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**THE INTER-KOREAN CONFLICT OVER THE NORTHERN
LIMIT LINE:
APPLYING THE THEORY OF HISTORICAL CONSOLIDATION**

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Submitted to the faculty of the University Graduate School in
partial fulfillment of the requirement for the degree

Master of Laws – Thesis

in the Maurer School of Law

Indiana University

February 2015

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Hyun Jin Kim

**THE INTER-KOREAN CONFLICT OVER THE NORTHERN
LIMIT LINE: APPLYING THE THEORY OF HISTORICAL
CONSOLIDATION**

Regardless of its uncertain legal status, it is the legal reality that the Northern Limit Line (“NLL”) has served as a de facto maritime demarcation line in the Yellow/West Sea in the absence of a peace treaty for the Korean Peninsula. Aside from its legal definition, however, the core of the NLL conflict is whether it has been historically consolidated as a valid legal system that may be enforceable against all States, and whether South Korea has historic title over the waters lying south of the NLL. In order to find an answer, it is important to determine whether there was either recognition or acquiescence on North Korea’s part during the formative period.

Judging from international legal practices and jurisprudence, has South Korea’s claim of historic title consolidated? The answer is yes for the following reasons. First, South Korea has continually exercised its sovereign authorities before and after North Korea’s first-ever protest in 1973, though the absence of relevant domestic legislation is still pointed out.

Secondly, South Korea sufficiently manifested its sovereignty around the vicinity for two decades. Given the particular circumstances of the Peninsula, the two-decade period seems legally sufficient for the purpose of historical consolidation. Given the fact that North and South Korea had debated over the maritime delimitation in the course of the armistice negotiations, both must have been highly sensitive to this issue as belligerents and must have recognized its importance. Most significantly, as multiple historic instances indicate, North Korea had acted in recognition of the NLL after the establishment of the armistice system.

Third, South Korea fulfilled the requirements of effective occupation for the period considering North Korea’s effective acquiescence. Therefore, North Korea’s late protest violates the principle of estoppel. North Korea should have launched a protest during the time

when South Korea formed its historic title through the public and notorious exercise of its governmental authorities. North Korea must have taken advantage of the stability provided by the NLL's role as a de facto maritime demarcation line while rebuilding its naval force. For international stability, therefore, North Korea must be estopped from protesting at a later time as against South Korea's reliance on North Korea's silence.

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INTRODUCTION

As a legacy of colonial times, islands and waters remain as the most explosive source of conflicts in Asia. Since the end of the Cold War, China and Japan have been involved in military confrontations over the *Senkaku/Diaoyu* Islands in the South China Sea. Additionally, China and Southeast Asian nations have both claimed the Spratly and Paracel Islands. In the East Asian theater, moreover, Japan and Russia have argued over the *Kuril* Islands, while Japan has also engaged in a territorial dispute with South Korea over *Dokdo/Takeshima* Island. The inter-Korean Northern Limit Line (“NLL”) conflict is another maritime dispute occurring across the seas and oceans of Asia and is arguably the most dangerous powder keg to regional peace and security.

In the Korean Peninsula, the NLL conflict has resulted in many tragedies: the First and Second *Yeonpyeong* Naval Clashes, which occurred in 1999 and 2002 respectively, killed many soldiers; the South Korean warship *Cheonan* was torpedoed near the NLL, resulting in the death of 46 sailors; the bombardment of *Yeonpyeong* Island also killed four people, including 2 civilians. Furthermore, the conflict has led to a number of boat seizures. Even today, North Korea occasionally provokes a military crisis, while the U.S. and South Korean navies continue military exercises in response to these military provocations. Recently, Seoul strengthened the rules of engagement and also announced a plan to station more marines on the five South Korean-held northwest islands (“NWI”) off the shore of North Korea.¹ The NLL, which runs near the coastline of North Korea for about 100 miles, is at the heart of the inter-Korean maritime conflict.

¹ Tim Lister, *Islands, Crabs and Skirmishes: The Koreas’ Maritime Mishaps*, CNN WORLD, Nov. 26, 2010, <http://www.cnn.com/2010/WORLD/asiapcf/11/25/koreas.maritime.explainer/index.html?iref=allsearch>.

After the Korean Armistice Agreement (“KAA”) was signed, the US-led United Nations Command (“UNC”) unilaterally drew the NLL, 3 nautical miles (“nm”) away from North Korea’s coastline. The line was initially set as a line of military control since both parties did not reach an agreement on the establishment of a maritime demarcation line in the course of armistice negotiations. However, the Demilitarized Zone (“DMZ”) was established on land. While its original purpose was to be a temporary line of military control, the NLL has not yet been replaced due to the absence of a peace treaty between the two Koreas.

Because of the uncertain legal status of the NLL, Pyongyang has taken advantage of the conflict as politico-military leverage. Also Pyongyang has proposed multiple alternative lines and has condemned the NLL as “an illegal and brigandish line drawn by the U.S. on our sacred territorial water.”² Interestingly, however, Pyongyang never challenged the NLL and the waters south of the line until the 1970’s. North Korea’s silence from 1953 to 1973 is a critical component of both the assessment of its attitude and the analysis of South Korea’s historic title in terms of international law relating to territory acquisition.

Regardless of its uncertain legal status, it is the legal reality that the NLL has served as a de facto maritime demarcation line in the Yellow/West Sea under the armistice system of the Korean Peninsula. Therefore, the main issues of the NLL conflict can be narrowed down to the following. First, does South Korean have a historic title to the NLL under the armistice system? Second, is South Korea’s historic title to the waters lying south of the NLL consolidated? Indeed the Ministry of Defense of the Republic of Korea (“ROK MND”) and South Korean academics have relied heavily on the theory of historical consolidation in defense of the legal status of the NLL and the disputed waters. Both assert that the NLL has been historically consolidated as a de facto military demarcation line and, therefore, South

² *Id.*

Korea has acquired sovereign rights over it.³ On the contrary, Pyongyang claims that the assertion is an inappropriate application of the theory to the dispute,⁴ thereby aggravating the inter-Korean conflict.⁵

This conflict of opinion between the two Koreas arises from the fact that there was an insufficient examination of international law relating to territorial acquisition. First, neither the doctrinal basis of the theory of historical consolidation nor the constitutive elements of historic title have been thoroughly overhauled. Secondly, and most importantly, international legal practices and jurisprudence have not been explored to verify South Korea's alleged historic title. Given the NLL's significant role as part of the armistice system of the Korean Peninsula, South Korea must verify the legal basis of the NLL in international law in order to prevent North Korea from abusing it as politico-military leverage. In an effort to supplement the flawed South Korean approach, this thesis will therefore investigate international legal practices, *opinio juris*, academic writings, and jurisprudence of international courts and arbitrators to unravel the complicated legal issues.⁶ In this thesis, the concepts of historic title and of effective occupation will be thoroughly discussed to comprehensively understand the theory of historical consolidation and its requirements.⁷ This well-grounded doctrinal

³ See Seong Ho Jeh, *Buk-Bang-Han-Gye-Seon-Eui Beop-Jeok Yu-Hyo-Seong-Gwa Da-Eung Bang-Hyang* [Legal Validity of the Korean Northern Limit Line and South Korea's Possible Measures], CHUNGBEOPHAK Je7Jip Je2Ho [CHUNG-ANG L. REV. Vol. 7-2] 107, 116 (2005) (arguing that South Korea has a sovereign or at least an exclusive right over it by exercising decades-long effective control).

⁴ Yong Joong Lee, *Seo-Hae-Buk-Bang-Han-Gye-Seon-E Dae-Han Nam-Buk-Han Joo-Jang-Eui Guk-Je-Beop-Jeok Bi-Gyo Bun-Seok* [A Study on Northern Limit Line Dispute between the Two Koreas], KYUNGBUKDAEHAKGYOBEOPHAKYEONGUWONBEOPHAKNONGO Je32Jip [KYUNGPŌOK NAT'L. UNIV. L. REV. Vol. 32] 537, 554-55 (2010) (citing RODONG DAILY, July 11, 1999).

⁵ See, e.g., John Pomfret & Blaine Harden, *South Korean to Officially Blame North Korea for March Torpedo Attack on Warship*, WASHINGTON POST, Mar. 9, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/18/AR2010051803094.html>; see also Martin Fackler, *A Pattern of Aggression*, N.Y. TIMES, Nov. 23, 2010, http://www.nytimes.com/2010/11/24/world/asia/24north.html?_r=0.

⁶ Indeed the South Korean academics have not paid much attention to trace the doctrinal basis of theory of historical consolidation, although they have used the theory to support their argument. Tai Uk Chung, *Seo-Hae Buk-Bang-Han-Gye-Seon Jae-Ron: Yeonpyeongdo Po-Gyuk-Sa-Geon-Eul Gye-Giro* [The Northern Limit Line and the North Korean Artillery Attack], MINJOOBEOPHAKNONCHONG Je45Ho [DEMOCRATIC LEGAL STUD. No. 45] 255, 268-71 (2011).

⁷ See, e.g., Florian Dupuy & Pierre-Marian Dupuy, *The South China Sea: The Legal Analysis of China's Historic Rights Claim in the South China*, 107 AM. J. INT'L. L. 124 (2013); see also Tadashi Ikeda, *Getting*

analysis of the theory coupled with its appropriate application to actual disputes will shed new light on how to evaluate thorny territorial claims.

This thesis is composed of six sections, including an introduction and a conclusion. Section II will generally introduce the inter-Korean conflict over the NLL, including the definition of the NLL, an overview of the conflict, and the importance of the NLL for the two Koreas. This section will also introduce the positions of Seoul and Pyongyang in relation to the legal status of the NLL. Furthermore, this section will discuss the two concepts of a maritime border versus a maritime demarcation line so as to identify the role of the NLL in the armistice system. Section III will focus on clarifying the doctrinal basis of the theory of historical consolidation. Most importantly, this section will analyze the Anglo-Norwegian Fisheries Case (*“Fisheries Case”*). The *Fisheries Case* is a monumental case, which systemizes the theory of historical consolidation as a solution to the conventional difficulties and the ambiguities of the traditional modes of territorial acquisition. This section will also conduct a comparative analysis between the concept of historical consolidation and other traditional methods, such as acquisitive prescription and occupation, in order to verify the systematic interdependence and differences between them. Section IV will concentrate on the elements that are required to construct a historic title in a given territorial dispute. Due to the close connection between the constitutive elements and the concept of effective occupation, this section will also contain an analysis of the connection. Based on discussions in the previous sections, Section V will demonstrate whether South Korea’s alleged historic title to the NLL, as a legal institution of the armistice system, and the disputed waters has been consolidated under the armistice system of the Korean Peninsula. First, this section will thus elaborate on why and how historical consolidation is appropriate and applicable to the NLL

Senkaku History Right, THE DIPLOMAT (Nov. 26, 2013), <http://thediplomat.com/2013/11/getting-senkaku-history-right/>.

conflict. Secondly, this section will articulate whether South Korea fulfilled the conditions required to consolidate its alleged title to the NLL and the disputed waters.

I. THE INTER-KOREAN CONFLICT OVER THE NORTHERN LIMIT LINE

A. Overview of the NLL Conflict

1. Definition of the NLL

The NLL refers to the disputed de facto maritime demarcation line between the two Koreas in the Yellow/West Sea.⁸ It is widely known that General Mark Clark of the UNC unilaterally proclaimed the NLL between the NWI and North Korea's coastline after the enforcement of the KAA.⁹ The NLL, which consists of multiple straight-line segments, extends into the Yellow/West Sea from the Military Demarcation Line ("MDL") on land, and runs between the mainland portion of North Korea and the adjacent offshore islands, called the NWI, which have remained under South Korean control since the end of the Korean War. On its western end, the NLL extends out to the median line between China and the Korean Peninsula.¹⁰

⁸ Terence Roehrig, *The Northern Limit Line: The Disputed Maritime Boundary between North and South Korea*, NCNK ISSUE BRIEF, Sept. 2011, at 1.

⁹ The Korean Armistice Agreement stipulates that "[t]he five western islands –*Paengyong-do*, *Taechong-do*, *Sochang-do*, *Yonpyong-do* and *U-do*– shall remain under the military control of the Commander-in-Chief of the UNC." Korean War Armistice Agreement art. 2.13(b), U.N.C.-N. Kor.-China, July 27, 1953, 4 U.S.T. 234 [hereinafter KAA].

¹⁰ This is why the NLL conflict may be referred to international dispute resolution organs. Some segments of the NLL deeply intrude into international waters, such as the high sea and the potential EEZ of China.



Figure 1: Northern Limit Line and the Yellow/West Sea Area

Source: Jon Van Dyke, *The Maritime Boundary Dispute between North & South Korea in the Yellow (West) Sea*, 38 North (July 29, 2010), <http://38north.org/2010/07/the-maritime-boundary-between-north-south-korea-in-the-yellow-west-sea/>.

Although many complexities surround the demarcation of the NLL, the conflict can be boiled down to a specific disagreement. When the KAA was signed in 1953, a maritime demarcation line was never delimited. Nevertheless, South Korea has exercised governmental authority over the disputed water lying south of the NLL for decades. In other words, the NLL is not a *de jure* maritime demarcation line between the two Koreas, though it has served as a *de facto* maritime demarcation line and has created a maritime buffer zone between them.

2. Brief Background of the Conflict

Through armistice negotiations, both North and South Korea agreed to draw the MDL with the 2 kilometers-width DMZ on either side of the line, failing to reach an agreement regarding a maritime demarcation line due to strong differences of opinion.¹¹ Interestingly, Pyongyang insisted on a 12 nm (22 kilometers) standard for delimiting its territorial water

¹¹ Roehrig, *supra* note 8, at 1; *see also* KAA, *supra* note 9, at art. 2.15.

boundary contrary to the UNC's position asserting a 3 nm standard (5.6 kilometers).¹² At the time of the talks, however, a 3 nm standard was an accepted norm internationally.¹³ Ironically, the United Nations Convention on the Law of the Sea ("UNCLOS") later adopted a 12 nm as the international standard. In any case, the two sides only came to a decision to mandate that "opposing naval forces shall respect the waters contiguous to the DMZ and to the land area of Korea under the military control of the opposing side" according to Article 2, Section 15 of the KAA.¹⁴ Obviously, this is a failure of the armistice talks, an indispensable element to prevent potential armed hostilities.

Although some cast doubt on the NLL's date of creation, it is broadly admitted that General Mark Clark, the then-UNC commander, drew the NLL as a military control line in an effort to prevent the South Korean navy from advancing north after the armistice was signed.¹⁵ Significantly, however, Pyongyang never raised any official protest in the following two decades, since it might have been concerned about the overwhelming naval forces that the UNC/South Korea had.¹⁶ It is often presumed that Pyongyang was aware of the

¹² Roehrig, *supra* note 8, at 1.

¹³ *Id.*

¹⁴ A maritime demarcation line could have been delineated, thereby ignoring the prevailing authority of the UNC forces in both air and sea," given the KAA Article 2, Section 15. In any case, as a result of the KAA, the UNC naval forces had to retreat from all islands and waters "covering from the Estuary of *Yallu* River in the west: Latitude 4151'N, and that of *Tuman* River in the east: Latitude 3935'N, all the way down to the 38th parallel." Young Koo Kim, *A Maritime Demarcation Dispute on the Yellow Sea*, 2 J. E. ASIA & INT'L. L. 481, 491-92 (2009).

¹⁵ Roehrig, *supra* note 8, at 2 (quoting HEE KWON PARK, *THE LAW OF THE SEA AND NORTHEAST ASIA* 108 (2000)). Until recently, it was generally known that the NLL was drawn on August 30, 1953. However, the 1974 CIA report, declassified in 2002, has caused controversy with respect to the origin of the NLL, stating that "no documentation can be found to indicate that the NLL was established prior to 1960." CENTRAL INTELLIGENCE AGENCY, *THE WEST COAST KOREAN ISLANDS* (1974), available at <http://weekly.changbi.com/attachment/1010299189.pdf> (last visited Sept. 12, 2014). However, the reliability of the document is also controversial. As will be discussed, there are still many instances proving the existence of the NLL prior to 1960's, though the name may have been different at the beginning. GUK-BANG-BU [THE MINISTRY OF DEFENSE OF THE REPUBLIC OF KOREA], *BUK-BANG-HAN-GYE-SEON-EUL DAI-HA-NEUN WOO-RI-EUI JA-SE* [THE REPUBLIC OF KOREA POSITION REGARDING THE NORTHERN LIMIT LINE] (2nd ed. 2007) 2, available at <http://www.military.co.kr/english/NLL/NLL.htm> (last visited Sept. 12, 2014). Once referred to international courts or arbitrators, the fact related to the date of creation may be determined on the basis of evidence produced by the parties.

¹⁶ Jae Min Lee, *Buk-Bang-Han-Gye-Seon-Gwa Gwan-Ryeon-Doen Gook-Je-Beop-Jeok-Moon-Je-Eui Jae-Geom-To* [Revisiting Legal Issues over the Northern Limit Line], *SEOULGOOKJEBEOPYEONGOO Je15Kwon Je1Ho* [SEOUL INT'L. L. REV. Vol. 15-1] 41, 43 (2008).

establishment of the NLL, possibly known as the Northern Patrol Line at the time.¹⁷ For Pyongyang, the presence of the NLL must have been a benefit because it efficiently prevented UNC/South Korea vessels from marching north. On that basis, Seoul has argued that Pyongyang also followed the NLL as a de facto maritime demarcation line between the NWI and North Korea's adjacent coastal area.¹⁸

Pyongyang officially began to express its dissatisfaction with the NLL in 1973 along with a series of naval confrontations.¹⁹ This so-called West Sea Incident was the beginning of Pyongyang's continuing efforts to invalidate the NLL. The first protest against the NLL was recorded at a meeting of the Military Armistice Commission ("MAC") held on December 1st 1973.²⁰ At this meeting, Pyongyang's representative called on all UNC/South Korean vessels to acquire prior notification and permission before navigating toward the NWI.²¹ In the following years, Pyongyang declared its own EEZ as well as the 50 nm 1977 Military Warning Zone ("MWZ") allegedly on the basis of the principle of equidistance under the UNCLOS. In addition, Pyongyang unilaterally proclaimed the *Chosun* Military Demarcation Line ("CMDL") extending out from the end of the provincial boundary line between *Hwanghae*-do Province and *Gyeonggi*-do Province. Since then, Pyongyang continued to challenge the legal status of the NLL and suggested alternatives. Since the first post-war naval skirmish, the two Koreas have also entered into diplomatic disputes over the legality and validity of the NLL.

On June 15, 1999, both sides were engaged in a naval skirmish that resulted in the sinking of two North Korean crafts. Pyongyang, in the name of the Korean People's Army General Staff, issued a special communiqué publicly declaring the invalidity of the NLL, and

¹⁷ Roehrig, *supra* note 8, at 2.

¹⁸ Jon M. Van Dyke, *The Republic of Korea's Maritime Boundaries*, 18-4 INT'L J. MARINE & COASTAL L. 509, 530-31 (2003).

