

A Critical Legal Approach to the South China Sea Territorial Dispute

Abstract

The ‘law of nations’ that colonial powers invoked to claim the South China Sea islands was based not on international convention or custom but on their own municipal laws on guano concession. It provides that states have the exclusive right to assert title over distant islands where their respective citizens have engaged in economic activities. It was applied selectively to advance colonial and maritime interests and to suppress the claim of China. In their own records, the United States and United Kingdom acknowledged China’s prior and exclusive economic activities on the Spratly Islands and Paracel Islands, and consolidation of title over the Paracel Islands. The records were ignored and subsequently revised, thereby excluding China from availing of the rule. The Japanese peace treaties formalized China’s exclusion by relegating its claim to the same category as the claims that emerged from recent acts of occupation, and subjecting it to resolution by convention.

Keywords

Spratly Islands - Paracel Islands - rules of territorial acquisition - history - economic use - critical legal studies - colonialism

1 **1 Introduction**

2 The dominant positivist discourse on the South China Sea territorial dispute is that mere
3 discovery and ‘first use of the islands’ do not give rise to title.¹ China’s history of use and
4 occupation of the islands is not plausible title unless accompanied by the exercise of
5 sovereignty with the consent of other states.² Objective and impartial resolution of the
6 territorial dispute is possible only according to consent-based rules,³ with history being a
7 mere equitable factor.⁴

8 Taking a critical legal approach, this article inquires: is their basis to the claim to
9 objectivity of the consent-based approach to the resolution of the South China Sea territorial
10 dispute? Would disregard of the history of the claims in fact perpetuate the whim and caprice
11 by which international law has been administered to the colonies that surrounded the South
12 China Sea? It examines the legal history of the islands to determine what rule of territorial
13 acquisition was invoked when the United Kingdom, France and Japan claimed the islands.
14 What were its source and scope of application? Did it produce effects that cannot be ignored
15 in the present effort to resolve the dispute? The purpose of the inquiry is to show the

¹ Bennett, Michael. ‘The People’s Republic of China and the Use of International Law in the Spratly Islands Dispute’. *Stan J Int’l L* 28 (1992) 425-450, 446.

² Dupuy, Florian and Dupuy, Pierre-Marie. ‘A Legal Analysis of China’s Historic Rights Claim in the South China Sea’. *Am J Int’l L* 107 (1) (2013), 124-141, 138-139, 141.

³ For a review of decisions in international arbitrations and adjudications in which treaty-based title outweighed historical title see Fry, James and Loja, Melissa. ‘The Roots of Historic Title: Non-Western Pre-Colonial Normative Systems and Legal Resolution of Territorial Disputes’. *Leiden Journal of International Law* 27 (3) (2014), 727-754.

⁴ Munkman, A L W. ‘Adjudication and Adjustment - International Judicial Decision and the Settlement of Territorial and Boundary Disputes’, *Brit Y B Int’l L* 46 (1) (1972-1973), 108-109.

1 limitations of a consent-based approach to international law that ignores the history of the
2 claims to the South China Sea islands.

3 Following this introduction, part two discusses that the claims of the United Kingdom,
4 France and Japan invoked the rule that states have the exclusive right to assert title to distant
5 islands where their respective citizens engaged in economic activities. The United States
6 assessed these claims based on the same rule. The rule was based not on international
7 convention or custom but on mere municipal laws on guano concessions that the colonial
8 powers regarded as ‘law of nations’. Part three shows that the rule was applied selectively in
9 that, while their records acknowledged China’s history of economic and political activities on
10 the islands, the United States and United Kingdom ignored these records and even
11 revised/deleted them, thereby excluding China from availing of the rule. Part four details how
12 the Japanese peace treaties formalized the exclusion of China by denying its claim any
13 priority and, instead, relegating it to the same category as the claims that arose from more
14 recent acts of occupation. Part five summarizes the findings in the preceding parts and
15 concludes that a consent-based approach that ignores the legal history of the dispute will not
16 afford a just and objective resolution. This legal history is discussed in part two below.

17 **2 Territorial Acquisition Based on Economic Use**

18 This article examines the legal history of the islands in order to determine whether it is
19 reasonable to disregard historical factors in the resolution of the dispute. This part focuses on
20 the rule on economic use that the colonial powers applied in relation to the acquisition of the
21 islands.

22 The United Kingdom invoked the rule on economic use when it claimed Spratly Island
23 and Amboyna Cay in 1899 on the basis of guano concessions issued to the British North

1 Borneo Company.⁵ France also invoked the rule when it claimed certain features in the
2 Paracels Islands and Spratly Islands in connection with the mining license sought by
3 Phosphates Company of Tonkin.⁶ Japan, too, claimed the Sinnan Gunto or Spratly Islands as
4 a single unit on the basis of this rule.⁷ The United States assessed the claims of Japan and
5 France on the basis of the same rule.⁸

6 According to this rule, whenever a citizen ‘discovers a deposit of guano on any island,
7 rock, or key, not within the lawful jurisdiction of any other government, and not occupied by
8 the citizens of any other government, and takes peaceable possession thereof, and occupies
9 the same’, the state to which the citizen belongs (user-state) has the right to perfect a claim to
10 title to the feature. Other economic activities that are considered a form of occupation include
11 catching and curing fish⁹ and coconut cultivation.¹⁰ The right accrues notwithstanding prior
12 discovery of the feature by or their contiguity to or inclusion in the maps of a non-user

⁵ Undated letter of Foreign Office, SW1, to Law Officers of the Crown, enclosure to Despatch No. 17, 9 March 1932, of FG Borton, Consul General, British Consulate General, Saigon, to His Majesty’s Principal Secretary of State for Foreign Affairs, Foreign Office, SW1, para 3-12.

⁶ Gouvernement Général de L’Indochine, *Rapports au Conseil de Gouvernement* Session Ordinaire De 1928, 455; Republic of Vietnam, Ministry of Foreign Affairs. ‘White Paper on the Hoang Sa (Paracel) and Truong Sa (Spratly) Islands’, FEC 4/2, Territorial Disputes of China, UK National Archives (1974), 70-73.

