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Boundary Agreements in the International Court of Justice's Case Law, 2000–2010

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Abstract

Boundaries are a key element of the exercise of states' power and sovereignty. One of the cornerstones of boundaries is consent, as the ICJ has made clear. One should then expect from states that they be extremely careful when concluding agreements in such a critical realm. The undisputed character of consent as the pillar of boundaries by no means implies that the existence of a boundary or the attribution of sovereignty over territory is always clear when states have negotiated on these issues. The purpose of this article is to illustrate the different modalities of disputes over boundary agreements, in the ICJ's jurisprudence over the first decade of the new millennium; to present the Court's pronouncements on this particular issue; and to offer a general overview of this jurisprudence. Basically, this case law reveals that there are two general kinds of dispute. First, there were controversies relating to the existence of a boundary agreement. The second type of dispute involved controversies relating not to the existence of a boundary agreement but to its validity. As a conclusion, it can be said that the Court's jurisprudence displays two trends. First, the Court was strict in finding the existence of a boundary agreement between the parties relating to a particular territory. Secondly, once the Court decided that a boundary agreement existed, it was reluctant to declare its unlawfulness.

Boundaries are a key element of the exercise of states' power and sovereignty, for they determine the extent of their territory – with all the attached social, political, economic, and human dimensions – and of states' jurisdiction. One of the cornerstones of boundaries is consent, as the International Court of Justice made clear in its

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judgment in *Libyan Arab Jamahiriya/Chad*, in which it said that '[t]he fixing of a frontier depends on the will of the sovereign States directly concerned'.[1] One should then expect from states that they be extremely careful when conducting negotiations and concluding agreements in such a critical realm. However, problems relating to them exist for a number of reasons. Boundary treaties may have been negotiated decades or even centuries before a dispute is brought before the International Court of Justice (the Court); and they may be in relation to distant areas not well-known at the time of the conclusion of the agreement in question, making it difficult for the parties to them to ascertain in more recent days what they agreed on back then. Or there is always the political reality that, while states' international personality always remains the same, their governments usually change, and such changes may create incentives for a party to an agreement to attempt to revisit the scope of past commitments when they no longer suit its more contemporary interests, thereby triggering boundary controversies with the other party.

For these and other reasons, the undisputed character of consent as the pillar of boundaries by no means implies that the existence of a boundary or the attribution of sovereignty over territory is always clear when states have negotiated on these issues. The purpose of this article is to illustrate the different modalities of disputes over boundary agreements, in the International Court of Justice's jurisprudence over the first decade of the new millennium; to present the Court's pronouncements on this particular issue; and to offer a general overview of this jurisprudence, or, in more graphic terms and paraphrasing Orhan Pamuk, its hidden geometry.

Basically, this case law reveals two general kinds of dispute.[2] First, there were controversies relating to the existence of a boundary agreement. The second type of dispute involved controversies relating not to the existence of a boundary agreement but to its validity. As a conclusion, it can be said that the Court's jurisprudence displays two important trends. First, the Court was strict in finding the existence of a boundary agreement between the parties relating to a particular territory. Secondly, once the Court decided that a boundary agreement existed, it was reluctant to declare its unlawfulness. Finally, one of the main policy recommendations that emerges from the case law is quite an exception in the annals of the negotiation of international agreements. While ambiguity in international law is usually praised as a key and necessary element of such negotiations, there should be little room for it in boundary treaties.

This article is divided into four parts. The first offers a very brief general view of the settlement of boundary disputes and the role that boundary agreements play therein. The second part presents the different categories of controversies relating to such

[1] *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ Judgment of 3 Feb. 1994, [1994] ICJ Rep 6, at para. 45.

[2] This article uses the term 'boundary disputes' as comprising boundary and territorial controversies. In effect, as the Chamber of the Court stated in *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, '[T]he effect of any decision rendered either in a dispute as to attribution of territory or in a delimitation dispute is necessarily to establish a frontier': ICJ Chamber Judgment of 22 Dec. 1986, [1986] IUCJ Rep 554, at para. 17.

agreements that took place before the Court during the period under consideration and shows how the Court handled them. The third section discusses the controversies relating to the lawfulness of boundary agreements and settlements and the way in which the Court addressed them. Finally, the fourth part presents a general assessment of the Court's jurisprudence.

1 A Brief Description of Titles to Territory and the Place of Boundary Agreements

Title to territory can be acquired through diverse means: state succession; occupation in the event of *terra nullius*; third party decision; arbitration; international agreements; the principle of *uti possidetis juris*, according to which the boundaries that colonial powers imprinted on their colonies are preserved after independence;[3] and *effectivités*, understood as public actions carried out with sovereign intent by a state on a certain territory, sometimes in the absence of any other formal title.[4]

International boundary agreements interact in a number of ways with other titles to territory. To begin with, the Court established in *Cameroon v. Nigeria*[5] the prevalence of international agreements over the principle of *uti possidetis juris* in the sense that colonial law cannot change a boundary determined by the former.[6] Further, international boundary agreements always prevail over *effectivités*, as the Court has repeatedly stated.[7] Finally, it is possible, for a number of reasons, for an international agreement not to set a boundary in a specific area. When this is the case, the boundary is determined by the Court on the basis of *effectivités*.[8] This means that the absence

[3] See ICJ Chamber, *Case Concerning the Frontier Dispute (Benin/Niger)*, Judgment of 12 July 2005, at para. 23, available at: www.icj-cij.org/docket/files/125/8228.pdf (last visited 25 April 2012).

[4] The Court ratified in *Nicaragua v. Honduras* the long-standing definition of the elements of *effectivités* designed by the Permanent Court: 'A sovereign title may be inferred from the effective exercise of powers appertaining to the authority of the State over a given territory. To sustain a claim of sovereignty on that basis, a number of conditions must be proven conclusively. As described by the Permanent Court of International Justice "a claim to sovereignty based not upon some particular act or title such as a treaty of accession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority" (*Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, pp. 45–46).'See *Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, ICJ Judgment of 8 Oct. 2007, at para. 172, available at: www.icj-cij.org/docket/index.php?p1=3&p2=3&k=14&case=120&code=nh&p3=4 (last visited 28 April 2012).

[5] See *Case Concerning the Law and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, ICJ Judgment of 10 Oct. 2002, available at: www.icj-cij.org/docket/files/94/7453.pdf (last visited 28 April 2012). For assessments of this judgment see D'Argent, 'Des Frontières et des Peuples: L'Affaire de la Frontière Terrestre el Maritime entre le Cameroun et le Nigeria, Arrêt sur le Fond', 48 *Annuaire Française de Droit International(AFDI)* (2002) 281: and Mendelson, 'The *Cameroon – Nigeria* Case in the International Court of Justice: Some Territorial Sovereignty and Boundary Delimitation Issues', 75 *BYBIL* (2005) 223.

