

# Effective Control in International Territorial Disputes

-- Based on the Palmas Case

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**Abstract:** Effective control, or effectivites, has long been regarded as one important part in international courts' decision on territorial sovereignty. The Palmas case (United States v. The Netherlands, 1928) was crucial because it not only addressed territorial sovereignty but also helped solidify the doctrine of effective control as a critical factor in the determination of territorial claims. This article intends to analyze the standard for effective control by going through the development of the concept to its details in application on the basis of the Palmas case and other cases. The article starts by briefly introducing the Palmas case and then goes through the history of effective control, its relationship with other concepts like effective occupation, terra nullius, and also some details of state activities in determining effective control.

**Keywords:** Effective Control, International Territorial Disputes.

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## 1. A brief Introduction on The Palmas Case

The Palmas case is about a territorial dispute on the sovereignty of island of Palmas (or Miangas) between the United States of America and Netherlands.[1] The Palmas Island is a single isolated island in the Celebes Sea with few residents. [2] According to previous treaties, the island was ceded to the US by Spain in the 1898 Treaty of Peace between the United States and Spain as the end of Spanish-American war. The treaty was communicated to Netherlands. Since the 17th century, the Dutch East Indies was governed by Netherlands, which was only a few miles south east of the Palmas. In 1906, the US government general Wood visited the island of Palmas and saw the Dutch flag on the Palmas Island. He then reported the situation to the US government. the US government started to have diplomatic contact with the Netherlands with the belief that the Palmas Island belonged to the US which inherited the rights from the Spain. [3] The United States of America and the Netherlands came to a special agreement after the lengthy conversations from 1906 to 1925, in which the parties referred to dispute to the Permanent Court of Arbitration. The president of the Permanent Court of Arbitration, Max Huber, was appointed to be the sole arbitrator in this case.

During the arbitration, the US based its title on discovery and the geographical contiguity. Netherlands based its claim on the exercise of sovereignty over the island since 1677. It claimed that after the 1677 contact with the native communities in an authoritative level, it has established suzerainty and continued to exercise jurisdiction over the island in a continuous, and peaceful manner.

The arbitrator Max Huber examined the claims from both parties from discovery, title, inchoate title, possession, geographical vicinity to continuous and peaceful display of state authority. Eventually Huber decided after considering the relative value of the claims evidenced by the facts, treaties and international jurisprudence, the display of the Netherlands has been open and public, notified and fulfilled and that Netherlands had sovereignty over the Palmas Island instead of the United States of America.[4] Max Huber had

discussed in a clear and concise way the criteria for the establishment and continuity of territorial titles. The formulation of "continuous and peaceful display of territorial sovereignty" is an indispensable prerequisite for a valid title to arise from occupation. This is widely discussed in international law in the Eastern Greenland Case[5], Minquiers and Ecrehos Case[6] and so on.

## 2. Legal Analysis on Effective Control

### 2.1. International territorial legal disputes

An international law dispute means the disagreement or points of contention between parties. A mere assertion of the applicant is not enough, the disagreement shall be concrete, and positively opposed. In deciding a territorial dispute case, the competing claims of the parties, legal ground and factual basis shall be considered one by one. In analyzing the territorial disputes, the possibility of special arrangements between the parties shall to be considered first to confirm the existence of dispute. In the Palmas case, when considering the US claim on the activities Spain operated on the island, they existed for sure, but it was to decide on whether this proves, and to what extent proves the territorial sovereignty of Spain was manifested. The communication between the US and Spain before the Treaty of Paris indicated nothing specific in condominium. This serves as the precondition for the court to decide that the dispute exists and that the decision shall be made between the two parties over the issue of sovereignty. [7]

### 2.2. The history of effective control

From the 16<sup>th</sup> to 18<sup>th</sup> century, the standard for effective control was focused on actual habitation and use of the territory, which emphasizes the effectiveness of the territory.[8] In the 19<sup>th</sup> century, the standard for effective control became more feasible. In 1884, the Berlin Conference was held. [9] At the end of the 18<sup>th</sup> century, European explorers began to explore more on the African continent and by the middle of the 19<sup>th</sup> century most of the continent had been discovered by them. In 1884 Germany organized a conference at the request of Portugal for the major powers to decide on the divided control over the continent. The

fourteen countries at the time came to the conclusion of The General Act which covered several key points, one of which is that the principle of effectivity was established. This meant that the European powers were not allowed to set up colonies in name only. The conference sped up the process of colonization. [10] After the 1884 Berlin Conference, the standard for effective control was then focused on the display and exercise of state power instead of the former emphasis on actual occupation of the territory. [11]

