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The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the second round of oral argument of Burkina Faso. I now give the floor to Professor Pellet, counsel and advocate for Burkina Faso. Mr. Pellet, you have the floor.

Mr. PELLET: Thank you very much, Mr. President.

METHODOLOGY AND APPLICABLE LAW

1. Mr. President, Members of the Court, Professor Salmon — whom I shall not call an “old friend”¹, since he has the spirit and vivacity of youth, but a very dear friend — Jean Salmon told you when he broke off his address for the lunch break last Friday that “since you ha[d] been so very well behaved, [they would] continue [their] story [that] afternoon”². This is a telltale admission. Yes, Members of the Court, our opponents and friends have been telling you a story, which is at times fascinating — since they are so gifted — and at other times moving, because storytellers know how to appeal to the feelings of their audience. But like all stories, it is a fantasy, and should no doubt have been preceded by the usual warning whereby: “any resemblance to real events” — and we should add “and to positive law” — “is purely coincidental”.

2. Unfortunately, after the enchantment, it is time to come back to reality and *lex dura*. Time to realize that we are here before a court, which states the law with the consent of the Parties and to the extent granted by that consent; a court whose task is not to review the undertakings of the States, but to ensure that they are implemented³; whose task is not to redraw frontiers that it finds — or that one of the Parties finds — more satisfying or more convenient or more attractive, but to say where the frontiers lie, in accordance with the applicable law (which here Burkina and Niger have defined exhaustively); whose task is not to achieve an “equitable solution”, which would be appropriate in a maritime delimitation, but to base itself on (not only to “take into

¹Voir CR 2012/22, p. 2[7], para. 8 (Salmon).

²CR 2012/23, p. 56, para. 6 (Salmon).

³*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 229; see also: *Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7*, p. 20; *Rights of Nationals of the United States of America in Morocco (France v. United States of America), Judgment, I.C.J. Reports 1952*, p. 196; *South West Africa (Ethiopia v. South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 48, para. 91.

11 consideration”, but to *base itself on* the instruments designated as relevant — and only those which are relevant — in order to (fully) resolve the frontier dispute between the Parties.

3. Therefore, we must, for example, distance ourselves from the myth of the “Temps béni des colonies” [the good old colonial days] extolled by a popular French singer⁴. Unfortunately, there are not many “nice colonizers”, and France — I am the first to be sorry — was no exception. And while some administrators on the ground were no doubt concerned about the feelings and interests of those who were known as the “natives”, the decisions taken in Paris or in Dakar (and it was only there that the decisions that concern us could be taken) — those decisions were based instead on what people believed *there* (in Paris and in Dakar) to be in the interests of the colonial power in regions that were newly occupied and as yet little known. Those interests may have been misunderstood, but — no matter what our friends on the other side say — they led the French authorities to adopt frontiers that were often arbitrary and rough-hewn. And ours is no exception.

4. Mr. President, my colleagues and I are sorry to break the spell and to have to describe a less poetic and idyllic reality than the one dreamt up by our opponents. Without any claim to originality, we shall describe that reality according to the following plan:

- first of all, I shall return to the questions of methodology and applicable law which have taken up the majority of Niger’s arguments; I shall take the opportunity to give our replies to the questions put by Judges Bennouna and Donoghue;
- Professors Jean-Marc Thouvenin and Mathias Forteau will then share the task of explaining both why the — tortuous — line claimed by Niger is in fact a work of fiction, and how the one we propose is the only one that complies with the principles applicable to the delimitation of the disputed frontier, and this in turn for both the “Téra sector” and the “Say sector”;
- finally, Mrs. Sawadogo Tapsoba, Co-Agent of Burkina Faso, will make a few concluding remarks before reading out our final submissions.

⁴Michel Sardou, *Au temps des colonies*; lyrics available at: http://www.lyricsmania.com/le_temps_des_colonies_lyrics_michel_sardou.html.

I. The subject of the dispute

(reply to Judge Donoghue)

[Slide 1: Judge Donoghue's question]

5. Mr. President, at this very late stage in the proceedings, I do not believe it is necessary to return in detail to the subject of the dispute brought before the Court. However, the question posed by Judge Donoghue last Friday provides me with an opportunity to clarify, usefully I think, one particular aspect thereof.

6. In order to reply, I must return to a detail of terminology. In the French text — the only authoritative text — of Article 2, paragraph 2, of the Special Agreement, the Parties ask the Court to “*donner acte . . . de leur entente*”; the translation by the Registry reads “place on record the Parties’ *agreement*”. As I said last week⁵, with all due respect for the work of the Court’s translators and interpreters, I am not entirely convinced by this translation and I think that “understanding”, for example, would have been a better translation for “*entente*” than the word “agreement”.

7. That said, the question posed by Judge Donoghue is whether this “*entente*” is binding on the Parties. Our reply is this — and I would also refer, if I may, to what I said on the subject last Tuesday⁶: it *will* be when the Court has placed it on record. The reasons for this reply (which is based first of all on the very terms of that provision in the Special Agreement) are the following:

(1) we find it *most* regrettable — and I say this very solemnly on behalf of Burkina Faso — that the Agent of the Republic of Niger has affirmed that his country “has *ratified*” (“ratified”, Mr. President)

“the exchange of Notes between Niger and Burkina Faso of 29 October and 2 November 2009 . . . in accordance with Article 7 of the Agreement of 28 March 1987, which provides:

‘The result of the demarcation works shall be embodied in a legal instrument, which shall be submitted for signature and *ratification* by the two Contracting Parties’.”⁷;

⁵CR 2012/21, p. 27, para. 6 (Pellet).

⁶*Ibid.*, pp. 29-30, paras. 9-10 (Pellet).

⁷CR 2012/22, p. 13, para. 14 (Bazoum); emphasis added.

13 and counsel for Niger added: “the process of ratifying that agreement has been concluded in Niger”⁸; Niger has not provided any evidence to support its claim in this regard; in any event, for its part, Burkina has not ratified this exchange of letters, which has not been registered by either of the Parties with the United Nations;

(2) if this exchange of letters constitutes a treaty within the meaning of international law, subject to ratification under Article 7 of the 1987 Agreement, as the Agent of Niger asserts, then it has not, in any event, been “officially recognized” under international law, to use Niger’s phrase in respect of the consensual line of 1988 and the political compromise of 1991⁹; it has indeed not been ratified by both States; consequently, pursuing this line of reasoning, it remains legally non-binding between the Parties;

(3) it is precisely because Niger, in cases such as this, considers itself not to be bound by incomplete agreements¹⁰ — and in strictly legal terms it is not wrong — that the authorities of Burkina requested that paragraph 2 of Article 2 should be inserted in the Special Agreement;

(4) and furthermore, as I recalled in my pleading last Tuesday¹¹, the Parties’ “*entente*” — the understanding — constituted by the exchange of letters of 29 October and 2 November 2009 is *subsequent* to the conclusion of the Special Agreement and will only derive binding force from your judgment, Members of the Court.

8. It is only once this “*entente*” — this understanding — has been placed on record in that judgment that the frontier dispute submitted to the Court by the Parties will be completely resolved. I hope, Judge Donoghue, that I have answered your question clearly.

[End of slide 1]

II. The applicable law

9. Mr. President, a few words now on the applicable law — and I do indeed mean “the *law*”.

14 [Slide 2: Comparison between the *Benin/Niger* and *Burkina Faso/Niger* Special Agreements]

⁸CR 2012/22, p. 24, para. 3 (Salmon); emphasis added.

⁹CMN, p. 15, para. 1.0; p. 47, para. 1.2.2; pp. 54-56, paras. 1.2.19-1.2.23.

¹⁰See in particular CR 2012/22, p. 32, para. 20 (Salmon); pp. 43-44, paras. 29-30 (Kamto).

¹¹CR 2012/21, pp. 29-30, paras. 7-9 (Pellet).

10. Members of the Court, I am not telling you anything new when I recall that this is very clearly defined by Article 6 of the Special Agreement of 24 February 2009. It is a fairly unusual provision — firstly, because it exists (a number of special agreements have no equivalent clause — for example, that adopted by Burkina and Mali in 1983, which contains but a passing reference to the *uti possidetis* principle in its Preamble¹²); and secondly, because when a special agreement contains such a clause, that clause is usually very general. Such is the case with the 2002 Special Agreement in the *Benin/Niger* case, under the terms of which:

“The rules and principles of international law applicable to the dispute are those set out in Article 38, paragraph 1, of the Statute of the International Court of Justice, including the principle of State succession to the boundaries inherited from colonization, that is to say, the intangibility of those boundaries.”

11. The wording of Article 6 of the 2009 Special Agreement is very similar to that which I have just read out, except for two differences. The first — the equation between succession to the colonial boundaries and their “intangibility” — appears to me to be fairly trivial. Not the second. The reference to the Agreement of 28 March 1987 between Burkina and Niger is, on the contrary, crucial.

[End of slide 2. Slide 3: Articles 1 and 2 of the Agreement of 28 March 1987]

12. It is not a slight difference: through its silence, the Special Agreement in the *Burkina Faso/Republic of Mali* case referred back to general international law; the Special Agreement in the *Benin/Niger* case did not go very much further: the rules and principles of international law in Article 38 and the *uti possidetis juris* represent no great commitment. However, the reference to the 1987 Agreement is another matter altogether, and it is far more restrictive:

- the frontier between the two States is *that described in the 1927 Arrêté, as clarified by its Erratum* — that and no other;
- it being understood that it is only “[s]hould the *Arrêté* and *Erratum* not suffice [that] 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”.

¹²<http://www.icj-cij.org/docket/files/69/10664.pdf>.

This, Members of the Court, is the law, the *lex specialis*, which is binding on the Parties and likewise on the Court.

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13. Well, Mr. President, I can already see — or at least guess at — the indignant reactions of my opponents and friends; I can hear their imprecations: “fetishistic . . . view of the [text]”¹³! “Freudian obsession”¹⁴! “Passion for protocol”¹⁵! “It regards the Erratum . . . as sacred”¹⁶! No, no! I am simply reading the provisions of a treaty adopted freely and knowingly by the Parties and which has the force of law between them.

14. And I would add that, if there *is* any fetishism, our opponents are just as guilty of it. They are clearly not fussy about formality: they admit with good grace that “[t]hose boundaries were in reality de facto boundaries, only rarely laid down in texts”¹⁷ and that, in the region with which we are concerned, no text of any legal value has ever defined the boundaries of the colonial districts as between the heads of those same districts¹⁸, even though those individuals had no power to delimit the inter-colonial boundaries (indeed, they did not even have final responsibility for intra-colonial delimitation); and they accept without any particular scruples that sketch-maps which are undated and of uncertain provenance may constitute admissible and decisive evidence. Their obsession, however, lies elsewhere — and in particular in the 1986 Judgment of the Chamber of the Court in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, which they recite as if it were a breviary!

15. Mr. President, I have the greatest respect — affection almost! — for that founding Judgment, which I myself cited on a number of occasions last week — and Burkina Faso most certainly has no complaints in that regard, as recalled by our Agent last Monday¹⁹. However, it must be referred to judiciously, while keeping in mind the (sizeable) difference that exists between

¹³CR 2012/22, p. 36, para. 9 (Kamto).

¹⁴*Ibid.*, p. 31, para. 20 (Salmon).

¹⁵CR 2012/24, p. 38, para. 19 (Klein).

¹⁶CR 2012/22, p. 26, para. 7 (Salmon), and p. 36, para. 9 (Kamto); CR 2012/23, p. 15, para. 12 (Salmon). See also CR 2012/23, p. 14, para. 10 (Salmon), or CR 2012/24, p. 37, para. 19 (Klein).

¹⁷CR 2012/22, p. 23, para. 23 (Tankoano).

¹⁸See, for example, CR 2012/24, p. 11, para. 10 (Salmon) [Garnier/Lichtenberger “agreement” concerning the installation of the Vibourié marker]; CR 2012/24, p. 14, para. 15, and p. 18, para. 18 (Salmon) [Roser/Boyer “agreement”].

¹⁹CR 2012/19, p. 13, para. 2 (Bougouma).

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the two Special Agreements: that of 1983 did not refer to an agreement between the Parties. Our Special Agreement, that of 24 February 2009, does so; and this is a formal agreement, not a mere “understanding” of uncertain legal significance, but a treaty which *expressly* states on the basis of which instruments the frontier should be determined.

16. On the other hand, of course, whenever the special law which the Parties have adopted is not relevant for settling the present dispute, and thus does not lead to the exclusion of some of the rules which, in the absence of an agreement, were applied by the Chamber in 1986, there is nothing to prevent — and indeed everything to recommend — reference to the Judgment of the Chamber. This is particularly true in respect of the *uti possidetis* principle, on which my friend Maurice Kamto delivered an excellent speech — excellent, but far too abstract. Indeed, he failed to take account of the fact that, in our case, it must be applied while taking full account of the Special Agreement; of the reference in the latter to the 1987 Agreement; and of the exclusive role which that agreement accords, on the one hand, to the 1927 *Arrêté* and its Erratum, and on the other, in the alternative, to the 1960 IGN France map. That is the applicable law, and that above all else.

17. Moreover, and with this (important) proviso, we have no complaints about the masterful presentation delivered by Professor Kamto on the general *uti possidetis* principle²⁰ — it is the way he seeks to apply it to the present case which is the source of our misgivings. And, in particular, his uncompromising — might we say formalistic? — view of the critical date. He wants a single critical date, and we have to choose — or, rather, he proclaims that the only critical date to be taken into account is the dates of independence: 3-5 August 1960 (let us not quibble over a couple of days which, in any case, are not important — to our case, at least)²¹.

18. Mr. President, I myself am not in the least bit fetishistic — at any rate, not so far as the critical date is concerned. And I am more than ready to accept that the critical date for the application of the *uti possidetis* principle in our case is August 1960. However, this is of very little practical importance — and for at least two reasons:

²⁰CR 2012/22, pp. 33-35, paras. 2-5.

²¹See *ibid.*, p. 37, para. 11.

- 17 — firstly, the notion of a critical date is not unequivocal: it is, of course, used to determine the date for the application of the *uti possidetis* principle, but it is also relevant for establishing the date on which a dispute crystallized²²;
- secondly, and more generally, the term serves, in practice, to identify any date where pause must be taken in order to assess the status quo (be this territorial or otherwise).

