Original Title to Territory: To What and to What Extent Is the Concept of Title to Territory Applied?*

Tomoko Fukamachi

1. Introduction

It is well known that international law was born as the law among modern sovereign states based on territory. "Law of territory," which handles various problems regarding state territory, and in particular "title to territory," which regulates the attribution of territory, is a field with a long history within international law. Now that there are many opportunities for territorial problems to be addressed in school education and in the news, this is also a field that easily attracts beginners' interest. Yet, in fact, many people feel that it is a topic that is difficult to learn and difficult to teach. One of the probable reasons for this is that law of territory has few treaties that can serve as a reference concerning concepts and rules, let alone the codification conventions which are now often seen in many fields of international law, while relevant arbitral and judicial cases have become numerous. Accordingly, the overall legal structure cannot easily be grasped. In standard Japanese and foreign textbooks on international law, which should serve as the ultimate guide, there is a substantial lack of uniformity in how they handle and describe law of, and title to, territory.[1]

"Original title," which this paper addresses, is a relatively "new" concept that has come to be discussed in academia with several noteworthy published articles,[2] following the 2008 ruling by the International Court of Justice (ICJ) in the *Pedra Branca* case. I have placed "new" in quotation marks because the term "original title" itself has long been used in law of territory. If we are to call the traditional concept of original title the first original title, and the concept of original title employed in the *Pedra Branca* case the second original title, at the very least it is necessary to understand the differences between the two. However, the mere existence of differences is not a sufficient reason to hold discussions on the second original title separately and specifically. To state the conclusion in advance, the importance of the second original title is that it may provide an opportunity to reconsider the structure and scope of title to territory (territorial title).

As stated above, international law of territory was developed early in history. Why was that? The reason was that modern European nations "discovered" non-European regions, and in expanding their own control, rules were needed to govern the competition among European

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[1] Brownlie's textbook may be a clear example. The sections and description contents in "Part III Territorial Sovereignty" are greatly changed from the 7th edition, which was the last edition by Brownlie himself, to the 8th edition, which was revised by Crawford. Brownlie, Ian, *Principles of Public International Law*, 7th ed., (Oxford University Press: 2008), pp. 103–170; Crawford, James, *Brownlie's Principles of Public International Law*, 8th ed., (Oxford University Press: 2012), pp. 201–252.

[2] Kohen, Marcelo, "Original Title in the Light of the ICJ Judgment on Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge," *Journal of the History of International Law*, Vol. 15 (2013), pp. 151–171; Fry, James D. and Melissa H. Loja, "The Roots of Historic Title: Non-Western Pre-Colonial Normative Systems and Legal Resolution of Territorial Disputes," *Leiden Journal of International Law*, Vol. 27 (2014), pp. 727–754; Huh, Sookyeon, "Title to Territory in the Post-Colonial Era: Original Title and *Terra Nullius* in the ICJ Judgments on Cases Concerning *Ligitan/Sipadan* (2002) and *Pedra Branca* (2008)," *European Journal of International Law*, Vol. 26 (2015), pp. 709–725.

nations.[3] This history brought about certain basic characteristics in traditional law of territory as well as the concept of territorial title. The present-day arguments regarding law of territory may be said to be an accumulation of efforts to elucidate the structure of those characteristics in reference to a number of international arbitral and judicial decisions regarding the attribution of territory, and to seek an appropriate theory of title to territory for the post-decolonization era. From such a perspective, this paper follows the development of the concept of original title and aims to be of some assistance in understanding contemporary law of territory. The subsequent sections begin with an overview of traditional theory on territorial title and its revisions to date as preparation for clarifying what in traditional title theory the second original title concept leads us to reconsider.

2. The traditional concept of title to territory and first original title

Under international law, the attribution of territory is discussed using the concept of title to territory. Because territory is land where a state exercises territorial sovereignty, for land to be recognized as state territory, grounds to legally justify the establishment of territorial sovereignty by the state must be presented. The facts that are viewed as grounds for justification of territorial sovereignty under international law, in other words, the facts that are deemed the sources of territorial sovereignty, are called "title to territory." In general, title is a fact that is the grounds for a right to be vested.

