

NAVASSA: LEGAL NIGHTMARES IN A BIOLOGICAL HEAVEN?

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INTRODUCTION

Navassa is a small island, only 5km² in size, located in the Caribbean Sea, approximately 40 miles from the Haitian coast in the Windward Passage and Jamaica Channel between Haiti and Jamaica, at 18° 24' N, 75° 02' W. Isolated, without natural fresh water sources, presenting difficult rocky terrain, perilous for landing (it has only off-shore anchorage), the island has proved over time to be rather unfriendly to humans. Apart from the remaining guano, no natural resources such as oil or mineral deposits, are reported. However, Navassa is proving to be, both on land and in its surrounding waters, a biological haven of extreme importance, as assessed by a recent scientific expedition.¹

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The island was discovered in 1504 by a group of Spanish seamen attached to one of the exploratory expeditions led by Columbus.² Generally reproduced in maps thereafter, it did not attract the attention of the States involved in the area and for centuries remained at the fringes of local history. The island only emerged from obscurity in 1857, when it was occupied by American citizens searching for guano³ and brought under US jurisdiction in accordance with the 1856 Guano Act.⁴ The then Empire of Haiti, once informed of events on Navassa and after reported hesitations,⁵ moved to assert its own claim of sovereignty. In 1858 two vessels were sent to the island and Haitian officials proclaimed the island to be a dependency of the Empire, inviting the diggers to ask for Haitian permission to operate there and subsequently ordering them to abandon Navassa. No action was taken to enforce this order, however.⁶ Following these events a US vessel proceeded to Port-au-Prince to inform the Haitian government of the American position and that the US would keep “*a cruiser there to protect Americans as long as they remained there.*”⁷

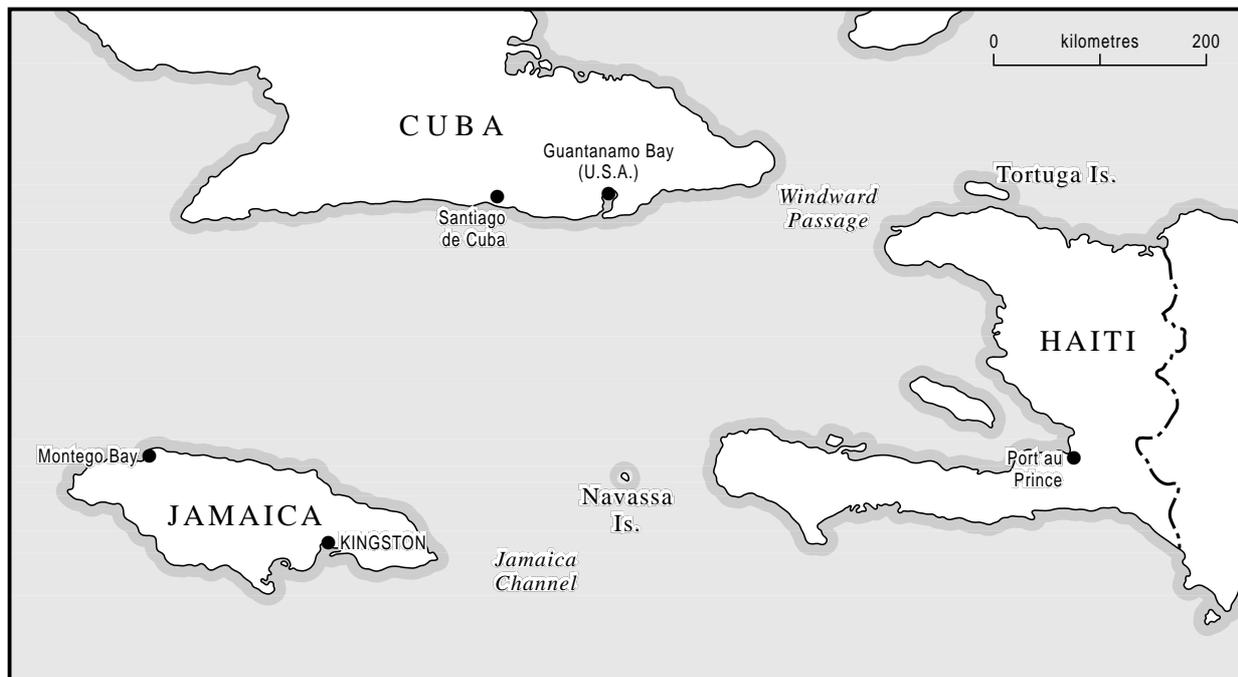
Mr B.C. Clark, Commercial Agent of Haiti in Boston (there being no diplomatic relations between the two countries at the time), was instructed to present Haiti's claim to the US Secretary of State who soon replied in the negative.⁸ A new exchange of letters followed in 1872-1873⁹ but both parties remained anchored to their original positions. Haiti's request to have a third party decide the matter was rejected. American citizens continued exploiting guano resources on the island, giving origin to several judicial cases in the meantime and the consequent interest of US courts. Haitian protests denouncing the US occupation of Navassa did not cease and the island was specifically named as part of Haitian national territory by all Constitutions adopted after 1856. Guano mining stopped at the end of the nineteenth century but American interests in the island increased due to the strategic and maritime safety considerations arising from the opening of the Panama Canal in 1914.¹⁰ Two years later in 1916 the dangerous nature of the maritime passage prompted the US to build a lighthouse on the island and proclaim its use for lighthouse purposes.¹¹ Technical personnel were dispatched to Navassa, to be later substituted by an automatic navigational beacon which was decommissioned in 1996.

Haiti continued to allow its citizens to use the area (without any consistent US actions being taken to regulate activities on or around the island¹²) and in the 1950s Haitian authorities built a church for the spiritual needs of passing fishermen. In 1989 the Haitian government also approved of the gesture of six Haitian radio ham operators (transported there by helicopters provided by President Duvalier, seemingly in his official capacity) who transmitted briefly

from Navassa. The Haitian Communications Authority also allocated the island with an Haitian call prefix.¹³

The Center for Marine Conservation (CMC) scientific expedition¹⁴ and subsequent US orders aimed at preserving the environmental sensitivity of the island once again raised Haitian protests and contributed to the reinvigoration of the 143 year old dispute.¹⁵

Navassa Island



HAITI'S CLAIM

Haitian governments have always held that the State's title to Navassa derived from its inclusion in the French possessions established over Hispaniola in the 17th century, formally transferred from Spain to France in accordance with the *Treaty of Ryswick* in 1697¹⁶ and passed on to Haiti on its independence from France (it had formerly been the colony of St. Domingue).¹⁷ The *Treaty of Ryswick*, however, did not mention Navassa, nor indeed did it mention St. Domingue. By means of Article IX, the parties called for mutual restitution of places ("*Toutes les Villes, Places, Forts, Châteaux, & Postes*"¹⁸), which either side had occupied, "*en quelque Lieu du Monde qu'elles soient situées.*"¹⁹

The boundaries of the French colony...were... drawn by the Aranjuez Convention of 1777 which did not refer to Navassa or to other islands around Hispaniola.

