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# Comments

## LEGAL CLAIMS TO NEWLY EMERGED ISLANDS

*If a new island arose from the sea, as is likely to occur between the Volcano and Mariana Islands, to which State would it appertain? This Comment examines four theories of international law through which States might attempt to claim new islands. One theory derives from the 1958 Geneva Conventions on the Law of the Sea. The others are the customary international law doctrines of contiguity, occupation and discovery. After determining that in this location only occupation and discovery would be applicable, the Comment concludes with an analysis of whether a claim would be politically feasible.*

There was a tremendous explosion as the liquid rock struck water and air together. Clouds of steam rose miles into the air. Ash fell hissing upon the heaving waves. Detonations shattered the air for a moment and then echoed away in the immensity of the empty wastes.

But rock had at last been deposited above the surface of the sea. An island—visible were there but eyes to see, tangible were there fingers to feel—had risen from the deep.<sup>1</sup>

In March, 1974, a Japanese fishing vessel was sailing approximately 150 miles northwest of the Mariana Islands when it encountered a previously unknown area of water no more than ten feet deep.<sup>2</sup> The fishermen reported their discovery to the Japanese Maritime Safety Agency, which radioed warnings of the shallow spot. The Agency also requested reports of any other spots discovered. In late 1975 the United States obliged, having found an area only 177 feet deep some nineteen miles from the previous discovery. The United States also reported other shallows nearby.<sup>3</sup>

The discoveries took place roughly half way between the islands of Farallon de Pajaros and Minami-io Jima, which are approximately

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1. J. MICHENER, HAWAII 5 (1959).

2. N.Y. Times, Nov. 21, 1976, § 1, at 6, col. 1.

3. *Id.*

300 miles apart. Pajaros, a United States Trust Territory, is the northernmost of the Marianas Group. Minami-jo Jima, a part of Japan, is the southernmost of the Volcano Islands. These islands and the groups to which they belong are links in a chain of volcanoes stretching from Mount Fuji in Japan to Guam. They form part of the "Ring of Fire" that encircles the Pacific Ocean.

Subsequent patrols dispatched by the United States and Japan have failed to locate the two earlier discoveries. However, the patrols have discovered other areas of relatively shallow water. Some volcanic peaks extend to within 1,000 feet of the surface. This depth may appear considerable, but in comparison with the surrounding water it is slight. The islands of the Fuji-Marianas volcanic zone are the peaks of volcanoes which rise abruptly from deep underwater ridges. These ridges, in turn, tower above very deep seabed. Waters of the nearby Izu and Marianas Trenches are among the deepest on earth.<sup>4</sup>

It is likely that new islands will soon emerge from the sea in the area between the Volcano and Mariana Islands.<sup>5</sup> The ownership of new islands would present various problems in the law of the sea. Because an island arising in this area would be beyond the internal waters of any State, its ownership would be uncertain, though of great importance. An island might have its own territorial sea, continental shelf and fishing zone as provided in the 1958 Geneva Conventions on the Law of the Sea.<sup>6</sup> Rights over an island's continental shelf could be particularly important because the shelf might contain valuable mineral resources.

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4. The Volcano and Mariana Islands form a chain running roughly from north to south. To the east of the chain are the Izu and Marianas Trenches. At the southern end of the Marianas Trench is the deepest spot on earth, with a depth of 36,198 feet below sea level. To the west of the chain is an abyssal plain, with a maximum depth of 15,400 feet. NATIONAL GEOGRAPHICAL SOCIETY, NATIONAL GEOGRAPHIC ATLAS OF THE WORLD 178, 180 (4th ed. 1975).

5. N.Y. Times, Nov. 21, 1976, § 1, at 6, col. 1. The emergence of new islands is uncommon but not unknown. In 1928 a new island emerged within the Kingdom of Tonga. Hoffmeister & Ladd, *Falcon, The Pacific's Newest Island*, 54 NAT'L GEOGRAPHIC 757 (1928). A volcano increased the size of Fayal Island (Azores group) in 1958 when it merged with the island after rising separately. Scofield, *A New Volcano Bursts from the Atlantic*, 113 NAT'L GEOGRAPHIC 735 (1958). As recently as 1965 the island of Surtsey emerged off the southern coast of Iceland. Thorarinsson, *Surtsey: Island Born of Fire*, 127 NAT'L GEOGRAPHIC 713 (1965).

6. Convention on the Continental Shelf, *done at Geneva*, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; Convention on Fishing and Conservation of the Living Resources of the High Seas, *done at Geneva*, Apr. 29, 1958, 17 U.S.T. 139, T.I.A.S. No. 5969, 559 U.N.T.S. 285; Convention on the High Seas, *done at Geneva*, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Convention on the Territorial Sea and the Contiguous Zone, *done at Geneva*, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

Fishing rights in the area between the Volcano and Mariana Islands would constitute the immediate concern. Koreans, Taiwanese and Japanese fish these waters. Should the United States, for example, acquire sovereignty over an island, it could enforce its recently enacted 200-mile economic zone, thus regulating fishing.<sup>7</sup>

Ultimately the consequences of claims to new islands could extend far beyond the United States and Japan to the continuing Third United Nations Conference on the Law of the Sea (UNCLOS III).<sup>8</sup> A principal goal of UNCLOS III is to negotiate a treaty creating an international regime governing seabed exploitation. A successful claim would reduce the area such a regime would control.

A claim could also cause interpretation of requirements for an island to generate a continental shelf or an exclusive economic zone (EEZ). The Informal Composite Negotiating Text (ICNT), a draft treaty being used in contemporary UNCLOS III negotiations, defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide."<sup>9</sup> Under the ICNT only an island capable of sustaining human habitation or economic life of its own can generate a continental shelf or an EEZ.<sup>10</sup> Although above water at high tide, numerous islets and rocks in the sea are considered too barren to generate continental shelves or EEZs. A liberal interpretation of what is required for an island to be capable of sustaining human habitation or economic life of its own could lead States to claim continental shelves and EEZs for islets and rocks previously considered incapable of generating them.

This Comment explores four theories of international law through which claim to newly emerged islands could be made.<sup>11</sup> The four

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7. See United States Fishery Conservation and Management Act of 1976, 16 U.S.C.A. §§ 1801-1882 (West Supp. 1977).

