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The Development of the Jurisprudence of the International Court of Justice in the Examination of Territorial Disputes in Recent Times

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The Development of the Jurisprudence of the International Court of Justice in the Examination of Territorial Disputes in Recent Times

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Abstract: *Maritime delimitations refer to the legal process of determining the boundaries between adjacent or opposite states' territorial waters and exclusive economic zones (EEZs)/continental shelves. This article aims at providing an overview of the case-law evolution of maritime delimitations and the principles and methods used in resolving such disputes. The article also examines the challenges and controversies that arise in the context of maritime delimitations, including the competing interests of states, the role of international law, and the impact on resource exploitation and conservation. Finally, the article explores the consistent approach of the ICJ of this topic.*

Key-words: maritime; delimitation; boundaries; territories; case-law

1. Introduction

The workload of the International Court of Justice has grown in recent years, with an increasing number of conflicts classified as *territorial* or *border disputes*. These are of particular interest from the point of view of codification of international law in this area, given the role of the international court in interpreting and applying provisions relating to the acquisition or transfer of territory, or the creation, location and effect of territorial boundaries. In fact, this study analyses the contributions made in the field of international law by the decisions of the International Court of Justice in recent cases, including the maintenance of tripartite adjudication and the conduct of the parties under treaty law.

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In practice, the case law of the Court shows that two general categories of territorial disputes have emerged: those based, first, on disputes relating to the existence of a border agreement and, second, those involving disputes relating not to the existence of a border agreement but to its validity. Thus, it can be said that the recent case-law of the Court shows two trends: the finding of the existence of a delimitation agreement between the parties relating to a given territory and, once the Court has decided that such an agreement exists, the reluctance of the Court to declare it invalid.

2. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)¹ - October 12, 1984

On 25 November 1981, Canada and the United States referred² to a chamber³ of the International Court of Justice the question of the delimitation of the maritime boundary dividing the continental shelf and the fishing grounds of the two parties in the Gulf of Maine.⁴

Having established its jurisdiction and defined the area to be delimited, the court analysed the origin and development of the dispute and determined the applicable principles and rules of international law. It indicated that the delimitation was to be carried out by the application of equitable criteria and by the use of practical methods capable of ensuring an equitable result, whilst also having regard to the geographical configuration of the area and other relevant circumstances. Rejecting the delimitation lines proposed by the parties, it defined the criteria and methods it considered applicable in establishing the delimitation line. Thus, criteria of a geographical nature were applied in the first instance, and appropriate geometrical methods were used both for the delimitation of the seabed and the adjacent waters.⁵

¹ Delimitation of the Maritime Boundary in the Gulf of Maine Area, Canada v United States, Appointment of Expert, Order, [1984] ICJ Rep 165, ICGJ 120 (ICJ 1984), 30th March 1984, United Nations [UN]; International Court of Justice [ICJ], see <https://www.icj-cij.org/en/case/67>, accessed on 06.05.2022.

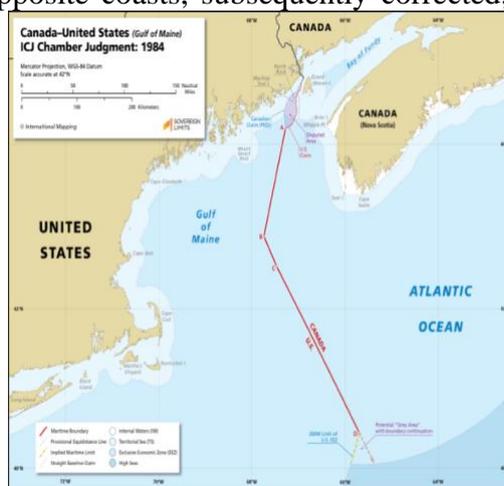
² Under a special agreement.

³ The Chamber was constituted in 1982 and was the first time a case was heard by an ad hoc Chamber of the Court.

⁴ Delimitation of the Maritime Boundary in the Gulf of Maine Area.

