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I. INTRODUCTION

The regime of innocent passage is a well-established body of customary international law.[1] As articulated in Article 19 of the Law of the Sea Convention,[2] the regime strikes a balance between the navigational interests of the maritime State and the protective interest of the coastal State by restricting the freedom of navigation of foreign-flagged ships to passages conducted in a manner that is not prejudicial to the coastal State's peace, good order, or security.[3] However, in cases where there is a dispute over sovereign entitlement to a territorial sea or its outer limit, the applicability and legal effect of the regime are brought into question. The coastal State exercising effective control over the disputed waters may consider any attempt to challenge its sovereignty as prejudicial to its peace, good order, or security, while the contesting State may dispute that State's entitlement to a territorial sea or its outer limit. Additionally, third States may refuse to recognize the validity of

1. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 2001 I.C.J. Rep. 40, ¶ 223 (Mar. 16) [hereinafter Qatar v. Bahrain]; *Report of the International Law Commission to the General Assembly*, 11 U.N. GAOR Supp. No. 9, U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 Y.B. Int'l L. Comm'n 272, U.N. Doc. A/CN.4/SER.A/1956/Add.l.

2. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC].

3. *See generally* Yoshifumi Tanaka, *Navigational Rights and Freedoms*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 536 (Donald R. Rothwell, Alex G. Oude Elferink, Karen Scott & Tim Stephens eds., 2015); William K. Agyebeng, *Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea*, 39 CORNELL INTERNATIONAL LAW JOURNAL 371 (2006); 1 E.D. BROWN, THE INTERNATIONAL LAW OF THE SEA 43–76 (1994); Tullio Treves, *Navigation*, *in* A HANDBOOK ON THE NEW LAW OF THE SEA 835, 906–40 (René-Jean Dupuy & Daniel Vignes eds., 1991); FRANCIS NGANTCHA, THE RIGHT OF INNOCENT PASSAGE AND THE EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA (1990); Jin Zu Guang, *Conflicts between Foreign Ships' Innocent Passage and National Security of the Coastal States*, *in* INTERNATIONAL NAVIGATION: ROCKS AND SHOALS AHEAD? 111 (John M. van Dyke, Lewis M. Alexander & Joseph R. Morgan eds., 1988); MYRES S. MCDOUGAL & WILLIAM T. BURKE, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA 174–79 (1987); Karin M. Burke & Deborah A. DeLeo, *Innocent Passage and Transit Passage in the United Nations Convention on the Law of the Sea*, 9 YALE JOURNAL OF INTERNATIONAL LAW 389 (1983); Brian Smith, *Innocent Passage as a Rule of Decision: Navigation v. Environmental Protection*, 21 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 48 (1982); Shekhar Ghosh, *The Legal Regime of Innocent Passage through the Territorial Sea*, 20 INDIAN JOURNAL OF INTERNATIONAL LAW 216 (1980); GEORGE P. SMITH II, RESTRICTING THE CONCEPT OF FREE SEAS: MODERN MARITIME LAW RE-EVALUATED 31–54 (1980).

a particular claim to a territorial sea and assert freedoms of navigation and overflight by conducting various maritime activities in the area concerned. Further, the very existence of a territorial or maritime dispute may render sovereign entitlement to maritime claims legally invalid until the dispute is resolved.

The applicability of the regime of innocent passage, and its legal effect, in disputed waters is an issue that plagues maritime security, particularly in Southeast Asia where there is a concentration of territorial and maritime disputes in the South China Sea.[4] Over 250 maritime features of diverse types (largely concentrated in the Paracel and Spratly island groups) are subject to competing territorial and maritime claims among Brunei, Malaysia, the Philippines, the People's Republic of China (China), the Republic of China (Taiwan), and Vietnam. The tension that has arisen from these disputes is compounded by the fact that the South China Sea is a busy international waterway and maritime nations such as Australia, Japan, and the United States have strategic interests in ensuring freedom of navigation and overflight. In recent years, China's land reclamation activities at some of the maritime features, for example, Johnson Reef and Fiery Cross Reef,[5] have attracted international criticism, with the United States in particular conducting freedom of navigation operations (FONOPs) to challenge China's maritime claims that it considers inconsistent with international law.[6]

State practice is unsettled as to whether the regime of innocent passage applies in disputed waters, often due to the categorical denial of the existence of a territorial or maritime dispute in the first place.[7] In Antarctica, where

4. Legal issues relevant to these disputes are multi-faceted and discussed in voluminous literature. For an updated overview, see especially THE SOUTH CHINA SEA DISPUTES AND THE LAW OF THE SEA (S. Jayakumar, Tommy Koh & Robert Beckman eds., 2014); NONG HONG, UNCLOS AND OCEAN DISPUTE SETTLEMENT: LAW AND POLITICS IN THE SOUTH CHINA SEA (2012).

5. *See, e.g.*, *In Pictures: The South China Sea Reef That Became an Island*, ASIA TIMES (Jan. 3, 2018), http://www.atimes.com/article/pictures-south-china-sea-reef-became-island/.

6. *See, e.g.*, Franz-Stefan Gady, *South China Sea: US Navy Conducts Freedom of Navigation Operation*, THE DIPLOMAT (Aug. 10, 2017), https://thediplomat.com/2017/08/south-china-sea-us-navy-conducts-freedom-of-navigation-operation/. It is important to note that FONOPs target multiple States to challenge maritime claims that the U.S. government considers excessive and invalid. *See, e.g.*, U.S. DEPARTMENT OF DEFENSE, REPORT TO CONGRESS: ANNUAL FREEDOM OF NAVIGATION REPORT: FISCAL YEAR 2017 (2017), https://policy.defense.gov/Portals/11/FY17%20DOD%20FON%20Report.pdf?ver=2018-01-19-163418-053 [hereinafter ANNUAL FREEDOM OF NAVIGATION REPORT].

7. Japan, for example, adopts the official position that "[t]here exists no issue of territorial sovereignty to be resolved concerning the Senkaku Islands." *Japanese Territory: About*

territorial disputes have been suspended under the Antarctic Treaty,[8] different views have been expressed as to whether claimant States are entitled to establish maritime zones adjacent to the Antarctic continent areas they effectively control.[9] In the South China Sea disputes, there has been confusion among commentators regarding the applicability of the regime of innocent passage.[10] This confusion has further compounded the existing uncertainty concerning navigation in the area caused by the ambiguity of China's legal position[11] and the unsettled controversy of innocent passage by warships.[12]

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the Senkaku Islands, MINISTRY OF FOREIGN AFFAIRS OF JAPAN (Apr. 13, 2016), http://www.mofa.go.jp/region/asia-paci/senkaku/. Similarly, the Republic of Korea adopts the official position that "[n]o territorial dispute exists regarding Dokdo, and therefore Dokdo is not a matter to be dealt with through diplomatic negotiations or judicial settlement." *The Korean Government's Basic Position on Dokdo*, MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF KOREA, http://dokdo.mofa.go.kr/eng/dokdo/government_position.jsp (last visited Nov. 7, 2018).

8. The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

9. *See* U.N. Secretary-General, *Question of Antarctica: Study Requested under General Assembly Resolution 38/77*, ¶¶ 94–95, U.N. Doc. A/39/583 (Part I) (Oct. 31, 1984); Commission on the Limits of the Continental Shelf (CLCS), *Recommendations in regard to the Submission Made by Australia on 15 November 2004*, ¶¶ 4–52 (Apr. 9, 2008), http://www.un.org/depts/los/clcs_new/submissions_files/aus04/Aus_Recommendations_FINAL.pdf; *Id.* annex II (containing notes from the United States, Russia, Japan, the Netherlands, Germany, and India refusing to recognize any State's maritime claims to areas adjacent to the continent of Antarctica).

10. *See, e.g.*, Jonathan G. Odom, *FONOPs to Preserve the Right of Innocent Passage?*, THE DIPLOMAT (Feb. 25, 2016), https://thediplomat.com/2016/02/fonops-to-preserve-the-right-of-innocent-passage/; Julian Ku, *The US Navy's "Innocent Passage" in the South China Sea May Have Actually Strengthened China's Sketchy Territorial Claims*, LAWFARE (Nov. 4, 2015), https://www.lawfareblog.com/us-navys-innocent-passage-south-china-sea-may-have-actually-strengthened-chinas-sketchy-territorial.

11. *Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea*, 15 CHINESE JOURNAL OF INTERNATIONAL LAW 903, ¶ III (2016). *See also* Florian Dupuy & Pierre-Marie Dupuy, *A Legal Analysis of China's Historic Rights Claim in the South China Sea*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 124 (2013); Keyuan Zou, *China's U-Shaped Line in the South China Sea Revisited*, 43 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 18 (2012); *cf.* Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 98 (2013).

12. *See, e.g.*, NATALIE KLEIN, MARITIME SECURITY AND THE LAW OF THE SEA 25–43 (2011); Keyuan Zou, *Innocent Passage for Warships: The Chinese Doctrine and Practice*, 29 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 195 (1998); Bernard H. Oxman, *The Regime of Warships under the United Nations Convention on the Law of the Sea*, 24 VIRGINIA JOURNAL OF INTERNATIONAL LAW 809 (1984); F. David Froman, *Uncharted Waters:*

China's regulations requiring foreign warships to give prior notification of their passage through its exclusive economic zone has also contributed to this legal conundrum.[13]

These disputes reflect doctrinal uncertainty regarding the fundamental relationship between territorial and maritime legal regimes in the exercise of State sovereignty within the current framework of international law. The uncertainty concerns whether a settlement of the territorial dispute, in accordance with the traditional principle "the land dominates the sea,"[14] constitutes a prerequisite to an entitlement to adjacent maritime zones such as territorial waters. If accord is required, no maritime zones can be generated while sovereignty over the territory or its legal classification remains unsettled, and therefore the relevant maritime space remains open to freedom of navigation and overflight. An alternative view is that the law of the sea regime provides an independent legal basis for generating various maritime zones in accordance with its own rules, even if sovereignty over the territory or its legal classification remains unsettled. According to the latter view, the State effectively controlling the disputed territory, *ipso facto*, exercises sovereignty over the adjacent territorial sea in which the regime of innocent passage applies.

In seeking greater clarity regarding the relationship between the territorial and maritime legal regimes, this article considers the applicability of the regime of innocent passage and its legal effect in disputed waters by critically examining the relevant jurisprudence of international courts and tribunals that have dealt with territorial and maritime disputes. "Disputed waters" encompass, for the purpose of this article, three different types of maritime disputes: (a) those arising from competing claims of sovereignty over coastal land; (b) those regarding the legal classification of a maritime feature as the basis for establishing various maritime zones, namely, whether the feature is a low-tide elevation, rock, or island within the meaning of Article 121 of the

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Non-Innocent Passage of Warships in the Territorial Sea, 21 SAN DIEGO LAW REVIEW 625 (1984).

13. *See, e.g.*, Raul (Pete) Pedrozo, *Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone*, 9 CHINESE JOURNAL OF INTERNATIONAL LAW 9 (2010); Haiwen Zhang, *Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? – Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ*, 9 CHINESE JOURNAL OF INTERNATIONAL LAW 31 (2010); Ivan Shearer, *Military Activities in the Exclusive Economic Zone: The Case of Aerial Surveillance*, 17 OCEAN YEARBOOK 548 (2003).

14. North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 96 (Feb. 20). *See infra* Part II.

Law of the Sea Convention;[15] and (c) those arising from an excessive claim of maritime zones by coastal States, especially those drawing straight baselines with a liberal interpretation of the "general direction of the coast."[16] These types of disputes are unique in that, unlike purely territorial disputes, there is inevitably an external dimension to the disputes due to the navigational interest of third parties that emerges from the application of the regime of innocent passage. These disputes are also distinguished from a situation where two coastal States have an overlapping area of territorial sea entitlement, which raises an issue of maritime delimitation rather than the applicability of the regime of innocent passage or its legal effect.

This article proceeds in six parts. Part II reviews the traditional principle of domination of the land over the sea, identifying a two-pronged legal connotation and the shift in emphasis of its role in maritime disputes. Part III assesses different legal contexts in which the applicability of the regime of innocent passage may be challenged in each of the three different types of disputed waters as categorized above. Part IV examines the meaning of innocent passage to the extent that this regime purportedly applies in disputed waters, and introduces the concept of opposability as a legal tool to help clarify the legal effect of the regime of innocent passage when it is applied in disputed waters. The findings from this analysis then are critically evaluated from a legal policy perspective, with a particular focus on their potential impact on the maintenance of international peace and security—one of the fundamental purposes of the UN Charter.[17] Part VI concludes by identifying how and to what extent the regime of innocent passage will be found opposable, specifically in each of the three types of disputed waters, while also highlighting doctrinal uncertainties that will remain and that will continue to provide legal incentives for States to resort to unilateral acts of self-help.