8. For a brief account of UNCLOS III negotiations, see generally Synopsis, *Recent Developments in the Law of the Sea 1976-1977*, 14 SAN DIEGO L. REV. 718, 719-24 (1977); *Recent Developments in the Law of the Sea: A Synopsis*, 13 SAN DIEGO L. REV. 628, 629-32 (1976); *Recent Developments in the Law of the Sea: A Synopsis*, 12 SAN DIEGO L. REV. 665, 666-68 (1975). See also Afterword, *Third United Nations Conference on the Law of the Sea: Report on the 1976 New York Sessions*, 14 SAN DIEGO L. REV. 736 (1977).

9. U.N. Doc. A/Conf. 62/WP. 10, art. 121(1) (1977).

10. *Id.*, art. 121(3).

11. These four are not intended to be an exhaustive catalogue of such theories. For example, the sector theory, which is similar to the doctrine of contiguity, is not discussed because it only applies to polar areas. See Waldock, *Disputed Sovereignty in the Falkland Islands Dependencies*, [1948] 25 BRIT. Y.B. INT'L L. 311 (1962).

theories are divided into two classes which approach the problem from different perspectives. The first class predicates claim to a new island on an existing claim to the seabed from which it arose. The 1958 Geneva Conventions and the customary international law doctrine of contiguity are the two theories comprising this class. The second class of theories assumes that a new island would be a *res nullius*, or territory owned by no one. A *res nullius* may be claimed through occupation or discovery, the third and fourth theories. Occupation may be defined as exercising control over a territory, while discovery entails finding and then ceremonially annexing territory.<sup>12</sup>

These theories do not confer the same rights on a successful claimant. In the present context, the word "claim" means no more than an amorphous right. Discussion of each theory identifies the specific rights bestowed and evaluates application of the theory to an island arising between the Volcano and Mariana Islands.

Finally, the probability of success of a legal claim to new islands is viewed in the highly political context of UNCLOS III. Since the 1958 Geneva Conventions were signed, many underdeveloped States have been clamoring for a share of the sea's riches as the earth's mineral and food supplies diminish. The Comment concludes with a discussion of whether a legal claim to new islands would be feasible in the current political climate.

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12. The Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, T.S. No. 993, codifies generally accepted sources of international law:

- a. international conventions, whether general or particular . . . ;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The 1958 Geneva Conventions are treaties and thus within § a. The other three theories—contiguity, occupation, and discovery—are rules of customary international law. The requirements of a rule of customary international law are commonly seen to include:

- (a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
- (b) continuation or repetition of the practice over a considerable period of time;
- (c) conception that the practice is required by, or consistent with, prevailing international law; and
- (d) general acquiescence in the practice by other States.

Working Paper on Article 24 of the Statute of the International Law Commission, [1950] 2 Y.B. INT'L L. COMM'N 24, 26, U.N. Doc. A/CN. 4/SER. A/1950/Add. 1.

All the sources of international law listed by the International Court of Justice Statute are consulted in examining these theories of claim.

## CLAIMS BASED ON EXISTING SEABED CLAIMS

*Conventional Law*

The first theory of claim is a prior sea or seabed claim through conventional law. The basis for this claim differs, depending upon whether an island arose in a State's territorial sea, on its continental shelf, or from the neighboring deep sea floor.<sup>13</sup> A State's rights over these zones are governed by the 1958 Geneva Conventions,<sup>14</sup> which in part codify customary international law and in part delineate compromises reached at the first Law of the Sea Conference.<sup>15</sup>

*Territorial Sea*

Article 1, paragraph 1 of the Territorial Sea Convention states that "[t]he sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea."<sup>16</sup> Article 2 states that sovereignty also extends to the seabed, subsoil and superjacent airspace within the territorial sea.<sup>17</sup> Although Jessup considers the littoral State to exercise sovereignty over the territorial sea, this conception is technically a simplification.<sup>18</sup> Paragraph 2 of Article 1 modifies the State's sovereignty by providing that its exercise is subject to the rest of the Convention "and to other rules of international law."<sup>19</sup>

The insertion of Article 1, paragraph 2, reflects a historical debate whether the State exercises sovereignty (an absolute right) or merely jurisdiction (a collection of lesser rights) over the territorial sea.<sup>20</sup> For purposes of claiming an island arising in the territorial sea, the

13. The boundaries among these three zones are flexible. The Territorial Sea Convention does not state the width of a territorial sea. The Continental Shelf Convention is bounded only by the greater of the limits of seabed exploitability or 200 meters of depth. Convention on the Continental Shelf, *done at Geneva*, Apr. 29, 1958, art. 1, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

14. Because the Marianas are a Trust Territory, it is not certain that the 1958 Geneva Conventions would apply. See Nordquist & Moore, *Emerging Law of the Sea: Issues in the Mariana Islands*, 7 J. INT'L L. & ECON. 43, 57 (1972).

15. See B. BUZAN, *SEABED POLITICS* 37-52 (1976).

16. Convention on the Territorial Sea and the Contiguous Zone, *done at Geneva*, Apr. 29, 1958, art. 1(1), 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

17. *Id.*, art. 2.

18. Jessup, *The United Nations Conference on the Law of the Sea*, 59 COLUM. L. REV. 234, 241-42 (1959).

19. Convention on the Territorial Sea and the Contiguous Zone, *done at Geneva*, Apr. 29, 1958, art. 1(2), 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

20. 1 D. O'CONNELL, *INTERNATIONAL LAW* 533-42 (1965). See 4 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 1-13 (1965).

debate is inconsequential. As Professor O'Connell of Oxford notes, "the intention behind the use of the word 'sovereignty' . . . is to concede to the coastal State plenary power to regulate events in the territorial sea."<sup>21</sup> The Convention does not necessarily extend the boundary of a State. It merely endorses any extension to the limits of the territorial sea.<sup>22</sup> Because the coastal State could acquire sovereignty at will, islands arising in its territorial sea would be automatically subject to its sovereignty.

