# DECISIONS OF INTERNATIONAL TRIBUNALS

Edited by Malcolm D. Evans*

**I. Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)**

**II. The Southern Bluefin Tuna Cases (*New Zealand* v. *Japan*; *Australia* v. *Japan*): Order for Provisional Measures of 27 August 1999**

## I CASE CONCERNING KASIKILI/SEDUDU ISLAND (BOTSWANA/NAMIBIA)

### I Introduction

The decision of the International Court of Justice of 13 December 1999 in the dispute between Botswana and Namibia concerning the island known to the former as Sedudu and the latter as Kasikili is the latest in a line of cases dealing with the identification of colonial boundaries,[1] including the two *Eritrea/Yemen* arbitration awards, the second of which (on Maritime Delimitation) was delivered four days after the Kasikili/Sedudu Island judgment itself.[2] While not as wide-ranging in either the geographical or legal senses as some of the preceding decisions on territorial issues, the decision of the Court in this case nevertheless raises some interesting and important questions.

The island at issue is approximately 3.5 square kilometres and lies some 20 kilometres upstream of Kazungula, where the Chobe flows into the Zambezi.[3] It is situated in the Chobe River, which divides the Namibian Caprivi Strip in the north from the Chobe National Park in Botswana to the south. The existence of the Strip arose as a consequence of the Anglo-German Agreement of 1 July 1890. This treaty dealt with several regions of Africa, as well as the North Sea island of Heligoland. In particular, it delimited the spheres of influence of Germany and Great Britain in south-west Africa, including the area directly at issue.

The dispute between Botswana, independent from 30 September 1966, and Namibia, independent from 21 March 1990, arose not long after the

* The aim of this section is to survey, on a selective basis, some of the more important decisions of international tribunals.

1. See, for example, *Burkina Faso/Mali*, ICJ Reports, 1986, p.554; *El Salvador/Honduras*, ICJ Reports, 1992, p.351; *Libya/Chad*, ICJ Reports, 1994, p.6; *Dubai/Sharjah*, 91 I.L.R., p. 543; *Eritrea/Yemen (First Phase on Territorial Sovereignty)*, 114 I.L.R., p.1.

2. Two of the five judges on the arbitral tribunal in the *Eritrea/Yemen* awards were serving judges at the ICJ at the time (Judges Schwebel and Higgins), while the President of the Tribunal was a former Judge and President of the ICJ (Judge Jennings).

3. *Botswana/Namibia*, ICJ Reports, 1999 (hereafter Court's judgment), para.11.



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latter event. Of especial importance was the Communiqué of Kasane, Botswana, of 24 May 1992 in which the parties declared that the issue should be resolved peacefully and agreed to submit the determination of the boundary around Kasikili/Sedudu Island to a Joint Team of Technical Experts. In its final Report issued on 20 August 1994, the Joint Team announced that it had failed to arrive at an agreed solution and recommended recourse to the peaceful settlement of the dispute on the basis of the applicable rules and principles of international law. Accordingly, the leaders of the two countries, together with the President of Zimbabwe, agreed to submit the dispute to the International Court. A Special Agreement was signed on 15 February 1996 between the two parties bringing the dispute before the Court. By Article I of the Special Agreement, the Court was "asked 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".[4]

## II THE SCOPE OF THE CASE AND THE APPLICABLE LAW

The Court was asked to determine two issues, the boundary between the parties "around Kasikili/Sedudu Island" and the "legal status of the island". The answer to either of these questions would decide the other as well since the fixing of the boundary to the north or south of the island would naturally determine the status of the island itself, while a decision on the status of the island would involve a determination as to which branch of the Chobe River (the northern or southern arms respectively) marked the boundary between the two claimant States.

The formulation used raises the interesting question as to whether the case could be characterised as either one concerning boundary delimitation or territorial attribution. The distinction is indeed established in international law and there are significant differences in principle between the two approaches.[5]

The reason for the formulation adopted in the Special Agreement appears to lie in a compromise between the parties. While both States accepted that the 1890 Treaty was determinative, Namibia clearly wished to introduce into the equation the conduct of the Masubia tribe from the eastern Caprivi Strip, which in its argument was an important alternative basis of its claimed title. By characterising the dispute as a territorial one (i.e. concerning the legal status of the island), it was no doubt hoped to

4. *Ibid.*, paras.13–16.

