

Legal Status of the Airspace Over an Indeterminate Territory: The Case of the Spratly Islands

Herbert Aclan Loja

Structured Abstract

Article Type: Research Paper¹

Purpose—This paper proposes an alternative approach in addressing the legal status of the Spratly Islands and its superjacent airspace.

Design, Methodology, Approach—The paper adopts the conceptual framework of territorial sovereignty indeterminacy first articulated in the case of *Eritrea v. Yemen* (1998) in determining the legal status of the Spratly Islands. Relevant provisions of the 1951 San Francisco Peace Treaty and pertinent United States of America (U.S.) archival records will be examined.

Findings—The proposition that the Spratly Islands may have the status of an indeterminate territory possessed of an indeterminate territorial airspace finds strong support from the terms of Article 2(f) of the San Francisco Peace Treaty and from the behavior of the states parties particularly of the U.S. before, during, and after the conclusion of the treaty.

Practical Implications—The paper invites a reassessment of the foundation of the claimant states' territorial claims to the Spratly Islands based on ancient or historic title and *res nullius*. It advocates for a less adversarial way of pressing for the claims.

Originality, Value—This is the first instance where the concept of indeterminate territory is applied in examining the legal status of the Spratly Islands and its airspace.

Address: Room 5.24, Cheng Yu Tung Tower, Centennial Building, University of Hong Kong, Faculty of Law, Pokfulam Road, Hong Kong SAR, Mobile: +852-90720833; email: attyherlo@yahoo.com; h1298547@connect.hku.hk



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Introduction

The People's Republic of China (China) has announced on several occasions that it is keeping open the option to declare an air defense identification zone (ADIZ) in the South China Sea (SCS) which may cover the disputed area of the Spratly Islands.² Maritime powers particularly the United States of America (U.S.) and the United Kingdom (UK) have declared that they will continue to exercise their international law right of navigation as well as overflight in the relevant areas of the SCS.³ While existing literature has dealt with these high seas rights in relation to the Spratly Islands and the SCS, no attempt has been made to look at the legal status under international law of the airspace superjacent the Spratly Islands. Dutton talks of freedom of navigation and overflight in the context of the exclusive economic zone (EEZ) in the SCS including the Spratly Islands.⁴ Yang articulates the observance of these freedoms in the SCS and the Spratly Islands in accordance with international law.⁵ Roach speaks of the right of overflight in relation to Chinese artificial islands in the Spratly Islands.⁶

This paper takes a different approach by employing the ruling in *Eritrea v. Yemen* and argue that an indeterminate territory, not being *res nullius* or *res communis*, generates its own territorial airspace which, although considered also as indeterminate for being an inseparable part of the subjacent indeterminate territory, is no longer part of the international airspace. Claimant states may consequently subject the territorial airspace of an indeterminate territory to domestic law jurisdiction.

The current disputed status of the Spratly Islands will be explored along this line. Part I of the paper examines the issue of territorial sovereignty indeterminacy under international law and relates it to the question of whether the legal status of the Spratly Islands may be described as one of indeterminacy. Part II then proceeds to consider the legal status of the Spratly Islands as one of indeterminacy. Part III explores the legal status of the airspace above the Spratly Islands and its implications. Part IV looks at the intermediate considerations in view of the indeterminate status of the Spratly Islands and its airspace in the midst of a seemingly intractable territorial dispute. Part V concludes that notwithstanding the indeterminate territorial status of the Spratly Islands, its air column, even if arguably also indeterminate, no longer forms part of the international airspace and can be subjected to the municipal jurisdiction of any claimant state.

The paper will not address which country has a better claim, right or title to the Spratly Islands. Any reference with respect to the basis of the contending claims is done solely for the limited purpose of seeking to establish the status of territorial indeterminacy of the Spratly Islands.

I. Territorial Indeterminacy: Concept in *Eritrea v. Yemen*

The notion of territorial indeterminacy may be said to have been first articulated in the case of *Eritrea v. Yemen*.⁷ The arbitral tribunal in this case speaks of two instances where the status of territorial indeterminacy may arise. Indeterminacy may ensue by reason of treaty or as a consequence of the application of the principle of *uti possidetis*.

A. Indeterminacy Arising by Treaty

Sovereign title to a territory may become indeterminate by treaty stipulations when the former sovereign renounces title over a territory to unnamed recipients and the settlement of the question of sovereignty is reserved by the states parties.⁸ In the peace settlement following the First World War (World War I), the Allied Powers signed with Turkey the Treaty of Lausanne on July 24, 1923.⁹ Article 15 of the treaty explicitly provided for the relinquishment by Turkey of specific islands in the Aegean in favor of Italy.¹⁰ However, Article 16 of the treaty, dealing with the renunciation of rights and title by Turkey with respect to other territories, not only lacked specificity as to the territories subject of the renunciation but also did not provide for the recipients in whose favor the renunciation was made.¹¹ It merely stipulated that “the future of these territories and islands being settled or to be settled by the parties concerned.”

Eritrea and Yemen agreed to arbitrate their dispute over the islands and islets which straddled the Red Sea opposite their respective coasts. They asked the tribunal to *inter alia* make “an award on territorial sovereignty” and to base the ruling on the applicable international law particularly that of historic titles.¹²

Acts of the Colonial Powers in the Inter-war Period. The actuations of colonial powers Italy and Great Britain during the inter-war period, before and after the signing of the Treaty of Lausanne, were crucial to the finding of the status of indeterminacy of the islands. It appeared that the proviso in the treaty placing the islands under indeterminate status was framed in consideration of the Italian territorial ambitions and claims of title by Yemen.¹³ But in particular, the arbitral tribunal looked at the 1938 Rome Conversations between Italy and Great Britain which contained the understanding to keep the status of indeterminacy of the islands.¹⁴ It determined such understanding as consistent with the purpose of Article 16 of the treaty.¹⁵ In addition, administrative powers and functions exercised by Italy over some of the islands always came with repeated assurances to the British on preserving the indeterminate status of the islands.¹⁶ During its presence in the area until 1967, the British vigilantly maintained the legal status of indeterminacy of the islands in accordance with the treaty.¹⁷

The arbitral tribunal interpreted Article 16 of the Treaty of Lausanne to have resulted to a situation where what was previously a sovereign title of Turkey became indeterminate *pro tempore* until title was settled by the concerned parties, “present

(or future) claimants *inter se*.¹⁸ In other words, it “created for the islands an objective legal status of indeterminacy pending a further decision of the interested parties.”¹⁹ But no such settlement or attribution of title was subsequently had.

