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# HANS OFF!: THE STRUGGLE FOR HANS ISLAND AND THE POTENTIAL RAMIFICATIONS FOR INTERNATIONAL BORDER DISPUTE RESOLUTION

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**Abstract:** As global warming continues to warm the Arctic seas, more of the Arctic is free of ice for longer periods. The possibilities for exploitation of natural resources and for control over Northern shipping lanes have prompted countries' renewed interest in their competing claims to the region. Recently, Denmark and Canada have clashed over their competing claims to a small, uninhabitable rock known as Hans Island. While this island may not seem significant, the eventual resolution of this border dispute may have widespread ramifications for the resolution of international conflicts in other remote, uninhabited areas. This Note examines the International Court of Justice decisions in a number of border dispute cases, applies that jurisprudence to the Hans Island facts, and urges both parties to reach an equitable solution.

## INTRODUCTION

On July 20, 2005, Bill Graham, the Foreign Defense Minister of Canada, made a helicopter trip to a small, rocky island in the Davis Strait, which separates Canada's Ellesmere Island from Greenland.<sup>1</sup> The short visit, which followed a Canadian military flag planting and Inukshuk<sup>2</sup> raising on the island, raised diplomatic tensions between Canada and Denmark.<sup>3</sup> Danish officials labeled the move an "occupa-

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<sup>1</sup> Brian Laghi, *Graham Visit to Arctic Island Causes Icy Spat with Denmark*, THE GLOBE AND MAIL, July 26, 2005, at A1; *Canada, Denmark Dispute Ownership of Tiny Arctic Island*, CBC NEWS ONLINE, July 26, 2005, <http://www.cbc.ca/story/canada/national/2005/07/25/hansisland050725.html> [hereinafter *Disputed Ownership*]; Canadian Geographic, *Whose Hans?*, *The Hans of Time*, <http://www.cangeo.ca/hansIsland/time.asp> (last visited Nov. 18, 2005) [hereinafter *Hans of Time*]; *Canada Island Visit Angers Danes*, BBC NEWS UK EDITION, July 25, 2005, <http://news.bbc.co.uk/1/hi/world/europe/4715245.stm> [hereinafter *Visit Angers Danes*].

<sup>2</sup> A traditional Inuit stone marker. See Laghi, *supra* note 1.

<sup>3</sup> See Laghi, *supra* note 1; *Disputed Ownership*, *supra* note 1; *Hans of Time*, *supra* note 1.

tion,"<sup>4</sup> filed an official protest, and sent their own military expedition to the island.<sup>5</sup> The two countries decided to discuss their disagreement and, on September 19, 2005 agreed to a "truce" in the dispute.<sup>6</sup>

In early 2006, however, Conservative Stephen Harper was sworn in as Canada's new Prime Minister.<sup>7</sup> Harper's campaign had promised increased assertion of the country's sovereignty over Arctic territories through the construction of three heavy icebreaking ships, a northern deepwater port, and an underwater network of listening posts.<sup>8</sup>

The events of 2005 and 2006 were only the latest acts in a dispute that has simmered since 1973.<sup>9</sup> Although both countries assert that the issue is simply one of national sovereignty, there is speculation that the desire to exploit the natural resources of the region and control the passage of ships through the soon to be ice-free Northwest Passage may be playing a major role in the intensifying struggle for the island.<sup>10</sup>

This Note will summarize the recent history of Hans Island and the origins of the competing claims of Canada and Denmark. It will explore possible factors behind the recent escalation of diplomatic hostilities. After an examination of the three rationales the International Court of Justice (ICJ) employs when deciding such disputes, the Note

<sup>4</sup> Anne McIlroy, *Hans Off My Island*, GUARDIAN UNLIMITED, Aug. 30, 2005, available at <http://guardian.co.uk/elsewhere/journalist/story/0,7792,1559064,00.html> (last visited Oct. 2, 2005); *Denmark Calls for Talks on Arctic Island Dispute*, CTV.CA, July, 28, 2005, [http://www.ctv.ca/servlet/Article-News/story/CTVNews/1122473659796\\_117882859?s\\_name=&no\\_ads=](http://www.ctv.ca/servlet/Article-News/story/CTVNews/1122473659796_117882859?s_name=&no_ads=)

<sup>5</sup> See McIlroy, *supra* note 4; *Hans of Time*, *supra* note 1.

