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# Cases Concerning Sovereignty over Islands before the International Court of Justice and the Dokdo/Takeshima Issue

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*The article analyzes the recent jurisprudence of the International Court of Justice in relation to disputes concerning sovereignty over islands and considers the potential implications of this jurisprudence for the resolution of the Dokdo/Takeshima issue. It does so by examining the principles and rules of international law applied by the Court to the determination of title to territory, especially those concerning the question of original title and its interplay with state conduct in general (effectivités). The article also pays special attention to the different legal techniques applied by the Court in resolving each particular dispute and the Court's practical approach to dealing with questions of historical facts and other evidentiary matters in relation to small and uninhabited islands.*

**Keywords** Island sovereignty, original title, treaty title, effectivités, Korea, Japan

## Introduction

In recent years various territorial disputes concerning sovereignty over islands and rocks in the East China Sea, South China Sea, and East Sea have occurred. Territorial title in these important seas have been a source of conflict among China, Japan, South Korea, the Philippines, Viet Nam, Malaysia, Brunei and Taiwan. In January 2013 the Philippines sought international arbitration under the United Nations Convention on the Law of the Sea (UNCLOS)[1] in an effort to have declared "illegal" China's nine dash line, which covers almost all the South China Sea.[2] The Chinese government has declined to participate in the proceedings.[3] In 2012 Japan alluded to the possibility to refer the Dokdo/Takeshima dispute with South Korea to the International Court of Justice (ICJ).[4] However, it became clear that South Korea would not accede to such a proposal and Japan has not proceeded, knowing that the ICJ would not have a clear jurisdictional basis.

In this century the ICJ has pronounced on a handful of disputes that concern sovereignty over islands with similar geographic characteristics to the islands of Dokdo/Takeshima. This article considers the potential implications of this jurisprudence for the resolution of the Dokdo/Takeshima issue and focuses on the methods of legal reasoning

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applied by the Court in resolving these disputes. In so doing, this article seeks to complement the rich literature that has already been written on this particular dispute.[5]

The dispute over the Liancourt Rocks, as the islands of Dokdo (in Korean)/Takeshima (in Japanese) are known in the West,[6] has long strained the bilateral relationship between Korea and Japan. The islets are located in the East Sea/Sea of Japan, lying approximately midway between Okinoshima in Japan and Ulleungdo (Dagelet) in Korea. Currently, Korea administers the islands, having taken control over them when the military occupation of Korea and Japan came to an end in the early 1950s. Korea maintains that Dokdo has been an integral part of Korean territory "historically, geographically, and under international law" since at least 512 A.D.[7] Japan—which controlled Takeshima between 1905, when it officially incorporated the islands in the prefecture of Shimane, and 1945, when following its defeat in World War II it relinquished control over them, as it did over the rest of Korea—claims Takeshima as an inherent territory of Japan, "in the light of historical facts and based upon international law."[8] Ever since the islands were mentioned in President Syngman Rhee's proclamation of sovereignty over the shelf and seas adjacent to Korean territory in 1952,[9] Japan has regularly protested Korea's exercise of jurisdiction over Dokdo/Takeshima and the Korean activities on and around the islands.

This article in the next section provides a brief account of the recent ICJ jurisprudence on sovereignty over island territory. Each of the subsequent sections analyzes a particular legal ground for confirming sovereignty over island territory: original historic title; treaty title and title based on arbitral awards; effective acts of administration; and transfer of title by tacit agreement. The final section draws some conclusions that may be pertinent to the Dokdo/Takeshima dispute.

## The Recent ICJ Jurisprudence

A number of the cases decided by the Court in the last 15 years provide interesting parallels for comparison with the sovereignty dispute over Dokdo/Takeshima. Of course, every territorial dispute involves a different web of factual and legal issues. Some are more complex than others, which makes any attempt at generalization a difficult endeavor. Nonetheless, the international cases concerning disputes over island territory warrant close consideration because they contain important dicta on the principles and rules of international law applicable in the determination of title to territory, particularly in the case of small, uninhabited islands. Moreover, many of the cases offer interesting examples of how the ICJ approaches questions of historical facts and other evidentiary matters.

The jurisprudence of interest includes the *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (2001), in which the Court had to decide a long-standing territorial dispute between Qatar and Bahrain and effect a delimitation of maritime boundaries between the respective states.[10] As part of that process, the Court had to determine which of the parties had sovereignty over the Hawar Islands, the island of Janan, and two minor maritime features called Fasht ad Dibal and Qit'at Jaradah.[11] The second case of interest is the *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (2002),[12] which concerned the dispute between Indonesia and Malaysia relating to sovereignty over the islands of Ligitan and Sipadan.[13] The third is the *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* (2007),[14] where the Court was primarily concerned with the delimitation of Nicaragua's and Honduras' maritime domains in the Caribbean Sea, but to undertake this, the Court had to determine which of the parties had sovereignty over four cays in the

disputed maritime areas: Bobel Cay, Savanna Cay, Port Royal Cay, and South Cay.[15] The fourth is the *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge (Malaysia/Singapore)* (2008),[16] which arose from a dispute between Malaysia and Singapore concerning sovereignty over three maritime features in the Straits of Singapore: the island called Pedra Branca (in Portuguese) or Pulau Batu Puteh (in Malay) and two minor maritime features known as Middle Rocks and South Ledge.[17] The fifth and final case of interest is the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (2007/2012),[18] in which the Court was required to delimit Nicaragua's and Colombia's maritime domains in the Caribbean Sea and in that process had to determine which of the parties had sovereignty over the islands of San Andrés, Providencia, and Santa Catalina, as well as Alburquerque Cays, East-Southeast Cays, Roncador atoll, the banks of Serrana, Serranilla, and Bajo Nuevo, and the maritime features known as Quitasueño.[19]

## Original Title as the Basis of Sovereignty over Islands—The Maritime Domain of Historic Asian Kingdoms

In the disputes submitted to the ICJ, it has not been uncommon for a party to invoke original title to the territory in question, either in the narrow sense that title is based on a specific act of occupation of *terra nullius* or in the more general sense of title being based on immemorial possession—possession established for so long that its origins are not only beyond question but also unknown. In the 1953 *Minquiers and Ecrehos Case* the first dispute involving island territory to be decided by the Court, France claimed it possessed original title to the islets and rocks of the Minquiers and Echrehos groups, a title it asserted it had always maintained and never lost.[20] Though the Court has not had much trouble applying the concept of original title to a territory claimed by a European state, its application has occasionally raised difficulties in the many territorial disputes that originated in the colonial era, where original title was invoked in relation to territory previously inhabited by non-European peoples.

The reason is that the acquisition of such territories by European colonial powers in the late nineteenth century was premised on an understanding of international law founded on a European model of statehood and sovereignty, which first and foremost implied control over territory.[21] In accordance with such understanding, the nineteenth-century jurists opposed the idea that the nomadic tribes of Africa, Australia, and the New World, in view of their failure to permanently occupy territory, were capable of being treated as sovereign, with the consequence that their territory was considered *terra nullius* and thus susceptible to occupation by European colonial powers.[22] Yet even where the original inhabitants exhibited a greater degree of political organization and had the required element of permanence, as in some parts of North Africa and Asia, nineteenth-century legal doctrine essentially denied these societies the capacity to enjoy recognition under international law of any right to the territory they inhabited, on the ground that they failed to meet the same "standard of civilization" as European states.[23] Such views were, however, not easy to reconcile with the practice of European powers that often acquired title to territory from the local communities by way of cession, through contracts with native princes or chiefs of peoples (though frequently obtained under compulsion). If native societies had insufficient personality in international law to have rights of occupation over their territory recognized by international law, it was difficult to argue that such societies, at the same time, had authority to conclude a treaty by which they could cede those rights.[24] International law, therefore, could not completely ignore the possibility of

"native sovereignty," but the extent to which some of these "native societies" were capable of holding original title to such territory (and by extension, disposing of it) depended on the circumstances of each case.[25]

The ICJ, on its part, adopted an ambivalent position on these questions and, particularly in cases involving African states, it has not always been willing to accept that local societies were capable of holding sovereign title to territory. Thus, in the 1975 *Western Sahara* Advisory Opinion, for example, the Court did not go as far as accepting that the tribes who inhabited Western Sahara at the time of Spanish colonization in the 1890s possessed anything in the nature of sovereignty, with the result that Western Sahara was not a State and the rulers of those tribes were not sovereigns.[26] The Court did conclude, however, that Western Sahara was not *terra nullius* because the territory was inhabited by peoples who were "socially and politically organized in tribes and under chiefs competent to represent them."[27] However, the Court did not consider whether the agreements by which Spain had acquired the territory from those chiefs could properly be considered as an actual cession of territory (a proposition that would implicitly recognize an element of "native" sovereignty on the part of those tribes), while at the same time it did regard such agreements as derivative roots of title.[28] In the 1999 *Botswana/Namibia Case*, on the other hand, the Court attached no legal significance to the long-standing and unopposed settlement of the Kasikili/Sedudu Island by the Masubia tribe and implicitly accepted that a 1890 colonial treaty between Great Britain and Germany respecting their spheres of influence in that part of Africa extinguished any preexisting title to territory vested in African tribes.[29]

Neither did the court in the 2002 *Cameroon v. Nigeria Case* accept that the kings and chiefs of Old Calabar who inhabited the Bakassi Peninsula in the 1890s could have something akin to sovereignty over territory that would have had to be respected.[30] Nigeria's claim that title to that territory was originally vested in this tribe, which purportedly retained their separate international status and rights even after entering into a Treaty of Protection with Great Britain in 1884, was rejected by the Court on the ground that while "[s]ome treaties of protection were entered into with entities which retained thereunder a previously existing sovereignty under international law," in sub-Saharan Africa such treaties "were entered into not with States, but rather with important indigenous rulers exercising local rule over identifiable areas of territory."[31] In the view of the Court, the 1884 Treaty

> . . .was one of a multitude in a region where the local Rulers were not regarded as States. Indeed, apart from the parallel declarations of various lesser Chiefs agreeing to be bound by the 1884 Treaty, there is not even convincing evidence of a central federal power. There appears in Old Calabar rather to have been individual townships, headed by Chiefs, who regarded themselves as owing a general allegiance to more important Kings and Chiefs. Further, from the outset Britain regarded itself as administering the territories comprised in the 1884 Treaty, and not just protecting them.[32]

The fact that Great Britain did not regard Old Calabar as a state apparently informed the Court's conclusion, as did Nigeria's inability to identify the source and character of Old Calabar's international personality, either at the time of the conclusion of the 1884 Treaty or any time thereafter. While the 1884 Treaty was, therefore, not an agreement between equals, the Court nonetheless considered that, in accordance with the rules of international law prevailing at that time, that Treaty conferred upon Great Britain full

territorial title, which the latter subsequently ceded to Germany on the basis of the Anglo-German Agreement of 11 March 1913.[33]

The Court, however, expressed an altogether different attitude in appreciating the question of "native sovereignty" in the case of Asian kingdoms. In the 1960 *Right of Passage (Portugal v. India) Case* the Court had no reservations in accepting that sovereignty over the villages of Dadrá and Nagar-Aveli were originally vested in the Marathas, a historic empire that ruled that part of India from 1674 until relinquishing control to the British in 1818.[34] The Court held that the Treaty of Poona, which the Marathas concluded with Portugal in 1779, had not transferred sovereignty over those villages to the Portuguese, thereby obviously accepting the Marathas as an equal power with Portugal, that is, as capable of holding, and by extension of disposing, title to territory as a sovereign.[35] Likewise, in the *Indonesia/Malaysia Case* the Court conceded that the sultanates existing in North Borneo at the time of the arrival of the European colonial powers could have possessed original title over the islands of Ligitan and Sipadan, and hence the Court readily examined whether either Indonesia or Malaysia had obtained such title by way of succession from either of these sultanates. On the facts of the case, it was eventually not possible for the Court to establish that Indonesia, as a successor to the Netherlands, inherited the title to the disputed islands from the sultan of Bulungan, because the various contracts of vassalage that governed the relations between the Netherlands and that sultanate could not be interpreted as extending in their scope to the islands in question.[36] The Court was equally unable to determine whether Malaysia, in turn, had obtained the title to the islands from the sultan of Sulu by way of an uninterrupted series of transfers of title through Spain, the United States, the British colonial authorities of North Borneo, and the United Kingdom, because it was impossible to infer from the relevant documents whether the islands in dispute were part of the sultanate's dependencies.[37] In this regard the Court did not give significant weight to the ties of allegiance that Malaysia claimed existed between the sultan of Sulu and the people who inhabited the islands off the coast of North Borneo and had frequently visited Ligitan and Sipadan, for even if the ties existed, they were in themselves not sufficient to provide evidence that the sultan claimed territorial title to Ligitan and Sipadan or considered them part of his possessions. Nor was there any evidence that the sultan actually exercised authority over those two small islands.[38]

In contrast, in the *Malaysia/Singapore Case* the Court found there was sufficient historical evidence to conclude that the sultanate of Johor, as the predecessor of Malaysia, had held an original title to the island of Pedra Branca/Pulau Batuh Puteh and other disputed maritime features in the Straits of Singapore. The Court determined that, since it came into existence in 1512, the sultanate of Johor had established itself "as a sovereign State with a certain territorial domain under its sovereignty in this part of southeast Asia"[39] and that from at least the seventeenth until early in the nineteenth century, its domain comprised a considerable portion of the Malaya Peninsula, straddled the Straits of Singapore, and included the islands and islets in the area of the Straits, thus including the area where Pedra Branca/Pulau Batuh Puteh and the other two maritime features are located. Support for the conclusion was found in the evidence recording the protest lodged by the sultan with the Dutch East India Company, when the latter sought to prevent Chinese traders from entering the Johor River, which according to the Court indicated that the sultan viewed the actions of the Dutch East India Company as an infringement of his right as a sovereign in the area. This was further corroborated by the fact that the British Resident in Singapore, reporting in 1824 to the Government of India, understood that the sultanate of Johor had an extensive maritime component that included all the islands in the region of the Straits of Singapore.[40]

In light of the historical and geographical context of the case, the Court had no problem concluding that the territorial domain of the sultanate extended to the island of Pedra Branca/Pulau Batuh Puteh and that the sultan had had original title to the feature. The Court attached importance to the fact that Pedra Branca/Pulau Batuh Puteh, having always been known as a navigational hazard in the Straights of Singapore, could not have remained undiscovered by the local community. Furthermore, and more importantly, the Court found no evidence that the possession of the island by the old sultanate of Johor had ever been challenged by any other power in the region. In this respect the Court recalled how in the 1933 *Legal Status of Eastern Greenland Case* its predecessor, the Permanent Court of International Justice (PCIJ), considered it necessary, in adjudicating upon a claim to sovereignty over a particular territory, to take into account the extent to which the sovereignty is also claimed by some other power.[41] In the view of the Court:

> If this conclusion was valid with reference to the thinly populated and unsettled territory of Eastern Greenland, it should also apply to the present case involving a tiny uninhabited and uninhabitable island, to which no claim of sovereignty had been made by any other Power throughout the years from the early sixteenth century until the middle of the nineteenth century.[42]

The Court noted that international law was satisfied with varying degrees in the display of state authority and recalled Judge Huber's famous observation in the 1928 *Island of Palmas* Arbitration that "sovereignty cannot be exercised in fact at every moment on every point of a territory."[43] Last but not least, the sultanate's title to the islands was confirmed by the existence of considerable political authority by the sultan over the Orang Laut, a nomadic people of the sea, who inhabited the islands in the Straits of Singapore and who made this maritime area their habitat where they engaged, as the historical record showed, in fishing and piratical activities.[44] In this regard the Court explicitly rejected Singapore's argument that the traditional Malay concept of sovereignty was based on control over people rather than on control over territory, concluding instead that "sovereignty comprises both elements, personal and territorial."[45]

Even though the Court ultimately found that title to the island of Pedra Branca/Pulau Batu Puteh had passed to Singapore,[46] its finding that the sultanate of Johor possessed an original title to the islands remained determinative for the fate of the other disputed maritime features. Thus, the Court held that original title to Middle Rocks remained with Malaysia, as the successor to the sultan of Johor. However, sovereignty over South Ledge was to belong to the state in whose territorial waters this low-tide elevation was found to be located. This depended on the outcome of the maritime delimitation, which the parties were first required to effect.[47] All in all, the Judgment—just as the Judgment in *Indonesia/Malaysia Case*—attested to the Court's acceptance of the proposition that ancient kingdoms of Southern Asia possessed a certain maritime domain and enjoyed sovereignty over adjacent islands, a proposition which accorded with the practices of the European colonial powers in contracting with the societies of southern Asia.[48] Of course, much depends on the circumstances of each case, where the Court seems to attach considerable weight to evidence demonstrating that such kingdoms had exercised authority over the islands in question or at least that the islands in question had been mentioned in contemporary documents describing the possessions of these kingdoms and their rulers. Evidence of personal ties between the inhabitants of these islands and the rulers of these ancient kingdoms would not necessarily be determinative, but could play a confirming role.