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15. A low-tide elevation is defined as "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide." LOSC, *supra* note 2, art. 13. An island, on the other hand, is defined as "a naturally formed area of land, surrounded by water, which is above water at high tide." *Id.* art. 121(1). However, no entitlement to an exclusive economic zone or a continental shelf is generated from "rocks which cannot sustain human habitation or economic life of their own." *Id.* art. 121(3). The legal regime of islands reflects customary international law. *See* Qatar v. Bahrain, *supra* note 1, ¶ 185.

16. LOSC, *supra* note 2, art. 7(3). *See generally* J. ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS (3d ed. 2012).

17. U.N. Charter art. 1(1).

II. THE PRINCIPLE OF DOMINATION OF THE LAND OVER THE SEA

The development of the law of the sea has, at critical junctures, hinged upon the nexus between land territory and the ocean.[18] In particular, the regime of innocent passage has evolved through the tension between the analogical extension of property theories to the territorial sea and the medieval notions of freedom of passage.[19] The principle that "the land dominates the sea" has indeed been considered as inherent in the nature of the territorial sea. In the *Fisheries* case, the International Court of Justice referred to "the close dependence of the territorial sea upon the land domain,"[20] observing:

> It is the land which confers upon the coastal State a right to waters off its coasts. It follows that while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast.[21]

This finding establishes that the legal connotation of this principle, as it applies to the territorial sea, is twofold: first, an entitlement to maritime zones derives from the territorial sovereignty of the coastal State;[22] second, geographical factors cannot be ignored in determining the direction and extent of maritime zones.

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18. For a discussion of this nexus in the development of the law of the sea, see Bing Bing Jia, *The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges*, 57 GERMAN YEARBOOK OF INTERNATIONAL LAW 1 (2014); PROSPER WEIL, THE LAW OF MARITIME DELIMITATION: REFLECTIONS 51–56 (Maureen MacGlashan trans., 1989). For differences between the two legal regimes, see Lea Brilmayer & Natalie Klein, *Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator*, 33 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 703 (2001).

19. *See especially* 1 D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 259–74 (Ivan A. Shearer ed., 1982).

20. Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 116, 133 (Dec. 18).

21. *Id.*

22. Sir Arnold McNair, in his dissenting opinion, emphatically explains the legal nature of attribution of the territorial sea as follows:

> To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory consisting of what the law calls territorial waters . . . . International law does not say to a State: "You are entitled to claim territorial waters if you want them." No maritime State can refuse them. International law imposes upon a maritime State certain obligations and confers upon it certain rights arising

The first thesis of the principle of domination of the land over the sea prescribes the subordinate character of maritime zones to the territorial title of a sovereign State for legal attribution, meaning the former may not exist without the latter. The arbitral tribunal in *Grisbadarna* endorsed this view, which Norway presented and to which Sweden did not object, concerning the maritime boundaries drawn by the Peace of Roskilde of 1658, stating:

> [T]hat opinion is in conformity with the fundamental principles of the law of nations, both ancient and modern, in accordance with which the maritime territory is an essential appurtenance of land territory, whence it follows that at the time when, in 1658, the land territory called the Bohuslän was ceded to Sweden, the radius of maritime territory constituting an inseparable appurtenance of this land territory must have automatically formed a part of that cession . . . .[23]

Similarly, in the *Beagle Channel* arbitration, a reference was made to "an overriding general principle of law that, in the absence of express provision to the contrary, an attribution of territory must ipso facto carry with it the waters appurtenant to the territory attributed."[24]

Arguments to the contrary have been dismissed. In *Minquiers and Ecrehos*, the French government pleaded that these islets formed part of a maritime zone that was closely dependent upon the (European) continent from geological, geographical, and historical points of view.[25] Judge Levi Carneiro in his individual opinion expressly dismissed this argument, stating, "[t]he union of the islands with the Continent is a geographical hypothesis having no

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> out of the sovereignty which it exercises over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory.

Id. at 160 (separate opinion by McNair, J.).

23. Grisbadarna (Nor. v. Swed.), 11 R.I.A.A. 147, 159 (Perm. Ct. Arb. 1909), *reprinted in* 4 AMERICAN JOURNAL OF INTERNATIONAL LAW 226, 231 (1910).

24. Dispute between Argentina and Chile concerning the Beagle Channel, 21 R.I.A.A. 53, ¶ 107 (Ct. Arb. 1977) [hereinafter Beagle Channel Arbitration]. On this ground, Spain's assertion of a "dry coast" doctrine, pursuant to which Gibraltar is incapable of generating a territorial sea, finds little support. *See* Jamie Trinidad, *The Disputed Waters around Gibraltar*, 86 BRITISH YEARBOOK OF INTERNATIONAL LAW 101, 151–54 (2015).

25. Oral Argument by Professor Andre Gros of France, Minquiers and Ecrehos (U.K. v. Fr.), 1953 I.C.J. Pleadings 190, 200–01 (Sept. 28, 1953).

further consequences."[26] In *Eritrea v. Yemen*, the arbitral tribunal acknowledged the presumption that islands within the twelve nautical-miles coastal belt would belong to the coastal State, but emphasized that "it would be no more than a presumption, capable of being rebutted by evidence of a superior title."[27]

This thesis has also been employed in the context of other maritime zones. In the *North Sea Continental Shelf* cases, the principle of domination of the land over the sea, together with the "natural prolongation" theory that the continental shelf was a continuation of the land territory, was used to provide a geographical justification for the assertion of vested rights over submerged land.[28] In the *Aegean Sea Continental Shelf* case, the International Court of Justice was even more explicit about the territorial nexus of the continental shelf, stating:

> It is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, *ipso jure*, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State.[29]

The same Court extended the application of this principle to the exclusive economic zone in the *Maritime Delimitation in the Black Sea* judgment.[30] And in *Territorial and Maritime Dispute between Nicaragua and Honduras*, it observed, "the claim relating to sovereignty [over the islands in the maritime area] is implicit in and arises directly out of the question . . . namely the delimitation

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26. Minquiers and Ecrehos (U.K. v. Fr.), Judgment, 1953 I.C.J. Rep. 47, 99 (Nov. 17). There is no reference to this argument in the judgment itself.

27. Territorial Sovereignty and Scope of the Dispute (Eri. v. Yemen), 22 R.I.A.A. 209, 317, ¶ 474 (Arb. Trib. 1998) [hereinafter Eritrea v. Yemen].

28. North Sea Continental Shelf, *supra* note 14, ¶¶ 43, 96.

29. Aegean Sea Continental Shelf (Greece v. Turk.), Judgment, 1978 I.C.J. Rep. 3, ¶ 86 (Dec. 19). *See also* Continental Shelf (Tunis. v. Libya), Judgment, 1982 I.C.J. Rep. 18, ¶ 73 (Feb. 24) [hereinafter Tunisia v. Libya]; Continental Shelf (Libya v. Malta), Judgment, 1985 I.C.J. Rep. 13, ¶ 49 (June 3) [hereinafter Libya v. Malta]; Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), Judgment, 1993 I.C.J. Rep. 38, ¶ 80 (June 14) [hereinafter Denmark v. Norway].

30. Maritime Delimitation in the Black Sea (Rom. v. Ukr.), Judgment, 2009 I.C.J. Rep. 61, ¶ 77 (Feb. 3). *See also* Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment, Mar. 14, 2012, 2012 ITLOS Rep. 4, ¶ 185 (referring to the principle in relation to the delimitation of the exclusive economic zone and the continental shelf).

of the disputed areas of the territorial sea, continental shelf and exclusive economic zone."[31] Referring to these applications of the principle, China developed the argument in the *South China Sea* arbitration (while being absent from the arbitral proceedings) that "only after the extent of China's territorial sovereignty in the South China Sea is determined can a decision be made on whether China's maritime claims in the South China Sea have exceeded the extent allowed under the [Law of the Sea] Convention."[32]

The second thesis that derives from the principle of domination of the land over the sea concerns the role of geographical considerations in determining the extent of maritime zones. This aspect of the principle is integral to the requirement that baselines, from which all the different maritime zones are to be generated, do "not depart to any appreciable extent from the general direction of the coast."[33] In the *North Sea Continental Shelf* cases, the International Court of Justice emphasized the need to consider geographical configurations, drawing on the principle of domination of the land over the sea, which furnished a means to decipher the unique legal characteristics of the geologically oriented regime, as well as a geographical justification for the assertion of vested rights over submerged land.[34] This is not to say that the mere physical fact of adjacency to the sea would produce a legal entitlement to maritime zones, but rather, it emphasizes the role that geographical conditions play as "medium," by operation of the law, to confer upon the coastal State a legal entitlement to a maritime zone adjacent to its coasts.[35]

The reference to the principle of domination of the land over the sea in subsequent cases has not been due so much to the legal attribution of maritime zones as to the primacy of geographical conditions in the determination and delimitation of maritime rights. In *Tunisia v. Libya*, while recalling that

31. Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. Rep. 659, ¶ 114 (Oct. 8) [hereinafter Nicaragua v. Honduras].

32. Ministry of Foreign Affairs of China, *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, 15 CHINESE JOURNAL OF INTERNATIONAL LAW 431, 434 (2016) (noting paragraph ten specifically).

33. LOSC, *supra* note 2, art. 7(3); Convention on the Territorial Sea and the Contiguous Zone art. 4(2), Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205.

34. North Sea Continental Shelf, *supra* note 14, ¶ 96.

35. Libya v. Malta, *supra* note 29, at 83, ¶ 21 (separate opinion by Ruda, J., Bedjaoui, J., and Jiménez de Aréchaga, J.); *see also* Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), Judgment, 1984 I.C.J. Rep. 246, ¶ 103 (Oct. 12) [hereinafter Canada v. U.S.].

the "geographical correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title,"[36] the Court treated the coast of each party as nothing more than "the starting line from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them extend in a seaward direction, as well as in relation to neighboring States situated either in an adjacent or opposite position."[37] Similarly, in *Qatar v. Bahrain*, the principle of domination of the land over the sea was referred to by way of emphasizing that it is "the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State,"[38] according to which the Court was to determine which maritime features constituted part of Bahrain's relevant coasts and baselines.[39] The same approach was adopted more recently in *Nicaragua v. Colombia*.[40]

Thus, the emphasis in the role of the principle of domination of the land over the sea appears to have shifted from the geographical justification for the extension of sovereign authority during the formative stage of the legal regime of maritime zones, to the centrality of geographical conditions to the determination and delimitation of maritime rights as the law of the sea regime has developed and been consolidated. The shift has been evident in two recent arbitrations established under Annex VII of the Law of the Sea Convention concerning jurisdictional questions that arose from mixed disputes involving both territorial title and maritime claims. In the *Chagos Marine Protected Area* arbitration,[41] one of the jurisdictional questions posed to the arbitral tribunal was whether the dispute—in this case, whether the United Kingdom was entitled to declare a marine protected area or other maritime zones since it was not a coastal State within the meaning of, *inter alia*, Articles 2, 55, 56, and 76 of the Law of the Sea Convention—was excluded from its jurisdiction, which was restricted to "any dispute concerning the interpretation or application of this Convention."[42] Departing from the first thesis of the principle of domination of the land over the sea, the tribunal addressed

36. Tunisia v. Libya, *supra* note 29, ¶ 73.

37. *Id.* ¶ 74.

38. Qatar v. Bahrain, *supra* note 1, ¶ 185.

39. *Id.* ¶ 186.

40. Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. Rep. 624, ¶¶ 140–41 (Nov. 19) [hereinafter Nicaragua v. Colombia].

41. In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), PCA Case No. 2011-03, Award (Arb. Trib. under LOSC Annex VII 2015), https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf.