19. Such was the approach of the Chamber of the Court in the *Burkina Faso/Republic of Mali* case. The Chamber began by explaining that a first critical date was the dates of independence, on which is fixed, to use its rightly celebrated expression (which was also recalled by Maurice Kamto²³), the “photograph of the territory” which constitutes the “colonial heritage”²⁴. But as my dear opponent also recalled, “the *uti possidetis* . . . settles the question of the date on which the colonial heritage should be considered, but not necessarily the issue of the precise content of that colonial heritage”²⁵. And that is why the 1986 Chamber had to go back in time in order to determine that “content” — i.e., the course of the frontier; it found that the Law of 1947 reconstituted Upper Volta within its 1932 boundaries, which were not modified subsequently; accordingly,

“the Chamber’s task in this case is to indicate the line of the frontier inherited by both States from the colonizers on their accession to independence . . . [T]his task amounts to ascertaining and defining the lines which formed the administrative boundaries of the colony of Upper Volta on 31 December 1932.” (*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 632, para. 148.)

20. The same applies to our case: 1960 relates back to 1947, which relates back to 1932. However, we have to go a little further back in time, since 1987 (by virtue of the Parties’ Agreement of 28 March) in fact “bestrides” — so to speak — this entire period, and refers directly to the 1927 Erratum, while fast-forwarding to the 1960 map should that Erratum not suffice.

[End of slide 3]

²²See, for example: *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (II), p. 698, para. 117; see also *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 682, para. 135; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, pp. 27-28, paras. 32-36.

²³CR 2012/22, p. 37, para. 12 (Kamto).

²⁴*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 568, para. 30.

²⁵CR 2012/22, p. 37, para. [17] (Kamto).

18 21. Mr. President, the methodology to be followed in the present case is fixed in the same way.

III. Questions of method

22. The house of cards constructed by Niger — the “story” which its counsel have invented — is summed up as follows by Professor Salmon: after asserting that “the 1927 texts” (he is referring to the *Arrêté* and its Erratum) are only “one piece of evidence of the frontier line, among others”, he adds:

“Upstream of the 1927 texts, Niger recalls that those texts were adopted pursuant to the Decree of the President of the Republic of 28 December 1926 . . . and, therefore, that their only possible purpose can be to give effect to the reorganizations of *cercles* and *cantons* for which that Decree provides. It believes that it is therefore reasonable to examine the preparatory acts carried out by the two colonies concerned in order to prepare the implementing *arrêtés*.

Downstream, it is necessary to consider how the 1927 texts were applied on the ground by the colonial authorities in order to remedy their insufficiency.”²⁶

19 23. Were it not for the sincere respect that I have for Professor Salmon, I would say that he is barking up entirely the wrong tree. And I have to say that I find it hard to see why you would find the intellectual complexity of the edifice dreamt up by our opponents “more appealing” — those are his words — than solving an equation, which the Parties have submitted to you, in which there are indeed “no unknowns”²⁷. Why complicate matters when they can be perfectly simple? Even before this Court, problems are sometimes presented in simple terms — I am thinking, for example, of the case of the Aouzou strip²⁸, of which certain aspects of today’s case are reminiscent: as in that case, we have one instrument, the 1927 Erratum, with which the frontier line must be compatible; it is sufficient to apply it — even, *where necessary*, to interpret it; to *interpret it*, not to betray it, even though, all too often, “to interpret is to betray” — apologies to our excellent interpreters! — *traduttore, traditore*. And when it is found *not to suffice* — not to suffice, rather than not to satisfy — it is necessary to refer to the IGN France map of 1960. All of this — no doubt because it is too simple — arouses the indignation of our opponents.

²⁶CR 2012/22, p. 28, para. 12 (Salmon).

²⁷*Ibid.*, p. 31, para. 19 (Salmon).

²⁸See *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, p. 6; see, in particular, p. 25, para. 51.

A. The alleged imperfection of the Erratum

[Slide 4: The course of the frontier]

24. First sign of indignation — and first error: the text of the Erratum is said to be “imperfect, imprecise, incomplete on certain points and erroneous on others”²⁹. Niger sees evidence of this in the fact that, as soon as it was enacted, “there were [supposedly] many complaints within the two colonies over the uncertainties in connection with the territorial boundary”³⁰. We are reaching the heart of the story, Mr. President: oh yes, the line in the Erratum gave rise to protests, including, and indeed in particular, on the part of the administrators of Dori *cercle* (as Professor Klein has repeated³¹ — but what difference does that make?). However, without exception, none of these protests concerned the existence and mandatory nature of the line, and very few referred to its lack of clarity. On the contrary, as we have shown³², the local administrators criticize a line which they understand and with which they are perfectly familiar! Just one example, Mr. President: in 1929, Taillebourg, the Commander of Dori *cercle*, goes to great lengths to obtain a *modification* to the Erratum; “I realize”, he writes, in particular to his counterpart in Tillabéry (but he conducts a very extensive campaign!), “I realize *that my request has a weak foundation*, and I am only making it because of the increasing difficulties which the prescribed boundaries, now that they are being rigorously observed, are causing in Dori *cercle*”³³.

25. Similarly, our friends on the other side of the Bar — and foremost among them the Agent of Niger himself — have asserted many times that, as soon as the two countries gained independence, their leaders “made numerous efforts to *identify* the precise line of the frontier”³⁴. With all due respect, that is not quite right, Mr. President: the two countries did not seek to *identify* their common frontier (at least, if we regard “identify” as a synonym of “delimit”); they

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²⁹CR 2012/22, p. 28, para. 11 (Salmon); see also CR 2012/22, p. 31, para. 20 (Salmon); CR 2012/22, p. 39, para. 16 (Kamto); CR 2012/23, p. 27, B (Klein); p. 45, para. 31 (Kamto); p. 54, para. 4 (Salmon); CR 2012/24, p. 16, para. 15 (Salmon).

³⁰CR 2012/22, p. 11, para. 8 (Bazoum); see also CR 2012/22, p. 39, para. 16 (Kamto); CR 2012/23, pp. 28-29, paras. 9-10 (Klein).

³¹CR 2012/23, p. 26, para. 7, or pp. 28-29, para. 9 (Klein).

³²See CR 2012/19, p. 62, para. 45, and CMBF, pp. 29-37, paras. 1.26-1.39, in particular pp. 33-36, paras. 1.29-1.36.

³³Letter No. 418 from the Commander of Dori *cercle* to the Commander of Tillabéry *cercle* dated 19 August 1929, MN, Ann. C 27, p. 2; see also his letter of 9 August 1929, MN, Ann. C 24, p. 3.

³⁴CR 2012/22, p. 12, para. 10 (Bazoum); see also CR 2012/23, p. 33, para. 15 (Klein).

immediately endeavoured to demarcate it on the ground, to mark it out on the basis of the Erratum. That was the case from 1964 onwards; it is what they attempted to do in the 1980s; and it was with a view to *demarcating* the frontier that they concluded the Agreement of 28 March 1987. And not without some success (even though the solution which was adopted still needs to be invested with the authority of *res judicata*): as I demonstrated last week³⁵, it was by relying on the Erratum (with the exception of one instance where it did not suffice, that inadequacy being overcome in accordance with the provisions of the 1987 Agreement) that the two sectors of the frontier which are the subject of the agreement — the understanding — which is referred to in Article 2, paragraph 2, of the Special Agreement were marked out. Moreover, the consensual line, which was adopted at the fourth meeting of the Joint Technical Commission on Demarcation, in September 1988³⁶, is based almost exclusively on the 1927 Erratum; the “almost” being explained by the fact that the 1960 IGN France map was consulted to determine the course of the frontier in a segment situated in the sector running from Bossébangou to the intersection of the Sirba with the Say parallel³⁷ — also in accordance with the provisions of the 1987 Agreement.

26. Admittedly, not having been the subject of a formal treaty, this consensual line is not binding on Niger³⁸ in the manner of one that derives from a conventional text. The matter is settled. However, as the Chamber of the Court made clear in the Gulf of Fonseca case, although

“[n]o account could be taken by the Chamber of any negotiating concessions which might have been made as to the position of the limit . . . *the Chamber is entitled to take account of the shared view in 1881 and 1884 of the Parties as to the basis and extent of their dispute*” (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 406, para. 73; emphasis added).

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“The significant aspect of the [in our case, 1987 and 1988] negotiations is . . . the shared view of the Parties as to the basis and extent of their dispute.” (*Ibid.*, p. 407, para. 76.)

In any event, although the consensus on the 1988 line admittedly resulted from the consultation between the two countries’ experts, the line itself is merely the consequence of the straightforward

³⁵See CR 2012/19, p. 65, para. 49 (Pellet).

³⁶Report of the fourth meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, Niamey, 26-28 September 1988, 28 September 1988, MBF, Ann. 81; see also MBF, cartographic Ann. 15.

³⁷See MBF, p. 155, para. 4.142.

³⁸See CR 2012/22, p. 44, para. 31 (Kamto).

application of the 1987 Agreement. I would note, moreover, that this consensual line was not, strictly speaking, the result of “negotiations”, as our opponents have repeated at length; that is to say, it was not the result of a bid to seek a new solution which would be acceptable to the Parties. The *experts* in the Joint Commission were *bound* by the delimitation “as described” by the 1927 Erratum, and could not depart from it.

B. The Erratum’s inadequacies and the 1960 map

[End of slide 4. Slide 5: Reply to Judge Bennouna’s question]

27. Members of the Court, the Erratum is not incomplete and only very marginally does not suffice. When — exceptionally — that is the case, reference must be made to the 1:200,000-scale IGN France map of 1960. And that brings me to our reply to Judge Bennouna’s question. That question is twofold.

28. We must first explain “to what extent” we agree “to refer to the 1960 IGN map to establish the course of the frontier” between the Parties. The answer is, in fact, to be found in the Agreement of 28 March 1987 and, in particular, Article 2 thereof: reference may only be made to the map if the *Arrêté*, as clarified by its Erratum, does not suffice; and, in the absence of any other document accepted by joint agreement of the Parties, first, reference *must* be made to it and, second, reference *may* be made *to it alone*. This is not fetishism, Mr. President, it is not formalism, it is not “Freudian”; it is quite simply what *is stated in* the 1987 text, to which the Special Agreement refers.

29. But beware: it is not permitted to reverse the order of the factors and take the map as a starting point, a step which our opponents quite blithely do not hesitate to take. Thus Professor Salmon, after appearing to admit that the map has been granted “the status of *subsidiary* title”, goes on unwaveringly to explain that “Niger considered it legitimate to *rely on* this subsidiary source”³⁹. And my esteemed opponent goes even further — much further: after admitting that Niger was, therefore, “rely[ing] on” the 1960 map, he explains that “Niger has scrupulously adhered to” its policy of only deviating “*from the IGN line* for reasons” based on the existence “of a colonial marker which was unknown to the drafters of the map”, of an alleged

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³⁹CR 2012/23, p. 55, para. 5 (Salmon); emphasis added.

“agreement which was reached after independence”, of “information dating from the colonial period” and for a “number of reasons” — which he does not elucidate — in the Say sector⁴⁰. No lengthy comments are necessary; I think it is sufficient for me to point out that:

— no, it is not the 1960 map that must be “rel[ied] on”, but the 1927 Erratum; and

— no, it is not permitted, should that text not suffice, to substitute the line shown on the map with an improbable mishmash of more or less formal colonial documents (generally less rather than more so, by the way).

If you will permit this bad play on words, Mr. President (which, incidentally, I am not sure can be translated into English): the map (*carte*) appears on a menu imposed by the 1987 Agreement — whether it is appetizing or not is irrelevant; Niger wishes, for its part, to choose the map (*à la carte*) in order to satisfy its culinary preferences. It may not do so.

30. Moreover, this is not quite the end of the matter — as I am quite willing to concede — since it is still necessary to determine exactly when the reference text does not suffice. Here too, it seems to me that the answer lies in the text: it is necessary for the Erratum *not to suffice* for the purposes of drawing the frontier line. My friend Professor Pierre Klein has gone to a great deal of trouble to show that the Erratum as a whole suffers from this defect of inadequacy⁴¹, and has denounced “the utter frivolity” of Burkina’s position⁴² and the presumptuousness of its counsel who, in splendid isolation, are, he says, obstinately persisting in denying the obscurity of the Erratum⁴³. Yet we are not postulating anything, Mr. President; this is a technical issue, and we are merely noting that the experts *of the two* Parties believed, in 1988, that it was perfectly possible to take the Erratum as the basis for the delimitation, even if it meant falling back on the map in those cases where that text did not describe the frontier adequately; and in the only instance where the map was unable to compensate for the Erratum, because a name that it mentioned did not appear on that map, the Joint Commission, in accordance with the letter and spirit of Article 2 of the

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⁴⁰CR 2012/23, p. 56, para. 6 (Salmon); emphasis added.

⁴¹See CR 2012/23, pp. 21-34 (Klein).

⁴²*Ibid.*, p. 21, para. 1 (Klein).

⁴³See, in particular, *ibid.*, p. 22, paras. 2 and 3; or pp. 32-33, para. 15 (Klein).

1987 Agreement, gave precedence to the Erratum over the map by interpreting the text of that instrument⁴⁴.

[End of slide 5. Slide 6: The 1927 Erratum and the 1960 map]

31. Mr President, Judge Bennouna's question also asks "for which section(s) . . . do each of the Parties agree to refer to the 1960 IGN map to establish the course of the frontier between them". The diagram which is now being shown on the screen illustrates Burkina's position on this point. The green line is compatible with both the description of the line in the Erratum and the line shown on the map; the red line represents the line described in the Erratum when the line shown on the map does not coincide with it, and the yellow line — which is not very easy to make out on the screen — represents the line shown on the map when the Erratum does not suffice. Professors Thouvenin and Forteau will elaborate on these segments of the frontier and explain the reasons which led the technical experts to think that, in these rare cases (only one as far as we are concerned), the Erratum did not suffice (I am referring to the short segment that I mentioned a moment ago⁴⁵, which is situated in the sector running from Bossébangou to the intersection of the Sirba with the Say parallel).

32. I hope that I have replied to Judge Bennouna's satisfaction, but, in accordance with your invitation, Mr. President, we reserve the right to supplement this answer by 24 October.

[End of slide 6. Slide 7: Article 2 of the Decree of 28 December 1926]

C. The title and the *effectivités*

33. Before concluding, Mr. President, I should like, with your permission, to address a final point which still — deeply — divides the Parties in respect of the method to be adopted for the delimitation in our case — not in the abstract, and not in the name of lofty principles, but in the circumstances of our case, which are quite particular. I refer to the relationship between the title and the *effectivités*, and the strange idea that our friends on the other side of the Bar have formed of it. That relationship should, in this case, be appraised in the light of the relationship that exists

⁴⁴See CR 2012/19, pp. 34-35, paras. 20-22 (Pellet).

⁴⁵See para. 25 above.

24 between the Erratum and the Decree of the President of the French Republic of 28 December 1926, and the conclusions that our opponents draw — or do not draw — from it.