Arguably, the above could be applicable to Japan and Korea, with either of them in principle being capable of holding an original title to Dokdo/Takeshima. By the end of the nineteenth century, the nations of Eastern Asia—China, Japan, and Korea—had begun to be gradually admitted into the "Family of Nations," even though as international legal persons they may not have all been considered equal to the "civilized" states of Europe.[49] Of course, the reasons for their late admission as subjects of international law lay partly in their reluctance to engage in commercial or diplomatic relations with foreign powers. Japan's historical isolationism was only terminated after being forced to open its ports to the Western world through American intervention in 1854, although by 1858 it had signed comprehensive treaties of amity and commerce with the United States, the Netherlands, Russia, Great Britain, and France.[50] Korea, too, maintained a policy of strict isolationism throughout the history of the Joseon dynasty, a policy that was further strengthened as a result of the traditional relationship of suzerainty vis-à-vis Qing China, which remained responsible for Korea's contacts with the outside world.[51] But unlike the case of Japan, attempts by the European powers to force Korea to open its doors to foreign trade reinforced its determination to resist outside encroachment.[52] It was Japan that, through a successful application of "gunboat" diplomacy, induced Korea to conclude the Treaty of Amity in 1876, the first modern treaty that Korea concluded with an outside power, in an attempt to exert influence on Korea ahead of the European powers.[53] The Treaty sought to end Korea's status as a suzerain state of the Qing dynasty, by recognizing it as an "independent State" that enjoyed "the same Sovereign rights" as Japan.[54] On the other hand, the 1876 Treaty also provided an impetus for the conclusion of further treaties with other non-Asian powers, because Korea, determined to resist the growing Japanese presence and influence, found it opportune to enter into treaties of amity and commerce with the United States (1882), Great Britain (1883), Germany (1883), Italy (1884), Russia (1884), France (1886), Austria-Hungary (1892), Belgium (1901), and Denmark (1902).[55] By the standards applicable at the end of the nineteenth century, Japan and Korea were sovereign states for the purposes of diplomacy and treaty making such that there was nothing in international law that would prevent them from holding sovereign title to adjacent island territory.

The question whether, as a matter of fact, either Japan or Korea possessed an original title to the Dokdo/Takeshima islands depends on the historical evidence. Considering the geographical context, it is certain that the Dokdo/Takeshima were not *terra incognita* in the nineteenth century, given that they are visible from the nearby Korean island of Ulleungdo.[56] Korea claims that Dokdo/Takeshima have always been known to the local communities, relying on documents dating back to 1454, which mention both Ulleungdo and Dokdo islands as not being far apart from each other, visible on a clear day, and both belonging to Joseon's Uljin prefecture.[57] Furthermore, Korea maintains that Dokdo/Takeshima appear, albeit under their old name of Usando, in many other historical documents originating from the fifteenth up to the early twentieth century, which treat them, together with Ulleungdo, as Korean territory.[58]

Japan, however, disputes the Korean documentary evidence on the ground that it is either inconclusive or inaccurate.[59] In particular, Japan claims that there is insufficient proof that Usando, as used in the old documents and maps, refers to present-day Dokdo/Takeshima, and that the name more likely refers to either Ulleungdo itself or to a smaller islet adjacent to the latter, the Jukdo.[60] Nonetheless, if Korea were able to demonstrate the accuracy of the historical documents,[61] the latter would seem to provide a strong indication that Dokdo/Takeshima were historically considered to belong to the old Korean kingdoms.

Japan, on its part, maintains that it has possessed sovereignty over Dokdo/Takeshima since at least the middle of the seventeenth century.[62] To prove this, it essentially relies on a historical document recording that a special permission was granted in 1618 by the Japanese government of the time, the Tokugawa Shogunate, to two Japanese merchant families from the Tottori region for the purpose of using Ulleungdo for catching abalone and sea lions and for exploiting its bamboo forests.[63] Japan claims that the families subsequently frequented Ulleungdo for about 70 years, during which they allegedly also used Dokdo/Takeshima as a navigational port when traveling to Ulleungdo. Japan contends that the shogunate considered both Ulleungdo and Dokdo/Takeshima as belonging to Japan.[64] Korea, on its part, disputes the conclusions drawn by Japan from this episode, arguing that the permission was nothing but a licence for foreign trade, because one does not need permission for passage to one's domestic islands.[65] Furthermore, Korea contends that a Japanese governmental document from 1667 described the Oki Islands as marking the northwestern limit of Japan, which would indicate that neither Ulleungdo nor Dokdo/Takeshima were perceived then as belonging to Japan.[66] Then again, Japan argues that passage to the islands of Ulleungdo and Dokdo/Takeshima was not prohibited when Japan closed itself to the outside world in 1653. Nor was passage to Dokdo/Takeshima prohibited after 1696, when the shogunate banned, on its own initiative, the travel of Japanese to Ulleungdo.[67] Essentially, however, Japan's claims to original title appear largely to be based on indirect inferences, because neither the Shogunate's 1618 permission nor its 1696 prohibition appear to specifically mention Dokdo/Takeshima. As the ICJ has often emphasized, what matters are not indirect presumptions deduced from events in the past, but evidence that relates directly to the possession of the disputed territory.[68] Thus, provided that sufficient probative value can be attached to the historical documents relied on by Korea, the record gives greater weight to the proposition that Korea had an original title to the islands.

Apart from the events occurring in the seventeenth century, Japan makes reference to an 1846 map as proof that Dokdo/Takeshima were considered Japanese territory.[69] But the map is disputed by Korea as being a privately drawn map, which at any rate depicts Ulleungdo and Dokdo/Takeshima differently from Japanese territories.[70] Moreover, Korea contends that Dokdo/Takeshima do not appear on any of the nineteenth-century maps commissioned by the Japanese government, some of which arguably representing the islands as part of Korean territory.[71] In accordance with the jurisprudence of the Court, maps and other cartographic material can serve only as corroborative evidence, whose probative value varies according to the circumstances of each case.[72] As indicated by the ICJ in the 2007 *Nicaragua v. Honduras Case*, their probative value depends on a number of elements, such as the extent to which the maps relate to territory that is known and over which administrative control was actually exercised, the extent to which they are geographical accurate and indicate the political distribution of depicted territories, as well as the extent to which they originate from sources that are neutral toward the dispute in question and the parties to that dispute.[73] However, as attested to by the decisions in *Singapore/Malaysia* and *Nicaragua v. Colombia Cases*, the Court may attach particular weight to maps that originate with one party but attribute the territory in question to the other.[74] If there are Japanese maps depicting Dokdo/Takeshima as Korean, this would have important consequences for Japan's claim, because such maps would provide evidence that Japan accepted that Korea had sovereignty over the islands.

## Importance of Treaty Titles and Titles Based on Arbitral Awards

The parties to a territorial dispute will commonly amass a great deal of documentary evidence by which they will seek to establish the existence of their title to the territory in question.[75] In the jurisprudence of the Court, however, two sources of title have typically assumed an important evidentiary role in the Court's decisions: title based on treaties, such as treaties of cession or treaties effecting a delimitation of boundaries/spheres of influence; and title based on arbitral awards or decisions of political organs. When faced with a claim based on these sources of title—as against a claim based solely on the actual exercise or display of sovereign authority—the Court has shown a strong tendency to attempt to dispose of the question of disputed sovereignty on the basis of the former, rather than the latter.

In the *Qatar v. Bahrain Case* the Court avoided the plethora of arguments based on the existence of an original title, *effectivités*, and the applicability of the principle of *uti possidetis juris* that Qatar and Bahrain invoked in favor of their claims to sovereignty over the Hawar Islands and the island of Janan.[76] For the purpose of resolving the territorial dispute, the Court instead relied entirely on a Decision of 11 July 1939, by which the British colonial authorities previously attributed the sovereignty over the Hawar Islands to Bahrain after this became a matter of contention between the rulers of Qatar and Bahrain. Qatar, which like Bahrain used to be a British protected state, disputed the legal implications of that Decision on the ground that it had never consented to the process. However, the Court was of the opinion that even if the Decision was not an arbitral award, this did not deprive it of legal effect. Indeed, because both Bahrain and Qatar had freely consented to the British government settling their dispute over the Hawar Islands, the Decision was and remained binding on both States.[77] As a result, according to the Court, Bahrain had sovereignty over the Hawar Islands,[78] while Qatar had sovereignty over the island of Janan, inasmuch as the latter, as evidenced from subsequent correspondence of British officials, were not regarded as part of the Hawar island group.[79] For all practical purposes, the Decision of 1939 offered a convenient legal basis to dispose of the dispute without engaging with the factually more complicated arguments relating to occupation and effective administration of the dispute island territory.

The Court's Judgments in the *Indonesia/Malaysia* and *Nicaragua v. Colombia Cases*, in turn, attest to the importance that the Court attaches to treaty-based claims over claims founded on other roots or basis of title. The Court's preference for treaty title is clear even in circumstances where the treaty provisions in question were far from unambiguous[80] and where it was less than certain that the treaty in question had intended to effect a definite determination of the boundary.[81] It is not surprising, therefore, that in the *Indonesia/Malaysia Case* the Court spent a considerable part of its judgment determining whether title over Ligitan and Sipadan belonged to Indonesia by virtue of the Convention between Great Britain and the Netherlands of 1891, in which the former colonial powers defined the boundaries between their possessions on the islands of Borneo and Sebatik. Contrary to Indonesia's claims, the Court did not find in the Convention anything that suggested that the former colonial powers intended to establish any allocation line beyond the east coast of Sebatik Island or to attribute sovereignty over any other islands. This conclusion was not only confirmed by an examination of the preparatory work of the 1891 Convention but also by the subsequent conduct of the parties, including certain contracts with the Sultanate of Bulungan.[82]

In the *Nicaragua v. Colombia Case*, in contrast, a treaty title turned out to be dispositive of at least part of the territorial dispute. In its 2007 Judgment on Preliminary

Objections, the Court dismissed Nicaragua's claim that it had sovereignty over the islands of Providencia, San Andrés, and Santa Catalina, in view of the clear language of Article 1 of the 1928 Barcenas-Esguerra Treaty which assigned sovereignty over those islands to Colombia.[83] In its Judgment on the Merits in 2012 the Court returned to the interpretation of Article 1 of the 1928 Treaty to determine whether any of the other maritime features in dispute between the parties were captured by "the other islands, islets and reefs forming part of the San Andrés Archipelago," the wording in the 1891 Treaty. The Court was not able to resolve the question of the composition of the Archipelago on the basis of the geographical location of the maritime features. Nor was the historical material provided by Nicaragua and Colombia in support of their arguments conclusive about the composition of the San Andrés Archipelago, because those records did not specifically indicate which features formed part of it.[84] Eventually, the Court had to determine the sovereignty over the maritime features in dispute based on the evidence of effective acts of administration.[85]

The Court's general inclination not to easily accept challenges to the validity of treaties,[86] or other instruments relevant to the issue of territorial title,[87] including arbitral awards,[88] is further demonstrated in the *Qatar v. Bahrain* and *Nicaragua v. Colombia Case*s. As already noted, in the *Qatar v. Bahrain Case* the Court accepted the validity of the 1939 Decision, which Qatar had put in question on the grounds that there had been bias on the part of the relevant colonial officials, the parties had not been given an equal and fair opportunity to present their arguments, and that the decision was not supported by reasons.[89] The Court noted that, even though the 1939 Decision was not subject to the procedural principles governing the validity of arbitral awards, the Decision was rendered "in the light of truth and justice."[90] First, the Court found that the Decision was not contrary to justice on the basis that the colonial officials proceeded on the premise that Bahrain possessed *prima facie* title to the islands and that it was for Qatar to prove the opposite, because Qatar had consented to the proceedings being conducted on that basis. Second, the procedure before the British authorities resembled a proper adversarial procedure as both Qatar and Bahrain had the opportunity to present their arguments in relation to the islands in dispute and the evidence supporting them. Third, the fact that the Decision was not supported by written reasons did not affect its validity, because there was no obligation to give reasons imposed on the British government when it was entrusted with the settlement of the matter. Furthermore, when informed about the decision, Qatar did not claim that the latter was invalid for lack of reasons.[91] Consequently, the 1939 Decision could be relied on by the Court for the purpose of resolving the dispute submitted to it.

