

Principles of sovereignty under international law

A fundamental principle of international law is that a state can generally control all activities within territory over which it has *sovereignty*. Outside of this territory, a state is generally restricted to controlling activities of its citizens and vessels or planes registered in its territory.

Sovereignty is a concept notoriously difficult of definition but, in essence, under international law it is a power and right, recognized or effectively asserted in respect of a defined part of the globe, to govern in respect of that part to the exclusion of nations or states or peoples occupying other parts of the globe.¹

There are a number of ways that states have historically acquired territorial sovereignty and delineated their land and maritime boundaries, although in practice these categories are simplistic and are often used in overlapping ways to determine sovereignty and boundary disputes:²

- **conquest**, where territory is annexed by the threat or use of armed force (although conquest and military occupation have not been recognised as lawful means of acquiring territory since the *Charter of the United Nations* entered into force in 1945);³
- **effective occupation** of *terra nullius* (i.e. uninhabited land belonging to no one);
- **prescription**, by which doubtful title is legitimised by long-continued, uninterrupted and peaceful possession where another state has neglected to assert its rights or has been unable to do so;
- **cession**, or voluntary transfer by treaty (e.g. the USA's purchase of Alaska from Russia in 1867⁴);
- **accretion**, where a gradual deposit of soil changes the contours of land; and
- **arbitral award** by bodies such as the International Court of Justice regarding boundary disputes.

The principles of “effective occupation” are particularly important for determining sovereignty over remote and uninhabited land such as small islands and sometimes vast areas of inhospitable arid and polar regions. Effective occupation is a question of fact that requires not mere discovery or recognition but rather a taking of actual possession and the establishment of effective administrative control over the territory.⁵ There must be an intention and will to act as sovereign and some actual exercise or

¹ *NSW v Commonwealth* (1975) 135 CLR 337 (the Seas and Submerged Lands Act Case) at 479, Jacobs J; *Island of Palmas Case* (1928) 2 UNRIAA, 829; *Legal Status of Eastern Greenland* 1933 PCIJ Ser. A/B No. 53: 22; *Clipperton Island Case* (1932) 2 UNRIAA, 1105.

² See generally, Triggs G, *International Law: contemporary principles and practices* (LexisNexis, London, 2006), Ch 5.

³ Art 2 of the UN Charter prohibits the use of armed force to acquire territory. The principle of inter-temporal law applies to protect the validity of title acquired by force prior to 1945. The obligation to accept existing territorial boundaries, often expressed in the formula *uti possidetis* (Latin for “as you possess”), unless otherwise agreed in a treaty, is generally applied to determine post-colonial territorial boundaries and following the break-up of federations such as the USSR and the former Yugoslavia. See Triggs, n 2, pp 237-238 and 240-241.

⁴ For the interesting history of this purchase, see https://en.wikipedia.org/wiki/Alaska_Purchase

⁵ *Island of Palmas Case* (1928) 2 UNRIAA, 829; *Legal Status of Eastern Greenland* 1933 PCIJ Ser. A/B No. 53: 22; *Clipperton Island Case* (1932) 2 UNRIAA, 1105. See generally the discussion in Professor Gillian Triggs, *International Law and Australian Sovereignty in Antarctica* (Legal Books Pty Ltd, Sydney, 1986), Chapters 1-2; and Sir Arthur Watts, *International Law and the Antarctic Treaty System* (Grotius Publications Ltd, Cambridge, 1992), p 121.

display of such authority.⁶ The test is satisfied by flexible and comparative standards that depend upon the degree and kind of control appropriate to the particular circumstances and character of the territory.⁷ Very little physical presence may be necessary for remote and inhospitable areas.

Resolving disputed claims of territorial sovereignty and boundaries is often complicated by historic changes in statehood and government of the territories concerned and ongoing political disputes, such for countries such as China, Taiwan, Vietnam, the Philippines and others claiming sovereignty over islands and maritime zones in the South China Sea.⁸ Where a dispute proceeds to arbitration, tribunals will consider a “penumbra of equities”, including matters such as recognition, acquiescence, and estoppel in acquiring territory and will establish a “critical date” at which the dispute should be assessed and the law at that time will be applied to determine the relative strength of competing claims of sovereignty.⁹ While recognition of territorial sovereignty by other states is not a definitive basis for sovereignty under international law, widespread recognition is persuasive evidence that sovereignty has been established.

