

Chapter I

Background Information on The Paracels and Spratlys

In order to clarify the vexed question of international law, the central issues of which have just been outlined, it is essential to provide a geographical description of the territories, a breakdown of the various elements comprising the legal issues and the main strands of the chronology of events on which the legal argument may be based.

GEOGRAPHICAL BACKGROUND

The island territories of the South China Sea are not all concerned by the current disputes, which relate to only two archipelagos, now easily identifiable on nautical charts.

The factual information collated here will be set forth separately for the Paracels and for the Spratlys.

The enormous difficulty of precisely identifying all the elements comprising these complex geographical configurations must be underlined. In addition to the main islands, there are any number of rocks, sandbanks, atolls, and coral reefs, some of them tiny. The topography is obscured by the coexistence of different systems for naming the islands. Chinese, Filipino, Vietnamese, French and English names have been superimposed on each other, without any clear correspondence between them. Referring to one system of names rather than another is not without symbolic significance. In this book we shall therefore use the English names, the least suspect since they do not correspond to any particular claim.

General facts

Both archipelagos form part of four groups of coral islands scattered over the South China Sea.¹

¹ The use in this book of this name, still widely used in geography textbooks although nowadays contested by Vietnam, obviously does not imply any support for Chinese claims regarding delimitation.

The other two (Pratas Island and Macclesfield Bank) are not the subject of any dispute over sovereignty.

The archipelagos sprawl over a sea bounded by many territories. China, Vietnam, Malaysia, Brunei and the Philippines form a crown around it.

These lands have little in the way of a continental shelf. The exceptions are China, and to a lesser extent Vietnam, especially south-west Vietnam.

The Paracels and Spratlys, however, lie well beyond the geological continental shelf, in the middle of a maritime zone which reaches a depth of over 1,000 metres close to the Paracels and around 3,000 metres north-east of the Spratlys.

From the legal standpoint, such facts are important, since no neighbouring State is able to claim rights over the archipelagos on the grounds that they belong, in geomorphological terms, to the continental shelf of any particular country. The islands and islets do not emerge from a zone of deep ocean floor which may be considered to be the natural prolongation of the land territory of a particular State. This argument, as will be seen in the following chapters, is however immaterial, since sovereignty over an island formation is independent of the links between that formation and the subsoil of the sea.

A few facts will underline the islands' geopolitical or geostrategic importance, which stems from the major role played by this maritime zone in global navigation.

To the south-west, the South China Sea connects with the Indian Ocean via the Straits of Malacca and Singapore, to the north-east it meets the East China Sea, which in turn connects with the Sea of Japan via the Strait of Korea.

No global maritime power can afford to ignore this sea. A glance at the map reveals that all maritime traffic traversing this sea is obliged to pass between the two archipelagos. The importance of sovereignty and consequently strategic control over these groups of islands therefore needs no emphasis.

Lastly, the islands are uninhabited. Their small size has never allowed any human development. Traditionally they have served as outposts for seasonal fishermen. That aside, they have harboured only garrisons or, very recently in the Paracels, a population of administrative origin, part of the enormous drive to develop an infrastructure.

The Paracels

Essentially, the Paracels lie between latitude 16° and 17° north and longitude 111° and 113° east.

They consist of two main groups: the Amphitrites and the Crescent group, which lie some 70 kilometres from one another.²

Added to these are a number of islands and isolated rocks.

In the west, the Crescent Group consists of 5 main islands: Robert Island (0.32 square kilometres), Duncan Island (0.48 square kilometres), Palm Island (0.09 square kilometres), Drummond Island (0.41 square kilometres), on which there are 5 tombs, and Pattle Island (0.3 square kilometres), which displays the remains of a landing stage and a channel.

Some 12 kilometres away lies Money Island (0.5 square kilometres), then further south, Triton Island. Each island has its own coral reef, with openings enabling shallow-bottomed craft to beach.

In the west, the Amphitrite group consists of Woody Island, Rocky Island, South Island, Middle Island, North Island, Tree Island, and to the east of this group, Lincoln Island.

The largest of them is Woody Island, which is no more than 4 kilometres long and 2 to 3 kilometres wide.³

Apart from the two groups of islands mentioned above, the archipelago as a whole consists of over 30 islets, sandbanks or reefs and occupies some 15,000 square kilometres of the ocean surface, which explains the extremely dangerous nature of navigation in this vicinity, a fact borne out, travellers say, by the number of wrecks.

It is the wrecks that signal the danger, in particular the steam kettles, which last longer thanks to their weight and which, owing to their size, can be spied from a long way off, surprising the uninitiated, who are thus at first at a loss to explain the nature of these protuberances on the reefs.⁴

Geologically speaking, the scientific studies undertaken during the period of French colonization by the *da Lanessian*, the results of which were collated in the notes published by Doctor A. Krempf, Director of the Oceanographic Service, indicate that the submarine shelf from which the reefs and islets of

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See map in Annex 3.

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See list of islands and islets in Annex 4.

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P.A. Lapicque, *A propos des lies Paracels* (Saigon, Les editions d'Extreme-Asie), p. 3.

the Paracels emerge lies at a depth ranging from 40 to 100 metres, and is enveloped in a layer of coral.

This is a surface which was formed in the period of glaciation and which, once again flooded by sea water after the glaciers retreated, constantly provided optimum conditions for the development of coral. At present, it is uniformly covered in living coral, sand and coral gravel. (Notes by Doctor Krempf).

The climate is hot and humid, with abundant rainfall. There are frequent mists. The islands are swept by winds (which give rise to currents, further complicating navigation) and the area is frequently subject to typhoons. There is vegetation on all the islands: phosphorite growths, trees, short grass and bushes. On some of the islands there are freshwater springs. There are vast numbers of birds and a great many turtles.

The economic resources can be divided into three groups:

- The resource of the future is obviously the offshore petroleum deposits.

The area is said to be promising, though as yet no precise data on actual expectations have been published.

- The resource which has long been coveted and indeed still is and which has been exploited to some extent is the phosphate deposits. This is what the ground is made of in all the islands in the archipelago which are high enough above sea level for vegetation to have developed. These deposits have been formed from an originally calcium carbonate soil (coral). This soil has been covered by birdlime containing phosphoric acid and the humid climatic conditions have transformed it into phosphates. The layer of phosphates which varies in content (23 to 25 per cent in some places, 42 per cent in others) is frequently over 1 metre thick. This phosphate was mined between 1924 and 1926 by Japanese companies (and in some cases the deposits have been completely depleted, Robert Island being an example). The damage done at that time seems to have been substantial (trees felled, vegetation destroyed). In 1956, the Saigon administration authorized a Vietnamese industrialist, Mr Le Van Cang, to mine the phosphates in the Paracels. The Vietnamese Fertilizer Company was to continue this process from 1960 to 1963. The most recent detailed data available before the advent of Chinese control are those given by an engineer, Tran Huu Chan (August 1973), on the occasion of a mission undertaken at the initiative of the Saigon administration by Japanese and Vietnamese experts.⁵ This mission, which was concerned only with the Amphitrites (the Crescent group having been

⁵ See the report of this mission in 'Les archipels Hoang Sa et Truong Sa', *Le Courrier du Vietnam*, Hanoi, 1984, pp. 52 *et seq.*

occupied by China since 1956) found that there were still major phosphate reserves left, though the conditions for mining them depended on a more detailed examination of the samples taken.

- The third - and renewable - resource (except in the case of uncontrolled exploitation which would lead to the local disappearance of certain species) is that of the marine fauna. However, the hope that there might be pearl oysters, about which there had been much talk before World War II, does not seem to have been borne out. Trawl fishing (which would offer a high return) hardly seems possible owing to the chaotic and jagged coral seabed. On the other hand, fishing for turtles has long been undertaken both by Chinese fishermen from a number of ports in the south of Hainan and by Vietnamese fishermen. However, this is carried out on a small scale, not an industrial one, the resulting income providing no more than a living for the fishermen's families.

