7 Territorial Disputes

1) Introduction

This chapter deals with boundary disputes relating to land. The following chapter deals with maritime boundary disputes.

Territorial disputes are concerned with sovereignty and involve the concept of title. A supranational court or tribunal faced with conflicting claims over rights to a territory will be presented with arguments and evidence aimed at showing that title to the disputed territory is vested in the contending party and not the opposing party.

There are two main methods of demonstrating the right to territory. The first method involves roots of title and is concerned with circumstances where a fairly direct and clear-cut right to territorial sovereignty can be demonstrated. The direct methods considered here are:

i) treaties;
ii) *uti possidetis;*[16]
iii) decisions of international courts and tribunals;
iv) agreements concluded with local rulers.

Second, where such direct claims cannot be demonstrated, there are various indirect methods of showing title. These include:

i) effective occupation;
ii) prescription;
iii) discovery;
iv) symbolic annexation.

2) Intertemporal Law and Critical Dates

Before looking at the direct and indirect methods of demonstrating the right to territory, however, it may be useful to consider two preliminary matters: intertemporal law and critical dates.

Intertemporal law

In considering the claims of the parties in a dispute concerning territorial sovereignty, it may be necessary for the Court or Tribunal to apply principles of international law in force at an earlier date.

16 *Uti possidetis* is the doctrine that has been used to establish the frontiers of newly independent States after decolonisation by following the existing boundaries. In the African context, it was seen as preventing the stability of new States being endangered by territorial border disputes following the withdrawal of the administering power.

One example can be found in the *Island of Palmas* case,[17] a decision of significance that is considered in various parts of the Manual. As mentioned in Chapter 6, the case came before the Permanent Court of Arbitration (PCA) in 1928 and the sole arbitrator was Max Huber.

The Netherlands and the United States agreed that the only duty of the arbitrator was to determine whether the Island of Palmas formed part of territory belonging to one or the other party. Their respective claims had to be tested on the basis of international legal principles ruling in the 16th century, the period when the island was discovered.

The report of the case sets out the arbitrator's statement in the Award on the matter of intertemporal law. He said that it was admitted by both sides that international law underwent profound modifications between the end of the Middle Ages and the end of the 19th century as regards the rights of discovery and acquisition of uninhabited regions:

> *"Both Parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it rises or falls to be settled. The effect of discovery by Spain is therefore to be determined by the rules of international law in force in the first half of the 16th century – or (to take the earliest date) in the first quarter of it, i.e., at the time when the Portuguese or Spaniards made their appearance in the Sea of Celebes.*
>
> *"If the view most favourable to the American arguments is adopted – with every reservation as to the soundness of such view – that is to say, if we consider as positive law at the period in question the rule that discovery as such, i.e. the mere fact of seeing land, without any act, even symbolical, of taking possession, involved ipso jure territorial sovereignty and not merely an 'inchoate title', a jus ad rem, to be completed eventually by an actual and durable taking of possession within a reasonable time, the question arises whether sovereignty yet existed at the critical date, i.e. the moment of conclusion and coming into force of the Treaty of Paris."*

The arbitrator then went on to deal with what he described as *"so-called intertemporal law"*:

> *"As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law. International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of states members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognized by existing law,*

17 *Supra.* The case can be viewed on the PCA website: www.pca-cpa.org/.

> *even if such a title ever conferred territorial sovereignty. For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas); and in so far as there is no sovereignty, the question of an abandonment properly speaking of sovereignty by one State in order that the sovereignty of another may take its place does not arise.*
>
> *"If on the other hand the view is adopted that discovery does not create a definitive title of sovereignty, but only an 'inchoate' title, such a title exists, it is true, without external manifestation. However, according to the view that has prevailed at any rate since the 19th century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered. This principle must be applied in the present case, for the reasons given above in regard to the rules determining which of successive legal systems is to be applied (the so-called intertemporal law). Now, no act of occupation nor, except as to a recent period, any exercise of sovereignty at Palmas by Spain has been alleged. But even admitting that the Spanish title still existed as inchoate in 1898 and must be considered as included in the cession under Article III of the Treaty of Paris, an inchoate title could not prevail over the continuous and peaceful display of authority by another State; for such display may prevail even over a prior, definitive title put forward by another State. This point will be considered, when the Netherlands argument has been examined and the allegations of either Party as to the display of their authority can be compared."*

Another example can be seen in the Western Sahara case, mentioned later in this chapter, where the ICJ considered the law relating to terra nullius in the period beginning 1884.

Critical dates

A specific date may be relevant in a territorial dispute. For example, the 1898 date of the treaty of cession was relevant to the United States' claim in the *Island of Palmas* case.

