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Chapter 1:

Discerning the International Legal Threshold for Acquisition of Sovereignty over Remote and Uninhabited Islands: Implications for Judicial Settlement of International Disputes

David M. Ong

Introduction

This chapter makes two related arguments about disputed sovereignty or title over island territory, specifically within the Asia-Pacific regional context. The second, more controversial, argument builds on the initial, less controversial, set of propositions that form the basis for the first argument. This initial argument confirms, through a re-examination of the relevant international case law and related academic commentary, that the resolution of questions over competing state claims of sovereignty/title to disputed territory rests on the relative strengths of such claims, rather than the application of any objective legal threshold standard of evidentiary proof. Moreover, this subjective legal threshold for evidentiary proof toward establishing sovereignty/title over disputed territory is invariably a low standard (or test) of proof, consisting of evidence of state authority sufficient only to prevail over any other competing claim. Further, this threshold of required proof is even lower in cases of disputes over remote territory, especially when such a remote territory is in insular form—that is, islands and/or related maritime-based territory, lying beyond the (mainland) territorial seas of rival claimants.

Second, as a corollary to this relatively uncontroversial initial argument, it is suggested that when it comes to disputes over sovereignty/title to remote, uninhabited *islands* in particular, in fact very little evidence is required for a state to meet this (even) lower threshold for establishing title. This is in stark contrast, for example, to claims that states might make over areas of marine space(s) lying beyond their own suite of legally designated maritime jurisdiction zones, such as "historic waters," on the basis of historic title or historic "rights."[1] Indeed, as Johnson has noted:

> The burden of proof required to establish a prescriptive claim over sea territory [*sic*] is, therefore, correspondingly greater than the burden of proof required to establish a similar claim over land territory. That the burden of proof in regard to sea territory is not impossibly heavy is due to the principle that the acquiescence of states, whose maritime interests are not affected and are not likely to be affected by the display of sovereignty, can, after due time and with due safeguards, be implied.[2]

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The implication of these two related arguments is to render such disputes over remote islands even less susceptible to resort to international judicial settlement than the usual frontier-based

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1 See, for example, the exquisitely analyzed distinctions between these terms in Clive Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal*, 2nd ed. (Leiden: Brill, 2019).

[2] D. H. N. Johnson, "Acquisitive Prescription in International Law," *British Year Book of International Law* 27 (1950): 332–54, 351.

territorial disputes on (main)lands. This is unfortunately the case for a number of insular formation-based sovereignty disputes within the East Asian region. These include, *inter alia*, Dokdo/Takeshima between the Republic of Korea and Japan in the East Sea/Sea of Japan; Diaoyutai/Senkaku, between China and Japan in the East China Sea; and the Paracels and Spratly Islands groups in the South China Sea, which are contested by several littoral states.

Indeed, it is possible to hold that any successful settlement of these "territorial-cum-maritime jurisdictional" disputes requires an *a priori* discussion and resolution of the following three distinct sets of international legal issues:

1. First, what is the applicable international law for the acquisition of sovereignty (also known as "title") over disputed offshore maritime territories, whether these are eventually designated as islands or not?
2. Second, what is the legal status of each individually disputed maritime territory in these subregions of the wider East Asia-Pacific region, as to whether they are to be regarded as a low-tide elevation, rock, or island, as defined by the relevant provisions of the 1982 UN Convention on the Law of the Sea (UNCLOS)?[3]
3. Third, notwithstanding the resolution of the first two sets of international legal issues set out already (which is unlikely to be forthcoming anytime soon), what is the applicable international law relating to the nature and type of any *unilateral* activities that the claimant states can undertake in the overlapping claims for maritime jurisdiction zones surrounding these offshore features?

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Only the set of issues arising from the first of these questions will be addressed here. But the analysis of the case law examined in this chapter is sufficient to arrive at the conclusion that the finer points of the decisions rendered by the respective international courts and tribunals in these cases mean that resorting to such judicial means of international dispute settlement is fraught with uncertainty for the competing claimant states concerned, thus ensuring that this mode of international judicial settlement of such cases is increasingly unlikely today.

The Legal Status and Significance of Remote and/or Uninhabited Islands as a Special Problem for Their Acquisition of Sovereignty under International Law

To begin with, it is important to stress how much islands, especially remote and/or uninhabited islands, tend to loom large in the imagination of states. It is almost as if states view such islands—in particular, the smaller and more far-flung ones—as children who have somehow been forcibly separated from their motherlands, and thus forever needing protection from would-be encroachers. On the other hand, it is also significant to note here that these metaphorical parental attitudes over minute maritime territories are arguably no longer simply the products of overblown national sentiments, given the legal possibility that even tiny specks of land on a map can generate 200-nautical-mile-wide exclusive economic zones (EEZs) and continental shelf (sea-bed) areas that stretch even beyond the 200-nautical-

[3] United Nations Convention on the Law of the Sea, December 10, 1982, 1833 UNTS 397 (UNCLOS).

mile limit, according to UNCLOS.[4] Nevertheless, for many countries around the world, and particularly those states facing the littoral seas of the Asia-Pacific theater—encompassing the East and South China Seas—the prospect of extensive maritime jurisdiction zones around these islands seems almost to be of less concern than the need to assert indisputable title over such offshore maritime territory. In other words, maritime jurisdiction zones are seen as important but ultimately adjunct to confirmation of sovereignty over the "marine–terrestrial ecology"[5] that encompasses the island(s) concerned.

However, the ever-growing spatial parameters of these nationalistic notions of the marine–terrestrial ecology do *contribute* to the increased perception among such states of what they might lose out on in case their claims over insular territory are not accepted as prevailing over all other would-be claimants. Such a loss would no longer be limited to the terrestrial-based territorial sovereignty over the island itself but would extend to the large amount of ocean space accruing to such an island territory. This is albeit such increased maritime jurisdiction being first and foremost contingent upon the title to the island concerned being ascertained to be legally vested in that state, and also this "island" fulfilling both the objective and the subjective criteria to generate a 200-nautical-mile EEZ and continental shelf under Article 121(1) and (3) of UNCLOS.[6] The net effect of such legally granted maritime *largesse*—especially when coupled with the fact that UNCLOS parties can choose to withdraw "any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory" from their acceptance of binding third-party dispute settlement under section 2 of Part XV of UNCLOS (including conciliation under Annex V)[7]—has arguably been to render any disputes over the sovereignty of islands even less susceptible to peaceful international dispute settlement.

Moreover, even before the advent of increased maritime jurisdiction space being formally accorded to island territory under UNCLOS, it was the *relative strength* of competing claims to title over territory that allowed one or another state's claim to prevail in a sovereignty dispute. Indeed, this reliance on the relative strength of competing claims was already an important, if not imperative, aspect of successive judicial deliberations from the earliest international decisions of disputed title to island territory. As Schwarzenberger observed already in 1957:

> Although international judicial institutions have contributed much to the elucidation of this topic, it is in the nature of the judicial process that they should view such

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[4] Article 121(2) of UNCLOS provides: "Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory."