French settlement of western Hispaniola had begun in the 1620s, spreading from Tortuga Island where a colonial Governor had been appointed in 1659. A Governor of "*La partie française de St. Domingue*" was appointed in 1665.²⁰ After the raids by Spanish and British forces during the War of the League of Augsburg (1689-1697), the peace treaty recognised the permanence of the French settlements on the island. The boundaries of the French colony (and consequently of Spanish Santo Domingo) were later drawn by the *Aranjuez Convention* of 1777 which did not refer to Navassa or to other islands around Hispaniola.²¹ Haiti considers them to have been included implicitly in the Ryswick deal, and, in fact, for some of them, this contention seems to rest on valid grounds. Tortuga is one such example, mainly for historical reasons; it was the stronghold from which French settlement spread over Western Hispaniola and it is also situated just two miles off the north coast of the mainland. Other islands present either one or both of the characteristics which

make them undoubtedly part of the Haitian State: i.e. common historical background with the French settlements and the very short distance separating them from the mainland, being located within the historical three-mile territorial sea limit.²² Most of these islands are, in normal circumstances, even when beyond such limits,²³ visible to the human eye from mainland Haiti.

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There appears to be no record of the French administration involving itself with Navassa. The early history of independent Haiti confirms the approach of the previous colonial authorities. In actual fact, scattered evidence would seem to suggest complete indifference, if not ignorance of the place. The instructions that the Foreign Minister of the Kingdom of Haiti, the Duke of Limonade, addressed to Mr T. Clarkson, who had been appointed special agent of Haiti for her potential dealings with France, stated the King's will "*Que sa Majesté Chretienne, Roi de France... reconaisse Haiti (c'est-à-dire le territoire de cette partie de Saint Domingue qui appartenait anciennement à la France, avec les îles independantes: la Tortue, la Gonâve, les Cayemittes, l'Île-à-Vâche et Beate)*" (emphasis added).²⁴ The value of the instructions does not lie in their 'international' nature but in the light that they can shed on the question of Navassa, as perceived by Haiti herself.

The Duke of Limonade was the minister of a government which controlled only the north of the country, while the southern part was under a Republican regime.²⁵ Nevertheless, the document referred to islands both to the north and south of the country (each government claiming sole legitimacy). Yet Navassa was not included. The significance of this exclusion is underlined by the fact that the size of Navassa is comparable to some of the quoted islands and that no residual formula is present.²⁶ The fact that the Kingdom of Haiti did not have provisions relating to adjacent islands in its Constitution of 1811 may have a certain relevance (however this lack of legal provisions did not stop King Christophe from claiming various islands in the sea surrounding Hispaniola) but it does not change the essentials of the arguments presented above.

If historical records seem insufficient to validate Haiti's claim, might support be forthcoming from the geographical characteristics of Navassa? In international law, geographical criteria in support of territorial claims are limited to the so-called principles of continuity and/or contiguity.

Continuity

Continuity applies when islands are located within the territorial sea limit of a State. There is a very strong presumption that in such circumstances the coastal State has territorial sovereignty over the islands in question.²⁷ In this case however, Navassa lies 40 miles off the coast of Haiti, outside current territorial sea limits and any that existed in the past.

Continuity applies when islands are located within the territorial sea limit of a State.

Continuity also applies when a State has clear sovereignty over part of a territorial-natural unity, which is thus extended to the whole of such a unity. It is a type of presumption, required since sovereignty cannot always exist or be proven for each single parcel of land.²⁸ But what is a territorial-natural unity? Some cases are quite widely-recognised, e.g. a group of isolated and closely-situated islands, but, in general, perceptions of such a unity tend to differ quite radically, depending on the perspective,²⁹ thus potentially depriving the principle of any determinative application.

The maritime environment has tended to remain extraneous to these theorisations which, even in their terrestrial dimension, were always far from being universally accepted and recognised.³⁰ A similar but more limited approach, however, found its way in to the international maritime practice of

States under the name of “*portico doctrine*”, which was summarised in the Eritrea-Yemen Award of 1998³¹ in the following way:

...by the same rationale [natural unity] a complementary question also arises of how far the sway established on one of the mainland coasts should be considered to continue to some islands or islets off that coast which are naturally “proximate” to the coast or “appurtenant” to it. This idea...was given the name of the “portico doctrine” and recognised as a means of attributing sovereignty over off-shore features which fell within the attraction of the mainland (emphasis added).

As early as 1861 H.W. Halleck, referring to “...islands in the sea, which do not derive their elements, as the principle of alluvium and increment, immediately from the main shore, but are separated from it by deep channels, of a greater or less width” had affirmed that:

Such islands, if in the vicinity of the main land, are regarded as its dependencies, unless some one else has acquired title to them by virtue of discovery, colonization, purchase, conquest, or some other recognized mode of territorial acquisition...The ownership of the main land includes the adjacent islands, even though no positive acts of ownership may have been exercised over them...But if such islands be in the sea, distant from the main land, their ownership follows the general rule of discovery, occupancy, colonization, purchase and conquest (emphasis added).³²

The dependency or attraction factor is not limited to location within the territorial sea limit. But what constitutes “*vicinity to the mainland*” or “*distant from the mainland*” has always been a contentious issue.³³ Haiti’s claim would seem to be that Navassa clearly falls within the attraction sphere of mainland Hispaniola. If this were acknowledged, Haiti’s claim would be strengthened by the fact that its Constitutions preceding US involvement all referred to dependent islands as being part of the State’s territory. According to the first Haitian Constitution (8 July 1801) the territory of the Colony extended to “*Samana, la Tortue, la Gonâve, Les Cayemites, l’Ile-à-Vâches, la Saône et autres îles adjacentes.*”³⁴

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From 1805 onwards the constitutional formula is almost identical: “*L’Ile d’Haiti et les îles adjacentes qui en dependent forment le territoire...*”³⁵ The reference to a non-specified relationship of dependence (“*qui en dependent*”) did not clarify matters.³⁶ It is interesting to note that a similar expression found its way into an international instrument, the *Friendship, Commerce and Navigation Treaty*³⁷ concluded with the Dominican Republic in 1874, according to which the parties were obliged not to alienate or compromise part or whole of their territory including “*les îles adjacentes qui en dependent.*”

The matter has still to find a universally applicable solution. The International Court of Justice (ICJ) has had to confront the issue at various times. In the *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua Intervening)* the Court actually provided a partial definition of what constitutes a dependency and, implicitly, a territorial unity: “*the small size of Meanguerita, its contiguity to the larger island, and the fact that it is uninhabited, allow its characterization as a ‘dependency’ of Meanguera.*”³⁸ No definition of contiguity was given. The short distance of Meanguerita from Meanguera does not exclude that contiguity can apply in the case of Navassa. In the *Minquiers and Ecrehos Case (France v. Great Britain)* the islands were defined as dependencies of the Channel Islands,³⁹ which meant that contiguity need not be interpreted only in terms of extremely short

distances (though the shorter they are, the more likely it will be for an adjacency relationship to arise⁴⁰). The recent *Case on the Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* was solved without the ICJ having to further analyse this concept.⁴¹

...in international law territorial unity tends to be based more on traditional or historical perceptions rather than on geographical characteristics...

