THE PHILIPPINE CLAIM TO THE SPRATLY ISLANDS GROUP*

HAYDEE B. YORAC**

Introduction

The Philippines is a mid-ocean archipelago consisting of more than 7,100 islands some of which remain unnamed. The islands portion of the archipelago lies along some 1,150 miles between the Pacific Ocean and the South China Sea. It is separated from Taiwan by the Bashi Channel, from Indonesia by the Celebes Sea, from North Borneo (Sabah) by narrow passages, channels and straits, from the Asian mainland by the South China Sea and from the Trust Territory of the Pacific Island by the Philippine Sea which is an arm of the Pacific Ocean.[1]

As such mid-ocean archipelago, some of its islands lie at a distance of more than twelve nautical miles from each other.[2] For economic, fiscal, political, but more especially security reasons,[3] the Philippines has been sensitive to the question of what constitutes its island waters and maritime boundaries, and has consistently been assertive of claims relative to them. It therefore advances the notion of itself as an island-studded water with both land and water forming a composite and integral unity making up territory.[4] The legal foundations of such claims are recognition by treaty,[5] devolution of treaty rights,[6] and historic title.[7]

Accordingly, since its first opportunity to officially define its national territory, the Philippines has consistently claimed boundaries that cover expanses of water greater than those traditionally recognized by inter-

* This article is part of a larger technical work in progress, which will focus on claims to territory and problems of delimitation of maritime boundaries in international law as regards the Philippine claim to the Spratly group.

** *Professorial Lecturer,* U.P. College of Law and *Senior Law Researcher,* U.P. Law Center.

1 Ridao, *The Philippine Claim to Internal Waters and Territorial Sea: An Appraisal,* PHIL. YRBK. INT'L. L. 57, 58-60 (1974). See map on the preceding page.

2 Mendoza, *The Baselines of the Philippine Archipelago,* 46 PHIL. L.J. 628, 631 (1971).

3 Tolentino, *The Philippine Territorial Sea,* 3 PHIL. YRBK. INT'L. L. 47, 48 (1974).

4 Ingles, *The Archipelagic Theory,* 3 PHIL. YRBK. INT'L. L. 23 (1974); Coquia, *The Problem of Territorial Waters of Archipelagos,* 7 FAR EAST. L. REV. 435, 453 (1959).

5 The Treaty of Paris of 10 Dec. 1898 between the United States and Spain, U.S.T.S. No. 343, 30 Stat. 1754. Supplementary treaties were the Treaty of 7 Nov. 1900 between the United States and Spain, U.S.T.S. No. 345, 31 Stat. 1942, and, the Treaty of 2 Jan. 1930 between the United States and the United Kingdom, U.S.T.S. No. 846, 47 Stat. 2198. For an extended discussion of this point, see Ridao, *op. cit. supra,* note 1 at 62-68.

6 Ridao, *op. cit.,* note 1 at 69-70.

7 *Id.* at 70-74.

national law in favor of non-archipelagic states. Thus, Article I of the Philippine Constitution of 1935 provided:

> The Philippines comprises all the territory ceded to the United States by the Treaty of Paris concluded between the United States and Spain on the tenth day of December, eighteen hundred and ninety eight, the limits of which are set forth in Article III of said treaty, together with all the islands embraced in the treaty concluded at Washington, between the United States and Spain on the seventh day of November, nineteen hundred, and in the treaty concluded between the United States and Great Britain on the second day of January, nineteen hundred and thirty, and all territory over which the present Government of the Philippine Islands exercises jurisdiction.

The pertinent provision of the Treaty of Paris[8] relied upon as the original source of the claim to national boundaries reads as follows:

> A line running from west to east along or near the twentieth parallel of north latitude, and through the middle of the navigable channel of Bachi, from the one hundred and eighteenth (118th) to the one hundred and twenty seventh (127th) degree meridian of longitude east of Greenwich, thence along the one hundred and twenty seventh (127th) degree meridian of longitude east of Greenwich to the parallel of four degrees and forty five minutes (4°45') north latitude, thence along the parallel of four degrees and forty five minutes (4°45') north latitude to its intersection with the meridian of longitude one hundred and ineteen degrees and thirty five minutes (119°35') east of Greenwich, thence along the meridian of longitude one hundred and nineteen degrees and thirty five minutes (119°35') east of Greenwich to the parallel of latitude seven degrees and forty minutes (7°40') north, thence along the parallel of latitude of seven degrees and forty minutes (7°40') north to its intersection with the one hundred and sixteenth (116th) degree meridian of longitude east of Greenwich, thence by a direct line to the intersection of the tenth (10th) degree parallel of north latitude with the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich, and thence along the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich to the point of the beginning.

It is asserted that the above-mentioned treaty and subsequent related treaties[9] recognized and confirmed the same limits of Philippine territory, and the Philippines has always acted conformably to this claim. Thus all official maps issued by the Government and its agencies and instrumentalities have reflected such claim.

In 1955, the Philippine Government, through its Secretary of Foreign Affairs, sent a note to the Secretary-General of the United Nations and diplomatic notes to other states notifying them that all waters embraced in the imaginary line described by the Treaty of Paris and other treaties mentioned in Article I of the Philippine Constitution were territorial

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[8] *See supra* note 5.
[9] *Ibid.*

waters of the Philippines, subject to the exercise of the right of innocent passage by vessels of friendly nations.[10]

In 1961, the Philippine Congress passed Republic Act No. 3046. By this law the Philippines adopted the straight baseline method to enclose its territorial waters, using the outermost islands and drying reefs of the archipelago in drawing the baselines but at the same time affirming the treaty limits set in the Constitution and the diplomatic note.

In January 1973, President Marcos proclaimed the ratification of a new Philippine Constitution by citizens' assemblies all over the country.[11] The new Constitution, like the one it purported to replace, contains a provision defining Philippine territory. The provision is an amplified version of the 1935 one. It reads:

> The national territory comprises the Philippine archipelago with all the islands and waters embraced therein, and all other territories belonging to the Philippines by historic right or legal title, including the territorial sea, the airspace, the subsoil, the sea-bed, the insular shelves, and other submarine areas over which the Philippines has sovereignty or jurisdiction. The waters around, between and connecting the islands of the archipelago, irrespective of their breath and dimensions, form part of the internal waters of the Philippines.

