

# *Application of the Principle of Effective Control in International Law: On the Question of Sovereignty over the Aksai Chin Region*

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**Abstract:** In August 2019, India amended its domestic constitution to transfer the Aksai Chin Region, which is under China's jurisdiction, to the jurisdiction of India's new "Union Territory of Ladakh", seriously violating China's territorial sovereignty and security. Since ancient times, the Aksai Chin Region has been an inalienable part of China's territory, and it has always been under the jurisdiction of the Chinese Government; India has no legal authority to prove that the Aksai Chin Region belongs to the Indian side. According to the relevant provisions of territorial law, a State may acquire sovereignty over an area by exercising effective control over it. According to the Principle of effective control, China has maintained sovereignty over and de facto control of the Aksai Chin Region for hundreds of years. India, on the other hand, does not have sufficient evidence to show the activities of the Indian government in the area, nor can it prove that India's claim to sovereignty over the Aksai Chin Region is superior to that of the Chinese government. Therefore, China has a superior claim in the Aksai Chin Region and sovereignty over the Aksai Chin Region should be vested in China.

## **1. Introduction**

The Aksai Chin Region is located in China's Xinjiang and Tibet intersection, its strategic significance is significant, since ancient times by India and other countries coveted. 1958, India to the Chinese government note, requesting the Chinese side will be the Aksai Chin Region area "return to the Indian side. In the following decades, India has always claimed its sovereignty over Aksai Chin Region, and China's occupation of Aksai Chin Region is illegal. On August 5-6, 2019, the Indian Union Parliament and the Supreme Court of India successively passed the Jammu and Kashmir Reorganisation Act (the Act), unilaterally transferring Aksai Chin Region to India's jurisdiction by amending the form of domestic law. In the Act, India declared the repeal of Article 370 of the Indian Constitution. The repeal of Article 370 is intended to remove the high degree of autonomy from Jammu and Kashmir and to split Jammu and Kashmir into two separate regions, the "Ladakh Territory" and the "Jammu and Kashmir Territory" into two separate regions and placing them under the direct jurisdiction of the central government of India.<sup>[1]</sup> On October 31, 2019, the

Indian Parliament announced the formal implementation of the bill.

The India's violation of China's territorial sovereignty and security has shocked China and the international community. In response to the Indian side's actions, the Chinese Government has stated: "The Indian side's approach is illegal, invalid and unacceptable. The Indian side's initiative does not have any effect on the Chinese side and will not change the status quo of China's exercise of sovereignty over the relevant territories and the exercise of effective jurisdiction."<sup>[2]</sup> The Indian side responded that "Aksai Chin Region is a vast area under the jurisdiction of India, and the India's act of adjusting the demarcation of Aksai Chin's administrative jurisdiction belongs to India's internal affairs, and it is hoped that China will refrain from commenting on other countries' internal affairs issues."<sup>[3]</sup> Subsequently, the Indian side refused to attend the 22nd meeting of the Special Representative on the Sino-India Boundary Question, and repeatedly provoked and attacked the Chinese side near the Line of Actual Control, which further deteriorated the situation of the Sino-India Boundary Question.<sup>[4]</sup> It can be seen that there is a dispute between China and India over the sovereignty of the Aksai Chin Region.<sup>[5]</sup> The sovereignty dispute unilaterally provoked by India has caused serious infringement of China's territorial sovereignty, and has a serious impact on regional and world peace and security. Therefore, it is necessary to clarify the basis of the sovereignty claims of China and India over the Aksai Chin Region, and compare the superiority of the sovereignty claims of both sides, so as to solve the problem of sovereignty belonging to the Aksai Chin Region. In the following, this paper will study and analyze the above issues in an effort to resolve the Sino-Indian sovereignty dispute over the Aksai Chin Region and to safeguard China's territorial sovereignty and security as well as world peace and stability.