The concept of critical dates is especially important in relation to the doctrine of *uti posseditis*, under which a new State retains the earlier colonial boundaries following independence. The date of independence may therefore be of particular significance in a territorial dispute.

3) Direct Methods of Acquisition of Title – Roots of Title

This section looks at the direct methods of acquisition of title.

i) Treaties

One of the direct methods of proving title is by reliance on the provisions of a treaty. In the *Island of Palmas* case the United States relied on a treaty of December 1898 under which Spain transferred the Philippines to the United States. The report of the Award of Max Huber dealing with the US claim states:

"The United States, as successor to the rights of Spain over the Philippines, bases its title in the first place on discovery. The existence of sovereignty thus acquired is, in the American view, confirmed not merely by the most reliable cartographers and authors, but also by treaty, in particular by the Treaty of Munster, of 1648, to which Spain and the Netherlands are themselves Contracting Parties. As, according to the same argument, nothing has occurred of a nature, in international law, to cause the acquired title to disappear, this latter title was intact at the moment when, by the Treaty of December 10th, 1898, Spain ceded the Philippines to the United States. In these circumstances, it is, in the American view, unnecessary to establish facts showing the actual display of sovereignty precisely over the Island of Palmas (or Miangas). The United States Government finally maintains that Palmas (or Miangas) forms a geographical part of the Philippine group and in virtue of the principle of contiguity belongs to the Power having the sovereignty over the Philippines."

Another case involving a territorial claim based on a treaty that came before the International Court of Justice (ICJ) involved a frontier dispute. The subject of the dispute related to the sovereignty over a region in which a temple was situated. The treaty in question was made in 1904 between France and Siam.

The proceedings in the case of the *Temple of Preah Vihear* concerned a dispute between Cambodia and Thailand. They were instituted in October 1959 by an Application of the Government of Cambodia. The Government of Thailand raised two preliminary objections. The ICJ Case Summary of 15 June 1962 shows that the Court by its Judgment of 26 May 1961 found that it had jurisdiction. The Court referred to the boundary treaties:

"In its Judgment, the Court found that the subject of the dispute was sovereignty over the region of the Temple of Preah Vihear. This ancient sanctuary, partially in ruins, stood on a promontory of the Dangrek range of mountains which constituted the boundary between Cambodia and Thailand. The dispute had its fons et origo in the boundary settlements made in the period 1904-1908 between France, then conducting the foreign relations of Indo-China, and Siam. The application of the Treaty of 13 February 1904 was, in particular, involved. That Treaty established the general character of the frontier, the exact boundary of which was to be delimited by a Franco-Siamese Mixed Commission.

"In the eastern sector of the Dangrek range, in which Preah Vihear was situated, the frontier was to follow the watershed line. For the purpose of delimiting that frontier, it was agreed, at a meeting held on 2 December 1906, that the Mixed Commission should travel along the Dangrek range carrying out all the necessary reconnaissance, and that a survey officer of the French section of the Commission should survey the whole of the eastern part of the range. It had not been contested that the Presidents of the French and Siamese sections duly made this journey, in the course of which they visited the Temple of Preah Vihear. In January-February 1907, the President of the French section had reported to his Government that the frontier-line had been definitely established. It therefore seemed clear that a frontier had been surveyed and fixed, although there was no record of any decision and no reference to the Dangrek region in any minutes of the meetings of the Commission after 2 December 1906. Moreover, at the time when the Commission might have met for the purpose of winding up its work, attention was directed towards the conclusion of a further

Franco-Siamese boundary treaty, the Treaty of 23 March 1907. The final stage of the delimitation was the preparation of maps...."

The Court upheld the submissions of Cambodia concerning sovereignty over Preah Vihear. [18]

ii) Uti possidetis

The operation of the doctrine of *uti possidetis* can be seen in Latin America, where the administrative boundaries of the Spanish empire were taken to be the boundaries for the newly independent states. It can also be seen in Africa. A resolution of the Organisation of African Unity (OAU) in 1964 stated that colonial frontiers existing at the date of independence should be respected.

In the *Case Concerning the Frontier Dispute (Burkina Faso / Republic of Mali)* the Chamber constituted by the ICJ considered the principle of *uti posseditis juris*. The ICJ Case Summary of the Judgment of 22 December 1986 shows that the task of the Chamber was:

"... to indicate the line of the frontier between Burkina Faso and the Republic of Mali in the disputed area which is defined by Article I of the Special Agreement as consisting of 'a band of territory extending from the sector Koro (Mali) Djibo (Upper Volta) up to and including the region of the Béli'. Both States have indicated, in their submissions to the Chamber, the frontier line which each of them considers to be well-founded in law."

