A PHILOSOPHICAL INQUIRY INTO THE CONCEPT OF TERRITORIAL SOVEREIGNTY:

A NEW ANALYTICAL FRAMEWORK OF THE TERRITORIAL DISPUTES IN THE CHINA SEAS

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ABSTRACT

Existing normative legal efforts that focus on territorial acquisition, appear inadequate in providing a uniform and final answer to the issue of territorial disputes in the South and East China Seas. China's historical claims are a unique and difficult issue therein. This article returns legal attention to the central concept of territorial sovereignty within territorial disputes by engaging in a philosophical inquiry to examine if the concept could be more fully understood and to ask to what extent do historical claims relate to the concept of territorial sovereignty and international law. This article argues that a definite answer to these disputes cannot simply be sought in positive international law, as the scope of the concept of territorial sovereignty goes beyond positivist tradition. Rather, the key issue in the disputes—specifically with regard to the legitimacy of the Chinese claims—is the historical origin of territorial sovereignty in the European background.

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I. INTRODUCTION

The territorial disputes over the islands in the South and East China Seas are a major threat to regional stability in Asia. The current applicable law to these disputes is the law of territorial acquisition. Despite the five modes of territorial acquisition outlined in the corresponding doctrine, the normative framework of the law is formulated in several landmark cases which took place during the early twentieth century.[1] To a certain extent, this is mainly a judge-made case law system, notably in the *Island of Palmas* case Judge Max Huber ruled that "a juridical fact must be appreciated in the light of the law contemporary with it" and "the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law," which gave rise to the so-called principle of inter-temporal law and proved to be a significant milestone.[2] Since the

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1 Clipperton Island Arbitration (Fr. v. Mex.), 2 R.I.A.A. 1107 (1931); Island of Palmas (U.S. v. Neth.), 2 R.I.A.A. 845 (Perm. Ct. Arb. 1928); Legal Status of Eastern Greenland (Den. v. Nor.), P.C.I.J. (ser. A/B) No. 53, at 22 (April 5th); Minquiers and Ecrehos (U.K. v. Fr.), Judgement, 1953 I.C.J. Rep. 47.

2 Island of Palmas (U.S. v. Neth.), 2 R.I.A.A. 845 (Perm. Ct. Arb. 1928).

late nineteenth century, notably, following the Berlin Conference, the criterion of territorial regime in international law has been centered on the principle of effectiveness. Effective control requires a State to display intent to act as a sovereign, and to undertake continuous and peaceful administrative measures over a piece of land.[3] Nevertheless, the scope of the principle of effectiveness remains uncertain. In particular, there remains no clear-cut standard in contemporary international law with respect to what administrative measures display sovereignty and whether a State's acts are in fact continuous. "Effectiveness," so as to achieve equitable results, is decided on a case-by-case basis according to the specific circumstances of individual cases.[4] For example, in the *Clipperton Island* arbitration, the tribunal tolerated France's non-action for nearly forty years,[5] while in the *Island of Palmas* case, the Judge was satisfied by the Dutch government's reliance on a 100-year gap in evidence.[6] As a result, the application of the principle of effectiveness relies heavily on judicial

3 Legal Status of Eastern Greenland (Den. v. Nor.), P.C.I.J. (ser. A/B) No. 53, at 45-46 (April 5th).

4 When Yemen in the *Eritrea-Yemen* case expressed its concern on the possibility for the tribunal to prefigure an eventual stage two on maritime solution as an element of its thinking about stage one on territorial sovereignty, notably the principle of equity, the tribunal found it unable to accept Yemen's supposition. To the tribunal, it is suitable to include any principles, rules, or practices of international law that are found to be applicable to the matters of sovereignty, even those that are part of maritime law. In other words, the tribunal considered the principle of equity as an established principle for international adjudication. *See* Territorial Sovereignty and Scope of the Dispute (Eri. v. Yemen), 22 R.I.A.A. 240 (Oct. 9, 1998) (In this case, the tribunal examined a wide variety of circumstances as evidence of the display of governmental authority and *effectivités*, which in my view well follows the spirit of equitable principle and special circumstances).

5 *See* Clipperton Island Arbitration (Fr. v. Mex.), 2 R.I.A.A. 1107 (1931), *translated in* 26 AM. J. INTL L. 391-392 (1932) (It is stated that since Lieutenant Kerwéguen's first cruise of the French Navy on November 17 1858, "until the end of 1887 no positive and apparent act of sovereignty can be recalled either on the part of France or on the part of any other powers . . . Towards the end of 1897, precisely the 24th of November of that year, France stated . . . that three persons were found in the islands collecting guano…and raised the American flag".).

6 *See* Island of Palmas (U.S. v. Neth.), 2 R.I.A.A. at 864 (The Judge pointed out that "[t]here is a considerable gap in the documentary evidence laid before the Tribunal by the Netherlands Governments . . . that these relations have not existed between 1726 and 1825." The problem of the uncertainty of the case laws has also been pointed out by some authors: *see also* Tao Cheng, *The Sino-Japanese Dispute over the Tiao-yu-Tai (Senkaku) Islands and the Law of Territorial Acquisition*, 14 VA. J. INTL L. 240 (1973-1974); S. Wei Su, *The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update*, 36 OCEAN DEV. & INTL L. 50-51 (2005)).

discretion. Therefore, the institutional weakness of international law cannot guarantee compulsory third-party adjudication.[7] The principle of effectiveness lacks the normative value of stability and predictability, which the rule of law requires. Though many States prefer to settle territorial disputes through political negotiation rather than judicial decision, if the parties are unable to reach a consensus on third party adjudication, the result may lead to the dysfunctionality of the law within certain disputes.

This uncertainty of the law has caused numerous problems in academic discussion. Existing literature on the ownership of the disputed islands, mostly focuses on the normative analysis of contemporary international law.[8] Various authors provide contrasting interpretations of the case law, which results in contrary conclusions. For example, based on the *Island of Palmas* case, Cheng concluded that the Chinese historic activities related to the disputed islands sufficiently met the standards of discovery-occupation and the subsequent effective control in international law,[9] whereas Bennett concluded that the Chinese historic activities could only constitute discovery and that no subsequent effective control had been exercised. Despite the *Clipperton Island* arbitration concluding that effective control could be mitigated over remote and uninhabitable islands, the Chinese had never administered any sovereign measures.[10] Different authors also treat individual events as having a decisive role in determining the belonging of title. For example, Chiu and Park considered the events in and after the 1930s, as having a decisive effect in the South China Sea disputes,[11] whereas Austin considered the events in and after 1816, as having a decisive effect in the South China

7 The institutional weakness of international law refers to the absence of a superior authority above sovereign States. The wills of sovereign States are the ultimate authority in international law so that the enforcement of international law is not compulsory.

8 There are numerous literatures about the disputes. I am not able to provide a thorough review in this limited length article.

9 Tao Cheng, *The Dispute over the South China Sea Islands*, 10 TEX. INT'L L. J. 265, 277 (1975).

10 Michael Bennett, *The People's Republic of China and the Use of International Law in the Spratly Islands Dispute*, 28 STAN. J. INT'L L. 425, 436 (1991-1992).

11 Hungdah Chiu & Choon-Ho Park, *Legal Status of the Paracel and Spratly Islands*, 3 OCEAN DEV. & INT'L L. 1, 19 (1975).

Sea disputes.[12] It is therefore evident that existing literature is incapable of providing a uniform and final answer as a response to the disputes.

Contemporary international law remains a successor of the nineteenth century international law.[13] The nineteenth century was dominated by the Western tradition of international legal positivism.[14] A major characteristic of international legal positivism is the concept of treating State consent as the sole source of international law.[15] This legal foundation allows for the law to arise from the common agreements of States. Therefore, the formal source of international law lies only in treaty and custom, which signify either the explicit or implicit consent of States. However, an essential problem of positivism and consensualism occurs when the national interests of States conflict greatly with each other, resulting in a possible fundamental obstacle in which States are unable to produce binding laws. A system founded on subjectivism, therefore, cannot be used to reach a consensus on all matters. General tenets of the rule of law tell us that the ultimate value of the law is the advancement of a normative order, which results in both stability and predictability. While the positivist approach has succeeded in many areas of international law in establishing this normative approach so that the law can remain genuine, unfortunately, this has not proven to be the case in the current territorial regime. As noted earlier, the "rule of law" of the current territorial regime centers on the single principle of effectiveness, the normative aspects of which is judge-made and decided on by a case-by-case basis.[16] As the application of the law depends heavily on judicial discretion, the institutional weakness of international law renders the law an empty regime, particularly if States in a dispute elect to opt out of a judicial settlement.

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12 GREG AUSTIN, CHINA'S OCEAN FRONTIER: INTERNATIONAL LAW, MILITARY FORCE, AND NATIONAL DEVELOPMENT 130 (1998).

13 MALCOLM N. SHAW, INTERNATIONAL LAW 22 (7th ed. 2014).

14 ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 232 (1958).

15 MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 17 (7th ed. 2013).

16 *See* Clipperton Island Arbitration (Fr. v. Mex.), 2 R.I.A.A. 1107; Island of Palmas (U.S. v. Neth.), 2 R.I.A.A. 845; Legal Status of Eastern Greenland (Den. v. Nor.), P.C.I.J. (ser. A/B) No. 53; Minquiers and Ecrehos (U.K. v. Fr.), Judgement, 1953 I.C.J. Rep. 47; *See* discussion, *supra* note 4; Territorial Sovereignty and Scope of the Dispute (Eri. v. Yemen), 22 R.I.A.A. 240.

The inadequacy of a normative approach in the settlement of the China Seas disputes serves as a basis not only for further inquiry into the relationship between the disputes and international law, but encourages a different, namely non-normative, perspective. This article considers the central legal issue of the China Seas disputes as the conflict of territorial sovereignty between China's historical claims and other disputants' modern claims to territory.[17] It attempts to make a philosophical inquiry into the central concept of territorial sovereignty, in order to establish a critical point of penetration, so that the China Seas claims can be examined through the aforementioned new perspective. As a research methodology, philosophical inquiry is an effective way of asking questions. Contrary to normative analysis, which focuses on the discussion of legal principles and rules, philosophical inquiry instead focuses on the investigation of the nature and the foundation of a given concept. The overall aim of this article is to establish a new analytical framework to further explore the China Seas disputes and international law.