In 1888, the Institut de Droit International passed the resolution on occupation and continued to perfect the effectivity in the Berlin Conference. The article 1 stipulated the condition for effectivity, which was to take possession of a specific area of territory in the name of the government and to also cooperate with the local government for keeping good order and making sure the display/exercise of state power over the territory occupied. [12] However, this document from the Institut de Droit International is in its essence not binding in international law.

In the *Palmas* case, Max Huber pointed out the continuous and peaceful display of sovereignty mattered just as much. [13] In the 1933 *Eastern Greenland* case, the standard for effective control was further interpreted into two elements, including the intention and will of the sovereign state and the actual exercise of display of the privilege. [14] The focus on management on the disputed territory was then confirmed and repeated by the international courts. It is to be determined what kinds of activities and to what extent they constitute effective control. [15]

The rule of effective control means the process of determination on which party has sovereignty over a specific area of territory after examination on sovereignty activity claims by the conflicting parties. When looking at the multiple evidence provided by the parties, the court normally analyzes in two steps. For one, identify the evidence as in whether it constituted the activities of the sovereign states. For another, determine the prevailing party based on the overall examination of all relevant factors, for instance the amount, the category, the geographical features and the attitude of other conflicting states. After thorough and meticulous comparison and balance of interests, the court decides on the party that prevails. [16]

### **2.3. Effective control and relevant concepts**

As for the connection between effective control and the effective occupation, since the definition for effective control involves the prerequisite that the land shall be *terra nullius*, in this case the land which was never once discovered by any country. Effective control also involves the condition of *terra nullius*, but it does not require the land was never discovered, but that it was never successfully under another country's control or abandoned by the former country. Some believe that the rule of effective control evolved from the rule of effective control, while some believe that these are two sets of rules. There is no uniform opinion on this in international law and it is impractical to be able to distinguish one from another.

The important thing here is to determine what constitutes an abandonment of the land by the last governing entity and what constitutes administration of the land. Some believe that the rule of effectivites shall be applied in *terra nullius* which is first discovered. The definition for *terra nullius* developed from the land never once discovered to the land once discovered and then the state lost control over. Some scholars

hold that abandonment represents the failure to maintain a minimum degree of sovereign activity. In the *Clipperton* case, the main points include whether France or Mexico has title to the island, whether Mexico has any title belongs over the island and whether it provides a lower occupation requirement to prove actual title where the territory claimed is an uninhabited island. In the reasoning, Emperor stated in 1858 the island was legitimately acquired by French. France did not lose subsequently right by dereliction. France never has the animus of abandoning the island and it has not exercised its authority their positive manner. For this France had sovereignty over the island since 1858. [17]

*Terra nullius* is not commonly seen in international territorial law these days. For now, effectivites is gaining more and more attention in this area. Effectivites is in its essence one of the two elements of effective occupation, with the other being *terra nullius* (in this aspect is includes the territory that was not successfully occupied, that was given up occupation and that was never successfully established of effective sovereignty. Mere sight of the territory and symbolic occupation is not sufficient enough to for a country to obtain sovereignty over the territory, but only an inchoate title to be completed by later activities. [18]

It is worth noting that before examination of the claims from both parties, the arbitrator Max Huber started with some explanations on the sovereignty in its relation to territory. Sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular state. [19] To begin with, it is not convincing enough to establish the sovereignty from just the moment of certain time point, but shall be consistent and continue to exist even at the moment critical to the dispute (critical date). Much of the time, the claims on sovereignty are based on title. In this case Max Huber pointed out that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other states) is as good as a title. [20] Before international law gained much attention, the territorial boundaries were determined by facts of countries' s exercise of state power in the area. As the international law evolves, the continuous and peaceful display of state function remains to be among the most important factors to consider. This is supported not just by the facts, but also the universally accepted international jurisprudence and doctrine.