5. See, for example, Shaw, "The Heritage of States: The Principle of *Uti Possidetis Juris* Today", 67 B.Y.I.L., 1996, pp.75, 79, and Kohen, *Possession Contesté et Souveraineté Territoriale*, 1997, pp.119 *et seq.* See also the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp.3, 32; the *Libya/Chad* case, ICJ Reports, 1994, pp.4, 15, and the *Burkino Faso/Mali* case, ICJ Reports, 1986, pp.554, 563.

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facilitate the introduction of prescriptive evidence.[6] This approach is to be seen in the submissions presented by Namibia to the Court.[7] Botswana by contrast submitted that its contention as to the boundary in the river was in accordance with the 1890 treaty and that "consequently" sovereignty in the island lay exclusively with it.[8]

The issue as to the scope of the dispute was tackled by the Court as part of the applicable law issue. The question put to the Court asked for the determination of the dispute "on the basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law".[9] This dual expression of the relevant applicable law bore a close relationship to the question as to the scope of the dispute in that the reference to the rules and principles of international law was deemed by Namibia to open the way to its prescriptive claim.[10] Botswana, on the other hand, argued that the purpose of the Special Agreement was to obtain from the Court "determination of the boundary solely on the basis of the 1890 Treaty" and took the view that arguments relating to prescription and acquiescence were not included in the scope of the question submitted to the Court.[11] However, Botswana was not able to convince the Court that the reference to "rules and principles of international law" in the Special Agreement was "pleonastic".[12]

The Court emphasised that the reference to the Anglo-German Treaty of 1890 as a basis for determination of the dispute submitted would in any event have entitled it to "apply the general rules of international treaty interpretation" so that the additional reference to "rules and principles of international law" must signify something beyond this. When taken with the provision in article III of the Special Agreement defining the phrase as the rules and principles laid down in Article 38, paragraph 1 of the Statute of the Court, it was clear that Botswana's restrictive interpretation could not be sustained. The Court concluded that the parties therefore had no

6. See further *infra* p.975.

7. Point 3 of Namibia's submissions presented in its Memorial, Counter-Memorial and Reply (the latter being repeated at the oral hearings) declared that "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", Court's judgment at para.9.

8. *Ibid.* Note that this approach was addressed in some detail by Judge Oda, who took the view that the parties had changed their approach to the dispute apparently from the time of the conclusions of the Joint Team of Technical Experts. A dispute which had been one concerning the determination of a boundary became instead an issue as to the legal status of the island, see Separate Opinion, paras.9 *et seq.*

9. The latter expression was defined in article III of the Special Agreement as "those set forth in the provisions of article 38, paragraph 1, of the Statute of the International Court of Justice", Court's judgment at para.19.

10. *Ibid.*, para.90.

11. *Ibid.*, para.91.

12. *Ibid.*

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intention of confining the rules and principles of international law applicable to the case solely to those relating to treaty interpretation so that it was not precluded from examining Namibia's arguments relating to prescription.[13]

This is clearly right as a matter of textual interpretation and is also consistent with the scope of the dispute as laid down in the Special Agreement. While a boundary determination could be made by reference exclusively to the treaty in question, the territorial issue raised (the legal status of the island) inevitably required the Court to consider those international legal rules and principles relative to territorial status. However, it should be noted that State practice could be relevant both in the context of treaty interpretation and in the formation of title by prescription.[14] In such matters, the key issue is the relevant starting-point and here it is right and inevitable that the treaty constitutes the point of departure and that other relevant rules of international law operate upon that chronological priority so that in this sense the burden of proof rests upon those seeking to demonstrate that other rules and principles of international law have modified the treaty provision. It is true, of course, that subsequent practice may operate as a mechanism of treaty interpretation but this is a separate point and would in any event constitute a principle inherent in consideration of the treaty itself.[15]

## III TREATY INTERPRETATION

The essence of the case concerned the interpretation of the 1890 Treaty, including the nature and role of subsequent practice.

### *1. The Principles of Treaty Interpretation*

The Court reiterated the centrality of Article 31 of the Vienna Convention on the Law of Treaties 1969. This provision was binding on the parties (neither of which were parties to the Convention itself) as reflecting customary international law,[16] a position already affirmed by the Court in earlier cases.[17] The Court, therefore, proceeded to interpret

13. *Ibid.*, para.93.

