



INTERNATIONAL COURT OF JUSTICE

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Summary

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Frontier Dispute (Benin/Niger)

Summary of the Judgment of 12 July 2005

History of the proceedings and submissions of the Parties (paras. 1-16)

The Chamber recalls at the outset that, on 3 May 2002, by a joint letter of notification dated 11 April 2002, the Republic of Benin (hereinafter “Benin”) and the Republic of Niger (hereinafter “Niger”) transmitted to the Registrar a Special Agreement whereby the Governments of the two States agreed to submit to a Chamber of the Court a dispute concerning “the definitive delimitation of the whole boundary between them”. In Article 2 of the Special Agreement, the Court is requested to:

- “(a) determine the course of the boundary between the Republic of Benin and the Republic of Niger in the River Niger sector;
- (b) specify which State owns each of the islands in the said river, and in particular Lété Island;
- (c) determine the course of the boundary between the two States in the River Mekrou sector.”

The Chamber then recalls the history of the proceedings including with respect to the formation and composition of the Chamber. By an Order of 27 November 2002 the Court constituted a Chamber to deal with the case, composed of President Guillaume and Judges Ranjeva and Kooijmans together with the judges *ad hoc*. In accordance with Article 18, paragraph 2, of the Rules of Court, Judge Guillaume, who held the office of President of the Court when the Chamber was formed, was to preside over the Chamber. However, by a letter of 11 October 2004, Judge Guillaume informed the President of the Court, pursuant to Article 13, paragraph 4, of the Statute, that he had decided to resign from the Court with effect from 11 February 2005. On 16 February 2005 the Court elected Judge Abraham as a member of the Chamber to fill the seat left vacant by Judge Guillaume’s resignation. By an Order of 16 February 2005, the Court declared that, as a result of this election, the Chamber was composed as follows: Judge Ranjeva, who, in his capacity as Vice-President of the Court, had become President of the Chamber, pursuant to Article 18, paragraph 2, of the Rules of Court; Judges Kooijmans and Abraham; and Judges *ad hoc* Bedjaoui and Bennouna.

The Chamber finally reproduces, inter alia, the final submissions presented by the Parties at the conclusion of the oral proceedings:

On behalf of the Government of Benin,

“For the reasons set out in its written and oral pleadings, the Republic of Benin requests the Chamber of the International Court of Justice to decide:

- (1) that the boundary between the Republic of Benin and the Republic of Niger takes the following course:
 - from the point having co-ordinates 11° 54' 15" latitude North and 2° 25' 10" longitude East, it follows the median line of the River Mekrou as far as the point having co-ordinates 12° 24' 29" latitude North and 2° 49' 38" longitude East,
 - from that point, the boundary follows the left bank of the River [Niger] as far as the point having co-ordinates 11° 41' 44" North and 3° 36' 44" East;
- (2) that sovereignty over all of the islands in the River [Niger], and in particular the island of Lété, lies with the Republic of Benin.”

On behalf of the Government of Niger,

“The Republic of Niger requests the Court to adjudge and declare that:

- (1) The boundary between the Republic of Benin and the Republic of Niger follows the line of deepest soundings in the River Niger, in so far as that line could be established at the date of independence, from the point having co-ordinates latitude 12° 24' 27" North, longitude 2° 49' 36" East, as far as the point having co-ordinates latitude 11° 41' 40.7" North, longitude 3° 36' 44" East.
- (2) That line determines which islands belong to each Party.
 - The islands between the line of deepest soundings and the right bank of the river, namely Pekinga, Tondi Kwaria Barou, Koki Barou, Sandi Tounga Barou, Gandégabi Barou Kaïna, Dan Koré Guirawa, Barou Elhadji Dan Djoda, Koundou Barou and Elhadji Chaïbou Barou Kaïna, belong to the Republic of Benin;
 - The islands located between the line of deepest soundings and the left bank of the river, namely Boumba Barou Béri, Boumba Barou Kaïna, Kouassi Barou, Sansan Goungou, Lété Goungou, Monboye Tounga Barou, Sini Goungou, Lama Barou, Kotcha Barou, Gagno Goungou, Kata Goungou, Gandégabi Barou Béri, Guirawa Barou, Elhadji Chaïbou Barou Béri, Goussou Barou, Beyo Barou and Dolé Barou, belong to the Republic of Niger.
- (3) The attribution of islands to the Republic of Benin and the Republic of Niger according to the line of deepest soundings as determined at the date of independence shall be regarded as final.
- (4) With regard to the Gaya-Malanville bridges, the boundary passes through the middle of each of those structures.
- (5) The boundary between the Republic of Benin and the Republic of Niger in the River Mekrou sector follows a line comprising two parts:

- the first part is a straight line joining the point of confluence of the River Mekrou with the River Niger to the point where the Paris meridian meets the Atacora mountain range, indicative co-ordinates of which are as follows: latitude: 11° 41' 50" North; longitude: 2° 20' 14" East;
- the second part of the line joins this latter point to the point where the former boundary between the cercles of Say and Fada meets the former boundary between the cercles of Fada and Atacora, indicative co-ordinates of which are as follows: latitude: 11° 44' 37" North; longitude: 2° 18' 55" East.”

Geographical context and historical background of the dispute (paras. 17-22)

The Chamber notes that Article 2 of the Special Agreement divides the disputed boundary into two sectors, the River Mekrou sector in the west and the River Niger sector in the east. The Chamber then briefly describes each of these sectors.

