

16 AVRIL 2013

ARRÊT

DIFFÉREND FRONTALIER

(BURKINA FASO/NIGER)

FRONTIER DISPUTE

(BURKINA FASO/NIGER)

16 APRIL 2013

JUDGMENT

TABLE OF CONTENTS

	<i>Paragraphs</i>
CHRONOLOGY OF THE PROCEDURE	1-10
I. HISTORICAL AND FACTUAL BACKGROUND	11-34
II. THE REQUEST CONCERNING THE TWO SECTORS RUNNING, IN THE NORTH, FROM THE HEIGHTS OF N'GOUMA TO THE TONG-TONG ASTRONOMIC MARKER AND, IN THE SOUTH, FROM THE BEGINNING OF THE BOTOU BEND TO THE RIVER MEKROU	35-59
A. The request of Burkina Faso	35-38
B. The position of Niger	39-40
C. Consideration by the Court	41-59
III. THE COURSE OF THE SECTION OF THE FRONTIER REMAINING IN DISPUTE	60-112
A. Applicable law	60-69
B. The course of the frontier	70-112
1. The course of the frontier between the Tong-Tong and Tao astronomic markers	72-79
2. The course of the frontier between the Tao astronomic marker and the River Sirba at Bossébangou	80-99
3. The course of the frontier in the area of Bossébangou	100-107
4. The course of the southern part of the frontier	108-112
IV. NOMINATION OF EXPERTS	113
OPERATIVE CLAUSE	114

INTERNATIONAL COURT OF JUSTICE

YEAR 2013

**2013
16 April
General List
No. 149**

16 April 2013

FRONTIER DISPUTE

(BURKINA FASO/NIGER)

Historical and factual background.

Arrêté of 31 August 1927 and its Erratum of 5 October 1927 — Agreement and Protocol of Agreement of 28 March 1987 — Work of the Joint Technical Commission on Demarcation of the Frontier — Special Agreement — Exchange of letters on the delimited sectors of the frontier.

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Request concerning the two demarcated sectors of the frontier.

Power of the Court to ascertain whether final submissions remain within the limits of a special agreement — Interpretation of points 1 and 3 of the final submissions of Burkina Faso — Interpretation of Article 2, point 2, of the Special Agreement — Request to place on record in the dispositif of the Court's Judgment the Parties' agreement concerning demarcated sectors of the frontier — Absence of a dispute — Request not compatible with the Court's judicial function.

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Course of the section of the frontier remaining in dispute.

Applicable law — Article 6 of the Special Agreement — Article 38, paragraph 1, of the Statute — Principle of intangibility of boundaries inherited from colonization — Agreement of 28 March 1987 — Arrêté as clarified by its Erratum is the instrument to be applied for delimitation of the boundary — Map of the Institut géographique national de France (IGN map) — No other document “accepted by joint agreement of the Parties”.

Course of the frontier between Tong-Tong and Tao astronomic markers — Location of Tao astronomic marker — Arrêté not sufficient to determine the course of the frontier — Irrelevance of Vibourié marker — Frontier follows straight line.

Course of the frontier between the Tao astronomic marker and the “River Sirba at Bossébangou” — Meaning of the expression “River Sirba at Bossébangou” — Reference to straight lines in Arrêté for other sectors — Relevance of the Decree of 28 December 1926 on the basis of which the Arrêté was issued — Colonial practice with respect to villages of Bangaré, Petelkolé and Oussaltane not relevant — Arrêté cannot be interpreted as drawing a straight line in this sector — Arrêté not sufficient to determine the course of the frontier — Frontier follows IGN map.

Course of the frontier in the area of Bossébangou and beyond — Frontier reaches median line of the River Sirba — Frontier then follows the River Sirba — Arrêté not sufficient to determine point where frontier leaves the River Sirba and course of frontier beyond that point — Recourse to the IGN map — Say parallel — Intersection of River Sirba and Say parallel — Meridian passing through this point.

Course of the southern part of the frontier — No agreement or acquiescence of the Parties — Clarity of the Arrêté — Frontier follows straight line.

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Nomination of experts.

JUDGMENT

Present: President TOMKA; Vice-President SEPÚLVEDA-AMOR; Judges OWADA, ABRAHAM, KEITH, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI; Judges ad hoc MAHIOU, DAUDET; Registrar COUVREUR.

In the case concerning the frontier dispute,

between

Burkina Faso,

represented by

H.E. Mr. Jérôme Bougouma, Minister for Territorial Administration, Decentralization and Security,

as Agent;

H.E. Ms Salamata Sawadogo/Tapsoba, Minister of Justice and Keeper of the Seals,

H.E. Mr. Frédéric Assomption Korsaga, Ambassador of Burkina Faso to the Kingdom of the Netherlands,

as Co-Agents;

H.E. Mr. Alain Edouard Traoré, Minister of Communication, Government Spokesman,

as Special Adviser;

Ms Joséphine Kouara Apiou/Kaboré, Director-General of Territorial Administration,

Mr. Claude Obin Tapsoba, Director-General of the Geographical Institute of Burkina,

Mr. Benoît Kambou, Professor at the University of Ouagadougou,

Mr. Pierre Claver Hien, Historian, Researcher at the National Science and Technology Research Centre,

as Deputy-Agents;

Mr. Mathias Forteau, Professor at the University of Paris Ouest, Nanterre-La Défense, Member of the International Law Commission,

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, former Chairman of the International Law Commission, associate member of the Institut de droit international,

Mr. Jean-Marc Thouvenin, Professor at the University of Paris Ouest, Nanterre-La Défense, Director of the Centre de droit international de Nanterre (CEDIN), member of the Paris Bar (Cabinet Sygna partners),

as Counsel and Advocates;

Mr. Halidou Nagabila, Surveying Engineer,

Mr. André Bassolé, Geomatics Expert,

Mr. Dramane Ernest Diarra, Civil Administrator,

Maître Benoît Sawadogo, *Avocat à la Cour*,

Maître Héloïse Bajer-Pellet, member of the Paris Bar,

Mr. Romain Pieri, International Law Researcher,

Mr. Ludovic Legrand, Researcher at the Centre de droit international de Nanterre (CEDIN),
Lawyer (Cabinet Sygna partners),

Mr. Simplicie Honoré Guibila, Director-General of Legal and Consular Affairs,

Mr. Daniel Bicaba, Minister-Counsellor, Embassy of Burkina Faso in Brussels,

as Advisers,

and

the Republic of Niger,

represented by

H.E. Mr. Mohamed Bazoum, Minister of State for Foreign Affairs, Co-operation, African
Integration and Nigeriens Abroad, Chairman of the Support Committee to Counsel for
Niger,

as Head of Delegation and Agent;

H.E. Mr. Abdou Labo, Minister of State for the Interior, Public Security, Decentralization
and Religious Affairs,

as Co-Agent;

H.E. Mr. Karidio Mahamadou, Minister of National Defence,

H.E. Mr. Marou Amadou, Minister of Justice, Keeper of the Seals, Government Spokesman,

as Deputy Co-Agents;

Mr. Sadé Elhadji Mahaman, Curator of Archives and Libraries, Co-ordinator of the
Permanent Secretariat of the Support Committee to Counsel for Niger,

as Deputy Agent;

Mr. Jean Salmon, Professor emeritus of the Université Libre de Bruxelles, member of the Institut du droit international, member of the Permanent Court of Arbitration,

as Lead Counsel;

Mr. Maurice Kamto, Professor agrégé of public law, member of the Paris Bar, former Dean of the Faculty of Law and Political Science at the University of Yaoundé II, Member and former Chairman of the International Law Commission, associate member of the Institut de droit international, member of the Permanent Court of Arbitration,

Mr. Pierre Klein, Professor of Law at the Université Libre de Bruxelles, Deputy-Director of the Centre of International Law,

Mr. Amadou Tankoano, Professor of International Law, former Dean of the Faculty of Economic and Legal Science, Lecturer and Researcher at Abdou Moumouni University in Niamey,

as Counsel;

Ms Martyna Falkowska, Researcher at the Centre of International Law, Université Libre de Bruxelles,

as Assistant;

General Maïga Mamadou Youssoufa, Governor of the Region of Tillabéri,

Mr. Amadou Tcheko, Director-General of Legal and Consular Affairs at the Ministry of Foreign Affairs, Co-operation, African Integration and Nigeriens Abroad, Deputy Co-ordinator of the Support Committee to Counsel for Niger,

Col. (retired) Mahamane Koraou, Permanent Secretary to the National Boundaries Commission, member of the Support Committee to Counsel for Niger,

Mr. Mahamane Laminou Amadou Maouli, *Magistrat*, Rapporteur of the Support Committee to Counsel for Niger,

Mr. Hassimi Adamou, Chief Surveyor, Director-General of the National Geographical Institute of Niger (NGIN), member of the Support Committee to Counsel for Niger,

Mr. Hamadou Mounkaila, Chief Surveyor at the National Boundaries Commission, member of the Support Committee to Counsel for Niger,

Mr. Mahamane Laminou, Chief Surveyor, Expert at the National Geographical Institute of Niger (NGIN), member of the Support Committee to Counsel for Niger,

Mr. Soumaye Poutia, *Magistrat*, member of the Support Committee to Counsel for Niger,

Mr. Idrissa Yansambou, Director of the National Archives of Niger, member of the Support Committee to Counsel for Niger,

Mr. Belko Garba, Surveyor, member of the Support Committee to Counsel for Niger,

General Yayé Garba, Ministry of National Defence, member of the Support Committee to Counsel for Niger,

Mr. Seydou Adamou, Technical Adviser to the Minister of State for Foreign Affairs, Co-operation, African Integration and Nigeriens Abroad,

Mr. Abdou Abarry, Director-General of Bilateral Relations, Ministry of Foreign Affairs, Co-operation, African Integration and Nigeriens Abroad,

Col. Harouna Djibo Hamani, Director of Military Co-operation and Peace-Keeping Operations, Ministry of Foreign Affairs, Co-operation, African Integration and Nigeriens Abroad,

as Experts;

Mr. Ado Elhadji Abou, Minister-Counsellor, Embassy of Niger in Brussels,

Mr. Chitou Boubacar, Protocol Officer, Embassy of Niger in Brussels,

Mr. Salissou Mahamane, Accountant of the Support Committee to Counsel for Niger,

Mr. Abdoussalam Nouri, Principal Secretary, Permanent Secretariat of the Support Committee to Counsel for Niger,

Ms Haoua Ibrahim, Secretary, Permanent Secretariat of the Support Committee to Counsel for Niger,

as Support Staff,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

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 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:
 - (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.
3. In case of difficulty in the implementation of the Judgment, either Party may seize 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.

Article 9

Registration and notification

1. The present Special Agreement shall be registered with the Secretariat of the United Nations pursuant to Article 102 of the Charter of the United Nations by the more diligent party.
2. In accordance with Article 40 of the Statute of the Court, this Special Agreement shall be notified to the Registrar of the Court by a joint letter from the Parties.
3. If such notification is not effected in accordance with the preceding paragraph within one month from the entry into force of the present Special Agreement, it shall be notified to the Registrar of the Court by the more diligent Party.

Article 10

Special undertaking

Pending the Judgment of the Court, the Parties undertake to maintain peace, security and tranquillity among the populations of the two States in the frontier region, refraining from any act of incursion into the disputed areas and organizing regular meetings of administrative officials and the security services.

With regard to the creation of socio-economic infrastructure, the Parties undertake to hold preliminary consultations prior to implementation.

In witness whereof, the present Special Agreement, drawn up in two original copies, has been signed by the plenipotentiaries.

Done at Niamey, 24 February 2009.”

3. In accordance with Article 40, paragraph 3, of the Statute of the Court and Article 42 of the Rules of Court, the Registrar transmitted copies of the joint letter of notification, the Special Agreement, the Protocol of Exchange of the Instruments of Ratification and the 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, to the Secretary-General of the United Nations, the Members of the United Nations and other States entitled to appear before the Court.

4. By letter of 24 September 2010, the Agent of Burkina Faso notified the Court that his Government had chosen Mr. Jean-Pierre Cot to sit as judge *ad hoc* in the case. By letter of 4 August 2010, the Agent of Niger notified the Court that his Government had chosen Mr. Ahmed Mahiou to sit as judge *ad hoc* in the case. Following the resignation of Mr. Cot, the Agent of Burkina Faso notified the Court by letter of 25 April 2012 that its Government had chosen Mr. Yves Daudet.

5. By Order of 14 September 2010, the Court fixed 20 April 2011 as the time-limit for the filing of a Memorial by each Party and 20 January 2012 as the time-limit for the filing of a Counter-Memorial by each Party. The Memorials and Counter-Memorials were duly filed within the time-limits thus fixed. The Parties then informed the Court that they did not consider it necessary to submit additional written pleadings, but that they wished to reserve the right to produce further documents if required, under Article 56 of the Rules of Court. No request for the production of such documents has been received by the Court.

6. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed should be made accessible to the public on the opening of the oral proceedings.

7. Hearings were held from Monday 8 to Wednesday 17 October 2012, during which the Court heard the oral arguments and replies of:

For Burkina Faso: H.E. Mr. Jérôme Bougouma,
Mr. Jean-Marc Thouvenin,
Mr. Claude Obin Tapsoba,
Mr. Alain Pellet,
Mr. Mathias Forteau.

For Niger: H.E. Mr. Mohamed Bazoum,
Mr. Amadou Tankoano,
Mr. Jean Salmon,
Mr. Maurice Kamto,
Mr. Pierre Klein.

8. At the hearings, Members of the Court put questions to the Parties, to which replies were given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. As provided for in Article 72 of the Rules of Court, each Party presented written observations on the replies received from the other.

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9. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Burkina Faso,

in the Memorial:

“5.1. In view of all the above considerations, Burkina Faso requests the Court to adjudge and declare that the frontier between Burkina Faso and the Republic of Niger follows the course described hereafter:

1. from the heights of N’Gouma to the Tong-Tong astronomic marker, the frontier takes the following course: a series of straight lines connecting the following points in turn¹: Mount N’Gouma (Lat. 14° 54' 46.0" N; Long. 00° 14' 36.4" E), Kabia Ford (Lat. 14° 53' 09.8" N; Long. 00° 13' 06.3" E), Mount Arwaskoye (Lat. 14° 50' 44.7" N; Long. 00° 10' 35.8" E), Mount Bellé Banguia (Lat. 14° 45' 05.2" N; Long. 00° 14' 09.6" E), Takabougou (Lat. 14° 37' 54.5" N; Long. 00° 10' 16.1" E), Mount Douma Fendé (Lat. 14° 32' 00.6" N; Long. 00° 09' 42.1" E) and the Tong-Tong astronomic marker (Lat. 14° 24' 53.2" N; Long. 00° 12' 51.7" E);

¹The co-ordinates which follow are those adopted in the record of the work of the Joint Survey Mission of the erected markers, 3 July 2009, Ann. MBF 101. The co-ordinates were measured by GPS.