II. UNIQUENESS OF THE CHINA SEAS DISPUTES

Territorial disputes may be asserted as one of the biggest difficulties faced by modern international law. A significant portion of the outstanding territorial disputes in the world are of ethnic attributes, such as the conflicts in Kosovo, Palestine, and Israel. However, although they are related to the concept of territorial sovereignty, those ethnic-related territorial disputes are formulated within the legal framework of the creation of Statehood, e.g. secession and self-determination, rather than the typical "law of territory" cases.[18] That is because in contemporary international law, the term "law of territory" refers more to "law of territorial acquisition."

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17 *See infra* Section II for clarification on historical and modern claims to territory.

18 *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 128 (7th ed. 2008) (Professor Ian Brownlie made this point fairly clear: "the usual analyses [of modes of territorial acquisition] do not explain how title is acquired when a new state comes into existence. Here title is created as a consequence of legal procedure relating to the establishment and recognition of new legal persons. The events leading to independence of the new state are matters within the domestic jurisdiction of another legal person, and yet they are legally relevant to territorial disputes involving the new state. In this type of case there is no 'root of title' *as such*: title is a by-product of the revolution, secession, or other events leading to the creation of a state as a new source of territorial sovereignty."); *see id.*

Among the "law of territorial acquisition" disputes in the world, the island disputes in the two China Seas are distinct. This article regards that their uniqueness could be best described by using the terms "historical claims" versus "modern claims." Such an antagonism is fundamentally the contradiction or incompatibility between Western and Eastern international orders and their underlying ideologies. Unlike Japan, Vietnam and the Philippines that have more thoroughly adopted the Western discourse within their international relations, [19] China, as the dominate force of medieval Eastern international order, has been much less westernized and modernized. In Professor Zheng Yongnian's words, the social culture in some Asian communities had been fragmented due to the intervention of the Western civilization, however, the Chinese civilization remains integral. [20] Although China has also transplanted many Western concepts and experiences, it emphasizes "the instrumental use of Western thought without transforming the essence of Chinese thought."[21] The fundamentally contrasting foundations of Western and Eastern international orders resulted in a completely disparate territorial understanding between China and Western/Western-influenced countries. China's claims on the islands are based on its attachment to the islands rooted in Eastern history. However, Japan, Vietnam, and the Philippines claim the islands based on their modern occupations in the nineteenth and twentieth centuries which occurred under the impact of Western modern thought.[22] It is necessary to clarify two points in this regard.

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19 Compared to Japan and the Philippines, Vietnam is less westernized, in particular in its internal political structure. However, as it was more fully colonized than China, its discourse in external relations is more influenced by Western modern thought.

20 ZHENG YONGNIAN, THE RISE OF CHINA: A RE-EVALUATION OF ASIAN VALUES 29 (2016) (available only in Chinese).

21 *Id*.

22 It is noted that Malaysia and Brunei did not make their claims based on the doctrine of occupation. The legal basis resorted by Malaysia in the law of the sea to territorial title of some features is controversial. On the one hand, "land dominates the sea" is a fundamental principle adopted by the law of the sea so that only territorial title could give rise to maritime titles, not *vice versa*; on the other hand, it may involve the issue of the nature of low-tide elevations and submerged features, i.e., they are land or part of seabed. To this issue, neither conventional nor customary international law have given any clear answer yet. Brunei only made maritime claims. For the claims of Malaysia and Brunei, *see* KHADIJAH MUHAMED

First, turning to the nature of the Vietnamese claims, according to the periodization of global history, the modern period roughly refers to the nineteenth century and after. It is without any doubt that the annexations of the disputed islands by Japan and the Philippines took place within this period. Japan incorporated the Diaoyu/Senkaku Islands into its territory via a 1895 cabinet decision.[23] The Philippines declared its effective occupation of part of the Spratly Islands in 1971.[24] Usually, the Vietnamese claims are considered just as historical in nature as the Chinese claims.[25] However, this article disagrees with that position. The most ancient, and the only historical records that Vietnam was able to provide, was a seventeenth century book of maps and an eighteenth-century book in which the South China Sea islands were mentioned.[26] In contrast, the historic Chinese records of the South China Sea islands dated back to the East Zhou

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& TUNKU SHAMSUL BAHRIN, *Scramble for the South China Sea: The Malaysian Perspective*, *in* FISHING IN TROUBLED WATERS: PROCEEDINGS OF AN ACADEMIC CONFERENCE ON TERRITORIAL CLAIMS IN THE SOUTH CHINA SEA 238 (R. Hill et al. eds., 1991).

23 https://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html (Ministry of Foreign Affairs of Japan: Basic View on the Sovereignty over the Senkaku Islands).

24 The first Filipino involvement in the Spratly Islands was in 1956, when Tomas Cloma, a Filipino citizen, declared that he had discovered and occupied 33 islands, reefs and cays in the Spratly Islands which he intended to establish as the "Kalayaan." *See* J. Coquia, *The Kalayaan Group as Part of Philippine Territory*, *in* THE SOUTH CHINA SEA DISPUTES: PHILIPPINE PERSPECTIVES 53 (A. Pablo-Baviera ed., 1992). The Philippines officially joined the disputes in 1971 when the government issued a statement that the "Kalayaan" were *terra nullius* and the Philippines were in effective occupation of some of the islands; *see also* Hungdah Chiu & Choon-Ho Park, *supra* note 11, at 153.

25 *See e.g.*, James D. Fry & Melissa Loja, *The Roots of Historic Title: Non-Western Pre-Colonial Normative Systems and Legal Resolution of Territorial Disputes*, 27 LEIDEN J. INT'L L. 727, 728 (2014) ("Vietnam's claim to the Paracel Islands and Spratly Islands equally is rooted in roughly the same period of history [as China].").

26 *Vietnam's Sovereignty over the Hoang Sa [Paracel] and Truong Sa [Spratly] Archipelagoes*, Info. and Press Dep't, Ministry of Foreign Affairs, Socialist Republic of Vietnam, Hanoi (1979), at 10-15 (Apart from these two historic records as well as the record of King Gia-long's 1816 act, the fourth oldest record Vietnam could provide is a geographical book compiled under the Nguyen Dynasty from 1865 to 1910. The rest of the Vietnamese evidence is dated between 1933 and 1973); *See id.* at 28-45.

Dynasty (770-221 B.C.),[27] continuing through the Qing Dynasty. The scarce historic evidence provided by Vietnam is therefore insufficient to prove the actual and immemorial historic connections between Vietnam and the islands. To Vietnam, the most important event is the 1816 measurement of the sea-routes from the mainland to the Paracel Islands by King Gia-long. This act was later confirmed in 1820 by Frenchman Jean Baptiste Chaigneau, assuring that King Gia-long had established sovereignty over the islands.[28] This is to say, the Vietnamese had already been impacted by Western modern thought at that time, which is fundamentally different from the Chinese, who claim a legacy of medieval Eastern international order. After 1816, Vietnam relied on the 1931 French claim of the Paracel Islands based on the 1816 annexation, and the 1933 French annexation of seven islands in the Spratly group, alleging itself as the successor to the French title.[29] The official language used by Vietnam is quite Western in style: "the Vietnamese feudal State was the first in history to *occupy*, claim ownership of, exercise sovereignty over and exploit these two archipelagos which had never before come under the administration of any country. This ownership is effective and in conformity with international law and practice."[30] Based on this, it can be seen that the earliest and most valid Vietnamese evidence stemmed from the nineteenth century and had a distinct modern characteristic. It is therefore reasonable to assert that the Vietnamese claims were influenced by, and thus based on, the positivist tradition of Western international law, which came into formation during the late

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27 Jianming Shen, *China's Sovereignty over the South China Sea Islands: A Historical Perspective*, 1 CHINESE J. INT'L L. 102-106 (2002). *See also* Jianming Shen, *International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands*, 21 HASTINGS INT'L & COMP. L.R. 15-17 (1997) (It is noted that Fry and Loja made a mistake in their article that the Chinese claim "can be traced back to China's discovery of the islands during the Tang Dynasty (206 B.C.-220 A.D.) . . ." by citing the articles of Jianming Sheng); *see also* James D. Fry & Melissa Loja, *supra* note 25, at 728 (Not only the Tang Dynasty in Chinese history was between 618-907 A.D. rather than 206 B.C.-220 A.D., but also the Chinese historic activities dated back to the East Zhou Dynasty (770-256 B.C.), much earlier than 206 B.C. The year 206 B.C. was one year after the fall of the Qin Dynasty (221-207 B.C.).

28 *See Vietnam's Sovereignty over the Hoang Sa [Paracel] and Truong Sa [Spratly] Archipelagoes*, *supra* note 26, at 51.

29 *Id*.

30 *See id.* at 7 (emphasis added).

eighteenth and nineteenth centuries. The Japanese and the Philippines claims are similar.

Second, this article will examine the nature of the Chinese claims. Some authors believe that the Chinese claims could be included within the scope of the doctrine of occupation in positive international law.[31] To examine this, the meaning of and the establishment background of the doctrine of occupation in positive international law should be clarified. The doctrine of occupation in positive international law includes two aspects: 1) the subject of occupation, i.e. sovereign States; 2) the object of occupation, i.e. *terra nullius* (land without sovereignty). [32] Simultaneously, occupation should meet the requirement of effectiveness. This meaning was formally established in the late nineteenth century when positivism became the dominant tradition in international law. Before the nineteenth century, occupation within the early modern law of nations was not considered an act of the State, but rather as a concept of private law that applied to individuals and merely conveyed the entitlement of private properties rather than territorial sovereignty.[33] An essential point of clarity is that before the nineteenth century—before positive international law was introduced to China—it was virtually impossible for the medieval Chinese State to form an intent to occupy during its connections with and administration of the disputed islands, because no such concept existed in medieval Chinese thought. The Chinese did not know about the concept and meaning of occupation in contemporaneous Europe. However, Chinese fishermen's use of the islands was closer and more comparable to the early modern meaning of occupation under the natural law theory. The Chinese medieval understanding of sovereignty also differs from the early modern tradition of Western international law which focuses on territorial control as a central underpinning of sovereignty. Therefore, it seems inappropriate to mechanically consider and analyze the Chinese claims under the Western framework.

Nonetheless, the official claims of the Chinese government are ambiguous. This ambiguity is reflected in the uncomfortable

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31 Late twentieth century authors on the disputes usually adopt such an approach.

32 *See* SHAW, *supra* note 13, at 363.