¹⁹ See NARUSHIGE MICHISHITA, NORTH KOREA'S MILITARY-DIPLOMATIC CAMPAIGN: 1966-2008 52-72 (2009).

²⁰ Roehrig, *supra* note 8, at 2.

²¹ *Id.*

proposing an alternative maritime demarcation line.²² Again, Pyongyang requested UNC and South Korean vessels to acquire a prior permission to transit to and from the NWI and to use a 2 nm-wide sea corridor for the transit.²³ Of course Pyongyang's alternatives were rejected by the UNC and Seoul.

In the aftermath of Pyongyang's first opposition in 1970's, the NLL became an explosive flashpoint between the two Koreas. In 2002, North and South Korean navies clashed along the NLL. The exchange of fire continued until North Korean warships withdrew across the NLL. The South Korean navy announced that 5 were killed and 19 were wounded, and it is also estimated that 30 soldiers died and an unknown number wounded in North Korea.²⁴ In 2010, the NLL drew wide attention from the international community due to the two events. The first event was the sinking of the South Korean warship, the *Cheonan*, which resulted in the death of 46 South Korean sailors. The second was the bombardment of *Yeonpyeong* Island, which also killed four South Koreans, including two civilians. Even today, the two Koreas have escalated military confrontations by continuously conducting military exercises in the vicinity of the NLL.

3. Importance of the NLL: Issue-based Approach

Beneath the surface, the NLL is important to Pyongyang for economic reasons. First, the waters along the NLL provide one of the world's richest fishing grounds, particularly blue

²² *Id.*

²³ Young Koo Kim, *Buk-Han-Eee Joo-Jang-Ha-Neun Seo-Hae-Hae-Sang-Gyeong-Gye-Seon-Gwa Tong-Hang-Jil-Seo-E Dae-Han Bun-Seok* [Analysis on the North Korean-backed Maritime Demarcation Line and Navigation Order] SEOULGOOKJEBEOPYEONGOO Je7Kwon Je1Ho [SEOUL INT'L. L. REV. Vol. 7-1] 1, 9 (2000). Regarding the navigation routes unilaterally designated by Pyongyang, please refer to the map included in the following website, Bruce E. Bechtol, Jr., *The Cheonan Incident and North Korea's Northern Limit Line Strategy*, CENTER FOR DEFENSE STUDIES (May 25, 2010, 4: 28 PM), <http://www.defensestudies.org/cds/the-cheonan-incident-and-north-koreas-northern-limit-line-strategy/> (last visited Sept. 12, 2014).

²⁴ Aiden Foster-Carter, *No-Penalty Shootout*, ASIA TIMES ONLINE, July 3, 2002, <http://www.atimes.com/atimes/Korea/DG03Dg01.html>.

crab fishing.²⁵ As the expected profits are enormous, Chinese trawlers even travel to these waters to fish.²⁶ Due to the politico-military complexity surrounding the NLL, managing the Chinese fishing boats causes extreme difficulties for the South Korean maritime police.²⁷

Secondly, the NLL prevents Pyongyang from developing maritime trade and commerce along the coastline.²⁸ As of now, North Korean merchant ships departing from the coastline must take a longer route around the NLL in order to avoid crossing it, rather than directly entering into external waters. As a result, their trips require extra miles and increased fuel costs. In the aftermath of the sinking of the *Cheonan*, both governments have entirely cut off most maritime trading between North and South Korean ports in the Yellow/West Sea.

In the NLL conflict, national security is the most significant issue to both Koreas.²⁹ Because of its geo-political importance, the NLL conflict can be explosive unless dealt with adequately and carefully. Throughout the conflict, the NWI, located off the adjacent coastline of North Korea alongside the NLL and slightly north of the median line claimed by Pyongyang, particularly gave rise to a series of military confrontations, though Pyongyang does not challenge the status of the NWI itself. Since the closest point between the coastline and the islands are 7 nm apart, not only the NLL but also the NWI remain as a significant security threat to North Korea since it allows South Korean warships to closely approach the military installations stationed along its shoreline.³⁰ This is why Pyongyang keeps suggesting that alternative lines be slightly adjusted southward. By shifting the NLL further south, Pyongyang can obtain “a larger maritime buffer from South Korean naval operations and intelligence activities.”³¹

²⁵ Roehrig, *supra* note 8, at 3.

²⁶ See Suk Kyoong Kim, *Illegal Chinese Fishing in the Yellow Sea: A Korean Officer's Perspective*, 5 J. E. ASIA & INT'L L. 455 (2012); see also Andrew Salmon, *Why border hot-spot is Korean War Relic*, BBC NEWS, Nov. 25, 2010, <http://www.bbc.co.uk/news/world-asia-pacific-11839284>.

²⁷ Roehrig, *supra* note 8, at 3.

²⁸ *Id.*

²⁹ *Id.* at 3.

³⁰ *Id.*

³¹ *Id.*

The question then becomes, what makes the NLL so important to Seoul? First of all, the NLL, regardless of the absence of a maritime demarcation line, is still consistent with the KAA's aim of preventing armed conflicts. The NLL has contributed to the maintenance of the armistice system, even in the absence of any provision creating a maritime buffer zone. In fact, both naval forces have conducted regular patrols and military operations in accordance with the existence of the NLL. As a matter of fact, issues over the NLL have been discussed at the MAC, which operates under the KAA.

Secondly, the NLL plays a crucial role in the maritime security of South Korea. The NLL has effectively protected Seoul and its vicinity by allowing South Korea to monitor the movements of North Korean armed forces that have to take the long route round the NLL.³² The NLL defends not only the NWI but also the Han River Estuary, considering that Pyongyang has installed a number of military stations along the *Ongjin Peninsula*.³³ If the NLL had been shifted slightly southward, it would have allowed North Korean patrol boats to come closer to the Estuary that acts as a bulwark of Seoul.³⁴ To that extent, the NLL reduces the possibility of a full-scale war between the two Koreas. If it were not for the NLL, the Incheon and Gimpo regions, and the *Ganghwa Island*, which are the outposts of the capital city area could have been jeopardized, since North Korean forces have continually prepared military landing operations that march from the *Haeju* or *Ongjin Peninsula*.³⁵ From a military perspective, therefore, the absence of the NLL would make defense more difficult for South Korean forces, whereas it would make infiltration operation much easier for North Korean armed forces.³⁶ Albeit Pyongyang appears to respect the territorial water boundary of the NWI, it is still hard to imagine that Seoul will accommodate Pyongyang's demands to adjust

³² Jeh, *supra* note 3, at 112.

³³ Roehrig, *supra* note 8, at 3.

³⁴ *Id.*

³⁵ Dong Jin Chun, *Buk-Bang-Han-Gye-Seon Non-Eui-Eui Jeon-Gae-Wa Hyang-Hoo Dae-Eung [Issues over the Northern Limit Line and Our Responses]*, TONGILJEONRYAK Je8Kwon Je3Ho [UNIFICATION STRATEGY Vol. 8-3] 47, 64-5 (2008); Chung, *supra* note 6, at 168.

³⁶ Roehrig, *supra* note 8, at 3.

the current NLL, given the outstanding security concerns mentioned above.³⁷ □



Figure 2: North Korean Bases and Locations of Artillery

Source: Claire Lee, *Island Panicked by Surprise Attack*, THE KOREA HERALD, Nov. 23, 2010, <http://www.koreaherald.com/view.php?ud=20101123001291>.

B. Debates over the Legal Status of the NLL

1. Seoul's Stance

Throughout the NLL conflict, the ROK MND, and South Korean legal scholars have invoked multiple academic sources, customary international law, the UNCLOS, and the KAA in justification of the legal status of the NLL. However, the legal doctrines and theories invoked, such as acquisitive prescription and the theory of historical consolidation, have caused heated debates between the two Koreas because of the lack of comprehensive attempts to overhaul their doctrinal basis in international law.

a. The Position of the ROK MND

³⁷ *Id.*

Although it sometimes rhetorically describes the NLL as South Korea's maritime frontier, the ROK MND, which is the most rigorous South Korean authority in the NLL conflict, firmly believes that the NLL must be protected as a de facto demarcation line in the Yellow/West Sea, particularly under the current armistice system.³⁸ In this view, the ROK MND also highlights the fact that the NLL has effectively separated two military forces since the end of the Korean War.³⁹

In addition to this pragmatic view, the ROK MND also promotes an understanding of the backdrop of the KAA. According to the ROK MND, the KAA parties obviously recognized that islands and coastal areas within the 38th parallel and the northwestern part of the provincial boundary between *Hwanghae-do* Province and *Gyeonggi-do* Province were under the control of the UNC/South Korea.⁴⁰ The UNC/South Korea agreed to withdraw from some islands lying south of the 38th parallel to the west coastline of North Korea to avoid blockade of the *Haeju* and *Ongjin* Peninsula in accordance with KAA article 2.13(b) and 2.15.⁴¹ In other words, the waters between the 38th parallel and the northwestern part of the provincial boundary could have been appertained to South Korea if the UNC/South Korea had not relinquished the waters.⁴² Therefore, the ROK MND strongly asserts that the NLL, though unilaterally established, must be respected as a de facto maritime demarcation line

³⁸ See GUK-BANG-BU, *supra* note 16, at 2–11.

³⁹ *Id.* at 9.

⁴⁰ *Id.* at 4–8.

⁴¹ *Id.*; see also KAA, *supra* note 9, at art. 2.13(b) (stating that “Within ten days after this Armistice Agreement becomes effective, withdraw all of their military forces, supplies, and equipment from the rear and the coastal islands and waters of Korea of the other side. If such military forces are not withdrawn within the stated time limit, unless there is a mutually agreed and valid reason for the delay, the other side shall have the right to take any action which it deems necessary for the maintenance of security and order. The term “coastal islands” refers to those islands which, although occupied by one side at the time when this Armistice Agreement becomes effective, were controlled by the other side on June 24, 1950. However, provided that all the islands lying to the north and west of the provincial boundary line between *Whanghaedo* province and *Kyonggido* province shall be under the military control of the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, except the group of islands including *Paengyong-do* (37 ° 58'N, 124 ° 40'E), *Taechong-do* (37 ° 50'N, 124 ° 42'E), *Sochung-do* (37 ° 46'N, 124 ° 46'E), *Yonpyong-do* (37 ° 38'N, 125 ° 40'E), and *U-do* (37 ° 36'N, 125 ° 58'E), which shall remain under the military control of the United Nations Commander-in-Chief.”).

⁴² *Id.*

because the NLL does not block the entire coastline of North Korea that had been surrounded by the UNC naval forces.⁴³ According to the ROK MND, both parties must comply with the NLL unless otherwise provided in the KAA or any form of agreement.⁴⁴

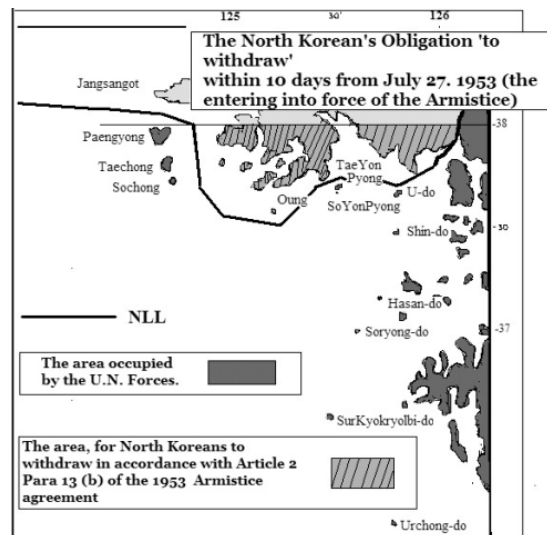


Figure 3: North Korea's Obligation to Retreat by the Primary Text of the KAA Article 2(13)(b).
 Source: THE MINISTRY OF NATIONAL UNIFICATION OF THE REPUBLIC OF KOREA, PROCEEDING MINUTE OF SOUTH AND NORTH MILITARY SUB-COMMITTEE 5TH SESSION 280(1992).

⁴³ *Id.* at 4–9.

⁴⁴ *Id.*

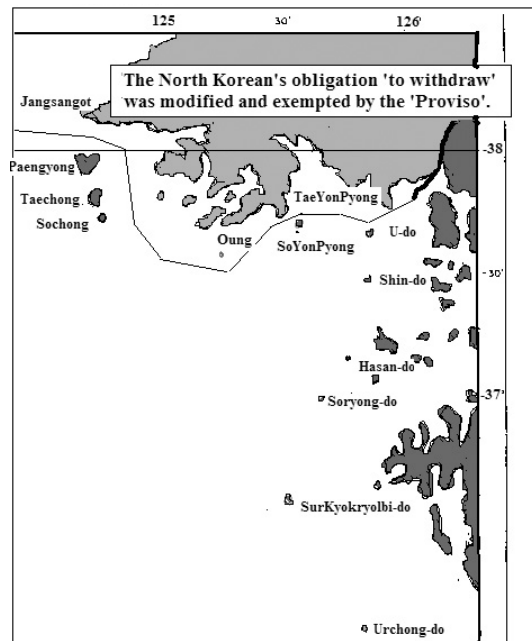


Figure 4: North Korea's Modified Obligation to Withdraw

Source: Young Koo Kim, *A Maritime Demarcation Dispute on the Yellow Sea*, 2 J. E. ASIA & INT'L L. 481, 487 (2009).

Furthermore, the ROK MND adduces to inter-Korean agreements to prove the legal status of the NLL. It insists that the NLL should keep serving as a de facto maritime demarcation line until an inter-Korean peace treaty resolves the current complexity.⁴⁵ According to the ROK MND, the Agreement on Reconciliation, Non-aggression, Exchanges and Cooperation between the South and the North (“South-North Basic Agreement”) Article 11 and the Protocol on Non-aggression Article 10 re-affirms the status of the NLL as a de facto maritime demarcation line.⁴⁶ Due to the ROK MND’s belief in the effectiveness of the

⁴⁵ *Id.* at 9.

⁴⁶ *Id.* at 7. Agreement on Reconciliation, Non-aggression, Exchanges and Cooperation between the South and the North art. 11, S. Kor.-N. Kor., Dec. 13, 1991 [hereinafter Basic Agreement] (stating that “the South-North demarcation line and the areas for non-aggression shall be identical with the Military Demarcation Line provided in the Military Armistice Agreement of July 27, 1953, and the areas over which each side has exercised jurisdiction until the present time.”); Protocol on Non-aggression art. 10, S. Kor.-N. Kor., Sept. 17, 1992 (providing that “the South-North sea non-aggression demarcation line shall continue to be discussed in the future. Until the sea non-aggression demarcation has been settled, the sea non-aggression zones shall be identical with those that have been under the jurisdiction of each side until the present time.”). However, it is generally admitted that this inter-Korean agreement is no longer effective. Even the South Korean courts ruled that the Basic Agreement has no binding authority as an international treaty. *See, e.g.*, Constitutional Court [Const. Ct.], 92Hun-Ba6 (consol.), Jan. 16, 1997, (1997 KCCR, 9-1) (S. Kor.). Professor Yong Joong Lee also casts doubt on this approach, arguing that two different concepts “line” and “area” should be distinguished in relation to the interpretation of the *Basic Agreement* and the *Protocol on Non-aggression*. In other words, neither line nor area was ever agreed on since the end of the Korean War, except the provincial boundary line

South-North Basic Agreement, a ROK MND representative responded that the issue should be discussed at a ministerial-level talk on the premise that both sides comply with the NLL and the inter-Korean agreement.⁴⁷

In support of its position, the ROK MND also presents a series of historical instances that might indicate Pyongyang's recognition of or acquiescence to the existence of the NLL. First, the NLL was shown as a maritime demarcation line in the 1959 *Chosun Central Yearbook*, published by Pyongyang's central news agency.⁴⁸ Second, a Pyongyang representative at the 168th MAC held in May 1963 officially affirmed the legal status of the NLL. In fact, the meeting was held to debate whether a Pyongyang spy ship had crossed the NLL. The UNC's representative strongly denounced the alleged trespass.⁴⁹ According to the record, the UNC/South Korea condemned it, saying that "we launched fire against that spy ship because it was trespassing."⁵⁰ In response, the Pyongyang representative refuted this claim, arguing that "the ship did not cross the NLL but stayed above the NLL."⁵¹ This response might indicate Pyongyang's implicit recognition of the NLL as a de facto maritime demarcation line in the Yellow/West Sea. Third, the Red Cross of North Korea delivered flood relief supplies to its South Korean counterpart on September 29 and October 5 in 1984. The convoy fleets composed of battleships and patrol boats of North and South Korean navies met at the NLL to exchange the relief goods. Strictly speaking, a military craft is not entitled to conduct any operation outside the territorial boundary unless otherwise granted by particular permission. Therefore, the ROK MND also interprets this instance as an indication

and the Han River Estuary. Lee, *supra* note 16, at 57–60. Compared to the ROK MND, the professor interprets "the areas that each party have exercised its jurisdiction until the present time" differently: "the areas that have been governed by the both parties until the present time," *id.*

⁴⁷ GUK-BANG-BU, *supra* note 16, at 8. This response was made when Pyongyang's representative vehemently lashed out about the NLL at the 3rd South-North general-level talk held in 2006.

⁴⁸ *Id.* at 16 (quoting CHO-SUN-CHOONG-ANG-NYEON-GAM [CHOSUN CENTRAL YEARBOOK] (Cho-Sun-Choong-Ang-Tong-Shin-Sa [Chosun Central News Agency] eds. 1959)).

⁴⁹ MILITARY MUTUAL AID ASSOCIATION OF THE JOINT CHIEF OF STAFF, MANUAL FOR THE KOREAN MILITARY ARMISTICE COMMISSION VOL. 4, at 138–40 (1999).

⁵⁰ *Id.*

⁵¹ *Id.*

of Pyongyang's implicit recognition of the NLL.⁵² Last but not least, in May 1993, the Air Navigation Plan ("ANP"), which was promulgated by the International Civil Aviation Organization ("ICAO"), slightly adjusted the Flight Information Region ("FIR"), and this adjustment reflected the NLL. Nevertheless, Pyongyang did not protest against the adjustment until the ANP came into effect in January 1998. Therefore, the FIR is still valid. Of course, the ICAO is not a binding authority that can participate in the international boundary delimitation through the formation of the FIR. However, the ICAO reflects the range and scope of each state's territorial sovereignty because the FIR is closely connected with an individual State's duty to rescue, such as the duty to rescue distressed airplanes within the boundary of the ANP.⁵³ To sum up, on the basis of the instances mentioned above, the ROK MND believes that Pyongyang has acquiesced to the NLL's role as a de facto maritime demarcation line.⁵⁴

b. Judicial Views on Inter-Korean Relations

Even though South Korean courts never directly adjudicated territorial issues over the NLL, it is appropriate to go over their opinions on the territorial boundary of South Korea. The judicial opinions tend to stimulate the conservative sentiment among the South Korean public that the NLL must be protected as the maritime frontier of South Korea. In particular, the interpretation of Article 3 and 4 of the Constitution of the Republic of Korea ("ROK Constitution") can be said as a source of conflict of opinion. Article 3 stipulates that "the territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent

⁵² GUK-BANG-BU, *supra* note 16, at 8.

