

Chapter III

Subsequent Development of the Title

The turning point of 1884 is an important one for the archipelagos, marking as it does the beginning of the period of French colonization in Vietnam and also, coincidentally, the establishment (after the Congress of Berlin) of new rules of international law. While at first valid in the specific context of the Great Powers present in Berlin and relating only to African territories, the rules extended under the effect of custom and by application in jurisprudence to the point where they became universal. They were later followed by other fundamental changes in the law.

Yet the period which then dawned was a tangled web of extreme complications both as regards the general situation in the two countries chiefly concerned (China and Vietnam), and as regards the administration and occupation of the two archipelagos. Was the right of sovereignty over the archipelagos, which had developed up to the 19th century in Vietnam's favour, consolidated and maintained, or did it disappear through the simple abandonment of these territories, or did it give way to another sovereignty and in what circumstances?

First, we must outline the development of international law since 1884 (Section I). Then the situation in the archipelagos will be considered in relation to the two main historical periods: the years during which the French colonial State exercised international authority over Vietnam until 1954—1956 (Section II), then the years when the Vietnamese people reappeared speaking for itself, but with the many complications and contradictions of the history of Vietnam since the end of the colonial war (Section III).

One element will be analysed in an introductory paragraph thus dispensing with one argument relating to the Franco-Chinese Treaty of 26 June 1887, which had no bearing on sovereignty over the archipelagos.

THE FRANCO-CHINESE TREATY OF 26 JUNE 1887

Where the acquisition of sovereignty is concerned, treaty titles occupy an important place, even though this is not necessarily decisive in all cases.

True, inter-State relations are more solid if based on a written text, each word of which tells and to which the States have pledged themselves by their signature and ratification.

States having acquired territories originally vacant by discovery followed by effective administration with the intention of exercising sovereignty, have thus traditionally sought firmly to base their rights by ensuring that they were recognized in written conventions concluded with third and sometimes rival States.

However, and notwithstanding the solidity of the rights recognized by treaties, deriving from the principle of respect for an undertaking given (*pacta sunt servanda*), the treaty can only be the proof and support of effective administration. By itself it cannot make up for the lack of such administration. Still less could it entail the attribution of sovereignty to a State whose inactive title conflicted with an effective administration actually exercised by another State.

This was the whole thrust of the award delivered on 4 April 1928 by Judge Max Huber in the Island of Palmas case. The Award states, among other things:

Moreover, even if she (i.e. Spain) had acquired a title she never intended to abandon, it would remain to be seen whether continuous and peaceful display of sovereignty by any other Power at a later period might not have superseded even conventional rights.¹

What has to be investigated, therefore, is both the reality of the administration of the islands and the intention to exercise that administration as a sovereign.

However, it is still illuminating to establish whether there was a genuine treaty commitment with respect to these territories.

Where the archipelagos in the China Sea are concerned, no such reference is made by either of the parties with respect to the period examined in the previous chapter.

On the other hand, when during the colonial period France expressed interest in the Paracels and the French Government challenged China's right to grant concessions on the archipelagos, China sought to base its claim on various arguments. A Note dated 29 September 1932 from the Republic of China to the French Government based itself on the Franco-Chinese Convention of 26 June 1887, which traced the frontier between China and

¹ Max Huber, Island of Palmas Award, 4 April 1928, *op. cit.*, p. 850

Vietnamese territory then under French control.² The Chinese Government still holds to this view today. An example is a Chinese publication of 1956, which states:

In Kwangtung, it is understood that the disputed points which are situated to the east and north-east of Monkai, beyond the frontier as fixed by the Delimitation Commission, are allocated to China. The islands which are east of the Paris meridian of 105°43' east,³ that is to say 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 [Kao Tao] and other islands west of this meridian belong to Annam.

A Chinese author, Shao Xunxheng, bases himself on the terms of this Convention when contending, in an article published in *Renmin Ribao-Peking* No. 3 of July 1956, that the Paracels and Spratlys lying east of this delimitation belonged to China under the same text.

The French colonial power would thus appear, by this form of words which does not even mention the two archipelagos, to have abandoned them three years after extending its protectorate over the whole of Vietnam. This is an argument which is found in a number of western authors writing in English or French.⁴

However, there is good reason to consider this view irrelevant. For the Vienna Convention of 29 June 1969, which codified the rules for the interpretation of treaties, stresses the role of good faith in the interpretation and the need to interpret the texts in accordance with the ordinary meaning to be given to the terms and in the light of the object and purpose of the treaty (Article 31).

The same Convention (Article 32) authorizes recourse to the preparatory work and to the circumstances surrounding the conclusion of a treaty where a first interpretation leaves doubt about its meaning or leads to an absurd result.

The object and purpose of the 1887 Treaty were the delimitation of the frontier between Tonkin and China (indeed, this is the title of the Convention as formulated by its authors). The Convention relates to the land territories. Although indications of lines drawn in the sea are given in old conventions

² See Annex 10 for this Note.

³ In other words, at longitude 108 ° 03' 13 " east of Greenwi ch.

⁴ See, for example, Jeannette Greenfield, *op. cit.*, p. 155.

such as the one concluded between France and China in 1887, as well as in others such as the 1886 Convention between France and Portugal,⁵ they cannot be used in contemporary maritime delimitation negotiations other than as pointers to be reviewed in the light of modern delimitation law.⁶ The only maritime territory on which the States claimed rights was the territorial sea. Its usual breadth was three nautical miles (the nautical mile is equivalent to 1.8 kilometres). For some States, it had been extended to six miles. There was neither contiguous zone, nor fisheries zone, nor continental shelf, all these institutions dating from after World War II.

The frontier to be delimited was that between *Tonkin* and China. Only this part of the present Vietnam was concerned, which France referred to as *Tonkin*.