### Continental Shelf

The Continental Shelf Convention states that "[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources."<sup>23</sup> Of particular importance is the use of the phrase "sovereign rights" instead of sovereignty and the limitation of this power to exploration and exploitation of natural resources. Accounts of negotiations at the first Law of the Sea Conference provide an explanation for this precise wording. Many delegates feared that giving sovereignty over the seabed and subsoil would provide the basis for further claims to the superjacent sea and airspace.<sup>24</sup>

Confusion persists over "the judicial dilemma of whether it is possible for sovereign rights to exist apart from sovereignty."<sup>25</sup> The distinctions are, however, of little consequence. The coastal State does not have sovereignty over its continental shelf, but it can exercise the rights of sovereignty. These rights can be likened to an exclusive license: No State may explore or exploit the continental shelf of another State without its permission. Although the exact legal nature of its claim remains unclear, the coastal State does have exclusive jurisdiction over its continental shelf and thus over any islands arising from it.

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21. O'Connell, *The Juridical Nature of the Territorial Sea*, [1971] 45 BRIT. Y.B. INT'L L. 303, 357 (1973).

22. *Id.* at 357-58. Claim to islands arising in the territorial sea finds historical support in *Secretary of State for India in Council v. Chellikani Rama Rao*, 43 I.A. 192, 32 T.L.R. 652 (Ind. P.C. 1916). In this case the British Crown claimed an island created by accretion off the coast of India, a colony at the time. *Accord*, C. COLOMBO, *THE INTERNATIONAL LAW OF THE SEA* § 129, at 120 (6th ed. 1967).

23. *Convention on the Continental Shelf, done at Geneva*, Apr. 29, 1958, art. 2(1), 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

24. B. BUZAN, *SEABED POLITICS* 37-52 (1976).

25. Gutteridge, *The 1958 Geneva Convention on the Continental Shelf*, [1959] 35 BRIT. Y.B. INT'L L. 102, 114-15 (1960). *See* Clingan, *Emerging Law of the Sea: The Economic Zone Dilemma*, 14 SAN DIEGO L. REV. 530 (1977).

## High Seas

High Seas are defined in the High Seas Convention as "all parts of the sea that are not included in the territorial sea or in the internal waters of a State."<sup>26</sup> This definition encompasses only the sea itself, not the seabed or subsoil.<sup>27</sup> The Convention excludes the seabed and subsoil because until recently, with few exceptions, they have not been amenable to exploitation.<sup>28</sup> The International Law Commission (ILC) did not consider the issue of deep seabed exploitation sufficiently important to be included in its High Seas Convention draft.<sup>29</sup> Accordingly, the Convention does not mention the seabed's legal status. A State could make no claim to the seabed through the High Seas Convention.

## The Area

The point at which the nascent islands may arise is approximately 150 miles from both the nearest United States and Japanese territory. Because neither State claims a territorial sea of this width,<sup>30</sup> only the High Seas Convention is *prima facie* applicable. However, this Convention provides no guidance in defining the status of an emerging island.

Of the four Geneva Conventions, the only potentially helpful alternative is the Continental Shelf Convention.<sup>31</sup> This Convention gov-

26. Convention on the High Seas, *done at Geneva*, Apr. 29, 1958, art. 1, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

27. *But see* C. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* § 81, at 67 (6th ed. 1967). Colombos considers the regime of the high seas also to include the seabed.

28. Historically exploitable have been the pearl beds off Ceylon, Venezuela and the Persian Gulf, and sponge fishing grounds off Tunisia. B. BUZAN, *SEABED POLITICS* 2 (1976).

29. Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9) I, 24, U.N. Doc. A/3159, art. 27 commentary (2) (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 297, U.N. Doc. A/CN.4/SER. A/1956/Add. 1.

30. The United States claims a 12-mile territorial sea and a 200-mile EEZ. *Territorial Sea Limits*, [1977-1978] STATESMAN'S Y.B., at xxiv (table). The Japanese Cabinet recently ratified a law enforcing a 200-mile EEZ and increasing its territorial sea from three to 12 miles. The law took effect July 1, 1977. N.Y. Times, June 15, 1977, § 1, at 12, col. 3.

31. Although the United States is a party to all four Conventions, Japan has signed only the Territorial Sea and the High Seas Conventions. TREATY AFFAIRS STAFF, OFFICE OF THE LEGAL ADVISOR, U.S. DEP'T OF STATE, *TREATIES IN FORCE* (1976). However, should Japan wish to make a claim under the Continental Shelf Convention, it could doubtless accede to it quickly.



erns the status of the seabed up to the lesser depth of 200 meters or to the limit of seabed exploitability.<sup>32</sup> Thus, the geography of the seabed in each case determines whether the Convention applies. In the present case the potential islands are more than 100 miles from any shore, and the sea floor in the area is deep and irregular.

Potential islands would be outside the treaty's bounds. Any limitation of the treaty's bounds would have to derive from the exploitability criterion because there is water over 200 meters deep between the volcanic area and the nearest land. If between the area over which claim is made and the State's baseline the water is too deep to admit of exploitation, the area will be beyond the State's jurisdiction. It is impossible to say to what depths the seabed is exploitable,<sup>33</sup> but it is likely that this depth is exceeded between either United States or Japanese territory and the potential islands. Until the limits of exploitation reach a similar depth, the Continental Shelf Convention will be an impotent theory for claiming these potential islands.

### *Contiguity*

The second theory of prior claim is contiguity. This theory asserts that sovereignty over the continental shelf accompanies sovereignty over the continent because the shelf is an underwater extension of the mainland.<sup>34</sup> The basis of contiguity contrasts with that of the Continental Shelf Convention because it is founded on the geograph-

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32. Convention on the Continental Shelf, *done at Geneva*, Apr. 29, 1958, art. 1, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

33. Deepsea Ventures has made a mining claim to the seabed beyond the limits of State jurisdiction in a different part of the Pacific Ocean. However, any estimate of the limits of exploitability would be mere speculation. Deepsea's claim is in water 2,300 to 5,000 meters deep, and mining has yet to begin. See Comment, *An Illusion of Camelot, the Validity of a Claim, and the Consequences of the Negotiations: The Great Nodule Spectacle*, 13 SAN DIEGO L. REV. 667 (1976).