⁵ Delimitation of the Maritime Boundary in the Gulf of Maine Area

Three segments were distinguished, the first two located in the Gulf of Maine and the third outside of the aforementioned area. In the case of the first segment, it was considered that there were no special circumstances that would preclude an equal division of the region.¹ For the second segment, the Chamber considered that, in view of the quasi-parallelism between the coasts of Nova Scotia and Massachusetts, a median line should have been drawn approximately parallel to the two opposite coasts, subsequently corrected, taking into account (1) the difference in length between the coasts of the two neighbouring states and (2) the presence of Seal Island off the coast of Nova Scotia.² The third segment, located in the open ocean, consisted of a perpendicular line to the Bay's closing line from the point where the corrected median line intersected it (see Fig. 1) **Fig. 1 - The Court's boundary between Canada and the United States of America**



The case is important in view of the particular circumstances considered by the Court to be relevant to the present case, namely Seal Island and the median line parallel to the two opposite coasts.

3. Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)³ - 13 September 1990

El Salvador and Honduras requested the international court to establish the demarcation of two thirds of the borderline between the two countries⁴ and to

¹ The boundary line shall run from the starting point agreed between the Parties and shall be the bisector of the angle formed by the perpendicular to the coastline running from Cape Elizabeth to the existing boundary head and the perpendicular to the coastline running from that boundary head to Cape Sable.

² The boundary line corresponds to the corrected median line from its intersection with the above-mentioned bisecting line to the point where it reaches the Bay's boundary line.

³ Land, Island and Maritime Frontier Dispute, El Salvador and Nicaragua (intervening) v Honduras, Judgment, Merits, ICJ GL No 75, [1992] ICJ Rep 351, ICGJ 100 (ICJ 1992), 11th September 1992, United Nations [UN]; International Court of Justice [ICJ], see <https://www.icj-cij.org/en/case/75/judgments>, accessed 09.05.2022.

⁴ A total of 343 kilometers.

determine the status of certain islands and maritime areas in the Gulf of Fonseca. The basis of the jurisdiction of the court was a *compromis* signed by the parties in 1986¹.

The disputed border was not covered by the *1980 General Peace Treaty signed* between the two parties. The parties made arguments based on treaty law, effective control of territory, history, economics and elitism.²

Significantly, in its reasoning, the court rejected all claims based on *terra nullius* and historical titles dating from the period before the parties gained independence³, considering the location of the Spanish provincial boundaries as a relevant element in determining the land border.⁴

On the one hand, although the parties brought to the Court's attention a wide range of evidence based on the *1980 Comprehensive Peace Treaty*⁵ between El Salvador and Honduras, most of it did not influence the analysis carried out by the Court. An example of this is the rejection of the argument of the high population density in El Salvador, which supported the Party's elitist claim, and the economic necessity that the land entailed for the State.⁶

On the other hand, the court conducted an analysis of actual control over the territory, as the Spanish borders were virtually non-existent and the evidence of historical events was qualified as inconclusive. Looking primarily at post-colonial possession and jurisdiction as indicators of the parties' perceptions of the limits of their territorial sovereignty, the court considered two factors in determining whether either party had accepted control of the islands by the other: the parties' post-independence behavior in relation to the situation in 1821 and the recent conduct of the states.⁷

Given that the islands remained unoccupied for a long period after independence, against the background of their low economic value, the court held that, even after many years of non-exercise of possession rights, this could still, belatedly, constitute a strong argument for the exercise of sovereignty under *uti possidetis juris*. The Court therefore decided to grant the right to any party that had exercised effective post-colonial control over the islands. Specifically, the case is relevant to international law because the limit of the application of the principle of *uti possidetis* was extended, the court basing its decision, whenever possible, on this principle. When it could

¹ Land, Island and Maritime Frontier Dispute.

² Ibid.

³ In 1821.

⁴ Land, Island and Maritime Frontier Dispute.

⁵ Referred to in the compromise agreement.

⁶ Land, Island and Maritime Frontier Dispute.