In the *Nicaragua v. Colombia Case* the Court was disinclined to accept Nicaragua's claim that the 1928 Barcenas-Esguerra Treaty was invalid, because it had purportedly been concluded in violation of the Nicaraguan Constitution. In its Judgment on Preliminary Objections, the Court held that Nicaragua could not assert the invalidity of the Treaty having treated it as valid for more than 50 years.[92] Nor could Nicaragua terminate the Treaty in response to Colombia's alleged breaches, because even if the Treaty could be terminated due to material breach, this would not have affected the territorial *régime* established by the Treaty.[93] The Court in several of its previous cases had emphasized that a territorial *régime* achieves a permanence that the underlying treaty itself does not necessarily enjoy and hence the *régime* does not depend on the continuing life of the legal instrument embodying it.[94]

No treaty has been concluded between Korea and Japan respecting the question of sovereignty over Dokdo/Takeshima. However, Japan and Korea have both made claims in relation to the 1951 Treaty of Peace with Japan (commonly known as the San Francisco Peace Treaty), which provides in Article 2(a) that "Japan, recognizing the independence of

Korea, renounces all right, title and claim to Korea, including the islands of Quelpart [Jejudo], Prot Hamilton [Geomundo], and Dagelet [Ulleungdo]."[95] Japan has argued that because Dokdo/Takeshima are not specifically mentioned in this provision, it has never renounced "right, title and claim" to them.[96] According to Korea, however, the silence of Article 2(a) in relation to Dokdo/Takeshima does not mean that the latter were not part of the territories that were to be separated from Japan. Korea has some 3,000 other islands on which the Treaty is silent.[97] Moreover, the word "including" suggests the list is nonexhaustive. In support of this interpretation, Korea essentially relies on the circumstances of the Treaty's conclusion. It argues that Dokdo/Takeshima were the first of the territories that Japan had taken "by violence and greed" and from which it had to be expelled from in accordance with the Cairo Declaration of 1 December 1943.[98] Korea argues that the intention of the Allies to restore Dokdo/Takeshima as an integral part of Korean territory is further evidenced from some of the administrative measures adopted by the Allied Powers, which excluded the islands from the territories that were to be controlled and administered by Japan.[99] Japan, on its turn, relies on the drafting history of Article 2(a), invoking in particular how the U.S. drafters rejected Korea's request to have Dokdo/Takeshima specifically added to the provision on the ground that the islands appeared to be part of Japan.[100] At the same time, Japan refutes the administrative measures relied on by Korea and invokes other administrative measures purportedly treating the islands as Japanese.[101]

An interpretation of Article 2(a) in accordance with the ordinary meaning of the language reasonably supports either construction. Its drafting history sheds little light on whether the 1951 Treaty intended to dispose of the question of Dokdo/Takeshima. The initial drafts designated the islands as Korean, but other drafts list the islands as Japanese, with the later drafts abandoning any reference to Dokdo/Takeshima.[102] Because of the absence of an express disposition of the islands in Article 2(a) and the indeterminacy of the latter's drafting history, it is difficult to resolve the island dispute on the basis of the San Francisco Peace Treaty alone. Furthermore, because Korea never became party to the San Francisco Peace Treaty (it was not entitled to do so under its provisions), the argument could arise regarding the extent to which the Treaty's territorial clause is opposable to Korea as a third party.[103] One could consider Article 2(a) as reflecting a political decision having certain legal effects, akin to the 1939 Decision, by which the British authorities resolved the question of sovereignty over Hawar Islands, but even then it is doubtful what legal effects this would have vis-à-vis Korea. In contrast to the dispute between Qatar and Bahrain, where the British government was entrusted with the settlement of the question of sovereignty over the Hawar Islands, Korea did not entrust the U.S. government, or any other of the Allied Powers participating in the drafting of the San Francisco Treaty, with determining the status of Dokdo/Takeshima. And unlike Qatar and Bahrain, which both had the opportunity to present their arguments in relation to the Hawar Islands and the evidence supporting them, Korea did not have an opportunity to make its case regarding to Dokdo/Takeshima. Last but not least, even when confronted with the fact that the territorial clause did not explicitly mention Dokdo/Takeshima among the islands, Korea has never acquiesced that the Treaty confirmed Japan's sovereignty over the islands.

## In Absence of Title, Evidence of Effective Manifestation of Sovereign Authority

The principle is now well established that in circumstances where the extent of a prior title is absent or uncertain, sovereign title may be inferred from the effective manifestation of

State functions over the territory in dispute or what is frequently referred to by the Court as *effectivités*.[104] The Court applied the principle already in the 1953 *Minquiers and Ecrehos (France/United Kingdom) Case*,[105] and endorsed it in more general terms in the 1986 *Frontier Dispute (Burkina Faso/Mali) Case*, where a Chamber of the Court, upon drawing a distinction "among several eventualities," stated that "[i]n the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration."[106] Since then, the principle has been applied by the Court in numerous territorial disputes, including several of the recent cases concerning island territory.[107]

A number of conditions must be conclusively proven to successfully sustain a claim of sovereignty on the basis of the effective exercise of State authority.[108] These conditions have not developed only through the Court's recent practice but had been articulated by the PCIJ in the 1933 *Eastern Greenland Case*. As explained by the Court's predecessor in that case:

> a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.[109]

To be relevant, in other words, the activity in question must be conducted *à titre de souverain* and not rest on a previous permission given by another State. Second, relevance will be given to "the extent to which the sovereignty is also claimed by some other Power."[110] Third, the exercise of sovereign rights must be proportionate to the nature of the disputed territory in question. According to the PCIJ:

> [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 populated or unsettled countries.[111]

The continued importance of these pronouncements is confirmed in the decisions in *Qatar v. Bahrain*,[112] *Indonesia/Malaysia*,[113] *Nicaragua v. Honduras,*[114] and *Nicaragua v. Colombia*,[115] where the Court faithfully adhered to the conditions when deciding title to disputed islands on the basis of *effectivités*.

While a variety of different activities have been invoked as evidence of *effectivités* in relation to island territory, not every activity has necessarily been considered as amounting to an exercise of sovereignty. Particularly in the case of physical activities, the question has occasionally arisen as to whether these amount to a manifestation of State authority. Faced with this question in the *Qatar v. Bahrain Case*, the Court considered that "[c]ertain types of activities invoked by Bahrain such as the drilling of artesian wells would, taken by themselves, be considered controversial as acts performed *à titre de souverain*. The construction of navigational aids, on the other hand, can be legally relevant in the case of very small islands."[116] Determinative of the issue was whether the activity in question was one typically falling within the public or government prerogatives. While this was apparently not the case with the provision of water (as this could arguably also be done by private parties), the maintenance of navigational safety was perceived as one belonging to acts *à titre de souverain*, with the consequence that Bahrain's erection of a

beacon on Qit'at Jaradah was held to be sufficient to support its claim to sovereignty over that islet.[117]

The question whether the construction and operation of navigational aids can be considered as manifestations of State authority will depend on the circumstances of the case.[118] But following the *Qatar v. Bahrain* Decision, the Court has adhered to the proposition that such activities are legally relevant in respect of very small islands. Thus, in the *Indonesia/Malaysia Case* the Court attached some importance to the fact the British colonial authorities of North Borneo had constructed lighthouses on Sipadan (in 1962) and Ligitan (in 1963), which were maintained thereafter by Malaysian authorities.[119] In the 2012 *Nicaragua v. Colombia Case* the Court gave weight to Colombia's involvement in the maintenance of lighthouses and buoys on Alburquerque, East-Southeast Cays, Quitasueño, Serrana, and Roncador in deciding that Colombia had sovereignty over the maritime features.[120] Furthermore, in the 2007 *Nicaragua v. Honduras Case*, the Court considered that legal significance could also be attached to other types of public works in addition to the maintenance of navigational aids. In the circumstances of that case, this meant that the erection of an antenna on Bobel Cay related to authorized oil exploration activities, even though effected by private parties, was considered as evidence of *effectivités* supporting Honduran sovereignty over the islands in dispute.[121]

To amount to a manifestation of State authority, the activities in question must be imputable to the State. The occasional visits to the disputed islands by governmental officials acting in that capacity certainly can have probative value,[122] provided, however, that there is proof that the authorities considered that the islands in question were under the sovereignty of the respective State.[123] It is for this reason that evidence concerning naval patrolling, while in itself indisputably an act of exercise of sovereign authority, has rarely been taken into account by the Court in the recent island dispute cases. Only in the 2012 *Nicaragua v. Colombia Case* did the Court find that island visits by the Colombian Navy and search and rescue operations carried out in the immediate vicinity were sufficiently conclusive to attribute them significance in determining the question of sovereignty.[124] The possibility of activities amounting to manifestations of State authority will be difficult to establish in the case of private persons. In the *Indonesia/Malaysia Case* the Court did not give weight to Indonesia's claim that its fishermen had traditionally used the waters around Ligitan and Sipadan for the reason 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."[125]

It is not surprising that in most of the island sovereignty cases decided by the Court, it has been proof of general regulatory activity in the form of legislative or administrative acts, coupled with some evidence of enforcement, which has had the greatest bearing on the sovereignty outcome.[126] In the *Indonesia/Malaysia Case* the most important evidence of effective administration over the islands were the legislative measures taken in 1917 by the North Borneo authorities to regulate and control the collecting of turtle eggs on Ligitan and Sipadan (on the basis of which the authorities issued licenses to private individuals and settled disputes about the collection of turtle eggs on Sipadan) and the establishment of a bird reserve on Sipadan in 1933.[127] In the 2007 *Nicaragua v. Honduras Case* the determinative *effectivités* were the exercise of criminal jurisdiction over the islands by Honduras, the administrative and enforcement activities that the latter had undertaken for the purpose of regulating immigration and fishing, its issuance of construction and other permits, as well as Honduras' authorization of drug enforcement activities conducted by the United States.[128] In the 2012 *Nicaragua v. Colombia Case* the Court took into account Colombia's acts relating to the public administration of the territory; its

legislative and administrative acts relating to the regulation of guano extraction, coconut collection, and lime phosphate exploitation (coupled with evidence of permits and contracts that were granted to private persons on that basis); and Colombia's acts relating to the regulation of fisheries, including various enforcement measures.[129]

To be admitted as evidence of *effectivités*, the regulatory activities need to be sufficiently specific. As the Court explained in the *Indonesia/Malaysia Case*:

> it can only consider those acts as constituting a relevant display of authority which leave no doubt as to their specific reference to the islands in dispute as such. Regulations or administrative acts of a general nature can therefore be taken as *effectivités* [...] only if it is clear from their terms or their effects that they pertained to these two islands [in question].[130]

The measures taken by Malaysia were found to satisfy the conditions inasmuch as they amounted to "regulatory and administrative assertions of authority over territory which is specified by name."[131] In contrast, this was not the case with the legislation on archipelagic baselines relied on by Indonesia, which did not specifically mention either Ligitan or Sipadan.[132] In subsequent cases the Court has reiterated that it will only take into account activities that were undertaken specifically in relation to the maritime features in dispute.[133] At the same time, the required specificity does not need to be direct but may follow by necessary implication. In the 2007 *Nicaragua v. Honduras Case* the Court attached significance to the fishing licenses issued by the Honduran authorities which, even though undesignated as to areas, were known to have been used for fishing taking place around the disputed islands.[134] As demonstrated in that Case, the Court may occasionally draw inferences concerning the scope of application of regulatory measures from the conduct of private persons to the extent that this had taken place on the basis of official regulations or under governmental authority. In this regard the Court accepted witness statements presented by Honduras to the effect that the latter regulated fishing activities around the disputed islands and cays as legally relevant evidence of administrative and legislative control.[135]

Not all acts *à titre de souverain* will be accepted as relevant for the purpose of assessing and validating *effectivités*. What is most relevant are those occurring before the so-called "critical date." As the Court explained in the 2007 *Nicaragua v. Honduras Case*:

> In the context of [...] a dispute related to sovereignty over land, the significance of a critical date lies in distinguishing between those acts performed *à titre de souverain* which are in principle relevant for the purpose of assessing and validating *effectivités*, and those acts occurring after such critical date, which are in general meaningless for that purpose, having been carried out by a State which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims. Thus a critical date will be the dividing line after which the Parties' acts become irrelevant for the purposes of assessing the value of *effectivités*.[136]

This dividing line is not necessarily one of strict separation. In the *Indonesia/Malaysia Case* the Court adhered to the principle that it would not take into consideration acts having taken place after the critical date "unless such acts are 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."[137] In the 2012 *Nicaragua v. Colombia Case* the Court took

into account some of Colombia's activities that it considered as a normal continuation of prior acts *à titre de souverain*.[138]

The extent and intensity of *effectivités* has varied according to the circumstances of each Case. But in keeping with the PCIJ's observation that tribunals have been "satisfied with very little in the way of the actual exercise of sovereign rights [. . .] in the case of claims to sovereignty over areas in thinly populated or unsettled countries,"[139] the ICJ has generally been satisfied with minimal evidence of sovereign activities over the islands in dispute. In the *Qatar v. Bahrain Case* the erection of a beacon on Qit'at Jaradah was sufficient to support Bahrain's claim to sovereignty over that islet.[140] In the *Indonesia/Malaysia Case* the measures taken by Malaysia to regulate and control the collecting of turtle eggs and the establishment of a bird reserve sufficed for the Court to attribute sovereignty over the islands to Malaysia. The Court observed that "[i]n particular in the case of very small islands which are uninhabited or not permanently inhabited—like Ligitan and Sipadan, which have been of little economic importance (at least until recently)—*effectivités* will indeed generally be scarce."[141] But though "modest in number" as they were, Malaysia's *effectivités* were "diverse in character," covered "a considerable period of time," and showed "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."[142] In the 2007 *Nicaragua v. Honduras* and 2012 *Nicaragua v. Colombia Cases*, evidence of *effectivités* was abundant, although not plentiful. In the former case most of the activity considered relevant by the Court was concentrated in the decade before the critical date. The Court was satisfied that Honduras had shown "a sufficient overall pattern of conduct," demonstrating its intention to act as sovereign over the islands in question.[143] The fact that the time span of some of Honduras' *effectivités* was relatively short, in the case of immigration control not amounting to more than a few years, was not considered a problem for the Court because only Honduras had undertaken those measures.[144] In any event, as the Court felt necessary to explain, "[s]overeignty over minor maritime features, such as the islands in dispute between Honduras and Nicaragua, may therefore be established on the basis of a relatively modest display of State powers in terms of quality and quantity,"[145] a point subsequently reiterated in the 2012 *Nicaragua v. Colombia Case*.[146] In the latter case the relevant *effectivités* consisted of sporadic episodes of regulatory activity scattered over a period of more than a hundred years. But despite their scarcity, the Court found that Colombia had "continuously and consistently" acted *à titre de souverain*.[147]

Following the approach in the *Eastern Greenland Case*,[148] the Court in its recent decisions also examined the extent to which sovereignty over the disputed islands was claimed by the other party or some other State. In appraising the relative strength of the opposing claims to sovereignty, the Court has rarely been compelled to decide which of the disputing parties has made a superior claim on the basis of competing *effectivités*. In the *Indonesia/Malaysia Case* the Court concluded that none of the putative acts of sovereign authority invoked by Indonesia were in fact *à titre de souverain*.[149] Similarly, in the 2007 *Nicaragua v. Honduras Case* the Court found that the *effectivités* invoked by Nicaragua were unpersuasive, inconclusive, or otherwise had no bearing on the islands in dispute, such that there was no proof of any exercise or display of authority over the islands by Nicaragua.[150] In other cases the issue of competing *effectivités* did not arise. In the *Qatar v. Bahrain Case* only Bahrain advanced evidence of sovereign activities in support of its claim to Qit'at Jaradah. Qatar contended that the disputed maritime feature was a low-tide elevation that could not be appropriated.[151] In the 2012 *Nicaragua v. Colombia Case*, in contrast, Nicaragua decided not to provide evidence of acts *à titre de souverain*

in relation to the islands, preferring to rely on the principle of *uti possidetis juris* to base its claims to the islands.[152]