[6] See *Cameroon v. Nigeria, supra* note 5, at para. 212.

[7] See *ibid.*, at para. 68.

[8] *Burkina Faso v. Mali*, *supra* note 2, at para. 63.

of a boundary agreement does not have the effect that the dispute cannot be settled: the conceptual framework of the international law of boundaries has developed this concept to resolve such a situation.

2 When Is There an International Boundary Agreement?

A *Disputes over the Existence of an International Agreement of Any Sort*

During the first decade of the new millennium, the ICJ addressed disputes in which one state sought to hold another accountable for a violation of, in its view, a boundary agreement, while the other state denied its very existence. Two situations occurred in this kind of controversy during the period concerned: whether the agreement had entered into force or whether there was a tacit agreement.

1 The International Agreement Never Entered into Force

A controversy over the existence of an international boundary agreement on the basis of a claim that the agreement never entered into force was at issue in *Cameroon v. Nigeria*, regarding the 1975 Maroua Declaration.[9] The Declaration was signed by the Heads of State of Cameroon and Nigeria, who agreed on a partial delimitation of the maritime boundary between the two states.[10] The Declaration was signed but never ratified, and Nigeria invoked the absence of ratification as a reason for the lack of any binding character of the Declaration.[11] The Court recognized that signature and ratification were a process usually found in treaties as conditions for their entry into force; however, the Court stated that there could be international agreements that came into existence upon signature. The Court said that it was 'up to States which procedure they want to follow';[12] then, it looked at the text of the Declaration, and since no ratification had been contemplated, the Court declared that the Declaration had entered into force upon its signature.[13]

2 Tacit Boundary Agreements

Disputes over the existence of a delimitation agreement rooted in a claim by one state that there is a tacit boundary agreement, which is denied by the other, was at issue in *Nicaragua v. Honduras*.[14] There, Honduras claimed that, by virtue of a tacit agreement, the maritime boundary between the parties followed the 15th parallel. Honduras

[9] See *Cameroon v. Nigeria*, *supra* note 5, at paras 210–211.
[10] See *ibid.*, at para. 38.
[11] See *ibid.*, at para. 259.
[12] *Ibid.*, at para. 264.
[13] See *ibid.*
[14] See *Nicaragua v. Honduras*, *supra* note 4, at para. 158. For an assessment of this judgment see Kirk, 'Decisions of International Courts and Tribunals. International Court of Justice', 57 *ICLQ* (2008) 701.

based the agreement on the parties' oil concessions never having gone south or north of the parallel,[15] the parties' fishing licence practice, and the enforcement of fisheries policies.[16] Honduras also mentioned an incident in which a Honduran vessel fishing south of the parallel was apprehended by Nicaraguan authorities and taken to a point on the parallel, where the vessel was released.[17] Finally, Honduras relied on fishermen's statements to prove some of these facts. Nicaragua, for its part, denied that it had ever accepted the 15th parallel as the maritime boundary with Honduras.[18]

The Court stated that evidence of a tacit and permanent maritime boundary had to be compelling, and that it was not prepared easily to declare the existence of tacit boundary agreements. Further, it pointed out that not all tacit agreements that looked like *de facto* maritime boundary agreements were so. The Court highlighted that a *de facto* line could be only a provisional agreement or could exist only for a limited purpose, such as the sharing of a scarce resource.[19]

The Court found that the parallel had had some relevance for a certain period: the 1960s. In effect, the parties' concessions then explicitly alluded to the 15th parallel as the limit, and fishermen understood that the parallel divided the jurisdictions of Nicaragua and Honduras. However, the Court found that this situation lasted for only a short time and that it did not consequently give rise to a permanent maritime boundary.[20] This was even clearer, given the fact that Honduras' Minister for Foreign Affairs had explicitly recognized in 1982 that the maritime boundary had to be defined.[21]

In the Court's view, the parties' oil concession practice did not reflect a *de facto* agreement, but simply their caution.[22] The Court's overall conclusion was that a tacit agreement between the parties establishing a legally binding maritime boundary did not exist.[23]

As can be seen, the Court subjected the existence of tacit boundary agreements to strict requirements: the parties' behaviour cannot be explained for any reasons other than setting a boundary; the behaviour must have lasted for a significant period of time; and even the existence of a temporary tacit agreement does not indicate that of a permanent tacit agreement. Add to this requirement an explicit statement that the Court would not easily recognize the existence of boundary agreements of this nature, and one can conclude that the Court virtually put in place, for practical purposes, a presumption against their recognition in *Nicaragua/Honduras*.

[15] See *Nicaragua v. Honduras*, *supra* note 4, at para. 238.
[16] See *ibid.*, at para. 240.
[17] See *ibid.*
[18] See *ibid.*, at paras 247–249.
[19] See *ibid.*, at para. 253.
[20] See *ibid.*, at para. 256.
[21] See *ibid.*, at para. 257.
[22] See *ibid.*, at para. 254.
[23] See *ibid.*, at para. 258.

B *Disputes over the Categorization of an International Agreement as a Boundary Agreement*

The second kind of dispute relating to boundary agreements that took place before the Court during the first decade of the new millennium was related to the categorization as a boundary agreement of the agreement between the parties. They agreed that there was an international agreement between them, but they had conflicting views about whether it was a boundary agreement. Or, in other words, they disagreed on whether their formal non-boundary agreement set a boundary.

C *The Rule: Formal Non-boundary Agreements Do Not Set Boundaries*

When dealing with disputes relating to the categorization of an agreement as a boundary agreement, the Court determined that formal non-boundary agreements neither set frontiers nor resolved territorial issues. The Court, first, dealt with this kind of controversy in *Indonesia v. Malaysia.*[24] In effect, in its attempt to show that it was the successor to the United Kingdom to the title over the islands in dispute, Malaysia referred to the 1907 Exchange of Notes between the United States and the United Kingdom in which the former, according to Malaysia, accepted that the latter had been administering the islands and had allowed this situation to continue.[25] The Court did not accept the categorization of the administration agreement between the parties as a boundary agreement and pointed out:

> [T]his exchange of notes . . . did not involve a transfer of territorial sovereignty, provided for a continuation of the administration by the [British North Borneo Company] of the islands . . . No conclusion therefore can be drawn from the 1907 Exchange of Notes as regards sovereignty over Ligitan and Sidapan.[26]

The Court also pronounced on whether a non-boundary agreement had determined a territorial issue and reached the same negative conclusion in *Malaysia v. Singapore.*[27] At issue was whether there had been a transfer of sovereignty over Pedra Branca by the titleholder and for the benefit of the UK by virtue of the UK's having authorized the construction of a lighthouse on the island. Some letters sent by the Sultan of Sohor to the UK expressed pleasure at the construction of the lighthouse,[28] but they were understood by the British Governor of the East India Company to imply the cession of the island.[29] The Court stated that any transfer of title on the basis of the

[24] *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, ICJ Judgment of 17 Dec. 2002, available at: www.icj-cij.org/docket/index.php?p1=3&p2=3&k=df&case=102&code=inma&p3=4 (last visited 28 April 2012). For an analysis of this judgment see Perri, 'Titre Conventionnel et Effectivités: L'Affaire de la Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie c. Malaisie)', 48 *AFDI* (2002) 322.

