Leiden Journal of International Law, 18 (2005), pp. 777–794
 Printed in the United Kingdom doi:10.1017/S0922156505003006

HAGUE INTERNATIONAL TRIBUNALS

The International Court of Justice Judgment in the Benin–Niger Border Dispute: The Interplay of Titles and 'Effectivités' under the *Uti Possidetis Juris* Principle

FABIO SPADI*

Abstract
The chamber of the ICJ entrusted with solving the Benin–Niger dispute based its judgment on the colonial heritage left to the two countries at the time of their independence, as prescribed by the *uti possidetis juris* principle. The dispute actually stemmed from that heritage: the chamber's role was to interpret and clarify it. But while the *uti possidetis juris* principle underlines border stability, features such as river boundaries, because of their intrinsic movable nature, can put this stability under intense strain. The judgment lends itself to further reflections on this dichotomy, since the disputed areas revolved around two rivers.

Key words
critical date; effectivités; median line; river boundary; territorial delimitation; *thalweg*; title; *uti possidetis juris*

1. Introduction

On 12 July 2005 a 40-year dispute over the Benin–Niger boundary was finally brought to an end by a chamber of the International Court of Justice (ICJ), which had been requested to adjudicate the matter by virtue of a special agreement concluded by the two parties in 2001 (see *infra*).[1] It is the second time a chamber of the ICJ has resolved a territorial controversy between former French colonies in west Africa, the first having been the Burkina Faso–Mali dispute.[2] Both are a by-product of the historical and administrative development of French West Africa (Afrique Occidentale Française – AOF),[3] and in particular of the fact that boundaries between its component colonies

* Ph.D. in International Law, Scuola Superiore S. Anna, Pisa; LL.M. (Cantab.).

1. The chamber's judgment – *Frontier Dispute (Benin v. Niger)*, Judgment of 12 July 2005 (not yet published) – the special agreement, and the written and oral pleadings (the latter uncorrected) of the parties are available at http://www.icj-cij.org/icjwww/idocket/ibn/ibnframe.htm. The chamber was established in accordance with Art. 26(2) of the ICJ Statute and was composed of three judges (Judge Guillaume, Judge Ranjeva and Judge Kooijmans. When Judge Guillaume resigned in 2003, the presidency of the chamber was assumed by Judge Ranjeva and the vacant post was filled by Judge Abraham) and two judges ad hoc (Judge Bennouna and Judge Bedjaoui) chosen by the parties.
2. *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment of 22 December 1986, [1986] ICJ Rep. 554.
3. The AOF was established in 1895. For a historical overview see C. Vodouhê Cakpok, *La création de l'Afrique Occidentale Française (1895–1904)* (1974), Ph.D. thesis, Paris-Sorbonne, cited in Benin's Memorial, at 15, para. 1.22.

had long been only approximately fixed, both because of the limited knowledge of the areas concerned and because having a common sovereign made this need less imperative (but not irrelevant, as the history of the dispute in question bears witness).

2. The historical development of the dispute

The core and main flashpoint of the territorial dispute[4] was sovereignty over Lété, an island in the river Niger around 16 km long and 4 km wide, located 38 km upstream from the city of Gaya (Niger). The island, the largest in the tract of the river between Niger and Benin, is quite fertile and currently permanently inhabited by, according to certain estimates, 2,000 people. During the colonial period the authorities of Dahomey (the name of Benin under French rule and for 15 years after independence) and Niger had already contested each other's administrative competence over the location and inquired as to where the boundary between the two colonies actually lay. This difference of opinions and the need to solve it partly derived from conflicts between the different users of the island, farmers on the one hand (belonging mostly to tribes which gravitated around the areas appertaining to Dahomey) and animal breeders on the other (belonging mostly to tribes which gravitated around the areas appertaining to Niger) with permanent or quasi-permanent residence on Lété. These conflicts had not been definitively settled in a clear-cut way during the colonial period and, not surprisingly, they resurfaced when Dahomey and Niger became independent;[5] from 1960 a series of incidents involving citizens of both parties contributed to an escalation in tension between the two newly independent states, especially in 1963, when, following other events in Cotonou, the massing of troops on the common border had brought about a serious risk of war.

Thanks to the mediation of neighbouring African countries, the parties chose to settle the dispute peacefully.[6] Meetings between the two parties, at different levels, reaffirmed the imperative not to resort to the use of force together with the important principle of ensuring the peaceful livelihood of all populations involved, but they failed to reach an agreement on the substantive matter.[7] In 1994 Benin and Niger created a joint delimitation commission entrusted with the task of determining the entire border between the two countries, and not only sovereignty over the island of Lété.[8] The commission met six times, but, while contributing to ensuring progress in

4. For a brief overview see I. Brownlie, *Africa Boundaries: A Legal and Diplomatic Encyclopaedia* (1979), 161–3; M. N. Shaw, *Title to Territory in Africa: International Legal Issues* (1986), 256–7.
5. Dahomey became independent on 1 August 1960, Niger on 3 August 1960.
6. Especially significant were two regional meetings of heads of state in Yammoussoukro (Ivory Coast) held in January 1965. Press release on the Yammoussoukro meeting on 17 and 18 January 1965, in *Afrique Contemporaine – Documents d'Afrique Noire et de Madagascar*, no. 18, March–April 1965.
7. Press sources at one point reported that the matter of Lété had been solved with the two parties agreeing that 'l'île leur appartiendrait en commun'. Brownlie, *supra* note 4, at 162–3; Shaw, *supra* note 4, at 257. These reports were not subsequently confirmed. Neither party has referred to any agreement of the sort in pleading their case before the chamber.
8. Accord portant création de la commission mixte paritaire de délimitation de la frontière entre la République du Bénin et la République du Niger, signed in Niamey on 8 April 1994. For the text of the agreement see *supra* note 1, Annex 109, Benin's memorial.

the treatment of the populations concerned and thus pre-empting major backlashes from the continuation of the dispute, it failed to reach a consensus on the subject of the dispute itself. To resolve the impasse, the commission recommended the seizing of the ICJ. The parties agreed to the recommendation and, by virtue of a special agreement signed in 2001 in Cotonou and entered into force in 2002, requested a chamber of the Court to adjudicate the matter.[9]

3. Scope and applicable law

3.1. Scope

Article 2 of the above-mentioned agreement specified the object of the dispute. The chamber's task was to determine

(a) the boundary between Benin and Niger in the river Niger sector;

(b) sovereignty over the islands in the river Niger, and especially over Lété; and

(c) the boundary between Benin and Niger in the river Mekrou sector.

