal title on which those *effectivités* might be based.

3.28 However, Equatorial Guinea cannot succeed in transforming *contra legem effectivités* into evidence of a legal title or the modification of such title, into a basis for legal title or, even less, into a legal title itself[292]. The reason for this is simple: there was no legal title other than the Paris Convention before 1974. Not only are the so-called *effectivités* invoked contrary to the Paris Convention, but they also provide no factual support for Equatorial Guinea's claims.

A. There was no modification of the boundary in the Utamboni River area

3.29 Equatorial Guinea wrongly continues to assert that a modification was made to the boundary in the Utamboni River area by Spain and France, "by designating the 1901 Commission in accordance with Article 8 of the 1900 Convention, to modify the boundary and, by approving through subsequent practice, the Commission's modifications in that area"[293]. This allegation is both legally and factually flawed.

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[286] Letter No. 435/74 from the Ambassador of Spain to Equatorial Guinea to the Ministry of Foreign Affairs, 24 Aug. 1974 (RG, Vol. II, Ann. 44); Letter No. 524/74 from the Ambassador of Spain to Equatorial Guinea to the Spanish Ministry of Foreign Affairs, 2 Oct. 1974 (REG, Vol. IV, Ann. 38).

[287] Letter No. 524/74 from the Ambassador of Spain to Equatorial Guinea to the Spanish Ministry of Foreign Affairs, 2 Oct. 1974 (REG, Vol. IV, Ann. 38). See also 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); 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).

[288] See above, para. 3.12.

[289] See above, paras. 1.61-1.67.

[290] REG, Vol. I, para. 5.3.

[291] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 587, para. 63; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 38, paras. 75-76; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 353, para. 68.

[292] See above, paras. 1.23 and 1.63-1.66.

[293] REG, Vol. I, para. 5.15.

1. ***The Paris Convention was not modified in accordance with its Article 8 and Appendix No. 1***

3.30 Equatorial Guinea's argument that Spain and France entrusted the 1901 Commission with the task of *modifying* the boundary and replacing abstract lines with a boundary following natural obstacles and man-made features conflicts with the provisions of the Paris Convention and the instructions given to the 1901 Commission. Contrary to what Equatorial Guinea asserts, Gabon never agreed that "the boundaries set out in the 1900 Convention had to be adjusted to conform to the reality on the ground"[294]. First, international law does not oblige States to use any particular method when choosing their boundaries. While a so-called natural boundary may have certain advantages (and disadvantages), it is not required by law. Second, France and Spain's choice of abstract lines was largely a deliberate one. Thus, at Spain's request, in the Utamboni River area the parties adopted a boundary based on the 1° north parallel of latitude, rather than one determined by the course of that river[295]. The parallel and meridian adopted in the text of Article 4 of the Paris Convention are not mere points of reference in relation to which the boundary was subsequently to be delimited; they themselves constitute the delimitation agreed by both parties. In providing that the Commissioners designated by each party "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"[296], the terms of Article 8 of the Paris Convention leave no room for ambiguity in this regard.

3.31 This is also confirmed by the instructions given to and the work carried out by the 1901 Commission[297]. This work was primarily aimed at identifying and marking out on the ground points that could be used to determine the 1° north parallel of latitude and the 9° east of Paris meridian. Captain Roche, a member of the French section, described the mission and working method of the 1901 Commission as follows:

> "Clearly, the Commission could not follow the parallel and meridian boundary lines exactly: in terrain as dense and impenetrable as this, it is essential to keep to the paths. Although we could have cleared a route through the forest in both directions (parallel and meridian), this would have been a Herculean task which would have taken several years to complete and whose results, moreover, would have been very short-lived, since the vegetation would quickly have grown back. It was therefore necessary to keep to the indigenous paths, which follow the boundary as closely as possible, to survey them precisely, transfer the results onto a map and, using that map, identify the boundary in relation to the points plotted, indicating, for example, that the boundary runs midway between such and such villages, that it crosses a waterway or that it follows the waterway so many metres upstream from a particular confluent, and so on. This is the method that was adopted."[298]

3.32 The records of the 1901 Commission also confirm that it was tasked with identifying three points needed to plot the rectilinear boundary, using astronomical observations to determine their geographical co-ordinates. It thus identified the place at which the Utamboni meets the 1° north parallel of latitude[299] (from where the boundary proceeds along the parallel), the place at which that

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[294] *Ibid*., para. 5.1.

[295] CMG, Vol. I, paras. 1.28-1.29.

[296] 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 (CMG, Vol. III, Ann. 47), Art. 8, para. 2.

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

[298] Report for the Minister for the Colonies by Mr Bonnel de Mézières (RG, Vol. II, Ann. 1), p. 82.

[299] *Ibid.*, p. 98.

parallel intersects the 9° east of Paris meridian[300], and the place at which that meridian intersects the southern boundary of Kamerun. These locations, which enabled the above-mentioned points to be identified, as well as a number of intermediate observation sites, were recorded and plotted on the map produced by Equatorial Guinea[301] (identified by the △ symbol) (see sketch-map No. 3.2); the co-ordinates determined by mutual agreement were recorded in the Commission's documents[302].

3.33 The members of the Spanish section of the 1901 Commission fully shared this understanding of the task entrusted to them. Hence, they refused to confine themselves to any particular practice of the administration of either colonial Power on the ground. Referring to the instructions received by the Commission, they insisted that whether a town or village was located in Río Muni or Gabon was to be determined with regard to its position relative to the 1° north parallel of latitude[303].

3.34 Appendix No. 1 of the Paris Convention confirms that the 1901 Commission was never instructed by Spain and France to replace the abstract boundary with a natural one. On the contrary, according to Appendix No. 1, it had to "use as a basis the description of the boundaries as established in the Convention" to carry out its task. The terms of Appendix No. 1 read as follows:

> "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."[304]

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[300] With regard to this point, see also the itinerary followed by the Delimitation Commission in the Gulf of Guinea, 1901 (MEG, Vol. III, Ann. 12), pp. 7-8.

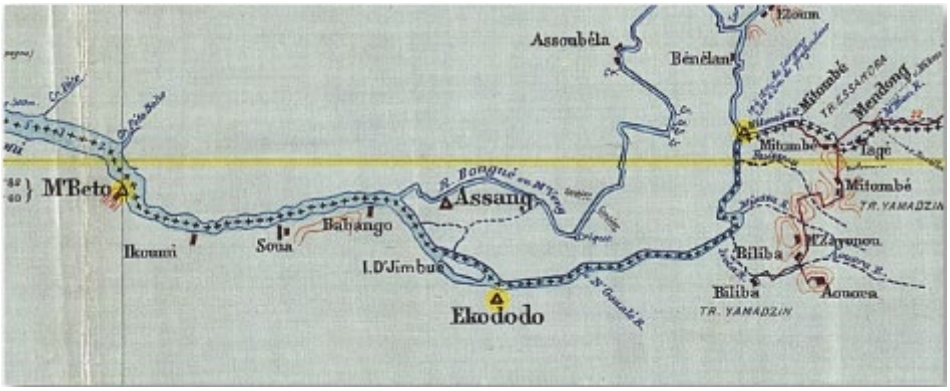
[301] REG, Vol. II, Ann. MR1. The Spanish map drawn up by d'Almonte and published by royal order in 1903 also shows the boundary as determined by Article 4 of the Paris Convention and depicts the work of the 1901 Commission, in particular the astronomical survey points (indicated by the △ symbol here too) (CMG, Vol. II, Ann. C9).

[302] Itinerary followed by the Delimitation Commission in the Gulf of Guinea, 1901 (MEG, Vol. III, Ann. 12). See also Report for the Minister for the Colonies by Mr Bonnel de Mézières (RG, Vol. II, Ann. 1), p. 103.

[303] REG, Vol. III, Ann. 8. This document directly contradicts Equatorial Guinea's allegation in its Memorial that the Commission "assigned French nationality to the village[] of Mitombe" (MEG, Vol. I, para. 3.47). In fact, the Commission considered that Mitombé, located to the north of the 1° north parallel of latitude, was in Spain. The Commission, therefore, merely proposed that the village be French (MEG, Vol. III, Ann. 15). See also below, para. 3.34.

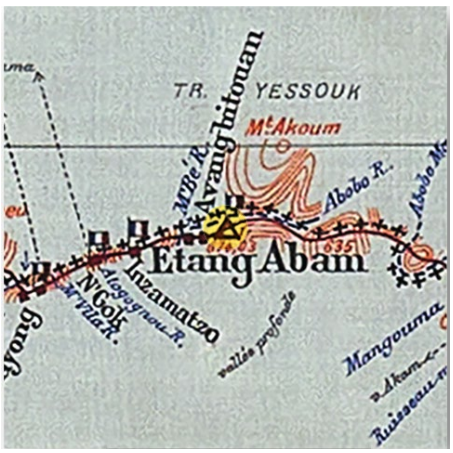
[304] Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, Paris, 27 June 1900 (CMG, Vol. III, Ann. 47), Ann. I.

Excerpt 1: Utamboni (M' Beto, Ekododo, confluence with the Mitombé)



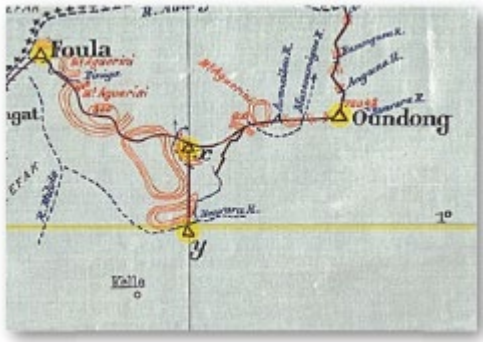
Excerpt 2: Ephong

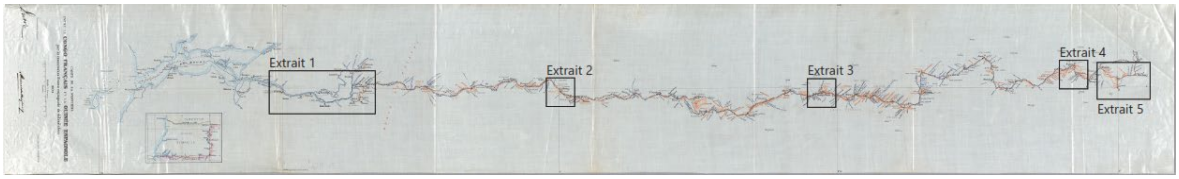
Excerpt 3: Etang-Abam



Excerpt 4: Aquas

Excerpt 5: Intersection 1° north - 9° east





Sketch-map No. 3.2
The work of the 1901 Commission (REG, Ann. MR1; astronomical observation sites △ and 1° north parallel of latitude highlighted)

3.35 Accordingly, any proposed modification of the demarcation lines had to be agreed between the Commissioners *and* approved by their respective governments. In other words, the 1901 Commission could only make *proposals* to modify the boundary, proposals which remained subject to the approval of the States parties. In practice, the 1901 Commission demonstrated the same understanding of the terms of Appendix No. 1. Well aware of the limits of its mandate, it simply "proposed" the boundary it had drawn up as "the natural border that is the most convenient and most

in keeping with the spirit of the Convention"[305]. This proposal, therefore, does not reflect what the 1901 Commission considered to be the boundary delimited by the Paris Convention, but rather what in its view could constitute the boundary in the future. Thus, the tables annexed to the Commission's proposals do not set out which of the two States actually exercised authority over a particular village, but which of those two States — in the opinion of the Commission, as reflected in its proposed boundary — might do so[306]. Mindful that its proposed modifications strayed from the definition of the boundary as set out in Article 4, the Commission noted:

> "Nevertheless, the Commissioners *propose* the boundary described, on account of the advantages that it presents owing to its determination by reference to the natural features on the ground, and leave it to their respective Governments to make a decision regarding this discrepancy and what, if any, compensation is to be provided."[307]

3.36 As Gabon has explained, France and Spain never approved the proposals of the 1901 Commission[308]. While in its Memorial, Equatorial Guinea conveniently had very little to say on the question of the approval of the modifications, in its Reply, it effectively dismisses this requirement out of hand. It states that "in A[ppendix No.] 1 there were no special procedures adopted for 'approval' of boundary modification proposals"[309], before concluding that

> "any form of approval by the contracting parties — including implied approval, or approval demonstrated by practice — sufficed in regard to boundary modifications mutually agreed to by the relevant Commissioners or local Delegates"[310].

It even goes so far as to argue that no exchange between France and Spain was needed in order for proposed boundary modifications to be approved[311], meaning that each State could unilaterally approve such proposals simply by remaining silent.

3.37 This new position of Equatorial Guinea lacks all credibility and largely disregards the ordinary meaning of the terms of Appendix No. 1 of the Paris Convention. In providing for proposed changes or corrections to be "submitted to the respective Governments for approval" ("sometarán á la aprobacion de los Gobiernos respectivos" in the Spanish version), the text of the Convention not only requires proof that the governments have been informed of these proposals ("submitted to"), but also that they explicitly approve them. Such is the ordinary meaning of the term "approval", which refers to the action of consenting to something in order to give effect to it[312].

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[305] Franco-Spanish Delimitation Commission, Border Project: Southern Border, 1 Jan. 1902 (MEG, Vol. III, Ann. 14).

[306] Table of villages recognized by the Delimitation Commission of Spanish Guinea, with names of chiefs, tribes and nationality according to the proposed boundary (MEG, Vol. III, Ann. 15, and CMG, Vol. IV, Ann. 56). Owing to a technical error, this document is not reproduced in Ann. 55, as indicated in the Counter-Memorial, but in Ann. 56.

[307] 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. 55) (emphasis added).

[308] CMG, Vol. I, paras. 1.44-1.49.

[309] REG, Vol. I, para. 5.13.

[310] *Ibid*.

[311] *Ibid*.

[312] See *Dictionnaire de l'Académie française*, 9th ed., online: https://www.dictionnaire-academie.fr/article/A9A2262 ("*Action* of approving; acceptance, assent, consent."; emphasis added). See also J. Salmon, *Dictionnaire de droit international public*, Bruylant, 2001, p. 74 ("*Expression of the agreement* or consent of a State with or without legal effect, given in respect of instruments, proposals or resolutions drawn up by other States with or without the participation of that State"; emphasis added); G. Cornu, *Vocabulaire juridique*, 12th ed., PUF, 2018, p. 77 ("Consent *granted* by a higher authority giving full effect to an instrument emanating from an authority under its control"; emphasis added).

3.38 Equatorial Guinea's position also runs counter to the object and purpose of the Paris Convention, namely the establishment of a stable boundary[313]. Contrary to what Equatorial Guinea claims, the authors of the Paris Convention clearly did not intend to enable the boundary they had agreed, following fiercely contested negotiations and transactions — it must be recalled[314] — to be modified by the Commissioners without any further formalities, on the basis of the subsequent practice of one of the parties. On the contrary, mindful that the establishment of a permanent boundary was "a matter of grave importance" and that "agreement is not easily to be presumed"[315], the parties to the Paris Convention took care to set out in detail the procedures by which proposals made by the 1901 Commission might — or might not — be endorsed. That is why, on several occasions, the French authorities followed up with their Spanish counterparts with a view to "reaching an agreement" on the "proposals"[316], quickly bringing the talks to a successful conclusion[317], or obtaining a "prompt response" to the proposals[318]. Spain's letter putting a definitive brake on the question of the 1901 Commission's work also left no room for doubt in this regard. Declaring that it was "impossible . . . to give a categorical response" to his French counterparts, the Spanish Minister of State explained:

> "Indeed, we could not make light of a question as important as this, to approve or reject the work of the 1901 Franco-Spanish Commission, without a clear understanding of the merit of its work.
>
> Thence the examination and the thorough and necessarily slow survey to which the Spanish delegates have had to dedicate the last three and a half years in order to be able to determine a precise boundary line and, in addition, to safeguard the interests of both France and Spain."[319]

3.39 It is quite clear that Spain and France never approved the work of the 1901 Commission, not even in part. Both expressed doubts as to its reliability and voiced the strongest reservations concerning the proposed boundary. The fact that both Powers drew attention to the most obvious and significant errors in justifying their rejection does not mean, *a contrario*, that in practice they partially approved the 1901 Commission's proposals for the Utamboni River area. In 1903, the French authorities began to question the proposed boundary in that area and wished to explore whether they could persuade Spain to agree to a boundary that, "instead of following the line of the Utamboni, follows the line of the Bongué River up to its eastern confluence with the Utamboni, giving France possession of the land in between"[320]. Spain was aware of these requests, and the members of the Spanish section of the 1901 Commission acknowledged that "there [could] be no disadvantage"[321]

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[313] *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 34.

[314] See CMG, Vol. I, paras. 1.24-1.30.

[315] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 735, para. 253.

[316] 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).

[317] 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).

[318] Letter from the French Minister for Foreign Affairs to the French Minister for the Colonies, 19 Sept. 1905 (CMG, Vol. IV, Ann. 61).

[319] Letter from the Spanish Minister of State to the Ambassador of France to Spain, 20 April 1907 (CMG, Vol. IV, Ann. 64), p. 6.

[320] Letter from the French Minister for the Colonies to the French Minister for Foreign Affairs, 8 Apr. 1903 (CMG, Vol. IV, Ann. 57), pp. 58-59.

[321] 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). See also Letter from the Spanish Minister of State to the Ambassador of France to Spain, 20 Apr. 1907 (MEG, Vol. IV, Ann. 56).

in granting them. These exchanges confirm that the Commission's proposals as a whole were not approved by the two States. Moreover, Spain was of the opinion that only a review of the Commission's entire work could be envisaged, and indicated that, on this basis, it would propose "the drawing of a natural frontier as close as possible to the meridian 9° east of Paris and the parallel of latitude 1° north"[322].

3.40 In view of the foregoing considerations, it is clear that, in the absence of any approval, there could never have been any *de jure* "modifications to the boundary described in Article 4 of the 1900 Convention in accordance with the terms of the 1900 Convention and international law"[323]. Spain's supposed subsequent practice cannot alter this fact. It cannot compensate for the lack of approval of any modification of the boundary pursuant to the provisions of the Paris Convention. Nor can it, on its own, modify the definition of the boundary established by that Convention.

2. *The* contra legem effectivités *invoked cannot establish or provide* de facto *confirmation of a modification of the Paris Convention*

3.41 Not having any legal effect, nor do the acts upon which Equatorial Guinea seeks to rely enable any *de facto* modification of the Paris Convention to be identified. The so-called *effectivités*, which — in the absence of any modification of the Convention — remain *contra legem effectivités*, in no way show that Spain and France considered the 1901 Commission's proposals in the Utamboni River area as being agreed. It is interesting to note in this regard that the Spanish authorities never relied on the modifications proposed by the 1901 Commission to justify their occupation of the bend in the Utamboni River or of the territories to the north of the Mitombé River.