34. While listening to them last week, I was struck by Niger’s waning interest in this text, which is nonetheless extremely important — it is true that, generally speaking, Niger is not very keen on texts; it prefers “practice”, which is less palpable from a legal point of view. Admittedly, Professor Salmon affirmed in passing, in his last address, that the decree of 1986 was “[t]he basic document which must never be overlooked”⁴⁶. However, apart from Professor Tankoano’s historical reminders⁴⁷, only Jean Salmon devoted a few brief words to it in his pleading on what he terms the “hypothesis of the artificial and arbitrary nature of the colonial frontier”⁴⁸.

35. I shall not go back over the fact that this is not a “hypothesis”, but an observation⁴⁹ — and an observation that is hardly surprising, considering

- the era (the French arrived late in the region and “pacified” it — a word that was politically correct at the time — even later);
- the geography (the region was far from the “centre” of FWA and, whatever our opponents may say⁵⁰, it was sparsely populated⁵¹; and it is rather inhospitable⁵²);
- in a nutshell, the scant knowledge of the colonial authorities⁵³; and their conduct, which was decidedly less philanthropic than that ascribed to them by Niger⁵⁴.

25 36. Returning more specifically to Article 2 of the Decree of 28 December 1926, Professor Salmon essentially makes two statements in this regard, both of which, I am afraid to say, I believe to be incorrect:

⁴⁶CR 2012/23, p. 53, para. 3 (Salmon).

⁴⁷CR 2012/22, p. 21, para. 19 and p. 23, para. 24 (Mr. Tankoano); see also CR 2012/23, p. 55, para. 4 (Salmon), and CR 2012/24 p. 24, para. 3 (Klein).

⁴⁸CR 2012/23, p. 50, paras. 6 and 7 (Salmon).

⁴⁹See CR 2012/19, p. 44, paras. 4-5 (Pellet); CR 2012/20, pp. 28-30, paras. 68-70 (Forteau).

⁵⁰See CR 2012/22, p. 54, para. 13 (Salmon).

⁵¹See CMBF, p. 76, para. 3.30.

⁵²CR 2012/19, p. 34, para. 16 (Tapsoba).

⁵³CMBF, pp. 88-90, paras. 3.61-3.63; Note No. 521 CM2 from the FWA Geographical Department, dated 25 June 1938, CMBF, Ann. 6; letter No. 112 of 10 April 1932 and Tour Report from Civil Service Deputy Roser, MN, Ann. C 45, p. 4; telegram/letter No. 47 from the Head of Say Subdivision to Dori *cercle* dated 18 June 1935, MN, Ann. C 61; report from the Head of Téra Subdivision on the census of Diagourou *canton*, MN, Ann. C 84, p. 5.

⁵⁴See above, para. 3 and CR 2012/19, pp. 48-49, paras. 15-16 (Pellet).

- firstly, “[t]he fact that the Presidential Decree expresses itself in terms of *cantons*, that is to say identifiable local administrative units which already existed in 1910 . . . certainly does not imply any wish to establish a line of an arbitrary and artificial nature”⁵⁵;
- secondly, and in particular, at the same time as asserting that “Niger has not lost sight of” paragraph 2 of Article 2 of the 1926 Decree (which is now showing on the screen), my opponent declares in peremptory fashion that “the Governor-General’s action in describing the boundary resulting from the transfers effected by the Decree could only have a declaratory effect, and not a constitutive one”⁵⁶.

Some brief words on each of these strong statements.

37. The first is doubly questionable. To begin with, the phrase according to which the *cantons* were “identifiable local administrative units” is admirably ambiguous: they were, of course, territorial units whose existence, administrative centre and territorial basis were known; but, as regards their precise boundaries, that is another matter. Professor Tankoano claimed that the colonial authorities were simply “working on a jigsaw puzzle, always with the same pieces”⁵⁷. But that is not the issue: to be able to “work on” such a puzzle, the pieces have to be drawn. For the boundaries of the *cantons* adjoining the other colony concerned, a drawing exists: the Erratum of 1927, which delimited the territory of the two colonies; elsewhere, as our opponent moreover points out, the boundaries were generally de facto, “rarely laid down in texts”⁵⁸ and uncertain.

38. Thus, even in August 1954, the Head of Téra Subdivision found “like most of [his] predecessors that an exact delimitation of this *canton* of Diagourou [of which the Chief admitted, in 1920, not to know the boundaries⁵⁹] is absolutely impossible, despite the never-ending claims and disputes to which this situation gives rise”⁶⁰. Furthermore, the reports of the meetings between the local administrators intended to try to resolve such disputes do not really support Niger’s thesis: it is because there were problems with the boundaries between neighbouring divisions that those

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⁵⁵CR 2012/2[2], p. 50, para. 6 (Salmon).

⁵⁶*Ibid.*, para. 7.

⁵⁷CR 2012/22, pp. 22-23, para. 23 (Tankoano).

⁵⁸*Ibid.*, see above, para. 14.

⁵⁹See MN, Ann. C 45, p. 4.

⁶⁰Report from the Head of Téra Subdivision on the census of Diagourou *canton*, p. 5, MN, Ann. C 84.

meetings or field trips took place. And the uncertainty surrounding those boundaries — up until the 1950s, on the eve of independence — is hardly surprising; as an administrative body it was still young (it should not be forgotten that Upper Volta and Niger became autonomous colonies in 1919 and 1922 respectively), and the precise delimitation of the *cantons* was probably not its primary concern: as I said last Monday, France treated everywhere like its own back-yard⁶¹. Moreover, herein lies the second criticism that can be levelled at our opponents: it is difficult to see how they can assert that the 1926 Decree does not “imply any wish to establish a line of an arbitrary and artificial nature”⁶². It does not, in fact, imply anything: it does not concern the delimitation and leaves the task of determining “the course of the boundary of the two Colonies in this area”⁶³ to the Governor-General of FWA, who had the power to do so. At the very most, one might draw the conclusion that this boundary did not exist or that it was not sufficiently precise — otherwise, it is not clear why the Governor-General would have been given the task of “determin[ing its] course”.

39. In actual fact, this common-sense observation kills two birds with one stone: not only does it show that the colonizer was not as completely confident as Niger’s counsel regarding pre-existing boundaries between identifiable local subdivisions — *cercles* or *cantons*; it also shows that Professor Salmon’s second statement whereby the *Arrêté* “could only have a declaratory effect, and not a constitutive one” is unfounded — or rather it would be founded if the Governor-General did not have the power to decide on “the incorporation of a territory into a particular colony”, as my opponent put it⁶⁴ when referring to Professor Tankoano’s very clear presentation⁶⁵; however, he did indeed have the power to determine the precise composition of the territorial divisions in his jurisdiction, and of the inter-colonial boundaries: the 1926 Decree invites him to exercise that power in the region concerned. Acting on that invitation, he would adopt the *Arrêté*, and then the Erratum, of 1927.

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⁶¹See CR 2012/19, p. 61, para. 44 (Pellet).

⁶²CR 2012/22, p. 50, para. 6 (Salmon).

⁶³MBF, Ann. 26.

⁶⁴CR 2012/23, p. 50, para. 7 (Salmon).

⁶⁵*Ibid.*, pp. 17-19, paras. 7-19.

40. And the latter, whether our opponents like it or not⁶⁶, is *the* territorial title on which, Members of the Court, you must rely in order to deliver your judgment. The colonial *effectivités* have no role to play, other than a confirmatory one, as the Chamber of the Court explained in *Burkina/Republic of Mali*, from which I quote:

“Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title.” (*Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment, I.C.J. Reports 1986*, pp. 585-586, para. 63.)

41. Professor Kamto has the wrong hypothesis, Mr. President. We are in one, or perhaps the other, of the two hypotheses that I have just mentioned, but certainly not in the one in which my opponent and learned friend has positioned himself, the one in which the title is purported not to have effected the delimitation. The Erratum “determines the course” of the disputed frontier along its entire length. The *uti possidetis* speaks here with the most certain of voices⁶⁷. And in this connection, I would repeat⁶⁸, the 1986 Judgment does not constitute a precedent that can be invoked in the present case: the Parties were careful to specify, in Article 2 of the 1987 Agreement to which the Special Agreement refers, the frontier title on which they rely and the evidentiary material which they may invoke — the Erratum itself and, on a subsidiary basis, the 1960 map. The *Burkina/Republic of Mali* case was completely different in this respect; the principle of the “free admissibility of evidence”, to which Niger clings⁶⁹, was fully applicable in that case. It is quite simply inappropriate to claim, in our case, that “the 1927 *Arrêté* and its Erratum are one piece of evidence of the frontier line, *among others*”⁷⁰.

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42. And the same of course applies, Mr. President, to the cartographic evidence, in respect of which the Chamber of the Court had the following to say in 1986, despite the fact that no

⁶⁶See in particular CR 2012/22, p. 26, para. 7 (Salmon).

⁶⁷See CR 2012/22, p. 38, para. 15; p. 39, para. 16; or p. 45, para. 32 (Kamto) — see *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, *Judgment, I.C.J. Reports 1992*, p. 386, para. 41.

⁶⁸See above, paras. 15-16.

⁶⁹See CR 2012/23, pp. 39-42 (Kamto).

⁷⁰See CR 2012/23, pp. 45-52 (Kamto).

conclusive title had been adopted by joint agreement of the Parties, as is the case in our proceedings:

“Whether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights.” (*Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment, I.C.J. Reports 1986*, p. 582, para. 54.)

“The only value they possess is as evidence of an auxiliary or confirmatory kind, and this also means that they cannot be given the character of a rebuttable or *juris tantum* presumption such as to effect a reversal of the onus of proof.” (*Ibid.*, p. 583, para. 56; emphasis added.)

43. Mr. President, tales often tell of Sirens, whose song is said to bewitch — and be the undoing of — sailors. Our opponents have tried to entice you with ballads — sometimes rather cacophonous ones — of the realities on the ground, of the frontier “in practice”, of ethnic boundaries scrupulously respected by the colonizer. Fond of him as I am, I am not entirely sure that Jean Salmon has the charm of the Sirens (he does have other charms); but I am convinced, Members of the Court, that you will not lose yourselves in the complex labyrinth of Niger’s thesis, and that you will adhere to the more discreet and austere rigours of applying the legal rules which the Parties, in their wisdom, have asked you to apply.

44. That concludes my pleading. Jean-Marc Thouvenin and Mathias Forteau will now apply the method I have just outlined to the two sectors of the frontier (which we only refer to as such, I would recall, for the sake of convenience, since there is only one frontier). Members of the Court, thank you very much for listening, and I would ask you, Mr. President, to be so kind as to give the floor to Professor Thouvenin.

29 The PRESIDENT: Thank you very much. I give the floor to Professor Thouvenin, although he is rather a long way from the podium.

THE COLONIAL EFFECTIVITÉS CLAIMED BY NIGER

[Slide 1]

1. Mr. President, Members of the Court, during the oral pleadings last Friday, Niger argued that the line it claims in the Téra sector basically follows the 1960 IGN line, from the Tao

marker — and not before, except in respect of the Petelkolé and Oussaltane enclaves⁷¹. Niger also spent a few minutes considering the case of Bangaré. Except at Petelkolé —and I shall come back to that in a moment — this line is entirely based on *effectivités* which are at odds with the title, namely the Erratum, which immediately leads to the conclusion that it should be rejected. Nonetheless, in order to acquaint the Court fully with the issues involved, I shall return to the arguments put forward by Niger and show that, in any event, the alleged *effectivités* provide no support whatsoever for the line that it claims.

[End of slide 1]

I. The Petelkolé enclave

2. As to the Petelkolé enclave, the lengthy arguments expounded by Professor Salmon⁷² call for four observations. First, our opponent asserts that Petelkolé “appears neither on Delbos’s sketch-map, nor on that of Prudon”⁷³. This is odd. I have here a sketch-map produced twice by Niger, in Annexes C 13 and C 14 to its Memorial. [Slide 2] “[I]t is the Delbos sketch-map of June 1927.”⁷⁴ With my glasses on and the map the right way up, I can see Petelkolé on it. [Slide 3] And it is on the Upper Volta side of the boundary.

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3. Secondly, the unfruitful — not to say impenetrable — analysis provided by the lead counsel for Niger concerning the 1932 Roser report⁷⁵ reveals a basic misunderstanding of that document on his part. (This document could perhaps be removed.)

4. Roser and Boyer were — to quote Professor Salmon — “the two *cercle* commanders”⁷⁶. According to the Roser report⁷⁷, Mr. Boyer was the Head of Téra *canton*.

5. Counsel for Niger also argued that, in 1932, the two administrators “were interpreting the course of the line in the Erratum . . . in cartographic terms, in accordance with the *new frontier*

⁷¹CR 2012/24, p. 13, para. 14 (Salmon).

⁷²*Ibid.*, pp. 13-18, paras. 15-17 (Salmon).

⁷³MN, Ann. D 3; CR 2012/24, p. 14, para. 15.

⁷⁴See the letter of 7 September 2012 from the Minister for Foreign Affairs of Niger to the Registry of the Court correcting a number of material errors, Annex.

⁷⁵CR 2012/24, pp. 14-16, para. 15 (Salmon).

⁷⁶*Ibid.*, p. 14, para. 15 (Salmon).

⁷⁷MN, Ann. C 45.

map”. We are told that Roser regarded it as “the official map”⁷⁸. This is an extrapolation. Nowhere in the entire report did Mr. Roser mention the “new frontier” map.

6. What Professor Salmon did not say, and this is not an extrapolation but is clear from simply reading this report, is that Petelkolé was not a cause of concern for Roser. [Slide 4] The issue that was the real focus of interest in Upper Volta for the Commander of Dori *cercle* was “the triangular salient whose apexes are Higa, Nabambori and Tingou”. And the main reason he wished to have the Erratum corrected was because the boundary it established had cut into this salient⁷⁹.

[Animation]

There is Professor Salmon’s melon⁸⁰; sliced “with a single blow of a machete”.

7. That is the reason why Roser proposed including the following text in a further Erratum:

“The boundary between the *cercles* of Dori and Tillabéry shall be defined as it was by Administrators Delbos and Prud’hon in 1927. In particular, in the area of the Higa-Nabambori-Tingou triangle, it shall be defined by the two mountain chains known as the Great and the Little Sesséra.”⁸¹

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8. Mr. President, Members of the Court, I am well aware that Niger is not arguing for *that* green line which you can see on the screen, since it has a selective reading of what it calls the Roser/Boyer Agreement. But if there was such an agreement⁸² — *quod non* —, as it insists, and if that agreement established “exactly where the boundary lay in practice, to the nearest kilometre”⁸³, as Professor Salmon asserts, then it really is *that green line* that Niger claims.

9. Thirdly, Niger believes that it is possible to conclude from a sketch-map of Diagourou *canton* — a sketch-map whose author is unknown and which Niger says was prepared in 1954, although this is not indicated on the document it has produced — that Petelkolé belongs to Niger⁸⁴. Basically, Niger opposes this sketch-map to the title constituted by the Erratum. [Slide 5] The weakness of the argument is self-evident.