14. But cf. Judge Oda's view at para.10.

15. Judge Kooijmans in his Separate Opinion took what may be termed an intermediate position. He declared that the Special Agreement precluded the Court from applying the rules and principles of international law "independently of the Treaty", at para. 11. He noted that the Court could only have answered the question as to the legal status of the island independently of the first question if it had concluded that the terms of the treaty could not possibly be interpreted in a meaningful way or that the parties to the treaty by their conduct had indicated that the terms of the treaty had "lost their relevance", *ibid.*, para.13.

16. Court's judgment, para.18.

17. See, for example, the *Libya/Chad* case, ICJ Reports, 1994, pp.4, 21, and the *Oil Platforms* case (preliminary objections), ICJ Reports, 1996, p.812.

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the provisions of the 1890 Treaty by applying the rules of interpretation contained in the Vienna Convention 1969. The essence of these rules was contained in the statement by the Court in the *Libya/Chad* case, and repeated in the Court's judgment in the present case, 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.[18]

Judge Oda, however, took exception to the role deemed by the Court to be played by the Vienna Convention. He declared that the judgment placed "excessive reliance" upon the Convention and went further by noting that "This case does not appear to me to be one related to the application of the Vienna Convention". The reason for this approach was that the Convention only applied, by virtue of Article 4, to treaties concluded by States after the entry into force of the Convention, i.e. 1980. However, Judge Oda accepted that the Vienna Convention reflected customary law.[19] This approach raises an important temporal issue. Does one interpret pre-1980 treaties to which the Vienna Convention as such cannot apply in the light of the customary law as at the date of the treaty to be interpreted or in the light of contemporary customary law? Of course in many instances these will be the same, but would an investigation into the customary law of 1890 thereby be necessitated? To accept this would complicate matters considerably since many international disputes turn to some extent at least upon treaty interpretation issues. It is preferable by far to accept that the Vienna Convention codified customary law (at least in this respect if not in all) and apply that customary law to treaties adopted prior to 1980. To do otherwise might indeed jeopardise the codification achieved in 1969. The temporal issue in other guises will be noted in the following sections.

### 2. *The Process of Textual Interpretation*

The process of textual interpretation, like the issue of the applicable law in a case, will often entrain consideration of the temporal factor. But the temporal factor should not be confused with the specific issue of the "critical date" as this has evolved in international law. The temporal factor may arise in considering the extent to which post-treaty factors of various kinds can and should be used in attempting to understand the meaning of the treaty provision in question. The notion of the critical date in its more traditional sense relates to the attempt to determine whether

18. ICJ Reports, 1994, pp.21–22, as cited in the Court's judgment, para.20.
19. Separate Opinion of Judge Oda, para.4.

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any given moment or period is so critical with regard to title that it essentially precludes or significantly colours consideration of later events. It is fundamentally an evidential issue.[20]

Article III of the 1890 Treaty, the key provision in question, provided that the sphere of influence line between Great Britain and Germany,[21] in so far as is relevant, ran eastward along the 18th parallel of south latitude "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". Since the river Chobe splits into two branches north and south of the Kasikili/Sedudu Island, the real issue in the case was to determine which of the two branches of the Chobe River constituted the main channel. The treaty itself gave no further assistance and indeed it was clear that such was the state of geographical knowledge available to the contracting parties at the time of the treaty that this was unknown. The question therefore was to determine how the term "main channel" might be understood and which factors needed to be considered in reaching a decision. In so doing, it was clear that the term was not a term of art as such in international law so that finding an "ordinary meaning" for it as required in the law of treaty interpretation was bound to be difficult.

### 3. *The Temporal Factor*

The Court stated that in order to illuminate the words agreed upon in 1890, "there is nothing that prevents the Court from taking into account the present-day state of scientific knowledge, as reflected in documentary material submitted to it by the Parties".[22] The Court cited in support of this proposition a passage in the decision of the Arbitral Tribunal in the *Laguna del Desierto* case where it was noted that to apply the relevant award of 1902 in light of geographical knowledge acquired subsequently would not be equivalent to its revision through the retrospective consideration of new facts.[23] However it should be noted that the Tribunal adopted an exact temporal test with regard to claims made with regard to the territory in question, such claims being strictly limited to those

20. Note that the Court pointed out that in 1984 and 1985, a period when certain issues relevant to the boundary and the application of the 1890 treaty were being considered by Botswana and its neighbour and an agreement was under discussion, "the two States had no competence to conclude such an agreement" since South Africa's mandate over what became Namibia had been terminated, para.69. Since this issue was not essential to its reasoning, indeed the Court stated that it was "unnecessary to add" the point, the fact that it was made is interesting.

