CHAPTER 6

Significance of Silence in Territorial Disputes

Toward Legal Construction on "75 Years of Silence" regarding the Senkaku Islands (*Pinnacle Islands*)

Tomofumi Kitamura

1 Introduction

Silence, or the fact of failure to act via an absence of protest, reservation, or other reaction, is often given decisive importance in territorial disputes. This applies to the territorial issues facing Japan, and particularly to the Senkaku Islands issue. In fact, some theories in Japan regarding territorial sovereignty to the Senkaku Islands emphasize that neither China nor others made any protests from Japan's incorporation of the islands in 1895 until 1971. Japan asserts that it acquired territorial sovereignty over the Senkaku Islands through occupation of *terra nullius*. Even if the Senkaku Islands were not *terra nullius*, it has been pointed out that as a result of the absence of protests by China and others in the subsequent 75 years, Japan acquired territorial sovereignty. However, the reasons given for why the absence of protests would result in Japan's acquisition of the territorial sovereignty differ depending on the proponent. For example, while Taijudō suggests that the absence of China's protest signifies "acquiescence" of Japan's territorial sovereignty and thus justifies the transfer of territorial sovereignty,[1] Matsui treats the absence of protest as establishing a title via a "continuous and peaceful display of territorial sovereignty."[2] Miyoshi, on the other hand, states that China's absence of protest indicates "acquiescence" of Japan's territorial sovereignty and thereby creates an "estoppel" effect,[3] although he also acknowledges the role of the absence of

1 Taijudō Kanae 太壽堂鼎, *Ryōdo Kizoku no Kokusaihō* 領土帰属の国際法 [International Law of Territory Possession] (Tokyo: Tōshindō, 1998), 204.

2 Matsui Yoshirō 松井芳郎, *Kokusaihō Gakusha ga Yomu Senkaku Mondai* 国際法学者が読む尖閣問題 [International Law Theorists' View of the Senkaku Islands Issue] (Tokyo: Nippon Hyōronsha, 2014), 141–142.

3 Miyoshi Masahiro 三好正弘, "Ryōdo Shutoku ni Okeru Kōgi to Mokunin" 領土取得における抗議と黙認 [Protest and Acquiescence in Territorial Acquisition], *Tōsho Kenkyu Jyānaru* 島嶼研究ジャーナル, vol. 4, no. 2 (2015), 44.

protest in providing grounds for "prescriptive title or historic title."[4] There is as yet no agreement among theories regarding how to legally define the "75 years of silence" regarding the Senkaku Islands, or, in other words, what type of legal effect to determine from this silence and via what concept.

The background to the abovementioned lack of agreement regarding the Senkaku Islands issue is disagreement or confusion about the concepts themselves of acquiescence, estoppel, prescription, etc. For example, Marques Antunes, under the item "acquiescence" in the Encyclopedia of Public International Law, refers to the legal maxim that "he who keeps silent is held to consent if he must and can speak" (*Qui tacit consentire videtur si loqui debuisset ac potuisset*) and defines the concept as "a consent tacitly conveyed by a State, unilaterally, through silence or inaction, in circumstances such that a response expressing disagreement or objection in relation to the conduct of another State would be called for" with a recommendation to refer also to the entry for "Unilateral Acts of States in International Law."[5] Therefore, acquiescence in this case seems to be understood as an "instantaneous act" of tacit consent (expression of intent) through silence as a juridical act with the effect of "changes in substantive rights." However, the author also explains that acquiescence requires a "lengthy lapse of time"[6] and may produce the effect of "estoppel,"[7] and it is hence unclear how the author understands this concept. Furthermore, even though the author states that acquiescence differs from prescription because it involves consent along with the requirement for a "lengthy lapse of time,"[8] there are also scholars who argue that "acquiescence" is important in establishing prescription.[9] In this way, the concepts of acquiescence, estoppel, and prescription are discussed in a closely intertwined manner, and there are disagreement and confusion broadly across the spectrum from the conditions and effects of these concepts, as well as whether or not they exist.

The interconnectedness of the concepts of acquiescence, estoppel, and prescription, etc., has distant roots. This chapter, in consideration of the abovementioned issues and with the ultimate aim of finding insights for addressing

4 *Ibid.*, 26.

5 N. S. Marques Antunes, "Acquiescence," in *Max Planck Encyclopedia of Public International Law* (online edition, last updated in September 2006), para. 2.

6 *Ibid.*, para. 25.

7 *Ibid.*, para. 24.

8 *Ibid.*, para. 25.

9 For example, James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019), 219–220.

the Senkaku Islands issue, attempts to untangle the relationship among these concepts and ascertain whether or not they exist, as well as their content. For this purpose, the chapter reviews judicial practices from before World War II and theories regarding acquiescence, estoppel, and prescription (Section 2) and early judicial practices of the International Court of Justice (ICJ) and related theories (Section 3). In terms of the latter, i.e., judicial practices of the ICJ, this chapter conducts in-depth reviews of the Fisheries Case judgement and the Preah Vihear Temple Case judgement. Both judgements stand, respectively as major precedents on historic title (prescription) and acquiescence, and acquiescence and estoppel. At the same time, there are fundamental disagreements in how these judgements are understood, including differing opinions on which concepts and what understanding of them were used in determining the judgements, making them highly useful judicial practices for comprehending these concepts. Nevertheless, it is obviously not possible to obtain definitive answers for understanding these concepts and finding insights for addressing the Senkaku Islands issue just by reviewing the ICJ's early judicial practices. The final section therefore sketches out a provisional understanding of the various concepts gleaned from the abovementioned review and presents suggestions and key points in looking at subsequent judicial practices (Section 4).

This chapter provisionally defines acquiescence as a tacit consent (expression of intent) through silence without prejudice to its effect. Prescription in this chapter refers to acquisitive prescription. In the review covered by this chapter, prescription and title of "continuous and peaceful display of territorial sovereignty," as well as historic title, are understood as coming under the same legal framework with the same purpose and content. In any discussion that does not delineate these items, the term "prescription, etc." is used.

2 Judicial Practices and Theories before World War II

2.1 *Prescription and Correlation between Prescription and Acquiescence*

2.1.1 Theories

The modes of territorial acquisition in international law have been discussed in an analogy from Roman law that regulated acquisition of land by individuals. Prescription is one such mode of acquisition. Grotius was the precursor of this discussion and heavily influenced subsequent theories. Grotius pointed out that, because usucaption was introduced from Roman law to municipal law (time in fact, in its own nature has no effective force), it had no place in the relations between States. At the same time, however, he wondered if that

would therefore mean that contests about kingdoms and the boundaries of kingdoms never come to an end with lapse of time.[10] Grotius' answer to this question is the theory of immemorial possession and assumed abandonment of rights through silence. According to Grotius, human expression of intent occurs not just with words but also through acts and failure to act. A person who knows that their property is in the possession of another but is silent of their own free will is assumed to have abandoned their right thereto. The lapse of time offers many opportunities for cognizance of one's property in the possession of another and taking counsel against fear, in other words, to overcome constraints on one's free will. Therefore, silence over a long period of time implies the abandonment of a right, and specifically if a length of time exceeding the memory of man has passed, it will always seem sufficient to imply such an abandonment.[11]

Therefore, for Grotius, it is the tacit expression of intent, in other words acquiescence, that results in the abandonment of a right by the right holder and the acquisition of a right by the possessor,[12] and this acquiescence is presumed based on possession exceeding the memory of man and silence regarding such possession. However, Grotius also mentions roughly 100 years as possession exceeding the memory of man,[13] and seems to wish to set a limit on the period of time required to infer acquiescence. Moreover, while Grotius explains, as the reason for presuming acquiescence from silence over a long period of time, that the lapse of time suggests that the right holder knows of the possession but is silent of their own free will, he also states that it is to the interest of human society that governments be established on a sure basis and beyond the hazard of dispute and all implications which point in that direction ought to be looked upon with favor.[14] This leaves a question about whether he truly aimed to identify the intent of the right holder. Grotius rejects

10 Hugo Grotius, *De jure belli ac pacis*, book ii, chap. iv, s. 1.

11 *Ibid*., ss. 3–7.

12 Grotius explains the effect of acquiescence as abandonment rather than transfer of rights. Although possession of another party's property actually occurs prior to abandoning the right, he positions acquisition of territory in this manner as "assumed abandonment of ownership and occupation consequent thereon" (*ibid.* (chapter title)) and keeps it within the scope of original acquisition. For more on these points, as well as Grotius' discussion of *ius voluntarium*, refer in particular to Yanagihara Masaharu 柳原正治, "Shoyūken, Shihaiken" 所有権・支配権 [Ownership Rights and Control Rights], in Sensō to Heiwa no Hō [Hoseiban] 戦争と平和の法[補正版] [*Laws of War and Peace* (*Revised Edition*)], Ōnuma Yasuaki 大沼保昭 (ed.) (Tokyo: Tōshindo, 1995), 237–238.

