

SEPARATE OPINION OF JUDGE KOOLJMANS

Namibia's alternative claim of acquisitive prescription — Admissibility — Reference to "rules and principles of international law" in Special Agreement — Subsequent practice and acquisitive prescription.

Kasane Communiqué — Mutual commitments linked to settlement of dispute — Waters around Island part of unitary whole irrespective of location of boundary — Use of these waters similar to non-navigational uses — Convention on Law of Non-navigational Uses of International Watercourses — Helsinki Rules — Principle of equitable and reasonable utilization.

1. Although I have voted in favour of the operative provisions of the Judgment, I feel compelled to append some observations since I find myself unable to concur with part of the Court's reasoning. I also wish to make a number of additional remarks to supplement the conclusions of the Court concerning the use of the waters around Kasikili/Sedudu Island.

I

2. I agree with the Court's conclusion that the boundary between Botswana and Namibia follows the line of deepest soundings in the northern channel of the Chobe River around Kasikili/Sedudu Island and that this Island forms part of the territory of Botswana.

3. That finding is the result of the Court's interpretation of the Anglo-German Treaty of 1 July 1890 and is in conformity with Article I of the Special Agreement of 15 February 1996, in which the Parties requested the Court to determine, on the basis of the Anglo-German Treaty and the rules and principles of international law, the boundary between them around Kasikili/Sedudu Island and the legal status of the Island.

4. In my opinion the Court's conclusion with regard to the legal status of the Island should, however, not have been based simultaneously upon the consideration that the correctness of Namibia's claim that it has 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, has been insufficiently established by Namibia and that this claim, therefore, cannot be accepted (paras. 99 and 101 of the Judgment).

5. I do not disagree with the Court's analysis of this claim nor with its evaluation of the evidence adduced by Namibia to support it; in my opinion, however, this claim should have been declared inadmissible right away.

6. In the written and oral proceedings Namibia has claimed that there is an alternative ground — entirely independent of the terms of the 1890 Treaty — by which it is entitled to sovereignty over Kasikili/Sedudu Island, viz., prescription, acquiescence and/or recognition. It contended that the Special Agreement, by referring in its Article 1 to the rules and principles of international law, explicitly or implicitly allowed the Court to apply the doctrine of acquisitive prescription as a separate ground for Namibia's sovereignty over the Island.

7. For its part, counsel for Botswana maintained that it would be “contrary to common sense to presume that the general reference to ‘the rules and principles of international law’ should prevail over the reference to a specific international agreement *which defines the boundary in question*” (emphasis in original).

8. The Court is of the view that the reference in the Special Agreement 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 them independently and that, consequently, the Special Agreement does not preclude the Court from examining arguments relating to prescription (para. 93).

9. With all due respect, I do not find the Court's reasoning persuasive. The fact that Article III of the Special Agreement states that the rules and principles of international law applicable to the dispute shall be those set forth in the provisions of Article 38, paragraph 1, of the Court's Statute can hardly be called enlightening; it only refutes — as the Court correctly states — Botswana's argument that the Special Agreement allows the Court to apply only the rules and principles of international law concerning treaty interpretation.

10. But this reference in Article I, as specified in Article III of the Special Agreement does not add anything to what the Court is not already entitled to do by the Statute. In the case of *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* the Court stated:

“While the Court is, of course, bound to have regard to all the legal sources specified in Article 38, paragraph 1, of the Statute of the Court in determining the relevant principles and rules applicable to the delimitation, it is also bound, in accordance with paragraph 1 (a), of that Article, to apply the provisions of the Special Agreement.” (*I.C.J. Reports 1982*, p. 37, para. 23.)

11. In the Special Agreement the Parties ask the Court to determine, on the basis of the 1890 Treaty and the rules and principles of international law — without dissociating the latter from the former — the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the Island — again, without dissociating the latter from the former.

In my opinion, therefore, the Special Agreement precludes the Court from applying the rules and principles of international law independently of the Treaty. It is the Treaty which determines the boundary. Without interpreting and applying the Treaty the Court is not able to determine the boundary and the legal status of the Island as it is requested to do by the Special Agreement.