Hence, the interpretation of this text must mean that it can be seen as an indication of the attribution of the coastal islands of the two States. As a convention intended to settle the fate of the mainland, its *additional* purpose was to determine the closest islands. In the interests of simplicity and effectiveness, the text does not enumerate all of them. There are some very small ones and there would be the danger of omitting one or other of them from the attribution. The inclusion of the meridian is illuminating. Furthermore, if some new island were to be formed by the accumulation of sand or some other geological phenomenon, it would be attributed in pursuance of the text. This and nothing else is the meaning of the 1886 formulation.

In support of this interpretation, it is very important to note that the line indicated has a precise starting point - *the north-south line passing through the eastern point of the island of Tcha's-Kou (Tra Co)* - but has no terminal point. This cannot be either chance or an oversight. The line has no need to end on a point. Its useful length is a function of the existence of the coastal islands.⁷

⁵ Note, in this connection, the somewhat analogous case between the Republic of Guinea and the Republic of Guinea-Bissau (Arbitral Award of 14 February 1985). A treaty of 12 May 1886 was disputed. The Treaty had drawn a maritime perimeter to separate the islands under French and those under Portuguese sovereignty. The Republic of Guinea held this line to possess the status of a maritime boundary. The Tribunal did not endorse this view, holding (paragraph 56 of the Award) that the object of the 1886 Convention had been the attribution of land territories alone.

⁶ On the 1887 Convention and the maritime delimitation between China and Vietnam, see J.R.V. Prescott, *The Maritime Political Boundaries of the World* (London, New York, Methuen, 1985), pp. 224 *et seq.*

⁷ This is indeed the meaning given to the terms of the Convention by the French diplomats, for whom this meridian *marks only the maritime extremity of the boundary between China and Tonkin* (Foreign Affairs Note of 20 July 1933).

How could it possibly have been thought that the authors of the text had envisaged the legal validity of this line to where it intersects the coast of Annam? All the Vietnamese coastal islands in the region which lie south of Hue would have become Chinese by virtue of this text... Yet this is precisely what the Chinese authors do not scruple to defend, seeing as they do in this Treaty the conventional basis of China's title to the Spratlys. The recognition of China's rights therefore had no limits in the east and south-east. It can thus quite legitimately be asked why one should stop at these coral archipelagos? The rights conceded to China by France might thus be extended so considerably as to border on the absurd... and prompt China to claim a conventional title to the Philippines for instance. For are the Philippines not islands situated east of the meridian indicated?

However, if the interpretation becomes absurd, the pointers provided by the Vienna Convention must be followed to see whether the preparatory work can confirm or invalidate it.

The preparatory work does indeed illustrate the concerns of the two parties and what was at stake in their relations at the time. This was trade. France was dominated by the concern to secure the Indochinese market (an Indochina with delimited, and therefore controllable, land frontiers), and, in view of European rivalries in this field, to create the most favourable possible conditions for penetrating China.

The question of the archipelagos was not raised by either side during the negotiations.

Subsequent events were clearly to show that the years which followed were years of loss of interest on the part of these two countries in the Paracels and the Spratlys. The awakening would come later, prompted by other desires. It was then that China sought to invoke an *ad hoc* interpretation of the 1887 Treaty. France, however, the other contracting Party to this Convention, strongly protested against this interpretation:

The provisions of the 1887 Treaty... had no other object but to fix the maritime frontier between China and Tonkin in the region of Monkai, attaching to China some territories and islands situated east of the mouth of the River Monkai and which were formerly under Annam. To simplify matters, the 105°43' Paris meridian was chosen as the demarcation line. However, the text of the agreement clearly shows that the clause at issue specifically refers to the Monkai region. To seek to apply it to the Paracels, which are situated almost 300 nautical miles south-east, would amount to saying that everything east of the 105°43' meridian belongs to China. China could therefore

lay claim to most of the coastal islands of Indochina, Poulo Cecir among them! The absurd consequences of such an argument clearly show that only local scope and significance should be given to the clause in the 1887 Convention.⁸

Meanwhile, international law relating to the attribution of territories has evolved. It has become exacting and more technical.

APPLICABLE LAW AFTER 1884

The late 19th century, a period of intense international relations, was also a period of many changes which gradually refrained international law.

The rights of the various parties are evaluated on the basis of four concepts. These are: the fresh requirements of international law with regard to consolidating and maintaining title to territory (1884-1885); the concept of State succession with the need to identify the predecessor and successor State in each case, and its extensions in the form of the principles of the protection of territorial integrity and of the right of peoples to self-determination; the prohibition of the use of force and of the acquisition of territory by force; the notion of the critical date when weighing up international disputes, especially territorial disputes, and the need to identify the moment of crystallization, after which the acts of States can no longer be taken into account for the construction of a right, because such acts are carried out with the intention of belatedly displaying their authority.

The rules governing rights to a territory in the late 19th century and thereafter

Like any other treaty, the Berlin General Act of 1885 which divided up the African territories, was relative in character. It bound only the States parties and was valid only in respect of the territories under negotiation.

Yet, because it was the expression of the new social requirement, its content rapidly became universal in scope.

The acquisition of title (which could have taken place under the less stringent requirements of the previous era) then had to be consolidated under the new, stricter conditions. The right was maintained only if such conditions were complied with.

⁸ Note from Paris of 10 October 1937. On the same lines, see Note by Mr Chargueraud-Hartmann for the Under-Directorate for Asia of 16 August 1933.

In order to examine whether or not this process of consolidated acquisition of sovereignty took place, we shall endeavour to identify the manifestations of sovereignty of the claimant State, and of its supposed rivals.

The party which claims title must be able to prove that it exercised that title through regular acts of the State, covering the entire territory concerned inasmuch as physical conditions allowed, these acts corresponding to permanent, uninterrupted possession and peaceful administration. Where this is lacking, international tribunals consider that there is insufficient evidence of the government's intention to act as sovereign, since in that case:

Those acts [are not] of such a character that they can be considered as involving a manifestation of State authority in respect of the islets.⁹

The machinery of consolidation is therefore very important.

