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Eruptions in International Law: Emerging Volcanic Islands and the Law of Territorial Acquisition

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ERUPTIONS IN INTERNATIONAL LAW: EMERGING VOLCANIC ISLANDS AND THE LAW OF TERRITORIAL ACQUISITION

Volcanic activity on the bottom of the ocean between November 1963 and June 1967 created the island of Surtsey off the southwest coast of Iceland.[1] In September 1973, Japan acquired a new islet formed by volcanic eruptions in the Bonins 580 miles south of Tokyo.[2] More recently controversy threatens to arise between the United States and Japan over new islands being formed by undersea volcanic activities in the South Pacific.[3] Two shoals, one discovered by a Japanese fishing boat in 1974, and the other discovered by the United States in 1976, are expected to become islands in the Mariana group. The shoals lie midway between Uracus Island, a strategic trust territory under the administration of the United States, and Minami Iwo Jima, an island belonging to Japan.

Prior to the 20th century, uninhabited islands in the Pacific Ocean assumed little importance. Today, however, their value as strategic bases for air and naval forces is increasingly being recognized. In addition, as more nations extend the limits of their territorial sea to a distance of 200 miles,[4] the importance of these emerging islands as a means of controlling large areas of international waters, and the fishing and mineral resources within those waters, cannot be underestimated.[5]

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1. *See* Kane, *Surtsey: An Island Emerges*, 76 NAT. HIST. 22-27 (1967); Shuldiner, *Fiery Birth of a New Island: Surtsey*, POPULAR SCI., Oct. 1965, at 92-93; Thorarinsson, *Surtsey: Island Born of Fire*, 127 NAT'L GEOG. MAG. 712-26 (1965); *Surtsey, Child of an Expanding Earth?*, SATURDAY REV., July 3, 1965, at 33-39.

2. Cleveland Plain Dealer, Nov. 21, 1976, § 1, at 12, col. 2.

3. *Id.*

4. The United States extended its seaward control to the 200 mile limit as of March 1, 1977. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 101, 90 Stat. 33 (1976) (to be codified in 16 U.S.C. § 1811). At least nine other countries have extended their sovereignty over seas adjacent to their coasts to a distance of 200 nautical miles. Several additional countries have extended their jurisdiction over fishing rights beyond the traditional 12 mile limit. U.S. GENERAL ACCOUNTING OFFICE, INFORMATION ON UNITED STATES OCEAN INTERESTS TOGETHER WITH POSITIONS AND RESULTS OF LAW OF SEA CONFERENCE AT CARACAS 1, 2 (1975). *See also* K. HJERTONSSON, THE NEW LAW OF THE SEA 20-38 (1973).

5. Although international waters have long been valuable as fishing grounds, the newly discovered mineral wealth on the ocean floor has greatly increased the value of these

This Note will examine the international law of territorial acquisition and the application of the principle of discovery-occupation to new territories formed by geologic activity. The shortcomings of this traditional principle will be highlighted, and an alternative approach suggested for the resolution of disputes over the sovereignty of emerging volcanic islands.

I

HISTORICAL BACKGROUND

A. DEVELOPMENT OF THE PRINCIPLE OF DISCOVERY-OCCUPATION

Territorial sovereignty is the authority of a state to control territory and to rule over the persons and objects present therein.[6] Of the five traditionally recognized modes by which territorial sovereignty can be acquired,[7] occupation is the means of establishing sovereignty over land not under the authority of any state. When applied to newly discovered territory, it is commonly referred to as the principle of discovery-occupation.[8]

The origin of the principle of discovery-occupation can be traced to the age of European colonialism in the 15th and 16th centuries. Prior to that time, the feudal states of Europe were organized on the presupposition that land could be acquired only if it could be effectively governed by a feudal lord.[9] The discoveries of the great explorers in the 15th and 16th

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waters. It has been estimated that deposits of copper, manganese, nickel, and other minerals, primarily in the form of deep sea nodules, are present in sufficient quantities to satisfy mankind's needs for thousands of years. Wertenbaker, *Mining the Wealth of the Ocean Deep*, N.Y. Times, July 17, 1977, § 6 (Magazine), at 14, col. 1.

6. Territorial sovereignty was defined by Max Huber, arbitrator in the *Island of Palmas* arbitration, in these terms: "Sovereignty in the relation between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State." Island of Palmas (United States v. Netherlands), Hague Ct. Rep. 2d (Scott) 83 (Perm. Ct. Arb. 1928), 2 R. Int'l Arb. Awards 829 (1949).

