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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

Chagos in the South Pacific? The principle of self-determination and the France-Vanuatu dispute over the Matthew and Hunter Islands

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Abstract
The dispute over the Matthew and Hunter Islands (MHIs) has long been a constant strain on Vanuatu-French relations. The article examines this dispute in light of the Chagos Advisory Opinion and a few other cases concerning territorial disputes. It first submits that sovereignty over the MHIs had never been raised until 1962, when, at the occasion of a private claim, France and Britain, the two administering powers of the New Hebrides at that time, considered the issue. The two states reached an agreement in 1965, asserting that the MHIs were part of the French colony of New Caledonia and not the British-French Condominium of the New Hebrides. This article then considers the legal implications and lawfulness of the agreement, which did not take into account the local populations' will. Although there are some important differences between the Chagos and MHIs disputes, mainly due to the fact that the MHIs are uninhabited, the applicability of the right of self-determination to both cases is nevertheless beyond doubt. The article contends therefore that the 1965 Agreement between France and Britain may constitute a violation of the right to self-determination of the people of the New Hebrides (Vanuatu), who were not consulted on the decision to attach the MHIs to the French territory of New Caledonia, and suggests that there may be, however, some other legal principles under international law that can come into play. Finally, the article contends that negotiated solutions could be a potential way forward for the parties involved.

Keywords: disputes; self-determination; France; Vanuatu

1. Introduction

In June 2023, French President Macron visited Vanuatu. The visit is widely considered historic because it is the first time a French presidential trip passed through non-French islands in the South Pacific region.[1] During his visit, Vanuatu members of Parliament and customary leaders

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[1]See, e.g., C. Pajon, 'President Macron's Historic Pacific Visit: A Signal of France's Regional Step-Up', *The Diplomat*, 21 July 2023, available at thediplomat.com/2023/07/president-macrons-historic-pacific-visit-a-signal-of-frances-regional-step-up/; 'French President Macron's Historic Visit to Vanuatu and PNG Strengthens Bilateral Relations', *Vanuatu Investment Marketing Bureau*, 20 July 2023, available at vimb.vu/blog/french-president-macrons-historic-visit-to-vanuatu-and-png-strengthens-bilateral-relations/; 'French President Macron Travels to Vanuatu for Historic Visit and Warns against "New Imperialism"', *Euronews*, 27 July 2023, available at www.euronews.com/2023/07/27/french-president-macron-travels-to-vanuatu-for-historic-visit-and-warns-against-new-imperi#:~:text = During%20a%20historic%20visit%20to,a%20speech%20in%20Port%2DVila.

vocally urged President Macron to address the long-standing French-Vanuatu dispute over the Matthew and Hunter Islands (MHIs).[2] President Macron and Vanuatu Prime Minister Ishmael Kalsakau reportedly reached an agreement to settle the dispute by the end of 2023.[3] The fact that the MHIs dispute came up during President Macron's visit to Port Vila clearly signals its political significance in Vanuatu-French bilateral relations.

The dispute over the MHIs has long been a constant strain on those relations. Vanuatu and France both claim to own the MHIs and have respectively declared a 12-nm territorial sea, a 24-nm contiguous zone, and a 200-nm exclusive economic zone (EEZ) around them.[4] New Caledonia also included the MHIs in its Natural Park of the Coral Sea, an EEZ-wide marine protected area it established in 2014.[5] Vanuatu, which was a British-French condominium known as the New Hebrides, has disputed France's claims over the MHIs since its independence in 1980.[6] In 2005 and again in 2014, Vanuatu threatened to take the MHIs dispute to the UN.[7] Vanuatu also objected to a French request in 2007 for an extension of the continental shelf to the UN Commission on the Limits of Continental Shelf (UNCLCS) due to the MHIs, causing the French request to remain partially pending.[8] In addition, the MHIs dispute has caused disagreement between Vanuatu and neighbouring countries in the South Pacific region.[9] For example, in August 2017, Vanuatu made an official complaint to New Zealand after a New Zealand research ship sought permission from New Caledonia, not Vanuatu, to conduct marine research near the MHIs.[10]

[2]N. Maclellan, 'Vanuatu MP Says Macron Should Act on Matthew and Hunter', *Islands Business*, 27 July 2023, available at islandsbusiness.com/news-break/vanuatu-mp-says-macron-should-act-on-matthew-and-hunter/; E. Foon and H. Bule, 'Vanuatu traditional leaders call for Macron to address islands dispute', *RNZ*, 26 July 2023, available at www.rnz.co.nz/international/pacific-news/494498/vanuatu-traditional-leaders-call-for-macron-to-address-islands-dispute; 'Vanuatu MP Urges French President Macron to Return Matthew and Hunter', *Daily Post*, 25 July 2023, available at www.dailypost.vu/news/vanuatu-mp-urges-french-president-macron-to-return-matthew-and-hunter/article_25eb6216-0591-5e3e-8f6c-1e24b54712ee.html.

[3]H. Bule and D. Wiseman, 'Macron to Provide Money to Vanuatu, Look at Land Dispute', *RNZ*, 28 July 2023, available at www.rnz.co.nz/international/pacific-news/494637/macron-to-provide-money-to-vanuatu-look-at-land-dispute.

[4]Vanuatu Maritime Zones Act 2010, Arts. 7(2)(b), 8, 9; Décret n° 2002–827 du 3 Mai 2002 définissant les lignes de base droites et les lignes de fermeture des baies servant à la définition des lignes de base à partir desquelles est mesurée la largeur des eaux territoriales françaises adjacentes à la Nouvelle-Calédonie, Art. 2.

[5]Nouvelle-Calédonie, Arrêté du 23 avril 2014 portant création du Parc naturel de la mer de Corail. After this legal ground was challenged regarding repartition of competences such as provided by the Loi organique de 1999 portant statut de la Nouvelle-Calédonie, the Congress of New Caledonia voted in a new text (Loi du Pays) to create an appropriate legal framework for the Marine Protected Area: Loi du pays n°2022-1 du 12 janvier 2022 relative à la protection des aires marines de la Nouvelle-Calédonie, JONC, 20 Janvier 2022, 381.

[6]Letter from Ham Lini Vanuaroroa, Prime Minister of Vanuatu, 11 July 2007, available at www.un.org/Depts/los/clcs_new/submissions_files/fra07/van_0701306.pdf.

[7]D. Fisher, *France in the South Pacific: Power and Politics* (2013), at 146; J. Cullwick, 'Prime Minister Adamant on Sovereignty over Matthew and Hunter', *Daily Post*, 8 May 2014, available at www.dailypost.vu/news/prime-minister-adamant-on-sovereignty-over-matthew-and-hunter/article_acbd76ea-0dde-5b7d-b5fb-c5602edfc357.html.

[8]Letter of the *French Secrétaire de la mer* to the Commission on the Limits of the Continental Shelf (CLCS), 18 July 2007, available at www.un.org/Depts/los/clcs_new/submissions_files/fra07/fra_letter_july2007.pdf; UNCLCS, 'Summary of Recommendations of the Commission on The Limits of the Continental Shelf in Regard to the Submission Made by France in Respect of French Guiana and New Caledonia Regions on 22 May 2007', 2 September 2009, available at www.un.org/depts/los/clcs_new/submissions_files/fra07/COM_REC_FRA_02_09_2009_summary.pdf.

[9]See, e.g., H. Kines, 'Islands Battle Hots Up', *Islands Business*, January 1983, at 23; 'NZ Research Ship Flares Vanuatu-France Border Dispute', *RNZ*, 5 August 2017, available at www.radionz.co.nz/international/pacific-news/336520/nz-research-ship-flares-vanuatu-france-border-dispute; 'Vanuatu PM Hits Out at France over Matthew and Hunter Dispute', *RNZ*, 26 March 2019, available at www.rnz.co.nz/international/pacific-news/385606/vanuatu-pm-hits-out-at-france-over-matthew-and-hunter-dispute.

[10]See 'NZ Research Ship Flares Vanuatu-France Border Dispute', ibid.

However, existing legal scholarship on the MHIs dispute is very limited.[11] This article aims to narrow that knowledge gap. Section 2 of this contribution reviews the history of the dispute. It demonstrates that it is likely sovereignty over the MHIs had never been raised until 1962, when, at the occasion of a private claim, France and Britain, the two administering powers of the New Hebrides, considered the issue. The two states then reached an agreement in 1965, asserting that the MHIs were part of the French colony of New Caledonia and not the British-French Condominium of the New Hebrides (1965 Agreement). The 1965 Agreement, if lawful under international law, would have significant legal implications on the MHIs dispute (see Section 4.1 below). However, there is no evidence showing that Britain or France consulted the local peoples of the New Hebrides or New Caledonia in the process of reaching the 1965 Agreement, raising the question of whether the 1965 Agreement violated the principle of self-determination in international law. Section 3 discusses the nature and content of the 1965 Agreement and concludes that it can be considered as a treaty between France and Britain. Section 4 analyses the possible effects of the 1965 Agreement. Firstly, it considers whether the New Hebrides was established in such a way that the sovereignty over it rested with the Condominium itself rather than with Britain and France. If that was the case, then the 1965 Agreement between France and Britain would be without legal effect, even without engaging the principle of self-determination. That is, though, arguably not the case. Secondly, the section considers the application of the principle of self-determination to the case. Although specific difficulties emerge from such application, as it is hard to ascertain whether the MHIs were part of New Caledonia or the New Hebrides before 1965, or which people should have been consulted, it provides a strong basis for arguing that the agreement was unlawful under international law. Section 5 then considers the prospects of resolving the dispute between the two states. In doing so, the section argues that under the lens of indigenous peoples' rights, any proposed resolution should take into consideration not only the cultural connections between the MHIs and the southern islands of Vanuatu, but also the Keamu Declaration adopted in July 2009 by New Caledonia's Kanak and Socialist National Liberation Front (FLNKS), a pro-independence political group that represents the Kanaks, which recognizes that the MHIs traditionally belong to Vanuatu and not New Caledonia.[12] This Declaration and these cultural connections could be relied upon to support the position that the principle of the continuity of traditional rights includes fishing rights and the use of maritime resources around the two islands.

