

CAPRIVI STRIP: WORLD COURT AWARDS ISLAND TO BOTSWANA

International Court of Justice Case concerning Kasikili/Sedudu Island (Botswana/Namibia)

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INTRODUCTION

On 13 December the International Court of Justice at The Hague gave judgement in the case between Botswana and Namibia. The case began when in May 1996 the two Governments filed with the Registry of the Court the text of a *Special Agreement* dated 15 February 1996, giving the Court specific jurisdiction over the dispute between them.

Origins of the case

The *Special Agreement* referred to the Treaty of 1 July 1890 between Great Britain and Germany concerning their spheres of influence in Africa, and to the dispute that had arisen between Botswana and Namibia as to their boundary around the island in the Chobe River which Botswana calls Sedudu Island and which the present article also refers to under that name, although Namibia calls it Kasikili.

Both sides claimed Sedudu under the terms of the Treaty of 1890. A joint team of technical experts appointed by the two countries in May 1992 had been unable to resolve the issue. In 1996 the two States therefore entered into the *Special Agreement*, which 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.”

SPECIAL AGREEMENT PROCEDURE AND PLEADINGS

Boundary disputes are normally brought before the International Court of Justice either by unilateral *Request* (in which event there are frequently preliminary issues to be tried as to whether the Court has jurisdiction and the case is admissible) or pursuant to a *Special Agreement*, or *compromis*, between the States concerned.

In *Request* cases the normal procedure is for the parties to file pleadings alternately – the requesting State following up its *Request* with a detailed statement of the facts and law (the *Memorial*), the responding State answering this in a *Counter-Memorial*, the requesting State following up with a *Reply*, and so on. This is the procedure that is currently being followed in the *Case concerning the Land and Maritime Boundary, Cameroon v Nigeria*.

The Parties agreed that each of them would prepare and file a Memorial, a Counter-Memorial, and such other written pleadings as they might agree or the Court might direct.

In *Special Agreement* cases, however, the procedure is normally different, consisting of consecutive rounds of ‘simultaneous’ pleadings. In *Botswana/Namibia* the Parties agreed in Article II of the *Special Agreement* that each of them would prepare and file a *Memorial*, a *Counter-Memorial*, and such other written pleadings as they might agree or the Court might direct.

On 27 February 1998 the Court ordered the filing of *Replies*, so that in the event the Parties went through three rounds of simultaneous pleadings. .

THE ORAL PHASE OF THE PROCEDURE

The oral phase involved public hearings at The Hague from 15 February to 5 March 1999. At these hearings, D J Freeman acted for Botswana, and speeches were made on behalf of Botswana by the distinguished Agent and Deputy Attorney-General of Botswana, Mr A.B. Tafa, by Mr M. L. Selepeng, then Permanent Secretary for Political Affairs in the Office of the President, by Professor Ian Brownlie QC

(heading the team of Botswana's external Counsel), and by Lady Fox QC, Dr. Stefan Talmon, Professor F.T.K. Sefe, and Mr Isaac Muzila. Representing Namibia was Dr Albert Kawana, Permanent Secretary, Ministry of Justice, distinguished figures in international law including Professor Abram Chayes, Professor Sir Elihu Lauterpacht, CBE, QC, Mr Jean-Pierre Cot, Professor Dr Jost Delbrück and Professor Dr Julio Faunaz. Technical experts included Professor W.J.R. Alexander of the University of Pretoria and Professor Keith S. Richards of the University of Cambridge and Mr Peter Clark, former Chief Map Research Officer, MOD, UK. A substantial number of visual aids were used, some of them being seriously sophisticated from a technical point of view. In addition each side played the Court a short cassette. The Court gave judgment in December 1999, some eight months later.

This present article is primarily concerned with the Judgment of the Court as a whole. However a number of the judges made individual Declarations or expressed their dissent, as to which see the penultimate section of the present article.