The conclusion to be drawn from these cases then is that in international law territorial unity tends to be based more on traditional or historical perceptions rather than on geographical characteristics, notwithstanding the fact that the latter may well influence and determine the former. On this basis it could be argued that an adjacency relationship exists based on historical and present day use of the island and its surrounding waters by Haitian fishermen and dependency or attraction of the mainland could be interpreted in social and economic terms. The limit to this line of reasoning is represented by the sovereign value that private activities would thus acquire, in the face of a jurisprudence which has always tended to exclude them from this ambit. The same principle would apply to maps.⁴² If historical, economic and social perceptions are to be considered valid in determining dependency, unofficial maps could acquire a value which is not generally recognised.⁴³

Contiguity

Given the legal difficulties surrounding continuity, can the related principle of contiguity offer any solutions in this case? The answer is a mixed one, as contiguity has even more problematic applications in international law than continuity and indeed is often identified with it.⁴⁴ A possible use of the principle may serve to create a slight presumption in favour of territorial sovereignty of the nearest State to the land in dispute. To some it is not really a presumption but a sort of inchoate title to be perfected by subsequent action. In the words of Mr Fish, US Secretary of State, in his note to the Haitian Minister who had protested once again in 1872 against US occupation of the island:

As Hayti [sic] was unable to show an actual possession and use of the island [Navassa], or an extension and exercise of jurisdiction and authority over it, before the discovery of guano by Americans...her pretension of proprietorship of, and sovereignty over, the island was inadmissible...the absence of proof of such acts... could not be supplied by the facts of the proximity of the islands to her territory...The utmost to which the argument in her favour amounts to, is a claim to...a right of possession; but in...international law such claim of a right to possession is not enough to establish the right...to exclusive territorial sovereignty...The exercise of jurisdiction is one of the most valid pieces of evidence of sovereignty; the extension of laws of an empire over a colonial possession forms one of the chief muniments of that nation's title to sovereignty over the colony; and the absence of these...links... appear fatal to that claim, nor can this absence be supplied by the facts of contiguity..." (emphasis added).⁴⁵

Interestingly enough, Fish qualified his position on this point by comparing the case of Navassa with other island disputes in which the US had recognised the non-existence of its title, Alta Vela and Key Verd. Among the reasons which had led to the abandonment of the US claim, was the fact that these two islands were "**much nearer to the mainland and adjacent islands**" (emphasis added) than Navassa.⁴⁶

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Even the inchoate title possibly emerging from 'proximity' was far from being a recognised rule. Judge Huber's Award in the *Isle of Palmas Case* denied this possibility by stating that: "...it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial

waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size).” Even its value as a mere presumption “*would be in conflict with...territorial sovereignty*”, and its use as a method to determine issues of this kind, because “*it is wholly lacking in precision*”, would “*lead to arbitrary results.*”⁴⁷

THE US CLAIM

The contention would seem to have been that, because of Haiti's lack of action...any inchoate title or preference right which Haiti could have claimed, had long since disappeared leaving Navassa as *res nullius*.

The language used by Fish in 1872 underlined the importance of “*effectivités*” when proving or defending a title to territorial sovereignty. The contention would seem to have been that, because of Haiti’s lack of action and the previous lack of action by Spain and France, any inchoate title or preference right which Haiti could have claimed, had long since disappeared leaving Navassa as *res nullius*. But effective administration, relevant as it may be, and indeed title to territory itself, is not always easy to determine, especially when it refers to isolated and non-inhabited locations. However, it is useful to recall the Permanent Court of International Justice (PCIJ) remark that “*it is impossible to read the records of decisions in cases as to territorial sovereignty without observing that...the tribunal has been satisfied with very little in the way of actual exercise of sovereign rights...*”⁴⁸

Judge Huber had already pointed out that “*Manifestations of territorial sovereignty assume...different forms, according to conditions of time and place.*”⁴⁹ The same criterion can be applied to the early phases of Navassa’s history. The US has always contended that Haiti never exercised any kind of jurisdiction or administration over the island without, however, denying that isolated and/or uninhabited locations need less in terms of concrete activity to prove the exercise of sovereignty. In a remarkably similar case concerning the island of Alta Vela (located south of Hispaniola),⁵⁰ the then US Secretary of State recognised the Dominican Republic’s sovereignty on the basis of a Dominican law enacted in 1855 which included Alta Vela, by specifically mentioning it, in one of the Dominican provinces.⁵¹ If any similar instrument could be found for Navassa, the American claim would then be seriously undermined. Haiti’s Constitutions might provide such an instrument,⁵² except for the fact that explicit identification of the adjacent island as being “*La Tortue, la Gonâve, les Cayemites, la Navaze, la Grosse-Caye et toutes les autres qui se trouvent placées dans le rayon des limites consacrées par le droit des gens*” (emphasis added) was made in the 1874 Constitution (Article 2), adopted after the dispute had arisen, and by all subsequent ‘Lois Fundamentaux’.⁵³ It is not, therefore, as decisive an element as it could have been due to the operation of the principle of the ‘critical date’.⁵⁴

The US has consistently declared that Navassa was under the sovereignty of no other nation when occupied by American citizens...

The US has consistently declared that Navassa was under the sovereignty of no other nation when occupied by American citizens and brought under American jurisdiction in accordance with the 1856 Guano Act. Consequently, the traditional rules on occupation would apply to Navassa, this being in 1856 *res nullius*. The Act provided that “*Whenever any citizen of the United States discovers a deposit of Guano on any island, rock, or key, not within the lawful jurisdiction of any other Government, and not occupied by citizens of any other Government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.*”⁵⁵

The President had full discretion as to whether to consider the qualified islands as appertaining to the US, and the meaning of “*appertaining*” was purposefully left undefined. The term was especially chosen because it was “*deft, since it carries no precise meaning and readily lends itself to circumstances and the wishes of those using it.*”⁵⁶ In fact, this quality of being undefined seems to have

been more a question of trying to legitimise and encompass completely different attitudes under one single heading than simply of being merely ambiguous. The fact is that the *animus* of the US Executive has not always been consistently that of acquiring sovereignty over Navassa and other guano islands, at least not until the early 20th century. In some instances, American sources denied that sovereignty was ever intended to be an issue.

And in the case of Navassa the US Executive did not even bother to proclaim the island a US appurtenance...

