

## PALMAS ARBITRATION REVISITED

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### I. INTRODUCTION

In 1994, the Philippines and Indonesia held its first ever Senior Officials Meeting on the Delimitation of the Maritime Boundary between the two States.

Official representatives agreed that both countries would delimit the location between 120° and 129° 30' East Longitude.<sup>1</sup> This includes the area of the Philippines and Indonesia where the island of Palmas may be found.

The officials agreed that the following general principles shall serve as basis for negotiations:

- a) "...to achieve result fully in keeping with international law including the 1982 United Nations Convention on the Law of the Sea (UNCLOS)<sup>2</sup>;
- b) ... where applicable, the maritime boundaries between the two countries shall be delimited on the basis of the median line principle;
- c) The two delegations, cognizant of their friendly and warm relationship between their governments and people, agreed to use creative options as appropriate.<sup>3</sup>

A second bilateral consultation between the two countries was held on 9 November 2000. The discussion was exploratory<sup>4</sup> and no further agreements were forged.

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<sup>1</sup> Record of Discussion, The First Senior Officials Meeting on the Delimitation of the Maritime Boundary Between Indonesia and the Philippines, Manado, June 23-25, p. 2

<sup>2</sup> UNCLOS is the fundamental international law on maritime matters, including maritime borders among nations.

<sup>3</sup> Record of Discussion, *supra* note 1.

On 20 December 2002, the Third Meeting of the Philippine Indonesian Joint Commission for Bilateral Cooperation was held in Manila. The Indonesian panel gave notice to the Philippine panel that Indonesia has enacted a new Baselines Law, which amended its law enacted in 1960.<sup>5</sup> The Indonesian panel also presented a copy of the law written in *Bahasa*. No other substantial topic was discussed in the meeting and the panels agreed on the agenda for the next bilateral talks scheduled in March 2003.<sup>6</sup> The Philippine panel requested that an English version of the law be furnished the government through its mission in Jakarta.<sup>7</sup>

The new Indonesian Baselines Law uses the island of Palmas (also known as *Miangas*) as a base point in drawing Indonesia's straight archipelagic baselines.<sup>8</sup> This provision emphatically contradicts Indonesia's commitment with the Philippine government to delimit the area where the island of Palmas is found only after and pursuant to the negotiations, and in keeping with UNCLOS. Prior to the passing of said law, the two countries, recognizing that the island of Palmas would be a contentious issue in delimiting their territories, agreed to do so bilaterally and in consultation with the other. This was the very reason why the two countries entered into the delimitation talks in the first place.

The passage of the new law is a unilateral act and is the official expression of Indonesia's intent to treat Palmas island as Indonesian territory. It is not just an official claim to land territory but also to the archipelagic and territorial waters representing all waters enclosed by the island's straight baselines.

The Philippine delegation was surprised with this revelation. It appears that preparatory to the passage of the new Baselines Law, Indonesia embarked on a

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<sup>4</sup> Diplomatic Correspondence No. 352.00 from Department of Foreign Affairs, Philippines to the Department of Foreign Affairs of Indonesia (18 October 2000) (on file with the UP Institute for International Legal Studies [UP IILS]).

<sup>5</sup> Minutes of the Working Group on Maritime and Ocean Issues, 3<sup>rd</sup> Meeting of the Philippine-Indonesian Joint Commission for Bilateral Cooperation (December 20, 2002) (on file with UP IILS).

<sup>6</sup> See Minutes of the Third Meeting of the Philippine-Indonesian Joint Commission for Bilateral Cooperation, December 20-21, 2002, Manila, Philippines.

<sup>7</sup> The head of the Philippine Panel, Ambassador Alberto Encomienda asked for an English copy of the Baselines Law from the Head of the Indonesian Panel and requested that the same be delivered to the Philippine delegation in Jakarta, Indonesia.

<sup>8</sup> Art. 47, UNCLOS. "1. An archipelagic state may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1."

modern hydrographic survey to chart its new baselines.<sup>9</sup> The project was financed with the help of Official Development Assistance Funds from Norway of approximately \$170 million. The head of the Philippine panel admitted later that the Philippines has not even started its own hydrographic survey.

Clearly, the date of passage of the 2002 Indonesian Baseline Law would be a “critical date<sup>10</sup>” from which to gauge which one between the two countries has a superior claim to both Palmas island and the archipelagic and territorial waters surrounding it.

The Indonesian Baselines Law has not yet been deposited with the United Nations Secretary General owing to the fact that the ICJ just recently issued a decision in the territorial dispute between Indonesia and Malaysia over the islands of Sipadan and Ligitan, awarding both islands to Malaysia and thereby necessitating amendments to the Indonesian Baselines Law.<sup>11</sup>

If the new baseline coordinates drafted by Indonesia were followed, the Philippines would lose not only Palmas Island but also some 15,000 square miles of

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<sup>9</sup> Digital Marine Resource Mapping Project: A Three-Phase Project Undertaken by BLOM-ASA for the Indonesian Mapping Authority. This was cited by BLOM-ASA in a budgetary proposal submitted to the Department of Foreign Affairs (January 2003) (on file with the Maritime and Ocean Affairs Center, DFA).

<sup>10</sup> The Arbitration of Differences Respecting Sovereignty Over the Island of Palmas (or Miangas), (Netherlands v. U.S.) 22 AM. J. INT'L L. 867, 875 (1928). “If a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the states claiming sovereignty possesses a title – cession, conquest, occupation, etc. – superior to that which the other state might possibly bring forward against it. However, if the contestation is based on the fact that the other party has actually displayed sovereignty, it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical.” *See also See also Legal Status of Eastern Greenland* (Denmark v. Norway), PCIJ Series A/B No. 43 at 170 (1933). “The Danish claim is not founded upon any particular act of occupation but alleges – to use the phrase employed in the *Palmas Island* decision of the Permanent Court of Arbitration, April 4<sup>th</sup>, 1928 – a title ‘founded on the peaceful and continuous display of State authority over the island.’ It is based upon the view that Denmark now enjoys all the rights which the King of Denmark and Norway enjoyed over Greenland up till 1814. Both the existence and extent of these rights must therefore be considered, as well as the Danish claim to sovereignty since that date.

It must be borne in mind, however, that as the critical date is July 10<sup>th</sup>, 1931, it is not necessary that sovereignty over Greenland should have existed throughout the period during which the Danish Government maintains that it was in being. Even if the material submitted to the Court might be thought insufficient to establish the existence of that sovereignty during the earlier periods, this would not exclude a finding that it is sufficient to establish a valid title in the period immediately preceding the occupation.”

<sup>11</sup> Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), INT'L COURT OF JUSTICE, 17 December 2002

archipelagic and territorial waters.<sup>12</sup> These are Philippine territories currently defined under the Treaty of Paris.