The method followed by the Court (particularly in the *Minquiers and Ecrehos* case) consists in acknowledging the territorial sovereignty of the State which is able to prove a long, well-established usage, reflecting a set of interests or relations attaching the territory to the State.¹⁰

Consolidation and maintenance of title over the centuries are linked to acquiescence on the part of other States." Such acquiescence may be active but it may also be passive.

Consolidation may apply to territories where it is not possible to establish whether they used to belong to another State, it may be achieved not only through acquiescence *per se* but more easily through a sufficiently long period of absence of opposition on the part of States which might be interested in disputing possession.¹²

The silence of third parties is important in the case of an original occupation, when a State is the first to administer unclaimed territory, and continues to do so for many years without any challenge from third parties.

⁹ International Court of Justice, *Minquiers and Ecrehos* case, *Reports* 1953, at p. 71.

¹⁰ Suzanne Bastid, *Les problèmes territoriaux dans la jurisprudence de la C.I.J.* (1962) *Recueil des Cours de l'Académie de Droit International*. II, vol. 107, at p. 441.

¹¹ See Jean Barale, 'L'acquiescement dans la jurisprudence internationale' (1965) *Annuaire Français de Droit International*, at pp. 389 *et seq.*

¹² Suzanne Bastid, *op. cit.*, p. 441.

It is even more important when third parties claim that the original title was invalid because the territory was not *terra nullius*, other rights having already been established. If it can provide evidence of a long period of continuous, peaceful, public administration, in which the previous occupying State showed no interest, the current occupying State is then in a position of acquisitive prescription. In such a case, the judges or arbitrators scrutinize most carefully the attitude of the States claiming to hold the true, original title. Their silence implies acquiescence; conversely protest preserves their rights. For '*a sovereignty which is challenged must react, on pain of forfeiture*',¹³ there being no '*customary rule attributing to effective possession atone the capacity to shift the existing title to sovereignty*'.¹⁴ Thus non-recognition may impede the validation of a *de facto* situation.¹⁵ However, such non-recognition must be periodically renewed and must reflect a genuine will to oppose the actual situation. It therefore requires a certain degree of intensity.

Such are the rules shaped by the greater demands of relations between societies and the increasing rarity of undiscovered territory, and also by the exacerbation of political rivalries between States.

All we would need to do is verify their application to the situation of the archipelagos, were it not for the fact that the vicissitudes of history introduced other concepts whose legal content must be determined before we proceed.

Notion of State or government succession and its consequences

The issue of the international status of the archipelagos in the China Sea is greatly complicated on all sides by problems of State or government succession.¹⁶

¹³ Jean-Pierre Cot, *Chronique de jurisprudence Internationale, Affaire du Temple de Preah Vihear (1962) Annuaire Francais de Droit International*, at pp. 389 *et seq.*

¹⁴ Marcelo G. Cohen, *Possession contestee et souverainete territoriale*, Publications de l'Institut Universitaire des Hautes Etudes Internationales (Geneva, PUF, 1997), p. 492.

¹⁵ Gerard Cohen-Jonathan, *Les iles Falkland (Malouines) (1972) Annuaire Francais de Droit International*, at p. 240.

¹⁶ For an outline of these difficulties, see the note by the Foreign Ministry's legal adviser dated 25 May 1950, Annex II. It must be noted that the legal analyses favouring the Chinese position rarely take account of the various State successions, *inter alia* Jian Zhou, *op. cit.*

The case of Vietnam

On the Vietnamese side, 120 years were to elapse between the pre-colonial Empire of Annam and a sovereign, reunified Vietnam (the shelling of the port of Tourane in 1856 marked the start of the colonial conquest).

In the initial, somewhat uncertain period (lasting approximately until the nomination of Paul Doumer as Governor General in 1897), the Empire of Annam retained a degree of international personality through the system of the protectorate. Under the first Treaty (15 March 1874), the Emperor simultaneously promised '*to align his foreign policy on that of France and to change nothing in his current diplomatic relations*' (Article 3, paragraph 1) and retained the power to conclude treaties under certain conditions, albeit restrictive conditions under French control.

On 6 June 1884 a second Treaty of Protectorate, known as the Patenotre Treaty, came into force, giving France more swingeing powers. '*France shall represent Annam in all its external relations*' (Article 1, paragraph 2).

The personality of Annam, a highly fictitious one, was nevertheless preserved.

Its gradual incorporation into the Indochinese Union began with the decree of 17 October 1887. Its attachment to the Ministry of the Colonies was effective from 1894 onwards.

Therefore a first instance of *State succession* did take place, this being understood as '*the fact of the replacement of one State by another ... with respect to a given territory*'" ... and a given time.

The status of French colony left no room for an international legal personality, and the personality of France effectively replaced that of the Empire of Annam. The Patenotre Treaty had not been formally abolished, yet from 1885 onwards the situation was, *de facto*, a colonial one.^{1*}

The renaissance of the unified Vietnamese State was long and painful.

Although colonial France spoke for Vietnam from the time of the protectorate until the Japanese overran the French troops in Indochina on 9 May 1945, between 1945 and 1975 many voices were raised on its behalf.

A first declaration of independence was made by Emperor Bao Dai on 11 March 1945. However, on 19 August 1945 the Emperor abdicated in

¹⁷ Sir Humphrey Waldock (1968) *Yearbook of the International Law Commission*, vol. II, at p. 91. Quoted by Michel Virally in the preface to the work by Nguyen Huu Tru.

¹⁸ See on this subject Nguyen Huu Tru, *op. cit.*, pp. 44-50. The author bases his reasoning on some scholarly opinion and on judgments in French administrative jurisprudence which recognized the inclusion of Annam and Cambodia in a legal entity of French public law.

favour of the Revolutionary Government of Ho Chi Minh. The Revolutionary Government, which controlled Tonkin and Annam,¹⁹ proclaimed both independence and the creation of the Democratic Republic of Vietnam on 2 September 1945.²⁰

France found itself in a cleft stick: on the one hand, under the Agreement of 6 March 1946, it recognized '*the Republic of Vietnam as a free State having its own government, army and finances, and forming part of the Indochinese Federation and the French Union*' (Article 1); on the other it was endeavouring to reassert its sovereignty over Indochina and more precisely to obtain the withdrawal of Chinese troops from Vietnamese territory.