12. The Special Agreement asks the Court to do two things: first, to determine the boundary between Namibia and Botswana around Kasikili/Sedudu Island, and, second, to determine the legal status of the Island. The logical order seems to be to answer the first question first. In order to do so the Court must on the basis of the Anglo-German Treaty determine whether the northern or the southern channel is or contains the main channel. Once that determination has taken place, the second question is implicitly answered as well: if the northern channel is the main channel, the Island belongs to the territory of Botswana; if the southern channel is the main channel, it is part of Namibia; in other words, the Island goes with the boundary.

13. The second question, that of the legal status of the Island, can in my opinion only be answered independently of the first question if the Court would have concluded that the terms of the Treaty cannot possibly be interpreted in a meaningful way, or that the parties to the Treaty by their conduct have indicated that the terms of the Treaty have lost their relevance. In that case a reverse situation presents itself: the answer to the first question is implicitly given by the preceding answer to the second question: the title over the Island determines the location of the boundary and it does so irrespective of the terms of the Treaty, but certainly not independently of the Treaty. In theory such a procedure would not be unthinkable.

14. In his award in the *Island of Palmas* case the sole Arbitrator, Judge Max Huber, stated that

“neighbouring states may by convention fix limits to their own sovereignty, even in regions such as the interior of scarcely explored continents where such sovereignty is scarcely manifested, and in this way each may prevent the other from penetration of its territory . . . If, however, no conventional line of sufficient topographical precision exists or if there are gaps in the frontiers otherwise established, or if a conventional line leaves room for doubt . . . the actual continuous and peaceful display of State functions is in case of dispute the sound and natural criterium of territorial sovereignty.” (*Reports of International Arbitral Awards (RIAA)*, Vol. II, p. 840.)

15. In my opinion, the conditions mentioned in the Award are not met in the dispute before the Court. For the determination of the boundary the Special Agreement explicitly refers to the 1890 Anglo-German Treaty. There is no lack of sufficient topographical precision in the conventional

provisions, like e.g., in the *Palena* case (Argentine-Chile Frontier case, 38 *International Law Reports*, pp. 89 ff.). The Court does not have to find where the main channel of the River Chobe is located, it merely has to determine which of the two channels around Kasikili Island is or contains the main channel and what forms its thalweg. And the conventional line may leave room for doubt, but that doubt cannot be solved in a reasonable and arguable way by choosing a completely different approach which ignores the terms of the Treaty.

16. The inconsistency of Namibia's arguments in respect of its alternative claim is borne out by the fact that this non-Treaty-based claim rests on virtually the same grounds which it has submitted for its Treaty-based claim that the parties by their subsequent conduct have confirmed their agreement regarding the interpretation of the 1890 Treaty (see para. 71 of the Judgment).

17. These grounds are: continued control and use of the Island by the Masubia of Eastern Caprivi, the exercise of jurisdiction over it by the governing authorities in the Caprivi Strip, and the continued silence of the other Party and its predecessors. After examining Namibia's arguments the Court with good reason concludes that these facts do not constitute subsequent practice within the meaning of Article 31, paragraph 3 (b), of the 1969 Convention on the Law of Treaties (para. 75 of the Judgment).

18. These same arguments lie at the basis of Namibia's alternative claim that it has obtained sovereignty over Kasikili/Sedudu Island by acquisitive prescription (see para. 90 of the Judgment). The Court is of the view that Namibia has failed to prove that acts of State authority carried out with regard to the Island justify its claim to prescriptive title (paras. 98 and 99).

19. That conclusion, however, leaves unanswered one question. If Namibia had been able to prove that the requirements for acquisitive prescription, as referred to in paragraph 94 of the Judgment, had been fulfilled, would that not have constituted subsequent practice as well? Would it have been conceivable indeed to evaluate Namibia's claim to prescriptive title positively and at the same time to evaluate its claim concerning subsequent practice negatively? In my view that would mean that the Court, after having found that according to the terms of the 1890 Treaty the boundary is in the northern channel, would have been expected to use its answer to the second question concerning the legal status of the Island in order to trump its answer to the first question. In my opinion it would be highly artificial to read the Special Agreement as enabling the Court to do so.

20. In my view, therefore, the Court should have refused to entertain Namibia's alternative claim and should have declared it inadmissible.

