Double Aspects of Being a Sovereign State: Positive and Passive Aspects[1]

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Introduction

This paper will take up several issues that form the fundamental structure of international law. The purpose of this paper is not to examine them in detail, rather, by being based upon them, to explain the dual aspects of being a sovereign State under international law. The issues to be dealt with in this paper will highlight what international law requires of a sovereign State, and what international law enables it to realize. The former can be explained mainly by international obligations. This paper principally focuses upon the latter.

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*For the reader's convenience, in the footnotes, the titles of cited works originally written in Japanese will be translated into English with [Japanese titles].

** All URLs were last accessed on the 27th of May, 2024.

[1] This paper is based upon and expanded from the following lectures delivered by the author: A collaborative project between the Japan International Cooperation Agency and Open University, Japanese Modernization Lecture Series 2020, Chapter 10, "Japan and Modern International Law," and the lecture, entitled "Realization of National Interests in Accordance with International Law," on the 2nd of May, 2024 at the Foreign Service Training Institute of the Ministry of Foreign Affairs of Japan.

International law, by its fundamental structure, confers opportunities and possibilities on a sovereign State to reform and create international law.

This paper aims to elaborate on the dual aspects of being a sovereign State, with a particular focus on analyzing Japan's practice. It will proceed as follows. Section I will give the definition of the dual aspects of being a sovereign State as a subject of international law. Section II will explain Japan's "passive attitude" toward modern European international law, and it will trace the change of Japan's attitude after Japan's reception of modern European international law. Section III will discuss the fundamental structure of international law from the perspective of defining what international law requires of a sovereign State, and what international law enables it to realize. Section IV will further examine, in depth, the characteristics of current international law from the same perspective. Section V will, based upon the examination in the previous Sections, consider Japan's recent international practice to examine whether it deserves to be a sovereign State, a subject of international law.

I. Double Aspects of a Sovereign State as a Subject of International Law[2]

[2] As a similar idea, see, Kanae Taijudo, "Some Reflections on Japan's Practice of

International law has sovereign States as its subjects. Let's focus on the meaning of "subject." There are dual sides to it. First, since international society does not have any authoritative legislative organs, sovereign States themselves create international law by, typically, concluding treaties and raising customary rules. Second, sovereign States are bound by international law, and they comply with international obligations.

The first is the positive side of being a subject of international law. We may call this the "creator" or "reformer" side. The second is the passive side of being a subject of international law. We may call this the "conformist" side.

The most important thing is that a sovereign State should maintain these two sides "at the same time." On the one hand, they need to positively contribute to the revision or creation of international law. On the other hand, "at the same time," they need to comply with international law. A lack of either side would mean, in reality, a lack of the complete status of being a "subject" of international law. This lack would mean that such a State does not deserve to be a "sovereign" State.

From this perspective, the next Section will begin with the reception by Japan of

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International Law during a Dozen Eventful Decades," *American Society of International Law Proceedings*, Vol. 69 (1975), p. 68.

modern European international law.

II. Japan's Passivity toward Modern European International Law and Its Subsequent Change in Attitude[3]

1. Reception of Modern European International Law[4]: Passive Acceptance of International Law

In the period of Japan's reception of modern European international law, the salient feature was the passive side of Japan of being a subject of international law. Japan, under the Tokugawa Shogunate, impose[5]d a seclusionist or isolationist policy between 1639-1854.[6] While Japan had some intercourse with several

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[3] On this issue, see, for example, Masaharu Yanagihara, "Significance of the History of the Law of Nations in Europe and East Asia, in *Recueil des cours*, Vol. 371 (2015), hereinafter referred to as Yanagihara, "Significance"; by the same author, "Japan," in Bardo Fassbender and Anne Peters eds., *The Oxford Handbook of the History of International Law*, (Oxford University Press, 2012), hereinafter referred to as Yanagihara, "Japan," and Kitaoka Shinichi, *The Political History of Modern Japan – Foreign Relations and Domestic Policies*, translated by Robert D. Eldridge with Graham Leonard, (Routledge, 2018), hereinafter referred to as Kitaoka, "The Political History".

[4] As to the meaning of "modern European international law," see Yanagihara, "Significance," pp. 287-294. Here, international law that binds sovereign States, in a modern sense, is assumed. This consists of the following three elements: a group of rules, a principle of legal bindingness, and the concept of "a civilized nation." The existence of international law depends on law, "civilized" nations, and sovereignty.

[5] Kitaoka, "The Political History," p. 13.

[6] For a detailed examination of the seclusionist policy, see Yanagihara, "Significance," pp.

foreign countries during that time, Japanese were not allowed to go abroad, and foreigners were not allowed to enter Japan. At the end of Japan's seclusion, in 1853, the Tokugawa government was demanded by the US and other great powers to "open up," even, in some cases, by the threat of force. Japan did not have enough knowledge of international law nor, particularly, military power. As a result, it had no choice but to conclude, in 1858, unequal treaties of commerce with the great powers, such as the US, the UK, the Netherlands, France and Russia.[7]

Under these unequal treaties, Japan admitted extraterritoriality and lost its tariff autonomy.[8] As to extraterritoriality, within Japan's territory, the great powers had consular jurisdiction in certain designated areas.

In the Normanton incident of 1886,[9] the Normanton, a vessel flying the UK flag, became stranded and sank in the vicinity of Wakayama Prefecture of Japan. The vessel, with its crew, was rescued by local people, but all 25 Japanese passengers,

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334-335; Yanagihara, "Japan," 2.2.

[7] Onuma Yasuaki, "Japanese International Lawin the Prewar Period-Perspectives on the Teaching and Research of International Law in Prewar of Japan," Japanese Annual of International Law, No. 29 (1986), p. 27; Taijudo, *op. cit., supra* n. 2, p. 65; Yanagihara, "Significance," p. 336.

[8] Kitaoka "The Political History," pp. 53-54.

[9] For more details about this incident, see *ibid.*, pp. 54-55.

without exception, died on board. The fact is that the Japanese were left to die by the captain and crew of the Normanton. They were not given any tools to escape. By exercising its consular jurisdiction, the Marine Accident Tribunal of UK gave first a "not guilty" verdict in favor of the captain. Japan, by itself, could not try or rule on the incident. This was because Japan's criminal jurisdiction was limited by the consular jurisdiction of UK. This incident provoked a strong protest in Japan against the consular jurisdiction of the great powers.

In addition, Japan could not decide tariffs in that period by its own will.[10] The imposition of tariffs is a very important element of the sovereignty of States, but Japan was not allowed to decide tariffs on imported foreign products. As a result, Japan's revenues from tariffs remained very low.

The Tokugawa government came to understand that it urgently needed knowledge of international law and military power to alleviate this unfavorable situation. This policy was continued by the Meiji government after the 1868 Meiji reformation and the collapse of the Tokugawa Shogunate.

After the abolition of its seclusionist policy, Japan entered an age of enlightenment

[10] Yanagihara, "Significance," p. 336.

and civilization.[11] At the end of the Tokugawa Shogunate, Japan sent people to the Netherlands, for instance, to study international law. In the Meiji era, many authoritative textbooks of international law were translated into Japanese. In 1897, the Japanese Association of International Law was established, which is now the Japanese Society of International Law.[12]

It is a well-known fact that in the 1868-1869 Hakodate War, in which the new Meiji government clashed with the old samurais (soldiers) of the Tokugawa Shogunate, "abordage" was applied between the two hostile sides. "Abordage" is a strategy for naval wars where combatants, after coming alongside a hostile ship, are sent to the ship and attack it on board.[13]

This acceptance by Japan of European or Western civilization and modern European international law clearly shows its passive attitude toward international law. Japan tried to be a conformist of modern European international law.[14]

However, in the same era, it could not be completely denied that there were some

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[11] *Ibid.*, pp. 336-338 and 347.

