

JUDGMENTS AND ORDERS

CASE CONCERNING KASIKILI/SEDUDU ISLAND¹

(Botswana/Namibia)

BACKGROUND INFORMATION

On 29 May 1996, Botswana and Namibia gave joint notice to the Court of a Special Agreement signed at Gaborone, Botswana on 15 February 1996, which entered into force that day. The Special Agreement submitted to the Court the dispute concerning the boundary around an island known as "Kasikili" in Namibia and "Sedudu" in Botswana. The Special Agreement referred, *inter alia*, to a Treaty signed on 1 July 1890 between Great Britain and Germany delimiting their respective spheres of influence in Africa.

Under the Special Agreement, the Parties asked the Court to determine, on the basis of the Anglo-German Treaty of 1 July 1890 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.²

On 13 December 1999, the Court handed down its Judgment in this case.

THE JUDGMENT

*Background*³

In Namibia, the Island in question is known as "Kasikili"; in Botswana, it is known as "Sedudu". The Island is approximately 3.5 square kilometres in area and located in the Chobe River, which divides around it to the north and south. The Island is subject to flooding during several months of the

¹ International Court of Justice, Press Communiqué 99/53 bis. For a review of the proceedings and submissions of the Parties refer Judgment paras 1-10.

² Article I of the Special Agreement provided 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.

³ Refer Judgment paras 11-16.

year, beginning around March. The Court briefly outlined the historical context of the dispute and examined the text of the 1890 Treaty which, in respect of the region concerned, located the dividing line between the spheres of influence of Great Britain and Germany in the “main channel” of the Chobe River.

The Dispute

The real dispute between the Parties concerned the location of the “main channel”. Botswana contended that it was the channel running north of Kasikili/Sedudu Island, and Namibia the channel running south of the Island. Since the Treaty did not define the notion of “main channel”, the Court had to determine which was the main channel of the Chobe River around the Island. To do so, the Court considered, *inter alia*, the depth and width of the channel, the flow (namely, the volume of water carried), the bed profile configuration, and the navigability of the channel. The Court described the geography of the area concerned, illustrated by three sketch maps, and recounted the history of the dispute which was set against the background of the nineteenth century race amongst the European colonial powers for the partition of Africa.

In Spring 1890, Germany and Great Britain had entered into negotiations to agree on their trade and 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, and this delimitation was the main issue in the present case. In the ensuing century, the territories involved experienced a number of mutations in status. The independent Republic of Botswana came into being on 30 September 1966, on the territory of the former British Bechuanaland Protectorate. On 21 March 1990, Namibia (formerly Southwest Africa), of which the Caprivi Strip forms part, became independent.

Shortly after Namibia’s 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 announced that it had failed to reach an agreed conclusion on the question put to it. As a result, it was decided to submit the dispute to the Court for a final and binding determination.

After invoking the object and purpose of the 1890 Treaty and its *travaux préparatoires*, the Court examined at length the subsequent practice of the Parties to the Treaty. The Court found that this practice did not result in any agreement between them regarding the interpretation of the Treaty or the application of its provisions. The Court stated that it could not draw conclusions from the cartographic material “in view of the absence of any map officially reflecting the intentions of the Parties to the 1890 Treaty” and “in the light of the uncertainty and inconsistency” of the maps submitted by the Parties.

The Court considered Namibia’s alternative argument that Namibia and its predecessors had prescriptive title to Kasikili/Sedudu Island by virtue of the exercise of sovereign jurisdiction over it since the start of the century, with the full knowledge and acceptance by Botswana authorities and its predecessors. The Court found that although the Masubia tribes of the Caprivi Strip had used the Island for many years, they had done so intermittently, according to the seasons and exclusively for agricultural purposes. The Masubia tribes did not establish that they had occupied the Island *à titre de souverain*, namely, they did not exercise the functions of State authority on the Island on behalf of the Caprivi authorities.

Thus, the Court rejected Namibia’s argument and concluded as follows: (a) the boundary between Botswana and Namibia around Kasikili/Sedudu Island followed the line of deepest soundings in the northern channel of the Chobe River; and (b) the Island formed part of the territory of Botswana. The Court recalled that, under the agreement concluded in May 1992 (the Kasane Communiqué), the Parties had agreed that there should be unimpeded navigation in the channels around the Island for the crafts of their nationals and flags.

Submissions of the Parties

Namibia’s final submissions, presented 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 territory under the sovereignty of Namibia.

Botswana's final submissions, presented at the hearing of 5 March 1999, requested 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 according to 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
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.

