Disputes on Sovereignty over the Islands in the Light of International Judicial Decisions

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Abstract

Throughout history, many countries have had many disputes on the sovereignty over the islands, many of which still have not been resolved and even could pave the ground for war. In this regard, the precedent Permanent Court of International Justice, International Court of Justice and arbitral awards are available as a source of law. By taking advantage of past precedent, the principles of international law concerning the settling the claims of sovereignty over the islands can be achieved. This illuminates the present and future disputes of the Law of the Sea.

In this conflict, several factors such as treaties and contractual relationship, geographical issues, the colonial boundaries stability and effective governance have been invoked by the disputing states. Although each of these factors are important per se, this study seeks to show that the most important factor that attracted the attention of international jurisprudence and in case of conflict with other factors is prior is the effective governance.

Keywords: disputes settlement, islands, judicial opinions.
Introduction

Disputes concerning the islands are of fundamental importance since they are associated with the rule of governments. Most of these disputes still remain unresolved, some of the most important are dispute between England and Argentina over the Falkland (Malvinas) Islands in Atlantic Ocean, Canada dispute with Denmark over Hans Island in North America Ocean, Canada dispute with the United States of America on the Macias Island in North America Ocean, the dispute between Kuwait and Iraq on Bobian Island in the Persian Gulf, Iran dispute with United Arabic Emirates about the islands of Greater Tunb, Lesser Tunb and Abu Musa in the Persian Gulf, Malaysia dispute with China, Taiwan, Philippines and Vietnam over the Spratly Island in the China South Sea, dispute between Japan and Russia over Kuril Island and the Northern Territory in the Pacific Ocean, dispute between China, Japan and Thailand over the Senkaku Islands in the South China Sea.

Unfortunately, there are no detailed treaty’s provisions in this regard. So, a rich jurisprudence, including 13 cases handled by the International Court on the rule of islands are available and in accordance with Article 38 of the Statute of the International Court of Justice, jurisprudence is one of the sources of international law. Although, four of the 13 cases are examined in the court of arbitration and are not judicial practice in their specific meaning, but if we use jurisprudence in its general meaning, it will be benefited from the arbitral awards. Some of the awards are set with such legal precision and delicacy that have been considered by lawyers. One case is pursued in the Permanent Court of International Justice and the rest in International Court of Justice.

By studying these precedents, we achieve common points therein which either can be a source of future proceedings or to some extent, further investigation can be guessed using them.

First topic: 
History of judicial proceedings relating to sovereignty over the islands

In accordance with section "d" of paragraph 1 of Article 38 of the Statute of the International Court of Justice, international precedent is one of the sources of international law. In this research, precedent in its general meaning is also used as judgment. So, about justice, the reward of Permanent Court of International Justice and the International Court is merely examined, because neither the International Court of Justice in the Law of Sea and the European Court of Justice have not issued. Although Central American Court of Justice has issued a decree in dispute between Nicaragua and Honduras, the dispute led to a decision of the International Court of Justice.

So far, four cases on islands dispute settlement have been addressed based on arbitration including:
1- Case of Bulama Island between England and Portugal in the judgment 1870. In this case, American president (Ulysses S. Grant), as a judge on the Bulama Island -an African colony - has issued.

2- Palmas Island case between Netherlands and United States of America in the judgment of 1928. In this case, Max Huber, a well-known international judge, has judged in the framework of the Permanent Court of Arbitration on the Palmas Island which was a colony in Philippines.

3- Case of Clipper ton Island between Mexico and France in the judgment of 1931. The judgment of this case was done by Victor Emmanuel, King of Italy.

4- Hanish archipelago case between Yemen and Eritrea in the judgment of 1998 and 1999.

A case is also addressed in the Permanent Court of International Justice, which includes the case of legal status of East Greenland between Norway and Denmark.

Eight cases are also addressed in the International Court of Justice as follows:

2. Case of Kalikili and Sedudu Islands between Botswana and Namibia in 1999.
3. Case of Hawar islands between Qatar and Bahrain in 2001.
6. Case of Nicaragua against Colombia, with the third entry of Costa Rica, Honduras in 2007.