2. History of the MHIs dispute and general context

The MHIs, known as *Umaenupne* and *Umaenea* (or *Leka*) Islands in the indigenous Vanuatu languages of Aneityum and Futuna, are two volcanic islets located about 162 nm southeast of Vanuatu and 241 nm east of New Caledonia, a French territory. Matthew Island covers an area of 70 ha and rises to 177 m above sea level.[13] Hunter Island, some 75 km to the east, covers just 65 ha,

[11]Notable recent publications include M. Mosses, 'Revisiting the Matthew and Hunter Islands Dispute in Light of the Recent Chagos Advisory Opinion and Some Other Relevant Cases: An Evaluation of Vanuatu's Claims Relating to the Right to Self-Determination, Territorial Integrity, Unlawful Occupation and State Responsibility Under International Law', (2019) 66 *Netherlands International Law Review* 475; S. Heathcote, 'Secession, Self-Determination and Territorial Disagreements: Sovereignty Claims in the Contemporary South Pacific', (2021) 34 *Leiden Journal of International Law* 653; S. Heathcote, 'Joint Territorial Governance in the South Pacific Law', in J. E. Viñuales et al. (eds.), *The International Legal Order in the XXIst Century/L'ordre juridique international au XXIeme siècle* (2023), 53; J. Sautier, 'Un différend méconnu entre la France et le Vanuatu: le cas des îlots Matthew et Hunter', (2016) XXI *Annuaire du droit de la mer*, at 49.

[12]Flash d'Océanie, 'Les îles Matthew et Hunter n'en finissent pas d'empoisonner les relations franco-vanuatuanes', *Tahiti Infos*, 30 November 2010, available at www.tahiti-infos.com/Les-iles-Matthew-et-Hunter-n-en-finissent-pas-d-empoisonner-les-relations-franco-vanuatuanes_a13518.html; see Fisher, *supra* note 7, at 146.

[13]P. Maillet, M. Monzier and C. Lefevre, 'Petrology of Matthew and Hunter Volcanoes, South New Hebrides Island Arc (Southwest Pacific)', (1986) 30(1) *Journal of Volcanology and Geothermal Research* 1.

with an elevation of 242 m above sea level. They belong to the New Hebrides chain and are therefore geologically linked to the Vanuatu archipelago, while they are separated from New Caledonia by the New Hebrides submarine trench.[14]

In addition to their remoteness, their accessibility is limited, even dangerous, and only possible in calm waters, due to both their seismic activity and the steepness of their coasts. Matthew Island is home to an active volcano, and Hunter Island's sulphurous fumaroles are still escaping. The islets are therefore unsuitable for permanent occupation, and the only infrastructure on the MHIs is the Matthew Island weather station set up in 1979. The geological characteristics of the islands make them ideal for observing the development of species, particularly avian species. Scientists were interested in them before politicians. Nowadays, French scientists monitor the MHIs as part of the New Caledonian Natural Park of the Coral Sea.[15] The MHIs' perceived value mainly lies in their potential to generate maritime zones around them. As mentioned above, France and Vanuatu have both declared expansive maritime zones around the islets.

According to Vanuatu legends, the MHIs are at the centre of the arrival of the great god Mauitikitiki in the islands of Tafea.[16] Indigenous Vanuatu people from the southern parts of Vanuatu have a long history of traveling to the MHIs to perform cultural ceremonies, leaving customary gifts behind, and for fishing and sacrificial purposes.[17] Also recorded is the encounter between a group of men from Aneityum and Futuna with the big man or great god of the islands of the south while they visited the two islets.[18] There is also a well-known legend about the voyage of a group of men from Futuna, an island near the MHIs, and their encounter with the god of these islets, who provided them with food and water for several months while they stayed on the MHIs.[19]

Europeans encountered the MHIs for the first time in the late eighteenth century.[20] It is generally undisputed that neither Matthew Island nor Hunter Island were annexed by European countries before the twentieth century.[21] A number of authors assert that France annexed the MHIs in 1929,[22] whereas some publications claim that the MHIs were still not annexed by any country in the 1930s, the 1940s, or until the early 1960s.[23] As Heathcote notes, *if* France did annex

[14]Ibid.

[15]See the official website of the Protected Marine Area: mer-de-corail.gouv.nc/.

[16]J. Joshua, 'Matthew, Hunter Dialogue', *Daily Post*, 3 January 2017, available at dailypost.vu/news/matthew-hunter-dialogue/article_74783f07-617a-5a1d-8f4c-455dcdd9f513.html; B. Makin, 'Matthew and Hunter Day', *Daily Post*, 12 March 2015, available at dailypost.vu/news/matthew-and-hunter-day/article_253d5ec4-47b1-5a5c-ac54-69a739cee733.html. For more discussion about Vanuatu legends about the MHIs see L. Song, M. Mosses and G. Giraudeau, 'The Ambiguous History of Matthew and Hunter Islands: Tracing the Roots of Vanuatu and French Claims', (2023) 58(3) *Journal of Pacific History* 232.

[17]Vanuatu Cultural Centre, J.-M. Leye, 'History of Hunter and Matthew Islands', 224/68 (audiocassette), 21 June 2007.

[18]Ibid.

[19]Vanuatu Cultural Centre, Ch. Nimoho, 'Talks of Matthew and Hunter Islands (Futuna)', 235/5 (audiocassette), 6 September 1982.

[20]See A. Sharp, *The Discovery of the Pacific Islands* (1960), at 153; M. Quanchi and J. Robson, *Historical Dictionary of the Discovery and Exploration of the Pacific Islands* (2005), at 122; J. Dunmore, *Who's Who in the Pacific Navigation* (1991), at 116. T. Gilbert, *Voyage from New South Wales to Canton in the Year 1788* (1968), at 27; Editorial, 'Wanted: One Barren, Volcanic Island to be Landlords of', *Pacific Islands Monthly*, April 1963, 89. *Pacific Islands (Pilot). [With] Suppl. [and] Admiralty Notices to Mariners* (London: British Admiralty Hydrographic Department, 1885).

[21]For more details, see note 12, *supra*.

[22]See Fisher, *supra* note 7, at 145; D. Cambou, J. Gilbert and M. Degremont, 'Marine Protected Areas and Indigenous Peoples' Rights: A Case Study of the National Park of the Coral Sea in New Caledonia', in S. Allen, N. Bankes and Ø. Ravna (eds.), *The Rights of Indigenous Peoples in Marine Areas* (2019), at 209, note 91, citing Fisher; A. Dayant, 'Not One, but Two New Points of Tension for France in the Pacific', *Lowy Institute*, 19 Mar 2019, available at www.lowyinstitute.org/the-interpreter/not-one-two-new-points-tension-france-pacific; A. Willemez, 'Flashpoint: South Pacific – Vanuatu and New Caledonia', *Centre for International Maritime Security*, 16 January 2014, available at www.cimsec.org/south-pacific/9356.

[23]See Sautier, *supra* note 11, at 49; Great Britain Admiralty, Pacific Islands Vol. 3, Western Pacific (Richmond: H.M. Stationery Office, 1945), at 604; Government of Australia, 'Memorandum Prepared for Delegation to Imperial Conference: Unoccupied Islands in the Vicinity Of Australia', n.d., in Documents on Australian Foreign Policy, 1937–49, Vol. 1, 1937–38,

the MHIs in 1929, that would provide a strong basis for the French claim to sovereignty over the MHIs.[24] Our research based on archives in Vanuatu, France (including mainland France and New Caledonia), Britain, and New Zealand found no evidence suggesting that France annexed the MHIs in 1929.[25] On the contrary, there were multiple occasions – in 1964, 1965, and 1983 – when the French government sought to justify French sovereignty over the MHIs but did not mention a 1929 annexation at all.[26] That strongly suggests that no such annexation occurred in 1929.

It is clear that until 1962, no sovereignty dispute over the MHIs had arisen.[27] As noted by Crocombe and Buchholz, for decades there was a lack of interest from colonial powers in the MHIs.[28] It is difficult to find definitive evidence on whether the MHIs had been annexed for the New Hebrides or New Caledonia before 1962, although cultural elements and opinions of the Ni-Vans and Kanaks on the matter support the MHIs cultural and traditional linkage to the New Hebrides (see below).

In 1962, believing that Matthew Island had not been claimed by any country or individual, an Australian residing in Vanuatu and a French person residing in New Caledonia jointly applied to the Joint Court of the New Hebrides (Joint Court) in Port Vila to register their claim to the title of Matthew Island.[29] Unsure about its jurisdiction over the matter,[30] the Joint Court asked the British and French resident commissioners to the New Hebrides to advise whether Matthew Island was part of the New Hebrides, the French colony of New Caledonia, or Australia.[31] The commissioners elevated the matter to London and Paris, respectively. The British authorities (the Colonial Office and the Foreign Office) and the French authorities (the Ministry of Overseas Departments and Territories, the Ministry of Foreign Affairs, and the Maritime Forces) subsequently conducted extensive research about both Matthew Island and Hunter Island for about three years; they found no definitive evidence as to whether the MHIs had been annexed by France or Britain or by any other sovereign state.[32]

As early as March 1963, the British Foreign Office made an informal enquiry to the French Embassy in London.[33] In August 1964, an internal note of the Legal Service of the French Ministry of Foreign Affairs concluded that despite the absence of definitive evidence of ownership of the MHIs, there was 'a certain acquiescence, a certain international consensus in favor of the French

ed. R. G. Neale (Canberra: Australian Government Publishing Service, 1975), 14–18, available at https://www.dfat.gov.au/about-us/publications/historical-documents/Pages/volume-01/4-memorandum-prepared-for-delegation-to-imperial-conference; H. J. Buchholz, *Law of the Sea Zones in the Pacific Ocean* (1987), at 2; S. Ratuva, 'Pacific Island States', in P. Clavert (eds.), *Borders and Territorial Disputes in the World* (2004), 236.

[24]See Heathcote, *supra* note 11, at 671.

[25]Into the framework of this project, research was conducted on the sources housed in the National Archives of the United Kingdom, the National Archives and Cultural Centre in Port Vila, the Pacific Manuscripts Bureau in Canberra, the Archives of New Zealand, the French Archives of Foreign Affairs (Archives du Ministère des affaires étrangères or AMAE) at La Courneuve, and the Archives Nationales d'Outre-Mer (ANOM) in Aix-en-Provence. Results were published in Song, Mosses and Giraudeau, *supra* note 16.

[26]See Letter from the Minister of Foreign Affairs to the Director of Overseas Territories, 5 October 1964, AMAE, 31DJ/88, Letter no. 41/A5; Letter from F.H. Brown to A.M. Wilkie, FCO141.13277, Document 23, 7 October 1965; Editorial, 'The French Reply', *Islands Business*, March 1983, at 22.

[27]See Buchholz, *supra* note 23, at 2; R. Crocombe, 'Land Reform: Prospects for Prosperity', in R. Crocombe (ed.) *Land Tenure in the Pacific* (1987), 389; Government of Australia, *supra* note 23; Editorial, 'Wanted: One Barren, Volcanic Island to be Landlords of', *Pacific Islands Monthly*, April 1963, at 89.

[28]See Buchholz, *supra* note 23, at 2; Crocombe, ibid., at 389.