⁷⁸CR 2012/24, p. 14, para. 15 (Salmon).

⁷⁹MN, Ann. C 45.

⁸⁰CR 2012/22, p. 55, para. 15 (Salmon).

⁸¹MN, Ann. C 45.

⁸²CR 2012/24, p. 15, para. 15 (Salmon).

⁸³*Ibid.*, p. 16.

⁸⁴*Ibid.*, pp. 16-17, para. 15 (Salmon).

10. Fourth and lastly, Niger changes its mind on the position of the juxtaposed frontier post between Niger and Burkina, established on *the basis* —on the *sole* basis — of the much-discussed report prepared by the Bilateral (Burkina-Niger) Committee on the identification of sites for the installation of juxtaposed control posts on the Ouagadougou-Dori-Téra-Niamey road⁸⁵.

11. I stated last Monday that that Committee had no power to draw or recognize the frontiers between Burkina and Niger⁸⁶. Professor Salmon replied scathingly that “both States were perfectly entitled to decide to establish a juxtaposed control post and, at the same time, to determine where their frontier passed”⁸⁷.

12. True enough, *both States* can of course decide to modify the course of their frontier. However, *that Committee could not*, as it had no competence in that regard. Furthermore, it was headed, on the Burkina side, by the *Regional* Director for infrastructure, transport and habitat in the Sahel and, on Niger’s side, by a *technical adviser from the Ministry for Infrastructure*. Neither of them had the power to conclude a frontier agreement.

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13. Moreover, it is rather shocking to hear counsel for Niger rely on this report, which dates from June 2006⁸⁸, as a basis for Niger’s territorial claim over the Petelkolé enclave.

14. On 2 February 2006, four months before that Committee reported on its work, the Prime Minister of Niger sent a letter to his Burkina Faso counterpart, in which he wrote the following:

“As you know, the work of demarcating our frontier has been suspended since 1990 . . . As you also know, our two governments have decided to maintain the status quo until frontier demarcation operations are completed. This interim measure, which has been restated regularly on the occasion of meetings between Ministers, administrative frontier authorities and the heads of the defence and security forces of our two countries, was intended primarily to ease, and indeed avoid, disputes arising from an erroneous interpretation of the agreed frontier line . . . To achieve a permanent resolution of these problems, I believe that it is urgent and necessary to resume the work of demarcating our frontier by providing the appropriate resources to the Joint Technical Commission on Demarcation.”⁸⁹

⁸⁵*Ibid.*, p. 17, para. 16 (Salmon).

⁸⁶CR 2012/20, pp. 39-40, para. 39 (Thouvenin).

⁸⁷CR 2012/24, p. 18, para. 16 (Salmon); see also CR 2012/22, p. 30, para. 18 (Salmon).

⁸⁸CMN, Ann. A 24, Report of the Bilateral (Burkina-Niger) Committee on the identification of sites for the installation of juxtaposed control posts on the Ouagadougou-Dori-Téra-Niamey road, 9 June 2006.

⁸⁹MN, Ann. A 10, Letter No. 000082 from the Prime Minister of Niger to the Prime Minister of Burkina Faso dated 2 February 2006.

15. So,

- on the one hand, in February 2006, the Prime Minister of Niger solemnly reminded the Prime Minister of Burkina Faso that, in order to avoid any erroneous interpretation of the agreed frontier line — the agreed line meaning the line agreed in 1987 —, a status quo was in effect, by joint agreement of the Parties, until the Joint Commission established by the 1987 Agreement had completed the demarcation operations;
- on the other hand, last Friday, counsel for Niger argued that it was obvious that the conclusions formed by a committee in June 2006 — a committee with no competence regarding the frontier and whose conclusions are clearly erroneous — were opposable to Burkina.

16. Mr. President, Members of the Court, in law, once it was agreed between both States, as Niger solemnly recalled in February 2006, that the status quo had to be observed until the official demarcation work had been completed, what is obvious is that the isolated acts of technical officials cannot be opposed to either State in respect of their common frontier.

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17. Moreover, although counsel for Niger take the opposite view, the Agent of Niger does not. At this podium last week, he stressed that since their independence, the efforts of the two States had

“resulted in the delimitation and demarcation of only half of the frontier. *Unable to agree on the remainder*, in February 2009 the two States signed the Special Agreement whereby they entrusted the Court with settlement of that part of the frontier which was still in dispute.”⁹⁰

He also referred to the frontier “in the sector from the astronomic marker of Tong-Tong to the beginning of the Botou bend, on which no agreement could be reached”⁹¹. The Agent of Niger before the Court is therefore not aware that the two States have reached agreement on the course of the frontier around Petelkolé, for the very simple reason that no such agreement has been reached.

II. The Oussaltane enclave

18. As to the Oussaltane enclave, I shall make only a few comments here concerning the three main arguments heard during the oral pleadings.

⁹⁰CR 2012/22, p. 13, para. 13 (Bazoum).

⁹¹*Ibid.*

19. In order to prove that Oussaltane belonged to Niger during the colonial period, it was first suggested that: “[T]he members of certain tribes stated that Oussaltane, where they were living, was part of Téra Subdivision”⁹². If I understand this correctly, in Niger’s view, statements by private individuals amount to colonial *effectivités*. In international law, *effectivités* consist of “the conduct of the administrative authorities”⁹³.

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20. Reference was then made to a letter from the Head of Téra Subdivision dated 24 May 1935⁹⁴. Niger considers that this document “confirmed that Oussaltan encampment ‘is in the territory of Téra’”⁹⁵. In fact, what emerges from this letter is the opposite *effectivité*, since an attentive reader of this letter will learn that it is Dori in Upper Volta — or rather, which was previously in Upper Volta, subsequently to become Upper Volta once again, since we are in 1935 — it is Dori which exercised administrative authority over Oussaltane in 1935. It is stated in the letter that: “Boulohoré [a person’s name] was handed the notification in Oussalta by a representative from Dori.”⁹⁶ Having said that, I agree that the argument is inadmissible, since we are in 1935, when Upper Volta had already been dissolved.

21. Finally, counsel for Niger presented as further evidence to show that Oussaltane belongs to Niger a document from 1951, in which: “the Head of Téra Subdivision, in a telegram/letter of 11 July 1951 to Tillabéry *cercle*, uses exactly the same wording as the Roser/Boyer Agreement of April 1932”⁹⁷. One is inclined to say “So what?” But, to tell the truth, the other Party was indeed right to draw the Court’s attention to that document, the really relevant excerpt of which reads as follows:

“During the meeting of 29 June [we are in 1951] in Téra, the Commander of Dori *cercle* stated again that he believes it is important to demarcate the boundary on the basis of the Erratum . . . of 1927, by connecting the Tao boundary marker directly with Bossébangou.”⁹⁸

⁹²CR 2012/24, p. 18, para. 18 (Salmon).

⁹³*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, pp. 586-587, para. 63.

⁹⁴CR 2012/24, p. 19, para. 18 (Salmon), and CMN, Ann. C 60, Letter No. 161 from the Head of Téra Subdivision to Tillabéry *cercle* dated 24 May 1935.

⁹⁵CR 2012/24, p. 19, para. 18 (Salmon).

⁹⁶CMN, Ann. C 60.

⁹⁷MN, Ann. C 73.

⁹⁸MN, Ann. C 73, Official telegram/letter No. 70 from the Head of Téra Subdivision to Tillabéry *cercle* dated 11 July 1951, inc. reproduction on a scale of 1:500,000 of a sketch-map by Mr. Delbos.

It is hard to discern here any colonial *effectivité* of Niger's regarding Oussaltane. However, it is a very enlightening reaffirmation of the title — the Erratum — and of the view taken of it in 1951.

III. Bangaré

22. Members of the Court, I will now turn very briefly to Bangaré. I must say that we felt there was a certain nervousness on the other side of the Bar when this village came to be mentioned.

23. It must be said that Niger's argument is essentially based on the idea that the outline of Diagourou *canton* had been established during the colonial period, whereas the documents it produces show exactly the opposite.

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24. This is the case with Administrator Roser's report of 1932, which Niger has unwisely used as a cornerstone of its edifice. Referring to the Chief of the Diagourou, Roser explained in his report that "[i]n 1919 or 1920, he was given a territory, without precise boundaries, that forms the current *canton* of the Diagourou. He himself acknowledges that he does not know the boundaries of his *canton*."⁹⁹

25. And again this is the case with the 1954 census of Diagourou *canton*, 22 years later, which can be found in the case file¹⁰⁰. The other Party deduces from it that Bangaré belonged to Niger¹⁰¹. But the most relevant section of the document is to be found on page 13. Referring to Diagourou *canton*, the report reviews:

"the problem of the territorial boundaries, which arises periodically whenever there is any discussion about land. As was noted in the first section, the artificial nature of the *canton* and the recent arrival of many of those concerned do not allow the boundaries to be determined in a clear and definitive manner, since that would stir up old grudges and jealousies . . . The current of state of affairs must therefore be maintained."

26. Two quite essential pieces of information emerge from this:

— first, the boundaries of Diagourou *canton* were, according to the colonial administration, "artificial". Indeed, the Erratum draws a straight, and therefore artificial, inter-colonial boundary, which is consequently the western boundary of Diagourou *canton*;

⁹⁹MN, Ann. C 45.

¹⁰⁰MN, Ann. C 84, Report from the Head of Téra Subdivision on the census of Diagourou *canton* dated 10 August 1954.

¹⁰¹CR 2012/24, p. 21, para. 19 (Salmon).

— second, it was difficult in 1954 to establish the boundary on the ground in a clear and definitive manner, because the colonial administration anticipated trouble with the local populations, precisely because the boundary was artificial.

In terms of colonial *effectivités*, this document directly contradicts Niger’s argument.

27. Professor Salmon said he was puzzled when he heard and later read my statement of last Monday¹⁰², before declaring — without further ado — that all my remarks were inaccurate, and that we had to take his word for it, because he told you in all sincerity that everything I said was “misconceived”¹⁰³. Indeed, he would be quite prepared to give the Court a summary of his views in that regard.

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28. I will not comment on that. So as not to tax the Court’s patience, I would refer it to all the observations I made in my statement last Monday afternoon, which are relevant in Burkina’s view, and which I reaffirm here¹⁰⁴.

29. Thank you, Mr. President. I would now ask you to give the floor to Professor Forteau.

The PRESIDENT: Thank you, Professor Thouvenin. I will give the floor to Professor Forteau after the break. We shall take a 20-minute break. The sitting is suspended.

The Court adjourned from 11.15 a.m. to 11.35 a.m.

The PRESIDENT: Please be seated. You have the floor, Professor Forteau.

Mr. FORTEAU: Thank you, Mr. President.

THE “TÉRA SECTOR”

THE LINE AS DESCRIBED IN THE ERRATUM BETWEEN TONG-TONG AND BOSSÉBANGOU

1. Mr. President, Members of the Court, in this first part of my presentation I shall attempt to respond to Niger’s claims that the line as described in the Erratum does not consist of two straight-line segments in the Téra sector. In the kind words of Professor Salmon, I shall thus

¹⁰²*Ibid.*

¹⁰³*Ibid.*

¹⁰⁴CR 2012/20, pp. 41-45, paras. 50-61 (Thouvenin).

continue this morning the “truly confusing”¹⁰⁵ explanations which I had the honour of setting forth last Monday.

2. Before doing so, it is worth recalling the substance of Niger’s argument, which relies entirely on the following — as yet unsubstantiated — syllogism: the boundary of the 1927 Erratum was not meant to be anything more than a reproduction of the traditional *canton* boundaries; however, “a boundary between inhabited and juxtaposed *cantons* cannot form a straight line”¹⁰⁶; therefore, the line must be sinuous. QED.

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3. In order to show that this syllogism does not hold true, it is enough to recall, first, how the Erratum should be interpreted, and then how it has been interpreted.

I. How should the Erratum be interpreted?

4. In respect of this first point, several remarks are called for — and you will find the text of the Erratum at tab 1 of the judges’ folder.

5. First, the frontier title as constituted by the Erratum is a legal instrument which must be interpreted in terms of its purpose. This is neither debated nor debatable: its purpose was to effect a *delimitation*, as required by the Decree of December 1926.

6. In order to achieve this, the author of the instrument, the Governor-General of FWA, did not have umpteen methods at his disposal for delimiting the territory of the colonies — unless one considers that he did not intend to effect such a delimitation, as Niger suggests against all reason¹⁰⁷. There are only two ways to delimit an administrative boundary or a frontier: by referring to a natural feature (a river, for example) or by indicating frontier markers which are to be joined together by an artificial line.

7. If the decision is made to draw an artificial line, the presumption — in the absence of any indication to the contrary — is that the boundary follows a straight line. Niger did not contest last week that such a presumption exists¹⁰⁸, a presumption which can be seen in the jurisprudence¹⁰⁹

¹⁰⁵CR 2012/23, p. 14, para. 11 (Salmon).

¹⁰⁶CMN, para. 1.1.22.

¹⁰⁷See CR 2012/22, p. 52, para. 11 *in fine* (Salmon) (“had the authorities wished to delimit it”).

¹⁰⁸CR 2012/23, p. 21, para. 23 (Salmon).

¹⁰⁹CR 2012/20, pp. 29-30, para. 69 (Forteau).

and which, moreover, Professor Salmon made himself when he stated that the boundaries of Say *cercle*, as defined in the *Arrêté* of August 1927, are made up “of straight lines, with the exception of the river boundaries”¹¹⁰, despite the fact that the passage he cited contains no mention of straight lines.

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8. If one reads the Erratum in the light of these remarks, the sense of the text is clear: in certain sectors, it refers expressly to natural features; in others, it does not, mentioning only the frontier markers through which the line must pass — such is the case with the Téra sector. It follows that, since the author of the Erratum did not choose to follow a natural boundary in this sector, an artificial line was adopted. To claim otherwise is contrary both to the text and to its purpose.

9. The very *structure* of the text of the Erratum is also revealing; these are textual considerations on which Niger remained completely silent last week, despite the fact that the 1987 Agreement refers to the frontier “as described” by the Erratum.

10. When reading the Erratum, it is apparent that its draftsman is following the course of the line with his pen: “[t]he boundaries”, states the Erratum, “are determined as follows”: “[a] line”, which starts from the heights of N’Gouma, and then passes in turn through a number of points until it reaches Tong-Tong; “*this* line [the author of the Erratum is still following the same line, he has not lifted his pen] then turns towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool, and [again, his pen has not moved from the line he is following] reaching the River Sirba at Bossebangou”. “It [the same line again, his pen has still not moved from this line] almost immediately turns back up”, etc.

