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Letter dated 26 October 2016 from the Agent of Equatorial Guinea to the Registrar

[Translation]

With reference to the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, I have the honour to communicate to you the replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue at the public sitting of 19 October 2016.

**Replies of Equatorial Guinea to the questions put by
Judge Bennouna and Judge Donoghue**

[Translation]

During the public hearings on the request for the indication of provisional measures in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judge Bennouna and Judge Donoghue put the following questions to Equatorial Guinea:

Judge Bennouna's question

Judge Bennouna put the following question to Equatorial Guinea:

“In a Note Verbale dated 15 February 2012 to the French Ministry of Foreign Affairs, which is included in the case file, the Embassy of the Republic of Equatorial Guinea states that ‘the Republic of Equatorial Guinea has acquired a townhouse at 42 avenue Foch’, adding that ‘[t]he title to the property is in the process of being transferred’. My question is as follows:

‘On what date did Equatorial Guinea definitively acquire that property title, and did it register it at the Land Registry in France?’”¹

Reply

There are two components to the question: one regarding the date on which the building located at 42 avenue Foch was definitively acquired, the other relating to registration at the Land Registry in France.

Equatorial Guinea considers that it definitively acquired the title to the property located at 42 avenue Foch on 15 September 2011. That title was not registered as such at the Land Registry in France.

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1. Regarding the date on which the building was definitively acquired

1. On 19 September 1991, the building located at 42 avenue Foch in Paris was acquired by the following Swiss companies: Ganesha Holding SA, GEP Gestion Entreprise Participation SA, RE Entreprise SA, Nordi Shipping & Trading Co Ltd, and Raya Holdings SA. On 18 December 2004, Mr. Teodoro Nguema Obiang Mangue became the sole shareholder of the five Swiss companies.

2. On 15 September 2011, by way of an agreement on the transfer of shares and claims between Mr. Teodoro Nguema Obiang Mangue, transferor, on the one hand, and the Republic of Equatorial Guinea, transferee, represented by Mr. Miguel Edjang Angue, having the power of attorney of the President of the Republic of Equatorial Guinea dated 4 September 2011, on the

¹CR 2016/17, p. 20.

other, Equatorial Guinea acquired the shares of the five Swiss companies which co-own the building located at 42 avenue Foch in Paris, for a purchase price of thirty-four million euros (€34,000,000)². At no point has it been contested that this transaction was conducted under normal market conditions.

3. As the sole shareholder of these five Swiss companies, Equatorial Guinea became the owner of the building located at 42 avenue Foch in Paris.

4. It is to be noted that this transfer of shareholder rights constituted grounds for the amendment of the articles of association of the five companies, as a result of the conversion of bearer shares into registered shares, in accordance with the minutes established on 19 September 2011 for each of the companies by Mr. Richard Rodriguez, notary in Geneva³.

5. On 19 September 2011, the amendment of the articles of association relating to the conversion of bearer shares into registered shares was duly recorded, for each of the five companies, in the Commercial Register of the Canton of Fribourg⁴.

6. On 19 September 2011, the chairman of each of the five companies issued a share certificate to Equatorial Guinea stating that “[t]he Republic of Equatorial Guinea is listed in the share register of the company as the owner of these shares”⁵.

7. On 17 October 2011, the transfer to Equatorial Guinea, as sole shareholder, of the shareholder rights in the five companies was officially recorded and registered in France by the main non-residents department of the French tax authority in Noisy-le-Grand, on a form entitled “Uncertificated transfer of shareholder rights subject to mandatory declaration”.

²Ann. 1, Share and claims transfer agreement, signed 15 September 2011.

³Ann. 2, Minutes of the extraordinary general meetings dated 19 September 2011.