Second topic:

Contractual relationship

Since the first and most important source of international law is treaties, there is a treaty between the two countries on an island, upon which it should be acted. Treaty reflects the intention and the explicit consent of the parties and so on the event of a conflict with other legal rules and principles; it has primacy over them. But in practice, usually an international dispute on the sovereignty over the island is shaped when there is no contractual relationship or the contractual relationship is ambiguous and interpretable. However, according to the principle of relativity of treaties, treaties will only be effective in dispute between the two parties not for the third states.
For example, in the case of Bulama between England and Portugal, English have documented the contractual relationship. This contractual relationship was in this regard that England has purchased the island in 1702 in exchange for a small amount from the Bissagoo tribe leader, the tribe living on the island. In 1828, the king of Portugal also has received a declaration of chiefs of Biafra and Bissagoo where the chiefs had said they have never sold the island to England. This action by Portugal was to take the possibility of next citation of England to the contractual relationship. Although, this action did not affect the contractual relationship, but the British contract fault was that the party to the contract was not the state to the dispute but a third party. So, this contractual relationship could not affect the rights of this third state that was obtained in accordance with the effective sovereignty. So, America president who had been elected as a referee between the two countries, has issued his vote in favor of Portugal, with the argument that until 1792 the islands were not occupied by any foreign power and only indigenous people lived and in 1792, the Portuguese have occupied the island and have built facilities on Geba River and the purchase agreement between the UK and the chief of tribe cannot have any effect on these actions. The reason why the judge in the case did not consider the contractual relationship was that the contract is a weak with misrepresentation that has been included after the Portuguese sovereignty and in fact, the tribe leader had not sovereignty over the island, to transfer it to another country. In other words, the arbitrator has used the istiṣḥāb rule. Although, the arbitrator is criticized that in fact, none of the colonial powers should not rule island and the island is belonged to its native people, but if colonial relationship that at that time was considered legitimate in international law is not considered; the arbitrator award is a very strong one and even though the domestic and foreign lawyers were discouraged to write about the case, it must be admitted that the argument was very similar to the famous award of Palmas that was issued after it.

Exactly, the same argument of Bulama Island has been repeated for Palmas Island. Despite the importance of arbitration case of Bulama was less and older and weaker legally and has not been considered by lawyers in their books and articles and Palmas case arbitrator may not even look at it, but it seems that the nature of both vote was the same and only the award of Palmas arbitration was written more accurately and very technically and the nature is that in the event of a conflict between contractual relationship, one of the parties to the dispute and the third state by the rule of other contractual party, rule priority has priority. Palmas Island dispute was as follows: in 1898, Spain has ceded Philippines -its colony - to the United States of America and, according to United States of America; Palmas was also part of the archipelago of the Philippines. In 1906, the United States of America has found that The Netherlands also has sovereignty over the island. In this year, when Colonel Leonard Wood, appointed as the American governor of Philippine, has visited the Palmas Island that has been called Miangas, he noticed that the Netherlands flag was raised over it. Max Huber has issued his verdict arguing that the ownership is based on the discovery of a

1United nations, reports of international arbitral awards, Arbitral award between Portugal and the United Kingdom, regarding the dispute about the sovereignty over the Island of Bulama, and over a part of the mainland opposite to it, 2007, p. 133, available at: http://legal.un.org/riaa/cases/vol_XXVIII/131-140.pdf, p135
defective property and if another rule rules truly, it cannot claim against the United States of America and in favor of the Netherlands. It is observed that the arbitrator has again used the istiṣḥāb principle.

In the case of Minquiersand Ecrehos Islands, again the contractual relationship has been cited, but rejected again, because the International Court of Justice that was addressing this case noted that none of the treaties in 1259 Paris, Calais 1360 and Troyes 1420 did not specify which islands belong to the king of England, and which to the King of France (Chao, J. K. T. 1989 p. 62).

In other cases, international precedent in conflict between contractual relationship and governance, have preferred the governance. But these were not due to the fact that the contractual relationship was with third party and the principle of relativity of treaties has not been met, but because for the fact that the treaties are ambiguous. Otherwise, as mentioned above, if the treaty is clear and perfect, it must be acted according to it. For example, in the case of the islands of Sipadan and Litigan, Indonesia has cited the 1891 Convention between the United Kingdom and the Netherlands for sovereignty that defines the boundary between the two countries. International Court of Justice by examining the text of Convention has concluded that the Convention give nothing on the islands. So the Court tried to find which country has done sovereignty (John G. 2013, p. 247).

