

CASE CONCERNING KASIKILI/SEDUDU ISLAND (BOTSWANA v. NAMIBIA)

Judgment of 13 December 1999

In its judgment in the case concerning Kasikili/Sedudu Island (Botswana/Namibia), the Court found, by eleven votes to four, that “the boundary between the Republic of Botswana and the Republic of Namibia follows the line of the deepest soundings in the northern channel of the Chobe River around Kasikili/Sedudu Island” and, by eleven votes to four again, that “Kasikili/Sedudu Island forms part of the territory of the Republic of Botswana”.

The Court added unanimously that, “in the two channels around Kasikili/Sedudu Island, the nationals of, and vessels flying the flags of, the Republic of Botswana and the Republic of Namibia shall enjoy equal national treatment”.

The Court was composed as follows: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Registrar Valencia-Ospina.

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The full text of the operative paragraph of the Judgment reads as follows:

“104. For these reasons,

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THE COURT,

(1) By eleven votes to four,

Finds that the boundary between the Republic of Botswana and the Republic of Namibia follows the line of deepest soundings in the northern channel of the Chobe River around Kasikili/Sedudu Island;

IN FAVOUR: President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Higgins, Kooijmans;

AGAINST: Vice-President Weeramantry; Judges Fleischhauer, Parra-Aranguren, Rezek.

(2) By eleven votes to four,

Finds that Kasikili/Sedudu Island forms part of the territory of the Republic of Botswana;

IN FAVOUR: President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Higgins, Kooijmans;

AGAINST: Vice-President Weeramantry; Judges Fleischhauer, Parra-Aranguren, Rezek.

(3) Unanimously,

Finds that, in the two channels around Kasikili/Sedudu Island, the nationals of, and vessels flying the flags of, the Republic of Botswana and the Republic of Namibia shall enjoy equal national treatment.”

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Judges Ranjeva, Koroma, and Higgins appended declarations to the judgment of the Court; Judges Oda and Kooijmans appended separate opinions; and Vice-President Weeramantry and judges Fleischhauer, Parra-Aranguren and Rezek appended dissenting opinions.

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Review of the proceedings and submissions of the Parties
(paras. 1-10)

By joint letter dated 17 May 1996, Botswana and Namibia transmitted to the Registrar the original text of a Special Agreement between the two States, signed at Gaborone on 15 February 1996 and entered into force on 15 May 1996, Article I of which reads as follows:

“The Court is asked to determine, on the basis of the Anglo-German Treaty of 1 July 1890 [an agreement between Great Britain and Germany respecting the spheres of influence of the two countries in Africa] and the rules and principles of international law, the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the island.”

The Court then recites the successive stages of the proceedings and sets out the submissions of the Parties:

Botswana’s final submission as presented at the hearing of 5 March 1999 were as follows:

“*May it please the Court:*

(1) to adjudge and declare:

(a) that the northern and western channel of the Chobe River in the vicinity of Kasikili/Sedudu Island constitutes the ‘main channel’ of the Chobe River in accordance with the provisions of Article III (2) of the Anglo-German Agreement of 1890; and

(b) consequently, sovereignty in respect of Kasikili/Sedudu Island vests exclusively in the Republic of Botswana; and further

(2) to determine the boundary around Kasikili/Sedudu Island on the basis of the *thalweg* in the northern and western channel of the Chobe River.”

Namibia’s final submissions read at the hearing of 2 March 1999 were as follows:

“*May it please the Court, rejecting all claims and submissions to the contrary, to adjudge and declare*

1. The channel that lies to the south of Kasikili/Sedudu Island is the main channel of the Chobe River.

2. The channel that lies to the north of Kasikili/Sedudu Island is not the main channel of the Chobe River.

3. Namibia and its predecessors have occupied and used Kasikili Island and exercised sovereign jurisdiction over it, with the knowledge and acquiescence of Botswana and its predecessors since at least 1890.

4. The boundary between Namibia and Botswana around Kasikili/Sedudu Island lies in the centre (that is to say, the *thalweg*) of the southern channel of the Chobe River.

5. The legal status of Kasikili/Sedudu Island is that it is a part of the territory under the sovereignty of Namibia.”

Background to the case
(paras. 11-16)

The Court then gives a description of the geography of the area concerned, illustrated by three sketch maps.

Thereafter the Court recounts the history of the dispute between the Parties which is set against the background of the nineteenth century race among the European colonial powers for the partition of Africa. In the spring of 1890, Germany and Great Britain entered into negotiations with a view to reaching agreement concerning their trade and their spheres of influence in Africa. The resulting Treaty of 1 July 1890 delimited inter alia the spheres of influence of Germany and Great Britain in south-west Africa; that delimitation lies at the heart of the present case.

In the ensuing century, the territories involved experienced various mutations in status. The independent Republic of Botswana came into being on 30 September 1966, on the territory of the former British Bechuanaland

Protectorate, while Namibia (of which the Caprivi Strip forms part) became independent on 21 March 1990.

Shortly after Namibian independence, differences arose between the two States concerning the location of the boundary around Kasikili/Sedudu Island. In May 1992, it was agreed to submit the determination of the boundary around the Island to a Joint Team of Technical Experts. In February 1995, the Joint Team Report, in which the Team announced that it had failed to reach an agreed conclusion on the question put to it, was considered and it was decided to submit the dispute to the International Court of Justice for a final and binding determination.

The rules of interpretation applicable to the 1890 Treaty (paras. 18-20)

The Court begins by observing that the law applicable to the present case has its source first in the 1890 Treaty, which Botswana and Namibia acknowledge to be binding on them. As regards the interpretation of that Treaty, the Court notes that neither Botswana nor Namibia are parties to the Vienna Convention on the Law of Treaties of 23 May 1969, but that both of them consider that Article 31 of the Vienna Convention is applicable inasmuch as it reflects customary international law.

