

Chapter 2

The Port and the International Law in General: A Land Appendix

The lack of interest shown for seaports by the international legal order can be partly explained by the interference of the principle of domestic jurisdiction.¹ Indeed, civilian seaports used to be a national asset, under the full sovereignty and administration of the port State, and with their management strongly (and jealously) dominated by local organizations and entities.² Therefore, any form of international regulation appeared unnecessary, and was not even considered by the international community.

The condition of military seaports (naval bases) was completely different, since it was not unusual for strategic naval bases to be under the control of a foreign Power different than the port State. In this case, in order to safeguard the sovereignty of the territorial State, the granting of a naval base has been based on international agreements analytically regulating the relationship between the territorial State and the Power of the naval base.

However, even the provisions of the international agreements applying to foreign naval bases fail to specifically focus on seaports. In most cases, the granting of the naval bases is treated merely as a granting of territory, clearly because territory is perceived as a constitutive element of the State, thus making any granting of international rights to a foreign Power over it a particularly sensitive issue. This will usually lead the contracting Powers to neglect the water and port component of the naval base involved.

The provisions of the treaty of Utrecht,³ regulating the transfer of Gibraltar from Spain to Great Britain, treat what was clearly a naval base under every respect—strategical, geopolitical and practical—as a “town and castle”: “La ciudad y castillo de Gibraltar, juntamente con su puerto, defensas y fortaleza que le pertencen” in the Spanish text; “the town and castle of Gibraltar, together with the port, fortifi-

¹The question of whether domestic jurisdiction should be considered a principle of law, a general provision of the international legal order or otherwise classified will be left open here.

²See Chap. 6.

³Baskett (1714).

cations, and forts thereunto belonging” in the English text; “*proprietas urbis et arcis Gibraltar noncupatae, una cum portu, munitionibus, fortalitiis eodemque pertinentibus*” in the Latin text.⁴ The port is indeed mentioned, but just as an accessory of the fortress town. It is therefore no surprise that, as part of the ongoing controversy between Great Britain and Spain on the status of Gibraltar, both parties agree that the Utrecht Treaty cannot be considered a sufficient basis for Britain to claim any sovereign right over the territorial waters of Gibraltar.⁵ Since the Rock is clearly a naval outpost to control the access to the Strait of the same name, the drafting of the norm is quite staggering; and yet, this is far from being an isolated case.

Another important element of British international practice is the 1921 Anglo-Irish Treaty, by which the United Kingdom,⁶ in granting independence to Ireland, reserved to itself, among other things, the control over some strategical naval bases, the so-called “treaty ports”. Also in this case, no mention at all is made of the British sovereign rights over the Irish waters served by the said ports, which are referred as “such harbour and other facilities as are indicated in the Annex hereto, or such other facilities as may from time to time be agreed between the British Government and the Government of the Irish Free State.”⁷ The only mention of water or underwater facilities (submarine cables and navigation signals) is found in the Annex to the Treaty, and apparently the British Government was content with leaving the control of those facilities to Ireland, subject to its supervision. Yet, just like in the case of Gibraltar, it is obvious that Britain, by putting the treaty into execution, acquired extensive sovereign rights over the Irish waters, so much that, when the controversial concession of the treaty ports was revoked, the Irish Minister of Foreign Affairs told the Irish Parliament that new agreement with Britain would reinstate “Irish sovereignty over the Twenty-Six Counties and the territorial sea.”⁸

Finally, a relevant element of British practice is the agreement with the United States on the use by the latter of some islands of the British Indian Ocean Territory, in particular the Diego Garcia atoll, which hosts an important US naval base. The agreement,⁹ dating back to the Sixties, again does not explicitly regulate the legal

⁴Artículo X in the Spanish text, Article X in the English text, Articulus X in the Latin text.

⁵United Nations (2013). See Spanish declaration upon signature (December 4, 1984): “The Spanish Government, upon signing this Convention, declares that this act cannot be interpreted as recognition of any rights or situations relating to the maritime spaces of Gibraltar which are not included in article 10 of the Treaty of Utrecht of 13 July 1713 between the Spanish and British Crowns”. An identical declaration was made by Spain upon ratification (January 15, 1997). The United Kingdom itself bases its claim on the continued and undisputed control of the water rather than on the treaty, an argument which is equally rejected by Spain: Gobierno de España (2017).

⁶The National Archives of Ireland (1998).

⁷Art. 7.

⁸Oireachtas (1938).

