

JUDICIAL DECISIONS INVOLVING QUESTIONS OF  
INTERNATIONAL LAW

FRANCE-MEXICO

ARBITRAL AWARD ON THE SUBJECT OF THE DIFFERENCE RELATIVE TO THE  
SOVEREIGNTY OVER CLIPPERTON ISLAND<sup>1</sup>

*Decision rendered at Rome, January 28, 1931*

Admitting that the discovery of Clipperton Island was first made by Spanish subjects, it would be necessary, to establish Mexico's claim to it, to prove that Spain not only had the right to incorporate the island in her possessions, but also had effectively exercised the right. That has not been demonstrated at all. Mexico's claim based on an historic right is not supported by any manifestation of her sovereignty over the island.

The regularity of the act by which France made known, in a clear and precise manner, her intention to consider the island as her territory, is incontestable. By immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there. In ordinary cases this only takes place when the state establishes in the territory itself an organization capable of making its laws respected.

Properly speaking, however, this step is only a means of procedure to the taking of possession and is not identical with the latter. There may be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.

Held, that sovereignty over Clipperton Island belongs to France.

We, Victor Emmanuel III, by the grace of God and by the will of the nation, King of Italy.

Considering the agreement signed at Mexico March 2, 1909, by which the Government of the French Republic and that of the Republic of Mexico have referred to our arbitration the solution of the difference which has arisen between the high contracting parties on the subject of the sovereignty over Clipperton Island;<sup>2</sup>

<sup>1</sup> Translated from *Revue Générale du Droit International Public*, 3d ser., Vol. VI (1932), pp. 129-132.

<sup>2</sup> The Government of the Mexican Republic and the Government of the French Republic.

Considering that there exists a disagreement between them on the subject of the sovereignty over Clipperton Island and that it is becoming to the relations of amity which exist between the two countries as well as to their reciprocal desires to reach a definitive settlement by means of arbitration, on the proposition of France have resolved to conclude a convention to that effect and have named as their plenipotentiaries

The President of the Mexican Republic, Monsieur le Licencié Don Ignacio Mariscal, Secretary of State for Foreign Relations, and the President of the French Republic, Monsieur le Comte de Greigueuil, *Chargé d'Affaires ad interim* of France in Mexico;

Who, after having exchanged their full powers, found to be in good and due form, have agreed upon the following articles:

Considering our acceptance, which was notified to the high contracting parties by note of August 21, 1909 of our Minister Secretary of State for Foreign Affairs;

Having read all the memorials presented by the high contracting parties according to the forms and within the time-limits fixed by us, as well as the documents communicated by them;

We have deliberated and pronounce the present sentence.

IN FACT, we find, in the first place, that on November 17, 1858, Lieutenant Victor Le Coat de Kerwéguen, of the French Navy, commissioner of the French Government, while cruising about one-half mile off Clipperton, drew up, on board the commercial vessel *L'Amiral*, an act by which, conformably to the orders which had been given to him by the Minister of Marine, he proclaimed and declared that the sovereignty of the said island beginning from that date belonged in perpetuity to His Majesty the Emperor Napoleon III and to his heirs and successors. During the cruise, careful and minute geographical notes were made; a boat succeeded, after numerous difficulties, in landing some members of the crew; and on the evening of November 20, after a second unsuccessful attempt to reach the shore, the vessel put off without leaving in the island any sign of sovereignty. Lieut. de Kerwéguen officially notified the accomplishment of his mission to the Consulate of France at Honolulu, which made a like communication to the Government of Hawaii. Moreover, the same consulate had published in English in the journal *The Polynesian*, of Honolulu, on December 8, the declaration by which French sovereignty over Clipperton had already been proclaimed.

Thereafter, until the end of 1887 no positive and apparent act of sovereignty can be recalled either on the part of France or on the part of any other Powers. The island remained without population, at least stable, and no administration was organized there. A concession for the exploitation of guano beds existing there, which had been approved by the Emperor on

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Article I. The controversy which exists between the high contracting parties relative to the sovereignty over Clipperton Island shall be settled by means of arbitration.

Article II. Upon the proposition of the Mexican Government, accepted by the French Government, the two governments will address to His Majesty Victor Emmanuel III, King of Italy, a request that he accept the rôle of arbiter for the solution of the controversy which exists between them on the subject of the sovereignty over Clipperton Island.

Article III. The two governments engage faithfully to observe the arbitral sentence which shall be rendered by virtue of the present convention.

Article IV. The present convention shall be ratified and the ratifications shall be exchanged at Mexico as soon as possible.

In witness whereof, the respective plenipotentiaries have signed the present convention in duplicate and have appended thereto their seals.

Done at Mexico the second of March, one thousand nine hundred and nine.

(L. S.) (Signé.) GREIGUEUIL.

(L. S.) (Signé.) IGNACIO MARISCAL.

(Translated from De Martens, *Nouveau Recueil Général de Traités*, 3rd ser., Vol. 5 (1912), pp. 8-9.)

April 8, 1858, in favor of a certain Mr. Lockart, and which had given rise to the expedition of Lieut. de Kerwéguen, had not been followed up, nor had its exploitation been undertaken on the part of any other French subjects.

Towards the end of 1897, precisely the 24th of November of that year, France stated, through the Chief of the Naval Division of the Pacific Ocean, which was charged with the examination of the matter, that three persons were found in the island collecting guano for the account of the Oceanic Phosphate Co., of San Francisco, and that they had, on the appearance of the French vessel, raised the American flag. Explanations were demanded on this subject from the United States, which responded that it had not granted any concession to the said company and did not intend to claim any right of sovereignty over Clipperton (January 28, 1898).