<sup>6</sup> *Canada, Denmark Reach Truce on Island*, SEATTLE TIMES, Sept. 20, 2005, at A2 [hereinafter *Truce*]; *Canada, Denmark Agree to Hans Island Process*, CTV.CA, Aug. 19, 2005, [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1127148182767\\_122557382/?hub=CTVNewsAt11](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1127148182767_122557382/?hub=CTVNewsAt11) [hereinafter *Agreement*]; *Denmark, Canada to Negotiate over Disputed Arctic Island*, CBC NEWS ONLINE, Aug. 8, 2005, <http://www.cbc.ca/story/world/national/2005/08/08/hans-island-050808.html> [hereinafter *Disputed Island*]; *In Depth: It's a Fine Line*, CBC NEWS ONLINE, August 9, 2005, [http://www.cbc.ca/news/background/boundary\\_disputes/](http://www.cbc.ca/news/background/boundary_disputes/) [hereinafter *Fine Line*].

<sup>7</sup> *Harper Sworn in as 22nd Prime Minister*, CBC NEWS, Feb. 6, 2006, <http://www.cbc.ca/story/canada/national/2006/02/06/harper-ottawa060206.html>.

<sup>8</sup> *Harper Brushes off U.S. Criticism of Arctic Plan*, CBC NEWS, Jan. 26, 2006, <http://www.cbc.ca/story/canada/national/2006/01/26/wilkins-harper060126.html>.

<sup>9</sup> *Disputed Island*, *supra* note 6; *Visit Angers Danes*, *supra* note 1.

<sup>10</sup> See McIlroy, *supra* note 4; Alexander Rubin, *Hands off Hans Island*, CANADA FREE PRESS, July 27, 2005, available at <http://www.canadafreepress.com/2005/rubin072705.htm>; *Agreement*, *supra* note 6; Canadian Geographic, *Whose Hans?, Hans' History*, <http://www.cangeo.ca/hansIsland/background.asp> (last visited Oct. 2, 2005) [hereinafter *Hans' History*]; *Canada Has Claim to Hans Island: Pettigrew*, CTV.CA, Aug. 20, 2005 [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1124451989435\\_49/?hub=Canada](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1124451989435_49/?hub=Canada); Dianne DeMille, *Denmark 'Goes Viking' in Canada's Arctic Islands—Strategic Resources of the High Arctic Entice the Danes*, CANADIAN AMERICAN STRATEGIC REVIEW, Mar. 2005, <http://www.sfu.ca/casr/id-arcticviking1.htm>.

will explain how this case presents a unique challenge for the court because, under traditional ICJ jurisprudence, a decision in either country's favor based on recent visits to the island is not in the best interest of the parties or the international community. The best scenario, in the absence of a negotiated political solution, may be an equitable division of the disputed land.

## I. BACKGROUND

The history of possession of the land surrounding the Davis Strait is long and interesting.<sup>11</sup> Canada claims Ellesmere Island and the rest of its Arctic possessions on the basis of the British Adjacent Territories Order, which gave Canada all of Britain's Arctic possessions on September 1, 1880.<sup>12</sup> The United States claimed the Northern portions of Greenland adjacent to the Island until it relinquished those claims as part of its agreement to purchase the Danish West Indies from Denmark in 1917.<sup>13</sup> Denmark gained the rest of Greenland in a 1933 decision of the Permanent Court of International Justice and has maintained it as a semi-autonomous possession ever since.<sup>14</sup>

By most accounts, the first western explorer to discover and name Hans Island was American Charles Francis Hall.<sup>15</sup> Hall, on an expedition to the North Pole, noted the tiny island and named it after his Inuit guide from Greenland, Hans Hendrik.<sup>16</sup> There is little subsequent history surrounding the island itself until 1971 when, in the middle of discussions to determine the boundary between itself and Greenland, Canada first claimed sovereignty over Hans.<sup>17</sup> Denmark did and has since disputed this claim for a number of reasons, including: its belief that the island was discovered by Hans Hendrik himself; certain geological similarities between Greenland and Hans Island; and evidence

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<sup>11</sup> See e.g. *Hans of Time*, *supra* note 1.

<sup>12</sup> Adjacent Territories Order, 1880 (U.K.), reprinted in R.S.C. 1985, App. 11, No. 14.

<sup>13</sup> See Treaty on Cession of Danish West Indies, U.S.-Den., Aug. 4, 1916, 39 Stat. 1706.

<sup>14</sup> See Legal Status of the South-Eastern Territory of Greenland (Nor. v. Den.), 1933 P.C.I.J. (ser. A/B), No. 55, (May 11).

