DISSENTING OPINION OF VICE-PRESIDENT WEERAMANTRY

Article 31 of Vienna Convention on the Law of Treaties — Meaning of terms "subsequent practice" and "agreement" in Article 31, paragraph 3 (b) *— Silence and non-protest as indicia of assent — "Common understanding" — Ambivalence of scientific criteria — Navigability as a criterion — The thalweg concept — Cartographic evidence — Equitable navigational use of boundary river — Conclusion regarding "main channel" or* "Thalweg des Hauptlaufes" *in 1890 Treaty.*

Boundary delimitation involving dismantling or division of ecologically or culturally integral unit — Biodiversity Convention — Scope for equity in boundary delimitation — "Spheres of influence" treaties distinguished from boundary treaties — Joint international régimes — Need for international law to be responsive to environmental concerns.

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1. The Court has analysed and assessed with great care the vast amount of historical and diplomatic information placed before it. Upon a detailed consideration of all this material, the Court has arrived at the conclusion that the northern channel of the River Chobe constitutes the international boundary between Botswana and Namibia, in terms of Article III (2) of the 1890 Treaty between Germany and Great Britain.

2. A cardinal feature in this complex of information is the long continued Masubian use and occupation of Kasikili/Sedudu Island from a period prior to the 1890 Treaty for upwards of half a century thereafter. Namibia uses this information for two distinct purposes. It argues that the conduct of both administrations in reference to this use and occupation corroborates its interpretation that Article III (2) of the Treaty refers to the southern channel[1]. It also argues that such use and occupation establishes an entirely independent Namibian prescriptive claim to sovereignty over the Island[2].

The entirety of this opinion concentrates on the first of these Namibian bases of claim.

3. On the central question of the legal significance of this use and occupation, I incline to a somewhat different approach to that adopted by the Court. This leads me to a different conclusion regarding the international boundary.

My reasons for concluding that the southern channel constitutes the international boundary are set out in Part A of this opinion.

4. Part B of this opinion deals with a different set of concerns.

Since my finding places Kasikili/Sedudu Island within the territory of Namibia, while the Chobe Game Park to the south falls within the territory of Botswana, it positions within two territorial jurisdictions what is essentially a single wildlife sanctuary — a sanctuary, moreover, which is one of the most prized wildlife habitats in southern Africa.

5. The Island is frequented, as far as one can gather from the pleadings, by a rich variety of wildlife. Elephant, hippopotamus, buffalo, lechwe, rhinoceros, giraffe, eland, baboon, lion, zebra, leopard, and fish eagle either frequent the Island or visit it from time to time. As the Island, together with the Chobe Game Park to the south, forms the natural habitat of this wildlife, my conclusion that the Island falls within the territorial jurisdiction of Namibia necessitates a consideration of the environmental principles drawn in by such a finding, without which this opinion would be incomplete. One of these is the principle of joint

[1] Memorial of Namibia, p. 10, para. 32.
[2] *Ibid.*, para. 33.

régimes, a matter peripherally involved in the Court's stipulation of equal access to the navigational use of the river. However, my finding necessitates a more detailed examination of this concept, which the Court has so far-sightedly incorporated in its Judgment.

6. Thus, on the one hand, this case transports us back to the age of empire-building in Africa, and requires us to re-enter the time frame of that era in order to understand what Britain and Germany had really agreed upon when dividing the relevant African territories between them. On the other hand, it raises issues which project us into a vital new area of international law, the rapid development of which will be a feature of the international law of the future.

PART A

Introduction

7. This case turns upon the interpretation of Article III (2) of the 1890 Treaty between Germany and Great Britain. The sphere in which the exercise of influence is reserved to Germany is described as bounded by a line which runs 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 the junction of the Zambezi" (emphasis added). The German version of the Treaty uses the term *"Thalweg des Hauptlaufes"* for the English words italicized.

8. Problems arise in this case because of the bifurcation of the River Chobe into two channels which run to the south and the north of the disputed Island and reunite thereafter. The legal ownership of the Island would depend on whether the northern or southern channel is considered to be the main channel. If the northern channel is the main channel, the Island would fall within the territorial jurisdiction of Botswana, while a determination that it is the southern channel would bring it within the jurisdiction of Namibia.

A central question therefore is the interpretation of the italicized English and the corresponding German expressions. Are they synonymous and, if they have different connotations, how does one interpret this clause?

9. I am inclined to the view that the German terms were intended to be synonymous with the English expression "centre of the main channel". Yet, the German word "thalweg" often carries additional technical connotations as well. However, whether one reads the two expressions as synonymous or whether one gives the word "thalweg" a different and special connotation, it seems to me, for reasons which will be amplified later, that they point in the direction of the southern channel being the boundary indicated by the Treaty.

10. Since the terms used are not so explicit as to point definitively to one or the other channel of the river, it becomes necessary to derive assistance from such aids to interpretation as are permitted by the law relating to treaties. Inasmuch as the cardinal question involved is how the boundary was understood by the parties or their agents in the context of the period of the Treaty, i.e., 1890 and the years immediately succeeding, there is invaluable assistance to be derived from the way in which the authorities on both sides regarded the regular Masubian crossings of the northern channel. These movements occurred regularly for over 50 years after the Treaty, without the faintest suggestion from either side that they involved the crossing of an international boundary.

11. After outlining the relevant rules of treaty interpretation and the legal significance, in that context, of the Masubian use and occupation of the Island, I shall consider the implications of the phrases used in the Treaty, and the ambivalence of the other criteria that have been suggested for determining what is the main channel.

General Approach to Questions of Interpretation Arising in This Case

12. The first stage of any exercise in treaty interpretation is to interpret the words according to their ordinary meaning. Even at this initial stage, the task is complicated by the fact that the expressions used may carry a legal meaning and a scientific meaning as well. The normal rule of interpretation of documents that words are to be interpreted according to their ordinary meaning is naturally modified if those words also bear a technical meaning in the context in which they are used.

13. This case presents a classic instance of what the law relating to treaties would class as a situation where the ordinary or indeed the legal and scientific meaning of the words used leaves one in considerable doubt as to the correct interpretation. Either interpretation — that which regards the northern channel as the main channel or that which regards the southern channel as the main channel — can be supported by a wealth of scientific and circumstantial data, based upon different criteria such as breadth, depth and volume, which have no necessary ranking order among them. While not discounting the high scientific and technical expertise of the experts who have been called before the Court by both Parties, it is necessary to note that there is a limit to the assistance they can give in the determination of the question which is the main channel of the Chobe River.

14. Since the matter thus remains unclear, another basic rule of interpretation is called into play, permitting a court to look further into the way in which the parties or their agents in fact acted upon the document. Parties know best in what sense they used any particular words and, espe-

cially in the case of an old or ancient document, this helps the modern interpreter considerably.

15. In this opinion, I shall place particular emphasis on this approach, as the words used are capable of more than one construction, whether viewed according to the ordinary meaning of the words used, or according to their legal or technical meaning. Since the document we are considering is over a hundred years old, the way in which the document was understood at the time is clearly a powerful aid to its interpretation.

16. In determining this rather obscure question so long after the date of the Treaty, it must be acknowledged that the meaning we are searching for must have been much more apparent to those dealing with it closer to the time. Who better than they would know which of the two channels was considered at the time of the Treaty to be the main channel?

17. I am not, in this context, directing my attention to Namibia's alternative claim of prescriptive occupation of Kasikili/Sedudu Island, in the years immediately following the Treaty. I am here concerned, rather, with determining what would be a reasonable construction of the ambiguous expression "main channel", having regard to the conduct of those who were closest in time to the Treaty. In the crucial period immediately following the Treaty, how was it acted upon by those who were closest not only in time, but also in fact, to its practical operation?

It is apparent that there could not have been an implementation of the terms of the Treaty in the period immediately following the Treaty, in a manner which ran contrary to the sense of the two administrations as to what the Treaty meant.

18. I may add that contemporaneous conduct in relation to the Treaty is especially important in this case in the light of the fact that observations regarding the various qualities of the river — whether they be breadth or depth or volume of flow — can vary considerably over a period of a hundred years, and could depend very much on the time of observation, be it the wet season, the dry season or any other. The sense in which the Treaty was understood contemporaneously is the best index to what was actually intended, and any search for clarification of the terms used must focus intensely on this aspect.

Article 31 of the Vienna Convention

19. This brings me to a consideration of Article 31, paragraph 3 *(b)*, of the Vienna Convention, which has been the subject of detailed written and oral submissions by both Parties. Namibia has contended that it refers to "any subsequent practice . . . which establishes the *understand-*

ing of the parties regarding its interpretation"[3], and that it therefore extends to conduct that takes the form of silence or inaction.

20. Botswana has resisted this contention[4], arguing that the Court should be cautious in the face of this suggestion, and that the meaning of the word "agreement" should not be thus watered down. Botswana has also argued that:

> "In the present case the whole point is that the acts alleged to constitute relevant acts of jurisdiction by Namibia are intended to constitute an independent source of title, that is, on the basis of prescription."[5]

21. This submission does not accord with the submission of Namibia that it was relying upon this evidence for a twofold purpose. The establishment of prescriptive title through this evidence was only one of them.

The other, on which I concentrate in this opinion, was the question whether the silence or inaction of Botswana and its predecessors, in the face of regular use and occupation of the Island by the Masubian people, is evidence of an understanding of the Parties that the boundary referred to in the Treaty was the southern and not the northern channel.

22. Since the question before us is what the main channel was considered to be over a century ago, and since modern scientific evidence was not available then, one must turn to contemporaneous indicia. People living in the vicinity of the river, as well as those who had administrative authority over the area, would have had a far better understanding as to which was considered to be the main channel for practical purposes. The conduct of colonial officials, in particular, in relation to matters involving the boundary, would give us a valuable insight into the contemporaneous view as to which channel constituted the boundary. Here is a practical indicator of the Parties' understanding of the Treaty, which cannot be discounted or ignored. Indeed, it would seem strange, if not unrealistic, to give to the Treaty a meaning which does not accord with the contemporaneous understanding of the Treaty by the very officials who were called upon to administer it.

23. I accept Namibia's submission that the word "agreement" in Article 31, paragraph 3 *(b)*, of the Vienna Convention can be read in the sense of "understanding", and can therefore cover silence and inaction as

[3] Memorial of Namibia, Vol. I, p. 65, para. 177 (emphasis supplied).
[4] Counter-Memorial of Botswana, Vol. I, p. 84, para. 238.
[5] CR 99/13, p. 57.

well. This view derives support not only from the general law relating to the interpretation of documents, but also from the *travaux préparatoires* of the Convention[6]. In paragraph 49 of its Judgment, the Court likewise gives its support to the view that the Parties' understanding of the Treaty is the basis for the importance of subsequent practice.

