56Deciding Sovereignty Disputes: Ownership Claims Over "Land Features" in South China Sea

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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

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[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

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 comprising 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

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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 ".

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].

The court rejected both Malaysia and Indonesia arguments in the case of the island of Sipadan-Ligitan that they both claimed title on the two islands as successor through an alleged series transfers and contracts of either the Sultan of Sulu or the Sultan of Bulungan respectively as the original title holder. In alternative both country relied on *effectivites* to constitute acts a *titre de souverain* . The court noted that *Effectivites* are generally scarce in the case of very small islands which are uninhabited or not permanently inhabited like Sipadan and ligitan[8]. Having found that neither Malaysia nor Indonesia has treaty based title the court considered *Effectivites* as independent and a separate issue[9]. The court imposes a caveat that it would only considered those act constituting a relevant display of authority which leaves no doubt as to specific reference to the island in dispute. For regulations and administrative act general in nature to be taken as effectivites, it has to be clear from their terms or their effects that they pertained to the two islands[10].

The ICJ similarly in the case Pedra Branca concluded the conduct of the parties after 1953 by reference to the conduct of Singapore and its predecessor as a titre de souverain that by 1980 sovereignty over Pedra Branca has passed from Malaysia to Singapore. Whether the conduct of parties to the territorial disputes in the South China Sea occupying the Land features and lately the activities of Philippines bringing a teacher to schooled 5 children in the Scarborough shoal amounts to act of titre de souverain is doubtful as being opposed and objected by China.

History

Historical claims to territory are based on historical priority (first possession) or duration (length of possession). Although effective control (possession) presents the

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

[8] The Court first recalls the statement by the Permanent Court of International Justice in the *Legal Status of Eastern Greenland (Denmark* v. *Norway)* case:

"It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries." (P. *C.I.* J., *Series AIB, No. 53,* pp. 45-46.)

[9] *ibid* at pp 45 .

"a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority. Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory is the extent to which the sovereignty is also claimed by some other Power."

[10] Siyanda-Ligitan (2002) ICJ judgment at paragraph 133

strongest claim under property law, historical claims create an underlying entitlement to territory,
regardless of whether a state has actual or constructive possession of the land at the time of the claim. Thus, historical claims tend to be most common, compared to the other claims discussed here. A claim of historic right is bolstered by the passage of time; when the encroached state does not act to counter the claimant's right, it is deemed to have acquiesced in that right and is estopped from rejecting the title for lack of consent. In Pedra Branca case while the court based on historical evidence confirm the ancient original title of the Sultanate of Johor to Pedra Branca/Pulau Batu Puteh the title however has passed to Singapore as successor to its predecessor by scrutinizing the conduct of parties from 1824-1940's and after 1953.

Acquiescence

The ICJ in the *Pedra Branca/Pulau Batu Puteh* case set out the rule[11]:

> 121. Under certain circumstances, sovereignty over territory might pass as a result of the failure of the State which has sovereignty to respond to conduct *à titre de souverain* of the other State or, as Judge Huber put it in the *Island of Palmas* case, to concrete manifestations of the display of territorial sovereignty by the other State (*Island of Palmas Case (Netherlands/United States of America)*, Award of 4 April 1928, *RIAA*, Vol. II, (1949) p. 839). Such manifestations of the display of sovereignty may call for a response if they are not to be opposable to the State in question. The absence of reaction may well amount to acquiescence. The concept of acquiescence
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> > "is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent . . ." (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 305, para. 130).

Thus, silence may also speak, but only if the conduct of the other State calls for a response.

> 122. Critical for the Court's assessment of the conduct of the Parties is the central importance in international law and relations of State sovereignty over territory and of the stability and certainty of that sovereignty. Because of that, any passing of sovereignty over territory on the basis of the conduct of the Parties, as set out above, must be manifested clearly and without any doubt by that conduct and the relevant facts. That is especially so if what may be involved, in the case of one of the Parties, is in effect the abandonment of sovereignty over part of its territory.

