Historic Title Over Land and Maritime Territory

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Structured Abstract

Article Type: Research Paper

Purpose—This article intends to give a better understanding of the theoretical roots and practical operations of the concept "historic title" under two different spatial frameworks of land and sea.

Design, Methodology, Approach—The opinions of publicists and judicial decisions rendered by international courts and tribunals pertinent to "historic title" are examined. Moreover, the analysis adopts comparative approach.

Findings—The concept "historic title" has separate and independent development paths under the frameworks of land and sea which indeed mirrors the historical development of these two corresponding spatial orders. Furthermore, the norm of "*effectivité*" over land territory and "historic title" over maritime territory share the same legal structure. But "historic title" over land territory has a distinct problem, the lack of applicability in practice.

Originality, Value—Few researchers have touched on the topic in comparison of the same concept "historic title" in different spatial contexts, as well as the comparison between "historic title" and "*effectivité*." Therefore, the findings make original contributions to these topics and also have important implications for the states involved in territorial sovereignty disputes.

Keywords: *effectivité*, historic title, history, land territory, maritime territory

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Journal of Territorial and Maritime Studies / Volume 4, Number 1 / Winter/Spring 2017 / pp. 31–46 / ISSN 2288-6834 (Print) / © 2017 Yonsei University

Introduction

Observation about the history of international jurisprudence shows that historic titles are commonly asserted in territorial sovereignty claims over land and maritime spaces. Historic title, a legal concept demonstrating how history helps shape the legal order of land and maritime territory,[1] provides a particular perspective to observe and reflect the action and reaction between history and international law. This concept seems to develop separately under the frameworks of land and sea. Therefore, this article intends to explore its theoretical evolution separately under these two different frameworks. Opinions of publicists and judicial decisions rendered by the international courts and tribunals are examined in order to give a better understanding of the theoretical roots and practical operations of this concept.

This article begins with tracing the historical development of the historic title concept in terms of land territory. The second part continues to discuss the same topic but in the context of maritime territory.[2] In the third part, the comparison between these two separate evolution paths are discussed. The last part concludes the distinct fates of the same concept in practice under these two different spatial frameworks of land and sea. This study contributes to the growing body of secondary literature on the modes of territorial acquisition, the distinction between the spatial orders of land and sea, as well as the interaction between history and international law.

Historic Title Over Land Territory

Blum gave an authoritative definition for the concept of "historic title": "while all the other titles rest on an instantaneous act having an immediate effect, to which act the origins of such titles can be traced, the historic title is the outcome of a lengthy process comprising a long series of acts, omissions and patterns of behavior."[3] The core of the concept of historic title is "historic." It can be inferred from Blum's definition that the word "historic" refers to the "lengthy process" mentioned above. It underlines the time element of this concept.

When it comes to the time element, a question naturally arising is how "lengthy" the "process" is in order to establish a historic title over land territory. The answer was first given by Grotius in 1625. He held that "as time immemorial … silence for such a length of time appears sufficient to establish the presumption that all claim to a thing is abandoned."[4] This is also called "immemorial possession" which was originated from Roman law. Grotius was the first person to admit the concept of "immemorial possession" into the rules governing international relations between two independent States or Kings. Another question is how to define the term "time immemorial." In the view of Grotius, one hundred years are sufficient enough to be considered as "time immemorial," since this is the term beyond which human existence seldom reaches.[5]

The test of "time immemorial" was also honored by the *Arbitration on Terri-*

torial Sovereignty and Scope of the Dispute (Eritrea and Yemen) case. The Tribunal in this case held that there were various kinds of historic titles, and one of these was called "ancient title," "a title that has so long been established by common repute that this common knowledge is itself a sufficient."[6] It does not specify a term, as long as it leads to the "common repute" or "common knowledge." Moreover, in the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* case, the court held that a period of twenty years was far too short to establish a historic title.[7]

"Time immemorial" indicates that the origin of possession is unknown or deeply obscure, and it is impossible for the possessor to prove whether it has derived its title from the original proprietor or receive its possession from another.[8] However, Vattel asserted that there was another possibility about the status of the original title. The possession may take place under the circumstance that the original title exists but is defective. For example, the original proprietor has neglected his title.[9] In Vattel's word, this kind of possession is called "*usucapio*" or "acquisitive prescription" which he believed to be part of the natural law.[10]

In fact, the only difference between immemorial possession and "*usucapio*" or "acquisitive prescription" is the status of the original titles.[11] They are treated as two separate kinds of prescription by Johnson and Hugh: "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 has been unable to do so."[12]

