International Rivers as Boundaries

The Dispute over Kasikili/Sedudu Island and the Decision of the International Court of Justice

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Abstract: International rivers serve a number of purposes, the most obvious are the navigational and non-navigational uses. Less noticed is the fact that international rivers are also used to delimit boundaries between nations. The immediate question that would arise is: Where are such boundaries actually drawn across the river? Boundaries, however, are established by treaties and the answer to this question is often included in the interpretation of treaties delimiting such water boundaries, taking into account the special characteristics of the international river. Indeed, this has been the case regarding the boundaries across the Chobe river between Botswana and Namibia. Determining where such boundaries lie would result in deciding to whom a disputed Island, the Kasikili/Sedudu, belongs. In a praiseworthy step, the two countries agreed to take their dispute over the Island, after failure to resolve it through negotiations, to the International Court of Justice. This paper discusses the uses of international rivers as boundaries, and reviews the dispute between Botswana and Namibia, and the decision of the Court thereon.

Keywords: Botswana, boundaries, Chobe river, dispute resolution, Germany, Great Britain, International Court of Justice, international rivers, Kasikili/Sedudu Island, Namibia, treaties.

Introduction

International watercourses are usually thought of in connection with the quest for sharing their waters, or the benefits stemming from the use of such waters. In this regard, disputes and cooperation over such watercourses have centered around both, the quantitative and qualitative aspects of such use and have covered a wide array of areas including irrigation, hydropower generation, fisheries, and flood control. This has been referred to as the non-navigational uses and has occupied a large portion of the work of scholars interested in international water law. Yet, the international legal regime for the uses of international watercourses for non-navigational purposes has been developing quite slowly. Although a large number of bilateral and multi-lateral treaties has been concluded, and some regional conventions have been successfully negotiated, the absence of a universal treaty regulating the use and protection of international watercourses is quite conspicuous. The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses that was adopted by the United Nations General Assembly on May 21, 1997, has still not received the required number of ratifications to enable it to enter into force and effect. As of November 2000, 16 countries have signed the Convention, and about half of them have ratified it. The Convention requires 35 ratifications to enter into force and effect.

The use of international rivers and lakes for navigational purposes has developed in parallel and has generated separate sets of principles. Unlike the non-navigational uses, principles governing navigational uses started to evolve in the 19th century, as a result of the expansion of the industrial revolution and the scramble for colonies in Africa and Asia (Baxter, 1964). At that time navigation was the only important element in the uses of international rivers. The Final Act of the Vienna Congress of 1815 included provisions establishing freedom of navigation for the riparian states of the international rivers. Article 113 obliges the states to effect in the river-bed works for eliminating all obstacles to navigation. The Congress of Berlin of 1885 established the principle of freedom of navigation which facilitated the conquest of Africa by the colonial powers. The Treaty of Versailles of 1919 emphasized the supremacy of freedom of navigation which facilitated the conquest of Africa by the colonial powers. The Treaty of Versailles of 1919 emphasized the supremacy of freedom of navigation over all other uses, and extended freedom of navigation to vessels carrying the flags of non-riparian states. The Convention and Statute on the Regime of Navigable Waterways of International Concern, 1921 (commonly known as the Barcelona Convention), confirmed the principle of priority and freedom of navigation. This principle was observed at that time in Europe and its colonies, but not in North and South America. In both continents, the right to require other states, including other riparian states, to have a special permission to use the international river for navigation prevailed (Caflisch, 1998).
However, the primacy of freedom of navigation started to gradually lose grounds following the end of the Second World War. Two factors contributed to this loss of primacy. The first was the emergence of communist East Europe and the ensuing cold war with the West, which resulted in lack of cooperation in many fields, including international rivers. The second was the process of decolonization and the birth of new nations for which navigation was not a priority. This loss of primacy for navigation is reflected in the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses. Article 10 of the Convention, codifying customary international law in this field, states that in the absence of an agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses. Although it does not mention any specific uses, the Article was originally conceived to provide that navigational uses no longer enjoy inherent priority over non-navigational uses (McCaffrey, 1998).

