CHAPTER 5

The Arguments Based on "Law" in Territorial Disputes

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1 Main Subject Matter of This Chapter*

1.1 *Discussions on the Relation to the Law*

The main subject matter of this chapter is how international law can ensure its own validity, specifically in the context of territorial issues.[1] Territorial disputes involve both legal[2] and non-legal arguments. However, even in the case of non-legal arguments, international law has the flexibility to include such arguments, perhaps thereby attempting to ensure its own validity. This chapter will consider what the dynamism of international law is, in the sense of how the regulation of international law is achieved in its application to people, objects, facts, and acts, or figuratively speaking, exactly how formidable the world of international law is.

The following specific example comes to mind. Japan adheres to the so-called "inherent territory" argument, which has been described as "not a legal concept" and "having no clear legal meaning."[3] In that regard, the following question arises from the perspective of international law. Can the unilateral

* All of the URLs were last accessed on September 27, 2021.

1 The territorial issues referred to here are the actual circumstances between Japan and its neighboring States in relation to the Northern Territories, Takeshima, and the Senkaku Islands. The official position of Japan on the Senkaku Islands is there is no "dispute" with China. The official position of Japan on the Four Northern Islands and Takeshima is there are "disputes" with Russia and Korea, respectively. The term territorial "issues" collectively refers to these individual disputes. The author will use either "dispute(s)" or "issue(s)" as is required and appropriate according to the context.

2 The term "law" in this chapter refers to international law, with a focus on "international law in relation to territorial disputes."

3 With the reservation that this likely also contains personal views, refer to Yamagami Shingo 山上信吾, Counsellor (as of writing this chapter) for the International Legal Affairs Bureau, Ministry of Foreign Affairs, Koyū no Ryōdo o Kangaeru "固有の領土"を考える [Considering inherent territory], *Nihon Gaikō Kyōkai Hō* 日本外交協会報 [The Society for Promotion of Japanese Diplomacy Magazine] November 20, 2012 edition (Tokyo: The Society for Promotion of Japanese Diplomacy, 2012), 1.

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argument of one State cause the severance of its relation from the legal world? If Japan's "inherent territory" argument implies a blurring and denial of a relation to the legal world, then historic rights[4] are conversely asserted as rights under international law despite the existence of some doubt as to whether they are indeed such rights. China asserts that it has historic rights in the vast sea area that is the South China Sea. This assertion is not founded on the United Nations Convention on the Law of the Sea (UNCLOS), but rather based on customary international law.[5] Ever since the Fisheries Case[6] of 1951, there has been debate about the relationship between historic rights and international law. This is an unavoidable theme when constructing Japan's objection to China's assertion of historic rights regarding the Senkaku Islands.

1.2 *Structure of This Chapter*

The "inherent territory" argument will be dealt with elsewhere. This chapter focuses on the extent to which assertions and claims of a relation to the law will be incorporated into the legal world. It will consider this in the following order: 1) Elaboration of the subject matter; 2) Claims of a relation to the law – "historic rights"; 3) Main elements of determining a relation to the law – intent and time; 4) Reconsideration of the elements of the "effect of intent" in territorial disputes; and 5) Proposal for the building of Japan's integrated position as a sovereign State on the Senkaku Islands issue. This position is constructed with references to the territorial title argument, the law of the sea, and the concept of disputes, and contributes to the realization of the common interests of the international community as well.

The author believes it would be beneficial to also frankly express her own perceptions, and has therefore described the subject matter of this chapter to be the "blurring and denial of a relation to the law" and "claims of a relation to the law." Prior to considering these themes in Section 2 and onwards, the author will here clarify her perceptions by using the term "validity" of the law.

4 "Historic rights," "historic title," and other such terms will be dealt with later.

5 The arbitral award (merits) on the South China Sea dispute carefully confirms, in several official documents, the arguments of China that did not appear in the tribunal. Kanehara Atsuko, "Validity of International Law over Historic Rights: The Arbitral Award (Merits) on the South China Sea Dispute," *Japan Review*, vol. 2, no. 3 (2018, Winter), 9–11. The South China Sea Arbitration (The Republic of Philippines v. The Republic of China), Award of 12 July 2016, at https://pcacases.com/web/sendAttach/2086.

6 *Fisheries Case* (*United Kingdom v. Norway*), Judgment of December 18th, 1951, *ICJ Reports* 1951.

1.3 *"Validity" of the Law*

In this chapter, the existence of a relation to the law is described as the validity of the law being extended. This means the law applies those standards of legal assessment to people, objects, facts, and acts. This is described as the law extending regulation over people, objects, facts, and acts, and can also be called "prescriptive jurisdiction." The term "validity extends" is how the author expresses her perception of "people, objects, facts, and acts being included in the world of law." The law extends regulation and subsequently the people, objects, facts, and acts are legally assessed (legal or illegal) by the law.[7]

The usage of "validity" in precedents and so forth is not necessarily unambiguous. The usage of "validity" in this chapter, as the author has explained it to mean, also includes the following meanings depending on the context: "effectiveness," "relevancy," "usefulness," and "applicability."

2 Claims of a Relation to the Law – "Historic Rights"

2.1 *"Historic Rights"*

The following is a clarification of the main terms used in this section. Historic "rights" can also refer to "historic title," "historic rights," "(rights to) historic bays," "(rights to) historic waters," and so forth; however, these concepts will be collectively referred to as "historic rights."[8] These concepts will be applied according to the context, including the use of "historic rights" in a particularly narrow sense.

This section will consider the legal and non-legal aspects of arguments in territorial disputes, in regard to historic rights. The term "non-legal" that is used here includes all aspects (justice, historic, political, cultural, etc.) other than the legal elements. "Non-legal" is not used only in the sense of justice as "justice" in contraposition to law.

There are two types of "law" in relation to historic rights, as follows. The first type is international law that governs the relationship between historic rights and the matters of international law (for example, international law on territorial title, maritime delimitation, and border delimitation). For this type

7 Later in this chapter, a legal assessment of the "existence or absence of opposability" will also be introduced.

8 The substantive reason for this is that the considerations in this chapter generally apply to "historic" rights and "historic" title, etc. Furthermore, in the same sense, the arbitration award (merits) in the South China Sea disputes also use "historic rights" as "a generic term." Kanehara, *supra* note 5, 13.

of law, "general international law" is assumed that can take the form of customary international law and treaties. The term "special (not excluding bilateral) international law"[9] will be used as required. The second type is international law that concerns historic rights per se. (This brings to mind customary international law, but also does not exclude treaties.) Typical international law is that which governs the definition of historic rights and their requirements for establishment.[10] A clear distinction cannot always be made between the first and second types of international law. For example, in the first type of international law governing maritime delimitation, when some kind of legal effect is given to historic rights, it is possible to also stipulate (second type of international law) the requirements for qualifying as historic rights.[11] Therefore, the author will clarify, as much as possible and according to the individual context, whether an issue of international law pertains to the first or second type.

2.2 *Relationship between International Law and Arguments That Do Not Conform with International Law*

The relationship between international law and historic rights has been debated since 1951, prompted by the International Court of Justice (ICJ) judgment in the Fisheries Case.[12] The ICJ ruled that Norway's straight baseline method is "the application of general international law."[13] The "general international law" referred to here is that in relation to the straight baseline. In the terminology used in this chapter, it is the international law that governs the relationship between historic rights and the matters of international law. The United Kingdom argued that there was a 10 nautical mile rule for closing lines across the mouths of bays, and that the assertion of any exceptions to that rule would need to be based on historic grounds. The United Kingdom asserted that Norway's straight baseline method was what it deemed an exception to general international law, and that Norway had the burden of proving that the method was founded on historic grounds. The ICJ dismissed this assertion.[14]

9 "Special (bilateral) international law" and "opposability" will be considered later in Section 2.

10 Although prudent evaluation is required, China bases its assertions of historic rights in the South China Sea on general international law and customary international law.

11 In contrast, Article 15 of UNCLOS recognizes the special consideration of historic title in the maritime delimitation of territorial waters, but it does not stipulate the requirements for the establishment of historic title.

12 *Supra* note, 6.

13 *Ibid.*, 131.