## **2. Application of the Principle of Effective Control in Territorial Disputes**

In 1998, the Permanent Court of Arbitration (PCA) rendered its judgment of the case concerning the Eritrea / Yemen Islands Sovereignty Dispute. In its judgment, the PCA elaborated on the criteria for determining sovereignty over territory. The Tribunal stated that the principle of effective control is the criterion in modern international law for judging territorial acquisition, i.e., the demonstration to the international community of its power and authority over a given territory through the exercise of jurisdiction and other functions of the State on the basis of a continuing peace.<sup>[6]</sup> Therefore, in the Sino-Indian Aksai Chin territorial sovereignty dispute, China and India can prove their sovereignty over the area through the principle of "effective control". In applying the principle of effective control to the sovereignty dispute over the Aksai Chin Region, the following issues should first be identified:

### **2.1 Critical date**

The "critical date" first appeared in the case concerning Island of Palmas before Judge Huber, the sole judge of that case. Judge Huber suggested that the intertemporal law as it existed at the material date should be applied in the settlement of disputes. In that case, Judge Huber repeatedly referred to the critical date and decided the case on the basis of the situation as it existed at the critical date. Although Judge Huber did not explicitly define the critical date in his judgment, it can be seen from the context of the judgment that the critical date referred to by Judge Huber was the date on which the dispute arose<sup>[7]</sup>. In the subsequent practice of international law, the critical date has been recognized by the judiciary, countries around the world and public jurists, and gradually become an important rule of international law. The International Court of Justice (ICJ) stated in the case concerning the Territorial and Maritime Delimitation between Nicaragua and Honduras that in applying the principle of effective control in adjudicating a dispute over territorial sovereignty, only sovereign activities carried out by the parties in the disputed area prior to the critical date should be

taken into account.<sup>[8]</sup>

Specifically, in the Sino-Indian sovereignty dispute over Aksai Chin, the Indian government formally submitted a note to the Chinese government on August 21, 1958, concerning the claim of sovereignty over the Aksai Chin Region,<sup>[9]</sup> while the Chinese government denied India's claim on November 3, 1958, in the form of a note.<sup>[10]</sup> It can be seen that China and India disagreed on the sovereignty of the Aksai Chin Region on November 3, 1958, which led to the sovereignty dispute between the two sides over the Aksai Chin Region. Therefore, November 3, 1958 should be the key date in the Sino-Indian sovereignty dispute over the Aksai Chin Region. In addition, according to the evidence materials submitted by both China and India, it can be seen that the earliest evidence presented by China concerning the exercise of sovereignty by the Chinese side in the Aksai Chin Region can be traced back to the middle of the 18th century,<sup>[11]</sup> and the earliest evidence presented by India concerning the exercise of sovereignty by the Indian side in the Aksai Chin Region can be traced back to the 19th century.<sup>[12]</sup> Thus, the sovereignty over the Aksai Chin Region can be determined by examining the evidence of both sides between the mid-18th century and the crucial date - November 3, 1958.

## 2.2 Components of the principle of effective control

The PCA stated in the 1933 case concerning the Legal Status of Eastern Greenland that if a State's claim to territorial sovereignty is not based on a particular act or source of authority, but only on a continuous act of assertion of sovereignty, it must consist of two essential elements: first, the intention and desire of the State to act as a sovereign; and second, the actual exercise or demonstration of the State's authority.<sup>[13]</sup>

The "intention and desire of the State to act as sovereign", also known as the intention to occupy, refers to the will of the State as sovereign to do certain acts.<sup>[14]</sup> At present, international law has not yet clarified the unified standard for judging the intention and desire of the state, but the "intention and desire of the state to act as the sovereign" can be judged by the behavior of the state. It is worth noting that only sovereign activities carried out in the name of the state can embody the "intention and desire of the state to act as sovereign", and the acts of other organizations or individuals not authorized or recognized by the state cannot be regarded as the "intention and desire of the state to act as sovereign". The ICJ stated in the case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan, that over the years, Malaysia had performed a variety of acts, including legislative, executive and quasi-judicial activities in the name of the State on the islands of Ligitan and Sipadan, which had manifested Malaysia's intention and desire to act as sovereign over Ligitan and Sipadan. Indonesia and its former sovereign, the Netherlands, on the other hand, have not engaged in long and steady sovereignty activities in the name of the State, nor have they expressed opposition to the sovereignty activities carried out by Malaysia. Therefore, Malaysia should acquire sovereignty over Pulau Ligitan and Pulau Sipadan as compared to Indonesia.<sup>[15]</sup> In the *Nicaragua v. Honduras* case of 2007, the ICJ held that individual activities that are not authorized or sanctioned by the State are not evidence of effective control.