The main drafter of the Guano Act, Senator W.H. Seward, said that “*the bill is framed so as to embrace only those more ragged rocks, which are covered with this deposit in the ocean, which are fit for no dominion, or for anything else, except for the guano which is found upon them. There is no temptation for the abuse of authority by the establishment of Colonies or any other form of permanent occupation there.*”⁵⁷ The whole character of the Act was more focused on the rights and interests of American citizens. For example, it was specifically for their protection that the President could have used the country’s naval and land forces (Section 1417). Similarly the US Circuit Court for the District of Maryland in *Grafflin v. Navassa Phosphate Company*, came to the conclusion that “*Looking to the language and purpose of the [Guano Islands] Act...we find nothing which indicates that it was the intention of Congress to claim title to or recognize in the discoverer...any title to the land; on the contrary, the provisions of the law entirely negative any idea that such islands were in any sense to become part of the territorial domain of the United States*” (emphasis added).⁵⁸ And in the case of Navassa the US Executive did not even bother to proclaim the island a US appurtenance but limited itself to declaring that the American citizens involved were entitled to the rights and privileges provided for by the Act.⁵⁹

More significantly, an internal memorandum⁶⁰ prepared in 1904 for the Assistant Secretary of State A.A. Adee clearly stated that “*The United States possesses no sovereign or territorial rights over guano islands*”, and that the Act “*simply protects American citizens who discover guano on an island...in the prosecution of their enterprise which extends only to appropriation and disposal of guano.*” When asked officially in 1907 by the Isthmian Canal Commission about the political status of Navassa, Adee replied that “*it cannot be claimed that this or other guano island ‘belong’ to the United States.*”⁶¹ Earlier that year the Department of State had expressed an identical opinion: “*...the United States possess no sovereign or territorial rights over guano islands.*”⁶²

But the Act lends itself to other interpretations that appear to contradict this opinion. Section 1416 provides that all acts done by persons who may land on any island considered to be appertaining to the US “*shall be held and deemed to have been done or committed on the high seas, on board a merchant ship or vessel belonging to the United States, and be punished according to the laws of the United States relating to such ships or vessels and offences on the high seas; which laws...are hereby extended to and over such islands, rocks or keys.*” Thus American jurisdiction was extended to its guano appurtenances.⁶³ Though jurisdiction is certainly not sovereignty, it is inextricably connected to it. When evaluating whether effective sovereignty has been exercised over a disputed piece of land, criminal (and civil) jurisdiction has always tended to be at the forefront of the evidence to prove the existence of an effective administration and, thus, of title to territory that derives from it.⁶⁴ Significantly, guano legislation also provides that the “*introduction of guano from such islands... shall be regulated as in the coasting trade between different parts of the United States, and the same laws shall govern the vessels concerned therein*” (emphasis added). Accordingly, when a British vessel engaged in transport between Navassa and the mainland US in 1860, American authorities

confiscated the vessel as the Navigation Act prohibited “foreign-owned vessels from transporting merchandise between ports of the United States.”⁶⁵

‘Annexation’ was a term used by US officials when referring to the Declaration of Appurtenance.

The final Section of the Act states that “Nothing...shall be construed as obliging the United States to retain possession of the islands, rocks or keys after the guano shall have been removed from the same.” It is not sovereignty the Act is referring to but it is obviously rather more than a mere question of protecting US citizens. It is possession of the islands, to be continued or interrupted after the mining of guano has ceased.

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Perhaps more significant than the Act itself is the language that surrounded its early application. ‘Annexation’ was a term used by US officials when referring to the Declaration of Appurtenance.⁶⁶ It was intended by some to be temporary but it was annexation all the same, and thus indicated an extension of state sovereignty, as annexation usually has a definite meaning only when referring to complete territorial dominion. The US Supreme Court, in its 1890 decision⁶⁷ in a way confirmed this tendency by qualifying the Guano Act and its application as belonging to the realm of the principle of occupation of *res nullius*, so that “the nation may exercise such jurisdiction and for such period as it sees fit over the territory so acquired.” Furthermore, the Supreme Court of Massachusetts had clearly stated in 1871 that the “United States had acquired...a title in the island by discovery and lawful possession, as authorized by the Law of Nations.”⁶⁸

The US claim to Navassa has always been based upon the contention that the island was *res nullius*. If this were so, sovereignty could have been acquired by means of occupation. This needs effective possession of the land (*corpus*) as well as the intention of acquiring sovereignty (*animus*).⁶⁹ As far as the former is concerned, the American record is evidently more relevant than the Haitian one. Effective administration of the island has been indirectly recognised, albeit as illegal, by Haiti herself when protesting against US public acts concerning Navassa. The very nature of the place justifies certain gaps in the enforcement of US laws over the island.

...prior to 1916, the US had been claiming possession but not sovereignty in its fullest sense, the consequence being that the US could prevent any other government claiming Navassa...

It is the second element (the *animus*) which is not so clearly defined. The intended flexibility of the concept of appurtenances was never so wide as to justify the internal inconsistencies of the US attitude to the question. In general terms, it would seem that, prior to 1916, the US had been claiming possession but not sovereignty in its fullest sense, the consequence being that the US could prevent any other government claiming Navassa without taking measures to acquire full territorial sovereignty over the island for itself. Mr Adee's reply to the Isthmian Canal Commission, after affirming that guano islands did not belong to the US, went on to state that “Nevertheless, it would appear that internationally speaking this Government is in a position to assert full authority over Navassa Island should such action be deemed desirable.”⁷⁰ Thus up to 1907 such full authority had not been asserted, but, because of the American course of action, this constituted an option left open to the US alone and to no other Government. And the quoted opinion of the Solicitor for the Department of State concluded that “there could [not] be any reasonable objection on the part of any other government to a change in the manner of our occupation of a guano island like Navassa, and the assertion on our part of full sovereignty thereover.”

Can this position be accepted in international law, i.e. that a land is not *res nullius* because of effective possession of an authority which does not want to claim territorial sovereignty over it but seemingly prevents other governments from exercising their sway? It is undoubtedly peculiar⁷¹ and even more so if

one considers the additional element of a Haitian claim. So there was, at least for a time, one government which possessed the island without wishing to be its territorial sovereign and another which did not exercise any authority over it but claimed it as sovereign in its original title.

This state of limbo seemed to disappear in 1916 when the island was designated for lighthouse purposes. The relevant Presidential Proclamation contained quite an interesting introduction according to which, “*pursuant to the foregoin [sic] Act of Congress [Guano Act], the island of Navassa is now under the sole and exclusive jurisdiction of the United States and out of the jurisdiction of any other Government*” (emphasis added). Since 1916, the US has claimed Navassa as part of its own territory thus rendering this proclamation the closest to a full claim to sovereignty.⁷²

...Order No. 3205 (16 January 1997) concerning the administration of the island, candidly stated that it was adopted “In furtherance of United States sovereignty over Navassa Island.”

