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W. J. B. VERSFELT

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PROEFSCHRIFT

TER VERKRIJGING VAN DEN GRAAD VAN DOCTOR IN DE RECHTSGELEERDHEID AAN DE RIJKSUNIVERSITEIT TE UTRECHT OP GEZAG VAN DEN RECTOR-MAGNIFICUS Dr. C. G. N. DE VOOYS, HOOGLEERAAR IN DE FACULTEIT DER LETTEREN EN WIJSBEGEERTE, VOLGENS BESLUIT VAN DEN SENAAT DER UNIVERSITEIT TE VERDEDIGEN TEGEN DE BEDENKINGEN VAN DE FACULTEIT DER RECHTSGELEERDHEID OP VRIJDAG 7 JULI 1933, DES NAMIDDAGS 5 UUR

DOOR

WILLEM JOHAN BERNARD VERSFELT
GEBOREN TE HAARLEM

KEMINK EN ZOON N.V. — OVER DEN DOM — UTRECHT

TO MY WIFE.

CHAPTER I.

GENERAL SURVEY.

A. Exposition of the Case.

1. The Facts.

On April 4th, 1928 the controversy which had been in progress between the United States of America and the Netherlands for over twenty years, relating to differences respecting sovereignty over the Island of Miangas, was brought to an end. On that date, Dr. Max Huber, acting as sole Arbitrator, decided, in conformity with Article 1 of the Special Agreement of January 23, 1925, that the Island of Palmas (or Miangas) forms in its entirety a part of Netherlands territory.

The island in dispute, named Miangas according to the Netherlands and Palmas according to the United States, is situated about 5° 35′ north latitude and 126° 36′ longitude east from Greenwich, between the Talaud Islands (Netherlands East Indies) on one side, and Mindanao (Philippine Islands) on the other side. The distance from Garata, the most northerly of the Nanusa Islands, forming in their turn the most northerly group of the Talaud Islands, is 52 sea miles; the distance from the nearest point of Mindanao, Cape San Augustin, is 48 sea miles.

The island itself is oblong in shape and is about 6½ K.M. in circumference; it rises both in the north and in the south into an elevation or hill. At high tide, part of the island to the north of the southern elevation is inundated, a circumstance which, when the island is seen from a certain angle, produces the effect, that it consists of two smaller islands. The low middle part of the island is formed by a fresh water marsh, covered with sago trees and tuberous plants; its more sandy parts are rich in coconut palm trees; hence probably the Spanish name Palmas (in Portuguese: Palmeiras). On the northern hill are one or two small groves, valuable for their timber.

The number of inhabitants, formerly Mohammedans, afterwards

converted by Protestant Missionaries from the Island of Celebes, amounts to less than 700; the language spoken by the native population is most closely akin to the Talaud language, much more so than to the language of the native population in Mindanao [1]).

According to the statement of D. H. Malone, major of the Philippine Constabulary, who visited the island in June 1919, the only articles of commerce exported from the island are copra and mats. Practically all the copra exported from the island is bought by some Chinese merchants running a small store on the island. According to this official the sanitary conditions are very bad indeed [2]). It is stated, however, by the Dutch Government [3]), that the reports of the Dutch civil officers, who regularly visited the island, are quite different: the death rate on Miangas was in 1924 24 per 1000, which is the same as in Batavia in 1923. The water supply, however, is unsatisfactory in the dry season. According to Major-General Leonard Wood [4]), who visited the island on January 21, 1906, being on a tour of inspection as Provincial Governor of the Moro Province (Mindanao), the island is fertile, and well cultivated; in 1919 Newton D. Baker [5]), the then Secretary for War, esteemed the value of Palmas Island from a military, naval or commercial point of view to be relatively small, an opinion, shared by the United States Agent, Fred K. Nielsen [6]), as appears from his report on May 2, 1928, to the then Secretary of State, Frank B. Kellogg.

By the Treaty of Paris of December 10, 1898, which put an end to the war between the United States of America and Spain, the latter country ceded the Philippine Islands to the former.

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1) Dr. N. Adriani, in "De Indische Gids", 1916, I, p. 221, states: Miangas speaks the Talaud language and the Philippine languages spoken north of this island are neither used nor understood on the latter, although they are fairly closely related to the Talaud language.
2) U. S. Mem. p. 208; U. S. Count. Mem. p. 108.
3) Neth. Count. Mem. p. 78.
4) Neth. Count. Mem. p. 83.
5) U. S. Count. Mem. p. 106.
6) The Island of Palmas Arbitration. Report of Fred. K. Nielsen, p. 1.

Article III of the treaty reads as follows [7]):

Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line:

A line, running from West to East, along or near the twentieth parallel of north latitude, and through the middle of the navigable channel of Bachi, from the one hundred and eighteenth (118th) to the one hundred and twenty-seventh (127th) degree meridian of longitude East of Greenwich, thence along the one hundred and twenty-seventh (127th) degree meridian of longitude East of Greenwich to the parallel of four degrees and forty-five minutes (4° 45′) north latitude, thence along the parallel of four degrees and forty five minutes (4° 45′) north latitude to its intersection with the meridian of longitude one hundred and nineteen degrees and thirty-five minutes (119° 35′) East of Greenwich, thence along the meridian of longitude one hundred and nineteen degrees and thirty-five minutes (119° 35′) East of Greenwich to the parallel of latitude seven degrees and forty minutes (7° 40′) north, thence along the parallel of latitude of seven degrees and forty minutes (7° 40′) north to its intersection with the one hundred and sixteenth (116th) degree meridian of longitude, East of Greenwich, thence by a direct line to the intersection of the tenth (10th) degree parallel of north latitude with the one hundred and eighteenth (118th) degree meridian of longitude East of Greenwich, and thence along the one hundred and eigteenth (118th) degree meridian of longitude East of Greenwich to the point of beginning.

The United States will pay to Spain the sum of twenty million dollars ($ 20,000,000) within three months after the exchange of the ratifications of the present treaty.

Undoubtedly the Island of Miangas is included within the lines of demarcation traced by the contracting parties. The United States, on February 3, 1899, communicated the Treaty of Paris

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7) U. S. Mem. p. 4.

to the Netherlands; no formal reservations were, however, made by the latter Power, in respect to the delimitation of the Philippines in article III of the said treaty. Both the litigant Powers and the Arbitrator are of the opinion, that the dispute did not arise at the moment of this notification [8]); the United States Government, as successor to the Spanish title, claim sovereignty over the island from the moment of cession (ratification of the treaty), whereas the Dutch claim that they have exercised sovereignty there for over 200 years and that they still continue to do so.

The litigant Powers, however, esteem that the conflict only arose in 1906. On January 21st of that year a visit was paid to the island by Major-General Leonard Wood, who was much surprised to find the Dutch flag flying, both on shore and on a boat which came out to meet him. "As far as I could ascertain", runs his report from Zamboanga, January 26, 1906, to the military secretary U.S. Army [9]), "the Dutch flag has been there for the past fifteen years, one man said he thought it had always been there. — The people trade with the Philippine Islands and appear to have little communication with the Celebes, except through the annual visit of a Dutch ship." On March 31, 1906, the United States Ambassador at The Hague inquired of Her Majesty's Government what was its understanding as to its status in the territory referred to: a copy of Major-General Wood's letter, "relative to the ownership of Palmas Island" was enclosed [10]). In a note of October 17, 1906, from the Netherland's Ministry for Foreign Affairs to the American Legation at the Hague, it was stated on several grounds that the Island of Palmas or Miangas forms a part of the Netherlands possessions and that naturally Spain could not cede an islet which had never formed a part of the Spanish territory and over which Spain has never exercised any right of suzerainty [11]). The diplomatic correspondence proceeded until January 23, 1925, when on the basis of the existing Arbitration Convention of May 2, 1908,

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8) Prof. F. de Visscher is of a different opinion. Revue de Droit Int. et de Lég. Comp., 1929, p. 738.

9) Neth. Count. Mem. p. 83.

10) id.

11) U. S. Mem. p. 135.

last renewed on February 13, 1924, the Special Agreement was concluded, by which the United States of America and Her Majesty the Queen of the Netherlands agreed to refer the decision of the difference to the Permanent Court of Arbitration at The Hague. Dr. Max Huber, of Zurich, member of this Court, having been asked, whether he would be disposed to accept the mandate to act as sole arbitrator under the Special Agreement of January 23, 1925, informed the Parties that he was willing to accept the task. This decision was delivered, as has already been stated, on April 4, 1928.

The United States arguments

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 only by reliable cartographers and authors, but also by treaty, in particular the Treaty of Münster of 1648, to which Spain and the Netherlands are themselves contracting parties. The Treaty of Münster of January 30th 1648, by which a state of peace was established between Spain and the States-General of the United Provinces of the Netherlands deals in article V with the territorial relations between the two Powers as regards the East- and West Indies. This article provides a solution of the territorial question on the basis of actual possession. (.... Et un chacun, sçavoir les susdits Seigneurs Roy & Estats respectivement demeureront en possession et jouiront de telles Seigneuries, Villes, Chasteaux, Forteresses, Commerce & Pays és Indes Orientales & Occidentales, ... que lesdits Seigneurs Roy & Estats respectivement tiennent et possedent ....). As nothing has occurred of a nature which, at international law, would cause the acquired title to disappear, this title was still intact when by the Treaty of Paris 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 over the Island of Miangas itself. The United States Government finally maintains, that the island 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. The claim of the United States to sovereignty over the Island of Miangas, is thus

derived from Spain by way of cession under the Treaty of Paris and is based on the titles of discovery, of recognition by treaty and of contiguity, i.e. titles relating to acts or circumstances, leading to the acquisition of sovereignty.

The Netherlands arguments

According to the Netherlands Government, on the other hand, the fact of discovery by Spain is not proved, nor yet any other form of acquisition, and even if Spain had at any time had a title, such title had been lost; in the Netherlands view the principle of contiguity is open to dispute. The Netherlands Government argue, that the Netherlands, represented for this purpose in the first period of colonization by the East-India Company, have possessed and exercised rights of sovereignty since 1677, or probably even from a date prior to 1648, up to the present day. This sovereignty arose out of conventions, concluded with the native princes of the Sangi Islands, establishing the suzerainty of the Netherlands over the territories of these princes, including the Island of Miangas. In the submission of the Netherlands, this claim, founded on a title of continuous and peaceful display of state authority over the island, prevails in international law, over a title of acquisition of sovereignty, not followed by actual display of state authority.

2. The Award.

"It is evident", the Arbitrator remarks [12]), "that Spain could not transfer more rights than she herself possessed, ... it would seem, that the cessionary Power never envisaged, that the cession, in spite of the sweeping terms of Article III of the Treaty of Paris, should comprise territories, on which Spain had not a valid title, though falling within the limits, traced by the treaty. This article may, however, be considered as an affirmation of sovereignty on the part of Spain as regards the island".

The notification

"The essential point is, whether the Island of Palmas (or Miangas) at the moment of the conclusion and coming into force of the Treaty of Paris formed a part of the Spanish or the Netherlands territory. If at that moment the Netherlands had a perfect title to

12) Award, p. 22.

sovereignty over the island, such sovereignty could not be affected by the mere silence of the territorial sovereign as regards a treaty which has been notified to him and which seems to dispose of a part of his territory. If she had not, only then the question would arise, whether — and, if so, how — the conclusion of the Treaty of Paris and its notification to the Netherlands might have interfered with the rights which the Netherlands or the United States of America may claim over the island in dispute" [13]).

The United States arguments

This condition having been stated, the Arbitrator proceeds to consider the United States arguments.

a. The study of the adduced documents leads to the result, that for the purpose of the present affair it may be admitted that the original title derived from d i s c o v e r y belonged to Spain. The effect of discovery is to be determined by the rules of international law in force in the first half of the 16th century. Did discovery at that time create a definite title to sovereignty or only an inchoate title? The Arbitrator apparently hesitates and consequently both possibilities are considered. In regard to the first hypothesis Judge Huber states, that international law in the 19th century laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective. Therefore a title of acquisition which is no longer recognized by existing law cannot at the present time suffice to prove sovereignty, if it is not supported by any subsequent act.

In regard to the second hypothesis, Judge Huber admits, that such an inchoate title exists without external manifestation. According to existing international law such an inchoate title must be completed within a reasonable period by the effective occupation of the region claimed. Even if such an inchoate title still existed in 1898, it could not prevail over a definite title founded on continuous and peaceful display of sovereignty [14]).

b. The title of r e c o g n i t i o n b y t r e a t y does not apply, because even if the Sangi States, with the dependency of Miangas, are to be considered as "held and possessed" by Spain

13) id., p. 22.

14) id., p. 26—28.

in 1648, the rights derived by Spain from the Treaty of Münster would have been superseded by those which were acquired by the Netherlands under the Treaty of Utrecht, for if there is evidence of a state of possession in 1714, concerning the Island of Palmas (or Miangas), such evidence is exclusively in favour of the Netherlands.

The study of the United States documents leads to the conclusion, that there is a complete absence of (effective) Spanish sovereignty over the Island of Palmas [15]).

c. The title of contiguity as a basis of territorial sovereignty has, according to the Arbitrator, no foundation in international law.

The Netherlands arguments

In the opinion of the Arbitrator the Netherlands has succeeded in establishing the following facts:

a. The Island of Palmas (or Miangas) is identical with an island, designated by this or a similar name, which has formed, at least since 1700, successively a part of two of the native states of the Island of Sangi (Talautse Islands);

b. These native states were from 1677 onwards, connected with the East-India Company and thereby with the Netherlands, by contracts of suzerainty, which conferred upon the suzerain such powers as would justify his considering the vassal state as part of his territory;

c. Acts, characteristic of state authority, exercised either by the vassal state or by the suzerain Power in regard precisely to the Island of Palmas (or Miangas) have been established as occurring at different epochs between 1700 and 1898, as well as in the period between 1898 and 1906 [16]).

The conditions for the acquisition of sovereignty by the Netherlands are therefore to be considered as fulfilled.

The Netherlands title of sovereignty, acquired by continuous and peaceful display of state authority, during a long period of time, going probably back beyond the year 1700, therefore holds good [17]).

15) id., p. 36.
16) id., p. 57—58.
17) id., p. 60.

3. Analysis of the Award.

In form the Award is a model of clearness and precision. The body of the Award is divided into three parts: general observations, arguments of the United States, and arguments of the Netherlands. In these three parts questions of substance and form are treated separately. The body is preceded by a chapter on the proceedings and followed by the conclusions, ending with the dictum. The whole is preceded by the Special Agreement of January 23, 1925, by which the difference is submitted to arbitration.

The general observations contain a section dealing with legal doctrine [18]) in which the Arbitrator expounds his conception of territorial sovereignty. It may be stated at once, that this conception is of decisive influence on the Award.

Actual display of state authority

The Arbitrator does not admit the existence of territorial sovereignty which is not actually exercised. On p. 18 of the Award, Judge Huber speaks of "the principle that continuous and peaceful display of the functions of state within a given region is a constituent element of territorial sovereignty", and again on p. 19: "the actual continuous and peaceful display of state functions is in case of dispute the sound and natural criterium of territorial sovereignty".

The Arbitrator, however, only points to the necessity of a display of sovereignty in the event of sovereignty being disputed by an other State: "If a dispute arises, as to the sovereignty over a portion of territory, it is customary to examine which of the States claiming sovereignty, possesses a title — cession, conquest, occupation, etc. — superior to that which the other State might possibly bring forward against it" [19]). In that case the mere title of cession, conquest, occupation, etc. appears to be insufficient of the contestation is based on actual display of state authority: "However, if the contestation is based on the fact that the other Party has actually displayed sovereignty, it cannot be sufficient to establish

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18) id., p. 16—19.
19) id., p. 16.

the title by which territiorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical" [20]) and this can only be shown by the actual display of state activity by the state whose right is contested.

The United States arguments

The title by discovery

First hypothesis

It is evident, that the Arbitrator considers it possible that a definite title, acquired by discovery, may afterwards be lost. This appears from the fact that he hesitates to accept the first hypothesis which we have mentioned.

From a general point of view, apart from the Award, it would seem, that only in one of the three following ways Spain could have lost her title to the Island of Miangas:

1. By abandonment. In this case it must be proved, that Spain has relinquished both the *animus possidendi* and the *corpus*.

As to the *corpus*, it is expressly stated, that Spain withdrew from the Moluccas in 1666, making however, express reservations as to the maintenance of her sovereign rights. In 1677 the Spaniards were, in particular, driven by the East-India Company from Taboekan of which Miangas was a dependency [21]). History only affords scanty information about these facts. Nothing, for instance, is said of the Island of Miangas in particular and it does not appear, that before this time Spain ever exercised authority over the island. It is questionable accordingly, whether Spain ever was in possession of the *corpus*, but if she were, she lost the *corpus* in 1677, when the East-India Company concluded its first treaty with the Sangi princes.

The same holds good as regards the *animus*. It is true, that in 1666 the Spaniards were determined to keep the *animus*, but until the protest made by the United States in 1906, no protest or action of any kind directed against the exercise of territorial sovereignty by the Netherlands is on record. No reference is made to the act of violence above-mentioned in the Treaty of Utrecht of 1714, which, in so

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20) id., p. 16.
21) id., p. 31.

far as Spain and the Netherlands were concerned, afforded a legal basis to the *status quo* of the moment as regards their possessions in the East and West Indies. If Spain had meant to keep her rights of sovereignty over the region in question, she would at that moment have formulated a claim. There is further no trace of evidence that Spain ever on some later occasion, for instance in connection with the territorial rearrangements at the end of the Napoleonic wars, claimed the restitution of territories taken or withheld from her in violation of the treaties of Münster and Utrecht [22]).

That Spain had abandoned the *animus detinendi* is flatly denied by Jessup [23]), who contends, that "Spain exercised a very high order of sovereign authority by a formal cession of the territory"; adding the following reproach: Judge Huber discusses the Treaty of Paris merely from the point of view that Spain could not cede the island if it were not hers. Jessup's argument, however, does not seem quite justifiable. From what has been said on p. 6 it appears, that this affirmation of sovereignty on the part of Spain as regards the island did not escape the Arbitrator's attention. Moreover, it would seem that the act of cession is not amongst those acts which the Arbitrator comprises under display of state activity, as will be shown on p. 30. It may suffice at the moment to state, that territorial sovereignty, according to Judge Huber, involves not only a right, but also a duty, viz. the duty to assure the minimum of protection of which international law is the guardian. A formal act like the cession of the island by the Treaty of Paris, could not be said to fall within the category of acts, providing this assurance. Moreover, in the third place, this act of cession is precisely the point of difference upon which the whole arbitration turns, for only if Spain had the sovereignty over the Island of Miangas in 1898 could she cede it to the United States.

2. By prescription [24]). Still adopting the hypothesis

22) id., p. 32.

23) Am. J. 1928, p. 746.

24) The word prescription is used both by the Parties and the Arbitrator. For this reason, the term is used in this analysis of the Award. In the next Chapter it will be discussed in detail.

that discovery formerly gave a perfect title, Spain could have lost this title, either by extinctive prescription or by acquisitive prescription on the part of the Netherlands. A detailed consideration of the question whether international law recognizes the principle of prescription, is, of course, outside the scope of this monograph. As, however, the principle is appealed to, both by the Parties [25]) and by the Arbitrator [26]), some provisional observations on the subject may not be out of place here:

Assuming that international law recognized the principle of extinctive prescription, the Spanish title, established in the first part of the sixteenth century, would have lapsed. From this it would follow that the Island of Miangas, as Spain never exercised any state activity there, would also have become a *territorium nullius*; however long the delay required in connection with limitation of actions at international law, a period of over two hundred years would at all events be sufficient [27]).

If on the other hand Spain lost her title by means of acquisitive prescription operating on behalf of the Netherlands, in the first place possession must have been taken by the Netherlands in the conviction that sovereignty would thus be acquired. If possession is acquired by a lessor (the contracts of lease with China), if the administration is ceded to another Power (as was the case in Cyprus in 1878 and in Bosnia Herzegovina in the same year) or exercised by a mandatory Power (Art. 22 of the Covenant of the League of Nations), the latter Power can never lawfully acquire sovereignty, however long the full range of sovereign rights be exercised.

In the second place the exercise of sovereignty must have been peaceful and uninterrupted. Whatever the delay which must elapse

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25) Neth. Mem., p. 22; U. S. Count. Mem. p. 84.

26) Award, p. 59.

27) Extinctive prescription was largely discussed by the Institute of International Law, which stated, in its Resolution on Limitation of Actions (1925), that limitation of actions is "a general principle of law, recognized by civilised nations"; the principle is "long accepted in arbitral jurisprudence"; e.g. in the case of the Williams.

for acquisition by prescription in international law [28]), an exercise of state functions contested by a third state, or not continued throughout the whole period, can never lead to the acquisition of sovereignty.

In the third place, possession must have been exercised publicly. It might seem hardly possible that state activity could be displayed without being noticed abroad. This, if anywhere, would be possible in so remote a part of the world as the region between the Philippines and the Dutch East-Indies. In the case of the Island of Miangas, however, the Spaniards were turned out of the Moluccas and as they never asserted their rights, it would seem that Spain is in a weaker position than any other Power to plead the necessity for the public exercice of state functions [29]).

The Arbitrator repeatedly states that the Netherlands exercised state authority and that they did so continuously and peacefully during at least two centuries. It would therefore seem, that this is a case for appeal to *vetustas* or *immemorabilis* rather than to prescription. Subject to this observation, the lapse of the Spanish title can be explained by means of acquisitive prescription operating on behalf of the Netherlands.

The Arbitrator comes back to this point in his conclusions: As to the conditions of acquisition of sovereignty by way of continuous and peaceful display of state authority (so-called prescription),

28) Infra, p. 105.

29) A different question is, of course, whether, again assuming that international law recognizes acquisitive prescription, the same conditions must be fulfilled as in private law. The Arbitrator refers to the conditions of private law on p. 59 of the Award. The question was amply discussed in regard to rule A of Article 4 of the treaty of 1897 in the case of the Venezuela-British Guiana Boundary Arbitration; it was provided: "Adverse holding or prescription during a period of 50 years shall make a good title. The Arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription." It was argued by Venezuela, that time is but one of many elements essential to create title by prescription; and that prescription must be bona fide, public, notorious, adverse, exclusive, peaceful, continuous, uncontested, and maintained under a claim of right (H. Lauterpacht, Private Law Sources and Analogies of International Law, p. 229).

some of which have been discussed in the United States Counter Memorandum, the following may be said:

"The display has been open and public, that is to say that it was in conformity with usages as to exercise of sovereignty over colonial states. A clandestine exercise of state authority over an inhabited territory during a considerable length of time would seem to be impossible". And after having argued that an obligation of notification, as required by the Act of Berlin, does not exist for the Netherlands as regards the contracts, concluded with native princes in 1885 and 1889, Judge Huber continues: "There can further be no doubt that the Netherlands exercised the state authority over the Sangi states as sovereign in their own right, not under a derived or precarious title" [30]).

Nec vi, nec clam, nec precario, have the Netherlands exercised their authority: could it be said more clearly, that the Arbitrator here takes the position that the Netherlands has acquired sovereignty over the Island of Miangas by means of prescription? The Arbitrator has the less difficulty in adopting the hypothesis of prescription because, however long the period required for acquisition by means of prescription, the period from 1700 till 1906 is certainly adequate.

3. By the change of International Law. Again assuming that in former times discovery as such, without any subsequent act, could establish a perfect title to sovereignty, this title may be lost, according to the Arbitrator, in the following way [31]):

> 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.

30) Award, p. 59.
31) id., p. 27.

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 the 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, even if such a title ever conferred territorial sovereignty.

"For these reasons", Judge Huber continues, "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 make take its place, does not arise".

This theory is certainly open to dispute, for its influence would, if it were accepted by State practice, be highly disturbing. Every state would continually have to be considering: does international law still recognize my sovereignty over such or such part of my territory or has it developed new requirements, which I do not now fulfil?

Jessup [32]) formulates his objection as follows:

For the sake of clarity, the principle thus enunciated, may be applied to another state of facts. Assume that state A in a certain year acquires Island X from State B by a treaty of peace, after a war, in which A is the victor. Assume Island X is a barren, rocky place, uninhabited and desired by A only for strategic reasons, to prevent its fortification by another

32) Loc. cit., p. 739.

> Power. Assume that A holds Island X, but without making direct use of it, for two hundred years. At the end of that time suppose that the development of international morality has so far progressed as to change the previous rule of international law, and that the new rule is that no territory may be acquired by a victor from a vanquished at the close of a war. Under the theory of "intertemporal law" as expounded, it would appear that A could no longer have good title to Island X, but must secure a new title upon some other basis or in accordance with the new rule. Such retroactive effect of law would be highly disturbing. Every state would constantly be under the necessity of examining its title to each portion of its territory in order to determine, whether a change in the law had necessitated, as it were, a reacquisition. If such a principle were applied to private law and private titles, the result would be chaos.

It may be recalled once more, that the Arbitrator is still arguing on the hypothesis, that in the 16th century the mere fact of discovery gave a definite title to sovereignty. If international law had not developed the requirement of effective possession, Spain's title, and accordingly the United States title, would have subsisted up to the present day. According, however, to the principles laid down by the Arbitrator in the doctrinal part of the Award and expressing this requirement, Spain has lost her title by not fulfilling it. This, of course, is totally different from the extinction of an existing sovereignty by non-usage and De Visscher seems to be under a misapprehension, when, referring to this doctrine of intertemporal law, he states: C'est un véritable cas de perte de la souveraineté par le non-usage [33]).

Thus, by means of this theory of intertemporal law, the Arbitrator comes to the conclusion, that assuming a definite title conferred by discovery, Spain would in any event have lost it by the time of the cession.

The title of discovery

Second hypothesis

The Arbitrator, however, also takes a second hypothesis and argues as follows [34]):

33) De Visscher, loc. cit. p. 740.

34) Award, p. 27.

If on the other hand, the view is adopted that discovery does not create a definite 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 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.

It has been stated on p. 7, that an inchoate title must, within a reasonable time, be consummated by effective possession. If such possession is not taken, the inchoate title will lapse and the territory, to which it relates, will again be *territorium nullius*. International law, however, has not developed and cannot develop a general rule to fix this period, because the circumstances will differ according to each case. A period that will suffice in one case, will not suffice in another. Accordingly, the Arbitrator takes into account the possibility, that the inchoate title still existed in 1898 and that, consequently, Spain ceded this inchoate title to the island, to the United States.

This is, what Judge Huber has in mind, when he states[35]): "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". But a period of a length such as is here conceived by the Arbitrator, seems at all events excessive. Moreover it is very improbable, that inter-

35) id., p. 60.

national law, on the one hand definitely rejecting the perfect title under the first hypothesis, would under the second hypothesis, allow an inchoate title to subsist. The Arbitrator's view is apparently to be explained by his desire *suum cuique tribuere*.

This lengthy discussion of the Arbitrator's opinion may be summarized as follows:

1. Spain has lost her title to the Island of Miangas as a result of the change in the requirements regarding territorial sovereignty laid down by international law. If Spain's title was a definite title, this title is completely lost. If Spain's title was an inchoate title, it is questionable, whether it still existed in 1898. But even if it existed at that moment, it could not prevail over a title based on effective display of state functions.

2. Apart from this reasoning, based on the theory of intertemporal law, Spain would have lost her title by means of acquisitive prescription operating on behalf of the Netherlands.

The title of Treaty

The United States contends, that its claim based on the fact of discovery, is confirmed in particular by the Treaty of Münster of 1648, to which Spain and the Netherlands were Contracting Parties. Article V of this treaty reads as follows:

> La Navigation & Trafique des Indes Orientales et Occidentales sera maintenuë, selon & en conformité des Octroys sur ce donnés, ou à donner cy-aprés; pour seureté de quoy servira le present Traicté & la Ratification d'iceluy, qui de part & d'autre en sera procurée; Et seront compris sous ledit Traicté tous Potentats, Nations & Peuples, avec lesquels lesdits Seigneurs Estats, ou ceux de la Société des Indes Orientales & Occidentales en leur nom, entre les limites de leursdits Octroys sont en Amitié et Alliance; Et un chacun, sçavoir les susdits Seigneurs Roy et Estats respectivement demeureront en possession et jouiront de telles Seigneuries, Villes, Chasteaux, Forteresses, Commerce & Pays ès Indes Orientales & Occidentales, comme aussi au Bresil & sur les costes d'Asie, Afrique & Amérique respectivement, que lesdits Seigneurs Roy & Estats respectivement tiennent et possedent, en ce compris spécialement les Lieux & Places que les Portugais depuis l'an mil six cent quarante &

un, ont pris & occupé sur lesdits Seigneurs Estats; compris aussi les Lieux & Places qu'iceux Seigneurs Estats cy-aprés sans infraction du present Traicté viendront à conquerir & posseder; Et les Directeurs de la Société des Indes tant Orientales que Occidentales des Provinces-Unies, comme aussi les Ministres, Officiers hauts & bas, Soldats & Matelots, estans en service actuel de l'une ou de l'autre desdites Compagnies, ou aiants esté en leurs service, comme aussi ceux qui hors leur service respectivement, tant en ce Pays qu'au District desdites deux Compagnies, continuent encor, ou pourront cy-après estre employés, seront et demeureront libres & sans estre molestez en tous les Pays estans sous l'obéissance dudit Seigneur Roy en l'Europe, pourront voyager, trafiquer & frequenter, comme tous autres Habitans des Pays desdits Seigneurs Estats. En outre a esté conditionné & stipulé, que les Espagnols retiendront leur Navigation en telle manière qu'ils la tiennent pour le present és Indes Orientales, sans se pouvoir estendre plus avant, comme aussi les Habitants de ce Pays-Bas s'abstiendront de la fréquentation des Places, que les Castillans ont és Indes Orientales.

The Arbitrator, however, does not accept the contention. "However liberal be the interpretation given, for the period in question, to the notions of "tenir" (hold) and "posséder" (possess)", the Arbitrator remarks [36]), "it is hardly possible to comprise within these terms the right arising out of mere discovery; i.e. out of the fact that the island had been sighted. If title, arising from discovery, well-known and already a matter of controversy at the period in question, were meant to be recognized by the Treaty, it would probably have been mentioned in express terms". Moreover, the Arbitrator bases his opinion on the following consideration: "It must be remembered that Article V provides not merely a solution of the territorial question on the basis of possession, but also a solution of the Spanish navigation question on the basis of the *status quo*. Whilst Spain may not extend the limits of her navigation in the East-Indies, nationals of the Netherlands are only excluded from "places" which the Spaniards hold in the East-

36) id., p. 30.

Indies. Without navigation there is no possibility of occupying and colonizing regions as yet only discovered; on the other hand, the exclusion from Spanish "places" of Netherlands navigation does not admit of an extensive interpretation. For these reasons", the Arbitrator concludes, "a title based on mere discovery cannot apply to the situation considered in Article V as already established".