In the various cases the Court has not only satisfied itself through an examination of the parties' *effectivités* but has usually also taken account of their conduct in general, including acts or omissions that could be capable of amounting to acquiescence to the other party's sovereignty. In the *Indonesia/Malaysia Case* the Court could not disregard the fact that at the time when Malaysia carried out its activities *à titre de souverain*, neither Indonesia nor its predecessor, the Netherlands, expressed disagreement or protest.[153] Similarly, in the 2007 *Nicaragua v. Honduras Case* the Court noted that the Honduran activities qualifying as *effectivités* did not elicit any protest on the part of Nicaragua, even though the latter was likely to have been aware of Honduras' conduct.[154] In the 2012 *Nicaragua v. Colombia Case*, on the other hand, the Court held that Nicaragua's failure to properly react to an earlier arbitral award and to reserve its position with regard to the disputed islands when concluding a treaty with Columbia, albeit falling short of outright recognition of Colombia's sovereignty over the maritime features in dispute, nonetheless provided "some support" to Colombia's claim.[155] Furthermore, the Court has occasionally attached significance to instances of recognition by interested third States as potentially resulting from specific dealings with the State concerned (e.g., requests for authorizations, conclusion of treaties), or evidenced by third State conduct in general. While the Court in the 2007 *Nicaragua v. Honduras Case* considered the evidence of third States practice as neither consistent nor pertinent to the islands in question,[156] in the 2012 *Nicaragua v. Colombia Case* it found that such evidence afforded "some measure of support" to Columbia's claim, although this did not amount to outright recognition of Colombia's sovereignty over the disputed islands.[157]

A number of relevant inferences may be drawn from these cases regarding the Dokdo/Takeshima dispute especially in the event that the historical documents relied on by Korea and Japan do not furnish conclusive proof about whether either of the States had original title to the islands. The evidence of sovereign activities over the islands is decisively in favor of Korea. It is not disputed that since 1952 Korea has exercised governmental authority in relation to Dokdo/Takeshima, to the exclusion of any other State. Korea's *effectivités* have included acts of a legislative, administrative, and judicial nature, as well as taking the form of regular police and military patrolling and the constructing of public works, such as the erection and maintenance of a lighthouse and other government facilities on the island.[158] But inasmuch as Japan has regularly protested to Korea's activities, it is the evidence of activities conducted prior to the emergence of the dispute in 1952 that will be of primary importance in deciding the question of sovereignty over the islands. This is not to say that account may not be taken of activities conducted thereafter, to the extent that those acts were "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."[159]

In the absence of clear title the historical record appears to afford Korea a stronger basis of claim to the islands. On the one hand, Korea maintains that ever since the Kingdom of Joseon began to implement its "vacant islands" policy in 1403, a policy that lasted until 1895 and that was arguably aimed at protecting the residents of Ulleungdo against ransacking by Japanese pirates, it has dispatched special governmental officials to Ulleungdo every two or three years for the purpose of repatriating the island's residents to the mainland, even though Korea could not entirely prohibit Japanese fishermen from using the islands of Ulleungdo and Dokdo.[160] Such governmental inspections qualify as acts *à titre de souverain*, but for them to be confirmative of a conviction on the part of the

Korean rulers that Dokdo/Takeshima was under their sovereign jurisdiction, it would have to be proven that the inspections took place on Dokdo/Takeshima and were not limited to Ulleungdo. Japan, on its part, does not indicate any specific *effectivités* in relation to the islands prior to the beginning of the twentieth century. Admittedly, the monopoly that the shogunate is said to have given to Japanese merchant families for the purpose of exploiting the natural resources of Ulleungdo (then Utsuryo) in the seventeenth century could be construed as an act of sovereign authority; yet, the historical record does not indicate in any way that the shogunate's special permission specifically included Dokdo/Takeshima.[161] More significant, on the other hand, is Korea's claim that it had intensified its governmental activities around both Ulleungdo and Dokdo/Takeshima in the second half of the nineteenth century, when it abandoned its vacant island policy. Accordingly, in December 1881 Korea adopted a Reclamation Program for Ulleungdo, pursuant to which the island begun to be resettled, and a superintendent of the island was appointed in 1895.[162] Furthermore, with a view to strengthening the local administration of Ulleungdo and curbing down illegal logging on the island by the Japanese, the State Council of the Empire of Korea adopted Imperial Edict No. 41 of 24 October 1900 within which Ulleungdo was renamed Uldo and elevated to the status of a county and its superintendent transformed into a county magistrate.[163] Most importantly, the 1900 Edict placed Dokdo/Takeshima, then referred to as Seokdo, under the administrative jurisdiction of Ulleungdo, whose county magistrate administered the island until at least 1906.[164] Japan disputes that the word "Seokdo" used in the 1900 Edict corresponds with Dokdo/Takeshima given that Korea had previously used the name "Usan" for the island.[165] Furthermore, it claims that there is no evidence that Korea had ever exercised effective control over Takeshima at the time of the 1900 Edict.[166]

Provided that Seokdo refers to the Dokdo/Takeshima, it would be difficult to deny that the 1900 Edict and the subsequent administration by the Uldo county magistrate constituted acts *à titre de souverain* on behalf of Korea, because they demonstrate Korea's "intention and will to act as sovereign," as well as "some actual exercise or display of such authority"—to borrow from the dictum in the *Eastern Greenland Case*.[167] Considering the small size of Dokdo/Takeshima and its location, such activities may be sufficient to confirm or establish Korea's title. As seen in the jurisprudence, in the case of small, remote, and uninhabited islands, the Court has been "satisfied with very little in the way of the actual exercise of sovereign rights,"[168] provided that the other State cannot make a superior claim. Japan appears never to have lodged any protest to the adoption of the 1900 Edict or its subsequent application in relation to Dokdo/Takeshima, even though it is difficult to imagine that Japan was unaware of it, considering the significant involvement of Japanese advisers in the improvement of Korea's system of administration.[169] Furthermore, Korea maintains that there are official Japanese government documents from the late nineteenth century that plainly state that Dokdo/Takeshima is not Japanese territory. One is a report prepared in 1870 by officials of Japan's Ministry of Foreign Affairs, which is said to describe the islands of Takeshima/Ulleungdo and Matsushima/Dokdo as being under Joseon's jurisdiction.[170] Of even greater importance, however, is a directive adopted by Japan's Grand Council of State in 1877, which appears to have formally disclaimed Japanese ownership of Dokdo/Takeshima.[171] This official disclaimer could weigh heavily against Japan's claims, especially if further corroborated by the absence of Japanese government documents treating Dokdo/Takeshima as Japanese territory prior to Japan's attempt to incorporate the islands in 1905, as contended by Korea.[172]

Japan has not officially repudiated or otherwise qualified the 1877 disclaimer. Instead, Japan principally relies on the decision of the Japanese Cabinet of 22 February

1905 by which it formally incorporated the islands into its territory. The decision declared that Dokdo/Takeshima came under the jurisdiction of the Okinoshima branch of Shimane Prefectural Government and that the islands were officially called Takeshima. It was conveyed to the Governor of Shimane Prefecture, which subsequently registered Dokdo/Takeshima into the State Land Register, and established a license system for sea lion hunting, a practice that is said to have continued until 1941.[173] According to Japan, the decision was published in the newspapers of the day and was broadly publicized.[174] The Cabinet decision apparently came to the knowledge of the United States, during the drafting of Article 2(a) of the San Francisco Peace Treaty, when the U.S. Assistant Secretary of State Dean Rusk rejected Korea's request to have Dokdo/Takeshima included among the territories to which Japan would officially renounce title, on the ground that, according to his information, the islands had been under the jurisdiction of Japan's Shimane Prefecture since 1905 and that it did not appear that they had ever before been claimed by Korea.[175] Japan claims that such views were later reiterated by U.S. Ambassador Van Fleet after his visit to Korea in 1954.[176]

Korea contends that Japan's 1905 Decision only appeared in Prefecture's Public Notice No. 40 and that it had only learned about the incorporation of Dokdo/Takeshima on 28 March 1906 as a result of a visit of a Japanese survey team from Shimane Prefecture to the Uldo County Magistrate. Korea maintains that the matter was subsequently reported to the *Uijeongbu*, the State Council of the Empire of Korea, which issued a directive on 20 May 1906, repudiating the claim that Dokdo had become Japanese territory.[177] Korea argues that by that time any protest could not be effective because, by virtue of an Agreement of 22 August 1904, it was already compelled to accept Japanese political advisers on financial and foreign affairs, which effectively deprived it of sovereignty in foreign relations.[178] Furthermore, as a result of a Convention of 17 November 1905, Korea's foreign relations were officially brought under the control of Japan.[179] Therefore, while the adoption and subsequent implementation of the 1905 Cabinet Decision undoubtedly constitute acts *à titre de souverain* on behalf of Japan,[180] the question arises as to what extent these are opposable to Korea and whether these could prevail over the *effectivités* exercised by Korea over the island in the last quarter of the nineteenth century.

## The Possibility of Transfer of Sovereignty by Tacit Agreement

In the *Malaysia/Singapore Case* the Court confirmed that there were circumstances under which sovereign activities performed by one party over the disputed territory were capable of displacing a clearly established legal title of another disputing party.[181] Thus, notwithstanding the fact that the Court found the sultanate of Johor possessed an original title to the disputed maritime features in the Straits of Singapore, the Court held that sovereignty over one of them, the Island of Pedra Branca/Pulau Batu Puteh, had passed to Singapore.[182]

The ICJ has shown reluctance to pronounce on whether, and under what conditions, subsequent State conduct could trump a definitive legal title of another State.[183] Since its 1986 *Frontier Dispute* Judgment, the Court has appeared to oppose the idea that *effectivités* could prevail over an unequivocal prior legal title. As the Chamber of the Court stated, "[w]here the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title."[184] The Court has reiterated this proposition in several judgments,[185] noting in the 2005 *Benin/Niger Case* that "*effectivités* can only be of interest in a case in order to complete or make good

doubtful or absent legal titles, but can never prevail over titles with which they are at variance."[186] However, when faced with a claim of acquisitive prescription in the 1999 *Botswana/Namibia Case*, the Court avoided pronouncing on the status of such a doctrine in international law or on the general conditions for acquiring title to territory by prescription, deciding instead that the conditions invoked by Namibia itself in support of its title to Kasikili/Sedudu Island in reliance upon effective possession, namely, that such possession (1) must be exercised *à titre de souverain*, (2) must be peaceful and uninterrupted, (3) must be public, and (4) must endure for a certain length of time, had not been satisfied.[187] In the view of the Court, the members of the Masubia tribe, on whose presence on the island Namibia relied as evidence of its continuous and exclusive occupation, had used the island only "intermittently, according to the seasons and their needs, for exclusively agricultural purposes" and, despite the links of allegiance potentially existing between them and the colonial authorities of the Caprivi strip, had not occupied the island à *titre de souverain*.[188]

In the *Malaysia/Singapore Case*, however, the Court upheld the proposition that a State's peaceful and uninterrupted display of sovereignty could displace an established legal title of another State.[189] However, this was not on the ground of any general doctrine of prescription, that is, by mere passage of time, but because an extensive absence of a reaction may amount to acquiescence.[190] The proposition that a passing of sovereignty can occur as a result of acquiescence is not new. The Court has contemplated it on several occasions[191] and implicitly applied it in the 1960 *Right of Passage Case*.[192] However, only in *Malaysia/Singapore* did the ICJ for the first time elaborate on the necessary conditions for a transfer of sovereignty to occur by way of tacit agreement. The Court began by observing that any passing of sovereignty occurs by agreement and, while such agreement usually takes the form of a treaty, it "might instead be tacit and arise from the conduct of the Parties. International law does not, in this matter, impose any particular form. Rather it places its emphasis on the parties' intentions."[193] The Court further explained:

> Under certain circumstances, sovereignty over territory might pass as a result of the failure of the State which has sovereignty to respond to conduct *à titre de souverain* of the other State or, as Judge Huber put it in the *Island of Palmas* case, to concrete manifestations of the display of territorial sovereignty by the other State [. . .] Such manifestations of the display of sovereignty may call for a response if they are not to be opposable to the State in question. The absence of reaction may well amount to acquiescence [. . .] That is to say, silence may also speak, but only if the conduct of the other State calls for a response.[194]

In other words, the absence of protest may lead to the consolidation of title to territory, just as general toleration will lead to a consolidation of rights in general.[195] However, as the Court was cautious to add, the passing of sovereignty as a result of acquiescence is subject to an exacting evidentiary standard and, in principle, there is a presumption in favor of maintaining the sovereignty in the hands of the initial title-holder.

> Critical for the Court's assessment of the conduct of the Parties is the central importance in international law and relations of State sovereignty over territory and of the stability and certainty of that sovereignty. Because of that, any passing of sovereignty over territory on the basis of the conduct of the Parties,

> as set out above, must be manifested clearly and without any doubt by that conduct and the relevant facts. That is especially so if what may be involved, in the case of one of the Parties, is in effect the abandonment of sovereignty over part of its territory.[196]

In applying these principles to the circumstances in the *Malaysia/Singapore Case*, the Court was initially unable to determine that there was any express agreement between the sultanate of Johor and the British colonial authorities, which demonstrated that Johor ceded sovereignty over any of the islands under its sovereignty at the time of the construction of the Horsburgh lighthouse.[197] Thereafter, however, the conduct of the parties pointed to the emergence of a tacit agreement by which sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore.[198] It is interesting that the Court could not pinpoint the moment when the passing of sovereignty occurred. Rather, the assessment of the relevant facts, including the conduct of the Parties, demonstrated "a convergent evolution of the positions of the Parties regarding title to Pedra Branca/Pulau Batu Puteh."[199]

Of particular weight was the exchange of letters that took place in 1953 between the British colonial officials in Singapore and Johor in which the then Acting State Secretary of Johor, in response to the inquiry by the then Colonial Secretary of Singapore on the status of the island, stated that "the Johore Government does not claim ownership of Pedra Branca."[200] This disclaimer, in the view of the Court, demonstrated that as of 1953 Johor understood that it did not have sovereignty over the island.[201] This understanding was further supported by the subsequent conduct of the Parties in relation to the island. On the one hand, Singapore was found to have displayed several activities *à titre de souverain*. Particularly relevant were Singapore's investigation of a number of shipwrecks and shipping casualties in the waters around island, its regulation of the visits of the island, its installation of military communications equipment on the island, its plans for land reclamation around the island, and its treatment of Horsburgh lighthouse as Singaporean in official publications.[202] On the other hand, Malaysia's own activities in relation to the islands were not only found to be inconclusive,[203] but even confirmatory of Singapore's title. Malaysia had failed to properly respond to the display of Singapore's maritime ensigns on the island and had treated the island as Singaporean in its official maps.[204] Thus, title to Pedra Branca/Pulau Batu Puteh had passed because Malaysia and its predecessors, albeit aware of it, had failed to respond to the conduct of Singapore and its predecessors *à titre de souverain*.