2. from the Tong-Tong astronomic marker to the beginning of the Botou bend, the frontier takes the following course:
 - a straight line as far as the Tao astronomic marker (Lat. 14° 03' 04.7" N; Long. 00° 22' 51.8" E)²;

²The co-ordinates of this point were measured by GPS by Burkina. The co-ordinates of this marker on the Clarke 1880 ellipsoid are: Lat. 14° 03' 13" N; Long. 00° 22' 53" E.

- from that point, a straight line up to the point where the frontier reaches the River Sirba at Bossébangou (Lat. 13° 21' 06.5" N; Long. 01° 17' 11.0" E)³;

³The co-ordinates of this point, and the following ones, are given on the Clarke 1880 ellipsoid.

- from that point, the frontier follows the right bank of the River Sirba, from east to west, up to the point on the right bank with the co-ordinates: Lat. 13° 19' 53.5" N; Long. 01° 07' 20.4" E;
- from that point, the frontier follows the line on the 1:200,000-scale map of the *Institut géographique national de France*, 1960 edition, as far as the point with the co-ordinates: Lat. 13° 22' 30.0" N; Long. 00° 59' 40.0" E;

- from that point, the frontier runs south in a straight line, ending at the intersection of the right bank of the River Sirba with the Say parallel (Lat. 13° 06' 10.7" N; Long. 00° 59' 40.0" E);
- from that point, the frontier runs in a straight line up to the beginning of the Botou bend (Tyenkilibi) (Lat. 12° 36' 19.2" N; Long. 01° 52' 06.9" E)⁴.

⁴The co-ordinates of this point, and the following ones, are those adopted in the record of the work of the Joint Survey Mission of the erected markers, 3 July 2009, Ann. MBF 101. The co-ordinates were measured by GPS (WGS84 ellipsoid).

3. from the beginning of the Botou bend as far as the River Mekrou, the frontier takes the following course:
 - a series of straight lines connecting the following points in turn: Jackal Mountain (Lat. 12° 41' 33.1" N; Long. 01° 55' 43.9" E), Laguil (Lat. 12° 41' 31.9" N; Long. 01° 57' 01.3" E) and Nonbokoli (Lat. 12° 44' 12.9" N; Long. 01° 58' 47.0" E);
 - from the latter point, the frontier follows the median line of the Dantiabonga *marigot*, passes to the south of Dantiandou and then follows the line of the Yoga Djoaga hills as far as the confluence of the Dyamongou and Dantiabonga rivers (Lat. 12° 43' 15.1" N; Long. 02° 05' 14.9" E);
 - from that point, the frontier follows the median line of the River Dyamongou as far as the confluence of the Dyamongou *marigot* and the Boulel Fouanou (Lat. 12° 43' 44.0" N; Long. 02° 06' 23.9" E);
 - from that point, the frontier runs in a series of straight lines connecting the following points in turn: Boulel (Lat. 12° 42' 15.1" N; Long. 02° 06' 53.3" E), Boulel East (Teylinga) (Lat. 12° 41' 09.5" N; Long. 02° 09' 43.2" E), Dyapionga North (Lat. 12° 39' 42.3" N; Long. 02° 09' 37.3" E), Dyapionga South (Lat. 12° 38' 55.4" N; Long. 02° 09' 08.1" E), Kanleyenou (Lat. 12° 37' 21.7" N; Long. 02° 11' 57.1" E), Niobo Farou (Caiman Pool) (Lat. 12° 35' 19.6" N; Long. 02° 13' 23.9" E), the eastern crests of Mount Tambouadyoaga (Lat. 12° 31' 19.7" N; Long. 02° 13' 48.0" E), Banindyidouana (Lat. 12° 27' 52.7" N; Long. 02° 16' 27.2" E) and the confluence of the Banindyidi Fouanou and Tapoa rivers (Lat. 12° 25' 30.5" N; Long. 02° 16' 40.6" E);
 - from the latter of those points, the frontier follows the median line of the River Tapoa as far as the point where it intersects with the former boundary of the Fada and Say *cercles*⁵ (Lat. 12° 21' 04.88" N; Long. 02° 04' 12.77" E);

⁵The co-ordinates of the following points are those adopted in the record of the meeting to ascertain the co-ordinates of the unmarked points in Sector B, 15 October 2009, Ann. MBF 105. They were derived from the IGN France 1:200,000-scale map (Clarke 1880).

- from the latter point, the frontier runs in a straight line, corresponding to the former boundary of the Fada and Say *cercles*, up to the point where it intersects with the River Mekrou (Lat. 11° 54' 07.83" N; Long. 02° 24' 15.25" E).

5.2. Pursuant to Article 7, paragraph 4, of the Special Agreement, Burkina Faso further requests the Court, in its Judgment, to nominate three experts to assist the Parties as necessary for the purposes of demarcation.”

in the Counter-Memorial:

“5.1. In view of all the considerations contained in its Memorial and in the present Counter-Memorial, Burkina Faso stands by the submissions set forth in paragraphs 5.1 and 5.2 of its Memorial in their entirety and requests the Court to find in its favour and to reject any contrary submissions from the Republic of Niger.”

On behalf of the Government of Niger,

in the Memorial:

“The Republic of Niger requests the Court to adjudge and declare that the frontier between the Republic of Niger and Burkina Faso in the Téra sector takes the following course:

- starting from the Tong-Tong astronomic marker (co-ordinates: 14° 25' 04" N, 00° 12' 47" E);
- from that point: a straight line as far as the Vibourié marker (co-ordinates: 14° 21' 44" N, 00° 16' 25" E);
- from that point: a straight line as far as the Tao astronomic marker (co-ordinates: 14° 03' 02.2" N, 00° 22' 52.1" E);
- from that point the frontier follows the 1960 IGN line (Téra sheet) as far as the point having co-ordinates 14° 01' 55" N, 00° 24' 11" E;
- from that point, it runs in a straight line to the frontier point on the new Téra-Dori road (co-ordinates: 14° 00' 04.2" N, 00° 24' 16.3" E);
- it then meets a river arm at the point with co-ordinates 13° 59' 03" N, 00° 25' 12" E. The frontier then passes through a frontier point called Baobab (13° 58' 38.9" N, 00° 26' 03.5" E), then follows the IGN line, leaving Tindiki (13° 57' 15.4" N, 00° 26' 23.6" E) to Niger, as far as the break in the line of crosses north of Ihouhaltane (Oulsalta) on the 1960 IGN map (Sebba sheet), at the point with co-ordinates 13° 55' 54" N, 00° 28' 21" E;
- from this point the frontier follows the loop formed by the river to the west as far as the point having co-ordinates 13° 55' 32" N, 00° 27' 07" E, and passes through a point situated on the Sidibébé-Kalsatouma road having co-ordinates 13° 52' 32.8" N, 00° 28' 13.5" E. From that point, it rejoins the IGN line at the point having co-ordinates 13° 53' 24" N, 00° 29' 58" E, which it follows as far as the break in the line of crosses at the point having co-ordinates 13° 52' 04" N, 00° 31' 00" E;

- the frontier then turns to the south again as far as the point having co-ordinates 13° 48' 55" N, 00° 30' 23" E situated on the arm of the river to the west of Komanti, passes through a point south-west of Ouro Toupé (Kamanti) with co-ordinates 13° 46' 31" N, 00° 30' 27" E, then to the north of Ouro Sabou to a point on the arm of the tributary of the Tyekol Dyongoytol whose co-ordinates are 13° 46' 18" N, 00° 32' 47" E. The frontier then follows this tributary until its confluence with the Tyekol Dyongoytol at the point having co-ordinates 13° 46' 51" N, 00° 35' 53" E. From there it follows the 1960 IGN line until it reaches the level of Bangaré (Niger) on the River Folko at the point having co-ordinates 13° 46' 22.5" N, 00° 37' 25.9" E;
- from that point the frontier follows the IGN line, following the watercourses where there are no crosses, passing between Kolangoldagabé (Burkina Faso) (co-ordinates 13° 43' 52.3" N, 00° 36' 14.5" E) and Lolnando (Niger) (co-ordinates 13° 43' 50.3" N, 00° 36' 49.0" E). The line leaves the hamlet known as Kolnangol Nore Ole to Niger, Gourel Manma to Burkina Faso and Pate Bolga to Niger;
- the frontier then follows the 1960 IGN line (Sebba sheet) as far as the point with co-ordinates 13° 37' 20" N, 00° 50' 47" E and then to the point with co-ordinates 13° 34' 47" N, 00° 58' 20" E, leaving to Burkina Faso the current site of Hérou Bouléba and to Niger that of Hérou Boularé;
- from there it follows the IGN line, connecting the gaps between continuous sections with straight lines, as far as the tripoint of the former boundaries of the *cercles* of Say, Tillabéry and Dori (co-ordinates 13° 29' 08" N, 01° 01' 00" E);
- from that point, the frontier runs in a straight line as far as the point having co-ordinates 13° 04' 52" N, 00° 55' 47" E, then from that point a straight line passing through a point situated 4 km to the south-west of Dogona with co-ordinates 13° 01' 44" N, 01° 00' 25" E, as far as the frontier marker with co-ordinates 12° 37' 55.7" N, 01° 34' 40.7" E, and finally from there to the point fixed by agreement between the Parties, the co-ordinates of which are the following: 12° 36' 18" N, 01° 52' 07" E.”

in the Counter-Memorial:

“The Republic of Niger requests the Court to adjudge and declare that the frontier between the Republic of Niger and Burkina Faso takes the following course:

In the Téra sector:

- starting from the Tong-Tong astronomic marker (co-ordinates: 14° 25' 04" N, 00° 12' 47" E);
- from that point: a straight line as far as the Vibourié marker (co-ordinates: 14° 21' 44" N, 00° 16' 25" E);
- from that point: a straight line as far as the Tao astronomic marker (co-ordinates: 14° 03' 02.2" N, 00° 22' 52.1" E);

- from that point the frontier follows the 1960 IGN line (Téra sheet) as far as the point having co-ordinates 14° 01' 55" N, 00° 24' 11" E;
- from that point, it runs in a straight line to the frontier point on the new Téra-Dori road (co-ordinates: 14° 00' 04.2" N, 00° 24' 16.3" E) (to the west of Petelkolé);
- from that point, it runs in a straight line to the point with co-ordinates 13° 59' 03" N, 00° 25' 12" E; and reaches the IGN line (at the point with co-ordinates 13° 58' 38.9" N, 00° 26' 03.5" E), which it follows as far as the break in the line of crosses north of Ihouchaltane (Oulsalta on the 1960 IGN map, Sebba sheet), at the point with co-ordinates 13° 55' 54" N, 00° 28' 21" E;
- from this point the frontier skirts Ihouchaltane (Oulsalta), passing through the points with co-ordinates 13° 54' 42" N, 00° 26' 53.3" E, then 13° 53' 30" N, 00° 28' 07" E;
- from that point, it rejoins the IGN line (at the point having co-ordinates 13° 53' 24" N, 00° 29' 58" E), which it follows as far as the tripoint of the former boundaries of the *cercles* of Say, Tillabéry and Dori (co-ordinates 13° 29' 08" N, 01° 01' 00" E).

Where there are gaps in the course of the IGN line, these will be filled by straight lines or, where there is a watercourse, by following its bed.

In the Say sector:

- Starting from the tripoint of the former boundaries of the *cercles* of Say, Tillabéry and Dori (co-ordinates 13° 29' 08" N, 01° 01' 00" E), the frontier runs in a straight line as far as the point having co-ordinates 13° 04' 52" N, 00° 55' 47" E (where it cuts the River Sirba at the level of the Say parallel), then from that point a straight line passing through a point situated 4 km to the south-west of Dogona with co-ordinates 13° 01' 44" N, 01° 00' 25" E, as far as the frontier marker with co-ordinates 12° 37' 55.7" N, 01° 34' 40.7" E, and finally from there to the point fixed by agreement between the Parties, the co-ordinates of which are the following: 12° 36' 18" N, 01° 52' 07" E.”

10. At the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of Burkina Faso,

At the hearing of 15 October 2012:

The submissions read at the hearing were identical to those presented by Burkina Faso in its written pleadings.

On behalf of the Government of Niger,

At the hearing of 17 October 2012:

The submissions read at the hearing were identical to those presented by Niger in its Counter-Memorial, with the exception of the following paragraph which was added:

“In accordance with Article 7, paragraph 4, of the Special Agreement, Niger also requests the Court to nominate, in its Judgment, three experts to assist our two countries as necessary in the demarcation of the common frontier.”

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* *

I. HISTORICAL AND FACTUAL BACKGROUND

11. The Court will begin with a brief description of the historical and factual background to the present case.

12. The frontier dispute between the Parties is set within an historical context marked by the accession to independence of the countries that were formerly part of French West Africa. From the beginning of the century up to the entry into force of the French Constitution of 27 October 1946, the territorial administration of French West Africa was centralized. It was headed by a governor-general and divided into colonies, whose creation or abolition fell within the executive power of the French Republic. Each of these colonies was headed by a “colonial governor” with the title of “lieutenant-governor”. The colonies were themselves made up of basic units called *cercles* which were administered by *commandants de cercle*; the creation and abolition of the *cercles* were the sole prerogative of the governor-general, who decided their overall extent. Each *cercle* in turn was composed of subdivisions, administered by *chefs de subdivision*. Finally, the subdivisions comprised *cantons*, which grouped together a number of villages. The creation and abolition of subdivisions and cantons within any particular *cercle* came within the jurisdiction of the lieutenant-governor of the colony of which the *cercle* formed part (see *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 569, para. 31).

13. By a decree dated 18 October 1904, the purpose of which was to reorganize the administration of French West Africa, the President of the French Republic established the colony of Haut-Sénégal et Niger. This newly created colony was composed of *cercles*, which were under civil administration, as well as an area under military administration called the “Military Territory of Niger”.