There are many reasons why it is in the best interest of the Philippines to maintain its authority and control over the Palmas Island and its surrounding waters. Here are some of the reasons:

a) The island of Palmas and the waters surrounding it are very close to the strategic axis linking the Pacific and Indian oceans.<sup>13</sup> The nearest island to Palmas is Cape San Agustin. The establishment of archipelagic sealanes between Cape San Agustin and Palmas over which the Philippines has sovereignty, will enable the country, possibly in cooperation with Indonesia, to monitor, control and maintain surveillance of sensitive maritime jurisdictions.<sup>14</sup> Many of the country's major population centers, industrial zones, and the ports of Mati, Davao City, General Santos, Cotabato, Pagadian, and Zamboanga are directly accessible from the said sealanes.

b) Palmas island is also close to the critical spawning areas and passage highways of economically important fish, like the yellow fin tuna. The area has also been tagged as a marine ecoregion by the Worldwide Fund for Nature (WWF) owing to the area's distinct and outstanding biodiversity.<sup>15</sup>

c) The "warm pool" of the world's oceans is also centered on Southern Mindanao, making the Davao Gulf, Sarangani and Illana bay in the Moro gulf the most suitable sites for large scale ocean terminal plants (OTEC).<sup>16</sup>

Clearly, the sheer area of maritime territory which the Philippines stand to lose, coupled with the foregoing reasons, should warrant a re-examination of the root of Indonesia's claim to the Palmas island, the Palmas Arbitration of 1928.

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<sup>12</sup> The figure given is an estimate based on the proposed project area.

<sup>13</sup> British Hydrographic Department, *Ocean Passages for the World* at 123 (1987).

<sup>14</sup> See Art. 47, United Nations Convention on the Law of the Sea (UNCLOS).

<sup>15</sup> OLSON AND DINERSTEIN, *The Global 200: Representation Approach to Conserving the Earth's most Biologically Valuable Ecoregions*, *Conservation Biology* [v. 12, no. 3] at 502-515 (1998). See also R.P. WIEDENBACH, *Maritime Jurisdiction and Total Marine Catch* (Morgan and Valencia, eds.) (1983).

<sup>16</sup> LLEI-WAKIL, *POWER PLANT TECHNOLOGY* (McGraw Hill Int'l Ed.) at 627-667 (1984).

## II. PALMAS: THE ISLAND AND THE ARBITRATION

The island of Palmas (also known as *Miangas*) was described in 1928 as "an isolated island of less than two square miles lying about half way between Mindanao in the Philippine Islands and the most northerly of the Nanusa group in the former Dutch East Indies."<sup>17</sup> The Swiss arbitrator Max Huber succinctly summarized the conflicting claim to the island when he said: "It lies within the boundaries of the Philippines as ceded by Spain to the United States in 1898 (by the Treaty of Paris)."<sup>18</sup>

Palmas island first became a bone of contention between the United States and The Netherlands in 1906, when Major General Leonard Wood, then the American Governor-General of the Philippines, visited Palmas and discovered that the Dutch flag was hoisted in the island.<sup>19</sup> In Maj. Gen. Wood's affidavit dated July 27, 1925, he said that when he visited the island in 1906, a native who spoke some Spanish informed him of the "visits of Netherlands subjects to the island."<sup>20</sup> Gen. Wood informed the State Department of this fact and the latter made inquiries with the Dutch government.<sup>21</sup>

The Dutch government responded that its claim to the island is by virtue of a treaty of suzerainty entered into between the Dutch East Indies Company and the local settlers of Palmas.<sup>22</sup>

The American authorities reiterated in their official correspondence with Dutch authorities that the island forms part of the archipelago ceded to them by Spain through the Treaty of Paris. It was evident from certain records, however, that the Americans were generally hesitant to pursue the claim due to the following reasons: one, the island was small and populated by "six hundred eighty-nine (689) diseased and destitute inhabitants of low mentality who speak a Malay-Spanish dialect;" and two, the legal recourse to the claim, including recourse to arbitration,

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<sup>17</sup> The Arbitration of Differences Respecting Sovereignty Over the Island of Palmas (or Miangas), (Netherlands v. U.S.) 22 AM. J. INT'L L. 867, 872 (1928).

<sup>18</sup> *Id.*

<sup>19</sup> Report to the Governor General of the Philippine Islands from Major General Leonard Wood (January 26, 1906) in 2 RECORDS OF THE DEPARTMENT OF STATE RELATING TO POLITICAL RELATIONS BETWEEN THE UNITED STATES AND THE NETHERLANDS, 1910-1929 [hereinafter LAS PALMAS ARBITRATION RECORDS] (on file with the UP Law Center Institute for International Legal Studies (UP IILS)).

<sup>20</sup> Affidavit of Major General Wood (July 27, 1925) in 1 LAS PALMAS ARBITRATION RECORDS (on file with the UP IILS).

<sup>21</sup> *Id.*

<sup>22</sup> Note from the Netherlands Ministry of Foreign Affairs to the American Legation at the Hague, (October 17, 1906) in 1 LAS PALMAS ARBITRATION RECORDS (on file with the UP IILS).

was not justified owing to the "trifling value of the island."<sup>23</sup> It was even admitted that "the matter has been delayed because this Government [the US Government] has not been persistent. The claim of the United States has undoubtedly suffered tremendously by reason of this delay and because of the lack of vigor with which the claim was presented and prosecuted."<sup>24</sup>

The Americans nevertheless pursued the arbitration owing to adverse public reaction that followed a report in 1911 that Dutch authorities tore down the flag of the United States found in the island.<sup>25</sup>

This incident was widely reported in the American media and prompted at least one Senator to inquire on the veracity of the report from the State Department.<sup>26</sup> The American authorities later started official discussions with Dutch authorities to bring the matter to arbitration.<sup>27</sup>

The American claim to the island was summarized as follows:<sup>28</sup>

1. That the island lies well within the demarcation of Article 3 of the Treaty of Paris of December 10, 1898 between the United States and Spain ceding the Philippine Archipelago to the United States;

2. That the island is approximately twelve miles nearer the island of Mindanao, the largest island of the Philippine archipelago, than to any of the smaller islands of the Dutch Archipelago;

3. That the island is well within the limits marked by the Bull of Alexander 6<sup>th</sup> dated May 4, 1493;

4. That the island is well within the limits of the agreement concluded in July 4, 1494, between Spain and Portugal;

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<sup>23</sup> Memorandum (October 5, 1923) *in* 3 LAS PALMAS ARBITRATION RECORDS (on file with the UP ILS).

<sup>24</sup> *Id.*

<sup>25</sup> Letter from the Department of Navy to the Secretary of State, (May 6, 1911) *in* 3 LAS PALMAS ARBITRATION RECORDS (on file with the UP ILS). *Cf.* Letter from PC Knox to Senator H.C. Lodge and Letter from J.L. Scott, (May 15, 1911) *in* 3 LAS PALMAS ARBITRATION RECORDS (on file with the UP ILS).

<sup>26</sup> Letter of Senator H.C. Lodge to Secretary of State *in* 3 LAS PALMAS ARBITRATION RECORDS (on file with the UP ILS).