7. The four other means of acquiring territory are: prescription (acquisition by effective possession over a period of time); subjugation or conquest (acquisition of territory by force of arms); cession (transfer of territory by treaty provision); and accession or accretion (changes in the shape of territory through the processes of nature). *See generally* N. HILL, CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS 146-63 (1945); J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 155-64 (6th ed. 1967). Some authorities would add adjudication as a sixth mode of acquisition. *Id.* at 157. Adjudication is the determination of sovereignty by a decision-making body. *Id.* One author notes that none of these traditionally recognized modes of territorial acquisition can account for the creation of new states by revolution or other means. R. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 6-7 (1963).

8. Cheng, *The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition*, 14 VA. J. INT'L L. 221, 223 (1974).

9. [I]n the feudal system the acquisition of a certain territory presupposed the possibility of maintaining it effectively. Under feudal laws, a certain territory was

centuries raised for the first time the question of whether sovereignty over newly found territories could be acquired by discovery or by symbolic acts performed in the name of a sovereign state. Although mere discovery, in the sense of visual apprehension, had never been regarded as sufficient to establish sovereignty,[10] it was generally agreed that discovery accompanied by acts of symbolic annexation[11] created at least an "inchoate" title to territory which could subsequently be perfected by occupation.[12]

The intense colonial competition among European powers during the 17th and 18th centuries marked a turning point in the evolution of the principle of discovery-occupation. England, France, and Holland emerged as world powers and challenged the established colonial supremacy of Spain and Portugal. Consequently, the principle of symbolic annexation relied upon by Spain and Portugal to maintain their colonial dominance was questioned.[13] These new powers, moving into unoccupied regions from which Spain and Portugal attempted to exclude them, denied the validity of symbolic annexation, and stressed the necessity of actual occupation.[14] By the end of the 18th century, legal scholars generally agreed that discovery accompanied by symbolic annexation did not constitute sovereignty.[15] More was required; the claiming state had to prove

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acquired only by the fact that its inhabitants swore allegiance, as *homines ligii*, to their future lord. And allegiance presupposed an effective rule over the territory in question, both within and without.

Von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AM. J. INT'L L. 448, 448 (1935).

10. *Id.* at 452. In the forward to his book, Goebel states: "In respect, however, of the doctrine that the mere discovery of a new land can give rights of sovereignty . . . [t]he author believes he has demonstrated beyond a doubt that this theory is baseless in law and in fact . . . ." J. GOEBEL, THE STRUGGLE FOR THE FALKLAND ISLANDS, at xii (1927).

11. Symbolic acts of annexation involve placing markers, banners or flags on the land. Von der Heydte, *supra* note 9, at 452-57.

12. Von der Heydte, *supra* note 9, at 461. Controversy has centered on the question whether, during the age of European colonialism, discovery accompanied by symbolic acts of annexation constituted a completed act of sovereignty. Von der Heydte maintains that "the doctrine and practice of [the 19th century] were greatly influenced by a rigid theory which recognized effective occupation to be . . . the only sufficient title of territorial sovereignty." *Id.* at 462. However, three other legal scholars conclude that discovery accompanied by symbolic acts of possession was sufficient to establish full sovereignty:

A right or title so acquired and established was deemed good against all subsequent claims set up in opposition thereto unless, perhaps, transferred by conquest or treaty, relinquished, abandoned, or successfully opposed by continued occupation on the part of some other state.

A. KELLER, O. LISSITZYN & F. MANN, CREATION OF RIGHTS OF SOVEREIGNTY THROUGH SYMBOLIC ACTS 1400-1800, at 149 (1938).

13. Von der Heydte, *supra* note 9, at 457-58.

14. *Id.* at 458.

15. Vattel explained the principle as follows:

The law of nations then only acknowledge [*sic*] the property and sovereignty of a

effective occupation.[16] Although most scholars during this time felt that effective occupation was necessary to prove sovereignty, it was not until the early 19th century that states began to put this theory into practice.[17]

B. THE MODERN PRINCIPLE OF DISCOVERY-OCCUPATION

By the turn of the 20th century, it was well settled that sovereignty over territory could be acquired only by effective occupation.[18] Effective occupation consisted of two elements: settlement and administration.[19] Territory over which a state claimed sovereignty had to be placed under the actual control and administration of the state. A question remained, however, as to the kind and degree of occupation needed to create a valid title. In the first half of the 20th century, four important international cases addressed this issue.

The *Island of Palmas* arbitration[20] arose out of a controversy between the United States and the Netherlands over the sovereignty of a small island near the Phillippines.[21] The United States claimed that the island had been discovered by Spain, and was under Spanish sovereignty when, pursuant to the Treaty of Peace of December 10, 1898,[22] the island was ceded to the United States as part of the Phillippine Archipelago.[23] The

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> nation over uninhabited countries, of which they shall really, and in fact, take possession, in which they shall form settlements, or of which they shall make actual use. In reality, when navigators have met with desert countries, in which those of other nations have erected some monument to shew [*sic*] their having taken possession of them, they have no farther given themselves any pain about that vain ceremony, than as it proceeded from the regulation of the popes, who divided a great part of the world between the crowns of Castile and Portugal.