24. The substitution of the word "agreement" for the word "understanding", which was contained even in the International Law Commission's penultimate draft, occurred in the context of bringing the English text into line with the French, Russian and Spanish texts[7]. The word "agreement" in the Convention bears a meaning analogous to the French and Spanish *"accord"* or *"acuerdo"*, respectively, and does not therefore rule out an understanding which may not be couched in the form of a verbal agreement[8]. In the words of Sir Humphrey Waldock:

> "The word 'understanding' was chosen by the Commission instead of 'agreement' expressly in order to indicate that the assent of a party to the interpretation may be inferred from its reaction or absence of reaction to the practice."[9]

The French and Spanish versions used the words "accord" and "acuerdo", which themselves do not necessarily bear the meaning of an agreement expressly made in so many words[10]. The word "agreement" in Article 31, paragraph 3 *(b)*, of the Convention must not therefore be interpreted to be restricted to a verbal agreement. It could include an understanding manifested by conduct.

25. What has to be taken into account together with the context is "any subsequent practice in the application of the treaty establishing the

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[6] See the remarks of the Special Rapporteur, in discussing the comments by governments on the ILC Draft, 1964, that the ILC intended that evidence of subsequent practice indicating a "common understanding" should be taken as an "authentic interpretation comparable to an interpretative agreement" (*The Vienna Convention on the Law of Treaties, Travaux Préparatoires*, Dietrich Rauschning, ed., 1978, p. 247, para. 18).

[7] See *United Nations Conference on the Law of Treaties, First Session, 26 March-24 May, 1968*, 1969, p. 442, para. 29.

[8] Indeed, English speaking delegations appeared content with the word "understanding". Thus Australia and the United States had introduced an amendment which, while retaining the words "understanding", sought to introduce the word "common" before it (*United Nations Conference on the Law of Treaties, supra*, p. 442, para. 32).

[9] H. Waldock, doc. A/CN.4/186 and Add.1-7, "Sixth Report on the Law of Treaties", 2 *International Law Com.* (1966), p. 99.

[10] See *Le Grand Robert de la Langue Française*, 1992, defining "accord" as "État qui résulte d'une conformité ou d'une communauté de sentiments, de pensées, de volontés"; María Moliner, *Diccionario de uso del español*, 1988, defining "acuerdo" as "conformidad de pareceres entre dos o más personas".

understanding of the parties regarding its interpretation"[11]. I refer also to the *Beagle Channel* Arbitration where the Court of Arbitration observed:

> "The Court cannot accept the contention that no subsequent conduct, including acts of jurisdiction, can have probative value as a subsidiary method of interpretation unless representing a formally stated or acknowledged 'agreement' between the parties. The terms of the Vienna Convention do not specify the ways in which 'agreement' may be manifested."[12]

The ample jurisprudence of this Court relating to subsequent practice[13] also shows that "the way in which the parties have actually conducted themselves in relation to the treaty affords legitimate evidence as to its correct interpretation"[14].

26. For the purposes of the case before us, the words "any subsequent agreement" seem to me to refer to any consensus or common understanding in regard to how the words in question are to be viewed. The word "agreement" here is not restricted to a subsequent agreement in the sense of a fresh verbal *agreement* superimposed upon the original. It also embraces a *consensus* or *common understanding*, as shown by conduct, regarding its interpretation or application. Such conduct can take the form of action or inaction, affirmation or silence. I uphold the Namibian contention in this regard, and do not think it waters down the meaning of the term "agreement", as Botswana contends.

27. In other words, what we are looking at is not a variation of the Treaty by another *agreement*, but a consensus or common understanding between the Parties (as manifested by conduct, which may include action or inaction) as to how the words of the Treaty were interpreted and acted upon. In the words of Sir Gerald Fitzmaurice:

> "conduct usually forms a more reliable guide to intention and purpose than anything to be found for instance in the preparatory work

[11] Ian M. Sinclair, *The Vienna Convention on the Law of Treaties*, 1973, p. 71 (emphasis added).

[12] Case concerning a dispute between Argentina and Chile concerning the Beagle Channel (1977), United Nations, *Reports of International Arbitral Awards*, Vol. XXI, p. 187, para. 169.

[13] See, for example, *Corfu Channel, I.C.J. Reports 1949*, p. 25; *Temple of Preah Vihear, I.C.J. Reports 1962*, pp. 33-35; *South West Africa, I.C.J. Reports 1971*, p. 22; *Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1984*, pp. 408-413.

[14] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. I, 1986, p. 357.

of the treaty, simply because it has taken concrete and active, and not merely verbal or paper, form"[15].

Further, "there is no doubt about the standing of [this] principle, as an independent principle, which, in a proper case, *it may be not only legitimate but necessary to make use of*"[16].

This approach does not involve an attempt to move *away* from the text of the Treaty, as suggested by Botswana[17], but rather an attempt to call in aid the conduct of the parties as a means of understanding the actual terms of the Treaty.

28. I stress, of course, that resort to subsequent practice, as showing contemporaneous understanding of the treaty, can only be had when the ordinary meaning of the words used in the Treaty is not sufficiently clear — as is pre-eminently the situation in the present case. Words so charged with ambiguity as those under consideration here demand the use of supplementary means of interpretation, and contemporaneous understanding ranks high among them.

29. We are not here interpreting or applying a legal concept, in which case intertemporal principles might, in certain cases, attract the meaning that concept bears at the time of interpretation. Rather, we are here examining a question of fact as to which of the two channels was considered by the parties *at that time* to be the main channel. This principle of contemporaneity is one of the important principles of treaty interpretation[18], and is not, I think, given its proper effect by taking into account, as the Court has done, the attitude of the Parties more than 50 years later, when political and other circumstances may well have necessitated a change of administrative policy from that which had been evidenced for the half century immediately following the Treaty.

30. Colonial administrations were specially sensitive, in the period of colonial rivalry, to incursions upon their territory from the territory of another colonial power. This would be expected to be particularly so at the time a treaty is concluded which defines their respective areas. At that time, the administrative authorities in the border regions, even though thinly spread, would be specially on the alert to incidents of use and occupation of the territory which are contrary to their contemporaneous understanding of what the treaty defines. If, indeed, there are such incidents and, as in this case, they are openly conducted, the administrative authorities would naturally register their concern. If, on the contrary,

[15] Fitzmaurice, *op. cit.*, p. 357.
[16] *Ibid.*, p. 359 (emphasis added).
[17] Counter-Memorial of Botswana, Vol. I, p. 85, para. 240.
[18] Fitzmaurice, *op. cit.*, p. 359.

they are aware of significant acts pointing to a particular understanding of the Treaty, and take no steps indicative of a different understanding, the natural conclusion to be drawn from such conduct is that such acts of use and occupation accorded with their contemporaneous understanding of the Treaty.

Indicia of Occupation

31. The use and occupation of this territory by Caprivi residents must be considered in the context of the particular geographical characteristics of the region and contemporary modes of human use and occupation of such territory.

We must not look for indicia of occupation in terms of settled housing or ordered agriculture, burial sites, or schools, for the very nature of this terrain prevented settled habitation in the manner known to Western jurisprudence and tradition. At best there would have been temporary occupation in makeshift huts from time to time as the rains and the climate determined. Such mud huts as there were would tend to be washed away during floodtime, for they were not constructed for permanent occupation. Even agricultural holdings could have been at best of a rather haphazard variety as compared with the holdings one is accustomed to in settled societies. Aerial photographs likewise would not reveal the ordered patterns of cultivation one is accustomed to see in cultivated agricultural land.

Factors such as these must be taken into account in assessing the inferences we could draw regarding Masubian occupation of the Island when the floods of each year had subsided.

32. Quite apart from the flood factor, there may well have been a lack of regularity in Masubian occupation of this territory, as is characteristic of a society which does not follow a regular routine year in and year out. Concepts of settled occupation, in default of which a territory is deemed unoccupied and even *res nullius*, which traditional principles of international law have led us to expect, must consequently be discarded in approaching a case such as the present. One recalls, in this context, judicial observations such as those in the *Legal Status of Eastern Greenland*[19], holding that even slender proof may satisfy a court of the exercise of sovereign rights in cases of thinly populated or unsettled territory, where the other party cannot make out a superior claim.

[19] *P.C.I.J., Series A/B, No. 53*, p. 46.

The Significance of Masubian Use and Occupation

33. Was the Masubian use and occupation of this territory, in the years immediately succeeding the Treaty, an occupation that was merely permissive, under some external authority, or was it resorted to on the basis that the occupiers felt entitled to such occupation without seeking the permission of any external authority?

If the latter was the case, their occupation must be presumed to be occupation under the State of which they were the subjects, rather than under any other State which claimed to have authority over the territory.

34. This approach may have its limitations, as the acts of occupation of the Masubia of the Caprivi Strip were not sovereign acts, but yet such legal benefit as might accrue from them must enure to the benefit of their sovereign authority rather than any other. This would be especially so if the occupation was an organized occupation under their chiefs rather than sporadic acts of occupation by individuals. In fact, the evidence indicates that the tribesmen attached great sentimental value to the Island which was regarded as a seat of chiefly authority, and that such occupation was part of the living tradition of their tribe.

35. Namibia argues that

> "the Masubia of Caprivi had occupied and cultivated Kasikili Island from before the conclusion of the 1890 treaty until well into the second half of the present century and that Namibia's predecessors in title had continuously exercised jurisdiction over the area with the full knowledge of Botswana and its predecessors and without any official objection or protest from them until 1984"[20].

I believe there is no dispute regarding Masubian cultivation of the Island until 1947, allowing for such occasional intervals as were necessitated by climatic conditions. I believe the evidence supports the view that, from 1890 to 1947, such cultivation during the period when the Island was not flooded was a regular feature.

36. Colonial governments depended heavily on chiefly authority at a local level, and the claims and movements of chieftains were not matters of indifference to them.

What do we infer from this?

This may not have been occupation by a sovereign government such as is necessary for the acquisition of title by adverse prescription, though it could come close to such an interpretation. However, it was an occupation of the land of which the administrations on both sides were not

[20] Counter-Memorial of Namibia, Vol. I, p. 40, para. 83.

unaware. If this occupation was in disregard of the 1890 Treaty, one would have expected the Government of Botswana or its predecessors to lodge a protest, or at least to make it clear that the Masubia were there on sufferance. There is no evidence of any such action on Botswana's part.