<sup>27</sup> Note from the Department of State to the Netherlands Minister in Washington (April 25, 1914) *in* 1 LAS PALMAS ARBITRATION RECORDS (on file with the UP ILS).

<sup>28</sup> *Id.*

5. That the union of Spain and Portugal in 1580 should remove any doubts as to the title of the Island prior to that time;

6. That the Government of Spain considered the Island as one of its oceanic possessions;

7. That Spain never relinquished control over the island except to the United States;

8. That Spain exercised sovereignty over the Philippine archipelago as a whole and it was not necessary for Spain, in order to sustain its sovereignty over each individual island of the Archipelago, to maintain separate administrations over the island.

The Americans endeavored to prove that Spain exercised sovereignty over the island by attempting to prove the payment of *cedula* or residence certificate taxes by the inhabitants of the island to the Government of Spain, as well as regular visits of Spanish naval vessels to the islands.<sup>29</sup> Evidence was also uncovered in the archives of Seville, Spain showing that Spain sent an expedition to the Island in 1710, and that a group of Jesuit missionaries were actually sent to settle in the island with the avowed goal of converting the natives and to exercise occupation of the island on behalf of the Spanish crown.<sup>30</sup>

The Netherlands government, on the other hand, anchored its title to the island on the following grounds:<sup>31</sup>

1. That the 17<sup>th</sup> century Palmas Island was conquered by the Rajah of Taboucan, who in 1877 signed the agreement with the Dutch East Indies Company, which agreement provided that the Taboucan territories should become the property of the company;

2. That the possession of the Dutch East Indies Company came under the direct control of the Netherlands Government and

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<sup>29</sup> Telex from US War Department to American Spain Legation asking for confirmation that Spanish gunboats used to visit the islands and that Spain levied *cedula* tax from the native inhabitants (June 20, 1924) in 3 LAS PALMAS ARBITRATION RECORDS (on file with the UP ILS).

<sup>30</sup> Letter to Mr. W. C. Burdett, American Consul in Seville, Spain on the results of an investigation into documents existing in the General Archives of Seville, (April 6, 1925) in 2 LAS PALMAS ARBITRATION RECORDS (on file with the UP ILS).

<sup>31</sup> Note from the Netherlands Ministry of Foreign Affairs to the American Legation at the Hague (October 17, 1911) in 2 LAS PALMAS ARBITRATION RECORDS (on file with the UP ILS).

that since the beginning of the 19<sup>th</sup> century the island has been under the suzerainty of the Netherlands;

3. That the inhabitants paid taxes to the Netherlands government since the early part of the 19<sup>th</sup> century;

4. That the island is named in contract between the Netherlands government and the Sultan of Turante;

5. That the Netherlands government introduced vaccination upon the island;

6. That the Netherlands authorities visited the island at least once a year;

7. That Spain never questioned the right of the Netherlands government to exercise its sovereignty or to plant its flags in the island;

8. That Spain, not having control of the island at the time of cession in 1898 could not cede it to the United States.

Implicit in its arguments is that while Spain may have had title to the island by virtue of discovery, it has since lost and/or abandoned its title by allowing the Dutch East Indies Company to enter into contracts and agreements with the native rulers who ceded their territories in favor of the Company.

The United States and The Netherlands agreed to resort to arbitration under the auspices of the Permanent Court of Arbitration (PCA).<sup>32</sup> The case could not be brought to the Permanent Court of International Justice (PCIJ) because the United States was not a member of the League of Nations and consequently, of the PCIJ. The case should have been ideally brought to the PCIJ because it involved international law. The Americans believed however that the PCIJ might be biased against the US because the court was based at The Hague and headed by a Dutch man.<sup>33</sup> Why the Americans considered the Permanent Court of Arbitration to be more neutral, considering that it is also based at The Hague, is an issue that was not discussed in the official communication made by the people who opted for the Permanent Court of Arbitration.

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<sup>32</sup> Both the Netherlands and the United States were signatories to the Convention for The Pacific Settlement of International Disputes, adopted 29 July 1899 which established the Permanent Court of Arbitration.

<sup>33</sup> *Id.*



What does appear in official American communication is that the Swiss Max Huber was not the first choice of the Americans as Arbitrator. In a telegram from Tokyo dated April 14, 1925, a certain Dr. Yoruzo Oda was believed to be qualified to act as arbitrator.<sup>34</sup> A letter to the Secretary of State dated April 25, 1925 shows however that reservations about Dr. Oda were entertained, and the names of Lord Finlay, a member of the Permanent Court of International Justice, and Dr. Walter Schucking of Germany were put forward.<sup>35</sup> It appears now that Huber, although of unquestionable credentials, was a choice suggested by the Dutch and viewed with disapproval by a competent American authority.<sup>36</sup>

The arbitration on Palmas took place pursuant to a Special Agreement for the Submission to Arbitration of the Question of Sovereignty over the Island of Palmas.<sup>37</sup> Unlike subsequent arbitrations conducted under the aegis of the Permanent Court of Arbitration<sup>38</sup>, the parties, probably to minimize costs,<sup>39</sup> stipulated that the proceedings shall be summary in nature, or limited to the submission of Memorandums and Counter-Memorandums.<sup>40</sup>

The legal luminary Philip Jessup, who was an Assistant Professor at Columbia University at that time, observed that the stipulation had the effect of limiting the ability of each party to prove facts that it was alleging.<sup>41</sup> Worse, Jessup maintained, the Americans and the Dutch had a different construction of the requisite Memorandum. Consistent with modern forms of summary procedure, the

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<sup>34</sup> Telegram from Bancroft to the Secretary of State (April 14, 1925) in 2 LAS PALMAS ARBITRATION RECORDS (on file with the UP IILS).

<sup>35</sup> Letter to the Secretary of State (April 25, 1925) in 2 LAS PALMAS ARBITRATION RECORDS (on file with the UP IILS).

<sup>36</sup> Letter to the Secretary of State (August 20, 1925) in 2 LAS PALMAS ARBITRATION RECORDS (on file with the UP IILS). Unfortunately, the writer of the letter has not been identified. Nonetheless, the warning against the appointment of Huber reads: "If the naming of an arbitrator in the island of Palmas case is to be made by the President of Switzerland, and if he names a Swiss, which he undoubtedly will, he will be limited to Swiss members on the Hague Court, namely Huber and Soldati. Huber, in view of his unfortunate experience with the United States recently, will probably not be named". It is highly probable that the writer of the letter is Fred K. Nielsen, agent for the US since the letter appears to be part of a series of correspondence written by him.

<sup>37</sup> Arbitration of Differences Respecting Sovereignty Over Island of Palmas, January 23, 1925, United States-The Netherlands, T.S. No. 711.

<sup>38</sup> Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States (effective October 20, 1992), Article 15, par. 2. "If either party so requests at any appropriate stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials"

<sup>39</sup> PHILIP C. JESSUP, *The Palmas Island Arbitration*, 22 Am. J. Int'l. L. 735, 749 (1928).

<sup>40</sup> Arbitration Treaty, *supra* note 37, at Art. II.