The question is rather, which of the two parties was at the moment of the conclusion of the Treaty of Münster in possession of the island, for this is, according to the article, the criterium. The United States consequently tries very hard to prove that at that date Spain was in possession of the island. She makes it probable indeed, that the island came into Spanish possession in 1606. But in 1677 the Spaniards were driven by the Dutch from Taboekan, to which the Island of Miangas, with the Nanusa and Talauer Islands belonged. "It may be considered as not unlikely", the Arbitrator states [37]), "that Miangas, in consequence of its ancient connection with the native state of Taboekan, was in 1648 at least in direct possession of Spain. However, this point has not been established by any specific proof".

But all this is, according to the Arbitrator, of no importance, for on June 26, 1714, a new Treaty of Peace was concluded, in which again the *status quo possessionis* at that moment was taken as the criterium. Article X stipulates that the Treaty of Münster is maintained in so far as not modified and that the above quoted Article V remains in force as far as it concerns Spain and the Netherlands.

The wording of Article X of the Treaty of Utrecht is as follows:

> Le Traité de Munster du 30 janvier 1648 fait entre le feu Roi Philippe 4 & les Seigneurs Etats Generaux, servira de base au présent Traité, & aura lieu en tout, autant qu'il ne sera pas changé par les Articles suivants, & pour autant qu'il est applicable, & pour ce qui regarde les Articles 5 et 16 de ladite Paix de Munster, ils n'auront lieu qu'en ce qui concerne seulement lesdites deux hautes Puissances contractantes & leurs Sujets.

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37) id., p. 31.

It thus appears, that the argument put forward by the United States to prove her right, operates against her: the Treaty of Münster does not confirm the Spanish title, but the Treaty of Utrecht confirms the Netherlands title.

Accordingly it appears that the Treaty of Münster and at all events that of Utrecht would have constituted facts of a nature to cause the acquired title to disappear if really such title had been previously established by discovery. And the Arbitrator is justified in saying: "It is, therefore, unnecessary to consider, whether subsequently Spain by any express or conclusive action, abandoned the right, which the said treaties may have conferred upon her in regard to Palmas (or Miangas)" [38]).

The title of contiguity

The United States, however, have another argument: "The United States finally maintains", the Arbitrator states [39]), "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".

It is to be observed that the distance from the island to the nearest point of American territory is about 48 sea-miles, whereas that to the nearest point of Netherlands territory is 52 sea-miles, so that the United States have scarcely more justification for appealing to the principle of contiguity than the Netherlands. But it is not on this ground that the claim based on this principle is rejected by the Arbitrator [40]):

> Although States have in certain circumstances maintained that islands relatively close to their shores, belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters, should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish

38) id., p. 33.
39) id., p. 14.
40) id., p. 39.

such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even Governments of the same State have on different occasions maintained contradictory opinions as to its soundness. 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. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results.

This would be especially true in a case such as that of the island in question, which is not relatively close to one single continent, but forms part of a large archipelago in which strict delimitations between the different parts are not naturally obvious.

Having dealt with the Arbitrator's views upon the arguments of the United States, it remains to consider what he has to say concerning the Netherlands' arguments.

The Netherlands argument

Acquisition of Sovereignty

"The Netherlands Government's main argument", Judge Huber points out [41]), "endeavours to show that the Netherlands, represented for this purpose in the first period of colonization by the East-India Company, have possessed and exercised rights of sovereignty from 1677, or probably from a date prior even to 1648, to the present day. This sovereignty arose out of conventions entered into with native princes on the island of Sangi (the main island of the Talautse (Sangi) Isles), establishing the suzerainty of the Netherlands over the territories of these princes, including Palmas

41) id., p. 15.

(or Miangas). The state of affairs thus set up is claimed to be va'idated by international treaties".

The native princes to whom the Arbitrator refers, are those of Taboekan, Taroena and Kandahar-Taroena. Contracts, the text of which are filed in the Netherlands memorandum, were concluded in 1677, 1697, 1720, 1758, 1828, 1885 and 1899. These principalities, at any rate since 1885, include the Nanusa Islands and, according to the Netherlands, the Island of Miangas also. The contracts are of an eminently political nature and based on the conception that the Prince received his principality as a fief of the East-India Company in the 17th and 18th centuries and after 1795 of the Dutch State. The Arbitrator says: "The fact that these contracts were renewed from time to time and appear to indicate an extension of the influence of the suzerain, seems to show that the regime of suzerainty has been effective", and he concludes [42]): "there is here a manifestation of territorial sovereignty normal for such region".

Having stated this, the Arbitrator proceeds to consider the two following questions:

Was the Island of Palmas (or Miangas) in 1898 a part of territory under Netherlands sovereignty?

Did this sovereignty actually exist in 1898 in regard to Palmas (or Miangas) and are the facts proved which were alleged on this subject?

At first sight the former question is by no means clear, for the answer to it would seem to cover the whole issue between the United States and the Netherlands regarding the Island of Miangas. The Arbitrator's meaning is only clear if we bear in mind the principles laid down by him regarding territorial sovereignty in the section of the Award dealing with doctrine. The same questions might be put in the following form:

Had the Netherlands in 1898 a title to the Island of Miangas?

Was this title supported by the exercise of state authority by the Netherlands?

The main point consequently is, whether there is evidence of

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42) id., p. 42.

the continuous and peaceful display of state activity by the Netherlands in the contested region. There are, however, two preliminary points to be considered in regard to which the Parties put forward different views:

1. The United States contests the power of the East-India Company under international law validly to act on behalf of the Netherlands, in particular by concluding so-called political contracts with native rulers;

2. The identity or non-identity of the island in dispute with the island to which the allegations of the Netherlands as to display of sovereignty, would seem to relate.

Status of East-India Company

As to the first point (for the second point see Chapter III) the Arbitrator remarks [43]), that "acts of the East-India Company, in view of occupying or colonizing the regions at issue in the present affair, must, in international law, be entirely assimilated to acts of the Netherlands State itself ... Article V of the Treaty of Münster and consequently also the Treaty of Utrecht clearly show that the East- and West-India Company were entitled to create situations recognized by international law: for the peace between Spain and the Netherlands extends to "tous Potentats, nations et peuples" with whom the said companies, in the name of the States of the Netherlands, "entre les limites de leursdits Octroys sont en Amitié et Alliance". The conclusion of conventions, even of a political nature, was, by Article XXXV of the Charter of 1602, within the powers of the Company". "These conventions are not", Judge Huber continues, "in the international law sense, treaties or conventions capable of creating rights and obligations, such as may, in international law, arise out of treaties. But, on the other hand, contracts of this nature, are not wholly void of indirect effects on situations governed by international law; if they do not constitute titles in international law, they are none the less facts of which that law must in certain circumstances take account".

Character of political contracts

As to the character of such a contract, the Arbitrator says [44]):

43) id., p. 44.
44) id., p. 44.

"It is a question for decision in each individual case whether a contract, concluded by the Company, falls within the range of simple economic transactions or is of a political and public administrative nature", and continues [45]): "in substance, it is not an agreement between equals; it is rather a form of internal organisation of a colonial territory, on the basis of autonomy for the natives". The Arbitrator "can therefore not exclude the contracts invoked by the Netherlands from being taken into consideration in the present case" [46]).

Netherlands display of State activity

Having considered these preliminary points, the Arbitrator turns his attention to the documentary evidence laid before him by the Netherlands Government in support of their claim. After a careful consideration of the facts alleged by this Government, the Arbitrator states that [47]) "this documentary evidence .... leads to the conclusion that the Island Palmas (or Miangas) was in the early part of the 18th century considered by the Dutch East-India Company as a part of their vassal-State of Taboekan".

A report of the governor of Menado, dated December 31, 1857, mentions the Nanusa and "Melangis" Islands as part of Taroena, a state of things maintained in the contracts of 1885 and 1899. A transfer must evidently have taken place between 1825 and 1857. "From the point of view of international law", the Arbitrator remarks [48]), "the transfer from one to another vassal-State is to be considered as a purely domestic affair of the Netherlands; for their suzerainty over Taboekan and Taroena goes back far beyond the date of this transfer".

There is a considerable gap in the documentary evidence in the period between 1726 and 1825 so far as concerns not the vassal-State of Taboekan in general, but Miangas in particular, and the Arbitrator is fully justified in stating [49]): "It would however seem that before 1895 the direct relations between the island and the colonial administration were very loose". Several instances of the display of state authority are, on the contrary, alleged by the

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45) id., p. 45. 46) id., p. 46. 47) id., p. 51.
48) id., p. 52. 49) id., p. 53.

Netherlands in the period from 1895 to 1906, when the dispute arose. As to this point the Arbitrator says[50]): "but apart from the consideration that the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period. It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date, 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 .... It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of state control. This is particularly the case, if sovereignty is acquired by the establishment of the suzerainty of a colonial power over a native State, and in regard to outlying possessions of such a vassal-state".

The Arbitrator then carefully examines, whether there is any evidence which would establish any instance for display of sovereignty over the island by Spain or another Power, such as might counter-balance or annihilate the manifestations of Netherlands sovereignty and whether the display of state authority might not be legally defective and therefore unable to create a valid title of sovereignty. Both questions being answered in the negative, the Arbitrator concludes that the Netherlands title holds good.

Corroboration of Conclusion

It is characteristic of the scrupulousness of the Arbitrator that, having ended his task, Judge Huber states[51]): "The same conclusion would be reached, if, for arguments sake, it were admitted that the evidence laid before the Tribunal ... dit not — as it is submitted by the United States — suffice to establish continuous and peaceful display of sovereignty over the island of Miangas". If neither of the Parties had succeeded in establishing its claim, the decision of the Arbitrator would have to be founded on the

50) id., p. 58.
51) id. p. 60.

relative strength of the titles invoked by each Party, since, according to the Special Agreement (Article I), it is presupposed for the purpose of the arbitration, that the island can only belong in its entirety either to the United States or to the Netherlands and (Preamble of the Special Agreement) a *non liquet* is not desired. In this case the same conclusion would be reached, for the acts in the years immediately preceding the rise of the dispute

> "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. Such inchoate title, based on display of state authority, would, in the opinion of the Arbitrator, prevail over an inchoate title derived from discovery, especially if this latter title has been left for a very long time without completion by occupation; and it would equally prevail over any claim which, in equity, might be deduced from the notion of contiguity. International law, like law in general, has the object of assuring the coexistence of different interests which are worthy of legal protection. If, as in the present instance, only one of the two conflicting interests is to prevail, because sovereignty can be attributed but to one of the Parties, 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".

This conclusion is again wholly in accordance with the principles of territorial sovereignty, as laid down by the Arbitrator. Supposing that the Netherlands had only an inchoate title in 1898, it would remain to be seen whether some third Power had not a perfect title to the island. As already stated, no trace of any action calculated to confer such a title is found in the evidence submitted to the Tribunal. In these circumstances however the validity of the Netherlands title could hardly be regarded as valid *erga omnes*.

B. Territorial Sovereignty and its Title.

1. Territorial Sovereignty.

The State and its Territory

In the previous paragraph, we have several times had occasion to refer to the weight assigned by the Arbitrator to the effective display of state functions in regard to the establishment of a title to sovereignty. In order fully to understand this the question of the relation between a State and its territory must be considered more closely. This question can in fact be considered from different points of view; it has even been said that in international law there are as many opinions concerning this relation as there are authors who deal with the subject [1]); or again: there are as many juridical definitions of territory as there are theories or even tendencies as regards the conception of the State [2]).

Three main trends of opinion, however, may be noticed:

Right of sovereignty

The patrimonial conception of the State considers the relation of the State to its territory analogous to the relation between subject and object. In this theory this relation is identical with or analogous to the private law right of property. "It is a convenient and not wholly arbitrary rule of international jurisprudence to regard the territory of the State as something distinct from the State itself, and to treat it as if it were national property possessed by the State in much the same way that property in land is held by individual citizens within the State" [3]). To the like effect Hyde [4]): "The existence of an exclusive right of property and control over territory necessarily implies the existence of a possessor whose capacity to possess is recognized by the family of nations". In its strictest sense this theory is taken up by Donati [5]), who points out that the right of a State to its territory "constitutes a right of property in the strictest sense of the word". According to this author

1) Cavaglieri, Recueil des Cours A.D.I., 1929, p. 384.
2) L. Delbez, Du Territoire dans ses Rapports avec l'Etat. Revue Gén. de Droit Int. Public. 1932, p. 711.
3) Fenwick, p. 219.
4) Ch. Ch. Hyde, vol. I, p. 162.
5) D. Donati, Stato e territorio; p. 59—60.

the State is the owner of the whole of the territory and consequently also of the part owned by a private individual, but only in relation to other States; State-ownership therefore is co-existent with and cannot clash with individual property rights. This view is shared by Gemma [6]): "We can therefore say that every State has in its own territory in relation to other States, a right of a real nature, either in the strict meaning of a *jus in re*, or in the more absolute sense of an exclusive right of state activity exercised *erga omnes*", and especially by Cavaglieri [7]): "We believe that the right of the State in its territory is a right of a real nature, a *dominium*, the nature and the effects of which belong to the domain of public law. This right covers the whole territory conceived as a unit and therefore has nothing to do with the proprietary right exercised by individuals within the sphere of private law over parts of the same territory". It has been remarked [8]), that this theory is in accordance with the terminology of treaties, and excellently explains a certain number of institutions of international law (cessions of territory, servitudes, condominium) but that it is inadequate from the point of view of internal law (federal State, colonies).

In contradistinction with this theory, which considers the territory as the object of the State, another theory, of which G. Jellinek is the main exponent, considers the territory as one of the constitutive elements of the State. In this view the territory is the State itself, considered within its territorial limitation. The relation of the State to its territory corresponds to that between an individual and his body; "Le territoire ne fait pas partie de l'avoir de l'Etat, mais de son être" [9]). An individual may lose his patrimony, he remains none the less a subject of law as before. A State which lost its territory would disappear. According to this view the authority exercised in the State is not *dominium*, but *imperium*; it can only be exercised in relation to the individual.

According to the third opinion the territory of a State is that

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6) Gemma, Appunti di diritto internazionale; p. 180.
7) Cavaglieri, loc. cit. p. 385.
8) Delbez, loc. cit. p. 711, note.
9) Carré de Malberg, quoted from Delbez.

portion of the globe's surface within which its authority is valid. According to this view the State is a bundle (faisceau) of objective rights, derived from the national constitution or from some superior law, and its jurisdiction extends only within the frontiers of the territory. But a State cannot fix its frontiers by a unilateral act, as in so doing it would also fix the limits of other States. A frontier also derives its characteristics from international law; "by fixing the frontiers of a State international law likewise gives it its title to jurisdiction" [10]).

Be this as it may, the value of these opinions is mainly theoretical. What they have in common is the great importance assigned to the territory and to its frontiers in connexion with the exclusive jurisdiction of the local State as regards the exercise of State authority.

This in fact is also the point of departure of the Arbitrator in the doctrinal part of the Award, where the principles of territorial sovereignty are laid down. "Territorial sovereignty", it is stated on p. 17, "involves the exclusive right to display the activity of a State". "This right", the learned Arbitrator continues, "has as corrollary a duty: the obligation to protect within the territory the rights of other States, in particular the right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfill this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States, for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian".

Duty of sovereignty

Now it is evident that the three different trends of opinion above-mentioned in regard to the relation of a State to its territory only explain a right on the part of the State, viz. the right to exclude other States, but say nothing of the duty to which the

10) Bourquin, qouted from Delbez.

Arbitrator refers. It seems that the problem of the relation between a State and its territory must be looked at from a different angle to explain the Arbitrator's view. The Arbitrator lays down [11]), that the titles on which the United States claim is based, those of discovery, of recognition by treaty and of contiguity, are titles relating to acts or circumstances leading to the acquisition of sovereignty. Now, in general, one of the titles of acquisition of sovereignty over a certain territory is occupation. We may recall here what the Arbitrator says about occupation: International law in the 19th century ... laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective. The Arbitrator concludes from this: it seems therefore incompatible with this rule of positive law that there should be regions 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, even if such a title ever conferred territorial sovereignty. The Arbitrator here extends the requirement as to effectiveness, which is generally recognized in the case of a particular title of acquisition, namely the title of occupation, to titles of acquisition in general.

In fact the same requirement of effectiveness would seem, according to the Arbitrator, to be demanded in a case where the title is acquired by treaty recognition: on p. 33 Judge Huber says: it remains to be seen whether continuous and peaceful display of state authority by any other Power at a later period might not have superseded even conventional rights. And cession presupposes [12]), that the ceding and the cessionary Power or at least one of them, have the faculty of effectively disposing of the ceded territory [13]). As to the question of cession Prof. de Visscher remarks [14]): it does not seem that a conveyance to the cessionary Power is necessary for a transfer of sovereignty; though the question is disputed by jurists, State practice seems to keep to the system whereby transfer is

11) Award, p. 57.

12) id., p. 16.

13) The question, of course, does not arise if the territory is acquired by means of conquest, which presupposes effective seizure.

14) loc. cit. p. 757.

effected by means of the treaty itself. Prof. de Visscher refers to articles 99, 100, etc. of the Treaty of Versailles; Article IV of the convention concerning the cession of the Danish West-Indian Islands of August 4, 1916, may also be mentioned [15]). "As regards effective delivery by the ceding Power, this undoubtedly concerns the execution of its obligations, but cannot be considered as a condition for the validity of the transfer of sovereignty".

It is thus the requirement of effectiveness in the case of occupation, demanded by modern international law, which becomes the guiding principle of the Arbitrator. The reason why effectiveness is required in the 19th century is very clearly indicated by the Arbitrator: "There should be no regions which . . . are reserved for the exclusive influence of one State". It should not be forgotten that the last quarter of the 19th century was the period of the second great colonial expansion. Whereas in the 16th and 17th centuries the principal aim of the developing European States was to assure themselves of territories in which they could exercise a commercial monopoly, and commercial aims thus prevailed, the acquisition of territory, principally in Africa and Oceania, is the aim of the second wave of colonization.

It is true that the opening of new débouchés for the rapidly developing industries is a powerful motive, but political interests are prominent. As this need of expansion is urgent for a number of great Powers, it is certainly true that, theoretically, and from the point of state-morality, regions could not be reserved for the influence of one State. Even if the occupation of *territorium nullius* is thus justified from the point of view of the colonizing Powers, this argument does not suffice to justify colonization from the point of view of the population of the backward territory: the newly colonized territories are inhabited and thus a justification is necessary also as regards the population of these regions. As to the

15) Article IV . . . Formal delivery of the territory and property ceded shall be made immediately after the payment by the United States of the sum of money stipulated in this convention; but the cession with the right of immediate possession is nevertheless to be deemed complete on the exchange of ratifications of this convention without such formal delivery. De Martens III, X, p. 357.

latter point it should not be forgotten that the War of Secession had focussed the attention on the relation with backward peoples. The world becomes conscious, that the advanced peoples have a duty to fulfil as regards backward peoples: the Act of Berlin of 1885 contains some stipulations for the protection of the native African population; from this very moment the consciousness of this duty increases and culminates in Article XXII of the Covenant of the League of Nations, which lays down the principle "that the well-being and development of such peoples form a sacred trust of civilization", whilst safeguards for the performance of this trust are embodied in the same article of the Covenant.

A moral duty

This formula sounds as edifying as the argument, put forward by Fauchille [16]): "Occupation consists, as we know, of the appropriation of territories without a master, either uninhabited or inhabited by a barbarous population without organization. Is it not in accordance with the general interest that these territories should not always remain unproductive, that they should be cultivated and regularly developed, that the fruits they can produce should be produced? Is not occupation a means of attaining this end? Moreover it is a means of bringing civilization to barbarous peoples, of initiating them in the usages and laws of more advanced peoples. An occupation is thus legal, when it leads to such consequences. It would seem that the occupant, in order really to justify occupation, should not confine himself to a taking of possession but should leave a token of his activity".

General interest

This appeal to the "general interest" is taken up by de Visscher [17]): "It is contrary to the general interest that these territories should remain abandoned; the progress of civilization demands that as far as possible all territories and all populations of the globe should be brought under the domination of States capable of ensuring their material and moral development and of establishing effectively the conditions requisite for international juridical inter-

16) Fauchille, I, II. 534.

17) loc. cit. p. 758.

course". This point of view is characterized by this jurist as the "finality" of the right of sovereignty.

A legal duty

If follows from this, that the Arbitrator is fully justified in saying that the right of sovereignty has as corrollary a duty; but according to Judge Huber this duty is not essentially moral, but essentially legal, viz. the duty to protect within the territory the rights of other States, for territorial sovereignty serves to divide between nations the space upon which human activities are employed in order to assure them at all points the minimum of protection of which international law is the guardian.

An appeal to international law as the guardian of a minimum of protection presupposes that the territory in question, *in casu* the Island of Miangas, is inhabited by the subjects of other States or at least one other State. At p. 58 of the Award the island however is referred to as "a small and distant island, inhabited only by natives". Now the affidavit of Major D. H. Malone, filed in the annexes of the United States memorandum, mentions a small store on the island operated by Chinese traders [18]). The affidavit, however, is dated July 8, 1925, and contains a statement concerning conditions on Palmas Island on June 14, 1919. It does not appear from the documents that Chinese subjects inhabited the island in 1906, when the dispute arose, and this is the moment the Arbitrator has to deal with. This, however, seems of but little importance, as the island could be, and in fact was visited by subjects of other States: this appears from the visits of mr. Malone, mr. Alvarez and that of the American gentlemen in 1924, which gave rise to a minor incident [19]).

From the point of view of the "finality" of the right of sovereignty the Arbitrator is certainly justified in extending the requirement of effectiveness, originally demanded only in case of occupation, to other titles of acquisition. A different question is, whether the Arbitrators opinion is supported by positive international law. Before answering this question a preliminary point must be settled.

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18) U. S. Mem. p. 208. Perhaps they were Netherlands subjects?
19) Neth. Mem. p. 20.

We may refer again to Prof. de Visscher's study [20]): "The likelihood of a territory remaining uncultivated or without state organization exists only in the case of certain territories over which the hold (l'emprise) of the civilized world is as yet incomplete or precarious. On the other hand, on the European continent, for instance, such a possibility is practically excluded. Every territory is necessarily placed under the effective authority of one State or another, whether it be that of the rightful sovereign (souverain en titre) or not. The inconveniences resulting from the absence of any real possession need no longer be considered". In this case, "juridical titles reassume their full value in connexion with the decision of controversies regarding sovereignty (au point de vue de la décision des litiges de souveraineté). Simple possession cannot prevail over a title, as the general interest which was the dominating factor in the case previously considered cannot be invoked in this case". But in this system the principle of acquisitive prescription, "nowadays nearly unanimously recognized" [21]), operates as a corrective.

Thus the two conceptions are at variance: that based on the social and economic function of sovereignty prevails in backward territory over that based on respect for the right of the State, whereas in more developed territory the latter prevails over the former. This would certainly supply a guiding principle, if in any controversy regarding territorial sovereignty it were possible *a priori* to decide, whether the region in question was or was not a backward territory. As positive international law has not laid down any objective rule or any criterion for the decision of this point, it seems that de Visscher's distinction can only be accepted with great caution. It must at all events be regretted that de Visscher dit not elaborate the point.

Effective occupation

The question has now to be considered, whether the Arbitrator is justified in extending the requirement of effectiveness, demanded by modern international law in the case of occupation, to other titles of acquisition.

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20) loc. cit. p. 759.

21) The responsibility for this remark remains with Fernand de Visscher.

This view is based on the conception that international law, being a system of law, different from municipal law, has not yet reached such a degree of development as to recognize a nominal right of sovereignty [22]): "Although municipal law, thanks to its complete judicial system, is able to recognize abstract rights of property as existing apart from any material display of them, it has none the less limited their effect by the principles of prescription, and the protection of possession. International law, the structure of which is not based on any superstate organization, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations".

This is certainly true, to a certain extent, in the case of acquisition of territory by means of occupation.

The fundamental principle was laid down by the Act of Berlin in 1885, in Articles XXXIV and XXXV. Chapter VI of this Act bears the title: Déclaration relative aux conditions essentielles à remplir pour que des occupations nouvelles sur les côtes du continent africain soient considérées commes effectives.

Article XXXIV reads as follows:

> La puissance qui, dorénavant, prendra possession d'un territoire sur les côtes du continent africain situé en dehors de ses possessions actuelles, ou qui, n'en ayant pas eu jusque-là, viendrait à en acquérir, et de même la puissance qui y assumera un protectorat, accompagnera l'acte respectif d'une notification adressée aux autres puissances signataires du présent acte, afin de les mettre à même de faire valoir, s'il y a lieu, leurs réclamations;

and article XXXV:

> Les puissances signataires du présent acte reconnaissent l'obligation d'assurer dans les territoires occupés par elles, sur les côtes du continent africain l'existence d'une autorité suffisante pour faire respecter les droits acquis et, le cas échéant, la liberté du commerce et du transit dans les conditions où elle serait stipulée.

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22) Award, p. 17.

The opinion that effectiveness is desirable in the case of occupation was also expressed during the session of the Institut de Droit International in 1888 at which it was proposed to extend the requirements of notification and effectiveness to any occupation in any part of the world, whereas the Act of Berlin restricted these requirements only to occupations on the African coast. In fact, the Act of Berlin contains two more limitations: it only has in view future occupations [23]), not those already effected at the time the Act was signed and it only applies to the Powers signatories of the Act: the resolutions were, for instance, not signed by the United States, although this Power participated at the conference.

F. de Martens [24]) points out, that under those circumstances the practical value of the dispositions of the Act of Berlin is very small, because before the opening of the conference nearly the whole of the African coast had already been occupied. As an example showing that state practice is in accordance with the principle that territorial sovereignty should be effective, the mediation of Pope Leo XIII in 1885, in the controversy between Spain and Germany, concerning the Caroline Islands, is generally invoked [25]); the Pope assigned the sovereignty over the Islands to Spain, subject to the obligation to establish in the group of Islands as soon as possible a regular administration with adequate powers for the maintenance of order and protection of vested rights; Spain's claim was thus recognized, although it would not seem sufficient at the present day. The mediation proves, and in this respect accords with the Act of Berlin, that for the *future* effective occupation is required. On the contrary by the Treaty of March 7, 1885, Great Britain and Germany recognized the sovereignty of Spain over such parts of the Sulu Archipelago as she had occupied effectively: this implies recognition of an already existing principle, that effective occupation creates a title to sovereignty.

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23) Title of the Act: Déclaration pour régler la liberté du commerce dans les bassins du Congo et du Niger, ainsi que les occupations nouvelles de territories sur la côte occidentale de l'Afrique.

24) La Conférence du Congo à Berlin et la politique coloniale des Etats modernes. R.D.I. t XVIII, p.p. 113 and 244.

25) Fauchille I, II, 540; Cavaglieri loc. cit. 410.

The Act of Berlin does not, as is stated above, apply to the interior of the African continent; moreover it recognizes the institution known as a colonial protectorate, established either by a unilateral act of the protecting Power, or by a treaty, concluded by or on behalf of this Power with native chiefs. It had been proposed at the conference to extend the requirement of effective possession to this institution, but mainly as a consequence of the British opposition, this requirement was dropped and mere notification to the other Signatory Powers was considered sufficient, as appears from Article XXXIV, to render the establishment of such a protectorate valid as regards these Powers, which practically means valid *erga omnes*. The fictitious occupation, which the contracting Powers intended to prevent by means of this conference, has thus been legalised.

About the same time a new state practice arises which, it is unanimously held, has no foundation in international law. It is the practice of establishing a hinterland, or a sphere of influence by means of a treaty, by which two Powers each reserve a certain region for their own influence and undertake to refrain from effective occupation, concluding contracts with native chiefs, etc., in the region of the other. Such a regional understanding is, of course, valid only between the contracting Parties and theoretically any third state would be at liberty to acquire sovereign rights over the region or part of it by effective occupation or by concluding contracts with the chieftains. But state practice is, as Cavaglieri remarks [26]), wholly different: "When the two States have notified their convention to third Powers and these have manifested their acquiescence either explicitly or tacitly, or when possible claims of their own have been set off by the concession of other advantages, the delimination becomes effective *erga omnes*".

Cavaglieri thus seems justified in concluding that this rule of the Act of Berlin has not lost its purely conventional character and assumed that of a rule of general law.

Although the desirability of establishing the principle that any future occupation should be effective, was generally recognized at

26) Cavaglieri, p. 411.

the time of the Conference, the result was by no means in accordance.

A similar rule was laid down by the Convention of St. Germain of September 10, 1919. Article 10 of this convention states:

„The Signatory Powers recognize the obligation to maintain in the region subject to their jurisdiction an authority and police forces sufficient to ensure protection of persons and of property and, if necessary, freedom of trade and transit".

There is no article, however, dealing with the conditions to be fulfilled by a State if it acquires possession by means of occupation.

But again the practice of fictitious occupations was adopted and, in fact, is still adopted to a large extent in the case of Polar regions.

State practice

By a decree of November 21, 1924, France placed a part of the Antarctic Continent, Adélie Land, under the administration of the Governor General of Madagascar [27]). According to Article I, Adélie Land and the Antarctic Islands Saint Paul, Amsterdam, Kerguelen and Crozet are attached to the Government-General of Madagascar and form one of the administrative branches of this colony. As appears from the Preamble of the Decree, the requirement of effective occupation is formally maintained but the stipulations of the Decree of March 27, 1924, by which the rights of mining, hunting and fishing within territiorial waters are reserved to French subjects, are not controlled, and if they are infringed, no attempt is made to enforce them. Smedal states [28]), that the distance from the southern point of Madagascar to Adélie Island is about 8000 K.M. "It is self-evident that the Governor-General, even with the best will in the world, cannot exercise any control over this part of Antarctica. No French official, as far as is known, has ever set foot on Adélie Land, nor was the Frenchman Dumont d'Urville, who discovered the land in 1840, and whose discovery is the basis of the French claim, ever ashore on the Antarctic Continent".

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27) "Journal Officiel", Nov. 27, 1924.

28) G. Smedal, Acquisition of sovereignty over Polar Areas; in Skrifter om Svalbard og Ishavet, p. 36.

A considerable number of years before, by Letters Patent of July 21, 1908, and March 28, 1917, South Georgia, the South Orkneys, South Shetland, the Sandwich Islands, Graham Land, and a considerable sector of the Antarctic Continent, were declared to be British and placed under the administration of the Governor of the Falkland Islands.

Again by an Order in Council of July 30, 1923, all islands and territories situated between 160 E. and 150 W. to the 60th degree south latitude were assigned administratively to the Governor-General of New Zealand. According to Smedal, the condition as to effective possession [29]) cannot be fulfilled as regards the greater part of the territories in question. The distance from the Falkland Islands to Graham land is about 1250 K.M., and to the South Pole about 4250 K.M. In this case Great Britain claims land, some of which is quite unexplored, has never been seen by any human being, and about the conditions of which there is no positive information. From the Falkland Islands no control can be exercised over these territories. The distance from Wellington, the capital of New Zealand, to Oatesland, is about 3100 Kilometers; to Ross Barrier about 4200 Kilometers, and to the South Pole about 5500 Kilometers. It is not easy to understand how any of these territories can be efficiently controlled by an administration at Wellington.

