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Letter to the Registrar dated 31 October 2016 from the Agent of France

[Translation]

With reference to the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, please find enclosed herewith our comments on the Republic of Equatorial Guinea's replies to the questions put by Judge Bennouna and Judge Donoghue, which the French Republic wishes to bring to the Court's attention.

COMMENTS OF THE FRENCH REPUBLIC ON THE REPLIES OF EQUATORIAL GUINEA TO THE QUESTIONS PUT BY JUDGE BENNOUNA AND JUDGE DONOGHUE

At the end of the hearings held on 17, 18 and 19 October 2016 on the request for the indication of provisional measures in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judge Bennouna and Judge Donoghue put questions to Equatorial Guinea.

The replies to these questions were transmitted to France on 26 October 2016. In accordance with Article 72 of the Rules of Court, and as invited by the Court, France hereby wishes to provide its comments on those replies.

General comments

1. The presentation by the Agent of the French Republic and its counsel's oral arguments demonstrated that the facts of the case which had given rise to the dispute submitted to the Court had particular characteristics and been the subject of contradictory statements by Equatorial Guinea. France notes that those contradictions are once again reflected in the replies presented by Equatorial Guinea to the Court.

Judge Bennouna's question

2. In its reply to Judge Bennouna's question, Equatorial Guinea states that "it definitively acquired the title to the property located at 42 avenue Foch in Paris on 15 September 2011". It further observes that "[t]hat title was not registered as such at the Land Registry in France"¹.

3. France notes that the question put by Judge Bennouna referred explicitly to a Note Verbale dated 15 February 2012 from the Embassy of Equatorial Guinea, in which it asserted that "[t]he title to the property [was] in the process of being transferred"².

4. Equatorial Guinea now asserts that "it definitively acquired the title to the property . . . on 15 September 2011", whereas on 15 February 2012³ — that is, precisely five months after the date it is now putting forward — it stated that it had not yet acquired this same title.

5. France also takes note of additional information provided by the Republic of Equatorial Guinea in respect of an agreement on the transfer of shares and claims⁴ (hereinafter the "agreement"), which was concluded between itself and Mr. Teodoro Nguema Obiang Mangue on 15 September 2011, is subject to Swiss law and concerns members' shares in five Swiss companies. It further notes that Mr. Teodoro Nguema Obiang Mangue is presented in the agreement as holding the members' shares in the said companies in the form of bearer shares.

¹Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, p. 1.

²CR 2016/17, p. 20.

³No. 10 of the documents communicated by France.

⁴Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, Ann. 1.

6. Equatorial Guinea claims that it acquired the property located at 42 avenue Foch by becoming the sole shareholder of the Swiss companies Ganesha Holding SA, GEP Gestion Entreprise Participation SA, RE Entreprise SA, Nordi Shipping & Trading Co Ltd, and Raya Holdings SA, the latter holding the capital of the French companies 42 Avenue Foch and SCI Avenue Du Bois. In Article 1, paragraphs C to H, the agreement establishes that these companies are the direct owners of the various portions of the building at 42 avenue Foch.

7. Article 1, paragraph M, of the agreement further states that:

“The parties are also aware that the selling price of the shares will have to be reduced in relation to the price at which the companies sell the building directly to the TRANSFEREE, since, in particular, in order to become the direct owner of the building, the latter will have to ensure that the companies sell the building to it, thus incurring a capital gains tax, calculated on the difference between the original purchase price after deduction of 2 per cent per annum and the selling price, as well as a registration duty of 5 per cent”⁵.

8. The assets of a company are not to be confused with the shareholders’ own assets. At no point has Equatorial Guinea produced evidence that a contract of sale was concluded with these Swiss companies in respect of the building located at 42 avenue Foch.

9. Furthermore, Equatorial Guinea recognizes that the Swiss and French companies alone are registered as the owners of the building at the Land Registration Department in Paris⁶.

10. Any sale of real property must be registered by a notary. This procedure is important in French law, since it ensures that the deed of sale of the property is binding on third parties. *A contrario*, if unregistered, the sale of the property is not binding on third parties. Consequently — and unlike the buildings at 46 rue des Belles-Feuilles and 29 boulevard de Courcelles which Equatorial Guinea owns directly — only the Swiss and French companies can assert ownership of the building vis-à-vis all third parties.

11. Equatorial Guinea writes that it was “legally impossible”⁷ for it to register the property title. The registration of the attachment order of 19 July 2012 issued against the property effectively precluded any subsequent change to the register. France notes, however, that almost a year passed between the time when Equatorial Guinea allegedly acquired the title to the property definitively and the said attachment order was registered. At no point during that period did Equatorial Guinea seek to purchase the building from the companies of which it had become the sole shareholder, in accordance with Article 1, paragraph M, of the agreement; nor, *a fortiori*, did it seek to be registered as the owner at the Land Registration Department.

