

# A Brief Analysis of the Defining Standard of the National Territorial Boundary Treaty

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## Abstract

Territorial sovereignty refers to the supreme power a country has over its territory itself and the people and things within its territory, and its content includes ownership and jurisdiction. The state's ownership of the territory means that the state has the right to possess, use and control all the land and resources within its territory, so the importance of territorial treaties is self-evident.

The area under the jurisdiction of a sovereign state usually includes land (territorial land), internal waters (including rivers, lakes, and internal seas) within a country's national borders (borders), as well as their sub beds, subsoils, and airspace (airspace). Sometimes it also includes territorial waters. There are often disputes over territorial disputes between different countries. Therefore, the International Court of Justice needs to make correct judgments based on the treaty.

In judicial practice, a treaty accepted after analysis has a decisive weight in determining the territorial sovereignty and boundary of the disputed country. Therefore, the parties will provide a large amount of treaty evidence to the International Court of Justice based on their respective interests. In general, the case law of the International Court of Justice on territories reveals two common disputes. The first type of dispute is related to the existing territorial treaty; the second type of dispute involves not the existence of the territorial treaty itself, but its validity. Territorial sovereignty belongs to a country's core interests. Based on the provisions of Articles 31-32 of the Vienna Convention on the Law of Treaties, the International Court of Justice adopted defining standards such as "substance superior to form" and "consent" when resolving disputes over national territorial border treaties. However, some treaties concerning territorial sovereignty will cause disputes, so the definition of territorial treaties needs to be further determined.

**Keywords:** territorial sovereignty, National Territory Border Treaty

## 1. Research Background

In all human records, territory has been a problem until now. As a concept of international law, territory is a constituent element of the state and the scope of national jurisdiction, so the state and territory are inseparable. Moreover, territorial identity is also the basis of national identity and the essentials of building a harmonious world and a community of human destiny. National Territorial Border Treaties (hereinafter referred to as Territorial Treaties) interact with other territorial rights in many ways.

First of all, for colonial countries, the International Court of Justice has established a multiplicity of hierarchical rules of adjudication—the effectiveness of international treaties is superior to the law of retention of possession, the law of retention of possession is superior to effective control, and effective control is superior to other jurisprudence. For example, in the 2002 Cameroon v. Nigeria Land and Maritime Delimitation case, the International Court of Justice held, on the basis of relevant international agreements, that colonial law could not

alter treaty boundaries. For non-colonial countries, the International Court of Justice generally follows the triple-tiered rules of adjudication—international treaties are superior to effective control, and effective control is superior to other jurisprudence. This is a rule that the International Court of Justice often reiterates<sup>1</sup>. Of course, for a variety of reasons, the historical evidence presented by the States parties is often insufficient or unclear, and territorial treaties may not clearly define borders in a particular area. In this case, the boundary delimitation or sovereignty is determined by the court's effective control principle<sup>2</sup>, and other factors are considered to make a judgment.

Due to the intertwining influence of political, economic, cultural, historical and other factors, territorial and border issues remain the external or potential major negative factors hindering the peace and development of the international community. It is well known that there are peaceful and non-peaceful means of settling territorial disputes between States, such as political negotiation, justice or arbitration, war, military conquest and so on. However, regardless of the solution, an effective treaty is an external main representation of the territorial boundary of the 'solidified' parties, which has become the consensus of the international community. As the International Court of Justice made clear in its 1994 Judgment in the Libya/Chad Territorial Dispute case: the determination of the border depends to a large extent on the will of the sovereign State directly concerned, and nothing can prevent the parties from determining the boundary line through bilateral treaties<sup>3</sup>. Even, individual treaties are not territorial treaties, but as long as the 'consent' between the parties, they can also be considered as territorial treaties. In the 1999 Botswana/Namibia Kasikiri and Sedudu Islands case, for example, the Anglo-German Treaty of 1890 was not a territorial treaty per se, but rather a treaty involving the division of spheres of influence between the two countries in South-West Africa, but both parties to the dispute agreed to treat it as a territorial treaty between them.