13 Grotius, *supra* note 10, s. 7.

14 *Ibid*., s. 8.

the existence of prescription in natural law on the ground that time in its own nature has no effective force. However, his intention could be understood to be to "introduce" prescription into natural law and thus in relations between States for the interest of peace and stability by using the "technique" of the presumption of acquiescence.

Scholars of natural law subsequently understood that the Grotius theory explained above recognized the existence of prescription in natural law, and, based on this theory, they discussed whether or not prescription did in fact exist, as well as its content. For example, Pufendorf introduces the Grotius theory and criticizes the basis as not always being valid. He points out that a long continued silence does not necessarily give sufficient ground to suppose a tacit derelict for it may happen that a man might either have been ignorant of his right, or hindered from asserting it through apprehension or want of power.[15] Having raised that point, Pufendorf then argues that, as the propriety of things was introduced out of a regard to the common peace, based on the same principle, they who have been let into the possession of anything upon a fair and honest presumption should be freed from perpetual suits and quarrels about their title. Furthermore, he states that, while the space of time is not determined by natural reason or the universal consent of nations, this can be decided by each particular case considering the various circumstances affecting the ancient owner and the new possessor.[16] Pufendorf understood that Grotius's intention was to establish the existence of prescription under natural law and thus in relations between States as being a framework for the purpose of a stable order and therefore considered that long continued silence on possession should always result in the acquisition of rights. Recognizing, however, that this is not guaranteed by assumed acquiescence, Pufendorf based prescription under natural law directly on the interest of peace and stability, drawing on his theory of the propriety of things being introduced for the same interest.

In contrast, Wolff retains and consistently upholds the logic of assumed acquiescence. He states that prescription refers to the acquisition of ownership from presumed abandonment of a thing and argues that abandonment is presumed from long continued silence for the reason that it is not credible that in so great a space of time the other party should not have obtained knowledge of his right, or that no opportunity of questioning it had arisen. Wolff further explains that, if reasons for long-continued silence are alleged,

15 Samuel von Pufendorf, *De jure naturae et gentium libri octo*, book iv, chap. xii, s. 8.

16 *Ibid*., s. 9.

the reason for the presumption fails, and consequently also the prescription.[17] While Pufendorf positions prescription as a title that produces a right based on possession and long continued silence, for Wolff, they are merely facts which allow the presumption that the right holder was, at some point, placed in a situation where he "could and ought to speak"[18] but, by failing to do so, acquiesced in the right of the possessor. Here, it is the acquiescence, that is to say the consent, of the right holder, not public interests such as peace and a stable order, that creates the right of the possessor.[19] Prescription in this context therefore, rather than being a title, refers to acquisition of a right produced by acquiescence derived through a specific method of presumption based on possession and long continued silence. Wolff consistently upholds this logic of assumed acquiescence and positions it as a literal presumption (*juris tantum*) that allows for rebuttal based on lack of knowledge, constraints on free will, and other defenses.

Vattel, meanwhile, defines prescription as a framework that creates acquisition of a title only on the basis of the fact of long-term possession uninterrupted and undisputed, while also referring to Wolff's view of prescription and stating that the two stances are easily harmonized and not in conflict.[20] He argues that natural law demands respect for ownership rights for the purpose of protecting peace, safety, and welfare in human society, and, therefore, according to natural law, it can be assumed that an owner who ignores their own rights over a long period of time without a legitimate reason has abandoned said rights.[21] In this way, Vattel also mentions the logic of assumed acquiescence, but bases his reasons for the presumption on the interests of human society, such as peace, instead of probability in the form of the unlikeliness that lack of knowledge and constraints on free will would continue over a long period of time. The main issue then becomes the nature of such a presumption. In this regard, Vattel states that, considering the need for peace among States, even those States that remain silent due to reasons such as fear must endure the loss of rights,[22] and therefore seems to consider that at least in the case

17 Christian Wolff, *Jus gentium methodo scientifica pertractatum*, book iv, chap. vii, ss. 358 and 363.

18 *Ibid.*, s. 359.

19 Wolff also describes the abandonment of a right as being an effect of acquiescence, while stating that a right cannot be "transferred" without the consent of the owner (*ibid.*, s. 363). In contrast to Grotius (refer to previous footnote 12), he does not use the construction of "assumed abandonment of ownership and 'occupation consequent thereon.'"

20 Emer de Vattel, *Le droit de gens*, book ii, chap. xi, s. 140.

21 *Ibid.*, s. 141.

22 *Ibid.*, s. 149.

of prescription in relations among States, the nature of the presumption is one without room for rebuttal (*juris et de jure*). Even though he speaks of presumed acquiescence, if the presumption does not actually allow rebuttal and the acquiescence is fictious in the interest of peace, this is tantamount to arguing for the existence of a title that results in the acquisition of a right based only on long-term possession uninterrupted and undisputed for the purpose of maintaining peace and stability.

As explained above, there exists, among scholars of natural law, the understanding of prescription as a title that produces a right premised on possession and long continued silence for the purpose of maintaining peace and stability, and also as an acquisition of a right produced by acquiescence derived through a specific method of presumption based on possession and long continued silence. (Hereinafter, the former shall be referred to as prescription for the purpose of peace and stability and the latter as prescription premised on acquiescence.) Theories at the end of the 19th century and early 20th century more frequently understood prescription in international law in the former sense.[23] The following opinion from Hall is a representative example.

> Title by prescription arises out of a long-continued possession, where no original source of proprietary right can be shown to exist, or where possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his right, or is unable to do so. … [T]he object of prescription as between states is mainly to assist in creating a stability of international order which is of more practical advantage than the bare possibility of an ultimate victory of right.[24]

Hall explains prescription in international law as title with the purpose of maintaining peace and stability and accepts the establishment of prescription in not only cases of negligence in asserting the right by the right holder but also when it could not be done, that is to say when the right holder did not consent. Hall also argues that prescription can be established regardless of whether there is an actual right holder. If the basis for prescription is the consent of the right holder, a true right holder must exist and be identified because it is not possible to give something that you do not possess (*nemo dat quod non habet*). However, this does not apply in a case of prescription for the

23 For example, refer to documents listed in D. H. N. Johnson, "Acquisitive Prescription in International Law," 27 *British Year Book of International Law* (1950), 333, n. 1; Y. Z. Blum, *Historic Titles in International Law* (The Hague: M. Nijhoff, 1965), 12–13.

24 W. E. Hall, *A Treatise on International Law*, 4th ed. (Oxford: Clarendon Press, 1895), 123.

purpose of peace and stability. If things are settled through possession without interruption over a long period of time, this should provide the basis for rights enforceable against all parties.

It is unclear why in this period the prevalent view became that of prescription for the purpose of peace and stability. However, the transition from thinking based on natural law to legal positivism may have provided liberation from the difficult issue of how to establish a basis, under natural law, for the existence of a framework that allows the acquisition of rights through the lapse of time and reduced the necessity of relying on the "technique" of assuming acquiescence. That being said, there are no statutes under international law that establish the prescription period, and some theorists used this as the basis for rejecting the existence of prescription.[25] Furthermore, the transition from thinking based on natural law to legal positivism instead raised the need to ground the existence of prescription in international practice. While judicial practices invoking prescription started to appear, particularly from the 20th century, how is prescription utilized as a concept and what are the judgements regarding it in these judicial practices?

2.1.2 Judicial Practices

The Grisbådarna Case (1909) in which Norway and Sweden filed suits with the Permanent Court of Arbitration (PCA) to delimit their maritime boundary is an early practice that could be deemed a precedent regarding prescription in international law. The PCA decided that according to the international law of the 17th-century, in which parities asserted that a boundary line in the disputed sea areas was automatically drawn as a result of cession of the adjoining land territory, the line should be made according to the general direction of the land territory. However, the PCA attributed all of the Grisbådarna banks, which based on the aforementioned boundary line would have been partly owned by both parties, to Sweden[26] and explained its reasoning in the following manner.

> [I]t is a well established principle of the law of nations that the state of things that actually exists and has existed for a long time should be changed as little as possible; this principle is especially applicable in the

25 For example, A. W. Heffter, *Le Droit international de l'Europe*, 4th ed. (Paris: A. Cotillon, 1883), 39–40. Fauchille criticizes this theory because it rejects the existence of the principle itself based on a lack of rules regarding the application of the principle. (Paul Fauchille, *Traité de droit international public*, 8th ed. (Paris: Rousseau, 1925), vol. 1, pt. 2, 755.)

26 Affaire des Grisbadarna (Norvège, Suède), 23 October 1909, XI *RIAA*, 160.

> case of private interests which, once disregarded, cannot be effectively preserved by any manner of sacrifice on the part of the Government of which the interested parties are subjects; … from these various circumstances it appears so probable as to be almost certain that the Swedes exploited the banks in question much earlier and much more effectively than the Norwegians.[27]

In this case, both parties invoked prescription, but the PCA did not mention this term. Furthermore, looking at subsequent judicial practices, questions linger as to whether effective exploitation by a private entity could be rightly called effective control by a State. Nevertheless, the aforementioned decision attributed to Sweden a sea area that would have been attributed to Norway based precisely on the principle to not move settled things (*quieta non movere*), and therefore this case can be understood as a practice that granted rights to one of the parties premised on prescription for the purpose of peace and stability.