Since the full-scale Chinese occupation of the archipelago, and particularly from 1974 onwards, when the Chinese occupied the western part of the islands (the Crescent group), Chinese activities throughout the archipelago have intensified. Woody Island, the only one with a surface area sufficient to support costly infrastructures, has been equipped with an airstrip and an enlarged harbour. And a harbour was built by the Chinese Navy on Triton Island in 1982.⁶

The Spratlys

Once again we encounter a vast underwater platform in the middle of the South China Sea, though much further south than the Paracels, cut off from any mainland or major island territory by ocean trenches up to several thousand metres deep.

It is not easy to identify the archipelago clearly (even less so than in the case of the Paracels) because the region includes widely scattered islands, islets, banks and rocks. There are over one hundred of them, and the total surface area encompasses almost 160,000 square kilometres of water (over ten times bigger than the Paracels). Its northern limit is latitude 12° north and its eastern limit longitude 111° east.

Various documents and nautical charts reveal the existence of 26 main islands or islets, and many rocky outcrops and sandbanks of varying size, named in several languages.⁷ The respective claims will be studied and

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See Chi Kin Lo, *China's Position Towards Territorial Disputes. The Case of the South China Sea Islands* (London, Routledge, 1989), p. 118.

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See the list of islands in Annex 4.

examined later. We shall merely note at this point that not all the islands are occupied. Some are occupied by the Philippines, Malaysia, Taiwan, China and Vietnam respectively. The archipelago also includes seven groups of rocks, identified on charts, which remain above the water at high tide.

The islands are small. Some are bare of vegetation, covered only by sand and guano. Others have a few bushes, some a few coconut palms. Observers note that the islands are more reminiscent of Oceania than of East Asia.

During the dry season, the climate is torrid. There are two annual monsoons. If wells are sunk, it is possible to find fresh water and to cultivate crops, at least such crops as withstand the heavily saline soil. A report by the Vietnamese exploratory expedition of 1973 stated that some islands were swarming with mosquitoes and rats.

Fishery resources appear to be considerable throughout the archipelago. The distance from *terra firma* might cause problems (albeit not insurmountable) were large-scale fishing to be carried out.

The islands do not have and have never had a native population. All the States which have staked claims currently maintain garrisons on one island or another. When they administered the islands (between the two World Wars) the French noted the sporadic presence of a few Chinese fisherman from Hainan.⁸

As in the Paracels, and for the same reasons, the islands have seen a build-up of guano, a coveted resource, and one which was mined by the Japanese prior to World War II. The reserves of phosphorus are currently estimated at 370,000 tonnes.

The promise of oil is repeatedly mentioned in the international press and appears to have a solid foundation. According to Chinese sources, the Spratlys are thought to harbour a reserve of 25 billion cubic metres of gas and 105 billion barrels of oil.⁹

The main islands and rocks are: North Danger Group, comprising 4 islets (North Reef, North-East Cay, South-West Cay and South Reef), one of which is about one kilometre long; Trident Shoal, measuring approximately 14 by 11 kilometre; Lys Shoal; Thi Tu Island made up of two atolls, the largest of which measures about 1 by 1.5 kilometres, having vegetation and fresh water; Subi Reef, a coral ring; Loai Ta Island, a small island 0.3 kilometre long surrounded by extensive shallows; Tizard Bank, comprising two main islands and three reefs, including Itu Aba Island which measures 1 by 0.4 kilometre. Itu Aba is the most important island, having wells sunk by

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See 'Inoccupation d'îlots de la mer de Chine' (1933) *Asie Française* no. 313, at p. 266.

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Newsweek, 15 May 1978, 'Treasure Islands'; *China Daily*, 24 December 1984.

the Japanese, and vegetation. Nam Yit Island is 0.5 kilometre long. Discovery Great Reef is ring-shaped, and visited by fishermen of the region. Fiery Cross Reef is an area of shallows approximately 26 kilometres long, forming a semi-open lagoon containing some higher reefs. London Reef complex comprises 4 shoals. Spratly Island is a small island 0.75 by 0.4 kilometre, with water and vegetation. It is also a source of guano and a breeding ground for turtles. Amboyna Cay is covered with vegetation and guano. Rifleman Bank is a large bank 56 by 24 kilometres, although it does not normally stand clear of the water. Further south, near the Malaysian coast, the group of banks and reefs known as James Shoal is thought to be the site of a substantial reserve of gas and oil.

The centre of the archipelago is 'dangerous ground', so dangerous that most vessels will not go near it. The States competing to annex these minute outcrops have all gained a foothold here or there, although few of them would support facilities.

The Taiwanese Navy maintains a garrison of almost one thousand men on Itu Aba Island. Vietnam controls Spratly Island, its principal power base in the area. The Philippines are present on Thi Tu Island and Loai Ta Island. The People's Republic of China, a late arrival (1988-1989) in this archipelago so far from its coast, has been obliged to found its claims on mere sandbanks which are not always above sea level at high tide.

Major construction work has been carried out on Fiery Cross Reef, for example, despite the fact that this thankless spot lies under 50 centimetres of water during exceptionally high tides. A wharf, roads and a helicopter hangar have all been constructed, coral formations having been dynamited and the ground level raised over a sufficiently large area.

This completes our brief review, based on available documentation, of the archipelagos so hotly disputed and so stridently claimed by various States.

THE LEGAL ISSUE

In order to clarify the issue of title to sovereignty over the two groups of islands, we need to ask a first set of questions on the nature of the disputed territories and the nature of the dispute, then consider the applicable law for settling the dispute on a satisfactory basis.

Category of territory and identification of the dispute

The nature of the disputed territories

Examining the nature of the territories means asking two questions:

a) Do they constitute lands which are capable of appropriation?

The question is all the more relevant in that the archipelagos are composed of a sprinkling of banks, islets and rocks, among which there are a few proper islands. It needs to be asked, since the life of the oceans and geological movement within the earth's crust may trigger off abrupt or gradual upheavals perhaps obliterating certain territories which used to protrude above the water.

However, the reply would not seem to be in doubt for either archipelago.

The concept of land which is capable of appropriation was raised before the International Court of Justice in the *Minquiers and Ecrehos* case.¹⁰

For scholarly opinion, to be capable of appropriation an island territory must apparently present at high tide a surface of land clear of the water which is large enough to be habitable in practice. Some authors add that the islands must also be shown on geographical maps.¹¹ The debates at the Third United Nations Conference on the Law of the Sea revealed the great complexity of the problem. Article 121 of the Montego Bay Convention of 10 December 1982 uses a geological criterion, '*a naturally formed area of land*'. Artificial islands are thus excluded. On the other hand, the nature of the area of land matters little. '*Mud, silt, coral, sand, madrepore, rocks, etc., anything makes an island.*'¹²

There is also a hydrographic criterion: protruding above the high-water line. This distinguishes islands from low-tide elevations. However it does not resolve the difficulty of defining high water, nor whether it includes exceptional tides.

Both archipelagos contain many islands, but also islets, sandbanks, coral reefs and rocks. Although the status of certain fringes is doubtful, there is no doubt that the main islands, clearly identified on nautical charts, are capable of appropriation. The fringes are then seen as accessories to the main islands.

¹⁰ International Court of Justice, *Reports*, 1953, at pp. 49 and 53.

¹¹ See Gilbert Gidel, 'La mer territoriale et la zone contigue' (1934) *Recueil des Cows de l'Academie de Droit International*, II, vol. 48, at pp. 137-278.

¹² Laurent Lucchini and Michel Voelckel, *Droit de la mer*, vol. I (Paris, Pedone, 1990), p. 331.

Therefore the dispute indeed concerns lands which are capable of appropriation.

b) Are these territories the kind which entail the attribution of extensive maritime zones to the State which has sovereignty over them?