Notably, no express reference is made in the new provision to the treaties on which the original claim to maritime boundaries was based. It can be assumed that the territories mentioned in these treaties are now subsumed by the phrase "territories belonging to the Philippines by historic right or legal title." By using broad and comprehensive terms in the definition of its national territory, the Philippines confirmed active assertion of ownership over some islands in the Spratly group.

Philippine Claim to Spratly Islands Group

In 1956, a Filipino navigator named Tomas Cloma issued a "Proclamation to the whole World" asserting ownership by discovery and occupation over all the territory, "33 islands, sands cays, sands bars and coral reefs and fishing grounds in the Spratlies covering an area of 64,976 square nautical miles."[12] This claim provoked statements of protest against

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[10] Laws and regulations on the regime of the territorial sea (U.N. legislative series), ST/LEG/SER. B/6 39-40; 4 WHITEMAN, DIGEST OF INTERNATIONAL LAW 282-283; DUBNER, THE LAW OF TERRITORIAL WATERS OF MID-OCEAN ARCHIPELAGOS AND ARCHIPELAGIC STATES 60-61 (1976). The United States is one of the governments that have registered their protest against this declaration. A/CONF. 19/C 1/L.6, 2nd UNCLOS (A/CONF. 19/8) 167-168. This has elicited rejoinders from official representatives of the Philippines. See Tolentino, *On Historic Waters and Archipelagos*, 3 PHIL. YRBK. INT'L. L 31 (1974).

[11] Proc. No. 1102 (1973).

[12] Chiu & Park, *Legal Status of the Paracel and Spratly Islands*, 3 OCEAN DEV. INT'L. L. J. 9 (1978).

the Philippines by the People's Republic of China and the Republic of Viet-Nam.[13]

The Cloma proclamation was not the first attempt on the part of the Philippine Government to assert title over these islands. Shortly after its independence, in early 1947, the Philippine Secretary of Foreign Affairs demanded that the "New Southern Islands" which were occupied by Japan during the Second World War be given to the Philippines.[14] No further manifestation of interest nor effective assertion of jurisdiction followed.

After the Cloma assertion of title, however, it appears that some officially sanctioned acts were taken with a view to confirm or consolidate a legal claim.[15] In 1971, the Philippine government sent a diplomatic note to Taipeh demanding that the Chinese garrison in Itu Aba, the largest island in the group, be immediately withdrawn. The legal bases of the demand were as follows: (1) The Philippines has legal title to the island group as a consequence of the occupation by Tomas Cloma; (2) the presence of the Chinese forces in Itu Aba constituted a threat to the security of the Philippines; (3) the Chinese occupation of some islands in the Spratly group constituted *de facto* trusteeship on behalf of the World War II allies which precluded the garrisonning of the islands without the allies' consent; and (4) the Spratly group is within the archipelagic territory claimed by the Philippines. This demand was precipitated by the firing by Chinese artillerymen on a boat which carried former Senator Ramon Mitra Jr., a resident of Palawan who was visiting some of the islands on an inspection tour.[16]

In 1974, an official spokesman of the Philippine government announced that the Philippines had garrisoned five of the islands within the group.[17] At present, the Philippines has possession of seven islands. A number of Filipino nationals have settled in these islands, and a local government has been organized in one of them.[18]

On June 11, 1978, President Marcos issued Presidential Decree No. 1596 declaring most[19] of the islands, cays, shaols and reefs as belonging to the Philippines and forming an integral part of Philippine territory. It named the area claimed "Kalayaan Island Group," which is a Filipinized version of the name Tomas Cloma gave his discovery: "Freedomland." The group of islands was integrated as a municipality of the province of Palawan, the Philippine island closest to the incorporated cluster. The

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13 Id. at 9, 15.

14 Cheng, *The Dispute Over the South China Sea Islands,* 10 TEX. INT'L. L.J. 265, 270 (1975).

15 Perfecto, *The Philippines' Kalayaan Islands,* FSI REC. 29, 39 (June 1980)..

16 Cheng, *op. cit.,* note 15 at 270-271.

17 *Id.* at 271.

18 Perfecto, *op. cit.,* note 15 at 40.

19 Spratly Island, for instance, is not within the enclosed area.

decree cited a number of bases for the claim to title, namely: (1) the area is part of the continental margin of the Philippine archipelago; (2) the islands do not belong to any state, but by reason of history, indispensable need, and effective occupation and control established in accordance with international law, should now be deemed subject to the sovereignty of the Philippines; and (3) claims by other states over the area had lapsed by reason of abandonment and cannot prevail over that of the Philippines on legal, historical and equitable grounds.[20]

On the same date, President Marcos also issued another decree[21] proclaiming a 200-mile exclusive economic zone for the Philippines. This decree provides for the exclusive right on the part of the Philippines: to issue licenses and enter into agreements within such zone;

> [to] explore or exploit any resources; carry out search, excavation or drilling operations; conduct any research; construct, maintain or operate any artificial island, off-shore terminal, installation or other structure or device; or, perform any act or engage in any activity which is not contrary to, or in derogation of, the sovereign rights and jurisdiction...provided [in the decree].

In the same month, the Philippine Coast and Geodetic Survey Office, an agency under the Ministry of National Defense, issued a new official map of the Philippines which extended the country's previous maritime boundaries by enclosing, through the expedient of drawing straight lines, the Kalayaan Island Group within the Philippine archipelago. Another map by the Survey Office reflecting the continental shelf of the Philippines also evinced this assertion of title.

The Spratly Islands Group

The Spratly Islands group consists of a large number of banks, reefs, cays and islands stretching from a point at 40°N and 109° northeastward to a point of 11°31 and 117°E.[22] Nine of the islands or cays appear to be more important than others because of their sizes, and are the ones occupied by the various claimants: the Spratly Island, the Amboyna Cay, the Itu Aba Island, the Namyit Island, the Laotia Island, the Lankiam Cay, the Thitu Island, the North Danger Southeast Cay and the Northeast Cay.

The islands, volcanic in origin, consist mainly of sandstone or sand. Most are covered with bushes, coconut and plantain trees, and guano. While some of the islands are habitable, they have not been subjected to permanent settlement until recent times. Structures such as huts and temples had been built, but had always been abandoned to disuse.

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20 Pres. Decree No. 1596 (1978), sec. 1.
21 Pres. Decree No. 1599 (1978).
22 Cheng, *op. cit.*, note 15 at 267.