[29]Bob Paul's letter to the *Pacific Islands Monthly*, 'The Man Who Once Claimed Matthew Is.', *Pacific Islands Monthly*, June 1983, at 7.

[30]The Court only had jurisdiction over the New Hebrides lands.

[31]British National Archives, FCO141.13277 F.68/378/6, 18 December 1962.

[32]Based on research mentioned above in note 25, *supra*.

[33]This request was transmitted by the ambassador of France in Britain to the French Ministry of Foreign Affairs on 29 March 1963, AMAE, Letter 442/A5, 31DJ/88.

ownership of these islets', which could be assimilated to 'an admission, at least tacit, of French sovereignty over these territories'.[34] In November 1964, the British Foreign Office expressed readiness to accept France's position that the MHIs were part of New Caledonia, subject to the possibility of Australian objection.[35] Britain subsequently consulted Australia, which provided assurance that it had no intent to claim the MHIs.[36] There is no evidence showing that the British authorities or the French authorities consulted the indigenous peoples of the New Hebrides or New Caledonia during their research from 1962 to 1965.

On 22 November 1965, the French and British resident commissioners to the New Hebrides jointly sent a letter to the Joint Court, stating:[37]

> The Islands of Matthew and Hunter are considered by the *French Administrative authorities* as being attached to New Caledonia. The *British Government* was content with this view.

It is clear from the wording of the commissioners' letter to the Joint Court, the two commissioners stated the position of the government of Britain and the government of France, not their own position as the commissioners to the New Hebrides. The Joint Court then informed the two individual claimants that it had no jurisdiction over the claim because the MHIs were not part of the New Hebrides but part of New Caledonia.[38] The Joint Court did not deliver a ruling in 1965, declaring that the MHIs belonged to New Caledonia as the then French Ambassador to Fiji, Robert Puissant, asserted in 1983 in support of his statement that 'French sovereignty over these islands is incontestable'.[39]

3. Nature and content of the 1965 agreement

Even though there is no evidence of a relevant formal treaty in writing, it can be said that Britain and France reached an agreement in 1965, evidenced by the joint reply on 22 November 1965 and the diplomatic correspondence mentioned above. They agreed on the following things:

1. The MHIs were part of the French colony of New Caledonia. This is evident in the joint reply on 22 November 1965 from the two commissioners to the Joint Court.
2. The MHIs were not part of the Anglo–French Condominium of the New Hebrides. This is clear in the relevant diplomatic correspondence mentioned above and can be inferred from the joint reply on 22 November 1965. Indeed, in its letter to the two individual claimants following the joint reply, the Joint Court made such inference.

One of the claims made by Vanuatu is that the MHIs were administered under the New Hebrides and were unlawfully transferred to New Caledonia by Britain and France before independence. Notably, the joint reply on 22 November 1965 and the relevant diplomatic correspondence did not say, explicitly or impliedly, that the MHIs were administered under the New Hebrides or that Britain and France ceded or transferred the MHIs from the New Hebrides to New Caledonia under the 1965 Agreement. As mentioned above, in an internal note of the Legal

[34]Note from the Legal Service of the French Ministry of Foreign Affairs to the director of Diplomatic Archives, 20 August 1964, AMAE, 31DJ/88. Unless otherwise stated, the translation is the authors' own.

[35]Letter from the British secretary of state for the colonies to the acting British resident commissioner, New Hebrides, 24 November 1964, TNA, FCO 141/13277.

[36]Letter from F. H. Brown to A. M. Wilkie, British National Archives, FCO141.13277, 7 October 1965.

[37]Letter from British and French Resident Commissioners to the New Hebrides to the Joint Court of the New Hebrides, British National Archives, FCO141.13277, 22 November 1965 (emphasis added). For discussion about why Britain was content with the French claim, see Song, Mosses and Giraudeau, *supra* note 16, at 247–8.

[38]Letter from E. Buteri to Henri Martinet and Robert Paul, 22 November 1965, TNA, FCO 141/13277, doc. 26.

[39]Editorial, 'The French Reply', *Islands Business*, March 1983, at 22.

Service of the French Ministry of Foreign Affairs, at that time France based its sovereign claim over the MHIs on an alleged 'certain international consensus in favour of the French ownership of these islets', which France claimed could be assimilated to 'an admission, at least tacit, of French sovereignty over these territories'.[40] And Britain accepted France's position. There is no evidence that Britain or France even mentioned cession or transfer as potentially relevant in the discussion that led to the 1965 Agreement. However, it should be emphasized that this does not necessarily mean that the MHIs were not administered from the New Hebrides; it is possible that Britain and France simply avoided admitting that the MHIs were administered under the New Hebrides for their own convenience.

Regarding its nature, in the absence of a formal treaty in writing, whether the 1965 Agreement (even if it were lawful in international law), which is evidenced by the joint reply on 22 November 1965 and the diplomatic correspondence, is legally binding may deserve some discussion. The Vienna Convention on the Law of Treaties (VCLT)[41] does not require that a treaty be in any particular form or contain any particular elements.[42] In *Qatar* v. *Bahrain*, the minutes of a meeting, which did not have the common characteristics of a treaty, were held by the International Court of Justice (ICJ) to constitute a binding agreement.[43] In *Legal Status of Eastern Greenland (Denmark* v. *Norway)*, an oral statement by Ihlen, then Norwegian Foreign Minister, in response to the Danish Foreign Minister in discussion about Spitzbergen and Greenland was found to be binding by the Permanent Court of International Justice, even though the statement was only recorded in Ihlen's own minutes of the meeting.[44] It is also worth mentioning that, according to Article 3 of the VCLT, the fact that the VCLT does not apply to international agreements not in written form shall not affect the legal force of such agreements.[45] In light of the above, the mere fact that the 1965 Agreement did not take the form of a formal treaty in writing should not render it non-legally binding. Neither France nor Britain has expressed or demonstrated unwillingness to be bound by it. For example, in 1981, when a British member of Parliament questioned Lord Privy Seal Humphrey Atkins and the British Foreign and Commonwealth Office on why the British government accepted the French position on the MHIs in 1965, Atkins stated that '[t]he weight of available cartographical historic and custom evidence led us to express the view in 1965 that we were content with the French assertion of sovereignty'.[46]

In the section that immediately follows, we explain why the 1965 Agreement matters. If it were lawful in international law, it would indeed have significant implications on the current French-Vanuatu dispute over the MHIs. It will be further argued that the applicability of the self-determination principle might suggest the agreement was unlawful.

4. Effects of the 1965 Agreement

For the sake of completeness and in order to assess both parties' arguments, an analysis of the effects of the 1965 Agreement first requires us to ask the following question: prior to the crystallization of the right of peoples to self-determination, did territorial sovereignty over the New Hebrides lie with the Condominium itself rather than with the two colonial powers? If it did, then it would seem unnecessary to engage the principle of self-determination, as Britain and France, having no territorial sovereignty over the New Hebrides, could not have lawfully

[40]Note from the Legal Service of the French Ministry of Foreign Affairs to the director of Diplomatic Archives, 20 August 1964, AMAE, 31DJ/88. Unless otherwise stated, the translation is the authors' own.

[41]1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

[42]M. Fitzmaurice 'The Practical Working of the Law of Treaties', in M. D. Evans (ed.) *International Law* (2018), 138, at 139.

[43]*Maritime Delimitation and Territorial Questions* (*Qatar v. Bahrain),* Jurisdiction and Admissibility, Judgment of 1 July 1994, [1994] ICJ Rep. 112.

[44]*Legal Status of Eastern Greenland (Denmark v. Norway),* PCIJ Series A/B, No 53, at 22.

[45]For further discussion about unwritten treaties see R. Gardiner, *Treaties* (2023), at Ch. 1.III.3.

[46]British National Archives, FCO107/377, 7 October 1981, Document 9, at 2.

renounced the MHIs for the New Hebrides. It appears, though, that was arguably not the case (see Section 4.1). Therefore, it is necessary to engage with the principle of the right of peoples to self-determination (see Section 4.2). As that principle was applicable in 1965, territorial sovereignty over colonial territories lay with the colonized people, not with the administering powers, when local populations were not consulted in the process leading to the 1965 Agreement.

4.1 Sovereignty issues under condominium status

The Anglo–French Condominium of the New Hebrides was established under a 1906 Convention between Britain and France (1906 Convention).[47] In 1914, the two colonial powers signed a joint Protocol[48] under the terms of which the New Hebrides was administered (1914 Protocol).[49] Neither document clearly defined the boundaries of the New Hebrides, let alone whether Matthew Island or Hunter Island were part of the New Hebrides. Nor did English, French, or New Hebridean laws.

New Caledonia was annexed in 1853 by France, which made it a penal colony,[50] and became an overseas territory (*territoire d'outre-mer*) in 1946 under the French Fourth Republic.[51] Before 1976, neither French nor New Caledonian laws specified whether Matthew Island or Hunter Island were part of New Caledonia.

As mentioned above, in 1965, Britain and France, the colonial powers of the New Hebrides, agreed that the MHIs were not part of the New Hebrides and that they were part of the French colony of New Caledonia. If the MHIs did belong to New Caledonia before 1965, such an agreement just reflected that arrangement. On the contrary, if the MHIs belonged to the New Hebrides before 1965 or if the title to the MHIs was contentious or uncertain, subject to below discussion about where sovereignty over the New Hebrides lay, the 1965 Agreement appears to be akin to renunciation of title (if the MHIs belonged to the New Hebrides) or renunciation of a claim to title (if title was contentious or uncertain) to the MHIs for the New Hebrides. As Parlett notes,[52]

> Title to territory – *or a claim to it* – may be abandoned. The consequence of abandonment is that the territory either becomes *res nullius* or falls under another state's sovereignty. On some occasions, abandonment is coupled … with the recognition of the validity of another claim.

Granted, the act of renunciation of territory (or claims to territory) of the New Hebrides could only be lawfully carried out by whoever had territorial sovereignty over the New Hebrides. Otherwise, the result would be absurd. Given that the New Hebrides was a condominium, with which the territorial sovereignty over the New Hebrides rested is a question that requires some

[47]'Convention between the United Kingdom and France concerning the New Hebrides, signed at London, October 20, 1906', (1907) 1(2) *American Journal of International Law* 179, Supplement: Official Documents (April 1907). See also S. Heathcote, 'Legal Models and Methods of Western Colonisation of the South Pacific', (2022) 24 *Journal of the History of International* 62, at 92.

[48]Protocol respecting the New Hebrides, signed at London, 6 August 1914, by representatives of the British and French governments, enclosed in 'The New Hebrides Order in Council', 1922. The 1914 Protocol was not formally ratified until 1922.

[49]New Zealand Embassy in Paris, Letter to secretary of external affairs, Wellington, 1965, Archives New Zealand Te Rua Mahara o te Kāwanatanga, Wellington, 07/1965-08/1977, PAR 304/1/6, R22447223.

