Function of Maps in Territorial Disputes
— Treatment of Maps by International Tribunals —

Tetsuya NAKANO
(Kansai University)

1 Territorial Disputes and Standards of Dispute Settlement

State territory consists of land, waters, and airspace which is subjected to the sovereignty of the State. Rights regarding territory, including the right to govern and the right to dispose of territory, are referred to as territorial sovereignty.

Japan holds the position that there exists a "dispute over territorial sovereignty over Takeshima" between itself and the Republic of Korea.[1] "Dispute over territorial sovereignty," in light of the above, means one which arises when the States concerned do not agree on the extent to which they can exercise territorial sovereignty.

International law has dealt with such disputes mainly through rules related to title to territory. Title to territory provides the cause or factual basis for effective exercise of territorial sovereignty over a certain area of land. Traditionally, original or historic title, occupation, prescription, cession, annexation, accretion, and subjugation have been recognized as the modes of acquisition of title to territory. However, the traditional mode of title to territory is "a system in which title and title-holder establish a single title to the territory in question."[2] It is not a standard of dispute settlement designed for cases like the Takeshima dispute where more than one State claim title to the same territory.[3] Furthermore, territorial disputes often emerge due to the complexity and diversity of the facts. For example, when occupation is claimed, it is extremely difficult to find the facts necessary for determining whether the area in question was *terra nullius* or territory of another State and which State had taken effective control over it.[4]

International tribunals to which territorial disputes have been referred have thus presented their own standards for dealing with disputes.[5] The earliest example is the title of "continuous and peaceful display of territorial sovereignty" put forward by the sole arbitrator in the *Island of Palmas case* in 1928.[6] On the other hand, in the *Minquiers and Ecrehos case*, the International Court of Justice (ICJ) considered the attribution of the disputed islets in light of evidence directly related to occupation of the islets,[7] i.e., evidence corresponding to "[exercise of] State functions" and "intention of that Government to act as sovereign."[8]

2 Function of Maps

(1) Overview

States faced with territorial disputes regard maps as a piece of evidence that directly or indirectly establishes "continuous and peaceful display of territorial sovereignty," "exercise of State functions," or "intention of that Government to act as sovereign," and have striven to collect such maps. Hence, parties submit various types of maps if territorial disputes are referred to international tribunals.

That said, international tribunals have held that, in determining the existence of titles, including "continuous and peaceful display of territorial sovereignty," maps can be direct evidence of the existence of such a title only if they are annexed to an official text such as a treaty determining the attribution of territory of which they form an integral part. Such maps are incorporated into text that expresses the will of the States concerned,[9] and therefore, can be considered to have the same effect as the text and an integral part of it.[10]

1 Ministry of Foreign Affairs of Japan, "Japan's Consistent Position on the Territorial Sovereignty over Takeshima," https://www.mofa.go.jp/region/asia-paci/takeshima/index.html (accessed February 15, 2021).
2 Huh Sookyeon, "Ryoikiken Genron Saiko (1)" [Reconsidering the Theory of Territorial Title (1)], *Kokka Gakkai Zassi* [The Journal of the Association of Political and Social Sciences], Vol. 122, No. 1-2, p. 36.
3 Masaharu YANAGIHARAanagihara, *Kokusaiho* [International Law], Tokyo: Foundation for the Promotion of the Open University of Japan, 2014, p. 106; Hironobu SAKAI, "Kokusai Saiban ni yoru Ryoiki Funso no Kaiketsu" [Settlement of Territorial Disputes by International Tribunals], *Kokusai Mondai* [International Affairs], No. 624 (September 2013), p. 11; Huh Sookyeon, "Ryodo Kizoku Hori no Kozo: Kengen to *effectivité* wo meguru Gokai mo Fukumete" [Structure of the Territorial Attribution Doctrine: Including Misunderstandings About Title and *Effectivité*], *Kokusai Mondai* [International Affairs], No. 624 (September 2013), p. 23; Kyoko HAMAKAWA, "Senkaku Shoto no Ryoyu wo meguru Ronten" [Issues Surrounding Possession of the Senkaku Islands], *Chosa to Joho* [Issue Brief], No. 565, p. 2.
4 YANAGIHARA, *supra* note 3, *Kokusaiho*, p. 106; Kanae TAIJUDO, "Takeshima Funso" [Takeshima Dispute], in *ibid, Ryodo Kizoku no Kokusaiho* [The International Law of Territorial Attribution], Tokyo: Toshindo, 1998, pp. 139-140.
5 Giovanni Distefano, "The Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law," *Leiden J.I.L.*, Vol. 19 (2006), p. 1048.
6 *Island of Palmas Case (Netherlands/United States of America), Award of 4 April 1928, RIAA*, Vol. II (1949), p. 839.
7 *The Minquiers and Ecrehos Case, Judgment of November 17th, 1953: I.C.J. Reports 1953*, p. 57.
8 *Ibid.*, pp. 60-72.
9 *Différend frontalier, arrêt, C.I.J. Recueil 1986*, p. 582, par. 54. See also, *Decision regarding delimitation of the border between Eritrea and Ethiopia (hereinafter referred to as Eritrea and Ethiopia case), Reports of International Arbitral Awards*, Vol. XXV, pp. 113-114, paras. 3.18, 3.20.
10 See also, Marcelo G. Kohen and Mamadou Hébié, "Territory, Acquisition," in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. IX, Oxford, New York: Oxford University Press, 2012, pp. 888-889, para. 3.