In addition, the principle of effective control requires the "actual exercise or demonstration of State authority". In determining whether a State is in possession of an act of effective control, both form and substance need to be considered. In terms of form, the only subjects that are required to be able to carry out such an act and to give it the force of international law are the sovereign State or a natural or legal person or other organization that has been granted representative authority by the sovereign State to carry out the act of control. In terms of substance, an act of control that is actually effective may include acts of national legislation, acts of law enforcement, acts of administration and military activities.<sup>[16]</sup> Only when these activities are characterized by openness,

relevance, continuity and peacefulness can they be recognized as acts of effective control and thus be used as evidence of sovereignty.<sup>[17]</sup>

## **2.3 Criteria for judging the strength of the claims of China and India**

In applying the “principle of effective control” in adjudicating territorial disputes, the ICJ will judge the priority of the claims of the parties in the disputed area on the basis of the evidentiary material submitted by the parties to the dispute. However, there is no principle, rule of international law or customary international law that attests to the existence of a definitive standard of proof. Consequently, judges in international judicial bodies have a wide discretion on the issue of standard of proof, and they can make fair decisions according to the different circumstances of a case. According to the practice of the judiciary, the International Court of Justice usually adopts the “balance of probabilities” as the criterion for judging the priority of the claims in the decision of the case.<sup>[18]</sup> In 1946, the ICJ in the case between Britain and France *Minkî ãre/Eccles Islands* studied a large number of historical materials, and made an analysis of the relationship between the two sides in the recent past. In 1946, the ICJ in the case concerning Britain and France over the *Mingui ãEccles Islands* examined a large number of historical materials, compared the effective control of the disputed area between the two parties in recent times, and decided that the effective control of the British in the disputed area was more superior. Although the Court did not specify the standard of proof in its judgment, the result of the Court’s judgment seemed to support the “balance of probabilities”. Subsequently, the “balance of probabilities” standard was explicitly recognized by the International Court of Justice in the 1992 *El Salvador/Honduras Land, Island and Sea* case. The Court held that, since neither party had submitted sufficient evidence to the Court to prove the question of sovereignty, the Court would apply the “balance of probabilities” test to determine sovereignty over the disputed area.

Specifically, international judicial institutions generally judge the probative value of evidence by comparing the following two aspects. The first is the nature, type and amount of effective control exercised by the parties over the disputed area. In the case concerning *Sovereignty over Pedra Branca*, the Court found that Singapore had exercised sufficient control over Pedra Branca, whereas Malaysia and its colonial authorities had not exercised any sovereignty over Pedra Branca for a considerable period of time. Singapore therefore had an overwhelming advantage in that regard. Secondly, the Court will take into account the natural geographical location of the disputed area as well as the magnitude of its strategic value. In the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan*, neither Malaysia nor Indonesia had sufficient effective control over the said islands due to their remote and uninhabited location, but Malaysia had carried out a few sovereignty activities in the area such as catching sea turtles and constructing and maintaining lighthouses. Therefore, in this respect, Malaysia’s sovereignty rights over the said islands are superior to those of Indonesia.<sup>[19]</sup> From this case, it can be seen that if the disputed area of the parties is remote and uninhabitable, the sovereignty activities of the parties in the disputed area may be less or only at the minimum level of effective control. For the purpose of determining sovereignty over the disputed area, the Court held that even if a State has exercised only minimal effective control, its conduct may give rise to a claim by that State that is superior to the claims of the other States parties to the dispute.