The western part of the boundary follows a course running approximately south-west to north-east from a point marking the boundary between the two States and Burkina Faso as far as the confluence of the River Mekrou and the River Niger.

The eastern part of the boundary follows the River Niger in a south-easterly direction over a distance of some 150 km from that confluence and ends at a point marking the boundary of the two States with Nigeria. There are several islands within the stretch concerned; their exact number and their attribution to either Party are matters of dispute in the present case. The island of Lété, referred to expressly in Article 2 (b) of the Special Agreement, is the largest, covering approximately 40 sq km. The island is fertile, with rich pastures, and is permanently inhabited; according to information supplied by Niger, its population numbered some 2,000 in the year 2000.

The frontier dispute between the Parties is set within a historical context marked by the accession to independence of the territories that were formerly part of French West Africa (“Afrique occidentale française”, hereinafter “AOF”). Benin, which has been independent since 1 August 1960, corresponds to the former colony of Dahomey, and Niger, which has been independent since 3 August 1960, corresponds to a territory which underwent various administrative transformations during the colonial period.

Both Parties referred to incidents that occurred on the island of Lété on the eve of their independence, in 1959 and 1960. The two States subsequently set up a process for the friendly settlement of their frontier dispute: in 1961 and 1963 two Dahomey-Niger joint commissions met to discuss the matter. In October 1963 the crisis between Dahomey and Niger regarding the island of Lété deepened and each State subsequently published a White Paper setting out, inter alia, their positions regarding the frontier dispute. There were fresh attempts to reach a peaceful settlement in the years that followed. However, the issue of sovereignty over the island of Lété was not resolved and there were further incidents in subsequent years, notably in 1993 and 1998. On 8 April 1994 Benin and Niger entered into an agreement creating a joint commission for the delimitation of their common border. Since efforts to arrive at a negotiated solution to the dispute were unsuccessful, the commission proposed that the governments of the two States bring the dispute before the International Court of Justice by Special Agreement.

Applicable law and principle of uti possidetis juris (paras. 23-31)

The Chamber notes that, under Article 6 of the Special Agreement (“Applicable Law”), the rules and principles of international law applicable to the present dispute include “the principle of State succession to the boundaries inherited from colonization, that is to say, the intangibility of those boundaries”. The Chamber observes that it follows from the wording of this provision and from the arguments of the Parties that they are in agreement on the relevance of the principle of uti

possidetis juris for the purposes of determining their common border. It recalls that the Chamber formed in the case concerning the Frontier Dispute (Burkina Faso/Republic of Mali) had occasion to state, that, according to the principle in question, “pre-eminence [is] accorded to legal title over effective possession as a basis of sovereignty” and that its essence lies “in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved”, including former administrative delimitations established during the colonial period that became international frontiers (Frontier Dispute (Burkina Faso/Mali), Judgment, I.C.J. Reports 1986, pp. 586-587, para. 63, and p. 566, para. 23).

The Chamber concludes that on the basis of the principle of uti possidetis juris, it must seek to determine, in the case before it, the boundary that was inherited from the French administration. The Parties agree that the dates to be taken into account for this purpose are those of their respective independence, namely 1 and 3 August 1960. The Chamber observes that there was no change in the frontier between these two very close dates.

In response to differing opinions expressed by the Parties regarding certain aspects of the application of the uti possidetis juris principle in the present case, the Chamber firstly observes that the Parties agree that the course of their common boundary should be determined, in accordance with the uti possidetis juris principle, by reference to the physical situation to which French colonial law was applied, as that situation existed at the dates of independence. It emphasizes, however, that the consequences of such a course on the ground, particularly with regard to the question of to which Party the islands in the River Niger belong, must be assessed in relation to present-day physical realities and that, in carrying out the task assigned to it under Article 2 of the Special Agreement, the Chamber cannot disregard the possible appearance or disappearance of certain islands in the stretch concerned.

The Chamber secondly points out that it cannot exclude a priori the possibility that maps, research or other documents subsequent to the dates of independence may be relevant in order to establish, in application of the uti possidetis juris principle, the situation that existed at the time. In any event, since the effect of the uti possidetis principle is to freeze the territorial title, the examination of documents posterior to independence cannot lead to any modification of the “photograph of the territory” at the critical date unless, of course, such documents clearly express the Parties’ agreement to such a change.

The Chamber thirdly notes that the approach employed by both Parties, which have on occasion sought to confirm their claims to legal title by relying on acts whereby their authorities allegedly exercised sovereignty over the disputed territories after 1960, should not necessarily be excluded.

The Chamber recalls that both Parties acknowledge that, in accordance with the principle of uti possidetis juris, the course of the frontier and the attribution of islands in the River Niger to either one of them must be determined in the light of French colonial law, known as “droit d’outre-mer”. The Parties also agree on the identification of the relevant rules of that law, but do not share the same interpretation thereof. Before turning to those rules, the Chamber recalls that, when reference is made to domestic law in such a context, that law is applicable “not in itself (as if there were a sort of continuum juris, a legal relay between such law and international law), but only as one factual element among others, or as evidence indicative of . . . the ‘colonial heritage’” (ibid., p. 568, para. 30).

