

Determining ‘Territorial Sovereignty’ in Maritime Disputes

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The robust debate on the ongoing action-reaction dynamics by the posture and conduct of the involved (claimants) and indirect (interested) actors in East and South China Sea disputes has invariably referred to the 1982 United Nations Convention on the Law of the Sea (UNCLOS)¹ besides references to international law and norms. While these maritime disputes with territorial connotations are considered as the most volatile and contemporary regional flashpoints, the earlier narratives on disputes with similar content had also made extensive references to the UNCLOS.

However, UNCLOS Article 298 Para 1 (a) (1) brings out that the dispute resolution mechanism under this Convention, among other issues such as historic bays/titles, does not cover the ambit of territorial sovereignty (ownership of land). The relevant text states, “...any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory [of island character/origin] shall be excluded from such submission [request for dispute resolution under UNCLOS]”. It is in this context that this article aims to examine the relevance and the application of UNCLOS in determining the ‘sovereignty’ dimension of such complex disputes.

Categories of Maritime Disputes

It is useful to point out that maritime disputes related to sovereignty, territoriality and sovereign rights could be classified into two broad categories:

- (a) Disputes arising between states due to overlapping maritime entitlements to territorial sea, Exclusive Economic Zone (EEZ) and the Continental Shelf,

but not related to the ownership of a land feature at sea or a disputed land boundary. For example, the dispute between Bangladesh and Myanmar in the Bay of Bengal resolved in 2012 through arbitration at the International Tribunal of the Law of the Sea (ITLOS).² While there was a consensus on the location of the land boundary terminal, both nations had differing interpretations about the delimitation of maritime regimes afforded by the UNCLOS. This category also includes disputes related to discrete maritime functional/usage rights like the traditional or historical practice of fishing by state(s) within the maritime entitlements of another state.³

(b) The second and the more contested category of maritime disputes involves sovereignty (ownership) over a land (insular) feature at sea between coastal states or a disputed land boundary between adjacent states with a consequential maritime dimension. The content, causation and geography of such disputes can be quite diverse. The Falkland Islands dispute between Argentina and Britain that are separated by around 7000 nautical miles (NM) with the islands in question about 300 NMF offshore from Argentina, is a case in point.⁴ Another example is the Sir Creek dispute that was resolved in 1914 among the colonial states of Sind and Kutch. This dispute, however, continues to persist between India and Pakistan, due to differing interpretations about the operative clauses of the resolution.⁵

Broad Overview of South and East China Sea Disputes

It would thus be obvious that the East and South China Sea disputes fall under the latter category and involve a mix of sovereignty and maritime entitlement issues. These disputes are far more complex where the assertions of claimants not only comprise competing claims to the ownership (sovereignty) over minor, and often insignificant land features, but each claimant has a differing interpretation about the status of each of these feature(s) which ranges from island, reef, rock and shoal. The hypersensitivity attached to these disputes is surprising considering that such insular features, in most cases and few exceptions, would at best generate a 12 nautical mile territorial sea entitlement.⁶ This fact also needs to be seen in light of the proposition that the South and East China seas fit the definition of 'semi-enclosed and enclosed seas' and, no claimant can reasonably expect to seek full entitlements in such constrained geographies without vigorous protests. Such objections have not only

come from other adjacent/opposite coastal states of the region but also by the larger international community with ‘strategic stakes’ in the region of whatever hue.