Again attention may be drawn to the notification of the Sowiet Government of November 4, 1924, whereby a number of islands, among others Wrangel Island, lying on the Asiatic coast of Russia, within the Siberian sector, are declared to be Russian, and other Powers are warned to keep away [30]).

These cases prove that the principle that occupation should be supported by effective occupation, is not so rigourously applied by modern state practice as the Arbitrator supposes. The Arbitrator does not deny, that manifestations of sovereignty assume different forms, according to conditions of time and place. "The intermittance and discontinuity compatible with the maintainance of the right,

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29) ibid., p. 37.

30) P. G. de Lapradelle; La Frontière, p. 68 note 2.

necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is uncontestably displayed, or again regions accessible from, for instance, the high seas" [31]). The requirement of effective occupation cannot be maintained, it would seem, in the case of an island only temporarely inhabited in view of the collection of guano or for fishing purposes. In 1877 Great Britain annexed Amboyna Cay, and Sprattley Island, and leased these sandbanks, lying in the middle of the Chinese Sea, for the purpose mentioned. The sovereignty of Great Britain, is not contested. The same would seem to hold good in the hypothesis taken by Jessup, mentioned on p. 15. It would thus appear that a title based on the subjective right of a State, would again prevail over a title based on the economic function of a State. From this point of view an award rendered by the King of Italy on January 28, 1931, in the controversy between France and Mexico, concerning Clipperton Island, is very interesting [32]).

Clipperton Island

The sovereignty over the island, lying less than 700 miles southwest of Mexico, was proclaimed and declared to belong to the Emperor Napoleon III on November 17, 1858, by an act, drawn up by Lieutenant Le Coat de Kerwéguen, of the French Navy, commissioner of the French Government, while cruising about half a mile off the island. The accomplishment of the mission was notified to the Consulate of France at Honolulu. The island remained uninhabited or at all events without any permanent population, and the concession for the exploitation of guano beds, which had been approved by the Emperor on April 8, 1858, was not followed up; in 1897 a French vessel stated, that three persons were found on the island, collecting guano and that they had, on the appearance of the vessel, raised the American flag. Explanations were requested from the United States, which responded that it had not granted any concession and did not intend to claim any right of sovereignty over

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31) Award, p. 18.

32) Text, translated into English, to be found in Am. Journal, Vol. XXVI, p. 390.

Clipperton. (January 28, 1898.) Mexico, ignorant of the occupation claimed by France, and regarding Clipperton as territory which had long belonged to her, sent a gun-boat to the island, and a detachment of officers and marines who landed on December 13, 1897, and again found the three persons residing on the island. The American flag was lowered and the Mexican flag hoisted in its place. France, on January 8, informed Mexico of her rights over Clipperton; a diplomatic correspondence ensued, and the solution of the difference was referred to Victor Emmanuel III, King of Italy.

The King assigned the island to France. The Award rejects the Mexican claim on the ground that prior Spanish discovery is not proved, and the right of Mexico, as successor of Spain, is not supported by any manifestation of her sovereignty, a sovereignty never exerted until the expedition of 1897, and it is consequently held that, when France proclaimed her sovereignty over Clipperton, that island was in the legal situation of *territorium nullius*. Mexico maintained alternatively, that France had not carried out an effective occupation, satisfying the conditions required by international law for the validity of this method of territorial acquisition and that she (Mexico) had acquired an original title to the island in 1897. As to this point the King of Italy remarks:

> It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession, is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying State reduces to its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking, and in ordinary cases, that only takes place when the State establishes in the territory itself an organization capable of making its laws respected. But this step is, properly speaking, but a means of procedure to the taking of possession, and, therefore, is not identical with the latter. There may also be cases where it is unnecessary to have recourse to this method. 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.

The Award is approved by Edwin D. Dickinson [33]): "In effect, it is held that the occupation which is required is such an occupation as is appropriate and possible under the circumstances. It is a question of fact. This is a realistic and altogether satisfactory solution from the legal point of view". This may be true, it proves none the less that actual display of sovereignty is not in all cases the sound and natural criterium of territorial sovereignty [34]). According to Judge Hubers doctrine, the only solution possible in this case woud seem either a *non liquet*, or a decision in favour of that Power whose inchoate title is the stronger.

Nominal sovereignty

As the Award is a declaratory one, sovereignty is assigned, *expressis verbis*, to France as from 1858. What is really done here, is to presume a nominal right of sovereignty. This is wholly contrary to Judge Huber's opinion, who states that international law cannot be presumed to reduce a right such as territorial sovereignty, to the category of an abstract right, without concrete manifestations. This statement, it may be recalled, is based on the Arbitrator's view as to a fundamental difference between municipal and international law. The point, which is one of those in regard to which jurists differ fundamentally, cannot be discussed here, as it lies without the scope of this study. It may however be remarked that modern international law, as a consequence of the rapid development of intercourse between states, has of late evolved a complicated system of territorial relations and a great variety of juridical situations was bound to follow. The fundamental axiom of the classical doctrine, viz. the territorial principle, according to which a territory is subject to the exclusive influence of the local state, is nowadays often

33) Am. Journal, Vol. XXVII, p. 133.

34) The Award is, of course, only valid between Mexico and France. If a third Power took possession of the island, built a lighthouse on the place, the guardian of which were assigned police authority, it would be doubtful whether an arbitrator would, if this situation had lasted for some years, in the event of a dispute again decide in favour of France.

partly frustrated by the facts. Delbez states: it is partly set aside (écarté) or even refuted in a certain number of recent institutions, and, according to certain authors, a tendency exists to substitute for the rule of exclusive use that of use in common [35]). Delbez points out that the territorial principle is infringed upon when territorial jurisdiction is shared (atténuations au principe) or when only a nominal jurisdiction is left (renversement du principe). The territorial jurisdiction is shared, in the case of extra-territorial jurisdiction, and in the case of conflicting territorial jurisdictions. It is, however, the second exception, by which an abstract right of sovereignty is created with which we are concerned here.

. Thus in 1878 Great Britain acquired from Turkey the right to occupy and administer the Island of Cyprus; a nominal sovereignty remained with the Sultan. In the same year Austria-Hungary acquired the right to occupy and administer the Turkish Provinces of Bosnia-Herzogowina for an unlimited period. Article 25 of the Treaty of Berlin was only signed by the Turkish delegates when they were satisfied that the occupation was to be provisional and not to affect the sovereign rights of the Sultan. The famous letter of the Austrian Emperor of October 5, 1908, declared that the Emperor extends his rights of sovereignty over Bosnia and Herzogowina. In 1883, by Article 3 of the Treaty of Ancon, Chile was to occupy the Peruvian Provinces of Tacna and Arica for ten years from the ratification of the Treaty in 1884, "upon the expiration of which term (expirado este plazo!), a plebiscite will decide by popular vote whether the territory . . . is to remain definitely under the dominion and sovereignty of Chile or is to continue to constitute a part of Peru". Other striking examples of sovereignty as a *nudum jus* are the leases garanted by China to Germany, Russia, England and France in 1898 and 1899. According to these treaties China retained *expressis verbis* the sovereignty over the leased territories; the exercise of her sovereign rights was left to the lessee, as appears from for instance Article 3 of the

35) Delbez loc. cit. p. 705, where G. Scelle is quoted (Précis de droit des gens. Principes et systématique, p. 77): The use of a territory is never exclusive and the evolution of international relations trends more and more to a use in common.

Shantung Treaty with Germany which contains the following words: "um einem etwaigen Entstehen von Konflikten vorzubeugen". To the like effect was the treaty between China and Russia of March 27, 1898, by which Port Arthur and Talienwan with Kwantung were leased to the latter Power for 25 years. Article 1 states, that "this act of lease, however, in no way violates the sovereign rights of H.M. the Emperor of China to the above mentioned territory". That this *nudum jus* is by no means merely formal and that these leases are not, as has been said [36]), simply disguised cessions, is proved by the fact that China exercised her right of sovereignty in a treaty with Japan in 1905, by giving her consent to the conveyance of the territory from Russia to Japan. Again in 1915 China gave her consent to the extension of the term of the lease to 99 years.

The creation of *nuda jura* of sovereignty was not restricted to the old world; in fact article 3 of the Hay-Varilla Treaty of November 18, 1903, between the United States of America and Panama, by which the latter Power granted to the former in perpetuity a zone of territory for the purpose of constructing a canal across the Isthmus of Panama, runs: The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article 2 . . . which the United States would possess and exercise if it were the sovereign of the territory . . . to the entire exclusion of the exercise by the republic of Panama of any such sovereign rights, power and authority. And in the same year the United States of America leased to the same effect lands from Cuba for the construction of coaling and naval stations [37]).

It was, however, after the Great War, that a number of arrangements were instituted whereby the sovereignty over a certain territory was assigned to one State, whereas the exercise of sovereign rights was assigned to another. The Treaty of Sèvres provides a provisional régime for Smyrna [38]): Turkish sovereignty is mani-

36) Von Liszt, p. 161. See also Lauterpacht, p. 181—190.

37) See Article III of this treaty of February 3, 1903. This treaty might, however, be considered as being of a private law character.

38) Fauchille, I, I, 347.

fested only by the maintenance of the flag (art. 69): but Greece exercises, under Articles 70, 71, 72 and 73, the full range of sovereign rights. According to Article 49 of the Treaty of Versailles, Germany renounces in favour of the League of Nations, in the capacity of trustee (considérée ici comme fidéi-commissaire), the government of the territory of the Saar-Basin. At the end of a term of 15 years from the coming into force of the treaty, the inhabitants of the said territory shall be called upon to indicate the sovereignty under which they desire to be placed. "C'est un territoire entièrement soustrait au gouvernement de l'Allemagne. Cette Puissance en conserve la souveraineté, mais elle n'y a l'exercice d'aucun des droits de la souveraineté. L'exercice des droits de la souveraineté appartient à la Société des Nations, agissant par la Commission de Gouvernement", wrote the president of the said Commission to the Secretary-General of the League of Nations, on July 4, 1921.

Again the creation of the institution of mandated territories is a striking example of the separation of sovereignty and the exercise of sovereign rights. However much debated the question who is entitled to sovereignty over these territories may be, it is nearly generally recognized, that it is not the Mandatory Power, who, however, exercises sovereign rights under the supervision of the Permanent Commission provided for in Article 22 of the Covenant of the League of Nations.

The number of these examples might be multiplied; the separation of sovereignty from the exercice of the rights of sovereignty remains none the less an exception. What these cases prove, is, that the occupation of a certain territory by a State does not necessarily correspond to an acquisition of territorial sovereignty by that State. It thus appears that the principle is infringed upon in two ways: on the one hand it appears that the principle that the taking of possession should be effective, is not always strictly applied and on the other hand it appears that the full range or sovereign rights may be exercised by a Power who is not the sovereign. For this reason it seems that international law does not justify Judge Huber in extending the requirement that an occupation with a view to the acquisition of sovereignty should be effective, to other titles of acquisition. In fact a title based on, for instance, a treaty of cession and a title,

based on the exercice of social and economic functions of the State, are *incommensurabilia*. The former is essentially legal: the latter is essentially moral, no matter whether it be supported by the principle that state morality does not allow a powerful State to annex territory, which she is not in need of, to the disadvantage of other States, or by the principle that the general interest requires the development of territories "inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world".

Only one perfect title

Whereas Judge Huber's extension of the requirement of effectiveness to other titles of acquisition must be rejected as insufficiently founded in international law, the learned Arbitrator develops, more or less implicitly, a theory which may now be considered.

It has been stated, that the Arbitrator, in examining the United States title based on discovery, first considers the hypothesis, that discovery gives a perfect title to sovereignty over the discovered country and afterwards the hypothesis, that discovery gives only an inchoate title, to be consummated by effective occupation within a reasonable time.

The second view seems to have been first developed in doctrine by Vattel [39]), who states in Chapter XVIII: When a nation finds a country uninhabited and without an owner, it may lawfully take possession of it and after it has sufficiently made known its will in this respect, it cannot be deprived of it by another nation. Thus navigators going on voyages of discovery, furnished with a commission from their sovereign, and meeting with islands or other lands in a deserted state, have taken possession of them in the name of their nation, and this title has been usually respected, provided it was soon after followed by real possession (pourvu qu'une possession réelle l'ait suivi de près).

It was, as far as we can ascertain, Sir Robert Phillimore, who first introduced the word "inchoate title". In his Commentaries

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39) That state practice used the inchoate title even in the first part of the 17th century is evidenced by the instrument, by which possession was taken of Saint Helena, See p. 86.

upon International Law, I, 227, this author states: "Discovery, according to the acknowledged practice of nations, whether originally founded upon comity or strict right, furnishes an inchoate title to possession in the discoverer", and again on 229: "The fact of authorised discovery may be said to found the right to occupy". In the Netherlands Counter Memorandum p. 16—20 a number of eminent authors and jurists are quoted, who agree with this opinion [40]). In this connection, what the Arbitrator states on p. 33 is of importance: Even if she (Spain) had acquired a title she never intended to abandon, it would remain to be seen whether continuous and peaceful display of sovereignty by any other Power at a later period might not have superseded even conventional rights.

It appears from this, that the Arbitrator only recognizes one perfect title, the title based on effective occupation. Any other title, whether based on discovery or on cession, is only an inchoate title. The Arbitrator thus extends the use of the term "inchoate title", which has thus far only denoted in legal literature the effect of mere discovery, to other titles of acquisition. Even (effective) occupation is only a perfect title, if the display of state authority is commensurate with the local conditions: examining the facts, immediately preceding the cession, and alleged by the Netherlands to prove the effectiveness of its occupation, the Arbitrator lays down [41]): 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. Such an inchoate title, based on display of state authority, would, in the opinion of the Arbitrator, prevail over an inchoate title derived from discovery.

Although writers on international law do not use the word "inchoate title" save with reference to discovery, it seems that this view is in accordance with state practice. The claim, based on

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40) The quoted literature was partly used in the British case in the Venezuela British Guiana Boundary Arbitration.

41) Award, p. 61—62.

effective possession prevailed in the Venezuela-British Guiana Boundary Arbitration; this appears from the Treaty in which the principles to be applied by the arbitrators were laid down. The same view prevails in the Austro-Hungarian Arbitration regarding the Meerauge Lake, in the Alaskan Boundary Arbitration under the treaty of 1903, and in the Brasil-British Guiana Boundary Arbitration; again in the Bulama Arbitration effective possession prevailed over a cession by native chiefs; the Hague Tribunal decided in 1909 in favour of Sweden not only on the ground that Swedens lobster fisheries off the banks of Grisbådarna were of the greater importance by far, but also on facts showing display of state activity, such as large expenditure for expensive equipments for fishing purposes and in connexion with the erection of buoys and lighthouses and with surveys and soundings. And in the Anglo-German dispute of 1911 regarding the southern boundary of the Walfishbay territory the unchallenged and continued possession of Great-Britain was taken as "evidence of a wish to acquire and of an effective occupation by which in any case British sovereignty could have been established over the zone in dispute" [42]).

In all these cases the title based on effective occupation prevailed, because it was deemed stronger than any other title. Where a claim based on effective occupation fails, the better of two imperfect titles prevails; this was the case in the Clipperton Award. In Jessup's hypothesis a Power acquiring by cession a rock, simply in order to prevent another Power from taking possession of it, only has an imperfect right, valid merely because no other Power will exercice state authority there. A theory of intertemporal law, undoubtedly highly disturbing, is wholly superfluous. Reasoning along this line only, the Arbitrator in the Miangas Arbitration would have come to the same conclusions without recourse to the theory of intertemporal law and without drawing an uncritical distinction between the creation and maintenance of rights, which were rightly attacked from several sides.

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42) In the Dutch Venezuelan case of Aves Island; the contrary view prevailed. The Award is severely criticised by de Lapradelle-Politis. (Again the Venezuelan Columbia Boundary arbitration of 1922.)

2. The Title to Sovereignty.

In the term "inchoate title", denoting an imperfect right vested in the country on behalf of which the discovery was made, the word title is used in the meaning of right. The Arbitrator speaks of a title of acquisition as well as of the acquisition of a title. It is obvious, that the word title is indiscriminately used to denote both a right and the juridical fact on which the right is based.

Title in Roman law

According to Roman law property could be transmitted either by *mancipatio* or by *in jure cessio* or by *traditio*. In contradistinction with both other meanings of transmission *traditio* is causal. Not every *traditio* had transference of property as a consequence. In the first place the *tradens* must be willing to transmit property: for this reason *traditio* based on a contract of lease for instance, could not transmit property. But even on the ground of a contract of sale or gift, property is only transmitted if the *tradens* is the owner. If this is not the case, his successor will only acquire juridical possession; he acquires *pro emptore, pro donato* and his possession becomes ownership only by means of *usu-capio* [43]). Besides the fact that the *tradens* must be entitled to transmit property, Roman law requires a *justa causa traditionis*. If this causa (the contract of sale or gift) is not valid, the property is not transmitted.

This *causa* is the title of acquisition of property.

For *usu-capio* a *possessio animo domini* is required and this *possessio animo domini* is to be acquired *bona fide* and must be based on a *justa causa possessionis* or *justus titulus*. Only in the case of the non-fulfilment of the formal requirements or of a deficiency in the right of the *tradens*, would the successor not become the owner. A valid contract of sale or of gift is a *titulus verus:* if a *causa*, not recognized by law, is presumed to be a title (*titulus putativus*), this presumption is only exceptionally valid and then only in case of a justifiable mistake [44]).

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43) If the *tradens* subsequently becomes the owner, his successor also becomes the owner; the *tradens* cannot vindicate the thing, because his successor is protected by the *exceptio rei venditae et traditae*.

44) Von Czyhlarz, Lehrbuch der Institutionen des Römischen Rechts, 18th. ed., p. 140.

Diverging meanings

This brief survey may indicate that in Roman law the *titulus* is the ground on which the right of property is based (der Erwerbsgrund). As to this point Black's Law Dictionary remarks: "Title is the means whereby a person's right to property is established. Title may be defined generally to be the evidence of right which a person has to the possession of property. The word "title" certainly does not merely signify the right which a person has to the possession of property, because there are many instances in which a person may have the right to the possession of property, and at the same time have no title to the same. In its ordinary legal acceptation, however, it generally seems to imply a right of possession also. It therefore appears, on the whole, to signify the outward evidence of the right, rather than the mere right itself. Thus, when it is said that the "most imperfect degree of title consists in the mere naked possession or actual occupation of an estate", it means that the mere circumstance of occupying the estate is the weakest species of evidence of the occupier's right to such possession. The word is defined by Sir Edward Coke thus: *titulus est justa causa possidendi quod nostrum est*, that is to say the ground, whether purchase, gift, or other such ground of acquiry; "*titulus*" being distinguished in this respect from "*modus acquirendi*", which is the traditio, i.e. delivery or conveyance of the thing".

The Concise Law Dictionary, Osborn, gives s.v. title: the right to ownership of property; "a vestitive fact" (Salmond); the Dictionnaire de Droit International Public et Privé par Charles Calvo, says: titre (droit, qualité) Acte écrit, pièce authentique qui établit ou confère un droit, une qualité: titre de propriété, titre de rente, titre de noblesse. But as second meaning: droit sur lequel on s'appuie pour posséder, pour demander ou pour faire une chose. Titre est aussi synonyme de qualité, qualification qu'on donne aux personnes pour exprimer certaines relations d'époux, d'acquéreurs etc. And the judicial dictionary by F. Stroud states: "The word "title" has different meanings. In one sense it may import whether a party has a right to a thing which is admitted to exist; or it may mean, whether the thing claimed does in fact exist".

It is obvious that, as a legal term only, the word title is used in different meanings, deviating from the original meaning. On the

whole it would seem that in those European countries, in which municipal law has recourse to the fundamental notions of Roman law, the term is used according to the Roman law terminolgy, in the sense of juridical fact, whereas in Anglo-American countries the meaning of right prevails. Accordingly, "title of acquisition" corresponds to the former, and "acquisition of title" to the latter meaning.

The term is accordingly rightly used by de Louter [45]), when stating that a treaty of cession constitutes only a title, which is to be completed by execution. The term was, of course, rightly used in the arbitral award of March 24, 1922 of the Swiss Federal Council in the controversy between Columbia and Venezuela, p. 34:

> Les titres sur lesquels les Parties basent leur souveraineté sont donc différents, en ce sens que pour les sections un (Goajira); trois (San Faustino); six (premier tronçon), ces titres sont exclusivement d'anciens documents coloniaux espagnols; que pour les sections deux et quatre l'accord des Parties a servi de titre et que l'arbitre espagnol s'est abstenu de statuer; etc.

A second meaning in which the term title is generally used on the European continent is that of an instrument, in which a right is embodied. The term has been used in this sense also for many centuries.

According to Du Cange T. VIII, p. 114: Titulos vocamus instrumenta chartarum, quae praediorum possessionem firmant, quove jure teneantur, indicant. This is derived from titulus in the meaning of limes: Videmus igitur modo per terminos territoriales, et limitum cursus et titulos, id est inscriptis lapidibus, plerumque fluminibus, nec non aris lapideis claudi territorium, atque dividi ab alterius territorio civitatis . . . Nam titulus proprie lapis inscriptus, vel ipsa lapidis inscriptio.

In this meaning it would seem, that in Anglo-American countries the term "title deed" is preferred.

As already stated, Judge Huber uses title in both meanings. On p. 16 it is said that "it is customary to examine which of the states claiming sovereignty possesses a title — cession, conquest, occu-

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45) de Louter, Het stellig volkenrecht, p. 367.

pation, etc. — superior to that which the other state might possibly bring forward . . . it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment". In both places title is used in the sense af a juridical fact, on which the claim is based. But one juridical fact as such can not, of course, outweigh another juridical fact. On p. 60, for instance, a résumé is given of the different titles (of discovery, of contiguity, of recognition) and it is said: "The title of discovery (title-juridical fact) exists only as an inchoate title (title-right), as a claim to establish sovereignty by a fact of occupation. It is obvious that a title in the sense of a juridical fact cannot be superseded by another title". The fact of discovery, alleged by the United States as successor of Spain, is not obliterated by the fact of continuous and peaceful display of state authority. When the Arbitrator speaks on p. 61 of the "relative strength of titles" this can only mean the relative strength of the juridical consequence, assigned by international law to certain facts. The Netherlands title prevails over the United States title because international law assigns greater consequences to the fact of effective possession than to the fact of discovery. In conjunction with what has been said above, it follows from this that the distinction between the creation and the existence of a right, made by the Arbitrator, is unnecessary.

The question, however, whether the fact of discovery ever conferred a right, will be considered in a subsequent chapter.

C. The Notification of the Treaty of Paris, 1898.

1. The Notification under Consideration.

On February 3, 1899, the Minister of the United States at The Hague notified the conclusion of the Treaty of Paris to the Netherlands Minister for Foreign Affairs in the following terms:

Sir:

I have the honor to send Your Excellency herewith two copies of the President's Message relating to the Treaty of Peace be-

tween the United States and Spain signed at the City of Paris on December 10 1898.

Accept, Mr. Minister, the renewed assurance of my high consideration.

(signed) STANFORD NEWE.

To this the Netherlands Government answered on February 8, 1899:

Monsieur le Ministre,

J'ai l'honneur de Vous accuser réception de Votre office du 3 de ce mois, par lequel Vous avez bien voulu me faire parvenir deux exemplaires du Message du Président des États-Unis d'Amérique concernant le traité de paix, signé à Paris le 10 décembre dernier, entre ces États et le Royaume d'Espagne.

En Vous remerciant de cet envoi, je saisis cette occasion, Monsieur le Ministre, pour Vous renouveler l'assurance de ma haute considération.

(signé) W. H. DE BEAUFORT.

From this correspondence it is evident that the Netherlands Government did not make any reservation in regard to sovereignty over the island.

Whereas in the United States Memorandum nothing is said on the subject, the Counter Memorandum [1]) states that "although the Netherlands Government had the most explicit notice of Spanish sovereignty over the island in the boundaries fixed in the Treaty of Paris between the United States and Spain, concluded December 10, 1898, they did not make any protestations respecting sovereignty to the island until 1906". In the conclusions of this document, however, the United States did not argue, that the Netherlands had lost its right to the island, because it had not lodged a protestation. The Arbitrator, on the other hand, being of opinion, that the point required further elucidation, put questions to the litigating Parties on the subject.

It is stated in the Netherlands Explanations, p. 16: "The treaty

1) U.S. Counter Mem. p. 72.

(of Paris) being a treaty of peace between the United States and Spain by which, as was publicly known, the Philippine Islands (and of course no more than the Spanish possessions in that region) were to be ceded to the United States, the Netherlands Government of that time did not, as far as can be seen, make a special study of the treaty and dit not at once notice the error in the delineation. Very soon, however, in 1906, the dispute concerning the island arose", whereas the United States, after referring again to "the most explicit notice of these lines", answered [2]): "And certainly, after such notice, laches on the part of any nation asserting a claim would be evidence of weakness or of the unfounded character of the claim".

Thus the situation is clear: on the one hand it can hardly be said, that the Netherlands had "the most explicit notice" of the Island of Miangas having been ceded by Spain to the United States; the delineation was fixed by certain meridians of longitude and parallels of latitude. The boundary lines, drawn so as to run in non-territorial waters, consequently appear to have been drawn, not as territorial frontiers, but merely to include in, or to exclude from the cession, certain islands of the Philippine Archipelago. Whatever the United States may contend in the Further Written Explanations p. 3 sqq., the exclusion from the cession of the Islands Cagayan de Joló and Sibutu points to the fact that these lines were not correctly drawn and the United States seems to have recognized this by buying the islands from Spain in 1900. On the other hand the Netherlands Government state, that they "did not at once note the error in the delineation" (from which it may be presumed, that they would have made a formal protestation, if the error had been noticed).

The Arbitrator is thus called upon to decide, what is the effect of the absence of protestation by the Netherlands Government. Before considering, whether the Arbitrator's opinion concerning the silence of a Power to which a treaty has been notified, is in accordance with the principles of international law, some preliminary remarks may be submitted.

2) F. Wr. Expl. p. 24. Again the point is referred to in the U.S. Rejoinder p. 41.

2. Notification in general.

It is to be noted that there is no general agreement amongst jurists as to the legal character of notification in international law. Even in connection with the acquisition of territory the word is used in two distinct ways: the erection of a flag, an inscription on a pillar, the reading of a proclamation, etc., on the territory of which possession has been taken, has often been described by the word notification [3]). In its technical sense, however, notification is a communication expressly made by one Government to another Government.

Is any such communication to be considered as a notification? It would seem, that again a distinction must be made: a communication from one Government to another is made either to produce some legal effect or merely to meet the requirements of international comity [4]). Suppose two States have concluded a treaty, which is rejected by the Parliament of one of them; the State, whose Parliament has rejected the treaty may or may not communicate the rejection to the other State: it makes no difference with respect to the legal consequences as regards the relation between them. But it is obvious, that non-communication would be inconsistent with the principles of the *comitas gentium*. Oppenheim says: "Notification is the technical term for the communication to other States of certain facts and events of legal importance" [5]). "La notification est l'acte par lequel un Etat porte à la connaissance d'un ou de plusieurs autres Etats un fait déterminé auquel peuvent se rattacher des conséquences juridiques" is Anzilotti's definition [6]). According

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3) An example is the notification of the occupation of St. Helena, p. 86. In this sense the word notification was used by Lord Stowell in the case of the Fama (1804): "In newly discovered countries, where a title is meant to be established for the first time, some act of possession is usually done and proclaimed as a notification of the fact". (Westlake, International Law I, p. 102).

4) An *a priori* distinction between notification and communication is impossible, as the legal importance may only appear afterwards.

5) L. Oppenheim, International Law I, 488.

6) D. Anzilotti. Cours de Droit International, p. 345. Later on Anzilotti

to Röderer [7]) it is "die von einem Völkerrechtssubjekt an ein anderes gerichtete Verständigung über den bevorstehenden oder erfolgten Eintritt einer rechtserheblichen Tatsache". The example given above, however, illustrates the point: the rejection of the treaty is certainly "an event of legal importance", but the communication is juridically irrelevant. The juridical importance of the communication itself and not that of the fact communicated determines the character of the notification, and this is the real meaning of the writers above mentioned, for their distinction between obligatory and facultative notifications bears on the legal character of the notification itself. Cavaglieri [8]) states: "La notification est une déclaration officielle d'un Etat à l'adresse d'un autre ou de plusieurs autres Etats, par laquelle certains faits sont communiqués. Le but de la notification est de provoquer une réaction juridiquement importante". It would thus seem, that a notification is a communication of juridical importance from one Government to another Government [9]). Accordingly von Liszt [10]) lays stress on

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states: Son effet propre est celui de porter légalement les faits qui en sont l'objet à la connaissance de l'Etat à qui elle est adressée.

7) G. Röderer in Strupp's Wörterbuch, s.v. Notifikation; he adds: Ihrer Form nach handelt es sich um einen einseitigen, nach aussen gerichteten Staatsakt von internationaler Bedeutung, die auf dem Gebiete der sog. Staatencourtoisie liegend oder eine völkerrechtliche i.e.S. des Wortes sein kann.

8) Cavaglieri, R. d. C. A. D. I. 1929, p. 515.

9) For our purpose political notification need not be considered. An example of this is the declaration of President Monroe, issued on December 2, 1823, by which the American continents were declared henceforth not to be considered as subjects for future colonisation by any European Powers", as interpreted by President Polk on December 22, 1845:... "It is due alike to our safety and our interests, that the efficient protection of our laws should be extended over our whole territorial limits, and that it should be distinctly announced to the world as our settled policy, that no future European colony or dominion shall, with our consent, be planted or established on any part of the North American continent (Kraus, Die Monroedoktrin, p. 409). By this Message the European Powers were warned away from territories, which, according to international law, are no man's land.

Another instructive example is the famous Note of Tchitcherine of November 4, 1924, where, appealing to the principle of contiguity, he says: Le Gouvernement Fédéral de l'Union, faisant usage de ses droits

the legal importance of the communication, when he says: Die eingetretene oder bevorstehende Aenderung der Rechtslage ist denjenigen Staaten zu notifizieren, deren Rechte durch die Aenderung berührt werden.

Obligatory notification

Notification is either obligatory or facultative.

By the treaty of March 17, 1824 [11]) between the Netherlands and Great Britain mutual notification with regard to establishments in the Malay Archipelago was made obligatory. Between 1843 and 1880 nearly four hundred treaties and conventions with native princes were accordingly notified by the Netherlands to the British Government.