Historic or Ancient Title. The tribunal characterized historic title into two imports. One sense speaks, though not exclusively, of historic bays where a title “has so long been established by common repute that this common knowledge is itself a sufficient title.”²⁰ The other relates to a title “that has been created, or consolidated, by a process of prescription, or by possession so long continued as to have become accepted by the law as title.”²¹ This latter sense relies in essence on “continuity and the lapse of a period of time.”²²

Eritrea traced its historic title argument through the alleged title of Ethiopia which the latter was said to have inherited from Italy when the Italian colony of Eritrea became federated with Ethiopia in 1952–1953 and subsequently annexed by the latter.²³ When Eritrea became independent in 1993, it allegedly succeeded to the title of Ethiopia over these islands.²⁴ Moreover, it contended that Article 16 of the Treaty of Lausanne which provided for the future settlement of the islands to the parties concerned transformed the former Turkish islands in the Red Sea into *res nullius* susceptible of acquisition under international law.²⁵ And through effective occupation, it further bolstered its territorial sovereignty claim.²⁶

Yemen asserted that its ancient and historic title over the islands could be traced all the way back to the existence of an entity, *Bilad el-Yemen*, in the 6th Century A.D.²⁷ This entity supposedly survived and retained its separate identity even when it was incorporated into the Ottoman Empire and an administrative unit known as *vilayet* of Yemen created in its place.²⁸ Yemen argued that this ancient title never ceased to exist even when Turkey lost World War I in 1918 and as a consequence was made to renounce title to some territories under the Treaty of Lausanne.²⁹ With Turkey’s renunciation of the title over the islands in the Red Sea, it concluded that title over them reverted back to Yemen.³⁰ Since Yemen was not a party to the treaty, the treaty should be considered as *res inter alios acta* as regards Yemen.³¹

Non-Survival of Historic or Ancient Title. In dispensing with the respective claims of historic or ancient title of Eritrea and Yemen, the arbitral tribunal ruled that these purported titles did not survive the medieval conquests and western colonialism.³² It recalled the Ottoman and Turkish hegemony and the change in the power relations upon the entry of Italy and Great Britain in the area.³³

Eritrea’s alleged historic title originated when Italy, without the consent of Turkey, entered into agreements with local rulers, began colonizing the African coast, and declared the creation of the colony of Eritrea.³⁴ Italy was among the victorious Allied Powers which defeated Turkey in World War I, consequently resulting to the signing of the Treaty of Lausanne where Turkey renounced under Article 16 its possessions in the Red Sea area.³⁵ But Italy was itself stripped of its African possessions when it became one of the losing parties in the aftermath of the Second World War (World War II).³⁶ Article 43 of the 1947 Treaty of Peace with Italy contained another renunciation, general in nature, where Italy renounced whatever rights and claims it had under Article 16 of the Treaty of Lausanne.³⁷ But during the inter-war period,

Italy and Great Britain maintained the status of indeterminacy of the islands.³⁸ As previously mentioned Eritrea became part of a federation with and then annexed by Ethiopia. After a long civil war, it gained its independence in 1993. Its so-called “chain of titles” was, according to the tribunal, not definitive and continuous.³⁹

With respect to the ancient title claim of Yemen, the tribunal determined the lawful character of the military occupation of Yemen by the Ottoman under the principle of intertemporal law.⁴⁰ Otherwise stated, since conquest at the time was considered a lawful mode of territorial acquisition, Ottoman sovereignty over Yemen was likewise lawful. More importantly, it was not disputed that Turkey used to be the recognized sovereign power over both the African and Arabian littorals of the Red Sea area until 1880 and remained so with respect to the Arabian littoral until Turkey lost in World War I.⁴¹ When it signed the Treaty of Lausanne and renounced all its possessions in the Red Sea, it did so as a sovereign with the unencumbered power to alienate its territorial possessions.⁴²

The tribunal also noted that the western European powers dominated the Red Sea area that both Ethiopia and Yemen could exercise acts of state authority over the islands only after the British left in 1967.⁴³ It resolved that even assuming the historic and ancient titles of Eritrea and Yemen, respectively, existed, they simply did not survive military conquest and colonialism. The continuity of whatever historic or ancient title they had was broken and could not be construed as peaceful, established, and uninterrupted.⁴⁴

Not Res Nullius and No Automatic Reversion. Contrary to the view expressed by Eritrea, the islands in spite of their indeterminate status did not become *res nullius* and open to unilateral territorial acquisition.⁴⁵ They remained covered by the Article 16 provision that their title was to be settled by the “concerned parties.”⁴⁶ This particular provision negated the “possibility that a single party could unilaterally resolve the matter by acquisitive prescription.”⁴⁷ Neither could title automatically revert back to Yemen for lack of continuity since as previously noted its purported title did not survive Ottoman military occupation and western European colonialism.⁴⁸

Res Inter Alios Acta Unavailing. Yemen posited that the Treaty of Lausanne was *res inter alios acta* with regard to Yemen since it was not a party to the treaty.⁴⁹ It was alleged that the treaty could not impinge upon the prior existing ancient title of Yemen.⁵⁰

The arbitral tribunal explained that while treaties respecting boundaries and territories are *res inter alios acta* as to third parties, they nonetheless possess a legal reality which has *erga omnes* effect upon non-parties.⁵¹ A non-party which has a better title than the party making a disposition can therefore legally raise the principle of *res inter alios acta* since no such transfer could be effected without its consent.⁵² While technically the treaty was *res inter alios acta* as to Yemen, it was legally unavailing because Turkey had title to the islands at the time when the treaty was entered into between the parties.⁵³ Parties to the treaty, which included Turkey, had in 1923 the power over the disposition of the islands.⁵⁴

Inapplicability of the Concept of Sovereignty Title. The arbitral tribunal found it unconvincing to extend the same understanding of the concept of sovereignty to

the pre-Ottoman Yemen. It doubted whether the authority of a medieval mountain territory of Yemen could encompass the islands.⁵⁵ It considered as problematic the “sheer anachronism” of attributing to pre-Ottoman Yemen the “modern Western concept of a sovereignty title, particularly with respect to uninhabited and barren islands used only occasionally by local, traditional fishermen.”⁵⁶

Recent Effectivities or “Historic Claim of a Different Kind” as Basis of Award. In the end, with Eritrea and Yemen failing to prove that their historic titles over the islands, islets, and rocks were “of such long-established, continuous and definitive lineage,”⁵⁷ the tribunal had to resort to the “relatively recent history of use and possession” to support its award on territorial sovereignty.⁵⁸ This recourse was entertained because Eritrea and Yemen also relied on “a form of historic claim of a rather different kind,” that is, one founded “upon the demonstration of use, presence, display of governmental authority, and other ways of showing possession which may gradually consolidate into a title.”⁵⁹

Recognition of Historic Rights. Eritrea and Yemen established that there existed a traditional fishing regime governing both Eritrean and Yemeni fishermen in some of the disputed islands.⁶⁰ After awarding the territorial sovereignty of the various islands to the two claimant states, the tribunal obligated Yemen with respect to certain islands to ensure respect, free access and enjoyment, and perpetuation of the traditional fishing regime.⁶¹ It reasoned that the award and exercise of sovereignty was “not inimical to, but rather entails, the perpetuation of the traditional fishing regime.”⁶²

B. Indeterminacy Arising in Relation to *Uti Possidetis*

The principle of *uti possidetis* aims to secure “respect for the territorial boundary at the moment when independence is achieved. Such territorial boundaries might be no more than delimitation between different administrative divisions or colonies all subject to the same sovereign.”⁶³ In other words, “the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.”⁶⁴ The status of indeterminacy may arise in the course of the application of the principle when the extent of the administrative boundaries which became the international borders of post-colonial states is not known or cannot be ascertained with certainty.⁶⁵ The arbitral tribunal in *Eritrea v. Yemen* expressed some hesitation whether the principle of *uti possidetis* which was then “thought of as being essentially one applicable to Latin America” could be extended to the situation in the Middle East after World War I.⁶⁶ Nonetheless, even during the Ottoman sovereignty of both sides of the coasts of the Red Sea, it was not clear which island or islands come within the administrative jurisdiction of which Ottoman administrative coastal entity.⁶⁷

This indeterminacy arising from the uncertainty of administrative boundaries prior to the breakup of an empire will not be further elucidated since it does not appear to be relevant to the discussion of the Spratly Islands. In the Spratly Islands situation, there was no erstwhile empire in common which broke up and gave rise to several states upon decolonialization.

