

Trends and prospects in the settlement of territorial disputes in West Africa

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Abstract

The African continent is one of the areas where the most challenging work on border issues remains to be effected, since it is estimated that at present only 35 % of African land boundaries have been subject to delimitation and demarcation. In the recent period, several factors have contributed to a better understanding from concerned States and stakeholders of the urgent need for a completion of the delimitation process, among them the persistence of potentially disruptive border disputes, and the negative impact of imprecise boundaries on cross-border cooperation and trade. The same observations apply to the region formed by the former French colonial territories in West Africa, on which this presentation will focus.

The presentation will start with a review of the delimitations effected in the region to date, either by judicial means through submission of cases to the International Court of Justice, or by diplomatic negotiations. Such review will extend to issues of compliance and implementation on the ground. It will analyse the region-specific features related to the delimitation of frontiers inherited from the colonial period, and the way States involved (and the ICJ) have dealt with these peculiarities.

The presentation will then turn to an assessment of the prospects for a more integrated approach to boundary delimitation, developed since 2007 in the framework of the Conference of African Ministers in charge of Border Issues and of the African Union Border Programme (AUBP). Such approach implies capacity-building in the field of delimitation and boundary management, and incorporates a systematic inventory of African borders still to be delimited, based on a questionnaire sent to States. The presentation will evaluate the relevance in that

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respect of the draft African Union Convention on Cross-Border Cooperation (Niamey Convention). In this context, it will identify challenges facing the delimitation work, inter alia the significant financial costs implied, and will mention the involvement of external actors such as the United Nations and various States in support of the objectives of the AUBP.

1. Introduction

The African continent is one of the areas where the most challenging work on border issues remains to be effected, since it is estimated that at present only 35 % of African land boundaries have been subject to delimitation and demarcation.² In the recent period, several factors have contributed to a greater awareness from concerned States and stakeholders of the urgent need for a completion of the delimitation process, among them the persistence of potentially disruptive border disputes, and the negative impact of imprecise boundaries on cross-border cooperation and trade. These general observations apply to the region formed by the former French colonial territories in West Africa (the so-called ‘French West Africa’, in French ‘Afrique Occidentale Française’ or AOF), on which this presentation will focus. The AOF comprised eight colonies: Mauritania, Senegal, French Sudan (now Mali), French Guinea, Côte d'Ivoire (Ivory Coast), Upper Volta (now Burkina Faso), Dahomey (now Benin) and Niger. Mention also needs to be made of French Togoland (now Togo), seized by France from Germany in World War I, which was not nominally a colony but a Mandate territory. In this area, developments concerning a number of frontier disputes have been recently reported, for instance between Benin and Nigeria, and between Ivory Coast and Guinea³, to quote only a few examples.

2. Review of boundary delimitations in the region

² The figure of 35% is found in the report of the Preparatory Meeting of Government Experts of the 3rd AU Conference of African Ministers in charge of Border Issues, Niamey, Niger, 14-16 May 2012: see Annex I to the Report of the Conference, doc. EX.CL/726(XXI), para. 8. But during the first Conference of African Ministries in Charge of Border Issues (2007), the Preparatory Meeting of Experts on the AUBP referred to a lower figure, stating that ‘[s]ubject to an inventory to be made, it is estimated that less than a quarter of African borders have been defined’. *Summary Note on the AUBP and its Implementation Modalities*, Doc. BP/EXP/2 (II) (2007), para. 16).

³ A dispute related to sovereignty over the village of Kpeaba currently opposes Ivory Coast and Guinea, and the armed forces of Guinea occupied the area in January 2013. See Agence France-Presse, ‘Ivory Coast, Guinea vow peaceful resolution to border dispute’, 20 February 2013.

The International Court of Justice (ICJ) has been significantly involved in the delimitation of boundaries in the region, since it has been called to determine the course of frontiers between Burkina Faso and Mali⁴, between Benin and Niger⁵ and most recently on 16 April 2013, between Burkina Faso and Niger.⁶ These three disputes were all submitted to the Court by way of special agreement pursuant to Articles 36(1) and 40 of the Statute of the Court, which evidences the will of the States concerned to depoliticize as much as possible the settlement of their boundary disputes. Seisin of the Court by means of a special agreement has allowed the parties to design to a large extent the procedural framework of the proceedings, including the fixing of time-limits and the use of French language, as well as the applicable law, and the definition of the extent of the disputed area.⁷ The first two cases quoted were submitted to a Chamber of the Court, while the third was adjudicated by the full Court. In each of these cases, recourse to the Court followed the failure of lengthy bilateral negotiations in the framework of joint delimitation commissions.