⁷ The Japanese Embassy to the Department of State, undated, USDOS, *Foreign Relations of the United States (FRUS)*, Japan: 1931-1941, vol. II, 278-280.

⁸ The Secretary of State to the Japanese Ambassador, *ibid.*, 280-281.

⁹ *Jones v. United States*, 137 US 202 (1890), 212. See, however, 34 *Op Att’y Gen*, 507 1926, 514-516, which excludes fishing.

¹⁰ 34 *Op Att’y Gen*, *ibid.*, 511-513.

1 state.¹¹ The right is exclusive for no other state can make a claim without the consent or
2 acquiescence of the user-state.¹² However, the right is inchoate for economic use must be
3 followed by acts of sovereignty in order for the claim to ripen into title.¹³ Acts of sovereignty
4 include flag hoisting, trading, construction of a lighthouse and analogous acts which ‘amount
5 to a declaration that the [features are] considered as appertaining’ to the user-state.¹⁴
6 Abandonment of the right to claim is strictly construed, for even if the citizen’s economic
7 activities cease, the user state can still perfect its title at any time.¹⁵ However, failure to
8 protest a claim by another state amounts to abandonment.¹⁶ For convenience, this is referred
9 to in this article as the rule on economic use.

10 The rule in question was based, not on any international convention or custom, but on
11 the guano concession laws that facilitated acquisition of distant and uninhabited islands by
12 the United States,¹⁷ United Kingdom¹⁸ and other colonial powers.¹⁹ However, the United

¹¹ 31 *Op Att’y Gen* 216 1920, 220-222.

¹² 34 *Op Att’y Gen*, 507.

¹³ 34 *Op Att’y Gen*, *ibid*.

¹⁴ 31 *Op Att’y Gen*, 219-220.

¹⁵ 31 *Op Att’y Gen*, 220.

¹⁶ 31 *Op Att’y Gen*, *ibid*.

¹⁷ An Act to Authorize Protection to be Given to Citizens of the United States who may Discover Deposits of Guano (Guano Island Act), 18 August 1856, 11 *Stat* 119-120.

¹⁸ See Correspondence respecting Grant by Crown to raise and take away Guano from Islands of Jiblea, Huskie and Ghwrzoad, on S Coast of Arabia, House of Commons Papers, 8 June 1857, 373-400. See, also, Memorandum relating to certain Groups of Islands situated in the Pacific Ocean with which the French, British, and United States Governments have more or less intimate relations, 30 July 1865, UK Foreign Office, in Bourne, Kenneth, Watt, Cameron and Partridge, Michael (eds.).

1 States Supreme Court declared the rule part of the ‘law of nations, recognized by all civilized
2 states’.²⁰ The Law Officers of the Crown considered it a well-settled rule.²¹ The question is
3 how was this rule applied to the South China Sea islands and what were its effect? This is
4 discussed in part three.

5 **3 Selective Application of the Rule on Economic Use**

6 The application of the rule on economic use to the South China Sea islands is discussed in
7 two sections. The first section details the records in the US and UK archives regarding
8 economic and political activities on the islands during the relevant period that the United
9 Kingdom, France and Japan claimed them. The records referred to are state and diplomatic
10 papers as well as hydrographic reports issued by the Hydrographer to the British East India
11 Company, Royal Geographic Society, UK Admiralty Hydrographic Department and US
12 Navy Hydrographic Office. The nature of these records as relevant materials in the study of
13 the legal history of the islands is explained prior to the discussion of the contents. The second
14 section shows that the records were ignored and subsequently revised to the prejudice of the
15 claim of China. Nonetheless, the subsistence of the unrevised entries in the records
16 underscore the importance of historical factors in the determination of rules for the resolution
17 of the territorial dispute in the South China Sea.

*British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential
Print, Asia, 1860-1914* (University Publications of America, 1989-1995), 1-28.

¹⁹ See Legation of France to the United States, 29-30 March 1864, USDOS, Papers Relating to
Foreign Affairs, Accompanying the Annual Message of the President to the Second Session, Thirty-
Eighth Congress (1864), 210-211.

²⁰ *Jones v. United States*, 212.

²¹ Report of the Law Officers’ Department, 29 July 1932, FO 371/16364, France, UK National
Archives, 8-9.

1 **3.1 *Records of Economic and Political Activities***

2 The records relied upon in this section include hydrographic reports. Hydrographic reports
3 are an official source of information on economic and political activities on the islands. For
4 instance, the *China Sea Pilot*, published by the UK Hydrographic Department, is considered
5 ‘an official publication’ such that its entry regarding the Paracel Islands was regarded as ‘the
6 nearest approach to a British public position ... that China annexed the islands in 1909’.²²
7 The United States relied on *Sailing Directions for Japan*, published by the US Hydrographic
8 Office, to define the scope of the territory that the Japanese peace treaties placed under the
9 residual sovereignty of Japan.²³

10 The hydrographic reports and diplomatic records that are discussed in this section
11 reveal that the United Kingdom and United States had knowledge that 1) there were
12 economic activities undertaken on the South China Sea islands exclusively by Chinese
13 citizens; 2) the activities included fishing, junk trading in rice and basic necessities, income
14 remittance and gathering of turtle eggs and other products on the islands; and 3) they took
15 place at regular intervals over a long period of time. Moreover, they had acknowledged that
16 the Paracel Islands were annexed by China in 1909.

17 The first to record human habitation and exploitation of the South China Sea islands
18 was James Horsburgh, hydrographer of the British East India Company. Unlike other

²² DS(L)584, Research Department Memorandum: The Paracel Islands, June 1975, in FEC 4/2, Territorial Disputes of China, 1975, UK National Archives, 38.

For this reason, unlike other authors who rely on statements of individual officials and statesmen, this author cites only hydrographic reports and official memoranda and reports issued by law-applying authorities.

