The Legal Status of Eastern Greenland Case: a Note on its Legal Aspects

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This dispute was one between Denmark and Norway regarding the sovereignty over territory in Eastern Greenland.1 Greenland, inhabited by indigenous Eskimos, was first discovered by Scandinavian explorers circa 900 A.D. and colonised about one hundred years later by people of apparently Norwegian origin (including the Icelander Eric the Red). Two settlements (Eystribygd and Vestribygd) were founded at the southern end of the western coast and became tributary to Norway during the thirteenth century, only to lapse once more in the 16th century. From 1380 until 1814 the Kingdoms of Denmark and Norway were united under the same crown. After the disappearance of the two colonial settlements expeditions were made to Western Greenland, but although Norway’s claim was maintained verbally, no permanent colonies were supported. These claims seem to have been generally recognised by neighbouring states. The first permanent colony to be established, however, was in 1721, by Hans Egede, a Norwegian, and it was succeeded during the eighteenth century, by other settlements along the West coast. Trading concessions and monopolies were granted and regulations were enacted, in terms which in general refer to ‘Greenland’ and not simply to the specific settlements2. In 1814, under Article 4 of the Treaty of Kiel, Denmark was forced, to cede the Kingdom of Norway to Sweden, excluding, inter alia, Greenland.3

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3) Ibid., pp. 30-31; see also 7 BFSP, p. 114.
It must be noted that the island of Greenland has a total area of 2,175,600 square kilometres, five sixths of which is covered by permanent 'Inland Ice': only the coastal strip is free of permanent ice. A small proportion of the western coast had been inhabited at an early date. But the east coast remained virtually inaccessible by land or sea until the expeditions of the nineteenth century. It was only in 1900 that it was finally

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known that Greenland was in fact an island and that it was not connected by land to the North American Continent. The first landing on the eastern coast had been made by the Scottish whaler Scoresby in 1822, while the first settlement on the same coast was a Danish settlement at Angmagsslik (65° 36′ N) in 1894. In 1925 a Danish trading and mission station was established at Scoresby Sound, and Danish hunting companies were formed from 1919 onwards to hunt between Scoresby Sound and Germanishavn (77° North). On the west coast the most northerly Danish permanent settlements—mission and trading stations—were at Thule and Cape York (also about 77° North). On the Norwegian side, expeditions were made during the summer to the east coast from 1889 onwards. From 1908, expeditions wintered there occasionally and subsequently a wireless station was set up at Mygg-Bukts in 1922. Houses and cabins were also built in the Norwegian area.

From 1915 onwards Denmark began to seek explicit recognition of her potential claims to the Eastern coast of Greenland—first from the United States in the context of the cession of the Danish Antilles, then in 1919 from Norway (in the context of Norwegian claims to Spitzbergen at the Versailles Peace Conference), in 1920 from the United Kingdom, France, Italy and Japan, and subsequently from Sweden and Norway. In one terminology or another, this recognition was given by all those asked, except Norway, which was primarily concerned with obtaining assurances for Norwegian hunting and fishing interests on the East coast. Denmark was unwilling to give such assurances, and decided to rely on a favourable verbal undertaking given by the Norwegian foreign minister in 1919. On 10th May 1921 a Decree was issued as follows:

... know all men that Danish Trading, Mission and Hunting Stations have been established on the East and West coasts of Greenland with the result that the whole of that country is henceforth linked up with Danish colonies and stations under the authority of the Danish Administration of Greenland.

Diplomatic negotiations between Denmark and Norway over the succeeding years resulted in the signing of a Convention in 1924 to deal with the question of hunting and fishing on the eastern coast of Greenland. Norway continued to pursue the view, however, that those parts of Greenland which had not been occupied in such a manner as to bring them effectively under the administration of the Danish Government were in the condition of terrae nullius, and that if they ceased to be terrae nullius

5) PCIJ Series A/B, No. 53, pp. 31-38.
6) Ibid.
7) Translation from the French text supplied by the Danish Government. Ibid., p. 33.
they must pass under Norwegian sovereignty. It was decided by Denmark to refer the question to the PCIJ, and on 10th July 1931 Norway issued a Royal Proclamation stating that

[The occupation of the country in Eastern Greenland between Carlsberg Fjord on the south and Bessel Fjord on the north, carried out on June 27th, 1931, is officially confirmed, so far as concerns the territory extending from latitude 71° 30' to latitude 75° 40'N., and the said territory is place under Norwegian sovereignty.]

This proclamation furthermore named persons to exercise police powers and the territory was denominated 'Eirik Raudes Land.'

The question of sovereignty over this area was submitted to the PCIJ the following day. Denmark sought a declaration that this Proclamation 'add any steps taken in this connection by the Norwegian Government constitute a violation of the existing legal situation and are accordingly unlawful and invalid'. Norway, in reply, sought a declaration that 'Denmark has no sovereignty over Eirik Raudes Land' and that 'Norway has acquired the sovereignty over Eirik Raudes Land'.

