CHAPTER 7

TERRITORIAL RIGHTS

7.1 Introduction

Territory is a tangible attribute of statehood and within that particular geographical area which it occupies a state enjoys and exercises sovereignty. Territorial sovereignty may be defined as the right to exercise therein, to the exclusion of any other state, the functions of a state. A state's territorial sovereignty extends over the designated land mass, sub-soil, the water enclosed therein, the land under that water, the territorial sea (the nature and extent of the territorial sea will be discussed in Chapter 10) and the airspace over the land mass and territorial sea (airspace will be considered in Chapter 11). It has already been seen in Chapter 5 that territory is undoubtedly a basic requirement of statehood.

The fundamental nature of territory and sovereignty over territory can be appreciated when an attempt is made to identify the causes of wars and international disputes throughout history – 99 per cent of them could be classified ultimately as territorial disputes. As Philip Allott has written:

> Endless international and internal conflicts, costing the lives of countless human beings, have centred on the desire of this or that state-society to control this or that area of the earth's surface to the exclusion of this or that state-society.[1]

Rights and duties with respect to territory have therefore had a central place in the development of international law, and the principle of respect for the territorial integrity of states has been one of the most fundamental principles of international law. It should be pointed out, however, there is a growing body of international law which operates outside concepts of exclusive territorial rights. As the need for interdependence has grown and as technology has presented increasing problems as well as benefits so international law has responded by developing concepts such as the 'common heritage of mankind' and rules regional and global protection of human rights and environmental rights. These matters will be dealt with in more detail in Chapters 15 and 17. It is also important to note that title to territory in international law is more often than not relative rather than absolute. Thus, resolving a territorial dispute is a question of deciding who has the better claim rather than accepting one claim and dismissing another.

7.2 Basic concepts

7.2.1 Terra nullius[2]

Terra nullius (sometimes *res nullius*) consists of territory which is capable of being acquired by a single state but which is not yet under territorial sovereignty. In the age of European imperialism there was a tendency for the

1 Allott, Eunomia, *New Order for a New World*, 1990, Oxford: Oxford University Press at p 330.

2 *Terra nullius* may be contrasted with *res communis* – ie territory not capable of being claimed by any single State, for example, the high seas and outer space.

Western writers to consider as *terra nullius* those territories inhabited by non-Europeans which were not organised on the lines of European states. Such a view was firmly rejected by the ICJ in the *Western Sahara Case.*

Western Sahara case[3]

Western Sahara was colonised by Spain in 1884 and was known as Spanish Sahara. In 1960 it was added to the UN General Assembly list of non-self-governing territories and from 1963 onwards it was considered by the UN Special Committee on Decolonisation. In 1966 the General Assembly asked Spain, in consultation with Mauritania and Morocco to 'determine at the earliest possible date ... the procedures for the holding of a referendum under United Nations auspices with a view to enabling the indigenous population of the territory to exercise freely its right to self-determination'.[4] Spain accepted the principle of self-determination but it was not until 21 August 1974 that it announced that it would hold a referendum under UN auspices in the first half of 1975. At this point both Morocco and Mauritania claimed the territory of Western Sahara on the basis of 'historic title' predating the Spanish colonisation of the area. On 13 December 1974 the General Assembly reaffirmed the right of Spanish Sahara to self-determination and decided to ask the ICJ for an advisory opinion on the following questions:

I Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonisation by Spain a territory belonging to no-one (terra nullius)? If the answer to the first question is in the negative,

II What were the legal ties between this territory and the Kingdom of Morocco and the Mauritian entity?[5]

Opinion of the Court

79 Turning to Question I, the Court observes that the request specifically locates the question in the context of 'the time of colonisation by Spain', and it therefore seems clear that the words 'Was Western Sahara ... a territory belonging to no one (*terra nullius*)?' have to be interpreted by reference to the law in force at that period. The expression '*terra nullius*' was a legal term of art employed in connection with 'occupation' as one of the accepted legal methods of acquiring sovereignty over territory. 'Occupation' being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of valid 'occupation' that the territory should be *terra nullius* – a territory belonging to no-one – at the time of the act alleged to constitute the 'occupation (*cf* Legal Status of Eastern Greenland, PCIJ, Series A/B, No 53, pp 44f and 63f). In the view of the Court, therefore, a determination that Western Sahara was a *terra nullius* at the time of colonisation by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of 'occupation'.