⁴Ann. 3, Certified copies of entries in the Commercial Register of the Canton of Fribourg, dated 23 September and 5 October 2011. Current entries for each of the companies are available online at the following links: GEP Gestion, Entreprise, Participation SA (<https://appls.fr.ch/hrcmatic/hrcintapp/externalCompanyReport.action?companyOfrcID13-CH-660-0474984-1&ofrcLanguage=2>); Nordi Shipping & Trading Co Ltd (<https://appls.fr.ch/hrcmatic/hrcintapp/externalCompanyReport.action?companyOfrcID13-CH-660-1390995-0&ofrcLanguage=2>); RE Entreprise SA (<https://appls.fr.ch/hrcmatic/hrcintapp/externalCompanyReport.action?companyOfrcID13-CH-217-01355826&ofrcLanguage=2>); Raya Holdings SA (<https://appls.fr.ch/hrcmatic/hrcintapp/externalCompanyReport.action?companyOfrcID13-CH-660-0956993-5&ofrcLanguage=2>); Ganesha Holding SA (<https://appls.fr.ch/hrcmatic/hrcintapp/externalCompanyReport.action?companyOfrcID13-CH-217-0135878-7&ofrcLanguage=2>).

⁵Ann. 4, Share certificates dated 19 September 2011. Article 686 of the Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911 (status as of 1 January 2016), concerning the share register, provides as follows:

“1. The company keeps a share register of registered shares in which the names and addresses of the owners and usufructuaries are recorded. It must be kept in such a manner that it can be accessed at any time in Switzerland.

2. Entry in the share register requires documentary proof that the share was acquired for ownership or of the reasons for the usufruct thereof.

3. The company must certify such entry on the share certificate.

4. In relation to the company the shareholder or usufructuary is the person entered in the share register.” *[Translation from the website of the Federal Council of the Swiss Confederation.]*

8. This form, registered by Equatorial Guinea with the French tax authorities, states that Mr. Teodoro Nguema Obiang Mangue is the transferor of the shareholder rights and that the Republic of Equatorial Guinea is the transferee. It also cites, under the heading “form and name of the company”, the five Swiss companies mentioned above, and, under the heading “seat of the company”, the Canton of Fribourg in Switzerland. Finally, the heading “nature of the assets represented by the transferred shareholder rights” indicates “real estate”.

9. It should be noted that the tax due in relation to this transfer of shareholder rights, estimated by the French tax authorities at three hundred and seventeen thousand, six hundred and seventy-two euros (€317,672), was paid in full by Equatorial Guinea⁶.

10. The capital gains on the transfer of the shareholder rights, estimated at one million, one hundred and forty-five thousand, seven hundred and forty euros (€1,145,740) on a form entitled “Declaration of capital gains on the transfer of movable assets or shares in companies investing primarily in real property”, was also paid in full by Equatorial Guinea to the French tax authorities.

11. The capital gains declaration registered by the French tax authorities on 20 October 2011 names the Republic of Equatorial Guinea as the “purchaser” of the securities of the five companies mentioned above⁷.

12. It was therefore on 15 September 2011, the date of the agreement on the transfer of shares and claims, that Equatorial Guinea became the owner of the building located at 42 avenue Foch in Paris.

13. Having recorded and registered the transfer of shareholder rights to Equatorial Guinea and having collected the related taxes, France has never contested Equatorial Guinea’s right of ownership of the property at 42 avenue Foch as stated in the deed of transfer.

2. Regarding registration at the Land Registry in France

14. Currently, the companies Ganesha Holding SA, GEP Gestion Entreprise Participation SA, RE Entreprise SA, Nordi Shipping & Trading Co Ltd, and Raya Holdings SA are listed as the owners of the property at the Land Registration Department of the 8th arrondissement of Paris, as is the case with all companies investing primarily in real estate, whose registration documents do not mention the identity of company members⁸.

15. Pursuant to paragraph N of the share transfer contract, Equatorial Guinea must liquidate the five companies in order to register its property title at the Land Registration Department directly.

⁶Ann. 5, Transfer of shareholder rights form registered by the French tax authorities on 17 October 2011.

⁷Ann. 6, Capital gains declaration registered by the French tax authorities on 20 October 2011.

⁸Ann. 7, Request for information from the Land Registration Department No. 2015H9665, dated 10 June 2015, p. 163.