34. This unity is "provided by the fact that the shelf is supposed to constitute the base, the platform, on which the continent rests." Lauterpacht, *Sovereignty over Submarine Areas*, [1950] 27 BRIT. Y.B. INT'L L. 376, 424 (1962). However, contiguity does not always conform to the technical geographical definition of a continental shelf.

It is possible to imagine . . . unity also in relation to submarine areas—such as those in the Persian Gulf—which do not constitute a continental shelf in the technical meaning of the term. . . . [T]he conception of the continent resting on the shelf visualized as a platform may partake to some degree of a figure of speech.

*Id.*

A similar theory is continuity. This denotes a geographical situation where the claimed territory is not separated from the continent by water. Continuity and contiguity are merely two applications of the same principle. *Id.* at 423; Von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AM. J. INT'L L. 448, 468 (1935).

ical unity of the continental shelf and its mainland rather than a legal definition of the continental shelf.

A misapprehension of its fundamental premise has caused the theory of contiguity to be met with mixed reactions.<sup>35</sup> The doctrine proceeds from the conception of a continent and its continental shelf as being two parts of one whole, but critics of contiguity appear to have forgotten this essential link between shelf and mainland. The Arbitrator in the *Island of Palmas Case* exemplified misunderstanding of the theory when he stated that "it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size)."<sup>36</sup>

Dr. Mouton of the Royal Netherlands Navy, not mentioning the geological foundation of the theory, hypothesizes that claims to the continental shelf purporting to be based on contiguity are in fact "moved by reasons of security."<sup>37</sup> To support this proposition he cites *The Anna*, a case decided in 1805.<sup>38</sup> In *The Anna*, an English Admiralty court considered whether some small islands were part of the United States for purposes of determining jurisdiction over a ship. The islands, formed by accretion, were located near the mouth of the Mississippi River.<sup>39</sup> Lord Stowell held that they were part of the United States and continued:

Consider what the consequence would be if lands of this description were not considered as appendant to the mainland, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America!<sup>40</sup>

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35. Y. BLUM, *HISTORIC TITLES IN INTERNATIONAL LAW* 176-77, 328-31 (1965); M. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY* 228-31 (1926). See generally Lauterpacht, *Sovereignty over Submarine Areas*, [1950] 27 BRIT. Y.B. INT'L L. 376, 425-27 (1962) (discussion of contiguity's historical use).

36. *Island of Palmas Case* (Netherlands v. United States), 2 R. Int'l Arb. Awards 829, 854, 22 AM. J. INT'L L. 867, 893 (Perm. Ct. Arb. 1928) (parenthetical original). For a discussion of the case, see text accompanying notes 52 & 53 *infra*.

37. M. MOUTON, *THE CONTINENTAL SHELF* 292 (1952).

38. *The Anna*, 165 Eng. Rep. 809 (Adm. 1805).

39. Lord Stowell's theory of accretion is unique. He states that an island belongs to the State from which the alluvion came "even if it had been carried over to an adjoining territory." *Id.* at 815.

40. *Id.*

The reason underlying the decision indeed appears to be the security of the United States; but Dr. Mouton confuses this underlying motivation with the legal theory used in conjunction with it—contiguity.

Professor Jennings of Cambridge argues that contiguity cannot give an independent title but merely raises “some sort of presumption of effective occupation.”<sup>41</sup> Basing his argument on a power theory, he hypothesizes that a State is more likely to have control over a proximate than a distant *res nullius*. Although in this view another theory of acquiring territory should accompany contiguity, Professor Jennings concedes that contiguity could be a basis for claim even in the absence of an accepted theory.<sup>42</sup>

Support for the theory of contiguity is evident after comparing the ILC commentary to the Continental Shelf Convention<sup>43</sup> with the opinion of the International Court of Justice (ICJ) in the *North Sea Continental Shelf Cases*.<sup>44</sup> The commentary states:

Neither is it possible to disregard the geographical phenomenon whatever the term—propinquity, contiguity, geographical continuity, appurtenance or identity—used to define the relationship between the submarine areas in question and the adjacent non-submerged land. All these considerations of general utility provide a sufficient basis for the principle of the sovereign rights of the coastal State as now formulated by the Commission.<sup>45</sup>

This comment could be interpreted to imply that contiguity has always been an inchoate theory which, along with other “considerations,” is metamorphosized into Article 2 of the Continental Shelf

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41. R. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 74 (1963). See Waldock, *Disputed Sovereignty in the Falkland Islands Dependencies*, [1948] 25 BRIT. Y.B. INT'L L. 311, 342 (1962).

42. R. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 75 (1963).

43. Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9) 1, U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. INT'L L. COMM'N 253, U.N. Doc. A/CN.4/SER. A/1956/Add. 1.

44. [1969] I.C.J. 3. In these cases Denmark and the Netherlands disputed with Germany their respective shares of the North Sea continental shelf. Germany's coastline on the North Sea bends at approximately a right angle. Application of the equidistance rule in the Convention on the Continental Shelf, *done at Geneva*, Apr. 29, 1958, art. 6, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311, would have given Germany a smaller share than it claimed was equitable. The court held that the equidistance rule is not mandatory and instructed the parties to resume negotiations.

45. Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9) 1, 43, U.N. Doc. A/3159, art. 68 commentary (8) (1956), reprinted in [1956] 2 Y.B. INT'L L. COMM'N 253, 298, U.N. Doc. A/CN.4/SER. A/1956/Add. 1. Article 68 of the ILC's draft treaty became Article 2, paragraph 1 of the Convention, which states that “[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.” Convention on the Continental Shelf, *done at Geneva*, Apr. 29, 1958, art. 2 (1), 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

Convention.<sup>46</sup> The ICJ, however, has endorsed contiguity as a separate theory. The court calls the doctrine "fundamental" and "inherent," and states that it is "quite independent" of the Continental Shelf Convention.<sup>47</sup> Lingering doubts were dispelled when the court rejected Norway's erroneous conception of the theory, which was based on proximity without mention of the underlying continental shelf.<sup>48</sup>

Although it is accurate to say that contiguity is not as well received as other theories, it remains a viable theory in international law. The utility of the theory lies in its geographical rather than legal foundation. It could be used to claim islands anywhere on a State's continental shelf, regardless of the 200-meter isobath or the depth of current exploitability. Where two or more States share the same continental shelf, it may not be clear from which continental shelf an island arose; but this uncertainty does not detract from the theory itself.

