

DECLARATION OF JUDGE HIGGINS

The task of the Court — Temporal issues — Relevance of mistake as regards navigability — Realism in application of treaty terms — Importance of visible physical features.

1. At paragraph 28 of its Judgment the Court states that it is interpreting words in a treaty to give them their ordinary meaning; and that this is what it is doing in determining the meaning of “main channel” by “reference to the most commonly used criteria in international law”. I find this somewhat fanciful. In my view, although there are commonly used international law criteria for understanding, for example, the term “thalweg”, the same is not true for the term “main channel”. And it seems that no “ordinary meaning” of this term exists, either in international law or in hydrology, which allows the Court to suppose that it is engaging in such an exercise. The analysis on which the Court has embarked is in reality far from an interpretation of words by reference to their “ordinary meaning”. The Court is really doing something rather different. It is applying a somewhat general term, decided upon by the parties in 1890, to a geographic and hydrographic situation much better understood today.

2. The term “the main channel” is not a “generic term” (cf. *Aegean Sea Continental Shelf*, *I.C.J. Reports 1978*, p. 32, para. 77) — that is to say, a known legal term, whose content the parties expected would change through time. Rather, we find ourselves closer to the situation of the Arbitral Tribunal in the *Laguna del Desierto* case of 1994 (see paragraph 20 of the Court’s Judgment). The Tribunal there stated that it could not accept Chile’s argument:

“that to apply the 1902 Award in light of geographical knowledge acquired subsequently would be equivalent to its revision through the retrospective consideration of new facts. The 1902 Award defined, in the sector with which this Arbitration is concerned, a frontier which follows a natural feature that, as such, does not depend on accurate knowledge of the area but on its true configuration. The ground remains as it has always been . . . [t]his Judgment is . . . faithfully applying the provisions of the Award of 1902.” (*International Law Reports*, Vol. 113, p. 76, para. 157.)

This dictum retains a certain relevance, notwithstanding that the fact situation in the *Laguna* case is somewhat different from ours.

3. The Court is indeed, for this particular task, entitled to look at all the criteria the Parties have suggested as relevant. This is not to discover a mythical “ordinary meaning” within the Treaty, but rather because the general terminology chosen long ago falls to be decided today. To use contemporary knowledge and scientific data to assist in fulfilling that task is not at all inconsistent with the intertemporal rule in the *Island of Palmas* Award, which was concerned with the legal rules applicable to title to territory and not with identification, through the legal technique of evaluating evidence, of a chosen term.

4. At the same time, we must never lose sight of the fact that we are seeking to give flesh to the intention of the parties, expressed in generalized terms in 1890. We must trace a thread back to this point of departure. We should not, as the Court appears at times to be doing, decide what *in abstracto* the term “the main channel” might today mean, by a mechanistic appreciation of relevant indicia. Rather, our task is to decide what general idea the parties had in mind, and then make reality of that general idea through the use of contemporary knowledge.

5. Although the *travaux préparatoires* have little to say, our general knowledge of the time suggests that two things were important to Britain and Germany as they concluded the Treaty of 1890. The first was that they sought a clear delimitation of their spheres of interest in (*inter alia*) the north eastern sector of South West Africa. The second was that they supposed that this could be done in a way as to allow to each party the possibility of riverine access to the Zambezi.

6. We know now that the assumptions as to navigability were mistaken. For its greater part the River Chobe is not navigable; no further engineering works have been able to bring into being access to the Zambezi and indeed, even in the area around Sedudu-Kasikili, there can only be navigation by vessels of very shallow draught. But the law of mistake, and particularly Article 48 of the Vienna Convention on the Law of Treaties, has no place in all of this, because it cannot plausibly be suggested that the 1890 Treaty would not have been concluded if this error had been known — nor even that the words that exercise us here would have been in a different formulation whose content we can now discern. A fully contextual application today of treaty terms selected in 1890 should not place emphasis on elements that, to be sure, have a theoretical relevance but none in the particular realities of the case. Thus in my view little account should thus today be taken of factors that go

mostly to concepts of navigability when we seek to determine which is the main channel. Nor does the fact of important contemporary tourist boating in the southern channel guide us as to which today should be designated as “the main channel”, as navigation around the Island was not at all what the parties were concerned with.

7. I add, to make my position clear, that I agree with all the Judgment has to say at paragraphs 47 to 63, regarding the legal significance of the diplomatic history of the matter. However — and unlike the Court — I equally place no reliance at all in the facts said to be found by Eason, Trollope and Redman, whose methodology is not fully known to us and who were preoccupied with the question of depth; nor do I think it useful to accept as “facts” findings of the Joint Team of Experts, such “facts” not having been accepted by South Africa as determinative of the underlying legal issue.

8. By contrast, emphasis should be given to the main, and still realistic, desire of the parties to choose the channel that would most clearly mark the limits of their interests. Thus, in my view a considerable importance has thus to be given to the visible physical distinctions between the two channels. Whether the waters in them do or do not originate in the Chobe itself, whether they are stagnant or fresh, whether one channel is fractionally deeper than another, seems to me to matter very little.

9. From this perspective two competing elements immediately come into play. The first is that the Chobe Ridge could be said to play an important role in marking a clearly visible frontier, throughout the year. But the second, perhaps yet more significant, is that, year round, taking one season with another (which seems to me more relevant to the task in hand than low water mark reliance), it is the north that appears in the aerial photography and satellite imagery to be the broader and more important channel.

10. Not without some difficulty, I have therefore come to the view that the main channel — in the generalized sense intended by the parties — lies in the north.

(Signed) Rosalyn HIGGINS.