⁷ Ibid.

not identify the possibility of its application, it analysed actual post-colonial possession. In addition, the Court relied on equity *infra legem* when irreconcilable evidence undermined the claims of both states, without considering historical, economic or elitist arguments.¹

4. Territorial Dispute (Libyan Arab Jamahiriya/Chad)² - 3 February 1994

The Great Socialist People's Libyan Arab Jamahiriya and Chad submitted a dispute to the Court in 1990, on the basis of a *compromis*³ concluded between the two states in 1989,⁴ concerning the determination of the sovereignty of the Aozou Strip (see Fig. 14). Specifically, the conflict has its origins in 1973, when the Libyan colonel Mohammed Qaddafi annexed the strip of land in northern Chad to Libya.⁵ In its analysis, the Court noted that Libya considered that there was no specific border and requested that one be established, whereas Chad considered that there was a specific border and requested that it be declared the legal border between the two States.

Fig. 2- Aozou Strip



Libya's claims were based on an accumulation of rights and titles of the indigenous inhabitants, the Senoussi Order, the Ottoman Empire, Italy and Libya itself, while Chad's claims were based on a *Treaty of Friendship and Good Neighbourliness of 10 August 1955* concluded by France and Libya⁶ or, alternatively, on the effective control over the territory achieved by France as a former colonial power, either in connection with or

¹Ibid.

² Territorial Dispute, Libya v Chad, Judgment, merits, [1994] ICJ Rep 6, ICGJ 88 (ICJ 1994), 3rd February 1994, United Nations [UN]; International Court of Justice [ICJ], see <https://www.icj-cij.org/en/case/83>, accessed 13.05.2022.

³ Ibid

⁴ And, in subsidiary, on the *Franco-Libyan Treaty of Friendship and Good Neighbourliness of 10 August 1955*.

⁵ As a suspected source of uranium.

⁶ Territorial Dispute.

independent of the provisions of previous treaties.¹

The Court noted that both parties recognized the *1955 Treaty of Friendship and Good-Neighbourliness* between France and Libya as the starting point for examining the dispute, as neither party had questioned the validity of the agreement. Given that the border was an issue addressed in the treaty², the Court emphasized that, if it resulted in the establishment of a border, it constituted the answer to the issues raised by the parties. Libya's argument that the *1955 Treaty of Friendship and Good-Neighbourliness* did not establish a border between the two countries was rejected, finding that, when interpreted in good faith in accordance with the meaning commonly attributed to its terms, the agreement left no undefined border. The Court confirmed this by consulting the preparatory works for the conclusion of the treaty, which clearly indicated that Libya had agreed to the establishment of the borders.³

The 1955 Treaty of Friendship and Good-Neighbourliness included by reference and in Annex 1 several earlier agreements codifying international borders. Specifically, Article 3 of the treaty⁴ provided that France and Libya recognized that the borders between, inter alia, French Equatorial Africa and Libya, were those resulting from a series of international instruments in force at the time of the establishment of the United Kingdom of Libya. In the Court's view, the terms of the treaty meant that the parties thus recognised complete frontiers between their territories as a result of the combined effect of all the instruments listed. Accordingly, the court's task was to determine the precise content of the undertaking given, stating that there was nothing to prevent the parties from deciding by common consent to regard a particular line as a frontier, irrespective of the previous status of the line in question. Having concluded that the contracting parties wished to define their common border by means of the *1955 Treaty of Friendship and Good Neighbourliness*, the court analyzed what that border is. After carrying out a detailed study of the instruments relevant to the case, namely (1) the *Anglo-French Declaration of 1899*⁵ and the *Convention of 8 September 1919 signed in Paris between Great Britain and France*⁶ and (2) the *Franco-Italian Agreement (exchange of letters) of 1 November 1902*,⁷ the Court established that the map

¹ Territorial Dispute.

² In Article 3 and Annex I.

³ Territorial Dispute.

⁴ Reproduced in Annex I to the Treaty.

⁵ Which defined a line bounding the French sphere of influence from the east of the line of 16° longitude northeastward towards Egypt and the Nile Valley, already under British control.

⁶ Which solved the problem of the location of the border of the franchise area of influence according to the *Declaration of 1899*.