II

21. I have voted in favour of paragraph 3 of the *dispositif* of the Judgment which deals with the use of the two branches of the Chobe around Kasikili/Sedudu Island and is based on the Court's finding that the Parties have undertaken commitments to one another in this respect.

22. It seems relevant to point out that these undertakings are part of the Kasane Communiqué of 24 May 1992, a document which has as its main element the agreement between the Parties to settle the boundary dispute peacefully. These undertakings therefore are indissolubly linked to the Parties' decision to have the boundary determined, first by a jointly appointed Team of Technical Experts and subsequently, after the failure of the Joint Team to reach a conclusion, by the International Court of Justice on the basis of the Special Agreement of 15 February 1996. In carrying out its task of determining the boundary and the legal status of Kasikili/Sedudu Island, the Court can and must consider the Special Agreement in its context together with the surrounding statements and circumstances.

23. In addition to what the Court has said in paragraphs 102 and 103, I wish to make some observations which could provide guidance to the Parties for further conduct and place their mutual relations in a wider perspective. These observations are based on recent developments of the rules and principles of international law concerning the uses of international watercourses and in particular those concerning the equitable and reasonable utilization of their resources.

24. Such considerations have no place in determining the boundary between the Parties. The Court cannot relocate or shift the boundary on such grounds if according to the terms of the Treaty it must be taken to be the thalweg of the northern channel. While reflecting the rules and principles of international law, referred to in the Special Agreement, these considerations can merely focus on the undertakings of the Parties entered into in the context of their efforts to settle the dispute peacefully and on their present and future relations. As the Court has observed: "It is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law" (*Fisheries Jurisdiction, I.C.J. Reports 1974*, p. 33, para. 78; p. 202, para. 69).

25. The Chobe River around Kasikili/Sedudu Island can be said to be part of a "watercourse" in the sense of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.

Article 2 (a) of that Convention gives the following definition of a watercourse:

“‘Watercourse’ means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus.”

26. This idea of a watercourse-system as a unitary whole was already recognized by the Institut de droit international in its 1961 Salzburg Resolution on the utilization of non-maritime international waters (except for navigation) (*Annuaire de l'Institut de droit international*, Vol. 49, Part II (1961), pp. 381 ff.). In this Resolution, which was adopted unanimously, the Institute referred to “waters which form part of a watercourse or hydrographic basin which extends over the territory of two or more States”. In Article 2 the Institut observes that the right of a State to utilize waters which traverse or border its territory “is limited by the right of utilization of other States interested in the same watercourse or hydrographic basin”, whereas Article 3 states that “if States are in disagreement over the scope of the right of utilization, settlement will take place on the basis of equity, taking particular account of their respective needs, as well as of other pertinent circumstances”.

27. In 1966 at its Fifty-Second Conference the International Law Association adopted, with only eight abstentions, the so-called Helsinki Rules on the Uses of the Waters of International Rivers (ILA, *Report of the Fifty Second Conference*, Helsinki, 1966, London, 1967, pp. 484 ff.). These refer to the waters of an international drainage basin which in Article II is defined as “a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus”.

The Helsinki Rules are far more detailed than the Institut’s 1961 Salzburg Resolution and in certain respects can be called a precursor of the 1997 United Nations Convention. With regard to the principle of equitable utilization Article IV states: “Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin”.

28. It can, therefore, be said that in doctrine there was already overwhelming support for the principle of the equitable utilization of shared water resources when in 1971 the International Law Commission included the topic “The Non-navigational Uses of International Watercourses” in its general programme of work.

29. From the pleadings in the present case it is clear that the waters around Kasikili/Sedudu Island are nearly exclusively used for tourist pur-

poses. Tourists are carried by flat-bottomed boats (mainly, but not exclusively in the southern channel) to view the wild animals in the Chobe Game Park south of the river, and on Kasikili/Sedudu Island to which these animals regularly cross. Such navigation as there is has virtually nothing to do with fluvial transport in the normal sense of the word "navigation", as this is understood to mean transport by boat in a river from one place to another. The use which is made of the waters around Kasikili/Sedudu Island is more similar to the non-navigational uses of watercourses in the sense of the 1997 Convention.