This question is tantamount to asking whether Article 121, paragraph 2, of the United Nations Convention on the Law of the Sea is applicable to these islands, islets and rocks, i.e. whether the annexation of the archipelagos, in itself, gives exclusive rights to the living resources of the sea or the resources of its subsoil within the limit of 200 nautical miles around the land in question. Article 121, paragraph 2, states:

Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.

It could be argued that these are rocks calling for the application of paragraph 3 of the same article:

Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

This is the crux of the current dispute, despite the fact that the protagonists hesitate as to the best attitude to adopt in order to serve their own interests.

Looming behind the question of title to sovereignty - our strict focus here - the decisive issue is control of the resources of the sea. The appetite of States for maritime territory is growing in line with the role of fisheries in national economies, and the importance of finite oil and mineral resources in certain key industries. In order to decide between competing desires for maritime space, international law allows for delimitation between States with adjacent or opposite coastlines.

Sovereignty, however, is a prerequisite. The titleholder must be established before identifying the resultant rights to adjacent waters and the States between which the delimitation will be effected.

Strategies are hesitant. Each State claims possession of the land and international recognition of what it considers to be an ancient title. Hoping for a favourable outcome, each attempts to persuade all the partners that all the islands are habitable, thus multiplying the maritime areas which would fall under its national control.

However, when it comes to the claims of others, the interpretation of the wording '*rocks which cannot sustain human habitation*' becomes more punctilious, in an endeavour to curtail the number of islands which would give rise to broad rights over the adjacent waters.

Pending settlement of the conflict - which steadily recedes as positions harden - certain parties have not hesitated to change the original reality. In the Paracels particularly, since taking military control, the Chinese have carried out spectacular development projects. In places where, until the end of World War II, navigators and geographers described inhospitable lands occupied only by seasonal fishermen, swept by typhoons or racked by oppressive heat, harbours, airstrips, roads and fortifications or other facilities have appeared, sustained by a feat of military logistics. All this has made the words '*sustain human habitation*' lose their original meaning.

The various States which have occupied islands in the Spratlys have also expended a great deal of energy on similar schemes. This has been encouraged because the above-mentioned paragraphs of the United Nations Convention on the Law of the Sea, itself the fruit of complex compromises, left several difficulties unresolved. How to distinguish between an island and a rock? Under what conditions are human habitation on an island or an economic life of its own feasible? ¹³

The last paragraph of Article 121 leaves a great deal to interpretation, since the text does not say '*uninhabited rocks*' but '*rocks which cannot sustain human habitation*'. For example, if the criterion for human habitation is the presence of fresh water, then that is found on the main islands in both the Paracels and the Spratlys. If it is the presence of vegetation, this is also found.

The alternative to that condition is the possibility for an island to have an economic life of its own. Once again, there is substantial imprecision.¹⁴ Do fishing or the mining of guano constitute adequate activities?

For a reply to these questions, we must interpret Article 121, paragraph 3, of the Montego Bay Convention.

The wording of the text indicates that artifice must be eliminated. The rocks must *sustain* human habitation, eliminating the hypothesis that they might be equipped to make them suitable for this. Similarly, mention is made of an economic life of their own. Therefore cases where the islands serve as outposts for activities which in fact are based in another territory cannot be taken into account.

¹³ See on this subject J.R.V. Prescott, *The Maritime Political Boundaries of the World* (London, New York, Methuen, 1985), pp. 72 *et seq.*

¹⁴ *Ibid.*

To sum up, land above the water, however insubstantial, must be capable of supporting naturally a relatively stable community of people.¹⁵

Were both archipelagos able to do so from the beginning? No account must be taken of the presence of garrisons, maintained only with military support, nor of any population maintained there by means of costly infrastructure and facilities, since it is well known that such developments, widespread *after* the dispute has arisen, are designed to change the odds. It is therefore necessary to go back to the state of the islands as described by navigators or visitors before the conflict caused transformations.

Without doubt, the overwhelming majority of these sprinklings of land come under paragraph 3 of Article 121. The status of some of the larger islets is debatable, particularly Woody Island in the Paracels. If the human habitation mentioned in the Convention is seasonal, then since ancient times some islets have been visited for several months of the year, in the dry season, by fishermen from various neighbouring countries who *'lived'* there without making the islets their usual abode. However no economic life of their own, i.e. with a certain autonomy, has ever been possible for these lands.

So it is noteworthy that most authors have tended to conclude that these islands might well have a territorial sea but that they do not provide entitlement to an exclusive economic zone.¹⁶

To make progress on the main issue - the validity of the titles claimed - the exact nature of the dispute must be identified.

The legal nature of the dispute

Several States have irreconcilable positions regarding these archipelagos. What then is the legal foundation of the claims of the various governments? Does any one of them have a better title than another, or than others, which demands recognition?

Vietnam asserts that it has territorial State sovereignty over both archipelagos, on the grounds of ancient, continuously maintained titles. Let us recall that:

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the

¹⁵ See Jon M. van Dyke and Dale L. Bennett, *Islands and the Delimitation of Ocean Space in the South China Sea*, 13 March 1989, mimeographed paper, p. 41. See van Dyke and

¹⁶ Bennett, *op. cit.*; similarly, Jeanette Greenfield, *China's Practice in the Law of the Sea* (Oxford, Clarendon Press, 1992), p. 164.

right to exercise therein, to the exclusion of any other State, the functions of a State.¹⁷

China counters the Vietnamese claim to the Paracels with a claim of its own. It has backed its claim by a military occupation which ousted the previous Vietnamese presence, in 1956 for part of the archipelago and in 1974 for the rest.

Contemporary international law (Charter of the United Nations, Article 2, paragraph 4) prohibits the use of force against the territorial integrity of a State. So a military occupation denounced as such cannot ever, in any way, become a valid, recognized title.¹⁸

Matters are different in the Spratlys. The assertion of sovereignty by the Vietnamese Government (subsequent to the affirmation of French sovereignty), and its control over the main islands of the archipelago, were countered by Filipino and Taiwanese claims and occupations, more recently by Malaysian and Chinese (1988) ones, the Chinese claim being accompanied by the military occupation of several islets after violent incidents.

These factual data prompt us (and even make it imperative) to examine the nature of the dispute. Two possibilities must be considered in turn.

Is this a dispute relating to the acquisition of sovereignty over *terra nullius*? Or, is it a territorial dispute between two States which both claim title to sovereignty?

The first possibility must be disregarded, since there are certain similarities between the situation studied here and the Minquiers and Ecrehos case.

Both parties contend that they have respectively an ancient or original title to the Ecrehos and the Minquiers, and that their title has always been maintained and was never lost. The present case does not therefore present the characteristics of a dispute concerning the acquisition of sovereignty over *terra nullius*.¹⁹

These words may be transposed to the case of the archipelagos in the South China Sea. It is no longer a question, and has not been for a long time, of

¹⁷ Max Huber, *Arbitral Award, Island of Palmas*, 4 April 1928, *Reports of International Arbitral Awards*, vol. II, at p. 838.

¹⁸ See Tullio Treves, 'La declaration des Nations Unies sur le renforcement de l'efficacite du principe de non-recours a la force' (1987) *Annuaire Francais de droit international*, at pp. 379 *et seq.*

¹⁹ Minquiers and Ecrehos case, International Court of Justice, *Reports*, 1953, at p. 53.

attributing sovereignty over *terra nullius* to a State which seeks to acquire title. Rather the dispute will be settled only by resolving a territorial dispute between several States, which occupy or have occupied the same lands over very different time scales and on the basis of very different titles.

The dispute having been characterized, the question which then arises is: *what law will be applicable?*

The norms of international law applicable to a settlement of the dispute

What legal approach can be adopted which might permit a conclusion as to the merits of one claim against another? The concept of one single argument will have to be abandoned in favour of a method which takes account of the rhythms of time in relations with the law.

