Ownership of territory is significant because sovereignty over land defines what constitutes a state. [1] Additionally, as Machiavelli suggested, territorial acquisition is one of the goals of most states. [2] The territorial disputes in South China Sea have long plagued the relationship of nations in a semi enclosed sea and the disputes in ownership over some 240 islands, atolls, low tide elevations and the waters surrounding them have long been seen as a national and regional security problem. By themselves, they are not serious enough reasons for states to go to war with each other. They are, nonetheless, a source of insecurity in the region, more so for the smaller claimant countries. In a legal dispute concerning the status of an island or sub-aerial features the question first to be determined is who owns or held sovereign over the island. Secondly, do the island be entitled to generate continental shelves and economic exclusive zone and finally, what effect should they have on maritime boundaries delimitations between adjacent and opposite states. This paper attempts to discuss the jurisprudence developed over eight decades as the guiding principles on sovereignty over “land features” focusing on Malaysia’s experiences and contribution to this jurisprudence by way of the two cases to the International Court of Justice namely the Sipadan-Ligitan case (2002) and Pedra Branca (2008).

Deciding Ownership

Countries claiming sovereignty over the land features assert legal and historical arguments in support of their claims and some have taken various steps to occupy the land features [3] . While the two assertions seem to be in the forefront in maintaining their claims, it is by no means that countries are estopped in resorting to other assertions or basis to advance further and legitimizing their claims
[4]
. Meanwhile, despite the claimant countries' expressed commitment to cooperation, diplomacy, and the employment of peaceful means to settle the dispute
[5]
, tensions remain high and the potential for armed conflict exists.

Effectivites

Sovereignty over territory was aptly summarized in the Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (1998) [6] by an intentional display of power and authority over the territory, and by the exercise of jurisdiction and state functions, on a continuous and peaceful basis and was fondly endorsed by Judge Dugard, in his dissenting opinion in the Pedra Branca/Pulau Batu Puteh case, stated:

"This formulation requires serious attention for two reasons. First, because it gives effect to the jurisprudence of contemporary international law from the time of Max Huber's seminal decision in the Island of Palmas Case (Netherlands/United States of America) (Award of 4 April 1928, RIAA, Vol. II (1949), pp. 839, 868). Secondly, because it was expounded by a Tribunal omprising two former Presidents of the International Court of Justice (Professor Sir Robert Y. Jennings and Judge Stephen M. Schwebel), the President of the Court (Judge Rosalyn Higgins) and two highly experienced and well regarded international law practitioners (Dr. Ahmed Sadek El-Kosheri and Mr. Keith Highet). In my view, this is a formulation of the law on the acquisition of territory that is to govern all acquisitions of territorial title based on the effective control of territory over a long period of time, including prescription, estoppel, abandonment of title by the previous sovereign, acquiescence and tacit agreement evidenced by conduct" [7]

(countinuing)

Read full text of this paper here

---

[1] See PAUL GILBERT, THE PHILOSOPHY OF NATIONALISM 91 (1998) ("To claim a right to statehood is to claim a right to some territory over which the state can exercise political control.")

[2] See NICOLÒ MACHIAVELLI, THE PRINCE 25 (W.K. Marriott ed., J.M. Dent & Sons 1938) (1513) ("The wish to acquire is in truth very natural and common . . . ."). This principle is the state-level extension of human territoriality, or the "spatial strategy to affect, influence, or control resources and people, by controlling area." ROBERT DAVID SACK, HUMAN TERRITORIALITY: ITS THEORY AND HISTORY 1 (1986)

[3] See generally MARK J. VALENCIA ET AL., SHARING THE RESOURCES OF THE SOUTH CHINA SEA 20-30 (1997) (describing the basis of each country's claim).

[4] See BRIAN TAYLOR SUMNER, TERRITORIAL DISPUTES AT THE INTERNATIONAL COURT OF JUSTICE (2004) (Such claims can be generally divided into nine categories: treaties, geography, economy, culture, effective control, history, uti possidetis, elitism, and ideology. States have relied on all nine categories to justify legal claims to territory before the International Court of Justice (ICJ)). See also the ICJ decision in Pedra Branca/Pulau Batu Puteh (Malaysia/Singapore) ICJ case (decided 2008) where the tribunal found that it is impossible that the island could have remained unknown or undiscovered by the local community. Pedra Branca/Pulau Batu Puteh evidently was not terra incognita. It is thus reasonable to infer that Pedra Branca/Pulau Batu Puteh was viewed as one of the islands lying within the general geographical scope of the Sultanate of Johor. Judgment, p. 35.

[5] See P. Paramaswaran, Concerns over Spratlys, Malacca Straits Dog Asian Naval Show, AGENCE FR.-PRESSE, May 6, 1997, available in 1997 WL 2104886(stating that analysts perceive the Spratly Islands dispute as one of the

most probable sites of armed conflict, other than the Korean Peninsula); Australia Sees Spratlys as Major Security Threat, REUTERS N. AM. WIRE, Nov. 22, 1995, available in LEXIS, News Library, Curnws File (expressing Australian Defence Minister Robert Ray's belief that other than the Korean peninsula, the Spratly Island dispute represents the most threatening security risk in the region); Richard Lloyd Parry, No Plain Sailing in Desert Island Dispute, INDEP. (LONDON), May 20, 1997, available in 1997 WL 10468034 (expressing the Philippines' military chief General Arnulfo Acedera's acknowledgment of the possibility of armed conflict over the Spratly Islands). But see, e.g., China Said Unlikely to go to War over Spratlys, REUTERS N. AM. WIRE, Nov. 14, 1995, available in LEXIS, News Library, Curnws File (stating that engaging in armed conflict would be economically disastrous for China).

[6] Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and

Yemen (Territorial

Sovereignty and Scope of the Dispute, (1998) 22 RIAA. p. 268, para. 239).

“The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and size of its population, if any “.

[7] (Pages 150-151, para. 42).