According to Article 31 of the Vienna Convention on the Law of Treaties:

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”

The Court indicates that it shall proceed to interpret the provisions of the 1890 Treaty by applying the rules of interpretation set forth in the 1969 Vienna Convention, recalling that

“a treaty must be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty.” (*Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, pp. 21-22, para. 41).

The text of the 1890 Treaty (paras. 21-46)

The Court first examines the text of the 1890 Treaty, Article III of which reads as follows:

“In Southwest Africa the sphere in which the exercise of influence is reserved to Germany is bounded:

1. To the south by a line commencing at the mouth of the Orange river, and ascending the north bank of that river to the point of its intersection by the 20th degree of east longitude.

2. To the east by a line commencing at the above-named point, and following the 20th degree of east longitude to the point of its intersection by the 22nd parallel of south latitude; it runs eastward along that parallel to the point of its intersection by the 21st degree of east longitude; thence it follows that degree northward to the point of its intersection by the 18th parallel of south latitude; it runs eastward along that parallel till it reaches the river Chobe, and descends the centre of the main channel of that river to its junction with the Zambesi, where it terminates.

It is understood that under this arrangement Germany shall have free access from her Protectorate to the Zambesi by a strip of territory which shall at no point be less than 20 English miles in width.

The sphere in which the exercise of influence is reserved to Great Britain is bounded to the west and northwest by the above-mentioned line. It includes Lake Ngami.

The course of the above boundary is traced in general accordance with a map officially prepared for the British Government in 1889.”

As far as the region covered by the present case is concerned, this provision locates the dividing line between the spheres of influence of the contracting parties in the “main channel” of the River Chobe; however, neither this, nor any other provision of the Treaty, furnishes criteria enabling that “main channel” to be identified. It must also be noted that in the English version refers to the “centre” of the main channel, while the German version uses the term “thalweg” of that channel (*Thalweg des Hauptlaufes*). Observing that Botswana and Namibia did not themselves express any real difference of opinion on the meaning of these terms, the Court indicates that it will accordingly treat the words “centre of the main channel” in Article III, paragraph 2, of the 1890 Treaty as having the same meaning as the words “Thalweg des Hauptlaufes”. In the Court’s opinion, the real dispute between the Parties concerns the location of the main channel where the boundary lies. In Botswana’s view, it is to be found “on the basis of the thalwegs in the northern and western channel of the Chobe”, whereas in Namibia’s view, it “lies in the centre (that is to say thalwegs) of the southern channel of the Chobe River”. The Court observes that by introducing the term “main channel” into the draft treaty, the contracting parties must be assumed to have intended that a precise meaning be given to it. For these reasons, the Court indicates that it will therefore

proceed first to determine the main channel. In so doing, it will seek to determine the ordinary meaning of the words “main channel” by reference to the most commonly used criteria in international law and practice, to which the Parties have referred.

Criteria for identifying the “main channel”
(paras. 29-42)

The Court notes that the Parties to the dispute agree on many of the criteria for identifying the “main channel”, but disagree on the relevance and applicability of several of those criteria.

For Botswana, the relevant criteria are as follows: greatest depth and width; bed profile configuration; navigability; greater flow of water. Botswana also lays stress on the importance, from the standpoint of identification of the main channel, of “channel capacity”, “flow velocity” and “volume of flow”. Namibia acknowledges that:

“[p]ossible criteria for identifying the main channel in a river with more than one channel are the channel with the greatest width, or the greatest depth, or the channel that carries the largest proportion of the annual flow of the river. In many cases the main channel will have all three of these characteristics.”

It adds, however, referring to the sharp variations in the level of the Chobe’s waters, that:

“neither width nor depth are suitable criteria for determining which channel is the main channel.”

Among the possible criteria, Namibia therefore attaches the greatest weight to the amount of flow: according to it, the main channel is the one “that carries the largest proportion of the annual flow of the river”. Namibia also emphasized that another key task was to identify the channel that is most used for river traffic.

The Court notes that the Parties have expressed their views on one or another aspect of the criteria, distinguishing between them or placing emphasis on their complementarity and their relationship with other criteria. Before coming to a conclusion on the respective role and significance of the various criteria thus chosen, the Court further notes that the present hydrological situation of the Chobe around Kasikili/Sedudu Island may be presumed to be essentially the same as that which existed when the 1890 Treaty was concluded.

Depth
(para. 32)

Notwithstanding all the difficulties involved in sounding the depth of the channels and interpreting the results, the Court concludes that the northern channel is deeper than the southern one, as regards mean depth, and even as regards minimum depth.

Width
(para. 33)

With regard to the width, the Court finds, on the basis of a report dating from as early as 1912, aerial photographs taken between 1925 and 1985, and satellite pictures taken in June 1975, that the northern channel is wider than the southern channel.

Flow of water
(paras. 34-37)

With regard to the flow, i.e., the volume of water carried, the Court is not in a position to reconcile the figures submitted by the Parties, who take a totally different approach to the definition of the channels concerned. The Court is of the opinion that the determination of the main channel must be made according to the low water baseline and not the floodline. The evidence shows that when the river is in flood, the Island is submerged by flood water and the entire region takes on the appearance of an enormous lake. Since the two channels are then no longer distinguishable, it is not possible to determine the main channel in relation to the other channel. The Court therefore is not persuaded by Namibia’s argument concerning the existence of a major “main” channel whose visible southern channel would merely constitute the thalweg.

Visibility
(para. 38)

The Court is further unable to conclude that, in terms of visibility — or of general physical appearance — the southern channel is to be preferred to the northern channel, as maintained by Namibia.

Bed profile configuration
(para. 39)

Having examined the arguments, maps and photographs put forward by the Parties, the Court is also unable to conclude that, from its bed configuration, the southern channel constitutes the principal and natural prolongation of the course of the Chobe before the bifurcation.