<sup>41</sup> JESSUP, *supra* note 39, at 736, 749.

Americans submitted all their arguments to the island, as well as their evidence, by way of Annexes to their Memorandum. The Dutch, on the other hand, did not state the entirety of their case in their Memorandum. Instead, they summarized their arguments for the first time only in their Counter-Memorandum, enabling them to dispute point by point the arguments advanced by the Americans.<sup>42</sup> What was particularly alarming to Jessup was that the Dutch never attached any of their alleged documentary evidence to prove their claims, as they merely undertook to "produce them upon request of the arbitrator."<sup>43</sup>

The American panel registered its objection on the manner by which the Dutch panel wanted to prove its allegations, i.e., by way of hindsight and not up front. The Dutch position was nevertheless suspiciously sustained by Huber when he ruled:

"however desirable it might be to produce complete evidence at an early stage, it was contrary to broad principles applied in international arbitrations to exclude a *limine*, except under explicit terms of conventional rule, every allegation made by a party as irrelevant, if not supported by evidence, and to exclude evidence relating to such allegations from being produced at a later stage of the procedure."<sup>44</sup>

Under Article III of the Special Agreement, the Arbitrator was authorized to ask for further written instructions from either party. Mr. Huber did so but only from The Netherlands. He asked them to explain the weakness in their arguments as pointed out in the American Counter-Memorandum.<sup>45</sup> The Americans objected to this call, but since the Arbitrator was the sole Judge of questions on procedure, he could not have been expected to sustain the Americans' objection and in effect question the propriety of his own acts.

Modern day litigators would probably not be surprised therefore that Huber awarded the Palmas Island in favor of The Netherlands. His decision, despite the little known criticisms on the procedural aspects of the arbitration, would later on become required reading for all students of Public International Law, particularly on the topic of territorial jurisdiction. The Huber decision would also be invoked as a

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<sup>42</sup> JESSUP, *supra* note 39, at 749.

<sup>43</sup> *Id.*

<sup>44</sup> Arbitration Award, *supra* note 17, at 878.

<sup>45</sup> JESSUP, *supra* note 39, at 751.

precedent in the decisions of the ICJ and other arbitral bodies, as well as by party litigants in disputes concerning conflicting claims to territory.<sup>46</sup>

#### A. HIGHLIGHTS OF THE DECISION

The Palmas case is particularly remembered for the ruling that discovery *per se*, as invoked by the Americans, gives rise only to an inchoate right which must be perfected through open and continuous acts evidencing effective occupation:

“Even admitting that the Spanish title still existed as inchoate in 1898 and must be considered as included in the cession under Article III of the Treaty of Paris, an inchoate title could not prevail over the continuous and peaceful display of authority by another state; for such display may prevail even over a prior, definitive title put forward by another state.<sup>47</sup>”

Huber ruled that The Netherlands has established effective occupation through, among others, its contract of suzerainty with the local rulers and tribesmen of the island:

“In the opinion of the Arbitrator, The Netherlands has succeeded in establishing the following facts:

a. The Island of Palmas (or Miangas) is identical with an island designated by this or a similar name, which has formed, at least since 1700, successively a part of two of the native States of the Island of *Sangi* (Talaute Isles).

b. These native States were from 1677 onwards connected with the East India Company, and thereby with the Netherlands, by contracts of suzerainty, which conferred upon the suzerain such powers as would justify his considering the vassal state as a part of his territory.

c. Acts characteristic of state authority exercised either by the vassal state or by the suzerain Power in regard precisely to the Island of Palmas (or *Miangas*) have been established as occurring at different

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<sup>46</sup> Some international law cases which cite as doctrine the Huber decision are the *Legal Status of Eastern Greenland* (Denmark v. Norway), PCIJ Series A/B No. 43 (1933), and *Eritrea-Yemen Arbitration* (Case Concerning Land, Island, and Maritime Frontiers Dispute), PCA, October 9, 1998.

<sup>47</sup> Arbitration Award, *supra* note 17, at 884.

epochs between 1700 and 1898, as well as in the period between 1898 and 1906.

The acts of indirect or direct display of Netherlands sovereignty at Palmas (or *Mianga*), especially in the 18th and early 19th centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But apart from the consideration that the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period. It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights. . . .<sup>48</sup>

There is moreover no evidence which would establish any act of display of sovereignty over the island by Spain or another Power, such as might counterbalance or annihilate the manifestations of Netherlands sovereignty. As to third Powers, the evidence submitted to the Tribunal does not disclose any trace of such action, at least from the middle of the 17th century onwards. These circumstances, together with the absence of any evidence of a conflict between Spanish and Netherlands authorities during more than two centuries as regards Palmas (or *Mianga*), are an indirect proof of the exclusive display of Netherlands sovereignty. . . .<sup>49</sup>

The conditions of acquisition of sovereignty by the Netherlands are therefore to be considered as fulfilled. It remains now to be seen whether the United States as successors of Spain are in a position to bring forward an equivalent or stronger title. This is to be answered in the negative.

The title of discovery, if it had not already been disposed of by the Treaties of Munster and Utrecht, would, under the most favorable and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation. An

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<sup>48</sup> Arbitration Award, *supra* note 17, at 908.

<sup>49</sup> Arbitration Award, *supra* note 17, at 909.

inchoate title however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty. . . .<sup>50</sup>

The Netherlands title of sovereignty, acquired by continuous and peaceful display of state authority during a long period of time going probably back beyond the year 1700, therefore holds good. . . .<sup>51</sup>

For these reasons the Arbitrator . . . decides that:

The Island of Palmas (or *Mianguas*) forms in its entirety a part of Netherlands territory.<sup>52</sup>

Likewise, Huber's use for the first time of the concepts of "inter-temporal law" and "critical date," was precedent-setting and has since been often cited by the ICJ, arbitral bodies, and other litigants to support their arguments.

Inter-temporal law is the rule that where different legal rules existed over a period of time, both the rule at the creation of the right and at the time of its exercise must be applied:

"As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law. International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of states members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other states and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a state,

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<sup>50</sup> Arbitration Award, *supra* note 17, at 910.

<sup>51</sup> *Id.*

<sup>52</sup> Arbitration Award, *supra* note 17, at 912.

nor without a master, but which are reserved for the exclusive influence of one state, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such a title ever conferred territorial sovereignty. For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas); and in so far as there is no sovereignty, the question of an abandonment properly speaking of sovereignty by one state in order that the sovereignty of another may take its place does not arise"<sup>53</sup>.