The issue of the international status of the Republic of Vietnam was the spark which ignited the armed colonial conflict. At the time France still considered itself to have sovereignty over Indochina, whereas Vietnam intended to make full use of its international personality.

From late 1946 onwards, therefore, competing claims to exercise acts of sovereignty emerged. Under such conditions, which country validly represented Vietnam in international law between 1946 and 1949?

Changing its strategy and banking on division, on 27 June 1947 France set up a Provisional Central Government of Vietnam in Saigon, recognizing its independence in the Along Bay Declaration of 5 June 1948.

The Agreements of 8 March 1949 created an Associated State of Vietnam. Thenceforth, with the agreement of France (although not without further hesitation), the Associated State of Vietnam had an international personality.²¹ Through a process of tortuous legal manoeuvres, France adopted a position under which Cochin China was incorporated into this State, which was then considered to be the successor to the Empire of Annam, formerly a protectorate.

This legal procedure counted for little. From 1949 to 1954, effective government was shared between: the French Expeditionary Force, which was still present along with political advisers; the Viet Minh Government, which controlled a large part of Tonkin and Annam and was internationally recognized by certain States from 1950 onwards; the Government of the Associated State, which controlled Cochin China alone.

¹⁹ But which had had neither the time nor the means to impose its authority on Cochin China.

²⁰ See Chronology, *supra*, p. 34.

²¹ See Nguyen Huu Tru, *op. cit.*, pp. 72 *et seq.*

Which country, therefore, was entitled to carry out international acts in the archipelagos? What was the value of such acts for the governments of later periods?

From 1954 onwards, under the Geneva Agreements, France recognized the full independence and sovereignty of the State of Vietnam. At the same time, the armistice agreements between the two high commands were concluded.

The Vietnamese military command represented the Democratic Republic of Vietnam, its French partner represented France alone, not the State of Vietnam, which rejected the Agreements.

So a further phase in the history of Vietnam commenced, one in which two States co-existed *de facto*, at war with each other, each claiming with different diplomatic support to represent the Vietnamese nation, and each having *de facto* only partial control over the territory and the population.

How should the acts concerning the archipelagos carried out by either State during this period be evaluated?

The case of China

Though not as complex, China's case also presents some interesting difficulties in terms of State succession.

The first arises from the fact that some of the instruments issued by China on the archipelagos (especially in 1921) were issued by a local government which was recognized neither by the Central Government of China nor by the European powers.

How far could the Central Government subsequently rely on these acts? Moreover, is it possible to interpret the relations of power within China, particularly the rules for attributing international powers, on the basis of categories shaped by western political and legal culture?

From 1949 onwards a second issue of State succession arose: should the People's Republic of China or Nationalist China succeed to the claims to the archipelagos formerly made by China?

International law on State succession is somewhat vague, providing only ill-defined solutions. It gives no precise guidance on how to identify the successor and predecessor States (or Governments) when there are several contenders. That is an issue settled bilaterally through the procedure of recognition. Confronted with several contenders, each member State of the international community is free to recognize the State or government it chooses.

The content of the rules of State succession

This content is itself equivocal, since practice is so diversified.²²

Nonetheless, contemporary international law has formulated and refined some recent principles which may be useful in seeking a solution to the dispute over the archipelagos.

First, the status of territories has an objective character in international law. Status remains valid not only for the signatories to a treaty (when status derives from a treaty) or for the parties directly concerned, but for all parties.

Second, there is the protection afforded to the right of self-determination of peoples under contemporary international law. It was written into the purposes of the Charter, in Article 1, paragraph 2, and has been echoed in many subsequent texts which have sought to flesh out all its consequences. Thus, resolution 1514 of 1960 entitled Declaration on the Granting of Independence to Colonial Countries and Peoples states:

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 (paragraph 4)

and also:

Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations (paragraph 6).

Similarly, resolution 2625 of 1970 entitled Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, having recalled the principle of the right of peoples to self-determination, states:

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised

²² There are two Vienna Conventions, one on the Succession of States in respect of Treaties (1978), the other on the Succession of States in respect of Matters other than Treaties (1983); neither has yet come into force, owing to an insufficient number of ratifications.

their right of self-determination in accordance with the Charter, and particularly its purposes and principles

and further:

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

Taken together, these texts show how contemporary international law, the law of decolonization, has developed protective principles designed to prevent decolonized peoples, emerging from a long colonial period, from losing some of their territory, whether by accident or by design on the part of the colonial power. Thus any weakening of the effectiveness of the administration of a territory cannot lead to a situation of *res derelicta*, if it can be ascribed to the policy of the colonial power.

Principle of the prohibition of the acquisition of territories by force

Traditional international law had made conquest an attribute of sovereignty. Admittedly, not quite as baldly as this, since the distinction between just wars and... others had been introduced into the debate on sovereignty from the very outset. After the upheaval of World War I, the League of Nations Covenant prohibited wars of aggression, then, on 26 August 1928, the Briand-Kellogg Pact sought to outlaw war through the voluntary renunciation of the signatory States. With Article 2, paragraph 4, of the United Nations Charter, prohibition of the use of force assumed the value of a legal principle applying to all States.

The principle formulated in 1945 was developed and reinforced in Resolution 26/25 (1970).

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.

The same text also stipulates that:

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

Hence, the politics of the cannon can no longer have any legal effects. The use of force cannot form the basis of law.