Hence the chamber was asked to draw up the entire boundary between the two states, and not just the status of the island of Lété, which the parties considered as a special sub-case of one of the contended items (i.e. the determination of the boundary in the river Niger sector). This was not surprising, since the dispute existed all along the common boundary, as reflected by the work of the delimitation commission, but the original focus on Lété may have been the reason behind some interesting developments concerning the management and claims of the parties in relation to the river Mekrou (see section 4.2, *infra*).

On the interpretation of the geographical scope of the dispute as submitted to the chamber, a slight disagreement arose between the two parties, more precisely on whether it should or should not cover the setting of the boundary on the bridges crossing the river Niger in the contested sector.[10] Not unexpectedly, given the kind of claims presented (see section 4.3, *infra*), Niger was of an affirmative opinion (albeit its position was specified during the oral pleadings), as opposed to Benin. The chamber

9. Both parties later submitted a joint application to the UN Secretary-General for financial support from the Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice to defray the expenses for the management of the case in front of the chamber. This fund, created in 1989, can grant financial assistance on the condition that it is used by the receiving state(s) to defray expenses incurred in connection with the submission of a dispute to the Court and the costs of implementing a judgment. Under the recommendations of an ad hoc panel of experts (composed of Prince Zeid Ra'ad Zeid Al-Hussein, Permanent Representative of Jordan at the United Nations, Mr Jagdish Koonjul, Permanent Representative of Mauritius at the United Nations, and Mr Kishore Mahbubani, Permanent Representative of Singapore at the United Nations), on 28 May 2004 the UN Secretary-General awarded US$350,000 to each of the applicants. Press Release SG/2087, L/3070, 4 June 2004. The terms of reference of the Trust Fund and annual reports on its activities are available at http://www.un.org/law/trustfund/trustfund.htm.

10. This concerned two bridges crossing the river Niger between Gaya (Niger) and Malanville (Benin). The first was built in 1958, the second in 1988–9. They are each more than 300 m long, and connect platforms built on each of the banks, which are used for customs and other administrative purposes. The parties have joint ownership, and finance their use and maintenance on an equal basis. *Frontier Dispute* (*Benin v. Niger*), *supra* note 1, at paras. 122–123.

https://doi.org/10.1017/S0922156505003006 Published online by Cambridge University Press

sided with Niger, in the light of its overall mandate to determine the boundary for the whole of the identified sectors.[11]

3.2. The applicable law

As for the applicable law, the parties agreed (Art. 6 of the Agreement) that it be the full range of applicable international law as defined by Article 38 of the Statute of the ICJ, including the principle governing state succession to borders inherited from the colonial era, namely 'l'intangibilité des frontières' identified by the parties, and by the chamber, with the *uti possidetis juris* rule.

The first direct consequence of this was the setting of the critical date at 1–3 August 1960, the date the colonies became independent states (see note 5, *supra*), a point on which there was full agreement by both parties (and the chamber).

Second, both parties being former French colonies, the relevance to their case of international agreements concluded in the colonial era was rather reduced (except for determining the starting and ending points of the boundary, in relation to Nigeria and Burkina Faso), while the applicable law and administrative practice of the common colonial authorities assumed a determining role, as made evident by the contents of both parties' written pleadings. Hence the overall dispute was essentially rooted in the validity and opposability of colonial titles (especially those based on the French 'droit d'outre-mer') and related administrative practices. As for international law, which by means of the *uti possidetis* criterion had given this prominence to colonial titles, its role in the practical application and interpretation of the latter was somewhat reduced, and not only in relation to applicable treaties; the important concept such as 'the intention and will to act as sovereign' was deemed by the chamber as inapplicable to the case, as it could not simply be transplanted into colonial law (para. 102).

The role of colonial law was also limited. The chamber reiterated its position concerning domestic law in similar cases – that it 'is applicable not in itself . . . but only as one factual element among others, or as evidence indicative of . . . the "colonial heritage", the "photograph of the territory" at the critical date'.[12] The consequence of this position in the case in question was that relevant French *arrêtés* and decrees had a key role for the adjudication, but their validity according to French colonial law could have become an issue only when the related administrative practices did not follow suit. According to paragraph 140 of its pronouncement,

> the Chamber would emphasize that the *uti possidetis juris* principle requires not only that reliance be placed on existing legal titles, *but also that account be taken of the manner in which those titles were interpreted and applied by the competent public authorities of the colonial Power, in particular in the exercise of their law-making power* . . . It is not for the Chamber to substitute itself for a domestic court (in this case, the French administrative courts) by carrying out its own review of the legality of the instruments in question . . . nor to speculate on what the French courts might have decided had they been seized of the matter.[13]

11. 'Since the bridges between Gaya and Malanville are located in that sector (read: river Niger), the chamber considers that it has jurisdiction to determine where the boundary is located on these bridges.' Ibid., para. 120.
12. *Frontier Dispute (Burkina Faso v. Republic of Mali), supra* note 2, at 568, para. 30.
13. Emphasis added.

https://doi.org/10.1017/S0922156505003006 Published online by Cambridge University Press

Albeit at first sight it could appear as contradictory to the principle expressed in the *Frontier Dispute (Burkina Faso/Mali)* judgment, according to which 'pre-eminence [is] accorded to legal title over effective possession as a basis of sovereignty', in reality it follows the same line of reasoning, since the judgment in the above-mentioned dispute also recognized that colonial effectivités had an interpretive role in cases where the title was ambiguous and/or unclear (para. 63) or that of a more or less stringent guideline in cases where the title was absent. The colonial heritage, which the *uti possidetis juris* brings back to prominence, is clearly founded on legal titles from the past but also on the way in which these were applied on the ground; this becomes proportionally more important the more the legal status from the colonial era is ambiguous or unclear. At the latter end of this scale stands the situation where a legal title gives way to contrary effectivités, but only if accompanied by acquiescence on the part of the title holder (prescriptive acquisition)[14] or agreement thereto; but even in this case, it is more a question of the original title having been conceded (and thus of a new title having been established) rather than of the effectivités prevailing by their own force.

As for the post-colonial effectivités, that is, the display of state/public functions after the critical date, both parties occasionally relied for their arguments on acts whereby their authorities allegedly exercised sovereign powers over the areas in dispute. The chamber recognized this as legitimate, reiterating previous jurisprudence,[15] but only when the latter could afford valuable indications in respect of the original *uti possidetis juris* boundary.