Territorial title has traditionally been considered equivalent to several fixed "modes of acquiring territorial sovereignty." Because the requirements for each of these modes are defined mutually exclusively, whether or not absolute title exists at a given point in time is statically judged by their fulfillment. The modes of acquisition many scholars cite are occupation, accretion, cession, prescription, and subjugation, and these are generally classified into original acquisition and derivative acquisition. What is established by modes of original acquisition is original title in the traditional sense, that is to say, the first original title.

However, it is necessary to note that several different opinions have been presented regarding specifically what is classified as original acquisition.[4] For example, according to the view that original acquisition is to establish territorial sovereignty over land which previously did not belong to any state and that other acquisitions are all derivative acquisition, occupation and accretion are categorized as original acquisition, while cession, prescription, and subjugation are classified as derivative acquisition. Conversely, under the standpoint that instances where the validity of a title depends on the validity of a prior title are derivative acquisition and all other instances are original acquisition, occupation, prescription, accretion, and subjugation are original acquisition, while derivative acquisition is limited to only cession.[5]

At any rate, it is now widely recognized that title to territory as that of above-mentioned "modes" has played only a limited role in the settlement of territorial disputes through international

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3 As research that clarified this point, Taijudō, Kanae "Kokusaihō jō no sensen ni tsuite: Sono rekishiteki kenkyū" [Regarding occupation in international law: Its historical research], *Hōgaku Ronsō*, Vol. 61, No. 2 (1955), pp. 36–99 (in Taijudō, Kanae, *Ryōdo Kizoku no Kokusaihō* [Title to territory in international law] (Toshindō: 1998)) is essential reading.

4 See Fukamachi, Tomoko "Gendai kokusaihō ni okeru ryōiki kengen ni tsuiteno ichikōsatsu" [Some reflections on title to territory in international law], *Hōsei Kenkyū*, Vol. 61, No. 1 (1994), p. 71.

5 Prescription, subjugation, and cession all concern the acquisition of the territory of another state. However, in the cases of prescription and subjugation, the prior title is cut off, as it were, and a separate title is established, while in the case of cession, the title of the state receiving territory is established only within the effective scope of the prior title, that is, the title of the state ceding territory.

adjudications.[6] While the courts and tribunals to which territorial disputes are submitted have tried to judge attribution based on agreement among the parties regarding the disputed territory as much as possible, they have also adopted an approach of determining the existence of title emphasizing the fact that the exercise of state authority, namely, acts which are deemed as embodiment of territorial sovereignty, is continuously and peacefully conducted ("the continuous and peaceful display of territorial sovereignty [peaceful in relation to other states]") ("the display of sovereignty approach").[7] While there is no room for a detailed explanation in this paper, under the display of sovereignty approach, title to territory—which had a static and absolute nature under the modes of acquisition scheme—becomes dynamic, relative, and non-standardized. This important point has been noted in a previous study.[8] In this way, it may be said that the view which unconditionally equates title to territory with the modes of acquisition of territorial sovereignty has been overcome.

However, the traditional concept of title to territory actually has one more limitation or self-definition. This is the concept to "acquire" territorial sovereignty. Because it was generated and developed as rules to govern the colonization of non-European regions by modern European states, the scope of the territorial title concept was limited to the new acquisition of territorial sovereignty by existing states under international law, despite the seemingly universal definition as "the facts deemed as grounds for the justification of territorial sovereignty." For acquisition, the prior existence of the acquiring body, i.e., the state, is essential. Consequently, as long as the concept of title is deemed to be for acquisition, it becomes difficult to use this to logically explain the grounds whereby "defined territory," which is a requirement necessary for the establishment of a new state, belongs to that state. A similar problem applies to the territories of modern European states, which were the assumptions upon which modern international law was established.[9]