²³ USDOS, Memorandum from Fearey to Allison on Nansei Shoto, folder Ryukyus-Old, box 4, ONA Records, RG 59, serial no. 694.001/4-551.

1 hydrographers who limited their reports to technical descriptions of the geographical situation
 2 of insular features,²⁴ Horsburgh included in his hydrographic reports, from 1805 through
 3 1852,²⁵ observations about human habitation and use of the South China Sea islands.
 4 Beginning in his 1817 publication, Horsburgh noted that 'Hainan fishermen visit the [Spratly]
 5 islands and shoals ... in March and April to fish, as well as those of the Paracels'.²⁶ In his
 6 subsequent reports in 1836, 1843 and 1852, Horsburgh elaborated that Hainan fishermen
 7 engaged in other economic activities, such as gathering *bicho de mer*, dried turtle and sharks'
 8 fins.²⁷ It is noted that Horsburgh's reports mention only Chinese citizens, and that the latter

²⁴ See Dalrymple, Alexander. *Memoir of a Chart of the China Sea* (H. Gregory, 1771); Kerhallet, Philippe. *General Examination of the Indian Ocean* (Washington: Govt Printing Office, 1870).

²⁵ Horsburgh, James. *Memoirs: Comprising the Navigation to and from China, by the China Sea, and through the Various Straits and Channels in the Indian Archipelago; also, the Navigation of Bombay Harbour* (London: C Mercier and Co, 1805); Horsburgh, James. *India Directory, or, Directions for Sailing to and from the East Indies, China, New Holland, Cape of Good Hope, Brazil, and the Interjacent Ports* (London: Black, Parbury, and Allen, 1817); Horsburgh, James. *India Directory, or, Directions for Sailing to and from the East Indies, China, Australia, Cape of Good Hope, Brazil, and the Interjacent Ports*, vol. 2 (London: W.H. Allen, 1936); Horsburgh, James. *India Directory, or, Directions for Sailing to and from the East Indies, China, Australia, Cape of Good Hope, Brazil, and the Interjacent Ports*, vol. 2 (London: W.H. Allen, 1841-1843); Horsburgh, James. *India Directory, or, Directions for Sailing to and from the East Indies, China, Australia, Cape of Good Hope, Brazil, and the Interjacent Ports*, vol. 2 (London: W.H. Allen, 1852).

²⁶ Horsburgh, *India Directory*, 1817 (n25), 317; Horsburgh, *India Directory*, 1836 (n25), 428; Horsburgh, *India Directory*, 1843 (n25), 483; Horsburgh (1852), 498.

²⁷ Horsburgh, *India Directory*, 1836 (n25), 330-331; Horsburgh, *India Directory*, 1843 (n25), 356; Horsburgh, *India Directory*, 1852 (n25), 346-347.

1 engaged in various economic activities on the islands at regular intervals over a long period
2 of time.

3 The foregoing observations of Horsburgh were confirmed by a subsequent nautical
4 notice issued in 1865 by HM Surveying Vessel Rifleman that ‘North Danger Reef ... is
5 frequented by Chinese fishermen from Hainan, who collect *beche-de-mer*, turtle-shell, &c.,
6 and supply themselves with water from a well in the centre of the north eastern cay’.²⁸ The
7 observation is reproduced verbatim in the 1898 edition of *The Chinese Sea Directory* of the
8 UK Hydrographic Department²⁹ and the 1909,³⁰ 1915³¹ and 1925³² editions of the *Asiatic*
9 *Pilot* of the US Hydrographic Office. In 1867, HMS Rifleman issued a more detailed
10 account of the variety of economic activities, that included junk trading and remittance, that
11 Hainan fishermen regularly engaged in on the islands:

12 Hainan fishermen, who subsist by collecting trepan and tortoise-shell, were
13 found upon most of these islands, some of whom remain for years amongst the
14 reefs. Junks from Hainan annually visit the islands and reefs of the China Sea
15 with supplies of rice and other necessaries, for which the fishermen give
16 trepan and other articles in exchange, and remit their profits home. The junks
17 leave Hainan in December or January, and return with the first of the S.W.
18 monsoon. The fishermen upon Itu Abaer Island were more comfortably

²⁸ *Hydrography of the China Sea*, received from Mr Tizard, Master RN, HM Surveying Vessel Rifleman, *The Nautical Magazine*, vol. 35 (1866), 552.

²⁹ *The China Sea Directory*, vol. 2 (London: Hydrographic Office, Admiralty, 1878), 69.

³⁰ *Asiatic Pilot*, vol. 4 (Washington: Govt. print off, 1909), 121.

³¹ *Asiatic Pilot*, vol. 4 (Washington: Govt. print off, 1915), 112.

³² *Asiatic Pilot*, vol. 4 (Washington: Govt. print off, 1925), 121.

1 established than the others, and the water found in the well on the island was
2 better than elsewhere.³³

3 These observations were reiterated by Alexander George Findlay³⁴ and the US
4 Hydrographic Office in *Asiatic Pilot* (1909),³⁵ *Asiatic Pilot* (1915),³⁶ *Asiatic Pilot* (1925)³⁷
5 and *The China Sea Directory* that the UK Hydrographic Department, Admiralty published in
6 1878³⁸ and 1906.³⁹

7 With respect to the Paracel Islands, in *Asiatic Pilot* (1915), the US Hydrographic
8 Office reported that the islands ‘were annexed by the Chinese Government in 1909’.⁴⁰ This
9 status of Paracel Islands is reiterated in *Asiatic Pilot* (1925)⁴¹ as well as *Sailing Directions*
10 (1937).⁴² The UK Hydrographic Department also reported in the 1912, 1923, 1937, 1951 and

³³ Navigation of the China Sea - Dangers between the Fiery Cross and North Danger Reefs, in the main route of the China Sea, and shoals in the Palawan route, with remarks on the Paracel, by Navigating Lieut John W Reed, EN, HM Surveying Vessel Rifleman, 1867, in *Nautical Magazine and Naval Chronicle*, vol. 36 (1867), 702.