⁵³ *Id.*

⁵⁴ *Id.* In response to national lawmakers' inquiries, interestingly, the former Defense Minister Yang Ho Lee of the Kim Young Sam administration officially stated that it would not be a violation of the KAA, even if a North Korean naval ship crosses the NLL. Hee Sang Chung, *A Line of Peace Turned into A Line of War*, SISAIN, Dec. 30, 2010, <http://www.sisainlive.com/news/articleView.html?idxno=9118>.

islands,” while Article 4 provides that “the Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.”⁵⁵ South Korean constitutional scholars have suggested various points of view on the articles. Some argue that Article 3 prevails over Article 4; another argues that Article 4 takes precedence over Article 3; and, others call for a harmonious interpretation of the articles.⁵⁶ Interestingly, both the Supreme Court and the Constitutional Court held that the entire Korean Peninsula appertains to South Korea’s territorial jurisdiction pursuant to the Article 3 of the ROK Constitution, though the latter left open a possibility to consider the special characteristic of the inter-Korean relations.⁵⁷ According to the Courts, ironically, the NLL cannot be regarded as a maritime frontier because the Korean Peninsula and the territorial waters surrounding the Peninsula must be inherently appertained to the territory of the Republic of Korea. However, the Courts’ opinion is not inconsistent with the existence of the NLL, since it is possible to maintain the NLL as a de facto maritime demarcation line existing for particular purposes under the armistice system.

c. Conflicting Public Opinions in South Korea

In South Korea, the NLL conflict is more than a mere international legal dispute. In the aftermath of the First *Yeonpyeong* Naval Clash, the South Korean public became increasingly conservative in addressing the NLL conflict, believing that the NLL is the

⁵⁵ DAEHANMINKUK HUNBEOB [HUNBEON] [CONSTITUTION] art. 3, 4 (S. Kor.) [hereinafter ROK Constitution].

⁵⁶ CHUL SOO KIM, CONSTITUTIONAL LAW OF KOREA 168–69 (20th ed. 2008). *See also* Seong Ho Jeh, *Bun-Dan-Gwa Tong-Il-E-Dae-Han Beob-Jeok Jaeng-Jeom* [Main Legal Issues Concerning the Division and Unification of Korea] CHUNGANGBEOPHAK Je6Jip Je2Ho [CHUNG-ANG L. REV. Vol. 6-2] 67 (2004).

⁵⁷ Supreme Court [S. Ct.], 90Da1451, Sept. 25, 1990 (S. Kor.); Constitutional Court [Const. Ct.], 2003 Hun-Ma114 (consol.), June 30, 2005, (17(1) KCCR, 879) (S. Kor.); Constitutional Court [Const. Ct.], 2004Hun-Ba68 (consol.), July 27, 2006 (18(2) KCCR 880) (S. Kor.); *see also* Supreme Court [S. Ct.], 89NU6396, Sept. 28, 1990 (S. Kor.) (holding that the *Copyright Act* is still valid even in North Korea). However, by contrast, the Constitutional Court found that one of North Korean universities cannot be regarded as a South Korean university officially registered in the Ministry of Education, Science and Technology in spite of the article 3 of the ROK Constitution. Constitutional Court [Const. Ct.], 2006Hun-Ma679 (consol.), Nov. 30, 2006 (18(2) KCCR 549) (S. Kor.).

Maginot Line of maritime security. Yet many South Koreans are aware that the legality of the NLL is controversial. Moreover, many academics generally admit that the NLL does not fall within the scope of the legal concept of maritime border in the international law of the sea. However, they still assert that the NLL is an integral part of South Korea's maritime sovereignty due to the fact that the Korean Peninsula is technically in a state of war.

A statement by an anonymous law expert of the Foreign Ministry points out the conceptual confusion among South Koreans:

[A]part from legal arguments, the NLL conflict has to be understood with other complexities. As a matter of international law, sovereign states can negotiate the delimitation of maritime border during peacetime. The ROK Constitution recognizes the Republic of Korea as the sole legitimate government of the Korean Peninsula. South Korea, therefore, should not defined the NLL as a maritime frontier, because North Korea is a legitimate state under the ROK Constitution. On the other hand, however, the Korean Peninsula is technically in a state of war. Therefore, South Korea cannot exercise her maritime jurisdiction over the northern part of the NLL. Nor does North Korea cross the NLL. In this respect, it should be admitted that the NLL performs the role as maritime border between the two Koreas.⁵⁸

In this circumstance, the Roh Moo Hyun Government's approach of separating legal elements from politico-military elements brought about heated political debates in South Korea. The government publicly declined to define the NLL as a maritime frontier on the premise that the concept of a maritime demarcation line must be distinguished from a maritime border in international law.⁵⁹ This revolutionary view stimulated conservative national sentiment, and even affected the following presidential elections in South Korea.⁶⁰ Conservative groups harshly lashed out at the former president's remark, defining it as an

⁵⁸ Sung Sik Cho, *Autopsy the NLL*, SHINDONGA at 580 (2008), http://blog.daum.net/_blog/BlogTypeView.do?blogid=06g2L&articleno=16144382&categoryId=758161®dt=20101124001804#ajax_history_home.

⁵⁹ *Roh Says the NLL Is Not a Sea Border*, THE HANKYOREH, Oct. 11, 2007, <http://www.hani.co.kr/arti/politics/bluehouse/242291.html>.

⁶⁰ Su Heon Kim, *Defense Ministry Confirms Roh's Plan to Honor NLL*, THE HANKYOREH, Oct. 9, 2013, http://english.hani.co.kr/arti/english_edition/e_national/606378.html; Jin Woo Kim, *NIS: The Beginning and the End of the NLL Controversy*, THE KYUNGHYAN SHINMUN, July 24, 2013, http://english.khan.co.kr/khan_art_view.html?artid=201307241024287&code=710100.

abandonment of the territory. As mentioned earlier, however, the NLL was unilaterally designated by the UNC in an intention to prevent South Korean naval forces or civilian crafts from advancing north after the Korean War.⁶¹ The NLL closely modeled “a line drawn in 1961 with another name,” that was drawn to “prevent a certain possibility of naval conflicts by prohibiting either the UNC forces or the ROK forces from advancing north.”⁶² From its very beginning, the NLL has never been a maritime border between the two Koreas, though its purpose to separate military forces is consistent with its current role as a maritime demarcation line.

2. Pyongyang’s Position

Since 1973, Pyongyang has persistently undermined the NLL. Soon after the West Sea Incident, the Rodong Daily, a Pyongyang-based newspaper, commented that “the seas around *Haeju*, *Dungsangot* and *Ongjin* Peninsula should be appertained to its jurisdiction on the basis of the rightful interpretation of the KAA.”⁶³ In addition, Pyongyang claimed that South Korean vessels traveling to the NWI must receive prior permission from the North Korean maritime authority since the islands lay within its “coastal water.”⁶⁴ Allegedly based on the interpretation of the article 2.13(b) of the KAA, Pyongyang suggested that a “hypothetical extension line stretching extended parallel to the latitude from the end of the provincial boundary line between *Hwanghae*-do Province and *Gyeonggi*-do Province” as an alternative line.⁶⁵ In 1977, Pyongyang unilaterally proclaimed “200 nautical-mile of the EEZ”

⁶¹ Jon M. Van Dyke et al., *The North/South Boundary Dispute in the Yellow (West) Sea*, 27 MARINE POL’Y. 143, 143 (2003); see also Jeh, *supra* note 3, at 112.

⁶² Jae Jeong Seo, *A New Truth on the NLL Has Come Out*, PRESSIAN, Mar. 23, 2001, http://www.pressian.com/article/article.asp?article_num=40110323132438§ion=05 (quoting CENTRAL INTELLIGENCE AGENCY, THE WEST COAST KOREAN ISLANDS (1974), available at <http://weekly.changbi.com/attachment/1010299189.pdf>) (last visited Aug. 29, 2014).

⁶³ Lee, *supra* note 4, at 545 (quoting RODONG DAILY, Dec. 1, 1973, at 5).

⁶⁴ Lee, *supra* note 4, at 546 (quoting RODONG DAILY, Dec. 3, 1973, at 6).

⁶⁵ Kim, *supra* note 15, at 483.

from its coastal baseline, followed by the establishment of the MWZ, although both zones appeared analogous. None of these actions took into account the NWI, although Pyongyang argued that the measures reflected the principle of equidistance as achieved in the UNCLOS.⁶⁶

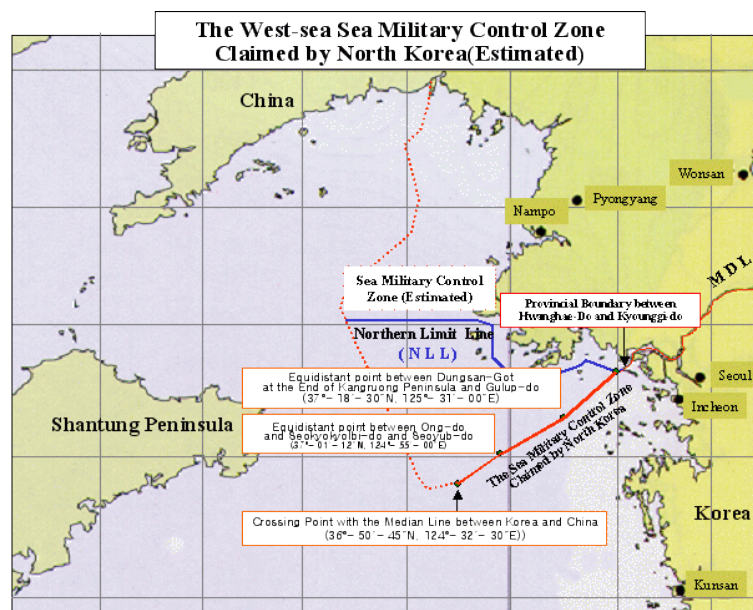


Figure 5: Maritime Delimitation Claimed by North Korea

Source: GUK-BANG-BU [THE MINISTRY OF DEFENSE OF THE REPUBLIC OF KOREA], BUK-BANG-HAN-GYE-SEON-EUL DAI-HA-NEUN WOO-RI-EUI JA-SE [THE REPUBLIC OF KOREA POSITION REGARDING THE NORTHERN LIMIT LINE] (2nd ed. 2007) 19, available at <http://www.military.co.kr/english/NLL/NLL.htm>.

In the aftermath of the First *Yeonpyeong* Naval Clash, Pyongyang's comment on the NLL was recorded as the first official opposition since the end of the Korean War.⁶⁷ Pyongyang publicly opposed the NLL, saying that it “violently infringes on North Korea’s maritime sovereignty.”⁶⁸ At a ministry-level talk held on June 22, 1999, a Pyongyang representative contended that “[t]he NWI are situated within its territorial water....The KAA does not provide any legal basis of the NLL....Moreover the NLL is not based on any form

⁶⁶ Cham-Yeo-Yeon-Dae [People’s Solidarity for Participatory Democracy], NLL Jaeng-Jeom-Gwa Dae-An [NLL: Problems and Solutions] (Nov. 22, 2011), at 8, http://www.peoplepower21.org/PSPD_press/962270 (last visited Aug. 29, 2014).

⁶⁷ Lee, *supra* note 4, at 551 (quoting RODONG DAILY, June 16, 1999, at 5).

⁶⁸ Lee, *supra* note 4, at 553.

of agreement....”⁶⁹ In this view, Pyongyang made it clear that “[t]he NLL was neither acknowledged nor recognized....Neither maritime demarcation line nor maritime border has ever been drawn between the NWI and the coastline....”⁷⁰

Pyongyang also invokes the UNCLOS in defense of its position in the NLL conflict. Pyongyang condemned the NLL as undermining the maritime sovereignty of North Korea in the following ways: the NLL encroaches on the territorial waters of North Korea, thereby infringing upon the maritime sovereignty guaranteed by the UNCLOS.⁷¹ Pyongyang emphasized that each state is limitedly entitled to delimitate the territorial water boundary of an island within the territorial water of an opponent state only through mutual agreement and under special circumstances, such as an armistice system.⁷² Pyongyang therefore underscores that “[c]onsidering the UNCLOS, the disputed water appertains to North Korea’s maritime jurisdiction...therefore, fisheries in the water neither violate the KAA nor encroach the maritime sovereignty of South Korea.”⁷³

Furthermore, Pyongyang rebuts Seoul’s assertions by relying on the international law of territorial acquisition, including acquisitive prescription and the theory of historical consolidation.⁷⁴ With respect to the theory of historical consolidation, Pyongyang points out that there was no form of recognition or acquiescence on its part, and also stresses that the theory requires at least acquiescence on the part of a concerned state to construct a claiming state’s historic title.⁷⁵ When it comes to the assertion based on acquisitive prescription, Pyongyang argues that acquisitive prescription restrictively legitimizes the violation of

⁶⁹ *Id.* (quoting RODONG DAILY, June 23, 1999, at 5).

⁷⁰ Lee, *supra* note 4, at 553 (quoting RODONG DAILY, June 28, 1999, at 5).

⁷¹ U.N. Convention on the Law of the Sea art. 3, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS] (providing that “[E]very State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles....”).

⁷² Lee, *supra* note 4, at 554 (quoting RODONG DAILY, July 3, 1999, at 5); *see also* the UNCLOS, *supra* note 71, art. 15.

⁷³ Lee, *supra* note 4, at 554 (quoting RODONG DAILY, July 11, 1999, at 5).

⁷⁴ Lee, *supra* note 4, at 557 (quoting RODONG DAILY, Sept. 2, 1999, at 5; RODONG DAILY, Sept. 17, 1999, at 5; RODONG DAILY, Sept. 23, 1999, at 6).

⁷⁵ Lee, *supra* note 4, at 555 (quoting RODONG DAILY, Mar. 3, 2000, at 5).

another's state's territorial sovereignty and may be admitted only if the other state has acquiesced the possession for a considerable period of time without any affirmative protest.⁷⁶ Hence, Pyongyang concludes that “[S]eoul is not able to rely on the establishment of acquisitive prescription, insofar as it does not produce any reliable evidence to construct its alleged title.”⁷⁷ Pyongyang further insists that a “[m]ilitary demarcation line can be established both through mutual agreement and the KAA on the condition that Washington and Seoul give up their obsession with the current NLL.”⁷⁸

As part of its protest, Pyongyang proclaimed the CMDL in September 1999, followed by the Navigation Order of the Five Western Coastal Islands (“Navigation Order”). Compared to other alternatives, the CMDL is not parallel to the Latitude, but rather protrudes deep into the gulf of *Gyeonggi*.⁷⁹ The CMDL is an extension from the end of the provincial boundary line between *Hwanghae*-do Province and *Gyeonggi*-do Province, although it arbitrarily connects multiple equidistant points between the corresponding islands.⁸⁰ Relying on the CMDL, Pyongyang contested that the water north of the CMDL should be appertained to North Korea's maritime jurisdiction, and warned that potential military action will be taken as a self-defensive measure.⁸¹ In other words, Pyongyang declined to follow the NLL as a de facto maritime demarcation line by suggesting the CMDL.⁸² The Navigation Order, as a follow-up measure of the CMDL, restricts navigations that enter into and come out from the NWI.⁸³ To be specific, it divides the water around the NWI into three parts: Zone 1-*Baekryong* Island, *Taechong* Island and *Sochung* Island; Zone 2-*Yeonpyeong* Island and its

⁷⁶ See Lee, *supra* note 4, at 555.

⁷⁷ *Id.* (quoting RODONG DAILY, Mar. 3, 2000, at 5).

⁷⁸ Lee, *supra* note 4, at 554 (quoting RODONG DAILY, July 3, 1999, at 5).

⁷⁹ Kim, *supra* note 15, at 485; see also Lee, *supra* note 4, at 556 (quoting RODONG DAILY, July 22, 1999).

⁸⁰ Kim, *supra* note 15, at 485.

⁸¹ CHOONGANG DAILY, Sept. 3, 1999, at 1, 3; CHOSUN DAILY, Sept. 3, 1999, at 4.

⁸² CHOSUN DAILY, Sept. 3, 1999, at 4.

⁸³ Lee, *supra* note 4, at 558 (quoting RODONG DAILY, Mar. 24, 2000, at 2); see also Lee, *supra* note 4, at 558-59 (quoting CHO-SUN-CHOONG-ANG-NYEON-GAM [CHOSUN CENTRAL YEARBOOK] 530-31 (Cho-Sun-Choong-Ang-Tong-Shin-Sa [Chosun Central News Agency] eds. 2001)).

vicinity; Zone 3-U Island.⁸⁴ Pyongyang requested that both civilian and military crafts navigating toward the NWI, particularly the Zone 1 or Zone 2, only use the designated sea-lanes.⁸⁵

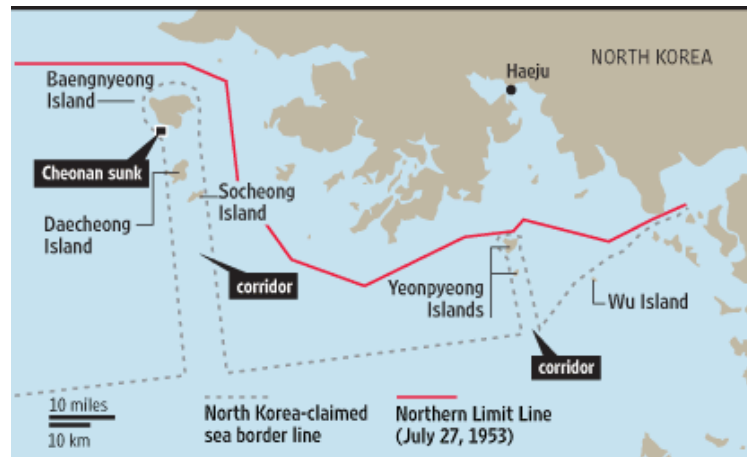


Figure 6: Declared Navigation Corridors

Source: Evan Ramstad, *Korea Crisis Has Roots in Border Row*, THE WALL STREET JOURNAL, June 2, 2010, <http://online.wsj.com/articles/SB10001424052748703961204575280472071130754>.

In the wake of the Second *Yeonpyeong* Naval Clash which occurred in 2000, Pyongyang accused the South Korean military boats of the first strike against North Korean patrol ships, which had prevented the ships from performing their rightful duties within the legitimate maritime boundary.⁸⁶ A Pyongyang representative officially condemned the NLL again, stating that “the South Korean boats provoked by infringing upon the territorial sovereignty of North Korea through a preemptive attack, while the North Korean navy only took self-defensive actions in response to that illegal attack.”⁸⁷ Pyongyang also argued:

The NLL was unilaterally drawn by the UNC in 1950s without any relevant notification. Therefore, the NLL does neither comply with the KAA nor fundamental principles of international law. But both Seoul and Washington have

⁸⁴ Lee, *supra* note 4, at 558–59 (quoting CHO-SUN-CHOONG-ANG-NYEON-GAM [CHOSUN CENTRAL YEARBOOK] 530–31 (Cho-Sun-Choong-Ang-Tong-Shin-Sa [Chosun Central News Agency] eds. 2001)).