In this regard, what should be added quickly is that, while "a defined territory" constitutes a qualifying element for a state, the complete delimitation of borders is not required. That is to say, the possibility that the outer limit of such territory as inseparable from the very existence of a new state may not be totally fixed is contained in the qualifying elements for a state. Modern

6 Regarding approaches of resolving territorial disputes taken by international courts and tribunals, see Yanagihara, Masaharu, Morikawa, Koichi, and Kanehara, Atsuko (eds.), *Purakutisu kokusaihō kōgi* [Lectures on international law and practice] 3rd edition (Shinzansha: 2017), pp. 199–202.

7 In past judgments and awards, in line with the specific conditions of the disputed territory, the exercise of legislative, administrative, and judicial authorities of states such as tax collection and administration of justice has been recognized as displays of sovereignty that create title. For a simple commentary on the display of sovereignty approach and the display of sovereignty concept, see Huh, Sookyeon, "Jikkōshihai to wa nanika?: Kokkashuken to jikkō shihai no kankei" [What is effective control?: The relation between state sovereignty and effective control] in Morikawa, Koichi et al. (eds.), *Kokusaihō de sekai ga wakaru: Nyūsu wo yomitoku 32 kō* [Understand the world with international law: 32 lectures to interpret the news] (Iwanami Shoten: 2016), pp. 69–80.

8 Huh, Sookyeon, *Ryōiki kengenron: Ryōiki shihai no jikkōsei to seitōsei* [The acquisition of territory in international law: The effectiveness and legitimacy of territorial control] (University of Tokyo Press: 2012), pp. 148–165.

9 Yanagihara, Masaharu, "*Kyōiki, hanto, hōdo, soshite ryōiki*" [Chinese and Japanese notions of territory and the European notion of territory], *Kokusai Mondai*, No. 624 (2013), p. 1; Fukamachi, Tomoko, "Nihon, Kankoku, Chūgoku ga tomoni shuchō suru 'koyū no ryōdo' to wa?: Ryōiki funsō no kaiketsu kijun to shite no ryōiki kengen" [What is the 'inherent territory' claimed by Japan, South Korea, and China?: Title to territory as a standard for resolving territorial disputes] in Morikawa, Koichi et al. (eds.), *Kokusaihō de sekai ga wakaru: Nyūsu wo yomitoku 32 kō* [Understand the world with international law: 32 lectures to interpret the news] (Iwanami Shoten: 2016), pp. 52–54; Starke, Joseph G., "The Acquisition of Territorial Sovereignty by Newly Emerged States," *Australian Year Book of International Law*, Vol. 2 (1966), p. 11.

European states themselves were not clearly divided by complete national boundaries right from the start. In some cases there were areas, on the periphery of core territory of those states, whose attribution was not yet decided or being disputed. If the state argues for their attribution that it acquired territorial sovereignty over them after it was established as a state, the structure of the argument remains as one of acquisition of sovereignty by an existing state under international law. In contrast, when the claim is that the area in question has always been the state's own territory from the time it was established as a state, it seems necessary to squarely discuss the grounds for justifying territorial sovereignty over such territory as inseparable from the establishment of the state or its very existence. An unavoidable repercussion of this line of argument is to bring into the theory of title to territory the difficult problem of how to assess "territorial control" implemented under the "international order," which differs from international law.