M. DE VATTEL, THE LAW OF NATIONS 91 (London 1793).

16. *See* notes 18-43 *infra* and accompanying text.

17. I, Part 2 P. FAUCHILLE, TRAITÉ DE DROIT INTERNATIONAL PUBLIQUE 688-89 (1925); von der Heydte, *supra* note 9, at 462. For a discussion of the principle of effective occupation and its manifestations during the 19th century, see G. SMEDAL, ACQUISITION OF SOVEREIGNTY OVER POLAR AREAS 18-24 (1931).

18. 1 L. OPPENHEIM, INTERNATIONAL LAW 557 (8th ed. 1955).

19. *Id.* Settlement is the establishment on the territory of a community capable of maintaining the authority of the state. Administration is the maintenance of a responsible authority which exercises governing functions. *Id.* at 557-58.

20. Island of Palmas (United States v. Netherlands), Hague Ct. Rep. 2d (Scott) 83 (Perm. Ct. Arb. 1928), 2 R. Int'l Arb. Awards 829 (1949).

21. The dispute was referred to the Permanent Court of Arbitration at The Hague by a *compromis* signed in Washington on January 23, 1925. The decision was to be rendered by a single arbitrator, and for this purpose the parties chose Max Huber, member of the Permanent Court of Arbitration. It was agreed that the award should be final. *Id.* at 83, R. Int'l Arb. Awards at 831.

22. Treaty of Peace, Dec. 10, 1898, United States-Spain, 30 Stat. 1754, T.S. No. 343, 11 Bevans 615.

23. The Treaty transferred to the United States all rights of sovereignty which Spain may have possessed in the region covered by the Treaty. The Spanish claim to the territory was based on discovery. As successor to Spain, the United States could only claim those rights

Netherlands contended that the island had long been under its undisputed authority.[24] The arbitrator, Max Huber, a member of the Permanent Court of International Justice, awarded the island to the Netherlands on the basis of his finding that the Netherlands had exercised a continuous and peaceful display of authority over the island for a long period of time.[25] The claim of the United States, based on discovery, was rejected.[26]

Although the arbitrator phrased his explanation of the award in terms of effective occupation,[27] the decision was not based on this principle as it has traditionally been understood. Neither Spain, from whom the United States derived its claim, nor the Netherlands had any "settlement" or "administration" on the island. The arbitrator, therefore, refrained from defining effective occupation in these terms and phrased the test as one of "continuous and peaceful display of territorial sovereignty."[28] The arbitrator explained:

> Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in

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which Spain possessed in 1898, the date of cession. Thus, the question became whether the discovery of the island by Spain was sufficient to establish Spanish sovereignty over the island. *Id.* at 96-112, R. Int'l Arb. Awards at 843-55.

24. The Netherlands contended that the East India Tea Company established Dutch sovereignty over the island in the 17th century by contracting with native chieftains. These contracts were based on the concept that the chieftain received his principality as a fief of the Dutch state, creating a suzerainty. The Netherlands claimed that the Island of Palmas was included in these contracts and consequently, in the suzerainty, and that Dutch sovereignty had been continuously displayed during the past two centuries. *Id.* at 112-16, R. Int'l Arb. Awards at 855-59. A further claim was based on the taxation of the peoples of Palmas by the Dutch authorities. *Id.* at 124, R. Int'l Arb. Awards at 865.

25. *Id.* at 129, R. Int'l Arb. Awards at 869. The arbitrator stated:

> It may suffice that such display . . . had already existed as continuous and peaceful . . . long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.

Id. at 127, R. Int'l Arb. Awards at 867.

26. "The title of discovery . . . would, under the most favourable and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation. An inchoate title however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty." *Id.* at 128, R. Int'l Arb. Awards at 869.

27. *Id.* at 93, R. Int'l Arb. Awards at 839.

28. *Id.* In fact, however, the display of sovereignty by the Netherlands was not proven to be continuous. The tribunal admitted that "there is a considerable gap in the documentary evidence laid before the Tribunal by the Netherlands Government." *Id.* at 123, R. Int'l Arb. Awards at 864. The gap was one of 100 years, 1726-1825. The arbitrator acknowledged that the award was not based on a clear showing of continuous and peaceful sovereignty: "These facts at least constitute a *beginning of establishment of sovereignty* by continuous and peaceful display of state authority, or a *commencement of occupation* of an island not yet forming a part of the territory of a state; and such a state of things would create in favour of the Netherlands an *inchoate title for completing the conditions of sovereignty.*" *Id.* at 130, R. Int'l Arb. Awards at 870 (emphasis added).

> principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas.[29]

Sovereignty was granted to the nation which had displayed the greater "[m]anifestations of territorial sovereignty . . . according to conditions of time and place."[30] Thus, the *Island of Palmas* arbitration applied a lesser standard than the traditional "rigid theory which recognized effective occupation to be in every possible case the only sufficient title of territorial sovereignty."[31]

A similar approach was taken in two subsequent controversies over uninhabited territories. A dispute between France and Mexico over a small island in the East Pacific gave rise in 1931 to the *Clipperton Island* arbitration.[32] And in 1933 the Permanent Court of International Justice rendered its decision in the *Legal Status of Eastern Greenland*,[33] resolving a controversy between Norway and Denmark over the sovereignty of Eastern Greenland.[34] Neither of these cases turned upon effective occupation. Rather, like the award in the *Island of Palmas* arbitration, each decision was based on those acts of sovereignty considered by the tribunal to be sufficient under the peculiar circumstances of the case.[35]

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29. *Id.* at 94, R. Int'l Arb. Awards at 840.

30. *Id.*

31. Von der Heydte, *supra* note 9, at 462.

32. Clipperton Island (France v. Mexico), 26 AM. J. INT'L L. 390 (1932). The dispute between France and Mexico over Clipperton Island was submitted to the King of Italy for arbitration. The island was awarded to France on the basis that in 1858 a French navy lieutenant had performed the symbolic act of "proclaim[ing] and declar[ing] that the sovereignty of the said island beginning from that date belonged in perpetuity to His Majesty the Emperor Napoleon III . . . ." *Id.* at 391. Further facts offered by France to support her claim included approval by the Emperor of a concession for the exploitation of guano beds on the island seven months before the proclamation of sovereignty and further acts of surveillance in the area by the French Navy. Mexico, as the successor to Spain, based its claim on Spanish discovery of the island. *Id.* at 392-93.

33. Legal Status of Eastern Greenland, [1933] P.C.I.J., ser. A./B., No. 53.

34. Norway claimed that Eastern Greenland was an uninhabited territory, and thus subject to Norwegian occupation and sovereignty. Denmark claimed the territory on the ground that her sovereignty, concentrated on the west coast of the island, extended to the entire island and that Norway had recognized such sovereignty by treaty and diplomacy. The Court established a two-fold requirement for the acquisition of territory: "the intention and will to act as sovereign, and some actual exercise or display of such authority." *Id.* at 45-46. Applying these two principles, the Court rendered its decision in favor of Denmark. A discussion of this case can be found in Cheng, *supra* note 8.

35. In the *Clipperton Island* arbitration, the tribunal reasoned that actual occupation was but one means of acquiring territory, and that where the area was uninhabited, resort to actual occupation might be unnecessary:

In 1953 the International Court of Justice decided the *Minquiers and Ecrehos Case*,[36] which stemmed from a controversy between France and Great Britain over the sovereignty of two groups of inhabited islets in the English Channel. This case was unique since Great Britain had exercised actual administrative, judicial, and legislative control over the islands.[37] In awarding the islands to Great Britain, the Court stated that "[t]he present case does not . . . present the characteristics of a dispute concerning the acquisition of sovereignty over *terra nullius*,"[38] and that "[w]hat is of decisive importance . . . is . . . the evidence which relates directly to the possession of the Ecrehos and Minquiers groups."[39] Thus the court implicitly recognized the principle established in previous cases that effective occupation of territory need only be as extensive as the nature of the territory permits.[40]

In evaluating the above four cases, two elements must be emphasized. First, each case involved a controversy between only two parties; the tribunal was not called upon to decide whether either party had in fact effectively occupied the territory, but only to determine which of the two

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> Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.

Clipperton Island (France v. Mexico), 26 AM. J. INT'L L. 390, 394 (1932). The tribunal found the French government's symbolic act of annexation a sufficient display of sovereignty to justify awarding the uninhabited island to France.

Similarly, in *Legal Status of Eastern Greenland* the award of the territory to Denmark was not based on effective occupation. Danish authority in Eastern Greenland had never been extensive. Although the first requirement of the Court's two-fold test, evidencing an intent to rule, was satisfied by the Danish government's issuance of legislative enactments, there was no proof of the second requirement, administrative control. Judge Anzilotti in his dissenting opinion noted:

> [I]n the remainder of Greenland there were perhaps laws in force but no authority to enforce them: in fact—and this is a circumstance as exceptional as it is significant—no officials had even been appointed competent to decide disputes or to apply and ensure respect for the law.

Legal Status of Eastern Greenland, [1933] P.C.I.J., ser. A./B., No. 53, at 83. Pure legislation, without an effective administration to enforce it, more closely resembles a symbolic act of annexation than it does an effective occupation.