4. The opposing claims

4.1. Benin: its claim over the river Niger sector

Benin's claim was that the boundary lay on the left bank, thus leaving the entire river in its territory; consequently, all the islands belonged to Benin. To give substance to the claim, Benin relied on a number of administrative acts and exchanges between officials of the Dahomey and Niger colonial administrations; particularly central in this context was a 1954 letter from the governor of Niger to the official in charge of the Gaya district (Niger), who had asked for instructions concerning the limits of the colony and in particular the status of the island of Lété, following problems encountered in the levying of taxes on grazing rights. According to the then governor,

> *la limite du territoire du Niger est constituée de la ligne des plus hautes eaux, côté rive gauche du fleuve, à* partir du village de Bandofay, jusqu'à la frontière de Nigéria. En conséquence, *toutes les îles situées dans cette partie du fleuve font partie du Territoire du Dahomey.*[16]

This letter was fundamental to Benin's case, first, because it was issued by the predecessor of the counterpart, and was proof of the recognition by Niger of the

14. *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, Judgment of 11 September 1992, [1992] ICJ Rep. 351, at 408–9, para. 80; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Merits, Judgment of 10 October 2002 (not yet published), para. 68.
15. *Land and Maritime Boundary between Cameroon and Nigeria*, *supra* note 14, para. 62.
16. Letter no. 3722/APA, 27 August 1954, quoted several times in Benin's written pleadings (e.g. in its memorial, at 86, para. 3.48) (emphasis added).

https://doi.org/10.1017/S0922156505003006 Published online by Cambridge University Press

Dahomey/Beninese title;[17] second, because it clearly set the boundary on the river bank, leaving the river Niger (and all its islands) entirely in Beninese territory. For Benin the letter simply recognized and formalized a situation already established by the colonial authorities by means of regulatory acts purporting to determine, directly or indirectly, the limits between French possessions in the area. In terms of the latter, Benin relied in particular on an *arrêté général* adopted by the governor-general of the AOF on 23 July 1900[18] (and subsequently confirmed by a presidential decree on 20 December 1900) establishing a military territory (which was then subsequently transformed into the Territory of Niger twenty years later) and according to which 'Ce territoire s'étendra *sur les régions de la rive gauche du Niger* de Say au lac Tchad qui ont été placés dans la sphère d'influence française par la Convention du 14 juin 1898'.[19] Benin claimed that this *arrêté général*, in so defining the territory of Niger, excluded the latter from the river itself and that the legal situation thereby established remained stable until independence, nor did it change thereafter; subsequent *arrêtés* (especially those relied on by Niger, see section 4.3, *infra*), where reference was made to the 'cours du fleuve', did not contradict or amend this delimitation, as such expression was consistent with the border being located on one of the river banks.[20] In Benin's view, the arrangements adopted at the time (i.e. the full allocation of the river to Dahomey) could not be considered peculiar and/or suspect. While recognizing that, in general, river boundaries tend to follow the median line or the *thalweg* (however that is defined), Benin correctly recalled a widely shared doctrine, confirmed by an ICJ pronouncement,[21] that there is no general rule in international law that prescribes these solutions as compulsory. Indeed, there are plenty of cases where the river boundary has been defined as excluding one country from the river in question, limiting its sway to only one of its banks. Significantly, considering the value of colonial law and practice for the applicable law in the present case, Benin proved that the above-mentioned criterion had also been used by the French colonial administration for defining other inter-colony boundaries.[22] The fact that historically the colony of Dahomey had at first clearly included territories on both banks of the river (see note 18, *supra*) was seen by Benin as further evidence that all the new situations in the area had been created by slicing away the preceding

17. In its memorial (*supra* note 1, at 153, para. 6.21) and reply (at 66, para. 3.52), Benin suggested that such a declaration had a somewhat analogous value to that of the 'Ihlen Declaration' to which the Permanent Court of International Justice had attributed a key role in its judgment in the *Eastern Greenland* case of 1933. (1933) 53 *PCIJ Ser. A/B*, at 45–6.
18. Arrêté général du 23 juillet 1900 créant un troisième territoire militaire dont le chef-lieu sera établi à Zinder, (1900) *Journal officiel de l'Afrique occidentale française* at 313. Benin also originally relied on other acts that suggested the existence of a territorial unity in the river area that favoured its claim: (i) the Protectorate Treaty concluded between France and the Kingdom of Dendi, 21 October 1897, according to which the latter extended on both banks of the river Niger; and (ii) an *arrêté* of 11 August 1898, adopted by the governor of Dahomey (*Journal officiel de la colonie du Dahomey et dépendances*, no. 16, 15 August 1898, at 5), describing the areas forming the colony of Dahomey which included the two river banks, and thus in some way continued the existence of the territorial unity for some of the areas enclosed in the Protectorate Treaty.
19. Arrêté général du 23 juillet 1900, *supra* note 18, Art. 1 (emphasis added).
20. Benin's reply, at 59–60, paras. 2.67–72.
21. *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment of 13 December 1999, (1999 [II]) ICJ Rep. 1045, at 1061–2, para. 24. See section 4.2, *infra*.
22. F. Schroeter, 'Les systèmes de délimitation dans les fleuves internationaux', (1992) XXXVIII *Annuaire français de droit international* 948, at 953.

entity. This implicitly suggested the possible existence of a kind of default criterion in favour of Dahomey and its successors in cases of doubt on unallocated areas.

To strengthen its claim Benin also relied on its own colonial effectivités record (and on the post-colonial one, albeit for its mere declaratory/confirmatory value), with special regard to the island of Lété. These were affected by the perceived nature and location of the area (for Benin, a scarcely inhabited borderland) but nevertheless at first sight appeared convincing: levying of grazing rights taxes, granting of fishing and tree-felling licences, agricultural experimentation by local authorities, sanitary and veterinary controls, and anti-contraband monitoring. However, this 'impressive' list presented what in the end was probably a major fault: substantial parts of it, especially for the period 1914–54, were based only on witness statements[23] and not on administrative and documented evidence. Energetically contested by Niger, Benin subsequently let the matter recede to the background, as subsequently recorded by the chamber (para. 80).

4.2. Benin: its claim in the river Mekrou sector

The river Mekrou is one of the affluents of the Niger. Benin's claim in the area was that the boundary between the colonies followed the course of the river itself, and more precisely that it was located on its median line. The written pleadings reveal that Benin considered this part of the dispute to be rather artificial, and that it had accepted its inclusion in the special agreement for the sake of clarification and, implicitly, as the price to pay in order to have the other part of the dispute brought before the ICJ. The kind of title claimed by Benin was similar to that presented for the river Niger sector, that is, the colonial administrative division established in law and practice by France. In particular, Benin based its position on an *arrêté géneral* adopted by the governor-general of the AOF on 31 August 1927, which fixed the boundaries between the colonies of Upper Volta (subsequently Burkina Faso) and Niger.[24] This *arrêté*, in determining the limits of one of the administrative districts of Niger, referred to the river Mekrou as the boundary line. While this part of the *arrêté* was erroneous,[25] as it was addressing a boundary that had nothing to do with its own object (the delimitation between Niger and Upper Volta), Benin nevertheless considered it proof that the French authorities had already decided and determined, although not always in a consistent practice, where the north-western boundary of Dahomey lay: on the river Mekrou.

