DECLARATION OF JUDGE XUE

1. I have voted in favour of the operative paragraph of the Judgment except for the decision concerning the title over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga. Before explaining my dissent on that vote, I would like to make a few general observations on the Judgment.

2. The jurisdiction of the Court in the present case is limited by the terms of Article 1 of the Special Agreement. By virtue of its mandate, the Court is not entrusted with the task of delimiting the land and maritime boundaries between the two States, but instead is requested to determine the validity of the "legal titles" invoked by the Parties, in particular those under the Convention demarcating the land and maritime frontiers of Equatorial Guinea and Gabon, signed in Bata on 12 September 1974 (hereinafter the "Bata Convention") 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, signed in Paris on 27 June 1900 (hereinafter the "1900 Convention"). Such "legal titles", in the view of the Court, may refer to both documentary and non-documentary evidence. Ultimately, however, the Court has only examined the documentary evidence.

3. In the context of the present case where State succession arising from decolonization was concerned, the issue of whether *effectivités* and the principle of *uti possidetis juris* constitute legal titles within the meaning of the Special Agreement naturally presents itself and is indeed debated by the Parties during the proceedings. The Court decided not to take up that issue on the understanding that Equatorial Guinea does not claim legal titles on those grounds in its final submissions (Judgment, para. 46). Thus, the scope of the Court's jurisdiction is largely restricted, leaving untouched some important issues relating to State succession in respect of borders.

4. Apparently, the validity of the "Bata Convention" is an essential issue in the present case; should it constitute a legally binding instrument in the relations between Equatorial Guinea and Gabon, the "Bata Convention" would apply to largely settle the dispute. I agree with the Court's finding that Gabon's evidence may arguably prove the existence and authenticity of the document, but its terms and subsequent conduct of the Parties indicate that the instrument did not take legal effect after its signature in 1974. According to Article 7 of the "Bata Convention", there would be a swap of land territories between the two States. The Parties agreed to draw up protocols to

"determine the surface area and precise boundaries of the land area[s]" that they had agreed to cede to each other. In respect of the maritime boundary, a *nota bene* marked in the margin of the "Bata Convention" text indicates that Article 4 on the maritime boundary was subject to the conclusion of a new text which was to replace Article 4 so as to "bring it into conformity with the Convention of 1900". These terms show that the negotiation process was not yet over, and the follow-up actions as provided for in the document were determinative for the legal titles arising from the "Bata Convention" to enter into force.

5. The subsequent conduct of the Parties further reveals that there was a clear lack of intention and willingness of the Parties, particularly on the part of Equatorial Guinea, to continue this process so as to bring the negotiations to fruition. Gabon does not produce any evidence to show that subsequent negotiations on boundary matters between the Parties were in any way connected with the provisions of the "Bata Convention", in particular Articles 4 and 7 thereof, nor does it explain why for 29 years, from 1975 to 2004, the "Bata Convention" was virtually consigned to oblivion. Based on the materials adduced by the Parties, I agree with the Court's conclusion that the "Bata Convention", as it currently stands, is not a legally binding instrument on the land and maritime boundaries between Gabon and Equatorial Guinea and therefore does not confer legal titles on the Parties.

6. The "Bata Convention" was apparently an unsuccessful attempt on the part of the two nascent States to resolve their boundary dispute through negotiations after their achievement of independence. That failure, regrettably, rendered the Parties to fall back on the colonial boundary treaty concluded between Spain and France during colonial times, namely the 1900 Convention. The terms of the boundary between the Spanish colony and the French colony under the 1900 Convention are clear and straightforward. The land boundary basically follows the 1° north latitude in the south and the 9° longitude in the east, with little regard being given to the ethnic distinction of the local population or the natural features on the ground except the border river, the Utamboni River, which was imperative to commerce and navigation to the sea for the two colonial Powers (see the map in Annex 3 to the 1900 Convention, reproduced as Figure 3.6 in the Memorial of Equatorial Guinea); the boundary would proceed along the thalweg of the Muni River and the Utamboni River all the way until it intersects with the 1° north latitude.