Though contiguity is a valid theory of claim, the underwater geography of the area between the Volcano and Mariana Islands precludes its use. Geographically, a continental shelf is a platform upon which a continent rests, or it is an underwater extension of the continent. Using this definition, the Volcano and Mariana Islands do not sit atop continental shelves. They are merely the peaks of underwater volcanoes. Arguably, a contiguity claim could be made to the sides of these mountains, but this theory would not suffice to claim the seabed over 100 miles away.

#### CLAIMS TOWARD ACQUIRING OWNERSHIP

The theories included in the first class of claims were based on prior claim to the seabed. In contrast, claims toward acquiring ownership assume that a newly emerged island would be a *res nullius*, or owned by no one. Occupation and discovery are the theories comprising this second class of claims.

#### *Occupation*

Occupation connotes the power of control over territory. It is an elusive term, but its essence may be captured by comparing the

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46. Convention on the Continental Shelf, *done at Geneva*, Apr. 29, 1958, art. 2, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

47. North Sea Continental Shelf Cases, [1969] I.C.J. 3, 23, para. 19.

48. *Id.* at 32-33, para. 44. *See id.* at 30-33, paras. 39-46.

holdings of three seminal cases: the *Island of Palmas Case*,<sup>49</sup> the *Clipperton Island Case*,<sup>50</sup> and the *Legal Status of Eastern Greenland Case*.<sup>51</sup>

*Island of Palmas* concerned disputed sovereignty between the United States and the Netherlands over Palmas Island. At issue was whether the Netherlands had exercised peaceful and continuous sovereignty (effective occupation) from the early eighteenth century until 1898.<sup>52</sup> Recognizing that displays of sovereignty were irregular and few, the Arbitrator nonetheless found them sufficient. The tribunal held that manifestations of sovereignty may vary with the nature of the territory occupied.<sup>53</sup>

King Victor Emmanuel III of Italy arbitrated *Clipperton Island* in 1931. The dispute concerned an uninhabited island in the Pacific Ocean claimed by Mexico and France. In 1858 the French had landed and symbolically annexed it. The issue was whether from that date the island was effectively occupied even though it remained uninhabited.<sup>54</sup> The King stated that possession ordinarily requires the establishment in the territory of "an organization capable of making its laws respected."<sup>55</sup> Reasoning that this exercise of authority would be pointless without inhabitants, he held that an uninhabited territory is effectively occupied "from the first moment when the occupying state makes its appearance."<sup>56</sup> He added that at that time the occupation is "thereby completed."<sup>57</sup> The latter part of this holding has been criticized.<sup>58</sup>

In *Eastern Greenland*, Denmark and Norway litigated title over unsettled areas of Greenland. The resolution of the case depended upon the character of alleged Danish occupation. The Permanent Court of International Justice noted that evidence of Danish occupation was scanty but was nonetheless sufficient because of the nature of the territory. The court found necessary "very little in the way of

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49. *Island of Palmas Case* (Netherlands v. United States), 2 R. Int'l Arb. Awards 829, 22 AM. J. INT'L L. 867 (Perm. Ct. Arb. 1928).

50. *Clipperton Island Case* (France v. Mexico), 2 R. Int'l Arb. Awards 1105, 26 AM. J. INT'L L. 390 (1931).

51. *Legal Status of Eastern Greenland Case*, [1933] P.C.I.J., ser. A/B, No. 53.

52. Actually, it was only necessary that the Netherlands be found to have effectively occupied the island in 1898, the critical date in the chain of title. 2 R. Int'l Arb. Awards at 866-67, 22 AM. J. INT'L L. at 907-08.

53. *Id.* at 867, 22 AM. J. INT'L L. at 908.

54. 2 R. Int'l Arb. Awards at 1110, 26 AM. J. INT'L L. at 393.

55. *Id.*, 26 AM. J. INT'L L. at 394.

56. *Id.*

57. *Id.*

58. Lauterpacht, *Sovereignty over Submarine Areas*, [1950] 27 BRIT. Y.B. INT'L L. 376, 417-18 (1962); Waldock, *Disputed Sovereignty in the Falklands Islands Dependencies*, [1948] 25 BRIT. Y.B. INT'L L. 311, 324-25 (1962).

the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries."<sup>59</sup>

These cases show that the required degree of occupation is only that necessary for "effectiveness." Effectiveness, in turn, refers to that amount necessary "to guarantee a certain minimum of legal order and legal protection within the boundaries, and to exclude any interference from a third State."<sup>60</sup> This amount of occupation varies with the nature of the territory. In uninhabited or inaccessible territories, a formal annexation may be sufficient. In more populated areas, a military garrison and civil administration may be necessary.

Effective occupation of a newly emerged volcanic island after it has cooled presents no difficulty, but occupation of submarine areas poses unusual problems. *Island of Palmas*, however, held that manifestations of sovereignty may vary with the nature of the territory occupied.<sup>61</sup> This principle may be applied to the seabed with reference to evidence cited in *Clipperton Island* and *Eastern Greenland*. In *Clipperton Island*, evidence deemed germane included the account in the ship's log, an announcement in a newspaper, notification to the French Government, and regulation of guano mining.<sup>62</sup> In *Eastern Greenland*, the court noted *inter alia* expeditions for hunting and scientific purposes,<sup>63</sup> inspections,<sup>64</sup> and legislation governing the area.<sup>65</sup> These factors are evidence of occupation because they illustrate the administration and control which is the essence of sovereignty.

With the exception of guano mining regulation, these acts could accompany any claim to the seabed. They could also accompany claims to an erupting volcano, but this application does violence to the natural meaning of the word "occupation." *Clipperton Island* and *Eastern Greenland* show that a territory must be amenable to human influence in the form of visits and regulation in order to be occupied. These manifestations of occupation are proxies for human

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59. [1933] P.C.I.J., ser. A/B, No. 53, at 171.

60. Von der Heydte, *supra* note 34, at 463.

61. 2 R. Int'l Arb. Awards at 867, 22 AM J. INT'L L. at 908.