The Chamizal Case (1911) is a precedent involving a detailed decision on the conditions for prescription in international law. In this case, while the United States and Mexico concluded a treaty in 1848 that stipulated the Rio Grande River as the boundary line, there was a dispute regarding the possession of a tract of land that shifted from the southern side to the northern side due to changes in the river's channel. While the United States contended that it acquired the title of the tract in question by prescription alleged to result from "the undisturbed, uninterrupted, and unchallenged possession of the territory since 1848,"[28] the International Boundary Commission reached the following decision on this assertion.

> Without thinking it necessary to discuss the very controversial question as to whether the right of prescription invoked by the United States is an accepted principle of the law of nations, in the absence of any convention establishing a term of prescription, the commissioners are unanimous in coming to the conclusion that the possession of the United States in the present case was not of such a character as to found a prescriptive title. … On the contrary, it may be said that the physical possession taken by citizens of the United States and the political control exercised by the local and Federal Governments, have been constantly challenged and

27 *Ibid.*, 161.

28 The Chamizal Case (Mexico, United States), 15 June 1911, XI *RIAA*, 317.

> questioned by the Republic of Mexico, through its accredited diplomatic agents.[29]

The Commission refrains from discussing the existence of prescription in international law but cites prescription in domestic law and addresses the conditions for its application. The point explained in the award that "(i)n private law, the interruption of prescription is effected by a suit, but in dealings between nations this is of course impossible, unless and until an international tribunal is established for such purpose"[30] deserves attention. While this could be interpreted as stating that it is necessary to file a suit in the case of the existence of an international tribunal,[31] if the basis of prescription in international law is acquiescence of the right holder, it is unclear why protest is not enough.

Furthermore, the Island of Palmas Case (1928) is an important precedent as a case in which the PCA mentioned prescription and acknowledged the right of one of the parties based on it. In this case, the United States argued that Spain discovered and acquired sovereignty over the Island of Palmas before 1648 and subsequently ceded it to the United States, while the Netherlands asserted that it held sovereignty over the island and exercised it from 1677 or a date prior to 1648.[32] The PCA acknowledged the Netherlands' title based on the following decision.

> practice, as well as doctrine, recognizes – though under different legal formulae and with certain differences as to the conditions required – that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title.[33]
>
> Since the moment when the Spaniards, in withdrawing from the Moluccas in 1666, made express reservations as to the maintenance of their sovereign rights, up to the contestation made by the United States in 1906, no contestation or other action whatever or protest against the exercise of territorial sovereignty by the Netherlands over the Talautse (Sangi) Isles and their dependencies (Miangas included) has been recorded. The peaceful character of the display of Netherland's sovereignty for the entire period to which the evidence concerning acts of display relates (1700–1906) must be admitted.[34]

29 *Ibid.*, 328.
30 *Ibid.*, 329.
31 Johnson, *supra* note 23, 340–342.
32 Island of Palmas Case (Netherlands, USA), 4 April 1928, II *RIAA*, 837–838.
33 *Ibid.*, 839.
34 *Ibid.*, 868.

The award introduces new language of "continuous and peaceful display of territorial sovereignty" to explain the title of the Netherlands to the Island of Palmas. Furthermore, while it does not recognize the Island of Palmas as being *terra nullius* at the time of the start of the acts of display, it also does not recognize it as Spanish territory. Due to these points, opinions are split on how to understand the award, with some viewing it as approving occupation,[35] others viewing it as not distinguishing between occupation and prescription and applying conditions shared by both,[36] and yet others viewing it as presenting "new territorial law" distinct from the existing theories on the modes of territorial acquisition.[37]

However, the award rephrases "continuous and peaceful display of territorial sovereignty" as "so-called prescription,"[38] asserts that doctrine has approved this title, explains that federal States applying international law to interstate relations have also recognized it, and cites a US Supreme Court decision that included quotations from "Vattel and Wheaton, who both admit prescription founded on length of time as a valid and incontestable title."[39]

The split in opinions on how to understand the title of "continuous and peaceful display of territorial sovereignty" despite these points seems to stem from a view that prescription requires the existence of a true right holder.[40] As already noted above, however, prescription for the purpose of peace and stability can be established even if the origin of the right is not certain. In other words, it is not necessary to confirm that the Island of Palmas was Spanish territory. Meanwhile, in order to ascertain that things are settled through long-term possession and establish a right enforceable against all others, it is necessary to show that the possession was not generally contested. This is why the award uses the term "peaceful" to mean "peaceful in relation to other States," and confirmed the absence of protests from not only Spain but all States.

Considering these points and that "continuous and peaceful display of territorial sovereignty" fit the conditions of "possession and long continued silence" or "long-term possession uninterrupted and undisputed," it is reasonable to understand that the award acknowledged the existence of prescription

35 Taijudō, *supra* note 1, 66.

36 Robert Jennings and Arthur Watts, *Oppenheim's International Law*, 9th ed. (London: Longman, 1996), vol. 1, pts. 2–4, 709–710.

37 Huh Sookyeon 許淑娟, *Ryōiki Kengen Ron* 領域権原論 [The Acquisition of Territory in International Law] (Tokyo: University of Tokyo Publishing, 2012), 137–138.

38 Island of Palmas Case, *supra* note 32, 868.

39 *Ibid*., 840.

40 Taijudō, *supra* note 1, 11; Jennings and Watts, *supra* note 36, 710; Huh, *supra* note 37, 100–101.

for the purpose of peace and stability, clarified some detailed standards, such as the public (not clandestine) nature of display of sovereignty,[41] and approved the sovereignty of the Netherlands based on prescription thus understood.

However, after acknowledging the title for the Netherlands in this manner, the award addresses the question of "whether the United States as successors of Spain are in a position to bring forward an equivalent or stronger title." The explanation it gives, in answering in the negative,[42] deserves attention.

> [T]he acquiescence of Spain in the situation created after 1677 would deprive her and her successors of the possibility of still invoking conventional rights (rights based on the Treaty of Munster from 1648 that the United States claimed as recognition of Spain's rights) at the present time.[43]

The award, as explained above, acknowledged the Netherlands' title based on "continuous and peaceful display of State authority (so-called prescription)" and also noted that this title "may prevail even over a prior, definitive title."[44] While it mentioned Spain's acquiescence and possible loss of rights due to the acquiescence, the award did not conduct any examination of whether Spain had knowledge of the display of sovereignty by the Netherlands. Therefore, it is questionable whether the award genuinely intended to identify Spain's intent and reject the Netherlands' sovereignty if it was confirmed that Spain did not consent. This type of nominal mention of acquiescence is reminiscent of the theory described by Vattel and others that refers to the presumption of acquiescence but rejects the possibility of rebuttal. In this sense, it can be said that traces of the correlation between prescription and acquiescence can be found in international practice as well.

As shown above, while courts and tribunals rarely made overt references to prescription because of the historical division of views on prescription in international law, they acknowledged the existence of prescription in international law as a title which creates the right of a possessor for the purpose of maintaining peace and stability and on the conditions of "continuous and peaceful display of territorial sovereignty," regardless of whether a true right holder existed. However, following World War II, the understanding of prescription in international law became the subject of much debate in the ICJ

41 *Island of Palmas Case*, *supra* note 32, 868.
42 *Ibid.*
43 *Ibid.*, 869. Author's note added in parentheses.
44 *Ibid.*, 846.

under the concept of historic title. The next section looks at what judgements were reached by the Court and how these judgements were understood.

2.2 *Estoppel and Correlation between Estoppel and Acquiescence*

2.2.1 Judicial Practices

While prescription in international law was initially debated in theories and later accepted in international practice, estoppel is a concept that emerged in international law through international judicial practices from the latter half of the 19th century. Estoppel has long existed in a wide range of forms in common law, many of which did not themselves result in a change of rights under substantive law and instead had the effect of dismissing assertions of facts and rights in court cases.[45] It makes sense, therefore, that its application to international law would need to wait until the emergence and development of an international court and tribunal. While there are many cases that involve estoppel,[46] because the purpose in this chapter is to clarify the concept of estoppel, as well as the origin and nature of the correlation between this concept and acquiescence, the review looks at three cases: the Serbian Loans Case, the Eastern Greenland Case, and the Costa Rica-Nicaragua Treaty of Limits Case.

The Serbian Loans Case (1929) involved French holders of Serbian bonds requesting payment of interest and principal in gold francs as stipulated in the bond contract. Since Serbia asserted that it would pay in paper francs, the French side protested, and this case was brought before the Permanent Court of International Justice (PCIJ). In this case, Serbia invoked estoppel, asserting that, because the bondholders had accepted payment in paper francs over a lengthy period of time, they could not enlist the right to payment in gold francs.[47] The PCIJ reached the following decision regarding Serbia's assertion.