3.42 Take, for example, the alleged *effectivités* in the village of Asobla, which according to Equatorial Guinea was a seemingly thriving Spanish colonial hub[324]. On the map produced by the 1901 Commission, Asobla lies well to the north of the boundary, i.e. the 1° north parallel of latitude (see sketch-map No. 3.3). In 1963, the Spanish authorities continued to locate that village to the north of the parallel[325] (see sketch-map No. 3.4). There is nothing to suggest that the colonial authorities considered [other than] that Asobla belonged to Spain because it lay to the north of the 1° north parallel of latitude, or north of the boundary proposed by the 1901 Commission (i.e. the Utamboni River). The same must be said of the censuses carried out by the Spanish authorities[326].

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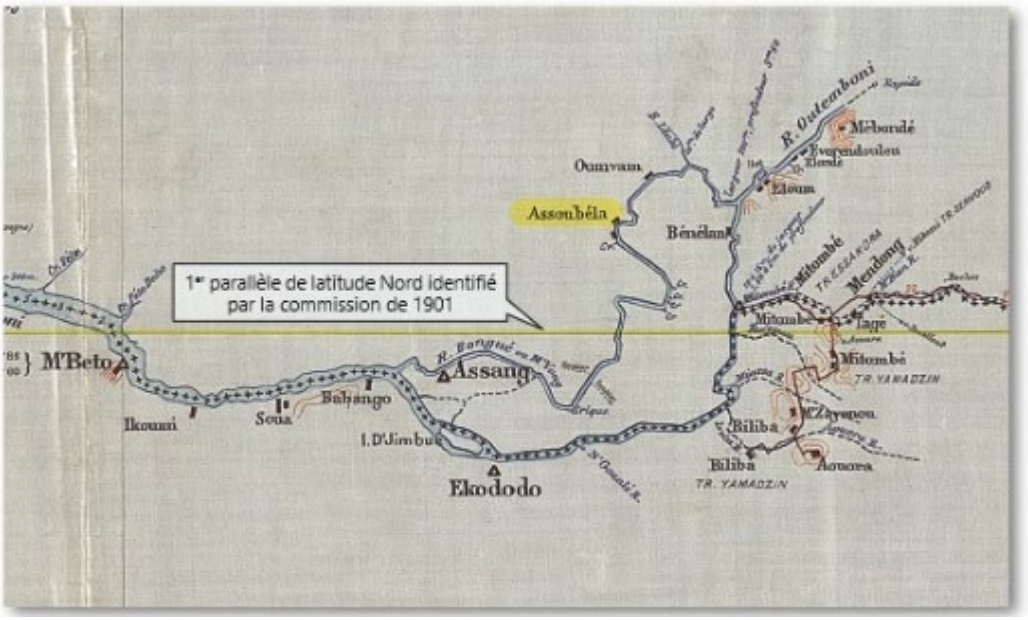
[322] Letter from the Spanish Minister of State to the Ambassador of France to Spain, 20 Apr. 1907 (CMG, Vol. IV, Ann. 64), p. 143.

[323] REG, Vol. I, p. 144 (point III (3) of the submissions).

[324] *Ibid.*, paras. 5.20, 5.21 and 5.32.

[325] Economic development plan for Equatorial Guinea, 1964 to 1967 (REG, Vol. IV, Ann. 25) and REG, Vol. II, sketch-map No. R5.14.

[326] REG, Vol. I, para. 5.32, and REG, Vol. II, sketch-map No. R5.5.



Sketch-map No. 3.3
Location of Asobla (Assoubéla) according to the work of the 1901 Commission (highlighting and annotation added)

[In white: 1° north parallel of latitude identified by the 1901 Commission]

3.43 Likewise, the proposals made to the German authorities by the Governor-General of Spanish Guinea, Mr Barrera, in 1913 — of which much is made by Equatorial Guinea in its Reply[327] — in no way confirm the acceptance of the 1901 Commission's proposals in the Utamboni River area. Despite how it is presented by Equatorial Guinea in its Reply[328], the agreement in question[329] does not concern the delimitation of the boundary. It is merely an agreement on a *modus vivendi* enabling the authorities on either side of the boundary to pursue fugitives some 30 km into the territory of the other party[330]. Mr Barrera confirmed that he was providing only his personal opinions and that the *modus vivendi*, or "*special status quo*", was to apply "while our Governments come to an agreement and a clear and stable delimitation that merits the approval of our respective Sovereigns"[331], and "without, I repeat, prejudging anything"[332].

[327] *Ibid.*, paras. 5.24-5.25.

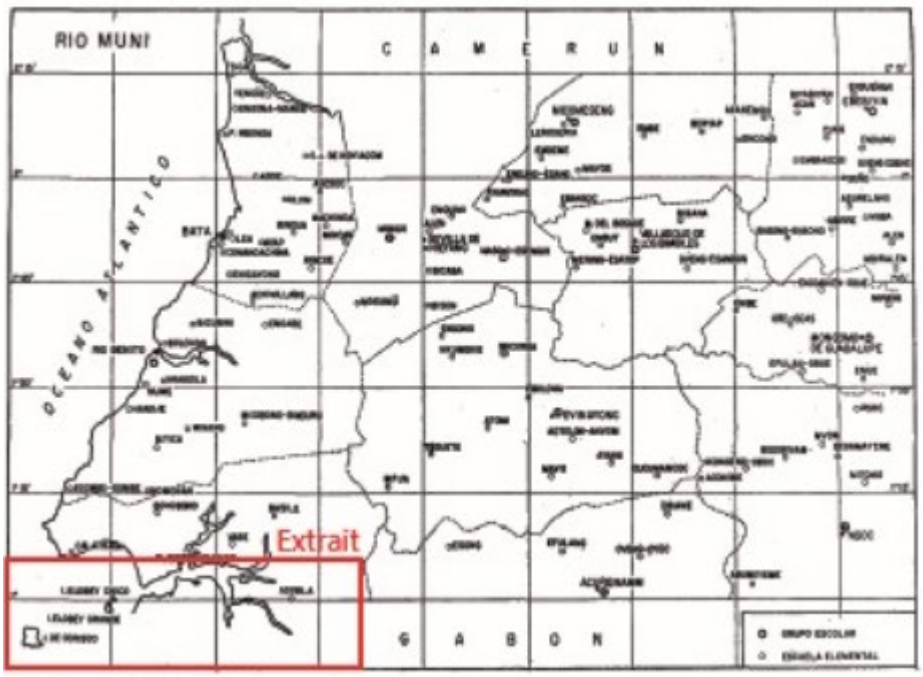
[328] REG, Vol. I, para. 5.24.

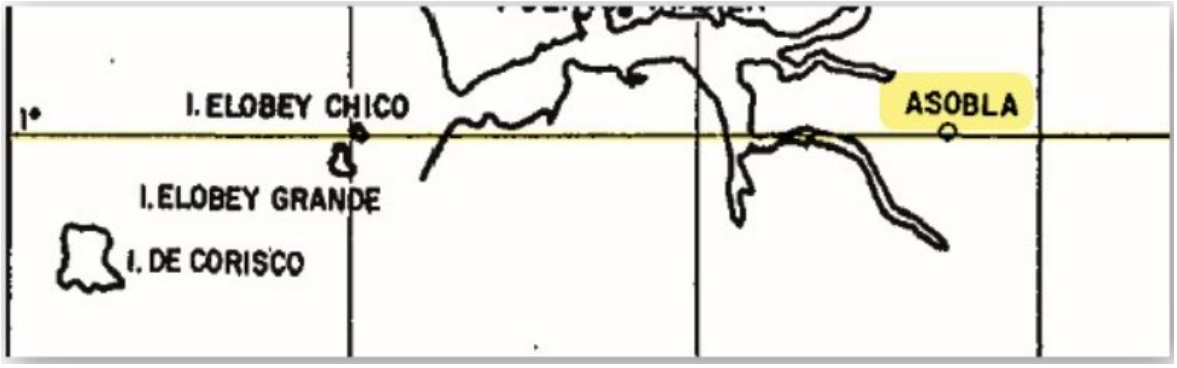
[329] Certification from the head of the archives of the General Government of the Spanish territories in the Gulf of Guinea, 27 Dec. 1948 (REG, Vol. III, Ann. 14).

[330] *Ibid.*, p. 278.

[331] Report No. 1196 from the Government of Kamerun to the Secretary of State for the Imperial Colonial Office, 6 Aug. 1913 (REG, Vol. III, Ann. 9), p. 156 (translation by Equatorial Guinea of the original Spanish: "y en tento que por nuestros Gobiernos no se llega a acuerdo y a una delimitación clara y estable que merezca la sanción de nuestro respectivos Soberanos").

[332] *Ibid.*, p. 162 (translation by Equatorial Guinea of the original Spanish: "sin que ello, repito, prejuzgue nada").



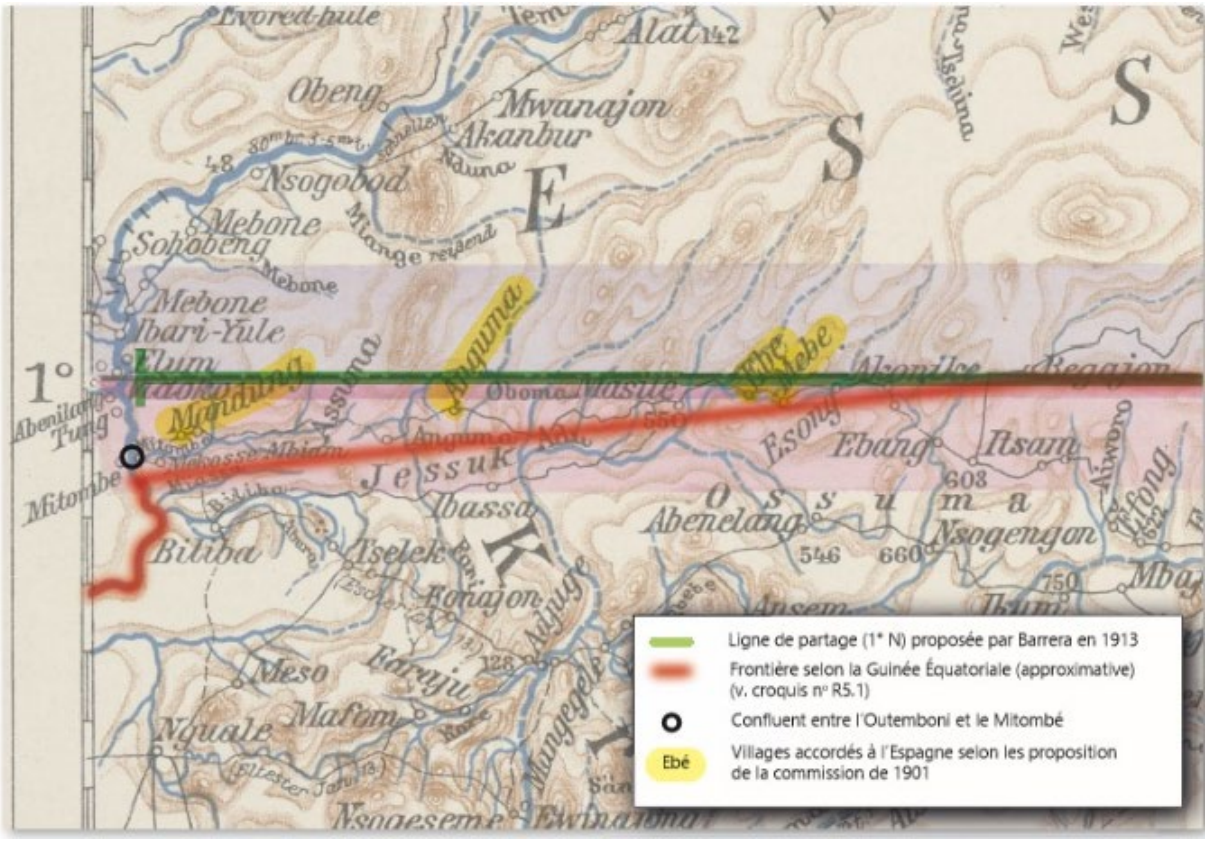


Sketch-map No. 3.4
Location of Asobla according to the map of schools in Río Muni (1963) (highlighting added)

3.44 Even more interesting is Governor-General Barrera's statement specifically recalling that the work of the Commission "did not later merit the approval of the French and Spanish governments"[333]. He was clearly not even aware of the proposals that had been made by the 1901 Commission. Far from following the natural boundary along the Mitombé River to the east of the Utamboni River, as had been proposed by the 1901 Commission, he agreed that, from the confluence of the Utamboni and Mitombé rivers (which the Commission identified as lying slightly to the north of the 1° 0' 14.77″ north parallel of latitude), the boundary followed the 1° north parallel of latitude as indicated on the Moisel map. The boundary was thus located significantly further north than Equatorial Guinea alleges, leaving villages that had been allocated to Spain under the 1901 Commission's proposals (such as Mendong (Mandung), Angouma, Ebé and Mébé), and over which Equatorial Guinea claims sovereignty, to the south of the dividing line and therefore in German

[333] *Ibid.*, p. 159 (translation by Equatorial Guinea of the original Spanish: "que si bien no merecieron despues la sancien de los gobiernos Frances y español").

territory (sketch-map No. 3.5). Unaware of the 1901 Commission's proposals[334], Governor-General Barrera stated that the village of Mitombé, which had been allocated to France under the Commission's proposals, belonged to Spain[335]. In correspondence with his superiors, moreover, the Governor-General of Spanish Guinea indicated that his aim was not to confirm with the German authorities the boundary proposed by the 1901 Commission, of which he knew nothing, but to assert certain Spanish interests in respect of earlier claims made by France[336].



Sketch-map No. 3.5
The Barrera proposal of 1913, the proposal of the 1901 Commission and the position of Equatorial Guinea (lines and annotations added to the Moisel map, CMG, Vol. II, Ann. C12)

[In green: Dividing line (1° N) proposed by Barrera in 1913; in red: Boundary according to Equatorial Guinea (approximate) (see sketch-map No. R5.1); black circle: Confluence of the Utamboni and the Mitombé; in yellow: Villages allocated to Spain under the 1901 Commission's proposals]

3.45 In 1914, the Spanish authorities considered that their possessions in the Gulf of Guinea, which were completely surrounded by German possessions at the time, remained "without the borders being delimited except for parallels 1° and 2°10′20″ north latitude, and the meridian 9°

[334] 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, 2 Jan. 1905 (MEG, Vol. III, Ann. 15).

[335] Certification from the head of the archives of the General Government of the Spanish territories in the Gulf of Guinea, 27 Dec. 1948 (REG, Vol. III, Ann. 14), p. 17.

[336] See also *ibid.*, pp. 13-14 and p. 18.

longitude east of Paris, intangible lines not established on the ground"[337]. There is no mention of a boundary being modified according to the 1901 Commission's proposals in the Utamboni River or Mitombé River areas.

3.46 Nor do the work of the Spanish-German Commission or the report drawn up in 1914 confirm the existence of an agreement on the boundary proposed by the 1901 Commission[338]. Equatorial Guinea still fails to understand the terms — and even the title — of that report[339]. There is nothing in that document to suggest that the Spanish-German Commission recognized certain villages as belonging to Spain on account of "the reality that Spain administered those villages"[340]. According to the report, the Commission based its observations and conclusions solely on the "astronomical observations made by the two sections" and "the routes followed", and thus necessarily on their geographical co-ordinates and not on whether they lay to the south or north of the 1° north parallel of latitude[341]. Governor-General Barrera confirmed this in 1919, explaining that "it was seen that several of them [i.e., the villages] were located north of the first parallel north and therefore, were in Spanish territory"[342]. The geographical location of the villages mentioned in the work of the Spanish-German Commission in relation to the boundary proposed by the 1901 Commission was not taken into consideration.

3.47 In 1940, the Spanish colonial authorities again acknowledged that they were unaware of the legal basis on which they occupied the territories to the south of the 1° north parallel of latitude. While recognizing that the Paris Convention left the bend in the Utamboni River to France[343], the Spanish administrator for the area confirmed that he was entirely unaware of any modification made on the basis of and in accordance with the 1901 Commission's proposals, asking:

> "What proof do we have that the reservations in Appendix No. 1 [of which he had no knowledge] do not actually say that the abstract boundary will be replaced by natural boundaries if and when possible?"[344]

3.48 The other *effectivités* relied on by Equatorial Guinea are similarly flawed. The Miang forestry concession cannot substantiate the boundary modifications proposed by the 1901

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[337] 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), p. 223 (translation by Equatorial Guinea of the original Spanish: "sin que las fronteras esten 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 immateriales no fijadas sobre el terreno").

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

[339] Gabon notes that Equatorial Guinea continues to refer to the document contained in Ann. 115 of its Memorial as a "Decree Signed by the German Empire and the Kingdom of Spain for the Delimitation Between Spanish Guinea and the Protectorate of Cameroon" (see, e.g. REG, Vol. I, pp. 107-108, fns. 328 and 330). It adds moreover in a footnote that "[a]ll of Equatorial Guinea's translations of annexed documents are certified by professional translators" (REG, Vol. I, fn. 327). However, the title of the translated document provided by Equatorial Guinea and certified by its professional translators is simply "Record". See also CMG, Vol. I, para. 2.6.

[340] REG, Vol. I, para. 5.28.

[341] CMG, Vol. I, para. 2.7.

[342] 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: "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"). See also CMG, Vol. I, para. 2.7.

[343] 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).

[344] *Ibid*.

Commission[345]. By Equatorial Guinea's own account, the land area awarded under the concession extends far to the south of the boundary proposed by the Commission. Equatorial Guinea has offered no explanations in this regard. The "Echam" forestry concession, for its part, is also at odds with Equatorial Guinea's claims. The southern limit of this concession is described as corresponding to the land "on the border with Gabon" ("terreno de la frontera con el Gabón")[346]. However, the boundary proposed by the 1901 Commission lay further to the south (see sketch-map No. 3.6). Also inconsistent with the proposals made by the 1901 Commission, as well as being of doubtful probative value[347], are the lists of villages drawn up by Spain and Gabon during the negotiation of the agreement on transboundary movement and trade between them, which never entered into force. Indeed, the Spanish authorities' list of villages considered to form part of Spanish possessions included some, such as Masilé (Masili) and Tom (the name the Spanish used for Mitombé[348]), which the 1901 Commission had attributed to France.