This stance was subsequently confirmed, according to Benin, by later *arrêtés*, especially those establishing nature reserves on both sides of the border. In 1937 the colonies of Dahomey and Niger, implementing a framework policy elaborated by France, established two protected areas in the region of the 'W Niger': a national park on the Niger side and a nature reserve on the other side of the border. The administrative acts adopted by Niger and Dahomey for the creation of the park

23. Under the format of 'sommations interpellatives', i.e. replies to official inquiries.
24. Arrêté général du 31 août 1927 fixant les limites des colonies de la Haute-Volta et du Niger, (1927) *Journal officiel de l'Afrique occidentale française* at 658.
25. And indeed was later corrected by another *arrêté* adopted on 5 October 1927, (1927) *Journal officiel de l'Afrique occidentale française* at 718.

https://doi.org/10.1017/S0922156505003006 Published online by Cambridge University Press

and the reserve respectively (in 1937 they provided for an interim solution; new, definitive *arrêtés* were adopted in 1952 and 1953) all referred to the river Mekrou as one of the limits of the protected areas, in a clearly corresponding fashion on both sides. Official and semi-official acts relating to the preparation and implementation of these *arrêtés* appeared to give credit to the same position.[26] Benin also referred to evidence of administration by its own authorities in the area, albeit in reality quite limited.

Interestingly enough, in its memorial, Benin did not rely on, or for that matter even mention, the bilateral developments concerning the area of Mekrou that occurred following independence, when Niger began negotiations with Benin in view of the construction of a dam on the river, at the site of Dyodyonga. The Niger government wanted a clear picture of the border in the area, and, after historical and legal research, came to the conclusion that it followed the course of the Mekrou. This conclusion was codified into a 'Note verbale' (29 August 1973) from the Ministry of Foreign Affairs of Niger to the Ministry of Foreign Affairs of Dahomey, as well as into the minutes of a meeting of experts of the governments of Niger and Dahomey, held on 8 February 1974, concerning the Mekrou and the dam project on that river, according to which

> Après un échange de vues sur la question, les deux Délégations sont convenues de ce qui *la Mékrou, dans son cours inférieur, constitue la frontière entre la République du Niger et la République du Dahomey*.[27]

It is unclear why Benin did not resort to this evidence in its memorial, and resorted to it only in its counter-memorial and reply; the focus on the river Niger sector, the prominence of colonial law and practices stemming from the *uti possidetis* principle (see note 28, *infra*), and the strong conviction of the fallaciousness of the counter-arguments for the area of the Mekrou, may have led it to underestimate the Niger claim and possibly ignore these post-independence developments. Interestingly, Benin had not exploited this evidence in the proceedings of the joint boundary commission, a point used by Niger to argue *a contrario* that Benin had implicitly acknowledged that such documentation and acts could not be legitimately used.[28] A possible further explanation is that Benin had simply mislaid any reference to the exchange that had occurred in the 1970s and only recovered this knowledge when Niger brought it to light before the chamber. In subsequent developments, Benin relied on this material as a subsidiary title, possibly underlining once again the perceived strength of its own original claim.[29]

---

26. Benin's memorial, *supra* note 1, at 96–107, paras. 4.15–4.40.
27. Niger's memorial, *supra* note 1, at 221, para. 3.1.56 (emphasis added). An agreement on the construction and operation of the dam was finally concluded on 14 January 1999. The agreement provided (Art. 1) for the construction of the dam 'dans le secteur frontalier entre les deux Etats', but also specified (Art. 7) that it was 'sans effet sur le processus de délimitation de la frontière entre les deux Etats'. For the text of the agreement see Annex A/17, Niger's memorial.
28. A point rebuffed by Benin by, *inter alia*, referring to the focus on colonial law stemming from the *uti possidetis* rule that the commission was bound to apply. Benin's counter-memorial, at 189, para. 4.79.
29. Oral pleadings, 7 March 2005, para. 14.22.

4.3. Niger: its claim in the river Niger sector

Niger's claim in the sector was based on a variety of grounds. In its view, a number of colonial documents proved that for some time the colonial administrations had been considering the course of the river as either the ideal boundary or as the boundary itself. The 1900 *arrêté général* (see section 4.1, *supra*) was deemed as only describing the extent of an area but lacking any precise delimitation criterion,[30] which was to be found in later documents. Among them, a 1901 letter from the then Ministry of the Colonies to the governor-general of the AOF was particularly relevant:

> Par dépêche du 7 août 1901, no. 1380, vous avez bien voulu me transmettre les extraits de deux rapports politiques, dans lesquels M. le Gouverneur du Dahomey envisageait la question de la délimitation entre le Dahomey et le 3ème territoire militaire, et *indiquait le cours du Niger comme la meilleure ligne de démarcation, au double point de vue géographique et politique*. Vous ajoutiez que cette proposition vous semblait acceptable. J'ai l'honneur de vous faire connaître que je partage sur ce point votre manière de voir.[31]

While not conclusive, similar letters and notes were instrumental to an 'administrative' environment which finally led to the main pillars in Niger's claim, i.e. two *arrêtés* issued in the 1930s by the governor-general of AOF. The first of these (8 December 1934)[32] concerned the internal reorganization of Dahomey, which indirectly stated the limits of the colony by defining its constitutive parts, and in particular the northern district (*cercle*) of Kandi. The latter was defined by Article 1(7) as delimited 'A l'Est, par la frontière nigerienne [*sic* nigériane] jusqu'au Niger; Au Nord-Est, *par le cours du Niger jusqu'à son confluent avec la Mékrou*' (emphasis added). The second *arrêté* (27 October 1938)[33] confirmed this status by prescribing for the same district the same boundaries: 'A l'Est par la frontière du Nigeria jusqu'au fleuve Niger; Au Nord-Est, par le cours du fleuve Niger jusqu'à son confluent avec la Mékrou' (Art. 1(8)). Significantly, both acts contained a provision which determined that the boundaries referred to were those reproduced in a map of Dahomey (scale 1/500.000) to be kept by the Service géographique de l'Afrique occidentale française (1934) or annexed to the act (1938). The maps in question were not found by either party and could not be presented to the chamber.[34]

Similarly to Benin, Niger purported to confirm its title by showing a record of administrative practices, colonial and post-colonial (albeit with a different value – see section 3.2, *supra*), over activities in the river and some of the islands therein. Particularly relevant, in Niger's view, were colonial effectivités linked to the management and organization of transport along the river in the contested area, inter-colonial administrative exchanges concerning the problems arising on grazing rights on a number of islands, the arrest of poaching fishermen and, on the island of Lété, the