The Danish assertion that the Norwegian 'occupation' was invalid rested upon three bases:

1. that Denmark had enjoyed and had peacefully and continuously exercised an uncontested sovereignty over Greenland for a long time;
2. that Norway had recognised Danish sovereignty over the whole of Greenland;
3. that, in any case, Norway was estopped by quid pro quo, a promise (the 'Ihlen Declaration') given by the Norwegian foreign minister in 1919 to desert from occupying any territory in Greenland.

On the other hand, Norway contended that Danish sovereignty in Greenland was restricted to the areas of its colonies, and that it did not therefore extend to the area that Norway had occupied since 10th July 1931. Furthermore, the attitude that Denmark had taken between 1915 and 1921 was inconsistent with its claim to pre-existing sovereignty over all Greenland, and consequently, Denmark was estopped from claiming that she possessed such a pre-existing

8) Ibid., p.39.
9) The Royal Norwegian proclamation was translated by the Registry of the PCIJ from the French translation filed by the Norwegian Government. Ibid., pp. 26, 43.
10) Ibid., p. 43.
12) Ibid., p. 44.
13) For Ihlen Declaration, ibid., pp. 36 et seq.
14) Ibid., p. 44.
The Court, however, accepted all the Danish Contentions and denied that, by her action, Denmark was estopped from claiming a historic sovereignty over all Greenland. Although it is the ‘Ihlen Declaration’ which subsequently aroused most attention, the decision on the first Danish contention was perhaps more controversial within the Court itself. Four out of fourteen judges found it necessary to state their disagreement on this point. The reasoning behind the judgment on this point therefore requires some explanation.

On 14th July 1919 the Danish Minister to Oslo called on Mr. Ihlen, the Norwegian Foreign Minister, and assured him in conversation that, at a forthcoming conference, Denmark would raise no objections to the sovereignty over Spitzbergen. He hoped that Norway would make no difficulty with regard to the Danish claim to Eastern Greenland. Mr. Ihlen replied that the question would be considered. On 22nd July 1919 Mr. Ihlen replied to the Danish Minister that the Norwegian Government ‘would not make’ (‘ne fera pas’) any difficulties in the settlement of this question. Under this gentlemen’s agreement, which is known as the “Ihlen Declaration”, the Court concluded that Norway would be under an obligation to refrain from contesting Danish sovereignty over Greenland. It is extremely difficult to assess the true juridical character of the Ihlen declaration. The conversation between Ihlen and the Danish Minister resulted in a bargain; the one promise was the consideration of qui pro quo for the other. But the Court evidently did not regard the Ihlen declaration as belonging to the category of estoppel, though an English lawyer might do so. The Court held that:

a reply of this nature given by the Minister for Foreign Affairs on behalf of his government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister

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16) Series A/B, No. 53, pp. 69-71. In de Visscher’s view the PCIJ has misunderstood the Ihlen declaration and the real point of the Danish-Norwegian decision is a distinction drawn by the Court between an unconditional, definitive, promise made unilaterally, which may be binding, and a vague assurance of benevolent support, which is not. See Charles de Visscher, Problèmes d’interprétation judiciaire en droit international public (Paris: Éditions A. Pedone, 1963).
It concluded that a Minister of Foreign Affairs, acting within the scope of his Country by a declaration or statement made to the representative of a foreign State. Judge Anzilotti, in his dissenting opinion, thought it must be recognised that the Minister for Foreign Affairs—the direct agent of the chief of the state—with authority to make statements or current affairs to foreign diplomatic representatives, and in particular, to inform them as to the attitude which the government, in whose name he speaks, will adopt is a given question can make declarations of such a kind which are binding upon the state. He further added that there was 'no rule of international law requiring that agreements of this kind must necessarily be in writing, in order to be valid'.

Judge Anzilotti then argued that what the Court should have done was to decide whether the Danish request of 1919 and the subsequent Ihlen declaration constituted a valid agreement between the two Governments. If so, Norway would be debarred from occupying the territory in Eastern Greenland. Moreover, he discussed the question whether the validity of a declaration made by the Norwegian Foreign Minister could have been vitiated by a mistake (Judge Anzilotti found that there was no mistake at all) as to the consequences of the extension of Danish sovereignty:

one can scarcely believe that a Government could be ignorant of the legitimate consequences following upon an extension of sovereignty.