"Critical date" on the other hand, is a "judicial technique in the use of evidence and more especially the exclusion of evidence consisting of self-serving acts of parties at a stage when it was evident that a dispute existed."<sup>54</sup> "The United States claimed as successor to Spain under a treaty of cession dated 10 December 1898, and everything turned on the nature of Spanish rights at that time."<sup>55</sup>

The Huber award had its share of criticisms. In the same year that the award was promulgated, a very young Philip Jessup had stinging criticisms not only on the procedural aspect of the arbitration, but also on the substantive aspects of the award. In particular, he described as a "non-sequitur"<sup>56</sup> the Huber formulation of the intertemporal law:

"For the sake of clarity, the principle thus enunciated may be applied to another state of facts. Assume that State A in a year acquires Island X from State B by a Treaty of peace after a war in which A is the victor. Assume Island X is a barren rocky place, uninhabited and desired only by A for strategic reasons to prevent its fortification by another power. Assume that A holds island X, but without making use of it, for two hundred years. At the end of that time suppose that the development of International law and that the new rule is that no territory maybe acquired by a victor from a vanquished at the close of a war. Under the theory of "intertemporal law" as expounded, it would appear that A would no longer have good title to island X but must secure a new title upon such other basis or in accordance with the new rule. Such a retroactive effect of law would

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<sup>53</sup> Arbitration Award, *supra* note 17, at 883-884.

<sup>54</sup> IAN BROWNIE, PRINCIPLES PUBLIC OF INTERNATIONAL LAW 128 (1998)

<sup>55</sup> *Id.*

<sup>56</sup> JESSUP, *supra* note 39, at 739. See also Letter from Laurence Martin, Chief of Maps, Library of Congress (January 22, 1926), in 2 LAS PALMAS ARBITRATION RECORDS (on file with the UP IILS), where he cited Ebbing Wubben's article entitled "Die Nanusa Inseln" which said "In conclusion, I note that the Meangis Islands do not exist and are apparently confused with certain of the Nenusu islands."

be highly disturbing. Every State would constantly be under the necessity of examining its title to each portion of its territory in order to determine whether a change in the law has necessitated, as it were, a reacquisition. If such a principle were to be applied to private law and private titles, the result would be chaos.”<sup>57</sup>

Jessup’s foregoing criticism goes to the very heart of the Palmas award. As formulated by Huber, the application of inter-temporal law is the legal basis for third states, such as The Netherlands, to acquire a better title to disputed islands on the basis of subsequent acts executed over a long period of time from the incipient time of discovery.

Huber’s theory, was, however, without precedent and may probably be described as a bold articulation of a new theory which until today, does not seem to have been given wide acceptance. The reality is that jurisprudence abound in International Law respecting acquired rights or applying the law in force at the time of the creation of the right. This explains why, in Jessup’s example, state’s title to territory acquired as a result of conquest is not *ipso facto* extinguished as a result of the rise of the contemporary norm forbidding the use of force in the conduct of international relations.

Jessup had other criticisms of the Palmas award, one of the most significant is an issue of fact, which appears to have been overlooked. The Americans argued that based on historical data, the Dutch have always referred to Palmas as “*Miangis*”, “*Mayages*”, “*Meangis*” and “*Miangas*.” All these names have also been used to refer to the Nenusu Islands, a group admittedly belonging to the Netherlands. It was possible therefore that the island being claimed by Netherlands was not the Palmas Island but one of the Nenusu Islands which admittedly belong to them. Jessup maintained that this is an issue of fact which should have been decided with the assistance of experts.<sup>58</sup>

Jessup also objected to Huber’s findings that the American panel failed to show evidence proving effective occupation of the islands by either Spain or the United States. Jessup called attention to the American’s argument: there being a paucity of evidence of actual Spanish exercise of authority on Palmas island, it is proper to take into account the fact that this island is one part of the geographical unit known as the Philippine archipelago. Jessup insisted that Spain’s title over the archipelago is clear and in the absence of contrary evidence, it must be assumed that

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<sup>57</sup> JESSUP, *supra* note 39, at 740.

<sup>58</sup> *Id.*, at 744.

her occupation and control of Mindanao and other islands included Palmas Island.<sup>59</sup> This is the theory of constructive possession, *i.e.*, since Spain possesses the whole, constructively, it possesses all the parts.

The official records of communication among the Americans indicate a consensus as to the need to submit specific evidence to prove effective occupation of Palmas. Evidence contemplated for submission were the collection of the *cedula* or residence tax from the inhabitants of the islands, as well as reports from the different catholic sects<sup>60</sup> in the island. The fact that they did not actually do so was solely because Spain did not provide the Americans with actual evidence of its effective occupation of the island<sup>61</sup>. By default, therefore, the Americans had to argue that it was unnecessary to prove this specific fact of effective occupation in view of its theory of constructive possession as articulated by Jessup.

Clearly, Huber was of the opinion that specific evidence had to be presented. The Dutch agent did this. To debunk the American's crude formulation of what would later on be an accepted doctrine referred to in International Law as "constructive possession of hinterlands<sup>62</sup>," Huber ruled that title could not arise solely by reason of contiguity:

"In the last place there remains to be considered title arising out of contiguity. Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a state from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size)."<sup>63</sup>

Huber obviously not only failed to appreciate the American proposition, he ignored even the common definition of "archipelago" as a group of islands and

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<sup>59</sup> JESSUP, *supra* note 39, at 742.

<sup>60</sup> 3 LAS PALMAS ARBITRATION RECORDS, *supra* note 29.

<sup>61</sup> Letter from Fred Nielsen, Agent and Counsel for the United States in the arbitration, to the Secretary of State (September 28, 1925) in 2 LAS PALMAS ARBITRATION RECORDS (on file with the UP IILS). "I have an idea we might have a reasonable chance to win this case if Spain could have shown or would even have said that she ever exercised the slightest control over the island of Palmas. This she has not been willing to undertake to do."

<sup>62</sup> Legal Status of Eastern Greenland (Denmark v. Norway), PCIJ Series A/B No. 43 (1933).

<sup>63</sup> Arbitration Award, *supra* note 17, at 893.



waters forming a geographical whole.<sup>64</sup> Huber ruled that Palmas was beyond the territorial waters of either the Philippines or Indonesia.<sup>65</sup> He blatantly ignored the argument of the Americans that the island forms part of the Philippine archipelago. Consequently, both the Americans and the Dutch, in his mind, had to prove effective occupation of the island.

Huber rejected the contiguity theory based solely on the alleged lack of a positive rule that such a theory is recognized in international law.<sup>66</sup> There was an obvious hesitancy on his part to establish a precedent on this matter, despite the fact that he would later on establish two revolutionary and precedent-setting rulings on inter-temporal law and the use of critical dates.

It is not true that there was no positive rule in international law that would support the American argument that possession of a part of the archipelago results in an effective occupation of all the islands comprising the unit. It was pointed out in the American memorandum<sup>67</sup> and later on by Jessup,<sup>68</sup> that Venezuela, in the British Guiana Boundary Arbitration, already raised the proposition that occupation to be effective need not extend to every nook and corner of the territory. Some examples given by Venezuela in that arbitration was the constructive occupation of parts of American and Canadian wilderness which had the effect of possession of the entire area; as well as the English occupation of parts of Australia and New Zealand, which had the effect of possession over the entire continent.

