

## IBRU Workshop No. 70: Evidence and Archive Research for Boundary Dispute Resolution

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### Title to territory and the role of evidence in demonstrating title

(i) Sources of title to territory

1. Treaty (legally binding agreement between States)
  - a. The boundary can remain effective even if the treaty is terminated.<sup>1</sup>
  - b. However, boundaries fixed by treaty can be changed, e.g. by a subsequent treaty or by the sovereign State's acquiescence in another State's effective occupation.
  - c. Disputes can arise regarding the interpretation of treaties, requiring fresh negotiations or third-party dispute settlement.
2. Judgment or award (binding decision obtained through third party dispute settlement)
  - a. Arbitration or adjudication requires consent of the parties. Consent can be expressed through, e.g.: (i) agreement in boundary treaty; (ii) general consent to third-party dispute settlement; (iii) special agreement.
  - b. An ambiguous award or judgment can require fresh dispute settlement.
  - c. Other means of dispute settlement involving third parties (e.g. conciliation) do not result in binding decisions.
3. Exercises of sovereign authority over territory:
  - a. *Effectivités* do not automatically create territorial title and their significance will depend on a number of different factors.<sup>2</sup>
  - b. There are two fundamental requirements: (i) acts of sovereign authority; and (ii) intention to act as sovereign.<sup>3</sup>

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<sup>1</sup> *Territorial Dispute (Libya/Chad), Judgment*, ICJ Rep 1994, p. 6 at p. 37, paras. 72–73; *Territorial and Maritime Dispute (Nicaragua v Colombia), Preliminary Objections*, ICJ Rep 2007, p. 832 at p. 861, para 89.

<sup>2</sup> *Frontier Dispute (Burkina Faso/Mali), Judgment*, ICJ Rep 1986, p. 554 at pp. 586–587, para. 63

<sup>3</sup> *Legal Status of Eastern Greenland, Judgment*, 1933, PCIJ, Series A/B, No. 53, p. 22 at pp. 45–46.

- c. As to (i), examples include: (a) the passage of legislation concerning territory;<sup>4</sup> (b) administrative and judicial acts taken in respect of territory;<sup>5</sup> (c) the construction of navigational aids such as lighthouses;<sup>6</sup> (d) military, policing and naval patrolling;<sup>7</sup> (e) the regulation of immigration and/or economic activities such as fishing;<sup>8</sup> and (f) the granting of oil concessions.<sup>9</sup>
- d. As to (ii), whether a State carrying out such activities is a matter to be determined on the facts of each case.<sup>10</sup>
- e. The act of any State official can constitute *effectivités*, although conduct of central government is most persuasive.<sup>11</sup> Acts by private parties generally do not qualify,<sup>12</sup> unless they are done under governmental authority.<sup>13</sup>
- f. The scale of *effectivités* necessary to give rise to sovereignty depends on the character of the territory in question.<sup>14</sup>
- g. In some circumstances, sovereignty based on *effectivités* will also require acquiescence or recognition by another State. Title can be transferred through acquiescence.<sup>15</sup>
- h. Must consider the “critical date” when the dispute “crystallised”. Conduct *before* the critical date is relevant and should be taken into account in resolving the sovereignty dispute. Conduct *after* the critical date will generally be irrelevant except: (i) where the acts in question “are a normal continuation of prior

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<sup>4</sup> *Legal Status of Eastern Greenland, Judgment*, 1933, PCIJ, Series A/B, No. 53, p. 22 at p. 48; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment*, ICJ Rep 2002, p. 625 at p. 684, para. 145.

<sup>5</sup> *Minquiers and Ecrehos (France/United Kingdom), Judgment*, ICJ Rep 1953, p. 47 at p. 65; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment*, ICJ Rep 2007, p. 659 at p. 771, para. 170; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment*, ICJ Rep 2012, p. 624 at p. 655, para. 80.

<sup>6</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment*, ICJ Rep 2001, p. 40 at pp. 99–100, para. 197.

<sup>7</sup> *Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan (India/Pakistan) (1968) XVII RIAA 1 at p. 558.*

<sup>8</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment*, ICJ Rep 2007, p. 659 at p. 771, para. 170; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment*, ICJ Rep 2012, p. 624 at p. 655, para. 80.

<sup>9</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment*, ICJ Rep 2007, p. 659 at p. 771, para. 170

<sup>10</sup> *Minquiers and Ecrehos (France/United Kingdom), Judgment*, ICJ Rep 1953, p. 47 at pp. 70–71.

<sup>11</sup> *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits*, ICJ Rep 1962, p. 6 at p. 30.

<sup>12</sup> *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment*, ICJ Rep 2002, p. 625 at p. 683, para. 140 (fishing); *Kasikili/Sedudu Island (Botswana v. Namibia), Judgment*, ICJ Rep 1999, p. 1045 at pp. 1105–1106, para. 98 (agriculture); *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua Intervening), Judgment*, ICJ Rep 1992, p. 351 at p. 400, para. 66 (habitation).

<sup>13</sup> *Island of Palmas (Netherlands v. USA) (1928) 2 RIAA 831 at p. 858; Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment*, ICJ Rep 2008, p. 12 at p. 25, para. 21.