There are two prevailing wind directions: northeasterly winds are generated by the northeast monsoon from September to March and southwesterly winds by the southwest monsoon from April to August. A rainy season, during which rainfall may reach 530 mm., lasts from July to December.[23]

Like many islands distant from the mainlands which have been claimed by different imperial powers of Asia, the Spratly Islands group has been subjected to recurrent and sometimes concurrent assertion of title and ownership by different claimants, often without knowledge of other existing claims.[24]

There is no record, however, that claims made prior to the 1900's had been accompanied by positive assertions of effective sovereignty or control for a continuous and substantial length of time. Japan used the islands as naval outpost for six years during the Second World War. During the early post-World War II period, all the present claimants, who base their claim upon occupation, were in the throes of social revolution. Therefore while an exchange of verbal claims of ownership was made, there is no evidence that these were followed by acts which might be legally characterized as assertions of sovereignty except those undertaken by the Republic of China after the surrender of Japan. But the effects of those acts are debatable as will become evident in the discussion of the facts and the law below.

Significance of the Spratly Islands Group

a. *Economic*

While the different claimants took some measures to protect their interests in 1956, interest in the island groups gained new intensity around 1971 when oil became a vital, expensive and oftentimes scarce commodity in the world economy. Since the discovery of oil in the vicinity of the South China Sea, it has been believed that this body of water could be holding locked in its sea-bed one of the largest deposits of oil in the world.[25]

b. *Strategic*

Apart from the possibility of finding great deposits of petroleum in the area, the Spratly Islands group is important because of its location. It straddles practically the center of the South China Sea, which is a sea-lane used by all maritime countries either for military passage and maneuvers or for commerce.[26] The fluid and volatile political situation in the East Asian region gives added significance to the ultimate establishment of

23 Perfecto, *op. cit.*, note 16 at 29.
24 Chiu & Park, *op. cit.*, note 13 at 3.
25 *Id.* at 4; Cheng, *op. cit.* at 265, 266.
26 Chiu & Park, *op. cit.* at 5-6; Perfecto, *op. cit.* at 36-39.

ownership over the islands. It is a well-known fact that the three claimants which base their claim on sovereign occupation represent three divergent political interests as well. The Democratic Republic of Viet-Nam is an ally of the Soviet Union and is therefore sympathetic to the latter's international policies. The Philippines, despite ostensible efforts to identify itself with non-aligned countries in recent years, has thus far continued to pursue policies in harmony with those of the Western powers, especially the United States. The People's Republic of China, while at present (as a consequence of its conflict with Russia) following a policy of cooperation with the United States, is an emergent great power in the region with a strong sense of its own short- and long-term interests.

It can easily be seen how the effective assertion of ownership over the islands will determine decisions on who shall explore and exploit the resources in the surrounding seas and how the important passage shall be used in the future. It has important regional and international economic and military implications. It is therefore understandable why the conflict of interests that led to armed clashes between the troops of the People's Republic of China and those of the Republic of Viet-Nam in 1974 in the Paracels also impelled contesting claimants to station military forces in the different islands in the Spratly group.[27]

Claims to Spratly Islands Group

The Spratlies or some part thereof has been variously claimed by China (both the People's Republic of China and the Republic of China), Viet-Nam, France, Japan, the Philippines, and, lately, Malaysia. Lindley also records that in 1877 two of the islands in the group were annexed by Great Britain and leased out for guano collection.[28]

a. *China*

Writers[29] who have shown sympathy with the claim of China over both the Paracels and the Spratlies acknowledge that references to the latter in Chinese historical writing are infrequent.[30] They adduce the following evidence in support of China's claim to the Spratly Islands:

1. During the Yuan Dynasty, an expeditionary force sent to Java sailed through both the Spratlies and the Paracels.[31]

2. When the famous Chinese navigator Cheng Ho of the Ming Dynasty sailed through the South China Sea between 1403 and 1433, his ships sailed through the Paracel and Spratly Islands and his men recorded

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27 Chiu & Park, *op. cit.* at 1; Cheng, *op. cit.* at 265.

28 LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 7 (1925).

29 Chiu & Park, *op. cit.*, note 13; Cheng, *op. cit.*, note 15.

30 Chiu & Park, *op. cit.* at 10; See discussion of Cheng, *op. cit.* at 273-275.

31 Chiu & Park, *op. cit.* at 10.

the location of these island groups on a map drawn between 1425 and 1430.[32]

3. During the Ching Dynasty a Chinese scholar, Chen Lun-Chiung described the islands' geographical position in a book and charted the two groups in his map.[33]

4. It is claimed that Chinese people from Hainan have used the Spratly Islands since ancient times. The only evidence offered to support this claim, however, is the British publication, *The China Sea Pilot,* published in 1923, which recorded that Chinese fishermen from Hainan were found in most of the islands.[34]

5. Names were given to the Spratly group by Chinese governments of 1912 and 1934 and by the Republic of China in 1947.[35]

6. Reference is made to an alleged attempt by the German government to survey the Spratly group in 1883 which attempt was supposed to have been stopped when the Chinese government protested. The source of this information, however, is a supposed disclosure made by the Provincial Government of Kuantung in 1933.[36]

7. The treaty of delimitation of 1887 between China and Tonkin provided that with respect to islands in the ocean, the longitude 105°E was the dividing line. So, according to the supporters of the Chinese claim, both the Paracels and Spratly group fall on the side of China.[37]

No reference is made to the leases granted by Great Britain over both Spratly Island and Amboyna Cay in the same year.[38]

8. Finally, the possession of the islands taken by Chinese forces from Japanese troops after the Second World War[39] and the provision of the bilateral treaty of peace.[40] between the Republic of China and Japan, are pointed to as evidence that Japan admitted the historic claim of China over the islands.[41]

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[32] *Id.;* Cheng, *op. cit.* at 273 says that "it is maintained that his forces occupied or surveyed all the major South Sea Islands."

[33] Chiu & Park, *op. cit.* at 10.

[34] *Ibid.* at 10-11; Cheng, *op. cit.* at 274.

[35] Chiu & Park, *op. cit.* at 11.

[36] *Ibid.*

[37] Chiu & Park, *op. cit.* at 12.