Sketch-map No. 3.6
The forestry concessions and the 1901 Commission's natural boundary proposal (REG, sketch-map No. R.57 with annotations and proposal added)

[In brown: Natural boundary proposal of the 1901 Commission (as interpreted by Equatorial Guinea, see sketch-map No. R5.3) (added)]

3.49 Equatorial Guinea's claims in these proceedings also deviate from the proposals made by the 1901 Commission. It admits to having made errors in transposing the proposals onto its own sketch-maps[349]. In its Reply, Equatorial Guinea provides a revised depiction. However, by Equatorial Guinea's own account, it is not the proposed boundary that is shown on its sketch-map, but the route

[345] Miang River Forestry Concession (Kogo District), 28 Jan. 1961 (REG, Vol. III, Ann. 19).

[346] Spanish Decree No. 1505/1961, 20 July 1961 (REG, Vol. IV, Ann. 24).

[347] CMG, Vol. I, para. 2.56.

[348] 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).

[349] REG, Vol. I, para. 5.17. On this subject, see CMG, Vol. I, paras. 7.31-7.33.

followed by the Commission[350]. This is obviously not the same thing. Notwithstanding these inaccuracies, Equatorial Guinea saw no need to modify the depiction of the boundary that it wrongly believes can be inferred from the alleged titles on which it relies. Despite its insistence on the existence of a modified boundary along natural features and based on the proposals of the 1901 Commission, Equatorial Guinea simply draws a straight, rather ill-defined line to connect the Utamboni River to a point on the parallel which is never identified. This line in no way corresponds to the proposals of the 1901 Commission (sketch-map No. 3.7). Somewhat embarrassed, Equatorial Guinea offers the beginnings of an explanation for this in a footnote: "[T]hat is due to further uncontested administrative actions and agreements during and after the colonial period, which gave rise to additional adjustments to the Southwest boundary"[351]. This confirms that, in Equatorial Guinea's own opinion, the proposals of the 1901 Commission do not constitute a legal title on which the so-called *effectivités* may be based. Since they do not tally with the law, the facts relied on and *effectivités* invoked by Equatorial Guinea therefore remain *contra legem*.

Sketch-map No. 3.7
The 1901 Commission's natural boundary proposal and the boundary according to Equatorial Guinea (sketch-map No. R5.3 with annotations added)

[In red: Boundary according to Equatorial Guinea (approximate) (see sketch-map No. R5.1) (added)]

3.50 On the other hand, the French (and German) authorities have consistently confirmed that the southern boundary of Spanish Guinea followed the 1° north parallel of latitude from its first

[350] *Ibid.*, para. 5.17, fn. 302.

[351] *Ibid.*, p. 113, fn. 354.

downstream intersection with the Utamboni River. The texts establishing the limits of the subdivisions of French Gabon, and the extensive correspondence between the local authorities[352], demonstrate that at no time did those authorities envisage approving the proposals of the 1901 Commission. On the contrary, they considered that they continued to have a legal title to the territories to the south of the boundary established by Article 4 of the Paris Convention. The documents submitted by Equatorial Guinea confirm, moreover, that the Spanish colonial authorities had exactly the same understanding. They knew that the French authorities considered the area in the bend in the Utamboni as falling under their authority[353] and had no reason to believe that France had waived the legal title established by the Paris Convention.

B. There was no modification of the boundary in the vicinity of the Kie River

3.51 Equatorial Guinea also wrongly continues to claim that the boundary in the vicinity of the Kie River was modified. It states that "Spain and France also agreed to a modification of the boundary set out in Article 4 of the 1900 Convention, pursuant to the procedures of A[ppendix No.] 1"[354]. In its view, the modification of the eastern boundary was carried out by what it refers to as the "1919 Governors' Agreement"[355], which is said to have replaced the 9° east of Paris meridian with the course of the Kie River up to its source.

3.52 Once again, Equatorial Guinea refuses to face the facts: the "1919 Governors' Agreement" does not form any part of the procedure of Appendix No. 1 of the Paris Convention, which allows for changes or corrections to the boundary delimited by Article 4 of the Convention to be proposed, subject to the approval of the respective Governments[356]. Neither the Governor-General of Spanish Guinea nor the Governor-General of French Equatorial Africa acted within the framework of and limits imposed by Appendix No. 1. The provisions of the Paris Convention were not even mentioned by the two Governors-General in their respective letters.

3.53 It is with good reason that the authors of these letters did not include any such references. As demonstrated above[357], the Paris Convention did not require the boundaries delimited by Article 4

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[352] See CMG, Vol. I, para. 7.33. See, in particular, 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); 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); 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).

[353] Certification from the head of the archives of the General Government of the Spanish territories in the Gulf of Guinea, 27 Dec. 1948 (REG, Vol. III, Ann. 14), pp. 13-14 ("The French who have apparently located, of their own accord, some points on the southern border of the territory [sic] placed the entire river N'vmy on which banks Asobla is located south of parallel 1° N. Therefore, if this is true, the town would belong to the Germans today, and if the borders are not rectified as soon as possible, I repeat, this would lead us again to constant friction in the south of our continental possessions". Equatorial Guinea's translation of the original Spanish: "los franceses que por lo visto han situado por su cuenta algunos puntos de la frontera Sur del territorio colocan todo el rio N'vym en cuyas orillas está situado Asobla al Sur del paralelo 1° de latitud Norte, y por lo tanto de ser cierto esto resultaría que dicha localidad pertenecería a los alemanes hoy día, y al no rectificar cuanto antes las fronteras no conduciría repito a constantes rozamientos en el Sur de nuestra Posesión Continental").

[354] REG, Vol. I, para. 5.51.

[355] 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 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).

[356] 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 (CMG, Vol. III, Ann. 47), Ann. I.

[357] See above, para. 3.34.

to be replaced with natural ones, let alone "invite" the Commissioners or Delegates to do so, contrary to what Equatorial Guinea claims[358]. Most importantly, neither the Governor-General of Spanish Guinea nor the Governor-General of French Equatorial Africa was a "local [d]elegat[e] . . . subsequently responsible for delimiting . . . on the ground . . . all or some of the boundaries"[359], i.e. for demarcating them on site[360]. Nor did they do so. The two Governors-General conducted this exchange of letters with the sole aim of reaching an agreement on a more acceptable provisional boundary, pending a definitive solution to the question and without having visited the site.

3.54 The explanations provided by the Governor-General of Spanish Guinea confirm this. He did not consider himself vested under the Paris Convention with the power to "substitute natural lines for the artificial lines established as a boundary"[361] or to adjust the boundary line to conform to the "reality on the ground"[362]; rather, he offered the following explanation to his French counterpart:

> "When the current European war was declared, the Imperial Governor of Kamerun had proposed to me that the part between the Benito River and the 2°10′20″N line of latitude, the Kié River, be temporarily considered the eastern border of Spanish Guinea and the western border of the Kamerun River territories, which I could not accept at that time. Because the campaign in Kamerun had started, I did not believe it was a good time to accept the proposal since it was the opposite of neutrality, and accepting the proposal would have allowed the Germans to withdraw the forces that defended the passage of the aforementioned river."[363]

3.55 The Governor-General was merely repeating a proposal originally made by the German authorities. This proposal, which had been unacceptable during the war (since the Spanish authorities wanted the Germans to continue to defend the Kie River passage), was reiterated once the war ended. Since France was once again occupying that part of Gabon, the Governor-General proposed that:

> "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"[364].

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[358] REG, Vol. I, para. 5.54.

[359] 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 (CMG, Vol. III, Ann. 47), Ann. I.

[360] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 340, para. 49.

[361] REG, Vol. I, para. 5.54.

[362] *Ibid.*, para. 5.1. See also paras. 5.19, 5.23 and 5.28.

[363] 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). Equatorial Guinea's translation of the original Spanish: "Al declararse la actual guerra europea al Gobernador Imperial de Camerún había propuesto a este Gobierno General, el considerar provisionalmente como frontera Este de la Guinea española y Oeste de los territorios del Rio Camerun, la parte comprendida entre el Benito y el paralele de 20-10'-20'' de latitud Norte, el rio Kie, le que no pudo aceptar en aquello momentos éste Gobierno general, debido á que empezada la luche en Camerun, no consideré oportuno aceptar la proposición por considerar la opuesto a la neutralidad ya que de aceptarla hubiera permitido á los alemanes retirar las fuerzas que pudieren defender el paso del mencionado rio".

[364] 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); our English translation of the original Spanish. See CMG, Vol. I, para. 2.18.

3.56 The French authorities also confirmed that there was no question of delimiting the boundary established by the Paris Convention on the ground, or of determining a definitive boundary. Recalling the provisional nature of the arrangement, the Minister for the Colonies stated that

> "it is essential that I have *the position of this river* [the Kie] verified, in order to 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*"[365].

3.57 The reconnaissance work relating to a natural boundary in the area, which was carried out in 1920[366] and is mentioned by Equatorial Guinea in its Reply[367], likewise confirms that neither the French nor the Spanish authorities — including the Governor-General of Spanish Guinea, who was involved in this work — understood the "1919 Governors' Agreement" as modifying the Paris Convention. The Governor-General of Spanish Guinea and the head of the Gabonese district of Woleu-N'Tem observed that the exposé on the study of a natural boundary in the east of Spanish Guinea "may be used as a basis for proposals subsequently made to the two governments to [substitute] a natural border [for] the 9° longitude east of Paris"[368]. There is no question that these proposals were never approved by the respective governments[369]. Their mere existence nonetheless proves that in 1920 — one year after the "1919 Governors' Agreement" — the local authorities, including one of the authors of the 1919 agreement, remained convinced that the "[substitution of] a natural border [for] the 9° longitude east of Paris" had not been formally approved. They knew that any modification of the boundary delimited by the Paris Convention in fact required proposals to be made and submitted to the governmental authorities for approval[370].

3.58 The absence of any modification of the eastern boundary defined by the Paris Convention is also borne out by regulatory instruments adopted by Spain and France. In 1936, the French authorities confirmed the 1900 land boundary delimitation line, i.e. the 9° east of Paris meridian, which was expressly mentioned in the definition of the limits of the Bitam and Oyem subdivisions[371]. In addition, much as it may displease Equatorial Guinea[372], the texts adopted by its former colonial Power in 1935 defined the eastern limit of the border districts by reference to a "*linea recta*" (straight line) and not the natural boundary of the Kie River or other rivers or artificial boundaries further to the south[373]. Even if this "*linea recta*" did not correspond to the 9° east of Paris meridian exactly[374],

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[365] Letter from the French Minister for the Colonies to the French Minister for Foreign Affairs, 24 Nov. 1919 (CMG, Vol. IV, Ann. 72), p. 219 (emphasis added).

[366] Succinct exposé on the study of a natural border in the east of Spanish Guinea, 7 Oct. 1920 (REG, Vol. III, Ann. 10).

[367] REG, Vol. I, para. 5.57.

[368] Succinct exposé on the study of a natural border in the east of Spanish Guinea, 7 Oct. 1920 (REG, Vol. III, Ann. 10), p. 1.

[369] 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.

[370] Succinct exposé on the study of a natural border in the east of Spanish Guinea, 7 Oct. 1920 (REG, Vol. III, Ann. 10), p. 1.

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

[372] REG, Vol. I, para. 5.64.

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

[374] Indeed, the Spanish authorities had claimed since 1920 that this meridian lay further to the east than it appeared on the maps in existence at the time. See 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.

these regulatory texts unmistakeably confirm that the abstract boundaries had not been replaced with natural lines.

3.59 The provisional arrangement between the Governors-General in 1919, therefore, is not and was never understood to be a modification of the Paris Convention. It was nothing more than its drafters intended it to be: a temporary arrangement making it possible to avoid incidents pending a more comprehensive review of the boundary delimited by the Paris Convention. As the Court has explained, "[e]ven if there had been a provisional line found convenient for a period of time, this is to be distinguished from an international boundary"[375]. Similarly, the arbitral tribunal in the territorial and maritime delimitation case between Slovenia and Croatia stated that:

> "Th[e] legal boundary is not necessarily the same as what might be called the 'practical' boundary. In any particular place, it may have been the habit to treat that location as part of one or other republic — for example, for the purpose of allocating postal codes or connecting to public utilities such as gas, electricity, water and sewage — on the basis of practical convenience or local traditions or preferences, and without regard to the precise location of the legal boundary."[376]

3.60 And as that same arbitral tribunal recalled, the impractical nature of a boundary determined as a matter of law is not a reason for its replacement with a boundary that is more appropriate in practical terms[377].

3.61 In these circumstances, the acts invoked by Equatorial Guinea — even conveniently described as "administrative acts"[378] — cannot change the provisional nature of the arrangement between the Governors-General. In fact, they do not even constitute *effectivités*, i.e. activities carried out *à titre de souverain*. The Spanish authorities could not have been unaware that the administration of the territories had been authorized by their French counterparts on a provisional basis only, subject to the full regularization of the eastern boundary of Spanish Guinea.

Conclusion

3.62 For the reasons set out above, Gabon maintains its submissions on the legal titles having the force of law with regard to the delimitation of the land boundary:

(a) The 1974 Bata Convention, which confirms and partially reproduces the boundary delimitation resulting from Article 4 of the Paris Convention, is today the legal title with the force of law between the Parties as regards the delimitation of their land boundary.

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[375] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 735, para. 253.

[376] *Arbitration between the Republic of Croatia and the Republic of Slovenia*, Final Award, 29 June 2017, para. 337.

[377] *Ibid.*, para. 565.

[378] REG, Vol. I, para. 5.62. There is reason to question some of these "*effectivités*", such as the alleged construction of a floating bridge over the Kie in the vicinity of Ebebiyin and "on the road to French Gabon" (*ibid*., Vol. III, Ann. 13). The map on which Equatorial Guinea attempts to indicate the position of the floating bridge (by adding the river and the bridge) does not show it. What is more, the road on which Equatorial Guinea seeks to position its floating bridge lies well to the north of the 2°10′20″ north parallel of latitude and thus beyond the southern boundary of Spanish Guinea.

(b) No other legal title concerning the delimitation of the land boundary exists or has the force of law between the Parties. In particular, there was no modification of the Paris Convention prior to 1974.

CHAPTER IV
THE TITLE RELATING TO SOVEREIGNTY OVER THE ISLANDS

4.1 The Parties have diametrically opposed views on the legal titles that "have the force of law . . . between [them] in so far as they concern . . . sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga"[379].

4.2 In its Reply, Equatorial Guinea maintains the position expressed in its Memorial that:

> "The legal title that has the force of law in the relations between the Gabonese Republic and the Republic of Equatorial Guinea with respect to the sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga is the succession by the Republic of Equatorial Guinea to the title held by Spain on 12 October 1968 over Mbanié/Mbañe, Cocotiers/Cocoteros and Conga, which itself was founded on 1) the general cession of rights from Portugal in the 1778 Treaty of El Pardo, 2) Spain's 1843 Declaration of Spanish Sovereignty for Corisco Island, 3) Spain's 1846 Record of Annexation signed with King I. Oregek of Corisco Island, 4) Spain's 1846 Charter of Spanish Citizenship Given to the Inhabitants of Corisco, Elobey and their Dependencies, 5) Spain's 1858 Charter Reaffirming Spanish Possession of the Island of Corisco and 6) Spain's uncontested effective and public sovereign occupation of these islands from 1843 until Equatorial Guinea's independence in 1968."[380]

4.3 Equatorial Guinea does not specify whether it is these elements as a cumulative whole that are supposed to establish its legal title to the islands, or whether each element is capable of doing so individually. As the first part of this chapter will show, none of the elements invoked by Equatorial Guinea, analysed separately and in turn, constitutes a legal title in its relations with Gabon regarding the islands in dispute. Consequently, they are no more capable, as an ill-defined whole, of furnishing such a title.

4.4 In Gabon's view, the Bata Convention is, within the meaning of Article 1 of the Special Agreement, the legal title that has the force of law in its relations with Equatorial Guinea as regards sovereignty over the islands[381]. It cements the agreement between the Parties regarding sovereign title to the disputed islands, because they "recognize . . . that Mbane island forms an integral part of the territory of the Gabonese Republic". Since Gabon has never in any way abandoned this title, it continues to have the force of law in relations with Equatorial Guinea, as the second part of this chapter will show.

I. Equatorial Guinea has provided no evidence of its title to the islands in dispute

4.5 The arguments advanced by Equatorial Guinea with regard to legal title over the islands of Mbanié, Cocotiers and Conga are woefully inadequate. Indeed, the elements invoked by Equatorial Guinea do not amount to a legal title (**A**), any more than do the Spanish *effectivités* to which Equatorial Guinea refers extensively in its written pleadings, all the while distorting their factual and legal significance (**B**). Equatorial Guinea's argument that France and its successor State Gabon recognized a purported Spanish title pre-dating the Paris Convention is equally untenable (**C**).

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[379] Special Agreement, Art. 1.

[380] See REG, Vol. I, p. 145 (para. IV of the submissions); see also MEG, p. 144 (para. B of the submissions).

[381] See CMG, Vol. I, p. 291, para. *(a)* of the submissions; see also paras. 8.48-8.60.

A. The elements invoked by Equatorial Guinea are not capable of constituting a legal title

4.6 In its Counter-Memorial, Gabon exposed the fatal flaws and contradictions in Equatorial's arguments on the legal titles to the islands. It is clear that, in its Reply, Equatorial Guinea is once again avoiding any discussion of the (lack of) legal force of the elements it characterizes as titles; it simply asserts Spanish sovereignty, but without specifying the rule of international law to which those titles are linked. Gabon can only reiterate here, in analysing each of the elements invoked by Equatorial Guinea to establish its title to the disputed islands, the reasons why none satisfies the conditions for a valid legal title.

4.7 It is apparent from Equatorial Guinea's submissions that, as regards sovereignty over the islands, it relies solely on its "succession . . . to the title held by Spain on 12 October 1968"[382]. But succession does not in itself constitute a legal title enforceable against another newly independent State, which is also a successor State and which claims the same territory by virtue of succession[383]. Equatorial Guinea acknowledges this[384], moreover, and endeavours to show that Spain itself held a legal title to the islands of Mbanié, Cocotiers and Conga.

4.8 However, none of the elements invoked to this end is capable of establishing Spain's title and therefore of supporting Equatorial Guinea's claims in respect of the islands. As recalled in Chapter I, in order to establish the sovereignty of a State, i.e. to constitute a title (cause or basis of title), an element must be the direct source of that alleged sovereignty; similarly, if that element is invoked as "proof of title", it must, in point of fact, support the claims that are based on it and be endowed with such force under international law[385].

