DECLARATION OF JUDGE *AD HOC* WOLFRUM

Status of the so-called "Bata Convention" — Status of the United Nations Convention on the Law of the Sea — Mandate of the Court.

1. I agree with the Judgment as far as its ruling, reasoning and structure are concerned. My declaration has the sole objective of providing additional clarifications on three issues, namely: the legally binding nature, or lack thereof, of the so-called "Bata Convention", the status of the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS") under Article 1 (1) of the Special Agreement and the mandate of the Court according to the Special Agreement.

I. So-called "Bata Convention"

2. The Parties argued intensively as to whether the so-called "Bata Convention" constituted a legal title with force of law in the relations between the Parties concerning the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga. The Court had before it copies in French and Spanish of the said instrument deposited in the archives of the Foreign Ministry of France. Two distinct questions had to be addressed, which were distinguished in the Judgment. These were, first, whether the copies before the Court were authentic and, second, whether the text, referred to as the "Bata Convention", constituted a treaty having the force of law between the Parties and thus a legal title within the meaning of the Special Agreement.

3. The Judgment begins its assessment of the so-called Bata Convention by questioning whether its terms "afford indications of the Parties' intention to be legally bound" (Judgment, para. 77). I fully endorse this approach. An interpretation of a legal instrument concerning it being legally binding has to establish the objective pursued by the drafters as stated in the deliberations of the International Law Commission (ILC) concerning the law of treaties (see ILC Commentary, Observations and proposals of the Special Rapporteur, *Yearbook of the International Law Commission*, 1966, Vol. II, pp. 94-101). Such an assessment cannot be achieved by relying on subsequent practice; rather, the original intentions are the ones that are relevant as a starting-point.

4. The Judgment states in this regard that "several features . . . , at first sight, make it appear to be a treaty" (Judgment, para. 77). The Judgment continues, though, that

> "certain features — in particular Article 7 of the 'Bata Convention' and the *nota bene* clause (handwritten in the Spanish version but typed in the French version put on record in these proceedings) — . . . cast some doubt on the intention of the Parties to definitively establish their common land and maritime boundaries" (*ibid*., para. 78).

The *nota bene* clause included at the margin of the Spanish text by both Presidents, who were evidently in agreement in this respect, reads as translated: "The two [H]eads of [S]tate agree to subsequently proceed with a new drafting of Article 4 in order to bring it into conformity with the 1900 Convention."

5. In my view, this *nota bene* clause should have been analysed more intensively by taking into account the relevance of Article 4 as well as the object and purpose of the so-called "Bata Convention" (see Article 31 (1) of the Vienna Convention on the Law of Treaties (hereinafter "VCLT")). As far as the object and purpose of the "Bata Convention" is concerned, its title gives an indication of what was meant to be achieved by the VCLT. The "Bata Convention" was titled "Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon". Article 4 of that Convention established in detail the maritime boundary between Equatorial Guinea and Gabon while providing for Equatorial Guinea particular maritime areas around the Elobey Islands and Corisco Island. The *nota bene* clause agreed upon by the two Presidents rendered Article 4 in its original version moot. The two Presidents must have been aware that the referenced Article 4 was of crucial relevance to the dispute over land and maritime boundaries between Equatorial Guinea and Gabon, as the Paris Convention of 1900 — an uncontested, relevant legal title — did not address maritime boundaries between the two Parties. This means the so-called "Bata Convention" was not able to fill the legal gap in respect of maritime boundaries left by the Paris Convention of 1900 and to fulfil the objective announced in its title.

6. To what extent is the modification of Article 4 of the so-called "Bata Convention" relevant to the Convention as a whole? In my view, note must be taken of the fact that Articles 1 and 2 of the "Bata Convention" correspond in substance with the Paris Convention of 1900 and that Article 7 is not directly applicable, as it requires an additional agreement between the parties (Protocols). Only Article 3 of the the Convention remains operational.

7. In my view, the "Bata Convention", as modified by the two Presidents, lacks sufficient original legal substance regarding land and maritime delimitation and sovereignty over islands to be considered a legal title, although it

may have been planned otherwise at the beginning of the negotiations held in Bata. These doubts are confirmed by the subsequent practice, as the Judgment convincingly proves (paras. 83-97).

8. In my view, it is important to acknowledge that the two Presidents, at the moment when they introduced the *nota bene* clause into the text of the "Bata Convention", indicated or signalled their intention not to conclude a legally binding instrument. Emphasizing this intention of the two Presidents is relevant. One might have gained the impression that the non-implementation of the "Bata Convention" would have resulted in its termination. Such an approach would be contrary to the rules of the VCLT régime on the termination of treaties. However, this — the relevance of the non-implementation of the "Bata Convention" — is not what the Judgment meant to convey as the factor for its termination. That the "Bata Convention" remained in draft form was the result of the consent of the two chief negotiators in Bata.

II. Status of UNCLOS under the Special Agreement

9. UNCLOS has not been identified as a potential legal title; it is not, in itself, a source of a right to a specific maritime area. UNCLOS cannot constitute a legal title with respect to either land territories or of maritime spaces.

10. As far as land territories are concerned, the Convention does not provide for rules or procedures to establish a legal title. As has been demonstrated in the *Island of Palmas case* (*(Netherlands/United States of America), Award of 4 April 1928, Reports of International Arbitral Awards*, Vol. II, p. 829), the rules on the acquisition of a title in the case of the territories have been derived from customary international law. As far as maritime spaces are concerned, recourse to the rules governing the acquisition of land is not applicable. Rights to maritime zones such as the territorial sea (sovereignty), exclusive economic zones and continental shelves (sovereign rights) are determined by recourse to the sovereignty over the relevant land areas. The principle that "the land dominates the sea" was coined by the judgment in the *North Sea Continental Shelf* cases (*(Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 51, paras. 95-96). Overlapping claims are to be resolved first through negotiations (see Articles 15, 74 and 83 of UNCLOS) and if negotiations fail, through adjudication by international courts or tribunals. The procedure and the result achieved have to be equitable. In the *Maritime Delimitation in the Black Sea* case (*(Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, pp. 101-103, paras. 115-122), the Court developed a procedure which reflects the requirements of Articles 15, 74 and 83 of UNCLOS. I therefore agree with the ruling in the Judgment referring to

UNCLOS as an international instrument binding both Parties and being relevant for the delimitation of their competing claims to maritime zones. Judgments of international courts and tribunals in this respect are declaratory in nature, and not constitutive.

III. The Mandate of the Court

11. It has been agreed by the Gabonese Republic and the Republic of Equatorial Guinea that the Court's mandate is to determine whether the legal titles, treaties and international conventions invoked have the force of law in the relations between both Parties in so far as they concern the delimitation of their common maritime and land boundaries and the sovereignty over certain islands. The arguments of the Parties occasionally extended beyond this mandate. This at times influenced the Court's reasoning, although the *dispositif* reflects the limited scope of its mandate.

(Signed) Rüdiger Wolfrum.