[25] See *Indonesia v. Malaysia*, *supra* note 24, at para. 103.

[26] *Ibid.*, at para. 118.

[27] See, *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, ICJ Judgment of 23 May 2008, at paras 295–299, available at: www.icj-cij.org/docket/index.php?p1=3&p2=3&k=2b&case=130&code=masi&p3=4 (last visited 25 April 2012).

[28] See *ibid.*, at para. 128.

[29] See *ibid.*, at para. 129.

conduct of the parties must be 'manifestly clear and without any doubt'[30] in order to preserve the stability and certainty of sovereignty.[31] The Court decided that the letters did not imply a cession, and it did not give too much weight to the UK's use of this word when referring to the letters sent by the titleholder.[32]

In sum, what these findings in *Indonesia v. Malaysia* and *Malaysia v. Singapore* evidence is that international instruments that deal with the allocation of areas for the purpose of their administration do not prove sovereignty over the allocated areas. Or, generally, non-boundary agreements do not determine frontiers.

D *The Exception: Non-boundary Agreements May Have a Bearing on Frontiers or Be Transformed into Boundary Agreements*

Other debates over international boundary agreements gave the Court the opportunity to introduce nuances by virtue of which non-boundary agreements might still have a bearing on frontiers or be transformed into boundary agreements. This was the case, first, in *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*.[33] Part of this dispute related to sovereignty over Zubarah Island. The island had been under the control of the rulers of Bahrain,[34] who were later ejected by the rulers of Qatar. However, as a result of a subsequent agreement brokered in 1868 by the UK, as the dominant colonial power of the time, the authority of the ruler of Qatar over Zubarah could no longer be challenged by the ruler of Bahrain, because the UK would prevent this from happening.[35] The agreement dealt with piracy and other irregularities at sea committed by the ruler of Bahrain,[36] and one of its long-term results was the consolidation of the *status quo* over the island as a matter of fact.[37] In 1868, the UK considered that Zubarah was part of Qatar and made it clear in its own decisions[38] and in negotiations with another colonial power operating in the area, the Ottoman Empire.[39]

The Court endorsed Qatar's sovereignty over the island, and one of the bases was the factual situation on the island created by the 1868 anti-piracy agreement for the benefit of Qatar, supported by the subsequent understanding of the UK as to sovereignty over the island.[40] The agreement did not explicitly confer any title over Zubarah

[30] *Ibid.*, at para. 122.

[31] See *ibid.*

[32] See *ibid.*, at para. 136. The Court, however, found that transfer of title had taken place on the basis of other grounds. See more on this below in sect. 2B2.

[33] See *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, ICJ Judgment on the Merits, 16 Mar. 2001, available at: www.icj-cij.org/docket/files/87/7027.pdf (last visited 25 April 2012). For an assessment of this judgment see Decaux, 'Affaire de la Délimitation Maritime et des Questions Territoriales entre Qatar at Bahrein, Fond (Arrêt du 16 Mars 2001 Qatar c. Bahrein)', 47 *AFDI* (2001) 177.

[34] See *Qatar v. Bahrain*, *supra* note 33, at para. 82.

[35] See *ibid.*, at para. 84.

[36] See *ibid.*, at paras 40 and 83–84.

[37] See *ibid.*, at para. 96.

[38] See *ibid.*, at paras 92–95.

[39] See *ibid.*, at paras 87–91.

[40] See *ibid.*, at paras 96–97.

on Qatar, but it was quite important for the Court, since there was no factual evidence contradicting such conclusion. The Court said:

> In the period after 1868, the authority of the Sheikh of Qatar over the territory of Zubarah was gradually consolidated; it was acknowledged in the 1913 Anglo-Ottoman Convention and was definitively established in 1937. . .[41]

Another situation was the transformation of non-boundary agreements into title to territory by acquiescence, a situation that arose in *Malaysia v. Singapore* in relation to the Island of Pedra Branca. It has already been noted that the agreement between the successors to the parties for the construction of a lighthouse on the island was regarded by the Court as not transferring title over it. However, such circumstance did not prevent the Court from declaring the subsequent transfer of title over the territory.

The Court in this case found that Malaysia had proven that Pedra Branca had belonged to the Sultanate of Johor until 1844 and therefore that it had title as its successor.[42] Then the Court assessed whether the British acts in constructing and maintaining a lighthouse on the island over a long period of time supported by other *effectivités* had led to a transfer of title to the UK for its benefit and that of its successor, Singapore, or whether such acts were only the result of the authorization given for the construction by the titleholder, the Sultan of Johor.

The Court concluded that title had passed from Johor to Singapore,[43] and rooted its conclusion in a diverse set of facts. First, and obviously, there were actions carried out by the UK and Singapore as sovereign, such as investigating maritime risks and shipwrecks in the territorial waters of Pedra Branca,[44] the installation of military equipment on the island in 1977,[45] and a proposed reclamation of 5,000 sq. m. of land in 1978.[46] Second was the British declaration that the island was its own, a declaration made in 1958 legislation specifically claiming that the island belonged to Singapore, then a British colony,[47] which the Court regarded as worth mentioning.[48] Thirdly, there was Malaysia's acquiescence.

The Court based the finding of acquiescence on unilateral Malaysian declarations, actions, and omissions. First, evidence of acquiescence was found in a Malaysian officials' unilateral declaration in 1953, explicitly stating that Malaysia did not claim ownership of Pedra Blanca.[49] The Court also interpreted as acquiescence Malaysia's actions, for instance, in a Malaysian official publication listing the lighthouse in Pedra Branca as a Singapore station;[50] in Malaysian officials' actions implicitly

41 *Ibid.*, at para. 96.
42 See *Malaysia v. Singapore*, *supra* note 27, at para. 117.
43 See *ibid.*, at paras 273–277.
44 See *ibid.*, at paras 231–234.
45 See *ibid.*, at paras 247–248.
46 See *ibid.*, at paras 249–250.
47 See *ibid.*, at para. 173.
48 See *ibid.*, at para. 174.
49 *Ibid.*, at para. 223.
50 See *ibid.*, at para. 265.

recognizing Singapore's sovereignty over the island, such as a response given by a Malaysian Commanding Officer who, requested by Singapore in 1974 to provide a list of Malaysian nationals who would be staying at the lighthouse in Pedra Branca in order to facilitate the necessary approvals, submitted such a list.[51] Then, there was a request sent by the Malaysian High Commission to Singapore for authorization for a Malaysian government vessel to enter Singaporean waters which specifically mentioned the lighthouse in Pedra Blanca.[52] The Court also relied on Malaya's and Malaysia's official maps, in which Pedra Branca was explicitly deemed to come under Singapore's sovereignty.[53]

