Chapter II
Acquisition of the Original Title

The rules of intertemporal law outlined in Chapter I suggest that the major periods of international law (and the norms which in each of them governed the acquisition of territory) need to be correlated with the events relating to the archipelagos during each of these periods.

It has been observed that, until the latter half of the 19th century, a State could, by virtue of discovery accompanied by the assertion of sovereignty, acquire sovereignty over an inhabited land.[1]

For this period, and in the light of this norm which will first be analysed and clarified (I), the question of how there was first knowledge of the archipelagos without that knowledge entailing a discovery with legal effects needs to be examined (II). The actual acts of sovereignty effected by the various States, the related evidence and the antecedence of some with respect to others will then be considered (III).

By comparing the claims of the different parties, it will be possible to establish whether, in respect of one or other of the protagonists, an original title was created, in other words, whether one of the States possesses *'a title superior to that which (he other State might possibly bring forward against it'*. [2]

In Sections II and III, the Paracels and the Spratlys will be considered separately.

THE NORMS OF INTERNATIONAL LAW REGARDING THE ACQUISITION OF TERRITORIES UNTIL THE LATTER HALF OF THE 19TH CENTURY

The corpus of rules examined here is what has gradually emerged, in a customary fashion, down the centuries, above all since the era which saw the development of navigation and the great discoveries. Punctuated here and there by a number of arbitral awards or theoretical works, it did not undergo

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1 See Chapter 1, p. 15.

2 Island Of Palmas Award, Max Huber, 4 April 1928, *op. cit.,* at p. 839.

any significant change until the 1884 Congress of Berlin. The rules which are reviewed here are now held to be general ones based on a very European concept of international relations. Whether they are truly universal, in other words, what the rules in force were during the periods concerned in other parts of the world, will also need to be examined.

In the context of international law of western origin, acquisition of territories means either the assertion of a new sovereignty where there was none hitherto or a sovereignty modified by a change in the holder of it. The case of the Paracel and Spratly archipelagos is, or was originally, a matter of the establishment of a new sovereignty. It is this point which needs to be examined here, leaving the matter of the possibility of a change in the holder of the sovereignty for the following chapter.

It is a well-known fact that (sovereign) State power usually derives from a triangular relationship between a government, a territory and a population.

In the colonial conquests (the particular case of the protectorate apart), the local population was ignored and the territory reduced by a fiction to the status of *res nullius,* this artifice enabling the western powers to act as though affirming a new sovereignty.

But in other cases, it was specifically a matter of *terra nullius* owing to the genuine absence of a settled population (as the comings and goings of a seasonal population did not warrant the status of inhabited land). It is the rules relating to this case (or to this series of cases) that need to be clearly identified.

The general principle of these rules is, or rather was during the long period referred to here, that, for uninhabited territories hitherto ownerless:

> ...a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.[3]

Hence, two sorts of elements must be shown to exist for the acquisition of sovereignty to be accepted under international law. There are elements which are physical, material *(corpus).* These are inadequate without an element of intent *(animus),* in other words, the clearly expressed will to act as sovereign.

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[3] Permanent Court of International Justice, Advisory Opinion regarding Eastern Greenland, *ICJ Reports* 1933, p. 45 {territory disputed between Denmark and Norway).

The 19th century is strewn with major arbitral awards, on which occasions the arbiters, or the scholarly opinion through the medium of the commentaries on the decisions, refined this requirement.

> Discovery accompanied by a public affirmation of sovereignty creates no more than an inchoate title capable of removing third States from the territory to which it applies, during the time necessary for its development through occupation, but not indefinitely, as it is enough to enable its possessor to supplement it by actual occupation, that cannot be a substitute for it. To improve the title, to make it complete and definitive, 'the intention to appropriate the territory discovered must be accompanied by actual possession, in other words, the country must be completely under the control of the party concerned and it must have undertaken works which constitute settlement'.[4]

This was the doctrine expressed in the middle of the last century and confirmed by arbitral case-law and diplomatic practice.[5]

There is no shortage of varied expressions of the same view. It may be summarized as follows: *discovery in the 15 th century, followed, in the 17th century, by a public affirmation of sovereignty, provided an inchoate title which actual possession of the island in the 19th century had completed.*[6]

Two groups of alternate elements may be identified here: a factual element: discovery, then the element of intent, the indispensable public affirmation of sovereignty and, lastly, reinforcement of the factual element.

The material element As the above

quotations show, the concrete facts fall into two categories.

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4 Eugene Ortolan, *Des moyens d 'acquerir le domaine international,* Paris, 1851, p. 49.

5 Aves Islands case. Award of 30 June 1865 between the Netherlands and Venezuela, A. de la Pradelle and N. Politis, Historical Note, Recueil des Arbitrages Intemationaux, vol. II, pp. 417-418. See also Beatrice Orent and Patricia Reinsch, 'Sovereignty over Islands in the Pacific', *American Journal of International Law,* 1941, at pp. 443 *et seq.*

6 Case concerning the Island of Bulama, Award of 21 April 1870 between Great Britain and Portugal.

Mere knowledge of the territory

Little can be said about man's first encounter with an unknown territory. It relates to a whole mythology surrounding *terra incognita.* Matters are often more prosaic. We will revert below to the issue of how confusion often arises (sometimes with ill intent) between knowledge of a territory and its 'discovery'.

A territory, and especially an island or an archipelago, can easily have been known from time immemorial to navigators frequenting those parts, to geographers keen to extend their work to include all territories regardless of who owns them, yet at the same time never have formed the object of any 'discovery' producing legal effects. The latter can only derive from facts of a certain nature issuing from specific authorities.

However, supposing this condition, which falls in the domain, of intentionality, (discussed in the following paragraph) is met, it is nevertheless true that the first stage in the discovery must subsequently be reinforced.

The notion of taking possession

The law of the period under consideration here must not be confused with the law in force since the Berlin Congress. It should not be overlooked that only from 1884-85 onwards has there been a specific requirement of actual occupation (Article 35 of the Berlin Act), that this requirement cannot have retroactive effect and that to consider it as so having would be to make an error of law.

> For to require of the acquisition of sovereignty by occupation an active taking of possession, uninterrupted and permanent, is to apply to acts dating from the 18th century and the early 19th century a principle of law not proclaimed until 1885 by the Berlin Conference; the declarations of that Conference cannot have retroactive effect.[7]

However, long before the Berlin Act, it was accepted and required that occupation should materially amount to more than symbolic acts. *'Mere discovery has never constituted sufficient basis for a claim to* terra nullius'...

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[7] Paul Fauchille, 'Le conflit de limites entre le Bresil et la Grande-Bretagne' (1905) *Revue generale de droit international public,* Paris, at p. 135.

> The symbolic ceremonies were generally supplemented by some exercise of administrative authority, such as the granting of a lease, or by lodgement of private citizens.[8]

It was a matter of the legal relations between States.

> International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals.[9]

However, it will be noted:

First, that the degree of effectiveness of the occupation required during this period had none of the rigour or scope required of occupations under the Berlin regime:

> Territorial sovereignty could be acquired in the past in conditions which would not suffice today.[10]

Second, that in all ages it has been necessary to adapt the requirement of effectiveness (regardless of the legal degree of it required) to the circumstances of the place and the topography of the territory.

> ... A claim to sovereignty based upon continued display of authority involves two elements, each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority. (.,.)
>
> True, the Permanent Court recognized that, in the case of claims to sovereignty over areas in thinly populated or unsettled countries, 'very little in the way of actual exercise of sovereign rights might be sufficient in the absence of a competing claim'.[11]

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8 Beatrice Orent and Patricia Reinsch, 'Sovereignty over Islands in the Pacific' (1941) *American Journal of International Law,* pp. 443 *et seq.*

9 Max Huber, Arbitral Award, Island of Palmas, *op. cit.,* pp. 845-846.

10 Paul Reuter, *Droit international public* (Paris, PUF, 1968 Ed.), p. 117.

11 International Court of Justice, Advisory Opinion concerning Western Sahara, *ICJ Reports 1975,* p. 43.

The element of intention

Thus (in the system of intertemporal law we must apply here) mere discovery must be followed by acts of occupation meeting the requirement of qualified effectiveness described above.