⁷ Which referred to the map annexed to the *Declaration of 21 March 1899*, establishing the territory west of the line of 16° longitude.

corresponded to the map in the *Livre jaune*,¹ published by the French authorities in 1899, which contained a dotted line indicating the border of Tripolitania.² Finally, the resulting line was described and, in view of the attitudes subsequently adopted by the parties with regard to borders, it was concluded that the existence of a border was accepted by them and they acted accordingly. As regards the provisions contained in the *1955 Treaty of Friendship and Good Neighbourliness* according to which it had been concluded for a period of 20 years and could be unilaterally terminated, the Court indicated that that treaty was to be regarded as determining a permanent border. Taking all the arguments into account, the Court ruled in favour of Chad and found it unnecessary to consider *uti possidetis*³, title inherited from indigenous peoples⁴ or spheres of influence.⁵ The relevance of this case is highlighted through the conclusion of Court that, where a boundary has been the subject of an agreement, its continued existence does not depend on the life of the treaty under which that boundary was agreed. In particular, since it held that the scope of the *1955 Treaty of Friendship and Good Neighbourliness* constituted a valid legal instrument, the court applied the limits laid down in the agreements annexed thereto.

5. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)⁶ - 16 March 2001
In 1991, Qatar initiated litigation proceedings against Bahrain before the Court to settle the dispute between the two states over the sovereignty of the Zubarah Land, the Hawar Islands and Janan Island, all of which lie between



Fig. 3- Howar Islands

¹ Territorial Dispute.

² Historical region and former province of Libya.

³ Given that the *1955 Treaty of Friendship and Good Neighbourliness* was clear on the issue of identifying borders.

⁴ A Libyan ideological claim.

⁵ A Libyan elitist claim.

⁶ Maritime Delimitation and Territorial Questions between Qatar and Bahrain, *Qatar v Bahrain*, Order, [1998] ICJ General List No 98, ICGJ 79 (ICJ 1998), 30th March 1998, United Nations [UN]; International Court of Justice [ICJ], see <https://www.icj-cij.org/en/case/87>, accessed 18.05.2022.

the peninsulas of Qatar and Bahrain (see Fig. 3). They also requested the court to delimit their maritime zones.¹

Qatar based its claim on two international agreements concluded in 1987 and 1990, but as Bahrain challenged the jurisdiction of the court, the parties agreed that the court should first decide on the issues of jurisdiction and admissibility. Thus, in 1994, the Court concluded that the exchanges of letters between the King of Saudi Arabia and the Emir of Qatar and between the King of Saudi Arabia and the Emir of Bahrain respectively constituted international agreements, creating rights and obligations for the parties. It therefore found that it had jurisdiction to rule on the dispute.²

The complex history between the two kingdoms, both former British protectorates,³ figured prominently in the dispute, with the parties invoking arguments based on *uti possidetis*, effective control over territory, history and geography.⁴

The Court first examined the parties' claims to the territory of Zubarah, noting that, in the period after 1868, the authority of the Sheikh of Qatar over Zubarah was gradually consolidated, being recognized in the *Anglo-Ottoman Convention of 29 July 1913*⁵ and definitively established in 1937. The Court found that Bahrain's arguments regarding the right of sovereignty over Zubarah were not supported in all respects, given that there was convincing evidence of the parties' understanding that the entire peninsula of Qatar⁶ was governed by the predecessor state formations of Qatar. This has been confirmed by the existence of long-standing Qatari settlements in Zubarah, and there is no evidence that members of the Naim tribe exercised sovereign authority on behalf of the Bahraini Sheikh in Zubarah. Accordingly, the Court concluded that the holder of sovereignty over the territory was the State of Qatar.⁷

As regards the Hawar Islands, the Court stated that the British Government's 1939 decision that they belonged to Bahrain did not constitute an arbitral award, but was not without legal effect. In the context, the court noted that Bahrain and Qatar had agreed that the UK should settle their dispute at that time and found that the *1939 Decision* must be regarded as a decision which

¹ Maritime Delimitation and Territorial Questions between Qatar and Bahrain.

² Ibid.

³ Bahrain and Qatar concluded exclusive protection agreements with the UK in 1892 and 1916 respectively for limited periods (until 1971).

⁴ Maritime Delimitation and Territorial Questions between Qatar and Bahrain.

⁵ Ibid.

⁶ Including Zubarah.