33 For specific investigation on the meaning of occupation in early modern Europe, *see* Henan Hu, *The Doctrine of Occupation: An Analysis of Its Invalidity Under the Framework of International Legal Positivism*, 15 CHINESE J. INT'L L. 75, 83-105 (2016).

accommodation of the Chinese medieval thought to Western international law, which was effectively established by the colonial history in China. It appears that both the international community and the Chinese government is unclear about the legal significance of the Chinese claims. The remarkable feature of the Chinese claims is that it associates historical evidence with the jurisprudential—as it calls itself—evidence and argues that the Chinese claims are legitimate both in history and in law.[34] A fairly important point is that Chinese "historical evidence" includes not only medieval evidence, but also modern evidence beginning from the late Qing Dynasty to the late twentieth century.[35] It is the combination and continuity of all of the relevant facts, including the colonial history, that is regarded as the culmination of "Chinese history."[36] Meanwhile, a problematic issue is that Chinese "jurisprudential evidence" does not in any substantive aspect differ from "historical evidence." The "historical" position was reiterated in the "jurisprudential" document.[37] The overall argument of the Chinese claims centers on one sentence: "China was the first to discover, name, develop, conduct economic activities on and exercise jurisdiction of the . . . Islands,"[38] which "is also manifested in a series of continued effective government behaviour."[39] China does not formulate its claims in the doctrine of occupation in positive international law. It can therefore be concluded that with regard to the historical parts of the evidence, the Chinese government is unclear as to how to argue for their legitimacy from an international law perspective. The historical part of their argument is particularly not accepted by modern international lawyers and has been criticized by rivalry claimants as insufficient in providing prior legal titles.

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34 China divides its official evidences into two parts, see http://www.fmprc.gov.cn/eng/topics/3754/t19231.htm (PRC Ministry of Foreign Affairs, Historical Evidence to Support China's Sovereignty over the Nansha Island); http://www.chinaembassy-fi.org/eng/ztxw/SCSI/t1352668.htm http://www.fmprc.gov.cn/eng/topics/3754/t19234.htm (PRC Ministry of Foreign Affairs, Jurisprudential Evidence to Support China's Sovereignty over the Nansha Islands).

35 *See* Historical Evidence to Support China's Sovereignty over the Nansha Island*, supra* note 34.

36 *See id.*

37 *See id.*

38 *See id.*

39 *See id.*

The most relevant concept in contemporary international law, related to these Chinese claims, is "historic right."[40] So far, this concept is considered controversial and its scope has not been fully established.[41] While historic right is a generic concept, concepts such as historic title, historic bay, and historic water are subordinate and have more limited scopes.[42] With regard to the land domain, only the concept of historic title could be applicable. Israeli Professor of law, Yehuda Blum, commented that "the historic title is the outcome of a lengthy process comprising a long series of acts, omissions and patterns of behaviour which, in their entirety, and through their cumulative effect, bring such a title into being and *consolidate* it into a title valid in international law." [43] Various contemporary international law case law has also acknowledged that historic title was not acquired instantly, but rather through an uninterrupted process

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40 Through its domestic law, China shows a position that it retains historic rights, apart from the application of the UN Convention on the law of the sea. *See* PRC Law on Exclusive Economic Zone and Continental Shelf art. 14.

41 *See* Zou Keyuan, *Historic Rights in International Law and in China's Practice*, 32 OCEAN DEV. & INTL L. 149-152 (2001).

42 Historic bay and historic water are close concepts. For now, contemporary international law only confirmed that historic bay is included in the concept of historic water. However, the concept of historic water *per se* is as controversial as historic right. The concept of historic bay was first put forward in the 1910 *North Atlantic Coast Fisheries* case in which it was referred as those bays "convention and established usage might be considered as the basis for claiming [them] as territorial", *see* N. Atl. Coast Fisheries, (U.K. v. U.S), 11 R.I.A.A. 197 (Perm. Ct. Arb. 1910). The 1951 *Fisherie*s case developed the concept of historic water in which it was referred as "waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title," *see* Fisheries (U.K. v. Norway), Judgement, 1951 I.C.J. 130 (Dec. 18). Thus, in the Court's opinion, historic water is a subordinate concept of historic title. Another relevant case is *El Salvador-Honduras* in which the Gulf of Fonseca was discussed. However, in accepting the Gulf of Fonseca as a historic bay, the Chamber does not further make clear the legal standards of historic bay but rather accept the "unanimous finding" of the parties, the intervening State (Nicaragua) and the 1917 decision of the Central American Court of Justice concerning the gulf, *see* Land, Island and Maritime Frontier Disputes (El Sal. v. Hond.), Judgement, 1992 I.C.J. 241-246 (Sept. 11). For current status of these concepts, *see also* U.N. Secretariat, Historic Bays, Memorandum by the Secretariat, Intl L. Comm'n., U.N. Doc. A/CONF.13/1 (1962); Juridical Regime of Historic Waters, Including Historic Bays, 2 Y.B. Int'l L. Comm'n., U.N. Doc. A/CN.4/143 (1962).

43 Y. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 335 (1965) (emphasis added).

of historical consolidation.[44] It requires that a State exercise sovereignty over a piece of land chronically, peacefully, continuously, and effectively with the acquiescence of the community of States. In a sense, historic title as territorial title, remains under the scope of the principle of inter-temporal law and effectiveness. As is referred to in the *Fisheries* case, historic title does not intend to justify exceptional rights, but rather to assure the invoked history is in conformity with general law.[45] In other words, historic territorial title is not treated as a separate regime of the law of territory. Even within the case law that is relevant to historic evidence, international courts and tribunals did not formulate justifications of territorial titles based on the concept of historic title, but were more prone to treaty law, the doctrines of *uti possidetis,* and effective control.[46]

For Fry and Loja, historic title formulated as immemorial possession, should be a "form of possession where no evidence can be adduced that the situation was ever different and no living person has ever heard of a different state of affairs . . . [s]uch possession . . . [is] unbroken and uncontested."[47] According to their study, in all of the cases relevant to historic title and territory in international judicial proceedings, in only two cases was historic title eventually recognized: the *Minquiers and Ecrehos* case and the *Malaysia-Singapore* case.[48] Based on an analysis of these cases, their central

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44 *See* Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. 138 (Dec. 18) (Fry and Loja also commented that "[s]uch historic title [the Chinese claims] as ancient title is distinct from historic title that, over time, ripened or consolidated through the exercise by a state of 'authority which is both continuous and peaceful'"); *see* James D. Fry and Melissa Loja, *supra* note 25, at 728. Such a position also indicates that it is in fact improper to formulate the Chinese claims under the concept of historic title in contemporary international law.

45 *Id*. at 133.

46 Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice*, 53 DUKE L.J. 1803-04 (2003-2004). Sumner concluded that there was a tripartite hierarchy in the ICJ decisions that looks first to treaty law, then to *uti possidetis* and finally to effective control. Although territorial disputants perennially make arguments based on nine categories of justifications for territorial claims (treaties, geography, economy, culture, effective control, history, *uti possidetis*, elitism and ideology), only three of these have operated consistently as the ICJ's decision rule: treaty law, *uti possidetis* and effective control. He still inquired about whether there was a causal mechanism to explain this. *Id.* at 1811-1812.

47 *See* James D. Fry & Melissa Loja, *supra* note 25, at 743. But it is interesting that Fry and Loja distinguished historic title from historic consolidation of title without providing explanations.

48 *Id.* at 731-47.

argument is that according to the principle of inter-temporal law, the validity of historic evidence has to survive colonialism and war in the China Seas disputes and in particular, it has to survive the Japanese annexation of the islands during World War II.[49] Fry and Loja were pioneers in studying the relevant case law surrounding the attitudes of international courts and tribunals which accepted historic evidence from non-Western systems. However, what Fry and Loja failed to address, is that every territorial case that was part of an international judicial decision was considered particularly and individually within the standards of inter-temporal law, and the effectiveness thereof was applied flexibly and equitably according to the specific circumstances of each case. Namely, the substance of circumstances and judicial discretion plays essential roles in international adjudications.[50] As is known, international judicial decisions are not formal sources of international law according to Article 38 (1) of the ICJ Statute and the approach of international courts and tribunals is that they are to treat every case as a *unicum*. Whether or not one should take into consideration the decisions of prior cases, depends on their relevance and necessity. Such an approach of particularism, adopted by international courts and tribunals, is evident with regard to maritime right[51] and maritime historic right.[52] Hence, it seems not rigorous for

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49 *Id.* at 754.

50 Even Fry and Loja acknowledged that "such vicarious exercise of sovereignty [exercise of sovereignty through tribes whose chiefs were appointed by the Sultans] was found insufficient in the *Malaysia v. Indonesia* case, yet it was determined to be sufficient in the *Malaysia v. Singapore* case," *see* James D. Fry & Melissa Loja, *supra* note 25, at 743 (They regarded that other two pieces of evidences add to the strength of the Malaysian title and made the difference in the *Malaysia-Singapore* case: protest to the Netherlands and cession of the islands to Great Britain by the Sultan of Johore. Still, as we could see from other cases, the acts of protest and cession *per se* do not serve as decisive grounds for territorial title. Their effect was only evaluated in each particular case, under specific circumstances).

51 In contemporary maritime regime, in particular the delimitation of Exclusive Economic Zone (EEZ) and Continental Shelf (CS), the criterion of law centers on the single principle of equitable results/relevant circumstances. For the specific delimitation method, the roles of different principles such as natural prolongation, distance criterion, equidistance, etc., and the effect of islands were all decided on a case-by-case basis. For a discussion, *see* L. Nelson, *The Roles of Equity in the Delimitation of Maritime Boundaries*, 84 AM. J. INTL L. 837 (1990).

52 In the *Tunisia-Libya* case, ICJ stated that "[i]t seems clear that the matter continues to be governed by general international law which does not provide for a single 'régime' for 'historic waters' or 'historic bays', but only for *a particular*

Fry and Loja to simply state that because the majority in prior cases did not accept historic evidence and gave more weight to the colonial impact on the disputed lands, that these cases will provide guidance for the China Seas disputes. If one is to adopt a normative approach, without a specific analysis of all of the historic and modern evidence that is relevant in the disputes under the legal framework of inter-temporal law and effectiveness, no position could possibly be taken. Unfortunately, the legal dilemma is that although existing literature has undertaken numerous discussions and analysis of the specific evidence in the China Seas disputes, no consensus has been drawn. The existing conclusions are completely contrary to one another. This phenomenon is caused by the uncertainty of the law, which leaves great room for auto-interpretation.

