THE TALE OF THE COINS: FRANCE'S EIGHTEENTH CENTURY CLAIM TO WESTERN AUSTRALIA

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On 16 January 1998 an archaeological party led by Mr Max Cramer and Monsieur Philippe Godard uncovered two 18th century French coins at a site at Turtle Bay on Dirk Hartog Island in Shark Bay, Western Australia.[1] At the time this created great interest in both Western Australia and France. The party had been searching for a proclamation purporting to annex the surrounding region in the name of King Louis XV on 30 March 1772. The proclamation was made by a junior officer of a French maritime expedition led by Count Louis Francois de Saint Aloüarn. Ensign Mengaud de la Hage, with another officer Francois-Etienne Rosily-Mesros landed with a small party of seamen in Turtle Bay. A short ceremony of annexation (*prise de possession*) was carried out at the base of a steep hill overlooking the waters. This involved raising the white Bourbon Flag, the firing of a musket volley, and the proclamation of the claim. The annexation party then buried at the foot of the two bottles containing two French "ecus" and a parchment reciting the proclamation.[2] These events occurred less than two years after Captain James Cook had conducted a similar ceremony in 1770 claiming the continent's Eastern Coast for Great Britain.

The discovery of the French coins by the Cramer-Godard team in 1998 revived historical interest in the saga of French voyages along the Western and Southern coasts of Australia in the 18th and early 19th centuries. Pertinently, it also raised a number of legal questions, even if hypothetical. First, did the purported French annexation constitute a *legitimate claim* to part of what is now Western Australia, then known as 'New Holland'? Secondly, if the claim was effective at the time, did it retain any validity after 1772? Thirdly, if it did, why did the claim subsequently become ineffective in international law at the

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[1] The discovery is recounted in Leslie Marchant, *France Australe* (Hesperian Press, 1982); Noelene Bloomfield, *Almost a French Australia: French-British Rivalry in the Southern Oceans* (Halstead Press, 2007) and Philippe Godard and Tugdual de Kerros, '*1772: The French Annexation of New Holland; The Tale of Louis de Saint Aloüarn*' (Western Australian Museum, 2008).

[2] The parchment has not been found: Godard and Kerros, above n 1, 230.

end of the 1820s? Finally, could the claim have any substance today?

This article argues that the historic claim was probably *inchoately valid* immediately after 30 March 1772 according to contemporary rules of international law. However, it probably lapsed shortly afterwards due to lack of any official French endorsement when it became known in Paris.[3] Alternatively, even if it might have theoretically endured for some time notwithstanding the lack of immediate endorsement, it was vulnerable to supersession due to official failure to consummate it by further sovereign acts. Unquestionably, it was effectively trumped by the establishment of a British military settlement on the south coast of Western Australia in 1826.[4] It certainly lost any residual viability it might still have had when in 1829 Great Britain established the Colony of Western Australia at the Swan River where Perth now stands.

Nevertheless, it is of legal as well as historic interest to examine the potential effectiveness of the French claim in the context of international law principles governing historic claims of territorial acquisition in the latter half of the 18th, and if asserted in the first three decades of the 19th century, and perhaps now.

The article first places Saint Aloüarn's 'annexation' in its historic context, including the pursuit of French interests in regions south of the Australian continent. It then analyses more specifically the legal effect of the symbolic actions at Turtle Bay in terms of the 18th century cannons of territorial acquisition. The article concludes by evaluating the strength of the claim that France might have been able to assert up to 1825 in accordance with prevailing 19th century jurisprudence, given its failure to take more definite steps between 1772 and 1825 to occupy and to consolidate its title.

I Early French Interest in the Australian Continent

French interest in the existence of a continent located somewhere in the southern region of the Indian Ocean can be dated to when a French navigator, Binot Paulmier de Gonneville sailed south from Honfleur in 1503. His voyage challenged exclusive Portuguese assertion of maritime dominion based on the notion of 'closed seas' (*mare clausum*). This doctrine denied acquisition by other nations of newly discovered territories in areas previously allocated by the

[3] There appears to have been no public acknowledgment of the claim by the French authorities at the time.

[4] This action was taken to forestall any possible French colonisation of the South-Western region of Australia.

Pope to Portugal.[5] His vessel was blown off course, possibly near the Cape of Good Hope. Gonneville subsequently claimed to have discovered a new south land. His description of its native inhabitants having bows and arrows eliminates the possibility that he discovered part of Australia. Gonneville's records were lost when his boat was wrecked returning to France so his claims could not be verified. Nevertheless his expedition stimulated French interest in the possibility of a legendary 'south-land'. As Marchant, a notable Australian scholar on French maritime exploration of Australia's western coast states:

> Nevertheless, for the next centuries the French became convinced that Gonneville had in fact gone to the south Indian Ocean, and they consequently identified Gonneville land with *"Terra Australis Incognita"* which thus to them became synonymous with France Australe.[6]

That interest received an impetus when France sought to extend its colonial interests in the South Asian region in the 17th century. The need for a staging-post along the route to India was initially satisfied by establishing a port at Mauritius. Mauritius, however, was not suitable for sustaining a sizeable colony to serve the strategic needs of large-scale maritime commerce. France was precluded from establishing ports in adjacent regions bordering the south Indian Ocean due to prior Dutch and Portuguese occupation. Accordingly, French interest returned to locating the mythic 'Gonneville land'.

The first expedition directed to that purpose that of Charles Bouvet de Lozier who left France in 1738. It was unsuccessful in achieving its objective. French activity intensified in 1771 when two separate expeditions, one under Marion Dufresne and another under Yves-Joseph de Kerguelen-Tremarec, were despatched to the southern Indian Ocean. Dufresne's expedition succeeded in discovering the Crozet group of islands. These were largely barren and did not present any real prospect of settlement. He then proceeded east across the Southern Ocean, eventually making landfall in New Zealand, where he was killed by Maoris.

Significantly for Saint Aloüarn's later annexation at Shark Bay, a ceremony was performed by one of Dufresne's officers claiming the Crozet Islands for France. As recounted by Marchant:

[5] Regarding the Pope's authority to dispose of newfound territories see Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) chapter 7, 'The Creation and Transfer of Territorial Sovereignty'.
[6] Marchant, above n 1, 19.