³⁴ Findlay, Alexander George. *A Directory for the Navigation of the Indian Archipelago, China and Japan* (London: R H Laurie, 1878), 627-628. See also *The China Sea Directory*, vol. II (London: Hydrographic Office, Admiralty, 1894), 104.

³⁵ *Asiatic Pilot* (1909), 109-110.

³⁶ *Asiatic Pilot* (1915), 109-110.

³⁷ *Asiatic Pilot* (1925), 118.

³⁸ *The China Sea Directory* (1878), 66.

³⁹ *The China Sea Directory*, vol. 1 (London: Hydrographic Office, Admiralty 1906), 114.

⁴⁰ *Asiatic Pilot* (1915), 119.

⁴¹ *Asiatic Pilot* (1925), 133.

⁴² *Sailing Directions for the Western Shores of China Sea* (Washington: Govt print off, 1937), 126.

1 1964 editions of *China Sea Pilot* that Paracel Islands ‘were annexed by the Chinese
2 government in 1909’.⁴³

3 To summarize, this section showed that, based on US and UK records, during the
4 relevant period when the colonial powers claimed the South China Sea islands, Chinese
5 citizens were already engaged in economic activities on the islands and that China had
6 annexed the Paracel Islands in 1909. The next section shows that these records were ignored
7 and later revised to the effect that China’s exclusive economic activities on the islands were
8 obscured.

9 **3.2 Treatment of Records of Economic and Political Activities**

10 Having shown in the previous section that US and UK records acknowledged the economic
11 activities of Chinese citizens on the islands and the annexation of the Paracel Islands, this
12 section addresses the question of what legal significance was ascribed to these records for
13 purposes of application of the rule on economic use. The discussion is divided under Paracel
14 Islands and Spratly Islands.

15 3.2.1 Paracel Islands

16 To recall, the United Kingdom repeatedly reported in its hydrographic reports that the Paracel
17 Islands were annexed by China in 1909. On three other occasions, the United Kingdom
18 officially recognized the consolidation of China’s title over the Paracel Islands. The first
19 occasion was when the United Kingdom was advised by the UK Admiralty that Dr Sun Yat
20 Sen, head of the southern separatist government, had leased the Paracel Islands to Japan in

⁴³ *The China Sea Pilot* (London: Hydrographic Department, 1912), 106; *The China Sea Pilot*, vol. 3 (London: Hydrographic Department, 1923), 89; *The China Sea Pilot*, vol. 1 (London: Hydrographic Department, 1937), 107; *China Sea Pilot*, vol. 1 (London: Hydrographic Department, 1951), 115; *China Sea Pilot*, vol. 1 (London: Hydrographic Department, 1964), 100.

1 exchange for cash, arms and ammunition.⁴⁴ The UK Foreign Office advised the Admiralty to
 2 oppose Japan's lease on the ground that the Nine-Power Treaty⁴⁵ prohibits foreign powers
 3 from acquiring any part of Chinese territory, which includes the Paracel Islands, as these
 4 were already part of Chinese territory at the time of the treaty.⁴⁶ Likewise, in 1931, the
 5 United Kingdom declared to France that China holds the title to the Paracel Islands. To
 6 justify occupation of the Paracel Islands in 1931, France had written to the United Kingdom
 7 that the islands are historically part of Annam and not subject to the Nine-Power Treaty.⁴⁷
 8 The United Kingdom replied that, at that time of the treaty (1922), China already had
 9 consolidated title over the islands by annexing them in 1909 and maintaining possession for
 10 20 years without protest from France.⁴⁸

11 In 1936, France changed tack to argue that whatever title China acquired was
 12 abandoned when it declared that the Paracel Islands are not part of the 'Celestial Empire'.⁴⁹
 13 The Foreign Office advised France that 'a careful search of the relevant archives has failed to

⁴⁴ Agreement between the Southern Government and Japan-China Forestry, Mining and Industrial Society, 5 February 1922, enclosure to Consul-General Jamieson to Sir B Alston, 11 July 1922, 371/8050 and MS British Foreign Office: Japan Correspondence, 1914-1923: Emergence of Japan as a Pacific Power: 1922 371/8050, UK National Archives.

⁴⁵ Principles and Policies Concerning China (Nine-Power Treaty), 6 February 1922, 44 *Stat* 2113. Under art 1 and art 2, no colonial power shall take possession, by agreement or otherwise, of any part of the territory of China.

⁴⁶ Foreign Office to Admiralty, 17 October 1922, F 2916/1292/23, 142.

⁴⁷ Despatch No. 748, British Embassy, Paris, 8 July 1931, FO 676/85, Files of the Peking Legation: Sovereignty of China over Paracel Islands, 8.

⁴⁸ Admiralty to Foreign Office, 25 August 1931, F 4669/2669/10, *ibid.*, 12.

⁴⁹ French Claim to Sovereignty of Paracel Islands, 23 December 1936, Ambassade de France A Londres, F 8054/6636/10, FO 676/271 (1937).

1 reveal any trace of such a disclaimer of sovereignty by the Chinese Government as is
 2 attributed to them in paragraph 5 of the Embassy's aid memoire'.⁵⁰

3 Yet, in 1975, the UK Hydrographic Department inquired with the Far Eastern
 4 Department of the Foreign and Commonwealth Office whether the entry in the 1964 *China*
 5 *Sea Pilot* on the annexation of the Paracels should be deleted, given that '[s]overeignty over
 6 these islands may be in dispute'.⁵¹ The Far Eastern Department advised that '[w]hether the
 7 new government in South Vietnam or the government of a united Vietnam will take up
 8 Saigon's claim remains to be seen ... it would be wise therefore to ... delete the statement
 9 about the Chinese Government annexing the islands in 1909'.⁵² As early as 1957, the United

⁵⁰ Letter from His Majesty's Principal Secretary of State for Foreign Affairs to the French
 Ambassador, 10 March 1937, F 980/980/10, *ibid.*