The salient features of boundary delimitation in West Africa are mostly related to two factors. First, many African frontiers, while theoretically defined by means of treaties, are insufficiently (if at all) demarcated on the ground, which causes confusion concerning the actual physical location of (at least parts of) boundaries.⁸ Such observation is common to the whole African continent. Second, what is specific to the territories within the former AOF is that their frontiers were initially internal colonial administrative limits which became international boundaries upon occurrence of independence. In the *Frontier Dispute* (Burkina Faso/Republic of Mali) case, the ICJ stated that, according to the *uti possidetis juris* principle, ‘pre-eminence [is to be] accorded to legal title over effective possession as a basis of sovereignty’⁹ and that the essence of the said principle lies ‘in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved’,

⁴ *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, *ICJ Reports* (1986), p. 554.

⁵ *Frontier Dispute (Benin/Niger)*, Judgment, *ICJ Reports* (2005), p. 90.

⁶ *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013, not yet published, available at <http://www.icj-cij.org/docket/files/149/17306.pdf>.

⁷ On Special Agreements in general, see S. Yee, ‘Article 40’, in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice* (Oxford: Oxford University Press, 2012) 922-999, at 935-936.

⁸ See e.g. Alec C. McEwen, ‘The Establishment of the Nigeria/Benin Boundary, 1889-1989’, *The Geographical Journal*, Vol. 157, No. 1 (Mar., 1991), pp. 62-70. On boundary issues in Africa in general, see I. Brownlie, *African Boundaries* (London: C. Hurst, 1979); J. R. V. Prescott, *Political Frontiers and Boundaries* (London: Allen & Unwin, 1987).

⁹ See F. Spadi, ‘The International Court of Justice Judgment in the Benin–Niger Border Dispute: The Interplay of Titles and ‘Effectivités’ under the Uti Possidetis Juris Principle’, *Leiden Journal of International Law* 18 (2005), 777-794.

including former administrative delimitations established during the colonial period that became international frontiers.¹⁰ The Court had thus to determine the course of the boundary in the light of French domestic colonial law ('droit d'outre-mer'), referred to as one factual element among others, or as 'evidence indicative of [...] the 'colonial heritage'. It had to undertake such task by reference to the physical situation to which French colonial law was applied, as that situation existed at the dates of independence, but at the same time it had to consider the present-day physical realities and the possibility of its evolution since the critical date, for instance the appearance or disappearance of certain islands in the stretch concerned, which was found in the *Benin/Niger* case. In each of the three cases dealing with AOF States, the Court had to assess the relevance of a number of French administrative legal materials, and to deal with a large quantity of cartographic and photographic material produced by the Parties in support of their respective arguments. An assessment of the findings of the Court on the substantive issues involved, for instance on the relationship between title and *effectivités*, would far exceed the scope of this presentation. But on a procedural level, it may be observed that the Court's treatment of documentary evidence presented by the parties, a challenging task given the amount of documents produced, has generally been considered satisfactory. In particular, the Court was given the occasion to develop a consistent approach concerning for instance the probative value of maps and other kinds of documents, which may serve as guidance for future cases.

Delimitation of boundaries by judicial settlement leaves open issues of implementation on the ground – through demarcation – and of compliance. While no major issue of non-compliance with a judgment has been reported to date, it seems that delays may affect demarcation works themselves, but few reliable data are available on this issue. What needs to be mentioned is that in *Burkina Faso/Mali*, *Benin/ Niger* and *Burkina Faso/Niger*, the parties had undertaken in the respective special agreements, although under different modalities, to proceed with the demarcation work within a certain delay from the judgment of the Court. In *Burkina Faso/Niger*, the special agreement provides for the nomination by the Court, *in the judgment itself*, of three experts to assist in the demarcation, but it merely states that such work shall

¹⁰ *Frontier Dispute (Burkina Faso/Mali), Judgment*, ICJ Reports 1986, pp. 586-587, para. 63, and p. 566, para. 23

begin within 18 months from the judgment, and does not determine the deadline for completion of the demarcation.¹¹