7. From the outset, the two colonial Powers were fully conscious that the demarcation lines as drawn on the maps attached to the 1900 Convention were not a "correct representation" of the boundary; they primarily served to divide the colonial "possessions" of the two Powers in that part of Africa. Therefore, in Article VIII and Appendix No. 1 of the Convention, the parties

specifically reserved the possibility that the delimitation commission — the Franco-Spanish Delimitation Commission of 1901 (hereinafter "1901 Commission") — may modify the demarcation lines in light of the actual geographical situation. For that purpose, however, Appendix No. 1 further provided that the 1901 Commission's proposals for any changes or corrections of the boundary "shall be submitted to the respective Governments for approval". Thereby, the two Powers maintained the ultimate control over any change or modification of the colonial boundaries.

8. In the context of the African continent, maintenance of stability and security of the borders has always been a great challenge to the relations of African States since the date they gained independence. This is much due to the fact that colonial boundaries were often drawn up on the basis of quadrillage by the colonial Powers without proper regard for the local circumstances, including natural, ethnic, economic and social conditions. They are inherently embedded with potential conflicts. At the dawn of their independence, African leaders recognized that "border problems constitute a grave and permanent factor of dissention" for the nascent African States. In order to maintain peace and security in Africa, Member States of the Organization of African Unity (hereinafter the "OAU") solemnly affirmed the principle of respect for the sovereignty and territorial integrity of every State in Article 3 of the Charter of the OAU. More specifically, at its First Ordinary Session of the Conference of African Heads of State and Government, meeting in Cairo in 1964, they adopted the resolution entitled "Border Disputes among African States", whereby they declared that all Member States of the OAU "solemnly . . . pledge themselves to respect the borders existing on their achievement of national independence" (Assembly of Heads of State and Government meeting in its First Ordinary Session in Cairo, UAR, from 17 to 21 July 1964, AHG/Res. 16 (I)). By maintaining the territorial status quo at the time of independence, they accepted the principle of intangibility of frontiers inherited from colonization as a legal basis for the settlement of frontier disputes, a principle reflective of the general rule of *uti possidetis juris* in connection with the decolonization process in international law (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 564-565, para. 19).

9. It goes without saying that the application of the principle of intangibility of frontiers inherited from colonization was in no way to legitimize the arbitrariness of colonial boundaries, but to serve a very important purpose, namely to prevent African States from engaging in fratricidal struggles provoked by challenging the frontiers following the withdrawal of the administering power (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 565, para. 20). Therefore, the deter-

mination of the territorial status quo at the time of independence is crucial for the stability of the frontiers.

10. In the present case, at the time of their independence, many things had happened at the borders of the two colonies since the conclusion of the 1900 Convention. First, evidence before the Court demonstrates that, in accordance with Article VIII of the 1900 Convention, the Franco-Spanish Delimitation Commission of 1901 (1901 Commission) designated by the Governments of Spain and France traced on the ground the demarcation lines and in its report submitted proposals to modify some parts of the boundary based on natural features such as rivers and paths. Although their proposals, as found by the Court, were not formally approved by the respective authorities of Spain and France, their proposal to modify some part of the frontiers in the south-east of the boundary in fact reflected the situation on the ground. The evidence shows that Spain exercised administrative activities in some segments south of the 1° north latitude, in other words, on the Gabonese side of the border. Such practice persisted until Equatorial Guinea's independence and continued afterwards.

11. Furthermore, documents show that the proposals of the 1901 Commission on the eastern part of the boundary were totally rejected by their authorities. Through an exchange of letters between the Governors-General of the two colonies in 1919, the two sides agreed that the course of the Kie River would provisionally be used as part of the eastern boundary between the two colonies. With that arrangement, the provisional boundary was virtually moved eastward into Gabonese territory. Spain carried out administrative activities in the locations on the west side of the Kie River but east to the 9° meridian.