21. Note that Judge Weeramantry sought to distinguish spheres of influence treaties and boundary delimitation treaties especially in terms of the argued lack of precision in the former, Dissenting Opinion, paras.94–98.

22. Court's judgment, para.20.

23. 113 I.L.R., pp.1, 76 (para.157).

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actually made at the relevant time (1898–1902) and not those subsequently stated to have been made.[24] Further, the Tribunal made it clear that its conclusions were "founded also on the geographical knowledge of the Parties in 1902" so that it "strictly respected the principle of contemporaneity".[25]

Indeed, the Court itself essentially adopted the temporal test with regard to the question as to the relationship between the English term "main channel" used in the 1890 Treaty and the German term "thalweg". The Court stated that at the time of the conclusion of the treaty, "it may be that the terms... were used interchangeably" and referred to the Draft adopted by the Institut de droit international in 1887 to the same effect.[26]

In the light of such observations, the Court's reference to modern scientific knowledge in interpreting the treaty, carefully expressed though it is, would need as a general principle to be cautiously construed. Judge Higgins drew attention in her Declaration to the problem. She noted that while the application of contemporary knowledge and scientific data to assist in discovering the "ordinary meaning" of a provision in a treaty was not inconsistent with the intertemporal rule in the *Island of Palmas* case, the latter was concerned "with the legal rules applicable to title to territory and not with identification, through the legal technique of evaluating evidence, of a chosen term".[27] Further, she advised that:

> We should not, as the Court appears at times to be doing, decide what *in abstracto* the term "the main channel" might today mean, by a mechanistic appreciation of relevant indicia. Rather our task is to decide what general idea the Parties had in mind, and then make reality of that general idea through the use of contemporary knowledge.[28]

This is not essentially inconsistent with the approach taken by the Tribunal in the *Laguna del Desierto* case. It is also consistent analogically with the view taken by the Chamber in the *El Salvador/Honduras* case to the effect that post-independence practice of the parties "may throw light on the contemporary appreciation of what the situation in 1821 had been, or should be taken to have been".[29]

### *4. Criteria for the Determination of the "the Main Channel"*

The Court examined a range of criteria by "reference to the most commonly used criteria in international law and practice, to which the

24. *Ibid.*, p.49.
25. *Ibid.*, p.56.
26. Court's judgment, para.25.
27. Declaration of Judge Higgins, para.3.
28. *Ibid.*, para. 4. Note that Judge Weeramantry in his Dissenting Opinion declared that "modern scientific criteria are not the indicia appropriate for determining what was commonly understood to be the main channel a hundred years ago", at para.67.
29. ICJ Reports, 1992, pp.351, 559.

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Parties have referred" concerning the definition of the "ordinary meaning" of the term "the main channel".[30] These were the depth, width, bed profile configuration, flow of water and navigability of the channels in question, although the Parties did not agree on the relevance and applicability of several of those criteria. The choice of criteria appears to have been determined by the arguments of the Parties and thus was not controversial in this particular context, but it is worth specially noting Judge Higgins' point that there are no commonly used international law criteria for understanding the term "main channel".[31] If this is so, and it is believed that this is correct, then the Court's judgment can take us little further than the fact that the Parties agreed upon the application of certain criteria. It cannot be taken as an exhaustive list, precluding the introduction of further criteria in any future dispute. Still less can the issue of the respective weight to be assigned to particular criteria be regarded as foreclosed.

The Court concluded in the light of the cited criteria that the northern channel (claimed by Botswana as the main channel and thus the boundary line) was wider and deeper than the southern channel and that the largest part of the bed of the latter was dry for the greater part of the year. The Court also found that the northern channel did not contain any of the meanders deemed so typical of the secondary branches of watercourses whereas the southern channel did show such meanders. Further, the Court took the view that "the 'main channel' in this part of the Chobe is that of the two which offers more favourable conditions for navigation" and this was the northern. Accordingly, the Court concluded that "in accordance with the ordinary meaning of the terms that appear" in the treaty, the northern channel was to be regarded as the main channel.[32]

Four points should be made. First, the issue of proof is raised, not for the first nor for the last time. The Court relied heavily upon scientific criteria, while pointing to the "extensive, often contradictory, information" provided by the Parties' experts.[33] The Court did not feel it necessary to appoint its own experts[34] nor to visit the area in question.[35] Judge Oda, however, felt that the Court should indeed have had recourse