Contemporaneous Understanding of the Treaty as Evidenced by the Conduct of the Parties

37. For the purpose of assessing the Parties' understanding of the Treaty, I now move on to a consideration of the factual material placed before the Court regarding official conduct on both sides. In doing so, I stress that what is most important to the legal question I am addressing is the common understanding of the two administrations in the years immediately succeeding the Treaty, and not during periods half a century or more after the Treaty.

38. Changes of official attitude that occurred at a later period, e.g., in 1947 or thereafter, throw little light on how the Parties understood the Treaty at the time it was entered into, or shortly thereafter. New policy orientations, and indeed new configurations of political power, may well have intervened half a century or more after the Treaty, having regard to the profound changes that took place in the region. For these reasons, I differ from the Court's conclusion of absence of agreement, based upon events between 1947 and 1951 and, indeed, thereafter[21].

Evidence of Common Understanding

39. In the light of the nature of Masubian occupation, as discussed earlier, I proceed to set out a summary of what can be gathered from the material before us, in regard to the common understanding of the Treaty in the years immediately following it. In doing so, I start with some of the findings of the Court as set out in paragraph 62 of the Court's Judgment.

— Prior to 1947, no differences had arisen between Bechuanaland and the power administering the Caprivi Strip with regard to the boundary in the area of Kasikili Island.

— It appears that, on the basis of the maps available at the time, the boundary had until then been supposed to be located in the southern channel of the Chobe.

[21] Judgment, para. 63.

— While in 1948 a local official from Caprivi and a local official from Bechuanaland came to the conclusion that the main channel was the northern one, at the same time they noted that since at least 1907 use had been made of the Island by Caprivi tribesmen without objection by the Bechuanaland authorities, and that that situation still continued.
— It was subsequently, after consulting London, that the higher authorities in Bechuanaland took the view that the boundary was located in the northern channel.

Such subsequent action, taken nearly 60 years after the date of the Treaty, can scarcely be used to help in showing how the Parties understood the Treaty, especially where their earlier conduct points to a different understanding.

40. One should also take into account that

— Masubia use and occupation of the Island was of as significant a nature as the terrain and climatic conditions allowed.
— Masubia use and occupation included even the residence of a chief and a well organized village community and a school, factors of much significance when we consider that such occupation was never challenged by an administration whose successors claim that this was their territory, and did not raise objections thereto until nearly 60 years after the Treaty.

— One of the initial acts of the first German Imperial Resident, Streitwolf, was to install the Masubia chief, Chikamatondo, who was to be responsible to him for the area[22].

— In later years, the Masubia chief himself lived on the Island, and held his court there.

As already observed, Botswana's contention that the "subsequent conduct" argument is one grounded in acquisitive prescription[23] does not take account of the fact that these are in fact two separate arguments. Factors throwing light on the contemporaneous understanding of the Treaty can be considered quite apart from their weight as supporting acquisitive prescription.

41. For these reasons, there is sufficient material from which to conclude an understanding on the part of the Parties to the Treaty, as evidenced by their practice for upwards of half a century, that they regarded the southern boundary of the River Chobe as the main channel.

[22] Memorial of Namibia, Vol. I, p. 9, para. 28.
[23] Reply of Botswana, Vol. I, p. 55, para. 157.

Suggested Contrary Factors

42. Some items of fact asserted by Botswana to evidence non-recognition of Namibian sovereignty need now to be examined.

(a) *The Eason Report, 1912*

43. Botswana relies heavily on Captain Eason's report in which he stated that "undoubtedly the North should be claimed as the main channel". Here was an occasion where the precise question now in issue was specifically brought to the notice of the governmental authorities in question, with a categorical recommendation that a claim should be made. It must be presumed that this assertion received official consideration. Yet no such claim was made. A reasonable inference is that higher officials considered this recommendation and took a considered decision not to act upon it.

This is confirmatory of the Namibian position rather than a rejection of it. Moreover, the instructions to Eason of Lieutenant Colonel Panzera, the Resident Commissioner in Bechuanaland, reveal that the matter was in fact under consideration by the Bechuanaland authorities and that they were seeking a solution to the question which was the main channel. This reinforces the conclusion that the authorities took a definite decision not to act on the conclusions of Eason, thus administratively rejecting the recommendation that a claim be made that the northern channel was the main channel.

Colonel Panzera instructed Eason that the question under consideration could only be solved by following up the deepest channel in which there is the strongest current, and that the width of the channel was not the matter in issue. Eason's observations made during the dry season could hardly have been observations in accordance with these guidelines, for during the dry season there is scarcely any current in either channel. Indeed, Eason's observations were made at the end of an exceptional drought during the previous 12 months[24].

(b) *The Trollope-Dickinson arrangement, 1951*

44. This relates to a period more than 60 years after the Treaty, and does not have the same relevance to contemporaneous understanding as events closer to the Treaty. I shall still examine it in view of the importance attached to it by Botswana.

[24] Memorial of Botswana, Vol. III, Annex 15, p. 226, para. 2.

The Botswana Memorial places much reliance on what is stated to be a "joint report" by Major Trollope, the South African magistrate for the Eastern Caprivi, and Noel Redman, the District Commissioner for the Bechuanaland Protectorate. The report, which does not state the reasons for its conclusions, states that the main channel lies in the waterway which would include the Island in question in the Bechuanaland Protectorate.

Yet, as with the Eason Report, there are circumstances which adversely affect the weight of this opinion.

(i) After the receipt of the joint report, matters between the two governments were not settled on this basis, but the officials "agreed to differ on the legal aspect regarding Kasikili Island"[25]. No advance was therefore made on the pre-existing position.

(ii) Trollope himself stressed the aspect of use and occupation as indicating that the Island was part of the Caprivi Strip[26].

(iii) The Legal Advisers of the Bechuanaland Protectorate seem to have proceeded on the basis that the Island had never been treated as part of the Bechuanaland Protectorate and therefore "shall be deemed not to be included, and never to have been included, in the [Bechuanaland] Protectorate"[27]. There could hardly be a more categorical rejection of the position contended for by Botswana.

(iv) The Report expressly leaves open the question of the impact of the use of the Island by Caprivi tribesmen since 1907 on the question of the ownership of the Island.

(c) *The 1984-1986 discussions resulting from the shooting incident of 24 October 1984*

45. I do not need to deal with these discussions as they were nearly a century after the Treaty, and can throw little light on how the Treaty was contemporaneously understood.

46. In the result, there appears to have been a long-standing use by Caprivi tribesmen of Kasikili/Sedudu Island, without any official protest or assertion of rights by the authorities of the British possessions to the south. The right of the Caprivi tribesmen to use the Island was undisputed not only by the Bechuanaland authorities, but even by the Bechuanaland tribesmen — as was noted by the Secretary for External

[25] Counter-Memorial of Namibia, Vol. IV, Ann. 71, para. 7 *(a)*. This conclusion emerged from correspondence between Trollope and Dickinson, Redman's successor, who came to a "gentleman's agreement" in which they agreed to let the issue rest in obscurity (*ibid.*, para. 8, and Ann. 73, para. 4).

[26] Counter-Memorial of Namibia, Vol. I, p. 47, para. 104.

[27] Memorial of Botswana, Vol. III, Ann. 28, para. 3 *(b)*; Counter-Memorial of Namibia, Vol. I, p. 48, para. 104.

Affairs of South Africa in his reply of 14 February 1949, addressed to the Chief Secretary to the High Commissioner for Bechuanaland[28].

47. The understanding that the Island was not Botswana territory appears to have been so deep-rooted that it carried over into the years immediately succeeding the achievement of Botswana's independence. Important evidence in this regard is the action of a Botswana magistrate in 1972 (six years after Botswana achieved independence) in acquitting three Caprivi tribesmen who had been arrested on Kasikili Island by game wardens of the Chobe National Park and detained in Kasane for five days. According to affidavits submitted by Namibia, the magistrate criticized the game wardens for arresting them on Caprivi territory[29].

48. Botswana denies this incident, stating that it depends only on the affidavits of the accused persons. However this may be, the occurrence of an incident of this nature is confirmed by the fact that in 1973 South Africa sent a protest note to the President of Botswana relating to the entry of armed Botswana officials into what it described as "Eastern Caprivi territory"[30], and that Botswana did not reply to this communication, even though South Africa sent a follow-up inquiry[31]. The matter was thus taken up administratively at governmental level, with South Africa issuing a note on the matter to the President of Botswana. There was no assertion of rights by the Government of Botswana in reply.

All this is far different from the judicial and/or governmental response that would have ensued had it been the official view in Botswana that this was Botswana territory.

49. These circumstances are sufficient to show the official perception of the position of the main channel from a period comparatively close in time to the Treaty to the period even after independence.

What is most important to note against this background of official attitudes is the openness of the manner in which the Masubia tribesmen had over the years for nearly half a century visited, lived in and cultivated this Island whenever the weather and river conditions permitted. They did this without acknowledgment of title under any external authority, but as part of their traditional lifestyle. This was a fact that was well known in the area and must be taken to have been particularly well known to the officials exercising jurisdiction over it.

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[28] Memorial of Namibia, Vol. IV, Ann. 65, also noted in the Court's Judgment, para. 59.

[29] Counter-Memorial of Namibia, Vol. II, Ann. 24; Counter-Memorial of Namibia, Vol. I, pp. 42-44, paras. 87-90.

[30] Counter-Memorial of Namibia, Vol. II, Ann. 26.

[31] *Ibid.*, Ann. 27.

50. Against this background, the absence of contrary action by a State authority claiming title to the territory is difficult to reconcile with an understanding of the Treaty in any sense other than that it treated the Island as lying within the territory that fell to Namibia — a result presupposing a commonly accepted view on both sides that the "main channel", for the purposes of the Treaty, was the southern one.

In short, if one is attempting to understand the terms of an expression in the Treaty which is equally capable of two interpretations, there is an almost conclusive indication in all this conduct of the way in which the authorities on both sides of the border understood and interpreted the agreement. That understanding and interpretation are clearly indicative of the Island being considered without any objection or assertion to the contrary to be part of the Caprivi Strip.

51. I stress again that I am using this material in regard to use and occupation and non-protest by the rival State authority only as an aid to the understanding of the terms of the Treaty, in view of the ambiguity therein which needs to be resolved. I am *not* using it as evidence of prescriptive title. I stress particularly that this is not material on the basis of which the terms of the Treaty can be *altered*. It is only a basis on which the terms to the Treaty can be *interpreted* and better understood.