42. LOSC, *supra* note 2, art. 288(1).

the question as one that required it to "evaluate where the relative weight of the dispute lies."[43] In the words of the tribunal:

> Is the Parties' dispute primarily a matter of the interpretation and application of the term "coastal State", with the issue of sovereignty forming one aspect of a larger question? Or does the Parties' dispute primarily concern sovereignty, with the United Kingdom's actions as a "coastal State" merely representing a manifestation of that dispute?[44]

The majority considered that the dispute was "properly characterized as relating to land sovereignty over the Chagos Archipelago,"[45] whereas Judges Kateka and Wolfrum dissented as they saw the submission of Mauritius as appropriately qualified with reference to the term "coastal State" at its core.[46]

This majority view of the *Chagos* tribunal is distinguished in the *South China Sea* arbitration, in which the arbitral tribunal applied a two-pronged test to the jurisdictional question posed by a mixed dispute: (a) whether an explicit or implicit determination of sovereignty is a prerequisite for the resolution of the maritime claims; and (b) whether the actual objective of a State Party's maritime claims is to advance its position in the dispute over sovereignty.[47] As neither of these criteria was satisfied, the tribunal held that "the determination of the nature of and entitlements generated by the maritime features in the South China Sea does not require a decision on issues of territorial sovereignty."[48] Although the decision makes no reference to the principle of domination of the land over the sea, its position is consistent with the second thesis of the principle advanced by the Philippines, which emphasized the relevance of geographical considerations by stating, "without land, there can be no maritime entitlements on the basis of historic rights or otherwise."[49]

This shift in emphasis has diminished the normative value of the principle of domination of the land over the sea for the legal attribution of maritime

43. Chagos Marine Protected Area Arbitration, *supra* note 41, ¶ 211.

44. *Id.*

45. *Id.* ¶ 212.

46. In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), PCA Case No. 2011-03, Dissenting and Concurring Opinion, ¶¶ 8–17 (Arb. Trib. under LOSC Annex VII 2015) (separate opinion by Kateka, J. and Wolfrum, J.), https://pcacases.com/web/sendAttach/1570.

47. In the Matter of the South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶ 153 (Arb. Trib. under LOSC Annex VII 2015), https://www.pcacases.com/web/sendAttach/1506.

48. *Id.* ¶ 180.

49. *Id.* ¶ 143.

zones to such an extent that its application to maritime claims in disputed waters, and its impact upon navigational rights, has become more uncertain. As a result, in cases where the basis (or the extent) of a sovereign claim to a territorial sea is challenged, the principle provides two possible legal arguments: (a) the disputed claim is not opposable to the challenging State, therefore the challenging State's vessels may exercise freedom of navigation and overflight in disputed waters; or (b) the disputed claim is a purported exercise of sovereignty, therefore the challenging State's vessels can only exercise the right of innocent passage in disputed waters. Each of these arguments warrants closer examination by assessing them in the different legal contexts in which the applicability of the regime of innocent passage may be challenged, before turning to the legal effect of the regime in disputed waters.

III. APPLICABILITY OF THE REGIME OF INNOCENT PASSAGE IN DISPUTED WATERS

The regime of innocent passage consists of a navigational right of passage by foreign-flagged vessels and the corresponding restriction on, or a qualification of, the coastal State's sovereignty in its territorial sea.[50] The juridical nature of the right of innocent passage and its scope has thus corresponded to the juridical nature of the territorial sea as it evolved.[51] As such, innocent passage is a distinct legal regime governing one of the modes of navigation for foreign-flagged vessels, along with transit passage in international straits, archipelagic sea lanes passage, and freedom of navigation and overflight on the high seas. Its applicability is limited to the territorial waters of coastal

50. Compañia de Navegación Nacional (Panama) v. United States, 6 R.I.A.A. 382, 384 (Gen. Claims Comm'n 1933); John E. Noyes, *The Territorial Sea and Contiguous Zone*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA, *supra* note 3, at 97; Peter B. Walker, *What Is Innocent Passage?* 61 INTERNATIONAL LAW STUDIES 365, 368 (1980).

51. For different theories on the juridical nature of the territorial sea prior to its contemporary codification, see, for example, R. R. CHURCHILL & A. V. LOWE, THE LAW OF THE SEA 71–75 (3d ed. 1999); René-Jean Dupuy, *The Sea under National Competence*, *in* A HANDBOOK ON THE NEW LAW OF THE SEA 247, 254–57 (René-Jean Dupuy & Daniel Vignes eds., 1991); D.P. O'Connell, *The Juridical Nature of the Territorial Sea*, 45 BRITISH YEARBOOK OF INTERNATIONAL LAW 303 (1971); PHILLIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTIONS (1927); Percy Thomas Fenn, Jr., *Origins of the Theory of Territorial Waters*, 20 AMERICAN JOURNAL OF INTERNATIONAL LAW 465 (1926); THOMAS WEMYSS FULTON, THE SOVEREIGNTY OF THE SEA 338–77 (1911).

States,[52] and is therefore dependent upon the validity of the coastal State's maritime claim to a territorial sea and its geographical reach.

In disputed waters where the regime of innocent passage purportedly applies, the context of the dispute has a bearing upon the legal effect of a unilateral act to challenge the applicability of the regime. To that end, this Part examines three different legal contexts in which the applicability of the regime may be disputed: (a) where sovereignty over coastal land is contested; (b) where the legal classification of a maritime feature is in dispute; and (c) where the outer reach of a territorial sea is considered excessive. In each of these contexts, doctrinal uncertainty as to the applicability of the regime of innocent passage is entangled with the legal significance, or a lack thereof, that the passage of foreign-flagged vessels carries as an act of protest.

A. The Dispute over Territorial Title

When sovereignty over coastal land is contested, the legal basis for claiming a twelve nautical miles maritime zone adjacent thereto as a territorial sea itself is in dispute. The attribution of the territorial sea, when two or more States contest sovereignty over coastal land, is essentially a territorial dispute, which requires resolution according to the rules concerning territorial title under international law or *ex aequo et bono* should the disputing parties agree to it.[53] Indeed, the International Court of Justice has observed, "the attribution of maritime areas to the territory of a State, which, by its nature, is destined to be permanent, is a legal process based solely on the possession by the territory concerned of a coastline."[54] It follows that the territorial sea adjacent to contested coastal land cannot be attributed to any particular State until and unless the territorial dispute is resolved.[55] This leaves the legal status of the adjacent maritime area, and applicability of the regime of innocent passage, open to question and challenge by other States.

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52. An exception to this is that the right of innocent passage continues to apply in areas of internal water that had not been considered as such prior to the establishment of a straight baseline. LOSC, *supra* note 2, art. 8(2). In addition, the regime of innocent passage applies in archipelagic waters outside designated archipelagic sea lanes of an archipelagic State. *Id.* art. 52.

53. Statute of the International Court of Justice art. 38(2), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

54. Denmark v. Norway, *supra* note 29, ¶ 80.

55. For a list of islands with disputed territorial claims, see VICTOR PRESCOTT & CLIVE SCHOFIELD, THE MARITIME POLITICAL BOUNDARIES OF THE WORLD tbl. 11.1 (2d ed. 2005).

One view holds that if the principle of domination of the land over the sea is applied according to its first thesis, effective control over the contested coastal land is insufficient in itself to generate legal entitlement to the adjacent maritime area, which therefore remains open to freedom of navigation by any State. James Kraska, for example, observes in the context of the South China Sea dispute: "Since the territorial sea is [a] function of state sovereignty of each rock or island, and not a function of simple geography, if the United States does not recognize any State having title to the feature, then it is not obligated to observe a theoretical territorial sea and may treat the feature as *terra nullius*."[56] However, the opposing view is that the effective control exercised by one of the disputing States over the contested coastal land and the adjacent maritime area is an exercise of sovereignty, which remains valid until and unless the legitimate title is found in the other State.[57] This view is premised on the legal position that the classification of maritime features and entitlements generated by the land territory can be determined under the law of the sea without requiring a decision on issues of territorial sovereignty.

The rationales for each of these views are further clarified when they are assessed according to the position in which each of the parties to the dispute finds themselves. In cases where a State claims sovereignty based on effective occupation (historic title) or acquisitive prescription (prescriptive title), international law jurisprudence on territorial title requires the State to demonstrate a continuous and peaceful display of sovereign authority (*effectivités*) over the contested coastal land and adjacent waters.[58] This requirement

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56. James Kraska, *The Legal Rationale for Going Inside 12*, ASIA MARITIME TRANSPARENCY INITIATIVE (Sept. 11, 2015), https://amti.csis.org/the-legal-rationale-for-going-inside-12/.

57. Australia, for example, has established maritime zones off the coast of the Australian Antarctic Territory. Attorney-General (Cth), Outline of Submissions as Amicus Curiae, Submission in *Humane Society International Inc. v. Kyodo Senpaku Kaisha Ltd.*, NSD1519/2004, Jan. 25, 2005 [10], [18], *reprinted in* ANTARCTICA IN INTERNATIONAL LAW 919–20 (Ben Saul & Tim Stephens eds., 2015). In the context of the UN transitional administration in East Timor, McLaughlin observes that "UN control over a Territorial Sea is essentially sovereign in effect." ROB MCLAUGHLIN, UNITED NATIONS NAVAL PEACE OPERATIONS IN THE TERRITORIAL SEA 167 (2009).

58. Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.), Judgment, 2008 I.C.J. Rep. 12, ¶¶ 62–69 (May 23) [hereinafter Sovereignty over Pedra Branca]; Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. Rep. 554, ¶ 63 (Dec. 22) [hereinafter Burkina Faso v. Mali] (holding that "[i]n the event that the *effectivités* does not co-exist with any legal title, it must invariably be taken into consideration"); Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, at 45–46 (Sept. 5); Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829, 846 (Arb. Trib. 1928);

derives from the operation of the principle of intertemporal law, which demands that the right be created in accordance with the law at the time the right arises and that the right be maintained according to the law as it subsequently evolves.[59] On that basis, the adjudication of territorial disputes has tended to involve assessment of the conduct of the disputing parties performed *à titre de souverain* (as a function of State authority). Such conduct includes, but is not limited to, legislative acts, administrative control, law enforcement, immigration control, naval patrols, and search and rescue operations occurring prior to the critical date the dispute crystallized.[60] These provide evidence of a peaceful and continued display of *effectivités* in establishing a historic or prescriptive title.[61]

El Salvador v. Nicaragua, Opinion and Decision of Mar. 9, 1917 (Cent. Am. Court of Justice), *reprinted in* 11 AMERICAN JOURNAL OF INTERNATIONAL LAW 674, 700–01 (1917).

59. The Swiss jurist Max Huber in the *Island of Palmas* arbitration famously articulated the principle of intertemporal law:

> 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.

Island of Palmas, *supra* note 58, at 845.

For further discussion of this principle, see Hitoshi Nasu & Donald R. Rothwell, *Re-Evaluating the Role of International Law in Territorial and Maritime Disputes in East Asia*, 4 ASIAN JOURNAL OF INTERNATIONAL LAW 55, 61–67 (2014). *See also* Ulf Linderfalk, *The Application of International Legal Norms over Time: The Second Branch of Intertemporal Law*, 58 NETHERLANDS INTERNATIONAL LAW REVIEW 147 (2011); JOSHUA CASTELLINO & STEVE ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORARY ANALYSIS (2003); T.O. Elias, *The Doctrine of Intertemporal Law*, 74 AMERICAN JOURNAL OF INTERNATIONAL LAW 285 (1980); ROBERT Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 28–31 (1963); 1 GEORG SCHWARZENBERGER, INTERNATIONAL LAW: INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 21–24 (3d ed. 1957).

60. On the notion of the critical date, see, for example, L.F.E. Goldie, *The Critical Date*, 12 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1251 (1963); Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951–4: Points of Substantive Law Part II*, 32 BRITISH YEARBOOK OF INTERNATIONAL LAW 20, 20–44 (1955–56).

61. Nicaragua v. Colombia, *supra* note 40, ¶¶ 66–84; Sovereignty over Pedra Branca, *supra* note 58, ¶¶ 231–77; Nicaragua v. Honduras, *supra* note 31, ¶¶ 176–208; Frontier Dispute (Benin v. Niger), Judgment, 2005 I.C.J. Rep. 90, ¶¶ 82–100 (July 12) [hereinafter Benin v. Niger]; Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), Judgment, 2002 I.C.J. Rep. 625, ¶¶ 137–49 (Dec. 17); Qatar v. Bahrain, *supra* note 1, ¶ 197; Kasikili/Sedudu Island (Bots. v. Namib.), Judgment, 1999 I.C.J. Rep. 1045, ¶¶ 96–99 (Dec. 13) [hereinafter Botswana v. Namibia]; Land, Island and Maritime Frontier

This is also the case where national borders have not been established with geographical precision until a territorial dispute erupts. As observed in the *Island of Palmas* arbitration:

> If . . . no conventional line of sufficient topographical precision exists or if there are gaps in the frontiers otherwise established, or if a conventional line leaves room for doubt, or if, as e.g., in the case of an island situated in the high seas, the question arises whether a title is valid *erga omnes*, the actual continuous and peaceful display of State functions is in case of dispute the sound and natural criterion of territorial sovereignty.[62]

The International Court of Justice applied this approach in *Burkina Faso v. Mali*, holding that in cases "where the legal title is not capable of showing exactly the territorial expanse to which it relates . . . *effectivités* can then play an essential role in showing how the title is interpreted in practice."[63] Thus, from the perspective of States exercising effective control over contested coastal land and the adjacent waters, there are strong policy reasons for applying and enforcing the regime of innocent passage as evidence of *effectivités*.

