Moving towards coexistence and cooperation: the Spratly Islands and international law

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PART I

Coexistence: Setting out Predictable Territorial Order and Permissible Scope for Unilateralism

2 The Underlying Territorial Dispute

2.1 INTRODUCTION

Territory remains an indispensable component of statehood in this contemporary world even after over 370 years of the Peace of Westphalia since the emergence of modern sovereign States.[1] The influence of territorial disputes cannot be overstated because these disputes fundamentally shape and sometimes shake the foreign relations between relevant States. This is due to various factors such as pressures of national sentiment and the strategic significance of areas in question.[2] The territorial dispute in the Spratly Islands is one illustrative example, which has caused tensions in diplomatic relations between the disputant States consisting of China, Vietnam, the Philippines and Malaysia.[3] Moreover, the territorial dispute is an underlying cause of the maritime dispute in this region, as according to the legal principle of '*la terre domine la mer*', a State can only claim maritime entitlements over specific marine areas when it enjoys territorial sovereignty over certain land territories.[4] Resolving the underlying territorial dispute would alleviate tensions and serve as a prerequisite for settling the maritime dispute, thereby creating a relatively peaceful environment for the sustainable use and

[1] See The Peace of Westphalia, adopted 24 October 1648, Article 8(1): 'Constitutional Position of Imperial Estates/ Confirmation of Rights'; Montevideo Convention on the Rights and Duties of States, adopted 26 December 1933, entered into force 26 December 1934, Article 1; N. Schrijver, The Changing Nature of State Sovereignty, 70 *BYIL* (1999), 65-66; M.G. Kohen and M. Hébié, Introduction to the Research Handbook on Territorial Disputes in International Law, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 1.

[2] For instance, territorial disputes may increase States' chances of military conflicts. See S.F. Abramson & D.B. Carter, The Historical Origins of Territorial Disputes, 110 *American Political Science Review* (2016), 675. Also see J. Crawford, *Brownlie's Principles of Public International Law* (OUP 9th ed. 2019), 203.

[3] Brunei is not a party to the territorial dispute discussed here. Albeit Brunei claims sovereign rights over Louisa Reef, it claims Louisa Reef to be a submerged feature located on its continental shelf. See B.K. Murphy, Dangerous Ground: the Spratly Islands and International Law, 1 *OCLJ* (1995), 208.

[4] North Sea Continental Shelf (Federal Republic of Germany/Denmark), Judgment of 20 February 1969 (ICJ), para.96. Also see C. van Bijnkershoek, *De Dominio Maris Dissertatio* (OUP 2nd ed. 1744) (translated by R. Van Deman Magoffin), 43.

management of the Spratly Islands area. Hence, the legal analysis of the territorial dispute is necessary if the role of international law in the management of the Spratly Islands area is to be discussed. In light of this, this chapter mainly addresses the question of whether the legal arguments put forward by the disputant States for claiming territorial sovereignty over the Spratly Islands are substantiated under international law.

Despite the numerous discussions which this territorial dispute has attracted,[5] scholarly opinions vary a lot on this issue. Some claim that none of the territorial claims of the disputant States is legally strong under international law,[6] while others argue that one of these States has the strongest legal argument.[7] The discrepancy between these opinions is perhaps understandable considering that this territorial dispute, involving multiple States and various maritime features, relates to a complicated web of factual and legal issues. Moreover, some arguments invoked by the disputant States are based on 'ancient oriental concepts of ownership' and 'imaginative interpretations of contemporary international law' and thus are difficult to be evaluated under contemporary international law, which therefore also contribute to the discrepancy.[8]

To overcome these difficulties, this chapter employs the dichotomy of titles and *effectivités* as the analytical framework, which is perhaps the first attempt of this kind in the literature on the Spratly Islands disputes. The titles/*effectivités* dichotomy is built upon the special nexuses between these two concepts and is a well-accepted pattern of analysis in cases involving territorial disputes (section

[5] See *e.g.*, H. Chiu and C.H. Park, Legal Status of the Paracel and Spratly Islands, 3.1 *ODIL* (1975); D. Heinzig, *Disputed Islands in the South China Sea: Paracels, Spratlys, Pratas, Macclesfield Bank* (Otto Harrassowitz. 1976); R. Haller-Trost, *The Spratly Islands: A Study on the Limitations of International Law* (Canterbury: Centre of South-East Asian Studies. 1990); G. Valero, Spratly Archipelago Dispute: Is the Question of Sovereignty Still Relevant?, 18 *Marine Policy* (1994); B.K. Murphy, Dangerous Ground: the Spratly Islands and International Law, 1 *OCLJ* (1995); D.J. Dzurek, *The Spratly Islands Dispute: Who's On First?* (IBRU. 1996); M. Koo, *Scramble for the Rocks: The Disputes over the Dokdo /Takeshima, Senkaku /Diaoyu, and Paracel and Spratly Islands* (ProQuest Dissertations Publishing. 2005); B. Womack, The Spratlys: from Dangerous Ground to Apple of Discord, 33 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* (2011); H. Chen, Territorial Disputes in the South China Sea under the San Francisco Peace Treaty, 50(3) *Issues & Studies* (2014); M. Hasan and H. Jian, Spratly Islands Dispute in the South China Sea: Potential Solutions, 12(1) *Journal of East Asia and International Law* (2019).

[6] M.J. Valenicia, The Spratly Islands Dispute, 166 *Far Eastern Economic Review* (2003), 21.

[7] For literature supporting that China has the strongest legal argument under international law, see *e.g.*, D.J. Dzurek, *The Spratly Islands Dispute: Who's On First?* (IBRU. 1996), 54. For literature supporting Vietnam, see *e.g.*, M. Chemillier-Gendreau, *Sovereignty over the Paracel and Spratley Islands* (Springer. 2000), 137-138. For literature supporting the Philippines and Malaysia, see *e.g.*, B.K. Murphy, Dangerous Ground: the Spratly Islands and International Law, 1 *OCLJ* (1995), 200-208.

[8] L.G. Cordner, The Spratly Islands Dispute and the Law of the Sea, 25 *ODIL* (1994), 62.

2.2).[9] This chapter then sorts out the legal arguments advanced by the disputant States in chronological sequence against the historical background of the territorial dispute involving the Spratly Islands (section 2.3). These legal arguments are restated according to the law of territory. This chapter further appraises whether the disputant States' territorial claims based on the titles of territorial sovereignty and *effectivités* (sections 2.4-2.8) are substantiated in contemporary international law. Based on the appraisal results, the titles/*effectivités* analytical framework is applied to reach a final conclusion about the territorial situation of the Spratly Islands as it is today (section 2.9).

Two caveats are worth mentioning. First, although the author has been careful not to overlook any available and relevant official documents and secondary literature, the conclusion made in this chapter may still be subject to the risk of not depicting a complete picture of this territorial dispute provided that evidence of significant importance might not be available to the public owing to confidentiality or other reasons. Second, the scope of this chapter is limited to the territorial dispute over the nearly twenty islands in the Spratly Islands area.[10]

2.2 Analytical Framework: Titles/Effectivités Dichotomy

In international law, the notion of 'title' is used to denote the source or root of a right over territory.[11] A French term '*effectivité*' is

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[9] M.G. Kohen, Titles and Effectivités in Territorial Disputes, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 146.

[10] There are at least 19 islands in the Spratly Islands area: Itu Aba Island, Thitu Island, West York Island, Spratly Island, North-East Cay, South-West Cay, Sin Cowe Island, Nanshan Island, Sand Cay, Loaita Island, Swallow Reef, Namyit Island, Amboyna Cay, Flat Island, Fiery Cross Reef, Mckennan Reef, Gaven Reef (North), Cuarteron Reef, and Johnson Reef. This list is based on the *South China Sea Arbitration* award: first, the tribunal has conducted a detailed examination on the status of eleven (11) maritime features identified in the Philippines' submissions and concluding that Scarborough Shoal (not a part of the Spratly Islands), Fiery Cross Reef, Mckennan Reef, Gaven Reef (North), Cuarteron Reef and Johnson Reef are high-tide elevations; and second, by passage, the tribunal has confirmed that Itu Aba Island, Thitu Island, West York Island, Spratly Island, North-East Cay, South-West Cay, Sin Cowe Island, Nanshan Island, Sand Cay, Loaita Island, Swallow Reef, Namyit Island, Amboyna Cay and Flat Island are high-tide elevations. See South China Sea Arbitration (The Philippines v. China), Award of 12 July 2016 (PCA), paras.382 (regarding Fiery Cross Reef, Mckennan Reef, Gaven Reef (North), Cuarteron Reef and Johnson Reef), 401 (regarding Itu Aba Island), 402 (regarding Thitu Island), 403 (regarding West York Island), 404 (regarding Spratly Island), 405 (regarding North-East Cay), 406 (regarding South-West Cay), 407 (regarding Amboyna Cay, Flat Island, Loaita Island, Namyit Island, Nanshan Island, Sandy Cay, Sin Cowe Island, and Swallow Reef).

[11] Frontier Dispute (Burkina Faso/Republic of Mali), Judgment of 22 December 1986 (ICJ), para.18.

employed to refer to the act of exercise of State authority over territory.[12] A title arises not simply by physical occupation or *effectivités* but through acquisition in accordance with international law.[13] Several international cases have shown that the possessor who exercises State authority over a disputed territory is not necessarily the title-holder.[14] As rightly pointed out by Marcelo Kohen, '[i]nternational law is indeed richer than the simplistic idea that actual possession is tantamount to sovereignty'.[15]

The ICJ has described four types of relationship between these two concepts - 'title' and '*effectivité*' - in *Burkina Faso/Republic of Mali*.[16] First, in circumstances where the exercise of State authority corresponds to the right to territory, *effectivités* confirms the territorial title. Second, in the event of incompatibility between *effectivités* and a legal title, the preference is given to the title, and *effectivités* are deemed unlawful. Third, in the absence of any legal title to the territory, *effectivités* may itself be constitutive of a territorial title. In this instance, effective occupation of *terra nullius* is itself one kind of the sources or roots of territorial sovereignty. Fourth, if a legal title is obscure, *effectivités* can play a critical role in clarifying and interpreting the extent of that title.

Apart from the above four types, Marcelo Kohen has added a fifth type of the titles/*effectivités* relationship. That is, when a legal title is not duplicated by any *effectivité*, the absence of *effectivités* does not prevent this title from taking effect.[17] This fifth type can be read as a normal corollary to the second type, according to which the legal effect of a title is not adversely impacted by the presence of incongruous *effectivités*, not to mention the absence of *effectivités*. Table 2-1 summarizes five types of the titles/*effectivités* relationship.

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[12] See M.G. Kohen, Titles and Effectivités in Territorial Disputes, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 145; M.N. Shaw, *International Law* (CUP. 8th ed. 2017), 379.
[13] J. Crawford, *Brownlie's Principles of Public International Law* (OUP 9th ed. 2019), 204.
[14] See *e.g.*, Clipperton Island (France v. Mexico), Decision of 28 January 1931; Legal Status of Eastern Greenland (Denmark v. Norway), Judgment of 5 April 1933, PCIJ Series A/B No. 53; Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment of 3 February 1994 (ICJ); Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment of 10 October 2002 (ICJ).
[15] M.G. Kohen, Titles and Effectivités in Territorial Disputes, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 148.
[16] Frontier Dispute (Burkina Faso/Republic of Mali), Judgment of 22 December 1986 (ICJ), para.63.
[17] M.G. Kohen, Titles and Effectivités in Territorial Disputes, in in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 164.

Table 2-1: Five types of the titles/effectivités relationship

Type No.	*Existence of Title*	*Existence of Effectivité*	*Compatibility between Title and Effectivité*	*Preference or Consideration Given to*	*The Role Played by Effectivité*
1.	Yes	Yes	Yes	Title	Confirmatory
2.	Yes	Yes	No	Title	N/A
3.	No	Yes	N/A	Effectivité	Constitutive
4.	Obscure	Yes	N/A	Effectivité	Interpretative
5.	Yes	No	N/A	Title	N/A

Notes: 'N/A' means non-applicable.

This table allows several remarks. First, a legal title always prevails over *effectivités*. Where *effectivités* corresponds to the title to territory, *effectivités* are confirmatory of that title. In contrast, e*ffectivités* contradictory to an existing title are unlawful, which have been called '*effectivités* contra legem' in the *Cameroon/Nigeria* judgment.[18] Second, in the absence of a title, the role of *effectivités* becomes significant and can be constitutive of a title. In this circumstance, *effectivités* become a 'law-establishing mechanism'.[19] Third, where a legal title, or more precisely, the evidence of a legal title, is obscure or equivocal, *effectivités* can play a probative or interpretative role in clarifying the extent of that title.[20] These remarks accord with the general statement made by the most recent arbitral award on territorial disputes - the 2017 *Croatia/Slovenia* award - that 'legal title takes precedence over effectivités. Where no legal title can be established, or where legal title is established but not with sufficient precision to establish the exact location of the boundary, the *effectivités* play a crucial role'.[21]

Furthermore, as showcased in *Malaysia/Singapore*, a legal title previously established may lapse due to a common understanding or tacit agreement developed between the disputant States, and in this circumstance, *effectivités* can come into play. In *Malaysia/Singapore*, the ICJ first concluded that the predecessor of Malaysia - the Sultan of Johor - obtained an original or ancient title to the disputed island (Pedra Branca/Pulau Batu Puteh), but Malaysia lost this title later since it failed to protest against

[18] Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment of 10 October 2002 (ICJ), para.223.
[19] M.N. Shaw, *International Law* (CUP. 8th ed. 2017), 382.
[20] In Marcelo Kohen's opinion, the obscurity of a legal title refers to the obscurity of evidence. See M.G. Kohen, Titles and Effectivités in Territorial Disputes, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 164.
[21] Arbitration between the Republic of Croatia and the Republic of Slovenia, Final Award of 29 June 2017 (PCA), para.340.

Singapore's *effectivités* over the island.[22] In particular, Malaysia's official statement in 1953 indicated that it did not claim ownership of the disputed island.[23] The ICJ considered that the lack of protest and the 1953 statement constituted an 'evolving understanding shared by the Parties'[24] or 'a convergent evolution of the positions of the Parties'.[25] In the ICJ's view, territorial sovereignty may 'pass' as a result of a State's failure to respond to conduct *a` titre de souverain* of the other State,[26] as the absence of reaction 'may well amount to acquiescence' and the concept of acquiescence 'is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent'.[27] As a result, the ICJ concluded that the territorial sovereignty over the disputed island had 'passed' from Malaysia to Singapore.[28] In the author's view, when Malaysia's original title had lapsed, the situation of the case transformed into the third type of the titles/*effectivités* relationship, where in the absence of any legal title, *effectivités* could be constitutive of a territorial title.

Based on the five types of relationships described in Table 2-1, the dichotomy of titles and *effectivités* is a well-accepted pattern of analysis in cases involving territorial disputes.[29] The only case that has departed from this analytical framework is the 2002 *Eritrea/Ethiopia* arbitral award,[30] but this award has not been

[22] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), para.276.
[23] *Id*., para.275.
[24] *Id*., para.224.
[25] *Id*., para.276.
[26] *Id*., para.121.
[27] *Id*. Also see Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment of 12 October 1984 (ICJ), para.130.
[28] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), para.276.
[29] See *e.g*., Frontier Dispute (Burkina Faso/Republic of Mali), Judgment of 22 December 1986 (ICJ), para.63; Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment of 3 February 1994 (ICJ), paras.75-76; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment of 10 October 2002 (ICJ), para.68; Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment of 17 December 2002 (ICJ), para.126; Frontier Dispute (Benin/Niger), Judgment of 12 July 2005 (ICJ), para.77; Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007 (ICJ), para.152; Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012 (ICJ), para.66; Arbitration between the Republic of Croatia and the Republic of Slovenia, Final Award of 29 June 2017 (PCA), para.340.
[30] Decision regarding delimitation of the border between Eritrea and Ethiopia, 13 April 2002, Vol. XXV, para.3.14. (holding that subsequent conduct mainly *effectivités* might supersede a title prescribed by the relevant treaty provisions) Also see M.G. Kohen, The Decision on The Delimitation of The Eritrea/Ethiopia Boundary of 13 April 2002: A Singular Approach to International Law Applicable to International Law Applicable to Territorial Disputes, in *Promoting Justice, Human Rights and Conflict Resolution Through International Law* (M.G. Kohen ed. 2007), 770.

followed by any further judicial decision.[31] This chapter will use the titles/*effectivités* dichotomy as the framework to analyze the territorial dispute in the Spratly Islands area. One point is worth mentioning before the analysis. Under contemporary international law, the list of titles of territorial sovereignty has grown beyond the orthodox five modes of acquisition reflecting Roman law (namely effective occupation of *terra nullius*, acquisitive prescription, cession, accretion and subjugation or conquest).[32] Tailored to the Spratly Islands setting, the arguments advanced by the disputant States also go beyond the orthodox five modes of acquisition and concern historic title, *effectivités* of *terra nullius*, boundary treaties, cession, and discovery of *terra nullius*. A more elaborate analysis of the applicable law of these titles and their application to the Spratly Islands setting is provided in sections 2.4-2.8.

2.3 LEGAL ARGUMENTS OF THE DISPUTANT STATES

To better understand the legal arguments advanced by the disputed States, this section presents and analyses them in chronological sequence against the historical background of the territorial dispute involving the Spratly Islands. It then gives a summary of these legal arguments.

Among the four disputant States, China claimed to be the first one to discover the Spratly Islands.[33] There is little dispute that ocean activities especially navigation conducted by the Chinese people in the South China Sea date back to at least 225-230 A.D.[34] Several Chinese official records mentioned the islands therein to be located in an area called 'Zhang Hai' ('rising sea'), and at least since Song Dynasty (960-1279), geographic names had been given to the Spratly Islands ('Qian Li Chang Sha', or 'Thousands of Miles of Long Sand').[35]

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[31] M.G. Kohen, Titles and Effectivités in Territorial Disputes, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 167.

[32] For an account of the types of titles of territorial sovereignty, see M.G. Kohen, Titles and Effectivités in Territorial Disputes, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 146-157; M.N. Shaw, *International Law* (CUP. 8th ed. 2017), 367-387; J. Crawford, *Brownlie's Principles of Public International Law* (OUP 9th ed. 2019), 203-230.

[33] China, White Paper: China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea (13 July 2016), para.3.

[34] D. Heinzig, *Disputed Islands in the South China Sea: Paracels, Spratlys, Pratas, Macclesfield Bank* (Otto Harrassowitz. 1976), 22.

[35] See M. Samuels, *Contest for the South China Sea* (Taylor & Francis. 1982), 10-13; Guangdong Province Geographic Names Committee, *The Collection of the Geographic*

During the seventeenth century, the Spratly Islands became known to the European navigators.[36] However, it was not until the nineteenth century that the UK became the first European power to conduct official hydrographical surveys in the Spratly Islands which it called 'Dangerous Ground' due to the presence of countless reefs and shoals.[37] During surveys in the 1860s, the crew of British surveying ships encountered Chinese fishermen from Hainan on some islands thereof.[38]

In 1883, the German government sent a military detachment to the Spratly Islands to carry out survey work, which triggered protests from the Chinese government.[39] In the end, Germany discontinued its survey work under pressure from the Chinese government.[40]

In 1887, as a result of the Tokin War for deciding whether France would supplant China's control of northern Vietnam, China and France concluded a treaty to delimit the frontier between China and northern Vietnam. The third clause of this treaty used the Paris meridian 105°43'E as the demarcation line and allocated the islands east of this line to China.[41] This treaty has only specified the starting point of the demarcation line, namely 'the eastern point of the island of Tcha's Kou, or Ouan Chan (Tra Co)', but not the ending point.[42] The Spratly Islands area lies east of the demarcation line if it could

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Names of the Islands in South China Sea (Nan Hai Zhu Dao Di Ming Zi Liao Hui Bian) (Guangdong Province Map Publishing House. 1987), 400.

[36] The maritime features in this area were called 'Archipelago of Reefs' by Western navigators. See D. Hancox, *Secret Hydrographic Surveys in the Spratly Islands* (ASEAN Academic Press. 1999), 'Foreword', 4.