Such acts could lead to the acquisition of rights which could be invoked against third States only if there was an intention *(animus)* to act as sovereign.

For this reason acts by private individuals which were not immediately followed up by the public authorities are disregarded.

The debate is of long standing. It was pursued by the parties in the Aves Island case *(Netherlands* v. *Venezuela)*. The arbitrator concluded:

> Having regard to the established fact that the inhabitants of Saint-Eustache, a Dutch possession, fish for turtles and collect eggs on Aves Island, this practice, implying as it does merely temporary, precarious occupation of the island and being not the exercise of an exclusive right, but the consequence of the abandonment of fishing by the inhabitants of neighbouring countries or by the island's legitimate owner, cannot found the right of sovereignty; [12]

Intention derives either from the actual nature of certain facts or from the standing of the party performing the acts.

This question lay at the heart of the Minquiers and Ecrehos case between France and the United Kingdom.

In that case the International Court of Justice considered, among other things, the fact that the Jersey courts had exercised criminal jurisdiction in respect of the Ecrehos, that Jersey had levied local taxes on habitable houses or huts built by the inhabitants of Jersey on the Ecrehos, that fishermen living on and fishing from the Ecrehos had been entered in the register of fishing boats for the port of Jersey, and that contracts of sale relating to real property on the islets of the Ecrehos had been concluded in Jersey and registered in the public register of deeds of that island.[13] Together these facts proved the United Kingdom's assertion of sovereignty.

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[12] Moore 5, 5037 (original Spanish).

[13] See International Court of Justice, *Reports,* 1953, at p. 65.

Conversely, certain facts invoked by France, such as buoying outside the reefs of the group could *'hardly be considered as sufficient evidence of the intention of that Government to act as sovereign over the islets* '.[14]

Thus what the Court required was acts that could be considered to be displays of exclusive State authority over the territory concerned.

Lastly, the *'animus',* as distinct from actual facts, is not lost by reason of their absence. This was a key element of the legal system which prevailed until the late 19th century. A territory is abandoned by its sovereign (and cannot therefore be claimed by another sovereign) only if both elements which together establish sovereignty are lacking.

> In international law, *derelictio* results from two elements: in material terms, the absence of any effective administration of the territory concerned; in psychological terms, the intention to abandon the territory.[15]

The rule is of long standing and is still in force. It has been mentioned and applied in various arbitrations.

> It follows from these premises that Clipperton Island was legitimately acquired by France on November 17, 1858. There is no reason to suppose that France subsequently lost her right by *derelictio,* since she never had the *animus* of abandoning the island, and the fact that she has not exercised her authority there in a positive manner does not imply the forfeiture of a acquisition already definitively perfected.[16]

Or again:

> Against these titles, the fact of not having actually occupied the island did not prove anything, since the abandonment of the exercise of sovereignty was not enough to establish its loss, the titleholder further had to renounce the *animus possidendi.*[17]

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[14] *Idem, p.* 71.

[15] Gerard Cohen-Jonathan, 'Les iles Falkland (Malouines)' (1972) *Annuaire Francois de Droit International* (Paris, CNRS), at p. 238.

[16] Clipperton Island, Arbitral Award by King Victor Emmanuel III (1932) *American Journal of International Law,* at p. 394.

[17] Aves Island case, Netherlands-Venezuela, 30 March 1865, Moore 5, 5027 (original Spanish).

Such was the law until 1884. Title to sovereignty arose only from a blend of discovery followed by the taking of effective possession accompanied by the will to act as sovereign.

Two elements then supplemented this norm: the taking of effective possession must be evaluated on the basis of the location: the interruption of physical manifestations of sovereignty did not in itself interrupt sovereignty if there had been no clear renunciation of it.

Was this set of norms equally valid throughout the world at the time (until the end of the 19th century)? It would appear that in Asia the abstract concept of the territoriality of the State was linked less to a spatial definition of legal jurisdiction and more to the loyalty of subjects and the social organization of society, elements which could not apply to uninhabited territories.[18] This specificity must be taken into consideration in the analysis.

We shall first examine the period prior to the 18th century, which was characterized by mere awareness of the islands, then the period which saw an assertion of sovereignty, from the 18th century onwards.

AWARENESS OR DISCOVERY. THE SITUATION OF THE ARCHIPELAGOS BEFORE THE l8TH CENTURY

A clear distinction must be made between the concept of geographical awareness and that of discovery, their legal effects being fundamentally different.

There is no doubt that since ancient times (difficult to date) the archipelagos were known to geographers and navigators from various lands. They are mentioned in a host of documents (albeit with the relative lack of precision inherent in old map-making techniques).

However the names in use before the 18th century do not allow us to conclude that there was universal recognition of the sovereignty of any one State over either archipelago. Works of geography do not therefore support the claims of one party or another in ancient times. These observations flow from consultation of the maps available at the French National Library. The archipelagos are identifiable on many maps dating from the early 18th century or later.'[19] However, the names are given in various languages (often

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[18] See van Dyke and Bennett, *Islands and the Delimitation of Ocean Space in the South China Sea,* statement at the Conference held in Bali (Indonesia) on the question of hydrocarbons in the South China Sea, 13 March 1989, mimeographed paper, p. 11.

[19] In particular:

18th century Dutch nautical chart (GeB 220)

that of the navigator or mapmaker), making it impossible to use such charts to infer conclusions of a legal nature concerning title to sovereignty at the time.

Despite the fact that China and Vietnam claim to have asserted their rights since time immemorial, as things stand there are no documents in the case allowing us to state that, beyond geographical awareness or private visits by a few fishermen, either State carried out any acts which might have revealed a taking of possession, however symbolic, *before the 18th century*.[20] Fishing was always practised by both Chinese and Annamese fishermen. Owing to the climate (torrid heat in some seasons and formation of cyclones), there was no trace of permanent occupation before military logistics made the recent installation of garrisons possible.

Examination of the documents first reveals that initially, and for a long time, there was no separate mention of two archipelagos. China and Vietnam both appear to consider that any mention embraced all the islands in general.

A few Vietnamese documents are nevertheless detailed enough for a distinction between the two archipelagos to be inferred. The references produced by China are more vague in this respect.

The explanation for the long confusion is historical. The navigators of the region, like the first western navigators (Portuguese, Spanish, Dutch), believed there to be a single archipelago in that part of the sea. The Europeans called it the Paracels, the Vietnamese called it Hoang Sa, and the Chinese gave it several names. It is true that the inhospitable seas of the reputedly dangerous zone discouraged idle forays.

In the 18th century, the French Kergariou-Locmaria expedition (1787—1788) identified the islands more accurately, distinguishing one archipelago which kept the name Paracels as well as *'a great number of islands which are not shown on any chart old or new'*.[21] Subsequently the charts showed the existence, 500 kilometres further south, of a vast, separate archipelago, named the Spratlys, or Truong Sa by the Vietnamese, and Nansha by the Chinese. It must be added that, however well the South China Sea was

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Map compiled in 1808 by Daniel Rops, Lt. of the Bombay Marine (Ge 2301/17)
Map of Neptune's Eastern Realm after Mannevilette (1745, Ge DD 2987)
Map of Amsterdam, 1785 (GE D 3610)
Map of the China Sea, 1821 (GeCC2301)
Map of the Coasts of Siam and Part of the Coasts of China, 1732, compiled by Mr de la Vignein 1712 (GeC 10431).

