

The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunals

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I. Introduction

Silence as state conduct plays a significant role in various contexts in the relationships among states and has important practical application in the settlement of disputes by international tribunals. Silence is mainly related to the concept of acquiescence. Acquiescence as a negative concept has been found to connote ‘the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights ... Acquiescence thus takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection’.¹ Acquiescence is a legal concept; it comes into play when silence or inaction is interpreted in such a way as to manifest a state’s acceptance of a factual or legal situation. In this respect, acquiescence has been characterised as ‘qualified silence’.²

However, confusion in the treatment of silence lies in the difficulty of determining with certainty what states think or will.³ As D’Amato observes there might be a ‘fundamental difference between what we as observers think a state thinks, and what the state in fact thinks, or feels, or has a conviction about’.⁴ Since silence is a real fact, its interpretation and its legal value will depend upon the

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¹ I C McGibbon, ‘The scope of acquiescence in international law’ (1954) 31 *British Year Book of International Law* 143.

² J Müller and T Cottier, ‘Acquiescence’ in R Bernhardt (ed), *Encyclopedia of Public International Law* (vol 7, 1984) 5; E Suy, *Les actes juridiques unilatéraux en droit international public* (1962) 66; M E Villiger, *Customary International Law and Treaties* (1985) 19 (referring to the formation of customary law). See also the statement by Pellet in ‘Summary Record of the 2629th Meeting’ 30 May 2000, UN Doc A/CN.4/SR.2629 extracted from (2000) I *Yearbook of the International Law Commission* 137, [69] <http://untreaty.un.org/ilc/documentation/english/a_cn4_sr2629.pdf>; he refers to ‘intentional eloquent silence expressive of acquiescence’.

³ A D’Amato, *The Concept of Custom in International Law* (1971), 73:
a state is of course an artificial entity; one can surely ask whether what a state ‘thinks’ is what a majority or vocal minority of its leading or at least influential decision-makers – or their advisers – say they are thinking.

⁴ *Ibid* 73.

circumstances of the case under examination. In its recent judgment in the *Case concerning the sovereignty over Pedra Branca/Pulau Puteh, Middle Rocks and South Ledge* between Malaysia and Singapore, the International Court of Justice (ICJ) noted that ‘silence may also speak, but only if the conduct of the other state calls for a response’.⁵

Positivism (mainly voluntarism)⁶ and objectivism advocate contrary views concerning the legal value of silence in the relationships among states. Voluntarism purports to ascertain what a state really thinks and to verify that the external conduct of the state conforms to its will. Positivist authors treat silence as a manifestation of state will, and contend that the legal effects produced by silence in the relations among states stem from this will.⁷ Objectivism, on the other hand, treats silence as a fact, and purports to establish that the legal effects of such silence are produced irrespective of any intent or will of the silent state. Authors ascribing to this theory have attempted to show that the concept of acquiescence is an exception to positivist thinking concerning the preponderance of state will in international law⁸ and have justified the legal effects produced by silence by invoking concepts such as the international responsibility of states⁹ or good faith, legal certainty, and general interests.¹⁰

⁵ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)* [2008] ICJ Rep 51 [121].

⁶ As described by Brierly, ‘the doctrine of positivism ... teaches that international law is the sum of the rules by which states have consented to be bound, and that nothing can be law to which they have not consented’: J L Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th ed, 1963). Voluntarist positivism focuses on the manifestation of state wills (see C de Visscher, *Theory and Reality in Public International Law* (P E Corbett trans, 1968) 52–54) and declares that state will is the only instrument of creation of law: see J Bentz, ‘Le Silence comme manifestation de volonté en droit international public’ (1963) *Revue Générale de Droit International Public* 44, 47–48; (particularly his note 5 on authors ascribing to this doctrine). On positivism see also R Ago, ‘Positivism’ in *Encyclopedia of Public International Law* (vol 7, 1984) 385–93.

⁷ G Danilenko, ‘The Theory of International Customary Law’ (1988) 31 *German Yearbook of International Law* 33; I C McGibbon, above n 1, 145: ‘The function of acquiescence may be equated with that of consent’; G Fitzmaurice, ‘The Law and Procedure of the ICJ, 1951–54: General Principles and Sources of Law’ (1953) 30 *British Year Book of International Law* 68: ‘it is probably true to say that consent is latent in the mutual tolerations that allow practice to be built up at all; and actually patent in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law’; Schwarzenberger refers to acquiescence or toleration as ‘silent consent’: G Schwarzenberger, ‘Title to Territory: Response to a Challenge’ (1957) 51 *American Journal of International Law* 318.

⁸ J Barale, ‘L’acquiescement dans la jurisprudence internationale’ (1965) 11 *Annuaire Français de droit international* 389, 426.

⁹ *Ibid* 424–27.

¹⁰ C de Visscher, *Les effectivités en droit international public* (1967) 156–7. De Visscher criticises voluntarism and its approach to the generation of legal effects by silence as outdated by developments in international law and in the relationships among states, *ibid* 166, 169; see also C de Visscher, *Problèmes d’interprétation judiciaire en droit*

The International Law Commission (ILC) discussed the issue of the legal effects produced by silence in the framework of its discussion on unilateral acts.¹¹ Conflicting views were advanced concerning whether state conduct in the form of silence or acquiescence should be included in the draft articles produced by the ILC. The main objection of the Special Rapporteur, Victor Rodríguez Cedeño, and the members of the ILC who shared his views was that silence – albeit producing legal effects in the relations among states – could not be defined as a legal act in the sense dealt with by the Commission, namely ‘as an express manifestation of independent will intended to produce legal effects in relation to third states’.¹²

The Guiding Principles finally adopted by the ILC apply solely to unilateral acts *stricto sensu* taking specifically the form of formal declarations and do not encompass state conduct.¹³ The debate concerning the legal effects produced by state conduct, such as silence, is however reflected in the Preamble of the Guiding Principles. It is therein stated that ‘it is often difficult to establish whether the legal effects stemming from the unilateral behaviour of a state are the consequence of the intent that it has expressed or depend on the expectations that its conduct has raised among other subjects of international law’.¹⁴ Despite the fact that this question was of importance for the ILC in its attempt to define efficiently – and admittedly restrictively – the ambit of its work, its actual significance concerns the juridical value of silence as depicted in the voluntarism/objectivism debate mentioned above. As voluntarism argues, the legal effects of silence, that is whether silence is legally relevant, depend upon the intention of the silent state. On the contrary, objectivism asserts to base its conclusions not on the intention of this state, but on the impact of silence as a factual situation upon other states.

A third pillar should be added to the voluntarist/objectivist interpretation of silence, that of the jurisprudential perspective. Indeed, international tribunals play a fundamental role in the interpretation of state conduct including silence. International judges and arbitrators are called to assess the evidence presented before them by states and to adjudicate on the actual juridical significance of a state’s silence. Barale stressing the role played by jurisprudence in the conceptualisation of acquiescence referred to acquiescence as ‘*une théorie jurisprudentielle*’ and emphatically pointed out that it ‘*consacrerait ainsi le rôle de la jurisprudence dans l’élaboration du droit international objectif détaché de la*

international public (1963) 166–67, 169.

11 The International Law Commission undertook the task of examining unilateral acts of states as a topic appropriate for the codification and progressive development of law; see (1996) II(2) *Yearbook of the International Law Commission*, Annex II [248].

12 Fourth Report of Special Rapporteur, 30 May 2001, UN Doc A/CN.4/519, 7, [31] <<http://untreaty.un.org/ilc/sessions/53/53sess.htm>>

13 Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, (2006) II(2) *Yearbook of the International Law Commission*. Also found at <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf>.

14 Ibid.

volonté des Etats'.¹⁵ According to Barale, international tribunals may be deemed to objectivise the interpretation of silence as acquiescence, in some instances even contrary to the real will of the silent state. Similarly, de Visscher stressed the importance of the jurisprudence of the ICJ in dispelling uncertainties characterising the legal effects of unilateral attitudes including silence.¹⁶

This article examines silence as an element of state behaviour having legal effects in the relationships among states. The question this article seeks to answer concerns the stand international tribunals have taken in the voluntarism/objectivism debate regarding the legal value of state silence. To answer this question, this article analyses the conditions under which silence may acquire legal significance, especially related to the materialisation of the legal concept of acquiescence, according to the jurisprudence of the ICJ and arbitral tribunals. Despite the fact that, as has been suggested elsewhere, the circumstances for the interpretation of silence are a matter of fact and not of law, the ICJ and arbitral tribunals have been consistent in the use of specific conditions on the basis of which silence may be deemed to have legal significance. Conclusions drawn from the utilisation of these criteria may provide some answers to the question whether it is the intention of the silent state or the impact of silence upon other states which gives silence legal value.

II. Silence as state conduct

State silence as a factual reality indicates that a state says or does nothing.¹⁷ The meaning of silence depends upon the circumstances in which it appears. As suggested by Suy, silence may signify a state's acceptance,¹⁸ opposition¹⁹ or it may have no significance at all.²⁰ State silence as such cannot be thought to have any meaning unless connected with a legal or factual situation particularly the act or claim of another state.²¹ In this sense, as noted by the Special Rapporteur of the

¹⁵ Barale, above n 8, 416 ('it would thus sanction the role of jurisprudence in the development of objective international law detached from the will of states'.) The French extracts in this article have been translated by the author unless otherwise stated.

¹⁶ De Visscher, above n 10, 156–7.

¹⁷ See J Bentz, above n 6, 45.

¹⁸ Certain treaty provisions explicitly stipulate the conditions under which silence amounts to consent. For example, art 252 of the 1982 United Nations Convention on the Law of the Sea 1833 UNTS 397 concerning Marine Scientific Research (MSR) provides that silence in a period of four months after the filing of an application for conducting MSR in the Exclusive Economic Zone and the Continental Shelf signifies this state's implied consent.

¹⁹ In the *Asylum Case* the ICJ perceived Peru's failure to ratify the Montevideo Conventions of 1933 and 1939 as a manifestation of its objection to the rules embodied in that treaty with regard to political asylum: *Asylum Case (Colombia v Peru)* [1950] ICJ Rep 278.

²⁰ Suy, above n 2, 61.

²¹ J Cot, 'L'interprétation de l'accord franco-américain relatif au transport aérien international' (1964) 10 *Annuaire Français de Droit International* 379: 'Le silence

ILC in his reports on unilateral acts of states, silence as state behaviour having legal effects is reactive.²² It acquires juridical value when a state is faced with a situation, normally an act performed or a claim raised by another state, which ‘calls for’ its reaction.²³

In this context, passive reaction or silent conduct is tantamount to absence of protest or opposition. Protest normally refers to diplomatic protests, which have been defined by Oppenheim as ‘a formal communication from one state to another that it objects to an act performed or contemplated by the latter’ serving ‘the purpose of preservation of rights or of making it known that the protesting state does not acquiesce in and does not recognise certain acts’.²⁴ This is indeed the commonest means for objecting to the alleged illegality of a claim.²⁵ However, the notion of protest has a broader context and may include not solely diplomatic protests but also any kind of statement advanced or action performed by a state,

n’emporte pas acquiescement par lui-meme. Il faut encore qu’il suive une prétention clairement affirmée’ (‘Silence does not result in acquiescence by itself. It must also follow a clearly stated claim’). See also the statement by Brownlie in ‘Summary Record of the 2696th Meeting (26 July 2001)’ (2001) I *Yearbook of the International Law Commission* 197, [27] <http://untreaty.un.org/ilc/documentation/english/a_cn4_sr2696.pdf>: ‘what had to be evaluated was silence in a particular context and in relation to a certain precipitating act, not silence *per se* or in isolation’. See also Fourth Report of Special Rapporteur, above n 12, 7, [30]:

Lack of protest – that is, silence – can be decisive in legitimising a given situation or legal claim, although it is clear that silence in itself does not signify any recognition whatsoever.

²² The Special Rapporteur paid particular attention to the reactive nature of silence in order to support his argument that silence cannot be considered as a unilateral act in the sense defined in his reports: see Fourth Report of Special Rapporteur, above n 12, 5–6, [26]–[27]. Barale refers to silence as ‘une attitude de passivité d’un Etat *vis-à-vis* des prétentions (emphasis added) d’un autre Etat’ (‘passive behaviour of one State *vis-à-vis* the claims of another’), above n 8, 397.

²³ What is more, the legal effects produced by silence will be partly determined by the claim, the act or the practice of the other state or states. The question of whether silence or acquiescence are unilateral juridical acts is not addressed in the present article. For an analysis of the legal nature of acquiescence see Barale, above n 8, 416 *et seq.*

²⁴ L Oppenheim, *International Law* (7th ed, vol I, 1948) 789.

²⁵ The importance of diplomatic protest as an obstacle in the formation of customary or prescriptive rights has been emphasised by many authors: See Y Z Blum, *Historic Titles in International Law* (1965) 154:

the absence of protest may be regarded as the corner-stone of the doctrine of acquiescence. It rests on the assumption that states will not remain silent when faced with a situation likely to affect adversely their rights, if there is the slightest justification for any objection on their part ... they will usually give air to their grievances by the formulation and dispatch of a protest, the purpose of which is to build up an almost instinctive defence mechanism designed to vitiate any possible interpretation of silence as acquiescence.

McGibbon, above n 1, 171, who stresses the significance of diplomatic protests as ‘a constantly recurring feature of the diplomatic practice of states’; see also K Wolfke, *Custom in Present International Law* (2nd ed, 1993) 62, fn 48.

through which its objection is manifested.²⁶ Suy refers to actions such as the reference of a case to an international tribunal, the rupture of diplomatic relations or the initiation of hostilities.²⁷ A state, however, may raise its objections through less obvious ways, such as the conclusion of an agreement with an objective contrary to the claim of another state, the raise of a rival claim²⁸ or the performance of an opposing practice in the same field. It should, however, be admitted that the actual meaning of these actions may be inconclusive,²⁹ and thus it will be a matter of assessment which is the actual conduct of a state which has relevance in a specific factual and legal context.³⁰

III. The Role of Silence as State Conduct in the Settlement of Disputes

Silence plays an important role in various and diverse contexts in the relationships among states and in the settlement of their disputes before international tribunals. Silence as state conduct has indisputably important evidentiary value and may be used by international tribunals as a means of shedding light and resolving uncertainties with regard to the actual meaning of a state's behaviour.³¹

²⁶ Suy states that there is no rule of international law requiring in most instances a special form for juridical acts including protests, above n 2, 49; on the contrary McGibbon argues that the element of formality is essential to the validity of protests: I C McGibbon, 'Some Observations on the part of protest in international law' (1953) 30 *British Year Book of International Law* 294. In the *Island of Palmas Case* arbitrator Huber found that the display of Netherlands sovereignty was peaceful as 'no contestation or other action whatever or protest (emphasis added) against the exercise of territorial rights by the Netherlands' had been recorded: *Island of Palmas Case* (1928) 2 RIAA 829, 868.

²⁷ Suy, above n 2, 53.

²⁸ In the *Right of Passage Case* the ICJ found that the UK had accepted the Portuguese sovereignty over the enclaves by not raising any such claim herself; *Case Concerning the Right of Passage over Indian Territory (Portugal v India)* [1960] ICJ Rep 39.

²⁹ Suy who accepts this broad spectrum of the notion of protest states 'la protestation englobe tous les actes et actions par lesquels se manifeste clairement l'intention de ne pas reconnaître un état de fait contraire au droit' ('protest includes all acts and actions through which the intention not to recognize a fact contrary to law is clearly expressed'), above n 2, 53; however, whether an action manifests clearly such intention can only be a matter of assessment of the facts. It is true that in the examples suggested by Suy (rupture of diplomatic relations, initiation of hostilities) the intention of the state is clear, but he refers to other instances such as withdrawal from an international conference or denunciation of a treaty where the content of the exact intention of the state is not so clear and would thus be a matter of assessment.

³⁰ See below nn 205–210 and accompanying text for the relationship between silence and positive conduct.