Notion of the critical date and the moment of crystallization of the dispute

International disputes over territories are often extremely protracted. The notion of the critical date is introduced into the discussion for the sake of clarifying it. And yet one should not expect more from this notion than it is able to provide. Neither scholarly opinion nor case-law has truly defined what should be understood by the critical date, or its actual effects. While many authors concur that it signifies the date after which the acts of States can no longer modify their respective laws,²³ the idea of the crystallization of the dispute nevertheless introduces confusion. Crystallization would be the result of an impasse, the Parties having declined to negotiate, protest or endeavour to persuade one another.

The notion of the critical date has been played down somewhat both by the case-law and by authors.

in the *Minquiers and Ecrehos* case, the disagreement between France and the United Kingdom on the critical date spanned more than a century (for France it was 1839 and for the United Kingdom it was 1956).

The Court accepts the idea of the crystallization of a dispute, the evidence subsequently established no longer having any effect. The critical date is fixed as the moment a formal claim is expressed. However, it does not decline to consider events subsequent to that date as the manifestation of a continued development and '*unless the measure in question was taken with a view to improving the legal position of the Party concerned*'.²⁴

In the *Eastern Greenland* case, the Court opted for a critical date of 10 July 1931, the day Norway occupied the disputed territory. Denmark, claiming already at that time to have a long-established title, had to prove the validity of the title on that date.²⁵

Hence, the view expressed by A.G. Roche in 1959 is still valid and likely to remain so.²⁶

In brief the Court left itself considerable discretion as far as future cases are concerned, since the rules applied are only

²³ See Jean-Pierre Ferrier, *op. cit.*, pp, 187 *et seq.*

²⁴ International Court of Justice, *Reports*, 1953, at p. 59.

²⁵ Case concerning the Legal Status of Eastern Greenland, Permanent Court of International Justice, 5 April 1933, *Reports*, Series A/B, at p. 45.

²⁶ A.G. Roche, *The Minquiers and Ecrehos Case* (Geneva, Thesis No. 115, 1959), p. 104.

prima facie rules which may be displaced by the Parties and are anyway not well enough rooted in judicial procedure as to be virtually binding on the Court; it is therefore impossible to predict what exactly will be the attitude adopted by the Court in any future cases.

In reality, from this angle, every dispute is unique, some developing very gradually, while others are periodically active and then dormant, as well as sometimes experiencing decisive accelerations.

Some authors have ventured an opinion on the critical date in the dispute over the archipelagos in the South China Sea.

Choon-ho Park sees the start of the dispute as going back to the 1880s, which in his view saw the beginning of a genuine dispute about control over the islands. And he invokes the 1887 frontier delimitation Treaty as the point when the conflict started to accelerate.²⁷ It is hard to endorse this view. The Franco-Chinese Treaty of 1887 does not deal with the archipelagos and could therefore have no legal consequences for their status, even indirectly.

If the 1880s are pivotal to this conflict, it is for another reason already explained. At that time, the Vietnamese title was real and effective. It was not challenged by China either on the ground or at the diplomatic level. These are the years when Vietnam changed hands following the reinforced Protectorate of 1884. The ignorance or negligence of the colonial power, if exploited by a rival State turning this situation to advantage, could not lead to the creation of rights in respect of that rival State.

It is for this reason, not for the reasons given by Mr Choon-ho Park, that the 1880s were pivotal years in this dispute. Of particular relevance at this point is the reasoning of Judge Max Huber when he wrote:

It is not necessary that the display of sovereignty should be established as having begun at a precise epoch; it suffices that it had existed at the critical period preceding the year 1898.²⁸

As regards the contemporary conflict over the Paracels and Spratlys, in the absence of the expression of the Chinese claims in the 18th and 19th centuries, it is crucial to the argument that the exercise of Vietnamese sovereignty was not opposed for a very long period.

²⁷ Choon-ho Park, 'The South China Sea Disputes' (1978) 5 *Ocean Development and International Law*, 1 at p. 33.

²⁸ Arbitral Award of 4 April 1928 between the United States of America and the Netherlands in the dispute concerning sovereignty over the Island of Palmas, 2 RIAA (1929) at p. 867.

Kriangsak Kittichaisaree however distances himself considerably from the notion of the critical date, though he also acknowledges that the rival claims did not really emerge until after the 1880s.²⁹

And Jean-Pierre Ferrier - noting that judges or arbitrators never defined the question of the critical date when this was put to them, nor offered any criterion - recognizes the importance of the year 1937 (which marked the effective French occupation, but also the proposal made by France for a judicial or arbitral settlement of the dispute over the archipelagos).

However, he regards the date of 1954, the date of the end of the French presence in Vietnam, as the most likely one to symbolize the crystallization of the dispute.³⁰

Without making too much of the notion of the critical date, it is important to remember that this question is linked to that of the legal nature of the dispute. Contrary to what is often asserted, the dispute does not concern the legitimacy of the acquisition of a territory by a State having embarked on the acquisition of a *res nullius*. Nor is it a matter of rivalry between two States making comparable claims, whose respective legal weight would have to be evaluated. More simply, there is a well-established title, the title of the rulers of Vietnam peacefully exercised for decades, which needs to be examined in order to establish whether it may have been lost in favour of the acquisitive prescription by another legal subject.³¹

We must utilize these various legal tools here in order to examine what has become of the rights asserted by the various Parties during first the colonial and then the post-colonial era.

THE FATE OF THE ARCHIPELAGOS DURING THE COLONIAL PERIOD

The fate of Vietnam's title, which had been solidly established during the 18th and 19th centuries, was to become linked to subsequent political events.

The Vietnamese dynasty, weakened by conquest and by the speed with which France transformed a protectorate into a virtual colony, voiced its claims to the islands in muted tones. However, it did voice them whenever it had an opportunity to do so.

At the outset, France showed little interest in the archipelagos. It was not absent from them, but did not initially consider them to be an integral part of

²⁹ Kriangsak Kittichaisaree, *op. cit.*, p. 142.