Under Article XXXIV of the Congo Act of Berlin, in 1885, notification became one of the constitutive elements of a good title to territorial sovereignty over tracts of land on the African coast and to the establishment of a protectorate there. Notification was to accompany the respective act and to be addressed to the other Signatory Powers of the Act, in order to enable them, if need be, to make good any claims of their own.

It remains to be seen, however, whether the Conference was applying a rule of positive international law. "Notification is not yet wholly sanctioned by practice", ran the report of the commission, charged by the Conference with the draft of Articles XXXIV

souverains sur ces territoires (certain islands, among others Wrangel Island, which, according to the Sowjet Government, constitute the continuation of the continental plateau of Siberia), exigera satisfaction des Gouvernements qui soutiendraient l'organisation de semblables violations (de ses droits territoriaux) . . . , ou qui les laisseraient impunies, contrairement aux principes généraux du Droit International etc. (De Lapradelle, La Frontière, p. 68).

Again, in this class falls the notification addressed by the British Government to the other Powers concerned with regard to the special relations with Egypt "as matters in which the rights and interests of the British Empire are vitally involved. In pursuance of this principle, they will regard as an unfriendly act any attempt at interference in the affairs of Egypt by another Power, and they will consider any agression against the territory of Egypt as an act to be repelled with all the means at their command".

10) Von Liszt, Das Völkerrecht, p. 169.

11) Staatsblad van het Koninkrijk der Nederlanden, 1824, 39.

and XXXV; she considered that it would be "a useful innovation in public law"; and the British representative, in his anxiety after the Conference to prove that "international duties on the African coasts remain such as they have been hitherto understood", went so far as to say that the requirement of notification in the Final Act was "rather an act of courtesy than a rule of law" [12]). In this the British representative was in agreement with Twiss [13]), who says: "A State may indeed notify to other States any important additions to its territorial limits, which it may have acquired either by occupation or by cession, but such notifications are matters of courtesy for mutual convenience, and the announcement of the fact of any such acquisition is not obligatory upon the State who makes it".

The Final Act, signed by the plenipotentiaries of Great Britain, Germany, Austria-Hungary, Belgium, Denmark, Spain, the United States, France, Italy, the Netherlands, Portugal, Russia, Sweden, Norway and Turkey, was not, however, ratified by the United States. Moreover it has been repealed by the Convention of Saint Germain of September 10, 1919, between Great Britain, Belgium, the United States, France, Italy, Japan and Portugal, to which Germany, Austria, Hungary, Bulgaria and Turkey undertook to agree. This convention does not contain any stipulation corresponding to Article XXXIV of the Berlin Act.

Is it to be inferred from this that the obligation respecting notification was virtually abolished since it only remains in the case of Denmark, the Netherlands, Norway, Spain, Sweden and perhaps Russia, and also in the case of the Powers signatories of the Convention of Saint Germain in so far as concerns the States just mentioned? Or has the useful innovation of the Berlin Act been applied so generally that it can be said to have become a customary rule of international law?

The latter question is answered in the negative by Lindley, whose opinion, however, does not seem to hold good. After stating that, since the Conference of Berlin, a few acquisitions outside the

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12) Lindley, p. 294.

13) Twiss, Int. Law, § 19.

territories dealt with in the Final Act have been notified, he mentions the special international agreements by which notification has been provided for: the agreement of March 7, 1885 between Great Britain and Germany on the one hand and Spain on the other with reference to the Sulu Archipelago, the arrangement between Germany and Spain in December of the same year with regard to the Caroline and Palaos Islands, following the mediatorial recommendations of Pope Leo XIII in the same year, and the Anglo-German Agreement of July 1, 1890, by which the contracting Powers promised to notify to one another all treaties that might be made in territories intervening between the Benue and Lake Chad. Lindley then concludes as follows [14]): "These isolated special agreements, when taken in conjunction with the fact that, apart from the region dealt with in Article XXXIV, notifications have been the exception rather than the rule, serve to emphasize the point that such notifications were not required by the general law".

This conclusion seems, however, premature: it might with equal reason be said, that the useful innovation of the Congo Conference was adopted in the treaties referred to by Lindley and that thus a customary rule has been established. Not only have recent occupations of *territorium nullius* generally been notified [15]), but the same may also be said of every change in territorial status.

In 1885 Germany took possession of the north coast of New Guinea and of certain of the adjacent islands; Great Britain subsequently extended her protectorate in New Guinea and the German Government received a notification of this extension from the British Ambassador.

Japan notified to the European Powers the decree of August 22, 1910, by which she annexed Corea; France notified the annexation of Madagascar in 1896 and the establishment of her protectorate over Morocco by the treaty of March 30, 1912; Great Britain did the same upon converting her *de facto* protectorate over Egypt into a *de jure* protectorate on December 18, 1914 as a consequence of the intention manifested by the Khedive, Abbas

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14) Lindley p. 295.
15) Fauchille I, ii, 553.

Hilmi, to join the Turks, whose suzerainty over Egypt was only nominal. Again a change in the territorial status of Egypt was effected by Great Britain on February 27, 1922 and the latter Power notified the other Powers, that she had terminated her protectorate over Egypt and recognized that country as an independent sovereign State, reserving, however, for future discussion the questions of the security of communications through Egypt, the defence of Egypt, the protection of foreign interests and of minorities, and the Soudan.

Norway notified to foreign Powers the occupation of Jan Mayen and Bouvet Island [16]), after the controversy with Great Britain in 1928 had been settled; and the Royal Resolution of July 10, 1931 by which this country declared the occupation of "Eirik Raudes Land" was notified to the Powers whom Norway regarded as interested.

In 1894 the first Danish settlement on the east coast of Greenland was established and the fact was communicated to the Swedish and Norwegian Governments [17]).

These examples may suffice to show that, at all events since the Congo Conference, a general practice may be said to have existed amongst States of notifying a change of territorial status and that notification to the interested Powers has, in particular, become one of the essential steps in the taking of possession of a *territorium nullius*.

Smedal [18]) answers the question, whether notification of an occupation has become customary in international law, in the negative, "because the opinion that the validity of an occupation depends on the fact that notification has been given, is not sufficient warrant". Smedal, however, seems to forget, that notification is only

16) Smedal, p. 41.

17) The Permanent Court of International Justice, however, considered that Denmark had a title to sovereignty over the whole of Greenland and that in notifying the establishment of the settlement of Angmagssalik Denmark only notified the extension of an already existing sovereignty. This method of Denmark is, however, certainly not customary in international Law.

18) Smedal, p. 40.

one of the constitutive elements and that the requirement of effectiveness is at least equally important.

It is interesting to note, that in regard to this notification Judge Huber shares the opinion of Lindley and Smedal. We read on p. 59 of the Award:

"An obligation for the Netherlands to notify to other Powers the establishment of suzerainty over the Sangi States or of the display of sovereignty in these territories did not exist.

Such notification, like any other formal act, can only be condition of legality as a consequence of an explicit rule of law. A rule of this kind adopted by the Powers in 1885 for the African continent does not apply *de plano* to other regions, and thus the contract with Taruna of 1885, or with Kandahar-Taruna of 1889, even if they were to be considered as the first assertions of sovereignty over Palmas (or Miangas) would not be subject to the rule of notification".

International law prescribes notification in many other cases: According to Article 84 of the Hague Convention for the peaceful settlement of international disputes, if two Powers agree to refer to arbitration a question concerning the interpretation of a treaty to which other Powers besides themselves are parties, they are bound to notify all such other Powers. The Hague Convention of October 18, 1907, concerning the commencement of hostilities, lays down in Article 1 that as between the Signatory Powers, hostilities are not to commence without "un avertissement préalable et non-équivoque" and in Article 2 that the state of war is to be notified without delay to neutral Powers. One of the most important obligatory notifications in international law is that required by Article 18 of the Covenant of the League of Nations, according to which every treaty or international engagement entered into by any member of the League shall be forthwith registered with the Secretariat and as soon as possible be published by it. This, of course, implies the notification of treaties and engagements to the Secretariat.

Facultative notification

Whereas notification of the occupation of *territorium nullius* seems to be a constitutive element of a valid title to territorial

sovereignty — it certainly is so under the Act of Berlin —, the same cannot be said of the notification of other changes in territorial status. Thus the notification of the annexation of Corea by Japan in virtue of a treaty of cession concluded with the Emperor of Corea in August 1910 cannot be said to be a constitutive element of Japan's title. The legal importance of the notification, however, appears from its terms [19]):

> Treaties concluded by Corea with foreign Powers cease to binding, and Japan's existing treaties are extended to Corea. Consequently, foreigners are allowed to reside and trade in all parts of Corea, and there to enjoy the same rights and privileges as in Japan proper. At the same time, the right of extra-territoriality which foreigners have hitherto enjoyed in Corea comes definitely to an end from to-day. The Japanese Government believe that they are entirely justified in regarding such right of extra-territoriality as ended upon the termination of Corea's Treaties in consequence of the annexation, considering, that the continuance of that system would inevitably prove a serious obstacle and interfere with the unification of the administration of Corea. Moreover, it seems only natural that foreigners, being allowed to enjoy in Corea the same rights and privileges as in Japan proper, should be called upon to surrender the right of extra-territoriality which is not granted to them in Japan proper.

It cannot be denied, that notification to other Powers of such changes is advisable. It is especially advisable that a change in territorial status should be notified to neighbouring States; the Anglo-Dutch treaty of 1824 can thus be easily explained. The notification of the Treaty of Paris is of the same character: though nowhere prescribed, it was advisable: it stated that in all matters relating to the Philippines the Netherlands Government henceforth were to address the United States Government. For similar reasons changes in the headship and in the form of Government of a State, the appointment of a new Secretary for Foreign Affairs and the like, are usually notified.

The notification informs the notified Power of certain facts or

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19) Lindley, p. 308.

events, because, as Oppenheim states, "States cannot be considered subject to certain duties without knowledge of the facts or events". The notified States are thus enabled "if need be, to make good any claims of their own". Thus, under Article XXXIV of the Act of Berlin, a notified State which did not make a reservation within a reasonable time, must be understood as not having any objection. International law, however, does not fix a period, within which such reservations must be recorded. The question was considered by the Congo Conference. A motion to fix the period was, however, rejected on grounds of international courtesy. But, as Fauchille rightly remarks: on the contrary, international courtesy requires a prompt reply [20]). Fauchille accordingly proposes a period of one year. But this is not supported by positive international law; moreover this period would be too long in some and too short in other cases; it would seem that it must differ in different cases.

3. Protestation in general.

In general, it thus appears that notification is closely connected with another unilateral act, namely, protestation. In the case under consideration Judge Huber refers not only to the notification of the Treaty of Paris but also to the silence of the Netherlands Government. Accordingly it remains to be seen what effect is assigned by international law to the absense of protestation.

J. Kunz in Strupp's Wörterbuch des Völkerrechts assigns an absolute value to the maxim: *Qui tacet consentire videtur* [21]). It is, however, questionable, whether this is in accordance with international law. Cavaglieri [22]) admits, that the particular nature of international relations, the perfect liberty enjoyed by States as to the manner in which they manifest their will, justify a broad application of the principle, broader at all events than in civil law. But he denies the absolute value assigned to the maxim by Kunz. Kunz's opinion is characterized as going too far as it would oblige the States to make continual protestations. Cavaglieri thus limits

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20) Fauchille I, II, 553.
21) Wörterbuch II, p. 329.
22) Cavaglieri, loc. cit. p. 513.

the principle by adding: *dum loqui potuit et debuit*. In this Cavaglieri is in accordance with Strupp [23]), who speaks of a "qualified silence", and proposes the same addition to the maxim. Both writers come to the conclusion that a general rule cannot be formulated, because the juridical consequences can only be determined having regard to the actual circumstances [24]). Cavaglieri holds that if notification is obligatory, silence imports *de jure* abandonment of any conflicting claim. If notification is facultative the absence of response would create a presumption of recognition and consequently the burden of proof would rest with the State which should have responded. In the case of a fact which is common knowledge no effect can be assigned to notification. As regards this point Cavaglieri agrees with Brüel [25]), who states that when a notification has been made without being followed by a protestation, consent can be presumed with more certainty than in a case of non-notification. It would seem, however, that even this limited application of the maxim is unjustifiable: the consequence would be that every State would be bound always to protest against any notification in order to avoid a presumption of recognition. This would not only impede international relations; it would ultimately lead to a general practice of protestation on receipt of any notification.

Another point to be considered is the form in which a protestation is to be made. Both Cavaglieri [26]) and Brüel [27]) admit that protestation in international law is not bound to take a definite form. The protestation can be the result of an uninterrupted conduct of a State in regard to a certain situation or pretension of another State, as Cavaglieri puts it, or of conclusive acts (Brüel and Kunz). A written and precisely formulated note is undoubtedly preferable.

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23) K. Strupp, Grundzüge des positiven Völkerrechts, 1932, p. 170.
24) Also Cavaglieri in Rivista di Diritto Internazionale, 1926.
25) Erik Brüel, Den folkeretlige Protest in Nordisk Tidsskrift for International Ret, Vol. III (with translation in French).
26) Rec. des Cours 1929, p. 517.
27) loc. cit. p. 83.

4. Conclusions.

The foregoing outlines the considerations to be taken into account in appraising the importance to be attached to the notification of the Treaty of Paris by the United States Government to the Netherlands.

It appears, that this notification can neither be classed as an act of international courtesy, nor as an obligatory notification, such as is required under the Act of Berlin. It falls under the head of the facultative notifications, which, according to Oppenheim, are "usually made".

If the Island of Miangas had been *territorium nullius* in 1898, the United States would by occupation of the island and notification to the Netherlands Government have acquired an incontestible title to sovereignty over the island as regards the latter Power.

If at that date the Netherlands had only had a nominal title to the island, not supported by any effective display of sovereignty, the United States claim in 1906, which was as purely nominal as any claim possessed by Spain before the cession (*nemo plus juris transferre potest quam ipse habet*) would have prevailed over the Netherlands claim because the United States claim was strengthened by the notification, whereas the Netherlands claim was weakened by non-protestation.

The third possibility need not be considered, for if the Netherlands claim in 1898 was (and could be proved to be) based upon effective possession, a claim based on cession by a third Power, even if accompanied by notification, was invalid, the cession being a *res inter alios acta*.

The Arbitrator expresses the same idea in the following way [28]):

> Whilst it is conceivable that a conventional delimination duly notified to third Powers and left without contestation on their part may have some bearing on a inchoate title not supported by any actual display of sovereignty, it would be entirely contrary to the principles laid down above as to territorial sovereignty to suppose that such sovereignty could be affected by the mere

28) Award, p. 23.

silence of the territorial sovereign as regards a treaty which has been notified to him and which seems to dispose of a part of his territory.

The essential point is therefore whether the Island of Palmas (or Miangas) at the moment of the conclusion and coming into force of the Treaty of Paris formed a part of the Spanish or Netherlands territory. The United States declares that Palmas (or Miangas) was Spanish territory and denies the existence of Dutch sovereignty; the Netherlands maintain the existence of their sovereignty and deny that of Spain. Only if the examination of the arguments of both Parties should lead to the conclusion that the Island of Palmas (or Miangas) was at the critical moment neither Spanish nor Netherlands territory, would the question arise whether — and, if so, how — the conclusion of the Treaty of Paris and its notification to the Netherlands might have interfered with the rights which the Netherlands or the United States of America may claim over the island in dispute.

This is the — conditional — result arrived at, from the point of view of the notification, which is the only point of view considered by the Arbitrator. The result ceases to be conditional as soon as the Arbitrator acquires the conviction that the Netherlands title was based on an effective display of state activity [29]).

There remains, however, the point of view of the protestation, which the Arbitrator does not consider. The uninterrupted conduct of the Netherlands, the conclusive acts, constituting a valid protestation, can be proved and are not denied by the United States Government. The Arbitrator says on p. 55: "The events falling between the Treaty of Paris, December 10th, 1898 and the rise of the present dispute in 1906, cannot in themselves serve to indicate the legal situation of the island at the critical moment when the cession of the Philippines by Spain took place". This is certainly true. He even adds, that "there is no essential difference between

29) J. P. A. François in his Handboek van het Volkenrecht, p. 373, reaches the same conclusion, on different grounds.

the relations between the Dutch authorities and the Island of Palmas (or Miangas) before and after the Treaty of Paris". The weight attaching to the acts demonstrating the display of Netherlands state activity during the period 1899—1906 is an entirely different matter; these acts constitute the protestation required by international law.

CHAPTER II.

THE UNITED STATES TITLE.

A. The Title by Discovery.

The United States title is based in the first place on discovery. In connection with this title different questions must be considered. In the first place the question arises: Was the island discovered on behalf of Spain? [1]) According to the Netherlands Government, it is not established that the island of Miangas was discovered by Spain, nor that that country acquired it in any other manner. And even if it were proved that the island was discovered on behalf of Spain, it is submitted by this Government, that the mere fact of discovery did not vest in Spain a definite title to sovereignty. Accordingly, this question must next be considered and if the answer be in the negative, a third question arises: If the mere fact of discovery did not vest a definite title in Spain, what, if any, is the legal consequence of this fact?

1. The Discovery of the Island.

United States contention

The Philippine Archipelago

As to the question, whether Spain did or did not discover the island in question, the United States Government hold that it is beyond doubt that the Spaniards discovered and even took possession of the Philippines. About the middle of March 1521, the expedition of Magellan, having set out from Seville on September 20, 1519, reached the group of islands, nowadays known as the Philippines, but which Magellan named the Islands of St. Lazarus, because the group had been sighted on the day sacred to that saint. The great navigator actually landed on the Island of Matan, where he was treacherously killed by the natives. Not until 1542 did Lopez

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1) Mere geographical discovery it not a juridical act. The United States refers to discovery in its technical sense: either made by duly authorised navigators or afterwards approved by the Government.

de Villalobos name the islands the Islas Felipinas; they were pacified in 1571 by Lopez de Legaspi.

The Island of Miangas

The records of these and other voyages of about the same time, communicated by the Spanish to the United States Government, make it probable that the Island of Miangas was seen by the Spaniards; the island appears on a map, produced as early as 1595 by Jan Huygen van Linschoten (I. das Palmeiras), where it is, according to the United States Government, charted as an island of the Philippine group. The United States hold that both the group in general and the Island of Miangas in particular were thus discovered by Spain and that the island in dispute, as a part of the group, was in possession of Spain in 1898, and consequently, likewise as a part of the group should now belong to the United States.

The Netherlands contention

The Netherlands Government are, on the other hand, of opinion, that the discovery was made on behalf of Portugal, as on the older maps of the Portuguese Lopo Homem (1554), Diogo Homem (1568) and Bertholameu Laso (1590) the island appears under Portuguese names [2]); this is also the case with van Linschoten's chart. As regards Magellan's voyage it is impossible that this navigator on his voyage from Sarangani southward should have sighted the island. Moreover it should be borne in mind, this Government submit, that the common feature of all these oceanic islands is that they bear palmtrees, so that the name Palmas or Palmeras may have been applied to several islands.

The Award

The Arbitrator makes a distinction between the discovery of the Island of Miangas as such, and its discovery as a part of the Philippines [3]). The latter point will, following the example of the Award, be dealt with in relation to the argument of contiguity. As regards the first point, the Arbitrator deems it probable that the island seen when the Palaos Islands were discovered, is identical with the Island of Palmas (or Miangas). This opinion is based on a communication from the Spanish Government, which, how-

2) Neth. Mem. p. 9.
3) Award, p. 24.

ever, does not give any details as to the date of the expedition, the navigators or the circumstances in which the observations were made; the communication is not supported by extracts from the original reports on which it is based. "For the purpose of the present affair it may be admitted", the Arbitrator concludes [4]), "that the original title derived from discovery belonged to Spain, for the relations between Spain and Portugal in the Celebes Sea during the first three quarters of the 16th century may be disregarded for the following reasons: In 1581, i.e. prior to the appearance of the Dutch in the regions in question, the crowns of Spain and Portugal were united. Though the struggle for separation of Portugal from Spain had already begun in December 1640, Spain had not yet recognised the separation when it concluded in 1648 with the Netherlands the Treaty of Münster. . . . This treaty contains special provisions as to Portuguese possessions, but only in regard to such places as were taken from the Netherlands by the Portuguese in and after 1641. It seems necessary to draw from this fact the conclusion that, for the relations *inter se* of the two signatories of the Treaty of Münster, the same rules had to be applied both to the possessions originally Spanish and to those originally Portuguese . . . It is therefore not necessary to find out which of the two nations acquired the original title, nor what the possible effects of subsequent conquests and cessions may have been on such title before 1648". From this reasonable conclusion it appears that the discovery of the island consists in the fact that it was "seen" only, for it does not appear that a landing was made or any contact with the natives established. The question has now to be considered, what the consequences of this discovery were.

2. Discovery as creative of a definite Title.

It has been said above that the Arbitrator considers two hypotheses, viz. 1° that discovery as such in the beginning of the sixteenth century conferred sovereignty upon the State on behalf of which it was made and 2° that discovery only vested in that State an inchoate title to be completed by an effective taking of

4) Ibid., p. 25—26.

possession within a reasonable time. The former of these two hypotheses is only hesitatingly accepted by the Arbitrator: "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" [5]). The same doubt is expressed on p. 30: "If title arising from discovery, well-known and already a matter of controversy at the period in question, were meant to be recognized by the treaty, it would probably have been mentioned in express terms"; and again on p. 60: "The title of discovery, if it had not been already disposed of by the Treaties of Münster and Utrecht, would, under the most favourable and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation". That the Arbitrator's doubt is fully warranted is clearly proved by Goebel's brilliant study on the struggle for the Falkland Islands, to which we shall refer later.

International law at that epoch recognized the former hypothesis according to the United States and the latter according to the Netherlands.

First (U.S.) hypothesis

On p. 19 of the United States Memorandum attention is drawn to several historical facts with regard to the discovery of the Philippine Islands by Spanish explorers and the establishment and maintenance of Spanish sovereignty in the Philippine Archipelago; on p. 51 et seq. with an appeal to Westlake and Hall is referred to "the obvious principle applicable to any act, that the effect of the act is to be determined by the law of the time when it was done". The American Agent quotes Hall's discussion of the "prin-

5) Ibid., p. 26—27.

ciples applicable to the earlier cases and the later tendency to exact more solid grounds for title than those sanctioned in the past". Also Moore's International Law Digest, Justice Story's Commentaries on the Constitution of the United States, the Delagoa Bay Arbitration, the Netherlands Venezuela Arbitration concerning Aves Island, and the decision of Pope Leo XII in the case between Spain and Germany regarding the Caroline Islands are quoted.

From these facts the conclusion is drawn [6]) that Spain acquired a title to the Island of Palmas by discovery and that that title has never been questioned. Moreover a number of international arrangements bearing on the sovereign rights of Spain and, accordingly, of the United States, are invoked to prove, that title by mere discovery was generally recognized during the period in question: the Bull issued by Pope Alexander VI, on May 4, 1493, by which the Pope granted to Spain and Portugal "certain islands and mainlands discovered and to be discovered by each within specified limits"; the Treaty of Zaragoza of April 22, 1529, concluded between Spain and Portugal, to settle the controversies between the two nations respecting the Molucca Islands; the Treaty of Madrid of January 13, 1750, between the same Powers; the Treaty of Paris between England, France and Spain of February 10, 1763, and finally that of Münster of January 30, 1648.

In their Counter Memorandum the Netherlands Government maintain that there is in the United States Memorandum "a singular lack of evidence as to actual facts that might constitute the basis of a claim of American territorial rights [7]). There is no evidence of any assertion or exercise of Spanish jurisdiction over Palmas, and consequently it must be assumed, that the foundation of the claim is deemed by the United States to be discovery alone" [8]).

Second (Netherlands) hypothesis

It is submitted by the Netherlands Government [9]) that, irrespective of the epoch at which the discovery was made, it is a well established principle of international law that discovery alone does

6) U.S. Mem. p. 130.
7) Neth. Count. Mem. p. 7.
8) Ibid. p. 13.
9) Neth. Count. Mem. p. 14.

not confer a perfect title to territorial jurisdiction or sovereignty. Grotius' Mare Liberum Chapter II and the above quoted passage from Vattel are referred to, and also a letter of King Charles I of Spain, written in 1523 to his ambassador, Don Juan de Zuñiga, showing that the sighting or discovery of land did not constitute a legal title, but that to constitute a title it was necessary that the land should be actually possessed. "Even Powers having the greatest interest in maintaining that discovery by itself was sufficient to confer sovereignty", it is stated on p. 14, "did not defend the view that discovery alone was sufficient to constitute a complete title". In this connection the case of the Falkland Islands, the Delagoa Bay Arbitration, the mediation regarding the Caroline Islands and the Bulama Arbitration are quoted.

To corroborate their argument, the Netherlands Government quote a number of authors, who share the opinion, that the fact of discovery only gives an inchoate title, that is to be completed within a reasonable time. Among them is Westlake, who, however, seems to hold a different opinion: "En considérant ces questions de détail", this author states [10]), "j'admettrai que la découverte peut seulement conférér ce que l'on a appelé un commencement de titre, à compléter par l'occupation dans un délai raisonnable; mais j'admettrai aussi que, si elle confère un pareil titre, ce n'est point par suite d'une vertu propre à la découverte, mais parce que le procédé d'un autre Etat, qui s'emparerait trop tôt du pays découvert, serait tellement peu amical que l'on pourrait à bon droit le considérer comme un acte d'hostilité". "Indeed", the Netherlands Counter Memorandum adds, "in those times of continuous strife it was political considerations, and not principles of International Law, that fixed the extent of a title based on discovery". There would however seem to be a contradiction here: if political considerations alone determined the extent of a title based on discovery, the fact of discovery would give neither a perfect nor an inchoate title: it could not confer more rights than the delimitation of a hinterland does nowadays. It was the subsequent fact of taking possession,

10) Rev. d. D. I. et de Lég. Comp. XXIII, p. 256. In the Neth. Count. Mem. the text is quoted in French.

which conferred a title upon the country on behalf of which the discovery was made.

It seems in fact, that international law, even in remote times, always recognised that only an effective taking of possession conferred a right of territorial sovereignty. In this connection two points arise which will successively be dealt with: it will be shown in the first place that both before and since international law can be said to have existed, the Pope as well as temporal princes strictly observed this principle; in the second place the question arises: When can taking of possession be said to be effective? The latter question will be answered in Chapter III.

The bull *Inter Caetera*

One of the best known territorial arrangements in history is the famous bull *Inter Caetera*, issued on May 4, 1493, which was designed to put an end to the everlasting controversies between the only two colonising Powers of that period, Portugal and Spain. These controversies reached a climax when Columbus, after having discovered and taken possession of the new continent on October 12, 1492, in the name of Jesus Christ for the Castilian Crown, reached Lisbon on March 4, 1493 and soon after was solemnly received by King Ferdinand and Queen Isabella of Spain at Barcelona. According to Portugal, the newly discovered country, the "land of cloves and gold", supposed to be India, had been assigned to that country by the bull *Romanus Pontifex* issued in 1452, by which Alfonso V of Portugal was authorised to attack and subjugate all countries inhabited by infidels, and by the bull *Imper Non* of January 8, 1454, by which Pope Nicholas V granted to the same sovereign all the regions discovered and to be discovered, south of Cape Bojador and Cape Non toward Guinea, and all regions on the south coast and on the east *"usque ad Indos"*. And on September 12, 1484, Innocent VIII confirmed the previous bulls in similar language, thus confirming the Portuguese claim to Africa and the Indies.

By the bull *Inter Caetera* Pope Alexander VI granted to Ferdinand and Isabella all islands and continents to the West of a line, running frome pole to pole a hundred leagues west of the Azores and Cape Verde:

with the proviso, however, that none of the islands or continents found and to be found, discovered and to be discovered, beyond the said line towards the west and south, were in the actual possession of any Christian King or Prince up to the latest birthday of our Lord Jesus Christ from which the present year one thousand four hundred and ninety-three begins. And we make and appoint you and your heirs and successors Lords thereof with full and free power, authority and jurisdiction of every kind; with this provisio however, that by this our gift, grant and assignment no right acquired by any Christian prince, who may be in actual possession of the said islands and continents is hereby to be understood to be withdrawn or taken away.

The proviso, that the actual possession of Christian princes is to be respected seems to lead to the conclusion, that the bull had in view in the first place the conversion of heathens and infidels in the regions to be colonised. Several times the bull lays stress on the fact that the Spanish monarchs were to undertake the Christianisation of the inhabitants of the newly discovered countries [11]) and shortly after the issue of the bull the title of "Catholic King" was conferred upon King Ferdinand.

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11) Inter cetera divinae Majestati beneplacita opera, et cordis nostri desiderabilia, illud profecto potissimum extitit, ut fides Catholica, Christiana religio, nostris praesertim temporibus exaltetur, ac ubilibet amplietur et dilatetur, animarumque salus procuretur, ac barbaricae nationes deprimantur et ad fidem ipsam reducantur.

... Sane accepimus, quod vos dudum animum proposueratis aliquas insulas et terras firmas remotas et incognitas ac per alios hactenus non repertas quaerere et invenire, ut illarum incolas et habitatores ad colendum Redemptorem nostrum et fidem Catholicam profitendum reduceretis, ... Qui tandem (Divino auxilio facta extrema diligentia in mare Oceano navigantes) certas insulas remotissimas et etiam terras firmas, quae per alios hactenus repertae non fuerant, invenerunt, inquibus quam plurimae gentes pacifice viventes, et ut asseritur nudi incedentes, nec carnibus vescentes inhabitant, et ut praefati Nuncii vestri possunt opinari, gentes ipsae in insulis, et terris praedictis habitantes credunt unum Deum Creatorem in Coelis esse, ac ad fidem Catholicam amplexandum et bonis moribus imbuendum satis apti videntur, spesque habetur quod si erudirentur, nomen Salvatoris Domini nostri Jesu Christi in terris et insulis praedictis fateretur, ac praefatus Christophorus in una ex prin-

One of the chief powers of the Pope as the head of Christendom has been the propagation of the Christian faith. It would seem, that the division of the new world into two parts assigned to monarchs with the mission to undertake the conversion of the natives, benefitted both parties: the Church by the propagation of Christianity, the monarchs by the extension of their political power.

The Pope solemnly declares that he makes the grant to the monarchs:

> of our own accord, not on account of any petition of theirs, or of anyone else on their behalf, but of our own pure liberality, sure knowledge, and fullness of Apostolic power, and with the authority of Almighty God, bestowed on us through blessed Peter, and of the vicarship of Jesus Christ which we hold upon earth.