⁸⁵ Kim, *supra* note 24, at 9.

⁸⁶ Lee, *supra* note 4, at 561 (quoting RODONG DAILY, July 2, 2002, at 4, 5).

⁸⁷ Lee, *supra* note 4, at 562 (quoting RODONG DAILY, July 4, 2002, at 5).

continually dismissed to redraw a maritime demarcation line in accordance with international law.⁸⁸

On the pretext of reconciling inter-Korean relations, Pyongyang suggested a new alternative line at the 6th South-North general-level talk held in 2007. The proposed line is different from both the NLL and the CMDL, even though Pyongyang did not clarify whether it is presented as a maritime demarcation line or maritime border.⁸⁹ Interestingly, this line is analogous to the NLL in part: specifically, the waters between three of the NWI -*Baekryong* Island, *Daechong* Island and *Sochung* Island, and *Jangsangot* and the *Ongjin* Peninsula of the North Korean coastline; the waters between *Haeju* and *Deungsangot*, and the South Korean-held *Yeonpyeong* Island.⁹⁰ Compared to the NLL, however, this alternative line extends farther south between *Sochung* Island and *Yeonpyeong* Island. Regardless of the fact that the South Korea's de facto military control, Pyongyang claimed the 12 nm of the territorial water from its coastline, thereby incorporating the water at a distance of about 10 kilometers from the NLL into North Korea's maritime jurisdiction.

3. Maritime Border or Military Demarcation Line?⁹¹

⁸⁸ Lee, *supra* note 4, at 562 (quoting RODONG DAILY, July 9, 2002, at 4; RODONG DAILY, July 10, 2002, at 4; RODONG DAILY, July 16, 2002, at 5; RODONG DAILY, Aug. 2, 2002, at 5).

⁸⁹ Professor Chung regards the new line must have been suggested as a maritime border, given the fact that it was initially not discussed at the U.S.–North Korea general-level talk which is irregularly held on behalf of the Military Armistice Commission (“MAC”), but instead discussed at the South-North general-level talk. Chung, *supra* note 6, at 266. However, it is still not sure whether Pyongyang considers the US-North Korea general-level talk as the replacement of the MAC. Therefore it is speculated that Pyongyang might have wanted to negotiate with Seoul with respect to issues over maritime economic and security. As of now, Pyongyang's underlying intention is not clear whether the new line was suggested as a maritime border, or as a maritime demarcation line at the 6th South-North general-level talk.

⁹⁰ *Id.*

⁹¹ Professor Park even describes that “...the dispute over the NLL is not a matter of law, but military security concerns are deeply involved...moreover, the conceptual confusion therein appears to emerge from the discrepancy of legal interpretation.” Chun Ho Park, *Maritime Issues Surrounding the Korean Peninsula*, 76 DIPLOMACY 35–6 (2006).

This is a highly debatable question that gives rise to strong differences of opinion between the two Koreas, who are still technically in a state of war. As mentioned earlier, the South Korean government, including the judiciary, does not recognize North Korea as a legitimate state. Logically speaking, therefore, it is ironic for South Korea to insist on the NLL as its maritime frontier. Throughout the conflict, Pyongyang explicitly distinguishes between the concept of maritime border and maritime demarcation line. However, apart from the controversy about the statehood of North Korea, it is still necessary to discuss whether the NLL falls within the scope of either concept under international law to focus on the main issue of the NLL conflict, which is the establishment of South Korea's historic title to the NLL and the disputed waters. It must be remembered that the NLL conflict itself is not concerned with the delimitation of either the territorial sea or the EEZ in the Yellow/West Sea.⁹²

Pyongyang defines Seoul-led military drills as the use of force against its territorial water, particularly with respect to the water between *Sochung* Island and *Yeonpyeong* Island.⁹³ Pyongyang often suggests that a hypothetical maritime boundary should extend south of the water, far beyond the current NLL. As a matter of fact, the straight baseline segment of the NLL between the two South Korean-held islands is at a distance of 45 nm (83 kilometers) that may not be incorporated into the territorial water of South Korea under general principles of the law of the sea.⁹⁴

On the contrary, Seoul refutes Pyongyang, arguing that military drills have been conducted within South Korea's territorial boundary since the ROK MND recognizes the NLL as the maritime frontier.⁹⁵ The national sentiment prevailing in South Korea also highlights the symbolic status of the NLL as the maritime frontier that defends the NWI as

⁹² Lee, *supra* note 17, at 56.

⁹³ Chung, *supra* note 6, at 271.

⁹⁴ *Id.* at 267.

⁹⁵ *Joint Chief of Staff Said Fire Drill Will be Resumed*, THE HANKYOREH, Dec. 16, 2010 <http://www.hani.co.kr/arti/politics/defense/454201.html>.

well as Seoul metropolitan area. Some academics support the ROK MND, asserting that “as the NLL is the maritime border in the Yellow/West Sea, the waters lying south of the NLL appertains to the maritime jurisdiction of South Korea.”⁹⁶ Depending on political tendencies, however, Seoul’s politicians are highly divided as to whether the NLL should be regarded as a maritime frontier of South Korea. To some extent, Seoul’s dogma has proscribed the development of legal arguments that may support Seoul’s position in light of international law.

Strictly speaking, the NLL has significant flaws to be included into the concept of maritime border inasmuch as maritime border, in principle, must be distinguished from maritime demarcation line in terms of shape, object, and function. In terms of the international law of the sea, the term “territorial water” means a sea over which a coastal state is exclusively entitled to exercise its maritime jurisdiction, and “an adjacent belt of sea of a coastal State” in shape.⁹⁷ By comparison, the term “military demarcation line” is drawn either vertically or horizontally in a linear form to separate belligerent parties by creating a buffer zone between them. Basically, a coastal state is entitled to exercise maritime sovereignty over its territorial water by using natural resources to deal with security, customs, and law enforcement. In comparison, a maritime demarcation line refers to a line drawn on the sea for particular purposes such as the separation of conflicting military forces.⁹⁸ In this respect, Seoul’s position can be strengthened only if it views the NLL as a *de facto* maritime demarcation line established for the stability of the armistice system.⁹⁹ It is also consistent

⁹⁶ See Chung, *supra* note 6, at 257–68.

⁹⁷ UNCLOS, *supra* note 71, at art. 2.

⁹⁸ The DMZ is a good example legitimately performing as a military demarcation line in the Korean Peninsula.

⁹⁹ Still, however, the NLL may be considered as a valid maritime border, particularly with respect to some segments where the NWI and North Korea’s coastline are directly opposite to each other. Both the KAA Article 2.15 and the UNCLOS Article 15 appear to accept the validity as well as the necessity.

with Henry Kissinger's report, which points out an erroneous use of the term "territorial water" by South Korean officials.¹⁰⁰

In the absence of a legal basis, it is hard for Seoul to insist that the NLL is South Korea's maritime frontier. Even assuming that the UNCLOS is applied to the NLL conflict, the NLL cannot be the maritime frontier in the Yellow/West Sea,¹⁰¹ since the NLL extends into the midst of the *Shandong* Peninsula of China and the *Hwanghae-do* Province.¹⁰² The western end of the NLL stretches far into the midst of the *Shandong* Peninsula of China and the *Hwanghae-do* Province of North Korea. Under the UNCLOS, Seoul's claim of territorial title to such broad maritime areas may not be persuasive, as it overlaps with a large portion of the international waters, such as the high sea or the potential EEZ of China.¹⁰³ In addition, the KAA does not provide, in its text, any basis for the NLL to serve as South Korea's maritime frontier. Considering that the NLL blocks the coastline of North Korea, it may rather be a violation of the KAA.¹⁰⁴

Fortunately, however, the KAA, though it has no prescription for any form of a maritime demarcation line, generally covers post-war maritime management surrounding the Korean Peninsula: "[b]oth sides shall respect the water contiguous to the DMZ and to the land area under the military control of the opposing side, and not to engage in blockade of any kind in Korea."¹⁰⁵ Although the KAA does not use the term "territorial water," it is not unreasonable to conclude that both sides acknowledge maritime concerns, by including the phrase "the water contiguous to the land area." The following points also support the following conclusion. First, international law had no definition of territorial water at the time

¹⁰⁰ Je Min Son, *Kissinger "Unilaterally Drawn NLL Violates International Law,"* THE KYUNGHYANG SHINMUN, Dec. 17, 2010, http://news.khan.co.kr/kh_news/khan_art_view.html?artid=201012172153245&code=910303 (citing SECRETARY OF STATE, SUMMARY PUBLIC AFFAIRS ASPECT OF NORTH KOREA BOAT/AIRCRAFT INCIDENT (1975)) (last visited Sept. 12, 2014).

¹⁰¹ Jon Barry Kotch & Michael Abbey, *Ending Naval Clashes on the Northern Limit Line and the Quest for a West Peace Regime*, 27-2 ASIAN PERSP. 183, 188 (2003); see also Van Dyke et al., *supra* note 62, at 150.

¹⁰² See UNCLOS, *supra* note 71, at art. 3; see also Chung, *supra* note 6, at 269.

¹⁰³ Chung, *supra* note 6, at 269.

¹⁰⁴ See KAA, *supra* note 9, at art. 2.15, 2.16.

¹⁰⁵ See *id.*

of the armistice negotiations.¹⁰⁶ Second, the US-led UNC and Communist China that led the negotiations might have believed that border delimitation was beyond their authority.¹⁰⁷ Third, the KAA take into account military objectives and it further presumes the establishment of a military demarcation line, other than the MDL.¹⁰⁸ Lastly, the parties were concerned about issues over the maritime delimitation, given the fact that they debated over the breadth of the territorial water throughout the negotiations.¹⁰⁹ In other words, the KAA provides a general framework for a maritime boundary between the two Koreas by using the phrase “the water contiguous to the land area shall be respected.”¹¹⁰ Considering the purpose of the KAA and the role of the NLL, the NLL should keep serving as a de facto military demarcation line to create a maritime buffer zone, until both Koreas settle this issue whether in courts or through diplomatic negotiation.

¹⁰⁶ Chung, *supra* note 6, at 262; *see also* Cham-Yeo-Yeon-Dae, *supra* note 66.

¹⁰⁷ Chung, *supra* note 6, at 262.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* In 1968, the American idea based on the 3 nm rule was dismissed by North Korea who asserted the 12 nm-rule in dealing with the Pueblo Incident, because Pyongyang unilaterally proclaimed the 12 nm of the territorial water in 1955, *id.*

¹¹⁰ *Id.*

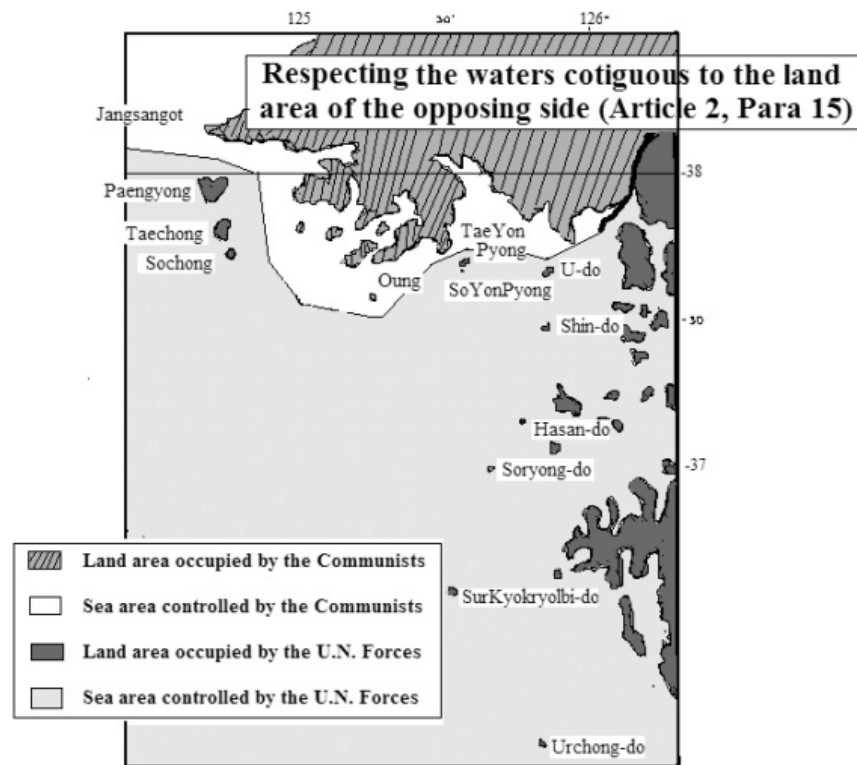


Figure 7: Areas Occupied by Each Side

Source: THE MINISTRY OF NATIONAL UNIFICATION OF THE REPUBLIC OF KOREA, PROCEEDING MINUTE OF SOUTH AND NORTH MILITARY SUB-COMMITTEE 5TH SESSION 283(1992).

The NLL cannot be South Korea's maritime frontier in the Yellow/West Sea in terms of international law. However, the NLL can still serve as a *de facto* maritime demarcation line between the two Koreas, though an issue over South Korea's alleged historic title remains.¹¹¹ It is undeniable that the NLL has been essential to the stable management of the KAA, even during the Cold War.¹¹² In defense of the NLL, therefore, South Korean legal writers have referenced many principles and theories. Some believe that the NLL has been historically consolidated as a *de facto* maritime demarcation line as years go by, because the parties of the KAA implicitly recognized the NLL at least as a temporary measure. Others argue that the NLL reflects unique circumstances surrounding the Korean Peninsula, thereby

¹¹¹ GOOK-HOE-IP-BEOB-JO-SA-CHEO [National Assembly Research Service], BUK-BANG-HAN-GYE-SEON MOON-JE-WA DAE-EUNG-BANG-HYANG [THE NLL CONFLICT AND PLANS OF REACTION] 48 (2011).

¹¹² Kyung Hwan Chung, *NLL Moon-Je-Eui Gi-Bon-Seong-Gyeok-Gwa Woo-Ri-Eui Dae-Eung-Jeong-Ryak* [A Study on the Basic Character of the NLL Issues and Response Strategies] TONGILJEONRYAK Je8Kwon Je3Ho [UNIFICATION STRATEGY Vol. 8-3] 153, 164–68 (2008).

becoming an exception to general principles of international law.¹¹³ Yet, current literature lacks comprehensive analysis on international legal practices and jurisprudence of international courts and arbitrators. Accordingly, additional discussions are required to analyze South Korea's alleged historic title to the NLL and the disputed waters by exploring the law relating to territorial acquisition.

¹¹³ See Cho, *supra* note 59.

	Seoul	Pyongyang
Legal Status of the NLL	Though unilaterally drawn, it is a valid <i>de facto</i> demarcation line for the prevention of armed conflict under the armistice system. The UNCLOS is not applicable since the Korean Peninsula is technically in a state of war.	It is an illegal line, which does not have any basis either in the KAA or in any form of international law. Therefore, it infringes upon North Korea's territorial sovereignty.
Historical Consolidation	Under South Korea's effective occupation, it has been consolidated as an international norm. Moreover, North Korea acquiesced to the NLL in many instances.	A state may acquire territorial sovereignty over a particular territory when there is either agreement, recognition or acquiescence on the part of concerned states. However, was there any form of agreement on the existence of the NLL? Or, was there any form of recognition on the part of states involved?
Acquisitive Prescription	As inter-Korean practices indicate, Pyongyang has acted in compliance with the NLL since the War ended.	The doctrine of acquisitive prescription is a legal mode of transferring sovereignty when an opponent state has acquiesced in the defective possession for a considerable period of time without any opposition. However, North Korea has persistently opposed the NLL, though the U.S./South Korea always disregard that opposition.

TABLE 1: Inter-Korean Dispute over the Legal Status of the NLL¹¹⁴

¹¹⁴ Lee, *supra* note 4, at 552–53.

II. DOCTRINAL BASIS OF THE THEORY OF HISTORICAL CONSOLIDATION

A. Emergence of the Concept of Historical Consolidation

1. The Anglo-Norwegian Fisheries Case

The theory of historical consolidation was initially introduced in the *Fisheries Case* in which Norway and the United Kingdom disputed over the interpretation and the application of the Norwegian Royal Decree of 1935, which delimits the Norway's territorial sea. In particular, a *dictum* of the *Fisheries Case* produced remarkable legal consequences for the development of the theory to deal with potential territorial disputes. In this case, International Court of Justice ("ICJ") encountered the question of whether "[N]orway, as against other states, has acquired historic title to territorial waters so delimited by its system of straight baseline since 1869, even though this method was not proved as valid under general principles of international law."¹¹⁵ Based on historical consolidation, the ICJ found Norway's claim of historic title to the disputed water to be valid in part.¹¹⁶ More significantly, the ICJ upheld Norway's straight baseline method of delimiting its territorial sea as "a traditional system of delimitation" that conforms to the general principles of international law.¹¹⁷ The finding can be summarized as follows: "the Norwegian system of delimiting her territorial water had acquired legal validity by way of 'historical consolidation' and thus becomes

¹¹⁵ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 156 (7th ed. 2008).

¹¹⁶ MARJORIE M. WHITEMAN, *A DIGEST OF INTERNATIONAL LAW* VOL. 2 1225 (1963) (citing Anglo-Norwegian Fisheries Case (U.K. v Nor.), 1951 I.C.J. 116 (Dec.18) [hereinafter Fisheries Case]).

¹¹⁷ MARJORIE, *supra* note 116.

‘enforceable as against all states.’”¹¹⁸ This finding called on judges and academics to reconsider the traditional rules and principles governing territorial titles.¹¹⁹

In the *Fisheries Case*, notably, each party contributed to the development of the theory of historical consolidation. The Norwegian counsel’s main argument was that “[N]orway does not merely rely on historic title to justify her exceptional rights over the [disputed water]; however, she invokes history, as part of the entire claim, to justify the decree which is in consonance with the general rules of international law.”¹²⁰ According to Norway, its straight baseline system is not a violation of universal law, but rather is an “expression of adaptation to concrete factual situations.”¹²¹ With regard to this argument, the ICJ stated:

[T]his concept of an historic title is in consonance with the Norwegian Government’s understanding of the *general rules of international law*. In its view, these rules of international law take into account the *diversity of facts* and, therefore, concede that the drawing of baselines must be adapted to the *special conditions* obtaining in different regions. In its view, the system of delimitation applied in 1935, a system characterized by the use of straight lines, does not therefore infringe the general law; it is an adaptation rendered necessary by local conditions, [such as the general direction of the coast].¹²²

More precisely, the ICJ indicated an important constitutive element regarding the consolidation of historic title: with the existence of any opposition on the part of other states, *acquiescence* is required to establish the consolidation in a given dispute. Therefore, any opposition from other states would stop the process of consolidation of a historic title. Based on the facts and circumstances in this case, the ICJ found that the Norwegian government’s

¹¹⁸ *Id.* at 1227 (citing *Fisheries Case*, *supra* note 116, at 138).