[12] Onuma, *op. cit., supra* n. 7, 34.

[13] A succinct explanation of French influence on the use of the "abordage" strategy in the Hakodate War is available at:
https://www.berlinale.de/en/2005/programme/20053101.html.

[14] Onuma, *op. cit., supra* n. 7, p. 44; Taijudo, *op. cit., supra* n. 2, pp. 65-66.

precursors for Japan's later change of attitude toward international law.

First, Japan held some doubts toward international law in relation to the reality of the force of the great powers. Japan, in some way, harbored the idea that international law was useless and too weak to bind States, especially the great powers.

Second, Japan made every effort to strengthen its own power, both militarily and economically.[15] This policy is referred to by a special Japanese term: "hukokukyohei-saku," the policy of "rich nation, strong military."[16] Certainly, its purpose was to obtain a favorable position in the negotiations for the revision of the unequal treaties with the great powers. In this sense, it was one of Japan's policies for catching up with the Western powers, alongside the adoption of the policies of enlightenment and civilization. Nonetheless, with cherishing its fundamental doubts about the effectiveness of international law in relation to the great powers, Japan's adoption of the policy of "rich nation, strong military" pushed forward its motivation for being a great power.

This brings us to the second sub-section of Section II.

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[15] Onuma, *op. cit., supra* n. 7, pp. 28-29.

[16] Kitaoka, "The Political History," p. 38.

2. Motivation for Being a Great Power: Law and Force

At the beginning of the Meiji era, in 1871, the government dispatched a delegation to the US and to European countries to study Western systems of politics, law, military, society, and culture.[17] The head of the delegation was Tomomi Iwakura. Councilor Takayoshi Kido and Finance Minister Toshimichi Okubo were among the vice ambassadors in the mission. The details of this mission's travels were recorded by one of its attendants.[18]

When the mission visited Germany, they met Chancellor Bismarck and Army Chief of Staff Moltke. The small country of Prussia, after wars with Austria and France, had achieved the unification of the German Empire (Reich). Against this background, Bismarck made a memorable statement to the Iwakura mission with respect to international law. He said, "The law of nations is not a law that can

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[17] Kitaoka, "The Political History," pp. 28-29. As to the detail of the visit of this mission, see, Akira Tanaka *Iwakura Embassy-A True Record of Visit of the United States and European Countries [Iwakura Shisetsudan-Beiou Kairan Jikki]*, (Iwanami Shoten, 2002), hereinafter referred to as *A True Record*. English version was published entitled *The Iwakura Embassy 1871-73*, (Routledge, 2002), by the same author, *Meiji Reformation and Western Civilization-What the Iwakura Embassy Watched [Meiji Ishin to Seiyo Bunmei-Iwakura Shisetsudan wa Naniwo Mitaka]* (Iwanami Shoten, 2003), hereinafter referred to as *Meiji Reformation*.

[18] Tanaka, *A True Record*.

protect the rights of great powers. Small countries earnestly obey it. Great powers disregard international law by military force, as soon as it turns out to be unfavorable to their national interests. And thus, small countries cannot preserve their rights of autonomy."[19] Army Chief of Staff Moltke in 1874 made similar remarks in a speech in the German Parliament. Although his speech was given after the Iwakura mission returned to Japan, it is not difficult to imagine that the members of the Iwakura mission knew about the speech by Moltke.[20]

The important figures of the Meiji government in the Iwakura mission were no doubt impressed by these remarks regarding international law and its weakness against force. The ambassador of the Iwakura mission, Tomomi Iwakura, wrote in 1869 that international law is not a rule agreed by mutual consent among States and that States do not obey it.[21]

In addition to these politicians, one of the most influential enlightenment thinkers in Japan, Yukichi Fukuzawa, wrote that a hundred volumes of international law textbooks are inferior to a couple of cannons.[22]

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[19] Tanaka, *A True Record*, pp. 147-148; Tanaka, *Meiji Reformation*, pp. 65-66.

[20] Tanaka, *A True Record*, pp. 150-151; Tanaka, *Meiji Reformation*, pp. 66-67.

[21] Yanagihara, "Significance," p. P. 344.

[22] *Ibid.*

This recognition of the fragility of international law in the face of force raised a strong fear in the Japanese politicians that Japan would lose its status as a sovereign State and its sovereign independence if it did not have enough military and economic power. The following remarks can be fully understood in this context. Tomomi Iwakura said, regarding the Western powers, "They have the heart of tigers or wolves. If we are only frightened and do not resist their violence, our imperial nation will come to be enslaved."[23] The vice ambassador Takayoshi Kido wrote in 1868 that international law is a tool to take away from those who are weaker.[24]

These fears, and the policy of "rich nation, strong military" went side by side. The policy of "rich nation, strong military" had initially purported to make Japan equal to the Western countries. Nonetheless, the policy, under the fear of Japan's becoming further inferior to Western countries, might suggest a different significance. Beyond being strong enough not to have anything taken away by the great powers, Japan began to harbor a self-image of becoming a great power that could, by force, even negate and trespass on international law.

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[23] Onuma, *op. cit., supra* n.. 7, pp. 28-29.

[24] Yanagihara, "Significance," p. 344.

In addition, there was a European bias that strongly colored Japan's enlightenment and civilization policy at that time. As the dark side of the coin of Eurocentrism, Japan, out of its ambition to be a great power, showed its fangs to other Asian countries. This tendency was referred to as "datsua nyuo" in Japanese, namely "leave Asia, join Europe."[25] For Japan, international law was regarded as "a political bargaining chip" that could be taken advantage of solely by "civilized nations," which meant European or Western nations.[26]

Also, Japan's demonstration of its will to observe international law was toward the Western countries, and not toward Asian countries. This closely relates to the third sub-section of Section II.

3. Negation of International Law by Force: Deviation from Being a Subject of International Law[27]

In the enlightenment period, Japan eagerly tried to acquire knowledge of international law and, then, to become a rule-abiding country. In the 1904-1905

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[25] Onuma, *op. cit., supra* n. 7, pp. 40-41; Yanagihara, "Significance," p. 338; Yanagihara, "Japan," 4.2.

[26] Yanagihara, "Significance," p. 345.

[27] Taijudo, *op. cit., supra* n. 2, pp. 67-68.

Russo-Japanese War, Japan abided by the laws of war. During this war, Japan's treatment of Russian prisoners of war was extremely courteous and humane. This was entirely in accordance with the law of war.[28]

At the same time, however, the Russo-Japanese War was a turning point after which Japan changed its policy of faithfully obeying modern European international law.

Before explaining this change, an important reservation needs to be noted. Japan's motivation for being a great power did not necessarily entail a negation of international law. Actually, Mineichiro Adatchi, a highly esteemed Japanese diplomat at the end of the 19th century, thought that Japan was required to play a very important role as a strong country in the international community. It would do so by abiding by existing international law.[29] Therefore, being a great power does not necessarily lead to the idea of a negation of international law.[30]

Nonetheless, after its victory in the Russo-Japanese War, Japan, having gained the confidence to be a great power, took steps toward the negation of international

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[28] Yanagihara, "Significance," p. 342; Taijudo, *op. cit., supra* n. 2, 67; Onuma, *op. cit., supra* n. 7, pp. 33-34.

[29] Yanagihara, "Significance," p. 340.

[30] Onuma, *op. cit., supra* n. 7, p. 41.

law principally by force.