Navigability
(paras. 40-42)

The Court notes that the navigability of watercourses varies greatly, depending on prevailing natural conditions. Those conditions can prevent the use of the watercourse in question by large vessels carrying substantial cargoes, but permit light flat-bottomed vessels to navigate. In the present case, the data furnished by the Parties tend to prove that the navigability of the two channels around Kasikili/Sedudu Island is limited by their shallowness. This situation inclines the Court to the view that, in this respect, the “main channel” in this part of the Chobe is that of the two which offers more favourable conditions for navigation. In the Court’s view, it is the northern channel which meets this criterion.

For the foregoing reasons, the Court concludes that, in accordance with the ordinary meaning of the terms that appear in the pertinent provision of the 1890 Treaty, the northern channel of the River Chobe around Kasikili/Sedudu Island must be regarded as its main channel. It observes that this conclusion is supported by the results of three on-site surveys carried out in 1912, 1948 and 1985, which concluded that the main channel of the River Chobe was the northern channel.

The object and purpose of the 1890 Treaty
(paras. 43-46)

The Court then considers how and to what extent the object and purpose of the treaty can clarify the meaning to be given to its terms. While the treaty in question is not a boundary treaty proper but a treaty delimiting spheres of influence, the Parties nonetheless accept it as the treaty determining the boundary between their territories. The contracting powers, the Court observes, by opting for the words “centre of the main channel”, intended to establish a boundary separating their spheres of influence even in the case of a river having more than one channel.

The Court notes that navigation appears to have been a factor in the choice of the contracting powers in delimiting their spheres of influence, but it does not consider that navigation was the sole objective of the provisions of Article III, paragraph 2, of the Treaty. In referring to the main channel of the Chobe, the parties sought both to secure for themselves freedom of navigation on the river and to delimit as precisely as possible their respective spheres of influence.

The subsequent practice
(paras. 47-80)

In the course of the proceedings, Botswana and Namibia made abundant reference to the subsequent practice of the parties to the 1890 Treaty — and of their successors — as an element in the interpretation of that Treaty. While both Parties accept that interpretative agreements and subsequent practice do constitute elements of treaty interpretation under international law, they disagree on the consequences to be drawn from the facts in this case for purposes of the interpretation of the 1890 Treaty.

Article 31, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties, which, as stated earlier, reflects customary law, provides, for the interpretation of treaties, as follows:

“3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretations.”

In support of its interpretation of Article III, paragraph 2, of the 1890 Treaty, Botswana relies principally on three sets of documents: a report on a reconnaissance of the Chobe produced in August 1912 by an officer of the Bechuanaland Protectorate Police, Captain Eason; an arrangement arrived at in August 1951 between Major Trollope, Magistrate for the Eastern Caprivi, and Mr. Dickinson, a District Commissioner in the Bechuanaland Protectorate, together with the correspondence that preceded and followed that arrangement; and an agreement concluded in December 1984 between the authorities of Botswana and South Africa for the conduct of a Joint Survey of the Chobe, together with the resultant Survey Report.

The Eason Report (1912)
(paras. 53-55)

The Court shares the view, put forward by Namibia and accepted by Botswana in the final version of its argument, that the Eason Report and its surrounding circumstances cannot be regarded as representing “subsequent practice in the application of the treaty” of 1890, within the meaning of Article 31, paragraph 3 (b), of the Vienna Convention.

The Trollope-Redman correspondence (1947-1951)
(paras. 56-63)

In 1947, Mr. Ker, who was operating a transport business in Bechuanaland, planned to bring timber down the Chobe using the northern channel. He obtained the necessary permission from the competent official in the Caprivi Strip, Major Trollope, but also raised the matter with the Bechuanaland authorities. Following a Joint Report entitled “Boundary between the Bechuanaland Protectorate and the Eastern Caprivi Zipfel: Kasikili Island” produced by Major Trollope and Mr. Redman (District Commissioner at Kasane, Bechuanaland) in 1948, and forwarded to their respective authorities, there ensued an extended correspondence between those authorities.

In 1951 an exchange of correspondence between Mr. Dickinson, who had in the meantime succeeded Mr. Redman as District Commissioner at Kasane (Bechuanaland) and Major Trollope led to the following “gentlemen’s agreement”:

“(a) That we agree to differ on the legal aspect regarding Kasikili Island, and the concomitant question of the Northern Waterway;

(b) That the administrative arrangements which we hereafter make are entirely without prejudice to the rights of the Protectorate and the Strip to pursue the legal question mentioned in (a) should it at any time seem desirable to do so and will not be used as an argument that either territory has made any admissions or abandoned any claims; and

(c) That, having regard to the foregoing, the position revert to what it was de facto before the whole question was made an issue in 1947 — i.e. that Kasikili Island continue to be used by Caprivi tribesmen and that the

Northern Waterway continue to be used as a 'free for all' thoroughfare."

Each side however made a caveat with regard to its position in any future controversy over the Island.

The Court observes that each of the Parties to the present proceedings relies on the Trollope-Redman Joint Report and the correspondence relating thereto in support of its position. From its examination of the extended correspondence, the Court concludes that the above-mentioned events, which occurred between 1947 and 1951, demonstrate the absence of agreement between South Africa and Bechuanaland with regard to the location of the boundary around Kasikili/Sedudu Island and the status of the Island. Those events cannot therefore constitute "subsequent practice in the application of the treaty [of 1890] which establishes the agreement of the parties regarding its interpretation" (1969 Vienna Convention on the Law of Treaties, Art. 31, para. 3 (b)). *A fortiori*, they cannot have given rise to an "agreement between the parties regarding the interpretation of the treaty or the application of its provisions" (ibid., Art. 31, para. 3 (a)).