¹¹⁹ See D.H.N. Johnson, *The Anglo-Norwegian Fisheries Case*, 1-2 INT’L & COMP. L. Q. 145 (1952); see also Jens Evensen, *The Anglo-Norwegian Fisheries Case and Its Legal Consequences*, 46-4 AM. J. INT’L L. 609 (1952).

¹²⁰ MARJORIE, *supra* note 116, at 1226 (citing *Fisheries Case*, *supra* note 116, at 133).

¹²¹ Artur Koztowski, *Legal Construct of Historic Title to Territory in International Law: An Overview*, 30 POLISH Y.B. INT’L L. 61, 66 (2010).

¹²² *Fisheries Case*, *supra* note 116, at 134 (emphasis added).

consistent application of the method had never encountered any protest from foreign states.¹²³

The ICJ held:

Norway has been in a position to argue without any contradiction that neither the promulgation of her Royal Decrees in 1869 and in 1889, nor their application, gave rise to *any opposition on the part of foreign states*. Since, moreover, these Royal Decrees constitute... 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 an historical consolidation which would make it *enforceable as against all States*.¹²⁴

Overall, the ICJ determined that the existence of any opposition on the part of foreign states plays a significant role in assessing whether a state's alleged historic title to particular territory has acquired *erga omnes*.

In addition to the opposition requirement, the ICJ suggested other significant elements that have to be considered prior to the establishment of the consolidation of Norway's historic title. The ICJ particularly mentioned:

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.¹²⁵

Accordingly, the ICJ concluded:

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 in to be contrary to international law.¹²⁶

¹²³ MARJORIE, *supra* note 116, at 1227.

¹²⁴ Fisheries Case, *supra* note 116, at 139 (emphasis added).

¹²⁵ *Id.*

¹²⁶ *Id.* at 140.

2. Confusing Terminology

In *Eritrea v. Yemen Arbitration*, where sovereignty over the islands was in dispute, the terms “original title,” “traditional title,” and “original historic title,” were indiscriminately employed in describing Yemen’s assertion about its historic title.¹²⁷ Regarding this differing terminology, particularly in the context of the law of the sea, Professor B. L. Ruderman explains:

[T]he term “ancient title” should be reserved for legal claims which stretch back in time before the sea was transformed into *res communis*, while the term “historic title” refers to legal title which arose after the concept of freedom of the seas became an accepted part of international law.¹²⁸

This analysis shows that the formation of a historic title, as an exception to generally applicable principles, requires the fulfillment of more rigorous conditions than establishing ancient title.¹²⁹ To some extent, therefore, a claim of historic title is analogous to “prescription,” while a claim of ancient title seems to be linked to “discovery” and/or “appropriation through occupation.”¹³⁰

Contrary to Ruderman’s approach,¹³¹ Artur Koztowski highlights the similarity historic title and other titles mentioned above. He stresses a historic title as a source of

¹²⁷ The Eritrea-Yemen Arbitration, Phase I: Territorial Sovereignty and Scope of Dispute (Eri. v. Yemen), 22 R.I.A.A. 211, at 222, 317 (Perm. Ct. Arb. 1998) [hereinafter *Eritrea v. Yemen Arbitration*].

¹²⁸ Koztowski, *supra* note 121, at 95 (quoting B. L. Ruderman, *The Doctrine of Ancient Title: Unknown Origins, Uncertain Future*, 24 SAN DIEGO L. REV. 769, 780, 785 (1987) (“The doctrine of ancient title derives from this concept of the seas as sovereignless territory.”)).

¹²⁹ Koztowski, *supra* note 121, at 95 (quoting Ruderman, *supra* note 128, at 782, 788) (“Because ancient title is not an assertion of dominion over waters which are the property of the community of states, a state making an ancient title claim has a lesser burden than one asserting historic title.”)).

¹³⁰ Koztowski, *supra* note 121, at 95 (quoting Ruderman, *supra* note 128, at 783–86).

¹³¹ See Ruderman, *supra* note 128, at 789 (asserting that the acceptance of historic title must be a foundation of the legitimacy of ancient title).

sovereignty as well as a reasonable solution to territorial disputes.¹³² Kozyowski asserts, based on “systematic efficiency and coherence,” that historic title is a legal “unity,” although its “meaning, importance, and construction” may vary according to the principle of “intertemporality.”¹³³ Furthermore, Kozyowski argues that the differing terminology merely reflects “the evolution of title,” thereby adopting various means of expression. Thus, it has no negative impact on the invocation of historic title in an individual territorial dispute.¹³⁴ A State can thus contend the acquisition of historic title “regardless of whether it is a primary or secondary, or whether there are any competing claims against the alleged title.”¹³⁵ In this sense, a State may claim a historic title to *terra nullius*, or claim the formation of title based on historical consolidation to a particular territory that was already ruled by another sovereign state.¹³⁶ Kozyowski points out that the international community, which creates “norms, rules and principles” of customary international law, must individually evaluate the derivative feature of historic title.¹³⁷ In other words, Kozyowski believes that the international community should engage in an evaluation of the process of consolidation in a territorial dispute over historic title in order to ensure practicality and efficiency.¹³⁸

How, then, can coherence be achieved in interpreting historic title and the consolidation of historic title? And how are the two elements connected? As a legal method of obtaining territorial sovereignty, “[h]istoric right is the product of a lengthy process comprising a long series of acts, omissions and patterns of behavior which, in their entirety, and through their cumulative effect, bring such rights into being and consolidate them into

¹³² Kozyowski, *supra* note 121, at 95.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* (citing Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶ 80 (Oct. 16)).

¹³⁶ Kozyowski, *supra* note 121, at 96. *Contra* Minquiers and Ecrehos (Fr. v. U.K.), 1953 I.C.J. 47 (Nov. 17) (stating that “since both parties assert historic title (original or ancient title), the principles associated with the formation of title to *res nullius* could thus not be applied) [hereinafter Minquiers and Ecrehos Case].

¹³⁷ Kozyowski, *supra* note 121, at 96.

¹³⁸ *Id.*

rights valid in international law.”¹³⁹ In the *Fisheries Case*, the ICJ implanted the concept of consolidation into the establishment of historic title. In the construction of historic right or title, “[c]onsolidation is an essential part of that lengthy legal process through which a State may acquire sovereignty over a particular territory.”¹⁴⁰ Through the process of “historical consolidation,” therefore, a state may acquire “historic title” to or “historical right” over a particular land or sea that cannot be acquired through general international law.¹⁴¹

B. Doctrinal Value of the Idea of Consolidation

1. Complexities of the Doctrine of Acquisitive Prescription

The doctrine of acquisitive prescription refers to a legal method of transferring territorial sovereignty. In principle, acquisitive prescription is analogous to the common law doctrine of adverse possession for private real estate, although it is often debated whether possession from time immemorial falls into the scope of acquisitive prescription. In international law, acquisitive prescription is defined as follows: “the result of the peaceable exercise of de facto sovereignty for a very long period over territory subject to the sovereignty of another.”¹⁴² In short, acquisitive prescription involves a sovereign’s open encroachment upon a particular territory for a prolonged period of time, and also involves acting as a sovereign in the absence of any contention from the original sovereign.¹⁴³ In modern international law, the broad definition of acquisitive prescription is categorized by

¹³⁹ Y. Z. Blum, *Historic Rights*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW VOL. II* 711 (R. Bernhardt ed., 1995).

¹⁴⁰ S. P. SHARMA, *TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW* 173 (1997).

¹⁴¹ Blum, *supra* note 139, at 710.

¹⁴² Randall Lesaffer, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, 16-1 *EUR. J. INT’L. L.* 25, 46 (2005) (quoting *STARKE’S INTERNATIONAL LAW* 146 (I. A. Shearer ed., 11th ed. 1994)).

¹⁴³ Lesaffer, *supra* note 142, at 46–7.

three different elements: *immemorial possession* which is invoked in a situation where “[t]he origin of a state of affairs is uncertain and may have been legal or illegal but is presumed to be legal;” *usucapio bona fide* requiring “[u]ninterrupted possession, *justus titulus*- even if it was defective, *good faith*, and continuance of possession for a period defined by the law”; and *usucapio mala fide*,- “[m]odified and applying under conditions of *bad faith*.”¹⁴⁴

It is accepted that the doctrine of acquisitive prescription has existed as one of the traditional modes of acquiring title to territory,¹⁴⁵ though a few still cast doubt on its basis in international law.¹⁴⁶ Regardless of which side they choose, however, international legal practitioners generally agree that the role of “immemorial possession” (straightforward possession), which essentially means “possession from time immemorial,” makes up part of the doctrine.¹⁴⁷ In territorial disputes, immemorial possession was particularly invoked in cases where there was “no certainty about the origin of a long period of possession.” In the case of immemorial possession, this practice is “presumed legal.”¹⁴⁸ Interestingly, scholars attempted to combine the concepts of “immemorial possession” and “prescription properly so called” under the larger heading of acquisitive prescription. However, there are still those

¹⁴⁴ BROWNLIE, *supra* note 115, at 146–47. Indeed the second and third forms are not exactly the same as the Roman law *usucapio*, though international lawyers tend to acknowledge them as being close to the Roman concept. Lesaffer, *supra* note 142, at 47. This paper, however, will not particularly distinguish between *usucapio bona* and *mala fide* in explanation of adverse possession. In recent international legal practices over territorial disputes, in fact, there is no relevant adjudication directly applying either “*praescriptio bona* or *mala fide*.” SHARMA, *supra* note 140, at 113. For further detailed discussion on the doctrine of acquisitive prescription, see Lesaffer, *supra* note 142, at 46–56.

¹⁴⁵ Judgment on Jurisdiction and Admissibility in Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 461, at 464 (Apr. 9) (separate opinion of Judge Mosler) (stating that acquisitive prescription is a “general principle of law within the meaning of Article 38, paragraph 1(c) of the Statute, by which lapse of time may remedy deficiencies of formal legal acts”).

¹⁴⁶ Land and Maritime Frontier Dispute (El Sal. v. Hond.), 1992 I.C.J. 629, at 678 (Sept. 11) (separate opinion of Judge Torres Bernardez) (insisting that “acquisitive prescription is a highly controversial concept which, for my part, I have the greatest difficulty in accepting as an established institute of international law”).

¹⁴⁷ D. H. N. Johnson, *Consolidation as a Root of Title*, 1955 CAMBRIDGE L. J. 215, 219 (1955); see also Lesaffer, *supra* note 143, 46–56.

¹⁴⁸ Lesaffer, *supra* note 142, at 46.

who strictly distinguish the two concepts.¹⁴⁹ This tendency arises from a strong belief that adverse possession is a pure essence of prescription properly so called.¹⁵⁰

Indeed, the tendency is to distinguish prescription from occupation by implanting the element of adverse possession into acquisitive prescription.¹⁵¹ Although acquisitive prescription and occupation are accepted as traditional means of acquiring territorial sovereignty, and both contain the element of “effective occupation,”¹⁵² occupation and effective occupation relates territorial title to *res nullius/terra nullius* over which another state had no sovereignty before.¹⁵³ Therefore, in cases where a “wider belt of territorial waters” in the high seas are is at issue, a state may acquire exclusive rights only through acquisitive prescription. This is because the high seas are regarded as *res communis* in which many states share interests.¹⁵⁴ In a situation that do not involve the high seas, but involve particular territory was fully governed by another sovereign, a state may also rely on prescription.¹⁵⁵ In this regard, it is obvious that acquisitive prescription, using adverse possession as its basis, is a legal method by which a “[s]tate can acquire a particular territory belonging either to other sovereigns or the international community.”¹⁵⁶

2. Consolidation as a Solution

Interestingly, in territorial disputes, international courts and arbitrators have not yet mentioned “acquisitive prescription in the sense of the Roman *usucapio*” as a sole source of

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Johnson, *supra* note 147, at 220.

¹⁵² Lesaffer, *supra* note 142, at 49.

¹⁵³ Johnson, *supra* note 147, at 219.

¹⁵⁴ *Id.* at 220.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* According to Johnson, the *Minquiers and Ecrehos Case* explicitly indicates that prescription essentially refers to a method of territory acquisition “through adverse possession,” *id.* at 221.

territorial title.¹⁵⁷ As indicated above, acquisitive prescription is designed to cure the defective title of a state that can prove its “[p]eaceful and uninterrupted possession of particular territory for a long period of time.”¹⁵⁸ Hence, logically speaking, a claim of acquisitive prescription does not have to assess other competing claims or titles on the part of foreign states.¹⁵⁹ In every territorial dispute, however, international jurisprudence usually involve “competing acts of sovereignty or possession of different states” that courts and tribunals have to assess.¹⁶⁰ This may be the reason why it became necessary for international law to employ historical consolidation embracing various legal methods, such as acquisitive prescription and occupation, as a legal method.

As a newly invented method of acquiring a territorial title, Professor Charles de Visscher introduced the concept of “consolidation” after his involvement in the *Fisheries Case*. The new approach highlights consolidation, which is distinguished from either occupation or acquisitive prescription.¹⁶¹ By introducing the so-called “theory of historical consolidation,” Professor de Visscher attempted to avoid certain ambiguities connected with the traditional classification of the legal modes of territorial acquisition, particularly with acquisitive prescription.¹⁶²

Immemorial possession and adverse possession are comprehensively combined under the theory of historical consolidation.¹⁶³ As discussed above, scholars and judges, though they generally accept acquisitive prescription as a legal method, have resisted the combination of two different types of possession under the single title of acquisitive prescription.¹⁶⁴ Due to the theory, however, the concepts of acquisitive prescription and

¹⁵⁷ Lesaffer, *supra* note 142, at 49.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ CHARLES DE VISSCHER, *THEORIES AND REALITY OF PUBLIC INTERNATIONAL LAW* 244–45 (1953).

¹⁶² See Johnson, *supra* note 147, at 219–22; see also Koztowski, *supra* note 121, at 90.

¹⁶³ Johnson, *supra* note 147, at 223.

¹⁶⁴ *Id.* at 219.

adverse possession may either be abandoned altogether, or confined to only cases concerning adverse possession.¹⁶⁵

Furthermore, the theory of historical consolidation has significant implications for international law relating to territorial acquisition, given contemporary international jurisprudence that requires “a title be not only acquired, but also be continuously maintained, following ‘the conditions required by the evolution of law.’”¹⁶⁶ In a series of territorial disputes, international courts and arbitrators tend to focus on the maintenance of titles instead of the acquisition of titles. By adopting the idea of consolidation, the theory can now support the approach of international courts and arbitrators, because it places more emphasis on the process of maintenance and manifestation of sovereignty than other legal methods do.

Obviously, the theory of historical consolidation also avoids the ambiguities and difficulties connected with the traditional modes of territorial acquisition, particularly with acquisitive prescription. The theory disproves the continuous efforts of international legal community to broaden and modify the doctrines of acquisitive prescription and occupation. Based on the theory, the concepts of immemorial possession and adverse possession, which give rise to the conceptual confusion, can be embraced under the single heading of historical consolidation. As a new legal mode of territorial acquisition, historical consolidation has resulted in another remarkable legal consequence. As indicated above, the theory underscores not only the acquisition of title, but also it emphasizes the maintenance of title through the gradual process of consolidation.¹⁶⁷ In the sense of a territorial dispute, thus, the definition of historic title becomes much clearer by focusing on the process itself. More practical premises are available to resolve territorial disputes.¹⁶⁸

¹⁶⁵ *Id.* at 223.

¹⁶⁶ *Id.*; see also the Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928). In the aftermath of the theory, scholars’ attention have shifted from acquiring titles to maintaining titles, *id.* at 224.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

C. Systematic Interdependence between Historical Consolidation and Other Legal Methods

As indicated above, the systematic interdependence among the legal modes creates difficulties in interpreting and applying them properly. Unlike the case of other legal modes of territorial acquisition, international jurisprudence concerning historical consolidation take into consideration all relevant legal circumstances as to the exercise of sovereignty, particularly at the moment of materializing “consolidation” –the critical moment.¹⁶⁹ Depending on the facts and circumstances in each case, a state’s action may form either a part of the establishment of historic title, or a part of other independent legal titles.¹⁷⁰ In other words, a particular historical event may constitute another legal mode, although it appears to be related to historic title.¹⁷¹ As repeated, historical consolidation is a product of comprehensive efforts to combine the diverse elements of occupation, immemorial possession and adverse possession under a single heading. Therefore, a state asserting historic title, before courts or arbitrators, should first determine whether its assertion is based on historic title or another title, since the same event may indicate a different legal mode.¹⁷² Overlapping similarities and differences between historical consolidation and other legal modes must be clarified in advance.

1. Occupation

Occupation refers to a traditional process of constructing “complete and exclusive sovereignty over a territory” belonging to no other sovereigns. A state can assert occupation even without reference to “acquiescence, tolerance or any other form of acceptance on the

¹⁶⁹ Koztowski, *supra* note 121, at 92.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

part of foreign states,” contrary to a claim based on historical consolidation.¹⁷³ Because adverse possession constitutes the essence of historical consolidation, historical consolidation requires the toleration or acquiescence of other states or the generality of states. However, given that both occupation and consolidation demand the physical exercise of sovereignty, a state’s action, for instance “a peaceful appropriation of *terra nullius*,” may either form historic title or just initiate the process of consolidation.¹⁷⁴

As a primary legal mode of territorial acquisition, a state’s exercise of sovereignty accompanied by the “intention of appropriation” is an essential element of occupation.¹⁷⁵ Hence, both historical consolidation and occupation require the “actual exercise of effective sovereignty” to establish a territorial title, particularly in circumstances involving a peaceful appropriation of territory over which no other sovereignty has valid legal title.¹⁷⁶ As “possession of territory” plays a significant role in the formation of both legal modes, a state may assert a claim of historic title to stress its long period of possession as well as its positive legal influence on the alleged title.¹⁷⁷ However, it is still plausible that competing states can assert the absence of acquiescence or tolerance on their part to prevent the establishment of the alleged title. To figure out whether the alleged title is formed, international courts and arbitrators will then evaluate the “degree of effective occupation” by examining all relevant facts and circumstances.¹⁷⁸ In the absence of the proof of acquiescence or in the case of *terra nullius*, therefore, a claiming state would choose occupation as a basis of its claim, rather than historical consolidation.

2. Prescriptive Rights (Acquisitive Prescription)

¹⁷³ *Id.* at 93.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 94.

¹⁷⁷ *Juridical Regime of Historic waters including historic bays-Study prepared by the Secretariat*, [1962] 2 Y.B. Int’l L. Comm’n 80, U.N. Doc. A/CN.4/143 at 71 [hereinafter *Juridical Regime*].

¹⁷⁸ Koztowski, *supra* note 121, at 93.