14 *Ibid.*, 130–131.

Following the Fisheries Case judgment, the International Law Commission (ILC) examined matters in relation to historic waters and historic bays,[15] including the logic of the ICJ in the Fisheries Case judgment and the logic of the United Kingdom's assertion. This was an examination of the rights applying to historic waters; therefore, based on the terminology of this chapter, and provided that doing so is not particularly inappropriate, the term "historic rights" is used when referring to these considerations of the ILC.

It is difficult to substantially differentiate between the view that historic rights are an exception to general international law, and the view that historic rights are an application of general international law, when considered in the following manner, namely, when general international law provides for an abstract provision, which allows a certain amount of room to consider individual and specific circumstances. In this type of general international law, it is difficult to substantially differentiate between cases where the "application" of the law recognizes and gives certain consideration to historic rights as individual and specific circumstances, and cases where historic rights are recognized as deviating from general international law only as an "exception." In the former case, the legality (or illegality) of historic rights (and their corresponding assertions, etc.) is determined by the application of international law with reference to individual and specific circumstances. In the latter case, the legality (or illegality) of historic rights (and their corresponding assertions, etc.) is determined by whether or not they are an "exception." Put simply, whether or not historic rights are themselves an "exception" is primarily determined by the content of general international law.

From the perspective of this chapter's subject matter of the validity of general international law, a number of points can be made as outlined further below. First, however, it should be noted that the terms "general international law" and "exception" will be used in the following manner. The subject matter of this chapter is the validity of "international law" and the issue of ensuring and maintaining the world of "international law," in which case there is no particular need to limit this to "general international law." The term "general international law" refers to the type of international law that applies to and is in effect on all States, as opposed to "special international law," which applies, for instance, only between the party States to the dispute. Then, it can also

15 *Juridical Regime of Historic Waters, Including Historic Bays*, Study Prepared by the Secretariat, 19 March 1962, Document A/CN.4/143. Hereinafter written as the "ILC report." The ILC report takes heed of the terminology of "historic waters" and "historic bays," while not seeking further differentiation between the two, as historic bays are regarded as being included in historic waters. *Ibid.*, para. 34.

be argued that an "exception" of "general international law" is "special international law." However, in such a case, it is clear that this "exception" does not mean "outside of the law." In contrast, this chapter uses the term "general international law" in relation to, needless to say, discussions on the two logical structures presented by the ICJ in the Fisheries Case, and also when its use would not cause confusion in discussions on the validity of international law.

With these terms thus having been clarified, an examination of the two aforementioned views, from the perspective of this chapter, indicates that, if historic rights are positioned as an "application" of general international law, it is possible to ensure the validity of general international law in regard to historic rights. In other words, this may imply that "historic rights can be included in the world of international law." In comparison, when historic rights are perceived to be an "exception" to general international law, it can perhaps be posited that historic rights are dismissed from the world of international law. However, even when historic rights are positioned as an "exception" to general international law, it is, albeit by formal logic, general international law that positions them as an "exception." In that sense, it can also be suggested that general international law governs historic rights, and "historic rights are included in the world of international law" as an "exception."

The establishment of customary international law in regard to historic rights per se, as well as the adoption of provisions on historic rights by way of treaties, are also not excluded. The "international law" (both customary law and treaty) described here is, in accordance with the terminology of this chapter, that which stipulates the definition and requirements of historic rights. Then, if general international law in regard to historic rights per se is established, it is not necessary to position historic rights as an "exception" to general international law. For example, if historic rights are established upon fulfilling the requirements stipulated in general international law in regard to historic rights per se, the extent to which those historic rights have an impact in the maritime delimitation is determined by the relationship between the application of general international law in relation to the maritime delimitation and general international law in regard to historic rights per se.

Historic rights are referred to in the following manner in judicial and arbitral practice. In the Eritrea-Yemen Arbitration[16] of 2006, the Permanent Court of Arbitration stated, "if there is indeed an established [historic] title … then it is

16 The Eritrea-Yemen Arbitration, Phase I: Territorial Sovereignty and Scope of Dispute, *Reports of International Arbitral Awards*, vol. XXII (1998), 211–234. Hereinafter referred to as the "Eritrea-Yemen Case."

by definition a prior right."[17] In the Qatar and Bahrain Case[18] of 2001, the joint dissenting opinion of Judges Bedjaoui, Ranjeva, and Koroma criticized the ICJ for not ruling on the validity of the parties' arguments on *the legal ground* of their rights, including "*the competing historical titles*."[19]

When asserting historic rights as an "exception" to general international law, the relationship between historic rights and general international law follows the course stated below, from the perspectives of the lapse of time and development of the law.

When general international law is in the process of being created and formed, those rights that are asserted and exercised as ones prior to general international law, and that do not conform with it in terms of content, are to be upheld as legal historic rights even if they are an "exception" under the international law that is being created and formed. Or, in the case of rights that conform with general international law, even when those rights come to no longer conform due to changes in general international law, in order to uphold such rights as legal rights, historic rights are asserted as an "exception." If general international law that allows for historic rights is established, then historic rights are no longer an "exception" to such international law.

If that is the case, in the relationship between historic rights and international law, it raises the issue of whether historic rights will be definitely overridden by the agreements (i.e., treaties) of the relevant States or the States of the international community in general.[20] This point will be considered later when examining the "attitude of foreign States," which is a requirement for establishing historic rights, while also considering the issue of the range of States expressing consent.

The above subsection has explained the relationship between historic rights and the "international law that governs the relationship between historic rights and the matters of international law." The next subsection will examine international law in regard to historic rights per se.

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17 *Ibid.*, para. 107.

18 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Merits), Judgment of 16 March 2001, *ICJ Reports, 2001*, 40. Hereinafter referred to as the "Qatar and Bahrain Case."

19 Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva, and Koroma, *ibid.*, para. 52.

20 There may also be a relationship between historic rights and customary international law. There is also debate as to whether customary international law treats "tacit agreement" as true agreement. Accordingly, in discussions of historic rights and the relation to the agreement of the specific States concerned or the States of the international community in general, this mainly pertains to agreement and the treaties that shape said consent.

2.3 *International Law on Historic Rights*[21]

2.3.1

As an underlying consideration, Subsection 2.3 will address the issue as to whether there are any differences in the logical constructs that are the basis for rights in the land and sea. The reasons for the argument that there are differences are as follows: 1) On land, physical effective occupation is an important element of territorial acquisition, whereas in the sea, legal logic is an important element. 2) On land, there is occupation of *terra nullius* or acquisition of land from the prior owner, whereas in the sea, rights are allocated on the basis of *res communis*. 3) On land, weight is placed on physical occupation and effective rule, with facts being more significant than norms, whereas in the sea (particularly in the current law of the sea), the focus is on the use of resources. In order to be able to derive profits from the development of resources, global markets need to function, and in order for those markets to function and to be utilized, it is necessary to follow norms rather than facts.[22]

Each argument is likely to apply to a certain degree, but what is important is that they cannot definitively be said to lead to differences in the logical constructs that are the basis for rights in the land and sea. Rather, it suffices simply to be aware that there may be such differences when determining elements such as effective occupation, the long-term use of authority, and acquiescence[23] from foreign States. Consequently, as will be explained below, it is primarily areas of the sea that are considered in regard to historic rights, and such considerations can also be applicable to the land, "*mutatis mutandis*."

2.3.2

The classification criteria and classifications of historic rights are presented in theory.[24] When forming the logical construct of historic rights as being legal rights, there is the possible issue of the extent of the applicability of this logic – namely, when following these classifications, do the logical constructs

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21 For a comprehensive consideration of historic rights, refer to Clive Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Leiden: Brill, 2007).

22 For a comparative discussion of territorial sovereignty in the land and sea, refer to Lea Brilmayer, Natalie Klein, "Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator," *New York University Journal of International Law and Politics*, vol. 33 (2001), 704; and also Irina Buga, "Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals," *International Journal of Marine and Coastal Law*, vol. 27 (2012), 59 *et seq*.