14. By an *arrêté* of the Governor-General of French West Africa dated 21 June 1909, Dori *cercle*, part of the Military Territory of Niger, was incorporated into the Civil Territory of Haut-Sénégal et Niger. By an *arrêté* of 22 June 1910, the region of Timbuktu and parts of Gao, Tillabéry¹ and Djerma *cercles* which also belonged to the Military Territory of Niger were incorporated into the Civil Territory of Haut-Sénégal et Niger to form the *cercles* of Timbuktu (sedentary and nomadic populations), Gourma and Say. The *cantons* of Tillabéry situated on the right bank of the River Niger were also incorporated into Dori *cercle*.

15. On 7 September 1911, the President of the French Republic issued a further decree which separated the Military Territory of Niger from the colony of Haut-Sénégal et Niger and established it as a separate administrative subdivision under the authority of the Governor-General of French West Africa.

16. By virtue of a decree of the President of the French Republic dated 1 March 1919, the *cercles* of Gaoua, Bobo-Dioulasso, Dédougou, Ouagadougou, Dori, Say and Fada N’Gourma, which had until then been part of Haut-Sénégal et Niger, were established as a separate colony with the name of Upper Volta.

17. By a decree of the President of the French Republic dated 4 December 1920, the Military Territory of Niger was turned into the Territory of Niger, with effect from 1 January 1921. It was then made an autonomous colony by decree of 13 October 1922.

18. By a decree of the President of the French Republic dated 28 December 1926, certain territories belonging to the Colony of Upper Volta, namely “Say *cercle*, with the exception of Gourmantché Botou canton”, and “[t]he *cantons* of Dori *cercle* which were formerly part of the Military Territory of Niger in the Téra and Yatacala regions, and [which] were detached from it by the *Arrêté* of the Governor-General of 22 June 1910” (see paragraph 14 above), were incorporated into the Colony of Niger. The Decree also provided that an *arrêté* of the Governor-General “shall determine the course of the boundary of the two Colonies in this area”.

19. On 31 August 1927, the Governor-General *ad interim* of French West Africa issued an *arrêté* intended to “[fix] the boundaries of the Colonies of Upper Volta and Niger”. The text of that *Arrêté* read as follows:

“Article 1

The boundaries of the Colonies of Niger and Upper Volta shall henceforth be determined as follows:

¹Also referred to by the Parties as Tillabéri.

1. Boundaries between the Tillabéry *cercle* and Upper Volta:

This boundary is determined to the north by the current boundary with Sudan (Gao *cercle*) as far as the heights of N’Gourma, and to the west by a line passing through the Kabia ford, Mount Darouskoy and Mount Balébanguia, west of the ruins of the village of Tokébangou, and Mount Doumafondé, which then turns [*s’infléchi*] towards the south-east, leaving the ruins of Tong-Tong to the east and descending in a north-south direction, cutting the Téra-Dori motor road to the west of the Ossolo Pool, until it then joins the River Sirba (boundary of Say *cercle*), near to and to the south of Boulkalo.

2. Boundaries between the Say *cercle* and Upper Volta:

The villages of Botou *canton* are excluded from this boundary.

To the north and to the east, by the current boundary with Niger (Niamey *cercle*), from Sorbohaoussa to the mouth of the River Mekrou;

To the north-west, by the River Sirba from its mouth as far as the village of Bossébangou. From this point a salient, including on the left bank of the Sirba the villages of Alfassi, Kouro, Takalan and Tankouro;

To the south-west, a line starting approximately from the Sirba at the level of the Say parallel and running as far as the Mekrou;

To the south-east, by the Mekrou from that point as far as its confluence with the Niger.

3. Boundaries of Botou *canton*:

To the west: the furthest point is marked by the intersection of the Fada-Say road with the former boundary of the two *cercles* and the Tiéguelofonou *marigot*. That point is located 1,200 m west of the village of Tchenguiliba.

From that point, the boundary turns back up towards the north, running in a straight line in a marked SSW-NNE direction.

It passes approximately 2 km west of the village of Berni-Oueli and terminates in the north approximately 2 km south of the village of Vendou Mama at the top of the northernmost spur of the Héni-Djoari (Gourma) massif or Jackal Mountain.

To the north: the boundary runs in a marked west-east direction. It passes 1 km south of Mount Tambado Djoaga, follows the course of the Dantiabonga *marigot*, passes south of Dantiandou, follows the line of the Yoga Djoaga hills as far as the confluence of the Dantiabouga and Diamoungou *marigots*, and continues along the latter up to the confluence of the Diamoungou and Boulelfonou *marigots* approximately 5 km north of the latter village;

To the north-east: the boundary follows the crests of the Djoapienga hills up to the source of the Boulelfonou *marigot*, runs up the north slope of the Tounga Djoaga massif and terminates at the point known as Niobo-Farou (Caiman Pool), a sort of broad basin, which is traversed during the dry season by the track from Botou to Fombonou;

To the east: the boundary follows the eastern crests of the Tounga Djoaga massif and runs towards the River Tapoa in a precise north-south direction. It passes approximately 5 km east of the village of Royori (a relatively dispersed farming village) and reaches the Tapoa at a point which it is not possible to define precisely;

To the south-east and to the south: the boundary follows the course of the Tapoa upstream until it meets the former boundary of the Fada and Say *cercles*.

This end-point cannot be defined, as the southern region of Botou is completely empty, and virtually unexplored.

Article 2

The Lieutenant-Governors of Upper Volta and Niger are responsible for implementing the present *Arrêté*, which shall be recorded, published and publicized in all appropriate quarters.”

20. The *Arrêté* was the subject of an Erratum dated 5 October 1927, which stated as follows:

“Article 1 of the *Arrêté* of 31 August 1927 fixing the boundaries of the Colonies of Niger and Upper Volta, published in the Official Journal of French West Africa No. 1201, of 24 September 1927, page 638, should read as follows:

Article 1

The boundaries of the Colonies of Niger and Upper Volta are determined as follows:

A line starting from the heights of N’Gouma, passing through the Kabia ford (astronomic point), Mount Arounskoye and Mount Balébangoua, to the west of the ruins of the village of Tokebangou, Mount Doumafende and the Tong-Tong astronomic marker; this line then turns [*“s’infléchit”*] towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool, and reaching the River Sirba at Bossébangou. It almost immediately turns back up towards the north-west, leaving to Niger, on the left bank of that river, a salient which includes the villages of Alfassi, Kouro, Tokalan, and Tankouro; then, turning back to the south, it again cuts the Sirba at the level of the Say parallel.

From that point the frontier, following an east-south-east direction, continues in a straight line up to a point located 1,200 m to the west of the village of Tchenguiliba.

From that point it turns back up in a straight line that runs in a marked SSW-NNE direction; it passes approximately 2 km west of the village of Birniouli and, approximately 2 km to the south of the south of the village of Vendou Mama, reaches the top of the northernmost spur of the Heni-Djourri (Gourma) massif or Jackal Mountain.

Running then in a west-east direction, it passes 1 km south of Mount Tambado Djoaga, follows the course of the Dantiabonga *marigot*, passes south of Dantiandou, follows the line of the Yoga Djoaga hills as far as the confluence of the Dantiabonga and Diamongou *marigots*, and runs along the latter as far as the confluence of the Dialongou and Boulelfonou *marigots* approximately 5 km north of the latter village.

From that point, the boundary follows the crests of the Djoapionga hills as far as the source of the Boulolfonou *marigot*, runs up the northern slope of the Tounga and Djoaga massif and terminates at the point known as Niobo-Farou (Caiman Pool), a sort of broad basin, which is traversed during the dry season by the track from Botou to Fombonou.

It is then determined by the eastern crests of the Tounga Djoaga massif, before running towards the River Tapoa in a precise north-south direction. It passes approximately 5 km east of the village of Kogori and reaches the Tapoa approximately 4 km south of the aforementioned village.

It then follows the course of the Tapoa upstream until it meets the former boundary of the Fada and Say *cercles*, which it follows as far as the point where it intersects with the course of the Mekrou.”

21. By a decree of the President of the French Republic dated 5 September 1932, the Colony of Upper Volta was dissolved and its territory was divided among Niger, French Sudan and Côte d'Ivoire. Upper Volta was subsequently reconstituted within its 1932 boundaries by Law No. 47-1707 of 4 September 1947, which abrogated the decree of 5 September 1932.

22. In 1958, the colonies of Upper Volta and Niger became, respectively, the Republic of Upper Volta and the Republic of Niger, members of the “Community” established by the French Constitution of 1958. Niger gained independence on 3 August 1960 and Upper Volta on 5 August 1960. On 4 August 1984, Upper Volta took the name Burkina Faso.

23. Following their independence, the two States concluded the Protocol of Agreement of 23 June 1964 concerning the delimitation of their common frontier. According to that Protocol, it was decided to take as basic documents for the determination of the frontier the 1927 *Arrêté*, as clarified by the Erratum of the same year, and the 1:200,000-scale map produced by the French *Institut géographique national* in 1960 (hereinafter the “IGN map” or the “1960 map”). The Protocol of Agreement also established a Joint Commission to demarcate the frontier on the ground. However, the Joint Commission did not succeed in accomplishing this task.

24. The negotiation process between the two States over the course of their common frontier was relaunched in the mid-1980s, resulting in the conclusion of the Agreement of 28 March 1987 (registered with the United Nations by Burkina Faso on 7 October 2010 under registration number I-47964), supplemented by a Protocol of Agreement of the same date (registered with the United Nations by Burkina Faso on 7 October 2010 under registration number I-47965). According to Article 1 of the 1987 Protocol of Agreement, the frontier between the two States “shall run” as described in the *Arrêté*, as clarified by the Erratum (see paragraph 64 below). Moreover, according to Article 2, common to both the Agreement and Protocol of Agreement, that frontier “shall be demarcated” following the course described in the *Arrêté*, as clarified by the Erratum. This second provision, relating to demarcation, also added that “[s]hould the *Arrêté* and Erratum not suffice, the course shall be that shown on the [IGN map], and/or any other relevant document accepted by joint agreement of the Parties”.

25. The 1987 Protocol of Agreement also created a Joint Technical Commission on Demarcation of the Frontier (hereinafter the “Joint Technical Commission”) and a Demarcation Fund, and dealt with certain questions concerning the rights of individuals affected by the demarcation. The Joint Technical Commission began its work in May 1987, and in March 1988 it set up a field team comprising 42 experts from the two States to conduct topographical work. The Joint Technical Commission held a meeting in Niamey in September 1988 to plot on a map the line resulting from the field surveys carried out by that team of experts. The Parties disagree as to the results of this meeting. Burkina Faso is of the view that the report established a “consensual line”, which was later contested by Niger on the grounds that it was contrary to both the *Arrêté* and Erratum. Niger, for its part, maintains that, while the two Parties agreed on various proposals for the frontier line in dispute, they never agreed on a “consensual line”. Furthermore, Niger contends that the provisional line proposed in 1988 has never been formalized in a binding legal instrument.

26. At the conclusion of a ministerial consultative and working meeting held in May 1991, the Minister of the Interior of Niger and the Minister for Territorial Administration of Burkina Faso issued a Joint Communiqué, dated 16 May 1991, which stated that:

- “1. From the Tong-Tong astronomic marker to the River Sirba at Bossébangou, passing through the Tao astronomic marker, the frontier shall consist of a series of straight lines.
2. From the River Sirba at Bossébangou to the River Mekrou, the course of the frontier adopted shall be that shown on the [IGN map].”

27. At a meeting of the Joint Technical Commission from 2 to 4 November 1994, however, Niger called into question the solution set forth in the Joint Communiqué on the grounds that it was not consistent with the terms of Articles 1 and 2 of the 1987 Protocol of Agreement. Burkina Faso

contested Niger's point of view during the same meeting. Thereafter, the text of the Joint Communiqué was not submitted to the ratification procedure required by Article 7 of the 1987 Agreement.

28. At the fourth ordinary session of the Joint Technical Commission, in July 2001, it was concluded, *inter alia*, that:

- “1. The frontier was clearly defined from the heights of [Mount] N’Gouma to the astronomic marker of Tong-Tong, with the exception of the ruins of Tokébangou, which the frontier passes to the west. These ruins were not identified in the course of the survey of the frontier line.

.....

2. The frontier was clearly defined from Tchenguiliba to the River Mékrou, subject to the survey team's verification of the position of the village of Kogori.
3. From the Tong-Tong astronomic marker to the River Sirba at Bossébangou, the phrase ‘this line then turns [*s’infléchi*]’ towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool, and reaching the River Sirba at Bossébangou’ has resulted in two interpretations:

(a) the frontier is composed of two (2) straight lines:

- from the Tong-Tong astronomic marker to the Tao astronomic marker;
- from the Tao astronomic marker to the River Sirba at Bossébangou.

(b) the frontier consists of a curved line, starting from the Tong-Tong astronomic marker, passing through the Tao marker and terminating at the River Sirba at Bossébangou.

.....

4. From Bossébangou to Tchenguiliba, the Commission noted problems of interpretation associated with the failure to identify the villages referred to in the Erratum and with the identification of the point at which the frontier again cuts the River Sirba at the level of the Say parallel. The technical survey team will also visit the area in order to identify these villages or their 1927 sites. The villages concerned are Alfassi, Kouro, Tokalan and Tankouro.”

29. The Joint Technical Commission consequently decided to appoint a field survey team to locate in particular the ruins of the village of Tokébangou and the villages of Kouro, Alfassi, Tokalan, Tankouro and Kogori. However, that decision was never implemented, and the

differences of opinion persisted with regard to the course of the frontier between the Tong-Tong astronomic marker and a point located 1,200 m to the west of the village of Tchenguiliba (referred to in the Special Agreement as the “beginning of the Botou bend”).

30. At a meeting held on 24 February 2009, the Governments of Burkina Faso and Niger signed the Special Agreement whereby they agreed to submit the dispute to the Court (see paragraph 1 above).

31. From 23 June to 3 July 2009, experts of the two countries conducted a joint survey mission to record the co-ordinates of the markers constructed on the Burkina Faso-Niger frontier in the sectors running from Mount N’Gouma to the Tong-Tong astronomic marker and from the beginning of the Botou bend to the River Mekrou. The results were set out in a report signed on 3 July 2009. A second joint mission was carried out in October 2009, in order to ascertain the co-ordinates of the points which had still to be marked in the two above-mentioned sectors, namely the point where the course of the Tapoa intersects with the former boundary of Fada and Say *cercles*, and the point where that boundary intersects with the course of the Mekrou. The results of this second mission were set out in a report signed on 15 October 2009.