80 Whatever differences of opinion there may have been among jurists, the state practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terra*

3 Advisory Opinion [1975] *ICJ Rep* at p 12.

4 GA Res 2229, GAOR, 21st Session, Supp 16, p 72 (1966).

5 Mauritania was not a state in 1884.

nullius. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rules. On occasion, it is true, the word 'occupation' was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as 'occupation' of a '*terra nullius*' in the proper sense of these terms. On the contrary, such agreements were regarded as derivative roots of title, and not original titles obtained by occupation of *terra nullius*.

81 In the present instance, the information furnished to the Court shows that at the time of colonisation Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organised in tribes and under chiefs competent to represent them. It also shows that, in colonising Western Sahara, Spain did not proceed on the basis that it was establishing its sovereignty over *terra nullius*. In its Royal Order of 26 December 1884, far from treating the case as one of occupation of *terra nullius*, Spain proclaimed that the King was taking Rio de Oro under his protection on the basis of agreements which had been entered into with the chiefs of local tribes ...

90 ... Morocco's claim to 'legal ties' with Western Sahara at the time of colonisation by Spain has been put to the Court as a claim to ties of sovereignty on the ground of an alleged immemorial possession of the territory ...

91 In support of this claim Morocco refers to a series of events stretching back to the Arab conquest of North Africa in the seventh century AD, the evidence of which is, understandably, for the most part taken from historical works ... Stressing that during a long period Morocco was the only independent state which existed in the north-west of Africa, it points to the geographical contiguity of Western Sahara to Morocco and the desert character of the territory. In the light of these considerations, it maintains that the historical material suffices to establish Morocco's claim to a title based 'upon continued display of authority' on the same principles as those applied by the Permanent Court in upholding Denmark's claim to possession of the whole of Greenland.

92 This method of formulating Morocco's claims to ties of sovereignty with Western Sahara encounters certain difficulties. As the Permanent Court stated in the case concerning the *Legal Status of Eastern Greenland*, a claim to sovereignty based upon continued display of authority involves 'two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority' (*ibid*, p 45f). True, the Permanent Court recognised that in the case of claims to sovereignty over areas thinly populated or unsettled countries, 'very little in the way of actual exercise of sovereign rights (*ibid*, p 46) might be sufficient in the absence of a competing claim. But, in the present instance, Western Sahara, if somewhat sparsely populated, was a territory across which socially and politically organised tribes were in constant movement and where armed incidents between these tribes were frequent. In the particular circumstances outlined in para 87 and 88 above, the paucity of evidence of actual display of authority unambiguously relating to Western Sahara renders it difficult to consider the Moroccan claim as on all fours with that of Denmark in the *Eastern Greenland* case. Nor is the difficulty cured by introducing the argument of geographical unity or contiguity. In fact, the information before

> the Court shows that the geographical unity of Western Sahara with Morocco is somewhat debatable, which also militates against giving effect to the concept of contiguity. Even if the geographical contiguity of Western Sahara with Morocco could be taken into account in the present connection, it would only make the paucity of evidence of unambiguous display of authority with respect to Western Sahara more difficult to reconcile with Morocco's claim to immemorial possession.
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> 93 In the view of the Court, however, what must be of decisive importance in determining its answer to Question II is not indirect inferences drawn from events in past history but evidence directly relating to effective display of authority in Western Sahara at the time of its colonisation by Spain and in the period immediately preceding that time (cf *Minquiers and Ecrehos*, Judgment [1953] *ICJ Rep* at p 57) ...
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> 162 The materials and information presented to the Court show the existence at the time of Spanish colonisation, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has found no legal ties of such a nature as might affect the application of Resolution 1514 (XV) in the decolonisation of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory (*cf* paras 54–59 above[6])

