

International Court of Justice — Jurisdiction — *Compromis* — Delimitation — Request to include agreement between Parties in operative part of Court's decision — Judicial function of Court — Definition of dispute — Whether lack of formalization of agreement relevant to existence of dispute — Whether recording agreement of Parties would be outside the judicial function of Court — Article 38(1) of Statute of the Court

Territory — Boundaries — Demarcation — Boundaries between units of same colonial empire — Boundaries of former colonies — *Uti possidetis* — Organization of African Unity resolution on post-colonial boundaries — Whether to be equated with *uti possidetis* — Interpretation of colonial legislation regarding boundary — Burkina Faso and Niger — Relevance of map — *Effectivités* — Impact of boundary decision on population of border area

Rivers — River boundary — Whether frontier located on bank of river or along median line — Access of population to water resources

General principles of international law — Principle of intangibility of boundaries inherited from colonization — Whether *effectivités* can be used to contradict a legal title — Equity — Role of equity in delimitation

FRONTIER DISPUTE

(BURKINA FASO/NIGER)¹

International Court of Justice

Judgment. 16 April 2013

(Tomka, *President*; Sepúlveda-Amor, *Vice-President*; Owada, Abraham, Keith, Bennouna, Skotnikov, Cañado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Judges; Mahiou² and Daudet,³ *Judges ad hoc*)

¹ A list of counsel participating in the proceedings appears at para. 7 of the judgment.

² Appointed by Niger.

³ Appointed by Burkina Faso.

SUMMARY:⁴ *The facts*:—Burkina Faso and the Republic of Niger (“Niger”) were, until 3 and 5 August 1960 respectively, colonies of the Republic of France (“France”) within French West Africa. Following their independence, both States accepted that the *Arrêté* of 31 August 1927 of the Governor-General of French West Africa, as clarified by the *Erratum* of 5 October 1927, described the course of their common frontier. That frontier remained, however, to be demarcated. On 28 March 1987 the States signed an Agreement (“the 1987 Agreement”) and a Protocol of Agreement (“the 1987 Protocol”), the latter of which established a Joint Technical Commission on Demarcation of the Frontier (“the Joint Technical Commission”), to effect delimitation on the ground. Article 2 of both the 1987 Agreement and its Protocol determined that, should the terms of the *Arrêté* and its *Erratum* be insufficient to determine the course of the boundary, reference should be made to a 1:200,000-scale map of the area produced by the French *Institut géographique national* in 1960 (“the IGN map”).

The outcome of the work of the Joint Technical Commission was accepted by both States insofar as it related to two of three sectors of the common frontier: the sector from the heights of N’Gouma to the astronomic marker of Tong-Tong (“the first sector”) and the sector between the Botou bend and the River Mekrou (“the third sector”). That agreement was set out in a 2009 exchange of diplomatic notes between the States, but was never formalized in a legal instrument. The Parties did not agree to the delimitation of the sector lying between sectors one and three, starting from the Tong-Tong astronomic marker and ending at the Botou bend (“the second sector”). Accordingly, on 24 February 2009 Niger and Burkina Faso signed a Special Agreement⁵ whereby they agreed to refer their frontier dispute to the International Court of Justice (“the Court”). The Special Agreement requested that the Court determine the course of the boundary in sector two; and place on record the Parties’ agreement on the results of the work of the Joint Technical Commission of the boundary with regard to sectors one and three. Article 6 of the Special Agreement stated that the dispute should be settled in accordance with the rules and principles of international law referred to in Article 38(1) of the Statute of the International Court of Justice, including the *uti possidetis juris* principle and the 1987 Agreement.

Burkina Faso argued that since the *Arrêté* did not specify how to connect the points mentioned as delimiting the boundary line in the second sector, the author must have intended that those points be connected by straight lines. Accordingly, it submitted that the course of the frontier ran in a straight line from Tong-Tong to Tao, and from Tao to Bossébangou. In the area of Bossébangou, Burkina Faso submitted that the frontier ran along the right bank of the River Sirba, this bank being closest to the village of Bossébangou mentioned in the *Arrêté*, and that the IGN map applied to determine the

⁴ Prepared by Ms R. Elphick.