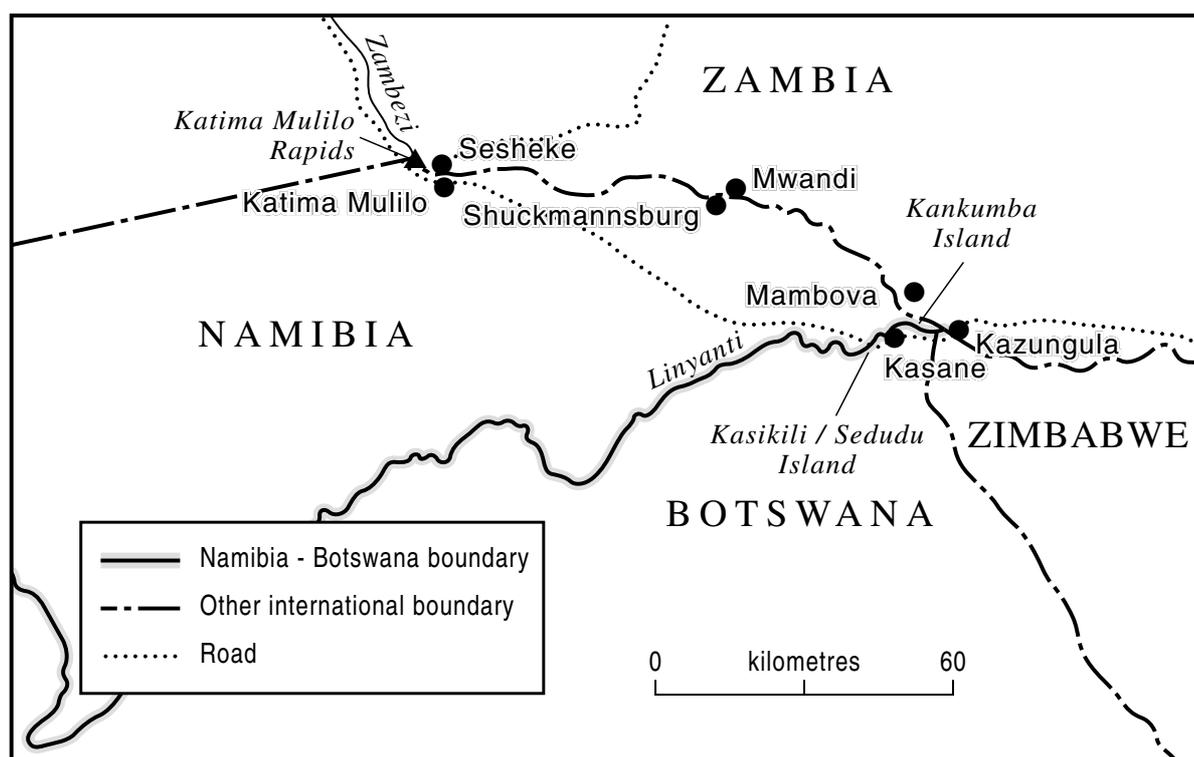
GEOGRAPHY

The Chobe River rises in Angola, where it is called the Rio Cuando. It crosses into Namibia and becomes the Kwando, and then the Mashi, flowing South into the Linyanti swamp and thence to Lake Liambezi. At the exit from that lake it becomes the Chobe. The Chobe is itself a tributary of the Zambezi.

The Chobe River and the location of Sedudu Island, which is located at the eastern edge of the Caprivi Strip, are shown on the attached maps.

The area of the Island is some 3.5km. The Botswana town of Kasane lies on the South bank some 1.5km downstream, and the Namibian village of Kasika is located on the northwestern bank of the river. Nearly due south of the Island, on the Botswana side, are the headquarters of the Chobe National Park, a protected reserve with a wide variety of wildlife. The southern bank is characterised by a steep sandy escarpment ranging between 900 and 1,000 metres above sea level.

The adjoining part of the Caprivi Strip is within the seasonal flood plain of the Zambezi. The island itself forms part of the flood plain, and is subject to flooding of several months' duration every year, starting in about March.