The Chamber then observes that the territorial administration of the French possessions in West Africa was centralized by a decree of the President of the French Republic of 16 June 1895 and placed under the authority of a Governor-General. The entity of the AOF thus created was divided into colonies, headed by Lieutenant-Governors and themselves made up of basic units

called “cercles” which were administered by commandants de cercle; each cercle was in turn composed of subdivisions, each administered by a chef de subdivision. The subdivisions consisted of cantons, which grouped together a number of villages.

The Chamber notes that the Parties acknowledge that the creation and abolition of colonies fell within the jurisdiction of the authorities of metropolitan France: the President of the French Republic, acting by decree, under the Constitution of the Third Republic, and subsequently the French Parliament, following the adoption of the Constitution of 27 October 1946. The power to create territorial subdivisions within a single colony, on the other hand, was vested in the AOF until being transferred to the local representative institutions in 1957.

Article 5 of the decree of the President of the French Republic dated 18 October 1904, providing for the reorganization of the AOF, vested the Governor-General with authority to “determine in government council (conseil de gouvernement), and on the proposal of the Lieutenant-Governors concerned, the administrative districts in each of the colonies”. In his circular No. 114 c of 3 November 1912, concerning the form of instruments for the organization of administrative districts and subdivisions, the Governor-General interpreted this text as conferring upon him “the right to establish . . . the number and extent of the cercles which, within the colonies, constitute[d] the actual administrative unit”, but pointed out that it was “acknowledged that the Lieutenant-Governors would retain the power to determine the territorial subdivisions created within these cercles by measures adopted under their own authority”. According to that circular, “any measure concerning the administrative district, the territorial unit proper, i.e. affecting the cercle, in terms of its existence (creation or abolition), its extent, its name, or the location of its administrative centre”, was to be confirmed by an arrêté général adopted in government council; it lay with the Lieutenant-Governors “to define, by means of arrêtés, the approval of which [was] reserved to [the Governor-General], the exact and detailed topographical boundaries of each of these districts”, as well as “within the cercles, [to] fix . . . the number and extent of the territorial subdivisions . . . and the location of their centre” by means of local decisions.

Evolution of legal status of territories concerned (paras. 32-36)

For a better understanding of the historical context in which the Parties’ claims stand in relation to the determination of the frontier and to the question of to whom the islands in the River Niger belong, the Chamber briefly recapitulates the evolution of the legal status of the territories concerned during the colonial period.

Documents and cartographic material relevant to the settlement of the dispute (paras. 37-44)

The Chamber goes on to describe the main documents relevant to the settlement of the frontier dispute, listing on the one hand the documents that concern the determination of the course of the boundary in the River Niger sector and the question of to whom the islands in that river belong, and on the other hand the documents that relate to the delimitation in the River Mekrou sector. The Chamber also describes the large quantity of cartographic and photographic material produced by the Parties in support of their respective arguments.

The course of the boundary in the sector of the River Niger and the question of to which Party each of the islands belongs (paras. 45-124)

— Evidence of title (paras. 45-74)

Benin's claims to title

The Chamber recalls that it is firstly asked, in accordance with Article 2, paragraphs (a) and (b), of the Special Agreement, to determine the course of the boundary in the sector of the River Niger and then to specify to which Party each of the islands in the river belongs.

The Chamber points out that in the present case these territorial boundaries were no more than delimitations between different administrative divisions or colonies subject to the same colonial authority. Only at the moment of independence, also called the “critical date”, did these boundaries become international frontiers. Since the Parties achieved independence virtually simultaneously the period between 1 and 3 August 1960 can be considered as the critical date. The Chamber indicates that, in accordance with the approach of the Chamber in the Frontier Dispute (Burkina Faso/Republic of Mali) case, it will first consider the various regulative or administrative acts invoked by the Parties.

In this respect, the Chamber recalls that the Parties agree that, during the period under consideration, the power to create colonies or territories was vested in the President of the French Republic until 1946 and thereafter in the French Parliament, while colonial subdivisions could be created by the Governor-General of the AOF under the terms of the decree of 18 October 1904. In his circular No. 114 c of 3 November 1912, the Governor-General of the AOF determined that the main subdivisions (“cercles”) would be established by the Governor-General, but that the Lieutenant-Governors would be entitled to create further territorial subdivisions within the cercles. The Chamber observes that it appears that it is not disputed between the Parties that the competence to create or establish territorial entities included the power to determine their extent and to delimit them, although during the colonial period this was never made explicit in any regulative or administrative act.

The Chamber further recalls that it is not contested that in the initial period after its creation in 1894 the colony of Dahomey comprised territories situated on both banks of the River Niger. By arrêté of 23 July 1900, the Governor-General of the AOF established a third military territory, which “will encompass the areas on the left bank of the Niger between Say and Lake Chad that were placed within the French sphere of influence by the [Anglo-French] Convention of 14 June 1898”. On 20 December 1900 a decree of the President of the French Republic was issued which established a third military territory “between the Niger and Lake Chad”. The decree, which was superior to an arrêté in the hierarchy of legal acts, made no reference to the arrêté of 23 July 1900. In the Chamber's view, the decree must nevertheless be seen as a confirmation of the arrêté of the Governor-General since it covers the same area between the (River) Niger and (Lake) Chad.