Similarly, when a State contests sovereignty over coastal land and adjacent waters under control of another State, there are also good reasons for the former to challenge the exercise of sovereign authority by the latter. As the Permanent Court of International Justice observed in *Legal Status of Eastern Greenland*, "another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which sovereignty is also claimed by some other Power."[64] Indeed, absence of protest by one of the disputing parties has been of critical significance in many of the territorial disputes settled by international courts and tribunals.[65]

Dispute (El Sal. v. Hond., Nicar. intervening), Judgment, 1992 I.C.J. Rep. 351, ¶¶ 356–67 (Sept. 11) [hereinafter El Salvador v. Honduras]; Minquiers and Ecrehos, *supra* note 26, at 60–72.

62. Island of Palmas, *supra* note 58, at 840.

63. Burkina Faso v. Mali, *supra* note 58, ¶ 63.

64. Legal Status of Eastern Greenland, *supra* note 58, at 46. *See also* Fitzmaurice, *supra* note 60, at 64–66.

65. *See, e.g.*, Nicaragua v. Colombia, *supra* note 40, ¶ 84; Sovereignty over Pedra Branca, *supra* note 58, ¶¶ 274–76; Benin v. Niger, *supra* note 61, at ¶ 98; Sovereignty over Pulau Ligitan and Pulau Sipadan, *supra* note 61, ¶ 148; El Salvador v. Honduras, *supra* note 61, ¶ 368; Temple of Preah Vihear (Cambodia v. Thail.), Judgment, 1962 I.C.J. Rep. 6, 31 (June 15).

The failure to protest may generate different legal effects for the State concerned in establishing evidence of the existence or non-existence of a title.[66] Most relevantly, it may amount to acquiescence when it is a prerequisite for the valid formation of territorial title.[67] Acquiescence in the context of territorial disputes is "equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent,"[68] and thus forms a constituent element of a historic or prescriptive title in demonstrating *effectivités*.[69] It follows that an effective protest operates as evidence to rebut the presumption of acquiescence in the formation of a prescriptive or historic title, although it does not nullify the competing claim of sovereignty. By contrast, when the acquisition or attribution of territory is based on a bilateral agreement, the territorial dispute is to be settled by recourse to treaty interpretation in the interest of stability and finality.[70] Yet, even in such cases, the establishment of a change in treaty-based title effected by acquiescence is not wholly precluded as a possibility in law.[71]

It should be emphasized that no protest would invalidate territorial title acquired by another State through peaceful occupation when the territory concerned was clearly *terra nullius*, for effective protest "must be directed against the violation of a right which is vested in the protesting State."[72] In practice, however, territorial disputes tend to arise when there is room for

66. Gerald Fitzmaurice identified four different legal effects: (i) a tacit abandonment of its own title; (ii) a failure to check the prescriptive acquisition of a title by another State; (iii) acquiescence in, or an admission of the validity of, the claim of the other party to the dispute; and (iv) an admission (or evidence) of the non-existence of the title of the non-protesting party. Fitzmaurice, *supra* note 60, at 59–60.

67. For a detailed discussion, see I.C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRITISH YEARBOOK OF INTERNATIONAL LAW 143, 152–67 (1954); I.C. MacGibbon, *Some Observations on the Part of Protest in International Law*, 30 BRITISH YEARBOOK OF INTERNATIONAL LAW 293, 306–07 (1953).

68. Canada v. U.S., *supra* note 35, ¶ 130.

69. *See, e.g.*, YAHUDA Z. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 38–98 (1965); JENNINGS, *supra* note 59, at 39–40.

70. *See* Territorial Dispute (Libya v. Chad), Judgment, 1994 I.C.J. Rep. 6, ¶¶ 72–73 (Feb. 3) [hereinafter Libya v. Chad]; Temple of Preah Vihear, *supra* note 65, at 34. *Cf.* Botswana v. Namibia, *supra* note 61, at 1146–48, ¶¶14–20 (separate opinion by Kooijmans, J.).

71. Decision regarding Delimitation of the Border between Eritrea and Ethiopia, 25 R.I.A.A. 83, ¶¶ 3.14–3.15 (Boundary Comm'n 2002); El Salvador v. Honduras, *supra* note 61, ¶ 80; Beagle Channel Arbitration, *supra* note 24, ¶¶ 164–72. *See also* Roger O'Keefe, *Legal Title versus* Effectivités*: Prescription and the Promise and Problems of Private Law Analogies*, 13 INTERNATIONAL COMMUNITY LAW REVIEW 147, 154–82 (2011).

72. MacGibbon, *The Scope of Acquiescence in International Law*, *supra* note 67, at 167.

debate as to which State first satisfied the requirement for peaceful occupation.[73] Absence of protest in those instances provides evidence of acquiescence when opposition is called for in the face of a competing State's open and official acts of sovereignty in the establishment of a title. Such circumstances arise when (1) the competing claim of sovereignty is made open and public;[74] (2) the original title holder has actual or presumptive knowledge of the competing claim of sovereignty;[75] and (3) the original title holder has the ability and opportunity to protest within a reasonable time after it learns that the competing claim of sovereignty may be prejudicial to its rights.[76]

Competing sovereignty claims also create difficult problems for third States that must decide the mode of navigation their vessels will take in the territorial sea adjacent to contested coastal land, particularly if they adopt a neutral position toward the territorial dispute. Restricting the navigation of their vessels to innocent passage could be seen as assisting the occupying State in reinforcing its continuous and peaceful display of sovereign authority. Asserting high seas freedom of navigation rights, by contrast, will conflict with the occupying State's claim of sovereignty over the disputed territory. There is a fine line between not recognizing a territorial sea by claiming that no State has established title to the territory, and not recognizing a territorial sea by rejecting the occupying State's sovereignty claim.[77] As will be discussed below, these positions can be expressed in the different ways in which

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73. MALCOLM SHAW, TITLE TO TERRITORY IN AFRICA: INTERNATIONAL LEGAL ISSUES 17 (1986).

74. *See, e.g.*, Nicaragua v. Colombia, *supra* note 40, ¶ 84; Beagle Channel Arbitration, *supra* note 24, ¶ 172.

75. *See, e.g.*, Delimitation of the Border between Eritrea and Ethiopia, *supra* note 71, ¶ 3.9; Fisheries, *supra* note 20, at 138–39; Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law*, 30 BRITISH YEARBOOK OF INTERNATIONAL LAW 1, 33–42 (1953).

76. *See, e.g.*, Dubai-Sharjah Border Arbitration, 91 I.L.R. 543, 624 (Perm. Ct. Arb. 1981); Canada v. U.S., *supra* note 35, ¶¶ 132, 140; EMMERICH DE VATTEL, THE LAW OF NATIONS bk. 2, ch. 11, ¶ 144 (Charles G. Fenwick trans., Carnegie Institute of Washington 1916) (1758) (denying acquiescence when there are just reasons for silence such as the impossibility of speaking and "a well-founded fear"). With regard to the Diaoyu/Senkaku Islands, for example, Japan asserts that it completed peaceful occupation of the islands in 1894 since these were *terra nullius* at that time. One of the key questions for this dispute is therefore how effectively China can prove the lack of knowledge of an official act of occupation by the Japanese government or its inability to make an effective protest out of "a well-founded fear."

77. Adam Klein & Mira Rapp-Hooper, *Freedom of Navigation Operations in the South China Sea: What to Watch For*, LAWFARE (Oct. 23, 2015), https://www.lawfareblog.com/ freedom-navigation-operations-south-china-sea-what-watch.

foreign-flagged vessels may engage in what a coastal State may consider non-innocent passage.

B. The Dispute over the Legal Classification of Maritime Features

Uncertainty as to the applicability of the regime of innocent passage also arises when there is disagreement over whether a particular maritime feature can be classified as an island (including a rock) within the meaning of Article 121 of the Law of the Sea Convention. The entitlement of a maritime feature to the territorial sea is a purely factual determination. Namely, if a naturally formed area of land remains above water at high tide it is an island and is capable of generating a territorial sea,[78] whereas if it is submerged at high tide it is a low-tide elevation and is incapable of generating a territorial sea of its own.[79] However, there are various technical challenges in defining tidal levels without detailed hydrographic surveys conducted over a significant period. Disagreement may arise from the use of different measurements of high water, different tidal data sets, and the spatial and temporal variations of tidal patterns.[80] Land reclamation activities carried out on maritime features further compound the objective assessment of the naturally formed condition of the features.[81]

Insofar as disagreement on the factual determination involves an interpretation of treaty terms such as "high tide" and "above water," the applicability of the regime of innocent passage is dependent on how these terms are interpreted and applied in assessing the entitlement of a maritime feature to a territorial sea. However, when a State's proclamation of a territorial sea surrounding a maritime feature has not been disputed for a period of time, the applicability of the regime of innocent passage may also be dependent upon whether the law of the sea regime allows for the residual formation of customary international law on a sovereign entitlement attached to maritime features of disputable classification. This entitlement does not derive from,

78. LOSC, *supra* note 2, art. 121.

79. Except where it falls within the breadth of a territorial sea generated from a high tide feature or the mainland. *Id.* art. 13(2).

80. Note the technical challenges that confronted the arbitral tribunal in the South China Sea arbitration. *See* In the Matter of the South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award, ¶¶ 310–32 (Arb. Trib. under LOSC Annex VII 2016) [hereinafter South China Sea Arbitration Award]. *See also* Nicaragua v. Colombia, *supra* note 40, ¶¶ 28–38.

81. Note that no human modification can change the naturally formed status of the maritime features. South China Sea Arbitration Award, *supra* note 80, ¶¶ 305–06.

and therefore must be distinguished from, any historic rights that a State may have enjoyed previously since those have been superseded by the limits of the maritime zones provided by the Law of the Sea Convention[82] or by the customary international law of the sea.[83] It rather forms part of general international law,[84] primarily the law governing territorial sovereignty as it intersects with the law of the sea regime.

Even though the issue here does not concern acquisition or attribution of territorial title itself,[85] the proclamation of a territorial sea surrounding a maritime feature is analogous to acquisitive prescription. In both situations legal validity may be given to titles and associated maritime entitlements that were either originally invalid (in this instance the feature may be incapable of appropriation or generating maritime zones) or whose original validity is impossible to prove due to the lack of sufficient scientific evidence that establishes the geographical condition of the feature in its natural form.[86] It is debatable whether the assertion of sovereign authority over a maritime feature of disputable classification and the proclamation of a territorial sea adjacent thereto, much like a prescriptive or historic title, will generate a legally valid claim when the State has demonstrated its intention and will to act as a sovereign with an actual exercise or display of such authority in a peaceful and uninterrupted manner for a certain length of time.

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82. *Id.* ¶¶ 235–62.

83. Canada v. U.S., *supra* note 35, ¶ 235.

84. The preamble to the LOSC affirms, "matters not regulated by this Convention continue to be governed by the rules and principles of general international law." LOSC, *supra* note 2, pmbl.

85. It should be noted, however, that there are different views as to whether low-tide elevations are capable of appropriation by sovereignty. *Compare* Eritrea v. Yemen, *supra* note 27, ¶¶ 475, 508 (including low-tide elevations in the award for territorial sovereignty), *with* South China Sea Arbitration Award, *supra* note 80, ¶ 309 (denying sovereignty over low-tide elevations). *See also* Qatar v. Bahrain, *supra* note 1, ¶¶ 205–06.

86. *See* D.H.N. Johnson, *Acquisitive Prescription in International Law*, 27 BRITISH YEARBOOK OF INTERNATIONAL LAW 332, 332 (1950). In this respect, theoretical support is found in the concept of historical consolidation espoused by de Visscher. CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 200–01 (P.E. Corbett trans., 1957). For criticism of this concept, see JENNINGS, *supra* note 59, at 25–26; D.H.N. Johnson, *Consolidation as a Root of Title in International Law*, 13 CAMBRIDGE LAW JOURNAL 215, 223 (1955).