As discussed above, acquisitive prescription refers to a legal mode of territory acquisition that is only concerned with territories where some requisite conditions have been fulfilled over a long period of time.¹⁷⁹ Particularly in disputes over maritime territories, a state may choose to argue for either immemorial possession or adverse possession. Compared to the case of immemorial possession, which is presumed to be legal, however, a state claiming adverse possession usually did not usually satisfy the conditions of valid legal possession at the beginning of the process.¹⁸⁰ Regardless of a state's choice in developing its claim, the essence of both modes lays in possession, like occupation and historical consolidation.¹⁸¹

Strictly speaking, a claim relying on “adverse possession which by definition is an assertion of title against another sovereign state” tends to require a more stringent approach than a claim relying on immemorial possession, which is relatively more flexible in choosing a legal method to acquire title.¹⁸² Thus, the lapse of time requirement, by which is meant “such possession extends over a course of time,” is justifiable only for the case of immemorial possession.¹⁸³ However, a state claiming historic title may still argue a parallel claim of acquisitive prescription in circumstances where the state is confident that its possession started from time immemorial.¹⁸⁴

In order to demonstrate the acquisition of territory, both adverse possession and immemorial possession have to deal with an issue over “uncertain starting date” of possession.¹⁸⁵ Considering the “uncertainty” of immemorial possession, a state would prefer to choose adverse possession, since both share uncertainty regarding the precise starting date

¹⁷⁹ *Id.* (quoting Juridical Regime, *supra* note 177, at 63).

¹⁸⁰ Juridical Regime, *supra* note 177, at 63.

¹⁸¹ Koztowski, *supra* note 121, at 93 (quoting Juridical Regime, *supra* note 177, at 64).

¹⁸² Koztowski, *supra* note 121, at 93 (quoting Juridical Regime, *supra* note 177, at 64).

¹⁸³ Koztowski, *supra* note 121, at 93

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

of the acquisition of sovereignty.¹⁸⁶ In this sense, a claim of acquisitive prescription may also be understood as a claim of historic title as long as the former contains an assertion based on possession from time immemorial.¹⁸⁷ On the other hand, if a state claiming the acquisition of historic title relies on “defective and invalid” prescriptive possession, such a claim may be understood as an exception.¹⁸⁸

In conclusion, territorial possession accompanied by a claim of historical consolidation may help construct a title even in a circumstance where another state claims the existence of its earlier legal title to a given territory.¹⁸⁹ Therefore, a title acquired through historical consolidation should not easily be defined as invalid or voidable at the first glance, because it may still be assessed as better or worse than another title.¹⁹⁰ The theory of historical consolidation is a hybrid model of the traditional legal modes of territorial acquisition. Based on historical consolidation, a state may claim its acquisition of historic title over *terra nullius*, or over particular territory that was already ruled by another sovereign state.¹⁹¹

III. CONSTITUTIVE ELEMENTS OF HISTORIC TITLE

According to Brownlie, historical consolidation was originally invented to deal with “the extension of sovereignty over *res communis*.”¹⁹² From this perspective, the “attitude of other states” or “toleration of foreign states or the international community” must be the most

¹⁸⁶ *Id.* at 93–4.

¹⁸⁷ *Id.* at 94.

¹⁸⁸ *Id.* (quoting Juridical Regime, *supra* note 177, at 68).

¹⁸⁹ Koztowski, *supra* note 121, at 94.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 96. *Contra* Minquiers and Ecrehos Case, *supra* note 136.

¹⁹² BROWNLIE, *supra* note 115, at 156.

significant element in the formation of historical consolidation.¹⁹³ By themselves, however, these two concepts are not sufficient evidence proving the legality of an alleged historic title.¹⁹⁴

In the *Fisheries Case*, it was the British counsel that advanced the prerequisite conditions of historic title before the Court. The British argument can be summarized as follows:

...reliance on historical title to a definite territory requires that the State asserting historic title demonstrate the exercise of a requisite amount of jurisdiction over the disputed territory over a long period of time, without adversarial claims by other governments, in such a fashion that the absence of adversarial claims would amount to a recognition of jurisdiction...such jurisdiction would be an exception to existing international law.¹⁹⁵

Although the *Fisheries* Court ruled in favor of Norway, it partially accepted the British argument in its verdict. The British argument is reflected in the Court's finding, which lists multiple factors for assessing a claim of historic title: "the notoriety of the facts, the general toleration of the international community, the U.K.'s position in the North Sea, the U.K.'s own interest, the U.K.'s prolonged abstention, constant and sufficiently long practice, and even geographical conditions."¹⁹⁶

In the aftermath of the *Fisheries Case*, the International Law Commission ("ILC") formulated three integral elements required for examining historic title in the light of territorial dispute. The ILC study covers the elements that are applicable to both land and maritime disputes.¹⁹⁷ In order for international dispute resolution bodies to address a claim of historic title, the following three elements should be examined: "a) the exercise of authority

¹⁹³ *Id.* Brownlie also believes that the *Fisheries* Court might have considered the UK government's silence "[a]s an independent basis of legality of [Norway's title] as against the British claim," *id.*

¹⁹⁴ *Id.* at 156.

¹⁹⁵ Koztowski, *supra* note 121, at 70 (citing *Fisheries Case*, *supra* note 116, at 130).

¹⁹⁶ Koztowski, *supra* note 121, at 70 (citing *Fisheries Case*, *supra* note 116, at 139).

¹⁹⁷ Koztowski, *supra* note 121, at 70–1.

over the disputed area by the state claiming the historic right; b) the continuity of this exercise of authority; and c) the attitude of foreign states.”¹⁹⁸

As will be thoroughly discussed below, these three constitutive elements are closely connected with the concept of effective occupation, which also plays a crucial role in the determination of occupation, and acquisitive prescription in a given territorial dispute. However, it must be remembered that effective occupation was originally designed to govern disputes over *terra nullius*.¹⁹⁹ Since acquisitive prescription, occupation and historical consolidation stand on a common ground, it is worth exploring international legal practices and jurisprudence concerning effective occupation. In particular, effective occupation should be examined in connection with the requirement of acquiescence that will be discussed below.

In several cases where prescriptive rights were invoked as a source of title, international courts and arbitrators defined effective occupation as “undisturbed, uninterrupted and unchallenged possession,”²⁰⁰ “continuous and peaceful display of territorial sovereignty,”²⁰¹ “continuous and peaceful display of authority, and the intention and will to act as sovereign, and some actual exercise or display of such authority.”²⁰² In each individual dispute, however, international courts and arbitrators will determine which acts constitute a “display of territorial sovereignty” by deliberating specific circumstances.²⁰³

¹⁹⁸ Juridical Regime, *supra* note 177, at ¶ 80. *But see*, BROWNIE, *supra* note 115, at 156 (arguing that the term “attitude of foreign States” cannot cover all relevant elements thereof).

¹⁹⁹ JEREMIE GILBERT, *INDIGENOUS PEOPLE’S LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTORS TO ACTORS* 32 (2006). At the time of discovery, a State could acquire a title simply based on the discovery of particular territory insofar as the State proved the intention of appropriation as well as the fact of discovery. However, as discovery is no longer occurring and territorial competitions become heated, international law requires effective occupation in addition to an actual act of occupation.

²⁰⁰ *See Chamizal Case (Mex. v. U.S.)*, 6 R.I.A.A. 309 (Perm. Ct. Arb. June 1911).

²⁰¹ *Island of Palmas Case*, *supra* note 166, at 839.

²⁰² *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 53, at 45-46 [hereinafter *Eastern Greenland Case*].

²⁰³ Lesaffer, *supra* note 142, at 51 (citing *Island of Palmas Case*, *supra* 166, at 840); *see also* BROWNIE, *supra* note 115, at 140.

In terms of effective occupation, the possessor of a territory must display its sovereignty in a peaceful way.²⁰⁴ Since the international law related to effective occupation requires more than the “absence of violence,” another state may stop the process of prescription or consolidation simply through “diplomatic protest.”²⁰⁵ Therefore, in the sense of effective occupation, the term “peaceful” may be understood as “acquiescence” on the part of foreign states.²⁰⁶ Inasmuch as the basic elements of effective occupation are related to the constitutive elements of historic title, further discussion is necessary for better understanding of the construction of historic title. However, it must be noted that an act of occupation may only be adduced as evidence demonstrating the fact of possession in the process of prescription or consolidation, and the act itself is not sufficient to establish a title.²⁰⁷ In many cases, therefore, judges and arbitrators will contemplate relevant factual and legal circumstances before rendering a decision.

A. Sovereign Authority Required

As mentioned above, the ILC study sets forth “the effective exercise of sovereign authority over a defined territory by appropriate action on the part of the claiming state” as the first condition in consolidating an alleged historic title.²⁰⁸ In this view, a claiming state must exercise its governmental authority in a “visible and sovereign fashion” for a considerably long period of time, directed toward “the usage of the territory” at issue.²⁰⁹ The most important considerations for determining sovereign authority are “[t]he extent of the authority exercised, the relevant acts underlying such assertion of authority, and proof of

²⁰⁴ Lesaffer, *supra* note 142, at 51.

²⁰⁵ *See id.*

²⁰⁶ *Id.*

²⁰⁷ *See id.*

²⁰⁸ Koztowski, *supra* note 121, at 73.

²⁰⁹ *Id.* (quoting Juridical Regime, *supra* note 177, ¶ 80).

effectiveness of the authority exercised.”²¹⁰ Even though the exercised sovereignty does not necessarily have to be absolute,²¹¹ a state’s exercise of governmental activities must be unbounded over “the requisite prolonged period of time,” especially in cases where the state asserts “absolute sovereignty on the basis of historic title.”²¹²

Then how would judges or arbitrators decide the range and scope of required sovereign activities in support of a state’s claim of historic title? Insofar as activities are performed to uphold the sovereign authority, regardless of whether the legislature, executive or judicial branch is involved, all such activities of a particular state or its legal institution are entitled to support a claim of sovereignty over a disputed area.²¹³ However, there are limitations that activities must be “public, constituting an open manifestation of its will, and even achieving a state of recognition and notoriety.”²¹⁴

A claiming state must demonstrate its exercise of sovereign activities to the extent of “a high degree of effectiveness” in order for the activities to lead to the consolidation of a historic title.²¹⁵ Thus, international courts and arbitrators must consider all particular and specific issues of a given territorial dispute when assessing the characteristic of sovereign activities.²¹⁶ In dealing with a claim of historic title, it is difficult to build a permanent

²¹⁰ Koztowski, *supra* note 121, at 71. Moreover, the nature of a given claim is also an important factor to be considered for determining the required character of the sovereign authority, *id.*

²¹¹ A state is not required to exercise all sovereign rights and duties. Rather, the ILC stresses that “the main consideration is that in the area and with respect to the area the State carried on activities which pertain to the sovereign of the area.” Juridical Regime, *supra* note 177, ¶ 88.

²¹² *Id.* According to the ILC, “[e]ither the sovereign activities carried on by a State in a disputed area or the authority carried on by a State in that area must be commensurate with its claim,” *id.* ¶ 87.

²¹³ Koztowski, *supra* note 121, at 72. In this context, the activities of natural persons or private legal entities are not considered sufficient to constitute evidence in claiming sovereignty. On the condition of authority, agency and license, however, those activities can be construed as sovereign acts, *id.* (quoting Juridical Regime, *supra* note 177, at ¶ 95); *see also* Indo-Pakistan Western Boundary between India and Pakistan, (India v. Pak.), 17 R.I.A.A. 1, 436 (Perm. Ct. Arb. 1968) [hereinafter Rann of Kutch Case].

²¹⁴ Koztowski, *supra* note 122, at 72 (citing Rann of Kutch Case, *supra* note 214, at 416); *see also* Sovereignty over Pulau Ligitan/Pulau Sipadan (Indon. v. Malay.), 2002 I.C.J. 625, 683 (Dec. 2002) [hereinafter Pulau Ligitan/Pulau Sipadan Case].

²¹⁵ Koztowski, *supra* note 121, at 73.

²¹⁶ *Id.*

universal standard for determining the required sovereign activities without considering the particularities of specific circumstance.²¹⁷

B. Maintenance/Manifestation of Sovereign Authority

The process of “maintaining” or “manifesting” territorial title over time is an integral part of the process of “consolidating” territorial sovereignty, though the required degree varies in accordance with situational circumstances.²¹⁸ In order for a state to claim a historic title, there needs to be the manifestation of sovereign authority over a particular territory. This requirement is connected to the “[n]ational or internal usage” of territory requirement.²¹⁹ In terms of historical consolidation, it is not sufficient for a claiming state to passively retain sovereign authority over a disputed territory, because the theory calls for more engaging activities on the part of a claiming state. Therefore, a state must exercise its sovereign authority through the “[r]ealization of effective governmental actions.”²²⁰

A state must manifest its territorial sovereignty “in a manner corresponding to the circumstances” so as to maintain its historic title to a particular territory.²²¹ In that sense, a state must prove that the “actual display of sovereignty” has continuously existed and also “[d]id exist at the critical moment,” rather than arguing that the valid acquisition of its territorial sovereignty was completed at a certain moment.²²² However, the required degree of maintenance or manifestation largely hinges upon whether there is another state competing against that alleged historic title. In other words, the presence of a competing claim would require a “considerable degree of manifestation,” while its absence would merely require that

²¹⁷ *Id.*

²¹⁸ Johnson, *supra* note 147, at 225.

²¹⁹ Koztowski, *supra* note 121, at 74.

²²⁰ *Id.*

²²¹ Of course, judges would still consider particular circumstances, such as whether a territory in question is inhabited or uninhabited and whether any competing claims have been raised, Johnson, *supra* note 147, at 223.

²²² *Id.* at 224.

“loss by abandonment cannot be proved.”²²³ When a competing claim is absent, the alleged proprietor’s reaction must be “reasonably thorough and instantaneous” to win a case.²²⁴

International legal practices take into account the lapse of time in evaluating effective occupation and therefore, “momentary occupation” is not sufficient.²²⁵ In relation to effective occupation, the lapse of time remains as an important factor in the assessment of the construction of historic title. In light of effective occupation and historical consolidation, however, international jurisprudence has no fixed model concerning the lapse of time. The ILC, though it did not suggest any specific guideline, provides that “repetitive or long-term activities” of a state asserting sovereign rights based on historic title must occur over a “considerable period of time” in a particular territory.²²⁶ As of now, therefore, both the requirement of a concrete time length and the means of determining whether sufficient time elapsed are analyzed on a case-by-case basis.²²⁷

*C. Foreign States Attitude*²²⁸

²²³ *Id.* at 224–25.

²²⁴ *Id.* at 225. In the *Island of Palmas Case*, the arbitrators found Spain’s losing title –if she ever had it- on the ground that “Spain had not sufficiently manifested her title in the face of the Netherlands’ growing competition over the island,” *id.* By contrast, however, in the *Clipperton Island Case*, France was held to retain her title inasmuch as she took “immediate steps” as soon as competing claims were raised against her title, even if her failure to manifest her sovereignty after the acquisition was also found by the arbitrators, *id.* (quoting *Judicial Decision Involving Questions of International Law*, 26 AM. J. INT’L L. 390).

²²⁵ Lesaffer, *supra* note 142, at 55.

²²⁶ Koztowski, *supra* note 121, at 73.

²²⁷ *Id.* According to the ILC, “this must remain a matter of judgment when sufficient has elapsed for the usage to emerge....it will anyhow be a question of evaluation whether, considering the circumstances of the particular case, time has given rise to a usage,” *Juridical Regime*, *supra* note 177, at ¶ 104.

²²⁸ Given the *Fisheries Case*, this requirement appears to reflect that historical consolidation essentially contains the element of adverse possession. That is, Norway’s appropriation of the disputed water “which under general international law would be high seas,” may be seen as adverse possession “at the expense of the international community” such as “toleration or acquiescence of the generality of states,” Johnson, *supra* note 147, at 222. Generally speaking, a state may not acquire sovereignty over the high seas. *See* UNCLOS, *supra* note 71, art. 82. However, some parts of the high seas may be subject to a State’s sovereignty by relying on recognition, acquiescence and prescription. MALCOM N. SHAW, *INTERNATIONAL LAW* 609 (6th ed. 2008). In light of customary international law, in other words, a state may acquire the high seas in part if its long usage is established on the basis of the toleration of other states, *id.*

In addition to the second requirement, which focuses on the internal aspect of usage, the theory of historical consolidation requires an external aspect of usage in the establishment of historic title. In this regard, the theory calls on judges and arbitrators to deliberate the role of foreign states when determining the international usage of a particular territory.

1. The Element of Acquiescence in Effective Occupation

As briefly mentioned earlier, this element is closely linked to the prerequisites for effective occupation, i.e., peaceful possession and/or acquiescence, although the latter particularly concerns *terra nullius*. As noted, the theory of historical consolidation has its root in the doctrine of acquisitive prescription and occupation. Thus, a “continuous display of sovereignty” – more precisely, “effective exercise of territorial jurisdiction or sovereignty” – has essentially been required by international legal practices.²²⁹ Also, the prerequisites of acquisitive prescription resemble those of effective occupation.²³⁰ Given that historical consolidation shares common ground with the traditional legal modes, it is worth exploring international jurisprudence on effective occupation to help understand the constitutive elements of historical consolidation.²³¹

Effective occupation is defined as “undisturbed, uninterrupted and unchallenged possession,”²³² “continuous and peaceful display of territorial sovereignty,”²³³ “continuous and peaceful display of authority, and the intention and will to act as sovereign, and some

²²⁹ Lesaffer, *supra* note 142, at 49, 55. In international adjudications, various terms, such as *effectivités*, possession, display of territorial sovereignty, effective occupation and effective administration, have been employed, *id.* at 54.

²³⁰ *Id.*

²³¹ Indeed, both prescription and occupation need effective occupation of territory to be established. However, effective occupation refers to the Roman law *occupatio* in the case of *terra nullius*, while it, on the other hand, refers to the Roman law *possessio* in the case of prescription. BROWNIE, *supra* note 115, at 138–39.

²³² See Chamizal Case, *supra* note 200.

²³³ Island of Palmas Case, *supra* note 166, at 839.

actual exercise or display of such authority.”²³⁴ To some extent, effective occupation is related to the third required element of historic title, while it is also generally related to the first and the second elements. Yet it is clear that effective occupation has the closest connection to acquiescence since effective occupation also pays attention to undisturbed and peaceful possession of a particular territory.

