

DEVELOPMENTS IN JURISPRUDENCE ON SOVEREIGNTY: DISPUTES OVER ISLANDS

Captain J. Ashley Roach. JAGC, USN (ret.)

Center for International Law

National University of Singapore

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Outline

- What are islands, low-tide elevations, submerged features?
- Maritime zones of islands and other features
- What does sovereignty mean for these features?
- Rules for deciding conflicting claims to sovereignty over islands

What are Islands?

- Naturally formed area of land
 - Surrounded by water
 - Above water at high water

LOS Convention, article 121(1)

Low-tide Elevations (LTE)

- Naturally formed area of land
 - Surrounded by and above water at low tide
 - Submerged at high tide

LOS Convention, article 13(1)

Maritime Zones

- Land generates maritime zones
 - Not vice versa
- Sovereignty of coastal State extends, beyond its land territory and internal waters to adjacent belt of sea, described as territorial sea
- Sovereignty extends to air space over the TS and to its seabed and subsoil

LOS Convention, article 2

Exclusive Economic Zone (EEZ)

- Maritime area beyond and adjacent to TS
 - Coastal State has sovereign rights and jurisdiction
 - Less than sovereignty
 - All States have freedoms of navigation and overflight in EEZ
 - Maximum breadth 200 nm from baseline

LOS Convention, Part V

Continental Shelf

- Comprises seabed and subsoil of submarine areas
 - Extends beyond the TS
 - Throughout the natural prolongation of its land territory
 - to outer edge of continental margin
 - 200 nm from baseline or more if criteria met
- Continental margin is submerged prolongation of land mass of coastal State
 - Consists of seabed and subsoil of the shelf, the slope,
 - and the rise

LOS Convention, article 76

Maritime Zones of Islands

- Territorial sea not to exceed (NTE) 12 nm
- EEZ NTE 200 nm
- Continental shelf

LOS Convention, article 121(2)

Maritime Zones of LTEs

- Low water line on LTE within TS of mainland or island may be used as baseline for measuring breadth of TS
 - i.e., may expand outer limit of TS
- LTE situated wholly outside TS of mainland or islands has no TS of its own

LOS Convention, article 13

Rocks

- Rocks are islands which cannot sustain
 - human habitation, or
 - Economic life of their own
 - Entitled only to a territorial sea
 - Not entitled to EEZ or continental shelf
- LOS Convention, article 121(3)

- State practice

Rockall



Source: <http://www.irelandbyways.com/top-irish-peninsulas/irelands-northwest/co-donegals-offshore-islands/rockall/>

Reefs

- Islands on atolls and
- Islands having fringing reefs
 - Baseline is seaward low-water line of the reef
 - Shown by appropriate symbol on official charts
- LOS Convention, article 6

Okinotorishima



Submerged Features

- Feature below water at low tide
 - No maritime zone
 - Not subject to sovereignty

Spratly Islands



Source: <https://www.cia.gov/library/publications/the-world-factbook/geos/pg.html>

Sovereignty Key to Zones

- Maritime features generate maritime zones for the State which has sovereignty over them
- What if sovereignty is disputed or not agreed among claimants?
- Jurisprudence has developed over past 80 years in 11 cases where disputes have been submitted to international judicial or arbitral tribunals
- Many disputes over sovereignty over islands have not yet been submitted to compulsory dispute settlement

Jurisdiction Based on Special Agreement

- *Island of Palmas* (Netherlands-USA), award 1928
- *Clipperton Island* (Mexico-France), award 1931
- *Minquires and Ecrehos* (France-UK), ICJ 1953
- *Eritrea v. Yemen*, awards 1998 & 1999
- *Botswana v. Namibia* (Kasikili/Sedudu Island), ICJ judgment 1999
- *Pulau Ligitan & Pulau Sipadan* (Indonesia-Malaysia), ICJ judgment 2002
- *Malaysia v. Singapore* (Pedra Banca/Pulau Bau Puteh, Middle Rocks, South Ledge), ICJ 2008

Jurisdiction Based on Prior Agreement

- *Legal Status of Eastern Greenland*, PCIJ 1933
- *Nicaragua v. Honduras* (Caribbean Sea), ICJ judgment 2007
- *Nicaragua v. Colombia*, ICJ judgment on preliminary objections 2007 (interventions by Costa Rica and Honduras pending)
- *Romania v. Ukraine* (Black Sea delimitation), ICJ judgment 2009

Sovereignty Disputes

- In Asia, sovereignty over the Spratlys, Senkakus, Liancourt Rocks are just a few of the unresolved disputes
- In North America, disputes over Hans Island (Canada-Denmark) and Macias Island and North Rock (Canada-USA) are unresolved
- In the South Atlantic, Argentina disputes with UK sovereignty over the Falkland Islands (Malvinas)