Finally, the Court found evidence of acquiescence in Malaysia's omissions. First, there was an internal communication from the Director of Marine of the Federation of Malaya, which included Johor, who made a suggestion in 1952 relating to assuming responsibility for lighthouses close to the coasts of the Federation, which excluded the one on Pedra Branca. The suggestion seemed to imply that the island was not part of the Federation. Although the statement was unrelated to sovereignty and to the administration of a lighthouse built there by the UK, and despite the fact that the Court did not conclude that sovereignty over the island had been transferred to the British Empire on the basis of this communication, the Court gave some significance to the statement as pointing in this direction.[54]

However, the second prominent omission to which the Court attached significance as supporting its conclusion of acquiescence in the transfer of title over the island was the fact that 'the Johor authorities and their successors took no action at all on Pedra Branca/Pulau Batu Puteh from June 1850 for the whole of the following century or more'.[55] The third significant omission was Malaysia's lack of protest against those actions carried out by the UK and Singapore in Pedra Branca.[56] Thus, the initial non-boundary agreement and the building and administration agreement between the parties became a boundary agreement transferring title to Pedra Branca on the basis of subsequent actions by the UK and Singapore and acquiescence by Malaysia.

In sum, the ICJ certainly does not find a boundary or recognize sovereignty over territory in non-boundary agreements, such as administrative agreements on territory, in which by definition the parties do not directly address sovereignty. This is the rule and a sound one. However, exceptions may occur in which the Court recognizes, for reasons associated with the specific facts and law of the case, that a non-boundary agreement can be recognized as creating the conditions for the establishment of a frontier or transfer of sovereignty through subsequent actions, international agreements, or acquiescence. It is not a situation that one may expect to happen often, but it

[51] See *ibid.*, at para. 237.
[52] See *ibid.*, at para. 238.
[53] See *ibid.*, at paras 269–272.
[54] See *ibid.*, at para. 178.
[55] *Ibid.*, at para. 275.
[56] See *ibid.*, at para. 274.

may take place in the context of agreements in colonial or post-colonial times, as was the case in *Qatar v. Bahrain* and *Malaysia v. Singapore*, respectively.

E *Disputes over Whether a Boundary Agreement Sets a Boundary in a Particular Area*

There were three reasons why a dispute over whether a boundary agreement set a boundary in a particular area appeared before the Court. First, the boundary agreement was related to the disputed area but not for the purpose of making a maritime delimitation. Secondly, the boundary agreement dealt with the specific region, but in a vague way that made the boundary undetermined. And, thirdly, the boundary agreement did not deal with the disputed region: it was an incomplete boundary agreement.

1 The Boundary Agreement Had a Bearing on the Disputed Area but was not Aimed at Making a Maritime Delimitation

In *Nicaragua* v. *Colombia*,[57] the Court addressed the issue of whether two agreements, the 1928 Treaty concerning Territorial Questions at Issue between Colombia and Nicaragua and the 1930 Protocol of Exchange of Ratifications, which had resolved a dispute between the parties regarding sovereignty over a set of islands, had also included a maritime delimitation. At issue was the scope of the 1930 Protocol, in which the parties stated that 'the San Andrés and Providencia Archipelago . . . does not extend west of the 82nd degree of longitude west of Greenwich'.[58] Colombia claimed that the instruments provided for a delimitation line of maritime areas between Nicaragua and Colombia.[59] Nicaragua, for its part, argued that the above-mentioned text simply determined the limit of the Archipelago, without constituting a general maritime delimitation.[60]

The Court sided with Nicaragua for two reasons. First, the Court said that the text 'cannot be interpreted as effecting a delimitation of the maritime boundary between Colombia and Nicaragua'.[61] And, secondly, the debates prior to the ratification of the 1928 treaty did not mention such an outcome.[62]

2 Imprecision in Boundary Agreements

In *Cameroon v. Nigeria*, the Court dealt with the existence of an alleged vague, undetermined delimitation agreement, and with Nigeria's claim that the relevant agreements relating to Lake Chad were only procedural and programmatic and

[57] See *Case Concerning the Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, ICJ Judgment of 13 Dec. 2007, available at: www.icj-cij.org/docket/index.php?p1=3&p2=1&k=e2&case=124&code=nicol&p3=4 (last visited 30 April 2012). For an evaluation of this judgment see Mathias, 'The 2007 Judicial Activity of the International Court of Justice', 102 *AJIL* (2008) 588, at 602.

[58] *Nicaragua v. Colombia*, *supra* note 57, at para. 106.

[59] See *ibid.*

[60] See *ibid.*, at para. 111.

[61] *Ibid.*, at para. 115.

[62] See *ibid.*, at para. 116.

did not make any delimitation.[63] The first agreement was the 1919 Franco-British Declaration, also known as the Milner–Simon Declaration, apportioning the territories belonging to Germany before World War I between those two countries. That first agreement was further clarified by the 1930 Thompson–Marchand Declaration, agreed to by the Governor of the Colony and Protectorate of Nigeria and the Commissaire de la République Française au Cameroun.[64] This declaration was incorporated into the 1931 Exchange of Notes between France and the UK, also known as the Henderson–Fleuriau Exchange of Notes.[65] After World War II, the French and British mandates over Cameroon, in particular, were replaced by UN trusteeship agreements, duly approved by the General Assembly in 1946 and explicitly relying on the Milner–Simon Declaration for the identification of the territories covered by the trusteeships.[66]

Nigeria based its claim of an indefinite delimitation on three elements. First, the UK recognized that the Thomson–Marchand Declaration was only the result of a 'preliminary survey' regarding the boundary in Lake Chad between the two powers.[67] Secondly, the Milner–Simon Declaration stated that the description of the boundary line in Lake Chad had used the word 'approximately' regarding longitude 14°05′E of Greenwich. And, thirdly, the mouth of the Ebeji had changed through time.[68] The last was a relevant issue, since the 1919 Milner–Simon Declaration indicated that a straight line should be followed from 14°05′E to the mouth of the Ebeji.[69]

The Court acknowledged that the Thompson–Marchand Declaration did 'have some technical imperfections and that certain details remained to be specified'.[70] However, the Court did not deem that these imperfections and gaps prevented a boundary between the parties from existing. The Court found evidence supporting the parties' intention to delimit a boundary in the above-mentioned agreements.[71] In effect, the mandate conferred upon the UK by the League of Nations identified the territory covered by the mandate as that referred to by the Milner–Simon Declaration.[72] In addition, the Court found that the UK had declared in a note to France that the line set out in the 1929–1930 Declaration 'did in substance define the frontier in question'.[73] Finally, the Court declared that the 1946 UN Trusteeship Agreements had authorized both the UK and France to introduce minor changes due to inaccuracies in the map attached to the Milner–Simon Declaration. The Court inferred that; any problems associated with inaccuracies of the Moisel 1:300.000 map were by 1946 regarded as