The Chamber notes that Benin contends that the arrêté of 23 July 1900 established the boundary between the Third Military Territory and the colony of Dahomey at the left bank of the River Niger, leaving the river itself and the islands located therein as part of that colony. Benin further contends that the boundary thus established was confirmed by the Governor ad interim of Niger in a letter of 27 August 1954 which stated “that the boundary of the Territory of Niger [was] constituted by the line of highest water on the left bank of the river, from the village of Bandofay to the frontier of Nigeria” and that “[c]onsequently, all the islands situated in this part of the river [formed] part of the Territory of Dahomey”. Niger, for its part, denies that the arrêté of 23 July 1900 established a boundary; in its view the relevant wording was merely intended to

indicate the territorial extent of the newly created Territory. It further observes that an understanding soon developed that the boundary was constituted by “the course of the river” and that this could only mean that the boundary was situated within the watercourse of the river.

The Chamber is of the view that the arrêté of 23 July 1900 in conjunction with the decree of the President of the French Republic of 20 December 1900, which created the Third Military Territory, cannot be read as determining the boundaries thereof. The geographical references used can only be seen as indicating in general terms the extent of the newly created territory; the words “the areas on the left bank of the Niger” in the arrêté and “the Niger” in the decree make it clear that these areas are detached from the colony of Dahomey to which they previously belonged. The conclusion that the legal instruments of 23 July and 20 December 1900 did not determine any boundary, and were not considered at the time as doing so, is confirmed by the letter of 7 September 1901 of the French Minister for the Colonies addressed to the Governor-General of the AOF, referring to the “course of the Niger as the best demarcation line”. Although this letter did not determine the boundary, the Chamber considers that it provides sufficient evidence that a delimitation had not taken place the year before. Nor has the Chamber found any document which shows that a delimitation was carried out in subsequent years.

The Chamber therefore concludes that Benin’s argument that the arrêté of 23 July 1900 located the boundary at the left bank of the River Niger, and that this delimitation remained in force until the date of independence, cannot be upheld.

Turning to the letter of 27 August 1954 of the Governor ad interim of Niger, the Chamber initially analyses the context in which this letter was written. It concludes that, in view of its finding that the arrêté of 23 July 1900 did not establish a boundary, this letter cannot be seen as an authoritative confirmation of such a boundary, as claimed by Benin. The Chamber further notes that, under French colonial law, the Lieutenant-Governor of a colony had no competence to delimit unilaterally the external boundaries of the colony. Therefore, the letter in itself cannot be relied on by Benin as a legal title placing the boundary on the left bank of the river. The Chamber thus finds that it cannot uphold Benin’s claim according to which the letter of 27 August 1954 in conjunction with the arrêté of 23 July 1900 provides it with legal title to a boundary on the left bank.

Niger’s claims to title

The Chamber then turns to the acts invoked by Niger as evidence of its legal title, namely the arrêtés issued by the Governor-General of the AOF on 8 December 1934 and 27 October 1938 reorganizing the internal administrative structure of the colony of Dahomey and containing a description of the boundaries of the various cercles. In both arrêtés the north-west boundary of the cercle of Kandi is described as “the course of the Niger as far as its confluence with the Mekrou”.

The Chamber first notes that both arrêtés were issued by the Governor-General, who was the authority competent to establish, delimit and reorganize the cercles of colonies. In so far as they describe the boundaries of these cercles with the neighbouring colonies which also came under his authority, the arrêtés do not have an exclusive internal character but may also be relied upon in intercolonial relations. Consequently it can be concluded on the basis of these arrêtés that the course of the River Niger constituted the intercolonial boundary. The Chamber finds itself unable, however, to deduce therefrom that that boundary was situated in the river, whether at the thalweg or the median line. It notes in this regard that the terminology used in the arrêtés is identical to that of the 1901 letter and is just as imprecise. The notion of the “course of the river” covers a range of possibilities: a boundary on either river bank or a boundary somewhere within the river. The Chamber thus finds that the 1934 and 1938 arrêtés did not establish a boundary in the river; and that it cannot therefore sustain Niger’s claims as to title.

— Effectivités as basis for determination of the frontier (paras. 75-102)

Since the Chamber has concluded that neither of the Parties has succeeded in providing evidence of title on the basis of regulative or administrative acts during the colonial period, it turns to consider whether the evidence furnished by the Parties with respect to effectivités can provide the basis for it to determine the course of the frontier in the sector of the River Niger and to which of the two States each of the islands in the river belongs.

It recalls in this regard that the Court has previously ruled in a number of cases on the legal relationship between effectivités and title. The passage most pertinent to the present case can be found in the Judgment in the Frontier Dispute (Burkina Faso/Republic of Mali) case, in which the Chamber of the Court, having noted that “a distinction must be drawn among several eventualities” when evaluating the legal relationship between effectivités and title, stated, inter alia, that: “[i]n the event that the effectivité does not co-exist with any legal title, it must invariably be taken into consideration” (I.C.J. Reports 1986, p. 587, para. 63).