16. However, because of the attachment order registered by the Paris *Tribunal de grande instance* at the Land Registration Department of the 8th arrondissement of Paris on 31 July 2012, it was legally impossible for Equatorial Guinea to register the property title directly under its name as the owner of the building at 42 avenue Foch⁹.

⁹*Ibid.*, p. 162, referring to the attachment under the Code of Criminal Procedure that took place on 31 July 2012.

Judge Donoghue’s question

Judge Donoghue put the following question to Equatorial Guinea:

“The Application of Equatorial Guinea (paragraph 12) describes the property at 42 avenue Foch as ‘the premises of the diplomatic mission of Equatorial Guinea in France’. As of what date does Equatorial Guinea consider that the property acquired the status of premises of its diplomatic mission in France?”¹⁰

Reply

Equatorial Guinea considers that the building at 42 avenue Foch in Paris acquired diplomatic status as of 4 October 2011.

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17. This question involves considerations of law and fact regarding the interpretation and application of the Vienna Convention on Diplomatic Relations, in particular Article 1, paragraph (i) thereof, which provides:

“For the purpose of the present Convention, the following expressions shall the meanings hereunder assigned to them:

.....

(i) The ‘premises of the mission’ are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.”

18. For the purposes of these proceedings on provisional measures, the key factor to take into account is that the building located at 42 avenue Foch in Paris forms part of the premises of Equatorial Guinea’s diplomatic mission, within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961 (hereinafter the “Vienna Convention”).

19. The relevant passage in paragraph 12 of the Application instituting proceedings reads thus: “neither the courts nor the French Ministry of Foreign Affairs have recognized the inviolability of the building located at 42 avenue Foch in Paris, as the premises of the diplomatic mission of Equatorial Guinea in France”.

20. In paragraph 20 of the Application, we explained from which point in time the building at 42 avenue Foch in Paris was assigned to the diplomatic mission of Equatorial Guinea in Paris. The Application states in this regard that:

¹⁰CR 2016/17, p. 21.

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

21. Equatorial Guinea considers that the building located at 42 avenue Foch in Paris, of which it is the owner, acquired the status of premises of its diplomatic mission from the time when a diplomatic Note was sent to the French Ministry of Foreign Affairs, on 4 October 2011, informing it that the building was being used for the performance of the functions of Equatorial Guinea’s diplomatic mission¹¹. The relevant passages in that diplomatic Note read as follows:

“The Embassy of the Republic of Equatorial Guinea presents its compliments to the Ministry of Foreign and European Affairs . . . and has the honour to inform it that the Embassy has for a number of years had at its disposal a building located at 42 avenue Foch, Paris (16th arr.), which it uses for the performance of the functions of its diplomatic mission, a fact which it has hitherto not formally notified to your Department”.

22. In that Note, which was sent long before the building was attached under the Code of Criminal Procedure on 31 July 2012, the Embassy of Equatorial Guinea recognizes that it had used the building for a number of years for the performance of the functions of its diplomatic mission. However, Equatorial Guinea does not claim that the building, while being used prior to 4 October 2011, enjoyed diplomatic mission status, in other words, that the building was protected by the principle of inviolability of premises under the Vienna Convention. It had in fact happened previously, prior to 4 October 2011, that the building had been used to accommodate Equatorial Guinea’s diplomatic staff or other officials on special missions. The Embassy did not deem it necessary to register the building with the French Ministry of Foreign Affairs — which, moreover, is not a formal requirement — so that it would be recognized by the latter as having the status of diplomatic premises and thus requiring protection, because part of the building was being used for private purposes during that period.

23. Equatorial Guinea has continually repeated to the French authorities that, regarding the status of premises of a diplomatic mission, the régime of the Vienna Convention is declaratory¹². In a Note Verbale dated 28 March 2012, Equatorial Guinea reiterated in this respect:

“in the Note Verbale of 4 October 2011, in which it advised the Protocol Department that it had premises located at 42 avenue Foch, Paris, for which it was requesting diplomatic protection, **the Republic of Equatorial Guinea expressly stated that the assignment of those premises to the diplomatic mission of Equatorial Guinea had already taken effect**” (emphasis in the original)¹³.