The ICJ makes found on similar consent in the case of Sipadan- Ligitan[12]:

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[11] *Malaysia v. Singapore* (Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge), judgment 2008

[12] Malaysia *v* Indonesia (Sovereignty over the Island of Sipadan and Ligitan) judgment 2002 at paragraph 148

> “Court moreover cannot disregard the fact that at the time when these activities were carried out, neither Indonesia nor its predecessor, the Netherlands, ever expressed its disagreement or protest. In this regard, the Court notes that 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 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 behavior is unusual

Light house and navigation aids

The ICJ in both cases Pedra Branca and Sipadan-Ligitan on the issue of light houses and constructions of navigation aids states:

> 147. The Court observes that the construction and operation of lighthouses and navigational aids are not normally considered manifestations of State authority *(Minquiers and Ecrehos, Judgment, I.C.J. Reports 1953,* p. 71). The Court, however, recalls that in its Judgment in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)* it stated as follows:
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> "Certain types of activities invoked by Bahrain such as the drilling of artesian wells would, taken by themselves, be considered controversial as acts performed a *titre de souverain.* The construction of navigational aids, on the other hand, can be legally relevant in the case of very small islands. In the present case, taking into account the size of Qit'at Jaradah, the activities carried out by Bahrain on that island must be considered sufficient to support Bahrain's claim that it has sovereignty over it." *(Judgment, Merits, I.C.J. Reports 2001,* pp. 99-100, para. 197.)
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> The Court is of the view that the same considerations apply in the present case.

Evidential Proof

On the status of map in both cases Sipadan-Ligitan and Pedra Branca, the ICJ quoting its earlier decision stated:

> “Maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic

> legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an officia1 text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts."[13]

The question remains whether map drawn to show jurisdictions by China 9 dash line or any of the claimants would pass the test or merely extrinsic evidence and circumstantial only. In Pedra Branca case Malaysia published map between 1962 and 1975 and The Court recalls that Singapore did not, until 1995, publish any map including Pedra Branca/Pulau Batu Puteh within its territory. The court concludes:

> "But that failure to act is in the view of the Court of much less weight than the weight to be accorded to the maps published by Malaya and Malaysia between 1962 and 1975. The Court concludes that those maps tend to confirm that Malaysia considered that Pedra Branca/Pulau Batu Puteh fell under the sovereignty of Singapore.[14]"

Sovereignty over Middle Rocks and South Ledge

Under UNCLOS[15], a state exercising territorial sovereignty over an island may declare a territorial sea extending 12 nautical miles from the island's baseline. The sovereignty of the controlling state extends to the air space above and the seabed and subsoil below the territorial sea." In addition, a state exercising territorial sovereignty over an island may declare an EEZ, which extends 200 nautical miles from the island's baseline.

The court having decided that Pedra Branca sovereignty is with Singapore also ruled that Middle Rocks to Malaysia as the original title rested with the Sultanate of Johor however with regard to South Ledge, the Court however notes that there are special problems to be considered, inasmuch as South Ledge presents a special geographical feature as a low-tide elevation (LTE). The court then concluded the sovereignty over South Ledge lies with the state in the territorial waters it is located.[16] Interestingly referred to its previous judgment in noting that treaty law is silent in providing guidance whether low tide elevation is considered as "territory" and in its absence LTE cannot be said to be in the same league as islands or other land territory.[17]

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[13] ICJ quoting *(Frontier Dispute (Burkina FasolRepublic of Mali), Judgment, I.C.J. Reports 1986,* p. 582, para. 54; *KasikifilSedudu Island (BotsivanalNarnibia), Judgment, I. C.* ***J.*** *Reports 1999 (II),* p. 1098, para. 84.)

[14] Supra note 11at paragraph 272

[1515] UNCLOS 1982 see article 56-57 and 121

[16] Supra note 11 at paragraph 291-299

[17] See Qatar V Bahrain (2001) ICJ Rep 40 referred in the judgment of Pedra Branca case from paragraph 205-206

Way forward and conclusion

It is suggested that the matters of “land features” in South China Sea be referred for arbitrations for interpretations and advisory whether they are islands, rocks or LTE. The arbitrators are to also provide opinions as to the regime under UNCLOS its entitlements are. Once the matter being resolved the maritime boundaries be redrawn or negotiated with the adjacent neighbors.

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