Although Namibia argues further that this record constitutes an independent title to sovereignty over the Island by operation of the doctrines of acquiescence, recognition and prescription, I need not go into this argument for the reasons indicated above.

Ambivalence of Other Criteria

52. Various criteria were suggested in the course of the argument for determining the main channel. Among these were navigability, the thalweg concept, greatest mean depth, depth at the most shallow point, greatest capacity, and velocity of flow.

I proceed however to make some observations on these aspects.

Navigability as a Criterion for Interpreting "Main Channel"

53. There seem to be strong arguments indicating that in the context of the river we are considering, namely the Chobe River, navigability is an inappropriate criterion for the determination of its main channel.

It is to be remembered that there was no uniform way in which at the period in question river boundaries were designated or understood. For example, as the Namibian Counter-Memorial points out, there were, in

the context of treaties fixing African river boundaries, a variety of expressions that were used:

1884 — "up the course of the Limpopo River . . ."
1891 — "the centre of the channel of the [River] Ruo"
"the mid-channel of that [Aroangwa] River"
"the centre of the main channel of the Sabi"
1898 — "the median line of the [Niger] river"
1899 — "the centre of the River Ruo up-stream"
"shall follow the Malosa River up-stream"
1911 — "the line of the thalweg of those [Ruo and Shiré] rivers"
1912 — "the centre of the channel of the River Gaeresi"
1926 — "the middle line of the Kunene River, that is to say, the line drawn equidistant from both banks"[32]

Some of these rivers were navigable. Some were not. The Chobe was largely non-navigable. There was no set rule of interpretation reading navigability into these phrases. To apply navigability as a criterion indiscriminately to all river boundaries, whether the river be navigable or not, does not seem to be appropriate.

54. One bears in mind in this context the known desire of the German empire to have access to the Zambezi. This was a general principle all colonial powers pursued as they desired the maximum freedom of movement to, from and within their territories. Yet this was at the time a rather theoretical concept, for the Zambezi was not a navigable river, at any rate near its junction with the Chobe, and the navigability of the Chobe along its entire length and for the greater part of the year was not even in contemplation.

55. Moreover, using navigability as a criterion does not accord with the principle that words should be given their ordinary meaning. I would not therefore give to the words "the main channel" a meaning which is dependent on the concept of navigability, which was not a dominant meaning in the minds of the drafters of the document.

56. In relation to navigation, it is to be noted that, even up to 1914, such navigation as there was on the Chobe River was done by dug-out canoes or *mekoro* and that even the colonial officials used no better craft[33]. Moreover, there was clearly no evidence of regular, scheduled commercial navigation[34]. Even as late as the 1940s when the much discussed timber venture of W. C. Ker was inaugurated, this was the first attempt at the use of the Chobe as a means of transport. However, there

[32] Counter-Memorial of Namibia, Vol. I, pp. 26-27, para. 57, citing examples from Ian Brownlie, *African Boundaries: A Legal and Diplomatic Encyclopaedia*, 1979.

[33] Botswana's reply to Judge Fleischhauer's Question 1.
[34] *Ibid.*

is doubt as to whether Ker in fact set up such a service, and Namibia has stated in answer to a question by President Schwebel that it has not been able to find any evidence that W. C. Ker ever actually transported timber through the northern channel.

57. For these reasons, definitive importance cannot be accorded to navigation as a criterion. I note also in this connection Namibia's answer to Judge Fleischhauer in which it stated that it has been unable to find a single reference to a boat of any kind at any period in history ever traversing the whole length of the Chobe River where it forms a common boundary between Namibia and Botswana.

There are limits therefore to the extent to which navigability can be used as a criterion for determining which was the main channel.

The Thalweg Concept

58. There has been much discussion in the course of the presentations before the Court regarding the applicability of the thalweg concept to this case. Botswana identifies the thalweg as one of the criteria by which to identify the main channel, defining the thalweg as "the channel most favourable to the movement of vessels proceeding downstream when the water is at its lowest"[35].

This argument highlights the question whether the term was used in the Treaty as a synonym for "centre of the main channel", or whether it was used as a term with an independent meaning. I believe that the use of the term "thalweg" in the Treaty was not a use of it in any technical sense but, even if it were so used, it would enure to the benefit of Namibia.

(a) *Applicability of the concept*

59. If the thalweg concept is to be used in interpreting a treaty of 1890, it must first be established that the technicalities associated with the concept were generally recognized at the time. We cannot use the more developed concepts of a later time to interpret a treaty entered into more than a century ago.

The Namibian pleadings assemble 47 authorities who discussed the thalweg concept between 1820 and 1930[36]. These authorities represent a variety of views — that the thalweg should be the boundary in navigable rivers only; that it should be the boundary in all rivers; that it does not

[35] Memorial of Botswana, Vol. I, p. 89, para. 205, citing Julius Hatschek, *Outline of International Law*, trans. by C. A. W. Manning, 1930, p. 130.

[36] See Counter-Memorial of Namibia, Vol. II, Ann. 9.

apply at all; that it means the same as the median line; that it was not a principle that was generally recognized; and that it was a principle which as yet was in the realm *de lege ferenda*. Even the proceedings of the Institute of International Law in 1887 reflect this uncertainty, for De Martens, the Rapporteur for the session concerning international rivers, did not include this provision in his project for the Institute as he said "ce principe n'est pas généralement reconnu"[37].

60. An inference that can be drawn from all of this is that it was not a principle so widely accepted at the time as to vary the natural meaning of the words used in the Treaty.

However, even should the thalweg concept be deemed to be applicable, its implications do not necessarily enure to Botswana's benefit, as shown in the next subsection.

(b) *Implications of the concept*

61. Even if the principle were applicable, there is considerable authority in support of the proposition that the thalweg concept relates not merely to depth but also to the flow or current of the river. Indeed, some authorities would appear to indicate that considerations relating to depth are secondary to those relating to flow or current.

According to Westlake, for example, the thalweg is "the course taken by boats going down stream, which again is that of the strongest current"[38].

L. F. von Neumann, likewise, describes it as "the line that is taken by ships going downstream, more precisely the centre of the downward current"[39].

Other authoritative writing from around the same period may be cited for the same proposition. Fiore, for example, speaks of the line "ou les eaux sont les plus profondes et les plus rapides"[40] — a combination of the concepts of depth and current.

62. It is not difficult to perceive the reason for the blending of depth and current in the concept of the thalweg, for the "downway" as it literally meant, was for boats the path of the strongest current and not necessarily the path of the deepest channel. Of course depth was also

[37] IX *Annuaire de l'Institut de droit international* (1887-1888), p. 173.

[38] J. Westlake, *International Law*, Part. I, Peace, 1904, p. 141. Westlake points out that the older authorities had taken the middle line of the river as the true boundary in obedience to the Roman law relating to delimitation of properties, and that the thalweg was thought to have been first proposed at the Congress of Rastatt (1798-1799).

[39] L. F. von Neumann, *Grundriss Des Heutigen Europäischen Völkerrechtes*, 3rd ed., 1885, p. 45 (trans.).

[40] Pasquale Fiore, *Le droit international*, trans. from the Italian by A. Chrétien, 1890, p. 205. A later edition accentuates the consideration of flow by defining the thalweg as determined by "the median line of the current and following precisely the course of water with the most rapid flow" (1911 ed., p. 503, trans. by C. Antoine).

an important ingredient in the complex of factors that produced the strongest current.

63. There is significance also in the fact that the line it represented was the line of the "downway", i.e., for ships that went down the river, and therefore those in maximum need of using the maximum current. By contrast, ships going up the river needed the slowest current to fight against — a point very clearly made by Westlake[41].

64. In the case of the two channels of the Chobe, it is clear that the southern channel is not by any means to be disregarded from the point of view of its use for shipping. Those who operate boats on rivers know best the channels which suit them for downward navigation. The number of boats using the southern channel appears to exceed by far the number of those using the northern channel. Boatmen would know best which is the swiftest channel for this, and it is no accident that so many of them choose the southern channel.

Judged by this test as well, the southern channel has a very good claim to being regarded as the main channel of the Chobe.

It is not without significance also that, while the tourist boats use the southern channel almost exclusively, some of the boats returning from Kasane use the northern channel[42] — an indication that the current in that channel is the slow channel that is suitable for up-river navigation.

65. Another factor to be borne in mind is that mean depth cannot be the only criterion for navigability. A river which has very great depth along a very narrow channel would be quite unsuitable for navigation if the sides of that deep channel rise very steeply to present very shallow levels outside the narrow crevice of greatest depth. Boats, especially broad-bottomed boats, would not be able to use such a channel, however deep it might be. As Namibia has observed in its Counter-Memorial, "Passage through a channel is controlled by the point of minimum depth, because all craft must clear that point to traverse the channel."[43]

66. There are obstacles of this nature in the way of free use of the northern channel — in particular the sand bar at its entrance. By way of contrast, the entire length of the southern channel is of sufficient depth to accommodate the flat-bottomed boats that use it at all times of the year. Nor does the southern channel dry out during the dry season, if one has regard to the calculations of Professor Alexander[44].

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[41] Westlake, *supra*, p. 141; see also p. 33, fn. 103, of Counter-Memorial of Namibia.

[42] Counter-Memorial of Namibia, Vol. I, p. 19, para. 45.

[43] *Ibid*,. para. 46.

[44] *Ibid.*, p. 20, para. 47. See Supp. Rep, sec. 12.

The Scientific Evidence

67. If the term "main channel" had been used in a contemporary treaty, and we were seeking the true meaning of that term, scientific evidence on such matters as depth, volume, breadth, and flow would help us considerably. But the Treaty under examination is over a century old and, even if depth, volume, breadth and flow had been constant over the years, modern scientific criteria are not the indicia appropriate for determining what was commonly understood to be the main channel a hundred years ago.

I hence have considerable difficulty in reaching a definitive conclusion based upon the scientific evidence in this case.

68. In the first place, it is extremely complex and, considered in its totality, contains opposing views by equally credible and competent experts in the various fields covered. A plausible case can be made out for either viewpoint using the data furnished to the Court, and this leaves one none the wiser in the midst of all this expert information.

69. Secondly, I have grave doubts that the problem before the Court can in any event be resolved by scientific evidence. The question we are faced with is the meaning of an expression used by the Parties, which meaning has to be gathered not from quantitative statistics of volume and flow and depth, but rather from the Parties' own understanding at the time of the apparently simple language used in the Treaty. This was a non-technical understanding, not dependent upon expert scientific opinion or precise quantitative data.