## **3. Sovereignty over the Aksai Chin Region belongs to China**

### **3.1 During the period of Qing dynasty**

China’s activities in exercising sovereignty over the Aksai Chin Region can be traced as far back

as the mid-eighteenth century. The Chinese side has made public official boundary maps such as the Qianlong Thirteen Rows Map, the Western Regions Map, the Western Regions Map of the Qin Ding Emperor's Opinion, the Western Frontier Presidential Matters Strategy, and the Southeast Boundary Map of Shache and Yecheng, which prove that since the Qing Dynasty the Aksaiqin region has been included in China's jurisdiction, and that the Qing government and its officials have been carrying out sovereignty activities such as guarding mountains, patrolling, surveying, and collecting taxes over the region. The Qing government and its officials had already carried out sovereign activities such as mountain guarding, patrolling, surveying and tax collection in the Aksai Chin Region.<sup>[20]</sup>

India presented a map of the police posts established by the Government of British India in the Aksai Chin Region, but the map was a sketch made by the Surveyor of British India and not a finalized official map. The map was not an expression of the national will of British India, nor was it a sovereign exercise of national authority. Moreover, according to another public Indian document, the Imperial India Gazetteer, India never set up a police post in the Aksai Chin Region. More importantly, Indian President Nehru had himself admitted that India had not set up any police posts in the Aksai Chin Region, nor were there any Indians living in the Aksai Chin Region. Subsequently, India claimed that its construction of a commercial road in Aksai Chin was a sovereign activity carried out by the Indian side. However, according to historical records, the commercial road constructed by India only reached the present day Gogol region, which is still a long way away from the Aksai Chin Region. Finally, India submitted that it had carried out activities such as surveying and mapping in the Aksai Chin Region between 1865 and 1878. However, at that time there was a rebellion in Aksai Chin led by Agubai, which was subsequently suppressed by the Qing government. The behavior of British India in the Aksai Chin Region was an illegal act of taking advantage of the rebellion to infringe upon the sovereignty of China's Xinjiang region, and the act of the Qing government in suppressing the rebellion precisely proved China's sovereign identity. Therefore, the evidence of the Indian side cannot prove that the Aksai Chin Region belonged to India, and that the sovereignty of the Aksai Chin Region belonged to China during the Qing Dynasty.

### **3.2 During the period of Republic of China (1912-1949)**

During the period of the Republic of China (ROC), the Central Government ROC continued to exercise sovereignty over the Aksai Chin Region. In 1918, the Central Government of ROC Staff Headquarters marked the Aksai Chin Region as China's boundaries on the China Public Opinion Map. From 1920 to 1928, the ROC government successively set up the Hetep Road in the Hetep region of the Aksai Chin and the ROC Government established the Ruling Bureau in Saitura region to strengthen the jurisdiction of the Aksai Chin Region. In 1943, the Survey Bureau of the Chinese Ministry of Defense drew a topographic map of Xinjiang, mapping the traditional customary line between Xinjiang, China and the Ladakh region of British India along the Karakoram Mountains, and the Aksai Chin Region was assigned to the jurisdiction of the Hetep region of Xinjiang, China. In addition, Chinese border guards patrolled the Aksai Chin Region many times, and between 1940 and 1941, the Xinjiang provincial government organized geological survey teams to conduct geological and topographical mapping of the entire Xinjiang region and drew a detailed topographical map of Xinjiang, including the Aksai Chin Region. During the mapping process, the Chinese government and other local governments provided a great deal of assistance to the surveying teams, and such a large batch of assistance would have been difficult to carry out if it had not been on their own national soil.