Customary international law has recognised for over a century that a state has sovereignty (and may control the exploitation of marine resources) within the coastal or territorial waters adjacent to land over which the state has sovereignty.¹⁰ Under the *United Nations Convention on the Law of the Sea 1982* (“UNCLOS”) a coastal state has sovereignty to 12 nautical miles (the territorial sea),¹¹ but sovereign rights may extend out to 200 nautical miles, the exclusive economic zone (“EEZ”), or the edge of the continental shelf.¹² Beyond territorial waters (i.e. on the “high seas”) a state has jurisdiction over its nationals and flag vessels (i.e. vessels registered in the state).

Example: Australian sovereignty in Antarctica

An example of disputed sovereignty and associated maritime areas is the Australian Antarctic Territory (“AAT”) and associated EEZ and continental shelf. Australia’s sovereignty in Antarctica is based on the principles of customary international law and Australia’s sovereign rights over the waters within 200 nautical miles of the AAT and associated continental shelf are based upon treaty law in the UNCLOS. The AAT was proclaimed by Australia in 1936 as a result of a transfer of title from the United Kingdom and the pioneering work of Australians in the area of Antarctica directly to Australia’s south and south-west.¹³ The AAT is a sector claim over the Antarctic mainland and islands lying south of Latitude 60° South (to the South Pole) and between Longitudes 45° East to 136° East and 142° East to 160° East.

Applying the normal principles of customary international law, while only four states (the United Kingdom, France, Norway and New Zealand) recognise Australian sovereignty over the AAT,¹⁴ Australia has established territorial sovereignty in Antarctica through effective occupation of the coastline surrounding its three permanent Antarctic bases (Mawson, Davis and Casey) lying between

⁶ *Legal Status of Eastern Greenland* 1933 PCIJ Ser. A/B No. 53: 22 at 46.

⁷ *Legal Status of Eastern Greenland* 1933 PCIJ Ser. A/B No. 53: 22.

⁸ See, e.g., US Department of State, *Limits in the Seas (No. 143): China: Maritime Claims in the South China Sea* (US Department of State, Washington DC, 2014), <http://www.state.gov/documents/organization/234936.pdf>, for an analysis of the facts regarding a current dispute involving China’s claimed sovereignty and maritime zone in the South China Sea.

⁹ See Triggs, n 2, p 214.

¹⁰ *Behring Sea Fur Seals Arbitration* (1898) *Int. Arbitration Awards* I: 811. See also the *Icelandic Fisheries Cases (UK v Iceland)* (1973) ICJ Rep 3; and *(FRG v Iceland)* (1974) ICJ Rep 175.

¹¹ UNCLOS, Article 2.

¹² UNCLOS, Articles 56 and 77.

¹³ Following British expeditions dating from the 1830s, Douglas Mawson’s 1911-1914 Australasian Antarctic Expedition and 1929-1931 British, Australian and New Zealand Antarctic Research Expedition (BANZARE) discovered and mapped much of the coast of (what became) the AAT.

¹⁴ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Australian Law in Antarctica: The report of the second phase of an inquiry into the legal regimes of Australia’s external Territories and the Jervis Bay Territory* (AGPS, Canberra, 1992), para 2.8.

Longitude 60° East and 120° East.¹⁵ In her leading study of the issue, Professor Gillian Triggs concluded that:¹⁶

“Australia has valid title to those parts of the Australian Antarctic Territory which have been effectively occupied by it. Such areas are the coastal mainland bases of Davis, Casey and Mawson and their surrounding territory and the continental shelves adjacent to them. These coastal areas lie between longitudes 120°E and 60°E. That part of Australia’s claim which lies between 160°E and 142°E supports no bases at all. The coastal area however, has been mapped and explored to some extent, and such Australian legislation as extends to the Australian Antarctic Territory has effect there also. It is possible that these facts alone satisfy the requirement of effective occupation. However, there is little evidence to support Australian sovereignty over the vast hinterland of its claimed sector beyond exploratory expeditions and the extension of legislation. It is thus doubtful whether Australia can support its claim to sovereignty over such territory.”