70. Thirdly, even if the scientific evidence were applicable, it would be legal criteria that would determine which aspect if any of the vast amount of scientific data placed before the Court would be determinative. There are no clear cut legal principles for determining this which are sufficient to outweigh the principles of interpretation discussed already.

71. Fourthly, there is no definite principle for a ranking order among the various scientific criteria offered. Among these criteria are capacity (i.e, amount of flow), velocity of flow, mean depth, and depth at the shallowest point. It is not scientific principle but non-scientific factors that would determine the choice of the governing criterion. Moreover, one gets a different result depending on which criterion one employs.

Cartographic Evidence

72. There is support to be gained from the maps of the two administrations for the view that the understanding of the Treaty in the period succeeding the time of its execution was to the effect that the operative

branch of the river was that which placed the Island within Namibian territory. Indeed, the Court has found[45] that maps published subsequently to the 1890 Treaty, in so far as they showed the boundary at all, for a number of years placed the boundary in the southern channel. The 1933 Bechuanaland map and the 1949 South African map are among these.

73. Maps can of course carry varying degrees of weight depending on their authorship and the circumstances in which they were made. Moreover, the scale of the maps is often so small as not to show clearly the particular area which is the subject of the dispute, while other maps which are sufficiently large can indicate the area of dispute in sufficient detail.

Of the 16 maps in Namibia's atlas, some are too small in scale to show Kasikili/Sedudu Island, but 12 are large enough to show the Island and they all show the Island as Namibia's, in the sense that they show the southern channel as the international boundary.

It is significant that among the maps showing the southern channel as the border are several sketch maps of the Bechuanaland Protectorate published by the British Colonial Office from 1912 to 1914 — a fact admitted by Botswana in its Memorial[46] — and referred to in Namibia's Counter-Memorial[47].

Of the 19 Colonial Office reports containing maps, 15 show the boundary on the south side of the Chobe and four on the north side.

74. The arithmetical preponderance is not so important as the fact that not in any of these maps — leave alone the majority — are the boundaries indicated in such a manner as to leave the disputed territory within the boundaries of the other State. This is scarcely consistent with the position that the Treaty was intended to treat the northern channel as the main channel. Rather, this statistic supports the view that the understanding of the Treaty was certainly not such as to place the Island in question within the territory of Bechuanaland — in other words that the understanding of Parties was that the main channel was the southern channel. Prominent among the British maps is the official British map of 1933 used up to 1965, one year before independence, which shows the Island within the Caprivi Strip[48].

75. Namibia likewise has the advantage of a number of official maps on the German side also indicating the southern channel as the boundary. Among these are Seiner's map, the principal large-scale map used by German officials in Berlin and in the field, from its publication until the

[45] Judgment, para. 85.

[46] Memorial of Botswana, Vol. I, paras. 270-272.

[47] Counter-Memorial of Namibia, Vol. I, p. 63, para. 141.

[48] Map GSGS 3915 of 1933, Namibia Atlas Map IX; see also, Memorial of Namibia, Vol. I, p. 125, para. 305.

end of German rule in Namibia[49]. It was sent by Germany to the British Foreign Office during the 1909-1914 negotiations relating to the southern boundary of the Caprivi Strip. The boundary is there shown placing Kasikili Island very clearly on the Namibian side. So, also, is the case with von Frankenberg's map[50]. Adding to the weight of these maps is the South African Official Map of 1949[51], the principal map used by South Africa until Namibian independence.

76. The cartographic evidence thus seems to me to be in favour of the Namibian position, and of the contemporaneous understanding of the Parties, as outlined earlier in this opinion.

Equitable Navigational Use of Boundary Rivers

77. It is an important principle of riparian law that equitable factors also play a significant role in determining riparian boundaries, where there is room for a difference of opinion[52].

One of the principal uses of rivers is navigation and transport and the need especially to use rivers for transportation downstream. That was probably the rationale underlying the thalweg principle, already referred to in this opinion.

There is another factor as well that is relevant to this aspect. Since the vast bulk of the tourist traffic, which is the most vital traffic carried on either channel, uses the southern channel, this is a substantial source of revenue to both countries.

A riparian boundary is meant to afford to both riparian States equal use and benefit from the boundary river. If the boundary is decided to be the channel which is not suited to carry the bulk of the vessels using the river, both States would not be able to use the river equitably. To hold in the present case that the northern channel is the boundary would, by denying Namibia the use of the southern channel, cause far greater loss to Namibia than the loss that would ensue to Botswana if the southern channel were held to be the boundary, in which case Botswana would be denied only the use of the northern channel which is comparatively of far less value.

[49] Memorial of Namibia, Vol. I, p. 121, para. 294; see also Counter-Memorial of Namibia, p. 69, para. 155.

[50] Memorial of Namibia, Vol. I, p. 123, paras. 298-299; Counter-Memorial of Namibia, Vol. I, p. 70, para. 156.

[51] Counter-Memorial of Namibia, Vol. I, p. 75, para. 162.

[52] On the "overwhelming support of the international community" for the doctrine of equitable utilization and the limitations of territorial sovereignty in relation to riparian boundaries, see M. Fitzmaurice, in *Legal Visions of the 21st Century*, Anthony Anghie and Garry Sturgess (eds.), 1998, pp. 428-436.

This important use of the river must be equitably shared by both riparian States. This use is particularly essential to the economy of both countries. As Namibia informed the Court at the oral hearings[53], tens of thousands of tourists from all over the world come to Namibia to visit its game parks, and the same is no doubt true of Botswana. The use of the southern channel to observe the wildlife on Kasikili/Sedudu Island would be a natural and important part of the agenda of the tourists in both countries.

78. The evidence we have before us indicates that the vast majority of tourist vessels — including the redoubtable *Zambezi Queen* — do not use the northern channel. Most of them use the southern one. Apart from this being a strong indication of the thalweg being in the southern channel, it also raises the equitable consideration that both riparian States should have an equal right to use this main navigational route. To consider the northern channel to be the main channel is to deprive Namibia of the valuable use of this southern channel which is capable of taking all the traffic which the northern channel cannot take. On the other hand, if the southern channel is considered the boundary, both States would have equal use of this main means of navigation. The loss or inconvenience to Botswana in not having the free use of the northern channel would be comparatively minor as compared to the loss to Namibia if it could not use the southern channel.

The principal loss and inconvenience to Botswana would be not in regard to navigation, but in regard to the tourism and preservation of wildlife which would ensue from the fact that the teeming wildlife on the Botswana side has habitually crossed over to the Island and that the Island is in a sense an integral part of this wildlife preserve. This aspect is considered in Part B of this opinion.

Conclusion Regarding the "Main Channel"

79. My conclusion is therefore that the southern channel must be regarded as the main channel for the purposes of the 1890 Treaty. This would leave Kasikili/Sedudu Island *de jure* within the territory of Namibia.

Having reached this conclusion, I am obliged to examine certain consequential legal questions which would arise from such a decision. They do not arise in this form in the context of the Court's Judgment, but need to be examined in this opinion as a necessary consequence of my conclu-

[53] CR 99/10, p. 15, para. 18.

sion that the southern channel is the main channel. These legal questions are examined in Part B of this opinion.

PART B

Introduction

80. Having arrived at my conclusion that the main channel is the southern one, and hence that Kasikili/Sedudu Island must be considered part of Namibian territory, I now address a resultant question which will confront international law with increasing intensity in the future — the tension between principles of territorial sovereignty and principles of ecological protection which involve a fiduciary responsibility towards the ecosystems of the States concerned.

The teeming wildlife of this area makes it one of the prized game parks of Africa. Its protection is a matter of international concern which cannot be permitted to recede from view in the midst of conflicting claims of the contending Parties. This raises in pointed form the scope of judicial responsibility when environmental issues straddle the boundaries demarcated by the Court.

Indeed, this aspect was addressed in the pleadings, and it was argued on behalf of Botswana that

> "if the Court were to rule in favour of Namibia, the decision would immediately remove the Island from the range of the wildlife, as they would be hunted down on the Island, as was done in the rest of the Caprivi. Thus, in the interest of conservation, and for all the other reasons to be advanced by Botswana in this case . . . the Court should rule in favour of Botswana. By so doing, the Court would make a clear statement on conservation to all mankind, including Namibians."[54]

The circumstance referred to does not *per se* amount to a ground for ruling in favour of Botswana, but it does raise a serious consideration which cannot be ignored.

81. My finding that the Island falls within Namibian territory thus requires me to address this argument, having regard to the compelling weight which modern international law attaches to environmental considerations, reinforced as it is by such conventions as the 1992 Convention on Biological Diversity (the Biodiversity Convention) signed and ratified by both Parties to this case, and other conventions such as the Convention on International Trade in Endangered Species (CITES), and the 1971 Convention on Wetlands of International Importance Especially

[54] CR 99/6, p. 22.

as Waterfowl Habitat (Ramsar Convention). The problem adverted to by Botswana is one which can be suitably addressed in the light of the great progress that has been made by modern international law in the structuring of joint régimes for the conservation of environmentally important sites.

The fact that the entity to be preserved is a "common heritage" or at least a "common concern"[55] of humankind, reinforces the judicial duty in this regard — a duty which naturally reaches further than that of surveyors and cartographers who depict stipulated geographical features on the ground.

International law is now in too mature a state of development to carry out its tasks of boundary delimitation in mechanical fashion. It cannot interpret and apply a boundary treaty *in abstracto*, an approach which may have been possible in an earlier age. In the environmental field, the growing recognition of world heritage values prevents such a rigid attitude from being followed.

82. The present case offers us an instance of a situation which is likely to come before the courts more often in the future. The evolution of legal guidelines for such situations is not a venture into new legal territory, for many precedents already exist. I see it as inevitable that the future will bring before international tribunals other situations as well in which there are interests of a universal nature which need to be preserved, and where two or more States may need to co-operate to ensure that some important aspect of the universal heritage of humanity is not diminished.

83. As we enter an era in which active co-operation, rather than passive co-existence, becomes a keynote concern of international law, it is inevitable that such concerns will receive increasing judicial consideration. It helps in this case that the Court is required to decide "on the basis of the Anglo-German Treaty of 1 July 1890 *and the rules and principles of international law*" (emphasis added) the question of the true boundary between Botswana and Namibia in the disputed area of the Caprivi Strip. The "rules and principles of international law" comprise well-recognized principles of environmental law which cannot be ignored.