The position of the International Court of Justice in the case of Sipadanand Ligitan was repeated in the case of delimitation of Black Sea. In the recent case, the Romania has cited the contract 1949 and agreement 1997, while Ukraine denied the existence of an agreement on the delimitation of such areas in the 1949 agreements. Given that no stipulation existed in the contract, the Court did not accept the inclusion of contract on the maritime delimitation (Alvarez-Jimenez, Alberto, 2012, pp. 57 & 58).

An international dispute over sovereignty on the islands, a contractual relationship may not be in conflict with other rules and both parties may have accepted the contractual relationship. In this case, the only duty of an international court is the interpretation of the contract and qualifying the intention of parties. In the case of Kaskili/Sdudu, the dispute was between Botswana and Namibia. According to treaty 1890, Great Britain and Germany have placed their border in the main channel of the wood river. Botswana claimed that this channel is in the north of island and Namibia argued that the channel was on the south of island. The two countries agreed to refer their dispute to the International Court of Justice in 1996. After scientific investigation, the Court said; the channel was on the north of the island and issued the award in favor of Botswana (Alexander, w. j. R. Pp. 1 & 2).

The reason for the difference was that in this case, both parties had accepted the contractual relationship, only the debate was over the interpretation of the contract based on geography.
The result of citation to the contractual relationship and effective governance principle might be the same. But in the case of Nicaragua against Colombia, Nicaragua has accepted the Colombian sovereignty on the island of San Andres in the 1928 treaty of Barcenas-Sguerra (Ospina, Mariano, Nicaragua v. Colombiat, 2013, p. 32). Finally, although the award was in favor of Colombia, but a citation has voted to the rule of Columbia. Court has reviewed the reasons and the UAE, including the continued presence of Colombia in this area and lack of objection of Nicaragua until 1969, has met the Colombia's sovereignty over the islands.

In this case, in protocol 1930 between the parties has said that San Andres and Providencia Archipelagos will not exceed more than 82 degrees Western Greenwich. Colombia stated that this document has limited the boundaries between the parties and Nicaragua stated that this document has only specified the boundaries of islands and not the delimitation. The Court has accepted the view of Nicaragua, because the words of this document cannot interpret the delimitation (Alvarez-Limenez, Alberto, 2012, p. 504).

If there is a contract on the transfer of ownership, it must be explicit. In the case of Pdra Branka Island between Malaysia and Singapore, several letters have been sent by Sultan Johor to England which declared the satisfaction of the Sultan Johor to build the lighthouse by England in Pedara Branka. English East India Company interpreted the letter as the permission to annex the islands. But, the Court stated that the transfer of ownership should be clear and unequivocal, and therefore, the words in the letters do not imply such meaning (Alvarez-Limenez, pp. 500 & 501).

Second topic: UtiPossidetis Juris

UtiPossidetis Juris means when a larger land is created with the integration and unity of some lands and then the larger one is degraded, governments that are created from the collapse of bigger government, are obliged to respect the borders according to the time before their degradation. For example, if one day the United States of America is decomposed into their fifty constituent states, each of these states must respect the boundaries of time before decomposition. The main function of the principle is maintaining Pinter national ease and security.

This principle is defined in the Oxford dictionary of law as:

"A principle usually applied in international law to the delineation of borders. When a colony gains independence, the colonial boundaries are accepted as the boundaries of the new lying dependent state. This procedure was first applied in Spanish Colonies of America when independence and after the collapse of each empire, it was used anywhere in the world." ( A. MARTIN, ELIZABETH ,2003, p. 521).

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2Ibid, p. 37
In the case of Nicaragua v. Honduras, the Court found that no enough reasons exists for the ownership of any of the parties based on the principle of UtiPossidetis Juris (Pratt, Martin, 2007, p. 35). Therefore, the Court accepted the principle of UtiPossidetis Juris, but in terms of manner and procedure, it failed to meet it in this case. The Court didn’t apply the UtiPossidetis Juris for two reasons. First, historically, allocation of the disputed islands to Honduras does not prove and secondly, the Nicaragua and Honduras were both under a single sovereign in colony time and a unit rule had been applied over them. It seems that the Court believes that sovereignty is not degradable.