<sup>15</sup> See *Hans of Time*, *supra* note 10; Kenn Harper, *Hans Island Rightfully Belongs to Greenland, Denmark*, NUNATSIAQ NEWS, Apr. 9, 2004, available at <http://www.nunatsiaq.com/archives/40521/opinionEditorial/opinions.html> (last visited Oct. 2, 2005). But see Letter from Poul E.D. Kristensen, Ambassador of Denmark, to the OTTAWA CITIZEN, (July 28, 2005), available at <http://www.ambottawa.um.dk/en/menu/PressAndCulture/News/ArticleabouttheHansIslandissue.htm> (stating that, in Denmark's opinion, the expedition was conducted in agreement with Danish authorities) (last visited Oct. 2, 2005) [hereinafter *Kristensen*].

<sup>16</sup> Harper, *supra* note 15; *Hans' History*, *supra* note 10.

<sup>17</sup> See Harper, *supra* note 15; *Kristensen*, *supra* note 15.

that Inuit populations native to Greenland may have used the island in the past.<sup>18</sup> The resulting treaty reflects the two countries' inability to agree on the issue.<sup>19</sup>

### A. *The 1973 Delimitation Treaty*

The boundary discussions culminated with the two countries signing an agreement on the delimitation of the Continental Shelf on December 17, 1973.<sup>20</sup> This treaty established the dividing line in the "area between Greenland and the Canadian Arctic Islands . . . for the purpose of each Party's exploration and exploitation of the natural resources" of the shelf.<sup>21</sup>

The agreement draws the borderline between Canada and Greenland by connecting the midpoints of 127 straight baselines surveyed between the coasts of the two countries by the Canadian Hydrographic Service in 1964 and 1972.<sup>22</sup> The line is unbroken except for an 857 meter gap between point 122 (lat. 80° 49' 2, long 66° 29' 0) and point 123 (lat. 80° 49' 8, long. 66° 26' 3).<sup>23</sup> Hans Island sits in this gap.<sup>24</sup> Unable to agree on ownership of the island during negotiations, the two countries simply decided to stop the border at the low water mark on one side of the island and restart it again at the low water mark on the opposite side.<sup>25</sup>

### B. *Visitors to Hans Island*

The treaty having left the issue of Hans' ownership unclear, both Denmark and Canada have seen fit to embark on visits to the island in the ensuing years.<sup>26</sup> Canadian interests seem to have made the first move—a series of research trips to the island by Dome Petroleum in

<sup>18</sup> See Kristensen, *supra* note 15; Jane George, *Greenland, Canada Squabbling over Pet Rock*, NUNATSIQ NEWS, Apr. 9, 2004, available at [http://www.nunatsiak.com/archives/4040/news/nunavut/40409\\_08.htm](http://www.nunatsiak.com/archives/4040/news/nunavut/40409_08.htm) (last visited Oct. 2, 2005); Harper, *supra* note 15.

<sup>19</sup> See Agreement between the Government of the Kingdom of Denmark and the Government of Canada relating to the Delimitation of the Continental Shelf between Greenland and Canada, Den.-Can., Dec. 17, 1973, 950 U.N.T.S. 148 [hereinafter *Delimitation Treaty*]; Harper, *supra* note 15; Rubin, *supra* note 10.

<sup>20</sup> See *Delimitation Treaty*, *supra* note 19.

<sup>21</sup> *Id.* art. 1.

<sup>22</sup> See *id.* art. 2.

<sup>23</sup> See *id.*

<sup>24</sup> See *id.* Annex 3.

<sup>25</sup> See Harper, *supra* note 15; *Fine Line*, *supra* note 6.

<sup>26</sup> See *Hans of Time*, *supra* note 1.

1981 and 1983 to study the island's ability to withstand the force of Arctic ice floes.<sup>27</sup>

After learning of this visit by the Canadians, the Danish government decided to undertake its own expedition to the island.<sup>28</sup> On July 28, 1984, Tom Høyem, Denmark's minister of Greenlandic Affairs, flew to the island.<sup>29</sup> Høyem reportedly planted a Danish flag on the island and started a new visitor tradition by leaving a bottle of aquavit behind.<sup>30</sup> The Danish military returned to the island in 1988, 1995, 2002, and 2003.<sup>31</sup> Each time, they planted a new Danish flag.<sup>32</sup>