[37] The first systematic attempt to chart the Spratly Islands was in 1812 under the instructions of Caption James Horsburgh, a hydrographer to the British East India Company. The chart resulting from this survey was published in 1821, which became the basis for other charts which were published later by the hydrographic offices all around the world. The UK published a chart comprehensively showing the main reefs in this area in 1888. Until 1936, British surveys were the sources of most of the publicly available hydrographical information concerning the Spratly Islands. See *id*., 30, 161.

[38] See *id*., 10. Also see D. Heinzig, *Disputed Islands in the South China Sea: Paracels, Spratlys, Pratas, Macclesfield Bank* (Otto Harrassowitz. 1976), 23. China, White Paper (13 July 2016), para.15. Moreover, some historians claim that a Chinese fisherman, named Zaide Fu, was the first person from Hainan to fish in the Spratly Islands in 1286. See W. Zhou & L. Tang, *Hainan Tianshu-Hainan Fishermen's Cultural Explanation of 'Geng Lu Bu'* (Kunlun Publisher. 2015), 4, 227.

[39] See D. Heinzig, *Disputed Islands in the South China Sea: Paracels, Spratlys, Pratas, Macclesfield Bank* (Otto Harrassowitz. 1976), 25-26. Also see David Whiting, The Spratly Islands Dispute and the Law of the Sea, 26 *Denver Journal of International Law and Policy* (1998), 897, 900-901.

[40] D. Heinzig, *Disputed Islands in the South China Sea: Paracels, Spratlys, Pratas, Macclesfield Bank* (Otto Harrassowitz. 1976), 25-26, 72. Also see M. Samuels, *Contest for the South China Sea* (Taylor & Francis. 1982), 52.

[41] Clause 3 of the China-France Treaty on the Delimitation the Frontier between China and Northern Vietnam (26 June 1887). Also see M. Chemillier-Gendreau, *Sovereignty over the Paracel and Spratley Islands* (Springer. 2000), 36.

[42] *Id*.

extend southwards to reach into the South China Sea.[43]

The first military occupation of the islands happened in the 1930s when France, as a colonial power in Asia, proclaimed the occupation of several islands in the Spratly Islands by the French Navy under a decree of 26 July 1933.[44] The French government based its territorial claim over the rule of discovery of *terra nullius*.[45] Nevertheless, France admitted that when it occupied the islands, it found Chinese people living on some of those islands.[46] China protested against France's occupation, claiming that only Chinese fishermen lived on these islands and that they belonged to China.[47] France offered to settle this dispute with China by submitting the case to arbitration.[48] However, no record of any reply from the Chinese government has been found.

The French occupation did not last long. Japan occupied the Spratly Islands area by the end of 1939 and renamed it the 'Shinnan Gunto' archipelago, which constituted part of the Asian beginnings of what would become WWII.[49] Following the surrender of Japan at the conclusion of the war in 1945, the Japanese forces withdrew from the Spratly Islands.[50] In 1946, China sent military fleets to occupy the Spratly Islands by erecting the steles, measuring and scouting the islands.[51] According to the statement of the commissioner carrying

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[43] C.H. Park, The South China Sea Disputes: Who Owns the Islands and the Natural Resources?, 5 *ODIL* (1978), 33 ('China also relies in part on an important boundary pact it signed with Vietnam in 1887. This agreement stipulated that all islands situated east of a specified line-as the Paracels and the Spratlies were belonged to China.'); D.J. Dzurek, *The Spratly Islands Dispute: Who's On First?* (IBRU. 1996), 9 ('The 1887 treaty has been cited as evidence against French and Vietnamese claims to the Paracel and Spratly Islands.').

[44] Journal officiel de la Republique Francaise, No. 172 (25 July 1933), 7794.

[45] Note dated 26 November 1928 addressed to the Under-Directorate for Asia and Oceania regarding the Spratly Island or Strom Island, reproduced in: M. Chemillier-Gendreau, *Sovereignty over the Paracel and Spratley Islands* (Springer. 2000), 'Annex 19'.

[46] D. Heinzig, *Disputed Islands in the South China Sea: Paracels, Spratlys, Pratas, Macclesfield Bank* (Otto Harrassowitz. 1976), 28.

[47] The protest from China was made through its ambassador WeiJune Gu. See Z. Han, *The Collection of the Historical Materials of the Islands in South China Sea (Wo Guo Nan Hai Zhu Dao Shi Liao Hui Bian)* (in Chinese) (Eastern Publishing House. 1988), 261. Also see H. Chen, Territorial Disputes in the South China Sea under the San Francisco Peace Treaty, 50(3) *Issues & Studies* (2014), 176-177.

[48] See D. Heinzig, *Disputed Islands in the South China Sea: Paracels, Spratlys, Pratas, Macclesfield Bank* (Otto Harrassowitz. 1976), 29. France's suggestion to settle the dispute with China was also confirmed in the 1975 Vietnamese White Paper. See Republic of Vietnam, White Paper (1975), Chapter III.

[49] See D.J. Dzurek, *The Spratly Islands Dispute: Who's On First?* (IBRU. 1996), 11. Also see B.K. Murphy, Dangerous Ground: the Spratly Islands and International Law, 1 *OCLJ* (1995), 191-192.

[50] See D. Hancox, *Secret Hydrographic Surveys in the Spratly Islands* (ASEAN Academic Press. 1999), 151. Also see B.K. Murphy, Dangerous Ground: the Spratly Islands and International Law, 1 *OCLJ* (1995), 192.

[51] See H. Chen, Territorial Disputes in the South China Sea under the San Francisco Peace Treaty, 50(3) *Issues & Studies* (2014), 178. Also see D. Heinzig, *Disputed Islands in the South China Sea: Paracels, Spratlys, Pratas, Macclesfield Bank* (Otto Harrassowitz. 1976), 31.

out this assignment, Yunyu Mai, the Chinese government controlled the main islands (including Itu Aba) in this area and claimed that the control of the main islands should be regarded as the control of the whole archipelago.[52]

In 1947, China formally incorporated the Spratly Islands into Guangdong Province.[53] Moreover, in the same year, China published the first U-shaped line map with the title of 'Map of the Locations of the South China Sea Islands' ('Nan Hai Zhu Dao Wei Zhi Tu'), using the U-shaped line to enclose a vast area of the South China Sea, including the whole of the Spratly Islands.[54] This map would play a prominent role in the discussion on the South China Sea in the 21st century. Yet, China has never published the geographic coordinates specifying the precise location of the U-shaped line.[55]

As a result of the 1951 San Francisco Peace Conference, which was convened to solve territorial issues that remained in Asia in the wake of WWII, Japan formally renounced its territorial claims over the Spratly Islands by signing the Peace Treaty.[56] Nevertheless, this Peace Treaty did not mention who received the territorial sovereignty over the Spratly Islands after Japan's renouncement.[57] France was a participant in this conference, but it did not use this opportunity to reassert its territorial claims.[58] Rather, France sponsored South Vietnam to send a delegate to participate in this conference, and the latter used this chance to declare the Vietnamese sovereignty over the whole of the Spratly Islands.[59] Though China

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[52] *Id*., 31-32.
[53] M. Samuels, *Contest for the South China Sea* (Taylor & Francis. 1982), 76.
[54] The U-shaped line published in the 1947 map consisted of eleven dashes. Two dashes originally depicted inside the Gulf of Tonkin were removed later around 2000 in the Chinese maps, probably owing to the adoption of the delimitation agreement relating to the Gulf of Tonkin between China and Vietnam in 2000. The U-shaped line was also attached to China's 2009 Note Verbale addressed to the UN Secretary-General. See China, Note Verbale addressed to UN Secretary-General (7 May 2009).
[55] OES, China: Maritime Claims in the South China Sea, *Limits in the Seas* (5 December 2014).
[56] Treaty of Peace with Japan, adopted 8 September 1951, entered into force 28 April 1951, 136 *UNTS* 45, Article 2(f).
[57] The Peace Treaty was signed by 49 out of the 52 participating States on 8 September 1951. The then Soviet Union, Poland, and the then Czechoslovakia refused to sign because the provision concerning the South China Sea islands did not indicate that the sovereignty of these islands belonged to China. See D. Heinzig, *Disputed Islands in the South China Sea: Paracels, Spratlys, Pratas, Macclesfield Bank* (Otto Harrassowitz. 1976), 39-40; M.M. Whiteman, *Digest of International Law, Vol. 3* (Department of State publications. 1964), 595; H. Chen, Territorial Disputes in the South China Sea under the San Francisco Peace Treaty, 50(3) *Issues & Studies* (2014), 173, 180.
[58] See B.K. Murphy, Dangerous Ground: the Spratly Islands and International Law, 1 *OCLJ* (1995), 192. Also see M. Bennett, The People's Republic of China and the Use of International Law in the Spratly Islands Dispute, 28 *Stan. J. Int'l L.* (1991), 425, 432.
[59] South Vietnam did not specify the legal arguments for its territorial claim. See M.M. Whiteman, *Digest of International Law, Vol. 3* (Department of State publications. 1964), 595. Also see D.J. Dzurek, *The Spratly Islands Dispute: Who's On First?* (IBRU. 1996), 15-16.

did not attend this Conference,[60] the Chinese government made an official statement to reiterate its territorial claims to all islands of the Spratly Islands.[61] The Philippines was a participant in this conference and thus would have been aware of the Spratly Islands since the territorial disposition of this island group was one of the most debated topics during the conference,[62] but it did not protest against the territorial claims of either South Vietnam or China, which indicated its lack of interest at that time.[63]

In 1956, through perhaps one of the most novel approaches to claim the Spratly Islands, a Philippine citizen, Tomas Cloma, without any authorization from the Philippine government, claimed his ownership over some islands in this area based on the rule of discovery of *terra nullius* and attempted to create a new country on these islands, called 'Kalayaan' or 'Freedomland'. [64] His claim stimulated official protests from China and South Vietnam.[65] North Vietnam published public statements to support the Chinese government's authority over the Spratly Islands.[66] In response to Cloma's claim and protests from other States, the Philippine government declared that it had no official claim in relation to the area concerned.[67]

In the 1960s when the Vietnam War took place, States paid less attention to the issue of the remote islands in the Spratly Islands, and relevant territorial claims remained latent. [68] In 1975, with the Vietnam War approaching the end, South Vietnam reasserted its territorial claims to the Spratly Islands by publishing a White Paper, in which it gave a detailed account of the alleged legal basis for its territorial claims.[69] In this White Paper, while admitting the lack of sufficient historical contacts with the Spratly Islands, [70] South Vietnam claimed that France incorporated the Spratly Islands into

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[60] The underlying reason was that the US and the UK had different opinions as to which one of the Chinese governments was the legitimate one: Beijing or Taiwan. See H. Chen, Territorial Disputes in the South China Sea under the San Francisco Peace Treaty, 50(3) *Issues & Studies* (2014), 180.
[61] China, Statement on the joint US/UK draft for the Peace Treaty with Japan, dated 15 August 1951.
[62] M.H. Loja, The Spratly Islands as a Single Unit Under International Law: A Commentary on the Final Award in Philippines/China Arbitration, 47 *ODIL* (2016), 313.
[63] See B.K. Murphy, Dangerous Ground: the Spratly Islands and International Law, 1 *OCLJ* (1995), 193.
[64] See *id*. Also see M. Samuels, *Contest for the South China Sea* (Taylor & Francis. 1982), 82. Republic of Vietnam, White Paper (1975), Chapter III.
[65] See B.K. Murphy, Dangerous Ground: the Spratly Islands and International Law, 1 *OCLJ* (1995), 193. Also see China, White Paper (13 July 2016), para.58.
[66] R. Haller-Trost, *The Spratly Islands: A Study on the Limitations of International Law* (Canterbury: Centre of South-East Asian Studies. 1990), 60.
[67] See M. Samuels, *Contest for the South China Sea* (Taylor & Francis. 1982), 84. Also see China, White Paper (13 July 2016), para.58.
[68] B.K. Murphy, Dangerous Ground: the Spratly Islands and International Law, 1 *OCLJ* (1995), 194.
[69] Republic of Vietnam, White Paper (1975).
[70] *Id*., Chapter III.

Vietnamese territory on behalf of Vietnam in 1933, stating that:

> the French, who occupied the Southern part of Vietnam known as Cochinchina, took all those measures necessary for the establishment of the legal basis for possession of the Spratly Islands. In 1933, the Spratlys were incorporated into the French colony of Cochinchina and from that year forward have had an adequate administrative structure. It is true that French jurisdiction was disrupted by the Japanese invasion of 1941. However, shortly after the Japanese defeat in 1945, France returned Cochinchina to Vietnam, which then recovered all the rights attached to the former French colony.[71]

This statement showed that South Vietnam claimed to succeed the French claim of territorial sovereignty over the islands in the Spratly Islands established in the 1930s.[72] In 1976, North Vietnam defeated South Vietnam and established a reunited country, namely the Socialist Republic of Vietnam (Vietnam). Vietnam has been following South Vietnam's positions regarding the Spratly Islands since then.[73]

In 1974, Tomas Cloma formally relinquished his territorial claim over some islands in the Spratly Islands to the Philippine government by the 'Deed of Assignment Waiver of Rights'.[74] Furthermore, by the 1978 Presidential Decree No. 1596, the Philippine government clarified the scope of its territorial claim to be the islands within an area called 'Kalayaan Island Group'.[75] The Philippines articulated the legal bases for its territorial claim over these islands as below:

> by reason of their *proximity* the cluster of islands and islets in the South China Sea situated within…Kalayaan Island Group…these areas *do not legally belong to any state or nation* but, by reason of history, indispensable need, and *effective occupation and control* established in accordance with international law, such areas must now be deemed to belong and subject to the sovereignty of the Philippines.[76] [emphasis added]

From this statement, the Philippines advances two legal arguments to support its territorial claim, namely discovery of *terra nullius* and effective control.[77]

In 1979, Malaysia published a map of its territorial waters and continental shelf and claimed territorial sovereignty over some insular features in the southeastern portion of the Spratly Islands.[78]

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[71] *Id*.
[72] B.K. Murphy, Dangerous Ground: the Spratly Islands and International Law, 1 *OCLJ* (1995), 203.
[73] D.J. Dzurek, *The Spratly Islands Dispute: Who's On First?* (IBRU. 1996), 19.
[74] R. Haller-Trost, *The Spratly Islands: A Study on the Limitations of International Law* (Canterbury: Centre of South-East Asian Studies. 1990), 54.
[75] The Philippines, Presidential Decree No. 1596 (11 June 1978).
[76] *Id*.
[77] B.K. Murphy, Dangerous Ground: the Spratly Islands and International Law, 1 *OCLJ* (1995), 206-207.
[78] See D. Heinzig, *Disputed Islands in the South China Sea: Paracels, Spratlys, Pratas, Macclesfield Bank* (Otto Harrassowitz. 1976), 65. Also see R. Haller-Trost, *The Brunei-Malaysia Dispute over Territorial and Maritime Claims in International Law* (IBRU. 1994), 48-49.

Furthermore, the 1970s, 1980s and the 1990s witnessed a number of occupations by military forces in the Spratly Islands (Table 2-2).

Table 2-2: Islands controlled by the disputant States in the Spratly Islands[79]

Controlling State	***Island***	***The year when control began***
China (6)	Itu Aba Island	1946
	Fiery Cross Reef	1988
	Mckennan Reef	1988
	Gaven Reef (North)	1988
	Cuarteron Reef	1988
	Johnson Reef	1988
Malaysia (1)	Swallow Reef	1977
Philippines (6)	Flat Island	1970
	Nanshan Island	1970
	Thitu Island	1971
	West York Island	1971
	North-East Cay	1971
	Loaita Island	1971
Vietnam (6)	Spratly Island	1975
	South-West Cay	1975
	Sin Cowe Island	1975
	Sand Cay	1975
	Namyit Island	1975
	Amboyna Cay	1975

[79] The author compiled this table mainly based on the following literature: M. Chemillier-Gendreau, *Sovereignty over the Paracel and Spratley Islands* (Springer. 2000), 178; Y. Zhang, *China Politics and Geography Study on Oceans* (Science Publishing House. 2004) (in Chinese), 129.

The Philippines began to take up military control over islands in this area since the early 1970s.[80] For instance, the Philippines controlled Nanshan Island and Flat Island in 1970, Loaita Island, Thitu Island, West York Island and North-East Cay in 1971.[81] Malaysia also sent military troops to occupy several features between 1977 and 1999, including Swallow Reef, Asdasier Bank, Mariveles Reef, Louisa Reef, Erica Reef and Investigator Shoal.[82] Turning to Vietnam, in 1973, South Vietnam sent military troops to occupy Namyit Island.[83] In 1975, North Vietnam occupied Namyit Island, Sand Cay, Spratly Island, Sin Cowe Island and Amboyna Cay.[84] The tension reached a peak in 1988 when both China and Vietnam started campaigns to occupy remaining islands in this region.[85] Finally, in March 1988, armed conflicts took place between the Chinese and Vietnamese forces over Johnson South Reef.[86] Within this year, China occupied and took over six maritime features, and Vietnam occupied twelve features. After taking control of the islands, all the disputant States have been conducting a variety of activities thereon, based on which they claim *effectivités*. Section 2.5.3.1 will provide a detailed description of such activities subsequent to the military control.

In summary, all four disputant States put forward multiple legal bases for their territorial claims. First, China may claim a historic title to the Spratly Islands based on its alleged prolonged historical contacts with the region.[87] Second, all the disputant States resort to *effectivités* for their territorial claims to this region. Third, China and Vietnam claim themselves to be the rightful recipients when Japan renounced its titles and rights to the Spratly Islands according to Article 2(f) of the 1951 Treaty of Peace with Japan. China also refers

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[80] D. Heinzig, *Disputed Islands in the South China Sea: Paracels, Spratlys, Pratas, Macclesfield Bank* (Otto Harrassowitz. 1976), 36.
[81] China, White Paper (13 July 2016), para.59.
[82] C. Schofield, Untangling A Complex Web: Understanding Competing Maritime Claims in the South China Sea, in I. Storey & C.Y. Lin (eds.) *The South China Sea Dispute: Navigating Diplomatic and Strategic Tensions* (Singapore: ISEAS Yusof Ishak Institute. 2016), 209.
[83] D. Heinzig, *Disputed Islands in the South China Sea: Paracels, Spratlys, Pratas, Macclesfield Bank* (Otto Harrassowitz. 1976), 36.
[84] *Id*., 37.
[85] B.K. Murphy, Dangerous Ground: the Spratly Islands and International Law, 1 *OCLJ* (1995), 195.
[86] See *id*.
[87] Some scholars argue that Vietnam also bases its territorial claim over the islands in the South China Sea including those in the Spratly Islands on the rule of historic title. However, this argument is inconsistent with the practice of Vietnam. In its 1975 White Paper, South Vietnam claimed 'early historical rights' over the Paracel Islands but not the Spratly Islands. In fact, South Vietnam explicitly admitted that '[u]nlike the case of the Hoang Sa (Paracel) Islands, the former emperors of Vietnam did not have the time to strengthen [the intermittent] contacts [with the Spratly Islands] through the organization of an administrative jurisdiction'. See J.D. Fry & M.H. Loja, The Roots of Historic Title: Non-Western Pre-Colonial Normative Systems and Legal Resolution of Territorial Disputes, 27 *LJIL* (2014), 728. Also see Republic of Vietnam, White Paper (1975), 'The Early Historical Rights of Vietnam' and Chapter III.

to the 1887 treaty as evidence of its territorial title to the Spratly Islands.[88] Fourth, Vietnam bases its territorial claim on cession through which it succeeded the French territorial title to the Spratly Islands established in 1933. Fifth, both China and the Philippines claim a title established by discovery of *terra nullius*. China alleges itself to be the first State to have discovered the Spratly Islands, while the Philippines bases its claim on the discovery of certain features thereof by its citizen, Tomas Cloma, in 1956. Table 2-3 summarizes the legal arguments of these four States. Against the applicable law, sections 2.4-2.8 will examine whether the territorial claims based on historic title, *effectivités*, treaty title, cession, and discovery of *terra nullius* are respectively substantiated under international law.

Table 2-3: Summary of the legal arguments advanced by the disputant States

Titles/Effectivités Dichotomy	*Historic Title*	*Effectivités*	*Treaty Title*	*Cession*	*Discovery of Terra Nullius*
China	√	√	√	--	√
Vietnam	--	√	√	√	--
Philippines	--	√	--	--	√
Malaysia	--	√	--	--	--

Notes: The symbol '√' means that the State concerned advances the legal argument and the symbol '**--**' indicates the opposite.