The absence of protest is likely to carry considerable, if not conclusive, probative value as a constituent element of prescription or estoppel as a general principle of law.[87] In turn, this absence of protest may prevent States from challenging the validity of the legal claim made on the maritime feature and adjacent maritime area. For example, Hersch Lauterpacht considered the absence of protest especially relevant to the extension of sovereign rights over submarine areas under customary international law and explained its significance as follows:

> It is an essential requirement of stability – a requirement even more important in the international than in other spheres; it is a precept of fair dealing inasmuch as it prevents states from playing fast and loose with situations affecting others; and it is in accordance with equity inasmuch as it protects a state from the contingency of incurring responsibilities and expense, in reliance on the apparent acquiescence of others, and being subsequently confronted with a challenge on the part of those very States.[88]

He continues, finding the relevance of the failure to protest especially conspicuous in the international sphere because "the normal avenues for ascertaining disputed rights through the compulsory jurisdiction of tribunals are not always available."[89]

Alternatively, the doctrine of acquiescence may operate as an evidentiary element in the interpretation of a treaty provision by showing general agreement in the subsequent practice of States in the sense of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.[90] In its effort to clarify the

87. *See* Temple of Preah Vihear, *supra* note 65, at 39–43 (separate opinion by Alfaro, J.), *id.* at 62–65 (separate opinion by Fitzmaurice, J.). *See also* JENNINGS, *supra* note 59, at 41–51; I.C. MacGibbon, *Estoppel in International Law*, 7 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 468 (1958); D.W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 33 BRITISH YEARBOOK OF INTERNATIONAL LAW 176 (1957); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 141–49 (1953).

88. Hersch Lauterpacht, *Sovereignty over Submarine Areas*, 27 BRITISH YEARBOOK OF INTERNATIONAL LAW 376, 396 (1950).

89. *Id.*

90. *See, e.g.*, South China Sea Arbitration Award, *supra* note 80, ¶¶ 274–75; Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 272, WTO Doc. WT/DS269/AB/R, WT/DS286/AB/R (adopted Sept. 12, 2005); Beagle Channel Arbitration, *supra* note 24, ¶ 169. *See also* Georg Nolte (Special Rapporteur), *Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, ¶¶ 20–33, 58–70, U.N. Doc. A/CN.4/671 (Mar. 26, 2014); Oliver Dörr, *Article 31: General Rule of Interpretation*, *in* VIENNA CONVENTION ON THE LAW

meaning of this interpretive rule, the International Law Commission has suggested that in order to establish general agreement under Article 31(3)(b), "[s]ilence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction."[91] In the context of the Law of the Sea Convention, the International Tribunal for the Law of the Sea observed in the *M/V "Virginia G"* judgment that coastal State regulation of bunkering of foreign vessels fishing in its exclusive economic zone is established State practice that developed after the adoption of the Convention. It cited the national legislation of several States and noted, "there is no manifest objection to such legislation and that it is, in general, complied with."[92] It is thus arguable that when a particular interpretation of the terms of a treaty is clearly asserted, the failure to protest may amount to "general agreement" between the parties as a whole.[93] Yet, it is debatable whether the mere practice of the declaration of a territorial sea adjacent to a maritime feature of disputable classification can be considered as a particular interpretation of the terms of the Law of the Sea Convention, or rather a breach thereof.[94]

States are under no obligation to protest an assertion of sovereign authority over a maritime feature and adjacent maritime area by another State. However, for contesting territorial title, protest is considered necessary to preserve the rights of the protesting State in circumstances where failure to protest would be tantamount to acquiescence as a constituent element of perfecting a historic or prescriptive title.[95] In the maritime context, the validity of any unilateral act of delimiting the sea depends upon international law,

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OF TREATIES – A COMMENTARY 559, 602 (Oliver Dörr & Kirsten Schmalenbach eds., 2d ed. 2018); M.E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 431–32 (2009).

91. International Law Commission, Report on the Work of Its Sixty-Sixth Session, GAOR, 69th Sess., Supp. No. 10, U.N. Doc. A/69/10, Conclusion 9, ¶ 2, at 197 (2014).

92. M/V "Virginia G" (Pan. v. Guinea-Bissau), Case No. 19, Judgment of Apr. 14, 2014 ITLOS Rep. 4, 69, ¶¶ 217–18.

93. *Reports of the Commission to the General Assembly*, [1966] 2 Y.B. Int'l L. Comm'n 169, 222, ¶ 15, A/CN.4/SER.A/1966/Add.l (The Commission considered that "the phrase 'the understanding of the parties' necessarily means 'the parties as a whole.'").

94. In the context of a bilateral boundary treaty, there are at least two criteria that would have to be satisfied to that end: (1) a subjective belief on the part of the occupying power that the practice is consistent with the treaty terms; and (2) the other side is fully aware of and accepted that practice as a confirmation of the treaty terms. *See* Botswana v. Namibia, *supra* note 61, ¶ 74; Beagle Channel Arbitration, *supra* note 24, ¶ 169.

95. *See supra* notes 66–69 and accompanying text.

rather than an effective exercise of sovereignty.[96] This means that protest may create a legal barrier only if, by virtue of the residual development of customary international law, acquiescence forms a constituent element of perfecting the sovereign entitlement to a maritime feature of disputable classification and the adjacent maritime area. The applicability of the regime of innocent passage, based on the purported exercise of sovereign authority over a maritime feature of disputable classification, must therefore be ascertained by the extent to which acquiescence operates to rebut the presumption of the freedom of the seas.

An implication of these possible legal grounds for asserting sovereignty over a maritime feature of disputable classification is that an unchallenged claim to the territorial sea adjacent to a maritime feature may be deemed valid, after a reasonable length of time, if it is subsequently disputed. This remains the case even when a third-party adjudicatory body, upon the development of a dispute, establishes that the feature is a low-tide elevation and therefore incapable of generating a territorial sea under the Law of the Sea Convention. This implication sets the validity of the maritime claim apart from the principle of domination of the land over the sea and the principle's centrality of geographical conditions to the determination and delimitation of maritime rights. Instead, it shifts the emphasis of the principle back to the first thesis of the principle as a geographical justification for the extension of sovereign authority over a maritime feature when its legal classification is uncertain or disputable.

Another implication is that maritime States failing to challenge the assertion and exercise of sovereign authority when there is a factual and objective basis for disputing the legal classification of the maritime feature as an island will be considered as contributing to, and being bound by, the residual rule of customary international law, or a particular interpretation of treaty terms. This results because while the acquisition of territorial title by a State is contested vis-à-vis another claimant State, the proclamation of a territorial sea is an exercise of sovereign authority over the maritime area vis-à-vis the entire community of States, at the expense of freedom of the seas in an area that would otherwise remain open to them.[97] Insofar as the customary international law basis is concerned, the doctrine of persistent objector could be invoked to preclude the contesting State, through repeated and consistent objections, from being bound by the residual rule of customary international

96. Fisheries, *supra* note 20, at 132.

97. JENNINGS, *supra* note 59, at 39–40; Johnson, *Acquisitive Prescription in International Law*, *supra* note 86, at 350–51.

law.[98] Every maritime State is thus incentivized to ensure that their vessels navigating through the maritime area will not be seen as acquiescing to the residual formation of customary international law.[99] Critical in this respect, as will be discussed below, is the mode of navigation that would be considered as sufficient evidence of persistent objection when the regime of innocent passage is purportedly applied in an area claimed as a territorial sea generated by a maritime feature of disputable classification.

C. The Dispute over the Outer Limit of the Territorial Sea

The legal regime of the territorial sea, as established under the Law of the Sea Convention, is considered reflective of customary international law.[100] Therefore, unlike disputes over title to land and the legal classification of maritime features, any disagreement regarding the geographical limit of the territorial sea concerns an interpretation and application of the terms of the Convention. It is for each coastal State to establish the breadth of its territorial sea up to a limit not exceeding twelve nautical miles,[101] but a dispute may arise as to whether the baseline for establishing the breadth of the territorial sea has been determined in accordance with the Convention.[102] Of particular

98. *See especially* JAMES A. GREEN, THE PERSISTENT OBJECTOR RULE IN INTERNATIONAL LAW (2016).

99. Of particular note is the announcement made by the governments of the United Kingdom and France that British and French naval vessels will participate in freedom of navigation operations in the South China Sea, though their precise legal concerns and legal motives for their decision are unclear. *See, e.g.*, *France, UK Announce South China Sea Freedom of Navigation Operations*, NAVAL TODAY (June 6, 2018), https://navaltoday.com/2018/06/06/france-uk-announce-south-china-sea-freedom-of-navigation-operations/; Bill Hayton, *Britain Is Right to Stand Up to China Over Freedom of Navigation*, CHATHAM HOUSE (June 1, 2018), https://www.chathamhouse.org/expert/comment/britain-right-stand-china-over-freedom-navigation; Yo-Jung Chen, *South China Sea: The French Are Coming*, THE DIPLOMAT (July 14, 2016), https://thediplomat.com/2016/07/south-china-sea-the-french-are-coming/.

100. *Report of the International Law Commission to the General Assembly*, [1956] 2 Y.B. Int'l L. Comm'n 253, 265, U.N. Doc. A/CN.4/SER.A/1956/Add.l; DONALD R. ROTHWELL & TIM STEPHENS, THE INTERNATIONAL LAW OF THE SEA 61–63 (2d ed. 2016); BROWN, *supra* note 3, at 43–51. The International Court of Justice has declared that the right of States to establish the breadth of their territorial sea up to a limit not exceeding 12 nautical miles under Article 3 of the Law of the Sea Convention reflects the current state of customary international law. *See* Nicaragua v. Colombia, *supra* note 40, ¶ 177.

101. LOSC, *supra* note 2, art. 3.

102. 2 MYRON H. NORDQUIST, SATYA NANDAN & SHABTAI ROSENNE, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY ¶ 3.8(b), at 81

concern is the absence of any universally accepted criteria for satisfying the requirements for the drawing of straight baselines, which are not formulated with geographical precision in the Convention.[103] Indeed, in Fiscal Year 2017, the U.S. Navy conducted FONOPs against excessive straight baselines drawn by Albania, Cambodia, China (around the Paracel Islands), Malta, Oman, Tunisia, and Vietnam.[104]

Challenges to excessive maritime claims were more prevalent at the formative stage of the law of the sea regime. In the *Fisheries* case, from which the existing requirements for straight baselines originated, Professor Waldock, acting as counsel for the British government, argued that Norway's claim to the extension of its maritime rights beyond those established under general international law "is not, in our view, opposable to any other State without its agreement."[105] The Court dismissed this argument on the grounds that the Norwegian practice of drawing straight baselines along a number of insular geographical formations—a practice known as "skjærgaard"—received "the general toleration of the international community" and found that "Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom."[106] Thus, Norway's claim to straight baselines was upheld due to the absence of protest.

On the other hand, the establishment of an exclusive fisheries zone extending to fifty nautical miles from baselines along the coast of Iceland was

(1993). For a discussion of the different types of excessive baseline claims, see ROACH & SMITH, *supra* note 16, at 72–133.

103. *See* NORDQUIST, NANDAN & ROSENNE, *supra* note 102, ¶ 7.9(e), at 101–02. Article 7(3) of the Law of the Sea Convention states: "The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters." LOSC, *supra* note 2, art. 7(3). For the U.S. position on the rules for the drawing of baselines, see J. Ashley Roach & Robert W. Smith, *Straight Baselines: The Need for a Universally Applied Norm*, 31 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 47 (2000).

104. *See* ANNUAL FREEDOM OF NAVIGATION REPORT, *supra* note 6.

105. Reply by Professor Waldock of United Kingdom, Fisheries (U.K. v. Nor.), 1951 I.C.J. Pleadings 396 (Oct. 18, 1951). This argument drew on the Note, dated April 7, 1951, prepared by the French government with regard to the claims of various Latin American States to extend their territorial waters, which reads, in part: "*Aucun État ne peut, par une déclaration unlatérale, étendre sa souveraineté sur la haute mer et rendre cette annexion opposable aux pays qui ont le droit d'invoquer le principe de la liberté des mers, tant que ces derniers ne l'auront pas formellement acceptée.*" *Id.* at 605.