30. Niger's reply, at 51–3, paras. 2.12–20.
31. Niger's memorial, at 92, para. 2.2.13 (emphasis added).
32. Arrêté général du 8 décembre 1934 portant réorganisation des divisions territoriales de la colonie du Dahomey, (1934) *Journal officiel de l'Afrique occidentale française* 1052.
33. Arrêté général du 27 octobre 1938 portant réorganisation des divisions territoriales de la colonie du Dahomey, (1938) *Journal officiel de l'Afrique occidentale française* 1335.
34. Research conducted at the national archives of Senegal and at the Institut géographique national in Paris revealed only three maps attached to the draft of the two *arrêtés* and did not appear to shed any light on the disputed areas.

https://doi.org/10.1017/S0922156505003006 Published online by Cambridge University Press

levying of taxes, the licensing of tree felling, reference in census registers, and the establishment of polling stations.

As to what the boundary in the river actually meant, Niger considered that the above-mentioned colonial administrative effectivités, all in all, showed the boundary to be the line of deepest soundings and that that said line determined which islands belonged to which party, namely that those on the right side were under the sovereignty of Niger, and those on the left under that of Benin. This position partly evolved during the proceedings before the chamber; originally, Niger referred to the border in the river as having to be the line of deepest soundings, without any further qualification, leaving in doubt whether it meant the one existing on the day of independence or the current one; the doubt was somewhat underlined by the fact that its original claim also called for the attribution of the river islands to be based on the *current* line of deepest soundings. In the final reply and the oral pleadings, Niger's claim was reassessed: the boundary called for now was the line of deepest soundings as it was at the date of independence, insofar as it could be established, and that such line determined which islands belonged to which party. While in practice the significance of this evolution may have been limited (the difference being the island of Dolé Barou, which Niger had originally been willing to concede to Benin due to the change of the line that had taken place since independence but subsequently reclaimed as its own in application of a strict interpretation of *uti possidetis*[35]), it nevertheless pinpoints an interesting issue, that of the limits of the freezing effect of the *uti possidetis juris* on natural boundaries that move over time (on which see section 5, *infra*).

4.4. Niger: its claim in the river Mekrou sector

Niger's claim in the area was based on the presidential decree of 2 March 1907,which incorporated into the colony of Upper Senegal and Niger (to which Niger succeeded) the districts (*cercles*) of Fada-N'Gourma and Say, originally part of the French Sudan and for a short period part of the colony of Dahomey, and which established that

> La limite entre la colonie du Haut-Sénégal et Niger et celle du Dahomey est constituée à partir de la frontière du Togo, par les limites actuelles du cercle du Gourma jusqu'à la rencontre de la chaîne montagneuse de l'Atakora dont elle suit le sommet jusqu'au point d'intersection avec le méridien de Paris, d'où elle suit une ligne droite dans la direction Nord-est et aboutissant au confluent de la rivière Mekrou avec le Niger.[36]

This border is represented by two straight lines, which have the effect of including much of the river Mekrou (including the dam at Dyodyonga) into Niger territory. Niger claimed that the 1907 line had not been validly amended by any subsequent act; the later colonial references to the border on the river Mekrou were the result either of a mistake or of over-simplification deriving from the then scarce knowledge of the area. As for the opposite stance taken and formalized by the Niamey government in the 1970s (see *supra*) in relation to the dam project at Dyodyonga, Niger's position

35. Niger's reply, at 174, para. 3.86.
36. Décret du 2 mars 1907 rattachant à la colonie du Haut-Sénégal et Niger les cercles de Fada N'Gourma et de Say. (1908) *Journal officiel de l'Afrique occidentale française* 12, Art. 1.

https://doi.org/10.1017/S0922156505003006 Published online by Cambridge University Press

was that the latter had been vitiated by a manifest error, to be applied analogously to that codified by Article 48(1) of the Vienna Convention of the Law of Treaties,[37] and was thus deprived of validity.

5. The judgment

The chamber's decision was taken by four votes to one concerning the boundary in the river Niger sector (including the question of the islands located therein) and unanimously for the boundary in the river Mekrou area. A dissenting opinion was expressed by the ad hoc Judge Bennouna on the part of the judgment concerning the river Niger.

5.1. The river Niger sector

The chamber's pronouncement for this disputed area represented a total rejection of Benin's claim. The 1900 *arrêté* relied on for the identification of the left bank of the river as the boundary was deemed such that it could not be read as determining the exact limits of Niger's predecessor; and the geographical references contained therein could only be interpreted as indicating, in general terms, the extent of the newly created territory (para. 53). To confirm this reasoning the chamber recalled the 1901 exchange between the French Minister for the Colonies and the governor-general of the AOF, from which it emerged that 'a delimitation had not taken place the year before', and that alternative boundaries were being considered.

The demise of the 1900 *arrêté* argument had a chain effect on what was the core of Benin's claim: the value of the 27 August 1954 letter from the governor of Niger to the chief of the subdivision of Gaya. For the chamber this letter could not be considered an authoritative confirmation of the boundary claimed by Benin, which, as seen, *had not* been precisely determined by the 1900 act. Apart from not having legal value under French colonial law (para. 65), the most important factor to consider was that it had not been subsequently validated by a higher authority (namely the governor-general), as it could have been. Nor did the chamber share Benin's argument that the 1954 letter had led to some sort of informal inter-colonial understanding which bound Niger at the critical date of independence. The chamber noted that such a legal concept did not exist in French colonial law and thus was not part of the colonial heritage (formed by a law and its actual implementation) that it was bound to apply.

The chamber's position vis-à-vis the acts invoked by Niger as evidence of its legal title in the area was formally more positive (as to the value thereof), but in substance produced the same effects. In fact, while it recognized that the *arrêtés* of 1934 and 1938 could be relied on in inter-colonial relations (as acts issued by the governor-general of the AOF) and that, as such, they did establish that the course of the river Niger constituted the boundary between Dahomey and Niger (para. 71), nevertheless the

37. 'A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty'. The Convention (text available at http://www.un.org/law/ilc/texts/treaties.htm) entered into force on 27 January 1980.

https://doi.org/10.1017/S0922156505003006 Published online by Cambridge University Press

reference to the course of the river was not sufficient to deduce therefrom that 'the border is situated *in* the river, whether at the *thalweg* or the median line' (para. 72). Quite significantly, the chamber noted that 'the notion of the "course of the river" covers a range of possibilities: *a boundary on either river bank or a boundary somewhere within the river*' (emphasis added). The reference to 'the course of the Niger' could not be intended to indicate the precise location of the boundary but merely to indicate the separation line between the two colonies. Hence, in theory, Benin's claim to a boundary on one of the river banks could have been perfectly consistent with the above-mentioned *arrêtés*. The chamber thus recognized a point that both parties had claimed in relation to each other, that is, that the acts relied on by the counterpart were inconclusive, as the expressions used therein ('river bank', 'course of the river') did not set a precise delimitation rule, and because of this were consistent with conflicting interpretations thereof.