[20] See Pierre Bernard in: Lafont (ed.) *Les frontieres du Vietnam* (Paris, L'Harmattan, 1989), pp. 246 *et seq.*

[21] Excerpt from a letter dated 28 April 1788 from Captain de Kergariou-Locmaria (frigate *Calypso),* National naval archives, B.4.278. Annex 7.

known, for centuries it was so notorious for the dangerous ground in the form of islets, banks and reefs strewn across its centre, that navigators setting a course for Singapore or the Gulf of Thailand always hugged the Vietnamese coast.

The result was that, inevitably, far less was known about the Spratlys than about the Paracels, which for Chinese sailors remained the *'gateway to Champa'.* [22]

The documents produced by the Chinese

The Chinese arguments are expressed either in documents published by the Ministry of Foreign Affairs of the People's Republic of China, or in publications originating with the Chinese Government, such as *Nouvelles sinologiques* or other studies by Chinese researchers. They contain quite general assertions such as the following:

> A large quantity of historical works and documents as well as many archaeological finds prove beyond all doubt that the Xisha and Nansha Islands have been Chinese territories since antiquity.[23]

In the case of more detailed statements, arguments pointing to knowledge that Chinese navigators were said to have had of the existence of these archipelagos going back a long time are mingled with assertions relating to Chinese sovereignty.[24]

Geographical knowledge

In certain Chinese documents, excerpts from geographical works are quoted as support for a Chinese title to the islands. And these islands are actually mentioned and described, though as they are works dealing with countries other than China, they have no value as evidence. Like all geographers in search of universal data, the Chinese geographers and chroniclers concentrated on meticulously describing territories, without necessarily including them under Chinese sovereignty.

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[22] Marwyn S. Samuels, *Contest for the South China Sea* (New York, London, Methuen, 1982), pp. 23-24.

[23] (1988) *Nouvetles sinologiques.* No. 7, 20 April 1988.

[24] (1988) *Nouvelles sinologiques,* No. 8, reproducing a document of the Ministry of Foreign Affairs of the People's Republic of China of 30 January 1980, entitled: 'China's Indisputable Sovereignty over the Xisha and Nansha Islands'.

The following works may be placed in the category of documents which merely prove a general knowledge of the area, but are not useful to the legal argument:

- *Nan Zhou Yi Wu Zhi (Record of Strange Things of the South)* by Wan Zhen (period of the Three Kingdoms, 220-265), written under the reign of Emperor Wudi of the Han dynasty. A travel account of a voyage in the South China Sea, it mentions that the water is quite shallow and that there are a great many *'magnetic stones'*. This poetic term certainly denotes rocks or sandbanks but is too imprecisely used to enable one to identify either or both of the two archipelagos at issue today. Moreover, the Chinese themselves admit that the islands had *'a multitude of vivid and poetic names'*. Whence the scepticism of non-Chinese authors regarding the fact that this text allegedly relates to the Paracels and the Spratlys.[25]

- *Fu Nan Zhuan* by Kang Tai, from the same period, mentions that, in the Sea of Shanghai, coral islands are found on a flat rocky base, with the coral growing on top. In the September 1993 issue of the periodical *Window* published in Hong Kong, a study signed Panshiying, a specialist researcher at the Beijing Foundation for International and Strategic Studies, quotes this very general text of Kang Tai dating from the first centuries of the Christian Era. The author claims that it contains a description of the Spratlys. Yet the quotation produced is not precise enough to bear this out.

- *Yi Wu Zhi* by Yang Fu (Eastern Han period, 25-220 A.D.) concerns *'exotic things'* relating to foreign countries.

- *Ling Wai dai da* by Zhou Chufei (Song Dynasty, 1178), *Zhu fan zhi (Notes on Foreigners)* by Zhao Ju Guo (Song Dynasty, 1225), *Dao Ji Zhi Lue (General View of the Islands)* by Wang Da Yuan (Yuan Dynasty, 1349), *Dong Xi Yang Kao (Study of the Eastern and Western Seas)* by Zhang Xie (1618), *Wu bei Zhi (On the Seven Voyages of Zheng He, 1405-1433, in the southern Seas and Indian Ocean)* by Mao Yuan Ji (1628), *Haiguo wenjihian lu (Things Seen and Heard in Countries Overseas)* (Qing Dynasty), *Hat Lu (Notes on Sea Voyages)* by Yang Brignam of the same period (1820), *Haigue tuzhi (Notes on Foreign Countries and Navigation)* by Wei Yuan (1848) and *Yinghuan zhilue (Summary Geography of the Globe)* by Feng Wenzhang (1848) form a collection of works consisting of travel accounts, geographical monographs or nautical books concerning countries foreign to China. Some are the work of the travellers themselves or of Chinese ambassadors abroad. Others, such as *Dong Xi Yang Kao,* relate *'things seen and heard',* the author explaining that he has set out to question people hailing from distant places,

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[25] See Marwyn S. Samuels, *op. cit.,* p. 10

sailors or explorers, sometimes simply because he has run into them in the harbour.

Most of these accounts refer to the islands using widely varying names, which makes any identification uncertain. Sometimes there are a few details of the distance from the coast. They do not always confirm that it is indeed the Paracels which are being referred to, still less the Spratlys, which are much further from the Chinese coasts.

For example, in *Dong Xi Yang kao* referred to *supra,* islands are mentioned which are situated 100 *li* (50 kilometres) from Wenchang, which cannot correspond geographically to the Paracels, lying as they do over 200 kilometres south-east of Hainan. The names of the islands vary in the most whimsical fashion: Jiurulozhou, Wanlizhitang, Wanlichengsha, Qian-lishitang, Qizhouyang, Qizhousan. So it is difficult to follow the Chinese authors when they assert that all of these denote the Paracels or sometimes the Spratlys (however, they themselves sometimes agree that the word Wanlishitang denotes the four archipelagos, in other words, *all* the islands in the South China Sea) or when they infer from them a Chinese title, whereas the texts in question, such as *Hai Yu* by Huang Zhung, of the Ming dynasty (1536), refer to sandbanks in the barbarian countries of the south-west, which strongly indicates how foreign these territories are to China. Sometimes the assertion that a particular account mentioned the Spratlys cannot help but surprise the reader when the remark is illustrated in a note by a quotation mentioning the Paracels and clearly identifying them as situated at latitude 17° 10' north. This is a serious confusion.[26]

Uncertainty as to China's intentions

The Chinese documents or the works of certain authors on this subject include a number of more precise references.[27]

This applies to the examples adduced by the Chinese as proof of an act of sovereignty when they state that, under the Northern Song dynasty (10th to 12th centuries), military patrols were organized from Kwangtung and sailed to the Paracels. *Wu Jing Zong Yao (General Programme of Military Affairs*

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[26] Jian Zhou, *Les frontieres maritimes de la Chine* (University thesis, Paris X, 1991), p, 330. The author states: 7» *1878, Guo Songtao, first ambassador of China sent to the West, in the account of his voyage, also mentioned the Nansha Islands (Spratlys) as belonging to China.'* There follows a footnote 18, in which the quotation produced speaks of the Paracels and indicates their latitude, which avoids any possible confusion with the Spratlys, but ruins the argument.

[27] See, for example, Tao Cheng, 'The Dispute over the South China Sea Islands' (1975) *Texas Internationa! Law Journal,* at p. 273.

prefaced by Emperor Renzong himself) reports patrols going right to the islands. However, the quotation used is less demonstrative when it is put back in its context, which appears to be a geographical reconnaissance expedition to the Indian Ocean rather than patrols allegedly policing Chinese lands.

So although this confirms China's knowledge of the Paracels, it does not show that China took possession of them.

Similarly, the fact that, in the 13th century, a Yuan emperor, himself a passionate astronomer, ordered a renowned astronomer by the name of Guo Shoujing to take readings, some of which were carried out in the Paracels, does not prove anything either. Since readings were taken partly on Chinese territory and partly outside it, the fact that some of them were made on the islands is not sufficient to furnish proof of the Chinese territoriality of these islands.