In other words, both Grotius and Vattel rely on prescription as the legal root of historic titles. Pursuant to this approach, a State can be entitled to a historic title only when the status of the original title is unknown or defective. This position is supported by the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* case. In this case, Nigeria asserted its territory title over the disputed Lake Chad villages through the process of historical consolidation of title. However, this assertion was rejected by the Court. The Court held that the possession could not prevail a previously established treaty title.[13]

Besides the time element, possession is also the foundation of a historic title. The possession should be completed by a sovereign.[14] This position is well illustrated by the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* case. In this case, El Salvador and Honduras both asserted their titles over some or all of the islands of the Fonseca Gulf on historical basis. Due to the colonial history, both parties contended a title of succession from the Spanish Crown. However, after careful consideration of these arguments as well as the available materials, the Chamber of the International Court of Justice rejected these claims. The Chamber underlined that the title should belong exclusively to the Spanish Crown, rather than the internal administrative subdivisions established by it which were the predecessors of El Salvador and Honduras.[15] In his separate opinion, Judge Torres also agreed with this position that neither El Salvador nor Honduras might have historic title enjoyed by the Spanish Crown, or any international title of Spain's

making. In his view, the moment Spain recognized the Spanish-American Republics, the historic titles lapsed, and this also applies to the cases of El Salvador and Honduras:

> Under the "colonial régime," the original title of the Spanish Crown was an international law title, but it was not shared by the Spanish colonial administrative units in America. Such units did not participate in such a title. It is quite inappropriate, therefore, to invoke in the present case the concept and principle of "historic title" in international law or to use equivocal expressions which could convey the idea that there is floating around some original "historic title" that … could apply to the "island dispute."[16]

He further pointed out that this case was different from the *Minquiers and Ecrehos (France/United Kingdom)* case. In that case, France and the UK did participate in the formation of historic titles as "independent sovereigns and nations."[17]

It is worth noting that in the *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* case, the Court also paid attention to the sovereign status of the Sultanate of Johor before considering whether it could enjoy historic titles. In order to do this, the Court cited a piece of evidence that in the middle of the seventeenth century, the Sultan protested against the Dutch East India Company sending two boats to the waters in the vicinity of the disputed island in order to prevent Chinese traders from entering Johor River. According to the Court, this clearly indicated that the Sultan of Johor considered the seizure of the junks as an infringement of his right as sovereign in the related area.[18]

In addition to being a sovereign, certain extent of the exercise of actual possession is required. In the *Clipperton Island (France v. Mexico)* case, Clipperton Island is an uninhabitable coral reef located in the Pacific Ocean, and Mexico asserted "historic right" over this island. The reference of "historic right" here is tantamount to "historic title."[19] According to Mexico, this island was discovered by Spanish navy and succeeded by Mexico in 1836. But France argued that this island was a *terra nullius* in 1858, and therefore open to occupation. The arbitrator, Victor Emanuel III held that no evidence showed that the island was actually discovered by Spanish navigators. Hence, the arbitrator concluded that Mexico's asserted historic title was not supported by any manifestation of her sovereignty over the island. As regards France's argument, the arbitrator held that due to the small size and uninhabited feature of Clipperton Island, from the moment of the discovery by France, the taking of possession could be considered as having been accomplished and consequently remained perfected.[20]

From the *Clipperton Island* case, it can be concluded that with respect to the uninhabited islands, the requirement of actual occupation can be fulfilled by simply taking possession at the outset without any subsequent administration. However, the opinion of international jurisprudence has changed since this case. Even regarding the uninhabited islands, as long as there are some human activities pertinent to these islands, the international courts and tribunals would require higher extent of the exercise of actual possession. This position is proved by the comparison between the *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* case and

the *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* case. In these two cases, the islands in dispute are uninhabited but visited and used by some local tribes from time to time.

In the former case, Indonesia and Malaysia had a dispute about the territorial sovereignty over two small islands in the Celebes Sea, i.e., Pulau Sipadan and Pulau Ligitan. Indonesia's claim rested primarily on the historic title originally held by the Sultan of Bulungan, which later was transferred to the Netherlands by the Contract dated 12 November 1850, and further transferred to Indonesia by the 1891 Convention between Great Britain and the Netherlands. Or alternatively, Indonesia claimed the historic title as successor to the Sultan of Bulungan or the Netherlands. Malaysia also relied on an unbroken chain of historic titles originally held by the former sovereign, the Sultan of Sulu, and "subsequently passed, in succession, to Spain, to the United States, to Great Britain on behalf of the State of Northern Borneo, to the United Kingdom of Great Britain and Northern Ireland, and finally to Malaysia itself." Regarding Indonesia's claim, the Court first considered the 1891 Convention, and concluded that it could not be interpreted as allocating the sovereignty of the islands. Furthermore, the Court also rejected Indonesia's contention of inheriting title from the Netherlands, since the various contracts of vassalage concluded between the Netherlands and the Sultan of Bulungan showed that the island possessions of the Sultan of Bulungan did not include the disputed islands. With respect to the "chain of title" claimed by Malaysia, the Court found that Malaysia based the possession of the disputed islands by the Sultan of Sulu on the ties of loyalty between the Sultan of Sulu and the Bajau Laut. The Bajau Laut inhabited on the islands off the coast of North Borneo, and might have utilized the two islands in dispute from time to time. However, the Court held that the ties between the Sultan of Sulu and the Bajau Laut were not sufficient to prove that Sultan of Sulu claimed territorial title or exercised authority over Ligitan and Sipadan.[21]