The argument of geographical contiguity

This argument must be jettisoned from the outset. In the history of claims of sovereignty over island territories, the argument based on geographical proximity has been used many times by one State or another (the Argentine claim to the Falkland Islands for instance). However, it has never been recognized as constituting a rule of international law making it possible, in the event of conflict, to rule in favour of the State whose territory lies closest to the disputed islands.²⁰

In the Island of Palmas case, Judge Max Huber considered this argument at length. His reasoning deserves to be quoted *in extenso*:

In the last place there remains to be considered title arising out of contiguity. Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish

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The case of the Island of Bulama on the coast of West Africa (Ulysses Grant Arbitration of 21 April 1878) cannot serve as a precedent. Apart from the fact that it is an isolated case, the arbiter remarks that this island 'is adjacent to the mainland and so near to it that animals cross at low water'. Here contiguity occurs in such special conditions as to be unique.

such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even Governments of the same State have on different occasions maintained contradictory opinions as to its soundness. The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one State rather than another, either by agreement between the Parties, or by a decision not necessarily based on law; but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the activities of a State. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results.²¹

Although dating back to the period prior to World War II, these comments are still just as pertinent today.

They mean that one argument devoid of legal value can be eliminated from the field of consideration, and one can but conclude, in the words of Louis Cavare, '*It is impossible to accept that proximity can serve as basis for the creation of a genuine right.*'²²

Hence, the fact that, where the Paracels are concerned, the closest point in these islands to Vietnam lies some 170 nautical miles from Da Nang and 156 nautical miles from the coast of Hainan, or that the distance separating the closest point in the Spratlys from the coast of Vietnam (Cam Ranh) is 250 nautical miles, while that archipelago lies some 522 nautical miles from Hainan, have no bearing on the legal substance.²³

The legal substance must be weighed up in relation to a process of acquisition of title and maintenance of title which consists of a lot more than mere geographical data.

The question whether these archipelagos are situated in the exclusive economic zone of one or other riparian State of this sea is neither here nor there. In international law, it is not the fact that an island is situated within

²¹ Max Huber, *Arbitral Award, Island of Palmas*, 4 April 1928, *op. cit.*, at pp. 854-855.

²² Louis Cavare, *Droit international public positif* (Paris, Pedone, 1962), p. 597.

²³ It is surprising to note the persistence of this argument among a handful of authors such as Charles Rousseau, *Revue generate de droit international public*, 1972, at p. 835.

the exclusive economic zone which has any bearing on whether the island belongs to one State or another, it is the title of sovereignty to an island which, when it has been determined, leads, under certain conditions examined above, to the attribution to this island of a territorial sea and, as the case may be, of an exclusive economic zone, in which case the title recognized will affect the actual data of the delimitation themselves.

By virtue of their land mass, both China and Vietnam, under the terms of the 1982 Convention on the Law of the Sea, can claim rights up to 200 nautical miles, and in this respect, the Paracels lie in an area where the potential rights of the two States overlap. It is the delimitation between them which will determine their maritime boundary. However, sovereignty over the archipelagos is not governed by the maritime delimitation, which would include the Paracels in an area controlled by one or other of the two States. On the contrary, it is a separate, preliminary question, whose outcome has a bearing on the delimitation.

On the other hand, in this respect the Spratlys are in a very different geographical position, since they lie outside the zones that either State (China or Vietnam) can claim as continental shelf or exclusive economic zone. However, some of the islands in this vast archipelago are closer to Malaysia or the Philippines.

The machinery of intertemporal law

How in international law are the titles of acquisition to an uninhabited territory constituted? How are these titles maintained? The answer to these questions is provided by a subtle legal argument denoted by the name *intertemporal law*.

Intertemporal law consists in comparing the particulars of the legal system at the different periods of its development with the specific facts of the situation which constitute the basis of the dispute.

The legal system has evolved over centuries of history woven between human societies and territories. The rules which, at a given period, presided over the acquisition of a title of sovereignty were gradually transformed. Confirming the Latin dictum *ubi societas, ibi jus*, the law adapted to the evolution of societies and to the values which they developed.

If one goes back to the period of the great discoveries, and noting only the major turning points (which appear as such to us but in reality were slow to emerge), three stages can be identified.

The first period is the one when, for islands which were said to be *terra nullius*, territorial discovery served as acquisition of title, provided it was accompanied by an affirmation of sovereignty. Yet this period was also

characterized by the fact that the sovereignty of the State included the right of conquest. Further, the Great Powers had treated many lands inhabited by peoples unknown to them, which had developed their own non-western systems of social organization, as *terrae nullius*.²⁴

By this means, and showing complete disregard for the populations, the word conquest could be omitted, being replaced by the much simpler expression of 'discovery'.

This first system of law only changed under the influence of inter-Power rivalry during the 19th century. The change in the law was crystallized at the Congress of Berlin and in the precise terms of its General Act of 1885. Two new rules were admitted by the signatories, Africa being essentially the field of application.

These were the requirement that lands allegedly acquired should actually be occupied and the requirement that other States should be notified of this effective possession.

From that time onwards, supported by numerous arbitral awards or legal decisions, international law with respect to territorial acquisition became consolidated and widely accepted, in particular through the magisterial award of Judge Max Huber in the *Island of Palmas* case.

A dispute over sovereignty between two States was settled by the finding that one of the States concerned had greater title than the other. The relevant acts must have been performed in sovereignty and could not therefore have been performed by private individuals acting on their own behalf. A distinction was drawn between creation of the title to the territory and the maintenance of this title in continuity. The effects of an act produced as giving access to the title (cession, conquest, discovery or occupation) must be weighed up in the context of the law in force when that act was performed, and not on the basis of the law in force at the time when the dispute arose.

However, the initial title had to be backed up by the continuous, peaceful exercise of the authority of the State active in the territory. And if the initial title had been obtained without the display of authority throughout the territory, maintenance of the title could only stem from the generalization of such display. However, it was accepted that, where uninhabited, remote lands were concerned, the manifestations of that display might be more tenuous than in lands with more developed civilization.

²⁴ See in this connection '*Terra Nullius, "droits" historiques et auto-determination*', Mohammed Bedjaoui. The Hague, 1975. Oral statements made before the International Court of Justice in the case concerning Western Sahara on 14 May and 14, 15, 16 and 29 July 1975.

Lastly, the recognition or acquiescence of third States could not serve as basis of the title itself, but was an element which reinforced the position of the State exercising the authority.²⁵

Such was the state of the law from the close of the 19th century until the first half of the 20th century.

A number of fundamentally important and radically innovative elements were introduced with the Charter of the United Nations, which laid the foundations of a universal, international legal order. Concerned as they were to attain the objective of the maintenance of peace, the founding States introduced a vitally important element. This element constitutes a truly revolutionary change in international law with the prohibition of the use of force against the national integrity of a State (Article 2, paragraph 4). Wars of conquest, as a source of new sovereignty over a territory, are now prohibited. Conquest by force entails a situation of military occupation which is always illegal and which, failing an agreement concluded between the States concerned, cannot be transformed into law, even with the passage of time.

However, the United Nations Charter also contained another principle which lay at the root of considerable upheavals in international law, namely, the right of peoples to self-determination (Article 1, paragraph 2, of the Charter). However, the inclusion of this principle among those which moulded the initial aims of the United Nations was not sufficient in itself to ensure that it produced its full effect. Not until 1960 and the dawn of the great decade of decolonization was what had hitherto been the law completely overturned. It was then that the law of peoples attained its fullest expression with the Declaration on the Granting of Independence to Colonial Countries and Peoples (United Nations General Assembly Resolution 1514 of 14 December 1960).

Paragraph 4 of the Declaration is especially noteworthy in relation to the legal principles enumerated here for their usefulness in illuminating the case under consideration:

All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

²⁵ See, on these points, Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (Oxford University Press, 1987), pp. 140 *et seq.*

The last phrase is crucially important. It highlights the fact that the difficult transition of a colonized people to an independent people, which often takes place in political conditions marked by confusion and disorder, must never involve any encroachment on its territory.