7.2.2 Intertemporal law

In many disputes the rights of the parties may derive from legally significant acts concluded a long time ago at a time when particular rules of international law may well have been different to what they are today. It has long been accepted as a principle of international law that in such cases the situation must be appraised or the treaty interpreted in the light of the rules of international law as they existed at the time. This principle was re-affirmed by Judge Huber in the *Island of Palmas* case[7] when he stated that:

> Both parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. The effect of discovery by Spain is therefore to be determined by the rules of international law in force in the first half of the sixteenth century.

Some confusion was caused by the fact that Judge Huber went on to note that while the creation of particular rights was dependent upon the international law of the time, the continued existence of such rights depended upon their according with the evolution of the law. One possible implication of this would be that states would constantly have to re-establish title to territory on a basis

6 See Chapter 5 on Subjects of International Law.

7 (1928) 2 RIAA 829.

approved by international law at the time. The potential problem would seem to be resolved by acknowledging the fact that title to territory in international law involves assessing the relative strength of competing claims. Creation of title is to be assessed according to contemporary law and creation coupled with effective occupation is likely to defeat most other rival claims apart, perhaps, from claims based on self-determination.

7.2.3 Critical date

The date on which a dispute over territory 'crystallises' is known as the 'critical date'. In many disputes a certain date will assume particular significance in deciding between rival claims. The choice of the critical date or dates will lie with the tribunal deciding the dispute and will usually depend on the particular facts. Once a date is chosen subsequent events relating to territorial claims will be ignored. Thus in the *Island of Palmas* case[8] the United States claimed the island as successor to Spain under a treaty of cession dated 10 December 1898. That date was chosen as the critical date and the case was decided on the basis of the nature of Spanish rights at that time. In the *Minquiers and Ecrehos* case[9] France and the United Kingdom submitted two different critical dates but the ICJ did not specifically choose between the two. Since that case tribunals have made little reference to the choice of critical date.

7.3 Title to territory

Traditionally, writers have referred to five means by which territory and title to territory may be acquired:

1 occupation of *terra nullius*;
2 prescription;
3 conquest;
4 accretion;
5 cession.

These five modes will be discussed here, but it is important in this matter to note the words of Ian Brownlie:

> A tribunal will concern itself with proof of the exercise of sovereignty at the critical date or dates, and in doing so will not apply the orthodox analysis to describe its process of decision. The issue of territorial sovereignty, or title, is often complex, and involves the application of various principles of the law to the material facts. The result of this process cannot always be ascribed to any single dominant rule of 'mode of acquisition'. The orthodox analysis does not prepare the student for the interaction of principles of acquiescence and recognition with the other rules.[10]

8 (1928) 2 RIAA 829.

9 *France v United Kingdom*, [1953] *ICJ Rep* at p 47.

10 Brownlie, *Principles of Public International Law*, 1990, Oxford: Oxford University Press at p 132.

7.3.1 Occupation of terra nullius

Occupation is preceded by discovery. Discovery alone is insufficient to establish title; it can only serve to establish a claim which in a reasonable period of time must be completed by effective occupation. Published discovery can obviously establish a better claim in time, but is ineffective against proof of continuous and peaceful display of authority by another state.

The exact nature of effective occupation and title to territory was considered in the *Island of Palmas* case. Under the Treaty of Paris 1898, which brought to an end the Spanish-American War of 1898, Spain ceded the Philippines to the United States. The United States based its claim, as successor to Spain, principally on discovery. There was evidence that Spain had discovered the island in the 17th century, but there was no evidence of any actual exercise of sovereignty over the island by Spain.