> A small cove was found on the eastern side of the Island … There a young officer Roux was sent ashore to take possession of the group for France and to leave a bottle with a manuscript claiming possession.[7]

In sailing east Dufresne narrowly missed discovering the island now known as Kerguelen Island. Remarkably, within two weeks, on 13 February 1773, a second French expedition under Kerguelen encountered, named and claimed that island.

Kerguelen's expedition, comprising two vessels, left Mauritius on 16 January 1772. Kerguelen, the commander of the expedition was in the vessel *Fortune*. Count Saint Aloüarn commanded the other, the *Gros Ventre*.

The expedition reached Kerguelen Island in mid-February. A party from the *Gros Ventre* landed on the island and a ceremony of annexation took place. Again, the French flag was hoisted, a volley fired from muskets and the party gave three cheers. They then buried a proclamation parchment in a bottle to record the annexation.[8] After the dinghies were retrieved the weather worsened and the two vessels became separated. Unable to see the *Gros Ventre*, Kerguelen headed directly back to Mauritius. This was contrary to his instructions which were to proceed further across the lower latitudes of the Indian Ocean with a view to discovering the long-sought Gonneville land.

Saint Aloüarn, upon losing contact with Kerguelen, proceeded according to the original plan and sailed eastward, first encountering land at the south-western tip of the Australian continent. His vessel anchored at Flinders Bay near Cape Leeuwin on 17 March 1772. He then headed north sailing well out to sea to avoid reefs which had presented dangers to earlier Dutch and British navigators.[9] The *Gros Ventre* sighted Shark Bay on 28 March 1772 and anchored in the vicinity of Dirk Hartog Island. The island had been discovered by the Dutch navigator of that name in 1616 and revisited by the English explorer, William Dampier in 1699. On the morning of 30 March a party under Ensign Mengaud de la Hage[10] went ashore at Turtle Bay and purported to take possession of the region for France as outlined previously. After a

[7] Marchant, above n 1, 48.

[8] French sovereignty over Kerguelen Island forms the basis of a treaty between France and Australia delimiting the continental shelf between that island and the Australian territory of Heard and MacDonald Islands. Regarding Australia's claim to the latter islands see D Millard, 'Heard and MacDonald Islands Act, 1953' (1954) 1 *Sydney Law Review* 374.

[9] The dangers had become known to earlier Dutch and English navigators. The most notorious islands were the Abrolhos Archipelago where the Dutch vessel, *Batavia*, foundered in 1629.

[10] Marchant, above n 1, refers to de la Hage as Ensign 'Mingault'; Bloomfield, above n 1, prefers 'Mengaud de la Hage'.

cursory examination of the area, the party returned to the *Gros Ventre*. Further exploration was carried out by a second party under Ensign Rosily.[11]

Saint Aloüarn then proceeded along the north-west coast to Melville Island off northern Australia's and returned to Mauritius via Timor. Unfortunately, conditions aboard ship were extremely unhealthy. Saint Aloüarn was seriously ill when he reached Mauritius in September 1772. He died shortly afterwards followed closely by Ensign de la Hage.[12]

Although Saint Aloüarn had undertaken an important role in advancing French knowledge of the western part of continental Australia (even if he failed to find the mythical Gonneville Land) little political interest appears to have been shown in the information his expedition had provided.[13] Perhaps because his death prevented him personally returning to France, no official steps are known to have been taken to ratify the annexation. More relevantly, no physical attempts were made to exploit the claim by establishing settlements and asserting control over the region with a view to colonizing it. It was almost 20 years before another French expedition visited the area.[14]

II Subsequent French Activities Concerning Western Australia, 1773-1826

Further French exploration following Saint Aloüarn' proclamation was sporadic and exhibited no intention to consummate his claim. The next French expedition to visit Western Australia was under the command of Joseph D'Entrecasteau. He was sent to search for an earlier explorer, Jean-François, Comte de Lapérouse (La Perouse) who had left France in 1787 ostensibly to complete a survey of Western Australia. After exploring the northern Pacific region La Perouse had landed near Botany Bay in 1788 shortly after Governor Arthur Phillip established a British convict settlement nearby at Port Jackson (Sydney). Phillip's act effectively consummated Captain Cook's annexation of the eastern part of Australia (named 'New South Wales') in 1776. Subsequently La Perouse disappeared somewhere in the Pacific.

D'Entrecasteau was dispatched in 1791.[15] His expedition comprised two

[11] Rosily-Menros later became a Vice-Admiral and in 1819 Ministre de Maritime. He was influential in planning further French expeditions to Western Australia during the restoration period: Marchant, above n 1, 229, 250; Godard and de Kerros, above n 1, 164-6.
[12] Marchant, above n 1, 51-66; Bloomfield, above n 1, 144-56; Godard and de Kerros, above n 1, 192.
[13] Marchant, above n 1, 67.
[14] Ibid 73.
[15] Bloomfield, above n 1, 99.

vessels, the *Recherche* under his command and the *Esperance* under Huon de Kermedec.[16] The voyage was promoted by intellectuals wishing to pursue their philosophical interest in 'the study of man'. The expedition was primarily concerned with conducting a hydrographic survey of the South Coast of Western Australia. Unfortunately, it did not engage in a systematic botanical and geological survey of the adjacent land. As a consequence his report to French authorities suggested that the region was largely barren, confirming earlier Dutch, British and French impressions based mainly on prior evaluations of the north-west region. That part of Western Australia was truly hot, inhospitable and arid. This had the effect of discouraging further French interest in establishing a permanent presence in the more fertile and cooler Southern area.[17]

At the end of the 18th century despite the earlier efforts of Dutch, English and French explorers in the West and Cook in the East, much of Australia still remained unexplored. Almost simultaneously both the French and British governments decided to complete mapping the Australian coast. In 1800 Napoleon authorized a French expedition comprising two vessels under Nicholas Baudin to undertake the task.[18] At the same time the British admiralty instructed Captain Matthew Flinders to commence a circumnavigation of the continent, by then known as *Terra Australis*. Both expeditions contributed enormously to advancing knowledge about Australia, although only Flinders succeeded in surveying the whole coastline.