Having concluded that neither of the parties had succeeded in providing evidence of title on the basis of regulative and/or administrative acts during the colonial period, the chamber had to rely on the effectivités, and evidence thereof furnished by the parties (para. 77). Its analysis, set in the criteria referred to above as developed in previous jurisprudence, used the record of effectivités to determine a boundary where the title was too ambiguous or general to be relied upon. After excluding all the maps presented by Benin and Niger as not possessing any intrinsic legal force in the sense that they represent the 'physical expressions of the will of the State . . . concerned',[38] the chamber came to the conclusion that the relative weighing of documented administrative activities in the river area and on the island of Lété, gave clear prominence to Niger in the 1914–54 period.

The chamber explained this prominence as a result of a semi-official modus vivendi reached by middle-ranking administrators of the relevant districts of the two colonies: in July 1914 the *commandant* of the *secteur* of Gaya (Niger) had written a letter to the *commandant* of the *cercle* of Moyen-Niger, based in Kandi (Dahomey), which stated,

> J'ai l'honneur de vous envoyer ci-joint *le tableau des îles du Niger avec l'indication du grand bras du fleuve et de la colonie à laquelle, par suite, ces îles appartiennent.* J'ai cru devoir établir cette liste dans le but unique de déterminer nettement le cas dans lequel des laissez-passer de pacage doivent être délivrés aux Peulhs des deux rives et de délimiter la compétence territoriale des tribunaux indigènes des deux colonies . . . Toute la conscience désirable a été apportée dans ce travail: *j'ai entendu par grand bras du fleuve, non le bras le plus large, mais le bras qui seul est navigable aux basses eaux*;[39] je crois en effet que c'est le chenal principal qui doit servir de délimitation, le Commandant du Secteur de Guéné m'ayant cite l'an dernier à ce sujet un texte qui se trouve à Kandi mais que je ne possède pas à Gaya. . . . J'envoie copie de cette lettre et de ce tableau au Commandant du Secteur de Guéné en le priant de vous adresser les observations qu'il pourrait avoir à présenter sur cette délimitation. Dans le cas ou ce tableau donnerait lieu à des contestations, je serais heureux si vos occupations vous permettraient de venir personnellement à Gaya où je me ferais un plaisir de vous revoir.[40]

38. *Frontier Dispute (Burkina Faso v. Republic of Mali), supra* note 2, at 582, para. 54.
39. Translated by the chamber as 'the river's main channel, not the widest channel, but the only channel navigable at low water'.
40. Emphasis added.

https://doi.org/10.1017/S0922156505003006 Published online by Cambridge University Press

No reaction to the letter was found, but the chamber deemed that the administrators had met and reached an agreement, which confirmed the solution identified in this letter (and the division indicated in the annexed table). While not officially sanctioned by higher authorities,[41] the modus vivendi appeared generally to have guided the behaviour of the two parties thereafter (para. 85), with Niger's authority over the island of Lété being clearly exercised in the ensuing years (levying of taxes, licensing of tree felling, reference in census registers, and the establishment of polling stations). The picture becomes more opaque between 1954 and 1960, more precisely after the issuing of the 1954 letter by the governor of Niger relied on by Benin: the chamber itself recognized the effect of the letter on the increased display of administrative will on the part of Dahomey (para. 67), and especially on the island of Lété, but deemed that the latter was not such as to overshadow completely the effectivités put in place by Niger in the same period (para. 100); indeed, the display of effectivités by both sides in this period led to the development of the dispute in the 1960s.

In the light of this background, the chamber's balancing of effectivités was tipped in favour of Niger by the 1914–54 period. Consequently, the chamber applied the 1914 modus vivendi. It recognized the boundary as being the main navigable channel of the river, and within it the line of deepest soundings, existing at the time of independence (para. 103), and allocated the islands accordingly: those situated between the boundary thus defined and the right bank of the river belonged to Benin and those situated between that boundary and the left bank of the river belonged to Niger. No island enclave, on either side, was thus created. However, in the sector opposite the city of Gaya, where three small islands are located, the river has two navigable channels of which it is unclear which one is consistently deeper. In this case, the chamber avoided any difficulty by applying the solution already identified in the 1914 modus vivendi, which had included the three islands in the colony of Dahomey.[42] The chamber considered that, in this sector, the boundary was constituted by the line of deepest soundings of the left navigable channel, with one minor exception.[43]

As to the precise identification of the line of deepest soundings in the main navigable channel, the chamber relied on a number of hydrographic and topographic surveys conducted from 1896 onwards and in the 1970s (para. 107) and on the extremely important observation deduced therefrom that the Niger river bed has been relatively stable over time (in both the colonial and post-colonial period) and that any silting which has taken place has rarely led to a noticeable change in the

41. In his dissenting opinion (para. 29), Judge ad hoc Bennouna contested the value attributed to this modus vivendi, as he considered it to be an arrangement adopted at local level, which could not overrule the position of the central authorities, and the purpose of which was to 's'entendre sur les populations qui relèvent de la compétence personnelle de chacune d'entre elles et non de trancher un conflit de limites et d'attribution d'espaces territoriaux, ce qui n'était manifestement pas de leur ressort'.

42. The peculiar situation had been the object of a proposal sent by the governor of Dahomey to his counterpart in Niger (11 April 1925, reproduced in Niger's memorial, at 183–4, para. 2.3.74): in exchange for the said three islands opposite Gaya, Niger would have conceded Lété to Dahomey. The chamber considered this proposal as further evidence that the 1914 modus vivendi had been complied with over the years.