[38] See note 29, *supra.*

[39] Again, there is some discrepancy in the account of Chiu and Park and that of Cheng. According to the former, "On August 26, 1945...Japanese forces withdrew from the Paracel and Spratly Islands. In November 1946, the Republic of China government sent a naval contingent...to take over the islets," at 13. The latter, on the other hand, claims that the Japanese forces surrendered to the representatives of China, at 275.

[40] 138 U.N.T.S. 38.

[41] Chiu & Park, *op. cit.* at 14; Cheng, *op. cit* at 275.

At present, Republic of China troops are stationed in the Itu Aba island.[42]

b. *Viet-Nam*

Although Viet-Nam also claims historic title to the islands, its claim to the Spratly group is traced only as far back as 1927, when the French government sent the ship De Lanessan on an expedition to the island. This was followed by two more expeditions: in 1930 by the ship *Le Millicieuse,* on the occasion of which a French flag was planted on one of the islets, and in 1933 by three other French ships. After the last trip, a decree was issued by the French government incorporating six groups of islets in a Vietnamese province. The expedition and the decree provoked protests from both China and Japan.[43]

In 1938, a weather station was built on one of the Islands by the Indo-China Meteorological Service.[44]

A number of questions arise with respect to the foregoing acts. Did the French expeditions of 1927 and 1930 redound to the benefit of Viet-Nam? There seems no evidence at this point that France intended to integrate the islands with Viet-Nam. If France undertook the expedition for its own account without reference to Viet-Nam, the latter cannot use the first two expeditions as legal basis to support its claim. This therefore leaves the expedition of 1933 and the decree issued subsequent to it as the only bases of Viet-Nam's claim to ownership. Therefore, the claim of the Vietnamese representative to the San Francisco Conference in 1951 that "we affirm our right to the Spratly and Paracels Islands, which have always belonged to Viet-Nam" appears at best overstated, at least with respect to the Spratly Islands.

Like China, the Republic of Viet-Nam had sent patrols to the area since 1956, although the occupancy of the islands it holds at present only dates back to 1974, when the troops it stationed in the Paracels retreated to the Spratly group after clashing with the forces of the People's Republic of China. As of 1980, the Republic of Viet-Nam had possession of the South-west Cay, Sincowe, Namyit and Sand Cay in addition to the Spratly Island. The last is not among those claimed by the Philippines.

c. *The Philippines*

Among the active claimants by virtue of occupation, the Philippines is chronologically the last. It traces its claim of title to the occupation and proclamation made by Tomas Cloma in 1956.[45] It was, however, the first

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42 Perfecto, *op. cit.*, note 16 at 29.
43 Chiu & Park, *op. cit.* at 8-9; for a somewhat different account see Cheng, *op. cit.* at 268.
44 Chiu & Park, *op. cit.* at 9.
45 *Ibid.*; Cheng, *op. cit.* at 270.

to assert title to the territory after the renunciation made by Japan in 1951 and 1952.

d. *Malaysia*

The latest active claimant to the Islands is Malaysia. In 1980, it issued a new official map which claimed continental shelf encroaching upon a portion of the Spratly group and part of the Palawan group. Among the islands of the former included in the delimitation are the Commodore Island, the Northeast Shea, the North Vipa Shoal, the Glouchester Breakers, the Adraiser Shoal, the Banque Canada, the Mariveles Reef, the Lizzie Webber and their vicinity.[46]

The basis of this claim appears to be solely the concept of exclusive control over the continental shelf.

e. *Japan*

Japan is not an active claimant to the islands at present. Nevertheless, its previous claim, its behavior relative to the islands, and other evidence of its relations with the same appear to be critical factors in assessing the various claims of the present active disputants.

As far as available records show, the first expression of Japanese claim to title was made in 1933. The French government sent an expedition to occupy the islands, placing the same under French administrative control through the enactment of a decree attaching the islands to the Barja province of Viet-Nam. At this time, the Japanese government issued formal protests declaring that Japanese subjects had been conducting solemn occupation of the islands since 1917 with the support of the Imperial Government.[47]

In fact, the French expeditionary forces found some mining machines left by Japanese guano collectors.[48]

In 1939, Japan announced its decision to take physical possession of both the Paracels and Spratly Islands. The Japanese official gazette showed a declaration by Japan's Office of the Taiwan Governor-General that the Shinnan Gunto was placed under the jurisdiction of the Kaoshiung Chou (County) of Taiwan, then a territory of the Japanese Empire. Throughout the Second World War, some of the islets were used by the Japanese Navy as outposts for its naval base in Hainan Island.[49]

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[46] Perfecto, *op. cit,* note 16 at 31.

[47] Chiu & Park, *op. cit.* at 9. But see, at 12 for a statement that the Chinese record Japanese protest to Viet-Nam sovereignty over the islands as dating back to the 1920's arising from Japanese mineral exploration as well as some other grounds, citing Ohira Zengo, *The Acquisition of Shinnan Gunto and the International Law of Occupation,* GAIKO JIHO (Diplomatic Times) Tokyo, vol. 91, No. 5 (Sept. 1, 1939), pp. 92-103.

[48] *Id.* at 8.

[49] Cheng, *op. cit.* at 267.

On August 26, 1945, the Japanese forces withdrew from the Paracels and the Spratly Islands. On September 8, 1951, the Treaty of Peace[50] between the Allied Powers and Japan was signed in San Francisco. Art. 2(f) of this Treaty provided that "Japan renounces all rights, title and claim to the Spratly Islands and to the Paracel Islands."

On April 28, 1952, Japan signed a bilateral peace treaty with the Republic of China which provided that "It is recognized that under Article 2 of the Treaty of Peace with Japan signed in the city of San Francisco in the United States of America on September 8, 1951, Japan has renounced all right, title and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratly Islands and the Paracel Islands"[51]

The foregoing facts raise the issue of the existence and nature of the Japanese title to the territory and the legal effects of the renunciation that it made in the Peace Treaty signed with the Allied Powers and the bilateral treaty with the Republic of China.

The Applicable Rules

In international law, conflicting claims to territory are not resolved by a determination of who among the several claimants possesses the perfect title, but who among the contending parties has the better title.

Judicial and arbitral decisions and the writings of publicists provide the guidelines to principles which might be applicable in the determination of whether or not a particular territory is without legal owner, or is *territorium nullius,* or, as between two or more disputants, who has the superior title or holds the valid legal claim.