3. Prospects for an integrated approach

The African Union Border Program

Within the framework of the Organization for African Unity (OAU), then of the African Union (AU), efforts have been made for decades to support the process of delimitation and demarcation of outstanding land boundaries. For instance, the establishment of an OAU Boundaries Commission was considered by the OAU Council of Ministers in 1981, then again in 1991, but there was no follow-up to these proposals. These efforts seemed to receive new impetus with the ‘Declaration on the African Union Border Programme (AUBP) and its Implementation Modalities’, which was adopted by the Conference of African Ministers in charge of Border Issues in 2007¹², and subsequently endorsed by the AU Executive Council.¹³ Delimitation and demarcation of African boundaries is one of the two objectives of the AUBP, the other being the development of cross-border cooperation.¹⁴ It is interesting to observe that in various official statements of the AU, such efforts are not considered as distinct from those aiming at the delimitation of maritime borders and efforts made towards the determination of the continental shelf in the region.¹⁵

In this framework, it was initially agreed that the delimitation and demarcation of all African boundaries was to be completed in 2012, and that a survey of the status of African borders would be effected by means of a questionnaire sent to all AU member States. As of 2012,

¹¹ The special agreement in *Burkina Faso/Mali* provided in its Article IV(2) that ‘[w]ithin one year after that Judgment the Parties shall *effect* the demarcation of the frontier’ (emphasis added). In our view the meaning of effect in this provision may raise an issue of interpretation.

¹² Conference of African Ministers in charge of Border Issues, ‘Declaration on the AU Border Programme (AUBP)’, Addis Ababa, 7 June 2007.

¹³ Decision on the Conference of African Ministers in charge of Border Issues held in Addis Ababa, 7 June 2007, 11th Ordinary Session of the Executive Council held in Accra, Ghana, from 25 to 29 June 2007, Doc. EX.CL/352 (XI), and Decision EX.CL/Dec.370(XI).

¹⁴ Report of the AU Conference of Ministers in charge of Border Issues, Niamey, Niger, 17 May 2012, doc. EX.CL/726(XXI), para. 2.

¹⁵ See e.g. Conclusions of the Regional Workshop for West Africa on the Implementation of the African Union Border Programme, Ouagadougou, Burkina Faso, 23-24 April 2009, para. 7.

only 32 AU Member States had responded to the questionnaire¹⁶, and the 2012 deadline has been extended to 2017.

The latest Preparatory Meeting of Government Experts of the Conference of African Ministers in charge of Border Issues, held in Niamey, Niger, 14-16 May 2012, agreed on the following measures:

- (i) the finalisation, at the latest by July 2012, of the survey of African borders with the submission by the Member States, which had not yet done so, of their responses to the questionnaire sent by the Commission;
- (ii) the submission to the Commission by each Member State of an annual report on the progress made in the demarcation of their borders;
- (iii) the acceleration by Member States of the delimitation and demarcation process of their boundaries, where such an exercise has not yet taken place, and take all necessary measures so as to comply with the new deadline of 2017 set by the Assembly of the Union for the completion of these operations.
- (iv) the speedy settlement of existing border disputes by peaceful means;
- (v) the adoption of concrete measures to maintain regularly and, if necessary, densify the boundary pillars so as to make them more visible and reduce the risks of dispute and conflict.
- (vi) the speedy finalisation of the Guide on best practices in border delimitation and demarcation under preparation;¹⁷

The establishment of a Border Information System (BIS), fed with the responses to the questionnaire and other data, designed to enable Member States to easily access information relating to their borders, is also considered.¹⁸ Such a system was advocated decades ago by Sir Ian Brownlie, who stressed that a regional system of registration of claims and of agreed alignments would perhaps ‘soften’ the procedures of reservation of rights and help to ‘depoliticize’ boundary issues in Africa, and at the same time would assist in the regulation of tripoint problems.¹⁹

¹⁶ 3rd Conference of African Ministers in charge of Border Issues, Preparatory Meeting of Government Experts, Niamey, Niger, 14-16 May 2012, Annex I to the Report of the AU Conference of Ministers in charge of Border Issues, Niamey, Niger, 17 May 2012, doc. EX.CL/726(XXI), para. 8.