Although one of the cornerstones of the determination of national borders is the 'consent' between the parties, for a number of reasons, the undisputed nature of 'consent' as a pillar of the border does not mean that the existence of the borders of the parties or the ownership of territorial sovereignty are always so clear. On the one hand, due to the logic of expression of the treaty text itself, the diversity of language, the game of national interests and the influence of time factors, there are inevitably various differences between the parties in the effectiveness and interpretation of the relevant treaties. For example, both the States parties to the dispute and the International Court of Justice have invoked Articles 31-32 of the Vienna Convention on the Law of Treaties, hereinafter referred to as the "Convention on the Law of Treaties" in the interpretation of territorial treaties, but sometimes differing results are derived from differences in approaches, methods of interpretation and operational structures on which a treaty is interpreted, thus deepening the international community's doubts about the validity of its interpretation. Even the International Court of Justice has in individual cases played down the validity of treaty interpretation in favour of relying on the jurisprudence of effective control of the case. Undoubtedly, this has greatly affected the judicial authority of the International Court of Justice and shaken the confidence of the parties to resolve their territorial disputes by legal means. Second, some territorial treaties may have been signed decades or even centuries before the dispute was brought to the International Court of Justice. Some of these disputes relate to issues that may be of relevance to some unknown remote areas at the time of contracting, making it difficult for the parties or the International Court of Justice to identify specific geographical names in the short term. In particular, there may be a political reality that, despite the fact that a state's status as a subject of international law remains unchanged, its government frequently changes, so that when a changed government finds that a treaty signed by the former government is not in their current interest, it may choose not to fulfil the obligations set out in the agreements reached in the past, thereby triggering a border dispute with the other party. Therefore, how to draw on the jurisprudence of international justice and arbitration to resolve disputes through political negotiations or legal means has become an urgent problem to be solved.

In fact, although domestic scholars have also analyzed some issues of treaty law when interpreting the jurisprudence of the International Court of Justice and the arbitral tribunal in resolving territorial boundary disputes, there is a lack of systematic and comprehensive research on the definition criteria of territorial treaties. In particular, there is a lack of empirical analysis and the definition of the nature of territorial treaties to analyze the international legal issues involved in the territorial treaties between China and relevant neighboring countries. Compared with domestic scholars, foreign scholars have conducted more in-depth research on the treaty issues in territorial disputes, but these research results are relatively broad and lack of a comprehensive analysis of the legal issues related to the interpretation of territorial treaties; moreover, when it comes to the rules for the interpretation of territorial treaties, there are often different and controversial views on the rules applicable to international courts and arbitral tribunals based on different legal traditions and customs.

To sum up, in judicial practice, the International Court of Justice has always used territorial treaties as the logical starting point for the legal analysis of cases, and placed them in a legal position of priority measurement. Based on this, this paper analyzes the defining standards of territorial treaties involved in the settlement of territorial disputes by the International Court of Justice, which can provide a theoretical reference for the peaceful

settlement of territorial boundary disputes by the parties to the dispute in the international community.

## **2. National Territorial Boundary Treaties and the Criteria for Their Definition**

In international judicial practice, the parties often dispute whether an agreement is a territorial treaty. Moreover, there are also disputes: one country believes that another country violates the territorial treaty signed by the two countries and is responsible for its violation of the agreement, while the other country denies it. Specifically, the dispute over the nature of international agreements mainly means that although the parties agree to have international treaties with each other, there are differences in whether they are territorial treaties. In this regard, the International Court of Justice usually adopts the standard of “substance over form” according to Articles 31-32 of the Convention on the Law of Treaties, focusing on the purpose, purpose and subsequent practice of the parties to sign the treaty to determine whether it belongs to the territorial treaty. For example, in the 1999 Botswana/Namibia Kasikili and Sedudu Islands case, the parties had differences of interpretation regarding the “main channel of the Chube River” under article 3 of the Anglo-German Treaty of 1890. Since the treaty between the United Kingdom and Germany uses the term ‘sphere of influence’ and does not explicitly refer to it as a national territorial boundary treaty, the individual judges noted that the nature of the treaty is not a territorial treaty but a treaty dividing the spheres of influence of the two countries in Africa; moreover, in the strict sense, one of the main differences between the territorial treaty and the colonial sphere of influence treaty is that the former divides the space area, while the latter involves points or lines without width. Therefore, the territorial treaty has accuracy and certainty, which makes it different from the general nature of the colonial sphere of influence treaty. In this regard, on the one hand, the parties agree that the treaty is a territorial treaty; on the other hand, after analyzing the principle of purpose and purpose, the International Court of Justice also concluded that the purpose of the treaty was indeed to divide the boundary. It follows that, in the event of a dispute between the parties as to whether an agreement is a territorial treaty or not, the International Court of Justice defines it as ‘superior in substance to form’, regardless of whether its title is a territorial treaty or not. Moreover, when examining whether the treaty text determines the boundary, a reasonable and accurate judgment is usually made based on the purpose and purpose of the treaty stipulated in Articles 31-32 of the “Convention on the Law of Treaties.”