[5] Webb, for example, argues that the traditionally binary marine/terrestrial division in comparative ecological studies misses opportunities for more interesting comparisons, and that combined "marine–terrestrial" comparative studies can be extremely useful in uncovering mechanisms when they explicitly consider those facets of the environment that are important to a particular hypothesis. See Thomas J. Webb, "Marine and Terrestrial Ecology: Unifying Concepts, Revealing Differences," *Trends in Ecology and Evolution* 27, no. 10 (October 2012): 535–41, 535.

[6] Article 121(1) provides the objective criterion, that "[a]n island is a naturally formed area of land, surrounded by water, which is above water at high tide," whereas Article 121(3) subjectively requires that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

[7] See UNCLOS, Article 298(1)(a)(1).

> issues from a particular angle. In the typical case, they are confronted with conflicting claims of two contestants. Thus, they are not primarily concerned with the elaboration of the general rules governing title to territory and their operative scope in relation to third states, but with *the relative superiority of the evidence produced by one of the parties.* While this is an inevitable and general feature of judicial proceedings, judicial reluctance to formulate generally applicable rules is more pronounced in disputes of this kind than, for instance, in the fields of international responsibility or the laws of war and neutrality.[8]

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From this, it can be discerned that the necessary subjectivity involved in assessing the differences between such competing claims of *relative strength/superiority* to sovereignty had already injected sufficient uncertainty into these judicial deliberations, such that very few states would welcome third-party adjudication of their island sovereignty claims.

This contribution first engages with the application of this more subjective *relative strength* test (rather than any objectively determined absolute test) that allows a particular claim over title to territory, especially in the "marine–terrestrial" space around islands, to prevail over other competing claims of similar, but ultimately *relatively weaker*, *strength*, as adjudicated by the international arbitrator(s) in a particular case. Post traces the roots of these different (absolute and relative) standards of law back to the debate over whether international law itself is a "unititular" or "multititular" system of law, postulating that in a multititular legal system "the significance of having a title to a thing is much more relative: other titles may simply be stronger."[9] Enlarging on this point later on in the same contribution, Post notes that "[i]n a multititular system the plaintiff does not need to prove that his title is the best of all titles, it suffices to prove that it is better than the defendant's title."[10] Applying this legal standard to the dispute between Indonesia and Malaysia over title to Ligitan and Sipadan islands lying just off the eastern coast of Borneo island, Ko confirmed—even before the case came before the International Court of Justice (ICJ)—that "[s]o far as the two islands are concerned, the case is one about competing claims to title, and the task of the Court would be to weigh the supporting facts and evidence and determine the stronger claim."[11]

A further relevant question within the context of establishing sovereignty/title over island territory based on the *relative strength* of state claims is whether the applicable legal threshold standard of evidentiary proof for such island territory is necessarily different from that applied to disputed parts of mainland/continental territory. Specifically in relation to disputed sovereignty claims over islands, Xuechan Ma recites O'Connell's view that more remote island territory requires a less stringent threshold of evidence to confirm "effective

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[8] Georg Schwarzenberger, "Title to Territory: Response to a Challenge," *American Journal of International Law* 51, no. 2 (1957): 308–24, 309 (emphasis added).

[9] Harry H. G. Post, "Some Comments on the Principles of International Law Relating to the Acquisition of Territory," in *Reflections on Principles and Practice of International Law: Essays in Honour of Leo J. Bouchez*, ed. Terry D. Gill and Wybo P. Heere (The Hague: Martinus Nijhoff, 2000), 147–73, 152.

[10] Post, "Some Comments" (n. 9), 164.

[11] Ko Swan Sik, "Asian Territorial Disputes, with Special Reference to the Islands of Sipadan and Ligitan: Succession to Dutch and British Titles?" in *Reflections on Principles and Practice of International Law: Essays in Honour of Leo J Bouchez*, ed. Terry D. Gill and Wybo P. Heere (The Hague: Martinus Nijhoff, 2000), 109–25, 114.

control."[12] Post makes a similar suggestion: "If title to rather barren or uninhabited or otherwise not too significant territory is at stake only a few or minor acts of a party to a dispute can lead a tribunal to award the territorial title."[13] This view raises the rather intriguing corollary proposition that where a dispute involves an inhabited and/or otherwise significant territory, then the evidentiary proof required to establish sovereignty/title to such territory would be more stringent. Even leaving aside the difficulty of objectively determining the significance (or otherwise) of a territory over which sovereignty/title is disputed between two (or more) states, the fact that there may be different legal thresholds of evidentiary proof that are applicable to different categories of disputed territory is bound to add a further layer of complexity to an already difficult judicial exercise of weighing up the competing evidence adduced by each interested state.

Yet this seems to be the implication of the following passages from the judgment of the Permanent Court of International Justice (PCIJ) in the *Eastern Greenland* case,[14] as cited by the ICJ in its own judgment on the *Ligitan and Sipadan* case.[15] The ICJ first recalls the statement by the PCIJ in the *Eastern Greenland* case that

> a claim to sovereignty based not upon some particular act or title such as a treaty of cession 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.
>
> Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power.[16]

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The PCIJ continues:

> It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.[17]

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Based on the preceding passages from the *Eastern Greenland* case, the ICJ in the *Ligitan and Sipadan* case concludes: "In particular in the case of very small islands which are uninhabited or not permanently inhabited—like Ligitan and Sipadan, which have been of little economic importance (at least until recently)—*effectivités* will indeed generally be scarce."[18]

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[12] Xuechan Ma, "Historic Title Over Land and Maritime Territory," *Journal of Territorial and Maritime Studies* 4, no. 1 (Winter/Spring 2017): 31–46.

[13] See Post, "Some Comments" (n. 9), 153.

[14] *Legal Status of Eastern Greenland (Denmark v. Norway)* [1933] PCIJ, Series A/B, No. 53 (April 5) (*Eastern Greenland* case).

[15] *Sovereignty over Pulau Ligitan and Sipadan Pulau (Indonesia/Malaysia)*, Judgment, [2002] ICJ Rep. 625 (December 17), para. 2 (*Ligitan and Sipadan* case).

[16] *Ligitan and Sipadan* case, para. 134, quoting from *Eastern Greenland* case, 45–46.

[17] *Ligitan and Sipadan* case, para. 134.

[18] *Ligitan and Sipadan* case, para. 134.

A further observation that will be made relates to the types of factual evidence deemed sufficiently authoritative by international adjudicators to meet the *lower legal threshold standard* for evidence required to prevail on the basis of the *relative strength* of competing state claims. This observation relates to the fact that such evidence (as adduced by claimant states over several international cases) has usually not been regarded as definitive to confer absolute title over the disputed territory. Instead, what is notable in this re-examination of the adduced evidence over several international cases is that a *low legal threshold* is applied by the adjudicators in these cases to assess this evidence. Indeed, this *low legal threshold* confines itself to weighing up only the *relative strengths* of the adduced evidence, rather than applying a more objective and stringent (and therefore higher) legal threshold to ensure certainty of the absolute sovereignty of a state over a particular disputed territory. It is arguably this combination of the application of the *relative strength* test for assessing different sovereignty claims, alongside the *low legal threshold* for assessing the adduced evidence for establishing sovereignty over disputed territory, that increases the level of uncertainty for disputing states. This strong and abiding perception of uncertainty acts to further drive states away from bringing their claims to international judicial settlement.