In 2000, a team of geologists from the Geographical Society of Canada flew to Hans while on a trip to map Ellesmere Island.<sup>33</sup> They took geological samples from the island and mapped its location.<sup>34</sup> In 2005, members of the Canadian armed forces visited the island in advance of Bill Graham's visit.<sup>35</sup> They planted a Canadian flag and built and Inukshuk.<sup>36</sup>

### C. *Why Fight Over Hans Island and Why Now?*

While there are no known deposits of oil, natural gas, gold, or other minerals on Hans Island, there is speculation that the seafloor under the surrounding waters could contain such natural resources.<sup>37</sup> As global warming has heated the Arctic seas, the waterways between Canada and Greenland have become navigable throughout more of the year.<sup>38</sup> The countries have seized this opportunity to conduct research into possible oil and gas reserves, and Denmark has already licensed some of the area on its side of the Davis Strait for oil explora-

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<sup>27</sup> See Harper, *supra* note 15; *Hans of Time*, *supra* note 1.

<sup>28</sup> See Harper, *supra* note 15.

<sup>29</sup> See *id.*; *Hans of Time*, *supra* note 1; *Visit Angers Dane*, *supra* note 1.

<sup>30</sup> *Id.* Aquavit is a popular Danish alcoholic beverage. When Canadians visit Hans Island, they now leave behind a bottle of Canadian whisky. See Martin O'Malley, *Look Ma, No Hans*, CBC News, July 29, 2005, [http://www.cbc.ca/news/viewpoint/vp\\_omalley/20050729.html](http://www.cbc.ca/news/viewpoint/vp_omalley/20050729.html) (last visited Oct. 2, 2005).

<sup>31</sup> *Hans of Time*, *supra* note 1.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*; George, *supra* note 18.

<sup>34</sup> George, *supra* note 18.

<sup>35</sup> *Hans of Time*, *supra* note 1.

<sup>36</sup> Holly Bridges, *Raising the Canadian Flag on Hans Island*, [http://www.airforce.forces.gc.ca/news/2005/07/27\\_e.asp](http://www.airforce.forces.gc.ca/news/2005/07/27_e.asp); *Hans of Time*, *supra* note 1.

<sup>37</sup> See McIlroy, *supra* note 4; DeMille, *supra* note 10.

<sup>38</sup> See McIlroy, *supra* note 4; DeMille, *supra* note 10.

tion—though, interestingly, the purchaser of this license is EnCana Corporation, a Canadian company.<sup>39</sup>

Global warming is also responsible for a second possible reason that interest in controlling the island is so strong.<sup>40</sup> The warmer Arctic sea temperatures bring with them the promise that the Northwest sea passage will become passable throughout the year.<sup>41</sup> Should this happen, the amount of shipping through the Arctic will increase dramatically and could represent a lucrative revenue source for whichever country regulates passage.<sup>42</sup> Other countries, such as the United States, have already asserted their belief that the waters are international territory and have made their own, unannounced trips to the area.<sup>43</sup>

## II. DISCUSSION

The clear preference for most countries involved in territorial disputes is to solve their disagreements through political means.<sup>44</sup> On several occasions, however, countries have decided to submit their disputes to third parties for binding legal settlements.<sup>45</sup> Such a decision can stem from, *inter alia*, a treaty commitment to peaceful dispute resolution, the desire to acquire international legitimacy in the final outcome, or simply the inability of the parties to negotiate an agreement on their own.<sup>46</sup>

Although the International Court of Justice is not the only third party available to parties engaged in territorial disputes, it has become a more popular choice of late.<sup>47</sup> It has heard many different border disputes and, while complicated and often lengthy (the border dispute between Bahrain and Qatar is the longest case ever heard by the court),<sup>48</sup>

<sup>39</sup> DeMille, *supra* note 10.

<sup>40</sup> See McIlroy, *supra* note 4; The Honourable Pierre Pettigrew, Canada's Leadership in the Circumpolar World, Remarks at the Northern Strategy Consultations Round Table on Reinforcing Sovereignty, Security, and Circumpolar Cooperation (Mar. 22, 2005), available at [http://w01.international.gc.ca/minpub/Publication.asp?publication\\_id=382497&Language=E](http://w01.international.gc.ca/minpub/Publication.asp?publication_id=382497&Language=E).

<sup>41</sup> See McIlroy, *supra* note 4; Rubin, *supra* note 10.

<sup>42</sup> See McIlroy, *supra* note 4; Rubin, *supra* note 10.

<sup>43</sup> See McIlroy, *supra* note 4; Rubin, *supra* note 10.