At the same time, in territorial disputes, the International Court of Justice is often called upon to resolve differences between States parties regarding the interpretation or application of specific texts of relevant agreements, sometimes even in individual cases concerning the validity of treaties signed but not ratified by the parties. Generally, the International Court of Justice’s rule on its validity is: whether the unapproved treaty reflects the true intention of the disputing party, if it is true, it gives these treaties with flawed acts to prove their validity, so as to reflect the definition standard of “substance over form.” For example, in the 1959 Belgium / Netherlands certain border land case, the International Court of Justice pointed out that in the 1892 unratified treaty, Belgium had agreed to the transfer of two pieces of land to the Netherlands in this case. Although the treaty of course did not produce any rights or obligations, its terms indicated that Belgium was claiming sovereignty over the two pieces of land at that time, and the Netherlands also knew that it was doing so. On this basis, the International Court of Justice granted Belgium sovereignty over the unratified treaty as additional evidence to the 1843 treaty. Similarly, in the case concerning Maritime Delimitation and Territorial Questions in Qatar v. Bahrain (2001), concerning the sovereignty of Zubala, the International Court of Justice noted that, although the 1913 Agreement between the United Kingdom and the Ottoman Empire on the Persian Gulf and the Territories around it had not been ratified, it could still be regarded as a clear expression of intent by the parties at the time of signature. Moreover, the treaty signed by Britain and Turkey in 1914 can also be used as strong evidence for Qatar’s actual exercise of rights, thus giving the treaty not ratified in 1913 a decisive probative value.

## **3. Criteria for Determining the Borders of the Countries Concerned**

In international judicial practice, parties sometimes have disputes over whether territorial treaties determine boundaries in specific regions. For such disputes, the International Court of Justice adopted the criterion of ‘consent’ between the parties, in accordance with the relevant provisions of articles 31-32 of the ‘Convention on the Law of Treaties’.

The first is that the territorial treaty is related to the disputed area, but not based on the purpose of delimitation. For example, in the case of Nicaragua v. Colombia in 2012, the problem faced by the International Court of Justice was that the two parties mainly disputed the scope of the “1930 Exchange of Ratification Protocol”. Colombia argues that the agreement has stipulated the maritime boundary between the two countries, while Nicaragua believes that the text mentioned above only determines the boundary of the islands and does not determine the maritime boundary. The International Court of Justice recognized Nicaragua’s claim on two grounds. First, it is believed that the above-mentioned agreement text cannot be interpreted as a maritime boundary between Colombia and Nicaragua; second, before the ratification of the 1928 treaty, the two sides did

not reach a consensus on the maritime boundary dispute.

The second situation is the lack of precision of the territorial treaty, so the two sides are in dispute. For example, in the 2002 Cameroon v. Nigeria Land and Maritime Delimitation case, the International Court of Justice, in dealing with the dispute over the delimitation agreement between the two States, due to its uncertain content, Nigeria made three arguments that the two States were not delimited. In this regard, the International Court of Justice held that, although the 'Thompson-Marshan Declaration' does contain technical flaws and details that need to be clarified, there is evidence that the parties intended to determine the boundary, and therefore these flaws and deficiencies cannot constitute a basis for denying the existence of the boundary. In addition, the International Court of Justice believed that Britain had declared to France that the boundary line stipulated in the 1929 and 1930 statements 'de facto delineated the border involved'. Finally, the International Court of Justice stated that in 1946, the United Nations Trusteeship Council had authorized the fine-tuning of the imprecise parts of the map annexed to the Mirna-Simon Statement by France and Britain in relation to the inaccuracy of the Muss map. By 1946, it should be considered to have been resolved, which can be derived from the existence of border agreements related to the Lake Chad region. With regard to Nigeria's second claim, the International Court of Justice, on the basis of the Mirna-Simon Statement and the Henderson-Fleurio Exchange of Notes drawings, held that the location was 14 degrees 4 minutes 59.9999 seconds east rather than near 14 degrees 5 minutes. The International Court of Justice has found that these differences are not sufficient to indicate an uncertain border. Finally, with regard to the third point, the International Court of Justice held that the Nbezi River had not only one single estuary at the time of the judgement and that, therefore, in order to interpret the term, the intention of the parties at the time should be ascertained and the map referred to above should be used to confirm that the parties had not.

The third situation is the dispute over whether the territorial treaty completely determines the boundary. In judicial practice, it is often found that the parties have disputes over whether a territorial treaty completely stipulates the boundary between the two countries. In this regard, the standard initially established by the International Permanent Court is the standard of presumed consent of the parties. However, this criterion was amended in Indonesia v. Malaysia in 2002. Indonesia claims that the 1891 Convention relating to this dispute can resolve all future disputes between the Netherlands and the United Kingdom concerning the special regional boundary of the island of Borneo, but the International Court of Justice, in the light of the object and purpose of the treaty and in the light of the context, considers that the Convention is not such a complete boundary settlement treaty as the Permanent Court of International Justice indirectly refers to in its citation. Because it did not find any evidence in the treaty that the parties tried to delineate their boundaries in the eastern territories of Borneo and Sabadique or to clarify the sovereignty of any other islands. As for the islands of Ligitan and Sipatan, the International Court of Justice also noted that the preamble of the treaty is difficult to apply to these two islands. Because Indonesia and Malaysia admitted that they did not know the two islands at that time, and they were not a matter of dispute between the Netherlands and Britain. It can be seen that the International Court of Justice has established strict conditions: the existence of an agreement with a complete boundary can only be based on the clear consent of the parties rather than the presumption; if this is not the case, it is considered that the agreement provided by the parties does not determine the complete boundary in the disputed area.