23 Terminology for expressing intent will be explained later.

24 See, for example, the articles listed in *supra* note 22 and the theories to which they refer, etc.

themselves need to be distinguished; in other words, does following these classifications require the application of different logical constructs? Nevertheless, it is difficult to conceive of classifications that would require the distinguishing of the logical constructs themselves. Rather, in considering the requirements for acquiring historic rights, the factors taken into (particular) account are indicated in the following classification criteria.

The classification criteria are: 1) Target of rights: Land or sea;[25] 2) Sovereignty or (complete and comprehensive) rights / partial rights; 3) Exclusive rights; and 4) Rights *erga omnes* or rights in relation to specific States.

2.4 *Requirements for the Establishment of Historic Rights*

2.4.1

The ILC report sets out three factors for the establishment of historic rights,[26] following the ICJ judgment in the 1951 Fisheries Case. These are: 1) The exercise of authority; 2) The attitude of foreign States; 3) Continuity. Generally, even in theory, and in judicial and arbitral precedents, historic rights are considered to converge on these three factors,[27] which will be examined in 2.4.2 to 2.4.4, respectively.

2.4.2

The first factor is "the exercise of authority."

2.3.2 stated that irrespective of the discussions on classifications surrounding historic rights, such classifications do not require the distinguishing of the logical constructs for asserting historic rights; however, they may be factors

25 The following points should be kept in mind in regard to islands. An island is a land, and so historic rights to such land can be assumed. On the other hand, the definition by international law of marine features such as islands or rocks and the types of marine area and seabed that are generated therefrom are in accordance with the law of the sea. An island requires "human habitation" as set out in Article 121 of UNCLOS, so as to have an exclusive economic zone (EEZ) and continental shelf status. In the territorial acquisition of land, in order to establish and continue effective rule, it is important to have either the habitation of people who are rulers of the land or a process of dealing with native inhabitants of the land, etc. However, it is difficult to understand the relationship between that and the "human habitation" requirement of Article 121 of UNCLOS. In the meaning shown here, the "human habitation" requirement from the perspective of the law of the sea, and the emphasis on the habitation of people who are rulers of the land or a process of dealing with native inhabitants of the land, etc., from the perspective of territorial acquisition may perhaps each be due to separate reasons.

26 ILC Report, para. 80.

27 Refer to the theories, etc., considered in the ILC Report.

to be accounted for when considering whether the requirements for acquiring historic rights have been fulfilled. This point is noticeably evident in the factor "the exercise of authority." It will be confirmed across several different elements below.

Firstly, in regard to the "subject of an act," this must be a part of the domestic (legal) system and the act must emanate from the State. The ILC report reached this conclusion by aggregating several theories.[28] The same is true of the view of the arbitral tribunal in the 1968 Indo-Pakistan Western Boundary (Rann of Kutch) Case[29] between India and Pakistan and the view regarding the Pulau Islands in the 2002 Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) Case judgment.[30]

Secondly, as for the requisite content and extent of the exercise of authority, this is regarded as differing from case to case.[31] Upon closer examination, from the perspective of the land and sea being different, it has been pointed out that while it is physically easy to effectively occupy land, it is not necessarily the same in the sea (particularly the deep sea).[32]

Thirdly, concerning the assertion of sovereignty or complete and comprehensive rights, or that of partial rights, there is perhaps also the line of thinking that the degree of proof required differs depending on the content of the rights being asserted (sovereignty or rights that do not reach the level of sovereignty). Sovereignty naturally includes exclusivity. It can perhaps be said that in rights for a "specific purpose and function," exclusivity will become an even more important factor of consideration.[33]

For example, in the Gulf of Maine Case,[34] in regard to the traditional fisheries industry of the United States, the ICJ stated that any mere factual

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28 ILC Report, para. 95.

29 The Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan, *Reports of International Arbitral Awards*, vol. XVII (1968), 416.

30 *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan* (*Indonesia/Malaysia*), Judgment of 17 December 2002, *ICJ Reports, 2002*, 625.

31 In the same vein, refer to the Island of Palmas Case (Netherland/U.S.A.), Award of April 4, 1928, *Reports of International Arbitration Awards*, vol. II (1949), 867.

32 For works that consider topics on territorial sovereignty in comparison between the land and sea, see *supra* note 22.

33 It has also been pointed out that in the ocean, it is not easy to extend effective and physical rule in vast areas of the sea; rather, it becomes a case of States making assertions based on the exclusivity of legal rights to marine resources. Brilmayer and Klein, *supra* note 22, 735.

34 Affaire de la Délimitation de la Frontière Maritime dans la Région du Golfe du Maine (Canada/États-Unis D'Amérique), Arrêt du 12 Octobre 1984 Rendu par la Chambre Constitué par Ordonnance de la Cour du 20 Janvier 1982.

predominance could not support legal validity in relation to an (established) exclusive fishery zone.[35] In the Qatar and Bahrain Case[36] of 2001 as well, Bahrain's right in regard to its pearling industry was not deemed a special circumstance in the delimitation of boundaries, the reason being that Bahrain's right was not established as being "an exclusive and quasi-territorial (territorial) right."

Fourthly, as for rights *erga omnes* or rights in relation to specific States, assertions of rights *erga omnes* are perhaps considered to need to meet higher standards to fulfil "the exercise of authority" requirement, compared to the assertions of rights in relation to specific States; or these classification standards may only relate to the "attitude of foreign States," which will be examined next.

Similarly, the acts and public announcements (they cannot be secret acts) recognized by foreign States can also be considered in relation to the following factor of "the attitude of foreign States."

2.4.3

Under 2.4.3, the second factor, "attitude of foreign States," will be taken up.

1) Not only in practice and the ILC report but in theory as well, the unilateral assertion of rights to secure historic rights is considered to be insufficient on its own; the attitude of foreign States has also become a requirement.

As stated above, there are two possible logical constructs: asserting historic rights as an "exception" to general international law, or asserting historic rights as part of the application of general international law.[37] Whether or not the attitude of foreign States becomes a requirement depends on which of these logical constructs is applied. If historic rights are included in the scope of general international law as an application of such law, then the attitude of foreign States is not a requirement.

In this regard, similar to the Fisheries Case judgement, the ILC report has taken the position of historic rights being included in the application of general international law. (It frequently indicates criticisms of and questions about theories that use logical constructs that explain historic rights as an "exception" to general international law.) However, it states that "the attitude of foreign States" is a requirement to secure historic rights.[38] Logically, while positioning historic rights as a part of considering individual and specific circumstances

35 *Ibid.*, para. 235.
36 *Supra* note 18, para. 236.
37 2.2.
38 ILC Report, para. 80.

within the scope of the application of general international law, it can call for certain requirements to be fulfilled in order to secure historic rights.[39]

The conclusion of the ILC report is that, in confirming the ICJ judgment on the Fisheries Case, "the general toleration of the international community" is a requirement.[40] That this does not refer to "interested States" but rather to "*the general attitude of the international community and requires toleration*" will be elaborated on later. Logically, either of the other factors of an "exercise of authority," and also "(long term) continuity," which will be elaborated on in some sense later, can be connected to discussions on whether assertions of historic rights are an exception to or an application of general international law. That being said, this issue is actually most prominent in relation to the "attitude of foreign States" factor.

In the Fisheries Case judgment, the straight baseline method of Norway satisfied the three factors set by the ICJ. However, it is notable that, beyond recognizing that point, the ICJ also confirmed: (a) the attitude of the United Kingdom, an interested State, and also (b) the lack of opposition from the general international community.[41] This can be understood to a certain extent when taking into account that on the one hand, particularly in regard to (a), the ICJ played a role in resolving disputes between the United Kingdom and Norway; and on the other hand, particularly in regard to (b), the ICJ also made a legal declaration in general to the international community that Norway's straight baseline method conformed with international law.

While the ICJ adopted the logic that the straight baseline method is an application of general international law and not an exception, it nonetheless considered the toleration of the United Kingdom and also of the international community, and the absence of opposition. In other words, "foreign States," whose attitude is to be taken into consideration, were extended beyond the United Kingdom to the general international community. Although the ILC report has taken the stance of positioning historic rights as being an application of general international law, it, too, states that "the general toleration of the international community" is required to secure historic rights. This can perhaps be described as adhering to the Fisheries Case judgment.