Except in these very limited cases, as a general rule, a title to territory will never be established by a map alone or by the mere fact that a map exists. Maps are confined to secondary evidence that endorses a conclusion reached by means unconnected with the maps, and will not be regarded as decisive evidence that can constitute a title to territory.[11] Their value as secondary evidence also varies depending on a number of factors, including their source, consistency, the response of the parties to the dispute, and when the maps were created.

(2) Factors influencing the evidentiary value of maps

i. Source

Official maps produced and published by State agencies and semi-official maps producted and published under the auspices of or with the official permission of State agencies have been estimated as having relatively high evidentiary value, because they can be considered to have been produced on the basis of carefully collected information. For example, the award in the *Island of Palmas case* suggests that the relevant maps have high evidentiary value.[12] The judgment in the *Clipperton Island case* did not give importance to the map used by Mexico for the reason that "the official character of this map cannot be affirmed."[13]

However, even official maps are not necessarily absolutely reliable or objectively accurate.[14] In particular, if a party to the dispute produce "official" or "semi-official" maps of the disputed territory after the dispute arose, such maps will have lower evidentiary value compared to maps produced before the dispute arose. This is because maps produced after the dispute arose are unlikely to contain information unfavorable to the party.[15] It is for the same reason that maps produced not by a party to the dispute but by a neutral organization are deemed to have evidentiary value. Such maps are considered to contain objective information that can be relied upon since the organizations have no conflict of interest with the parties to the dispute.[16]

Private maps produced by private individuals have little evidentiary value and are often not subject to examination, except in cases where they are considered to have particularly high reliability due to the reputation of the cartographer, such as a renowned expert in the field.[17]

Maps of an unknown source have less evidentiary value if there exist legally relevant facts which contradict the information they show, "however numerous and generally appreciated they may be."[18]

ii. Consistency

If a party to the dispute made maps that consistently indicated the disputed territory as its own, whereas the maps produced by the other party to the dispute and a third country did not consistently depict the attribution of the disputed territory, then the former maps have superior evidentiary value.

In the *Beagle Channel case*, none of the maps which were produced by Chile and submitted to the arbitral tribunal depicted that the disputed territory was Argentine territory. On the other hand, maps produced by Argentina or a third country included both maps indicating that the disputed territory was Chilean territory and maps indicating it was Argentine territory. In addition, the maps produced by Chile consistently depicted the boundary in the same place, while only one of the maps produced by Argentina depicted the boundary claimed by Argentina at the time. Furthermore, most of the maps produced by a third country supported Chilean claims. Based on these facts, the arbitral tribunal concluded that the maps produced by Chile give the impression that they favor Chile's position, whereas many of the maps produced by Argentina were doubtful or contradictory enough to deprive them of their evidentiary value.[19]

iii. Response of the parties to the dispute

If a State does not lodge protests or take other actions against a map that displays information unfavorable to its state, it could be deemed that the information shown on the map was adopted or acquiesced in by the State and it may not be able to claim title over the disputed territory. This is because there is a reasonable expectation that a State that is considered to be adversely affected will seek correction by the State that made the map.[20]

In the *Minquiers and Ecrehos case*, as one of the evidence showing that the sovereignty over the Minquiers belongs to the United Kingdom, the ICJ cited the fact that France did not express any reservations about the charts that listed all of the Minquiers and part of the Ecrehos as British territory.[21] In the *Beagle Channel case*, one of the grounds for concluding that the

11 *Différend frontalier, arrêt, supra* note 9, pp. 582-583, pars. 54, 56; Tomoko FUKAMACHI, "Ryodo Kizoku Handan ni okeru Kanren Yoso no Koryo" [Consideration of Relevant Factors for Determination of Territorial Attribution], *Kokusai Mondai* [International Affairs], No. 624 (September 2013), pp. 40-41; Norio ARAKI, "Ryodo Kokkyo Funso ni okeru Chizu no Kino" [Function of Maps in Territorial and Border Disputes], *Waseda Hogaku* [Waseda Law Review], Vol. 74, No. 3 (1999), pp. 23-24; Victor Prescott and Gillian D. Triggs, *International Frontiers and Boundaries: Law, Politics and Geography*, Leiden: Martinus Nijhoff, 2008, p. 192.