C. Indeterminate Territory and Disputed Territory Distinguished

From the previous discussion, an indeterminate territory may be distinguished from disputed territory primarily on the basis of the treatment of title. As to the former, the sovereignty title of a territory is held in abeyance by treaty or becomes uncertain because of undetermined administrative borders of the preceding state prior to its breakup into new states.⁶⁸ As to the latter, the issue relates to which claimant state has superior or better title to a territory.⁶⁹ In addition, the former cannot be acquired by acquisitive prescription for being no longer *res nullius*⁷⁰ while in the latter, acquisitive prescription may be a basis to establish title.⁷¹ It may happen that an indeterminate territory may be the subject of a territorial dispute where the issue of superior or better title, right, or claim would arise.⁷²

D. Summary

Indeterminacy may occur when the contracting parties to a treaty agree to keep the title over a particular territorial possession indeterminate (such as a renunciation to unnamed recipients) to be settled at some future time. The contracting parties must have the power or authority of disposal over the territory in question.⁷³ There exists a claimant or claimants with respect to the territory subject of the disposition. And when the question arises on the status of the title to the territorial possession, the acts of the contracting parties prior, during, or subsequent to the treaty confirm the preservation of the status of indeterminacy.

Indeterminacy may also arise in the course of the invocation of *uti possidetis*. Such is the case when the former administrative borders of an empire or state, which become international boundaries upon the creation of new states, are not certain.

In essence, for a territory to be considered indeterminate, it must have already been brought to the sovereignty of a state. Territorial sovereignty then becomes uncertain, not because of abandonment, but by reason of treaty stipulations or unclear former administrative borders upon the break-up of a state.

II. Spratly Islands: Legal Status of Indeterminacy

With the decision in *Eritrea v. Yemen* serving as reference, the legal status of the Spratly Islands will be evaluated in the light of the San Francisco Peace Treaty, the acts of some of the states parties prior to, during, and after the conclusion of the agreement, and the legal import of the contending claims of China, Vietnam, and the Philippines.

A. The Spratly Islands

There is no commonly agreed understanding of what constitutes the Spratly Islands.⁷⁴ During the negotiation for the extension of the U.S. military bases in the

Philippines in 1976, former U.S. Ambassador to the Philippines Sullivan remarked that the breadth of the Spratly Islands depends on who defines it.⁷⁵ Dzurek observed the lack of a commonly agreed definition of the Spratly Islands.⁷⁶ But there is a common understanding that it is “measurable and identifiable.”⁷⁷

Hancox and Prescott treat the Spratly Islands region, with the exception of Luconia Shoals, as lying “south of 12°N and seawards of the 200 metres isobath off the continental and insular coasts that define the South China Sea.”⁷⁸ Prescott and Schofield clarified this to mean the “many islands, rocks and reefs ... located in the southern part of the South China Sea extending for approximately 460 nm from southwest to northeast and 220 nm from east to west.”⁷⁹ They computed the “area of land, sea and seabed lying within the line of equidistance surrounding the Spratly Islands [as measuring] 165,000 sq. nm.”⁸⁰ Corder describes the Spratly Islands as “situated in the South China Sea,” comprising of “a collection of hundreds of shoals, reefs, atolls, and small, mostly uninhabited islets.”⁸¹

British Claim, French Annexation, and Japanese Shinnan Gunto. The British claim published in Hong Kong in 1889 covers only the Spratly Island and Amboyna Cay features.⁸² It describes the Spratly Island as “situated in Latitude 8° 38' N., and Longitude 111° 54' E.,” and the Amboyna Cay at “Latitude 7° 52' N. and Longitude 112° 55' E.”⁸³ There appears to be no record of protest from any state regarding the British claim.

When the French formally declared on July 25, 1933, the annexation of “six small islands, with their dependent islets, which lie between 11° 29' and 7° 52' N. Lat. and 114° 25' and 111° 55' E. Long.” in the South China Sea,⁸⁴ they expanded the Spratly Islands to include the Spratly Island and the Amboyna Cay, previously claimed by the British, as well as Itu Aba, North Danger, Loaita, and Thitu.⁸⁵ Like the British, they did not enclose their claim within definite boundaries.

On March 31, 1939, the Japanese, unlike the British and the French, enclosed their claim in the Spratlys area within clearly identifiable metes and bounds. They named the annexed territory as Shinnan Gunto (Sinnan Islands) which not only encompassed the British and French claims but also covered other insular features.⁸⁶ This area, which lies “in the east central portion of the South China Sea, between 7° and 12° N. Lat. and 111° 30' and 117° E. Long.,”⁸⁷ had been substantially enlarged by the Japanese to cover thirteen identified small islands and other unidentified coral reefs.⁸⁸ This territorial entity at the point “nearest the Philippines is only 48 statute miles from the southern tip of the island of Palawan, but the nearest island is some 200 miles distant.”⁸⁹

Philippine Kalayaan Island Group, Vietnamese Truong Sa, and Chinese Nansha. Like Japan, the Philippines enclosed its claim in the Spratly Islands within well-defined coordinates and named it the Kalayaan Island Group (KIG). Under Presidential Decree No. 1596 promulgated on June 11, 1978, KIG lies between 7° 40' and 12° N. Lat. and 112° 10' and 118° E. Long.⁹⁰ While it does not include the Spratly island itself, which is situated at 8° 38' N. Lat. and 111° 54' E. Long., it covers all the insular and other features, including the sea-bed, sub-soil, continental margin as well as the superjacent airspace.⁹¹ In 2009, the Philippines changed the status of the KIG, for

purposes of determining the baselines, to that of regime of islands pursuant to Article 121 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).⁹²

Both Vietnam and China claim the entire Spratly Islands which they consider as an archipelago, Truong Sa in Vietnamese and Nansha in Chinese.⁹³ They have not defined the exact extent of their archipelago's boundaries.⁹⁴

B. A Case of Indeterminacy

The legal status of the Spratly Islands has been the subject of conflicting assertions. Even legal experts, academics and commentators are divided on the issue of which state has title to or superior or better claim to the area.

Guo and Jiang basically rely, among other things, on discovery and occupation (including acts of administration), historic title, and the recovery of the islands after World War II as basis for China's claim over the Spratly Islands.⁹⁵ Chiu and Park suggest that China appears to have a stronger claim to the Spratly Islands based on occupation of the islands post-World War II.⁹⁶ Dzurek concludes that the Republic of China (ROC) has the strongest claim but the claim suffers from the non-recognition of ROC's government by the other claimants.⁹⁷

Dupuy and Dupuy maintain that China's claim to the Spratly Islands based on historical factors will not pass the standards of public international law as China has not exercised sovereign authority in an effective, continuous, and peaceful manner, free from protests and objections from other interested states such as Vietnam.⁹⁸ Nguyen argues that the Spratly Islands belong to Vietnam by historic title as shown by acts of state authority exercised by the Nguyen Lords and Kings and as a successor to the titles, rights, and claims of France and the erstwhile Republic of Vietnam.⁹⁹

Roque doubts whether Vietnam's claim can prevail over that of China's because of estoppel and remains skeptical whether China "can present the most superior claim" on the basis of historic title.¹⁰⁰ He opens the possibility that the Philippines can establish a better claim based on geography and the effect of the Japanese renunciation.¹⁰¹ Yorac contends that the Spratly Islands may properly belong to the Philippines by reason of effective occupation after the islands became a "territory without owner or effective sovereign" when Japan renounced its right to the islands to unnamed recipients.¹⁰² Aguda and Arellano-Aguda press the case for the Spratly Islands as properly belonging to the extended continental shelf of the Philippines.¹⁰³

This paper takes the view that title to the Spratly Islands remains indeterminate. The states parties to the 1951 Treaty of Peace with Japan (San Francisco Peace Treaty)¹⁰⁴ decided to keep it indeterminate primarily because of the question on Chinese representation.