[50]United Nations, 'New Caledonia', UNST/PSCA(05)/D3/No.37/ENG/COP.1 (May 1988), 2, available at www.un.org/dppa/decolonization/sites/www.un.org.dppa.decolonization/files/decon_num_37-1.pdf.

[51]Ibid.

[52]K. Parlett, 'State Conduct in Territorial Disputes beyond Effectivités: Recognition, Acquiescence, Renunciation and Estoppel', in M. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (2018), 169, at 183 (emphasis added). See also M. Hébié, 'Acquiescement et volonté tacite du titulaire de la souveraineté territoriale', in J. E. Vinuales et al. (eds.), *The International Legal Order in the XXI century, Essays in honour of Professor Marcelo Gustavo Kohen* (2023), 71.

discussion.[53] We will examine the founding treaties/documents of the New Hebrides, publications/documents issued by the British and French governments, and academic legal scholarship.

The preamble and Article I(1) of the 1906 Convention, which established the Condominium of the New Hebrides, provide:

> Preamble
> The Government of His Britannic Majesty and the Government of the French Republic ... in order to secure the exercise of their *paramount rights* (French version: *droits de souveraineté*) in the New Hebrides ... have agreed on the following Articles:
> Article I Status
> (1) The Group of the New Hebrides, including the Banks and Torres Islands, shall form a region of joint influence ... each of the two Powers retaining *jurisdiction* (French version: *souveraine*) over its subjects or citizens ...[54]

The General Instructions to the British and French Commissioners (1907 Instructions),[55] which embody the philosophy underlying the Condominium of the New Hebrides,[56] stated:

> The preamble of the Convention of the 20th October, 1906 indicates the desire of the two Governments to secure the exercise of their paramount rights (French version: *droits de souveraineté*) in the New Hebrides ... *[T]he two countries jointly assume jurisdiction* (French version: *souveraineté*) *in the islands*, and thereby provide against the possible appearance of a third Power
> ...
> The two Powers have not thought it desirable at present to create the separate authority, neither British nor French, which is absent in the New Hebrides. They have preferred to recognize and re-inforce the pre-existing British and French organizations ...[57]

The inconsistency between the English text and the French text of the 1906 Convention and the 1907 Instructions is unhelpful: the former refers to jurisdiction, and the latter refers to sovereignty. There is force in the argument that Britain and France had no territorial sovereignty over the New Hebrides.[58] There is, however, room for alternative arguments.

Reports issued by the British or French governments may help shed light on their respective views on the matter. The British Colonial Office's *Reports on the New Hebrides* stated that:[59]

[53]See *infra*. For example, Shaw notes that '[t]here are argument as to the relationship between the states concerned, the identity of the sovereign for the purpose of the territory and the nature of competences involved': M. Shaw, *International Law* (2014), at 165, and further references therein. See also Heathcote, *supra* note 47, at 94.

[54]See 1906 Convention, *supra* note 47, Preamble and Art. I(1) (emphasis added).

[55]The text of the 1907 Instructions was agreed upon by the British and French governments on 29 August 1907 and was not revised in 1914: British and Foreign State Papers, Vol. 108, at 519.

[56]D. P. O'Connell, 'The Condominium of the New Hebrides', (1968–1969) 43 *British Yearbook of International Law* 71, at 93.

[57]See 1907 Instructions, *supra* note 55 (emphasis added).

[58]See Heathcote, *supra* note 47, at 94; the learned author argued: 'Legally speaking the regime was different to the joint protectorate over Samoa not only because there was no recognised local sovereign in the New Hebrides but also because it was intended that the condominium itself, as a legal person distinct from its members, hold sovereignty over the New Hebrides.'

[59]Colonial Office, Reports on the New Hebrides (1955) (emphasis added); reports in other years stated the same. As seen in M Kohen, 'Is the Notion of Territorial Sovereignty Obsolete?', in M. A. Pratt and J. A. Brown (eds.), *Borderlands Under Stress* (2000), 35, at 41–2. See also Colonial Office, New Hebrides: Anglo-French Condominium: Report for the years 1965 and 1966 (Her Majesty's Stationery Office, 1968) at 105.

> It is clear that … the New Hebrides is neither British nor French and … there is no *territorial* sovereignty (*unless it can be said to be jointly exercised*) …

This seems to mean that although *individually* neither of them had territorial sovereignty, *jointly* they could exercise territorial sovereignty. The 1965 Agreement may be seen as an example of Britain and France jointly exercising territorial sovereignty. This is similar to Bantz's view (see below).

In a reply to the French National Court in the New Hebrides in 1961,[60] the French Ministry of Foreign Affairs concluded that:

1. the expression 'territory of joint influence' in Article I(1) of the 1906 Convention established the New Hebrides a judicial entity in international law;
2. it was not a *personnalité morale* in French *droit administratif*; and
3. even though the Condominium was a subject of international law, it was only capable of exercising the *rights conferred on it by the signatory powers*.[61]

This appears to point away from recognizing the Condominium as the sovereignty holder. Point 3 mentioned here is similar to the view of Shaw (see below).

Legal scholarship on condominia is limited, and disagreements exist.[62] In an article entitled 'The Condominium of the New Hebrides' published in the late 1960s, O'Connell distinguishes the New Hebrides from a protectorate. He notes that in the case of a protectorate, the territory was 'already an established entity, whose faculties [of sovereignty] are, in part, exercised representationally by the protecting State'.[63] Although some condominia such as the Sudan have approximated to a protectorate, the New Hebrides 'clearly does not':[64]

> All the faculties of sovereignty in this case [i.e., the New Hebrides] derive from the Condomini [i.e., the colonial powers], and beyond them there is a legal vacuum
> …
> Clearly the active agents in Condominium are the Condomini. They make treaties for the territory; and if they breach them, or interfere through the Condominial administration with alien property, or wrongfully arrest a foreign ship in Condominial waters, it is they who are internationally liable to make amends and are responsible in international law for failing to do so.

In his 1951 doctoral thesis, El-Erian, who would later become a judge of the ICJ, identifies the New Hebrides as (then) an existing case of a condominium and notes that it was 'under the present joint sovereignty of Britain and France'.[65] Commenting on the New Hebrides, Shaw notes,

[60]The French National Court in the New Hebrides had to consider the legal status of the New Hebrides when the Condominium sued for compensation after a vehicle of a French District Agent was negligently damaged. No judgment was given as the defendant subsequently paid the damages.

[61]*Ministre des Affaires Etrangères*, Fiche No. 513, as seen in O'Connell, *supra* note 56, at 86.

[62]V. P. Bantz, 'The International Legal Status of Condominia', (1998) 12 *Florida Journal of International Law* 77, at 77, 89.

[63]See O'Connell, *supra* note 56, at 81.

[64]Ibid., at 81–2.

[65]A. A. El-Erian, 'Condominium and Related Situations in International Law: With Special Reference to the Dual Administration of the Sudan and the Legal Problems Arising out of It', doctoral thesis (1951) Columbia University, at 141. He also states: 'For a state to claim a Condominium in a certain territory with another state means that she claims that the territorial sovereignty of that territory belongs to her conjointly with the other state.' Ibid., at 100.

> The entity involved prior to independence grew out of an international treaty and established an administrative entity arguably distinct from its metropolitan governments but more likely operating on the basis of a form of joint agency with a range of delegated powers.[66]

Bantz, Samuels, and Blais also appear to opine that Britain and France *jointly* had sovereignty over the New Hebrides.[67] For example, Bantz notes that in the case of a condominium, '[n]one of the [metropolitan] states enjoy all of the attributes of sovereignty over the condominium, only the condominial community of these [metropolitan] states does' and that for the New Hebrides, '[o]ne should not be too much confused by the terms employed, since both powers ... adopted the joint-sovereignty view'.[68]

Last but not least, the fact that the two commissioners in their joint reply on 22 November 1965 referred to the position of the British and French governments instead of the position of the Condominium of the New Hebrides perhaps may also be seen as pointing away from recognizing the Condominium as the sovereignty holder.

We note that it has been pointed out that in British law, the New Hebrides was considered 'foreign territory'.[69] To be clear, British law distinguishes between British possession (namely territory under the sovereignty of the Crown), foreign territory under Her Majesty's jurisdiction, and foreign territory under foreign jurisdiction; the New Hebrides was categorized as 'foreign territory under Her Majesty's Jurisdiction', and as such, its status was comparable to that of British protected territory *in British law*.[70] But, after all, the New Hebrides was not a protectorate – O'Connell has clearly distinguished the two in the context of international law (see above) – and the fact that it was 'foreign territory under Her Majesty's Jurisdiction' in British law does not suffice to conclude that the sovereignty over the New Hebrides rested with the Condominium itself instead of with the two powers: it probably reflects the reality that Britain *alone and individually* did not have sovereignty over the New Hebrides.

In light of the above, it seems that it is not impossible to argue that the Condominium was established in a way that the territorial sovereignty over the New Hebrides rested with Britain and France, the colonial powers of the New Hebrides, instead of with the Condominium itself. Therefore, subject to the analysis based on the principle of self-determination below, it is not impossible to argue that the 1965 Agreement has renounced the title (if the MHIs belonged to the New Hebrides) or renounced claims to title (if title was contentious or uncertain) to the MHIs for the New Hebrides. In other words, from that colonial perspective, even if the MHIs were administered under the New Hebrides before 1965, they were not part of the territory of the New Hebrides as a result of the 1965 Agreement.

It flows that, in the absence of evidence to the contrary, the colonial boundaries of the New Hebrides immediately before its independence in 1980 arguably did not encompass the MHIs (subject, of course, to the analysis based on the principle of self-determination below). Those colonial boundaries would have been the boundaries inherited by the independent state of Vanuatu. Therefore, if the 1965 Agreement were lawful in international law (which it is probably not, see sections below), Vanuatu is unlikely to be able to claim the MHIs on the basis of succession.

On the other hand, given that there is little evidence showing that France exercised effective governmental control over the MHIs on behalf of New Caledonia prior to 1965, it would seem that the 1965 Agreement *per se* would not suffice to confer or validate title to the MHIs, as acquisition

[66]M. Shaw, *International Law* (2014), at 166.

[67]See Bantz, *supra* note 62, at 121; J. H. Samuels, 'Condominium Arrangements in International Practice: Reviving an Abandoned Concept of Boundary Dispute Resolution', (2008) 29(4) *Michigan Journal of International Law* 727, at 738; H. Blais, 'Sharing Colonial Sovereignty? The Anglo-French Experience of the New Hebrides Condominium, 1880s–1930s', in J. R. Fichter (ed.) *British and French Colonialism in Africa, Asia and the Middle East* (2019), 225.