In their reasoning, the Chinese authors rely on a further event which occurred in the 13th century (1293), and which is related in *Yuan Shi*. According to this, an expedition led by Shi Bi embarked to attack Java. Travelling by junk, an army of around 5,000 men sailed south, camping on certain islands. However, the itinerary described does not allow the route, and therefore the islands, to be clearly identified. Nor is the text relevant to territorial control of these spaces, and provides no proof of this. And some authors have speculated that the islands mentioned might rather be those of Macclesfield Bank.[28]

The hesitations on this point can be better understood if they are seen in the context of the maritime history of this region of the world. The preferred shipping routes hugged the coast, allowing for stopovers, trade and contacts, all the more so in that navigation was for a long time not reliable enough to avoid shipwreck in the dangerous ground of the archipelagos.[29]

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[28] An example is the view taken by Groeneveldt, the translator of *Shi Bi Zhuan (History of Shi Bi),* for whom Qizhou (the Seven Islands) refers to the Paracels and Wanlishitang to Macclesfield Bank. However, Pierre Yves Manguin, in a work published by the Ecole Francaise d'Extreme Orient *(Les Portuguais sur les cotes du Vietnam et du Champa,* Paris, 1972) does not share Groeneveldt's view and believes that Qizhou refers to the Tayas and Wanlishitang to the Paracels. On the lack of identification of islands mentioned in these accounts of episodes dating back to the 13th century, see M.S. Samuels, *op. cit.,* pp. 18-19, and his conclusions: 'Despite greatly increased contact with the seas during the fourteenth century and despite the power of the Yuan navy, the islands of the South China Sea were apparently not absorbed into the empire or colonized.' (p. 20).

[29] This incontrovertible fact is disregarded by some authors, for example, Jianming Shen, 'International Law Rule and Historical Evidence Supporting China's Title to the South China Sea Islands' (1997) *Hasting International and Comparative Law Review,* vol. 21, number 1, at pp. 17 and 26.

The Chinese use certain archaeologists' reports to support their claim that Pattle Island once harboured a pagoda, now destroyed, which they did not actually see, but which is said to have been a Chinese remain. Scientific verification of this claim is not possible.

Lastly, the Chinese documents refer to patrols at a later date, since it is asserted that between 1710 and 1712 under the Qing dynasty, Wu Sheng himself, Vice-Admiral of the naval forces of Kwangtung, led a patrol at sea. The itinerary is given, together with a commentary that Qizhouyang (Sea of the Seven Islands), which the patrol traversed, corresponded to the outer reaches of the Paracels. However, following the itinerary claimed on the map, it is impossible not to notice that it corresponds to a journey around Hainan Island, not a voyage to more distant seas. The text reads: *'Departing from Qiongya, he passed by Tong Gu and traversed Qizhouyang and Sigengsha, thus covering 3,000 li.'* Qiougyo is the chief town in the north of Hainan Island (Hoihow), Tong Gu is a mountain on the north-east point of the island, Qizhouyang designates the Taya Islands group and Sigengsha is a sandbank to the west of Hainan.

There is nothing here to suggest maritime control over the archipelagos. The signs required by the international law of the time are missing. As far back as the 16th and 17th centuries, a distinction was made between discovery during reconnaissance (discovery) and discovery with appropriation (finding). On 18 December 1523, the Holy Roman Emperor Charles V used this distinction in his instructions to Ambassador Juan de Zuniga, recalling that a territory merely encountered en route by the King of Portugal's ships could not be regarded as having conferred on him title to that territory, since there was no taking of possession,[30]

The Chinese claims are contradicted by other sources within China itself. There are many old geographical documents describing and delimiting the territory of the Chinese Empire. With a fair degree of concordance, they describe Chinese lands as ending at Hainan Island in the south.

Writings of the 12th century, then the 17th and 18th centuries appear to confirm this, including a geographical description of the prefecture of Quiongzhou and a geographical description of Kwangtung dated 1731, a work submitted to the Emperor of the Qing in year 9 of the reign of the Wengzheng (1731). The map of Kwangtung Province does not mention the archipelagos.

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[30] Friedrich A.F. von der Heydte, 'Discovery, Symbolic Annexation and Virtual Effectiveness in International Law' (1935) *American Journal of International Law,* at pp. 449 *et seq.*

Close scrutiny of the references produced by the Chinese certainly reveals an awareness, far back in time, of the existence of many islands scattered throughout the South China Sea. However, such references do not take us any further and are not enough to substantiate the claim that China was the first to discover, exploit, develop and administer the archipelagos.[51]

The old tale that in 1754 some Vietnamese sailors, who had lost their course near the Paracels and drifted as far as the Chinese coast, were escorted home without further protest, following an investigation by the Chinese authorities, leads us to believe that there are no grounds for this claim."

It is true that, desirous to expand its trade, China pursued a relatively active maritime policy until the 15th century, through its various ruling dynasties. Chinese works of the time may indeed mention the islands, although they do not provide any convincing arguments supporting the assertion of a Chinese title to sovereignty.

On the other hand, from the 15th century onwards, *'the Chinese presence in and control over the shipping lanes of the South China Sea lapsed into memory'*. It is therefore surprising that many authors, in various publications, have often concluded that China's ancient historical title is a solid one. However, as has been remarked elsewhere:

> The majority of these studies have been undertaken by overseas Chinese, who were not necessarily free from bias when selecting information for examination; the arguments of the South Vietnamese Government have often been rejected without close scrutiny.[33]

In some slightly more guarded documents the idea is put forward that, over the course of these historical periods, China acquired merely an *'inchoate'* or incipient title. This concept is accepted in international law. However it must be based on adequate factual grounds.

When Mexico, opposing France's claim, contended in the 19th century that Clipperton Island had belonged to it before the expression of French rights, the arbitrator appointed to settle the case sought in vain any right to the island which might have been formed by Spanish navigators:

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31 (1988) *Nouveties sinologiques,* 8, at p. 5.

32 Le Qui Don, *Miscellany on the Government of the Marches,* Book 2.

33 Chi Kin Lo, *China's Position towards Territorial Disputes, the Case of the South China Sea Islands* (London, Routledge, 1989), p. 14.

> That they [Spanish navigators] might have known it before the log-books of the French vessels *La Princesse* and *La Decouverte,* dated in 1711, had identified and described it is a conjecture more or less probable, but from which one cannot draw any decisive argument.

The arbitrator continued:

> The proof of an historic right of Mexico's is not supported by any manifestation of her sovereignty over the island.[34]

This is also the logical conclusion when, disregarding the verbose assertions in many works or articles, we examine the elements put forward in support of an ancient title with respect to China.

During that first period (which we have identified as being before the 18th century), were there any other displays of interest in the archipelagos by other peoples?

The documents produced by the Vietnamese

These documents also confirm that the archipelagos were known far back in time. From the 18th century onwards, this knowledge was transformed into an actual taking of possession.

The paucity of official Vietnamese documents springs from the fact that many were looted, burned or destroyed in the course of past wars, so that it is barely possible to go further back.

From what is available (in references at least) it is clear that, as in the Chinese literature, mention was made long ago of islands and archipelagos. Maps which mention the Paracels, probably dating from the end of the 15th century (Emperor Le Thanh Tong), are reproduced in a publication of the Historical Research Institute (*Hong Duc Ban Do,* Saigon, 1962, p. 218); they are also mentioned in the *Hong Duc* atlas, a work dating from the 17th century conserved in Japan.