The Chamber first analyses the various activities prior to 1954, presented as effectivités by the Parties. It refers to the letter of 3 July 1914 of the commandant of the secteur of Gaya (Niger), administrateur adjoint Sadoux, to the commandant of the cercle of Moyen-Niger (Dahomey), written for the purpose of determining when grazing permits should be issued and delimiting the jurisdiction of the two colonies’ indigenous tribunals. Administrateur adjoint Sadoux attached to his letter a list of islands in the border area, drawn up on the basis of an exploration of the whole stretch of the river, with an indication of the colony to which each island belonged according to its position with respect to the main navigable channel. He defined this channel as “the river’s main channel, not the widest channel, but the only channel navigable at low water”. The Chamber notes that it appears that a meeting took place and led to an agreement. Although difficulties arose in 1919 with regard to the administration of the island of Lété by Gaya, which was contested by Dahomey, the 1914 arrangement, which became known as the 1914 modus vivendi, seems to have been complied with in subsequent years.

The Chamber then turns to the effectivités in the period from 1954 until the critical date in 1960. It recalls that, on 27 August 1954, the Governor ad interim of Niger wrote a letter in which he stated that the boundary was situated “at the line of highest water, on the left bank of the river, from the village of Bandofay to the frontier of Nigeria” and that “all the islands situated in this part of the river [formed] part of the territory of Dahomey”. The Chamber takes note of the fact that, during this period, the claims of Dahomey to be entitled to administer the island of Lété became more frequent.

On the basis of the evidence before it, the Chamber finds that, from 1914 to 1954, the terms of the modus vivendi established by the 1914 Sadoux letter were in general respected and that, during this period, the main navigable channel of the River Niger was considered by both sides to be the boundary. As a result, administrative authority was exercised by Niger on the islands to the left and by Dahomey on the islands to the right of that line. The entitlement of Niger to administer the island of Lété was sporadically called into question for practical reasons but was neither legally nor factually contested.

With respect to the islands opposite Gaya, the Chamber notes that, on the basis of the modus vivendi established by the 1914 Sadoux letter, these islands were considered to fall under the jurisdiction of Dahomey and that it has not received any information to indicate that these islands were administered from anywhere else other than the cercle of Kandi (Dahomey). The Chamber therefore concludes that, in this sector of the river, the boundary was regarded as passing to the left of these three islands.

The Chamber finds that the situation is less clear in the period between 1954 and 1960. It is apparent that both Parties periodically claimed rights over the islands, in particular Lété, and also

occasionally performed administrative acts as a display of authority. However, on the basis of the evidence before it, the Chamber cannot conclude that the administration of the island of Lété, which before 1954 was undoubtedly carried out by Niger, was effectively transferred to or taken over by Dahomey. In this respect, the Chamber notes that a report of the gendarmerie of Malanville of 1 July 1960 stated that Lété was “currently administered by the subdivision of Gaya”.

For all these reasons and in the circumstances of the case, particularly in light of the evidence furnished by the Parties, the Chamber concludes that the boundary between Benin and Niger follows the main navigable channel of the River Niger as it existed at the dates of independence, it being understood that, in the vicinity of the three islands opposite Gaya, the boundary passes to the left of these islands. Consequently, Benin has title to the islands situated between the boundary thus defined and the right bank of the river and Niger has title to the islands between that boundary and the left bank of the river.

— Precise location of the boundary line in the main navigable channel (paras. 103-115)

The Chamber then proceeds to determine the location of the boundary line in the main navigable channel, namely the line of deepest soundings, as it existed at the dates of independence.

The Chamber initially notes that, over the course of time, a number of hydrographic and topographic surveys have taken place on the River Niger and that the position of the main navigable channel of the river as determined by each of the missions is very similar. The Chamber considers that this indicates that the riverbed is relatively stable and that any siltation which has taken place has rarely led to a noticeable change in the location of the main navigable channel. This appears to have been the case in both the colonial and post-independence period.

Given that it has to determine the course of the boundary at the time of independence, the Chamber is of the view that the report of a study on the navigability of the Middle Niger, carried out by the NEDECO firm between 1967 and 1970, provides the most useful information on the situation at the critical date. In view of the proven stability of the riverbed, it may be assumed that the situation between 1967 and 1970 was virtually identical with that in 1960. In this respect, the Chamber considers it of great importance that the 1967-1970 survey was carried out by an independent firm renowned for its expertise and experience and that the results were contained in a report presented to the governments of four riparian States, including the Parties to the present case. Furthermore, the findings of the NEDECO study were not contested at the time of their publication and they are corroborated by both earlier and later studies.

The Chamber notes that map No. 36 of the NEDECO report indicates that in the sector opposite the village of Gaya, the river has two navigable channels. On the basis of the available data, it is not possible to say which one is consistently deeper. This is however without consequence in the present case given the conclusions drawn above by the Chamber, from the colonial effectivités in that sector. The Chamber considers that, in the sector of the three islands opposite Gaya, the boundary is constituted by the line of deepest soundings of the left navigable channel. However, in the vicinity of the last of these islands, Kata Goungou, the boundary deviates from that line and passes to the left of that island.

With the exception indicated in the previous paragraph, the boundary between the Parties therefore follows the line of deepest soundings of the main navigable channel of the River Niger as it appears in the 1970 NEDECO report, from the intersection of this line with the median line of the River Mekrou until its intersection with the boundary of the Parties with Nigeria.

Opposite Gaya, the boundary is constituted by the line of deepest soundings of the left navigable channel from the point situated at co-ordinates 11° 52' 29" latitude North and 3° 25' 34" longitude East until the point located at co-ordinates 11° 51' 55" latitude North and 3° 27' 41"

longitude East, where the boundary deviates from this channel and passes to the left of the island of Kata Goungou, subsequently rejoining the main navigable channel at the point located at co-ordinates 11° 51' 41" latitude North and 3° 28' 53" longitude East.