The Issues

(i) Rules of Interpretation Applicable to the 1890 Treaty⁴

The Court observed that the law applicable to the present case had its source, first of all, in the 1890 Treaty, which Botswana and Namibia acknowledged was binding on them. On the Treaty's interpretation, the Court noted that neither Party was privy to the Vienna Convention on the Law of Treaties of 23 May 1969 (Vienna Convention). However, both had considered that Article 31 of the Vienna Convention was applicable to them inasmuch as it reflected customary international law.

⁴ Ibid paras 18-20.

According to Article 31 of the Vienna Convention:

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 indicated that it would interpret the provisions of the 1890 Treaty by applying the rules of interpretation set forth in the Vienna Convention. The Court stated 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.⁵

(ii) The Text of the 1890 Treaty⁶

First of all, the Court examined the text of the 1890 Treaty. Article III 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

⁵ Territorial Dispute (Libyan Arab Jamahiriya/Chad) [1994] International Court of Justice Reports 21-22 at para 41.

⁶ Refer paras 21-46 of the Judgment.

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 was understood that under this arrangement, Germany should have free access from her Protectorate to the Zambesi by a strip of territory that at no point should be less than 20 English miles in width. The sphere in which the exercise of influence was reserved to Great Britain was bounded to the west and northwest by the above-mentioned line, and it included Lake Ngami. The course of the above boundary had been traced in general accordance with a map officially prepared for Britain in 1889.

Regarding the region in issue in the present case, this provision located the dividing line between the spheres of influence of the Parties in the "main channel" of the Chobe River. However, neither this nor any other provision of the Treaty furnished criteria that enabled the "main channel" to be identified. It was noted that the English version referred to the "centre" of the main channel, while the German version used the term "the thalweg" of that channel (*Thalweg des Hauptlaufes*). Observing that the Parties did not themselves express any real difference of opinion on the meaning of these terms, the Court indicated that it would accordingly treat the words "centre of the main channel" in Article III(2) of the 1890 Treaty to mean the same as "*Thalweg des Hauptlaufes*".

In the Court's opinion, the real dispute between the Parties concerned the boundary's location in the main channel. On the one hand, Botswana argued that it was to be found "on the basis of the thalwegs in the northern and western channel of the Chobe". On the other hand, Namibia argued that it was found "in the centre (that is to say thalwegs) of the southern channel of the Chobe River". The Court observed that by introducing the term "main channel" into the draft treaty, the Parties must be assumed to have intended that a precise meaning be given to it. For these reasons, the Court indicated that it would proceed, in the first instance, to determine the main channel. In so doing, it would determine the ordinary meaning of the term "main channel" by reference to the most commonly used criteria in international law and practice, to which the Parties had referred.

(iii) **Criteria for Identifying the “Main Channel”⁷**

The Court noted that the Parties had agreed on many of the criteria for identifying the “main channel”, but had disagreed on the relevance and applicability of several of those criteria.

For Botswana, the relevant criteria were the greatest depth and width, bed profile configuration, navigability, and greater flow of water. Similarly, Botswana stressed the importance of criteria such as channel capacity, flow velocity and volume of flow, to help identify the main channel.

On the other hand, Namibia acknowledged that:

[the possible] 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.

Namibia referred to the sharp variations in the level of the Chobe River’s waters and stated that “neither width nor depth are suitable criteria for determining which channel is the main channel.” Among the possible criteria, Namibia attached the greatest weight to the amount of flow. It argued that the main channel was the one “that carries the largest proportion of the annual flow of the river”. It emphasised that another key task was to identify the channel that was most used for river traffic.

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

(a) *Depth of the Channel*⁸

Notwithstanding all the difficulties involved in sounding the depth of the channels and interpreting the results, the Court concluded that the northern

⁷ Refer paras 29-42 of the Judgment.

⁸ See the Judgment para 32.

channel was deeper than the southern one, as regards mean depth, and even as regards minimum depth.

*(b) Width of the Channel*⁹

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, the Court found that the northern channel was wider than the southern channel.

*(c) Flow of Water*¹⁰

With regard to the flow, namely, the volume of water carried, the Court was unable to reconcile the figures submitted by the Parties as they had taken a totally different approach regarding the definition of the channels. The Court stated that the determination of the main channel should be made according to the low water baseline, not the flood line. The evidence showed that when the river was flooded, the Island was submerged by floodwater and the entire region took on the appearance of an enormous lake. When the two channels became indistinguishable, it was impossible to determine the main channel in relation to the other channel.