63 See *Cameroon v. Nigeria*, *supra* note 5, at para. 45.
64 See *ibid.*, at para. 34.
65 See *ibid.*
66 See *ibid.*, at para. 35.
67 See *ibid.*, at para. 45.
68 See *ibid.*
69 See *ibid.*, at para. 41.
70 See *ibid.*, at para. 50.
71 As quoted in *ibid.*
72 See *ibid.*, at para. 49.
73 See *ibid.*, at para. 50.

having been resolved'.[74] The Court then concluded that there was a boundary agreement relating to the Chad Lake area.[75]

As to the second aspect of Nigeria's claim, the Court relied on the maps attached to the Milner–Simon Declaration and to the Henderson–Fleuriau Exchange of Notes and declared that the point was located at 14°04′59″9999 longitude east and not at approximately 14°05′. The Court did not find this difference to be so significant as to mean that the boundary was undetermined.[76] Finally, as to the third point, the Court recognized that the River Ebeji did not have a single mouth at the time of judgment.[77] The Court determined that it should 'seek to ascertain the intention of the parties at the time',[78] and made use of the abovementioned maps to determine the location of the mouth that the parties had agreed on then.[79]

In sum, although the Court admitted the existence of some textual and factual difficulties in the title to determine the boundary, the Court found enough support both in law and in subsequent agreements and practice to overcome these difficulties.

3 Disputes Over the Complete or Incomplete Character of Boundary Agreements

There were controversies before the Court regarding whether the agreement between the parties should or should not be understood as setting a complete boundary, one party claiming that the agreement in question was a complete boundary agreement, while the other denied it and alleged that the delimitation in the specific area was not covered by the boundary treaty at issue.

It can be said about complete boundary agreements that the 20th century jurisprudence had been marked by a principle of interpretation that both the PCIJ and the Court had established, according to which, when a treaty was negotiated with the purpose of establishing a frontier, the treaty should be interpreted in a way that ensured the complete determination of that frontier. The Permanent Court stated in *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*:

> It is . . . natural that any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provision in their entirety should be the establishment of a precise, complete and definitive frontier.[80]

This statement and others of a similar nature led Shaw to declare that '[t]here is a presumption that courts will favour an interpretation of a treaty creating a boundary that holds that a permanent, definite and complete boundary has been established'.[81]

[74] See *ibid.*, at para. 51. The Moisel map was attached to the Milner-Simon Declaration: see *ibid.*, at para. 48.
[75] See *ibid.*, at para. 55.
[76] See *Cameroon v. Nigeria*, *supra* note 5, at para. 57.
[77] See *ibid.*, at para. 58.
[78] *Ibid.*, at para. 59.
[79] See *ibid.*, at paras 59–61.
[80] *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, PCIJ Advisory Opinion (1925). PCIJ Series B. No. 12, at 20.
[81] Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today', 67 *BYBIL* (1996) 7, at 93.

A revision of this criterion took place in *Indonesia v. Malaysia* and was subsequently applied once by the Court over the first decade of the new millennium. Indonesia invoked that principle of interpretation and gave the Court the opportunity to narrow it by reversing the presumption. Indonesia stated that the relevant treaty in this dispute, the 1891 Convention, sought to resolve any future disputes between the Netherlands and the UK regarding the boundaries of a specific area in Borneo, and Indonesia attempted to give a broad meaning to the object and purpose of the Convention.[82] The Court did not regard the Convention as one of the treaties the Permanent Court had alluded to in the quoted passage. The Court determined the object and purpose of the Convention on the basis of a strict textual interpretation of the preamble and its provisions, where there was no indication that the Convention was intended to determine a complete boundary.[83] The Court concluded:

> [T]he Court does not find anything in the Convention to suggest that the parties intended to delimit the boundary between their possessions to the east of the islands of Borneo and Sebatik or to attribute sovereignty over any other islands. As far as the islands of Ligitan and Sipadan are concerned, the Court also observes that the terms of the preamble to the 1891 Convention are difficult to apply to these islands as they were little known at the time, as both Indonesia and Malaysia have acknowledged, and were not the subject of any dispute between Great Britain and the Netherlands.[84]

As can be seen, the Court established strict requirements that treaties must meet in order to be regarded as like those alluded to in *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*. The given treaty must clearly suggest in its text and/or preamble that the parties have decided to delimit their boundary in a clear, precise, and definitive way. The Court would be unwilling to infer such nature absent such explicit text.

The Court's approach in *Indonesia v. Malaysia* was later applied in *Romania v. Ukraine*.[85] In effect, the Court again declared there that the agreement was not complete and did not cover the issue in dispute. Romania argued that a series of agreements between it and the Soviet Union, paramount among them being the General Procès-Verbal of 1949, established the initial 'part of the maritime boundary along the 12-nautical-mile arc around Serpents Island'.[86] According to Romania, subsequent agreements in 1997 and 2003 ratified the applicability of the 1949 Procès-Verbal.[87] Further, Romania claimed that:

> [I]t is clear from the language of the 1949 General Procès-Verbal that the Parties agreed that the boundary would follow the exterior margin of the 12-mile marine boundary zone

[82] See *Indonesia v. Malaysia*, *supra* note 24, at para. 49.

[83] See *ibid.*, at para. 51.

[84] See *ibid.*

[85] See *Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, ICJ Judgment of 3 Feb. 2009, available at: www.icj-cij.org/docket/index.php?p1=3&p2=3&k=95&case=132&code=ru&p3=4 (last visited 30 April 2012).

[86] *Ibid.*, at para. 44.

[87] See *ibid.*

> 'surrounding' Serpents' Island. Moreover . . . the Agreement effected an 'all-purpose delimitation' which was not limited to an initial short vector in the west.[88]

However, Ukraine contested the existence of an agreement on such delimitation on several grounds, paramount among them being the fact that regimes for continental shelves and exclusive economic zones did not exist in 1949, the year of the Procès-Verbal.[89] The Court found that the 1949 Procès-Verbal did not refer to the abovementioned notions.[90] On one hand, neither Romania nor Ukraine had claimed the continental shelf in 1949 and, on the other, the notion of an exclusive economic zone had not been developed then.[91] In addition, the only instrument between the parties that alluded to the concepts, the 1997 Additional Agreement, did not determine a boundary but a process to be followed in order to achieve that result.[92] On these main bases, the Court declared that the parties had not entered into an agreement regarding their continental shelves and exclusive economic zones when they agreed on the Procès-Verbal.[93]

As can be seen, the Court recognized the existence of a complete agreement only on the basis of the parties' explicit categorization of their boundary treaty as such. If this was not the case, the Court held that the given agreement did not set a delimitation in the area under dispute.