11. The text is thus crystal-clear: it was indeed a *complete* boundary that the author of the Erratum intended to delimit by referring to the various successive points through which a *single line* passes. In other words, the boundary, in 1927, is delimited in full.

12. For its part, Niger claims that in fact, from the Tao marker, the course of the boundary is sinuous. However, if that were true, *it would have been described as such* in the Erratum — as it

¹¹⁰CR 2012/23, p. 11, para. 4 (Salmon).

was, for example, in the case of the Botou bend, which we shall come back to. The fact is that this was not done by the author of the Erratum in this sector.

13. In this sector, to recall the apt words of Professor Kamto, the Erratum “provides sufficient information to determine the exact course of the frontier”¹¹¹: it passes through three points, without following a natural frontier or passing through any other intermediate points: therefore, the frontier consists of straight-line segments.

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II. How has the Erratum been interpreted?

14. Niger, however, criticizes Burkina for adopting a totally “disembodied” approach to the Erratum¹¹². Let us look, therefore, for the sake of completeness, at how that Erratum has been interpreted, first by Niger, and then by the colonial authorities and administrators.

A. Niger’s interpretation

15. I shall not go back over the views expressed by the Niger authorities in 1988 during the work of the Joint Commission, a point which was addressed a few moments ago by Professor Pellet¹¹³.

16. Nor shall I go back over the authentic ministerial interpretation of 1991, which is along very similar lines¹¹⁴, and in support of which the counsel for Niger have not offered any additional arguments to those put forward in its Counter-Memorial¹¹⁵.

17. On the other hand, it should be noted that the line claimed by Niger is not compatible with its own argument that the 1927 boundary was supposed to follow the de facto *canton* boundaries and, therefore, could not take the form of “a straight line”¹¹⁶.

18. In the Say sector, as in the Téra sector, Niger itself has recourse to a great number of straight lines. In particular:

[Slide 1: The line claimed by Niger — the straight-line segments up to the Tao astronomic marker]

¹¹¹CR 2012/23, p. 37, para. 7 (Kamto).

¹¹²See, for example, CR 2012/23, p. 28, para. 9 (Salmon).

¹¹³See above, speech of Alain Pellet.

¹¹⁴See CR 2012/20, p. 30, paras. 72-73 (Forteau).

¹¹⁵See CR 2012/23, p. 44, para. 28 (Kamto); *ibid.*, p. 14, para. 11 (Salmon); see the response in CR 2012/20, p. 30, p. 73 (Forteau).

¹¹⁶CMN, para. 1.1.22.

- in the entire marked sector from the Mali tripoint to the Tong-Tong marker;
 - then from Tong-Tong to Vibourié, and from Vibourié to Tao;
- [Slide 2: The line claimed by Niger — the straight-line segments from the “tripoint”]
- likewise from the alleged “tripoint” to the end of the salient;
 - as well as up to the beginning of the Botou bend;
 - and from the Botou bend to the tripoint with the Mekrou, except for where the Erratum expressly indicates a natural boundary.

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19. This is an awful lot of straight lines for a text which, we are told by those on the other side of the Bar, was supposed to reproduce the de facto *canton* boundaries which could not be straight lines. Nor does it tally with Professor Salmon’s assertion that “Niger does not agree that the boundary in the Téra sector . . . is composed of straight lines”¹¹⁷.

[Slide 3: Line claimed by Niger in the first sector]

20. In fact, Niger itself has recourse to straight lines in this sector up to the Tao marker; then, for reasons which it has failed to make clear, all of a sudden at the Tao marker — as can be seen on the sketch-map — Niger has a change of heart and out of the blue claims a frontier line following a large number of natural features and based on purported *effectivités*. Why is what was appropriate upriver from Tao no longer appropriate downriver from it? The question remains.

[End of Slide 3]

21. Moreover, Niger does not dispute that the term “*s’infléchir*” used in the Erratum reflects a change in direction between two straight-line segments to either side of the turning point — here the Tong-Tong marker. Although I must admit to being a little confused by Niger’s arguments on this point.

22. On Friday morning, Professor Salmon asserted that Niger did not accept that the line as described in the Erratum consists of two straight-line segments to either side of Tong-Tong. This strong affirmation would, however, be contradicted that very day . . . by the same Professor Salmon! These are the two contrasting arguments which were put forward either side of the lunch break.

¹¹⁷CR 2012/23, pp. 12-13, para. 7 (Salmon).

[Slide 4: Course of the line between Tong-Tong and Tao]

23. On Friday morning, Professor Salmon first argued that

“Niger, too, accepted that there were two straight lines . . . Niger, which relies here on an intermediate boundary point — the Vibourié marker — is clearly not contending that this represents an interpretation of the Erratum, *since it departs from it*”¹¹⁸.

24. The line claimed by Niger between Tong-Tong and Vibourié, and then up to Tao, is thus said not to be an interpretation of the Erratum. Indeed, Niger confirms here that *it departs* from the line as described by the frontier title, something which is both entirely unfathomable and completely at odds with the law declared applicable by the Parties. *A contrario*, this implies, moreover, that the line as described in the Erratum directly connects the markers of Tong-Tong and Tao.

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25. On Friday afternoon, however, Professor Salmon stated that

“[i]t is clear that Niger has never claimed that the establishment of the [Vibourié] marker had the effect of moving the line laid down by the 1927 Erratum but, while it is necessary to follow what that text says, this was a case of it being interpreted . . . Niger sees this agreement [of 1935 relating to the establishment of a marker at Vibourié] as a simple interpretation of the 1927 Erratum”¹¹⁹.

26. It appears this time, therefore, that the line claimed by Niger in the vicinity of Vibourié is indeed an interpretation of the Erratum, something which Niger had denied that morning. The whole thing is very confusing, with the exception of the conclusion drawn by Professor Salmon: “[t]he boundary in this sector therefore consists of two straight-line segments”¹²⁰. In other words, Niger accepts that the line as described in the Erratum is made up of straight-line segments at the level of the Tong-Tong turning point.

B. The interpretation of the colonial authorities and administrators

27. I now come, Mr. President, to the interpretation of the Erratum adopted during the colonial period — once again, purely in the alternative, since the text of the Erratum suffices in itself.

[Slide 5: Sketch-map of Téra Subdivision submitted by Niger]

¹¹⁸*Ibid.*, p. 14, para. 11 (Salmon) (emphasis added).

¹¹⁹CR 2012/24, pp. 12-13, para. 12 (Salmon).

¹²⁰*Ibid.*, pp. 11-12, para. 11 (Salmon).

28. For the period prior to 1927, Niger has shown us a great many times its “lucky sketch-map”, which is claimed to represent the traditional boundary of Téra Subdivision in 1910, and which the 1927 Erratum was supposed to endorse. That sketch-map proves nothing, however: in the first place, the map is described in Niger’s Memorial as a “sketch-map with no date (but subsequent to 1932) or legend”¹²¹; it is thus not a reliable document, a fact which Niger has failed to bring to your attention during these hearings; secondly, the sketch-map does not show a sinuous line, but the opposite.

29. Niger admits, moreover, that there is no colonial document prior to 1927 which describes these boundaries. It is thus hard to see where Niger has unearthed its purported “1910 boundary”.

[End of slide 5]

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30. We would, however, note in passing the abundant evidence of an artificial line in this sector:

- the sketch-map of Captain Coquibus, dating from shortly prior to 1910 (1908), which has not been found, but on which Niger places such reliance¹²²; that 1908 sketch-map — that “Coquibus sketch-map” — was described in 1927 as “only show[ing] theoretical lines and points”¹²³ (“*conventionnelle[s]*” meaning here an artificial line, and not a “treaty line”, as it has unfortunately been translated in the English version of the annexes to the written pleadings)*;
- Administrator Prudon likewise says of this Coquibus sketch-map of 1908 that it showed a “theoretical boundary line”, and that “the fields of the natives lay astride the boundary following the existing theoretical line”¹²⁴;
- Professor Salmon indeed pointed out that the line *proposed* as the new boundary by Administrators Delbos and Prudon in 1927 “depart[ed]”¹²⁵ from the boundary “drawn” by

¹²¹MN, Ann. C 47.

¹²²See CR 2012/23, pp. 15-18, paras. 13-16 (Salmon).

¹²³MN, Ann. C 20.

*Note by the Registry: in the official Registry translation of the annexes, “*conventionnelle[s]*” is rendered as “theoretical” or “notional” — with a single exception: Niger’s Annex C15, where, in one instance, “treaty” has been used instead of “theoretical”.

¹²⁴MN, Ann. C 15.

¹²⁵CR 2012/23, p. 16, para. 14 (Salmon).

Coquibus in 1908¹²⁶, since Prudon, as Professor Salmon tells us, “described a certain part of the line as theoretical”, while Delbos “considered that it included ‘notional lines’”¹²⁷ (again in the sense of artificial);

— moreover, as Niger recognizes, the — differing — lines proposed by Delbos and Prudon “played no role in the delimitation effected by the Governor-General”¹²⁸. In other words, their proposals aimed at deviating from the theoretical and notional lines of Captain Coquibus were not adopted.

31. What happened after the adoption of the Erratum?

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32. Niger presents us with the image of an Erratum which allegedly harmoniously co-existed with clarifications on the ground effected by the colonial administrators, who thus, without ever doing violence to the text, or to the intention of its draftsman, made good the deficiencies, remedied the imprecisions and corrected the inconsistencies in the text, so as to end up with the sinuous boundary which Niger proposes to you today¹²⁹. In short, the colonial administrators gradually managed to establish a line which in 1927 was only pencilled in. That is not correct, either in law or in fact.

33. I would first of all remind you that the colonial authorities, acting under the authority of the Governor-General of French West Africa, were required by Article 2 of the corrected *Arrêté* of 1927 not to supplement it, but to “implement it”.

34. I would further point out that what Niger describes as clarifications or supplementations of the Erratum in this sector are in reality disagreements with it, which led to proposals for amendments — which came to nothing.

35. I would likewise add that the documents in the file clearly show that, during the colonial period after 1927, there was no doubt that the Erratum did indeed provide for a complete line in this sector, consisting of two straight lines.

¹²⁶MN, Ann. C 15 (“[t]he theoretical boundary line drawn by Captain Coquibus”).

¹²⁷CR 2012/23, p. 16, para. 14 (Salmon).

¹²⁸CR 2012/23, p. 17, para. 15 (Salmon).

¹²⁹CR 2012/23, p. 54, para. 4 (Salmon)

[Slide 6: 1920 sketch-map, “new frontier between Upper Volta and Niger of 1927 to a scale of 1:1,000,000]

36. Niger first relies for support on this point on the cartographic evidence, brandishing what it calls the “map of key importance” of 1927. According to Professor Salmon, “the course of the boundary shown on it is in total contradiction with [Burkina’s] own theses”¹³⁰.

37. If you will allow me, Mr. President, I would make the following comment.

38. First, this sketch-map is undoubtedly wrong in certain respects: in particular, the boundary does not reach the River Sirba at Bossébangou, contrary to what the Erratum provides. I shall come back to this shortly.

39. Even on the — erroneous — assumption that this map is entirely faithful to the Erratum, does it assist Niger’s arguments? Assuredly not, and for a number of reasons:

- the map shows the various frontier points specified in the Erratum; in the Téra sector — leaving aside the mistake over Bossébangou — the line on the map connects those points and those points only, with continuous lines (and not with a broken line allegedly requiring clarification); nor is there any question here of a sinuous line, passing through intermediate points: before the salient, there is Tong-Tong and then Tao, and that is it; and between these points, lines connecting them directly;
- moreover, the map shows that, where the boundary of a *canton* needed to take a sinuous course, as is the case for Botou *canton*, in the Say sector — shown at the bottom right of the map — the author of the Erratum drafted the text accordingly, giving a series of frontier points and referring to natural features and villages;
- that is an extremely important point; Professor Salmon has told us several times that the Say sector was less densely populated, less well-known, with fewer inhabitants, than the Téra sector¹³¹. However, in that sector (the Say sector), the draftsman of the Erratum considered that it was necessary to describe — and did describe — a complex, sinuous course. Since the Téra sector was better known than the Say sector, it is difficult to see what would have prevented him from doing the same thing between Tong-Tong and Bossébangou, *if it had been*

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¹³⁰*Ibid.*, pp. 18-19, para. 18 (Salmon).

¹³¹CR 2012/23, p. 12, para. 6 (Salmon).

apparent that this was required. The fact is that in this sector the Governor-General of French West Africa adopted an artificial line, without any twists and turns. The contrast with the Botou bend is neither fortuitous, nor without significance;

- finally, Professor Salmon explained to us that the form of the line between Tong-Tong and the start of the salient “is of a curved line and not of two straight lines”¹³². That is to admit, in any event, that the line is not a sinuous one: in fact the sketch-maps from the period show the boundary as a series of straight or almost straight lines, but never as a sinuous one, or with enclaves, as Niger today claims it to be after the Tao marker¹³³;

[Slide 6bis: Add Niger’s superposed line to sketch-map No. 5 at tab 17 of Niger’s judges’ folder]

- the fact remains that it suffices to lay a ruler on the 1927 map to see that it provides in reality for a boundary in the form of two straight lines; that is clear, moreover, from the orange line superposed by Niger on sketch-map No. 5 at tab 17 of its judges’ folder, which you can see on the screen.

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[End of slide 6bis]

40. Niger has ultimately sought to give the impression that, following the adoption of the Erratum, there were no further references to a boundary consisting of two straight lines. However, Niger has argued by omission, refraining from mentioning the many documents from the colonial period that I submitted to the Court last week, all of which showed that the colonial administrators had understood that the Erratum described an artificial boundary, composed of two straight lines, running from Tong-Tong, to Tao, to Bossébangou¹³⁴.

41. It is true that Professor Klein referred to the letter from the Commander of Dori *cercle* of 9 August 1929, which, in his view, was evidence of “lack of precision in the terminology” used in the Erratum in the Téra sector¹³⁵. But that is not what that letter shows¹³⁶. In the letter, the Administrator proposes that the current boundaries should be “modified” in order to escape what he calls the “rigours of the 1927 delimitation”. He accordingly proposes to submit a request “to

¹³²*Ibid.*, p. 20, para. 20 (Salmon).

¹³³See MN sketch-maps, Anns. D 5, D 10, D 11, D 13, D 14, D 15, D 16, D 17, D 18, D 19, D 20 and D 22.

¹³⁴CR 2012/20, pp. 28-29, para. 68 (Forteau).

¹³⁵CR 2012/23, p. 26, para. 7 (Klein).

¹³⁶See MN, Ann. C 24.

mitigate the rigours of the 1927 delimitation”. He further states that the Erratum speaks not of “cantons, only of boundaries” and recognizes that this difference is “crucial”. The same expression (“the rigour of the official texts”) can be found in a letter from the Commander of Dori *cercle* of 14 August 1929¹³⁷.