The British Archivist had reported that 'there is no trace of a disclaimer of sovereignty of the
 Paracels by the Chinese government'. See Memorandum of the Archivist, British Embassy, Peking,
 13 May 1937, F 8054/6636/10, FO 676/271 (1937). As to the case in which China had purportedly
 stated that the Paracel Islands are not part of the Celestial Empire, the Foreign Office clarified that the
 case in question involved the 'looting of the cargo of the *Bellona* and *Umeji*' but that 'the archives ...
 contain nothing to support' the allegation of France. Rather, the archives show that 'the Chinese
 Government based their refusal to entertain any claim for compensation principally on the grounds
 that the Insurance companies had not taken adequate measures to protect their property and that in any
 case the Paracel Islands were so far from the coast that it was unreasonable to expect the Chinese
 Government to take special measures to prevent looting'. See Foreign Office to Admiralty, 16 January
 1937, F 8054/6636/10, *ibid.*

⁵¹ Letter to Mr Ehrman, Far Eastern Department, from Commander J Pryor RN, Superintendent of
 Sailing Directions, Hydrographic Department, 5 May 1975, in FEC 4/2, Territorial Disputes of China,
 1975, UK National Archives, 79.

⁵² Letter to Commander J Pryor RN from Mr Ehrman, 29 May 1975, in FEC 4/2, *ibid.*, 60.

1 States had already deleted the entry in hydrographic reports on China's annexation of the
 2 Paracel Islands.⁵³ The entry was replaced with the statement that the islands' 'phosphate
 3 deposits ... [are] worked by Chinese from the mainland and by South Vietnamese...'.⁵⁴ The
 4 revised entry obscured the annexation of the islands in 1909.

5 3.2.2 *Spratly Islands*

6 The records on the Spratly Islands were largely ignored and eventually revised. To recall, the
 7 United Kingdom claimed Spratly Island and Amboyna Cay in 1899. Despite knowledge of
 8 Chinese economic activities on the islands,⁵⁵ it treated the islands as *terra nullius* susceptible
 9 of acquisition by 'some form of annexation and some act of physical appropriation'.⁵⁶ These views
 10 were expressed in connection with the French claim in 1929.⁵⁷

11 Moreover, in the 1951 edition of *China Sea Pilot*, the UK Hydrographic Department revised
 12 the entry regarding Chinese economic activities by stating that on Itu Aba 'there were a number of
 13 fishermen from Palawan and Hainan'.⁵⁸ Although reference to Philippine fishermen was not repeated

⁵³ *Sailing Directions for the Western Shores of China Sea* (Washington: Govt print off, 1957).

⁵⁴ *Sailing Directions* (1957), *ibid.*, 77.

⁵⁵ Great Britain, Colonial Office. *The Colonial Office List for 1890: Comprising Historical and Statistical Information Respecting the Colonial Dependencies of Great Britain*, (London: Harrison, 1925), 310; Great Britain, Office of Commonwealth Relations. *Dominions Office and Colonial Office List for 1931*, (London: Waterlow & Sons, Ltd), 526.

⁵⁶ Considerations Governing Acquisition of Territory, with Reference to the Question of Sovereignty over Spratley Island and Amboyna Cay (Memorandum by the Legal Adviser of the Foreign Office), 10 November 1930, 9-10, FO 371/16364, W 12921/2379/17 (1931), UK National Archives; Letter from Secretary of the Admiralty, United Kingdom, to Secretary of State for Foreign Affairs, United Kingdom, 14 November 1932, FO 371/16364, *ibid.*

⁵⁷ Undated letter, n5.

⁵⁸ *China Sea Pilot* (1951), 124

1 in the 1964 edition of *China Sea Pilot*, the entry about Chinese economic activities was limited to
 2 Hainan fishermen regularly visiting the islands, with Thi-tu islands being occasionally inhabited by
 3 them.⁵⁹ The detailed observations of Horsburgh and HMS Rifleman were deleted.

4 The United Kingdom was confronted with its own records about Chinese economic activities
 5 on the Spratly Islands in 1956 and 1974. The Foreign Office was informed of two articles published in
 6 *People's Daily* that cited the hydrographic reports discussed in part two, particularly Findlay's
 7 detailed observations about the activities of Hainan fishermen on Tizzard Bank.⁶⁰ The Foreign Office
 8 sought the comment of the Admiralty given that '[t]he evidence of these publications mentioned
 9 above would seem to provide a pretty good basis for the Chinese claim to sovereignty on grounds of
 10 occupation'.⁶¹ The Admiralty referred the query to its 'international law experts'⁶² but the latter
 11 merely confirmed the contents of the hydrographic reports and did not address the question of whether
 12 these are sufficient evidence of China's title.⁶³ The Foreign Office did not pursue the query.⁶⁴ Again,
 13 in 1974, the United Kingdom was confronted with the records when its Legal Adviser noted US and
 14 UK records of Chinese economic activities on the islands and that these were ignored when the
 15 United Kingdom made a claim in 1899.⁶⁵ However, the United Kingdom decided that 'no public
 16 indication of preference of China's claim' shall be given'.⁶⁶

⁵⁹ *China Sea Pilot* (1964), 110.

⁶⁰ Chancery, Peking to Admiralty, 3 July 1956, FC 1082/28, FO 371/120937, 00141-149.

⁶¹ FC 1082/28, *ibid.*, 00150-54.

⁶² Admiralty to Foreign Office, 29 August 1956, FC 1082/39, FO 371/120937, 00191.

⁶³ Admiralty to Foreign Office, 14 February 1957, Reference No. M/NID.216/6042/56, FC 1081/1,
 FO 371/127311 (1957).

⁶⁴ Foreign Office to Admiralty, 4 March 1957, FC1081/1, FO 371/127311.