<sup>44</sup> Beth Simmons, *See You in "Court"? The Appeal to Quasi-Judicial Legal Processes in the Settlement of Territorial Disputes*, in *A ROAD MAP TO WAR: TERRITORIAL DIMENSIONS OF INT'L CONFLICT 205, 209* (Paul F. Diehl, ed., 1999).

<sup>45</sup> *Id.* at 205.

<sup>46</sup> See *id.* at 208–13.

<sup>47</sup> See *id.* at 205–06 and app. 1.

<sup>48</sup> Press Release, I.C.J., Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Press Release 2001/9 (Mar. 16, 2001).

the decisions in these cases offer valuable insight into the bases of border dispute resolution and display a relatively predictable pattern of decision.<sup>49</sup> With this in mind, and with Canada and Denmark no closer to agreeing about the island's ownership, the possibility of the dispute being tried before the International Court of Justice looms and it is important for both countries to consider how the ICJ would analyze this case.<sup>50</sup>

The court gives the most weight to territorial claims that are backed by treaty.<sup>51</sup> Unless they are somehow defective, treaties are considered binding on the parties that have entered into them and are dispositive when they reflect past agreement on international boundaries.<sup>52</sup>

In a dispute between Belgium and the Netherlands, for example, the court considered both an 1843 Boundary Convention establishing the border between the countries and the claim that Belgium, although granted the territory in the treaty, had effectively ceded control over the area to the Netherlands.<sup>53</sup> The Netherlands had been collecting taxes and registering births, deaths, marriages, and property transfers.<sup>54</sup> It even sold a plot of land in the disputed area.<sup>55</sup> The court found the treaty dispositive, however, and held that Belgium had not ceded its rights to the territory simply because of the Netherlands's "routine and administrative" acts.<sup>56</sup>

When there is no clear delimiting of a disputed border by way of a treaty between the two parties, the ICJ proceeds to consider the doc-

<sup>49</sup> See generally Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice*, 53 DUKE L.J. 1779, 1781 (2004) (explaining the hierarchical approach to fact analysis used by the I.C.J. when deciding such cases).

<sup>50</sup> See, e.g., Press Release, Secretary-General Congratulates Bahrain and Qatar on Resolution of Territorial Disputes, U.N. Doc. SG/SM/7751 (Mar. 23, 2001) (congratulating Bahrain and Qatar for settling their border dispute through the ICJ and stating that it is an excellent example to other States of how disputes of this nature should be resolved).

<sup>51</sup> Sumner, *supra* note 49, at 1782, 1804; see also Statute of the International Court of Justice, art. 38, June 26, 1945, <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm>. [hereinafter *ICJ Statute*] (stating that the court, when deciding international law disputes, shall apply "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states").

<sup>52</sup> See Sumner, *supra* note 49, at 1804.

<sup>53</sup> *Sovereignty Over Certain Frontier Land (Belg. v. Neth.)*, 1959 I.C.J. 209, 221–22,227 (June 20).

<sup>54</sup> *Id.* at 228–29.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 229; see also *Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6, 37–39, 40 (Feb. 3) (holding it unnecessary to consider *uti possidetis*, inherited title, or spheres of influence arguments because a treaty clearly defined all borders in dispute).



trine of *uti possidetis*.<sup>57</sup> This type of claim generally arises when the two countries in dispute were once colonies of the same country.<sup>58</sup> There are frequently no formal treaties defining the colonial borders, merely administrative boundaries, so, under the doctrine, these boundaries are deemed to be functionally equivalent to international borders.<sup>59</sup>

In the case of Bahrain and Qatar's dispute over possession of the Hawar Islands, for instance, the court examined a ruling by the British courts from 1939.<sup>60</sup> That decision, made when both countries were British possessions, clearly granted ownership of the islands to Bahrain.<sup>61</sup> The ICJ accepted that judgment and held that the islands still belonged to Bahrain.<sup>62</sup> Bahrain and Qatar were also contesting possession of the island of Janan in their dispute.<sup>63</sup> The court found no reference to Janan in the British decision of 1939 and instead relied on a 1947 British declaration that the grant of the Hawar Islands to Bahrain did not include Janan to make their determination that Janan belonged to Qatar.<sup>64</sup> Although Bahrain put forth an effective control argument that the fishermen of Janan were required to obtain Bahraini permission before constructing huts on the island, that argument was not considered in the court's decision.<sup>65</sup>

When there is no documentation of a territory's ownership either through treaty or *uti possidetis* or when that documentation is ambiguous, the court looks at the customary use of the area by the countries disputing ownership to see if either has established effective control over the territory.<sup>66</sup> Effective control has been described by one commentator as "continuous administration and effective occupancy of the land; ideally, the territory should be settled throughout and the natural resources of the area should be developed and

<sup>57</sup> Sumner, *supra* note 49, at 1804. *Uti possidetis* is a doctrine under which newly independent states inherit the preindependence administrative boundaries established by the former colonial power. *Id.* at 1790.