42. It is symptomatic, moreover, that in a letter just prior to that cited by Professor Klein, dated 31 July 1929, the Commander of Dori *cercle* expresses no alarm at the imprecision of the boundary in this sector; *on the contrary*, referring expressly to the delimitation effected by the Erratum, he states that he would like “Téra to agree to apply *a little less precision* in relation to the boundaries between Dori and Tillabéry”¹³⁸. A little less precision, and not a little more precision. Here we see once again an attempt to escape the rigours of the delimitation in the Erratum.

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43. In a letter of 19 August 1929, this same Commander of Dori *cercle* again refers to the potential problems created by the “official boundaries [of 1927], if they are rigorously complied with”¹³⁹. In other words, there is no doubting the fact that the Erratum completely defined the course of the boundary. What was causing problems was not the imprecision of the boundary, but its excessive rigour.

44. On 6 February 1932, the *Chef de cabinet* of the Lieutenant-Governor of Upper Volta in his turn describes the Erratum boundary in the Téra sector as “a boundary that is simply a line on the map”¹⁴⁰. In short, an artificial one.

45. On 10 April 1932 Civil Service Deputy Roser interprets the Erratum as describing a line which “takes no account of the reality”, and the effect of which is to locate the village of Bangaré “to the west, on the Volta side, of the famous ‘line’”¹⁴¹. That is indeed what the famous double-straight-line boundary does, as Professor Salmon ultimately admits¹⁴². Roser accordingly calls for “modification of that boundary”, which, as we know, would never happen.

¹³⁷MN, Ann. C 25.

¹³⁸MN, Ann. C 23, p. 2.

¹³⁹MN, Ann. C 27.

¹⁴⁰MN, Ann. C 44.

¹⁴¹MN, Ann. C 45.

¹⁴²CR 2012/24, pp. 19-20, para. 19 (Salmon).

46. The episode of the Vibourié marker confirms this. Professor Salmon asserts that “it is the straight line invented by Burkina Faso which does not pass through” this boundary marker established in 1935¹⁴³. However, this is totally at odds with the Record of Agreement relating to the installation of that marker, which clearly states that the boundary in this sector “follow[s] a notional straight line starting from the Tong-Tong astronomic marker and running to the Tao astronomic marker”¹⁴⁴. It would be hard to make it any clearer. This extract from the 1935 Record of Agreement would be incorporated *expressis verbis* six years later in the Description of Tillabéry *cercle* of 1941, in direct connection with the delimitation effected in 1927 by the Erratum¹⁴⁵.

47. On 19 May 1943, there is a further reference to the “official Dori-Téra boundary fixed by the 1927 *Arrêté* and, as you know, purely theoretical and artificial”¹⁴⁶; on 11 July 1951 there is again a reference to the “boundary on the basis of the Erratum . . . of 1927 . . . connecting the Tao boundary marker directly with Bossébangou”¹⁴⁷; on 24 December 1953, to “the Tao-Sirba line of the *arrêté*”, which was more “theoretical” than the proposals by Delbos in 1927 for a series of straight lines¹⁴⁸.

48. No question of sinuous boundaries, boundaries on the ground, gradual adjustments of an allegedly imprecise line. What emerges from all of these documents is clear: the Erratum provided for an artificial delimitation, in the form of two straight lines, between the Tong-Tong and Tao markers and Bossébangou.

49. The fact remains that locating the three boundary points on the frontier in this sector is not entirely straightforward. The co-ordinates of the Tong-Tong marker are given in the Special Agreement. And Niger has not at any time challenged the co-ordinates given by Burkina for the point where the frontier reaches the River Sirba at Bossébangou. There only remains a very minor disagreement between the Parties over the co-ordinates of the Tao marker. Niger does not explain

¹⁴³*Ibid.*, p. 12, para. 12 (Salmon).

¹⁴⁴MN, Ann. C 56.

¹⁴⁵MN, Ann. C 65, last page.

¹⁴⁶MN, Ann. C 67.

¹⁴⁷MN, Ann. C 73.

¹⁴⁸MN, Ann. C 79, p. 2.

how it calculated its co-ordinates¹⁴⁹. Moreover, contrary to what Professor Salmon claims, Burkina has not confused the Tao marker, said to be located in the actual village of Tao, with the Tao astronomic marker¹⁵⁰. The co-ordinates used by Burkina for this frontier point are those in the data sheet for the Tao *astronomic* marker of 1927, which is expressly marked: “New Upper Volta-Niger frontier”¹⁵¹. The location of this point is thus not open to dispute.

50. Mr. President, Members of the Court, that concludes Burkina’s presentation on the course of the frontier in the Téra sector as described in the Erratum, which, between Tong-Tong, Tao and Bossébangou, consists of two straight lines.

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**THE “SAY SECTOR”
THE STARTING POINT OF THE FRONTIER IN THE SAY SECTOR**

1. Mr. President, having therefore dealt with the first section, we can now turn to the second, which is the “Say sector”. I shall say a few words about the frontier’s starting point in this sector before Professor Thouvenin takes over for the continuation of the line.

2. As we know, the Erratum fixes this point on the River Sirba at Bossébangou. Niger, for its part, disregards that point in favour of what it considers to be the former “tripoint” between the *cercles* of Tillabéry, Dori and Say.

3. In reply to Professor Klein’s presentation on the subject, I shall start by reasoning as if Niger were right (I), before explaining why it is wrong (II).

I. If Niger were right (*quod non*)

[Slide 1: Niger’s tripoint]

4. I shall, however, give a preliminary word of explanation about the sketch-map now being shown, in order to ensure that what follows is properly understood. The red line is the line described in the Erratum, which reaches Bossébangou and then continues in a westerly direction before forming the salient, which runs to meet our point P2, the apex of the salient, before the frontier runs back down to the south. If, like Niger, we think in terms of a “tripoint” between three

¹⁴⁹See CMBF, paras. 0.14 and 3.4.

¹⁵⁰CR 2012/24, p. 13, para. 14 (Salmon).

¹⁵¹MBF, Ann. 41.

cercles, then under the terms of the Erratum, that point would be Bossébangou¹⁵². For its part, Niger believes that the apex of the salient is further to the north and, moreover, that it corresponds to the former tripoint. According to Niger, the Erratum therefore made a mistake when it adopted Bossébangou as a frontier point instead of Niger's "tripoint". Even assuming that Niger was right — for the time being I am reasoning as if that were the case — it would still be necessary to determine the precise location of that tripoint.

5. During the first round of oral argument, we wondered aloud about the method used by Niger to find the co-ordinates of its tripoint. Let us take a look at the answers which Professor Klein provided.

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6. Firstly, he asserted that there is no instrument of delimitation prior to 1927 defining that point¹⁵³. This obviously complicates Niger's task, since, that being so, it is asking the Court to give precedence to a point which was neither established nor defined by a colonial text before 1927, over the one which was expressly defined by the Governor-General of FWA in the 1927 Erratum.

7. Secondly, Professor Klein maintained that it was possible to rely on a number of sketch-maps, but conceded that they were not entirely reliable — indeed, they feature only a bipoint, with the sole exception of Captain Boutiq's very crude sketch-map of 1909¹⁵⁴. Niger's esteemed counsel went on to declare that "Niger clearly has sufficient sources to identify the position of this tripoint"¹⁵⁵. It is all very well for Niger to assert this, but we are still in the dark as to how, on the basis of these sources which it does not present, it set about establishing the co-ordinates of its tripoint, which it provides to the nearest second in its Memorial¹⁵⁶.

8. Niger produces a whole series of sketch-maps which feature a salient, yet none includes technical data making it possible to determine the precise location of Niger's tripoint¹⁵⁷. Niger thinks, however, that it can deduce from these sketch-maps not only that the point that it is

¹⁵²CMBF, para. 4.28.

¹⁵³CR 2012/24, p. 30 (Klein).

¹⁵⁴MN, Ann. D 1.

¹⁵⁵CR 2012/24, pp. 30-31 (Klein).

¹⁵⁶See MN, para. 6.25.

¹⁵⁷See MN, Anns. D 1, 5, 6, 7, 9, 10, 11, 14, 15, 16, 17, 18, 19 and 20.

claiming is a tripoint, for the sole reason that it is supposedly situated at the apex of the salient, but also that the point in question is situated to the north-west of Bossébangou, around 30 km from that village. But once again, on what basis?

9. In its written pleadings, Niger considers that this tripoint corresponds to the village of Nababori or Nabambori, or alternatively to a point which is situated close to that village¹⁵⁸.

10. However, in making that claim, Niger relies on a document with which its argument is simply incompatible. As Professor Klein recalled on Friday morning, Delbos had criticized the Erratum in 1927 on the grounds that it would have been preferable, in his view, for the inter-colonial boundary to have run towards “Nababori, reaching the Say *cercle* to the west of Alfassi and not at Bossébangou, *which is further up*”¹⁵⁹.

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11. Two conclusions can be drawn: firstly, since the Erratum, it is Bossébangou which has constituted the tripoint — hence Delbos’s criticism; secondly, the point claimed by Niger cannot be Nababori, since if it were, that point would have been situated not to the north of Bossébangou, as Niger claims, but to the south of Bossébangou. After all, Delbos states that Bossébangou is further up than Nababori. I would add, moreover, that Delbos considered that this point was “on the River Cirba”¹⁶⁰; thus Nababori would be to the south of Bossébangou and on the Sirba; this is not the case for Niger’s tripoint. As we can see, therefore, there is nothing to justify this point.

II. The other reasons why Niger is wrong

12. By contrast with Niger’s thesis, the 1927 Erratum is clear: it expressly specifies a frontier point, which it designates as “the River Sirba at Bossebangou”.

13. Niger, however, persists in claiming that the reference to this point is “erroneous”. I will not go back over everything that has been said in the past week to show that there is nothing to support Niger’s “error theory” so as to enable it to escape the clear text of the Erratum¹⁶¹. I will confine myself to responding to the arguments of Professor Klein, and then to making a series of important concluding observations.

¹⁵⁸MN, para. 7.19; CMN, para. 2.2.5; CR 2012/24, p. 31, para. 11 (Klein).

¹⁵⁹CR 2012/23, p. 30, para. 12, citing MN, Ann. C 20; CMN, para. 2.2.5.

¹⁶⁰See MN, Ann. C 16.

¹⁶¹See CR 2012/20, pp. 47-57, paras. 7-38 (Forteau).

14. I now come to Professor Klein's arguments.

15. In the first place, he argues that the fact that in this case a treaty — the 1987 Agreement — specifies the frontier as that “described in the . . . Erratum” does not prevent Niger from invoking the error in order to escape the terms of the Erratum. However, no argument is put forward in support of this notion¹⁶², which contradicts your own decision of 1994 in the *Libya/Chad* case. Enough said!¹⁶³

16. Secondly, Professor Klein admits that in 1927 there existed no text delimiting Say *cercle*. That complicates the search for his “tripoint”, since this is supposed to be located at the intersection of the boundaries of three *cercles*. According to Niger, however, “between 1899 and 1910”¹⁶⁴, and indeed, more precisely, between the time when Say *cercle* appears and the time when, in 1910, the tripoint disappears (I would point out, incidentally, that in 1901 the boundaries of Say territory had yet to be defined¹⁶⁵), thus in less than six months, “this *cercle* did indeed have boundaries [the term boundary must be understood here in its strict sense], which gradually became what may legitimately be called ‘traditional boundaries’”, on the basis of which the tripoint can be identified¹⁶⁶.

17. We were already familiar with the “wild custom” or the “VHS [Very High Speed] custom”¹⁶⁷; now Niger has invented the HST boundary — “the High Speed Traditional boundary”! In less than ten years, in a region that was uninhabited or unexplored, traditional colonial boundaries of a purely pragmatic nature are said to have been born and fixed once and for all in 1910, with such certainty and geographical precision that they tied the hands of the Governor-General of French West Africa 17 years later, when he was preparing the Erratum! Is that really convincing?

18. Failing this, in reality, as sole indication of the precise boundaries in the area in 1910, Professor Klein relies on the “new frontier” sketch-map of 1927, which, without further ado, he

¹⁶²CR 2012/24, pp. 25-26, para. 5.

¹⁶³CR 2012/20, pp. 49-50, paras. 13-14 (Forteau).

¹⁶⁴CR 2012/23, p. 53, para. 3 (Salmon).

¹⁶⁵CR 2012/20, p. 52, para. 24 (Forteau).

¹⁶⁶CR 2012/24, p. 26, para. 6 (Klein).

¹⁶⁷See *inter alia*, R.-J. Dupuy, *Coutume sage et coutume sauvage*, Mél. Rousseau, 1974, pp. 75-89.

substitutes for the title constituted by the Erratum — without even feeling obliged to transit via the 1960 map, despite the fact that the latter is the only one referred to in the 1987 Agreement as a subsidiary source should the Erratum not suffice¹⁶⁸. Niger would certainly have some trouble in showing that the Erratum does not suffice here; moreover, as you can see on the screen, the line on the 1960 map, like the Erratum, passes through Bossébangou.

52 19. On the other hand, that is not the case with the line on the “new frontier” map of 1927, which, as we have just seen, does not pass through Bossébangou. Professor Klein regards this as proof that the draftsman of the Erratum made a mistake. I regard it, on the contrary, as proof that it was the draftsman of the map who made a mistake. It was the draftsman of the map who was supposed to follow the line described in the Erratum, and not vice versa. Admittedly, the Court did have regard to this sketch-map in the *Burkina/Republic of Mali* case. However, Professor Klein only quotes part of the relevant passage from the 1986 Judgment: it is true that the Court began by stating that,

“even if [the 1927 map] cannot be shown to have been drawn up by [the colonial] administration, it remains certain that the map’s compiler, having perused the governing text, and possibly the accessible maps, had acquired a very clear understanding of the intention behind the text, which enabled him afterwards to lend that intention cartographic expression”.

20. But the Court was careful to add the following sentence (which Professor Klein fails to quote): “That does not mean that the map necessarily conveys the correct interpretation of the Erratum.” (*Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment*, *I.C.J. Reports 1986*, p. 646, para. 171.)

21. In fact, in the case of Bossébangou, this is manifestly not the correct interpretation, since the draftsman of the map does not make the boundary line run as far as the frontier point at Bossébangou.

22. Finally, Professor Klein takes good care to avoid mentioning the numerous documents subsequent to 1927 which confirmed that the line was indeed intended to pass through Bossébangou, and that Bossébangou is indeed the relevant frontier point. Last Monday I cited a

¹⁶⁸CR 2012/24, pp. 26-27, paras. 7-8 (Klein).

large number of these, which leave not the slightest doubt in this regard¹⁶⁹. There is a deafening silence from Niger on this point.

