



Kasikili/Sedudu Island (Botswana/Namibia)

ARGUED: 19 November 2023

DECIDED: 20 November 2023

1 The Majority Opinion was signed and agreed to by Justice Avva of Venezuela, Justice Barness of Malta,
2 Justice Damron of Cypress, Justice Dorsch of Costa Rica, Justice Gomez of Mozambique, Justice Hakim of The
3 Russian Federation, Justice Koziolk of Australia, and Justice Policastro of Ghana on 20 November 2023.

4 The Court has jurisdiction over this case, as stipulated by both parties, according to Article 36, 1 of the
5 Statute of the International Court of Justice “The jurisdiction of the Court comprises all cases which the parties refer
6 to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in
7 force.” It further states in Article 2 “The state parties to the present Statute may at any time declare that they
8 recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same
9 obligation, the jurisdiction of the Court in all legal disputes concerning:

10 a.) the interpretation of a treaty;

11 b.) any question of international law;

12 c.) the existence of any fact which, if established, would constitute a breach of an International obligation;

13 d.) the nature or extent of the reparation to be made for the breach of an international obligation.

14 Additionally, the Court looks to the Special Agreement of 1996 signed by the Republic of Namibia and the
15 Republic of Botswana. Under Article I of the Special Agreement, “The Court is asked to determine, on the basis of
16 the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law. The boundary between
17 Namibia and Botswana around Kasikili/Sedudu and the legal status of the island”. Further in Article IX of the
18 Agreement, the decision of the Court regarding the dispute described in Article I shall be binding on the Parties
19 “shall be final and binding”.

20 Although customary international law holds to not take into account treaties enforced on countries during
21 a period of colonization, under the Special Agreement, both parties have requested that the 1890 Anglo-German
22 Agreement be taken into consideration.

23 Namibia and Botswana have both appealed to the Court to adjudicate the boundary between Namibia and
24 Botswana as well as the legal status of the Island based on the Anglo-German Agreement of 1 July 1890 in their
25 respective memoranda. Thus the Court must use this Agreement to make its opinion. While the UN Charter states
26 that a treaty that was ratified during colonial rule becomes obsolete when the countries gain independence this does
27 not apply to this case as both countries asked the Court to specifically use this treaty to guide this opinion. Founded
28 on this request the Court has two decisions to make, to conclude on the boundary between Namibia and Botswana
29 that goes around the Island as well as the legal status of the Island. The 1890 Anglo-German Agreement states
30 regarding the fork of the Chobe that flows around the Island: “It runs eastward along that parallel til it reaches
31 the river Chobe, and descends the center of the main channel of that river to its junction with the Zambezi, where
32 it terminates”. In this statement, the region covered locates the dividing line between the countries as the “main
33 channel”. As well it refers to the “centre” in the English version and “thalweg” in the German version of the main
34 channel as the dividing line. Due to the phrasing of this Agreement, the Court’s objective is to decipher which of
35 the channels is the “main channel” and where the “centre” is and the location of these two would be the boundary
36 between the two countries. According to Botswana the criteria to decipher which is the main channel is as follows:
37 Channel capacity, flow velocity, and volume of flow. Namibia on the other hand emphasized the flow of the river to
38 be the criteria of the main channel. The Court determined that it cannot depend on a single criterion to determine

39 the main channel. The Court has ruled that the criteria we will apply to determine the main channel are flow,
40 navigability, depth width, and inter alia. Based on these criteria we have determined our opinion as follows.

41 In 1890, the Anglo-German treaty was signed; Namibia accepted this to define their modern border. It
42 defines that border near Kasikili island as the following-“the thalweg of the main channel until it meets the Zambezi,
43 where it ends.” Other than the 1890 Anglo-German treaty, the most relevant precedent is the Vienna Convention
44 on the Law of Treaties. Article 31 of that convention stipulates that treaties are interpreted by their “ordinary
45 meaning” based on “context” to the signing of the treaty and also that “any subsequent agreement between the
46 parties regarding the interpretation of the treaty or the application of its provisions” should be considered. While
47 no context to the question of which channel of the river constitutes the main channel exists from 1890, it has been
48 addressed several times by scientific reports and surveys.

49 First among these is Captain H.V. Eason’s Survey, taken in 1912. In his report, Eason states that : “Two
50 miles above the rapids lies [Sedudu] Island. Here I consider that undoubtedly the north should be claimed as the
51 main channel.”The accuracy of this report-the earliest interpretation of the 1890 treaty- has never been called into
52 question. Given that this report was issued only 22 years after the treaty’s signing, it should be considered contextual
53 evidence to support the treaty’s signers believing that the main channel was in fact the northern one.