³¹ For example, (a) as evidence strengthening the conclusion of the Court: In the *Case Concerning the Territorial Dispute* between Libya and Chad, the ICJ accepted that there was a conventional title in favour of Chad determining the boundary and binding the states. However, it also took into consideration as strengthening its conclusion, the lack of any objection on behalf of Libya to the territorial dimensions of Chad as presented by France and as appeared in UN Reports after 1955: *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 36 [68]. On the

Furthermore, silence as state conduct may produce legal effects in international law, especially with regard to the materialisation of legal concepts such as acquiescence, prescription and estoppel, and within the context of formation of general or special customary law and acquisition of territory. However, it should be noted that the jurisprudence of international tribunals has not always been clear with regard to the legal effects produced by silence in terms of the materialisation of a specific legal concept. Indeed, the concepts of acquiescence, estoppel, tacit agreement and prescription (in the context of territorial disputes) are not always distinguishable in practice.³²

According to the dictum of the ICJ in the *Gulf of Maine Case*, ‘acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent’.³³ In *Pedra Branca/Pulau Batu Puteh Case*, the

contrary, Judge Ajibola found that Libya was estopped from denying the 1955 Treaty boundary; *ibid* (Judge Ajibola’s dissenting opinion), 83 [114]; (b) as a means for interpreting an agreement between the parties: see *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1158–163 (Judge Weeramantry); see also Indonesia’s argument in the *Case concerning sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Rep 648-9; (c) as a relevant circumstance for the delimitation of a maritime area: in the *Libya/Tunisia Case* the Court found that the conduct of the parties (particularly the Tunisian acquiescence in the Libyan proposals for the use of the 26° line) could be taken into account as a relevant circumstance in the maritime delimitation: *Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] ICJ Rep 70, [95]; Judge Ago, on the contrary, in his separate opinion found that there was a tacit agreement between the two parties establishing a maritime boundary on the basis of Tunisia’s acquiescence: *ibid* (Judge Ago) 96–7, [3–4]. In the *Gulf of Maine Case*, Canada invoked acquiescence as having evidentiary value first ‘as an indication ... of the existence of a *modus vivendi* or of a *de facto* boundary, which the two states have allowed to come into being’ or alternatively ‘as mere indicia of the type of delimitation that the Parties themselves would have considered equitable’: *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA)* [1984] ICJ Rep 304, [128]. Canada also invoked the concept of acquiescence as equivalent to estoppel.

³² Müller and Cottier in Bernhardt *et al*, above n 2, 6. Brownlie points out that ‘recognition, acquiescence, admissions constituting a part of the evidence of sovereignty, and estoppel form an interrelated subject-matter, and it is far from easy to establish the points of distinction’: I Brownlie, *Principles of Public International Law* (7th ed, 2008) 153; M N Shaw, ‘The heritage of states: the principle of *uti possidetis juris* today’ (1996) 63 *British Year Book of International Law* 98; M N Shaw, *International Law* (6th ed, 2008) 515. See also *Case Concerning the Temple of Preah Vihear (Cambodia/Thailand) (Merits)* [1962] ICJ Rep 131 *et seq* (Judge Spender). See *Award of the Eritrea-Ethiopia Boundary Commission*, [3.9]: ‘This process has been variously described by such terms, amongst others, as estoppel, preclusion, acquiescence or implied or tacit agreement’ <http://www.pca-cpa.org/showpage.asp?pag_id=1150>. See also the discussion on acquiescence and estoppel in M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), 355–62.

³³ *Gulf of Maine Case*, above n 31, 305 [130]. In the same case, Canada defined acquiescence as follows:

one government’s knowledge, actual or constructive, of the conduct or assertion of rights of the other party to a dispute and the failure to protest in the face of

International Court of Justice (ICJ) found that sovereignty over Pedra Branca/Pulau Puteh had passed to Singapore on the basis of a tacit agreement inferred from the *effectivités* performed by Singapore, and Malaysia's acquiescence.³⁴ The ICJ pronounced that 'the absence of reaction may well amount to acquiescence' and that 'silence may also speak, but only if the conduct of the other state calls for a response'.³⁵ In the *Land, Island and Maritime Frontier Dispute Case*, the ICJ accepted that as long as the *uti possidetis juris* rule can be modified by adjudication or by treaty 'there seems to be no reason in principle why ... (acquiescence or recognition) should not operate, where there is sufficient evidence to show that the parties have in effect clearly accepted a variation or at least an interpretation of the *uti possidetis juris* position'.³⁶ And it went on to state that 'it was obviously open to those states to vary the boundaries between them by agreement; and some forms of activity or inactivity, might amount to acquiescence in a boundary other than that of 1821'.³⁷

Equally important is the concept of acquiescence for the formation of customary law. Whereas acquiescence has been recognised as an essential element for the establishment of special customary law and historic or prescriptive rights,³⁸

that conduct or assertion of rights involves a tacit acceptance of the legal position represented by the other Party's conduct or assertion of rights: *ibid* 304, [129].

³⁴ *Pedra Branca/Pulau Batu Puteh Case*, above n 5, 50–52 [118–25], 95–96 [273–77].

³⁵ *Ibid* 51 [121].

³⁶ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening)* [1992] ICJ Rep 401, [67].

³⁷ *Ibid* 408, [80]. The Court further stated:

the situation was susceptible of modification by acquiescence in the lengthy intervening period; and the Chamber finds that the conduct of Honduras from 1881 until 1972 may be regarded as amounting to such acquiescence in a boundary corresponding to the boundary between the Tepangüisir lands granted to Citalá and those of Ocotepeque.

The approach adopted by the Court in this judgment may be considered as providing an affirmative answer to the question left open in the *Passage through the Great Belt Case* as formulated by Thirlway: is it 'correct that anything that can be done by express agreement can also result from an implicit agreement in the form of acquiescence or from an estoppel': H Thirlway, 'The Law and Procedure of the ICJ 1960–1989, Supplement, 2005: Parts one and two' (2005) 76 *British Year Book of International Law* 20. Thirlway also seems to be giving an affirmative reply to this question stressing that:

if Finland had acquiesced informally, but in such a manner as to be bound in law, in the Danish proposals, is there any reason, deriving from the particular nature of the rights involved why Finland should not equally be bound?.

³⁸ Fitzmaurice points out that 'the element of consent, that is to say, acquiescence with full knowledge on the part of other States is not only present, but necessary to the formation of the right': Fitzmaurice, above n 7, 28, 68–9; McGibbon stresses that:

in place of general participation which raises strongly the presumption of consent with regard to general customary rights, special and exceptional customary rights are validated entirely by the consent or acquiescence of the

the degree of significance attributed to silence and acquiescence for the formation of general customary law varies. Positivist authors consider consent and subsequently acquiescence as an essential element for the establishment of rules of customary law.³⁹ On the other hand, authors rejecting the consensual basis of custom do not discard the concept of acquiescence. They accept that acquiescence may be relevant in the customary process not as a law-formation factor, but as evidence that a rule of customary law has evolved.⁴⁰

Of particular significance is silence and acquiescence for the acquisition of territory, especially in the form of acquisitive prescription.⁴¹ According to

states affected manifested in relations to a passage of a comparatively prolonged period of time:

I C McGibbon, 'Customary International Law and Acquiescence' (1957) 33 *British Year Book of International Law* 123. See Blum for an account of the views of international scholars, international bodies and tribunals regarding the prominent role of acquiescence as the juridical basis of historic rights: Blum, above n 25, 60–89.

³⁹ McGibbon, above n 38, 115 *et seq*; acquiescence has been suggested by McGibbon as mitigating 'the rigours of the positivist view' and imparting 'a welcome measure of controlled flexibility to the process of formation of rules of customary international law': *ibid* 145; see also McGibbon, above n 1, 184–5; Danilenko, above n 7, 35; O Elias, 'The nature of the Subjective Element in Customary International Law' (1995) 44 *International and Comparative Law Quarterly* 501 *et seq*; K Wolfke, above n 25, 61–4.

⁴⁰ M Mendelson, 'The formation of Customary International Law' (1998) 272 *Hague Recueil* 260. In the same spectrum, Pellet argues that the express acceptance of a customary rule 'has, no doubt, important practical effects in facilitating proof both of the existence of the rule in general and of its application to the accepting state': A Pellet, 'The Normative Dilemma: Will and consent in International Law-Making' (1988–9) 12 *Aust YBIL* 37; see similarly Gaja ('acceptance of a rule contributes to its effectiveness; however, it cannot be held that no effective rule exists until it has been accepted') in A Cassese and J H H Weiler (eds), *Change and Stability in International Law-Making* (1988) 16. O'Connell similarly admitted that 'absence of protest is very relevant as a test of the value of unilateral acts' but rejected it as a necessary condition for the establishment of a rule of law: D O'Connell, 'Sedentary Fisheries and the Australian Continental Shelf' (1955) 49 *American Journal of International Law* 194. D'Amato, despite the fact that he does not accept the importance attributed to acquiescence for the formation of customary law, does acknowledge that:

if a given rule, or the practice giving rise to a rule, meets with objection from the overwhelming majority of states – not simply verbal objection or notes of protest, but a complete unwillingness to recognise that rule in all relevant claim-conflict situations – then by definition that rule is not a rule of international law

D'Amato, above n 3, 195–7. See also Shaw, above n 32, 89–90; M Akehurst, 'Custom as a Source of International Law' (1974–5) 47 *British Year Book of International Law* 33, 38 *et seq*.

⁴¹ R Y Jennings, *The acquisition of territory in international law* (1963) 38; Schwarzenberger, above n 7, 307; Prescription is defined in *Oppenheim's International Law* as:

the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order

Jennings, acquiescence in the case of adverse possession is not solely of evidentiary value but is ‘the essence of the process’.⁴² The ‘peaceful display of state authority’,⁴³ as one of the main requirements for acquisition of territory, necessitates that a state is presumed to have voluntarily abandoned its rights over a territory in favour of another state.⁴⁴ In sovereignty dispute cases before the ICJ, acquiescence has been treated as an essential prerequisite for the acquisition of territory through prescription.⁴⁵

Particularly interesting in terms of the treatment of silence, is the relationship between acquiescence and estoppel. States very often in their arguments refer to acquiescence as having the same function and producing the same legal effects as estoppel.⁴⁶ Silence indicating acquiescence may indeed compose the representation

R Jennings and A Watts, *Oppenheim’s International Law* (9th ed, vol I, 1992) 706. The concept of acquisitive prescription in international law is disputed: see *Kasikili/Sedudu Island Case*, above n 31, 1101–5. In this case, the ICJ circumvented any pronouncement on the status of the concept of acquisitive prescription in international law; the Court stated:

For present purposes, the Court need not concern itself with the status of acquisitive prescription in international law or with the conditions for acquiring title to territory by prescription’: [97].

Nevertheless, the litigants were in agreement concerning the status of acquisitive prescription and the conditions of its materialisation. The concept of acquisitive prescription was also accepted by the litigants and the Tribunal in the *Eritrea-Yemen Arbitration Award, Phase I – Territorial Sovereignty and Scope of the Dispute* (Permanent Court of Arbitration, 9 October 1998) [106], [164] <http://www.pca-cpa.org/showpage.asp?pag_id=1160>. See also Cameroon’s position in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea intervening)* [2002] ICJ Rep [219] 413.

⁴² Jennings, above n 41, 39; see also Schwarzenberger, above n 7, 311–2.

⁴³ *Island of Palmas Case*, above n 26, 868 (Judge Huber); see also *Eritrea/Yemen Arbitral Award*, above n 41, [239].

⁴⁴ Brownlie, above n 32, 146: ‘The essence of prescription is the removal of defects in a putative title arising from usurpation of another’s sovereignty by the consent and acquiescence of the former sovereign’; Jennings, above n 41, 36: ‘both in the practice of states and the jurisprudence of international tribunals, these manifestations of consent (referring to recognition and acquiescence) have been regarded as important elements in the make-up of territorial titles’; see also the UK Counsel in *Minquiers and Ecrehos (France v United Kingdom)* [1953] III ICJ Pleadings 351.

⁴⁵ See, eg, the *Cameroon/Nigeria Case*, above n 41, [62] *et seq* (for the area of Lake Chad) and [218] *et seq* (for the Bakassi peninsula); *Kasikili/Sedudu Island Case*, above n 31, [94] *et seq*; *Ligitan and Sipadan Islands Case*, above n 31, [127] *et seq*; *Case Concerning Sovereignty over Certain Frontier Land (Belgium/Netherlands)* [1959] ICJ Rep 227–30; see *Case Concerning Maritime delimitation and Territorial Questions between Qatar and Bahrain (Qatar/Bahrain)* [2001] ICJ Rep 390, [371] (Judge Torres Bernardez).

⁴⁶ See, eg, the arguments raised by Canada in the *Gulf of Maine Case*; Canada referred to estoppel in the oral proceedings as the ‘alter ego of acquiescence’; *Gulf of Maine Case*, above n 31, 304, [129]. Judge Ajibola in his dissenting opinion in the *Libya/Chad Case* referred interchangeably to both concepts of acquiescence and estoppel, above n 31, 77–83.

upon which the state invoking the concept of estoppel has relied (estoppel by conduct or silence). In this case the silent state may be precluded/estopped from changing its position.⁴⁷ The ICJ has, however, repeatedly asserted that for the materialisation of estoppel, the elements of detriment suffered by the relying state or advantage enjoyed by the state making the representation (in the case of estoppel by conduct by the silent state) have to be evidenced.⁴⁸ Moreover, the Chamber in the *Gulf of Maine Case* noted that while both acquiescence and estoppel ‘follow from the fundamental principles of good faith and equity’, ‘they are ... based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion’.⁴⁹ Despite the fact that the Chamber noted that the existence of detriment is an element differentiating the two concepts, it accepted that ‘it is able to take the two concepts into consideration as different aspects of one and the same institution’.⁵⁰ Moreover, there were cases in which despite the fact that the element of detrimental reliance was not present, the Court based its conclusions – though in a cautious way — upon a rather broader and less rigid concept, which precluded the silent state from asserting a different view than that allegedly advanced before.

In the *Temple of Preah Vihear Case*, where silence played an important role in the conclusion reached by the ICJ, the Court did not refer explicitly to the existence of an estoppel but pronounced that Thailand was ‘precluded by her conduct from asserting that she did not accept’ the map showing the temple in the French

⁴⁷ *Temple of Preah Vihear Case*, above n 32, 62 (Judge Fitzmaurice): ‘But acquiescence can operate as a preclusion or estoppel in certain cases, for instance where silence, on an occasion where there was a duty or need to speak or act, implies agreement or a waiver of rights, and can be regarded as a representation to that effect’; *Case Concerning Elettronica Sicula S.A. (ELSI) (United States of America v Italy)* [1989] ICJ Rep 44, [54]: ‘it cannot be excluded that an estoppel could in certain circumstances arise from a silence when something ought to have been said ...’; Brownlie, above n 32, 153: ‘It is clear that in appropriate conditions acquiescence will have the effect of estoppel’; G Schwarzenberger, ‘The Fundamental Principles of International Law’ (1955–I) 87 *Hague Recueil* 256: ‘acquiescence produces an estoppel in circumstances when good faith would require that the state concerned should take active steps of some kind in order to preserve its rights of freedom of action’; E Lauterpacht, ‘Sovereignty over submarine areas’ (1950) 27 *British Year Book of International Law* 395–6.

⁴⁸ *Land, Island and Maritime Frontier Dispute Case*, (El Salvador/Honduras, Application by Nicaragua for Permission to intervene) *ICJ Reports 1990*, 118, [63]; *North Sea Continental Sea Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 26 [30]; *Cameroon/Nigeria Case (Preliminary Objections)* [1998] ICJ Rep 303, [57]. See also D W Bowett, ‘Estoppel before International Tribunals and its relation to acquiescence’ (1957) 33 *British Year Book of International Law* 176; A Martin, *L’estoppel en droit international public* (1979) 259–60.

⁴⁹ *Gulf of Maine Case*, above n 31, 305 [130].

⁵⁰ *Ibid.*

(subsequently Cambodian) side.⁵¹ Judge Spencer and Judge Wellington Koo in their dissenting opinions found that the elements of estoppel particularly the element of detrimental reliance were not present in the case.⁵² Similarly, in the *King of Spain's Arbitral Award Case*, where the lack of objection to the jurisdiction of the King of Spain as arbitrator and to the validity of his award played an important role in the resolution of the dispute, the ICJ found that it was 'no longer open to Nicaragua to rely on either of these contentions as furnishing a ground for the nullity of the Award'.⁵³ Again, in this case, there was no proof or indication of detrimental reliance on behalf of Honduras upon the Nicaraguan behaviour.⁵⁴ In these cases, it has been suggested that acquiescence functions as establishing 'quasi-contractual links' which are 'gradually and informally developing between interacting states'.⁵⁵

Juridical concepts such as acquiescence, prescription and tacit agreement have been used as instruments for the attribution of legal value to the same state conduct, that is, to a state's silence. Regardless of the legal concept to be used, the jurisprudence of the ICJ has shown that what is important is to identify the legal effects international law attributes to silent conduct in the specific context it appears.

This was evident in the recent case of the ICJ concerning sovereignty over *Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*. In this case, the ICJ found that there was a tacit agreement between the parties for the cession of territory.⁵⁶ The elements invoked by the ICJ as contributing to the conclusion of such agreement, namely the exercise of acts *à titre de souverain* on behalf of

⁵¹ *Temple of Preah Vihear Case*, above n 32, 32.

⁵² Ibid 144 (Judge Spender). See also ibid 97 (Judge Wellington Koo); also C W Chan, 'Acquiescence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited' (2004) 3 *Chinese Journal of International Law* 434. Thirlway pointed that 'there was initially no estoppel in any strict sense. The Court made no finding that Cambodia (or France) had, in the early years, acted on the faith of Siam's apparent acceptance of the map, so as detrimentally to change its position': H Thirlway, 'The law and procedure of the ICJ, 1960–1989 Part I' (1989) 60 *British Year Book of International Law* 31–2. Indeed, the conclusion reached by the Court regarding the advantage gained by Thailand, namely its enjoyment of stable and secure frontiers for a number of years, was not very convincing.