***Island of Palmas* case (1928)**[11]

Under the terms of the Treaty of Paris 1898, which ended the Spanish-American War of 1898, Spain ceded the Philippines to the United States. In 1906, a United States official visited Palmas, believing it to be part of the territory of the Philippines, and found the Dutch exercising sovereignty. There followed a protracted dispute between the US and the Netherlands which was finally submitted to arbitration in 1928.

Award of the arbitrator

> Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state. The development of the national organisation of states during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the state in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. The special cases of the composite state, of collective sovereignty etc, do not fall to be considered here and do not, for that matter, throw any doubt upon the principle which has just been enunciated. Under this reservation it may be stated that territorial sovereignty belongs always to one, or in exceptional circumstances to several states, to the exclusion of all others. The fact that the functions of a state can be performed by any state within a given zone is, on the other hand, precisely the characteristic feature of the legal situation pertaining in those parts of the globe which, like the high seas or lands without a master, cannot or do not yet form the territory of a state.
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> Territorial sovereignty is, in general, a situation recognised and delimited in space, either by so-called natural frontiers as recognised by international law or by outward signs of delimitation that are undisputed, or else by legal engagements entered into between interested neighbours, such as frontier conventions, or by acts of recognition of states within fixed boundaries. If a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the states claiming sovereignty possesses a title – cession, conquest, occupation etc – superior to that which the other state might possibly

11 *Netherlands v United States* (1928) 2 RIAA 829, Permanent Court of Arbitration – sole arbitrator: Huber.

bring forward against it. However, if the contestation is based on the fact that the other Party has actually displayed sovereignty, it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical. This demonstration consists in the actual display of state activities, such as belongs only to the territorial sovereign.

Titles of acquisition of territorial sovereignty in present-day international law are either based on an act of effective apprehension, such as occupation or conquest, or, like cession, presuppose that the ceding and the cessionary Powers, or at least one of them, have the faculty of effectively disposing of the ceded territory. In the same way natural accretion can only be conceived of as an accretion to a portion of territory where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity. It seems therefore natural that an element which is essential for the constitution of sovereignty should not be lacking in its continuation. So true is this, that practice, as well as doctrine, recognises – though under different legal formulae and with certain differences as to the conditions required – that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other states) is as good as title. The growing insistence with which international law, ever since the middle of the 18th century, has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right. If the effectiveness has above all been insisted on in regard to occupation, this is because the question rarely arises in connection with territories in which there is already an established order of things. Just as before the rise of international law, boundaries of lands were necessarily determined by the fact that the power of a state was exercised within them, so too, under the reign of international law, the fact of peaceful and continuous display is still one of the most important considerations in establishing boundaries between states.

Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a state. This right has as corollary a duty: the obligation to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and in war, together with the rights which each state may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the state cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, ie to excluding the activities of other states; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points of the minimum of protection of which international law is the guardian.

Although municipal law, thanks to its complete judicial system, is able to recognise abstract rights of property as existing apart from any material display of them, it has none the less limited their effect by the principles of prescription and the protection of possession. International law, the structure of which is not based on any super-state organisation, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations ...

The principle that continuous and peaceful display of the functions of state within a given region is a constituent element of territorial sovereignty is not only based on the conditions of the formation of independent states and their boundaries (as shown by the experience of political history) as well as on an

international jurisprudence and doctrine widely accepted; this principle has further been recognised in more than one federal state, where a jurisdiction is established in order to apply, as need arises, rules of international law to the interstate relations of the state members. This is more significant, in that it might well be conceived that in a federal state possessing a complete judicial system for interstate matters – far more than in the domain of international relations properly so-called – there should be applied to territorial questions the principle that, failing any specific provision of law to the contrary, a *jus in re* once lawfully acquired shall prevail over *de facto* possession however well established ...

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ accordingly as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas. It is true that neighbouring states may by convention fix limits to their own sovereignty, even in regions such as the interior of scarcely explored continents where such sovereignty is scarcely manifested, and in this way each may prevent the other from any penetration of its territory. The delimitation of Hinterland may also be mentioned in this connection.