(a) *Territorium nullius*

As a matter of general definition, *territorium nullius* is territory over which there exists no effective sovereignty and which is therefore, subject to acquisition by occupation.[52] The concept of *territorium nullius* is analogous to the Roman doctrine of *res nullius.* But while the rules governing the latter's acquisition may be analogized to the acquisition of territory in a general way, caution must be taken to recognize that the rules on *res nullius* are mostly inadequate to resolve questions of rival claims to sovereignty over large tracts of territory.[53]

Lindley lists down territory which might come within the concept of *territorium nullius* as follows:[54]

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50 Chiu & Park, *op. cit.* at 14; Cheng, *op. cit.* at 275.
51 *Ibid.*
52 KELLER, LISSITZYN & MANN, SOVEREIGNTY THROUGH SYMBOLIC ACTS 4 (1938); LINDLEY, *op. cit.,* note 29 at 80; HILL, CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS 146 (1945).
53 LINDLEY, *op. cit.,* note 29 at 10.
54 *Id.* at 80.

1. Uninhabited lands, unless they are unsuitable for permanent habitation and are being used for the purposes for which they are suitable, or are islands which are situated within territorial waters, or have been formed by alluvium from occupied territory.

2. Land inhabited by individuals who are not united for political action.

3. Lands which have been abandoned by their former occupants.

4. Lands which have been forfeited because they have not been occupied effectively.

Uninhabited islands are not necessarily *territorium nullius* but may be brought under effective occupation by a state. The extent of sovereign occupation required by international law for these islands is much less than that required for inhabited territory.[55]

However little international law requires to place uninhabited territory under a sovereignty, this obviously does not dispense with the requirement of sufficient evidence that occupation has in fact been effected, and that the same has been accomplished with the purpose of subjecting the territory to ownership and sovereign authority. In the absence of such proof, the territory should remain *territorium nullius.*

On the other hand, inhabited territory may come within the meaning of *territorium nullius* if the persons who inhabit it do not constitute a political society. By political society is meant "a considerable number of persons who are permanently united by habitual obedience to a certain and common superior or whose conduct in regard to their mutual relations habitually conforms to recognized standards."[56] Therefore, if territory is inhabited only by isolated individuals and no sovereignty is effectively exercised over the territory, the land may be treated as *territorium nullius.*[57]

Abandonment and forfeiture shall be treated separately later in this paper. Suffice it to say at this point that the significant element or characteristic that unites all categories of *territorium nullius* is the absence of sovereignty, either because it has never been effectively asserted or because it has been withdrawn voluntarily or involuntarily by the previous sovereign.

(b) *Establishment of sovereignty*

1. *Occupation*

The initial step that must be taken to establish sovereignty over territory is actual physical possession or occupation of the same.

In the *Eastern Greenland* case,[58] the Permanent Court of International Justice held:

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[55] *Id.* at 22; See also discussion on *Clipperton Island Arbitration, infra,* 55-56.
[56] LINDLEY, *op. cit.* at 22-23.
[57] *Ibid.*
[58] P.C.I.J. Ser. A/B No. 53 at 46-47 (1933).

> [I]t might be well to state that a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of authority.

Jennings also asserts that:

> [H]owever important all [the] various consolidating factors may be, it is still the fact of possession that is the foundation and the *sine qua non* of this process of consolidation. The process cannot, therefore, begin to operate until actual possession is first enjoyed...the process of consolidation cannot begin unless and until actual possession is already an accomplished fact...[59]

In the *Ecrechos and Minquiers* case,[60] the International Court of Justice also emphasized that "what is of decisive importance... is not indirect presumptions deduced from events in the Middle Ages, but evidence which directly relates to the possession of the Ecrechos and Minquiers groups."

Of course, not every kind of physical possession results in the establishment or acquisition of title over territory. Intermittent, occasional physical use of territory does not as a rule result in the acquisition of the same. Even proof of continued possession does not suffice to acquire title unless the same is accompanied with the intent to appropriate in the concept of owner. In the case of a state, it is necessary that physical occupation be accompanied by an intent to establish sovereignty over the territory, or the intent to incorporate it to its political authority.[61]

Occupation by individuals subject of a state without prior authorization from such state but with the intention to acquire territory in the concept of owner presents a complex of legal problems.[62] While a state cannot be compelled to acquire territory, it may, however, choose to do so through its nationals. What is important is that such intention to appropriate in the concept of owner must be linked with the sovereignty of the state at some point in time in order for the state to assert title.[63]

2. *Maintenance of effective control*

Occupation or physical possession even if accompanied by an intention to acquire title to territory cannot, unless effectively maintained, supervene an active rival claim. Failure to effectively maintain occupation may give rise to loss of title by forfeiture or abandonment or by the establishment of superior title through adverse possession.

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59 JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 26 (1963).
60 I.C.J. Reports (1953) at 57.
61 LINDLEY *op. cit.* at 80.
62 *Id.* at 84-86.
63 *Id.* at 289.

In the case of the *Island of Las Palmas* (Miangas), the arbitrator Dr. Huber clearly emphasized that "the continuous and peaceful display of territorial sovereignty (peaceful in relation to other states) is as good as title."[64]

Jennings makes the following observations:

> When we come to look more closely at the various modes which international law recognizes as creating a title to territorial sovereignty, we shall find that all have one common feature: the importance both in the creation of the title and of its maintenance, of actual effective control.[65]

> ...[T]he growing insistence with which international law ever since the middle of the eighteenth century, has demanded that occupation shall be effective would be inconceivable if the effectiveness were required only for the act of acquisition and not equally for the maintenance of the right.[66]

In the arbitration of boundary between British Guiana and Brazil[67] it was held that occupation can only be accomplished after the taking of actual possession, uninterrupted and permanent. The intention manifested to render the occupation effective is not sufficient.

Prof. De Visscher also asserts that proven use is the foundation of title.[68]

(c) *Sovereignty over uninhabited island*

As previously noted, international law demands much less in terms of manifestations of sovereignty to prove title over uninhabited islands.[69] Thus in the *Clipperton Island Arbitration* case, a French naval officer was sent to the island in 1858 to make a claim of French sovereignty. Thereafter, a concession for the exploration of guano was approved by the French emperor. No further exercise of sovereignty by the French government followed until 1897 when a French warship visited the island again. One month later, Mexico sent a warship to the island and claimed sovereignty over it.