⁶⁵ Legal Advisers' re-examination of claims to sovereignty over the Spratly islands in a minute of 1
 February 1974 from Mrs Denza to Mr Chapman in South-East Asia Department, Annex to DS (L)
 530, Departmental Series Research Department DS No 5/75, Research Department Memorandum:

1 With respect to the United States, in 1905, US naval collier Nanshan, reported that the islands
 2 showed ‘signs of former Chinese habitation and it is apparently visited every year by fishermen from
 3 Hainan for the purpose of collecting Trapang, &c’.⁶⁷ The same notice was published by the US Navy
 4 but observations regarding Chinese economic activities were deleted.⁶⁸ Instead, it was reported that
 5 Prideaux, commander of the Nanshan, discovered and named Nanshan Island and West York Island,
 6 thereby implying that these were uninhabited.⁶⁹ Moreover, the 1937 and 1957 editions of *Sailing*
 7 *Directions* of US Hydrographic Office reported merely that ‘[f]ishermen from Hainan visit the
 8 island’.⁷⁰ The detailed observations of Horsburgh and HMS Rifleman regarding the nature and extent
 9 of these economic activities were deleted.

10 To summarize, the rule applied by colonial powers with respect to claims to the Paracel Islands
 11 and Spratlys Islands recognize the inchoate right of the user-state to perfect title based on the prior
 12 economic activities of its citizens. US and UK hydrographic reports recorded the various economic
 13 activities on the islands that were undertaken regularly and exclusively by Chinese citizens over a
 14 long period of time. Moreover, from 1912 through 1964, US and UK records acknowledged that
 15 China had annexed the Paracel Islands in 1909. However, these records were initially ignored by the
 16 colonial powers, and later revised, if not deleted, such that China was excluded from availing of the
 17 rule on economic use in order to formalize its claims to the islands. The next part discusses how this
 18 exclusion was formalized under the Japanese peace treaties.

The Spratly Islands (bringing up to date the Memorandum RR 7/2 of 27 January 1972), FCO 21/1389, Territorial Disputes of China (1975).

⁶⁶ Research Department’s Memorandum on Claims to Spratley Islands in South China Sea, RR 7/6 of 1975, para 10-11, in FCO 51/411.

⁶⁷ Notice No. 1105 - China Sea: Flat, Nanshan, and West York Islands, *The London Gazette*, 27 October 1905, 7185-7186.

⁶⁸ US Hydrographic Office, *Notice to Mariners No. 41*, 14 October 1905, 580.

⁶⁹ Notice to Mariners No. 41, *ibid.*

⁷⁰ *Sailing Directions* (1937), 112; *Sailing Directions* (1957), 83.

1 **4. Treatment of Records of Economic and Political Activities in the Japanese Peace**
 2 **Treaties**

3 It is clear that the United States ‘made no claim to the islands for itself or for the Philippines
 4 islands’.⁷¹ It had notice of the history of Chinese economic activities on the islands, although
 5 it eventually revised its records of this history. When France claimed some features in the
 6 Spratly Islands and Japan and China reportedly protested,⁷² the United States did not
 7 comment on the claims and protests, except to note that, as of 1938, the existing claimants
 8 were Japan and France.⁷³ Throughout this exchange, the United States did not acknowledge
 9 any subsisting Chinese claim.⁷⁴

10 It was only after World War II that the United States considered China a claimant to the
 11 islands. However, it applied a narrow interpretation of the requirements of sufficiency and
 12 continuity for purposes of determining whether China’s past claim survived under the
 13 requirements of the rule on economic use.

⁷¹ CAC-301, Spratly and other islands (Shinnan Gunto), 19 December 1944, in Iokibe, Makoto. *The Occupation of Japan: US Planning Documents (1942-1945)* (Washington: Congressional Information Service, Inc, 1987).

⁷² ‘French Occupation of Pacific Islands Provokes Protests in Tokyo and Nanking’. *The China Weekly Review*, 5 August 1933, 404. The author has not found copy of the protest.

⁷³ The Japanese Embassy to the Department of State, received 31 March 1939, USDOS, *FRUS*, vol. II (1931-1941), 278-280.

⁷⁴ At that time, the United States believed that the British had withdrawn its claim ‘in favor of the French’ with the expectation that France will thwart the claim of Japan’. See Foreign Office to Admiralty, 17 February 1930, 371/3823, MS British Foreign Office: Japan Correspondence, 1914-1923: Emergence of Japan as a Pacific Power, 263; Foreign Office to Admiralty, 18 March 1920, 371/5350, MS British Foreign Office: Japan Correspondence, 1914-1923: Emergence of Japan as a Pacific Power, 136.

1 At the Territorial Subcommittee of the Advisory Committee on Post-War Foreign
 2 Policy,⁷⁵ the first study, called T-324, acknowledged China's claim to the islands,⁷⁶ although
 3 the basis cited were the declarations of China after the war rather than its long history of
 4 economic activities on the islands.⁷⁷ T-324 noted that Chinese fishermen had visited the
 5 islands for centuries, but so had the Malay and Annamite fishermen.⁷⁸ T-324 did not refer to
 6 US hydrographic reports of exclusive Chinese presence on the islands. It did not provide
 7 basis for its observation of Malay and Annamite presence on the islands. Moreover, T-324
 8 found China's claim doubtful because of a report of 'the American Embassy at Nanking that
 9 a Chinese official textbook described the southernmost boundary of Chinese waters as
 10 extending just below Paracel Island, considerably to the north of the area in dispute'.⁷⁹ Thus,
 11 T-324 did not recommend transfer of the islands to China whose 'claim does not appear to
 12 have substantial foundation'.⁸⁰

13 The US embassy report cited in T-324 is actually a report from the British Consul in
 14 Nanking that when France claimed some features of the Spratly Islands, 'the Waichiaopu had
 15 asked the French Legation about the position of the Islands and that the French Legation had

⁷⁵ The Secretary of State to President Roosevelt, 22 December 1941, USDOS, *FRUS*, vol. I (1941), 594-595. Following Roosevelt's approval of the creation of the Advisory Committee (*ibid.*, 595), a territorial subcommittee was formed to 'stud[y] the territorial disputes that contributed so heavily to the coming of a Second World War'. See Notter, Harley. *Post World War Foreign Policy Planning* (State Department Records of Harley A Nötter, 1987), 1939-1945, xi.

