ARTICLE 31(3) (A) AND (B) OF THE VIENNA CONVENTION
AND THE KASIKILI/SEDUDU ISLAND CASE*

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I. Introduction

On 13 December 1999 the International Court of Justice gave its judgment in the Kasikili/Sedudu Island (Botswana/Namibia) case.¹ The decision settled satisfactorily, and Botswana and Namibia accepted and applied the judgment relating to a boundary dispute. Why then did four judges dissent? Why do two other judges add qualifying remarks and certain jurists criticise the judgment? In trying to answer I shall only direct my remarks to the Court’s treatment of ‘subsequent practice’ as a method of interpretation of Art III of 1890 Anglo German Treaty as to the meaning of ‘the centre of the main channel’ of the Chobe River.

The dispute related to the location of the boundary where that island divides the Chobe, a tributary of the Zambezi River, between to the north the State of Namibia, formerly the German colony of SW Africa, and to the south the State of Botswana, formerly the British protectorate of Bechuanaland. The ICJ was requested in the Special Agreement to interpret the Anglo-German Treaty of 1890 which drew the boundary between the German and British possessions and provided by Article III that the boundary should follow ‘the centre of the main channel’ of the Chobe to its junction with the Zambezi. The words ‘the main channel of’ were added shortly before the treaty was signed at the specific instance of Lord Salisbury, the Foreign Secretary and Prime Minister of Great Britain at the time.

The International Court interpreted and applied Article III awarding the island to Botswana but declaring, – and this was accepted by Botswana, – that the tourist boats of both Botswana and Namibia should have free access to both channels round the island.

The judgment of the International Court was accepted by both parties and there would seem to be no further cause for difference between the two States in that location. The accurate delimitation of boundaries and the allocation of

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¹ This Chapter was based on the presentation made by the author during the ‘First Annual Conference on International Law: Interpretation under the VCLT’ organized by Queen Mary and Eversheds in 2006, and is current as of that date.

¹ Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia), Judgment of 13 December 1999, 1999 ICJ Rep. 1045 (hereinafter Kasikili/Sedudu Judgment). In the interest of transparency it is noted that the author acted as one of the counsel for Botswana in this case.
shared water resources remain a matter of constant concern to governments in Southern Africa and is one where the applicable principles of international law identified by the Court are likely to prove of great assistance. The third paragraph of the dispositif of the Judgment that in the two channels around the Island the nationals of and vessels flying the flags of Botswana and Namibia should enjoy equal national treatment provides a valuable application of the principle of equitable utilization of shared water resources. The ICJ decision is also likely to be a useful precedent to solve other potential river boundary disputes relating to the Zambezi and the Chobe.

Nonetheless, the Court’s assessment of the relevance of the ‘subsequent practice of the States’ in solving the parties’ dispute has proved controversial, it challenges the general principle as stated by Judge Huber that “a juridical fact must be appreciated in the light of the law contemporary with it and not of the law in force at the time when a dispute arises or falls to be settled”.

It will be recalled that article 31 of the 1969 Vienna Convention on Treaties (VCLT), after stating the general rule of interpretation in paragraph 1, and defining the context to which reference may be made in the second paragraph, deals with subsequent practice in paragraph 3, which provides that there shall be taken into account, together with the context a) any subsequent agreement between the parties regarding the interpretation of the treaty or its application of its provisions and b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

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2 The Court’s identification of the thalweg or median line between the banks as a method of delimitation of a boundary in a water course (Kasikili/Sedudu Judgment supra note 1, para. 24) was applied in the Case concerning the Frontier Dispute (Benin/Niger), Judgment of 12 July 2005, 2005 ICJ Rep. 90, para. 144.

3 See Kasikili/Sedudu Judgment supra note 1, Separate Opinion of Judge Kooijmans.

4 Peter Ashton, ‘South African Water Conflicts: are they inevitable or preventable?’ in Water for Peace in the Middle East and South Africa, Green Cross International (ed.) (Geneva: Green Cross International, 2000), 94–8. He identifies two islands on the Zambezi and five islands on the Chobe where the boundary is uncertain and describes the Kasikili/Sedudu case as an excellent example of a water based conflict that reached a high level of tension preventing resolution of the problem by disputing parties, thus requiring a third party (the ICJ) to arbitrate the dispute.

5 Island of Palmas (or Miangras) case (United States of America v. the Netherlands) (1928), RIAA 2: 829, at 839.