32. In a letter of 29 October 2009, the Acting Minister for Foreign Affairs and Regional Co-operation of Burkina Faso proposed to the Minister for Foreign Affairs and Co-operation of Niger that these two reports be considered as representing the agreement (“*entente*”) between the two Governments within the meaning of Article 2 of the Special Agreement. The Niger Minister for Foreign Affairs and Co-operation replied in a letter dated 2 November 2009, in which she confirmed “the agreement of the Government of Niger to this proposal”, so that the above-mentioned letter of 29 October 2009 and her own letter “constitute[d] an agreement [*accord*] placing on record the agreement [*entente*] between Burkina Faso and the Republic of Niger on the delimited sectors of the frontier between the two countries”. Niger carried out the internal procedure to enable the ratification of the exchange of letters, informed Burkina Faso accordingly by a letter of its Minister for Foreign Affairs dated 13 February 2012 and proposed that the exchange of instruments of ratification take place as soon as possible.

33. As far as the Special Agreement is concerned, the Protocol of Exchange of the Instruments of its Ratification was signed by representatives of the two Governments on 20 November 2009. The Special Agreement itself, which entered into force on the same day, was notified to the Court on 20 July 2010. It was accompanied by the above-mentioned exchange of letters dated 29 October and 2 November 2009, under the title “Exchange of notes embodying the agreement of the Parties on the delimited sectors of the frontier” (see paragraph 1 above).

34. The Parties request the Court to settle the dispute between them regarding the course of their common frontier between the astronomic marker of Tong-Tong and the beginning of the Botou bend, on the basis of Article 2, point 1, of the Special Agreement (see paragraph 2 above) (see sketch-map No. 1). The Court will examine that dispute in Part III of the present Judgment. Before doing so, it will deal, in Part II below, with the request submitted to it by Burkina Faso, on the basis of Article 2, point 2, of the Special Agreement, regarding the two sectors of the frontier which have already been demarcated, lying north of the Tong-Tong astronomic marker and south of the beginning of the Botou bend (see sketch-map No. 1).

II. THE REQUEST CONCERNING THE TWO SECTORS RUNNING, IN THE NORTH, FROM THE HEIGHTS OF N'GOUMA TO THE TONG-TONG ASTRONOMIC MARKER AND, IN THE SOUTH, FROM THE BEGINNING OF THE BOTOU BEND TO THE RIVER MEKROU

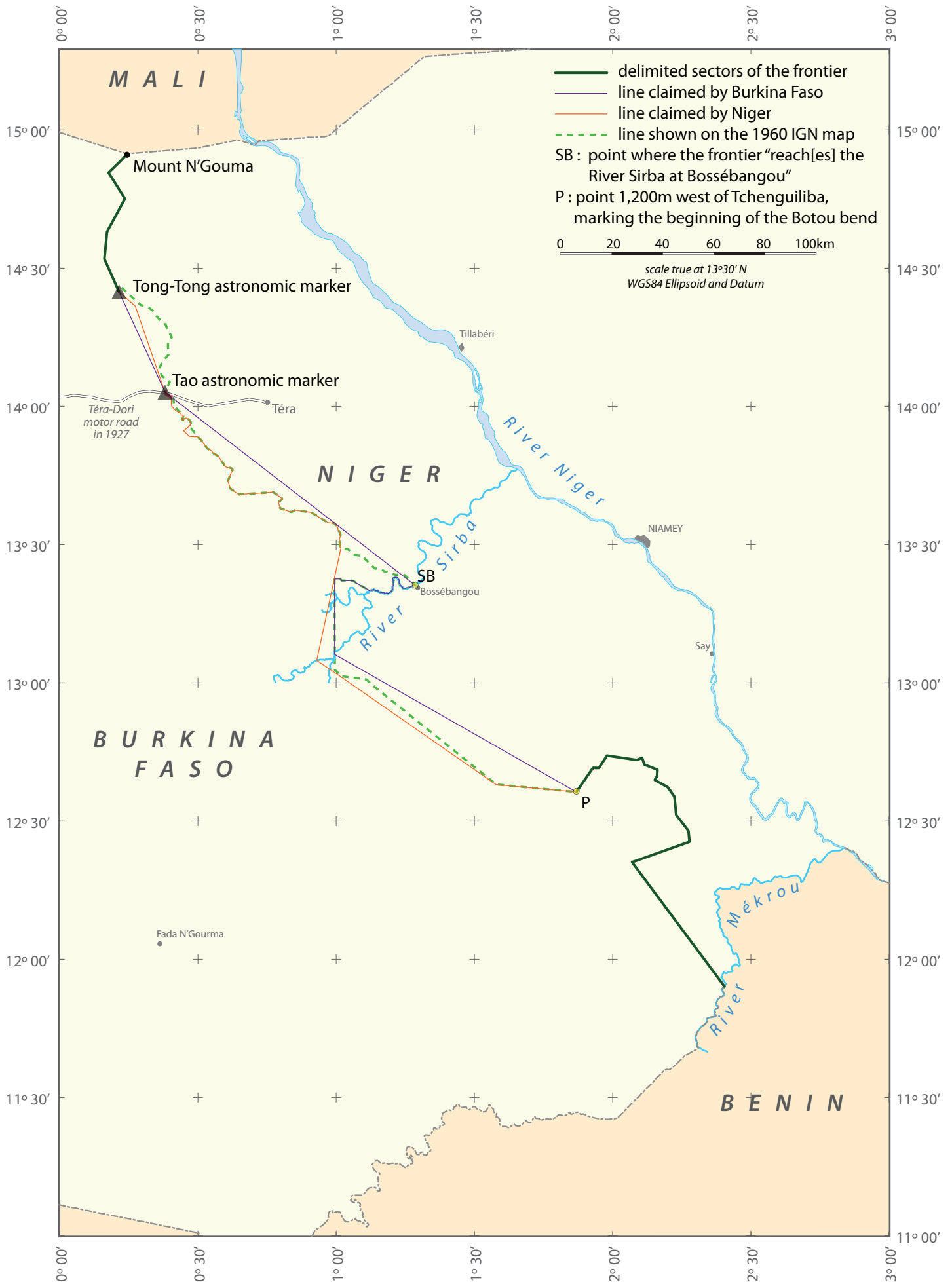
A. The request of Burkina Faso

35. In points 1 and 3 of its final submissions, Burkina Faso requests the Court to adjudge and declare that its frontier with Niger follows, in the sector situated between the heights of N'Gouma and the Tong-Tong astronomic marker, and in the sector situated between the beginning of the Botou bend and the River Mekrou, a course which consists of lines linking points whose co-ordinates it provides (see the text of the final submissions of Burkina Faso in paragraph 10 above).

36. In submitting this request, Burkina Faso does not claim that there still exists, at the present time, a dispute between itself and Niger regarding these two sectors of their common frontier. It acknowledges that the Joint Technical Commission, created by the 1987 Protocol of Agreement, reached conclusions in 2001 that were accepted by both Parties concerning the two sectors in question, situated respectively in the northern and southern parts of their common frontier. The co-ordinates of the points which Burkina Faso requests the Court to adopt in order to draw the frontier line in these two sectors correspond to those recorded in 2009 by the joint mission appointed by the two States and given the task of conducting surveys based on the work of the Joint Technical Commission relating to the sectors in question.

37. Burkina Faso nevertheless requests the Court to include in the operative part of its Judgment the line of the common frontier in the two sectors on which the Parties have agreed, so as to endow this line with the force of *res judicata*. Hence, according to Burkina Faso, the two Parties will indisputably be bound in accordance with their agreement ("*entente*") on those two sectors, in the same way that they will be bound with regard to the frontier line which the Court will determine with regard to the sector that remains in dispute.

Sketch Map 1: PARTIES' CLAIMS AND LINE DEPICTED ON THE 1960 IGN MAP *This sketch map has been prepared for illustrative purposes only*



38. In order to found the Court's jurisdiction in respect of the two sectors already demarcated by mutual agreement, Burkina Faso relies on Article 2, point 2, of the Special Agreement, under the terms of which the Court is requested to:

“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:

(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.”

B. The position of Niger

39. Without expressly asking the Court to reject the request made by Burkina Faso in points 1 and 3 of its final submissions, Niger does not join in it.

According to Niger, since there already exists an agreement between the Parties regarding the two sectors in question, there is no need for the Court to include in the operative part of its Judgment a reference to those sectors. Niger indicates that it accepted the inclusion of Article 2, point 2, in the Special Agreement for the sake of reaching an agreement that would allow the Court to be seised, and because of Burkina Faso's insistence on this point. However, it takes the view that the Court should note the agreement in question in the reasoning of its Judgment and settle the only dispute which remains between the Parties, namely that relating to the part of the frontier in respect of which the Joint Technical Commission was unable to conclude its work successfully, and on which the Parties have therefore not been able to reach agreement.

40. Consequently, in its final submissions, Niger only requests the Court to draw the frontier between the two States in the section running from the Tong-Tong astronomic marker to the point which both Parties have identified as the “beginning of the Botou bend”. Niger's final submissions thus correspond, in fact, to Article 2, point 1, of the Special Agreement.

C. Consideration by the Court

41. The Court first recalls that even when it is seised on the basis of a special agreement concluded between the two States that appear before it, it is always required to rule on the final submissions of the parties as formulated at the close of the oral proceedings. There is no difference in this respect between cases where the Court is seised by means of a unilateral application and those where it is seised by a special agreement.

42. However, in cases where the special agreement forms the only basis of jurisdiction, it goes without saying that any request made by a party in its final submissions can fall within the jurisdiction of the Court only if it remains within the limits defined by the provisions of the special agreement, a matter which is for the Court to ascertain.

43. In this respect, the Court observes that the request contained in points 1 and 3 of the final submissions of Burkina Faso does not exactly correspond to the terms of the Special Agreement. Indeed, Burkina Faso does not request the Court to “place on record the Parties’ agreement” (“*leur entente*”) regarding the delimitation of the frontier in the two sectors concerned, but rather to delimit itself the frontier according to a line that corresponds to the conclusions of the Joint Technical Commission upon which the two Parties have agreed. Although the final outcome is equivalent in substance as regards the line itself, Burkina Faso’s request is not the same in nature as that contained in Article 2, point 2, of the Special Agreement: it is one thing to note the existence of an agreement between the Parties and to place it on record for them; it is quite a different matter to appropriate the content of that agreement in order to make it the substance of a decision of the Court itself. Taken literally, Burkina Faso’s request could therefore be rejected as exceeding the limits of the Court’s jurisdiction as defined by the Special Agreement.

44. It is true, however, that the Court has the power to interpret the final submissions of the Parties in such a way as to maintain them, so far as possible, within the limits of its jurisdiction under the Special Agreement. In the present case, without dwelling on their precise language, it would be possible to interpret points 1 and 3 of the final submissions of Burkina Faso as seeking that the Court place on record the agreement of the Parties. Taken in that way, this request would remain within the limits of the jurisdiction which the Special Agreement conferred upon the Court in the present case.

45. Nevertheless, that would not necessarily be sufficient for the Court to be able to entertain such a request. It would still have to be verified that the object of this request falls within the Court’s judicial function, as defined by its Statute.

As the Court has already had occasion to state in a different context, but in terms that have a general scope:

“even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court’s judicial integrity.” (*Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963, p. 29.*)

46. These considerations are perfectly applicable to the present case, despite the fact that, unlike in the *Northern Cameroons* case, the Court has been seised by means of a special agreement. A special agreement allows the parties to define freely the limits of the jurisdiction, *stricto sensu*, which they intend to confer upon the Court. It cannot allow them to alter the limits of the Court’s judicial function: those limits, because they are defined by the Statute, are not at the disposal of the parties, even by agreement between them, and are mandatory for the parties just as for the Court itself.

47. In the light of the foregoing, the Court must determine whether the object of the request contained in Article 2, point 2, of the Special Agreement falls within the judicial function attributed to the Court by its Statute.

48. In contentious cases, the function of the Court, as defined in Article 38, paragraph 1, of the Statute, is to “decide in accordance with international law such disputes as are submitted to it”. Consequently, the requests that parties submit to the Court, must not only be linked to a valid basis of jurisdiction, but must also always relate to the function of deciding disputes. As the Court has already indicated, also in a context different from that of the present case:

“The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function.” (*Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, pp. 270-271, para. 55; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 476, para. 58.)

49. It is for the Court to determine objectively whether there is a dispute, without being bound in that respect by the assertions of the parties (*ibid.*, paras. 55 and 58).

50. In the present case, the Court’s task is all the more straightforward since neither of the two Parties claims, or has ever claimed, that a dispute continued to exist between them concerning the delimitation of the frontier in the two sectors in question on the date when the proceedings were instituted — nor that such a dispute has subsequently arisen. The absence of a dispute is amply confirmed by the documents in the case file. The Special Agreement, duly ratified by both Parties (see paragraph 33 above), states in the clearest manner that “thanks to the work of the Joint Technical Commission on Demarcation . . . , the Parties have been able to reach agreement [*s’accorder*] in respect of [these] sectors of the frontier”. It further states that “the two Parties accept the results of the work carried out in those sectors as definitive”. Article 2, point 2, which was previously cited, provides that the Court be requested to “place on record the Parties’ agreement [*leur entente*]” on the results of the work of the Commission with regard to these two sectors. To affirm that the Parties have “reach[ed] agreement” (*[se sont] accord[ées]*), or that there is an “agreement” (*entente*) between them, necessarily signifies that there is no longer any dispute between them on the subject-matter of that “agreement” (*entente*).

51. If the Parties have appeared to argue differently, it is on the question of whether the “*entente*” referred to in Article 2, point 2, of the Special Agreement has already resulted in an agreement which is legally binding for the two Parties under international law.

Niger has maintained, in particular in reply to a question put by a Member of the Court during the hearings, that “[t]he agreement between the two States on the demarcated sectors was definitively reached”. It has however stated that the exchange of letters of 29 October and 2 November 2009 was not yet legally binding between the Parties, but that it was up to Burkina Faso for its part to follow the necessary ratification procedure, should it wish the said agreement to become a binding legal instrument between itself and Niger.