Therefore, the Court was not persuaded by Namibia's argument on the existence of a major "main" channel whose visible southern channel would merely constitute the thalweg.

*(d) Visibility*¹¹

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

*(e) Bed Profile Configuration*¹²

Having examined the arguments, maps and photographs tendered by the Parties, the Court was unable to conclude that, from its bed configuration, the southern channel constituted the principal and natural prolongation of the course of the Chobe River before the bifurcation.

*(f) Navigability*¹³

The Court noted that the navigability of watercourses varied greatly

⁹ Ibid para 33.

¹⁰ Ibid paras 34-37.

¹¹ Ibid para 38.

¹² Ibid para 39.

¹³ Ibid paras 40-42.

depending on prevailing natural conditions. The conditions could prevent the use of the watercourse in question by large vessels carrying substantial cargoes, although it permitted light flat-bottomed vessels to navigate it. In the present case, the data furnished by the Parties tended to prove that the navigability of the two channels around Kasikili/Sedudu Island was limited by their shallowness. This situation caused the Court to take the view that the "main channel" in this part of the Chobe River was the one that offered more favourable conditions for navigation. In the Court's view, it was the northern channel that met this criterion.

(g) The Court's Conclusion

For the above reasons, the Court concluded that according to the ordinary meaning of the words in the pertinent provision of the 1890 Treaty, the Chobe River's northern channel around Kasikili/Sedudu Island should be regarded as its main channel. This was supported by the results of three on-site surveys carried out in 1912, 1948 and 1985, which concluded that the main channel of the Chobe River was the northern channel.

*Object and Purpose of the 1890 Treaty*¹⁴

The Court considered how and to what extent the Treaty's object and purpose could clarify the meaning of the 1890 Treaty's terms. While the Treaty was not a boundary treaty proper, but rather a treaty delimiting spheres of influence, the Parties nonetheless had accepted it as the treaty that determined their boundary. The Court observed that the Parties had opted for the words "centre of the main channel", thus intending to establish a boundary separating their spheres of influence even in the case of a river having more than one channel.

The Court noted that navigation seemed to be a relevant factor when the Parties delimited their spheres of influence. However, the Court did not consider that navigation was the sole objective of Article III(2) of the Treaty. Whenever possible when referring to the Chobe River's main channel, the Parties had sought to secure for themselves freedom of navigation on the river, and the precise delimitation of their respective spheres of influence.

¹⁴ Ibid paras 43-46.

Subsequent Practice¹⁵

At the proceedings, the Parties referred to several of their own practices (including their successors') following the 1890 Treaty because they were relevant elements in the Treaty's interpretation. While the Parties accepted that interpretative agreements and subsequent practice were elements of treaty interpretation in international law, they disagreed on the conclusions to be drawn from the facts in this case when interpreting the Treaty.

Article 31(3) of the Vienna Convention, which reflected customary international law, provided for the interpretation of treaties as follows:

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(2) of the 1890 Treaty, Botswana relied principally on three sets of documents, namely:

1. a report on a reconnaissance of the Chobe produced in August 1912 by an officer of the Bechuanaland Protectorate Police, Captain Eason;
2. 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
3. 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.

(i) The 1912 Eason Report¹⁶

Namibia argued that the Eason Report and its surrounding circumstances did not represent "subsequent practice in the application of the treaty" of

¹⁵ Ibid paras 47-80.

¹⁶ Ibid paras 53-55.

1890, within the meaning of Article 31(3)(b) of the Vienna Convention. The Court accepted this view because Botswana had put it forward as well during the final version of its argument.

(ii) The Trollope-Redman Correspondence (1947-1951)¹⁷

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

In 1951, an exchange of correspondence between Mr Dickinson (who had succeeded Mr Redman as District Commissioner) 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 – namely 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.

However, each side made a caveat on its position in any future controversy over the Island.

¹⁷ Ibid paras 56-63.

The Court observed that both Botswana and Namibia had relied on the Trollope-Redman Joint Report and the correspondence relating to it in support of their respective positions. After examining the correspondence, the Court held that the above events between 1947-1951 did not evidence any agreement between South Africa and Bechuanaland on the location of the boundary around Kasikili/Sedudu Island and the status of the Island. The events could not constitute “subsequent practice in the application of the [1890] treaty which establishes the agreement of the Parties regarding its interpretation” under Article 31(3)(b) of the Vienna Convention. *A fortiori*, they could not have given rise to an “agreement between the Parties regarding the interpretation of the treaty or the application of its provisions” under Article 31(3)(a).