30. Already in 1929 the Permanent Court of International Justice stressed the community of interest for navigation purposes of all riparian States and the exclusion of any preferential privilege of any of them in relation to the others (*Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23, p. 27*). In the *Gabčíkovo-Nagymaros* case the present Court observed that "modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly" (*I.C.J. Reports 1997, p. 56, para. 85*).

31. The 1997 Convention has not yet entered into force and it will take in all probability a number of years before the 35 instruments of ratification necessary for its entry into force have been deposited. Nor is there any indication that the Parties before the Court have the intention to become bound by its provisions.

This does not mean, however, that a number of the principles, which are formulated in the Convention, have not yet become part of the *corpus* of international law.

32. In paragraph 1 of its commentary on Article 5 of the 1997 Convention, which deals with the principle of equitable and reasonable utilization and participation, the International Law Commission observes:

"Article 5 sets out the fundamental rights and duties of States with regard to the utilization of international watercourses for purposes other than navigation. One of the most basic of these is the well-established rule of equitable utilization, which is laid down and elaborated upon in paragraph 1."

And the Commission continues by saying that

"a survey of all available evidence of the general practice of States, accepted as law, in respect of the non-navigational uses of international watercourses . . . reveals that there is overwhelming support for the doctrine of equitable utilisation as a general rule of law for

the determination of the rights and obligations of states in this field” (para. 10).

33. Both Article 5 of the 1997 Convention and Article IV of the 1966 Helsinki Rules seemingly contain a territorial limitation by providing that watercourse States (Helsinki Rules: basin States) in their territories are entitled to a reasonable and equitable share of the uses and benefits of an international watercourse¹.

Both instruments, however, clearly reject the so-called “Harmon Doctrine” which embodies the claim that a State has the unqualified right to utilize and dispose of the waters of an international river flowing through its territory.

The comment on Article IV of the Helsinki Rules states that the Harmon Doctrine has never had a wide following among States and has been rejected by virtually all States which have had occasion to speak out on the point and it continues by saying that each basin State has rights equal in kind and correlative with those of each co-basin State.

34. By the commitments contained in the Kasane Communiqué of 24 May 1992 (see para. 102 of the Judgment) the Parties have implicitly recognized that the Chobe River around Kasikili/Sedudu Island is part of a unitary whole, irrespective of the exact location of the boundary as a result of the determination by the Court.

35. The southern channel does not all of a sudden turn into an internal water once it is decided that the northern channel is or contains the “main channel” in the terms of the 1890 Treaty, even if the former is wholly within Botswana territory. It continues to be part of a system of surface waters and groundwaters which by virtue of their physical relationship constitute a unitary whole.

36. In their future dealings concerning the uses of the waters around Kasikili/Sedudu Island the Parties should let themselves be guided by the rules and principles as embodied in the 1997 Convention and in the Helsinki Rules. They should keep in mind that, as the International Law Commission said, “the rule of equitable and reasonable utilization rests on sound foundations and provides a basis for the duty of States to participate in the use and development and protection of an international watercourse in an equitable and reasonable manner”.

37. This rule has now been widely accepted both for the navigational and the non-navigational uses of international watercourses. For a further implementation of the rule, Article 6 of the 1997 Convention enumerates

¹ In paragraph 2 of its commentary on Article 5, the ILC observes that this Article, although cast in terms of an obligation, also expresses the correlative entitlement.

in a non-exhaustive way the factors which are relevant to equitable and reasonable utilization.

38. It is clear that the use of the waters around Kasikili/Sedudu Island for tourist purposes has in the course of time become far more important from an economic point of view than the use of the Island itself, e.g., for cultivation purposes; this is also exemplified by the Kasane Communiqué. But even the present economic interest resulting from eco-tourism may be of a transient character. It would, therefore, be commendable if the Parties would place any further co-operation in a wider and more general framework. In this respect it may be recalled that in the Preamble to its 1961 Resolution the Institut de droit international observes that "in the utilization of waters of interest to several States, each of them can obtain, by consultation, by plans established in common and by reciprocal concessions, the advantages of a more rational exploitation of a natural resource".

(Signed) P. H. KOOIJMANS.