4.9 In general, when two successor States make competing claims over territories which, as in the present case, were also the subject of a dispute between two predecessor colonizing States[386], the title of one of the successor States may in theory be based on an agreement between the predecessor States which is said to govern the fate of the territories in dispute[387]. Yet Equatorial Guinea does not invoke any title that purportedly derives from an agreement between France and Spain.

4.10 The only conventional title invoked, surreptitiously, by Equatorial Guinea is the 1778 Treaty of El Pardo. However, the latter is not put forward as a conventional title — Equatorial Guinea having realized only belatedly that France was in fact a party to it[388] — but as the basis of a "general cession of rights", the nature and scope of which are not specified: "1) the general cession of rights from Portugal in the 1778 Treaty of El Pardo"[389].

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[382] See REG, Vol. I, p. 147 (para. IV of the submissions); see also MEG, Vol. I, p. 144 (para. B of the submissions).

[383] See above, para. 1.37 (and more generally, paras. 1.27-1.37) and para. 1.45.

[384] REG, Vol. I, paras. 2.22-2.23.

[385] See above, para. 1.23.

[386] Equatorial Guinea was careful not to make any mention in its Memorial of this Franco-Spanish dispute, whose existence it continues to deny in its Reply. In contrast, see CMG, Vol. I, paras. 8.3-8.8 and 8.40-8.47.

[387] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 338-339, para. 48.

[388] CMG, Vol. I, para. 1.4 and fn. 17.

[389] REG, Vol. I, para. 4.2, and p. 145 (para. IV of the submissions).

4.11 However, there is not in fact any Spanish title based on a cession agreed by convention. The Treaty of El Pardo provides for the cession by Portugal to Spain of the islands of Annobón and Fernando Pó, and of these two islands alone[390]. Like France, Gabon has never disputed Equatorial Guinea's sovereignty over those islands, even though one of them — Annobón — is located off its mainland coast. But the Treaty of El Pardo simply does not apply to the island territories in dispute, i.e. Mbanié, Cocotiers and Conga, which are not referred to in its provisions[391]. Since Equatorial Guinea has not responded to Gabon's arguments that the Treaty of El Pardo was not capable of constituting a title to the disputed islands, there is no need to dwell on this point any further.

4.12 The other alleged Spanish "causes of title" invoked by Equatorial Guinea are:

"2) Spain's 1843 Declaration of Spanish Sovereignty for Corisco Island,

3) Spain's 1846 Record of Annexation signed with King I. Oregek of Corisco Island,

4) Spain's 1846 Charter of Spanish Citizenship Given to the Inhabitants of Corisco, Elobey and their Dependencies,

5) Spain's 1858 Charter Reaffirming Spanish Possession of the Island of Corisco"[392].

4.13 Before refuting the probative value of these documents, it should be noted that none falls into the category of agreements or treaties enforceable against France, and thus against Gabon, and therefore none is capable of constituting a legal title. Moreover, they are divided by Equatorial Guinea into several categories[393], including unilateral acts of Spain. The latter can at best constitute Spanish acts *à titre de souverain*, thus *effectivités*. Yet *effectivités* do not in themselves amount to a title, and invoking them separately from a title is in fact an implicit admission that a legal title *does not exist*[394].

4.14 The document reproduced in Annex 110 of Equatorial Guinea's Memorial — christened "Spain's 1843 Declaration of Spanish Sovereignty for Corisco Island", even though the original is untitled — is an act signed by Juan José de Lerena, captain of the *Nervión*, which seeks to annex the island of Corisco following the earlier practice of the conquistadors, not on the basis of a conventional title derived from the Treaty of El Pardo, but on the basis of "discovery" and occupation[395]. However, the African territories were no longer considered *terrae nullius* at that

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[390] CMG, Vol. I, para. 1.4; Treaty of Amity, Guarantee and Commerce between Spain and Portugal ("Treaty of El Pardo"), 11 Mar. 1778 (MEG, Vol. III, Ann. 1), Art. XIII.

[391] *Ibid.*, para. 8.10.

[392] REG, Vol. I, p. 145 (para. IV of the submissions); see also REG, Vol. I, para. 4.2.

[393] These categories include "Historical Correspondence and Official Documents" (MEG, Vol. IV, which comprises Spain's 1846 Charter of Spanish Citizenship Given to the Inhabitants of Corisco, Elobey and their Dependencies (MEG, Vol. IV, Ann. 47) and Spain's 1858 Charter Reaffirming Spanish Possession of the Island of Corisco (MEG, Vol. IV, Ann. 48)), which is distinguished from "Colonial Legislation, Census and Official Reports" (MEG, Vol. V, which includes Spain's 1843 Declaration of Spanish Sovereignty for Corisco Island (MEG, Vol. V, Ann. 110) and Record of Annexation, 18 Feb. 1846 (MEG, Vol. V, Ann. 112)).

[394] See above, paras. 1.56-1.72, and below, paras. 4.22-4.27, esp. para. 4.23.

[395] See *Island of Palmas* case, Permanent Court of Arbitration, Arbitral Award of 4 Apr. 1928, United Nations, *RIAA*, Vol. II, p. 839. See also *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, pp. 45 and 46.

time — if they ever had been[396]. The document is therefore not in itself capable of constituting a legal title, since it is not endowed with any particular force under international law. Moreover, the same territories had also been "discovered" by France, as evidenced by the description made of them in 1839 by Lieutenant Commander Bouët-Willaumez[397], under whose authority the Gabon trading post was established in 1843[398].

4.15 The third document invoked by Equatorial Guinea, reproduced in Annex 112 of its Memorial and entitled "Record of Annexation (18 February 1846)", is a declaration by which a certain "S. Orejeck", referred to as the "King of the Island of Corisco, Elobey, and dependencies", undertakes to submit to Spanish sovereignty, "[r]ecognizing that the Island of Corisco, Elobey and its current dependencies are Spanish"[399].

4.16 In so far as this document falls into the category of agreements with local indigenous rulers within the meaning of the jurisprudence of the Court[400] — which Equatorial Guinea neither claims nor demonstrates — it cannot form the basis of a Spanish legal title enforceable against France at that time. There are several reasons why the document cannot be characterized as a "legal title". First, as the Court noted in its Advisory Opinion on the status of Western Sahara, "such agreements with local rulers, whether or not considered as an actual 'cession' of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*"[401]. They cannot in themselves constitute an autonomous legal title, and their significance is especially unclear given that the scope of the authority of the local rulers concerned is open to debate[402]. Moreover, such acts were recognized as having a certain legal significance in territorial matters only in so far as it was established that they concerned territories which were inhabited, or possessed by indigenous rulers[403], which is not true of the islands in dispute. Finally, and in any event, France too concluded agreements with other local rulers — the king and chiefs of Elobey Grande and then the chiefs of Elobey Chico — in respect of the same island territories[404].

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[396] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 39, para. 80 ("Whatever differences of opinion there may have been among jurists, the State practice of the relevant period [end 19th century] indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers. On occasion, it is true, the word 'occupation' was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an 'occupation' of a '*terra nullius*' in the proper sense of these terms.")

[397] See MEG, Vol. I, para. 1.7, and 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).

[398] See MEG, Vol. I, para. 1.9. Bouët-Willaumez then became Governor of Senegal.

[399] See MEG, Vol. V, Ann. 112 (Equatorial Guinea's translation of the original Spanish: "Reconociendo que la Isla de Corisco, Elobey y sus actuales dependencias son españolas").

[400] See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 404-407, paras. 203-209, especially paras. 205 and 207. For a nuanced analysis of the different types of agreements with local rulers and their variable legal scope, see M. Hébié*, Souveraineté territoriale par traité. Une étude des accords entre puissances coloniales et entités politiques locales*, PUF, 2015, esp. pp. 515-551.

[401] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 39, para. 80.

[402] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 405-406, para. 207.

[403] *Arbitral award between Portugal and the United Kingdom, regarding the dispute about the sovereignty over the Island of Bulama, and over a part of the mainland opposite to it*, 21 Apr. 1870, RIAA, Vol. XXVIII, p. 136.

[404] CMG, Vol. I, para. 1.10.

4.17 Another document which, like the previous one, is dated 18 February 1846, and which is reproduced in Annex 47 of Equatorial Guinea's Memorial, is entitled "Letter of Spanish Citizenship Given to the Inhabitants of Corisco, Elobey and their Dependencies"[405]. It is another unilateral act, by which Spain grants Spanish citizenship to the inhabitants of Corisco and its dependencies. It invites the same comments as Annex 110 discussed above: it was not capable of constituting a legal title in relations between Spain and France.

4.18 The same conclusion must be drawn about the document reproduced in Annex 48 of Equatorial Guinea's Memorial, "Spain's 1858 Charter Reaffirming Spanish Possession of the Island of Corisco" (20 July 1858). By this act, Commander Chacon y Michelena, "Governor General of the Islands of Fernando Pó, Annobon, Corisco and dependencies and Head of the Gulf of Guinea Naval Division", sought to retake possession of the island of Corisco, from which the Spanish had been ousted by the English in 1841, as he himself acknowledges[406]. By dint of this detail, the document itself casts doubt on the effectiveness of Spain's occupation of the territories concerned in the three above-mentioned documents. What is more important here, however, is the fact that this document is equally incapable of furnishing Equatorial Guinea with a legal title, since the same considerations that led the other Spanish unilateral acts to be dismissed also apply to this one: it was not enforceable against France, and it does not have the force of a title to territory under international law[407].

4.19 Finally, the last Spanish title invoked by Equatorial Guinea is the following: "6) Spain's uncontested effective and public sovereign occupation of these islands from 1843 until Equatorial Guinea's independence in 1968"[408]. As will be shown below, this lacks any factual basis, since France and Gabon have long made competing claims to the islands in dispute, which amounts to an objection[409]. However, it is important to note at this stage that occupation cannot, in any event, constitute a valid legal title as regards the disputed islands. Indeed, those islands were not legally considered *terrae nullius*, for

> "'[o]ccupation' being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid 'occupation' that the territory should be *terra nullius* — a territory belonging to no-one — at the time of the act alleged to constitute the 'occupation'"[410].

4.20 As for the purported "historic title" held by Spain, which Equatorial Guinea mentions in a passage of its Reply[411] but not in its submissions, this lacks any basis or significance. Indeed, as the Court noted in its Judgment in *Cameroon* v. *Nigeria*,

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[405] This is the title of Annex 47. The document itself is entitled "Charter of Spanish Citizenship Given to the inhabitants of Corisco, Elobey and dependencies"/"Carta de Nacionalidad Española dada á los habitantes de Corisco, Elobey, y sus dependencias".

[406] Letter from the Spanish Ministry of State, 20 July 1958 (MEG, Vol. IV, Ann. 48), p. 1 ("Spaniards have been established on the island of Corisco and its dependencies for many years without any nation disputing their possession and rights. They left due to burning and looting by an English warship without the authorization of its government in 1841". Equatorial Guinea's translation of the original Spanish: "habiendo establecido los españoles desde muchos años sin que ninguna otra Nación les haya disputado su posesión ni derecho, abandonado por ellos en vigor del incendio y saqueo efectuado por un buque de guerra inglés sin autorización de su gobierno en el año 1841").

[407] See above, paras. 4.14 and 4.17.

[408] See REG, Vol. I, p. 145 (para. IV of the submissions); see also REG Vol. I, para. 4.2.

[409] See below, paras. 4.41-4.42, 4.48-4.49, 4.53, 4.63-4.73.

[410] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 39, para. 79, referring to *Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No. 53*, pp. 44 and 45, and pp. 63 and 64.

[411] REG, Vol. I, para. 1.7 ("historic legal title").

"the notion of historical consolidation has never been used as a basis of title in other territorial disputes, whether in its own or in other case law.

Nigeria contends that the notion of historical consolidation has been developed by academic writers, and relies on that theory, associating it with the maxim *quieta non moveré*.

The Court notes that the theory of historical consolidation is highly controversial and cannot replace the established modes of acquisition of title under international law, which take into account many other important variables of fact and law."[412]

4.21 In addition, the purported Spanish legal titles identified by Equatorial Guinea are different from the one that Spain believed it had identified when the question was put to it in 1972[413]. Spain relied mainly on geomorphological arguments and the theory of adjacency, as well as on *effectivités*[414]. These differences of position between the successor State and the predecessor State, when the former is supposed to have inherited the latter's legal title, show that the dispute concerning the title to sovereignty over the islands was not in fact settled until the Bata Convention was signed[415].

B. The *effectivités* invoked by Equatorial Guinea cannot constitute a legal title

4.22 Equatorial Guinea's argument essentially seeks to establish a legal title on the basis of a number of sovereign acts which Spain is said to have undertaken in respect of the island of Corisco and its "dependencies". However, this argument must be dismissed for several reasons, it being recalled that it is well-established jurisprudence that *effectivités* do not in themselves amount to a legal title[416].

4.23 The jurisprudence of the Court in the *Nicaragua* v. *Honduras* and *Nicaragua* v. *Colombia* cases is representative of the linkage between title and *effectivités* in relation to small, uninhabited islands. In those cases, the Court first examined whether a legal title existed, concluding that it was impossible for it to identify one. It was only in a second step, clearly distinguished from the first, that the Court had recourse to *effectivités* for the purpose of fulfilling its mission, which was to determine sovereignty over the islands in dispute:

"65. In light of the foregoing, the Court concludes that in the present case the principle of *uti possidetis juris* affords inadequate assistance in determining sovereignty over the maritime features in dispute between Nicaragua and Colombia because nothing clearly indicates whether these features were attributed to the colonial provinces of Nicaragua or of Colombia prior to or upon independence. The Court accordingly finds that neither Nicaragua nor Colombia has established that it had title to the disputed maritime features by virtue of *uti possidetis juris*.

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[412] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 352, para. 65.

[413] See below, para. 4.70; see also CMG, Vol. I, paras 2.52-2.53.

[414] Letter from the Spanish Minister for Foreign Affairs to the Ambassador of Spain to Equatorial Guinea, 19 Sept. 1972 (RG, Vol. II, Ann. 34). See also Spanish memorandum on sovereignty over and the administration of the islands of Mbanié, Conga and Cocotiers, 16 Oct. 1972 (CMG, Vol. V, Ann. 130).

[415] See below, paras. 4.74 *et seq*.

[416] See above, paras. 1.56-1.72; see also CMG, Vol. I, paras. 5.89-5.94.

66. Having concluded that *no title over the maritime features in dispute can be found* on the basis of the 1928 Treaty or *uti possidetis juris*, the Court will now turn to the question whether sovereignty can be established on the basis of *effectivités*."[417]

4.24 The present case is clearly different from the circumstances mentioned above, since the Special Agreement does not ask the Court to resolve the sovereignty dispute, but only to identify the *legal titles* that have the force of law in the relations between the Parties. Indeed, while a judicial decision may be based on *effectivités* for the purpose of settling a dispute concerning sovereignty over islands, such reasoning does not entail any confusion between legal title and *effectivités*.

4.25 It goes without saying that, in the present case, the Court could not conclude that the *effectivités* invoked by Equatorial Guinea can constitute a legal title, without contradicting well-established jurisprudence. Moreover, those *effectivités* do not concern the islands in dispute and thus have no probative value in the case at hand.

4.26 It is for Equatorial Guinea to demonstrate that the islands in dispute formed part of the "Corisco Dependencies" mentioned in the documents which it invokes as title. In fact, in its written pleadings, Equatorial Guinea challenges Gabon to show that the disputed islands were "treated separately from Corisco Island in regard to sovereignty"[418]. Equatorial Guinea is plainly seeking to reverse the burden of proof, which sleight of hand is clearly aimed at masking the fact that its reasoning is based on circular arguments[419]. There is no evidence that the term "Corisco Dependencies" used in certain documents invoked as titles by Equatorial Guinea included Mbanié, Cocotiers and Conga. Indeed, none of these islands is mentioned in the six purported titles invoked by Equatorial Guinea. Equatorial Guinea's position is therefore based on an unfounded assumption. The persistent repetition in Equatorial Guinea's written pleadings of the term "Corisco Dependencies", with initial capital letters, cannot provide a credible basis for this assumption.

4.27 As Gabon stated in its Counter-Memorial, the term "dependencies" used in those documents necessarily referred to inhabited territories[420], which was not the case for any of the islands. This is also the interpretation put forward by Spain at the time, including in its relations with France, as a basis for claiming vast mainland territories from the mouth of the Campo River in the north to Cape Santa Clara in the south, encompassing the whole of Corisco Bay[421]. Spain's contemporaneous interpretation of the term "dependencies" as used in its own acts is thus different from the one proposed by Equatorial Guinea in these proceedings. It is no doubt because Equatorial Guinea had no arguments to counter this line of reasoning that it chose to disregard it in its Reply.

4.28 In conclusion, the six purported titles invoked by Equatorial Guinea in support of its contention relating to the island territories do not, by their very nature, have the force of a legal title; nor do they have any probative value as regards the islands in dispute, since they make no mention of Mbanié, Cocotiers or Conga.

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[417] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, pp. 651-652, paras. 65-66 (emphasis added); see also *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, pp. 710-711, para. 167.

[418] REG, Vol. I, para. 4.22.

[419] See below, para. 4.43.

[420] CMG, Vol. I, paras. 8.17-8.19.

[421] *Ibid*., para. 1.18 *(c)*. See also CMG, Vol. I, paras. 8.24-8.26.

C. The non-existent recognition of an alleged Spanish legal title over the islands in dispute

4.29 Like Gabon, Equatorial Guinea does not consider the Paris Convention between France and Spain to be a legal title with the force of law as regards sovereignty over the islands. However, Equatorial Guinea mistakenly regards it as evidence of recognition by France of a pre-existing Spanish title over the islands in dispute (**1**). Moreover, there is nothing in the subsequent conduct of France or Gabon to attest to such recognition (**2**).

1. *The Paris Convention does not constitute, by creation or confirmation, a legal title over the islands in dispute*

4.30 The 1900 Paris Convention is not among the instruments put forward in Equatorial Guinea's written pleadings as the bases of titles on which it relies as regards the disputed islands[422]. At most, Equatorial Guinea regards the Convention as confirmation, and hence as subsidiary evidence, of France's recognition of Spain's sovereignty over the islands in dispute, when it states that "[t]he 1900 Convention is premised upon a recognition of Spain's existing legal title to the islands of Corisco Bay"[423] and "[t]he 1900 Convention neither created nor transferred any legal title to the islands of Corisco Bay"[424].