There remained a certain residual degree of ambiguity in the legal status of the island within the US territory, well expressed by the fact that it is “*one of only two jurisdictions under United States sovereignty not within the ordinary ambit of a US District Court.*” However, Order No. 3205 (16 January 1997) concerning the administration of the island,⁷³ candidly stated that it was adopted “*In furtherance of United States sovereignty over Navassa Island.*” Moreover, newspaper sources in 1996 reported that there was a state of confusion insofar as which agency or branch of the administration had responsibilities over the place, with the General Services Administration even claiming that no title to the island existed.⁷⁴ In 1997 Order No. 3205 was adopted by the Secretary of the Interior, delegating to the Director of the Department of the Interior’s Office of Insular Affairs its responsibilities for Navassa.⁷⁵ By Order No. 3210 (3 December 1999) the island and the surrounding waters up to the twelve mile limit were transformed into a National Wildlife Refuge under the management of the US Fish and Wildlife Service which assumed full administration of Navassa.⁷⁶ The island is closed to the public but enforcement of the prohibition is still rather ineffectual.⁷⁷

It is possible that the above mentioned ambiguity and confusion in the American approach is partly to blame for its having entrusted to private citizens the onus of proving the *res nullius* character of the island before granting them protection and proclaiming the locations as appurtenances of the US. In replying to the initial Haitian protests, the American position was that “*a citizen of the United States having exhibited to this Department proofs which were deemed sufficient that the island was derelict and abandoned...*”, the Guano Act could consequently apply. It is difficult to evaluate how private parties would have offered sufficient proof of the *res nullius* character of the area, apart from demonstrating that no concrete sign of administration was visible.⁷⁸ Subsequent disputes with other States showed that the assessment capacity of private parties of the *res nullius* quality was not very reliable, to say the least. Such deficiencies had serious internal legal consequences for the application of the Guano Law and, consequently, on the occupation exercised by the Americans. In 1859 in a legal opinion concerning the Act, the Attorney-General of the US, Mr J. Black, contended that the President could not annex any island if there existed a contending claim to it by another government, until the dispute had been resolved.⁷⁹

It could be argued that the internal legal defects concerning the US operation on Navassa may well have impaired the international value of the US course of action, that is, the expression of its *animus occupandi*, by trespassing the limits which the US had imposed on itself and which disciplined the expression of the *animus* and *corpus occupandi*. But this line of reasoning is not wholly convincing. It is a well-established principle of international law that a State can

not justify its illegal behaviour in the international sphere on the basis of an internal law or regulation. Conversely, a violation of an internal law can not be brought against a State's course of action if the latter is in accordance with international law. In other words, the fact that the US may have violated its own laws in pursuance of the occupation of Navassa is not relevant in determining the legality of the US conduct in the international sphere, the legality of occupation *per se*. Obviously a completely different (but relevant) question is whether internal legal inconsistencies have affected the international stance of the US, i.e. the action and opinion of the American government on the international plane.

Aquisitive Prescription

...does the fact of US administration of the island for over a century provide sufficient grounds for a claim based on prescription?

If the US title to Navassa is considered not to rest on valid grounds, does the fact of US administration of the island for over a century provide sufficient grounds for a claim based on prescription?⁸⁰ Four criteria need to be met for the latter to occur: peaceful and uninterrupted, public possession exercised à titre de souverain for a certain length of time.⁸¹ There would be two objections against the US in this case: the inconsistencies in the *animus* of the occupant; and, the continuous claim to the island by Haiti à titre de souverain, which never acquiesced to US occupation. According to some authors, diplomatic protests and notes, which have been the main expression of Haiti's discontent, are not sufficient to block the process of prescriptive acquisition, especially if considered within a legal context which at the time still allowed for the use of force as a legitimate means of acquiring territorial sovereignty. The argument is that if a State could have legitimately acquired a parcel of land by conquest, another State rejecting such claimed sovereignty should have been prepared to go to war – i.e. to use force – to protect its alleged rights.⁸²

This argument could, however, be reversed, so that use of force should have been the option of the State which had effective administration of the contended location against the claimant State in order to have it cease its “*defiance*” (though the onus of action, in this case, would thus shift on the party which has effective control of the island, a position probably inconsistent with the value that international law grants on the principle of effectiveness).⁸³

This reasoning is only of limited value for the present issue. The US did not go to war for Navassa because it contended that the island belonged to no one at the time of its interest in it. Direct military confrontation was avoided by both sides. As to whether conquest could be a better title on the American part, force or rather the threat of the use of force was undoubtedly instrumental in the US administration of the island. Can this amount to conquest? Some jurists argue that in the 19th century conquest as a mode of acquiring sovereignty had to satisfy specific conditions (a state of war to be initiated and terminated, a manifest intention to acquire territorial dominion). To others such conditions and limits really did not apply and the simple taking by force of a territory (and the capacity of holding it) sufficed to allow the transferral of sovereignty. If the first opinion were to be valid, prescription on the part of the US could have corrected the original error or imperfection in the American title. But there is a forceful argument in favour of prescription not having occurred due to continuous Haitian claims (so that the actual exercise of sovereignty on the part of the US was never peaceful).⁸⁴ Thus the solution to the legal dilemma probably still lies in whether Navassa was *res nullius* at the time of American involvement.

CONCLUSION

An evaluation of the differing claims for the purpose of establishing who has sovereignty over Navassa is similar to an attempt to untie the Gordian knot, an inextricable bundle of history, presumptions and legal theories. In fact, this knot is even more difficult to loosen than its Gordian 'ancestor' because unilateral action would not put a definitive end to the question. The sword needed here would be the obvious convergence of positions by means of an agreement between the two claimants: a bilateral instrument.

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As this does not seem likely to happen, what can be said of the validity of the titles presented by both parties? At first sight, the US position would seem to be the more legally sound of the two. Effective administration and acts of jurisdiction, both civil and criminal, have been taking place for over 100 years, though the *animus* of it has not always been straightforward. On the Haitian side, there seems to be no sign or proof of effective rule over Navassa, either during colonial rule or after independence. The main basis of Haiti's claim lies in the possible application of the continuity and contiguity principles.

Although these principles are rather ambiguous and lack a definitively established precise scope of application it should be noted that innumerable isolated parcels of land have never experimented effective administration (even in the extremely light form which is internationally accepted for deserted or inaccessible locations) and yet they are considered as part of one nation or the other. In many of these instances, definitive rules such as the territorial sea limit may apply. But when this is not the case, the legal claim of sovereignty is based on these same ambiguous concepts of continuity and contiguity or on other expressions of such principles such as the "*attraction of the mainland*" or territorial-natural unity. Indeed, it could be argued that these concepts are so well established in their practical application that they are never even mentioned. They do not need to be. It is only when other factors intervene that the lack of specific definition or identification becomes apparent.