**International Rivers as Boundaries**

It is rarely noticed that international rivers and lakes, in addition to the navigational and non-navigational uses, are also used as boundaries, constituting the line that formally separates communities and states. It is ironic that international rivers, which are used as international highways facilitating commerce and communication between nations, are also used as formal boundaries separating such communities and nations. Indeed, international rivers and lakes form the boundaries, at stretches varying in lengths, between a large number of countries. As examples, in Africa, the Senegal river constitutes the boundary between Senegal and Mauritania; the Congo river between the Democratic Republic of the Congo and the Congo; and the Zambezi river between Namibia and Zambia, and Zambia and Zimbabwe. In Asia the Mekong river is a boundary river between Laos and Cambodia, Laos and Thailand, and Laos and Myanmar; the Salween between Thailand and Myanmar; the Ganges between India and Bangladesh; and the Mahakali between India and Nepal. In Europe, the Danube constitutes the boundary between a number of countries, including Germany and Austria, Austria and Slovakia, Yugoslavia and Romania, and Romania and Ukraine. The Rio Grande and the Colorado rivers constitute borders between Mexico and the United States; the Parana river between Argentina and Paraguay; and the Amazon between Peru and Colombia. Similarly, a number of lakes, such as Lake Victoria, Lake Chad, Lake Constance, and the Great Lakes in North America also constitute the borders between a number of countries (Wouters 1997).

However, the statement that rivers and lakes are used to delimit boundaries between countries raises more questions than it answers. Indeed, the question that may immediately arise is: Where are the boundaries that separate the two states drawn along the international river? Should the shores of each state become its boundaries, leaving the entire river or lake as a no-man’s land or a condominium? Should the boundaries be drawn at the shores of one state leaving one state with the entire river, and the other with nothing? The former is a theoretical possibility, but the latter has been used in a few cases such as the case of Lake Malawi where the entire lake falls on the Malawi side, with Tanzania having no part of the lake within its boundaries (Zacklin and Caflisch, 1981). This possibility has been extended to boundaries between provinces and states in a federal system. The entire Potomac river is owned by the State of Maryland under a 1632 land grant from King Charles II, leaving the borders of the State of Virginia on the shores of the Potomac river. Virginia has to ask for permission from Maryland every time it needs to expand its water use from the Potomac river, although Virginia is theoretically a riparian state. The recent refusal of Maryland to grant such a permission prompted Virginia to take the case to the United States Supreme Court (Masters and Shear, 2000).

According to Caflisch (1998), two basic methods are used for drawing water boundaries. The first method is through the thalweg (a German word meaning the path running at the bottom of a valley) which could mean the succession of the deepest points in the river bed, or the main channel used by navigators when travelling downstream, or the median line of that channel. The second method is the median line which is a line every point of which is equidistant from the nearest point on each shore. However, the answer to the question of where to draw the boundaries lies in the fact that boundaries are, as a general rule, established through treaties between the countries separated by such rivers. As such the issue becomes one of interpreting the treaty in question as to where the boundary is to be drawn. Such interpretation is bound, however, to take into account the special characteristics of the international river in question.

This issue of interpretation of a treaty as to where the boundary lies was the crux of the dispute between Namibia and Botswana over the Kasikili/Sedudu Island in the Chobe river. The rest of this paper is devoted to an analysis of the history of the dispute over the Island, the arguments of the parties before the International Court of Justice, and the decision of the Court as to where the water boundaries across the Chobe river between Namibia and Botswana lie, and hence to which country the Island belongs.

**The Kasikili/Sedudu Dispute**

The Island, known in Namibia as Kasikili, and in Botswana as Sedudu, is about 3.5 kilometers in area, and lies in the Chobe river. The Chobe river originates in Angola and is called Rio Cuando (where it forms the borders with Zambia, near its borders with Namibia), and the name changes to Kwando after the river crosses into...
the Caprivi Strip of Namibia. The name of the river changes again into Mashi where it starts to form the border between Namibia and Botswana, and later to Linyanti. After the river exits Lake Liambezi, it is called the Chobe. The Chobe river joins the Zambezi river at the border of Botswana, Namibia, and Zambia, not far from where the Zambezi forms the border between Zambia and Zimbabwe. As such the borders between Namibia and Botswana are delimited by the river where it is known as Mashi, Liyanti, and Chobe. The Kasikili/Sedudu Island is located in the Chobe river about 20 kilometers before the Chobe joins the Zambezi river.

The scramble for Africa by the European colonial powers in the 19th century resulted in the conclusion of a number of treaties between those powers for delimiting their sphere of influence, and hence, the boundaries between many of their colonies. One such treaty was the 1890 Treaty between Germany and Great Britain which resulted in defining the borders of their colonies in the southwestern part of Africa, placing South West Africa under the domination of Germany, and Bechuanaland under Great Britain. As a result of the defeat of Germany and the end of the first World War, the German colony of South West Africa was administered by the Republic of South Africa under a mandate from the League of Nations issued in 1920. The United Nations terminated this mandate in 1966, establishing instead the United Nations Council for South West Africa. The Council was later renamed as the United Nations Council for Namibia, and it ceased to exist when Namibia became independent in 1990. On the other hand, the British Protectorate of Bechuanaland was renamed after independence in 1966 as the Republic of Botswana.