⁷⁶ 600-T-342: Spratly and other islands (Shinnan Gunto) in Nötter, *Post World War*, 1987 (n76).

⁷⁷ T-342, *ibid.*

⁷⁸ T-342, *ibid.*

⁷⁹ T-342, *ibid.*

⁸⁰ T-342, 4.

1 replied [by] sending a map'.⁸¹ The British Consul then made the following observation
2 regarding the merit of China's claim to the islands:

3 as between China and France, the Chinese undoubtedly had a worse claim than
4 the French; school geographies in China showed the limit of China's boundaries
5 well north of the position of these islands; the French flag had been raised first
6 on the islands in 1930; some Chinese fishermen had been discovered living there
7 and had been requested (for a consideration) to continue the hoisting of the flag,
8 but when a French expedition again visited the islands some time later the
9 fishermen had disappeared.⁸²

10 To return to T-324, it noted that the Philippines is not a claimant to the Spratlys⁸³ but,
11 in view of the weakness of the Chinese claim and in the interest of security, safety and
12 freedom of navigation, it proposed that the islands be transferred to the Philippines.⁸⁴

13 T-324 was reviewed by the Division of Political Studies which issued a report called
14 1520-H-68: Spratly and other Islands (Shinan Gunto), dated 15 October 1943.⁸⁵ In 1520-H-
15 68, the claim of China is depicted as a claim to 'Chinese territory on the basis of the fact that
16 for many years Chinese vessels and nationals had used the islands for fishing and trading
17 purposes',⁸⁶ along with Annamite and Malay fishermen.⁸⁷ Similar to T-324, 1520-H-68

⁸¹ British Consulate, Nanking to British Legation, Peking, 23 August 1933, FO 676/85, Files of the Peking Legation: Sovereignty of China over Paracel Islands.

⁸² T-342, 5.

⁸³ T-342, 3.

⁸⁴ T-342, *ibid.*

⁸⁵ Notter (1987), ix-xi.

⁸⁶ 1520-H-68, 3.

⁸⁷ 1520-H-68, 1.

1 found China's claim without 'substantial basis' because of its inconsistency with a 'Chinese
2 official textbook that described the southernmost boundary of Chinese waters as extending
3 just below Paracel Island'.⁸⁸ However, unlike T-324, 1520-H-68 did not favor transfer to the
4 Philippines for 'if any one state is to have sovereignty over the islands it might be inadvisable
5 to deny the stronger legal claim of France in favor of the Philippines' which had 'made no
6 official claim to the islands, [although] some of the leading Filipinos have expressed a keen
7 interest in them, based on the principle of propinquity'.⁸⁹ The claim of France was considered
8 superior 'on the basis of formal annexation'⁹⁰ in July 1933 and various acts of sovereignty,
9 such as the visit of a French gunboat in April 1930 and other periodic visits, as well as the
10 raising of the French flag, in subsequent years.⁹¹ However, 1520-H-68 noted that while the
11 option to give possession to France or Indochina would not undermine maritime security, it
12 'might arouse resentment in China'.⁹²

13 1520-H-68 was subjected to a more focused and area-specific review by the Inter-
14 Divisional Area Committee on the Far East (IDACFE),⁹³ whose output was called CAC-301:
15 Spratly and other Islands (Shinnan Gunto), dated 19 December 1944.⁹⁴ There is no difference
16 between 1520-H-68 and CAC-301 in their treatment of China's claim to Spratly Islands,
17 except that CAC-301 recommended international administration of Shinnan Gunto by either
18 an international organization of the islands, subject to 'the assent of the French Government'

⁸⁸ 1520-H-68, 5.

⁸⁹ 1520-H-68, *ibid.*

⁹⁰ 1520-H-68, *ibid.*

⁹¹ 1520-H-68, 2-3.

⁹² 1520-H-68, 5.

⁹³ CAC-301, Notter, *Post World War, 1987* (n76), ix-xi.

⁹⁴ CAC-301, 1 and 4.

1 in order to ‘eliminate the claim of France to sovereignty over the principal islands in this
2 area’.⁹⁵ The Policy and Post-War Programs Committee of the State Department revised CAC-
3 301 and adopted Policy Paper 1192-PR-43: Disposition of the Spratly Islands, dated 28
4 February 1946.⁹⁶ 1192-PR-43 described Spratly Islands as having ‘no indigenous population,
5 although they have occasionally been utilized by fishermen’.⁹⁷ It regarded China’s claim as
6 one ‘based on use of the islands for many years by Chinese vessels and nationals for fishing
7 purpose’.⁹⁸ It found that, compared to France’s claim, China’s claim is weak because the
8 ‘United States Embassy at Nanking reported that ... a Chinese official textbook described the
9 southern boundary of Chinese waters as extending just below Parcel Island, considerably to
10 the north of the area in dispute’.⁹⁹

11 Moreover, unlike the previous recommendations, 1192-PR-43 favored indeterminacy
12 of the status of Spratly Islands on the ground that the United States has no direct interest in
13 the islands and that, if ‘France and China or any other claimant should be unable to arrive at
14 amicable agreement by diplomatic negotiation’, international arbitration or adjudication
15 should be the proper recourse.¹⁰⁰

16 It is important to note that while CAC-301 and 1192-PR-43 limited the claimants to
17 France and China, and deliberately eliminated consideration of the Philippines as recipient,

⁹⁵ CAC-301, 6.

⁹⁶ Policy and Post-War Programs Committee, 1192-PR-43, in Notter, *Post World War*, 1987 (n76),
ix-xi

⁹⁷ 1192-PR-43, 1.

⁹⁸ 1192-PR-43, 2.

⁹⁹ 1192-PR-43, 5.

¹⁰⁰ 1192-PR-43, *ibid.*

1 1192-PR-43 entertained the idea of ‘any other claimant’ and placed the same on equal footing
2 with the claim of China for purposes of arbitration.