(iii) The Joint Survey of 1985¹⁸

In October 1984, an incident occurred where shots were fired between members of the Botswana Defence Force and South African soldiers who were travelling by boat in the Chobe River’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 arose out of differences in the interpretation of the precise location of the boundary around Kasikili/Sedudu Island. At this meeting, reference was made to the terms of the 1890 Treaty and the Parties agreed as follows:

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 and 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 Map C) 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

¹⁸ Ibid paras 64-68.

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 organisations. 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 found that it could not conclude therefrom that in 1984-1985 South Africa and Botswana had agreed on anything more than the dispatch of the joint team of experts. In particular, the Court could not conclude that the two States agreed in some fashion or other to recognise each other as being 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 served to establish that any such agreement was reached. Moreover, the subsequent correspondence between the South African and Botswana authorities appeared to deny the existence of any agreement.

In a Note of 4 November 1985, Botswana had called upon South Africa to accept the survey conclusions. However, not only did South Africa fail to accept them but on several occasions it emphasised the need for Botswana to negotiate and agree on the question of the boundary with the relevant authorities of South West Africa, or the future independent Namibia.

*Presence of Masubia Tribes on the Island*¹⁹

In the proceedings, Namibia invoked the subsequent practice of the Parties to the 1890 Treaty to support its arguments. In its Memorial, it contended that this conduct was:

relevant to the present controversy in three distinct ways. In the first place, it corroborates the interpretation of the Treaty. Second, it gives

¹⁹ Ibid paras 71-75.

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 upon by Namibia consisted 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 indicated that it would not at this point examine Namibia's argument on prescription. Instead, it would merely seek to ascertain whether the long-standing and unopposed presence of the Masubia tribes on Kasikili/Sedudu Island constituted "subsequent practice in the application of the [1890] treaty which establish[ed] the agreement of the Parties regarding its interpretation" under Article 31(3)(b) of the Vienna Convention. To establish such practice, at least two criteria would have to be satisfied. First, that the occupation of the Island by the Masubia tribes was linked to a belief by the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the southern channel of the Chobe River. Secondly, that the Bechuanaland authorities were fully aware and accepted this as a confirmation of the Treaty boundary.

The Court found that there was no evidence to show that the intermittent presence on the Island of people from the Caprivi Strip was linked to territorial claims by the Caprivi authorities. Further, it seemed that as far as Bechuanaland, and later Botswana, were concerned, the intermittent presence of the Masubia tribes 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. Thus, the Court arrived at the following conclusions:

1. the peaceful and public use of Kasikili/Sedudu Island, over a period of many years, by Masubia tribesmen from the Eastern Caprivi did not constitute "subsequent practice in the application of the [1890] treaty" within the meaning of Article 31(3)(b) of the Vienna Convention; and

2. 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(3)(a) of the Vienna Convention nor any “practice in the application of the treaty which establishe[d] the agreement of the Parties regarding its interpretation”, within the meaning of subparagraph (b) of that same provision.

*Maps as Evidence*²⁰

Both Parties had submitted in evidence a large number of maps dating back to 1880. Namibia pointed out that the majority of the maps, even those emanating from British colonial sources and intended to show the boundaries of Bechuanaland, appeared to place the boundary around Kasikili/Sedudu Island in the southern channel. Namibia relied 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, placed less reliance on maps, pointing out, *inter alia*, that most of the early maps showed too little detail or was too small in scale to be of value in the case. Botswana asserted that the available maps and sketches indicated that, from the time the Chobe River was surveyed with any particularity by European explorers from the 1860s onwards, a northern channel around the Island was known and regularly depicted. However, Botswana did not attempt to demonstrate that this placed the boundary in the northern channel. Rather, Botswana’s overall position was that the map evidence was far less consistent in placing the boundary in the southern channel than claimed by Namibia.

The Court dealt with these submissions by recalling the words of the Chamber of the Court when it dealt with the evidentiary value of maps in *Frontier Dispute (Burkina Faso/Republic of Mali)*:²¹

[M]aps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence,

²⁰ Ibid paras 81-87.

²¹ [1986] International Court of Justice Reports 554, 582 at para 54.

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.

Thus, after examining the map evidence produced by the Parties, the Court was unable to draw conclusions from it. The reasons were the following:

1. There was no map that officially reflected the intentions of the Parties to the 1890 Treaty.
2. Neither the Parties nor their successors had an express or tacit agreement on the validity of the boundary depicted in a map.
3. There was uncertainty and inconsistency in the cartographic material submitted to the Court in evidence.