In the latter case, Malaysia and Singapore disputed on the sovereignty over a rock named "Pedra Branca" in Portuguese and "Pulau Batu Puteh" in Malay, together with two associated smaller features called Middle Rocks and South Ledge. In light of Pedra Branca/Pulau Batu Puteh, Malaysia contended that its predecessor, namely the Sultanate of Johor, had original title to Pedra Branca/Pulau Batu Puteh and retained it up to the 1840s. It claimed that the establishment of the original title was from "time immemorial." The Court supported Malaysia's contention. It held that Pedra Branca/Pulau Batu Puteh had always been known as a navigational hazard and thus was impossible to remain unknown or undiscovered by the Sultanate of Johor. And during the entire history of the old Sultanate of Johor, no evidence had shown that there were any competing claims regarding the disputed islands. Besides, in the middle of the seventeenth century, Malaysia showed the manifestation of its authority by protesting against the activities of the Dutch East India Company in the waters around the islands in dispute. In addition, Malaysia claimed that its title was also confirmed by the ties of loyalty between the Sultanate and the Orang Laut. The Orang Laut conducted various activities including fishing and piratical activities in the area of Pedra Branca/Pulau Batu Puteh. The Court found that the Sultan of

Johor had established sufficient political authority over the Orang Laut, and this, in turn, confirmed the historic title of the Sultanate of Johor to Pedra Branca/Pulau Batu Puteh.[22]

From the comparison between these two cases, it can be inferred that now even regarding the uninhabited islands, sovereign administration is required in order to establish actual control. The personal allegiance with the local tribes can only act as a confirming evidence to the title to land territory, rather than a sufficient evidence. Only the actual control over the land territory can establish a valid historic title.

In other words, the establishment of historic title requires the manifestation of State authority. Two conditions need to be satisfied here. The first condition is that the possession shall be completed by a sovereign. The second condition is the exercise of actual possession. Actual control over the territory is needed in order to establish a valid historic title, and the personal allegiance with the local tribes confirms this title.

From the aforesaid discussion, it can be seen that some international judicial cases clearly follow Grotius's theory and Vattel's theory which use prescription as the legal root of historic titles.[23] However, based on Grotius's theory and Vattel's theory, some scholars have developed different theories about historic titles.[24] In 1957, based on the work done by Grotius and Vattel, de Visscher included both immemorial possession and acquisitive prescription under the single heading of "consolidation."[25] In his own words,

> consolidation, which may have practical importance for territories not yet finally organized under a State regime as well as for certain stretches of sea-like bays, is not subject to the conditions specifically required in other modes of acquiring territory. Proven long use, which is its foundation, merely represents a complex of interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given State. It is these interests and relations, varying from one case to another, and not the passage of a fixed term, unknown in any event to international law, that are taken into direct account by the judge to decide *in concreto* on the existence or nonexistence of a consolidation by historic titles.[26]

Seen in this light, de Visscher refuted the position that the passage of a fixed term was the core of a historic title, and deepened his thought to conclude that actually it was the complex of interests and relations behind and represented by the long use that constituted the essence of a historic title. To this extent, de Visscher excluded the formality requirement of time factor, but underlined the substantive requirement of relevant interests.

International courts and tribunals seem to have different views on the validity of de Visscher's consolidation theory. The answer is in the affirmative in the *Arbitration on Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)* case. In this case, the Tribunal held that there were various kinds of historic titles. One of them can be "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."[27] However, in the *Land and Maritime Boundary between Cameroon and Nigeria*

(Cameroon v. Nigeria: Equatorial Guinea intervening) case, the Court held that the consolidation theory was highly controversial, and it could not replace the established modes of acquisition of title under international law.[28]

Besides de Visscher's consolidation theory, Blum also developed a new approach in 1965. Instead of using prescription as the legal root of historic title, Blum asserted that acquiescence, rather than prescription, was "the very pillar of the mechanism" that helped historic titles take shape. In his view, the acquiescence theory removes the difficulty which confronts the prescription theory, that is the requirement of a fixed period of time.[29] In fact, the acquiescence theory and the consolidation theory is compatible with each other. Pursuant to de Visscher, the consolidation process can be accomplished by acquiescence where a sufficiently prolonged absence of opposition exists.[30] The *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* case seems to give support to Blum's acquiescence theory. As is shown above, the absence of competing claims regarding Pedra Branca/Pulau Batu Puteh did play an important role in establishing the historic title to this island in dispute.[31]