Above all, it is fairly important to distinguish two easily confused concepts: one is "historical claim," the other is "historic title." According to the Oxford Dictionary, "historical" means "connected with the study of history," emphasizing a particular history that is related to the concerned matter, in other words the historical background and circumstances of the concerned matter, which is a substantive concept. [53] "Historic" means "important in history," emphasizing past events and time, which is merely a temporal concept.[54] In contemporary international law, "historic title" refers to the creation or formation of rights at a past time or during a past period. International criticisms of the Chinese claims are founded exactly on this point: that the Chinese title has never been created, nor established in pre-modern times.[55]

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régime for each of the concrete, recognized cases of 'historic waters' or 'historic bays.'" *See* Continental Shelf (Tunis v. Libya), 1982 I.C.J. 74, ¶ 100 (Feb. 24) (emphasis added). In the *El Salvador-Honduras* case, the Chamber reiterated the *Tunisia-Libya* case and stated that "[i]t is clearly necessary, therefore, to investigate *the particular history* of the Gulf of Fonseca to discover what is the 'régime' of that Gulf resulting therefrom…*the particular historical régime* established by practice must be especially important in a pluri-State bay", *see* Land, Island and Maritime Frontier Disputes (El Sal. v. Hond.), Judgment, 1992 I.C.J. 242, ¶ 384 (Sept. 11) (emphasis added).

53 *See Historic*, OXFORD ADVANCED LEARNER'S ENGLISH-CHINESE DICTIONARY (9th ed. 2018).

54 *See id*.

55 *See* for example Michael Bennett, *supra* note 10, at 446; MARK. J. VALENCIA ET AL, SHARING THE RESOURCES OF THE SOUTH CHINA SEA 22- 24 (1997); MONIQUE CHEMILLIER-GENDREAU, SOVEREIGNTY OVER THE PARACEL AND SPRATLY ISLANDS 136 (2000).

In a sense, the Chinese approach is closer to the approach taken by international courts and tribunals, in that it emphasizes the "uniqueness" of particular circumstances, i.e. the substance of the history (both medieval and modern) that China has experienced.[56] It is inappropriate to examine the Chinese claims using the concept of historic title in the case law, as the Chinese historical part of the argument emphasizes the validity of its claims under both the cultural and colonial Eastern historical circumstances. That is, the chronic and continuous connections to the islands under the medieval Eastern international order and the subsequent colonial (modern) history suffered by China, in which when compared to Japan, Vietnam, and the Philippines, China was virtually late to accept a Western standard of territorial understanding. They are "historical claims" with the substance of a particular history, rather than mere rights formed in the past. Such a Chinese approach is incompatible with positive international law of territorial acquisition, which merely accepts the nineteenth century standard of territorial sovereignty. As will be shown in later discussions, the scope of territorial sovereignty, influenced by Europe, is beyond the nineteenth century context. Therefore, the legitimacy of the Chinese claims simply cannot be sought in positive international law. The issue requires a fundamental analysis of the central concept of territorial sovereignty in international law.

The rest of this article turns to the central concept of territorial sovereignty in the disputes, to examine how the concept could be more fully understood, and to what extent historical claims could be analogized to the concept, and to international law. It argues that the key issue of the territorial disputes in the China Seas is the issue of historical origin and legitimacy of territorial sovereignty in the European background. To examine the legitimacy of the Chinese claims, it is necessary to draw a conclusion on the following issue: though historically different, whether the Chinese claims are intrinsically the same as their Western counterpart. In order to do so, a theoretical framework of their origin and the legitimacy of territorial sovereignty in the European historical background needs to first be

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56 *See* Historical Evidence to Support China's Sovereignty over the Nansha Islands, *supra* note 34.

established.[57] However, this task has never been fulfilled by Western international law.

III. TERRITORIAL SOVEREIGNTY IN CONTEMPORARY INTERNATIONAL LAW

A basic position of this article is that contemporary international law does not regulate the coming into being of European States. Such an assertion needs further elaboration for accurate understanding. The origin of sovereignty and Statehood in Europe is seen by contemporary international law as a matter of fact rather than law. This refers to the very historical origin of sovereignty in the European context and is conceptually separated from entry into international society by the non-European States during the nineteenth and twentieth century. European international law has been an international system since the peace of Westphalia, and was seemingly seen as *de facto*, pre-installed, and unquestioned. This is to say, the very origin of sovereignty—the social process of sovereignty formation—was not treated as relevant with the discipline. It declines to examine any historical, social, political, or cultural meanings of the concept of sovereignty, simply because these dimensions preceded the creation of law, and are thus not seen as legal.

During the foreign contacts between the Europeans and the non-Europeans in the early modern period, Christian relationships were formulated within a system of natural law that was underpinned by individual men as moral beings. Naturalism retreated from the historical stage in the nineteenth century when European public lawyers began to see the world as a society of States rather than as a society of peoples.[58] As a result, territorial control by States, the *de facto* constituent of Statehood, and sovereignty in Europe, was seen by modern international lawyers as the very legal basis which conferred additional rights of the European States to acquire territories outside of Europe. However, a logical problem is that the legal foundation of the original control of territory by European States had never been dealt with nor been justified by the law. In other words,

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57 The central task of this article is to conclude on the necessity of such a project. The project should be completed in a separate research.

58 Henan Hu, *supra* note 33, at 76.

international law does not deal with any matters before the emergence of the territorial State system, but rather focuses on the follow-up distribution of the earth's surface. This is the legal connotation of the concept of "territorial right" in both modern and contemporary international law.[59] It is reasonable to assert that the legitimacy of territorial right is an assumption in contemporary international law,[60] as the law never endeavours to further explore or challenge the "legal" inference of territorial acquisition. This dominant formalist understanding, about the underpinnings of international law, is the legacy of the late nineteenth century tradition of international legal positivism, which will be discussed further in later sections.

With this overview and by calling attention to the impasse of territorial sovereignty in contemporary international law, this article stresses the importance of re-conceptualizing territorial sovereignty, so as to understand this approach completely.

A. The Impasse: Interdependence of Territory and Sovereignty

The law of territory, to most international lawyers, is the discussion of how to distribute the earth's surface to separate States. The most important part of the law of territory, is the mode of territory acquisition, which is claimed as an analogy from the Roman law governing individuals' acquisition of private properties. [61] International lawyers assume that States are territorially defined and possess such rights over land,[62] and base those territorial rights on State sovereignty. It is called territorial sovereignty in spatial terms which, in a wider sense, includes land (also islands), territorial sea, and the seabed, and subsoil underneath it, as well as the airspace

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59 There are many different features between modern (nineteenth century) and contemporary (after 1945) international law. However, as the territorial regime is basically the same in the two traditions, I use the two terms together in this article.

60 A. CARTY, THE DECAY OF INTERNATIONAL LAW? A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION IN INTERNATIONAL AFFAIRS 58 (1986).

61 There are traditionally five modes of acquisition: occupation, prescription, cession, conquest and accretion, *see* BROWNLIE, *supra* note 18, at 127; SHAW, *supra* note 13, at 358.

62 For example, Brownlie stated that "[t]he legal competence of states and the rules for their protection depend on and *assume* the existence of a stable, physically delimited, homeland." *See* BROWNLIE, *supra* note 18, at 105.

above.[63] International lawyers only deal with questions of how existing States acquire new territories, but hardly ask the question of how an existing State acquired its original territory at its birth. The creation of States is treated not as belonging to the category of "the law of territory acquisition," but rather as being regulated under the concept of international legal personality and the principle of self-determination.[64] Within the creation of new States under the principle of self-determination, the control of territory has been established by the mother State, or the former protecting power, so that the question is not about the transfer of territory, but about the transfer of power.

The four criteria of Statehood, which State sovereignty relies upon, were initially provided in Article I of the 1933 Montevideo Convention on Rights and Duties of States. They include population, territory, government, and independence (capacity to enter into relations with other States).[65] Sovereignty is also understood as being equal to Statehood.[66] Regardless of the concern that the criterion of independence might be a circular definition,[67] international law here is at an impasse: territorial rights rely on State sovereignty, while State sovereignty needs territory to be created. It is not denied in the discipline that there exists an outstanding question about the legitimacy of territorial sovereignty. With respect to this outstanding question, Oppenheim suggested that the question about the formation of a new State should be regarded as a matter of fact rather than a

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63 *Id.* States' rights over EEZ and CS are slightly different. They are called "sovereign rights," as distinguished from sovereignty, for the reason that other States enjoy the freedom of navigation, over-flight and laying of submarine cables and pipelines, etc. in these zones. However, in the sense that they are spatial rights and coastal States enjoy "exclusiveness" with regard to exploration and exploitation of natural resources, the regime of EEZ and CS may be regarded as quasi-territorial. *See also* U.N. Convention of the Law of the Sea arts. 56, 58, 77, 78.

64 This phenomenon can be seen from the separate treatment of the issues of the creation of Statehood and the issues of the law of territorial acquisition in authoritative textbooks of contemporary international law, *see* SHAW, *supra* note 13; BROWNLIE, *supra* note 18.

65 *See also* BROWNLIE, *supra* note 18, at 70-72.

66 *Id.* at 106.

67 This circular problem is that an entity only obtains independence after it is created as a State, while without independence a State cannot be created. Professor Ian Brownlie acknowledges that there is a circular problem in the definition of subjects of public international law "since the *indicia* referred to depend on the existence of a legal person." However, that is "all that can be said . . . ." *See* BROWNLIE, *supra* note 18, at 57.

matter of law.[68] He pointed out that "[t]he acquisition of territory by an existing state and member of the international community must not be confused, first, with the foundation of a new state . . . ."[69] Jennings observed that the five modes of territorial acquisition were unable to provide the answer to how a State's title relates to the main portion of its territory, which was acquired "because they all assume some activity by an existing international person."[70] He acknowledged that "the emergence of the new state—by far the most important case of territorial change at the present time—in regard to which, however, international law is singularly undeveloped, uncertain, and, it must be said, comparatively unstudied."[71]

Certainly, legal discussion about territorial sovereignty can be divided into two categories: one is normative, and the other is philosophical. The legitimacy of territorial sovereignty arguably falls into the latter. Mainstream normative discussion pre-supposes the rights of States to acquire territory outside their original lands. In contrast, philosophical discussion might question the legitimacy of such rights, which may possibly deny the rightness of a part, or the entirety of a contemporary territorial regime. Unfortunately, although the pending nature of the latter aspect is undeniable, it has largely been neglected and at times considered non-meaningful.[72] It has been advocated that there is a far greater urgency for international lawyers to concentrate on the normative level of inquiry and to deal with State affairs and practices.[73]

In providing a final answer to the China Seas disputes, by proceeding from the inadequacies created by the normative approach,

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68 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 544 (H. Lauterpacht ed., 8th ed. 1955).