On the arguments of the Parties,

17) PCIJ Series A/B, No. 53, p. 71. In State of Russia v. National City Bank of New York, the United States Circuit Court of Appeals held that the minister for foreign affairs of a State has the right to alienate State property by the execution of an assignment in his name. (1934) 69 F. (2d) 44; In the Minquiers and Ecrehos Case in which a letter of 14th September 1819, from the French Minister of Marine, together with a chart, was transmitted to the French Foreign Minister on 12th June 1820, by the French Ambassador. The letter contained a reference to the "island of... the Minquiers which are in the possession of England." Annexes to U.K. Memorial (No. A25), ICJ Pleadings, 1953, Vol. I, p. 174; On this point, Judge Basdevant observed: "If it is to be taken literally, this reference would resolve the manner in respect of the Minquiers, but it seems to me that one cannot attribute such authority to it.... It emanated from a Minister without authority to make decisions pertaining to questions of territorial sovereignty." See ICJ Reports, 1953, p. 80.

18) Dissenting opinion of Judge Anzilotti, PCIJ Series A/B No. 53, p. 91. In the Island of Lamu Arbitration where the German claims to the island was rejected, *inter alia*, by the fact that the verbal agreement by which it was alleged to have been granted the island was in an inadequate form. J.B. Moore, International Arbitration, Vol. 5, p. 4940.

19) PCIJ Series A/B, No. 53, p. 76.

20) Ibid., p. 92. In the Nuclear Tests Cases, the ICJ held that 'declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations... when it is the intention of the State making the declaration that it should become bound according to its terms'. See ICJ Reports, 1974, pp. 253, 457. For discussion, see Alfred P. Rubin, "The International Legal Effects of Unilateral Declarations", 71 AJIL (1977), p. 1.
the date at which the Norwegian occupation took place, 10th July 1931, was the 'critical date'\(^\text{21}\) for the establishment of Danish sovereignty.

The basis of this claim to sovereignty was not put forward by Denmark, nor by the Court in terms of 'occupation' or 'prescription'. Influenced by the Island of Palmas Arbitration of 1928,\(^\text{22}\) Denmark's claim was 'founded on the peaceful and continuous display of State authority over the island.' The Court defined very broadly the basic requirements for the establishment of such a title: there must be the intention and will to act as sovereign, and some actual exercise or display of such authority (although very little actual exercise of authority was necessary, especially in thinly populated or unsettled areas); and there must be no competing or stronger claim to sovereignty.

It is noteworthy that the Court seemed to base its reasoning on Savigny's theory of possession. According to Savigny, possession consists in two elements of physical control (\textit{corpus}), and intention to possess (\textit{animus possidendi}); but the latter is not merely an intention to exclude others; it is an intention to hold as owner (\textit{animus domini}).\(^\text{23}\) Thus the Court said:

... a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.\(^\text{24}\)

In deciding between two competing claims to territory, each country's claim should be considered as a whole, and the decision should be in favour of the country whose claim is the stronger.\(^\text{25}\) In accordance with this approach, the Court stated that up

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21) The technical learning about the "critical date" (i.e., the date by reference to which a territorial dispute must be deemed to have crystallised.) is important in territorial disputes it has become increasingly important since the arguments before the ICJ in the Minquiers and Ecrehos Case (ICJ Reports, 1953, p.47) made it inevitable that in the Argentine-Chile Boundary Arbitration (XVI RIAA, p. 115) and in the Rann of Kutch Arbitration (50 ILR, p.2) the respective Parties endeavoured to raise arguments concerning the critical date. For discussion, see L.F.E. Goldie, "The Critical Date", 12 ICLQ (1963), p. 1251.

22) Island of Palmas Arbitration, II RIAA, p. 829.


24) PCIJ Series A/B, No. 53, pp. 45-46 [Italics added]. This is the requirement of action \textit{animum occupandi}; but there must be some physical act coupled with it, i.e. the \textit{animum}.

25) \textit{Ibid.}, p. 46. What is of decisive importance, in the opinion of the ICJ in the Minquiers and Ecrehos Case, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups. See \textit{ICJ Reports}, 1953, p. 57. Cf. Western Sahara Case, \textit{ICJ Reports}, 1975, p. 43, para. 93; J. K. T. Chao, "The Western Sahara (Advisory Opinion) Case", \textit{人 \hspace{1em} 文 \hspace{1em} 社 \hspace{1em} 會 \hspace{1em} 科 \hspace{1em} 學 \hspace{1em} 論 \hspace{1em} 文 \hspace{1em} 集 (國際關係類) }" (臺北：臺灣商務印書館，民國七十二年初版), pp. 159–74.
to 1931 there was no claim by any Power other than Denmark to the sovereignty over Greenland. Indeed, up till 1921, no Power disputed the Danish claim to sovereignty. Therefore it is impossible for the Court to read the records of the decisions in cases relating to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of 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.²⁶ It seems that the Court was very much influenced by the two relatively recent awards on sovereignty over islands, the Island of Palmas and the Clipperton Island²⁷ arbitrations. One of the difficulties of the Court’s decision on this point, and the one which was clearly felt by four of the judges, was whether concepts drawn from two awards relating to relatively small islands were applicable in all aspects to a big island. The Court’s discussion of the evidence for the Danish ‘intention and will to act as sovereign, and... actual exercise or display of such authority’ shows a lack of consideration of the relative scale of the disproportion between the size of the landmass and the exiguous display of authority.