⁷ Maritime Delimitation and Territorial Questions between Qatar and Bahrain.

was binding on both States from the outset and continued to be so after 1971.¹ In addition, the court rejected Qatar's claim that it had not consented to the *British 1939 Decision* and refused to consider the state's arguments based on colonial-era practice, and geographical proximity. Accordingly, rejecting Qatar's arguments that the decision was null and void, the Court concluded that Bahrain was the holder of sovereignty over the Hawar Islands.²

Noting that the *British Decision of 1939* did not mention Janan Island (see Fig. 16), which it regarded as forming a single island with Hadd Janan, the Court concluded that the British Government, in 1947, had interpreted its own *1939 Decision* as indicating that Janan Island belonged to Qatar. Accordingly, the court rejected Bahrain's argument that it effectively controlled the island, and established the holder of the sovereignty right³ as Qatar.

Subsequently, the Court considered the question of maritime delimitation, finding that customary international law was the applicable law in the case and that the parties had asked it to establish a single maritime boundary. Thus, on the southern side, it was necessary to establish the delimitation of the territorial waters of the parties,⁴ and on the northern side it was necessary to establish the delimitation between the areas where the parties had sovereign rights and the other areas.⁵

It was considered necessary to draw a provisional equidistance line,⁶ and was subsequently considered whether this should be adjusted in the light of any special circumstances. In this sense, it was first established which islands fell under the sovereignty of each party. Bahrain claimed sovereignty over the islands of Jazirat Mashtan and Umm Jalid, which was contested by Qatar, and Qit'at Jaradah was considered to be an island as it was above the water at low tide. Against the background of Bahrain's activities, the Court found that these were sufficient to support its claim to sovereignty. As regards the low⁷ coasts, it was decided that they could not be taken into account in the process of drawing the equidistance line. In addition, it was found that there were special circumstances justifying the choice of a boundary line passing between Fasht al Azm and Qit'at ash Shajarah on the one hand and between Qit'at Jaradah and Fasht ad Dibal on the other.

¹ Both parties are deemed to have pleaded their cases to the British authorities.

² Maritime Delimitation and Territorial Questions between Qatar and Bahrain.

³ Over Janan Island, including Hadd Janan.

⁴ Areas over which they enjoyed territorial sovereignty.

⁵ Exclusive Economic Zone, continental shelf.

⁶ A line made up of points, each of which is equidistant from the nearest points on the baselines from which the width of the territorial sea of the two states is measured.

⁷ Fasht al Azm and Qit'at ash Shajarah.

In the north, the Court followed the same approach, rejecting Bahrain's argument that the existence of certain pearl beds located in northern Qatar which were predominantly exploited by Bahraini fishermen constituted a circumstance justifying a change in the line. At the same time, it rejected Qatar's argument that there was a significant difference between the lengths of the parties' coasts, which required an appropriate correction. It also noted, having regard to considerations of equity, that the maritime formation of the island of Fasht al Jarim had no effect on the determination of the boundary line between the two States.

The case is important because of its complexity and the methods used in the reasoning contained in the final judgment. As regards the territorial delimitation, the Court maintained the reasoning contained in the previous case law, judging with primacy on the basis of the existence of agreements between the parties. One aspect worth mentioning is the Court's recognition of the *1939 British Decision* as a device,¹ and, applying the tripartite rule, the argument of effective control over the territory invoked by Bahrain was not analyzed. As regards maritime delimitation, the court applied the equidistance rule, a rule subsequently abandoned by the *1982 United Nations Convention on the Law of the Sea of Monte-Baj*,² in favour of the median line method.

6. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)³ - 10 October 2002

On 29 March 1994, Cameroon lodged an application at the Court's Registry against Nigeria, requesting the Court to determine the holder of sovereignty over the Bakassi peninsula and the Lake Chad region⁴ (see Fig. 17), as well as the course of the maritime boundary between the two States.⁵ Two regional plebiscites in 1961, which provided for the annexation of the territory in question by Cameroon, formed the basis of the dispute. Despite the existence of plebiscites, the annexation never took place because of a minority

¹ Of a legal decision.

² Available at <https://lege5.ro/App/Document/g44donrr/conventia-natiunilor-unite-asupra-dreptului-marii-din-10121982> accessed on 18.05.2022.