From 1931, it is said that Japan went into a period of militarism.[31] It rushed into a long war with China in 1931 and ultimately with the US from 1941. In 1933, while Japan was a permanent member of the Council of the League of Nations, it withdrew from this organization. This was because the General Assembly of the League of Nations had adopted a resolution to urge Japan to leave Manchuria in China.[32]

In the background to Japan's aggressive conduct, particularly against Asian countries, was the policy of "datsua-nyu-o-saku," "leave Asia, join Europe."[33] Japan tried to obtain a dominant status among Asian countries, in sharp contrast to the equal relations that Japan eagerly tried to attain with Western countries. Japan concluded unequal treaties with Asian countries, such as Korea in 1876 and Thailand in 1898. Against China, Japan presented the 21 points of demand in 1915, which eloquently showed Japan's unequal treatment of that country. Thus, Japan sought to establish a new international order in East Asia. The "Dai Toa

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[31] Yanagihara, "Significance," p. 339; Taijudo, *op. cit., supra* n. 2, pp. 67-68.

[32] Kitaoka, "The Political History," pp. 122-124.

[33] Onuma, *op. cit., supra* n. 7, pp. 40-41.

Kyoei Ken," "a Greater East Asian Co-prosperity Sphere,"[34] may explain such an idea of creating a new international order in East Asia.

After Japan surrendered to the United Nations (Allied Powers) at the end of World War II, it enacted a new constitution, the Constitution of Japan, in 1946. Article 9 of the Constitution reads, "aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes." In addition, as reflected in its Preamble and Article 98, international cooperation is one of the main pillars of the Constitution of Japan. Article 98 prescribes that the treaties concluded by Japan and established laws of nations shall be faithfully observed.

It is clear that Japan, under its Constitution, has a passive side of being a subject of international law. Then, did Japan come to take the conformist position toward international law, again, as it did in the era of the reception of modern European international law? Or, is Japan, as a sovereign State, really becoming a subject of international law, with the dual sides of it, namely, the passive and positive sides

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[34] *Ibid.*, p. 41.

being seen at the same time?[35]

Consideration of this question calls for an analysis of the fundamental structure of international law with current developments, as it defines what international law requires of a sovereign State and what international law enables it to realize. These factors establish a tool to evaluate the achievement of the dual aspects, both the passive and the positive, of a sovereign State as a subject of international law, at the same time. The following two sections will examine the fundamental structure of international law and its current characteristics from such a perspective.

III. Fundamental Structure of International Law in Relation to the Significance for a Sovereign State to Be Its Subject

1. Consensual Basis for Creation, Enforcement, and Application of International Law

International society lacks any authoritative legislative, enforcement, and judicial organs. Without consent from a sovereign State, there cannot be any binding laws, compulsory law enforcement measures, or judicial decisions. For instance, the resolutions by the General Assembly and the United Nations (UN) Security

[35] In this regard, see Taijudo, *op. cit., supra* n. *, p. 68.

Council do not have any binding force, and if they were to have any, it would be based upon the prior consent from the party States to the UN Charter.[36] The same holds true for the economic and non-economic "coercive" measures, which are frequently called "sanctions,"[37] that the UN Security Council takes.[38] The International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), and arbitral tribunals cannot entertain any disputes unless party States to disputes confer their consent on the competence (jurisdiction) of these courts and tribunals.

The next subsection will focus upon the creation and interpretation of international law, in which a sovereign State holds wide possibilities.

competence

2. Possibility for a Sovereign State to Create and Interpret International Law

(1) Creation of International Law by Sovereign States

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[36] https://www.un.org/en/about-us/un-charter/full-text.

[37] Under Chapter VII of the UN Charter, the Security Council has the competence to adopt resolutions to impose economic and non-economic measures on countries that engage in aggression against another member of the UN, for instance. These measures are frequently called "sanctions."

[38] Thus, as far as "sanction" connotes a compulsory nature, international society does not have any competence to impose sanctions on a sovereign State.

The principal legal sources of international law are treaties and customary international law.[39] Treaties are explicit agreements of sovereign States, and customary international laws are said to be tacit agreements among them.[40] Thus, a sovereign State itself has the possibility and opportunity to create international law rules by the way of concluding treaties and participating in the formation of international practice and the normative conscience.[41]

(2) Interpretation of International Law by a Sovereign State

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[39] Article 38, Paragraph 1 of the Statute of the International Court of Justice reads:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf.

[40] There are different authorities on the nature of customary international laws. Many authorities are in accord in that the two requirements for customary international laws are international practice and normative conscience, *opinion juris*, which means the normative belief that a certain international practice should be a legal rule. Here, it is not necessary to go into the detail of such discussion. As to a typical example of the two requirements theory, see, the ICJ judgement on the case of North Continental Shelf, Judgement, *I. C. J. Reports 1969*, para. 71.

[41] For the two conditions for a rule to be customary international law, see *supra* n. 40.

In international society, there are no courts and arbitral tribunals that have the competence to compulsorily entertain international cases. In other words, no sovereign States are forced to stand in front of courts as defendants unless they themselves consent to do so.[42] As a result, when two States have different interpretations of an international law rule, it could not be expected that an authoritative third party, such as a court or tribunal, would render a binding interpretation of the rule concerned. The difference of opinions between sovereign States could continue endlessly. In cases of negotiation between two such sovereign States, a more convincing interpretation could supplant the different interpretations.[43]

Under such circumstances, in international society, a sovereign State has a strong possibility to justify its acts through the "self-interpretation" of international law rules. Self-interpretation of international law rules by each sovereign State bears

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[42] Theoretically, it is conceivable that sovereign States could be forced to be applicants in front of courts. While there exists a very rare case of this, such a possibility is not meaningful, as applicants themselves tend to refer to disputes to which they are parties. Case of the monetary gold removed from Rome in 1943, (Preliminary Question), *I. C. J. Reports* 1954

[43] International Law has an idea to describe some legal effect in relation to a specific State(s), and it is "opposability." The French version of the ICJ Judgement on Fisheries Case gives a typical example for this. Affaire des pćcheries, Arrét du 18 décembre 1951, *C. I. J. Recueil*, pp. 131 and 139.

far more weight than the equivalent by individuals under domestic law. In domestic societies, as long as an authoritative third party, such as a court, has competence to render a binding interpretation, the weight given to self-interpretation by each individual is relatively small.

In the end, a sovereign State has large possibilities for the creation and interpretation of international law, and this is the very advantage of being a subject of international law. The fundamental structure of international law enables a sovereign State to create international law and justify its acts by its own self-interpretation of international law. This is the positive aspect of a sovereign State. A sovereign State should positively engage in the creation and interpretation of international law by using such possibilities. Otherwise, a State would remain an "object," which is opposite to a "subject," of international law that solely complies with international law. Such a State does not deserve to be a "subject" of international law, in a precise sense.

The following characteristics of international law further enlarge such possibilities and opportunities for a sovereign State.

3. Characteristics of International Law that Enlarge the Possibilities of a Sovereign

State as Its Subject

(1) Lack or Incompleteness of Provisions of International Law

There are cases in which provisions which should exist are lacking. For instance, under the United Nations Convention on the Law of the Sea (UNCLOS),[44] there are no provisions that clearly and explicitly prescribe for the innocent passage of foreign warships in territorial seas.[45] Intense arguments over this issue prevented States from including a provision to provide for it. Such cases can also be found in other fields of international law.

Facing such a lack or incompleteness of provisions of international law, a sovereign State has the opportunity to create international law rules or interpret the relevant rules to achieve what it desires. In fact, as to the interpretation of the relevant rules on the right of innocent passage, the US and the former Soviet Union in 1989 issued a joint statement on this matter.[46] The statement provides

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[44] https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

[45] Article 17 of UNCLOS can be interpreted that it prescribes a right of innocent passage of foreign warships. It reads:

> Right of innocent passage
> Subject to this Convention, *ships of all States*, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea (emphasis added).