3. Forerunners of the second original title

(1) The *Minquiers and Ecrehos* case

The ICJ handled such problematic situations as early as 1953 in the *Minquiers and Ecrehos* case.[10] In this case, the UK and France disputed the attribution of the Minquiers and Ecrehos islands in the English Channel going back to the Middle Ages when modern international law was not yet established. Both of the parties asserted that the disputed islands had become part of their respective territory at one time in the Middle Ages as part of the Channel Islands, and that the ancient title or original title had been maintained without interruption during and after the modern era. As an alternative claim in case this argument was not upheld by the Court, the UK also argued that it had acquired title based solely on long continued effective possession. In response, the Court concluded that even though the ancient title asserted by the UK was presumed to have existed, the attribution of sovereignty could not be decided by that alone, that it must be founded on evidence directly related to the possession of the Minquiers and Ecrehos, and that both of the disputed islands belonged to the UK based primarily on the exercise of "jurisdiction" by England in the Middle Ages and of state functions in the modern era.[11]

The concept of original title asserted in this case is clearly different from the one traditionally adopted in the classification of original acquisition and derivative acquisition. Moreover, it is deemed to be used in the context of how to show the grounds to justify territorial sovereignty over a territory that the parties claimed they already possessed at the time when they became international legal subjects as modern states. Nevertheless, this case did not produce the momentum to consciously question the scope of title to territory as an "acquisition" scheme. That is to say, while the reliance on the exercise of state functions that characterizes this case has gathered frequent attention, amid the academic trend to reconsider the appropriateness of the "mode" theory mentioned in the previous section, the issues of how the parties and the Court grasped original title or ancient title and the significance thereof for the concept of title to territory at large has not been examined in sufficient depth.[12]

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[10] *Minquiers and Ecrehos* case, judgment of 17 November 1953, *ICJ Reports 1953*, pp. 47–73.

[11] However, between Minquiers and Ecrehos, the extent to which the exercise of state functions is used as the basis for the attribution differs. In the case of Minquiers, the evidence that France recognized the island as British territory was also emphasized. *Ibid.*, pp. 70–72.

[12] For an interpretation of the relationship between "ancient title" and "the display of sovereignty" in the *Minquiers and Ecrehos* case presented by ICJ in its 1992 judgment in the *El Salvador–Honduras Land, Island, and Maritime Frontier* case, see Huh, *supra* n. 8), pp. 244–246.

(2) The *Qatar v. Bahrain* case

The next case that should be noted is the *Qatar v. Bahrain* case in which a judgment on the merits was rendered in 2001.[13] In this case, regarding the Zubarah region in the northwestern part of the Qatar Peninsula, the ICJ concluded that the authority of the Sheikh of Qatar based in Doha on the eastern coast of the peninsula had gradually been consolidated to be definitively established in 1937.[14] On the other hand, regarding the Hawar Islands located between the peninsula and the main island of Bahrain, the Court found that the decision by the British government in 1939 which attributed the island to Bahrain was binding on both states, giving no consideration to original title, *effectivités*,[15] or any other arguments presented by the parties.[16] It concluded that the Hawar Islands belonged to Bahrain.

Five of the judges voted against 2(a) of the operative provisions of the judgment, which presents the attribution of the Hawar Islands. One of them, Judge Torres Bernardez, criticized the conclusions of the majority of the Court, stating that they failed to acknowledge the scope of the original title of Qatar to the Qatar Peninsula and its adjoining islands and viewed the 1939 British decision, which fundamentally lacks validity, as the source of Bahrain's derivative title.[17] According to Judge Bernardez's definition, original title is the title to the territory of a new state while derivative title is the title to territory acquired by an existing state. In his view, international legal theory has distinguished between these two categories from long ago.[18] As we have seen, however, it was clear at least that the expressions of original title and derivative title were generally used for a different classification. Therefore, although we should have certain reservations about the appropriateness of Judge Bernardez's remark that the distinction between the two categories has a long history, the significance of his opinion can be found in the conceptualization and presentation of original title as a title with "constitutive elements linked to the very birth of the political entity or state."[19] As such, this opinion leads to the concept of second original title.

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13 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment of 16 March 2001, *ICJ Reports 2001*, pp. 40–118.

14 *Ibid.*, pp.64–69. Regarding this judgment, from the viewpoint of the theoretical interest of this paper, issues may be noted such as whether the authority consolidated regarding Zubarah can be explained under the "acquisition" framework, the timing of when Qatar was established as a state, and what are the territories that are inseparable from the establishment of Qatar as a state, but because of the space limitations here these will have to be addressed on some other occasion.