³ Land and Maritime Boundary between Cameroon and Nigeria, Cameroon and Equatorial Guinea (intervening) v Nigeria, Judgment, Merits, [2002] ICJ Rep 303, ICGJ 63 (ICJ 2002), 10th October 2002, United Nations [UN]; International Court of Justice [ICJ], see <https://www.icj-cij.org/en/case/94>, accessed 25.05.2022.

⁴ By a supplementary application submitted on 6 June 1994.

⁵ Land and Maritime Boundary between Cameroon and Nigeria.

population in the region that did not want to be incorporated into the state of Cameroon.

In its application, Cameroon referred to the acts undertaken by the troops of the Federal Republic of Nigeria as aggression, as they were occupying several Cameroonian localities in the Bakassi Peninsula, and invoked the international responsibility of Nigeria for violating the principle of respect for the borders inherited from decolonization.¹ In doing so, the parties invoked arguments based on treaty law, *uti possidetis*, effective control over the territory and history.

On 12 February 1996, against the background of the escalation of the conflict between the forces of the two States deployed on the territory of the Bakassi peninsula,² Cameroon requested the Court to order interim measures, which were granted on 15 March 1996, when the Court ordered a series of measures to put an end to the hostilities. The Court rejected seven of the preliminary objections raised by Nigeria and decided to deal with the eighth during the proceedings on the merits, and on 30 June 1999 the Republic of Equatorial Guinea filed an application to intervene in the case,³ which was granted by the Court.⁴ The claims of the parties based on treaty law and *uti possidetis* were resolved through an analysis of the actions of the colonial powers in the period preceding independence. Thus, the existence and validity of the *Thomson-Marchand Declaration of 1929-1930* (between Great Britain and France), by which the two colonial powers made a detailed demarcation of the inter-state boundary, was established. In addition, the Court found particularly convincing the acts carried out by the UN Trusteeship Council after the end of the Second World War on Nigeria and Cameroon.⁵ They contained express references to the *Thomson-Marchand Declaration* and the Henderson-Fleuriau exchange of diplomatic notes of 1931, which gave the declaration the status of an international agreement. Similarly, subsequent work by the Lake Chad Basin Commission indicated that the Declaration defined the disputed boundary, rejecting Niger's claims to the contrary.⁶

The Court established the course of the border, from north to south, between Cameroon and Nigeria as follows:

- In the Lake Chad area, it considered that the boundary was determined by the *Thomson-Marchand Declaration of 1929-1930*, as

¹ *Uti possidetis juris*.

² February 3, 1996.

³ Pursuant to Article 62 of the Statute of the International Court of Justice.

⁴ Land and Maritime Boundary between Cameroon and Nigeria.

⁵ Land and Maritime Boundary between Cameroon and Nigeria.

⁶ *Ibid.*

contained in the 1931 Henderson-Fleuriau exchange of notes (between Britain and France).¹

- Between Lake Chad and the Bakassi Peninsula, the Court confirmed that the boundary was delimited by the following international instruments: (1) the *Thomson-Marchand Declaration of 1929-1930*, as incorporated in the Henderson-Fleuriau Exchange of Notes of 1931², (2) the *British Order in Council of 2 August 1946*³ and (3) the *Anglo-German Agreements of 11 March and 12 April*.⁴ In doing so, the Court examined point by point seventeen sectors of the frontier and specified, for each, how the international instruments were to be interpreted.

- As regards the Bakassi peninsula, the Court ruled that the border had been delimited by the *Anglo-German Agreement of 11 March 1913* and that Cameroon had sovereignty over it.

The territory was attributed to Cameroon, and the court urgently requested Nigeria to withdraw its administration and military and police forces from the Lake Chad area under Cameroon's sovereignty and from the Bakassi Peninsula. At the same time, it called on Cameroon to withdraw any administrative, military and police forces that might be present along the land border from Lake Chad to the Bakassi Peninsula in territory that, according to the decision, belonged to Nigeria. In addition, the Court rejected Cameroon's arguments on the international responsibility of the State of Nigeria, as well as its counterclaims.⁵

The case is significant in that the court fully rejected the argument of historical consolidation of Nigeria's title, holding that a pre-established way of acquiring title under international law cannot be replaced. The court's conclusion was reiterated in *Frontier Dispute (Burkina Faso v. Republic of Mali)*, where it stated that the argument of actual control over territory is subsidiary and incapable of replacing a conventional title. In fact, the reasoning previously used by the Court in its case law was maintained. According to it the treaty, although imperfect and not answering all the dilemmas of territorial delimitation, outweighed the numerous pieces of circumstantial evidence presented by the Nigerian side on effective control of

¹ Thus, he found that it started in the lake at the Cameroon-Nigeria-Cihad crossing point and followed a straight line to the mouth of the Ebeji River, as it existed in 1931, and from there it flowed in a straight line to the point where the river divides, today, into two arms.