Historic Title Over Maritime Territory

The legal concept of historic title relates not only to land territory, but also applies to maritime territory. With respect to the United Nations Convention on the Law of the Sea (hereinafter as "UNCLOS"), it simply mentions "historic title" in Article 15 and Article 298. There is no elaboration on this concept in UNCLOS. In fact, "historic title" is categorized as one of the issues that are left out for future resolution during the United Nations Conferences on the Law of the Sea.

Before going into the details, it is worth noting that there are two important legal documents on the topic of historic title over waters. One is the study report titled "*Historic Bays: Memorandum by the Secretariat of the United Nations*" (hereinafter as "1958 Report"). This study was conducted by the Secretariat of the United Nations and intended for the United Nations Conference on the Law of the Sea. Another one is "*Juridical Regime of Historic Waters, Including Historic Bays*" (hereinafter as "1962 Report"). It was drafted by the International Law Commission under the request of General Assembly resolution 1453 (XIV) of 7 December 1959.

The issue whether the regime of "historic waters" is an exceptional regime is analyzed in the 1962 Report. There is a widely held opinion that the regime of historic waters constitutes an exception to the general rules of international law regarding the delimitation of the maritime domain of a State.[32] Based on this presumed opinion, when the historic title has not been expressly reserved in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, and assumed that relevant articles of that Convention have been codified and become general rules of international law, relevant articles of that Convention must prevail as between the parties to the Convention.[33] However, according to the 1962 Report, the aforesaid opinion is criticized because there would arise several difficulties:

> The so-called general rules would then be "general" in the sense only that they would be more generally applicable than the "exceptional" title to "historic waters." But they would not be "general" in the sense of having a superior validity in relation to the "exceptional" historic title. Both the general rules and the historic title would be part of customary international law, and there would be no grounds for claiming *a priori* that the historic title is valid only if based on the acquiescence of the other States.[34]

Hence, this Report suggests that the most realistic view would be "not to relate the claim or right to 'historic waters' to any general customary rules on the delimitation of maritime areas, as an exception or not an exception from such rules, but to consider the title to 'historic waters' independently, on its own merits."[35] This position is also supported by the *Fisheries (United Kingdom v. Norway)* case in which the Court held that the rule of historic titles was not contrary to international law.[36]

Another issue discussed in the 1962 Report is concerning whether the title to "historic waters" is a prescriptive right. As is shown above, historic title over land territory is a prescriptive right. However, this Report holds that the first form of acquisitive prescription, i.e., immemorial possession, applies to historic waters, while the second form, i.e., adverse acquisition, does not apply to historic waters. It is because historic waters are "waters which one State claims to be part of its maritime territory while one or more other States may contend that they are part of high seas."[37] It approximates to the situation of immemorial possession "where the original title is uncertain and is validated by long possession."[38] However, according to this Report, if adverse acquisition applies here, it would mean that "through the effect of time an exceptional historic title to the waters had emerged." It would "embrace the idea that 'historic waters' is an exception to the general rules of international law regarding the delimitation of maritime areas,"[39] which is rejected by this Report. Therefore, it would be better "not to refer to the concept of prescription in connection with the regime of 'historic waters.'"[40]

At the beginning of the 1958 Report, it recognized that "the theory of historic bays is of general scope. Historic rights are claimed not only in respect of bays, but also in respect of marine areas which do not constitute bays, such as the waters of archipelagos and the water area lying between an archipelago and the neighboring mainland; historic rights are also claimed in respect of straits, estuaries and other similar bodies of water. There is a growing tendency to describe these areas as 'historic waters,' not as 'historic bays.'"[41] Nevertheless, the scope of this Report mainly focuses on historic bays.

It further discusses the constituent elements of the theory of historic bays and the conditions for the acquisition of historic title. In this regard, two conceptions are summarized based on domestic and international judicial practice, draft codes and the works of learned authorities.[42]

The first conception is "usage." This is based on the fundamental principle that "this bay belongs to me because it has always belonged to me, or because it has belonged to me for a certain time."[43] Two additional notions, namely "time" and "continuity," are also taken into account. Therefore, the word "usage" is qualified

by "continued and of long standing."[44] Different opinions exist regarding the concept of "usage." Some asserts that "national usage" is a sufficient root of historic title,[45] while some argues that "international usage," i.e., "established usage generally recognized by the nations," is required. In other words, "[t]he national usage must have received international recognition."[46]