24. It is clear from these diplomatic exchanges that, in Equatorial Guinea’s view, the building located at 42 avenue Foch in Paris should be considered as the premises of its diplomatic mission in France as of 4 October 2011, whether the criterion of “declaratory effect”, as advanced

¹¹Application instituting proceedings, para. 32.

¹²Nos. 16, 17 and 19 of the documents communicated by France.

¹³Nos. 17 and 19 of the documents communicated by France.

by Equatorial Guinea, or that of “effective assignment”, as advanced by France, is applied. In the same Note Verbale, Equatorial Guinea took the view that the criterion of “effective assignment”, relied on by France to refuse the diplomatic protection that had been requested, was fulfilled through its declaration of 4 October 2011. It could not be otherwise, since assignment consists in giving a purpose or a function to a person or property. That is precisely the subject of the Note Verbale of 4 October 2011. In accordance with the criterion of effective assignment put forward by France, it is beyond doubt that Equatorial Guinea effectively decided to make the building the premises of its diplomatic mission in France. This is attested by the fact that as of 17 October 2011, following the end of Ambassador Edjo Ovono Frederico’s mission, the Chargée d’affaires *a.i.*, Ms Bindang Obiang, who is also the Permanent Delegate to UNESCO, was rehoused at 42 avenue Foch¹⁴. The reason for this change in accommodation was that the dwelling located at 46 rue des Belles Feuilles was unfit for habitation and that the dignity of Ms Bindang Obiang’s new functions required a better residence.

25. The Embassy of Equatorial Guinea housed its Chargée d’affaires *a.i.* at 42 avenue Foch precisely because it considered that, as of 4 October 2011, the building enjoyed inviolability as premises of the diplomatic mission. When the French authorities intruded on the premises on 14 February 2012, the Chargée d’affaires protested on the spot and by Note Verbale addressed to the Quai d’Orsay¹⁵. Equatorial Guinea’s Minister for Foreign Affairs, International Co-operation and Francophone Affairs also reacted the same day by Note Verbale. He wrote to his French counterpart to express his “regret that . . . the residence of the Chargée d’affaires and Permanent Representative of Equatorial Guinea to UNESCO in Paris is the subject of intervention by the investigating judge and the French police, without any preliminary inquiry that would justify such action” and to ask the French Government to respect the Vienna Convention¹⁶.

26. We would draw attention to the fact France was informed at the highest level of State that Equatorial Guinea had acquired the building at 42 avenue Foch and assigned it to its diplomatic mission. In a letter dated 14 February 2012, President Obiang wrote as follows to his French counterpart, President Sarkozy:

“Your Excellency is not unaware of the fact that my son, Teodoro NGUEMA OBIANG MANGUE, lived in France, where he pursued his studies, from childhood until he reached adulthood. France was his preferred country and, as a young man, he purchased a residence in Paris, however, due to the pressures on him as a result of the supposed unlawful purchase of property, he decided to resell the said building to the Government of the Republic of Equatorial Guinea.

At this time, the building in question is a property that was lawfully acquired by the Government of Equatorial Guinea and is currently used by the Representative to UNESCO, who is in charge of the Embassy’s property. The said property is afforded legal and diplomatic protection under the Vienna Convention and the bilateral agreements signed by the two States.”¹⁷

27. In order to determine whether Equatorial Guinea considered the building at 42 avenue Foch to be protected by the rule of inviolability at that time, it is irrelevant whether the appointment of Ms Bindang Obiang was contrary to the Vienna Convention, as claimed by France

¹⁴No. 3 of the documents communicated by France.

¹⁵No. 7 of the documents communicated by France.

¹⁶No. 6 of the documents communicated by France.

¹⁷No. 5 of the documents communicated by France.

in a Note Verbale of 31 October 2011¹⁸. Ms Bindang Obiang, who was extremely upset by the events on 14 February 2012, also hastened to write to UNESCO the same day¹⁹, to ensure that the organization took account of her change of address from 46 rue des Belles Feuilles to 42 avenue Foch in Paris. She had not deemed it necessary to do so earlier, since she considered herself to be protected by the Vienna Convention of 18 April 1961, as a member of the diplomatic staff of the Embassy of Equatorial Guinea.