⁵³ *Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras/Nicaragua)* [1960] ICJ Rep 209.

⁵⁴ Ibid 222, 236 (Judge Urrutia Holguin).

⁵⁵ J Müller and T Cottier, above n 2, 6; H Thirlway, above n 37, 25. Thirlway and Brownlie refer to these cases as judicial applications of the broader version of the principle of estoppel; Brownlie, above n 32, 644; Thirlway, above n 52, 31–2; I Sinclair, 'Estoppel and acquiescence' in V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings* (1996) 109–10.

⁵⁶ For the conditions for the establishment of acquisitive prescription see D H N Johnson, 'Acquisitive Prescription in International Law' (1950) 27 *British Year Book of International Law* 284–89; see *Kasikili/Sedudu Island Case*, above n 31, [96]; *Pedra Branca/Pulau Batu Puteh Case*, above n 5, 122 [17] (Judges Simma and Abraham).

Singapore and Malaysia's acquiescence, could substantiate the concept of acquisitive prescription. Judges Simma and Abraham in their joint dissenting opinion regretted that the ICJ did not make mention to the concept of acquisitive prescription, which according to these judges encompasses the concepts of tacit agreement and acquiescence.⁵⁷ However, as noted by these judges 'what matters above all is ascertaining what effects international law attaches to this or that conduct by the States concerned relating to territorial sovereignty, rather than choosing between one expression or another capable of characterizing the legal process leading from cause to consequence'.⁵⁸ Indeed, what was important was that Malaysia's silent conduct was found to have legal effects with regard to the sovereign status of the territory in dispute, particularly referring to its cession from one state to the other.

IV. Silence and the Voluntarism/Objectivism Debate

Müllerson refers to state practice in international relations as having two facets: 'a visible, manifest, observable behaviour of states (or other subjects) and their subjective attitude to this behaviour which may be implicitly present in the very act of behaviour or which may be conveyed to other states through different acts of behaviour constituting in turn state practice of a different kind'.⁵⁹ Silence as a negative form of state practice is similarly composed of two elements: an objective and a subjective one. The objective aspect of silence refers to the actual conduct of states which is reflected in the absence of actions or statements. The subjective side of silence refers to the intention, will or belief of the inactive state. The concurrence of the two elements would signify that silence manifests and reveals the intention of the state to adopt a stance vis-à-vis a specific situation.

The significance of the objective and subjective element of silence is reflected in the voluntarism/objectivism debate as described above. Voluntarism gives due weight to the intention of the state. According to this theory, silence is relevant as long as it reflects the true intention of the silent state.⁶⁰ Voluntarism seeks to demonstrate that the external conduct of the state conforms to its will. Silence is treated as having juridical value provided that it reflects the intention of the silent state to tacitly express its will.

⁵⁷ *Pedra Branca/Pulau Batu Puteh Case*, above n 5, 119-120 [11], 121 [15] (Judges Simma and Abraham).

⁵⁸ *Ibid* [16] (ICJ official translation).

⁵⁹ R Müllerson, 'The interplay of objective and subjective elements in customary law' in K Wellens (ed), *International Law: Theory and Practice, Essays in Honour of Eric Suy* (1998), 165.

⁶⁰ See Bentz, above n 6, 49:

Le silence, interprété comme une manifestation de volonté, apparaît comme l'aboutissement logique de cette théorie, attachée essentiellement à la libre recherche de la volonté interne ('Silence, interpreted as manifestation of will, appears as the logical outcome of this theory, mainly attached to the free search of internal will').

On the contrary, objectivism treats silence as a fact (and not as a manifestation of will), and asserts that it produces legal effects without the need to ascertain the internal will of the silent state.⁶¹ This approach dissociates silence from its psychological connotation, particularly the true intention of a state, and bases its findings upon elements which may be objectively ascertained.

These two approaches are guided by a different perception regarding the scope of international law. Objectivism purports to safeguard the juridical security in international law as expressed in the reliance of states or the international community upon the conduct of a state, whereas voluntarism seeks to preserve the rights and the interests of the silent state, whose will is the legal basis of international law. As Pellet has pointed out ‘auctoritas is the positivist flag’ whereas ‘societas is the objectivist alpha and omega’.⁶²

During the discussion in the ILC on unilateral acts, much was said regarding silence and its connection with intent. The Special Rapporteur argued that silence lacks intention and was thus outside the ambit of the legal acts examined by the ILC.⁶³ However, it cannot be denied that silence may be intentional,⁶⁴ in the sense that the silent state desires the legal effects that will be produced by its silence, that is a state wants to accept/recognise a factual or legal situation and decides to do so by means of inaction. It is true that, in practice, a state will choose a less vague way to convey its acceptance, namely by means of a written or oral declaration, but this does not preclude its choosing silence as a means of expressing its consent.⁶⁵

⁶¹ Ibid 49–50.

⁶² Pellet, above n 40, 40; see Bentz, above n 6, 47 who observes that the objectivist approach is inspired by considerations of social order.

⁶³ Special Rapporteur’s Fourth Report on Unilateral Acts of States, UN Doc A/CN.4/519, 30 May 2001, [31] and [43]. Also other members of the ILC, Special Rapporteur’s Third Report on unilateral acts of states, UN Doc. A/CN.4/505, 17 February 2000 [127] <http://untreaty.un.org/ilc/guide/9_9.htm>. Despite the fact that there was consensus among the members of the ILC that the intent of the state plays a central role in the production of legal effects of unilateral declarations (see the definition of unilateral acts *stricto sensu* adopted in the Guiding Principles applicable to unilateral declarations of states: ‘formal declarations formulated by a state with the *intent* (emphasis added) to produce obligations under international law’) and the commentary to paragraph 1, above n 13), there was disagreement on whether intent is entailed in all unilateral acts generating legal effects; see Report of the International Law Commission on the work of its fiftieth session, 20 April–12 June and 27 July–14 August 1998, UN Doc A/53/10 [169] <http://untreaty.un.org/ilc/documentation/english/A_53_10.pdf>.

⁶⁴ Intention is defined by Rodríguez Cedeño, the ILC Special Rapporteur, as ‘the meaning which the author intends to give to the act’: Special Rapporteur’s Fifth Report on Unilateral Acts of States, UN Doc A/CN.4/525 4 April 2002, [129] <<http://untreaty.un.org/ilc/sessions/54/54docs.htm>>.

⁶⁵ See the statement by Rodríguez Cedeño, ILC Special Rapporteur, in the 2693rd Meeting of the ILC, ‘States generally pursued their international relations through unilateral acts which were frequently more akin to conduct, attitudes or even reactions like silence’: ‘Summary Record of the 2693rd Meeting of the ILC (20 July 2001)’ (2001) I *Yearbook of the International Law Commission* 175, [28]

However, ascertaining the true intent of the silent state is rather fictitious.⁶⁶ Judging from the cases brought before international tribunals, states which remained silent in the past maintained that their silence did not manifest their intention to accept a juridical situation or assume any obligation; nevertheless, international tribunals found that these instances of silence amounted to acquiescence and had legal effects in the relations with other states.⁶⁷ In the context of unilateral acts, a member of the ILC stated that ‘the intention of the state might not be apparent at the time the act was performed, but could become apparent afterwards, when its effects could be objectively analysed’.⁶⁸ However, the important question is not whether silence contains intention (as it was noted above, silence may be intentional) but whether such intention matters for the legal relevance of silence, and consequently for the production of legal effects.

In some instances, the ICJ has specifically referred to intention when examining the silent conduct of states. In the recent *Pedra Branca/ Pulau Batu Puteh Case*, the World Court accepted as the legal basis for the passing of territory the existence of a tacit agreement between the parties. The ICJ emphasised the importance of the intention of the states for the conclusion of such agreement: ‘Any passing of sovereignty might be by way of agreement between the two States in question. Such an agreement might take the form of a treaty ... The agreement might instead be tacit and arise from the conduct of the Parties. International law does not, in this matter, impose any particular form. Rather it places its emphasis on the parties’ intentions’.⁶⁹ In the *Land, Island and Maritime Frontier Dispute Case*, the ICJ

<http://untreaty.un.org/ilc/documentation/english/a_cn4_sr2693.pdf>.

⁶⁶ Authors have pointed out the difficulty of inferring the belief of a state from its actual practice; Müllerson, eg, suggests that the subjective attitude of a state is more clearly expressed in official statements or judicial pronouncements than in ‘actual practice’: R Müllerson, above n 59, 166. See also J Müller and T Cottier, ‘Estoppel’ in R Bernhardt (ed), above n 2, 80: ‘it is usually very difficult, if not impossible, to prove intention as a subjective element of a party’s behaviour’. Also de Visscher, above n 10, 166.

⁶⁷ The same was admitted by Rodríguez Cedeño, ILC Special Rapporteur, with regard to unilateral acts:

An international tribunal might, for example, find that a unilateral declaration which contained a promise was binding upon its author under international law even though that state might maintain that it had had no intention to assume any such obligation when it performed that act: 1998 Report of the ILC, above n 63, 56, [169].

⁶⁸ Candioti, ‘Summary Record of the 2543rd Meeting (8 June 1998)’ (1998) I *Yearbook of the International Law Commission* 175, [26] <http://untreaty.un.org/ilc/documentation/english/a_cn4_sr2543.pdf>. See also the statement by the Special Rapporteur:

the intention of the State could be established only subsequently after the declaration had been interpreted. It was at that point that the rules which were to be formulated and would be applicable to that declaration would come into play: *ibid* 175 [25].

⁶⁹ *Pedra Branca/Pulau Batu Puteh Case*, above n 5, 50 [120]. The ICJ referred to the *Temple of Preah Vihear Case (Cambodia v Thailand) (Preliminary Objections)* [1961]

accepting the role of acquiescence as having a modificatory effect upon the *uti possidetis juris* principle stated:

There seems to be no reason in principle why these factors (acquiescence or recognition) should not operate, where there is sufficient evidence to show that the parties have in effect clearly accepted a variation, or at least an interpretation, of the *uti possidetis juris* position.⁷⁰

Again, the ICJ stressed the existence of the intention of the states to accept a situation by means of silent conduct.

International tribunals have also been using the terms acquiescence, tacit recognition and tacit consent in order to refer to the legal consequences of a state's silent conduct or inaction. This shows that international tribunals are influenced by the positivist perception of 'presumed consent' in the case of silence,⁷¹ which is also reflected in the argumentation of state-litigants. Silence is legally relevant because it reflects the consent expressed by tacit means and perceived by means of presumption. This is also related to the role played by silence and acquiescence in the relationships among states and therefore in the disputes before international tribunals. However, this presumption is only one of law⁷² and thus it may be said that such consent was never really given by the silent state.⁷³

Interesting in such terms is the difference, as suggested by Fitzmaurice and upheld by Thirlway, between acquiescence and estoppel. As stated by Thirlway: 'while a claim of acquiescence asserts that the State concerned *did* accept or agree on that point, a claim of estoppel accepts, by implication that the respondent State did *not* accept or agree, but contends that, having misled the applicant State by behaving as though it did agree, it cannot be permitted to deny the conclusion

ICJ Rep 31:

Where, on the other hand, as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it.

See also Judge Spender's dissenting opinion in the *Temple of Preah Vihear Case*:

a state may of course recognize – or acquiesce in – any fact or situation either of law or fact and its intention to do so may be evidenced expressly or by implication: *Temple of Preah Vihear Case*, above n 32, 130 (Judge Spender).

⁷⁰ *Land, Island and Maritime Frontier Dispute*, above n 36, 401 [67].

⁷¹ See Wolfke, above n 25, 62; Danilenko, above n 7, 33.

⁷² Bentz defines presumption as following: 'la présomption est une règle de preuve qui permet aux juges de se prononcer sur un fait *dont l'exactitude reste douteuse* (emphasis added) avec le maximum de chances de traduire la vérité' ('presumption is an evidentiary rule which allows judges to rule on a fact whose accuracy remains doubtful with the best chances to discover the truth'): Bentz, above n 6, 52.

⁷³ Cahier referring to the *Temple of Preah Vihear Case*, the *King of Spain's Arbitral Award Case* and the *Air Service Agreement Award*, noted that the states had not intended their actions to produce the legal effects which the judges ascribed to them: P Cahier, 'Le comportement des Etats comme source de droits et d'obligations' in *Recueil d'Etudes de droit international en hommage à Paul Guggenheim* (1968) 240.

which its conduct suggested'.⁷⁴ The difference thus being one of fact; in the case of acquiescence there is indeed consent by the silent state, in the case of estoppel, there is not. Nevertheless, as mentioned above, despite the doctrinal narrow construction of estoppel, the jurisprudence of the ICJ has been reluctant to draw rigid limits between the concepts of acquiescence and estoppel,⁷⁵ thus making it difficult to uphold the distinction suggested by Fitzmaurice concerning the reality of the existence of a state's consent.

What is more, in the oft-quoted definition of acquiescence in the *Gulf of Maine Case*, the ICJ stated that 'acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent'.⁷⁶ In this way, the World Court equated the legal effects of acquiescence and tacit recognition, but not the concepts themselves. What is more, it put emphasis on the perception of other states with regard to a silent conduct, and stressed that it is their perception of the existence of a state's consent which is of importance for the assessment of a state's silent conduct.

Moreover, international tribunals have been applying specific criteria on the basis of which silence may be deemed to have juridical value in the context of legal concepts such as acquiescence, estoppel, tacit agreement, and customary law formation. In the following subsection, the criteria used by international tribunals for the ascertainment of the juridical value of silence will be examined. It is submitted here that these criteria may reveal the stand international tribunals have taken on the voluntarism/objectivism debate concerning the legal value of silence.

V. Conditions under which Silence may Acquire Legal Value and the Jurisprudence of International Tribunals

It has been argued that every instance of silence should be examined independently taking into account the particular circumstances prevailing in each case.⁷⁷ It is,

⁷⁴ Thirlway, above n 52, 29–30, quoting *Temple of Preah Vihear Case*, above n 32, 63 (Judge Fitzmaurice); see also Thirlway, above n 37, 18:

acquiescence signifies actual consent, consent that can be proved, while estoppel (in relation to the state of mind of the person or State concerned) relates to a consent that never existed but appeared to exist, and led to consequences of detriment/advantage.

⁷⁵ See above nn 51–55 and accompanying text.

⁷⁶ *Gulf of Maine Case*, above n 31, 305, [130].

⁷⁷ K H Kaikobad, 'Some observations on the doctrine of continuity and finality of boundaries' (1983) 54 *British Year Book of International Law* 126; K Wolfke, above n 25, 62; Danilenko, above n 7, 40; Scharzenberger, above n 7, 321; Fitzmaurice, above n 7, 33:

Clearly absence of opposition is relevant only in so far as it implies consent, acquiescence or toleration on the part of the States concerned. But absence of opposition *per se* will not necessarily or always imply this, it depends on whether the circumstances are such that opposition is called for because the absence of it will cause consent or acquiescence to be presumed.

Also Suy, above n 2, 66. Attention to the particular circumstances was drawn by the

indeed, true, as observed by Oppenheim, that ‘the question ... in what circumstances such a condition of things arises is not one of law but of fact’.⁷⁸ The disputes brought by states before adjudicative mechanisms may well illustrate the difficulty in assessing and evaluating the various circumstances in which a state’s silence may be deemed to amount to acquiescence. In all the cases brought before the ICJ litigants took diametrically opposed stands regarding the assessment of the same factual situations.⁷⁹ Nevertheless, the ICJ and other arbitral tribunals following its example have identified and have been applying specific criteria on the basis of which silence may acquire legal relevance.

In the *Temple of Preah Vihear Case* the ICJ, when examining Thailand’s absence of protests against the map produced and used by France and its successor, Cambodia, with regard to the frontier line, stressed the existence of two elements in the behaviour of a state on the basis of which acquiescence could be inferred: obligation and capacity to react. Particularly, the Court pronounced that:

it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset*.⁸⁰

ILC in ascertaining when a unilateral behaviour of a state binds it in a given situation: [3] of the Preamble, above n 13; See also [3] of the Guiding Principles providing that ‘To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise’.

⁷⁸ *Oppenheim’s International Law* (7th ed), above n 24, 706, 707 (referring to acquisitive prescription). Similarly D Anzilotti, *Cours de droit international* (G Gidel trans, 1929) 344, who pointed out that the value of silence as manifesting state will cannot be submitted to general rules, as this will depend on the factual circumstances in which silence is observed. Also V D Degan, *Sources of International Law* (1997) 252. Koskenniemi argues that the doctrines of acquiescence/estoppel are arbitrary, in the sense that there are no criteria for the ‘contextual evaluation’ which will determine the interpretation of state conduct: M Koskenniemi, above n 32, 362–64.