69 *Id.*

70 R. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW, 7 (1963).

71 *Id*. at 12. Sharma also observed this problem, *compare* S. SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW 165-166 (1997) (contrasting in that Sharma was not interested in filling this doctrinal gap which he regarded as an "omission" of the traditional modes of acquisition).

72 For example, Tamar Meisels, in her monograph which is devoted to a liberal nationalist discussion of territorial rights, stated that her book "does not question the legitimacy of territorial sovereignty" but rather assumes that "most nations possess such rights over some territory." By citing others' disdain of moral inquiry, she said the significance of ideal or philosophical level of inquiry is questionable. *See* T. MEISELS, TERRITORIAL RIGHTS 7, 9-10 (2005).

73 *Id.* at 10.

there is a demonstrated importance to pursuing philosophical inquiry into territorial sovereignty, without implicating any bias as to the normative approach in other areas of international law. The methodological crisis in the territorial regime today is such that international lawyers are consistently trapped in the dilemma of the uncertainty of the norms, leaving only auto-interpretation to dominate. The outstanding question as to the legitimacy of territorial sovereignty ought to be confronted, especially when examining the case of the China Seas disputes, where the conflict of sovereignty reaches its culmination and appears impossible to reconcile under the current regime.

B. Continuing Principle of Effectiveness

Since its widely recognized birth at the Westphalia, a central characteristic of international law has been that no international rules are to stipulate the creation of States.[74] Professor Antonio Cassese analyzed that the creation of States could only be inferred from the customary international rules that "presuppose certain general characteristics in the entities to which they address themselves."[75] These rules require two elements: "[t]he first is a *central structure* capable of exercising effective control over a human community living in a given territory. . . . The second element needed is a *territory* which does not belong, or no longer belongs, to any other sovereign State, with a community whose members do not owe allegiance to other outside authorities."[76] Cassese's analysis, as Professor Anthony Carty also points out, confirms the continuing primacy of the traditional principle of effectiveness in international legal personality or Statehood.[77] The first three criteria of Statehood in contemporary international law, i.e. population, territory, and government, respond to the principle of effectiveness, as Statehood requires a political power to establish effective control over a certain population and a territory.[78]

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74 ANTONIO CASSESE, INTERNATIONAL LAW 72 (2nd ed. 2005).

75 *Id.* at 73.

76 *Id.*

77 ANTHONY CARTY, PHILOSOPHY OF INTERNATIONAL LAW 82 (2007).

78 BROWNLIE, *supra* note 18, at 71. Professor Malcolm Shaw also comments that in the creation of Statehood, "the relevant framework revolves essentially around territorial effectiveness." *See* SHAW, *supra* note 13, at 144.

Apart from the classical view, Professor James Crawford has argued that the criteria for Statehood in international law has become more flexible in modern practice since 1815.[79] He, in particular, put forward that new criteria had been established on the principle of self-determination and illegal use of force.[80] He also classified the various dynamic circumstances under which new States come into being: occupation, dependency, devolution, secession, and the role of how international organizations affect the creation of States.[81] In his book, Crawford attempted to challenge the traditional view that the creation of States is a matter of fact and not of law. Written in 1979, Crawford's book contributed to the scholarship by pointing to important developments of international law in the twentieth century. In particular, it discussed the various ways and processes that colonies entered into the Western international system.

Unfortunately, after the wave of de-colonization in the second half of the twentieth century, international law has strengthened the application of the principle of self-determination out of the colonial context. For instance, in response to the question raised by the Republic of Serbia of whether the Serbian population in Croatia and Bosnia-Herzegovina had a right to self-determination, the Arbitration Commission of the break-up of Yugoslavia answered in its opinion No. 2, that "not all the implications of self-determination were clear under contemporary international law" and "the right of self-determination must not involve changes to frontier at the time of independence, except by agreement between the states concerned."[82] This is to say, the *de facto* territorial control of an existing State is not likely to be altered under contemporary international law. This ruling further suggested that the implication of self-determination in international law when creating new States, remains largely unclear or in fact very narrow. Thus, the principle of effectiveness, hidden in territorial integrity of existing States, persistently returns to international law.

In a word, Cassese's observation is a valid one for the contemporary era. Most crucially, the impasse or pending nature of

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79 JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW, at vii-viii (1979).

80 *See id.* at ch. 3.

81 *See id.* at parts II & III.

82 Yugoslav Arbitration Commission, Opinion No. 2, 92 INTL L. REP. 167-68 (1994); *see also* CARTY, *supra* note 77, at 79-80.

the legitimacy of territorial sovereignty in contemporary international law as analyzed in Section III. A. above puts the legitimacy of the principle of effectiveness into question.[83]

IV. RE-CONCEPTUALIZATION OF TERRITORIAL SOVEREIGNTY

Why is territorial sovereignty in contemporary international law facing such a logical impasse? Why is the "normative framework" it produces incapable of effectively solving disputes? How can we explain and understand this phenomenon? The rest of this article aims to answer these inquiries by directing particular attention to the so-called "law of territory." A famous study by Professor Antony Anghie examined the relationship between positivism and colonialism, in which he identified that the invention of the law of territory served as a legal tool for nineteenth century imperialists to annex the non-Western world, which was a result of a positivist project to extend the European system of international law into the non-European world.[84]

However, an essential question remains: why were nineteenth century positivist international lawyers charged with the task of universalizing international law, while the colonial connections with the New World had already began centuries ago under the natural law of nations? Had the legal formulation of the Europe-colony relations not already been formed by naturalism? Under what circumstances had positivism and colonialism, as Professor Angie argued, mutually constructed with each other in the nineteenth century? The shift of traditions of sovereignty in Western public law in the nineteenth century appears to explain this puzzle. This shift ultimately led to a fatal development of Statism, which is central to the establishment of the modern concept of territorial sovereignty in international law and therein the rise of the law of territory.

A. Nineteenth Century Growth of Statism

In the eighteenth century, two pivotal events in Western history were indisputably the American Revolution in 1776 and the French Revolution in 1789. The former resulted in an unprecedented political system of federalism, and the latter evoked the political ideology of

83 *See* CARTY, *supra* note 77, at 58.

84 A. ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 33 (2005).

nationalism, both of which were monumental. After the French Revolution, nationalism spread widely on the European Continent, particularly influencing Germany. The American model of federalism was also adopted in Germany and Switzerland. The United Kingdom was largely uninfluenced by the trends on the Continent and across the Atlantic; however, the Western world as a whole during the nineteenth century entered into the age of Statism, albeit with different characteristics. This section examines how Statism grew within Western public law, which serves as essential context for understanding the concept of sovereignty in nineteenth century international law.

1. In England

From roughly the late eighteenth century to the mid-nineteenth century, the classical constitutionalism of Locke, that had dominated the English tradition since the seventeenth century, gradually retreated. What replaced the classical tradition was "utilitarianism in ethics" and "positivism in jurisprudence."[85] Jeremy Bentham was a key figure in this transition. He opposed the social contract theory as the basis of political society and instead declared the principle of utilitarianism. In other words, he maintained that men in a political society submit to authority not because of their voluntary agreement, but rather because submission is in their interest as it leads to maximized happiness.[86]

John Austin, who was the successor of Bentham, also based his theory on the principle of utility and developed a unitary concept of sovereignty. For him, sovereignty was a determinate and common superior, to whom "[t]he *bulk* of a given society are in a *habit* of obedience or submission."[87] There are three elements in sovereignty: a determinate superior (certain member or certain body of a society),[88] the bulk of a given society, and habit of obedience. For the first element, Austin stated that "'[t]he state' is usually synonymous with 'the sovereign,'" and the sovereignty in England resides in "the king

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85 C. MERRIAM, HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU 131 (1900).

86 *See* J. BENTHAM, A FRAGMENT ON GOVERNMENT (1776).

87 J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 199 (1832).

88 *Id.* at 200.

and the peers, with the electoral body of the commons."[89] For the last element, Austin stated that the only cause of habitual obedience is "a perception, by the bulk of the community, of the utility of political government, or a preference, by the bulk of the community, of any government to anarchy."[90] To him, the sovereign is only part of the society, and the community as a whole is not a sovereign.

In Austin's theory, sovereignty is understood purely in legal terms. The sovereign is the source of law, the ultimate law giver, and "incapable of *legal* limitation."[91] Therefore, the king in a limited monarchy or in the modern constitutional State is not a genuine sovereign. The sovereign is not subjected to superior law and the command and will of the sovereign is the only law. At the same time, the sovereign has no legal rights against its own subjects, since this assumes a superior ruler.[92] In a word, sovereignty is the totality of which the law relies on, but sovereignty itself has no legal relation. Austin separated any social dimensions from the legal field. He focused exclusively on the enforcement or sanction of law but was not interested in how such authority was produced. To him, the sovereign itself was *de facto* and completely absolute. As a result, to Austin, the constitution could not be law, but rather only positive morality.[93]

Through these tenets, Austin was considered the founder of analytical jurisprudence. His method aims to achieve precision in the definition of terms and the rigid deduction of conclusions, which in later development through the work of Hart and Kelsen, dominated the legal discipline. Based on Austin's tenets of legal positivism, his most famous conclusion regarding international law is that international law, as law between sovereigns, cannot be regarded as positive law, but only as positive morality.[94] In opposition to his opinion, late nineteenth century international lawyers endeavoured to build a modern system of international law based firmly on positivism and the will of sovereign States.

As a supplement to Austin's pure legal and formalist theory of sovereignty, in the late nineteenth century A.V. Dicey developed a

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89 *Id.* at 235, 241.
90 *Id*. at 321-22.
91 *Id.* at 268.
92 *Id.* at 300.
93 J. AUSTIN, *supra* note 87, at 274.
94 *Id.* at 130.

dualist theory of legal and political sovereignty, which remains the mainstream British constitutional theory until this day. This theory recognizes that power backs and produces sovereignty.[95] Dicey's theory is different from Austin's, in that it separated the Commons or the Electors from the "legal sovereignty," as held by the King and the House of Lords, and proclaimed that they served as the "political sovereignty."[96] These two sovereigns were considered as absolute in their own spheres and not related to one another. The theory of Dicey has grave implications for the British imperial policy in the international field, particularly in that international lawyers began to accept that political reality exists regardless of legal principles and consequently international law must recognize political inequality between States.[97] This led to a differentiation theory of sovereign and non-sovereign States.[98]

2. In the United States

Post-Revolution America came to be the pioneer of modern federalism. The development of the theory of sovereignty, thereafter, underwent three stages in the United States. The Constitution of the United States in the first half century of its existence was *sui generis*, and its uniqueness depended on its "federal-national" characteristic, which was abnormal, particularly when compared to previous theories of sovereignty, yet perfect for the American political conditions at that time.[99] Additionally, this was featured as the idea of divided sovereignty. The 1789 Constitution was the result of a compromise between particularism and nationalism. The new government was considered neither wholly federal, nor wholly national, but rather a combination of the two. The states were made as constituent parts of the national sovereignty, while each of them retained all of the rights of sovereignty that they had before. In theory, such an arrangement may look self-contradictory initially. In practice, the governmental power was divided between the states and the new central government.