23. A final series of observations, Mr. President, on the error theory invoked by Niger — an illusion, which needs to be dispelled. Niger has told us repeatedly that the Erratum is mistaken, in that it amputates Say *cercle* of part of its territory, for the benefit of Upper Volta¹⁷⁰. Niger's reasoning is as follows: the tripoint was traditionally located to the north-west of Bossébangou and thus, by not making the boundary run to that tripoint, but moving it to the east to pass through Bossébangou, the Erratum was prejudicial to Say *cercle* and to Niger Colony. But is that really what happened, in historical terms?

[Slide 2: The delimitation according to the *Arrêté* of August 1927]

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24. We first note that, by comparison with the *Arrêté* of August 1927, the Erratum moved the line not from west to east (from left to right, in simple terms), as Niger claims, but in the opposite direction: thus paragraph 1 of Article 1 of the *Arrêté* of August 1927 fixed the tripoint between Tillabéry *cercle*, Say *cercle* and Upper Volta — here it is, the famous tripoint — on “the River Sirba (boundary of Say *cercle*), near to and to the south of Boukalo”; that is to say, as you can see on the screen, to the north-east of Bossébangou, and not, as Niger claims, to the north-west of that village; the same tripoint is to be found on the sketch-map appended to the Record of Agreement of 2 February 1927¹⁷¹; let us also listen to Delbos, who, in his letter of 17 December 1927, does not contest the August 1927 *Arrêté* on this point and, furthermore, states the following: coming from the north, “Captain Coquibus [he is referring here to Captain Coquibus's map of 1908] travelled in a south-easterly direction and finished south of Boukabo not Bossébangou”¹⁷²: that is precisely what the *Arrêté* of August 1927 does.

[Slide 3: The delimitation according to the *Arrêté*, and to the 1927 Erratum]

25. By moving this tripoint to the south, to Bossébangou, the Erratum was prejudicial not to Niger Colony, but to Upper Volta¹⁷³.

¹⁶⁹CR 2012/20, pp. 57-63, paras. 39-64 (Forteau).

¹⁷⁰See, for example, MN, para. 2.2.10.

¹⁷¹See Ann. MBF 30, sketch-map, left-hand page.

¹⁷²MN, Ann. C 20, p. 1.

¹⁷³See MN, Ann. C 21, p. 2.

26. That explains why, immediately after the adoption of the Erratum, it was the Commander of Dori *cercle*, Delbos, in Upper Volta, who complained of the delimitation effected by the Erratum, which, he observed in particular, had taken from the colony Yagha *canton*, which lay between the August 1927 line and that of October 1927¹⁷⁴. This also explains — as we pointed out just now — that it was the Dori authorities, on the Upper Volta side, who would complain in the months to come about the “rigour” of the 1927 delimitation.

27. No trace, on the other hand, of any protest from the Commander of Say *cercle*, which, however, Niger now tells us today, was the major loser in the 1927 delimitation. That tells us a lot about the alleged existence of a tripoint where Niger locates it. And it bears repeating: in reality, Say *cercle* lost nothing in 1927; on the contrary, it gained a salient.

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28. Moreover, this was in no sense an immemorial salient, as Niger believes, since while it appears for the first time on the 1909 sketch-map of Captain Boutiq, it does not appear to have existed one year before on the more frequently used map of Captain Coquibus, drawn in 1908. It was precisely on that 1908 map (which the Parties have been unable to find, but which the Governor of Niger had in his possession) that the latter relied on 26 January 1926 when submitting a version of it in outline form in order to indicate the territorial changes which he was seeking (and which he would succeed in obtaining) from the Governor-General of French West Africa¹⁷⁵. The “outline map” appended by the Governor of Niger to his letter of 1926, which is now on the screen and which you will find in more legible form at tab 3 in the judges’ folder, contains four important pieces of evidence:

[Slide 4: Sketch-map appended to the letter from the Governor of Niger of 26 January 1926 (Ann. MBF 24)]

— the tripoint was located in 1908 on the Sirba; the letter from Delbos of December 1927, to which I have just referred¹⁷⁶, confirms that it was this same point, “Boukalo”, that Captain Coquibus reached in 1908, and that it was also this point which would be adopted in the *Arrêté* of August 1927;

¹⁷⁴MN, Ann. C 20, p. 2; and MN, Anns. D 2 and D3.

¹⁷⁵Ann. MBF 24

¹⁷⁶MN, Ann. C 20, p. 1.

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- there is, moreover, no salient at the level of this tripoint;
 - the *cantons* which the Governor sought to have transferred to his colony (and in December 1926 his claim would succeed)— *cantons* the list of which was read out to us by Professor Salmon last week¹⁷⁷ — are located along the right bank of the River Niger: from south to north, we have Dargol, Songai, Kokoro, Logomaten and Gorouol. All of these *cantons* are located to the east of the town of Téra, hence at some distance from the sector which is today in dispute between the Parties. I am almost inclined to describe these *cantons* as “glued” to the bank of the River Niger — and with good reason, since, as the Governor of Niger explains in that same letter of January 1926, these *cantons* “originally extended” to either side of the River Niger; these were thus riverine populations. The Governor of Upper Volta, when informed of this claim by the Governor of Niger, would moreover refer a few days later, regarding the territory of which he has been told that he is to be dispossessed, to “the part of Dori *Cercle* on the left bank of the river, *as far as Téra*” (as far as Téra, and no further)¹⁷⁸, and that applies also to Diagourou, which is not shown on this map, but which is located on the maps of the period to the south-east of Téra;
 - fourth and final item: the line ending at the tripoint on the Sirba is indeed not straight, but curves markedly towards the east, and not to the west: in other words, it points towards the River Niger. The 1927 delimitation will thus, once again, in this respect also, be very generous to the Colony of Niger, since not only does it in August draw a straight line passing to the south-west of Téra, but it also fixes the endpoint of that line not at Boulkalo, but further south, at Bossébangou.

29. To sum up, if there were “an historic error” to be corrected, it would be for the benefit of Upper Volta, and not the reverse. We wish, however, to reassure both the Court and Niger; Burkina has said and repeated: it does not confuse history and law, and it accepts the colonial heritage as fixed by the Erratum of 1927, however rigorous it may be¹⁷⁹.

¹⁷⁷CR 2012/22, p. 51, para. 9 (Salmon).

¹⁷⁸MBF, Ann. 25.

¹⁷⁹CR 2012/19, p. 44, para. 4 (Pellet).

30. In conclusion, Mr. President, if there was a mistake, it was not the mistake that Niger claims. However, this debate is irrelevant, for the boundary, “as described” by the frontier title, was definitively fixed in October 1927 on the River Sirba at Bossébangou. End of story.

Members of the Court, I thank you kindly for your attention, and I should be most grateful, Mr. President, if you would give the floor to my colleague and friend, Jean-Marc Thouvenin, for his presentation of the line of the frontier from Bossébangou.

The PRESIDENT: Thank you, Professor Forteau. I would now ask your colleague, Professor Thouvenin, to continue with Burkina Faso’s oral argument. You have the floor, Sir.

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Mr. THOUVENIN: Thank you, Mr. President.

THE LINE FROM BOSSÉBANGOU TO THE BEGINNING OF THE BOTOU BEND

1. [Slide 1] Members of the Court, I come before you again today to describe the course of the frontier in what has, up to now, been called the “Say sector”. Allow me to point out straight away that the use of this phrase by Burkina, purely for the sake of convenience, has strictly no meaning within the law.

2. I stress this point, Mr. President, because on Friday, Niger cast a series of spells, at which it is adept, in an attempt to make us believe that the Erratum gives way before some kind of principle of inviolability of the boundaries of this territorial entity which Niger has dubbed the “traditional” Say *cercle*.

3. It is in fact not true to say, contrary to what Professor Salmon claimed, that “the sole change effected by the Erratum of 5 October 1927 to the traditional shape of Say *cercle* is the removal of Botou *canton*, which remains in Upper Volta”¹⁸⁰. The purpose of the Erratum, *in delimiting two colonies*, was never to enshrine the so-called traditional course of the boundaries of Say *cercle*.

4. Moreover, this is demonstrated by the fact that, clearly, the shape given to Say *cercle* by the inter-colonial boundary — by implication, since that was not its purpose — changed between the *Arrêté* of August 1927 and the Erratum of October correcting it. In August, Say *cercle* was

¹⁸⁰CR 2012/23, p. 12, para. 5 (Salmon).

57 delimited, in the north-east, by the River Sirba from its mouth, that is to say from the River Niger, as far as Bossébangou. From that point, i.e., from Bossébangou, the boundary immediately turned back up to the north-west to form a salient. The *Arrêté* states: “[f]rom this point [Bossébangou] a salient”. At that time, therefore, Say *cercle* included a salient consisting of a line running north-west from Bossébangou [Slide 2]. This did not pose a problem, since the boundary coming from Tao did not arrive at Bossébangou, but — as we have just indicated — further east on the Sirba, near Boulkalo. After Tao, therefore, the boundary took the following course: coming from Tao, it arrived in a straight line at the Sirba, a few kilometres north-east of Bossébangou, that is to say at Boulkalo. From there, it followed the River Sirba upstream — from east to west — as far as Bossébangou and, from there, it turned back up to the north-west to form a salient. The north-west boundary of Say *cercle* had the same shape.

[Animation]

5. The Erratum could not retain this solution, for the simple reason that it establishes that the boundary coming south-west from Tao arrives not east of Bossébangou, but directly at Bossébangou. It could not, therefore, retain the principle of a salient starting immediately from Bossébangou, since the line coming from Tao would have had to turn back upon itself from Bossébangou. That is why it simply moved the salient towards the west — it made it slide westward —, by stating that this salient does not start immediately from Bossébangou, but “almost immediately” after the line has reached the River Sirba at Bossébangou. Ultimately, it shifted the whole line resulting from the *Arrêté* of August 1927 towards the west, to the detriment, moreover, of Upper Volta, and to the great benefit of Niger. In any event, and this is what matters here, the colonial administration had absolutely no intention of respecting any traditional boundary of Say *cercle*. [End of slide]

6. Apart from its untenable argument on the intangibility of the boundaries of Say *cercle*, what does Niger say about its own line? Very little. We have heard criticism of Burkina’s line and of the Erratum, but hardly anything about Niger’s line:

- the Court heard the text of the Erratum being read out, by Professor Salmon, with emphasis on its rough edges — the *salient*, the line *turning back to the south*¹⁸¹ — while the 1927 sketch-map was being shown on the screen, as if the two corresponded, whereas — on the contrary — the 1927 sketch-map clearly does not comply with the text of the Erratum; in addition,
- Niger projected a sketch-map which, we were told, showed a line that “deviates from that shown on the IGN map in the sector of Bossébangou and in that of the ‘four villages’, for . . . various reasons . . . [but] [o]n the other hand, . . . is much closer to, if not the same as, the 1960 line in respect of the southern part of Say *cercle*”¹⁸².

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7. It should be noted that this line, claimed by Niger, with which the Court is now familiar, does not respect any — and I repeat, any — of the terms of the Erratum of 1927 describing the sector from Bossébangou to the beginning of the Botou bend, apart from the position of the latter point. The point on the Sirba at Bossébangou is omitted and replaced by a fantastical “tripoint” or bipoint — it is no longer very clear; Professor Forteau mentioned that just now. The salient has fallen by the wayside. The Say parallel and the River Sirba never meet. And finally, the straight line between the latter point and the beginning of the Botou bend is folded in two.

8. I shall not spend any longer refuting this line, and will now endeavour to counter the criticisms levelled against Burkina’s line by Niger.

9. Professor Klein would have it that this line is the result of “supposedly scientific extrapolations from the text of the Erratum”¹⁸³. As regards extrapolations, I actually believe that our opponents could teach us a thing or two. However, Mr. President, the work carried out by Burkina is far more modest than our opponents claim. It is simply respecting the 1987 Agreement, that is to say, it considers that the frontier is as described in the Erratum and, where that description does not suffice, that the line is as shown on the 1960 map. With all due respect to our opponents — for whom, in the words of Oscar Wilde, “a mist makes things wonderful” — ours is a clear approach, a method, which does not have the charms of uncertainty so beloved by Professor

¹⁸¹CR 2012/23, p. 12, para. [4] (Salmon).

¹⁸²CR 2012/24, p. 39, para. 20 (Klein).

¹⁸³CR 2012/24, p. 34, para. 15 (Klein).

Salmon, but which enables the frontier to be drawn with certainty, in accordance with the applicable international law in these proceedings.

I. From point P to point P1

10. More specifically, Professor Klein contested the line claimed by Burkina between point P and point P1 [Slide 3]. I shall not follow the order in which he spelled out his objections, but I shall attempt to reply to all of them.

59 11. It should be pointed out that the first of these reflects a certain lack of understanding of last Tuesday's oral argument¹⁸⁴, and of Burkina Faso's Memorial¹⁸⁵, since according to my opponent, after Bossébangou, Burkina relies on the line shown on the 1960 map¹⁸⁶. That is not the case; as I demonstrated on Tuesday, the portion of the line that lies on the right bank of the Sirba derives from the Erratum¹⁸⁷. It is true that it happens to be shown correctly on the IGN map. So much the better.

12. My opponent then finds it appropriate, which it is not, to take issue with the line plotted by the IGN in 1960, “[f]or the simple reason that it seems to have been created *ex nihilo* by the map's drafters and that no trace of it is to be found on *any* other document dating from the colonial period”¹⁸⁸. He adds: “[t]he 1960 IGN map is — I repeat — the only one to follow this course, without any basis in the 1927 texts or in any subsequent practice”¹⁸⁹. I urge Niger to reflect on this analysis, which is no less valid for the Téra sector than for the Say sector: indeed there is not a single document, not a single map, from the colonial period which shows the boundary in the Téra sector in an even remotely similar manner to the one plotted on the 1960 map.

13. Nevertheless, in attacking the line on the 1960 map in this way, Niger has chosen the wrong target. If the 1960 cartographic line can be used to determine the course of the frontier, in the event of the description in the Erratum not sufficing, it is quite simply because Niger and Burkina concluded a sovereign agreement to that effect in 1987. It is therefore immaterial whether

¹⁸⁴CR 2012/21, pp. 14-15, paras. 14-19.

¹⁸⁵MBF, pp. 104-108, paras. 4.18-4.23.

¹⁸⁶CR 2012/24, p. 29, para. 10 (Klein).

¹⁸⁷CR 2012/21, pp. 14-15, paras. 18-19 and p. 16, paras. 23-24.

¹⁸⁸CR 2012/24, p. 29, para. 10 (Klein).