#### **4. Disputes and Definition of the Validity of International Agreements**

The typical case of a dispute concerning the validity of a territorial treaty was Nicaragua v. Colombia in 2012. The case mainly involves the validity and interpretation of the 1928 treaty. After taking power in 1979, the Sandinista government of Nicaragua declared the treaty invalid on February 4, 1980. The main reasons are twofold: First, Nicaragua claims that the 1928 treaty is contrary to the 1911 Constitution of Nicaragua, which, in its articles 2-3, provides that a treaty has no legal effect if it is contrary to the independence and integrity of the State or if government officials enter into powers involving the disposition of territory without legal authorization; secondly, the Government of Nicaragua was deprived of the capacity of international law because, at that time, it was under military occupation and substantial manipulation by the United States and therefore could not freely express its views on the acceptance of the treaty. Perhaps out of concern about the lack of sufficient international law basis for its claim that the 1928 Treaty was invalid, Nicaragua also pointed out that Article 1, paragraph 1, of the Treaty did not clearly define the precise definition of the San Andres Islands; moreover, Roncador and Serrana are unlikely to be part or geographical unit of San Andres Island, Providenciales Island and Santa Catalina Reef, according to distance criteria. At the same time, Nicaragua stressed that there is no historical record that the disputed islands form part of the San Andres Islands. Regarding Colombia's definition of the islands as an administrative unit through domestic legislation, Nicaragua pointed out that the creation of administrative units at the international level could not prove that they were part of the San Andrés Islands. As for the 1930 agreement, Nicaragua considers that it sets the western limits only for the San Andres Islands.

In contrast to Nicaragua, Colombia considers that the unilateral declaration of invalidity of the Treaty by the Nicaraguan side lacks grounds under international law, mainly because, while both countries had claimed sovereignty over the San Andres Islands since Spain's colonial independence in 1821, the 1928 Treaty made clear Colombia's sovereignty over the islands of San Andres, Providencia and Santa Catalina Reef, as well as other ancillary islands forming part of them. In addition, the 1930 agreement also stipulated that the 82-degree meridian was the dividing line of territorial ownership between the two countries. Moreover, both in the colonial and post-colonial periods, the San Andres Islands were regarded as a whole. In order to rule out this objection, the International Court of Justice decided that the issue of sovereignty over the islands had been resolved through the 1928 Treaty by seizing the key step of negotiating and agreeing on the treaty text before obtaining the approval of their respective legislative bodies. It follows that, in that case, the International Court of Justice further established the 'consent' criterion in order to preserve the integrity and validity of international agreements that had previously been consensual.

## 5. Conclusion

As a concept of international law, state and territory are inseparable. However, due to the intertwining effects of political, economic, cultural, historical and other factors, territorial and border issues remain the main external or potential negative factors hindering the peace and development of the international community. In the practice of international justice and arbitration, the accepted treaty has a decisive weight on the sovereignty and boundary delimitation of the disputed territory of the parties, so the parties provide much treaty evidence to the International Court of Justice based on their respective interests. For treaties provided by the parties, the International Court of Justice usually adopts the criteria of 'substance over form' and 'consent' to screen and determine the nature of various treaties. Of course, for some territorial treaties, the parties are not controversial about their nature, but there are differences in the meaning of related terms. For the interpretation of the treaty, the International Court of Justice interprets the text terms according to the interpretation rules established by Articles 31-32 of the "Convention on the Law of Treaties" to determine whether it establishes territorial sovereignty or delimitation.

Nevertheless, the International Court of Justice has shown a certain degree of flexibility in the interpretation of territorial treaties. Of course, in the process of settling territorial disputes, the International Court of Justice and arbitral tribunals still need to improve the definition of territorial treaties, which remains to be examined in future practice.

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<sup>1</sup> Cf. Land and Maritime Boundary between Cameroon and Nigeria, Judgment, I.C.J. Reports 2002, p. 353, para.68.

<sup>2</sup> Cf. Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, p. 586, para. 63.

<sup>3</sup> Cf. Territorial Dispute (Libya/Chad), Judgment, I.C.J. Reports 1994, p. 21, para. 45.

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