The second conception is "the vital interests of the coastal State." It is regarded as perfectly explicable in the case of new nations, "in respect of which the condition of long-established dominion cannot be adduced."[47] This conception corresponds with de Visscher's consolidation theory. According to de Visscher, a complex of interests and relations can have the effect of attaching a territory or an expanse of sea to a certain State.[48] It is also supported by the *Fisheries (United Kingdom v. Norway)* case. The Court gave a clear definition for the concept of "historic waters" in this case. "By 'historic waters' are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title." Nevertheless, both parties as well as the Court referred to the notion of "historic titles" both in respect of territorial waters and internal waters. According to Norway, it based its claim of historic titles "on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other States." In the end, the Court judged in favor of Norway's position, and concluded that "the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law."[49] It is interesting to note that de Visscher was one of the judges in this case. The conclusion about the historic titles here is an exact duplicate of his consolidation theory.

In the 1962 Report, it discusses the elements of titles to "historic waters." "There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States."[50] These elements correspond with the "international usage" in the 1958 Report. But the conception of "the vital interests of the coastal State" is abandoned in this new Report.

Comparison of the Same Concept Under Two Spatial Orders

The concept of "historic title" compared under two different spatial frameworks still shares some similarity. It relies on the exercise of State authority over the land or maritime territory. In other words, the titles to the land or maritime territory are created based on concrete State behavior, will or interest. From the perspective of international law, history is indeed a series of events generating various State behav-

iors, wills and interests, either continuous or successive both in time and in space. Hence, seem in this light, the nature of historic title, either over land territory or maritime territory, is to convert a series of historical events into titles protected by international law.

Nevertheless, there is quite some difference between historic title over land territory and historic title over maritime territory. The formula of historic title over land territory seems to be relatively complex and concrete. In contrast, the formula relating to maritime territory is relatively concise and normative. It is quite understandable when considering the reality that the histories of land territory are usually longer and thus a more complex or concrete regime is needed in order to adapt to various interests generated during history. Moreover, it is also a reflection of different historical development paths of the spatial orders shaped in the land and the sea.

In history, the land territory was allocated mostly at a time when there were no international legal institutions for allocating the titles and rights, and during a time when war was not outlawed, raw physical power was the only consideration. Consequently, the legal regime governing the land is ascending from the reality to norm. The concept of historic title over land territory is not exceptional, thus being complex and concrete due to the diversity and complexity of reality.

In contrast, unlike the land surfaces, for a long time maritime space continued to be characterized as *res communis*. The Grotian dogma of "freedom of the sea" was applied, and it was based on the reality that transient passage was sufficient for the States to get what they wanted from the seas. This prevailed with little change until the years following World War II. With the development of technology and the growth of population, navigation and resources interests from the seas gained more importance for the coastal and marine States. In this particular historical context, States gradually sought to assert increasing control over maritime areas adjacent to their coasts. Hence, the legal regime governing the maritime territory is descending from the norm to the reality, including the rule of historic title, thus being well organized and clearly structured.

Furthermore, as can be seen from the above analysis of judicial practice, while most of the States claiming historic titles over land territory are new countries that have become independent sovereign in recent history, the States asserting historic titles over maritime territory are usually old countries with a long history and were able to assert influence over the maritime areas in a relatively early time. This exerts some impact on the consideration of historic titles. In the case of land territory, it usually resorts to the practice of the ancestor or predecessor. However, in event of maritime territories, it relies on the practice of the claimant States themselves. In this sense, the legal regime of historic titles over maritime territory is more similar to the legal regime of "*effectivité*" over land territory.

The norm of "*effectivité*" can be stated as: territorial sovereignty can be inferred from the effective manifestation of State authorities over the territory as long as the prior title is absent or uncertain.[51] There are two constituent elements to "*effectivité*," i.e., "the intention and will to act as sovereign, and some actual exercise or display of such authority."[52] Same as the norm of historic title over maritime territory, *effec-*

tivité requires the actual control by the claimant State itself over land territory. To this extent, these two norms seem to share the same legal structure. But this same legal structure is applied to spatial frameworks of land and sea under these two different names, i.e., "*effectivité*" over land territory and "historic title" over maritime territory.

In fact, the relationship between "historic title" and "*effectivité*" in the context of land territory is also very interesting. The norm of "*effectivité*" is only applied in the case of land territory but not maritime territory. In the context of land territory, unlike the norm of "historic title" which was first raised at the time of Grotius, "*effectivité*" is a latecomer which came into existence as a specific norm under international law not until twentieth century. However, the norm of "*effectivité*" enjoys the latecomer's advantage. In light of the history of international jurisprudence, the norm of "*effectivité*" is more frequently applied than the norm of "historic title" when it comes to the issue respecting the acquisition of land territory.[53] This position is well demonstrated in cases where it is difficult and impossible to deduce direct presumptions from the events in history. Under this circumstance, the courts and tribunals will attach decisive importance to the evidence that relates directly to the possession of the disputed territory in relatively recent times, i.e., "*effectivité*." This position is supported by the *Minquiers and Ecrehos (France/United Kingdom)* case, as well as the *Arbitration on Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)* case.