The Joint Survey of 1985 (paras. 64-68)

In October 1984 an incident during which shots were fired took place between members of the Botswana Defence Force and South African soldiers who were travelling by boat in the Chobe's southern channel. At a meeting held in Pretoria on 19 December 1984 between representatives of various South African and Botswanan ministries, it emerged that the incident had arisen out of differences of interpretation as to the precise location of the boundary around Kasikili/Sedudu Island. At this meeting, reference was made to the terms of the 1890 Treaty and it was agreed "that a joint survey should take place as a matter of urgency to determine whether the main Channel of the Chobe River is located to the north or the south of the Sidudu/Kasikili Island". The joint survey was carried out at the beginning of July 1985. The conclusions of the survey report were as follows:

"The main channel of the Chobe River now passes Sidudu/Kasikili Island to the west and to the north of it. (See annexed maps)

The evidence available seems to point to the fact that this has been the case, at least, since 1912.

It was not possible to ascertain whether a particularly heavy flood changed the course of the river between 1890 and 1912. Captain Eason of the Bechuanaland Protectorate Police states, on page 4 of Part I of the report which has been referred to earlier, that floods occurred in 1899 and in June and July of 1909.

If the main channel of the river was ever situated to the south of the island, it is probable that erosion in the Sidudu Valley, the location of which can be seen in the annexed Map C, has caused the partial silting up of the southern channel.

Air photographs showing the channels of the river in the vicinity of the island are available in the archives of the two national survey organizations. They were taken in 1925, 1943, 1972, 1977, 1981 and 1982. No substantial change in the position of the channels is evident from the photographs."

Having examined the subsequent correspondence between the South African and Botswana authorities, the Court finds that it cannot conclude therefrom that in 1984-1985 South Africa and Botswana had agreed on anything more than the despatch of the joint team of experts. In particular, the Court cannot conclude that the two States agreed in some fashion or other to recognize themselves as legally bound by the results of the joint survey carried out in July 1985. Neither the record of the meeting held in Pretoria on 19 December 1984 nor the experts' terms of reference serve to establish that any such agreement was reached. Moreover, the subsequent correspondence between the South African and Botswana authorities appears to deny the existence of any such agreement: in a Note of 4 November 1985, Botswana called upon South Africa to accept the survey conclusions; not only did South Africa fail to accept them but on several occasions it emphasized the need for Botswana to negotiate and agree on the question of the boundary with the relevant authorities of South West Africa/Namibia, or indeed of the future independent Namibia.

Presence of Masubia on the Island (paras. 71-75)

In the proceedings Namibia, too, invoked in support of its arguments the subsequent practice of the parties to the 1890 Treaty. In its Memorial it contended that this conduct

"is relevant to the present controversy in three distinct ways. In the first place, it corroborates the interpretation of the Treaty ... Second, it gives rise to a second and entirely independent basis for Namibia's claim under the doctrines concerning acquisition of territory by prescription, acquiescence and recognition. Finally, the conduct of the parties shows that Namibia was in possession of the Island at the time of termination of colonial rule, a fact that is pertinent to the application of the principle of *uti possidetis*."

The subsequent practice relied on by Namibia consists of

"[t]he control and use of Kasikili Island by the Masubia of Caprivi, the exercise of jurisdiction over the Island by the Namibian governing authorities, and the silence by Botswana and its predecessors persisting for almost a century with full knowledge of the facts ..."

The Court indicates that it will not at this point examine Namibia's argument concerning prescription. It will merely seek to ascertain whether the long-standing, unopposed, presence of Masubia tribes people on Kasikili/Sedudu Island constitutes "subsequent practice in the application of the [1890] treaty which establishes the agreement of the parties regarding its interpretation" (1969 Vienna Convention on

the Law of Treaties, Art. 31, para. 3 (b)). To establish such practice, at least two criteria would have to be satisfied: first, that the occupation of the Island by the Masubia was linked to a belief on the part of the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the southern channel of the Chobe; and, second, that the Bechuanaland authorities were fully aware of and accepted this as a confirmation of the Treaty boundary.

There is nothing that shows, in the opinion of the Court, that the intermittent presence on the Island of people from the Caprivi Strip was linked to territorial claims by the Caprivi authorities. It further seems to the Court that, as far as Bechuanaland, and subsequently Botswana, were concerned, the intermittent presence of the Masubia on the Island did not trouble anyone and was tolerated, not least because it did not appear to be connected with interpretation of the terms of the 1890 Treaty. The Court thus finds that the peaceful and public use of Kasikili/Sedudu Island, over a period of many years, by Masubia tribesmen from the Eastern Caprivi does not constitute “subsequent practice in the application of the [1890] treaty” within the meaning of Article 31, paragraph 3 (b), of the Vienna Convention on the Law of Treaties.

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The Court concludes from all of the foregoing that the subsequent practice of the parties to the 1890 Treaty did not result in any “agreement between the parties regarding the interpretation of the treaty or the application of its provisions”, within the meaning of Article 31, paragraph 3 (a), of the 1969 Vienna Convention on the Law of Treaties, nor did it result in any “practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”, within the meaning of subparagraph (b) of that same provision.

Maps as evidence (paras. 81-87)

Both Parties have submitted in evidence in support of their respective positions a large number of maps, dating back as far as 1880. Namibia points out that the majority of the maps submitted in these proceedings, even those emanating from British colonial sources and intended to show the boundaries of Bechuanaland, tend to place the boundary around Kasikili/Sedudu Island in the southern channel. Namibia relies on this as “a specialized form of ‘subsequent practice’ and ... also an aspect both of the exercise of jurisdiction and the acquiescence in it that matures into prescriptive title”. Botswana for its part places less reliance on maps, pointing out, inter alia, that most of the early maps show too little detail, or are too small in scale, to be of value in this case. Botswana asserts, however, that the available maps and sketches indicate that, from the time the Chobe was surveyed with any particularity by European explorers from the 1860s onwards, a north channel around the Island was known and regularly depicted. Botswana does not, however, attempt to demonstrate that this places the boundary in the northern

channel. Rather, its overall position is that the map evidence is far less consistent in placing the boundary in the southern channel than Namibia claims.