To successfully establish the title by effectivites, both the intention from the country to exercise sovereignty over the specific territory and the actual state activities are strictly required. As for the intention part, it is not too specific on whether a public announcement is required. More often it is shown in the activities the state exercised to serve directly or indirectly as proof. In the opinion of some experts, the role of effectivites includes the following: to serve as proof to effective occupation in compensation for *terra nullius* (the *Palmas* case), to prove and affirm the existence of legal sovereignty, to be the title to remnant rights when a country gives up publicly or by default the territory or to directly evidence the sovereignty when the title is unclear. [21]

### **2.4. Requirements for the state activities**

Since the two dimensions-subjective intention and objective state activities are standard too abstract and unclear, it is to be further illustrated in the following paragraphs. The subjective intention of the state is not known unless expressly conveyed but is shown in the actual measures it takes.

Normally due to the indeterminate nature of such wordings, this is examined in a case-by-case manner. The court ruled that the intention and will of Denmark to act as sovereign and Denmark's exercise of authority such as establishment of a trade monopoly for the whole island and the granting of trade and mining concessions were sufficient in proving Danish possession.[22] In the Palmas case, the court held that the inability in such a case to indicate any acts of public administration makes it difficult to imagine the actual display of sovereignty, even if the sovereignty be regarded as confined within such narrow limits as would be supposed for a small island inhabited exclusively by natives.[23]

In the analysis, some key factors are to be considered. The standard of effective control mostly bares the features of sovereign, specific, public and symbolic. According to some scholars, the sovereign activities taken shall fall within the elements of openness, practicality, continuity, peacefulness and sufficiency. The activities are supposed to be public and open so that the other countries get to know the content and nature of its activities. This is especially important in case of territorial disputes in that if it was not public, the fact that the territory may be related to a third country poses the risk of international illegality. Normally the states take measures or express their will through the foreign affairs department or other official persons/ organizations to make public international statements.

#### **2.4.1. Three main categories of state activities**

The activities in showing state control shall show the practical involvement of the state, which are generally included in the three categories, which are the administrative activities, judicial activities and legislative activities as well as other activities that would qualify the same effect of state jurisdiction over the territory. In the Palmas case, the display of sovereignty by Netherlands was shown in the flying flag hoisted by the natives who also notified the sailors that the name of the island was "Meangis". The administrative activities are common and convincing in proving state function. In the *Minquiers and Ecrehos* case, the officials from Jersey island registered boats for fisherman in the area. The license was cancelled in 1882 while later the Customs Officers of Jersey visited that island occasionally to endorse the license of the boat.[24] Other than that, since 1889 the Parish on the Ecrehos was assessed for levying of local taxes.[25] Examples of registration of contracts were produced for 1863, 1884 and later years. In the Palmas case, among the many documents and facts considered, the Miangas taxation to the Netherlands government was the most significant one. [26]

The legislative activities are considered the most obvious form of sovereign function in the permanent court of justice decision on the 1933 Eastern Greenland case. In this case, Denmark enacted legislation regulating the hunting and fishing, and in the same year Greenland was divided into provinces by a law which declared that all commercial activity was reserved to the Danish State. [27]

The judicial activities may include the exercise of civil or criminal jurisdiction. This is proven through the direct exercise of judicial activities by the state officials, for example, prosecution on a case in the land, judgement on the criminal who committed crime on the territory. In the *Minquiers and Ecrehos* case, the United Kingdom provided the evidence that in 1826 criminal proceedings were instituted before the Royal Court of Jersey against a Jerseyman for having shot at a person on the Ecrehos. [28] Also, there were

similar proceedings in Jersey in respect of criminal offences committed on the Ecrehos took place in 1881, 1883, 1991, 1913 and 1921. [29] Also, evidence showed that the law of Jersey had for centuries required the holding of an inquest on corpse found within the Bailiwick where it was not clear that death was due to natural causes and the inquests took place in 1859, 1917 and 1948. [30]

#### **2.4.2. The subject: representation of the state**

The activities are authorized by the subject that represents the state. In the Palmas case, the East India Company already established the sovereignty over Palmas Island through signing treaties with the two local leaders, and later on during the two hundred years showed sovereignty over the Palmas. According to the arbitrator, the successive contracts are one much like another; the more recent are more developed and better suited to modern ideas in economic, religious and other matters, but they are all based on the conception that the prince receives his principality as a fief of the Company or the Dutch State, which is suzerain. Later Max Huber decided there were three main points to solve. [31] The first one is whether Palmas Island was Netherlands 's territory in 1898. The second one is whether the sovereignty over the Palmas Island existed in 1898 and whether the relative claims were verified. What is essential in this case is the continuous and peaceful display of actual power in the contested region. As for that, it is important to take a look at both the official role taken by the East India Company and 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.