¹⁸⁹*Ibid.*

the line has “any basis in the 1927 texts”, to use the words of my opponent¹⁹⁰, something which remains questionable. For it is precisely in the event of the Erratum not sufficing to describe a line which can be plotted on a map that the 1960 cartographic line — which therefore cannot correctly illustrate the Erratum, apart from correctly illustrating that it does not suffice — becomes relevant.

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14. Professor Klein further notes that: “[i]f the drafters of the 1927 texts had intended the boundary to follow the course of the Sirba in this area, they would obviously have said as much”¹⁹¹. However, the innermost thoughts of the drafters of the 1927 texts are, in truth, immaterial here. What matters is the sovereign decision taken by Niger and Burkina in 1987. And they decided that their frontier was as *described* in the Erratum. Therefore the only question is whether, from the description given in the Erratum, the frontier can be seen as following the right bank of the River Sirba. And on Tuesday, basing myself solely on that description, I demonstrated that to be the case¹⁹².

15. [Slide 4] Declaring himself to be baffled, my opponent then wonders out loud before the Court:

“even taking into account the precise words of the *Erratum* and the fact that it refers to a line which does not turn back up immediately, but “almost immediately”, in the opposite direction to the one from which it came, should it not be expected that the line resulting from that description would look like the one you see on the slide before you now?”¹⁹³.

This is the dotted red line showing on the screen.

16. Quite frankly, Members of the Court, this is not to be expected at all. The line shown by Professor Klein “*immediately turns back up* towards the north-west”. The Erratum, for its part, states that it *almost* immediately turns back up. I have just explained the origins of this phrase. “Almost” is a word which has a meaning. If I told the Court that my pleading was almost finished, I would be lying; but let us suppose that I say so in seven or eight minutes’ time: it does not mean that it is finished, but that it is not finished yet – and that it will be shortly.

¹⁹⁰ *Ibid.*

¹⁹¹ CR 2012/24, p. 29, para. 10 (Klein).

¹⁹² CR 2012/21, pp. 14-16, paras. 14-24.

¹⁹³ CR 2012/23, p. 25, para. 6 (Klein).

17. [Slide 5] Burkina therefore concludes that there has to be a portion of frontier after it has reached Bossébangou and before it starts to turn back up towards the north-west. It is this portion that necessarily follows the River Sirba.

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II. The “salient”

18. [Animation] I now come to what my opponent¹⁹⁴ refers to as the “salient of four villages”, while at the same time asserting, with a touch of humour, that “[i]t is clear”¹⁹⁵ that there is no salient in this area¹⁹⁶. Three points are to be noted.

19. First point: contrary to what my colleague contends¹⁹⁷, Burkina’s argument regarding the salient does not consist in relying entirely on the cartographic line. [Animation] Recourse to this line is required only in respect of the section running from point P1 to point P2. For the remainder of the salient, the description contained in the Erratum is sufficient to draw the frontier.

20. Second point: I am sorry, Mr. President, but I am afraid I cannot comment in detail on Friday’s oral pleadings regarding the exact location of the four villages¹⁹⁸. I understood very little, except as regards the location of Tankouro, which is one of the four villages referred to in the Erratum. Firstly, Niger has not carried out the additional research which it promised in its Counter-Memorial; secondly, it put together an obscure collection of maps which produced contradictory results regarding the location of Tankouro — which everyone agrees, moreover, is impossible to determine; and thirdly, it then concluded that Tankouro is of course located at the place which is most favourable to its argument¹⁹⁹. The method is, I am sure you will agree, very odd and unconvincing.

¹⁹⁴CR 2012/24, p. 31, para. 11 (*in fine*) (Klein).

¹⁹⁵*Ibid.*, p. 32, para. 12 (Klein).

¹⁹⁶*Ibid.*

¹⁹⁷*Ibid.*

¹⁹⁸*Ibid.*, pp. 32-34, paras. 12-15 (Klein).

¹⁹⁹*Ibid.*, pp. 33-34, para. 15 (Klein).

III. At the level of the Say parallel

21. [Slide 6] My opponent returns to sketch-map No. 16 in Niger's Counter-Memorial and continues to rely on this "piece of evidence" to dispute the frontier resulting from the Erratum, in spite of Burkina's criticism, arguing that the latter has not challenged its authenticity²⁰⁰.

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22. It is of course for the Court to determine the evidentiary value of this document, which, I would merely point out, is of uncertain provenance, date and purpose and also incompatible with the Erratum, which is the regulatory text, the 1987 Agreement, the 1987 Protocol of Agreement and the 1960 IGN map.

23. Furthermore, Burkina was reproached with betraying *the terms* of the 1927 Erratum, whereas we on this side of the Bar would claim to be adhering to them. It is true that for the purposes of my presentation last Friday, I said that point P3 lay "at the intersection of the River Sirba with the Say parallel". Of course, I do not dispute that the word "intersection" is not in the text of the Erratum, according to which the frontier "turning back to the south . . . again cuts the Sirba at the level of the Say parallel".

24. Nonetheless, "intersection between the Sirba and the Say parallel" is precisely what the text of the Erratum means.

25. Those are not the words used because that is not the type of language employed in territorial delimitation. The phrase used to express the idea that a frontier passes through a point where a line and a parallel meet is: "at the level of". We find it, for example, in the 1972 treaty delimiting the frontier between Morocco and Algeria. The reason for using such language is obvious: when we look at a map of the meridians, a parallel is nothing other than a "level".

IV. From point P3 to the beginning of the Botou bend

26. [Slide 7] As to the last portion of the frontier, from point P3 — the intersection of the Say parallel with the Sirba — to the beginning of the Botou bend, the Court is now very familiar with the respective arguments: in Burkina's view, in accordance with the crystal-clear description in the Erratum — the Parties agree on that²⁰¹ —, the frontier is a straight line. According to Niger, it is composed of two straight lines.

²⁰⁰*Ibid.*, pp. 34-35, paras. 16 (Klein).

²⁰¹CR 2012/24, p. 36, para. 18 (Klein).

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27. In order to justify its position, Niger claims that there is an international agreement, reached several decades ago²⁰², which had the effect of modifying the line established in the Erratum²⁰³. This agreement is informal²⁰⁴. It is said to be a matter of acquiescence²⁰⁵.

28. Burkina is thus said to have acquiesced, since its independence, in the frontier not passing where the Erratum says it passes. And, according to Professor Klein, “the positions adopted by its experts in the context of the Joint Commission’s work in 1988 do not change anything”²⁰⁶.

29. In fact, however, it is not the Joint Commission which invalidates Burkina’s so-called acquiescence. It is Niger itself which, by signing the 1987 Agreement, freely accepted that the frontier which has the force of law is the one described by the Erratum, supplemented where it does not suffice by the line shown on the 1960 map. There is no mention in the 1987 Agreement of the previous informal agreement referred to by Niger. Therefore, even supposing that it did indeed exist — *quod non* —, it would simply have been repudiated as a consequence of the 1987 Agreement. Did Niger protest? Did Niger assert, after 1987, that the Erratum could not have force of law in respect of the section of the frontier between point P3 and the beginning of the Botou bend? No, it did nothing of the kind. However, such protests should have been made by Niger’s Joint Commission experts in 1988, and at all subsequent meetings. The only protests made by Niger relate to the 1991 compromise, even though that compromise accepted the much-discussed course consisting of two straight-line segments claimed by Niger.

30. In truth, it was not until last Friday that Burkina first heard about this alleged acquiescence, purportedly dating back several decades. I think, Mr. President, that in order for an acquiescence to have the effect of modifying a frontier line, we need rather more. In the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, your Court considered that:

²⁰²CR 2012/24, p. 36, para. 18 (Klein).

²⁰³*Ibid.*

²⁰⁴*Ibid.*, p. 38, para. 19 (Klein).

²⁰⁵*Ibid.*

²⁰⁶*Ibid.*

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“any passing of sovereignty over territory on the basis of the conduct of the Parties . . . must be manifested clearly and without any doubt by that conduct and the relevant facts. That is especially so if what may be involved, in the case of one of the Parties, is in effect the abandonment of sovereignty over part of its territory.” (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 51, para. 32.)

31. In the present case, what is clear and beyond all doubt is that Niger and Burkina freely agreed, not tacitly but by treaty, that the frontier between the two countries is that described by the Erratum. And, by making reference to the 1987 Agreement, the 2009 Special Agreement further confirms, if there were any need, the complete absence of any tacit agreement whatsoever to modify the resulting frontier.

32. [Slide 8] Mr. President, Members of the Court, that concludes my statement today and those of counsel for Burkina Faso in the present case. We thank you for your kind attention, and I would ask you to call the Co-Agent of Burkina Faso, who will make a few brief concluding remarks and read out Burkina Faso’s final submissions.

The PRESIDENT: Thank you, Mr. Thouvenin. I give the floor to H.E. Ms Salamata Sawadogo Tapsoba, Co-Agent of Burkina Faso and Minister of Justice. You have the floor, Madam.

Ms SAWADOGO TAPSOBA: Thank you, Mr. President.

1. Mr. President, Members of the Court, in the absence of Burkina Faso’s Agent, who has had to leave The Hague for compelling reasons and who has asked me to convey his apologies to you, I have the honour to conclude my country’s second round of oral argument in my capacity as Minister of Justice, Keeper of the Seals, and Co-Agent of Burkina Faso.

2. Our counsel have presented Burkina Faso’s legal argument. It is easy to summarize it. It is very straightforward: we are simply asking the Court to confirm the course of the frontier as it results from the 1927 Erratum, supplemented, where necessary, by the line shown on the 1960 map of the *Institut Géographique National de France*, should the reference text not suffice to determine the course of that frontier definitively. And we are asking you to do that, Members of the Court, both for the demarcated sectors of the frontier, which are the subject of the “agreement” (“*entente*”) between Burkina and Niger referred to in Article 2, paragraph 2, of the Special

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Agreement, and for the portion of the frontier which is disputed by Niger. Such is the object of the submissions which I shall read out in a few moments.

3. Before that, with your permission, I should like to make some brief remarks of a general nature.

4. Firstly, we were somewhat surprised by the many changes made by the Republic of Niger at the last minute — and just last week, during its first round of oral argument — both to its argument and to its claims. One day the frontier line is curved; the next, in the same sector, it is broken into sections; and the third, it is straight — before Niger reverts back to one or other of its earlier positions. The 1927 Erratum is the reference document for the frontier; then it becomes one piece of evidence among many others. And quite frankly, Mr. President, claiming that these about-turns are due to the “discovery” of new facts is not sufficient justification: none of the documents annexed to the Counter-Memorial (and there is nothing to say that these were discovered belatedly) justifies Niger’s “changes of direction” between its Memorial and its Counter-Memorial. And Niger certainly cannot cite the discovery of new facts as justification for its — often drastic — changes of position between the close of the written proceedings and the hearings last week: neither Party has filed any new documents in the Registry of the Court.

5. These variations, not to say these about-turns, in Niger’s arguments have not helped our defence, and I should like to state, Mr. President, that we would vigorously object before the Court if, during their second round of oral argument, our brothers from Niger were to present a new argument or a previously unseen submission. We agreed, at Niger’s request, to be heard first, but on condition, of course, that the equality of the Parties is fully respected.

66 6. My second remark is a general one concerning Niger’s attitude towards the delimitation of the frontier. I have no wish to dash the hopes that were raised when the experts of the two Parties accepted the 1988 consensual line, whose adoption could so easily have prevented the present dispute; however, for reasons which escape us, Niger has refused to grant official recognition to this solution, even though it seems obvious. Convinced that an unsatisfactory agreement is better than satisfactory legal proceedings, Burkina declared itself ready to ratify the political compromise of 1991 — even though it was not to its advantage; the Republic of Niger ultimately disowned it. And that is why, Members of the Court, we are standing here before you today at the end of these

proceedings — satisfactory proceedings, most certainly, since we have complete confidence that the solution you adopt will be in accordance with the law, but proceedings which have been taxing and costly for both our countries, and which could easily have been avoided. And that is also why we are asking you to address all the Parties' requests set out in Article 2 of the Special Agreement — in order to put an end once and for all to the frontier dispute between the two countries. This dispute is, as recalled by the Agent of Burkina Faso at the opening of these hearings, the only shadow over our relations with the sister Republic of Niger.

7. And now for my third and final — more general — remark. We have said it often during these proceedings, but it is certainly not “redundant” to repeat it one last time: the case before you, Members of the Court, is particularly straightforward. It is straightforward because the Parties — and now you — are able to rely on a frontier title which is much clearer and much more complete than those covering the majority of Africa's frontiers — where such titles exist. I do not dare imagine what would happen if you were to succumb to the “charms” of the *effectivités* or “living” colonial boundaries, so as to challenge or even simply to “complement” or “clarify” the line in the 1927 Erratum, which is sufficient in itself: that would open a Pandora's Box and encourage States in Africa (and elsewhere, no doubt) to call into question the best-established frontiers for the most tenuous of reasons. Your list of cases would certainly grow, but I am not convinced that this is necessary, or something you would wish for.

8. Mr. President, before I read out the final submissions of Burkina Faso, I should like to offer our sincere thanks to you and all Members of the Court for listening to us patiently and attentively, and to express once again the complete confidence that my country has in the Court. We should also like to thank the Registrar and every member of the Registry's excellent team, whose professionalism, efficiency and readiness to help have been much appreciated, as well as the interpreters — in a “unilingual” case, those in the other language booth have a particularly arduous task. I must not forget to thank our counsel and advocates, and our entire team, who have spent a great deal of time preparing our case and these pleadings, with special thanks to our cartographers for all the work they have done. Finally, I must thank our brothers and sisters from Niger, whom I salute once more by saying that the Government and people of Burkina Faso are convinced that the

judgment rendered by the Court will help to strengthen further the good relations which exist so felicitously between our two countries.

9. Mr. President, Members of the Court, in accordance with the provisions of Article 60, paragraph 2, of the Rules of Court, I shall now read out the final submissions of Burkina Faso.

In view of all the considerations set out in its Memorial, its Counter-Memorial and its oral argument, Burkina Faso has the honour to request that it may please the International Court of Justice to adjudge and declare that the frontier between Burkina Faso and the Republic of Niger follows the course described in paragraph 5.1 of its Memorial, the precise written co-ordinates of which are reproduced in the written submissions that we have transmitted to the Registry of the Court.

In accordance with Article 7, paragraph 4, of the Special Agreement, Burkina Faso also requests the Court to nominate, in its Judgment, three experts to assist the Parties as necessary in the demarcation.

Mr. President, Members of the Court, thank you for your kind attention.

The PRESIDENT: Thank you, Your Excellency. The Court takes note of the final submissions which you have just read out on behalf of Burkina Faso. The Republic of Niger will present its second round of oral argument on Wednesday 17 October from 3 p.m. to 6 p.m. The sitting is closed.

The Court rose at 1 p.m.