HISTORY

The Treaty of 1890 was one of the key events in the 'Scramble for Africa' amongst the European powers of the day. From 1890 the Caprivi Strip formed part of German South-West Africa. To the South, across the Chobe river, lay the British Bechuanaland Protectorate.

The Caprivi Strip was conquered, along with the rest of German South-West Africa, by South African forces in the course of World War I. South Africa thereupon obtained a League of Nations mandate, which it delegated to the British Bechuanaland Protectorate from 1921 to 1929.

Legally, the mandate was terminated by the UN General Assembly in 1966, following which the Assembly established the United Nations Council for South West Africa/Namibia: but South Africa remained in *de facto* control until Namibia became independent in March 1990. In the meantime, the British Bechuanaland Protectorate had on 30 September 1966 become the independent Republic of Botswana.

ISSUES

The essential issues in the case were fairly straightforward.

The key parts of Article III of the Treaty read as follows:

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

2. *To the east by a line...[that] runs eastward along that [18° South] 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.*

Although the English version of the Article referred to the “centre” of the main channel, in the German text the expression used was the “*Thalweg des Hauptlaufes*” – the “*thalweg*” of that channel. There was considerable debate about the meaning of these expressions, but the Court treated the two versions as having the same meaning, citing Article 33(3) of the Vienna Convention, under which “*the terms of the treaty are presumed to have the same meaning in each authentic text.*”

The primary question was whether the main channel was that lying to the north and west of Sedudu Island (as Botswana argued) or, as Namibia contended, the channel lying to the south and east.

Both sides accepted that the Treaty was binding upon them, and relied upon it. The primary question was whether the main channel was that lying to the north and west of Sedudu Island (as Botswana argued) or, as Namibia contended, the channel lying to the south and east.

In addition, Namibia argued that Namibia and its predecessors had occupied and used the island, and exercised sovereign jurisdiction over it, with the knowledge and acquiescence of Botswana and its predecessors since at least 1890.

The Parties also referred to the principles of the UN Charter and the Charter of the Organization of African Unity (OAU), as well as to Resolution AGH/Res.16(1) adopted in Cairo on 21 July 1964 by the Assembly of Heads of State and Government of the OAU. This Resolution provides that Member States of the OAU pledge themselves *inter alia* to respect the frontiers existing on their accession to national independence (in implementation of the *uti possidetis juris* principle).

THE COURT'S APPROACH TO INTERPRETATION OF THE TREATY

Citing its own judgment in *Libya/Chad*, the Court recalled 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.

The Court considered, in light of the *Laguna del desierto* arbitral award of 21 October 1994, that it might also take into account the present-day state of scientific knowledge, as reflected in the considerable volume of documentary material submitted by the Parties.

As to interpretative method, Botswana argued that the Court must simply determine the thalweg of the Chobe, as the main channel of the river – the words *des Hauptlaufes* adding nothing to the text. Namibia argued that the Court must first identify the main channel, and then determine where its centre lay.

THE COURT'S VIEW OF THE DISTINGUISHING FEATURES OF THE CHOBE RIVER

The Court considered that it was not charged with making findings as to the distinguishing features of the river itself.

For Botswana, the river was a perennial river independent of the Zambezi, with a stable profile, continuous downstream flow and stable banks. For Namibia it was an ephemeral watercourse, not navigable over most of its length. For Botswana the relevant criteria for determining the main channel were depth and width, bed profile configuration, navigability, and flow of water. Namibia, for its part, referring to the sharp variations in the Chobe's water level, argued that a range of criteria could be applied, but also that discharge was the most straightforward and general criterion. It attached the greatest importance to the channel which carried the largest proportion of annual flow, and also emphasised the importance of identifying the channel most used for river traffic.

The Court decided that it could not rely on any single criterion, but would take them all into account.

The Court decided that it could not rely on any single criterion, but would take them all into account. Amongst other matters, it specifically considered depth, width, bed profile configuration and navigability. As to flow, it said it was not in a position to reconcile the figures submitted by the Parties.