[46] 1989 US/USSR Joint Statement on Uniform Acceptance of Rules of International Law Governing Innocent Passage, available at: https://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE14.pdf,

a uniform interpretation of the rule on the right of innocent passage, namely that warships have said right.[47] As the US is not a party to UNCLOS, the statement mentions "the rule" on the right of innocent passage, not the provisions of UNCLOS, such as Articles 17-19.

In addition, it is not uncommon for international law rules to provide for a provision in an unclear and flexible manner that allows plural interpretations. For instance, international law rules frequently prescribe for "appropriate measures," "necessary measures," "measures in accordance with domestic laws," and so forth to be taken by a sovereign State.[48] A sovereign State holds a wide discretion in taking such measures as the provisions require.

(2) Nature of International Obligations that Also Admit the Discretion of a Sovereign State

Regarding the law of State responsibility, different natures of international obligations were discussed in the process of drafting the rules on the law of State

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pp. 12-13.

[47] *Ibid.*, p. 13.

[48] Examples will be given later in relation to the nature of international obligations.

responsibility under the International Law Commission (ILC).[49] The categories of international obligation in respect to their nature were introduced to the draft articles on the law of State responsibility.[50] While the idea of the categorization of international obligations did not gain strong approval among States,[51] its introduction has important significance that is not limited to the law of State responsibility. Namely, it demonstrates the idea of the categorization of international obligations from the perspective of how and to what extent international obligations restrict acts of States.

The three categories of international obligations are: an obligation requiring the adoption of a particular course of conduct, an obligation requiring the

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[49] Later some explanation will be given on the concept of codification of international law and on its comparison with the progressive development of international law.

[50] The ILC set the categories in order to facilitate decisions on how and when obligations are breached. This is because one of the two requirements for State responsibility to be triggered is the existence of a violation of an international obligation. The categories were incorporated into the draft articles on the law of State responsibility in the first draft adopted by the ILC in 1966. The draft articles and the commentaries thereto are available at:
https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_1996.pdf.

[51] In the end, however, the ILC deleted the categories of international obligations in the second draft adopted in 2001, as the categories were complicated and States did not strongly approve of them. The second draft was adopted by the resolution of the General Assembly of the UN (A/56/83 of 12 December 2001) in the same year. The articles and the commentaries thereto are available at:
https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

achievement of a specified result, and an obligation to prevent a given event.[52] As the third category may be thought of as being a form of the first category,[53] it is reasonable here to focus upon the first and the second categories.

As to the obligation requiring a particular course of conduct, requiring particular legislative measures is strict and burdensome for a sovereign State. Particularly for a country that has precise and rigid procedures for the enactment of laws,[54] such an obligation is not easy to implement. In other words, the obligation requiring a special course of conduct precisely and strictly regulates the acts of a sovereign State.

In regard to such an international obligation requiring legislative measures, a comparison between the two Covenants of 1966 on human rights is useful. One is the International Covenant on Civil and Political Rights.[55]

Article 2, Paragraph 2 reads:

> Where not already provided for by existing legislative or other measures,

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[52] They are provided for respectively under Article 20, Article 21 and Article 23 of the draft articles adopted by the ILC in 1996. As to the provisions and the commentaries thereto, see, *supra* n. 50.

[53] This is because, "a given event" can be one of "a specific result."

[54] Japan and civil law countries could be such States.

[55] https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, *to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant* (emphasis added).

The other is the International Covenant on Economic, Social and Cultural Rights.[56]

Article 2, Paragraph 1 reads:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant *by all appropriate means, including particularly the adoption of legislative measures* (emphasis added).

Due to differences in the character of the various human rights covered, the

[56] https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.

requirements of the legislative measures are of different rigidities in the two covenants.

In comparison, the obligation requiring the achievement of a special result does not place requirements on a sovereign State on how to achieve the result. A sovereign State has full discretion in regard to the means and tools to achieve the result. For instance, under Article 22, Paragraph 1 of the 1961 Vienna Convention on Diplomatic Relations,[57] the receiving States have the obligation of ensuring the inviolability of diplomatic premises.[58] How such inviolability is to be ensured is entirely within the discretion of the receiving States. They can choose any measures at their disposal, such as legislation, administrative guides, etc. Article 22, Paragraph 1 solely requires that the inviolability of diplomatic premises be ensured.

A similar situation is found in the case of ozone layer protection. Article 2 of the 1985 Vienna Convention for the Protection of the Ozone Layer[59] prescribes for

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[57] The treaty is available at: https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf.

[58] It reads:

> The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

[59] The Convention is available at: https://ozone.unep.org/sites/default/files/2019-12/The%20Ozone%20Treaties%20EN%20-%20WEB_final.pdf.

the general obligation of the protection of the ozone layer.[60] It reads:

> 1. The Parties shall take appropriate measures in accordance with the provisions of this Convention and of those protocols in force to which they are party to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.
>
> 2. To this end the Parties shall, *in accordance with the means at their disposal and their capabilities* (emphasis added):
>
> …
>
> (b) *Adopt appropriate legislative or administrative measures* and co-operate in harmonizing appropriate policies to control, limit, reduce or prevent human activities under their jurisdiction or control should it be found that these activities have or are likely to have adverse effects resulting from modification or likely modification of the ozone layer (emphasis added);

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[60] To concretely determine the harmful substances, in 1987 the Montreal Protocol on Substances that Deplete the Ozone Layer was adopted. It is available at: https://web.archive.org/web/20130420100237/http://ozone.unep.org/new_site/en/Treaties/treaties_decisions-hb.php?sec_id=5.

…

(d) Co-operate with competent international bodies to implement effectively this Convention and protocols to which they are party.

This provision mentions various measures for complying with the general obligation. A party State shall take measures *in accordance with the means at their disposal and their capabilities.* It also mentions *appropriate legislative or administrative measures*. Here also, a sovereign State has a wide discretion in choosing the measures to achieve the goal of the protection of the ozone layer. Thus, with such different categories of international obligations, particularly in the case of an international obligation that requires an achievement of a special result, a sovereign State has a wide discretion to comply with such obligations.

(3) Reservation and Interpretative Declaration of Treaty Provisions

The 1969 Vienna Convention on the Law of Treaties[61] under Article 2, Paragraph 1 (d) defines "reservation" as follows:

"reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding

[61] https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

By declaring its reservation, a sovereign State can become a party to a treaty while purporting "to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Simply speaking, a sovereign State can "customize" the treaty concerned. For instance, when State A makes reservation to deny toward it the application and binding force of Article 5 of a treaty, between A and other party States to the treaty Article 5 would not be applied. Among other States, Article 5 is applied and binding. Therefore, the right and obligation relationship among party States may be different depending on the effect of reservations. The integrity of such relationship is not maintained.

This is a device of international law that encourages sovereign States to become parties to treaties, even if doing so reduces the integrity of the rights and obligations among the parties to a particular treaty.[62] While there are restrictions on possible reservations,[63] here, it is enough to confirm that a sovereign State, by becoming a party to a treaty through the utilization of the reservation scheme, has

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[62] The Vienna Convention on the Law of Treaties, under Article 20 and Article 22, defines such legal relations depending on several categories.

[63] Part II, Section 2 of the Vienna Convention on the Law of Treaties deals with this.

a certain discretion to determine the content and binding force of the treaty concerned toward itself.

A similar scheme is interpretative declaration. This is a device with the same purpose as that of reservation.

Article 309 and Article 310 of UNCLOS[64] make a clear distinction between reservation and interpretative declaration.

They read:

> Article 309 Reservations and exceptions
>
> No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.
>
> Article 310 Declarations and statements
>
> Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal

[64] https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

effect of the provisions of this Convention in their application to that State.

For instance, when a treaty provision allows plural interpretations, a sovereign State can make statement to choose a certain interpretation. An interpretative declaration should not purport to change the content and binding force of the provision concerned.