Baudin set out in the *Geographe* from Le Havre in October 1800 accompanied by Baron Jacques Hamelin in the *Naturaliste*. The company comprised many scientists including Francois Peron.[19] Peron's later writings about the expedition, largely concerned with aggrandizing his own reputation and condemning that of Baudin, were extremely influential on later French policy. Baudin's expedition was essentially for scientific purposes and had no directly political objective to consolidate French claims in Australia.

Baudin made landfall at Cape Leeuwin on the south-west tip of Australia on 27 May 1801. He then proceeded in a northerly direction to survey parts of the West Australian coast. Although he conducted detailed surveys of Shark Bay in July he did not visit the site of Saint Aloüarn's annexation proclamation

[16] After whom the Kermedec Islands in the Pacific Ocean are named.
[17] Marchant, above n 1, 76-83.
[18] Ibid chapter 5.
[19] For Peron's contribution to French exploration see Edward Duyker, *François Péron: An Impetuous Life: Naturalist and Voyager* (Melbourne University Press, 2006).

in 1772.[20] After resupplying in Timor, Baudin resumed his commission to circumnavigate Australia. Returning to the south-west coast in 1803 he continued to explore the coast of South Australia, visiting Shark Bay for a second time in March 1803 before again sailing to Timor. Like Saint Aloüarn he died before returning to France.

Although Baudin failed to achieve a great reputation in France, partly because of Peron's denigration, his expedition was one of the most successful scientific voyages of the time. The great volume of exhibits and drawings, including strange animals, contributed enormously to European scientific knowledge, including information about the area around King George Sound. This suggested that the area *was capable* of supporting habitation. Unfortunately, however, when the Baudin team returned to France, France and Great Britain were at war. Investigations of Australia then lapsed for a further decade and a half.

It was not until the restoration of the Bourbons that interest in Western Australia resumed.[21] Successive expeditions were dispatched under Louis-Claude de Freycinet in 1817, Louis-Isadore Duperrey in 1822, Louis de Bougainville in 1824 and Dumont D'Urville in December 1826. Only the first and last expeditions actually explored Western Australia, the others were diverted in favor of other objectives.

Freycinet visited Shark Bay in September 1818 at a time when French interest in Australia revived.[22] One possible site was the south-west coast of Western Australia. French designs in the region received a major impetus in February 1819 when the Council of Ministers established a committee to report on the possible establishment of a penal colony in Australia.[23] Among the members of that committee was the former Ensign Rosily who had played a prominent role in the 1772 expedition. He considered acquisition of territory in the south-west of Australia as one appropriate site.

Two expeditions were sent to pursue this end; one under Duperrey and the other led by Bougainville. Both failed to carry out the purpose for which they were sent; the further exploration of Western Australia. French interest in the area then started to wane. Attention shifted to New Zealand. Dumont D'Urville was instructed to explore the prospects of establishing a colony in

[20] Marchant, above n 1, 153.
[21] Ibid 219.
[22] Bloomfield, above n 1, 136-40, 147-53, 160.
[23] Marchant, above n 1, 227-9.

that country. On 5 October 1826, more by accident than intention his expedition stopped at King George Sound on its way to the Pacific and carried out further scientific investigations.

III The British Pre-Emptive Annexation

Dumont D'Urville was impressed by the environs and later confirmed his assessment by recommending its annexation. However, this rejuvenated flurry of interest occurred too late. Both in England and at the penal settlement at Port Jackson British suspicions and mistrust of French intentions regarding Western Australia and the south coast of Victoria had been aroused.[24] Following instructions from London the British Governor at Port Jackson, Sir Ralph Darling, dispatched an officer, Major Lockyer from the colony of New South Wales with a party of marines and convicts to establish a military settlement at King Georges sound.[25] Lockyer was ordered that if he encountered any French settlement there he was to land troops and inform them that the whole of 'New Holland' was subject to British governance.[26] At the same time Captain James Stirling, a British naval officer, was engaged in charting the region around the Swan River with a view to establishing a permanent colony there. These actions effectively preempted potential French claims to the region unless France was prepared to pursue a counterclaim of its own by force. The British assertion of title was consummated when on 2 May 1829 Captain Stirling formally established the Swan River Colony.[27] It eventually developed to become after Federation in 1901 the present State of Western Australia.

Ironically, the possessory acts by the British Government prevented French initiatives to set up a colony in Western Australia just when the French Government finally was considering taking concrete measures to establish a permanent presence in the region. If Britain had not taken these steps to preclude a French claim there is a real prospect that Dumont D'Urville's reports might have led to the resurrection and final consummation of Saint Aloüarn's purported 1772 annexation. By the end of the 1820s, however, France had begun looking elsewhere in Oceania, such as New Caledonia, to establish penal

[24] Marchant, above n 1, 231; James Battye, *Western Australia: A History From its Discovery to The Inauguration of the Commonwealth* (Clarendon Press, 1924) chapter 3, 'Annexation of Western Australia'.

[25] Government of New South Wales, State Records, 'King George Sound Settlement'.

[26] Ernest Scott, *A Short History of Australia* <http://gutenberg.net.au/ebooks02/0200471h.html> Chapter VIII, 'Albany settlement'; Bloomfield, above n 1, 160-2.

[27] The colony was established by the *Western Australia Act 1829* (UK).

colonies. Historically the prospect of a *France Australe* vanished with the realignment of French interest. British settlement at the Swan River finally eliminated any chance of a lingering French claim.

IV The Issues Arising From the 1772 Proclamation

Even though the establishment of the Swan River Colony formally extinguished any subsisting French claim to territorial sovereignty over part of western continental Australia, one may ask whether the annexation proclamation of Saint Aloüarn at Turtle Bay in 1772, on behalf of France was an *effective* assertion of territorial sovereignty at the time it was made and in the period thereafter.

In particular were the shore party's ceremonial actions in 1772 sufficient to constitute a valid territorial acquisition in terms of then existing international law? This entails a subsidiary issue: Would lack of recognition by other maritime nations, particularly Great Britain, have been fatal to any attempt by France to maintain its claim during the period up to 1826?