The Court begins by recalling what the Chamber dealing with the *Frontier Dispute (Burkina Faso/Republic of Mali)* case had to say on the evidentiary value of maps:

“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. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.” (*I.C.J. Reports 1986*, p. 582, para. 54)

After examining the map evidence produced in this case, the Court considers itself unable to draw conclusions from it, in view of the absence of any map officially reflecting the intentions of the parties to the 1890 Treaty and of any express or tacit agreement between them or their successors concerning the validity of the boundary depicted in a map, as well as in the light of the uncertainty and inconsistency of the cartographic material submitted to it. That evidence cannot therefore “endorse[e] a conclusion at which a court has arrived by other means unconnected with the maps” (*Frontier Dispute (Burkina Faso/Republic of Mali)*, *I.C.J. Reports 1986*, p. 583, para. 56), nor can it alter the results of the Court’s textual interpretation of the 1890 Treaty.

“Centre of the main channel” or Thalweg (paras. 88-89)

The foregoing interpretation of the relevant provisions of the 1890 Treaty leads the Court to conclude that the boundary between Botswana and Namibia around Kasikili/Sedudu Island provided for in this Treaty lies in the northern channel of the Chobe River.

According to the English text of the Treaty, this boundary follows the “centre” of the main channel; the German text uses the word “thalweg”. The Court has already indicated that the parties to the 1890 Treaty intended these terms to be synonymous and that Botswana and Namibia had not themselves expressed any real difference of opinion on this subject.

It is moreover clear from the *travaux préparatoires* of the Treaty that there was an expectation of navigation on the Chobe by both contracting parties, and a common intention to exploit this possibility. Although the parties in 1890 used the terms “thalweg” and “centre of the channel”

interchangeably, the former reflects more accurately the common intention to exploit navigation than does the latter. Accordingly this is the term that the Court will consider determinative in Article III, paragraph 2.

Inasmuch as Botswana and Namibia agreed, in their replies to a question put by a Member of the Court, that the thalweg of the Chobe was formed by the line of deepest soundings in that river, the Court concludes that the boundary follows that line in the northern channel around Kasikili/Sedudu Island.

Acquisitive prescription
(paras. 90-99)

The Court continues by observing that Namibia, however, claims title to Kasikili/Sedudu Island, not only on the basis of the 1890 Treaty but also, in the alternative, on the basis of the doctrine of prescription. Namibia argues that “by virtue of continuous and exclusive occupation and use of Kasikili Island and exercise of sovereign jurisdiction over it from the beginning of the century, with full knowledge, acceptance and acquiescence by the governing authorities in Bechuanaland and Botswana, Namibia has prescriptive title to the Island”.

Botswana maintains that the Court cannot take into consideration Namibia’s arguments relating to prescription and acquiescence as these are not included in the scope of the question submitted to it under the terms of the Special Agreement.

The Court notes that under the terms of Article I of the Special Agreement it is asked to determine the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the Island “on the basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law”. In the Court’s view the Special Agreement, in referring to the “rules and principles of international law”, not only authorizes the Court to interpret the 1890 Treaty in the light of those rules and principles but also to apply those rules and principles independently. The Court therefore considers that the Special Agreement does not preclude the Court from examining arguments relating to prescription put forward by Namibia.

After summarizing the arguments advanced by each of the Parties the Court observes that they agree between themselves that acquisitive prescription is recognized in international law and that they further agree on the conditions under which title to territory may be acquired by prescription, but that their views differ on whether those conditions are satisfied in this case. Their disagreement relates primarily to the legal inferences which may be drawn from the presence on Kasikili/Sedudu Island of the Masubia of Eastern Caprivi: while Namibia bases its argument primarily on that presence, considered in the light of the concept of “indirect rule”, to claim that its predecessors exercised title-generating State authority over the Island, Botswana sees this as simply a “private” activity, without any relevance in the eyes of international law.

The Court continues by pointing out that for present purposes, it need not concern itself with the status of acquisitive prescription in international law or with the conditions for acquiring title to territory by prescription. The Court considers, for the reasons set out below, that the conditions cited by Namibia itself are not satisfied in this case and that Namibia’s argument on acquisitive prescription therefore cannot be accepted.

The Court observes that it follows from its examination of the presence of the Masubia on the Island (see above) that even if links of allegiance may have existed between the Masubia and the Caprivi authorities, it has not been established that the members of this tribe occupied the Island *à titre de souverain*, i.e., that they were exercising functions of State authority there on behalf of those authorities. Indeed, the evidence shows that the Masubia used the Island intermittently, according to the seasons and their needs, for exclusively agricultural purposes; this use, which began prior to the establishment of any colonial administration in the Caprivi Strip, seems to have subsequently continued without being linked to territorial claims on the part of the Authority administering the Caprivi. Admittedly, when, in 1947-1948, the question of the boundary in the region arose for the first time between the local authorities of Bechuanaland Protectorate and of South Africa, the Chobe’s “main channel” around the Island was said to be the northern channel, but the South African authorities relied on the presence of the Masubia on the Island in order to maintain that they had title based on prescription. However, from then on the Bechuanaland authorities took the position that the boundary was located in the northern channel and that the Island was part of the Protectorate; after some hesitation, they declined to satisfy South Africa’s claims to the Island, while at the same time recognizing the need to protect the interests of the Caprivi tribes. The Court infers from this, first, that for Bechuanaland, the activities of the Masubia on the Island were an independent issue from that of title to the Island and, second, that, as soon as South Africa officially claimed title, Bechuanaland did not accept that claim, which precluded acquiescence on its part.

In the Court’s view, Namibia has not established with the necessary degree of precision and certainty that acts of State authority capable of providing alternative justification for prescriptive title, in accordance with the conditions set out by Namibia, were carried out by its predecessors or by itself with regard to Kasikili/Sedudu Island.