12. After their independence, the Parties continued to apply the 1919 Agreement by using the course of the Kie River as part of their eastern boundary. On 3 August 2007, in order to promote the movement of people and goods between the two countries, the Parties concluded an agreement to construct a border bridge over the Kie River and a section of asphalted road with works between the two countries (hereinafter the "2007 Agreement"). Article 2 of the 2007 Agreement expressly provides that the border bridge is located between the village of Medzeng in Gabonese territory and the town of Mongomo in Equatorial Guinea, which reaffirms the common understanding of the Parties that the course of the Kie River continues to be used as a boundary river.

13. The materials and evidence adduced by the Parties inform the Court that, first, the delimitation of the boundary under the 1900 Convention does not correspond to the situation on the ground; the demarcation lines as drawn on the maps must be modified or readjusted according to the local conditions. Secondly, part of the border lines had been altered in practice through local delegates of the colonial Powers, which had existed until the

two colonies achieved independence. Thirdly, the legal titles as identified and determined by the Court under the 1900 Convention cannot provide a full solution to the border dispute between the Parties.

14. In the present case, the Court primarily focuses on the question whether the changes of the boundary had been formally approved by France and Spain in accordance with Article VIII and Appendix No. 1 of the 1900 Convention. Its formal answer may technically address the final submissions of the Parties. The legal implications of its finding must, however, be understood and appreciated in the proper context of this case. For the very purpose of maintaining stability and security of the borders, the Parties have the prerogative to resolve their border dispute in light of the reality on the ground.

15. Take the 2007 Agreement concerning border bridges, for example. The Court considers that, as the 2007 Agreement does not mention the 1900 Convention, it does not suggest that it constitutes a modification of the boundary (see Judgment, para. 154). This interpretation, in my view, is overly formalistic, given the object and purpose of the 2007 Agreement. The course of the Kie River was used as a provisional boundary since the 1919 Governors' Agreement during colonial times. That boundary, despite its "provisional" character, has existed for over one hundred years, both before and after the Parties' independence. A close perusal of the contents of the 2007 Agreement reveals that the construction of the border bridges and the associated road works can be carried out only on the premise that the Parties accept that the course of the Kie River is the boundary line. Continued uncertainty of the status of the boundary is not conducive to the promotion of the relations between the two States and their peoples.

16. I next turn to my second point explaining my dissent on the decision in respect of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga (also referred to as the "three disputed islands"). The historical records concerning Spanish rule in the Gulf of Guinea are overwhelming before the Court. There is no doubt that Spain, during the relevant period of time, was the dominant power controlling the maritime route in the area. Its occupation of Corisco Island secured its position in the Gulf of Guinea. The 1900 Convention reflects the deal between the two colonial Powers over the territories on the Sahara coast and the Gulf of Guinea. By virtue of Article VII thereof, France secured the right of first refusal in case Spain wished to cede the Elobey Islands and Corisco Island. Apparently, in the Gulf of Guinea, these islands were under the colonial power of Spain. This provision, nevertheless, does not expressly mention by name the three disputed islands, thus leaving a question mark on the issue before the Court.

17. Documents submitted by the Parties show that the three disputed islands, situated between Corisco Island and the mainland coast of Gabon, are not inhabitable. There is little evidence showing to which side these islands may physically appertain. Aside from colonial archives, no information about the local activities at sea is available.

18. The total reliance on colonial documents for determining boundaries is prevailing in the succession process among African States. For the most part, this is perhaps inevitable because of the nature of the boundaries imposed on the former colonies, which were not regarded as a subject but as an object of international law. In the third-party settlement of international disputes, including the cases before this Court, boundary treaties concluded between the former colonial Powers and their *effectivités* over the colonial territories exclusively form the legal and factual bases of the boundaries between African States. Notwithstanding its positive objective for stability and peace, such practice is not without question, in particular in respect of maritime disputes.