The Chamber considered two principles:

"1. The principle of the intangibility of frontiers inherited from colonization (para. 19)

The Judgment considers the question of the rules applicable to the case, and seeks to ascertain the source of the rights claimed by the Parties. It begins by noting that the characteristic feature of the legal context of the frontier determination to be undertaken by the Chamber is that both States involved derive their existence from the process of decolonization which has been unfolding in Africa during the past 30 years: it can be said that Burkina Faso corresponds to the colony of Upper Volta and the Republic of Mali to the colony of Sudan (formerly French Sudan). In the preamble to their Special Agreement, the Parties stated that the settlement of the dispute should be 'based in particular on respect for the principle of the intangibility of frontiers inherited from colonization', which recalls the principle expressly stated in resolution AGH/Res. 16 (I) adopted in Cairo in July 1964 at the first summit conference following the creation of the Organization of African Unity, whereby all member States 'solemnly... pledge themselves to respect the frontiers existing on their achievement of national Independence'...

"2. The principle of uti possidetis juris (paras. 20-26).

In these circumstances, the Chamber cannot disregard the principle of uti possidetis juris, the application of which gives rise to this respect for intangibility of frontiers. It emphasizes the general scope of the principle in matters of

18 The ICJ Case Summary in the *Temple of Preah Vihear* case is available at www.icj-cij.org/icjwww/idecisions/isummaries/ictsummary620615.htm.

decolonization and its exceptional importance for the African continent, including the two Parties to this case. Although this principle was invoked for the first time in Spanish America, it is not a rule pertaining solely to one specific system of international law. It is a principle of general scope, logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power. The fact that the new African States have respected the territorial status quo which existed when they obtained independence must therefore be seen not as a mere practice but as the application in Africa of a rule of general scope which is firmly established in matters of decolonization; and the Chamber does not find it necessary to demonstrate this for the purposes of the case."

The Chamber went on to consider the significance of the principle in a dispute concerning sovereignty.

"The principle of uti possidetis juris accords pre-eminence to legal title over effective possession as a basis of sovereignty. Its primary aim is to secure respect for the territorial boundaries which existed at the time when independence was achieved. When those boundaries were no more than delimitations between different administrative divisions or colonies all subject to the same sovereign, the application of this principle resulted in their being transformed into international frontiers, and this is what occurred with the States Parties to the present case, which both took shape within the territories of French West Africa. Where such boundaries already had the status of international frontiers at the time of decolonization, the obligation to respect pre-existing international frontiers derives from a general rule of international law relating to State succession. The many solemn affirmations of the intangibility of frontiers, made by African statesmen or by organs of the OAU, should therefore be taken as references to a principle already in existence, not as affirmations seeking to consecrate a new principle or to extend to Africa a rule previously applicable only in another continent.

"This principle of uti possidetis appears to conflict outright with the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields has induced African States to consent to the maintenance of colonial boundaries or frontiers, and to take account of this when interpreting the principle of self-determination of peoples. If the principle of uti possidetis has kept its place among the most important legal principles, this is by a deliberate choice on the part of African States." [19]

The *Temple of Preah Vihear* case considered earlier is another example of consideration being given to pre-independence boundaries.

19 The ICJ Case Summary in the *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* is available at www.icj-cij.org/icjwww/icases/iHVM/ihvmframe.htm.

iii) Decisions of international Courts and Tribunals

The award of a Tribunal and the decision of an international Court may be said to create title, or at any rate to demonstrate the existence of that title. The award of the arbitrator in the *Island of Palmas* case and the decision of the Court in the *Temple of Preah Vihear* case are examples of this method of acquisition of title. Further examples can be seen in the *Eastern Greenland* case and in the *Minquiers and Ecrehos* case, both considered later.

Yet another example is the *Clipperton Island* case. Clipperton Island is a remote and barren atoll 600 miles south of Mexico in the Pacific Ocean that was claimed by France for its guano in 1858, but then ignored for decades because the guano was not commercially exploitable. After Mexico asserted jurisdiction over the atoll in the 1890s (claiming historic links traced back to earlier Spanish explorers), France and Mexico agreed to submit the ownership dispute to arbitration, selecting as arbitrator Victor Emmanuel, the Italian Emperor.

The Emperor's decision, finally announced many years later in 1931, stated that something more than mere discovery is normally needed to establish ownership: effective occupation is also required. And 'effective occupation' usually requires a presence in the territory and some governmental structure capable of enforcing laws. But for uninhabited islets, these requirements are apparently reduced. All that is necessary is that *"from the first moment when the occupying State makes its appearance there,"* the territory is *"at the absolute and undisputed disposition of that State".*

Thus, based primarily on its 'discovery' of the atoll – and despite the fact that US citizens had explored Clipperton and Mexico had established a garrison there – the Emperor awarded title to France.[20]

iv) Agreements concluded with local rulers

An example of the acquisition of sovereignty through an agreement concluded with a local ruler can be seen in the *Western Sahara* case. The ICJ Case Summary of the Advisory Opinion of the ICJ, 16 October 1975, states that the UN General Assembly had posed two questions concerning the Western Sahara, the first of which was: "Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonisation by Spain a territory belonging to no one (*terra nullius*)?"