15 When the concept of *effectivités* was initially employed in law of territory, under the *uti possidetis juris* principle which requires that the boundaries between new states having achieved independence from the same colonizing power follow the administrative boundaries in the colonial period, the concept had only the limited meaning of indicating the conduct of the colonial authorities during the colonial era. Subsequently, however, cases emerged where this was used to paraphrase the display of sovereignty, and it has now become rather ambiguous. Regarding the discussion concerning *effectivités* by the parties in this case, see Huh, *supra* n.8), pp. 262–266. For an overview of the ambiguity of the concept of *effectivités*, Huh, Sookyeon, "Ryōdo kizoku hōri no kōzō: Kengen to effectivités wo meguru gokai mo fukumete" [Structure of the legal doctrine of attribution of territory: Including misunderstandings regarding title and *effectivités*], *Kokusai Mondai*, No. 624 (2013), pp. 20–34 is useful.

16 *Qatar v. Bahrain* case, *supra* n. 13), pp. 70–85. The judgment only mentions the fact that the parties made arguments regarding the claim of original title, and the parties themselves hardly touched upon it in the written procedures, so it is necessary to refer to the record of the oral arguments.

17 Dissenting Opinion of Judge Torres Bernardez, the *Qatar v. Bahrain* case, *supra* n. 13), p 260.

18 *Ibid.*, p. 281, para. 60.

19 *Ibid.*

(3) The *Ligitan and Sipadan* case

In the following year, 2002, the ICJ handed down its ruling in the *Ligitan and Sipadan* case.[20] The two parties, Indonesia and Malaysia, both used the concept of original title in their claims. Pulau Ligitan and Pulau Sipadan are uninhabited islands in the Celebes Sea off the coast of northeastern Borneo. In this case, Indonesia called the title to both islands held by the Sultan of Bulungan the original title and Malaysia did the same regarding the title held by the Sultan of Sulu. Each party claimed that these had been transferred to Western powers and then inherited by themselves.[21] In the end, the Court did not adopt either argument. As for Indonesia, the Court did not examine the original title at all because it found that the disputed islands were clearly not included in the areas that had passed to Indonesia as a successor to the Netherlands.[22]

On the other hand, regarding Malaysia's claim, the Court did consider whether or not the disputed islands had been part of the possessions of the Sultan of Sulu, and denied the existence of original title to both islands based on the following four points. First, the parties recognize that geographically both islands do not belong to the Sulu Archipelago. Second, the relevant documents describe the territorial extent of the Sultanate of Sulu as comprising "the Archipelago of Sulu and the dependencies thereof," but these documents provide no specific reference to decide whether Ligitan and Sipadan, which are located at a considerable distance from the main island of Sulu, were part of the Sultanate's dependencies. Third, even if the Bajau Laut who may have made use of the two islands were loyal to the Sultan of Sulu, such ties are not sufficient to provide evidence that the Sultan of Sulu claimed territorial title to both islands. Fourth, there is no evidence that the Sultan of Sulu actually exercised authority over both islands.[23]

In this way, while the application to Ligitan and Sipadan was not recognized, the concept of original title was used by the Court as the grounds for justifying the territorial control exercised by Sulu, which was a non-European local "state." In addition, the above-mentioned four points which the Court considered when it denied that original title existed can be summarized, using more common expressions, as three factors: focusing on the overall territorial extent of the state, negative evaluation on personal ties of loyalty to determine original title, and the requirement of the actual exercise of authority. Keeping these in mind, the following section examines in detail the contents of the judgment in the *Pedra Branca* case, which first presented outright recognition of the second original title.