[68]See Bantz, *supra* note 62, at 94 (with further reference to A. Coret, *Le Condominium I* (1960)), 121.

[69]E.g., see O'Connell, *supra* note 56, at 109.

[70]Ibid.

of territory required more than mere proclamation.[71] The acceptance of the French claim by Britain would not make much difference in this regard. As conceded by the then French Minister of Foreign Affairs in his reply to the Director of Overseas Territories of France on 5 October 1964:[72]

> The basis for this attitude in favor of attachment to New Caledonia can only be explained, a priori, by the theory of geographical contiguity which has often been used in the past as a dispensation from actual occupation. These two islets are closer to the last French island attached to New Caledonia, Walpole Island, than to the least distant island of the New Hebrides Condominium, Anatom Island.
> But the validity of the acquisition of "territories without a master" (terrae nullius) requires the intention to possess and this intention must be expressed sooner or later by a legal title if the occupation is effective, measured obviously according to the geological and climatic characteristics which could constitute an impediment, French sovereignty could therefore – since French claims are not in competition with the existence of any other legal title for the benefit of another State – be based on the principle of good faith and be expressed by the inscription of its islands in the Nouméa land register and the sending of official scientific missions at regular intervals.

Whether France's claim about the MHIs' attachment to New Caledonia was valid in 1965 or validated by subsequent conduct is beyond the ambition of this article.[73]

4.2 Validity under the principle of self-determination

The right of peoples to self-determination is an essential principle of international law, whose application can be nonetheless complex, particularly in relation to the principle that follows from it: the principle of territorial integrity of non-self-governing territories.

4.2.1 Self-determination and the principle of territorial integrity of colonized countries

The principle of self-determination of peoples as recognized and developed by modern international law is the result of a long process. It was first a philosophical and political concept before being consecrated by the UN Charter and the 1966 Covenants[74] and enriched by the General Assembly resolutions.[75] Its nature and scope have also been clarified by international case law, notably by the ICJ Advisory Opinion on Namibia[76] and, more recently, by the ICJ Advisory

[71]For discussion about principles of acquisition of territory see M. Dixon, *Textbook on International Law* (2013), Ch. 6.3; J. Crawford, *Brownlie's Principles of Public International Law* (2019), Ch. 9.

[72]French Foreign Affairs Archives, 31DJ/88, 5 October 1964, Letter n°41/A5.

[73]For discussion about the merits of the French claim over the MHIs see Mosses, *supra* note 11.

[74]Common Article 1 of the 1966 Covenants provides:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

[75]Self-determination is the subject of abundant academic literature. For recent publications on the history of self-determination see, for instance, P. Sands, 'Colonialism: A Short History of International Law in Five Acts', in (2023)431 *Collected Courses of the Hague Academy of International Law*, at 298 et seq.; or T. Sparks, *Self-Determination in the International Legal System* (2023).

[76]*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16.

Opinion on the Chagos Islands. In its 2019 Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,[77] the UN judicial body provided substantial elements to the application of self-determination and to its corollary, the territorial integrity of colonized countries. Such clarification can usefully shed light on the situation of several territorial disputes in the world that are related to the decolonization movement.[78]

As the 2019 ICJ Opinion reminded, after Article 1.2 of the UN Charter established self-determination as a core value of the organization, the General Assembly Resolution 1514 of 1960 represented 'a defining moment in the consolidation of State practice on decolonization'[79] – as completed further by Resolution 1541 (XV)[80] and by Resolution 2625 (XXV) of 24 October 1970.[81] The 1960 'Declaration on Decolonization' is also of key importance in that it states that:

> [a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.[82]

To the Court, the incompatibility of partial or total disruption of national unity with UN principles has been confirmed by states' practice through the time, as they 'have consistently emphasized that respect for the territorial integrity of a non-self-governing territory is a key element of the exercise of the right to self-determination under international law'.[83] Also, while assessing the legal consequences of the separation of the Chagos Islands, the Court declared in 2019:

> . . . peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering Power. It follows that any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination.[84]

Further, the judges confirmed 'the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination'.[85]

In the case of the Chagos Islands, the General Assembly resolutions on Mauritius had already pinpointed such principle, as in Resolution 2066 (XX) of 16 December 1965[86] or in Resolutions 2232 (XXI)[87] and 2357 (XXII).[88] Because the judges observed that the 1965 Lancaster House Agreement was

[77] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, [2019] ICJ Rep. 95.

[78] For a few examples of actual territorial disputes linked to the historical process of decolonization, let us mention Mayotte and Tromelin Island in the Indian Ocean or the Falklands in the Atlantic.

[79] See *Chagos Advisory Opinion*, *supra* note 77, para. 150.

[80] Resolution 1541(XV), A/RES/1541(XV) (15 December 1960).

[81] Resolution 2625(XXV), A/RES/25/2625 (24 October 1970) carrying the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.

[82] See Resolution 1514(XV), A/RES/1514 (14 December 1960), para. 6.

[83] See *Chagos Advisory Opinion*, *supra* note 77, para. 160.

[84] Ibid.

[85] Ibid.

[86] Resolution 2066(XX), A/RES/2066(XX) (16 December 1965).

[87] Resolution 2232(XXI), A/RES/2232(XXI) (20 December 1966) (Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Mauritius, Montserrat, New Hebrides, Niue, Pitcairn, St. Helena, St. Kitts-Nevis-Anguilla, St. Lucia St. Vincent, Seychelles, Solomon Islands, Tokelau Islands, Turks and Caicos Islands, and the United States Virgin Islands).

[88] Resolution 2357(XXII), A/RES/2357(XXII) (19 December 1967) (Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Mauritius, Montserrat, New Hebrides, Niue, Pitcairn, St. Helena, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent, Seychelles, Solomon Islands, Swaziland, Tokelau Islands, Turks and Caicos Islands, and the United States Virgin Islands).

not the 'free and genuine expression of the will of the people concerned',[89] they concluded, by 13 votes to one, that the UK's separation of the Chagos Islands from the rest of Mauritius in 1965 was unlawful.

The history of the independence of Mauritius is not, though, the only situation for which the principle of territorial integrity of colonized territories was mobilized by the UN General Assembly through the time. Among numerous examples, two are actually linked to the decolonization process of French colonies, namely Mayotte[90] and the Scattered Islands (*Îles Éparses*).[91]

In contrast, there is no existing UN resolution regarding the MHIs dispute.

4.2.2 Comparison with the Chagos case: Relevance and limits

A parallel between the dispute over the MHIs and the Chagos archipelago's detachment from Mauritius can be easily drawn. This comparison must be made with caution, though, and is fraught with certain limitations. Firstly, the MHIs are uninhabited – and not habitable[92] – and therefore there was no forced transfer of population organized from them to other territories. Secondly, their attachment to the New Hebrides or New Caledonia prior to 1965 is unclear – even if cultural elements and declarations of Ni-Van and Kanak leaders plead for the first option. If there was detachment, it was not negotiated with the Ni-Van independence leaders, and additionally, it happened quite some time before Vanuatu became independent in 1980 (see below).

The question assessed here will therefore be whether, including in view of the new elements provided by the ICJ in its 2019 Opinion, the attachment of the two islets to New Caledonia may constitute a violation of international law and if so, what consequences such violation may entail.

4.2.3 The applicable international law is the law at the time of the conduct

The international law to be taken into account when assessing whether or not there was a violation regarding the territorial integrity of Vanuatu is the law applicable at the time of the conduct, that is to say the date when France and the UK agreed between themselves to attach the islets to New Caledonia, under French administration. In that regard, the 2019 Opinion, which assessed the international effects of the 1965 Lancaster House Agreement, is directly useful, as the agreement between France and the UK on the MHIs was also reached in 1965. There is no doubt that the applicable law to the MHIs dispute is also the law of decolonization, which certainly evolved through the second half of the twentieth century but was already constitutive of general customary international law in the mid-1960s. As previously mentioned, the adoption of Resolution 1514 (XV) in 1960 by the General Assembly was, according to the ICJ, a 'defining moment in the consolidation of State practice on decolonization'.[93] Therefore, a general customary rule of international law providing for the fundamental right of self-determination, and, as a corollary,

[89]Ibid., para. 172.

[90]The UN General Assembly, requested by the Comorian authorities, has always recognized Comorian sovereignty on Mayotte and condemned the attachment of Mayotte to France under the principle of self-determination of peoples and territorial integrity of the Comoros. See Resolution 3161(XXVIII), A/RES/3161 (XXVIII) (14 December 1973), Resolution 3291(XXIX), A/RES/3291 (XXIX) (13 December 1974), Resolution 31/4, A/RES/31/4 (21 October 1976), Resolution 49/18, A/RES/49/18 (6 December 1994).

[91]In its Resolution 34/91 of 12 December 1979 titled 'Question of the islands of Glorieuses, Juan de Nova, Europa and Bassas da India', the UN General Assembly reaffirmed 'the necessity of scrupulously respecting the national unity and territorial integrity of a colonial territory at the time of its accession to independence': Resolution 34/91, A/RES/34/91 (12 December 1979).

[92]See L. Song and M. Mosses, 'Revisiting Ocean Boundary Disputes in the South Pacific in Light of the South China Sea Arbitration: A Legal Perspective', (2018) 33(4) *International Journal of Marine and Coastal Law* 768, at 775–8.

[93]See *Chagos Advisory Opinion*, *supra* note 77, para. 150.

the necessary respect of integrity of colonial territory, existed when France and the UK agreed on the attachment of the MHIs to New Caledonia.

Indeed, appreciation of the respect of territorial integrity is a question of time: once the legal right to self-determination is recognized, the situation changes, as 'colonial powers' become 'administering powers'.[94] From that point, only territorial changes conducted under the UN framework or resulting from the application of self-determination (like the example of Tuvalu and Kiribati previously forming one colonial entity) are acceptable.[95]

It is true, though, that if the MHIs were part of the New Hebrides, that detachment occurred quite a long time before the independence of Vanuatu, in comparison with other situations, such as when the Chagos Islands or the Scattered Islands, for instance, which were detached just a few weeks before independence. This difference is not anodyne and raises the argument of the colonial powers' intention in 1965, which was, in the MHIs context, more a decision of opportunity than a strategic territorial modification. Judge Abraham was underlying that important aspect, in the declaration to the Chagos Opinion, when, rejecting an interpretation of territorial integrity that would be too absolute, he was saying about obligations from the administering powers towards colonial territory that:

> What this obligation seeks to prevent is amputation of part of the territory under colonial administration by a unilateral decision of the administering Power, at the time of or in the period immediately preceding that territory's accession to independence, for the sake of convenience, for strategic or military interests, or, more generally, because of the political or economic interests of the colonial Power itself.[96]

To that regard, such timing could have an influence on how the application of the law of decolonization would be interpreted by a judge in the MHIs dispute case.

