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CHINA'S CONCEPT OF "HISTORIC RIGHTS" AND INTERNATIONAL LAW: A VIEW FROM JAPAN

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Question 1: It has been more than three years since the award of the arbitral tribunal in The Hague to decide in favor of the Philippines regarding the South China Sea and China's claims. In that context, how would you define the concept of "historic rights" as used by China with International law?

In many cases, historic rights are claimed and discussed concerning sea areas and maritime features. However, some analysis of the "historic rights" considers the concept is significant in issues concerning both land and the sea. The way how international law maintains its regulation and validity over historic rights gives a useful frame of thinking in dealing with issues related to entitlement to both man and sea claims.

In terms of the definition of the concept, according to the arbitration tribunal, "the term "historic rights" are general and can describe any rights that a state may possess that would not normally arise under the general international law, absent particular historic circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty". Historic title is historic sovereignty to land or maritime areas, and historic waters is simply a claim of historic title over maritime areas, typically internal waters or territorial seas.

Question 2: In your analysis, what is the relation between UNCLOS and China's "historic rights"?

China's historic rights in the South China Sea are those to living and non-living resources in the sea areas surrounded by the so-called 9 dash line. Both parties to the dispute, China and The Philippines, are parties to UNCLOS, and the arbitral tribunal was established under UNCLOS. The tribunal examined China's historic rights in its relation to UNCLOS. As its conclusion, it declared that China's historic rights are at variance with UNCLOS and that UNCLOS superseded them.

In reaching the concluding, the tribunal emphasized above all the "comprehensiveness" of UNCLOS. As to the meaning of comprehensiveness, there are two meanings. First, UNCLOS covers all sea areas, including seabed and subsoil. It regulates all the usages of the sea. It may be described as the material or spatial coverage of UNCLOS, and comprehensiveness is the word used to express this meaning. Second, rather than other international law rules, it is UNCLOS that establishes the regimes for the ocean, and that regulates the uses of the sea. This meaning may be described as exhaustiveness.

Doubts are raised regarding such comprehensiveness of UNCLOS. Here, I would like to stop short of further examining the appropriateness of such logic of the tribunal. Anyway, we can confirm that between party States to UNCLOS due to its comprehensiveness, historic rights that are not compatible with UNCLOS do not have room to be maintained. With the logic of

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comprehensiveness of UNCLOS, it can keep its validity as international law against historic rights.

Question 3: Beyond the framework of UNCLOS, what is the relationship between international law and China's historic rights?

The logic of the tribunal regarding the comprehensiveness of UNCLOS does not apply to non-party States to UNCLOS. Therefore it is needed to consider the relationship between international law and historic rights, not limited to UNCLOS. The definition of historic rights given by the tribunal is useful here also. According to its ruling, historic rights described as "any rights that a State may possess that would not normally arise under the general international law, absent particular historic circumstances."

Historic rights would not usually arise under international law. Considering such nature of historic rights, there are two possibilities that international law can encompass historic rights within its legal sphere. First, it is to give the status of exception to historic rights concerning international law. Second, without admitting historic rights as an exception, it is to assume international law that regulates historic rights by considering concrete and individual circumstances.

The first position finds its reason in that it enables the preexisting international law to survive a changing law. Metaphorically speaking, exceptions, or historic rights, discharge the function of a safety valve (*soupe de sécurité*). The International court of justice took the second position in the Norwegian Fishery Case. Regarding the Norwegian straight baseline system, the ICJ ruled that the baseline system is allowed as application of general international law in the particular case of

Norway. According to the ICJ, the Norwegian straight baseline system does not form any exceptions to the international law rule that regulates drawing methods of baselines.

The two possible positions are the same in that either of them recognizes the importance of respect for concrete and individual circumstances that historic rights bear. Historic rights may be accepted either as exceptions to general international law by the first position, or as a particular case of application of general international law to cases with historic factors. According to both positions, the validity of international law can be kept. As to the first point, the existence of exceptions does not deny the validity of the relevant international law. As to the second point, the flexibility to allow the consideration of concrete and individual circumstances is a method of its application.

International law may have these possibilities to cope with historic rights without fatally undermining its validity. To maintain the validity of international law in the case of the first position, unlimited exceptions should not be permitted. In the case of the second position, too much flexible application should not be allowed. Otherwise, substantially, the validity of international law would be severely damaged, and the legal spheres that the relevant international law sets forth would lose their definite limits. It is the case even if the international law continues to hold its status as a law purely formalistically.

Question 4: How would you analyze China's claims and behavior in the South and East China Sea?

In the South China Sea, China, based upon its claims of historic rights, has continued to construct artificial islands and the militarization of these facilities.

Even if China's claims have a long history, this is extravagant. Therefore, while we apply the logic of historic rights as an exception to international law, such claims are not within the limited example of exceptions to international law. Besides, according to the logic of an application of general international law to cases with consideration of special circumstances of each case, if international law tries to encompass such extravagant claims of historic rights by considering historic factors, its validity and regulation would be fatally undermined.

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In the East China Sea, among Korea, China, and Japan, no maritime delimitation has been agreed, except for the agreement between Korea and Japan on delimitation and joint development of resources regarding the continental shelf. Between China and Japan there is a prior notification regime regarding marine scientific researches. In addition, the two countries politically agreed the joint development of the continental shelf.

UNCLOS obliges parties to delimitation disputes to refrain from conduct that may hamper the final agreement of delineation. Irrespective of the agreed prior notification regime on marine scientific research and irrespective of agreed joint development of resources on the continental shelf between China and Japan, China has unilaterally continued marine scientific research activities in the un-delimited sea areas, and built oil rigs for development of resources on the un-delimited continental shelf.

The obligation under UNCLOS to refrain from conduct that may hamper the final agreement of delineation is not precisely defined and flexible to allow consideration of individual and concrete circumstances. Nevertheless, such constant rejection of cooperation and obstinate unilateralism of China would not be legally justified and would form a violation of the obligation. There should be a certain limit to the allowance of a flexible interpretation of the obligation. Otherwise, the obligation and even the legal sphere that UNCLOS sets forth would be fatally undermined. This consideration of a limit to the allowance of international law implicates similar restriction of international law that admits individual and concrete situations to encompass within its legal sphere historic rights.

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In the end, there are two propositions: on the one hand, taking either of the two logics as explained before, historic rights are an exception to international law, a safety valve (*souape de sécurité*) to enable the law to cope with various phenomena. Even without admitting exceptions, by allowing flexible consideration of individual and concrete cases, international law may encompass historic rights within its legal sphere. On the other hand, too much exception and too much allowance for flexibility would fatally undermine the regulations and the validity of international law. Thus, to seek a fine balance between the two propositions is a critical requirement for

international law to maintain its validity. This way of thinking is significant in coping with the issues of both land and sea.

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