Both of these observed characteristics—the *relative strength* between competing sovereignty claims (over islands in particular) and the *low legal threshold* of any factual evidence adduced in support of such claims—are linked to the requirement of "effective control" over disputed territory. However, as Sumner notes in this context:

> The effective control doctrine is not without problems, though. In particular, the lack of consensus on the applicable standards has resulted in many competing claims. Specifically, these questioned the quantum of control required, as well as its quality—namely, whether private actors can contribute to a state's effective control of a territory.[19]

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A further conceptual connection that can arguably be made here is between the legal threshold for evidence of "effective control" or "effective occupation" and "symbolic annexation." Brownlie initially notes that claims for "effective occupation" can prevail simply by showing "manifestations of sovereignty legally more potent than those of the other claimant or claimants."[20] He adds: "The intensity of state activity required will obviously be less in the case of *terra nullius* than in the case where a competing claimant takes an interest in territory."[21] He follows this up by stating that "[i]n the case of uninhabited, inhospitable, and remote regions little is required in the nature of state activity, and a first and decisive act of sovereignty will suffice to create a valid title."[22]

However, when he contemplates "symbolic annexation" as a means of sovereign acquisition of territory, Brownlie tries to adopt a more cautious approach, stating that, "[i]n principle, the state activity must satisfy the normal requirements of 'effective occupation.'"[23] This

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[19] Brian Taylor Sumner, "Territorial Disputes at the International Court of Justice," *Duke Law Journal* 53, no.6 (April 2004): 1779–812, 1788.

[20] Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Oxford University Press, 2000), 137.

[21] Brownlie, *Principles* (n. 20), 137.

[22] Brownlie, *Principles* (n. 20), 145.

[23] Brownlie, *Principles* (n. 20), 145.

positivist attempt to fall back on an objective standard to meet the required legal threshold is also discernible in Jennings's approach to this point. After initially observing that in a tussle between two rival claims, "the successful State may have had to show very little in the way of sovereign activity,"[24] Jennings then attempts to revert to a more objective test, stating: "But of course, the assumption here is that however little sovereign activity had to be shown, it was nevertheless activity that was unambiguously *à titre de souverain*."[25] Following on from his stricter stance, Brownlie suggests that "symbolic annexation" does not give title except in special circumstances (as in the *Clipperton Island* case discussed later).[26] Thus, he appears to "exceptionalize" remote uninhabited islands in particular as being allowed to be claimed with very little by way of the usual evidentiary requirements for effective control/occupation. Indeed, Brownlie goes on to raise the specter of possible armed conflict over such remote territories if the usual standards of effective occupation are to be applied, saying:

To require too much in respect of the maintenance of rights may well involve a return to the nineteenth-century concept of effectiveness and encourage threats to peace. In the case of remote islands, it is unhelpful to require a determinate minimum of "effectiveness."[27]

While Brownlie thus eschews any objective test or otherwise strict criteria to be fulfilled in order to meet a minimum legal threshold of "effectiveness" for remote territories, von der Heydte had already made a relevant and significant conceptual distinction between "discovery" and "symbolic annexation" much earlier, when he noted that "[a] distinction must be made between mere discovery and the legal act of appropriation by means of land-marks and symbols."[28] Distinguishing between these two notions, however, merely gives rise to yet another question—namely, "when could a newly found region be considered as being 'taken or possessed,' *i.e.*, whether possession presupposes effective occupation or only a symbolic act of appropriation."[29] As von der Heydte elaborates:

> The problem we have to deal with, which engaged the theory of international law for nearly five hundred years without being solved, cannot be characterized by the opposition of the two notions of "discovery" and "possession" under such a general conception as "acquisition of sovereign rights," but by opposition of "symbolic annexation," on the one hand, and "effective occupation" on the other, under the general title "possession."[30]

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[24] See R. Y. Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), with these quotes taken from the reprint with a new introduction by Marcelo G. Kohen: R. Y. Jennings, *The Acquisition of Territory in International Law* (1963; repr., Manchester: Manchester University Press, 2017), 20.

[25] Jennings, *Acquisition of Territory* (n. 24).

[26] Brownlie, *Principles* (n. 20), 145.

[27] Brownlie, *Principles* (n. 20), 145.

[28] Friedrich August Freiherr von der Heydte, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law," *American Journal of International Law* 29, no. 3 (1935): 448–71, 452.

[29] Von der Heydte, "Discovery" (n. 28), 453.

[30] Von der Heydte, "Discovery" (n. 28), 453.

The answer to this dilemma as to the sufficiency of any such "symbolic annexation" in relation to the legal requirement of "effective occupation" for ultimate "possession" is summarized by von der Heydte as follows:

> Such symbolic acts were considered as a substitute for effective possession, bestowing the full possessory title. They may be interpreted also as a device to show to the world that an inchoate title to the discovered region was acquired which rendered it *terra prohibita* as far as other States were concerned, but which did not yet grant full control or discretion in regard to the territory to the State whose signs were erected. The inchoate title finally perishes unless it is followed and perfected by effective possession in a reasonable time.[31]

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Significantly for our purposes here in relation to competing sovereignty claims over remote uninhabited maritime territory, while such "symbolic annexation" therefore buttresses "discovery" but does not bring with it more than an inchoate title, it nevertheless *prohibits* any other state from doing the same, thereby both establishing and confirming "first-mover" status to the state that initiated the "symbolic annexation" over the territory concerned.

The preceding set of propositional statements, which already build on similar arguments and points made previously, will be re-assessed in this contribution by a revisitation of selected island-focused territorial sovereignty disputes that have come before international adjudication. To determine the strength of the hypothesis put forward here, the following analysis will focus on how the relevant international adjudication body (or sole arbitrator in certain cases) initially applied a *low legal threshold* for the factual evidence adduced by states to this body/adjudicator to decide upon effective possession or occupation, and then considered the *relative strength* of this evidence as between competing sovereignty claims in order to determine which of these claims would succeed. In doing so, this analysis will cover the following international case law, focusing on disputes over island territory, both remote and nearby, such as the *Island of Palmas* case (1928), the *Clipperton Island* case (1931), the *Eastern Greenland* case (1933), the *Minquiers and Ecrehos* case (1953), and, more recently, within the South China Sea region, the *Ligitan and Sipadan* (2002) and *Pedra Branca/Batu Puteh* (2008) cases.

Island of Palmas Case (1928)

Both the low legal threshold for establishing initial possession of disputed remote territory and the "relative strength" test applied between competing sovereignty claims when such a territory is disputed are on display in the most famous island territorial sovereignty dispute of them all—namely, the *Island of Palmas* case (1928).[32] First, as Waldock summarizes, since the island was already inhabited by native tribes, the question was not whether the Dutch had themselves settled on the island but instead whether the Netherlands (the state) had established a sufficiently effective administration over the island to meet Judge Huber's test of showing "continuous and peaceful display of actual power."[33]

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[31] Von der Heydte, "Discovery" (n. 28), 454.

[32] *Island of Palmas (Netherlands v. United States)* (1928) 2 RIAA 829 (April 4) (*Island of Palmas* case).

[33] C. H. M. Waldock, "Disputed Sovereignty in the Falkland Islands Dependencies," *British Year Book of International Law* 25 (1948): 311–53, 317, citing *Island of Palmas* case, 857.