It would seem, as if the Pope, foreseeing that the Kings of Spain and Portugal would interpret the bull as first and foremost a political document, had been anxious to deprive them of this possibility. "The legal quality of the act of the Pope", Goebel [12]) states, "by no means limited its political significance. Indeed, the political purpose which the grant was made to serve almost immediately tended to give the matter a pseudolegal significance that in no way coincided with the original purposes of the grant. In other words, the bull *Inter Caetera*, instead of being construed as

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cipalibus insulis praedictis, jam unam turrim satis munitam, in qua certos Christianos, qui secum iverant, in custodiam, et ut alias insulas et terras firmas remotas et incognitas inquirerent posuit, construi et aedificari fecit. ... Unde omnibus diligenter et praesertim fidei Catholicae exaltatione et dilatatione (prout decet Catholicos Reges et Principes) consideratis more progenitorum vestrorum clarae memoriae Regum, Terras firmas et insulas praedictas, illarumque incolas et habitatores vobis divina favente clementia subjicere, et ad fidem Catholicam reducere proposuistis.

... Nos igitur hujusmodi vestrum sanctum et laudabile propositum plurimum in Domino commendantes, ac cupientes ut illud ad debitum finem perducatur, et ipsum nomen Salvatoris nostri in partibus illis inducatur, hortamur vos, quamplurimum in Domino ... ut cum expeditionem hujusmodi omnino prosequi ... intendatis, populos in hujusmodi insulis et terris degentes ad Christianam religionem suscipiendum inducere velitis et debeatis, ... (From Ango et ses pilotes, by Eugène Guénin).

12) J. Goebel, The Struggle for the Falkand Islands, p. 84.

a charge to convert the heathen, was treated as a grant of territory".

Nys points out [13]) that the Spanish monarchs at least did not regard the bull as a special favour bestowed on them by the Pope, as on June 19, 1493, at a public consistory, Diego de Lopez reproached the Pope in the name of his master, King Ferdinand, for the wars which afflicted Italy and for the conduct of the pontifical sovereign, which ruined the faith. That the relations between the Holy See and the King of Spain were at that moment not so cordial as might be supposed from the bull *Inter Caetera* may also be inferred from the conclusion of the Treaty of Tordesillas on June 7, 1494, by which the Kings of Portugal and Spain on their own account moved the line of demarcation 270 leagues to the west; twelve years were to elapse before this treaty was confirmed by the bull *Ea Quae* of Pope Julius II.

The power of the Popes as the vicars of Christ to assign territories, inhabited by heathens and infidels, to Christian Princes was originally derived from a forged document, the so-called Donation of Constantine the Great to Pope Silvester I, which vested in the Pope the sovereignty over Italy and the western kingdoms and over all islands. Schulte [14]) bases the bull of Nicholas V, granting the Portuguese the rights in Africa, upon the assertion of the papal right to send to non-Catholic peoples and countries Catholic governors who had the right to enslave the population if necessary for their conversion. As early as 1344 Clement VI had granted the Canary Islands or Fortunatae Insulae to Louis of Spain as a tributary of the Apostolic See upon his promise to convert the islanders to the worship of Christ [15]). The same duty is emphasised in the bulls *Romanus Pontifex* and *Imper Non*. And St. Thomas Aquinas defends the papal right to conquer the countries inhabited by infidels, because the faithful become God's children [16]).

13) E. Nys, La ligne de démarcation d'Alexandre VI, in Rev. d. D. I. et de Lég. Comp. XXVII, p. 488.

14) Schulte, Die Macht der Römischen Päpste, p. 20; quoted from Goebel.

15) Lindley, The acquisition and Government of backward territory in international law, p. 125.

16) "quia infideles merito suae infidelitatis merentur potestatem amittere super fideles qui transferuntur in filios Dei."

It is obvious that the assignment of territories already discovered and to be discovered to the Kings of Portugal and Spain would only fulfil the Pope's purpose, namely the conversion of the natives, if effective possession was taken of these territories, for only in that case could missionary activity be undertaken under the protection of the temporal power.

In the view of those peoples and princes who did not regard the Pope as the head of Christianity and who consequently were not impressed by the threat of excommunication *latae sententiae* of the bull to those navigators who without a special license from the Portuguese and Spanish Kings entered the regions assigned to those princes, neither the bull nor the Treaty of Tordesillas were of more effect than any other territorial delimitation contracted between third Powers.

"The Peruvian Inca", Lindley relates [17]), "was not unreasonable when, hearing of the Pope and his commission to the Spaniards for the first time, he told Pizarro that the Pope must be crazy to talk of giving away countries which do not belong to him". And Henry VII of England is sending out John Cabot and his three sons for the first time in 1495, issued letters patent by which Cabot is given full authority to discover and find new regions: plenam potestatem navigandi ad omnes partes, regiones et sinus maris orientalis, occidentalis et septentrionalis, sub insignis et vexillis nostris" and, "subjugare, occupare, possidere" on behalf of the King such lands as they might discover. Thus even a catholic Prince acted wholly in disregard of the papal bull.

Letters patent

In 1501 the same Monarch issued letters patent to an Anglo-Portuguese company, by which the company was authorized to enter into, take possession of and conquer the regions assigned them, with power to resist and drive away invaders.

Fresh letters patent delivered to the company in 1502, recognizing the authority of the sovereigns of Portugal and Spain are exceedingly interesting, particularly because the navigators were warned to keep away from lands already discovered and in the possession of

17) Lindley, p. 127.

other princes. After conferring the authority to take possession of, subjugate and govern newly found lands, the charter continued:

> Provided always, that they shall by no means enter or encroach upon those countries, nations, regions or provinces, heathen or infidel, which have previously been found by the subjects of our most dear brother and cousin the King of Portugal, or of any other Prince, friend or neighbour of ourselves, and which already are in possession of the said Princes.

The provision giving a right to oust intruders, is a most cogent proof that the English King recognized possession as the only true source of right [18]).

In consequence of Drake's voyage round the world the Spanish ambassador at the English court, Mendoza, protested most energetically. Elizabeth's answer is wellknown:

> "She understood not, why hers and other Princes subjects should be barred from the Indies, which she could not perswade her selfe the Spaniard had any rightfull title to by the Byshop of Romes donation, in whom she acknowledged no prerogative, much lesse authority in such causes, that he should bind Princes which owe him no obedience, or infeoffe as it were the Spaniard in that new World, and invest him with the possessions thereof, and that only on the ground that the Spaniards have touched here and there, have erected shelters, have given names to a river or promontory: acts which cannot confer property. So that this donation of *res alienae* which by law is void, and this imaginary proprietorship, ought not to hinder other Princes from carrying on commerce in these regions and from establishing colonies where Spaniards are not residing, without the least violation of the Law of Nations, since without possession, prescription is of no avail".

English — On June 11, 1578, letters patent were issued to Sir Humphrey Gilbert, authorizing him to discover and view countries "not actually possessed of any Christian Prince or people . . . the same to have, hold, occupie and enjoy to him" with the power to expel any

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18) Goebel, p. 58.

invaders". In the same form was the charter given to Sir Walter Raleigh in 1584.

From these facts it may be assumed that English law in the sixteenth century regarded the claims of the Spanish and Portuguese to exclusive rights in the new continent as defensible only in so far, as these claims were supported by actual possession.

As late as the 17th century the same principle was acted upon by Great Britain; this appears from the first Virginia charter of 1606 and the charter of New England of 1620, and as late as 1670 the Hudson's Bay Company was granted a charter by Charles II, assigning to the Company all the lands and territories around Hudson's Bay, "which are not now actually possessed by any of our Subjects, or by the subjects of any Christian prince or state" [19] [20].

French

In France the same principle was accepted in the letters patent granted by King François I to de Roberval in 1540 with regard to "esdits pays de Canada et Ochelagua, et autres circonjacens, mesmes en tous pays transmarins (et maritimes), inhabitez ou non, possedez et donnez par aucuns princes chrestiens". Settlements are to be made "et jusque en la terre de Saguenay, et tous autres pays susdits, affin d'en iceulx converser avec lesdits peuples estranges, si faire se peulx, et habiter esdites terres et pays, y construire et edifier villes et forts", etc. And de Roberval is instructed to "descendre et entrer en iceulx, et les mettre en notre

19) Lindley, p. 58. This does not alter the fact that the British Government put forward extravagant claims based on the mere seeing of the coast, if it served its turn. Drake's exploration of the American coast from 37° to 48° was basis of the British claim against the Netherlands contention of settlement of New Amsterdam. The sword decided in favour of the British.

20) Goebel in his above mentioned study: "The Struggle for the Falkland Islands" points out that this protection of possession is quite in accordance with the theory of English law, which, based on the fundamental principle of seisin, could not conceive of an original acquisition of territorial sovereignty, the available land of England being subject to the system of tenure. The whole feudal system being based on the theory that all the known property of the world was vested in an overlord and that the *dominium* over it was exercised by him only mediately

main, tant par voye damittié ou amyables compositions, si faire se peulx, que par force darmes, main forte et toutes autres voyes

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or immediately, sovereignty could only be had by derivation, either by enfeoffment, by cession or by conquest. This accounts for the fact that the English Kings only recognized claims based on actual possession.

From the point of view of Roman law on the other hand *occupatio* was a method of original acquisition, acquisition of *res nullius*. (G. Inst. II, 66). Referring to Czyhlarz' commentary on Digest 41, Goebel proves (p. 72) that "occupation in private law is the acquisition in fact and not the mere casual exercise of power over a thing, for the latter is no more than a precedent step to the completed act, and is consequently without enduring legal significance".

Bartolus de Saxoferrato combines the Roman law and the current view of the feudal law. He states, that a (feudal) superior may give the right of occupation as has frequently been done by the Pope. In such a case, if the person to whom the right is given, fails to occupy, he loses his right. The doctrines of the Tractatus de Insula (island being a technical term for newly discovered land) were embodied in the accepted body of Roman law. It is, therefore, proper to assume, Goebel concludes, that they were well known to the Holy See at the time when the bull *Inter Caetera* was issued.

Goebel then draws attention to the *capitulación* or charter and the patent granted by the Spanish Monarchs to Columbus, their mandatory, preceeding the bull. These documents both speak of discovery and acquisition (*ganar*); in this way the King expected to gain a title to sovereignty and Columbus accordingly left some of his followers on the Island of Hispaniola. (In the famous code of Alfonso the Wise (1265), known as the Siete Partidas, *occupare* is translated by *poblar*, a conclusive proof, that as far as the Spanish law was concerned, occupation was synonymous with colonization). The instructions issued to Columbus on May 29, 1493 show the change effected by the bull. At the very outset they lay upon the admiral the charge of converting the Indians to the Christian faith. Also in the following patents the power to make discoveries is given, but nothing is said of the taking of possession. Obviously the papal bull is regarded as a political instrument and as a title to sovereignty. But this can only be true as far as Spain and Portugal are concerned and as soon as the English entered upon their policy of colonial expansion, the Spanish King had to fall back upon his former principle, namely, that only effective occupation could give title. The same applies to Spain and Portugal in the interpretation of the papal grant: As the bull *Ea Quea* had only drawn a line of demarcation in the Western hemisphere a conflict in the eastern was bound to follow. After the successful circumnavigation of the globe by Magellan

d'hostilité, — de assaillir villes, chasteaulx, forts et habitations, et d'en construire et en ediffier, ou faire construyre et en édifier daul-

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a conflict arose as to the sovereignty over the Moluccas. Both Portugal and Spain claimed that these territories had been assigned to them. According to his instructions Magellan had concluded treaties with different chieftains by which the latter had recognized the Suzerainty of the King of Spain; and accordingly possession was taken. The Portuguese on the other hand, claimed a right of prior discovery, corroborated by reference to the bull *Praecelsae Devotionis*, issued by Leo X on November 3, 1514, by which the rights granted by the bull of Nicholas V were extended *ubicumque et in quibuscumque partibus etiam nostris temporibus forsan ignotis.*

It is exceedingly interesting to notice, that the instruction of Charles V to his ambassador Juan de Zuñiga of December 18, 1523, represents exactly the same point of view that the Netherlands Government was to take four hundred years later in the present, Miangas controversy and nothing is more natural than this Government's reference to the instruction, on p. 14 of the Counter Memorandum:

Having alleged several acts showing actual possession of the islands by Spain and having denied any such acts on behalf of the King of Portugal, the instruction continues:

> And, in proof thereof (to continue the above), our present possession, which had been public and without any opposition by the said Most Serene King of Portugal, was sufficient. And this possession of ours has been continued with his knowlegde, sufference and good grace, and had been likewise known and suffered by the Most Serene King Don Manuel, his father . . .
>
> It could not be denied that Malucco had been found and taken possession of first by us, a fact supposed and proved by our peaceful and uninterrupted possession of it until now; and the contrary not being proved legally, our intention in the past and present is inferred and based upon this possession . . .
>
> Furthermore it was declared on our behalf, that, although Malucco had been discovered by ships of the King of Portugal — a thing by no means evident — it could not, on this account, be made to appear evident, or be said that Malucco had been found by him. Neither was the priority of time, on which he based his claims, proved, nor that it was discovered by his ships; for it was evident, that to find required possession, and that which was not taken or possessed could not be said to be found, although seen or discovered . . .
>
> From the above it followed clearly that the finding of which the said treaty speaks, must be understood and is understood effectually. It is expedient to know, by taking and possessing it, that which is

tres, esdits pays, et y mettre habitateurs" [21]). In the same year Jacques Cartier was charged by the same Monarch to go to Canada and Hochelagua "avec bon nombre de navires, et de toutes qualités, arts et industrie, pour plus avant entrer esdits pays, converser avec les peuples diceux, et avec eux habiter (si besoin est)" [22]). In 1603, King Henry IV, having "reconeu . . ., combien peut être fructueuse, commode et utile à nous, à nos Etats et sujets, le demeure, possession et habitation d'iceux (le territoire de la Cadie)" instructed de Monts to "surtout peupler, cultiver et faire habiter lesdites terres, le plus promptement, soigneusement et dextrement,

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found; and consequently the Most Serene King of Portugal, nor his ships can in no manner be spoken of as having found Malucco at any time, since he did not take possession of it at all, nor holds it now, nor has it in his possession in order that he may surrender it according to the stipulations of the said treaty.

And by this same reasoning it appeared that Malucco was found by us and by our ships, since possession of it was taken and made in our name, holding it and possessing it and having power to surrender it, if supplication is made to us . . .

Furthermore the right of our ownership and possession was evident because of our just occupation. At least it could not be denied that we had based our intention on customary law, according to which newly-found islands and mainlands, belong to and remain his who occupied and took possession of them first, especially if taken possession of under the apostolic authority, to which — or according to the opinion of others, to the Emperor — it is only conceded to give this power. Since we, the said authorities, possessed these lands more completely than any other, and since the fact of our occupation and possession was quite evident, it followed clearly and conclusively that we ought to be protected in our rule and possession, and that whenever anyone should desire anything from us, he must sue us for it; and in such suit must be the occasion for examining the virtue and strength of the titles, the priority, and the authority of the occupation alleged by each party to the suit.

The elaborate quotation from Goebel's book seems justified on the mere ground that no study on the subject of discovery can claim any degree of completeness, which does not take it fully into account.

21) A. Gourd, Les chartes coloniales et les constitutions des Etats-Unis de l'Amérique du Nord, I, p. 208 sqq.

22) Ibid., p. 218.

que le temps, les lieux et commodités, le pourront permettre" [23]). And in 1678 Louis XIV charged La Salle "à former des habitations sur lesdites terres (la partie occidentale de notre pais de la Nouvelle France)" [24]). Again the charter of 1626 to the Compagnie des Isles de l'Amérique grants a monopoly, after receiving that the grantees have discovered and occupied some of the islands in the West-Indies [25]).

Dutch In the charter of the Dutch East-India Company no such provisions are to be expected, the Company being a mere trading company. In fact, neither the charter of 1602, nor the Placaet on discovery of 1614 mentions the necessity of an effective occupation. Actual authority was only exercised in so far as was necessary for the protection of trade; the Company never aimed at the acquisition of territorial sovereignty. None the less, effective possession was taken of those islands, which the Company intended to reserve as its own sphere of influence.

It should be borne in mind that in the beginning of the 17th century the eighty years war between the United Provinces and Spain (and Portugal, that country having been annexed by Spain in 1580) was in full swing. This may on the one hand account for the lack of provision on the subject in the Company's charter, the Spanish and Portuguese being the only competitors of the Dutch in the Archipelago at that time. Between these Powers the right of the stronger prevailed. As soon as Portugal became independent a truce was concluded with that country (1641) and consequently effective possession was taken *e.g.* of the Island of Solor, known to be desired by the Portuguese [26]). On the other hand Grotius, who was counsel for the East-India Company, was of opinion, that heathens and infidels could not be dispossessed of their territories. This may also serve to explain the absence of provisions in the charter.

That effective occupation is an essential constituent of a title

23) Ibid., p. 231 sqq.
24) Ibid., p. 283.
25) Lindley, p. 96.
26) J. E. Heeres, Corpus Diplomaticum I, p. 246.

to territorial sovereignty was a fact well known in the United Provinces; this is evidenced by the act, whereby possession was taken of Saint Helena on April 15, 1633 by Jacques Specx, retired governor-general of the Dutch East Indies. The notification (Notificatie op pilaer aengeslagen) states, that "possession and dominion were taken on behalf and in the name of the United Provinces of the Island of Saint Helena, with all lands, hills, cliffs and islets appertaining thereto, with a view to its fortification, occupation, population and protection against any hostile invasion, at the earliest opportunity". (Op dato 15en Aprillis Ao 1633 hebben den E. Heer Jacques Specx, oudt Gouvernr Generael, wegen den Staet der Vereenichde Nederlanden in India, t'saempt den Breeden Raedt van de presente alhier gearriveerde Nederlantse vloote ... de possessie ende eygendom van dit eylandt, van oudts genaempt St. Helena, soo als t'zelve jegenwoordich leght, met alle zyne aenlangende gronden, heuvelen, clippen ende rotsen, voor den Staedt der Vereenichde Provintien aengenomen, omme t'zelve ten besten ende voordeel van den gemten Nederlandtschen Staet ter eerster gelegentheyt te verstercken, besetten, peupleren ende tegen alle jnvasien van vyanden te beschermen) [27]).

Doctrine

Grotius, who, of course, denies the legal character of any Papal bull says:

> Si dicent inventionis praemio eas terras sibi cessisse, nec jus, nec verum dicunt. Invenire enim non illud est oculis usurpare, sed apprehendere ... ad titulum dominii parandum eam demum sufficere inventionem quae cum possessione conjuncta est (Mare Liberum c. 2).

In the same chapter Grotius holds:

> Praeterea inventio nihil juris tribuit, nisi in ea quae ante inventionem nullius fuerant. Atqui Indi, cum ad eos Lusitani venerunt, etsi partim idolatrae, partim Mahumetani erant, gravibusque pec-

27) Ibid., p. 257. This act is remarkable from another point of view also: it shows, that state practice recognized an inchoate title long before Vattel referred to it. The island was discovered by the Portuguese in 1502, who, however, had abandoned it. It was again abandoned by the Dutch in 1651.

> catis involuti, nihilominus publice atque privatim rerum possessionumque suarum dominium habuerunt, quod illis sine justa causa eripi non potuit . . . Imo credere infideles non esse rerum suarum dominos, haereticum est: et res ab illis possessas illis ob hoc ipsum eripere furtum est et rapina, non minus quam si idem fiat Christianis.

Again in his De Jure Belli ac Pacis Grotius denies that a claim to land inhabited by a native population, based on discovery, is a just cause of war (II, XII, 9 & 10), even though the possessors be evil men, with wrong notions of God and dull intellects. As regards this point Grotius is fully in accordance with Franciscus a Victoria, who in his Relectio de Indis holds the opinion, that discovery could not give a title to sovereignty. He maintains that no papal bull could grant such a title and that the American continent, being owned by the native population, could not be considered as *territorium nullius*. He consequently had to found the Spanish title on conquest. But Las Casas even rejected this title, holding, in 1542, that the conquest of the Indies from the natives was unlawful, tyrannical and unjust, and Gentilis, in 1588, maintained, that only a war for commercial purposes could be considered as a *justum bellum:* the Spaniards, however, aimed at the acquisition of territory [28]). Another of Grotius' predecessors is the German jurist Gryphiander to whose Tractatus de Insulis (1623) Grotius often refers. Goebel relates [29]), that to Gryphiander *invenire* denotes not merely the sighting of the land, but sighting and effective occupation (invenire = in + venire, entering upon). This writer uses *inventio* in the sense in which other writers use *occupatio* and his lengthy discussion in c. 21 as to *apprehensio*, together with the *animus sibi habendi* and the status of the island as *terra nullius* being the requisites for the acquisition of sovereignty, clearly shows, that he has in view effective occupation.

Conclusion

It would not be difficult to show, that in the 17th and 18th centuries the principle of *uti possidetis* was in general as strictly

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28) Lindley, p. 12—13.

29) Goebel, p. 117—118.

observed as in the 15th and 16th centuries. It is to be seen from Article V of the Treaty of Münster and Article X of the Treaty of Utrecht, both referred to in the present case, that the principle was applied in those treaties which are generally regarded as the basis of modern international law. At all events it appears both from state instruments and doctrine of the period with which the Arbitrator had to deal, that, under international law, the mere fact of discovery never conferred a right to territorial sovereignty.

3. Discovery as creative of an inchoate Title.

Thus, the creation of a definite title vested by the mere fact of discovery does not appear to be supported by international law as it was understood in the 16th century.

It may, however, for clearness' sake once more be recalled, that it is not on this ground, that the Arbitrator rejects the United States claim to the island in dispute. From the Arbitrator's point of view the Spanish title, if any, would have been lost, because Spain did not comply with the change in international law, viz. the requirement that occupation must be effective.

Thus the second hypothesis must be considered, viz., that discovery only creates an inchoate title, to be completed by effective possession within a reasonable period. It has been seen on p. 86, that state practice made use of inchoate titles as early as 1633; only a careful examination of earlier acts by which possession was taken of different regions would provide an answer to the question, whether this practice can be said to be founded in international law.

Smedal [30]) demonstrates that the doctrine is especially supported by Anglo-Saxon jurists, that it has been received more reservedly on the European continent (France) and that it is rejected in Germany by Heilborn. It is remarkable that this situation corresponds to the colonizing activity displayed by Great Britain, France and Germany respectively.

Dudley-Field and Fiore suggest a period of twenty-five years, Fauchille, on the other hand, one of one year [31]). These time limits

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30) Smedal, p. 48.

31) Fauchille, I, ii, 552[1].

are wholly arbitrary as has been pointed out above on p. 17; a general rule can not be laid down. In general the "reasonable period" is accepted, however vague the term may be. Smedal relates that Great Britain claimed a right to Bouvet Island on the ground of a rediscovery in 1825, more than one hundred years before [32]). This could hardly be called a reasonable period; at all events the inchoate title in these circumstances would seem devoid of sense.

In the present case it was admitted, that the Island of Miangas was discovered in the first quarter of the 16th century; possession had not yet been taken in 1898. The Arbitrator, however, admits the possibility, that Spain at that date still had an inchoate title to the island. If this is to be considered as a reasonable delay, it might be asked what is an unreasonable delay.

The point is, however, of no practical importance in the present case, as such inchoate title cannot prevail over a title supported by effective display of state authority.

B. The Title of Contiguity.

It is said in the Award [1]), that the United States 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. As to this point the Arbitrator states on p. 60, that the title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law.

1. Professor Jessup's Criticism.

Professor Jessup, however, denies, that the American title is based on the principle of contiguity. Before considering whether and, if so, to what extent international law recognizes a title based on this principle, the preliminary question must be answered, whether

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32) Smedal, p. 49.
1) Award, p. 14.

the United States Government put forward a claim based on such a principle.

Jessup [2]) in fact says: The Arbitrator seems to have misapprehended the American theory, since he suggests that the United States definitely based a claim to sovereignty on the principle of contiguity. On the contrary it is stated in the American Memorandum [3]):

> Perhaps it may be said that definite, comprehensive rules of international law have not been formulated with regard to the rights accruing to a nation by reason of the geographical situation of territory . . . However, attention may be drawn to some principles which have been laid down by writers, principles to which importance has been attached in international transactions.

"Indeed", Jessup adds, "they were practically estopped from doing so by the opposing statement of Secretary of State Webster in 1852, when disputing the Peruvian claim to the Lobos Islands" [4]).

The passage left out by Jessup in quoting the United States Memorandum runs as follows:

> Nevertheless, this subject has frequently been discussed by writers on international law and by arbitral tribunals, and it has played an important part in international relations. In considering this subject it is pertinent again to bear in mind the difference in international practices between the present time and a remote period two or three centuries in the past. The Philippine Archipelago is a group of islands, and for that reason theories that have been evolved with regard to islands situated off the mainland of a nation's territory may not be directly applicable to the situation under consideration. The Island of Palmas which lies off the coast of the much larger island of Mindanao is itself one of the Philippine Group.

The American Agent refers to the "principles laid down by writers" and to a number of cases which turned on the geographical position, the whole taking exactly twenty pages of the United States

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2) loc. cit. p. 742.
3) U.S. Mem. p. 111.
4) J. B. Moore. A digest of international law, I, p. 265.

Memorandum. In the conclusions of this Memorandum it is expressly stated, that "Spain possessed title to the island in 1898 as an island of the Philippine group, and the island as a part of that group now belongs to the United States". It is difficult to see, why the American Agent should have taken the trouble to quote such abundant references, if he did not intend to support a claim based on a principle to which the reference applies.

None the less the American Agent seems not to have intended to invoke the principle of contiguity. Such is evidenced by his Report [5]), where we read:

> In support of the views indicated above (the passage on p. 111 of the United States Memorandum) citation was made to numerous writers on international law and to international precedents.
>
> The Arbitrator does not explain his own conception of what he calls the "notion of contiguity" or of the term contiguity on which he states that the United States founded its claim. He declares that "the title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law". The statement of the Memorandum of the United States that "perhaps it may be said that definite, comprehensive rules of international law have not been formulated with regard to the right accruing to a nation by reason of the geographical situation of territory" and the reference to international precedents, are convincingly borne out, it is believed, by the citations of authorities and precedents.

It is by no means clear, what the United States Memorandum really means. As the authorities and precedents quoted all refer to the principle of contiguity, it is only natural, that the Arbitrator was of opinion that the United States claim was based on it. It appears from the Netherlands Counter Memorandum that the Netherlands Government shared this view, but neither the subsequent United States Further Written Explanations nor the Rejoinder refer to the subject.

Jessup [6]) explains, that the United States did not go so far as to appeal to the strict theory of contiguity:

5) Report of Fred. K. Nielsen, p. 26—27.

6) loc. cit. p. 742.

"The American position, for which there seems to be considerable authority, was roughly as follows: there being a paucity of evidence of actual Spanish exercise of authority on Palmas Island, it is proper to take into account the fact that this island is one part of the geographical unit known as the Philippine Archipelago; Spain's title over the archipelago is clear, and in the absence of contrary evidence, it must be assumed that her occupation and control of Mindanao and the other islands included Palmas Island. In other words this part of the American argument is closely bound up with the apt quotation from the Venezuelan argument in the British Guiana Boundary Arbitration, which was set forth at length in that part of the Memorandum which deals with discovery and occupation (Am. Mem. p. 101—102). The Venezuelan Government there developed with adequate examples the sound rule that occupation to be effective need not extend to every nook and corner of the territory. It was noted that down well into the nineteenth century one could have traversed vast areas of American and Canadian wilderness, seeing no white man and constantly being in danger of unsubjected savages.

In like manner, the American argument suggested, rather tentatively indeed, that they obviously could not show specific acts of Spanish administration in every inch of the Philippines, but that it was sufficient merely to show the occupation and control of the unit".

What Jessup forgets, is, that "the absence of contrary evidence" is the *conditio sine qua non* of his argument and that on the contrary the Netherlands claim is essentially based on the continuous and peaceful display of activity over the island. In this connexion it is interesting to quote three jurisconsults invoked in the United States Memorandum, p. 112:

Heffter, discussing territorial sovereignty, says:

"Finally effective occupation of the main thing will also include the dependencies *when they are not separately held*".

In the same sense Pradier-Fodéré says:

"Effective occupation of the main thing necessarily includes its dependencies *when they are not held by another*".

Dana, in one of his notes to Wheaton's Elements of International Law declares to be "appurtenant" to the coast of the mainland, adjacent islands even though they are not formed by alluvium or increment. He says:

"Islands adjacent to the coast of the main land, though not formed from it by alluvium or increment, are considered as appurtenant, *unless some other power has obtained title to them by some of the recognized modes of acquisition*". (Writer's italics).

And even the passage quoted from Calvo [7]) seems to operate against the United States argument rather than in favour of it:

"The possession and occupation of the mainland carries with it that of the adjacent islands, even when no positive act of ownership has been exercised over them. As regards these islands, it may be said that if any foreign State tried to colonize them it would give a just cause of complaint and even of war to the State to which they are appurtenant, by persisting in an intention to take possession of them.

The possession of islands situated at a certain distance from the mainland is acquired in the same ways as that of any other territory".

It is obvious that, as regards the Island of Mindanao, at a distance of 48 seamiles, the Island of Miangas is rather to be described as "at a certain distance" than as "adjacent", and that consequently, according to Calvo, it would be impossible to base a title to the Island of Miangas upon the geographical situation. Only if the Netherlands Government were unable to prove the effectiveness of their occupation of the island would any purpose have been served by the quoting of these writers and the American Agent must be assumed to have judged that this would be the case. This is in accordance with Jessup's conclusion [8]): "Judge Huber, however, was dealing with this argument in the light of his conclusion that the Dutch had proved "continuous and peaceful display of state authority during a long period of time "on Palmas Island, and under

7) U.S. Mem. p. 114.
8) loc. cit. p. 744.

this hypothesis control implied from geographic propinquity undoubtedly should not prevail". The essential point therefore turns out to be not the geographical position, but the effectiveness of the Netherland's occupation of the Island of Palmas. Thus only does it seem possible to justify Jessup's reproach when he says that "it seems that the Government of the Netherlands was not willing to combat the proposition thus stated. Their argument on this point was rather directed toward destroying the straw man of strict title based on contiguity and, more pertinently, toward proving that on the basis of geographical and geological evidence, Palmas could not be considered part of the Philippines any more than part of the Nanusa (Dutch) Islands, from which it was only six miles more distant" [9]).

It is evident, that the Arbitrator, on the one hand, considering that the Netherlands had exercised state authority over the island for a long period and on the other hand having before him, not the interpretation of Professor Jessup, but only the above quoted passage of the United States Memorandum and the conclusion [10]): "Spain possessed title to the island in 1898 as an island of the Philippine group, and the island as a part of that group now belongs to the United States", could not attach much legal weight to this part of the American contention.

2. The Arbitrator's Opinion.

The following passage of the Award is illustrative of the Arbitrator's opinion [11]):

> Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size). Not only would it seem

9) ibid. p. 743.
10) U.S. Mem. p. 130.
11) Award, p. 39.

that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even Governments of the same State have on different occasions maintained contradictory opinions as to its soundness. 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. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results. This would be especially true in a case such as that of the island in question, which is not relatively close to one single continent, but forms part of a large archipelago in which strict delimitations between the different parts are not naturally obvious".