² From the point where the Ebeji River forks to the Tamnyar peak.

³ From Tamnyar Peak to Pillar 64 (as determined in Article XII of the Anglo-German Agreement of 12 April 1913).

⁴ From pillar 64 to the Bakassi Peninsula.

⁵ Land and Maritime Boundary between Cameroon and Nigeria.

the disputed territory.¹ The distinction between *Minquiers and Ecrehos (France/United Kingdom)*, on the one hand, and *Sovereignty over Certain Frontier Land (Belgium/Netherlands)* and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, on the other, is an important one, since, although the doctrine refers to acts of sovereignty and the consent of the opposing party to establish the holder of the sovereign right, in the last two cases mentioned the Court based its reasoning solely on treaty law, to the detriment of effective control.

Thus, although the Netherlands had effective control over the disputed territory, in resolving this dispute the court outlined a hierarchy of the sources of property rights applicable in cases concerning the right of territorial sovereignty.² *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* further reinforces the hierarchy, as the Court based its decision on an international agreement fixing the boundary, considering effective control subsidiary to any such agreement.³

7. Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)⁴ - 17 December 2002

On 2 November 1998, Indonesia and Malaysia, on the basis of a compromise agreement,⁵ requested the Court to determine, on the basis of treaties, agreements and any other evidence provided by them, to which State sovereignty over the islands of Pulau Ligitan and Pulau Sipadan, located off the coast of Borneo, east of Sebatik Island, belonged (see Fig. 4)

¹ Ibid.

² *Sovereignty over Pulau Ligitan and Pulau Sipadan, Indonesia v Malaysia*, Judgment, Merits, [2002] ICJ Rep 625, ICGJ 54 (ICJ 2002), 17th December 2002, International Court of Justice [ICJ], see <https://www.icj-cij.org/public/files/case-related/17/017-19531117-JUD-01-00-EN.pdf>, accessed on 30.05.2022.

³ *Sovereignty over Pulau Ligitan and Pulau Sipadan*.

⁴ Ibid.

⁵ International Court of Justice, Special Agreement, for Submission to The International Court Of Justice Of, The Dispute Between Indonesia And Malaysia Concerning, Sovereignty Over Pulau Ligitan And Pulau Sipadan, jointly notified to the Court on 2 November 1998, General List, No. 102, joint notification, dated 30 September 1998, Addressed to the Registrar of the Court, New York, 30 September 1998, see <https://www.icj-cij.org/public/files/case-related/102/7177.pdf> accessed on 30.05.2022.

In the context, the parties presented arguments based on treaty law, *uti possidetis*, effective control over the territory and history, and the court, in its judgment, began by recalling the complex historical background against which the dispute between the parties arose, and then examined the titles invoked in turn.¹ (Fig. 4)



Indonesia argued that its claim to sovereignty over the islands was based primarily on the existence of a treaty title, namely the *1891 Convention* between Great Britain and the Netherlands. Thus, the court began its analysis with the *British-Dutch Convention of 1891*. Having regard to the context in which it was concluded and in the light of its object and purpose, the instrument could not be interpreted as establishing a line of demarcation from which Indonesia's sovereignty over the islands could be inferred. Having been unable to identify a legal basis in treaty law on which to base its decision,² the Court analysed subsequent agreements between the UK and the Netherlands, and then the subsequent practice of the parties, in an unsuccessful attempt to understand their mutual intent. In addition, the Court noted that the cartographic material submitted by the parties in question does not contradict this conclusion.