4. Recognition of the second original title—the *Pedra Branca* case

(1) Outline of the case and the claims of the parties

Pedra Branca is a small island located at the eastern entrance to the Straits of Singapore. In Malaysia, the island is called Pulau Batu Puteh. In 2003, Malaysia and Singapore signed a Special Agreement requesting the ICJ to determine the attribution of Pedra Branca/Pulau Batu Puteh (hereinafter Pedra Branca) and the nearby Middle Rocks and South Ledge. The Court issued its ruling in 2008.[24] This section examines the dispute focusing on the judgment concerning Pedra Branca.

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20 *Sovereignty over Pulau Ligitau and Pulau Sipadan*, Judgment of 17 December 2002, *ICJ Reports 2002*, pp. 625–686.

21 Indonesia primarily claimed that the attribution of the disputed islands was already decided by the 1891 Convention concluded between Great Britain and the Netherlands, but this was not upheld by the Court. Transfer and succession from the Sultan of Bulungan was Indonesia's alternative claim.

22 *Ligitan and Sipadan* case, *supra* n. 20), p. 669, paras. 95–97.

23 *Ibid.*, pp. 674–675, paras. 108–110.

24 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, Judgment of 23 May 2008, *ICJ Reports 2008*, pp. 12–102.

In this case, it was Malaysia that claimed original title. According to Malaysia, Pedra Branca was and is part of the Malaysian State of Johor. The reason for this is that the Sultanate of Johor, which is the predecessor of the State of Johor, controlled all of the islands in the Straits of Singapore including Pedra Branca ever since it was established in 1511, and that there is nothing to show that Johor ever lost its title. Malaysia called the title which it inherited from the Sultanate of Johor "an original title of long standing."[25]

In response, Singapore claimed that prior to 1847, Pedra Branca was *terra nullius*. As such, it was claimed that by taking possession of it through the construction of a lighthouse from 1847 to 1851, the United Kingdom was able to acquire lawful title, and that the title had been maintained until the present time by the British Crown and by its successor the Republic of Singapore.[26] Consequently, the issue was whether Malaysia could prove the establishment of its original title dating back to before the lighthouse construction activities, or conversely whether Singapore could prove its claim that it established lawful possession at some time after the start of the construction of the lighthouse.[27]

(2) Recognition of original title by the Court

The ICJ recognized the original title that the Sultanate of Johor possessed over Pedra Branca based on the following considerations.[28]

The Court started by observing that it was not disputed that the Sultanate of Johor had been established as a sovereign state with a certain territorial domain under its sovereignty since its foundation in the early 16th century, and then examined proof showing the common understanding of that time regarding the extent of that territorial domain to confirm that the Straits of Singapore and the islands therein were included in that domain. Next, the Court pointed out that because Pedra Branca had been known as a navigational hazard, and had not been an unknown island, the reasonable inference was that it was one of the islands within Johor's general geographical scope. Finally, the Court mentioned the requirement of "continuous and peaceful display of territorial sovereignty [peaceful in relation to other states]," noted that no competing claim had ever been advanced against Johor and that it is sufficient to display sovereignty in accordance with the specific circumstances of each case, and concluded that Johor satisfied the requirement of display of sovereignty.

The Court then addressed the ties of loyalty that existed between the Sultan of Johor and the Orang Laut, who made the Straits of Singapore the area of their activities, and concluded that this could also be used to confirm the existence of Johor's original title to Pedra Branca.[29, 30]

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25 *Ibid.*, p. 29, paras. 37–38; pp. 31–32, paras. 47–48.

26 *Ibid.*, pp. 29–30, paras. 39–40; pp. 32–33, paras. 49–51.

27 *Ibid.*, p. 30, para. 42.

28 *Ibid.*, pp. 31–37, paras. 52–69.

29 *Ibid.*, pp. 37–39, paras. 70–75.

30 In the dispositif, Pedra Branca is attributed to Singapore and the Middle Rocks to Malaysia, while the attribution of South Ledge, which is a low-tide elevation, is required to be decided by future maritime delimitation. This is because the Court judged that the territorial sovereignty based on the original title to Pedra Branca held by Johor had been transferred to Singapore some time after the middle of the 19th century or at least by 1980, whereas it found that Malaysia, as the successor to Johor, continued to hold the original title to the Middle Rocks, which did not fall under special circumstances having caused that transfer.