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[95] A.V. DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION *et. seq.* (1885).

[96] *Id*. at 36.

[97] *See e.g.,* THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW 92-93 (L. Oppenheim ed., 1914).

[98] *See infra* section IV.B.

[99] MERRIAM, *supra* note 85, at 162.

Sovereignty thus, was not understood as supreme, but rather as limited within the "federal-national" framework. Alexis de Tocqueville in his work *Democracy in America* commented that:

> [T]he result was, that the rules of logic were broken, as is usually the case when interests are opposed to arguments. A middle course was hit upon by the legislators, which brought together by force two systems theoretically irreconcilable. The principle of the independence of the States triumphed in the formation of the Senate, and that of the sovereignty of the nation in the composition of the House of Representatives.[100]

He considered such a system as not suitable for the centralized States of Europe.[101]

The next stage of development was marked by the contest between nationalism and particularism in the context of the Civil War during 1861-1865. During this stage, the sovereignty of government was denied by both parties. They asserted firmly that the sovereignty must reside with the people and not with the government.[102] The government was considered merely as an agent of the true sovereign. This was clearly an idea based on the Lockean model of constitutionalism. However, the two parties were in dispute over the anti-thesis of the states and the union. Representative advocators of the two positions were Daniel Webster and John C. Calhoun. Webster, whose view was supported by the Northern states contended that:

> [S]overeignty of government is an idea belonging to the other side of the Atlantic. No such thing is known in North America. Our governments are all limited. In Europe, sovereignty is of feudal origin…But with us, all power is with the people. They alone are sovereign…the people of the United States are one people.[103]

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100 A. TOCQUEVILLE, DEMOCRACY IN AMERICA 148 (F. Bowen ed., H. Reeve trans., vol. I, 1862).

101 *Id.* at 218.

102 *See* MERRIAM, *supra* note 85, at 166-67.

103 D. WEBSTER, THE PAPERS OF DANIEL WEBSTER: SPEECHES AND FORMAL WRITINGS 589, 592 (C. Wiltse ed., vol. I 1986).

To him, the unity of the union must be retained. Calhoun, the leader in the Southern movement, though in favour of popular sovereignty, rejected the social contract of men as necessary to form a political society. To him, government is a necessity rather than a choice, and it is rooted in the social and political instinct of men.[104] Sovereignty, in its nature is indivisible, and the states could not surrender any portion of their power. They could only form associations based on a constitutional compact. Therefore, the union could only be a confederation between the thirteen sovereigns. Even if Calhoun rejected the sovereignty of the government, he nevertheless made a conceded distinction between sovereignty and the attributes belonging to sovereignty. The latter, Calhoun said, could be exercised by the federal government.

Eventually, the nationalist movement came to dominate in the aftermath of the Civil War. A school of nationalism emerged.[105] Representatively, Francis Lieber defined sovereignty as "[t]he right, obligation and power which human society or the state has to do all that is necessary for the existence of man in society, is the true sovereign power."[106] For him, sovereignty was considered a natural fact that belongs to the society alone, one which cannot be fragmented.[107] He regarded that there is an essential difference between the people and the nation. While the former is merely the aggregate of the inhabitants of a territory without any additional idea, the latter is an organic unity made conscious of a common destiny.[108] E. Mulford further enriched the nationalist theory that "[t]he nation is a moral person…Personality has its condition and its realization in freedom. Personality is constituted in self-determination…The central attribute of personality is the will."[109] In the legal field, W. Willoughby confirmed that the national sovereignty of America in the

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104 J. CALHOUN, A DISQUISITION OF GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 58 (R. Cralle ed., 1851).

105 Writers in this school include Francis Lieber, John A Jameson, O. A. Brownson, John C. Hurd, E. Mulford and J. N. Pomeroy. *See also* MERRIAM, *supra* note 85, at 175.

106 F. LIEBER, MANUAL OF POLITICAL ETHICS 216 (T. Woolsey ed., 2nd ed. vol. I 1875).

107 *Id.* at 219.

108 F. Lieber, *On Nationalism & Internationalism*, *in* THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER 227, 228 (vol. II 1881).

109 E. MULFORD, THE NATION: THE FOUNDATION OF CIVIL ORDER AND POLITICAL LIFE IN THE UNITED STATES 72 (1870).

political field was absolute and unlimited State sovereignty in law. He pointed out that "sovereignty belongs to the State as a person, and represents the supremacy of its will."[110] It is limited by neither international nor constitutional law.[111] "Sovereignty, upon which all legality depends, is itself a question of fact, and not of law."[112]

As can be seen, the consolidation of the American tradition of sovereignty in the late nineteenth century was primarily a national one. This is largely due to the influence of the English—the Lockean—tradition in North America, in which the people are firmly regarded as the source of power. Thus, even though the Americans adopted a corporate conception of the union, it is composed of people from each constituent state, collectively forming an organism. Despite this, the work of Willoughby, particularly in the legal field, elaborated on the idea that sovereignty had reached a certain level of abstraction, as can be applied to a State, particularly one which is much closer to its counterpart in Continental Europe. This is especially true for Germany.

3. In Germany

Like in America, a similar unionization of states took place in nineteenth century Germany. The German Confederation was formed in 1815. During the earlier years of its existence, the Confederation was seen as an association of sovereign states, and the general theory was inclined toward a limitation of sovereignty.[113] In 1853, Georg Waitz put forward a theory that the political functions of the association should be divided into portions: while a portion was placed under the body as a whole, the rest should be in charge of the individual members. [114] Waitz reasoned that both the central government and each member thereof may be regarded as sovereigns in their own limits of sphere.[115] This theory was dominant for some

110 W. WILLOUGHBY, AN EXAMINATION OF THE NATURE OF THE STATE: A STUDY IN POLITICAL PHILOSOPHY 195 (1896).

111 *Id.* at 204.

112 *Id.* at 217.

113 MERRIAM, *supra* note 85, at 185.

114 *Id.* at 186. Please note that the theories of German publicists discussed in this section are cited secondarily, as the author cannot read and access the original German texts.

115 *Id.* at 186, 187.

time, as it was a way to resolve the conflict between nationalism and particularism.

Later, the formation of the North German Confederation and the German Empire tended to lean towards supremacy of the Confederation and the Empire. As the new theory developed, sovereignty came to be seen as the power of a community to set limits for its own jurisdiction and competence.[116] In 1868, George Meyer argued that the power of a State to determine the limits of its own jurisdiction must be an essential mark of sovereignty and that the State has the power to make whatever it chooses an object of its activity.[117] Albert Haenel argued that there was no legal superior above the sovereign State, and that self-sufficiency is the first principle for the legal self-determination of its competence.[118] For Haenel, the Empire is the true sovereign.[119] Under a similar line of argument, Paul Laband held that States are either sovereign or non-sovereign, and there is no such a thing as a half or divided sovereignty.[120] He regarded the German Empire as the sovereign, while believing that the subordinated members are not.[121]

Georg Jellinek, the Austrian publicist, modified the competence theory of States from an international perspective. He held that internally speaking, sovereignty is the power of a State to determine its own competence; but that externally this may not be sufficient.[122] Externally, Jellinek preferred to see States as being bound by the law, rather than seeing States doing whatever they want. In his theory of this legal boundness, Jellinek argued that a State can only be exclusively and solely bound by its own will. Self-obligation thus became, in Jellinek's eyes, the central mark of sovereignty.[123] In this sense, Jellinek should be considered as the most critical figure in the nineteenth century to provide a scientific foundation for international law based on liberal constitutionalism and positivism.[124] His attempt

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116 *Id.* at 190.
117 *Id.*
118 *Id.* at 191, 192.
119 MERRIAM, *supra* note 85, at 192.
120 *Id.* at 192, 193.
121 *Id.* at 193.
122 *Id*. at 193, 194.
123 *Id*. at 194.
124 *See* J. Bernstorff, *Georg Jellinek and the Origins of Liberal Constitutionalism in International Law*, 4 GOTTINGEN J. INTL L. 659 (2012).

was to build international law on the same formal foundation as public law in other fields.[125] Through a psychological approach, Jellinek argued that every legal obligation is found in the fact that the will regards itself as bound by its expression, and he considered that the law is a psychological phenomenon in human beings.[126] Using this as his basis, he was able to proceed from the subjective foundation, i.e. States' own will, as the formal ground of international law, to an "objective" international law. He maintained that the voluntary will of the States is able to generate objective international law, in that the very foundation of such "objectivity" and its binding nature, is the objective nature of international relations.[127] He saw the factual existence of international relations between States as sociologically created by the European history.[128] In other words, the "international community" had been a fact among civilized European nations, and it is this fact that serves as the objective foundation of international law. The nineteenth century German-Austrian tradition of public law, as Bernstorff pointed out, was influenced by the German tradition of idealism, which was influenced by figures including Kant through Hegel. Jellinek's theory is in particular a heritage of Hegel, who maintained that in the absence of a superior, the rights and duties of States could find their origin only in their wills. Nevertheless, Jellinek went beyond Hegel's realist picture of a temporary order between States and opted for an objective and constitutionalist one.[129]

To summarize, the nineteenth century Western public law tradition saw sovereignty as *de facto*, unrestrained, and omnipotent in which a central mark is Statism. Sovereignty became an exclusive possession of the State, as an indivisible and abstract being, which could think and will for and by itself. Since the Austrian publicist Jellinek, this tradition of Statism began to greatly influence the theory of sovereignty in international law. The nineteenth century Western public law tradition of sovereignty is essential in our understanding of the corresponding concept of sovereignty in international law during the same period.

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125 *Id.* at 667.
126 *Id.* at 669.
127 *Id.* at 671.
128 *Id.* at 672, 673.
129 *Id.* at 663-66. *See also* G. HEGEL, OUTLINES OF THE PHILOSOPHY OF RIGHT 311-315 (S. Houlgate ed., T. Knox trans., 2008).