Article 2(f) of the San Francisco Peace Treaty. After the defeat of Japan in World War II, she was stripped of some of her territories and possessions. With respect to her possessions in the SCS particularly the Spratly Islands, Article 2(f) of the San Francisco Peace Treaty provides that "Japan renounces all right, title and claim to the Spratly Islands..." Like Article 16 of the Treaty of Lausanne in *Eritrea v. Yemen*, Article 2(f) did not state the beneficiary of Japan's renouncement of right, title and

claim and the manner in which the settlement of title to the territory be effected. While the Treaty of Lausanne expressly reserved the settlement of the territorial title to the interested parties, the San Francisco Peace Treaty was simply silent as to the future and manner of settlement of the status of or title to the islands.

This silence was deliberate. U.S. delegate John Foster Dulles confided that there were some Allied Powers which suggested for the definitive disposition of each of the former Japanese territories.¹⁰⁵ But this recourse would elicit intractable disagreements among the allies as to what should be done to these territories.¹⁰⁶ The preferred course was to leave their disposition to the future through international processes other than the San Francisco Peace Treaty.¹⁰⁷

The subsequent 1952 Treaty of Peace between the Republic of China and Japan¹⁰⁸ did not appear to help clarify the issue of the territorial sovereignty over the Spratly Islands. Article 2 of the treaty simply recalled Article 2(f) of the San Francisco Peace Treaty by stating that “[i]t is recognised that under Article 2 of the Treaty of Peace which Japan signed at the city of San Francisco on 8 September 1951..., Japan has renounced all right, title, and claim to ... the Spratley Islands....”

State Acts Before, During, and After the Conclusion of the San Francisco Peace Treaty. During the course of World War II, the leaders of the United States, China and the United Kingdom met in Cairo, Egypt from November to December 1943. On December 1, 1943, they issued the Cairo Declaration which *inter alia* sought, after the unconditional surrender of Japan would have been achieved, to strip Japan of “all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914.”¹⁰⁹ These island territories also included the Spratly Islands.¹¹⁰ This was followed on July 26, 1945, with the issuance of the Potsdam Declaration by the heads of the Governments of the U.S., China, and the UK, and later concurred in by the Soviet Union, which reiterated that the “terms of the Cairo Declaration shall be carried out.”¹¹¹ The Potsdam Declaration aimed at limiting the extent of Japanese sovereignty to the “islands of Honshu, Hokkaido, Kyushu, Shikoku and such other minor islands” to be determined by the four allied powers.¹¹²

Almost contemporaneous to these events, the United States Department of State (U.S. DOS) began considering for post war foreign policy planning the strategic implications of the transfer of sovereignty of the Spratly Islands to France, the Philippines, and China.¹¹³ The U.S. DOS Territorial Subcommittee of the Division of Political Studies perceived that France had a “stronger claim to sovereignty than any other state on the basis of first formal annexation of part of the islands and of acts which might be regarded as constituting occupation” and saw the transfer of possession to France (or to the Indo-Chinese government) as presumably not constituting a security threat to the other territories of the SCS.¹¹⁴ But it viewed this option as possible of arousing “resentment in China” and “would be regarded by many, in view of the exceptional physical characteristics of the islands, as less desirable than international control.”¹¹⁵

As regards the suggestion that the islands be handed over to the Philippines, the subcommittee noted at the time that the Philippines had “made no official claim to the Spratly Islands, but some of the leading Filipinos have expressed a keen interest

in them, based on the principle of propinquity.”¹¹⁶ The Japanese-claimed Shinnan Gunto ocean area was “closer to the Philippines than to any other territory” and lay “on the direct line between Manila and Singapore.”¹¹⁷ The subcommittee nonetheless opined that “it might be inadvisable to deny the stronger legal claim of France in favor of the Philippines.”¹¹⁸ Besides, it took into account the latter’s “negligible amount of shipping” and lack of experience in administering dependent islands.¹¹⁹

With respect to the option of transferring the islands to China, the subcommittee regarded China’s claim as not appearing “to have substantial foundation.”¹²⁰ It noted that the “American Embassy at Nanking reported that the Chinese claim was weakened by the fact that a Chinese official textbook described the southern boundary of Chinese waters as extending just below Paracel Island, considerably to the north of the area in dispute.”¹²¹ Besides, the islands were “located at considerable distance from Chinese territory.”¹²² Retention by Japan of the islands could never be countenanced because of the security threat such possession caused the neighboring territories and because of the explicit intention under the Cairo Declaration to remove the islands from Japanese possession.¹²³

These views, later incorporating the relevant portions of the Potsdam Declaration, remained substantially unaltered throughout 1946.¹²⁴ It was suggested that the U.S. should not take “any positions as to the sovereignty” of the islands.¹²⁵ It was further advocated that if “France and China or any other claimant should be unable to arrive at amicable settlement by diplomatic negotiation, the United States should favor the submission of the dispute to international arbitration or adjudication.”¹²⁶ One of the committees already foresaw that because of the strategic location of the islands, recognizing “the sovereignty of any single power [over the islands] would almost inevitably give rise to international protest and friction.”¹²⁷ It preferred the proposal to have the islands transferred to the United Nations.¹²⁸

After the Japanese surrender on July 2, 1945, and Japan’s occupation principally by the U.S., Secretary of State John Foster Dulles negotiated with other governments the terms of the peace treaty leading to the conference in San Francisco.¹²⁹ In this conference, China’s representation was excluded as no invitation was extended to either the People’s Republic of China (PRC) or the ROC.¹³⁰ The Soviet delegate proposed that the PRC should be invited but the proposal was ruled out of order.¹³¹ He would later on moved to have the Spratly Islands given to the PRC but again he was ruled out of order.¹³² The final draft of what later became the San Francisco Peace Treaty had Japan renounced her right, title and claim over the Spratly Islands, but no recipients were named much less the future settlement of the right, title and claim over them outlined. The Soviet Union did not sign and never became a party to the treaty.

The U.S. position has had been fairly consistent even after the signing of the San Francisco Peace Treaty. It further clarified its position in the course of the July 3, 1976, negotiating session for the renewal of the U.S. military bases in the Philippines. Former U.S. Ambassador to the Philippines Sullivan acknowledged that internationally the Spratly Islands are a disputed territory and expressed the preference of the U.S. for a peaceful resolution of the dispute among the claimants.¹³³ He described that “there were no [caretaker] arrangements on the Spratlys which were

left in limbo as disputed territories.”¹³⁴ The Philippines may be said to have coaxed the U.S. to highlight the legal status of indeterminacy of the Spratly Islands.

The Japanese renunciation of title, right and claim over the Spratly Islands under the San Francisco Peace Treaty without identifying the recipients of such divestment and the absence of stipulations as to how the territory was to be settled, and the actuations of the parties particularly of the U.S. before, during, and after the conclusion of the treaty strongly suggest that the states parties intended the situation of the sovereign title to the islands to remain indeterminate. It may not be implausible to construe that the parties, having been aware of the competing claims in the area, the problem of which legitimate Chinese representation to recognize, and the onset of the Cold War, chose to refrain from awarding the Spratly Islands to any state, opting instead to have the matter settled peacefully through diplomatic negotiation, arbitration or adjudication. It is in this sense that somehow it was the U.S. position which prevailed in the manner of the disposition of the islands after the Japanese renunciation of right, claim, and title.