54 The second report was issued in 1948 by , L.F.W. Messers and N.V. Redman who were Magistrate of the
55 Eastern Caprivi Zipfel, and District Commissioner at Kasane respectively. Because this was in fact a joint report,
56 under article 31 of the Vienna Convention on the Law of Treaties, it can be considered precedent as a subsequent
57 agreement between the parties regarding the interpretation of the treaty.

58 In their joint report concerning Kasiki island, both agreed “that the ”main channel” lies in the waterway
59 which includes the island in question in the Bechuanaland Protectorate”. In short, this is a strong piece of precedent
60 in Botswana’s favor.

61 The 1948 joint report was followed shortly by official government admissions from South Africa in 1949
62 that the main channel of the Chobe river “passes to the North of [Sedudu.]” A 1951 letter written by the British
63 government reiterates this position-its 5th paragraph, “in particular, affirms the status of the northern channel as
64 the main channel for legal purposes”.

65 This was again affirmed by a 1965 statement by the surveyor-general of Buchannanland. On 11 November
66 1965, he stated that “The boundary between Bechuanaland and the relevant portion of the Caprivi Strip was the
67 center of the main channel or Thalweg of the Chobe River, and this main channel ran to the north of the island.
68 This therefore placed Kasikili Island on the Bechuanaland side of the international boundary.”

69 More Recently, on December 19th, 1984 held a meeting between the delegation of Botswana and the South
70 African delegation to determine whether the “main channel” of the Chobe River was located to the north or south
71 side of the Kasikili/Sedudu Island. It was further agreed that the officials of the Botswana Department of Surveys
72 and Lands and the South African Directorate of Surveys and Mapping produced their *Joint Report* on 15 July 1985.
73 The findings of the *Joint Report* confirmed the main channel is located to the north of the island and that is where
74 the boundary is, therefore the Island lies on the Botswana side of the border. The South African delegation did not
75 seek to deny the legal validity of the Joint Survey Report.

76 Thus, an accurate reading of the Vienna Convention on the Law of Treaties leads the Court to conclude that
77 the ordinary meaning of the 1890 Anglo-German agreement delineated the main channel of the Chobe river to be
78 its’ Northern one.

79 Even if we are not to consider the Vienna Convention and strictly adhere to the scientific definition of
80 the borders defined in the Anglo-German treaty of 1890, Kasikili island should still be recognized as belonging to
81 Botswana. As identified by both parties in their oral arguments, the main channel of a river is determined by four
82 characteristics. These characteristics are as follows:

- 83 a.) Navigability
- 84 b.) Depth
- 85 c.) Width
- 86 d.) Flow

87 A “thalweg” is defined as the line at the water’s surface vertically above the deepest channel of the river
88 bed at low tide. It connects the lowest points of successive cross-sections along the course of a valley or river. To

89 identify the location of the thalweg, depth, width, navigability, water flow velocity and volume must be taken into
90 account. According to the 1985 Joint Survey, the northern channel has an average depth of 5.7m, greater navigability,
91 30.5m width, as well as greater and more perennial volume than the southern channel. In comparison, the southern
92 channel has an average depth of 2.23m, ephemeral volume patterns, and half the width of the northern channel. As
93 the ephemeral portion of the river, the southern channel dries out seasonally. In combination with reeds that often
94 obstruct the passage of vessels through the southern channel, the lack of consistency in volume throughout the year
95 in the southern channel significantly reduces its navigability. With regard to flow as a factor used to identify the main
96 channel, the northern channel has more consistent and larger flow, while the southern channel has less consistent
97 yet heavier flow. Overall, however, the mean discharge (the amount of water in a stream at a given time) at Site
98 II in the northern channel is 78.865 cubic m/s compared to 41.823 cubic m/s at Site I in the southern channel...
99 Notice that the ratio of roughly 1:2 between [p1067] the mean discharges of the southern and northern channels also
100 applies to the median and maximum discharges.” Namibia argues that the southern channel has greater flow than
101 the northern channel because when flow does exist in the channel, it is more rapid than the flow of the northern
102 channel. This argument is unconvincing in light of the overall higher discharge rate of the northern channel.