⁷⁹ See, eg, the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* where both litigants used the concept of acquiescence and interpreted the conduct of the other party as amounting to acquiescence in *their* sovereignty over the disputed territory: *Cameroon/Nigeria Case*, above n 41; regarding the Lake Chad area: Nigeria’s argument: [62]; Cameroon’s argument: [63]. For arguments regarding the absence of protest on behalf of both states with regard to oil concessions see [283].

⁸⁰ *Temple of Preah Vihear Case*, above n 32, 23: ‘he who keeps silent is held to consent if he must and can speak’. See also *ibid* 70 (Judge Moreno Quintana): ‘silence has consequences in law only if the party concerned is under an obligation to make its voice heard in response to a given fact or situation.’. See also *ibid* 62 (Judge Fitzmaurice): ‘acquiescence can operate as a preclusion or estoppel in certain cases, for instance where silence, on an occasion where there was a duty or need to speak or act, implies agreement, or a waiver of rights’. See also Villiger, above n 2, 19.

(a) 'Obligation' to protest (*debuisset*)

The obligation of a state to protest in order to reserve its rights in international law is not a legal one. As pointed out by Suy, international law does not contain any principle according to which subjects of law have the obligation to protest against a threat or infringement of their rights or interests.⁸¹ Whether states will respond to a claim raised or an act performed by another state is facultative, and depends on how these states perceive their interests. Notwithstanding this, protest is not entirely optional, in the sense that if states want to preserve their rights in international law, they have to manifest their opposition.⁸² Moreover, due to the nature of international law and the decentralised law-making process, states as the principal law-makers⁸³ have (or should have) the responsibility to act accordingly on the international plane.

McGibbon stated that absence of protest amounts to acquiescence 'in circumstances which generally *call for* (emphasis added) a positive reaction signifying an objection'.⁸⁴ It has generally been suggested that a state is expected to respond to an act/claim of another state when its interests and rights are infringed by such act/claim.

⁸¹ Suy, above n 2, 68–9. He writes: 'Les Etats restent en effet maîtres de leurs droits, ils peuvent en disposer comme ils l'entendent, et la renonciation à un droit ou la résignation devant une violation ou une menace sont laissées à la libre appréciation de chaque sujet de droit' ('States are indeed masters of their rights, they can dispose of them as they see fit, and the waiver of a right or submission to a violation or a threat are left to the discretion of each subject of law'). See also *ibid* 69–70 for cases where exceptionally it may be accepted that states do have a legal obligation to protest. Commenting on the *Nigeria/Cameroon Case*, Thirlway doubts whether there was 'any duty (and if so, owed to whom) on Nigeria to raise the matter' regarding the Lake Chad area during the negotiations for its independence or during the plebiscites determining the future of the populations of the Northern and Southern Cameroons: Thirlway, above n 37, 25–6.

⁸² Cot, above n 21, 379: 'les états ont l'obligation de prendre toutes les mesures nécessaires pour affirmer leur droit' ('states have the obligation to take all necessary measures to assert their rights'). See also M Verdross, 'Regles generales du droit de la paix' (1929–V) 30 *Hague Recueil* 437: 'une telle protestation, en principe facultative, peut être nécessaire à un Etat pour conserver ses droits si son silence équivalait un assentiment' ('such a protest, in principle optional, may be necessary for a state to preserve its rights, if its silence amounted to assent').

⁸³ R Bernhardt, 'Customary International law' in R Bernhardt (ed), above n 2, 61 referring to the formation of general customary law.

⁸⁴ McGibbon, above n 1, 143. However, authors have questioned the practical ascertainment of such circumstances. D'Amato, eg, doubted that one can find many situations (except in certain clear situations where states normally protest against certain types of acts) where 'protest is "called for" by the circumstances' and criticises McGibbon's use of the concept of acquiescence as abusive in the sense that acquiescence may be found 'whenever states are silent' which 'in turn, amounts to presumed acquiescence which is not an analytically useful concept but merely another cumbersome legal fiction': D'Amato, above n 3, 196. Suy also stressed the difficulties in identifying the circumstances when a protest is expected: Suy, above n 2, 63–4.

(i) *Qui tacet consentire videtur ubi tractatur de ejus commodo*:⁸⁵ *the issue of state interests*

Indifference has been suggested by legal scholars as the most common reason why states may refrain from protesting against an act.⁸⁶ It is, indeed, true that states whose rights are infringed or whose interests are directly affected by the act/claim are bound to protest against it, so as to reserve their rights and safeguard their interests. In his dissenting opinion in the *Nicaragua/Honduras Case*, Judge Torres Bernandez noted: 'to safeguard the rights claimed in the present proceedings, Nicaragua should, in accordance with international law, have exercised greater vigilance and expressed clearer opposition in respect of Honduras's acts concerning the islands in question'.⁸⁷ As pointed out by McGibbon, 'it is difficult to believe that states will remain silent without good reason in the face of acts in derogation of their rights'.⁸⁸

However, even in the case where a state's interests are not directly involved, its silence may still have juridical relevance. This issue concerns mainly the formation of customary law.⁸⁹ In this case, positivist authors argue that it is only the silence of directly affected states which may amount to acquiescence and may thus have juridical effect.⁹⁰ Of course, it can be accepted that there are areas of state practice

⁸⁵ He who keeps silent is held to consent so far as the matter is of his own interests.

⁸⁶ Anzilotti, above n 78, 344; O'Connell pointed out that:

absence of protest is, however, of relative value. States may not protest for a variety of reasons unconnected with the law. They may not know of the practice or they may be indifferent to it for reasons of geographical or economic irrelevance:

D P O'Connell, *International Law*, (2nd ed, vol I, 1970) 18.

⁸⁷ *Nicaragua/Honduras Case*, above n 53, [56] (Judge Torres Bernandez).

⁸⁸ McGibbon, above n 1, 171.

⁸⁹ In the case of territorial disputes or the formation of special customary law, it is difficult to think that the rights and interests of states involved in such a dispute are not directly affected; see also following subsection.

⁹⁰ Tunkin argued that:

when the respective forming of a customary norm does not affect a state's interests at the given time, its silence cannot be considered to be tacit recognition of this norm. But in those instances when an emerging rule affects the interests of a particular state, the absence of objections after a sufficient time can, as a rule, be regarded as tacit recognition of this norm: G I Tunkin, *Theory of International Law* (1974) 129.

Similarly, Danilenko states that:

it is necessary that the practice should directly or indirectly affect the interests and rights of an inactive state because otherwise there would be no ground to expect a protest: Danilenko, above n 7, 40.

O'Connell after stating that lack of protest may be attributed to various reasons unconnected with the law, such as indifference for reasons of geographical or economic irrelevance, stressed that 'abstention from counter-action, then, is only of significance in establishing acquiescence to the extent to which vital interests are affected': O'Connell, above n 86, 18.

and therefore of emerging rules of law which are of common interest to all states and which concern and affect the entire international community.⁹¹ This could include, for example, rules of law regulating the use of force or human rights or rules regarding the exploration and use of *res communis*, such as the high seas or outer space.⁹² However, still in this case, it cannot be said that states are directly interested in or affected by the specific claim/practice. Moreover, in the *Anglo-Norwegian Fisheries Case*, the ICJ pronounced that the absence of protest on behalf of other states denoted the ‘general toleration of the international community’ with regard to the baseline applied by Norway in her coasts, without examining whether these states were affected by the system or interested in the case.⁹³ Therefore, the silence of all states as indicating their tolerance or acquiescence was found in that case to have significance for the resolution of the dispute.⁹⁴

(ii) Types of acts against which a protest is required

Given that silence is a reactive act, its legal effects would depend upon the act/claim of another state. The nature of the latter is thus pertinent to the ‘obligation’ of a state to react.⁹⁵ In this sense, acts/claims which may compose the basis for the creation, consolidation or modification of a legal situation from which rights and obligations may derive should not be left unresponded.

International tribunals have in various instances stressed the connection between the type of acts performed and the ‘obligation’ of other states to respond. For example, in the *Gulf of Maine Case*, the Chamber assessing the precedent

⁹¹ Danilenko, above n 7, 40.

⁹² Ibid. As Mendelson observes, since every *erga omnes* ‘claim is a brick in the edifice of a (new) customary law’, all states are affected by it: Mendelson, above n 40, 257. However, he doubts whether each state will protest simply because the precedent might be invoked in the future in a similar situation which might be of interest to this state.

⁹³ *Anglo-Norwegian Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 138–39.

⁹⁴ The judgment of the ICJ is not clear in terms of the legal basis for the legality of the Norwegian straight baseline system. The ICJ found that that the Norwegian system was valid in international law on the basis of the ‘peculiar geography of the Norwegian coast’, ‘a constant and sufficiently long practice’ and other states’ general toleration (ibid 139, 143); it has been suggested that the ICJ recognised that Norway had acquired a historic title to the delimitation of its maritime zones by the use of straight baselines: see G Fitzmaurice, ‘The Law and Procedure of the International Court of Justice, 1951–54: Points of Substantive Law – I’, 31 *British Year Book of International Law* (1954), 382; also D H N Johnson, ‘The Anglo-Norwegian Fisheries case’, 1 *International and Comparative Law Quarterly* (1952) 165–66. deVisscher referred to the dictum of the ICJ in this case as supporting the concept of historical consolidation of title: de Visscher, *Theory and Reality in Public International Law* (1957) 1999.

⁹⁵ In the case of territorial acquisition, Shaw points out that there is a connection between the acts of sovereignty necessary to found a title and ‘the amount of opposition (if any) that such acts on the part of the claimant state have aroused’: Shaw, above n 32, 511.

created by the Judgment of the ICJ in the *Fisheries Case* stressed the importance of the activities performed by Norway in manifestation of its practice as an important element leading to the ascertainment of acquiescence on behalf of the state whose rights were infringed by that practice.⁹⁶

In territorial disputes, international tribunals have repeatedly referred to the nature of acts against which a response was ‘called for’. In the *Temple of Preah Vihear Case*, the ICJ, referring to the visit paid to the Temple in 1930 by Prince Damrong of Thailand, stressed that the reception of the Prince by the French Resident for the adjoining Cambodian province with the French flag flying was a clear indication that France was acting as the host country. The Court noted that ‘the Prince could not possibly have failed to see the implications of a reception of this character. A clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined. It demanded a reaction (emphasis added). Thailand did nothing.’⁹⁷ In the *Pedra Branca/Pulau Batu Puteh Case*, the ICJ stressed the nature of the acts undertaken by Singapore as *à titre de souverain* and the failure of Malaysia and its predecessors to respond to these acts, in order to ascertain that the sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore.⁹⁸ Similarly in the *Nicaragua/Honduras Case*, the Court found that Nicaragua had not protested against ‘those Honduran activities qualifying as effectivités’.⁹⁹

On the contrary, the ICJ denied any inference from a state’s silence when the act did not qualify as *à titre de souverain*, or when the act was not relevant to the acquisition of territory. For example, in the *Case concerning the Kasikili / Sedudu Island*, the Court found that ‘the activities of the Masubia on the islands were an independent issue from that of title to the island’ and that the possession was not *à titre de souverain*¹⁰⁰ and there was, therefore, no need for Botswana to protest against such actions.¹⁰¹ The Court emphasised the fact that Bechuanaland protested

⁹⁶ *Gulf of Maine Case*, above n 31, 309, [144].

⁹⁷ *Temple of Preah Vihear Case*, above n 32, 30.

⁹⁸ *Pedra Branca/Pulau Batu Puteh Case*, above n 5, 95-96 [273]–[277].

⁹⁹ *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* [2007] ICJ Rep [208]. In the *Dubai/Sharjah Border Award*, the arbitral tribunal stressed that Sharjah ‘did nothing, although major work (emphasis added) was being carried out on what it should have considered as its territory’: *Dubai/Sharjah Border Award* (1993) 91 ILR 622. During the oral proceedings in the *Minquiers and Ecrehos Case*, the UK Counsel stressed that the acts of sovereignty performed by the UK were so *significant* and *definite* that the failure of France to protest against them amounted to acquiescence: *Minquiers and Ecrehos (France v United Kingdom)* [1953] II ICJ Pleadings 337. The Court did not refer specifically to the British argument, but it seems that it took into consideration the failure of France to protest against the effectivités performed by the UK, when it concluded in favour of the UK’s sovereignty over the islands: *Minquiers and Ecrehos Case (France/United Kingdom)* [1953] ICJ Rep 66 for the failure to challenge the British effectivités.

¹⁰⁰ *Kasikili/Sedudu Island Case*, above n 31, 1106, [98].

¹⁰¹ Namibia argued that Botswana or her predecessors did not express any objection or protest against the ‘indirect rule’ of Namibia through the Masubia people for almost a

as soon as South Africa officially raised a sovereignty claim over the islands, and therefore, it could not be presumed that due to lack of protests, Botswana had acquiesced in the sovereignty of Namibia over the islands.¹⁰² Similarly, in the *Cameroon/Nigeria Case* the ICJ explained the absence of Cameroon's protests by stressing the fact that 'no Nigerian effectivities in Bakassi before that time can be said to have legal significance for demonstrating a Nigerian title'.¹⁰³ In the *Nicaragua/Honduras Case*, the ICJ accepted Nicaragua's plea that she had 'had no reason to protest' against various Honduran Constitutions and laws, as the latter had no relevance and there was no evidence that they were applied to the islands in dispute.¹⁰⁴

Similarly, in maritime boundary disputes, the nature of the act has been found as relevant to the obligation of states to protest. In the *Tunisia/Libya Case*, the Court found that the enactment of the Petroleum Law and Petroleum Regulation No. 1 by Tunisia and particularly the line indicated on the map could not be considered as reflecting a 'formal claim at the level of international relations to a maritime or continental shelf boundary', and precluded any assumption of acquiescence by Tunisia to such a delimitation.¹⁰⁵ Similarly, the arbitral tribunal in

century and had therefore acquiesced in the sovereignty of Namibia over the islands; Namibia stressed the existence of 'indirect rule' through the Masubia people as follows: authority was exercised by Namibia 'for the most part ... through the modality of 'indirect rule' using the chiefs and political institutions of the Masubia to carry out the directives of the ruling power, under the control and supervision of officials of that power' and 'although indirect rule was manifested in a variety of ways, its essence was that the acts of administration of the colonial authorities and those of the traditional authorities were acts of a single entity: the colonial government': *Kasikili/Sedudu Island Case*, above n 31, 1103–4 [94]. The ICJ also rejected Namibia's argument concerning the interpretation of the 1890 Treaty on the basis of the parties conduct; in particular, it stated that the 'presence of the Masubia on the Island did not trouble anyone and was tolerated, not least because it did not appear to be connected with interpretation of the terms of the 1890 Treaty': *ibid* 1095, [75]. On the contrary, Judge Weeramantry pointed out that in the time of colonial rivalry, colonial administrations were very sensitive to the encroachment of their jurisdiction by another colonial power, and would have thus registered their concerns: *ibid* 1162, [30]. See also Judge Rezek's dissenting opinion, 1236–7, [12]–[14] who accepted that Namibia had acquiesced in the exercise of sovereignty through the indirect rule of the Masubia people.

¹⁰² *Kasikili/Sedudu Island Case*, above n 31, 1105–6, [98].

¹⁰³ *Cameroon/Nigeria Case*, above n 41, [223]. In the same case, Cameroon implicitly argued that it was under no obligation to protest against the granting of oil concessions, as this act 'is a unilateral *fait accompli* and not a legal fact that is opposable to another state': *ibid* [283]. Cameroon also stressed the fact that the granting of oil concessions is not a factor to be taken into consideration in the maritime delimitation process implying that it did not consider it necessary to protest in order to reserve its rights with regard to the maritime delimitation.

¹⁰⁴ *Nicaragua/Honduras Case*, above n 99, [180]–[181].

¹⁰⁵ *Tunisia/Libya Case*, above n 31, 69, [92]; referring to the 1951 Decree providing for the ZV 45° line, the Court similarly found that this Decree constituted an internal legislative measure for the surveillance in the context of fisheries and not a maritime delimitation line opposable to Libya: *ibid* 68, [90]. In the *Libya/Malta Case*, Libya

the *Barbados/Trinidad and Tobago Award*, found that there could be no acquiescence or estoppel on the part of Trinidad and Tobago in Barbados's sovereignty north of the equidistance line, since the activities performed by the latter were not of legal significance.¹⁰⁶

A similar act may be accorded different treatment on the basis of the circumstances and the specific facts. In the *Minquiers and Ecrehos Case*, the French government argued that the UK filed no objection to the lighting and buoying performed by France in the Minquiers for a period of more than 75 years. The Court did not examine the silence of the UK, as it considered that those acts could 'hardly be considered as sufficient evidence of the intention of that Government to act as sovereign over the islets' implying that the UK was not under the obligation to oppose or contest such acts which were performed solely for the protection of shipping against the dangerous reefs of the Minquiers.¹⁰⁷

The construction of navigational aids as acts manifesting state authority and subsequently the silence vis-à-vis such acts was treated differently in the *Qatar/Bahrain Case* and in the *Ligitan and Sipadan Islands Case*. The Court found in both cases that the construction of navigational aids was deemed as 'legally relevant in the case of very small islands'.¹⁰⁸ In the *Ligitan and Sipadan Islands Case*, the ICJ made the following pronouncement: 'in 1962 and 1963 the Indonesian authorities did not even remind the authorities of the colony of North Borneo, or Malaysia after its independence, that the construction of the lighthouses

rejected the argument raised by Malta in her Counter-Memorial referring to the alleged acquiescence of Libya in the equidistance line, arguing initially that at the crucial time there was no definite legal position put forward by Malta and that the Maltese documents did not represent a legal position regarding the application of the median line (*Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, [1985], IV ICJ Pleadings, 12 *et seq* (Reply of Libya,)). The Court did not specifically reply to these arguments but found that the Libyan conduct did not constitute acquiescence: *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Rep 29 [25]. Similarly, in the *Gulf of Maine Case* the USA argued that in so far as 'Canada never issued an official proclamation or any other publication for the purpose of making its claims known internationally', 'the US could not ... infer the existence of such claims by such indirect means': *Gulf of Maine Case*, above n 31, [134].