The Court observed that, on the evidence, the present hydrological situation of the Chobe around the Island may be presumed to be essentially the same as in 1890. It then examined the various criteria, as to which substantial bodies of documentary evidence, scientific and other, including satellite photography, had been supplied by the parties in their written pleadings.

THE COURT'S DECISION AS TO THE "MAIN CHANNEL"

The Court concluded that in accordance with the ordinary meaning of the terms of the Treaty, the northern channel was the main channel

The Court took the view that the determination of the main channel must be made according to the low water baseline and not the floodline – an understandable view given that when the river is in flood, the island is completely flooded.

Having reviewed the evidence, the Court concluded that in accordance with the ordinary meaning of the terms of the Treaty, the northern channel was the main channel. The Court observed that the three on-site surveys carried out at different times (in 1912 by Captain Eason, in 1948 in the *Trollope & Redman Report*, and in a joint report of 1985) had come to the same conclusion.

The Court noted that the Treaty of 1890 was concerned to separate the spheres of influence of the United Kingdom and Germany, and that, however mistakenly, navigability was a factor in the minds of the treaty-makers. Both Governments were interested in access to the Zambezi, as was shown by the *travaux préparatoires*.

**PRACTICE OF
THE PARTIES
SUBSEQUENT
TO 1890: THE
VIENNA
CONVENTION
ON THE LAW
OF TREATIES**

As the Court observed, both sides had made abundant reference to post-Treaty practice, in reliance upon Article 31(3) of the Vienna Convention. The Court noted that neither side was a party to the Convention, but that both of them considered Article 31 to be applicable in so far as it reflected customary international law. This followed the past jurisprudence of the Court, notably in *Libya/Chad* and in the *Iran/USA: Preliminary Objections* hearings.

Article 31 provides as follows:

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.*

Botswana relied particularly on events of 1912, 1951 and 1984.

The Court took the view that a Report by Captain Eason in 1912, and its surrounding circumstances, could not be regarded as representing “*subsequent practice in the application of the treaty*” of 1890, since at all times it remained an internal British document and was never taken further by the British Government itself.

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Both sides relied on the Trollope-Redman Joint Report and related correspondence up to 1951. The Court observed that prior to 1947 no differences had arisen as to the boundary around Kasikili/Sedudu Island; that on the basis of the maps then available the boundary had been supposed to lie in the southern channel; and that in 1948 local officials came to the joint conclusion that the main channel was the northern one, at the same time noting that since at least 1907 use had been made of the island by Caprivi tribesmen without objection from Bechuanaland.

The Court inferred that there was an absence of agreement between South Africa and Bechuanaland with regard to the location of the boundary around the island and the status of the island, and that the events cited did not constitute “*subsequent practice in the application of the treaty*” establishing the agreement of the parties regarding its interpretation, within the meaning of Article 31 para. 3(b) of the Vienna Convention.

Botswana contended that the decision in December 1984 to carry out a joint survey, and related documents, constituted an “*intergovernmental agreement...regarding...the application of the treaty.*” Namibia denied this. The Court decided that it could not conclude that in 1984-1985 South Africa and Botswana agreed on anything more than the despatch of a joint team of experts. Nor could it conclude that they were bound by the results. It was therefore unnecessary for the Court to add that in 1984 and 1985 the two States had no competence to conclude such an agreement, since at that time the UN General Assembly had already terminated the South African Mandate, and the Security Council had approved that measure.

The Court observed that in order to constitute “*subsequent practice in the application of the 1890 Treaty which establishes the agreement of the parties regarding its interpretation*” (Vienna Convention 1969 Art.31 para 3(b)), at least two criteria would have to be satisfied. First, that the occupation of the island by the Masubia

tribesmen of the eastern Caprivi Strip 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; second, that the Bechuanaland authorities were fully aware of and accepted this as a confirmation of the Treaty boundary.

Against these tests, the Court concluded that the peaceful and public use of the island over many years by the Masubia tribesmen did not constitute “*subsequent practice*” within para. 3(b).

The Court concluded that there was no agreement regarding the interpretation of the treaty, nor subsequent practice establishing agreement regarding the treaty's interpretation.

