

Whether Acquiescence Constitutes the Principle of Estoppel in Territorial Dispute Cases: Case of Temple of Preah Vihear as an Example

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Abstract: The principle of estoppel and acquiescence are widely applied in territorial disputes. In some cases, acquiescence can lead to estoppel, but the specific criteria for its application still need further clarification. Otherwise, the abuse of estoppel followed by acquiescence might result in a violation of the sovereignty of other States. In this study, we focused on the case of Temple of Preah Vihear to gain a more extensive understanding about the prerequisites of that acquiescence constitutes estoppel in territorial disputes, and we concluded the basic conditions that acquiescence acts might lead to estoppel through other relevant cases and literatures.

Keywords: International Law, Territorial Dispute, Estoppel, Acquiescence.

1. Introduction

In international law, estoppel first appeared in the Case of Serbian Loans in 1929 [1], and its application has since been expanded to the settlement of territorial disputes in particular. However, the conditions for the application of estoppel are not yet clarified, and many territorial disputes, including the Diaoyu Islands dispute, have resulted from the abuse of the estoppel principle. A fundamental requirement for the construction of estoppel is the acceptance by a State of a past act of sovereignty by another State. Acquiescence, as a tacit acknowledgement, usually does not exist in the form of an explicit document or declaration. Therefore, whether an implied act can constitute estoppel is a question that needs urgent elucidation at this time. The Case of Temple of Preah Vihear was the first territorial dispute case in international law to hold that acquiescence constitutes the principle of estoppel. In this article, we focused on this case and tries to specify the basic elements of what constitutes estoppel by acquiescence through the interpretation of similar cases and relevant articles.

2. Definition of Estoppel and Acquiescence

Estoppel, as one of the principles, is derived from the French word ‘estoupe’ and the English word ‘stop’. According to Coke [2], Estoppel has three groups, including estoppel by the record, estoppel by matter in writing, and estoppel by matter in pais. Acquiescence is a negative concept, which is characterized as prevent a State from rejecting in front of tribunals the validity of a statement of fact proposed earlier by that State to another whereby that other has behaved to his harm or the State

making a statement which has achieved some advantage [3]. In international law, acquiescence is regarded as the passivity of a State which is under threats or violation of its rights. The typical type of acquiescence is quiet or absent of protest in conditions that ordinarily call for a positive response expressing an opposition [4].

The earliest case of territorial disputes that applied the estoppel principle is the Eastern Greenland Case. In this case, the estoppel principle was applied because of the “Ihlen declaration” by Norwegian Minister. Norway opposed Denmark’s claim to sovereign rights over the whole of Greenland. The Court determined that as a consequence of the undertaking inherent in the Ihlen statement of July 22nd, 1919, Norway is under a responsibility to stop from opposing Danish authority over Greenland as a whole, and a fortiori to desist from occupying a section of Greenland. And the Court determined that the statement of possession by the Norwegian Government was unconstitutional and illegitimate [5].

Acquiescence is widely applied in maritime delimitation disputes, almost all of the issues of acquiescence revolve around the question of its determination. Since the International Court of Justice (ICJ) referred to acquiescence in the Continental Shelf case in 1982 [6], the practice regarding the determination of acquiescence in maritime disputes has undergone a long development. The ICJ was involved in cases including the Continental Shelf case, Land and Maritime Boundary between Cameroon and Nigeria, etc. The judgment of some cases demonstrated that acquiescence can serve as an element of estoppel in practice. Nevertheless, further research is needed to clarify whether there are general conditions for acquiescence to constitute estoppel.

3. Case of Temple of Preah Vihear: Application of Estoppel Constituted by Acquiescence under Territorial Dispute

In international law, estoppel requires the existence of an express statement or act by a party to express its consent. And the act includes express and implied recognition, of which implied recognition is generally the attitude expressed through behavior. Therefore, the concepts of estoppel and acquiescence are difficult to disentangle from each other and whether acquiescence can constitute estoppel is somewhat difficult.