Burkina Faso has appeared to cast doubt on the existence, at the present time, of a legally binding agreement. It has contended that the term used in Article 2, point 2, of the Special Agreement is “*entente*” in French, which is not precisely synonymous with the word “*accord*” (agreement), that it has not yet ratified, in accordance with Article 7 of the 1987 Agreement, the “*entente*” between the Parties constituted by the exchange of letters of 29 October and 2 November 2009, and that only once this *entente* has been “placed on the record” by the Court will the frontier dispute “be completely resolved”.

52. In the opinion of the Court, the decisive question is whether a dispute existed between the Parties concerning these two sectors on the date when the proceedings were instituted, and the answer to that question is indisputably negative, for the reasons which have just been set forth.

53. It matters little, from the point of view of the judicial function of the Court, whether or not the “*entente*” reached by the Parties has already been incorporated into a legally binding instrument. If such an instrument had already entered into force between the Parties, it would not be for the Court to record that fact in the operative part of a Judgment, since such a pronouncement would lie outside its judicial function, which is to decide disputes. And if the legal instrument embodying the “*entente*” had not yet entered into force, it would not be for the Court to substitute itself for the Parties: since they both recognize that they have found some common ground, it is for them, if need be, to take any step which remains necessary for that agreement to enter into force. A judicial decision may not be requested in this way as a substitute for the completion of the treaty-making process between States. Furthermore, since there is an obligation to comply both with international agreements and with Judgments of the Court, the “force of *res judicata*” with which, according to Burkina Faso, the delimitation effected in the two sectors in question would be endowed if the Court acceded to its request would not reinforce the binding character of that delimitation.

54. Burkina Faso cites two precedents, in which it claims that the Permanent Court of International Justice consented to record, in the actual operative part of a Judgment, an agreement concluded between the parties.

55. However, the Court considers that those precedents are not relevant, since they both contemplate situations in which an agreement is reached between the parties during the proceedings, and not a situation in which the dispute had been resolved between the parties before seising the Court.

56. In the Order that it made on 6 December 1930 in the case concerning *Free Zones of Upper Savoy and the District of Gex (Second Phase)*, the Permanent Court of International Justice took the view that “there seems nothing to prevent the Court from embodying in its judgment an agreement previously concluded between the Parties; as a ‘judgment by consent’, though not expressly provided for by the Statute, is in accordance with the spirit of that instrument” (*P.C.I.J., Series A, No. 24*, p. 14). However, as the context of this assertion shows beyond all doubt, the

Permanent Court had in mind the possibility of an agreement which the Parties might conclude during the proceedings, pursuant to the particular terms of the Special Agreement in that case, thereby putting an end to all or part of the original dispute between them, i.e., the dispute which the institution of the proceedings was intended to bring before that Court.

57. The same applies to the Judgment rendered in the case concerning *Société Commerciale de Belgique* (Judgment, 1939, P.C.I.J., Series A/B, No. 78, p. 178). In that case, the Permanent Court stated in the operative clause that it “not[ed] the agreement between the Parties” with regard to the definitive and obligatory character of the arbitral awards made previously between the Greek Government and the *Société commerciale de Belgique*, awards whose execution lay at the heart of the dispute submitted to that Court. The agreement in question was arrived at during the proceedings, as a consequence of declarations of the Greek Government acknowledging the obligatory character of the financial awards made against it, declarations which Belgium treated as “changing the character of the dispute”, leading it to withdraw part of its original submissions. In these circumstances, it is understandable that the Permanent Court formally noted, in the operative part of its Judgment, the agreement arrived at between the Parties during the proceedings, an agreement whose existence was bound to influence the settlement on the merits of the dispute originally brought before the Court.

58. In the circumstances of the present case, it is not necessary for the Court to rule on such a possibility. What the Special Agreement provides for is that the Court should place on record the “*entente*” reached by the Parties at the end of their negotiations, before the proceedings were instituted. According to Burkina Faso, this should be included in the operative part of the Judgment. But for the reasons explained above, the Court considers that such a request is not compatible with its judicial function.

59. Thus, the only dispute which remained between the Parties on the date when the proceedings were instituted, and which continues to exist, has as its subject-matter the course of the common frontier between the Tong-Tong marker and the beginning of the Botou bend, that is, the sector on which the Joint Technical Commission was unable to conclude its work successfully and in respect of which the Parties have presented the Court with different solutions. It is this sector which will be examined in the remainder of this Judgment; only this sector will be delimited in the operative clause of the Judgment.

III. THE COURSE OF THE SECTION OF THE FRONTIER REMAINING IN DISPUTE

A. Applicable law

60. Since the Court is required to rule on the delimitation of the frontier remaining in dispute, it must first determine the relevant applicable law.

61. Article 6 of the Special Agreement, entitled “Applicable law”, stipulates:

“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.”

62. The reference to Article 38, paragraph 1, of the Statute of the Court clearly indicates that the rules and principles mentioned in that provision of the Statute must be applied to any question that it might be necessary for the Court to resolve in order to rule on the dispute.

63. Amongst the rules of international law applicable to the dispute, the above-mentioned provision of the Special Agreement highlights “the principle of the intangibility of boundaries inherited from colonization and the Agreement of 28 March 1987”.

A reference to the principle of intangibility of boundaries inherited from colonization also appeared in the preamble to the Special Agreement on the basis of which the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* was brought before the Court. The Chamber of the Court which dealt with the case concluded that it could not “disregard the principle of *uti possidetis juris*, the application of which gives rise to this respect for intangibility of frontiers” (*Judgment, I.C.J. Reports 1986*, p. 565, para. 20).

The wording used in the Special Agreement in the present case is similar to the text of resolution AGH/Res. 16 (I) adopted in Cairo in 1964 at the first session of the Conference of African Heads of State and Government, whereby the Conference declared that all member States of the Organization of African Unity “solemnly . . . pledge themselves to respect the borders existing on their achievement of national independence”. Subsequently, Article 4 (*b*) of the Constitutive Act of the African Union laid down the principle of “respect of borders existing on achievement of independence”.

The two Parties have consistently invoked in their pleadings either the principle of the intangibility of boundaries inherited from colonization or the *uti possidetis juris* principle. Thus, the Parties referred to the boundaries as they existed between the two French overseas territories in question, Niger and Upper Volta, on the dates — which are very close to each other — on which the two Parties gained independence (3 and 5 August 1960, respectively).

64. In the present case, the Special Agreement provides specific indications as to the way in which the principle of the intangibility of boundaries inherited from colonization must be applied. Article 6 of the Special Agreement requires the application of “the Agreement of 28 March 1987” (hereinafter the “1987 Agreement”), which binds the two Parties and the objective of which is, according to its title, “the demarcation of the frontier between the two countries”. The first two articles of this Agreement are also reproduced word for word in a recital of the Special Agreement (see paragraph 2 above), which demonstrates the importance the Parties attach to those provisions for the settlement of the dispute between them. They read 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 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.”

In one of the two original texts of the 1987 Agreement, a copy of which was submitted to the Court by the Parties, the reference to the *Arrêté* in Article 1 is not accompanied by a reference to the Erratum. However, that omission is probably due to an oversight, as demonstrated by the recital of the Special Agreement which, like the other original text of the same Agreement, reproduces the words “as clarified by the Erratum of 5 October 1927”. Only with the addition of those words is the text of Article 1 coherent with that of Article 2. Moreover, neither Party contested the fact that the 1987 Agreement refers to the *Arrêté* as clarified by its Erratum.

65. Although the aim of the 1987 Agreement is the “demarcation of the frontier” between the two countries through the installation of markers, it lays down first of all the criteria that must be applied to determine the “course” of the frontier. Those criteria are thus also relevant to the sectors that the Joint Technical Commission was unable to demarcate. The 1987 Agreement specifies the acts and documents of the French colonial administration which must be used to determine the delimitation line that existed when the two countries gained independence.

66. In this regard, the 1987 Agreement accords particular importance to the *Arrêté* of 31 August 1927, as clarified by its Erratum of 5 October 1927. This is the *Arrêté* “fixing the boundaries of the colonies of Upper Volta and Niger”, issued by the Governor-General of French West Africa on the basis of a decree of the President of the French Republic of 28 December 1926, in which it was indicated: “[a]n *arrêté* of the Governor-General in Standing Committee of the Government Council shall determine the course of the boundary of the two Colonies in this area”. As the Chamber of the Court emphasized in the case concerning the *Frontier Dispute (Benin/Niger)*, “the *uti possidetis juris* principle requires not only that reliance be placed on existing legal titles, but also that account be taken of the manner in which those titles were interpreted and applied by the competent public authorities of the colonial Power” (*Judgment, I.C.J. Reports 2005*, p. 148, para. 140). It follows from the 1987 Agreement that the *Arrêté* as clarified by its Erratum is the instrument to be applied for the delimitation of the boundary. It has to be interpreted in its context, taking into account the circumstances of its enactment and implementation by the colonial authorities. As to the relationship between the *Arrêté* and its

Erratum, the Court observes that, since the purpose of the Erratum is to correct the text of the *Arrêté* retroactively, it forms an integral part of the latter. For that reason, whenever reference is made to the “*Arrêté*” in the remainder of the present Judgment, that will signify, unless otherwise indicated, the wording of the *Arrêté* as amended by the Erratum.

67. Article 2 of the 1987 Agreement provides for the possibility of “the *Arrêté* and Erratum not suffic[ing]” and establishes that, in that event, “the course shall be that shown on the 1:200,000-scale map of the *Institut géographique national de France*, 1960 edition” or resulting from “any other relevant document accepted by joint agreement of the Parties”. The Parties do not consider, however, that they have accepted any relevant document other than the IGN map. According to the 1987 Agreement, that map may only be used on an alternative basis, should the *Arrêté* “not suffice”. The 1987 Agreement implies that the requirement of having recourse to the IGN map should the *Arrêté* prove insufficient is applicable not only to a delimitation, but also to a demarcation, as both Parties acknowledged in their pleadings. It is primarily in relation to the interpretation of the wording of Article 2 of the 1987 Agreement and its application to the present dispute that the Parties express differing views. Burkina Faso contends that the *Arrêté* can be considered not to suffice only in relation to a single section of the frontier, while Niger stresses the imprecise and vague nature that it claims characterizes the *Arrêté*, which even contains, in its view, certain errors. The questions of interpretation and application that divide the Parties will, in so far as necessary, be considered by the Court when it rules on delimitation in the various unmarked sections of the frontier.

68. Although it was drawn up under the auspices of the administration of French West Africa, the IGN map is not an official document. In the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, the Chamber of the Court observed that, in general, “[w]hether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case” (*Judgment, I.C.J. Reports 1986*, p. 582, para. 54). However, concerning the IGN map in question, the Chamber considered that, “having regard to the date on which the surveys were made and the neutrality of the source” and in a situation “where all other evidence is lacking, or is not sufficient to show an exact line, the probative value of [this] map becomes decisive” (*ibid.*, p. 586, para. 62). In the present case, by virtue of Article 2 of the 1987 Agreement, the line shown on the IGN map is always of decisive value, where the *Arrêté* does not suffice. The role thus accorded to the map may be explained by the fact that, as evidenced by a Note compiled by the IGN on 27 January 1975, the frontier has been outlined on the map “in the light of information supplied by the heads of the frontier districts and according to information gathered on the spot from the village chiefs and local people” (*ibid.*, p. 586, para. 61). As Niger points out, though it draws only partial conclusions in this respect, the IGN map is supposed to reflect the colonial *effectivités* at the critical date. However, under the 1987 Agreement, the frontier line drawn on the IGN map must be referred to on a subsidiary basis even if it does not correspond to those *effectivités*.

69. When recourse is had to the IGN map², it should be borne in mind that the frontier line is marked on it, according to convention, by discontinuous lines of crosses. It is nonetheless easy to complete the line by joining the points where it stops and then starts again. Generally, there is no reason not to use straight-line segments for this purpose. However, when the crosses follow a river or the ridge of a hill, the line must continue along that river or that ridge.

B. The course of the frontier

70. As noted above, in order to determine the course of the frontier, recourse must first be had to the *Arrêté*, pursuant to the 1987 Agreement, referred to in the Special Agreement.

As regards the section of the frontier that remains to be delimited, the *Arrêté* describes in the following terms the new inter-colonial administrative boundary between Niger and Upper Volta that it determines:

“[From the Tong-Tong astronomic marker] this line then turns [*s’infléchi*] towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool, and reaching the River Sirba at Bossébangou. It almost immediately turns back up towards the north-west, leaving to Niger, on the left bank of that river, a salient which includes the villages of Alfassi, Kouro, Tokalan, and Tankouro; then, turning back to the south, it again cuts the Sirba at the level of the Say parallel.

From that point the frontier, following an east-south-east direction, continues in a straight line up to a point located 1,200 m to the west of the village of Tchenguiliba.”

71. Following the line thus described, the Court will examine in turn the various sections of the frontier which remain in dispute between the Parties:

- (1) that which runs from the Tong-Tong astronomic marker to the Tao astronomic marker;
- (2) that which runs from this latter point to the River Sirba at Bossébangou;
- (3) that which runs from this point to the intersection of the Sirba with the Say parallel;
- (4) and, lastly, that which runs from this latter point to the point located 1,200 m to the west of the village of Tchenguiliba, which the Special Agreement refers to as “the beginning of the Botou bend” (see sketch-map No. 1).

²The IGN map was drawn up on the basis of the Clarke 1880 ellipsoid, which was then in common usage. The Court, for its part, is using the 1984 World Geodetic System datum (WGS 84) for the purposes of the present Judgment. Hence, the co-ordinates provided by the Court for various points of the frontier line have been established on the basis of the WGS 84 datum, even where those points are determined by reference to the IGN map.

Given the scale of the IGN map, the said co-ordinates may be subject to a certain margin of error. In any event, the indications given in wording in the Judgment shall prevail.

1. The course of the frontier between the Tong-Tong and Tao astronomic markers

72. The Parties agree that, in accordance with the *Arrêté*, which in this regard is deemed to describe the inter-colonial administrative boundary in force at the critical date of independence, their common frontier connects the two points at which the Tong-Tong and Tao astronomic markers are respectively situated. They are also in agreement on the location of the Tong-Tong astronomic marker, whose co-ordinates are fixed in the Special Agreement at 14° 25' 04" latitude North and 00° 12' 47" longitude East. As regards the Tao astronomic marker, the Parties give it slightly different co-ordinates in their final submissions: 14° 03' 04.7" N, 00° 22' 51.8" E, according to Burkina Faso; 14° 03' 02.2" N, 00° 22' 52.1" E, according to Niger. It is not necessary for the Court to fix the precise co-ordinates of the Tao astronomic marker; since the Parties do not disagree on the identification or the location of this marker, it will be for them to determine its precise co-ordinates together during the demarcation operations.