About the principle of UtiPossidetis Juris, the previous decision of colonial government or the central government for its subsidiary state is binding. In the case of Qatar against Bahrain on the Ha war Islands; Bahrain cited the letters on 11 July 1939 to the foreign representative of England in Bahrain in which the Ha war Islands were considered to be belonged to Bahrain (Barbara Kwiatkowska, p.15).

According to Qatar, the nature of the decision of the United Kingdom in 1939 was not judgment to have the validity of res judicata and therefore, it is null and void. But Bahrain, except citing this decision, has also cited the principle of UtiPossidetis Juris. Finally, the Court has rejected all the claims of Qatar based on the fact that the 1939 British decision is invalid and given the argument that the decision is taken in 1939 and at that time and until 1971, both countries were under British mandate, the decision shall be binding for both parties.

The principle of UtiPossidetis Juris is comparable with the rules of inheritance in domestic law. So, first the rule and ownership of state should be established and then it should be established that the transfer is done correctly. In addition, no contract should be awarded against it. In the case of arbitration between Ritereh and Yemen, Yemen has claimed the sovereignty based on the principle of UtiPossidetis Juris. Because it knew it in accordance with the Administrative sector of Yemen in Ottoman Empire (Nuno Sergio Marques Antunes, 1999, p. 370). The Court stated, first, this principle applies only where the exact boundary line is drawn that it was not the same in this case. Secondly, according to Article 16 of the Treaty of Lausanne, this principle does not apply. So, the Court went on to effective governance principle.

Third topic: Geographical issues

It seems that the geographical issues in comparison with other factors have very little impact on the sovereignty over the islands and there is no prohibition that a state rules over an island so remote. However, the geographical issues are not entirely ineffective. The claim that the island belongs to a state which has the smallest distance is not accepted because, it is possible for a farther government to have more sovereignty over the island. Regardless of the
dispute between England and Argentina on the Falkland Islands (Malvinas), which state has the right, according to this principle, the UK government knows itself as rightful because Argentina is geographically nearer than England. That is why the United Arabic Emirates argument on the proximity of this country to Abu Musa, Greater Tunb and Lesser Tunb islands, than Iran is not acceptable regardless of the fact that the claim is true or not.

For example, in the case of Palmas Island, the role of geographical factors was ignored. Because one of the arguments of American states was that Palmas Island is 12 miles closer to Mindanao, the largest island of the Philippines, than any of the islands of the Netherlands archipelago (H. Harry L. Roque J. R, p. 442). However, reward was issued against the America.

A similar situation exists for Clipper Ton Island. The island - an uninhabited island in 600 miles South West of Gulf of Mexico – was the case of dispute between Mexico and France. Mexico claimed the island had been discovered for hundreds of years ago by the Spanish and France claimed that it has owned it since 1858 that a French ship has discovered the island(B. Heflin,William,2000, p. 11). In 1909, the parties agreed to refer the matter to arbitration of Victor Emmanuel3, King of Italy. Clipper ton arbitrator has rewarded according to the French government, despite Mexico is geographically closer to Clipper Ton Island than France.

If there is a contractual dispute between the parties and geographical issues and terms have not been mentioned in the contract; the court or international arbitration should try to explain and clarify the geopolitical issues. In the case of Kasikili/Sedudu, six scientists have expressed opinion as expert (Alexander, w. j. R, p. 7). In this case, the role of geographical factors was very bold because the problem was on the interpretation of a contract that the contract was mutually accepted.

The least effect of geographic issues is that it represents the interests of one of the parties to the dispute. In the case of Nicaragua v. Colombia, although geographical issues were not effective on the arguments of the parties and the Court, but it was effective on the arrival of Costa Rica third country. Although, the Court has ultimately dismissed the petition of Costa Rica, but first, due to the land friction between Costa Rica and the parties to the case of arrival of Costa Rica was accepted (V.Ospina, Mariano, p. 36). Thus, we conclude geographical factors are effective in determining the sovereignty of the islands. However, this effect is very small and if there are other factors, principle of effective governance is especially ignored.

Fourth Topic:
Exercise of sovereignty

The most important criterion in determining sovereignty over the islands is the exercise of sovereignty. Exercise of effective governance can have different instances including
judicial, legislative or administrative governance. An example of exercise of sovereignty is not unlimited, but a government can do it with any action that is a sovereignty act. The concept was first observed in the award of Balama arbitration between England and Portugal. The concept can be seen more tangibly in the award of Palmas Island between America and Netherlands. This award is the groundwork for a strong legal precedent in international law in this regard. In this case, even though the United States had bought the island from Spain, but because of the exercise of sovereignty by the Netherlands, the award was issued in favor of the Netherlands. The regulation was governing the arbitration award of Clipper ton Island between France and Mexico (B. heflin, William, p. 12).