B. Relativism of Sovereignty in International Law and the Rise of the Law of Territory

Though the nineteenth century growth of Statism in the conception of sovereignty took on different forms within the domestic spheres of different Western countries, it has had a grave impact internationally. Sovereignty in international law had been corporatized and possessed solely by the State. More importantly, the German-Austrian tradition of competence theory of States was widely adopted by international thinking. While Jellinek was a cornerstone in creating a new theoretical foundation for international law, Dicey's separation of legal and political sovereignty also greatly impacted the international legal theory during the late nineteenth century in that the political reality was seen as the point of departure of, but analytically irrelevant to the law. International law simply recognized the political reality of inequality between States, and only external sovereigns were regarded as legal. Lass Oppenheim, as the most influential international lawyer across the Anglo-American and German traditions, founded early twentieth century international law firmly on Statism. He stated clearly that:

> Sovereign States exclusively are International Persons—i.e. subjects of International Law' . . . The majority of publicists teach nowadays that neither the monarch, nor Parliament, nor the people is originally Sovereign in a State, but the State itself . . . Colonial States have no international position whatever . . . although they enjoy perfect self-government, and may therefore in a sense be called States.[130]

Influenced by the growth of Statism in the Western public law, in modern and contemporary international law, sovereignty is primarily understood as the independence and competence of States. Despite the three traditional elements of Statehood (population, territory and government), a fourth criterion is usually expressed in the words of "independence" or "capacity to enter into relations with other States."[131] While the three traditional elements were considered by

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130 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 99, 102, 103, 106, 107 (1905).

131 BROWNLIE, *supra* note 18, at 71. SHAW, *supra* note 13, at 147. *See also* Montevideo Convention on Rights and Duties of States art. I (1933).

public lawyers to suffice internal sovereignty, the fourth criterion is particularly used by international lawyers to feature external sovereignty.

A fundamental development that led to the nineteenth century understanding of sovereignty in international law was that the State began to be seen as detached from the individual. The State no longer was classified as a simple aggregate of individuals that inhabit a certain geographical sphere, but rather a completely independent moral being which has its own will and ability to decide independent of its citizens. Analogies, therefore, are no longer made regarding the likeness between humans and States as was done in the Roman, medieval, and early modern traditions, when the State was not conceived as detached from biological persons.[132] Instead, analogy now is made in the simulation between a civil society and an international society, while the solidarity of the latter is assumed. Humans and States are treated as essentially different from, yet behaviourally similar to, each other. The State is no longer viewed as constituted or willed by humans. Instead, it is a moral person created by its own idea. Such a transformation in the conception of the State did not result in any substantial difference in the national public law, as national law does not ask what the State is, but only asks who in the State holds the supreme power. However, it had grave impact upon international public law because, as the subjects of international law began to be upgraded into States, there was no relevance or place for humans in this system any longer.[133]

There has been a long historical process during which the paradigm of foreign relations shifted from the people-based Roman tradition of *jus gentium* and its early modern followers to the modern tradition of precisely "inter-State" law.[134] Against this background, the relativism of sovereignty in international law started in the nineteenth century intercourse of colonialism, in which the freshly born profession of "international lawyers" who grew out of, but were distinguished from, previous public lawyers in Europe, confronted the task to solve the difficulty of the legal relationships within the New World. In other words, nineteenth century international lawyers felt it

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132 *See* A. Carty, *Sovereignty in International Law: A Concept of Eternal Return*, *in* RECLAIMING SOVEREIGNTY 103-104 (L. Brace & J. Hoffman eds., 1997).

133 *Id*. at 104.

134 *Id*. at 103-104.

necessary to establish a juridical system that could incorporate the New World, while sustaining the "logic" of European public law as the tradition of sovereignty had shifted.[135]

The dilemma is rooted in the historical fact that during the early modern development of sovereignty, no legitimacy of the ruler to the ruled was ever provided, and sovereignty merely signified the measure of powers of the princes in a certain territorial scope.[136] This phenomenon was largely due to the sixteenth and seventeenth century conception of sovereignty and the State, in which sovereignty did not acquire any "international" characteristic, but rather was based on private possessions of the rulers, which was done in a patrimonial way.[137] This was the result of the early modern acceptance of the classical tradition of Roman natural law of people—*jus gentium*, which is essentially private in character—when dealing with external relations.[138] A strong "international" characteristic only took place when the corporate idea of the State became possible: that is since Rousseau in constitutional theory and Vattel in international theory, both of whom wrote in the late eighteenth century.[139]

Territory began to be incorporated into sovereignty through a political course, which aimed to prioritize the public security in times of war in early modern Europe, but the virtual establishment of territorial control was without any legal justification. In the early modern period, when almost all legal relations were still founded on a private basis, the lack of legal justification for territorial control of princes did not cause difficulty. That is because the subjects of all legal relations at the time were basically individuals, therefore the people in

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135 D. Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 65 NORDIC J. INTL L. 406-412 (1996).

136 Carty, *supra* note 132, at 102-103. *See also* CARTY, *supra* note 77, at 83; A. Carty, *Myth of International Legal Order: Past and Present*, 10 CAMBRIDGE REV. INTL AFF. 6 (1997).

137 *Id*. at 104.

138 *Id*. at 103, 104.

139 Rousseau is the first person in constitutional law to develop a corporate idea of the State and a general will theory. Contemporary to Rousseau, Vattel is the first person in international law to develop a corporate idea of the State and an international system purely based on the wills of States. For Rousseau's theory, *see* JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES (G.D.H. Cole trans., J.M. Dent and Sons ed. 1923). For Vattel's theory, *see* EMER DE VATTEL, LE DROIT DES GENS (Charles G. Fenwick trans., Carnegie Inst. Of Wash. 1916) (1758).

the New World were not seen as legally different from Europeans, only anthropologically undeveloped.

As time passed, the modern age of Statism and imperialism assumed the underlying "logic" of European public law and found difficulty in extending itself to the legal relations with the New World, as the subjects of foreign relations had become the corporate entities of the States. It became problematic to define the countries in the New World, whose political organizations were distinct from that in Europe and many of whom were, in earlier times, recognized by the Europeans as sovereigns, such as the East Indies and China. It was a creation of nineteenth century international lawyers to understand sovereignty in terms of "civilization."[140] They firstly denied naturalism and the universal application of positive international law in the late nineteenth century, and secondly made positive international law applicable globally by the annexation of "unoccupied" territories in Australia, Africa, and most parts of Asia.[141] It was through such a dual project that the concept of territorial sovereignty was eventually established across the whole world. However, the legal issue of illegitimacy of territorial control remained unsolved.

The major project of differentiation between the civilized and the uncivilized was initiated by the prominent American positivist international lawyer in the nineteenth century, Henry Wheaton. Wheaton denied the existence of universal international law by saying that "[t]he public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin."[142] He cited Bynkershoek, stating that "the law of nations is that which is observed, in accordance with the light of reason, between nations, if not among all, at least certainly among the greater part, and those the most civilized."[143] Professor Anghie argued for a nineteenth century re-interpretation of sovereignty from the perspective of relativism between the colonizer and the colonized, in particular, the positivist project in managing colonialism. To Anghie, this relativism came into being out of the mutual construction of positivism and colonialism. For him, the conceptualization of

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140 H. WHEATON, ELEMENTS OF INTERNATIONAL LAW 15 (G. Wilson ed., 1936).
141 ANGHIE, *supra* note 84, at 33.
142 H. WHEATON, *supra* note 140.
143 *Id.* at 16.

sovereignty in nineteenth century international law was split into two models: one European and the other non-European.

Based on such a dichotomy, different conceptual frameworks were then assigned to the European and the non-European world: "the European issue is how conflicts between sovereign states may be resolved in the absence of an overarching sovereign; the problem for the non-European world, by contrast, is its acquisition of sovereignty."[144] Most importantly, the focus on the European model decayed in a legal sense, in that sovereignty in Europe was seen as a given, and the origin of it was regarded as a myth that could not be inquired into.[145] Instead, the major legal efforts were devoted to a project that would determine what sovereignty would mean and imply within non-European societies. The positivist jurisprudence then created a fundamental tenet, which Anghie termed as the "dynamic of difference" into the concept of sovereignty.[146] Anghie thus argued that sovereignty in modern international law ought to be understood in terms of the colonial encounter—in the "civilizing mission" of the "others" by the Europeans: "the acquisition of sovereignty was the acquisition of European civilization."[147]

As a result, admission into the family of nations could only be allowed through the method of recognition from those who had naturally been full sovereigns. Namely, the judgement of a non-European country as a sovereign or non-sovereign, was purely at the disposal of the European powers. Failing the standard of European civilization (the existence of a European model of political organization), no recognition will be made, the membership into

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144 ANGHIE, *supra* note 84, at 103.

145 *See* J. WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 134-36 (1894). S*ee also* T. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 84 (1895). Professor David Kennedy analyzed in this regard that how the fundamental question of how there can be order among sovereigns was evaded and directed to a more pragmatic approach by nineteenth century international lawyers. This development culminated in the 1927 *Lotus* case in which the Court ruled that no philosophical inquiry into the nature of the legal order was necessary and helpful. During the twentieth century, the question itself was not rejected, but the project of philosophical and theoretical response was downgraded. Under a pragmatic approach, the question was addressed doctrinally, procedurally and institutionally with a pragmatic observation on the behaviors of States. Kennedy argued that the nineteenth century positivism paved the road for the twentieth century pragmatism. *See* Kennedy, *supra* note 135, at 397-403.

146 ANGHIE, *supra* note 84, at 37.

147 *Id.* at 104.

international society will be denied, and no law could be applicable to that primitive community.[148] In that way, the primitive community would be treated as merely an object of the legal relations between sovereigns. The law of territorial acquisition thus emerged as time was required for the solution of conflicts between sovereigns in the target of various uncivilized, and thus non-sovereign regions. The different destinies of China and Japan in their nineteenth century encounter with the Western powers vividly illustrated such a law: China, due to the misleading translation of international law treatise and the deeply rooted tradition of Confucianism, failed to realize the importance of "civilization," while Japan rapidly accepted and fulfilled the standard of "civilization."[149] Japan was thus recognized and admitted into the Western world, whereas China was denied the capacity to enter into international relations.