The Court held that the evidence could not endorse a conclusion that was arrived at by other means unconnected with the maps.²² In addition, it could not alter the results of the Court's textual interpretation of the 1890 Treaty.

"Centre of the Main Channel" or Thalweg²³

The foregoing interpretation of the relevant provisions of the 1890 Treaty led the Court to conclude that the boundary between Botswana and Namibia around Kasikili/Sedudu Island provided for in the Treaty was in the northern channel of the Chobe River. According to the English text of the Treaty, this boundary followed the "centre" of the main channel, but the German text used the word "thalweg". However, the Court had indicated that the Parties to the 1890 Treaty intended the terms to be

²² Frontier Dispute (Burkina Faso/Republic of Mali) [1986] International Court of Justice Reports 554, 583 at para 56.

²³ Refer paras 88-89 of the Judgment.

synonymous and that Botswana and Namibia had not expressed any real difference of opinion on this subject.

Moreover, it was clear from the Treaty's *travaux préparatoires* that there was an expectation of navigation on the Chobe River by the Parties and a common intention to exploit this possibility. Although the Parties in 1890 used "thalweg" and "centre of the channel" interchangeably, the former reflected more accurately the common intention to exploit navigation than the latter. Accordingly, this was the term that the Court would consider as determinative in Article III(2).

Botswana and Namibia had agreed, in their replies to a question put by the Court, that the line of deepest soundings in the Chobe River formed its thalweg. As a result, the Court concluded that the boundary followed this line in the northern channel around Kasikili/Sedudu Island.

*Acquisitive Prescription*²⁴

The Court observed that Namibia had claimed title to Kasikili/Sedudu Island, not only on the basis of the 1890 Treaty but also on the basis of the doctrine of prescription. Namibia had argued 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 had argued that the Court could not consider Namibia's submissions on prescription and acquiescence as they were not included within the terms of the Special Agreement on the Court's jurisdiction. The Court noted that under Article I of the Special Agreement, it was asked to determine the boundary between Namibia and Botswana around Kasikili/Sedudu Island. Also, it was asked to determine 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". The Court held that the Special Agreement, in referring to the "rules and principles of international law", not only authorised the Court to interpret the 1890 Treaty in the light of

²⁴ Ibid paras 90-99.

those rules and principles, but also to apply them independently. Thus, the Court considered that the Special Agreement did not preclude it from examining Namibia's arguments on prescription.

After summarising the Parties' arguments, the Court observed that they had agreed between themselves that acquisitive prescription was recognised in international law. Further, they had agreed on the conditions under which title to territory could be acquired by prescription. However, their views differed on whether the conditions were satisfied in this case.

The Parties' disagreement related mainly to the legal inferences to be drawn from the presence on Kasikili/Sedudu Island of the Masubia tribes of Eastern Caprivi. Namibia had based 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. On the other hand, Botswana saw this as simply a "private" activity, without any relevance in international law.

The Court pointed out that for present purposes, it need not concern itself with the status of acquisitive prescription in international law nor with the conditions for acquiring title to territory by prescription. For the reasons below, it considered that the conditions cited by Namibia were not satisfied in this case. As a result, Namibia's argument on acquisitive prescription could not be accepted.

After examining the Masubia tribes' presence on the Island, the Court observed that even if links of allegiance had existed between the tribes and Caprivi authorities, Namibia had not established that the tribes had occupied the Island *à titre de souverain*. Further, Namibia had not established that the tribes did not exercise functions of State authority there on behalf of those authorities. The evidence showed that the tribes had used the Island intermittently according to the seasons and their needs. This was for agricultural purposes only, which began prior to the establishment of any colonial administration in the Caprivi Strip. It also appeared that this had continued subsequently without being linked to territorial claims on the part of the authority that administered the Caprivi Strip.

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 South Africa, the Chobe River's "main channel" around

the Island was said to be the northern channel. South Africa had relied on the presence of the Masubia tribes on the Island to support their claim to title based on prescription. From then on, Bechuanaland claimed that the boundary was located in the northern channel and that the Island was part of the Protectorate. However, after some hesitation, Bechuanaland declined to satisfy South Africa's claims to the Island, although at the same time, it recognised the need to protect the interests of the Caprivi tribes.

From this, the Court inferred the following conclusions:

1. for Bechuanaland, the activities of the Masubia on the Island were an independent issue from that of title to the Island; and
2. as soon as South Africa officially claimed title, Bechuanaland did not accept that claim, which precluded acquiescence on its part.