2.4 HISTORIC TITLE

This section discusses the concept of historic title as a legal argument for territorial claims. This concept, compared with other well-established titles of territorial sovereignty, is complicated and sometimes controversial. Thus, this section takes the opportunity to analyze issues including the terminology, validity and operation of this concept.

2.4.1 Terminology

It is not uncommon in the ICJ cases that States base their territorial claims on historic titles.[89] In those cases, occasionally, terms

[88] C.H. Park, The South China Sea Disputes: Who Owns the Islands and the Natural Resources?, 5 *ODIL* (1978), 33; D.J. Dzurek, *The Spratly Islands Dispute: Who's On First?* (IBRU. 1996), 9.

[89] The focus of this sub-section is on the rule of historic title over land territory instead of the rule of historic title over maritime territory. In another separate paper, the author has argued that the concept of historic title has developed separately under the frameworks of land and sea. For further discussions on this point, see X.

including 'original title', 'ancient title' or 'ancient or original title' are used interchangeably to refer to a 'historic title'.[90] Take *Malaysia/Singapore* for example. Malaysia claimed an 'original title' to Pulau Batu Puteh,[91] and Singapore referred to Malaysia's above claim as 'historic title'.[92] The ICJ endorsed the 'ancient original title' of Malaysia's predecessor (the Sultanate of Johor) to Pulau Batu Puteh.[93] Similarly, in *Minquiers and Ecrehos*, both the UK and France based their territorial claims to the disputed Minquiers and Ecrehos on an 'ancient title' or 'original title' dating back to the Middle Ages.[94] Despite the lack of support for the 'ancient or original title' alleged by the parties in the majority opinion,[95] Judge Alvarez referred to such allegations as 'historic titles' in his declaration.[96] Likewise, in the *El Salvador/Honduras* judgment, the ICJ, when citing the *Minquiers and Ecrehos* judgment, referred to these arguments advanced by the UK and France as 'ancient historical titles'.[97] Similar uses have occurred in *Cameroon v. Nigeria*.[98] Apart from the ICJ cases, the *Eritrea/Yemen* arbitral tribunal has explicitly endorsed the linkage between 'historic title' and 'ancient title' by holding that historic titles can manifest in diverse forms, one of which can be termed 'ancient title', which this tribunal referred to as 'a title that has so long been established by common repute that this common knowledge is itself a sufficient title'.[99]

Furthermore, the notions of 'historical consolidation of title' and 'possession immemorial' are both linked to the concept of historic title. In *Eritrea/Yemen*, Eritrea claimed a 'historic consolidation of title' to the disputed islands.[100] The tribunal regarded this 'historic consolidation of title' as another form of historic titles distinct from the kind of 'ancient title'.[101] According to the tribunal, 'historic

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Ma, Historic Title Over Land and Maritime Territory, 4 *Journal of Territorial and Maritime Studies* (2017), 31-46. Also see A. Gioia, Historic Titles, *MPEPIL* (2013), paras.1-29.

[90] For a mention of the interchangeable use of 'ancient, original, or historic title', see J. Crawford, *Brownlie's Principles of Public International Law* (OUP 9th ed. 2019), 209.

[91] See Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), para..37.

[92] *Id.*, paras.123-124.

[93] *Id.*, para.75.

[94] Minquiers and Ecrehos Case (France v. United Kingdom), Judgment of 17 November 1953 (ICJ), 50.

[95] *Id.*, 53.

[96] See *id.*, 73 (Judge Alvarez's Declaration).

[97] Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992 (ICJ), para.343.

[98] Nigeria claimed 'historical consolidation of title' with respect to the Lake Chad region and an 'ancient title' or 'original title' with respect to the Bakassi Peninsula. See Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment of 10 October 2002 (ICJ), paras.47, 65, 218, 220.

[99] Arbitration on Territorial Sovereignty and Scope of the Dispute (Eritrea/Yemen), Award on the First Stage (PCA), para.106.

[100] *Id.*, para.115.

[101] *Id.*, para.106.

consolidation of title' is a title that 'has been created, or consolidated, by a process of prescription, or acquiescence, or by possession so long continued as to have become accepted by the law as a title'.[102] Similarly, in *Cameroon v. Nigeria*, Nigeria claimed territorial sovereignty over certain areas of Lake Chad as a consequence of 'historical consolidation of a title'.[103] With respect to 'possession immemorial' or 'immemorial possession', Malaysia claimed an ancient or original title to Pedra Branca/Pulau Batu Puteh based on possession since time immemorial, 'which has lasted for such a long time that it is impossible to provide evidence of a different situation and of which anybody recalls having heard talk'.[104] In *Eritrea/Yemen*, Yemen also relied on a claim of historic title stemming from 'time immemorial'.[105]

2.4.2 Validity

The successful application of the concept of historic title has been rare in international jurisprudence. The *Eritrea/Yemen* tribunal, though considering the concept of historic title to be well recognized in international law, did not uphold the parties' arguments based on this concept owing to the specific circumstances of the case where the alleged historic titles, if any, would be necessarily interrupted and adversely impacted by the Ottoman sovereignty over the regions as well as by the subsequent 1923 Treaty of Lausanne.[106] The ICJ has upheld territorial claims based on historic title in only one case, namely *Malaysia/Singapore*, where Malaysia claimed an ancient or original title to Pedra Branca/Pulau Batu Puteh based on immemorial possession.[107] The ICJ concluded that the Sultan of Johor - Malaysia's predecessor - enjoyed an original title to the disputed islands (Pedra Branca/Pulau Batu Puteh and Middle Rocks).[108]

The ICJ, nevertheless, has been cautious and never explicitly denied the validity of the concept of historic title. In those cases where the ICJ has rejected the application of this concept, the rejection has never been based on the invalidity of this concept but rather on its inapplicability in concrete circumstances. Occasionally, the ICJ, though not giving full support for historic titles alleged by

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[102] *Id*.
[103] Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment of 10 October 2002 (ICJ), paras.62, 65.
[104] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), para.48. (citing Meerauge (Austria/Hungary), Arbitral Award of 13 September 1902, RIAA Vol. XXVIII, 391.)
[105] Arbitration on Territorial Sovereignty and Scope of the Dispute (Eritrea/Yemen), Award on the First Stage (PCA), para.246.
[106] *Id*., para.125.
[107] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), para.48.
[108] *Id*., para.69.

parties, does take these alleged titles into account for the ultimate determination of territorial sovereignty. An illustrative example is *Minquiers and Ecrehos* where the ICJ did not simply disregard historic titles asserted by the UK and France but instead took these alleged titles into account, and thus did not assimilate the disputed islands (Minquiers and Ecrehos) to *terra nullius*.[109]

The rejection of applying this concept is usually based on one of the following four reasons. First, in *Minquiers and Ecrehos* where the alleged historic-title holders were European States, the ICJ rejected the application of historic title to Minquiers and Ecrehos mainly because of the historical controversies surrounding the evidence dating back to the Middle Age.[110] Second, in cases involving Latin American and African countries such as *El Salvador/Honduras* and *Cameroon v. Nigeria*, the ICJ rejected the application of historic title on the ground that the predecessors of the countries concerned, being either local tribes or internal administrative subdivisions established by colonial powers, were incapable of holding a historic title to territory as a sovereign.[111] Third, when appreciating historic titles of an Asian kingdom, the ICJ tends to have no reservations in regarding such a kingdom as a sovereign to hold a particular territorial domain under its authority.[112] Hence, in *Indonesia/Malaysia*, the ICJ's rejection has been based on a rather different ground than the sovereign issue that the ties of allegiance or loyalty between the Sultan of Sulu and the Bajau Laut who frequently used the two disputed islands (Pulau Ligitan and Pulau Sipadan) did not suffice to prove that the Sultan of Sulu had a title to these two islands.[113] Fourth, the ICJ would not consider the application of historic title at all in the presence of an established territorial title based on binding boundary treaties or decisions. In *Qatar v. Bahrain*, the ICJ felt it unnecessary to entertain Qatar's alleged 'original title' to the Hawar Islands because the binding British decision of 1939 had attributed these islands to

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[109] This observation is given by the ICJ in *Land, Island and Maritime Frontier Dispute* when citing the *Minquiers and Ecrehos* judgment. See Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992 (ICJ), para.344.

[110] Minquiers and Ecrehos Case (France v. United Kingdom), Judgment of 17 November 1953 (ICJ), 56.

[111] See Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992 (ICJ), para.345 (holding that the 'original title' or 'historic title' belonged to the Spanish Crown rather than the internal administrative subdivisions established by it); Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment of 10 October 2002 (ICJ), paras.207, 212 (rejecting Nigeria's contention that the Bakassi Peninsula had remained under the sovereignty of the Kings and Chiefs of Old Calabar on the ground that Old Calabar could not be regarded as States and were without any international personality).

[112] N. Schrijver and V. Prislan, Cases Concerning Sovereignty over Islands before the International Court of Justice and the Dokdo/Takeshima Issue, 46 *ODIL* (2015), 285.

[113] Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment of 17 December 2002 (ICJ), para.110.

Bahrain.[114]

Only in one case - *Cameroon v. Nigeria* - where Nigeria claimed territorial sovereignty over the Lake Chad region as a consequence of 'historical consolidation of a title', the ICJ has simply stated, without further explanations, that the notion of 'historical consolidation' was highly controversial.[115] The ICJ did not go further to give an absolute denial of this notion, possibly because it did not need to do so since in the circumstances of this case, the presence of an established treaty title to the disputed territory at stake had already provided it with a strong and sufficient reason to disregard the alleged 'historical consolidation of a title'.[116] However, this finding did not win unanimous support from inside the court. Judges Koroma and Ajibola, in their dissenting opinions, disagreed with the majority opinion, and instead, supported Nigeria's claim based on the concept of historical consolidation.[117]

The opinions of scholars are also divided when it comes to the notion of 'historical consolidation of a title'. Charles De Visscher introduced the notion of 'consolidation' to substitute 'acquisitive prescription' with an attempt to avoid the difficulties and controversies that had developed around the latter.[118] Acquisitive prescription properly so called, referred to as acquisition through adverse possession, is an alleged mode of establishing title to territory, which has a previous holder and thus not *terra nullius*, through the possession *à titre de souverain* over a prolonged lapse of time.[119] The difficulties confronting acquisitive prescription, which give rise to controversies,[120] are that its application requires not only 'the efflux of a fixed period of time'[121] or a fixed deadline for prescription, but also the authority of an adjudicator to declare the transfer of title from its legitimate owner to the possessor.[122] Attempted to avoid the difficulties and controversies in relation to

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[114] Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment of 16 March 2001 (ICJ), para.148.
[115] Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment of 10 October 2002 (ICJ), para.65.
[116] *Id.*
[117] *Id.*, Dissenting opinion of Judge Koroma, 476, para.8; Dissenting opinion of Judge ad hoc Ajibola, 562, para.64.
[118] C. De Visscher, *Theory and Reality in Public International Law* (Princeton University Press. 1957) (Translated from the French by P.E. Corbett), 199 (fn 68), 200. The first edition of this book was first published in French in 1953. D.H.N. Johnson's comments in 1955 were based on that edition.
[119] See M.G. Kohen, Titles and Effectivités in Territorial Disputes, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 154; M.N. Shaw, *International Law* (CUP. 8th ed. 2017), 374.
[120] For an account of these controversies, see the bibliographies established by: D.H.N. Johnson, Acquisitive Prescription in International Law, 27 *BYIL* (1950), 334-340; Y.Z. Blum, *Historic Titles in International Law* (The Hague: Nijhoff. 1965), 8-12.
[121] See Y.Z. Blum, *Historic Titles in International Law* (The Hague: Nijhoff. 1965), 59.
[122] See M.G. Kohen, Titles and Effectivités in Territorial Disputes, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 155.

the concept of acquisitive prescription, De Visscher introduced the notion of 'consolidation' to substitute 'acquisitive prescription' based on the 1951 *Anglo-Norwegian Fisheries* judgment where he served as a member of the court.[123] In De Visscher's view, the foundation of the 'consolidation' of a title to a certain portion of land or sea is the 'proven long use', which represents 'a complex of interests and relations', rather than 'the passage of a fixed term, unknown in any event to international law' as required by the notion of 'acquisitive prescription'.[124] De Visscher further stated that the notion of 'consolidation' differed from 'acquisitive prescription' in the sense that it could also apply to 'territories that could not be proved to have belonged formerly to another State', whereas 'acquisitive prescription' only applied to territories previously owned by others.[125]

D.H.N. Johnson, Georg Schwarzenberger and Nsongurua Udombana supported De Visscher's concept of historical consolidation of title.[126] Johnson perceived the approach of De Visscher as embracing the notion of 'acquisitive prescription' properly so called or 'adverse possession' on the one hand and the notion of 'immemorial possession' on the other hand under a single heading of 'consolidation'.[127] Johnson further commented with endorsement that the notion of 'consolidation' not only removed certain confusion and ambiguity surrounding the notion of prescription but also emphasized the close relationship between the acquisition and maintenance of titles.[128] Schwarzenberger also supported the concept of historical consolidation of title, stating that this concept transformed relative titles into absolute title through a gradual process in time and underlined the interplay between fundamental principles of sovereignty, recognition, consent and good faith governing titles to territory.[129] Udombana argued that historical consolidation, when coupled with *effectivités* and supported by the requisite evidence, could be a sound and valid means of creating title.[130] However, Marcelo Kohen held the opposite

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[123] C. De Visscher, *Theory and Reality in Public International Law* (Princeton University Press. 1957), 199 (fn 68), 200.
[124] *Id.*, 200.
[125] *Id.*
[126] D.H.N. Johnson, Consolidation as a Root of Title in International Law, 13 *Cambridge Law Journal* (1955), 223-225. G. Schwarzenberger, Title to Territory: Response to a Challenge, 51(2) *AJIL* (1957), 311, 324. N.J. Udombana, The Ghost of Berlin Still Haunts Africa! The ICJ Judgment on the Land and Maritime Boundary Dispute between Cameroon and Nigeria, 10 *African Yearbook of International Law* (2002), 35.
[127] D.H.N. Johnson, Consolidation as a Root of Title in International Law, 13 *Cambridge Law Journal* (1955), 223.
[128] *Id.*, 223-225.
[129] G. Schwarzenberger, Title to Territory: Response to a Challenge, 51(2) *AJIL* (1957), 311, 324.
[130] N.J. Udombana, The Ghost of Berlin Still Haunts Africa! The ICJ Judgment on the Land and Maritime Boundary Dispute between Cameroon and Nigeria, 10 *African Yearbook of International Law* (2002), 35.

opinion, arguing that the so-called 'historical consolidation of titles' doctrine constructed by scholars had not been successfully established in international law.[131] In his view, this doctrine fails to 'find any echo in case law' and rather, was set aside by the ICJ in *Cameroon v. Nigeria* for being controversial.[132]

In contrast, a historic title informed by the notion of immemorial possession is less disputed among scholars. After examining opinions of different writers towards prescription and 'immemorial possession', Johnson reached a conclusion that 'even those writers who deny the existence of prescription as such in international law admit the existence of…"immemorial possession"'. [133] Johnson's conclusion, albeit based on opinions of legal writers expressed decades ago, is still tenable today. For instance, Kohen, though rejecting the legal significance of the notion of 'historical consolidation of titles' under international law, was of the view that immemorial possession, where 'the origin of that possession is unknown and no one can advance a better title', was not problematic from a legal perspective.[134] In a similar vein, Nico Schrijver and Vid Prislan also observed that at least the ICJ had no problem applying the concept of original title based on immemorial possession to a territory claimed by European States or even Asian kingdoms.[135] In the author's view, the wider acceptation of the concept of immemorial possession than the concept of historical consolidation of title might result from the fact that the former applies to territory without a previous holder, whereas the latter also applies to territories previously owned by others and is thus more likely to trigger disputes.

2.4.3 Operation

Malaysia/Singapore, being the only case that has upheld a territorial claim to a disputed island (Pedra Branca/Pulau Batu Puteh) based

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[131] M.G. Kohen, Titles and Effectivités in Territorial Disputes, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 146, 154, 156-157; M.G. Kohen and M. Hébié, Conclusion, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 437.

[132] M.G. Kohen, Titles and Effectivités in Territorial Disputes, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 146.

[133] D.H.N. Johnson, Consolidation as a Root of Title in International Law, 13 *Cambridge Law Journal* (1955), 219. Also see D.H.N. Johnson, Acquisitive Prescription in International Law, 27 *BYIL* (1950), 334-340.

[134] M.G. Kohen, Titles and Effectivités in Territorial Disputes, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 154.

[135] N. Schrijver and V. Prislan, Cases Concerning Sovereignty over Islands before the International Court of Justice and the Dokdo/Takeshima Issue, 46 *ODIL* (2015), 283, 285.

on a historic title informed by the notion of immemorial possession, offers unique and useful hints for the application of this concept in concrete circumstances. [136] Malaysia claimed that Pedra Branca/Pulau Batu Puteh was under the sovereignty of the Sultan of Johor based on possession since time immemorial. [137] To decide whether Malaysia's territorial claim was sound in international law, the ICJ has examined three elements: (1) the possession element, (2) the time element, and (3) the ties of allegiance or loyalty.

2.4.3.1 The Possession Element

First, the possession should be completed by a sovereign. The ICJ admitted without any difficulty that the Sultan of Johor was a sovereign that could hold a particular territorial domain under its sovereignty since it came into existence in 1512. [138] Second, concerning the required degree of possession, given that Pedra Branca/Pulau Batu Puteh was a small and uninhabited island,[139] the ICJ was satisfied that a protest made by the Sultan of Johor against the activities of the Dutch East India Company in the waters around Pedra Branca/Pulau Batu Puteh in the middle of the seventeenth century had clearly indicated that the Sultan of Johor had held Pedra Branca/Pulau Batu Puteh within its territorial domain.[140]

It is necessary to detail the above incident here. In the middle of the seventeenth century, the Dutch Governor of Malacca wrote a letter to propose the Dutch East India Company to send two boats to cruise in the vicinity of Pedra Branca/Pulau Batu Puteh for preventing Chinese traders from entering Johor River.[141] According to this proposal, two Chinese junks were taken in the Straits and diverted to Malacca.[142] This incident triggered a protest from the Sultan. The Sultan sent an envoy to the Dutch Governor of Malacca to indicate his great displeasure regarding the seizure of the two Chinese junks, 'not without using offensive and threatening terms in the event that the same thing occurs in the future'.[143] On this basis of this single incident, the ICJ concluded that the Sultan of Johor had possessed sovereign authority over Pedra Branca/Pulau Batu

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[136] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), para.69.
[137] See *id*., para.48.
[138] The ICJ has cited Hugo Grotius's words to *confirm* the sovereign status of the Sultan of Johor, which stated that: 'There is in India a kingdom called Johore, which has long been considered a sovereign principality [*supremi principatus*], so that its ruler clearly possessed the authority necessary to conduct a public war [against the Portugese].' See Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), paras.52-53.
[139] *Id*., paras.62-67, 261.
[140] *Id*., para.55.
[141] *Id*., para.54.
[142] *Id*.
[143] *Id*.

Puteh.[144] This conclusion obtained little doubt from inside the court,[145] and has not received open criticism from scholarly commentaries.[146] In the author's view, the ICJ's above conclusion, albeit not necessarily applicable in all circumstances, is arguable in terms of a small and uninhabited island like Pedra Branca/Pulau Batu Puteh in this case. This position is also in line with Schrijver and Prislan's analysis of a series of ICJ cases concerning island sovereignty. According to their analysis of international jurisprudence, in the case of small, remote and uninhabited islands, the ICJ has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State(s) cannot make a superior claim.[147]

2.4.3.2 The Time Element

The time element requires that the possession should be uninterrupted, unbroken and uncontested for a sufficiently long period of time.[148] It is, however, difficult to fix the time-limit as required for the establishment of a title based on immemorial possession. It is reasonable to expect that the time required would depend on specific circumstances. According to Paul Fauchille, absent agreement between interested parties, the time-limit would vary according to the importance of the territory at stake, the manner

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[144] *Id*., para.55. It is noted that Malaysia and Singapore also disputed the relevance to the sovereignty issue of the construction and commissioning of the lighthouse on Pedra Branca/Pulau Batu Puteh around 1850. Malaysia claimed that Johor manifested its sovereignty over this island by having permitted the building of the lighthouse. Yet, the ICJ did not draw any conclusion about sovereignty based on the construction and commissioning of the lighthouse. See *id*., paras.150, 162.