The legal status of the Island and the two channels around it
(paras. 100-103)

The Court’s interpretation of Article III (2) of the 1890 Treaty has led it to conclude that the boundary between Botswana and Namibia around Kasikili/Sedudu Island follows the line of deepest soundings in the northern channel of the Chobe. Since the Court has not accepted Namibia’s argument on prescription, it follows that

Kasikili/Sedudu Island forms part of the territory of Botswana.

The Court observes, however, that the Kasane Communiqué of 24 May 1992 records that the Presidents of Namibia and Botswana agreed and resolved that:

“(c) existing social interaction between the people of Namibia and Botswana should continue;

(d) the economic activities such as fishing shall continue on the understanding that fishing nets should not be laid across the river;

(e) navigation should remain unimpeded including free movement of tourists”.

The Court, which by the terms of the Joint Agreement between the Parties is empowered to determine the legal status of Kasikili/Sedudu Island concludes, in the light of the above-mentioned provisions of the Kasane Communiqué and in particular its subparagraph (e) and the interpretation of that subparagraph Botswana gave before the Court in this case, that the Parties have undertaken to one another that there shall be unimpeded navigation for craft of their nationals and flags in the channels of Kasikili/Sedudu Island. As a result, in the southern channel of Kasikili/Sedudu Island, the nationals of Namibia, and vessels flying its flag, are entitled to, and shall enjoy, a treatment equal to that accorded by Botswana to its own nationals and to vessels flying its own flag. Nationals of the two States, and vessels, whether flying the flag of Botswana or of Namibia, shall be subject to the same conditions as regards navigation and environmental protection. In the northern channel, each Party shall likewise accord the nationals of, and vessels flying the flag of, the other, equal national treatment.

Declaration of Judge Ranjeva

Judge Ranjeva explains how he interprets the reply to Article I of the Special Agreement concerning Articles II and III of the operative part of the Judgment relating to the status of Kasikili/Sedudu Island:

1. Given its effect, in terms of allocation of territory, the Judgment’s choice of the northern channel as the main channel is the least improbable solution, in the absence of a systematic comparison of the two navigation channels; this is the reason for the finding that Kasikili/Sedudu Island forms part of Botswana territory.

2. The Kasane Communiqué created legal obligations for the two States parties to the dispute with regard to the enjoyment and exercise of rights by their nationals in the relevant area; in addition to navigation and fishing rights in the channel, there is a right of free access to the surrounding waters and to the territory of Kasikili/Sedudu Island.

Further, as regards the presence of the Masubia on Kasikili/Sedudu Island, the statement in paragraph 98 of the Judgment that:

“even if links of allegiance may have existed between the Masubia and the Caprivi authorities, it has not been established that the members of this tribe occupied the Island *à titre de souverain*, i.e., that they were exercising

functions of State authority there on behalf of those authorities”

is not of general import and relates only to the particular circumstances of the present case.

Declaration of Judge Koroma

In his declaration Judge Koroma stated that the Governments of Namibia and Botswana should be commended for their decision to bring their dispute to the Court for peaceful settlement. He recalled that similar disputes have in the past given rise to serious armed conflicts, endangering the peace and security of the States involved.

He further stated that, given its task, it was inevitable that the Court would choose one of a possible number of interpretations of the 1890 Anglo-German Agreement as representing the shared intention of the Parties regarding the location of the boundary and the status of the Island. But that in so doing, the Court also took into consideration the principle of *uti possidetis*, a recognized principle of the African legal order regarding boundaries of African States.

The Judge added that, this notwithstanding, the Court had ruled that the nationals and boats flying the flags of the Republic of Botswana and the Republic of Namibia should enjoy equal treatment in the waters of each other’s State in accordance with the contemporary principles of the law of international watercourses and the Kasane Communiqué.

In the Judge’s view, the Judgment should invest the boundary between the two countries with the necessary legal validity and ensured equitable treatment of a shared natural resource.

Declaration of Judge Higgins

Judge Higgins states in her declaration that, contrary to what is stated in the Judgment, the Court is not engaged in an exercise of treaty interpretation of words in their ordinary meaning. Rather, the Court is applying, in 1997, to a river section well understood today, a general term selected by the Parties in 1890. In so doing, the Court must simultaneously have regard to the broad intentions of the Parties in 1890 and the state of contemporary knowledge about the area in question.

In her view no great weight should be placed upon criteria related to navigation, as we now know the hopes of the Parties regarding navigation to the Zambezi to be misplaced. Realism requires us rather to emphasize criteria relevant to the other intention of the Parties — to arrive at a clear frontier — that being an objective which is still obtainable through the decision of the Court.

The question of general physical appearance is thus important. Although the Chobe Ridge is the most dominant bank in both channels, year round the northern channel appears to be broader and more visible. For Judge Higgins, many of the factors, while educational and interesting in themselves, have little relevance to the task at hand.

Separate opinion of Judge Oda

Judge Oda voted in favour of the operative part of the Judgment because he supports the Court's determination that the northern channel of the Chobe River constitutes the boundary between Botswana and Namibia.

However, Judge Oda finds it difficult to understand properly the sequence of logic followed by the Court in the Judgment. In his view, the Judgment places excessive reliance on the Vienna Convention on the Law of Treaties, whereas, so Judge Oda believes, the case is not one involving the application of that Convention for the purpose of the Court's interpretation of the 1890 Anglo-German Treaty. In addition, he does not agree with the Court's approach of viewing the past practice primarily from the standpoint of whether this might constitute evidence of any "subsequent agreement" or "subsequent practice" within the meaning of the Vienna Convention.

Judge Oda accordingly sketches out the view that he takes of the case.

After looking at the background to the presentation of the case to the Court, Judge Oda takes the view that, as the *compromis* was not drafted with clarity, the Parties should have been asked to clarify their common position as to whether they regard the determination of the boundary, which would then result in the determination of the legal status of Kasikili/Sedudu Island, as a single issue or whether they regard these as two separate issues.

Judge Oda is of the view that the definition of the main channel and, in particular, the identification of its location, depends largely on scientific knowledge, which the Court should have obtained by seeking the assistance of experts appointed by it. That, however, the Court chose not to do.