Second, the significance of *relativity* in the assessment of the evidence adduced by each competing state claim over the disputed maritime territory concerned is also clear from Huber's seminal judgment. In this regard, he initially proclaims: "In this case no Party would have established its claims to sovereignty over the Island and the decision of the Arbitrator would have to be founded on the *relative strength* of the titles invoked by each Party."[34] And then, when concluding the case, he observes that "[i]t is the conclusion reached on the ground of the *relative strength* of the titles invoked by each Party" and "may be regarded as sufficiently proving the existence of Netherlands sovereignty."[35]

Clipperton Island Case (1931)

Dickinson summarizes both the facts and the legal aspects of the *Clipperton Island* award[36] as follows:

> Clipperton Island is a low coral lagoon reef, less than three miles in diameter, situated in the Pacific Ocean at 10° 17' N., 109° 13' W., some 670 miles southwest of Mexico. It is uninhabited and for all practical purposes uninhabitable. Whether it was known to the early Spanish navigators is uncertain. It was discovered by an Englishman, Captain Clipperton, in 1705, but was not claimed by the British Government. A few years later it was rediscovered by French navigators, but France made no formal claim at the time. It appears to have been regarded in Mexico as a part of the domain of that republic, by right of succession to Spain, though there is no record of an active Mexican claim until comparatively recent times. Meanwhile, early in 1858, the French Government granted a concession to exploit the island's guano, which was never used. On November 17, 1858, French sovereignty was formally proclaimed from the deck of a French commercial vessel cruising off the island by a naval officer commissioned for that purpose. Careful geographical notes were made and one attempt at a landing was successful; but the vessel left without placing any mark of French sovereignty on the island itself. The accomplishment of this mission was reported to the French Consulate at Honolulu, the Government of Hawaii was notified, and the proclamation of sovereignty was published in an Hawaiian journal.[37]

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The award then proceeds to consider whether France accomplished an effective occupation "satisfying the conditions required by international law for the validity of this kind of territorial acquisition," observing that

> it is disputed that France took effective possession of the island, and it is maintained that without such a taking of possession of an effective character, the occupation must be considered as null and void.
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> It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or

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[34] *Island of Palmas* case, 869 (emphasis added).

[35] *Island of Palmas* case, 870, 871 (emphasis added).

[36] *Clipperton Island Arbitration (Mexico v. France)* (January 28, 1931), English translation in "Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island," *American Journal of International Law* 26, no. 2 (1932): 390–94, 393 (*Clipperton Island* case).

[37] Edwin D. Dickinson, "The Clipperton Island Case," *American Journal of International Law* 27, no. 1 (1933): 130–33, 131.

> series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking, and in ordinary cases, that only takes place when the state establishes in the territory itself an organization capable of making its laws respected. But this step is, properly speaking, but a means of procedure to the taking of possession, and, therefore, is not identical with the latter. There may also be cases where it is unnecessary to have recourse to this method. *Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.*[38]

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Dickinson notes:

> The notice given of French occupation in 1858 was sufficient; and French sovereignty had not been lost by abandonment, since France "never had the animus of abandoning the island, and the fact that she has not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitely perfected."[39]

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As Ma succinctly concludes, the arbitrator in the *Clipperton* case "held that due to the small size and uninhabited feature of Clipperton Island, from the moment of the discovery by France, the taking of possession could be considered as having been accomplished and consequently remained perfected."[40] This is even though such "possession" was claimed from the deck of a French commercial vessel—hardly a robust and definitive "act of state." However, it may be noted that at least in relation to remote, and either uninhabited or largely uninhabited, territory, such as the polar regions, Waldock had already long confirmed the demise of what he called "the now-exploded theory that actual settlement or use of territory is essential to its effective occupation."[41] Indeed, he goes on to state unequivocally that "[t]he *Island of Palmas*, *Eastern Greenland* and *Clipperton Island* cases are clear authority that settlement is not a necessary element in effective occupation."[42] Moreover, even the requirement for public or official notification of such possession is minimal. As MacGibbon notes,

there is little authority for the view that actual or formal notification is necessary. Neither the Award in the *Island of Palmas Arbitration* nor that in the *Clipperton Island* case lends any support to the argument that official notification of a claim is a precondition of its validity.[43]

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[38] *Clipperton Island* case, 393–94 (emphasis added).

[39] Dickinson, "Clipperton Island Case" (n. 37), 132.

[40] Ma, "Historic Title" (n. 12), 34.

[41] Waldock, "Disputed Sovereignty" (n. 33), 315.

[42] Waldock, "Disputed Sovereignty" (n. 33), 315.

[43] I. C. MacGibbon, "The Scope of Acquiescence in International Law," *British Year Book of International Law* 31 (1954): 143–86, 176–77.

Eastern Greenland Case (1933)

Following "hard on the heels" of the *Clipperton Island* decision, the *Legal Status of Eastern Greenland* case, adjudicated before the PCIJ in 1933, strengthens this presumption of "not very much" in the way of evidentiary proof required for the initial presumption and, thus, the award of (inchoate) title. As noted by von der Heydte, while inchoate in character, the presumption conveyed by such title (on the basis of symbolic annexation) is nevertheless sufficient to ward off competing claims—at least unless and until they achieve an opposable "prescriptive" status in and of themselves. On this basis, the apparently exacting requirements of international law for "effective occupation" and, thus, legal "possession" were also modified or altered in the *Eastern Greenland* case and, arguably, mitigated to "permit a flexible standard which depends upon the circumstances of the territory. The more isolated the territory and the fewer the inhabitants, the less stringent are the requirements of effective occupation."[44]

In its judgment in the *Eastern Greenland* case,[45] the PCIJ initially observed:

> Before proceeding to consider in detail the evidence submitted to the Court, it may be well to state that a claim to sovereignty based not upon some particular act or title such as a treaty of cession 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.[46]

Click here to enter text.

The Court then went on to note that "[a]nother circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power,"[47] before reiterating the *relative strength* test applied to any two (or more) competing sovereignty claims: "In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger." Moreover, the PCIJ observed:

> It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.[48]

Click here to enter text.

Turning to the facts in the *Eastern Greenland* case, the PCIJ initially stated that

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[44] Janice Cavell, "Historical Evidence and the Eastern Greenland Case," *Arctic* 61, no. 4 (December 2008): 433–41, 433–34, citing Gillian D. Triggs, *International Law and Australian Sovereignty in Antarctica* (Sydney: Legal Books, 1986)

[45] *Eastern Greenland* case, 39.

[46] *Eastern Greenland* case, 45–46.

[47] *Eastern Greenland* case, 46.

[48] *Eastern Greenland* case, 45–46.