[145] Almost all the individual opinions expressly agreed with the majority of the court on this point. See *id*., Declaration of Judge Ranjeva, para.1; Separate Opinion of Judge Parra-Aranguren, para. 13; Joint Dissenting Opinion of Judges Simma and Abraham, para.4; Declaration of Judge Bennouna, para.1; and Dissenting Opinion of Judge ad hoc Dugard, para.3. The only criticism came from Judge Rao, who was the *ad hoc* judge appointed by Singapore on this case. In his view, 'Malaysia could not show that the Sultan of Johor had even a notional possession of Pedra Branca/Pulau Batu Puteh to sustain the claim of original title based on immemorial possession'. See *id*., Separate Opinion of Judge ad hoc Sreenivasa Rao, para.25.

[146] See *e.g*., C.G. Lathrop, Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, 102(4) *AJIL* (2008), 830, 833-834; D.A. Colson and B.J. Vohrer, Introductory Note to International Court of Justice: Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), 47 *International Legal Materials* (2008), 834; T. Hsien-Li, Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), 12 *SYBIL* (2008), 259-262; S. Kopela, Case concerning Sovereignty over Pedra Branca/Pulau Batu Putech, Middle Rocks and South Ledge (Malaysia v. Singapore), 25(1) *IJMCL* (2010), 95, 110.

[147] N. Schrijver and V. Prislan, Cases Concerning Sovereignty over Islands before the International Court of Justice and the Dokdo/Takeshima Issue, 46 *ODIL* (2015), 297.

[148] Regarding 'uninterrupted', see Arbitration on Territorial Sovereignty and Scope of the Dispute (Eritrea/Yemen), Award on the First Stage (PCA), para.125; Regarding 'unbroken' and 'uncontested', see Meerauge (Austria/Hungary), Arbitral Award of 13 September 1902, RIAA Vol. XXVIII, 391.

of possession, and the attitudes of interested parties.[149]

In terms of the circumstances of *Malaysia/Singapore* where the island concerned is small and uninhabited, the ICJ considered two factors to be of significance. First, the ICJ noted that Pedra Branca/Pulau Batu Puteh evidently was not *terra incognita*.[150] This island was impossible to remain unknown or undiscovered by the local community, as it had always been known as a navigational hazard in the Straits of Singapore, which was an important channel for international navigation in east-west trade connecting the Indian Ocean with the South China Sea.[151] Thus, the ICJ concluded that it was reasonable to infer that Pedra Branca/Pulau Batu Puteh was viewed as one of the islands lying within the general geographical scope of the Sultan of Johor.[152] Second, the ICJ found that throughout the entire history of the Sultan of Johor, no competing claim had ever been advanced by other sovereigns.[153] Based on a combination of these geographical and historical contexts of the present case, the ICJ was satisfied that such a sufficiently prolonged absence of opposition by other sovereigns could lead to a conclusion that the possession of Pedra Branca/Pulau Batu Puteh by the Sultan of Johor had continued for so long a time that the origin of the territorial title to this island, though unknown, is beyond question. This finding indeed echoes the *Meerauge* arbitral award cited in the *Malaysia/Singapore* judgment, which defined 'immemorial possession' as 'the form of possession where no evidence can be adduced that the situation was ever different and no living person has ever heard of a different state of affairs'.[154] Giovanni Distefano supported this position, commenting that immemorial possession indicated that one State's possession of territory was so ancient that other States could not put forward any adverse evidence.[155]

2.4.3.3 The Ties of Allegiance or Loyalty

Evidence of the ties of allegiance or loyalty between the inhabitants or regular users of the territory in dispute and the rulers of ancient kingdoms is not determinative but could confirm a historic title.[156]

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[149] Though Fauchille's comments was pertinent to possession for prescription, it could equally apply to immemorial possession. See P. Fauchille, *Traité de Droit International Public*, Vol. i, Part ii (Paris: Rousseau 8th ed. 1925), 762.
[150] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), para.61.
[151] *Id.*
[152] *Id.*
[153] *Id.*, para.62.
[154] Meerauge (Austria/Hungary), Arbitral Award of 13 September 1902, RIAA Vol. XXVIII, 391.
[155] G. Distefano, The Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law, 19 *LJIL* (2006), 1069.
[156] It is noted that in *Indonesia/Malaysia* where Indonesia and Malaysia disputed the territorial sovereignty over two small islands in the Celebes Sea, namely Pulau Sipadan and Pulau Ligitan, Malaysia claimed that its predecessor – the Sultan of

The *Malaysia/Singapore* judgment sheds light on the required level of the ties of allegiance or loyalty. Malaysia argued that the title of the Sultanate of Johor to Pedra Branca/Pulau Batu Puteh was confirmed by the ties of loyalty existing between the Sultanate and the Orang Laut, a nomadic people of the sea.[157] The Orang Laut, most of which constantly lived in their boats with a few having habitations onshore, frequently visited Pedra Branca/Pulau Batu Puteh and were engaged in various activities including fishing and piratical activities in the waters surrounding it.[158] The Orang Laut was one class of the Sultan's subjects. First, they were under the immediate control of two officers called Orang Kaya and Batin, the latter being subordinate to the former, which were appointed by the Sultan of Johor. Second, the Sultan could command their services on an emergency such as a war with a neighboring Chief.[159] Accordingly, the ICJ considered that the level of the ties of relationship between the Sultan of Johor and the Orang Laut proved sufficient political authority by the Sultan of Johor to qualify him as exercising sovereign authority over the Orang Laut, thereby confirming the title of the Sultanate of Johor to Pedra Branca/Pulau Batu Puteh.[160]

2.4.4 Application to the Spratly Islands Setting

China may base its territorial claim on the rule of historic title owing to its alleged historical contacts with the Spratly Islands. It is noted that the islands thereof are small and uninhabited similar to Pedra Branca/Pulau Batu Puteh. Hence, the *Malaysia/Singapore* formula for the application of the concept of historic title can offer useful guidance.[161] Two elements need to be satisfied in order to establish a

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Sulu – originally held a historic title to these two disputed islands during the nineteenth and twentieth centuries based on the ties of loyalty between the Sultan of Sulu and the Bajau Laut, which was a local tribe that might have utilized these two islands from time to time. In this regard, the ICJ considered that even if the ties of loyalty between the Sultan of Sulu and the Bajau Laut were proved to be true, such ties were not in themselves sufficient to provide evidence that the Sultan of Sulu claimed territorial sovereignty over these two islands or considered them part of his possessions. See Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment of 17 December 2002 (ICJ), paras.12-13, 98, 110. Also see N. Schrijver and V. Prislan, Cases Concerning Sovereignty over Islands before the International Court of Justice and the Dokdo/Takeshima Issue, 46 *ODIL* (2015), 286.

[157] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), para.70.

[158] *Id.*, paras.70-72.

[159] *Id.*, para.73.

[160] *Id.*, paras.74-75.

[161] The *Malaysia/Singapore* formula does not necessarily exclude the possibility of special rules or practices relating to territorial acquisition under non-Western normative systems. Yet, these special rules or practices are beyond the discussion of this chapter. For discussions about non-Western understanding of territorial acquisition, see *e.g.*, A. Carty & F.N. Lone, Some New Haven International Law Reflections on China, India and Their Various Territorial Disputes, 19 *Asia Pacific*

historic title: the possession element and the time element. Moreover, evidence of the ties of allegiance or loyalty between the inhabitants or regular users of a contested land and the rulers of ancient kingdoms, albeit not determinative, could confirm a historic title.

2.4.4.1 The Possession Element

First, the possession should be completed by a sovereign that is capable of exercising authority over relevant land territory.[162] There is little dispute that China had begun to be admitted into the 'Family of Nations' at least by the end of the nineteenth century.[163] Moreover, by analogy to the ICJ's decision in *Malaysia/Singapore*, which admitted that the Sultan of Johor was a sovereign that could hold a particular territorial domain under its sovereignty since it came into existence in the early sixteenth century,[164] it is safe to conclude that China could be considered as a sovereign even in the time earlier than the late nineteenth century. This conclusion is also in line with Mamadou Hébié's observation on international jurisprudence relating to the recognition of the legal personality of local political entities with non-western systems of social organizations. In his view, 'the tide has now turned in favour of admitting that local political entities enjoyed international legal personality during all relevant colonial periods'.[165]

Second, establishing a historic title over small and uninhabited islands such as those in the Spratly Islands requires the manifestation of State authority over the islands concerned. In the present case, China had manifested its authority over these islands by protesting against the activities of the German government in this area in 1883.[166] Concerning small and uninhabited islands, possession does not necessarily mean maintaining a garrison at those places, but the

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Law Review (2011), 93-112 (regarding the Asian concepts of territorial sovereignty); B. Kwiatkowska, The Eritrea-Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation, 32 *ODIL* (2001), 15 (regarding the Islamic concepts of territorial sovereignty); D.W. Bowett, The Dubai/Sharjah Boundary Arbitration of 1981, 65 *BYIL* (1994), 123, 133 (regarding the Arabian concepts of territorial sovereignty).

[162] R.Y. Jennings, *The Acquisition of Territory in International Law* (MUP. 1963), 26.

[163] See N. Schrijver and V. Prislan, Cases Concerning Sovereignty over Islands before the International Court of Justice and the Dokdo/Takeshima Issue, 46 *ODIL* (2015), 287. Also see H.T. Hodgkin, *China in the Family of Nations* (George Allen & Unwin. 1923), 56; I.C.Y. Hsü, *China's Entrance into the Family of Nations: the Diplomatic Phase 1858-1880* (Harvard University Press. 1960).

[164] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), para.52.

[165] M. Hébié, The Acquisition of Original Titles of Territorial Sovereignty in the Law and Practice of European Colonial Expansion, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 39-43.

[166] See D. Heinzig, *Disputed Islands in the South China Sea: Paracels, Spratlys, Pratas, Macclesfield Bank* (Otto Harrassowitz. 1976), 25-26, 72. Also see M. Samuels, *Contest for the South China Sea* (Taylor & Francis. 1982), 52.

power to hold such areas at will and to prevent other States from occupying them is sufficient.[167] Hence, it is arguable that a protest against the survey activities of the German government in the Spratly Islands suffices to demonstrate China's power to hold this area under its authority. Importantly, this event is similar to what happened to the Sultan of Johor in *Malaysia/Singapore*. In that case, the ICJ concluded that the Sultan of Johor enjoyed a territorial title to Pedra Branca/Pulau Batu Puteh since it had manifested its authority over this island by protesting against the activities of the Dutch East India Company in the waters around this island in the middle of the seventeenth century.[168] By analogy to this ICJ judgment, a protest against the survey activities of the German government in the Spratly Islands should, arguably, suffice to demonstrate China's power to hold this area under its authority.

2.4.4.2 The Time Element

It is difficult to fix the time-limit as required for the establishment of a title based on immemorial possession.[169] In *Malaysia/Singapore*, the ICJ considered two factors to be of significance, including: first, the geographical factor that Pedra Branca/Pulau Batu Puteh evidently was not *terra incognita*; and second, the historical factor that no competing claim had ever been advanced by other sovereigns throughout the entire history of the Sultan of Johor.

The Spratly Islands setting presents similar geographical and historical factors with Pedra Branca/Pulau Batu Puteh. First, the islands in this region were known as a navigational hazard in the South China Sea and thus were impossible to be *terra incognita*.[170] Second, no competing territorial claims regarding these islands had been put forward by other sovereigns until the twentieth century. Hence, in the author's view, by analogy to *Malaysia/Singapore*, it can be argued that such a sufficiently prolonged absence of opposition by other sovereigns could lead to a conclusion that the possession of the Spratly Islands by China had continued for so long a time that the origin of the territorial title to this island, though unknown, was beyond question at least until the twentieth century. This conclusion, albeit not necessarily applicable in all circumstances, is arguable in terms of small and uninhabited islands like those in the Spratly

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[167] Minquiers and Ecrehos (France v. United Kingdom), Individual Opinion of Judge Basdevant of 17 November 1953 (ICJ), 78. Also see G. Schwarzenberger, Title to Territory: Response to a Challenge, 51 *AJIL* (1957), 316.
[168] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), para.55.
[169] P. Fauchille, *Traité de Droit International Public*, Vol. i, Part ii (Paris: Rousseau 8th ed. 1925), 762.
[170] D. Heinzig, *Disputed Islands in the South China Sea: Paracels, Spratlys, Pratas, Macclesfield Bank* (Otto Harrassowitz. 1976), 22.

Islands area.[171]

2.4.4.3 The Ties of Allegiance or Loyalty

Using the ties of allegiance or loyalty to confirm the historic title established by China, two conditions need to be fulfilled, including: first, Chinese fishermen had regularly used the Spratly Islands; and second, the Chinese government had sufficient political authority over such fishermen. As discussed below, these two conditions are fulfilled.

First, Chinese fishermen had been conducting activities on or around the islands of the Spratly Islands at least since the nineteenth century. The crew of British surveying ships encountered Chinese fishermen from Hainan on some islands thereof during surveys in the 1860s.[172] These surveys took place from 1862 until 1867 carried by *Royalist*. *The China Sea Directory* published in 1868 by the Britain Admiralty, when referring to the Tizard Bank and Reefs (Zhenghe Qunjiao) in the Spratly Islands, observed that 'Hainan fishermen, who subsist by collecting trepang and tortoiseshell, were found upon most of these islands, some of whom remain for years amongst the reefs'.[173] Moreover, some historians claim that Chinese fishermen had been compiling and circulating a book called 'Geng Lu Bu'

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[171] An analogy could be made to the time-limit element contained in the continuity requirement of *effectivités*. See section 2.5.1.4.

[172] The French magazine *Le Monde Colonial Illustré* published in September 1933 gave support to the inhabitation of Chinese fishermen on the Spratly Islands as well. It was recorded that only Hainan natives from China inhabited the nine islands of the Spratly Islands and no people from other countries inhabited there. For example, there were seven inhabitants on South West Cay (two of them were children), five on Thitu Island, and four on Spratly Island (one more than that of 1930). There were worship stands and thatched cottages on Loaita Island, and a tablet with Chinese scripts on Itu Aba Island. This magazine analyzed the habitation situation on these islands and concluded that they were habitable because there was abundant vegetation (including coconut palms, banana trees, papaya trees, pineapples, green vegetables and potatoes), wells providing drinking water and poultry raised by the inhabitants. The *Asiatic Pilot*, Vol. IV, published by the United States Hydrographic Office in 1925, also had accounts about the inhabitation of Chinese fishermen on the maritime features of the Spratly Islands. See China, White Paper (13 July 2016), paras.16-17. The presence of Chinese fishermen on the maritime features of Spratly Islands was also confirmed in a Note dated 8 March 1928 from Mr Bourgouin, which acted in the capacity of representing French authority to respond to the Japanese claims to the Spratly Islands made in 1927. The original text reads as follows: 'The area [i.e. the Spratly Islands] is now visited only by a few Chinese fishermen from Hainan, who find an abundance of turtles and sea cucumbers there; it appears that some of them built temporary shelters.' See Note dated 8 March 1928 from Mr Bourgouin, reproduced in: M. Chemillier-Gendreau, *Sovereignty over the Paracel and Spratley Islands* (Springer. 2000), 'Annex 18'.

[173] Similar records were also contained in *The China Sea Directory* in 1906 and *The China Sea Pilot* in its editions of 1912, 1923 and 1937 published by the Britain Admiralty. See D. Hancox, *Secret Hydrographic Surveys in the Spratly Islands* (ASEAN Academic Press. 1999), 10. Also see D. Heinzig, *Disputed Islands in the South China Sea: Paracels, Spratlys, Pratas, Macclesfield Bank* (Otto Harrassowitz. 1976), 23, 27. China, White Paper (13 July 2016), paras.12, 15.

(Manual of Sea Routes) at least since the sixteenth century, which was a navigation guidebook for the travelling between the coast of mainland China and the maritime features in the South China Sea.[174] This book records names given by Chinese fishermen for at least seventy maritime features in the Spratly Islands.[175] Such names were mentioned and adopted by Western navigators and even marked in some official navigation guidebooks and charts published in the nineteenth and twentieth centuries. For example, the English names commonly used for Namyit Island, Sin Cowe Island and Subi Reef are originated respectively from 'Nanyi', 'Chenggou' and 'Chouwei' as pronounced in Hainan dialects.[176]

Second, China had exercised sufficient political authority over these fishermen at least through household registration and fish tax. China had established a household registration system at least since the Western Zhou Dynasty (1045-771 BC), mainly for the purposes of collecting poll taxes and commanding military services when a need arose.[177] Chinese fishermen operating in the Spratly Islands were called 'Dan Min' (or the Tankas, meaning 'the people of the sea') mainly from Hainan.[178] As shown by the official records of Ming Dynasty such as 'Ming Tai Zu Shi Lu' ('Records of Hongwu Emperor') and 'Jiajing Guangdong Tong Zhi' ('General Records of Guangdong Ruled by Jiajing Emperor'), 'Dan Min' had become one class of the subjects that were required to be registered in the household registration system at least since the Ming Dynasty (1368-1644 AD).[179] China collected fish tax from 'Dan Min' at least in the

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[174] W. Zhou & L. Tang, *Hainan Tianshu-Hainan Fishermen's Cultural Explanation of 'Geng Lu Bu'* (Kunlun Publisher. 2015), 117.
[175] China, White Paper (13 July 2016), para.11.
[176] *Id*., para.12.
[177] The existence of a household registration system in the Western Zhou Dynasty is evidenced by the records in a book - *Zhou Li (Rites of Zhou)* - credited to the Duke of Zhou, who was a member of the royal family of the Zhou dynasty who played a major role in consolidating the kingdom and acted as a capable and loyal regent for his young nephew King Cheng. According to these records, an officer called 'Simin' was responsible for implementing the household registration system. Females aged more than seven months after birth and males over eighth months must be registered in books. In addition, the birth and death of the population must be registered every year to reflect the natural changes, and a population survey verification was conducted every three years. See Zhou Li (Rites of Zhou) (in Chinese), available at <
https://zh.wikisource.org/wiki/%E5%91%A8%E7%A6%AE/%E7%A7%8B%E5%AE%98%E5%8F%B8%E5%AF%87>.
[178] W. Zhou & L. Tang, *Hainan Tianshu-Hainan Fishermen's Cultural Explanation of 'Geng Lu Bu'* (Kunlun Publisher. 2015), 128-129.
[179] These two books were both drafted and edited by officials authorized by the Emperors of China. See F. Xiao and Z. Liu, Clan, Market, Bandits and Dan Min: Clan Groups and Society in the Pearl River Delta Since the Ming Dynasty (in Chinese), 3 *Journal of Chinese Social and Economic History* (2004), 5. For example, it was recorded that 'in 1383, the Emperor ordered General Yong Zhao to register thousands of Dan Min from Guangzhou in the household registration system and further to recruit them into the navy'. See *Ming Tai Zu Shi Lu* (Records of Hongwu Emperor), Vol. 143, para. 456, available at <
https://ctext.org/wiki.pl?if=gb&chapter=83442&remap=gb#p422 >.

Ming Dynasty and the Qing Dynasty (1644-1912 AD).[180] The Guangdong provincial government, whose administrative jurisdiction covered 'Dan Min' from Hainan, levied a fish tax on 'Dan Min' according to the number of vessels rather than the amount of catch.[181] An official entity called 'He Bo Suo' (the Office of Rivers and Lakes) was responsible for collecting the fish tax.[182]

2.4.4.4 Summary

In terms of the small and uninhabited islands within the Spratly Islands area, the preceding analysis concludes that two elements - the possession element and the time element - for establishing a historic title are, arguably, satisfied. It further concludes that China had been enjoying a historic title over the islands thereof at least until the twentieth century. This title is also confirmed by the ties of allegiance or loyalty between the Chinese government and the Chinese fishermen who had regular activities in the region. Admittedly, this conclusion is built on a foundation that no competing territorial claims regarding these islands in the Spratly Islands area had been put forward by other sovereigns until the twentieth century. As mentioned at the beginning of this chapter, although the author has been careful not to overlook any available and relevant official documents and secondary literature, risks remain that evidence of significant importance might not be available to the public owing to confidentiality or other reasons. Thus, the above conclusion is valid unless adverse evidence, if any, is uncovered.