Thus, the Court held that Namibia had not established, with the necessary precision and certainty, that the acts of state authority capable of providing an alternative justification for prescriptive title, were carried out by Namibia or its predecessors with regard to Kasikili/Sedudu Island.

*Legal Status of Kasikili/Sedudu Island and the Two Channels*²⁵

The Court's interpretation of Article III (2) of the 1890 Treaty led it to conclude that the boundary between Botswana and Namibia around the Kasikili/Sedudu Island followed the line of deepest soundings in the Chobe River's northern channel. Since the Court rejected Namibia's argument on prescription, it followed that the Island formed part of the territory of Botswana. However, the Court observed that the Kasane Communiqué of 24 May 1992 showed that the Presidents of Namibia and Botswana had agreed and resolved a number of issues including the following:

- (i) existing social interaction between the people of Namibia and Botswana should continue;
- (j) economic activities such as fishing shall continue on the understanding that fishing nets should not be laid across the river; and
- (k) navigation should remain unimpeded including free movement of tourists.

²⁵ Ibid paras 100-103.

In this light, and particularly subparagraph (e) and its interpretation, the Court held:

1. The Parties had undertaken to one another that there shall be unimpeded navigation for the craft of their nationals and flags in the channels of Kasikili/Sedudu Island.
2. 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.
3. 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.
4. In the northern channel, each party shall likewise accord the nationals of, and vessels flying the flag of the other, equal national treatment.

THE COURT'S ORDERS

After considering the figures/calculations submitted by the Parties, as well as surveys performed on the ground at different periods, the Court held that “the northern channel of the River Chobe around Kasikili/Sedudu Island must be regarded as its main channel”. It made the following orders:²⁶

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: per Schwebel P, Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Higgins, Kooijmans JJ; Weeramantry V-P, Fleischhauer, Parra-Aranguren, Rezek JJ (dissenting).
2. By eleven votes to four,
Finds that Kasikili/Sedudu Island forms part of the territory of the Republic of Botswana: per Schwebel P, Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Higgins, Kooijmans JJ; Weeramantry V-P, Fleischhauer, Parra-Aranguren, Rezek JJ (dissenting).

²⁶ Refer *ibid* para 104 for the full text.

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.

Ranjeva, Koroma and Higgins JJ appended Declarations to the Judgment of the Court; Oda and Kooijmans JJ appended Separate Opinions; Weeramantry V-P, Fleischhauer, Parra-Aranguren and Rezek JJ appended Dissenting Opinions.

Declaration of Ranjeva J²⁷

Ranjeva J explained how he interpreted the reply to Article I of the Special Agreement concerning Articles II-III of the operative part of the Judgment on 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 was the least improbable solution. He found that Kasikili/Sedudu Island formed part of Botswana territory because a systematic comparison of the two navigation channels was absent.
2. The Kasane Communiqué created legal obligations for the Parties with regard to their nationals' enjoyment and exercise of rights in the relevant area. In addition to navigation and fishing rights in the channel, there was a right of free access to the surrounding waters and to the territory of Kasikili/Sedudu Island.
3. On the presence of the Masubia on Kasikili/Sedudu Island, he found that the following statement in paragraph 98 of the Judgment was not of general import and related only to the particular circumstances of the present case:

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*, namely, that they were exercising functions of State authority there on behalf of those authorities.

²⁷ Refer Annex to Press Communiqué 99/53 bis.

Declaration of Koroma J

In his Declaration, Koroma J 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 had in the past resulted in serious armed conflicts and endangered the peace and security of the States involved.

Koroma J stated that, given the task of the Court, it was inevitable that the Court would choose one of several 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. However, in so doing, the Court had taken into consideration the principle of *uti possidetis*, a recognised principle of the African legal order regarding the boundaries of African States.

This notwithstanding, Koroma J found that the Court had ruled that the nationals and boats flying the flags of the Botswana and Namibia should enjoy equal treatment in each other's territorial waters in accordance with the contemporary principles of the law of international watercourses and the Kasane Communiqué. He added that the Judgment should invest the boundary between the two States with the necessary legal validity and ensure the equitable treatment of a shared natural resource.

Declaration of Higgins J

Higgins J declared that, contrary to what was stated in the Judgment, the Court was not engaged in an exercise of treaty interpretation of words in their ordinary meaning. Rather, the Court was applying, in 1997, a general term selected by the Parties in 1890 to a river section well understood at present. In so doing, the Court should simultaneously have regard to the Parties' broad intentions in 1890 and contemporary knowledge of the area.