Lastly, the Charter was strengthened, clarified, and extended in 1970 by a particular resolution which has sometimes been compared to a constitutional development of the Charter. This is resolution 2625 of 24 October 1970.²⁶ This text reiterates the prohibition of the use of force as a means of settling territorial disputes and also the fact that no territorial acquisition resulting from the threat or use of force will be recognized as legal.

The Manila Declaration of 15 November 1982 on the Peaceful Settlement of International Disputes crowns this edifice and defines the principles which must in all circumstances take the place of violence.²⁷

This is the set of rules which, by successive stages, have formed the corpus of positive international law. The changes have never occurred abruptly. Even the most salient one, prohibition of the use of force, had been heralded by the provisions of the League of Nations Charter and the Briand-Kellogg Pact, less precise and radical though those provisions may admittedly have been.

As a rule, the elaboration of law and the gradual modifications through which it passes are slow processes in which the part played by custom, itself permeated by the slow development of attitudes, envelops the text of the dated treaty or convention (should there be one) and, as it were, levels out the temporal unevenness by absorbing it into a more blurred landscape.

Against the backdrop of this long evolution of the legal principles over three periods sufficiently distinct for them to be specifically identified, the history of the two archipelagos must be examined in relation to the troubled history of Vietnam and to that - more uniform but nevertheless not free from complications - of China, today Vietnam's principal rival for these lands.

One of the major difficulties of this case is the necessity to correlate two totally different historical rhythms.

The law has been transformed step by step with the various historical epochs, social evolution causing each period characterized as new to engender different norms, whose gestation had been perceptible during the preceding period.

Even if certain dates have the appearance of watersheds (1885 or 1945), the law has developed within a certain continuum.

²⁶ Known as Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

²⁷ General Assembly resolution 3710

It is against this background that the principal fault lines in the history of Vietnam should be seen.

The first French protectorate over this sovereign State (even though it was tied by vassalage to China) was in 1874, the actual protectorate regime beginning in 1884. The Democratic Republic of Vietnam was created on 2 September 1945. A State of Vietnam within the framework of the French Union was officially set up under the Agreements of 8 March 1949. In July 1954, putting an end to the hostilities with the Democratic Republic of Vietnam, France concluded agreements whose practical consequences at the time were the creation of two Vietnamese States. Reunification was to come in 1975 after further hostilities.

Thus, despite its fierce and legendary independence, the Vietnamese people was '*under supervision*' for long decades of its history. And the rightful holder of the sovereignty (the people) found itself lumbered with spokesmen who were variously suffered, despised, resisted or endured. Not counting the period of partition, during which this people experienced a mutually hostile dual representation.

Certain episodes in the history of China must also be taken into consideration. At the beginning of the 20th century, the Government of Kwangtung was not recognized by Peking, nor by third States. From 1949 onwards, there were two Chinas, a situation which persists to this day. The consequences of this state of affairs for the legal case were heavy. When the Emperor of Annam acted as sovereign at the beginning of the 19th century, what was the impact on his actions on the alleged vassalage with respect to China? When France, having conquered Vietnam with arms, ignorant of a great deal of the history of the people thus colonized, appeared hesitant, uncertain; when the officials of its colonial administration were divided over what attitude to take to the archipelagos; when France was slow to assert its rights as a continuation of Vietnamese rights in face of Chinese appetites, themselves considerably diminished by the Japanese threat in the region, what was the significance of the French diplomatic and political correspondence and how was it to be evaluated?

When the two parts of Vietnam, North and South, were riven by a war, into which a foreign power, the mightiest power in the world, was throwing all its weight, as were a number of other powers, what was the value of the sometimes quite contradictory acts or declarations by one party or another?

In the long, chaotic, conflict-ridden, and even for a long period, dramatic history of this part of the world, it is very difficult to assemble the sort of incontrovertible documents which constitute evidence and are the material on the basis on which the law can be established.

It is particularly hard for the claimants to the title to demonstrate the complete continuity of the national will in the display of the maintenance of the law. It is difficult, yet seemingly not impossible.

Admittedly, certain archive material is missing.²⁸ This is not decisive to the case, however.

Certain acts or declarations must be interpreted in the political context which was theirs. There is thus room for a degree of subjectivity, which is inevitable whatever the system of law applied. Yet through their rigour, jurists must strive to build up objectivity.

At this juncture, therefore, let us turn to our analysis of a case of which it has been said, '*Only the Falkland Islands is a more complex case than that of the Paracets*'²⁹

A chronology of the important facts is the first essential step.

CHRONOLOGY

Identifying the succession of events over the course of time is always necessary when there are many facts, some of them old. The aim is simply to present and clarify the case.

However, in a legal issue the chronology meets another need, that of dating a certain number of events in order to situate them in relation to each other, and to determine which took place first. The established pre-existence of a fact may indeed have decisive legal effects.

Lastly, accurate dating, as well as the order of events over time, are indispensable if we are to state the rules of international law under which each fact or series of facts must be assessed.

There are still many difficulties in establishing a chronology.

The first task in trying to overcome these difficulties is to identify with care the authors of the acts. Some acts were carried out by representatives of States, but in complex cases of division, superimposition and rivalry between the powers of States, it is necessary to identify the State concerned with great accuracy. Other acts, in the realm of society, were carried out by private individuals or population groups. They may have some value in the legal argument, although never having the same authority as acts of the State.

²⁸ This needs to be viewed in the light of the awkward problem of the succession of archives in the case of States issuing from decolonization.

²⁹ Herve Couteau-Begarie, *Geostrategie du Pacifique* (Paris, Economica, 1987), p. 229.

Lastly, certain instances of conduct on the part of third States can and must be taken into consideration and consequently included in the chronology.

Our chronology will be constructed around two major events which concerned not only the protagonists but all the States in the area: the arrival of a colonial power and World War II.

Before colonization

During this period a distinction can be made between discovery not followed by the taking of possession or by occupation, and actual occupation.

Awareness of the existence of the archipelagos, as revealed by numerous references to them in historical works, certainly dates back to ancient times. However, awareness of their existence, as a result of their discovery by various navigators, was something mentioned in accounts of journeys, or came from the study of maps, and prior to the 18th century it was not accompanied by any measure having legal ramifications.³⁰

Fishermen from various neighbouring countries visited the islands over the centuries. Navigators from more distant climes (Indians, Persians, Arabs, Portuguese, Spaniards, Dutchmen) knew of them and spoke of them long ago.

Among them were some French navigators who set sail for the Far East from the port of La Rochelle on 7 **March 1568**, with Jesuit scholars on board. They were to reach the Paracels.³¹ The islands became notorious in maritime history with the wreck of the *Amphitrite*, sailing from France to China in the reign of Louis XIV (1698).³² Old Chinese texts dating back to various periods before the 18th century mention the existence of the islands, of which Chinese navigators had long been aware.

However, until the 18th century, no major events having effects on the status of the islands occurred.

Under the Nguyen dynasty, the rulers of Annam in the early 18th century, a company was formed to exploit and protect the islands.

In 1816, Emperor Gia Long solemnly confirmed the sovereignty of the Emperors of Annam over the archipelagos.

³⁰ The legal discussion of the titles of discovery advanced by the various parties will be presented, document by document, in the following chapter.

³¹ Le Thanh Khe, *L'affaire des îles Paracels et Spratleys devant le droit international*, Institut International d'Etudes et de Recherches Diplomatiques, 1958.

³² Claudius Madrolle, 'La question de Hainan et des Paracels' (1939) *Revue Politique Etrangere*.

The Minh Mang dynasty which succeeded Emperor Gia Long pursued his work.

- **1833-1834** The order was given to erect a monument and to make a map.

- **1835—1836** - Various works on the islands were taken forward under the administration of the Emperor.

- **1847-1848** - The administration of the islands was maintained, its purpose being geographical, for better reconnaissance of maritime routes, as well as fiscal, to levy taxes on the fishermen of the region.