The Chamber then provides a table, indicating the co-ordinates of the points numbered from 1 to 154, through which the boundary line between Benin and Niger passes in the sector of the River Niger, proceeding downstream. These points that constitute the boundary line are further represented, purely for illustrative purposes, on a sketch-map (No. 4) attached to the judgment.

— Determination of to which of the Parties each of the islands belongs (paras. 116-118)

The Chamber proceeds to determine to which of the Parties each of the islands in the River Niger belongs, following the course of the river downstream from its confluence with the Mekrou to the frontier with Nigeria.

The Chamber notes that it has not received reliable information that new islands formed nor that islands disappeared between 1960 and 1967-1970. As regards subsequent years, it observes that one of the islands identified by Niger, namely Sandi Tounga Barou, which is not represented on any map prepared before 1973, does appear on various aerial photographs and SPOT images taken from 1973 onwards. The Chamber finds it must consequently determine to which of the Parties this island belongs. With respect to the “island” of Pekinga, which Niger in its final submissions attributed to Benin, the Chamber notes that it is not identifiable as a separate island on the maps annexed to the NEDECO report, but instead appears to be part of the river bank on the Benin side. The judgment then lists all the islands in the relevant sector of the River Niger, indicating to which Party they belong in accordance with the Chamber’s findings. Finally, the Chamber observes that the determination in regard to the attribution of islands is without prejudice to any private law rights which may be held in respect of those islands.

— The frontier on the two bridges between Gaya (Niger) and Malanville (Benin) (paras. 119-124)

The Chamber finally notes that Niger has also asked it to determine the frontier on the two bridges between Gaya (Niger) and Malanville (Benin). Benin contends that this issue is not covered by the Special Agreement and that the Chamber therefore has no jurisdiction to comply with Niger’s request. The Chamber observes in this regard that, in the Special Agreement, “[t]he Court is requested to . . . determine the course of the boundary . . . in the River Niger sector”. Since the bridges between Gaya and Malanville are located in that sector, the Chamber considers that it has jurisdiction to determine where the boundary is located on these bridges.

The Chamber notes that Niger claims that the boundary is situated at the middle point of each of the bridges given that the construction and maintenance of these structures has been financed by the Parties on an equal basis and that the bridges are their joint property. Benin, for its part, submits that a difference between the location of the boundary on the bridges and the course of the boundary in the river beneath would be incoherent.

The Chamber observes that, in the absence of an agreement between the Parties, the solution is to extend vertically the line of the boundary on the watercourse. This solution accords with the general theory that a boundary represents the line of separation between areas of State sovereignty, not only on the earth’s surface but also in the subsoil and in the superjacent column of air. Moreover, the solution consisting of the vertical extension of the boundary line on the watercourse avoids the difficulties which could be engendered by having two different boundaries on geometrical planes situated in close proximity to one another.

In light of the foregoing, the Chamber concludes that the boundary on the bridges between Gaya and Malanville follows the course of the boundary in the river. This finding is without prejudice to the arrangements in force between Benin and Niger regarding the use and maintenance

of these bridges, which are financed by the two States on an equal basis. The Chamber observes in particular that the question of the course of the boundary on the bridges is totally independent of that of the ownership of those structures, which belong to the Parties jointly.

The course of the boundary in the River Mekrou sector (paras. 125-145)

The Chamber then determines “the course of the boundary between the two States in the River Mekrou sector”, a task with which it is charged under Article 2 (c) of the Special Agreement.

It notes that, according to Benin, the boundary follows the median line of the River Mekrou as far as the boundary of the Parties with Burkina Faso. That is said to result, on the one hand, from the application of the uti possidetis juris principle, since, at their dates of independence, the territories of Dahomey and Niger were separated by the course of that river pursuant both to the legal titles in force and to the effectivités; on the other hand and in any event, such a boundary is said to have been confirmed by Niger’s formal recognition, at the time of the negotiations between the two Parties in 1973 and 1974 with a view to the construction of the Dyodyonga dam, that the Mekrou did indeed constitute the boundary between their respective territories.

The Chamber notes that, according to Niger, the boundary in the sector in question follows a line comprising two parts: the first is a straight line in a south-westerly direction joining the point of confluence of the River Mekrou with the River Niger to the point where the Paris meridian meets the Atakora mountain range: the second part joins this latter point to the point where the former boundary between the cercles of Say and Fada meets the former boundary between the cercles of Fada and Atakora. That is claimed to result from the combined effect of the regulatory instruments which, during the colonial period, defined the boundary between Dahomey and Niger in the sector in question, namely the decree of 2 March 1907 incorporating the cercles of Fada-N’Gourma and Say into the colony of Haut-Sénégal et Niger (to which Niger succeeded) and the decrees of 12 August 1909 and 23 April 1913 modifying the boundary of the latter colony with Dahomey.

The Chamber states that it will first ascertain, by application of the principle of uti possidetis juris, what the course of the intercolonial boundary was at the critical dates of independence in August 1960. It observes that, for that purpose, it is necessary to examine first the legal titles relied on by the Parties, with any effectivités being considered only on a confirmatory or subsidiary basis, in accordance with the rules recalled earlier in its judgment.