V A Preliminary Issue: The Extent of the French Claim

Before those questions can be answered there is a logically prior enquiry: What was the territorial ambit of the 1772 proclamation? Was the extent of the area subject to the proclamation confined to the immediate environs and hinterland adjacent to the Shark Bay region?[28]

Certainly, in terms, the extent of Saint Aloüarn's claim is ambiguous.[29] It may be taken to represent an assertion of sovereignty over a substantial portion of Western Australia. Whether it included territory beyond Shark Bay and even encompassed the whole of 'New Holland' must be regarded as contentious.[30]

This is compounded by the fact that there was doubt about how much of eastern Australia had been claimed for Great Britain by James Cook in 1770.[31]

[28] Hinterland claims are problematic: Donald Grieg, 'Sovereignty, Territory and the International Lawyer's Dilemma' (1988) 26 *Osgoode Hall Law Journal* 140, 160-1. See also Surya Sharma, *Territorial Acquisition, Disputes and International Law* (M Nijhoff Publishers, 1997) 53.

[29] Bloomfield, above n 1, 150-2.

[30] *The Legal Status of Eastern Greenland (Denmark v Norway)* (*Eastern Greenland Case)* [1933] PCIJ (ser A/B) No 53 is relevant to the extent of a possible French claim. Denmark's claim to the *whole* area of Eastern Greenland based on several administrative acts directed essentially to its *coastal region* was upheld: Sharma, above n 28, 81.

[31] In fact, Cook made no attempt to delimit the western boundary of the territory claimed, confining his claim basically to territory adjacent to the eastern coastline of Australia. The western boundary was defined in 1786 as extending west to 135° east longitude in commissions issued to Captain Arthur

Arguably, the Saint Aloüarn claim could be regarded as comprising the residue of the area of Australia that was not part of that claimed by Cook (although Saint Aloüarn would not have been aware of the latter at the time). That proposition has some credence given the fact that prior to the explorations made by Matthew Flinders and Nicholas Baudin in 1802-1805 it was unknown whether the eastern side of the continent was divorced from the western by some great inland sea. For the purpose of this analysis, however it is not necessary to determine the issue. In geographic terms it was never sufficiently defined to support any continuing French claim and fell by the wayside after the comprehensive British annexation of Australia's remaining third in 1829.

VI The Difficulty of Identifying Territorial Acquisition at a Fixed Date: The Centrality of Judge Huber's *Palmas* Concept of 'Inter-Temporality'

A second preliminary problem in approaching the French purported annexation is whether the issues can necessarily be determined simply by reference to a *single event* fixed in time. This is because, seen from the perspective of contemporaneous international law, the doctrine of *inter-temporality* now governs the resolution of territorial disputes. This influential doctrine was enunciated in 1928 by Judge Max Huber, the arbitrator in the *Island of Palmas Case* between the Netherlands and the United States.[32]

Huber started from the premise that the primary concept of 'sovereignty' was intimately linked with the notion of territory. He described the essential attributes of sovereignty as signifying the independence to perform governmental functions over a particular territory to the exclusion of any other

Phillip appointing him Governor of the penal settlement of New South Wales: Gerard Carney, 'The Story behind the Land Borders of the Australian States - A Legal and Historical Overview' (Speech delivered at the Public Lecture Series, Canberra, High Court of Australia, 10 April 2013) 2-3, citing *Historical Records of New South Wales* Ser I volume I pp 1-8.

[32] Island of Palmas (Miangas) Case (*Netherlands v United States*) Hague Ct Rep 2d 83 (1932) (Perm. Ct. Arbitration, 1928); 2 U.N. Rep. Intl. Arbitral Awards 829. For commentary on the case see F De Visscher, 'L'arbitrage de l'Ile de Palmas (Miangas)' (1929) 56 *Revue de droit international et de legislation compare* 735; Robert Jennings, *The Acquisition of Territory in International Law* (Manchester University Press, 1963) 2; Daniel-Erasmus Khan, 'Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations' (2007) 18 *European Journal of International Law* 145, 146-7, 161-8.

state.[33] The corollary is that if there is no manifested intent on the part of a state to exercise those rights, it cannot maintain its title to the claimed land.

The doctrine of inter-temporality is now accepted as governing contemporary disputes between opposed claimants to territory. It asserts that the *critical date* for determining the applicable principles is the time *when a claim crystallises*.[34] This can be a somewhat complex matter where there are different periods during which sporadic exercises of physical possession and administrative action took place. Importantly, it distinguishes the *creation* of a right to title from the separate question of the continuing *existence* of that right. Official formal acts that might be *creative* of an expectation of title may prove ineffective if not pursued by later acts.

For the purpose of analysing the validity of the 1772 French claim two dates are relevant.[35] The first is 1772 itself when the initial claim to annexation was made. Due to the ambiguity about French intentions concerning Australia's Western region in the following five decades, the second is 1826 when it appeared that a dispute might have arisen between France and Great Britain regarding the exercise of sovereignty over some parts of, or the whole of, the area now known as Western Australia. As further explained below whatever the legal effect of the 1772 events was, the requirements of inter-temporal substantiation tend to work against the validity of a French claim after 1772. Even if the 1772 proclamation ceremony might have attracted some priority, the lack of acts of physical occupation and assertions of exclusivity means that any vitality of the original claim probably lapsed shortly thereafter. Given the length of the period between 1772 and 1825 this would have made it untenable for France to have relied on the 1772 claim as having any continuing viability.

[33] Island of Palmas (Miangas) Case, above n 32, 829. Judge Huber held that at best discovery only gave rise to an inchoate title, its efficacy to be determined ultimately in accordance with the law prevailing at the time when title came into contest.

[34] The critical date may differ for different modes of territorial acquisition: *Kasikili/Sedudu Island* (*Kasikili/Sedudu*) (Judgment) [1999] ICJ Rep 1045, [94], [97]; *Sovereignty over Pedra Branca* (*Pedra Branca*) (Judgment) [2008] ICJ Rep 23, [34]-[36]; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v *Honduras* (Judgment) [2007] ICJ Rep 659, [123]; *Sovereignty over Pulau Litigan and Pulau Sipidan* (*Pulau Litigan*) (Judgment) [2002] ICJ Rep 625.