Ancient or Historic Titles of China and Vietnam. Under the modern conception of ancient or historic title as expounded in *Eritrea v. Yemen*, both the ancient or historic titles of China and Vietnam may not have survived military conquest and Western colonialism. For China, whatever ancient rights it might have had in the Spratly Islands since time immemorial may have been interrupted by the British claim in 1889 over the Spratly island and the Amboyna Cay, which appears not to have been protested by any state, by the French annexation of some islands and islets in the area in 1933, and by the Japanese annexation of the Spratly Islands in 1939. For Vietnam, its claim of historic title may have been broken by the British claim and the Japanese annexation. Likewise, its claim to succession of the French right or title may have suffered the same fate because of the Japanese interlude.

It is arguable under the intertemporal law at the time that the Japanese annexation could be taken as lawful since conquest and subsequent effective occupation were accepted modes of territorial acquisition.¹³⁵ Only later was conquest expressly prohibited under Article 2(4) of the United Nations Charter.¹³⁶ It is important to note that the French did protest the Japanese annexation and the British supported the French position.¹³⁷ But it is equally important and instructive to realize that the U.S. never protested the annexation itself.¹³⁸ The U.S. reservation on the Japanese annexation centered only on its observation that the area claimed by Japan could not “properly be treated as one island group” and blanketing insular features and ocean area in between “with respect to which Japan [had] exercised no acts which might properly be regarded as establishing a basis for claim to sovereignty” could have international validity.¹³⁹ In essence, the U.S. never protested to the Japanese annexation of the individual islands and islets over which Japan exercised effective occupation. It is in this light that Japan’s annexation of some of the islands and islets in the Spratly Islands could have matured into lawful territorial sovereignty (if not colorable title), the sovereignty title to which Japan renounced in the San Francisco Peace Treaty.

Res Nullius Claim of the Philippines. The Philippine claim based on *res nullius*¹⁴⁰

may have been further weakened by the decision in *Eritrea v. Yemen*. As previously discussed, a sovereign territory which became indeterminate by virtue of a treaty does not become *res nullius* subject to acquisitive prescription.¹⁴¹ Like the Red Sea Islands in the Treaty of Lausanne, the Spratly Islands was at the lawful disposal of the parties to the San Francisco Peace Treaty, to which Japan was itself a party. It cannot be acquired through unilateral act of a state such as the Philippines, also a party to the San Francisco Peace Treaty, because the parties to the treaty chose to keep the status of the Spratly Islands indeterminate by failing to name the recipients consequent to the Japanese divestment of title.

Res Inter Alios Acta and Automatic Reversion Unavailing. Technically the San Francisco Peace Treaty was *res inter alios acta* with regard to China as neither PRC nor ROC was allowed to represent China in the San Francisco Conference which culminated in the signing of the treaty. But following the holding in *Eritrea v. Yemen*, the principle of *res inter alios acta* can only be legally significant as to China if it can present a superior or better title to the Spratly Islands. Mere insistence of territorial sovereignty even by protests without sufficient legal basis would not suffice to give China a better title following the reasoning in *Eritrea v. Yemen*.

Dulles explained that neither PRC nor ROC was invited to the San Francisco Conference as there was disagreement which government could legitimately represent China because of the Chinese civil war.¹⁴² The U.S. and UK diverged on the issue of representation with the former favoring the ROC¹⁴³ and the latter the PRC.¹⁴⁴ Dulles elucidated that the terms of the treaty nonetheless preserved the rights of China, and China could enter into a separate treaty with Japan on the same terms as the San Francisco Peace Treaty.¹⁴⁵

Since the purported ancient title of China could be said not to have survived conquest and colonialism, it would follow that there could be no automatic reversion of territorial sovereignty and possession of the Spratly Islands to China (or Vietnam for that matter). The ancient or historic title could not be said to have remained continuous, peaceful, and uninterrupted.

Sway and Sovereignty Over the Islands. The claim of ancient title by China over the Spratly Islands could have been further diluted by China's publications which placed the Chinese SCS boundaries to the north of the Spratly Islands.¹⁴⁶ It had been reported that the Ministry of Information of China (ROC) published the China Handbook, 1937–1943, which indicated the “southern boundary of China as 15°16'N. Lat., the most southerly of the Paracel group, as a part of China.”¹⁴⁷ This would place the Spratly Islands as claimed by the British, annexed by the French, and blanketed by the Japanese as Shinnan Gunto outside of these coordinates. This calls into question the Chinese claim of sovereignty over the distant and probably uninhabited Spratly Islands reportedly used only periodically by traditional fishermen of the surrounding territorial areas.

Recent Effectivities as Basis of Award. If the legal status of indeterminacy of the Spratly Islands and the dispute of sovereignty title were to be submitted to arbitration, it would likely be the recent manifestations of the exercise or display of state or governmental authority that would play a vital importance in the arbitral award.

Following the language in *Eritrea v. Yemen*, the recent display of state or government authority of China, Vietnam, and the Philippines over the islands and islets in the Spratly Islands may gradually ripen into a title or titles of a different kind.

C. Summary

In sum, Article 2(f) of the San Francisco Peace Treaty through which Japan renounced its title, right and claim to the Spratly Islands without neither naming the recipients nor providing for the manner in which the territorial sovereignty and possession were to be settled strongly suggest that the parties to the treaty intended to make indeterminate the legal status of the Spratly Islands. This may be validated by looking at the thinking and actuations of the parties particularly the U.S. before, during, and after the conclusion of the San Francisco Peace Treaty. The legal status of indeterminacy may further find support because none of the competing claimants appears to be able to present a better title. Nevertheless, the indeterminate status of the Spratly Islands does not make it *res nullius* susceptible to unilateral acts of acquisitive prescription since at the time of the conclusion of the San Francisco Peace Treaty, the Spratly Islands was at the lawful disposal of the parties to the treaty.

After having discussed the legal status of indeterminacy of the Spratly Islands, the paper will now turn to addressing the legal status of the airspace above the Spratly Islands. China has been reported to have kept open the option of establishing an air defense identification zone or an exclusion zone over the airspace above the SCS.¹⁴⁸ This exclusion zone may be expected to cover the airspace above the Spratly Islands.

III. Airspace Over the Spratly Islands: Legal Status and Implications

As previously discussed, an indeterminate territory such as the Spratly Islands is no longer *res nullius* or an entity which belongs to no one. Neither is it *res communis* or belonging to everyone since its sovereignty title merely assumes an indeterminate status to be possibly settled in the future.

A. Indeterminate Not Res Nullius or Res Communis

An indeterminate territory possesses an indeterminate airspace. Kish points out that the legal status of the airspace follows that of the relevant subjacent surface.¹⁴⁹ For littoral land territories, including islands, sovereignty of the state is not confined to the land surface alone but extends to the airspace not just above the land but also above the adjacent territorial sea, now extended to 12 nautical miles by Article 3 of UNCLOS. This customary rule is reflected in Article 1 of the 1944 Convention on International Civil Aviation (Chicago Convention), Article 2 of the 1958 Convention on the Territorial Sea and Contiguous Zone, and Article 2(2) of UNCLOS. In this air volume from the land territory extending seaward to 12 nautical miles, sovereignty is exclusive and absolute such that no right of overflight is countenanced much less

innocent passage recognized.¹⁵⁰ Beyond the 12-mile territorial sea limit, the freedom of the high seas right of overflight is preserved in the airspace above the EEZ and the high seas.¹⁵¹ Since the legal status of the airspace generally follows that of the subjacent surface, an indeterminate territory possesses also an indeterminate airspace.