¹⁷ 3rd Conference of African Ministers in charge of Border Issues, Preparatory Meeting of Government Experts, Niamey, Niger, 14-16 May 2012, Annex I to the Report of the AU Conference of Ministers in charge of Border Issues, Niamey, Niger, 17 May 2012, doc. EX.CL/726(XXI), para. 10.

¹⁸ 3rd Conference of African Ministers in charge of Border Issues, Preparatory Meeting of Government Experts, Niamey, Niger, 14-16 May 2012, Annex I to the Report of the AU Conference of Ministers in charge of Border Issues, Niamey, Niger, 17 May 2012, doc. EX.CL/726(XXI), para. 8.

¹⁹ I. Brownlie, *supra* note 8, 20.

The conference of Ministers of the AU endorsed the measures agreed by the Meeting of Experts²⁰, and deplored the inadequate responses to the questionnaire sent to Member States within the framework of the survey on the status of African borders, noting that five years after its launch, twenty-two Member States had not yet responded to the questionnaire, which, it was emphasized, ‘does not make it possible to have a comprehensive view of delimitation and demarcation needs’.²¹ It stressed the need to ‘do everything’ to successfully complete the delimitation and demarcation of African boundaries, where such an exercise has not yet taken place, in compliance with the new deadline of 2017 set by the Assembly of the Union, at its session in Malabo, in July 2011.²² It will be interesting in that respect to follow the outcome of the next conference of AU Ministers, which is to be held in 2014.²³

Challenges facing delimitation projects

Regional stakeholders frequently emphasize the costs related to judicial determination of boundaries.²⁴ AUBP documents argue that in cases of border disputes, Member States should explore ‘all options available, including recourse to African legal processes and conflict resolution mechanisms’.²⁵ To date, however, the availability of regional judicial fora in a position to settle territorial disputes in a satisfactory manner remains dubious. Some experts have evoked the potential relevance of the African Court of Justice in boundary cases, but it is

²⁰ Declaration of the Ministers of Member States of the AU in charge of Border Issues on the AUBP, Annex II to the Report of the AU Conference of Ministers in charge of Border Issues, Niamey, Niger, 17 May 2012, doc. EX.CL/726(XXI), para. 10.

²¹ Declaration of the Ministers of Member States of the AU in charge of Border Issues on the AUBP, Annex II to the Report of the AU Conference of Ministers in charge of Border Issues, Niamey, Niger, 17 May 2012, doc. EX.CL/726(XXI), para. 8.

²² Declaration of the Ministers of Member States of the AU in charge of Border Issues on the AUBP, Annex II to the Report of the AU Conference of Ministers in charge of Border Issues, Niamey, Niger, 17 May 2012, doc. EX.CL/726(XXI), para. 8. The Ministers stressed that ‘the acceleration by the Member States of the delimitation and demarcation of their boundaries, where this exercise has not yet taken place, taking, if necessary, all appropriate legal, financial, institutional and other measures for this purpose, so as to comply with the new deadline of 2017. Likewise, we urge Member States involved in border disputes, to do everything for their early resolution, through peaceful means, with the support, if necessary, of the AU and other appropriate African mechanisms’ (at para. 10).

²³ Declaration of the Ministers of Member States of the AU in charge of Border Issues on the AUBP, Annex II to the Report of the AU Conference of Ministers in charge of Border Issues, Niamey, Niger, 17 May 2012, doc. EX.CL/726(XXI), para. 18.

²⁴ See Conference of African Ministries in Charge of Border Issues, Preparatory Meeting of Experts on the African Union Border Programme: Summary Note on the AUBP and its Implementation Modalities (Addis Ababa, Ethiopia), Doc. BP/EXP/2 (II) (2007), para. 16.

²⁵ See e.g. Conclusions of the Regional Workshop for West Africa on the Implementation of the African Union Border Programme, Ouagadougou, Burkina Faso, 23-24 April 2009, para. 7.

unclear whether this court, which has never been involved in a delimitation case, could provide an appropriate forum for such disputes. The African Union Convention on Cross-Border Cooperation (also known as the ‘Niamey Convention’),²⁶ not yet entered into force, will not provide a mechanism for the settlement of frontier disputes. Indeed, while it mentions among its objectives to ‘facilitate the delimitation, demarcation and reaffirmation of interstate borders, in conformity with mechanisms agreed upon by the parties concerned’ and to ‘facilitate the peaceful resolution of border disputes’²⁷, it does not provide for any specific mechanism in that respect.