The Court in its Advisory Opinion stated that:

> *"For the purposes of the Advisory Opinion, the 'time of colonization by Spain' may be considered as the period beginning in 1884, when Spain proclaimed its protectorate over the Rio de Oro. It is therefore by reference to the law in force at that period that the legal concept of terra nullius must be interpreted. In law, 'occupation' was a means of peaceably acquiring sovereignty over territory otherwise than by cession or succession; it was a cardinal condition of a valid 'occupation' that the territory should be terra nullius. According to the State practice of that period, territories inhabited by*

20 [1932] 26 AJIL 390.

tribes or peoples having a social and political organization were not regarded as terrae nullius: in their case sovereignty was not generally considered as effected through occupation, but through agreements concluded with local rulers. The information furnished to the Court shows (a) that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them; (b) that Spain did not proceed upon the basis that it was establishing its sovereignty over terrae nullius: thus in his Order of 26 December 1884 the King of Spain proclaimed that he was taking the Rio de Oro under his protection on the basis of agreements entered into with the chiefs of local tribes." [21]

4) Advocacy – Proof and Indirect Methods of Showing Title [22]

The previous section considered the acquisition of territorial sovereignty by demonstrating the right to a root of title through a relatively clear-cut process: by way of reference to a treaty, for example. Such proof is comparatively straightforward. Direct methods of proof may not always be available, however. What is to be done in those circumstances?

Say the dispute involves State A and State B. Looking at the matter from the point of view of an advocate acting for State A, the case is to be approached in much the same way as any other case (but subject, needless to say, to the specific Rules applicable to the procedure in question). This is likely to involve consideration of the following matters, which can be divided into two broad stages: the pre-hearing preparatory stage and the hearing stage.

The precise ways in which those stages are dealt with will be dictated by whatever Rules are in force for the relevant tribunal, whether it be a Court or an Arbitral Tribunal. However, what is set out below is a general guide to the procedure likely to be adopted. The advocacy process described approaches the matter from the common law adversarial viewpoint, with its emphasis on the need for discovery of documents, the cross-examination of witnesses (and experts) and the importance of oral advocacy, and the outcome decided by an impartial tribunal. That may be described as the Anglo-Saxon approach to advocacy.[23]

However, it is fair to say that the influence of the civil law countries is seen in the increasing use – particularly in international commercial arbitration – of the written testimony of witnesses and the written submissions of advocates.

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21 The ICJ Case Summary in the *Western Sahara* case is available at www.icj-cij.org/icjwww/idecisions/isummaries/isasummary751016.htm.

22 A particularly important book in the context of indirect methods of showing title is R Doak Bishop (ed.), *The Art of Advocacy in International Arbitration,* Juris Publishing, 2004.

23 In an article in *The Sunday Times* in early 2005, Clive Anderson said that the adversarial approach "...pitching one side against the other, the winner chosen by an impartial court, is the norm throughout the Anglo-Saxon world, America, the Commonwealth and beyond. It allows for the interests of one person to be balanced against those of another and the interests of the state to be weighed against the rights of the individual." 'The jury is out on Rumpole of the Elysée', 13 February 2005.

i) Pre-hearing preparatory stage

What is to be proved?

The factual and legal aspects of the case need to be analysed in order to discover what issues will be faced by the international Tribunal. Put shortly, this will involve the broad question of whether territorial sovereignty is vested in State A or State B.

How is it to be proved?

How will the party prove its case?[24] What evidence will be required to satisfy the Tribunal on the issues to be decided? For example, what documents are needed by State A? Does State B have documents that will assist State A in proving its case (or in disproving the case of State B)? The process of discovery and inspection of documents may play a vital role in the dispute.

Is evidence required from factual witnesses? Is evidence required from expert witnesses? How is the factual and expert evidence to be presented to the international body dealing with the dispute? Normally, the testimony of witnesses as to fact will be set out in witness statements or affidavits and the opinion evidence of experts will be set out in expert reports. The Rules of the particular Court or Tribunal will invariably deal with the exchange between the parties of their factual and expert testimony, and with the way in which such factual and expert testimony is to be presented.