---

45 Estoppel in common law includes estoppel by record, estoppel by deed, estoppel by convention, estoppel by representation, proprietary estoppel, and promissory estoppel. Excluding the first two types, the other types are jointly referred to as "estoppel by conduct," among other terms. Among them, proprietary estoppel itself creates rights and obligations in substantive law and can serve as the cause of claims. The others previously only had a role as a principle in procedural law of preventing the assertion of facts or rights by a claimant before a court, thereby acting as a "shield" against the establishment of a claim. At present, they are understood to be a principle in substantive law that creates rights and obligations in substantive law and can also function as a "sword," in the sense of preventing rebuttal against facts and rights that serve as causes of claims and thereby enabling relief that would not have been given otherwise. Piers Feltham et al., *Spencer Bower: Reliance-Based Estoppel*, 5th ed. (London: Bloomsbury Professional, 2017), 31–43.

46 For details regarding international judicial practices on estoppel, refer to Antoine Martin, *L'Estoppel en droit international public* (Paris: A. Pedone, 1979), 93–172.

47 *Serbian Loans, Speeches Made in Court, PCIJ, Series C, No. 16/3-11*, 155–157.

> when the requirements of the principle of estoppel to establish a loss of right are considered, it is quite clear that no sufficient basis has been shown for applying the principle in this case. There has been no clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied. There has been no change in position on the part of the debtor State.[48]

In this case, the two parties described estoppel as "forbidden to speak against his own act or deed" and "cannot blow hot and cold"[49] and presented it as a principle that prevents assertions that contradict clear past conduct. However, the judgement cited factors such as clear representation, reliance upon the representation by the other party, and whether there was a disadvantageous change in position, and treated them as conditions for estoppel. This understanding shares points in common with the forms of estoppel referred to as "estoppel by conduct," among other terms, in common law, and the judgement can be said to have confirmed the applicability of this type of estoppel in international law.

Meanwhile, the Eastern Greenland Case (1933) is an example in which the parties asserted a rigorous understanding of estoppel similar to the abovementioned Serbian Loans Case judgement, but the PCIJ seemed to have interpreted it as a principle that prevents assertions that contradict clear past conduct and approved the estoppel. In this case, Denmark asserted that Norway's past recognition of Denmark's sovereignty over the whole of Greenland and acceptance of compensation in exchange prevented Norway from contesting the sovereignty via estoppel,[50] and the PCIJ reached the following decision regarding the assertion.

> It has already been said that when the Treaty of 1826 speaks of 'Greenland', this can only denote … the whole of Greenland. … In accepting these bilateral and multilateral agreements as binding upon herself, Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland, and, in consequence, from proceeding to occupy any part of it.[51]

---

48 *Serbian Loans, Judgement of 12 July 1929, PCIJ, Series A, Nos. 20/21*, 39.

49 *Serbian Loans* (*Speeches*), *supra* note 47, 157, 255.

50 *Legal Status of Eastern Greenland, Documents of the Written Proceedings, PCIJ, Series C, No.63/2*, 841–842.

51 *Legal Status of Eastern Greenland, Judgement of 5 April 1933, PCIJ, Series A/B, No. 53*, 68–69.

The judgement does not mention the term "estoppel." It explains that Norway recognized the whole of Greenland as Denmark's territory, and, with that being the case, the PCIJ needed perhaps only to state that this thereby debarred Norway from occupation. However, the PCIJ instead explains that as the effect of Norway's recognition, Norway "debarred herself from contesting Danish sovereignty," and, in consequence, from proceeding to occupy any part of Greenland. Although Denmark asserted that Norway received compensation (in other words, showing that Denmark disadvantageously changed positions), the PCIJ did not review this point and dismissed Norway's assertion. Based on these points, the judgement can be deemed to have shown an understanding of permissive estoppel, expressed as "cannot blow hot and cold," and recognized the establishment of estoppel.

The Eastern Greenland Case discussed above is a precedent in which a counterpart's rights are recognized through an action such as the conclusion of a treaty, resulting in the dismissal of assertions that run contrary thereto. Meanwhile, the Costa Rica-Nicaragua Treaty of Limits Case (1888) is a precedent in which the acquiescence of the validity of a treaty through the inaction of silence was recognized as having the effect of a dismissal of an assertion. In this case, the two parties concluded the "Treaty of Limits" in 1858, but Nicaragua subsequently asserted the invalidity of the treaty and the case was brought before an arbitrator. Nicaragua asserted the invalidity of the treaty due to the absence of ratification by the San Salvador Government despite Article 10 of the treaty guaranteeing observance by said government,[52] but the arbitrator dismissed the assertion, stating the following.

> The arguments now advanced by Nicaragua, as establishing the invalidity of the Treaty, might perhaps have been urged as reasons for refusing to exchange the ratifications until San Salvador was ready to unite in the act. But the Government of Nicaragua was silent when it ought to have spoken, and so waived the objection now made. It saw fit to proceed to the exchange of ratifications without waiting for San Salvador. The Treaty was complete without Article X. … neither may now be heard to allege, as reasons for rescinding this completed Treaty, any facts which existed and were known at the time of its consummation.[53]

52 *Award of the President of the United States in Regard to the Validity of the Treaty of Limits between Costa Rica and Nicaragua of 15 July 1858, 22 March 1888*, XXVIII RIAA, 201–202.

53 *Ibid.*, 206.

While the award does not discuss acquiescence, its statement that Nicaragua "was silent when it ought to have spoken" indicates that it acknowledged Nicaragua's acquiescence in accordance with the legal maxim that "he who keeps silent is held to consent if he must and can speak." The award also does not mention estoppel, though the result of the assertion "neither may … be heard" is the same effect as estoppel. The award recognized Nicaragua's acquiescence and, with that being the case, needed perhaps only to state that, as a result, the treaty was valid, but it instead proceeded to identify an effect of estoppel from acquiescence and acquiescence alone.

As explained above, this period has many judicial practices that were examples of the application of estoppel as a principle with the effect of dismissing an assertion. Regarding the conditions, while there were some decisions involving a strict understanding that requires clear representation, reliance upon the representation, and a disadvantageous change in position, there were also those that seemed to approve estoppel without examining, for example, whether or not there had been a disadvantageous change in position. However, it is important to note that the latter type of decisions involved cases with recognition or acquiescence and did not overtly mention estoppel. The next section addresses academic discussion of the conditions for estoppel in international law and the relationship between estoppel and recognition or acquiescence.

2.2.2 Theories

Prior to World War II, theories did not discuss the topic of estoppel in international law much. Even in the few cases in which it is addressed, tension is evident between strict and permissive views of estoppel. For example, McNair argues regarding "estoppel by conduct" in domestic law that it must be proven that the party setting up the estoppel acted or abstained from action upon it to his detriment and that this opinion is also evident in estoppel under international law.[54] At the same time, however, he also mentions that although it is not literally estoppel, the principle of "cannot blow hot and cold" and "*allegans contraria non audiendus est*" (a person adducing to the contrary is not to be heard) is to some extent accepted in international courts,[55] and thus leaves unclear what serves as the basis for establishing estoppel in international law.

Additionally, Lauterpacht introduces "estoppel by conduct" in English law, which has the effect of dismissing assertions under strict conditions such as a

54 A. D. McNair, "The Legality of the Occupation of the Ruhr," 5 *British Year Book of International Law* (1924), 34–35.

55 *Ibid.*, 35.

disadvantageous change in position, and argues that the principle underlying estoppel is recognized by all systems of private law and that this principle is also applicable in relationships among States.[56] He then lists seven examples of judicial practice in which parties invoked the principles of estoppel and preclusion and international courts used them as the basis for the judgements.[57] However, many of these are not literal cases of estoppel as defined by McNair and instead are invocations or applications of permissive estoppel expressed as "cannot blow hot and cold."[58] It is unclear how Lauterpacht understood the principle of estoppel which, he alleges, is a general principle of law.

Anzilotti, Rousseau, and other scholars from the same period discuss treaties and unilateral acts of States as juridical acts and address recognition and tacit expressions of intent through silence, i.e., acquiescence.[59] According to these views, it is incomprehensible to interpret recognition or acquiescence as having the effect of dismissing assertions, because they result in changes in rights under substantive law themselves. However, arguments by McNair, etc., do not express this concern. Hidden in the background of this state of theories, as well as in the abovementioned judicial practices, which do not refer to estoppel itself but recognize the effect of recognition or acquiescence in dismissing assertions, seems to be the divergence between civil law scholars, who know the concept of a juridical act, and common law scholars, who do not accept the effect of raw intent that lacks consideration and who seek equity among parties using the estoppel principle. How did the relationship between these concepts come to be understood in the postwar period?

3 Early Judicial Practices of the International Court of Justice

3.1 *Fisheries Case* (*1951*) – *Prescription, Etc., and Acquiescence*

3.1.1 Overview of the Judgement

The Fisheries Case was an example of the ICJ's recognition of the right of one of the parties based on historic title, which strongly influenced theories related to historic title, prescription, and acquiescence. The case involved a dispute

56 Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longman, 1927), 203–204.

