

# East Asian and European Notions of Territory\*

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## Abstract

The concepts of territory, territorial sovereignty, and territorial title were originally elaborated in the latter half of the 19th century and the beginning of the 20th century. Non-Western countries, and particularly Eastern countries such as the Ottoman Empire, Persia, Siam, China, Korea, and Japan, each existed within their own world order, but contact with the West around the beginning of the 19th century created pressure to apply to their own states the concepts of territory and borders as defined under modern European international law. When analyzing the process of accepting the European concept of territory, which may conflict with non-European ideas of territory, the issue is whether these concepts and the modern European concept of territorial right can really be understood as a continuum. Growing number of territorial disputes and maritime border delimitation disputes are brought before international courts for resolution in recent years. It is no easy matter to find a legal resolution to a territorial dispute. A comprehensive approach needs to be taken which also gives sufficient consideration to historical perspectives. In so doing, we should not underestimate the role played by international law as it stands but, at the same time, we must not forget to envision what international law ought to be as *lex ferenda*.

## The concept of territory in modern European international law

**T**erritory comprises that area over which a state exercises exclusive control or, in other words, the area over which territorial sovereignty extends. Issues in relation to the acquisition of an area (composed of land as principal and sea and air as accessory) as state territory are debated within the legal framework of territorial title. By contrast, according to international law, no matter the means by which a new state is formed—annexation, separation, division, etc.—the territory of that state has been explicated on completely different theoretical grounds to territorial title. The area effectively controlled<sup>1</sup> by a new state is regarded as that state's territory as of the point at which that state becomes a state under international law. In other words, the theoretical grounds for a new state's territory have rested on the reality of effective control and recognition as a state by other countries (although the constitutive view of recognition and declaratory view of recognition are opposed on the effect of state recognition).

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\* This article is a revised and enlarged version of an article in Japanese, “疆域、版図、邦土、そして領域” [Kyōiki, Hanto, Hōdo (Chinese and Japanese Notions of Territory), and Ryōiki (European Notion of Territory)], *Kokusai Mondai* [International Affairs], No. 624 (2013), pp.1-4.

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<sup>1</sup> Effective control or occupation means an actual taking of possession of an area through state activities to exercise exclusive authority there. Concrete terms and degree of state activities establishing effective control are richly diverse according to the geographical or social circumstances of that area such as a distance from the mainland, if it is an island, or whether that area remains without population.

Where an area is regarded as territory, another form emerges in addition to the two above—namely, state territory already in existence at the point when international law was formulated. The existence of international law is premised on the existence of a group of states, with the existence of a group of states and the existence of international law essentially two sides of the same coin. The territory of those states, too, must be treated as a given. It is rational to represent the core territories of England, France, etc., in this manner (see also the concepts of original title, inchoate title, and historical title discussed below).

### **The history of theories of territory**

The above concepts of territory, territorial sovereignty, and territorial title were originally elaborated in the latter half of the 19th century and the beginning of the 20th century. Territorial title is not discussed by Vitoria, Grotius, or Vattel—the foremost scholars in the 16th, 17th, and 18th century respectively—or indeed by any other scholars. In the case of Vitoria and Grotius, even the modern concept of territory had yet to mature. While Vattel advances something close to the modern concept of territorial sovereignty, he does not systematically address the causes of territorial acquisition and loss.

In the 19th century, the notion of (state) territory as falling under the exclusive reach of state sovereignty (variously called state ownership, state territorial right, territorial sovereignty, etc.) gradually became predominant (although there was no consensus as to whether that sovereignty was of an ownership or an authority nature). At the same time, the practice of debating all questions of the way in which territory was acquired within the categories of the mode of acquisition of state territorial right, or else title to state territory, had become virtually standard. However, a close look at international legal theory at the time as well as British Law Officers' Reports in relation to territorial acquisition reveals that, while there was almost complete agreement on occupation, cession, and conquest as means of acquiring territorial title, opinions were hugely divided on all other modes, with no standard theory yet to emerge. It is certainly not the case that the “traditional” theory of five modes of acquisition of territorial title comprising occupation, accretion, cession, subjugation, and prescription dominated international law as of the mid-19th century.

### **Different concepts of “territory”**

Does the modern state as the above-defined territorial state differ in essence from other “states”—the city states of ancient Greece (Athens, Sparta, etc.), the ancient Roman Empire, China's dynasties (Qin, Han, Yuan, Ming, etc.), the Islamic dynasties (the Umayyad and Abbasid Caliphates, etc.), and “Japan” prior to the Meiji Restoration, for example?