106. Fisheries, *supra* note 20, at 139.

found "not opposable" to the United Kingdom in the *Fisheries Jurisdiction* judgment,[107] rather than *ipso jure* illegal and invalid *erga omnes*.[108] The Court's rationale was grounded in the overriding norm of international law enshrined in Article 2 of the 1958 Convention on the High Seas,[109] which requires States to have due regard for each other's interests. Iceland's preferential rights in the distribution of fishery resources in the adjacent waters had to be balanced against Britain's historic interests in fishing in Icelandic waters.[110] As Judge Dillard observed in his separate opinion, it was considered unnecessary for the Court to pronounce on the validity *erga omnes* of the exclusive fisheries jurisdiction under international law, in light of the way in which customary international law was evolving at that time.[111] Adopting the same line of reasoning that he employed as counsel in the *Fisheries* case, Judge Waldock observed, "an extension of fisheries jurisdiction beyond twelve miles is not, in my opinion, opposable to another State unless shown to have been accepted or acquiesced in by that State."[112] However, the legal grounds of the judgment are specifically confined to the circumstances and special characteristics of the case.[113] Thus, the Court's decision is much narrower than Judge Waldock's statement that no unilateral action can be opposable to another State without its acceptance or acquiescence.

As the legal basis and limit of each maritime zone is now firmly established under customary international law, as reflected in the Law of the Sea Convention, there is little scope for further unilateral extension of maritime rights that can be found opposable to other States as a new rule crystallizing into customary international law. There is no need to submit a formal protest, from a legal point of view, to prevent the establishment of excessive maritime rights.[114] However, when the cause of a dispute lies in disagreement

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107. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. Rep. 3, 29 (July 25).

108. *Id.* at 40 (declaration by Nagendra Singh, J.).

109. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

110. Fisheries Jurisdiction, *supra* note 107, at 29.

111. *Id.* at 60 (separate opinion by Dillard, J.). *Cf.* R.R. Churchill, *The* Fisheries Jurisdiction *Cases: The Contribution of the International Court of Justice to the Debate on Coastal States' Fisheries Rights*, 24 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 82, 88–92 (1975).

112. Fisheries Jurisdiction, *supra* note 107, at 120 (separate opinion by Waldock, J.).

113. *Id.* at 45 (separate opinion by Forster, J., Bengzon, J., Jiménez de Aréchaga, J., Nagendra Singh, J., and Ruda, J.).

114. Yehuda Z. Blum, *The Gulf of Sidra Incident*, 80 AMERICAN JOURNAL OF INTERNATIONAL LAW 668, 674 (1986).

as to the interpretation or application of the terms of the treaty, protest may carry an evidentiary value in establishing that there is no general agreement in the subsequent practice of States in the sense of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.[115] The absence of protest, on the other hand, may permit an inference that what is alleged to be an excessive maritime claim may have been accepted to confirm a particular interpretation of treaty terms.[116] In any event, the legal risk of an expansive interpretation in favor of excessive maritime claims through subsequent practice should not be overstated as it must reflect "a common understanding" of the States parties as a whole.[117]

This is not necessarily the case with regard to States that are not party to the Law of the Sea Convention.[118] The validity of a treaty-based maritime claim against a non-party State may well be subject to challenge under customary international law and the failure to protest could be considered as a form of acquiescence to the unilateral act designed to extend maritime claims, which might otherwise not be opposable to that non-party State.[119] This concern appears to undergird the U.S. position as the rationale for launching FONOP, as the U.S. had stated that it would not "acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses."[120] Although the freedom of navigation program commenced

115. Vienna Convention of the Law of Treaties, May 23, 1969, 115 U.N.T.S. 331.

116. *See* Beagle Channel Arbitration, *supra* note 24, ¶ 169(a). For a critical reflection, *see* D.W. Greig, *The Beagle Channel Arbitration*, 13 AUSTRALIAN YEARBOOK OF INTERNATIONAL Law 332, 361–67 (1977).

117. *See* Nolte, *supra* note 90, ¶¶ 43–48; Georg Nolte (Special Rapporteur), *First Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation*, ¶¶ 91–110, U.N. Doc. A/CN.4/660 (Mar. 19, 2013); Jean-Marc Sorel & Valérie Boré Eveno, *1969 Vienna Convention: Article 31 General Rule of Interpretation*, *in* THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 804, 825–29 (Olivier Corten & Pierre Klein eds., 2011); Luigi Crema, *Subsequent Agreements and Subsequent Practice within and outside the Vienna Convention*, *in* TREATIES AND SUBSEQUENT PRACTICE 13, 16–23 (Georg Nolte ed., 2013); RICHARD GARDINER, TREATY INTERPRETATION 256 (2d ed. 2015).

118. Care must be exercised not to confuse the legal effect of protest in the context of a treaty regime with the legal effect of protest in the context of customary international law. These two distinct issues are often conflated in recent literature. *See, e.g.*, LYNN KUOK, THE U.S. FON PROGRAM IN THE SOUTH CHINA SEA: A LAWFUL AND NECESSARY RESPONSE TO CHINA'S STRATEGIC AMBIGUITY 5 (2016).

119. Dale Stephens, *The Legal Efficacy of Freedom of Navigation Assertions*, 80 INTERNATIONAL LAW STUDIES 235, 244–46 (2006).

120. Statement on United States Oceans Policy, 1 PUB. PAPERS 378–79 (Mar. 10, 1983), *reprinted in* 22 INTERNATIONAL LEGAL MATERIALS 464 (1983).

before the Law of the Sea Convention was finalized for adoption,[121] it has continued to be relevant given that as a non-party to the Convention, the United States remains vulnerable to the doctrine of acquiescence in relation to excessive maritime claims.

IV. THE LEGAL EFFECT OF THE REGIME OF INNOCENT PASSAGE IN DISPUTED WATERS

The applicability of the regime of innocent passage hinges upon the validity of sovereign authority, *ipso jure*, to control the territorial sea adjacent to a State's territory. But when the State exercises sovereign control, *ipso facto*, over a disputed maritime area as its territorial sea, the application of the regime of innocent passage is subject to challenge by contesting States. To the extent that the regime of innocent passage is applied in disputed waters, its application to the contesting State or third States needs to be reconciled with their legitimate interest of contesting territorial title or asserting freedom of navigation until the dispute is settled in one way or another. This Part first examines the irreconcilable tension between the act of challenging a claim of sovereignty and innocent passage, before turning to how the concept of opposability helps clarify the legal effect of the regime of innocent passage when it is applied in disputed waters.

A. Is Challenging a Claim of Sovereignty an Innocent Passage?

Innocent passage is defined in Articles 18 and 19 of the Law of the Sea Convention as the passage—the continuous and expeditious navigation for the purpose of traversing the territorial sea or proceeding to or from internal waters, a call at such roadstead or port facility—of a foreign ship that is "not

121. It was launched in 1979 during the final year of the Carter administration. For the origins and historical development of the freedom of navigation program, see, for example, JAMES KRASKA, MARITIME POWER AND THE LAW OF THE SEA: EXPEDITIONARY OPERATIONS IN WORLD POLITICS 397–403 (2011); William J. Aceves, *The Freedom of Navigation Program: A Study of the Relationship Between Law and Politics*, 19 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 259, 277–87 (1995); Stephen A. Rose, *Naval Activity in the EEZ – Troubled Waters Ahead?*, 39 NAVAL LAW REVIEW 67, 85–90 (1990); George Galdorisi, *The United States Freedom of Navigation Program: A Bridge for International Compliance with the 1982 United Nations Convention on the Law of the Sea?*, 27 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 399, 401–03 (1996).

prejudicial to the peace, good order or security of the coastal State."[122] The catalogue of non-innocent activities found in Article 19 reflects those activities over which the coastal State may exercise its sovereignty through the adoption of domestic laws and regulations.[123] It follows that from the coastal State's point of view, any act of challenging its sovereignty—whether contesting territorial title, disputing the legal classification of a maritime feature, or the manner in which the baselines are drawn—will be deemed prejudicial to its peace, good order, or security. However, from the contesting State's point of view, there is no application of the regime of innocent passage in the first place since it denies the coastal State's sovereign entitlement to a territorial sea in the disputed maritime area.

In the *Corfu Channel* case, the International Court of Justice discussed whether a passage with a political mission—in this case, to test Albania's attitude toward the passage of foreign vessels—could qualify as an innocent passage.[124] In its judgment, the Court observed:

> The legality of this measure taken by the Government of the United Kingdom cannot be disputed, provided that it was carried out in a manner consistent with the requirements of international law [i.e., innocent passage]. The "mission" was designed to affirm a right which had been unjustly denied. The Government of the United Kingdom was not bound to abstain from exercising its right of passage, which the Albanian Government had illegally denied.[125]

The Court then examined whether the manner in which the British warships carried out their passage was consistent with the requirements for innocent

122. LOSC, *supra* note 2, art. 19(1). For an exhaustive list of activities incompatible with innocent passage, see *id.* art. 19(2). *See also* U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 2.5.2.1 (2017); CHURCHILL & LOWE, *supra* note 51, at 86; Richard A. Barnes, *Innocent Passage in the Territorial Sea*, *in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 176, 190–96 (Alexander Proelss ed., 2017).

123. LOSC, *supra* note 2, art. 21. *See* K. Hakapää & E.J. Molenaar, *Innocent Passage – Past and Present*, 23 MARINE POLICY 131, 135–37 (1999); O'CONNELL, *supra* note 19, at 270.

124. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4 (Apr. 9).

125. *Id.* at 30.

passage.[126] This indicates that the regime of innocent passage does not prevent the contesting State from carrying out a passage as a means to assert the right disputed or wrongly denied by the coastal State, unless the passage is carried out as part of, or incidental to, usurpation of the coastal State's sovereignty or interference therewith.[127]

The question is whether the same interpretation extends to the assertion of freedom of navigation in challenging claims of sovereignty or sovereign entitlement to a territorial sea. The act of challenging a claim of sovereignty may take a variety of forms, ranging from a diplomatic protest to a naval operation. It is the manner in which the passage is carried out, not the political motive or objective of the passage that determines its conformity with the regime of innocent passage. The passage will not be deemed innocent if, for instance, the act of challenging sovereignty involves a military exercise, deployment of military aircraft, or interference with the coastal State's communication system,[128] even though the challenging State may consider these acts a legitimate exercise of the freedom of navigation. Moreover, when these activities are intended to change the outcome of the dispute with another State by force, the passage will not only be deemed non-innocent, but will also constitute an unlawful use of force against the challenged State.[129] This is because, despite the fact that the claim of sovereignty itself is in dispute, the prohibition of the threat or use of force extends to where force is used "as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States."[130]

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126. The Court, however, abstained from considering a more general question regarding the right of warships to innocent passage in the territorial sea of a foreign State not forming an international strait. *Id.*

127. *See* G. G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: General Principles and Substantive Law*, 27 BRITISH YEARBOOK OF INTERNATIONAL LAW 1, 28–31 (1950).

128. LOSC, *supra* note 2, art. 19(2)(b), (e), (f), (k).

129. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), 2015 I.C.J. Rep. 665, 1, 4, ¶ 12 (Dec. 16) (separate opinion by Owada, J.) [hereinafter Costa Rica v. Nicaragua] (noting that Judge Owada's separate opinion is not consecutively paginated from the decision); *id.* at 1, 13, ¶ 55 (separate opinion by Robinson, J.) (noting that Judge Robinson's separate opinion is not consecutively paginated from the decision); Corfu Channel, *supra* note 124, at 35.

130. G.A. Res. 2625 (XXV), ¶ 4, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Oct. 24, 1970).

The mere traversing of warships or government vessels, on the other hand, is considered by most commentators to be consistent with the requirements for innocent passage.[131] As such, the innocent passage of warships and government vessels will not be characterized as an act challenging the coastal State's claim of sovereignty to the territory or territorial sea, although it can be an effective protest against any infringement or restriction upon the right of innocent passage.[132] Different views have been expressed as to whether a passage involving a violation of the rules and regulations of the coastal State necessarily renders it non-innocent.[133] Given the contested status of sovereignty, there is little support for rendering a passage non-innocent when it merely breaches a State's rules and regulations.

Controversies are more likely to arise in cases where the act of challenging a claim of sovereignty to the disputed waters involves a non-innocent passage or an overflight below the threshold of a threat or use of force. For instance, an assertive passage could involve passive listening or monitoring activities to gauge the operating frequencies and radar coverage installed on a disputed territory,[134] or a geological survey to gather tidal data in the area surrounding a maritime feature of disputable classification.[135] While non-innocent under the regime of innocent passage, these activities may well be considered a legitimate exercise to challenge claims of sovereignty. The significance of such activities cannot be understated as evidence to rebut the presumption of acquiescence in what would otherwise be a continuous and peaceful exercise of sovereign authority by the occupying State. Thus, in *Pedra Branca*, Singapore's decisions granting Malaysian officials permission to

131. *See supra* note 12. For deviations in State practice, see Hakapää & Molenaar, *supra* note 123, at 143. Innocent passage of warships as customary international law is therefore contentious. *See* BROWN, *supra* note 3, at 64–72.