The period of French colonization up to the end of World War II

French domination began with a first Treaty of Protectorate signed in Saigon on **15 March 1874**. This was confirmed by a protectorate definitively established under the Treaty of Hue (called the Patenotre Treaty) of **6 June 1884**, which gave France substantial powers in a large number of fields.

The French controlled Tonkin and Annam. All the points in the territory of the Empire were accessible to the French troops.

On **17 October 1887** the Indochinese Union was created, transformed under Governor General Paul Doumer into a true colonial administration. In essence, imperial power then passed into the hands of the Chief Resident.

The facts relating to either or both of the archipelagos during this period were as follows:

- **1881-1884** - The Germans proceeded systematically to map the waters of the Paracels (as they were doing throughout the South China Sea) without making any claim to sovereignty.

- **1887** - On 26 June, France and China concluded a Convention delimiting the frontier between Tonkin and China.

Inter alia, the text states:

In Kwangtung, it is agreed that the disputed points which lie east and north-east of Monkai, beyond the frontier as determined by the Delimitation Commission, are allocated to China. The islands which are east of the Paris meridian 105°43'E, i.e. east of the north-south line passing through the eastern point of the island of Tcha's Kou, or Ouan Chan (Tra Co), which forms the boundary, are also allocated to China. The island of Gotho and other islands west of this meridian belong **to Annam**.

- **1895-1896** - Two shipwrecks in the Paracels, that of the German vessel *Bellona* and that of the Japanese vessel *Imezi Maru*, caused disputes. Both

vessels were carrying copper insured with British companies. It proved impossible to save the cargo and it was abandoned where it lay. Chinese fishermen looted it and carried it away to Hainan by junk or sampan to resell it to shipbuilders.

The insurance companies sought redress against those responsible, a protest being lodged by the representative of Great Britain in Peking, and by the Consul in Hoihow.

The local Chinese authorities (the Governor of Liang Guang) then protested, disclaiming any responsibility on the grounds that, for them, the Paracels were abandoned islands which belonged no more to China than to Annam, that they were not administratively attached to any district of Hainan and that '*no special authority was responsible for policing them*'.³³

- In **1899**, Governor General Paul Doumer ordered a lighthouse to be built on the Paracels. A study was carried out by the colony's technical services. The lighthouse was not built because of lack of funds.³⁴

- **In 1909**, on 6 June, the Viceroy Governor of Liang Guang (the Chinese provinces of Kwangtung and Kwangsi) sent two small gunboats under Admiral Li Zhun to debark for a short time (24 hours) on some islands in the Paracels.

France made no protest.

- In **1920** a Japanese company, Mitsui-Bussan Kaisha, mined phosphates on some islands, after seeking French authorization.

- From **1920** onwards France exercised maritime and customs supervision over the Paracels.

- **30 March 1921** - The civilian Governor of Kwangtung announced that the military Government of the south had decided administratively to incorporate the Paracels into the sub-prefecture of Yai Hien (Hainan Island). France made no protest (the Kwangtung Government being recognized neither by the central Government of China nor by the Great Powers).

- From **1925** onwards a scientific study of the Paracels was carried out by a team under Dr A. Krempf, Director of the Oceanographic Service, on board the trawler *de Lanessan*. The same specially equipped vessel surveyed the Spratlys in July **1927**.

- **On 8 March 1925** the Governor General of Indochina declared the Paracels and Spratlys to be French territory.

³³ Statement reported by the Governor General of Indochina to the Minister for the Colonies, 20 March 1930, Annex 5.

³⁴ Same correspondence.

- **1927**, the Consul General of Japan, Mr Kurosawa, asked the French authorities in Indochina for information on the territorial status of the Spratlys.

- November **1928** - The New Phosphates Company of Tonkin applied to the Governor of Cochin China for a permit to prospect for mineral deposits on Spratly Island.

- July **1927** - The Spratlys were officially visited by the vessel *de Lanessan*.

- **1929** - 15 June - The Governor General of Cochin China requested the Commander of the Navy in Indochina to undertake a voyage to Spratly or Storm Island, which was administratively attached to the province of Ba Ria (Cochin China).

- **1930** - 13 April - The Governor General of Indochina sent the advice-boat *Malicieuse* to the Spratlys. The members of the expedition raised the French flag on a hill. Communique of **23 September 1930** notifying the other Great Powers that France had occupied the Spratlys.

- **1931** - A contract for the mining of guano deposits in the Paracels was awarded by China. The French Government claimed the islands in a Note handed to the Legation of China in Paris on **4 December 1931**.

- **1932** - 29 April - Explicit protest by the French Government, relying on Annam's historic titles and the evidence of the occupation by Annam and subsequently by France.

In the same year, France proposed bringing the case before an international tribunal, and China opposed this.

- **1933** - 13 April - A flotilla detached from the French naval forces of the Far East, under the command of Post Lieutenant Delattre, sailed from Saigon to Spratly Island (the advice-boat *Malicieuse*, the gunboat *Alerte* and the hydrographic vessels *Astrobale* and *de Lanessan*). Taking of possession according to the time-honoured ceremony. A written document was signed by the captains in 11 copies. Each island received its own document, encased in a bottle itself sealed into a boundary-marker permanently fixed on the ground. The French flag was raised and the clarion sounded on each island.

1933 By a decree of 26 July the French Government proclaimed the occupation of the Spratlys archipelago by the French Navy. (The islands were listed individually). Furthermore, by a decree of 21 December of the same year, the Governor of Cochin China, Mr J. Krautheimer, officially incorporated the Truong Sa archipelago into Ba Ria Province.

- In **1937** - the head of public works, Mr Gauthier, went on an official mission to the Paracels, on behalf of the French colonial administration, to

study the potential for maritime and air traffic facilities, and to build a lighthouse on Pattle Island.

- 1938-1939 - As a follow-up to the mission, France sent detachments of the civil guards to the islands. By a decree dated 15 June 1938, the Governor General of Indochina, Jules Brevie, created an administrative *delegation* in the Paracels (Emperor Bao Dai having signed an order transferring the Paracels from Nam Ngai Province to Thua Thien Province).

- On 5 May **1939** the same Governor General of Indochina, Jules Brevie, amended the previous decree to create two administrative *delegations* in the Paracels.

A marker had been erected on Pattle Island (Paracels) in 1938, bearing the inscription: "*French Republic - Kingdom of Annam - Paracels Archipelago 1816 - Pattle Island 1938*: A lighthouse, a meteorological station and a radio station were installed on Pattle Island in the Paracels, and on Itu Aba Island in the Spratlys.

- **1939** - 31 March - In a Note to the Ambassador of France, stating that Japan had been the first to explore the islands in 1917, the Japanese Government (Foreign Ministry) announced that it controlled the Spratlys. Japan noted the absence of a local administrative authority, viewing this as a situation prejudicial to Japanese interests. On 4 April the same year, France lodged a protest.

Among third States, it is interesting to note the position of the United Kingdom, which was defined in the course of a debate in the House of Commons on 5 April, when the representative of the Foreign Office stated that the Spratlys were '*claimed in full sovereignty by the French Government*'.

- **1943** - 1 December - Communique of the Anglo-American-Chinese Conference in Cairo affirming its will to strip Japan of the territories it had stolen (Manchuria, Formosa, Pescadores) and restore them to the Republic of China.

- **1945** - on 9 March the Indochinese detachment on duty in the Paracels was taken prisoner by the Japanese Navy. The Japanese did not leave the Paracels until 1946, being replaced in May of that year by a French infantry platoon which landed from the *Savorgnan de Brazza* and stayed only a few months.

Chiang Kai-shek landed troops on both archipelagos, on the pretext of disarming the Japanese, landing in the Paracels in November 1946 and on one island in the Spratlys in December 1946.

- **1945** - 2 August - Potsdam Declaration.