In each individual dispute, international courts and arbitrators determine what constitutes a “display of territorial sovereignty,”²³⁵ and whether the possessor of a territory displays its sovereignty in a peaceable way.²³⁶ In the light of effective occupation, “peaceable” can be interpreted as “acquiescence” on the part of competing states.²³⁷ As the term “peaceable” requires more than the “absence of violence,” a concerned state can stop the process of prescription or consolidation simply by posing “diplomatic protest.”²³⁸

However, the standard is not absolute, but relative. Even though international jurisprudence does not articulate “what actions constitute effective occupation,” it has attempted to evaluate state parties’ positive actions, reactions against other states’ exercise of sovereignty, and even omission – particularly acquiescence.²³⁹ As recent cases indicate, there are certain criteria that international courts and arbitrators have adopted in the assessment of effective occupation: for example, the exercise of sovereign authority must pertain to the disputed territory;²⁴⁰ and a state may exercise its sovereignty by itself,²⁴¹ authorize individual activities on behalf of a state,²⁴² or confer a form of license upon corporations or companies.²⁴³ In the process of acquisitive prescription or historical consolidation, however,

²³⁴ Eastern Greenland Case, *supra* note 202, at 45-6.

²³⁵ Lesaffer, *supra* note 142, at 51 (citing Island of Palmas Case, *supra* 166, at 840); *see also* BROWNLIE, *supra* note 115, at 140.

²³⁶ Lesaffer, *supra* note 142, at 51.

²³⁷ *Id.*

²³⁸ *See id.*

²³⁹ *Id.* at 54.

²⁴⁰ Pulau Ligitan/Pulau Sipadan Case, *supra* note 214, at ¶ 136.

²⁴¹ *See* Minquiers and Ecrehos Case, *supra* note 136, at 65, 69.

²⁴² *See* Pulau Ligitan/Pulau Sipadan Case, *supra* note 214, ¶ 140.

²⁴³ *See* Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045, at 1105 (Dec. 13).

such an act, which involves occupation or possession, can only be treated as evidence indicating the fact of possession. Therefore, effective occupation can be at best one of many constitutive conditions.²⁴⁴

2. Acquiescence or Tolerance on the Part of Third States

When a historic title was at issue before international courts and arbitrators, they had to decide whether the historic title is a static and permanent title, or just a consequence of the process of maintaining or manifesting sovereignty on the part of a claiming state.²⁴⁵ Regarding this issue, some judges identified so-called “progressive consolidation or recognition” in their individual opinions attached to the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain Case* (“Qatar-Bahrain Case”). The judges found that “[Q]atar possesses a historic title to the *Hawars* for a period of 45 years accompanied with indirect conduct of recognition from Bahrain and third states, including international agreements between them, and thus the title had been progressively established, consolidated and recognized.”²⁴⁶ This finding indicates the link between the consolidation of historic title and “acquiescence, tolerance, and the acceptance of the status quo.”²⁴⁷

The requirement related to the attitude of foreign states was previously understood in connection with the concept of acquiescence and recognition, but the ILC later replaced this approach.²⁴⁸ According to the ILC study, acquiescence is considered important particularly in situations where the “[l]egal title to particular territory has already been questioned or

²⁴⁴ Lesaffer, *supra* note 142, at 54–5.

²⁴⁵ Koztowski, *supra* note 121, at 91.

²⁴⁶ *Id.* (citing *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr)*, 2001 I.C.J. 40, at 172, 174, 180–4 (Mar. 16) [hereinafter *Qatar-Bahrain Case*]).

²⁴⁷ Koztowski, *supra* note 121, at 92.

²⁴⁸ Juridical Regime, *supra* note 177, ¶ 105.

contested.”²⁴⁹ In other words, the concept, if applicable, plays a significant role in cases where a claiming state sets forth the formation of historic title on the basis of a “separate form of legal title.”²⁵⁰ In this view, the ILC study concludes that “[i]n order to establish historic title, the lapse of time would be immaterial, if the continued exercise of sovereignty during a length of time had to be validated by acquiescence in the meaning of consent by the foreign states concerned.”²⁵¹ Instead of the original understanding of acquiescence as a form of agreement, the ILC suggests “[t]he lack of merely inaction or toleration” in order to reconcile certain conceptual confusion that may arise therefrom.²⁵² The ILC’s effort, which particularly favors “toleration over acquiescence,” appears to eliminate acquiescence from the construction of historic title.²⁵³ According to the ILC, a state must demonstrate the concerned foreign state’s recognition of its historic title by showing the absence of inaction or toleration.²⁵⁴

Importantly, the positive and negative aspects of “qualified silence” must be understood separately in the context of historical consolidation. In other words, the positive aspect refers to a “state’s agreement to an existing state of affairs,” whereas the negative aspect means that “a state is simply aware of the issue” to the extent that it does not constitute agreement.²⁵⁵ In each individual instance, the establishment of historic title can be achieved by relying on the “principles of good faith and legitimacy.”²⁵⁶ Therefore, if a foreign state changes its attitude and then launches a protest, it may be viewed as a “[p]otential violation of good faith or in other words protection of legitimate legal expectations.”²⁵⁷ Hence, if a

²⁴⁹ Koztowski, *supra* note 121, at 74.

²⁵⁰ *Id.* at 74.

²⁵¹ *Id.* at 74 (quoting Juridical Regime, *supra* note 177, ¶ 107).

²⁵² Koztowski, *supra* note 121, at 74. The lack of inaction or toleration specifically refers to a situation where there is no “[f]orm of interference on the part of third States into the sovereign powers asserted by a State over a particular territory during the formation of historic title,” *id.*

²⁵³ *Id.* at 74.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 75.

state wishes to strengthen its claim of historic title,” the state had better invoke the doctrine of estoppel or good faith.²⁵⁸

As mentioned earlier, international jurisprudence gave up the notions of *justus titulus* and *bona fide* as a requirement, since a fixed lapse of time is not always easy to be designated in the sense of acquisitive prescription.²⁵⁹ Similarly, in the case of acquiescence, there are no fixed criteria on how long other states must remain silent. For sure, however, judges and arbitrators consider whether a state has fulfilled effective control over a particular territory during a certain period of time.²⁶⁰ Momentary occupation is not sufficient to verify the existence of effective control. As a result, international legal practices only require “peaceful and undisturbed possession” or “effective occupation” for assessing the exercise of sovereign authority.²⁶¹ Based on the facts and circumstances in each dispute, international dispute resolution institutions determine “whether the exercise of sovereignty has been peaceful or not, uninterrupted or not, or public or not.”²⁶² Therefore, whether a claiming state’s possession of particular territory was peaceful and uninterrupted by others will be determined by a case-by-case basis in order to clarify the existence of acquiescence. In an individual case, however, acquiescence is just one of many elements in evaluating state actions. For instance, other elements may include “recognition, preclusion, affiliations of the inhabitants, geographical, economic and historical considerations.”²⁶³ Therefore, in a real dispute, a state that provides the “most convincing evidence for the most convincing behavior as sovereign, including acquiescence,” wins.²⁶⁴

3. Burden of Proof

²⁵⁸ *Id.*

²⁵⁹ Lesaffer, *supra* note 142, at 50.

²⁶⁰ *Id.* at 55.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 52.

²⁶⁴ *Id.* at 55.

Pursuant to the general rules of litigation, a state asserting historic title to a particular territory must establish the constitutive elements before judges and arbitrators.²⁶⁵ The burden of proof lies on a state that refers a case to tribunals, regardless of whether the state party claims its historic title or argues against it.²⁶⁶ The ILC study finds:

The elements of the title have evidently to be proved to the satisfaction of the arbitrator, otherwise he will not accept the title. And this holds true whether or not the title is considered to be an exception to the general rules of international law, so that burden of proof is not really a logical consequence of the allegedly exceptional character of the title.²⁶⁷

Particularly, a state alleging the exercise of its sovereign authority must produce relevant facts and evidence of the “requisite acquiescence or tolerance” on the part of third-party states in order to support the formation of its historic title.²⁶⁸ On the other hand, a state arguing against the formation must present “sufficient facts and evidence,” which prove that the constitutive requirements of historic title have not been fulfilled.²⁶⁹ Judges and arbitrators will also contemplate whether the international community has shown the requisite acquiescence or tolerance, or whether there is a “lack of such acquiescence or tolerance on the part of a sufficient number of third-party states.”²⁷⁰ Even if a state claims a limited historic title, the claiming state still bears the burden of proving its exercise of sovereign authority, which supports its claim of limited sovereignty over a disputed area.²⁷¹

4. Protest

²⁶⁵ Koztowski, *supra* note 121, at 78.

²⁶⁶ *Id.*

²⁶⁷ Juridical Regime, *supra* note 177, ¶ 158.

²⁶⁸ Koztowski, *supra* note 121, at 78.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 71 (quoting Juridical Regime, *supra* note at 177, ¶ 85).

A strong basis for claiming historic title is evident when a state continually exercises its effective sovereignty over a given territory for a considerable length of time and under the toleration of other states.²⁷² What if third-party states with competing claims or interests properly protest against another state's exercise of sovereignty over a given territory? Also, when is the appropriate time to launch the protest?

Although a third-party state can launch an official protest to prevent the formation of an alleged historic title, the ILC study requires that "such an act of protest must unequivocally express effective and sustained opposition to the exercise of sovereignty against specific actions undertaken by the state claiming sovereignty over the area in question."²⁷³ Moreover, a protest based on competing title to a particular territory should be accompanied by affirmative action against an open and public exercise of sovereignty over the territory.²⁷⁴ In a case involving an open and public exercise of sovereignty on the part of a claiming state, a competing state is not allowed to assert its lack of actual knowledge on the exercise insofar as it "imputes knowledge thereof to all third states with competing claims or interests."²⁷⁵ Of course, it remains as a matter of judgment subject to particular circumstances in a particular dispute. However, there is a minimum requirement that a protest against the exercise of sovereignty over a given territory be widespread, rather than arise from only a single state's opposition.²⁷⁶

Then, when should the protest be launched? In order to effectively oppose another state's exercise of sovereignty over a given territory, the opposition should be lodged "during

²⁷² *Id.* at 75.

²⁷³ *Id.* (quoting Juridical Regime, *supra* note 177, ¶ 115).

²⁷⁴ Koztowski, *supra* note 121, at 76.

²⁷⁵ *Id.* Hence, the ILC holds that "open and public exercise of sovereignty is required rather than actual knowledge by the foreign States in the area," Juridical Regime, *supra* note 177, at ¶ 130.

²⁷⁶ Juridical Regime, *supra* note 177, at ¶ 116, ¶ 119. In this regard, in the *Fisheries Case*, the Court deemed the British opposition against Norway's delimitation as significant since it had important interests in the North Sea, and the result of the dispute was directly related to the restriction of fishing right in the disputed area, Koztowski, *supra* note 121, at 75.

the formative period of the disputed title” before the final establishment of an alleged historic title.²⁷⁷ The ILC study supports this time frame, asserting that a protest cannot reverse an established fact after “[a] state has exercised its sovereignty over a particular area during a considerable period of time under general toleration by other states.”²⁷⁸ This is because an established historic title is already in existence and cannot be defeated by “belated opposition.”²⁷⁹ However, the ILC repeatedly stresses that both “the lapse of time necessary for the emergence of historic title and the amount of protest necessary to defeat general toleration” need to be individually examined on a case-by-case basis.²⁸⁰

D. Additional Considerations

Even though the basic elements outlined above are required to construct historic title, assessing the fulfillment is “a matter of judgment and appreciation” in each individual case.²⁸¹ In other words, those constitutive elements of historic title are not absolute, but relative. Therefore, international courts and arbitrators will take into account all circumstantial conditions prior to adjudicating each dispute concerning a claim of historic title. For instance, “geographical features, the shape of a given territory and significant interests of states involved” may also be examined for the construction of historic title.²⁸² Conversely, unstable situations that bring constant changes to the operative facts, such as location and shape of a given territory, may disrupt the construction of historical title.²⁸³

²⁷⁷ Koztowski, *supra* note 121, at 76.

²⁷⁸ Juridical Regime, *supra* note 177, at ¶ 121.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at ¶ 131.

²⁸¹ *Id.* at ¶ 187.

²⁸² Koztowski, *supra* note 121, at 77. As Koztowski points out, however, it may be debatable whether those particular circumstances should be understood as the fourth constitutive element of historic title, or whether they are simply implied as “systematic components” in the formation of historic title, *id.*

²⁸³ *Id.* (quoting Juridical Regime, *supra* note 177, at ¶ 449).

In assessing the effect of the relation between the three elements and other potential elements, some believe that a formalized approach is necessary to produce concrete methods or patterns.²⁸⁴ However, in order to determine the formation of historic title in each dispute, rigorous formality is not always helpful since “[t]he particular circumstances such as the geographical characteristics may in one case weaken the need to show usage over a substantial period of time, and in another case strengthen the necessity, even to the point of requiring documentary possession from time immemorial.”²⁸⁵

IV. DEBATING THE CONSOLIDATION OF SOUTH KOREAN HISTORIC TITLE

A. Historical Consolidation as a Source of South Korea’s Sovereignty over the NLL and the Disputed Water

The first legal issue concerning the NLL conflict is whether the NLL is a valid straight baseline as a de facto maritime demarcation line in the Yellow/West Sea in terms of the theory of historical consolidation. Aside from the NLL’s basis in international law as a maritime border, its legal basis as a de facto demarcation line may be implied in KAA Articles 2.15 and 2.16. In the *Fisheries Case*, the Norwegian Royal Decree of a straight baseline was also characterized as a valid method of territorial delimitation regardless of the lack of legal basis in international law. Therefore, it should be discussed whether the theory supports the NLL’s basis as a de facto demarcation line under the armistice system.

²⁸⁴ Koztowski, *supra* note 121, at 78.

²⁸⁵ *Id.*

The second issue concerning the NLL conflict is whether South Korea's claim of historic title to the water lying south of the NLL has been consolidated. To be specific, the disputed waters refer to the water between *Baekryong* Island and the westernmost point of the NLL, the water between *Sochung* Island and *Yeonpyeong* Island, the water between *Yeonpyeong* Island and *U* Island, and the water between *U* Island and the Han River Estuary. Since the disputed waters may be considered either as part of the high sea or as part of China's potential EEZ, Seoul seeks to construct its historic title, just as Norway acquired its historic title through the process of consolidation for *erga omnes*.²⁸⁶

1. Occupation or Acquisitive Prescription

In an individual territorial dispute, it is crucial for a claiming state to decide which legal method it will rely on. Depending on the circumstances, a certain sovereign act may be used to claim historical consolidation or to claim another legal method of territorial acquisition.²⁸⁷

First, occupation cannot be invoked as a source of South Korea's alleged title to the NLL and the disputed waters, since the mode deals with issues over *terra nullius*.²⁸⁸ Even if South Korea asserts the acquisition of title without reference to any form of recognition on North Korea's part, the NLL conflict is not concerned with *terra nullius*. Instead, the disputed waters might be considered either as the high sea or part of another sovereign's maritime areas, which the international law of the sea regards as *res communis*.²⁸⁹ In disputes where a

²⁸⁶ MARJORIE, *supra* note 116, at 1227 (citing Fisheries Case, *supra* note 116, at 138).

²⁸⁷ Koztowski, *supra* note 121, at 92.

²⁸⁸ Johnson, *supra* note 147, at 219.

²⁸⁹ Ruderman, *supra* note 128, at 780, 785.

“wider belt of territorial waters” in the high seas is at issue, a state may acquire exclusive rights only through acquisitive prescription.²⁹⁰

Secondly, in principle, acquisitive prescription is not relevant to the NLL conflict because North Korea is not an original sovereign of the NLL and the disputed waters. Acquisitive prescription confers sovereign title to a particular territory when there is no protest by the original sovereign and when there is an open encroachment by the new sovereign for a prolonged period of time.²⁹¹ Based on acquisitive prescription, therefore, a state may acquire a particular territory even if it was fully governed by another sovereign state.²⁹² In the NLL conflict, however, North Korea did not have any original sovereign title to the NLL or the disputed waters. As mentioned earlier, the waters between the NWI and North Korea’s coastline inherently appertain to the territorial waters of each side, and the disputed waters may belong to the international waters.

2. Applying Historical Consolidation: Focusing on Similarities with the Fisheries Case

Due to the doctrinal difference between occupation and acquisitive prescription, it seems appropriate for Seoul to claim historical consolidation as a source of its sovereign right over the NLL and the disputed waters.²⁹³ Based on historical consolidation, a state may acquire sovereignty over either *terra nullius* or *res communis*,²⁹⁴ and may also acquire either primary or secondary territorial title regardless of competing claims.²⁹⁵ Moreover, a state may claim historical consolidation to a particular territory even if another sovereign already

²⁹⁰ Johnson, *supra* note 147, at 220.

²⁹¹ Lesaffer, *supra* note 142, at 46–7.

²⁹² Johnson, *supra* note 147, at 220.

²⁹³ Historic title can be invoked in disputes over land, islands and the sea. *See Eritrea v. Yemen Arbitration*, *supra* note 127, at 239, 243.

²⁹⁴ According to Brownlie, historical consolidation particularly concerns “the extension of sovereignty over *res communis*.” BROWNIE, *supra* note 115, at 156.

²⁹⁵ Koztowski, *supra* note 121, at 95 (citing *Western Sahara*, *supra* note 135, ¶ 80).

ruled it.²⁹⁶ It is not proper for South Korea to invoke acquisitive prescription in the NLL conflict because the mode does not usually situations, which involve competing claims or possession on the part of foreign states.²⁹⁷

Since 1973, North Korea has claimed its maritime jurisdiction over the waters north of the CMDL, which appear to be a mirror image of the NLL, except for the territorial waters of the NWI.²⁹⁸ However, the CMDL does not have any legal basis in international law, and it significantly disregards the maritime sovereignty of the NWI. As both the NLL and the CMDL cover a large portion of the international waters, the NLL conflict should be defined as a maritime dispute over *res communis* involving competing claims and possession. Given that historical consolidation contains the element of adverse possession and requires acquiescence on the part of other states in its establishment, a winning side of the NLL conflict may assert *erga omnes* against the neighboring states concerned. Hence, Seoul's reliance on historical consolidation seems appropriate in order to identify its alleged historic title.

More importantly, the *Fisheries Case* indicates why historical consolidation is the most appropriate legal method for resolving the NLL conflict, considering that the two cases share a common ground in both factual and legal aspects. In the *Fisheries Case*, the ICJ had to decide whether Norway had acquired historic title to territorial waters so delimited by its unique system of straight baseline, even though the method of delimitation was seemingly invalid under the general principles of international law.²⁹⁹ In reliance on historical consolidation, the ICJ ruled that the Norwegian method of delimiting territorial water

²⁹⁶ Koztowski, *supra* note 121, at 94, 96. *Contra* Minquiers and Ecrehos Case, *supra* note 136 (stating that “since both parties assert historic title (original or ancient title), the principles associated with the formation of title to *res nullius* could thus not be applied).

²⁹⁷ *Id.*

²⁹⁸ Please refer to the map introduced here, Bruce E. Bechtol, Jr., *The Cheonan Incident and North Korea's Northern Limit Line Strategy*, CENTER FOR DEFENSE STUDIES (May 25, 2010, 4: 28 PM), <http://www.defensestudies.org/cds/the-cheonan-incident-and-north-koreas-northern-limit-line-strategy/> (last visited Aug. 29, 2014).