36. Minquiers and Ecrehos Case, [1953] I.C.J. 47.

37. *Id.* at 65-66. The Court emphasized those "acts which relate[d] to the exercise of jurisdiction and local administration and to legislation." *Id.* at 65. These included instituting proceedings against those who committed criminal offenses on the Ecrehos, holding inquests on corpses found in the Ecrehos, levying taxes on houses or huts built on the islets of Ecrehos, and requiring public registry of deeds relating to the sale of property on the islets. *Id.*

38. *Id.* at 53.

39. *Id.* at 57.

40. Judge Carneiro, in his individual opinion, explicitly recognized this principle. *See id.* at 85.

claims was the stronger.[41] A second, closely related factor was the importance given by the courts to the maintenance of the existing legal order; that is, the courts' express intention to resolve the dispute in the way least likely to disrupt the international order.[42] With these factors in mind, the significance of the four cases as regards the principle of discovery-occupation is that each acknowledges that the requirements for the acquisition of sovereignty may vary according to the nature of the territory. Sovereignty over uninhabitable territory may be acquired without fully satisfying the classic conditions of effective occupation. Territories capable of habitation, or which have in fact been occupied, will require more in the way of administration or settlement before sovereignty can be established. A modern definition of the principle of discovery-occupation must be sufficiently flexible to take these factors into account.

II

APPLICATION OF THE PRINCIPLE OF DISCOVERY-OCCUPATION TO EMERGING VOLCANIC ISLANDS

Although the principle of discovery-occupation may be well suited to resolving disputes over newly found territories, its application to newly forming volcanic islands creates numerous difficulties. The most immediate problem is determining the time at which such islands can be said to be discoverable or subject to effective occupation.[43] As previously mentioned, the United States and Japan have each discovered a volcanic shoal that is expected to develop into an island.[44] Shoals are not discoverable as that term is understood in international law because they do

41. This factor was relied upon by the Court in Legal Status of Eastern Greenland, [1933] P.C.I.J., ser. A./B., No. 53, at 46.

42. If . . . only one of two conflicting interests is to prevail . . . the interest which involves the maintenance of a state of things having offered at the critical time to the inhabitants of the disputed territory and to other States a certain guarantee for the respect of their rights ought, in doubt, to prevail over an interest which—supposing it to be recognized in international law—has not yet received any concrete form of development.

Island of Palmas (United States v. Netherlands), Hague Ct. Rep. 2d (Scott) 83, 130 (Perm. Ct. Arb. 1928), 2 R. Int'l Arb. Awards 829, 870 (1949).

43. This question might be stated in terms of the "critical date"—the date after which any action of the parties can no longer affect the issue of sovereignty. The function of such a date is to prevent a party from improving its position after a dispute has arisen. Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law*, 32 BRIT. Y.B. INT'L L. 20 (1955-56).

44. *See* note 3 *supra* and accompanying text. A shoal is defined as a "submerged ridge, bank, or bar producing a shoal, consisting of or covered by sand, mud, gravel, or other unconsolidated material, and rising from the bed of a body of water to near the surface so as to constitute a danger to surface navigation." AMERICAN GEOLOGICAL INSTITUTE, GLOSSARY OF GEOLOGY 653 (1974).

not constitute a piece of territory. According to traditional theory, discovery, symbolic annexation, and effective occupation can take place only after the shoal has become an island.[45] Thus, under the principle of discovery-occupation, the island would belong by inchoate right, not to the nation that discovered the developing shoal, but to the nation that first performed a symbolic act of annexation upon the developing island.[46]

An international rule of law which denies to the finder of developing territory the right to acquire it, while granting that right to the first nation to perform a symbolic ceremony upon the developed territory, is a rule not likely to be respected by the world community. Although it can be argued that the finding nation, if sufficiently interested in acquiring the territory, should be on hand to appropriate the island once it has arisen, this argument overlooks the uncertainty as to when volcanic shoals will emerge as islands. To deploy a ship to watch a volcanic shoal which may or may not develop into an island is a potentially senseless waste of economic resources.[47] Furthermore, a conflict may arise if more than one nation is on hand to "discover and symbolically annex" the island. It is unlikely that a nation which has discovered a developing shoal will idly sit by if, once the shoal emerges as an island, another nation is the first to accomplish the mystical acts leading to sovereignty.[48] By emphasizing symbolic annexation as a means of acquiring a prior right to territory, and thus encouraging nations to be in the vicinity of an island when it emerges, international law may be inviting open conflict, particularly where the island is of great economic or strategic importance. Such a theory may in fact jeopardize the peace and security which an international legal system should foster.

The award of a newly formed island to the first nation to discover a developing shoal is likewise riddled with problems. The first difficulty is ascertaining which nation in fact discovered the developing shoal. Conceivably, nations could agree to openly declare the discovery of newly forming territory and their intent to acquire it. Delineating what consti-

45. A new series of problems will arise if nations are allowed to appropriate volcanic shoals. For example, how close to the surface must the shoal be before it can be acquired? What happens if the volcanic activity ceases and no island develops?