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[180] See Q. Li Qingxin, The Sea-related People in the Qiongzhou Strait Area and Their Marine Beliefs: Also on Some Issues in the Study of the History of the Straits (in Chinese) (28 November 2016), available at <
http://www.sohu.com/a/120054012_523177>. Also see P. Yang, Ocean Governance during the Qing Dynasty: The Evolution of Fisheries Tax Regulations in the Southeast Coast (in Chinese), 55(3) *Journal of Sun Yat-Sen University (Social Science Edition)* (2015), 142-143.

[181] This method of taxation was recorded in a report from the Finance Minister, Ben Xu, addressed to the Qianlong Emperor, and also in Vol. 17 of the official records of Huilai County ruled by the Yongzheng Emperor. See P. Yang, Ocean Governance during the Qing Dynasty: The Evolution of Fisheries Tax Regulations in the Southeast Coast (in Chinese), 55(3) *Journal of Sun Yat-Sen University (Social Science Edition)* (2015), 142, 143 and fn. 1.

[182] For example, the fish tax collected from 'Dan Min' in all counties of Hainan in 1384 (the Ming Dynasty) was about 7632 Dan (i.e. an ancient volume unit of China, usually used to measure rice and pay official salaries and taxes), whereras in 1557 (the Qing Dynasty), it was equivalent to around 1871 taels of silver. See Q. Li Qingxin, The Sea-related People in the Qiongzhou Strait Area and Their Marine Beliefs: also on Some Issues in the Study of the History of the Straits (in Chinese) (28 November 2016), Table 3, available at <
http://www.sohu.com/a/120054012_523177>.

2.5 EFFECTIVITÉS

As the PCIJ has described in the 1933 *Eastern Greenland* judgment, a claim to sovereignty based not upon legal titles but merely upon continued display of authority namely *effectivités* requires two constituent elements: 'the intention and will to act as sovereign, and some actual exercise or display of such authority'.[183] The recent *Croatia/Slovenia* arbitral award has referred to the above description as 'two elements of *effectivités*'.[184]

2.5.1 The Objective Element: Acts of Effectivités

Effectivités require material acts exercising or displaying State authority. In international judicial practice, a wide range of acts has been invoked as evidence of the exercise of State sovereignty. In *Nicaragua v. Colombia*, the ICJ has summarized that 'acts and activities considered to be performed *à titre de souverain* are in particular, but not limited to, legislative acts or acts of administrative control, acts relating to the application and enforcement of criminal or civil law, acts regulating immigration, acts regulating fishing and other economic activities, naval patrols as well as search and rescue operations'.[185] These acts can be classified according to the three traditional powers of a State, namely the legislative power, the administrative or executive, and the judicial (subsection 2.5.1.1). Furthermore, to constitute relevant *effectivités*, these acts need to fulfil general requirements including being attributable to a State (subsection 2.5.1.2), peaceful (subsection 2.5.1.3), continuous, public, pertinent to the disputed territory (subsection 2.5.1.4), and sometimes, before the critical date (subsection 2.5.1.5).

2.5.1.1 Categories of Acts of Effectivités

Legislative Acts

As the PCIJ stated in *Eastern Greenland*, '[l]egislation is one of the most obvious forms of the exercise of sovereign power'.[186] In that case, the PCIJ held that the enactments including Ordinances of 1740-1751, 1758, 1776 and their operation had manifested the display of authority of the King of Denmark and Norway during the period

[183] Legal Status of Eastern Greenland (Denmark v. Norway), Judgment of 5 April 1933, PCIJ Series A/B No. 53, 45-46.
[184] Arbitration between the Republic of Croatia and the Republic of Slovenia, Final Award of 29 June 2017 (PCA), para.341.
[185] Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012 (ICJ), para.80.
[186] Legal Status of Eastern Greenland (Denmark v. Norway), Judgment of 5 April 1933, PCIJ Series A/B No. 53, 48.

from the founding of the colonies by Hans Egede in 1721 up to 1814 to an extent sufficient to give his country a valid claim to sovereignty over Greenland which was not limited to the colonized area.[187] In *Indonesia/Malaysia*, the ICJ considered that the Turtle Preservation Ordinance of 1917 and Land Ordinance of 1930 enacted by Malaysia, which regulated and controlled the collecting of turtle eggs and the establishment of a bird reserve, constituted regulatory assertions of authority over territory including the disputed Ligitan and Sipadan.[188]

Administrative or Executive Acts

Administrative or executive acts might comprise regulation of immigration or control of visits, [189] recognition of consular representations, [190] regulation of economic activities including fishing,[191] law enforcement measures,[192] naval visits and search and rescue operations, [193] marine incident investigation, [194] land reclamation projects,[195] and public works including the construction and operation of lighthouses and other navigational aids[196] over the disputed territory or within waters in its immediate vicinity.

Judicial Acts

Judicial acts include the exercise of jurisdiction by domestic courts in respect of the disputed territory. In *Minquiers and Ecrehos*, the ICJ concluded that 'Jersey courts have exercised criminal jurisdiction in respect of the Ecrehos during nearly a hundred years' based on the fact that five criminal proceedings were initiated in Jersey for

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[187] *Id.*, 48-51.
[188] Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment of 17 December 2002 (ICJ), paras.143-145.
[189] See *e.g.*, Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), paras.235-239, 274.
[190] See *e.g.*, Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012 (ICJ), paras.82-84.
[191] See *e.g.*, Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007 (ICJ), para.195-196; Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012 (ICJ), paras.82-84.
[192] See *e.g.*, *id*., paras.82-84.
[193] See *e.g.*, *id*.
[194] See *e.g.*, Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), paras.231-234.
[195] See *e.g.*, *id*., paras.249-250.
[196] See *e.g.*, Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment of 16 March 2001 (ICJ), paras.31-33, 197; Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment of 17 December 2002 (ICJ), paras.130, 132, 147; Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007 (ICJ), para.205-207; Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012 (ICJ), paras.82-83.

criminal offences committed on the Ecrehos between 1826 and 1921.[197] Similarly, in *Nicaragua v. Honduras*, the ICJ held that the evidence provided by Honduras of criminal complaints before the courts of Honduras for criminal acts occurred on the islands in dispute (South Cay and Savanna Cay) did have a bearing on the evaluation of *effectivités*.[198]

2.5.1.2 Acts Attributable to a State

First, in general, acts performed by State organs including both central and local governments and State agents acting in their official capacity are attributable to a State.[199] Second, acts performed by private entities cannot be attributed to a State unless they are acting on the instructions of or under the direction or control of that State.[200] In *Indonesia/Malaysia*, the ICJ did not consider Indonesian fishermen's traditional use of the waters around Ligitan and Sipadan acts of *effectivités* on the ground that 'activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority'.[201]

The presence and activities of a population on a territory are not in themselves acts of *effectivités*.[202] For instance, in *Land, Island and Maritime Frontier Dispute*, the ICJ rejected El Salvador's contention that the private ownership of land by Salvadorians in the disputed area could indicate that this disputed area was not part of Honduras but part of El Salvador.[203] In contrast, the acts of State organs or agents regulating the activities of individuals on a territory can amount to *effectivités.* An example is *Malaysia/Singapore* where the ICJ considered that control of lighthouse visits conducted by the UK and Singapore constituted acts *à titre de souverain* respecting Pedra Branca/Pulau Batu Puteh.[204]

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[197] Minquiers and Ecrehos Case (France v. United Kingdom), Judgment of 17 November 1953 (ICJ), 65.
[198] Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007 (ICJ), paras.182-185.
[199] ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), Articles 4 and 7.
[200] *Id.*, Article 8.
[201] Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment of 17 December 2002 (ICJ), para.140.
[202] M.G. Kohen, Titles and Effectivités in Territorial Disputes, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 160.
[203] Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992 (ICJ), para.97.
[204] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), para.274.

2.5.1.3 Peaceful

The display of sovereign authority should be peaceful. It is evident that military action, albeit belonging to activities of administrative function in domestic law, is difficult to be considered as a peaceful and regular exercise of the functions of control over the territory concerned thereby constituting a relevant *effectivité*.[205] Moreover, a perusal of the ICJ jurisprudence shows that in the various cases when an international court or tribunal has upheld a party's territorial claim based upon *effectivités*, such *effectivités* are usually accompanied by another party's failure to protest, acquiescence or even recognition.[206] It is still, however, inconclusive to say that *effectivités* could only be considered peaceful in the absence of any disagreement or protest. Indeed, it is open to question whether diplomatic protests of an opposing State have the value of interrupting the peaceful possession maintained by a possessor State over the disputed territory.[207]

The 1911 *Chamizal* arbitral award has upheld that protests can preclude the peaceful character of the possession. In that case where Mexico and the US disputed the territorial title to the Chamizal Tract (land territory), the US based its territorial claim partly on prescription in addition to its title under the treaties of 1848 and 1853.[208] The tribunal dismissed the US's plea of prescription on the ground that it had been constantly challenged and questioned by Mexico through diplomatic protests.[209]

Scholars seem to hold a different opinion from the *Chamizal* award. According to P.A. Verykios, a diplomatic protest has a value of drawing the attention of international public opinion to the question, but a protest not followed by further steps such as the settlement of the dispute would become 'academic' and 'useless'.[210] D.H.N. Johnson agreed with Verykios and held that such further steps might include, where possible, a reference of the matter to the League of Nations or the PCIJ since 1919 or to the UN or the ICJ since 1945.[211] Johnson argued that the advent of new machinery for international dispute settlement since 1919 had largely reduced the

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[205] For a similar view, see M.G. Kohen, Titles and Effectivités in Territorial Disputes, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 162.
[206] N. Schrijver and V. Prislan, Cases Concerning Sovereignty over Islands before the International Court of Justice and the Dokdo/Takeshima Issue, 46 *ODIL* (2015), 296.
[207] Shaw has pointed out that diplomatic protests will probably be sufficient to block any prescriptive claim, but he was aware that this position was not accepted by all academic writers. See M.N. Shaw, *International Law* (CUP. 8th ed. 2017), 375-376.
[208] The Chamizal Case (Mexico/United States), Arbitral Award of 15 June 1911, RIAA Vol. XI, 328.
[209] *Id.*, 328-329.
[210] P.A. Verykios, *La prescription en droit international public* (Paris: Pedone. 1934), 101. ('ces protestations académiques finissent par ne plus avoir aucune utilité')
[211] D.H.N. Johnson, Acquisitive Prescription in International Law, 27 *BYIL* (1950), 346.

significance of a protest in frustrating the peaceful display of the possession, and since then a protest could be said to have amounted to no more than a temporary bar.[212] Johnson further stated that how soon diplomatic protested should cease to be of value and become 'academic' and 'useless' was a matter of fact to be left to the determination of the court or tribunal concerned.[213]

However, in the author's view, no real inconsistency exists between the *Chamizal* award and the 'diplomatic protests plus further steps' formula purported by the scholars. Notably, the *Chamizal* award inferred that the circumstances in that case were such that for Mexico, diplomatic protests constituted the *only* feasible method of asserting its rights before the establishment of the International Boundary Commission in 1889, an international body created by the US and Mexico to determine the location of their international boundary and the commissioners of which also served as the arbitrators in this case.[214] The tribunal further pointed out that Mexico brought the dispute 'within a reasonable time' before the International Boundary Commission after it started to function. In this regard, I.C. MacGibbon has commented that this tribunal appeared to have required proof that 'the protesting State had taken some further steps [i.e. asserting a claim before the International Boundary Commission] as evidence of the seriousness and good faith of its intention to oppose encroachments on its rights'.[215] Hence, the *Chamizal* award does not differ from the 'diplomatic protests plus further steps' formula purported by the scholars.

The discussions contained in the *Chamizal* award and scholars' views, though pertaining to prescription or adverse possession, can entail analogical implications for *effectivités*. To this effect, diplomatic protests could not have the ultimate effect of obstructing peaceful possession unless followed by qualified further steps. Reducing the significance of diplomatic protests is reasonable because the costs of lodging diplomatic protests are so low that States might abuse them as 'unilateral and frequently opportunist instruments', thereby destabilizing the territorial order.[216] Thus, it is necessary and reasonable to require further steps to show 'evidence of the seriousness and good faith' of the protesting State's 'intention to oppose encroachments on its rights'.[217] Otherwise, giving preference to mere periodical and ineffectual paper protests might prolong disputes indefinitely without good reason, which would be 'incompatible with the régime under which the rights of each State

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[212] *Id.*
[213] *Id.*
[214] The Chamizal Case (Mexico/United States), Arbitral Award of 15 June 1911, RIAA Vol. XI, 329.
[215] I.C. MacGibbon, Some Observations on the Part of Protest in International Law, 30 *BYIL* (1953), 310.
[216] *Id.*, 293.
[217] *Id.*, 310.

would be specified and guaranteed'.[218]

According to Johnson, there are two kinds of qualified further steps: a reference of the matter to the UN or the ICJ since 1945.[219] First, according to Article 35 of the UN Charter, a State, whether a member of the UN or not, can bring any dispute or any situation which might lead to international friction or give rise to a dispute before the General Assembly and Security Council for discussion to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security. [220] This article undoubtedly applies in the context of territorial disputes. Second, in case the possessor State does not accept the ICJ's jurisdiction, even if the opposing State brings the matter before the ICJ, the ICJ cannot exercise its jurisdictional power over the matter. In light of this, Judge Levi Carneiro suggested in his individual opinion in *Minquiers and Ecrehos* that France could have and ought to have proposed arbitration to settle the territorial dispute regarding Minquiers and Ecrehos with the UK, in order to be adequate and effective in blocking the latter from claiming territorial titles based on its activities.[221] Hence, making an offer or proposal to settle the territorial dispute through an international court or tribunal amounts to one kind of qualified further steps.

A relevant question is whether there could be other kinds of qualified further steps, in addition to mechanisms involving the UN and international adjudication as proposed by Johnson about 70 years ago. Notably, Article 33(1) of the UN Charter sets forth other equally important peaceful means including negotiation, enquiry, mediation, conciliation, resort to regional agencies or arrangements, or other peaceful means of their own choice.[222] These peaceful means are of equal importance with mechanisms involving the UN and international adjudication in the sense that they can lead to the final settlement of a dispute. Nevertheless, the outcome of these peaceful means highly depends on the political will of the disputant States. Consequently, similar to diplomatic protests, there is a risk that the disputant States might abuse these peaceful means to prolong disputes without good reason. Therefore, a balance must be struck between recognizing the importance of these peaceful means in dispute settlement and preventing the abuse of them to prolong disputes unreasonably. Georg Schwarzenberger's suggestion is worth taking. In his view, to the extent that the opposing State has supplemented action by evidence that it has made every effort to induce the possessor State to agree to the peaceful settlement of the

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[218] Minquiers and Ecrehos (France/United Kingdom), Individual Opinion of Judge Levi Carneiro of 17 November 1953, 108.
[219] D.H.N. Johnson, Acquisitive Prescription in International Law, 27 *BYIL* (1950), 346.
[220] UN Charter, Article 35.
[221] Minquiers and Ecrehos (France/United Kingdom), Individual Opinion of Judge Levi Carneiro of 17 November 1953, 107.
[222] *Id*., Article 33(1).

dispute through means enumerated in Article 33(1) of the UN Charter, such supplemented action amounts to qualified further steps to thwart the peaceful display of State authority alleged by the possessor State.[223]

However, one accepted exception to the 'diplomatic protests plus further steps' formula is that '[m]inor manifestations in the purported exercise of title might well adequately be met by protests'.[224] This position was stated by the agent for the UK in the oral proceedings of *Minquiers and Ecrehos* where it was argued that the character of the action taken by the protesting State should be related to and in proportion to the action taken by the State acquiring title.[225] Later, in the oral proceedings of *Anglo-Norwegian Fisheries*, the agent of the UK expressed a similar argument that '[t]he paper protest is at least as important as the paper decree'.[226] Such 'paper decree' include municipal legislation without actual enforcement. MacGibbon has commented that in the event of a paper decree, diplomatic protests are 'the proper and probably the only effective course open to an aggrieved State' because without the suffering of actual infringement of its rights, an aggrieved State would be unlikely to have any substantial cause of action before an international court or tribunal.[227] Hence, diplomatic protests would suffice at least until the attempt is made to enforce the paper decree.[228]

To conclude, diplomatic protests could generally act as a temporary bar to disturb the peaceful character of possession. Qualified further steps that can produce the ultimate effect of obstructing peaceful possession include mechanisms involving the UN, international adjudication, and other peaceful means enumerated in Article 33(1) of the UN Charter to the extent that the opposing State has demonstrated that it has made every effort to induce the possessor State to agree on these peaceful means. One exception is that if the possessor State manifests its authority through municipal legislation without actual enforcement, diplomatic protests would suffice at least until the attempt is made to enforce the legislation.

2.5.1.4 Continuous, Public and Pertinent

The display of sovereign authority should be *continuous*. Continuity means that the performance of *effectivités* endures for a certain length of time. It is, however, impossible to point to any defined length of

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[223] G. Schwarzenberger, Title to Territory: Response to a Challenge, 51 *AJIL* (1957), 323.
[224] Minquiers and Ecrehos (France/United Kingdom), Oral Proceedings, 367.
[225] *Id.*
[226] Fisheries (United Kingdom v. Norway), Oral Proceedings, 37.
[227] I.C. MacGibbon, Some Observations on the Part of Protest in International Law, 30 *BYIL* (1953), 316.
[228] *Id.*

time.[229] The time-limit will rely on the specific circumstances of the case.[230] Isolated acts could become crucial depending on the nature of the territory and the existence of competing claims advanced by other sovereigns, including legal titles other than *effectivités* and the weight to be attributed to opposite *effectivités* performed by another sovereign over the same territory.[231]

First, the required degree of the display of sovereign authority should be in proportion to the nature of the territory concerned. The ICJ stated in *Nicaragua v. Honduras* that '[s]overeignty over minor maritime features…may therefore be established on the basis of a relatively modest display of State powers in terms of quality and quantity'.[232] For example, though the construction and operation of lighthouses and other navigational aids were not considered as an act manifesting the exercise of State authority in *Minquiers and Ecrehos*,[233] the ICJ has concluded in several cases, including *Qatar v. Bahrain*, *Indonesia/Malaysia*, *Nicaragua v. Honduras* and *Nicaragua v. Colombia*, that these acts could be legally relevant and suffice to constitute a title in the event of tiny islands.[234] Scholars also comment that what act will suffice for the establishment of territorial sovereignty relies on the character of the territory: 'the bar with respect to remote and sparsely settled areas will be set lower than in the context of more heavily populated territory.'[235]

Second, the continuous requirement might be reduced in the absence of any superior competing claim made by other States. The PCIJ endorsed this position in *Eastern Greenland*, stating that:

> [i]t 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

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[229] M.N. Shaw, *International Law* (CUP. 8th ed. 2017), 376.
[230] *Id.*
[231] M.G. Kohen, Titles and Effectivités in Territorial Disputes, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 157.
[232] Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007, para.174.
[233] Minquiers and Ecrehos Case (France v. United Kingdom), Judgment of 17 November 1953 (ICJ), 70-71.
[234] See *e.g.*, Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment of 16 March 2001 (ICJ), paras.31-33, 197 (regarding a small island, Qit'at Jaradah); Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment of 17 December 2002 (ICJ), paras.130, 132, 147 (regarding two tiny islands, Pulau Ligitan and Pulau Sipadan); Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007 (ICJ), para.205-207 (regarding Bobel Cay, Savanna Cay, Port Royal Cay and South Cay); Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012 (ICJ), paras.82-83 (regarding Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla).
[235] J. Crawford, *Brownlie's Principles of Public International Law* (OUP 9th ed. 2019), 210.

populated or unsettled countries.[236]

In keeping the same approach with the PCIJ, the ICJ held in *Nicaragua v. Honduras* that 'a significant element to be taken into account is the extent to which any acts *à titre de souverain* in relation to disputed islands have been carried out by another State with a competing claim to sovereignty'.[237] In case there are two competing claims of *effectivités* over the same territory, the relatively stronger one should prevail. Nevertheless, the international courts or tribunals have rarely been compelled to decide on which party has made a superior claim in the presence of competing *effectivités*, either because the other party has not provided any evidence of acts *à titre de souverain* in relation to the disputed territory or the evidence put forward by it has been deemed unpersuasive, inconclusive, or otherwise has no bearing on the territory in dispute.[238]