For example, the PCA's Rules for Arbitrating Disputes between Two States contain provisions in Article 25 relating to evidence. Where witnesses are to be heard, at least 30 days prior to the hearing date each party is to communicate to the Tribunal and the other party the names and addresses of the witnesses it intends to call, the subject matter of their testimony and the language in which such testimony will be given. Where appropriate, arrangements will be made for the translation of oral statements. Hearings are held in camera unless the parties agree otherwise. The Tribunal is entitled to require the retirement of any witnesses during the testimony of other witnesses and is also entitled to determine the manner in which witnesses are to be examined. The evidence of witnesses may be in the form of written statements. The Tribunal determines the admissibility, relevance, materiality and weight of the evidence.

Pleadings

Once the advocate has marshalled the facts and considered the relevant law, and has decided how the issues involved are to be proved by way of documentary and other evidence (together with the evidence of witnesses and experts), the next vital stage of the advocacy process is the pleadings.

The importance of written pleadings cannot be over-emphasised. They are a vital part of the advocacy process as they are likely to be the first statement of the parties' case that the Tribunal will see. They should set out clearly and concisely the nature of the case being put by the parties to the dispute. Pleadings cannot be properly drafted by the advocate

24 It is for the party bringing the claim to prove its case: the burden of proof is on the Claimant.

who is to present the case at the hearing until he or she has a clear understanding of the case: the facts, the law, the issues, the evidence.

The rules in force for the particular Tribunal will set out what written pleadings are required from the parties. However, they are likely to involve:

- a claim by the Claimant (probably described as a Statement of Claim or a Memorial);
- a defence by the Respondent (probably described as a Statement of Defence or a Counter-Memorial) – this may well include a counter-claim by the Respondent;
- further written pleadings responding to the defence and any counterclaim. For example, the London Court of International Arbitration (LCIA) Rules specifically require the service of a Reply. And the International Convention on the Settlement of Investment Disputes (ICSID) Arbitration Rules, in addition to requiring a Memorial and a Counter-Memorial, make provision for the service of a Reply and a Response.

To take a further example, the Rules of Court of the ICJ deal with the 'written proceedings' in Articles 44 to 53. In the case of proceedings begun by an application, the pleadings are to consist of a Memorial and Counter-Memorial. The Court may also direct service of a Reply and a Rejoinder.

The pleadings will usually be accompanied by (and cross-referenced to) the relevant documents to which they refer. Those documents will normally be contained in separate paginated and indexed files (or 'bundles' as some lawyers call them).

The success of the hearing stage – and therefore of the case itself – is likely to depend on how well and how competently the preparatory work was carried out.

ii) The hearing

The second major stage of the advocacy process involves the oral hearing. Arguably, this is the most important stage of the entire process. Common law judges and arbitrators set great store on the 'dialogue' between the tribunal and counsel: the opportunity for the Tribunal to put questions to the advocates.

It is assumed that in an international dispute the complexities of fact and law will inevitably require an oral hearing at which each party can present its case to the Tribunal and can test the other party's case.

This is likely to involve the advocate for each party making opening oral submissions to the Tribunal. Next will follow the examination, cross-examination and re-examination of the factual witnesses and experts. Again, to take the ICJ Rules as an example, Articles 54 to 72 deal with the oral proceedings. They contain detailed provisions covering the production of documents, evidence, witnesses and experts. Finally, closing oral submissions are made to the Tribunal on the issues, the evidence and the law.

In addition to the oral submissions, the advocates are likely to have prepared written submissions for the Tribunal. Indeed, either the Tribunal is likely to have directed that such

submissions be prepared, or the procedural rules in question may require the service of opening and/or closing submissions.

Such written submissions are of benefit both to the advocates and to the members of the Tribunal. The advocates are likely to feel that the Tribunal will have a better understanding of the nature of the case that they are putting forward if the Tribunal has read beforehand the points that will be made at the oral hearing. For its part, the Tribunal should be better able to follow the oral submissions of the advocates if it has had the opportunity of pre-reading the written submissions.

Further, it is likely to be of great benefit to the Tribunal – when drafting its judgment or award – to be able to look back at the written witness statements and expert reports, the pleadings and the written submissions of the advocates. It is at that stage that the Tribunal has to decide (if it has not already done so) which of the competing claims of the parties has been proved. As the Permanent Court of International Justice stated in the *Eastern Greenland Case* (considered in the next section):

> *"In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger."*

The International Court in the *Minquiers and Ecrehos* case (again considered in the next section) referred specifically to "convincing proof of title":

> *"Under the Special Agreement, the Court was asked to determine which of the Parties had produced the more convincing proof of title... each Party therefore had to prove its alleged title and the facts upon which it relied."*

The importance of written and oral advocacy – both of which involve the careful preparation of the case in accordance with the relevant Rules – cannot be stressed too strongly. The Rules of various supranational Courts and Tribunals, and of a selection of international arbitral bodies, are considered in Parts III and IV of the Manual.