This indeterminate airspace cannot be equated to an international airspace or the air volume beyond the territorial airspace.¹⁵² In fact it no longer forms part of the international airspace. It should be remembered that an indeterminate territory used to have a sovereignty title which became indeterminate and its indeterminacy does not result to the territory becoming *res nullius* or *res communis*. The same may be said of the airspace above the indeterminate territory from which the airspace derives its legal status.

As applied to the Spratly Islands, since its legal status may be one of indeterminacy, its airspace may likewise be indeterminate. But it is neither *res nullius* nor *res communis* as the indeterminacy does not result to either status. Consequently, it is not part of international airspace.

Notwithstanding the indeterminate status of the airspace above the Spratly Islands, it does not mean that there is absence of rules to maintain safety and order in the area with respect to civil aviation. The International Civil Aviation Organization (ICAO), a United Nations specialized agency formed pursuant to the Chicago Convention,¹⁵³ has in place three flight information regions (FIRs) of Ho-Chi-Minh, Manila, and Singapore, which intersect at 10°30'N 114°00'E, approximately right in the middle of the airspace superjacent the Spratly Islands, to provide air navigation aids to civilian aircrafts flying in that area.¹⁵⁴ The FIR is designed to provide some order to ensure safety of navigation in the airspace over the high seas consistent with Article 12 of the Chicago Convention. Article 12 provides that above the high seas, the “rules in force shall be those established under this Convention.” This does not imply that ICAO recognizes the airspace above the Spratly Islands as international airspace because ICAO has no competence to change the legal status of territories or resolve territorial disputes.¹⁵⁵

While the airspace above the Spratly Islands may be indeterminate, claimant states are not precluded from attempting to exercise acts of state or governmental authority over what they perceive to be their territorial airspace and enforce their domestic laws over the claimed airspace. A previous Philippine law treated the airspace over the Spratly Islands as territorial airspace.¹⁵⁶ China tried to modify the FIR arrangements in the area by insisting that it should be the one to provide air navigation aids over the airspace of the South China Sea area.¹⁵⁷ It has been reported to have warned aircrafts approaching or entering the airspace above its occupied insular features.¹⁵⁸ Recently, it announced that it is not ruling out the option of setting up an exclusion zone in the SCS which might include the Spratly Islands.¹⁵⁹

B. Challenges and Implications Consequent to Indeterminacy

The existing indeterminacy of the Spratly Islands affords claimant states the leeway to pursue more forceful actions to consolidate their possessions or to strategically

temper the breadth of their claims. Claimant states can change the current situation and enforce their alleged exclusive sovereignty over the airspace of the Spratly Islands. If they choose to enforce sovereignty over their alleged territorial airspace, they can prevent foreign aircraft from overflying. Aircraft entering the claimed territorial airspace without permission can be buzzed, intercepted, and forced to land. They even risk being shot down notwithstanding Article 3*bis* of the Chicago Convention which obligates contracting parties to “refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered.”¹⁶⁰ But while the claimant states have so far respected the ICAO FIRs and have restricted their response to warnings against violating aircrafts, the situation could dramatically change.

If claimant states would enforce sovereignty on their claimed territorial airspace, the difference in the extent and nature of their claims would further compound the problem. There remains the question whether Spratly Islands should be treated as a single geographical entity or an archipelago, or a group of islands and islets with subgroups of islands and islets capable of being individually subjected to sovereignty.

Should the Spratly Islands be treated under the regime of islands, there will be portions of the airspace beyond the territorial seas, between the islands and insular features, where high seas freedoms such as overflight may be exercised by foreign state aircraft. As mentioned, the Philippines has modified its claim to that of regime of islands over portions of the Spratly Islands. This would allow the existence of non-territorial airspace, or the airspace beyond the 12-mile territorial sea limit, between the islands and insular features that it is claiming.

If the Spratly Islands were to be treated as a single unit drawn on straight baselines, then the waters between the islands may be considered as internal or archipelagic waters, as the case may be, and the airspace above this singular entity extending seaward for another 12 nautical miles subject to territorial sovereignty. Even if the Spratly Islands were to be treated as a single unit, such as for instance to refer to the breadth of Shinnan Gunto, its metes and bounds needs to be readjusted. It has to be determined which insular features and portions of the Spratly Islands qualify as baseline points for drawing the enclosure. The entity may either shrink or enlarge depending on what insular features qualify as baseline points and so does its airspace.

A similar situation would arise if the Spratly Islands were treated as an archipelago. The waters between the islands may assume the status of archipelagic waters and sovereignty would extend even to the airspace above it.¹⁶¹

But even if the Spratly Islands were to be treated as a single unit or even as an archipelago, it would still face the difficult hurdle of complying with the relevant provisions of UNCLOS on archipelagic states and the drawing of archipelagic baselines. Under Article 47(1) of UNCLOS, only archipelagic states may draw such baselines to enclose the islands and interconnecting waters and treat the waters within as archipelagic waters.

If China and Vietnam would enclose its Nansha archipelago and Truong Sa archipelago, respectively, with straight or archipelagic baselines, then the disputed airspace over the disputed islands would be considerably large and would even encompass the airspace claimed by the Philippines under the regime of islands. But this enclosure would likely create more friction emanating even from non-claimants. It should be recalled that the U.S. considered the way in which the enclosure was made by Japan in 1933 of the islands and other insular features in the SCS as of doubtful validity in international law.¹⁶² The U.S. has been somewhat consistent in its view as shown by its freedom of navigation missions in the Spratly Islands.¹⁶³ It has recently sailed within 12 nautical miles from China's reclaimed insular features as well as those features occupied by Vietnam and the Philippines.¹⁶⁴

It is to be noted, however, that in the *South China Sea Arbitration (Philippines/PRC)*, it was held that neither the UNCLOS nor customary international law allows states to use archipelagic or straight baselines to enclose offshore or dependent archipelagos and generate maritime entitlements as a single unit.¹⁶⁵ Hence, the proposition that the high-tide features of the Spratly Islands could be enclosed in straight baselines to approximate archipelagic baselines does not appear to have solid traction.

While artificial islands have no territorial sea and airspace entitlements and are allowed only a 500-meter safety zone radius,¹⁶⁶ there has developed a heightened ambiguity over which insular feature in the Spratly Islands now qualifies as an island, a rock, or artificial island because of the continuing reclamations. An island generates a territorial sea and other maritime entitlements such as a contiguous zone, EEZ, and continental shelf.¹⁶⁷ A rock "which cannot sustain human habitation or economic life of [its] own" has no EEZ or continental shelf, but is entitled only to a territorial sea¹⁶⁸ and, depending on its location, to a contiguous zone.¹⁶⁹ Both island and rock have territorial airspace extending seaward up to the limit of the 12-mile territorial sea. China treats the reclaimed islands as having a territorial airspace. It has repeatedly warned foreign military aircrafts flying near or over them.¹⁷⁰ An aircraft flying above the Spratly Islands has to deal with various competing state jurisdictions.