¹⁰⁶ *Barbados/Trinidad and Tobago Arbitration*, (Award of the Arbitral Tribunal, 11 April 2006) [363] <http://www.pca-pa.org/showpage.asp?pag_id=1152>.

¹⁰⁷ The lighthouses were placed outside the reefs of the group; *Minquiers and Ecrehos Case*, above n 99, 70–71. On the contrary, the ICJ was content to find that the UK had protested against the issuing of a lease by French officials allowing the construction of a house on one of the islets of the Minquiers: *ibid* 71. In the *Gulf of Maine Case*, the US similarly argued that it was under no obligation to undertake any special action against 'Canadian seismic exploration of minor importance, which involved neither drilling nor the extraction of petroleum': *Gulf of Maine Case*, above n 31, 307, [136].

¹⁰⁸ *Qatar/Bahrain Case*, above n 45, [197]; *Ligitan and Sipadan Islands Case*, above n 31, [147]. In the *Grisbadarna Arbitration* the Tribunal took into consideration that Sweden had installed a lightship and had placed a large number of beacons without any protest on behalf of Norway, *Maritime Boundary Dispute between Norway and Sweden* (Permanent Court of Arbitration, 23 October 1909) 6–7 <http://www.pca-cpa.org/showpage.asp?pag_id=1029>.

at those times had taken place on territory which they considered Indonesian; even if they regarded these lighthouses as merely destined for safe navigation in an area which was of particular importance for navigation in the waters off North Borneo, such behaviour is unusual'.¹⁰⁹ Therefore, in these cases, the construction of navigational aids was considered as an act requiring some kind of opposition on behalf of the states claiming sovereignty over the islands. This is not necessarily incompatible with the pronouncement of the ICJ in the *Minquers and Ecrehos Case* mentioned above. In that case, the ICJ preferred to take into consideration activities related to the islands themselves, such as the construction of houses.¹¹⁰ What differentiated these cases was the size of the islands and the fact that any kind of activities performed in very small and mainly uninhabited islands¹¹¹ would have significance for the resolution of a territorial dispute.

It should also be emphasised that the appraisal of the acts has been objectively conducted, in the sense that the beliefs — even the *bona fide* beliefs — of the states regarding the nature and the significance of the acts have not been taken into account. In the *Eritrea/Yemen Case*, the Arbitral Tribunal found that the potential view taken by Yemen that the Ethiopian naval presence on the islands were not 'elements of continuous and peaceful occupation by Ethiopia' or that the 'Ethiopian regulation of Yemeni fishing vessels found within the waters of the islands was incidental to Ethiopian belligerency' could not be accepted as justifying its lack of protests, as it would be irreconcilable with Yemeni sovereignty over the islands.¹¹² In the *Pedra Branca/Pulau Batu Puteh Case*, Malaysia argued repeatedly that she did not protest against various acts performed by Singapore on the island or within the maritime zones around the island, as she considered them as acts of the operator of the lighthouse and not as acts *a titre de souverain*. The Court rejected this argument and proceeded in evaluating objectively the nature of the acts performed by Singapore. In the light of their consideration as acts *à titre de souverain*, Malaysia's absence of protest (silent conduct) was considered as acquiescence.¹¹³

On the contrary, Judge Moreno Quintana in his dissenting opinion in the *Temple of Preah Vihear Case* accepted that there was no obligation on behalf of Thailand to respond as the French practice was 'devoid in itself of legal significance' as according to a well-established rule of international law 'when there is a discrepancy concerning a frontier delimitation between the text of a treaty

¹⁰⁹ *Ligitan and Sipadan Islands Case*, above n 31, [148]; the Court concluded that Malaysia had title to both islands.

¹¹⁰ See above n 107.

¹¹¹ Both Ligitan and Sipadan are very small islands. Ligitan is not permanently inhabited, whereas Sipadan was only permanently inhabited as a scuba-diving resort after 1980s: *Ligitan and Sipadan Islands Case*, above n 31, [14].

¹¹² *Eritrea-Yemen Arbitration Award*, above n 41, [308]. See similarly *Ligitan and Sipadan Islands Case*, above n 31, [148].

¹¹³ *Pedra Branca/Pulau Batu Puteh Case*, above n 5, 82-83 [233]–[234], 85 [239].

and maps, it is the text and not the maps which is final'.¹¹⁴ Therefore, according to this view, a state confronting an act which has – allegedly — no legal effect is not obliged to respond to it. However, as mentioned above, it is difficult to ascertain that a state whose rights are infringed by an act, particularly in the case of usurpation of territory, would remain silent because it thinks that the act is invalid. What is more, acquiescence presupposes that the invalidity or illegality of the initial claim or act is cured by the subsequent silence or inaction of the states concerned.¹¹⁵

(iii) Concluding remarks on 'obligation to protest'

Appraising the circumstances in which a protest or a reaction is 'called for' is characterised by uncertainties. However, international tribunals, as shown above, have identified and applied specific criteria on the basis of which the circumstances in which a reaction is required may be objectively appraised. The infringement of the rights of the states involved is a factor which may objectively determine the circumstances requiring a reaction. It should not, however, be overlooked that in the case of general customary law the existence of interests has been interpreted broadly. Much will depend upon the act/claim of the other state and upon whether this act may contribute to the materialisation of a legal situation from which rights and obligation will derive. International tribunals have interpreted objectively the act/claim and its potential legal value, and have thus rejected arguments by silent states regarding their perception vis-à-vis these acts. By examining objective factors and circumstances, international tribunals have dissociated the legal value of silence from the actual intention of the silent state. This is not to say that if the state may have shown or may be able to prove a contrary intention, the circumstances will prevail; but silence as such is uncertain and ambiguous, and thus if the state cannot provide positive evidence concerning its contrary intention, the effects of silence and particularly its consideration as acquiescence will partially depend upon the objective appraisal of the act/claim vis-à-vis which a response is required.

(b) Capacity to protest (*potuisse*)

(i) Knowledge

Knowledge is one of the main elements which differentiates objectivism and voluntarism. Voluntarism considers knowledge as a *sine qua non* for the consideration of silence as acquiescence. A state cannot express its intention to accept a factual or legal situation, if it ignores it. A positive ascertainment of lack of knowledge renders the silence of a state excusable, and negates any possibility

¹¹⁴ *Temple of Preah Vihear Case*, above n 32, 70 (Judge Moreno Quintana).

¹¹⁵ McGibbon stated that 'acquiescence operates in the sphere to which the maxim *ex injuria jus non oritur* is least applicable, that is, where the vindication of a claim or course of action depends on the consent of the states affected': McGibbon, above n 1, 143.

for the ascertainment of acquiescence.¹¹⁶ Silence has been considered as lacking any juridical value when the silent state is ignorant of the legal or factual situation to which its silence is later claimed to be relevant.¹¹⁷ On the contrary, objectivism denies the necessity of knowledge, which links the factual element of silence with the intention of the state. Knowledge is irrelevant, in the sense that it is the fact of silence which produces legal effects and not the intention of the state.

Knowledge has been a crucial element in the consideration of states' silent conduct by international tribunals. States have invoked the element of knowledge in cases before the ICJ either to justify their silence on the basis of their ignorance of the situation concerned or when pronouncing the notoriety of their claim treating the silence of the other party as acquiescence.¹¹⁸ International tribunals responding to these arguments, have accepted the relevance of state's knowledge in their examination of the legal value of silence. Nevertheless, they have adopted a flexible interpretation of the conditions under which the knowledge of a state may be verified and have rejected in most cases pleas of ignorance. The issues addressed by international tribunals with regard to the evidence of knowledge are discussed in the following subsections.

(a) Notification v. notoriety: Notification¹¹⁹ of the claim to the interested states or the states whose rights will be affected by the act is not necessary.¹²⁰ However,

¹¹⁶ As pointed out by Johnson 'without knowledge there can be no acquiescence at all': D H N Johnson, above n 56, 347.

¹¹⁷ McGibbon, above n 1, 173 (and authors cited therein).

¹¹⁸ See, eg, the *Cameroon/Nigeria Case*: Nigeria argued that 'its operations within the maritime areas now claimed by Cameroon have always been particularly significant and completely open' and particularly its 'oil practice in the area was public, open and of long duration'; on the contrary, Cameroon denied ever having been notified of such concessions: *Cameroon/Nigeria Case*, above n 41, [282]; see also Nigeria's similar argument with regard to the territorial dispute: [62]:

'Nigeria relies in particular on the fact that the settlement of these villages by Nigerian nationals openly carrying on peaceful activities and Nigeria's peaceful administration of those villages, aroused no protest of any kind from Cameroon before April 1994'; for the Cameroonian contention, see [283].

¹¹⁹ Notification has been defined by Anzilotti as 'l'acte par lequel un Etat porte à la connaissance d'un ou plusieurs autres Etats un fait déterminé auquel peuvent se rattacher de conséquences juridiques' (an act by which a state communicates to one or more other states a specific fact to which legal consequences can be attached): Anzilotti, above n 78, 346.

¹²⁰ McGibbon, above n 1, 176. The fact that notification is not necessary may be inferred by the fact that the ICJ has been content with evidence of constructive knowledge (see below). In the *Gulf of Maine Case* the US argued that:

the issue of offshore permits under Canadian legislation was not common knowledge and merely constituted an internal administrative activity incapable of forming the basis of acquiescence or estoppel at the international level. Before any effect could result at this level it would, at least, have been necessary for the Canadian Department of External Affairs to send a diplomatic communication to the US Department of State:

Gulf of Maine Case, above n 31, 305, [131]; the Court by concluding that the US was

if the claim is indeed notified to the silent state, it is very likely that its silence will be regarded as acquiescence.¹²¹

Lack of notification, however, cannot prejudice the knowledge of the silent state, particularly in the case where the knowledge may be inferred from other facts. In the *Ligitan and Sipadan Islands Case*, the ICJ accepted the Malaysian argument that despite the fact that the map forming part of the Explanatory Memorandum was never officially communicated by the Dutch government to the British government, the British government was aware of the existence of this map through its diplomatic agent in The Hague.¹²²

Apart from the notification of the claim, the ICJ has taken into account various circumstances from which the knowledge of the silent party may be clearly inferred, such as the participation in judicial proceedings where the disputed claim was mentioned,¹²³ or the exchange of correspondence even between low-level officials where reference was made to the disputed claim.¹²⁴

aware of the Canadian oil concessions in the area, implicitly rejected the necessity for an official notification of the oil permits to the US.

¹²¹ The significance of notification was emphasised by Judge Fitzmaurice in his separate opinion in the *Temple of Preah Vihear Case*, where he stated that ‘if the map had never been officially communicated to Thailand ... then Thailand would ... have been entitled to a finding in her favour’: *Temple of Preah Vihear Case*, above n 32, 55 (Judge Fitzmaurice). See also de Visscher (1963), above n 10, 170; Cavaglieri distinguished three categories according to which notification has an impact upon the interpretation of silence: in the case of obligatory notification, silence amounts to a legal presumption of consent, in the case of optional (facultative) notification, to a presumption *juris tantum*, whereas mere knowledge of the facts (without notification) gives place to a simple presumption (*praesumptio hominis*) of consent: A Cavaglieri as quoted in Suy, above n 2, 62, fn 46. Suy points out that while silence following obligatory notification will evidently amount to consent, it is difficult to establish a clear rule for the meaning of silence after voluntary notification or as a result of factual knowledge: *ibid* 62, fn 46.

¹²² *Ligitan and Lipadan Islands Case*, above n 31, 649-650.

¹²³ In the *Land, Island and Maritime Frontier Dispute Case*, the Court referred to the participation of El Salvador in a case before the Central American Court of Justice, in which there was an explicit reference to the island of El Tigre as a reference point in the delimitation between Honduras and Nicaragua in order to show that El Salvador was certainly aware of Honduras’s claim over this island and, regardless of such knowledge, did not protest: above n 36, [354].

¹²⁴ In the *Gulf of Maine Case*, the USA alleged that Canada:
 never issued an official proclamation or any other publication for the purpose of making its claims known internationally; the US could not, therefore, infer the existence of such claims by such indirect means. By 1964 Canada had not published any official claim to the continental shelf under its own legislation:
Gulf of Maine Case, above n 31, [134]. Canada though proved – and the Court accepted – that the US knew by 1 April 1965 (the concessions had been granted in 1964) because of the correspondence following questions made by the Bureau of Land Management of the US Department of Interior regarding the exact position of the offshore permits: *ibid* [132].

The nature of the act or the contextual framework in which it appears may be indicative of a state's knowledge of it. Therefore, acts which are published or carried out openly may be deemed to be known to the states concerned.¹²⁵ On the contrary, acts carried out secretly cannot be considered as satisfying the criterion of knowledge. The Arbitral Tribunal in the *Eritrea/Yemen Award* noted that the absence of protest by Yemen against the patrols carried out by Eritrea around the Hanish Islands was justified by the fact that the patrols appeared to 'have taken place at night, and sometimes in conditions of darken ship'.¹²⁶

(b) Constructive knowledge: When knowledge cannot be evidenced with certainty from the facts of the case, the ICJ has resorted to the notion of constructive knowledge. In the *Fisheries Case*, the most-quoted case concerning constructive knowledge, knowledge was presumed on the basis of the existence of vital British interests in the maritime area concerned. Particularly, the Court stated that 'as a coastal state on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the UK could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government'.¹²⁷ In the *Minquiers and Ecrehos Case*, France pleaded ignorance of the activities performed by the Jersey authorities in the disputed islands; the ICJ rejected such contention, and Judge Levi Carneiro

¹²⁵ See, eg, the *Pedra Branca/Pulau Batu Puteh Case*, the Court accepted that most of the acts invoked by Singapore were made openly, and thus Malaysia was aware of them: above n 5, [75]. However, it found that some of the acts were performed in secret and were thus unknown to Malaysia; in one case, the acts were not given weight on the final conclusion on sovereignty (see, eg, [240]–[243] on naval patrols and exercises), while in the other ([247]: the installation by Singapore of naval communications equipment on the island of Pedra Branca/Pulau Batu Puteh) the acts were taken into consideration in the evaluation of the effectivities performed by Singapore, but not as evidence of Malaysian acquiescence ([274]).

¹²⁶ *Eritrea/Yemen Arbitration Award*, above n 41, [301]. See also [306]: when examining Yemen's lack of protest against Ethiopian naval activities on the islands, the Tribunal took into consideration 'the location of the islands, the fact that they were not settled and the fact that there was no normal line of communication from persons on or near the islands to the mainland'.

¹²⁷ The ICJ concluded that 'the notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the UK'. *Anglo-Norwegian Fisheries Case*, above n 93, 139. See also Judge Alvarez's separate opinion: 'a state is not obliged to protest against a violation of international law, unless it is aware or *ought to be aware* (emphasis added) of this violation': *ibid* 152. The dissenting judges defied the conclusion reached by the ICJ arguing that the UK was not aware of the Norwegian straight baseline system before the dispute began; *ibid* 205 (Judge Read); *ibid* 180 (Judge McNair). Waldock noted that the Court fixed states 'with a more stringent duty of alertness in scrutinizing the domestic legislation of other states and in objecting to claims – or even possible claims – that is acted upon in state practice': C H M Waldock, 'The Anglo-Norwegian Fisheries case' (1951) 28 *British Year Book of International Law* 164. See also Fitzmaurice, above n 7, 34 *et seq* (especially 41).

emphatically stated that ‘failure to exercise such surveillance and ignorance of what was going on on the islets indicated that France was not exercising sovereignty in that area’.¹²⁸ In the *Island of Palmas Case*, Arbitrator Huber stressed the presumption of knowledge in cases of territorial claims, and emphatically noted that ‘clandestine exercise of State authority over an inhabited territory during a considerable length of time would seem to be impossible’.¹²⁹

The only instance where the Court accepted a plea of ignorance was in the *Sovereignty over certain Frontier Land Case*. The Court found that Belgium was unaware of various acts performed by the Netherlands in the disputed plots and thus was justified in remaining silent vis-à-vis such acts. The Court stressed that the geographical location of the plots, surrounded as they were by Netherlands territory, made the detection of encroachments and the exercise of sovereignty difficult for Belgium.¹³⁰ The ICJ based its findings upon the geography of the area and the enclosure of the disputed plots, but contrary to its previous jurisprudence, it did not accept that the knowledge of Belgium should have been inferred from its having a vital interest in the area, as the dispute concerned its territorial sovereignty. The Court, however, took into consideration other factors and particularly the fact that Belgium itself was asserting its sovereignty over the plots, and that the Netherlands was aware of that assertion.¹³¹ It seems that the Court adopted a stricter threshold regarding the element of knowledge; this may however be explained by the fact that the Court, having already concluded that Belgium had a valid conventional legal title over the plots on the basis of the Descriptive Minute of the Boundary Convention of 1843, gave precedence to the holder of the legal title (Belgium) over the state asserting its adverse possession (Netherlands).