In the *Minquiers and Ecrehos (France/United Kingdom)* case, the islets and rocks of the Minquiers and Ecrehos groups are located between the British Channel of Jersey and the French coast. Both France and the UK asserted ancient titles to the Ecrehos and the Minquiers. The UK derived its "ancient title" from the conquest of England in 1066 by William, Duke of Normandy. However, in 1204, the then French King drove the Anglo-Norman forces out of Continental Normandy. Nevertheless, the UK contended that the Ecrehos and the Minquiers remained united with the UK on a legal basis of subsequent Treaties concluded between the English and French Kings. But France argued that after 1204, these two islet and rock groups should belong to the King of France. France also based its claim on the same medieval treaties that were invoked by the UK. As to the ancient titles asserted by both parties, Judge Alvarez held that they were indeed historic titles. After examining all the relevant medieval treaties between the English and French Kings, the Court concluded that the Ecrehos and the Minquiers were never specifically mentioned in these treaties, and thus the Court could not draw any definitive conclusion as to the sovereignty over these two groups from these treaties. Furthermore, the Court concluded that there were many historical controversies in this case, and it was difficult to figure out the real situation in the remote feudal epoch. In the end, the Court decided to give up the consideration of historic titles, and instead resorted to the activities in relatively recent times. The Court held that "[w]hat is of decisive importance … is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups."[54]

This formula is also followed by the *Arbitration on Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)* case. In this case, Eritrea and Yemen referred their dispute to arbitration according to an Arbitration Agreement dated 3 October 1996. Pursuant to Article Two of this Arbitration Agreement, the Tribunal was requested to provide rulings in two-stages. The first stage was related to territorial sovereignty and the definition of the scope of the dispute between these two States, while the second stage was on the delimitation of maritime boundaries. On 9 October 1998 the Tribunal rendered an Award on the first stage. The disputed islands and islets can be divided into four subgroups, namely the Mohabbakahs, the Haycocks, the Zuqar-Hanish Group, and Jabal al-Tayr along with the Zubayr group of Islands. In its Award, the Tribunal used one whole chapter to discuss the historic titles and other historical considerations. With respect to the sovereignty over these islands and islets, both Eritrea and Yemen primarily relied on historic titles. The Tribunal first admitted that "the notion of an historic title is well-known in international law." Eritrea based its sovereignty on the historic consolidation of title by Italy during the inter-war period, and this title was effectively transferred to Ethiopia after the defeat of Italy in the Second World War. In contrast, Yemen asserted its historic title dated back to the middle ages, when the islands were asserted to belong to the *Bilad el-Yemen*. Yemen further contended that this ancient title predated the several occupations by the Ottoman Empire, and it should revert to modern Yemen after the collapse of the Ottoman Empire at the end of the First World War.[55]

The Tribunal first considered Yemen's claim. It found that medieval Yemen was mainly a mountain entity with little sway over the coastal areas, and the coastal areas essentially served for the maritime trade. The medieval Yemen was unfamiliar with the concept of territorial sovereignty. Nevertheless, it is worth noting that these historic considerations were still given some legal significance by the Tribunal. In fact, based on such historic facts or evidences, the Tribunal confirmed the existence of certain historic rights enjoyed by Yemen in this area. As regards the historic title asserted by Eritrea, the Tribunal admitted that in the inter-war period Italy did have territorial ambitions regarding the Red Sea islands. However, the effect of Article 16 of the Treaty of Lausanne of 1923, the effects of the provisions of the Italy Peace Treaty of 1947, and the constant and consistent specific assurances given by the Italian government to the British government led to the situation that the territory sovereignty of those islands should stay unsettled and be decided in the future. In the end, the Tribunal concluded that "neither Party has been able to persuade the Tribunal that the history of the matter reveals the juridical existence of an historic title, or of historic titles, of such long-established, continuous and definitive lineage to these particular islands, islets and rocks as would be a sufficient basis for the Tribunal's decision." Therefore, the Tribunal decided to follow the formula of the *Minquiers and Ecrehos (France/United Kingdom)* case, agreeing that "it is the relatively recent history of use and possession that ultimately proved to be a main basis of the Tribunal decisions."[56]