[o]ne of the peculiar features of the present case is that up to 1931 there was no claim by any Power other than Denmark to the sovereignty over Greenland. Indeed, up till 1921, no Power disputed the Danish claim to sovereignty.[49]

The PCIJ then considered the competing claim by Norway, which argued that the use of the term "Greenland" in eighteenth-century Danish laws related only to "the colonies or the colonized area" on the western part of that very large island.[50] Specifically, the PCIJ noted:

> Norway has argued that in the legislative and administrative acts of the XVIIIth century on which Denmark relies as proof of the exercise of her sovereignty, the word "Greenland" is not used in the geographical sense, but means only the colonies or the colonized area on the West coast.
>
> *This is a point as to which the burden of proof lies with Norway.* The geographical meaning of the word "Greenland," i.e. the name which is habitually used in the maps to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention. *In the opinion of the Court, Norway has not succeeded in establishing her contention.* It is not sufficient for her to show that in many of these legislative and administrative acts action was only to be taken in the colonies. Most of them dealt with things which only happened in the colonies and not in the rest of the country. The fact that most of these acts were concerned with what happened in the colonies and that the colonies were all situated on the West coast is not by itself sufficient ground for holding that the authority in virtue of which the act was taken—whether legislative or administrative—was also restricted to the colonized area. Unless it was so restricted, it affords no ground for interpreting the word "Greenland" in this restricted sense.
>
> The terms of some of these documents give no support to the Norwegian view. As shown above, the [Danish] Ordinances of 1740, 1751, 1758 and 1776 purport to operate in Greenland generally. If the terms of these Ordinances are examined closely, they do not bear out the view that "Greenland" means only the colonized area.[51]

Click here to enter text.

Thus, when Norway tried to question the precision of geographical coverage of the Danish legislation naming "Greenland," and thereby disprove the notion that such Danish legislation constituted a claim to the whole of this remote and very large island territory, this was rebuffed by the PCIJ. Moreover, the Court confirmed that "[t]his is a point as to which the burden of proof lies on Norway."[52] This high(er) threshold placed on Norway to discount the full geographical extent of Danish claims over the whole of the island of Greenland, when compared with the initially lower threshold placed on the Danish government in relation to Denmark's original, prescriptive claim to Greenland, is yet another indicator of the overall balance in favor of "first-movers" in the acquisition of sovereignty/title to territory stakes under international law. Indeed, not only is the legal threshold for establishing initial possession lower, but any other requirements or conditions relating to the status and identity

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[49] *Eastern Greenland* case, 46, also cited in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)* [2008] ICJ Rep. 12 (May 23), para. 64 (*Pedra Branca/Pulau Batu Puteh* case).

[50] *Pedra Branca/Pulau Batu Puteh* case, para. 110.

[51] *Eastern Greenland* case, 49 (emphasis added).

[52] *Eastern Greenland* case, 49.

of the individuals undertaking these initial prescriptive actions are also less stringent. In the *Eastern Greenland* case, this led the PCIJ to conclude that

> bearing in mind the absence of any claim to sovereignty by another Power, and the Arctic and inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway displayed during the period from the founding of the colonies by Hans Egede in 1721 up to 1814 his authority to an extent sufficient to give his country a valid claim to sovereignty, and that his rights over Greenland were not limited to the colonized area.[53]

Click here to enter text.

As Fitzmaurice later confirmed with regard to the initial acquisition of title by prescription through the actions of private individuals, this apparently cannot be undone thereafter prescriptively by the actions of private individuals for another state,

> for whereas it might not be particularly surprising if the acts of individuals, could in certain circumstances, confer on their States a title to territory which was *res nullius* and ownerless, even though these acts were carried out for purely private purposes, it would be quite inadmissible that the title of one State should be ousted by the prescriptive claim of some other State when there had been no exercise by the latter State authority as such, but only the actions of its nationals acting in their personal capacity.[54]

Click here to enter text.

Here it is also possible to argue that the presumption of sovereignty (and therefore preference) given to such "first-movers" in relation to claims over remote and/or uninhabited or sparsely populated territories finds succor/alignment with the Latin maxim *quieta non movere,* which according to MacGibbon was given expression in the *Grisbådarna Arbitration* award as follows: "It is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible."[55]

Minquiers and Ecrehos Case (1953)

Similarly, in the *Minquiers and Ecrehos* case,[56] where the sovereignty of these islet groups was contested between France and the United Kingdom, the ICJ initially affirmed that questions of sovereignty or title to territory are rarely won decisively by one or the other opposing party but usually decided on the basis of the relative superiority of one set of claims (and the evidence adduced to support it) over another set (with its own evidence in support). In this case, the ICJ began by pronouncing:

> Having regard to the above-mentioned documents, and particularly to the Charters of 1200 and 1203, and in view of the undisputed fact that the whole of Normandy, including all of the Channel Islands, was held by the English King in his capacity as

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[53] *Eastern Greenland* case, 50–51.

[54] Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law," *British Year Book of International Law* 30 (1954): 1–70, 49.

[55] MacGibbon, "Scope of Acquiescence" (n. 43), 152 n. 1, citing *Grisbådarna Arbitration (Norway v. Sweden)* (1909) 11 RIAA 155 (October 23).

[56] *Minquiers and Ecrehos (France v United Kingdom)*, Judgment, Merits, [1953] ICJ Rep. 47, 47 (*Minquiers and Ecrehos* case).

> Duke of Normandy from 1066 until 1204, there appears to be a strong presumption in favour of this British view.[57]

Click here to enter text.

On the other hand, the French government contended that it

> derives the original title invoked by it from the fact that the Dukes of Normandy were the vassals of the Kings of France, and that the Kings of England after 1066, in their capacity as Dukes of Normandy, held the Duchy in fee of the French Kings. … The French Government further relies on a Judgment of April 28th, 1202, of the Court of France and contends that King John of England was thereby condemned to forfeit all the lands which he held in fee of the King of France, including the whole of Normandy. On the basis of this historical origin and of the Judgment of 1202, there is, in the opinion of that Government, a presumption in favour of the present French claim to sovereignty over the Ecrehos and the Minquiers.[58]

Click here to enter text.

In the face of these competing antebellum claims, the Court reverted to the doctrinal position, stating:

The Court does not, however, feel that it can draw from these considerations alone any definitive conclusion as to the sovereignty over the Ecrehos and the Minquiers, since this question must ultimately depend on the evidence which relates directly to the possession of these groups.[59]

Instead, the Court held: "What is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the *evidence which relates directly to the possession* of the Ecrehos and Minquiers groups."[60] Breaking this statement down, initially in relation to the notion of "possession," an early appraisal of this ICJ judgment by Fitzmaurice first noted that the phrases "exercise of State functions" and "a manifestation of State authority" were both indicative of the doctrinal requirements for "possession," the lineage of which could be traced to the PCIJ in the *Eastern Greenland* case and Judge Huber in the *Island of Palmas* case.[61] However, Fitzmaurice then highlighted that such "possession" must be read as "possession in sovereignty" rather than, necessarily, physical occupation.[62] In confirming this subtle yet significant change in emphasis for the notion of "possession," Fitzmaurice refers to Waldock's earlier contribution on this point (already noted above), where he (Waldock) observes, *inter alia*:

> The emphasis has shifted from the taking of physical possession of the land and the exclusion of others to the manifestation and exercise of the functions of government over the territory. This change is a natural consequence of the recognition that in modern international law occupation is the acquisition of sovereignty rather than of property. … Accordingly it is effective activity by the state either internally within

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[57] *Minquiers and Ecrehos* case, 55.

[58] *Minquiers and Ecrehos* case, 56.

[59] *Minquiers and Ecrehos* case, 55.

[60] *Minquiers and Ecrehos* case, 57 (emphasis added).