F *When Treaties Settle Boundary Disputes*

A closely related issue to whether there is a boundary agreement between two states is when they have settled a boundary dispute. The most significant difference between these two concepts, and a very important one, is the jurisdiction of the Court under each of them. When there is a dispute over the existence of a boundary agreement, the Court has jurisdiction to settle it. On the other hand, when the dispute has already been settled by a treaty, there is no dispute and the Court lacks jurisdiction. Thus, it is not surprising that the Court recognized disputed issues as settled only when the given treaty was unequivocal in this regard.

This issue was addressed by the Court in *Nicaragua v. Colombia*, in which a treaty explicitly stated that it had settled the dispute between the parties regarding sovereignty over certain territory. Nicaragua recognized in the 1928 Treaty concerning Territorial Questions at Issue between Colombia and Nicaragua Colombia's full 'sovereignty over the islands of San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago'.[94] The Court concluded that it was clear that any dispute regarding the islands specifically

[88] See *ibid.*, at para. 45.
[89] See *ibid.*, at para. 52.
[90] See *ibid.*, at para. 70.
[91] See *ibid.*
[92] See *ibid.*
[93] See *ibid.*, at para. 76.
[94] *Nicaragua v. Colombia*, *supra* note 57, at para. 18.

mentioned had been settled within the meaning of Article VI of the Pact of Bogotá.[95] However, the Court declared that the controversy relating to sovereignty over the other unspecified islands, islets, and reefs had not been resolved and that, therefore, the Court had jurisdiction to rule on it.[96]

As can be seen, the Court's approach is strict in terms of precision in language: a boundary settlement covers what has been explicitly mentioned and identified; beyond that, the dispute remains unsettled and the Court has jurisdiction to adjudicate on the controversy.

3 Disputes Relating to the Validity of International Boundary Agreements or Settlements and the Court's Reluctance to Declare Them Void

A *The Validity of International Boundary Agreements*

The case law of the first decade of the 21st century shows that the Court has been somewhat reluctant to declare the unlawfulness of boundary agreements. States that have subsequently invoked the nullity of boundary treaties have not found a receptive Court to uphold such claims.

Disputes over the legality of boundary agreements occurred in *Cameroon v. Nigeria*. The relevant delimitation agreement was the 1913 British–German agreement establishing the frontier between Nigeria and Cameroon, which placed the Bakassi Peninsula within German jurisdiction.[97] In its attempt to claim sovereignty over the peninsula, Nigeria argued that the agreement should be disregarded because it had to be approved by the German parliament according to the German law of the time, an approval that did not take place.[98] The Court did not declare so. Instead of delving into German law to assess whether the agreement was valid, the Court looked at the parties' external behaviour regarding it. The Court found that Germany had stated that its domestic procedures had been followed, the UK had not raised the issue, and both parties had officially published the agreement.[99] The agreement was then valid and constituted for the Court the fundamental ground for declaring that the peninsula belonged to Cameroon.[100]

Regarding the Maroua Declaration, again in *Cameroon v. Nigeria*, Nigeria attempted an argument to challenge its validity: the Nigerian Head of State lacked powers, under the

[95] Art. VI of the Pact of Bogotá provided: 'The aforesaid procedures, furthermore, may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty.'

[96] See *Nicaragua v. Colombia*, *supra* note 57, at para. 97.

[97] See *Cameroon v. Nigeria*, *supra* note 5, at para. 37.

[98] See *ibid.*, at para. 196.

[99] See *ibid.*, at para. 197.

[100] See *ibid.*, at paras 210 and 212.

Nigerian Constitution, to bind his state without referring back to his government – then the Supreme Military Council – and Cameroon should have known of this situation.[101] The Court, relying on Article 46(1) and (2) of the Vienna Convention on the Law of Treaties (VCLT), stated that only those constitutional restrictions on the Head of State that had been 'properly publicized' would invalidate the agreement.[102]

The Court's interpretation of Article 46 not only responds to the reality of the case, but it is also sound from a law and economics perspective. In effect, the Court's finding saves costs, since governments do not need to spend resources in identifying their counterparts' domestic restrictions on concluding treaties. The burden is imposed on the party for which obtaining the information is less costly – the government, which is constrained by the internal provisions and must know them.

The validity of a boundary agreement was also debated in *Nicaragua v. Colombia*, and the case found a Court ready to uphold such validity. The legal foundation of the case was the 1928 Treaty Concerning Territorial Questions at Issue between Colombia and Nicaragua. There, as was mentioned, Nicaragua recognized Colombia's full sovereignty over a set of islands.[103] The ratification of this treaty took place on 5 May 1930.[104] In 1979, the Sandinista Government seized power in Nicaragua and declared in February 1980 that the 1928 Treaty was unlawful or that it had terminated as a result of Colombia's material breach.[105] Thus, Nicaragua contested the validity of the treaty on the basis of Article XXXI of the 1948 Pact of Bogotá.[106]

Nicaragua claimed that the 1928 Treaty was in violation of Nicaragua's Constitution in force at that time, in particular of its Article 2, according to which 'treaties may not be reached that oppose the independence and integrity of the nation or that in some way affect her sovereignty'.[107] Nicaragua also argued that it was under military occupation by the US and unable not to conclude treaties that the US demanded.[108]

To rule on this objection, the Court started by describing the key steps that both Nicaragua and Colombia had followed in their negotiations and the approval of the treaty before their respective legislative bodies[109] prior to its ratification.[110] The Court

[101] See *Cameroon v. Nigeria*, *supra* note 5, at para. 258.

[102] See *ibid.*, at para. 266.

[103] See *Nicaragua v. Colombia*, *supra* note 57, at para. 18.

[104] See *ibid.*, at para. 20.

[105] See *ibid.*, at paras 28 and 74.

[106] See *ibid.*, at para. 44. Art. XXXI of the Pact of Bogotá stated: 'In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning: *(a)* The interpretation of a treaty; *(b)* Any question of international law; *(c)* The existence of any fact which, if established, would constitute the breach of an international obligation; or *(d)* The nature or extent of the reparation to be made for the breach of an international obligation.'

[107] See *Nicaragua v. Colombia*, *supra* note 57, at para. 75.

[108] See *ibid.*

[109] See *ibid.*, at paras 70–71.