²⁶) PCIJ Series A/B, No. 53, p. 46. Cf. the dictum in the Island of Palmas Arbitration where the Arbitrator held that ‘sovereignty cannot be exercised in fact at every moment on every point of a territory...’ II RIAA p. 829.
²⁷) Clipperton Island Arbitration (1931), II RIAA, p. 1105.
²⁸) PCIJ Series A/B, No. 53, p. 46.
²⁹) Ibid.

Referring to the claims and rights of the Kings of Norway during the thirteenth and fourteenth centuries which derived from the tributary relationship of the settlements of Eystri-bygd and Vestrabygd (in the southwest of the island), the Court said:

So far as it is possible to apply modern terminology to the rights and pretensions of the kings of Norway in Greenland in the XIII and XIV centuries, the Court holds that at that date these rights amounted to sovereignty and that they were not limited to the two settlements.²⁸

The Court did not therefore give any indication of how far the settlements should be regarded as under Norwegian sovereignty at that date.

It had been contended on behalf of Norway that with the disappearance of the two nordic settlements of Eystri-bygd and Vestrabygd during the 14th century, Norwegian sovereignty was lost and the whole of Greenland reverted to terra nullius.²⁹ Legal bases suggested for this view were either ‘conquest’ or ‘voluntary abandonment’. The Court’s attitude to this question was ambivalent. On one hand, the Court held that sovereignty had been lost neither by conquest nor by voluntary abandonment. There
was no evidence of the latter, nor indeed of the former; and the Court found it difficult to apply the international legal concept of 'conquest' to a possible destruction of the settlements of indigenous Eskimos.

The word "conquest" is not an appropriate phrase ... Conquest only operates as a cause of loss of sovereignty when there is a war between two States and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious State. The principle does not apply in a case where settlement has been established in a distant country and its inhabitants are massacred by the aboriginal population.\(^{30}\)

Although the term 'conquest' is inappropriate in such a situation, yet the destruction of a settlement cannot fail to have an effect on title. If nothing else, where title, is rooted in suzerainty over persons, the disappearance of those persons is in effect a loss of the subjects over whom sovereignty is exercised and explicit "abandonment" is in such a case irrelevant. In respect to voluntray abandonment, the Court held that there was nothing to show any definite renunciation on the part of the Kings of Norway or Denmark.\(^{31}\) As Judge ad hoc Vogt observed:

Even admitting that an ancient sovereignty is not forfeited by dereliction, unless the *animus* is abandoned as well as the *corpus possessionis*, it must be conceded that the sovereignty could not be still in being some centuries after the extermination of the ancient colonies and the cessation of communications.\(^{32}\)

The question really is one of terminology: 'conquest' and 'dereliction' may seem inappropriate terms to apply to a particular set of facts, but nevertheless the concept of 'sovereignty' cannot realistically be divorced from some form of administration. When administration ceases, clearly sovereignty must eventually lost. The precise terminology used to describe this loss is therefore of secondary importance. In this case, the Court seemed unclear as to whether, in its view, sovereignty had been lost or not.

With respect to general claims to 'Greenland' made during the period between the disappearance of the first colonies and the founding of Hans Egede's colonies in 1721, the Court said:

That the King's claims amounted merely to pretensions is clear, for he had no permanent contact with the country, he was exercising no authority there. The claims, however, were no

\(^{30}\) *Ibid.*., p. 47.


disputed, No other Power was putting forward any claim to territorial sovereignty in Greenland, and in the absence of any competing claim the King’s pretensions to be the sovereign of Greenland subsisted.\footnote{33) \textit{Ibid.}, p. 48.}

The Court referred to ‘pretensions’ to sovereignty over Greenland as subsisting,\footnote{34) The Court also noted that ‘as there were at this date no colonies or settlements in Greenland, the King’s claim cannot have been limited to any particular places in the country’. \textit{Ibid.}, pp. 47-48.} and not to ‘sovereignty’ in so many words. Yet it also emphasised that these pretensions were ‘not disputed’ and that there was no competing claim. This apparently echoes the earlier observations on the slender requirements of exercise of sovereignty over similar territories. The necessary implication seems to be that \textit{animus} without \textit{corpus} was regarded as sufficient to maintain sovereignty in such special cases.