[61] Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951–54: Points of Substantive Law (Part II)," *British Year Book of International Law* 32 (1957): 20–96, 50.

[62] Fitzmaurice, "Law and Procedure" (n. 61).

> the territory or externally in relations with other states which is the foundation of title by occupation, not settlement and exploitation.[63]

Click here to enter text.

Fitzmaurice then notes that there may be "considerable variations in the degree of display of 'State activity' required in different cases to support a title to territory,"[64] before citing Waldock again as stating that the principal authorities are "agreed that the degree of State activity required to confer title varies with the circumstances of each territory."[65]

Reverting again to the ICJ's statement of the evidentiary requirements of possession (see earlier), this begets the next question as to what exactly constitutes such evidence. To this query, Fitzmaurice holds that the Court "indicated certain acts as having special value as evidence of title."[66] These were enumerated by the Court as follows: "Of the manifold acts invoked by the United Kingdom government the Court attaches, in particular, probative value to the acts which relate to the exercise of jurisdiction and local administration and to legislation."[67] Considering the relative strength of the opposing claims to sovereignty over the Ecrehos first, the Court found that

> the Ecrehos group in the beginning of the thirteenth century was considered and treated as an integral part of the fief of the Channel Islands which were held by the English King, and that the group continued to be under the dominion of that King, who in the beginning of the fourteenth century exercised jurisdiction in respect thereof. The Court further finds that British authorities during the greater part of the nineteenth century and in the twentieth century have exercised State functions in respect of the group. The French Government, on the other hand, has not produced evidence showing that it has any valid title to the group. In such circumstances it must be concluded that the sovereignty over the Ecrehos belongs to the United Kingdom.[68]

Click here to enter text.

The Court noted that "Jersey [that is, British] authorities have in several ways exercised ordinary local administration in respect of the Ecrehos during a long period of time"[69] and that, with respect to the Minquiers, "British authorities during the greater part of the nineteenth century and in the twentieth century have exercised State functions in respect of the group."[70]

Specifically, the exercise of various state functions, through the Jersey authorities, in relation to, *inter alia*, landed property registration and taxation, the administration of inquests for deaths on the Minquiers, and the construction and maintenance of *onshore* harbor works on

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[63] Fitzmaurice, "Law and Procedure" (n. 61), 51 n. 2, citing Waldock, "Disputed Sovereignty" (n. 33), 317.

[64] Fitzmaurice, "Law and Procedure" (n. 61), 51.

[65] Fitzmaurice, "Law and Procedure" (n. 61), 51, citing Waldock, "Disputed Sovereignty" (n. 33), 336.

[66] Fitzmaurice, "Law and Procedure" (n. 61), 53.

[67] *Minquiers and Ecrehos* case, 65.

[68] *Minquiers and Ecrehos* case, 67.

[69] *Minquiers and Ecrehos* case, 66.

[70] *Minquiers and Ecrehos* case, 67.

the islet itself, was sufficient to support UK assertions of sovereignty over the Minquiers group as a whole. On the other hand, the French evidence in support of its claims over the Minquiers, including the placing and maintenance of *offshore* navigational aids, was deemed by the ICJ to be less persuasive. The Court did not find that the facts invoked by the French government were sufficient to show that France has a valid title to the Minquiers:

> As to the above-mentioned acts from the nineteenth and twentieth centuries in particular, including the buoying *outside* the reefs of the group, such acts can hardly be considered as sufficient evidence of the intention of that Government to act as sovereign over the islets; nor are those acts of such a character that they can be considered as involving a manifestation of State authority in respect of the islets.[71]

Click here to enter text.

However, as we will see in our analysis of the grounds for the ICJ decisions in the *Ligitan and Sipadan* (2002) and *Pedra Branca/Batu Puteh* (2008) cases, navigational aids, as well as the investigation and reporting on maritime hazards and shipwrecks, in the vicinity of the disputed territories were nevertheless deemed to be of sufficient significance to the claims of the states undertaking these activities, when compared to activities of even less merit.

Ultimately, however, it may be seen that a further decisive factor with regard to sovereignty over the Minquiers group was evidence of French *acquiescence* to this UK government exercise of various state functions in official diplomatic exchanges between the two states.[72] For these reasons, the ICJ unanimously found that the sovereignty over the islets and rocks of the Ecrehos and Minquiers groups, insofar as these islets and rocks are capable of appropriation, belongs to the United Kingdom. Thus, in addition to the lower threshold of proof in relation to evidential requirements for initial sovereignty claims, the little that is needed by way of notification of such claims for the establishment of title, and the subsequent presumption of sovereignty in the face of competing claims based on the prescription by other states, acquisition of sovereign title over remote and/or uninhabited territories can be further confirmed by acquiescence on the part of other states.

On this last point in relation to the role of acquiescence in contributing to the confirmation of sovereignty claims, MacGibbon initially observes that "[t]ribunals to which disputes involving prescriptive claims have been referred have unequivocally affirmed the importance which they have attached to the acquiescence of one party in conduct by the other which related to the subject-matter of the dispute."[73] He then qualifies this somewhat by stating that "[a]cquiescence has seldom formed the sole reason for the judicial determination of a dispute, but it is clear that it is a factor to which the courts have ascribed great weight."[74] MacGibbon later reiterates: "The relevance and importance of acquiescence in the form of failure to protest in appropriate circumstances has been illustrated in a number of international adjudications on disputed title to territory."[75] MacGibbon then contributes several significant international case law examples to this argument in favor of the significance of acquiescence to such decisions, two of which are highlighted here as follows.

First, MacGibbon notes that in the 1933 *Guatemala/Honduras Boundary Arbitration* award,

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[71] *Minquiers and Ecrehos* case, 71 (emphasis added).

[72] As detailed in the *Minquiers and Ecrehos* case, 71.

[73] MacGibbon, "Scope of Acquiescence" (n. 43), 154.

[74] MacGibbon, "Scope of Acquiescence" (n. 43), 154.

[75] MacGibbon, "Scope of Acquiescence" (n. 43), 156.

the continued and long unopposed assertion of authority by Guatemala over part of the disputed territory operated to raise a presumption in favour of the claim of Guatemala which could be rebutted only by the clearest proof, the Tribunal clearly equated the fatal defect in the case presented by Honduras with her failure to protest.[76]

Second, and reverting to the *Grisbådarna Arbitration* once again, MacGibbon observed that the acquiescence of Norway to certain acts of Sweden in this case was "a factor which supported the validity of the Swedish claims"[77]—this even though those Swedish acts, such as the placing of beacons and the installation of a light-boat, were also undertaken within the maritime, rather than terrestrial, domain. Although these types of offshore activities have been previously discounted (in the *Ecrehos* case, for example), their acceptance by the Tribunal in the *Grisbådarna* case as constituting relevant displays of sovereignty is altogether more explicable, since the disputed areas were in fact fishing banks lying beyond territorial waters limits anyway.