4.31 Not only is this an erroneous interpretation of the Paris Convention in so far as it concerns the islands[425], but moreover, none of the six elements invoked by Equatorial Guinea as bases for its alleged legal title, and examined above, can be characterized as a pre-existing (Spanish) title[426]. The Paris Convention could not therefore confirm a title that had not been created in law.

4.32 Furthermore, as Gabon made clear in its Counter-Memorial, the negotiations between France and Spain, which concerned not just the islands at the mouth of the Mondah River in Corisco Bay but also the mainland coast of the Gulf of Guinea, faltered over the question of legal title.

4.33 The Franco-Spanish Mixed Commission met between March 1886 and June 1891 "with a view to delimiting French and Spanish possessions in West Africa in northern Senegal and Gabon"[427]. Yet the Mixed Commission's work ended with an admission that it had failed because the two States were unable to identify or decide on the legal titles serving as the bases for their respective claims[428]. As the Commission explained:

> "The rights that each nation believes it holds in respect of the disputed regions were meticulously examined on both sides, but it was not possible to determine the extent of the respective rights of Spain and France over those lands. However, since the Spanish Government, and the French Government too of course, is prepared to adopt a

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[422] See above, para. 4.2 (for a discussion of those bases of titles, see paras. 4.6-4.21).

[423] REG, Vol. I, p. 75 (heading of Sec. B, Chap. 4). See also MEG, Vol. I, para. 3.19.

[424] *Ibid*., para. 4.19 (fn. omitted).

[425] For the correct interpretation of the Paris Convention as regards the island territories see above, paras. 4.35-4.43.

[426] See above, paras. 4.6-4.21.

[427] Protocol No. 1 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 22 Mar. 1886 (RG, Vol. II, Ann. 2). See also CMG, Vol. I, paras. 1.15-1.20.

[428] CMG, Vol. I, para. 8.33.

transactional approach, it is worth considering on what bases a transaction might be made"[429].

4.34 Some of the evidence that Equatorial Guinea now invokes as titles relating to the island territories was put forward, unsuccessfully, by Spain when this work took place[430]. The failure of the search for legal titles caused the two colonial Powers to base their subsequent talks on a desire to reach an agreement of a transactional nature[431].

4.35 Equatorial Guinea is therefore wrong to ask this Court to establish as legal titles documents which were not regarded as such by the two colonial Powers at that time. Those Powers decided not to invoke any earlier titles they may have held, choosing instead to reach a compromise on sovereignty over the relevant territories in the Gulf of Guinea, which the 1900 Convention unequivocally divides between its two parties[432].

4.36 Contrary to Equatorial Guinea's argument that the Convention merely confirmed a pre-existing Spanish title[433], the 1900 Convention in fact *created*, in relations between France and Spain, a title to sovereignty over both the land territory and Corisco and the Elobey Islands. This is clearly how it was viewed by the parties after its signature[434]. Moreover, as successor States, Equatorial Guinea and Gabon consistently referred to it as the only legal instrument that might be of relevance in determining the extent of their territories, until the Bata Convention — which also makes reference to the Paris Convention — resolved the questions left outstanding at Paris[435].

4.37 However, the Paris Convention does not grant Equatorial Guinea sovereignty over *the islands in dispute*. Equatorial Guinea cannot, by extrapolation — or "extension", as it writes[436] — apply the 1900 Convention to the disputed islands, on the ground that they are alleged "dependencies" of Corisco[437]. Not only are Mbanié, Cocotiers and Conga not mentioned in the

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[429] Protocol No. 31 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 17 Oct. 1887 (RG, Vol. II, Ann. 3), p. 2. See also Protocol No. 32 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 31 Oct. 1887 (CMG, Vol. III, Ann. 32), p. 1; CMG, Vol. I, para. 1.19.

[430] CMG, Vol. I, para. 8.24.

[431] *Ibid*., paras. 1.19-1.23 and 8.33-8.34.

[432] *Ibid*.

[433] REG, Vol. I, para. 4.19.

[434] CMG, Vol. I, para. 1.21. 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, and the Note from the Spanish Minister of State to the Ambassador of France to Spain, 6 Feb. 1900, appended to 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.

[435] See, for example, 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), p. 1 *ter* (the parties "state that they adopted [the Paris Convention] as the basic document for delimitation of maritime borders") and p. 4, para. 5.2 (Equatorial Guinea states that its sovereignty over the islands "dates back to 1900, according to the Paris Convention of June 27, 1900"); Letter from the President of Equatorial Guinea to the President of Gabon, 20 July 1972 (CMG, Vol. V, Ann. 119) ("I am . . . pleased to note that Your Excellency recognizes Equatorial Guinea's sovereignty over the Elobey Islands and Corisco, as set out in the Convention of 27 June 1900") and the response of the President of Gabon in the Letter from the President of Gabon to the President of Equatorial Guinea, 30 Aug. 1972 (CMG, Vol. V, Ann. 120), p. 1 ("I am pleased to note that you refer primarily to the Convention of 27 June 1900 . . . Indeed, that Convention, for us, is and has always been the basic document which unequivocally determines the land boundaries between our two countries").

[436] REG, Vol. I, para. 4.19.

[437] See CMG, Vol. I, paras. 8.37-8.39.

Convention — which Equatorial Guinea acknowledges[438] — but the term "dependencies" itself, whatever the meaning attributed to it, is also absent.

4.38 The Court has always refused to establish a title to sovereignty on the interpretation by "extension" of a treaty term (which, moreover, is absent in this case). Thus, in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, the Court refrained from interpreting by extrapolation a treaty and acts from the colonial period that formed the basis of the *uti possidetis juris* in such a way that the latter would extend to the islands in dispute, even though those documents did not explicitly refer to them:

> "53. . . . Article I of the 1928 Treaty does mention 'the other islands, islets and reefs forming part of the San Andrés Archipelago'. This provision could be understood as including at least the maritime features closest to the islands specifically mentioned in Article I . . . Be that as it may, the question about *the composition of the Archipelago cannot*, in the view of the Court, *be definitively answered solely on the basis of the geographical location of the maritime features in dispute* or on the historical records relating to the composition of the San Andrés Archipelago referred to by the Parties, since this material does not sufficiently clarify the matter.
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> 55. The Court further observes that the historical material adduced by the Parties to support their respective arguments is inconclusive as to the composition of the San Andrés Archipelago. In particular, *the historical records do not specifically indicate which features* were considered to form part of that Archipelago.
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> 64. The Court observes that, as to the claims of sovereignty asserted by both Parties on the basis of the *uti possidetis juris* at the time of independence from Spain, none of the colonial orders cited by either Party *specifically mentions the maritime features in dispute*."[439]

4.39 In its Reply, Equatorial Guinea revisits the basis of France's purported recognition of the islands in dispute as "dependencies" of Corisco, which is said to pre-date the Paris Convention and to be implicitly reflected in its provisions[440]. This assertion rests on a comment contained in the records of the Franco-Spanish Mixed Commission that the islets of Laval and Mbanié (or Baynia) were "geographical dependencies" or "natural dependencies" of Corisco[441].

4.40 Without distorting the spirit and letter of those exchanges, it is not possible to see in them any form of recognition by France of Spain's sovereignty over the islands in dispute. As previously observed by Gabon in its Counter-Memorial, the French Commissioner responded to the Spanish argument that the term "dependencies" was intended to encompass sizeable portions of the mainland

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[438] REG, Vol. I, para. 4.19.

[439] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, pp. 649 and 651, paras. 53, 55 and 64 (emphasis added).

[440] REG, Vol. I, paras. 4.5 and 4.19.

[441] *Ibid*., para. 4.11, citing respectively Protocols Nos. 17 and 30 of the Franco-Spanish Commission for the Northern Delimitation of Gabon of 24 Dec. 1886 and 16 Sept. 1887 (MEG, Vol. III, Anns. 11 and 3).

territory. He linked the notion of "dependencies" with that of adjacency[442], but by no means accepted that the documents invoked by Spain, namely the proclamation of sovereignty of 16 March 1843, the "Record of Annexation" and "Carta de Nacionalidad Española dada á los habitantes de Corisco, Elobey, y sus dependencias" of 18 February 1846, and the "letter reaffirming Spanish possession of the island of Corisco" of 20 July 1858, constituted a legal title enforceable against France[443]. Equatorial Guinea therefore cannot conclude that France "recognized [the Corisco island and its dependencies] as belonging to Spain long before the Convention was signed"[444], when the work of the Mixed Commission on which it relies actually ended in failure, since the Commission's mandate was in fact to identify the respective legal titles of France and Spain over the territories in dispute[445]. Equatorial Guinea cannot now advance against Gabon, on the grounds of an alleged recognition, a negotiating position put forward by France against Spain which is not crystallized in an agreement between the two States[446].

4.41 Furthermore, after the Commission had concluded its work, the two parties continued to make competing claims over the island territories currently in dispute. It is only by distorting or disregarding the documents which undermine its argument[447] that Equatorial Guinea can deny that France had laid claim to those islands even before the Paris Convention was signed[448]. These competing claims reflect both the failure of the negotiations and the absence of recognition by France of a link between Corisco and the disputed islands, as "dependencies".

4.42 It is in this context that the Paris Convention was concluded. But while it settles the sovereignty dispute relating to the Elobey Islands and the island of Corisco[449], it remains silent on the subject of Mbanié, Cocotiers and Conga. Although the three islands had been known to exist for many years[450], they are not mentioned either in the text of the Paris Convention or on the map contained in Appendix No. 3 of that instrument. This omission could not have been unintentional, given that the islands in question were the subject of discussions within the Mixed Commission and that the two States had made conflicting claims in respect of Mbanié, reiterated on the eve of the negotiations[451].

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[442] CMG, Vol. I, paras. 8.20-8.22.

[443] Annex to Protocol No. 30 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 16 Sept. 1887 (MEG, Vol. III, Ann. 3), pp. 12-13 of the annex — passage in which the French delegation demonstrates at length why "it is apparent that [the Spanish delegation] sought to give the text of the 1843, 1846 and 1858 documents and extended meaning that they could not possess" (*ibid*., p. 12). Equatorial Guinea has in reality produced in Annex 3 of its Memorial, under the heading "Protocol No. 30", very short select excerpts (some pages out of order) from that brief protocol (3 pages in the original) and its lengthy annex (39 pages in the original) submitted by the French delegation.

[444] REG, Vol. I, para. 4.21.

[445] CMG, Vol. I, para. 8.31.

[446] *Ibid*., paras. 8.28-8.29.

[447] REG, Vol. I, paras. 4.9-4.10 and 4.14-4.15.

[448] See CMG, Vol. I. para. 8.8, and Letter No. 367 from the Governor-General of Fernando Pó to the Minister for Spanish Overseas Possessions 21 Nov. 1895 (MEG, Vol. IV, Ann. 49) and 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).

[449] CMG, Vol. I, paras. 8.35-8.36. Equatorial Guinea argues that there was no dispute between France and Spain as regards the islands. This assertion is surprising to say the least, since the negotiations also concerned the islands (see CMG, Vol. I, para. 8.34 and fn. 729) and since they were the subject of difficult discussions within the Franco-Spanish Mixed Commission (see CMG, Vol. I, para. 1.18 *(b)* and fns. 54 and 56).

[450] CMG, Vol. I, para. 1.7.

[451] *Ibid*., paras. 1.18 *(c)* and 1.20.

4.43 Consequently, Equatorial Guinea's contention that "the lack of depiction of the Corisco Dependencies confirmed that the Parties to the 1900 Convention did not consider those islands to be separate from Corisco"[452] lacks credibility. It is just one example of Equatorial Guinea's circular argument, which is based on a series of unsubstantiated assumptions:

(a) the assumption that Spain held a title to sovereignty over Corisco, enforceable against France, which pre-dated the 1900 Convention, *quod non*[453];

(b) the assumption that the islands in dispute were legally "dependencies" of Corisco, *quod non*[454];

(c) the assumption that this "dependency" relationship was recognized as such by France, *quod non*[455]; and

(d) the assumption that the mention in the 1900 Convention of only the island of Corisco was intended to encompass all three islands in dispute, which is contradicted by the text itself, read in the light of the competing claims made in respect of Mbanié.

2. *The absence of subsequent recognition by either France or Gabon of any Spanish legal title over the islands in dispute*

4.44 Equatorial Guinea then refers to an alleged recognition of Spain's legal title by France, which is said to have occurred after 1900[456]. Before examining the documents it produces to this end, some introductory comments are called for.

4.45 At this stage, Equatorial Guinea has neither demonstrated the existence nor identified the nature of this purported legal title. It is therefore difficult to see how it could have been recognized, since recognition can concern only a clearly identified claim[457]. Moreover, the only recognition of any relevance is recognition by France or Gabon, which would be affected by Spain's unlikely claim: the attitude of other States has no bearing on the question of the legal title. For this reason, internal documents of third States, such as those produced by the United Kingdom on the occasion of the wrecking of the *Pierre Loti*[458], cannot by their nature serve as evidence of a supposed recognition by France or Gabon of Spanish sovereignty. Furthermore, the documents in question are ambiguous, since they refer to the "waters adjacent to a Spanish colony"[459], without naming them.

4.46 In any event, Equatorial Guinea does not consider recognition as constituting an autonomous legal title; at most it regards it as confirmation of a pre-existing title, in the same way as for the 1900 Convention. But Equatorial Guinea avoids, in general, any discussion of the conditions under which recognition or acquiescence might be used to supplement an inchoate or incomplete title. In the case concerning the *Temple of Preah Vihear*, Thailand's acquiescence to the exercise of

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[452] REG, Vol. I, para. 4.23.

[453] See above, paras. 4.33-4.36.

[454] See above, paras. 4.37-4.38.

[455] See above, paras. 4.39-4.41.

[456] REG, Vol. I, paras. 4.26 *et seq*.

[457] *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 138, to which reference is made in *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Judgment, I.C.J. Reports 2021*, pp. 227-228, para. 51.

[458] See MEG, Vol. I, paras. 3.24-3.25; REG, Vol. I, para. 4.27.

[459] Report on Libreville and Port Gentil of the United Kingdom Ministry of War Transport, 22 June 1943 (MEG, Vol. IV, Ann. 80).

French sovereignty over the temple and its vicinity enhanced the inchoate conventional title held by Cambodia resulting from a convention concluded in 1904 between Siam and France, Cambodia's predecessor State. The Court studied the conduct of both States as evidence of how Article 1 of that convention, which fixed the boundary, had been interpreted[460]. It considered that the map on which Cambodia relied as proof of its sovereignty over the temple was part of the "treaty settlement"[461]. To reinforce its interpretation of the "treaty settlement", and in particular the cartographic evidence put forward by Cambodia, the Court also relied on the conduct of the parties, which confirmed Thailand's recognition of the inchoate conventional title on which Cambodia relied[462].

4.47 In these proceedings, unlike in the case concerning the *Temple of Preah Vihear*, Equatorial Guinea does not invoke any conventional title applicable to the disputed island territories. As shown above[463], the six elements on which it relies, which are not of a conventional nature, do not constitute a legal title either individually or collectively, and are not enforceable against Gabon. Consequently, however France's conduct is understood, it cannot have the legal effect attributed to it by Equatorial Guinea, because it cannot make good a non-existent title.

4.48 It is in this context that the exchanges between France and Spain regarding the beacon installed on Cocotiers by France must be framed. In February 1955, France began constructing a beacon on the island of Cocotiers[464], without seeking any prior authorization from Spain. Equatorial Guinea's assertion that "France began work on the beacon in 1955 believing it had received Spanish authorization in 1954 for such work, but Spain had only authorized temporary installations, not permanent ones" is entirely false[465]. None of the documents produced by Equatorial Guinea shows that Spain's authorization for the construction of beacons on Cocotiers (or Mbanié or Conga) was sought by France (or granted by Spain) prior to February 1955. The only Spanish authorization requested by France dates from February 1954 and concerns the "intended visit of the French hydrographic boat *BEAUTEMPS-BEAUPRE* to Corisco Bay in the years 1954, 55 and 56"[466]. As regards the letter dated 22 March 1955 — so after France had begun constructing the beacon — from the Governor-General of the Spanish Territories of the Gulf of Guinea to the High Commissioner of the (French) Republic in French Equatorial Africa, this makes no reference to any prior authorization to build. It simply refers to the discussions taking place between the captain of the *Beautemps-Beaupré* and the captain of Spanish vessel the *Canovas del Castillo*, which resulted in

> "all the necessary facilities . . . be[ing] provided for the construction — on territory under Spanish sovereignty — of as many signals as necessary to carry out the hydrographic work, as long as they are of [a] temporary nature"[467].

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[460] *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, pp. 16-17.

[461] *Ibid*., p. 33.

[462] *Ibid*., pp. 30-31.

[463] See above, paras. 4.6-4.21.

[464] Work to construct the beacon was carried out by the team from the *Beautemps-Beaupré*, which the previous year had conducted reconnaissance of Corisco Bay with a view to installing beacons and soundings (French sketch-map "Reconnaissance of Corisco Bay", Nov. 1954 (RG, Vol. II, Ann. 4)).

[465] REG, Vol. I. para. 4.29.

[466] Letter No. 87 from the Spanish Ministry of Foreign Affairs to the Department for Morocco and the Colonies, 24 Feb. 1954 (Equatorial Guinea's translation of the Spanish: "proyectada visita del barco hidrográfico francés BEAUTEMPS-BEAUPRE a la Bahía de Corisco en los años 1954, 55 y 56") (MEG, Vol. IV, Ann. 81).

[467] Letter from the Governor-General of the Spanish Territories of the Gulf of Guinea to the High Commissioner for French Equatorial Africa, 22 Mar. 1955 (Equatorial Guinea's translation of the Spanish: "cuantas facilidades fueran precisas para el levantamiento en territorio de Soberanía española, de cuantas señales fueran necesarias para llevar a cabo los trabajos hidrográficos, siempre que tuviesen un carácter eventual") (MEG, Vol. IV, Ann. 93).

4.49 These circumstances show that France considered itself to have sovereignty over Cocotiers, contrary to Equatorial Guinea's claim that there had been a "recognition" of Spain's sovereignty over this island[468]. Moreover, the High Commissioner of the Republic in French Equatorial Africa did not regard Spain's protest against the construction work, illustrated by a landing of troops on the island on 28 February 1955, as a claim of sovereignty:

> "it is not that the Spanish authorities are actually claiming possession of the island of Cocotier. They are simply expressing their surprise at not being consulted beforehand [in accordance with Article 5 of the 1900 Convention on navigation and beacons in the area]".