In case of Minkoiresand Akrohs islands between France and England, International Court of Justice made a similar argument again. In this case, in addition to Court for administrative exercises, legislative jurisdiction, taxation and criminal jurisdiction were considered as examples of exercise of sovereignty and thus the award was issued in favor of the United Kingdom (B. heflin, William, p. 62). In the case of Nicaragua v. Honduras, International Court of Justice has accepted the cited reasons of Honduras about the exercise of sovereignty to the four islands. For in terms of the Court, Honduras showed real authority over the four islands. Because Honduras has been able to apply and perform criminal, civil and immigration law, and adjust their fishing and the construction activities and impose its authority on public affairs. Therefore, the Court finally sentence about the Honduras sovereignty on four islands as Bobel Cay, Savannah Cay, Port Royal Cay and South Cay (Pratt, Martin, p. 35). In the case of Nicaragua against Colombia, again using the same criteria, the International Court of Justice ruled against Nicaragua. And considered all the islands belonged to Colombia. For, the Court has met the Colombia's sovereignty over the islands by assessing the reasons, including the continued presence of Colombia in this area and lack of objection of Nicaragua until 1969 (V.Ospina, Mariano).

Every act of government doesn’t imply effective government. Intention of exercise of sovereignty should also be clarified, and this rule should be effective. As, the examples of exercise of governance is not unlimited; determining what action is exercise of sovereignty is not an easy task. In case of Sepadan and Ligitan islands between Indonesia and Malaysia, the International Court of Justice has used the criteria of exercise of sovereignty and eventually has issued in favor of Malaysia. The Court has noted that the British colonial authorities before 1917 has passed rules concerning the collection of turtle eggs and during the years following the war on both Sipadan and Ligitan islands, they have installed lighthouse that was not contested by the Netherlands and Indonesia (John G. Butcher, p. 246). However, according to the Court, the activities of the Netherlands Royal Navy patrol and surveillance activities of Indonesian Navy are not considered as effective occupation because it does not have legislative character (Marcel Hendrapati, p. 381).

Again, the same rule of application of effective sovereignty in the case of Pdra Branka Island between Malaysia and Singapore has been used by International Court of Justice. But this time the award was issued in favor of Singapore. In this case, the Court has considered
certain acts as exercise of sovereignty, including the investigation on the broken ships, deployment of military equipment and the ongoing visit of the island by Singapore (Ushifumi, Tanaka, p. 10).

Of course, this is not the case that this principle is the only one applicable to the sovereignty of the islands. The principle of exercise of effective sovereignty over the Hawar Islands was not cited by the Court. Judge Rosalyn Higgins, however, formerly a member of the jury of Eritrea –Yemen, has considered also in a separate statement to the acquisition of land by Bahrain and exercise of effective sovereignty by the country and lack of effective sovereignty by Qatar (Barbara Kwiatkowska, p. 18).

**Conclusion**

The most important criterion for resolving disputes about islands is the exercise of sovereignty. In fact, if the two countries have disputed on an island, to judge these conflicts, we should consider which country has exercised more sovereignty. If both countries have applied the rule, award must be issued in favor of a country with more sovereignty. Sovereignty exercise is a legal argument that requires wide interpretations. In this regard, we can consider census, sailing and fishing license issuance, inspection of vessels, and implementation of the legislative, executive provisions and judicial jurisdiction. The criterion rises from the same principle in the Montevideo Convention that any state requires land, population and sovereignty to exist. Other criteria such as geographical issues and referendum do not stand against this criterion. This criterion is considered to be compatible with the terms of international law because the countries are entitled to exercise sovereignty over their territory (even on parts other than the islands). This perspective is a source which can be seen in international precedents.

However, there are other principles that apply on sovereignty over the islands and even are less cited. But if their conditions are confirmed, they are even superior to the principle of sovereignty exercise. If we are going to arrange the principles of sovereignty over the islands in order of priority; they include: 1 - Contractual relationship 2 - The principle of stability of borders 3 – Exercise of effective governance.
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