[35] The claim founded on the events of 1772 must be assessed in light of the law of that period: Island of Palmas (Miangas) Case (*Netherlands v United States*) Hague Ct Rep 2d 83 (1932) (Perm. Ct. Arbitration, 1928); 2 U.N. Rep. Intl. Arbitral Awards 829, 845; *Territorial Dispute (Libya v Chad)* (Judgment) [1994] ICJ Rep 6, 89; Joshua Castellino and Steve Allen, *Title to Territory in International Law - A Temporal Analysis* (Dartmouth, 2003) 3; Malcolm Shaw, *International Law* (Cambridge University Press, 5th ed, 2003) 424; R Victor Prescott and Gillian Triggs, *International Frontiers and Boundaries: Law, Politics and Geography* (Martinus Nijhoff, 2008) 148-58.

VII Applicable International Law Principles Governing Territorial Claims

In order to analyse the primary validity of the French claim one must first ascertain the applicable rules regulating acquisition of title in far distant lands in the latter part of the 18th century, especially 1772, and again in the first quarter of the 19th century when the French claim became subject to contest by another maritime power.

Current international jurisprudence identifies *five basic categories* by which a state could have acquired territory. The two forms potentially relevant to characterising the French claim of 1772 were *discovery (*or its surrogate *symbolic assertion of title* to land not already subject to a competitive claim) and *prescription*[36] (where conflicting claims to the same territory were later advanced). Prescription entails examination of official post-annexation acts exhibiting an intention to govern an area.[37] Even in those cases international tribunals in the last 100 years have tended to identify specific occurrences such as sovereign acts, recognition, acquiescence and the like as features to be taken into account irrespective of the particular kind of category of acquisition asserted. Classical modes of acquisition should therefore be regarded as conceptually porous especially when cases involve unsettled principles of acquiring territory in earlier periods such as 1772.[38]

International law principles governing territorial title prior to the 20th century were basically Eurocentric. They can be traced back to the European expansion into the newly discovered 'New Worlds' of Central and South America around the time of Columbus and in the Indian and Pacific regions by, among others, Vasco da Gama. In the 15th and 16th century, principally because the two most active protagonists of exploration were the Catholic states of Portugal and Spain, rights of acquisition were largely determined by papal edicts allocating certain parts of the new world for territorial acquisition by one of those two countries.[39] *Discovery* and *identification of location* were the

[36] This analysis leaves aside other modes of acquisition, namely *cession*, *conquest* and *accretion*.

[37] To acquire title by prescription, possession must first have been exercised *à titre de souverain*; secondly, be peaceful and uninterrupted; thirdly, persist for a reasonable period of time; and fourthly, be public: *Kasikili/Sedudu* (Judgment) [1999] ICJ Rep 1045, 5 [94], [97]; *Pedra Branca* (Judgment) [2008] ICJ Rep 23.

[38] For modern views of modes of acquiring territory see Marcelo Kohen, *Possession Contestée et Souveraineté Territoriale* (*Adverse Possession and Territorial Sovereignty*) (Presses Universitaires de France, 1997) chapter 3; Jennings, above n 32, 1-35.

[39] An 8th century edict, the *Donation of Constantine*, purported to confer the right to dispose of new-found 'islands' upon the Pope. Portugal and Spain relied on various Papal edicts to claim newly-

accepted basic requirements for title to a newly-discovered land.[40]

The rules dependent on papal ordinance were eroded, however, with the rising competition between other European states engaging in the expansion process, particularly the Netherlands, France and England. The need to develop an enlarged framework to accommodate territorial claims by these new European maritime powers ensured the demise of the papal scheme of division.[41] New methods of appropriation soon came to displace the pre-existing rules. A shift to a principle of *effective occupation* of territory occurred as the age of discovery gradually merged into the age of colonialism, requiring 'real' occupation as opposed to 'constructive' possession as a constituent of title.[42] While discovery *alone* might have sufficed to validate an absolute title in the late 15th and 16th centuries, it was not necessarily conclusive in the 17th and 18th centuries.

VIII Sufficiency of Symbolic Acts

While discovery in the form of *mere sighting*, that is, physical discovery and visual apprehension, was asserted as a mode of acquisition by the Spanish publicist Vittoria Suarez in relation to 15th and 16th century Spanish claims, by the late 18th century it was considered that some manifestation of sym*bolic annexation*, a public assertion of sovereignty, was necessary to establish at least an inchoate title to the claim territory.[43] That is, a formal ceremony was

discovered territories. They concluded the *Treaty of Tordesillas* (7 June 1494) allocating spheres of influence between themselves. The effect of these papal bulls on territorial claims is discussed by David Grieg, 'Sovereignty and the Falkland Islands Crisis' (1978) 8 *Australian Year Book of International Law* 20 and Leslie Marchant, *The Papal Line of Demarcation and Its Impact in the Eastern Hemisphere on the Political Division of Australia, 1479-1829* (Greenwood, Western Australia, 2008).

[40] James Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Clarendon Press, 1934) chapters 1-6. See also Valentin Jeutner, 'Of Islands and Sunny Beaches: Law and the Acquisition of Territory during the Fifteenth to the Nineteenth Centuries' (2013) 29 *World History Bulletin* 7.

[41] Castellino, above n 35, 45.

[42] Ivan Head, 'Canadian Claims to Territorial Sovereignty in the Arctic Regions' (1963) 9 *McGill Law Review* 200, 202.

[43] See Henri La Fontaine, *Pasicrisie Internationale* (Stämpfli, 1902) 201; M F Lindley, *The Acquisition and Government of Backward Territory in International Law*, 19 (Longmans, 1926) 129-132; Sharma, above n 28, 40-51. Regarding the relative weight to be given to discovery and later activities in the inter-temporal context, compared with contemporary jurisprudence on territorial delimitation, see Gillian Triggs, 'Maritime Boundary Disputes in the South China Sea: International Legal Issues' (2009) University of Sydney Law School Legal Studies Research Paper No. 09/37, 6. In the 18th century there may have been little difference between symbolic annexation and effective occupation: Emerich de Vattel, *Le Droit des gens ou principes de la loi naturelle* (Book 1) (1758) [207]-[208].

required.[44]

These principles governed, in particular, claims to newly discovered areas which were not subject to the sovereignty of any state and therefore regarded as *terra nullius*.[45] The capacity of this means of acquiring territory was usually coupled with an implicit *precondition of discovery*. In the case of Western Australia, of course it was not the French who discovered the long occidental coastline but rather the Dutch and English explorers. However, at the relevant time, discovery of a territory without proceeding to a formal declaration of an intention to occupy the region did not result in acquisition of the discovered territory.[46]

Even though the Saint Aloüarn claim was not based on discovery it relied on the symbolic displays of acquisition performed by Ensign de la Hage and his shore party at Turtle Bay in 1772. Applying the *Island of Palmas* principle it is strongly arguable that having regard to similar British and French customary ceremonies of annexation involving flag-raising, firing of salutes and burying coins and proclamation manuscripts, including those by Cook (Eastern Australia 1770), the Crozet Islands (Dufresne expedition 1772) and Kerguelen Island (Kerguelen 1772), the 1772 claim by Saint Aloüarn was consistent with those annexation practices and would have created at least the foundation for a *prior* claim in the event of no other competitive act of acquisition. As such they would have conferred an *inchoate* if not an *absolute* title.