A ‘strict (or narrow) interpretation’ of UNCLOS Article 298 mentioned earlier, may lead one to infer that the Convention is of little relevance in such hybrid disputes. Such stance is reflected in the December 2014 China’s Position Paper on the South China Sea disputes.⁷ A different interpretation could also be made where UNCLOS becomes of consequential/parallel application and relevance in such cases. The proceedings initiated by the Philippines against China before the Permanent Court of Arbitration (PCA) is a relevant and contemporary example.⁸ Among other issues and without making a direct reference to ownership (sovereignty) issue, the Philippines has sought arbitration to give a decision on the status of some of the features which China claims as islands. Philippines does not agree with this interpretation by China besides seeking redressal about the resultant adverse effects on its maritime entitlements under UNCLOS. On these two particular aspects, the Philippines has made reference to UNCLOS provisions on the regimes of islands (Article 121), low tide elevations (LTE) (Article 13), and reefs (Article 6). It is important to note that the recent extensive island reclamation exercise by China, to a large extent, was specifically targeted at the features highlighted by the Philippines in its submission to the Permanent Court of Arbitration (PCA), a fact that has not received due spotlight in the narratives on this issue.⁹

Legal Context

Irrespective of these two streams of interpretation mentioned above, it is evident that the issue of ownership or territorial sovereignty requires distinct and special considerations while analysing the strengths and weaknesses of the claims by the competing parties in such mixed territorial-cum-maritime disputes. Since this subject, like the UNCLOS, falls under the broader ambit of Public International Law where states are the traditional primary actors, one is compelled to draw upon the customary and contemporary legal perspectives.¹⁰ This is because the law among nations as it exists today is a process of historical evolution and its gradual codification, a fact highlighted in the United Nations (UN) Charter itself.¹¹

Principles for Determining/Asserting Territorial Sovereignty

While extensive literature exists on how to decide ‘who owns what’, there are five basic precepts (also referred to as principles or doctrines) through which a state can claim the ownership over land territory, be it continental or maritime in nature.¹² The question as to why these five propositions only can be ascertained from three principal observations.

- These are widely accepted by the international legal community, albeit with some new categorisations and a little scepticism in certain quarters, as the basic premises for states to assert their territorial sovereignty.
- Further, a review of case law (previous international judgements) throws up these precepts as the foundational reasoning on which the states have built their sovereignty narratives.
- International courts and arbitral tribunals have also made extensive references to these in their awards and judgements.

None of these are new and trace their origins as far back into history into as the Roman Era, and in some cases to the Grecian thalassocracy period, which in the view of many legal luminaries set the tone for codification of private and public international laws.

No One’s Land

The first precept on which many states stake their territorial assertions is the principle of ‘*Terra Nullius*’ or ‘no one’s land’. It draws on the premise that the territory in question was not under the direct sovereign rule of any state. This principle of claiming sovereignty over ‘supposedly un-sovereign lands’ has come under scrutiny in recent international arbitrations. Of particular relevance are the cases involving post-colonial states where the erstwhile imperial/colonial powers by using the Westphalian logic appropriated sovereignty without due consideration to the rights of indigenous people. However, this particular aspect is not of much relevance in the East and South China Sea disputes since the majority of the features over which the claimant states assert sovereignty and seek consequential maritime entitlements through UNCLOS, are for the most part uninhabited. However, this doctrine has been used extensively along with the logic of first discovery, historical

cartographic and literary evidence by each of the East and South China Sea claimants.

Prescription

The second principle by which states assert their sovereignty is of ‘Prescription’, which in simple terms means that the territory in question is under the peaceful and effective control by the claimant as well as administered continuously for a reasonably long period of time. This assertion draws upon the Roman law principle of *uti possidetis de facto*, which is based on the premise that the ‘facts on ground’ over certain territory maintained over time lend legitimacy to sovereignty assertions. As far as the issue of administration is concerned, the general jurisprudence norm upheld during many of the international arbitrations is that the state should not only have dealt with the territory in question on internal issues such as taxation, law and order, but also in an external (international) sense through foreign policy articulations and external security dimensions.¹³