The first traces of the assertion of a right appear in 1776 in *Phu Bien tap luc (Miscellany on the Government of the Marches),* by Le Qui Don. This dates satisfactorily the first legal certainties of the 18th century. This work, written by an encyclopaedist who held the post of Vice-Governor, described the archipelagos (as lying 3 days' and 3 nights' journey away, which locates them quite accurately) and refers to their exploitation for economic gain,

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[34] Arbitral Award, Clipperton Island (1932) *American Journal of International Law,* at p. 390.

already well organized by the rulers of Annam. The work contains a dated list, established after perusal of the registers kept by the rulers, of the wealth yielded:

> I have myself examined the registers of Cai doi thuyen, and found the following:
> — year *Nham Ngo* (1702), the Hoang Sa Company found 30 ingots of silver
> — year *Giap Than* (1704), 5-100 measures of pewter
> — year *At Dan* (1705), 126 ingots of silver. Between the year Ky Sun (1709) and the year Quy Ty (1713), over a five-year period, the Company collected several measures of tortoiseshell and sea cucumber. Sometimes it found only a few china bowls and two bronze cannons.[35]

The same author refers to known events, i.e. naval battles between the Dutch fleet and the Nguyen navy (1643-1644). These events confirm that the rulers of Annam had an effective navy and sought to control the seas. Can we therefore conclude that such organized exploitation was even older than the precise mention in the registers? It is impossible to maintain this contention, owing to the absence of earlier evidence.

On the other hand, from the early 18th century onwards, the evidence of Annamese administration is well established. Mr Le Fol, Chief Resident of France in Annam, wrote to the Governor General of Indochina, on 22 January 1929, stating, *'The archipelago (Paracels) seems to have remained* res nullius *until the beginning of the last century'*. In the same correspondence he provided information on the administration of the islands by former dynasties from the early years of the 19th century onwards. Doubtless his words, the words of a man carrying out his duties in the region of Vietnam most closely concerned by the historical aspect of these issues, were based on some knowledge of the archives. However, he did not know them sufficiently well to date the Annamese administration with accuracy, which a thorough examination of the archives would have allowed.[36]

Thus, in the context of the 18th century, it may be said that: at the time the existence of the Paracels was generally known; China has been unable to invoke any act of taking possession corresponding to the criteria described above; Vietnam possesses, in the work of Le Qui Don, the first document

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[35] Le Qui Don, *Phu-bien tap-luc. Miscellany on the Government of the Marches.*

[36] Annex 8.

mentioning acts corresponding to a certain administration of the archipelago, dating from the early years of the 18th century.

In the case of the Spratlys, their existence was probably known, although the distinction between the Spratlys and the Paracels (in the available documents) was ill-established. There is nothing which allows us to say that China took possession of them. The administration by the Nguyen rulers of the Spratlys at the same time as the Paracels, from the 18th century onwards, is a plausible hypothesis. There is no documentary evidence in this case of any interest in the islands at that time on the part of Indonesia, Malaysia or the Philippines.

THE AFFIRMATION OF SOVEREIGNTY (18TH TO 19TH CENTURIES)

The preceding section drew attention to the presence of a first element. It derives from a document of 1776 *(Miscellany on the Government of the Marches)* in which the author, who was then carrying out the duties of mandarin as deputy governor of two provinces, relates, drawing on reports from the early 18th century, that the rulers of Annam had founded the Hoang Sa Company sailing to the islands in the second lunar month and returning in the eighth in order to harvest the produce of the sea and gather booty from shipwrecks.

It needs to be seen whether this indication was subsequently confirmed, whether consequently a right opposable to other States was created in the islands, what the scope of this right was and lastly whether competing rights were expressed.

The Vietnamese documents of the 18th and 19th centuries

There are many of these documents, which on the whole concur, are supported by authoritative foreign accounts and which point towards the affirmation of a title of sovereignty.

Numerous Vietnamese maps, atlases or geographical works designate the archipelagos as part of Vietnam, such as:

- *Giap Ngo Binh Nam Do* of 1774
- *Dai Nam Nhat Thong Toan Do* of 183 8
- *Dai Nam Nhat Thong Chi* of 1882.[37]

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[37] These works, indicated in the document produced in 1981 by the Ministry of Foreign Affairs of Vietnam, may be consulted in Hanoi, at the Institut d'Histoire Nationale for instance.

The effective administration of the archipelagos appears in various documents available in Vietnam. The most important of these are:

The Authentic Writings on Dai Nam compiled between 1821 and 1844, *Dai Nam Thuc Luc Tien Bien* concerning the period 1600-1775 and *Dai Nam Thuc Luc Chinh Bien* relating to the subsequent period;

- the geography of unified Vietnam edited from 1865 to 1882, *Dai Nam Nhat Thong Chi;*
- the Dai Nam administrative repertory: *Kham Dinh Dai Nam Hoi Dien Su Le,* 1843-1851;
- certain reports filed in the Ho Chi Minh City archives.

Some of these documents bear the seal of the King or comments in red ink, a sure sign of the King's handwriting. They make it abundantly clear that the Vietnamese emperors pursued the task of organizing (as mentioned in an account of 1776) a maritime company whose purpose was the economic exploitation and maritime exploration of the archipelagos. These measures formed part of national policy with a concern for maritime interests.

Owing to the rigours of the tropical climate, the small islands were not suitable for farming. Some of them were covered in guano, though the use of this fertilizer did not begin until the 20th century. Chroniclers in the 19th century report that the resources consisted of tortoiseshell, mother of pearl, sea cucumbers and turtles, as well as articles from shipwrecks *(Dai Nam Nhat thong chi).*

Early in the 18th century, the rulers of Nguyen set up government-sponsored maritime companies. How they functioned and were organized is described in detail in the above-mentioned work by Le Qui Don (1776). Some of these companies specialized in harvesting produce from the sea on islands near the coast, while for others it was collecting articles or merchandise from wrecks on islands out to sea.

Le Qui Don describes these articles as muskets, swords, cannons, gold, silver, lead, pewter, ivory, porcelain, woollen cloth, fabric, wax etc.... He says that these companies were supposed to make out itineraries or draw up maps for the rulers of Nguyen and precisely indicates that there were 70 men to a company, that they were recruited in the district of Binh Son, that volunteers were exempt from personal taxes, from fatigues and from tolls. There was a system of punishments for professional misconduct. On the other hand, such service could provide entitlement to a commission or to material rewards. The tours of duty lasted from the 2nd to the 8th month of

the year, those concerned sailing in flotillas of five junks carrying six months' supplies.[38]

From 1771 to 1802 the history of Vietnam was marked by dynastic conflict.[39] When the Nguyen dynasty was restored, Emperor Gia Long made an inventory of all the lands in the kingdom. The maritime companies, then presided over by four mandarins, were to play an important role in compiling a register of the archipelagos. In 1815, the Emperor appointed Pham Quang Anh commander of the brigade given the task of exploring the archipelagos and of drawing up a map of sea routes there.

In 1816, according to certain accounts,[40] Emperor Gia Long wished to travel to the islands in person in order to take possession of them and add *'this flower to his crown*', yet this information is not confirmed, perhaps because the Emperor did not travel without a retinue consisting of thousands of people, thus making such a journey to the islands problematic. What is more likely is that he dispatched an official, Pham Quang Anh, in his place. *The Authentic Writings on Dai Nam (Dai Nam Thuc Luc Chinh Bien)* relate that, in 1815, and again in 1816, the King ordered the Hoang Sa Company to travel to the islands in order to make surveys, inform him about maritime routes and draw up maps.

In 1833, his successor, Minh Mang, gave the competent Ministry instructions for the erection of a temple and monument and for the planting of a great many trees:

> The trees will grow and provide greenery. Easily visible to navigators, they will prevent many a ship from running aground.

These instructions were reiterated in 1835, the project having been postponed owing to the violent wind and heavy seas. The work was duly carried out and orders were given by the King for those responsible to be recompensed.

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38 See Luu Van Loi's analysis of *Miscellany on the Government of the Marches, (Phu-Bien tap-luc* by Le Qui Don) (Hanoi, 1994, mimeographed).