⁵ The terms of the Special Agreement appear at para. 2 of the judgment.

course of the line from its departure with the River Sirba. In the southern part of the second sector, Burkina Faso denied the existence of any agreement with Niger as to the course of the frontier and again submitted that a straight line should join the relevant points in this area. Burkina Faso further requested that the Court include in the operative part of its decision a reference to the Parties' agreement on the delimitation of the common frontier in sectors one and three.

Niger argued that, in the area between Tong-Tong and Tao, a marker at Vibourié constituted an *effectivité* to be taken into account by the Court as a means of interpreting the *Arrêté*. From Tao to Bossébangou, Niger argued that the frontier line on the IGN map should be adopted, with deviations to give precedence to the *effectivités* and to account for a material error in the *Arrêté*. Niger considered that the area around Bossébangou should fall entirely within Niger and that, given a material error in the *Arrêté* in this regard, the delimitation should depart from the text of the *Arrêté* and the line on the IGN map. Accordingly, it submitted that the frontier line from Tao did not continue as far as the River Sirba, but turned south-west some 30 km before the river, following thereafter a straight-line segment running in a south-westerly direction. In the southern part of the second sector, Niger relied on colonial and postcolonial *effectivités* to infer the existence of an implicit agreement between the Parties as to the course of the frontier in this section. Niger did not join in Burkina Faso's request for the Court to include the Parties' agreement on the course of their common frontier in its *dispositif*, arguing that it would be sufficient to meet the terms of the Special Agreement for the Court to mention the Parties' agreement in this regard in its reasoning.

Held (unanimously):—(1) (a) Burkina Faso's request to include in the *dispositif* the terms of the Parties' agreement as to the course of the frontier in sectors one and three could not be upheld (para. 114(1)).

(b) A straight line connected the Tong-Tong and Tao astronomic markers (para. 114(2)).

(c) From Tao, the frontier followed the IGN line until its intersection with the median line of the River Sirba (para. 114(3)).

(d) The frontier followed the median line of the River Sirba upstream until its intersection with the IGN line. From that point the frontier followed the course of the IGN line until that line turned south. From that point, the frontier followed a straight line until it reached the meridian passing through the intersection of the Say parallel with the right bank of the River Sirba, at which point the frontier ran southwards along that meridian until it reached the point with geographic co-ordinates 13° 06' 12.08" N; 00° 59' 30.9" E (para. 114(4)).

(e) From this last point to the point situated at the beginning of the Botou bend, the course of the frontier took the form of a straight line (para. 114(5)).

(f) Experts would be nominated at a later date to assist the Parties in the demarcation of their frontier in the second sector (para. 114(6)).

(2) No dispute existed between the Parties as to the course of their common frontier in sectors one and three at the time proceedings were instituted, nor had any such dispute since developed. A pronouncement in this regard would therefore exceed the judicial function of the Court, which was to settle disputes. It was irrelevant that the Parties' agreement had yet to be formalized (paras. 35-59).

(3) In order to determine the course of the frontier in the disputed second sector, per the 1987 Agreement referred to in the Special Agreement, recourse was first to be had to the *Arrêté* read as one with its *Erratum* (taken together, "the *Arrêté*"). Where the *Arrêté*, interpreted in context and in light of its implementation by the colonial authorities, was not clear as to the course of the frontier, the IGN map applied as per Article 2 of the 1987 Agreement (paras. 60-9).

(4) The Tong-Tong and Tao astronomic markers would be connected by a straight line, as the evidence demonstrated that colonial administration officials interpreted the *Arrêté* to apply in this manner. Niger failed to demonstrate that the Vibourié marker was relevant to the effective practice of the colonial administration at the critical date of independence. In any event, an *effectivité* could not be used to contradict the legal title established by the *Arrêté* (paras. 70-9).