3 The recommendation in 1192-PR-43 was only partly adopted by the State Department
4 in its proposal to the State War Navy Coordinating Committee (SWNCC). The proposal,
5 known as SWNCC 59/1: Policy Concerning Trusteeship and other Methods of Disposition of
6 the Mandated and other Outlying and Minor Islands Formerly Controlled by Japan,¹⁰¹ dated
7 19 June 1946, read:

8 a. The Spratly Islands. ... In accordance with the Cairo Declaration Japan’s claim
9 to these islands should be extinguished and appropriate provision to that end made
10 in the peace settlement. It is not necessary at this time for the United States to take
11 any other position in relation to sovereignty over the islands than the elimination
12 of the Japanese claim.¹⁰²

13 It seems that the State Department had reverted to the formula of three claimants - Japan,
14 France and China – with Japan’s claim being eliminated under the Cairo Declaration.
15 SWNCC 59/1 was approved on 2 July 1946.¹⁰³

16 There is no available record of the discussions regarding the status of Spratly Islands
17 from 1946, when SWNCC 59/1 was adopted, through 1950, when the first draft of a peace
18 treaty with Japan was circulated.¹⁰⁴ It is interesting that, despite the years of post-war

¹⁰¹ United States. State-War-Navy Coordinating Committee (SWNCC) and State-Army-Navy-Air Force Coordinating Committee (SANACC) 1944-1949, Annex B to SWNCC 59/1, 30-31.

¹⁰² SWNCC 59/1, *ibid.*

¹⁰³ SWNCC 59/1, *ibid.*

¹⁰⁴ Provisional United States Draft of a Japanese Peace Treaty dated 23 March 1951, USDOS, *FRUS*, 1951, Asia and the Pacific, vol. VI, part 1, 944 and United States-United Kingdom Draft Peace Treaty dated 3 May 1951, *ibid.*, 1024.

1 planning on the islands, the first draft of the peace treaty did not provide for the disposition of
2 Spratly Islands. When Australia raised this point, the United States responded that the islands
3 were uninhabited and unimportant.¹⁰⁵ It is noted that even at this stage the only recognized
4 claimants were Japan, France and China.

5 To summarize, in the course of post-war planning, the United States took into account
6 evidence of China's activities on Spratly Islands. However, it downplayed the significance of
7 these activities. First, it did not consider the activities exclusively Chinese. Second, it
8 considered the activities outweighed by a report of the American Embassy in Nanking that
9 Chinese schools have used a map depicting Paracel Islands as its southernmost territory.
10 Third, it limited the criteria for post-war territorial disposition to maritime security and
11 freedom of navigation, and attributed minimal value to the legality of territorial claims.
12 Finally, whereas at first it entertained only three claimants - Japan, France and China – it
13 eventually allowed other claimants, such as the Philippines and Vietnam, to emerge. The
14 priority and exclusivity of the claim of China based on the rule on economic use were
15 diminished.

16 That the US attributed minimal significance to the legality of territorial claims is more
17 apparent in its approach to the post-war territorial disposition of Paracel Islands. During post-
18 war planning, the Territorial Subcommittee and Division of Political Studies did not include
19 these islands in their studies. When IDACFE produced a study called CAC-308: Paracel
20 Islands,¹⁰⁶ it provided a historical background that acknowledged the strength of the evidence
21 of China's title. The report traced the claim to China's history of economic activities and

¹⁰⁵ Undated Memorandum by Mr Robert A Fearey of the Office of Northeast Asian Affairs, USDOS, *FRUS*, East Asia and the Pacific, 1950, 1328. The statement was made in response to a query from Australia.

¹⁰⁶ Notter, *Post World War*, 1987 (n76), ix-xi.

1 details various evidence of acts of administration.¹⁰⁷ IDACFE further noted that United
2 Kingdom had regarded China the sovereign of the islands.¹⁰⁸ Notwithstanding the foregoing
3 findings, the primary recommendation of IDACFE was the administration of the islands by
4 an international organization, subject to the consent of both China and France.¹⁰⁹

5 The Policy and Post-War Programs Committee also acknowledged that ‘the Chinese
6 claim to the Paracels has a greater degree of validity than that of the French claim, in view of
7 [the] long historical foundation’ of China’s claim.¹¹⁰ However, it applied the policy that was
8 formulated for the Spratly Islands by not endorsing the Chinese claim on the ground that the
9 United States has no direct concern in the islands.¹¹¹

10 In sum, the United States acknowledged China’s claim to the Paracel Islands on the
11 basis of its recorded history of economic activities and annexation. However, after the Second
12 World War, it denied any priority to China’s claim and left it to compete with other more
13 recent claims.

14 **5 Conclusion**

15 The foregoing discussion establishes that territorial acquisition of the South China Sea islands
16 was governed by a rule on economic use. This rule was not based on international convention
17 or custom. Rather, it was based on colonial laws on guano concession. Moreover, it was
18 applied selectively to further colonial and maritime interests and to exclude China from
19 claiming the islands. In their own records, the United States and United Kingdom
20 acknowledged that, at regular intervals and over a long period of time, Chinese citizens

¹⁰⁷ CAC-308, 2-3.

¹⁰⁸ CAC-308, 4.

¹⁰⁹ CAC-308, 5-6.

¹¹⁰ 1192-PR-42, 4.

¹¹¹ *Ibid.*

1 engaged in various economic activities on the islands, and that China had annexed the Paracel
2 Islands in 1909. However, these records were ignored and subsequently revised such that
3 China was excluded from availing of the rule on economic. The Japanese peace treaties
4 formalized the exclusion of China by denying its claim of any history and priority. Its claim
5 was treated merely as equal and concurrent to the new claims that emerged from more recent
6 acts of occupation, all of which are to be resolved by negotiation and agreement. This
7 approach is prominent in the positivist discourse on the South China Sea territorial dispute
8 that advocates resolution based solely on negotiation and agreement, without regard to the
9 history of the claims to the islands. However, despite the revision of its entries in subsequent
10 years, the records of the legal history of the islands subsist and demand a critical approach to
11 international law in the South China Sea.