He concluded:

> "It is likely that this minor incident will be resolved at the local level. Nevertheless, in the event that the Spanish authorities were to contest our possession of the island of Cocotier, I should be grateful to know whether there are documents in the Department's archives or in those at the Quai d'Orsay establishing the respective rights of France and Spain over the islands in Corisco Bay"[469].

4.50 And in fact, this "minor incident" was resolved at the local level (i.e. without the involvement of the central authorities and therefore of authorized representatives of the French and Spanish States): on the same day, without awaiting the return of the responsible minister, the High Commissioner of the Republic in French Equatorial Africa sought the agreement of his Spanish counterpart for the completion of the beacon, and to prevent any further incidents declared that "[w]hatever the legal scope of Article 5 of the Convention of 27 June 1900, about which I am seeking clarification from Paris, I will henceforth inform you of the beaconing work to be carried out in Corisco Bay"[470]. This episode was brought to a definitive close by a meeting of 15 September 1955 between the captain of the *Beautemps-Beaupré* (French) and the captain of the *Canovas del Castillo* (Spanish), who was supposed to arrange for the cost of constructing the Corisco beacon to be reimbursed, again at the local level — as stated in the Reply — i.e. by the Puerto Iradier authorities (Spanish Guinea) to the authorities of Cocobeach (Gabon)[471].

4.51 Nowhere in these Franco-Spanish exchanges — assuming that they are to be taken into consideration as a matter of law despite their purely local scope, *quod non*[472] — is there any expression of recognition of Spain's sovereignty over Cocotiers (or Mbanié or Conga). The only

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[468] REG, Vol. I, para. 4.29.

[469] Letter No. 956 AP 3 from the Governor-General for Overseas France, High Commissioner of the Republic in French Equatorial Africa, 14 Mar. 1955 (RG, Vol. II, Ann. 5).

[470] Letter No. 955 AP 3 from the Governor-General for Overseas France, High Commissioner of the Republic in French Equatorial Africa, to the Governor-General of Spanish Settlements in the Gulf of Guinea, 14 Apr. 1955 (RG, Vol. II, Ann. 6). The French Minister for Foreign Affairs recommended in turn that the incident be resolved at the local level (Letter No. 438/AL from the Minister for Foreign Affairs to the Minister for Overseas France, 6 May 1955 (MEG, Vol. IV, Ann. 94)).

[471] REG, Vol. I, para. 4.32; Note No. 207 from the Spanish Navy in Central Africa, 6 Sept. 1955 (REG, Vol. III, Ann. 18).

[472] Nor does Equatorial Guinea dare to claim that the High Commissioner of the Republic in French Equatorial Africa was competent to commit France at the international level regarding sovereignty over the territories for whose administration he was responsible.

recognition by the captain of the *Beautemps-Beaupré* in that final document setting out the agenda for the meeting of 15 September 1955 concerned *(Spain's) ownership of the beacon* of Cocotiers[473].

4.52 Equatorial Guinea adopts the same wanton approach to its treatment of the facts and documents when it asserts that Gabon too recognized Spain's sovereignty over the islands in dispute[474].

4.53 It relies in this regard on a sketch-map showing a concession awarded to a Spanish oil company in 1962 on which the islands at issue are marked as Spanish[475], arguing that Gabon failed to protest. Yet first, it appears that Spain did not give notification of those concessions or that map — which has no probative value, moreover[476] — to Gabon, notification that is nonetheless necessary in order to trigger a duty to protest[477]; and second, Gabon had at the time begun to issue its own oil concessions and, contrary to Equatorial Guinea's claims[478], there is nothing in those concessions to suggest that they were based on the assumption that the disputed islands belonged to Spain[479].

4.54 The two sketch-maps put forward by Equatorial Guinea, purportedly illustrating the fact that "Gabon's Libreville Marin Permit Northern Limit is a Median Line Using Corisco Dependencies as Spanish Basepoints"[480], cannot deceive the Court: they were not issued by the Gabonese authorities but by the company Shell, which drew those limits itself at a time when it was seeking to expand its exploration activities in the region[481]. Moreover, Shell's sketch-maps do not show the islands in dispute and their purpose is not to depict the maritime boundary, which they do not.

4.55 In contrast, Decree No. 391 of 2 August 1967, subsequently adopted by the Gabonese Government, defines the northern limit of the "Libreville Marine Concession" as the "common maritime border between Gabon and Equatorial Guinea", but that boundary is not shown and there is no reference to any median line or to Spanish base points on the disputed islands. That line was

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[473] Note No. 207 from the Spanish Navy in Central Africa, 6 Sept. 1955 (REG, Vol. III, Ann. 18). ("[t]he French side has acknowledged in the correspondence regarding the COCOTEROS islet buoy that this buoy was Spanish property", Equatorial Guinea's translation of the original Spanish: "en la correspondencia cruzada sobre la baliza del islote COCOTEROS, se ha reconocido por parte francesa que esta baliza era propiedad española").

[474] REG, Vol. I, paras. 4.36-4.39 and 4.46-4.47.

[475] MEG, Vol. II, sketch-map No. 3.5, mentioned in REG, para. 4.36.

[476] Equatorial Guinea states that this sketch-map is based on MEG, Vol. VI, Ann. 163 (REG, Vol. I, para. 4.36), yet that particular annex is a circular of 19 September 1972, to which no map is appended and which has nothing to do with oil concessions. It is in fact, contrary to the formal way in which it is presented by Equatorial Guinea (as a map of an oil concession awarded by Spain to the Spanish Gulf Oil Company and the Compañia Española de Petróleos), a map drawn up by the Spanish Gulf Oil Company itself and entitled "Mapa Mostrando la zona de interes proxima à la frontera entre Guinea Espanola y Gabon", i.e. with no mention of any Spanish oil concession (MEG, Vol. II, sketch-map No. 3.23).

[477] It is well established in the jurisprudence that, for State conduct to be considered as requiring a response from other States, that conduct must be, among other things, notorious (*Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Judgment, I.C.J. Reports 2021*, p. 228, para. 51, referring to *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, pp. 138-139).

[478] REG, Vol. I, paras. 4.36 and 4.39.

[479] CMG, Vol. I, paras. 2.38-2.39.

[480] MEG, Vol. II, sketch-map No. 3.21.

[481] *Ibid*., sketch-map No. 3.21 ("Map of Permit Areas and Oil fields of Gabon and Congo", drawn up by the company Shell and on which the "Libreville" petroleum block, for which Shell was making an application at the time, appears as under investigation (the Libreville block is labelled as follows: "Application made 7th September 1964") and MEG, Vol. II, sketch-map No. 3.23 (*idem*. in 1967, Shell this time presenting itself on the map as the beneficiary of the "Libreville" petroleum block).

subsequently clarified, so as to correspond to the maritime boundary claimed by Gabon during the negotiations with Equatorial Guinea as an extension of the land boundary, along the parallel from the point at which the thalweg of the Muni River intersects a straight line drawn between Cocobeach and Dieke point[482].

4.56 Lastly, Spain itself refused to use the islands as its base points for a delimitation: when in 1967 it proposed holding talks with Gabon to delimit their common maritime boundary, it was aware that "if we start from the island Cocotier or Bane, we greatly fear that those negotiations will be clouded with difficulties"[483].

4.57 The same tendency to misrepresent documents can be seen in Equatorial Guinea's presentation of the Implementation Protocol in Compliance with the Maritime Signal Organization for the Buoyage and Signaling of Corisco Bay and the Muni River of 23 May 1962, Article 3 (c) of which referred "to the beacon on Cocoteros placed by the French as falling under Spanish authority and paid for by Spain"[484]. In reality, that provision reads as follows:

> "After broad discussions regarding the installation of a light on the Cocoteros Island beacon, the parties agree to halt construction and propose to exchange the Baynia buoy for another one that is taller and more visible"[485].

4.58 Far from documenting "Spain's sovereign authority and responsibility"[486], this document in fact appears to be establishing a joint régime for the management of the beacons and buoys in Corisco Bay and at the mouth of the Mondah, and is therefore in no way indicative of sovereignty over the islands in dispute.

4.59 Finally, Equatorial Guinea puts forward the supposed construction of a radio antenna on the islands of "Corisco, Bayna, or Laval", against which Gabon raised no protest[487]. There is no evidence to suggest that the project actually materialized or, if it did, that the antenna was built on Mbanié. The documents on which Equatorial Guinea relies consist of an exchange of letters between a company applying for the project and the Spanish authorities, which was not brought to the attention of Gabon.

4.60 In conclusion, none of the six elements invoked by Equatorial Guinea — whether examined objectively or in the light of an untraceable recognition by Gabon, or by France before

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[482] CMG, Vol. I, para. 6.21. See also Letter from the Ambassador of Spain to Gabon to the Under-Secretary of the Spanish Ministry of Foreign Affairs, 23 Mar. 1971 (RG, Vol. II, Ann. 15); Note entitled "Permit to explore for offshore hydrocarbons in the disputed area between Gabon and Equatorial Guinea" from the Embassy of France in Gabon, 5 Oct. 1972 (RG, Vol. II, Ann. 38).

[483] 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"); see also CMG, Vol. I, para. 2.40.

[484] REG, Vol. I, para. 4.37. The original Spanish title of that implementation protocol produced by Equatorial Guinea is "Protocolo de aplicación de conformidad con la organización de señales maritimas para el balizaje y señalización de la bahia de Corisco y del Rio Muni" (REG, Vol. III, Ann. 1).

[485] REG, Vol. III, Ann. 1 (Equatorial Guinea's translation of the original Spanish: "Después de amplias discursiones sobre la instalación de una luz en la baliza de la Isla de Cocoteros se acuerda desistir de esta instalación y proponer el cambio de la boya Baynia por otra mas alta y de mayor visibilidad").

[486] REG, Vol. I, para. 4.37.

[487] *Ibid*., para. 4.38.

it — has the characteristics necessary for qualification as a legal title, particularly as regards the islands in dispute, so that the Bata Convention appears to be the only legal title currently enforceable between the Parties that is capable of governing sovereignty over those islands.

II. The Bata Convention is the only legal title that has the force of law as regards the islands in dispute

4.61 When Gabon became independent in 1960, it inherited a situation in which no legal title had been established in respect of the islands in dispute[488]. The question was brought back to the table during discussions on the maritime boundary with Equatorial Guinea, which began shortly after the latter achieved independence[489]. It is in this context that the tensions between the two States in 1972 must be viewed (**A**), tensions which the Bata Convention resolved by establishing, for the first time and in unequivocal terms, the title to sovereignty over the islands in dispute (**B**). There is nothing in Gabon's subsequent conduct to suggest that it renounced the irrefutable conventional title it thus holds over those islands (**C**).

A. The context and significance of the 1972 tensions

4.62 In its Reply, Equatorial Guinea levels serious charges against Gabon, accusing it of an invasion and of annexing territory[490] when, in 1972, it set up a permanent police station on Mbanié. The severity of these charges calls for a clarification of that incident, already described in the Counter-Memorial[491].

4.63 It took place against the backdrop of negotiations concerning the fixing of the Parties' common maritime boundary. Those negotiations opened at the end of February 1971, at Gabon's suggestion, with the visit of a Gabonese delegation to Bata[492]. During the second meeting of the delegations of the Parties, this time in Libreville from 25 to 29 March 1972, Equatorial Guinea persisted in claiming sovereignty over Mbanié, Cocotiers and Conga, in keeping with its Decree No. 17/790 of 24 September 1970, which it claimed was opposable to Gabon. This claim ran counter to Gabon's own in respect of the three islands, reaffirmed by Decree 670/PR/MNERH-DMG of 14 May 1970 and Decree 1/72-PR of 5 January 1972, which extended Gabon's territorial sea to 30 nautical miles. At this second meeting, Gabon also proposed that the maritime boundary should begin at the intersection of the Muni River thalweg with a straight line drawn from Cocobeach point to Dieke point (i.e. the thalweg at the mouth of the Muni River) and extend westwards along the parallel on which that point of intersection is located, and that bands of 3 nautical miles of territorial sea be created around the islands of Corisco, Elobey Chico and Elobey Grande, thus partially enclaving them in Gabonese waters[493]. Gabon observed that Equatorial Guinea could not lay claim to any other islands "in the underwater area constituting the natural prolongation of Gabonese territory"[494].

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[488] CMG, Vol. I, paras. 8.40-8.45.

[489] *Ibid*., para. 2.40.

[490] REG, Vol. I, paras. 4.54-4.56.

[491] CMG, Vol. I, paras. 2.49-2.54.

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

[493] 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).

[494] Letter No. 55/DAM from the Ambassador of France to Gabon to the French Minister for Foreign Affairs, 1 Apr. 1972 (RG, Vol. II, Ann. 16), p. 2.

4.64 For several months, the number of incidents around Mbanié grew: on multiple occasions, Gabonese fishermen working on Mbanié and Cocotiers came under fire from Equatorial Guinea's military[495]; gunfire from those armed forces "almost took the lives of a French family, including a woman and a child, mere recreational fishers"[496]. However, to put a stop to this escalation and enable the negotiations on the maritime boundary, which had reached a standstill[497], to continue, the Head of the Gabonese State proposed on 18 July 1972 that a neutral zone be established in Corisco Bay, to be jointly operated and monitored by a joint maritime police force[498]. His counterpart from Equatorial Guinea rejected this proposal outright and doubled down on his position as regards the maritime boundary and sovereignty over the islands[499].

4.65 In the face of the obstructive attitude of his counterpart from Equatorial Guinea, and aware that urgent action was needed to put a stop to the incidents so as to ensure the safety of his citizens, the Head of the Gabonese State decided on 23 August 1972 to set up a police station on Mbanié[500]. He also sought to continue the discussions that were vital to resolving the territorial dispute: one week later, he informed President Macías Nguema of his disappointment at the latter's refusal to make Corisco Bay a neutral zone, emphasizing that it "would be most regrettable if our two Governments were unable to find some common ground and had to resort to arbitration or solutions of force", and recalling that he remained "open to any constructive proposal that might lead to a fair settlement for both our countries"[501].

4.66 Despite the ongoing efforts of the Gabonese Government to reach a negotiated settlement of the question of the maritime boundary and the islands, President Macías Nguema refused all dialogue, preferring to instil within the population of Equatorial Guinea, subject to censorship and fierce repression — particularly the people of Corisco, who had seen one of their two deputies "beaten to death by rifle butts during the great purge of [May 1972]"[502], and the other flee the country — a culture of hatred of the Gabonese people[503].

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[495] P. Decraene, "Une mauvaise querelle entre la Guinée Equatoriale et le Gabon", *Le Monde Diplomatique*, Oct. 1972 (RG, Vol. II, Ann. 37), p. 11. See also Interview of the President of the Gabonese Republic by AFP and AGB, 10 Sept. 1972 (REG, Vol. V, Ann. 60).

[496] 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), p. 5. See also Letter No. 118 from the Embassy of Spain in Gabon to the Spanish Minister for Foreign Affairs, 29 June 1972 (RG, Vol. II, Ann. 19).

[497] See the Final communiqué of the Gabon-Equatorial Guinea Joint Commission (24-27 June 1972), transmitted by the Letter from the Embassy of France in Gabon to the French Ministry of Foreign Affairs, 6 July 1972 (CMG, Vol. V, Ann. 118). The Commission noted that the views of the two delegations remained irreconcilable and referred the matter of finding a solution to a meeting between the two Heads of State.

[498] Interview of the President of the Gabonese Republic by AFP and AGB, 10 Sept. 1972 (REG, Vol. V, Ann. 60).

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

[500] See CMG, Vol. I, paras. 2.49-2.50.

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

[502] 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), p. 3. ("[a]s regards Mr Etanguino [opponent of the régime], according to the Spanish Ambassador, he recently travelled to New York to complain to the UN about the crimes of Equatorial Guinea's régime and to request, on behalf of his compatriots of Corisco, that the island be reattached to Gabon"). For testimony on the dramatic situation in Equatorial Guinea, see also, e.g. Letter No. 007/CF from the Ambassador of Gabon to Equatorial Guinea to the Gabonese Ministry of Foreign Affairs, 2 Sept. 1972 (RG, Vol. II, Ann. 25).

[503] P. Decraene, "Une mauvaise querelle entre la Guinée Equatoriale et le Gabon", Le Monde Diplomatique, Oct. 1972 (RG, Vol. II, Ann. 37), p. 11.

4.67 The responses of Equatorial Guinea's Head of State transmitted (indirectly) to his Gabonese counterpart were confined to protesting against (i) Gabon's decision, notified to France on 14 August[504] and to Equatorial Guinea on 23 August, to increase the extent of Gabon's territorial sea to 100 nautical miles[505], and (ii) the presence of two Gabonese vessels (the *Léon Mba* and the *Albert-Bernard Bongo*) in Equatorial Guinean waters in Corisco Bay[506]. Equatorial Guinea also transmitted a copy of these Notes Verbales to the United Nations and to the Organisation of African Unity (OAU) on 7 September 1972[507]. On the same day, its President gave an outrageously false presentation of Gabon's activity in Corisco Bay to the diplomatic corps, stating that "[s]ince 23 August, the Gabonese army has seized all the islands and islets of Corisco Bay, which form part of Equatorial Guinea's territory"[508].

4.68 This led Gabon to write to the Secretary-General of the United Nations to inform him "of the reasons for establishing a police station on the island of Mbanié and to put the incident back in its true proportions"[509]. Gabon sought to re-establish the truth of its operation of 23 August 1972 — which was confined to restoring order on Mbanié and Cocotiers and protecting Gabonese fishermen — through both media[510] and diplomatic[511] channels, in particular at the Conference of the Heads of State and Government of Central and East Africa, which simultaneously tasked the Heads of State of the People's Republic of the Congo and Zaire with mediating to assist with the settlement of the dispute[512]. Lastly, it remonstrated directly with Equatorial Guinea, rejecting its presentation of the facts and reaffirming Gabon's sovereignty over Mbanié and Cocotiers[513].

4.69 The Head of State of Equatorial Guinea nevertheless continued to make misrepresentations to the United Nations, asking the Security Council to intervene in the conflict in response to Gabon's purported invasion, on 23 August, of all Equatorial Guinea's islands, and to the equally supposed destruction by the two above-mentioned Gabonese military vessels of shuttle boats

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[504] See Note Verbale No. 86/MPG-C1 from the Permanent Mission of the Gabonese Republic to the United Nations Office at Geneva to the Permanent Mission of France, 14 Aug. 1972 (RG, Vol. II, Ann. 21).