12. Furthermore, without offering any explanation, Equatorial Guinea states in its reply that “[a]t no point has it been contested that this transaction was conducted under normal market conditions”⁸.

13. France notes, however, that Article 1, paragraph R, of the agreement provides:

⁵*Ibid.*, Ann. 1.

⁶*Ibid.*, para. 14.

⁷*Ibid.*, para. 16.

⁸*Ibid.*, para. 2.

“Regarding the selling price referred to in Article 3, the parties agreed that, given the risks, unknown factors and capital gains tax, and the underlying costs mentioned in paragraphs K to P below, and given that it is not a direct sale by name, they could not apply the market selling price for the building and that it was appropriate to set a price below the said market price, a reduction that will be applied to the amount of the claims”⁹.

14. This sale was indeed not without risk, a fact of which Equatorial Guinea could not have been unaware. Article 1, paragraph O, of the agreement states that “[t]he TRANSFEREE has been informed that the companies are also the subject of proceedings initiated by the tax authorities in France”, and paragraph P of the same article stipulates that “the TRANSFEREE has been informed that the companies are the subject of various proceedings, initiated in particular by certain Swiss tax authorities, as are the former administrators of the companies, or of a company belonging to them (Annex 2)”^{10,11}. Moreover, it is these proceedings in particular that led the investigating judges to take the view that the Swiss and French companies served as a screen between Mr. Teodoro Nguema Obiang Mangue and the townhouse at 42 avenue Foch, in relation to the acts of money laundering of which he is suspected.

15. Finally, France recalls that the attachment of the building under the Code of Criminal Procedure is not the subject of any of the provisional measures sought by Equatorial Guinea in the proceedings instituted before the International Court of Justice. This point was confirmed at the hearing of 17 October 2016¹².

Judge Donoghue’s question

16. In answer to the question put by Judge Donoghue, Equatorial Guinea states that it “considers that the building at 42 avenue Foch in Paris acquired diplomatic status as of 4 October 2011”¹³, because, it asserts, “the building [was] acquired for use as premises of [its] diplomatic mission”¹⁴.

17. This assertion is at odds with the successive and contradictory statements made by Equatorial Guinea on this point to the French authorities.

18. On 4 October 2011, the Embassy of the Republic of Equatorial Guinea claimed that these premises, which were not registered with the Protocol Department, had for a long time been designated for an unspecified diplomatic use. According to its Note Verbale:

“the Embassy has for a number of years owned a building located at 42 avenue Foch, Paris (16th arr.), which it uses for the performance of the functions of its diplomatic mission, a fact which it has hitherto not formally notified to [the Protocol] Department”¹⁵.

⁹*Ibid.*, Ann. 1.

¹⁰France notes that, unlike Annex 1 of the agreement, Annex 2 has not been transmitted by Equatorial Guinea.

¹¹Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, Ann. 1.

¹²CR 2016/14, p. 37, para. 24.

¹³Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, p. 1.

¹⁴*Ibid.*, para. 28.

¹⁵No. 1 of the documents communicated by France.

19. Then, all of a sudden, on 17 October 2011, the premises were presented by the Embassy of Equatorial Guinea as housing the new residence of the Permanent Delegate to UNESCO. According to a Note Verbale from the Embassy of the same date:

“Pending the arrival of his successor, the Embassy will be headed by Ms Mariola BINDANG OBIANG, Permanent Delegate of the Republic of Equatorial Guinea to UNESCO in the capacity of Chargée d’affaires *ad interim*, and we wish to inform you that the official residence of the Permanent Delegate to UNESCO is on the premises of the diplomatic mission located at 40-42 avenue FOCH, 75016, which is at the disposal of the Republic of Equatorial Guinea”¹⁶.

20. In its reply to Judge Donoghue’s question, Equatorial Guinea further confirms that the change in residence of its Permanent Delegate to UNESCO was only notified to that organization — despite it being the most directly concerned — on 14 February 2012, i.e., the first day that searches were conducted and movable property seized from 42 avenue Foch. Equatorial Guinea explains in its reply that “[Ms Mariola Bindang Obiang] had not deemed it necessary to do so earlier, since she considered herself to be protected by the Vienna Convention of 18 April 1961, as a member of the diplomatic staff of the Embassy of Equatorial Guinea”¹⁷.