While confirming the general rule relative to effective occupation in order to reduce territory to the sovereignty of a state, the court held:

> This taking of possession consists in the act or series of acts by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking, and in

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64 22 AM. J. INT'L. L. 867, 876 (1928).
65 JENNINGS, *op. cit.*, note 60 at 4.
66 *Id.* at 29-30.
67 Arbitration of boundary between British Guiana and Brazil, 1904, in REVUE GENERALE DE DROIT INTERNATIONALE PUBLIC, Vol. XI, Doc. 18 (1907), cited in HILL, *op. cit.*, note 53 at 148.
68 DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 200 (1957).
69 LINDLEY, *op. cit.*, note 29 at 80.

> ordinary cases, that only takes place when the state establishes in the territory itself an organization capable of making its laws respected. But this step is, properly speaking, but a means of procedure to the taking of possession and therefore, is not identical with the latter. There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory by virtue of the fact that it was completely uninhabited, is from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished and the occupation is thereby completed.[70]

On the basis of the enunciated principle France was held to have title to the island.

(d) *Acts not constituting imposition of sovereignty*

Whatever may be required to create title, it is crucial that a state must intend to impose sovereignty over territory it wishes to claim. Thus, even publicists[71] who support the proposition that sovereignty may be established by symbolic acts concede that:

> [A] mere disembarkation upon any portion of such regions—or even an extended penetration and exploration therein—was not regarded as sufficient in itself to establish such rights or title. Nor did merely giving names to regions, capes, headlands, islands, valleys, peninsulas, rivers, streams, gulfs, harbors and bays have any such results.[72]

If the foregoing acts are not sufficient to confer title to territory, there should be stronger force to the argument that seasonal, sporadic, temporary physical occupation of territory by subjects or nationals of a state even if this occupation were repeated over a long period of time is not sufficient to establish sovereignty. This is also the position taken by Japan in its dispute with China over title to Senkaku or Tiao-yu-tai Islands. It argues that the use of the islands by Chinese investiture envoys as navigational aids on their mission to the Ryukyu Islands did not constitute a basis for a claim of title because it did not indicate an intention to occupy, nor did it consist in actual possession in the name of the sovereignty. Neither did the use of the islands as shelter by Chinese fishermen constitute such possession.[73]

(e) *Abandonment and forfeiture*

Abandonment and forfeiture presuppose the existence of prior title to territory. Lindley uses the term abandonment to include both voluntary abdication of title and one effected under compulsion.[74] In any case, it

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[70] 26 AM. J. INT'L. L. 390 (1932).

[71] KELLER, LISSITZYN & MANN, *op. cit.*, note 53; JENNINGS, *op. cit.*, note 60 at 146.

[72] KELLER, LISSITZYN & MANN, *op. cit.* at 33.

[73] For discussion of issues which are parallel to those relating to the Spratly Islands Group, see Cheng, *The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition*, 14 VA. J. INT'L. L. 221 (1968).

[74] LINDLEY, *op. cit.* note 29 at 48-50.

involves both the fact of physical abandonment coupled with the intention to relinquish title. In the absence of direct evidence, abandonment may be presumed from the length of time that passes from the time of physical abandonment. Renunciation by treaty or otherwise is direct evidence of abandonment.

Forfeiture is loss of title to territory by failure to complete the process of establishing sovereignty.[75] This appears to contemplate situations where inchoate title established by discovery is not perfected by effective occupation of territory. This is illustrated by the failure of the Spanish authorities to take physical possession of Las Palmas.[76]

(f) *Critical date*

The concept of critical date was first advanced by Dr. Huber in the *Las Palmas* case.[77] In determining whether or not the United States had title to the island, it was vital to determine whether at the time Spain ceded the territory to the former, Spain had title to the same. The critical date was therefore the date of the signing of the Treaty of Paris.

As the doctrine has developed, the critical date is understood to be the time after which no act of the parties can affect the outcome of the case.[78] Lauterpacht defines it as "the date by reference to which a territorial dispute must be deemed to have crystallized.[79] Whatever rights the parties may have at that time will remain their rights thereafter, and nothing they can do against an adverse claimant can affect the latter's rights.[80]

(g) *Prescription*

In relation to territorial claims, prescription is a mode of acquisition of title consisting in continuous and peaceful display of sovereignty.[81] It is based upon peaceful effective possession, i.e., a possession as a sovereign extending over a considerable period.[82] To determine whether or not territory has been acquired by prescription such factors as repute and acknowledgment by other states may be taken into account.[83] Like other modes of acquisition, however, the basis of prescription is possession. Therefore care must be taken that possession actually exists else there will be danger that "a skillfully directed campaign of propaganda might seem to lay some

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[75] *Id.* at 51-53.
[76] *Op. cit.*, note 65 at 884.
[77] *Ibid.* at 883.
[78] Eastern Greenland Case note 59, *supra;* JENNINGS, *op. cit.*, note 60 at 32.
[79] LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 242 (1956).
[80] Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law· Part II,* 32 BRIT. YRBK. INT'L. L. 20 *et seq.* (1955-56).
[81] Las Palmas case, *op. cit.*, note 65 at 909.
[82] JENNINGS, *op. cit.*, note 60 at 25.
[83] *Ibid.*

apparently legal foundation for forcible seizure of territory on the ground of an already existing embryo title in process of consolidation."[84]

Observations on Territorial Claims

Taking the evidence offered by the parties and the basic principles of territorial acquisition, the following observations may be made:

1. While Chinese interest in the territory can be traced back to antiquity, old Chinese historical records do not indicate any effective assertion of sovereignty over the islands. The sighting of the territory by Chinese navigators and its inclusion in books and maps by Chinese scholars do not evince the exercise of effective physical possession.

2. The use of the islands as shelter and even the protracted stay there by Chinese fishermen and guano collectors do not appear to have been intentionally made with authority of the Chinese state to impose sovereignty over the territory.

3. The treaty of delimitation between China and Tonkin of 1887 is binding only as between the parties and cannot override superior valid claims of other states which might establish title.

4. The possession of the islands by Chinese troops upon the withdrawal of Japan and the provision in the bilateral treaty of peace between Japan and China regarding the territory become ambiguous when taken together with the circumstances of the possession of the islands and the repudiation by Japan.