It is significant, moreover, that the Court is asked to determine not merely the *boundary* between Namibia and Botswana, but also *the legal status of the Island*. This enables the Court to create a special legal régime for the Island, should it choose to do so — an aspect that becomes especially important in the event of a finding that the Island belongs to Namibia.

[55] See Biodiversity Convention, 1992, Preamble, para. 3.

84. We are here dealing with the protection and enjoyment of a unique part of the world's wildlife heritage which, from all that we have heard in the course of the case, represents a remarkable place of congregation of a rich variety of wildlife — a place where they meet and feed and breed. In the words of Professor Alexander:

> "There are very few wildlife areas in southern Africa where such a variety of game and bird life can be seen from such close quarters as along the southern channel of the Chobe river at Kasikili Island."[56]

He also confirms the statement in the Botswana Memorial that "[t]he grazing on the island is excellent and there is a daily elephant migration to the island"[57]. Such places are critical to the maintenance of biodiversity which, as the Biodiversity Convention has proclaimed is, if not a common heritage of humankind, at least a common concern of humankind.

85. The aspect I am now addressing brings to the forefront some vital legal issues relevant to the delimitation of boundaries. I shall deal with four of them in the following order:

1. The function of the Court when delimitation of a boundary line involves the dismantling or division of an ecologically integral unit of biodiversity.

2. The role of equity in the practical problems attendant on delimitation.

3. The relevance of the distinction, if any, between colonial treaties that specifically designate boundaries and colonial treaties indicating spheres of influence.

4. The notion of joint régimes over ecologically vital portions of territory which, despite the ecological unity of the territory, straddle national borders.

I shall proceed to consider these in the order in which I have designated them.

1. Judicial Responses to a Boundary Delimitation Which Involves Dismantling or Dividing an Ecologically or Culturally Integral Unit

86. The fact that a unique natural preserve, or a treasured cultural site, or a sacred area which needs to be preserved in its full integrity, straddles

[56] Counter-Memorial of Namibia, Vol. III, p. 34, para. 11.9.
[57] *Ibid.*, para. 11.2; Memorial of Botswana, Vol. I, p. 14, para. 32.

national boundaries does not necessarily mean that it is to be dissected between the two or more States whose boundary runs through it. International law would have resources enough to handle this difficult and delicate situation so as to preserve as a unity the valuable asset which would otherwise suffer from being divided in a manner that takes into account only the rights of individual States, but neglects other values which international law is bound to preserve.

For the large numbers of elephants, hippopotami, and rhinoceroses, not to speak of smaller forms of wildlife, which frequent this area and have been doing so as long as human memory extends, a disturbance of their patterns of occupation would be a disturbance of their natural habitat. The adverse consequences to their well-being and to their survival cannot be underestimated. In a world which increasingly places a strain on their natural lifestyles and habitats, and in which several important categories of wildlife are becoming endangered species, this is a result which is to be prevented as far as such action is permissible within the limits of the law.

87. I refer in particular to the Biodiversity Convention (1992), a Convention which both Botswana and Namibia have ratified without qualification (Botswana, 12 October 1995, and Namibia, 16 May 1997).

The States parties to that Convention have accepted responsibility for conserving their biological diversity and for using their biological resources in a sustainable manner. The Convention notes further that one of the fundamental requirements for the conservation of biological diversity is *in situ* conservation, defined as "the conservation of ecosystems and natural habitats and the maintenance . . . of viable populations of species in their natural surroundings"[58]. It further stresses the importance of and the need to promote international co-operation among States for the conservation of biological diversity[59].

88. Article 6 requires each contracting party to develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity. Article 8 *(d)*, dealing with *in situ* conservation, requires, *inter alia*, that each contracting party promote the protection of ecosystems, natural habitats, and the maintenance of viable populations of species in natural surroundings. All of these are indicative of the cardinal importance attached by modern international law to the protection of natural species in their natural environments.

So strong are the obligations imposed by the Convention that Article 22 provides that the provisions of the Convention shall not affect the rights and obligations of contracting parties, deriving from any existing international agreement *"except where the exercise of those rights*

[58] Biodiversity Convention, Preamble, para. 10; *ibid.*, Art. 2.
[59] *Ibid.*, Preamble, para. 14.

and obligations would cause a serious damage or threat to biological diversity". This indicates that a serious threat to biological diversity can even constitute an exception to treaty obligations.

I cite these provisions in order to show that specific State obligations exist to protect the natural habitats of wildlife, and that those obligations can even, in certain situations, override existing treaty obligations. The obligations imposed by the Convention are thus of such a compelling nature that they cannot be ignored in any determination defining inter-State rights and obligations if such determination should entail a risk of damage to ecosystems which it was the object of the Convention to prevent.

89. We are here not importing principles of modern law to interpret a treaty of 1890. We are interpreting the Treaty of 1890 as it stood, and as it was understood contemporaneously. We are determining the boundaries between the two States in terms of the Treaty of 1890 but, in applying them on the ground in the year 1999, we cannot disregard important principles of modern law.

Environmental standards transcend temporal barriers, as this Court noted when in *Gabčíkovo* it observed:

> "Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past."[60]

Consequently, in environmental matters, today's standards attach themselves to yesterday's transactions, and must be given due effect in judicial determinations stemming from them.

This aspect can be formulated even more strongly in the present case, because the question referred to the Court requires a determination in accordance with "the rules and principles of international law", and also because the Court is obliged to take into account the environmental obligations assumed by the Parties through multilateral treaties.

90. Moreover, this is a court not only of strict law, but of equity as well, and boundary delimitations, like all other determinations of the Court, involve not merely strictly legal but equitable considerations as well. This is not new jurisprudence, but has been recognized as far back as the *North Sea Continental Shelf* cases[61] which noted the relevance of equitable principles in the process of delimitation.

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[60] *Gabčíkovo-Nagymaros Project, I.C.J. Reports 1997*, p. 78, para. 140.
[61] *I.C.J. Reports 1969*, pp. 48-53.

2. The Scope for Equity in Boundary Delimitation

91. A court reaching such a conclusion as that Kasikili/Sedudu Island belongs to Namibia cannot end its responsibilities with the mechanical exercise of a geometric delineation of boundaries on the ground.

I have already advanced the illustration of a sacred site which is one and entire, but which may need to be divided in two if merely geometrical considerations are to be followed. Likewise, a village may be separated from a grazing ground which for centuries had been integral to it, or the village itself may be divided into two parts whose residents thus became citizens of two different States, however closely they may be connected. It would be a diminution of a court's inherent jurisdiction if it were expected in such hypothetical circumstances to turn its glance away from these very real and vital problems and proceed with the task of delineation as if it were a purely geometrical exercise. Charged as it is with the application of equity to the problem before it, a court would not proceed in this fashion.

If there is a natural reserve which, in the interests of the ecosystem and of biological diversity cannot be divided without lasting damage, this is a factor which the Court can no less ignore than a sacred site or archaeological preserve which must be maintained in its integrity if it is to be preserved.

92. There is more than one way in which equitable considerations can be given effect in such situations.

One is that the Court should consider itself empowered to make a slight deviation from the strict geometric path indicated by the boundary treaty, but always preserving a balance between the entitlements of the two parties to the enjoyment of this precious asset.

Another is to constitute, in the larger interests of both parties and indeed of the world community, a joint régime over the area so that neither party is deprived of its use. In this category, a multitude of possibilities and precedents are available which I shall briefly consider later.

93. I may observe here that the division of a sacred site or ecological preserve into two discrete portions is a procedure likely to produce tension between the Parties in the future, as that which was considered to be a common resource on both sides of the border is then available to neither Party, and the entire asset is under risk of destruction through the process of division. Indeed, in an extreme case, as where a geometrical line of partition passes through the most holy place of a sacred site, the imperative need for such discretion on the part of the Court is obvious.

That the Court has such a power, and indeed a duty in an extreme

case, is thus beyond dispute. Whether a given situation is an appropriate one for the use of its equitable power is a matter for the Court's discretion.

In the present state of recognition of the importance of ecological considerations, and having regard to the importance of this natural reserve as stressed to us by both Parties at the oral hearings, a decision in favour of Namibia would trigger the exercise of such discretion.

3. Treaties Dealing with Spheres of Influence Distinguished from Treaties Dealing with State Boundaries

94. Of special relevance to the exercise of the Court's equitable powers is the distinction which I believe should be drawn between treaties that specifically and precisely deal with boundaries and treaties which deal with spheres of influence.

The distinction I draw is in relation to the degrees of specificity of the two kinds of treaties. In the colonial past, the colonizing powers would sometimes in broad terms define their respective spheres of influence. It was of course necessary to establish the lines of division between them, but the primary purpose of the exercise was to make clear the broad extents of territory over which one or the other could pursue their activities without interference by the other. As Oppenheim has observed, they arose from "the uncertainty of the extent of an occupation, and the tendency of colonizing states to extend an occupation constantly and gradually into the interior or 'hinterland' of an occupied territory"[62]. They had

> "the object of regulating, in a spirit of mutual good-will, the relations which might result between the contracting Powers from the extension of their rights of sovereignty or protectorate in neighbouring regions"[63].

95. These agreements were arrangements with "a certain provisionality", and when in due course the parties took control of the areas respectively reserved, the delimitation would attain the status of a boundary description[64]. Thus a sphere of influence did not necessarily mean that the power claiming it already had control and possession of it, but this was clearly the objective towards which it intended to move.

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[62] *Oppenheim's International Law*, Vol. I, Peace, Parts 2 to 4, Sir Robert Jennings and Sir Arthur Watts (eds.), 9th ed., 1992, p. 691.

[63] M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law*, 1926, p. 210; see also Sir Thomas Holdich, *Political Frontiers and Boundary Making*, 1916, pp. 96-97.

[64] Ian Brownlie, *African Boundaries: A Legal and Diplomatic Encyclopaedia, op. cit.*, pp. 8-9.

It has also been observed that "[t]he term 'Sphere of Influence' is one to which no very definite meaning is as yet attached"[65], and "rather implies a moral claim than a true right"[66].

There are thus certain elements of provisionality and lack of precise definition associated with the concept, which can assume some relevance where, in a later interpretation of the Treaty, a question of uncertainty regarding the exact definition of a boundary needs to be resolved.