About a month after this act of surveillance had been accomplished by the French Navy, and while the diplomatic action with the United States was in progress, Mexico, ignoring the occupation claimed by France and considering that Clipperton was territory belonging to her for a long time, sent to the place a gun-boat, *La Democrata*, which action was caused by the report, afterwards acknowledged to be inaccurate, that England had designs upon the island. A detachment of officers and marines landed from the said ship December 13, 1897, and again found the three persons who resided on the island at the time of the preceding arrival of the French ship. It made them lower the American flag and hoist the Mexican flag in its place. Of the three individuals above mentioned, two consented to leave the island, and the third declared his wish to remain there, and in fact remained there until an unknown date. After that the *Democrata* left on December 15.

On January 8, France, having learned of the Mexican expedition, reminded that Power of its rights over Clipperton. From then a very long diplomatic discussion took place which lasted until the date when, by the agreement of March 2, 1909, the two governments decided to refer to our arbitration the solution of the difference relative to sovereignty over the island.

IN LAW, it is opportune to examine, in the first instance, the principal thesis maintained by Mexico that Clipperton Island already belonged to her before France had proclaimed her sovereignty over the said island. If this claim should be recognized as founded, it would be necessary to conclude that the occupation of the said island by France was unlawful.

According to Mexico, Clipperton Island, which had been given the name of the famous English adventurer who, at the beginning of the 18th century, used it as a place of refuge, was none other than Passion Island, called also Medano or Medanos Island, that this island had been discovered by the Spanish Navy and, by virtue of the law then in force, fixed by the Bull of Alexander VII, had belonged to Spain, and afterwards, from 1836, to Mexico as the successor state of the Spanish state.

But according to the actual state of our knowledge, it has not been proven that this island, by whatever name one may call it, had been actually dis-

covered by the Spanish navigators. That they might have known it before the log-books on board the French vessels *La Princesse* and *La Découverte*, dated in 1711, had identified and described it, is a conjecture more or less probable, but from which one cannot draw any decisive argument. However, even admitting that the discovery had been made by Spanish subjects, it would be necessary, to establish the contention of Mexico, to prove that Spain not only had the right, as a state, to incorporate the island in her possessions, but also had effectively exercised the right. But that has not been demonstrated at all. Mexico produces to support her thesis a geographical map printed from the Archives of the Mexican Society of Geography and Statistics, where the island figures as comprised within the "Political and Military Governments of Spain in North America." But the official character of this map cannot be affirmed, because it is not certain that it was drawn by order and under the care of the state, or because the manuscript memorandum which one reads there, namely, that it was used at the Royal Tribunal of the Consulate of Mexico, does not confer official character upon it.

Moreover, the proof of an historic right of Mexico's is not supported by any manifestation of her sovereignty over the island, a sovereignty never exercised until the expedition of 1897; and the mere conviction that this was territory belonging to Mexico, although general and of long standing, cannot be retained.

Consequently, there is ground to admit that, when in November, 1858, France proclaimed her sovereignty over Clipperton, that island was in the legal situation of *territorium nullius*, and, therefore, susceptible of occupation.

The question remains whether France proceeded to an effective occupation, satisfying the conditions required by international law for the validity of this kind of territorial acquisition. In effect, Mexico maintains, secondarily to her principal contention which has just been examined, that the French occupation was not valid, and consequently her own right to occupy the island which must still be considered as *nullius* in 1897.

In whatever concerns this question, there is, first of all, ground to hold as incontestable, the regularity of the act by which France in 1858 made known in a clear and precise manner, her intention to consider the island as her territory.

On the other hand, it is disputed that France took effective possession of the island, and it is maintained that without such a taking of possession of an effective character, the occupation must be considered as null and void.

It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking, and in ordinary cases, that only takes

place when the state establishes in the territory itself an organization capable of making its laws respected. But this step is, properly speaking, but a means of procedure to the taking of possession, and, therefore, is not identical with the latter. There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed. There is no reason to invoke the obligation contained in Art. 35 of the Act of Berlin of 1885 assuring to occupied territories the existence of an authority sufficient to cause acquired rights to be respected and, the case occurring, the liberty of commerce and of transit in the conditions upon which it may be stipulated. Since this Act of Berlin was subsequent to the French occupation here under consideration, concerns only territories on the coasts of Africa, and binds only the signatory states, of which Mexico is not one, in their mutual relations, it can have no weight in the present case. Besides, Art. 35, strictly speaking, has nothing to do with the taking of possession, but imposes an obligation which presupposes an occupation which has already taken place and is already valid.

The regularity of the French occupation has also been questioned because the other Powers were not notified of it. But it must be observed that the precise obligation to make such notification is contained in Art. 34 of the Act of Berlin cited above, which, as before mentioned, is not applicable to the present case. There is good reason to think that the notoriety given to the act, by whatever means, sufficed at the time, and that France provoked that notoriety by publishing the said act in the manner above indicated.

It follows from these premises that Clipperton Island was legitimately acquired by France on November 17, 1858. There is no reason to suppose that France has subsequently lost her right by *derelictio*, since she never had the *animus* of abandoning the island, and the fact that she has not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitively perfected.

FOR THESE REASONS, we decide, as arbiter, that the sovereignty over Clipperton Island belongs to France, dating from November 17, 1858.

Rome, January 28, 1931

(Signed) VICTOR EMMANUEL