Cession

The third and a related principle is of ‘Cession’, which means that the territory belongs by law at the time of the formation of the claimant state, also known as *uti posseditis de jure* or *juris* in the Roman Law.¹⁴ The distinction between these two *uti posseditis* categories though obvious is blurred by the reasoning that the competing parties use. For example, China and Taiwan insist that Senkaku/Diayou Islands are its sovereign territory ‘by law’ in that Japan was to revert all of Formosa (Taiwan) and the Pescadores, as per 1951 San Francisco Treaty and, that the 1895 Treaty of Shimonoseki was an ‘unequal treaty’ negotiated under duress. China (and Taiwan) also put forward logic of prior discovery, use and ownership of the islands in support of their claims.¹⁵ On the other hand, the Japanese claim rests on the arguments that the San Francisco Treaty was limited to territories annexed during the Second World War and, that it enjoys sovereignty based on legal possession of the islands, peaceful and continuous exercise of sovereignty and, acquiescence by China/Taiwan. Japan also states that the islands were *terra nullius* and formally incorporated as part of its national territory by the 1895 decision of Japanese Cabinet to erect a marker on the islands.¹⁶ It does not help that these islands do not find specific mention in any of the legal documents including the treaty texts. A somewhat similar situation also obtains vis-à-vis the Spratlys and the Paracels in the South China Sea where China and

Taiwan claim these though the 1947 Nationalist Government Map - the origin of Nine (originally Eleven) Dashed Line claim. Vietnam claims these as the successor state to the French. The Philippines, for its sovereign claim over the Kalayaan Group of islands in the Spratlys, draws inspiration from the 1898 Spanish–American Treaty concluded at Paris, despite contemporizing its archipelagic baselines through the 2009 enactment.¹⁷

Accretion

The last two principles deal with geo-physical changes to sovereign territory by reasons of geological phenomenon and politico-military events. The fourth principle is of ‘Accretion’, or growth of territory through acts of nature termed as *Alluvio* under the ancient Roman law. With advancements in geography, cartographic and legal studies including national and international jurisprudence, such effects are no longer simple but a subject of study by themselves.¹⁸ The Asian Tsunami of 2004 did result in substantial and abrupt changes to the geography of the affected region, but more subtle, gradual and long-term changes are also affected by the ever-changing climate of the Earth. An important observation at this stage is that the effect of ‘natural’ changes does alter the territory and, by extension the boundaries of a state but unnatural/artificial or manmade changes do not affect the ‘sovereign limits of territory’ and, by implication, its international boundaries. In a similar vein, UNCLOS clearly defines an island as a ‘naturally formed area of land’.¹⁹ The Convention further goes on to state that “Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf”.²⁰ Therefore, reclamation activities in the South China Sea by any of the claimants being ‘a deliberate manmade improvement’, irrespective of the reason, be they political or for improving habitability/harbour installations, or the extent to which these have been undertaken, remain beyond the legal pale.

Conquest/Annexation

The fifth principle is of Conquest or Annexation by the threat or use of force. Although coercion and military force for changing territorial *status quo* is prohibited under Article 2 of the UN Charter, it remains a fact of international politics.²¹ The annexation of Crimea by Russia can be cited as a recent example. China has used

force twice in South China disputes against Vietnam - first in 1974 to annex the Crescent Group features to establish virtual control over the Paracels, and again during the 1988 armed clash over the Johnson South Reef in the Spratlys.

Conclusion

The above arguments make it obvious that 'sovereignty assertions over territory' in maritime disputes are implied through a different reasoning than the UNCLOS. This reasoning comprises a mix of history and contemporary, customary and codified, and in most instances, contains a mix of all of the above-mentioned five precepts. Such disputes are naturally complex to unravel and in many cases driven by geopolitics, economic, culture, domestic politics, ideological and nationalist considerations. In such maritime disputes, the UNCLOS is of consequential and/or complementary utility as well as relevance since 'sovereignty over territory' forms the 'point of origin' in such circumstances. This aspect also assumes relevance in the context of the 'general principle' of *'la terre domine la mer'* (land dominates the sea) espoused by the International Court of Justice (ICJ) during the *1969 North Sea Continental Shelf* cases involving *Germany V. Denmark* and *Germany V. Netherlands*. This observation has been repeated in virtually all the international arbitrations involving maritime disputes. Therefore, it would appropriate to summarize by stating that in hybrid or mixed maritime disputes, the UNCLOS does provide for deciding on 'who gets what' of sovereign/territorial connotations like the territorial seas and 'sovereign rights' of EEZ and Continental Shelf, but is of lesser as well as interpretative 'relevance and effect' in determining 'who own what'.