The Arbitrator is thus in agreement with the Netherlands contention [12]):

If the contention of the United States Government were to be understood to be that Spain discovered the Philippine islands, and that Miangas by its contiguity to the Philippine group was embraced in this discovery, and that the subsequent effectual occupation or other lawful means of acquisition of the Philippine islands naturally extended its legal effect to the island of Miangas, the Netherlands Government maintain that any such contention would be unfounded.

This Government hold that, geographically speaking, Miangas is to be considered as a link in the chain of islands extending from northern Celebes through the Sangihe- and Talaud islands to south-

12) Neth. Count. Mem. p. 40.

eastern Mindanao, and that, geographically, there is no sharp division between the Philippine islands and the Netherlands Indonesian archipelago. For this reason it cannot be maintained that the island "constitutes an inseparable satellite, bound to the Philippine islands and perforce following the evolution of the latter".

According to the United States Memorandum [13]) an illustration of consideration given to geographic situation is found in the Treaty of Paris of February 9, 1920, by which Spitsbergen was assigned to Norway. This seems, however, rather to illustrate the extreme weakness of this part of the American contention. Undoubtedly the relative proximity to Norway (the island lies about 600 miles away) was a ground for assigning the island to Norway rather than to another Power, but Norway acquired a title by treaty and this example rather tends to prove, that relative proximity in itself has no legal effect. As to this point the Netherlands Government state [14]): The decision to assign the territory to Norway was a matter of political expediency, freely agreed to by the interested powers [15]).

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13) U.S. Mem. p. 124.

14) Neth. Count. Mem. p. 44.

15) If geographical contiguity has no legal consequences, it cannot be denied that is has important political consequences. This is clearly shown by the case of the *Anna*, again wrongly referred to in the United States Memorandum, p. 124. The capture of this ship was effected at the mouth of the river Mississippi, and, as it was contended in the claim, within the boundaries of the United States. The question arose as to what was to be deemed the shore, since there were a number of mud islands composed of earth and trees carried down by the river. "It is contended", Sir William Scott laid down in his judgment (1805), "that these are not to be considered as any part of the territory of America, that they are a sort of no man's land ... It is argued that the line of territory is to be taken only from the Balise, which is a fort raised on main land by the former Spanish possessors. I am of a different opinion; I think that the protection of territory is to be reckoned from these islands; and that they are the natural appendages of the coast on which they border, and from which indeed they were formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law. Quod vis fluminis de tuo praedio detraxerit, & vicino praedio attulerit, palam tuum remanet, even if it had been carried over to an

It would hardly be necessary to dwell upon the subject, if it were not for the interesting discussion devoted to it by the Arbitrator. Having explained that in the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space,

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adjoining territory. Consider what the consequence would be if lands of this description were not considered as appendant to the main land, and as comprized within the bounds of territory. If they do not belong to the United States of America, any other power might occupy them, they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible at least that they might be so occupied by European nations, and then the command of the river would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to shew, that these islands are not to be considered as part of the territory of America."

The political importance of the principle was again recognized by the German Ambassador in London in 1885, whose note to Earl Granville run as follows: "Although ... in the abstract, the whole independent portion of New Guinea formed in principle quite as justifiable an object of German as of English undertakings, the Imperial Government desired nevertheless to recognize as justified the wish of the Australians that no foreign Power should settle on the south coast of New Guinea in the region of the Torres Straits opposite Queensland" (76 S.P. 790). The same appears in the Franco-British Agreement of April 8, 1904, in which it was said, that "it (Morocco) appertains to France, more particularly as a Power whose dominions are conterminous for a great distance with those of Morocco, to preserve order in that country, and to provide assistance for the purpose of all administrative, economic, financial and military reforms which it may require". In the same arrangement the interests of Spain arising from "her geographical position" were recognized (101 S.P. 1053). In the same year Great Britain ceded to France the islands of Los, opposite Kanakry; both the Marquess of Lansdowne and Mr. Delcassé agreed, that the geographical situation of these islands bound them closely up with French Guiana and that their possession by another Power would constitute a serious menace to that colony (Fauchille, I, ii, 552[6]). And in explaining the Anglo-Japanese treaty of 1905 by which certain Japanese rights in Corea were recognized, the British Foreign Minister said: "It has become evident, that Corea, owing to its close proximity to the Japanese Empire and its inability to stand alone, must fall under the control and tutelage of Japan" (Lindley, op. cit. p. 218). And the United States recognized the political consequences arising from Japan's proximity to the Chinese Empire in the Notes exchanged with Japan on November 2, 1917. "The Governments of the

the learned Judge continues[16]): "This phenomenon will be particularly noticeable in the case of colonial territories, partly uninhabited or as yet partly unsubdued. The fact that a State cannot prove display of sovereignty as regards such a portion of territory cannot forthwith be interpreted as showing that sovereignty is inexistent. Each case must be appreciated in accordance with the particular circumstances".

This statement seems, *prima facie*, at variance with the principles laid down in the doctrinal section of the Award, for here the Arbitrator admits the existence of sovereignty as a right only. It only proves, however, that these principles have, and can only have, a relative validity, as has been pointed out above, p. 47—49.

In this connection the following passage is illustrative of the extreme scrupulousness displayed by the Arbitrator[17]):

"As regards groups of islands, it is possible that a group may under certain circumstances be regarded as in law a unit and that the fate of the principal part may involve the rest. Here, however, we must distinguish between, on the one hand, the act of first taking

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United States and Japan", is is stated, "recognize that territorial propinquity creates special relations between countries, and consequently the Government of the United States recognize that Japan has special interests in China, particularly in that part to which her possessions are contiguous". "Territorial propinquity", by Quincy Wright in A. J. XII, p. 519. And only recently the Japanese invasion of Jehol was explained on the ground of the contiguity of this province to the Manshukwo Republic. But nowhere is the delimitation between claims based on political or economic grounds and those based on legal grounds more distinctly drawn than by Baron Lambermont in his arbitral award of August 17, 1889 (R.D.I. XXII, p. 353): „Si des considérations basées sur l'intérêt économique et administratif ou sur des convenances politiques peuvent mettre en lumière les avantages ou les inconvénients qu'offrirait une solution conforme aux vues de l'une ou de l'autre des parties, de telles raisons ne tiennent pas lieu d'un mode d'acquisition reconnu par le droit international . . . Nous sommes d'avis que ni la dépendance géographique, ni la dépendance commerciale, ni l'intérêt politique proprement dit ne mettent aucune des parties en position de réclamer, à titre de droit, la cession des douanes et de l'administration de l'île de Lamu".

16) Award, p. 40.

17) ibid., p. 40.

possession, which can hardly extend to every portion of territory, and, on the other hand, the display of sovereignty as a continuous and prolonged manifestation which must make itself felt through the whole territory".

This is obviously an answer to the reference in the United States Memorandum, p. 113, where Lawrence is quoted [18]):

"The whole of an island, unless it be very large, and even a group of very small islands, may be acquired by one act of annexation and one settlement. Thus, in 1885, Great Britain and Germany took possession of the Louisiade Archipelago and the Marshall Islands, respectively. Both groups are situated off the eastern end of New Guinea, and were taken in consequence of the acquisitions made on that island. In each case one formal act of annexation was held sufficient for the entire group".

It appears that the Arbitrator has fully dealt with every separate argument of the litigating Powers. This reference, however, does not apply, because the Island of Miangas is "a somewhat isolated island, and therefore a territory clearly delimited and individualised. It is moreover an island permanently inhabited, occupied by a population sufficiently numerous for it to be impossible that acts of administration could be lacking for very long periods" [19]).

In rejecting a claim based on the geographical position, Judge Huber thus seems in accordance with Mr. Fish's contention in the Navassa case, that the utmost to which the argument amounts "is a claim to a constructive possession, or rather to a right of possession; but in contemplation of international law such a claim to a right of possession is not enough to establish the right of a nation to exclusive territorial sovereignty, which, according to Mr. Webster in the Lobos Islands case, must be supported by "unequivocal acts of absolute sovereignty and ownership" " and with Quincy Wright's conclusion, "that territorial propinquity has furnished a legal justification for the acquisition of territorial sovereignty, but only in regions unoccupied or occupied only by savages" [20]).

18) U.S. Mem. p. 113.
19) Award, p. 40.
20) Quincy Wright in A. J. XII, p. 519 sqq.

CHAPTER III.

THE NETHERLANDS TITLE.

A. Extinction of a previous Spanish Title.

Whereas the United States title to the Island of Miangas is essentially based on a right arising out of discovery and confirmed by treaty, the Netherlands title is essentially based on continuous and peaceful display of state activities during a long period. The Netherlands Government maintain, in fact, that the Netherlands have had a valid title to the Island of Miangas from the beginning of the eighteenth century, if not before, and that they developed, strengthened and completed their title in the following centuries, especially in the latter part of the nineteenth century; and that when the Treaty of Paris was concluded (1898), the island formed part of the Netherlands territory.

The Netherlands Government submit [1]), that "while the maintenance of sovereignty, on account of the variety of special relations existing internally in the territory of a colonial power, does not in all circumstances require the permanent presence of its officials in every part or island of its territory, the belonging of Miangas to native states under Netherlands' sway, the successive acts of paramountcy, conventions with native principalities, acts of administration etc. of the Netherlands, begun in a period when neither Spain nor any other power exercised sovereignty over that region, and continued afterwards and until 1898 without any protestation by any foreign Government, converged in validly establishing Netherlands sovereignty".

It has been pointed out above, p. 69, that the Netherlands contend, that it is a well established principle of international law that discovery alone does not confer a full title to territorial jurisdiction or sovereignty [2]), and that the United States hold the contrary

1) Neth. Mem. p. 21.
2) Neth. Count. Mem. p. 14.

view. The Netherlands Government, fully aware of the controversy as to this point, consequently took up two different positions to support their claim, one of them being based on their own assertion, the other being only an alternative argument, in case the Arbitrator should hold that the discovery of the island by Spain was established and share the American view as to the consequences of that fact [3]).

1. Abandonment.

The latter argument being closely connected with that of the United States, may be considered first. Attention may be drawn to the conclusion of the Netherlands Memorandum [4]):

> Even if it were found that in former times another power had exerted some kind of authority over the island, any title based thereon has lapsed by the unchallenged action of the Netherlands in later years. The Netherlands therefore also base their rights on the principle of prescription, having exercised their authority over Miangas (Palmas) for a long series of years without any protest or interference.

Whereas this conclusion expressly refers to the principle of

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3) "The weakness of the Netherlands Government's case is evidenced not alone by the variety of its claims, but by their conflicting nature" — the U.S. Count. Mem. states on p. 84. "Sovereignty is fundamentally claimed on the basis of contracts made by a trading company with native chiefs. A title claimed by virtue of such contracts would seem to imply contentions with respect to an original title, because it would scarcely be contended that savage chiefs could dispose of the sovereign rights possessed by a member of the family of nations. Sovereignty is claimed on the basis of a contention that Spain abandoned the Island of Palmas which was subsequently occupied by the Dutch. A contention of this kind of course negatives any assertion of an original title and concedes a prior title in Spain. Sovereignty is claimed on the basis of prescription. A contention of this kind is of course also at variance with the claim of an original title and admits the existence of a prior title".

But this reproach is unjustifiable. It is common in international controversies for one Party to put forward different constructions of its claim to meet any possible construction of the other Party. The recent Greenland case is a clear illustration of this truth.

4) Neth. Mem. p. 22.

prescription, it would seem that the Counter Memorandum has abandoned this position and invokes the abandonment by the Spaniards of their title. The conclusion runs as follows [5]):

> While the Netherland Government consider that the United States Government did not submit any evidence of having ever had as much as an inchoate title to Miangas, they are of opinion that, even if Spain had any title, the facts and considerations submitted by the Netherland Government in their first memorandum, amplified in the present memorandum, show that such title, if it ever existed, has been lost.

That the Netherlands Government here adduce an original title, vested in the Netherlands after the abandonment of the island by the Spaniards, is proved by the following passage of this document [6]):

> Whatever title Spain may have had before 1660, she must have lost it between 1660 and 1670, during the governorship of Don Manrique de Lara (1653—1663) and of Don Diego Salcedo (1663—1668). When, in 1662, Chinese invaders from Formosa threatened Luzon itself and the very capital Manila, the Governor-Captain (Governor-General) took the measure, disastrous for a Spanish title to Miangas, if such a title existed, of recalling the Spanish troops from their isolated station at Ternate (in the Moluccas), from the Western part of Mindanao, and from all the southern Philippine Islands. The whole of Ternate then passed under the authority of the Dutch, who remained there as sole occupants.

The action to which the Netherlands Government refers, was taken in consequence of the attack on the Philippines and especially on its capital Luzon, planned by the famous adventurer Kue Sing, son of a Chinese fisherman and a Japanese mother, known in Netherlands colonial history as Koxinga, whose father, having taken advantage of the revolutionary troubles afflicting China as a consequence of the Manshu invasion in 1644, had gathered great wealth. Being expelled from the southern part of China, where he held an independent position, the son conquered the Dutch pos-

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5) Neth. Count. Mem. p. 46.

6) Neth. Mem. p. 10.

sessions on Formosa and having strengthened his position, made up his mind to conquer the Philippine Archipelago. Being aware of Koxinga's intentions the Spanish Governor concentrated all available soldiers to defend the capital and even those in the Moluccas were withdrawn from the fortifications.

On the other hand, in a letter from the Provincial Prelacy of the Franciscan Order of Minors of the Province of St. Gregory the Great of the Philippines reproduced by the United States, the withdrawal from the Moluccas is said to have taken place in 1666 [7]):

> Don Francisco Atienza Ibañez, Captain General of the Royal Armada, on dismantling in 1666 all the fortified places of the Molucas Islands, made before the Dutch Governor of Malayo with free and full authority which he had for that purpose, the required and necessary legal protest in order that the Dutch should not occupy them nor would he consent that others should do so; for although armed force was withdrawn the King our Master retained personal dominion, lordship, authority and ownership which, as legitimate lord and master he held in all the places, forts and fortifications in that territory before the above-mentioned withdrawal.

Again in a report of the Dutch Resident of Menado [8]) it is stated, that in 1677 the Spaniards were driven from the Sangi Islands by the Dutch East India Company: the statement in the United States Agent's Report on p. 29 that Spain was obliged to withdraw from the Moluccas for the defence of Manila in 1648, is obviously wrong.

The Power who appeals to abandonment is, however, in a difficult position, because it must prove not only actual relinquishment of sovereignty by the other party, but also the intention to abandon it. In the well known cases relating to abandonment in international law, the superseded party has always denied that he has departed *sine spe redeundi*. This was the argument of the English in the Santa Lucia case and in the case of the Falkland Islands; and of the Spanish in the case of British Honduras. And in the Anglo-

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7) F. Wr. Expl. p. 66.

8) Neth. Expl. p. 54.

French case concerning the Egyptian Soudan, France claimed, that the Fashoda district had become *res nullius*, having been abandoned by the Egyptian Government, and was consequently open to occupation by Major Marchand; but the English Government contended that the British title had merely been rendered dormant by the military successes of the Mahdi. Strictly speaking the intention to abandon can only appear from either a unilateral act or treaty, by which the region in question is ceded.

According to the Arbitrator, the question of abandonment does not apply [9]):

> As it is not proved that Spain, at the beginning of 1648 or in June 1714, was in possession of the Island of Palmas (or Miangas), there is no proof that Spain acquired by the Treaty of Münster or the Treaty of Utrecht a title to sovereignty over the island which, in accordance with the said Treaties, and as long as they hold good, could have been modified by the Netherlands only in agreement with Spain.
>
> It is, therefore, unnecessary to consider whether subsequently Spain by any express or conclusive action, abandoned the right, which the said treaties may have conferred upon her in regard to Palmas (or Miangas).

Again, if at any time the mere fact of discovery conferred territorial sovereignty, such a title cannot, according to the Arbitrator, at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas) [10]):

> ... 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.

2. Prescription.

It has been pointed out above on p. 14, that the Arbitrator partly bases his decision on the title of prescription, invoked in the Netherlands Memorandum and apparently abandoned in the Counter Memorandum of this Government. In fact the title of

9) Award, p. 32.
10) Ibid. p. 27.

prescription is no less a matter of controversy in international law than that of discovery. The main argument of those jurisconsults who deny the existence (not the desirability) of this institution in international law is the impossibility of fixing a period during which adverse holding should have to confer a title [11]). A distinction must, however, be made between an appeal to prescription and an appeal to the *immemorabilis* or *vetustas*, which are different institutions. "The frontiers of the States are based in the first place", Fauchille states [12]), "on an immemorial and uncontested possession. The fact that a State has, for a long time and without any protest having been lodged, exercised sovereign power over a territory as far as certain limits, suffices to establish the boundaries of that territory. In this case there is something like a tacit agreement between the States." "The importance of the *immemorabilis*, of the *vetustas*", Cavaglieri adds [13]), "is naturally very great in a system of relations where the accomplished fact has the value of a juridical title and the violence of war is the source of the rights of sovereignty of most States". The appeal to continuous and peaceful display of sovereignty, as made by the Netherlands Government relates rather to the notion of *immemorabilis* or *vetustas* than to that of prescription which seems inseparable from the idea of a fixed period of time: recourse to the *immemorabilis* is had "to create a presumption of legality in favour of a possession which has lasted so long that the constitutive legal title can no longer be found or that it is no longer known whether such a title ever existed or whether, if it did, it was legal" [14]).

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11) To the like effect: Strupp, Grundzüge, 1932, p. 169, with an appeal to G. Jellinek's Normative Kraft des Faktischen.

12) Fauchille, I, ii, 100.

13) Cavaglieri, loc. cit. p. 387.

14) Ibid. p. 406. It was laid down in the Meerauge Arbitration that: Immemorial possession is possession which has continued for so long that it is impossible to produce proof of a different situation and no person can remember having heard such a situation spoken of. Such possession should in addition be uninterrupted and uncontested. It goes without saying, that such possession should also have continued up to the moment when the dispute arose and a *compromis* was concluded. (Rev. D. I. VIII, 207).

The Netherlands title based on prescription is contested at length in the United States Counter Memorandum [15]). "Obviously, if the Netherlands Government assert a title grounded on prescription, the burden of proof rests upon them to prove the existence of a rule or principle in international law by which title by prescription is recognized, and further to prove by competent evidence the performance of such acts by the Netherland Government as may be prescribed by any such rule or principle for the establishment by a nation of title to territory by prescription". After having cited numerous lawwriters who deny the existence of such a principle, the United States Government continues [16]):

> It does not seem to be necessary to argue that a title by prescription grounded on possession, open, notorious, continuous, uninterrupted and known to Spain cannot be substantiated by the Netherland Government in the light of the acts upon which they predicate their claim to sovereignty.

That these acts are deemed by the United States Government insufficient to establish an effective occupation, has been pointed out above and in any case they do not, according to this Government, fulfil "the legal requirement of convincing evidence of the highest character to establish acts to dispossess a prior sovereign".

Two remarks may be made in connection with this question. In the first place: it may be recalled that the United States Government, denying the existence of a principle of prescription in international law in the Miangas Arbitration, took up a contrary position in the controversy with Great-Britain relating to the Alaskan frontier (Arbitral Award of October 20, 1903) and in that with Mexico concerning the territory of El Chamizal, decided on June 15, 1911. In discussing the United States title based on the geographical position, professor Jessup admits that the United States were estopped from invoking this principle by their attitude in the case of the Lobos Islands; with as much right it could be said, that this Government in the present controversy, were estopped from denying the existence of the principle of prescription.

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15) U.S. Count. Mem. p. 84.

16) Ibid. p. 96.

In the second place: this principle, according to most of the law-writers who recognize its existence, is essential to the stability of the international order. But what is really essential here is, that a situation that has existed for a long time, should have a legal basis. This was recognized as a "well-established principle of international law" in the Grisbådarna case by the Permanent Court of Arbitration in 1909. This principle was again recognized in the Meerauge Arbitration between Austria and Hungary (Award 1903) and in the Award of the King of Italy of June 6, 1904 in the controversy between Brasil and Great-Britain. In most of the cases which are alleged to prove the recognition of prescription in international law, it was a situation existing from time immemorial which was recognized as legally valid. Only the case of the Venezuela British Guiana Boundary Arbitration can be said to refer to prescription, because a period of fifty years was fixed in advance. The principle was expressly rejected in the dispute between Honduras and Nicaragua (Compromis, and Arbitral Award by the King of Spain of December 23, 1906; de Martens II, XXXV, p. 569.)

Under these circumstances it would seem that an appeal to prescription in international law must be rejected, but that an appeal to the *immemorabilis* or *vetustas* must be recognized.

B. An original Netherlands Title (Display of state activity.)

The Netherlands title based on continuous and peaceful display of state activity is a very complicated one and cannot be understood without a short historical introduction.

1. Historical Introduction.

On their arrival in the East Indian Archipelago in 1596 the Dutch navigators did not find one barbarous or semi-barbarous population, but a great number of different peoples some of which had reached a high degree of civilisation. In the beginning of our era the archipelago was colonized by the Hindus, who settled on the coasts of the innumerable islands and mixed with the original population. In the course of the seventh century one of these Hindu-Indian states, Çriwidjaja, lying on that part of the Island of Sumatra nowadays

known as the Residency of Palembang, developed into a powerful kingdom. Even before 692 the state of Malayu, at present Djambi, was reduced to the position of a vassal state of Çriwidjaja [17]), the latter state gradually developing not only into a political, but also a scientific centre and extending its influence about the middle of the eigth century even to Java [18]). Here again different kingdoms arose: in the latter part of the ninth century the town of Jawa, capital of a Javanese kingdom, exercised suzerainty over twenty eight smaller neighbouring kingdoms [19]). In the eastern part of the island a powerful kingdom, the Kediri Kingdom, arose about the end of the tenth century under the Içâna dynasty, which subdued the Island of Bali and even attacked, though without success, the Kingdom of Çrîwidjaja. The last of the Singosari kings who succeeded to the Içâna kings, Kartanegara, was, however, more successful in this respect and the Çrîwidjaja Kingdom, pressed from the north by the rising Khmer state, had to cede in 1275 the principality of Malayu, which became a vassal state of Java. About the same time Kublai Khan tried to establish his suzerainty over the archipelago [20]), but after a long struggle the Chinese were ousted and under King Hayam Wuruk (1350—1389) the whole archipelago, except, the northern part of Celebes, but including the Malayan peninsula was brought under the suzerainty of the Javanese Kingdom of Madjapahit [21]), which, however, amounted to the recognition by the subdued princes of Javanese supremacy, the payment of tribute and the exclusion of foreign influences [22]).

At the end of the fourteenth century the town of Malaka on the Malayan peninsula develops into an important commercial centre, and from this point the Mahometan faith spreads over the seaport towns of the whole archipelago. Political, economic and religious controversies afflicted this part of the world when in

17) N. J. Krom, Hindoe-Javaansche Geschiedenis, p. 113.
18) N. J. Krom, in Neerlands Indië, p. 264.
19) N. J. Krom, Hindoe-Javaansche Geschiedenis, p. 167.
20) F. W. Stapel, Geschiedenis van Nederlandsch-Indië, p. 18.
21) J. C. van Eerde, De Madjapahitsche Onderhoorigheden, in Tijdschrift van het Aardrijkskundig Genootschap, 1911, p. 219.
22) N. J. Krom, in Neerlands Indië, p. 269.

1509 the Portuguese under Diego Lopez de Sequeira appeared in Sumatra. In 1511 the Portuguese vice-roy of Goa, d'Albuquerque, attacked the town of Malaka, which was taken and fortified and remained the centre of Portuguese activity for one hundred and thirty years [23]). From here commercial relations were established with Hitoe, Batjan, Ternate and Tidore; taking advantage of the endless differences between the native kings the Portuguese, by concluding contracts of alliance and friendship with one party or another, established a footing in the Moluccas; in 1522 the King of Ternate even induced the Portuguese to build a fortress on his island to protect him against his enemies; in return they were given a monopoly of the trade in spices.

In 1521 the Spaniards under Magellan made their appearance in the Archipelago and as both parties contended that the Moluccas lay in the part of the world assigned to them by the bull *Inter Caetera*, fierce competition arose, which was nominally settled in 1529, but in fact lasted till 1546. The relations between the Portuguese and the native princes, which had been very cordial up to this time (the dying King of Ternate even left, in 1545, his kingdom to the King of Portugal, and his successor, Sultan Hairoen, in the same year was installed as a vassal of His Most Faithful Majesty), became less friendly. In 1574 the Portuguese were even driven from the island of Ternate and the fortress was destroyed. Whereas the Lusitanian kingdom waned and in 1580 was even annexed by the Spanish Crown, the English power arose and began to make itself felt in this part of the world also. Frances Drake in 1579 and 1580 visited the Philippines, the Moluccas and Java, Thomas Cavendish followed in 1588 and James Lancaster in 1592. In 1605 they were the chief competitors of the Dutch on the Island of Banda, concluding commercial treaties with the Orangcays, who, by former contracts with the Dutch, had conceded them the monopoly of the spicetrade [24]).

In fact the possession of the spice islands and the consequent monopoly of the trade were the principal aim of the competing

23) J. E. Heeres, in Neerlands Indië, p. 277.
24) Ibid. p. 297.

powers. In the course of the sixteenth century the Dutch had gradually acquired the carryingtrade of Europe. The spices brought from the Indies by the Portuguese were taken to all parts of the continent; soon after the annexation in 1580 the Portuguese harbours, however, were closed to the Dutch, who since 1568 had been at war with Spain. As a consequence of this measure the Dutch had to discover the route to the Indies for themselves; a trading company was erected in 1594, the "Compagnie van Verre", which dispatched four vessels under the command of Pieter Keyser and Cornelis de Houtman who arrived at Bantam in West Java on June 23, 1596. After presenting their letters-patent, in which Prince Maurice of Nassau offered a treaty of friendship, a contract for commercial purposes was concluded on July 1 [25]); having visited Bali the Dutch vessels returned to Holland, where as a consequence of this expedition a number of commercial companies were formed. Between 1595 and 1602 no less than 14 expeditions were made; in the latter year these companies were united in the East-India Company. From Bantam, the principial office in the archipelago, relations were established with Borneo, Soembawa and other islands; collisions with the Portuguese could not be avoided. Their fortress on Lei Timor was taken and a treaty of alliance was concluded with the Hitu princes, the enemies of the Portuguese, in February 1605. In May of the same year the Portuguese fortress on Tidore was taken, which, not being occupied by the Dutch, was taken in the next year by the Spaniards from the Philippines; the Ternatese who had assisted the Dutch in the previous year, were forced to recognize the Spanish King as their suzerain. In 1607 again, a fortress was erected on Ternate by the Dutch, who were recognized by the native prince as his protectors. A contract was concluded on May 26 [26]), in which the inhabitants of Sarangani and Mindanao are mentioned as subjects of the Crown of Ternate.

In 1609 the Island of Batjan was conquered. In the same year a fleet was despatched to the Isles of Banda under Pieter Verhoeff, who was instructed to acquire the spice islands for the Company.

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25) J. E. Heeres, Corpus Diplomaticum I, p. 3.

26) Ibid. p. 61.

"either by treaty or by force". Knowing that a truce between Spain and the Dutch Republic would most probably be concluded with the provision that neither party should be allowed to navigate to those territories which were either in the possession of or connected by treaty with the other party [27]), the Company instructed its officials "to conclude contracts of friendship, alliance and conditions of commerce and traffic with the Indian Kings and Princes". But Verhoeff in fulfilling this task was treacherously killed; the Bandanese were severely punished and a contract was concluded on August 10, 1609, in which the monopoly of the Company was recognized and the sovereignty over Banda Neira was ceded. The political character of this contract is incontestable.

2. The political Contracts.

Two conclusions may be drawn from this brief survey: The conclusion of treaties with native chiefs was by no means an innovation introduced by the Dutch in this part of the world; it had been the general practice of the Portuguese and the Spanish in former times; it was done by the English in the same period. Nor did these treaties, in so far as they were not merely commercial in character, but were real political agreements establishing the relation of sovereign and vassal, constitute an innovation, since such relations were as old as the history of the Archipelago. Even up to the present time traces of such relations of public law are left in the form of apanage or official landed property [28]).

The treaties concluded by the Company at the beginning of its existence with the native princes were without doubt treaties between equals [29]): offensive and defensive alliances were made, because the Portuguese and the Spanish were common enemies; both parties were at liberty to exercise their religion without hindrance [30]); nearly always a provision was made that run away slaves were to be exchanged by both parties [31]), and if the Com-

27) Ibid. p. 66.
28) On the conception of suzerainty, see infra p. 118.
29) Cf. Encyclopaedie van Nederlandsch-Indië s.v. Contracten, p. 526.
30) J. E. Heeres, Corpus Diplomaticum I and II, passim.
31) Ibid. passim.

pany was granted a place to build a depository for merchandise or ammunition, the native prince stipulated customs advantages or some other equivalent.

Only when the treaty provisions were repeatedly violated or when required by commercial interests was possession taken as a result of conquest (Jacatra in 1619, and Banda in 1621) [32]) or territory ceded as compensation for the expenses of a war, engaged by the Company at the request of some Prince or Sultan, who as a consequence of endless family entanglements was in danger of losing his crown. This happened in the case of the Sultan of Mataram in 1675 and in that of the Sultan of Bantam in 1682. In these cases tracts of land or places on the coast were acquired, which made possible a stricter maintenance of the monopoly; the native nobility, although officers of the Company, were left to themselves. The shortsighted authorities, not understanding that a prosperous population served commercial interests better than an exhausted population, was guided by the principle that a poor population was easier to govern and disapproved of the use of ships of the Company in 1675 for the supply of rice to Batavia where famine was imminent: the ships were to be used for the traffic of the Company and not "for the feeding of the population with whom we are not concerned" [33]). This "policy of non-interference" was not only followed in the 17th and 18th centuries; even in 1861 the colonial secretary wrote: "I consider every extension of authority as a step towards our ruin" and in 1872 this official declared that increase of territory was "neither our wish nor aim" [34]).

In the 19th century direct authority was exercised only in the Isle of Java and at some places on the coast of Sumatra: by a resolution passed at the Hague in 1833 non-interference was prescribed to the officials "under penalty of losing their positions" and in 1846 the Netherlands representative in the Lampongs district was charged "even in case of rebellion or troubles carefully to refrain from menaces which might necessitate extraordinary meas-

32) E. B. Kielstra, De vestiging van het Nederlandsche Gezag in den Indischen Archipel, p. 91.

33) Ibid. p. 12.

34) Ibid. p. 41.

ures or measures the non-execution of which would diminish the Government's authority". The Resident of Timor on an official journey in 1881 was even made prisoner and had to be ransomed; the criminals, however, were not punished [35]).

Van Asbeck points out [36]), that the relation between the East-Indian Government and the native princes about the middle of the 19th century is characterized by

1. The recognition of Dutch paramountcy, the princes undertaking to maintain relations with no foreign Power except the Netherlands,
2. The procuring of certain advantages in order to prevent other powers from settling in the territory,
3. The liberty of the princes to watch their own interests.