³⁰ Jean-Pierre Ferrier, *op. cit.*, pp. 189 *et seq.*

³¹ See Sir Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice' (1955) 6 *British Yearbook of International Law* at pp. 30 *et seq.*

Vietnamese territory. It let matters drift, and when China's claims became insistent, it dithered, procrastinated and hesitated. In the closing years of the 19th century, and the early years of the 20th century, China was not in the least interested in these unprepossessing islands. It even disowned them. Then Japan entered the scene as a rising power. China was the first to realize the threat. Several years later, France made up its mind and voiced its claim in unequivocal terms. It exercised sovereignty. In the meantime, it had learned of the long history of the Vietnamese maritime companies operating in the archipelagos and was in a position to pose as successor. It did so selectively. Its knowledge of the historical facts was approximate. Lacking sufficient information, it thought in terms of State succession for the Paracels alone. For the Spratlys, it preferred to rely on the status of *terra nullius*, claiming original rights of acquisition.

From 1909 onwards, protest and the absence of protest criss-crossed in an intricate pattern. Nothing remained that was peaceful or spontaneous. Everything was dictated by the ulterior motive of outflanking rivals and accumulating evidence. Salvoes of discovery rang out over the islands. In the Paracels, they were sometimes Chinese and sometimes French. Later, in the Spratlys, they were French, but also Filipino or Taiwanese.

The colonial period was followed by the painful Japanese episode. The islands were a prize of war, coming under the control of the Japanese Navy. The departure of the Japanese corresponded to a period marked by the quest for independence, and another era was born.

The actions of China, and those of France until it left the region, will be examined in turn *infra*.

It will also be necessary to consider the attitude of the United Kingdom (which had shown interest in certain islets in the Spratlys), and naturally that of Japan as well.

In the course of these twists and turns, there is no doubt that the title acquired by the Vietnam of old was weakened and challenged. Our examination will focus on its possible loss, or continued existence. World War II, however, constitutes too great a rift to be disregarded. The acts of the various States cited will therefore be examined both in the pre-war period then in the immediate post-war period.

From the French colonization of Indochina to World War II

The policy of China

a) Lack of interest on China's part

Between 1884 and 1909 there was no hint that China had any interest in these slivers of land. Quite the reverse.

Only one incident is related by historians. It appears to bolster the thesis of Chinese acquiescence in the occupation of the islands by other countries. It was described by P.A. Lapique:

Two of the many shipwrecks in the Paracels caused disputes which deserve mention, that of the German vessel *Bellona* on North Reef in 1895 and that of the Japanese vessel *Imezi Maru* in the Amphitrites in 1896.

Both vessels were carrying a cargo of copper insured with British companies. It proved impossible to salvage the cargo and the wrecks were abandoned. Chinese sailors in sampans or small junks looted the wrecks and landed the copper at Hainan. The insurance companies then requested the intervention of the Minister of Great Britain in Peking and their Consul in Hoihow, who sought to hold the local mandarins responsible.

The mandarins protested, stating that the Paracels did not belong to China, were not administratively attached to any district of Hainan, and they denied liability.³²

This incident is also reported in a Note of 6 May 1921 from the Government General of Indochina (Directorate of Political and Indigenous Affairs). The text is more specific, reading as follows:

The mandarins protested, claiming that the Paracels were abandoned islands which belonged to China no more 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

Both versions clearly state that the authorities at local level firmly rejected any idea of Chinese sovereignty over the islands. This view is of considerable significance. They were local authorities and therefore in the best

³² P.A. Lapique, *op. cit.*, p. 4.

³³ See Annex 12.

position to know the true situation. They stated that the islands had not been administratively incorporated, thus providing evidence of the absence of administration.

Nevertheless, according to the Government General's Note, the mandarins also stated that the islands did not belong to Annam. It cannot therefore be inferred from these incidents that the Chinese authorities acquiesced in any way whatsoever in Vietnamese administration. On their part there was no more than ignorance of the fate of the archipelagos and lack of interest in them.

The contention echoed by most Chinese documents that Germany became interested in the islands in 1883 and ceased all activity in the vicinity only at China's insistence is contradicted by the attitude of the mandarins related in the documents cited and is not based on verifiable references.³⁴

b) Reversal of China's attitude

The Chinese action described *infra* indicates a complete change of tack. It dates from 1909. Alerted by the fact that in 1907 the Japanese had laid their claim to the Pratas (another archipelago lying north-east of the Paracels), the Chinese wished to outflank any Japanese claim to the Paracels and initially contrived a reconnaissance mission to the islands.³⁵

The Viceroy of the Two Kwangs sent three officers on an exploratory expedition (in April 1909). They brought back a descriptive report on the islands, which is evidence of the lack of knowledge then prevailing in China. It was a true journey of discovery for the Chinese. They noted traces of the passage of foreigners at various times in history. On reading the report, the Viceroy then planned a more systematic exploration. To this end, he borrowed the cruiser *Yuen K'ai* from his colleague the Viceroy of Min Chen and, as the Consul of France reported, '*Admiral Li was requested to provide the explorers with all possible assistance*'. Hence a fresh Chinese expedition left Hong Kong on 21 May 1909; it returned to Canton on 9 June, somewhat disillusioned. Nonetheless, the expedition had raised the Chinese flag on the islands and had displayed China's sovereignty. The Cantonese authorities then planned to develop local trade in the Paracels. This account confirms that the Chinese had sketchy knowledge of the archipelagos at that time, since the first expedition was exploratory, and also the fact that they had not been convinced of their rights to the islands, since they asserted these rights by means of symbolic acts.

³⁴ See Jian Zhou, *op. cit.*, p. 268 and *Nouvelles sinologiques*.

³⁵ Note dated 4 May 1909 from the Consul of France in Canton. See Annex 13.