After rejecting Indonesia's argument, the Court went on to examine the other titles on which the parties claimed to base their sovereignty, seeking to establish whether Indonesia or Malaysia had obtained title to the islands by succession. The court rejected Indonesia's justification that it had retained sovereignty over the islands as successor to the Netherlands, which had acquired it through contracts with the Sultan of Bulungan.³ It did not accept Malaysia's contention that it had acquired sovereignty over the islands through a series of alleged transfers of title originally held by the former sovereign, the Sultan of Sulu.⁴

Finding that neither party held title to sovereignty under a treaty, the court examined whether they could have held title by virtue of effective control. In doing so, it determined the extent to which the parties' claims to sovereignty

¹ Sovereignty over Pulau Ligitan and Pulau Sipadan.

² In view of the court's finding that the Convention could not constitute a basis for Indonesia's claims.

³ The original holder of the sovereign title.

⁴ The title would be passed on to Spain, the United States, Great Britain (on behalf of the state of North Borneo), the United Kingdom and finally Malaysia.

were based on activities that proved the exercise of effective and continuous control of authority over the islands, i.e. the intention and willingness to act as sovereign. Thus, Indonesia alleged a continuous presence of Dutch and Indonesian navies in the vicinity of Ligitan and Sipadan, adding that the waters around the islands were traditionally used by Indonesian fishermen. In the Court's view, the facts relied on did not constitute evidence that the authorities regarded the territories as belonging to Indonesia, and the activities carried out by private persons could not be regarded as effective control over the territory, as long as they were not based on formal regulations.

After rejecting Indonesia's arguments, the effective control claimed by Malaysia was examined. In that regard, as evidence of effective administration of the islands, Malaysia cited, inter alia, the measures taken by the authorities of North Borneo to regulate and control the turtle egg collection activity on the islands of Ligitan and Sipadan, which was of economic importance in the region at the time. Thus, *the Turtle Conservation Ordinance of 1917*¹ was issued, with Malaysia claiming that the legislation was in force until at least the 1950s. Further, the construction by the colonial authorities in North Borneo of lighthouses on the islands of Sipadan² and Ligitan³ was invoked, constructions which are still in operation and maintained by the Malaysian authorities since the time of independence. The Court noted that Malaysia's activities, although small in number, were diverse in nature and included legislative, administrative and quasi-judicial acts. Moreover, they covered a considerable period of time and revealed the government's intention to exercise specific state functions over the two islands in the context of the administration of several island formations. Moreover, the Court noted that, at the time the activities in question were undertaken, neither Indonesia nor its predecessor (the Netherlands) had ever expressed any disagreement or protest with them.⁴

Since the alleged effects invoked by Indonesia were not of a legislative nature, but Malaysia's regulations on the commercial collection of turtle eggs and the establishment of a bird sanctuary on the islands were administratively sufficient to demonstrate effective control, the Court concluded that sovereignty over Pulau Ligitan and Pulau Sipadan belonged to Malaysia.⁵

¹ *Turtle Preservation Ordinance. No. 11 of 1917, Ceylon Govt. Gazette, Extraordinary, May 9, 1917, 1-2.*

² In 1962.

³ In 1963.

⁴ Sovereignty over Pulau Ligitan and Pulau Sipadan.

⁵ *Ibid.*

The case is significant in that the court found that the arguments based on actual control constituted a sufficient basis for its decision. In examining the parties' competing claims, the Court thus took the view that, in order for it to constitute an independent basis for the judgment, there was a need for continuous and uninterrupted control so as to show the intention of the administration of the territory.

8. Conclusions

Despite the lack of a strict rule, the Court's case-law on territorial matters is generally consistent and frequently cites previous judgments in support of its recent decisions. The resolution of territorial disputes needs to be carried out with precision, completeness and concreteness. In today's international relations, a boundary must be indicated precisely and completely in order to be useful, leaving no vague areas or room for interpretation. Judgments often remain a substitute for international agreement between states, relying on the consent of the parties, either directly under the original treaty or by agreement to submit the matter to international jurisdiction.

Given the totality of the categories of justifications for territorial claims encountered in the cases of territorial disputes analyzed in this article (treaty law, *uti possidetis* principle, effective control, history, geography, culture, economics, elitism and ideology), only some are relevant. Thus, although States have always invoked most of the arguments in their applications, only some of them have consistently operated as the rule applied by the International Court of Justice in its reasoning.

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