Until the period between 1721 and 1814 the establishment of colonies afforded a clear ‘manifestation and exercise of sovereign rights’ which together with the pre-existing \textit{animus} made up the \textit{corpus} and \textit{animus} of sovereignty once more. However, the problem remained as whether this meant sovereignty over the whole of Greenland. The situation, as in the earliest period, was that the actual settlements were in a relatively small part of South-West Greenland. The Eastern coast was still unexplored, the extent of the island, and even the fact that it was an island was unknown. The Court nevertheless relied on legislation in general terms referring to ‘Greenland’ as evidence of an exercise of sovereignty beyond the settlements:

\begin{quote}
Legislation is one of the most obvious forms of the exercise of sovereign power, and it is clear that the operation of these enactments was not restricted to the limits of the colonies. It therefore follows that the sovereign rights in virtue of which the enactments were issued cannot have been restricted to the limits of the colonies.\footnote{35) \textit{Ibid.}, p. 48.}
\end{quote}

A further aspect of interest is to compare this view with that of the ICJ in the \textit{Minquiers and Ecrehos Case} where the Court held that the legislative act was a clear manifestation of British sovereignty over the Ecrehos at a time when dispute over such sovereignty had not yet arisen.\footnote{36) \textit{ICJ Reports}, 1953, p. 66.}

The judgment of the PCIJ throws some light upon the nature of the acts required to show a continuous exercise of sovereignty. But again it offered no explicit conclusion as to how far these ‘sovereign rights’ did extend merely concluding that

\begin{quote}
...this date no colonies or settlements in Greenland, the King’s claim cannot have been limited to any particular places in the country’\textit{. Ibid.}, pp. 47-48.
\end{quote}
... bearing in mind the absence of any claim to sovereignty by another Power, and the Arctic and inaccessible character of the uncolonised parts of the country, the King of Denmark and Norway displayed during the period from the founding of the colonies by Hans Egede in 1721 up to 1814 his authority to an extent sufficient to give his country a valid claim to sovereignty, and his rights over Greenland were not limited to the colonised area.\(^{37}\)

Although the Court rejected the Norwegian contention that legislative act regarding "Greenland" related only to the colonised area, and certainly not to the East coast, it was careful not to state that Danish/Norwegian sovereignty over the whole of what is now known as a "Greenland" was to be implied by them.

Here again the Court's approach is ambivalent. This is not surprising in view of the indeterminate concept of "Greenland" before its coasts had been thoroughly explored. Even if the intention had been present to exercise sovereignty over the whole of the area, there was an obvious disproportion between corpus and animus. Judges Schücking and Wang admitted that there were historic Danish claims which had been put forward by Denmark in earlier centuries, and had not been seriously disputed by other states. But the exact significance of the documents which should demonstrate the exercise of this sovereignty remains somewhat uncertain. Because

the documents in question are legislative acts, the effective application of which, elsewhere than on the western coast—though it would have been an indispensable requirement under the international law even of that period—has not been sufficiently established. Even if all the circumstances, taken together, conferred a presumptive title upon Denmark, the history of the diplomatic overtures undertaken by Denmark between 1915 and 1921 in order to obtain recognition of her sovereignty over the whole of Greenland, proves ... that, at that time, Denmark herself did not maintain towards the other interested Powers the theory of an already existing Danish sovereignty over the whole country.\(^{38}\)

In dealing with the controversy over the question of the interpretation of the term "Greenland", the Court started from the proposition that the

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\(^{37}\) PCIJ Series A/B, No. 53, pp. 50-51.

\(^{38}\) Judges Schücking and Wang expressed their view that Denmark was desirous of extending her sovereignty to the whole of Greenland, with the assent of the States chiefly interested; and that the Norwegian occupation is unlawful and invalid. Observation by W. Schücking and Chung-Hui Wang. *ibid.*, p. 96. See *infra*, n. 54.
expression “Greenland” used by the contracting Parties referred to the geographical meaning of the term as shown in the maps, it added that these facts did not exclude that possibility that the expression was, however, used in some special sense. The Court, nevertheless, observed that this is a point concerning the burden of proof lies on Norway. The geographical, meaning of the word “Greenland” i.e. the name which is habitually seen on maps assigned to the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the parties that some unusual or exceptional meaning is to be attributed to it, it lies with that party to establish its contention. Norway had not succeeded in establishing her contention. It was not sufficient for her to show that in many of these legislative and administrative acts, action was only to be taken in the colonies. Most of them dealt with matters which only arose in the colonies and not in the rest of the country. The fact that most of these acts were concerned with what happened in the colonies and that the colonies were all situated on the West coast, is not by itself sufficient ground for holding that the authority by virtue of which the act was taken, whether legislative or administrative, was also restricted to the colonised area. Unless it was so restricted, it afforded no ground for interpreting the world “Greenland” in this restricted sense.39

Norway argued that in the legislative and administrative acts of the eighteenth century on which Denmark relied as proof of the exercise of her sovereignty, the word “Greenland” was not used in the geographical sense, but meant only the colonies or the colonised area on the West coast.40 It had been argued on behalf of Norway that “Greenland” as used in documents of this period could not have been intended to include the East coast because at the time the East coast was unknown. On this point, the Court was of the opinion that the general features and configuration of the East coast were known to cartographers in the seventeenth and eighteenth centuries, the land was sighted by whalers and it was generally known as “Greenland”.41