Not until the very end of the 19th century and the beginning of the 20th century, did the Dutch East-Indian Government exert a powerful influence in all the parts of the Archipelago. Not until the 20th century was the Netherlands colonial empire deliberately built up: from that time onwards under the Netherlands authority, firmly based on the Indian constitutional law, the different parts of this mosaic of political forms: directly and indirectly governed regions, regions under a strong western influence or hardly any such influence at all, regions with representative systems, monarchies, priest-governments, republics, etc.) began to develop into a unit [37]). Most of the native princes are nowadays linked to the Dutch East-Indian Government by the so-called "Short Declaration", in which the prince

1. states that his country forms part of the Dutch East Indies and consequently is under Netherlands authority,
2. promises, not to establish relations with foreign Powers,

35) F. M. van Asbeck, Onderzoek naar den juridischen wereldbouw, p. 41.

36) Id. pag. 46.

37) F. M. van Asbeck, Samenhang van internationaal en koloniaal recht, p. 31. Very instructive on this point are Th. H. M. Loze, De Indische Zelfbesturende Landschappen in het nieuwe staatsbestel, p. 62 sqq. and B. Schrieke, The effect of Western Influence on native Civilisations in the Malay Archipelago, p. 195—203.

3. promises, to discharge all regulations and orders, issued by the Government in regard to the territory.

Under these circumstances these selfgoverning territories can no longer be looked upon as foreign territory. That description was right and in accordance with circumstances in the time of the Dutch East-India Company; it still had some shadow of truth in the 19th century, when formally the native princes were treated like any other foreign prince, when a formal declaration of war was sent to Bali in 1848, when an ultimatum was sent to Lombok in 1894, when the Netherlands Government did not consider their sovereignty infringed by foreign expeditions sent to punish the Atchin Prince for piracy (the United States expedition in 1831 and the British expedition in 1844) [38]). But even up to the present day the fiction of a contract is maintained by the Constitutional Law of 1925 [39]).

In order rightly to understand the political contracts filed by the Netherlands Government in the present case, those instruments must be considered within this historical setting. The East-India Company, in the beginning a trading company only and endeavouring to establish a trading monopoly, which could only be realised by the cooperation of the native princes, established offices and fortresses and concluded contracts wherever it had commercial interests, in the Archipelago, in China and Japan, on the Coromandel and Malabar coasts, in Ceylon and in Persia, at the Cape and in Madagascar. In the period between 1596 and 1675 at least 369 treaties were concluded. These interests being spread over half the globe and requiring on the one hand an ever increasing number of officials and on the other an ever increasing control over its allies by reason of the keen competition of, first, the Portuguese, Spanish and English, and later, the French, Danish and Swedish, an increasing exercise of authority was bound to follow. Nowhere is this more clearly illustrated than in the Moluccas. In 1607, when a treaty was concluded between the Company and the King of Ternate, this king was the overlord of the Sangi princes, the island

38) Van Asbeck, Onderzoek, etc. p. 50.

39) Article 34 par. 1. The Governor General concludes treaties with Indian Princes and Peoples.

of Miangas belonging to one of them. In 1677 the relations between these princes and their overlord were broken and a direct relation was established between the Princes of Taboekan and Taroena and the Company, by means of a contract between these princes and the Dutch Governor of Ternate, Robertus Padtbrugge, by which the prince received the principality as a fief of the Company. From Article 13 of this contract, filed as Appendix G in the Netherlands Memorandum, it appears that at least some direct relation with the Company had existed since 1670. In 1681, Padtbrugge suppressed an insurrectionary movement in the Sangi Islands; in 1697 new treaties with Taboekan and Taroena were concluded. Direct influence was again exerted by the Company in 1701, when a difference between these princes was settled by commissioners of the Company, who also issued prescriptions to stop "the extremely harsh and cruel treatment inflicted by the natives" on those who committed the crimes of murder and manslaughter [40]) (de noyt gehoorde onmenschelyke corminele justitie over eenen geperpetreerden dootslag die in dit gewest (God betert) dagelyx vry in swang gaet); the contracts of 1720 and 1758 (Appendices P and Q) are much like the previous ones; being concluded with the new kings after the previous king's death, they strikingly emphasize the personal relation between the kings and the Company. On the other hand they show a gradually increasing influence on the part of the Company's Governors. After the liquidation of the Company contracts were concluded with the State of the Netherlands in 1828, 1885 and 1899 (Appendices V, W and Y), more in accordance with modern ideas, but all based on the fundamental conception of the Netherlands as the paramount power and the native state as vassal.

According to the Special Agreement of 1925 the High Contracting Powers desire "to terminate in accordance with the principles of international law and any applicable treaty provisions" the differences with respect to the Island of Miangas. The Netherlands Government contend that the treaties with these native

40) Neth. Mem. p. 13.

princes must be taken into account; the United States, on the other hand, considers them as irrelevant from the point of view of international law [41]). In fact the United States Counter Memorandum

41) This was already a matter of controversy between the High Contracting Parties before the conclusion of the Special Agreement of January 23, 1925.

In the draft of an agreement, submitted by the Note of July 25, 1921, from the Secretary of State to the Netherlands Legation at Washington it was said, that the Parties desire "to terminate in accordance with the principles of international law and any applicable treaty provisions" the differences with respect to the Island of Miangas. The Note of the Netherlands Minister at Washington to the Secretary of State, dated January 9, 1924, answers: "With regard to the text of the drafted agreement, Jonkheer van Karnebeek has instructed me to suggest the omission in the preamble of the words: "any applicable treaty" as the immediately preceding words "the principles of international law" already embrace applicable treaties. If in addition to the principles of international law special mention be made of applicable treaties then conventions of any kind, international custom as evidence of a general practice adopted as law, and, to a certain extent, the writings of eminent jurists should also be mentioned. This, however, would be needlessly prolix". But this is deemed unadvisable. "As you are aware", runs the United States Note of February 1, 1924, "the Government of Spain considered that its sovereignty over the Island of Palmas was as complete as its sovereignty over the other islands in the Philippine Archipelago, and that Las Palmas Island was comprehended within the Archipelago ceded to the United States by Spain in the Treaty of December 10, 1898". On April 1, 1924 the Netherlands Minister at Washington stated again: "As far as the words "any applicable treaties" in the preamble of the drafted agreement are concerned, Jonkheer van Karnebeek's opinion has remained unchanged that these words, . . . if maintained, could give rise to doubt whether it is meant to exclude sources of international law, other than applicable treaties, and to limit the free judgment of the arbiter in so far that he is allowed to test the case only in general maxims of international law and on treaty provisions". The intention was elucidated in the Netherlands Note of August 5, 1924: "It being well understood that the Royal Government will be absolutely free to present to the Arbitrator arguments based on agreements between the Colonial Government and Native Chiefs and other agreements of this kind: that the American Government will be absolutely free to urge the rejection of such arguments and that the Arbitrator will be absolutely free to accept or to reject them . . ." (U. S. Mem. p. 167). Thus the American draft prevailed; it would seem, however, that the Netherlands point of view is according to international law.

speaks on p. 19 rather disdainfully of "these more or less amusing tribal relationship of which so much is made in the Netherland Memorandum" and again on p. 33 of this document of "the novel question as to what capacity some savage king, rajah or prince might have to barter away a nation's sovereignty to a trading concern".

From what has been said about these contracts it follows, that a distinction must be made: As long as contracts are concluded of a merely commercial character, even though on the basis of a treaty of alliance and friendship, these contracts are concluded between equals and have a standing in international law; as soon as these principalities' external relations are handed over to the Company, their independence is infringed upon; from that moment every contract is a form of internal arrangement. The first contract of this character, relating to Miangas, is that of 1677; it establishes the relation of vassal and suzerain; the vassal promises not to receive in his country Spanish, Portuguese, French, English, Danish or Swedish subjects; the Company's friend will be his friends, the Company's enemies his enemies; no war will be carried on, no peace will be concluded without the Company's assent. And differences between the allies or between the King and his nobility will be settled by the Governor. It would seem, that any people which concedes such rights to a foreign nation, loses its existence in the sense of international law, and not only those "not recognized as members of the community of nations". This notion being in itself vague, must be all the more carefully applied to those countries, which at a certain period, were the much desired allies of competing European powers.

In the present question, the Arbitrator holds the following opinion [42]): As regards contracts between a State or a Company such as the Dutch East India Company and native princes or chiefs of peoples not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties. But, on the other hand, con-

42) Award, p. 44—45.

tracts of this nature are not wholly void of indirect effects on situations governed by international law; if they do not constitute titles in international law, they are none the less facts of which that law must in certain circumstances take account . . . . . The form of the legal relations created by such contracts is most generally that of suzerain and vassal, or of the so-called colonial protectorate.

But, the United States Government say "Suzerainty does not connote sovereignty" [43]). To this the Netherlands Government reply as follows [44]): The word suzerainty "denotes a supremacy over a certain territory, sometimes of a feudal character, which, while inconsistent with independence of that territory with regard to foreign relations of that territory, leaves room for several of the attributes of sovereignty as to internal administration. The monarch who is suzerain in respect of the vassal, is the sovereign with regard to the outside world". It is difficult to define the precise import of the term suzerainty: "The degree of control on one side and of dependency on the other", Brierly states [45]), "may vary indefinitely, and in any case it must be deduced from the events or treaties which created the relationship, and not from the term used to describe it". The fatal consequences of the latter method are clearly shown by the discussion preceding the South African War of 1899" [46]) [47]). As to this point the Arbitrator lays down:

43) U.S. Mem. p. 86.

44) Neth. Count. Mem. p. 76.

45) J. L. Brierly, The Law of Nations, p. 67.

46) J. Westlake, Collected Papers, p. 442.

47) As a matter of fact the word "suzerainty" is extremely vague. The Netherlands Government, aware of this vagueness, speaks of a relation "sometimes of a feudal character". Like "fief" and "vassal", the word "suzerainty" is borrowed from feudal terminology and strictly speaking does not apply to relationships such as are described in the documents of the present case or in the historical survey. Kleintjes 5th ed., p. 58, mentions the word "leenman" (vassal) a misleading term. This is certainly true, but if the relationship between suzerain and vassal is judged according to the contract and not according to its more or less arbitrarily fixed import, the question whether such terms can be applied to relationships such as here contemplated becomes a mere matter of opinion, or rather of terminology, of no practical importance.

It might still be contended, that a native chief in signing a contract

In order to regularize the situation as regards other States, this organisation requires to be completed by the establishment of powers to ensure the fulfilment of the obligations imposed by international law in regard to its own territory. And thus suzerainty over the native State becomes the basis of territorial sovereignty as towards other members of the community of nations. It is the sum-total of functions thus allotted either to the native authorities or to those of the colonial Power which decides the question whether at any certain period the conditions required for the existence of sovereignty are fulfilled. It is a question to be decided in each case whether such a regime is to be considered as effective or whether it is essentially fictitious, either for the whole or a part of the territory" [48]).

This point of view is not only in conformity with the principles laid down by the Arbitrator in the doctrinal part of the Award, but also with the attitude taken up by the United States relating to two small islands lying just outside the line drawn by the treaty of Paris. The relevant note states that the two islands "have not

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could not judge its scope; this, however, is not so, because the contracts of the East-Indian Company were nearly always drawn both in Dutch and in the language of the native prince; in the Malayan text, e.g. the word "pindjeman" is used for fief (Encyclopaedie van Nederlandsch-Indië s.v. contracten), which is undoubtedly clearly understood.

The United States Mem. p. 102 refers to Rivier, Principes du Droit des Gens I, p. 188—189: "The pretended contracts of purchase or exchange made with savage chiefs for the purpose of giving to the occupation the external appearance of an acquisition by way of cession are devoid of juridical value for the sole reason that one of the contracting parties does not have the freedom of intention required for consent, a fact of which the other party is not ignorant. Even if one wished to admit from this point of view the validity of these acts, it would need to be rejected for another reason, to wit, that the chiefs, real or pretended, who make the arrangements do not and cannot have territorial sovereignty as the public law of civilized states conceives it and that consequently they do not know how to transfer it". This may apply to the contracts concluded in the 19th century with African and other chiefs, it does not apply to the contracts concluded by the East-Indian Company in the 17th and 18th centuries.

48) Award, p. 45.

hitherto been directly administered by Spain, but have been successfully claimed by Spain as a part of the dominions of her subject, the Sultan of Sulu. As such they have been administered by Sulu agencies, under some vague form of resident supervision by Spanish agencies, which latter have been withdraw as a result of the recent war" [49]).

One final remark may be made. Both Parties agree, that a title should be judged according to the conceptions of international law at the time of its origin. Applying this principle the Netherlands Government refers to the already quoted Article V of the Treaty of Münster: "Et seront compris sous ledit Traicté tous Potentats, Nations & Peuples, avec lesquels lesdits Seigneurs Estats, ou ceux de la Société des Indes Orientales & Occidentales en leur nom, entre les limites de leursdits Octroys sont en Amitié et Alliance".

Undoubtedly in 1648 both the Netherlands and Spain recognized the contracts concluded with native chiefs and according to the Netherlands Government this conclusively disposes "of the American argument, that no value can be attached to such conventions" [50]). The Arbitrator wholly approves of this argument and accordingly concludes [51]): The Arbitrator can therefore not exclude the contracts invoked by the Netherlands from being taken into consideration in the present case.

3. The Status of the East-India Company.

It has been stated several times in the previous pages, that the East India Company concluded treaties with native princes, thus establishing the relationship of suzerain and vassal, which has gradually established Netherlands sovereignty over the territory.

This again is a much contested point. "A claim of sovereignty over territory can not in law be predicated on the acts of individuals which are not committed in behalf of a sovereign. A claim to territory on which sovereignty can be based must be a claim of territorial sovereignty, and must be a claim made by a sovereign.

49) Ibid. p. 45.
50) Neth. Count. Mem., p. 29.
51) Award, p. 46.

because no one but a sovereign can assert such a claim". So runs the United States contention [52]). Again, the Netherlands description "is intended to imply that the Dutch East India Company might be regarded in international law as a sovereign and the rajah as a vassal. It is not believed that the company could have any such standing in international law, and in any event it is submitted that, if the company had a standing such as is explained in the Netherland Government's note, that would have no bearing on the Netherland Government's sovereignty over the Island of Palmas" [53]).

The real status of the East India Company can only be understood if compared with that of the colonizing companies established mainly in the second half of the 19th century. A brief survey of the treaties concluded with native chiefs in this period, either by officials or by chartered companies, will show, that the main purpose of these treaties was the acquisition of territorial rights for the countries they represent.

After the conclusion of a treaty, a protectorate is established; sometimes the external sovereignty only is ceded to the protecting state (Great Britain in 1886 on the Somali coast and France in Senegal); sometimes also the internal sovereignty was partly superseded by the sovereignty of the protecting state (Great Britain on the West coast of Africa in 1868 and 1875); sometimes the whole of external and internal sovereignty was ceded (Great Britain in Bechuanaland); sometimes again the powers of the protecting state have gradually increased (France in Madagscar), but invariably the final stage is annexation. In this period treaties were often concluded by chartered companies, but with the proviso that the sovereign rights accrued to the State, which granted the charter. Very instructive from this point of view is the Schutzbrief, granted by the German Emperor on May 17, 1885 to the German New Guinea Company, in which was granted "das Recht zur Ausübung landeshoheitlicher Befugnisse unter unserer Oberhoheit". Several provisions securing the sovereignty of the State are also embodied in the charter issued by the Portuguese Government in 1891 to the

52) U.S. Mem. p. 105.
53) Ibid. p. 90.

Moçambique Company, and when in 1897 the charter was renewed, the royal decree stated that "by the provisions of the present decree the sovereign rights of the nations are in no way lessened, but rather confirmed".

The same applies to the British North-Borneo Company (charter of November 1, 1881), the National African Company, afterwards the Royal Niger Company (charter of 1886), the Imperial British East-Africa Company (charter of 1888) and the British South-Africa Company (charter of 1889). Lindley after a lengthy discussion of these charters comes to the conclusion that, "although the British Government of the day disclaimed any sovereign power over the territories dealt with in the British North-Borneo charter, it is impossible to resist the conclusion, that the rights and responsibilities of external sovereignty rested with the British Crown as soon as it had granted the charter and that the charters of the African companies placed them even more completely under the control of the British Government, especially with relation to foreign affairs" [54]). From the point of view of international law there is no difference between the territories of the companies and the protectorates.

It must further be noted, that none of these charters grant an exclusive trading monopoly; nearly all contain provisions with respect to the treatment of the native population.

The position of the Dutch East-India Company was very different. It was constituted by the fusion of several small companies, of which the Compagnie van Verre has already been mentioned, and all of a purely private character. As a matter of fact, the newly established company, which was given a charter on March 20, 1602, was a trading company only and the rights of a public character assigned to it, were only subservient to commercial purposes. This clearly appears from Article 35 of the charter, by which it was provided "that the aforesaid Company shall be permitted to conclude with the aforesaid Princes alliances and contracts in the name of the States General, to build fortresses and strongholds, to appoint Governors, soldiers and officers of justice,

54) Lindley, p. 99—109.

. . . all in order to promote trade. The aforesaid Governors, Officers of Justice and soldiers shall make an oath of allegiance to the States General and to the Company, as far as concerns trade and traffic" [55]).

From this the connection between the State and the Company is undeniable; at all events in concluding treaties with native princes the Company acted as the agent of the Netherlands State [56]).

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55) Item, dat die vande voorsz. Compagnie sullen vermogen beoosten de Cape van bonne Esperance, mitsgaders in ende door de engte van Magellanes, met de Princen en de Potentaten verbintenissen ende Contracten te maken opten naem van de Staten gnael der Vereenichde Nederlanden, ofte hooge Overicheyt desselver, Mitsgaders aldaer eenige forteressen, ende versekertheden te bouwen, Gouverneurs, volck van oorloge, ende Officiers van Justitie, ende tot andere nootelycke diensten, tot conservatie vande plaetsen, onderhoudinge van goede ordre, politie ende Justitie, eensamentlyck tot voorderinge vande neringe, te stellen. Behoudelyck dat de voorscreven Gouverneurs, Officiers van Justitie, ende volck van Oorloge sullen eedt van getrouwicheyt doen, aende Staten generael, ofte hooge Overicheyt voorsz., ende aende Compaignie, soo veel die neringe ende traffique aengaet. (J. A. van der Chys, De Stichting der Vereenigde Oost-Indische Compagnie, p. 110).

Article VI of the Charter moreover states, that if the Committee of XVII cannot agree in important matters, the final decision is given by the States-General. (Ibid. p. 101.)

56) In his award of June 6, 1904, with regard to the boundary between the colony of British Guiana and the United States of Brazil, H.M. the King of Italy expressly recognizes the powers of sovereignty exercised by the West India Company:

. . . That, however, the right of the British State as the successor to Holland, to whom the colony belonged, is based on the exercise of rights of jurisdiction by the Dutch West-India Company, which, furnished with sovereign powers by the Dutch Government, performed acts of sovereign authority over certain places in the zone under discussion, regulating the commerce carried on for a long time there by the Dutch, submitting it to discipline, subjecting it to the orders of the Governor of the Colony, and obtaining from the natives a partial recognition of the power of that official.

That like acts of authority and jurisdiction over traders and native tribes were afterwards continued in the name of British sovereignty when Great Britain came into possession of the colony belonging to the Dutch . . . etc. (Manley O. Hudson, Cases and other materials on International law, 1929, p. 23).

From the strictly juridical point of view the territory, acquired by the Agent, accrues to the State. In the beginning the treaties were according to this view concluded in the name of the paramount power [57]). In ratifying the appointment of Pieter Both, the first Governor-General of the East-Indies, the States-General speak of "the fortresses and places, which We and Ours in the East-Indies hold and possess, with the inhabitants, military and others, in Our territory" [58]). But soon the Company by means of the enormous profits, developed into a "State within the State" and in 1644, before the Treaty of Münster made an end of the war with Spain, the Comittee of XVII contended that the possessions in the East-Indies were their private property, not the property of the State, and that they would be able to sell them, if they chose, even to the King of Spain [59]). From this one instance it is obvious, that the influence of the States-General was reduced to a negative quantity and that, practically speaking, the Company was independent and sovereign. From this moment dates the conflict between the interests of the Company-merchant and the Company-Sovereign, in which the former always prevailed. Fortresses were built all over the Archipelago, but authority was only exercised in the immediate surroundings and only in so far as commerce required it [60]). What the authorities in the Netherlands aimed at was a colonie d'exploitation (trading station); only broad-minded Governors-General like Jan Pieterszoon Coen, the founder of Batavia, insisted on the establishing of settlements; only as far as this policy prevailed, was a colonie de population (colony proper) established, which became the basis of Netherlands sovereignty in the present day [61]).

57) Heeres, Corpus Diplomaticum I, passim.

58) Van der Chys, p. 120. The instructions from the States General to this Governor General show the preponderant influence of the State in this period (Mijer, Verzameling van regeeringsinstructien voor Nederlandsch-Indië, artt. 2, 8, 13, 24 etc.)

59) Ibid.

60) Kielstra, p. 13.

61) The building of mere trading stations cannot be said to be an effective occupation. In the course of the negotiations of 1826—1827 between the United States and Great Britain (Oregon Dispute), it was contended on

A prosperous trade was the only thing aimed at and if possible, a trade monopoly: it was obviously forgotten, how eagerly the monopoly of the King of Spain was contested both by English and Dutch merchants at the time of the foundation of the East-India Companies [62]).

On the one hand, the difference from the 19th century companies is evident: on the other hand the conclusion is, that the East-India Company, in spite of itself, laid the foundations of the Netherlands colonial empire.

The Netherlands Government contend [63]), that the Netherlands authorities "did during two centuries everything in their power to render clear and perfect their titles to that insular region of Indonesia, part of which is the subject-matter of this Memorandum. Both in the north-eastern part of Selebes with its adjacent islands, and in the northern part of the Moluccas, the Netherlands not only kept up their position of effective occupation and administration, but even improved it". This contention must, however, be considered *cum grano salis*. Just as neither Spain's discovery of the Philippines, nor her effective occupation of them, establishes her title to the Island of Palmas, so also a display by the Netherlands of state activity in this region does not confer a title to that Island. It therefore remains to be considered whether the Netherlands' display of state authority over the island can be said to constitute an effective occupation.

4. The Effectiveness of the Occupation.

It has been demonstrated above that discovery is recognized as

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behalf of the United States that "mere factories, established solely for the purpose of trafficking with the natives, and without any view to cultivation and permanent settlement, cannot of themselves give a good title to dominion and absolute property". The United States claim, was none the less, at least partly, based upon the establishment of the factory of Astoria (Twiss, The Oregon Question examined, p. 316).

62) See Certayne reasons, why the English merchants may trade into the East-Indias, etc. in De Jonge, De Opkomst I, p. 287, in which the fellow-countrymen of Selden vehemently defend the freedom of the high seas. This document was used as a precedent by the Dutch merchants.

63) Neth. Mem. p. 15.

conferring sovereignty upon the State on behalf of which it is made, provided it is accompanied by an effective occupation. In the present case, in the first place the question must be considered what facts both contending Parties can adduce to prove the effectiveness of their display of authority over the Island of Miangas and in the second place, whether these facts, if any, constitute an effective occupation in the sense of international law.

By Spain

On p. 97 of the United States Memorandum it is said: "There is at least some evidence of Spanish activities on the island". This obviously refers to a Report of Mr. M. C. Alvarez, dated June 19, 1919,[64]) in which is said, that "later the Spanish Government sent a gunboat to the island returning a number of slaves, recaptured from the Moros. The Spanish gunboats continued to visit the island twice a year thereafter, and occasionally took natives to Sarangani and Mati. American whalers also visited the island on their way to Liroeng to winter, and left the impress of their blood on the natives. The Spaniards finally appointed a man to collect the cedula tax".

Again the affidavit of Mr. Frank W. Carpenter, dated March 10, 1926, is reproduced[65]), in which a visit of General Leonard H. Wood to the island about the year 1903 is mentioned.

As these points are of importance to substantiate the effectiveness of the Spanish possession of the island, the Arbitrator, conformably to Article III of the Special Agreement of January 23, 1925, requested the United States Government to supply him with explanations bearing on these points. As regards the Report of Mr. Alvarez the result was, that "after a careful investigation and an exhaustive research on the subject no document containing the data desired" was found in the Philippine archives[66]). And Mr. Carpenter had to recognize that his affidavit "contains a statement that is probably not as accurate as it should have been". General Wood appears to have made two visits to the island in 1906[67]). Moreover the Spanish Government as the result of their investigation of their

64) U.S. Count. Mem. p. 110.
65) U.S. Count. Mem. p. 113.
66) Furth. wr. expl. p. 53.
67) Furth. wr. expl. p. 54.

former title to the island communicated to the United States Department of State that "precise data of acts of dominion which Spain may have exercised in this island have not been found" [68]).

The Arbitrator thus needs must come to the conclusion that the United States "have however not established the fact that sovereignty so acquired was effectively displayed at any time" [69]).

By the Netherlands

The Netherlands connection with the Island of Miangas dates from 1677, when the East-India Company concluded political treaties with the Kings of Taboekan and Taroena, to whom the island belonged. Previous relations were probably still more indirect: the contracts with the King of Ternate, the overlord of the Sangi princes, dated 1607, 1609, 1629 and 1638 [70]), by which a protectorate over Ternate was established, do not show any display of state authority over the island.

In 1697 the contracts of 1677 were renewed; soon after a direct contact with the island was established. In order to avoid an occupation by the British, who were known to be in search of the alleged riches of the "Meangis Islands", three vessels were sent by the Governor of the Moluccas in 1700 in search of the islands; one of them, the Laricque, commanded by Jan de Hooft, visited the Island of Miangas, finding the population in possession of the "prince's flag". In 1701 commissioners of the Company made an inquiry in order to determine which islands were under the King of Taroena and under the King of Taboekan respectively and to learn "to whom belongs the Island Meangy". On this occasion it was decided that it belonged "solely to the King of Taroena" [71]). Furthermore the regulations referred to on p. 115 were laid down and expressly made applicable to Miangas.

In 1726 the Kings of Taboekan and Taroena again quarreled about the question to whom the island belonged. In conformity with the conventions of 1697 the dispute was submitted to the Netherlands authorities, not as arbitrators, but as the representatives of the paramount power. The question was decided by the Governor

68) U.S. Mem. p. 144.
69) Award, p. 57.
70) Heeres, Corpus Diplomaticum.
71) Neth. Mem. p. 13.

of Ternate and the island, this time, was assigned to the King of Taboekan. The convention of 1720 with this prince was followed by similar conventions of 1726 and 1758; two collective conventions, directed against the pirates of Magindanao and Maloelang and against the selling of Christians to them, were concluded with the six Sangihe princes in 1771; a similar collective convention was concluded in 1779 [72]).

The Netherlands Memorandum concludes on p. 16:

> The facts and public documents reviewed in this Chapter can only lead to one conclusion: this continuous series of activities and conventions proves that the Dutch authorities exercised a real and uninterrupted paramountcy over the native state to the territory of which Miangas belonged, whereas Spanish rule, interest and ambition were absent in this region since at least 1700.

This is certainly true, but these facts and documents do not prove any display of state authority over the Island of Miangas itself. They at the utmost prove that the Netherlands "incessantly extended their political influence and consolidated their titles in these regions" [73]). Again the Report of Resident Van Delden of 1825 mentions "the distant Island of Melangis" as belonging to Taboekan; in 1828 a new convention was concluded by the Netherlands Government with Taboekan and Taroena, mentioning Miangas as part of its territory. None of these facts, however, prove any direct contact with the island; the constant renewal of the conventions merely shows the wish of the Netherlands Government to preserve their sphere of influence and not, as the Arbitrator states [74]), that the regime of suzerainty has been effective. Up to this time the Netherlands only possessed a nominal title to the Island of Miangas.

Only subsequently, and conformably to what has been said above concerning the abandonment of the "policy of non-interference", does it appear that the Netherlands East Indies authorities estab-

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72) Ibid. p. 16.
73) Ibid. p. 17.
74) Award, p. 42.

lished direct contact with the island. In 1888 the government-steamer *Havik*, on board of which was the Resident of Manado, visited the island; in 1889 a headman was appointed by this official as "captain laut"; a native official of the Nanusa Islands was in 1892 instructed to make the inhabitants of Miangas leave their scattered dwellings and build a regular village, which was done in due course; in 1895 the Resident of Manado on board the government-steamer *Raaf* again paid a visit to the island. On this occasion the interests of the population were discussed; in 1896 again the Resident visited Miangas, accompanied by a clergyman who baptised 257 people. A coat of arms was put up. In 1898 a protestant missionary school and a church were erected; a series of measures have since been taken to improve food conditions, sanitary conditions, education, etc. During the Spanish-American war a Netherland man-of-war patrolled the waters round the island, in order to protect the neutrality of the Netherlands [75]).

After the war, in 1900, a visit was paid to the island by the civil officer of the Sangihe and Talaud Islands. When in 1904 a typhoon destroyed a great part of the settlements and plantations of Miangas relief measures were taken by the Resident of Manado and in 1905 the population, consisting of 450 souls, were all baptised [76]). After 1907, the Netherlands authorities regularly visited and administered the island, but the Netherlands Government refrain from giving details relating thereto, because the dispute with regard to the sovereignty of the island had arisen in the meantime.

From the facts above mentioned the following conclusion is drawn [77]): "The Netherland Government submit that while the maintainance of sovereignty, on account of the variety of special relations existing internally in the territory of a colonial power, does not in all circumstances require the permanent presence of its officials in every part or island of its territory, the belonging of Miangas to native states under Netherland sway, the successive

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75) Neth. Mem. p. 19.
76) Ibid. p. 20.
77) Ibid. p. 21.

acts of paramonutcy, conventions with native principalities, acts of administration etc. of the Netherlands, begun in a period when neither Spain nor any other power exercised sovereignty over that region, and continued afterwards and until 1898 without any protestation by any foreign government, converged in validly establishing Netherland sovereignty". The United States also takes the view, that "the maintenance of sovereignty over the territory of a colonial power does not in all circumstances require a permanent presence of officials in every part or islands of its territory" [78]). The same view was already expressed in the note addressed by the Department of State to the Netherland Government of April 15, 1914 [79]): "Considering the time and circumstances of the discovery of the Island of Palmas, its relatively small importance, its proximity to the larger island of Mindanao, the character of its people and the nature of the government throughout the Philippine Archipelago as a whole, it was not necessary, in the opinion of this Government, for Spain, in order to sustain its sovereignty, to maintain some separate administration over this small island". But the above mentioned facts are either denied or characterized as "utterly unsupported assertions". "It may be assumed", the United States Counter Memorandum runs [80]), "that it would not be contended that there has ever been any degree of intensity of Netherland administration in the Island of Palmas".