46. *See* notes 10-12 *supra* and accompanying text.

47. It has been reported that Japan is engaging in such observation. "Since the possibility has increased that the shoals will become islands, the Japanese maritime agency has decided to have [a] patrol ship sail near the shoal while engaged in its regular duty of patrolling against sea accidents. The ship will be on hand to 'discover' the new islands." Cleveland Plain Dealer, *supra* note 2.

48. For example, how likely is it that a nation would calmly sit by if another state claimed discovery of a developing volcanic island located in the middle of its traditional fishing grounds? Would a free western nation permit a communist state to "discover" an island close to its shores?

tutes newly forming territory, however, would be a nearly impossible task. For example, would the discovery of a fault in the ocean floor and the prediction of volcanic activity from the fault constitute discovery if, at some point in the future, volcanic activity from the fault created islands? Clearly sovereignty over territory should not depend on which nation's scientists are the first to detect the possible formation of new territories.

Moreover, a policy of scientific discovery would benefit only those nations with technology sufficiently advanced to enable them to engage in extensive geologic investigations, and would ignore the potentially persuasive claims of less developed nations. Strict adherence to a principle of discovery would fail to take into account such complicating factors as the proximity of the territory to hostile nations, the likelihood that the claiming nation will develop the territory, and the claiming nation's need for the territory to maintain its economic viability.

A further problem in awarding a volcanic island to the first nation to discover a developing shoal is that mere discovery does not demonstrate a nation's intent or desire to establish sovereignty over the territory.[49] Developing islands discovered by a nation having no intention of exercising sovereignty could remain in a politically aggravating state of limbo for a substantial length of time.[50] Thus the principle of discovery is too arbitrary to provide a lasting solution to international territorial disputes.

Even if the problems of discovery could be overcome, there remain the possible difficulties of effective occupation. Traditional theory maintains that an inchoate right to territory can be perfected only if followed by an effective occupation.[51] As previously noted, the elements of occupation differ according to the nature of the territory in question.[52] Moreover, since different nations may value the same uninhabited volcanic island for different ultimate uses—some may view the island as a future military base while others foresee economic development—effective occupation

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49. *See* notes 9-39 *supra* and accompanying text.

50. This problem is of equal concern if one assumes a symbolic act of annexation gives a nation an "inchoate right" to acquire territory. As already noted, the concept of "inchoate right" is not confined to the passage of a specified period of time but merely to a "reasonable" time. Von der Heydte, *supra* note 9, at 460.

51. *See* notes 10-12 *supra* and accompanying text.

52. *See* notes 18-43 *supra* and accompanying text. For example, suppose a small volcanic island with no economic value emerges close to a larger island possessed by the United States and utilized as a nuclear submarine base. The United States "discovers" the island and performs a symbolic act of annexation. The only value of the island to the United States is strategic; that is, possession of the island prevents hostile nations from acquiring the island and monitoring United States activities at the submarine base. If the island has no economic value, can it be said that the United States has failed to effectively occupy the island if it performs no other activities on the island? The ambiguity surrounding the doctrine of effective occupation presents no clear answer to this question.

will undoubtedly mean different things to different nations. A nation could fulfill the traditional requirements of effective occupation, settlement and administration, by placing several people on the island and passing a legislative act appointing a governor to rule over the island. Such a token gesture in the midst of controversy, however, would amount to little more than a symbolic act of annexation, and would involve the problems of symbolic annexation discussed above. Realistically, disputes over volcanic islands will most often arise immediately upon emergence of the islands—before any truly effective occupation is possible. Thus, the traditional yardstick of territorial acquisition, effective occupation, has little relevance to the problems created by developing volcanic islands.

III

RECOMMENDATIONS

The elusiveness of the principle of discovery-occupation recommends that conflicting claims to developing volcanic islands be evaluated not according to strict legal criteria, but according to economic, strategic, and geographical considerations. Although the aspects of these so-called non-legal factors are multifarious,[53] several guidelines can be recommended. In setting forth standards by which territorial disputes are to be resolved, it is important that no one nation or group of nations be favored. If such standards are to receive wide acceptance, it is important that they apply equitably to both Third World countries and to recognized world powers. Four factors should be weighed in settling disputes: (1) the claiming nations' desire for the island to maintain defensive national security; (2) the past economic activity of the claiming nations in the vicinity of the developing island; (3) the need of the claiming nations for the economic resources of the island; and (4) the proximity of the island to the claiming nations.