Ligitan and Sipadan Case (2002)

Significantly for our purposes here, more recent international law cases involving protagonist states within the South China Sea disputes have followed the same lines of reasoning. Thus, in the case of *Ligitan and Sipadan* between Indonesia and Malaysia, the ICJ initially recalled the PCIJ's summation of the relatively low evidentiary threshold that needs to be met to ensure confirmation of title over remote and/or uninhabited or sparsely inhabited territory in the *Eastern Greenland* case. The ICJ then added to this point: "In particular in the case of very small islands which are uninhabited or not permanently inhabited—like Ligitan and Sipadan, which have been of little economic importance (at least until recently)—*effectivités* will indeed generally be scarce."[78]

As to what constitutes such *effectivités*, the Court observed:

> [I]t can only consider those acts as constituting a relevant display of authority which leave no doubt as to their specific reference to the islands in dispute as such. Regulations or administrative acts of a general nature can therefore be taken as *effectivités* with regard to Ligitan and Sipadan only if it is clear from their terms or their effects that they pertained to these two islands.[79]

Click here to enter text.

Turning first to the *effectivités* relied on by Indonesia, the Court began by pointing out that none of them was of a legislative or regulatory character.[80] While the Court held that "the construction and operation of lighthouses and navigational aids are not normally considered manifestations of State authority,"[81] the Court then recalled its judgment in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, where it had noted: "The construction of navigational aids, on the other

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[76] MacGibbon, "Scope of Acquiescence" (n. 43), 158, citing *Honduras Borders (Guatemala v. Honduras)* (1933) 2 RIAA 1309 (January 23).

[77] MacGibbon, "Scope of Acquiescence" (n. 43), 158–59.

[78] *Ligitan and Sipadan* case, para. 134.

[79] *Ligitan and Sipadan* case, para. 136.

[80] *Ligitan and Sipadan* case, para. 137.

[81] *Ligitan and Sipadan* case, para. 147, citing the *Minquiers and Ecrehos* case, 71.

hand, can be legally relevant in the case of very small islands."[82] The Court then stated that it was of the view that the same considerations apply in the present case involving Malaysia and Indonesia. This muddies the waters somewhat, especially when we consider that in the *Pedra Branca/Batu Puteh* case (discussed in the following) the Court placed considerable weight on Singapore's investigations and reporting on maritime hazards and shipwrecks in the vicinity of the disputed islands in that case.

Aside from this apparent discrepancy in the ICJ's treatment of maritime/navigational aids, other similarities with the *Ecrehos* case can be discerned in the *Ligitan and Sipadan* case. For example, the Court noted that

> the activities relied upon by Malaysia, both in its own name and as successor State of Great Britain, are modest in number but that they are diverse in character and include legislative, administrative and quasi-judicial acts. They cover a considerable period of time and show a pattern revealing an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands. The Court moreover cannot disregard the fact that at the time when these activities were carried out, neither Indonesia nor its predecessor, the Netherlands, ever expressed its disagreement or protest.[83]

Pedra Branca/Pulau Batu Puteh Case (2008)

Another case brought before the ICJ by Malaysia against a neighboring state, namely, Singapore, concerned *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore).* Like the previous case involving Malaysia (see earlier), this ICJ judgment is significant for the purposes of the present analysis because it relates to claims made by littoral states over relatively remote, minute, and uninhabited islands situated within the South China Sea region. From a doctrinal perspective, the judgment also highlights how a combination of lack of protest, acquiescence, and arguably acceptance on the part of the state holding the original title (in this case, Malaysia) in the face of acts of possession *à titre de souverain* by the opposing state (in this case, Singapore) can be sufficient to result in a change of sovereignty over the disputed territory. As Schrijver and Prislan initially note, "the Court upheld the proposition that a State's peaceful and uninterrupted display of sovereignty could displace an established legal title of another State,"[84] although they then caution that "this was not on the ground of any general doctrine of prescription, that is, by mere passage of time, but because an extensive absence of a reaction may amount to acquiescence."

Thus, as the Court held:

> Under certain circumstances, sovereignty over territory might pass as a result of the failure of the State which has sovereignty to respond to conduct *à titre de souverain* of the other State or, as Judge Huber put it in the *Island of Palmas* case, to concrete manifestations of the display of territorial sovereignty by the other State (*Island of*

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[82] *Ligitan and Sipadan* case, para. 147, citing *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment, Merits, [2001] ICJ Rep. 40 (March 16), para. 197.

[83] *Ligitan and Sipadan* case, para. 148.

[84] Nico J. Schrijver and Vid Prislan, "Cases Concerning Sovereignty over Islands before the International Court of Justice and the Dokdo/Takeshima Issue," *Ocean Development & International Law* 46, no. 4 (2015): 281–314, 299, citing *Pedra Branca/Pulau Batu Puteh* case, paras. 120–21.

> *Palmas Case (Netherlands/United States of America)*, Award of 4 April 1928, RIAA, Vol. II, (1949) p. 839). Such manifestations of the display of sovereignty may call for a response if they are not to be opposable to the State in question. The absence of reaction may well amount to acquiescence. The concept of acquiescence
>
> > "is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent …"
> >
> > (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 305, para. 130).
>
> That is to say, silence may also speak, but only if the conduct of the other State calls for a response.[85]

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This reasoning suggests that subsequent activities by a competing state claimant deemed sufficient to amount to a display of sovereignty over disputed territory, which are not then protested by the state holding original title sufficiently early and often, raise the risk of the latter (original) state being deemed acquiescent to the former (competing) state's takeover of sovereignty. This is even though these subsequent activities by the competing state do not in themselves meet the temporal requirement for prescription of the disputed territory under international law.

On the other hand, the ICJ held in the *Pedra Branca/Pulau Batu Puteh* case:

> Critical for the Court's assessment of the conduct of the Parties is the central importance in international law and relations of State sovereignty over territory and of the stability and certainty of that sovereignty. Because of that, any passing of sovereignty over territory based on the conduct of the Parties, as set out above, must be manifested clearly and without any doubt by that conduct and the relevant facts. That is especially so if what may be involved, in the case of one of the Parties, is in effect the abandonment of sovereignty over part of its territory.[86]

Click here to enter text.

This conclusion confirms both the high evidentiary threshold to be met and that the burden of proof for meeting this threshold lies squarely with the state claiming subsequent acquisition of sovereignty through prescriptive acts amounting to conduct *à titre de souverain.* As Schrijver and Prislan summarize, "the passing of sovereignty as a result of acquiescence is subject to an exacting evidentiary standard and, in principle, there is a presumption in favor of maintaining the sovereignty in the hands of the initial title-holder."[87]

Reverting to the facts of the *Pedra Branca/Pulau Batu Puteh* case, it is notable that, to begin with, the Court was of the clear view that

the issue of the original title in the present case is the fact that throughout the entire history of the old Sultanate of Johor, there is no evidence that any competing claim had ever been advanced over the islands in the area of the Straits of Singapore.[88]

Indeed, the ICJ confirmed this initial finding as follows:

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[85] *Pedra Branca/Pulau Batu Puteh* case, para. 121.

[86] *Pedra Branca/Pulau Batu Puteh* case, para. 122.

[87] Schrijver and Prislan, "Cases Concerning Sovereignty" (n. 84), 299.

[88] *Pedra Branca/Pulau Batu Puteh* case, para. 62.

> If this conclusion was valid with reference to the thinly populated and unsettled territory of Eastern Greenland, it should also apply to the present case involving a tiny uninhabited and uninhabitable island, to which no claim of sovereignty had been made by any other Power throughout the years from the early sixteenth century until the middle of the nineteenth century.[89]

Click here to enter text.