Based on this underlying consideration, several elements of the "attitude of foreign States" will now be addressed.

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39 In that case, using the terminology of this chapter, it can be said that the international law of historic rights per se is included in the general international law that governs the relationship between historic rights and the matters of international law rules and order.

40 ILC Report, paras. 120, 132.

41 *Supra* note 6, 136–139. Kanehara, *supra* note 5, 24–25.

2) What is required in terms of the attitude of foreign States?

It is easy to explain the need to consider the attitude of foreign States if historic rights are taken to be an "exception" to general international law. However, if acquiescence and recognition are required as the attitude of foreign States, and if these can be termed the "tacit *agreement*" of foreign States, this would render assertions of historic rights superfluous to begin with.[42] The reason is that the legal effect of such assertions of historic rights can be acquired by the "agreement" of foreign States. This is a consequence of the "*pacta sunt servanda*" principle.

Those scholars who adopt the "exception" theory explain that the attitude of foreign States need only to be "weak and negative (i.e., not reaching an agreement)" in the sense of toleration or inaction, which is different from a response of positive approval, in other words agreement. The point has also been made that if that is the extent to which the attitude of foreign States is required, it diminishes the substantive difference between the explanation of historic rights being within the scope of the application of general international law and the explanation of them being an "exception" to general international law.[43]

In the elements that comprise this attitude of foreign States, the issue of the scope of "foreign States," namely whether this entails specific States or the international community in general, may also be pertinent. The meaning of "opposability" in regard to foreign States will be elaborated on below, but first, it is necessary to explain how the scope of foreign States and the effect of historic rights are connected.

In order for historic rights to have "opposability" against interested States, the response (either a positive agreement or negative inaction) of those States is necessary in order to secure historic rights. This can also be perceived as similar to the so-called logic of distinguishing "special law" from "general law." Alternatively, if legality and opposability are distinguished as the concept of "opposability" having a different legal effect to "legality (or illegality)," the following logical construct can also be posited. On the one hand, in order to establish the "opposability" of historic rights between interested States and the State asserting historic rights, the attitude of the interested States is required. On the other hand, if a binding effect *erga omnes* – "legality" – is not asserted in regard to historic rights, the attitude of *States other than* interested States

42 ILC Report, para. 107.
43 ILC Report, para. 109.

is not required. Although logically this can be considered to be "opposability" *erga omnes*, it is difficult to find meaning in distinguishing that from "legality."

It could be argued that the degree to which relations with specific foreign States becomes an issue varies between cases of the delimitation of maritime boundaries and cases of territorial sovereignty in regard to land. Regarding the former, it is worth considering whether or not the attitude of specific foreign States can be described as necessary. As confirmed above, the ILC report states that the "general toleration of the international community" is required to secure historic rights. In the Gulf of Maine Case, in regard to the United States' similar argument regarding historic rights on the fishing activities of its fishermen, the Special Chamber said "no reliance could any longer be placed on that predominance," as "a valid ground for its now claiming the incorporation into its own exclusive fishery zone of any area which, in law, has become part of Canada's."[44]

In the Fisheries Case, the ICJ adopted the logic that Norway's straight baseline method is "the application of general international law and not an exception to it" and declared three criteria that can be interpreted as the content of general international law. In spite of acknowledging that the straight baseline method of Norway satisfied the three factors, the ICJ also confirmed the attitude of the United Kingdom – the (interested) State in dispute with Norway – as well as the absence of protests by the general international community. In regard to the effect of Norway's straight baseline method in relation to the United Kingdom, the French version of the judgment uses the term "*opposer*"[45] although the English version does not use the expression "opposable." Furthermore, in the Tunisia-Libya Case, both Libya and the ICJ argue "opposability."[46]

3), the meaning of "opposability" will be clarified in terms of its use in this chapter. "Opposability" can be used as a concept indicating *a legal effect that differs from* "legality/illegality." Accordingly, it can explain the following situations.

Firstly, if the foreign State is a specific one, as to the establishment of historic rights being determined by the negative attitude of the specific foreign State, even though the establishment of historic rights would not be recognized by the "unilateral assertion" of the State asserting its historic rights, the

44 *Supra* note 34, paras. 235–236.

45 *Supra* note 6, 138, in French.

46 *Continental Shelf* (*Tunisia v. Libyan Arab Jamahiriya*), Judgment of 24 February 1982, *ICJ Report, 1982*, for instance, paras. 15, 90, 92, 97, 101, 105.

attitude of the "specific" foreign State alone would negate the establishment of historic rights (as being legal). There is thus an imbalance. The "opposability" concept is useful in upholding the point that the establishment of historic rights cannot be determined by "only" a specific foreign State, while still somewhat acknowledging the effect of the foreign State's opposition.

The underlying logic is as follows. If a specific foreign State has expressed its opposition, this negates the "opposability" against said foreign State; namely, one cannot go so far as to say that historic rights are "illegal." In this case, "opposability" becomes a concept indicating *a legal effect that differs from* that of "legality/illegality." It follows, then, that this leaves the possibility for the historic rights to acquire legality, regardless of whether the "opposability" is affirmed or negated in relation to the specific foreign State. In such a situation, historic rights will not be established (will not become legal rights) merely by "the unilateral assertion of the one State" that is asserting its historic rights. At the same time, it is also not possible to determine the establishment (legality or illegality) of those historic rights "only" by the specific foreign State's intent to oppose. In this way, balance between the two can be achieved.

Secondly, if the "foreign State" entails "States covering the general scope of the international community," it can be interpreted that the "legality" of historic rights will be negated by the protest and negative attitude of the foreign State.

Taking this approach, on the one hand, even though the first element for establishing historic rights, namely, the exercise of authority, is not fulfilled (for example, the exercise of insufficiently effective authority, only sporadic acts of the State and individuals, etc.), and if the foreign State has an affirmative attitude, the possibility of the historic rights having "opposability" in relation to the foreign State is not negated. On the other hand, historic rights that have "legality" cannot be established in relation to States covering the general scope of the international community by the affirmative attitude of (only) the relevant foreign State.

Considering only the logical possibilities, this may give rise to "opposability" in relation to States covering the general scope of the international community and also the legal effect of "legality" in relation to an interested State. However, it is difficult to find any significance in this beyond logical possibilities.

That is to say, "opposability" is a concept indicating a legal effect that differs from "legality/illegality." In contrast, generally, the legal effect against States covering the general scope of the international community is "legality (or illegality)." It may also be possible to deal with this by distinguishing between

bilateral (regional/special) customary international law and general customary international law, as in 2.4.3 point 4) and 5) below.[47]

4) Another meaning of "opposability" is a concept describing the effect of special international law as opposed to the effect of general international law.

As explained above, there are theories that divide historic rights into "rights *erga omnes*" and "rights in relation to specific States." When discussing the two in terms of the "legality" of historic rights, "rights *erga omnes*" would be "historic rights in general international law" and "rights in relation to specific States" would be "historic rights in special international law." Based on this view, in the case of "rights in relation to specific States," historic rights are established by the "tacit agreement" of specific States; in the case of "rights *erga omnes*," historic rights are acquired by "custom(ary law)." This distinction is perhaps due to the fact that, in the first place, general practice is not established by the assertion and exercise of historic rights of "only one State," and so it cannot be considered to be customary law.[48]

From the perspective of treating both "rights in relation to specific States" and "rights *erga omnes*" as being the same as the concept describing the legal effect of "legality/illegality," the concepts of "opposability" and "legality" can be contrasted as follows. Essentially, opposability is a concept describing the "legality (or illegality)" of historic rights in relation to specific States, and "legality" is a concept describing the "legality (or illegality)" of historic rights in relation to States covering the general international community.

In regard to "tacit agreement and customary law," "bilateral/special/regional customary law (special law) and general customary law (general law)," "opposability and legality" and so forth, the theories are not unambiguous. However, in any case, the common issue is that one of their purposes is to distinguish between the legal effect that historic rights can have in relation to specific States, and the legal effect that historic rights can have in relation to the general international community.