In response to China's claim, India has submitted that India passed the Jammu and Kashmir

Prohibition of Hunting Act in 1941, and that the Ladakh region, in which Aksai Chin is located, falls within the “hunting area” provided for in the Act. India considers this Act as evidence of its jurisdiction over Aksai Chin. However, a careful reading of the above text shows that, with the exception of the Kurnak Fort, the “hunting areas” mentioned by India are on the western side of the traditional customary line between India and China, and do not include the Aksai Chin Region under Chinese jurisdiction. Secondly, the Indian side claims that it sent official personnel to the Aksai Chin Region for patrolling, geological surveys and tourism between 1911 and 1949. In fact, the patrols, geological surveys and tours claimed by the Indian side were conducted in secret and were not publicized. In addition, the British Indian government has always been highly interested in the Sino-Indian border area and has secretly traveled to the area several times to carry out illegal activities. These activities are neither legal nor peaceful and do not prove the intention and activities of the British Indian Government acting as a sovereign. As a result, the Central Government of the Republic of China has also retained sovereignty over the Aksai Chin Region during the Republic of China period.

### 3.3 During the period after the establishment of New China

After the founding of New China, the Chinese People’s Liberation Army (PLA) took over the Sino-Indian border defense affairs in November 1949 and carried out defense protection in the Aksai Chin Region. The Chinese Army set up sentry points and conducted patrols at key border defense sites such as Thirty Mile Barracks and Kansywa between 1950 and 1951. After that, the Chinese border guards conducted a comprehensive inspection on the Chinese side of the western section of the traditional customary line between India and China in 1954 and 1955, in order to prepare for the subsequent border guarding work. In 1959, the Chinese set up posts at Shenxianwan, Bangong Lake, and Kurilnak Fort, and firmly controlled the Aksai Chin Region on the Chinese side. In addition to military guarding of the Aksai Chin Region, China has mapped the Aksai Chin Region many times and built highways; 180 kilometers of the New Tibet Highway, which was officially opened to traffic in 1958, passes through the Aksai Chin Region.<sup>[21]</sup> China’s exercise of sovereignty over the Aksai Chin Region after the founding of New China shows that the Aksai Chin Region has always been under China’s jurisdiction.

The Indian side maintains that it declared its sovereignty over the Aksai Chin Region in the 1950s in the form of patrols. However, according to information submitted by the Government of China, the Indian side made only three incursions into the Aksai Chin Region in September 1958, September 1959 and October 1959 to conduct covert reconnaissance. After being discovered by the Chinese border guards, the Indian personnel were detained and deported, and since then the Indian side has never entered the Aksai Chin Region. It can be seen that the “patrols” claimed by the Indian side were in fact an infringement of China’s territorial sovereignty and were not “peaceful”, and therefore cannot constitute evidence of India’s sovereignty over the area. In addition, India has submitted a large number of official and private maps to prove that it has effective jurisdiction over the Aksai Chin Region. While maps may attest to the occupation of the disputed area by the parties, they are not ipso facto evidence of territorial sovereignty or effective control. In the case concerning the Boundary between Burkina Faso and the Somali Republic, the International Court of Justice held that maps could only constitute evidentiary material of uncertain accuracy in individual cases. The cartographic material could not in itself prove the attribution of territorial sovereignty, but could only be used as supporting evidence to establish the facts of the case. It can be seen that the International Court of Justice has taken an extremely cautious approach to recognizing the evidentiary value of maps in cases of territorial disputes. The cartographic evidence presented by the Chinese side to the international community in the Aksai Chin territorial dispute did not present

the map as a separate piece of evidence, but was used in combination with other materials to prove the sovereignty of the Aksai Chin Region. Thus, the Chinese cartographic evidence has a higher probative value. The maps presented by India, on the other hand, were either inconsistent and contradictory or private maps without any validity in international law, and therefore could not prove India's sovereignty over the Aksai Chin Region.

#### 4. Conclusion

The Chinese Government has had jurisdiction and effective control over the Aksai Chin Region since the mid-18th century, and India has not exercised any effective control over the Aksai Chin Region, and India's claim of "sovereignty over the Aksai Chin Region" is an infringement of China's established territory and sovereignty. The Aksai Chin Region is an inalienable part of China's territory, and the Indian side's claim of sovereignty has no legal basis. In response to India's unlawful acts of encroachment on China's territory and sovereignty, China has the right to use any possible means in accordance with international law to firmly safeguard China's territorial integrity and sovereignty and security when necessary.

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