Dokdo / Takeshima / Liancourt Rocks



Source: <http://www.dokdo-takeshima.com/>

Spratly Island



Source: http://www.globalsecurity.org/military/world/war/images/spratly_swallow-reef_pulau-Layang-Layang.jpg



AFP photo

Senkaku / Diaoyu Islands



Canada – Denmark

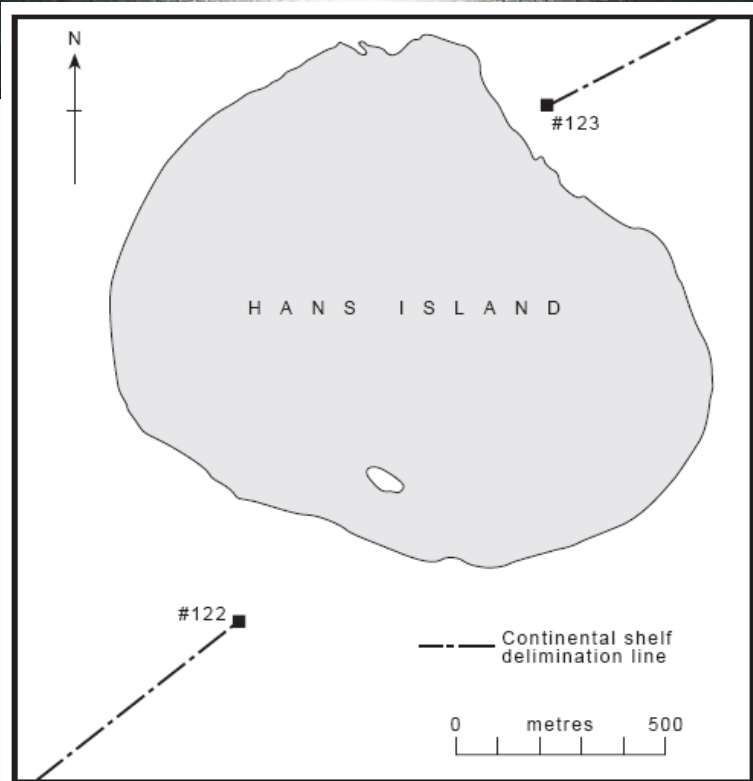
Dispute: Sovereignty of Hans Island



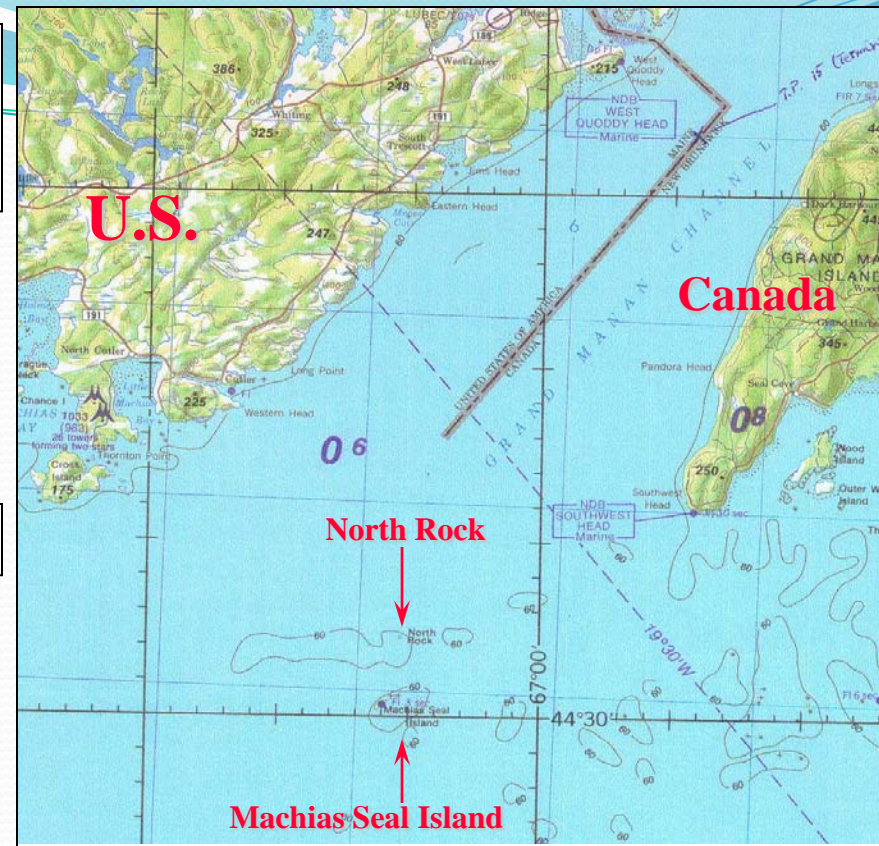
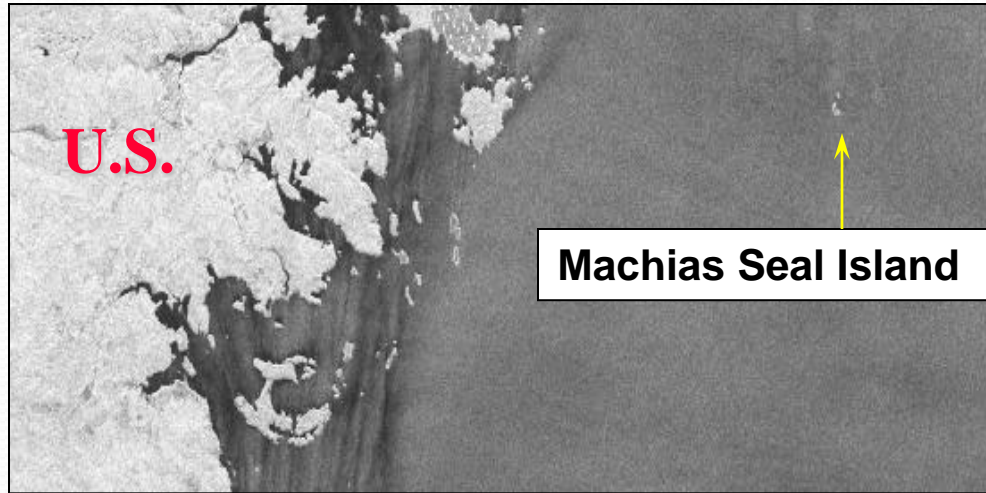
Denmark
August 13, 2002