73. The Parties disagree as to how to connect the two points at which the astronomic markers in question are situated. According to Burkina Faso, these points should be connected by a straight line. According to Niger, the two astronomic markers in question should be connected by two straight-line segments, one running from the Tong-Tong marker to the Vibourié marker, situated a few kilometres to the east of the straight line claimed by Burkina Faso, the other running from the Vibourié marker to the Tao marker (see sketch-map No. 1).

74. The Court notes that, in the sector in question, neither Party proposes to adopt the line on the IGN map, which corresponds neither to a straight line nor to a broken line passing through the Vibourié marker. This implies that both Parties consider that the 1927 *Arrêté* is not insufficient in this sector. They differ, however, as to its interpretation. The Court also observes that this sector is the only one in which each Party claims a line which would give more territory to the other, so that the territory situated in the triangle delimited by the lines proposed by the Parties is not claimed by either of them. However, the principle whereby the Court does not rule *ultra petita* does not prevent it, in this case, from attributing that territory to one or the other Party, since the Special Agreement entrusts it with the task of fully determining the course of the frontier between the Tong-Tong astronomic marker and the beginning of the Botou bend.

75. Burkina Faso's argument relies on the idea that, when the author of the *Arrêté* indicated that the inter-colonial boundary passed through two points, without specifying how those two points were connected, he should be considered to have intended them to be joined by a straight line.

76. Niger's argument is primarily based on a Record of Agreement ("*procès-verbal*") of 13 April 1935 established by the Administrator of Dori *cercle* and the official responsible for the Téra subdivision, with a view to settling a land dispute between the inhabitants of Dori and those of

Téra. Referring to the 1927 *Arrêté*, the two co-signatories assert that, in 1927, the inter-colonial boundary followed “a notional straight line starting from the Tong-Tong astronomic marker and running to the Tao astronomic marker” and state that they have established a marker at Vibourié located on that straight line and designed to demarcate the boundary between the two districts, “in order to prevent any similar further territorial dispute in this area”. According to Niger, even if Vibourié is not located on the course of the straight line connecting Tong-Tong with Tao, the marker established at Vibourié was, *de facto*, a marker of the boundary between the two colonies, thereby constituting an *effectivité* to be taken into account by the Court as a means of interpreting the *Arrêté* in the light of the subsequent practice of the colonial administrative authorities.

77. The Court is not convinced by Niger’s arguments. It first notes that the 1935 Record of Agreement was drawn up at a time when Upper Volta no longer existed, having been dissolved as a separate colony in 1932, so that the boundary that the two administrators sought to define in 1935 was purely internal to one colony (Niger). Only when Upper Volta was re-established in 1947 within its previous boundaries could the Vibourié marker have acquired a certain relevance on the basis of the effective practice of the colonial administration as regards the fixing of the inter-colonial boundary. However, Niger has failed to adduce any evidence to establish that, after 1947, and more specifically at the critical date of 1960, the Vibourié marker was regarded in practice as marking the boundary between Upper Volta and Niger.

78. Above all, it is clear that the establishment of the Vibourié marker was the result of a topographical error, because the authors of the Record of Agreement, who agreed that the *Arrêté* should be interpreted as drawing a straight line between Tong-Tong and Tao, mistakenly believed that Vibourié was situated on that straight line (see paragraph 76 above).

While an *effectivité* may enable an obscure or ambiguous legal title to be interpreted, it cannot contradict the applicable title.

79. The Court concludes from the foregoing that the colonial administration officials interpreted the *Arrêté* as drawing, in the sector in question, a straight line between the Tong-Tong and Tao astronomic markers. In so far as Niger proposes to take account of the location of the Vibourié marker on the basis of the *effectivités* of the colonial period, it fails to demonstrate the existence of such an *effectivité* at the critical date of independence, and, furthermore, such an *effectivité* could not, in any event, have overridden the legal title constituted by the 1927 *Arrêté*.

Therefore, a straight line connecting the Tong-Tong and Tao astronomic markers should be regarded as constituting the international frontier between Burkina Faso and Niger in the sector in question.

2. The course of the frontier between the Tao astronomic marker and the River Sirba at Bossébangou

80. As regards the section of the frontier running from the Tao astronomic marker to the River Sirba at Bossébangou, the *Arrêté* confines itself to stating, without any further details, that the “line . . . turns [*s’infléchit*] towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker . . . , and reaching the River Sirba at Bossébangou”. The indications on how to connect the Tao marker to “the River Sirba at Bossébangou” are therefore no more precise than those concerning the course of the line connecting the Tong-Tong marker to the Tao marker, the issue dealt with in the previous paragraphs. The Parties draw quite different conclusions from this laconic character of the *Arrêté*.

81. Burkina Faso, maintaining the line of argument which it has adopted throughout the proceedings, contends that, since the author of the *Arrêté* did not specify how to connect the two points mentioned by him in turn, it must be understood that he intended those two points to be connected by a straight line. It would only be otherwise, according to Burkina Faso, if there were a very particular reason to suppose that that had not been the intention of the author of the *Arrêté*, which is not the case in this instance. According to Burkina Faso, it is therefore a straight line that must run from the Tao astronomic marker to the River Sirba at Bossébangou, just as — and for the same reason — it is a straight line that constitutes the frontier between the Tong-Tong and Tao astronomic markers (see sketch-map No. 1).

82. According to Niger, “the *Arrêté* and *Erratum* [do] not suffice” within the meaning of the 1987 Agreement, to which the Special Agreement refers, in the section of the frontier in question, since the *Arrêté* is silent on how to connect the two points situated at the ends of that section. Consequently, according to Niger, it is necessary in principle to follow the line as drawn on the 1960 IGN map, which is not a straight line but a sinuous one. However, Niger considers that it is necessary to deviate in part from the IGN map in two respects. Firstly, it contends that there should be a slight deviation to the west of the line shown on the 1960 IGN map in two segments corresponding to the Petelkolé frontier post and to the Oussaltane³ encampment, so as to leave those two localities in Niger’s territory, whereas the IGN map locates them on the Upper Volta side of the inter-colonial boundary. According to Niger, this is to give precedence to the *effectivités* as observed at the end of the colonial period, namely at the critical dates of independence.

Secondly, according to Niger, the frontier line in this sector should not run to Bossébangou, but should descend only as far as a point situated some 30 km to the north-west of Bossébangou, and from that point turn towards the south-west, thereby leaving an extensive area around Bossébangou entirely in Niger’s territory. In this regard, the argument put forward by Niger amounts to a departure from both the 1927 *Arrêté* and the 1960 IGN map (see sketch-map No. 1).

83. The Court will begin by considering the question of the endpoint of the section of the frontier presently under consideration. In this regard, the Court is unable to accept Niger’s position.

³Also referred to by the Parties as Ihouchaltane, Ouchaltan, Ousalta, Ousaltan and Oulsalta.

84. That position is based essentially on the assertion that the author of the *Arrêté* inadvertently departed from the Decree of 28 December 1926, that he was supposed to implement, by continuing the line as far as “the River Sirba at Bossébangou” instead of stopping it some 30 km to the north-west of Bossébangou, at the point where it meets the intersection of the three *cercles* of Dori, Tillabéry and Say, in order for it then to turn towards the south-west. Indeed, according to Niger, by continuing the line as far as Bossébangou, the author of the *Arrêté* followed the boundary separating the *cercles* of Tillabéry and Say, each of which was situated in Niger, that being a boundary within one colony, and not the inter-colonial boundary separating Niger and Upper Volta. According to Niger, that was surely not his intention, and nor could it have been, given that the *Arrêté* had to comply with the terms of the Decree of 28 December 1926. In short, according to Niger, the *Arrêté* is vitiated on this point by a material error which renders it incompatible with the Decree that it is meant to implement.

85. Whatever the merits of the above analysis, it must be observed that, on this point, what Niger is asking of the Court is not to interpret the *Arrêté* in order to apply it according to the meaning which must be attributed to it, but indeed to disregard its clear terms on the grounds that it is vitiated by a material error, and that it is perhaps legally flawed.

As noted above (see paragraphs 64 to 67), the Court is obliged under the terms of the Special Agreement to apply the 1927 *Arrêté*, as amended by its Erratum, unless it is insufficient. The Court can and must interpret the *Arrêté*, in so far as it requires an interpretation, but it cannot disregard it, even on the grounds that it is allegedly contrary to the Decree which constituted the legal basis for its adoption. Consequently, the Court can only find that the *Arrêté*, both in its initial version and in that resulting from the Erratum — the latter being the only relevant one —, provides *expressis verbis* that the inter-colonial boundary continues as far as the River Sirba. If this reference had been the result of a material error, the Governor-General could have corrected the error thus made by publishing a new erratum; but the fact is that he did not do so. Whether or not the *Arrêté* contradicts the Decree because of that alleged mistake is a question which it is not for the Court to enter into, because, as noted above, it is bound by the terms of the *Arrêté* pursuant to the Special Agreement. In conclusion, the Court can only find that the frontier line necessarily reaches the River Sirba at Bossébangou; the question of where exactly the frontier reaches the river or the village will be considered in the following subsection (3).

86. The Court now turns to the question of how the “Tao astronomic marker” is to be connected to “the River Sirba at Bossébangou” in order to draw the frontier.

87. Without ruling, from a general point of view, on the value of Burkina Faso’s argument that “a delimitation text indicating, without any indication to the contrary, that a line passes through two points is interpreted as specifying a boundary in the form of a straight line connecting those two points”, the Court considers that in this case there are several reasons not to adopt such an approach.

88. First, it should be observed that, after the section that is currently being considered, the *Arrêté* specifies on two occasions that the boundary defined by it is a straight line. It does so first in the southernmost part of the frontier that remains to be delimited, when it states that, from the intersection of the Sirba with the Say parallel, the boundary, “following an east-south-east direction, continues in a straight line up to a point” which the Parties describe as the beginning of the Botou bend. It does so subsequently in the already demarcated section of the frontier situated to the south of the Botou bend, when it states that, from this latter point, the boundary “turns back up in a straight line that runs in a marked SSW-NNE direction”. It is clear that if it were always true, as Burkina Faso contends, that the indication of two points, without any further details, must be interpreted as meaning that those two points are connected by a straight line, the author of the *Arrêté* would not have needed to specify in respect of certain sections of the boundary that they followed a straight line. This is not necessarily enough to exclude the possibility that, in the section here under consideration, the inter-colonial boundary followed a straight line (as is indeed the case in the section running from the Tong-Tong astronomic marker to the Tao astronomic marker, examined above). Nevertheless, the fact that the provisions specifying that certain sections consist of straight lines appear in the same document as those providing no precise details in respect of other sections, weakens Burkina Faso’s argument that the latter provisions, solely by virtue of that lack of detail, should necessarily be interpreted as drawing a straight line.

89. Secondly, the Court considers that account should be taken of the fact that the *Arrêté* was issued on the basis of the Decree of the President of the French Republic of 28 December 1926 “transferring the administrative centre of the Colony of Niger and providing for territorial changes in French West Africa”. This decree thus constitutes an important element of the context within which the *Arrêté* was issued.

90. In this connection, it should be noted that the object of the Decree of 28 December 1926 was twofold.

In the first place, its *raison d’être* was to transfer certain *cercles* and *cantons* from the Colony of Upper Volta to the Colony of Niger (see paragraph 18 above).

It then empowered the Governor-General of French West Africa to draw the new inter-colonial boundaries between Niger and Upper Volta.

91. The task entrusted to the Governor-General was therefore to plot the new inter-colonial boundary by drawing the implications of the transfers effected, that is to say, by respecting the pre-existing boundaries of the districts, to the extent that they could be determined.

92. The Governor-General, seeking to identify the boundaries of the districts moved by the Decree, delegated to the Lieutenant-Governors of Upper Volta and Niger the task of demarcating on the ground the boundaries of the *cantons* and *cercles* in question. Thus on 2 February 1927, Mr. Lefilliatre, Inspector of Administrative Affairs, representing the Lieutenant-Governor of Upper Volta, and Mr. Brévié, Lieutenant-Governor of Niger, signed a Record of Agreement. As regards the section of the frontier running from Tao to Bossébangou, this Record uses a wording that was reproduced in identical terms in the *Arrêté* of the Governor-General of 31 August 1927, and which

is not substantially different from that which appears in the Erratum of 5 October 1927. However, the colonial administrators responsible for the matter were aware of the inadequacy of that wording, which failed to indicate the line by which Tao and Bossébangou were to be joined. This is evidenced by the fact that, during the months which followed, the Lieutenant-Governor of Upper Volta continued to ask the officials under his authority for additional information that would make it possible to define precisely the inter-colonial boundary. In particular, by a telegram/letter of 27 April 1927, that is to say two and a half months after the Lefilliatre-Brévié Record of Agreement was drawn up, the Lieutenant-Governor of Upper Volta asked the *commandants* of Dori and Fada *cercles* to provide him with “precise information to enable [the] preparation [of the] *Arrêté général* fixing new boundaries” between the two colonies, emphasizing that it was “essential that [the] course be determined on [the] ground” so as to avoid any “need [for] subsequent correction”, and that the “[r]esults [of the] work [be] recognized and accepted by [the] Heads [of] both adjacent Colonies” with a view to their “be[ing] forwarded [to] Dakar”.

As noted above, the *Arrêté* of 31 August 1927 reproduced the imprecise wording of the Record of Agreement of 2 February 1927, and the Erratum of 5 October of the same year provided no further details. The uncertainty as to the course of the inter-colonial boundary persisted, as demonstrated by the subsequent colonial practice (see paragraphs 94-95 below).

93. The Court concludes from the foregoing that the Governor-General sought, with the assistance of the Lieutenant-Governors of the two colonies, to determine the inter-colonial boundary by identifying those pre-existing boundaries of the *cercles* and *cantons* for which there is no indication that they followed a straight line in the sector in question. The Court observes that, in such a case, it would have been easy to plot this line on a map.

This contradicts Burkina Faso’s argument that the *Arrêté*’s silence in the sector in question as to how to connect the two points mentioned in the text must be understood as signifying that the Governor-General intended the inter-colonial boundary to be represented by a straight line.