In so concluding, one putative objection, foreshadowed above, can be put aside. The symbolic actions of Saint Aloüarn's officers presupposed, correctly in fact, that there were no pre-existing competitive claims that had been asserted by previous Dutch and English explorers. The earlier discoveries of Western Australia by foreign navigators would not have presented a barrier to any French claim to the region.

IX Counter-Factual Objection: Was the Land *Terra Nullius*?

At this point a second objection should be addressed arising from the fact that the land in question was actually occupied by indigenous inhabitants. As noted

[44] Sharma, above n 28, 45-8; A Keller, O Lissitzyn and F Mann, *Creation of Rights of Sovereignty Through Symbolic Acts, 1400-1800* (Columbia University Press, 1938) 148-9.

[45] The theory of *terra nullius* derived from the Roman law doctrine of *res nullius*: Castellino, above n 35, 43. Randall Lesaffer, 'Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription' (2005) 16 *European Journal of International Law* 25, 41–2.

[46] A variety of ceremonies is enumerated by Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640* (Cambridge University Press, 1995).

above, territorial claims to recently discovered areas in the southern Atlantic, Indian or Pacific Oceans were based on the assumption that they were *terra nullius*. Under the international principles to which France subscribed in the late 18th century did the presence of aboriginal people therefore constitute a barrier? In pure theory, the principle of acquisition by occupation was premised on the fact that the relevant territory belonged to '*no-one*'. The existence of indigenous inhabitants ostensibly conceivably constituted an inconvenient counter-factual circumstance.

The *terra nullius* assumption, however, should not be understood as applying to truly *unpopulated* islands or tracts of land: rather, the notion was predicated on the fact that, even if indigenous inhabitants were encountered they lacked a *civilised form of government* capable of exercising dominion over the land.[47]

That Eurocentric conception reflects the fact that during the latter part of the 18th century the age of discovery was being displaced by the age of colonisation in which competitive claims between states were more likely to arise. The possibility that two sovereign nations such as England and France might each lay claim to a single territory gave rise to a mutually accepted contention: namely, no European claimant was required to deny that any indigenous population in the disputed territory could stake a countervailing sovereign claim. In the late 18th century, therefore, under the accepted notion of *terra nullius* native groups were not taken to represent an already entrenched sovereign power. Hence the land subject to claim could be *notionally equated* with *unoccupied territory*. That rationale might equally apply to earlier acquisitions relying simply on symbolic taking of possession where there was no direct encounter with local inhabitants. The actual existence of native populations in areas like New Holland contrary to the fictional assumption therefore did not preclude European annexation. Acquisition could be achieved by simple occupation.

Increasingly, however, by the latter part of the 19th century the fiction of *terra nullius* came to be discarded. More specifically, the doctrine was critically examined by the International Court of Justice in 1975 in its Advisory Opinion on *Western Sahara*.[48] The Court held that *terra nullius* was not relevant to a

[47] Martin Dixon and Robert McQuorquodale, *Cases and Materials on International Law* (Oxford University Press, 4th ed, 2003) 240; Ivan Shearer, *Starke's International Law* (Oxford University Press, 11th ed, 1994) 147.
[48] [1975] ICJ Rep 39, [79], [80].

territorial dispute in a sparsely populated area of the Sahara desert. The doctrine has also been discredited by the High Court of Australia in the renowned *Mabo* case.[49] If the matter where to be contested today an application based on inter-temporal principles of international law would probably deny the status of Western Australia as having been *terra nullius*.

The matter would have been viewed differently in 1772. To the French the vast area behind the western coast comprising New Holland was seen to be sparsely inhabited. Any natives who were encountered were considered to lack any form of political organization. Conveniently the land could therefore be characterised as unoccupied and available for arrogation. Both France and England would have regarded it as *terra nullius* according to contemporary standards.

X The Need in 19th Century International law for *Effective Occupation* to Consummate an Inchoate Claim

Problematically, at the time of Saint Aloüarn's purported 'annexation' the basic principles were in flux. While the French symbolic annexation might have provided a measure of priority by way of an *inchoate* title, it was coming to be accepted that such a preliminary assertion of sovereignty had to be perfected by further acts constituting *effective possession* (*effectivités*). As the *Island of Palmas Case*[50] shows acts of effective occupation were necessary to consummate a title based on prescription against a competitive claim.[51] While some weight could be given to initial acts of discovery and symbolic annexation, the prevailing view since the 19th century has been that an inchoate title had to be complemented within a reasonable period by occupation and administrative control of the region.[52] What amounted to a reasonable period depended on geographic and logistical circumstances, including the nature of the territory

[49] *Mabo v Queensland (No 2) (Mabo)* [1992] HCA 23; (1992) 175 CLR 1, 33-42. Mason CJ and McHugh J observed that the notion that inhabited land could be classified as *terra nullius* no longer commanded general support and could hardly be retained. The High Court accordingly explicitly rejected the notion of New South Wales as unoccupied.

[50] Island of Palmas (Miangas) Case (*Netherlands v United States*) Hague Ct Rep 2d 83 (1932) (Perm. Ct. Arbitration, 1928); 2 U.N. Rep. Intl. Arbitral Awards 829.

[51] Sharma, above n 28, 71-5.