The aforementioned cases, in addition to other cases in which the norm of *effectivité* has been applied, show a trend that international courts and tribunals tend to

attach more importance to the norm of *effectivité* rather than the norm of historic title when it comes to the acquisition of land territory.[57] Though in theory the norm of historic title over land territory is still a valid international law, in practice it is not favored. Reasons may be diverse. Nevertheless, as discussed above, one of the most important reasons may be that unlike the norm of *effectivité*, this norm is full of complexity and lack of normativity since it depends on concrete interests generated during history. Consequently, it fails to obtain the same clarity and certainty as the norm of *effectivité*. Hence, the preference of the norm *effectivité* is understandable when taking account of the nature of international law in preserving its normativity and ensuring its certainty.[58]

Conclusion

From the above discussion, it can be seen that the same concept "historic title" has distinct legal structures under different spatial frameworks of land and sea. *Inter alia*, "historic title" over maritime territory has an equivalent norm in the context of land territory, i.e., "*effectivité*." They can be treated as a same legal structure applied to different spatial frameworks of land and sea under two different names. In the context of maritime territory, "historic title" is not only a valid international rule in theory but also active in practice. The most recent case is the 2016 *South China Sea Arbitration (the Philippines v. China)* in which the tribunal admitted the validity of the norm "historic title" in light of asserting territorial sovereignty over certain maritime spaces.[59]

In contrast, the norm of "historic title" over land territory seems to have a distinct fate. Though being a valid international rule in theory, "historic title" over land territory is rarely applied in the practice of the recent international jurisprudence. However, the norm of "*effectivité*" tends to enjoy the latecomer's advantage, being more competitive and favored. It is worth noting that international law is subject to constant changes. Lack of applicability in practice may in the end have some impact on the validity of a theory. Nevertheless, it may be too earlier to say whether the norm of "historic title" over land territory will lose its validity in the future. The final answer to this question is dependent on the observation and analysis of the future State practice.

Notes

1. Yehuda Zvi Blum, *Historic Titles in International Law* (The Hague: Nijhoff, 1965), p. 330. https://doi.org/10.1007/978–94-015–0699–1.

2. Maritime territory refers to the maritime spaces in which States exercise the territorial sovereignty. It usually includes internal waters and territorial seas. See Yoshifumi Tanaka, *The International Law of the Sea*, 2d ed. (Cambridge, UK: Cambridge University Press, 2015), p. 70.

3. Blum (1965), p. 335.

4. Grotius, Hugo. *The Rights of War and Peace*, book II, chap. IV, sec. VII, https://babel.hathitrust.org/cgi/pt?id=wu.89058311184;view=1up;seq=7, accessed 21 November 2016.

5. *Ibid.*

6. *Arbitration on Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)* (1998), Award on the First Stage, *PCA Award of the Arbitral Tribunal*, para. 106.

7. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (2002) Judgment of 10 October 2002, *I.C.J. Reports*, p. 352.

8. Emer de Vattel, *The Law of Nations,* book II, chap. XI, para. 143, http://files.libertyfund.org/files/2246/Vattel_1519_LFeBk.pdf, accessed 21 November 2016.

9. *Ibid.*, para. 142.

10. *Ibid.*

11. For avoidance of any doubt, it is necessary to discuss the difference between two concepts, i.e., "ancient title" and "original title." In the context of historic title, "ancient title" is considered as one kind of historic title which has been established by common repute or common knowledge, while "original title" refers to the original source of historic title which is either unknown or defective.

12. David H.N. Johnson, "Consolidation as a Root of Title in International Law," *C.L.J.* 13(2) (1955), p. 218; W.E. Hall, *A Treatise on International Law*, 8th. ed. (Oxford: Clarendon, 1924), p. 118.

13. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (2002) Judgment of 10 October 2002, *I.C.J. Reports*, pp. 350–352.

14. Jennings, Robert Yewdall, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), p. 26.

15. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (1992) Judgment of 11 September 1992, *I.C.J. Reports*, paras. 340–345.

16. *Ibid.*, p. 672, para. 85.

17. *Ibid.*, p. 672, para. 86.

18. *Ibid.*, paras. 52–55.

19. Historic rights can be divided into two kinds, i.e., historic rights proper and non-exclusive historic rights. The reference of "historic right" here is related to historic rights proper, i.e., historic title. See Yehuda Zvi Blum, *Historic Titles in International Law* (The Hague: Nijhoff, 1965), p. 58.

20. *Clipperton Island (France v. Mexico)* (1932) *Cumulative Digest* Vol. 2 (42 & 43), pp. 96–97.

21. *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (2002) Judgment of 17 December 2002, *I.C.J. Reports*, pp. 638–675.

22. *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (2008) Judgment of 23 May 2008. *I.C.J. Reports*, pp. 31–39.

23. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (2002) Judgment of 10 October 2002, *I.C.J. Reports*; *Arbitration on Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)* (1998) Award on the First Stage, *PCA Award of the Arbitral Tribunal*.