The dispute over the Kasikili/Sedudu Island predated the emergence of the two states as independent nations. However, the dispute erupted into an open, political one following the independence of Namibia in 1990. Each of the two countries claimed ownership of the Island based on its interpretation of the 1890 Treaty between Germany and Great Britain with regard to the delimitation of their borders. Attempts to resolve the dispute through negotiations started immediately after Namibia’s independence in 1990, and continued with the participation of Zimbabwe. As a result of the failure of those efforts, the two countries agreed in 1996 to refer the dispute over the Island to the International Court of Justice. A special agreement to that effect was signed on February 15, 1996 in Gaborone, the capital of Botswana. The Court was asked to determine the boundary between the two states around the Kasikili/Sedudu Island, and consequently the legal status of the Island, on the basis of the Anglo-German Treaty of 1890, and the rules and principles of international law. This agreement entered into force on May 15, 1996. The agreement was transmitted to the Registrar of the Court on May 29, 1996. The Court issued its decision on December 13, 1999.

Arguments of the Parties and the Decision of the Court

Article 21 (2) of the English version of the Treaty determined the sphere of influence reserved for Germany. With regard to the areas around the disputed Island, it specified the boundary as running eastward “...till it reaches the river Chobe, and descends the centre of the main channel of that river to its junction with the Zambezi, where it terminates.” The German version of the Treaty used the term “thalweg” of that channel, as opposed to “center of the main channel” used in the English version. The Treaty does not include any criteria, nor does it provide any guidance, for determining the main channel. The Court, after discussion of the meaning of the term “thalweg,” and after referring to the work of scholars in this area, including the work of the Institute of International Law, concluded that the words “centre of the main channel” has the same meaning as “thalweg des Hauptlaufes” (the latter German word means main channel). Since the Treaty did not define the term “main channel” of the Chobe river, the case before the Court centered around interpretation of the term “main channel.” In interpreting this term, the Court resorted, inter alia, to the 1969 Vienna Convention on the Law of Treaties, although neither country is a party to the Vienna Convention. The Court noted, in this connection, that the relevant paragraphs of the Convention reflect customary international law in this area.

The Court, however, noted that the real dispute between the parties concerns the location of the main channel where the boundary lies. For Botswana, the main channel is to be found “on the basis of the thalweg in the northern and the western channel of the Chobe.” This will result in placing the disputed Island within the boundaries of Botswana. On the other hand, Namibia argued that the main channel lies in the center of the southern channel of the Chobe river. This will consequently result in placing the disputed Island within Namibia’s boundaries. Hence, the Court’s first and main task was to determine the location of the main channel.

Figure 1. Botswana-Namibia borders and location of Kasikili/Sedudu Island.
The criteria laid down by Botswana for identifying the main channel included the greatest depth and width, bed profile, configuration, navigability, greater flow of water, channel capacity, flow velocity, and volume of flow of the Chobe river. Botswana stressed the last three elements of its criteria. The criteria for Namibia, on the other hand, included width, depth, velocity, discharge, and sediment transport capacity. Namibia attached the greatest weight to the amount of flow and to the channel that is most used for river traffic. The Court decided that it would not rely on one single criterion for identifying the main channel of the Chobe river around the Island because the natural features of a river may vary markedly along its course, and from one case to another. The Court consulted a number of scientific works, which define the concept of main channel. Those works identify the width, depth, volume of water, and navigability as the main elements of the criteria. With regard to the depth, the Court noted that the Parties are in agreement that the northern channel has the greater mean depth, but also noted that Namibia disputed that this conclusion was of any importance whatsoever for determining the main channel. Namibia argued that what was important in this respect was not mean depth, but draught at the shallowest point of the channel, and further asserted that any differences between the shallowest points in the northern and southern channels are minute. However, the Court concluded that, notwithstanding the difficulties in sounding the depth of the channels and interpreting the results, the northern channel is deeper than the southern channel as regards mean depth, and even as regards minimum depth.

With regard to the criterion of width, the Court consulted a number of national Court decisions, arbitral awards and reports. The Court also reviewed the aerial photography and satellite pictures and concluded that, apart from the season of flooding, the northern channel is indeed wider than the southern channel.