In some important cases, acquiescence is regarded as a temporary substitute for a formal agreement, in which case there is little difference between them [7]. Therefore, some scholars tend to identify acquiescence as the constituent element of the estoppel principle. For example, Lauterpacht concluded that the absence of objection may constitute a basis of legal authority as it is connected to or constitutes a component part of estoppel or prescription [8] And Bowett held that in some cases of territorial disputes, the tacit conduct of one party, which must or has to act but remains silent, leads to the prohibition of the rights that may be claimed [9]. MacGibbon also believed that in territorial disputes, the frequent application of the estoppel principle shows that the acquiescence of the state is one of the constituent elements of estoppel [10]. Based on these conclusions, it is necessary for us to further analyze the specific application of acquiescence constituting estoppel in previous territorial dispute cases.

The application of estoppel by implied conduct first appeared in the case of Temple of Preah Vihear (hereafter referred to as the Case). The following article will provide an in-depth reading of this case and explore the circumstances under which acquiescence can lead to the application of estoppel.

4. Case Review [11]

The Temple of Preah Vihear (hereinafter referred to as Temple) is a historic shrine that is positioned within that eastern sector of the Dangrek range of mountains that forms the divide between the two

States. In 1959, Cambodia filed a lawsuit with the ICJ against the Thai government for its prolonged occupation of the Temple, and the Cambodian Government demanded that the Thai Government ought to retract the regiments of military services in the Temple and the sovereign rights over the Temple corresponds to Cambodia.

Both Parties admitted that the dispute arose from a boundary treaty between France (Cambodia was belonged to French Indo-China) and Siam (Thailand was known as Siam). Hence, the Court aimed on the Treaty of 1904 and did not go into the condition that existed between both the Parties before the Treaty. In the related articles of the Treaty, the border between French Indo-China and Siam shall be “carried out by Mixed Commissions composed of officers appointed by the two contracting countries”. In the fall of 1907, the Mixed Commission formulated a set of maps and among of these was one map which depicted the Temple as being on the Cambodian side. Cambodia based upon that map in supporting for her claim and this map was submitted by Cambodia and will then be referenced as the Annex I map. Conversely, the Thai Government announced that she had never acknowledged this map or the borderline.

The Court decided that the central issue, in this dispute, is whether both Parties actually accept the Annex I map and the borderline shown on it. According to the documents, the Annex I map was distributed to all of the members of the Mixed Commission. Therefore, the Siamese members in the Mixed Commission must have known the error in the map. However, they did not have any reaction either then or for many years. The Court then considered that the Thai Government “must be held to have acquiesced” and concluded that the plea of error had not been made out. The subsequent events also indicated that the Thai Government did not raise any queries about the Annex I map. In 1934-1935, Thailand, of her own, produced some maps that indicated the Temple as being in Thailand. Nonetheless, she maintained to utilize the Annex I map for governmental purposes. The Siamese Royal Survey Department also drew a map depicting the Temple as located in Cambodia in a treaty with France in 1937. In 1947, a meeting was held to investigate any complaints about the frontier settlement of 1904 and 1907. Thailand raised protests about the border in a vast variety of locations with the exception of Preah Vihear, and she even provided a map showing Preah Vihear as located in Cambodia to the Commission. The most notable event occurred in 1930, Prince Damrong, who was once the Minister of the Interior, visit to the Temple. The Prince was greeted by the French Resident with the French flag flying when he arrived. After he returned to Thailand he also sent the resident several images which seems to acknowledge that France was the host state.

Based on the events mentioned above, the Court considered that the Thai Government did not raise any questions about Preah Vihear until 1958. Due to this reason, the Court concluded that the Temple is within the authority of Cambodia, and Thailand is under a responsibility to recall any military or police units, or any guardians or keepers, positioned by her at the Temple.

5. Whether Acquiescence Act Could Lead to Estoppel

In the Case, a crucial fact was that the Siam Government and Thai Government had never raised any objection after officially receiving the map. According to that, the Court considered that Thailand had acknowledged the map and thus concluded that the Temple was positioned under Cambodian authority. The extent to which acquiescence can be considered as recognition and thus constitute estoppel is an issue worth exploring in depth.

Since it is difficult to distinguish between estoppel and acquiescence, we believe that the following points are necessary to note in their application.