These schemes of reservation and interpretative declaration enable a sovereign State to "customize" treaty provisions in terms of their content, binding force, and interpretation.

(4) What International Law Enables a Sovereign State to Realize

In light of the fundamental structure of international law, which has been thus far examined mainly from the perspective of what it enables a sovereign State to realize, the following conclusion can be derived.

A sovereign State has the possibility to take the lead in creating international law by concluding treaties and raising customary international law.[65] Without any authoritative third party that makes binding decisions on the interpretation of international law rules, a sovereign State holds strong possibilities for self-

[65] As to the requirements for rules to be customary international law, see, *supra* n. 40.

interpretation thereof. As long as a sovereign State has the ability to propose a more convincing interpretation that can surpass a different one claimed by another State, it could justify its act by said interpretation, at least in relation to the State claiming the different interpretation.

In the end, a sovereign State can realize its own national interests[66] by taking advantage of the fundamental structure of international law, as long as it makes use of the positive aspect of being a sovereign State under, i.e., as a subject of, international law. If it were not able to, it would not deserve to be a sovereign State, nor a subject of international law, either.

To fully take advantage of the fundamental structure of international law through the dual aspects of being a sovereign State, particularly the positive aspect of being a reformer and creator of international law, recognition of its current characteristics is indispensable.

IV. Current Characteristics of International Law from the Perspective of What International Law Enables a Sovereign State to Realize

[66] Section IV will explore how a sovereign State should have the ability to make a compromise between its national interests and the general interests of international society so as to formulate international rules.

1. From Negative to Positive Character of International Law

(1) Development in the 19th Century

From the latter half of the 19th century to the beginning of the 20th century, the most prominent development in international law was its function to realize the general interests of international society. Different from the negative character of international law that purported to prevent conflicts between sovereign States, for instance, prevention of mutual intervention, and to act as a device for dispute settlement procedures, international law in the 19th century began also to be a law with "positive" nature for the purpose of realizing the general interests of international law. Sovereign States concluded multilateral treaties for their future relationships, different from bilateral treaties concluded on an *ad hoc* basis typically in cases of peace treaties after wars.

In addition, international administrative unions were established. These are symbols of international cooperation on various administrative matters, such as postal services, common and shared rivers, international health, railways, and so on.[67] The international organization with the competence to deal with political

[67] On international administrative unions, see Rüdiger Wolfrum, "International Administrative Unions," *Max Planck Encyclopedia of Public International Law*, at https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-

matters, particularly international security, was finally established after World War I, namely the League of Nations. After World War II, it was succeeded by the UN.

Such a tendency of articulating the general interests of international society by treaties has been significantly accelerated in the 20th century.[68]

Since the mid 20th century, international law has come to know a new idea of reflecting the general interests of international law, such as obligation *erga omnes*, international crimes, and *jus cogens* (a peremptory norm).

Obligation *erga omnes*[69] signifies an obligation that a State owes toward all other States in the world.[70] This is different from an obligation under a bilateral and

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e471. Article last updated: September 2006.

[68] For instance, treaties on marine environmental protection from oil pollution were initially concluded in 1950s. The same holds true with the conservation and management of fishery resources.

[69] The famous dicta given by the ICJ regarding obligations *erga omes* read:

> In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of al1 States. In view of the importance of the rights involved, al1 States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Barcelona Traction, Light and power Company, Limited, Judgment, *I. C. J. Reports* 1970, para. 33.

[70] Obligations *erga omnes* could be those toward international society and those toward all States in the world. Here, it is enough to confirm this possibility.

reciprocal relationship between States. For instance, there are obligations that cannot be dissolved into mutual bilateral relationships between States, such as disarmament treaties and treaties on free markets. Under these treaties, one party State's violation is harmful not only in relation to the direct counterpart State, but also harmful toward all the party States to the treaty concerned that enjoy safety resulting from disarmament and the economic activity of free markets. Furthermore, treaties for the purpose of realizing fundamental and universal values, such as human rights protection, the prohibition of the use of force and the threat of force, and prevention of genocide should not be dissolved into mutual bilateral relationships between States.

The ILC introduced the idea of an international crime in drafting the rules on State responsibility.[71] In the provisional draft adopted by the ILC, Article 19 prescribes for an international crime. It reads:

> 1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

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[71] For the draft articles on the law of State responsibility that were adopted first by the ILC, see *supra* n. 50.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime j that community as a whole constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance

for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.[72]

Sovereign States did not accept the idea of an international crime, mainly because of the lack of authoritative organs that have compulsory competence to determine an international crime with binding force. Thus, the draft articles that were finally adopted [73] do not maintain the provision on an international crime. [74] Nevertheless, international society has begun to embrace the idea of a delict that violates the fundamental and universal interests and values of international society. A similar but different concept to an international crime is *jus cogens*,[75] which was introduced in the 1969 Vienna Convention on the Law of Treaties.[76] Article 53 reads:

A treaty is void if, at the time of its conclusion, it conflicts with a

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[72] *Ibid.*, pp. 105-106.

[73] For the draft articles that the ILC finally adopted, see *supra* n. 51.

[74] Here, it is enough to confirm that some provisions, such as Articles 42 and 48, in the finally adopted draft articles have kept a similar idea to that of an international crime.

[75] This is also called "peremptory norms."

[76] For the Vienna Convention on the Law of Treaties, see *supra* n. 61.

> peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[77]

The idea of *jus cogens* sets an important restriction on the consensual basis of international law. Even if sovereign States conclude a treaty, the treaty would be void if it conflicts with a peremptory norm. The remaining issues are what peremptory norms are and how to identify them.[78]

Thus, while these new ideas of international law still face difficulties principally due to the lack of authoritative organs that decide and enforce them, there is no doubt that international society has harbored and developed an idea of general interests and universal values to be realized by international law. These general interests have been articulated in treaties and customary international law. The

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[77] Also, Article 66 deals with dispute settlement on the interpretation of peremptory norms. However, it does not mention a dispute as to which rules are peremptory norms.

[78] As seen in the case of international crimes, there is a lack, in international society, of authoritative third party, such as courts and tribunals that have compulsory competence to make binding decisions on which rules are peremptory norms.

institutionalization of the creation of international law proceeds side by side with emerging ideas of the general interests and universal values of international society.

(2) Developments in the Creation of International Law

① Sovereign States utilize international conferences to adopt multilateral and regional treaties. In this sense, the creation of international law has been institutionalized. As such a typical international practice, in 1930, an international conference was convened for the purpose of the "codification" of international law. Codification means the transformation of customary international rules into written treaty rules.[79] The UN has continued to implement codification projects on several matters by establishing the ILC under the UN General Assembly.[80]

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[79] Article 13, Pargraph 1 (a) of the UN Charter mentions the codification and progressive development of international law. It reads:

> The General Assembly shall initiate studies and make recommendations for the purpose of:
>
> a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;

While codification means drafting treaty rules reflecting established customary rules, progressive development is understood as drafting written treaty rules based upon rules that are still in the process of growing into customary rules.

[80] The ILC is an organ under the 6th Committee of the General Assembly of the UN.

② Customary international law has the nature of spontaneous and voluntary formation, different from the intentional adoption of treaties by sovereign States. Nonetheless, in the 20th century, the idea of the "institutionalized" and "intentional" formation of customary international law emerged. International conferences and international institutions issue documents that contain normative content to be shared among sovereign States. Typically, resolutions adopted by the UN General Assembly form such examples. These may be examples of evidence of the international practice and *opinio juris* (normative conscience)[81] of sovereign States.[82]

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[81] As explained at *supra* n. 40, these are the two requirements for rules to be customary rules.