103 The northern channel demonstrates greater compatibility with the characteristics used to determine the
104 thalweg. Because the location of the thalweg is the most prominent factor used in determining the main channel of a
105 river, the Court finds that the northern channel is the main channel of the river. Although flooding of the Northern
106 plains and channel occurs, it does not dissipate the boundary line that the Northern channel delineates.

107 All four characteristics in this case point to the northern channel being the Chobe river’s main one. Firstly,
108 the average depth of the northern channel is 5.7m, more than double the 2.23m. Average depth of the south channel.
109 Secondly, the width of the northern channel is also larger than that of the southern channel.

110 Namibia arguing that due to the rivers lacking flow during certain seasons, the Court should deem the
111 characteristics irrelevant is irresponsible and an insult to the Court. While flow may be of less importance to both
112 parties, it should still be considered in totality in regards to the channel. In total, the average annual discharge
113 (the literal amount of water in a stream of water) is greater in the northern channel.” According to the data,”the
114 northern channel conveys about twice as much flow as the southern channel. Overall, the northern channel has all
115 of the characteristics of a main channel for most of the year and three of them for the rest of the year. Furthermore,
116 the Anglo-German treaty states the border should follow the thalweg of the main channel. Due to the contention of
117 which channel is the “main” one, the Court deems that the channel with the deeper thalweg shall be the main one,
118 favoring the side of Botswana.

119 The Court finds that while the Masubia tribe of the Caprivi Strip inhabited the island and used the land
120 for a considerable amount of years; the island does not inherently belong to the people of Masubia and the Namibia
121 government. The Court has deemed irrelevant the government of Namibia’s claim that Masubia tribe members
122 reside on the island. This assertion, according to the Court, does not hold legal weight in establishing a continuous
123 and unambiguous claim to ownership. The Court has emphasized that, in the eyes of the law, the critical factor
124 is not the temporal nature of the tribe’s presence on the island but rather the absence of a formal and official
125 declaration of occupation. The tribe of Masubia used the land incrementally; according to the season and weather
126 changes and only for agricultural use. Moreover, the Court has pointedly noted that the structures erected on the
127 island by the Masubia tribe were utilized exclusively during specific seasons, reinforcing the transient nature of their
128 presence. This observation further underscores the Court’s stance that, despite the functional aspects resembling
129 a state government’s activities on behalf of the Caprivi Strip, the Masubia tribe did not conclusively establish a
130 permanent and sovereign claim to the island. They executed the functions of a state government on behalf of the
131 Caprivi Strip. The Court’s decision hinges on the lack of a formal and official declaration of occupation by the
132 Masubia tribe, despite their historical use of the land.

133 Therefore the Court Orders:

134 Both parties recognize the Northern Channel as the primary Channel in light of the 1890 Anglo-German
135 Agreement, thus recognizing the island in question to be under purview of Botswana.

136 Second, the native Masubians maintain their right to residence on the of the Sedudu Island, as Botswana
137 maintains ownership.

138 Lastly, the Court recommends further partnership and cooperation of the Republic of Botswana and the
139 Republic of Namibia by the admittance of the owners of the island, to share agricultural and residential functions.

140 As a Court tasked with resolving international disagreements and entrusted with upholding international

141 law, we must be, and are, plainly guided by said law. The Vienna Convention is clear in detailing the need to
142 interpret, “in good faith”, the “ordinary meaning” of the relevant provisions in the Anglo-German Treaty of 1890.
143 For better or for worse, the primary objective of that Treaty was to delineate an international boundary based solely
144 and explicitly on “the thalweg of the main channel,” irrespective of who inhabited this small island, when they
145 inhabited it, or for how long. Straying from the text of this Treaty, which both parties agree is central and relevant
146 to their claims, is misguided and most importantly misrepresents the law and facts relevant to this case. Due to
147 its navigability, greater and more consistent depth, width and flow, the Northern Channel is by definition the main
148 channel. Therefore, the thalweg is located in the Northern Channel as well, making it the correct border between
149 the parties involved. Sedudu Island is the sovereign territory of the Republic of Botswana.

150 With respect, the Majority.

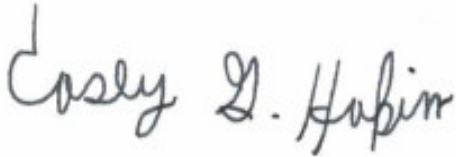
Signed By



Justice Alana Policastro



Justice Avery Damron



Justice Casey Hakim



Justice Emma Barnes



Justice Jaeda Koziolk



Justice Samuel Gomez



Justice Tyler Dorsch



Justice Vishnu Avva