[52] An inchoate title is one that has commenced, allowing a state to claim a prior acquisition or interest over later contenders, but is incomplete: Castellino, above n 35, 49. Regarding the need to perfect title see Giovanni Distefano, *L'Ordre International entre Legalite et Effectivite: Le titre juridique dans le contentieux territorial* (Editions Pedone, 2002) 246. In that regard, a distinction can be drawn between *acquisition of title* and its maintenance: Y Blum, *Historic Titles in International Law* (Martinus Nijhoff, 1965) 107-29.

itself, especially if it was uninhabited or not readily accessible to occupation.

Balanced against the requirement to show effective occupation, the need to demonstrate further acts between 1772 and 1825 exhibiting control of a particular territory would be evaluated less stringently than if a claim to that territory were asserted today. Consistent with the principle of *inter-temporal law* acquisition the 1772 claim should notionally be judged more flexibly according to the principles applying at the time.

In that regard it has long been recognised that taking into account the nature of a territory and its distance from other centres of government and commerce, some leeway should be accorded in applying the criteria of acquisition. Sovereignty could be manifested in a number of different ways no one of which was absolutely required.[53] These forms could vary *relatively* according to the time of annexation. For cold, isolated and remote areas with very little population occasional acts of administration could suffice to consummate a claim,[54] whereas a large, populated territory on an established trade route would need more frequent and constant forms of administration.

This is well illustrated in conclusions drawn in the *Clipperton Island* arbitration,[55] a contest between France and Mexico (relying on an earlier original assertion of acquisition by Spain). It concerned an uninhabited island in a remote area of the Pacific Ocean off the coast of Mexico. The French claim was upheld on the basis that a declaration of sovereignty over the island upon its discovery by a French naval officer in 1858 was effectively consolidated by the subsequent publication of the details in a Honolulu Gazette which had attracted no objections by Mexico. It was not until 1897 that a French warship again visited the island. The relative remoteness of the island in an area of the Pacific Ocean rarely traversed by vessels was a significant factor. The lack of French settlement might have substantially detracted from its claim but was not taken to be fatal. Other official acts, although meagre and of a very rudimentary nature, sufficiently evidenced France's intention to exercise *exclusive* control over the island.

[53] *Decision Regarding Delimitation of the Border Between the State of Eritrea and the Federal Democratic Republic of Ethiopia* (Decision) (The Boundary Commission), 13 April 2002, [3.29] and [4.65]; Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-1954: General Principles and Sources of Law' (1953) 30 *British Yearbook of International Law* 1, 48.

[54] The French annexation of the Kerguelen Islands in 1772 is instructive. No re-assertion of title to the islands was made until 1898. This has been accepted as an effective example of acquisition of an area that was extremely uninhabitable throughout the subsistence of the French claim.

[55] France-Mexico Arbitral Award on the Subject of the Difference Relative to the Sovereignty Over Clipperton Island (Clipperton Island case) (1932) 26 The American Journal of International Law 390.

Similarly, in the *Palmas Island Case*,[56] Judge Huber recognised that some leeway should be allowed in recognising acts of occupation and administration by the Netherlands in earlier centuries. Even intermittent acts lacking continuity could still substantiate a claim, given the relative inaccessibility of the island in distant seas.[57] An inverse calculus thus applied: the more isolated and relatively inaccessible a territory the less stringent the requirements to satisfy the condition of effective control.

Regarding assertion of sovereignty by administrative acts, in the *Eastern Greenland* case[58] the Permanent International Court of Justice, in upholding Denmark's claim, applied less stringent standards of scrutiny to the relatively minimal executive acts of Denmark in comparison with the even lesser degree of administrative control asserted by Norway.

Thus the fact that New Holland was rarely visited in the late 18th century means that any French claim based on the 1772 annexation would attract relaxed scrutiny and be given a generous margin of appreciation.

XI Applying the Inter-Temporal Doctrines Prevailing in 1772-1820 to Western Australia: Preliminary Problems Confronting the French Claim

The first defect in the pedigree of the French title flows from the lack of any official public endorsement when the claim was reported to the government authorities in Paris at the conclusion of the expedition.[59] That was, arguably, not necessarily fatal since it was possible that later government action on the part of France could, in a sense, constitute *ratification* of Saint Aloüarn's acts.

A second preliminary issue is whether there were completing British claims in the interim, and whether the British formally objected or opposed the priority of any French assertion of territorial title.[60] Regarding the first, it is

[56] Island of Palmas (Miangas) Case (*Netherlands v United States*) Hague Ct Rep 2d 83 (1932) (Perm. Ct. Arbitration, 1928); 2 U.N. Rep. Intl. Arbitral Awards 829.

[57] Friedrich von der Heydte, 'Discovery, Symbolic Annexation and Virtual Effectiveness in International Law' (1935) 29 *American Journal of International Law* 448, 462; Keller, above n 44, 149-51; Castellino, above n 35, 51; *Territorial and Maritime Dispute, Nicuaguar v Columbia* (Judgment) [2012] ICJ Rep 624, 718-20 [251].

[58] *Eastern Greenland Case (Denmark v Norway)* [1933] PCIJ (ser A/B) No 53.

[59] Acts of individuals like Saint Alouärn would have had to be attributable to or later endorsed by the France: *Sovereignty over Pulau Litigan and Pulau Sipidan* (*Pulau Litigan*) (Judgment) [2002] ICJ Rep 625.

[60] Regarding the need for public display of authority and the necessary acquiescence by the other state, see D Johnson, 'Acquisitive Prescription in International Law' (1950) 27 *British Yearbook of International Law* 332, 354.

clear that prior to 1825 England showed no inclination to annex Australia's western part.

Regarding the second, a *lack of protest* in the face of a strong assertion of title by the French might have estopped the British from later denying it.[61] There is however no evidence of a formal notification by France to support such a conclusion.[62] Put simply, no question of any British acquiescence or lack of opposition arises because nothing promulgated on the French side required positive disclaimer or denial.

Further, there is no evidence of a *positive acknowledgement* by Great Britain that it ever recognised the French title. In the absence of any such expression, Britain's absence of protest cannot be taken to enhance the status of the French claim. On the contrary, at times Great Britain's government harboured suspicions about French intentions, particularly concerning the Albany region. In the end these were sufficiently powerful to cause the British to take pre-emptive action by establishing the military settlement occupying King George Sound.

XII Was the Claim Defective Due to Inaction?