In her view, no great weight should be placed on criteria related to navigation since the Parties' hopes on navigation of the Zambezi were found to be misplaced. Rather, realism required the Court to emphasise criteria relevant to the Parties' other intention, namely, to arrive at a clear frontier, and this objective was obtainable through the Court's decision. Although the issue of general physical appearance was important, the Chobe Ridge was the most dominant bank in both channels all year round

and the northern channel appeared to be the broader and more visible. Thus, although many of the factors were educational and interesting in themselves, they had little relevance to the task at hand.

Separate Opinion of Oda J

Oda J voted in favour of the operative part of the Judgment because he supported the Court's determination that the northern channel of the Chobe River formed the boundary between Botswana and Namibia. However, he found it difficult to understand properly the sequence of logic in the Court's Judgment. In his view, the Judgment had placed excessive reliance on the Vienna Convention, which he did not believe applied to the interpretation of the 1890 Anglo-German Treaty.

Oda J disagreed with the Court's approach of viewing 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. Accordingly, he stated that before the legal status of Kasikili/Sedudu Island could be determined, the background of the case should be considered. Also, since the *compromis* had not been drafted with clarity, the Parties should be asked to clarify their common position on whether they regarded the determination of the boundary as a single or two separate issues.

Oda J found that the definition of the main channel and, in particular, the identification of its location, depended largely on scientific knowledge which the Court should have obtained by seeking the assistance of experts it appointed, and the Court had chosen not to do this. Nevertheless, Judge Oda did not object to the Court's conclusion that the northern channel was the main channel of the Chobe River. As such, it was the boundary along the River between the two States in spite of the fact that this conclusion had been reached without the assistance of independent experts.

Oda J agreed with the Court in rejecting the role played by the concept of "acquisitive prescription" in the case. He held that the northern channel had 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 for several decades, as indicated by certain practices and survey reports of the region. Contrary to the Court's view, Oda J held that at present, these factors would be the most pertinent in assisting the Court to determine the

boundary between two States. He concluded that the determination of the boundary was the original intention of the Parties when they submitted to the jurisdiction of the Court by their *compromis*.

Separate Opinion of Kooijmans J

Kooijmans J voted in favour of all parts of the *dispositif* of the Judgment. However, he disagreed with the Court's view that the Special Agreement, by referring to the "rules and principles of international law", had allowed the Court to apply them independently of the Treaty. Moreover, he disagreed that the Special Agreement had allowed the Court to examine Namibia's alternative claim that it had title to Kasikili/Sedudu based on the doctrine of acquisitive prescription. He held that this part of Namibia's claim should have been declared inadmissible because the Special Agreement precluded the Court from determining the Island's status independently of the Treaty.

Kooijmans J held that the mutual commitments the Parties made in the 1992 Kasane Communiqué on the uses of the waters around Kasikili/Sedudu Island reflected clearly recent developments in international law, such as the principle of the equitable and reasonable utilisation of shared water resources. The Chobe River around the Island was part of a "watercourse" within the context of the 1997 Convention on the Non-Navigational Uses of International Watercourses. The 1997 Convention had defined 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 the 1997 Convention had not entered into force yet, it embodied certain rules and principles, such as the rule of equitable utilisation, which had become well established in international law. Although the present use of the waters around the Island for tourist purposes could hardly be identified as transport by river, on the other hand, it was akin to the uses for non-navigational purposes that were the subject of the 1997 Convention. Therefore, in their future dealings concerning the uses of the waters around Kasikili/Sedudu Island, Kooijmans J held that the Parties should be guided by the rules and principles contained in the 1997 Convention.

Dissenting Opinion of Weeramantry V-P

Weeramantry VP held that since the terms “main channel” and “*Thalweg des Hauptlaufes*” in the 1890 Treaty had more than one interpretation, the sense in which they were understood contemporaneously by the Parties was important in their interpretation. Although the Masubia tribes had regularly used the Kasikili/Sedudu for over half a century after the Treaty, there was a contemporaneous understanding by the Parties to the Treaty and their officials that the Masubia tribes did not cross national boundaries. The Masubia tribes did not acknowledge title in any other State and did not object to their use. Also, the predecessors in title of Botswana did not assert any claim.

The above showed that the Chobe River’s southern channel was the boundary as indicated by the 1890 Treaty. The conduct of governments more than half a century later, when background circumstances and power configurations had changed drastically was, therefore, not evidence of contemporaneous understanding. Furthermore, the word “agreement” in Article 31(3)(b) of the Vienna Convention was not confined to a verbal agreement, but covered common understanding which could be indicated by action or inaction, affirmation or silence.