4.2.4 The principle of territorial integrity of non-self-governing territories is applicable to uninhabited spaces

Because the two islets are uninhabited, it is important to note that the principle applies to a territory as a whole, whether some parts are inhabited or not. There is no reason to consider that the uninhabited parts of a colonial territory should be excluded from its applicability. At the contrary, territory, by nature, must be considered as a unit. International law treats state territory as such, including different types of spaces – land, sea, and air – whether these spaces are habitable or not. The right of peoples to self-determination must necessarily concern the colonial territory in its entirety. The alternative would be tantamount to depriving this right of part of its content and its objective.

The Declaration on the Granting of Independence to Colonial Countries and Peoples is clear in that regard, stating that 'any attempt aimed at the partial or total disruption of the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'.[97] The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations also considers that:

> [t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate

[94]O. Corten and P. Klein, 'Le différend franco-malgache sur les Iles Eparses du Canal du Mozambique à la lumière de l'avis consultatif de la Cour internationale de Justice sur les Chagos', in Vinuales et al., *supra* note 52, at 44.

[95]Ibid.

[96]See *Chagos Advisory Opinion*, *supra* note 77, Declaration of Judge Abraham, at 62.

[97]See Resolution 1514, *supra* note 82, para. 6.

> and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.[98]

This interpretation was confirmed by the ICJ in its 2019 Opinion, when it recalled 'that the right to self-determination of the people concerned is defined by reference to the entirety of a non-self-governing territory'.[99]

Such interpretation was confirmed by other authors. This is, for instance, what comes out from the analysis conducted by Olivier Corten and Pierre Klein on the dispute over the Scattered Islands.[100]

The content and spatial scope of such principle are therefore clearly applicable to the situation of the MHIs.

4.2.5 Respect for the self-determination principle includes consultation with the colonized people

With these elements in mind, the question of whether the 1965 Agreement constitutes a violation of international law actually involves two aspects. The first is whether there was an obligation on France and the UK to consult the local population and if so, in view of the uncertainty at the time as to the territorial attachment of the MHIs, whether the local populations of both New Caledonia and the New Hebrides should have been consulted.

Indeed, the lack of consideration from the administering authorities for the will or traditions of the local populations emerges clearly from consulting the archives in London and Paris.[101] These correspondences, which led to the joint decision of the two powers to act between them to attach the MHIs to New Caledonia, from which resulted the lack of jurisdiction from the Joint Court of Port Vila on private appropriation, make no reference to the perspective of the local populations. The authorities in Paris and London were looking for 'official elements', 'official possession', and 'official attachment' and therefore elements of sovereignty from the colonial powers involved.[102] The question of which territory the MHIs belonged to was never asked in response to the question of whether the islands had any meaning for the local populations, nor was their opinion sought.

Should this lack of consultation be seen as a violation of international law? The question of the expression of the will of the peoples as to the definition of the basis of their territory is not necessarily addressed as such in the conventional sources providing for the right to self-determination. However, the need for such consultation emerges from the more general interpretation that has been given to this right by the General Assembly and by international courts. In the General Assembly resolutions, the expression of the will of the peoples concerned is a cornerstone of the right of peoples to decide on their political status. The need for this expression is indeed at the heart of the Resolution on the Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter, notably in its Principle VII. In a different register, the rights of indigenous peoples to natural resources have also been interpreted by both the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights as requiring consultation when decisions are made about their lands.[103] There is no possible application of self-determination without the expression of a free and genuine will from the peoples. This is what the ICJ already recognized in 1975, when stating that 'the application of the right of self-determination

[98]Resolution 2625(XXV), A/RES/2625(XXV) (24 October 1970).
[99]See *Chagos Advisory Opinion*, *supra* note 77, para. 160.
[100]See Corten and Klein, *supra* note 94.
[101]See Section 2, *supra*.
[102]Ibid.
[103]See, for instance, *Kichwa indigenous people of Sarayaku v. Ecuador*, Judgment of 27 June 2012, [2012] CIDH.

requires a free and genuine expression of the will of the peoples concerned'.[104] This is also what guided the Court in the Chagos Opinion: the fact that the Lancaster House Agreement was not based on the free and genuine expression of the will of the people concerned was a key element that led the Court to recognize the illegality of the detachment of the archipelago. Practice and judicial opinions therefore show that the expression of the will of the peoples concerned by the right to self-determination is not only essential when deciding their political status, but also more generally when assessing the application of the right to self-determination to a given colonial situation. For this reason, there are solid elements to consider that by answering the question of the territorial attachment of the MHIs, without consulting the local populations, there was a breach of international law as the right to self-determination was already crystalized as a norm of international law at the time of the conduct.

Here, however, remains the more precise question of who exactly should be understood as the people concerned. Practice shows that the UN General Assembly has been able to give an interpretation adapted to the circumstances of each situation. For example, in the context of the self-determination process of New Caledonia, UN resolutions refer to the 'people of New Caledonia' for the exercise of this right, even though such a 'Caledonian people' has no legal existence under domestic law.[105] Because both French and British authorities recognized that they did not have definitive elements proving that the MHIs were attached to New Caledonia instead of the New Hebrides, the 'concerned peoples' could be considered at that time being both the New Caledonia and the New Hebrides populations in the broad sense or the indigenous peoples of both countries in a narrower one.[106]

Similarly, if the declarations of independent representants in New Caledonia towards Vanuatu sovereignty over the MHIs cannot create territorial title per se, they are nevertheless determinant. As a minimum, they constitute a factual element able to give light on what was the Kanak people's perspective on this matter in 1965.[107] Actually, in such context, when there is a wide uncertainty on whether the MHIs were part of the New Hebrides or New Caledonia before the question was raised in 1965, Ni-Van and Kanak views could be given an even more important weight. After all, self-determination is supposed to be more a matter of people than a matter of space.[108]

5. Prospects of resolution

As a result, the prospects of resolving the MHIs dispute must necessarily take account of these difficulties as well as other applicable legal principles, namely not only the principle of *effectivités* but also the rights of indigenous people in international law (Section 5.1). The existing obstacles to a jurisdictional settlement, as well as the principles in balance, mean that a wide range of negotiated solutions should be considered (Section 5.2).

[104] *Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep.12, para. 55.

[105] French constitutional law recognizes the legal existence of the 'people of France' and the 'Kanak people', not the 'people of New Caledonia'. Such perspective from the UN means that we do not have to consider the difficult issue of determining who should be allowed to vote in the referendums of independence. For such reference to the 'people of New Caledonia', see for example the last resolution: Resolution 77/142, A/RES/77/142 (16 December 2022).

[106] On this question see also P. Bodeau-Livinec, 'Le droit à l'autodétermination des peuples insulaires', in SFDI, *Les îles et de le droit international* (2020), 112 et seq.

[107] New Caledonia's FLNKS, the pro-independence political group that represents the Kanaks, recognized in 2009, through the Keamu Declaration, that the Matthew and Hunter Islands traditionally belong to Vanuatu and not New Caledonia. On the Keamu Declaration see N. Maclellan, 'Ocean Diplomacy: the Kéamu Accord, Kastom and Maritime Boundaries', (2022) 4 *ANU Discussion Paper*.

[108] On the spatial perspective that was given to self-determination above the people perspective see Bodeau-Livinec, *supra* note 106.

5.1 Other legal principles in balance

If the 1965 Agreement was and still is contrary to the right to self-determination of the people of the New Hebrides (Vanuatu), the implications of this will be twofold. The first implication would be that Vanuatu will have a strong claim that the arrangement is invalid under international law since it constituted a violation of not only the right to self-determination of the people of the New Hebrides (Vanuatu) but also the principle of territorial integrity of the New Hebrides (as a colonized territory during the time the arrangement was made). The second implication would be that if the 1965 Agreement was unlawful under international law, France may seek to rely on the rule of *effectivités* (effective occupation) (Section 5.1.1), while Vanuatu could still claim that the principle of the continuity of traditional rights includes fishing rights and the use of maritime resources around the two islands (Section 5.1.2).

5.1.1 Effectivités

The international jurisprudence has made it clear that in the absence of title conferred either by treaty, arbitral awards, or through original title (where the title is based on a specific act of occupation of *terra nullius* or is based, in a more general sense, on immemorial possession – possession established for so long that its origins are not only beyond question but also unknown),[109] the focus has to be on the exercise of effective occupation over the islands.[110]

It is also well established in international law, particularly in the context of territorial disputes, that effective manifestations of sovereignty can only be taken into account before the critical date, i.e., the date:

> distinguishing between those acts performed *à titre de souverain* which are in principle relevant for the purpose of assessing and validating *effectivités*, and those acts occurring after such critical date, which are in general meaningless for that purpose, having been carried out by a State which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims.[111]

France has been effectively occupying the MHIs since the 1970s – intermittently rather than continuously, given the particularities of the territories concerned – that is to say, from the moment when the international context made it possible to identify the interest that the two islets could constitute in terms of an EEZ. However, the islets seem to fall more into the category of 'rocks' than 'islands' capable of projecting an EEZ within the meaning of Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS).[112]

In 1971, as part of a private stopover, the chief curator of the Nouméa museum hoisted a huge tricolour flag,[113] and since 1975, sovereignty and scientific reconnaissance missions have been carried out on a regular basis.[114] In 1979, France also built an automatic weather station on

[109]N. Schrijver and V. Prislan, 'Case Concerning Sovereignty over Islands before the International Court of Justice and the Dokdo/Takeshima Issue', (2015) 46 *Ocean Development and International Law* 281, 283 et seq.

[110]Island of Palmas case (USA/Netherlands), Awards, [1928] II RIAA 829; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 19 November 2012, [2012] ICJ Rep. 624; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, Judgment of 23 May 2008, [2008] ICJ Rep. 12; *Territorial Sovereignty and Scope of the Dispute (Eritrea v. Yemen), Awards*, [1998] XXII RIAA 211; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment of 14 June 1993, [1993] ICJ Rep. 38; *Clipperton Island Case (France v. Mexico)*, Awards, [1931] 2 RIAA 1105.

[111]*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, Judgment of 8 October 2007, [2007] ICJ Rep. 698, para. 117.

[112]On this point see Song and Mosses, *supra* note 92, at 775.

[113]See Sautier, *supra* note 11, at 59.

[114]Ibid. Such missions as *La Bayonnaise* in 1975, *La Dunkerquoise* in 1976, and *La Dieppoise* in 1977. See Song, Mosses and Giraudeau, *supra* note 16.