(5) The *Arrêté* provided *expressis verbis* that, from the Tao marker, the course of the frontier continued as far as the River Sirba at Bossébangou. The Court was bound by the terms of the *Arrêté* even if they contained a material error or legal flaw. However, the terms of the *Arrêté* did not detail the course that the frontier should run in this area. The absence of detail could not be interpreted as an intention to use a straight line: first, if the *Arrêté* had intended to make use of a straight-line configuration in this section of the frontier, it would have done so explicitly, as it did in relation to other sections; secondly, the Governor-General had sought to determine the inter-colonial boundary by identifying pre-existing boundaries and there was no indication that they had followed a straight line in the sector in question; thirdly, the colonial authorities had not interpreted the *Arrêté* as drawing a straight line in this area. In the section between Tao and the River Sirba, therefore, the *Arrêté* was "insufficient" within the meaning of Article 2 of the 1987 Agreement and the IGN map line applied. That line could not be altered to take account of the *effectivités* raised by Niger. The *effectivités* were relevant to the interpretation of the *Arrêté* only and no longer played a role once it was determined that that text was insufficient to delimit the area in question (paras. 80-99).

(6) In the area of Bossébangou, the clear terms of the *Arrêté* and the requirements of access to water resources and legal certainty determined that the median line of the River Sirba would constitute the next turning point in the frontier line. The wording of the *Arrêté* was clear that the frontier would from this point follow the course of the River Sirba, but did not detail the point at which the frontier would leave the river or the course it would follow once it left the river. The *Arrêté* therefore did not suffice to determine the

frontier line in this section and the line in the IGN map applied up until the point at which, as per the terms of *Arrêté*, the frontier returned to the River Sirba at the Say parallel (paras. 100-8).

(7) In the southern section of the second sector, the *Arrêté* specified that the frontier continued in a straight line from the intersection of the Say parallel with the River Sirba to the beginning of the Botou bend. There was insufficient evidence of an agreement to adopt a frontier line deviating from that specified in the *Arrêté*. The terms of the *Arrêté* were sufficient to detail the course of the frontier in this section (paras. 109-11).

Declaration of Judge Bennouna: When interpreting and applying colonial law in order to give effect to the *uti possidetis juris* principle, the fate of the populations concerned could not be disregarded (paras. 1-15).

Separate Opinion of Judge Cançado Trindade: (1) The judgment was substantially correct, but did not sufficiently emphasize the needs of the local populations or reflect the extent of the Parties' concern for the human impact of the delimitation. People and territory were related to each other and the tracing of the frontier could not be made *in abstracto* (paras. 1-5).

(2) Niger and Burkina Faso expressed their concern for local populations in several post-independence treaties (paras. 6-10).

(3) At the written phase of proceedings, both Parties expressed their concern with the local populations and emphasized the ineluctable relationship between territory and population (paras. 11-22).

(4) The Parties referred to post-independence written *communiqués* concerning the freedom of movement of local populations (paras. 23-6).

(5) The Parties conveyed considerable additional information on the villages in the border area to the Court, though this was insufficient to establish clear conclusions as to the historical nationality of certain villages (paras. 27-31).

(6) At the oral phase of proceedings, Burkina Faso emphasized the importance of legal title, whereas Niger dismissed Burkina Faso's reliance on a deliberately "artificial" frontier line and invoked the *effectivités* (paras. 32-4).

(7) In response to questions from the bench, the Parties again expressed their concern with the local population and committed to respecting the living conditions of the nomads and semi-nomads of the border area. The Parties' answers also clarified the effect that the delimitation would have on villages in the area (paras. 35-54).

(8) Between the Tao astronomic marker and Bossébangou, the IGN line was appropriate from the perspective of the relations between people and territory (paras. 55-62).

(9) Human beings should be of central concern to delimitation (paras. 63-9).

(10) The Parties admitted that they were bound by their bilateral agreements to cooperate in respect of local populations and committed to allowing freedom of movement to nomadic populations (paras. 70-86).

(11) The Parties confirmed their understanding of the régime of trans-humance, a true system of solidarity, which has always had a place in the *jus gentium* (paras. 87-98).