[82] The ICJ admits such a significance of the resolutions of the UN General Assembly, in the 1986 Nicaragua Case (merits), the ICJ said:

> This *opinio juris* may, though with al1 due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter. It would therefore seem apparent that the attitude referred to expresses an *opinio*

In other words, international conferences and meetings provide sovereign States with important opportunities to formulate the general interests and universal values of international society. They might even cause a kind of "inflation" of the articulation of those interests and values.

③ As to both treaties and customary international law, institutionalization is developing in a layered manner at various levels, such as the bilateral, regional and multilateral relationships of States. We may call this the "horizontal" evolution of international law in a layered manner.

In addition, international law is developing "vertically." One characteristic of current international law is that it penetrates into the domestic matters of a sovereign State, which were formerly domestic jurisdiction matters. These matters are, for instance, nationality, human rights protection, domestic environmental protection, economic activities, and so on. Nowadays, the everyday life of

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> *juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.

Also, it said:

> Acceptance of a text in these terms confirms the existence of an *opinio juris* of the participating States prohibiting the use of force in international relations.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, *I. C. J. Reports*, paras. 188-189.

individuals is regulated and restricted by international law. For combating global warming,[83] everyone is required to reduce CO_2 emissions in their daily life.[84]

(3) How Should a Sovereign State Take Advantage of Its Double Aspects?

A sovereign State should always be prepared to determine its national interests and to articulate the general interests of international society on any occasions, such as international conferences that adopt treaties and issue normative documents. In formulating such general interests, a sovereign State needs to reflect its own national interests at the same time. To achieve this goal, it needs to be sufficiently able to find a compromise between its national interest, and general interests and universal values. By taking the lead in articulating such general interests and universal values backed by its own national interests, and positively contributing to the creation of international law through the conclusion of treaties

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[83] The 1992 United Nations Framework Convention on climate Change, https://unfccc.int/sites/default/files/conveng.pdf.
The 2015 Paris Climate Agreement, https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf?gad_source=1&gclid=EAIaIQobChMIlrnKx_DAhgMV5NhMAh1k4xjUEAAYASABEgKkl_D_BwE.

[84] Climate Change Adaptation Plan approved by the Cabinet of Japan on October 22, 2021, available at: https://www.env.go.jp/content/000065953.pdf.

and participation in the formation of customary international law, a sovereign State can truly be a subject of international law with the double aspects of being a sovereign State, both negative and positive, conformist and reformist/creator.

In addition, domestically, a sovereign State needs to convince its people of the necessity of international law regulation even in their everyday lives for the purpose of realizing general interests and universal values. The point that should be made is that those interests and values are in a good compromise with the sovereign State's national interests, which are critical for its people. If that were not the case, people could not accept international law regulation in their everyday lives.

2. Standards for Assessment of Japan's Attitude Toward International Law

The examination thus far sets forth standards of assessment as to whether a State really maintains and utilizes the dual aspects of being a sovereign State, particularly the reformist/creator aspect. The last Section, Section IV, while taking examples of recent incidents, will consider whether Japan has become or is becoming a real subject of international law that demonstrates its positive aspect, after having served as a State with a mainly passive profile toward international

law since the end of World War II. At the time of this writing, almost 80 years have already passed.

The next Section will touch upon three incidents: the COVID-19 outbreak, obeyance of the reasonable and due regard principle, and the necessity of sufficiently demonstrating Japan's sovereignty over the territorial sea that international law explicitly confers on it.

V. Japan's Current Attitude toward International Law as Demonstrated during Recent Incidents

1. COVID-19 Outbreak

In February 2020, a luxury cruise liner, the Diamond Princess, was at Yokohama port of Japan. At that time, the number of passengers and crew was said to be 3713, and there were passengers and crew infected with COVID-19 inside the Diamond Princess. It is reported that the number of infected persons was 712 and 13 had died.[85]

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[85] Atsuko Kanehara, "'International Law on the Pandemic' from the Perspective of the Law of the Sea – With a Focus on Port State Jurisdiction [Kaiyoho kara Mita Pandemic Kokusaiho]," Atsuko Kanehara, Masaharu Yanagihara, Koichi Morikawa and Taro Hamada eds., *International Legal Order and Global Economy [Kokusaiho Titsujo to Gurobaru Keizai]*,

For the situation when the Diamond Princess was at Yokohama port, what basic stance should have been taken by the Japanese government, from the perspective of the dual aspects of being a subject of international law?[86]

By focusing upon the law of the sea issues,[87] there are several relevant treaties that can be applied to the COVID-19 pandemic situation. Among them, the most important international law is UNCLOS.[88] As to the basic stance that the Japanese government should have taken, above all, the two fundamental principles that could not be over-emphasized are those to be abided by Japan as a sovereign State and as a subject of international law.

As a sovereign State and as a subject of international law, first, Japan has the right to protect its territory and people from the pandemic. At the time, Japan was

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(Shinzansha, , 2021), pp. 67-95.

[86] For an introduction of Japan's practice in this incident, see Atsuko Kanehara, "Covid-19 and the Law of the Sea: Japan's Port State Jurisdiction in Relation to the Diamond Princess," *Japanese Yearbook of International Law*, Vol. 64 (2021), pp. 233-245.

[87] In addition, International Health Regulations contain provisions that have relation to law of the sea issues, such as port State measures. International Health Regulations, third ed. available at: https://iris.who.int/bitstream/handle/10665/246107/9789241580496-eng.pdf?sequence=1.

[88] For a particular focus upon port State measures, see, Atsuko Kanehara, "The Law of the Sea in the Context of 'The International Law on Pandemic'-Ports State measures in Regard to the Diamond Princess-[Pandemikku Kokusaiho ni Okeru Kaiyoho-Daiyamondo Prinsesu go ni Kakaru Kikokoku Sochi]," *International Affairs [Kokusai Mondai]*, No. 699 (2021), pp. 5-16.

facing the very real danger of an explosive and rapid outbreak of COVID-19 that would occur within its territory and seriously harm its people. Second, Japan has the obligation to prevent COVID-19 infections from spreading beyond its territory to other countries around the world.

These two principles are, without any doubt, convincing, both domestically and internationally. In facing the COVID-19 pandemic, there would be no argument against these principles from a commonsense point of view. By adhering to these principles, Japan should have exercised the dual aspects of being a subject of international law.

First, Japan, as a conformist, should have applied UNCLOS and the relevant treaties and customary international law to the situation, as much as possible. This is the passive and conformist aspect of being a subject of international law. However, the pandemic was, particularly in terms of its scale, the first one for almost 100 years since the Spanish Flu pandemic that is said to have begun in 1918. That experience was more than 100 years ago. Therefore, it cannot be expected that existing international law would fully cover the COVID-19 pandemic and the situation of the Diamond Princess. This fact brings us to the second point.

Japan, as a reformist and a creator, should have taken leadership in revising UNCLOS and other international treaties,[89] and even in creating new rules that could effectively cope with pandemic challenges. For future crises, some revision of UNCLOS or even the creation of new rules of the law of the sea is strongly required.[90] For this purpose, Japan, as a country that has experienced the COVID-19 pandemic, should have taken and should take the leading role.

2. Obeyance of the Reasonable and Due Regard Principle

In international law, frequent compromise between conflicting rights is keenly required. This is true in the case of drafting and adopting treaties in order to gain the required majority approval,[91] as international law is created on a consensual basis among equal sovereign States. The law of the sea offers a typical example for a compromise of conflicting rights.

Article 2 of the 1958 Geneva Convention on the High Seas[92] reads:

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[89] Japan should contribute to reforming/raising of customary international law, too, Here, the examination will focus upon treaties.

[90] Kanehara, *op. cit., supra* n. 85, pp. 88-95.

[91] As explained above, treaty making has been institutionalized. In many cases, treaties are adopted by majority or qualified majority.