The Court reviewed claims by Botswana that the Island was part of the Chobe National Park, and as to a visit of the Botswana Head of State in 1972. It also reviewed claims by Namibia as to a Botswana magistrate's alleged decision that the island was outside Botswana's jurisdiction. The Court found that none of these matters could be considered “*subsequent practice*” and, in the latter case, that it was “*insufficiently proven.*”

Overall, therefore, the Court concluded that there was no agreement regarding the interpretation of the treaty, nor subsequent practice establishing agreement regarding the treaty's interpretation, within Article 31 para.3 of the Vienna Convention.

Nevertheless the Court regarded itself as “*bound to note*”, once again, that on at least three occasions, in 1912, 1948 and 1985, surveys on the ground identified the North and West channel as the “*main channel.*” In 1948 and 1985 these had been joint reports. Although these facts were not “*subsequent practice*”, they supported the Court's own interpretation of the Treaty in accordance with the ordinary meaning of its terms.

A large body of cartographic evidence was filed with the Court and analysed by the parties. Namibia in particular sought to rely on this evidence.

The Court recalled its comments on the limited evidentiary value of maps, in the *Frontier Dispute (Burkina Faso/Mali)* case. In the present case, there was no indication that the boundary on various maps was so sited as to be in accordance with Article III(2) of the 1890 Treaty. A difference of opinion had hardened by 1951 to the point where a local *de facto* agreement became necessary. In the light of that disagreement the maps could not, in the Court's view, be considered “*subsequent practice*” or recognition of the boundary shown on those maps.

In fact it appeared to the Court that the parties largely ignored the maps. In the absence of any map officially reflecting the intentions of the parties to the 1890 Treaty and of any express or tacit agreement of their successors as to the maps, and in the light of the uncertainty and inconsistency of the cartographic material, the Court considered itself unable to draw any conclusions from it.

PRESCRIPTION, ACQUIESCENCE AND RECOGNITION

Namibia contended that it had title to the island by prescription, acquiescence and recognition.

Namibia contended on a “*second and entirely independent basis*” that it had title to the island by prescription, acquiescence and recognition. Namibia was in possession when colonial rule ended, and the principle of *uti possidetis juris* applied. Namibia cited the “*continuing presence*” of Masubian tribesmen on the island at least between 1890 and the late 1940s.

Botswana maintained that prescription and acquiescence could not be considered because they fell outside the terms of the *Special Agreement*. However the Court considered that the wording of the *Special Agreement* referring to the “*rules and principles of international law*” should not be construed as confining it to those rules and principles that related to treaty interpretation. Accordingly, the prescription and acquiescence arguments could be considered by the Court.

Botswana accepted the criteria for acquiring prescriptive title as set out by Namibia, but argued that they were not satisfied. This part of the argument focussed on what legal inferences might be drawn from the presence on Sedudu Island of the Masubia of the Eastern Caprivi.

The Court found that the conditions cited by Namibia itself were not satisfied. In particular, Namibia had not established with the necessary degree of precision and certainty that acts of State authority capable of providing alternative justification for prescriptive title were carried out by its predecessors or itself with regard to the island.

MAJORITY DECISION OF THE COURT

The Court found that Sedudu Island belonged to Botswana.

Although the Court found that the main channel was the northern one and that the island itself belonged to Botswana, it also took note of the agreement of the Presidents of the two States recorded in the Kasane Communiqué of May 1992, and certain statements made by Botswana at the oral hearings.

The Court therefore found, by a majority of 11 to 4, that the boundary followed the line of deepest soundings in the northern channel and that Sedudu Island belonged to Botswana, and went on to find, this time unanimously, that in the two channels the nationals and vessels flying the flags of the two States should enjoy equal national treatment.

SEPARATE INDIVIDUAL OPINIONS, DECLARATIONS AND DISSENTING OPINIONS

The Judgment was accompanied by separate opinions of Judges Oda and Koojimans (who were among the majority), Declarations by Judges Ranjeva, Koroma and Higgins (also all among the majority), and dissenting opinions by Vice-President Weeramantry, Judge Fleischhauer, Judge Parra-Aranguren and Judge Rezek.