On the issue of the flow of the river (that is the volume of water carried), Botswana contended that the northern channel conveyed about twice as much flow as the southern channel. Botswana’s presentation showed two channels around the northern part of the Island. On the other hand, Namibia provided figures to show that the southern channel carried not only the major portion, but substantially all of the flow of the Chobe around the Island. In Namibia’s presentation, the left bank for this channel is marked by the line of high ground, crossing the Island in a west-east direction. The Court decided that it was not in a position to reconcile the figures submitted by the two parties. However, the Court found that the largest part of the bed of the channel, described by Namibia as the main channel, remained dry for the greater part of the year. Hence, the court felt that it could not be persuaded by Namibia’s argument concerning the existence of this main channel, whose visible channel would merely constitute the thalweg. The Court, furthermore, considered Namibia’s contention that the southern channel of the Chobe has certain characteristics such as a steep, well-defined bank with a strip of riverine vegetation along it, that make it readily identifiable. The Court, however, felt that even if one part of the right bank of this channel is easily identifiable from a distance, other parts of this bank are not, and neither was the left bank.

The Court considered the criterion of navigability and determined that navigability of a river is the combined result of its depth, its width and the volume of water it carries, taking account of natural obstacles such as waterfalls, rapids, and shallow points. Botswana had accorded more importance to such criterion and contended that navigability was a primary consideration in the minds of the negotiators of the 1890 Treaty. Namibia, on the other hand, felt that the river is non-navigable in most of its parts, and as such it would be anomalous to apply this criterion. The court noted that the navigability of the Chobe river varies greatly, depending upon the natural conditions, and that navigability of the two channels is limited by their shallowness. However, the Court felt inclined to conclude that the main channel of the Chobe river should be that of the two which offers more favorable conditions for navigation. Based on the above determination, the Court concluded that it is the northern channel which meets this criterion, and as such should be regarded as the main channel.

The Court considered also the parties’ subsequent practice to the 1890 Treaty as an element in the interpretation of the Treaty, as stipulated in Article 31 (3) of the Vienna Convention. Such subsequent practice is considered under the Convention as “an objective evidence of the understanding of the parties as to the meaning of the treaty.” Again, the two parties agreed on this principle, but disagreed on the consequences to be drawn from the facts of the case as presented by each of them. Each party furnished a number of reports including incidents that it considered as subsequent practice in its favor. One such situation was the fact that the tribesmen of the Caprivi Zipfel were cultivating land in the Island on annual basis. An exchange of correspondence took place between the South African authorities and the British administration of the Bechuanaland Protectorate in the late 1940s on this issue, and on the wider issue of the boundaries and the ownership of the Island. South Africa was of the view that the tribesmen had made use of the Island for a considerable number of years and that their right to do so was not disputed by the Bechuanaland authorities. On the other hand, the Bechuanaland authorities kept referring to an annual renewal permit for the Caprivi Zipfel tribesmen to cultivate land on the Island. In 1951, the two parties reached a “gentlemen’s agreement” for dealing with the issue. First, they agreed to differ on the legal aspects regarding the Island; second, they agreed that administrative arrangements reached between them should not prejudice the right of either party to pursue the issue; and
thirdly, that the island would continue to be used by the Caprivi tribesmen and that the northern waterway would continue to be used as a “free for all” thoroughfare. After a thorough examination of those documents and correspondence, the Court concluded that there was no agreement between South Africa and Bechuanaland with regard to the location of the boundary around the Island, and as such those events did not constitute “subsequent practice” of the parties that could be used in the interpretation of the Treaty.

In 1985, following a shooting incident around the Island between members of the Botswana Defence Force and South African soldiers, it was agreed by the parties that a joint survey should take place as a matter of urgency to determine whether the main channel of the Chobe river is located to the north or the south of the Island. Although the joint survey pointed at the disparity in drawing the boundaries by each of the two parties, the survey concluded that the main channel of the Chobe river now passes the Island to the west and to the north of it. However, the correspondence that followed indicated that South Africa felt the issue related to the international boundary between Botswana and South West Africa/Namibia, and as such should be discussed and resolved by the political authorities of both countries. The Court concluded that the parties did not oblige themselves to be bound by the results of the joint survey and stated that the two states had no competence to conclude such an agreement since at that time (1984–1985) the United Nations General Assembly had already terminated South Africa’s mandate over South West Africa, and that the Security Council had approved such measures. The Court also noted its Advisory Opinion of June 21, 1971 in which it stated that the continued presence of South Africa in Namibia was illegal, and that the state members of the United Nations were under obligations to recognize the illegality of South Africa’s presence in Namibia and the invalidity of its acts on behalf of, or concerning Namibia.