57 *Ibid*., 205–206.

58 Martin, *supra* note 46, 175–180.

59 Dionisio Anzilotti, *Cours de droit international*, vol. 1 (Paris: R. Sirey, 1929), 344; Charles Rousseau, *Principes généraux du droit international public*, vol. 1 (Paris: A. Pedone, 1944), 126–127.

between Norway and the United Kingdom about the validity of Norway's straight base-lines method. The United Kingdom asserted that Norway's straight base-lines method violated international law because this method can only be applied to bays and no base-line can extend beyond 10 nautical miles. Norway, meanwhile, counterargued that the straight base-lines method did not violate international law, its rights were confirmed by historical aspects of long-term usage and absence of protests by the international community, and the straight base-lines method was justified by historic title even if the method deviated from international law.[60]

The ICJ rejected the existence of the rules argued for by the United Kingdom and then presented standards such as "certain economic benefits peculiar to a region, the reality and importance of which are clearly evidenced by a long usage" as the principle for determining the validity of the system applied by Norway to delimit its territorial waters.[61] The ICJ made its judgment on Norway's assertion of historic title in the context of discussing the above-mentioned "long usage." While the Court found that "the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose,"[62] it proceeded to state that "[f]rom the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States,"[63] and reached the following judgement.

> Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign States. Since, moreover, these Decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed this system itself which would reap the benefit of general toleration, the basis of a historical consolidation which would make it enforceable as against all States.
>
> The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it.
>
> The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it and that the system therefore

60 Fisheries Case, Pleadings, Oral Arguments, Documents, vol. IV, 307–308.
61 Fisheries Case, Judgment of December 18th, 1951, *I.C.J. Reports* 1951, 133.
62 *Ibid.*, 138.
63 *Ibid.*

> lacked the notoriety essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. … the United Kingdom could not have been ignorant of the Decree of 1869. Nor, knowing of it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system.
>
> The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.[64]

3.1.2 Review of the Judgement

In this case, both parties engaged in a detailed discussion of the basis and conditions for historic title. The United Kingdom considered that the demonstration of acquiescence is necessary for establishing historic title, and historic usage is relevant precisely to the extent that it shows acquiescence by inference.[65] It also explained that the acquiescence of States can only be deduced from their attitude towards acts of another State of such a kind as they can be expected to notice and to which they should react.[66] In this case, however, the United Kingdom claimed that it did not have knowledge of the Norwegian system, nor could it have reasonably been expected to have knowledge of it.[67] It hence rejected the existence of acquiescence and establishment of historic title.

On the other hand, Norway argued that the concept of historical consolidation reflects the need for stability.[68] According to Norway, history obviously has a role in historic title, and the lapse of time is an important condition. While historic title requires the peaceful exercise of sovereignty and therefore the absence of opposition from the international community, this differs from acquiescence. The argument can be made that, if historic title requires acquiescence, a State that did not protest against the usage of other States due to reasons such as lack of knowledge of the usage should not be bound by that usage, because in such a situation, silence does not necessarily mean acquiescence. However, from the perspective of Norway's view of historic title, such an argument cannot be made, because according to this view, once the situation is consolidated with the lapse of time, any opposition should be set aside.

---

64 *Ibid.*, 138–139.
65 Fisheries Case (Pleadings), *supra* note 60, 122.
66 *Ibid.*, 136–137.
67 *Ibid.*, 140–141.
68 *Ibid.*, 308–309.

Both parties rely on theories related to prescription in their discussion on historic title, and the United Kingdom utilizes these concepts interchangeably. However, while the United Kingdom highlights acquiescence as the cause and derives the necessity of having knowledge of the system from that premise, Norway argues that the purpose of historic title is the stability of order and title comes solely from continuous and peaceful exercise of sovereignty. These arguments correspond to the two different understandings of prescription reviewed in the previous section and it was demanded that the ICJ respond to this historical difference of opinions.

Many academic works present the view that the judgement agreed with the United Kingdom's understanding. For example, Fitzmaurice explained that Norway presented a "legal principle of historical right" as confirmation of an existing right rather than creation of a right that did not originally exist, and noted that "[o]n that basis, … the consent or acquiescence of other States would not so much be unnecessary as irrelevant – and so Norway argued."[69] Then, he cited statements in the judgement such as "it is … necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States" and "the general toleration of foreign States … is an unchallenged fact" to support an interpretation that the ICJ did not adopt Norway's legal principle and "considered the acquiescence, the consent in some form, or at least the toleration of the other State, to be necessary."[70]

Fitzmaurice claims that the judgement favored the United Kingdom's understanding and acknowledged that the ICJ reviewed whether there was acquiescence in confirming the historic title. However, he harshly criticizes the judgement as a departure from traditional law in concluding that the United Kingdom had knowledge of the system and consequently confirming acquiescence. This is because traditional law dictates that "neither knowledge nor acquiescence would be presumed except from circumstances in which it could unmistakably … be inferred," while the judgement ruled that the United Kingdom had knowledge and acquiesced despite factors including its extreme difficulties in acquiring information about the system.[71]

---

69 Gerald Fitzmaurice, "The Law and Procedures of the International Court of Justice," 30 *British Year Book of International Law* (1953), 28.

70 *Ibid*., 32–33. See also, I. C. MacGibbon, "The Scope of Acquiescence in International Law," 31 *British Year Book of International Law* (1954), 164–165; and Yamamoto Soji 山本草二, "Gyogyō Jiken" 漁業事件 [Fisheries Case], in *Hanrei Kenkyu Kokusai Shihō Saibansho* 判例研究国際司法裁判所 [Research on International Court of Justice Practices], Takano Yuichi (ed.) (Tokyo: University of Tokyo Publishing, 1965), 49.

71 Fitzmaurice, *supra* note 69, 35–39. See also, MacGibbon, *supra* note 70, 169; and Yamamoto, *supra* note 70, 49–50.

However, this understanding leaves some doubts for the following reasons. The first is that Norway did not propose the historic title as confirmation of existing rights and instead focused on the pursuit of the stability of order as the purpose and hence asserted that acquiescence was not required. Norway rejected the view that acquiescence was required to establish the historic title but did state that the absence of opposition from the international community was necessary, and just because the judgement considered whether or not there was opposition from foreign States does not imply a rejection of such an understanding. The second is that the judgement confirmed general toleration based on the absence of opposition from foreign States against Norway's long-term use and thus concluded that the system was enforceable against all States. If general toleration here means acquiescence, since silence does not necessarily imply acquiescence, it could not be said that general toleration existed even if there was no opposition from foreign States, nor that the system was enforceable against all States. Thus, the judgement's logic aligns conversely with Norway's understanding that historic title is established based on long-term use and absence of opposition from the international community.

Meanwhile, the judgement examined the legitimacy of the United Kingdom's assertion that it lacked knowledge of the system and thus the system was not enforceable against it. If the system was enforceable against all States based on general toleration, it should obviously also be enforceable against the United Kingdom. Therefore, while it is unclear for what purpose the ICJ examined the abovementioned assertion of the United Kingdom, comments such as "would in any case warrant … enforcement … against the United Kingdom" suggest that the examination was a precautionary *obiter dictum*. The conclusion that the United Kingdom could not have lacked knowledge, despite the extreme difficulty in acquiring information about the system and other factors, particularly considering that knowledge should not be presumed except in situations in which it can be presumed unmistakably, is indeed highly questionable. However, if knowledge was presumed in a situation in which it could not be presumed, this means that the ICJ approved rights enforceable against all States based only on long-term use and absence of opposition from the international community, or, in other words, continuous and peaceful display of sovereignty.

This judgement has the same structure as the Award in the Island of Palmas Case reviewed in the previous section in that it first recognizes the existence of title based on continuous and peaceful display of sovereignty alone and then mentions the presence of acquiescence or knowledge without clarifying the reason for it. However, this mention being only nominal, this case should also

be viewed as a precedent where the right of one of the parties was recognized based on prescription for the purpose of peace and stability.

3.1.3 Prescription, Etc., and Acquiescence in Theories – Deepening Confusion

In the Fisheries Case, the United Kingdom emphasized acquiescence as the cause of prescription, etc., and argued for the necessity of knowledge. This argument is seen in UK and US theories in the same period and combines with theories that the judgement favored the United Kingdom's understanding to become the mainstream and steadily evolve further. For example, Johnson makes the following observations.

> Publicity is essential because acquiescence is essential. For acquisitive prescription depends upon acquiescence, express or implied. Acquiescence is often implied, in the interests of international order, in cases where it does not genuinely exist; but without knowledge there can be no acquiescence at all.[72]

MacGibbon, having explained that "[t]he most helpful definition of prescription is one which substitutes for the stipulation of a fixed term of years a conception which takes account of the consensual basis of the rules of international law,"[73] provided the following comments on the conditions.

