



Kasikili/Sedudu Island (Botswana/Namibia)

ARGUED: 19 November 2023

DECIDED: 20 November 2023

1 The Dissenting Opinion was agreed to and signed by President Patel of Mexico, Vice President Kalla of the
2 Netherlands, Justice Farooqi of Qatar, and Justice Jimenez of India on 20 November 2023.

3 We find that the Anglo-German Agreement of 1890 does not explicitly define the main channel as either
4 the North Channel or the South Channel. The Majority is mistaken in stating that the four main characteristics of
5 navigability, depth and width of the channel, the flow and the bed profile configuration, should be the determining
6 factors in identifying the main channel. We believe that is a gross misinterpretation, considering those characteristics
7 remain inconsistent over time. Moreover, both the Republic of Botswana and the Republic of Namibia cite attributes
8 of the North Channel and the South Channel at different periods thus, further strengthening the argument that the
9 factors defining a river do not warrant consideration.

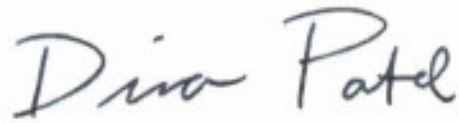
10 We refer to Article 38, Section 1(b), of the Statute of the International Court of Justice to apply customary
11 international law. Customary international law requires both an objective element and a subjective element or
12 *opinio juris*. We contend that the criteria for an objective element is fulfilled as a result of Botswana's consistent and
13 uniform pattern of behavior in which it did not claim sovereignty of the Kasakili/Sedudu islands for a substantial
14 duration spanning from 1966 to 1991.

15 Rationality dictates a departure from strict adherence to the provisions of the 1890 Heligoland-Zanzibar
16 Treaty. Considering that our determination of the treaty fails to explicitly delineate the thalweg of the Chobe
17 River surrounding the island, the principle of *uti possidetis juris* must be considered. As an established principle
18 in international law, this posits that newly sovereign states emerging from colonial status ought to maintain the
19 internal borders of their preceding dependent territories upon attaining independence. We recognize that the United
20 Nations demarcates the South Channel as the pre-colonial Namibian border; thus, warranting particular scrutiny to
21 demarcate the boundary between the two states, as adjudicated by us. Henceforth, we affirm the legal tenet of *uti*
22 *possidetis* as concurrently satisfying the subjective criteria required per customary international law, or *opinio juris*.

23 Henceforth, we assert, *inter alia*, the unequivocal right to self-determination for the indigenous community
24 that has inhabited this island for more than six decades. The challenges posed to the Namibian inhabitants of the
25 island, particularly since the incident in 1984 by the Botswana military force, underscore the urgency of recognizing
26 and safeguarding this right.

27 It is for these reasons we believe the South Channel stands as the recognized boundary between the Republic
28 of Namibia and the Republic of Botswana. We respectfully dissent.

Signed By

A handwritten signature in black ink that reads "Diva Patel". The signature is written in a cursive style with a large 'D' and 'P'.

Justice Diva Patel

A handwritten signature in black ink that reads "Fernanda Jimenez". The signature is written in a cursive style with a large 'F' and 'J'.

Justice Fernanda Jimenez

A handwritten signature in black ink that reads "Gabriel Kalla". The signature is written in a cursive style with a large 'G' and 'K'.

Justice Gabriel Kalla

A handwritten signature in black ink that reads "Murryum Farooqi". The signature is written in a cursive style with a large 'M' and 'F'.

Justice Murryum Farooqi