⁹United Nations (1967).

status of the island waters; in 1972, via a supplementary agreement,¹⁰ the United Kingdom assumed the obligation to forbid commercial fishing in the internal and external waters of Diego Garcia, including the Exclusive Economic Zone.¹¹ After that, further supplementary agreements gave to the United States extensive rights of jurisdiction over the Diego Garcia waters.¹²

In the Diego Garcia example it can be noticed that the United States practice, in comparison to the British one, appears to be more inclined to an explicit regulation of the status of the waters surrounding its overseas naval bases. Indeed, also the 1903 agreement between the United States and Cuba on the lease of the Guantanamo Bay naval base¹³ contained a very clear provision: “The grant of the foregoing Article shall include the right to use and occupy the waters adjacent to said areas of land and water.”¹⁴

However, after World War II, when the United States developed their “imperial” network of overseas military bases, the water component of the military bases started again to fade, or rather the naval bases ceased to be distinguished from the land and air bases, no matter how great their strategical significance. All the US military installations covered by the agreement with a given host country have simply been regulated in the same way.

Since the United States maintains hundreds of military installations in different foreign countries, it is impossible to examine all the relevant agreements. However, it is possible to limit the research to the major US overseas naval bases. Only three countries host US naval bases which are a Fleet HQ: Italy (HQ of the Sixth Fleet in Naples), Bahrain (HQ of the Fifth Fleet in Manama), and Japan (HQ of the Seventh Fleet in Yokosuka).

Italy and the United States are both parts of the NATO Status of Forces Agreement,¹⁵ but the United States has also concluded bilateral agreements with the individual NATO members hosting their bases. Italy and the United States concluded in 1954 a Bilateral Infrastructure Agreement (BIA), also known as “Umbrella Agreement”, which is however classified.¹⁶

The 1971 agreement between Bahrain and the United States is highly atypical.¹⁷ On a first look, it appears an agreement regulating the transitional permanence of an expeditionary corps on foreign soil rather than the long-term establishment of military bases, and indeed it does not make any mention of military installations except for “support facilities” whose regime is to be established by “administrative

¹⁰United Nations (1973).

¹¹Art. 12.

¹²United Nations (1976), par. 8.c, on recreational fishing by the British personnel stationed on the island; United Nations (1998), par. 5, on dredging operations and environmental protection.

¹³Skylar and Hagen (1972).

¹⁴Art. II.

¹⁵United Nations (1954).

¹⁶Ronzitti (2007), p. 4.

¹⁷United Nations (1972).

arrangements between the United States authorities and the authorities of Bahrain or, as appropriate, private property owners.”¹⁸ However, the agreement is more or less explicitly stipulated for an indefinite duration,¹⁹ and the United States still maintains a strong presence in Bahrain. The ambiguous wording of the agreement is probably an attempt not to hurt too much the sensitivities of the Muslim population in Bahrain and in the neighboring States, which has traditionally been hostile to the presence of Western troops on Arabian soil; under this respect, the presence of a foreign force is probably more palatable than permanent foreign bases. In any case, what is relevant for this treatise is that also the Bahrain agreement puts on the same footing the land, sea, and air units of the United States, thus lacking any specific regulation of the naval bases even under the guise of “naval support structures,” “ports of call used by the U.S. Navy,” or similar expressions.

Finally, the agreement between the United States and Japan applies an identical legal regime to the U.S. land, naval, and air bases.²⁰

In conclusion, the norms of international treaty law applying to overseas naval bases will focus on the terrestrial component of the said bases, without putting a particular emphasis on their naval character or their unavoidable influence over the territorial waters of the host States. This approach must probably be attributed to the sensitivity of stationing foreign troops on the soil of a State, thus directly affecting its territory, which is often—albeit not always—considered as a constitutive element of the State as an international subject. The mere presence of foreign military ships in the territorial waters, even if permanent, is considered less problematic,²¹ and the attention of the negotiators remains monopolized by the necessity of safeguarding, with explicit and possibly analytical norms, the territorial integrity of the host State.

Even when the waters serving the naval base are mentioned and regulated, they are treated as an accessory to the land component of the base.²²

As it will be seen further on, this approach can be detected even in the international regulation of the colonial factories, the peculiar overseas ports/outposts/ naval bases which in the era of the so-called “informal colonial empires” were the cornerstone of European colonial policy.²³

¹⁸Art. 13.

¹⁹Art. 14: “Should either government determine at some future time that it is no longer desirable to continue the presence on Bahrain of the United States Middle East Force, the United States shall have one year thereafter to terminate its presence”.

²⁰United Nations (1960).

²¹Significantly, the Montego Bay Convention allows the innocent passage of foreign military vessels in the territorial waters of a State: United Nations (1994), art. 17–26. See also International Court of Justice (1949).

²²The understanding of the waters served by a naval base as a mere accessory to the base appears to have influenced also the international practice related to domestic naval bases. Some States have declared the territorial waters served by a naval base special military areas which are permanently closed to the innocent passage of foreign ships, even if it is dubious whether the international law of the sea allows such a permanent limitation: see Ridolfi (1997).

²³See Chap. 5.

The only seaports which can rival the old factories in terms of economical and strategical significance—albeit not mirroring the military importance of the former—are today’s multimodal ports, key hubs of the container shipping industry, which is considered the conveyor belt of globalization. Given these premises, one would expect international commercial law to have drastically increased the amount of consideration given to the regulation of seaports. However, this is not the case, as it will be seen further on.²⁴

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