The *Malaysia/Singapore Case* demonstrates how important a "developing understanding" may be in ascertaining title to disputed islands. In the context of the Dokdo/Takeshima dispute, this may be relevant, given Japan's formal disclaimer in 1877 of its ownership of the disputed islands. Korea maintains that in the course of a land registry project during the Meiji period, the Ministry of Home Affairs sent an inquiry to the Daijokan, Japan's highest decision-making body during the Meiji period, about the ownership of the Ulleungdo and Dokdo islands. In response, the Daijokan issued a directive to the Ministry of Home Affairs on 20 March 1877, which is said to note that "[i]t was confirmed through the negotiations between the old government [Edo shogunate] and the Joseon [Korean] government that the two islands [Dokdo and Ulleungdo] do not belong to our country [Japan]." The Ministry of Home Affairs was thus advised that "[r]egarding Takeshima [Ulleungdo] and another island [Dokdo]... bear in mind that our country [Japan] has nothing to do with them."[205] Just as the Court could not ignore the 1953 correspondence between the colonial administrators of Singapore and Johor,[206] so the Court or any other dispute settlement body may not be able to ignore the 1877 Directive of the

Daijokan. Even if Japan ever had any title over the islands prior to 1877, the Directive arguably shows that as of 1877 Japan understood that it did not have sovereignty over the Dokdo/Takeshima islands.

On the other hand, the principles espoused by the Court in the *Malaysia/Singapore Case* are also relevant for considering the legal effects of Japan's formal incorporation in 1905 of Dokdo/Takeshima into its territory, to the extent that Korea's sovereign title to the islands, if found to have existed by the end of the nineteenth century, could nonetheless have passed as a result of Korea's failure to respond to conduct *à titre de souverain* of Japan. In this regard, it needs to be considered that prior to its official incorporation of Dokdo/Takeshima into the Shimane Prefecture, Japan had already established suzerainty over Korea.[207] As already noted, on 23 February 1904, Japan concluded (if not imposed) a Protocol with Korea, which partly deprived Korea of its right of diplomacy, as well as allowed the Japanese government to occupy and utilize strategic areas deemed necessary for military purposes.[208] This was followed by agreements in August 1904[209] and November 1905,[210] which resulted in Korea's foreign relations being under the control of Japan. The process culminated in Japan's complete annexation of Korea on 22 August 1910.[211] In these circumstances it is difficult to see how Korea could have protested Japan's incorporation of the islands (because it, for example, strenuously protested against the temporary British occupation of Port Hamilton in 1885).[212] In normal circumstances, Japan's manifestations of display of sovereignty over Dokdo/Takeshima would have called for a response from Korea if they were not to be opposable to it. Moreover, the absence of a reaction can amount to acquiescence. But as stated in the *Frontier Dispute Case*, "the idea of acquiescence ... presupposes freedom of will."[213] Moreover, in the *Malaysia/Singapore Case* the Court required that "any passing of sovereignty over territory on the basis of the conduct of the Parties [...] must be manifested clearly and without any doubt by that conduct and the relevant facts."[214] The circumstances surrounding Japan's incorporation of Dokdo/Takeshima in 1905 was questionable because of the inequality that existed between Japan and Korea and do not evidence an intention by the latter to abandon its title to the islands.

## Conclusion

Contested title to land, including islands, always involves a host of complex legal and political, and sometimes emotional issues. The Dokdo/Takeshima controversy is no exception. The extension of sovereign rights over maritime areas pursuant to the modern law of the sea and the demand for natural resources have added prominence to disputes concerning sovereignty over islands and other maritime features.

The ICJ has rendered a number of recent judgments pertaining to sovereignty over islands as well as the role of islands in the maritime delimitation processes from which a number of inferences can be made that are relevant to the Dokdo/Takeshima dispute.

First, the Court has put increasing emphasis on original title, including of ancient kingdoms, and assessments of their territorial and maritime domains. The cases demonstrate that a finding of *terra nullius* status of land territory, including island territory, is highly unlikely. Therefore, in view of all the evidence available, it is likely that the Dokdo islands would be considered to belong to the old rulers of Korea and that, despite the so-called vacant islands policy of the Korean dynasty, attempts of Japan to categorize the islands as *terra nullius* will flounder.

Second, treaty title and title based on arbitral awards are important. In the case of the Dokdo islands, treaty title is absent. The 1951 San Francisco Peace Treaty[215] is of no avail because its territorial clause does not explicitly mention the Dokdo/Takeshima islands. This is apart from the fact that Korea is not a party to the 1951 Peace Treaty. Furthermore, Korea has never accepted that this Treaty conferred sovereignty over these islands to Japan and through its protests indicated that it has not acquiesced to such an interpretation of the Treaty.

Third, the recent ICJ case law demonstrates that in the absence of an original title or a treaty title, evidence of effective manifestations of sovereignty over the islands matters. Korea can demonstrate an extensive record of sovereign activities, albeit mostly after 1952, and that these actions are a continuation of acts prior to the occupation of Korea by Japan. In the rare circumstances of a longtime absence of effective acts of administration, a transfer of sovereignty can take place if conduct *à titre de souverain* by one State is not met with an appropriate response from the other State. The absence of reaction may amount to acquiescence to the changed title. Such a situation is not the case in the Dokdo/Takeshima controversy.

The cautious offer of Japan to Korea in 2012 to have the Dokdo/Takeshima matter decided by the ICJ can be interpreted as a move to resolve the dispute that has all too frequently poisoned their bilateral relations. Parking the dispute in far-away The Hague may allow Japan to justify to its domestic polity the probable outcome of it losing the case.

## Notes

1. U.N. Convention on the Law of the Sea, 1833 *U.N.T.S.* 397.

2. For a background of the case, see Permanent Court of Arbitration, First Press Release, Arbitration between the Republic of the Philippines and the People's Republic of China, 27 August 2013, available at <www.pca-cpa.org/PH-CN%20-%20Press%20Release%20(ENG)%2020130827e141.pdf?fil_id=2311>.

3. See *Ibid.* and China, Foreign Ministry Press Conference, 19 February 2013, on the website of Ministry of Foreign Affairs at <www.dfa.gov>.

4. See "Statement by the Minister for Foreign Affairs of Japan on the Refusal by the Government of the Republic of Korea of the Government of Japan's Proposal on the Institution of Proceedings before the International Court of Justice by a Special Agreement," 30 August 2012, available at <www.mofa.go.jp/announce/announce/2012/8/0830_02.html>.

5. See, e.g., Kanae Taijudo, "The Dispute between Japan and Korea respecting Sovereignty over Takeshima," (1968) 12 *The Japanese Annual of International Law* 1–17; Byung Joe Lee, "'Title to Dokdo' in International Law," (1974) 2 *Korean Journal of Comparative Law* 85–102; Choung Il Chee, "Legal Status of Dok Island in International Law," (1997) 25 *Korean Journal of International and Comparative Law* 1–48; Benjamin K. Sibbett, "Tokdo or Takeshima? The Territorial Dispute between Japan and the Republic of Korea," (1998) 21 *Fordham International Law Journal* 1606–1646; Jon M. van Dyke, "Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary," (2007) 38 *Ocean Development and International Law* 157–224; Kentaro Serita, "Some Legal Aspects of Territorial Disputes over Islands," Seoung-Yong Hong and Jon M. Van Dyke, eds., in *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Leiden/Boston: Martinus Nijhoff, 2009), 137–144; Park Hyun-jin, et al. eds., *Insight into Dokdo: Historical, Political and Legal Perspectives on Korea's Sovereignty* (Jimoondang: The Korea Herald, 2009); and S. Lee and H.E. Lee, eds., *Dokdo: Historical Appraisal and International Justice* (Leiden: Nijhoff, 2011).

6. In Korean, the islands have been referred to by a variety of names: Usando, Woosando, Sambon(g)do, Gajido, Seokdo, Dok, Dokdo. In general, the name Usando was used until the late nineteenth century. Since then, Seokdo and Dokdo have gained widespread usage (both words being different Chinese translations of the Koran word Dokseom, which means rock island in the dialect used by the inhabitants of the island of Ulleungdo). Also in Japanese, different names have been used for the islands: Matsushima, Riyangkotō, Takeshima. Until the twentieth century, Japan had

used the names Takeshima and Matsushima for Ulleungdo and Dokdo interchangeably. It was in 1905 that Japan adopted the name Takeshima for Dokdo. The name Liancourt Rocks was given to the islands by the French whaling ship *Liancourt*, which "discovered" the island in 1849.

7. The basic position of Korea is stated in Ministry of Foreign Affairs of the Republic of Korea, *Dokdo, Korea's Beautiful Island*, at <dokdo.mofat.go.kr/upload/english.pdf>. See also *The Truth of Dokdo: Comments by the Northeast Asian History Foundation to the 2008 Brochure on Dokdo published by the Ministry of Foreign Affairs of Japan*, at <english.historyfoundation.or.kr/DATA/BBS1/ThetruthofDokdo.pdf>. This brochure was published by the Northeast Asian History Foundation and not the Ministry of Foreign Affairs, but the latter appears to acquiesce with the arguments.

8. Japan's official position is explained in Ministry of Foreign Affairs of Japan, *10 Issues of Takeshima* (February 2008), available at <www.mofa.go.jp/region/asia-paci/takeshima/pamphlet_e.pdf>.

9. Republic of Korea Presidential Proclamation of Sovereignty Over Adjacent Seas, 18 January 1952, reproduced in C.Y. Pak, *The Korean Straits* (Dordrecht: Martinus Nijhoff, 1988), at p. 126.

10. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, 16 March 2001, [2001] *I.C.J. Reports* 40.

11. The Hawar Islands are a group of islands situated off the west coast of Qatar in the Gulf of Bahrain of the Persian Gulf. The island closest to the main island of Bahrain is that of Rubud Al Gharbiyah (which lies at a distance of 10.6 nautical miles [nm] to it), while the island of Suwād al Janūbiyah lies at less than 1 nm to the Qatari mainland at the peninsula of Ras Abruq. The islands cover a total area of 50.6 sq. km. On the other hand, Janan is an island situated off the southwestern tip of the main Hawar island, located 2.9 nm from the nearest point on Qatar's coast and 17 nm from the nearest point of Bahrain (and 1.6 nm from the main Hawar island). It has a total area of around .12 sq km. Finally, the Qit'at Jaradah is a very small island, which measures at low tide 600 by 75 meters, but shrinks at high tide to only 12 by 4 meters in size, with an altitude of only .4 meters. Fasht ad Dibal was eventually considered to be a low-tide elevation, the legal status of which was left undetermined. *Ibid*., para. 35.

12. *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, 17 December 2002, [2002] *I.C.J. Reports* 625.

13. The two islands are located in the Celebes Sea, off the northeast coast of the Island of Borneo. The larger of the two, Sipadan, is an uninhabited, densely wooded island of volcanic origin, with an area of approximately .13 sq. km, situated 42 nm from the east coast of the Island of Sebatik (Kalimantan, Indonesia) and 15 nm from Tanjung Tutop, on the Seporna Peninsula, the nearest area on Borneo (Sabah, Malaysia). Ligitan, in turn, is a very small, uninhabited island with mostly sand, but also low-lying vegetation and some trees, situated some 21 nm from Tanjung Tutop and approximately 15.5 nm to the east of Sipadan. *Ibid*., para. 14.

14. *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, 8 October 2007, [2007] *I.C.J. Reports* 659.

15. These are small sandy islets formed on the surface of coral reefs, none of them raising more than a couple of feet above sea level. All of them are located outside the territorial sea of the mainland of both parties to the dispute: Bobel Cay (also known as Cayo Bobel) at a distance of 27 nm east of the left bank of the mouth of the River Coco and 4.76 nm north of the 15th parallel, Savanna Cay (also known as Media Luna Cay or Logwood Cay) at some 28 nm east of the left bank of the mouth of the River Coco and 8.2 nm north of the 15th parallel, Port Royal Cay (also known as Cayo Puerto Royal) at 32 nm east of the left bank of the mouth of the River Coco and 7 nm north of the 15th parallel, and South Cay (also known as Cayo Sur) at some 41 nm east of the left bank of the mouth of the River Coco and 5 nm north of the 15th parallel. The four cays in dispute have a surface of about .029 sq. km, .022 sq. km, .0028 sq. km, and .019 sq. km, respectively. While there has been disagreement between the parties whether, due to their size and other conditions, the islets sustained or could sustain a human population, it has not been disputed that they had been used as a shelter by fishermen in the fishing season. Counter-Memorial of the Republic of Honduras, 21 March 2002, available at <www.icj-cij.org/docket/files/120/13721.pdf>, at paras. 2.3–2.4, and Reply of the Government of Nicaragua, 13 January 2003, available at <www.icj-cij.org/docket/files/120/13723.pdf>, at para. 3.17. The Court was not in a position to make any determinative findings on other islands, cays, rocks, banks, and reefs in the area in dispute, as the parties had not provided it with sufficient information over any of these other maritime features. *Nicaragua/Honduras*, supra note 14, paras. 138–144. The Court also refrained from making any findings with regard to an

Island in the mouth of the River Coco, because of the changing conditions of the area. *Ibid*., para. 145.

16. *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, 23 May 2008, [2008] *I.C.J. Reports* 12.

17. Pedra Branca/PBP lies approximately 24 nm to the east of Singapore, 7.7 nm to the south of the Malaysian State of Johor, and 7.6 nm to the north of the Indonesian island of Bintan. Pedra Branca/PBP is a granite island, measuring not more than 137 metres in length, and approximately 60 metres in breadth. It covers an area of about 8560 sq. metres at low tide. *Ibid*., paras. 16–17. Middle Rocks is located .6 nm to the south of Pedra Branca/PBP and consisting of two clusters of small rocks that are permanently above water and stand .6 to 1.2 metres high. South Ledge located 2.2 nm to the south-southwest of Pedra Branca/PBP is a rock formation only visible at low-tide. *Ibid*., para. 18.

18. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, 13 December 2007, [2007] *I.C.J. Reports* 832 and Judgment, 19 November 2012, [2012] *I.C.J. Reports* 624.