The Court also considered Namibia’s argument of acquisition of the Island by prescription, acquiescence and recognition, in addition to the Treaty based title. Namibia contended in this regard that members of the Masubia tribe of the eastern part of the Caprivi Strip had continued presence in the Island, at least between 1890 and the late 1940s, and that their occupation was continuous, exclusive, and uninterrupted in so far as the physical conditions of the Island allowed. Namibia further contended that Germany and then its successors, incorporated the local institutions of the Masubia into the structure of the colonial governance, using them as an instrument of local authority, and all of this was known to the Bechuanaland authorities. Botswana did not dispute that people from the Caprivi Strip at times used the Island but stressed the sporadic nature of that use, and claimed that the same applied to people living on the other side of the Chobe, in Bechuanaland. After discussing the arguments of both parties, the Court concluded that the peaceful and public use of the Island over a period of many years by the Masubia tribesmen does not constitute subsequent practice in the application of the Treaty. The Court based this conclusion on two elements (1) the occupation of the land by the Masubia was not linked to any belief on the part of the Caprivi authorities that the boundary line laid down in the 1980 Treaty followed the southern channel, and (2) the Bechuanaland authorities were neither fully aware of, nor did they accept, this as a confirmation of the boundary Treaty.

The two parties submitted a large number of maps to substantiate their claim of ownership of the Island. However, the Court noted that there was no map appended to the 1890 Treaty that would express the understanding of Germany and Great Britain with regard to the borders of their respective colonies in the area. As such, the Court concluded that it was unable to draw any conclusion from the map evidence submitted by the parties.

Based on the foregoing, in particular the (1) factual findings in connection with the points of navigability of the river based on its width and depth, (2) interpretation of the historical instances with the regard to the Island, and (3) rejection by the Court of Namibia’s claims of the relevance of the presence of the Masubia tribesmen in the Island, the Court concluded that the boundary between Botswana and Namibia around Kasikili/Sedudu Island provided for in the 1890 Treaty lies in the northern channel of the Chobe river. Consequently, the disputed Kasikili/Sedudu Island belongs to the Republic of Botswana.

The Court, however, noted that the Kasane Communiquè of May 24, 1992, recorded that the Presidents of Botswana and Namibia agreed, inter alia, that navigation in the Chobe river around the Island should remain unimpeded, including free movement of tourists. Botswana reiterated this understanding during the hearing but required that all tourists boats should be registered because of its concerns about the environmental pollution of the Chobe. Botswana explained that some tourists boat operators tended to transport their boats from the Okavango river, infested with river weeds, down to the Chobe river. The Court observed that this requirement was backed by proper legislation, namely, the Laws of Botswana Aquatic Weeds (Control) Act, 1971. Thus, the Court incorporated this agreement on unimpeded navigation, subject to said environmental consideration, as part of its decision.

Conclusion

As Justice Koroma noted in his Declaration attached to the decision of the Court, Botswana and Namibia are to be commended for their decision to entrust their dispute over the Kasikili/Sedudu Island to the International Court of Justice for a peaceful settlement. Their decision
came at a time when other nations in Africa are resorting to arms to resolve such border disputes, with massive losses in human life and financial resources. They are also to be commended for trying, prior to involvement of the Court, direct negotiations, and the use of good offices of a third party, Zimbabwe. It is also praiseworthy that the failure of such negotiations and use of good offices of a third party did not produce a backlash.

The decision of the two countries also confirms the principle long accepted by the African states that their boundaries should follow those inherited from the colonial powers, mainly for stability, if nothing else. The decision of Botswana and Namibia of accepting the 1890 Treaty as the basis for determination of their boundaries has confirmed this principle and has added to such stability. This is notwithstanding the calls from some quarters of the African continent for non-recognition of treaties concluded during the colonial era (Godana 1985). The agreement of the two parties to respect freedom of navigation subject to environmental requirements should also be applauded in both of its elements of freedom of navigation and injection of the environmental considerations into the navigational uses of the Chobe river.

The decision of the International Court of Justice should not be seen from the narrow angle of who is the winner and who is the loser. It should rather be viewed as a triumph for the gradually emerging process in the third world of resolving disputes through negotiations and the good offices of a third party, and, failing that, through the International Court of Justice. Indeed, this should be particularly applauded in light of the difficulties and complexities of the disputes over international watercourses.

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