[505] See Note Verbale No. 2549 from the Ministry of Foreign Affairs of Equatorial Guinea to accredited diplomatic missions in Equatorial Guinea, 31 Aug. 1972 (RG, Vol. II, Ann. 22); Note Verbale No. 2581 from the Ministry of Foreign Affairs of Equatorial Guinea to accredited diplomatic missions in Equatorial Guinea, 1 Sept. 1972 (RG, Vol. II, Ann. 23). Equatorial Guinea declared that it regarded this extension of Gabon's territorial sea as an attempt to annex Corisco and adjacent islands.

[506] Note Verbale No. 2581 from the Ministry of Foreign Affairs of Equatorial Guinea to accredited diplomatic missions in Equatorial Guinea, 1 Sept. 1972 (RG, Vol. II, Ann. 23); Note Verbale No. 2574 from the Ministry of Foreign Affairs of Equatorial Guinea to accredited diplomatic missions in Equatorial Guinea, 1 Sept. 1972 (RG, Vol. II, Ann. 24).

[507] Telegram No. 41/43 from the Ambassador of France to Equatorial Guinea, 8 Sept. 1972 (RG, Vol. II, Ann. 26).

[508] 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), p. 1.

[509] Telegram No. 430/431 from the Ambassador of France to Gabon to the French Ministry of Foreign Affairs, 9 Sept. 1972 (RG, Vol. II, Ann. 27).

[510] Interview of the President of the Gabonese Republic by AFP and AGB, 10 Sept. 1972 (REG, Vol. V, Ann. 60).

[511] Letter No. 005194/MAEC/SG from the Gabonese Ministry of Foreign Affairs to accredited diplomatic and consular missions in Gabon, 12 Sept. 1972 (CMG, Vol. V, Ann. 123).

[512] See Telegram No. 426/429 from the Ambassador of France to Gabon to the French Ministry of Foreign Affairs, 9 Sept. 1972 (RG, Vol. II, Ann. 28).

[513] Dispatch No. 5192/MAEC/SG from the Gabonese Ministry of Foreign Affairs to the Ministry of Foreign Affairs of Equatorial Guinea, 11 Sept. 1972 (RG, Vol. II, Ann. 29).

connecting Corisco and the mainland[514]. His Gabonese counterpart objected to a Security Council meeting being held on the dispute and wrote to the United Nations Secretary-General to explain once again the truth of the Mbanié operation of 23 August and to confirm his wish to have the Presidents of Congo and Zaire act as joint mediators[515]. The following day, on 14 September 1972, Equatorial Guinea asked that no action be taken for the moment on its request for a Security Council meeting[516]. At the same time, it sent "a secret agent to the Ministry of the Navy in Madrid to obtain a Spanish map of Equatorial Guinea from the turn of the century, on which the islands in Corisco Bay are shown as belonging to France"[517].

4.70 Equatorial Guinea ultimately resolved with Gabon to "settle their dispute within the African framework and by peaceful means"[518], and the Conference of the four Heads of State (Congo, Zaire, Equatorial Guinea and Gabon) agreed to create a quadripartite *ad hoc* commission tasked with reaching a definitive solution[519]. This Commission met from 18 September 1972 onwards to allow the Parties' delegations to put forward their respective arguments regarding the basis of their sovereignty over the islands in dispute[520]; those arguments were transmitted to the Governments of France and Spain for their views[521].

4.71 Giving the Parties the opportunity to "raise" the 23 August 1972 operation and the consequences it had on the African negotiations, as well as the diligence of the quadripartite commission, enabled the tensions between the Parties to be gradually dispelled: by 23 September 1972, the Ambassador of Equatorial Guinea was preparing to return to Gabon, and the French diplomatic service was urging the Ambassador of Gabon to resume his post in Malabo[522]; on 12 October, Equatorial Guinea's national day, President Macías Nguema delivered a "very peaceful address, making no mention of the dispute between Equatorial Guinea and Gabon"[523], while

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[514] Letter from the President of the Republic of Equatorial Guinea to the President of the United Nations Security Council asking the Council to intervene in the conflict between the parties surrounding Mbanié, 11 Sept. 1972, as reproduced in Telegram No. 4028/31 from the Permanent Representative of France to the United Nations to the French Ministry of Foreign Affairs and the Embassies of France in Gabon and Equatorial Guinea, 12 Sept. 1972 (RG, Vol. II, Ann. 30).

[515] Telegram No. 4045/46 from the French Representative to the United Nations to the French Ministry of Foreign Affairs, 13 Sept. 1972 (RG, Vol. II, Ann. 31).

[516] Telegram No. 4067 from the French Representative to the United Nations to the Embassies of France in Zaire, Gabon and Equatorial Guinea, 14 Sept. 1972 (RG, Vol. II, Ann. 32).

[517] Telegram No. 34 from the Embassy of Spain in Gabon to the Spanish Minister for Foreign Affairs, 15 Sept. 1972 (RG, Vol. II, Ann. 33) (translation of: "agente secreto a Madrid a Ministerio de Marina para conseguir mapa español de Guinea Ecuatorial de principio siglo, en el que islotes de la bahia Corisco figuran como franceses").

[518] Final communiqué of the Conference of the Heads of State of Congo, Zaire, Equatorial Guinea and Gabon, Kinshasa, 17 Sept. 1972 (CMG, Vol. V, Ann. 125), p. 1.

[519] *Ibid*.

[520] Telegram No. 673/681 from the Ambassador of France to Zaire to the French Ministry of Foreign Affairs, 19 Sept. 1972 (RG, Vol. II, Ann. 35).

[521] 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).

[522] Telegram No. 52/53 from the Ambassador of France to Equatorial Guinea to the French Ministry of Foreign Affairs, 23 Sept. 1972 (RG, Vol. II, Ann. 36).

[523] Telegram No. 58 from the Ambassador of France to Equatorial Guinea to the French Ministry of Foreign Affairs, 14 Oct. 1972 (RG, Vol. II, Ann. 39).

President Bongo, for his part, called on the Gabonese press to "stop the attacks on the sister republic"[524].

4.72 On 13 November 1972, in Brazzaville, the Parties were able to reach an understanding thanks to the mediation of the OAU, agreeing to

> "A — the neutralization of the disputed area in Corisco Bay; [and] B — the delimitation by the OAU *ad hoc* Commission of the maritime boundaries between the Gabonese Republic and the Republic of Equatorial Guinea in Corisco Bay"[525].

4.73 After the Brazzaville summit, relations between the two States returned to normal[526]. However, from the summer of 1973, and increasing in intensity in 1974, further border incidents broke out along the eastern part of the territorial boundary, close to Ebebiyin[527]. It was against this backdrop that the two Heads of State concluded the Bata Convention[528].

B. The Bata Convention grants Gabon an unequivocal conventional title over the islands in dispute

4.74 The Bata Convention resolves the sovereignty dispute in respect of the islands of Mbanié, Cocotiers and Conga. Article 3 of that instrument states in this regard:

> "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."

4.75 The text of Article 3 of the Bata Convention is clear. The two States recognize 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 regardless of that situation, Article 3 of the Convention settles the matter once and for all[529]. It encompasses the group of three islands in dispute, which were considered a single unit by the Parties. This is confirmed by Article 4 of the Convention, which fixes the limits of the enclaves around Corisco and the Elobey Islands — belonging to Equatorial Guinea — within Gabon's territorial waters, but does not create enclaves around the Mbanié-Cocotiers-Conga group, which lies to the south of the maritime boundary, thus indicating that these three islands belong to Gabon[530].

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[524] Telegram No. 598 from the Ambassador of France to Gabon to the French Ministry of Foreign Affairs, 17 Oct. 1972 (RG, Vol. II, Ann. 40).

[525] Excerpt from the Final communiqué of 13 Nov. 1972 of the quadripartite conference for the resolution of the dispute between Gabon and Equatorial Guinea held in Brazzaville from 11 to 13 Nov. 1972, as reproduced in Briefing note No. 45/46-72 from the Embassy of France in Gabon, 20 Nov. 1972 (RG, Vol. II, Ann. 42). See also Letter No. 512 from the Ambassador of Spain to Zaire to the Spanish Minister for Foreign Affairs, 15 Nov. 1972 (RG, Vol. II, Ann. 41).

[526] Letter No. 35/73 from the Ambassador of Spain to Equatorial Guinea to the Spanish Minister for Foreign Affairs, 18 Jan. 1973 (RG, Vol. II, Ann. 43).

[527] CMG, Vol. I, paras. 2.57-2.59.

[528] See above, paras. 2.34-2.35.

[529] See *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 38-39, paras. 75-76.

[530] See CMG, Vol. II, sketch-map No. 8.1.

4.76 There is no question that the toponym "Mbanié" refers both to the island of Mbanié itself and to Conga and Cocotiers. Equatorial Guinea now appears to dispute this, in a footnote[531] and without offering any response to the evidence produced by Gabon in this regard in its Counter-Memorial[532]. Not only does Equatorial Guinea fail to refute this evidence, but it should also be noted that the negotiations preceding the signing of the Bata Convention concerned sovereignty over the three islands mentioned in the Special Agreement, as indeed confirmed by documents submitted by Equatorial Guinea[533]. The toponym Mbanié is commonly used to refer to the Mbanié-Conga-Cocotiers group[534], including and most recently by Equatorial Guinea itself[535].

4.77 Furthermore, in the days after the Bata Convention was signed, the two countries' respective authorities expressed concordant views on the subject of sovereignty over the group of islands. Hence, 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"[536].

4.78 The Gabonese Ambassador to Equatorial Guinea likewise explained to his French counterpart that "Gabon ha[d] obtained *de jure* recognition of its sovereignty over M'Banie, Cocotier and Conga"[537]. Equatorial Guinea's President Macías Nguema also stated 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"[538].

4.79 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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[531] REG, Vol. I. fn. 290.

[532] CMG, Vol. I, paras. 8.52-8.59.

[533] See, *inter alia*, Letter No. 0002967 from the Gabonese Minister for Foreign Affairs to the Minister for Foreign Affairs of Equatorial Guinea, 28 Aug. 1971 (MEG, Vol. VI, Ann. 154); 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), pp. 1, 5-6. See also 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).

[534] See the illustrative sketch-map appended to Letter No. 55/DAM from the Ambassador of France to Gabon to the French Minister for Foreign Affairs, 1 Apr. 1972 (RG, Vol. II, Ann. 16), by which the French chargé d'affaires sent to the Ministry the report drawn up on 29 Mar. 1972 by the Gabon-Equatorial Guinea Joint Commission at the end of the meeting in Libreville from 25 to 29 March (that report is also produced in MEG, Vol. VII, Ann. 199). See also Letter No. 118 from the Embassy of Spain in Gabon to the Spanish Minister for Foreign Affairs, 29 June 1972 (RG, Vol. II, Ann. 19); 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).

[535] Communiqué from the Prime Minister of Equatorial Guinea, 11 Mar. 2003 (REG, Vol. IV, Ann. 51).

[536] 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.

[537] 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; Letter No. 582/74 from the First Secretary of the Spanish Embassy in Malabo to the Spanish Minister for Foreign Affairs, 16 Oct. 1974 (REG, Vol. IV, Ann. 40).

[538] 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. 7.

> Heads of State who composed it had formally stipulated in 1972 that these islets would be a neutral zone"[539].

4.80 Thus, while President Macías Nguema's interpretation of the Bata Convention may have varied as regards the maritime boundary, he consistently and invariably acknowledged that it had the effect of recognizing Gabon's sovereignty over Mbanié, Cocotiers and Conga.

4.81 Consequently, the Bata Convention is the legal title on the basis of which the question of sovereignty over Mbanié, Cocotiers and Conga is governed between the two Parties under international law.

C. Gabon has not renounced its conventional title

4.82 This title to sovereignty over Mbanié, Cocotiers and Congo continues to be held by Gabon, which has never since consented to transfer that sovereignty to Equatorial Guinea. Nor does the latter claim otherwise.

4.83 It refrains in its written pleadings from advancing any arguments as an alternative to its untenable contention that the Bata Convention is not an instrument in force definitively establishing the title to the islands in dispute. Moreover, Equatorial Guinea recalls that Gabon has continually asserted its sovereignty over the said islands when:

(a) effectively exercising that sovereignty, for example by including Mbanié in the baselines fixed by Decree No. 2066/PR of 4 December 1992[540]; by awarding the company Shell the oil blocks known as "Mbanié" and "West Mbanié", encompassing both that island and Cocotiers and Conga[541]; by using Mbanié as a base point for the purposes of the maritime delimitation[542]; and by maintaining on Mbanié a police station which was visited by the Gabonese Minister of Defence, among others, on 26 February 2003[543];

(b) protesting against the opposing claims of Equatorial Guinea, such as the granting of an exploration permit to the company Clarion Petroleum in 1989, which, Gabon observed,

> "greatly encroaches upon Gabonese territory, not only by encompassing Mbanie Island, but also by not respecting the median line that goes from the t[h]alweg of Muni to the point of geographic coordinates 0° 50' 24" N 9° 20' 36" E, a point located equidistant from Mbanie and Corisco",
>
> thereby incorporating

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[539] Dispatch No. 43/DA/DAM-2 from the Ambassador of France to Equatorial Guinea to the French Ministry of Foreign Affairs, 14 Oct. 1974 (CMG, Vol. V, Ann. 153), p. 5. See also Letter No. 582/74 from the First Secretary of the Spanish Embassy in Malabo to the Spanish Ministry of Foreign Affairs, 16 Oct. 1974 (REG, Vol. IV, Ann. 40). See also above, paras. 2.14, 2.16.

[540] See REG, Vol. I, para. 3.74 and Gabon's Decree No. 2066/PR/MHCUCDM, *Official Journal of the Gabonese Republic*, No. 48/52-385, Dec. 1992 (REG, Vol. V, Ann. 54).

[541] See REG, Vol. I, para. 3.77 (license which elicited protests from Equatorial Guinea by Letter No. 4005 from its Minister for Foreign Affairs, 3 Jan. 2001 (REG, Vol. IV, Ann. 49)).

[542] See above, para. 2.44.

[543] See REG, Vol. I, paras. 3.78-3.79 (visit reported in J.D. Geslin, "The Island Coveted by All," *Jeune Afrique*, 10-23 Aug. 2003 (REG, Vol. V, Ann. 64.))

"the Mbanie, Conga and Cocotiers Islands[,which] are in Gabonese territory"[544]; and the delimitation of its maritime area in such a way that "the boundary line passes south of the island of Mbanie, which is thus in Equatoguinean territory"[545];

(c) engaging in bilateral negotiations with Equatorial Guinea, in particular within the framework of the Gabon-Equatorial Guinea *ad hoc* Boundary Commission from 10 to 16 November 1985 and 17 to 19 January 1993[546] — the 1993 session during which the acrimonious nature of the discussions on the Parties' claims over the islands became apparent[547].

At the next session of that Commission, eight years later, Equatorial Guinea, in the face of Gabon's steadfast claim to sovereignty over Mbanié, Cocotiers and Conga, proposed that the following approach be taken to the maritime delimitation: that first a median line "disregarding" those islands should be drawn and then an "examin[ation of] the situation of the islands" conducted separately[548].

4.84 That Gabon has consistently asserted its sovereignty over the islands in dispute since the conclusion of the Bata Convention is therefore not in question between the Parties. Indeed, this is because, under that Convention, Gabon holds a legal title which, as envisaged in Article 1 of the Special Agreement, has the force of law in its relations with Equatorial Guinea as regards sovereignty over the islands of Mbanié, Cocotiers and Conga.

Conclusion

4.85 For the reasons set out above, the Bata Convention is the only legal title applicable to the question, not addressed in the Paris Convention, of sovereignty over the islands in dispute; the title invoked by Equatorial Guinea, namely succession to pre-existing Spanish legal titles that are nowhere to be found, is nothing of the sort.

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[544] Letter No. 293 from the Gabonese Minister for Foreign Affairs to the Ambassador of Equatorial Guinea to Gabon, 4 May 1990 (REG, Vol. IV, Ann. 46). See REG, Vol. I, paras. 3.72-3.73.

[545] Note Verbale No. 1989/MAECF/SG/D1 from the Gabonese Ministry of Foreign Affairs to the Ministry of Foreign Affairs of Equatorial Guinea, 13 Sept. 1999 (REG, Vol. IV, Ann. 48), protesting against Equatorial Guinea's Decree N/1/1999 of 6 Mar. 1999 fixing the baselines and delimitation of its maritime area (MEG, Vol. VI, Ann. 193). See also REG, Vol. I, para. 3.75.

[546] See REG, Vol. I, in particular paras. 3.64, 3.66-3.68 (negotiations of the Gabon-Equatorial Guinea *ad hoc* Boundary Commission from 10-16 Nov. 1985 and 17-19 Jan. 1993).

[547] Undated Note from the Ambassador of France to Gabon, included in a dispatch note to the French Ministry of Foreign Affairs, 1 Feb. 1993 (RG, Vol. II, Ann. 51). See also Report of the "boundaries" sub-commission of the Gabon-Equatorial Guinea *ad hoc* Boundary Commission, Libreville, 19 Jan. 1993 (MEG, Vol. VII, Ann. 209).

[548] Minutes of the Gabon-Equatorial Guinea *ad hoc* Boundary Commission, Libreville, 31 Jan. 2001 (MEG, Vol. VII, Ann. 212), p. 4; see CMG, Vol. I, para. 4.19. This session would be the last one.

CHAPTER V
THE LEGAL TITLE IN RESPECT OF THE MARITIME BOUNDARY

5.1 Equatorial Guinea's argument regarding the titles that have the force of law between the Parties in respect of their common maritime boundary is based on a single premise: since, according to Equatorial Guinea, there is no maritime delimitation treaty between the Parties, reference must be made to other legal instruments, namely:

> "1. the 1900 Convention in so far as it established the terminus of the land boundary in Corisco Bay;
>
> 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 adjacent maritime areas derives from its title to land territory."[549]

5.2 This premise is doubly flawed: the Bata Convention is the only legal title that has the force of law between the Parties in respect of maritime delimitation (**I**). No other such title exists; and in the unlikely event of the Court finding that the Bata Convention does not have the force of law in the present case, there would currently be no other title with the force of law between the Parties as regards the delimitation of their maritime boundary (**II**).