21. This explanation does not stand up. Indeed, as Equatorial Guinea also confirms in its reply, France had informed the Embassy of Equatorial Guinea on 31 October 2011, by Note Verbale from the Ministry of Foreign Affairs, that Ms Mariola Bindang Obiang could not benefit from the provisions of the Vienna Convention of 18 April 1961 on Diplomatic Relations (hereinafter the “Vienna Convention”):

“The Protocol Department wishes first to draw the Embassy’s attention to the fact that, in accordance with Article 19 of the Vienna Convention of 18 April 1961 on Diplomatic Relations, only a member of the mission’s diplomatic staff may be designated Chargé d’affaires *ad interim* by the receiving State. The appointment of Ms BINDANG OBIANG is thus contrary to the above-mentioned Vienna Convention.”¹⁸

22. In the same Note Verbale, the French Ministry of Foreign Affairs also made it clear that:

“If there was a change in the address of Ms BINDANG OBIANG’s residence, the permanent delegation of the Republic of Equatorial Guinea to UNESCO must give official notification thereof to that organization’s protocol department, which should, in turn, advise our Protocol Department in an official Note Verbale. Indeed, the Embassy may not communicate on behalf of the permanent delegation.”¹⁹

23. France was thus at great pains to recall that the status of a Permanent Delegate to UNESCO falls solely under the Headquarters Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization, signed at Paris on 2 July 1954.

¹⁶No. 3 of the documents communicated by France.

¹⁷Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, para. 27.

¹⁸No. 4 of the documents communicated by France.

¹⁹*Ibid.*

24. Equatorial Guinea cannot therefore now claim that Ms Bindang Obiang “considered herself to be protected by the Vienna Convention of 18 April 1961, as a member of the diplomatic staff of the Embassy of Equatorial Guinea”²⁰ between 31 October 2011 and 14 February 2012.

25. France would also point out that on 16 February 2012, the Ministry of Foreign Affairs of Equatorial Guinea sought approval from the French authorities for the appointment of Ms Bindang Obiang as Equatorial Guinea’s Ambassador in France. However, in the curriculum vitae attached to that request, Ms Bindang Obiang was shown as residing at 46 rue des Belles-Feuilles, Paris (16th arr.), and not at 42 avenue Foch²¹.

26. It was not until 27 July 2012 that Equatorial Guinea presented the premises of 42 avenue Foch as housing, as from that date, the diplomatic mission itself. Indeed, by Note Verbale of the same date²², its footer still showing the Embassy’s address as 29 boulevard de Courcelles, Paris (8th arr.), the Embassy of Equatorial Guinea indicated that:

“as from Friday 27 July 2012, the Embassy’s offices are located at 42 avenue Foch, Paris (16th arr.), a building which it is henceforth using for the performance of the functions of its diplomatic mission in France”.

27. The terms of that Note Verbale therefore suggest, contrary to Equatorial Guinea’s claims, that the offices of the diplomatic mission were not previously located at 42 avenue Foch.

28. Equatorial Guinea further confirms in its reply to Judge Donoghue’s question that when, on 15 February 2012, its Embassy sought protection for two ministers of Equatorial Guinea visiting the building at 42 avenue Foch, “it was in fact in order to supervise preparations for the effective occupation of the building, which had been acquired for use as premises of the diplomatic mission of Equatorial Guinea”²³.

29. France would further point out that the Note Verbale of 27 July 2012 was sent eight days after the attachment order was issued against the property by the investigating judges (on 19 July 2012), of which Equatorial Guinea could not have been unaware.

30. Finally, on 13 June 2016, Equatorial Guinea assured the Court that the building located at 42 avenue Foch had been used by its diplomatic mission since 15 September 2011. Indeed, in paragraph 20 of the Application, Equatorial Guinea stated that:

“The building located at 42 avenue Foch in Paris was, until 15 September 2011, co-owned by five Swiss companies of which Mr. Teodoro Nguema Obiang Mangue had been the sole shareholder since 18 December 2004. On 15 September 2011, he transferred his shareholder’s rights in the companies to the State of Equatorial Guinea. Since then, the building has been used by the diplomatic mission of Equatorial Guinea.”

31. Yet in its replies dated 26 October 2016, Equatorial Guinea now refers to its Note Verbale dated 4 October 2011, according to which it “has for a number of years owned a building located at 42 avenue Foch, Paris (16th arr.), which it uses for the performance of the functions of its diplomatic mission . . .”.

²⁰Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, para. 27.

²¹No. 11 of the documents communicated by France.

²²No. 22 of the documents communicated by France.

²³Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, para. 28.

32. Faced with these changing and contradictory statements, the sole purpose of which is quite clearly to impede the ongoing criminal proceedings, the French Ministry of Foreign Affairs has consistently recalled that it did not consider the premises in question to form part of Equatorial Guinea's diplomatic mission, even when the French authorities consented to occasional protection measures for that building.