However, the subsequent conduct of both sides to this dispute was adjudged to be sufficiently persuasive to overturn the Court's confirmation of original title vested in the Sultanate of Johor and, thus, initial presumption of sovereignty in favor of Malaysia.

In particular, the Court found that Singaporean conduct in relation to, *inter alia*, the investigation of shipwrecks in the waters around the disputed island,[90] the exercise of exclusive control by Singapore over official visits to this island,[91] the installation by Singapore of military communications equipment on the island,[92] and proposed reclamation by Singapore to extend the island[93] comprised significant acts *à titre de souverain*—especially when combined with several Malaysian acts or omissions that implied Singaporean sovereignty over these disputed islands. As the Court itself concluded, "[w]ithout being exhaustive, the Court recalls their investigation of marine accidents, their control over visits, Singapore's installation of naval communication equipment and its reclamation plans, all of which include acts *à titre de souverain*, the bulk of them after 1953."[94] Malaysia, on the other hand, "did not respond in any way to that conduct, or the other conduct with that character identified earlier in this judgment, of all of which (but for the installation of the naval communication equipment) it had notice."[95]

This led the Court to the opinion that

> the relevant facts, including the conduct of the Parties, previously reviewed and summarized in the two preceding paragraphs, reflect a convergent evolution of the positions of the Parties regarding title to Pedra Branca/Pulau Batu Puteh. The Court concludes, especially by reference to the conduct of Singapore and its predecessors *à titre de souverain*, taken together with the conduct of Malaysia and its predecessors including their failure to respond to the conduct of Singapore and its predecessors, that by 1980 sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore.[96]

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Under these circumstances, it is perhaps unsurprising that Singapore was able to both fulfill the burden of proof and meet the high threshold of evidentiary requirement to allow the Court

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[89] *Pedra Branca/Pulau Batu Puteh* case, para. 66.

[90] *Pedra Branca/Pulau Batu Puteh* case, paras. 231–34.

[91] *Pedra Branca/Pulau Batu Puteh* case, paras. 235–39.

[92] *Pedra Branca/Pulau Batu Puteh* case, paras. 247–48.

[93] *Pedra Branca/Pulau Batu Puteh* case, paras. 249–50.

[94] *Pedra Branca/Pulau Batu Puteh* case, para. 274.

[95] *Pedra Branca/Pulau Batu Puteh* case, para. 274.

[96] *Pedra Branca/Pulau Batu Puteh* case, para. 276.

to ultimately conclude that "sovereignty over Pedra Branca/Pulau Batu Puteh belongs to Singapore."[97]

Conclusions

The implications of the preceding analysis for third-party settlement of disputes, especially those involving international adjudication over the disputed sovereignty of islands, are not positive. Any state contemplating recourse to such judicial settlement, whether in the form of an international court or an arbitral tribunal, already must contend with many institutional and procedural issues that are fraught with uncertainties. These inherent institutional and procedural uncertainties are exacerbated in cases involving disputed territorial sovereignty by the international judicial reliance on the *relative strength* of competing claims, coupled with a *low legal threshold* applied to the factual evidence adduced for the *initial* claim as determined by the international court or tribunal. This means that no state (or its opponents, for that matter) can be certain or sure that any historical evidence it adduces will suffice to be held to be the first of the competing claims to sovereignty and thereby meet the *low legal threshold* applied by the adjudicators as to its *relative strength* in relation to evidence submitted to substantiate the competing claims of its opponents. Moreover, should a claim by a state be deemed to be subsequent to any original title initially vested in the "first-mover" state, then this second claim will be required to fulfill the *burden of proof* and will thereby be subjected to a *higher legal threshold* in the evidence adduced than was the original, "first-mover" state.

A further source of uncertainty revolves around the notion of acquiescence by any claimant state to disputed territory, but especially disputes over remote and/or uninhabited islands. Thus, even a state holding original title, as did Johor/Malaysia in the *Pedra Branca/Batu Puteh* case, may contrive to lose its initial advantage if it is deemed to have acquiesced to subsequent activities constituting displays of sovereignty that are undertaken by a rival claimant state, as did Singapore. This is the case even if these competing activities themselves fall short of the requirements for *prescription* of the disputed territory from the holders of the original title for that territory.

This set of substantial legal uncertainties, when juxtaposed against the institutional and procedural issues alluded to above, does not augur well for the overall resort by states to peaceful international dispute settlement mechanisms, particularly those that involve third-party decisions and even less those that are beholden to adjudication by an international court or arbitral tribunal. Instead, it is more likely to result in states deciding to undertake unilateral or "self-help"-type actions to consolidate their sovereignty claims over disputed territory, especially small islands and/or those located further away from their mainland coastlines. Indeed, reverting to our initial categorization of three sets of disputes arising from such territorial claims over remote and/or uninhabited islands, it is the third set of issues that now becomes pertinent—namely, "what is the applicable international law relating to the nature and type of any *unilateral* activities that the claimant States can undertake in the overlapping claims for maritime jurisdiction zones surrounding these offshore features?"

Moreover, the scope for such unilateral action to escalate into threats of the use of force and, ultimately, the use of force itself is, therefore, also greater. This is notwithstanding the fact that the relevant case law authorities on the prohibition against the threat and/or use of force

[97] *Pedra Branca/Pulau Batu Puteh* case, para. 277.

under international law in the maritime sphere set a very low threshold for a finding of their breach or violation, summarized here as follows:

1. The dim view taken by the ICJ (in its inaugural decision) of aggressive actions undertaken by UK Royal Navy ships in their passage through the eponymous channel is displayed in the *Corfu Channel* case (1949) where the ICJ chastised the United Kingdom for trying to characterize the Operation Retail mine-sweeping exercise as, *inter alia*, merely being a self-help-type activity, declaring that "the action of the British Navy constituted a violation of Albanian sovereignty."[98]
2. The very low threshold placed upon threatening behavior by Surinamese naval vessels against a commercial vessel conducting exploratory drilling on behalf of Guyana, encapsulated by an order to leave the disputed waters "within 12 hours," along with a warning that if the vessel did not comply "the consequences would be theirs."[99] These Surinamese actions were deemed to constitute "a threat of the use of force in breach of the Convention [on the Law of the Sea], the UN Charter, and general international law"[100] by a 2007 award of an arbitral tribunal established pursuant to Article 287, and in accordance with Annex VII of UNCLOS.

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While these authoritatively rendered international court and tribunal decisions raise hopes that rival claimant states to remote and/or uninhabited islands will refrain from issuing threats and/or the use of force against each other, the overall prognosis is not one that gives great comfort to those committed to peaceful endeavor and international cooperation on these matters.Click here to enter text.

[98] *Corfu Channel Case (United Kingdom v. Albania)*, Judgment (Merits), [1949] ICJ Rep. 4 (April 9), 35.

[99] See remarks attributed to Major J. P. Jones in *Delimitation of the Maritime Boundary (Guyana v Suriname)*, Award, (2007) 30 RIAA 1, para. 436 (*Guyana v Suriname* case).

[100] *Guyana v Suriname* case, para. 488.