[110] See *ibid.*, at para. 72.

then assessed whether the 1928 Treaty was in force in 1948, the year of the conclusion of the Pact of Bogotá.[111]

The Court assessed whether Nicaragua had entered a specific reservation regarding the 1928 Treaty in the Pact, which was invoked as the source of the Court's jurisdiction, and found that no such reservation existed. Nor did Nicaragua consider the Treaty invalid in 1948 or even decades later.[112] In fact, Nicaragua had tacitly accepted the validity of the Treaty in 1969.[113] The Court then concluded that the Treaty was in force in 1948,[114] and that the issue of sovereignty over the islands in question had been settled by the 1928 Treaty.[115]

However, the Court's Vice-President, Judge Al-Khasawneh, dissented from the Court's conclusion. He argued that the alleged coercion affecting Nicaragua deserved analysis under Articles 45 and 52 of the VCLT: treaty norms that are unlawful regardless of the subsequent practice of the parties. In his view, such analysis should have been carried out during the merits phase of the proceedings.[116] A similar view was held by Judge Abraham. He argued that coercion makes a treaty absolutely void according to the above-mentioned provisions, and that, consequently, the Court's conclusion preventing states from subsequently challenging the validity of treaties that they have previously acquiesced in was in violation of the VCLT.[117]

The Court went further in *Nicaragua v. Colombia* in protecting the integrity of valid agreements. There, the Court ratified the intangibility of territorial regimes created by valid treaties even after their termination, which is called the principle of objectivization of boundary treaties. In this case, Nicaragua argued that, even if the 1928 Treaty was valid, it had been terminated by a Colombian material breach, owing to its interpretation from 1969 on.[118] The Court stated that any termination of the Treaty would not have affected Colombia's sovereignty over the San Andrés, Providencia, and Santa Catalina islands. It said:

> [T]he Court recalls that it is a principle of international law that a territorial régime established by treaty 'achieves a permanence which the treaty itself does not necessarily enjoy' and the continued existence of that régime is not dependent upon the continuing life of the treaty under which the régime is agreed.[119]

[111] See *ibid.*, at para. 73.

[112] See *ibid.*, at para. 78.

[113] See *ibid.*, at para. 79.

[114] See *ibid.*, at para. 81.

[115] See *ibid.*, at para. 88.

[116] See *Nicaragua v. Colombia*, *supra* note 57, Dissenting Opinion of Vice-President Al-Khasawneh, at paras 5 and 11.

[117] See *ibid.*, Separate Opinion of Judge Abraham, at para. 45.

[118] See *Nicaragua v. Colombia*, *supra* note 57, at para. 89.

[119] *Ibid.*, at para. 89. quoting *Jamahiriyal/Chad*, *supra* note 1, at paras 72–73. This principle was reiterated by the Court in *Navigational Rights (Costa Rica v. Nicaragua)*: see *Case Concerning the Dispute Regarding Navigational Rights and Related Rights (Costa Rica v. Nicaragua)*, ICJ Judgment of 13 July 2009, at para. 68, available at: www.icj-cij.org/docket/index.php?p1=3&p2=3&k=37&case=133&code=coni&p3=4 (last visited 30 April 2012). For an evaluation of this judgment see Cassella, 'Rééquilibrer les Effets Inéquitables d'une Délimitation Territoriale: L'Arrêt de la Cour Internationale de Justice du 13 Juillet 2009

To Mathias, the Court's conclusions in *Nicaragua v. Colombia* 'constitute further recognition by the Court that, in some circumstances, factors such as stability and legal finality operate to foreclose judicial proceedings'.[120] This conclusion also applies somewhat to the Court's findings in *Cameroon v. Nigeria* and reflects a certain reluctance on the part of the Court to declare the nullity of international boundary agreements.

However, the Court took a somewhat different direction in *Costa Rica v. Nicaragua*, although regarding a minor issue that did not impinge on the Court's above-mentioned approach. There, Costa Rica invoked a document signed by its Ministry of Public Security and Nicaragua's Ministry of Defence on 30 July 1998, the Cuadra–Lizano Communiqué, to support its claims of violation of its navigational rights under the relevant treaty, the 1858 Treaty of Limits. By virtue of this Communiqué, Costa Rica's armed police vessels could navigate the river to resupply their boundary posts on the Costa Rican side under certain conditions.[121] However, a few days later, on 11 August 1998, Nicaragua declared the Communiqué to be legally null and void.[122] The Court decided that the Communiqué was a practice under a previous agreement and not under the 1858 Treaty of Limits, the law applicable to the dispute, and therefore did not accept the Communiqué as part of the rights of free navigation under the Treaty.[123] However, and surprisingly, the Court found support for this disregard in the fact that the Communiqué 'was promptly declared null and void by Nicaragua'.[124]

Does this obiter statement by the Court mean an impairment of the intangibility of boundary agreements? Certainly not. In the reading of judgments, it may be wise to recall what the Colombian writer and winner of the Nobel Prize for Literature, Gabriel García Márquez, once said regarding novels and as an objection aimed at literary critics: '[b]ooks are not meant to be read word for word'.[125] The same applies sometimes to the Court's judgments. The Communiqué was not taken into account for a substantial reason: it was not linked to the 1858 Treaty of Limits, but to another agreement between the parties. Nicaragua's unilateral declaration that the Communiqué was void is mentioned by the Court as an addition, and, in this author's view, an unnecessary addition. It is more 'a slip of the pen' than anything else, and cannot be seen as contradicting the Court's stance usually supporting the validity of international agreements, absent sufficient proof of the contrary.

B *The Court's Reluctance to Declare as Invalid the Decision to Use a Dispute Settlement Mechanism to Resolve a Boundary Dispute*

Boundary delimitation can be determined by the parties' decision to entrust a third party with the settlement of their dispute outside arbitral or judicial proceedings. The

dans l'Affaire du *Différend Relatif à Des Droits de Navigation et Des Droits Connexes (Costa Rica c. Nicaragua)*', LV *Annuaire Français de Droit International* (2009) 253.

120 Mathias, *supra* note 57, at 604.

121 See *Costa Rica v. Nicaragua*, *supra* note 119, at para. 26.

122 See *ibid.*

123 See *ibid.*, at para. 40.

124 *Ibid.*

125 G.H. Bell-Villada (ed.), *Conversations with Garcia Marquez* (2006), at 125.

Court can also be unwilling to declare the unlawfulness of the third party's decision on the basis of a state's claim that it had not given its consent to submitting the dispute to the third party. This was the case in *Qatar v. Bahrain* relating to a dispute between the rulers of Qatar and Bahrain about sovereignty over the Hawar Islands. Both left the dispute in the hands of the UK, which in 1939 informed the rulers that the islands belonged to Bahrain, on the basis of past exercise of authority there.[126] Qatar challenged this decision before the Court on the basis of a lack of consent to submitting the dispute to the UK,[127] but the Court endorsed the former's decision.[128] Although the Court did not regard the British decision as an arbitral award, the Court stated that the decision settled the dispute and was binding on both parties.[129] It is important to say that some judges of the Court strongly disagreed with the relevance that the 1939 decision had to conferring sovereignty over the Hawar Islands on Bahrain. In their view, the 1939 decision was adopted in questionable circumstances and lacked the voluntary nature the Court attached to the decision. Judges Bedjaoui, Ranjeva, and Koroma emphasized that a senior British Foreign Office official pointed out a few years after the decision that:

> *Neither of the two rulers was asked before hand to promise his consent to the award, nor afterwards to give it.* H.M.G simply 'made' the award. Although it followed the form of an arbitration to some extent, it was *imposed from above*, and no question of its validity or otherwise was raised. It was quite simply a decision which was taken for practical purposes in order to clear the ground for oil concessions.[130]

In these judges' view, Qatar did not give its express, informed, and free consent to submit the controversy to the UK and therefore, the latter's decision was null and void.[131] However, what the Court's conclusion reveals is that it was unwilling to declare, in this case, the unlawfulness of the determination to resort to a third party and, consequently, its decision settling the dispute. The Court's analysis concentrated on assessing the procedure that led to the adoption of the decision, without exploring whether or not the consent had been given on the basis of the evidence that the dissenting judges highlighted.