The display of sovereign authority should be *public* so that interested States can be made aware of it.[239] In *Malaysia/Singapore*, Singapore claimed that its installation of military communications equipment on this island in 1977 could constitute an act of *effectivité*, while Malaysia argued that the installation was undertaken secretly.[240] The ICJ rejected this claim on the ground that it was unable to assess whether Malaysia had any knowledge of this installation.[241]

The display of sovereign authority should be explicitly or undoubtedly *pertinent* to the territory in dispute. In *Indonesia/Malaysia*, the ICJ pronounced a general principle for assessing activities constituting *effectivités* that '[the court] 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'.[242] Similarly, in *Minquiers and Ecrehos,* the ICJ considered that the fact that the Rolls of the Manorial Court of the fief of Noirmont in Jersey contained three entries for the years 1615, 1616 and 1617 regarding specific objects shipwrecked at the Minquiers indicated that these judicial activities specifically referred to the Minquiers, and could therefore constitute valid evidence of

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[236] Legal Status of Eastern Greenland (Denmark v. Norway), Judgment of 5 April 1933, PCIJ Series A/B No. 53, 46.
[237] Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012 (ICJ), para.80.
[238] For an account of the ICJ cases in this regard, see N. Schrijver and V. Prislan, Cases Concerning Sovereignty over Islands before the International Court of Justice and the Dokdo/Takeshima Issue, 46 *ODIL* (2015), 295.
[239] M.N. Shaw, *International Law* (CUP. 8th ed. 2017), 375.
[240] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), para.247.
[241] *Id.*, para.248.
[242] Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment of 17 December 2002 (ICJ), para.136.

effectivités.[243] In *Malaysia/Singapore*, the ICJ rejected to regard an exploitation concession granted by the Malaysian government to an oil company as valid evidence of *effectivités* because of the lack of publicity of the coordinates in relation to the concession.[244]

2.5.1.5 Critical Date

The concept of critical date is a date after which a court or tribunal should not admit evidence of the activities of the parties.[245] It is a jurisprudential tool used to 'freeze' any territorial title at the moment of the crystallization of the dispute.[246] As the ICJ has explained in the 2002 *Indonesia/Malaysia* judgment, in appraising evidence of *effectivités*, acts having taken place after the critical date, on which the dispute between the parties crystallized, could not be taken into consideration unless such acts amount to 'a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them'.[247] The ICJ has reaffirmed this position in cases including *Nicaragua v. Honduras*, *Malaysia/Singapore* and *Nicaragua v. Colombia*.[248]

The *raison d'être* of the concept of critical date includes two facets. The first facet is a pragmatic one, being the practical necessity to confine the dossier to the more relevant facts and thus to acts prior to the existence of a dispute.[249] The second facet is a logical one. The disputed character of a territory at stake should bar acts subsequent to the crystallization of the dispute from producing any effect on the territorial title, as a normal inference from the principle of good and fairness is that 'a state should be precluded in law to avail itself of a situation carried with the sole purpose of establishing its sovereignty while the latter [the sovereignty] is precisely and overtly challenged

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[243] Minquiers and Ecrehos Case (France v. United Kingdom), Judgment of 17 November 1953 (ICJ), 67-69.
[244] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), paras.251-253.
[245] Argentine-Chile Frontier Case, Arbitral Award of 9 December 1966, RIAA Vol. XVI, 166.
[246] G. Distefano, The Time Factor and Territorial Disputes, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 399-400, fn. 17.
[247] Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment of 17 Dec 2002 (ICJ), para.135.
[248] See *e.g.*, Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007 (ICJ), para.117; Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), para.179-180; Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 Nov 2012 (ICJ), para.83-84.
[249] J. Crawford, *Brownlie's Principles of Public International Law* (OUP 9th ed. 2019), 207.

by another state'.[250]

The ultimate relevance or importance of the concept of critical date may, however, vary depending on the specific circumstances of the case.[251] International courts or tribunals have found this concept of little utility in three circumstances. The first circumstance is where a court or tribunal is asked to determine a *contemporary* title to the territory in question, instead of a title established in the past. For example, the *Dubai/Sharjah* arbitral tribunal stated that:

> In reality the concept of the critical date has only played a significant role in cases where it was necessary to establish exactly and precisely when in the past sovereignty was exercised by a State over a given territory, as in the *Island of Palmas* and *Eastern Greenland* cases. This is not the situation in the present dispute where the task of the Court, as has been indicated in Chapter II above, is to decide to whom the disputed boundary areas belong today.[252]

D.W. Bowett commented that this finding indicated that the tribunal rejected the application of the concept of critical date to disputes about a contemporary title to territory.[253] In a similar vein, the *Argentine/Chile* arbitral tribunal 'considered the notion of the critical date to be of little value in the present litigation and…examined all the evidence submitted to it, irrespective of the date of the acts to which such evidence relates', as the *compromiso* asked the tribunal to determine the contemporary course of the boundary between the territories of the parties in certain sectors.[254] The second circumstance is where the parties do not advance any critical date argument. In *Eritrea/Yemen*, since the parties had not sought to employ a critical date argument in relation to any of the questions involving the substance of the dispute, the arbitral tribunal followed the example of the *Argentine/Chile* award and examined all the evidence submitted to it.[255] The third circumstance occurs when the activities of the parties had remained unchanged for a long time. The ITLOS in *Ghana/Côte d'Ivoire* considered the concept of critical date to be irrelevant to the case because the activities of both parties in the maritime area under consideration had been unchanged over the years.[256]

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[250] G. Distefano, The Time Factor and Territorial Disputes, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 399.
[251] See *e.g.*, *id*., 399; M.N. Shaw, *International Law* (CUP. 8th ed. 2017), 378-379; J. Crawford, *Brownlie's Principles of Public International Law* (OUP 9th ed. 2019), 207.
[252] Dubai/Sharjah arbitration of 1981, International Law Report, Vo. 91, 594-595.
[253] D.W. Bowett, The Dubai/Sharjah Boundary Arbitration of 1981, 65 *BYIL* (1994), 114.
[254] Argentine-Chile Frontier Case, Arbitral Award of 9 December 1966, RIAA Vol. XVI, 167.
[255] Arbitration on Territorial Sovereignty and Scope of the Dispute (Eritrea/Yemen), Award on the First Stage (PCA), para.95.
[256] Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment of 23 Sep 2017 (ITLOS), para.210.

2.5.2 The Subjective Element: the Intent to Act as a Sovereign

The acts of *effectivités* must be accompanied with an intent to act as sovereign. For example, acts performed by a trustee according to Chapter XII of the UN Charter or by a belligerent occupant cannot be considered as acts *à titre de souverain*.[257] International courts and tribunals tend to deduce the intent of a State from relevant acts undertaken by it rather than merely rely on its declarations. In *Indonesia/Malaysia*, the ICJ held that the activities relied upon by Malaysia, which included the measures taken to regulate and control the collecting of turtle eggs, the establishment of a bird reserve and the construction and operation of lighthouses and navigational aids, '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'.[258]

Conversely, naval patrols usually are not considered acts *à titre de souverain* but just a matter of geographical necessity to pass near areas in dispute. In *Malaysia/Singapore*, both Malaysia and Singapore claimed that naval patrols and exercises around the disputed island - Pedra Branca/Pulau Batu Puteh - constituted evidence of *effectivités*.[259] However, the ICJ held that these activities were a matter of geographical necessity since the naval vessels from Singapore harbor often had to pass near Pedra Branca/Pulau Batu Puteh and that some part of these activities belonged to the five power arrangements between Malaysia, Singapore, the UK, Australia and New Zealand, thereby being of a cooperative nature rather than *à titre de souverain*.[260]

2.5.3 Application to the Spratly Islands Setting

2.5.3.1 Relevant Activities in the Spratly Islands

The acts that can be invoked by the disputant States as evidence of *effectivités* mainly include legislative and administrative acts. There are no reported domestic cases involving any island in the Spratly Islands, probably because the only physical presences on most of these islands are military forces and facilities.

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[257] M.G. Kohen & M. Hébié, Territory, Acquisition, *MPEPIL* (2011), para.32.
[258] Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment of 17 December 2002 (ICJ), para.148.
[259] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), para.240.
[260] *Id*., paras.241.

Legislative Acts

Most national legislation of the disputant States that is specifically pertinent to the islands within the Spratly Islands aims at declaring sovereignty, rather than regulating activities on or around such islands.[261] China has declared its sovereignty over the Spratly Islands in a series of legislative documents,[262] including the 1949 Regulations on the Organization of the Office of the Chief Executive of the Hainan Special District which placed the Spratly Islands under the jurisdiction of the Hainan Special District,[263] the 1958 Declaration on Territorial Sea,[264] and the 1992 Law on the Territorial Sea and the Contiguous Zone.[265] Vietnam has declared its sovereignty over the Spratly Islands in legislative documents including the 1974 Proclamation by the Government of the Republic of Vietnam,[266] the 1997 Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf,[267] and the 2012 Law of the Sea of Viet Nam.[268] The Philippines has declared its sovereignty over the islands within an area that it calls 'Kalayaan Island Group', which comprises Flat Island, Nanshan Island, Thitu Island, West York Island, North-East Cay and Loaita Island, in its legislative documents including the 1978 Presidential Decree No. 1596,[269] and the 2009 Republic Act No. 9522.[270] Malaysia has indicated its sovereignty over some insular features in the southeastern portion of the Spratly Islands by publishing a map on

[261] The author has only found one piece of legislation that is specifically pertinent to the Spratly Islands, that is, *Announcement on the 2012 Summer Ban on Marine Fishing in the South China Sea Maritime Space*, enacted by the Fishery Bureau of Nanhai District under the Chinese Ministry of Agriculture on 10 May 2012. The announcement provided for a fishing moratorium in the South China Sea areas from 12° north latitude up and further stipulated that during the fishing moratorium, any fishing boat that holds Nansha Special Fishing Permits and goes to conduct fishing production in the sea areas of Nansha Islands [Spratly Islands] south of 12º north latitude must strictly follow the reporting system in its entry and exit of sea ports. See China, Announcement on the 2012 Summer Ban on Marine Fishing in the South China Sea Maritime Space (10 May 2012), reproduced in: South China Sea Arbitration (Philippines v. China), the Philippines' Memorial – Volume VI, Annex 118.

[262] For an account of relevant legislation and other official documents, see China, White Paper (13 July 2016), paras.29-42.

[263] China, Regulations on the Organization of the Office of the Chief Executive of the Hainan Special District (6 June 1949).

[264] China, Declaration on China's Territorial Sea (4 September 1958).

[265] China, Law on the Territorial Sea and the Contiguous Zone (25 February 1992), Article 2.

[266] South Vietnam, Proclamation by the Government of the Republic of Vietnam (14 February 1974), para.3.

[267] Vietnam, Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf (12 May 1977), para.1.

[268] Vietnam, the Law of the Sea of Viet Nam (21 June 2012), Article 1.

[269] The Philippines, Presidential Decree No. 1596 (11 June 1978).

[270] The Philippines, Republic Act No. 9522 (10 March 2009). (clarifying that the Philippines' sovereignty and jurisdiction of the Kalayaan Island Group area must be determined according to Article 121 of UNCLOS)

its territorial waters and continental shelf in 1979, whereby a certain portion of the Spratly Islands was shown to be part of Malaysia.[271] The Malaysian government reaffirmed this position in its official statements in 1983 and 1988.[272] All the above national legislation of the disputant States are for declaring sovereignty and does not directly entail enforcement, which thus belongs to 'paper decree'.[273]

Administrative Acts

As mentioned in section 2.3, the disputant States employed military forces to occupy islands in the Spratly Islands in the 1970s, 1980s and 1990s. After occupying the islands through military action, the disputant States have constructed and maintained the operation of lighthouses on most of their controlled islands in the Spratly Islands. Other facilities built by the States on these islands mainly include military bases or other military installations. These States exercise control of visits to both the disputed islands and their lighthouses. Only two islands are currently accessible to the civilian population: Swallow Reef under the control of Malaysia, and Thitu Island controlled by the Philippines. Moreover, China, Malaysia, the Philippines and Vietnam all have undertaken land reclamation projects on their controlled islands. (see Table 2-4)

[271] D. Heinzig, *Disputed Islands in the South China Sea: Paracels, Spratlys, Pratas, Macclesfield Bank* (Otto Harrassowitz. 1976), 65.
[272] R. Haller-Trost, *The Brunei-Malaysia Dispute over Territorial and Maritime Claims in International Law* (IBRU. 1994), 48-49.
[273] Fisheries (United Kingdom v. Norway), Oral Proceedings, 37.

Table 2-4: Lighthouses, other facilities, control of visits and land reclamation projects in the Spratly Islands[274]

Controlling State	*Island*	*The year when control began*	*Lighthouse*	*Other Facilities*	*Controls of Visits to the Site of the Island and the Lighthouse*	*Land Reclamation Project*
China (6)	Itu Aba Island	1946	Yes	A landing strip, a coast guard station, a weather station and an army garrison.	Site closed; Lighthouse closed.	Yes[275]
	Fiery Cross Reef	1988	Yes	An airstrip.	Site closed; Lighthouse closed.	Yes
	Mckennan Reef[276]	1988	Data Unknown	Data Unknown	Data Unknown	Data Unknown
	Gaven Reef (North)	1988	Yes	A military base.	Site closed; Lighthouse closed.	Yes
	Cuarteron Reef	1988	Yes	A military base.	Site closed; Lighthouse closed.	Yes
	Johnson Reef	1988	Yes	A military base and airfield.	Site closed; Lighthouse closed.	Yes
Malaysia (1)	Swallow Reef	1977	Yes	An airstrip, a small naval base, and more recently a 15-room scuba diving resort.	Site open; Lighthouse closed.	Yes
Philippines (6)	Flat Island[277]	1970	Data Unknown	Data Unknown	Data Unknown	Yes

[274] (1) Sources of data regarding lighthouses, other facilities and control of visits in this table: Lighthouses of the Spratly Islands, available at < https://www.ibiblio.org/lighthouse/spr.htm >. The data provided therein were last checked and revised on 31 January 2019. (2) Sources of data regarding land reclamation projects: CSIS, Asia Maritime Transparency Initiative, available at <https://amti.csis.org/>.

[275] It was reported that Taiwan began a modest land reclamation effort on Itu Aba Island in April 2014, which had reclaimed at least approximately five acres of land near the island's airstrip. See the US Office of the Secretary of Defense, Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2015 (7 April 2015), 72.

[276] Mckennan Reef is guarded by the Chinese soldiers stationed at the nearby Hughes Reef (regarded as a low-tide elevation by the *South China Sea Arbitration* award). The Philippines treats Mckennan Reef and Hughes Reef as one single feature. See South China Sea Arbitration (The Philippines v. China), Award of 12 July 2016 (PCA), para.292.

[277] Flat Island is guarded by Philippine soldiers stationed at nearby Nanshan Island.

	Nanshan Island	1970	Data Unknown	An army garrison.	Data Unknown	Data Unknown
	Thitu Island	1971	Yes	A military airstrip and houses for a civilian population (184 people in 2015).	Site open; Lighthouse closed.	Data Unknown
	West York Island	1971	Data Unknown	A small military observation post.	Data Unknown	Data Unknown
	North-East Cay	1971	Yes	An army garrison.	Site closed; Lighthouse closed.	Data Unknown
	Loaita Island	1971	Data Unknown	Data Unknown	Data Unknown	Data Unknown
Vietnam (6)	Spratly Island	1975	Yes	A military base, a short landing strip for propeller aircraft.	Site closed; Lighthouse closed.	Yes
	South-West Cay	1975	Yes	A military base.	Site closed; Lighthouse closed.	Yes
	Sin Cowe Island	1975	Yes	A military base.	Site closed; Lighthouse closed.	Yes
	Sand Cay	1975	Yes	A military base.	Site closed; Lighthouse closed.	Yes
	Namyit Island	1975	Yes	An army garrison.	Site closed; Lighthouse closed.	Yes
	Amboyna Cay	1975	Yes	An army garrison.	Site closed; Lighthouse closed.	Yes

2.5.3.2 Evaluation of Effectivités

Application of critical date

The concept of critical date is, arguably, of little relevance in appraising *effectivités* in the Spratly Islands. First, the purpose of the evaluation of *effectivités* in this section is to determine the contemporary title to the islands in the region, or in other words, to take a 'photograph' of the territorial situation[278] in the Spratly Islands as what it is today but not what it was at a precise moment in the past. Second, given the specific circumstance of the present case where the activities of each disputant State as evidence of *effectivités* have been met with constant protests from other disputant States since the very beginning, the critical date or the moment of the crystallization of the dispute, if relevant here (*quod non*), might be so early that almost all the activities of the disputant States would be deemed irrelevant to the determination of the territorial title. In light of this, the following evaluation of *effectivités* will examine all the activities of the disputant States without regard to their dates.

Application of the peaceful, continuous, public and pertinent requirements

Given the small size of the disputed islands in the Spratly Islands, there is little doubt that the above legislative and administrative acts, including the enactment of domestic legislation, the construction and operation of lighthouses and other facilities, the control of visits to the islands and lighthouses, and land reclamation projects, can constitute acts *à titre de souverain* and easily fulfil the *continuous*, *public* and *pertinent* requirements. However, whether these acts meet the *peaceful* requirement might sometimes be difficult to tell. There is little chance that the military action employed by the disputant States in the 1970s, 1980s and 1990s to gain or regain control of the disputed islands could be regarded as a peaceful and regular exercise of State authority and thereby constituting a relevant *effectivité*. Yet, whether legislative and administrative acts other than military action fulfil the peaceful requirement might be open to question, as these acts have been accompanied by constant protests lodged by other disputant States since the very beginning.[279]

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[278] Frontier Dispute (Burkina Faso/Republic of Mali), Judgment of 22 Dec 1986 (ICJ), para.30.

[279] For example, in a letter addressed to the UN dated 3 March 2016, the Chinese government stated that: 'Viet Nam has long been engaged in large-scale construction projects and deployment of missiles and other offensive weapons on the Chinese islands and reefs of the Nansha Islands [the Spratly Islands] that it has illegally occupied. China firmly opposes these acts and has been lodging sustained protests for a long time.' See China, Annex to the letter dated 3 March 2016 from the Permanent Representative of China to the United Nations addressed to the Secretary-General (2016). For an account of protests against activities respecting the Spratly Islands area, also see P. Kreuzer, A Comparison of Malaysian and Philippine

It might be helpful to briefly recap the peaceful requirement here. On the one hand, diplomatic protests would suffice to disturb the peaceful display of those legislative acts without actual enforcement until the attempt is made to enforce the legislation. Therefore, respecting the Spratly Islands, it would be difficult for a disputant State to claim islands that do not fall under its control based on the mere declaration of sovereignty through its domestic legislation. On the other hand, for those islands that a disputant State has actual control and exercises of administrative power, diplomatic protests could act as a temporary bar but not produce the ultimate effect of interrupting the peaceful character of possession unless followed by qualified steps such as mechanisms involving the UN and international adjudication, and other peaceful means under Article 33(1) of the UN Charter to the extent that the relevant State has demonstrated that it has made every effort to induce the possessor State to agree on such peaceful means. Hence, it is necessary to investigate the question of whether the disputant States have been committed to or engaged in any peaceful means for settling their territorial dispute over the Spratly Islands.

First, the disputant States have neither been committed to nor ever used mechanisms involving the UN and international adjudication to settle the territorial dispute in relation to the Spratly Islands. The compulsory dispute settlement regime stipulated in Part XV of UNCLOS, including Annex VII arbitration, does not apply to this territorial dispute because UNCLOS is a treaty about sovereignty and sovereign rights over the sea, not the land. [280] Moreover, China, Vietnam and Malaysia do not accept the compulsory jurisdiction of the ICJ. Though the Philippines does, it has made a reservation that excludes disputes relating to territorial sovereignty or maritime entitlements claimed or exercised by it.[281] None of these four disputant States has ever agreed to submit this territorial dispute to any other international courts or tribunals through a special agreement or an arbitration *compromis*. Conversely, China has expressly stated that it does not accept any recourse to third-party settlement on issues concerning territory and maritime delimitation, including the territorial dispute involving the Spratly Islands.[282]

Second, the disputant States have expressed their political

Responses to China in the South China Sea, 9 *The Chinese Journal of International Politics* (2006), 239-276.

[280] UNCLOS, Article 298(1)(a)(i). (providing that 'any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission')

[281] Declarations made by the Philippines under Article 36, paragraph 2, of the Statute of the International Court of Justice (18 January 1972), available at <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1&clang=_en#EndDec>.