The acts of East India Company, including the occupation, colonizing the regions at issue in the present affair must in international law be entirely assimilated to acts of the Netherlands state itself.[32] The nature of the Company was to be decided. As a company, the contract between the Company and the local leaders was not considered as the international contract between two qualified international actors, but the indirect influence was not to be ignored. Even if they didn't qualify as title, they constituted necessary facts to consider. It was very common that the countries gained occupation over a certain territory through contracts. Therefore, the arbitrator cannot exclude the contracts involved by the Netherlands from being taken into consideration in the present case.

#### **2.4.3. Specific on the land**

In demonstrating the practicality of state activities, the activities taken shall also be specific on the designated land. In the Eastern Greenland case, the parties were in disagreement on the scope of land involved in the case. This requires the activities to be specific on the land in that they are closely connected to the state function.

But it should be noted that the inability to mention the particular land does not equal to the non-existence of evidence. In the *Minquiers and Ecrehos* case, the United Kingdom submitted the view that the Channel Islands in the Middle Ages were considered as an entity, physically distinct from Continental Normandy, and that any failure to mention by name any particular island in any relevant document, while enumerating other Channel Islands, does not imply that any such island lay outside this entity. [33] The court held that if the Ecrehos and Minquiers were never specifically mentioned in such numerations, this was probably due to their slight importance. [34] For comparison, even some larger and more significant islands were only occasionally mentioned by name

in documents during that period of time.

#### 2.4.4. Peaceful control

This requires that the claims on the territory do not violate the existing rights of other countries, and that there are no conflicting sovereign activities. The most direct and precise standard for this is to see whether there is disagreement from another country during a reasonable period of time. In the Palmas case, the arbitrator held that the state that Spain did not officially object or question the sovereign activities Netherlands took in the Palmas Island kept on till 1906 when the United States of America started to question Netherlands. [35]

#### 2.4.5. Symbolic control

The occupation and control shall be symbolic, not mere discovery. In the Palmas case, in the Palmas case, as for the United States of America, it based its claim on discovery, with relevant files about the communication between the US and Spain. [36] It was necessary to determine whether it was Netherlands or Spain that gained the inchoate title instead of the cession after 1648. The discovery by Spain was certain in the first half or first quarter of the 16th century, but mere discovery without any symbolic occupation was not sufficient in proving sovereignty over the island. According to the views that got noted in the 19th century, an inchoate title must be completed within a proper period of time by effective occupation over the specific region. Therefore, the inchoate title from Spain didn't stand.

#### 2.4.6. The extent of effectiveness and the decision on the party that prevails

As for the extent of effectiveness, some hold that the longer the administration is, the more substantial the justification for a territorial claim based on effective control. In the Palmas case, the evidence before 1895 on the interrelation between the island and the colonial government was very loose. [37] However, it existed and was at least supported the relevant claim of sovereignty.

Eventually the decision is to be made under meticulous examination and comparison on claims and evidence from both parties. In the Palmas case, according to Huber, no sufficient evidence was shown that Spain exercised continuous and peaceful state activities on the Palmas Island, therefore sovereignty of Spain before the dispute was already lost. Since the island was not successfully occupied by Spain, then let alone the United States of America. The Palmas Island was then "terra nullius". Huber continued to illustrate that Netherlands was favored by basing its claims on sufficient evidence with regard to the exercise of state function for a certain period of time. [38] The continuous and peaceful exercise of state function was shown in Netherlands' activities. If, as in the present instance, only one of two conflicting interests is to prevail, because sovereignty can be attributed to but 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.[39] Eventually Huber came to the decision that Netherlands had sovereignty over the Palmas Island.

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