5. The strongest evidence that Viet-Nam can cite in support of its claim is the French expedition of 1933 which was a clear effort to establish sovereignty over the islands. Since these islands appear to fall within the concept of "uninhabited islands" as this is used in the *Clipperton Island* case, the French expedition satisfied the requirement of effective occupation required by international law for such territory. On the other hand, it is to be noted that this assertion of sovereignty did not go unchallenged. China claimed earlier sovereignty. Japan, on the other hand, claimed solemn occupation of the territory by Japanese subjects with the authorization of the Imperial Government. If either claim of sovereignty were valid, France, and therefore, Viet-Nam would be in the same position as Mexico in the *Clipperton Island* case.

6. Japan's title at some time would hinge upon a demonstration of its actual occupation of the islands with the intention of establishing Japanese sovereignty.

[84] *Id.* at 26.

7. If indeed title to the territory were located in Japan at some point of time, the territory in dispute became *territorium nullius* at the time that Japan lost or relinquished title to the territory.

It is possible to build a case in support of Japan's previous title. Among the various claimants which trace their title before the Second World War, Japan made the earliest categorical claim of sovereign occupation. As well, only Japan actually occupied the islands over a substantial period of time. The existence of Japan's title may also be naturally inferred from the fact that it was made to renounce title to the territory in 1951, for if no title or supportable claim existed in Japan's favor, the treaty renunciation would be devoid of any legal significance. There is no point in renouncing what one does not have in the first place.

Another consequence of conceding title to Japan would be the necessity of determining when such title ceased to exist. Is it from the time that it withdrew from the islands after it surrendered? Or was it only from the date that the treaty of peace was signed? The answer to the question would determine the legal characterization of acts taken by the active claimants after the war. For if title to the territory existed in favor of Japan between 1945 to 1951, it would have been a title that existed *erga omnes*, and any assertion of claim of sovereignty during the period would be in the nature of adverse possession governed by rules of international law on prescription.

The renunciation was made only in 1951. Therefore, it took effect only on that date. When the forces of the Republic of China entered the territory in 1945 and placed territorial markers and built radio and meteorological stations on some of the islands, these acts should consequently be viewed in the nature of adverse possession as against the real title holder.

8. While chronologically the Philippines is the latest of the active claimants which base their claim upon occupation, it appears to be the first to make an assertion of title after Japan's renunciation to title. It is true that no state can be compelled to assume responsibility for sovereignty over territory claimed by a subject or national, but here all manifestations show an active interest in acquiring ownership and sovereignty.

9. None of the parties claiming title can satisfy the requirements of acquisition by prescription.

10. The critical date or the date on which the issues between the parties were crystallized was May 15, 1956 when Tomas Cloma issued his proclamation.

11. Malaysia's claim is based upon the right of the coastal state to continental shelf. Obviously, this cannot prevail as against a superior title previously acquired.

Legal Grounds for Philippine Claim Examined

Presidential Decree No. 1596 cites the following legal grounds as bases for the Philippine claim to the Spratly Island Group: (1) the islands are part of the continental margin of the Philippine archipelago; (2) the islands do not belong to any state, and by reason of history, indispensable need and effective occupation, the territory belongs to the Philippines; and (3) claims by other states had lapsed by reason of abandonment and cannot prevail over that of the Philippines on legal, historical and equitable grounds.

(a) *The Contiguity or Propinquity Theory*

The first ground invoked by the decree appears to be the old theory that a state is entitled to ownership of territory by virtue of physical adjacency, i.e., the state that is closest to the territory shall have ownership of the same. While this principle had been applied in some instances in the past, it has not at present been looked upon with favor as basis for acquisition of title in international law.

Thus in the case of *Las Palmas,* the argument was raised by the United States that the island subject of the dispute between it and the Netherlands belonged to it because the same lay within close proximity of the Philippines and was in fact within the maritime limits of the country. In rejecting this contention, Dr. Huber held: "[I]t is impossible to show the existence of a rule of positive international law to the effect that islands situtated 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)."[85]

Hill also points out that "the geographic unity argument follows the logic that a disputed area forms with that of a claimant a certain physical unity." He criticizes this on the ground that such assertions "are likely to be vague, for there is no exact definition of a geographic unit to which appeal can be made."[86]

On the other hand, one must not lose sight of the context in which the rejection of the contiguity rule had been made. The *Las Palmas* case, on which a number of commentators depend and have built theories, was a conflict between two colonial powers over a piece of territory thousands of miles away from their respective mainlands. It was therefore not too difficult for the arbitrator to view the problem in terms of simple rules of occupation and prescription. The continuing international disputes and

[85] Las Palmas case, *op. cit.,* note 65 at 893.

[86] HILL, *op. cit.,* note 53 at 75. He explains: "In one sense, the proposition that contiguity is not an independent root of title is self-evident, for it is by definition relative and raises the question, contiguous to what? A claim of sovereignty based on contiguity cannot in fact be other than assertion concerning the definition or extent of a sovereignty the existence of which is accepted *ex hypothesi.* Contiguity is an aspect of possession. It cannot be a root of title independent of possession." See also Waldock, 25 BRIT. YRBK. INT'L. L. 342 (1948).

tensions relative to the ownership of islands off some mainlands which now constitute independent states and which continue to be utilized or controlled by a number of former colonial powers demonstrate the shortcomings of the occupation-prescription principle. It is, therefore, timely in this age of decolonization to reconsider the values and advantages of the contiguity principle in the light of the necessity to establish a more stable world public order.

This approach is not without analogues in recent state practice. Thus, the award of the Spitsbergen Archipelago to Norway because the islands are situated within the so-called Norwegian sector is an application of the hinterlands theory of territorial title which is really an extention of the contiguity theory.[87]

It might therefore be asserted that a state which might consider an island or a group of islands contiguous to it as its natural hinterlands—if such hinterlands are furthermore important to its economic, political or security needs—must be preferred as between different claimants whose claims are equally uncertain.[88]

(b) *Historic title*

As noted above, the Philippines is the latest among active claimants which base their title upon occupation. Therefore, if the "reason of history" is the equivalent of the legal concept of historic title, the same may not likewise be invoked to support the claim based on occupation. However, the hinterlands theory when reexamined might provide a support for this theory.