(3) Appraisal

In that this case employed the concept of original title to discuss the issue of whether or not the "territorial control" by a non-European local "state" extended to the territory in dispute, it follows the same track as the judgment in the *Ligitan and Sipadan* case. The original title in both cases, that is, the second original title, differs from the first original title, which concerns the acquisition of new territory by an existing state under international law, and may be seen as a concept used for the legal basis for the attribution of territory that cannot be separated from the establishment of the state or its very existence under international law, namely, territory that came to be established under an "international order" other than international law.

It was inevitable that the Court should feel the necessity of such a concept particularly strongly in judgments on the attribution of territory in the post-decolonization era. This is easily understood by recalling the *Island of Palmas* arbitral award, which was issued during the colonial era. To elaborate, that award, which is acknowledged as the pioneer in the display of sovereignty approach, did not use the traditional mode, but still left no room to doubt that the concept of title to territory consisted of rules to regulate territorial acquisition by Western countries. More specifically, the tribunal did not consider territory as belonging to a local "state" comparable to Johor, and took the conventions between the native princes and the East India Company as evidence of the display of sovereignty by the Netherlands, which was a state under international law.[31] However, as pointed out by Sookyeon Huh,[32] even if the principle of inter-temporal law were invoked, to rely on this kind of logic could no longer be a realistic option for the ICJ today, since it directly reflects colonialism which should be rejected. Hence, the introduction of the second original title concept may be considered as one attempt to accommodate law of territory to changes in international society.

As for the method whereby the Court recognized original title, it cannot be denied that there are points of doubt as well as points that require caution. Let us look at this in line with the procedure of recognition as stated above. What the Court did first was to label the Sultanate of Johor as a sovereign state with a certain territorial domain under its sovereignty. However, the only evidence presented for this was a work written by Grotius that called Johor a sovereign principality (*supremi principatus*).[33] The established theory is that Grotius did not have a clear concept of sovereignty in the modern sense,[34] and at the time that Johor was established, even in Europe, sovereign states were in the process of being formed both conceptually and in reality, so one cannot help but call the attitude of the Court, which used the word sovereignty without any qualification or explanation, ahistorical or at least incautious.

What the Court focused on next was, similar to the judgment in the *Ligitan and Sipadan* case, to identify a general scope of the "territory" of the local "state" and to draw a rational inference that the territory in dispute lay within that scope. Regarding the former, the Court found two grounds for identification: the Sultan of Johor's understanding of territory shown by the fact that the Sultan had objected to the East India Company's act of seizure in the Straits of Singapore, and the understanding of territory seen in letters by the British government official in Singapore at

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[31] *Island of Palmas* case, Arbitral Award of 4 April 1928, 2 *RIAA* 831, pp. 858–859.

[32] Huh, *supra* n. 2), p. 724.

[33] *Pedra Branca* case, *supra* n. 24), p. 33, para. 53. This quotation from the work by Grotius is believed to have been taken from a quotation in the memorial of Malaysia. However, the concerned section in the memorial of Malaysia does not contain any statement using this quotation to position Johor as a sovereign state. Memorial of Malaysia, Vol. 1, paras. 37–38 (available at http://www.icj-cij.org/files/case-related/130/14139.pdf).

[34] As a convenient reference concerning this point, see Yanagihara, Masaharu, *Grotiusu* [Grotius] (Shimizu Shoin: 2000), pp. 180–183. The version now being sold as of 2018 is the new edition published in 2014.

that time.[35] Regarding the latter, the inference was drawn from the fact that the island was not an unknown island. Accordingly, at none of those stages was the actual territorial control over the disputed territory by the local "state" scrutinized.