The nineteenth century was also, as Professor David Kennedy pointed out, a period in which international lawyers had a blind faith in the existence of autonomous international law, while sovereignty therein was merely a product and response to this development.[150] The strive for a common and scientific language of sovereignty in the common Roman root across the different legal traditions in Europe, resulted in the intensification of private law analogy into international public law and eventually rendered international lawyers the partners of the project of colonialism.[151] However, after a unified sovereignty in absolute and abstract terms had emerged, there grew an increasing separation between private and public, municipal and international law. Only those who practiced the newly emerged public law could be considered sovereign and the single subject of international law. This resulted in the disappearance of the recognition of indigenous normative systems in the non-European world, that remained the case

148 OPPENHEIM, *supra* note 130, at 109.

149 Lai Junnan (赖骏楠), *Shijiu Shiji de "Wenming" yu "Yeman": cong Guojifa Shijiao Chongxin Kandai Jiawu Zhanzheng* (十九世纪的"文明"与"野蛮"–从国际法视角重新看待甲午战争) [Civilization and Barbarism in the Nineteenth Century–Rethinking the First Sino-Japanese War from the Perspective of International Law], 12 PEKING U. L. REV. 109, 130 (2011) (According to Lai, W. A. P. Martin's translation of Wheaton's *Elements of International Law* changed the positivist style of the book into a natural law style so as to make it more acceptable to the Chinese people); *Id.* at 114.

150 Kennedy, *supra* note 135, at 405.

151 *Id.*

in the early nineteenth century.[152] Territorial sovereignty during this process grew as a crucial mechanism for solving conflicts among newly defined sovereigns, as a way to assert jurisdiction within one's sphere. It thus also became a mechanism for separating sovereigns and non-sovereigns, so that if a territory did not belong to any sovereign, it was *terra nullius*.[153]

The problem we are concerned with is thus clear: territorial control—a political product in early modern Europe not properly justified in law—became a central "legal" criterion to exclude the uncivilized societies from being sovereign and admitted into the international society in the late nineteenth century. Just as the nineteenth century international lawyer T. J. Lawrence stated, "modern international law, being permeated throughout by the doctrine of territorial sovereignty, has adopted the latter principle as fundamental."[154] Moreover, sovereignty was clearly delineated into two dimensions: internal and external. The two dimensions did not necessarily influence and depend on one another. While the internal aspect of sovereignty dealt with who was supreme in the society, the external aspect looked only at whether an entity was independent in relation to others. Therefore, a State might be sovereign internally, but not externally, and *vice versa*.[155] After the trend of de-colonization in the twentieth century, the sovereign status of non-European countries had eventually been admitted via the external building of independence, rather than by the recognition of their internal political structures. The legacy of the nineteenth century tradition persists nowadays, in that sovereignty is defined in relative terms of rights and duties on an equal international plane, while no substantive elements or fabrics of it, i.e. why sovereignty is sovereign internally, are discussed.

The analysis of the nineteenth century tradition of international law has demonstrated how the legal significance of the historical origin of sovereignty in Europe decayed in the colonial encounter and how the legal issue of the illegitimacy of territorial control within a sovereign went continuously unsolved. Professor Anthony Carty further noted how the law of territory was developed in the context of

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152 *Id*. at 409-11.
153 *Id*. at 408, 411-12.
154 LAWRENCE, *supra* note 145, at 190.
155 *See* MERRIAM, *supra* note 85, at 214-16.

the non-European world without a legal premise. He held that the doctrinal tendency in the law of territory could be traced to the nineteenth century growth of Statism, which was influenced by international lawyers who had adopted a competence theory of law.[156] This competence was considered legally granted by international law, in which international jurists began to see territory as an essential element of Statehood. Carty attributed the rise of the law of territory in the eighteenth and nineteenth century to the balance of power doctrine in the public law tradition, resting on European treaties. He pointed out that before the Industrial Revolution, power was measured mainly in terms of territory.[157] However, the intra-Europe treaty framework of territorial settlements, e.g. marriage, inheritance, or cession, which affected the balance of power, were not seen as legal in the sense of forming part of the modern law of territory.[158] It was denied that there had existed general rules of territory in the European frontier disputes.[159] Hence, in the sense of the formation of modern law of territory, it was only a question of the legal rights to acquire marginal and remote territory outside of Europe. As a result, "law focused on method of acquisition of territory and not the uses to which it might be put."[160] Carty identified that the transplanting of private property concepts into the international law of territory, was to conceptually make the law concerned with "exchange," but not with "use." "Use" is only within the discretion of the owner.[161] Therefore, the law is not concerned with whether there should be rights over territory but is merely concerned with the transfer of territory. He thereby argued that the international legal system was hypothetical and supposed that "no social, material or other basis was provided."[162] He commented in particular that "[t]he real problem is that in certain circumstances effective control of territory is undermined because the legitimacy of this control is in question."[163] This statement echoes the aforementioned impasse of international law, in which territorial sovereignty is pre-supposed and not justified by law.

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156 CARTY, *supra* note 60, at 43.
157 *Id.* at 48.
158 *Id.*
159 *Id.* at 49.
160 *Id.* at 43, 44.
161 *Id.* at 53.
162 CARTY, *supra* note 60, at 44.
163 *Id.* at 58.

C. Internal and External Territorial Rights: Implications for the China Seas Disputes

In the previous historical analysis, the circumstances were outlined to showcase how the law of territory developed, independent of a legal foundation. The law of territory in its formation was, in reality, the law of acquiring marginal territories. It can be perceived that the territory in Statehood and the territory a State acquires after its birth, are conceptually not the same thing. To mingle these two concepts of territory, causes both confusion and creates an impasse of international law as previously stated.

The dualism of the nineteenth century conception of sovereignty into internal and external sovereignty has made clear that there exist two different types of territorial rights, which modern and contemporary international law is indifferent to distinguish. One is a State's right to its original territory, the one that the State is based on (hereafter "internal territorial right"). The other is a State's right to marginal territory, the one that the State acquires after its birth (hereafter "external territorial right"). It is fairly necessary to differentiate these two kinds of territorial rights, for the reason that they in fact derive from different sources. The former, in particular due to its European origin, has so far been a matter of political fact rather than law, while the latter is an inference from the former and is therefore assumed. Both are not properly justified by law. The law of territory only focuses on acquisition of external lands but is never conscious about the internal premise of territorial rights. Such a negligence of internal territorial right is caused by the nineteenth century positivist exclusion of the origin of sovereignty from the law. The positivist conception of sovereignty understood itself, only through expansion and extension (acquisition of external territories).[164] Therefore, it is not possible to make clear what internal territorial right is by merely inquiring into modern and contemporary international law. The law of internal territorial rights must be about the historical origin of sovereignty in Europe, that is before the modern international law was created. The conceptualization of internal territorial right ought to be an engagement of interdisciplinary analysis about the origin of sovereignty and territory, so as to establish its legal aspects. In this regard, a way to examine the legitimacy of China's

164 Anghie, *supra note* 84, at 57.

historical claims to territorial sovereignty, is to determine whether China's historical evidences can theoretically be tested under the law of internal territorial right. As such, what suffices as a European title to territorial sovereignty in a legal sense, is the most essential question.

The concept of external territorial right mainly refers to the modern law of territorial acquisition. Still, it is necessary to refine the meaning of external territorial right. There are five traditional modes of territorial acquisition in the doctrine: occupation, prescription, conquest, cession, and accretion.[165] Not all five of the modes fall into the category of external territorial right. A distinction should further be made, as to whether they create or transfer territorial sovereignty for States. This is to say, if a mode deals with original territorial sovereignty within a State, this mode should be regarded as transfer of existing territorial sovereignty and relates more to internal territorial right. If a mode deals with the creation of a new territorial sovereignty for States over a piece of land, that created territorial sovereignty should be regarded as an external territorial right. Occupation and accretion are two modes of territorial acquisition that create territorial sovereignty (original titles) for States over a piece of land.[166] Occupation can be regarded as the typical mode of external territorial right. Accretion is likened to a physical process and usually involves very tiny pieces of land. Its legal effects in territorial changes could almost be ignored. It is legally not very significant to talk about accretion, though it creates an external territorial right. Conquest and cession are two modes that deal with the transfer of existing territorial sovereignty from one State to another.[167] The territory concerned should first have been that of the original territory of one State, and the transfer of territory is done in a way so as to transfer the internal supremacy of that place. In this sense, these two modes are related to internal territorial right, in that they establish a new power over a territory, rather than create a new territory by a power.

Prescription is the most difficult mode to categorize. On the one hand, it recognizes the existence of a prior owner in the first instance. However, on the other hand, a long period of possession of a territory, without protest from the prior owner, signifies that the land has been abandoned and become *terra nullius*. Thus, it is unclear whether

165 *See* SHAW, *supra* note 13, at 358; BROWNLIE, *supra* note 18, at 127.
166 BROWNLIE, *supra* note 18, at 127.
167 SHAW, *supra* note 13, at 360-61.

prescription creates or transfers territorial sovereignty. Doubt had been raised over the classification of prescription.[168] Fortunately, this ambiguity does not influence the China Seas disputes, as only the mode of occupation is officially resorted to by Japan, Vietnam, and the Philippines. As the doctrine of occupation assumes a pre-existing international person—a modern State—to carry out the act of occupation, it relies on pre-existing territorial sovereignty of the occupying State. As noted earlier, the legitimacy of occupation or external territorial right depends on the legitimacy of original territorial sovereignty or internal territorial right. The pending nature of the legitimacy of territorial sovereignty in modern international law makes the legal validity of the doctrine of occupation an open question.

V. CONCLUDING REMARKS

The philosophical inquiry in this article establishes a new analytical framework to apply to and examine the China Seas claims, focusing on the central concept of territorial sovereignty rather than the modes of territorial acquisition. The re-conceptualization of territorial sovereignty into internal and external territorial rights, serves as the central pillar for further exploration into the legitimacy of territorial sovereignty. This article broadens the existing legal vision of the concept of territorial sovereignty, in particular its political underpinnings and the historical context of how the law of territory grew. Under such a contextual analysis, it situates the conflict between China's historical claims and the modern claims of other disputants, into the outstanding question of the legitimacy of original territorial control by European States in international law.

Therefore, a final answer to the China Seas disputes cannot simply be sought in positive international law, as the scope of the central conflict goes beyond the theoretical framework of international legal positivism. For a final conclusion on whose title is legitimate in the territorial disputes in the China Seas, it is necessary to examine two further issues: first, the historical origin and legitimacy of territorial sovereignty in Europe, which requires interdisciplinary

168 *See* D. Johnson, *Consolidation as a Root of Title in International Law*, 13 CAMBRIDGE L.J. 215, 217 (1955). For a specific survey on prescription, *see* D. Johnson, *Acquisitive Prescription in International Law*, 27 BRIT. Y.B. INTL L. 332 (1950).

analysis, engaging social, political and historical dimensions into law and second, the legal validity of the doctrine of occupation under the framework of international legal positivism.[169]

169 The second task has been completed by me. *See* Henan Hu, *supra* note 33.