The Judge discussed the thalweg principle and the ambivalence of the scientific criteria and navigability for determining the main channel. He referred to the richness of Kasikili/Sedudu Island as a wildlife habitat, and stated that such circumstances attracted the application of legal principles. He considered the equitable navigational use of boundary rivers and the judicial responses to a boundary demarcation that involved the dismantling or division of an ecologically integral unit. He discussed the scope for equity in boundary delimitation and examined the differences between treaties dealing with spheres of influence and strictly boundary treaties, including the significance of this distinction in boundary delimitation.

In conclusion, Weeramantry VP held that while the Island belonged to Namibia, a joint international regime between the two States should be established to safeguard the environmental interests of the Island. As a consequence, he discussed the joint international regimes to safeguard the environment in some detail.

Dissenting Opinion of Fleischhauer J

Fleischhauer J voted against paragraphs 1 and 2 of the *dispositif* of the Court's Judgment. He dissented from the Court's interpretation of the term "main channel of that river"/"*Hauptlauf dieses Flusses*". The Court had held this to mean the northern rather than the southern channel of the Chobe River around Kasikili/Sedudu Island. As the Court did not accept Namibia's argument on prescriptive title to the Island, Fleischhauer J's dissent on the interpretation of the term affected not only his view on the location of the boundary but also his view on the territorial status of the Island. This explained why he voted against paragraphs 1 and 2 of the *dispositif*.

However, Fleischhauer J voted in favour of paragraph 3 of the *dispositif* on the role of prescription in the case.

Dissenting Opinion of Parra-Aranguren J

Even though Parra-Aranguren J agreed with the Court's observation that the Parties had not agreed on the meaning of "the centre of the main channel (*der Thalweg des Hauptlaufes*) of the Chobe River" found in Article III(2) of the 1890 Anglo-German Agreement, he held that the Agreement had not defined the phrase. In addition, he held that no other provision of the Agreement provided implied guidelines that were useful for this purpose. Thus, the phrase was to be interpreted according to customary international law as expressed in Article 31 of the Vienna Convention.

He stated that according to Article 31(b), it was necessary to examine "any subsequent practice in the application of the treaty which establishe[d] the agreement of the Parties regarding its interpretation". When so doing, it should be kept in mind that such agreement could be established not only through the Parties' joint or parallel conduct, but also through the activity of only one of them, irrespective of whether the other had assented or objected to it.

After considering the 1912 Report of Captain Eason, the 1948 Joint Report prepared by Mr Trollope and Mr Redman, the exchange of letters between 1948-1951, and Mr Renew's 1965 Report, Parra-Aranguren J concluded as follows:

- (a) the Masubia tribes were the only tribesmen who used Kasikili/Sedudu Island at least until 1914;
- (b) their occupation of Kasikili/Sedudu Island was peaceful and public; and
- (c) their chiefs “became in a certain sense agents of the colonial administration”, as acknowledged by Botswana.²⁸

Parra-Aranguren J held that 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(2) of the 1890 Anglo-German Agreement. The subsequent practice of the Parties to the 1890 Anglo-German Agreement was only relevant until the start of World War I when Rhodesian forces in September 1914 occupied the Eastern Caprivi.

No subsequent practice of the Parties to the Treaty was possible when British troops exercised *de facto* control over South West Africa. In 1920, the League of Nations had confirmed the establishment of the Mandate over South West Africa. During the existence of the Mandate over South West Africa (Namibia), neither party to the 1890 Anglo-German Treaty had competence to recognise that the “main channel” of the Chobe River was the northern channel, not the southern channel, either by express agreement or by subsequent practice. If so, this new interpretation would represent a modification of the territory submitted to the Mandate.

Consequently, the original understanding was maintained and for this reason Parra-Aranguren J concluded that Kasikili/Sedudu Island formed part of Namibia and that the southern channel of the Chobe River was the “main channel” referred to in Article III(2) of the 1890 Anglo-German Agreement.

Dissenting Opinion of Rezek J

In his dissenting opinion, Rezek J emphasised the ambiguities in the geography of the Kasikili/Sedudu area. He criticised the arguments based on navigability, visibility and the natural prolongation of the river at the bifurcation. He interpreted the 1890 Anglo-German Treaty in a historical

²⁸ See para 85 of Parra-Aranguren J’s dissenting opinion.

context, 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 Masubia tribes. He found that priority should go to those elements that placed the boundary in the southern channel and, accordingly, held that Namibia had sovereignty over Kasikili/Sedudu.