> Although it is generally conceded that rights can be lost by inaction in the course of time, this is not to assert that failure to protest invariably entails this consequence. There may be circumstances which militate against the inference of acquiescence from failure to protest. Pleas of substance are available, by way of explanation, which, if well-founded, serve to rebut the presumption of consent which might otherwise be raised by a long, unexplained silence.[74]

Furthermore, Blum comments that acquiescence "removes the besetting difficulty which confronts the exponents of international prescription, namely, that it can dispense with the exacting requirements for the efflux of a fixed period of time"[75] and argues the following regarding conditions for historic title.

---

72 Johnson, *supra* note 23, 347.
73 MacGibbon, *supra* note 70, 166.
74 *Ibid*., 172.
75 Blum, *supra* note 23, 59.

> [D]octrine and practice alike require for the establishment of an historic title an exercise by the claimant State of authority which is both continuous and peaceful. … [T]he [latter] – the requirement of peacefulness – is the invocation of acquiescence in disguise, for it indicates the lack of opposition to … an effective possession. … From the legal point of view it is of course not the fact of effective possession, but rather the presumption of acquiescence, that sets the seal of legal validity on the historic claim.[76]

While Johnson explains that prescription relies on acquiescence and requires knowledge, he also acknowledges that acquiescence is "implied, in the interests of international order" and seems to admit its fictious nature. However, MacGibbon consistently seeks the cause of prescription in acquiescence, with the intention to replace the definition of prescription with the concept of acquiescence. Blum argues that the source of historic title is acquiescence and not prescription, abandoning the latter concept.

This understanding clearly has roots in the prescription theory of natural law scholars, but it also seems to be influenced by the doctrine of "the presumption of a grant" related to prescription as the reason for the occurrence of easement in common law.[77] The presumption is thought to have been adopted by courts for the sake of accommodating the acquisition of rights in a shorter period of time, without changing the law itself, as a way of addressing the issue whereby proof of usage since the coronation of Richard the First (1189) had been required in British law but had become virtually impossible as time passed.[78] This doctrine is similar to the doctrine of presumed acquiescence advocated by natural law theories on prescription in that they both rely on the intent of the right holder to justify the acquisition of a right through usage or possession in the face of the obsolescence or inexistence of laws that provide effect to the lapse of time. What is even more notable is that the following points have also been made about the characteristics of this so-called presumption.

---

76 *Ibid*., 99.

77 In particular, Blum conducted a comparative review of prescription, in the form of prescription in domestic law, in Roman law and British law and explained that lapse of time has decisive importance as a component factor in the former case, while it only has meaning as evidence that contributes to strengthening the presumption in the latter case (*ibid*., 8–12). This indicates an association with his theory of historic title.

78 W. B. Stoebuck, "The Fiction of Presumed Grant," *University of Kansas Law Review*, vol. 15, no. 1 (1966), 19–22.

> Most courts that have considered the question have said the presumption cannot be rebutted by proof no grant was actually made. Otherwise stated, though the facts giving rise to the presumptive inference may be rebutted, the inference itself may not be. This really is only a way of saying that, as a rule of law, prescriptive use gives title to the incorporeal interest used, and presumed grant becomes a fictionalized rationale for the result of the rule. Such a rule and result accord with the generally accepted function of prescription. The minority of decisions holding that the presumptive inference is rebuttable thereby introduce an unwarranted restriction upon the doctrine of prescription.[79]
>
> [The minority of decisions], unfortunately, take the word 'acquiescence' literally. One result of this can be to defeat the presumption and to prevent prescription unless the owner has actual notice.[80]

Blum and others argue that the source of prescription, etc., is acquiescence as seen in the reliance on acquiescence and toleration in the Island of Palmas Case and the Fisheries Case[81] and therefore it is possible to hinder its establishment with a defense of lack of knowledge, etc. However, as indicated in this review, these decisions recognize title based on the continuous and peaceful display of sovereignty. Regarding acquiescence and other sometimes-mentioned terms, they do not appear to provide meaning beyond a fictitious reason for the title recognized in this way. Nevertheless, many theories seem to rely on these terms and have introduced an unwarranted restriction on prescription, etc.

3.2 *Temple of Preah Vihear Case* (*Merits*) (*1962*) – *Acquiescence and Estoppel*

3.2.1 Overview of the Judgement

The Temple of Preah Vihear Case is considered an important judicial practice for the concepts of acquiescence and estoppel, but has also generated a significant divergence of views about their interpretation. This case involves the dispute about the attribution of the Temple of Preah Vihear area located on the border between Cambodia and Thailand. France and Siam (Thailand) concluded a treaty in 1904 stipulating that the frontier in this area should adhere to the watershed line and a Mixed Commission should handle the actual delimitation work. However, the Commission did not complete its work, and French

79 *Ibid*., 24.
80 *Ibid*., 25–26. Author's note added in parentheses.
81 MacGibbon, *supra* note 70, 156–162; Blum, *supra* note 23, 67–78.

authorities, at the request of the Siam Government, handled map preparation and issuance. While the map was ready in 1907 and subsequently provided to the Siam Government, the frontier line placed the entire Temple area on the Cambodian side. In the case in question, Cambodia relied on this map for its claim of sovereignty, whereas Thailand asserted that it did not accept the map as having a binding character, among other arguments.[82]

The ICJ rendered the following judgment pointing out the circumstance that the map was allocated to the Siam Government as purporting to represent the outcome of the work of delimitation.[83]

> it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset*.[84]

Furthermore, noting that Thailand did not contest the map thereafter (from 1909), that it created its own maps showing the temple as located in Cambodia, and that a member of the Thai royal family was officially received with the French flag flying on his visit to the temple,[85] the Court provided the following judgment.

> Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map.[86]

82 *Case concerning the Temple of Preah Vihear* (*Cambodia v. Thailand*), *Merits, Judgement of 15 June 1962, ICJ Reports 1962*, 21.
83 *Ibid.*, 22–23.
84 *Ibid.*, 23.
85 *Ibid.*, 27–32.
86 *Ibid.*, 32.

3.2.2 Review of the Judgement

This judgement elicited a wide range of interpretations among theories. For example, Cot commented that Thailand accepted the map in Annex I and finalized the contract immediately in 1908–1909, and that its acts from 1909 were not elements of acquiescence,[87] whereas, he argued, the judgement regarding Thailand's attitude after 1909 applied the principle of estoppel.[88] In Cot's understanding, the rulings in the judgement were separated into those based on facts from 1909 and earlier and those based on facts thereafter, with the former recognizing Thailand's acquiescence and the binding character of the map, and the latter as *obiter dictum* explaining that Thailand, in any case, could not reject the binding character of the map due to estoppel.

Meanwhile, Marques Antunes explained that Thailand did not contest the map for over fifty years, and the ICJ used that fact to conclude that Thailand had "accepted the frontier … as it was drawn on the map" and that Thailand was "precluded … from asserting that she [had] not accept[ed] it."[89] Considering that Marques Antunes mentions that "elapsed time is … of extreme importance" for establishing acquiescence and acquiescence is "used … to impede an acquiescing State from contesting its previous conduct,"[90] he seems to interpret the judgement as recognizing Thailand's acquiescence based on silence of over fifty years and recognizing an estoppel effect from this.

Kolb, on the other hand, criticized the judgement for precluding Thailand's assertion, pointing out that the absence of change in the relative positions between the parties meant the conditions for estoppel were not met, and noted that "it is manifest that the decision … was heavily coloured by the principle of acquiescence, which does not require a detrimental reliance" and "[this] principle did seem relevant in view of the prolonged silence."[91] This view asserts that while the judgement appears to have applied estoppel, it actually confirmed Thailand's acquiescence based on over fifty years of silence and thereby recognized the binding character of the map.

As indicated above, while theories disputed what period and facts were the basis for the judgement's confirmation of acquiescence or estoppel and

87 Jean-Pierre Cot, "L'arrêt de la Cour internationale de Justice dans l'affaire du *temple de Préah Vihéar* (Cambodge c. Thaïlande – Fond)," 8 *Annuaire français de droit international* (1962), 237.

88 *Ibid*., 243–244.

89 N. S. Marques Antunes, "Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement," *Boundary & Territory Briefing*, vol. 2, no. 8 (2000), 13–14.

90 *Ibid*., 31.

91 Robert Kolb, *Good Faith in International Law* (Oxford: Hart Publishing, 2017), 114.

what the effect of acquiescence was, a straightforward reading of the actual language of the judgement seems to obviously support the interpretation presented by Cot.

First, considering that, after explaining that it precluded Thailand's assertion on the basis of events after 1909, the judgement clearly states "the Court however considers that Thailand in 1908–1909 did accept the … map as representing the outcome of the work of delimitation, … the effect of which is to situate Preah Vihear in Cambodian territory,"[92] it is evident that the ICJ recognized Thailand's acquiescence based on the silence during the period and thereby acknowledged Cambodia's rights. The judgement immediately recognizes acquiescence based on a lack of a reaction over a reasonable period of time after Thailand was placed in a position in which it "must and can speak" and acknowledged the effect of a change in rights under substantive law.