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Notes and References

¹ United Nations Convention on the Law of the Sea (hereafter UNCLOS), Montego Bay, Jamaica, 10 December 1982, 1833 U.N.T.S. 397, http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

² See, *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, International Tribunal for the Law of the Sea (ITLOS), Judgment, 14 March 2012, available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf, para 157.

³ For example, see, *Fisheries Jurisdiction Case (Spain v. Canada)*, International Court of Justice Judgment, 4 December 1998, <http://www.icj-cij.org/docket/files/96/7533.pdf>.

⁴ For more details see, Lowell S. Gustafson, *The Sovereignty Dispute Over the Falkland (Malvinas) Islands*, (Oxford: Oxford University Press, 1988), esp Chap 1.

⁵ Raghavendra Mishra, 'The 'Sir Creek' Dispute: Contours, Implications and the Way Ahead', *Strategic Analysis*, Vol. 39, 2, 2015, pp. 184-196.

⁶ See, David Hancox, Victor Prescott, 'A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst Those Islands', *Maritime Briefing*, Volume 1 Number 6, 1995, International Boundaries Research Unit, Department of Geography, University of Durham, <https://www.dur.ac.uk/ibru/publications/download/?id=229>, and; Gregory B. Poling (July 2013), Appendix to '*The South China Sea in Focus : Clarifying the Limits of Maritime Dispute*', Center for Strategic and International Studies, pp. 27-28 http://csis.org/files/publication/130717_Poling_SouthChinaSea_Web.pdf, (both accessed 20 October 2015). While both sources draw on somewhat dated information, they provide excellent indicators for interpretative purposes.

⁷ Ministry of Foreign Affairs of the People's Republic of China, 'Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 December 2014', http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml, (accessed 17 October 2015).

⁸ The supporting arguments for the Philippines claim to the Kalayaan Group of Islands (KGI) in the Spratlys are available at, 'The West Philippine Sea- The Territorial and Maritime Jurisdiction Disputes from a Filipino Perspective : A Primer', updated version, 15 July 2013, The Asian Center and Institute for Maritime Affairs and Law of the Sea, University of the Philippines, [http://philippinesintheworld.org/sites/default/files/FINAL_West%20Phil%20Sea%20Primer_UP%20\(15%20July%202013\).pdf](http://philippinesintheworld.org/sites/default/files/FINAL_West%20Phil%20Sea%20Primer_UP%20(15%20July%202013).pdf), (accessed 15 October 2015). Further, the Department of Foreign Affairs in Philippines also released a document in local language titled "West Philippine Sea - Isang Sipat" in January 2015 to promote greater understanding about this maritime dispute and the supporting evidence among its citizens, http://www.dfa.gov.ph/images/2015/center/doc/WPS_Isang%20Sipat.pdf (accessed 19 October 2015)

⁹ While the submission by the Philippines to the PCA is not yet available in the public domain, the features over which it seems to have protested against China are the Mischief Reef, McKennan Reef, Gaven Reef, Subi Reef, Scarborough Shoal/Reef, Fiery Cross Reef, Johnson Reef and Cuarteron Reef. See, Stefan Talmon, Bing Bing Jia, *The South China Sea Arbitration: A Chinese Perspective*, (Portland, OR: Bloomsbury Publishing, 2014), p. 213. For updated details on island reclamation by the South China Sea claimants including China, see 'Island Tracker' database on the *Asia Maritime Transparency Initiative* (AMTI), Center for Strategic and International Studies, URL - <http://amti.csis.org/island-tracker/>.

¹⁰ Luigi Condorelli, 'Customary International Law: The Yesterday, Today, and Tomorrow of General International Law' in Antonio Cassese (Ed), *Realizing Utopia - The Future of International Law*, (Oxford: Oxford University Press, 2012), pp. 148-157.