Matthew Island,[115] and three years earlier, it had passed the 1976 law recognizing the MHI into New Caledonia territory.[116] These visits and scientific missions continued until recently.[117]

Nevertheless, according to Sautier, the French authorities themselves acknowledged in 1979 that they had 'not carried out any positive and continuous act of settlement'.[118] After independence and when the competing claim had been formalized, Vanuatu included the MHIs in the textual and topographical definition of its territory.[119] It also raised a flag in 1983 after an expedition, and the postal services of the country produced a plate of illustrations featuring the islets the same year.[120]

Thus, France could claim an original territorial title based on these manifestations of sovereignty as evidence of occupation of a *terra nullius* territory – after all, the MHIs were not inhabited by tribes or peoples having a social and political organization, but they were culturally associated with and traditionally visited by the Ni-Vans, so this point would have to be argued – or at the very least not subject to conventional title.

To be submitted to a judge, such effectiveness would be assessed taking into account the specific features of the territory (its isolation and access difficulties in particular), according to established case law.[121] Above all, only the *effectivités* implemented before the critical date could be taken into account. There is a considerable margin of judicial discretion in establishing the critical date, but there is good reason to believe that in this case it could correspond to the date of Vanuatu's independence, which would leave a fairly short period of time for the acts in question to be sufficiently relevant.

In addition, and in the alternative, if the MHIs were not recognized as *territoires sans maître* at the time of the 1965 Agreement, France could rely on the theory of prescription. Acquisition by prescription 'occurs when a State exercises sovereignty over a territory that belongs to another sovereign with the latest's acquiescence'.[122] France would then need to demonstrate that its acquisition is effective and has cancelled out the previous ownership. To do so, France would need to prove that its possession was exercised in a sovereign capacity, was peaceful and uninterrupted, and existed for a reasonable length of time.[123] It can be argued that France could make a case that the acts undertaken to effectively occupy and administer the MHIs constitute *acts a titre de souverain* (governmental functions). For instance, since the 1970s, France has conducted on several occasions *missions de souveraineté* and scientific missions on the MHIs. In 1979, it built an automatic weather station on Matthew Island. France could also make a case that its possession of the MHIs has existed for a reasonable length of time. The Franco-British agreement was reached in 1965, and since then, France has undertaken activities (even if sometimes sporadically) to effectively occupy the MHIs.

The challenge for France, however, would be to prove that the New Hebrides (Vanuatu) has acquiesced to the subsequent title and that the possession was uninterrupted. There is no record of

[115]Ibid.

[116]Loi n°76-1222 du 28 décembre 1976 relative à l'organisation de la Nouvelle-Calédonie et dépendances.

[117]For more recent examples see *Mission de souveraineté pour le Vendemiaire*, Ministère de la Défense, 17 June 2015, available at www.archives.defense.gouv.fr/operations/territoire-national/forces-de-souverainete/forces-armees-de-la-nouvelle-caledonie/breves/fanc-mission-de-souverainete-sur-les-ilots-matthew-et-hunter.html; C. Fonfreyde et al., 'Matthew et Hunter: mission de suivi terrestre', Mai 2013, at 4, available at mer-de-corail.gouv.nc/sites/default/files/atoms/files/matthew_hunter.pdf; P. Borsa and J. Baudat-Franceschi, Mission ornithologique aux îles Matthew et Hunter, 19–23 janvier 2009, [Rapport de recherche] Institut de recherche pour le developpement (IRD) (2009), at 19–23, available at hal.archives-ouvertes.fr/ird-00666118/document.

[118]Translation of the authors. See Sautier, *supra* note 11. The author bases this quotation on an argumentative note from the *Direction des affaires politiques, administratives et financières* n°7166/DAPAF/AP/AI.

[119]See Section 1, *supra*.

[120]The 'stamp affair'.

[121]On that point see *Legal status of Eastern Greenland*, Judgment, PCIJ Series A/B No 53.

[122]A. Abass, *International Law: Texts, Cases and Materials* (2014), at 202–3.

[123]Ibid., at 212.

Vanuatu's acquiescence to the subsequent title held by France, and since the 1980s, as mentioned in the introduction, there has been active opposition by Vanuatu to the activities and acts undertaken by France to occupy the MHIs. On the day of independence, Vanuatu's government rejected the French take on the MHIs and has, since then, claimed the sovereignty over these two islands. Attempts by Vanuatu in 1983 to plant its flag on the islands were prevented by France's navy. In 2007, France claimed an extension of its continental shelf grounded in the MHIs, but Vanuatu immediately disputed this claim.[124] Then in 2014, a protest letter from the Vanuatu government to the French government noted that the Vanuatu government fully objected to the decision by the governments of France and New Caledonia to establish what they called a Natural Park of the Coral Sea that covered the French territory's entire EEZ and included the MHIs.[125]

5.1.2 Indigenous people's rights

The modern indigenous people's rights movement is relatively recent. It only began in the 1960s and 1970s when a number of countries in the South acceded to or were in the process of attaining their independence. In addition to the efforts made at the domestic level, indigenous peoples around the globe have called on the international system, in particular, the human rights regime, to advance their cause.[126] These efforts have led to new developments that were unfolded in two track approaches.

The first track is related to the enhanced institutional commitments to the concerns of the indigenous peoples. This has allowed indigenous peoples access to the international arena through the Working Group on Indigenous Populations, the UN Permanent Forum on Indigenous Issues, the Special Rapporteur on Rights of Indigenous Peoples, and the Expert Mechanism on the Rights of Indigenous Peoples. This first track also helped indigenous peoples to better understand their disadvantaged conditions.

The second track approach is related to the establishment of a set of international standards for the treatment of indigenous peoples. This is reflected not only in the adoption of International Labour Organization Convention No 169 and the UN Declaration on the Rights of Indigenous Peoples but also in the provisions of widely ratified human rights treaties of general applicability. Under this track, the UN treaty-monitoring bodies as well as the international courts and tribunals and domestic courts have played an important role in developing a jurisprudence on the interpretation of the relevant provisions of human rights treaties on indigenous peoples and their rights, including rights to traditional land use.[127]

5.1.2.1 Indigenous people's rights to traditional land use. The jurisprudence of international courts and tribunals and the treaty practice tend to indicate that in the absence of a clear intention to the contrary, traditional rights of indigenous peoples are not affected by territorial delimitation. In early 1960, in the *Right of Passage* case, the ICJ recognized the principle that customary rights are deemed to survive the transfer of territorial title.[128] The Court ruled that Portugal must

[124]Receipt of the submission made by France to the Commission on the Limits of the Continental Shelf, UN Doc. CLCS.08.2007.LOS, Continental Shelf Notification (29 May 2007), available at www.un.org/depts/los/clcs_new/submissions_files/submission_fra.htm.

[125]Letter published in Local Newspaper Vanuatu Daily Post on 8 May 2014, available at www.dailypost.vu/news/vanuatu-objects-to-marine-natural-park-established-by-new-caledonia/article_c395b4ab-62f9-5579-8a2a-f564b8203d19.html; see Arrêté n° 2014-1063/GNC du 23 avril 2014 créant le Parc naturel de la mer de Corail.

[126]See S. J. Anaya, 'The Human Rights of Indigenous Peoples: United Nations Developments', (2013) 35 *University of Hawai'i Law Review* 983.

[127]The UN Human Rights Committee was supportive of applying Art. 1 of the International Covenant on Civil and Political Rights for the benefit of indigenous peoples well before the UN Declaration on the Rights of Indigenous Peoples explicitly affirmed the right to self-determination of the indigenous peoples in its Art. 1. See, for instance, Human Rights Committee, Concluding Observations: Canada, CCPR/C/79/Add.105 (7 April 1999).

[128]*Right of Passage over Indian Territory (Portugal v. India)*, Judgment of 12 April 1960, [1960] ICJ Rep. 6, paras. 35–43.

continue to enjoy certain rights of passage over Indian territory that used to be Portuguese. This principle was later confirmed in the 1996 case of *Eritrea/Yemen*, where the arbitral tribunal recognized that customary rights 'run with the land' and that any party to which title to a particular territory has been allocated is bound to give effect to customary rights of the indigenous groups concerned.[129] In *Delimitation of the Abyei Area (Government of Sudan* v. *People's Liberation Movement Army)*,[130] an arbitral case of 2009, the tribunal noted, 'Convention No 169 of the International Labour Organisation (ILO) [sic] concerning Indigenous and Tribal Peoples in Independent Countries enshrines a positive duty on the part of states to safeguard the rights of peoples to their traditional land use.'[131] The Tribunal also observed that Article 14(2) of the same convention facilitates the protection of traditional rights to land use, including non-exclusive land use, in that it requires the governments to 'take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession'.[132] The Tribunal finally concluded that '[a]s a matter of "general principles of law and practices" ... traditional rights, in the absence of an explicit agreement to the contrary, have usually been deemed to remain unaffected by any territorial delimitation.'[133]

5.1.2.2 Traditional fishing rights of indigenous peoples. It is important to note that traditional rights of indigenous peoples also include traditional fishing rights and traditional use of maritime resources. In fact, it was recognized that the principle of the continuity of traditional rights includes fishing rights in the 1893 case of *Behring Sea Arbitration*, concerning the indigenous people's traditional rights to fish fur seals in the disputed waters.[134] In this case, the Tribunal exempted the 'Indians dwelling on the coasts of the territory of the United States or of Great Britain' from the laws regulating the issues at hand so as to ensure the continuation of their traditional fishing techniques.

In a number of cases, the ICJ upheld traditional fishing rights belonging to indigenous groups without, however, considering them sufficient to allocate title to territory based on the rule of *effectivités*.[135] In some cases related to boundary delimitation, the ICJ has observed, however, that the pre-existing traditional rights may result in spatial adjustments. In the case of *Gulf of Maine (Canada* v. *US)*, concerning delimitation of continental shelf and fishery zones, the ICJ recognized that in the event where boundary delimitations result in 'catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned', adjustments to

[129] *Sovereignty and Maritime Delimitation in the Red Sea (Eritrea/Yemen)*, PCA Case No. 1996-04, Award of the Arbitral Tribunal in the First Stage of 9 October 1998, para. 126, available at www.pca-cpa.org.

[130] The Government of Sudan/The Sudan People's Liberation Movement/Army (Abyei Arbitration), PCA Case No. 2008-07, (2009) XXX RIAA 145.

[131] Ibid., Final Award of 22 July 2009, para.763. The Tribunal relied on Arts. 13(1) and 14(1) of the Convention No 169 to make the above affirmation. Article 13(1) provides:

> Governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

Further, Art. 14(1) states:

> ... measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

[132] Ibid., para. 765. ILO Convention No 169, Art. 14(2).

[133] Ibid., para. 766.