The period after World War II

- **1945** - on 15 August Japan capitulated. On 19 August the Viet Minh seized power in Hanoi. Ho Chi Minh formed a provisional government on 22 August. On 25 August Emperor Bao Dai abdicated. On 2 September Ho Chi Minh proclaimed the independence of Vietnam and the Democratic Republic of Vietnam came into being.

France was determined to regain control of Indochina.

- **1946** - 28 February - A Franco-Chinese agreement was signed at Chung King, enabling France to succeed China as the military presence in Tonkin.

The Government of Ho Chi Minh and the representatives of France signed the Agreements of **6 March 1946**. Under the Agreements, France recognized the Democratic Republic of Vietnam as a member of the French Union.

- The application of the Agreements of **6 March 1946** was fraught with difficulties. From December 1946, there was conflict on all fronts.

However, since France had chosen to back a 'nationalist' Vietnamese State, the creation of a second Vietnamese Government was encouraged and endorsed by the Agreements of 8 March 1949, and the Agreements of 1954 enshrined the existence of two Vietnams, bringing the war in Indochina to an end. It was followed, however, by the Vietnam war, which lasted until the reunification of the two Vietnams in 1975.

- **In 1947** (7 January or 13 January, depending on the source) China again landed troops on Woody Island (Paracels), taking advantage of the fact that the French authorities were not occupying the islands. The French Government lodged an official protest against this illegal occupation and sent a detachment of French and Vietnamese soldiers to establish a garrison on Pattle Island.

The Chinese Government protested in its turn and negotiations opened in Paris, from 25 February to 4 July 1947. The Chinese Government rejected the French suggestion to take the matter to arbitration. On 1 December 1947, Chiang Kai-shek signed a decree giving both archipelagos Chinese names and including them in Chinese territory.

- **1948**, for China, was marked by events which diverted attention from the situation in the archipelagos.

The advent of the People's Republic of China in **1949** considerably changed the international context of the dispute.

- **1949** - April - At a speech given in Saigon, Prince Buu Loc, *chef de cabinet* in the Government of Emperor Bao Dai, publicly reaffirmed Vietnam's rights to the Paracels.

- **1950** - In April the garrison established by Nationalist China on Woody Island was evacuated. The French detachment on Pattle Island was maintained. On 14 October the French Government officially transferred control of the archipelagos to the Government of Bao Dai. The Governor of Central Vietnam presided over the handover ceremony in the Paracels.

It does not appear that there was any military presence whatsoever in the Spratlys at that time.

- **1951** - The Spratlys were the subject of claims expressed at diplomatic level. President Quirino of the Philippines claimed them for his country (on 17 May) on grounds of proximity. On 24 August the New China News Agency disputed both the rights of France and the claims of the Philippines, asserting China's rights in emphatic terms.

From summer 1951, the idea of a peace treaty with Japan began to take shape. This treaty was signed on 8 September 1951. Article 2, paragraph 7, of the Treaty stated that:

Japan relinquishes all rights, titles and claims to the Paracels and Spratlys.

Learning of the draft treaty, the Foreign Minister of the People's Republic of China, Chou en-Lai, on **15 August 1951** made public a declaration re-affirming the permanence of China's rights over the archipelagos.

- **1951** - September - Opening of the San Francisco Conference. China was not represented.³⁵

Mr Gromyko at the plenary meeting of 5 September proposed 13 amendments. The first of these envisaged the recognition by Japan of the sovereignty of the Chinese People's Republic over *the Paracels and other islands further south*. This amendment was rejected by 48 votes to 3.

On 7 September, the Prime Minister and Minister for Foreign Affairs of the Vietnamese Government of Bao Dai solemnly declared that the two archipelagos fell within Vietnamese territory. This declaration elicited no comment from any delegate.

There was thus no precise attribution of the islands by agreement at the end of this Conference.

- **1952** - Debate in the Assembly of the French Union, asked to express its opinion on the Peace Treaty with Japan. A number of statements were made, some of them contradictory:

³⁵ Mr Gorse, speaking in the Assembly of the French Union on 25 March 1952, referred to the absence of China, of both Chinas, at this Conference as regrettable (Official Gazette of the Assembly of the French Union, 25 March 1952, p. 367).

- Mr Nguyen Khac Su, Rapporteur of the Foreign Relations Committee, remarked that Japan relinquished all rights to the archipelagos but that there was no mention whatever in the text of their future destination.

He added:

...these islands have long formed part of the territory of Vietnam. We venture to hope that, in the future negotiations which cannot come too soon, their legal restitution will be effected in a spirit of friendly understanding.

In the same debate, Mr Gorse said that although the Treaty excluded Japan from these territories, it did not settle the problem of definitive devolution and Mr Buu Kinh recalled Vietnam's rights, after Maurice Schumann, Secretary of State in the Ministry of Foreign Affairs had stated:

It is quite true that the Spratlys and Paracels form part of the dominion of the French Union.

There was a marked contradiction between these comments and those made the following day, i.e. **26 March 1952**, by Maurice Faure, Rapporteur for the act of ratification of the Treaty. He considered that the islands had become *terrae derelictae*.

- In October **1955**, the International Civil Aviation Organization held a conference in Manila. By resolution 24, the Taiwanese authorities were requested to step up their meteorological observation work in the Nansha Islands (Spratlys). No objections or reservations were forthcoming (according to Chinese sources).

- **1956** - April - The French Expeditionary Force withdrew from Indochina. The South Vietnamese administration sent in armed troops to relieve the French garrison on Pattle Island (Paracels).

However, the Chinese People's Republic landed troops which, with the utmost discretion, occupied the eastern part of the Paracels (Amphitrites).

From 1956 onwards, the eastern Paracels were thus under military occupation by the People's Republic of China and the western Paracels by the troops of the South Vietnamese administration, which arranged hydro-logic studies there and authorized the mining of phosphates.

The same year, Tomas Cloma, a national of the Philippines, landed on some of the Spratly Islands on 15 March. In a private capacity, he and a few companions took possession of certain islands which he baptized '*Freedomland*', claiming the right of discovery and occupation. He informed the Ministry of Foreign Affairs of the Philippines of this on 15 May.

At a press conference held in Manila on 19 May, the Ministry reiterated the argument of proximity with a view to promoting the idea of the rights of

the Philippines to the Spratlys. However, Thomas Cloma having asked the Government of the Philippines to grant the status of protectorate to the administration he had set up, the representative of the Philippines declared that, apart from the seven islands bearing the international denomination of the Spratlys, all other parts of the archipelago were *res nullius*.

On 31 May, the Beijing Government issued a press communique stating that no infringement of the Republic of China's rights over the Spratlys would be tolerated.

However, on behalf of Nationalist China, the Taiwanese ambassador in Manila asserted the rights of China dating back to the 15th century. And a garrison of the Republic of China was then dispatched to Itu Aba, where it has been maintained since that date.

However, on **1 June 1956**, the Minister for Foreign Affairs of the administration of South Vietnam, Vu Van Man, reaffirmed the rights of Vietnam over the two archipelagos.

The following day, France reminded the Government of the Philippines of the rights it had acquired since 1933.

On 22 August, the armed forces of Saigon's Navy landed on the main island of the Spratlys, erected a monument and hoisted the flag.

In October the same year, the Taiwanese Navy moved in against Tomas Cloma.

On **22 October 1956** - A Vietnamese decree incorporating the Paracels into Phuoc Tuy Province was published.

- **1958** - In February, numerous Chinese fishermen tried in vain to settle in the western Paracels.

On **4 September 1958**, the Government of the People's Republic of China published a declaration announcing that the breadth of the territorial sea was 12 nautical miles.

The declaration specified that this stipulation applied to the archipelagos.

This information was disseminated on 6 September 1958 by the daily *Nhan Dan*, organ of the Central Committee of the Vietnamese Workers' Party. It was not challenged.