It did not come as a surprise that only five years after Huber's award and Jessup's article, the Permanent Court of International Justice would expressly recognize the existence of the same rule, which Huber declared was non-existent. In the *Legal status of Eastern Greenland Case*, the Court recognized that Denmark's possession of part of Greenland was sufficient evidence of her possession of the whole disputed area.<sup>69</sup>

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<sup>64</sup> Art. 46, UNCLOS. "For the purposes of this Convention: (a) 'archipelagic state' means a state constituted wholly by one or more archipelagos and may include other islands; (b) 'archipelago' means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."

<sup>65</sup> Arbitration Award, *supra* note 17, at 891-894.

<sup>66</sup> Arbitration Award, *supra* note 17, at 893.

<sup>67</sup> As quoted in Jessup, *supra* note 39.

<sup>68</sup> Arbitration Award, *supra* note 59.

<sup>69</sup> *Eastern Greenland Case*, *supra* note 62, at 169, 185. "The Norwegian submissions are that Denmark possessed no sovereignty over the area which Norway occupied on July 10<sup>th</sup>, 1931, and that at the time of the occupation, the area was terra nullius. Her contention is that the area lay outside the limits of the

Critics may point out that the arguments advanced by Jessup in 1928 could be dismissed as biased. As an American, he would understandably be displeased with an award rendered against his own state. But Assistant Professor Philip Jessup would later on become one of the most eminent publicists in International Law, a stature which would culminate with his appointment as a Judge of the International Court of Justice.

Given the various and irreconcilable points of disagreements which Jessup had with the Huber award, it is tempting to resolve these disagreements on the basis of which one is the better publicist. Which of the two views should be accorded more persuasive weight as subsidiary means of ascertaining the correct legal view?<sup>70</sup>

In any case, Jessup was not alone in his criticism of the arbitral award. Sir Hearsh Lauterpacht, addressing the issue of contiguity, wrote:

"The award of Dr. Huber in the case of Island of Palmas has occasionally been cited as proving the assertion that international law does not recognize the title of contiguity. Even if it were the correct interpretation of the award it is doubtful whether, notwithstanding the high authority of the arbitrator, it could dispose of a doctrine which has figured prominently in the practice of states....<sup>71</sup>

In fact, the apparent antimony of effectiveness and contiguity begins to wear thin as soon as we realize that . . . effectiveness need not be as complete as appears at first sight and that contiguity is not theoretical and arbitrary at first sight. . . . The fact is that as a rule the conceptions of effectiveness and contiguity often provide no more than starting point. . . . It is effectiveness relative to the situation and to the circumstances. It may range from the requirements of intensive administration in every "nook and corner" . . . and it may assume the form of a mere proclamation. When that point is reached there is little

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Danish colonies in Greenland and that Danish sovereignty extended no further than the limits of these colonies....

Even if the period from 1921 to July 10<sup>th</sup>, 1931 is taken by itself and without reference to the preceding periods, the conclusion reached by the Court is that during this time Denmark regarded herself as possessing sovereignty over all Greenland and displayed and exercised her sovereign rights to an extent sufficient to constitute a valid title to sovereignty."

<sup>70</sup> Statute of the International Court of Justice, Article 38. "1. The Court, whose functions is to decide in accordance with international law such disputes as are submitted to it, shall apply:...(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law."

<sup>71</sup> Hearsh Lauterpacht, *Sovereignty Over Submarine Areas*, 1950 BRIT. Y.B. INT'L L. 376.

to choose between contiguity and effectiveness of occupation. Contiguity in such cases may be an essential condition which gives rise to the only element of substance to such otherwise abstract occupation. In that sense contiguity is a factor more potent.”<sup>72</sup>

O’Connell, for his part, also questioned how effective the Dutch occupation of Palmas could have been. Could it be, he asked, “ that effectiveness was established negatively from the absence of any competing manifestations of sovereignty, and that it was only because The Netherlands has taken more interest in the island than Spain that it was adjudged entitled?”<sup>73</sup>

Clearly, at least on the issue of effectiveness, the *Legal Status of Greenland Case*, as well as the later *Clipperton Arbitration*,<sup>74</sup> have established the rule that tribunals have been satisfied with very little in the way of actual exercise of sovereign rights, provided that in the actual exercise of sovereign rights, the other claimant could not make out a superior claim.

The theory of contiguity was already in existence in 1928, despite Huber’s denial. This theory, supported with even token evidence of effective occupation, even the mere raising of the Spanish flag, should have been enough basis for the award of the Palmas Island in favor of the United States.

#### B. STANDING TO ARBITRATE

Independent of the substantive and procedural aspects of the Huber Award, serious questions now need to be asked on what standing the Americans had to arbitrate on the issue of title to Palmas.

Both The Netherlands and the United States assumed, and Huber recognized, that the United States’ standing to arbitrate, otherwise defined as a personality to advance a right<sup>75</sup>, is by virtue of Spain’s cession of the entire Philippine archipelago to the United States through the Treaty of Paris on December 10, 1898.<sup>76</sup>

While cession was then, and until now, recognized as a mode for acquisition of territorial sovereignty, it is subject to the limitation that one’s title is only as good

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<sup>72</sup> Lauterpacht, *supra* note 71, at 428-429.

<sup>73</sup> 1 O’CONNELL 472

<sup>74</sup> Clipperton Island Arbitration (France v. Mexico), 2 U.N.REP. INT’L. ARB. AWARDS 1105.

<sup>75</sup> See ROSALYN HIGGINS, PROBLEMS AND PROCESS at 1-16 (1994).

<sup>76</sup> Arbitration Award, *supra* note 17 at 842.

as the title of one's predecessor, as expressed in the Latin maxim "*Nemo dat quod non habet.*"<sup>77</sup>

Moreover, it has been the view since the time of *Grotius* that the consent of the population of the ceded territory is essential to the validity of the cession.<sup>78</sup>

Clearly, the American standing to arbitrate on Palmas arises from the title of Spain to the entire archipelago at the time of the alleged cession on December 10, 1898. The question however is: Did Spain still have title to the Philippine archipelago on that date?

The Philippines, as recognized by all countries of the world, celebrates its Independence Day on June 12, 1898,<sup>79</sup> or almost 6 months prior to the Treaty of Paris. On that day, Gen. Emilio Aguinaldo, as a result of a victorious armed struggle for independence against Colonial Spain, declared the independence of the country from Spanish colonialism and proclaimed the first Asian Republic.<sup>80</sup>

Historians are in agreement that by June 12, 1898, Spanish military forces were already defeated by Filipino revolutionaries and were then generally isolated.<sup>81</sup>

Immediately after the proclamation of independence, a revolutionary government was declared, a cabinet was appointed and convened, a constitution was drafted, local government units were organized, and a Congress was convened with a majority of its members duly elected. All these, including the armed struggle, which preceded it, were done with the knowledge and complicity of American forces.

Philippine historian Renato Constantino wrote that by December 18, 1898, when the Treaty of Paris was signed,

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<sup>77</sup> Or, *nemo plus iuris transferre potest ipse habet*: no man can give another any better title than he himself has.