<sup>58</sup> See Sumner, *supra* note 49, at 1790–91.

<sup>59</sup> See *id.*

<sup>60</sup> Maritime Delimitation and Territorial Questions (Qatar v. Bahr.) 2001 I.C.J. 40, 83–84 (Mar. 16).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 89–91.

<sup>64</sup> *Id.* at 90–91.

<sup>65</sup> See *id.* at 87, 90–91; see also Land, Island and Maritime Dispute (El. Sal. v. Hond.: Nicar. intervening), 1992 I.C.J. 351, 356, 391–93 (Sept. 11) (finding, in a case where a treaty failed to describe a disputed area, that Spanish documents indicating jurisdictions or territorial limits, where found, established the international border).

<sup>66</sup> See Sumner, *supra* note 49, at 1804–05.

used.”<sup>67</sup> It has also been described in a broader sense as “a certain degree of political, military, or administrative power deemed appropriate in the given conditions and varying from case to case according to circumstances.”<sup>68</sup> This second formulation—that of adjusting the amount of control necessary to assert sovereignty based on the circumstances—is what the court has been using.<sup>69</sup>

The ICJ resorted to an evaluation of effective control, for example, in a dispute between France and the United Kingdom over control of two English Channel islands.<sup>70</sup> There were no colonial borders because the islands had never been considered colonies of either country, and the court rejected claims of feudal land grants and fisheries agreements as nondispositive on the border issue.<sup>71</sup> Instead it found that the British government had exercised sovereign jurisdiction over both island groups through a number of administrative acts, such as holding judicial proceedings, establishing local ordinances regarding the handling of corpses, levying taxes, licensing commercial boats, registering deeds to property, and conducting censuses.<sup>72</sup> Because it had exercised this control, the United Kingdom was awarded sovereignty over the islands.<sup>73</sup>

In the dispute between Indonesia and Malaysia over control of the islands of Pulau Ligitan and Pulau Sipadan, however, the court used a less stringent standard to determine effective control.<sup>74</sup> The court began its analysis by examining an 1891 agreement between the British and the Dutch, but found that it did not address the boundary area around the islands in question.<sup>75</sup> Finding no other boundary authority, the court examined the countries’ competing claims of effective control.<sup>76</sup> It found that Indonesia’s claims were insufficient to establish authority, but that Malaysia’s regulation of the commercial collection of turtle eggs, its establishment of a bird sanctuary, and its construction of

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<sup>67</sup> Andrew Burghardt, *The Bases of Territorial Claims*, 63 GEOGRAPHICAL REV. 225, 229 (1973).

<sup>68</sup> YEHUDA Z. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 101 (1965).

<sup>69</sup> *Compare* *Minquiers and Ecrehos* (Fr. v. U.K.), 1953 I.C.J. 47, 65–66, 67–69 (Nov. 17) (requiring a great deal of administrative authority on heavily inhabited islands), *with* *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indon. v. Malay.) 2002 I.C.J. 625, 684–85 (Dec. 17) (requiring far less control of sparsely inhabited islands).

<sup>70</sup> *See* *Minquiers and Ecrehos*, 1953 I.C.J. at 65–66, 67–69.

<sup>71</sup> *See id.* at 59, 60–63, 65–69.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 72.

<sup>74</sup> *See* *Sovereignty over Pulau Ligitan and Pulau Sipadan*, 2002 I.C.J. at 684–7–85.

<sup>75</sup> *See id.* at 652–53.