[92] https://www.legal-tools.org/doc/7b4abc-1/pdf/.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States *with reasonable regard to the interests of other States* in their exercise of the freedom of the high seas (emphasis added).

The same idea is maintained in 1982 UNCLOS under Article 87, which provides for various ocean uses such as the freedom of the high seas and the due regard obligation. It reads:[93]

1. The high seas are open to all States, whether coastal or land-locked.

Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:

(a) freedom of navigation;

(b) freedom of overflight;

(c) freedom to lay submarine cables and pipelines, subject to Part VI;

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[93] While the Convention on the High Seas, Article 2 prescribes for the "reasonable" regard principle, Article 87, Paragraph 2 of UNCLOS does so with the "due" regard principle. The idea is the same in both provisions, and the purpose is to find compromise between conflicting exercises of the freedom of the high seas by plural States, as they are equal to each other.

(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;

(e) freedom of fishing, subject to the conditions laid down in section 2;

(f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also *with due regard for the rights under this Convention* with respect to activities in the Area (emphasis added).

Recently, Japan has come to seriously consider said due regard obligation in its development of offshore wind farms in its exclusive economic zone (EEZ).[94]

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[94] Under UNCLOS a coastal State may set its EEZ up to 200 miles from its coast. In its EEZ, the coastal State has a sovereign right on the matters designated by UNCLOS. Among them is the production of energy. Article 56, Paragraph 1 (a) reads:

> In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, *such as the production of energy from the water, currents and winds* (emphasis added);

The important point is that, regarding other matters that are not designated by this provision, as being confirmed later, under Article 58 foreign States have the freedom of the use of the oceans in Japan's exclusive economic zone. The due regard obligations of both Japan as a coastal State of its exclusive economic zone will be focused upon. Here, it is not

Japan enacted, in 2018, the Act on Promoting the Utilization of Sea Areas for the Development of Marine Renewable Energy Power Generation Facilities (provisional English translation).[95] The Act applies to internal and territorial sea areas. On the 12th of March 2024, a Cabinet Decision was made on the Bill for the Act for Partially Amending the Act on Promoting the Utilization of Sea Areas for the Development of Marine Renewable Energy Power Generation Facilities.[96] This has already been submitted to the Japanese Diet.[97]

Japan, as a coastal State of its EEZ, has sovereign rights over offshore energy production under Article 56, Paragraph 1 of UNCLOS.[98] In exercising such a right, it should comply with the due regard principle under Article 56, Paragraph 2.[99] According to Article 58, foreign States have the freedom of the use of the

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necessary to go into the details of the relationship between the sovereign rights and jurisdiction of a coastal State and the freedom of the use of the oceans by foreign States in exclusive economic zones.

[95] Act No. 89, 2018. An unofficial English translation is available at: https://www.japaneselawtranslation.go.jp/ja/laws/view/3580/je.

[96] A succinct explanation of this proposed amendment is available at: https://www.meti.go.jp/english/press/2024/0312_003.html.

[97] The Headquarter for Ocean Policy of Japan decided "The Priority Strategies on Ocean Development," on the 26th of April. It mentions establishment of a system for development of offshore wind farms in Japan's EEZ. https://www.kantei.go.jp/jp/singi/kaiyou/sanyo/dai71/71shiryou1.pdf.

[98] See footnote 94.

[99] Article 56, Paragraph 2 reads:

oceans in Japan's EEZ. It reads: [100]

> 1. In the exclusive economic zone all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
>
> 2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.
>
> 3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have *due regard to the rights and duties of the coastal State* and shall comply with the laws and

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> In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

[100] In accordance with Article 58, Paragraphs 1 and 2, the freedom of the high seas under Article 87 is applied to EEZs.

regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part (emphasis added).

In accordance with Paragraph 3 of Article 58, foreign States have the due regard obligation. Thus, UNCLOS imposes the due regard obligation upon both coastal States and foreign States mutually.

The establishment of the facilities of offshore wind farms and the possible setting of a sort of safety zone in Japan's EEZ[101] would conflict with foreign States' freedom of the use of the same sea areas.[102] In particular, foreign States' freedom of navigation would be hindered by Japan's establishment of offshore wind farm facilities and setting of some form of safety zones.

The important point regarding the due regard principle is that it requires States to achieve a compromise between possibly conflicting uses of seas. To make such a compromise meaningful, clear intents on how to use the oceans and a conflict

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[101] Article 60 of UNCLOS provides for installations, structures, and safety zones surrounding them. Offshore wind farm facilities can be installations or structures under Article 60. Here, it is enough to confirm this.

[102] Foreign States have the freedom of the use of the oceans in Japan's EEZ in regard to matters other than those designated by Article 56 of UNCLOS. See, *supra* n. 94. Relatedly, Article 58 was reproduced above.

between those uses must exist. Otherwise, no meaningful "compromise" could be assumed.

In this regard, has Japan made clear how it concretely its EEZ in relation to its offshore wind farm to be realized in its EEZ? Exactly where in its EEZ will it proceed to establish offshore wind farms? Japan has the 6th largest jurisdictional sea areas in the world. In such a wide ocean area, where Japan will set its offshore wind farms will be a very difficult but indispensable decision it must make. Why and based upon what considerations is it doing so? These factors, such as "how" and "where," may set forth the justification and convincingness of Japan's use of its EEZ for offshore wind farms in relation to foreign States' use of its EEZ. They are indispensable factors to consider if Japan intends to make a compromise with a conflicting use of the same sea areas by a foreign State.

As to such justification and convincingness of Japan's use of its EEZ, if Japan engaged in marine spatial planning (MSP), at least to a significant degree, the MSP would concretely embody these factors. As early as in 2018, the Third Basic Plan on Ocean Policy already mentioned MSP.[103] The Fourth Basic Plan on

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[103] The Third Basic Plan on Ocean Policy (a cabinet decision on the 15th of 2018) mentioned marine spatial planning as follows:

With regard to Marine Spatial Planning (MSP), already introduced in several other

Ocean Policy of 2023 also mentions MSP in several places,[104] and in relation to offshore wind farms in particular, it does so in a specific manner.[105]

MSP is the planning, by a State, of how to use its oceans and where certain uses are conducted.[106] MSP should be enacted by thoroughly consider the various possible uses of the oceans and the distribution of ocean spaces for various uses of the oceans. In sum, through MSP, a sovereign State can maximize its national interests in relation to ocean uses in the most efficient manner.

From this viewpoint, when looking at the proposed amendment of the 2018 Act above, there is no mention of MSP. Regarding exact sea areas for offshore wind

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countries, we will strive to understand the facts of MSP and we will study needs, issues, and feasibility in light of the reality of the use of Japan's ocean areas and the relationship with existing domestic laws and regulations.

https://www8.cao.go.jp/ocean/english/plan/pdf/plan03_e.pdf.

In addition, it gives a succinct explanation of MSP as a "management and utilization plan which aims for comprehensive ocean management and the sustainable use of diverse resources."

[104] The Fourth Basic Plan on Ocean Policy (A cabinet decision of the 28th of April, 2023), in Japanese, https://www8.cao.go.jp/ocean/policies/plan/plan04/pdf/keikaku_honbun.pdf, pp. 30, 50 and 78.

[105] *Ibid.*, p. 30.

[106] Atsuko Kanehara, "A Proposal on the Fourth Basic Plan on Ocean Policy and Beyond [Daiyonki Kaiyo Kihonkeikaku no Shuchu oyobi Shuyo Sisaku no Teigen-Daiyonki Kaiyo Kihonkeikaku to Sore wo Koete-]," *Ocean Policy Studies [Kaiyo Seisaku Kenkyu]*, No. 17, February (2023), 4. 3.

farms, the proposed Article 32, on the designation by the Minister of Economy, Trade and Industry of solicitation zones for the installation of marine renewable energy power generation facilities, sets forth the standards in accordance with which the Minister makes said designation: natural and weather conditions, expected production of a significant amount of electricity, no recognition of clear harm to fishing activities, and recognition of solely slight hindrance to the preservation of the marine environment (tentative English translation by this author).