12 *Island of Palmas Case, supra* note 6, pp. 852, 854, 861-862.

13 Clipperton Island Case (1931), RIAA, Vol. II, p. 1105.

14 *Dispute between Argentina and Chile concerning the Beagle Channel* (hereinafter referred to as *Beagle Channel Case*), RIAA, Vol. XXI, pp. 164-165, para. 138.

15 ARAKI, *supra* note 11o, p. 9.

16 *Différend frontalier, supra* note 9, p. 583, para. 56.

17 *Beagle Channel Case*, pp. 171-172, paras. 148-149.

18 *Island of Palmas Case, supra* note 6, p. 853.

19 *Beagle Channel Case, supra* note 14, pp. 168-169, 178, 182, paras. 144-145, 157, 162. See also, *Egypt-Israel Arbitration Tribunal: Award in Boundary Dispute concerning the Taba Area*, 27 *I.L.M.*, 1421 (1988), pp. 1484-1485, para. 219; ARAKI, *supra* note 11", p. 17.

20 *Eritrea and Ethiopia Case, supra* note 9, p. 114, para. 3.21.

21 *The Minquiers and Ecrehos Case, supra* note 7, pp. 66-67, 71.

disputed islands belong to Chile was the fact that the Argentine Congress had officially authorized the production of a map showing the disputed islands as Chilean territory, and that the Minister of the Interior had taken acts that made it appear as though he had approved the production of the map.[22] In the *Pedra Branca case*, it was assessed that Malaysia considered the disputed islands to be under the sovereignty of Singapore, the reason being that Malaya, the predecessor of Malaysia, and Malaysia had published official maps with a note that the disputed islands were "Singaporean territory."[23]

iv. When the maps were created

The evidentiary value of a map can vary greatly depending on the date of its production or publication. In general, maps produced or published by a party after a dispute emerges have less evidentiary value than those produced or published before the dispute arises.[24] Of course, this is not the case if the party continues to produce and publish maps that are unfavorable to itself or contradictory to its claims even after the dispute arises.

3 Signs of Change

The ICJ has not abandoned its position of using maps only to confirm conclusions reached by other evidence, with the exception of maps attached as an integral part of official text such as treaties providing the attribution of territory. This may be proof of a deep-rooted perception among judges that drawing a political boundary, i.e., a boundary artificially created by humans, is "not a task for a cartographer."[25]

On the other hand, it is certain that international tribunals are attaching greater importance to the evidentiary value of maps for confirming the will of a party related to a disputed territory.[26] Tribunals have suggested that maps may become decisive evidence when there is no or insufficient evidence of territorial title.[27] It is precisely because of this possibility that the parties to disputes have submitted a vast number of maps to international tribunals. The tribunals, too, have paid due respect to the efforts of the parties and have taken appropriate measures. All of the cases mentioned in this paper have judged the evidentiary value of maps upon carefully examining and without casually dismissing the claims made on the basis of the maps. International tribunals by no means underestimate the function of maps. Maps need to be collected and assessed with due consideration of this fact.

22 *Beagle Channel Case, supra* note 14, pp. 158-159, paras. 126-127; ARAKI, *supra* note 11, p. *9.*
23 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, para. 272. See also, *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 624, at 661-662, paras. 101-102.
24 *Beagle Channel Case, supra* note 14, pp. 167-168, para. 141.
25 *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, Separate Opinion of Judge Oda, p. 1134, para. 41.
26 *Différend frontalier, supra* note 9, p. 586, par. 62. Voir aussi, *Différend frontalier (Burkina Faso/Niger), arrêt, C.I.J. Recueil 2013*, p. 76, par. 68.
27 The tribunal judged in one case that maps are "important evidence of general opinion or repute" concerning the disputed territory. *Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), Decision of 9 October 1998, RIAA*, Vol. XXII, p. 295, para. 381, pp. 321-322, para. 490. See also, *Beagle Channel Case, supra* note 14, p. 183, para. 163.