5) Indirect Methods of Acquisition of Title

There are also a number of indirect methods of demonstrating the right to territorial sovereignty where more direct methods, such as treaty rights, are not available. Some examples are:

i) effective occupation;

ii) prescription;

iii) discovery;

iv) symbolic annexation.

i) Effective occupation

This method of acquisition of territorial sovereignty tends to relate to *terra nullius*: that is, land possessed by no one. This issue arose in the *Western Sahara* case considered earlier. It will be remembered that the Court said that the *"time of colonization by Spain"* might

be considered as the period beginning in 1884, when Spain proclaimed its protectorate over the Rio de Oro: *"According to the State practice of that period, territories inhabited by tribes or peoples having a social and political organization were not regarded as terrae nullius: in their case sovereignty was not generally considered as effected through occupation, but through agreements concluded with local rulers...."*

The question of effective occupation arose as well in the *Island of Palmas* case. The arbitrator stated that effective occupation involved not simply possession of territory but – in relation to that possession – the exercise by a State of activities of sovereignty in respect of the territory.[25] This issue was also considered by the Permanent Court of International Justice in the *Eastern Greenland Case: Denmark v Norway*. The Permanent Court described the background:

> *"According to the information supplied to the Court by the Parties, it was about the year 900 A.D. that Greenland was discovered. The country was colonized about a century later. The best known of the colonists was Eric the Red, who was an inhabitant of Iceland of Norwegian origin; it was at that time that two settlements called Eystribygd and Vestribygd were founded towards the southern end of the western coast. These settlements appear to have existed as an independent State for some time, but became tributary to the kingdom of Norway in the XIIIth century. These settlements had disappeared before 1500.*
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> *"Information as to these early Nordic settlements and as to the extent to which the settlers dominated the remainder of the country is very scanty. It seems clear that the settlers made hunting journeys far to the North on the western coast, and records exist of at least one expedition to places on the East coast.*
>
> *"In 1380, the kingdoms of Norway and Denmark were united under the same Crown; the character of this union, which lasted until 1814, changed to some extent in the course of time, more particularly as a result of the centralization at Copenhagen of the administration of the various countries which were under the sovereignty of the Dano-Norwegian Crown. This evolution seems to have obliterated to some extent the separation which had existed between them from a constitutional standpoint. On the other hand, there is nothing to show that during this period Greenland, in so far as it constituted a dependency of the Crown, should not be regarded as a Norwegian possession."*

The Permanent Court went on to consider the question of effective occupation, and referred to the phrase used in the *Palmas Island* decision, namely, a title that was founded *"on the peaceful and continuous display of State authority..."*. The Court said:

> *"The Danish claim is not founded upon any particular act of occupation but alleges – to use the phrase employed in the Palmas Island decision of the Permanent Court of Arbitration April 4th, 1928 – a title 'founded on the peaceful and continuous display of State authority over the island'. It is based upon the view that Denmark now enjoys all the rights which the King of Denmark and Norway enjoyed over Greenland up till 1814. Both the existence and the extent of these rights must therefore be considered, as well as the Danish claim to sovereignty since that date.*

25 See the remarks by Max Huber quoted in Chapter 6.

"It must be borne in mind, however, that as the critical date is July 10th, 1931, it is not necessary that sovereignty over Greenland should have existed throughout the period during which the Danish Government maintains that it was in being. Even if the material submitted to the Court might be thought insufficient to establish the existence of that sovereignty during the earlier periods, this would not exclude a finding that it is sufficient to establish a valid title in the period immediately preceding the occupation.

"Before proceeding to consider in detail the evidence submitted to the Court, it may be well to state that a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.

"Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power. In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger. One of the peculiar features of the present case is that up to 1931 there was no claim by any Power other than Denmark to the sovereignty over Greenland. Indeed, up till 1921, no Power disputed the Danish claim to sovereignty.

"It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries." [26]

ii) Prescription

Prescription, to the extent that it exists as a separate method of acquiring territorial sovereignty, differs from the taking of possession of *terra nullius* in that it involves the occupation of territory that in the past has been – or may have been – under the sovereignty of another State.

The ICJ delivered a judgement in November 1953 in a dispute between the United Kingdom and France over a group of islets lying between the island of Jersey and the coast of France. *The Minquiers and Ecrehos (France / United Kingdom)* case could be regarded as falling under the category of occupation or prescription. It was submitted to the Court by virtue of a Special Agreement concluded between the United Kingdom and France on 29 December 1950.