In 1959 Australia and Japan, and other nations concerned with the control and use of Antarctica, agreed to freeze further claims to sovereignty in Antarctica under the *Antarctic Treaty*. Australian sovereignty over the AAT was not lost by entry into this treaty, nor does the treaty prevent Australia exercising jurisdiction over nationals of other parties to the treaty. In recommending that, as a matter of principle, Australian law be extended and applied to those foreign nationals in the AAT who are not otherwise exempt under Article 8(1) of the *Antarctic Treaty*, The House of Representatives Standing Committee on Legal and Constitutional Affairs, noted that:¹⁷

“The Committee is of the view that there exists a strong misconception about the scope of Article 4(2) of the Antarctic Treaty and the degree to which it constrains Australia in applying Australian law to foreign nationals in the Australian Antarctic Territory. The Committee agrees ... that Australia is not prevented by Article 8(1) or Article 4(2) of the Antarctic Treaty from applying Australian laws to foreign nationals in the Australian Antarctic Territory.”¹⁸

In 1994 Australia proclaimed an EEZ of 200 international nautical miles under the UNCLOS, including waters adjacent to the AAT.¹⁹ Article 65 of the UNCLOS specifically allows coastal states to regulate whaling within the EEZ. Cetaceans were protected from whaling by Australians or foreign nationals from 1 August 1994²⁰ to 16 July 2000²¹ in the Australian Fishing Zone, which included the EEZ of the AAT under the *Whale Protection Act 1980* (Cth). Since 16 July 2000 cetaceans have been protected from whaling by Australians or foreign nationals in the Australian Whale Sanctuary (“AWS”) under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (“EPBC Act”).²²

While the normal principles of international law support Australian sovereignty over the AAT, Australia has adopted a practice of not applying its laws to foreign nationals in the AAT. With the exception of the four states which recognise Australian sovereignty, other states ignore it when conducting activities within the AAT.

¹⁵ Mawson was established in 1954, Davis in 1957 and Casey (previously Wilkes Station established by the USA) in 1958.

¹⁶ Triggs, n 5, pp 322-323.

¹⁷ House of Representatives Standing Committee on Legal and Constitutional Affairs, n 10, para 2.31.

¹⁸ The Committee also recommended (at para 3.11) that the *Fisheries Management Act 1991* (Cth) be amended to include in the Australian Fishing Zone the 200 nautical miles adjacent to the AAT, so as to extend Australian jurisdiction to the activities of non-Contracting Parties to the Antarctic Treaty. That recommendation was subsequently adopted by Parliament in Act No. 20 of 1994. Similarly, the extension of the AWS to this area under the EPBC Act follows this recommendation.

¹⁹ Australian laws regulating whaling surrounding the AAT began with the *Whaling Act 1935* (Cth).

²⁰ The date of commencement of the proclamation of Australia’s EEZ (Gazette, No S 290, 29 July 1994). Noted that the *Maritime Legislation Amendment Act 1994* (Cth) (Act No. 20 of 1994), which amended *Seas and Submerged Lands Act 1973* (Cth) to include Division 1A (The exclusive economic zone), ss 10A-10C and amended the definition of the Australian Fisheries Zone to include the EEZ in the *Fisheries Management Act 1991* (Cth) commenced on 15 February 1994.

²¹ The date of commencement of the EPBC Act and repeal of the *Whale Protection Act 1980* (Cth).

²² See further: McGrath C, “Australia can lawfully stop whaling within its Antarctic EEZ”, seminar paper delivered at the Australian National University, Canberra, 6 May 2008, available at <http://www.envlaw.com.au/whale24.pdf>.