Nevertheless, Marques Antunes and Kolb interpret the judgement as if it acknowledged Thailand's acquiescence based on a silence of over fifty years. The background to this understanding seems to involve a line of thinking whereby the decisions in the Fisheries Case and others are read as recognizing prescription, etc., premised on acquiescence, this leads to an understanding that "the backbone of acquiescence lies in the prolonged silence or passivity opposed to the claims of another subject,"[93] and this view is reflected in the judgement in the Temple of Preah Vihear Case.[94] However, as has already been noted, it is difficult to conclude that the Fisheries Case judgement recognized prescription, etc., premised on acquiescence.

Furthermore, the opinion that acquiescence requires the lapse of a lengthy period of time is problematic in that it misunderstands the reasoning involved in the doctrine of presumed acquiescence as the basis of prescription, etc. The doctrine implies that long-term possession puts the right holder in a position in which it "must and can speak" at some point and presumes acquiescence from the silence, on the ground that it is unlikely that lack of knowledge of the possession and constraints on free will would continue over a long period of time. The doctrine does not state that the acquiescence itself, that is to say a right holder remaining silent despite being in a position in which it "must and can speak," requires the lapse of a lengthy period of time. As noted by Cot, while explaining that the judgement in the Temple of Preah Vihear Case

92 Preah Vihear, *supra* note 82, 32.

93 Kolb, *supra* note 91, 92.

94 Marques Antunes and Kolb both quote the judgement in the Fisheries Case in explaining the importance of the lapse of time (Marques Antunes, *supra* note 89, 32; Kolb, *supra* note 91, 93).

accurately demonstrates the nature of acquiescence, acquiescence is "simply a method by which a State expresses its intent" and is "an instantaneous act and not something that emerges gradually over a period of time."[95]

Second, since the judgement recognizes Thailand's acquiescence based on silence prior to 1909 and does not include subsequent acts as part of the acquiescence, the portion of the judgement that dismisses Thailand's assertions based on these acts cannot be interpreted as granting an estoppel effect to the acquiescence. That portion of the judgement should be interpreted as *obiter dictum* that recognized the effect of precluding Thailand's assertions based on a strict understanding of estoppel consisting of clear representation, reliance upon the representation, and a disadvantageous change in position.

Judge Fitzmaurice offers a clear explanation in his separate opinion regarding this relationship between acquiescence and estoppel and the understanding of conditions for estoppel.

> A, having accepted a certain obligation, or having become bound by a certain instrument, cannot now be heard to deny the fact, to 'blow hot and cold'. True enough, A cannot be heard to deny it; but what this really means is simply that A is bound, and, being bound, cannot escape from the obligation merely by denying its existence. In other words, if the denial can be shown to be false, there is no room or need for any plea of preclusion or estoppel. Such a plea … prevents the assertion of what might in fact be true. Its use must in consequence be subject to certain limitation.[96]

If Thailand's silence constituted acquiescence, the acquiescence binds Thailand, and it is unnecessary to mention the preclusion of the assertion by Thailand that it did not accept the map. The significance of estoppel is that, even if Thailand's silence did not actually constitute acquiescence, as the result of this representation, i.e., silence, Thailand is precluded from asserting that it did not accept the map, and this is why the use of estoppel is subject to the strict condition that the other party relied on the representation and changed its position to its detriment.[97]

While the judgement only explained that Thailand's assertion of not having accepted the map should be precluded, even if questions existed about

---

95 Cot, *supra* note 87, 237.

96 Preah Vihear, Separate Opinion of Sir Gerald Fitzmaurice, *ICJ Reports 1962*, 63.

97 However, as seen in Kolb's comment, there is criticism regarding whether France did in fact rely on Thailand's actions and changed its position to its detriment.

Thailand's acquiescence, this can be interpreted as meaning that, as a result of precluding this assertion, Preah Vihear is in any case positioned in Cambodian territory. In the past, "estoppel by conduct" in common law was understood as a principle in procedural law that served only to shield against the establishment of a claim by preventing assertions of facts and rights by a claimant.[98] Since this case recognizes estoppel in the context of affirming rights, if the estoppel precludes an assertion regarding the existence of a right, it essentially constitutes a change in rights under substantive law as the effect of precluding the assertion.

3.2.3 Acquiescence and Estoppel in Theories – New Confusion

The recognition of acquiescence in the Preah Vihear Temple Case judgement does not require the lapse of a lengthy period of time and fits with the prewar practice of recognizing acquiescence based on silence by a party in a situation in which it "must and can speak." On the other hand, in this case, the distinction between acquiescence and estoppel, as well as the understanding of strict estoppel, deviated from the prewar practice that could be interpreted as approving an effect of estoppel in acquiescence and allowing the effect without consideration of points such as a disadvantageous change in position. Behind this difference was a change in international legal theory, particularly the gradual acceptance of the concept of unilateral acts or juridical acts by common law theorists.

The following Schwarzenberger opinion is an example of this development.

> If a subject of international law chooses to take up a position in relation to a matter which is legally relevant and communicates this intent to others it is bound within such limits to accept the legal implications of such a unilateral act … No doubt, in the formative stage of this rule, the obnoxiousness of self-contradictory behaviour and *venire contra factum proprium* assisted in creating the *opinio juris sive necessitatis* which marks the border-line between international comity and international customary law. Once, however, the rule on the binding character of unilateral declarations had come into existence, the necessity for reliance on good faith to justify this proposition had passed.[99]

98 Refer to footnote 45.

99 George Schwarzenberger, "The Fundamental Principles of International Law," 87 *Recueil des cours de l'académie de droit international de La Haye* (1955), 312.

This explains that there was recognition of a substantially binding character in cases of unilateral expression of intent for acquiescence and recognition, etc., based on the good faith principle, which disdains self-contradictory words and deeds, or, in other words, permissive estoppel, and that the stance has developed into recognition of these acts as juridical acts creating their own binding force.[100]

Meanwhile, based on a standpoint that assumes that acquiescence and recognition constitute juridical acts, the type of permissive estoppel seen in previous international practice is simply one form of expressing the effect that originates from juridical acts, etc., and estoppel as its own legal framework only existed as the strict estoppel that requires a disadvantageous change in position. For example, Dominicé discusses it in the following manner.

> Il résulte en définitive de l'analyse de la jurisprudence que tous les cas dans lesquels le préjudice n'est pas nécessaire pour que se produise une déchéance ont ceci de commun que cette déchéance est l'effet d'un acte juridique, ou de l'application d'une règle concrète. La forclusion, voire l'estoppel si l'on utilise ici ce terme, ne se présentent pas comme une institution juridique autonome, ce n'est qu'une manière de décrire la déchéance.
>
> En revanche, lorsque les comportements ne sont pas constitutifs d'un acte juridique, ou n'attestent pas le défaut d'action lorsque celle-ci était exigée de celui qui voulait sauvegarder son droit, ils ne sont susceptibles de lier définitivement leur auteur que si la position respective des parties a été modifiée.[101]

Prewar judicial practices confirming an effect of precluding assertions in recognition and acquiescence without mentioning estoppel are the product of doubts regarding the binding character of unilateral expressions of intent, and as the doubts faded after World War II, the understanding of recognition and acquiescence as juridical acts and a strict interpretation of estoppel become

100 Additionally, along with the abovementioned separate opinion, as literature that demonstrates the development of Fitzmaurice's understanding of the effect of unilateral expression of intent without *quid pro quo*, refer to Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951–4," 33 *British Year Book of International Law* (1957), 229.

101 Christian Dominicé, "A propos du principe de l'estoppel en droit des gens," in M. Battelli et al. (eds.), *Recueil d'études de droit international en hommage à Paul Guggenheim* (Genève: Imprimerie de la Tribune de Genève, 1968), 364–365.

the main approach. The Preah Vihear Temple Case is a good example of this development in judicial practices. However, the opinions of theorists are split on the judgement because of the view that "acquiescence requires the lapse of a lengthy period of time," derived from an erroneous understanding of the reasoning involved in the doctrine of presumed acquiescence as the basis of prescription, etc., and this left confusion regarding the relationship between acquiescence and estoppel and the conditions for estoppel.

4 Conclusion

This chapter is a preliminary work for considering the significance of silence in territorial disputes, and particularly how to legally structure the "75 years of silence" regarding the Senkaku Islands. For this purpose, this chapter examined prewar judicial practices and theories, as well as early ICJ judicial practices and theories in relation to prescription, etc., acquiescence, and estoppel, and attempted to untangle the relationship among these concepts and ascertain whether or not they exist, as well as their content. The following points offer provisional conclusions from the analysis.

First, understandings of prescription, etc., include title that creates rights based on the continuous and peaceful display of sovereignty for the purpose of maintaining peace and stability, as well as the acquisition of a right from acquiescence derived via a specific method of presumption premised on display of sovereignty and long continued silence over this. Judicial decisions seem to have been in accordance with the former understanding. These titles create a right enforceable against all States without requiring the existence or identification of a true right holder and regardless of factors such as lack of knowledge of displays of sovereignty.