If, however, no conventional line of sufficient topographical precision exists or if there are gaps in the frontiers otherwise established, or if a conventional line leaves room for doubt, or if, as, eg, in the case of an island situated in the high seas, the question arises whether a title is valid *erga omnes*, the actual and continuous and peaceful display of state sovereignty is in case of dispute the sound and natural criterion of territorial sovereignty ...

The title alleged by the United States of America as constituting the immediate foundation of its claim is that of cession, brought about by the Treaty of Paris, which cession transferred all rights of sovereignty which Spain may have possessed ... concerning the island of Palmas (or Miangos).

It is evident that Spain could not transfer more rights than she herself possessed ... the United States bases its claim, as successor of Spain, in the first place on discovery ...

It is admitted by both sides that international law underwent profound modifications between the end of the Middle Ages and the end of the 19th century, as regards the rights of discovery and acquisition of uninhabited region or regions inhabited by savages or semi-civilised peoples. Both Parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. The effect of discovery by Spain is therefore to be determined by the rules of international law in force in the first half of the 16th century ...

If the view most favourable to the American argument is adopted – with every reservation as to the soundness of such view – that is to say, if we consider as positive law at the period in question the rule that discovery as such, ie the mere fact of seeing land, without any act, even symbolical, of taking possession, involved *ipso jure* territorial sovereignty and not merely an 'inchoate title,' a *jus ad rem*, to be completed eventually by an actual and durable taking of possession within a reasonable time, the question arises whether sovereignty yet existed at

the critical date, ie the moment of conclusion and coming into force of the Treaty of Paris.

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of right, in other words its continued manifestation, shall follow the conditions required by the evolution of law. International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of states members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other states and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a state, nor without a master, but which are reserved for the exclusive influence of one state, in virtue solely of a title of acquisition which is no longer recognised by existing law, even if such a titles ever conferred sovereignty. For these reasons, discovery alone, without any subsequent act, cannot, at the present time, suffice to prove sovereignty over the island of Palmas (or Miangos); and in so far as there is no sovereignty, the question of an abandonment properly speaking of sovereignty by one state in order that the sovereignty of another may take its place does not arise.

If on the other hand the view is adopted that discovery does not create a definitive title of sovereignty, but only an 'inchoate' title, such a title exists, it is true, without external manifestation. However, according to the view that has prevailed, at any rate since the 19th century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered. This principle must be applied in the present case, for the reasons given above in regard to the rules determining which of successive legal systems is to be applied (the so-called intertemporal law). Now, no act of occupation nor, except as to a recent period, any exercise of sovereignty at Palmas by Spain has been alleged. But even admitting that the Spanish title still existed as inchoate in 1898 and must be considered as included in the cession under Article III of the Treaty of Paris, an inchoate title could not prevail over the continuous and peaceful display of authority by another state, for such display may prevail even over a prior, definitive title put forward by another state ...

In the last place there remains to be considered title arising out of contiguity. Although states have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial ,waters should belong to a state from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even Governments of the same state have on different occasions maintained contradictory opinions as to its soundness. The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one state rather than another, either by agreement between the Parties, or by a decision not necessarily based on law; but as a rule

establishing *ipso jure* the presumption of sovereignty in favour of a particular state, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other states from a region and the duty to display therein the activities of a state. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results. This would be especially true in a case such as that of the island in question, which is not relatively close to one single continent, but forms part of a large archipelago in which strict delimitations between the different parts are not naturally obvious.

There lies, however, at the root of the idea of contiguity one point which must be considered also in regard to the island of Palmas (or Miangas). It has been explained above that in the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space. This phenomenon will be particularly noticeable in the case of colonial territories, partly uninhabited or as yet partly unsubdued. The fact that a state cannot prove display of sovereignty as regards such a position of territory cannot forthwith be interpreted as showing that sovereignty is inexistent. Each case must be appreciated in accordance with the particular circumstances ...