However, three of the dissenting judges stressed the significance of the failure of Belgium to protest against the continuous exercise of administrative and other acts on behalf of the Netherlands in the plots. Judge Armand-Ugo found that the ‘prolonged silence of the Belgian government in this respect (vis-à-vis preponderant governmental functions in the disputed plots) has created an

¹²⁸ *Minquiers and Ecrehos Case*, above n 99, 106 (Individual opinion of Judge Levi Carneiro). Similarly, in the *Dubai/Sharjah Border Case*, the Arbitral Tribunal found that ‘given the nearness of Al Mamzer and the very limited size of this region’ the government of Sharjah could not be deemed to ignore the acts of authority performed therein by the Emirate of Dubai: *Dubai/Sharjah Border Award*, above n 99, 622, 624. Concerning the development works in the area, the Tribunal noted that Sharjah’s police ‘must have been aware of the work that was going on – because of its size, it was visible from the road linking Dubai and Sharjah’: *ibid* 621.

¹²⁹ *Island of Palmas Case*, above n 26, 868; see also Johnson, above n 56, 347; Schwarzenberger, above n 7, 306; Jennings, above n 41, 39.

¹³⁰ *Certain Frontier Land Case*, above n 45, 229.

¹³¹ *Ibid* 230. The Court referred to the conduct of the Netherlands in the period between 1892 till 1922, when the dispute arose between the two states. The Court stressed that during this period the Netherlands government never repudiated the Belgian assertion of sovereignty.

indisputable right of sovereignty in favour of the Netherlands Government'.¹³² In a different way, Judge Moreno Quintana in his dissenting opinion, stressed the importance of the lack of protests on behalf of Belgium as evidencing the legal (conventional) title of the Netherlands to the plots.¹³³

The ICJ has been lenient in ascertaining a presumption of knowledge in the case of inactive states, and thus pleas of excusable ignorance have seldom been successful.¹³⁴

(c) Plea of ignorance and attribution of knowledge to state organs: Another issue related to knowledge concerns its attribution to the relevant governmental organs entrusted with representing the state at the international level.¹³⁵ It has been argued by states before the ICJ that the knowledge of lower-ranked officials cannot prejudice the knowledge of the state. In the *Preah Vihear Temple Case*, Thailand raised a plea of ignorance regarding the map produced by French officials and showing the Temple on the French — subsequently Cambodian — side, on the reason that when the map was received from Paris it was examined solely 'by minor officials who had no expertise in cartography and would know nothing about the Temple of Preah Vihear'.¹³⁶ The Court rejected the arguments both on the basis of the facts and the law; it accepted that the maps were seen by persons belonging to both the central and local government, such as the Foreign Minister, and the governor of Khukhan province respectively, none of whom was a minor official.¹³⁷ Nevertheless, the Court stressed that even 'if the Siamese authorities did show these maps only to minor officials, they clearly acted at their own risk and the claim of Thailand could not, on the international plane, derive any

¹³² Ibid 250–1 (Judge Armand-Ugon). Similarly, Judge Lauterpacht, after finding that 'the relevant provisions of the Convention must be considered as void and inapplicable on the account of uncertainty and unresolved discrepancy', stressed that 'at least during the fifty years following the adoption of the Convention there had been no challenge to the exercise, by the government of the Netherlands and its officials, of normal administrative authority with regard to the plots in question. In my opinion, there is no room here for applying the exacting rules of prescription in relation to a title acquired by a clear and unequivocal treaty; there is no such treaty': ibid 231 (Judge Lauterpacht).

¹³³ Ibid 255–8 (Judge Moreno Quintana); Judge Moreno Quintana found that the defectiveness of art 90 of the Descriptive Minute did not affect the Boundary Convention of 1843, which should be interpreted as allotting the plots to the Netherlands.

¹³⁴ McGibbon reached the same conclusion examining the jurisprudence of the ICJ up to 1954. McGibbon, above n 1, 181. See also Barale, above n 8, 403–4.

¹³⁵ McGibbon, above n 26, 294. The ILC in its Guiding Principle on unilateral declarations identified the authorities which have the vested power to bind the state internationally by virtue of their functions, namely the head of state, heads of government and ministers for foreign affairs as well as persons entrusted with duties in specified areas. ILC Guiding Principles, above n 13, [4]; see also the consistent jurisprudence of the ICJ referring to the issue of the representation of the state at the international level in the commentary of this paragraph.

¹³⁶ *Temple of Preah Vihear Case*, above n 32, 25.

¹³⁷ Ibid.

assistance for that fact'.¹³⁸ Thus, states should be careful when assessing information concerning their international affairs, and should ensure that the knowledge and subsequently silent conduct of lower-ranked officials would not prejudice the knowledge and reaction of the organs entrusted with representing the state on the international plane.

The Arbitral Tribunal in the *Case Concerning the Air Service Agreement* assessed the silence of state authorities not *prima facie* competent to engage the state at the international level. The Tribunal took into consideration the conduct of the aeronautic authorities, particularly of the *Secrétaire Général a l'Aviation Civile*, and concluded that his conduct and particularly his silence had led to the modification of the 27 March 1946 Agreement signed between France and the USA.¹³⁹ The state was thus charged with the knowledge and the conduct of its public servant who was responsible for the execution of the Agreement between the two states. This approach is consistent with the treatment of silence by the ICJ as analysed above in the *Temple of Preah Vihear Case*. It is the responsibility of the organs of the state which represent it at the international level to exercise control over the activities of other state organs, which are likely to have an impact on the relations with other states.¹⁴⁰

A similar argument was raised by the US in the *Gulf of Maine Case*; it was argued that the central government did not proceed to react in any way against the claims raised by Canada, as it was only a mid-level government official who participated in the 1965 correspondence and who had 'no authority to define international boundaries or take a position on behalf of their governments on foreign claims in this field'.¹⁴¹ The US particularly contested the fact that the 'Hoffman letter' could not be regarded as acquiescence in the Canadian claims. The ICJ partly accepted the US contention by stating that there was 'nothing to show that that method (the use of a median line) had been adopted at government level' but concerned mostly a technical matter of low-level officials.¹⁴² The Chamber focused on the actual nature of the communication between the officials of the states, which was of a technical character entailing no maritime claims, and not on whether the US central government was aware of the Canadian claim.

(ii) *Plea of error*

Error is recognised as a reason which may be legitimately invoked by a state as invalidating its consent to be bound by a treaty. According to article 48 of the Vienna Convention on the Law of Treaties (VCLT) such an error should be related 'to a fact or situation which was assumed by that State to exist at the time when the

¹³⁸ Ibid.

¹³⁹ *Case Concerning the Air Service Agreement of 27 March 1946*, above n 80, 250–3.

¹⁴⁰ Cot, above n 21, 380–1.

¹⁴¹ *Gulf of Maine Case*, above n 31, 306, [133].

¹⁴² Ibid 107–8, [139]. See also USA's Counter-memorial, 155, [236].

treaty was concluded and formed an essential basis of its consent to be bound'.¹⁴³ Analogically, it could be argued that a state may raise a plea of error as a justification for its inaction vis-à-vis an act or claim.¹⁴⁴ The error may refer to the content of the act or the circumstances surrounding the act¹⁴⁵ and should concern a decisive element¹⁴⁶ on the basis of which this state remained silent.

A plea of error was raised by Thailand in the *Temple of Preah Vihear Case* before the ICJ. In particular, Thailand argued that she erroneously believed that the map produced by the French officers indicated the frontier corresponding to the watershed line. The Court pronounced that:

it is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error.¹⁴⁷

The Court rejected Thailand's contention and found that the clarity of the map with regard to the exact position of the frontier in the Temple area and the qualifications of the persons who saw it precluded any possibility for error on behalf of Thailand.¹⁴⁸ Finally, it pointed out that 'if the Siamese authorities accepted the Annex I map without investigation, they could not now plead any error vitiating the reality of their consent'.¹⁴⁹ The Court, thus, raised the issue of

¹⁴³ Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 331 (hereinafter VCLT)

¹⁴⁴ In the case of silence, the erroneous belief of the silent state regarding the claim/act or other related circumstances may be used as a reason justifying its silence and thus precluding or reversing any inference of acquiescence.

¹⁴⁵ It is argued that the error cannot be one of law: A Aust, *Modern Treaty Law and Practice* (2000) 254.

¹⁴⁶ P Reuter, *Introduction to the law of treaties* (2nd rev ed, 1995) 176. McNair states that the mistake should be fundamental, that is, it should 'go to the root of the transaction and be such that but for its existence the party misled would not have entered into the transaction': A D McNair, *The Law of Treaties* (1961) 211.

¹⁴⁷ *Temple of Preah Vihear Case*, above n 32, 26. See art 48(2) VCLT, above n 144.

¹⁴⁸ Ibid 26. The Court held that 'nobody looking at the map could be under any misapprehension about' the location of the frontier and that 'the map marked Preah Vihear itself quite clearly as lying on the Cambodian side of the line, using for the Temple a symbol which seems to indicate a rough plan of the building and its stairways'.

¹⁴⁹ Ibid 27. On the contrary, Judge Moreno Quintana in his dissenting opinion argued that the existence of a technical error cannot be reversed by the silent behaviour of the state in error; in particular, Judge Moreno stated:

it is possible to recognize expressly or tacitly a given *de jure* or *de facto* situation, but not a situation vitiated by a technical error. An error remains an error and cannot by repetition make good acts of later date that are based upon that error. That is the only significance that should be attached to the question of error in the present case, where it does not have the significance of vitiation of consent, the existence of which is possible in a legal instrument but not in a map: *ibid* 71.

the obligation of a government to ‘investigate’ any act or claim potentially affecting its interests or rights, and, what is more, to be vigilant with regard to issues of national importance, such as those concerning its territorial sovereignty.¹⁵⁰

However, the ICJ accepted in principle the possibility of error as a reason of excusable silence. In particular, it stated that even if Thailand’s plea was valid, ‘it should have been advanced shortly after Thailand’s own survey of the disputed region was carried out’.¹⁵¹ Since a plea of error is related to the defective will of a state, as expressed through its silence, the ICJ seems to have adhered to the voluntarist approach. However, although the possibility of error is open, the ICJ gave weight to the stability of the factual and legal situation created by the conduct of the states involved. The same approach was taken by the Arbitral tribunal in the *Taba Case*, where it stated that ‘the principle of the stability of boundaries ... requires that boundary markers, long accepted as such by the States concerned, should be respected and not open to challenge indefinitely on the basis of error’.¹⁵² Thus the legal situation ensued by prolonged silence cannot be reversed by a plea of error.¹⁵³

(iii) Restrictions upon the freedom of the will/action of the silent state

It is generally accepted that any act undertaken by a state under conditions suppressing its will or its capacity to act does not bind it in international law. Accepting the same for acquiescence, namely that a state’s silent conduct may be justified on the basis of reasons related to its freedom of will, reflects the

¹⁵⁰ Judge Anzilotti in his dissenting opinion in the *Eastern Greenland Case* rejected the possibility of error on behalf of Norway, as expressed in M Ihlen’s declaration, taking into consideration objective factors such as the interests of Norway in the area and the obviousness of the legal consequences of the extension of sovereignty:

if a mistake is pleaded it must be of an excusable character and one can scarcely believe that a government could be ignorant of the legitimate consequences following upon an extension of territory. I would add that, of all the governments in the world, that of Norway was the least likely to be ignorant of the Danish methods of administration in Greenland, or of the part played therein by the monopoly system and the regime of exclusion: *Legal Status of Eastern Greenland (Norway v Denmark)* [1933] PCIJ, (ser A/B) No 53, 92.

¹⁵¹ *Temple of Preah Vihear Case*, above n 32, 33; the Court also stressed the fact that the Siamese government was presented with many chances to raise the issue of sovereignty over the Preah Vihear Temple. The Court mentioned a survey conducted by Thailand in 1934–5, which established a divergence between the map line and the true line of the watershed; despite this survey, Thailand did not raise any concerns regarding the map (27). Moreover, Thailand did not raise the matter either during the negotiations for the 1925 and 1937 Franco-Siamese Treaties (which confirmed the existing frontier) or in 1947 before the Franco-Siamese Conciliation Commission. The Court specifically said that ‘it would have been natural for Thailand to raise the matter’ but she did not do so (28).

¹⁵² *Taba Award* (1988) 80 *ILR* 305–06, [235].

¹⁵³ This is also related to the passing of time and the consistency of a state’s behaviour; see below nn 182–96 and accompanying text.

voluntarist perception of acquiescence, which emphasises state intention for the production of legal effects.

Fraud, corruption and coercion of a representative of a state or coercion of a state by the threat or use of force are reasons recognised in the Vienna Convention of the Law of Treaties as reasons which may be legitimately invoked by a state as ‘invalidating its consent to be bound by the treaty’.¹⁵⁴ It has been suggested that analogically these reasons may also be invoked by states as an excuse for their silence vis-à-vis a situation which would normally call for their reaction.¹⁵⁵ However, these reasons have been described as very uncommon in practice for treaties;¹⁵⁶ their invocation as reasons justifying state silence is even less probable.

The ICJ has considered few cases where restrictions upon the will of a state were invoked as a reason of excusable silence. On only one occasion, did the Court accept such a plea, and that occasion concerned an individual and not a state. In the *Burkina Faso/Mali Case*, the ICJ found that no conclusion could be drawn from the absence of any protest by the Lieutenant-Governor of French Sudan vis-à-vis the boundary line described in a letter sent to him by the Governor-General of French West Africa, in so far as ‘the Lieutenant-Governor in question was replying to a communication from his superior. That being so, it is difficult to see how the idea of acquiescence which presupposes freedom of will can arise’.¹⁵⁷ The ICJ specifically invoked the freedom of will accepting thus the intentional aspect of silence as acquiescence; however, as noted above this case concerned the behaviour of an individual and not of a state as an abstract entity.

The issue of a threat against the territorial integrity of a country was implicitly raised as a plea to justify the lack of protest in the *Temple of Preah Vihear Case*; referring to the absence of protests following the visit of Prince Damrong in the Temple, Thailand argued that she did not protest because such protest could be

¹⁵⁴ See articles 49–52 VCLT, above n 144.

¹⁵⁵ See Degan, above n 78, 354. See Vattel as quoted by McGibbon, above n 1, 171: this plea of excusable silence, he mentions, ‘has often been employed against princes who by their formidable power had for a long time reduced the weak victims of their usurpations to silence’. Akehurst, above n 40, 1, fn 1:

It is possible that the position adopted by State A would have no legal effects if State A had been intimidated by the threat or use of force by State B, or if its officials had been bribed or coerced by State B (by analogy from the rules governing nullity of treaties). But these are extreme cases which are unlikely to happen often in practice.

I M L DeSouza, ‘The Role of State Consent in the Customary Process’ (1995) 44(3) *International and Comparative Law Quarterly* 525 (referring mainly to positive behaviour and not specifically silence):

if a will is indeed valid and capable of producing legal effects only when the corresponding behaviour is voluntary, then no legal effects should be inferred from a behaviour which is involuntary.

¹⁵⁶ Aust, above n 145, 254–6.