Considerations of a strategic nature depend for their strength upon conditions of international relations that are widely deplored. But as long as nations feel insecure against attack, this factor must be weighed. In evaluating strategic claims, a distinction must be made between those claims seeking advantages of an offensive nature, and those claims offered for defensive purposes.[54] Claims to territory adaptable to offensive

53. For a detailed study of the economic, strategic, historical, geographical, and ethnic claims to territory, see N. HILL, *supra* note 7, at 35-142.

54. It is not always easy to distinguish between offensive and defensive strategic activities. For example, during the Cuban Missile Crisis, the Soviet Union claimed that it was supplying only defensive missiles to Cuba. Even if this were true there is little doubt that the United States still would have felt threatened by the establishment of these missile bases so

warfare are objectionable since they pose a greater risk of disrupting the international balance of power. Claims based on defensive considerations, on the other hand, tend to preserve international peace. Strategic considerations should focus on which of the disputant nations presents a stronger defensive claim to the island. Maintenance of defensive national security, and not opportunity to obtain offensive advantage, should be the test.[55]

Another important factor is the extent of past economic activity near the developing island. Consideration of past economic activity would serve to preserve the stability of the claimant nations by granting to one of them sovereignty over an area already utilized by it for economic purposes. Furthermore, such a consideration would maintain what might be termed "historic rights"[56] to an area of the high seas. If a nation has traditionally carried on fishing activities in an area of international waters, that nation can be said to have acquired historic rights based on a time-honored practice. The notion of historic rights is important primarily because it serves to maintain the established expectations of the international community. By granting sovereignty over an emerging island to a nation which is already recognized as exercising rights over an area of international waters, the friction which might be caused by denying those rights will be avoided.

An equally important economic consideration is the need of the claimant nation for the resources of the volcanic island. It has been estimated that 30 to 45 percent of the oil in the ocean seabeds lies beyond the continental shelves.[57] Deep sea nodules containing copper, manganese, cobalt, and nickel cover thousands of square miles of ocean bottom and represent an inestimable source of wealth.[58] If nations continue to follow the current trend of extending territorial waters to the 200 mile limit, and if this limit applies to islands,[59] emerging volcanic islands will represent a potential source of great mineral wealth.

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close to its shores. Furthermore, the development of a new defensive weapon can upset the balance of power as easily as the invention of new offensive weaponry. Although on occasion only a fine line exists between offensive and defensive use, the importance of maintaining the present balance of power requires that such a distinction be made.

55. *See generally* N. HILL, *supra* note 7, at 65-70, 168-69.

56. *See* Y. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 241-334 (1965).

57. N.Y. Times, May 18, 1975, § 6 (Magazine), at 60, col. 1.

58. *Id.* at 61, col. 2.

59. The question of whether the 200 mile limit will apply equally to islands has not yet been resolved. According to the Convention on the Territorial Sea and the Contiguous Zone, art. 10(1), [1958] 15 U.S.T. 1606, T.I.A.S. No. 5639, the territorial sea of an island is measured in the same manner as that of any other land mass. For a discussion of the difficulties of applying the 200 mile limit to islands, see SPECIAL COMMITTEE ON GEOGRAPHICAL DISADVANTAGE, THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, COMPREHENSIVE PROPOSAL FOR ACCOMMODATION OF GEOGRAPHICALLY DISADVANTAGED COUNTRIES, *reprinted in* 3 OCEAN DEV. & INT'L L.J. 181 (1975-76).

A nation's need for the economic resources of an island is important for two reasons. First, simple equity would seem to demand that a nation in need of natural resources be accorded some preference. A greater distribution of wealth throughout the world community would serve to eliminate much economically based dissension. Second, because consideration of the extent of economic activity which a nation has carried on at the geographical location of an emerging island is likely to favor the technologically advanced world powers, consideration of a claimant nation's needs for the mineral resources of an island is likely to balance out the former consideration by favoring Third World nations. World powers such as the United States, Russia, and Japan, with large fishing and commercial shipping fleets, would most often benefit from a consideration of past economic activity. Third World nations, on the other hand, would more likely benefit from a determination of the need a nation has for the economic resources of a volcanic island. Such a balancing of interests is essential if any set of standards for the resolution of territorial disputes is to receive international acceptance.[60]

Although geographical proximity, or contiguity, has not received wide acceptance in international law as a principle establishing *ipso jure* sovereignty in favor of a particular state, it is an important consideration when the question is which among claimant nations is to be awarded sovereignty over a developing volcanic island.[61] Geographical proximity is important first because of its relation to strategic and economic claims. An island located close to a claimant nation is more likely to be wanted for defensive strategic purposes than for offensive advantage, and the resources of an island located proximate to a nation are more easily and economically developed. But aside from its relation to strategic and economic claims, geographical proximity is important from the perspective of the developing island itself. If volcanic islands are someday to be inhabited, it is necessary that they offer a level of security and social and

60. Another potential economic consideration is the ability of a nation to develop the resources of a volcanic island. The major drawback of this factor is that it would almost always favor nations with highly developed technology over Third World nations. However, since an underdeveloped nation has the ability to grant contractual rights to develop the resources, there is no danger that such resources will be wasted. Thus a nation's ability to develop the resources should not be weighed heavily.