Canada
July 13, 2005



Machias Seal Island (sovereignty dispute with Canada)





Source: http://images.nationmaster.com/images/motw/americas/falkland_islands.gif

Basic Rule

- Intentional display of power and authority over territory
- By exercise of jurisdiction and state functions
- On a continuous and peaceful basis
 - Latter two criteria tempered to suit nature of the territory and size of population, if any

Eritrea/Yemen first Arbitration Award (1998)

Similar articulation in

- *Legal Status of Eastern Greenland*, PCIJ 1933
- *The Minquiers and Ecrehos Case* (France/UK), ICJ 1953

Issues

- Inter-temporal law
- Critical date or dates
- Burden of proof
- Absence of competing sovereignty claims
- Effectiveness of exercise of sovereignty
- Acquiescence
- Historical title
- Military occupation
- Evidentiary value of maps

Inter-temporal Law

- Events that occurred centuries ago must be appraised and interpreted in light of the rules of international law as they existed at that time, and not as they exist today
- *Island of Palmas* (Netherlands-USA) award 1928

Critical Date

- Identify the date on which the dispute crystallized
- Acts before this date should be taken into consideration
- Acts after this date generally meaningless

Nicaragua v. Honduras, ICJ Rep. 2007, para. 117

Indonesia v. Malaysia, ICJ Rep. 2002, para. 135

Burden of Proof

- Party that advances a supporting point of fact must establish that fact
- Proof must be with certainty that
 - Claim is sound in law, and
 - Established conclusively the facts

Pedra Branca/Pulau Batu Puteh, ICJ Judgment 2008, para. 45

Pedra Branca/Pulau Batu Puteh, Rao sep. op., para. 3

Effectiveness

- Effectiveness of exercise of sovereignty
 - Evidence should be related to the territory in dispute and not generalized

Eritrea v. Yemen, First Stage Award, 1998, paras. 239-264

Acquiescence

- “Silence may also speak, but only if the conduct of the other State calls for a response.”
- Critical that passing of sovereignty on basis of conduct of Parties must be manifested clearly and without any doubt

Pedra Branca/Pulau Batu Puteh, ICJ Judgment 2008, paras. 121-122

Historical Title

- Specially relevant in determining sovereignty over nomadic lands occupied during time immemorial by tribes who owed allegiance to ruler who extended socio-political power over that geographic area
- Not so re uninhabited islands not claimed to be falling with limits of historic waters

Eritrea v. Yemen, First Award, 1998, para. 123

Military Occupation

- Title can be secured by military occupation if “lawful by reference to the international law of the say”

Eritrea v. Yemen, First Award 1998, para. 147

Evidentiary Value of Maps

- Maps cannot constitute a territorial title
- Maps annexed to an official text of which they form an integral part can acquire legal force
- Otherwise, maps are only extrinsic evidence of varying reliability, which may be used with other circumstantial evidence, to establish the real facts

Kasikili/Sedudu Island, ICJ Rep. 1986, para. 84

Pedra Branca/Pulau Batu Puteh, ICJ Rep. 2008, para. 272

Questions

- Discussion
- Thank you for your attention

jashleyr@yahoo.com