30. Court's judgment, para.27.

31. Declaration of Judge Higgins, para.1. The process adopted by the Court here was found by Judge Higgins to be "somewhat fanciful", *ibid.*

32. Court's judgment, paras.28–41 (paragraph 1 of the dispositif adopted by 11 votes to four, *ibid.*, para.104). Note that the centre of the main channel was deemed to follow the line of deepest soundings, since in response to a question put by a Member of the Court, both Parties accepted that the thalweg (assimilated to the centre of the channel in this case) was formed by the line of deepest soundings, *ibid.*, para.89.

33. *Ibid.*, para.28.

34. See, for example, the *Corfu Channel* case, ICJ Reports, 1949, p.4.

35. Cf., for example, the *Gabčikovo-Nagymaros* case, ICJ Reports, 1997, p.7.

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to its own experts[36] and one can certainly have sympathy with this view. While the Court may have felt that it was able to extract the information necessary for its judgment from the expert advice submitted by the Parties, even if that was often controverted, the time may come when in specialist areas the Court may need to consider seriously appointing its own experts.

Secondly, as noted above, the Court was particularly impressed by the criterion of navigability, which it took as the combined result of the depth, width and volume of water carried by the watercourse in question.[37] It is unclear whether the Court took this view as a matter of general principle concerning watercourses or was influenced by the fact that the issue of navigation was an important factor for Germany and Great Britain at the time of the conclusion of the treaty since the reason for the existence of the Caprivi Strip as such was to enable the former power to have access to navigation routes to the Zambezi (something which indeed proved to be geographically impossible).[38] However, in so emphasising the relative importance of navigability, the Court took pains to minimise the significance of navigation by flat-bottomed tourist boats in the southern channel since their presence was attributable to "the spectacle of large wild animals and the wealth of fauna on the banks of the southern channel. The economic importance of tourism in the southern channel does not alter its conditions of navigability".[39]

The third point to note was the consideration of the importance of the only distinctive topographical feature in the area, i.e. the Chobe Ridge on the right bank of the southern channel. This was emphasised by Namibia as a significant feature. The Court, however, was unconvinced of its relevance,[40] although Judge Higgins noted that the Ridge "could be said to play an important role in marking a clearly visible frontier".[41] The Chamber of the Court has previously held that distinctive topographical features may be taken into account in determining an identifiable boundary, but only where the relevant instruments give no clear and

36. Separate Opinion, paras.32, 43 and 61.

37. *Ibid.*, para.40.

38. *Ibid.*, para.44. The Court in discussing the object and purpose of the treaty concluded that there were two essential factors in question. The first was the navigation issue and the second, deemed the more important in fact, was the need to delimit as precisely as possible their respective spheres of influence, *ibid.*, paras.44–45. The Court felt that such conclusions were supported by the *travaux préparatoires* of the treaty, *ibid.*, para.46.

39. *Ibid.* Judges Higgins and Weeramantry felt that little if any importance should be accorded to navigability, Declaration of the former, para. 6 and Dissenting Opinion of the latter, para.53. By way of contrast Judge Fleischhauer felt that it was an important factor, Dissenting Opinion, para.7.

40. Court's judgment, para.38.

41. Declaration, para.9. See also the Dissenting Opinion of Judge Fleischhauer, para.6.

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unambiguous indication of the boundary in question[42] and this is surely correct.

Finally, Judge Higgins emphasised that "a considerable importance has thus to be given to the visible physical distinctions between the two channels" since "emphasis should be given to the main, and still realistic, desire of the Parties to choose the channel that would most clearly mark the limits of their interests". In the light of this appreciation, the Chobe Ridge was important, but more significant was the fact that "year around ... it is the north that appears in the aerial photography and satellite imagery to be the broader and more important channel".[43] This may be linked with the view of the Court that the hydrological situation of the Chobe around Kasikili/Sedudu Island had not radically changed since the date of the conclusion of the 1890 Treaty[44] in order to close the temporal circle. This "common-sense" approach to determining the main channel, a term which has no specific meaning in international law, has much to commend it.

### 5. *Subsequent Practice*

The Court devoted considerable space in its judgment to examining whether practice subsequent to the treaty impacted upon its interpretation. Article 31(3) of the Vienna Convention provides that there shall be taken into account "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" and "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". The Court in particular examined three sets of documents relied upon by Botswana.