On 14 September the same year, the Prime Minister of the Vietnamese Government, in a Note to the Chinese premier, stated:

The Government of the Democratic Republic of Vietnam recognizes and endorses the declaration made on 4 September 1958 by the Government of the Chinese People's Republic on the decision taken regarding China's territorial sea. The Government of the Democratic Republic of Vietnam respects that decision.

- **1965** - 9 May - In response to the delimitation by the United States Government of the "combat zone" for United States armed personnel in Vietnam, the Government of the Democratic Republic of Vietnam declared:

United States President Lyndon Johnson has designated all Vietnam and adjacent waters extending to a distance of 100 nautical miles from the Vietnamese coast, as well as part of Chinese territorial waters adjacent to the Xisha Islands belonging to the Chinese People's Republic, as a 'combat zone' for United States armed personnel in Vietnam (Chinese source).

- **1969** - 13 May - The Vietnamese daily *Nhan Dan*, published the following information:

On 10 May, a US military plane penetrated Chinese air space, above Yong Xing and Dong dao, two of the Xisha Islands, in the Chinese Province of Guang dong (Chinese source).

11 July 1971 - The President of the Philippines revealed that Nationalist Chinese forces had occupied and fortified Itu Aba in the Spratlys, but did not voice any claim to the archipelago by the Philippines, despite the fact that Filipino soldiers had taken up position on certain islands. A press communique of 13 July indicated that talks were in progress between Taiwan and the Philippines concerning this archipelago. The same day, Saigon's Minister for Foreign Affairs, Mr Tran Van Lam, present in Manila, recalled the Vietnamese claim and the titles on which it was based.

On 16 July the same year, the New China News Agency condemned the occupation of certain of the Spratlys by the Philippines and reasserted the Chinese claims to the archipelago.

- **1973** - Despite the Paris International Conference of March 1973, the Minister for the Interior of the South Vietnamese administration, on 6 September 1973, modified the administrative attachment of the Spratlys (from now on to be part of Phuoc Tuy Province).

On **11 January 1974**, Beijing said it saw this as an encroachment on Chinese territory and reaffirmed its claims to the two archipelagos.

On 15 January, the People's Republic of China landed troops on the western Paracels (Crescent group), hitherto occupied by Vietnam, and during the following days backed up its action with a strong naval presence.

On 18 January, the Ambassador of Taiwan in Saigon reaffirmed Nationalist China's claim by a diplomatic memorandum.

On 19 and 20 January, the People's Republic of China shelled the islands and landed its troops on them after violent clashes with Vietnamese forces.

The Vietnamese observer to the United Nations called upon the Security Council to consider the matter.

The Provisional Revolutionary Government of South Vietnam made public its position that, considering the complex nature of the problem, it needed to be examined on the basis of the principles of equality, mutual respect, friendship and good neighbourliness and settled by negotiation.

Asked to intervene by the administration of South Vietnam, the Pentagon decided not to get involved in the conflict.

By diplomatic Note addressed to all the signatory States of the Paris Agreements of 2 March 1973, the administration of South Vietnam recalled that a guarantee of the territorial integrity of Vietnam had been given. It called for a special session of the Security Council.

- 2 July. The delegate of South Vietnam made a statement to the United Nations Conference on the Law of the Sea reaffirming Vietnamese sovereignty over the archipelagos.

The Saigon administration decided to strengthen the defence of the Spratlys, thus eliciting a protest from the Philippines.

- **1975** - 5 and 6 May - The Vietnamese People's Navy seized back control of the Spratlys from the Saigonese troops.

On 10 September, the People's Republic of China dispatched a memorandum to the Democratic Republic of Vietnam asserting that the two archipelagos had always formed part of Chinese territory.

On 24 September, on the occasion of a visit to China by a delegation from Vietnam, Deng Xiaoping, Chinese Deputy Premier, announced: '*This problem will naturally form the subject of discussions in the future.*'

- **1977** - On 12 May, the Government of the Socialist Republic of Vietnam made an official pronouncement on the question of its rights in maritime matters (territorial sea, contiguous zone, exclusive economic zone and continental shelf).

In paragraph 5, it was stated that the islands and archipelagos forming part of Vietnamese territory and lying beyond the territorial sea had their own maritime territory.

- **1978** - On 2 March, the Philippine armed forces took possession of an island in the Spratlys (Lankian Cay) in addition to the ones they had already occupied.

- **1979** - By a decree issued in February, the President of the Philippines said that he regarded virtually all the Spratlys as being under the sovereignty of the Philippines (with the exception of Spratly Island itself).

- **1982** - In June, the New China News Agency announced the development of a large harbour in the Paracels.

On 12 November, the Socialist Republic of Vietnam published a declaration concerning the baselines used for measuring the breadth of its territorial sea and included the archipelagos in this operation.

On 9 December the same year, modifications were made to the administrative attachment of the archipelagos to Vietnam.

- **1983** - 23 February - Malaysia raised the issue of its sovereignty over three of the islands in the Spratlys. On 25 March, the Vietnamese Ministry of Foreign Affairs disputed the fact that Malaysia had any rights over these islands and islets. In June the same year, Malaysian troops were dispatched to the Island of Hoa Lau, where they embarked on major building work. Protest from Vietnam.

- **1984** - 2 June - The Chinese Parliament decided to create a special administrative zone including the island of Hainan and the two archipelagos. The Vietnamese Government issued a protest.

- **1988** - February - For the first time, the People's Republic of China dispatched troops to some of the islands in the Spratlys and made a military show of strength.

On 14 March, there was a naval incident in the vicinity of Johnson South Reef, Collins Reef and London Reef. A number of Vietnamese vessels were damaged.

The Chinese warships used heavy artillery. 74 Vietnamese sailors were listed missing. And the Chinese vessels prevented Vietnamese rescue ships bearing the insignia of the Red Cross from carrying out salvage operations.

After these incidents, according to Vietnamese sources, the Chinese Navy continued to hamper supply operations by Vietnamese ships.

Both parties protested. However, since that date things have remained as they were.

In April the same year, the Government of the Philippines had a mayor elected as head of the municipality set up on those of the Spratly Islands which it controlled (administrative centre - Thitu), thus conferring a more solid administrative basis on this claim to the islands.

- **1989** - May - China occupied a further island.

In August 1989, Vietnam embarked on the construction of an economic and scientific complex in the Spratlys.

- **1990** - August - The Chinese Prime Minister, Li Peng, proposed the joint exploration of the area around the Spratlys.

- **1991** - 15-18 July - At the initiative of Indonesia, an international conference was held in Bandung between the States of the region concerning the Spratly archipelago. The final press communique advocated dialogue and negotiation.

- **1992** - 25 February - The People's Republic of China adopted a new law with a very extensive definition of its territorial waters and including the archipelagos in them as Chinese territories.

In May, China granted the American Company Crestone Energy a concession for petroleum exploration in the South China Sea in a sector lying 300 kilometres from the coast of Vietnam, an area which the Hanoi Government claimed as its exclusive economic zone.

On 8 July the same year, China seized possession of a number of additional reefs in the Spratlys.

- **1994** - On several occasions, China reiterated its proposal to set aside the territorial dispute and to harness the resources by means of joint exploration.

In April 1994, the press (*Far Eastern Economic Review* of 13 October) reported a naval incident involving a confrontation between a Chinese vessel carrying out seismic research for Crestone and Vietnamese vessels ordering it to quit an area considered by them to be under Vietnamese jurisdiction. The Chinese vessel apparently refused.

On **23 June 1994**, the Vietnamese National Assembly authorized the Government in Hanoi to ratify the United Nations Convention on the Law of the Sea.

- **1995** - 9 February - The Philippines protested against the People's Republic of China for having occupied a small island in the Spratlys (Panganaban) claimed by the Manila Government and for having embarked on the construction of a shelter for boats.

Five States currently share the effective occupation of the Spratlys, China being the only occupant of the Paracels since the military incidents in 1974.³⁶

In the case of both archipelagos therefore, a legal analysis of the different claims will need to be made.

³⁶ See map, Annex 6.