[282] China, White Paper (13 July 2016), paras.83, 130.

commitments to settle the territorial dispute in the Spratly Islands through consultations and negotiations by signing a series of bilateral or multilateral documents, and have been implementing these bilateral consultations and negotiations in a sustained manner. Negotiations between States are usually carried out through 'normal diplomatic channels' including by competent authorities or representatives of each State party or by summit discussions between heads of State or foreign ministers.[283] Consultations, in theory, belong to one form of negotiations, which require a State to discuss with the affected State when it anticipates that a decision or a proposed course of action may harm that State.[284]

Firstly, in 1995, a joint statement was signed by the senior officials of the Philippines and China as a result of their first consultations on the South China Sea issue, stating that '[t]erritorial disputes between the two sides should not affect the normal development of their relations. Disputes shall be settled in a peaceful and friendly manner through consultations on the basis of equality and mutual respect'.[285] The subsequent bilateral documents signed between the Philippines and China reiterated this commitment.[286] Furthermore, a Bilateral Consultation Mechanism on the South China Sea, through which both governments meet regularly to discuss issues of concern to either side on the South China Sea, was established in October 2016,[287] and has held five meetings in May 2017, February 2018, October 2018, April 2019, and October 2019, respectively.[288]

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[283] For an account of forms of negotiation, see J.G. Merrills, *International Dispute Settlement* (CUP 6th ed. 2017), 8-12.
[284] *Id*., 2-8.
[285] China and Philippines, Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue (10 August 1995), reproduced in: The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), The Philippines' Memorial, Vol. VI, Annex 180.
[286] See *e.g.*, China and Philippines, Joint Statement: Philippine-China Experts Group Meeting on Confidence Building Measures (23 March 1999); China and Philippines, Joint Statement: Framework of Bilateral Cooperation in the Twenty-First Century (16 May 2000); China and Philippines, Joint Statement: 3rd Philippines-China Experts' Group Meeting on Confidence-Building Measures (4 April 2001); China and Philippines, Joint Press Statement on the State Visit of H.E. President Gloria Macapagal-Arroyo to the People's Republic of China, 1-3 September 2004 (3 September 2004); China and Philippines, Joint Statement (1 September 2011). These documents are reproduced in: The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), The Philippines' Memorial, Vol. VI, Annexes 178, 188, Vol. IX, Annexes 505, 506, 507.
[287] China and Philippines, Joint Statement (21 October 2016), available at < https://www.philstar.com/headlines/2016/10/21/1636345/full-text-joint-statement-philippines-and-china >.
[288] China and Philippines, Joint Press Release for the First Meeting of the China-Philippines Bilateral Consultation Mechanism on the South China Sea (19 May 2017), available at < http://www.xinhuanet.com//english/2017-05/19/c_136299099.htm >; China and Philippines, Joint Press Release Second Meeting of China-Philippines Bilateral Consultation Mechanism on the South China Sea (13 February 2018), available at < https://www.fmprc.gov.cn/mfa_eng/wjbxw/t1534824.shtml >; China and Philippines, Joint Press Release for the Third Meeting of the China-

Secondly, in the 1999 Joint Statement on the Framework for Future Bilateral Cooperation, China and Malaysia agreed to resolve the disputes in the South China Sea through bilateral consultations and negotiations according to recognized principles of international law.[289] The subsequent bilateral documents signed between China and Malaysia in 2004, 2014 and 2016 reiterated this commitment.[290]

Thirdly, in 2011, China and Vietnam signed a bilateral document where both parties agreed to resolve the disputes between them including those relating to South China Sea through negotiations and consultations, and to involve other interested parties in the negotiations as well if they are parties to the dispute.[291] Furthermore, in 2013, these two States established a working group for bilateral consultations in a joint statement, namely the Working Group on Maritime Cooperation and Joint Development.[292] This working group is responsible for negotiating the joint development issues in a broader sea area including not only the area near Beibu Gulf but also other areas in the South China Sea. Despite occasional interruptions owing to the unpleasant maritime conflicts between the two sides, this working group has held seven rounds of consultations.[293]

Fourthly, apart from bilateral mechanisms, China and ASEAN jointly declared in the 2002 DOC to settle the territorial dispute in the

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Philippines Bilateral Consultation Mechanism on the South China Sea (18 October 2018), available at < http://www.xinhuanet.com/english/2018-10/18/c_137542390.htm>; China, Press Release for the Fourth Meeting of the China-Philippines Bilateral Consultation Mechanism on the South China Sea (3 April 2019), available at < http://www.xinhuanet.com/world/2019-04/03/c_1124324452.htm> (It needs to be noted that China and the Philippines did not publish a joint press release for the fourth meeting.); China and Philippines, Joint Press Release for the Fifth Meeting of the China-Philippines Bilateral Consultation Mechanism on the South China Sea (29 October 2019), available at < http://www.xinhuanet.com/world/2019-10/29/c_1125166387.htm>.

[289] China and Malaysia, Joint Statement on the Framework for Future Bilateral Cooperation (31 May 1999), Article 9, available at < https://www.mfa.gov.cn/nanhai/chn/zcfg/t1367523.htm >.

[290] China and Malaysia, Joint Statement (29 May 2004) available at < http://www.china.org.cn/english/2004/May/96837.htm >; China and Malaysia, Joint Statement on the 40th Anniversary of the Establishment of Diplomatic Relations (1 June 2014), Article 30, available at <https://www.mfa.gov.cn/nanhai/chn/zcfg/t1161309.htm>; China and Malaysia, Joint Statement (3 November 2016), Article 26, available at < https://www.mfa.gov.cn/nanhai/chn/zcfg/t1412634.htm >.

[291] China and Vietnam, Agreement on Basic Principles Guiding Resolution of Maritime Issues (11 October 2011), Article 3, available at <http://www.gov.cn/jrzg/2011-10/12/content_1966682.htm>.

[292] China and Vietnam, Joint Statement (15 October 2013), available at < https://www.mfa.gov.cn/nanhai/chn/zcfg/t1089639.htm >.

[293] China, China and Vietnam hold a new round of consultations through the Working Group on Waters Outside Beibu Gulf and the Working Group on Maritime Cooperation and Joint Development (9 November 2018), available at < https://www.fmprc.gov.cn/nanhai/chn/wjbxw/t1611861.htm >.

South China Sea through consultations and negotiations. [294] Furthermore, in August 2017, China and ASEAN formally announced the start of negotiations on the fine print of the COC, which was aimed to coordinate State conduct in the South China Sea.[295] Three months later, China and ASEAN adopted a framework of the COC, reaffirming these States' commitments to explore and undertake cooperative arrangements in the region.[296]

Based on the above analysis of the engagement of the disputant States in using peaceful means for the settlement of the territorial dispute in relation to the Spratly Islands, it is clear is that the disputant States have neither been committed to nor ever used mechanisms involving the UN and international adjudication to settle this territorial dispute. In contrast, the 2002 DOC and the bilateral agreements, though not being legally binding documents, have indicated the disputant States' political commitments to settle this territorial dispute through consultations and negotiations as a preferred, though not necessarily exclusive, form of peaceful means.[297] These documents, together with the implementation of bilateral consultations and negotiations, are conclusive to the existence of the territorial dispute. In the author's view, it is prudent to argue that the sustained diplomatic protests and consultations and negotiations, which have been operated by relevant States since the very beginning of the acts *à titre de souverain* conducted by the possessor States, [298] though not yet producing any substantive outcome in relation to the settlement of this territorial dispute, have shown that the former had made sufficient efforts to induce the latter to agree on these peaceful means. Therefore, the peaceful character of those acts *à titre de souverain* is deprived, thereby unable to constitute *effectivités*. This conclusion is perhaps unsurprising, given that the activities of each disputant State have been conducted and maintained in the presence of constant opposition lodged by other disputant States since the very beginning. This situation significantly differs from the settled international jurisprudence where the relevant acts *à titre de souverain* are usually accompanied by another

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[294] ASEAN and China, Declaration on the Conduct of Parties in the South China Sea (2002), Article 4.

[295] Lee YingHui, A South China Sea Code of Conduct: Is Real Progress Possible? (18 November 2017), available at <https://thediplomat.com/2017/11/a-south-china-sea-code-of-conduct-is-real-progress-possible/>.

[296] Prashanth Parameswaran, Will a China-ASEAN South China Sea Code of Conduct Really Matter? (5 August 2017), available at <https://thediplomat.com/2017/08/will-a-china-asean-south-china-sea-code-of-conduct-really-matter/>.

[297] South China Sea Arbitration (The Philippines v. China), Award on Jurisdiction and Admissibility of 29 October 2015 (PCA), paras.217, 230-251.

[298] For an account of protests against activities respecting the Spratly Islands area, also see P. Kreuzer, A Comparison of Malaysian and Philippine Responses to China in the South China Sea, 9 *The Chinese Journal of International Politics* (2006), 239-276. Also see China, Annex to the letter dated 3 March 2016 from the Permanent Representative of China to the United Nations addressed to the Secretary-General (2016).

party's failure to protest, acquiescence or even recognition.[299]

2.6 TREATY TITLE

2.6.1 Applicable Law

Boundary treaties including peace treaties and boundary delimitation treaties, and more broadly, treaties of cession, 'whereby either additional territory is acquired or lost or uncertain boundaries are clarified by agreement between the states concerned', are themselves a root of territorial title.[300] These treaties are special in two senses. First, territorial titles created by boundary treaties are valid *erga omnes*. As stated by the *Eritrea/Yemen* arbitral tribunal:

> this special category of treaties [boundary treaties] also represents a legal reality which necessarily impinges upon third states, because they have effect *erga omnes*. If State A has title to territory and passes it to State B, then it is legally without purpose for State C to invoke the principle of *res inter alios acta*, unless its title is better than that of A (rather than of B). In the absence of such better title, a claim of *res inter alios acta* is without legal import.[301]

Second, a territorial title created by a boundary treaty would continue to exist even if the treaty expires.[302] The above two exceptional legal effects are based on the principle of the stability and finality of boundaries, the importance of which has been recorded in the law of treaties,[303] and repeatedly emphasized in various international jurisprudence including *Temple of Preah Vihear*, *Aegean Sea* and *Bangladesh v. India*.[304]

2.6.2 Application to the Spratly Islands Setting

2.6.2.1 The 1887 China-France Treaty

As a result of the Tokin War, China and France concluded a treaty in

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[299] N. Schrijver and V. Prislan, Cases Concerning Sovereignty over Islands before the International Court of Justice and the Dokdo/Takeshima Issue, 46 *ODIL* (2015), 296.
[300] M.N. Shaw, *International Law* (CUP. 8th ed. 2017), 73.
[301] Arbitration on Territorial Sovereignty and Scope of the Dispute (Eritrea/Yemen), Award on the First Stage (PCA), para.153.
[302] Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment of 3 February 1994 (ICJ), para.72.
[303] VCLT, Article 62(2)(a).
[304] See *e.g.*, Temple of Preah Vihear (Cambodia v. Thailand), Judgment of 15 June 1962 (ICJ), 34; Aegean Sea Continental Shelf (Greece v. Turkey), Judgment of 19 December 1978 (ICJ), 36; Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award of 7 July 2014 (PCA), para.216.

1887 to delimit the frontier between China and northern Vietnam. The third clause of this treaty used the Paris meridian 105°43'E as the demarcation line and allocated the islands east of this line to China.[305] This clause specifies only the starting point of the demarcation line, namely 'the eastern point of the island of Tcha's Kou, or Ouan Chan (Tra Co)', but not the ending point.

The absence of the ending point of the demarcation line gave rise to debates between China and France in the 1930s, more than 40 years after the treaty was concluded. In reply to the French government' inquiry on the Paracel Islands in 1932, the Chinese government declared that the Paracel Islands was under the sovereignty of China partly because this archipelago lied east of the demarcation line established according to the third clause of the 1887 China-France Treaty.[306] France rejected this argument, on the ground that the purpose of the 1887 treaty was to allocate the territories and islands situated in the Monkai region or the Gulf of Tonkin but not beyond, and that extending the demarcation line beyond that region would cause absurd consequences because islands immediately off the Vietnamese coast would also be placed to China.[307]

Apparently, China and France disputed the interpretation of the third clause of the 1887 treaty regarding the question of whether the demarcation line could extend southwards to reach into the South China Sea to allocate the Paracel Islands and even the Spratly Islands (lying east to the Paracel Islands) to China. If China intends to base its territorial claims to the Spratly Islands on the 1887 treaty, it would have to prove that both parties had the intent to do so when concluding the 1887 treaty, now that the text is ambiguous. However, due to the absence or unavailability of relevant historical evidence, the author could not consider the relevance of the 1887 treaty to the territorial dispute involving the Spratly Islands.

2.6.2.2 The 1951 Treaty of Peace with Japan

Article 2(f) of the 1951 Treaty of Peace with Japan provides that Japan

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[305] The third clause provides that: 'In Kwangtung, it is agreed that the disputed points which lie east and north-east of Monkai, beyond the frontier as determined by the Delimitation Commission, are allocated to China. The islands which are east of the Paris meridian 105°43'E, i.e. east of the north-south line passing through the eastern point of the island of Tcha's Kou, or Ouan Chan (Tra Co), which forms the boundary, are also allocated to China. The island of Gotho and other islands west of this meridian belong to Annam'. See Clause 3 of the China-France Treaty on the Delimitation the Frontier between China and Northern Vietnam (26 June 1887). Also see M. Chemillier-Gendreau, *Sovereignty over the Paracel and Spratley Islands* (Springer. 2000), 36.

[306] Note of 29 September 1932 from the Legation of the Chinese Republic in France to the Ministry of Foreign Affairs, Paris, reproduced in: M. Chemillier-Gendreau, *Sovereignty over the Paracel and Spratley Islands* (Springer. 2000), Annex 10.

[307] Note from Paris of 10 October 1937 and Note by Mr Charguéraud-Hartmann for the Under-Directorate for Asia of 16 August 1933, quoted in: M. Chemillier-Gendreau, *Sovereignty over the Paracel and Spratley Islands* (Springer. 2000), 85-86.

shall renounce all rights and claims to the Spratly Islands but does not specify the recipient.[308] Unfortunately, the drafting history of this provision also sheds little light on who was the recipient of the Spratly Islands.[309] Moreover, given that only the Philippines and Vietnam are parties to the Treaty of Peace,[310] it is doubtful what legal effects this treaty would have vis-à-vis Malaysia and China (especially the PRC government).[311] Therefore, it is difficult to determine the extent to which the 1951 Treaty of Peace with Japan alone would have a bearing on the territorial title to the Spratly Islands. Furthermore, strictly speaking, this treaty is not a boundary treaty properly so called or itself a root of a territorial title to the Spratly Islands. Nor should this treaty amount to a recognition of Japan's title to the Spratly Islands prior to 1951. During the drafting of this treaty, Mr. Robert A. Fearey of the Office of Northeast Asian Affairs of the US indicated in an official memorandum, which was to be transmitted to Australian representatives, that Japan was not perceived by the drafters of the Treaty of Peace as the rightful holder of the Spratly Islands.[312] Hence, the Treaty of Peace should be understood as merely obliging Japan to renounce all rights and claims to the Spratly Islands, if any, but not a recognition of Japan's title prior to 1951. To conclude, whether the 1951 Treaty of Peace with Japan has a bearing on the territorial title to the Spratly Islands remains questionable.

2.7 CESSION

2.7.1 Two Cumulative Requirements

It is a well-established rule under international law that a State with sovereignty over a particular area is entitled to cede such sovereignty

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[308] Treaty of Peace with Japan, adopted 8 September 1951, entered into force 28 April 1951, 136 *UNTS* 45, Article 2(f).
[309] For comprehensive discussions on the drafting history of Article 2(f), see H. Chen, Territorial Disputes in the South China Sea under the San Francisco Peace Treaty, 50(3) *Issues & Studies* (2014), 178-192.
[310] Signatories to the Treaty of Peace with Japan, available at <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801528c2>.
[311] It is noted that the ROC, by entering into the Sino-Japanese Peace Treaty with Japan on 28 April 1952, has accepted Article 2(f) of the Peace Treaty to be effective between them. See Article 2 of the Sino-Japanese Peace Treaty (also known as the Treaty of Taipei, adopted 28 April 1952, entered into force 5 August 1952).
[312] Undated Memorandum by Mr. Robert A. Fearey of the Office of Northeast Asian Affairs: Answers to Questions Submitted by the Australian Government Arising Out of the Statement of Principles Regarding a Japanese Treaty Prepared by the United States Government, *Foreign Relations of the United States (1950), East Asia and The Pacific*, Vol. VI, available at <
https://history.state.gov/historicaldocuments/frus1950v06/d774 >.

to another State.[313] To confer the successor State with an indisputable claim by right of cession, two *cumulative* requirements need to be fulfilled.

The first requirement is that the territorial title/claim of the predecessor State is substantiated under international law. Since the successor State cannot receive greater rights than those enjoyed by the predecessor State (*nemo dat quod non habet*), the former can only claim a territorial title when the latter is entitled to enjoy one.[314] For example, in *Island of Palmas*, the US based its territorial claim to the disputed island on cession indicated in an 1898 treaty with Spain whereby all rights of sovereignty that Spain may have possessed in the region were transferred to the US.[315] However, the arbitrator held that this treaty was not conclusive in this case, as 'Spain could not transfer more rights than she herself possessed'.[316]

The second requirement is that as a 'bilateral mode of acquisition', the basis of cession is the agreement on the transfer between the predecessor State and the cessionary State, which is usually manifested in the form of a treaty of cession.[317] The cessionary State has a right to occupy the territory at any time after the treaty enters into force under international law.[318]

2.7.2 Application to the Spratly Islands Setting

According to the rule of cession, for Vietnam to claim a territorial title to the islands in the Spratly Islands by right of cession, two cumulative requirements need to be fulfilled: first, France's territorial title/claim to these islands is substantiated under international law; and second, France agrees to cede the territory to Vietnam.

It is necessary to introduce France's historical contacts with the Spratly Islands briefly. Prompted by the growing Japanese interest in the Spratly Islands in the 1920s, France started to pay attention to the maritime features thereof.[319] Subsequently, on 13 April 1930, the

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[313] See R.Y. Jennings, *The Acquisition of Territory in International Law* (MUP. 1963), 16. Also see M.N. Shaw, *International Law* (CUP. 8th ed. 2017), 369-370; B.K. Murphy, Dangerous Ground: the Spratly Islands and International Law, 1 *OCLJ* (1995), 198.
[314] See R.Y. Jennings, *The Acquisition of Territory in International Law* (MUP. 1963), 16. Also see J. Crawford, *Brownlie's Principles of Public International Law* (OUP 9th ed. 2019), 205.
[315] Island of Palmas (The United States of America v. The Netherlands), Award of 4 April 1928 (PCA), p. 842.
[316] *Id*.
[317] R.Y. Jennings, *The Acquisition of Territory in International Law* (MUP. 1963), 16-17.
[318] *Id.*, 17.
[319] In the 1920s, some Japanese people showed the commercial interest of collecting guano and fishing on or near Spratly Island (Nansha Island), a high-tide elevation feature in the Spratly Islands area. Consequently, in 1927, the Japanese consul in Hanoi arranged a discussion with the French authority about the status of some islands, including Spratly Island, Itu Aba and Amboyna Cay, but no conclusion was

Governor-General of Indochina sent the advice-boat, *La Malicieuse*, to Spratly Island (a maritime feature in the Spratly Islands).[320] The members of the expedition raised the French flag on this island, but they did not occupy it and left on the same day. On 23 September 1930, France notified other Great Powers that it declared the ownership of Spratly Island and Amboyna Cay.[321] The French government based its territorial claim over the islands in the Spratly Islands on effective occupation of *terra nullius*, stating that:

> If the island [i.e. Spratly Island] is at present *terra nullius*, the granting of a permit to prospect, followed by actual operations undertaken by the holder of the concession, and accompanied by any manifestation whatsoever of continuous occupation by the French State (visits by warships, flag, orders issued by the police) would be the kind of act establishing the sovereignty of France over the island in question…The eventual solution might well also be applied to all or some of the other islands in the same group [i.e. the Spratly Islands].[322]

In 1933, French survey ships visited and surveyed some islands in the Spratly Islands.[323] By a decree of 26 July 1933, the French Government proclaimed the occupation of seven features thereof,[324] which prompted China's protest.[325] On 3 July 1938, France announced to occupy the whole archipelago of the Spratly Islands.[326]

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reached during this discussion. See D. Hancox, *Secret Hydrographic Surveys in the Spratly Islands* (ASEAN Academic Press. 1999), 52. The 1927 negotiation between Japan and France was also confirmed in a letter dated 26 December 1927 from the Acting Governor General of Indochina, Hanoi, to the Minister for the Colonies, Paris, and another letter dated 20 March 1930 from the Governor General of Indochina, Hanoi to the Minister for the Colonies, Paris. These two letters are reproduced in: M. Chemillier-Gendreau, *Sovereignty over the Paracel and Spratley Islands* (Springer. 2000), 'Annex 5 & Annex 17'.