The Eason Report of 1912 prepared by an officer of the Bechuanaland Protectorate[45] Police noted that "undoubtedly the North should be claimed as the main channel".[46] In January 1948 a report was produced by Major Trollope (an official in the Caprivi Strip) and Mr Redman (at the time District Commissioner at Kasane, Bechuanaland). This Report concluded that "We express the opinion that the 'main channel' lies in the waterway which would include the island [Kasikili/Sedudu Island] in question in the Bechuanaland Protectorate".[47] The Court made a number of observations as a result of this Report and the ensuing subsequent activity. It noted *inter alia* that while on the basis of maps available at the time the boundary had until the time of the Report been supposed to be

42. See the *El Salvador/Honduras* case, ICJ Reports, 1992, pp.351, 390.
43. Declaration, paras.8–9.
44. Court's judgment, para.31.
45. The colonial territory which became Botswana upon independence.
46. *Ibid.*, paras.52–53.
47. *Ibid.*, paras.56–57.

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located in the southern channel of the Chobe, the Report concluded that after examination of the terrain and of an aerial photograph the main channel was the northern channel. The Court also pointed out that South Africa (acting as the mandatory power over South-West Africa) laid claim to the island and that for a number of reasons it was decided to shelve the legal differences and continue on the basis of the *status quo ante*, which allowed for free access to the northern channel and use of the island by Caprivi tribesmen.[48]

The third item of subsequent practice put forward by Botswana concerned a joint survey carried out at the beginning of July 1985 at the behest of the Botswana and South African authorities. The survey concluded that the main channel of the Chobe passed to the north and west of Kasikili/Sedudu Island, but the subsequent discussions between the parties showed a lack of agreement as to the status of this survey. The Court concluded that the parties had in fact agreed on nothing more than the despatch of the joint team of experts.[49]

In all three cases, the Court emphasised that there had been no agreement between the parties. The Eason Report was apparently never made known to Germany and remained internal. It was never taken any further by the British Government.[50] The Trollope-Redman Report and succeeding events demonstrated only, according to the Court, that there was an absence of agreement between South Africa and Bechuanaland regarding the location of the boundary and the status of the island.[51] The events in 1984–1985 also demonstrated a complete absence of agreement, quite apart from South Africa's lack of competence in the matter following the termination of its mandate.[52] In none of the cases had the events in question demonstrated the "agreement of the parties" regarding the interpretation of the treaty required by Article 31(3).

Thus far, the Court's approach is clearly understandable and correct.[53] The Court, however, while holding that the surveys carried out in 1912, 1948 and 1985 respectively could not amount to subsequent practice in the context of treaty interpretation, decided that they did amount to "factual findings" identifying the main channel of the Chobe as the northern channel, findings which were not disputed at the time and which "support the conclusions" the Court had reached by the process of textual interpretation.[54] This is more controversial, particularly as the techniques

48. *Ibid.*, para.62.
49. *Ibid.*, paras.64–68.
50. *Ibid.*, para.55.
51. *Ibid.*, para.63.
52. See *supra*, p.968.
53. But see the Separate Opinion of Judge Oda who regards the practices in question as a "decisive factor enabling the Court to determine the boundary between the Parties along the northern channel", paras.38 and 59.
54. *Ibid.*, paras.42 and 80.

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used by the persons concerned at those times were not clearly explained and may not have matched the methodological rigour of some of the scientific data submitted by the Parties.[55] Further, the surveys were not in all cases carried out by scientists as a scientific enterprise. The Court also used the surveys as evidence supporting its view that the presence of Masubia tribesmen on the island was not such as to impact upon its interpretation of the 1890 Treaty.[56] It is perhaps problematic for the Court to accept "facts", the legal consequences of which were not accepted by both the relevant parties, as supportive of legal conclusions reached by the Court. It also contrasts interestingly with the treatment by the Court of maps.[57]

### 6. *Maps*

The Court addressed the question of the probative value of maps discussed in the *Burkina Faso/Mali* case, where the Chamber had concluded that maps may acquire legal force for the purpose of establishing territorial rights only where they constitute the physical expression of the will of the State or States concerned, most obviously where maps are annexed to an official text of which they form an intrinsic part. Otherwise, "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".[58]