94. Thirdly, account should be taken of the practice followed by the colonial authorities concerning the implementation of the *Arrêté* with respect to the village of Bangaré. According to Niger, this village, situated approximately in the middle of the sector in question and of some importance, was consistently regarded as belonging to Niger during the colonial period, and in any event at the critical dates of independence. Niger nevertheless observes that the straight line advocated by Burkina Faso would leave Bangaré on the Burkina side of the frontier.

95. The Court notes that, although the documents in the case file which are contemporaneous with the 1927 *Arrêté* do not clearly establish that the village of Bangaré was regarded at that time as belonging to Niger, there are sufficient subsequent documents to establish that, during the relevant colonial period and until the critical date of independence, Bangaré was administered by the authorities of the Colony of Niger.

This consideration supports the conclusion that the 1927 *Arrêté* should not be interpreted, and in fact was not interpreted in the colonial period, as drawing a straight line between Tao and Bossébangou.

96. The Court concludes from all of the foregoing that the *Arrêté* must be regarded as “not suffic[ient]”, within the meaning of the 1987 Agreement, in respect of the sector running from the Tao astronomic marker to the River Sirba at Bossébangou. Indeed, the Court concludes that, in the sector in question, a correct interpretation of the *Arrêté* does not provide for a straight-line solution. However, the Court does not have information enabling it to define another line on the basis of the *Arrêté*. In such circumstances, the Special Agreement, by referring to Article 2 of the 1987 Agreement, requires the Court to adopt “the course . . . shown on the 1:200,000-scale map of the *Institut géographique national de France*, 1960 edition”.

97. Niger has also emphasized the case of two other localities with regard to which the *effectivités* of the colonial period should in its view be taken into account: namely Petelkolé and Oussaltane (see paragraph 82 above). These two cases are different from that of Bangaré. The two localities in question are situated not only on the Burkinabe side of the straight line proposed by Burkina Faso, as is Bangaré, but crucially they are also situated on the Burkinabe side of the inter-colonial boundary as drawn on the 1960 IGN map. According to Niger, however, they were in fact administered by Niger during the colonial period, and in order to take account of the *effectivités*, the line on the IGN map should be shifted slightly westwards in the two segments where these localities are situated, so as to leave them on the Niger side.

98. While it is true, as a general rule, that for the purposes of the *uti possidetis* principle, the *effectivités* as established at the critical date may serve to compensate for the absence of a legal title or to complete a defective title, that does not hold in the present case, because of the terms of the Special Agreement, which provides that the 1987 Agreement forms part of the applicable law. Should the *Arrêté* not suffice, which is the case in the sector in question, the 1987 Agreement requires the Court to apply the line shown on the 1960 IGN map, instead of referring to the *effectivités*, even if there were to be some discrepancy between those *effectivités* and the line on the map. It has already been noted above (see paragraph 66) that the *effectivités* of the colonial period could, up to a certain point, be of use in interpreting the *Arrêté*, to the extent that they may reflect the colonial administration’s interpretation and implementation of that *Arrêté*. However, once it has been concluded that the *Arrêté* is insufficient, and in so far as it is insufficient, the *effectivités* can no longer play a role in the present case; in particular, they cannot justify a shifting of the line shown on the 1960 IGN map.

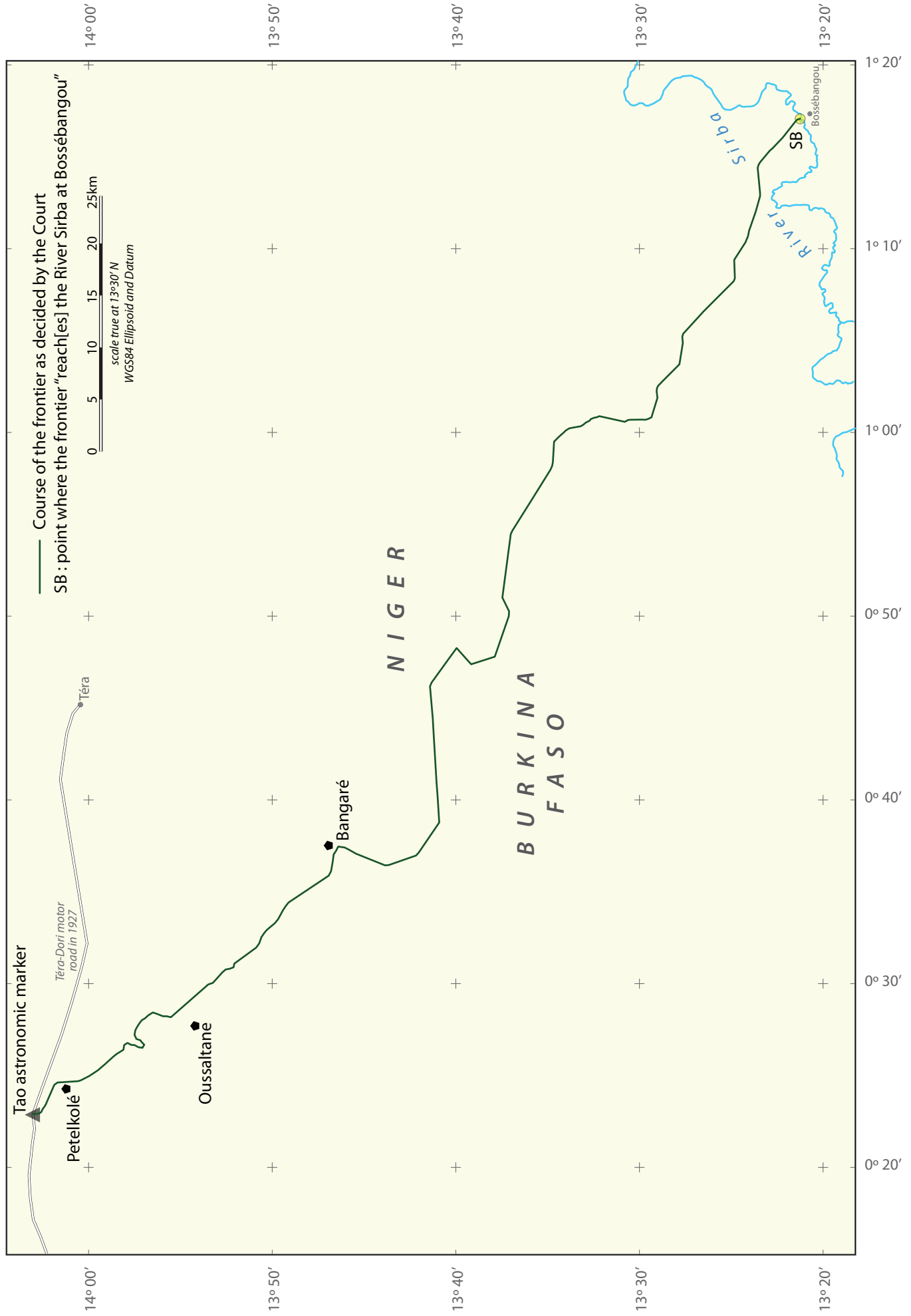
Accordingly, the Court cannot uphold Niger’s claims regarding Petelkolé and Oussaltane.

99. In conclusion, the Court finds that, in the sector of the frontier that runs from the Tao astronomic marker to “the River Sirba at Bossébangou”, the line shown on the 1:200,000-scale IGN map, 1960 edition, should be adopted (see sketch-map No. 2).

Sketch Map 2:

COURSE OF THE FRONTIER FROM THE TAO ASTRONOMIC MARKER TO THE POINT WHERE IT "REACH[ES] THE RIVER SIRBA AT BOSSÉBANGOU"

This sketch map has been prepared for illustrative purposes only



3. The course of the frontier in the area of Bossébangou

100. In order to complete the determination of the frontier line coming from the Tao astronomic marker, it is necessary to specify its endpoint where it reaches “the River Sirba at Bossébangou”. It is established that this village is situated a few hundred metres from the river, on its right bank. Burkina Faso maintains that the endpoint of the frontier in this section is located where the straight-line segment which runs from Tao to Bossébangou intersects with the right bank of the Sirba close to that village. Niger does not take a view on the matter, on account of its argument that the frontier line from Tao does not continue as far as the Sirba, but turns towards the south-west at the tripoint between the *cercles* of Dori, Say and Tillabéry, some 30 km before it reaches that river (see sketch-map No. 1).

101. According to the description in the *Arrêté*, it is clear that the frontier line ends at the River Sirba and not at the village of Bossébangou. The endpoint of the frontier in this section must therefore be situated in the Sirba or on one of its banks. The use of the verb “reach” (“*atteindre*”) in the *Arrêté* does not suggest that the frontier line crosses the Sirba completely, meeting its right bank. It is true that, in describing a subsequent section of the frontier, the *Arrêté* states that the line “again cuts” (“*coupe de nouveau*”) the Sirba so as to reach its right bank. That could suggest that the frontier has “cut” the river once already close to Bossébangou, and would argue in favour of the endpoint of the frontier in this section being situated on the right bank of the Sirba. However, it is significant that, in describing the relevant section of the frontier, the *Arrêté* uses the verb “reach” rather than “cut”. Furthermore, if the endpoint of the frontier were situated on the right bank of the Sirba close to Bossébangou, the line would have to “cut” the Sirba a second time at an intermediate location in order, this time, to cross from the right bank to the left bank before “cutting it again” in the other direction. But nothing of that nature is mentioned in the *Arrêté*.

Moreover, there is no evidence before the Court that the River Sirba in the area of Bossébangou was attributed entirely to one of the two colonies. In this regard, the Court notes that the requirement concerning access to water resources of all the people living in the riparian villages is better met by a frontier situated in the river than on one bank or the other.

Accordingly, the Court concludes that, on the basis of the *Arrêté*, the endpoint of the frontier line in the region of Bossébangou is located in the River Sirba. This endpoint is more specifically situated on the median line because, in a non-navigable river with the characteristics of the Sirba, that line best meets the requirements of legal security inherent in the determination of a boundary.

102. In its original wording, the *Arrêté* situated the meeting-point of the frontier line from Tao with the River Sirba further downstream and stated that this line “then joins the River Sirba”. It was clear, according to that wording, that the frontier was supposed to follow that river upstream for a certain distance. The language of the Erratum is less clear. However, since it specifies that,

after reaching the Sirba, the frontier line “almost immediately turns back up towards the north-west”, it can be concluded that the Erratum did not seek to amend the *Arrêté* entirely on this point and that it therefore implies that the line must follow the Sirba for a short distance. Burkina Faso contends that, in this section, the frontier should be situated on the right bank of the river, in accordance with its argument concerning the endpoint of the frontier close to Bossébangou. For its part, Niger refers to the median line or the thalweg. For the reasons given in the previous paragraph, the Court considers that the frontier follows the median line of the Sirba.

103. The corrected wording of the *Arrêté*, according to which the frontier line “almost immediately turns back up towards the north-west”, does not establish the precise point at which that line leaves the River Sirba in order to “[turn] back up”. There is no indication in the text in that regard except for the fact that the point is located close to Bossébangou. Similarly, once the frontier leaves the Sirba, its course is indicated in the *Arrêté* in a manner that makes it impossible to establish the line accurately. It can only be concluded, therefore, that the *Arrêté* does not suffice to determine the frontier line in this section. The Parties are agreed on this point. Niger departs from the text of the *Arrêté* and the line on the IGN map, arguing that, after the tripoint, the frontier consists of a straight-line segment running in a south-westerly direction. Burkina Faso refers to the subsidiary criterion laid down in Article 2 of the 1987 Agreement. According to that provision, it is indeed necessary, as Burkina Faso contends, to refer to the IGN map in order to define precisely the point where the frontier line leaves the River Sirba and “turns back up towards the north-west” and the course that it must follow after that point.

104. According to the *Arrêté*, the frontier line, after turning up towards the north-west, “turn[s] back to the south, . . . [and] again cuts the Sirba at the level of the Say parallel”. The line thus described follows a precise north-south direction. Once the place where it again cuts the Sirba has been determined, the meridian passing through that place can be followed northwards until the parallel running through the point where the line drawn on the IGN map turns back to the south. Niger contends, however, that the place where the Say parallel joins the Sirba is not a precise point. The Court observes that whereas, in its original wording, the *Arrêté* referred to “a line starting approximately from the Sirba at the level of the Say parallel”, the text of the Erratum is much more categorical in this respect and thus cannot be regarded as insufficient. It refers to the intersection between the parallel passing through Say and the River Sirba. It can even be deduced that this point, called point I on sketch-maps 3 and 4, is located on the right bank of the Sirba (at the point with geographic co-ordinates 13° 06' 12.08" N; 00° 59' 30.9" E), since, according to the Erratum, the frontier line coming from the north cuts the river here before continuing towards the south-east.

105. According to the *Arrêté*, which was not amended in this respect by the Erratum, the frontier line in this area leaves to Niger “a salient, including on the left bank of the Sirba the villages of Alfassi, Kouro, Takalan and Tankouro”. Alfassi and Kouro have apparently been moved, but they lie in Niger’s territory, both where they are situated now and where they were in 1927, regardless of the frontier line proposed for this area. The locations of Takalan (Tokalan, according to the Erratum) and Tankouro are in dispute. No clear evidence as to their position has

been submitted to the Court. Moreover, Niger has observed that “it is . . . very likely that these two latter villages simply disappeared during the period contemporary with the adoption of the 1927 Erratum”. Therefore, no conclusion can be drawn from the hypothetical location of those two villages with regard to the determination of the frontier line.

106. The frontier thus drawn from the area of Bossébangou to the point where the Say parallel cuts the River Sirba forms what might be termed a “salient”, in accordance with the description contained in the *Arrêté*. However, Niger acknowledges that the frontier line which it proposes does not, for its part, “create a salient in this area”.