<sup>76</sup> *See id.* at 678.

light houses were all that were required to demonstrate effective control.<sup>77</sup> Although these activities fell short of the standard set in *Minquiers and Ecrehos*, the court found them sufficient in the context of the disputed islands and awarded the islands to Malaysia.<sup>78</sup>

If it ultimately decides that there is insufficient evidence of effective control, it is unlikely that the ICJ will move on to consider the countries' geographical, economic, historical, ideological or cultural claims.<sup>79</sup> Although it has frequently heard such claims, the court's jurisprudence in territorial disputes is conspicuously void of reference to these issues.<sup>80</sup> Instead, the court has shown a preference to decide such cases under equitable principles.<sup>81</sup> If both parties agree to let the ICJ decide a case *ex aequo et bono*, the court is free to decide the case in the manner most equitable to both parties.<sup>82</sup> Even without such an agreement, the court can resort to the similar principle of *equity infra legem*.<sup>83</sup>

### III. ANALYSIS

In resolving the Hans Island dispute, the International Court of Justice would first look for treaty evidence establishing the border between Canada and Greenland.<sup>84</sup> No agreements exist between any other countries who may have had claims to the area before Denmark and Canada, so the only treaty upon which the court could rely is the 1973 Delimitation Treaty.<sup>85</sup> As discussed previously, however, the border described by this treaty is not established around Hans Island.<sup>86</sup> The treaty, therefore, would not be viewed as dispositive by the court.<sup>87</sup>

Without conclusive treaty evidence, the ICJ would examine the possibility of *uti possidetis*.<sup>88</sup> A showing of *uti possidetis* would require one side or the other to show that the area encompassing Northern Greenland, Hans Island, and Ellesmere Island was once controlled by

<sup>77</sup> See *id.* at 683–85.

<sup>78</sup> See *id.*; *Minquiers and Ecrehos* (Fr. v. U.K.), 1953 I.C.J. 47, 65–66, 67–69 (Nov. 17).

<sup>79</sup> See Sumner, *supra* note 49, at 1806–07.

<sup>80</sup> See *id.* at 1807.

<sup>81</sup> *Id.* at 1806.

<sup>82</sup> Statute of the International Court of Justice, art. 38, para. 2, June 26, 1945, <http://www.icj-cij.org/icjwww/ibasic> (allowing the Court decide a case *ex aequo et bono*, if the parties agree thereto).

<sup>83</sup> See Sumner, *supra* note 49, at 1797–98; see also *Frontier Dispute* (Burk. Faso v. Mali), 1986 I.C.J. 554, 567–68 (Dec. 22).

<sup>84</sup> See Sumner, *supra* note 49, at 1804.

<sup>85</sup> *Delimitation Treaty*, *supra* note 19.

<sup>86</sup> See *id.* at annex 3.

<sup>87</sup> See Sumner, *supra* note 49, at 1804.

<sup>88</sup> See *id.*

a single nation and that that nation employed administrative boundaries that could translate into current international borders.<sup>89</sup> As stated above, the Canadian Arctic islands were British possessions that were transferred to Canada in 1880.<sup>90</sup> It is unclear whether Hans Island was part of that transfer.<sup>91</sup> Greenland, however, was clearly not part of the British possession at the time because its Southern areas were controlled by Denmark and the Northern area around Hans Island was claimed by the United States until 1917.<sup>92</sup> Because the entire area was never under a single country's control and because, therefore, no colonial boundaries exist, there can be no finding of *uti possidetis*.<sup>93</sup>

Unable to find a basis for decision under either treaty or the doctrine of *uti possidetis*, the court's examination of the merits would shift to effective control.<sup>94</sup> The question here, of course, is how much effective control will be found to be sufficient to base a claim of sovereignty over an Arctic island.<sup>95</sup>

Clearly, permanent settlement of Hans is not feasible and, if there are no natural resources in the area, Canada and Denmark cannot be expected to assert their sovereignty through their development and use of them.<sup>96</sup> In the case of Pulau Ligitan and Pulau Sipadan, however, the court showed that it is willing to adjust its effective control requirements to fit the situation at hand.<sup>97</sup> Thus, in Pulau, the establishment of a bird sanctuary was a sufficient exercise of control on a sparsely inhabited island, while in Minquiers and Erehos, more populated islands, a greater showing of control was necessary.<sup>98</sup> The ICJ may well decide that periodic military visits and erections of stone markers are sufficient exercises of control for an uninhabited and largely inaccessible rock in the middle of the Arctic.<sup>99</sup> Such a decision, far from being a boon to either Canada or Denmark, would have disastrous consequences for both countries and their attempts to assert sovereignty in other parts of the Arctic.

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<sup>89</sup> See *Maritime Delimitation and Territorial Questions (Qatar v. Bahr.)* 2001 I.C.J. 40, 83–84 (Mar. 16).