Separate Opinion of Judge Yusuf: (1) The judgment, albeit substantially correct, was mistaken insofar as it referred interchangeably to the principles of *uti possidetis juris* and the principle of respect of borders existing on achievement of independence adopted by the Organization of African Unity (“the OAU principle”). These principles were neither identical nor equivalent (paras. 1-6).

(2) The principle of *uti possidetis juris* and the OAU principle could be differentiated on the basis of their origin and purpose, their legal scope and content and their legal nature. The OAU could not be taken to have endorsed the principle of *uti possidetis juris* (paras. 10-36).

(3) The reference in the OAU’s Cairo Resolution to Article III(3) of the OAU Charter could not be taken as a reference to the principle of *uti possidetis juris* (paras. 37-43).

(4) The Court was asked to interpret the 1987 delimitation agreement and the principle of *uti possidetis juris* was therefore redundant in this case. The judgment should have clarified this point (paras. 44-7).

Separate Opinion of Judge ad hoc Mahiou: (1) The judgment was substantially correct albeit that its position on the status of the various documents invoked in the course of the proceedings and the role played by the *effectivités* called for clarification (paras. 1-4).

(2) In its delimitation of the frontier line between Tao and the River Sirba, the Court should have given greater attention to the evidence before ruling on the fate of the villages of Petelkolé and Oussaltane. In view of the *effectivités*, these villages appeared to come under the administration of Niger (paras. 7-19).

(3) The Court was correct to find that the frontier line would turn at and run along the median line of the River Sirba. If the Erratum had intended to locate the entire river in a single colony, it would have clearly said so (paras. 20-2).

Separate Opinion of Judge ad hoc Daudet: (1) The judgment was substantially correct albeit that its reasoning for the delimitation effected between the Tao astronomic marker and the River Sirba at Bossébangou, and the delimitation in the area of Bossébangou with respect to the River Sirba, was flawed (paras. 1-2).

(2) It was neither inconceivable nor implausible that Tao and the River Sirba be connected by a straight line, as Burkina Faso suggested. However, the absence of any detail in the text regarding the course of the line in this area meant that the *Arrêté* was insufficient to establish that either a straight-line or any other configuration applied. For that reason, and not those suggested by the Court, recourse to the IGN map was necessary (paras. 3-13).

(3) In the area of Bossébangou, the Court introduced considerations of equity in order to justify its choice of the median line of the River Sirba. In so doing, the Court went beyond what was asked of it, which was to apply the *Arrêté* and the 1960 IGN map, and nothing more. A strict application of the Special Agreement called for recourse to the 1960 IGN map in the delimitation of this area. That solution would however have created an unduly formalistic result, which demonstrated the limits of *uti possidetis* (paras. 14-32).

The text of the judgment of the Court and opinions is set out as follows:

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[49] 1. By a joint letter of notification dated 12 May 2010 and filed in the Registry of the Court on 20 July 2010, Burkina Faso and the Republic of Niger (hereinafter “Niger”) transmitted to the Registrar a Special Agreement between the two States which was signed at Niamey on 24 February 2009 and entered into force on 20 November 2009, whereby the Governments of the two States agreed to submit to the Court the frontier dispute between them over a section of their common boundary. Attached to this letter were the Protocol of Exchange of the Instruments of Ratification of the Special Agreement and an exchange of Notes placing on record the agreement (“*entente*”) between the two States on the delimited sectors of the frontier, dated 29 October and 2 November 2009.

2. The text of the Special Agreement reads as follows:

The Government of Burkina Faso and the Government of the Republic of Niger, hereinafter referred to as the “Parties”;

Whereas, by agreements signed at Niamey on 23 June 1964 and at Ouagadougou on 28 March 1987, the two Governments agreed to mark out their common boundary and to that end created a Joint Technical Commission on Demarcation;

Whereas Articles 1 and 2 of the Agreement of 28 March 1987 provide as follows:

Article 1

The frontier between the two States shall run from the heights of N’Gouma, situated to the north of the Kabia ford, to the intersection of [50] the former boundary of the *cercles* of Fada and Say with the course of the Mekrou, as described in the *Arrêté* [order] of 31 August 1927, as clarified by the Erratum of 5 October 1927.