39 See Nguyen K.hac Vien, *Vietnam une tongue histoire* (Hanoi, Editions en langue etrangere, 1987).

40 This is the account by Monsignor Taberd in *The Journal of the Asiatic Society of Bengal* (September 1837) and that by Jean-Baptiste Chaigneau, Counsellor to Emperor Gia Long under the Vietnamese name of Nguyen van Thang, author of a *Memoir on Cochin China* in 1820.

In 1836, Emperor Minh Mang carried on his predecessor's plan to survey the entire territory. More detailed instructions were given in the matter of cartography.

> Everything shall be noted and described in detail for submission to the supreme attention of His Majesty The Emperor. As soon as the junks reach any island or sandbank, regardless of what kind, they shall from that point measure the length, breadth, height, surface area and circumference of that island or sandbank, the depth of the surrounding waters, identify any submerged sandbanks or reefs, record whether access is dangerous or poses no problem, undertake a careful examination of the terrain, take measurements and make a sketch.

The same year (1836), the King ordered the Commander of the Navy, Pham Huu Nhat, to lead the fleet himself and to prepare large wooden posts to mark the places inspected. The following inscription was to be engraved on each post:

> 17th year of the reign of Minh Mang by imperial order Commander of the Navy Pham Huu Nhat came here to Hoang Sa for reconnaissance and to make topographical measurements and leaves this post as record thereof.

In 1837, the Minister for the Interior prepared a report for the King on the Company's expenditure. In 1838, the Mandarin of Quang Ha Province requested the King to abolish the tax levied on the Company's ships. The King assented. The same year, the Minister for Public Works prepared a report for the King on the Company's activities. The Paracels are described in it.

In 1847, under Emperor Thieu Tri, the competent Minister prepared a report for the King on the need to postpone the Company's voyages for lack of funds.

In 1867, 20th year of the reign of Tu Duc, a number of sailors having lost their lives during the voyage to the archipelagos, the King conferred upon them the title of hero.

These details are taken from Vietnamese historical documents, whose authenticity has been acknowledged by various foreign authors. Two cases in point are Chaigneau (*Memoir on Cochin China)* and Gutzlaff (1849, *Journal of the Royal Geographical Society. On the Cochin Chinese Empire)*. It can therefore be argued that the Empire of Annam, as a pre-colonial State, displayed specific interest in the archipelagos and performed acts of admin-

istration there at a time when no other State had shown any interest in them as sovereign.[41]

The formation of a right to the islands and the scope of this right

The documents produced reveal governmental activity by Vietnam in the archipelagos, a historically established fact. What now needs to be done is carefully to define the boundaries of such activity, its date, intensity and geographical spread.

The first authoritative text is that of Le Qui Don in 1776. He describes in detail the exploitation of the archipelagos from 1702 onwards. Thus the intention of sovereignty on the part of the State was certain from the early 18th century onwards.

The Vietnamese authorities state that the Hoang Sa maritime brigades operated continuously from the first Nguyen dynasty onwards (1558-1786).[42]

The Hoang Sa Maritime Company may well have been in existence before 1702, indeed this is quite plausible. Nevertheless, information based on verifiable historical documents goes back no earlier than the early 18th century, and it is impossible to extrapolate with certainty.

Be this as it may, *from that date onwards,* there was a real intention to assert sovereignty over the islands, since it was expressed by the type of acts singled out in legal precedents.[43]

We shall not dwell on expeditions whose purpose was to compile maps and to discover shipping routes. Such ventures are initiated by geographers and navigators and help to promote a general, universal knowledge of a land or maritime region (even though China claims that it ended the reconnaissance surveys carried out by the Germans in the islands in 1883, on the grounds that it wished to *terminate such activities,* and by so doing stamp its authority).[44]

Many other activities which might be characterized as conduct of a State - forming a special maritime company, financing, profiting from, managing and recompensing that company, deciding to erect constructions on the

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41 See Dieter Heinzig, *Disputed Islands in the South China Sea* (Wiesbaden, Hamburg Institute of Asian Affairs, 1976).

42 United Nations A/42/346, 2 May 1988, letter dated 2 May 1988 from the Charge d'affaires ad interim of the Permanent Mission of Vietnam to the United Nations Organization addressed to the Secretary-General.

43 See pp. 55-56 *supra* the examples taken from the Minquiers and Ecrehos case.

44 Statement cited without a specific reference (1988) *Nouvelles sinologiques,* no. 8, at p. 76.

territories, intending them to have symbolic value such as a monument or boundary-marker denoting sovereignty - were acts which could not be misinterpreted. The imperial authorities of Annam carried out these various kinds of activities on the islands. Even disregarding the personal, ceremonial visit by Emperor Gia Long in 1816, on the grounds that it is mentioned by French authors alone,[45] there are still enough concordant, consistent facts to bear out the assertion that, between the 18th century and the onset of the colonial period, the Vietnamese authorities had acquired rights of sovereignty over the archipelagos in accordance with the rules of international law applicable at the time.

These acts were effective, their effectiveness meeting both the requirements of the time and the topographical and physical conditions in the islands, which made widespread, permanent occupation impossible. They were seasonal acts, but that arose from the physical and climatic characteristics of the islands. In his Arbitral Award of 28 January 1931 in the Clipperton Island case between France and Mexico, King Victor Emmanuel III of Italy recognized the validity of an occupation based on acts of supervision.[46]

These were acts of public authorities at the highest level. They leave no doubt as to the intention to assert sovereignty. In the absence of any challenge whatsoever, these acts constituted what might well be called peaceful, uninterrupted administration of the territories.

They correspond to the assertion found in the administrative register of Dai Nam *(Kham Dinh Dai nam hoi dien su le,* 1843-1851):

> The Hoang Sa are an integral part of our maritime territory and are of great strategic importance.

Nevertheless, the geographical scope of the rights thus asserted must be stated more precisely, examining the whole period from ancient times to the French protectorate. The date of consolidation of the protectorate (1884) coincided with the Berlin Congress, which opened a fresh chapter in the history of international law.

The assertion of sovereignty by the Vietnamese appears to have concerned a larger area than the Paracels alone. There are two pointers to this. Vietnamese geographical works of the 19th century mention 130

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[45] See p. 68, note40.

[46] Arbitral award, Clipperton Island (1935) *American Journal of International Law,* at p. 390.

elevations, i.e. land standing clear of the water.[47] Yet the figure of 130 does not correspond to either archipelago alone; instead it corresponds quite accurately to the two groups together.[46] Also, Annamese records clearly show that there were several companies with distinct geographical destinations.

> The Hoang Sa Islands lie east of Ly Island. From the port of Sa Can, it is possible to reach them in three or four days' journey, under a favourable wind. The islands number over 130 rocks, lying between one day and several hours apart from each other. At their heart stands a bank of yellow sand, stretching endless thousands of li, commonly called van-ly-trug-sa-chan, or the 10,000-li sandbank. There is a well on this bank, with a fresh water spring. Seabirds congregate in these places in countless numbers. The products are many: hai-sam, doi-moi, mother-of-pearl, large turtles, etc. Wrecks are commonly found. The beginning of the Nguyen reign saw the formation of the Hoang Sa Company, made up of 70 men from the village of Vinh-An. Each year, in the third month, the company embarked to harvest the products of the sea which it brought back to the port of Tu-Hien in the eighth month. A Northern Sea Company was also founded, under the same command, to collect the products of the sea on the Kouen-Leuen Islands in the Northern Sea.
>
> The east of the islands lies close to the prefecture of K'iong Chow on Hainan Island, which belongs to the Chinese Empire.[49]

One of the companies founded in the 19th century was called Bac Hai, from the name then given to the Spratly Islands by both the Vietnamese and the Chinese.