[134] *Behring Sea Arbitration, Great Britain v. United States*, 15 August 1893, 179 *CTS,* No. 8, 97, at 98.

[135] *Sovereignty over Pulau Ligitan and Pulau Sipadan (IndonesialMalaysia)*, Judgment of 17 December 2002, [2002] ICJ Rep. 625; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment of 16 March 2001, [2001] ICJ Rep. 40.

the median line would be required.[136] In addition, it is worth noting that the treaty practice also supports the position that the above principle of the continuity of traditional rights includes fishing rights. A number of early bilateral treaties concerning delimitation of boundaries have guaranteed traditional rights of indigenous groups.[137] Some modern treaties on boundary delimitations also have provisions recognizing the same. For instance, the 1978 Treaty between Australia and Papua New Guinea provides a special legal regime, including providing traditional fishing rights to groups of people who 'maintain traditional customary associations with areas or features in or in the vicinity if the Protected Zone in relation to their subsistence or livelihood or social, cultural or religious activities'.[138]

5.1.2.3 Legal arguments based on indigenous people's rights?. As noted earlier in this article, the MHIs are at the centre of Vanuatu legends. In fact, Ni-Vanuatu indigenous groups from the southern parts of Vanuatu used to travel to the two islands not only to perform cultural ceremonies, but also for fishing purposes.[139] In addition, New Caledonia's FLNKS, the pro-independence political group that represents the Kanaks, recognizes, through the Keamu Declaration, that the MHIs traditionally belong to Vanuatu and not New Caledonia.[140] This declaration reinforces the cultural and traditional connection between Vanuatu and the MHIs. As noted above, in the event that the 1965 Agreement did not constitute a violation of the Ni-Vans' right to self-determination, Vanuatu could arguably still claim that the principle of the continuity of traditional rights includes fishing rights and the use of maritime resources around the two islands. As was also indicated above, the jurisprudence of the international courts and tribunals as well as the treaty practice show that this principle was already a binding norm in the 1960s. Accordingly, traditional rights, including fishing rights and use of maritime resources of the people of the southern parts of Vanuatu, are likely to remain unaffected by the 1965 Agreement between France and the UK.

5.2 Limits of international procedures

The numerous specificities of the MHIs dispute should encourage France and Vanuatu in negotiating an original solution rather than turning to jurisdictions, especially since both countries have strong bilateral relations.

[136]*Gulf of Maine (Canada v. US)*, Judgment of 12 October 1984, [1984] ICJ Rep. 246, at 342. Also see *Maritime Delimitation (Denmark v. Norway)* where the ICJ considered the question of 'whether any shifting or adjustment of the median line as fishery zone boundary would be required to ensure equitable access to the capelin fishery resources for the vulnerable fishing communities concerned'. (*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment of 14 June 1993, [1993] ICJ Rep. 38, paras. 72–78).

[137]See 1888 Agreement between Great Britain and France, respecting the Somali Coast, signed at London, February 1888, Hertslet's, Vol. XIX, 204, at 204–5, Art. 1; Arrangement between Great Britain and France, fixing the Boundary between the British and French Possessions on the Gold Coast, signed in the French language at Paris, 12 July 1893, Hertslet's, Vol. XIX, 228, at 229–30, Art. V; Treaty between Great Britain and Ethiopia, signed by the Emperor Menelek II, and by Her Majesty's Envoy, at Adis Abbaba [sic], 14 May 1897, Hertslet's, Vol. XX, 1, at 2, Art. I.

[138]Treaty on Sovereignty and Maritime Boundaries in the Area between the Countries, 18 December 1978, (1979) XVIII ILM 291, at 293. Also see Treaty relating to the Legal Regime of Archipelagic State and the Rights of Malaysia in the Territorial Sea, Archipelagic Waters and the Territory of the Republic of Indonesia lying between East and West Malaysia, cited in R. R. Churchill and A. V. Lowe, *The Law of the Sea* (revised ed., 1988), 109.

[139]B. Makin, 'Matthew and Hunter Day', *Vanuatu Daily Post*, 12 March 2015, available at dailypost.vu/news/matthew-and-hunter-day/article_253d5ec4-47b1-5a5c-ac54-69a739cee733.html.

[140]Flash d'Océanie, 30 November 2010, available at www.tahiti-infos.com/Les-iles-Matthew-et-Hunter-n-en-finissent-pas-d-empoisonner-les-relations-franco-vanuatuanes_a13518.html; Fisher, *supra* note 7, at 146.

5.2.1 Obstacles to jurisdictional settlement

Over and above the classic disadvantages of any jurisdictional procedure, linked in particular to its financial and diplomatic cost, the submission of territorial disputes 'of attribution of sovereignty' to a jurisdictional third party has the peculiarity of leading to a necessarily binary solution: does the island or rock in question fall under the sovereignty of one state or the other? In this respect, this category of territorial dispute differs from a boundary dispute, which favours a solution that is more acceptable to both parties: conceding 'a little to each'. The same is often true of attribution disputes involving several maritime formations. There are a few counter-examples in international jurisprudence,[141] but it is hard to imagine a judge, for example, deciding that Matthew Island would belong to one state and Hunter Island to the other. As a result, when overseas lands give rise to international disputes over sovereignty, jurisdictional intervention can only respond with a clear-cut solution and is therefore less likely to purge tensions. The prospect of designating a winner and a loser is therefore in itself an element likely to curb any desire for a final settlement through recourse to a judge or an arbitrator.

Additionally, France, which is historically reluctant to turn to international courts and even more so on issues relating to the definition of its territory, would have no interest in subjecting controversies concerning its overseas territories (including the MHIs, Mayotte, the Scattered Islands, and Tromelin Island) to a jurisdictional settlement. It would actually have everything to lose in doing so, especially after the ICJ's opinion on the Chagos Islands, and very little to gain, as it is already in a position of economic, military, and political power in relation to states contesting its sovereignty. The French authorities are aware of the advantages of the status quo, in a context where France exercises de facto sovereignty over these territories.

Vanuatu, for its part, could be supported by the UN and buoyed by the movement initiated by Mauritius over the Chagos Islands. The emergence of an 'Oceania climate diplomacy' also seems to be contributing to a much stronger presence of certain states before international bodies.[142] Nevertheless, even if Vanuatu were to have such aspirations, it would be impossible for it to submit its case to a contentious procedure without France's consent[143] and all the less opportune in view of the existing avenues of co-operation with the states concerned. What remains is the consultative procedure, as activated in the case of the Chagos Islands, with the endorsement of the General Assembly. Litigation under the UNCLOS, on the other hand, could only deal with incidental aspects of such disputes and not with the question of sovereignty as such.

5.2.2 Possibilities of negotiated solutions

Beyond the general obligation of states to negotiate in good faith, to what extent are negotiated solutions that avoid the pitfall of binarity possible? To answer this question, the respective interests of the parties must first be taken into account. As mentioned earlier, there are obvious issues of co-operation between France and states with competing claims to overseas territories, which will necessarily be brought to the fore in these discussions. Moreover, the creation of the marine protected area around New Caledonia certainly has strategic implications in terms of asserting French sovereignty while at the same time highlighting genuine environmental issues. The latter are also likely to serve as a concrete basis for forms of co-management.

[141]Notable exception is given by the *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* case in front of the ICJ.

[142]Adoption of GA/RES.77/276 on March 2023, 'Request for an advisory opinion of the International Court of Justice on the obligations of states in respect of climate change', led by Vanuatu, is one of the strong illustrations of such movement.

[143]France withdrew its acceptance of the ICJ's compulsory jurisdiction after the nuclear testing case, which in any case excluded territorial disputes from jurisdiction. UNCLOS could neither be mobilized to resolve a territorial dispute.

In this respect, it is regrettable that in the case of Tromelin Island,[144] the initiative taken with Mauritius has still not been implemented, which invites us not to over-invest in the establishment of common administrative areas. Conceived back in the 1990s and signed in 2010,[145] this co-management agreement actually comprises a framework agreement itself and three implementation agreements. The text is neither perfect nor exhaustive but has the enormous advantage of being pragmatic, showing both that the apparently binary problems of sovereignty can also be overcome and that negotiated solutions are possible for similar disputes. However, political tensions remain, particularly within the French National Assembly, and the failure to ratify this agreement – which may only be temporary but is tending to fester – leaves a bitter taste in the mouth.[146] It is nevertheless an interesting precedent that could be inspiring for the MIHs dispute resolution.

6. Conclusion

The article examined the dispute between France and Vanuatu over the MHIs in light of the Chagos Advisory Opinion and a few other cases concerning territorial disputes to which France is a party.

The article first looked at the history of the MHIs and submitted that the question of sovereignty of the islets had not been raised before 1962. It explained the process and context of the negotiation of the 1965 Agreement between France and Britain, which asserted that the MHIs were part of New Caledonia and not Vanuatu. It then considered the legal implications of the Chagos Advisory Opinion on the MHIs dispute and argued that although there are some differences between the two disputes, the applicability of the right to the self-determination of peoples to the MHIs dispute is beyond doubt. The international jurisprudence and the UN resolutions show that the right to self-determination was already crystalized as a norm of customary international law, binding all states, in the 1960s. Such right also includes the protection of territorial integrity of non-self-governing territories.

Therefore, the 1965 Agreement between France and Britain may constitute a violation of the right to self-determination of peoples, as the 'peoples concerned' were not consulted on the decision to attach the MHIs to the French territory of New Caledonia. There may be, however, some other legal principles under international law that can come into play. France could, for instance, rely on the rule of effective occupation in its claims for sovereignty over the MHIs since it has been effectively occupying these islets since the 1970s, while Vanuatu could claim that the principle of the continuity of traditional rights includes fishing rights and the use of maritime resources around the MHIs.

Finally, due to the different obstacles and disadvantages a jurisdictional settlement of the dispute would have, the article contends that negotiated solutions, including a co-management agreement, could be a potential way forward for the parties involved.

[144]Tromelin Island, the only land formation of the Scattered Islands outside the Mozambique Channel, is now disputed solely by Port Louis. First attached to the Isle de France (Mauritius), then to the Ile Bourbon (Réunion Island), the islet was not claimed by Mauritius until eight years after its independence, in 1976. France firmly defended its sovereignty, on the bases of its discovery of Tromelin Island in the eighteenth century and its occupation from 1954 through meteorological infrastructures.

[145]Framework Agreement of 7 June 2010 between the Government of the French Republic and the Government of Mauritius on the economic, scientific, and environmental co-management of Tromelin Island and its surrounding areas, available at www.senat.fr/leg/pjl11-299-conv.pdf.

[146]However, the agreement is not entirely devoid of normative effects. See D.-S. Robin, 'La zone maritime disputée entre la France et Maurice autour du récif de Tromelin', (2019) AFDI, at 579–600.

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