61. The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one State rather than another, either by agreement between the Parties, or by a decision not necessarily based on law; but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the activities of a State.

Island of Palmas (United States v. Netherlands), Hague Ct. Rep. 2d (Scott) 83, 111 (Perm. Ct. Arb. 1928), 2 R. Int'l Arb. Awards 829, 854-55 (1949).

cultural benefits that compare favorably with those offered in other parts of the world. From a security standpoint, it would be important to the population of an island not to be located amidst hostile powers. Geographical proximity to a claimant nation would provide an island with a degree of security not available if the island were under the sovereignty of a distant nation. From the standpoint of social and cultural benefits, it would be essential for the population of an island to be close to friendly populations, so that in times of great need or tragedy assistance could be rendered promptly. And finally, it would be important for the island to be in a position where contact with surrounding populations would be both free and comfortable.

Although the above considerations do not exhaust the relevant criteria, they do represent a starting point for the development of an impartial set of standards for the intelligent resolution of territorial disputes over volcanic islands. In this regard, emerging volcanic islands present a situation unique in the law of territorial acquisition. Traditionally, the principle of discovery-occupation worked to maintain the international legal order. Because this principle recognized territory as belonging to the nation that occupied it, the principle served to maintain the international status quo by discouraging nations from asserting sovereignty over inhabited territories. With regard to emerging volcanic islands, however, previous occupation is impossible. A strict application of the discovery-occupation principle would arbitrarily grant sovereignty to the first nation to appropriate the island, while ignoring claims of a strategic, economic, or geographical nature that might be vital to the economic and security interests of the community of nations. Absent the problem of previous occupation, these nonlegal considerations are clearly more likely to provide a lasting solution conducive to the maintenance of international order.

One possible drawback to founding sovereignty on economic, strategic, and geographical considerations is that such criteria are less visible than the traditional standard of occupation. As a result, disputes over sovereignty may be more likely under the proposed scheme. Therefore, procedures for the prompt resolution of such conflicts must be developed.

Because the question of sovereignty over developing volcanic islands is a relatively new one, it is doubtful that there would be much resistance to the establishment of such a procedure. However, if nations remain inactive until serious conflicts arise, the possibility of setting up a mechanism to resolve disputes will be greatly reduced. Thus, haste is recommended. As regards the form by which such a procedure should be established, the most effective means would be the use of bilateral treaties. These treaties

have the advantage of precision and of a functionally more efficient enforcement machinery. A more encompassing alternative would be the use of multilateral treaties. Although multilateral treaties have suffered in the past from great difficulties of enforcement, they do provide a measure of control over signatory nations simply because of the international censure which follows a nation's failure to honor its commitments.[62]

Conflicts between signatory nations to a bilateral treaty should be submitted to an arbitral tribunal composed of representatives from the disputant countries and from a third neutral country upon which the signatories have agreed. As regards multilateral treaties, disputes should be submitted to the International Court of Justice. Although the Court has become increasingly inactive in recent years, the basic problem has been the reluctance of nations to refer international disputes to the Court.[63] The Court, as a tribunal accustomed to resolving international disputes, would be the most effective arbiter of conflicting claims of sovereignty. Finally, submission of conflicting claims for resolution by the International Court of Justice would serve to facilitate the development of a uniform body of international law regarding sovereignty over developing territories.

CONCLUSION

In its present state, the international law of territorial acquisition is inadequate to deal with conflicting claims to newly forming volcanic islands. In a world where a delicate balance of power must be maintained, the concepts of discovery, symbolic annexation, and effective occupation have little relevance to the sensitive question of which nation is to acquire sovereignty over valuable territory. Strategic, economic, and geographical considerations are far more likely to provide a lasting solution conducive to the maintenance of international peace and order. It is essential that nations establish a procedure capable of resolving conflicting claims before actual disputes develop. The possibilities of developing intelligent standards and a procedure to implement the standards are not remote; the danger lies in the international legal system remaining inactive until serious conflicts arise.

Mark Dingley

62. Because nonsignatory nations are not bound by such treaties, a procedure established by a resolution of the General Assembly of the United Nations might prove an effective alternative. Although such resolutions are only recommendations and are not legally binding on member states, they do possess a persuasive effect. *See* Advisory Opinion on Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, [1955] I.C.J. 67, 118-19.

63. Rogers, *The Rule of Law and the Settlement of International Disputes*, 64 AM. SOC'Y INT'L L. PROC. 285, 286 (1970).