Yet the burden of proof might perhaps equally well have fallen the other way. It might, for example, have been said that, by the inter-temporal principle, that the term ‘Greenland’ should be interpreted in the context of the geographical notions of the time that the exploration and settlement of the area had been made. Since Greenland was not then known to be an island, it could not be thought of as a definite unity. The term used in legislation must normally

39) Ibid., pp. 49, 52. For “Clear Meaning”, see Yi-ting Chang, The Interpretation of Treaties by Judicial Tribunals (New York: Columbia U.P. 1933), Ch. II, pp. 22-60.
40) PCIJ Series A/B, No. 53, p. 49.
41) Ibid., p. 50.
be interpreted as referring only to the explored and settled area and perhaps to a reasonable "hinterland": *corpus* and *animus* should then be presumed to keep in step.

As for the period from 1814 to 1915, the Court's conclusion was unambiguous:

... Denmark must be regarded as having displayed during this period ... her authority over the uncolonised part of the country to a degree sufficient to confer a valid title to the sovereignty.42

The Court based this conclusion on a concession granted in 1863 to an Englishman, A.J. Tayler, which gave him exclusive rights to establish stations on the East coast for trading, hunting, mining etc., which contained the provision that any such station was to be placed 'under the sovereignty of the Danish Crown'. No such stations were in fact established. It had been argued by Norway that this very provision was evidence that the Danish Government did not consider that Danish sovereignty extended to the East coast of Greenland, and the anxiety publicly expressed by Danish citizens at this time on this account had also been emphasised. As to this, the Court explained:

Tayler was an Englishman. The Danish Government were aware that people in Denmark had been afraid that foreign Powers would attempt to make settlements on the East coast, and Article 2 [of the concession] was intended to make sure that the settlements established by Tayler should not be made the basis of a claim of occupation and sovereignty by the King of England.43

This was indeed very likely the explanation. Yet it implies the view that previously, at least, occupation by Denmark had been insufficient to support title to the East coast, and that a 'claim of occupation and sovereignty' might well have been made by another Power whose nationals succeeded in founding settlements there. It is difficult to see how a 'concession' which existed merely on paper and was never carried out, could affect this position. Moreover, 'manifestations of the exercise of sovereign authority' were concessions which had been granted for the erection of telegraph lines. The concessions provided for 'a survey for a telegraph-line across Greenland from the eastern to the western coast' and were abortive—a decree of 1905 which fixed the limits of territorial water round Greenland, reserved fishing rights to Danish subjects in a three-mile zone. Additional support for the Danish claim was found in

the legislation [which] she had enacted applicable to Greenland

generally, the numerous treaties in which Denmark, with the concurrence of the other contracting Party, provided for the non-application of the treaty to Greenland in general, and the absence of all claim to sovereignty over Greenland by any other Power ... 41

The effect of all the documents connected with the grant of the concession is to show that the King of Denmark was in a position to grant a valid monopoly on the East coast because his sovereign rights entitled him to do so, and that the concessionaires in England regarded the grant of monopoly as essential to the success of their projects and had no doubt as to the validity of the rights conferred.45 In this connection, one cannot avoid the conclusion that this evidence is of a negative character: a couple of abortive concessions, legislation which never applied outside the South-West coast settlements, provisions for the ‘non-application’ of bilateral commercial treaties to Greenland, and the ‘absence’ of competing claims.

In the period 1921 to 1931 there was greater Danish legislative activity with regard to the East coast, viz.: the Decree of 10th May 1921, the Decree of 16th June closing the seas around Greenland to navigation, the legislation of 1925 on hunting and fishing, and a law dividing the admission of French and British nationals to the position of most-favoured-nationals in Eastern Greenland. The Court said:

These acts, coupled with the activities of the Danish hunting expeditions which were supported by the Danish Government, the increase in the number of scientific expeditions engaged in mapping and exploring the country with the authorization and encouragement of the Government, even though the expeditions may have been organized by non-official institutions, the occasions on which the Godthaab, a vessel belonging to the State and placed at one time under the command of a naval officer, was sent to the East coast on inspection duty, the issue of permits by the Danish authorities, under regulations issued in 1930, to persons by the Danish the eastern coast of Greenland, show to a sufficient extent—even when separated from the history of the preceding periods—the two elements necessary to establish a valid title to sovereignty, namely: the intention and will to exercise such sovereignty and the manifestation of State activity.46

44) Ibid., p. 54.
45) Ibid., p. 53.
Thus, the requisite display of authority was seen in a ‘manifestation of state activity’ that did not in fact embrace the exercise of administrative control, but expressed itself in large part through bare assertions of state interest in an unoccupied area. Whatever doubts the Court had about the preceding periods, they were at least satisfied that during the ten years preceding the ‘critical date’, Denmark regarded herself as possessing sovereignty over all Greenland and displayed and exercised her sovereign rights to an extent sufficient to constitute a valid title to sovereignty over all Greenland.47