62. 2 R. Int'l Arb. Awards at 1108, 26 AM. J. INT'L L. at 391-92.

63. [1933] P.C.I.J., ser. A/B, No. 53, at 185.

64. *Id.*

65. *Id.* at 173, 184.

presence. If this line of reasoning is persuasive, it must be concluded that uninhabitable territory cannot be occupied. It is difficult to imagine less hospitable territory than an erupting volcano, whether above or below the ocean surface.

### *Discovery*

“Discovery” in the present context is defined as the encountering, purposefully or accidentally, of previously unknown territory.<sup>66</sup> The encounter may be by visual apprehension or by disembarkation and subsequent penetration or exploration. The definition does not include any acts evidencing intent to make claim to the territory. These acts are called “symbolic annexation” and encompass the leaving of plaques, construction of crosses, formal ceremonies, and the like.<sup>67</sup> “Doctrine of discovery” is a general term and includes both discovery and symbolic annexation.

The doctrine of discovery was born in the middle of the fifteenth century when Europeans became aware of the rest of the world and began their great voyages.<sup>68</sup> The explorers wished to claim the territory they discovered for later exploitation. To this end, and in order to avoid confusion, they created the doctrine. In the words of Justice Story, “[i]t was probably adopted by the European nations as a convenient and flexible rule, by which to regulate their respective claims.”<sup>69</sup>

Considering the purpose of the doctrine, it is not surprising that at no time was mere discovery “in any way sufficient *per se* to establish a right of sovereignty over, or a valid title to, *terra nullius*.”<sup>70</sup> The most that could be claimed through discovery alone was an inchoate and incomplete right. “Whenever statesmen deduced sovereign rights from the bare fact of discovery, it was not because they were convinced of the correctness of their argumentation, but because they had no better arguments to support their political claims.”<sup>71</sup> The explorer, however, could perfect his claim merely by performing a ceremony of

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66. Cf. A. KELLER, O. LISSITZYN, & F. MANN, CREATION OF RIGHTS OF SOVEREIGNTY THROUGH SYMBOLIC ACTS 1400-1800, at 4, 148 (1967) (other definitions); Von der Heydte, *supra* note 34, at 452-57 (other definitions).

67. For a historical study of several States' discovery practices, see A. KELLER, O. LISSITZYN, & F. MANN, note 66 *supra*.

68. M. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY 124-30 (1926); Von der Heydte, *supra* note 34, at 452-57.

69. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 2 (2d ed. Cambridge, Mass. 1851) (1st ed. Cambridge, Mass. 1833).

70. A. KELLER, O. LISSITZYN, & F. MANN, *supra* note 66, at 148.

71. Von der Heydte, *supra* note 34, at 452.

symbolic annexation after the discovery had occurred. This ceremony was sufficient to give his country legal title to the territory.<sup>72</sup>

The doctrine of discovery resulted in numerous claims "based upon trivial and isolated acts."<sup>73</sup> As explorers discovered more of the world, it became obvious that further acts should be required for a State to acquire sovereignty. This need produced the notion of effective occupation. No longer would it be sufficient for a State merely to engage in formal ceremonies in order to annex *terra nullius*. The State must also effectively occupy it.<sup>74</sup>

The modern rule thus emerged: In order to perfect the inchoate title conferred by discovery and symbolic annexation, a State must effectively occupy the territory within a reasonable time.<sup>75</sup> Discovery survives, however, as a distinct though inferior theory of claim. As Lauterpacht notes, *ceteris paribus* effective occupation gives a title superior to that of discovery and symbolic annexation.<sup>76</sup>

Claims to a newly emerged island could be made through the doctrine of discovery because it has historically been used to claim newly found land. Aside from physical problems, there is no inherent reason why the doctrine should not also apply to discovery underwater. Only in contemplation of circumstances peculiar to actually erupting volcanic islands is the doctrine strained. Historically, ceremonies of symbolic annexation have been almost invariably accompanied by a landing,<sup>77</sup> but it would be impossible to land on an erupting volcanic island as it emerged from the sea.

An exception to the rule of a requisite landing shows one solution to the dilemma. In 1532 Captain Pedro de Guzman tried to land on a

72. The quality of the title thus acquired is uncertain. Keller, Lissitzyn and Mann state that it is sovereignty. A. KELLER, O. LISSITZYN, & F. MANN, *supra* note 66, at 148-49. Von der Heydte characterizes it as a "possessory title." Von der Heydte, *supra* note 34, at 453.

73. M. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY* 139 (1926).

74. Occupation need not be by the same State that made the discovery. Should a State acquire an inchoate title in territory and for one reason or another decline to follow with effective occupation, other States are free to occupy the territory. See Symmons, *Legal Aspects of the Anglo-Irish Dispute over Rockall*, 26 N. IR. L.Q. 65 (1975).

75. *Island of Palmas Case (Netherlands v. United States)*, 2 R. Int'l Arb. Awards 829, 846, 22 AM. J. INT'L L. 867, 883-84 (Perm. Ct. Arb. 1928); M. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY* 136-37 (1926).

76. Lauterpacht, *Sovereignty over Submarine Areas*, [1950] 27 BRIT. Y.B. INT'L L. 376, 416 (1962).

77. A. KELLER, O. LISSITZYN, & F. MANN, *supra* note 66, *passim*.



small island off the western coast of Mexico. Inclement weather and the lack of a suitable harbor frustrated his attempts, and after three days de Guzman ceased trying. Noting the hostile circumstances in his log, he took possession from aboard ship. Instead of landing de Guzman sailed completely around the island. He concluded that the small size of the island and the impossibility of landing justified this method of symbolic annexation.<sup>78</sup>

De Guzman's situation shows that inaccessible territory may be symbolically annexed without landing. This view is in accord with *Eastern Greenland*, which holds that even inaccessible territory can be occupied.<sup>79</sup> In the present situation perhaps an erupting volcanic island could be annexed by encircling it with markers as it emerged. One might, however, consider de Guzman's solution inconclusive and *Eastern Greenland* distinguishable. An erupting volcanic island is not only inaccessible but may also be unoccupiable. Because occupation is the sine qua non of a perfected discovery claim, only occupiable territory is subject to discovery. The notion of territorial occupation fundamentally presumes identifiable, fixed, and relatively solid ground to occupy. Flowing pools of lava distorted by irregular explosions are alien to this presumption.<sup>80</sup>

A State may claim a newly emerged island through both occupation and discovery, provided the island has sufficiently cooled to admit human presence. The two doctrines also apply to the calm seabed, subject to the state of technology and the physical environment, although they have rarely been used to claim underwater territory.<sup>81</sup> An emerging volcanic island, whether above or below water, can be claimed through neither occupation nor discovery because the continuing eruption would render it uninhabitable.