The Chinese documents give a different version of the facts.³⁶ They speak of a tour of inspection, as if the islands were well known. To justify raising the flag and firing a salvo (which are recognized facts), they state that this reasserted China's sovereignty, the reiteration implied in the prefix 're' evoking the idea that the same ceremony had taken place before, with no mention of where, when, or how. There is disagreement as to the duration of Admiral Li's voyage, which some authors claim lasted one month.³⁷

P.A. Lapique, then living in Hong Kong, gave his own interpretation of the events of 1909 in the following words:

As for the Paracels, I have some personal memories dating back 20 years or so. Late in 1908, being then resident in Hong Kong, I was approached by some Cantonese friends who were planning an expedition to the Paracels. The idea was to verify various assertions that the islands were covered in guano and that whole cargoes of pearl oysters were there for the picking around the reefs. Apparently what interested them more than my ability as a sailor to reach the islands was the fact that I was French. Although sorely tempted by this adventure, I was unable to take part, the Company which employed me having decided otherwise, sending me to the frontiers of Tibet at the time of the projected excursion to the Paracels.

Nonetheless, I was aware of some of what transpired. An expedition to the Paracels did take place in May-June 1909, but was more in the nature of a private venture. It might not even have had any link with the original project.

At that time the emotion aroused in China by the Japanese claims to the Pratas had not subsided. The officials doubtless sought to regain face by organizing an expedition to the Paracels, or by mounting a show of annexation. For whatever reason, an expedition did take place, and is worth mention. In late May 1909, two small Cantonese gunboats set sail, with two Germans from the Carlowitz Company on board, as well as Chinese sailors including an admiral. The latter was a 'river' admiral, so it would seem, for although the little fleet, advancing in the lee of the land, quite easily reached the port of Yu-Lin-Kan at the south end of Hainan, it tarried there at least a fortnight, doubtless waiting, before tackling the ocean, for the

³⁶ *Nouvelles Sinologiques*, no. 8, at p. 17.

³⁷ Jian Zhou, *op. cit.*, p. 277. In a similar vein, M.S. Samuels, *op. cit.*, pp. 53-54.

'Fong Sani' to be favourable and not afflict the bold navigators with seasickness. On 6 June (the nineteenth day of the moon) the expedition sighted one of the Paracel islands, and visited some of them. On 7 June, at 4 in the morning, both gunboats returned to Canton by the direct route, as the '*Kouo Che Pad*' (the main newspaper of Canton) informed its readers in an article dated 20 June 1909.

The author continued in ironic vein:

It would seem that the French administration, were it even informed, was not overly concerned by this display. Yet it would have done well to study the expedition attentively, not least for the purpose of teaching our Navy's hydrographic service the techniques which allowed the Paracels to be explored and a general map produced within the space of 36 hours, together with a further 15 special maps of the same islands and 10 photographs, not to mention a study for two commercial ports and a bridge to link two of the islands!!!

P.A. Lapique added that nothing further happened until 1920, save for the passage of cruisers belonging to the Indochinese customs service, which occasionally visited the various islands and archipelagos; nothing which corresponded to an administration of the islands.

c) Confirmation of the Chinese intention to act as sovereign of the islands

A further manifestation of the Chinese intention to attempt to recover the islands occurred in 1921.

By an 'order' dated 30 March 1921, the civilian Governor of Kwangtung incorporated the Paracels into the sub-prefecture of Yai Hien (Hainan). This was done in the name of the military government controlling the south, which doubtless explains why the central Chinese Government, even today, does not rely upon it.

The Legation of France in China became concerned, but did not lodge any official protest, to avoid '*stirring up Chinese nationalism*'. It decided to ignore the order, since it was issued by a government which was recognized neither by the central Government of China nor by foreign States.

However, this administrative incorporation was not totally devoid of practical consequences. Correspondence between Mr Beauvais, Consul of France in Canton, and the French Foreign Minister clearly revealed that France followed with interest the trading concession awarded by the Government of Kwangtung, in 1921, to a Chinese merchant named Ho Jui-Nien.

The French Government kept a particularly close eye on the matter because some Chinese newspapers attacked the merchant, claiming that he was no more than a figurehead for Japanese interests, and demanding that the concession be revoked.³⁸

Some Chinese authors state that China subsequently continued to award licences to mine or otherwise exploit the islands, even doing so via a national company.³⁹

d) Renewed Chinese interest in the Paracels (1928)

It was from 1928 onwards that Chinese interest in the Paracels again became active. A commission was set up, which inspected the Paracels and submitted documents. The documents were summarized in a report reasserting the Chinese claims to the islands and presenting ambitious projects to exploit them. However, probably as a result of the Chinese domestic situation, the projects came to naught, all the more so in that other interests showed their hand. In March 1932, the Chinese put the rights to mine guano in the Paracels up for public auction in Canton. This prompted a protest by France, which handed China a previously prepared Note in which the French Government asserted its rights and offered to take the matter to arbitration, should China not recognize these rights. China then based its claim on the fact that Vietnam had been its vassal before the colonial period.

The situation on the eve of World War II was as follows: the Chinese acts of 1895-1896 (refusal to accept liability for shipwrecks in the Paracels on the grounds that the islands were not attached to China), and 1909 (exploration and salvoes fired to proclaim sovereignty) weakened all the other assertions that the Chinese occupation had lasted thousands of years, since time immemorial; they dated Chinese interest in the territories as being recent. The acts of 1909, plus a few concessions and an apparently symbolic administrative attachment, marked an interest which did indeed exist but these acts were not sufficient to constitute a long, effective, peaceful, continuous occupation. They were carried out by a government which had no place in the continuity of the Chinese State. Therefore China did not fulfil the conditions required to create a situation (comparable to the Island of Palmas case) in which it would have acquired, on the grounds of effective authority, rights which would allow China to supplant Vietnam. Over the entire period (1884-1939) the acts advanced by China concerned the Paracels alone. On the eve of the War the Chinese position was explicit. In a

³⁸ See letter of 6 October 1921 from the official in charge of the French Consulate in Canton to the Foreign Ministry, Annex 14.

³⁹ Jian Zhou, *op. cit.*, p. 280.

Note dated 18 July 1938, the Embassy of China in Paris publicly asserted the Chinese rights to the Paracels. There was never any clear mention of the Spratlys.