¹⁵⁷ *Frontier Dispute Case (Burkina Faso v Republic of Mali)* [1986] ICJ Rep 596–7, [80].

considered by France as an excuse to seize more territory.¹⁵⁸ However, provided that there was no indication – nor did Thailand raise such contention — that there was a direct threat of use of force on behalf of France, the Thai argument will be examined below in the framework of political implications mostly concerning the inequality of states in the era of colonialism.¹⁵⁹

(iv) Considerations related to the political situation of the silent state

The internal political situation of the silent state was invoked by Eritrea in the *Eritrea/Yemen Arbitration Award*. In particular, this state argued that at the time of the issuing of the oil concessions Ethiopia, Eritrea's predecessor, was embroiled in military and political upheaval and thus could neither be aware of the concessions or protest against them.¹⁶⁰ The Tribunal accepted this argument and concluded that:

Ethiopia was then locked in its final struggle with the Eritrean liberation movement, the Mengistu regime was close to collapse and to suggest that Eritrea today should be taxed with Ethiopia's failure during that period to *find* and *protest* (emphasis added) the terms of the agreement may be unreasonable.¹⁶¹

(v) Concluding remarks with regard to 'capacity to protest'

The approach of international tribunals with regard to the capacity of a state to protest or react to a factual/legal situation is evidently influenced by voluntarism, in the sense that incapacity and thus excusable silence reflects the intention of a state to express its will. Therefore, the link between silence and intention is more evident. This may be illustrated by the examination of international tribunals of elements such as knowledge or reasons related to the restriction of the freedom of will of a state. However, having said that, it should be noted that international tribunals have utilised objective criteria in their assessment of a state's conduct and have rejected reasons related to the motives or political considerations of the silent state. Despite the fact that they have stressed the element of knowledge, which is denied by objectivism in its consideration of silence, they have adopted a flexible and broad approach accepting constructive knowledge in almost all the cases in which knowledge could not be evidenced. It should also be noted that constructive knowledge is only a legal presumption, and thus it cannot be established with certainty whether a state was indeed aware of the claim/act concerned.

¹⁵⁸ *Temple of Preah Vihear Case*, above n 32, 91 (Judge Wellington Koo).

¹⁵⁹ See below nn 171–175 and accompanying text.

¹⁶⁰ *Eritrea/Yemen Arbitration Award*, above n 41, [70]. What is more, she further argued that Ethiopia which was the sovereign state at the time had no reason to protest Yemeni concessions as she was aware that it was about to 'lose its entire coastline to the soon-to-be independent Eritrea'; see also [400].

¹⁶¹ *Ibid* [415], [520]; on the contrary, the Tribunal noted with regard to the contraction of an air landing strip on Hanish island in 1993 by Total Oil Company, to which Yemen had issued oil exploitation licences, that Eritrea did not protest despite the fact that the civil war was over and that Eritrea was an independent state, [502].

What is more, in cases of restriction of the will or action of the silent state, international tribunals have been reluctant to accept pleas of excusable silence. Silence as a factual element seems to weigh more than subjective considerations related to the actual will or intention of the state. Reversing an established situation on the basis of an alleged contrary intention by the silent state, would lead to instability and uncertainty. Stability in the relationships among states seems to have influenced such interpretation of state silence by international tribunals.¹⁶²

(c) Reasons related to political considerations as perceived by the silent state

It has been suggested that a state's failure to protest may not be conclusive of its legal stand vis-à-vis a claim insofar as its silence is motivated by political implications.¹⁶³ Shaw points out that 'a state might not wish to give offence gratuitously or it might wish to reinforce political ties or other diplomatic and political considerations may be relevant'.¹⁶⁴ In this sense, both filing and refraining from filing a protest may be politically motivated.

Political considerations have rarely and without success been advanced before international tribunals by the parties to a dispute in their attempts to justify their silence and inaction. The subjectivity of political considerations as well as their openness to abuse¹⁶⁵ has been taken into consideration by international tribunals when examining such pleas. During the oral proceedings in the *Minquiers and Ecrehos Case*, France advanced the argument that she had not protested against the British claim because she did not want to 'prejudice the good relations between the parties'.¹⁶⁶ The UK Counsel stressed that such plea may be used by each state desiring to justify its inaction and its potential acquiescence in a claim.¹⁶⁷ The Court rejected France's contention – even though it did not refer explicitly to the matter of political considerations latent in the lack of protests – and accepted that the UK had performed activities which evidenced its title over the islands.¹⁶⁸

In the *US Nationals in Morocco Case*, it was submitted during the hearings that the conduct of the French government in tacitly allowing the continuation of some of the benefits of capitulatory rights in favour of the US was a case of mere

¹⁶² Cahier, above 73, 258.

¹⁶³ D'Amato, above n 3, 70, 196; Shaw, above n 32, 90–91; Fitzmaurice, above n 7, 33; Anzilotti, above n 78, 344.

¹⁶⁴ Shaw, above n 32, 90. Akehurst mentions as an example that:

State A may think that State B's action is contrary to international law but may refrain from protesting because it does not want to jeopardise the conclusion of a trade agreement with State B: Akehurst, above n 155, 39.

¹⁶⁵ McGibbon, above n 1, 171 (fn 3).

¹⁶⁶ *Minquiers and Ecrehos (France v United Kingdom)* [1953] III ICJ Pleadings, 321.

¹⁶⁷ *Ibid* 270–1

¹⁶⁸ *Minquiers and Ecrehos Case*, above n 99, 67 (on the Ecrehos Islands), 69 (on the Minquiers Islands), 70–72 (on the French conduct).

‘gracious tolerance’, having no legal effect.¹⁶⁹ However, the Court found that the Moroccan authorities had *acquiesced* in a provisional temporary situation, which did not give rise – because of the negotiations taking place at that time — to ‘a right to exercise consular jurisdiction founded upon custom or usage’ binding on Morocco.¹⁷⁰

The issue of political considerations was raised more convincingly – without though success — by Thailand in the *Temple of Preah Vihear Case*; the political circumstances prevailing in the area at the time and particularly the inequality between Siam and France were advanced as reasons justifying Siam’s silence vis-à-vis the map produced by France and showing the Temple on the French side. Of particular importance was the lack of protest on behalf of the Siamese government after the visit of Prince Damrong in the Temple, which was considered by the ICJ as evidence of Siam’s acquiescence in the French (and subsequently Cambodian) sovereignty over the area. Thailand argued that the lack of protests could not be considered as a manifestation of acquiescence because of the political circumstances at that time concerning the superior position of France in the area as a colonial power.¹⁷¹ The Court did not examine these arguments raised by Thailand, but found the explanations regarding the visit unconvincing.¹⁷²

However, Judge Wellington Koo in his dissenting opinion stressed the significance of the explanation explication provided by Prince Damrong’s daughter who had accompanied him in the visit to the Temple. She claimed that a potential protest on behalf of Siam would be considered by the French as an excuse to seize more territory. Judge Wellington Koo accepted this reasoning and stated that ‘in view of the history of the relations between Siam and French Indo-China at the time and earlier during the preceding decades, the Princess’s explanation seems natural and reasonable. It was, generally speaking, the common experience of most Asiatic States in their intercourse with the Occidental Powers during this period of colonial expansion’.¹⁷³ Similarly, Judge Spender in his dissenting opinion stressed

¹⁶⁹ Minutes of the Public Sittings held at the Peace Palace, the Hague, 15-26 July 1952 and 27 August 1952, 212.

¹⁷⁰ The ICJ stated:

In these circumstances, the situation in which the US continued after 1937 to exercise consular jurisdiction over all criminal and civil cases in which US nationals were defendants, is one that must be regarded as in the nature of a provisional situation *acquiesced in* (emphasis added) by the Moroccan authorities,

Case Concerning Rights of Nationals of the USA in Morocco (France v USA) [1952] ICJ Rep 200–1. The dissenting judges held that the exercise of such rights by the US was not due merely to France’s ‘gracious tolerance’ in so far as she was aware that the US was asserting these rights on the basis of established custom and usage. See *ibid* 221 (Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau).

¹⁷¹ *Temple of Preah Vihear*, above n 32, 91 (Judge Wellington Koo); see also C W Chan, above n 52, 432–3.

¹⁷² *Ibid* 30.

¹⁷³ *Ibid* 91 (Judge Wellington Koo); see also C W Chan, above 52, 432–3.

the importance of examining the silence of a state within the context of the particular political situation at the time and place where such behaviour occurred.¹⁷⁴ He referred particularly to the fact that Siam was apprehensive of France's aspiration in the region and recognised this as a valid reason why Siam at that time did not protest against French actions.¹⁷⁵ The Court by not discussing this issue and by accepting that Siam's silence amounted to acquiescence rejected the Thai arguments, but it is not clear whether it rejected it on the basis of the facts, or whether it implicitly made a pronouncement that political considerations such as those referring to the beliefs of a state cannot be invoked as a successful plea of 'excusable' silence.

Similarly, in the *Pedra Branca/Pulau Batu Puteh Case*, the ICJ did not accord any significance to political considerations related to the colonial context, when it examined Malaysia's silent conduct *vis-à-vis effectivités* performed by the English authorities, Singapore's predecessor. However, the issue was raised by two of the dissenting judges. Judge Ranjeva stated that due to the colonial relationship between the Sultanate of Johor and the British authorities, the conduct of the former could not be deemed as amounting to acquiescence.¹⁷⁶ However, he argued that in the period following Malaysia's independence, its silence and its indifference concerning the sovereignty status of the island could be deemed as amounting to acquiescence.¹⁷⁷ A similar point was raised by Judge Bennouna in his declaration where he analysed the importance of the colonial relationships between the predecessors of the parties to the dispute. He particularly noted that the 1953 correspondence, which was treated by the Court as significant evidence of the Sultanate of Johor's acquiescence to the passing of territory, was made between the British colonial secretary of Singapore and the state secretary of Johor at a time when the UK was responsible for the defence and the foreign affairs of this state.¹⁷⁸ However, as seen from the previous judgment of the ICJ in the *Temple of Preah Vihear*, the ICJ has not considered colonial relationships as affecting the interpretation of a state's behaviour as acquiescence.

(d) Relevance of time

Time plays an important role in the consideration of silence as acquiescence.¹⁷⁹ According to positivist thinking, time establishes and strengthens the presumption

¹⁷⁴ Ibid 128 (Judge Spender); he stated:

It would not, I think, be just to apply to the conduct of Siam in this period objective standards comparable to those which reasonably might today be or might then have been applied to highly developed European States.

¹⁷⁵ Ibid. See also G M Kelly, 'The Temple Case in Historical Perspective' (1963) 39 *British Year Book of International Law*, 462.

¹⁷⁶ *Pedra Branca/Pulau Batu Puteh Case*, above n 5, 104-105 [5] (Judge Ranjeva).

¹⁷⁷ Ibid 105-106 [6].

¹⁷⁸ Ibid (Judge Bennouna) 132 [14]; he also noted that only the conduct of independent states should be taken into account when addressing issues of acquiescence because of the implications caused by colonial relationships [15].

¹⁷⁹ Sinclair, above n 55, 112: 'The period of time in which a silence has been maintained

of consent.¹⁸⁰ However, time is also linked to the criteria analysed above, namely the obligation and capacity of a state to protest against a factual or legal situation, especially referring to the period within which such response is expected. What is more, the passage of time is relevant to the consistency of the behaviour of the states concerned with regard to the already established and consolidated legal situation, particularly as a belated protest may contribute to insecurity and instability.¹⁸¹

It should be initially pointed out that it is a matter of facts, as to how long after the initiation of the claim/act, a state is required to file a protest so as to hinder the inference of acquiescence. It is certain that the passage of a long time during which the claimant state has retained its claim and the other state has remained silent may render silence into acquiescence. Indeed, international tribunals have found that protests following a long period of inactivity cannot reverse the inference of acquiescence. In the *Land, Island and Maritime Frontier Dispute Case*, the ICJ found that El Salvador had been silent for over a hundred years when Honduras had been in effective possession of the island of El Tigre and only raised a claim over the island some time before the conclusion of the Special Agreement by virtue of which these states decided to refer the boundary dispute to the ICJ.¹⁸² With regard to the islands of Meanguera and Meanguerita, the Court, similarly, observed that Honduras had not filed any protest or raised any objection to the power exercised by El Salvador over the island; the first time that Honduras raised a protest was in 1991¹⁸³ and therefore the Court considered ‘that this protest of Honduras, coming after a long history of acts of sovereignty by El Salvador in Meanguera (the Court had found that El Salvador first asserted its claim to the

will be an important factor in determining whether that silence can be held to amount to acquiescence’; see also Fitzmaurice, above n 7, 30; Barale states that we cannot talk about instantaneous acquiescence in the case of silence, above n 8, 405; contrary Cot who argued commenting on the *Temple Case* that ‘l’acquiescement est un acte instantané qui ne s’applique pas progressivement dans le temps’ (‘acquiescence is an instantaneous act which does not develop gradually over time’): J P Cot, ‘Affaire du temple de Préah Vihear’ (1962) 8 *Annuaire Francais de Droit International* 237.

¹⁸⁰ According to McGibbon the passage of time strengthens the ‘inference of consent by inaction’: McGibbon, above n 38, 120; see also Blum, above n 25, 188:

The passage of time, coupled with an absence of protest on the part of the States affected or likely to be affected by the exceptional claim, serve to strengthen this presumption of acquiescence underlying the historic title.

¹⁸¹ De Visscher (1963), above n 10, 167: ‘les réclamations tardives sont un ferment d’insécurité’ (‘belated protests are a source of insecurity’).

¹⁸² *Land, Island and Maritime Frontier Dispute Case*, above n 36, [355]; despite some discrepancies in the evidence with regard to the actual presence of Honduras in the island, the Court accepted that ‘Honduras has remained in effective occupation of El Tigre since 1849’ ([354]) whereas El Salvador raised a claim over the islands some time before the conclusion of the Special Agreement (May 1986): [354].

¹⁸³ Ibid [361]–[362].

islands in 1854) was made too late to affect the presumption of acquiescence on the part of Honduras'.¹⁸⁴

However, in cases of much shorter periods of inaction, it is difficult to indicate in advance how long after the initiation of the act a protest should be filed. In the *Temple of Preah Vihear Case*, the Court pronounced that Siam should have reacted 'within a reasonable period' to the map showing the temple in the French side¹⁸⁵ without though specifying how long such a period should be. The reasonableness in the reaction may be connected with the expectation borne by the acting state that the state interested in the situation will respond in due time. This element relates to the principle of good faith and concerns the *bona fide* expectation of the acting state that the states affected by its acts would raise their objections in due time.¹⁸⁶ The Chamber in the *Gulf of Maine Case* pointed out that 'when Canada, at the level of its Department of External Affairs and of the United States Embassy in Ottawa, clearly stated its claims for the first time (letter of 30 August 1966), it might admittedly have expected a reaction on the part of the United States Department of State'; the Court even stressed the 'reasonably justified' belief of Canada that lacking any objections 'the US would ultimately come round to its view'.¹⁸⁷

The issue of a short time of delay in filing a protest against an act infringing its rights was examined by the ICJ in the *Gulf of Maine Case*. There, the Chamber, while acknowledging that the US delayed in responding to the Canadian claim with regard to Georges Bank, stated that this delay in replying could not be deemed as acquiescence in the Canadian contentions, nor a forfeiture of its rights, as it would overstep the conditions required for invoking acquiescence or estoppel.¹⁸⁸ The Chamber found that the US indeed remained silent after the first permits for exploration on Georges Bank had been issued by Canada, but this time was too short (the USA's inaction lasted from 1964 till November 1969)¹⁸⁹ to attribute this silence any legal consequence.¹⁹⁰

¹⁸⁴ Ibid [364].

¹⁸⁵ *Temple of Preah Vihear Case*, above n 32, 23.

¹⁸⁶ Villiger stresses the element of expectation, above n 2, 19: 'a state will not have expressly or impliedly disclosed its dissatisfaction with an emerging rule over a longer period of time in situations *where other states could, in good faith, have expected the state to do so*'.

¹⁸⁷ *Gulf of Maine Case*, above n 31, 308, [142].

¹⁸⁸ Ibid.

¹⁸⁹ What the Court however noted was that while the first permits were issued in 1964, it was in August 1966 when Canada clearly proclaimed an equidistance line; the US without though protesting or objecting that, suggested the opening of discussions in May 1968 and finally objected the issuing of permits in the Georges Bank continental shelf in November 1969: *ibid* 308, [142].

¹⁹⁰ Ibid 311, [151]. The Chamber stressed the contrast between the long duration of the Norwegian practice in the *Fisheries Case* and the short time of the Canadian actions in the *Gulf of Maine*, 309, [144].

In the *King of Spain Arbitral Award Case*, the ICJ found that Nicaragua's belated protest, which was not 'put forward in proper time' could not reverse the presumption of acquiescence in the validity of the Award. What may appear inconsistent with the previous jurisprudence of the ICJ was that the actual time between the delivery of the award and the protest raised by Nicaragua was relatively short (five and a half years). Indeed, assessed on its own terms, five and a half years may seem as a short period of time, but the Court took into consideration other facts such as positive actions on behalf of Nicaragua denoting acquiescence in the validity of the award as well as the fact, as noted by Thirlway and Munkman, that Nicaragua waited for 45 years before initiating proceedings before the ICJ challenging the validity of the Award.¹⁹¹

In the *Pedra Branca/Pulau Batu Puteh Case*, the ICJ found that more than 100 years of non-action ('from June 1850 for the whole of the following century or more')¹⁹² and almost thirty years of absence of protest on behalf of Malaysia *vis-à-vis* *effectivités* performed by Singapore (mainly after 1953) were sufficient to manifest Malaysia's acquiescence to the passing of territory.¹⁹³ The dissenting judges disagreed with the consideration of time, especially the silent conduct of Malaysia *vis-à-vis* Singaporean *effectivités*.¹⁹⁴ However, the ICJ seems to consider that the lapse of time is relevant to the nature of acts performed by the other state. In cases of territorial disputes and the performance of sovereign acts by one state, the passage of 30 years of non protest may suffice for the consideration of the silent behaviour of a state as acquiescence.