These particulars strongly suggest that the emperors, minded to profit from both archipelagos, found a way to do so by bringing under the same command two companies with separate geographical destinations, an idea supported by the map compiled in the 14th year of the reign of Minh Mang.[50] This map shows a group of islands distinct from the coastal islands, and

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47 Particularly in Phan Huy Chu, *Regulations of Successive Dynasties by Subject-Matter (Lich Trieu hien chuong loai chi),* 1821, and in *Dai Nam Nhat Thong, A Geographical Description of Reunified Dai Nam,* written between 1865 and 1882.

48 See list of islands, Annex 4.

49 Annamese records, text cited by P.A. Lapique.

50 Reproduced in Annex 9.

depicted with two different names, harking back to the differentiation between the two archipelagos.

The possible expression of competing rights

A right comes into existence only if, once asserted, it is maintained under certain conditions. So dictates the machinery of intertemporal law. Any immediate challenge to the assertion of the right, any impediment to its exercise, weakens the right and may call it into question.

We must therefore examine the respective attitudes of the possible rivals.

The case of China

China's situation must be studied in the light of two questions: did it, by its own actions, acquire autonomous rights competing with those of Vietnam during that period; did it acquire rights through those of Vietnam, under the relation of vassalage between the two States?

a) The absence of historical Chinese titles to the islands

As seen in the preceding section, the Chinese documents fail to establish any acquisition of sovereignty in the period prior to the early 18th century. After that time, did any new facts establish rights for China? One of the brochures published by China contains the following account:

> Under the Qing, Guo Songtao, the Chinese Minister accredited to Great Britain, journeyed to England in 1876 in order to take up his post. He wrote the following passage in *Shi Xi Ji Cheng (Notes on my Official Travels to the West):* "The vessel, having covered 831 li, arrived at noon on the 24th day (of the 10th month of the 2nd year of the reign of Guangxu), at a point 17° 30' north of the equator and 200 to 300 li south of Qiong-Zhou. The sailors call this place the China Sea. Not far away, to the left, lie the Paracels (the Xisha Islands) which yield sea cucumbers, as well as coral of mediocre quality. These islands belong to China.'

The document cited does not bear a precise date, and no reference is given. Assuming it to be authentic, and authentically translated, it is an account of a journey. The author was not writing in an official capacity, and even if he was a diplomat rejoining his post in Europe, the mention in passing that the

islands belong to China, however interesting, is not an adequate foundation for what certain authors have called a *claim* by China in the distant past.[51]

In all these documents it is noted that Chinese fishermen have visited the islands since time immemorial.[52] However, as we know (see Section I), these were private, non-proprietary acts, which did not correspond to a taking of possession, nor to the intention to assert sovereignty, since occupation '*by individuals who are not acting in the name of their government but who are pursuing their own interest does not constitute possession*'.[53]

All the more so in that the same archipelagos were also visited by Annamese fishermen over the same periods.

In fact, there is no trace that China ever opposed the assertion of sovereignty by Emperor Gia Long and his successors, nor did it do so throughout the 18th century, nor, especially, in the 19th century when the rulers of Vietnam organized the exploitation of the islands under their jurisdiction on a sounder administrative footing.

We even find statements in historical Chinese writings which confirm the absence of Chinese claims in history. In *Hai Luc* we read:

> Van ly truong Sa is a sandbank rising above the sea. Several thousand leagues in length, it forms a rampart on the periphery of the Kingdom of Annam.[54]

The conclusion which follows is:

> There is no evidence here that the Ch'ing State had in any sense absorbed the islands into the imperial domain.[55]

Not only did China itself therefore not carry out any act of sovereignty, but further, by its silence, it appears to have acquiesced in the taking of possession by the Vietnamese.

An explanation has been put forward by some historians:

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[51] See in particular Jeanette Greenfield, *China's Practice in the Law of the Sea* (Oxford, Clarendon Press, 1992), pp. 154-155. The author quotes the Chinese texts analyzed above, texts whose very titles are revealing (e.g. *Description of the Barbarian Lands)* and
which contain a description of the islands as places foreign to China. She concludes that there is a Chinese claim to the archipelagos.

[52] Particularly *Window, op. cit.,* p. 25.

[53] Moore 5. p. 5036 (original Spanish).

[54] Quoted in volume 13, folio 4, page 2 of *Hai-Quoc do chi,* written in the 22nd year of the reign of Dasquang of the Thanh (1730). Reproduced in the archives of the French Foreign Ministry. Box file AS 1840 China 797.

[55] M.S. Samuels, *op. cit.,* p. 25.

> Since the far-off days of Gia Long, the only neighbours who might have intervened in the Paracels, the Chinese, were too far away. The occupation of Hainan was little more than nominal. Until very recent times, the Chinese occupied only a narrow coastal strip in the north of the island, and one or two ports on the south coast.[56]

Thus it is plausible that China took no interest in the archipelagos throughout the 19th century (moreover it was to give proof of this in the last years of the century).

China's indifference to the archipelagos at that period is confirmed by two documents: the Chinese *Map of the Unified Empire* by Hoang Chao Yitong Yudi Zongtu published in 1894. On that map Chinese territory is shown extending only as far as Hainan Island. Furthermore, the Chinese geography textbook *Zhongguo Dihixue Jiao Keshu,* published in 1906, states on page 241 that *'the southernmost point is the Yashou coast of Quongzhou Island at latitude 18°13' north'.*

These documents published at the end of the period under consideration confirm that until then (late 19th century), China had voiced no clear claim to either archipelago. This fact is attested by Chinese researchers themselves. For example, in a thesis for a French university, Jian Zhou notes in his chronology, for the year 1902, a *'first Chinese reconnaissance in the vicinity oftheXisha Islands (Paracels)*'.[57]

This reveals quite clearly that, prior to that date, there had been neither *reconnaissance* nor a fortiori administration. The author contradicts himself since in the same thesis and without citing precise references, he contends that *'the Chinese Government under the various dynasties had administratively annexed the islands and had placed them under the jurisdiction of the authorities of Kwangtung Province'* (p. 265).

Authors who are not content to confirm pre-established positions, but who deliberately examine each element of the reasoning in a quest for objectivity, are therefore led to the conclusion that China has no ancient historic title to the Paracels and Spratlys. Such a hypothesis could be defended only on the basis of unpublished documents in addition to all those on which this study has been based. The only undeniable fact is the presence of seasonal Chinese fishermen. Yet there were also fishermen from other

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[56] P.A. Lapique, *op. cit.,* p. 4.

[51] Zhou Jian, *Les frontieres maritimes de la Chine,* thesis completed under the supervision of Professor Hubert Thierry, University of Paris X, Nanterre, p. 562.

countries. In international law this does not constitute the basis for legal title.[58]

> A simple affirmation of the rights of sovereignty or a manifest intention to render the occupation effective cannot suffice.[59]

b) The non-existent consequences of vassalage

Did not China's suzerainty over Vietnam, however, confer rights through Vietnam's own actions?

China's response to Vietnam's detailed arguments in favour of its acquisition of sovereignty through acts dating back to the 18th century has been that the Kings of Annam never acted other than on behalf of their suzerain, the Emperor of China. Accordingly, their acts merely *'confirmed Chinese sovereignty over islands which were not Annamese.'* [60]

The nature of this tie of vassalage therefore needs to be elucidated as well as its consequences for the jurisdiction of the islands.

The Kingdom of Vietnam (Dai-Co-Viet) was founded in the 11th century by the creation of a political power and administration independent of China, but (prudently) acknowledging Chinese suzerainty.

This tie of vassalage is difficult to define in legal terms, as its precise meaning is vague and has fluctuated in intensity down the ages.

Any comparison with European feudalism, a more highly structured model and one better known to western jurists, would be rash. The tie would appear to have consisted above all of religious allegiance accompanied by a tribute of varying frequency.

> As for the legal validity of these reports, it obviously cannot be assessed according to the international rules of the community of European States, with which they could scarcely be reconciled, bearing in mind the two different historical epochs involved and the gulf between European concepts and those of Asian society.[61]

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[58] See Michael Bennett, 'The People's Republic of China and the Use of International Law in the Spratly Islands Dispute' (1992) *Stanford Journal of International Law,* at pp. 434-436.