Acquiescence, meanwhile, refers to intent tacitly conveyed by silence by a party in a situation in which it "must and can speak." Whereas in prewar practice, some cases expressed the effect of this as estoppel, in postwar practice, acquiescence is interpreted as a juridical act that itself creates a change in substantive rights. Silence in this context is not limited to one related to displays of sovereignty and while it does not need to be something longstanding, if there is a lack of knowledge or the existence of a factor that invalidates consent, then acquiescence is not established.

Regarding estoppel, prewar practice included some judicial practices that could be seen as applying a permissive understanding expressed as "cannot blow hot and cold" and recognizing the establishment of this type of estoppel. In postwar judicial practices, courts have adopted a strict understanding

that requires clear representation, reliance upon the representation, and a disadvantageous change in position. The clear representation mentioned here includes not only silence, i.e., inactions, but also actions. While estoppel is deemed to have the effect of precluding assertions, the result is a change in rights under substantive law in the sense of potentially recognizing a right that did not originally exist.

As for the "75 years of silence" regarding the Senkaku Islands, there is no doubt that China and other States were silent throughout the entire 75 years. Therefore, Japan would need to carefully assess in which period of silence (1) it can be said that there was a continuous display of sovereignty by Japan (prescription, etc.: in this case, whether there was a lack of knowledge or invalidating factor for consent on the part of China is irrelevant); (2) it can be said that there was not a lack of knowledge nor invalidating factor for consent on the part of China (acquiescence: China's silence in this case could be regarding the exercise of US administrative power or Japan's residual sovereignty and not the display of sovereignty by Japan); and (3) it can be said that Japan relied on China's silence and changed its position to its detriment (estoppel); etc. Japan should then select and invoke the appropriate concept.

That being said, the conceptual understandings explained above are simply conclusions based on some prewar and early ICJ judicial practices, and in order to obtain a conclusive conceptual understanding, a more in-depth review of international practices from the same period and a review of subsequent developments in international practices are required. Regarding this point, attention should be given to some subsequent ICJ practices that exhibit conflation of the acquiescence and prescription, etc., seen in theories. Specifically, it appears that the interpretation that "acquiescence requires the lapse of a lengthy period of time" and the resulting residual conflation of acquiescence and estoppel concepts have manifested themselves in a combined form, and acquiescence is being used as a concept that implies an approach of comprehensively determining a change in rights based on various actions or inactions (representation) that have occurred over a certain period of time (lengthy period of time) and that do not on their own constitute an expression of intent.[102]

102 For the beginning of this development, refer to Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, *ICJ Reports 1984*, paras. 126–154. As examples in which the rights of a State have been recognized using this new concept of "acquiescence," refer to Land, Island and Maritime Frontier Dispute, Judgment of 11 September 1992, *ICJ Reports 1992*, paras. 72–80 and Sovereignty over Pedra Branca/Pulau batu Puteh, Middle Rock and South Ledge, Judgment, *ICJ Reports 2008*, paras. 118–277. The latter judgement

The opinion presented in this chapter is that, even if it can be said that this approach of reaching a comprehensive assessment based on the new concept of "acquiescence" is established in international practice, it does not abolish the existing concepts which generate certain legal effects in rights under certain conditions as explained above, but may become a new option alongside these concepts as a legal construct concerning silence, etc. However, a review of the existence and significance of this type of new "acquiescence" concept obviously requires a separate serious consideration. The author intends to conduct such an assessment, as well as to present a review of the legal structure of the "75 years of silence" regarding the Senkaku Islands in light of a conclusive understanding of these concepts, as part of future work.

Bibliography

Secondary Sources

Japanese

Huh, Sookyeon 許淑娟. *Ryōiki Kengen Ron* 領域権原論 [The Acquisition of Territory in International Law]. Tokyo: University of Tokyo Publishing, 2012.

Miyoshi, Masahiro 三好正弘. "Ryōdo Shutoku ni Okeru Kōgi to Mokunin" 領土取得における抗議と黙認 [Protest and Acquiescence in Territorial Acquisition]. *Tōsho Kenkyu Jyānaru* 島嶼研究ジャーナル 4, no. 2 (2015): 25–46.

Matsui, Yoshirō 松井芳郎. *Kokusaihō Gakusha ga Yomu Senkaku Mondai* 国際法学者が読む尖閣問題 [International Law Theorists' View of the Senkaku Islands Issue]. Tokyo: Nippon Hyōronsha, 2014.

Taijudō, Kanae 太壽堂鼎. *Ryōdo Kizoku no Kokusaihō* 領土帰属の国際法 [International Law of Territory Possession]. Tokyo: Tōshindō, 1998.

Yamamoto, Soji 山本草二. "Gyogyō Jiken" 漁業事件 [Fisheries Case]. In *Hanrei Kenkyu Kokusai Shihō Saibansho* 判例研究国際司法裁判所 [Research on International Court of Justice Practices], edited by Takano Yuichi. Tokyo: University of Tokyo Publishing, 1965.

Yanagihara, Masaharu 柳原正治. "Shoyūken, Shihaiken" 所有権・支配権 [Ownership Rights and Control Rights]. In Sensō to Heiwa no Hō [Hoseiban] 戦争と平和の法［補正版］[*Laws of War and Peace* (*Revised Edition*)], edited by Ōnuma Yasuaki 大沼保昭. Tokyo: Tōshindo, 1995.

---

describes this new concept of "acquiescence" as "a convergent evolution of the positions of the Parties" (*ibid*., para. 276).

Western Languages

Maruques Antunes, N. S. "Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement." *Boundary & Territory Briefing* 2, no. 8 (2000): 1–42.

Maruques Antunes, N. S. "Acquiescence." In *Max Planck Encyclopedia of Public International Law*, online edition, last updated in September 2006.

Anzilotti, Dionisio. *Cours de droit international*, vol. 1. Translated by Gilbert Gibel. Paris: Recueil Sirey, 1929.

Blum, Yehuda Zvi. *Historic Titles in International Law.* The Hague: M. Nijhoff, 1965.

Cot, Jean-Pierre. "L'arrêt de la Cour internationale de Justice dans l'affaire du *temple de Préah Vihéar* (Cambodge c. Thaïlande – Fond)." *Annuaire français de droit international* 8 (1962): 217–247.

Crawford, James. *Brownlie's Principles of Public International Law*, 9th ed. Oxford: Oxford University Press, 2019.

Dominicé, Christian. "A propos du principe de l'estoppel en droit des gens." In *Recueil d'études de droit international en hommage à Paul Guggenheim,* edited by M. Battelli et al., 327–365. Genève: Imprimerie de la Tribune de Genève, 1968.

Fauchille, Paul. *Traité de droit international public*, 8th ed., vol. 1. Paris: Rousseau, 1925.

Feltham, Piers, et al. *Spencer Bower: Reliance-Based Estoppel*, 5th ed. London: Bloomsbury Professional, 2017.

Fitzmaurice, Gerald. "The Law and Procedures of the International Court of Justice." *British Year Book of International Law* 30 (1953): 1–70.

Fitzmaurice, Gerald. "The Law and Procedure of the International Court of Justice 1951–4." *British Year Book of International Law* 33 (1957): 203–293.

Grotius, Hugo. *De jure belli ac pacis*, book ii.

Hall, William Edward. *A Treatise on International Law*, 4th ed. Oxford: Clarendon Press, 1895.

Heffter, August Wilhelm. *Le Droit international de l'Europe*, 4th ed. Paris: A. Cotillon, 1883.

Jennings, Robert and Arthur Watts. *Oppenheim's International Law*, 9th ed. vol. 1. London: Longman, 1996.

Johnson, David H. N. "Acquisitive Prescription in International Law." *British Year Book of International Law* 27 (1950): 332–354.

Kolb, Robert. *Good Faith in International Law*. Oxford: Hart Publishing, 2017.

Lauterpacht, Hersch. *Private Law Sources and Analogies of International Law.* London: Longman, 1927.

MacGibbon, Iain C. "The Scope of Acquiescence in International Law." *British Year Book of International Law* 31 (1954): 143–186.

Martin, Antoine. *L'Estoppel en droit international public.* Paris: A. Pedone, 1979.

McNair, Arnold D. "The Legality of the Occupation of the Ruhr." *British Year Book of International Law* 5 (1924): 17–37.

Rousseau, Charles. *Principes généraux du droit international public*, vol. 1. Paris: A. Pedone, 1944.

Schwarzenberger, George. "The Fundamental Principles of International Law." *Recueil des cours de l'académie de droit international de La Haye* 87 (1955): 191–385.

Stoebuck, William B. "The Fiction of Presumed Grant." *University of Kansas Law Review* 15, no. 1 (1966): 17–34.

Vattel, Emer de. *Le droit de gens*, book ii.

Von Pufendorf, Samuel. *De jure naturae et gentium libri octo*, book iv.

Wolff, Christian. *Jus gentium methodo scientifica pertractatum*, book iv.