<sup>14</sup> *Legal Status of Eastern Greenland, Judgment*, 1933, PCIJ, Series A/B, No. 53, p. 22 at p. 46; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment*, ICJ Rep 2002, p. 625 at pp. 682, 685, paras. 134, 148.

<sup>15</sup> *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment*, ICJ Rep 2008, p. 12 at pp. 50–51, para. 121.

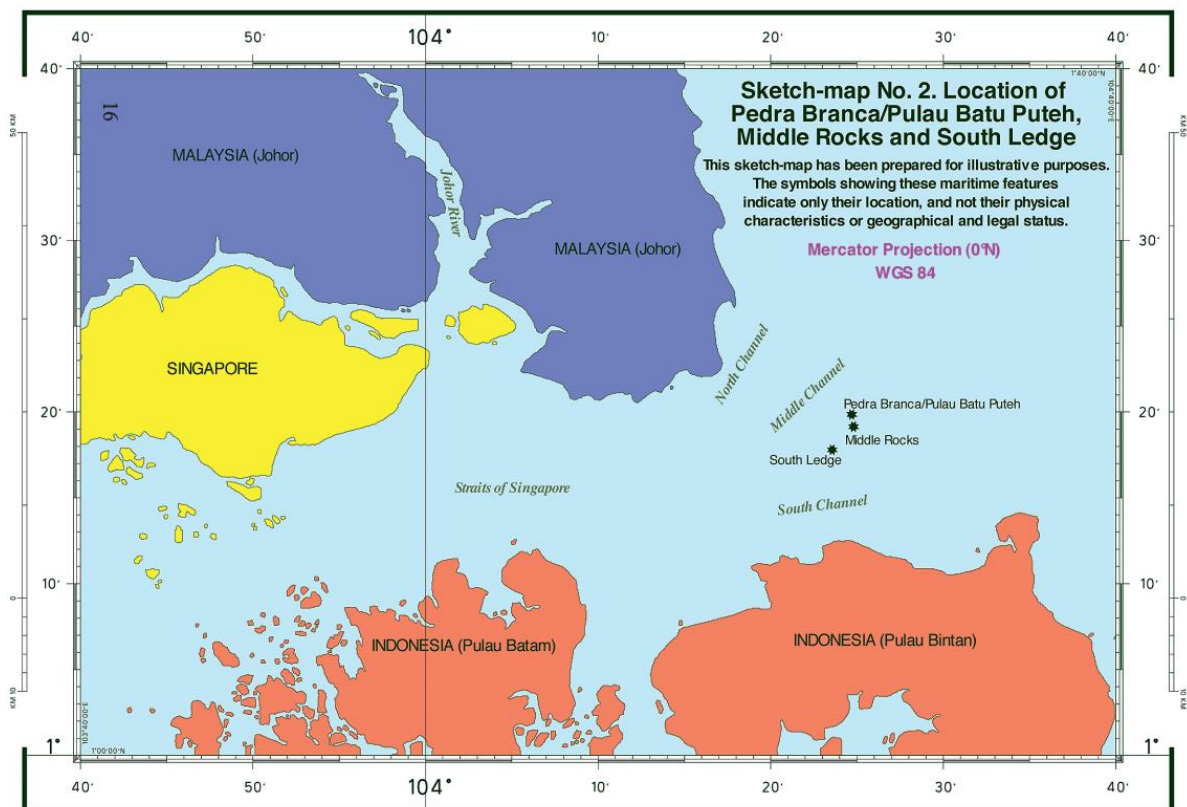
acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them”;<sup>16</sup> and/or (ii) they are not self-serving.

(ii) The significance of evidence in demonstrating title

4. Treaty: focus on what the drafters intended, including with reference to: (i) documents exchanged in or recording negotiations; (ii) state of scientific, technical and geographical knowledge at the time; (iii) different language versions.
5. Judgment or award: focus on precisely what the court or tribunal was asked to resolve, what arguments the parties advanced and what evidence was presented.
6. Effectivities: obtain primary source material.

(iii) Key types of evidence

(iv) Case study: Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, ICJ Rep 2008, p. 12



<sup>16</sup> *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, ICJ Reports 2021, p. 206, p. 237, para. 82.*

## Managing research and building a case

### (i) Coordinating research

7. Define objectives: what is evidence required for?
8. Identify evidence readily available: coordinate across government departments.
9. Identify repositories of additional evidence required: which national archives / libraries / online sources?
10. Identify relevant sources in archives: general vs specific searches
11. Prepare for visit to archives: (i) book slot; (ii) book documents; (iii) prepare your notes.
12. Visit the archives:
  - a. Practical points: (i) reader's card / ID; (ii) leave items in locker; (iii) bring a white piece of paper for sheer pages.
  - b. Pick up pre-placed orders; return once complete.
  - c. Photograph rather than read in detail.
  - d. Record source of all documents.
  - e. Take notes as well as photographs.
  - f. Record follow ups.

### (ii) Evaluating and organising evidence

13. Organising: (i) the documents themselves; (ii) the information from the documents.
14. Evaluating: (i) assess whether meets criteria for *effectivités*; (ii) addressing imperfections in the evidence.

### (iii) Presenting evidence in negotiations and third-party adjudications