#### LEGAL CLAIMS IN A POLITICAL CONTEXT

A State could make a legal claim to a newly emerged island through theories of international law, but political considerations

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78. *Id.*, at 35.

79. Legal Status of Eastern Greenland Case, [1933] P.C.I.J., ser. A/B, No. 53, at 175.

80. This presumption may initially appear to conflict with Lord Stowell's dictum that "the right of dominion does not depend upon the texture of the soil." *The Anna*, 165 Eng. Rep. 809, 815 (Adm. 1805). However, Lord Stowell was considering the character of the soil for purposes of *dominion*, not *occupation*.

81. Exceptions include the pearl beds off Ceylon, Venezuela and the Persian Gulf, and sponge fishing grounds off Tunisia. B. BUZAN, *SEABED POLITICS* 2 (1976).

Until recently, few have seriously considered underwater territorial acquisition. Today such an idea is increasingly credible. The UNCLOS III deadlock over seabed issues continues while States impatiently wait to exploit the sea. See authorities cited note 8 *supra*.

might render a claim ineffective. Theories of international law are rules governing conduct among sovereign States, and sovereignty denotes complete autonomy. Consequently, enforcement of these rules can only be by consent or by coercion, but States generally follow international law because it is expedient to do so.<sup>82</sup> The interest in an orderly international system usually outweighs the interest in breaking the rules. Accordingly, in any potential dispute, the interests of the various parties must be identified and weighed in order to determine whether States will comply with international law.

### *Interests of Japan and the United States*

The interests of Japan in the area between the Volcano and Mariana Islands are great. The Japanese, who rely on seafood for a large portion of their table fare, fish for bonito in this area. The news that an island could be emerging sparked discussion among government ministries and caused the Prime Minister's Office to create a special council to coordinate information about the issue.<sup>83</sup> If the United States were to claim an island in this area, it could regulate Japanese fishing in the 200-mile radius of its EEZ.

The interest of the United States is not so direct. The United States also might be interested in fishing in the area, but more likely it would be interested in mineral resources. It is possible that there are manganese nodules on the area's sea floor. By one estimate the gross value of all seabed nodules would be \$150 trillion at current prices.<sup>84</sup> One United States company, Deepsea Ventures, has already claimed mining rights to nodules in another area of the Pacific Ocean.<sup>85</sup> If the sea between the Volcano and Mariana Islands is currently too deep for mining, technology should soon render it accessible. Japan shares in this interest with the United States.<sup>86</sup>

### *Interests of Underdeveloped States*

Although the United States and Japan are the States which apparently would attempt to claim an island arising in this area, underde-

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82. Territorial acquisition is an area of international law in which the rules have frequently been ignored. R. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 69 (1963).

83. N.Y. Times, Nov. 21, 1976, § 1, at 6, col. 1.

84. Comment, *An Illusion of Camelot, the Validity of a Claim, and the Consequences of the Negotiations: The Great Nodule Spectacle*, 13 SAN DIEGO L. REV. 667, 668-70 (1976). However, this estimate "fails to take into account the extent of the market for the metals at any price and the cost of extracting the minerals from the sea." *Id.* at 669.

85. *Id.* at 671.

86. N.Y. Times, Nov. 21, 1976, § 1, at 6, col. 1.

veloped States would also have an interest in the claim. These States, termed the "Group of 77,"<sup>87</sup> would oppose any claim for two reasons. First, unlike developed States, this Group does not have the capability of exploiting the seabed. These States fear exclusion from what is considered the common heritage of mankind.<sup>88</sup> Second, should developed States begin mining seabed resources in quantity, the market price of raw materials could plummet. Consequently, both the price level and the volume of underdeveloped States' exports would fall.

The ICNT reflects these fears. Part XI describes comprehensively the Authority which would have jurisdiction over the seabed beyond State jurisdictional limits.<sup>89</sup> This part is amply scored with provisions for the protection of underdeveloped States. Article 136 sets the tenor for Part XI by restating the common heritage concept, while succeeding articles clearly show that underdeveloped States would have an uncommonly large voice in distributing the wealth. Articles 144 and 150 are particularly noteworthy. They provide respectively for technology transfer from developed to underdeveloped States and for a detailed price-fixing mechanism to insure "just, stable and remunerative prices for raw materials."<sup>90</sup>

Underdeveloped States thus have an interest in keeping as much seabed as possible within the jurisdiction of a future Authority. Assuming no overlap of zones, each claim to a newly emerged island by a State with a 200-mile EEZ would remove at least 125,000 square miles of seabed from this jurisdiction.<sup>91</sup> Although islands do not arise frequently, the phenomenon is not unknown. In this century at least

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87. B. BUZAN, *SEABED POLITICS* 54 (1976).

88. For several years States have agreed in principle that the sea is the common heritage of mankind. This principle found its first generally accepted articulation in a United Nations General Assembly resolution in 1970. G.A. Res. 2749, 25 U.N. GAOR, Supp. (No. 28) 24, U.N. Doc. A/8028 (1970). It also has been reflected in the various negotiating texts produced in UNCLOS III. Informal Composite Negotiating Text, U.N. Doc. A/Conf. 62/WP. 10 (1977); Revised Single Negotiating Text, U.N. Doc. A/Conf. 62/WP.8/Rev. 1 (1976); Informal Single Negotiating Text, U.N. Doc. A/Conf. 62/WP.8 (1975). However, neither the texts nor the resolution constitute law. The texts merely represent the current state of thinking on the law of the sea. Resolutions are not legally binding but are considered evidence of what the law is. W. BISHOP, *INTERNATIONAL LAW* 46-51 (3d ed. 1971); Gross, *The Development of International Law Through the United Nations*, in *THE UNITED NATIONS* 171, 198-203 (J. Barros ed. 1972). *But cf.* Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 *INDIAN J. INT'L L.* 23 (1965) (unanimous resolutions as instant customary international law without the necessity of practice over a period of time). *See also* note 12 *supra*. These documents may have a certain moral force, but the 1958 Geneva Conventions remain the law of the sea.