(c) *Abandonment and occupation*

Persuasive arguments in favor of the Philippine claim are the related notions of abandonment, *territorium nullius* and effective occupation. The case for a previous title by Japan before the Second World War and up to 1951 was already discussed above.[89] The effects of the Japanese renunciation both in the Treaty of Peace with the Allies in 1951 and the Bilateral Treaty of Peace with the Republic of China add strength to the argument that the territory was *territorium nullius*.

It is clear that the Japanese renounced title to the territory. What is not clear is whether or not this renunciation of title had the effect of passing title over the territory to any specific state or states. China claims that, in the very least, the treaty provisions demonstrated Japan's recognition of Chinese historic rights over the disputed territory.

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[87] LINDLEY, *op. cit.*, note 29 at 5; HYDE, INTERNATIONAL LAW 349 (1945); see also, Von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AM. J. INT'L. L. 448, 463 (1935).

[88] LINDLEY, *Id.* at 232. For analogous cases see Von der Heydte, *Id.*, at 465-466. 466.

[89] See discussions on pages *supra.*

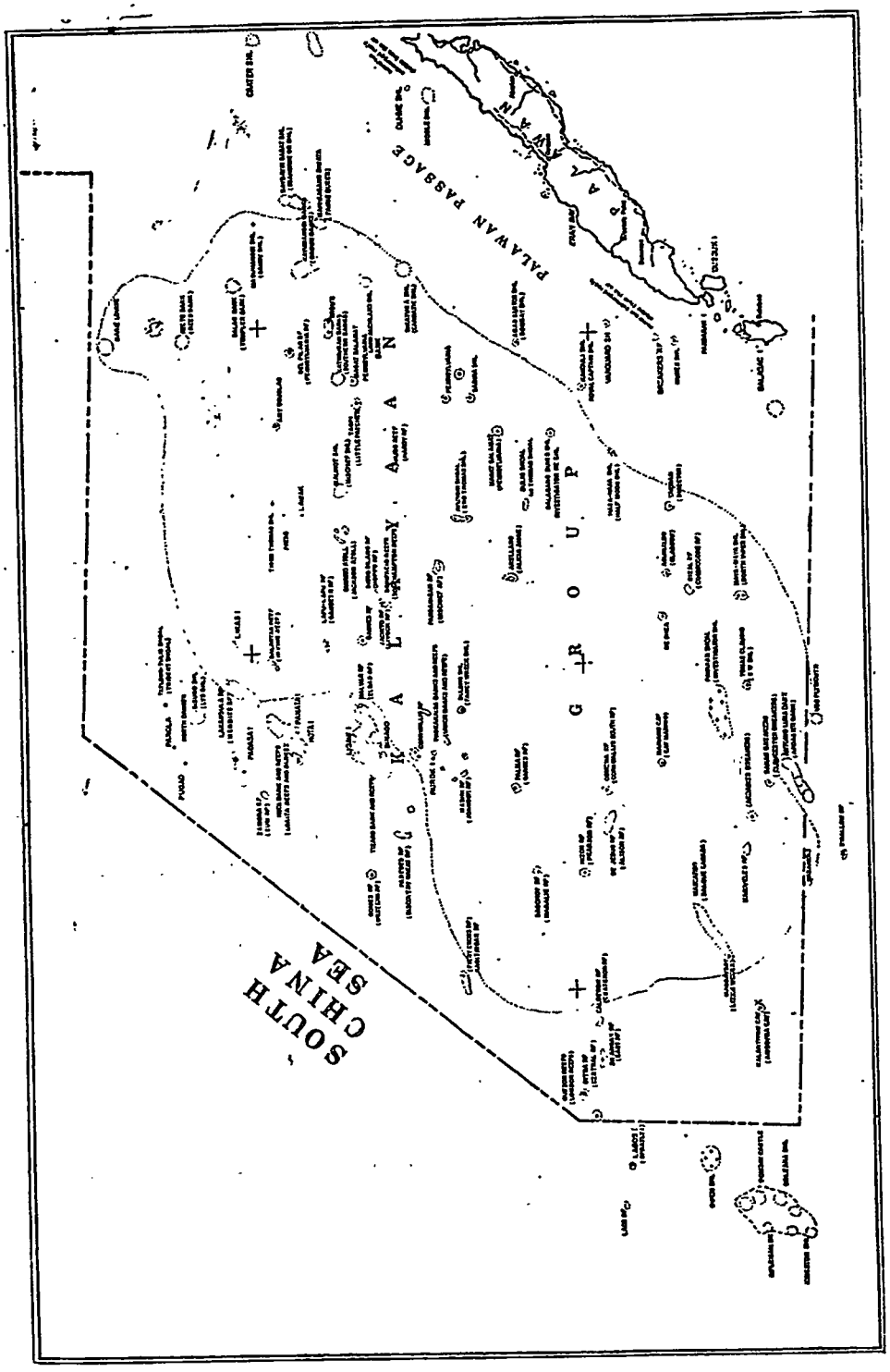
The text of the renunciation made in the treaty with the Allies appears to be only a relinquishment of right without any specific beneficiary as to title in the mind of the parties. Although it would have been a simple matter to merely recognize title as belonging to any signatory, this was not done. The provision in the peace treaty with China is at best ambiguous and susceptible of more than one interpretation. First, the text clearly recognized the provision of the San Francisco Treaty with respect to the renunciation. Second, it only confirmed the renunciation of title previously made to the signatories of the San Francisco conference, such confirmation being necessary because neither the nationalists nor the communists were parties to such conference.[90]

If the foregoing is correct, then when Japan signed the treaty in 1951 the Spratly Island group became territory without owner or effective sovereign. It was therefore subject to appropriation by effective occupation.

Manifestations of ownership by China in 1945 were an assertion of right as against an existing, if absent, sovereign, governed by rules on prescription. By these standards, the claim of China was adversely affected by its withdrawal of troops in 1950.

It is highly unlikely that the territorial dispute over the Spratly Islands will be resolved soon. Unless the parties can come to some voluntary agreement either to establish title definitively in one or some of the parties, or to establish some common regime, or to submit the issue to judgment, the Spratly question will constitute a potential for tension in the area. Apparently, the international community's capacity for enforcement of norms of international law—indeed, the very norms themselves—remain highly inadequate for resolving interstate conflicts.

[90] For discussion of the doubtful ownership of islands over which Japan renounced title in the Treaty of Peace, see, Chen and Reisman, *Who Owns Taiwan: A Search for International Title,* 81 YALE L. J. 599, 641-647 (1972).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