[59] Arbitral Award of 6 June 1904 by King Victor Emmanuel III of Italy, *Brazil* v. *the United Kingdom, Reports of International Arbitral Awards XI,* p. 21.

[60] See Jean-Pierre Ferrier, *op, cit.,* p. 180 (The author in no way endorses this Chinese argument).

[61] Huan-Lai Cho (Chinese Vice-Consul in Saigon), *Les origines du con/lit franco-chinois a propos du Tonkin jusqu 'en 1883* (Saigon, Imprimerie Albert Portail, 1938), p. 82.

> The Viet dynasty needed Chinese blessing in order to gain recognition, just as the modern State cannot do without international recognition to survive. Also, from the Chinese standpoint, the idea of two separate nations is scarcely appropriate. What would be more appropriate is the idea of two contiguous worlds: the civilized and the non-civilized. The civilized world, the Confucian one in other words, was organized around the Emperor (whom we call the Emperor of China); to participate in this world to which the Dai Viet belonged, since it used the Chinese script and observed the Chinese rituals, the hallmarks of civilization, it had no alternative but to accept vassal status with respect to the Emperor. What this means is that this tribute in fact concealed an extremely complex system of relations. For China, it indicated the maximum dependence in which it could hope to maintain the Dai Viet without provoking any reaction against imperialism on its part. For the Dai Viet, on the contrary, it indicated the maximum independence to which the kingdom could aspire without provoking any imperialistic reaction on the part of China. In either case, bearing in mind the Confucian nature of the two countries, the tribute, in part at least, evinced common adherence to one system of values.[62]

The Chinese themselves had a vague, extensive concept of it, so much so that the *'Official Yearbook of the Chinese Government classed as vassal States in the 19th century: Annam, Burma, Siam, Laos, Great Britain, the Netherlands, Italy, Portugal and the Holy See!'* [63]

In no way is this a legal system of the kind which, in other cases, has been characterized as *'semi-sovereignty'*. The semi-sovereign State is characterized by the fact that its international status is never complete.[64] In such cases, certain international powers are relinquished to the suzerain and part of the vassal's sovereignty is amputated. There was nothing of this kind in relations between Annam and China. The vassalage nominally accepted by Annam, in the form of honorary services, never allowed China access to the foreign relations of ancient Vietnam. The mandatory deference by the court of Hue to the court of Peking was purely formal. It was a matter of *'a*

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[61] Francois Joyaux, *La Chine et le reglement du premier conflit d'Indochine* (Geneve, 1954, Publication de la Sorbonne, 1979), pp. 44-45.

[63] Quoted by Jean-Pierre Ferrier, *op. cit.,* pp. 180-181.

[64] See on this point Nguyen-Huu-Tru, *Quelques problemes de succession d'Etats concernant le Vietnam* (Brussels, Bruylant, 1976), pp. 26 (in particular note 3) and 27.

nominal, ritual and wholly moral suzerainty rather than actual suzerainty of a political kind.' [65]

Ever since the State of Vietnam was created by throwing off the Chinese yoke, the history of Sino-Vietnamese relations has seen many Chinese military ventures against Vietnam. When victorious, the kings of Vietnam never failed to seek to appease their gigantic neighbour by symbolically paying liege.

It was China's very indifference that enabled Vietnamese independence towards it to develop during the years of French settlement (prior to the protectorate). The Chinese argument derived from vassalage can therefore scarcely have any legal significance.

There is a major precedent in case-law which reinforces this assertion. In the Minquiers and Ecrehos case, in fact, views comparable to those expressed today in relation to the archipelagos in the China Sea were put forward. France held that it possessed original rights simply by virtue of the fact that the Dukes of Normandy were the vassals of the Kings of France and that the Kings of England had received the Duchy of Normandy in fee. To this the United Kingdom objected that the title of the French Kings in respect of Normandy was only nominal. Noting that these were uncertain and controversial views on a remote feudal epoch, the Court found that, even if the French Kings had had an original feudal title also in respect of the Channel Islands, that title had lapsed in 1204, and the Court added:

> Such an alleged original feudal title of the Kings of France in respect of the Channel Islands could today produce no legal effect, unless it had been replaced by another title valid according to the law of the time of replacement. It is for the French Government to establish that it was so replaced.[66]

The following conclusions may be drawn from this for the present case: the vassalage of Vietnam with respect to China was certainly much more nominal than that of the Dukes of Normandy with respect to the Kings of France (even assuming the comparison can be made in such different political and cultural settings); the conclusions of the Court, valid for European feudalism, are also *a fortiori* valid for relations between Vietnam and China; the vassalage of Vietnam ended on the very day of the signature of the 1884 Treaty of French Protectorate. On that day *'the symbolic Chinese seal, a handsome article worked in gold and silver, surmounted by a camel*

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[65] G. Taboulet, *La geste francaise en Indochine* (Adrien Maisonneuve, 1956, vol. II), quoted by Nguyen Huu Tru, *op. cit.,* p. 27.

[66] International Court of Justice, *Reports,* 1953 at p. 56,

couchant, a gift from the Emperor of China to Gia Long in 1803, was melted down in the presence of Patenotre, the French plenipotentiary, during a solemn ceremony'.[67] This change was apparently greeted by Chinese indifference. At any event, China did not express the least desire to retain any of the rights acquired by Vietnam throughout a long history over its land or island territory. No reservation was expressed by China at the time to this effect.

All the conditions required for application of the dictum of the International Court of Justice in 1953 were therefore met: the original feudal title *'could today produce no legal effect, unless it had been replaced by another title valid according to the law of the time of replacement'*.

The time of replacement is the one lasting up to the French protectorate. At that time, as we have seen, China had not acquired any title to the archipelagos according to the law of the day. Therefore nothing could have replaced a vassalage which had disappeared after having been chiefly symbolic.

It is impossible to divide the territory of Vietnam in this way. In losing (feudal) control of Vietnam, China lost control over the archipelagos, that is if it actually ever took any interest in the archipelagos, and there is no evidence to this effect.

Lastly, it will be noted that, when China alleges vassalage in order to claim that the rights acquired by Vietnam would revert to it, then (if the argument of vassalage is rejected) China nevertheless acknowledges that rights had indeed been acquired. They cannot but have been acquired by Vietnam.

The other States in the region

Did other States (during the same period) express the intention to exercise sovereignty?

The reply to this question needs no hesitation. None of the other States in the region had made any claim at that time. None today seeks to found claims upon acts which took place in the 19th century or earlier.

It should be noted that, in 1898, the treaty concluded in Paris between Spain and the United States of America to end the war between them, included the Philippines under American administration. There was no mention whatever of the Spratlys.

The conclusion reached in this chapter is therefore that:

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[67] Nguyen Huu Tru, *op. cit.,* p. 28, note 8.

- At the time of the signature of the Treaty of French Protectorate in 1884, Vietnam possessed a right over the archipelagos, a right unchallenged and going back almost two centuries, in accordance with the legal system of the time.
- This right was undoubtedly exercised over the Paracels. It remains to be seen whether it was actually exercised over the archipelago as a whole. There is reason to think that the Vietnamese administration also included the Spratlys. But there is nothing specific to say that this then concerned the whole of an archipelago covering 160,000 square kilometres, or at least enough large islands to result, by extension, in a right over all of them. In that case, there is an 'inchoate title', which must subsequently be consolidated by its holders.

At this point in the analysis, and subject to the reservations just made, we can echo Max Huber's comment and say that there is no manifestation whatever of the exercise of sovereignty over the islands by China or any other State, such as to counterbalance or cancel the manifestations of Vietnamese sovereignty.

The problem then arises of whether or not the title was consolidated and above all maintained in relation to the evolution of international law.