As regards groups of islands, it is possible that a group may under certain circumstances be regarded as in law, a unit, and that the fate of the principal part may involve the rest. Here, however, we must distinguish between, on the one hand, the act of first taking possession, which can hardly extend to every portion of territory, and, on the other hand, the display of sovereignty as a continuous and prolonged manifestation which must make itself felt through the whole territory.

As regards the territory forming the subject of the present dispute, it must be remembered that it is a somewhat isolated island, and therefore a territory clearly delimited and individualised. It is moreover an island permanently inhabited, occupied by a population sufficiently numerous for it to be impossible that acts of administration could be lacking for very long periods. The memoranda of both Parties assert that there is communication by boat and even with native craft between the island of Palmas (or Miangas) and neighbouring regions. The inability in such a case to indicate any acts of public administration makes it difficult to imagine the actual display of sovereignty, even if the sovereignty be regarded as confined within such narrow limits as would be supposed for a small island inhabited exclusively by natives ...

[The Court then considered the Dutch claim.]

The Netherlands found their claim to sovereignty essentially on the title of peaceful and continuous display of state authority over the island. Since this title would in international law prevail over a title of acquisition of sovereignty not followed by actual display of state authority, it is necessary to ascertain in the first place, whether the contention of the Netherlands is sufficiently established by evidence, and, if so, for what period of time.

In the opinion of the Arbitrator the Netherlands have succeeded in establishing the following facts:

1 The island of Palmas (or Miangas) is identical with an island designated by this or a similar name, which has formed, at least since 1700, successively a part of two of the native states of the island of Sangi (Talautse Isles).

2 These native states were from 1677 onwards connected with the East Indian Company, and thereby with the Netherlands, by contracts of suzerainty,

which conferred upon the suzerain such powers as would justify his considering the vassal state as part of his territory.

3 Acts characteristic of state authority exercised either by the vassal state or by the suzerain Power in regard precisely to the Island of Palmas (or Miangas) have been established as occurring at different epochs between 1700 and 1898, as well as in the period between 1898 and 1906.

The acts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas), especially in the 18th and early 19th centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But apart from the consideration that the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period. It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.

The decisions of the international tribunals indicate that for a claim to territory based on occupation to succeed two elements must be satisfied: the claiming state must have the intention to act as sovereign (the *animus occupandi*) and also must be able to point to some actual, physical manifestation of this sovereignty. The intention is a matter of inference from all the facts – merely raising a flag is not enough. The second element is satisfied by some concrete evidence of possession or control or some symbolic act of sovereignty – it depends on the nature of the territory involved.

Clipperton Island Arbitration[12]

Award of the arbitrator

In fact, we find, in the first place, that on 17 November 1858 Lieutenant Victor Le Coat de Kerweguen, of the French Navy, commissioner of the French Government, whilst cruising about one-half mile off Clipperton, drew up, on board the commercial vessel L'Amiral, an act by which, conformably to the orders which had been given to him by the Minister of Marine, he proclaimed and declared that the sovereignty over the said island beginning from that date belonged in perpetuity to His Majesty the Emperor Napoleon III and to his heirs and successors. During the cruise, careful and minute geographical notes were made; a boat succeeded, after numerous difficulties, in landing some members of the crew; and on the evening of 20 November, after a second unsuccessful attempt to reach the shore, the vessel put off without leaving in the island any sign of sovereignty. Lt de Kerweguen officially notified the accomplishment of his mission to the Consulate of France at Honolulu, which made a like communication to the Government of Hawaii. Moreover, the same consulate had published in English in the journal The Polynesian, of Honolulu, on 8 December, the declaration by which French sovereignty over Clipperton had already been proclaimed.

12 *France v Mexico* (1932) 26 AJIL 390 – arbitrator: King Victor Emmanuel III of Italy. Clipperton is a coral reef less than three miles in diameter situated in the Pacific Island 670 miles south-west of Mexico.