Judge Anzilotti, however, regarded the historic Danish claim to Greenland as an example of the extensive claims to land and maritime areas which fell into desuetude, to be replaced by colonisation and ‘effective occupation’. This was an ancient claim to sovereignty over the country known as Greenland, a claim unconnected either with the extent of the colonisation of the country, or even with a more or less accurate geographical demarcation thereof.48

It is agreed that the origin of this claim resides in the authority which the ancient kings of Norway had acquired over the political organization which inhabitants of Iceland, of NorwegIan origin, had founded at the end of the Xth century in South-West Greenland and which, at first independent, did homage to the King of Norway in 1261 and became tributary to the Kingdom of Norway. This species of suzerainty fitted in with the notion of an exclusive dominion of the Kings of Norway over the seas and lands of the North and offered the basis for a claim which was neither limited to the territory occupied by the tributary State nor subject to the condition that State should continue to exist.49

As a result, Judge Anzilotti regarded the evidence relating to a continued animus possidendi after the disappearance of these settlements as:

at bottom, nothing else than the old claim on the basis of which, first the Kings of Denmark and Norway and late the Kings of Denmark, did not hesitate to act as sovereigns of Greenland when opportunity offered itself.50

But granted the existence of a claim, the problem of its exercise still remained. Here Anzilotti emphasised the disproportion between the claim to sovereignty over all Greenland and the effective exercise

47) Ibid., p. 63. In determining the degree of effectiveness of occupation necessary to confer sovereignty, regard must be considered to the extent of competing claims of other States.
48) Dissenting Opinion of D. Anzilotti, ibid., p. 82.
49) Ibid., p. 64.
50) Ibid., p. 83.
of that sovereignty.\footnote{Ibid.} Anzilotti conceded that Danish legislation had not been passed, nor had it been limited in its scope to the colonised parts of Greenland, and that treaties with foreign states bore similar evidence of claims to sovereignty over the whole of Greenland. He observed, however:

It is undeniable and it has not been denied—and that in my view is the essential point—that in this respect there was a profound difference between the colonised regions of Greenland and the remainder thereof; for, whereas in the colonies there was a regular administration and a judicial organisation, in the remainder of Greenland these were perhaps laws in force but no authority to enforce them: in fact—and this is a circumstance as exceptional as it is significant—no officials had even been appointed competent to decide disputes or to apply and ensure respect for the law.\footnote{Ibid.}

It has been shown that “Greenland” is a geographical area as denoted on maps unless proved otherwise by Norway. This disproportion was not of significance so long as ‘the title to sovereignty existed independently of its exercise’. But in Anzilotti’s view such a title had lapsed before the eighteenth century:

Historic claims to dominion over whole regions—claims which had, formerly, played an important part in the allocation of territorial sovereignty—lost weight and were gradually abandoned even by the States which had relied upon them. International law established an even closer connection between the existence of sovereignty and the effective exercise thereof, and States successfully disputed any claim not accompanied by such exercise.

Furthermore, the natural conditions prevailing in Greenland and their importance changed appreciably as a result of technical improvements in navigation which opened up to human activities a part of that country, especially the East coast, which previously, although known, had been practically inaccessible.\footnote{PCIJ Series A/B, No. 53, p. 84.}

Thus, apparently, in Anzilotti’s view Greenland in 1721 was a \textit{terra nullius}, and acts of occupation subsequent to that date must be judged according to contemporary requirements of international law. This view was also
shared by Judges Schücking and Wang and Judge ad hoc Vogl.

It must be concluded for the decision and reasoning, in the case, that the principles of recognition of territorial claims and estoppel in particular, merit further attention. Let us now examine them as follows:

1. Recognition

The pliability of recognition as a general device of international law makes recognition an eminently suitable means for the purpose of establishing the validity of a territorial title in relation to other states. The concept of recognition played a part in this case in two ways: first, the effect of recognition of Danish sovereignty over Greenland by third states was considered, both in the form of incidental ‘recognition’ in treaties dealing with other matters and in the more direct form of responses to the explicit request for recognition made by Denmark between 1915 and 1921; second, the effect of recognition by Norway of Denmark’s claims to the whole area of Greenland was also considered.