<sup>90</sup> *Adjacent Territories Order*, July 31, 1880, R.S.C., No. 14 (Appendix 1985).

<sup>91</sup> See *id.*

<sup>92</sup> See *Treaty on Cession of Danish West Indies*, *supra* note 13.

<sup>93</sup> See *Sumner*, *supra* note 49, at 1790.

<sup>94</sup> See *id.* at 1806.

<sup>95</sup> See BLUM, *supra* note 68, at 101.

<sup>96</sup> See DeMille, *supra* note 10.

<sup>97</sup> See *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.)* 2002 I.C.J. 625, 684 (Dec. 17).

<sup>98</sup> See *id.*; *Minquiers and Erehos (Fr. v. U.K.)*, 1953 I.C.J. 47, 65–66, 67–69 (Nov. 17).

<sup>99</sup> See *e.g.*, *Sovereignty over Pulau Ligitan and Pulau Sipadan*, 2002 I.C.J. at 684–85.

A decision granting either party sovereignty over Hans Island would set a dangerous precedent for other countries seeking to gain possession of remote territories. Essentially, it would send the message that uninhabited areas are available to the country which can make the most visits there. The ensuing land rush will be particularly noticeable in the Arctic, as a number of countries with competing claims in the region have become increasingly interested in enforcing those claims as global warming has made the area more accessible.<sup>100</sup> Russia, for instance, has begun to lay claims to other areas of the Arctic currently claimed by Denmark.<sup>101</sup> The United States also makes frequent naval forays to the Arctic and could potentially use these trips as a basis for sovereignty claims.<sup>102</sup>

If ever there were a case for the ICJ to decide in equity, it is this one.<sup>103</sup> The court should reject both Denmark's and Canada's claims of effective control as inadequate and award possession of the island under an equitable solution.<sup>104</sup> This solution could be as simple as dividing the island in two by drawing a straight line between the delimitation points on either side of the island, or as complex as the court should decide necessary.<sup>105</sup> Whatever the ultimate form of the division, a decision in equity would send a clear signal that the sovereignty of uninhabited lands will not be handed to whichever country can make the most frequent visits.<sup>106</sup> This will, in the end, protect the interests of not only Canada and Denmark, but also those of many other nations whose possessions include remote, uninhabited areas.<sup>107</sup>

## CONCLUSION

This examination of the probable outcome of an ICJ analysis of the Hans Island dispute should assist both parties in assessing the strengths of their respective claims. Both should note that time and money spent developing cultural claims, such as former Inuit use of the

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<sup>100</sup> See *Canada Steps Up Arctic Military Patrols*, SCIENCE DAILY, Aug. 22, 2005, available at <http://www.sciencedaily.com/upi/?feed=TopNews&article=UPI-1-20050822-09490200-bc-canada-arctic.xml> (last visited Nov. 20, 2005).

<sup>101</sup> Daniel Howden & Ben Holst, *The New Cold War*, INDEPENDENT, Jan. 5, 2005, at 27.

<sup>102</sup> See Rubin, *supra* note 10.

<sup>103</sup> See Sumner, *supra* note 49, at 1806–07.

<sup>104</sup> See Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 567–68 (Dec. 22).

<sup>105</sup> See *id.*

<sup>106</sup> See *e.g.*, Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.) 2002 I.C.J. 625, 684 (Dec. 17).

<sup>107</sup> See *Canada Steps Up Arctic Military Patrols*, *supra* note 100; Howden & Holst, *supra* note 101.

Island, and geographical claims, such as similarity to Greenland,<sup>108</sup> are not likely to yield effective arguments for sovereignty. In 2005, Canada and Denmark seemed to realize that the best result may come from working together when they announced that they would be cooperating in a new geographical study of the area.<sup>109</sup> Recently, however, Canada signaled that it may be changing its position by issuing a Vancouver geologist a prospecting permit for the island.<sup>110</sup> Hopefully cooperation will prevail and lead to an agreeable solution and settle international tensions in this increasingly important part of the world.

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<sup>108</sup> See Howden & Holst, *supra* note 101.

<sup>109</sup> *Hans Island Dispute Masks Common Interests*, SIKU CIRCUMPOLAR NEWS SERVICE, July 31, 2005, available at <http://www.sikunews.com/art.html?artid=360&catid=6>.

<sup>110</sup> *Geologist to Prospect on Disputed Hans Island in Arctic*, CBC NEWS, August 16, 2006, <http://www.cbc.ca/canada/north/story/2006/08/16/hans-island-prospect.html>.