Nonetheless, in the *South China Sea Arbitration (Philippines/PRC)*, no high-tide feature in the Spratly Islands was held to be capable of sustaining human habitation and economic life of its own.¹⁷¹ Some insular features were even classified as low-tide elevations with no territorial sea entitlement.¹⁷²

Perhaps one of the unintended consequences of *Eritrea v. Yemen* in primarily grounding a ruling on recent display of state authority over a disputed indeterminate territory is that claimant states in the Spratly Islands may be encouraged to also opt to reinforce their claims through legislation or regulation establishing an ADIZ. Through the mechanism of an ADIZ, the littoral state can locate, identify, and control any aircraft flying through its ADIZ with or without intention of penetrating the territorial airspace.¹⁷³ Interception, forced landing, and even use of weapons may be used by the coastal state concerned against aircraft not complying with the pertinent ADIZ regulations. China has established an ADIZ over the East China Sea in 2013 which elicited varied responses from Japan, South Korea, and the U.S.¹⁷⁴

It is quite possible that once China would announce and create an ADIZ in the SCS to encompass the Spratly Islands, the other claimants might also declare or enlarge their existing ADIZs.¹⁷⁵ The Philippines has a Cold War-era ADIZ covering only the northern part of the Philippine archipelago.¹⁷⁶ Vietnam also has an existing ADIZ¹⁷⁷ and may decide to activate and broaden it should the other claimants subject the Spratly Islands to ADIZ coverage.¹⁷⁸ The overlapping jurisdictions, should ADIZs be declared over the Spratly Islands, would have the potential of jeopardizing the air navigation safety of civil aircraft. They would also further undermine the security situation not only among claimants but also non-claimants who would be drawn to the area to enforce what they think as their right to exercise freedom of navigation and overflight under international law.

IV. Intermediate Considerations

There have been several suggestions on how to untangle the somewhat intractable situation in the Spratly Islands. Suggestions range from “freezing” the territorial sovereignty claims¹⁷⁹ to negotiating a bilateral, trilateral or multilateral settlement between and among claimants,¹⁸⁰ or even a multilateral settlement to include some interested maritime powers to address the issue of freedom of navigation and freedom of overflight in the Spratly Islands.¹⁸¹ This paper will not delve into the merits of these propositions.

In the intermediate, claimant states to the Spratly Islands should reassess the foundation of their claims. Claims based on ancient or historic title and *res nullius* may not survive current international law. More likely, as in *Eritrea v. Yemen*, recent *effectivités* may have a better chance to ground one’s claims. And instead of resorting to increasingly gradated use and display of state authority, it is never a bad idea to appeal to sobriety by reevaluating the international law basis of the claims, consider the advantages of negotiation and negotiating earnestly, and even perhaps arbitrate under an arbitral language agreement where all claimants retain the flexibility to save face.

V. Conclusion

An indeterminate territory, not being *res nullius* or *res communis*, generates its own territorial airspace. Although this territorial airspace is likewise considered as indeterminate as it follows the status of the subjacent indeterminate territory, it ceases to be part of the international airspace. A claimant state can subject it to its domestic law jurisdiction.

As applied to the Spratly Islands in the South China Sea, the islands may have the legal status of an indeterminate territory. Notwithstanding its indeterminacy, it has its own territorial airspace. While this territorial airspace is also indeterminate as it is inextricable from the status of the subjacent indeterminate land and sea territory,

it no longer forms part of the international airspace. Claimant states to the Spratly Islands like China, Vietnam, and the Philippines can subject the airspace of the Spratly Islands or a portion or portions thereof to their municipal law jurisdictions on the ground that their purported sovereignty extends to the airspace above the disputed islands, islets, and other insular features.

Should a claimant state decide to gradually consolidate its claim, it may enclose the Spratly Islands within an air defense identification zone. If this transpires, it may lead to overlapping of jurisdictional rules as other claimants may be expected to also establish their own ADIZ versions. It will also elicit responses from non-claimant states principally from maritime powers insisting on continuously exercising their customary (and conventional) international law right of navigation as well as overflight in the relevant areas of the South China Sea.

Claimant states China, Vietnam, and the Philippines should reexamine the foundation of their territorial claims to the Spratly Islands. Their ancient or historic title and *res nullius* claims may not survive the current understanding of territorial sovereignty under international law. It is never a bad idea to stay sober, negotiate, and save face for a mutually beneficial arrangement. It is to the best interest of claimant and non-claimant states alike.

Notes

1. Substantially based on the conference paper presented at the 2016 Regional Conference of the Asian Society of International Law, June 14–15, 2016, Hanoi, Viet Nam.

2. Chinese Foreign Ministry Spokesperson Hua Chunying, Regular Press Conference, May 7, 2015, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1261660.shtml, accessed June 5, 2016; Foreign Ministry Chinese Foreign Ministry Spokesperson Hong Lei, Regular Press Conference, April 1, 2016, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1352614.shtml, accessed June 5, 2016.

3. See Asia Maritime Transparency Initiative (AMTI), Center for Strategic & International Studies, “A Freedom of Navigation Primer for the Spratly Islands,” <http://amti.csis.org/fonops-primer/>, accessed June 5, 2016; see also Justin McCurry, “South China Sea Dispute: British Ambassador Steps into Row Over Pilot ‘Intimidation,’” *The Guardian*, January 19, 2016, <http://www.theguardian.com/world/2016/jan/19/south-china-sea-dispute-british-ambassador-steps-into-row-over-pilot-intimidation>, accessed June 5, 2016.

4. Peter Dutton, “Three Disputes and Three Objectives: China and the South China Sea,” *Naval War College Review* 64(4) (Autumn 2011), pp. 42, 50–54.

5. Zewei Yang, “The Freedom of Navigation in the South China Sea: An Ideal or a Reality?” *Beijing Law Review* 2012(3), pp. 137, 139–140, accessed April 30, 2017, <https://doi.org/10.4236/blr.2012.33019>

6. J. Ashley Roach, “China’s Shifting Sands in the Spratlys,” *American Society of International Law* 19(15) (2015), <https://www.asil.org/insights/volume/19/issue/15/chinas-shifting-sands-spratlys>, accessed June 2, 2016.

7. Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), Decision of 9 October 1998 (*Eritrea V. Yemen*), *Reports of International Arbitral Awards (R.I.A.A.)* 22 (2001), pp. 209–332.

8. *Ibid.*, paras. 165, 445.

9. Treaty of Peace, signed at Lausanne, July 24, 1923, *League of Nations Treaty Series (L.N.T.S.)* 28 (1924), pp. 11–113, entered into force, August 6, 1924; See also *Eritrea V. Yemen*, note 7, para. 157.

10. *Eritrea V. Yemen*, *Ibid.*; See also Seokwoon Lee, “Intertemporal Law, Recent Judgments and Territorial Disputes in Asia” in *Maritime Boundary Disputes, Settlement Processes, and the*

Law of the Sea, Seoung-Yong Hong and Jon M. Van Dyke, eds. (Leiden and Boston: Martinus Nijhoff Publishers, 2009), p. 130 (notes).