In the Navassa dispute, this seems to be exactly the case. Haiti's claim is based, in fact, on the assumption of the island being dependant-adjacent to the Haitian mainland. If this were to be established beyond question, the various Constitutions prior to 1872 would provide the necessary proof of administration or "*effectivité*" over the location, any other existing sway over the island being absent. Such determination of adjacency, as shown above, is extremely difficult to reach. But a rather more evident factor may tip the scales: the fact that Navassa, in clear conditions, is visible from the south-western tip of Haiti gives weight to the argument that it is subject to the 'attraction' of the mainland. Eye contact is the frame within which human interest and relations are usually and presumably stimulated. So the argument that the island was and is adjacent to (or dependent from) Haiti undoubtedly has a certain weight. Obviously, if a place can be seen, it will historically attract the attention of the beholders. The criterion of the 'range of vision' was often used by jurists in the 18th century to determine the sea areas subject to the coastal state's sovereignty though it did not seem to find much correspondence in State practice (apart, possibly, from medieval Scandinavian traditions).⁸⁵ Set against this argument is the acquisitive prescription by the US, notwithstanding the internal inconsistency of its approach over time.

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In conclusion, there seems to be an even balance between the two claimants' legal positions. Or, at least, the knot is so tight that probably no one can successfully untie it by pulling just one strand at a time.

- 1 Warrick, J., 'Unsullied by Humans, US Island Is Biological Motherlode', *The Washington Post*, 17 August, 1998 at A3. The Center for Marine Conservation (an American NGO) identified 800 animal species on land, 250 of which are believed to be entirely new to science; <<http://www.cmc-ocean.org/navassa/navassa.php3>> (visited 20 December 2000).
- 2 Skaggs, J. M. (1994) *The Great Guano Rush*, Basingstoke, Macmillan: 99.
- 3 Guano is a substance composed of dung of sea birds or bats, used as fertiliser.
- 4 On the American occupation of Navassa see Nichols, R. F. (1932-33) 'Navassa: A Forgotten Acquisition', *American History Review*: 38, 505-510; Skaggs, 1994: 99-105, 171-197.
- 5 When the British Consul in Haiti enquired on the status of Navassa (in furtherance of the interests of a British subject), the Haitian Minister for Foreign Affairs of the then Imperial Government of Faustin Ist, replied that "he was not sure, but...presumed that, from its situation, it belonged to this State." The conclusion that "The Minister...was evidently in complete ignorance as to whether Navassa was Haytian Territory or not" (Byron to Clarendon, No. 12, Foreign Office 35151, 10 March 1858) appears too radical but nevertheless underscores an initial uncertainty of the government in Port-au-Prince. Subsequently, when the Minister of the Interior was asked officially whether Navassa was Haitian or not, "His Excellency answered, unhesitatingly, that it was." The Consul himself seemed subject to rapid changes of mind: in March 1858 (*supra*) he communicated to the Foreign Office that he "had ascertained that Navassa was undoubtedly a Possession of Hayti." Three months later he affirmed that "the question of whether... Navassa really belongs to Hayti" was "a matter...of considerable doubt" (Byron to Malmesbury, No. 30, Foreign Office 35151, 26 June 1858).
- 6 Montague, L.L. (1940) *Haiti and the United States 1714-1938*, Durham (North Carolina), Duke University Press: 62-63. A second expedition informed the diggers that the island had been leased to the British subject who had activated the British Consul in Haiti. US State Department – Legal Adviser's Office (1932-1933) *Sovereignty of Islands Claimed Under the Guano Act and of the Northwest Hawaiian Islands, Midway and Wake*, Washington: 1377 (hereinafter *Sovereignty of Islands*).
- 7 Skaggs, 1994: 101-102.
- 8 Clark to the Secretary of State, 13 November 1858; Appleton to Clark, 17 November 1858. Partly reproduced in Jones v. United States, 137 US Supreme Court Reports, 1890: 698. Preston, Haitian.
- 9 Minister, to Fish, Secretary of State, 19 July 1872; 19 March 1873. Fish to Preston, 31 December 1872; 10 June 1873. Partly reproduced in Moore, J.B. (1906) *A Digest of International Law*, Vol. I, Washington, Government Print Office: 266.
- 10 Nichols, 1932-1933: 509.
- 11 39 United States Statutes at Large 1915-1917, 64th Congress, at 1763.
- 12 Beginning in 1963 and until 1967 signs prohibiting trespassing were posted and from 1970 until 1996 the Coast Guard restricted access to the island (2000 US App. LEXIS 33271). The enforcement of these provisions was rather feeble (see note 78).
- 13 Day, A. J. (1982) *Border and Territorial Disputes*, London, Longman: 385.
- 14 Two teams of scientists explored the biological richness of the land and seas around Navassa during summer 1998. For details see endnote 1.
- 15 Among others, Rohter, L. 'Whose Rock Is It? And, Yes, The Haitians Care', *The New York Times*, 19 October 1998, at A4; 'Navassa Island Dispute Raised', *Boundary and Security Bulletin*, Autumn 1998, Vol.6 No.3: 48.
- 16 Parry, C. (1969) *The Consolidated Treaty Series*, 1695-1697, Vol. 21, Dobbs Ferry N.Y., Oceana Publications: 455-469. The Haitian claim is that France had also acquired the rights that Spain had as discoverer of the island.