The Court noted that there was no official boundary map appended to the 1890 Treaty, thus the evidential value of the maps submitted by the Parties was uncertain. The Court accepted that "the early maps of the region placed the boundary around Kasikili/Sedudu Island in the southern channel of the Chobe",[59] but noted that there was no indication that the placement of the boundaries in such maps (particularly a 1933 Bechuanaland map and a 1949 South African map) was meant to be in accordance with Article III, paragraph 2 of the 1890 Treaty. Instead the Court felt that the placement of the boundaries in such maps reflected the

55. See, for example, the Declaration of Judge Higgins, para.7.

56. Court's judgment, paras.74 and 98.

57. See *infra*, p.965. The Court dismissed the Namibian argument that members of the Masubia tribe from the eastern Caprivi Strip had a "continued presence" on the island at least between 1890 and the late 1940s such as to form part of a German system of "indirect rule" occasioning no protest from the Bechuanaland authorities. The Court held that such presence was intermittent and unconnected with any Caprivi territorial claims. It was noted that it was not uncommon for inhabitants of border regions in Africa to cross borders for agricultural and grazing purposes without there being any issue of territorial title. In addition, the required "agreement" element of subsequent practice in the context of treaty interpretation was not satisfied and the Court thus concluded that the peaceful and public use of the island by the tribesmen did not constitute subsequent practice within this framework, paras.71–74.

58. ICJ Reports, 1986, pp.554, 586. See Court's judgment, para.84.

59. *Ibid.*, paras.74 and 85.

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use of the island by the Masubia tribesmen, a fact that had been rejected as evidence of subsequent practice with regard to the treaty.[60] This may be seen as a further move away from the significance to be attached to maps (other than those officially annexed to treaties).

While it is true that cartographic evidence should be handled "with great delicacy",[61] one should be wary of dismissing too easily the probative value of maps produced by the parties to a territorial dispute.[62] The Court appeared to analyse the maps in question in terms of subsequent practice within the context of treaty interpretation in a narrow sense in that specific reference to the treaty would have been required, a general perception as to where the boundary was believed to have been situated according to such maps being seen apparently as insufficient.[63] Maps produced after Botswana's accession to independence showed greater variation than those produced beforehand, but one wonders whether this has equal probative significance.[64] The Court held that in the light of the absence of official maps reflecting the intention of the parties to the treaty, or of maps demonstrating express or tacit agreement as to the boundary, and in the light of the uncertainty and inconsistency of the cartographic material generally, it was unable to draw conclusions from the map evidence produced by the Parties.[65]

## IV PRESCRIPTION

Namibia argued, in the alternative, that it had prescriptive title to the island in the light of "continuous and exclusive occupation and use of Kasikili Island and exercise of sovereign jurisdiction" coupled with the "full knowledge, acceptance and acquiescence" of Bechuanaland and Botswana.[66] This related to the activities of the Masubia. The Court proceeded rather cautiously, noting that it need not concern itself with the status of acquisitive prescription in international law or with the conditions for acquiring title to territory by prescription. It simply concluded that the conditions for a prescriptive title put forward by

60. *Ibid.*, para.85.

61. The *Eritrea/Yemen (Phase One: Territorial Sovereignty and Scope of the Dispute)*, 114 I.L.R., pp.1, 100. The view of Lord Salisbury that "the constant study of maps is apt to disturb men's reasoning power" is perhaps exaggerated, see Dissenting Opinion of Judge Parra-Aranguren, para.6.

62. As to the value of maps produced by third States, see the *Eritrea/Yemen (Phase One)* case, 114 I.L.R., pp.1, 98.

63. Note that Judge Oda adopted a more stringent position as to maps, paras.39–41. See also the Dissenting Opinion of Judge Parra-Aranguren, para.77 cf. the Dissenting Opinions of Judge Weeramantry, paras.72–76, and Judge Rezek, para.10.

64. Court's judgment, paras.86–87.

65. *Ibid.*, para.87. This is to be contrasted with the attitude adopted by the Court with regard to the three surveys which while not constituting subsequent practice nevertheless contained factual findings which supported the Court's conclusions, see *supra* p.974.

66. *Ibid.*, paras.90 and 94.

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Namibia itself were not satisfied.[67] Of course by analysing Namibia's claims in the light of the criteria put forward by it, the Court was in effect adopting such criteria. One must assume that had the Court felt that Namibia's list omitted a crucial condition or included a condition that would have the effect of contradicting existing international law principles, the omission or error would have been noted. Otherwise the possibility existed that the Court may have accepted a prescriptive title by Namibia based upon conditions that did not fully accord with international legal principles as seen by the Court.