The first text for consideration is the decree of 2 March 1907, the object of which was to change the course of the boundary between the colony of Haut-Sénégal et Niger and that of Dahomey by incorporating the cercles of Fada N’Gourma and Say, until then part of Dahomey, into the neighbouring colony. Article 1 of that decree provides that the new intercolonial boundary:

“is constituted, from the boundary of Togo, by the present boundary of the cercle of Gourma until it reaches the Atakora mountain range, whose summit it follows until it meets the Paris meridian, from which point it runs in a straight line in a north-easterly direction, terminating at the confluence of the River Mekrou with the Niger”.

The Chamber considers that that delimitation, which clearly does not coincide with the course of the River Mekrou, tends to support the position of Niger.

The Chamber finds that it cannot accept the proposition put forward by Benin that the decree of 1 March 1919 implicitly abrogated or amended that of 2 March 1907 in relation to the intercolonial boundary in the sector in question. The 1919 decree created the colony of Haute-Volta, which was constituted by detaching a certain number of cercles, including Fada

N’Gourma and Say, from Haut-Sénégal et Niger. However, there is nothing in the terms of the 1919 decree to suggest that its authors intended to call into question the line defined as the intercolonial boundary in 1907.

That does not suffice nevertheless to refute Benin’s argument with respect to the course of the boundary in the sector concerned.

The Chamber is bound to note, first of all, that the 1919 decree refers neither in its citations nor in its operative articles to the 1907 decree, and that it does not include any precise definition of the intercolonial boundary, as the earlier decree had done. In reality, the 1919 decree defines the territory of Haute-Volta solely by reference to the cercles which compose it, and it is thus also by this means that it indirectly defines the boundaries between Haute-Volta and the neighbouring colonies, and in particular Dahomey. It is by the precise delimitation of the cercles mentioned in Article 1 of the decree of 1 March 1919 — a delimitation not effected by the decree itself — that, from this date, the intercolonial boundary could be defined. However, the delimitation of the cercles, the principal administrative subdivisions of the colonies, was at that time a matter falling within the competence of the Governor-General. It must therefore be concluded from the foregoing that, while the 1919 decree did not call into question the intercolonial boundary determined in 1907, it left unaffected the power of the Governor-General to modify the boundary in the future by fixing the boundaries of the cercles in question in accordance with his normal competence in that regard.

The Chamber notes that an arrêté of the Governor-General of 31 August 1927 defines the River Mekrou as the boundary of the cercle of Say in the area contiguous with the colony of Dahomey. That arrêté was adopted by the Governor-General following, and as a consequence of, the decree of 28 December 1926 incorporating the cercle of Say into the colony of Niger (created some years earlier). It was thus for the Governor-General to define the boundaries between the colonies of Haute-Volta and Niger, in the exercise of his power to define the boundaries of the cercles: that was the purpose of the arrêté of 31 August 1927. That instrument, in the second paragraph of Article 1, defined the boundary between the cercle of Say and Haute-Volta in the following terms:

“In the South-West [by] a line starting approximately from the [River] Sirba at the level of the Say parallel and terminating at the Mekrou;

In the South-East, by the Mekrou from that point as far as its confluence with the Niger.”

Thus, by this arrêté the Governor-General clearly fixed the boundary of the cercle of Say, and hence the intercolonial boundary, on the Mekrou.

The Chamber observes that the arrêté of 31 August 1927 was followed on 15 October by an erratum amending its text retroactively by removing the reference to the course of the Mekrou as the south-eastern boundary between the cercle of Say and Haute-Volta. However, the erratum would seem in effect to have been motivated not by the fact that the Governor-General did not mean to fix the south-eastern boundary of the cercle of Say along the Mekrou, but rather by a wish not to define the boundary between Dahomey and Niger in an arrêté whose purpose, as was clear from its title, was to fix the boundary between Niger and Haute-Volta.

The Chamber furthermore takes account of the instruments concerning the creation of game reserves and national parks in the area known as “The Niger W”; it notes that all those instruments use the River Mekrou for purposes of delimitation of the areas in question. If, in the eyes of the administrative authorities competent to promulgate the arrêtés in question, the Mekrou did not represent the intercolonial boundary, it is difficult to see why it should have been chosen as the boundary of these national parks and nature reserves. Finally, the Chamber notes that the

cartographic material in the file clearly confirms that, certainly from 1926-1927, the Mekrou was generally regarded as the intercolonial boundary by all the administrative authorities and institutions of the colonial Power.

All of the foregoing considerations confirm the position that the 1907 line no longer corresponded, at the critical date, to the intercolonial boundary and that, on the contrary, at that date, it was the course of the Mekrou which, in the view of all the competent authorities of the colonial administration, constituted the boundary between the adjacent colonies — at that date the colonies of Dahomey and Niger.

The Chamber observes that, as argued by Niger, the decree of 2 March 1907, which clearly defined a different boundary, was never expressly abrogated or amended, or indeed superseded by some other instrument of at least equal authority — either a decree or a statute — containing provisions clearly incompatible with its own. However, the Chamber emphasizes that 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, in particular in the exercise of their law-making power. The Chamber is bound to note that the administrative instruments promulgated after 1927 were never the subject of any challenge before the competent courts, and that there is no evidence that the colonial administration was ever criticized at the time for having improperly departed from the line resulting from the 1907 decree.