43. In the vicinity of the last of the three small islands, Kata Goungou, the boundary deviates from the line of deepest soundings and passes to the left of that island (para. 113).

https://doi.org/10.1017/S0922156505003006 Published online by Cambridge University Press

location of the main navigable channel. Henceforth, the assumption is made that in 1970 the line of the deepest soundings as identified by Netherlands Engineering Consultants (NEDECO)[44] was essentially identical to that existing in 1960 (the critical date). On these grounds, paragraph 115 provides for the precise identification of 154 points forming the boundary in the Niger, and paragraph 117, in the light of the above, lists which islands belong to which state, a total of 16 going to Niger (including the island of Lété) and nine to Benin.[45]

As for the two bridges between Gaya and Malanville, the chamber agreed with Niger's position. After noting that neither of the parties had contended the existence of a rule of customary international law regarding territorial delimitation in the case of bridges over international watercourses,[46] it solved the question by simply extending vertically the line of the boundary, in accordance with the widely shared view that 'a boundary represents the line of separation between areas of State sovereignty, not only on the earth's surface but also in the subsoil and in the superjacent column of air' (para. 124). The chamber thus ruled that the boundary on the bridges follows the course of the delimitation in the river, consequently ensuring a simpler arrangement (as opposed to two different territorial borders in the same area) whose management should thus be more viable.

5.2. The river Mekrou sector

The chamber's conclusion for the river Mekrou sector followed a different line of reasoning. It recognized that at one point the boundary had indeed followed the line fixed by the 1907 decree, as indicated by Niger; more than that, it actually acknowledged (para. 140) that, contrary to Benin's claim, the 1907 decree had never been 'expressly abrogated or amended, or superseded by some other instrument of at least equal authority . . . containing provisions clearly incompatible with its own'. Nevertheless, it found that the way in which this title had been interpreted and applied (or not applied) by the competent public authorities later on was such that it showed that in time the inter-colonial boundary had changed. In particular, the chamber relied on the 1927 decree referred to by Benin, even if the latter was subsequently amended due to the mistake described above. From then on, the chamber considered the boundary to have been fixed on the course of the river Mekrou and that this was reflected, directly or indirectly, in all the instruments adopted by the competent authorities.[47]

On this basis, the chamber adjudicated that the boundary in the area followed the course of the Mekrou. The analysis of the effectivités was thus not warranted, as

44. Between 1967 and 1970 NEDECO carried out a study on the navigability of the middle Niger, at the request of the governments of Dahomey, Mali, Niger, and Nigeria.
45. This attribution differed from the final request of Niger only in relation to three islands.
46. Previous doctrine is consistent with this point, noting that in general two criteria have been applied to the issue in question: the border is fixed either (i) in correspondence with the border in the river; or (ii) at the centre of the structure. M. Hedegen, 'River Bridges', in R. Berhnardt (ed.), 4 *Encyclopaedia of Public International Law* (2000), 263–4.
47. To strengthen this result further, the chamber also used the evidence, even if within the stringent limits referred to in para. 44, provided by the cartographic material as confirming that 'certainly from 1926–1927, the Mekrou was generally regarded as the intercolonial boundary by all the administrative authorities and institutions of the colonial Power'.

the title was neither absent nor doubtful (para. 141). Nor was an examination of the 1973–4 exchange between Niger and Benin in relation to the dam on the river and the recognition by Niger of the river Mekrou as a boundary any longer relevant.

The reasoning of the chamber, at first sight, may appear inconsistent with the arguments used for the river Niger sector. Setting aside the fact that the chamber did seem to use some effectivités to consolidate its pronouncement,[48] what is noteworthy is that, while for the river Niger, after establishing that the colonial *arrêtés* set the course of the river as the boundary but did not determine where the line was actually positioned (the *thalweg*, the median line, one of the river banks), and thus the effectivités had to be relied on, for the river Mekrou the pronouncement stopped short of the question of the imprecision of the colonial acts. The chamber recognized the course of the river as the boundary, but when confronted with the issue of what this actually mean, instead of looking at the effectivités as for the Niger, it used as a criterion a general trend in international law concerning boundaries in watercourses surveyed in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, namely that

> Treaties or conventions which define boundaries in watercourses nowadays usually refer to the *thalweg* as the boundary when the watercourse is navigable and to the median line between the two banks when it is not, although it cannot be said that practice has been fully consistent.[49]

As the river Mekrou did not appear to be navigable, and taking into account the fact that in all likelihood there was a negligible difference between the *thalweg* and the median line, the chamber came to the conclusion that 'the median line of the Mekrou would more satisfactorily meet the requirement of legal security inherent in the determination of an international boundary in the present case' (para. 144), and so adjudicates (para. 145).

What were the reasons for this different approach? It is clearly imprudent to second-guess the chamber, but two elements may provide some grounds for an explanation: (i) the lack of effectivités, especially colonial, relating to the area under dispute, the region being scarcely populated and remote – a fact noted by the chamber but only *ex abundanti*; and (ii) the objective difference between the two features central to the case, the river Niger and the river Mekrou, the difference being in geographical terms (one river being considerably larger than the other, which explains why the chamber specifies the precise co-ordinates of the boundary in the Niger but not in the Mekrou) but also reflected in the domain of human activities conducted on or around the two rivers, which in turn had clearly been the cause of (i).

---

48. At para. 137 the chamber noted that it had to take account 'of the instruments concerning the game reserves and national parks in the area known as "The Niger W"'. These *arrêtés* could be considered effectivités, as their regulatory purpose was of a management kind (the fixation of nature reserve boundaries). For the chamber, 'If, in the eyes of the administrative authorities competent to promulgate the *arrêtés* in question, the Mekrou did not represent the intercolonial boundary, *it is difficult to see why it should have been chosen as the boundary of these national parks and nature reserves*' (emphasis added). For a broad definition of effectivités see, *inter alia*, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment of 17 December 2002 (not yet published), para. 148.
49. *Supra* note 21, at para. 144.

https://doi.org/10.1017/S0922156505003006 Published online by Cambridge University Press

Be it what it may, this different reality on the ground may have influenced the chamber more than was actually stated. The choice of relying on the median line/*thalweg* as opposed to the option of fixing the boundary on either river bank may well bear the marks of a solution based on equitable principles. The ICJ has already ruled in the past that equitable principles are part of international law, so this does not represent a controversial point; nevertheless, it can be argued that the chamber might have strengthened its pronouncement either by elaborating a little more on these elements or, rather, by clearly explaining the difference in its reasoning regarding the two river sectors.

6. Conclusion

Overall, the pronouncement confirms previous trends of the ICJ while providing further guidance on territorial disputes and the *uti possidetis juris* principle, especially with reference to river boundaries between former French colonies.[50] The case, however, lends itself to some further reflections. On the one hand, the centrality of the *uti possidetis juris* rule gives prominence to the stability of the boundary at the critical date and the consequent 'freezing' of the territorial title. On the other, rivers as natural boundaries have an inherent tendency to movement, hence possibly endangering the stability referred to. While this potential dichotomy clearly goes well beyond the issue of *uti possidetis*, as it affects the stability of any boundary versus its possible modification caused by natural events,[51] there are nevertheless some aspects that may be specific to the rule in question. In the first part of the judgment (para. 25), the chamber did, in fact, note the differing positions of Benin and Niger concerning, *inter alia*, the application of *uti possidetis* to physical realities subsequent to independence. For the former, the possibility of any reference to the current situation for the purposes of determining the boundary was to be excluded; for the latter, the chamber did have the power to take into account the realities existing on the ground so that the judgment could have meaningful and practical significance. In particular, Niger wanted the chamber to adjudicate on islands currently existing in the Niger, and not on those that might have disappeared in the meantime.