4 Conclusion

A general overview of the Court's case law relating to disputes over boundary agreements reveals a strict stance in certain areas: tacit boundary agreements are presumed not to exist (*Nicaragua v. Honduras*); non-boundary agreements do not set boundaries in principle (*Indonesia v. Malaysia* and *Malaysia v. Singapore*); settlements of boundary disputes cover only those particular issues specifically and unequivocally addressed by

[126] See *Qatar v. Bahrain*, *supra* note 33, at paras 128, 132–133.

[127] For a detailed description of the arguments raised by Qatar see Decaux, *supra* note 33, at 198–199.

[128] See *Qatar v. Bahrain*, *supra* note 33, at para. 138

[129] See *ibid.*, at paras 139–147.

[130] As quoted in *Qatar v. Bahrain*, *supra* note 33, Joint Dissenting Opinion of Judges Bedjaqui, Ranjeva and Koroma, at para. 20 (italics in the quotation).

[131] See *Qatar v. Bahrain*, Joint Dissenting Opinion of Judges Bedjaqui, Ranjeva and Koroma, *supra* note 130, at paras 38–39 and 46.

the parties (*Nicaragua v. Colombia*); and boundary agreements are not presumed to be complete, save in the event of the the existence of explicit evidence providing otherwise (*Indonesia v. Malaysia* and *Romania v. Ukraine*).

However, the Court also displayed a certain degree of flexibility in the interpretation of boundary agreements. This flexibility is evident in two situations. First and foremost, there is the fact that the Court does not require perfection as the standard in delimitation agreements, shown by its declaring the existence of boundaries regarding particular areas even in the face of lack of precision or errors in treaties or subsequent geographic changes (*Cameroon v. Nigeria*). And, secondly, there is the Court's recognition of limited exceptions to non-boundary agreements' inability to set boundaries. It must be kept in mind that agreements of this nature, at least in colonial times, may create a *status quo* regarding a particular area that may be recognized by the Court as the seed of future title if such *status quo* is subsequently incorporated into international agreements that the affected state is not even party to (*Qatar v. Bahrain*). Further, the Court recognized the possibility of non-boundary agreements' transformation into boundary agreements by *effectivités* and, mainly, the titleholder's acquiescence (*Malaysia v. Singapore*).

In addition, the Court's case law of the first decade of the 21st century shows that the Court has been somewhat flexible in endorsing the validity of boundary agreements once it has declared them. States that have subsequently invoked the nullity of boundary treaties or settlements have not found a receptive Court to uphold such claims (*Cameroon v. Nigeria*, *Nicaragua v. Colombia,* and *Qatar v. Bahrain*). While room for declarations of nullity certainly exists, it can be regarded as narrow, absent very compelling reasons. The threshold is high, and states are well advised when raising such a claim to expect success only exceptionally in boundary disputes. This is so once one takes note of the fact that an occupied state and a protectorate could not succeed in subsequently raising force or lack of consent as elements vitiating a treaty or a decision to submit a dispute to a colonial power.

The foregoing pronouncements regarding disputes relating to boundary agreements evidence a somewhat prudent stance on the part of the Court in this particular realm during the period in question. It shows a clear preference for the intangibility of frontiers.

These are trends at most, not hard rules, but nonetheless, they send clear signals to states. The first one has a bearing on the role of ambiguity in boundary issues. Jorge Luis Borges, in his *Fictions*, says that 'ambiguity is richness', and many international law scholars may well share his view, since vagueness is a well-known feature of international law. Julio Lacarte, the seasoned Uruguayan diplomat, arbitrator, and former Chairman of the WTO Appellate Body, also reiterated such feature regarding the WTO Agreements,[132] whose beauty perhaps without parallel is described by the *Zohar*: 'in any word shines a thousand lights'.[133]

[132] See Lacarte, 'WTO Appellate Body Roundtable', in L.R. Helfer and R. Lindsay (eds), *New World order or A World in Disorder? Testing the Limits of International Law: Proceedings of the 99th Annual Meeting The American Society of International Law* (2005), at 177.

[133] As quoted by H. Eco, *Semiotics and the Philosophy of Language* (1984), at 153.

It can be said that the first signal that can be identified from the ICJ's case law of the new millennium regarding boundary agreements is that ambiguity is to be avoided. Roberto Benigni, the Italian actor, says in one of his films, 'If the words aren't right, nothing is right'. The line lacks poetry, the film is not extraordinary,[134] but how important this line is when applied to the negotiation and drafting of boundary agreements and settlements. Although ambiguity may not prevent the Court from adjudicating on the dispute, as can be inferred from *Cameroon v. Nigeria*, such ambiguity gives the Court more room to adjudicate on the dispute according to its own views and dilutes the pre-eminence of the given treaty negotiated by the parties to serve as the main basis of settlement concerning the area in question, since the Court will have to rely more on *effectivités* to determine the boundary there, in which case the Court has many fewer constraints. In sum, ambiguity in boundary agreements interferes with states' control over settling any future dispute brought before the Court.

The second signal, closely linked to the first, is a reminder to states that they need *always* carefully to negotiate international agreements regarding *all* of the disputed areas, and conclude negotiations only when the text uses the right words to establish their boundaries.[135] Boundaries should always be as clear as possible; boundary agreements that must be understood as complete must be unequivocally so declared by states; settled frontier issues are only those precisely identified by the parties; title-holder states should always behave in a way that preserves intact the non-boundary character of their international agreements; and states should *ex ante* be mindful of the narrow possibilities for success of *ex post* claims of unlawfulness of boundary agreements. The great importance and impact of frontier issues require nothing less. These recommendations are just common sense for some states, a reinvention of the wheel. But they are not for others, among them those that failed to follow the recommendations and incurred painful social, political, cultural, and economic costs at the end.

[134] *The Tiger and the Snow* (2005).

[135] This is not to suggest that perfection has to be the standard regarding the drafting of boundary agreements. All treaties, even the most carefully negotiated and drafted, offer room for their interpretation by courts and tribunals.