²⁹⁹ BROWNLIE, *supra* note 115, at 156.

conforms to international law as a traditional system, thereby accepting both Norway's title to the straight baseline and the delimited waters.³⁰⁰ Furthermore, the ICJ emphasized that Norway was not violating universal law since the method is an adaptation to the special geographical conditions surrounding the maritime area.³⁰¹ Therefore, both the Norwegian Royal Decree and Norway's title to territorial waters were found to be legal through historical consolidation, and have thus become "enforceable as against all states."³⁰²

The *Fisheries Case* and the NLL are analogous to each other in the following ways. First, the *Fisheries* Court adjudicated the legality of the Norwegian straight baseline system adapted to the specific geological circumstances of Norway's coastline. Similarly, in the NLL conflict, it is debated whether the NLL has been historically consolidated as a valid straight baseline under the specific circumstances surrounding the Korean Peninsula, such as an on-going state of war. Secondly, the ICJ, based on historical consolidation, admitted Norway's title to the disputed territorial water delimited by its unique straight baseline system embodied in the Royal Decree of 1935. In the NLL conflict, South Korea also asserts its acquisition of historic title to the disputed water lying south of the NLL.

B. Did South Korea Fulfill the Conditions Required to Consolidate Historic Title?

1. Considering Sovereign Activities on the part of South Korea

In order to claim the consolidation of historic title, a state must prove, to the extent of a "high degree of effectiveness," that it exercised governmental authority in a very visible and sovereign fashion for a considerable period of time, directed its exercise toward "the

³⁰⁰ See MARJORIE, *supra* note 116, at 2.

³⁰¹ Koztowski, *supra* note 121, at 66.

³⁰² MARJORIE, *supra* note 116, at 1227 (citing *Fisheries Case*, *supra* note 116, at 138).

usage of the territory” at issue.³⁰³ In terms of the construction of historic title, the range of required sovereign activities covers legislative, administrative, and even judicial activities that are directed toward a particular territory.³⁰⁴ Since there is no universal standard, international dispute resolution organizations will take particular circumstances into consideration in each individual dispute.³⁰⁵

In the NLL conflict, South Korea has continually exercised its rights and duties as a coastal state before and after North Korea’s first protest in 1973.³⁰⁶ However, some may cast doubt on the degree of effectiveness due to the absence of South Korean domestic legislation prescribing the NLL.³⁰⁷ In fact, the relevant South Korea’s statute only declares the territorial water up to 12 nm and only prescribes the discontinued straight baselines around the NLL.³⁰⁸ Indeed, the Presidential Decree of the Territorial Water and Contiguous Zone Act only describes the territorial water only up to *Soryung* Island, which is situated south of the NWI and does not mention the territorial water boundaries of the NWI.³⁰⁹ Therefore it is often debated that South Korea lacks its exercise of sovereignty in governing the NLL. In South Korea, there was no attempt to enact any statute even under North Korea’s constant challenges against the NLL. However, the absence of domestic legislations does not automatically prove the absence of required sovereign authorities, since a state can still manifest its sovereignty through administrative or judicial actions. Throughout the NLL conflict, South Korea has continually exercised its administrative and military authorities

³⁰³ *Id.* (quoting Juridical Regime, *supra* note 177, ¶ 80); *see also* Koztowski, *supra* note 121, at 73.

³⁰⁴ Koztowski, *supra* note 121, at 72. In this context, the activities of natural persons or private legal entities are not considered sufficient to constitute evidence in claiming sovereignty. On the condition of authority, agency and license, however, those activities can be construed as sovereign acts. Koztowski, *supra* note 121, at 72 (quoting Juridical Regime, *supra* note 177, at ¶ 95); *see also* Rann of Kutch Case, *supra* note 213.

³⁰⁵ *Id.*

³⁰⁶ Interestingly, North Korea also attempts to exercise its administrative authority over the NLL and its vicinity. *North Rents Out Waters near NLL*, KOREA JOONGANG DAILY, Mar. 30, 2014, <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=2989913>.

³⁰⁷ Suk Kyoong Kim, *Understanding Maritime Disputes in Northeast Asia: Issues and Nature*, 23 INT’L J. MARINE & COASTAL L. 213, 221 (2008).

³⁰⁸ *Id.* at 221.

³⁰⁹ *Younghae mit jeopsok sooyeok beob sihaengryung* [Enforcement Decree of the Territorial Water and Contiguous Zone Act], Presidential Decree No. 24424, Mar. 23, 2013, *as amended*, art. 2 (S. Kor.).

around the NLL. For instance, the South Korean forces, sometimes jointly with the U.S. forces, have regularly conducted joint military drills around the NLL and the disputed waters.³¹⁰ Even in the middle of military confrontations, South Korea never abandoned the enforcement of a general power of maritime police authority over the NLL and its vicinity. The authority enforced is particularly concerned with matters of security and marine resources management, including the regulation of illegal fishing by Chinese trawlers.³¹¹

2. Process of Consolidation during 1953 and 1973

As indicated earlier, “maintaining” or “manifesting” territorial title over time is the essence of the process of “consolidating” sovereign title to a particular territory, though the degree required varies by circumstance.³¹² The presence of competing claims would require “considerable degree of maintenance or manifestation of sovereignty,” while their absence would only require that “loss by abandonment cannot be proved.”³¹³ Other than this degree requirement, international jurisprudence has yet to achieve any fixed model of the required lapse of time. The ILC study provides that “repetitive or long-term activities” of a state asserting sovereign rights based on historic title must occur over a “considerable period of time” over the particular territory in dispute.³¹⁴ As of now, either the length of required

³¹⁰ *N. Korea: Exercises Bring War ‘Closer,’* CNN WORLD (Nov. 26, 2010, 12:03 AM), <http://www.cnn.com/2010/WORLD/asiapcf/11/25/koreas.crisis/index.html?iref=allsearch>.

³¹¹ *Waters along NLL Cleared of Fishing Boats,* THE KOREA HERALD, Mar. 30, 2010, <http://www.koreaherald.com/view.php?ud=200906050042>; see also James Pearson, *The War That Never Ends between the Koreas*, REUTERS, June 17, 2014, <http://uk.reuters.com/article/2014/06/17/uk-northkorea-islands-insight-idUKKBN0ES00F20140617>.

³¹² Johnson, *supra* note 147, at 225. This requirement is also defined as the “[n]ational or internal usage” of territory requirement, Koztowski, *supra* note 121, at 74.

³¹³ Johnson, *supra* note 147, at 224-25.

³¹⁴ Koztowski, *supra* note 121, at 73.

amount of time or the method of measuring the length may be determined by a case-by-case basis.³¹⁵

Considering the particular circumstances in the Korean Peninsula, South Korea maintained and manifested its sovereignty by governing the NWI and conducting regular military operations for decades. In determining the required manifestation of sovereignty, a concrete length of time would be decided on a case-by-case basis. In the NLL conflict, the first two-decade period, between 1953 and 1973, seems to be sufficient as a “considerable period of time” given the state of war. First, both sides had debates over the delimitation of a maritime demarcation line, though they did not reach an agreement on that. Second, both sides were belligerent parties who had just agreed to stop the War and were highly sensitive to the acquisition of territories. Third, the ROK MND presents multiple historical instances where North Korea had acted in recognition of the NLL during the first two decades. As a matter of fact, North Korea never raised any official opposition to South Korea’s exercise of sovereignty over the NLL and the disputed waters during 1953 and 1973. As discussed above, since there was no opposing claim against the NLL during the period, South Korea can prove its manifestation of sovereignty by showing that it did not abandon the disputed waters during its possession. Rather than abandoning the NLL, it is true that South Korea performed the repetitive activities of military operations and maritime police authority along the NLL and its vicinity.

3. Effective Acquiescence on North Korea’s Part from 1953 to 1973

Given that the theory of historical consolidation concerns “the extension of sovereignty over *res communis*,” the “attitude of other states involved” is the most significant

³¹⁵ *Id.* According to the ILC, “this must remain a matter of judgment when sufficient time has elapsed for the usage to emerge....it will anyhow be a question of evaluation whether, considering the circumstances of the particular case, time has given rise to a usage,” Juridical Regime, *supra* note 177, ¶ 104.

element in the formation of historic title.³¹⁶ As discussed earlier, effective occupation, though it particularly concerns *terra nullius*, is a useful method in determining foreign states' attitudes in each territorial dispute. International jurisprudence concerning effective occupation focuses on "peaceful" and "undisturbed, uninterrupted and unchallenged possession" along with the element of "continuous display of sovereignty."³¹⁷ In order to prove its effective occupation, therefore, a possessing state must display its sovereignty in a peaceable way.³¹⁸ Since more than the "absence of violence" is required, diplomatic protest is sufficient to stop the process.³¹⁹ In this sense, "peaceful possession" can be interpreted as "acquiescence" on the part of foreign states.³²⁰ Again, however, the standard is not absolute, but rather relative.

As there is no universal standard about what constitutes effective occupation, states' positive actions, reactions against other states' exercise of sovereignty, and even non-action may be deliberated.³²¹ On the basis of the facts and circumstances, international courts and arbitrators determine "whether the exercise of sovereignty has been peaceful or not, uninterrupted or not, or public or not."³²² Therefore, a case-by-case basis will be employed to determine whether a claiming state's possession of a particular territory was peaceful and uninterrupted by others to the extent that it could be regarded as acquiescence. Similar to the case of acquisitive prescription,³²³ however, there is no fixed standard about how long other

³¹⁶ BROWNIE, *supra* note 115, at 156. Brownlie believes that the *Fisheries* Court might have considered the silence on the part of the U.K. government "[a]s an independent basis of legality of [Norway's title] as against the British claim," *id.* However, it is not itself sufficient to prove the legality of a state's territorial claim to the consolidation of historic title, *id.*

³¹⁷ See *Chamizal Case*, *supra* note 200; *Island of Palmas Case*, *supra* note 166, at 839; *Eastern Greenland Case*, *supra* note 202, at 45-6. In this respect, therefore, the concept of effective occupation is also connected with the conditions requiring the maintenance or manifestation of sovereign authorities.

³¹⁸ Lesaffer, *supra* note 142, at 51.

³¹⁹ See *Id.*

³²⁰ *Id.*

³²¹ *Id.* at 54. The *Pulau Ligitan/Pulau Sipadan Case* indicates that "the exercise of sovereign authority must pertain to the disputed territory" as a criteria assessing effective occupation in a given territorial dispute. *Pulau Ligitan/Pulau Sipadan Case*, *supra* note 214, at ¶ 136.

³²² Lesaffer, *supra* note 142, at 55.

³²³ *Id.* at 50.

states must remain silent. Momentary occupation, albeit peaceful, is not sufficient to establish effective occupation.

At what point and in what manner must opposition be lodged against the process of effective occupation over a particular territory? For instance, in the *Fisheries Case*, Norway encountered no opposition against its promulgation or constant application of the Norwegian Royal Decree. Relying on the facts in that case, the ICJ confirmed the consolidation of the Norwegian method as well as the territorial waters delimited through Norway's constant and sufficiently long practice, which had begun even before the dispute arose. Any sort of protesting acts unequivocally expressing effective and sustained opposition could have stopped the consolidation of Norway's historic title.³²⁴ The *Fisheries* Court clearly indicates that an act of opposition should be launched "during the formative period of the disputed title."³²⁵ Regarding the form of opposition, a competing state should take affirmative action against a possessing state's open and public exercise of sovereignty.³²⁶ A competing state should not assert its lack of actual knowledge when there is a possessing state's open and public exercise of sovereignty over a particular territory, since the exercise "imputes knowledge thereof to all third states with competing claims or interests."³²⁷ Significantly, however, both "the lapse of time necessary for the emergence of historic title" and "the amount of protest necessary to defeat general toleration" will be individually examined by overlooking particular circumstances.³²⁸

In conclusion, South Korea fulfilled the requirements of effective occupation as well as acquiescence for the first two decades, and there was the absence of affirmative action on

³²⁴ *Id.* (quoting Juridical Regime, *supra* note 177, ¶ 115). Still, however, there is a standard that protest against the exercise of sovereignty must be widespread, *id.* ¶ 116, ¶ 119. In this regard, in the *Fisheries Case*, the Court deemed the British opposition against Norway's delimitation as significant since it had important interests in the North Sea, and the result of the dispute was directly related to the restriction of fishing right in the disputed area, Koztowski, *supra* note 121, at 75.

³²⁵ Koztowski, *supra* note 121, at 76.

³²⁶ *Id.*

³²⁷ *Id.* Hence, the ILC holds that "open and public exercise of sovereignty is required rather than actual knowledge by the foreign States in the area," Juridical Regime, *supra* note 177, ¶ 130.

³²⁸ *Id.* ¶ 131.

North Korea's part.³²⁹ In this sense, North Korea is bound by the principle of estoppel. Before 1973, South Korea's undisturbed, uninterrupted and unchallenged possession of the NLL and the disputed waters had continued without any diplomatic protest from North Korea. And, international law does not suggest any universal standard mandating the amount of time required to demonstrate the concerned state's silence. In the NLL conflict, North Korea's acquiescence can be reasonably inferred from the facts and circumstances.³³⁰ As North Korea was adversely affected by the consolidation of South Korea's historic title, it should have launched any form of protest during the formative period so as to combat the consolidation. Considering that South Korea had publicly and notoriously exercised its governmental authority over two decades, North Korea cannot assert its lack of actual knowledge of the NLL at a later time. More significantly, based on the doctrine of estoppel, North Korea's failure to protest within a reasonable period of time constitutes the effective acquiescence on its part, regardless of the presence of explicit recognition. This is because North Korea was obliged to inspect and protest the creation of the NLL as a belligerent party to the KAA.³³¹ From 1953 to 1973, when North Korea did not have considerable naval forces, it substantially took advantage of the stability provided by the NLL's role as a de facto maritime demarcation line in the Yellow/West Sea. In the interests of international stability, North Korea should be estopped from protesting at a later time because South Korea's historic title was already consolidated in 1973 through North Korea's silence.³³²

³²⁹ A state may acquire the sovereignty over parts of the high seas through the operation of recognition, acquiescence and prescription. *See supra* note 227.

³³⁰ *See Case Concerning the Temple of Preah Vihear: Cambodia v. Thailand*, 1963 DUKE L. J. 307, 308 (1963) (citing the Temple of Preah Vihear (Cambodia v. Thai.), 1962 I.C.J. 6 (June 15)).

³³¹ *See Case Concerning the Temple of Preah Vihear: Cambodia v. Thailand*, *supra* note 330, at 308 (quoting Iain MacGibbon, *Estoppel in International Law*, 7 INT'L & COMP. L. Q. 468, 501 (1958)).

³³² *See Case Concerning the Temple of Preah Vihear: Cambodia v. Thailand*, *supra* note 330, 308 (quoting Hersch Lauterpacht, *Sovereignty over Submarine Areas*, 1950 BRIT. YB. INT'L L. 376, 395-96 (1950)).

CONCLUSION

It is undeniable that the NLL has served as a de facto maritime demarcation line in the Yellow/West Sea. However, the NLL cannot be the maritime frontier of South Korea in light of the international law of the sea. Aside from defining the NLL, the core of the NLL conflict is whether South Korea's historic title to the NLL and the water south of the line has been historically consolidated as part of the armistice system.

Throughout the NLL conflict, both sides have disputed South Korea's alleged historic title. South Korea asserts that its title was consolidated as a de facto maritime demarcation line and that South Korea has acquired the waters south of the NLL. South Korea further argues that North Korea is bound by the current situation. In contrast, North Korea refutes South Korea's claim by arguing that it did not explicitly recognize or acquiesce to the NLL. In addition, North Korea contends that the NLL significantly infringes upon its maritime sovereignty that must be respected under the international law of the sea.

There are multiple international law cases relating to territorial disputes that share a common ground with the NLL conflict. Above all, the *Fisheries Case* casts light on the inter-Korean conflict. In this case, the theory of historical consolidation constructed the main reasoning of the Court and the Court found that Norway had encountered no opposition throughout its constant and sufficiently long application of its decree. On that basis, the ICJ found that the Norwegian method of delimitation and the territorial waters delimited by the method had been consolidated even before the dispute with the U.K. arose. Precisely, the *Fisheries* Court upheld the Norwegian straight baseline system as a valid method of territorial delimitation and as an adaptation to the specific geological circumstances of Norway's coastline. Similarly, South Korea asserts that the NLL has been historically consolidated as a valid straight baseline under the armistice system. Secondly, on the basis of historical

consolidation, the ICJ admitted Norway's title to the disputed territorial water delimited by the straight baseline system. In the NLL conflict, South Korea alleges the acquisition of historic title to the disputed waters south of the NLL.

Judging from international legal practices and jurisprudence, has South Korea's claim of historic title consolidated? First of all, although the absence of domestic legislation prescribing the NLL is often pointed out, South Korea continually exercised rights and duties through other types of sovereign activities before and after North Korea's first protest in 1973. Importantly, the South Korean military and the maritime police never abandoned the exercise of authorities, particularly, in matters of security.

Secondly, South Korea sufficiently manifested its sovereignty around the NLL and the disputed waters from 1953 to 1973, and the two-decade period is a sufficient amount of time for the purpose of historical consolidation under the particular circumstances of the Yellow/West Sea. To be specific, there are several instances that can support this proposition. It is widely known that both sides had debated over the maritime delimitation in the course of the armistice negotiations. This indicates that the parties to the KAA were sensitive to the issue as belligerents and recognized the importance of the establishment of a maritime demarcation line in the Yellow/West Sea. Most significantly, North Korea acted in recognition of the NLL by remaining silent and by not opposing the NLL during the first two decades. Therefore, South Korea's sovereignty was sufficiently maintained throughout the period, and it never abandoned its possession of the NLL and the vicinity.

Finally, South Korea fulfilled the requirements of effective occupation as well as acquiescence for the first two decades under the effective acquiescence on North Korea's part. On that basis, South Korea acquired its historic title to the NLL and the disputed waters, though parts of them may be appertained to the international waters. So long as South Korea's historic title is based on the consolidation, North Korea's late protest is inconsistent

with *erga omnes* and further violates the doctrine of estoppel. From 1953 to 1973, South Korea's undisturbed, uninterrupted, and unchallenged possession of the NLL and the the disputed waters continued without any opposition, even though North Korea's maritime sovereignty had been adversely affected by the presence of the NLL. North Korea should have launched any form of protest while the formation of South Korea's historic title was in progress. Due to South Korea's public and notorious exercise of governmental authorities over the two decades, North Korea cannot refer to a lack of its actual knowledge of the exercise. Based on the doctrine of estoppel, North Korea's failure to protest within a reasonable time constitutes the effective acquiescence and the consolidation of South Korea's historic title, since North Korea was obliged to inspect the NLL as a belligerent party. As a matter of fact, North Korea took advantage of the stability provided by the NLL's role as a de facto maritime demarcation line while it was reconstructing its destroyed naval forces. South Korea relied on North Korea's silence throughout the formation. For the sake of international stability, therefore, North Korea must be estopped from protesting against the NLL and South Korea's historic title at a later time.

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