Article 2

The frontier shall be demarcated by boundary markers following the course described by *Arrêté* 2336 of 31 August 1927, as clarified by Erratum 2602/ APA of 5 October 1927. Should the *Arrêté* and Erratum not suffice, the course

shall be that shown on the 1:200,000-scale map of the Institut géographique national de France, 1960 edition, and/or any other relevant document accepted by joint agreement of the Parties;

Whereas thanks to the work of the Joint Technical Commission on Demarcation established pursuant to these provisions, the Parties have been able to reach agreement in respect of the following sectors of the frontier:

- (a) from the heights of N’Gouma to the astronomic marker of Tong-Tong;
- (b) from the beginning of the Botou bend to the River Mekrou;

Whereas the two Parties accept the results of the work carried out in those sectors as definitive;

Desirous of resolving this dispute once and for all in the spirit of fraternity between brotherly peoples and neighbourliness characterising their relations and in compliance with the principle of the intangibility of frontiers inherited from colonization;

Thus applying Article 8 of the Agreement of 28 March 1987 referred to above;

Have agreed as follows:

Article 1 Referral to the International Court of Justice

1. The Parties submit the dispute defined in Article 2 below to the International Court of Justice.
2. Each of the Parties will exercise the right conferred upon it by Article 31, paragraph 3, of the Statute of the Court to choose a judge ad hoc.

Article 2 Subject of the dispute

The Court is requested to:

1. determine the course of the boundary between the two countries in the sector from the astronomic marker of Tong-Tong (latitude 14° 25' 04" N; longitude 00° 12' 47" E) to the beginning of the Botou bend (latitude 12° 36' 18" N; longitude 01° 52' 07" E);
2. place on record the Parties' agreement [*leur entente*] on the results of the work of the Joint Technical Commission on Demarcation of the Burkina Faso–Niger boundary with regard to the following sectors: [51]
 - (a) the sector from the heights of N’Gouma to the astronomic marker of Tong-Tong;
 - (b) the sector from the beginning of the Botou bend to the River Mekrou.

Article 3 Written proceedings

1. Without prejudice to any question as to the burden of proof, the Parties request the Court to authorize the following procedure for the written pleadings:

- (a) a Memorial filed by each Party not later than nine (9) months after the seising of the Court;
 - (b) a Counter-Memorial filed by each Party not later than nine (9) months after exchange of the Memorials;
 - (c) any other written pleading whose filing, at the request of either of the Parties, shall have been authorized or directed by the Court.
2. Pleadings submitted to the Registrar of the Court shall not be transmitted to the other Party until the Registrar has received the corresponding pleading from that Party.

Article 4 Oral proceedings

The Parties shall agree, with approval from the Court, on the order in which they are to be heard during the oral proceedings; if the Parties fail to agree, the order shall be prescribed by the Court.

Article 5 Language of the proceedings

The Parties agree that their written pleadings and their oral argument shall be presented in the French language.

Article 6 Applicable law

The rules and principles of international law applicable to the dispute are those referred to in Article 38, paragraph 1, of the Statute of the International Court of Justice, including: the principle of the intangibility of boundaries inherited from colonization and the Agreement of 28 March 1987.

Article 7 Judgment of the Court

1. The Parties accept the Judgment of the Court given pursuant to this Special Agreement as final and binding upon them.
2. From the day on which the Judgment is rendered, the Parties shall have eighteen (18) months in which to commence the work of demarcating the boundary. [52]
3. In case of difficulty in the implementation of the Judgment, either Party may seise the Court pursuant to Article 60 of its Statute.
4. The Parties request the Court to nominate, in its Judgment, three (3) experts to assist them as necessary in the demarcation.

Article 8 Entry into force

The present Special Agreement is subject to ratification. It shall enter into force on the date on which the last notice of ratification is received.

The Parties nevertheless agree to apply Article 10 of this Special Agreement as from the date of signing.