[320] D. Hancox, *Secret Hydrographic Surveys in the Spratly Islands* (ASEAN Academic Press. 1999), 56.

[321] *Id*., 52-53.

[322] Note dated 26 November 1928 addressed to the Under-Directorate for Asia and Oceania regarding the Spratly Island or Strom Island, reproduced in: M. Chemillier-Gendreau, *Sovereignty over the Paracel and Spratley Islands* (Springer. 2000), 'Annex 19'. The plan to occupy the Spratly Islands was reaffirmed in the Letter of 30 March 1932 from the Minister for National Defence (Navy) to the Minister for Foreign Affairs – Directorate for Political Affairs and Trade (Asia-Oceania), reproduced in: *id*., 'Annex 31'.

[323] D. Hancox, *Secret Hydrographic Surveys in the Spratly Islands* (ASEAN Academic Press. 1999), 84-88.

[324] The French government claimed to occupy seven islands: (1) Spratly Island, possessed on 13 April 1930; (2) Amboyna Cay, possessed on 7 April 1933; (3) Itu Aba Island, possessed on 10 April 1933; (4) North-East Cay, possessed on 10 April 1933; (5) South-West Cay, possessed on 10 April 1933; (6) Loaita Island, possessed on 12 April 1933; (7) Thitu Island, possessed on 12 April 1933. See Republic of Vietnam, White Paper (1975), Chapter III. The occupation of these seven islands was also confirmed in Article 1 of the *Decree by the Governor of Cochin China (J. Krautheimer), Saigon,* dated 21 December 1933. This Decree is reproduced in: M. Chemillier-Gendreau, *Sovereignty over the Paracel and Spratley Islands* (Springer. 2000), 'Annex 30'.

[325] Journal officiel de la Republique Francaise, No. 172 (25 July 1933), 7794.

[326] D. Heinzig, *Disputed Islands in the South China Sea: Paracels, Spratlys, Pratas, Macclesfield Bank* (Otto Harrassowitz. 1976), 29.

Regarding the first requirement under the rule of cession, for France to claim a territorial title to the islands in the Spratly Islands, these islands must be *terra nullius* when France claimed to effectively occupy them in the 1930s. This matter depends on whether there had been any preexisting titles to the islands enjoyed by other sovereigns before the 1930s. As concluded in section 2.4, China had been enjoying a historic title over the islands thereof at least until the twentieth century. Therefore, there is little chance that such islands were *terra nullius* at the French occupation. In fact, the French occupation triggered protests from the Chinese government, who claimed that only Chinese fishermen lived on these islands and that they belonged to China.[327]

The second requirement is also not fulfilled. France has never agreed to cede the territory to Vietnam.[328] France explicitly stated in 1951 and 1955 that its occupation of the Spratly Islands was conducted on behalf of France itself but not Vietnam.[329] A relevant passage reads:

> Since 1933, when the French Government forcefully took possession of the Spratlys on behalf of France and up to the present day, these islands were included, for administrative purposes, under the former Government General of Indochina to which they had been attached…Indeed, at no point in its history did the former Empire of Annam [the predecessor of Vietnam] make any claim to these territories, which, furthermore, it has never occupied; and the fact that the Spratlys were for a time attached to Cochin China merely for administrative convenience cannot be relied on by the new State of Vietnam as jurisdiction for rights it never possessed…the Spratlys should now come under the French Department of Overseas Territories, on the same basis as other French territories in the Pacific.[330]

To conclude, since neither the first nor second requirement is satisfied, Vietnam's claim of a territorial title to the islands in the

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[327] The protest from China was made through its ambassador WeiJune Gu. See Z. Han, *The Collection of the Historical Materials of the Islands in South China Sea (Wo Guo Nan Hai Zhu Dao Shi Liao Hui Bian)* (in Chinese) (Eastern Publishing House. 1988), 261. Also see H. Chen, Territorial Disputes in the South China Sea under the San Francisco Peace Treaty, 50(3) *Issues & Studies* (2014), 176-177.

[328] Some scholars argued that in 1949 or 1950 the French government officially transferred the control of both the Spratly Islands and Paracel Islands to the South Vietnam authority. However, for the Spratly Islands, when making this statement, these scholars failed to cite or show any supporting evidence. See M. Chemillier-Gendreau, *Sovereignty over the Paracel and Spratley Islands* (Springer. 2000), 41; L.T. Nguyen, *The South China Sea Dispute: A reappraisal in the Light of International Law* (University of Bristol PhD Dissertation. 2008), 107-108.

[329] Letter of 7 May 1951 from the Minister of State with responsibility for relations with Associated States to the Minister for Overseas Territories. Letter of 16 June 1955 from General Jacquot, General Commissioner of France and Acting Commander-in-Chief in Indochina, to the Secretary of State with responsibility for relations with Associated States. These two Letters are reproduced in: M. Chemillier-Gendreau, *Sovereignty over the Paracel and Spratley Islands* (Springer. 2000), Annex 39 & Annex 40.

[330] Letter of 7 May 1951 from the Minister of State with responsibility for relations with Associated States to the Minister for Overseas Territories, reproduced in: *id*., Annex 39.

Spratly Islands by right of cession is untenable under international law.

2.8 DISCOVERY OF TERRA NULLIUS

2.8.1 Applicable Law

The rule of discovery was developed in the fifteenth century to deal with the legal relationship between the European States on acquiring discovered territories during the colonial era.[331] The following three observations have been rarely contested in international law.

First, discovery, distinct from mere geographical awareness, should be accompanied by an affirmation of sovereignty, which is usually demonstrated and materialized through acts of symbolic annexation including erecting signs, hosting flags and reciting solemn declarations.[332]

Second, the rule of discovery applies to *terra nullius* ('nobody's land'), which undisputedly covers the territories with the absolute absence of a settled population that did not belong to any sovereign.[333] Admittedly, it is disputable whether the concept of *terra nullius* includes territories inhabited by population unknown to the colonial powers with non-western systems of social organizations.[334] However, tailored to the Spratly Islands setting, the analysis can be confined to uninhabited territories, since the islands therein have never been inhabited permanently by a settled population. Importantly, 'uninhabited territories' are not necessarily '*terra nullius*', as a possibility remains that the former, though not materially inhabited by any settled population, might belong to a sovereign.[335]

Third, discovery could constitute a valid title of territorial

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[331] M.G. Kohen & M. Hébié, Territory, Discovery, *MPEPIL* (2011), paras.1, 4, 5.
[332] See F.A.F. von der Heydte, Discovery, Symbolic Annexation and Virtual Effectiveness in International Law, 29 *AJIL* (1935), 452. Also see M. Hébié, The Acquisition of Original Titles of Territorial Sovereignty in the Law and Practice of European Colonial Expansion, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 58-59.
[333] *Id.*, 59.
[334] For a comprehensive discussion on the application of the rule of discovery to inhabited territories, see *id.*, 61-72. Also see M. Chemillier-Gendreau, *Sovereignty over the Paracel and Spratley Islands* (Springer. 2000), 30, 50, 56.
[335] M. Hébié, The Acquisition of Original Titles of Territorial Sovereignty in the Law and Practice of European Colonial Expansion in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 76.

sovereignty until the middle of the sixteenth century.[336] The arbitrator, Max Huber, confirmed this position in *Island of Palmas*. In that case, the Netherlands and the US disputed the territorial sovereignty over the Island of Palmas, which was incidentally located not far from the Spratly Islands.[337] The US claimed itself to be a successor to the territorial title of Spain to the Island of Palmas established on the basis of discovery in the first half of the sixteenth century.[338] Huber held that the effect of discovery by Spain had to be appreciated in the light of the law contemporary with it, and thus a valid title to the island was created at that time.[339] However, since the middle of the sixteenth century, mere discovery does not suffice for the conferral of a territorial title and could only create an 'inchoate title' that needs to be perfected by actual occupation,[340] largely owing to the increasing competition between colonial powers as a result of the development of navigation technologies and the expansion of colonial presence.[341] As stated by Huber, absent the completion by actual occupation, 'an inchoate title could not prevail over the continuous and peaceful display of authority [namely an *effectivités*]

[336] See R.Y. Jennings, *The Acquisition of Territory in International Law* (MUP. 1963), 4; M.G. Kohen, Titles and Effectivités in Territorial Disputes, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 151; J. Crawford, *Brownlie's Principles of Public International Law* (OUP 9th ed. 2019), 211.
[337] Island of Palmas (The United States of America v. The Netherlands), Award of 4 April 1928 (PCA), 831.
[338] *Id*., 837.
[339] *Id*., 845.
[340] *Id*., 845-846. Also see F.A.F. von der Heydte, Discovery, Symbolic Annexation and Virtual Effectiveness in International Law, 29 *AJIL* (1935), 460.
[341] With the development of navigation technologies and the expansion of colonial presence since the middle of the sixteenth century, new colonial powers such as England and France desired a new theory about the rule of discovery to justify their occupation of overseas territories. These new colonial powers were concerned with infringing the rights enjoyed by Spain and Portugal under specific papal bulls including the bull *Inter Caetera* decreed by Pope Alexander VI in 1493, which granted Spain and Portugal exclusive rights to discover the lands located in each half of the world. Consequently, in the 1580s, the then British Queen, Elizabeth I, and her legal advisors refined the rule of discovery by adding one crucial new element, namely the requirement of actual occupation. This action was also followed by the successor of Elizabeth I, James I, who granted the British colonists property rights in America since such lands were 'not now actually possessed by any Christian Prince or People' in accordance with the 1606 First Charter of Virginia and the 1620 Charter to the Council of New England. Hence, an European State was required to actually occupy non-Christian lands to perfect their discovery title to discovered lands. See R.J. Miller & J. Ruru, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford Scholarship Online. 2010), 18; M. Hébié, The Acquisition of Original Titles of Territorial Sovereignty in the Law and Practice of European Colonial Expansion, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing. 2018), 44; The Papal bull Inter Caetera Alexander VI (4 May 1493), available at <http://www.let.rug.nl/usa/documents/before-1600/the-papal-bull-inter-caetera-alexander-vi-may-4-1493.php >; First Charter of Virginia (10 April 1606), available at <http://avalon.law.yale.edu/17th_century/va01.asp>; Charter of New England (1620), available at <http://avalon.law.yale.edu/17th_century/mass01.asp>.

by another state'.[342] Though the notion of 'inchoate title' might be misleading, the message is clear that effective occupation or *effectivités* rather than mere discovery matters in contemporary international law.[343]

2.8.2 Application to the Spratly Islands Setting

2.8.2.1 China

China claimed to be the first one to have discovered the Spratly Island, which could date back to at least 225-230 A.D.[344] According to the rule of discovery of *terra nullius* before the middle of the sixteenth century, to confer a territorial title, discovery should be accompanied by an affirmation of sovereignty, which is usually demonstrated through acts of symbolic annexation including erecting signs, hosting flags and reciting solemn declarations.[345] However, no historical documents recording any symbolic act conducted by China before the middle of the sixteenth century to demonstrate territorial sovereignty over the islands in this region have been found. Hence, although little evidence is required as regards possession of tiny islands,[346] China's mere geographical awareness of these islands could not create a title unless there is evidence indicating the affirmation of sovereignty.

2.8.2.2 The Philippines

The Philippines claims a legal title arising from the occupation of some islands by a Philippine citizen, Tomas Cloma, in 1956 on the basis of the rule of discovery of *terra nullius*. However, Cloma's occupation in 1956 did not constitute discovery because this conduct was not taken under the authorization of the Philippine government, thus lacking an affirmation of sovereignty. Even if the 1974 'Deed of Assignment Waiver of Rights' through which Cloma relinquished his territorial claim to the Philippine government could be considered as an affirmation of sovereignty, discovery could not be creative of a valid territorial title in the present case because discovery could entail a title until the middle of the sixteenth century. In other words, discovery was not a valid rule for acquiring a territorial title in 1956 when Cloma's occupation took place or in

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[342] Island of Palmas (The United States of America v. The Netherlands), Award of 4 April 1928 (PCA), 846.
[343] J. Crawford, *Brownlie's Principles of Public International Law* (OUP 9th ed. 2019), 211.
[344] China, White Paper (13 July 2016), para.3.
[345] F.A.F. von der Heydte, Discovery, Symbolic Annexation and Virtual Effectiveness in International Law, 29 *AJIL* (1935), 452.
[346] N. Schrijver and V. Prislan, Cases Concerning Sovereignty over Islands before the International Court of Justice and the Dokdo/Takeshima Issue, 46 *ODIL* (2015), 297.

1974 when the alleged affirmation of sovereignty occurred. As pointed out by Max Sorensen: 'Unless otherwise indicated, the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules of law that are contemporaneous with it.'[347] Hence, discovery, which was a valid title until the middle of the sixteenth century, could not be an applicable law for appraising the events in 1956 or 1974. To conclude, the territorial claim of the Philippines based on discovery is untenable under international law.

2.9 TITLES VIS-À-VIS EFFECTIVITÉS

The preceding analysis reveals that when evaluated against the contemporary law of territory, among all claims based on titles of territorial sovereignty, only China's territorial claim based on historic title is plausible. First, the acts *à titre de souverain* taken by the disputant States respecting the Spratly Islands fail to amount to *effectivités* in the present case, because such acts cannot fulfil the peaceful requirement owing to the presence of sustained diplomatic protests, consultations and negotiations, which have been operated by relevant States since the very beginning of the acts *à titre de souverain* conducted by the possessor States.[348] Second, there is no sufficient evidence to show that the 1887 China-France Treaty or the 1951 Treaty of Peace with Japan has a bearing on the disposition of the Spratly Islands.[349] Third, due to the presence of a pre-existing title enjoyed by China prior to the French occupation and the lack of agreement of cession between France and Vietnam, Vietnam's claim of a territorial title to the islands in the Spratly Islands by right of cession is untenable.[350] Fourth, China and the Philippines' territorial claims based on discovery of *terra nullius* are unsubstantiated under international law, owing to either the lack of an affirmation of sovereignty or the inapplicability of discovery after the middle of the 16th century.[351] According to the analytical framework as set forth in section 2.2, the present case coincides with the fifth type of the titles/*effectivités* relationship, where the historic title of China is not

[347] M. Sorensen (Rapporteur), *The Institute of International Law Resolution on The Intertemporal Problem in Public International Law* (11 August 1975), Article 1. For a further discussion on the application of intertemporal law and the South China Sea dispute, see X. Ma, The Intertemporal Principle in International Judicial Practice and Its Implications for the South China Sea Dispute, 3(1) *Edinburgh Student Law Review* (2016), 102-115.
[348] See section 2.5.
[349] See section 2.6.
[350] See section 2.7.
[351] See section 2.8.

duplicated by subsequent *effectivités*, which thereby does not prevent the historic title from having a legal effect.

The above appraisal results only describe, nevertheless, the territorial situation of the Spratly Islands as it is today. The territorial title might change with the development of the events and activities in the region. As showcased in *Malaysia/Singapore*, a legal title previously established may lapse due to a common understanding or tacit agreement developed between the disputant States, and in this circumstance, *effectivités* can come into play.[352] Hence, if China's alleged historic title lapses as a result of an 'evolving understanding' or 'a convergent evolution of the positions' shared by the claimant States,[353] to the extent that the conduct mentioned in section 2.5.3.1 could be considered as relevant *effectivités* in the absence of sustained protests, consultations and negotiations in the future, the third type of the titles/*effectivités* relationship might come to play, whereby these *effectivités* could be constitutive of a territorial title.

2.10 CONCLUSION

As observed by Max Huber, in a territorial dispute, 'only one of two conflicting interests is to prevail, because sovereignty can be attributed to but one of the Parties'.[354] Hence, it can never be a win-win situation for all the disputant States. Meanwhile, another point worth noting is that modern international law rejects the applicability of *terra nullius* and tends to attribute a certain territory to a country whenever possible. As observed by the PCIJ in *Eastern Greenland*: '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'.[355] In the author's view, the rejection of *terra nullius* is necessary for attaining a stable territorial order across the globe and thus worth supporting, despite its side effect that picking the best argument out of a mediocre bunch might sometimes be difficult and thus has little chance to enjoy unanimous support.

The evidence available to this study suggests that China's territorial claim to the islands in the Spratly Islands area based on historic title, among all the claims, is the most plausible one, albeit not necessarily an impeccable one, when evaluated against the law of territory. The extent or scope of China's established historic title,

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[352] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 (ICJ), para.276.
[353] *Id*.
[354] Island of Palmas (The United States of America v. The Netherlands), Award of 4 April 1928 (PCA), 870.
[355] Legal Status of Eastern Greenland (Denmark v. Norway), Judgment of 5 April 1933, PCIJ Series A/B No. 53, 46.

which covers all the islands in the Spratly Islands area, can, arguably, be based on the group or unity principle in relation to territorial allocation, which the author has discussed in another paper by examining a series of relevant international cases in the past one hundred years.[356] Nevertheless, as rightly pointed out by Schrijver, sovereignty, inevitably including territorial sovereignty, is 'not an absolute and static concept but more a relative and dynamic one'.[357] As mentioned earlier, if China's alleged historic title lapses as a result of an 'evolving understanding' or 'a convergent evolution of the positions' shared by the claimant States,[358] the acts *à titre de souverain* taken by the disputant States in respect of the Spratly Islands might have a chance to be considered as relevant *effectivités* and thus constitutive of a territorial title, provided that protests, consultations and negotiations are absent in the future.

Furthermore, there appears to be little possibility of resolving this territorial dispute by either judicial or diplomatic methods in the foreseeable future,[359] owing to various factors such as China's resistance to any recourse to third-party settlement,[360] the foreseeable difficulties in negotiations for claimant States to compromise their territorial interests,[361] nationalist sentiments about territorial sovereignty,[362] the strategic location of the Spratly Islands,[363] and high economic stakes because of the abundance of natural resources therein.[364] Hence, the settlement of this territorial dispute cannot be counted on as the only method to achieve and maintain the peaceful co-existence of the disputant States in the region. It would thus be wise for the disputant States to set aside this territorial dispute and to figure out alternative solutions to coordinate their behaviours and to make efficient uses of marine natural resources in the Spratly Islands area pending the final settlement of this territorial dispute. Relevant alternative solutions may include exercising self-restraint on their respective unilateral activities (chapter 4), and entering into cooperative arrangements on managing the hydrocarbon resources (chapter 5), fishery resources

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[356] X. Ma, International Jurisprudence Concerning the Group or Unity Principle in Territorial Allocation, 18(1) *CJIL* (2019), 165-178.
[357] N. Schrijver, The Changing Nature of State Sovereignty, 70 *BYIL* (1999), 98.
[358] *Id*.
[359] U. Hideshi, The Problems in the South China Sea, *Review of Island Studies* (2013), 2-3.
[360] China, White Paper (13 July 2016), paras.83, 130.
[361] M.Z. Ahmad and M.A. Mohd Sani, China's Assertive Posture in Reinforcing its Territorial and Sovereignty Claims in the South China Sea: An Insight into Malaysia's Stance, 18(1) *Japanese Journal of Political Science* (2017), 71.
[362] C.H. Park, The South China Sea Disputes: Who Owns the Islands and the Natural Resources?, 5 *ODIL* (1978), 34.
[363] B.K. Murphy, Dangerous Ground: the Spratly Islands and International Law, 1 *OCLJ* (1995), 189.
[364] U.S. Energy Information Administration, *South China Sea* (7 February 2013), available at
<https://www.eia.gov/beta/international/analysis_includes/regions_of_interest/South_China_Sea/south_china_sea.pdf>.

(chapter 6), and marine pollution (chapter 7) respecting the Spratly Islands area in the absence of delimitation.