- 17 Ordonnance royale du 17 avril 1825, issued by Charles Xth, King of France.
De Clercq, J. (ed.), (1880) *Recueil des Traités de la France*, Vol. 3, 1816-
1830, Paris, A. Durant et Pedone-Lauriel: 378-379.
- 18 Translation: “All the towns, squares, garrisons, castles and posts.”
19 Translation: “Wherever in the world they might be situated.”
- 20 Debs Heinl, R. and Gordon Heinl, N. (1996) *Written In Blood – The Story of
the Haitian People – 1492-1995*, 2nd edition Lanham MD, University Press of
America: 17.
- 21 Parry, *op. cit.*, 1776-1778, Vol. 46: 279-302.
- 22 See O’Connell, D. P. (1981) *The International Law of the Sea*, Vol. 1, Oxford,
Clarendon Press: 124-169.
- 23 It is the case of La Gonâve and Navassa, the former possessing that common
historical background which the latter lacks.
- 24 “*Lettre du Duc de Limonade a T. Clarkson*”, 20 November 1819, reproduced
in Griggs, E. L., and Prator, C. H. (1952), *Henry Christophe and Thomas
Clarkson. A Correspondence*, Berkeley/Los Angeles, University of California
Press: 175. Translation: “That His Christian Majesty, the King of France...
recognises Haiti (that is to say the territory of this part of Saint Domingue
which originally belonged to France, with its separate islands: Tortue,
Gonave, the Cayemittes, the Ile-à-Vâche and Beate).”
- 25 *Ibid.* The division came to an end with the death of King Christophe and the
reunification under President Boyer.
- 26 As to be found in various Constitutions.
- 27 Article 2 of UNCLOS. Even this can be rebuffed: according to the Judgment
on the *Maritime Delimitation and Territorial Questions between Qatar and
Bahrain (Qatar v. Bahrain)*, 16 March 2001, concerning, *inter alia*, the Hawar
islands, a group of islands the majority of which “lie wholly or partly within a
3-nautical mile territorial sea-limit from the coast” (i.e. Qatar), the ICJ based
its ruling on a 1939 Decision which had deemed this propinquity insufficient
against Bahrain’s history of occupation and administration of the islands.
Judgment available on <http://www.icj-cij.org>.
- 28 Award in the *Isle of Palmas Case*. United Nations (1949) *Report of
International Arbitral Awards*, Vol. 2, New York, United Nations: 840.
- 29 The Award (9 October 1998) in the Eritrea-Yemen dispute over the Hanish
Islands (<http://www.pca-cpa.org/ER-YEAwardTOC.html>) clearly points this
out (para. 464): “*These ideas, however, have a twofold possible application in
the present case. They may...be applied to cause governmental display on one
island of a group to extend in its juridical effect to another island or islands in
the same group. But by the same rationale a complementary question also
arises of how far the sway established on one of the mainland coasts should
be considered to continue to some islands or islets off that coast which are
naturally “proximate” to the coast or “appurtenant” to it...Thus the principle
of natural and physical unity is a two-edged sword, for if it is indeed to be
applied then the question arises whether the unity is to be seen as originating
from the one coast or the other*” (emphasis added).
- 30 *Contra* Lauterpacht, H. *Sovereignty over Submarine Areas*, XXVII BYIL
1950: 423-431. Also Wright, Q. *Territorial Propinquity*, 12 AJIL 1918: 520-
522.
- 31 Para. 463 of the Eritrea-Yemen Award, endnote 29.
- 32 Halleck, H. W. (1861) *International Law*, New York, D. van Nostrand: 131.
Similarly Wheaton, H. (1866, edition 1966) *Elements of International Law*,
Dobbs Ferry N.Y., Oceana Publications: 216.
- 33 For similar issues O’Connell, D. P. and Riordan, A. (1971) *Opinions On
Imperial Constitutional Law*, Sydney, The Law Book Company Ltd.: 265-
271; also Wright, *op. cit.*
- 34 Janvier, L. J. (1886) *Les Constitutions d’Haiti*, Paris, C. Marpon et E.
Flammarion. Translation: “*Samana, Tortue, Gonâve, the Cayemites, the Ile-à-
Vâches, Saône and other adjacent islands.*”
- 35 Constitutions of 1806, 1816, 1843, 1846, 1849, 1867. *Ibid.*

36 Moreover, adjacency would seem to suggest a more proximate geographical
 relationship than dependency.

37 Article 5 of the Treaty concluded on 9 November 1874. Similar provisions are
 to be found in the previous 1867 Treaty (July 26). *Secrétairerie d'Etat des*
Relations Exterieures (1945), *Recueil des Traités de la Republique d'Haiti*,
 1804-1914, Vol. 1, Port-au-Prince, Imprimerie de l'Etat.

38 Judgment, 11 September, 1992 *ICJ Report*: 570.

39 Judgment, 17 November 1953 *ICJ Report*: 71.

40 In the *Island of Bulama Case* President Grant's 1870 Award in favour of
 Portugal against Britain was motivated, *inter alia*, by the fact that "*Bulama is*
adjacent to the mainland, and so near that animals cross at low water."
 Coussirat-Coustère, V. and Eisemann, P. M. (eds.) (1989) *Répertoire de la*
Jurisprudence Arbitrale Internationale, Vol. 1, Dordrecht, Martinus Nijhoff:
 78.

41 See *supra* endnote 27.

42 Though map evidence may still prove of no use. Maps of Haiti have tended
 not to include Navassa, as it is placed off the most westerly point of Haiti
 proper, thus rendering it difficult to include in the traditional geographical
 rectangle that depicts the country or Hispaniola as a whole. Consider the map
Isle of St. Domingo or Hispaniola, printed for W. Waden, Geographer to the
 King and to H.R.H. The Prince of Wales, 1 October 1795 or *Carte de l'île*
d'Haiti, by Vuilleumin géographe, sous direction de A. Logerot, Editeur de
 Cartes géographiques, Paris, 1886. The latter map was prepared by order of
 the then Haitian Minister of Justice, Education etc., to be used in the schools
 of the Republic. One interesting exception is the map of Haiti prepared by the
 US Army, which clearly indicates Navassa as a US Possession but
 nevertheless includes it within the general Haitian map framework: *Haiti*
1:50,000, series E732, prepared by the Army Map Service – Corps of
 Engineering, Washington, 1962. To the same effect *Harbours and anchorages*
on the coast of Haiti or San Domingo: British Admiralty Charts VIII,
 published in 1896, 1907, 1913, 1914.

43 As confirmed by the ICJ Decision in the *Case Concerning Kasikili/Sedudu*
Island (Botswana/Namibia), 13 December 1999, paras. 98 and 84, available
 on <http://www.icj-cij.org>. See also paras. 525-526 of the Eritrea-Yemen
 Award.

44 Even the distinction between continuity and contiguity is far from being
 widely accepted. Jennings, R. Y. (1963) *The Acquisition of Territory in*
International Law, Manchester, Manchester University Press: 74-75.

45 Note by Mr Fish to the Haitian Minister, 31 December 1872.

46 Sovereignty of Islands: 1386.

47 *Report of International ...*, *op. cit.*: 854.

48 Legal Status of Eastern Greenland in 2 PCIJ REP. 1932-34, Series A/B, No.
 53, 5 April 1933: 46.

49 *Report of International ...*, *op. cit.*: 840.

50 So similar that the Haitian minister expressly referred to it in claiming
 Navassa. Moore, *op. cit.* Also Tansill, C. (1938) *The United States and Santo*
Domingo, 1798-1873, Baltimore, The John Hopkins Press: 287-337.

51 Mr. Fish 2nd Note to Haitian Minister, 10 June 1873. Text in Moore, *op. cit.*:
 266-267. Tansill, *op. cit.*: 294.

52 Interestingly enough Janvier (*op. cit.*: 566), pointed out that the lack of a
 specific identification put in danger the claim to other islands (la Beate, Alta
 Vela, les Frayles), which have subsequently become part of the Dominican
 Republic.

53 Constitutions of 1878, 1888, 1889, 1918, 1932, 1935, 1946, 1950, 1964, 1987.
E.g., Constitution of 1950, Art. 1: "*All adjacent islands, of which the principal*
ones are: La Tortue, La Gonâve, l'île-à-Vache, les Cayemittes, la Navase, la
Grande Caye and all those within the boundaries established by international
law, are an integral part of the Republic..." in Peaslee Xydis, D. (1970)
Constitutions of Nations, Vol. IV, Revised 3rd Edition, The Hague, Martinus
 Nijhoff. All modern Haitian Constitutions contain a specific claim to Navassa

except the 1918 one, adopted while the country was under US military occupation. The relevance of the latter is seriously undermined by the decisive US influence. See Schmidt, H. (1971) *The US Occupation of Haiti 1915-1934*, New Brunswick N.J., Rutgers University Press: 19. This prompted F.D. Roosevelt, who had acted as Assistant Secretary of the Navy, to boast that “*I wrote Haiti’s constitution myself*” (N.Y. Times, 19 August 1920: 15). However, the 1918 Constitution did contain a claim to the “*îles adjacentes*.” It is interesting to note that the Department of State had instructed the US Legation in Haiti to act so as to strike out Navassa from the definition of Haitian territory (Hackworth, G. H. (1940) *Digest of International Law*, Vol. 1, Washington, Government Print Office: 515). Thus presumably the residual formula of adjacent islands was not considered by the US as encompassing a claim to Navassa. For the 1918 Constitution (in English) Federal Register, 1918, at 487-502.