<sup>78</sup> II TRANSACTIONS OF THE GROTIUS SOCIETY. Also recent cessions have been conditioned upon the will of the people as expressed in plebiscite.

<sup>79</sup> Republic Act 4166 (August 4, 1964). An Act Changing the Date of Philippine Independence Day from July Four to June Twelve, and Declaring July Four as Philippine Republic Day, further amending for the purpose Section Twenty Nine of the Revised Administrative Code.

<sup>80</sup> RENATO CONSTANTINO, A PAST REVISITED 211 (1975). "The Filipino forces won victory after victory, capturing Spanish garrisons in quick succession. By the end of June, the Filipinos controlled virtually all of Luzon except Manila." It should be noted, however, that the declaration was patterned after the American Declaration of Independence, and that it said in part, "And summoning as a witness to the rectitude of our intentions, the Supreme Judge of the Universe, and under the protection of the Mighty and Humane North American Nation, we proclaim and solemnly declare, in the name and by the authority of the inhabitants of all these Philippine Islands, that they are and have the right to be free and independent..."

<sup>81</sup> *Id.* at 213.

"Spain actually controlled only a few outposts in the country. The Filipino people had won their war of liberation. On their own, without the help of any foreign power, they had put an end to the hated Spanish rule over their land. . . . The victorious people were now truly one nation with sovereignty won on the battlefield. The Malolos government was the symbol of their unity. They viewed its existence as the culmination of their struggles. They gave it their wholehearted support and allegiance."<sup>82</sup>

Another historian corroborated the foregoing when he observed that in January 1899:

"Excluding the town of Manila and the town of Cavite which were occupied by American troops, and excluding the southern and western part of the island of Mindanao and other lesser islands, the whole of the Philippine archipelago was loyal to the Malolos Government"<sup>83</sup>

It has become clear that as of the date of the signing of the Treaty of Paris, Spain no longer had title to the Philippine Archipelago. Consequently, Spain transferred nothing to the United States.

Furthermore, Spain could not have legally ceded the island of Palmas, or any other parts of the Philippines to the United States, not only because of its lack of title, but also because Filipinos had already established the Republic on June 12, 1898, before the signing of the Treaty of Paris.

Because of such declaration of independence and establishment of a Republic, the question arises: Did the Philippines achieve independent statehood on June 12, 1898?

The creation of any state is evaluated on the basis solely of the elements of statehood as defined by the *Montevideo Convention*: a permanent population, a defined territory, a government, and capacity to engage in formal relations with others<sup>84</sup>. On

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<sup>82</sup> CONSTANTINO, *supra* note 80, at 219.

<sup>83</sup> Senate Document No. 62, 55<sup>th</sup> CONG., 3<sup>rd</sup> Sess. at 500, as cited in LYNCH, *infra* note 92. See also MAJUL, THE POLITICAL AND CONSTITUTIONAL IDEAS OF THE PHILIPPINE REVOLUTION at 281 (1967).

<sup>84</sup> 26 Dec. 133, Art. 1, 49 Stat. 3097, TS No. 881. See also SIR GERALD FITZMAURICE, *The General Principles of International Law Considered from the standpoint of the Rule of Law*, 92 HAGUE RECUEIL 5, 13 (1957). "A State for international purposes may however perhaps be described generally as an entity which, possessing certain physical characteristics in the way of territory, a population, and governmental institutions, is self-contained and not part of a wider political unit; and which also has the capacity to enter into relations on the

the basis of historical accounts, the Philippines satisfied all such criteria by December 18, 1898, if not in fact sooner than such a date<sup>85</sup>.

The controversial issue is did the Philippines already have the capacity to enter into relations with other nations on December 18, 1898? This acquires significance given that no less than Apolinario Mabini, the acknowledged brains of the Philippine Revolution, acknowledged that amongst the avowed goals of the Revolutionary Government was to seek the recognition of other countries<sup>86</sup>.

Recognition, at one point, was considered to be an element of statehood<sup>87</sup>. This debate, however, has since been resolved in favor of the view that recognition is not an element of statehood and is merely declaratory in nature<sup>88</sup>.

Consequently, the Philippines, by December 18, 1898, need not show proof of recognition by other nations. In any case, the number of countries represented in the annual *vin de honor* held on the occasion of the country's independence day on June 12 of every year, including the attendance of the Ambassadors and officials from the Netherlands, Spain, Indonesia, and the United States, should be sufficient proof of recognition – that indeed, on June 12, 1898, the Philippines acquired independence and statehood.

That the Americans were keenly aware of the existence of a new independent State of the Philippines, and the fact that Spain had lost its title to the archipelago as of the time of signing of the Treaty of Paris, are well documented.<sup>89</sup> In fact, it was because of these considerations that American policy makers had to hide their imperialistic agenda to appease those who were opposed to the annexation of an independent nation.

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external plane with other States – either directly (in the case of fully sovereign independent States) or mediately, through other states (in the case of protected states)."

<sup>85</sup> CONSTANTINO, *supra* notes 80, 81.

<sup>86</sup> CONSTANTINO, *supra* note 80, at 128.

<sup>87</sup> H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* at 52-58 (1947).

<sup>88</sup> R. Y. JENNINGS, *General Course on Principles of International Law*, 121 HAGUE RECUEIL 323, 349-368; See also CHEN, *THE INTERNATIONAL LAW OF RECOGNITION* 18, n.41 (1951). Chen explains that the declaratory view of State recognition is grounded on the positivist doctrine of sovereignty of States.

<sup>89</sup> CONSTANTINO, *supra* note 80. "Admiral Dewey was pleased afterwards, he wrote in his autobiography: 'The Filipinos drove the Spaniards back toward the city. By day, we could see their attacks, and by night we heard their firing. The insurgents fought well... Their success, I think, was of material importance in isolating our marine force at Cavite from Spanish attack and in preparing a foothold for our troops when they should arrive'"

Among those who vigorously opposed the annexation of the Philippine Republic by the United States was Republican Senator George Frisbie Hoar:<sup>90</sup>

“under the Declaration of Independence you cannot govern a foreign territory, a foreign people, another people other than your own., that you cannot subjugate them or govern them against their will, because you think it is for their good when they do not; because you are going to give them the blessings of liberty.”<sup>91</sup>

Such opposition prompted the US Congress to explain its intentions:

“Resolved, That by ratification.... it is not intended to incorporate the inhabitants of said Islands into citizenship of the United states, nor is it intended to permanently annex said islands....”<sup>92</sup>

### C. NON-TRANSFERABILITY OF ARBITRAL AWARDS

It is a cardinal rule in arbitration that consent freely given is the core for any arbitration<sup>93</sup>. Arbitral awards are therefore only binding on States that agreed to the arbitration<sup>94</sup>. Since the Philippines, at the time an independent State already, was not a party to the Palmas Arbitration, it follows then that it cannot be made subject to the Huber decision.<sup>95</sup>

Even assuming for the sake of argument, that the Philippines may be held as the successor state of the United States to Palmas and the entire Philippine archipelago as ceded to it by Spain in the Treaty of Paris, still it would not *ipso facto* result in the Philippines’ succession to the obligations of US.