19. In the present case, evidence adduced by Equatorial Guinea on Spanish control over the three disputed islands largely demonstrates the rivalry between the former colonial Powers over western Africa during the eighteenth and nineteenth centuries. It does not reveal any physical and material connection between the disputed islands and Corisco Island; over the latter, Spain exercised sovereign control. In the colonial documents, including treaties concluded between different colonial Powers at different times, the three disputed islands were not mentioned. Apparently, they were insignificant for Spanish dominance in the region at the relevant time.

20. The disputed islands became attractive largely because of the subsequent development of the law of the sea and the discovery of maritime non-living resources. These islands, small as they are, may be used as the base points to affect the direction of the maritime boundary, possibly impacting the division of natural resources between the coastal States.

21. Obviously, in order to reach an equitable solution to maritime delimitation between the Parties, territorial sovereignty over the three disputed islands has to be determined first. In the Judgment, in ascertaining whether by its sovereign acts Spain had displayed a continuous and uncontested authority over the three islands, the Court examined a series of Spanish official documents in relation to Corisco Island, including the 1843 Declaration of Corisco, the 1846 Record of Annexation and the 1846 Charter of Spanish Citizenship Given to the Inhabitants of Corisco, Elobey and their Dependencies (see Judgment, para. 187). It is revealed that those documents refer only to Corisco Island and its "dependencies", without explicitly naming Mbanié/Mbañe, Cocotiers/Cocoteros and Conga. Considering the

object and purpose of those documents to strengthen Spain's foothold in the region and its control of the local population by granting citizenship, it is questionable that those non-inhabitable maritime features would naturally be covered by those documents. The term "dependencies" of Corisco Island appears a convenient way to expand the Spanish claim.

22. The Court attaches much importance to France's deference to Spanish rule over the islands in the Gulf of Guinea. Between the two colonial Powers, the test of a display of "continuous and uncontested" authority is primarily a matter of who had the dominance; the territory they occupied or annexed was not *terra nullius*. Apart from colonial activities, no evidence is presented or is given any weight with regard to the local activities at sea and any physical and social connections between Corisco Island and the three disputed islands. The Court also refers to the 1962 agreement between newly independent Gabon and Spain on the maintenance of maritime signals in Corisco Bay, including the beacon on Cocotiers/Cocoteros. Under this Protocol, Gabon was not permitted to conduct work on Cocotiers/Cocoteros or in the surrounding waters without Spain's authorization. This is not convincing evidence. In the first place, this agreement was about maritime signals, not about sovereignty. As a nascent State, Gabon apparently depended on the existing maritime signals established by Spain. Gabon could not possibly be able to challenge Spanish authority.

23. Between the Parties, the "Bata Convention", even though aborted, could be regarded as a positive move to resolve the issue of the disputed islands. Article 3 of the "Bata Convention" stated that the Parties recognized, "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". During the proceedings, Equatorial Guinea did not prove that the "Bata Convention" was not signed or argued that it was signed under coercion. Article 3 indicates that at that time the Parties at least did not consider that the disputed islands were dependencies of Corisco Island. More importantly, they had taken the maritime issue out of the colonial context with a view to pursuing an equitable solution to the maritime delimitation through negotiation. It is a great pity that, after so many years of independence, the Parties now have to dive into colonial archives and look for an answer that the former colonial Powers had perhaps not even bothered to think about.

24. The judicial settlement procedure, effective as it is, has its limitations. The Court is constrained both by the terms of the Special Agreement and by

the submissions and evidence presented by the Parties. In the present Judgment, the Court has only addressed one specific question put forward by the Parties, i.e. the legal titles in force between the Parties on the questions at hand. The ultimate resolution of the dispute requires further action from the Parties themselves.

(Signed) XUE Hanqin.