The Chamber concludes from all of the foregoing that, at least from 1927 onwards, the competent administrative authorities regarded the course of the Mekrou as the intercolonial boundary separating Dahomey from Niger; that those authorities reflected that boundary in the successive instruments promulgated by them after 1927, some of which expressly indicated that boundary, whilst others necessarily implied it; and that this was the state of the law at the dates of independence in August 1960. In these circumstances, the Chamber finds, it is unnecessary to look for any effectivités in order to apply the uti possidetis principle, since effectivités can only be of interest in a case in order to complete or make good doubtful or absent legal titles, but can never prevail over titles with which they are at variance. The Chamber notes moreover, ex abundanti, that the effectivités relied on by the Parties in the sector in question are relatively weak.

In the light of this conclusion, the Chamber notes that the dispute between the Parties regarding the Dyodyonga dam negotiations of 1973 and 1974 becomes moot. It is thus unnecessary for the Chamber to decide whether the resulting documents could have constituted a legally binding obligation for Niger and, if so, whether that obligation could have been vitiated by an error fulfilling the conditions laid down by customary international law.

— Location of the boundary line in the River Mekrou (paras. 143-145)

Lastly, the Chamber determines the exact location in the River Mekrou of the boundary between Benin and Niger.

The Chamber recalls that, in the case concerning Kasikili/Sedudu Island (Botswana/Namibia), the Court observed that:

“Treaties or conventions which define boundaries in water courses nowadays usually refer to the thalweg as the boundary when the watercourse is navigable and to the median line between the two banks when it is not, although it cannot be said that practice has been fully consistent.” (I.C.J. Reports 1999 (II), p. 1062, para. 24.)

In the present case, the Chamber observes that the Parties did not provide the Chamber with any documents that would enable the exact course of the thalweg of the Mekrou to be identified. The Chamber notes that in all likelihood there is a negligible difference between the course of the

thalweg and the course of the median line of the River Mekrou, but considers that, in view of the circumstances, including the fact that the river is not navigable, a boundary following the median line of the Mekrou would more satisfactorily meet the requirement of legal security inherent in the determination of an international boundary.

The Chamber concludes therefore, that, in the sector of the River Mekrou, the boundary between Benin and Niger is constituted by the median line of that river.

The full text of the operative paragraph reads as follows:

“For these reasons,

THE CHAMBER,

(1) By four votes to one,

Finds that the boundary between the Republic of Benin and the Republic of Niger in the River Niger sector takes the following course:

- the line of deepest soundings of the main navigable channel of that river, from the intersection of the said line with the median line of the River Mekrou until the point situated at co-ordinates 11° 52' 29" latitude North and 3° 25' 34" longitude East;
- from that point, the line of deepest soundings of the left navigable channel until the point located at co-ordinates 11° 51' 55" latitude North and 3° 27' 41" longitude East, where the boundary deviates from this channel and passes to the left of the island of Kata Goungou, subsequently rejoining the main navigable channel at the point located at co-ordinates 11° 51' 41" latitude North and 3° 28' 53" longitude East;
- from this latter point, the line of deepest soundings of the main navigable channel of the river as far as the boundary of the Parties with Nigeria;

and that the boundary line, proceeding downstream, passes through the points numbered from 1 to 154, the co-ordinates of which are indicated in paragraph 115 of the present Judgment;

IN FAVOUR: Judge Ranjeva, Vice-President of the Court, President of the Chamber; Judges Kooijmans, Abraham; Judge ad hoc Bedjaoui;

AGAINST: Judge ad hoc Bennouna;

(2) By four votes to one,

Finds that the islands situated in the River Niger therefore belong to the Republic of Benin or to the Republic of Niger as indicated in paragraph 117 of the present Judgment;

IN FAVOUR: Judge Ranjeva, Vice-President of the Court, President of the Chamber; Judges Kooijmans, Abraham; Judge ad hoc Bedjaoui;

AGAINST: Judge ad hoc Bennouna;

(3) By four votes to one,

Finds that the boundary between the Republic of Benin and the Republic of Niger on the bridges between Gaya and Malanville follows the course of the boundary in the river;

IN FAVOUR: Judge Ranjeva, Vice-President of the Court, President of the Chamber; Judges Kooijmans, Abraham; Judge ad hoc Bedjaoui;

AGAINST: Judge ad hoc Bennouna;

(4) Unanimously,

Finds that the boundary between the Republic of Benin and the Republic of Niger in the River Mekrou sector follows the median line of that river, from the intersection of the said line with the line of deepest soundings of the main navigable channel of the River Niger as far as the boundary of the Parties with Burkina Faso.”

Dissenting opinion of Judge Bennouna

Judge Bennouna cannot agree with the first three findings of the Chamber on the course of the boundary between Benin and Niger in the River Niger sector and on the question of which State the islands in the river belong to. However, he does agree with the Chamber's fourth finding, concerning the course of the boundary between Benin and Niger in the River Mekrou sector.

Judge Bennouna considers that the boundary in the River Niger sector is located on the left bank of the river, by virtue both of the legal title and of the effectivités. He accordingly concludes that all of the islands in the river belong to Benin. Finally, in Judge Bennouna's view, the Chamber has no jurisdiction to determine the course of the boundary on the two bridges across the River Niger.