54 Jennings, *op. cit.*: 31-35.

55 The Act, which has been subject to various revisions over the years, is still part of US law. US Code, Title 48, Sections 1411-1419. For the text of the Act see also Wharton, F. (ed.) (1887) *A Digest of the International Law of the United States*, Vol. III, Washington, Government Print Office: 63-64. It was adopted in the full Guano Rush after very well publicised episodes where US entrepreneurs and the US Executive had come into conflict with Latin American governments over possession of guano islands and had lost badly. The Act was designed to provide the legal means to avoid a recurrence of such situation. Skaggs, *op. cit.*: 91-114.

56 *Ibid*: 57, quoting Sovereignty of Islands. So for example the US Supreme Court had no problem in classifying Portorico, under American sovereignty but not part of the metropolitan territory, as “*appurtenant and belonging to the United States*.” *Downes v. Bidwell*, 182 US Supreme Court Reports 1901: 244.

57 The Congressional Globe, 23 July 1856, 34th Congress – 1st session, at 1698.
58 35 Federal Reporter 1888, at 474. According to the Legal Adviser to the Department of State (Sovereignty of Islands: 1389) this judgment was superseded by the Supreme Court Decision in the *Duncan v. Navassa Phosphate Company* case, 137 US Supreme Court Reports 1893: 637 ff.

59 The Supreme Court (*Jones v. US*) concluded that, nevertheless, the presidential proclamation was “*equivalent to a declaration that the President considered the island as appertaining to the United States*.”

60 Skaggs, *op. cit.*: 200.

61 Hackworth, *op. cit.*: 512.

62 *Ibid*: 502.

63 Opinion of the Solicitor for the Department of State, 25 September 1907, reproduced in *ibid*: 503.

64 But consider the Supreme Court Sentence of 19 January 1891 (*Duncan v. Navassa Phosphate Company*): “*the criminal laws of the United States, and the law regulating the coasting trade, are extended to guano islands; and nothing contained in the Act is to be construed as obligatory on the United States to retain possession of the islands after the guano has been removed. Congress has not legislated concerning any civil rights upon guano islands; but has left such rights to be governed by whatever laws may apply to citizens of the United States in countries having no civilized government of their own*.” In conjunction with the *Jones v. US* case, this amounts to an additional confirmation of US jurisdiction over Navassa.

65 Sovereignty of Islands: 1383.

66 Moore, *op. cit.*: 558-558.

67 See endnote 8.

68 *Whiton v. Albany Insurance Co*, 109 Massachusetts Supreme Court Reports 1871: 31.

69 Legal Status of Eastern Greenland Case, *op. cit.*: 45-46. See also Lauterpacht, H. (1962) *Oppenheim’s International Law*, Vol.1, 8th Edition London,

Longman: 554-563; Brownlie, I. (1998) *Principles of Public International Law*, 5th Edition Oxford, Clarendon Press: 136-142.

70

Skaggs, *op. cit.*: 201.

71

Some authors have assumed that “*this nebulous status is arguably equatable with the notion of ‘inchoate title’...*” so that this title “*would not vest the United States with legal sovereignty...instead it would serve notice to other states of the United States’ intention to occupy the island ...*” Ederington, L. B. *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 American University International Law Review 1997: 310. But no inchoate title can be assumed to last indefinitely, especially when confronted with effective administration.

72

Sovereignty of Islands: 1402; Hackworth, *op. cit.*: 514.

73

See endnote 74.

74

Gugliotta, G. ‘Dropping Anchor to Claim Fortune in Government Guano’, *The Washington Post*, 12 November 1996: A15.

75

However a certain Mr Warren sued the US Government for ownership of Navassa under the Guano Act by acquiring the rights of the heirs to the last US company to use the place. The lawsuit was later resolved in favour of the Government (26 December 2000; 2000 US App. LEXIS 33271) but his claims sparked off the above-mentioned clarification of Navassa’s status. Gugliotta, *op. cit.*.

76

Available at <http://elips.doi.gov/elips/sec_orders/html_orders/3210.htm> (visited on 28 December 2000).

77

Jensen, B. ‘Poop Dreams’, *Baltimore City Paper* (available at <http://www.citypaper.com/2001-02-21/feature.html>, visited on 3 March 2001) quoting US Fish and Wildlife Service’s personnel.

78

Consider how, in June 1858, a few months after the first filing to the Department of State declaring the island to be derelict, another American citizen wrote to the Secretary of State “*that he had discovered guano on Navassa in 1855; that he found the island in the possession of Haiti; that he entered into negotiations with the Haitian Government...for a lease...He concluded by protesting against the claim of others...and against considering the Island as one which falls within the provisions of the Guano Act.*” Sovereignty of Islands: 1377. Various procedural faults occurred in the claiming of guano islands. For a time the Department of State and the Treasury even had two differing lists of guano islands considered appurtenant to the US Moore, *op. cit.*: 566 ff.

79

Opinion of Hon. J.S. Black, *Cayo Verde*, 14 December 1859 (1859 US AG LEXIS 1). The Supreme Court (*Jones v. US*) did not consider that the Navassa case fell within this category and that therefore its occupation had violated the Guano Act, resting its decision mainly on the executive discretionary power in international matters (i.e. in its power to determine the existence of a dispute).

80

On prescription see Jennings, *op. cit.*, at 20-29; Lauterpacht, *Sovereignty ...*, *op. cit.*: 575-578.

81

Para. 94, Case Concerning Kasikili/Sedudu Island (*Botswana v. Namibia*), *op. cit.*

82

Johnson, D.H.N. *Acquisitive Prescription in International Law*, XXVII BYIL 1950, at 345-346: “*If then a state which fought in defence of its rights could yet lose them, a fortiori it follows that a state which did not so fight but which contented itself with making diplomatic protests also lost them.*” See also Brownlie, *op. cit.*: 155, referring to other authors.

83

In the already quoted passage, Halleck specifies that, in the case of adjacent islands, “*the attempt of another power, without title, to colonize them, would be a just cause of complaint, and, if persisted in, of war*” (emphasis added). On this point see Korman, S. (1996) *The Right of Conquest*, Oxford, Clarendon Press, especially at 94 ff.

84

Lauterpacht, Oppenheim ... , *op. cit.*: 576.

85

O’Connell, *op. cit.*: 124-125.