¹¹ United Nations, *Charter of the United Nations and Statute of the International Court of Justice*, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>, Article 38.

¹² Robert Jennings, *The Acquisition of Territory in International Law*, (Manchester, University Press 1963), pp. 6-7; and A. Burghardt, 'The Bases of Territorial Claims', *Geographical Review*, Vol 63, No 2, 1973, pp. 225 -246.

¹³ For example, see United Nations Reports of International Arbitral Awards, 'The Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan (India, Pakistan), 19 February 1968, pp. 566-570, http://legal.un.org/riaa/cases/vol_XVII/1-576.pdf, accessed 20 October 2015.

¹⁴ Aaron Xavier Fellmeth, and Maurice Horwitz, *Guide to Latin in International Law*, (Oxford: Oxford University Press, 2009), pp. 286-288; Parry, Clive, John P. Grant, J. Craig Barker, and Clive Parry. *Parry & Grant Encyclopaedic Dictionary of International Law* (Oxford: Oxford University Press, 2009), pp. 655-656; Bryan A Garner (Ed), *Black's law Dictionary*, (St Paul, MN: West Publishing, 2009), Ninth Edition, p. 1686, and; Malcolm N. Shaw, *International Law*, (Cambridge: Cambridge University Press, 2008, Sixth edition, pp. 525-530. *Uti possidetis* – A maxim meaning that a state that has acquired possession of territory with intent to annex it has thereby established sovereignty over

that territory. The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved[and] the doctrine is of great importance, for it may be relevant to the proper interpretation even of subsequent boundary treaties. Moreover, it aptly enshrines the vital principles of stability of state boundaries. *Uti possidetis juris* ["So that you may (rightly) possess"] - A modern principle according to which a change in sovereignty over a territory, especially due to independence following decolonization, does not *ipso facto* alter that territory's administrative boundaries as established by colonial authorities out of respect for succession to legal title by the new sovereign. *Uti possidetis de facto* [So that you may possess in fact]- a principle that was formerly invoked on occasion by postcolonial states to the effect that the boundaries of newly independent states upon decolonization should be defined by the limits of the territory actually administered by the colonial authorities and/or newly independent state rather than the administrative boundaries delimited by the colonizing states.

¹⁵ W. B. Heflin, "Diayou/Senkaku Islands Dispute: Japan and China, Oceans Apart", *Asian-Pacific Law and Policy*, 2000, Vol. 18, No. 1, pp. 1-22.

¹⁶ For more details, see entries under section 'Japanese Territory' on Ministry of Foreign Affairs of Japan website at URL - <http://www.mofa.go.jp/region/asia-paci/senkaku/index.html>.

¹⁷ Republic of the Philippines, 'An act to amend certain provisions of Republic Act No. 3046, as amended by Republic Act No. 5446, to define the archipelagic baseline of the Philippines and for other purposes, Republic Act No. 9522, March 10, 2009, http://www.lawphil.net/statutes/repacts/ra2009/ra_9522_2009.html, accessed 19 October 2015.

¹⁸ While the literature is extensive, see in particular, J.R.V. Prescott and Clive H. Schofield, *The Maritime Political Boundaries of the World*, (M. Nijhoff, Leiden, 2005), pp. 100-103; J.W. Donaldson, 'Paradox of the Moving Boundary: Legal Heredity of River Accretion and Avulsion', *Water Alternatives*, 4(2), 2011, pp. 155-170, and; Sikander Ahmed Shah, 'River Boundary Delimitation and the Resolution of the Sir Creek Dispute between Pakistan and India', *Vermont Law Review*, 34(357), 2009, pp. 357-413.

¹⁹ UNCLOS, Note 1, Article 121, Para 1.

²⁰ *Ibid*, Article 60. Para 8.

²¹ Para 4 of Article 2 to UN Charter states "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".