I. The Bata Convention is the only legal title that has the force of law between the Parties in respect of maritime delimitation

5.3 The Bata Convention is the only legal title that has the force of law between the Parties: it delimits the maritime boundary between Gabon and Equatorial Guinea (**A**); the arguments of Equatorial Guinea in response are unconvincing (**B**); and the Convention prevails over the alleged titles invoked by Equatorial Guinea (**C**).

A. The Bata Convention delimits the maritime boundary between Gabon and Equatorial Guinea

5.4 The Bata Convention clearly determines the maritime boundary between the two States. As Gabon observed in its Counter-Memorial[550], Article 4 of the Bata Convention defines the "maritime frontier between the Republic of Equatorial Guinea and the Gabonese Republic" in the form of three segments: the line parallel to 1° north parallel of latitude, starting at the land boundary terminus, and the 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"[551] side of the line, lying as they do to the south of the first segment and therefore in Gabon's maritime area. Article 5 of the Convention goes on to provide that "[f]or 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". The maritime space to the south of the boundary line falls under the sovereignty or within the sovereign rights of Gabon (except

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[549] REG, Vol. I, p. 146, Submissions, para. V.

[550] CMG, Vol. 1, paras. 9.3-9.5.

[551] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 624, para. 198; *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (1977), *RIIA*, Vol. XVIII, pp. 223-224, para. 183, and *ILR*, Vol. 54, p. 96; *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, para. 309.

for the enclaves around Corisco Island and the Elobey Islands), and Equatorial Guinea enjoys significant facilities in terms of access and passage.

5.5 Contrary to the position taken by Equatorial Guinea[552], the Bata Convention does indeed delimit the maritime boundary between the two States. The context in which the Bata Convention was signed, which Equatorial Guinea seeks to overlook, confirms their common intention to resolve all their territorial and boundary disputes[553]. Those negotiations, which had begun before Equatorial Guinea gained independence[554], intensified thereafter, when the uncertainties surrounding the course of the land boundary agreed in the Paris Convention, and the latter's silence on the maritime boundary and sovereignty over Mbanié, Cocotiers and Conga, led the Parties to the realization that it was essential for a legally binding agreement to be concluded. After the negotiations had started, certain incidents took place on Mbanié[555] and along the land boundary[556] which made it even more urgent to settle the questions of sovereignty over the islands in Corisco Bay and to delimit their maritime boundary. Equatorial Guinea, recognizing the need to resolve the conflict with Gabon, contacted Spain on several occasions with a view to obtaining legal and technical assistance on the boundary dispute, which Spain agreed to provide[557].

5.6 A look back at the negotiations on the conclusion of the Bata Convention shows that it includes precisely the proposals that were discussed between the Parties, namely the principle of a maritime boundary in a number of segments: a straight line drawn from the terminus of the land boundary, and the creation of two enclaves around the islands of Corisco, Elobey Grande and Elobey Chico[558]. Indeed, at the first negotiation meeting in February 1971, 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[559]. At the next meeting, in March 1972, Gabon reiterated and clarified the proposal made at the first meeting in Bata, namely the drawing of a straight line and enclaves whose co-ordinates were described precisely by the Gabonese delegation[560]. During the summer of 1974, after the resumption of negotiations following the incidents on Mbanié[561] and along the land boundary[562], there were several meetings at the highest level between Gabon and Equatorial Guinea aimed at finding a solution to the question of the delimitation of their land and maritime boundaries and that of sovereignty over the islands of Mbanié, Cocotiers and Conga[563], leading up to the meeting between the two Presidents in September 1974, at which they concluded the Bata Convention. A few days before that meeting, the legal adviser at the Gabonese Ministry of Mines, Industry, Energy and Hydraulic Resources proposed delimiting the common maritime boundary along a straight line, while

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[552] REG, Vol. I, paras. 6.5-6.6: "it does not even purport to delimit a maritime boundary, in whole or in part, between the Parties".

[553] CMG, Vol. I, paras. 2.49-2.54 and 6.54-6.61; see above, paras. 2.32-2.35.

[554] CMG, Vol. I, paras. 2.38-2.41.

[555] *Ibid.*, paras. 2.49-2.54.

[556] *Ibid.*, paras. 2.55-2.58.

[557] See above, para. 2.35.

[558] CMG, Vol. I, paras. 2.45-2.48; CMG, Vol. II, sketch-map No. 2.2.

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

[560] 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. 4.1.

[561] CMG, Vol. I, paras. 2.49-2.54.

[562] *Ibid.*, paras. 2.55-2.58.

[563] *Ibid.*, paras. 3.3-3.5; see above, paras. 2.32-2.35.

creating two enclaves around the Elobey Islands and Corisco Island[564]. That is exactly the course of the maritime boundary that was enshrined in the Bata Convention concluded on 12 September 1974.

5.7 In signing the Bata Convention, Gabon and Equatorial Guinea brought an end to nearly four years of negotiations on their maritime boundary and confirmed their full and absolute intention for it to be delimited, as is made clear in the text of the Convention itself: in the preamble of the Convention, the Parties clearly recorded their desire "to lay firm foundations for peace between their two countries, notably by *definitively* establishing their common land and maritime frontiers"[565].

B. The arguments of Equatorial Guinea in response are unconvincing

5.8 Equatorial Guinea wrongly maintains that the Bata Convention "does not even purport to delimit a maritime boundary, in whole or in part, between the Parties"[566]. With regard to the maritime boundary, it bases itself in the first place on the presence of a *nota bene*[567] stating that "[t]he 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"[568]. The fact that the signatories included a *nota bene* takes nothing away from the established fact that Article 4 of the Bata Convention determines the maritime boundary between the two States. Once again, the context in which the Bata Convention was concluded, on which Equatorial Guinea continues to remain silent, gives an understanding of the spirit and text of this *nota bene*. A few days after the signature of the Bata Convention, the President of Equatorial Guinea told various diplomatic representatives of his frustration regarding the course of the maritime boundary agreed in the Convention and two key elements in particular: its starting-point, and the territorial waters of Corisco Island and the two Elobey Islands. Thus he stated to the Ambassador of France to Equatorial Guinea that Gabon had "insisted"[569] on the maritime boundary as described in Article 4 of the Convention, and 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"[570]. Other diplomatic representatives to whom the President of Equatorial Guinea personally presented the solution agreed in the Bata Convention concerning the maritime boundary[571] — and to whom he expressed his frustration as regards its starting-point and the territorial waters of the islands belonging to Equatorial Guinea — pointed to President Macías's "resigned, pained and passionate tone"[572]. In December 1974, he reiterated his frustration, indicating that "he wanted and had always

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

[565] CMG, Vol. I, para. 9.7; Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon, 12 Sept. 1974, annexed to the letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155), preamble, third recital (emphasis added).

[566] REG, Vol. 1, para. 6.5.

[567] *Ibid.*, paras. 3.43-3.50.

[568] Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon, 12 Sept. 1974, annexed to the letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155); in French, "[l]es deux Chefs d'Etat conviennent de procéder ultérieurement à une nouvelle rédaction de l'article 4, afin de la mettre en conformité avec la Convention de 1900"; in Spanish, "[l]os dos jefes de Estado convienen de procedir ulteriormente a una nueva redacción del articulo 4, para ponerla en conformidad con la Convención de 1900".

[569] 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. 8.

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

[571] As reported by the Ambassador of France to Equatorial Guinea.

[572] 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. 6-7.

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"[573].

5.9 President Macías was aware that the purpose of the Bata Convention was to "draw[] a definitive line"[574] under the questions of land, island and maritime sovereignty, and that concluding such a convention necessarily involved concessions on his part, some of them disadvantageous. It is undeniably in this spirit that the *nota bene* was added to the Bata Convention: the Parties were committing themselves to negotiating a new text of Article 4.

5.10 This *nota bene* was clearly intended to enable the two States to conclude an overall agreement on the sensitive issues of land and maritime boundaries and sovereignty over islands, despite their differences on certain points regarding the maritime boundary. It allowed the Parties to negotiate in good faith, if need be, a new wording of Article 4 of the Bata Convention[575]. In the immediate wake of the signing of the Convention, President Macías Nguema did not call for further talks on the subject of this maritime boundary. In contrast, it was precisely in that spirit that the Parties later discussed the delimitation of their maritime boundary in order to determine whether they should ratify a different line from that fixed by the Bata Convention and agree on "proposals such as to preserve peace and fraternal relations between the two countries"[576]. This *nota bene* simply embodied the Parties' commitment to negotiate in good faith a new text of Article 4 of the Convention. Gabon, moreover, has always been willing to engage in negotiations to that end, and remains ready to do so.

5.11 Secondly, Equatorial Guinea maintains that the Parties have never treated the Bata Convention as delimiting the maritime boundary between them, relying on Gabon's alleged silence on the existence of this treaty in the years following its signature, and on subsequent Gabonese practice[577].

5.12 This position is misleading and fails to reflect the reality. Gabon has responded amply, both in its Counter-Memorial and in this Rejoinder, on the lack of any ensuing acquiescence[578].

5.13 Furthermore, even though Gabon may not have expressly mentioned the Bata Convention in the negotiations subsequent to its conclusion, Gabon's conduct has been in accordance with the maritime boundary determined in that instrument:

(a) the negotiations that led to the conclusion of the Petroleum Co-operation Agreement in 1979 were focused on petroleum co-operation between the two States and not on delimiting their

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[573] 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).

[574] 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.

[575] CMG, Vol. I, paras. 6.49-6.53; see above, para. 2.25.

[576] Letter from the President of the Gabonese Republic to the Secretary-General of the United Nations, 14 May 2007 (RG, Vol. II, Ann. 53), p. 1.

[577] REG, Vol. I, paras. 6.5-6.6.

[578] CMG, Vol. I, paras. 6.66-6.75; see above, paras. 2.36-2.46.

maritime boundary[579], and no provision of that Agreement called into question the maritime delimitation laid down by the Bata Convention;

(b) the discussions within the *ad hoc* Commission in 1982 concerned the question of petroleum co-operation between the two States[580], and none of those discussions called into question the maritime boundary provided for by the Bata Convention;

(c) the subsequent negotiations concerning the text of Article 4 took place in the spirit of the *nota bene* of the Bata Convention, which presupposed the drafting of a new wording of Article 4.

5.14 This Convention has the force of law between the Parties as regards the delimitation of the maritime boundary between them.

C. The Bata Convention prevails over the alleged titles invoked by Equatorial Guinea

5.15 The latest written pleading of Equatorial Guinea shows that the Parties agree in one fundamental respect: where an agreement exists between the Parties on maritime delimitation, that title prevails over any other instrument that might serve to delimit their common maritime boundary.

5.16 While this premise is merely touched on in its Memorial[581], Equatorial Guinea acknowledges it clearly in its Reply:

> "Because the document presented in 2003 does not have the force of law between the Parties in relation to delimitating their maritime boundary, Equatorial Guinea submits that the 'legal titles, treaties and international conventions' that have the force of law concerning the maritime areas adjacent to the Parties' coasts include:
>
> i. the 1900 Convention,
>
> ii. the U.N. Convention on the Law of the Sea ("UNCLOS"), and
>
> iii. legal titles to maritime areas adjacent to Equatorial Guinea's land territory derived under UNCLOS and customary international law."[582]

And Equatorial Guinea goes on to state that:

> "Because there is no agreement delimiting the Parties' maritime boundary, UNCLOS is an international convention with the force of law that 'concern[s]' the Parties' maritime boundary delimitation."[583]

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[579] CMG, Vol. I, para. 4.6.

[580] REG, Vol. I, paras. 3.74-3.78; *Official Journal of the Gabonese Republic*, No. 48/52, containing Decree No. 2066/PR/MHCUCDM (Dec. 1992), p. 4 (REG, Vol. V, Ann 54), and J.D. Geslin, "The Island Coveted by All", *Jeune Afrique L'Intelligent,* 10-23 Aug. 2003 (REG, Vol. V, Ann. 64).

[581] MEG, Vol. I, para. 6.54 ("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*") (emphasis added).

[582] REG, Vol. I, para. 6.7.

[583] *Ibid.*, para. 6.9.

5.17 As it has already established in its Counter-Memorial, Gabon maintains that the Bata Convention, which has binding force, prevails over the alleged titles invoked by Equatorial Guinea. With regard to the Paris Convention, inasmuch as the Bata Convention uses terms almost identical to those of the former in respect of the terminus of the land boundary, the Bata Convention prevails over the Paris Convention. As regards the other alleged titles invoked by Equatorial Guinea, Gabon has already established that the maritime delimitation methods provided for by UNCLOS, international jurisprudence and custom apply only in the absence of a conventional title[584].

II. No title other than the Bata Convention exists that has the force of law between the Parties in respect of maritime delimitation

5.18 In the unlikely event of the Court finding that the Bata Convention is not a title that has the force of law between the Parties in respect of their common maritime boundary, it would then have to find that no other such title exists.

5.19 None of the alleged titles invoked by Equatorial Guinea, namely the Paris Convention, the United Nations Convention on the Law of the Sea and international custom[585], is a title that has the force of law between the Parties for the purpose of delimiting their common maritime boundary.

5.20 The Paris Convention is silent on the course of the maritime boundary: it determines neither the course nor its direction, and provides no information on the maritime areas surrounding the Equatorial Guinean islands of Corisco, Elobey Grande and Elobey Chico[586]. The Paris Convention cannot therefore constitute the legal title between the Parties as regards the delimitation of their common maritime boundary. Equatorial Guinea takes the view that it constitutes a title in these proceedings in so far as it establishes the terminus of the common land boundary. In its Reply[587], Equatorial Guinea does not explain how the Paris Convention constitutes a legal title between the Parties, but merely states that it is "relevant" for the maritime delimitation in that it establishes the land boundary terminus[588]. Gabon readily acknowledges that a treaty establishing the terminus of a land boundary is relevant for maritime delimitation in that it fixes, in principle, the starting-point of the maritime boundary. Nevertheless, in no way does such a treaty constitute a title for the purpose of the maritime delimitation beyond that point.

5.21 Nor is UNCLOS a title that has the force of law between the Parties. It is not a title, but only an instrument establishing the possibility of a title (entitlement). It cannot constitute a title: it offers general guidance to States which have not concluded a maritime delimitation treaty, allowing them to establish their legal title by agreement or by judicial means[589]. In maritime delimitation, the title is not UNCLOS; the title would be the delimitation agreement or, where bilateral negotiations fail, the decision on maritime delimitation handed down by an international court.

5.22 The fact that UNCLOS is an international convention relating to maritime delimitation does not make it a convention equating to a legal title within the meaning of Article 1 of the Special Agreement. Equatorial Guinea claims that "as the Special Agreement makes clear, the Court's task

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[584] CMG, Vol. I, paras. 5.83 and 9.15; see above, paras. 1.40-1.41 and 1.52.

[585] MEG, Vol. I, p. 144.

[586] CMG, Vol. I, paras. 9.9-9.10.

[587] REG, Vol. I, para. 6.8.

[588] *Ibid.*

[589] CMG, Vol. I, paras. 9.12-9.16.

is not limited to determining titles but also treaties and conventions concerning maritime delimitation"[590]. As previously explained[591], the Parties can legitimately invoke in these proceedings any treaty or international convention that has the force of law between them, subject to such treaties and international conventions constituting legal titles. While UNCLOS has the force of law between the Parties (both Gabon and Equatorial Guinea are parties to it), it is not a legal title for the purpose of delimiting their common maritime boundary.

5.23 With regard to international custom, Equatorial Guinea wrongly argues that this constitutes a legal title between the Parties "in so far as it establishes that a State's title and entitlement to maritime areas derives from its title to land territory"[592]. Its reasoning is simplistic: it amounts to saying that, inasmuch as there exists a title to land and where, according to international custom, the title to sea "derives" from the title to land, customary international law equates to title. Once again, Gabon readily acknowledges that customary international law, and in particular the principle that "the land dominates the sea" invoked by Equatorial Guinea[593], are relevant for maritime delimitation and regularly used in international jurisprudence to establish a maritime boundary. However, while such customary international law may allow a title to be established, it in no way constitutes a legal title. In a misleading way, Equatorial Guinea deliberately confuses the notions of title and entitlement (the possibility of a title) by bracketing them together without distinction: "customary international law . . . recognizes that a coastal State's *entitlement and legal title* to adjacent maritime areas derive from its title to land territory"[594]. The Court will see through this confusion of terms: in the same way as UNCLOS, customary international law can only be the basis for legal title (entitlement) in respect of maritime delimitation, but not the title itself.

5.24 None of the three elements invoked by Equatorial Guinea is therefore a title that has the force of law between the Parties as regards their maritime delimitation. Nor would they be one in the unlikely event of the Court finding that the Bata Convention is not a title with the force of law between the Parties in respect of their common maritime boundary. In that scenario, the instruments relied on by Equatorial Guinea would still not be legal titles within the meaning of Article 1 of the Special Agreement, and the Court would have no choice but to find that there is no legal title with the force of law between the Parties as regards their maritime boundary. Gabon and Equatorial Guinea would then be in the same situation as the great majority of coastal States that wish to delimit their common maritime boundaries: in the absence of agreement, they would proceed to delimit their common maritime boundary by amicable or judicial means, basing themselves on the rules and principles that will ultimately enable their title to their respective maritime areas to be established. Like all States which have not concluded a delimitation agreement, they would refer to the methods of delimitation set out in UNCLOS and supplemented by customary international law, as clarified by the valuable jurisprudence of the Court, in order to establish the title of each of them to their respective maritime areas and with a view to achieving an equitable solution.

5.25 However, that is a purely hypothetical scenario: Gabon and Equatorial Guinea have fixed their common maritime boundary in the Bata Convention, and that Convention is the only title that has the force of law between the Parties for the purpose of maritime delimitation.

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[590] REG, Vol. I, para. 6.9.

[591] See above, paras. 1.46-1.55.

[592] MEG, Vol. I, p. 144.

[593] REG, Vol. I, para. 6.10.

[594] *Ibid.*, para. 6.11 (emphasis added).

Conclusion

5.26 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;

(b) neither the Paris Convention, nor the United Nations Convention on the Law of the Sea, nor international customary law constitutes a legal title that has the force of law between the Parties as regards their maritime boundary;

(c) in the unlikely event of the Court finding that the Bara Convention is not a title that has the force of law between the Parties in respect of their common maritime boundary, it would then have to find that no other such title exists.

SUBMISSIONS

In view of the arguments presented in this Rejoinder 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), subject to the modifications made to the boundary by the Bata Convention, 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, 6 March 2023.

(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, 6 March 2023.

(Signed) Ms Marie-Madeleine MBORANTSUO,
Agent of the Gabonese Republic.

LIST OF ANNEXES

VOLUME II

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