132. *See* John C. Hitt, Jr., *Oceans Law and Superpower Relations: The Bumping of the Yorktown and the Caron in the Black Sea*, 29 VIRGINIA JOURNAL OF INTERNATIONAL LAW 713, 733–36 (1989). On the bumping incident in the Black Sea, see also John W. Rolph, *Freedom of Navigation and the Black Sea Bumping Incident: How "Innocent" Must Innocent Passage Be?*, 135 MILITARY LAW REVIEW 137 (1992).

133. *Compare* Agyebeng, *supra* note 3, at 384, *and* NGANTCHA, *supra* note 3, at 176, *with* Guang, *supra* note 3, at 113, *and* Froman, *supra* note 12, at 660.

134. LOSC, *supra* note 2, art. 19(2)(c). This provision is also referred to as the "*Pueblo*" clause. *See* W.E. Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, 81 AMERICAN JOURNAL OF INTERNATIONAL LAW 331, 345 (1987). *But see* KRASKA, *supra* note 121, at 121–22 (setting forth the view of the U.S. government that the regime of innocent passage does not adversely affect a maritime State's intelligence gathering activities).

135. LOSC, *supra* note 2, art. 19(2)(j).

conduct surveys of the waters surrounding the disputed island were seen as conduct *à titre de souverain*.[136] In contrast, conducting these surveys without seeking permission from Singapore would have constituted non-innocent passage had that regime applied.

B. The Opposability of the Regime of Innocent Passage to Contesters

Given that the applicability of the innocent passage regime itself is uncertain in disputed waters, the legality of a non-innocent passage or an overflight will remain unresolved until the root cause of the dispute is settled. It is well established that upon settlement of the dispute, each party is under an obligation to withdraw any military or police forces and its civil administration from areas that are declared to be within the sovereign territory of the other party.[137] Questions remain, however, as to the wrongfulness of the act that was committed prior to the settlement of the territorial and maritime dispute. Could the lawfulness of an assertive passage or an overflight be retroactively assessed according to the ruling on the validity of the occupying State's territorial title or maritime claim to a territorial sea? Or, given the contested status of sovereignty, would an assertive passage or overflight not constitute a breach of sovereignty, even though the occupying State may perceive the act as such due to failure to satisfy the requirements for innocent passage?

The legality of assertive passage and overflight in disputed waters forms part of a broader question of State responsibility arising from conduct *à titre de souverain* in territorial disputes. The International Court of Justice has been inconsistent with regard to the legal consequences of conduct occurring in a disputed area prior to the settlement of the dispute. In its 2002 *Cameroon v. Nigeria* judgment, the Court abstained from ruling on the responsibility of either party to the dispute, stating:

> In the circumstances of the case, the Court considers moreover that, by the very fact of the present Judgment and of the evacuation of the Cameroonian territory occupied by Nigeria, the injury suffered by Cameroon by reason of the occupation of its territory will in all events have been sufficiently addressed. The Court will not therefore seek to ascertain whether

136. Sovereignty over Pedra Branca, *supra* note 58, ¶ 239.

137. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Eq. Guinea intervening), Judgment, 2002 I.C.J. Rep. 303, ¶ 315 (Oct. 10) [hereinafter Cameroon v. Nigeria]; Temple of Preah Vihear, *supra* note 65, at 37.

> and to what extent Nigeria's responsibility to Cameroon has been engaged as a result of that occupation.[138]

By contrast, in *Costa Rica v. Nicaragua*, the Court found that Nicaragua had violated Costa Rica's territorial sovereignty by carrying out various activities, such as establishing a military presence, in parts of the disputed territory.[139] In making this finding, the Court did not consider the fact that Nicaragua was contesting sovereignty over the disputed territory.

It is possible that the Court found that Costa Rica had conclusively proven its legal title to the disputed territory through the 1858 Treaty of Territorial Limits,[140] particularly as subsequent arbitral awards clarified this position.[141] Under this view, Nicaragua's activities in the area would have no basis for a claim of sovereignty that could be made in good faith.[142] This construction is indeed justified as an essential requirement of stability, drawing on Lauterpacht's observation cited earlier.[143] Further, this requirement is reflected in the Court's jurisprudence, which favors a treaty-based title over an effective exercise of sovereign authority.[144] The principle of good faith also requires the State contesting territorial title to protest as soon as it realizes that the action taken by another State may be prejudicial to its rights.[145]

Nevertheless, the way in which the Court relies upon its earlier judgment on the boundary dispute between Cameroon and Nigeria to abstain from ruling on Costa Rica's submission concerning an unlawful use of force is curious. While acknowledging "[t]he fact that Nicaragua considered that its

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138. Cameroon v. Nigeria, *supra* note 137, ¶ 319.

139. Costa Rica v. Nicaragua, *supra* note 129, ¶ 93.

140. Treaty of Territorial Limits between Costa Rica and Nicaragua, Apr. 15, 1858, 118 CTS 439.

141. Award in regard to the Validity of the Treaty of Limits between Costa Rica and Nicaragua of 15 July 1858 (Costa Rica v. Nicar.), 28 R.I.A.A. 189 (Arb. 1888–97).

142. This appreciation of the nature of the dispute is implicit in the language of the judgment. *See* Costa Rica v. Nicaragua, *supra* note 129, at 3, ¶ 9 (separate opinion by Owada, J.).

143. Lauterpacht, *supra* note 88, at 396.

144. *See, e.g.*, Frontier Dispute (Burk. Faso v. Niger), Judgment, 2013 I.C.J. Rep. 44, ¶ 79 (Apr. 16); Cameroon v. Nigeria, *supra* note 137, ¶ 68; Benin v. Niger, *supra* note 61, ¶ 141; Libya v. Chad, *supra* note 70, at ¶¶ 75–76; Burkina Faso v. Mali, *supra* note 58, ¶ 63; Sovereignty over Certain Frontier Land (Belg. v. Neth.), Judgment, 1959 I.C.J. Rep. 209, 227–30 (June 20).

145. *See supra* notes 74–76 and accompanying text. *See also* ROBERT KOLB, GOOD FAITH IN INTERNATIONAL LAW 127–29 (2017).

activities were taking place on its own territory does not exclude the possibility of characterizing them as an unlawful use of force," the Court found that it "need not dwell any further on this submission."[146] Judge Owada observes in his separate opinion that the reference to *Cameroon v. Nigeria* "could be quite misleading," as that case did not arise from the unilateral action of one party to forcefully alter the status quo.[147] As discussed above, the prohibition of the threat or use of force operates irrespective of the validity of the territorial title or maritime claim. The fact that a State engages in assertive activities for the legitimate purpose of contesting territorial title or maritime claim, on the other hand, could exclude the possibility of characterizing them as a violation of sovereignty.

Given the general uncertainty as to the legality of assertive passage and overflight in disputed waters, an individual assessment of whether the application of the regime of innocent passage is "opposable" in the specific context of each dispute to other States provides the best approach for resolution. The concept of opposability was originally employed in international law as a methodological aid to judicial reasoning when a unilateral act or a treaty rule was invoked against a third party at a time when its general applicability under customary international law was yet to be established.[148] This concept provides judicial institutions with a qualified means to determine the legal effect of a unilateral act of one State against another *inter se*, without making a generalized statement about its validity or applicability *erga omnes*.[149] At present, the regime of innocent passage in the territorial seas of coastal States is well established under customary international law, but its validity and applicability *erga omnes* is brought into question when the very basis for exercising sovereign authority over a territorial sea is subject to legitimate challenge. In a situation where the regime of innocent passage is applied in disputed waters, its legal effect is not amenable to any general pronouncement, but rather requires qualified assessment on an individual basis.

It is thus submitted that the legal consequences of a passage of foreign-flagged vessels, as well as their associated activities, in disputed waters are to

146. Costa Rica v. Nicaragua, *supra* note 129, ¶ 97.

147. *Id.* at 4, ¶ 12 (separate opinion by Owada, J).

148. *See* Burkina Faso v. Mali, *supra* note 58, ¶¶ 46, 48–50; North Sea Continental Shelf, *supra* note 14, ¶¶ 60, 69, 83; Nottebohm Case (Second Phase) (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep. 4, 34, 39–44 (Apr. 6) (separate opinion by Read, J.). For a discussion of opposability in the *Fisheries* and *Fisheries Jurisdiction* cases, see *supra* notes 105–113 and accompanying text.

149. J.G. Starke, *The Concept of Opposability in International Law*, 2 AUSTRALIAN YEARBOOK OF INTERNATIONAL Law 1, 3–4 (1968).

be assessed vis-à-vis the legal position of the States concerned in the context of each dispute. The regime of innocent passage is not opposable to a State that persistently engages in assertive passage or overflight for the legitimate purpose of contesting territorial title or maritime claim to a territorial sea in good faith. When the fundamental legal basis for claiming a territorial sea is contested, the applicability of the regime of innocent passage is dependent upon the extent to which acquiescence forms a constituent element of perfecting territorial title or maritime claim to a territorial sea under customary international law.[150] To the extent it does, the absence of protest carries considerable, if not conclusive, probative value as evidence of acquiescence, which may prevent other States from challenging the validity of the legal claim laid over the disputed territory and maritime area. Such legal consequences can be precluded when an assertive passage or overflight occurs in or over disputed waters, with a view to challenging the exercise of sovereign authority or collecting evidence relevant to the territorial or maritime claim. Such passage or overflight is considered a legitimate act of sovereignty to which the regime of innocent passage is not deemed opposable.[151]

State practice, however, often contradicts this operation of law by imposing the regime of innocent passage in an exercise of State sovereignty over the disputed area. This is what Japan does in relation to Diaoyu/Senkaku Islands, what China does with a degree of ambiguity in the South China Sea, and what Indonesia did in relation to East Timor when it was under Indonesia's occupation.[152] And this is indeed what international law jurisprudence requires States do to demonstrate their conduct *à titre de souverain*, particularly when the legal basis of their claim rests on historic or prescriptive title to the disputed territory.[153]

The regime of innocent passage is likely to be found opposable, on the other hand, when a State, due to the absence of protest, is deemed to have acquiesced in the territorial or maritime claim of the coastal State under customary international law, or against a third State that complies with the requirements of innocent passage without any involvement in the dispute. The purported exercise of sovereign authority generates legal effects relative to

150. *See supra* Sections III.A–B.

151. A similar argument was made by Qatar, which relied on its repeated protests against Bahrain's "unlawful occupation" as evidence that "at no time did Qatar acquiesce in the attribution of the Hawar Islands to Bahrain, and that this attribution was therefore not *opposable* to it." Qatar v. Bahrain, *supra* note 1, ¶ 106 (emphasis added).

152. *See infra* note 162 and accompanying text.

153. See *supra* notes 58–61 and accompanying text.

individual States that fail to challenge the exercise of sovereignty. However, these legal effects are distinct from the formation of subsequent practice as an aid to treaty interpretation, when the dispute solely concerns an interpretation or application of a treaty provision in a specific context.[154] The absence of protest or ignorant compliance with the application of the regime of innocent passage carries little legal value in resolving interpretive disputes unless the practice reflects "a common understanding" of the States parties as a whole.[155]

The remaining contentious question is whether the regime of innocent passage would be opposable to a third State that does not contest sovereignty but is not prepared to recognize any title while the dispute remains unresolved.[156] The answer to this question will depend upon which of the theses discussed above regarding the principle of domination of the land over the sea prevails. If the first thesis of the principle is strictly followed, no sovereign entitlement to a territorial sea can be established until the territorial dispute is settled. Under this thesis, the waters will remain high seas in which the freedom of navigation and overflight may be exercised. An emphasis on the second thesis of the principle is more likely to support the application of the regime of innocent passage based on geographical conditions that satisfy the requirements for generating a territorial sea.[157] A clearer basis for territorial title, for instance a treaty-based title, rather than a prescriptive or historic title, is likely to buttress the legitimacy of the exercise of sovereign authority to apply the regime of innocent passage and to render it opposable to other States.

V. LEGAL POLICY EVALUATION IN THE INTEREST OF INTERNATIONAL PEACE AND SECURITY

The conclusions reached above regarding the applicability of the regime of innocent passage, and the variations in its legal effect, are grounded in the analysis of jurisprudence developed by international courts and tribunals. The efficacy of these findings rests on whether the regime of innocent passage, thus applied or otherwise, is operationalized in a manner that provides

154. *See supra* Section III.C.

155. *See supra* notes 114–17 and accompanying text.