These “states,” too, were certainly political entities that controlled certain territories in one form or another. However, they do not appear to have shared the concept of territory in the sense discussed above. For example, the ancient Chinese concepts of 疆域 (*jiāngyù*; territory within boundary), 版圖 (*bǎntú*; territory), and 邦土 (*bāngtǔ*; domain) as well as pre-modern Japan's notions of 版圖 (*hanto*; territory), 所領 (*shoryō*; territory), 化外の地 (*kagai no chi*; lands outside imperial influence) and 異國境 (*ikokusakai*; the area next to a foreign country) did not correspond to modern Europe's ideas of “territory” and “borders.” Non-Western countries, and particularly Eastern countries such as the Ottoman Empire, Persia, Siam, China, Korea, and Japan, each existed within their own world order, but contact with the West around the beginning of the 19th century created pressure to apply to their own states the concepts of territory and borders as defined under modern European international law. In other words, faced with the West's overwhelming military superiority, non-Western countries were forced to conduct their relationships with the West based on modern European international law. These states received modern European international law along with its concept of territory, reforming themselves into

the territorial states of today.

### Establishment of territory in the late Edo and early Meiji periods

From around the end of the eighteenth century, when ships from Russia, France and England arrived to try to open up Japan, the Shogunate had to decide whether it could continue to maintain its conventional foreign policy. It at first used the maintenance of ancestral law as justification for refusing to open the country. The Shogunate, however, could not withstand demands to open its doors that were made by Commodore Matthew Perry's American East India Squadron, which carried out gunboat diplomacy with its overwhelming military power.

Through its growing contacts with Western countries, it became necessary for Japan to adopt concepts of modern European international law such as "territory" and "boundaries." In particular, the status of Ezochi and the Ryukyu Kingdom—conventionally regarded as a "foreign area" and a "foreign country," respectively—became subject to severe scrutiny. In addition, the treatment of the minor islands near Japan's main islands had to be clearly decided. Establishing what were Japan's territory<sup>2</sup> and boundaries became serious and urgent issues.

Settling issues with Russia was particularly problematic when it came to the process of demarcation, as this was closely related to the status of Ezochi.

Another problematic matter was the status of the Ryukyus. In the *uru'u* intercalary month of July in the traditional Japanese calendar, which was equivalent to early September 1854 in the Western Gregorian calendar, Rear Admiral James Stirling, the Commander-in-Chief of the British East Indies and the China Station, arrived in Nagasaki. He announced that Britain was fighting Russia in the Crimean War, and requested permission to enter the port of Nagasaki and other Japanese harbors. This presented an opportunity for Japan and England to discuss questions related to Japan's territories and boundaries. The Nagasaki *Bugyō* (Magistrate of Nagasaki)

<sup>2</sup> The term 領域 (*ryōiki*: territory) and similar terms (in Japanese; original terms in Chinese characters) such as 領土 (*ryōdo*; territorial land) and 領海 (*ryōkai*: territorial sea) came into common use only from the late Meiji era. The first treaty containing the word *ryōiki* was, as far as we could determine, the Franco-Japanese Treaty of 1907. Before that, terms such as 版図 (*hanto*; territory), 所領 (*shoryō*; territory), 邦土 (*hōdo*; domain), 領地 (*ryōchi*; appanage), 国土 (*kokudo*; domain), 境土 (*kyōdo*: territory within boundary) were used. Chinese official Li Hongzhang, in negotiations between Japan and Qing Dynasty China in 1876, and again when he met American ex-president Ulysses S. Grant on April 23, 1879, gave his interpretation of the word 邦土 (*bāng tǔ*; domain) used in the first article of the 1871 Sino-Japanese Friendship and Trade Treaty, which had the title "domains belonging to both countries." According to Li, the character 邦 referred to countries such as Korea (i.e. 外藩 (*gaihan*; territories governed by a ruler who is a subject of the king/emperor), 外属 (*gaizoku*; foreign countries) and 属国 (*zokkoku*; subject state), and the character 土 referred to territories directly governed by China (i.e. 内属 (*naizoku*; subject countries) or 内地 (*naichi*: mainland)). See "Furoku Amerika zen-daitōryō to no kaidan-roku" [Appendix: record of meeting with the former American president], *Shinpen Genten Chūgoku Kindai Shisō-shi: Dai 2-kan: Bankoku Kōhō no Jidai* [New Edition, Original Texts of Chinese Modern History of Thought, Vol. 2: Age of the Law of Nations] (Iwanami Shoten, 2010), p. 172. Motegi Toshio, "Nittchū kankeishi no katarikata: 19-seiki kōhan" [How to recount Japanese-Chinese history: the second half of the nineteenth century], Liu Jie et al., ed., *Kokkyō o Koeru Rekishi Ninshiki: Nittchū Taiwa no Kokoromi* [Contending issues in Sino-Japanese relations: toward a history beyond borders] (University of Tokyo Press, 2006), p. 14. A letter dated February 1, 1876 that was written by Japanese Minister Mori Arinori to Prince Gong of Qing China when Arinori was stationed in Qing China contains the sentence "Korea is actually a country that belongs to China..." (*Dai-nihon Gaikō Monjo Dai 9-kan* [Documents on Japanese Foreign Policy, Vol.9], p. 182.) Morita Yoshihiko sees the possibility that the Qing side intentionally communicated a different form of the meaning of 邦土 to Japan. Morita Yoshihiko, "Nisshin kankei no tenkan to nisshin shūkō jōki" [Turnaround in Sino-Japanese relations and Sino-Japanese Friendship and Trade Treaty], Okamoto Takashi and Kawashima Shin, ed., *Chūgoku Kindai Gaikō no Taitō* [Emerging diplomacy in late imperial China] (University of Tokyo Press, 2009), pp. 55-56.