Here may be recalled the principles relating to territorial sovereignty, laid down by the Arbitrator: "Territorial sovereignty is both a right and a duty, for it serves to assure to human activities in all points the minimum of protection of which international law is the guardian". If this is taken as the criterion, the facts prior to 1885, adduced by the Netherlands Government, are insufficient to confer a title of sovereignty. The Arbitrator states [81]): "It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of state control. This is particularly the case, if sovereignty is acquired by the

78) U.S. Count. Mem. p. 82.
79) U.S. Mem. p. 142.
80) U.S. Count. Mem. p. 66.
81) Award, p. 58.

establishment of the suzerainty of a colonial power over a native state". But the facts adduced and relating to the period from 1677 to 1885 cannot be said to show a progressive intensification of state control. The Netherlands claim is only different from the Spanish claim at that epoch, in so far that the Netherlands can prove that they never entirely neglected the existence of the island. It should not be forgotten, that the Colonial Secretary Baud in 1843 could not answer a question of the British Government concerning the exact limits of the Netherlands possessions in the Archipelago. And the address of Resident Stakman in 1889 at Liroeng, in which he said that wars between native princes would henceforth cease and that the burying of persons alive would be forbidden, does not testify to any degree of intensity of Netherlands state control in earlier times [82]). Under these circumstances the Arbitrator's conclusion that the Netherlands suzerainty has been effective, is unjustified.

In 1885, however, in accordance with the increase of interest in Europe in questions of territorial sovereignty in connection with the establishment of protectorates in Africa and elsewhere, the Netherlands Government intensified their control in the remote parts of the Archipelago. As concerns the special part in question this is shown by the facts enumerated above. If any other Power had had a right over the island, based on effective state activity, a collision could not have been avoided, just as it could not be avoided by the simple visit to the island of General Wood.

Even in the years immediately preceding the cession by Spain, the degree of intensity of Netherlands state control was very small indeed. It, however, meets the requirements of international law.

About the end of the 19th century two different points of view were put forward as to the effectiveness of an occupation. Both in the Delagoa Bay Arbitration and in the controversy relating to Mashonaland in 1889, Portugal relied on the erection of fortresses, in order to exclude foreign Powers, as "that act which is in law of all acts of possession the most decisive". This opinion was shared

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82) Neth. Expl. p. 104—105. Even head-hunting (koppensnellen) was still customary at that time; ibid. p. 125).

by Lord Salisbury: "Forts maintained in a condition of efficiency are undoubtedly a conclusive testimony that the territory on which they stand is in the military occupation, and under the effective dominion of the Power to which they belong". This point of view refers only to the right to exclude other Powers, but not to the duty, to which Judge Huber rightly refers. The opposite view, finds expression in Bluntschli [83]): The taking of possession consists in the fact of organizing politically the recently discovered country, joined with the intention of exercising power there in the future. This view was taken by Prince Bismarck at the opening of the Congo Conference: "Pour qu'une occupation soit considérée comme effective, il est, de plus, à désirer que l'acquéreur manifeste, dans un délai raisonnable, par des institutions positives, la volonté et le pouvoir d'y exercer ses droits et de remplir les devoirs qui en résultent", and again by the Pope, acting as a mediator in 1885 in the case of the Caroline Islands: "Le Gouvernement espagnol, pour rendre effective la souveraineté, s'engage à établir le plus tôt possible, dans cet Archipel, une administration régulière avec une force suffisante pour sauvegarder l'ordre et les droits acquis". (Cp. Article 10 of the Convention of Saint Germain-en-Laye of 1919). This, of course, regards the Archipelago as a unit; a mere political control must be deemed sufficient for the less important islands. This view also prevailed in the first paragraph of Article IV of the Treaty of February 2, 1897 between Great Britain and Venezuela, laying down the rules by which the Arbitrators should be guided: The Arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.

From this it appears, that a general rule as to the effectiveness of an occupation does not and cannot exist. This clearly appears, if uninhabited islands or Arctic regions, habitable only during a certain part of the year, are taken into account [84]).

Everything depends on the circumstances of the special case under

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83) J. C. Bluntschli: Le droit international codifié § 278; Vattel's view is literally expressed by § 281.

84) Smedal, p. 34.

consideration. A mere control at intervals would seem sufficient for uninhabited countries, a temporary control for temporarily inhabited countries. A densely inhabited country requires a greater intensity of state control than a country inhabited by a small population. In the case of an island such as Miangas, inhabited by a native population only, a native administration under the control of the Netherlands Government would seem sufficient. An organization, however rudimentary, is proved to exist on the island. Visits of Netherlands officials are proved to have taken place at intervals and incidents, such as the flag-incident of 1924 and the visit of General Wood, immediately came to the knowledge of the Netherlands Government.

It therefore cannot be denied, that the Netherlands in the course of the last quarter of the 19th century established their title to sovereignty over the Island of Miangas.

CHAPTER IV.

FORMAL QUESTIONS.

A. The Special Agreement.

The Special Agreement of January 23, 1925, by which Her Majesty the Queen of the Netherlands and the United States of America agreed to refer the decision of the differences with respect to the sovereignty over the Island of Miangas to the Permanent Court of Arbitration at The Hague, is based upon the Arbitration Treaty, concluded by the High Contracting Parties on May 2, 1908 and renewed on May 9, 1914, March 8, 1919 and February 13, 1924.

With reference to the questions to be treated in this chapter the following provisions of the Agreement are of importance:

Article I:

The arbitral tribunal shall consist of one arbitrator.

The sole duty of the Arbitrator shall be to determine whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States of America or of Netherlands territory.

The two Governments shall designate the Arbitrator from the members of the Permanent Court of Arbitration. If they shall be unable to agree on such designation, they shall unite in requesting the President of the Swiss Confederation to designate the Arbitrator.

Article II:

Within six months after the exchange of ratifications of this special agreement, each Government shall present to the other party two printed copies of a memorandum containing a statement of its contentions and the documents in support thereof.

. . . . . .

Within six months after the expiration of the period above fixed for the delivery of the memoranda to the parties, each party may, if it is deemed advisable, transmit to the other two printed copies

of a counter-memorandum and any documents in support thereof in answer to the memorandum of the other party.

. . . . . .

Article III:

After the exchange of the counter-memoranda, the case shall be deemed closed unless the Arbitrator applies to either or both of the parties for further written explanations.

. . . . . .

The party addressed shall be allowed for reply three months from the date of the receipt of the Arbitrator's request, which date shall be at once communicated to the other party and to the International Bureau. Such reply shall be communicated to the other party and within thirty days thereafter to the Arbitrator . . . , and the opposite party may if it is deemed advisable, have a further period of three months to make rejoinder thereto, which shall be communicated in like manner.

. . . . . .

Article V:

The Arbitrator shall decide any questions of procedure which may arise during the course of the arbitration.

The ratifications of the Agreement were exchanged at Washington on April 1, 1925. On September 19, 1925, both Parties asked Dr. Max Huber, whether he would be disposed to act as sole arbitrator. The answer being in the affirmative, on October 16 and 23, 1925 the International Bureau of the Permanent Court of Arbitration transmitted to the Arbitrator the Memoranda of the United States and of the Netherlands; on April 23 and 24, 1926 the Counter Memoranda of the Netherlands and of the United States were transmitted in the same way. Further written explanations, asked for by the Arbitrator, were received from the Netherlands and the United States on March 24 and on April 22, 1927. On October 21, 1927 a Rejoinder was filed by the United States only, the Netherlands Government having declared that they renounced the right to submit a Rejoinder, making however the express reservation that they maintained the points of view which the American Explanations contested. On April 4, 1928 three copies of the Award

were deposited by the Arbitrator with the International Bureau of the Permanent Court of Arbitration at The Hague.

Both in the documents of the Parties and in the Award various formal questions are dealt with — questions of procedure as well as questions of evidence. These questions will be considered here only in so far as they are of general interest: from the point of view of international law the conclusive weight of cartographical material is of more interest than a thorough treatment of the innumerable maps adduced by the Parties. In connexion with the distinction between questions of procedure and questions of evidence it may be remarked that the principal point in the present case relates to the necessity for and admissibility of evidence. This would seem rather a question of procedure than of evidence and accordingly must be treated under the former head.

B. Questions of Procedure.

The Netherlands Memorandum is preceded by a Note, reading as follows:

> In the following memorandum various documents are being referred to. Authentic copies are available; they will be produced if desired by the Arbitrator. The more important of the documents are annexed to the memorandum [1]).

This note is severely criticized in the United States Counter Memorandum [2]). It "indicates a procedure which it is believed may be properly characterized as remarkable and without precedent in international arbitrations. The treatment of evidence in cases before international tribunals is not governed by the rigid rules which are applied by domestic courts. Nevertheless, certain elementary principles are of course common to both kinds of tribunals. It is certainly not conceivable that in proceedings before a tribunal in the United States — and doubtless the same may be said with respect to proceedings before tribunals in other countries — counsel would

1) The Neth. Count. Mem. is preceded by a similar note: The books, maps and documents referred to, of which latter authentic copies are available, will be produced if desired by the Arbitrator.

2) U.S. Count. Mem. p. 2.

venture to refer to, much less endeavour to support contentions by evidence either oral or documentary without producing such evidence, or to make assertions to the effect that documents said to exist, without being produced, will be produced, if desired by the court. If any assertion is made in the Memorandum of either Government which is unspported by evidence, such assertion must of course fall and be without effect, except in so far as the use of it raises a presumption as to its character in view of the non-production of evidence to support it".

"If this view were not correct", this document states, "an arbitral tribunal would be in the invidious position of being called upon merely to record its judgment with respect to the correctness of unsupported assertions advanced by either side in an arbitration, whereas it is the function of a tribunal to determine a controversy in the light of evidence and by the application of proper rules or principles of law". To substantiate this view extracts of judicial opinions of American courts are quoted in the United States Rejoinder (p. 119—124).

The Arbitrator, before deciding the point pursuant to Article V of the Special Agreement, requests an explanation from the Netherlands with regard to this view.

"In the opinion of the Netherlands Government", runs the answer [3]), "the necessity of evidence arises if the judge or arbitrator finds that the parties are divided with regard to certain facts which in his opinion can be considered doubtful, and which he thinks material and not known to him or to be ascertained by himself. He may accept as true the statements of either party when, in the light of the whole case, such statements seem to him sufficient or when the contestation of such statements by the other party does not seem to him to be sufficiently well-founded. On the other hand, he may ask for evidence about any point, even when it has not been contested, if he thinks it necessary to do so". The opinion that an arbitrator has "the greatest freedom to adopt such rules of evidence as seem to him most conducive to reaching a just decision" is based on Article 49 of the Convention for the pacific

3) Neth. Expl. p. 7.

settlement of international disputes of 1899 and on Article 69 of the same Convention of 1907, which latter reads: Le tribunal peut, en outre, requérir des agents des Parties la production de tous actes et demander toutes explications nécessaires.

"It seems quite natural", the Netherlands Government continue [4]), "that art. 63 of the latter convention should say that, when introducing their memoranda, "les Parties y joignent toutes pièces et documents dans la cause". It is of course a question what in every particular cas are the "pièces et documents" concerned. Article III of the Special Agreement makes the Arbitrator "master of the situation": he is not obliged to accept a statement which in his eyes is not sufficiently substantiated and which he deems important for the decision. The article enables the Arbitrator to take into account such facts as he considers material; if he deems the evidence insufficient he can always call for evidence".

Whereas in the Netherlands contention the civilian is speaking, the United States contention gives the view of the common law lawyer, in whose ears the former opinion is "heresy" [5]). It must, however, be borne in mind that the present case is an arbitration under the Permanent Court of Arbitration and that the rules for the Arbitrator's conduct are to be found in the Hague Convention of 1907. From the above quoted articles and from Article 72, paragraph 1 (Les membres du tribunal ont le droit de poser des questions aux agents et aux conseils des parties et de leur demander des éclaircissements sur les points douteux), it appears that the Netherlands Government opinion is in accordance with the Hague Convention, drafted in its turn in accordance with the civil procedure, generally followed on the European Continent [6]).

Under Article V of the Special Agreement the Arbitrator decides, that "it would seem to be contrary to the broad principles applied in international arbitrations to exclude *a limine*, except under the explicit terms of a conventional rule, every allegation made by a

4) Neth. Expl. p. 9.

5) Jessup, loc. cit. p. 750.

6) According to Fuglsang this provision is borrowed from the Russian draft convention on the procedure of international arbitration. (Der Amerikanisch-Holländische Streit um die Insel Palmas, p. 65.)

Party as irrelevant, if it is not supported by evidence, and to exclude evidence relating to such allegations from being produced at a later stage of the procedure ... The authorization given to the Arbitrator by Article III of the Special Agreement to apply to the Parties for further written explanations would be extraordinarily limited if such explanations could not extend to any allegations already made and could not consist of evidence which included documents and maps ... It is for the Arbitrator to decide both whether allegations do or — as being within the knowledge of the tribunal — do not need evidence in support and whether the evidence produced is sufficient or not; and finally whether points left aside by the Parties ought to be elucidated" [7]). Judge Huber's opinion coincides with that of Judge J. C. Bancroft Davis in the Caldera Cases: "In the means by which justice is to be attained the court is freed from the technical rules of evidence imposed by the common law, and is permitted to ascertain truth by any method which produces moral conviction" [8]). And in the case of the North Atlantic Fisheries Arbitration between the United States and Great Britain the former Power agreed to a procedure conforming to the Netherlands view in the present case [9]).

It may thus be deemed established, that failing special provisions, an Arbitrator under a special agreement is wholly master of the situation; he is even to decide "points left aside by the Parties". "This liberty", Judge Huber states [10]), "is essential to him, for he

7) Award, p. 19—20.

8) Neth. Expl. p. 7.

9) Whereas Act VI of the Special Agreement of January 27, 1909 runs: As soon as may be and within a period not exceeding seven months from the date of the exchange of notes making this agreement binding, the printed case of each of the Parties hereto, accompanied by printed copies of the documents, the official correspondence and all other evidence on which each Party relies, shall be delivered in duplicate, etc., Article VII reads: If in the case or counter-case (exclusive of the accompanying evidence) either Party shall have specified or referred to any documents, correspondence or other evidence in its own exclusive possession without annexing a copy, such Party shall be bound, if the other Party shall demand it within thirty days after the delivery, to furnish to the Party applying for it a copy thereof, etc.

10) Award, p. 20.

must be able to satisfy himself on those points which are necessary to the legal construction upon which he feels bound to base his judgment. He must consider the totality of the allegations and evidence laid before him by the Parties, either *motu proprio* or at his request and decide what allegations are to be considered as sufficiently substantiated". The United States certainly could also have based their claim on the lack of formal protestation on the part of the Netherlands Government in response to the notification of February 3, 1899. For one reason or another the United States, however, preferred not to base a claim on this ground. None the less, this point is dealt with by the Arbitrator.

In the light of the extensive powers conferred upon the Arbitrator we must consider the Netherlands contention with reference to the measures taken on the Island of Miangas in 1895: "If facts like these are stated to have been done by them (the Netherlands Government) or their agents, such statements do not require corroboration by further evidence: such statements are evidence in themselves" [11]). "This is indeed a peculiarly spirited attitude", the United States remarks [12]), "the like of which, if it were ever heretofore assumed by any litigant before a domestic court or before an international court, has not come to the notice of the United States ... It is not clear what may be the function of a judge, under such a procedure, if he were to act on the theory that he must accept the allegations of one party as constituting at once allegations and evidence". It is again for the Arbitrator to estimate the value of assertions made by a Government in regard to its own acts. The Netherlands Government, however, go farther [13]): "The Netherlands Government do not think reasonable a thesis by which an Arbitrator should be bound to discard statements made in the name of the Government of a given State, and presented under the cover of a letter signed by or on behalf of the responsible Minister of the Crown". This of course, the United States has never contended. What it contends is [14]), that it "does not consider that,

11) Neth. Count. Mem. p. 76.
12) Rej. p. 7.
13) Neth. Expl. p. 11.
14) Rej. p. 13.

because documents in an arbitration are transmitted to an arbitral tribunal with stationery signed by or on behalf of a responsible Minister of the Crown, the allegations in the pleading must be treated as facts. Whether they are facts is a judicial question for the determination of the tribunal in the light of the evidence produced to support such allegations". This is of course different; moreover the Netherlands argument does not hold good, because the responsibility of the Minister is a purely internal matter which cannot be invoked in an international arbitration.

The divergence of view relating to the production of evidence is seen not only in the content of the documents filed by both parties, but also in their form.

The Netherlands Government take the position that the first memoranda are [15]) "statements of the case independent of one another and that only the counter-memoranda could take into account the point of view of the other party and that it was only by the counter-memoranda that each party knew the attitude of the other party towards his own statements". After the exchange of the counter-memoranda the Arbitrator could request further explanations on those points, which he deems insufficiently elucidated.

According to the United States Government the pleadings might have been limited to the Memorandum; Article II of the Special Agreement states, that it shall contain "a statement of its contentions and the documents in support thereof"; it therefore not only develops the United States argument, but also contests the Netherlands argument as far as it is known from the previous diplomatic correspondence.

It is true, that the Netherlands Government would have been in the stronger position, if the Arbitrator had not asked for further explanations; in that case they could have contested both the United States contentions and the reply to their own, whereas the United States Government could only contest the Netherlands contentions; as the Arbitrator made use of his authority, the practical difference between their relative positions is very small. Moreover it is questionable, whether the previous diplomatic correspondence should

15) Neth. Expl. p. 11.

be taken into consideration [16]); if it should not, the Netherlands attitude is the only possible one. Only if the Special Agreement contains provisions differing from those of the Hague Convention of 1907, are such provisions to prevail over the broad principles of that Convention. The Special Agreement in the present case, however, does not contain any such provision [17]).

C. Questions of Evidence.

One of the questions in the present case was the identification of the island, which, according to the United States, had been recognized throughout the world for nearly four centuries as grouped with the Philippine Islands to which it belonged as a Spanish possession until 1898, when sovereignty over it passed to the United States . . . It is established by maps and by early documents, one dating back to the year 1689. On the other hand it is said by the same Government, that it seemed probable that the Netherlands Government "had confused the Island of Palmas with the small group of islands (the Nanusa Islands), designated on some maps as "Meangis" Islands. Again it is said, that the name Miangas appears to be one by which the Netherlands Government have only recently designated the island. Moreover, it appears in

16) It is denied by the Neth. Count. Mem. p. 8: . . . it is submitted that that diplomatic correspondence and the arguments of the two parties advanced at that time, do not constitute the basis for the judgment on the validity of the claim submitted to the arbitrator. The Netherlands opinion is in conformity with J. H. Ralston, The Law and Procedure of international Tribunals, 1926, p. 191.

17) Fuglsang on p. 54 draws attention to Article II of the Special Agreement which in the Dutch text runs: eene memorie..., waarin vervat zijn eene uiteenzetting van hare aanspraken, etc., whereas the English text reads: a memorandum, containing a statement of its contentions, etc. According to the Dutch text the Netherlands Government put forward their claims (aanspraken) only, whereas the United States Government, according to the English text, put forward their contentions, which include both their claims and their contestation of the other Party's arguments. As the Special Agreement contains no provision making one of the two texts authoritative, they are certainly of equal authority.

different documents and on different maps with a different spelling: Menangus, Mianguis, Meangis, Melangis, etc. Moreover names like St. Juan, Mata, Hunter Island, Haycock Island and others were at different times applied to the same island, as well as that of Palmas.

Dampier mentions the "Islands Meangis" in his book, published in 1698 as islands "abounding with gold and cloves"; the map, published by Covens and Mortier at Amsterdam in the beginning of the 18th century, shows a single island with the inscription "'t regte Po Menangus", which proves that a doubt with respect to the name was settled. The island appears under similar names in different documents filed by the Netherlands Government. These differences are, in the Arbitrator's view, sufficiently explained by the statements of linguistic experts, produced by the Netherlands Government. The island in dispute is a single, distant, isolated island; it therefore cannot be identified with the alleged "iles Meangis" or islands designated by a similar name; the attempt to do so may be explained by "the desire to locate somewhere the Meangis Islands, famous since Dampier's voyage" [18]).

This reasoning sounds very convincing indeed; nevertheless the fact that the question as to the identification of the island could arise, proves that both documents and maps are to be used with the greatest caution.

"Maps of course are evidence", the United States Rejoinder states [19]), "with respect to the discovery of the Island and the general recognition of Spanish sovereignty over it prior to 1898. It is unnecessary to observe that maps as historical records prepared by experts have had a very conspicuous use in the arbitral settlement of territorial disputes. In an arbitration concerned with a portion of the world where there are numerous islands with which, as the Netherland Government explain with respect to their island possessions, there is little or no interference by the sovereign with local affairs . . . the use of maps would seem peculiarly pertinent and important. They record the recognition of sovereignty estab-

18) Award, p. 48.
19) U.S. Rej. p. 32.

lished through international covenants and historical forces of various kinds".

It is certainly true that a map drawn by the explorer of a certain region can prove the discovery of an island such as Miangas; every subsequent map, however, is only of importance, if it relies on new data and does not only copy a previous map. It is obvious, that of the approximately 1.000 maps examined by the United States Government only very few fulfil this condition.

Only maps relying on original data can afford evidence of the "general recognition", to which this Government refer. That the Island of Miangas was not generally recognized to belong to Spain is proved by the maps and documentary evidence adduced by the Netherlands Government. Moreover it should be borne in mind, that even a trustworthy cartographer with the best possible instruments can only locate an island such as Miangas; he can observe and reproduce its shape, but he can never observe its name or the sovereignty under which it is, if no evidence exists in the form of some sign such as a cairn or a flag; information given by native inhabitants must be accepted with extreme caution and is only of value, if confirmed by official information. Strictly speaking, a map is only evidence of the opinion of its author; it will only be of value in an international procedure, if it can be proved that the data on which the cartographer relies have been obtained from a Government. If a Spanish cartographer could be proved, in assigning sovereignty over the island on a map, to have relied on official Dutch data, or a Netherlands cartographer on official Spanish data, a map designating sovereignty over the island would be of value. But in this case value attaches rather to the admission of the Government than to the map.

This is wholly in accordance with Judge Huber's general remark [20]): If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statement of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be. In the present case the Arbitrator explains at some

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20) Award, p. 36.

length that not only maps of ancient date, but also modern, even official or semi-official maps seem wanting in accuracy. Under these circumstances it is not surprising that the role played by maps in the present arbitration is by no means in proportion to the trouble taken by the litigating Parties.

Whereas the questions of evidence so far considered have received the attention of both Parties, there is one question of general importance, which is raised by the Netherlands Government but fully dealt with by the Arbitrator only.

"The admission of the existence of territorial sovereignty early in the 18th century and the display of such sovereignty in the 19th century and particularly in 1906, would not lead, as the Netherlands Government appears to suppose, by analogy with French, Dutch and German civil law, to the conclusion that, unless the contrary is proved, there is a presumption for the existence of sovereignty in the meantime. For the reasons given above, no presumption(s) of this kind are to be applied in international arbitrations, except under express stipulations. It remains for the Tribunal to decide whether or not it is satisfied of the continuous existence of sovereignty, on the ground of evidence as to its display at more or less long intervals" [21]).

In the next paragraph, however, the Arbitrator states, that there is no reason to suppose, when the Resident van Delden, in a Report of 1825, mentioned the island "Melangis" as belonging to Taboekan, that these relations had not existed between 1726 and 1825. "This", professor Jessup says, "seems little different from presuming their continuance" [22]).

Two observations may here be made: In the first place: Is there really a gap in the documentary evidence laid by the Netherlands Government before the Tribunal relating to the Island of Miangas and extending over nearly a century? To the Netherlands Memorandum are annexed contracts of 1758, 1771, 1779 and 1782 (Appendices Q—U), either with the King of Taboekan or with the

21) ibid. p. 53.

22) Jessup, loc. cit. p. 745.

Sangi princes collectively. It is true that the Island of Miangas is not expressly mentioned in these contracts; they prove none the less the continuance of the suzerainty of the East-India Company over the Sangi states to which the island belongs. And when, for instance, under the contract filed as Appendix A, the King of Taboekan has to put at the disposal of the East-India Company 150 men to fight the pirates of Magindanao, this stipulation would seem also to concern the Island of Miangas and thus proves a display of sovereignty over the island. Regulations of the kind would seem no less direct than the regulations of 1701, in which the island is expressly mentioned.

In the second place Jessup's remark does not apply, because what the Arbitrator rejects is a presumption as to the existence of sovereignty, whereas in the next paragraph a presumption of the contrary is equally rejected[23]). The Arbitrator is "master of the situation"; he apparently will not allow any presumption to interfere with his freedom to form his own opinion as to the value of the opposing contentions.

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23) According to de Visscher, loc. cit. p. 748, the rejection of the praesumptio juris is perfectly compatible with the praesumptio facti in the next paragraph. Prof. de Visscher characterises Jessup's remark as "peu justifiée".

CHAPTER V.

CONCLUSIONS.

A. Importance of the Award.

It cannot be denied, that the material importance of the Island of Miangas is by no means in proportion to the trouble taken by the litigating Powers and to the time taken to settle the dispute.

None the less, the island will henceforth have its place in the history of international law, for the questions on which Judge Huber's opinion was invoked, are closely concerned with the fundamental principles on which international law is based and has been based since it began to play its role in the history of law.

In general disputes with respect to territorial sovereignty have arisen from the remotest times up to the present day. Notwithstanding this there is probably no subject in the domain of international law which is less definitely regulated. As an illustration of this fact, it is only necessary to point to the Award itself which begins with a section devoted to doctrine in which the principles of territorial sovereignty are laid down. From this point of view Judge Huber's clear-cut Award is a valuable contribution to the development of international law on the subject of territorial sovereignty.

It is therefore not surprising that the Judgment of the Permanent Court of International Justice in the Greenland case did Judge Huber the honour of quoting his Award. As a matter of fact the Court refers but rarely either to the opinions of jurists or to previous international decisions. Its judgments consequently take the form of more or less apodictical statements, which, however, as a result of their general acceptance, acquire the value of signposts pointing the direction in which international law is to develop. It is therefore important to compare the Judgment of the Permanent Court in the Greenland case both with the Award and with the conclusions reached in this treatise.

B. Miangas and Greenland.

According to the Arbitrator territorial sovereignty involves the duty of assuring to human activities the minimum of protection of which international law is the guardian. The Arbitrator admits that the degree of effectiveness required for an occupation necessarily varies; if this is taken into account, the facts and events alleged by the Netherlands Government are deemed by the Arbitrator sufficient to prove that the Netherlands occupation has been effective.

In the course of this treatise it has been shown that these facts and events, except in the years immediately preceding the cession, can hardly be said to constitute an effective occupation, and that at all events they do not satisfy the principle laid down by the Arbitrator. If on the other hand the facts and events are considered on which the Danish Government relies in order to prove — and which, according to the Court, constitute — an effective occupation of the whole of Greenland, it must be admitted at all events that the Netherlands' display of state authority over the Island of Miangas was more intense than that of Denmark over the whole of Greenland. As a matter of fact the recognition of Denmark's sovereignty over Greenland almost amounts to the recognition of a nominal sovereignty.

It has been stated in Chapter I, that both the Congo Conference in 1885 and the Convention of Saint Germain of 1919 were, as regards the effectiveness of occupation, rendered almost nugatory by subsequent state practice. This practice has now received the sanction of the Judgment of the Permanent Court of International Justice. Whereas in private circles in Denmark the Danish title was considered insufficient, because it was not supported by an effective display of state authority sufficient to constitute a valid title to the whole of Greenland, it nowhere appears from the Judgment, that Great Britain, the United States or Japan ever informed the Danish Government that the recognition sought by Denmark could only be given, if effective possession was taken. The dissenting opinions of Judges Anzilotti, Schücking and Wang are, as regards the effectiveness of the occupation, more in accordance

with the opinion of Judge Huber. None the less: *Roma locuta, causa finita.*

C. Final Conclusions.

The conclusions of this treatise may thus be summarized as follows:

It is probable, that Spain discovered the Island of Miangas, but it nowhere appears, that Spain ever effectively occupied the island.

According to the Arbitrator, the Spanish definite title of discovery, if it ever existed, was lost, because Spain did not fulfil the requirements, added by international law in later years. A Spanish inchoate title, if it still existed in 1898, could not prevail over the definite Netherlands title derived from the continuous and uninterrupted display of state activity.

The present study leads to the conclusion, that the mere fact of discovery never conferred a title to territorial sovereignty and that, even if it ever conferred an inchoate title, this title has lapsed, because the discovery was not followed by a taking of effective possession within a reasonable delay. The Arbitrator's theory of intertemporal law and its corrolary, the distinction between the creation and the existence of rights, must be rejected [1]).

The title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law. On this point the conclusion reached is wholly in accordance with the Award.

We agree therefore that the United States title does not hold good.

The title of prescription, recognized by the Arbitrator, is not founded in international law; on the other hand an appeal to *possessio immemorialis* is warranted.

According to the Arbitrator there has been an actual display of state authority on the part of the Netherlands since 1677, or at all events since 1700, and the title thus acquired prevails over an inchoate title of Spain, supposing that such a title could be said to

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1) It is interesting to note that Judge Anzilotti's dissenting opinion does not appeal to any such theory as Judge Huber's theory of intertemporal law.

exist in 1898. According to the view taken in the present treatise the facts and events alleged by the Netherlands Government did not create a definite, but only an inchoate title; this title however was strengthened by effective occupation in the years preceding the alleged cession of the Island of Miangas to the United States by Spain.

As Spain had no title to the island in 1898, she could not transfer it to the United States.

The Netherlands title could not be affected by the notification of the treaty of cession to the Netherlands Government. As regards this point, we are wholly in agreement with the Award.

Accordingly the final conclusion reached in this treatise is in agreement with Judge Huber's decision, namely, that the Island of Palmas (or Miangas) forms in its entirety a part of Netherlands territority.

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CONTENTS.

STELLINGEN.

I.

De souvereiniteit over de mandaatgebieden berust bij deze gebieden zelf.

II.

Het tractaat, dat geratificeerd is door het Staatshoofd buiten de grenzen van diens consitutioneele bevoegdheid, is verbindend.

III.

De Zelfbestuursregels 1927 hadden, als betreffende eene inwendige aangelegenheid van Nederlandsch-Indië, bij ordonnantie vastgesteld moeten worden.

IV.

Artikel 128 van de Indische Staatsregeling behoeft geen aanvulling om de mogelijkheid te openen tot het vernietigen van medebewind-verordeningen van Inlandsche gemeenten.

V.

Het Pond Sterling is van den gouden standaard gedrongen, omdat het Britsch economisch systeem en dan voornamelijk in dit systeem de loonen, totaal onbewegelijk zijn gebleven.

VI.

Het huwelijk, door eene Nederlandsche in het buitenland gesloten binnen drie honderd dagen sinds de ontbinding van haar vorig huwelijk, is daarom niet ongeldig.