In fact, Namibia's conditions are a fair reflection of international practice in requiring the possession to be *à titre de souverain*; peaceful and uninterrupted; public; and enduring for a certain length of time.[68] The Court did not feel it necessary to discuss the conditions in detail,[69] coming to the view rather swiftly in the light of its previous conclusions concerning the Masubia that it had not been established "with the necessary degree of precision and certainty" that the members of this tribe occupied the island *à titre de souverain*, that is that they were exercising functions of State authority there on behalf of those authorities.[70] None of the judges dissented from this point of view.[71]

The Court therefore concluded in the second paragraph of its *dispositif* and by 11 votes to four that Kasikili/Sedudu Island formed part of the territory of Botswana, having first decided by the same margin that the boundary between the Parties followed the line of deepest soundings in the northern channel of the Chobe.[72]

## V FREE NAVIGATION

The Court in the final paragraph (paragraph 3) of its *dispositif* declared unanimously that "in the two channels around Kasikili/Sedudu Island, the nationals of, and vessels flying the flags of, the Republic of Botswana and the Republic of Namibia shall enjoy equal national treatment".

67. *Ibid.*, para.97.

68. *Ibid.*, para.94. See also Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., 1992, pp.706–708.

69. Judge Fleischhauer held that the Court should have added that South Africa could not have acquired title by prescription (prior to the termination of the mandate in 1966) since it was a mandatory rather than a sovereign power in the territory, para.11.

70. Court's judgment, paras. 98–99. Note that Judge Kooijmans was of the view that Namibia's alternative submission should have been declared inadmissible, para.20, while Judge Weeramantry felt that although the activities in question appeared not to have amounted to the level apparently required for a prescriptive title, the lack of protest by Botswana was relevant, para.35. See also the *Eritrea/Yemen (Phase One)* case, 114 I.L.R., pp.1, 69.

71. Judge Kooijmans did raise the question as to what the position of the Court would have been had a prescriptive title been found and one that was in contradiction to the treaty as interpreted, Separate Opinion at para.19.

72. Court's judgment, para.104.

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This interesting development was based upon the terms of the Kasane Communiqué of 24 May 1992, by which the Parties resolved to settle the dispute peacefully. It was provided that "navigation should remain unimpeded including free movement of tourists". This approach was reiterated by Botswana during the oral hearings.[73] The Court, noting that by the Special Agreement it was empowered to determine the legal status of the island, expressly relied upon these factors to conclude that the Parties had undertaken to one another that there should be unimpeded navigation in the channels of the island.[74] It may be possible to conclude that Botswana's statements to the Court amount to binding unilateral acts,[75] but the reference to the Kasane Communiqué is more problematic. Two approaches have been put forward here. Judge Kooijmans regarded the undertakings in the Communiqué as being indissolubly linked to the Parties' decision to determine the boundary, first by a Joint Team of Technical Experts and subsequently by the Court. Thus, in carrying out its task, the Court "can and must consider the Special Agreement in its context together with the surrounding statements and circumstances".[76] Judge Fleischhauer, on the other hand and it is believed more persuasively, derived the jurisdiction of the Court in this instance from Article I of the Special Agreement itself and the requirement to determine "the legal status" of the island, which he interpreted as including the legal status of the waters around the island.[77] Whether one adopts a broader approach to the terms of the Special Agreement itself or interprets the agreement in the light of its broader context, the approach adopted here unanimously by the Court is likely to prove an influential and imaginative way forward in similar situations.[78]

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73. *Ibid.*, para.102.
74. *Ibid.*, para.103.
75. See generally *Oppenheim's International Law*, *op. cit.*, pp.1190–1192.
76. Separate Opinion, para.22.
77. Dissenting Opinion, para.10.
78. It also mirrors interestingly the conclusions of the Tribunal in the *Eritrea/Yemen* awards of 1998 and 1999. The Tribunal in the award on Territorial Sovereignty (1998) held that its finding of sovereignty over the islands in question entailed "the perpetuation of the traditional fishing regime in the region ... [including] free access and enjoyment for the fishermen of both Eritrea and Yemen", 114 I.L.R., pp.1, 137. This approach was reiterated and developed in the award on Maritime Delimitation of December 1999, see at para.87 *et seq.*

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