24. Charles De Visscher, *Theory and Reality in Public International Law* (Princeton, NJ: Princeton University Press 1957); Blum (1965).

25. De Visscher (1957), p. 200; David Hugh Neville Johnson, "Consolidation as a Root of Title in International Law," *C.L.J. 13*(2) (1955), p. 219; Jennings (1963), pp. 24–25.

26. De Visscher (1957), p. 200.

27. *Arbitration on Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)* (1998) Award on the First Stage, *PCA Award of the Arbitral Tribunal*, p. 239.

28. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (2002) Judgment of 10 October 2002, *I.C.J. Reports*, p. 352.

29. Blum (1965), p. 59.

30. De Visscher (1957), pp. 200–201.

31. *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (2008) Judgment of 23 May 2008. *I.C.J. Reports*, p. 35.

32. Juridical Regime of Historic Waters Including Historic Bays—Study Prepared by the Secretariat (1962) U.N. Doc. A/CN.4/143, para. 42.

33. *Ibid.*, para. 75.

34. *Ibid.*, para. 55.

35. *Ibid.*, para. 58.

36. *Fisheries (United Kingdom v. Norway)* (1951) Judgment of 18 December 1951, *I.C.J. Reports*, p. 139.

37. Juridical Regime of Historic Waters Including Historic Bays—Study Prepared by the Secretariat (1962) U.N. Doc. A/CN.4/143, para. 65.

38. *Ibid.*, para. 66.

39. *Ibid.*, para. 67.

40. *Ibid.*, para. 68.

41. Historic Bays: Memorandum by the Secretariat of the United Nations (1958) U.N. Doc. A/CONF.13/1, para. 8.

42. *Ibid.*, para. 138.

43. *Ibid.*, para. 137.

44. *Ibid.*, para. 141.

45. *Ibid.*, paras. 140–143.

46. *Ibid.*, paras. 144–150.

47. *Ibid.*, para. 153.

48. De Visscher (1957), p. 200.

49. *Fisheries (United Kingdom v. Norway)* (1951) Judgment of 18 December 1951, *I.C.J. Reports*, pp. 130–131, 139.

50. Juridical Regime of Historic Waters Including Historic Bays—Study Prepared by the Secretariat (1962) U.N. Doc. A/CN.4/143, para. 80.

51. *Frontier Dispute (Burkina Faso/Republic of Mali)* (1986) Judgment of 22 December 1986. *I.C.J. Reports*, para. 63; Nico Schrijver and Vid Prislan, "Cases Concerning Sovereignty Over Islands Before the International Court of Justice and the Dokdo/Takeshima Issue," *Ocean Development & International Law* 46(4) (2015), pp. 291–292.

52. *Legal Status of Eastern Greenland* (1933) Judgement of 5 April 1933, pp. 45–46.

53. *Minquiers and Ecrehos Case (France v. United Kingdom)* (1953) Judgment of 17 November 1953, *I.C.J. Reports*; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar V. Bahrain)* (2001) Judgment of 16 March 2001, *I.C.J. Reports*; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (2002) Judgment of 17 December 2002, *I.C.J. Reports*; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* (2007) Judgment of 8 October 2007. *I.C.J. Reports*; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (2008) Judgment of 23 May 2008. *I.C.J. Reports*.

54. *Minquiers and Ecrehos Case (France v. United Kingdom)* (1953) Judgment of 17 November 1953, *I.C.J. Reports*, pp. 53–57.

55. *Arbitration on Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)* (1998) Award on the First Stage, *PCA Award of the Arbitral Tribunal*, pp. 215–241.

56. *Arbitration on Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)* (1998) Award on the First Stage, *PCA Award of the Arbitral Tribunal*, pp. 244, 247–248, 311–312.

57. *Minquiers and Ecrehos Case (France v. United Kingdom)* (1953) Judgment of 17 November 1953, *I.C.J. Reports*; *Arbitration on Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)* (1998) Award on the First Stage, *PCA Award of the Arbitral Tribunal*; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (2001) Judgment of 16 March 2001, *I.C.J. Reports*; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (2002) Judgment of 17 December 2002, *I.C.J. Reports*; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* (2007) Judgment of 8 October 2007. *I.C.J. Reports*; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (2008) Judgment of 23 May 2008. *I.C.J. Reports*.

58. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 2d ed. (Cambridge: Cambridge University Press, 2007), p. 17.

59. However, the tribunal did not go further to discuss the applicability of the norm "historic title" in this case since it concluded that China did not intend to claim "historic title" over the maritime space within the South China Sea area. Instead, it concluded that what China intended to claim was non-exclusive historic rights. See *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* (2016) Award of 12 July 2016, paras. 217–229, 232.

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