The Court began by defining the task laid before it by the Parties:

" The two groups of islets in question lie between the British Channel Island of Jersey and the coast of France. The Ecrehos lie 3.9 sea miles from the former and 6.6 sea

26 A report of the decision in the *Eastern Greenland Case: Denmark v Norway* is available on the ICJ website, Series A/B 53, Judgment April 1953.

miles from the latter. The Minquiers group lie 9.8 sea miles from Jersey and 16.2 sea miles from the French mainland and 8 miles away from the Chausey islands which belong to France. Under the Special Agreement, the Court was asked to determine which of the Parties had produced the more convincing proof of title to these groups and any possibility of applying to them the status of terra nullius was set aside. In addition, the question of burden of proof was reserved: each Party therefore had to prove its alleged title and the facts upon which it relied. Finally, when the Special Agreement refers to islets and rocks, in so far as they are capable of appropriation, it must be considered that these terms relate to islets and rocks physically capable of appropriation. The Court did not have to determine in detail the facts relating to the particular units of the two groups."

In a unanimous decision, the Court found that sovereignty over the islets and rocks of the Minquiers and Ecrehos groups, in so far as these islets and rocks were capable of appropriation, belonged to the United Kingdom.[27]

iii) Discovery

Again, it may be arguable to what extent discovery can stand alone as a separate head of acquisition of territorial sovereignty as it is closely linked to effective occupation. Indeed mere discovery, unless linked to – and followed by – occupation, would be unlikely to lead to success in a dispute before an international Court or Tribunal.

Discovery was one of the bases of claim put forward by the United States in the *Island of Palmas* case. Again, it is perhaps worth looking at what was said by the arbitrator:

"As pointed out above, the United States bases its claim, as successor of Spain, in the first place on discovery. In this connection a distinction must be made between the discovery of the Island of Palmas (or Miangas) as such, or as a part of the Philippines, which, beyond doubt, were discovered and even occupied and colonized by the Spaniards. This latter point, however, will be considered with the argument relating to contiguity; the problem of discovery is considered only in relation to the island itself which forms the subject of the dispute.

"The documents supplied to the Arbitrator with regard to the discovery of the island in question consist in the first place of a communication made by the Spanish Government to the United States Government as to researches in the archives concerning expeditions and discoveries in the Moluccas, the 'Talaos' Islands, the Palos Islands and the Marianes.

"The above mentioned communication of the Spanish Government does not give any details as to the date of the expedition, the navigators or the circumstances in which the observations were made; it is not supported by extracts from the original reports on which it is based, nor accompanied by reproductions of the maps therein mentioned.

27 A report of the decision in the *Minquiers and Ecrehos (France / United Kingdom)* case is available at www.icj-cij.org/icjwww/idecisions/isummaries/ifuksummary531117.htm.

"In any case for the purpose of the present affair it may be admitted that the original title derived from discovery belonged to Spain." [28]

iv) Symbolic annexation

In the *Clipperton Island* case considered earlier, France claimed sovereignty by virtue of a proclamation of French sovereignty in the 1850s by a lieutenant in the French Navy. That proclamation was subsequently published in Honolulu. On the particular facts of the case, namely the uninhabited and inhospitable nature of the island, the arbitrator considered that the taking of possession, albeit symbolic, was sufficient to give sovereignty to France.

6) Territorial Border Disputes

So far this chapter on territorial disputes has primarily concentrated on the right to the possession of an entire territory. Disputes also arise, however, concerning the extent of territory: what line does the border follow between State A and State B?

Such territorial disputes have a long history. For example, the English Privy Council in London dealt with border disputes in the American colonies in the 1600s and 1700s:

"During the pre-revolutionary period in America, the colonies developed their own judicial systems. Despite the enormous influence of the English common-law legal system, each colony had its local variations and customs to which strong attachments developed. This preference for local institutions and local law meant that authority in the American colonies was badly fragmented, which posed a problem for the colonies in their relations with one another and also in their relations with the Crown. There was a need for some overriding judicial authority to deal with legal issues arising in the colonies. Ever practical, the English revived an old institution – the Royal Privy Council – and sowed the seeds that resulted in the establishment of the judiciary as a separate and coequal branch of government under the Constitution of 1787.

"...[An] important function of the Privy Council was the resolution of border disputes that often raged with great intensity between the colonies. These disputes seldom could be resolved except through the offices of a judicial body superior to the colonial courts, because those courts were both ill suited to task and frequently disinclined to perform it impartially." [29]

A more recent example of a border dispute is the *Temple of Preah Vihear* case, mentioned earlier, concerning the disputed frontier line on the boundary between Cambodia and Thailand.

The line of a frontier may change as a result of accretion, erosion or avulsion. One State may acquire or lose territory as a result of accretion or erosion. The line of a frontier fixed by reference to a river may give rise to a dispute where a significant change in the course of the river – avulsion – has occurred. That argument arose in a dispute between El Salvador and Honduras that was heard by the ICJ.

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28 Supra.

