

DECLARATION OF JUDGE KOROMA

Decision by Namibia and Botswana to bring dispute to Court by Special Agreement.

Possible interpretations of 1890 Anglo-German Agreement — Choice of one such interpretation by the Court — Recognition and application of principle of uti possidetis as part of the African legal order.

Kasane Communiqué as basis of shared use of river also in accordance with contemporary legal principles of international watercourses.

Legal effect of Judgment on boundary and status of Island.

The Governments of Namibia and Botswana are to be commended for their decision to entrust their dispute to the Court for peaceful settlement. Although the dispute involves the location of a riverine boundary between the two States within one specific area and the determination of the legal status of a relatively small island within that area, the fact that the Parties decided on the basis of a Special Agreement to bring the matter to the Court is a measure of the importance they attach to the territory in dispute and to their mutual relations.

It has not been unknown for similar disputes to be the source of serious tension between two States or even to give rise to armed conflict. Rather than that, the two neighbouring States elected by means of a Special Agreement to request the Court to determine, on the basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law, their boundary around Kasikili/Sedudu Island and the legal status of the Island.

It is inevitable that the Court, in performing its judicial task and applying the provisions of the 1890 Treaty, would choose one of a number of possible interpretations of the Treaty as representing the shared intention of the Parties and in the light of the material before it — both historical and contemporary — to identify and locate the boundary prescribed therein.

At the same time, in making these findings, the Court, recognizing the need for stable boundaries, applied the principle of *uti possidetis* — an important principle recognized by African States as part of the African legal order according to which African States' boundaries should follow those inherited at independence.

Accordingly, the Court's Judgment should invest the boundary as determined, as well as the status of the Island, with the necessary legal validity which they had been accorded by the 1890 Treaty and which the Parties to the Special Agreement have asked the Court to determine.

Also in the light of its judicial function, and taking into account the Kasane Communiqué and the official interpretation given to that Communiqué before the Court, the latter reached the decision that, in the two channels around the Island, the nationals of, and boats flying the flags of, the Republic of Botswana and the Republic of Namibia shall enjoy equal treatment in the waters of the other State. This important finding by the Court should not be regarded as extra-legal but finds a solid basis in international law and in the jurisprudence of the Court. In international law, control by a riparian State of its own fluvial territory is matched by that of free navigation. Thus, while respecting the terms of a Special Agreement empowering the Court to determine the riparian boundary between two States, the Court is entitled to lay down terms which not only determine the boundary as such but would contribute to the peace and stability between the two States. The Judgment, in my view, serves this purpose as well.

(Signed) Abdul G. KOROMA.
