

Actions speak louder than words

The tit-for-tat manoeuvres in the South China Sea are more than just propaganda - they could prove vital if sovereignty is ever settled by negotiation

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If recent history follows its course, the flag planted on the Scarborough Shoal last week by a Chinese state media reporter could soon be removed by Philippine officials determined to assert their own claim to the disputed reef in the South China Sea.

Such tit-for-tat actions may appear like a theatrical act of nationalistic propaganda yet there is - potentially, at least - a deeper strategic logic behind such moves. It could be called the mechanics of sovereignty.

When Beijing this week announced, for example, its annual South China Sea fishing ban, it served not just to protect the region's threatened fish stocks. It was also an expression of administration that could one day prove important in the still-unlikely event that the South China Sea territorial disputes ever come to an international court.

The unilateral ban also keeps the pressure on rival claimants, potentially serving Beijing's push for one-to-one negotiations and joint development deals, rather than risk defeat at the International Court of Justice.

And that is why, to protect themselves on both counts in return, Vietnam and the Philippines have again formally objected to the ban, which cuts into their economic zones - a protest they issue every year.

The mechanics of sovereignty have been on bold display in recent weeks over the five tiny rocks that sit just above sea level 124 nautical miles off the Philippine island of Luzon as both China and the Philippines seek to buttress their sovereign claims through word - megaphone diplomacy - and deed, such as the planting of flags and stationing of rival coastguard vessels and fishing fleets.

Elsewhere in the South China Sea, there are the moves to promote tourism to disputed areas and assign them to administrative districts. For each move, there is inevitably a counter as rival states manoeuvre to ensure they are not caught napping. Vietnam recently renamed streets in some of

its cities after the Paracel Islands - the Chinese-controlled archipelago it claims as its own. Beijing, meanwhile, is pushing ahead with plans to open the Paracels' shoals and reefs to mainland tourists.

In legal terms, sovereignty is easy to claim but difficult to prove. Proximity, for example, is no guarantee of sovereignty, according to international legal scholars.

Scarborough Shoal may sit within the Philippines' 200-nautical-mile exclusive economic zone under the UN Law of the Sea, but that does not mean it is necessarily Philippine territory. But then neither do historic facts such as discovery or traditional fishing, factors frequently raised by Chinese scholars and officials, denote ownership.

Some international law experts point to the need to be able to show "effective administration" - essentially the carrying out of sovereign acts. They point to Singapore's victory in 2008 over Malaysia in the case of Pedra Branca, a small island on the edge of Singaporean waters.

After a long-simmering dispute, the two sides agreed to seek a definitive ruling from the International Court of Justice in The Hague, a body run under UN auspices. The Philippines is attempting to take Scarborough to the court, but unless China agrees, this cannot happen.

"Effective administration is relative to the size of the feature," said Professor Robert Beckman, an international law expert at the National University of Singapore. "The key issue is, what acts did each claimant carry out, and how did the other react? Did they protest or did they acquiesce?"

"In the Pedra Branca case between Malaysia and Singapore the court found that Singapore carried out several acts which only a sovereign [power] would undertake, and Malaysia was silent. Therefore, the court found that Malaysia had 'acquiesced' to Singapore's acts, and at some point title had passed from Malaysia to Singapore because of Malaysia's acquiescence."

Effective administration can involve things such as reclamations, regulation of fishing, construction and maintenance of structures, and the investigation of accidents.

Some scholars have already noted that while the Philippines' construction of a lighthouse on Scarborough Shoal in the 1960s might be an advantage, the fact that Manila let it fall into disrepair would help China's cause.

Similar concepts proved the key to Malaysia's victory over Indonesia at the International Court of Justice in late 2002 concerning the ecologically rich islands of Sipidan and Ligitan off the coast of Borneo - larger than the rocks of Scarborough. The case hinged on Malaysia's "effective occupation" - something that dated back to colonial times.

Another key factor is the so-called date of dispute. This means that actions and statements after an island or feature was clearly in dispute are ignored for the purposes of the court case - it is the actions before that which count.

While some of the diplomatic rhetoric of recent weeks has been robust as Beijing and Manila trade verbal blows, there are good reasons why both sides have stopped short of beating the drums of war.

The use of force to secure occupation could greatly hamper a claim, whatever advantages an aggressor may think it will bring in terms of "effective administration" or occupation. Beckman notes: "Under the UN Charter and the UN General Assembly Resolutions interpreting it, it is no longer legally possible to acquire sovereignty through the use of force."

He points to the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States.

"The territory of a State shall not be object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal," the declaration says. The ICJ has ruled that the resolution reflects principles of customary international law binding on all states, Beckman said. While he has not taken a position on the various sovereign claims, he said there was not likely to be any use of force over territorial disputes.

Singapore-based security analyst Dr Ian Storey, of the Institute of South East Asian Studies, said it had been apparent for some time that various claimants well understood the need for consistency as a constant policy to buttress sovereign claims.

"With every move and counter-move, we can see some of these theories at work," he said. "It is not just about protecting ground for a possible court case. It is also about putting yourself in the strongest possible position should matters ever come down to negotiation. Whatever moves are made at [the Association of Southeast Asian Nations] in terms of a code of conduct to ease tensions, I think it is clear that tit-for-tat manoeuvring is going to be with us for some time yet."