Similarly, in the *Dubai/Sharjah Border Award*, the Tribunal took into consideration that Sharjah had remained silent for 19 years *vis-à-vis* Dubai's non-acceptance of the Tripps decision (adjudicating the area of Al Mamzer to Sharjah) but paid more attention to the 9 years of Sharjah's lack of protest *vis-à-vis* acts of sovereignty performed by Dubai in the disputed area.¹⁹⁵ Again, the time required for the inference or the consolidation of acquiescence seems to be connected with the nature of the acts performed by the other state.¹⁹⁶ In the case of usurpation of

¹⁹¹ Thirlway, above n 52, 46–7; Munkman, 'Adjudication and adjustment – International Judicial Decision and the Settlement of Territorial and Boundary Disputes' (1972–3) 46 *British Year Book of International Law* 96.

¹⁹² *Pedra Branca/Pulau Batu Puteh Case*, above n 5, 96 [275].

¹⁹³ *Ibid* 96 [275].

¹⁹⁴ *Ibid* 113 [25] (Judge Parra-Arrangugen); he also considered that the inaction of the Sultanate of Johor for more than 100 years was justified on the basis of the fact that this state had no obligation due to its historic title to perform any kind of acts. Judges Simma and Abraham also noted that the acts of Singapore and its predecessor, which the Court took into consideration as *à titre de souverain*, were performed at a time close to the critical date: *ibid* 126 [27] (Judges Simma and Abraham).

¹⁹⁵ *Dubai/Sharjah Border Award*, above n 99, 611–2, 622, 624.

¹⁹⁶ The Tribunal found that the time will be dependent upon other factors such as 'the remoteness of the territory in question or on the kind of acts manifesting authority which have been employed': *ibid* 624.

state territory, the reaction of the state raising a claim over this territory should be immediate.¹⁹⁷

It would thus appear that a belated protest will not reverse the inference of acquiescence, nor will it have any effect upon the legal situation created by it. It is obvious that the ICJ has put emphasis on the situation established by a prolonged silence, and has considered that the silent state is bound by the legal situation established on the basis of its conduct.

The fact that the ICJ has given more weight to the actual fact of silence and not to any kind of intent from the silent state may be demonstrated by the case where an initial protest by a state against the act/claim of another is followed by a relatively long period of inaction.¹⁹⁸ It has been argued that it is not expected from a state to take up action supporting its protest,¹⁹⁹ but it is necessary that the protest is repeated over time²⁰⁰ so as to show that the state's conduct has been consistent

¹⁹⁷ Note the emphasis put on this by the Tribunal in the *Dubai/Sharjah Border Award*: 'the *first thing* (emphasis added) that a state must do when the authorities of another state enter its territory is to make a protest and send its police force to put an end to these actions': *ibid* 620.

¹⁹⁸ 'The continuation of the situation which provoked the initial protest' is considered as a factor of assessing the efficacy of protests: McGibbon, above n 26, 311.

¹⁹⁹ This mainly concerns the question of whether the filing of diplomatic protests may be deemed as an adequate means for the preservation of a state's rights in international law; various positions have been advanced. It has been argued that in the case of territorial claims and in the case of prescriptive rights, 'paper' protests are not sufficient and that states should either take action against the claim or refer the issue to an adjudication international body; see Johnson, above n 116, 346, 353–4; Fitzmaurice, above n 7, 28–9, 42–3; see also Fitzmaurice, 'The Law and Procedure of the ICJ, 1951–4: Points of Substantive Law, Part II' (1955–6) 32 *British Year Book of International Law* 33; Suy, above n 2, 75–6, 78–9; Based on the proceedings in the *Minquiers and Ecrehos Case* and particularly the position taken by the UK, McGibbon concluded that international tribunals would require evidence of a positive initiative on behalf of the protesting state towards the settlement of the dispute through the use of 'all available and appropriate international machinery for that purpose': McGibbon, above n 26, 313; also Cahier, above n 73, 251; Judge Carneiro in his individual opinion endorsed the British view, requiring from a state disputing the claim of another (apart from filing diplomatic protests) to have attempted to resolve the dispute by its reference to an international tribunal: *Minquiers and Ecrehos Case*, above n 25, 108; Schwarzenberger, above n 7, 307. See also UK's Counsel in *Anglo-Norwegian Fisheries Case*, above n 93, II ICJ Pleadings, 653–4, 656, 678. However, there is no indication in international law that the protesting state should undertake 'forcible' action in order to retain its rights and establish its legal position. On the other hand, it is argued that diplomatic protests may be sufficient for the preservation of rights in international law as long as a clear and continuous opposition is illustrated; see Brownlie, above n 32, 149–50; T D Gill, 'The forcible protection, affirmation and exercise of rights by states under contemporary international law' (1992) 23 *Netherlands Yearbook of International Law* 143; Villiger, above n 2, 15–7; Danilenko, above n 7, 41; France's arguments in *Minquier and Ecrehos Case*, above n 99, III ICJ Oral Pleadings, 384; Akehurst, above n 40, 41; D A Colson, 'How persistent must the persistent objector be?' (1986) 61 *Washington Law Review* 963–4.

²⁰⁰ *Oppenheim's International Law* (9th ed), above n 41, 706; Fitzmaurice, above n 7, 29.

with regard to the particular issue; in the case where the state does not repeat its protest – not solely a diplomatic protest but any manifestation of its intention to oppose the specific claim — this state’s conduct may be thought to amount to acquiescence.²⁰¹

This was the argument raised by France in the *Minquiers and Ecrehos Case*; particularly the French Counsel argued in his oral pleadings that ‘le silence prolongé après une telle protestation (isolée) pourrait même être considéré comme un abandon, par l’Etat en cause de sa revendication’.²⁰² This issue was addressed by the ICJ in the *Fisheries Case* with regard to the protests of France and Germany vis-à-vis the straight baseline system established by Norway. The Court seems to have accepted the Norwegian contentions with regard to the abandonment of the protests on behalf of these states. Particularly, it pronounced that France ‘did not pursue the matter’ and thus concluded that the Norwegian system ‘encountered no opposition on the part of other states’.²⁰³ Similarly, the Arbitral Tribunal in the *Air Service Agreement Case* found that France despite its initial protest, had acquiesced in the inclusion of Teheran in route 1 provided in the 1946 Agreement, as for many years after its initial protest the competent authorities had raised no objection to the use of this route by the US.²⁰⁴

VI. Intention Manifested by Positive Acts and Silence

In most cases, the ICJ took into consideration both the failure of a state to raise an objection and its positive actions, and considered them of equal weight. In particular, in most instances the ICJ found that both negative and positive state conduct were in conformity to each other and were, therefore, considered as vindicating the conclusion reached by the Court regarding the position of a state in the particular case. For example, in *the King of Spain’s Arbitral Award Case*, the Court concluded that Nicaragua, by express declaration and by conduct, recognised the Award adding that ‘Nicaragua’s failure to raise any question with regard to the validity of the Award for several years after the full terms of the Award had

²⁰¹ Barale states that ‘insufficient’ protests cannot ‘annihiler l’acquiescement déduit du comportement passif’ (‘cancel out acquiescence deducted from passive behaviour’); Barale, above n 8, 393.

²⁰² *Minquiers and Ecrehos Case, (France v United Kingdom)* [1953] II ICJ Pleadings 269 (‘prolonged silence after such an (isolated) protest could be considered as abandonment by the state in question of its claim’).

²⁰³ *Anglo-Norwegian Fisheries Case*, above n 93, 136–7.

²⁰⁴ It is interesting to note that the Tribunal made a distinction between protest in principle and acceptance in fact: ‘tout en objectant *en principe* elle (France) a consenti *en fait* (emphasis added) à la poursuite de l’action à l’égard de laquelle elle a exprimé l’objection’ (‘while objecting *in principle*, she (France) consented *in fact* (emphasis added) in the continuation of the action against which she had expressed her objection): *Air Service Agreement Award*, above n 80, 250. It should also be noted that apart from the initial protest the Secrétaire General à l’Aviation Civile had notified that any authorisation for the use of Teheran via Beirut was on a temporary title; the Tribunal found that this statement could not be deemed as reserving France’s rights regarding the use of the specific route: *ibid* 252–3; see also Cot, above n 21, 376–7.

become known to it further confirms the conclusion at which the Court has arrived'.²⁰⁵ In the *Temple of Preah Vihear Case*, the Court considered instances of positive behaviour such as the use of maps showing the Temple in the French side, as confirming its conclusion regarding Thailand's acquiescence in the frontier boundary.²⁰⁶

In some cases, however, negative and positive state conduct may not be in conformity to each other, that is, different conclusions may be reached from the interpretation of each representation. Whereas positive acts may provide a safer conclusion concerning the intention of the acting state, silence in some instances was regarded as outweighing such conclusions in the context of the resolution of an international dispute.

In the *Temple of Preah Vihear Case*, the ICJ gave considerable weight to the lack of protests against the maps produced by France over the performance of activities by Thailand and particularly the maintenance of keepers and a police force in the Temple. The Court concluded that 'it would seem that Thailand while taking certain *local action* (emphasis added), was not prepared to deny the French and Cambodian claim at the diplomatic level'.²⁰⁷ The Court, thus, considered that the absence of protests on behalf of Thailand for a period of 40 years, despite the

²⁰⁵ *King of Spain's Arbitral Award Case*, above n 53, 213. Judge Urrutia Holguin in his dissenting opinion found that Nicaragua's act and conduct did not amount to estoppel; *ibid* 222.

²⁰⁶ *Temple of Preah Vihear Case*, above n 32, 27 *et seq.* One of the circumstances emphasised by the Court showing Thailand's acquiescence by positive action was the fact that she continued using maps showing Preah Vihear as lying in Cambodia (despite the fact that she had produced some maps with the frontier line following the watershed showing Preah Vihear in Thailand – after the surveys conducted by Thailand). The Thai arguments that it was 'purely for cartographical reasons (there were no other maps, or none that were so convenient or none of the right scale for the occasion') were rejected by the Court; the Court stated that 'Thailand could have used the map but could also have entered some kind of reservation with France as to its correctness. This she did not do': *ibid* 28.

²⁰⁷ *Ibid* 32. Thailand had invoked various instances of positive conduct performed in the area, which manifested her intention to act as sovereign:

the building of roads to the foot of Mount Preah Vihear, the collection of taxes by Siamese revenue officers on the rice fields of Mount Preah Vihear, the grant of permits to cut timber in the area, the visits and inspections by Siamese forestry officers, the taking of an official inventory in 1931 of ancient monuments which included the Temple of Preah Vihear, the visit of the Under-Secretary of the Ministry of the Interior in 1924–5 and the visit of Prince Damrong in 1930 both visits including the Temple of Preah Vihear: *ibid*, 92 (Judge Wellington Koo).

Judge Wellington Koo in his dissenting opinion stressed the importance of Thailand's 'consistent attitude and conduct during the five decades since 1904 in respect of her title to sovereignty over the Temple area' as having due weight over its absence of protest to various French contentions; *ibid* 91; he emphatically mentioned that such positive actions were 'facts which clearly refute the presumption'. The majority of the Court, however, adopted a different approach in the interpretation of Thailand's conduct.

maintenance of keepers or troops in the Temple, was indicative of her acquiescence in the frontier boundary. In the *Land, Island and Maritime Frontier Dispute Case*, the ICJ gave also precedence to the lack of any protests on behalf of Honduras over the alleged effectivities performed by this state on the island of Meanguera, particularly as Honduras could not prove its material presence on the island.²⁰⁸ Similarly, in the *Pedra Branca/Pulau Batu Puteh Case*, despite the fact that Malaysia had argued that she had been performing acts manifesting her intention to act as sovereign over Pedra Branca, the ICJ found that those acts could not be considered as sovereign acts,²⁰⁹ and thus gave due weight to this state's silent conduct *vis-à-vis effectivities* performed by Singapore and its predecessor, the British authorities.

This is not to say that in cases where positive acts may manifest the intention of the acting state in contradiction to its absence of protest, the conclusions based on its silent conduct will prevail. There are instances in its jurisprudence, where the ICJ rejected any significance arising from lack of protests in the face of contrary positive acts.²¹⁰ However, what the ICJ appears to have accepted is that when positive acts are inconclusive, silence should be given prevalence in determining the status of the relationships between states, with a view to avoiding uncertainty and maintaining stability.

VII. Concluding Remarks: International Jurisprudence and the Objectivism/Voluntarism Debate on the Legal Value of Silence

Silence has been regarded as an important element in the settlement of disputes between states by international tribunals.²¹¹ It should be noted that the ICJ has treated the issue of silence in a wider context accepting an interplay of factors influencing such interpretation on the basis of the specific circumstances prevailing in each case.

It may be true that international jurisprudence has been influenced by a voluntarist perception of states' silence as a manifestation of will, and has purported to establish such will by interpreting the various circumstances prevailing in each case. However, interpretation has been conducted both as a

²⁰⁸ *Land, Island and Maritime Frontier Dispute Case*, above n 36, 577.

²⁰⁹ *Pedra Branca/Pulau Batu Puteh Case*, above n 5, 96 [275].

²¹⁰ In the *Cameroon/Nigeria Case*, the ICJ, after examining the absence of protests by Cameroon regarding health, education and tax activities performed by Nigeria, stated that since its independence Cameroon had 'engaged in activities which made clear that it in no way was abandoning its title to Bakassi': above n 41, 416, [223]–[224].

²¹¹ I Sinclair stressed the significance of acquiescence in the arguments of states concerning 'long-standing territorial disputes' and in the jurisprudence of the ICJ: Sinclair, above n 55, 104 *et seq.* See also *Qatar/Bahrain Case*, above n 45, 168 (Judges Benjaoui, Ranjeva and Koroma):

International jurisprudential practice sets great store by the conduct of states. A state's silence, its consent, its acquiescence, any waiver of its rights, any protest, any effect of estoppel upon its actions, all represent important elements in the creation or extinction of a title over a territory.

means of establishing the intention of the silent state as well as a means of giving legal effect to the factual situation on the basis of an objective assessment of the impact of such silence upon the relationships between states.²¹²

The ICJ has given due weight to the factual existence of such silence, interpreting widely the context in which a reaction was expected or ‘called for’. Acknowledging the difficulty in ascertaining subjective considerations,²¹³ such as political motivations, international tribunals have shown preference for objective criteria. This may be manifested by the fact that tribunals have never accepted any plea based upon political reasons regarding the beliefs of the silent state. What is more, international tribunals have been lenient in the appraisal of the capacity of states to protest by applying objective criteria. Particularly with regard to the element of knowledge, they have accepted a wide spectrum of constructive knowledge.

In this respect, the ICJ and arbitral tribunals have shown preference for objective criteria and have attributed silence juridical meaning in almost all cases where these criteria, as discussed above, have been met. It might be thought that acquiescence is characterised by judicial subjectivity or arbitrariness; however, what international tribunals have managed to achieve is to dissociate — to a degree — the juridical value of silence and acquiescence from the actual intent of the silent state, by applying objective criteria, which contribute to legal certainty.

Is it not thus fictitious to argue that it is the intention of the silent state that creates the legal effects when this intention may have never existed? ‘Presumed’ intention (just as presumed consent advocated by positivist authors)²¹⁴ is again a useful vehicle to justify positivist thinking and the predominance of state will in the creation of legal obligations in international law, but it remains a fictitious legal concept.²¹⁵ International tribunals have stressed the importance of the conduct itself and the existence of objective criteria in order to establish whether the silence of a state may amount to acquiescence and produce legal effects in the relations among states. Despite the fact that they have not gone so far as to negate the existence or the importance of state intention, they have relied on the factual

²¹² Koskenniemi argues that ‘it seems impossible to defend a conception which would base the normativity of past behaviour in simple consent or in pure justice’: above n 78, 359.

²¹³ See Bentz, above n 6, 50.

²¹⁴ Danilenko, above n 7, 33; McGibbon, above n 1, 145.

²¹⁵ Mendelson criticising Danilenko’s perception of presumed consent states that:

this is pure fiction or to put it differently a presumption of law, and if it is a presumption of law, it seems to be a reinstatement of the objectivist approach to which voluntarists object: it would not be through the exercise of their will that these states are bound, but some other reason such as natural law or the interest of the *civitas maxima*:

Mendelson, above n 40, 259; see also D’Amato, above n 3, 196; Cahier argued that it is entirely artificial to say that the jurisprudence of tribunals is based on the will of states and that tribunals search for this will; above n 73, 264.

existence of silence and its impact upon the relationships among states. International tribunals though not rejecting the voluntarist approach, which is favoured by state-litigants, have objectified acquiescence with a view to safeguarding stability and certainty in international relations and international law.