Judge Oda, however, does not object to the conclusion the Court has reached in its choice on its own initiative, without the assistance of independent experts, of the northern channel as the main channel of the Chobe River; and hence, as the boundary along the River between the two States.

Judge Oda agrees with the Court in denying that the concept of "acquisitive prescription" has any role to play in this case.

Judge Oda concludes that the northern channel has, for the past several decades, as indicated by certain practices and in certain survey reports of the region, been regarded as the main channel separating the area of the northern and southern banks in the vicinity of Kasikili/Sedudu Island in the Chobe River. These factors would, in Judge Oda's view (which is contrary to the position taken by the Court), be the most pertinent in assisting the Court now to determine the boundary between the two States. Judge Oda believes that determination of the boundary was the original intention of the Parties in bringing this case by means of a *compromis* to the International Court of Justice.

Separate opinion of Judge Kooijmans

Judge Kooijmans has voted in favour of all parts of the *dispositif* of the Judgment. He disagrees, however, with the Court's view that the Special Agreement by referring to the "rules and principles of international law" allows the Court

to apply these rules and principles independently of the Treaty and to examine Namibia's alternative claim that it has title to Kasikili/Sedudu on the basis of the doctrine of acquisitive prescription. According to Judge Kooijmans this part of Namibia's claim should have been declared inadmissible, since the Special Agreement precludes the Court from determining the status of the Island independently of the Treaty and that is exactly what the Court would have done if it had concluded that Namibia's claim is valid.

In the second part of his opinion Judge Kooijmans expresses the view that the mutual commitments the Parties have made in the Kasane Communiqué of 1992 with regard to the uses of the waters around Kasikili/Sedudu Island, clearly reflect recent developments in international law such as the principle of the equitable and reasonable utilization of shared water resources. The Chobe River around the Island undoubtedly is part of a "watercourse" in the sense of the 1997 Convention on the Non-Navigational Uses of International Watercourses, which defines a watercourse as a "system of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole flowing into a common terminus". Although this Convention has not yet entered into force, it embodies certain rules and principles, such as the rule of equitable utilization, which have become well-established in international law. The present use of the waters around the Island for tourist purposes can hardly be identified as transport by river and is more similar to the uses for non-navigational purposes which are the subject of the 1997 Convention. In their future dealings concerning the uses of the waters around Kasikili/Sedudu Island the Parties, therefore, should let themselves be guided by the rules and principles contained in the 1997 Convention.

Dissenting opinion of Vice-President Weeramantry

Vice-President Weeramantry, in his dissenting opinion, took the view that since the expressions "main channel" and "*Thalweg des Hauptlaufes*" in the 1890 Treaty admitted of more than one interpretation, the sense in which they were understood contemporaneously by the Parties was an important aid to their interpretation.

The regular use of Kasikili/Sedudu Island by the Masubian people for over half a century after the Treaty, the absence of any acknowledgement by them of title in any other State, the absence of any objection to such use or of any assertion of claim by the predecessors in title of Botswana — all these pointed to a contemporaneous understanding, by the parties to the Treaty and their officials, that the Masubians were not crossing national boundaries. Consequently, this pointed to the southern channel of the Chobe as being the boundary indicated by the 1890 Treaty. The conduct of governments more than half a century later, when background circumstances and power configurations had drastically changed, was not evidence of contemporaneous understanding.

The word "agreement" in Article 31, paragraph 3 (b), of the Vienna Convention on the Law of Treaties is not confined to a verbal agreement, but covers common

understanding which may be indicated by action or inaction, affirmation or silence.

The opinion discusses the thalweg principle and the ambivalence of the scientific criteria and of navigability for determining the main channel.

The opinion points out the richness of Kasikili/Sedudu Island as a wildlife habitat and the legal principles that are attracted by this circumstance.

The opinion goes on to consider the equitable navigational use of boundary rivers, and judicial responses to a boundary demarcation which involves the dismantling or division of an ecologically integral unit.

It also discusses the scope for equity in boundary delimitation.

The differences between treaties dealing with spheres of influence and strictly boundary treaties are examined, as well as the significance of this distinction in the field of boundary delimitation.

The question of joint international regimes to safeguard the environment is discussed in some detail.

In the result, Vice-President Weeramantry's view, as expressed in the opinion, is that, while the Island belongs to Namibia, a joint international regime between the two countries should be set up to safeguard the environmental interests of the Island.

Dissenting opinion of Judge Fleischhauer

Judge Fleischhauer has voted against paragraphs 1 and 2 of the *dispositif* of the Court's Judgment; he dissents from the Court's interpretation of the term "main channel of that river"/ "*Hauptlauf dieses Flusses*" as meaning the northern rather than the southern channel of the Chobe River around Kasikili/Sedudu Island. As the Court does not accept Namibia's argument on prescriptive title to the Island, his dissent on the interpretation of the term "main channel of that river"/ "*Hauptlauf dieses Flusses*" affects not only his view on the location of the boundary but also his view on the territorial status of the Island. This explains why he voted not only against the first but also against the second paragraph of the *dispositif*. Judge Fleischhauer voted, however, in favour of the third paragraph.

While concurring with what the Court had to say about the role of prescription in the case, Judge Fleischhauer makes an additional remark on this subject.