156. Recognition of a situation by third States may assist and accelerate the process of consolidation of a title. *See* JENNINGS, *supra* note 59, at 26, 40–41.

157. South China Sea Arbitration Award, *supra* note 80, ¶¶ 333–84.

sufficient legal policy incentive for States to restrain themselves from unnecessarily engaging in assertive passage in disputed waters,[158] while at the same time leaving a reasonable scope for contesting territorial title or maritime claim to a territorial sea when there is a legitimate basis for it. To that end, legal policy concerns of each party to a territorial or maritime dispute, as well as those of third parties, need to be fully taken into account in assessing whether the findings strike a reasonable balance in the interest of maintaining international peace and security.

The most significant limit to assertive passage or overflight is the prohibition on the threat or use of force. Any activity involving a threat or use of force is prohibited under customary international law,[159] and will have no bearing upon the validity of territorial title or maritime claim to a territorial sea in dispute. As Judge Robinson observes in his separate opinion in *Nicaragua v. Costa Rica*, territorial disputes are "one of the most sensitive categories of international relations and particularly prone to provoking the use of force by States."[160] Therefore, any military operation to challenge the effective control over the territory or maritime area in dispute, including the laying of naval mines to deny access to the disputed territory or waters,[161] is categorically prohibited and in violation of the peremptory norm of settling international disputes through peaceful means—irrespective of whether the regime of innocent passage applies or is opposable.

The primary concern of coastal States exercising sovereign authority in disputed waters is the risk of forceful takeover of effective control under the guise of a legitimate sovereign act of contesting territorial title or conducting freedom of navigation and overflight operations. It is certainly conceivable that a coastal State involved in a territorial or maritime dispute with another State would enforce the regime of innocent passage by denying access to any vessels that challenge its sovereign authority. For instance, in 1988, Indonesia denied passage by closing the Sunda and Lombok straits to the *Lusitania Expresso*, a Portuguese registered car ferry carrying peace activists who were

158. *Cf.* Botswana v. Namibia, *supra* note 61, at 1112 (declaration by Koroma, J.) ("[T]he Court is entitled to lay down terms which not only determine the boundary as such but would contribute to the peace and stability between the two States.").

159. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 187–90 (June 27).

160. Costa Rica v. Nicaragua, *supra* note 129, at 16–17, ¶ 64 (separate opinion by Robinson, J.).

161. Military and Paramilitary Activities in and against Nicaragua, *supra* note 159, ¶¶ 213–15 (noting that it also prejudices the right of access to the port enjoyed by foreign ships).

highlighting human rights abuses in East Timor over which Indonesia's sovereignty was disputed.[162] To hold that the regime of innocent passage is not opposable to any State contesting the coastal State's territorial title or maritime claim to a territorial sea does not bode well for the coastal State and its interest in safeguarding the effective exercise of its sovereignty.

On the other hand, in contesting the territorial title claimed by the coastal State, protests are necessary to preserve the rights of the contesting State by rebutting the presumption of acquiescence and to prevent the consolidation of prescriptive or historic title. The protest must be effective in that mere periodical and ineffectual diplomatic protests cannot satisfy the requirement, particularly in cases where these are contradicted by, or inconsistent with, other acts of the protesting State. Such contradictory or inconsistent acts include omissions or failure to perform certain actions,[163] such as referring the dispute to a judicial institution for settlement when that option is available.[164] This does not mean that the protest must involve an attempt to take physical control of the disputed territory or any other measures that would provoke violence.[165] However, there is uncertainty as to which act of protest would be considered effective under the attendant circumstances, with different views expressed on the question.[166] In addition, the concept of critical date has been ineffective in determining when States may stop protesting to prevent further escalation of tension after the dispute has been crystallized due to the vague, and even arbitrary criteria that have been applied for the determination of that date.[167] Due to these uncertainties, the contesting State

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162. For a detailed analysis, see Donald R. Rothwell, *Coastal State Sovereignty and Innocent Passage: The Voyage of the* Lusitania Expresso, 16 MARINE POLICY 427 (1992).

163. Fitzmaurice, *supra* note 60, at 64 n.1.

164. Minquiers and Ecrehos, *supra* note 26, at 107–08 (individual opinion by Carneiro, J.). However, Fitzmaurice noted that "once arbitration or judicial settlement has been proposed, *and rejected, or not taken up by the acquiring State*, continued protest, even if only diplomatic, will retain all its preventive force." Fitzmaurice, *supra* note 75, at 29 n.3.

165. Chamizal (U.S. v. Mex.), 11 R.I.A.A. 309, 329 (Int'l Boundary Comm'n 1911), *reprinted in* 5 AMERICAN JOURNAL OF INTERNATIONAL LAW 782, 806 (1911) (observing "however much the Mexicans may have desired to take physical possession of the district, the result of any attempt to do so would have provoked scenes of violence and the Republic of Mexico cannot be blamed for resorting to the milder forms of protest contained in its diplomatic correspondence.").

166. *See, e.g.*, John M. van Dyke, *Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary*, 38 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 157, 188–92 (2007); MacGibbon, *Some Observations on the Part of Protest in International Law*, *supra* note 67, at 309–10; Johnson, *Acquisitive Prescription in International Law*, *supra* note 86, at 353–54.

167. Nasu & Rothwell, *supra* note 59, at 67–68.

would be inclined to be more provocative than necessary, which tends to fuel confrontation and risks the escalation of hostilities. To hold that the regime of innocent passage is not opposable to the contesting State that has been making effective protest would encourage States to be more provocative with assertive passage and overflight in disputed waters, which necessarily creates tension and may endanger the maintenance of international peace and security.

Maritime States challenging the sovereign claim to a territorial sea adjacent to a maritime feature of disputable geographical condition, or an excessive territorial sea resulting from unlawful baselines, may decide to assert freedom of navigation rights in disputed maritime areas. This is particularly important when there is a potential for the coastal State justifying the sovereign entitlement to the disputed waters under customary international law. The failure to protest operates in a similar manner to affect the formation of customary international law and the scope of its binding force,[168] again with different views as to what constitutes effective protest.[169] To hold that the regime of innocent passage is opposable to a State when it is deemed, due to the absence of protest, to have acquiesced in the territorial or maritime claim of the coastal State under customary international law, or to a third State that complies with the requirements for innocent passage without any involvement in the dispute, is likely to demand of every maritime State an immediate policy decision as to whether they should engage in—or abstain from—assertive passage or overflight in disputed waters. Given the non-innocent nature of such activities, the coastal State will necessarily regard it as violation of its sovereignty.

The strict application of the earlier conclusions appears, therefore, to lead the disputing States on a collision course, with an inflated risk of escalation of hostilities. This undesired likelihood suggests that the extension of existing jurisprudence to the issues of navigation in disputed waters does not further the maintenance of international peace and security. Legal policy considerations may thus demand certain qualifications on the conclusions

168. *See, e.g.*, Michael Wood (Special Rapporteur), *Third Report on Identification of Customary International Law*, 9–14, U.N. Doc. A/CN.4/682 (Mar. 27, 2015); 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, at xlv–xlvi (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); I.C. MacGibbon, *Customary International Law and Acquiescence*, 33 BRITISH YEARBOOK OF INTERNATIONAL LAW 115 (1957).

169. *Compare* Michael Akehurst, *Custom as a Source of International Law*, 47 BRITISH YEARBOOK OF INTERNATIONAL LAW 1, 39–41 (1976), *with* ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 89, 101–02 (1971).

regarding the opposability of the regime of innocent passage. Accordingly, conscientious jurists could be inclined to hold the regime of innocent passage non-opposable to another State to the extent that assertive passage is conducted as strictly necessary to display protest or collect evidence relevant to the territorial or maritime claim. It follows that the regime of innocent passage will be deemed opposable when the contesting State engages in overly assertive passage, that is, navigation or overflight not strictly required for legitimate purposes, such as conducting military exercises and maneuvers considered to be non-innocent.

The same considerations would also motivate conscientious jurists to support the claimed application of the regime of innocent passage without prejudice to the outcome of the dispute. They might pronounce that it is opposable to third states whether or not they are prepared to recognize the territorial sea in a disputed maritime area, but to the extent that it does not prevent them from engaging in assertive passage as strictly necessary to challenge the validity of the legal claim laid over the area. An obvious concern that arises from the perspective of the contesting State is that the enforcement of the regime of innocent passage could be regarded as conduct *à titre de souverain*, which favors the sovereignty claim of the occupying power. Greater care would therefore be required in treating certain purported exercises of sovereign authority, for instance, naval patrol, and granting approval for various maritime activities in disputed waters as evidence of a continuous and peaceful display of sovereignty.

VI. CONCLUSION

Despite detailed codification of the international law of the sea, doctrinal uncertainty persists at the edges of the maritime domain where it intersects with the land domain. The traditional principle, "the land dominates the sea," remains cardinal to the legal relationship between the two domains, but its role as the legal basis for attribution of maritime entitlement (first thesis) has subsided as the law of the sea regime has established itself as a distinct field of international law. Under the law of the sea regime, the principle of domination of the land over the sea has been embedded in specific rules, with its emphasis being shifted to geographical conditions in determining the extent of maritime zones (second thesis). Jurisprudence oscillates between these two aspects of the principle when applied to specific disputed legal claims to territorial title or maritime entitlement. As the analysis above has demonstrated, this doctrinal uncertainty has failed to clarify whether and how the

regime of innocent passage might apply in disputed waters. This article has presented a solution by resuscitating the concept of opposability as a means of assessing the applicability of the regime, and its legal effect, in the specific context of a particular dispute.

In cases where title to coastal land itself is in dispute, the applicability of the regime of innocent passage is dependent upon the extent to which the claim of sovereignty over the disputed territory is opposable to maritime States. The regime of innocent passage is not opposable to the contesting State that persistently engages in assertive passage or overflight to rebut the presumption of acquiescence when it does so in good faith for the legitimate purpose of contesting territorial title. It is also arguable that the regime is not opposable to third States that assert freedom of navigation while the dispute remains unsettled. However, in the interest of international peace and security, this operation of law should be qualified so that the regime of innocent passage is deemed non-opposable to another State only to the extent that assertive passage is conducted as strictly necessary to display protest or collect evidence relevant to the latter State's territorial or maritime claim.

When the legal classification of a maritime feature is challenged due to its disputable geographical condition, the applicability of the regime of innocent passage is dependent upon the extent to which acquiescence forms a constituent element of perfecting title over that feature, and the maritime claim to an adjacent territorial sea under customary international law. To the extent that it does, the regime of innocent passage will not be deemed to be opposable to another State that engages in assertive passage to challenge the validity of the legal claim laid over the maritime feature of disputable classification and adjacent waters. The purported exercise of sovereign authority arguably generates legal effects relative to individual States that fail to challenge the exercise of sovereignty before the claim consolidates into valid title under the residual rule of customary international law.

On the other hand, when the dispute concerning maritime claims solely involves disagreement as to the interpretation or application of the terms of the Law of the Sea Convention, the regime of innocent passage will be deemed opposable to third States to the extent that it does not prevent them from engaging in assertive passage as strictly necessary to challenge the validity of the legal claim laid over the disputed maritime area. The absence of protest or ignorant compliance with the purported application of the regime of innocent passage in disputed waters is not decisive in resolving interpretive disputes, but protest may carry an evidentiary value in establishing that

there is no "general agreement" in the subsequent practice of the States parties as a whole. However, the legal stability afforded by the treaty regime does not extend to non-party States, such as the United States, which remain vulnerable to the presumption of acquiescence in the unilateral act of extending maritime claims. The regime of innocent passage, as it applies under customary international law, will likely be deemed opposable to non-party States if they are found to have failed to make an effective protest.

These conclusions are primarily based on the doctrinal analysis of the existing rules of international law and relevant jurisprudence, with a critical evaluation from a legal policy perspective in the interest of the maintenance of international peace and security. The doctrinal analysis suggests that, despite modern advancement in codification and judicial mechanisms for dispute settlement, international law remains a legal system that relies upon resort to self-help by States in reserving and asserting their rights so long as it does not involve a threat or use of force against another State. A relevant question for scholars and practitioners of international law is to what extent the existing system of international law succeeds in stemming legal incentives for resorting to unilateral acts of self-help. It is not helpful, in this respect, to leave unresolved doctrinal uncertainties, such as what constitutes effective protest necessary to rebut the presumption of acquiescence, whether the exercise of contested maritime rights should be taken into account as conduct *à titre de souverain* in the settlement of a territorial dispute, and how the concept of critical date is to be applied.