On reading the judgment of the Court it is difficult to escape the conclusion that recognition of Danish sovereignty by the major Powers played a considerable part in the decision which the Court reached. The majority of the interested States such as France, Japan, Italy, Great Britain and Sweden show that they agreed to recognise that the Danish sovereignty extended to the whole of Greenland. The fact of such recognition, together with its concomitant that no other claim to Greenland had been made before that of Norway in 1931, was repeatedly emphasised by the Court. Perhaps because there is no easy category of international law which gives such recognition relevance, the Court rarely explicitly stated the relevance of this evidence, and to what extent it was effective against Norway. Logically, even if accumulated recognitions were not regarded as a mode of conferring title by the international community and ipso facto opposable to even non-recognising states, they still could not be dismissed as wholly irrelevant to any dispute over sovereignty. If it does not confer title, recognition affords at least indirect or circumstantial evidence of a situation of fact, i.e. that a particular state is, because it is regarded by other states as administering, in fact administering a certain territory. It is not evidence of sovereignty, but

57) e.g., the French reply on 31st March 1920, the Japanese reply on 24th June 1920, the Italian reply on 29th June 1920, the British reply on 6th December 1920, and the Swedish reply on 28th January 1921. See PCIJ Series A/B No, 53, pp. 58-60; see also Judge Anzilotti’s dissenting opinion, ibid., pp. 88-12.
evidence of the exercise of sovereign rights. On the negative side, it also no doubt estops, at least in certain circumstance, the recognising state from itself laying claim to the administration of the same territory. Also, it affords evidence that the state which is 'recognised' does claim sovereignty over the area in question.

With respect to a series of commercial conventions concluded by Denmark which contained stipulations to the effect that they should not apply to Greenland, the Court said:

The importance of these treaties is that they show a willingness on the part of the States with which Denmark has contracted to admit her right to exclude Greenland ... The importance of these conventions ... is due to the support which they lend to the Danish argument that Denmark possesses sovereignty over Greenland as a whole [and] to the extent that these treaties constitute evidence of recognition of her sovereignty over Greenland in general Denmark is entitled to rely upon them.58

But the Court did not state what impact such recognition has on the legal problem of title. Similarly, in considering the Danish requests for recognition of sovereignty over Greenland from 1915 to 1921, the Court, although emphasising that such recognition was granted by all those states of which it was requested except Norway, nevertheless treated these declarations in the context of estoppel only: as evidence, that is, of Denmark's claims and representations.

2. Estoppel

When an estoppel binds a state to an international litigation it is prevented from placing reliance on or denying the existence of certain facts. Although recognition and estoppel are technically distinct concepts, they inevitably become confused in practical use. In theory either recognition is 'constitutive' or 'declaratory':59 in territorial disputes it may then be regarded as constitutive of title or declaratory of a pre-existing title. It may be thought of as unambiguously constitutive in a case, for example, where sovereignty over a certain territory is recognised in a treaty of cession; or as purely decla-

58) PCIJ Series A/B No, 53, pp. 51-52.
ratory where the pre-existing situation, or the situation which might be created by the act of ‘recognition’, is unlikely to be unambiguous. In the context of any individual disputes ‘recognition’ is perhaps best regarded not as having of itself substantive legal consequences but as evidence of a factual situation or as creating an estoppel.

In this case, one of the peculiar features was that until 1931 there was no claim by any State other than Denmark to sovereignty over Greenland. Indeed, up to 1921, no State had ever disputed the Danish claim to sovereignty. Moreover, the Court considered the various acts of the Norwegian Government as ‘undertakings which recognised Danish sovereignty over all Greenland’. These were, first, the ‘Holst Declaration’ formally made by the Minister for Foreign Affairs of Sweden and Norway shortly after the cession of Norway to Sweden under the Treaty of Kiel, abandoning Norwegian claims to Greenland in favour of Denmark; second, a number of bilateral and multilateral agreements in which Greenland is described as a ‘colony’ or a ‘part’ of Denmark; and third, the ‘Ihlen Declaration’ of 22nd July 1919 was binding on Norway and barred a subsequent Norwegian attitude contrary to its notified intent. From the Ihlen Declaration, the Court reached the conclusion that Norway had debarred herself (or was ‘under an obligation to refrain’) from contesting a historic Danish sovereignty extending over the whole of Greenland.

In these circumstances, there can be no ground for holding that, by the attitude which the Danish Government adopted, it admitted that it possessed no sovereignty over the un-colonised part of Greenland, nor for holding that it is estopped from claiming ... that Denmark possesses an old established sovereignty over all Greenland.

The application of the principle of estoppel, in this case, is not necessarily conclusive as regards the facts admitted. Its force may vary according to the circumstance. Similarly in the Anglo-Norwegian Fisheries Case, the ICJ considered that the ‘prolonged

60) PCIJ Series A/B, No. 53, p. 46.
61) Ibid., pp. 64-66. The Convention of 1st September 1819, signed by the King of Sweden and Norway in his capacity as King of Norway and the King of Denmark, stated that ‘everything in connection with the Treaty of Kiel’ of 1814, which inter alia reserved Greenland to Denmark, ‘was to be regarded as settled’. Ibid., pp. 66-68.
63) PCIJ Series A/B No. 53, p. 36.
64) Ibid., pp. 68-69.
65) Ibid., p. 62 [italics added].
abstention' of the United Kingdom from protesting against the Norwegian system of straight baselines in delimiting territorial waters was one of the factors which, together with the general toleration of the international community, estopped the United Kingdom's action.  