19. The islands of San Andrés, Providencia, and Santa Catalina are situated between 105 and 125 nm from the coast of Nicaragua and approximately 380 nm from the mainland of Colombia. San Andrés, with a permanent population of over 70,000, has an area of about 26 sq km. Providencia, with a permanent population of about 5,000, has an area of 17.5 sq km. Santa Catalina has an area of some 2.5 sq. km. The atoll of Alburquerque, which includes North Cay and South Cay, lies about 100 nm to the east of the mainland of Nicaragua and 375 nm from the mainland of Colombia. The atoll known as East-Southeast Cays, which includes East Cay, Bolivar Cay, West Cay, and Arena Cay, is situated 120 nm from the mainland of Nicaragua and 360 nm from the mainland of Colombia. The atoll of Roncador is located about 190 nm to the east of the mainland of Nicaragua and 320 nm from the mainland of Colombia. Roncador Cay, the largest in this group of maritime features, has an area of some .165 sq. km. The bank of Serrana, which includes several cays, is located at 170 nm from the mainland of Nicaragua and about 360 nm from the mainland of Colombia. Serrana Cay, the largest in this group of maritime features, has an area of about .4 sq. km. The bank of Serranilla, which includes East Cay, Middle Cay and Beacon Cay, lies 200 nm from the mainland of Nicaragua and 400 nm from the mainland of Colombia. Beacon Cay, the largest in this group of maritime features, has an area of about .195 sq. km. The bank of Bajo Nuevo, composed of three cays, is located 265 nm from the mainland of Nicaragua and about 360 nm from the mainland of Colombia. Low Cay, the largest in this group of maritime features, has an area of about .012 sq. km. The bank of Quitasueño, in which a number of small maritime features are located, lies at 38 nm from Santa Catalina. The Court considered that the only naturally formed area of land that is above water at high tide and thus capable of appropriation was a tiny maritime feature called QS32. See *Nicaragua v. Colombia* (2012), supra note 18, paras. 36–38. For details on the maritime features, see *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Counter-Memorial of Colombia, Volume I, 11 November 2008, available at <www.icj-cij.org/docket/files/124/16969.pdf>, at pp. 15–36.

20. *Minquiers and Ecrehos (France/United Kingdom)*, Judgment, 17 November 1953, [1953] *I.C.J. Reports* 47, at pp. 50–51. Great Britain claimed, in turn, to have derived an ancient title to the Islands from the conquest of England by the Duke of Normandy in 1066. The Court, on its part, was unable to uphold either of the claims and had to base its decision on evidence of possession of the disputed islands from more recent times.

21. See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP, 2005), pp. 52ff.

22. For exponents of such views, see, e.g., A. Rivier, *Principes du droit des gens* (Paris: Arthur Rousseau, 1896), pp. 45–51 and R. Phillimore, *Commentaries upon international law*, 3rd ed., Vol. 1 (London: Butterworths, 1879), p. 81.

23. See M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, 1926), at p. 20, who noted the increased support among nineteenth century jurists for "a doctrine which denies that International Law recognizes any rights in primitive peoples to the territory they inhabit, and, in its most advanced form, demands that such peoples shall have progressed so far in civilization as to have become recognized as members of the Family of Nations before they can be allowed such rights." On this question generally, see J.A. Andrews, "The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century," (1978) 94 *The Law Quarterly Review* 408.

24. Andrews, supra note 23, p. 416. The practical explanation was that such treaties provided a cloak of legitimacy to the European powers for their acquisition of territory and support for their claims vis-à-vis rival claims by other European powers. In an attempt to explain away this contradiction, Judge Huber in the *Island of Palmas Case* (1928) considered that, even if such contracts "are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may in international law arise out of treaties [. . .] contracts of this nature are not wholly void of indirect effects on situations governed by international law; if they do not constitute titles in international law, they are none the less facts of which that law must in certain circumstances take account." *Island of Palmas Case (Netherlands/United States of America)*, Award of 4 April 1928, II *U.N.R.I.A.A.* 855, p. 858.

25. For an analysis of different colonial practices, see A.S. Keller, O.J. Lissitzyn, and F.J. Mann, *Creation of Rights of Sovereignty through Symbolic Acts 1400-1800* (New York: Columbia University Press, 1938). Specifically on the relationship between the European powers and the states of North Africa, Australia and New Zealand, and India, see, respectively, J. Mossner, "The Barbary Powers in International Law," in C.H. Alexandrowicz, ed., *Grotian Society Papers: Studies in the History of the Law of Nations* (1972), 197–221; E. Evatt, "The Acquisition of Territory in Australia and New Zealand," in Alexandrowicz, ed., *Grotian Society Papers: Studies in the History of the Law of Nations* (1968), 16–45; and W. Lee-Warner, *The Native States of India* (London: MacMillan, 1910).

26. *Western Sahara*, Advisory Opinion, 16 October 1975, [1975] *I.C.J. Reports* 12.

27. *Ibid*., at para. 81.

28. *Ibid*., paras. 80–82. However, it is interesting that the Court at no point considered that in the same period Morocco was anything other than a state in the fullest sense of the term. *Ibid*., paras. 94–95.

29. *Kasikili/Sedudu Island* (*Botswana/Namibia*), Judgment, 13 December 1999, [1999] *I.C.J. Reports* 1045, paras. 72–73 and 94–98. For a critical assessment of the Case, see J.T. Gathii, "Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)," (2002) 15 *Leiden Journal of International Law* 581.

30. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, Judgment, 10 October 2002, [2002] *I.C.J. Reports*.

31. *Ibid*., para. 205.

32. *Ibid*., para. 207.

33. *Ibid*., paras. 205 and 209.

34. *Right of Passage over Indian Territory (Portugal v. India)*, Merits, Judgment, 12 April 1960, [1960] *I.C.J. Reports* 6.

35. *Ibid*., at pp. 37–38.

36. *Indonesia/Malaysia Case*, supra note 12, paras. 94–96.

37. *Ibid*., paras. 97–124.

38. *Ibid*., paras. 109–110.

39. *Malaysia/Singapore*, supra note 16, paras. 52–53. This was attested to by a passage from Hugo Grotius famous treatise *De Jure Praedae*, which explicitly referred to the sultanate of Johor.

40. See *Ibid*., paras. 52–59. Furthermore, the Court also considered a contemporary article from the *Singapore Free Press*, which referred to the islands in the area as belonging to the sultan of Johore. And while Singapore disputed the probative value of the article, the Court considered it as corroborating other evidence. *Ibid*., paras. 57–58.

41. See *Ibid*., para. 64. *Legal Status of Eastern Greenland* (*Denmark v. Norway*), [1933] *P.C.I. J.* (Ser. A/B), No. 53.

42. *Ibid*., para. 66.

43. *Ibid*., para. 67. The Court further recalled at para. 67 from the *Island of Palmas*, supra note 24, that ". . .in the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space. . .The fact that a state cannot prove display of sovereignty as regards such a portion of territory cannot forthwith be interpreted as showing that sovereignty is inexistent. Each case must be appreciated in accordance with the particular circumstances."

44. *Ibid*., paras. 70–75. The nature and degree of the Sultan's authority exercised over the Orang Laut was confirmed by contemporary official reports by British officials in the region, which in the view of the Court, were of a high probative value. *Ibid*., para. 74.

45. *Ibid*., para. 79.

46. See *infra* section 6.

47. *Malaysia/Singapore*, supra note 16, paras. 288–290, 297–299.

48. See the conclusions of Keller, Lissitzyn, and Mann, supra note 25, p. 6, who surveyed the practice of the major powers in relation to acquiring title to *terra nullius* in the period from the fifteenth to the end of the eighteenth century.

49. See, e.g., L.F.L. Oppenheim, *International Law*, vol. 1 (London: Longmans, 1905), at p. 157, which maintained that Japan was a "full and real member of the Family of Nations," while China and Korea "are for some parts only within that family." See also F. E. Smith, *International Law*, 5th ed. (London, Dent: 1918), at p. 64.

50. Treaty concluded between the United States of America and the Japanese Empire, (Treaty of Jedo), 29 July 1858; Treaty of Peace, Friendship, and Commerce, between the Netherlands and Japan (Treaty of Jedo), 18 August 1858; Treaty between Russia and Japan (Treaty of Jedo), 19 August 1858; Treaty of Peace, Friendship, and Commerce, between Great Britain and Japan (Treaty of Jedo), 26 August 1858; and Treaty between France and Japan (Treaty of Jedo), 9 October 1858. All reproduced (in original) in *The Japanese Treaties, Concluded at Jedo, in 1858* (The Hague: Martinus Nijhoff, 1862); English translations of the treaties with the United States, Great Britain, and the Netherlands available in *Treaties, &c., Great Britain, France, America, Russia, The Netherlands, & Portugal with China & Japan* (Shanghai, 1861). These treaties were preceded by several others concluded between 1854 and 1858 with the United States, Great Britain, Russia and the Netherlands, which were restricted, however, to securing more limited privileges and to opening specific ports. For an overview, see J.H. Gubbins, *The Progress of Japan, 1853-1871* (Oxford, 1911), at pp. 40–77 and annexes.

51. K.W. Larsen, *Tradition, Treaties, and Trade: Qing Imperialism and Chosŏn Korea*, 1850-1910 (Harvard: Harvard University Asia Center, 2008), at p. 23.

52. *Ibid*., 52–56.

53. Treaty of Amity, also known as the Treaty of Kanghwa [Kang-hoa], 26 February 1876, reproduced in *Treaties, Regulations, etc., between Corea and Other Powers: 1876-1889* (Shanghai: Statistical Department of the Inspectorate General of Customs, 1891), at p. 1 and in H. Chung, *Korean Treaties* (New York: H. S. Nichols, 1919), p. 205. On this episode, see further G.N. Curzon, *Problems of the Far East* (London: Longmans, 1894), at pp. 202–203.

54. *Ibid*., Article 1. Apart from formal recognition of Korea as an independent sovereign state, this was hardly an equal treaty as it mandated the opening of the Korean ports of Busan, Incheon and Wonsan to Japanese trade, established therein Japan's right to consular jurisdiction, and sought to ensure that Japanese ships were allowed to survey the Korean coast without interference, without creating equal rights for Korea.

55. Treaty of Peace and Amity and Commerce and Navigation between the United States and Corea or Chosen (Treaty of Jenchuan), 22 May 1882, reproduced in *Treaties, Regulations, etc., between Corea and Other Powers*, supra note 53, at p. 41; Treaty of Friendship, Commerce and Navigation with Great Britain (Treaty of Seoul), 26 November 1883, reproduced in *Ibid*., p. 132; Treaty of Friendship, Commerce and Navigation with Germany (Treaty of Seoul), 26 November 1883, reproduced in *Ibid*., p. 172; Treaty of Friendship, Commerce and Navigation with Italy (Treaty of Seoul), 26 June 1884, reproduced in *Ibid*., p. 215; Treaty of Friendship, Commerce and Navigation with Russia (Treaty of Seoul), 25 June 1884, reproduced in *Ibid*., p. 263; Treaty of Friendship, Commerce and Navigation with France (Treaty of Seoul), 4 June 1886, reproduced in *Ibid*., p. 319; Treaty of Friendship, Commerce and Navigation with Austria-Hungary, 23 June 1892, reproduced in *Korean Treaties*, supra note 53, p. 1; Treaty of Friendship, Commerce and Navigation with Belgium, 23 March 1901, reproduced in *Ibid*., p. 27; and Treaty of Friendship, Commerce and Navigation with Denmark, 15 July 1902, reproduced in *Ibid*., p. 57.

56. A description in *Samguksagi* (History of the Three Kingdoms, 1146; a historical record of the Goguryeo, Baekje and Silla Kingdoms and presumably the oldest extant Korean history) mentions that in 512 the State of Usan, until then an independent kingdom based on Ulleung Island, submitted to the Kingdom of Silla, after having been tricked to surrender by "wooden dummy lions . . . divided and placed . . . on battleships." See K. Pusik, *The Silla Annals of the Samguk Sagi* (Seongnam: Academy of Korean Studies Press, 2012), p. 116. This suggests that Koreans already possessed the skills to reach Ulleungdo from mainland Korea since as early as the sixth century and that they were thus also technically capable of reaching Dokdo/Takeshima.

57. *Dokdo, Korea's Beautiful Island*, supra note 7, p. 5. The relevant passage is said to appear in *Sejong Sillok Jiriji* (Geographical Appendix to the Veritable Records of King Sejong, 1432). See

also H. Kazuo, "Japan's Incorporation of Takeshima into Its Territory in 1905," in Hyun Dae-song (ed.), *The Historical Perceptions of Korea and Japan* (Nanam, 2008), at pp. 95–98.

58. According to Korea, this includes: *Goryeosa* (History of Goryeo Dynasty, 1451); *Sinjeung Dongguk Yeoji Seungnam* (Revised and Augmented Survey of the Geography of Korea, 1531, a government-published geographical treatise of the early Joseon dynasty); *Dongguk Munheon Biggo* (Reference Compilation of Documents on Korea, 1770, an official history commissioned by the Joseon royal family); *Man-gi Yoram* (Manual of State Affairs for the Monarch, 1808); and *Jeungbo Munheon Bigo* (Revised and Enlarged Edition of the Reference Compilation of Documents on Korea, 1908). See *Ibid*., pp. 12–13.

59. *10 Issues of Takeshima*, supra note 8, pp. 3–4. Japan claims, for example, that *Samguksagi* (1146) makes no mention of Dokdo/Takeshima, and maintains that *Sinjeung dongguk yeoji seungnam* (1531) positions the islands on the wrong side of Ulleung Island.

60. *Ibid*., pp. 3–4.

61. In accordance with the Court's well-established jurisprudence, a party asserting a fact bears the burden of establishing it. See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, 26 November 1984, [1984] *I.C.J. Reports* 437, para. 101 and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, [2007] *I.C.J. Reports* 43, para. 204.

62. *10 Issues of Takeshima*, supra note 8, p. 5.

63. *Ibid*., pp. 5–6.

64. *Ibid*., pp. 5–7. The episode is said to be described in *Takeshima Tokai Yuraiki Bassho Hikae* (Copied Excerpts from an Account of a Voyage to Takeshima, 1818).

65. See *The Truth of Dokdo*, supra note 7, p. 6.

66. *Ibid*., p. 14. Korea relies on the *Onshu Shicho Goki* (Records on Observations from Oki, 1667) which was written by a local official from the eastern part of Shimane prefecture.

67. *10 Issues of Takeshima*, supra note 8, pp. 5–7. The ban was enacted in the aftermath of a diplomatic row that ensued between the shogunate and the Joseon government with regard to the ownership of the said island—an episode from which Korea and Japan have drawn opposing conclusions. According to the historical record, a clash occurred in 1693 between the Japanese merchant families and the Korean fishermen on Ulleungdo, which prompted the shogunate to initiate negotiations with Korea, demanding the latter to prohibit its fishermen's passage to Ulleungdo. However, negotiations failed to bring about an agreement and the shogunate instead prohibited passage to Ulleungdo on its own initiative in 1696. Korea maintains that, in the context of those negotiations, the shogunate had inquired of the feudal clan of Tottori as to the ownership of Ulleungdo, but having received confirmation on 25 December 1695 that neither Ulleungdo nor Dokdo/Takeshima belonged to the territories of the clan, issued a directive on 28 January 1696 that prohibited all Japanese from making passage toward Ulleungdo. See *Dokdo, Korea's Beautiful Island*, supra note 7, pp. 7, 16–17.