With respect to this, the ILC report describes the logically inconsistent approach of affording greater weight to the attitude of "specific interested States" in the case of logical constructs that take historic rights to be an "exception" to general international law.[49] The "general international law" here is that which is binding on all States in the international community, and the "exception" in this context can be interpreted as meaning that *all States* in the

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47 In regard to the effect of historic rights, in treaties, i.e., express agreement, the attitude of foreign States does not readily become an issue.

48 For similar considerations, refer to the ILC Report, paras. 102, 116–117.

49 ILC Report, para. 118.

international community *are equal*, each with the opportunity to react and have their own interests.

This logic does not allow for the explanation that historic rights acquire opposability against specific interested States by the attitude of said States. However, unlike the ILC report, when taking historic rights to be rights of general international law, and even when acknowledging that States in the general international community have the opportunity to react and have their own interests in regard to the assertion of historic rights, in actual fact, this does not necessarily exclude the affording of greater weight to the attitude of specific interested States.[50]

5) Academics of legal positivism view tacit agreement and customary international law as being the same. However, provided such a view is not adopted, a distinction is made between both of these concepts.

If the attitudes of foreign States in regard to the assertion of historic rights can be ones of toleration, inaction, acquiescence, and recognition, even if *opinio juris*, one of the requirements in the establishment of customary international law, is satisfied, it is not possible to acknowledge the establishment of customary international law in relation to such historic rights. This is because general practice, which is another requirement of customary international law, is not established only by one State's (a single) assertion and exercise of historic rights. If a certain number of States assert and exercise historic rights, and if a maximum number of common factors can be identified in the content of said historic rights, and also if it is supported by the *opinio juris* of the international community, said historic rights will become customary international law. In that case, may the historic rights become "territorial title?" That it is possible to discuss *customary international law in regard to specific historic rights* here does not, however, mean that it is generally possible to discuss, as a matter of course, the topics of historic rights becoming territorial title and, in such a case, the customary international law that stipulates the definition, requirements and other elements of historic rights.[51]

The ILC report states that national usage can develop into international usage based on the international reaction thereto.[52] From the perspective of the ILC report's use of the logical construct of historic rights being "an application of general international law," does this mean historic rights become international usage, which in turn becomes customary international law? If that is

50 ILC Report, paras. 117–118.

51 The discussion on whether historic rights become territorial title will be considered in Section 4 of this chapter.

52 ILC Report, paras. 102–105.

the case, then international usage can be used to describe one State's assertion of international rights spurring similar acts in foreign States. However, even if (only) one State's assertion of international rights is met with an attitude of toleration by States covering the scope of the general international community, this does not imply that general practice, which is a requirement of customary international law, is established, nor can this be considered international usage in terms of customary international law.

6) If the acquiescence of foreign States is required to establish historic rights, and if this acquiescence is understood to be the same as "tacit agreement," would this render the other requirements unnecessary to begin with? Similarly, if there is opposition (similar to protests or a clear expression of opposition) from foreign States toward the assertion of historic rights, could this be deemed a *reversal of the "pacta sunt servanda principle"* and negation of said historic rights for the reason of a "lack of consent"?

If there is the (tacit) agreement of foreign States, then on the grounds of consent, the historic rights will have a legal effect. Taking that approach renders meaningless the other requirements that historic rights should satisfy.[53]

In the resolution of territorial disputes, the consent of foreign States (treaties, tacit agreement) is "decisive." With it, could it perhaps be said that territorial sovereignty is established *regardless of* other elements? Or, in international law, which sets the standard for the resolution of territorial disputes, is it also possible to modify, relax, or make relative the fundamental principle of "*pacta sunt servanda*?" These questions will be considered in Section 4.

2.4.4

2.4.4 will briefly outline the third factor, "continuity." "Continuity" here refers to recurring acts by a specific State.

The terms "ancient title" and "original title" are similar concepts to custom. In the 2008 Pedra Branca Case, although the party State made an assertion of historic title, the ICJ used the term "ancient original title."[54] Supposedly influenced by the Fisheries Case judgment, in the 2001 Cameroon-Nigeria Case, Nigeria contended the notion of historical consolidation, but the ICJ deemed

53 ILC Report, para. 107. For a point of view that refutes the notion of acquisitive prescription and recognizes tacit agreement as a requirement for historic rights, refer to Zhang Zuxing, "A Deconstruction of the Notion of Acquisitive Prescription and Its Implications for the Diaoyu Islands Dispute," *Asian Journal of International Law*, vol. 2 (2012), 328.

54 *Case Concerning Sovereignty over Pedra Branca / Pulau Batu Puteh, Middle Rocks and South Ledge* (*Malaysia/Singapore*), Judgement of 23 May 2008, *ICJ Reports, 2008*, paras. 42, 75, 290. Hereinafter referred to as the "Pedra Branca Case."

this to be highly controversial.[55] Furthermore, in the Eritrea-Yemen Case, the Permanent Court of Arbitration used the terms “original,” “traditional,” and “original historic title” in regard to Yemen’s historic assertions. It stated, “a historic title … that has been created, or consolidated, by a process of prescription, or acquiescence, or by possession so long continued as to have become accepted by the law as a title.”[56] The ILC report deems the term “ancient title” to be appropriate when assertions of historic rights are used to strengthen the legal effect of long-term occupation.[57]

Section 2 examined historic rights as typical examples of assertions of rights whereby these rights have grounds in international law or whereby they are rights under international law, while also being assertions that are different in contents to international law. It considered how international law can ensure its validity against such assertions, and how to incorporate historic rights into the world of international law under any requirements. Section 3 will consider in detail the relevant elements for international law to ensure its validity, with a particular focus on the elements of the intent of a State and temporal elements, and in the specific context of the Senkaku Islands.

3 Intent and Time – The Main Elements in Determining the Relationship with the Law

3.1 *“International Law”*

This chapter takes up subjects concerning the validity of international law. With regard to the Senkaku Islands issue, there are, in the first place, a variety of issues about applicable “international law.” They are: 1) The intertemporal law and critical date[58] for determining the applicable law; 2) “The East Asian

55 Affaire de la Frontiére Terrestre et Maritime entre le Cameroun et Nigéria (Cameroun c. Nigéria; Guinée Équatriale (intervenant)), Arrêt du 10 Octobre 2002, *CIJ Recueil, 2002*, para. 65. Hereinafter referred to as the “Cameroon-Nigeria Case.”

56 *Supra* note 16, para. 106.

57 ILC Report, para. 71.

58 In regard to critical dates, refer, for example, to Sakai Hironobu 酒井啓亘, “Ryōiki Funsō ni Okeru ‘Ketteiteki Kijitsu’ no Igi – Kokusai Shihō Saibansho no Saibanrei o Chūshin ni –” 領域紛争における『決定的期日』の意義—国際司法裁判所の裁判例を中心に— [The Significance of ‘Critical Dates’ in Territorial Disputes: Centering on Precedents of the International Court of Justice] in *Kokusai Kankei to Hō no Shihai* (*Owada Kokusai Shihō Saibansho Saibankan Taikan Kinen*) 国際関係と法の支配（小和田恆国際司法裁判所裁判官退官記念）[International Relations and the Rule of Law: Festschrift for Judge Owada Hisashi in Commemoration of His Retirement from

World Order" that was established by China in the 14th to 19th centuries, which forms the basis of "historic title"; 3) The stance of courts concerning the application of "the East Asian World Order"; and other such issues. This chapter will only indicate where these issues exist.

Hereinafter, the Senkaku Islands will be referred to as "the Islands."

3.2 *Relationship between Protests and the Temporal Element of "Critical Dates"*

3.2.1

Japan asserts its occupation of the Islands as *terra nullius*. However, when said assertion is not recognized, Japan may, alternatively, assert acquisitive prescription, although this is not its official position. The (absence) of protests of the foreign State becomes a key requirement to establish acquisitive prescription. Thus, for Japan to build its position, it must, in relation to the point in time when China is required to have started protests, consider the critical date and (the absence of) China's protests in a manner that will be advantageous to Japan. This chapter will stop short of considering the critical date but will briefly examine points that concern the protest element, as well as the "impetus" and "crystallization" of the dispute.