The chamber considered that it was its task to determine the common boundary 'in accordance with the *uti possidetis juris* principle, by reference to the physical situation to which French colonial law was applied, as that situation existed at the dates of independence', but also that

50. It is worthwhile noting that, according to Brownlie, other river borders (or tracts thereof) in the former AOF are not precisely defined in terms of where the border actually lies: median line, *thalweg*, one of the river banks, etc. (Benin–Upper Volta, Mali–Mauritania, Mali–Senegal). At the time they had not developed into fully fledged disputes. Brownlie, *supra* note 4, at 212, 407–415, 426. A possible exception is represented by the Benin–Burkina Faso boundary; in 1980 the two countries signed an agreement establishing a joint delimitation commission (Cotonou, 22 February 1980). The proceedings of this commission have revealed that both parties claim the area of Kourou/Koalou, and that they partly refer to the same colonial acts that were relevant in the Niger–Benin dispute in the river Mekrou sector. N. S. Coulibaly, 'Les expertes se séparent en queue de poisson', *Sidwaya Quotidien*, 6 May 2005, available at http://www.siwaya.bf; 'Frontière Benin-Burkina: Le tracé qui divise', 31 May 2005, at http://www.lefaso.net.

51. In the case of boundaries in watercourses, phenomena of accretion may well cause their legitimate modification. See note 54, *infra*.

https://doi.org/10.1017/S0922156505003006 Published online by Cambridge University Press

> the consequences of such a course on the ground, particularly with regard to the question of to which Party the islands in the River Niger belong, must be assessed in relation to present-day physical realities and, in carrying out the task assigned to it under Article 2 of the Special Agreement, the Chamber cannot disregard the possible appearance or disappearance of certain islands in the stretch concerned.[52]

The chamber thus recognized that the freezing effect may be affected by natural realities. But had it been proved that the main navigable channel (and the line of deepest soundings in it) had changed over time, after the critical date, which boundary line would have been applicable? The judgment suggests that the line existing at the time of independence would have prevailed (and indeed the chamber seemed to have applied exactly this criterion to determine the status of the island of Dolé Barou – see section 4.3, *supra*), but a valid counter-argument can be made. The moment the administrative internal boundary becomes an international boundary, then the rules governing the latter, and especially those concerning watercourses, come into play. The ICJ chamber in the *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras)* had considered that the effect of the principle of the *uti possidetis juris* was *not*

> to freeze for all time the provincial boundaries which, with the advent of independence, became the frontiers between the new States. *It was obviously open to those States to vary the boundaries between them by agreement; and some forms of activity, or inactivity, might amount to acquiescence in a boundary other than that of 1821*.[53]

It can be argued that natural phenomena affecting a watercourse boundary have to be treated according to the same 'temporal flexibility', within, of course, all the limits that apply to any modification of a watercourse boundary because of them, mainly the 'incremental' and gradual nature that must govern any change causing a legitimate modification of the boundary and the non-existence of any agreement to the contrary between the interested parties.[54]

---

52. Judgment, *supra* note 1, para. 25.
53. *Supra* note 14, at 408, para. 80 (emphasis added).
54. The principle was stated *inter alia* by Grotius, in his *De Juri Belli ac Pacis*, Book II, ch. 3. The doctrine seems to recognize that in customary international law, under certain strict conditions, the boundary set in a river can change due to natural accretion, as opposed to avulsion (identified with the sudden change of course of the river bed). The *Chamizal Arbitration* Award in the United States–Mexico dispute on the Rio Grande boundary (10 June 1911) stated that '*According to well-known principles of international law* . . . this fluid boundary would continue, notwithstanding modifications of the river bed caused by gradual accretion on the one bank or degradation of the other bank; whereas, if the river deserted its original bed and forced for itself a new channel in another direction the boundary would remain in the middle of the deserted river bed' (emphasis added), V. Coussirat-Coustère and P. Eisemann (eds.), *Repertory of International Arbitral Jurisprudence* (1989), Vol. 1, at 92. A substantial number of treaties have incorporated the same kind of criterion, but there are also examples of different state practice, in different directions. G. Marston, 'Boundary Waters', in R. Bernhardt (ed.), 1 *Encyclopedia of Public International Law* (1992), at 483. Overall, the situation remains quite complex because, *inter alia*, the phenomena in question are often interlocked and not always easily distinguishable (moreover, avulsion has a broader definition, encompassing transformations that do not necessarily imply a change in the course of the river bed). Brownlie (*supra* note 4, at 17) considers that the customary rule referred to has to be read as a form of legal presumption. The safest approach is a case-by-case analysis, tailored to the legal status of each river boundary. For an overview see Schroeter, *supra* note 22, at 948–82; L. J. Bouchez, 'The Fixing of Boundaries in International Boundary Rivers', (1963) 12 *International Comparative Law Quarterly*, 789–817; A. McEwen, *International Boundaries in East Africa* (1971), 89–93. See also *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, *supra* note 14, at 546, para. 308.

The issue has also a forward-looking aspect: what will happen in the future to the boundary that the chamber has identified as following the main navigable channel, and the line of deepest soundings in it, if these were to change?[55] Paragraph 115 specifies the precise co-ordinates of the points through which the boundary line in the Niger passes; islands aside, were the channel or line of deepest soundings gradually to change with time, would the boundary follow suit (provided the parties had not agreed otherwise)? The answer would appear to be in the affirmative, provided that all the stringent conditions for the change to produce effect in the legal sphere be present. However, the fixing of precise co-ordinates will have strong effects on the behaviour of the parties, thus making this possibility rather more remote. Not so for the river Mekrou, where the chamber did not 'materialize' its ruling by specifying precise co-ordinates.

55. A possibility that Niger had considered credible in its first pleadings, since it had requested the chamber to rule that the boundary in the Niger, to be fixed at the line of deepest soundings, in the event of a future change in the course of that line, would follow the new course, albeit without modifying the status of the islands (Niger's memorial, at 234–5). In its reply (at 292–3) and oral pleadings (11 March 2005) this 'mobile' feature had disappeared. However, in its reply, Niger had addressed the issue one last time by specifying that it would be for the parties 'to ensure that this channel remains the principal navigable channel by carrying out dredging works as necessary'.