While these standards might form part of the considerations for enacting MSP, a clear national intent is indispensable for said enaction of MSP. Japan has not demonstrated such an intent in any way.

As to the international obligations which Japan should discharge, without mentioning due regard principle, the proposed Article 48, among other miscellaneous ones, reads:

> In enforcing the provision in this chapter, it should be without hampering Japan's faithful compliance with the international treaties to which Japan has agreed and other international commitments.

Without deciding and recognizing how and where it intends to do so, Japan cannot

make a meaningful compromise with other States' conflicting uses of the oceans. In other words, the due regard principle requires that sovereign States, first, decide what they intend to do, and second, produce a compromise with conflicting uses of the oceans. By doing so, a sovereign State can contribute to embodying the concrete content of the due regard obligation, as a reformer and creator of international law. Without clear intents and demonstration as to how and what to use oceans, by solely taking into consideration foreign States' interests, a State can represent the passive and conformist aspect.

3. Lack of Legal Declaration of Japan's Sovereignty over Its Territorial Sea

A somewhat similar situation to the issue above is found in Japan's lack of declaration, under domestic law, of its sovereignty over its territorial sea. Japan has not clearly demonstrated its intent as a sovereign State.

Under domestic law, Japan has not explicitly provided for its sovereignty over its territorial sea. It enacted the Law on Territorial Sea and Contiguous Zone in 1977.[107] Article 1 begins with the breadth of the territorial sea, and under this provision and in the preamble, there is no mention of Japan's sovereignty over the

[107] Law No. 30.

territorial sea.

International law, namely UNCLOS, clearly confers sovereignty over a territorial sea to a coastal State. Article 2, Paragraph 1 reads:

> The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

Japan has not implemented this by its domestic law.

This lack of legal prescription of its sovereignty over the territorial sea has caused difficult situations, particularly in law enforcement. This author has dealt with this in detail elsewhere, and so here, it suffices to present a succinct explanation of such situations.[108]

There were two incidents involving "unidentified" vessels.[109] One of them took place in Japan's territorial sea. Later the vessels came to be officially recognized as spy ships from North Korea conducting secret theft. The spy ships, which had

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[108] Atsuko Kanehara, "A Proposal of Legislative Measures Required on Coast Guarding of Territorial Sea [Ryokai Keibi ni Kakaru Ho Seibi no Teigen]," *Sophia Law Review [Jochi Hogaku Ronshu]*, Vol. 65, No. 4 (2022), pp. 11-57.

[109] The details of the incident in Japan's EEZ, Atsuko Kanehara, "The Incident of an Unidentified Vessel in Japan's Exclusive Economic Zone," *The Japanese Annual of International Law*, No. 45 (2002), pp. 116-126.

the appearance of fishing boats, conducted irregular activities in Japan's territorial sea. Patrol ships of the Japan Coast Guard (JCG) chased them in the two incidents, but ultimately failed to seize them.

The point is: what was the legal basis for such law enforcement measures that the JCG took? It was the 1949 Fishery Act.[110] Judging from the JCG's explanation that principally focusing upon the appearance of the vessels, it seems to be a fact that the spy ships did not conduct any fishing activities.[111] Whether or not the Japanese authorities knew that the "unidentified" ships were foreign spy ships has not been made public. If they did have any such information, and the JCG took the law enforcement measures in accordance with the Fishery Act, they were done "on an unrelated, separate charge."

This point was seriously criticized in the Diet.[112]

Why did this happen? One principal reason was that there does not exist a legal basis for law enforcement measures for the charge of infringement of Japan's sovereignty, nor similar ones, such as the violation of Japan's security. As

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[110] Act No. 267.

[111] This point is common to both the unidentified vessel incidents in 1999 and in 2001, Kanehara, *op. cit., supra* n. 109, [I-1-c], [II-1-e].

[112] Kanehara, *op. cit., supra* n. 108, pp. 39-42, particularly, p. 39.

explained above, under the Law on Territorial Sea and Contiguous Zone, there are no provisions on Japan's sovereignty over its territorial sea.[113]

The clear intent and demonstration of realizing its sovereignty and national interests are indispensable prerequisites for discharging the positive roles of a sovereign State toward international law. As examined in Section II and III, based upon what international law enables a sovereign State to realize, a sovereign State has opportunities to reform and create international law. To take advantage of this positive aspect of being a sovereign State, such a State should contribute to the reformation and creation of international law based upon compromises between its national interests and the general interests of international society.

Japan has repeatedly claimed China's infringement of Japan's sovereignty over its territorial sea around the Senkaku Islands.[114] Such a tense situation has been exacerbated since China's enaction of the Coast Guard Law.[115] Nonetheless,

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[113] In the Diet, several times the possible legal measures to be taken, including enacting new laws, has been discussed, *ibid.*, pp. 42-46.

[114] This is not the place to go into detail on such a tense situation in Japan's territorial sea around the Senkaku Islands. As to Japan's practice and an overview of the situation, see Ministry of Foreign Affairs of Japan, Status of Activities by Chinese Government Vessels and Chinese Fishing Vessels in Waters Surrounding the Senkaku Islands (Aug. 26, 2016), https://www.mofa.go.jp/files/000180 283.pdf.

[115] As to the China's Coast Guard Law and its impact on the Japan7s Coast Guard, see, Atsuko Kanehara, "The Impact on Japan's Coast Guard and Maritime Security Caused by

under domestic law, Japan has not clearly declared its sovereignty over its territorial sea. Laws are not solely a technique and/or standards for dispute settlement. They truly reflect the intent of a nation and its people, culture, history and so on. Therefore, there would be no arguing against the importance of the legal expression of sovereignty over the territorial sea.

By providing for sovereignty over its territorial sea and claiming an infringement thereof based upon concrete situations, Japan could not only realize its national interest, but also embody the fundamental principle of respect for sovereignty and concretely articulate an infringement thereof. As a result, Japan could contribute to the clarification and realization of the general interest of international society on sovereignty. In addition, by doing so, Japan could implement Article 2, Paragraph 1 of UNCLOS,[116] which provides for the sovereignty of a coastal State over its territorial sea.[117]

China's Coast Guard Law of 2021," *Japanese Yearbook of International Law,* Vol. 65 (2022), pp. 320-335.

[116] The provision is reproduced above.

[117] Also, this claim of an infringement of the sovereignty of a coastal State over its territorial sea closely relates to innocent passage under Article 19 of UNCLOS, such that it has a certain significance for clarifying the meaning of the non-innocence of a passage of a foreign vessel.

Concluding Remarks

This paper has examined what international law enables a sovereign State to realize and what it requires of a sovereign State. In particular, the former provides a sovereign State with its positive aspect, namely the reformer/creator aspect. Taking advantage of the possibilities and opportunities that the fundamental structure of international law and the current characteristics of international law both provide a sovereign State, sovereign States really should recognize and utilize this positive aspect to realize their own national interests with fine compromises or in combination with general interests and universal values.

If a sovereign State limits itself to the negative and passive aspect, solely realizing what international law requires of it and solely complying with international obligations, said sovereign State would not deserve to be a sovereign State as a subject of international law.

In the past, Japan demonstrated its passive and conformist attitude toward international law. After its negation of international law by force, after World War II, Japan had an opportunity to seriously (re)consider its attitude. Since then, more than 80 years have passed. Judging from the current pivotal incidents, still, Japan has been in the process of becoming a sovereign State with the dual aspects

in precise sense.