89. U.N. Doc. A/Conf. 62/WP. 10, arts. 133-92 (1977).

90. *Id.*, art. 150(1)(d).

91. Should the EEZ overlap any other zones, the area removed from an Authority's jurisdiction would be smaller.

three have arisen, the most recent being Surtsey, off Iceland, in 1965.<sup>92</sup> At any point where active underwater volcanoes exist an island could emerge.

The interest of underdeveloped States in a claim near the Marianas would not be limited to islands which may arise in this area. The resolution of a claim could affect the legal status of existing islets and rocks.<sup>93</sup> States have considered these worthless in the past because they are small and barren.<sup>94</sup> Some remain *terra nullius*, and some have been claimed, but no State has claimed a continental shelf or EEZ for an islet or rock.

The Territorial Sea Convention defines an island simply as "a naturally-formed area of land, surrounded by water, which is above water at high-tide."<sup>95</sup> However, the drafters of the Informal Single Negotiating Text (a predecessor to the ICNT issued in 1975) added a provision to the Territorial Sea Convention's definition of an island. The provision states that an island must be able to sustain human habitation or economic life of its own.<sup>96</sup> This addition appears to be unchallenged because it has been carried over in the Revised Single Negotiating Text (the immediate predecessor to the ICNT)<sup>97</sup> and in the ICNT as well.<sup>98</sup> The meaning of the provision is ambiguous but could be clarified should a volcanic island be claimed. Depending upon the condition of a volcanic island at the time of claim, a claim could create a precedent that would allow islets and rocks to generate continental shelves and EEZs. Many more square miles of the seabed than before thus would be outside the jurisdiction of a seabed Authority. Ultimately, underdeveloped States could have a greater

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92. Thorarinsson, *Surtsey: Island Born of Fire*, 127 NAT'L GEOGRAPHIC 713 (1965). See note 5 *supra*.

93. The sea surrounds a number of islets and rocks. These are defined in the present context as protuberances of land above water. Distinctions among islands, islets and rocks based on size have been proposed, but there is no commonly accepted standard. See Hodgson & Smith, *The Informal Single Negotiating Text (Committee II): A Geographical Perspective*, 3 OCEAN DEV. & INT'L L. 225, 230-32 (1976).

94. *But see* Symmons, *Legal Aspects of the Anglo-Irish Dispute over Rockall*, 26 N. IR. L.Q. 65 (1975). In 1955 the British Crown formally annexed Rockall, a rock located between Scotland and Ireland. The rock is important because of potential mineral resources and existing fishing in the surrounding area.

95. Convention on the Territorial Sea and the Contiguous Zone, done at Geneva, Apr. 29, 1958, art. 10(1), 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

96. U.N. Doc. A/Conf. 62/WP. 8, art. 132(3) (1975).

97. U.N. Doc. A/Conf. 62/WP. 8/Rev. 1/pt. II, art. 128(3) (1976).

98. U.N. Doc. A/Conf. 62/WP. 10, art. 121(3) (1977).

interest in the outcome of a claim to a new island than either the United States or Japan.

### *A Balancing of Interests*

The United States and Japan have a great interest in claiming a newly emerged island between the Volcano and Mariana Islands. Underdeveloped States have a comparably great interest in preventing a claim. Because international law would coincide with the interests of the United States and Japan, it remains to be determined whether underdeveloped States could exert extra-legal pressures sufficient to circumvent a claim.

Politically, underdeveloped States could condemn the United States or Japan, but this action would have little deterrent effect. The United States, if not Japan, has grown accustomed to vilification in the United Nations General Assembly. Further threats would be meaningless. Similarly, the Group of 77 could exert little pressure in UNCLOS III. The deadlocked conference falters over deep seabed issues while technology swiftly progresses.

Economically, underdeveloped States could exert substantial pressure if they were to act in unison. Perfection of seabed mining techniques lies several years in the future, and the United States and Japan are dependent upon a number of underdeveloped States for the minerals they hope to mine. The 1973 oil embargo starkly highlighted the power of a raw materials boycott. However, a similar boycott by the Group of 77 would probably not succeed. The Group would doubtless find it difficult to persuade its members which export minerals to the United States and Japan to bear the economic consequences of an embargo. Furthermore, the sheer size of the Group gives rise to internal divisions which would defeat consensus on an embargo. Because a boycott is unlikely, economic pressure from underdeveloped States would be virtually nil.

On balance, a claim by either the United States or Japan would succeed as against each other and as against the underdeveloped world. Such a claim would be legal under international law. The extra-legal sanctions the underdeveloped world could exert would be minute in comparison with the interests of the United States or of Japan in claiming a newly emerged island near the Marianas.

### CONCLUSION

Of the four theories considered in this Comment, States could use only occupation and discovery to claim a newly emerged island between the Volcano and Mariana Islands. The undersea geography of the area and the distance from other land at which an island would

probably emerge preclude use of the 1958 Geneva Conventions and contiguity.

Although a claim to a newly emerged island would be legal, whether it would be pressed depends upon the reactions of other States. A State would probably be persuaded to forego a claim for the benefit of international harmony if UNCLOS III negotiations were progressing with facility. However, UNCLOS III is stagnating over seabed issues. Meanwhile, technology progresses rapidly, bringing the time the deep seabed is readily exploitable ever closer. The interests of developed States are such that in the absence of an international convention governing the seabed, one would expect them to make individual claims.

The emergence of an island could be salutary to UNCLOS III negotiations. The actions of the United States, Japan and other States would demonstrate the extent of interest in the seabed. Events could inject a needed element of urgency into UNCLOS III, hastening a seabed agreement. The birth of an island would show that without a treaty, the common heritage concept will die, and chaos will infect the exploitation of the sea.

JIMMY L. VERNER, JR.