Space does not permit the author to do justice to these individual opinions and declarations, many of which are impressive documents in their own right. However a few points ought to be made.

Judge Higgins supported the majority decision, but in her Declaration questioned much of the logic of the Court's decision. She thought the Court was making a rather abstract attempt to discover what she called a "mythical" ordinary meaning of the Treaty wording, and that it would be better to look hard at what general ideas the parties had in mind – notably their mistaken belief in the use of the river for the purpose of navigation, as a link between the Caprivi Strip and the Zambezi. Unlike the majority, she placed no reliance at all on the facts said to be found by Eason, Trollope and Redman, whose methodology she said was unknown and who were preoccupied with questions of depth. Nor did she think it useful to accept as 'facts' findings of the Joint Team of Experts in 1985, when the South Africans did not regard them as legally determinative. For all these reasons she preferred to rely on the desire of the Parties in 1890 to choose the channel which most clearly marked the limits of their interests. In this perspective, the position of the Chobe Ridge favoured Namibia. However in Judge Higgins' view, taking a year-round view, the aerial and satellite photography showed the northern channel to be broader and more important.

Judge Oda's separate opinion expressed the view that the Court had relied excessively upon the Vienna Convention, even though the *Special Agreement* did not in fact ask the Court to interpret the 1890 Treaty itself. In his view the Convention was irrelevant because it applies only to treaties concluded after 1980. Judge Oda thought there was a certain lack of clarity in the terms of the *Special Agreement*, making it difficult for the Court to ascertain the Parties' true intention and wishes. He agreed with the finding of the majority that "the rules and principles of international law" as a separate basis for determining the boundary and the legal status of the island, had no significant role to play in the case. He suggested that the past practices

– the geographical surveys and correspondence between the authorities, were the most important and decisive element on which the judgment should be based.

Vice-President Weeramantry, dissenting, thought the wording of the 1890 Treaty “*pre-eminently*” unclear, and that resort could be had to subsequent practice to show contemporaneous understanding of what the Treaty really meant. He paid considerable attention to the significance of Masubian use and occupation of the island and to the absence of official protests. Perhaps the most interesting part of his dissenting opinion is the stress it places on equitable factors: “*It is an important principle of riparian law that equitable factors also play a significant part in determining riparian boundaries, where there is room for a difference of opinion.*” The Judge considered a northern channel boundary would cause far greater loss to Namibia than a southern channel boundary would cause to Botswana. In his view the boundary was in the southern Channel. However he also appeared to believe that the Parties should be required to work out a joint regime on a whole range of environmental and ecological matters.

CONCLUSION

In summary, the Court came to an essentially common-sense opinion based on the interpretation of the 1890 treaty.

It is seldom easy for the Court to decide complex disputes of fact, and even harder for it to resolve legal disputes on the basis of conflicting scientific evidence. Significant indicators of the way the Court works, and perhaps has to work can be found in the fact that, despite the presentation of a large body of historical, scientific and cartographical evidence, Namibia failed to persuade the Court to disregard the findings of 1912, 1948 and 1985 or that any of the matters pleaded amounted to “*subsequent practice*” or a “*subsequent agreement*” sufficient to satisfy Article 31 of the Vienna Convention; and that it likewise proved impossible, on the particular facts and circumstances of the case, for Namibia to establish a prescriptive title.

As is natural with States pursuing boundary disputes, the Parties laboured long and hard to say everything that could be said in support of their respective cases. Very heavy bodies of evidence, much of it extremely technical, and comprehensive submissions of law, were presented by both sides. Ultimately the Court concluded that it was faced with what, reduced to its essentials, was a fairly short point of treaty interpretation. It’s finding for Botswana was clearly influenced by the reports of 1912, 1948 and 1985, all of which concluded that the main channel lay to the North of the Island. The last two were, as the Court itself noted, joint reports.

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