expressed his opinion in an official letter to the Japanese government dated August 7, 1854: “Ryukyu is a dependency of Japan and Tsushima is within Japan’s territory.”<sup>3</sup> This letter clearly shows that, quite unlike the case of Tsushima, Ryukyu was not seen as an inherent territory of Japan. Was this the view generally accepted at the time? The letter further raises the issue of the status of Tsushima in connection with boundary issues with Korea.<sup>4</sup>

### The “inherent territory” argument

When analyzing the process of accepting the European concept of territory, which may conflict with non-European ideas of territory, we are required to discuss whether the notions of territory held by various states are simply a matter of historic interest that are not real and serious problems today.

As there is no space to go into detail on this issue in this short essay, I will limit myself to a simple explanation of the “inherent territory” argument put forward by Japan (and, more recently, Korea). There are differences of emphasis however in actual application of this argument—in the case of the Northern Territories, for example, the claim is that the Japanese people have inherited the territory as the land of their forefathers, and it has never once in history become foreign territory, while in the case of Takeshima/Dokdo, the Japanese claim is rather that the Koreans have presented no clear evidence that Korea had effective control over Takeshima prior to Japan taking effective control of the island and establishing territorial right, which is argued to have occurred at latest by the mid-17th century, i.e., the early Edo period. However, if the “inherent territory” argument claims that territorial right was established prior to Japan’s receiving modern European international law in the mid-19th century and establishing territory in line with the concept of territory espoused by modern European international law, this immediately presents the problem of whether concepts from modern European international law such as territorial right, territorial sovereignty, and borders can be applied directly to other eras and regions.

These ages and regions each had their own awareness of territory and borders. The issue is whether these concepts and the modern European concept of territorial right can really be understood as a continuum.

### Legal resolution of territorial disputes

There have been a growing number of cases in recent years where territorial disputes and maritime border delimitation disputes are brought before international courts for resolution. To resolve a dispute in court, the first hurdle is for the countries that are related to the dispute to recognize the existence of a dispute.<sup>5</sup> The second hurdle is for them to agree to recourse the dispute to a court. Even if these hurdles are cleared, the next issue is which international legal doctrines or framework to apply. The failure of the theory of territorial title to serve almost any useful role in court has been long bemoaned.

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<sup>3</sup> *Tsūkō Ichiran Zokushū*, Vol. 3, p.99.

<sup>4</sup> For more on the concept of territory in Japan, see Masaharu Yanagihara, “*Bakumatsuki Meiji shoki no ryōiki gainen ni kan suru ichikōsatsu*” [Some Thoughts on the Concept of Territory in the Late Edo and Early Meiji Periods] in Takeo Matsuda et al, *Gendai kokusaihō no shisō to kōzō I: Rekishi, kokka, kikō, jōyaku, jinken* [The Thought and Structure of Modern International Law I: History, States, Organizations, Treaties, and Human Rights] (Tōshindō, 2012), pp. 45-73.

<sup>5</sup> The International Court of Justice (ICJ) decision in the case *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)* said in its judgment of October 5, 2016 that “a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were ‘positively opposed’ by the applicant” (para. 41). Whether making “awareness of a dispute” a requirement that is universally acceptable is currently unclear.

In addition, as noted in relation to the “inherent territory” argument, there is the difficult question of which perspective to use in evaluating historical claims. This is particularly the case with non-Western countries. The traditional view of territory, 疆域 (*jiāngyù*; territory within boundary) and the traditional Chinese world order that China appears to be asserting in the case of the Senkaku Islands and the Spratly Islands can be interpreted within this context.<sup>6</sup> In international courts, it has been addressed in the context of how to evaluate original title, inchoate title, and historical title.<sup>7</sup>

It is no easy matter to find a legal resolution to a territorial dispute. A comprehensive approach needs to be taken which also gives sufficient consideration to historical perspectives. In so doing, we should not underestimate the role played by international law as it stands but, at the same time, we must not forget to envision what international law ought to be as *lex ferenda*. International law is neither a chimera, a mythical beast nor a panacea; it is “just one institution among others which we have at our disposal for the building up of a saner international order”.<sup>8</sup>

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<sup>6</sup> See Yoshirō Matsui, *Kokusaihgakusha ga yomu Senkaku shotō mondai* [Issues of the Senkaku Islands from the Perspective of International Law Specialists] (Nihonhyōronsha, 2014), pp. 113-118.

<sup>7</sup> ICJ decision in the 1953 Miquier and Ecrehos Case, the ICJ decision in the 1992 El Salvador-Honduras Land, Island and Maritime Frontier Dispute, the 1998 Eritrea-Yemen Arbitration: Phase 1, the ICJ decision in the 2008 Pedra Branca Case, etc.

<sup>8</sup> J.L. Brierly, *Law of Nations: An Introduction to the International Law of Peace*, Oxford: Clarendon Press, 1928, p.vi.