Dissenting opinion of Judge Parra-Aranguren

1. Judge Parra-Aranguren observes, as does the Judgment, that Botswana and Namibia are not in agreement as to the meaning of the phrase "the *centre of the main channel (der Thalweg des Hauptlaufes) of the Chobe River*" found in Article III, paragraph 2, of the 1890 Anglo-German Agreement; that the Treaty itself does not define it; that no other of its provisions provide by implication guidelines useful for this purpose; and that for this reason such expression has to be interpreted according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Therefore, in accordance with letter (b) of said Article 31, it is necessary to examine "any subsequent practice in the

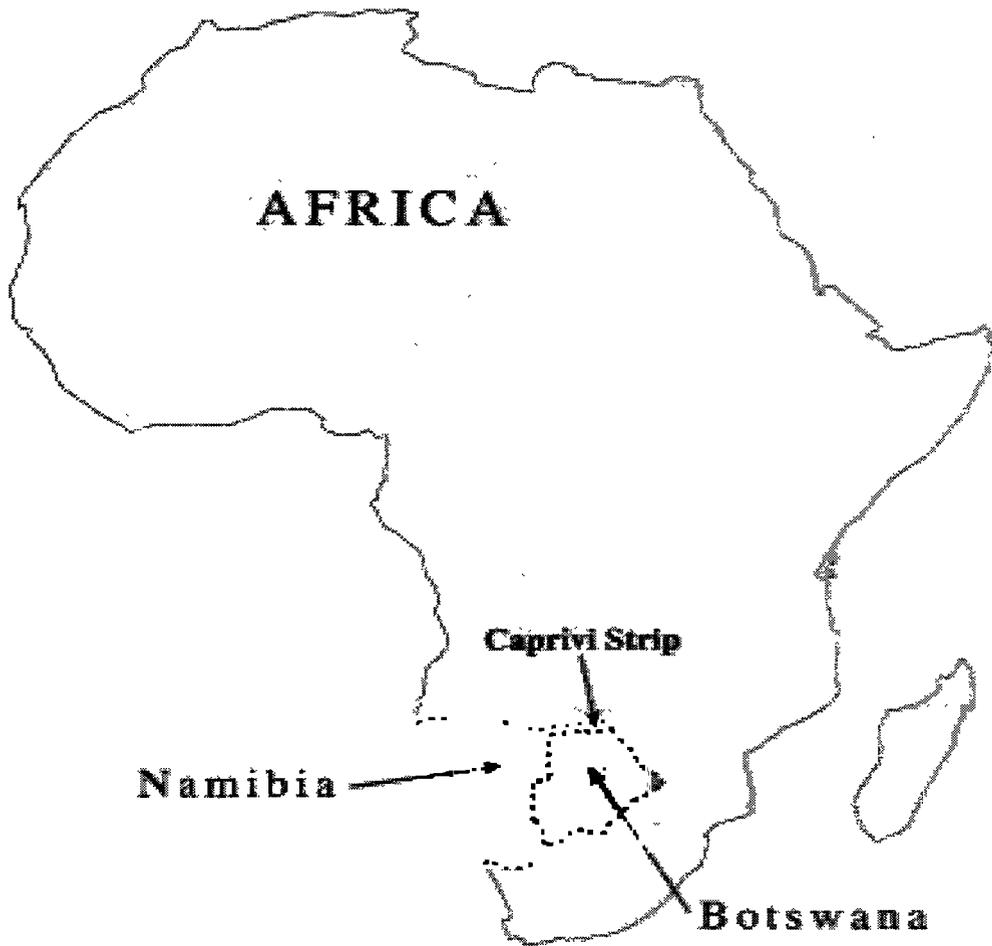
application of the treaty which establishes the agreement of the parties regarding its interpretation"; always keeping in mind that such agreement may be established not only through their joint or parallel conduct, but also through the activity of only one of the parties, where this is assented to or not objected to by the other party.

2. Judge Parra-Aranguren considers that the Report of Captain Eason (1912); the Joint Report prepared by Mr. Trollope and Mr. Redman (1948); the exchange of letters which followed between 1948 and 1951; and Mr. Renew's Report (1965) lead to the conclusion that the Masubia of the Eastern Caprivi were the only tribesmen who used Kasikili/Sedudu Island at least until 1914; that their occupation of Kasikili/Sedudu Island was peaceful and public; and that their chiefs "became *in a certain sense* agents of the colonial administration", as Botswana acknowledges (see paragraph 85 of his dissenting opinion). Therefore, in his opinion, the subsequent practice of Germany and Great Britain reflected their understanding that Kasikili/Sedudu Island formed part of German South West Africa and that the southern channel of the Chobe River was the "main channel" referred to in Article III, paragraph 2, of the 1890 Anglo-German Agreement.

3. Judge Parra-Aranguren states further that subsequent practice of the parties to the 1890 Anglo-German Agreement is only relevant up to the beginning of the First World War, when the Eastern Caprivi was occupied by Rhodesian forces in September 1914; that no subsequent practice of the parties to the Treaty was possible when British troops exercised *de facto* control over South West Africa; that in 1920 the League of Nations confirmed the establishment of the Mandate over South West Africa; and that during the existence of the Mandate over South West Africa (Namibia) neither of the parties to the 1890 Anglo-German Treaty had competence to recognize, either by express agreement or by subsequent practice, that the aforementioned "main channel" of the Chobe River was the northern channel and not the southern channel, since this new interpretation would have represented a modification of the territory submitted to the Mandate. Consequently, the original understanding was maintained and for this reason Judge Parra-Aranguren concludes that Kasikili/Sedudu Island forms part of Namibia and that the southern channel of the Chobe River is the "main channel" referred to in Article III, paragraph 2, of the 1890 Anglo-German Agreement.

Dissenting opinion of Judge Rezek

In his dissenting opinion Judge Rezek emphasizes the ambiguities in the geography of the Kasikili/Sedudu area. He criticizes the arguments based on navigability, visibility and the natural prolongation of the river at the bifurcation. He interprets the Anglo-German Treaty of 1890 in the light of history, taking into account the practice of the parties, the principle of the equitable apportionment of the resources of a watercourse, the cartography and the *de facto* occupation of the Island by the Caprivi Masubia. He finds that priority must go to those elements which place the boundary in the southern channel and accord Namibia sovereignty over Kasikili/Sedudu.



SKETCH-MAP No. 1

Botswana and Namibia

**N.B.: This sketch-map has
been prepared by the Court
for illustrative purposes only**

Sketch-map not to scale