For the purpose of this analysis the critical issue is: Did the tentative 1772 claim lapse because of the failure by French authorities to follow up the proclamation by acts calculated to consummate the annexation by assertions of sovereignty?[63] To establish priority under the evolving doctrine of effective occupation according to the *Island of Palmas* principle some acts of settlement, even if not continuous, supported by acts of control representing assertions of exclusivity, would have been necessary within a reasonable amount of time. French action following up the claim need only have been exercised sporadically over the next several decades, given the remoteness and generally inhospitable condition of

[61] A protest needs to be expressed in clear terms and conveyed through appropriate channels: *Chamizal Arbitration (United States v. Mexico)* (1911), 11 RIAA 309, 328-9; Brownlie, above n 5, 149.
[62] On the other hand, failure to notify by France would not necessarily have left the occupied territory open to appropriation: Lindley, above n 43, 299.
[63] The notion of title lapsing is illustrated by *The Minquiers and Ecrehos Case* (Judgment) [1953] ICJ Rep 47. The United Kingdom and France each claimed two small Channel Islands near the French coast. The primary issue was whether they had fallen under the jurisdiction of France as part of the Duchy of Normandy in the 11th century. The International Court of Justice held that any French entitlement that might have existed in the 11th century had lapsed sometime after 1204. See D Johnson, 'The Minquiers and Ecrehos Case' (1954) 3 *International and Comparative Law Quarterly* 14; A Lowe and A Tzanakopoulos, 'Minquiers and Ecrehos Case' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012).

New Holland.

This prompts a more specific question: What acts of consolidation between 1772 and 1826 *would have sufficed* to sustain and perfect the *inchoate* entitlement to sovereignty over that part of Australia and would any of the particular French activities involving exploration and scientific study before 1825 have provided a sufficient foundation for contesting the eventual British annexation in 1826-1829?

Relevant acts could have comprised establishing staging-point facilities for naval and commercial vessels and building protective installations such as forts or military settlement, and undertaking agricultural activities in the region. None of these were undertaken.

What is particularly pertinent in the case of the French claim to Western Australia was whether the activities of the French expeditions between 1772 and 1825 were sufficient to have consolidated the original inchoate claim. The inevitable conclusion is, however, that France's enterprises along the south-west coast would not be regarded as sufficient to constitute a continuous and peaceful display of the *political will* to assert territorial sovereignty.

Relevantly, there were no acts of settlement of any duration in the relevant sites on the south-west coast, either in the Swan River vicinity or around King George Sound. Likewise no ports or other resupply facilities were established accompanied by the exercise of authority through legislative or administrative regulations. These deficiencies make the French claim virtually unarguable today. Lacking these important elements manifesting title, any French claim based on the symbolic proclamation in 1772 would have been regarded as legally deficient.

In particular, the various French scientific visitations did not manifest a sufficient intention to permanently *colonise* the central or south-west region of New Holland. Certainly, the extensive exploration and mapping activities pursued by French explorers, including D'Entrecasteau, Baudin, Freycinet and Dumont d'Urville around the Western Australian coast between Shark Bay and the King George Sound between 1792 and 1826 might have provided some minimal if not compelling consolidation of the Saint Aloüarn initiative. This would particularly have been so if Duperrey had followed his official instructions and conducted a close survey of suitable sites for settlement in the south-west sector. Such activity arguably would have forestalled any later British claim in the absence of any opposing actions by Great Britain prior to 1826.

As mentioned above, however, the radical change of Great Britain's international posture in 1826 not only terminated its ambivalent if not acquiescent posture regarding the unannexed portion of Australia's Western coast; it actually reversed it. Founding its military settlement on King George Sound left no room for a French counter-annexation unless it was prepared to engage in naval and military hostilities.

The British claim was then consummated by the occupation in 1829 of the Swan River region under Governor James Stirling. Though that Colony languished at first and had to be sustained by the importation of British convicts until 1872 it later became, initially after the discovery of gold in the 1890s, and subsequently from the 1960s onwards, through the development of vast iron ore deposits in the Pilbara region, one of the great sources of mineral wealth in the world. This, of course, was not to be seen in the first quarter of the 19th century but had France taken a more active stance towards colonising the south-west region Western Australia, it would have presented a substantial opportunity for projecting French influence in the South Asian and Pacific regions. In the end it proved to be a "missed" opportunity.

King George Sound was particularly well situated to provide an alternative venue to Cape Town or Mauritius for the French to replenish vessels engaged in trade and exploration of the Pacific region. It would have provided France with access to one of the best deep-water ports in the Southern Hemisphere. A colony even if limited in its geographic expanse and population would have been significant for French defence strategy in protecting commerce passing to the south of the Australian continent. It is therefore ironic that at the very time when France was seriously considering colonising part of Western Australia to relocate its convicts, the failure of French expeditions in the 1820s to investigate prospective sites at King George Sound and the Swan River prevented them from consummating the 1772 claim.

Further, accepting that as in fact happened, Great Britain subsequently established its colony at the Swan River one may speculate that the inter-communal rivalries such as those between the French and British in Québec would not have proven unduly problematic. An *entrepot* founded on King George Sound would doubtless have been an irritating thorn in the British breast but the slow progress of the latter's struggling settlement around Perth many hundreds of kilometres away would have allowed some time for the

French to develop and secure their isolated outpost.[64] Furthermore, throughout the 19th century Britain and France pursued colonial policies that avoided belligerent confrontation, particularly after the Congress of Berlin in 1885.

XIII What Could Have Been: For a Few Ecus More?

Had France persisted, the south-west region of Western Australia would eventually have flourished as a significant colony in a strategic location possibly forestalling or constraining British activities in the southern Indian Ocean region. It would probably also have produced superb wines and marvellous cuisine 150 years before the establishment of a flourishing wine and gourmet industry in that region towards the end of the 20th century. Instead, the west coast of Australia is replete with French names perpetuating the legacy and legend of those French navigators like Saint Alouärn[65] who ventured boldly into that distant realm in the 18th and 19th centuries.

[64] Au contraire, one of the driving forces behind the formation of the Federation of the six colonies into the Commonwealth of Australia in 1901 was concern about expansive French and German territorial intentions in the Pacific region.

[65] The St Alouarn Islands off Cape Leeuwin are named after him.