First, the estoppel effect of a party's acquiescence or tacit acts can only occur if (1) a State (hereinafter referred to as State A) intends to acquire certain rights or interests that conflict with those of another State (hereinafter termed State B); (2) State B has the actual capacity to be aware that State A intends to acquire rights or interests that may conflict with State B's own rights or interests; (3)

acquiescence of State B which results in State A postulating that it has rights or interests that do not conflict with those of State B; and (4) reliance on the silence acts of State B leads to result that a breach of reliance on the part of State B would be detrimental to the interests of State A [12]. It is worth noting that the time required for acquiescence (silence) is determined on a case-by-case basis but not clearly defined in international law. However, we believe that this time should be associated with the creation of reliance by the other party.

Secondly, intertemporal law and the critical date have a bearing on whether or not an acquiescence can constitute estoppel. Although territorial changes may also arise from the failure of the original territorial possessor to respond properly to an expression of sovereign acts or claims by another State in the territory [13], intertemporal law and the critical date play a role in this. The intertemporal law and the critical date were first introduced by the arbitrator Huber in the case of the Islands of Palmas. Huber emphasizes that the legitimacy of an action may only be established by the law contemporaneous with it, not by the law in which the controversy began or was settled. He claimed that whenever a disagreement emerges about sovereign rights over a section of territory, it is typical to evaluate which of the States claiming sovereignty preserves a title which is superior to that which the other State may theoretically bring up against it. Nevertheless, if the dispute is attributable to the fact that the other Party has obviously presented sovereign control, it cannot be sufficient to determine the title whereby the territorial sovereignty was legitimately obtained at a certain point of time; it should also be demonstrated territorial sovereign rights has remained in place and actually existed at the time which for the judgment of the conflict must be considered as critical [14].

According to the view of Triggs and Hillier, the critical date may arise when the dispute arises or be established when the sovereignty of the parties over the territory becomes clear [15]. The practice of the Court also generally takes as the critical date the date on which the territorial dispute becomes clear. The critical date performs the role of certainty, that is, the law at the point the critical date is applied to determine territorial sovereignty. In the dispute between Indonesia and Malaysia, the Court pointed out that it cannot evaluate actions that happened after the date on which the dispute between both the Parties developed unless they are a natural extension of earlier acts and are not performed with the goal of boosting the legal situation of the Party that relies on them [14].

Therefore, if a state already has sovereignty over territory under the law at the time of the critical date, such possession is not valid even if the territory is occupied by another state after the critical date. In other words, such acquiescence or silence should have occurred prior to the critical date. Certainly, to maintain territorial sovereignty, one state should respond positively to the encroachment of another state on its territory at any time, otherwise, it will leave room for the other state to exploit it.

6. The Diaoyu Islands Dispute: Applicability of Estoppel Constituted by Acquiescence to the Resolution of China's Territorial Disputes

Chinese diplomacy is forcefully defending its territorial sovereignty and national integrity. To date, China has territorial disputes with some neighboring countries, including the dispute over the Diaoyu Islands (hereinafter referred as the Islands) and rights over the territorial sea with Japan. In this dispute, Japan holds that there is room for estoppel based on tacit acts from China. Therefore, it is necessary to clarify the application of estoppel constituted by acquiescence.

In the dispute over the Islands, Japan argues that the Chinese government did not object on official occasions to Japan's exercise of sovereignty over the Islands from 1895 to 1971, so China does not consider itself sovereign over the Islands. The argument is that China admitted Japan's authority over the Islands through tacit acts and then the acquiescence led to estoppel. However, international law and critical dates play an important role in territorial sovereignty, and act conducted after the critical date do not impact sovereign rights. It is generally accepted that 1895 constitutes the key date for the

Sino-Japanese dispute over the Islands, and that before that date, China had previously enjoyed sovereignty over the Islands by finding, identifying, and exploiting the islands and exerting long-term control over them since 14th century, and that both Chinese and foreign maps show that the Islands belong to China [16]. Therefore, Japan does not have any sovereignty over the Islands based on both inter-temporal law and the critical date.

7. Conclusion

Estoppel is applied in many areas of international law, but it is most often used in territorial disputes. Acquiescence can lead to estoppel, and intertemporal law and critical dates play a role in this. The current study explored the relevance of acquiescence and estoppel through an in-depth analysis of the case of Preah Vihear and further summarized the general conditions for acquiescence to constitute estoppel.

Reference

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