3.2.2

In territorial disputes surrounding occupation of *terra nullius*, the critical date[59] is deemed to be the point in time when disputes occur over "whether or not the land is *terra nullius*." There are cases of both clear and unclear critical dates; in (precedents involving) the latter case, a critical date is determined by the crystallization[60] of a dispute. In terms of the Japan-China situation, 1895 can perhaps be said to be the point in time when there was the crystallization of a dispute between the two States.

Certainly, the initial (impetus) point in time when "the question of whether or not the land is *terra nullius*" may have become an issue is likely to be the time of a related Cabinet decision by Japan in 1895. However, this was only an "impetus" that would not even "trigger" a dispute. The "crystallization" of a

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the International Court of Justice], Iwasawa Yūji 岩澤雄司, Okano Masataka 岡野正敬 (eds.) (Tokyo: Shinzansha, 2021), 147–180.

59 Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951–4," *British Year Book of International Law*, vol. 32 (1955–1956), 30.

60 In regard to the "crystallization" of disputes, refer to *The Minquiers and Ecrehos Case* (*France / United Kingdom*), Judgment of November 17th, 1953, *ICJ Reports, 1953*, 59–60, and *supra* note 58 by Sakai, 159–161.

dispute likely occurred subsequently, after the results (indicating the existence of prospective offshore oil fields) of the United Nations Economic Commission for Asia and the Far East (ECAFE) study around 1970.

3.2.3

The period of ongoing protests can be considered as the time from the crystallization of a dispute up to the critical date. It can be described as such when acts taken after the critical date are not deemed to be acts that serve a party's self-interest in the territorial dispute. Although the party State to the dispute is likely to continue its protests even after the critical date, such acts are not taken into consideration in court and do not "strengthen" the claims of the protesting State. The latter can also be said to be a negative effect of critical dates.

However, if the effect of the critical date is relative, there is no clear meaning in deeming the period of protest to be that up to the critical date.[61]

3.3 *Intent of Occupation and/or the Relationship between Effective Control and Protests*

3.3.1

There are various reasons as to why China did not make any protest for many years after 1895.[62] Japan likely asserted the acquisition of territorial sovereignty even by prescription in case 2), since 1) China did not protest against Japan's "occupation of *terra nullius*" and, 2) as an alternative assertion, even if the Islands were not *terra nullius* and were the territory of China, China did not protest after the Japanese Cabinet's decision in 1895.

61 Not protesting and "abandoning" are different. The relationship between not protesting and acquiescence will be explored later.

62 For an explanation of why China was unable to protest, including Taiwanese authorities, refer to Hungdah Chiu, "An Analysis of the Sino-Japanese Dispute over the T'iaoyutai Islets (Senkaku Gunto)," *Chinese (Taiwan) Yearbook of International Law and Affairs*, vol. 15, 21, 25; Carlos Tal Cheng, "The Sino-Japanese Dispute over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition," *Virginia Journal of International Law*, vol. 14, N. 2 (1974), 259–260; Carlos Ramos-Mrosovsky, "International Law's Unhelpful Role in the Senkaku Islands," *University of Pennsylvania Journal of International Law*, vol. 29, N. 4 (2008), 930; Han-yi Shaw, "Revisiting the Diaoyutai/Senkaku Islands Dispute: Examining Legal Claims and New Historical Evidence under International Law and the Traditional East Asian World Order," *Chinese (Taiwan) Yearbook of International Law and Affairs*, vol. 26, 114.

3.3.2

Then, assuming that protest is required, are, firstly, an official declaration / public announcement / notification likely to be elements of effective control in occupation? A negative stance can be deduced from precedents, such as in the arbitral award in the Island of Palmas Case[63] and the award in the Clipperton Island Case.[64] First of all, whether a "notification" pertains to both the intent of occupation and effective control or to either of the two cannot be specified. Moreover, the intended recipient of the "notification" could either be "other powers" or, more broadly, various States in general.

Secondly, what is the "assertion of rights"? For example, in the Libya/Malta Continental Shelf Case,[65] the ICJ did not permit the intervention of a third State (Italy),[66] and the area that Italy was "claiming" (rights to) was excluded from the geographic range covered by the judgment. In regard to this, Judge Schwebel criticized the judgment for not distinguishing between the "claims" and "rights," which, consequently, endorsed the limitation of the ICJ's competence (in the maritime delimitation) by the (mere) "claims" of a third State.[67] Similarly, the Georgia-Russian Federation Case concerning the application of the International Convention on the Elimination of All Forms of Racial Discrimination,[68] and even the Ukraine-Russian Federation Case Concerning Coastal State Rights,[69] hint at facts and situations that do not reach the level of a dispute.[70]

The distinction between "assertion of rights" or "claims" is not merely an issue of terminology, but has the following significance. The practice relating to the "*difference* between protests and an assertion of rights (assertion of opposition)" and the "*distinction* between an assertion of rights and claims (that can be described as one-sided arguments and false accusations that do not reach the level of an assertion of rights)," can provide a starting point for explaining

63 *Supra* note 31, 868.

64 *Affaire de l'île de Clipperton* (*Mexique c. France*), sentence de 28 janvier 1931, *Recueil de sentences arbitrales, Vol. II*.

65 *Libya/Malta Continental Shelf Case*, Judgment of 3 June 1985, *ICJ Reports 1985*, 13.

66 *Libya/Malta Continental Shelf Case*, Application by Italy for Permission to Intervene, Judgment of 21 March 1984, *ICJ Reports, 1984*, para. 47.

67 Dissenting Opinion of Judge Schwebel, *ibid.*, paras. 6, 12.

68 *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*), Preliminary Objections, Judgment of 1 April 2011, *ICJ Reports, 2011*, para. 129 *et seq*.

69 *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (*Ukraine and Russian Federation*), Award, Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, at https://pcacases.com/web/sendAttach/9272.

70 *Ibid.*, paras. 183 *et seq*.

Japan's position of deeming China's "complaints" about the Islands as "one-sided arguments and false accusations" and not acknowledging a dispute. The proposal of this chapter, from the perspective of the structure of Japan's integrated response, will be presented in the Conclusion.

Moreover, even if the absence of protest can be viewed as the "absence of an assertion of rights," it is difficult to extend this line of thinking further to the point of concluding that there was acquiescence on the part of China. The elements of intent are not easy to assess. If the absence of protests is the absence of an assertion of rights, and if the element of the lapse of time is added to that, do these, combined, constitute acquiescence?

3.4 *Absence of Protests from China Regarding Occupation and Acquisitive Prescription*

3.4.1

It is possible for Japan to argue, as an alternative assertion, for acquisitive prescription of the Islands due to the absence of protests from China. There have, however, been doubts raised, including in theory, as to whether acquisitive prescription is a type of territorial title.[71]

3.4.2

The first requirement of acquisitive prescription is the existence of a holder (A) of prior territorial sovereignty. Accordingly, the subject (B) that acquires territorial title by prescription will be illegally establishing sovereignty. This "illegality" is recognized as being "an infringement/encroachment on the rights of foreign States," "illegal," and "invalid."[72] Second is the lapse of time, during which there needs to be a continuous exercise of sovereignty by B. Third is the acquiescence by A. Fourth, albeit not, strictly speaking, a requirement, is the eventual abandonment of sovereignty by A.

If one is to focus on the third requirement of whether there was acquiescence by China, one needs to consider 1) the range of the subject(s) expressing

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71 For the point of view that the acquisitive prescription of territory is an effect of acquiescence rather than temporal elements, even though there is a system of prescription in international law, refer to Yanagihara Masaharu 柳原正治, "Dai 9 Shō 'Kokka Ryōiki'" 第 9 章「国家領域」[Chapter 9 'Territory'], in *Kōgi Kokusaihō* 講義国際法 [Lectures on International Law], Kotera Akira 小寺彰 et al. (eds.) (Tokyo: Yūhikaku, 2010), 246. For questions on acquisitive prescription, refer to Robert Jennings, "The Acquisition of Territory in International Law," in Robert Jennings, *Collected Writings of Sir Robert Jennings* (The Hague: Kluwer Law International, 1998), 953; Ian Brownlie, *The Rule of Law in International Affairs* (The Hague: Martinus Nijhoff, 1998), 153–155; Zhang, *supra* note 53.