Furthermore, if we ask whether the Court looked at the actual situation of territorial control by checking the requirement of "continuous and peaceful display of territorial sovereignty [peaceful in relation to other states]," which was deemed the final procedure in the judgment, that did not occur either, at least in this case. This is because the judgment accepted the requirement for display as being satisfied in accordance with the conditions of the disputed territory despite mentioning no specific acts which may be regarded as display of sovereignty.

As we have already seen, under the display of sovereignty approach, the "continuous and peaceful display of territorial sovereignty [peaceful in relation to other states]" has become an established expression indicating the exercise of state authority, which is the source of title as well as its proof. The exercise of state authority is recognized to be the source of title because it demonstrates that the sovereign of the territory fulfilled the duty imposed on him, that is, to ensure minimum protection within the territory as is required under international law.[36] Consequently, even if the extent and form of the exercise of authority required to fulfill that duty vary depending on the conditions within the territory, it is difficult to accept that no concrete evidence of the exercise of authority directly related to the territory in question could be presented, or that no specific examinations could be made as to whether it existed. This means that, in recognizing original title in this case, by making the "continuous and peaceful display of territorial sovereignty [peaceful in relation to other states]" its "requirement," the Court succeeded in giving the impression that recognition of original title and conventional recognition of acquisition of title are fundamentally the same. However, we cannot help but remark that the reality of the application in the former constituted "a variation that differs from the traditional display of sovereignty approach."[37]

5. Concluding remarks

The concept of the second original title employed in the *Pedra Branca* case is the point where two junctures come together. The first is the juncture between the concept of title to territory and the issue of the grounds of territorial sovereignty over territory that is inseparable from the existence of the state itself, which used to be considered as outside the scope of title to territory. The other is that between the issue of the evaluation of historical territorial control or attribution in the traditional order which differs from international law, and the determination of territorial attribution in contemporary international law.

Nevertheless, the Court did not try to evaluate the legitimacy of the historical territorial control by non-European "states" using the framework of the traditional order to which they belonged. This contrasts with the detailed examinations in the *Minquiers and Ecrehos* case of territorial control by medieval England and France in light of the *Grand Coutumier de Normandie*, which constituted the contemporary order.[38]

What the Court did instead in the *Pedra Branca* case was, while adopting the posture of using the same framework as the rules of territorial acquisition by existing states by mentioning the requirement of "continuous and peaceful display of territorial sovereignty [peaceful in relation to other states]," to recognize the existence of grounds for the justification of territorial sovereignty, namely original title, by incorporating a new method of emphasizing the general

[35] *Pedra Branca* case, *supra* n. 24), pp. 33–34, paras. 54–56.

[36] Huh, *supra* n. 7), pp. 75–76; Huh, supra n. 8), pp. 145–146.

[37] Huh, *supra* n. 8), p. 329.

[38] *Minquiers and Ecrehos* case, *supra* n. 10). pp. 60–64, pp. 67–68.

extent of territory without looking into the local traditional order and even without any display of sovereignty. As background to this recognition, which may be called an unusual feat of reasoning, it should be noted that the special geographical conditions in this case may have had some effect. That is to say, because the land on both banks of the narrow Straits of Singapore belonged to the Sultanate of Johor, it was not necessary to consider possible competing claims to the islands within the Straits by nearby countries or countries on the opposite bank. In this sense, it would be necessary to carefully and separately consider whether original title could be identified using the same method in the absence of such conditions.

From the above, it is difficult to support without qualification the positive evaluation that by recognizing Johor's original title, the ICJ made a concrete contribution to the clarification of the difference between original title and title of occupation of *terra nullius* and also of the territorial situation in Eastern Asia during the 19th century.[39] Rather, the concept of second original title encourages us to make further efforts and contributions toward the clarification of the concept of title to territory itself while showing many issues that should be examined regarding the application of the second original title and its theoretical impact on title to territory.

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39 Kohen, *supra* n. 2). pp. 170–171.