96. As a background to this Treaty and the concept of colonial expansion, it is not irrelevant to note the significant changes effected under Chancellor von Caprivi (after whom the Caprivi Strip is named) in the foreign and colonial policies of Bismarck, whom he succeeded in 1890, the very year of the Treaty[67]. Bismarck had followed a policy of placing little value on colonial expansion[68], but Caprivi took the line that now that the acquisition of colonies had been started, one could not very well turn back[69]. Indeed, Count Hatzfeldt, who was engaged in negotiating the Treaty in London with Lord Salisbury, is recorded as having observed that he was "impressed with the importance to the two countries of a *general settlement on a broad basis* which would appease and avert the jealousies and rivalries now unfortunately existing"[70]. Such was the background to the 1890 Treaty[71], which was thus rather different in its objective from the precise delineation of colonial boundaries aimed at by a treaty dealing strictly with territorial boundaries.

97. Another aspect of the generality of this Treaty is that it covered not merely the territories of the two Parties to the present dispute, but dealt with the spheres of influence of Germany and Great Britain in East Africa (Art. I), South West Africa (Art. III), and West Africa (Art. IV), in addition to other matters dealing with specific designated territories,

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[65] W. E. Hall, *A Treatise on International Law*, 8th ed., A. P. Higgins (ed.), 1924, p. 153, para. 38*b*.

[66] *Ibid.*, p. 154, para. 38*b*.

[67] "For better or for worse, from now [1890] on the Caprivi era would be known as the 'new course'" (J. A. Nichols, *Germany after Bismarck: The Caprivi Era 1890-1894*, 1958, p. 68).

[68] See Donald Kagan, *On the Origins of War and the Preservation of Peace*, 1995, p. 110. For a discussion of the changes in foreign policy and their impact on colonial policy, see *ibid.*, pp. 121 *et seq.*

[69] Nichols, *op. cit.*, p. 102, quoting Caprivi's speech during his first appearance in the Reichstag on 12 May 1890, a speech in which he disclaimed being himself a "colonial enthusiast".

[70] Emphasis added. Memorial of Botswana, Vol. II, Annex 9, p. 51 (Correspondence respecting the Negotiations between Great Britain and Germany relating to Africa, April to December 1890, No. 1).

[71] The 1890 Treaty with Great Britain was signed simultaneously with the lapsing of the Reinsurance Treaty with Russia, a cornerstone of Bismarck's foreign policy. The 1890 Treaty evidenced the increased interest in the building up of colonial possessions. The policy of clarifying spheres of influence with Great Britain was a natural preliminary stage of this process, so far as Southern Africa was concerned.

such as the transfer by Britain to Germany of sovereignty over Heligoland. It was thus far more general in its nature than a specifically boundary-oriented treaty[72], which laid down the exact borders between two States.

98. The emphasis, therefore, was on areas of interest rather than linear boundaries. A major difference between boundary treaties, *stricto sensu*, and zones of influence treaties is that zones of influence treaties deal with spatial zones while boundary treaties involve points or lines that have no breadth[73]. Consequently, there is a precision and definiteness attending a boundary treaty which distinguishes it from the generalized nature of a treaty dealing with spheres of influence. In the expressive language of Brownlie, a boundary treaty "draws precision and clarity in its train"[74]. The same cannot be said for spheres of influence treaties.

This is not a conclusive factor in the present case, but is not without its implications in the particular circumstances here, for

(a) it gives the Court greater flexibility in the definition of the boundary in question, while of course not departing from the terms of the Treaty;
(b) it gives the Court greater scope for the application of equitable principles;
(c) it widens the latitude available to the Court for making provision for the integrity and preservation of important features such as environmental preserves; and
(d) it enables the Court to take into account such factors as that one interpretation will draw a line between a given people and the land which they have traditionally used over a long period of time, while the other will not, thereby inclining the Court towards the former interpretation, if it be possible within the terms of the Treaty.

99. In the present case, this factor makes easier the resolution in favour of Namibia of the doubt regarding interpretation. It would also incline the Court against a formalistic interpretation which deprives a people of land which they have used over the generations without any acknowledgment of any other sovereignty over it and without any assertion of right by the State claiming such sovereignty. A zones of influence treaty would permit more flexibility in this regard than a treaty dealing strictly with boundaries.

[72] See further A. J. P. Taylor, *Germany's First Bid for Colonies: 1884-1885*, 1938, p. 98.

[73] Brownlie, *op. cit.*, p. 3.
[74] *Ibid.*

To attach the Island which the Masubia had long regarded and used as theirs to another sovereign State upon a literal interpretation of a zones of influence treaty would perhaps represent an overly formalistic approach to an essentially human problem.

100. At the same time, the additional leeway resulting from this fact would make it easier for the Court, in holding with Namibia, to make appropriate provision in its Order for preserving in its integrity as one comprehensive whole the wildlife habitat which comprises both the Island and the Chobe Game Park to the south. The Court would be able to exercise its equitable powers to require Namibia to enter into a joint régime with Botswana in order to ensure the integrity of this habitat.

101. The fact that the Treaty under interpretation was one demarcating zones of influence, and not a boundary treaty, is thus not without significance in the present case.

Needless to say, nothing in this opinion affects the principle of *uti possidetis juris*, for the task we are engaged on is that of defining the boundary in terms of the Treaty of 1890, as interpreted according to the legal principles applicable.

4. Joint International Régimes

102. The notion of joint régimes in areas straddling national boundaries has grown remarkably in recent years. There is thus a plenitude of models and ideas from which to draw the appropriate principles for the fashioning of a co-operative international régime that suits a particular case.

I cite initially an observation in the Foreword to a recent work on *International Boundaries and Environmental Security: Frameworks for Regional Cooperation*, to the effect that:

> "Modern boundary-making theory emphasises the virtue of flexibility at least as much as the traditional virtues of certainty and finality . . . but increasingly, in the case of ocean and river boundary contexts, . . . boundary-makers might be wiser to regard themselves less as the drawers of lines than as the designers of workable regimes."[75]

103. The Court is not, of course, a boundary-maker, but the entity charged with translating the terms of a treaty into conditions on the ground, adhering as faithfully to the Treaty as it can in accordance with international law. Since modern international law dictates a regard for

[75] Gerald Blake *et al.* (eds.), 1997, pp. xi-xii.

certain environmental considerations, this aspect must be taken into account in interpreting and applying the Treaty, with due regard to current legal concepts and standards. Of these current concepts, the concept of a joint régime over a resource which is valuable to both parties must receive judicial attention as a rapidly developing concept of international law.

104. Instances are not wanting of judicial recognition of the need to prevent a merely mechanistic division which takes no account of human factors and practical realities. In *Frontier Dispute*[76], the Chamber gave its careful consideration to a situation in which certain villages had appurtenant to them certain farming hamlets which were situated some distance away from them. The village was the native administrative unit and comprised all the land dependent on it. Mali argued specifically that the land dependent on a village included the farming hamlets. A line drawn between the village and the agricultural/grazing site could destroy the unity that had always existed between them. The Chamber showed its sensitivity to this issue, but was not called upon in that case to make a decision on this matter, as "[f]rom a practical point of view, the existence of such rights has posed no major problems"[77], but it nevertheless observed that:

> "In this matter, it all depends on the circumstances. The Chamber considers . . . that it will be able to ascertain whether a particular piece of land is to be treated as part of that village despite its lack of a connection with it, or as a satellite hamlet which does not fall within the boundaries of the village in the strict sense."[78]

105. In the same case, the notions of flexibility and the role of equity in demarcating the boundaries arose also in relation to a frontier pool. The Chamber there explained that it could resort to equity *infra legem* on the basis of the guiding concept that "Equity as a legal concept is a direct emanation of the idea of justice"[79], but that equity could not be used to modify an established frontier in the sense of a settled border. Acting on that basis, the Chamber resorted to equitable considerations in determining how the frontier pool should be divided.

106. In the present case, there is no established frontier in the sense of a settled boundary. Rather, the Court is in the process of settling that

[76] *Frontier Dispute (Burkina Faso/Republic of Mali), I.C.J. Reports 1986*, p. 554.
[77] *Ibid.*, p. 617, para. 116.
[78] *Ibid.*, para. 117.
[79] *Ibid.*, para. 149, quoting *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 60, para. 71.

boundary in accordance with the 1890 Treaty. In settling that boundary in accordance with the law, it is entitled to take equitable considerations into account so long as it does not depart from the terms of the Treaty. The equitable consideration of preserving this valuable natural resource in accordance with governing principles of environmental law does not in any way militate against the basic adherence to the terms of that Treaty which lies at the root of my conclusions.

107. We here have a situation of one of the world's richest wildlife reserves falling within the territory of Namibia, if my interpretation of the 1890 Treaty be correct. However, there can be no doubt that the rich wildlife moves over to the Island from the south and that the Island and the land to the south of it, which latter is in Botswanan territory, together form one integral natural preserve. Since merely drawing national boundaries between them so as to divide this resource in two would destroy its unique nature and affect its unique value for all time, something more is called for in such a situation. The establishment of a joint régime, in cases where it is appropriate, would be one of the equitable bases on which the Court could proceed in cases where such a régime would be appropriate to govern the situation resulting from the Court's determination.

108. The notion of joint régimes received recognition from this Court in the *North Sea Continental Shelf* cases[80]. The Court there indicated a number of factors to be taken into account in the negotiations between the parties. The separate opinion of Judge Jessup, recalling other instances of international co-operation, observes that "the principle of international co-operation in the exploitation of a natural resource is well established in other international practice"[81].

In such a joint régime, the authorities of both countries acting together would, in the best interests of the preservation of this valuable resource, follow certain mutually agreed guidelines which accord with the principles of international environmental law applicable to such a resource.

109. International experience, covering numerous aspects of joint régimes, is accumulating in many parts of the world. For example, the La Paz Agreement of 1983, the Great Lakes Water Quality Accord of 1978, and the North American Free Trade Agreement of 1992 have stimulated developments in this area in North America. The Environmental Side Agreements of NAFTA have resulted in a series of new international institutions and a more comprehensive approach to regional and environmental issues[82]. In the Asian region, Cambodia, Thailand, Laos and Vietnam have made elaborate arrangements for the development of the

[80] *I.C.J. Reports 1969*, pp. 53-54.
[81] *Ibid.*, p. 82.
[82] Blake, *op. cit.*, p. 249.

Mekong River[83]. In Eastern Europe the *Gabčíkovo-Nagymaros* case highlighted the importance of bilateral arrangements within the framework of mutually acceptable guidelines[84]. In the Mediterranean area, there has been a growing volume of State co-operation since the Barcelona Convention was signed in 1976[85].

On the basis of the Mediterranean experience, the United Nations Environmental Programme has sponsored several other "Regional Seas" conventions in various parts of the world.