Korea relies in particular on the story of Ahn Yong-bok, a Korean fisherman whose kidnapping actually triggered the Ulleungdo dispute. This is said to be recorded not only in Korean documents, such as *Sukjong Sillok* (Annals of King Sukjong's Reign, 1728) but also in various Japanese documents, such as *Takeshima kiji* (Records of Takeshima, 1726), *Takeshima tokai yurai kinuki gaki* (Copy of Excerpts from Record of a Trip to Takeshima, undated), *Inpu nenpyo* (Chronology of Inaba Province, around 1842), and *Takeshimako* (Notes on Takeshima, 1828), as well as in the recently found *Genroku Kyu Heishinen Chosenbune Chakugan Ikkanno Oboegaki* (Memorandum on the Arrival of a Joseon Ship on the Japanese Coast in 1696, 1869). *Ibid*., p. 18.

Japan rejects that any specific inquires had taken place with the Tottori clan and dismisses the relevance of Ahn Yong-Bok's statements, on the ground that the latter conflict on many points with factual evidence. *10 Issues of Takeshima*, supra note 8, p. 7.

68. See *Minquiers and Ecrehos*, supra note 20, p. 57 and *Western Sahara*, supra note 26, para. 93.

69. *10 Issues of Takeshima*, supra note 8, p. 3. Japan relies for that purpose on the sixth edition of the *Kaisei Nippon Yochi Rotei Zenzu* (Revised Complete Map of Japanese Lands and Roads, 1846), which depicts the two islands in the same color as the rest of Japan's territory. Reportedly, however, the previous editions of that map (including the first edition of 1779) depict the islands colorless, in the same way as the territory of Korea.

70. *The Truth of Dokdo*, supra note 7, pp. 2–3.

71. *Ibid*., pp. 14–15. Korea mentions in particular the *Dainihon Enkai Yochi Zenzu* (Maps of Japan's Coastal Areas, 1821; a collection of maps based on actual surveys conducted on orders of the Shogunate during the Edo period) and *Chosen Zenzu* (Complete Map of Joseon, 1876; published by the Advisory Bureau of the Japanese Army and allegedly depicting the islands within Joseon territory).

72. The Court's position as to the legal value of maps has remained unchanged since the Chamber's judgment in *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, [1986] *I.C.J. Rep*orts 582. On that occasion, the Chamber observed at para. 54 that maps "of themselves, and by virtue solely of their existence, cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights." As the Chamber further explained, save for the situation when maps are annexed to an official text of which they form an integral part, in which case such maps then fall into the category of physical expressions of the will of the States concerned, "maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts." *Ibid*. According to the Chamber, at para. 56, this meant that:

> maps can still have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with the maps. In consequence, except when the maps are in the category of a physical expression of the will of the State, they cannot in themselves alone be treated as evidence of a frontier, since in that event they would form an irrebuttable presumption, tantamount in fact to legal title."

The Chamber's opinion has subsequently been endorsed in several other cases, including *Kasikili/Sedudu*, supra note 29, para. 84; *Indonesia/Malaysia*, supra note 12, para. 88; *Nicaragua v. Honduras*, supra note 14, para. 215; and *Nicaragua v. Colombia* (2012), supra note 18, para. 100.

73. *Nicaragua v. Honduras*, supra note 14, paras. 213–217.

74. In *Singapore/Malaysia*, supra note 16, paras. 269–272, the Court concluded that, even though Singapore did not publish any map including the disputed island within its territory until as late as 1995, the maps published by Malaysia between 1962 and 1975, which described the island in question as Singaporean tended to confirm that Malaysia considered that the island fell under the sovereignty of Singapore. According to the Court, even though they were not creative of title, the maps gave a good indication of Malaysia's official position. Similarly, in *Nicaragua v. Colombia* (2012), supra note 14, paras. 101–102, the Court noted that none of the maps published by Nicaragua prior to the critical date showed the disputed islands as Nicaraguan, and that at least some of Nicaragua's maps, as well as Colombian maps, actually showed those islands as belonging to Colombia. While not being determinative, the maps evidence afforded some measure of support to Colombia's claim.

75. As explained by the Court in the *Frontier Dispute*, supra note 72, para. 18, the concept of "title" does not denote documentary evidence alone, but in fact, "may also, and more generally, comprehend both any evidence which may establish the existence of a right, and the actual source of that right."

76. *Qatar v. Bahrain*, supra note 10, paras. 99–109 and 151–156.

77. *Ibid*., paras. 117 and 139.

78. *Ibid*., paras. 146–147.

79. *Ibid*., paras. 163–165.

80. In *Kasikili/Sedudu*, supra note 29, paras. 71–75 and 90–99, the Court preferred to resolve the territorial dispute by opting for a construction of the relevant provision of the 1890 Anglo-German Treaty (a provision which was otherwise beset by interpretative ambiguities) which placed the disputed island under the sovereignty of Botswana and refused to give weight to Namibia's alternative claim to territorial title based on evidence of settlement, occupation, and use of the disputed island by the Masubian tribe.

81. In *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, 3 February 1994, [1994] *I.C.J. Rep*orts 6, paras. 45–51, the Court refused to accept Libya's claim that the 1955 Franco-Libyan Treaty had not brought about a boundary between Libya and Chad and that the Court should therefore proceed to the attribution of disputed territory on the basis of original title possessed thereto by the indigenous inhabitants of the Senoussi Order (which title had passed to Libya through the Ottoman Empire and later Italy). Instead, the Court decided that the 1955 Treaty

completely determined the boundary between Libya and Chad. It essentially resolved any ambiguity that may have existed in relation to Article 3 of the 1955 Treaty by relying on the principle that boundary treaties must be interpreted in such a way that leads to the establishment of a precise, complete, and definitive frontier, and more generally on the principle of effectiveness as a general principle of treaty interpretation.

82. *Indonesia/Malaysia*, supra note 12, paras. 36–92.

83. *Nicaragua* v. *Colombia* (2007), supra note 18, para. 88.

84. *Nicaragua v. Colombia* (2012), supra note 18, paras. 53–55.

85. See *infra* section 5.

86. In *Right of Passage*, supra note 34, pp. 37–38, the Court rejected India's claim that the 1779 Treaty of Poona, which was entered into between the Portuguese and the Marathas, was not validly entered into. Considering that the Marathas themselves regarded the Treaty as valid and binding upon them, and acted upon it, the Court did not wish to doubt the validity or binding character of the Treaty. In *Cameroon v. Nigeria*, supra note 30, paras. 263–268, the Court refused to accept Nigeria's challenge to the validity of the 1975 Maroua Declaration, which traced part of the maritime boundary between Cameroon and Nigeria, on the ground that it had been signed by the Nigerian Head of State of the time but never ratified. The Court found that Nigeria through its subsequent conduct treated the Declaration as valid and applicable, and that at least in the subsequent two years, had not contested its validity or applicability.

87. In *Sovereignty over Frontier Land*, (*Belgium/Netherlands*), Judgment, 20 June 1959, [1959] *I.C.J. Reports* 209, pp. 222–227, the Court examined whether the 1843 Belgo-Dutch Boundary Convention was vitiated by an alleged error in the Minute of the Mixed Boundary Commission that defined the plots of disputed land. The Court held that a discrepancy between that Minute with an earlier Minute drawn up by the burgomasters of the relevant communes was not sufficient to undermine the validity and binding force of the Convention. Such discrepancy must have been known to both sides, and for more than a century the Netherlands made no challenge to the attribution of the disputes plots to Belgium.

See also *Frontier Dispute (Burkina Faso/Niger)*, Judgment, 16 April 2013, [2013] *I.C.J. Reports* 44, para. 85, where the Court refused to disregard a colonial legislative instrument that effected changes to the administrative boundaries between the colonies (a so-called *arrêté*) on the ground that such instrument was purportedly vitiated by a material error, and thus void.

88. See, e.g., *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment, 18 November 1960, [1960] *I.C.J. Reports* 192, where the Court was called upon to pronounce upon the validity of an Arbitral Award that fixed a sector of the boundary between Nicaragua and Honduras, and which Nicaragua contested primarily on the ground that the arbitrator had exceeded his powers. The Court, however, rejected all the grounds of nullity alleged by Nicaragua, basing its decision primarily on the initial acceptance by Nicaragua of the Award. See also *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, 12 November 1991, [1991] *I.C.J. Reports* 53.

89. *Qatar v. Bahrain*, supra note 10, para. 106.

90. *Ibid*., para. 140.

91. *Ibid*., paras. 141–144.

92. *Nicaragua v. Colombia* (2007), supra note 18, paras. 73–80.

93. *Ibid*., para. 89.

94. See, e.g., *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment, 15 June 1962, [1962] *I.C.J. Reports* 6., at p. 34; *Aegean Sea Continental Shelf (Greece v. Turkey)*, Jurisdiction, Judgment, 19 December 1978, [1978] *I.C.J. Reports* 3, at p. 36; and *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, 3 February 1994, [1994] *I.C.J. Reports* 6, para. 73. In the latter case, the Court emphasized that " [a] boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy," and hence, "when a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed."

95. Treaty of Peace with Japan, signed by 48 nations in San Francisco on 8 September 1951, it entered into force 28 April 1952, 136 *U.N.T.S.* 49.

96. *10 Issues of Takeshima*, supra note 8, p. 10.

97. *Dokdo, Korea's Beautiful Island*, supra note 7, p. 28.

98. *The Truth of Dokdo*, supra note 7, p. 14–15.

99. *Ibid*., 26–28. This concerned instructions issued by the Supreme Commander for the Allied Powers (SCAPIN) No. 677 of January 1946 concerning Governmental and Administrative

Separation of Certain Outlying Areas from Japan and SCAPIN No. 1033 of June 1946, concerning Areas Authorized for Japanese Fishing and Whaling.

100. *10 Issues of Takeshima*, supra note 8, pp. 10–11.

101. *Ibid*., p. 12. Japan rejects SCAPIN No. 677 as being merely a temporary measure, which included an express disclaimer as to questions concerning the ultimate determination of sovereignty over the islands. Japan relies on SCAPIN No. 2160 of July 1951, which designated Dokdo/Takeshima as a bombing range for U.S. Forces, and a decision of the Joint Committee established pursuant to Japan-U.S. security arrangements that had purportedly similar effects.

102. On the drafting history, see S. Lee, "Territorial Disputes in East Asia, the San Francisco Peace Treaty of 1951, and the Legacy of U.S. Security Interests in East Asia," in Lee and Lee, supra note 5, 58–62. The reasons for the drafting change have been attributed to recommendations made by William J. Sebald, the U.S. Political Adviser for Japan, who considered that Japan's claims to the Liancourt Rocks were established and appeared to be valid. Then again, Sebald's views and other U.S. reports appear to have been based on Japanese language references, which obviously mentioned Japan's 1905 formal incorporation of the islands. *Ibid*., p. 62.

103. While Article 21 of the Peace Treaty, supra note 95, provides that "Korea [shall be entitled] to the benefits of Articles 2, 4, 9 and 12 of the present Treaty," Article 25 states that the Treaty "shall not confer any rights, titles or benefits on any State which is not an Allied Power as herein defined; nor shall any right, title or interest of Japan be deemed to be diminished or prejudiced by any provision of the Treaty in favour of a State which is not an Allied Power as so defined."

104. As early as in the *Island of Palmas*, supra note 24, p. 840, Judge Huber considered that "[i]f, 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, [. . .] the actual continuous and peaceful display of State functions is in case of dispute the sound and natural criterium of territorial sovereignty."

105. See *Minquiers and Ecrehos*, supra note 20, p. 55, where in view of the rather ambivalent claims to historic title over the islands advanced by both France and the United Kingdom, the Court held that "sovereignty over the Ecrehos and the Minquiers [. . .] must ultimately depend on the evidence which relates directly to the possession of these groups."

106. *Frontier Dispute*, supra note 72, para. 63.

107. For example, see *Indonesia/Malaysia*, supra note 12, para. 126.

108. On this see *Nicaragua v. Honduras*, supra note 14, para. 172.

109. *Eastern Greenland*, supra note 41, pp. 45–46.

110. *Ibid*., p. 46. In *Island of Palmas*, supra note 24, p. 868, Judge Huber similarly found it necessary to examine evidence that could establish any act of display of sovereignty over the island by Spain or another Power which otherwise "might counter-balance or annihilate the manifestations of Netherlands sovereignty."

111. *Eastern Greenland*, supra note 41, p. 46. This echoed Judge Huber's observation in *Island of Palmas*, supra note 24, p. 867, that "manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent."

112. *Qatar v. Bahrain*, supra note 10, para. 198.

113. *Indonesia/Malaysia*, supra note 12, para. 134.

114. *Nicaragua v. Honduras*, supra note 14, paras. 172–173, 208.

115. *Nicaragua v. Colombia* (2012), supra note 18, para. 80.

116. *Qatar/Bahrain*, supra note 10, para. 197.

117. *Ibid*., para. 197.

118. In *Minquiers and Ecrehos*, supra note 20, p. 71, the lighting and buoying of the Minquiers, on which France relied in support of its claim to the islands, could "hardly be considered as sufficient evidence of the intention of that Government to act as sovereign over the islets; nor [. . .] of such a character that they can be considered as involving a manifestation of State authority in respect of the islets." Then again, not too much weight should perhaps be attached to this statement, because the buoying in question took place outside the reefs of the Minquiers group. The Court at pp. 66 and 69 took a different position with regard to the construction by the Jersey authorities of beacons and mooring buoys on the Minquiers and Ecrehos Islands, which it considered as facts "throwing light upon the dispute."

119. *Indonesia/Malaysia*, supra note 12, paras. 146–147.

120. *Nicaragua v. Colombia* (2012) supra note 18, paras. 82–83.

121. *Nicaragua v. Honduras*, supra note 14, paras. 205–207.

122. In *Minquiers and Ecrehos*, supra note 20, pp. 66 and 69, the periodical visits to the disputed islands by officials of the Jersey authorities and the public works which the latter had occasionally carried out there were considered by the Court to be facts "throwing light upon the dispute."

123. See *Indonesia/Malaysia*, supra note 12, para. 139 and *Nicaragua v Honduras*, supra note 14, para. 201.

124. *Nicaragua v. Colombia* (2012), supra note 18, para. 82. In *Indonesia/Malaysia*, supra note 12, paras. 130, 138–139, the Court did not find proof that the patrolling by the Dutch and subsequently Indonesian authorities occurred under the conviction that the islands in question or the surrounding waters were under the sovereignty of the Netherlands or Indonesia. In *Nicaragua v. Honduras*, supra note 14, para. 201, the Court considered the evidence on naval patrolling to be too sparse and not clearly entailing a direct relationship between either of the parties and the islands in dispute.

125. *Indonesia/Malaysia*, supra note 12, para. 140.

126. In *Minquiers and Ecrehos*, supra note 20, pp. 65–66, and 69, the Court decided that sovereignty over the disputed island groups belonged to the United Kingdom on the basis that the latter, through its authorities on Jersey, had exercised ordinary local administration in respect of the Minquiers and the Ecrehos for a considerably long period of time. The Court attached probative value in particular to acts relating to the exercise of criminal jurisdiction concerning events occurring on those islands, to various acts of local administration of the islands (as evidenced through the levying of parochial rates and local taxes in respect of houses and huts on the islets, the issuing of fishing licenses to fishermen residing there, the registration of contracts relating to real property on the islands and the maintenance in the public registry of deeds of that island, the exercise of customs control, and the inclusion of the islands in census enumerations), and in the case of the Ecrehos, also to the adoption of legislation that included those islands within the limits of the Port of Jersey.