107. The Court concludes that the frontier line, after reaching the median line of the River Sirba while heading towards Bossébangou, at the point with geographic co-ordinates 13° 21' 15.9" N; 01° 17' 07.2" E, called point SB on sketch-maps 1, 2, 3 and 4, follows that line upstream until its intersection with the IGN line, at the point with geographic co-ordinates 13° 20' 01.8" N; 01° 07' 29.3" E, called point A on sketch-maps 3 and 4. From that point, the frontier line follows the IGN line, turning up towards the north-west until the point, with geographic co-ordinates 13° 22' 28.9" N; 00° 59' 34.8" E, called point B on sketch-map 3, where the IGN line markedly changes direction, turning due south in a straight line. As this turning point B is situated some 200 m to the east of the meridian which passes through the intersection of the Say parallel with the River Sirba, the IGN line does not cut the River Sirba at the Say parallel. However, the *Arrêté* expressly requires that the boundary line cut the River Sirba at the Say parallel. The frontier line must therefore depart from the IGN line as from point B and, instead of turning there, continue due west in a straight line until the point, with geographic co-ordinates 13° 22' 28.9" N; 00° 59' 30.9" E, called point C on sketch-maps 3 and 4, where it reaches the meridian which passes through the intersection of the Say parallel with the right bank of the River Sirba. The frontier line then runs southwards along that meridian until the said intersection, at the point with geographic co-ordinates 13° 06' 12.08" N; 00° 59' 30.9" E, called point I on sketch-maps 3 and 4.

4. The course of the southern part of the frontier

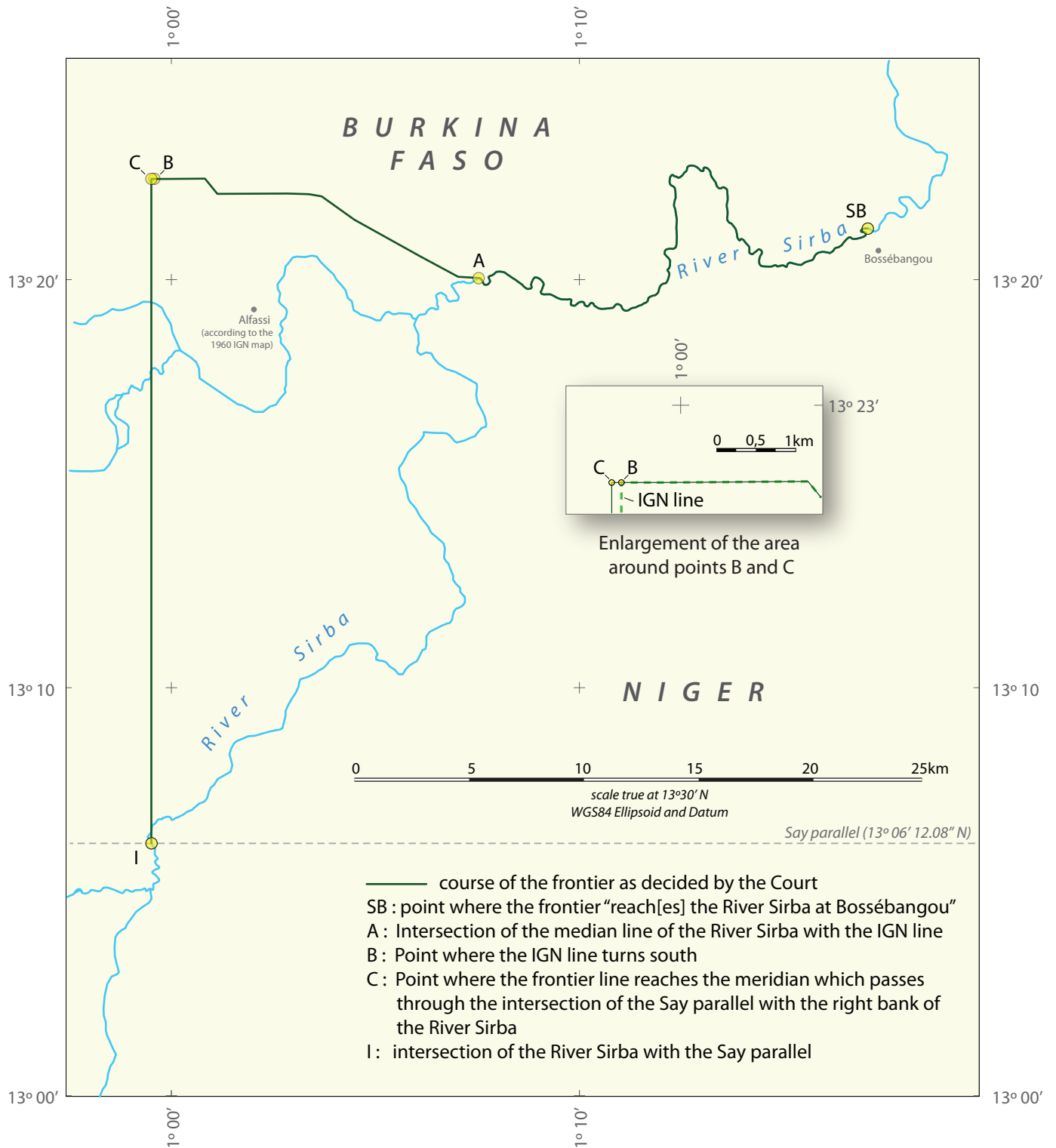
108. The intersection of the River Sirba with the Say parallel is the starting-point of another section of the frontier. According to the *Arrêté*, “[f]rom that point the frontier, following an east-south-east direction, continues in a straight line up to a point located 1,200 m to the west of the village of Tchenguiliba”. This latter point has been identified in a consistent manner by the Parties, since it marks the start of the southern section of the already demarcated portion of the frontier.

109. Niger relies on colonial and postcolonial *effectivités* to infer the existence of an implicit agreement between the Parties or of an acquiescence that the line in this section of the frontier is divided into two segments following slightly different directions. The intermediate point is said to be indicated by a frontier marker sited on the road between Ouagadougou and Niamey. Burkina Faso maintains that it “has never agreed” on this with Niger and disputes the use of two straight-line segments in this area (see sketch-map No. 1). The evidence placed before the Court regarding the conduct of the Parties in respect of this section of the frontier does not allow it to conclude that there is an agreement or acquiescence relating not only to the location of the frontier marker in question on the road between Ouagadougou and Niamey, but also to the determination of

Sketch Map 3:

COURSE OF THE FRONTIER FROM THE POINT WHERE IT "REACH[ES] THE RIVER SIRBA AT BOSSÉBANGOU" TO THE INTERSECTION OF THE RIVER SIRBA WITH THE SAY PARALLEL

This sketch map has been prepared for illustrative purposes only



a frontier line running for some 130 km. Therefore, the Court does not need to consider the extent to which the general criteria for delimitation laid down in the 1987 Agreement would be affected by an agreement reached between the Parties regarding a particular section of the frontier.

110. The *Arrêté* specifies that, in this section, the frontier “continues in a straight line”. It is precise in that it establishes that the frontier line is a straight-line segment between the intersection of the Say parallel with the Sirba and the point located 1,200 m to the west of the village of Tchenguiliba. It cannot therefore be said that the *Arrêté* does not suffice with respect to this section of the frontier.

111. The Court concludes that, in this section of the frontier, the line consists of a straight-line segment between the intersection of the Say parallel with the right bank of the River Sirba and the beginning of the Botou bend.

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112. Having determined the course of the frontier between the two countries (see sketch-map No. 4), as the Parties requested of it, the Court expresses its wish that each Party, in exercising its authority over the portion of the territory under its sovereignty, should have due regard to the needs of the populations concerned, in particular those of the nomadic or semi-nomadic populations, and to the necessity to overcome difficulties that may arise for them because of the frontier. The Court notes the co-operation that has already been established on a regional and bilateral basis between the Parties in this regard, in particular under Chapter III of the 1987 Protocol of Agreement, and encourages them to develop it further.

IV. NOMINATION OF EXPERTS

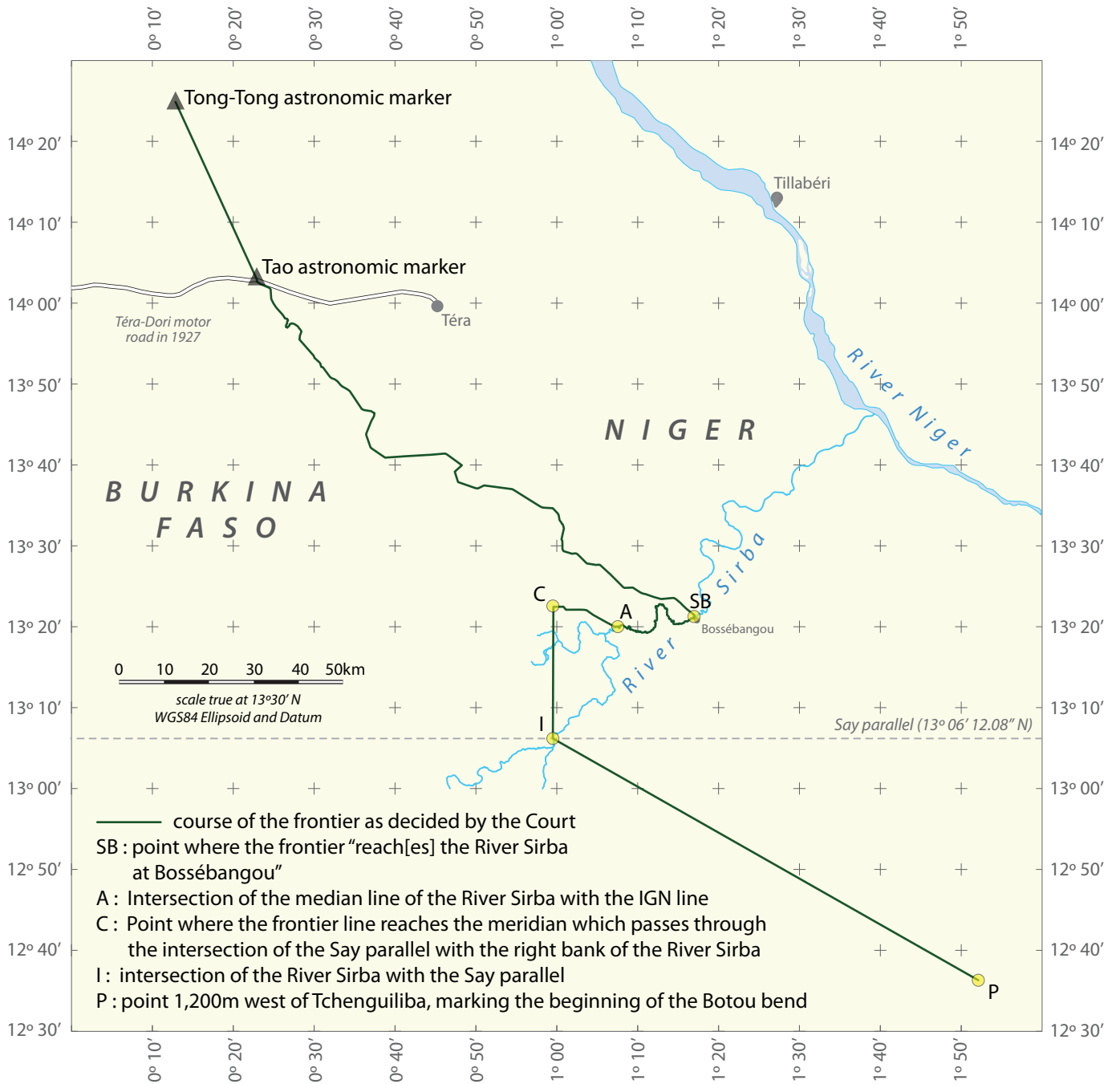
113. In Article 7, paragraph 4, of the Special Agreement, the Parties requested the Court to nominate, in its Judgment, three experts to assist them as necessary in the demarcation of their frontier in the area in dispute. Both Parties reiterated this request in the final submissions presented at the hearings. The Court is ready to accept the task which the Parties have thus entrusted to it. However, having regard to the circumstances of the present case, the Court is of the opinion that it is inappropriate at this juncture to make the nominations requested by the Parties. It will do so later by means of an Order, after ascertaining the views of the Parties, particularly as regards the practical aspects of the exercise by the experts of their functions (see *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 648, para. 176).

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Sketch Map 4: COURSE OF THE FRONTIER AS DECIDED BY THE COURT

This sketch map has been prepared for illustrative purposes only



114. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it cannot uphold the requests made in points 1 and 3 of the final submissions of Burkina Faso;

(2) Unanimously,

Decides that, from the Tong-Tong astronomic marker, situated at the point with geographic co-ordinates 14° 24' 53.2" N; 00° 12' 51.7" E, to the Tao astronomic marker, the precise co-ordinates of which remain to be determined by the Parties as specified in paragraph 72 of the present Judgment, the course of the frontier between Burkina Faso and the Republic of Niger takes the form of a straight line;

(3) Unanimously,

Decides that, from the Tao astronomic marker, the course of the frontier follows the line that appears on the 1:200,000-scale map of the *Institut géographique national (IGN) de France*, 1960 edition, (hereinafter the "IGN line") until its intersection with the median line of the River Sirba at the point with geographic co-ordinates 13° 21' 15.9" N; 01° 17' 07.2" E;

(4) Unanimously,

Decides that, from this latter point, the course of the frontier follows the median line of the River Sirba upstream until its intersection with the IGN line, at the point with geographic co-ordinates 13° 20' 01.8" N; 01° 07' 29.3" E; from that point, the course of the frontier follows the IGN line, turning up towards the north-west, until the point, with geographic co-ordinates 13° 22' 28.9" N; 00° 59' 34.8" E, where the IGN line turns south. At that point, the course of the frontier leaves the IGN line and continues due west in a straight line until the point, with geographic co-ordinates 13° 22' 28.9" N; 00° 59' 30.9" E, where it reaches the meridian which passes through the intersection of the Say parallel with the right bank of the River Sirba; it then runs southwards along that meridian until the said intersection, at the point with geographic co-ordinates 13° 06' 12.08" N; 00° 59' 30.9" E;

(5) Unanimously,

Decides that, from this last point to the point situated at the beginning of the Botou bend, with geographic co-ordinates 12° 36' 19.2" N; 01° 52' 06.9" E, the course of the frontier takes the form of a straight line;

(6) Unanimously,

Decides that it will nominate at a later date, by means of an Order, three experts in accordance with Article 7, paragraph 4, of the Special Agreement of 24 February 2009.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this sixteenth day of April, two thousand and thirteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Burkina Faso and the Government of the Republic of Niger, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge BENNOUNA appends a declaration to the Judgment of the Court;
Judges CANÇADO TRINDADE and YUSUF append separate opinions to the Judgment of the Court;
Judges *ad hoc* MAHIOU and DAUDET append separate opinions to the Judgment of the Court.

(Initialed) P. T.

(Initialed) Ph. C.