72 Fitzmaurice, *supra* note 59, 31–34; Ramos-Mrosovsky, *supra* note 62, 915–916.

acquiescence (the party State to the dispute, other States in the international community, etc.) and, 2) the substance of the acquiescence – the "effect of intent" but more specifically which type, namely toleration, acquiescence or tacit agreement. Moreover, if acquiescence can be taken to mean tacit agreement, then it is possible to provide grounds for the transfer of territorial sovereignty by consent, and the question arises as to whether the element of "(the lapse of) time" is rendered unnecessary to begin with. This will be elaborated on later.

Furthermore, Japan does not need to prove China's "abandonment," provided that "abandonment" is not a requirement of acquisitive prescription. The logic for Japan's position can be constructed in the following order: a. the land was *terra nullius*, b. occupation of *terra nullius* was enforced, and c. as an alternative assertion, even supposing that the land was not *terra nullius*, China's inaction from 1895 until around 1970 formed the basis for Japan's acquisitive prescription of the Islands.

3.5 *Relationship between Prescription and Historic Title*

3.5.1

Can, therefore, historic title be considered a type of territorial title, one that is separate from acquisitive prescription?

Regardless of the terminology, the following is an example of discussions when "historic title" is viewed as a type of territorial title. Firstly, there is a point of view that acknowledges this as being the case for an assertion of rights over a long period of time, even if the requirements of acquisitive prescription are not satisfied. According to said view, acknowledgement of the requirements of acquisitive prescription is not required for an assertion of rights "since the dawn of time."[73] Secondly, there is also a point of view[74] that, for an assertion of ancient rights from time immemorial, determining the attribution of those rights depends on the relative weight among the respective claims of the States concerned (although it is possible to debate whether this can be limited to the party States to disputes).[75]

A certain theory of China does not recognize acquisitive prescription as a type of territorial title; rather, acquisitive prescription comprises the two separate requirements of a. historic title, b. tacit agreement. Furthermore, this

73 Fitzmaurice, *supra* note 59, 31.

74 *Ibid.*, 34.

75 From this perspective, the terms "ancient title" and "original title," etc., likely need to be referenced and considered in terms of their usage and effect in judicial and arbitral practice.

must be "tacit agreement,"[76] not "acquiescence." Such a view proposes a new type of territorial title of "historic title & tacit agreement" as an alternative to acquisitive prescription, and can be said to strictly require "acquiescence or tacit agreement," which are deemed to be requirements of acquisitive prescription.[77] This is probably an assertion that, if Japan makes an alternative assertion of acquisitive prescription in regard to the Islands, it must satisfy the "historic title & tacit agreement" requirement.

If there is consent (albeit tacit), then the "lapse of time" element will no longer be required. This is in accordance with the *pacta sunt servanda* principle of international law. If that is the case, it raises questions as to where the features of "historic title" are. Furthermore, if territorial title is established by consent, this brings one back to the original question of "is historic title a type of territorial title?" with the conclusion being there is no need for it.

The ILC report requires the element of intent of the conflicting party State to the dispute (setting aside the issue of the range of the State) for establishing historic rights. However, the ILC states that territorial title is established by consent if there is a tacit "agreement," which renders meaningless the temporal element. Accordingly, the element of intent is toleration that is "not at the level of" consent.[78]

Lastly, this chapter will summarize the key issues relating to the effect of intent in territorial disputes, while referring to the foundation that is the *pacta sunt servanda* principle.

4 Reconsideration of the Element of the "Effect of Intent" in Territorial Disputes

4.1 *Aspects Involving the "Effect of Intent"*

Focusing on the considerations in this chapter, the effect of intent in territorial disputes appears in the following aspects: 1) the possibility of differences and distinctions among the "absence of protests," the "absence of an assertion of (opposing) rights" and "tolerance, acquiescence and tacit agreement"; 2) requirements of acquisitive prescription;[79] and 3) requirements for the establishment of historic rights.

76 Zhang, *supra* note 53, 328.

77 *Ibid.*, 328–331.

78 2.4.3, point 2).

79 If that effect of intent is a "(tacit) agreement," then, to begin with, the acquisition of territory is the result of a consent, which renders meaningless temporal elements. In that case,

With regard to the Fisheries Case, this chapter focused on whether Norway's straight baseline method could be opposable to the United Kingdom or if there was general toleration by the international community. Adhering to the terminology of this chapter, it also considered the legal effect that arises from the effect of intent as either an issue of "opposability" or of "legality (or illegality)," or an effect of general international law or special (regional) international law.

4.2 *"Consent" in the Effect of Intent*

4.2.1

It is possible for there to be "degrees" of the effect of intent, and this chapter thus far has considered toleration, acquiescence, and a tacit agreement. Indeed, the difference between acquiescence and a tacit agreement is not always clear. Moreover, even when distinguishing between toleration and acquiescence,[80] there remain questions as to whether such a distinction can be actually determined by the courts.

As for the "degrees" of the effect of intent, the following points must be kept in mind when considering Japan's response regarding the Islands. Although Japan asserts occupation of *terra nullius*, as an alternative assertion, it is possible to argue acquisitive prescription by Japan. In that case, 1) Can the absence of protests be called acquiescence?; and 2) If acquiescence includes consent, this renders meaningless the temporal element of acquisitive prescription from the start, and it is thus possible to assert the establishment of Japan's territorial sovereignty by a tacit agreement, rather than by acquisitive prescription.[81] In doing so, it is also important to invoke the following legal principles.

4.2.2

For a more detailed consideration of the effect of intent, (judicial) doctrines and principles that corroborate the formation of consent can be found in theories and judicial and arbitral practices. For example, there are silence and estoppel, and, as slightly more general principles, good faith and stability. It is not always easy to logically organize these (judicial) doctrines and other principles in terms of which phase to position them at. Perhaps there is an original means of organizing them in the setting of territorial disputes, and it may also

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the question also arises as to whether acquisitive prescription can be perceived as a type of territorial title.

80 ILC Report, paras. 107, 109.

81 Even in such a case, it is still possible to maintain an assertion of acquisitive prescription as a concurrent assertion.

be possible and appropriate to propose a logical construct that is applicable in general in international law.[82]

4.3 *"Consent" in Territorial Disputes*

The "*pacta sunt servanda* principle" is a fundamental principle in international law. In the transfer of territorial sovereignty by "consent" there is "successive acquisition." This notion is based on the idea of there being a holder of territorial sovereignty (A), and another subject (B) that receives the transfer of territorial sovereignty by consent.

On the one hand, in the case of the assertion of historic title, if this is recognized by the "consent" of various States, the idea is not that territorial sovereignty is transferred from the holder (A) of territorial sovereignty to the subject (B) that is asserting historic title, but one that is clearly different from the notion of successive acquisition. On the other hand, in the case of acquisitive prescription, if this is recognized by a "tacit agreement," it is not impossible to understand, as a type of successive acquisition, the transfer of territorial sovereignty, by the tacit agreement of the prior holder of territorial sovereignty (A), to the subject (B) that is asserting acquisitive prescription, despite the temporal elements being rendered meaningless. When arranged in the traditional theory of territorial title, if acquisitive prescription could be taken to be an original acquisition and not a successive acquisition, then it would be necessary to restructure the theory of territorial title.

The *pacta sunt servanda* principle is a fundamental principle in international law. However, does it make sense for temporal elements to be rendered meaningless by the involvement of "consent?" In the unique context that is the theory of territorial title, is it not conceivable that "consent" is given a unique effect and that effect is diminished? Furthermore, is it also possible that there are differences in the notions of "State" and "consent" in different legal orders, such as (modern) Western international law and the East Asia world order? In that regard as well, there is perhaps still room for further consideration of "consent." At the very least, in the territorial issues of Japan, which belongs to East Asia, there can be said to be room to reconsider the significance of consent in territorial disputes from such perspectives.