29 Sandra Day O'Connor, *The Majesty of the Law*, Random House, 2004, p 206.

On 10 September 2002 the Republic of El Salvador submitted a request to the Court for revision of the Judgment delivered on 11 September 1992 by the Chamber of the Court formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras: Nicaragua intervening).*

The revision was sought on the basis of new facts alleged by El Salvador. These concern on the one hand the avulsion of the river Goascorán and on the other the 'Carta Esférica' and the report of the 1794 El Activo expedition. In relation to the river Goascorán, the Court said:

> *"Turning to consideration of El Salvador's submissions concerning the avulsion of the Goascorán, the Chamber recalls that an application for revision is admissible only if each of the conditions laid down in Article 61 is satisfied, and that if any one of them is not met, the application must be dismissed; in the present case, the Chamber begins by ascertaining whether the alleged facts, supposing them to be new facts, are of such a nature as to be decisive factors in respect of the 1992 Judgment.*
>
> *"In this regard, the Chamber first recalls the considerations of principle on which the Chamber hearing the original case relied for its ruling on the disputes between the two States in six sectors of their land boundary. According to that Chamber, the boundary was to be determined 'by the application of the principle generally accepted in Spanish America of the* uti possidetis juris*, whereby the boundaries were to follow the colonial administrative boundaries' (para. 28 of the 1992 Judgment). The Chamber did however note that 'the* uti possidetis juris *position can be qualified by adjudication and by treaty'. It reasoned from this that 'the question then arises whether it can be qualified in other ways, for example, by acquiescence or recognition'. It concluded that 'There seems to be no reason in principle why these factors should not operate, where there is sufficient evidence to show that the parties have in effect clearly accepted a variation, or at least an interpretation, of the* uti possidetis juris *position' (para. 67 of the 1992 Judgment).*
>
> *"The Chamber then considered 'The contention of El Salvador that a former bed of the river Goascorán forms the* uti possidetis juris *boundary. In this respect, it observed that:*
>
> > *'[this contention] depends, as a question of fact, on the assertion that the Goascorán formerly was running in that bed, and that at some date it abruptly changed its course to its present position. On this basis El Salvador's argument of law is that where a boundary is formed by the course of a river, and the stream suddenly leaves its old bed and forms a new one, this process of 'avulsion' does not bring about a change in the boundary, which continues to follow the old channel.' (Para. 308 of the 1992 Judgment.)*
>
> *"The Chamber added that:*
>
> > *'No record of such an abrupt change of course having occurred has been brought to the Chamber's attention, but were the Chamber satisfied that the river's course was earlier so radically different from its present one, then an avulsion might reasonably be inferred.' (Ibid.)*
>
> *"Pursuing its consideration of El Salvador's argument, the Chamber did however note:*
>
> > *'There is no scientific evidence that the previous course of the Goascorán was such that it debouched in the Estero La Cutú... rather than in any of the other*

neighbouring inlets in the coastline, such as the Estero El Coyol' (para. 309 of the 1992 Judgment).

"Turning to consideration as a matter of law of El Salvador's proposition concerning the avulsion of the Goascorán, the Chamber observed that El Salvador 'suggests... that the change in fact took place in the 17th century' (para. 311 of the 1992 Judgment). It concluded that ' On this basis, what international law may have to say, on the question of the shifting of rivers which form frontiers, becomes irrelevant: the problem is mainly one of Spanish colonial law.' (Para. 311 of the 1992 Judgment.)

"Beginning in paragraph 312 of the 1992 Judgment, the Chamber turned to a consideration of a different ground. At the outset, it tersely stated the conclusions which it had reached and then set out the reasoning supporting them. In the view of the Chamber, 'any claim by El Salvador that the boundary follows an old course of the river abandoned at some time before 1821 must be rejected. It is a new claim and inconsistent with the previous history of the dispute.' (Para. 312 of the 1992 Judgment.)

"In the present case, the Chamber observes that, whilst in 1992 the Chamber rejected El Salvador's claims that the 1821 boundary did not follow the course of the river at that date, it did so on the basis of that State's conduct during the nineteenth century.

"The Chamber concludes that, in short, it does not matter whether or not there was an avulsion of the Goascorán. Even if avulsion were now proved, and even if its legal consequences were those inferred by El Salvador, findings to that effect would provide no basis for calling into question the decision taken by the Chamber in 1992 on wholly different grounds. The facts asserted in this connection by El Salvador are not 'decisive factors' in respect of the Judgment which it seeks to have revised." [30]

Disputes concerning territorial sovereignty, both in relation to entire territories and in relation to frontiers between territories, are likely to be heard by bodies such as the ICJ and the PCA.

30 The ICJ website carries a report of the *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras: Nicaragua* intervening case at www.icj-cij.org/icjwww/idocket/iesh/ieshframe.htm.