On the other hand, the possibility of recourse to the UN Secretary General’s ‘Trust Fund to assist States in the Settlement of Disputes through the International Court of Justice’ is to be reminded.²⁸ It is open to States having given their consent to submit a specific dispute to the ICJ in the form of a special agreement, subject to conditions as to eligibility set out in the Terms of Reference of the Trust Fund, and it was used *inter alia* to grant financial assistance in the amount of US\$ 350,000 to each the Republic of Benin and the Republic of the Niger to assist in the settlement of the *Frontier Dispute* case (Benin/Niger).²⁹ Such funding may also be granted to assist in the implementation of ICJ judgments, for instance the demarcation of delimited boundaries on the ground.

For all the reasons mentioned above, I hold the view that the ICJ is likely to remain a popular venue for African States, particularly in the former AOF. Apart from the fact that, as Sir Ian Brownlie had noted, boundary disputes are intrinsically ‘especially appropriate for settlement by judicial means’³⁰, particularly when the usual political options have been exhausted, it is clear that the *res judicata* effect attached to ICJ judgments, together with the possibility of seizing the Court in case of difficulty in the implementation phase, and the possibility of involvement of the UN Security Council in case of non-compliance under Article 94 of the UN Charter, are major arguments in favour of recourse to the ICJ.

²⁶ The text of the African Union Convention on Cross-Border Cooperation (the ‘Niamey Convention’) is reproduced as Annex III to Report of the AU Conference of Ministers in charge of Border Issues, Niamey, Niger, 17 May 2012, doc. EX.CL/726(XXI).

²⁷ African Union Convention on Cross-Border Cooperation, Art. 2(3) and 2(4).

²⁸ See C. Espósito, ‘Article 64’, in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice* (Oxford: Oxford University Press, 2012) 1598-1604, at 1602-1604; D. Anderson, ‘Trust Funds in International Litigation’ in N. Ando et al. (eds.), *Liber Amicorum Judge Shigeru Oda* (Kluwer: 2002), 793-807; P. Bekker, ‘International Legal Aid in Practice: the ICJ Trust Fund’, *AJIL* 87 (1993), 659-668; D. Vignes, ‘Aide au développement et assistance judiciaire pour le règlement des différends devant la Cour Internationale de Justice’, *AFDI* 35 (1989), 321-324.

²⁹ C. Espósito, ‘Article 64’, in A. Zimmermann et al. (eds.), *supra* note 27, at 1604.

³⁰ I. Brownlie, *supra* note 8, 20.

As to technical challenges to the delimitation of boundaries, documents of the AUBP encourage Member States to ‘endeavour to acquire up to date mapping and cartographic information, as well as survey equipment, to facilitate accurate delimitation and demarcation exercises’³¹. States are also called to undertake research in their respective colonial archives to retrieve records relating to their boundaries.³² The costs related to acquisition of technical data may indeed prove to be a major issue for certain States in the area.

The financial burden related to delimitation of boundaries in the region, be it through judicial settlement or by means of negotiation, may be relieved to some extent through assistance by international actors, in particular foreign governments and international organizations. For instance, the Government of Germany and the *Deutsche Gesellschaft für Internationale Zusammenarbeit* (GIZ)³³ have been providing financial and technical support towards the implementation of the AUBP since its inception.³⁴ In the same way, the EU, various agencies of the UN, and relevant entities such as the Association of European Border Regions (AEBR), should be called to contribute more significantly to the achievement of the objectives of the AUBP.

³¹ See e.g. Conclusions of the Regional Workshop for West Africa on the Implementation of the African Union Border Programme, Ouagadougou, Burkina Faso, 23-24 April 2009, para. 7.

³² See e.g. Conclusions of the Regional Workshop for West Africa on the Implementation of the African Union Border Programme, Ouagadougou, Burkina Faso, 23-24 April 2009, para. 7.

³³ GIZ is an entity supporting the German Government in achieving its objectives in the field of international cooperation for sustainable development.

³⁴ Declaration of the Ministers of Member States of the AU in charge of Border Issues on the AUBP, Annex II to the Report of the AU Conference of Ministers in charge of Border Issues, Niamey, Niger, 17 May 2012, doc. EX.CL/726(XXI), para. 15.