A legal framework for co-operation is contained in the 1982 United Nations Convention on the Law of the Sea, Article 123 of which obliges States bordering enclosed or semi-enclosed seas to co-operate with each other, *inter alia*, over environmental protection.

Joint management régimes have been established for the integrated development of resources in river basins with States splitting costs and responsibilities and sacrificing sovereignty as needed to facilitate the management process. Many agreements have been worked out for the joint management of continental shelf areas, and some with many specific provisions relating to protection of the marine environment and its flora and fauna.

There is thus much movement in the direction of international co-operation to protect the environment[86], and the time is opportune for models to be evolved for such co-operative administration of environmentally important areas of special significance.

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[83] Statute for Co-ordination of Investigation of the Lower Mekong Basin, 1957, supplemented in 1995 in much detail by the Agreement on Co-operation for the Sustainable Development of the Mekong River Basin, setting out a régime for even closer co-operation in regard to irrigation, hydropower, flood control, fisheries, timber floating, recreation and tourism, governed by the Mekong River Commission; see also, Gerald Blake, *op. cit.*, p. 294.

[84] *I.C.J. Reports 1997*, pp. 78-79, paras. 140-144.

[85] See the Protocol on Specially Protected Areas to the Barcelona Convention for the Protection of the Mediterranean Sea against Pollution (1982) by which signatories pledged to improve the state of natural resources and natural sites in the Mediterranean Sea by establishing and managing protected areas in the region.

[86] For the vast variety of approaches to this problem, classified under scientific responses, economic responses, institutional responses, moral responses, and legal implementation, see Lakshman D. Guruswamy and Jeffrey A. McNeely (eds.), *Protection of Global Biodiversity: Converging Strategies*, 1998.

110. Outside the environmental area, many joint management régimes straddling national boundaries have been worked out, and have functioned successfully.

Their experience of joint management régimes and joint use regions can also be harnessed in the environmental field.

Bilateral and multilateral arrangements have laid down many principles regarding the sharing of resources, joint administration, and rights of mineral exploration over another State's sovereign territory. Such agreements contain many examples of the prohibition, despite national sovereignty over the region, of certain types of operations. Among these are such varied examples as oil drilling and the construction of fortifications within designated areas.

Precedents prohibiting certain types of activity in the zone in question[87] could also be particularly useful where environmental protection is concerned.

Other agreements create a geographic zone straddling the boundary, allowing for joint exploration and exploitation of resources[88]. Petroleum development[89], river management[90], fishing rights[91], transit passage[92],

[87] For example, Agreement concerning the Sovereignty over the Islands of Al-'Arabiyah and Farsi, and the Delimitation of the Boundary Line Separating the Submarine Areas between the Kingdom of Saudi Arabia and Iran (1968), prohibiting oil drilling operations within 500 m of the boundary on either side. See, also, Treaty between the Hungarian People's Republic and the Republic of Austria concerning the Regulation of Water Economy Questions in the Frontier Region (1956). This agreement prohibits a State from planning or constructing hydraulic works in the frontier waters of its own territory without consulting the other State, and prohibits any effect that would decrease the supply of water to the other State. It established the Permanent Hungarian-Austrian Water Commission to oversee any planning and settle disputes.

[88] For example, Convention between the Government of the French Republic and the Government of the Spanish State on the Delimitation of the Continental Shelves of the Two States in the Bay of Biscay (1974).

[89] For example, Agreement on Settlement of Maritime Boundary Lines and Sovereign Rights over Islands between Qatar and Abu Dhabi (1969), providing for equal rights of ownership and revenue sharing with respect to an oil field through which the boundary runs.

[90] For example, Itaipu Treaty (1972) between Brazil and Paraguay by which the section of the river that borders the two countries is owned and closely managed and monitored by the respective Governments.

[91] For example, Agreement between the Kingdom of Sweden and the Union of Soviet Socialist Republics on the Delimitation of the Continental Shelf of the Swedish Fishing Zone and the Soviet Economic Zone in the Baltic Sea (1988), providing that, in the formerly disputed area, each party will have fishing rights in that part of the zone allocated to the other party.

[92] For example, Treaty between the Republic of Trinidad and Tobago, and the Republic of Venezuela on the Delimitation of Marine and Submarine Areas (1990) by which Venezuelan ships and aircraft were granted the rights of transit passage through the strait located between Trinidad and Tobago.

water and hydropower[93], pilgrimage[94], irrigation[95], and the use of arable and pasture lands[96] are some areas in which co-operative arrangements have been made, some of them dating back to periods long before environmental considerations had become a major issue.

The precedents are growing and the areas of co-operation expanding. The environmental area is one which is being particularly developed.

111. Many of these agreements include the establishment of a Joint Technical Commission or other co-operative supervisory body as well as a co-ordinate Declaration signed by the two Governments concerned, setting out a statement of principles which they will follow in the conservation or utilization of this common resource[97]. A notable instance of such joint regulation is the Frontier Water Commission and the Supreme Frontier Water Commission created by Germany and Denmark in the very detailed arrangement for the management of six watercourses between Germany and Denmark, under the 1922 Agreement between Denmark and Germany Relating to Watercourses on the German-Danish Frontier[98].

112. The international community has expressed concern for many years regarding the protection of environmental resources shared by two

[93] For example, Convention between the French Republic and the Federal Republic of Germany concerning the Development of the Rhine between Strasbourg/Kehl and Lauterbourg/Newburgweier (1969); Treaty between the United States and Canada Relating to Co-operative Development of Water Resources Relating to the Columbia River Basin (1961); Agreement between Argentina and Uruguay Relating to the Utilization of the Rapids of the Uruguay River in the Area of Salto Grande (1946).

[94] For example, Agreement between India and Sri Lanka on the Boundary in Historic Waters between the Two Countries and Related Matters (1974).

[95] For example, Treaty between Chile and Peru for the Settlement of the Dispute Regarding Tacna and Arica (1929), by which Chile gave Peru an easement over sections of certain irrigation channels which pass through Chilean territory.

[96] For example, Exchanges of Notes between the United Kingdom and France Constituting an Agreement Relating to the Boundary between the Gold Coast and French Sudan (1904) by which villages situated in proximity to the frontier shall enjoy rights to the use of arable and pasture lands, springs, and watering places on the other side of the border. Similar clauses were contained in agreements relating to the boundary between the Gold Coast and Ivory Coast (1905), and Southern Nigeria and Dahomey (1906).

[97] For both of these, see the Uruguay River Agreement referred to above. This Agreement was supplemented by the Declaration on Water Resources (1971) signed by the two Governments calling for the equitable and reasonable utilization of the river's water resources, and the prevention of pollution.

[98] For another example of detailed joint management provisions, see the Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany concerning the Course of the Common Frontier, the Boundary Waters, Real Property Situated Near the Frontier, Traffic Crossing the Frontier on Land and via Waters, and Other Frontier Questions (1960), which creates a Permanent Boundary Water Commission, sub-commissions, and an arbitral tribunal to co-ordinate management and settle disputes.

or more States, and I refer in this connection to General Assembly resolution 3129 of 13 December 1973 on Co-operation in the Field of the Environment concerning Natural Resources Shared by Two or More States, which stresses the necessity to ensure effective co-operation between countries for the conservation of natural resources common to two or more States. A similar concern for co-operation, in relation to transboundary environmental problems, was shown in Article 5 of the Ramsar Convention.

It would be in the spirit of resolutions such as this that such a joint régime be co-operatively evolved and brought into operation. The principles of environmental protection which they seek to foster have passed beyond the realm of mere aspiration, and are now part of customary international law.

113. I should refer also to the growing concern on the African continent for the preservation of valuable flora and fauna resources, as evidenced through such instruments as the African Convention on the Conservation of Nature and Natural Resources (the Algiers Convention) of 1968, by which 29 African States agreed to ensure, *inter alia*, the conservation, utilization, and development, in accordance with scientific principles, of flora and fauna resources, listing for this purpose a wide variety of protected species. It also requires the creation by participating States of conservation areas.

Conclusion

114. With these precedents and principles before them, there is ample scope for the Parties to be required to work out a joint régime for such matters as:

(a) protection of flora and fauna;
(b) right of access to the Island for citizens of both States;
(c) regulation of tourist traffic;
(d) river management and conservation;
(e) licensing of river craft;
(f) freedom of movement of wildlife to and from the Island;

(g) supervision by game wardens;
(h) permitted and prohibited activities on the Island;
(i) the adoption of a common set of principles for the protection of the natural resources of the area, including in particular the care and custody of wildlife.

In the event of a dispute regarding such administrative framework, the Court's assistance would always be available to the Parties, if so desired.

115. It is useful to note also in this regard the statement made to the Court by Namibia regarding its willingness to undertake joint anti-poaching measures with Botswana. In Namibia's submission:

> "Apart from our commitment to conservation, we believe that such joint anti-poaching measures would greatly enhance mutual trust and co-operation between the people of Namibia and Botswana."[99]

116. I would therefore hold that, while Kasikili/Sedudu Island falls within the sovereignty of Namibia, Namibia is obliged to negotiate with Botswana towards a mutually acceptable joint regulatory régime regarding, *inter alia*, the matters set out above. Such action must be within the framework of principles set out in the Biodiversity and other Conventions to which both States are parties. Until such time as the Joint Regulatory Régime is set up, the game wardens and tourists of Botswana shall have access to the Island.

* * *

117. The future will demand an international law that is sensitive and responsive to the problems of environmental law. The careful integration of the necessary principles of environmental law into the traditional body of international law is an important task awaiting attention. The principles and the duties arising from environmental obligations now superimpose themselves upon such rights arising from State sovereignty as may have been recognized by prior international law in an absolutist form.

118. The dispute here under consideration offers an opportunity for significant movement in this direction, with the possibility it presents for the incorporation of environmental concerns into boundary delimitation, and with the development of the concept of joint régimes for conserving the common environmental heritage. As international law reaches out to face the problems of the future, considerations of co-operative action may well seem appropriate where undiluted considerations of individual sovereignty once held sway.

119. I would like to observe in conclusion that the pressures bearing down on the environment are so universal that the international disputes of the future will increasingly involve considerations of an environmental nature. These considerations, if not directly or indirectly related to the matters in issue, will often be at least peripheral to them. Judicial decisions will necessarily be obliged to take them into account. International law will not be without its resources of evolving concepts and mechanisms wherewith to address these unprecedented concerns.

(Signed) Christopher G. WEERAMANTRY.

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[99] CR 99/10, p. 16, para. 24.