28. When, on 15 February 2012, the Embassy of Equatorial Guinea notified the French Ministry of Foreign Affairs that ministers from Malabo were seeking the protection of France with a view to visiting the building at 42 avenue Foch²⁰, it was in fact in order to supervise preparations for the effective occupation of the building, which had been acquired for use as premises of the diplomatic mission of Equatorial Guinea. Furthermore, the same day, the Embassy of Equatorial Guinea protested strongly against the intrusion by the French authorities in the building at 42 avenue Foch²¹.

29. Equatorial Guinea would also draw attention to the Note Verbale of 27 July 2012 from its Embassy, in which it informed France that the building at 42 avenue Foch was now in fact being used as premises of its diplomatic mission. The Note reads as follows:

“The Embassy of the Republic of Equatorial Guinea presents its compliments to the Ministry of Foreign and European Affairs . . . and has the honour to inform it that, as of Friday 27 July 2012, the offices of the Embassy are located at the following address: 42 Avenue Foch, Paris (16th arr.), a building which it now uses for the performance of the functions of its diplomatic mission in France.”²²

30. The wording of the Note Verbale of 2 August 2012 is equally clear:

“The Embassy of the Republic of Equatorial Guinea presents its compliments to the Ministry of Foreign and European Affairs . . . and has the honour to inform it that, further to its preceding Notes Verbales, it hereby confirms that its chancellery is indeed located at the following address: 42 Avenue Foch, Paris (16th arr.), a building that it uses as the official offices of its diplomatic mission in France.”²³

31. The official use of 42 avenue Foch has been maintained without interruption since that time. Moreover, it is to this address that French officials wishing to visit Equatorial Guinea submit their requests for an entry visa. Similarly, the French Embassy in Malabo informs French citizens who wish to visit Equatorial Guinea that the Embassy of Equatorial Guinea in Paris is located at 42 avenue Foch²⁴. The building at 29 boulevard des Courcelles, which formerly housed the

¹⁸No. 4 of the documents communicated by France.

¹⁹No. 8 of the documents communicated by France.

²⁰No. 9 of the documents communicated by France.

²¹No. 10 of the documents communicated by France.

²²No. 22 of the documents communicated by France.

²³No. 23 of the documents communicated by France.

²⁴See online: <http://www.ambafrance-gq.org/Visa-d-entree-en-Guinee-Equatoriale>. Last updated on 2 May 2016.

Embassy of Equatorial Guinea in France, is now used by the commercial department of Equatorial Guinea's mission in France. This information has been communicated to France²⁵.

32. In sum, Equatorial Guinea has been consistent in all the steps it has taken to have the status of the building located at 42 avenue Foch in Paris recognized as premises of its diplomatic mission. It announced to the French Ministry of Foreign Affairs on 4 October 2011 that it had designated this property as premises of its diplomatic mission; on 14 February 2012, its Head of State informed the French Head of State that it had acquired the building and assigned it to its diplomatic mission; it housed the Chargée d'affaires *a.i.* in the building as of 17 October 2011; and finally, it transferred its Embassy offices there on 27 July 2012. Equatorial Guinea therefore considers that the building at 42 avenue Foch in Paris acquired diplomatic status as of 4 October 2011.

(Signed) Mr. Carmelo NVONO NCA,

Agent of the Republic of Equatorial Guinea.

²⁵No. 26 of the documents communicated by France.

List of annexes

- Annex 1: Agreement on the transfer of shares and claims, signed 15 September 2011.
 - Annex 2: Minutes of the extraordinary general meetings dated 19 September 2011.
 - Annex 3: Certified copies of entries in the Commercial Register of the Canton of Fribourg.
 - Annex 4: Share certificates dated 19 September 2011.
 - Annex 5: Transfer of shareholder rights form registered by the French tax authorities on 17 October 2011.
 - Annex 6: Capital gains declaration registered by the French tax authorities on 20 October 2011.
 - Annex 7: Request for information from the Land Registration Department No. 2015H9665 dated 10 June 2015.
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