11. *Eritrea V. Yemen*, *Ibid.*, para. 157; Lee, *Ibid.*, p. 130 (notes).
12. *Ibid.*, paras. 7, 102.
13. *Ibid.*, para. 154.
14. *Ibid.*, paras. 169–171, 173–174.
15. *Ibid.*, para. 173.
16. *Ibid.*, paras. 174–176, 178, 242, 448, 489.
17. *Ibid.*, para. 456.
18. *Ibid.*, paras. 165, 188, 445.
19. *Ibid.*, para. 445.
20. *Ibid.*, para. 106.
21. *Ibid.*
22. *Ibid.*
23. *Ibid.*, paras. 13–14.
24. *Ibid.*, para. 13.
25. *Ibid.*, para. 19.
26. *Ibid.*, para. 13.
27. *Ibid.*, para. 31.
28. *Ibid.*, para. 32.
29. *Ibid.*, paras. 32–34.
30. *Ibid.*, paras. 32–34, 441.
31. *Ibid.*, para. 34.
32. *Ibid.*, paras. 125, 444–445, 449, 456.
33. *Ibid.*, paras. 125, 153, 445, 456.
34. *Ibid.*, para. 14.
35. *Ibid.*, paras. 17–19.
36. *Ibid.*, para. 195.
37. *Ibid.*
38. *Ibid.*, paras. 169–171, 173–176, 178, 242, 448, 456, 489.
39. *Ibid.*, paras. 448–449.
40. *Ibid.*, para. 444.
41. *Ibid.*, para. 133.
42. *Ibid.*, paras. 444–445.
43. *Ibid.*, paras. 125, 456.
44. *Ibid.*, paras. 125, 443.
45. *Ibid.*, paras. 165, 183.
46. *Ibid.*, paras. 165.
47. *Ibid.*
48. *Ibid.*, paras. 125, 165, 443.
49. *Ibid.*, paras. 99, 153.
50. *Ibid.*, paras. 31–32.
51. *Ibid.*, para. 153.
52. *Ibid.*
53. *Ibid.*, paras. 153, 445.
54. *Ibid.*, paras. 445.
55. *Ibid.*, para. 446.
56. *Ibid.*
57. *Ibid.*, para. 449.
58. *Ibid.*, para. 450.
59. *Ibid.*
60. *Ibid.*, para. 526.
61. *Ibid.*
62. *Ibid.*
63. *Burkina Faso V. Mali*, *International Court of Justice Reports* (1986), pp. 554–651, 566, para. 23.

64. *Ibid.*
65. See *Eritrea V. Yemen*, note 7, paras. 96–97.
66. *Ibid.*, para. 99.
67. *Ibid.*, paras. 97–99.
68. *Ibid.*, paras. 96–97, 165, 445.
69. See *Island of Palmas* case (Netherlands/United States), *R.I.A.A* 2 (1928), pp. 829, 839.
70. *Eritrea V. Yemen*, note 7, paras. 165, 183.
71. See *Ibid.*, paras. 19, 165. See also *Island of Palmas* case, note 69.
72. *Eritrea V. Yemen*, note 7.
73. In *Eritrea V. Yemen*, *Ibid.*, para. 153, the indeterminacy likewise subsisted because the claimant states could not present evidence of a better title vis-à-vis Turkey, the renouncing party.
74. Also known as Nansha Islands in Chinese, Truong Sa Islands in Vietnamese, Kalayaan Island Group in Filipino, see Lori Fisler Damrosch and Bernard H. Oxman, “Editors’ Introduction,” in *Agora: The South China Sea, American Journal of International Law (AJIL)* 107(1) (January 2013), p. 97.
75. United States Department of State (USDOS), Cable from the American Embassy in Manila to the Secretary of State, Washington, D.C. (Central Foreign Policy Files, Record Group 59: General Records of the Department of State, Electronic Telegrams, 1976, The U.S. National Archives and Records Administration), Document Number 1976MANILA11299, July 30, 1976, Second Segment, p. 2.
76. Daniel J. Dzurek, “The Spratly Islands Dispute: Who’s on First?” Clive Schofield ed., *International Boundaries Research Unit (IBRU) Maritime Briefing* 2(1) (1996), pp. 1, 3.
77. See Melissa Loja, “Spratly Islands as a Single Unit Under International Law: A Commentary on the Final Award in Philippines/China Arbitration,” *Ocean Development & International Law (ODIL)* 47(4) (2016), pp. 309–326, 312.
78. David Hancox and Victor Prescott, “A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst Those Islands,” Clive Schofield ed., *IBRU Maritime Briefing* 1(6) (1995), p. 2.
79. Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World*, 2nd ed. (Leiden: Martinus Nijhoff Publishers, 2005), p. 456, citing David Hancox and Victor Prescott, *Ibid.*
80. *Ibid.*, p. 457.
81. Lee G. Cordner, “The Spratly Islands Dispute and the Law of the Sea,” *ODIL* 25 (1994), p. 61. <https://doi.org/10.1080/00908329409546025>
82. Government Notification No. 153 published at the request of A. S. Hamilton, Acting Governor of the Government of Labuan, March 14, 1889, *The Hong Kong Government Gazette*, April 6, 1889, p. 276.
83. *Ibid.*
84. Post-World War II Foreign Policy Planning, State Department Records of Harley A. Notter, 1939–1945, Pacific Ocean Area: disposition of the Paracel and Spratly Islands (PR Documents on the Far East), 1192-PR-43 and 1192-PR-43 Final, February 28, 1946, p. 3.
85. Ministère des affaires étrangères, *Journal Officiel de la République Française*, Juillet 25, 1933, p. 7794.
86. See Notter (1939–1945), 1192-PR-43 and 1192-PR-43 Final, February 28, 1946, p. 3.
87. *Ibid.*, p. 1.
88. USDOS, Extension of Japanese Penetration into Southern Asia and South Pacific Territories, USDOS Foreign Relations of the United States (FRUS), Japan: 1931–1941, vol. II (Washington, D.C.: U.S. Government Printing Office, 1931–1941), pp. 278–280.
89. Notter (1939–1945), 1192-PR-43 and 1192-PR-43 Final, February 28, 1946, p. 2.
90. Section 1, Presidential Decree No. 1596 (Declaring Certain Area Part of the Philippine Territory and Providing for Their Government and Administration), June 11, 1978.
91. *Ibid.*
92. Section 2(a), Republic Act No. 9522 (An Act to Amend Certain Provisions of Republic Act No. 3046, as amended by Republic Act No. 5446, to Define the Archipelagic Baselines of the Philippines, and for Other Purposes), approved March 10, 2009.

93. Loja, note 77, p. 314, citing *Inter Alia* Art. 4, Declaration on China's Territorial Sea, September 9, 1958 and Art. 2, Law on the Territorial Sea and the Contiguous Zone, February 25, 1992, and Declaration of the Government of the People's Republic of China (PRC) on the Baselines of the Territorial Sea of the PRC, May 15, 1996; and, Art. 1, Law No. 18/2012/QH13 (Law on Vietnamese Sea), June 21, 2012; S/11199 and S/11202, Letters from the Permanent Observer of the then Republic of Vietnam to the United Nations Security Council, January 18, 1974 and January 24, 1974, respectively; Statement of the Government of the Socialist Republic of Vietnam, November 12, 1982; and, *Notes Verbales* No. 86-/HC-2009 and No. 77-/HC-2011, May 8, 2009 and May 3, 2011, respectively.

94. *Ibid.*, in relation to the geographic coordinates stated in the British Claim of 1889, note 82.

95. Zhiguo Gao and Bing Bing Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications," in *Agora: The South China Sea*, *AJIL* 107(1) (January 2013), pp. 98, 100–103, 111–113, 123.

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Biographical Statement

Herbert Aclan Loja is a Ph.D. candidate at the University of Hong Kong, Faculty of Law, under the supervision of professor Simon N.M. Young. He earned his Master of Laws in Human Rights (with Distinction) degree at the same institution in 2013. He was a Söhmen Human Rights scholar and a recipient of the Anna Wu Prize in Human Rights and Winston Chu & Company Prize in Law.