Similarly, in *Land, Island and Maritime Frontier Dispute*, (*El Salvador/Honduras*), Judgment, 11 September 1992, [1992] *I.C.J. Reports* 351, paras. 359–367, the Court awarded the islands of Meanguera and Meanguerita to El Salvador in the face of considerable documentary evidence concerning El Salvador's administration of the islands since the latter's independence from the Spanish empire. The acts of administration included the appointment of justices and militaries, issuance of licenses, organization of elections, levying of taxes, conducting population censuses, maintenance of registries of birth, death and land transactions, exercise of judicial jurisdiction in civil and criminal matters, as well as the provision of public services in relation to post, public health, and education.

127. *Indonesia/Malaysia*, supra note 12, paras. 142–144.

128. *Nicaragua v. Honduras*, supra note 14, paras. 185, 189, 195–196.

129. *Nicaragua v. Colombia* (2012), supra note 18, para. 82.

130. *Indonesia/Malaysia*, supra note 12, para. 136.

131. *Ibid*., para. 145.

132. *Ibid*., para. 137.

133. *Nicaragua v. Honduras*, supra note 14, para. 174 and *Nicaragua v. Colombia* (2012), supra note 18, para. 81.

134. *Ibid*., para. 195.

135. *Ibid*., paras. 194–195.

136. *Nicaragua v, Honduras*, supra note 14, para. 117.

137. *Indonesia/Malaysia*, supra note 12, para. 135. Similar reasoning had been previously adopted in *Minquiers and Ecrehos*, supra note 20, pp. 59–60, where the Court did not consider it justified to rule out events occurring after the critical date, because activity in regard to the islands had developed gradually, long before the dispute had arisen, and had since continued without interruption and in a similar manner. The Court was thus willing to consider subsequent acts, "unless the measure in question was taken with a view to improving the legal position of the Party concerned."

138. *Nicaragua v. Colombia* (2012), supra note 18, para. 83.

139. *Eastern Greenland*, supra note 41, p. 46.

140. *Qatar v. Bahrain*, supra note 10, para. 197.

141. *Indonesia/Malaysia*, supra note 12, para. 134.

142. *Ibid*., para. 148.

143. *Nicaragua v. Honduras*, supra note 14, para. 208.

144. *Ibid*., para. 189.

145. *Ibid*., para. 174.
146. *Nicaragua v. Columbia* (2012) supra note 18, para. 80.
147. *Ibid*., para. 84.
148. *Eastern Greenland*, supra note 41.
149. *Indonesia/Malaysia*, supra note 12, paras. 137–141.
150. See *Nicaragua v. Honduras*, supra note 14, paras. 197–198, 200–201, 203–204, and 208.
151. *Qatar v. Bahrain*, supra note 10, para. 196.
152. *Nicaragua v. Colombia* (2012), supra note 18, para. 84.
153. *Indonesia/Malaysia*, supra note 12, para. 148.
154. *Nicaragua v. Honduras*, supra note 14, para. 208.
155. *Nicaragua v. Colombia* (2012), supra note 18, paras. 88–90.
156. *Nicaragua v. Honduras*, supra note 14, paras. 224–226.
157. *Nicaragua v. Colombia* (2012), supra note 18, para. 95.
158. *Dokdo, Korea's Beautiful Island*, supra note 7, p. 30.
159. *Indonesia/Malaysia*, supra note 12, para. 135.
160. *Dokdo, Korea's Beautiful Island*, supra note 7, p. 19. Korea relies on references in literature describing the dispatch to Ulleungdo and allegedly also Dokdo of Lee Joon-Myong in 1706, of Park Suk-Chang in 1711, and Lee Man-Hyip in 1727.
161. See *10 Issues of Takeshima*, supra note 8, pp. 5–6. See also discussion on original title, *supra* section 3.
162. *Dokdo, Korea's Beautiful Island*, supra note 7, p. 22.
163. *Ibid*., p. 22.
164. *Ibid*., pp. 9 and 22. Attesting to this is according to Korea a report submitted on 29 March 1906 by the County Magistrate of Uldo, Sim Heung-taek, to the governor of the Gangwon province.
165. *10 Issues of Takeshima*, supra note 8, p. 9.
166. *Ibid*., p. 9.
167. *Eastern Greenland*, supra note 41, p. 46.
168. *Qatar v. Bahrain*, supra note 10, para. 198 ; *Indonesia/Malaysia*, supra note 12, para. 134; *Nicaragua v. Honduras*, supra note 14, para. 173; and *Nicaragua v. Colombia* (2012), supra note 18, para. 80.
169. Reportedly, it was none less than Count Inoue Kaoru, one of the most senior statesmen in Japan during the Meiji Period, who was sent to Korea in the late nineteenth century as advisory commissioner to assist the Reform Committee of the Korean Government. See W.E. Griffis, *Corea: The Hermit Nation* (London: Harper, 1905), pp. 479–481 and S.G. Hishida, *The International Position of Japan as Great Power* (New York: Columbia University Press, 1905), at pp. 164–165 and 186–187.
170. *Dokdo, Korea's Beautiful Island*, supra note 7, p. 21. This is known as *Chosenkoku kosai shimatsu naitansho* (Report on Past Interactions with Joseon, 1870).
171. *Ibid*., pp. 20–21. See also discussion on transfer of title by tacit agreement, *infra* section 6.
172. *Ibid*., p. 8.
173. *10 Issues of Takeshima*, supra note 8, pp. 8–9. Japan maintains that the incorporation of Takeshima was undertaken after the Japanese government had been petitioned in September 1904 by a resident of the Oki Islands to incorporate Takeshima. In view of the excessive competition in sea lion hunting that had been taking place on the islands, this resident wished to be granted a 10-year lease on their utilization. According to Korea, however, the resident of the Oki Islands initially perceived the islands as Korean territory. *Dokdo, Korea's Beautiful Island*, supra note 7, p. 23.
174. *Ibid*., p. 8.
175. *Ibid*., pp. 10–11.
176. *Ibid*., p. 14.
177. *Dokdo, Korea's Beautiful Island*, supra note 7, pp. 9, 24–25.
178. *Ibid*., p. 10. See Agreement concerning Financial and Diplomatic Advisers for Korea, 22 August 1904, reproduced in *Korea: Treaties and Agreements* (Washington, DC: Carnegie Endowment for International Peace, 1921), at p. 37. Article 2 provided that "all important matters concerning foreign relations shall be dealt with" by Korea only after the advice of a Japanese appointed diplomatic adviser. Article 3 required consultation with the Japanese Government when concluding treaties with foreign powers.
179. Convention providing for Control of Korean Foreign Relations by Japan, 17 November 1905, reproduced in *Korea: Treaties and Agreements*, supra note 177, at p. 55. Article 1 stipulated

that the Government of Japan "will hereafter have control and direction of the external relations and affairs of Korea." In accordance with Article 3, a Resident-General was sent to Seoul with the task of taking charge of and directing matters relating to diplomatic affairs.

180. In the past, Japan's official position was that Dokdo/Takeshima were *terra nullius*, and that the 1905 Decision was an act of occupation of an ownerless territory. See, e.g., Taijudo, supra note 5, pp. 10–11. Japan's official position today, however, is that through the adoption of the 1905 Decision it merely "reaffirmed its intention to claim sovereignty over Takeshima." *10 Issues of Takeshima*, supra note 10, p. 8.

181. *Malaysia/Singapore*, supra note 16, para. 120–122.

182. *Ibid*., para. 273–276.

183. Other international arbitral tribunals have also often been hesitant in accepting the possibility that title to territory could be acquired through prescription. See, e.g., *Chamizal (Mexico/United States of America)*, Award, 15 June 1911, XI *U.N.R.I.A.A.* at p. 328. Tribunals have been reluctant in adjudicating that a party had obtained territory on such basis. See, e.g., *First Stage of the Proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute)*, Award of the Arbitral Tribunal, 9 October 1998; XXII U.N.R.I.A.A. 209, para. 168. However, see *Island of Palmas*, supra note 24, pp. 846, and 867–868, for an unequivocal endorsement of the proposition that the continuous and peaceful display of authority by another State could prevail over a prior, definitive title put forward by another State. For a comprehensive treatment of this issue, see Marcelo Kohen, *Possession contestée et souveraineté territoriale* (Paris: Presses universitaires de France, 1997).

184. *Frontier Dispute*, supra note 72, para. 63.

185. See *Land, Island and Maritime Frontier Dispute*, supra note 125, para. 61; *Land and Maritime Boundary between Cameroon and Nigeria*, supra note 30, paras. 68–70; *Indonesia/Malaysia*, supra note 12, para. 126; *Frontier Dispute (Benin/Niger)*, Judgment, 12 July 2005, [2005] *I.C.J. Reports* 90, para. 47; and indirectly, in *Territorial Dispute (Libya/Chad)*, supra note 81, paras. 75–76.

186. *Frontier Dispute (Benin/Niger)*, supra note 184, para. 141.

187. *Kasikili/Sedudu*, supra note 29, paras. 94, 97.

188. *Ibid*., para. 98.

189. *Malaysia/Singapore*, supra note 16, paras. 120–121.

190. Generally on prescription in international law, see, e.g., D.H.N. Johnson, "Acquisitive Prescription in International Law," (1950) 27 *British Year Book of International Law* 332; R. Lesaffer, "Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription," (2005) 16 *European Journal of International Law* 25; J. Wouters and S. Verhoeven, "Prescription," *Max Planck Encyclopedia of Public International* Law; and J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford: Oxford University Press, 2012), 229–236.

On the difficulties with drawing analogies from the municipal doctrines of "acquisitive prescription" or "adverse possession," see specifically, R. O'Keefe, "Legal Title versus *Effectivités*: Prescription and the Promise and Problems of Private Law Analogies," (2011) 13 *International Community Law Review* 147.

191. See, e.g., *Belgium/Netherlands*, supra note 87, p. 227, where the Court considered whether Belgium had lost its sovereignty over certain plots of land enclosed in the Netherlands commune of Baarle-Nassau "by non-assertion of its rights and by acquiescence in acts of sovereignty alleged to have been exercised by the Netherlands at different times since 1843." That a change in treaty title on the basis of acquiescence cannot be wholly precluded as a possibility in law was also noted in *Land, Island and Maritime Frontier Dispute*, supra note 125, paras. 67 and 80 and in *Cameroon v. Nigeria*, supra note 30, paras. 67, 70 and 223–224.

192. *Right of Passage*, supra note 34, p. 39. In the circumstances of that case, the Court held that, by never bringing in question the exercise by the Portuguese of full and exclusive administrative authority over the villages of Dadrá and Nagar-Aveli (for which Portugal had originally been granted only a revenue tenure), the British had recognized "in fact and by implication" the Portuguese sovereignty over those villages, a situation which was subsequently "tacitly recognized" by India. Through the acquiescence by the British and the Indian Governments, the villages thereby acquired the character of Portuguese enclaves within Indian territory.

193. *Malaysia/Singapore*, supra note 16, para. 120. See also *Joint Dissenting Opinion of Judges Simma and Abraham*, at para. 10: "As sovereignty can be transferred by an express agreement, it must also be so by tacit agreement (if the conditions for it are met), since international law

is not formalistic as regards agreements and since what can be done by an express agreement may also, in principle, be done by a tacit agreement."

194. *Ibid*., para. 121.

195. The importance of general toleration as basis for a historical consolidation of a right has been underlined by the Court as early as in *Fisheries Case (United Kingdom v. Norway)*, Judgment, 18 December 1951, [1951] *I.C.J. Reports* 116, at p. 138.

196. *Malaysia/Singapore*, supra note 16, para. 122.

197. *Ibid*., para. 144.

198. *Ibid*., para. 276.

199. *Ibid*., para. 276. See also para. 162, where the Court speaks of the "evolving views of the authorities in Johor and in Singapore about sovereignty over Pedra Branca/Pulau Batu Puteh."

200. *Ibid*., para. 196.

201. *Ibid*., paras. 222–223.

202. *Ibid*., paras. 231–239, 247–250, 261–266.

203. For example, the Court, *Ibid*., paras. 240–243, did not find any support in the naval activities around Pedra Branca/PBP by either Malaysia or Singapore. Neither could the Court attach any significance to the 1968 Petroleum concession between Malaysia and the Continental Oil Company (paras. 251–253), the 1969 act of delimitation of Malaysia's territorial sea (paras. 254–256), the 1969 Indonesia-Malaysia Continental Shelf Agreement and the 1970 Territorial Sea Agreement (paras. 257–258), the 1973 Indonesia-Singapore Territorial Sea Agreement (para. 259), nor to the conduct of both parties concerning interstate cooperation in the Straits of Singapore (para. 260).

204. *Ibid*., paras. 244–246, 267–272. In this regard, the Court attributed much less weight to the fact that until 1995 Singapore did not publish any map including the island within its territory, than it accorded to certain maps published by Malaya and Malaysia between 1962 and 1975 which depicted the island as Singaporean.

205. *Dokdo, Korea's Beautiful Island*, supra note 7, pp. 20–21. Korea claims that the Ministry's inquiry was accompanied by *Isotakeshima Ryakuzu* (Simplified Map of Isotakeshima), which depicted Takeshima (the name given at that time by Japan to Ulleungdo) and Matsushima (the Japanese name for Dokdo) together. In the view of Korea, this corroborates the fact that the reference to "another island" in fact concerns Dokdo.

206. *Malaysia/Singapore*, supra note 16, para. 223.

207. See Hishida, supra note 168, p. 249, noting how Japan in 1904 "by virtue of her interference in administrative and military measures in the peninsula, established a *de-facto* protectorate over Korea."

208. Protocol between Japan and Korea, Seoul, 23 February 1904, reproduced in W.W. Rockhill (ed.), *Treaties and Conventions with or concerning China and Korea, 1894-1904* (Washington: Government Printing Office, 1904), at 441; and *Korea: Treaties and Agreements*, supra note 177, p. 36.

209. Agreement concerning Financial and Diplomatic Advisers for Korea, 22 August 1904, supra note 177.

210. Convention providing for Control of Korean Foreign Relations by Japan, 17 November 1905, supra note 178.

211. Treaty of Annexation, Proclamation, and Accompanying Documents, 22 August 1910, reproduced in *Korea: Treaties and Agreements*, supra note 177, p. 64.

212. See Griffis, supra note 168, p. 469, reporting how "Corea at once protested against this seizure of territory, and [. . .] secured, after voluminous correspondence [. . .], the evacuation of Port Hamilton by the British."

213. *Frontier Dispute*, supra note 72, para. 80.

214. *Malaysia/Singapore*, supra note 16, para. 122.

215. Peace Treaty, supra note 95.