82 See, Chapter 6 (Kitamura) of this book.

5 Conclusion

This chapter focused on the Senkaku Islands ("the Islands") and examined the validity of international law. It mainly dealt with historic rights, prescription, and the effect of intent as issues of the principles of territorial acquisition. Indeed, with regard to the Islands, Japan's response to the activities of Chinese vessels (government vessels, warships, and fishing boats) in the surrounding waters of the Islands is primarily based on the law of the sea. Lastly, in this Conclusion, in regard to the Islands issue, this chapter proposes that Japan, as a sovereign State, maintains an "integrated position" built on assertions that are based, in particular, on the theory of territorial title, the law of the sea, and the concept of disputes, respectively.[83] The reason for this is that the considerations in this chapter, which focused mainly on the theory of territorial title, should serve their intended functions, precisely as part of Japan's integrated position.

Japan's official position is that there is "no dispute" concerning territorial sovereignty of the Islands. To maintain this position, Japan appears to adopt, in principle, an approach of being *passive* in its response to China's assertions and acts, basically "not letting itself be provoked, *remaining silent, and shrinking away*."[84] This, consequently, also invites further provocations and other unbridled acts by China.

It is possible to conceive of a *proactive* response to prevent this from occurring, namely, a response grounded in the "rule of law,"[85] which is the central pillar of Japan's foreign policy, and criticizes China's attempts to unilaterally change the status quo by force, while at the same time maintaining Japan's position that there is no dispute over the Islands. Similarly, in another central pillar of Japan's foreign policy as well, that of a "Free and Open

83 The details are provided in a separate paper. Kanehara Atsuko, "Refining Japan's Integrative Position on the Territorial Sovereignty of the Senkaku Islands," *International Law Studies* (*2021*), vol. 97.

84 Not all of Japan's response to China's government vessels can necessarily be called "passive." See, for example, *ibid.*, III.1.(2). This is also closely related to the discussions on improving China–Japan relations held on November 7, 2014 (https://www.mofa.go.jp/a_o/c_m1/cn/page4e_000150.html), which mentions "the emergence of tense situations in recent years in the waters."

85 In the keynote speech by (then) Prime Minister Abe Shinzo in the Shangri-La Dialogue on May 30, 2014, he emphasized the "rule of law" at sea, which refers to the three principles of 1) Claims based on international law, 2) Not using "force or coercion," and 3) Peaceful settlement. https://www.mofa.go.jp/fp/nsp/page4e_000086.html.

Indo-Pacific,"[86] the "rule of law" is the first of the three central pillars. These pillars are also becoming established as common interests of the international community.

If that is the case, Japan should perhaps respond proactively to China's attempts to unilaterally change the status quo by force in the following manner:[87] 1) rather than a passive approach of avoiding the establishment of a dispute, 2) state clearly that China's assertions are nothing more than "false accusations" and do not constitute oppositional assertions that establish a dispute, and 3) proactively criticize and prevent China's attempts to unilaterally change the status quo by force. Specifically, based on the theory of territorial title, such an approach entails proving that there are no rational grounds whatsoever to China's assertions, and thoroughly refuting those assertions. Furthermore, in accordance with the notion of a dispute, Japan should deny the establishment of a dispute on the basis of China's assertions being nothing more than "false accusations." China and Japan are not in an equal position as mutual "party States to a dispute." Moreover, in response to China's unilateral attempts to change the status quo by force in the waters around the Senkaku Islands, besides of course taking steps based on the law of the sea, Japan should also implement effective measures[88] by invoking the fundamental principle of international law of the "respect of sovereignty" with the evidence of an infringement of Japan's sovereignty.

This would constitute and realize the sovereign State of Japan's "integrated" position, which leverages multiple perspectives based on the fundamental principles of international law of the theory of territorial title, the law of the sea, the notion of disputes, and the respect of sovereignty. Moreover, in the realization of this "integrated" position, Japan would not only be protecting its own rights but also simultaneously contributing to the realization of the common interests of the international community. This would be no less than an expression of Japan's wisdom as a sovereign State meriting the label of being a subject of international law.

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86 https://www.mofa.go.jp/files/000407643.pdf.

87 The Coast Guard Law of China, which was enacted in February 2021, is perhaps precisely what promotes such attempts to change the status quo by force.

88 Kanehara, *supra* note 83, 4.(3).

Bibliography

Secondary Sources

Japanese

Sakai, Hironobu 酒井啓亘. "Ryōiki Funsō ni Okeru 'Ketteiteki Kijitsu' no Igi – Kokusai Shihō Saibansho no Saibanrei o Chūshin ni –" 領域紛争における『決定的期日』の意義 – 国際司法裁判所の裁判例を中心に – [The Significance of 'Critical Dates' in Territorial Disputes: Centering on Precedents of the International Court of Justice]. In *Kokusai Kankei to Hō no Shihai* (*Owada Kokusai Shihō Saibansho Saibankan Taikan Kinen*) 国際関係と法の支配(小和田恆国際司法裁判所裁判官退官記念) [International Relations and the Rule of Law: Festschrift for Judge Owada Hisashi in Commemoration of His Retirement from the International Court of Justice], edited by Iwanaga Yūji 岩澤雄司 and Okano Masataka 岡野正敬, 147–180. Tokyo: Shinzansha, 2021.

Yamagami, Shingo 山上信吾. "'Koyū no Ryōdo' o Kangaeru" "固有の領土"を考える [Considering inherent territory]. In *Nihon Gaikō Kyōkai Hō* 日本外交協会報 [The Society for Promotion of Japanese Diplomacy Magazine], 1. Tokyo: The Society for Promotion of Japanese Diplomacy, 2012.

Yanagihara, Masaharu 柳原正治. "Dai 9 Shō 'Kokka Ryōiki'" 第 9 章「国家領域」 [Chapter 9 'Territory']. In *Kōgi Kokusaihō* 講義国際法 [Lectures on International Law], edited by Kotera Akira 小寺彰 et al., 246. Tokyo: Yūhikaku, 2010.

Western Language

Brilmayer, Lea and Natalie Klein. "Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator." *New York University Journal of International Law and Politics* 33 (2001): 703–768.

Brownlie, Ian. *The Rule of Law in International Affairs*. The Hague: Martinus Nijhoff, 1998.

Buga, Irina. "Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals." *International Journal of Marine and Coastal Law* 27 (2012): 59–95.

Cheng, Carlos Tal. "The Sino-Japanese Dispute over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition." *Virginia Journal of International Law* 14, no. 2 (1974): 221–266.

Chiu, Hungdah. "An Analysis of the Sino-Japanese Dispute over the T'iaoyutai Islets (Senkaku Gunto)." *Chinese (Taiwan) Yearbook of International Law and Affairs* 15 (1996–1997): 1–27.

Fitzmaurice, Gerald. "The Law and Procedure of the International Court of Justice, 1951–4." *British Year Book of International Law* 32 (1955–1956): 20–96.

Jennings, Robert. "The Acquisition of Territory in International Law." In Robert Jennings, *Collected Writings of Sir Robert Jennings*. The Hague: Kluwer Law International, 1998.

"*Judicial Regime of Historic Waters, Including Historic Bays: Study Prepared by the Secretariat*." UN Doc. A/CN.4/143, March 9, 1962.

Kanehara, Atsuko. "Validity of International Law over Historic Rights: The Arbitral Award (Merits) on the South China Sea Dispute." *Japan Review* 2, no. 3 (2018): 8–35.

Kanehara, Atsuko. "Refining Japan's Integrative Position on the Territorial Sovereignty of the Senkaku Islands." *International Law Studies* 97 (2021): 1588–1632.

Ramos-Mrosovsky, Carlos. "International Law's Unhelpful Role in the Senkaku Islands." *University of Pennsylvania Journal of International Law* 29, no. 4 (2008): 903–946.

Shaw, Han-yi. "Revisiting the Diaoyutai/Senkaku Islands Dispute: Examining Legal Claims and New Historical Evidence under International Law and the Traditional East Asian World Order." *Chinese* (*Taiwan*) *Yearbook of International Law and Affairs* 26 (2008): 95–168.

Symmons, Clive. *Historic Waters in the Law of the Sea: A Modern Re-Appraisal*. Leiden: Brill, 2007.

Zhang, Zuxing. "A Deconstruction of the Notion of Acquisitive Prescription and Its Implications for the Diaoyu Islands Dispute." *Asian Journal of International Law* 2 (2012): 323–338.