SURYA P. SHARMA

Territorial Acquisition, Disputes and International Law

MARTINUS NIJHOFF PUBLISHERS
THE HAGUE / BOSTON / LONDON
3. The Traditional Classification of Territorial Disputes — Legal and Political

Chapter II: The Traditional Modalities of Acquisition of Territorial Sovereignty

1. Introduction

2. Discovery
   A. Scholarly Opinion
   B. Judicial Opinion
   C. Appraisal
   D. Conclusion

3. Symbolic Activities
   A. Meaning and Forms
   B. Past Practices
   C. Scholarly Opinion
   D. Judicial Opinion
   E. Appraisal and Conclusion

4. Contiguity
   A. Nature and Basis of Claims in the Past and Present
   B. Status of the Principle — Law and Policy
      (i) Scholarly Opinion
      (ii) Judicial Opinion
   C. General Appraisal
   D. Conclusion
   E. Status of Islands Situated in the Maritime Zones of a Coastal State

5. Occupation
A. Introduction 61
   (i) Origin and Essential Elements of Occupation 61
   (ii) Contemporary Importance 63
B. Criteria of Effective Occupation — a Complex Process 63
   (i) Introduction 63
   (ii) Scholarly Controversy over the Scope of the Criteria of Effective Occupation 64
C. Historic Practices of Effective Occupation 66
   (i) North and South American Continents 66
   (ii) African Continent 67
   (iii) Polar Regions 70
D. Judicial and Arbitral Decisions on the Criteria 70
   (i) The Island of Palmas Case 71
   (ii) The Eastern Greenland Case 76
   (iii) The Clipperton Island Case 82
   (iv) The Minquiers and Ecrehos Case 83
   (v) The Rann of Kutch Case 89
   (vi) Other Cases 92
   (vii) Cases Involving Uti Possidetis — Relevance 92
E. Appraisal of Cases 97
   (i) Shift in the Meaning of the Concept of Effective Occupation since 1885 97
   (ii) The Scope of the Concept of Intertemporal Law 98
   (iii) The Concurrent Development of the Concept Of Sovereignty — Implications 99
   (iv) Flexible Criteria of Display of Sovereignty or Effective Occupation 100
      (a) Peaceful 100
      (b) Actual 101
      (c) Sufficient 102
Contents

(d) Continuous 103
(v) Critical Review of the Earlier Cases by Scholars 104

6. Prescription 107
   A. Meaning and Policy 107
   B. Requirements and Classification of Prescription 108
   C. Validity under International Law of the Concept of Prescription 112

7. Occupation and Prescription: Differences and Similarities 114
   A. Differences 114
   B. Common Requirements of Conditions 114
   C. Special Emphasis on the Conduct of the Parties and Attitude of Interested States 117

8. *Uti Possidetis Juris* 119
   A. Meaning and Scope 119
   B. Efficacy of the Principle in International Law and the Transplantation of the Doctrine from Latin America to Africa and Newly Independent States 121
   C. Relationship between *Uti Possidetis* and Legal Titles on which the Implementation of the Principle is Based — Review of Cases 125
      (i) The *Frontier Dispute* Case 125
      (ii) Other Cases 126
      (iii) The *Land, Islands and Maritime Frontier* Case 128
      (iv) The Rationale of the Case 129

9. Equity 129
   A. The Issue 129
   B. The Meaning, Function and Contents Of Equity 130
   C. Status of Equity in International Law and its Applicability as the Legal Criterion 131
   D. Judicial Cases on Boundary/Territorial Disputes 131
(i) The Frontier Dispute Case 131
(ii) The Land, Islands, and Maritime Frontier Dispute Case 133
(iii) The Rann of Kutch Case 134

E. Conclusion 136

10. Cession 136
   A. Meaning and Essentials of Cession 136
   B. Classification 137
   C. Typical Issues concerning the Modality of Cession 138
   D. Cession by Native Peoples in Asia and Africa during the Colonial Period 139

11. Accretion 141

12. Conquest 143
   A. Introduction (Traditional Status, Ingredients and Classification of Conquest) 143
   B. Validity of Title Acquired Through Conquest in Modern Times 145
      (i) Various Schools of Thought 145
      (ii) Majority View 146
      (iii) Assessment of Contemporary Prescriptions Prohibiting Territorial Acquisition by the Illegal Use of Force 146
   C. The Principle of Non-Recognition 148
      (i) Introduction 148
      (ii) The Origin and Development — Collective Non-Recognition 148
      (iii) Practice of Individual States Regarding Non-Recognition 154
      (iv) Non-Recognition as a Sanction 156
      (v) Conclusion 157
D. Effect of Non-Recognition on the Territorial Acquisition 158
E. Appraisal 160

Chapter III: The Review of the Traditional Modalities 161
1. The Traditional Law and Interests of Colonial Powers 161
2. The Modern Context 163
3. The Emergence of a New Trend of Reforming the Traditional Doctrines 164
   A. Response of Scholars — Identification of Omissions and Conceptual Anomalies in Traditional Modes 165
      (i) Omission of "The Emergence of the New State" and the Principle of "Self-Determination" 165
      (ii) Ambiguity Surrounding the Concept of Prescription 167
      (iii) Confusion about the Operation of the Two Modalities, namely, "Occupation" and "Prescription" 168
      (iv) Absence of Distinction between "Occupation" and "Historic Title" 170
   B. The Attitude of Courts and Tribunals 171
4. New Approaches or Theories 173
   A. The Historic Consolidation Theory 173
   B. The Multiple Considerations Theory 179
   C. The Territorial Effectiveness Theory 180
5. Conclusion 182

Chapter IV: The Framework of the Contemporary Process of Acquisition of Territory 183
1. Introduction 183
2. Major Features of Contemporary Process of Territorial Acquisition 185
3. Sources of the Law of Territorial Acquisition 190
   A. General Prescriptions 190
Contents

(a) The Right to Democracy 242

(b) The Right of Group Participation in Democratic Government 246

D. Conclusion 248

5. Fundamentals and Advantages of the "Process" Approach 249

6. The Major Contemporary Territorial Disputes — Claims and Legal Perspectives 253

A. Introduction 253

(i) Factors Giving Rise to Territorial Disputes 253

(ii) Incidence of Territorial Disputes 256

B. Specific Disputes Involving the Modalities of Discovery, Symbolic Annexation and Contiguity 258

(i) Discovery 258

(ii) Symbolic Annexation 260

(iii) Contiguity 262

(iv) Conclusion 265

C. Specific Disputes involving the Modality of Historic Possession (Competing Claims about Historic Title and Exercise of Territorial Sovereignty) 265

(i) Introduction 265

(ii) Specific Disputes 266

(iii) Conclusion 307

D. Disputes involving Claims in regard to the Implicit Conduct of the Parties — Invocation of the Technical Doctrines such as Recognition, Acquiescence, Preclusion or Estoppel 307

(i) Introduction 307

(ii) Specific Disputes 308

(iii) Conclusion 309
E. Specific Disputes Involving the Principle of Self-Determination 309
   (i) Self-Determination v. Territorial Integrity 310
       (a) Specific Disputes 310
       (b) Conclusion 313
   (ii) Disputes involving Claims of Group Identification 313
       (a) Specific Disputes 313
       (b) Conclusion 318

F. Specific Disputes Involving the Modality of Cession 320
G. Specific Disputes Involving the Modality of Accretion 324
H. Specific Disputes Involving the Modality of Conquest 324

Chapter V: The General Appraisal 327

Index 343