The matter, furthermore, is governed by the existing international law norms on State Succession. Under existing norms, successor states do not

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<sup>90</sup> G. GUNDER & LIVEZY, *THE PHILIPPINES AND UNITED STATES* 40 (1951).

<sup>91</sup> C.R., 55<sup>th</sup> Congress, 3<sup>rd</sup> Session, 493-503 as cited in LYNCH, *infra* note 92.

<sup>92</sup> The amendment was attributed to Sen. Samuel D. McEnery in Owen Lynch, *The Legal Bases of Philippine Colonial Sovereignty: An Inquiry*, 62 PHIL. L. J. 304 (1987).

<sup>93</sup> Convention for the Pacific Settlement of International Disputes, Article 31. “The Powers who have recourse to arbitration sign a special Act (compromis), in which the subject of the difference is clearly defined, as well as the extent of the Arbitrators’ powers. This Act implies the undertaking of the parties to submit loyally to the Award”

<sup>94</sup> *Id.* at Art. 56. “The Award is only binding on the parties who concluded the compromis.”

<sup>95</sup> *Id.*

automatically succeed to the rights, capacities, and obligations of their predecessor states<sup>96</sup>.

Recent state practices, including that of the recently unified Germany and the rise of new states from the former Yugoslavia, prove that States are at liberty to choose which obligations, treaty based or otherwise, they will succeed to.

There has yet been no official acknowledgement from the government of the Philippines that it has opted to succeed the United States in the Palmas arbitration. On the contrary, all its laws and Constitutions, define the territory of the Philippines on the basis of historical title, including the metes and bounds as contained in the Treaty of Paris<sup>97</sup>. There is also nothing in the Treaty Between the Philippines and the United States preparatory to the latter's attainment of independence that would indicate that the former agreed to succeed the latter on the Palmas arbitration. What was stipulated between them was only that:

"The Republic of the Philippines agrees to assume all continuing obligations assumed by the United States of America under the Treaty of Peace between the United States of America and Spain concluded at Paris on the 10<sup>th</sup> day of December, 1898, by which the Philippine Islands were ceded to the United States of America, and under the Treaty between the United States of America and Spain concluded at Washington the 7<sup>th</sup> day of November, 1900<sup>98</sup>".

The fact that the Treaty of Paris is recognized as defining the territory of the country does not give the supposed cession for which it was signed any recognition. Instead, the treaty only serves as evidence on the actual boundaries of the country as defined by its former colonial master.

Under the principle of *uti posseditis*, which was applied in such cases as the Mali-Burkina Faso case, the Guinea Bissau v. Senegal case, and the Guinea-Guinea-Bissau Maritime Delimitation case, colonial boundaries, for reasons of stability and finality of frontiers, should not be challenged.

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<sup>96</sup> D. P. O'CONNEL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW [vols. I and II] (1967); See also D. P. O'CONNELL, *Recent Problems of State Succession in relation to New States*, 130 HAGUE RECUEIL 95-206 (1970); See also KARL ZEMANEK, *State Succession after Decolonization*, 116 HAGUE RECUEIL 187-300 (1965); See also ERIK J. S. CASTREN, *Aspects Recents de la Succession* 78 HAGUE RECUEIL 379-506 (1951); JENNINGS, *supra* note 88 at 437-451.

<sup>97</sup> CONST., art. I.

<sup>98</sup> Treaty of General Relations Between the United States of America and the Republic of the Philippines, July 4, 1946, United States - Philippines, 7 U.N.T.S. NO. 88, at Art. VII.



Assuming that Indonesia successfully argues that the arbitration is binding on the Philippines, it is still estopped from claiming that Palmas forms part of the Indonesian Archipelago because unlike the Americans, the Dutch never alleged this in the Palmas arbitration<sup>99</sup>.

At the most, Indonesia may be recognized to have sovereignty over the island by virtue of the Palmas arbitration and pursuant to the UNCLOS, the island may be "enclaved"<sup>100</sup> and given its own territorial sea<sup>101</sup>. Any other arrangement would be contrary to the UNCLOS and would lead to a disproportionate and inequitable result.

The surrounding waters, therefore, even under the best scenario for the Indonesians, should still be declared as forming part of Philippine archipelagic and territorial waters<sup>102</sup>.

### III. CONCLUSION

The Palmas arbitration is, on the basis of criticisms made by the most qualified publicists, at best defective, and at worse, erroneous. Pursuant to the principle of autonomy of parties, the arbitration is binding only on the parties thereto: the Netherlands, and the United States. In any case, the Philippines, as a non-party to the arbitration, cannot be bound by the arbitral award.

Neither may it be said that the award is binding on the Philippines as successor state of United States for at least two reasons: one, at the time of the arbitration, the United States had no interest over the island of Palmas, nor to any of the islands comprising the Philippine archipelago. Since the United States claim its title to the Philippines on the basis of cession, it can acquire only such rights that its

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<sup>99</sup> See Dutch Memorandum and Counter-Memorandum to the Island of Palmas (or Miangas) Arbitration.

<sup>100</sup> Since the Dutch never claimed Palmas to be part of an archipelago, it should be treated as an island under art. 121(1) of the UNCLOS, which provides that "An island is a naturally formed area of land, surrounded by water, which is above water at high tide." If it cannot support "human habitation" or "economic life of its own," it can only have its own territorial sea, without an exclusive economic zone, under art. 121 (2) and (3) of the UNCLOS. Enclavement was applied by the ICJ in the case of *Minquiers and Ecrehos*, as well as by the PCA in the *Entrea-Yemen* arbitration.

<sup>101</sup> *Id.*

<sup>102</sup> Pursuant to art 310 of the UNCLOS, the Philippines declared that its signing the Convention does not in any way impair or prejudice the sovereign rights of the country under and arising from the Constitution of the Philippines. See VII PHIL. Y. INT'L. L. 30 (1982). Dean Merlin Magallona of the University of the Philippines maintains that the boundaries contained in the Treaty of Paris are still the basis of the maritime territory of the Philippines. See MERLIN MAGALLONA, *The UN Convention on the Law of the Sea and its Implications on Territorial Sovereignty*, VIII THE LAWYERS REVIEW 2 (1994).

predecessor had in the archipelago. Since Spain no longer had title to the Philippines at the time of the cession, it follows that its successor-in-interest acquired the same title it had over the country: that is, none. Second, there is nothing, to date, to show that the Philippines has agreed to succeed the United States in the arbitral award.

Assuming, for the sake of argument that Indonesia's title to Palmas is beyond dispute because of the Palmas arbitration, it does not, however, justify Indonesia's act in its 1992 baselines law utilizing the island as a base point for the drawing of its archipelagic baselines. This is because Indonesia's predecessor-in-interest, Netherlands, did not allege, in the Palmas arbitration, that the island formed part of the Indonesian archipelago. Accordingly, Palmas should be treated as an island independent of the Indonesian archipelago and properly enclaved.

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