*The attitude of France from taking possession of Indochina until
World War II*

The French attitude needs to be analysed over two different periods of time. Until the late 1920s, France showed very little interest in the archipelagos. It was not aware of Annam's former rights and its concern was solely to prevent others from controlling the islands and thus constituting a threat to the gateway to its colony of Indochina. However, from the late 1920s onwards, an unequivocal French claim emerged, based for the Paracels on succession to the rights of Annam and for the Spratlys on the principle of discovery. This claim was made official by a solemn taking of possession and by a genuine administrative organization.

a) The first period of colonization. The hesitations of France

At the beginning of the colonial period in Indochina, France's actual conduct in the archipelagos bore little relation to an assertion of sovereignty (sporadic acts, deliberate but not taken to completion, revealing the intention to explore and survey rather than to possess).

Moreover, diplomatic correspondence revealed on the part of various French authorities a genuine ignorance of the former rights of Annam, and a somewhat passive attitude towards China's claims.

For a long time France's interest was very remote.

It cannot be said that colonial France lacked interest in the archipelagos. However, it did not actually express the intention to act as sovereign.

The Ministry of the Colonies and the Government General of Indochina envisaged sovereignty over the Paracels as early as 1898.

A journalist, Mr Chabrier, had declared his intention of establishing in the Paracels stores to sell provisions to fishermen. On the advice of Mr Michon, then Minister in Peking, Mr Doumer replied (in June 1899) that Mr Chabrier's venture had no chance of success but that, with the aim of preventing another power from establishing a presence in the islands, it might be opportune to build a lighthouse in the archipelago in order to assert our sovereignty.

This was not done, since the construction of a lighthouse appeared to be more useful for navigators at Cape Parella than in the Paracels.

Moreover, the French Navy was regularly present in the archipelagos in the form of tours by cruisers belonging to the Indochinese customs service. This was related by P.A. Lapique,⁴⁰ whose information confirms a certain French presence.

According to this author, French naval cruisers used to visit the archipelagos at the request of the Consuls of France in Hainan, whenever the wives or children of the Annamese fishermen were captured by the Chinese 'to be sold'. They also intervened when information was received that arms, munitions or opium were being stored on the islands. Thus a French naval police service of a sort did operate.

P.A. Lapique even described the seizure by a French ship of a Japanese vessel loading phosphates at Woody Island. However, the Japanese captain claimed to have the permission of the Commander of the Navy in Saigon, and the author concluded that the Japanese had behaved correctly towards the French authorities, and had not disregarded their rights to the Paracels.

Lastly, in 1925 Mr Krempf, director of the Oceanographic Service of Indochina, surveyed the archipelago.

The interest expressed in the form of these various activities was real. Yet was it specific enough to be categorized as the intention to act as sovereign?

For some time, French intentions were shrouded in uncertainty.

Over the same period, diplomatic correspondence up to the late 1920s (and other archive documents) reveals that France had not made up its mind in respect of the archipelagos, or more precisely the Paracels, the Spratlys being rarely mentioned.

A Note of 4 May 1909 from the French Consulate in Canton (i.e. after the Chinese expedition to the Paracels) stated:

Mr Beauvais contends that France would have as many rights to the islands as China and that it would be easy for us to find arguments to support our claims. However, should the game not be worth the candle, it would perhaps be preferable, in his view, to turn a blind eye to what is now happening, since an intervention on our part might lead to a fresh wave of nationalist

⁴⁰ *Op. cit.*, p.9.

feeling in the population, more damaging to us than the possession of the Paracel Islands would be useful.⁴¹

This opinion was to persist until the late 1920s, expressed in slightly different terms by various authorities. Overall, France did not pose as successor to the rights of Annam, and did not know how solid such rights had been; France might well be a '*candidate*' for sovereignty over the Paracels but not at the price of too sharp a deterioration in its relations with China.

This was made very clear in a Note from the Foreign Ministry, cited *supra*. Recalling the opinion of Mr Beauvais, it stated:

My Ministry agreed with Mr Beauvais and we allowed the Chinese to do as they pleased.

Since a gap of 12 years had elapsed between Mr Beauvais' opinion and the Note in question, France showed a very marked lack of interest at the time.

A minor commotion was created by an incident reported by P.A. Lapique, mentioned *supra*, and positions began to be contradictory. On 20 September 1920, a Japanese company wishing to mine phosphates on Woody Island applied to the Commander of the Navy in Saigon, asking whether the Paracels were a French possession. The application proves that, at that date, Japan was concerned about France's possible rights.

In his reply, the Commander of the Navy in Saigon stated:

There is no paper in the official documents of the Navy allowing the nationality of the Paracel Islands to be determined. Nevertheless, I believe that I can assure you that they are not a French possession, but this assertion is based solely on my personal memories and I cannot provide you with any conclusive document in support of this.

As can be seen, the Commander of the Navy, aware that he had no authority to speak, acted with caution.

The press having reported the absence of any claim on the part of France, the Ministry of the Colonies was alerted and requested further information from the Foreign Ministry.

All correspondence exchanged on that occasion, dating from the 1920s, revealed France's hesitations. In that initial phase, it was unsure of its rights. When China announced that the Paracels had been administratively incor-

⁴¹ See Annex 13.

porated into Hainan, Paris debated whether it was necessary to protest against the incorporation and to declare the islands a French possession.

It can even be seen that some political authorities did not rule out negotiating the abandonment of all French rights in exchange for other French interests in China.⁴² However, negotiating the abandonment of its rights meant recognizing that it had rights.

It would perhaps not be excessive, in exchange for official recognition that the Paracels are Chinese, to request a formal commitment from the sovereign Government never to set up a military or naval base there and to install no facilities to that end.⁴³

in a letter to the Foreign Minister dated 25 October 1921, France's Charge d'Affaires in China referred to the difficulty there might be in negotiating with China at that time, in view of the absence of a 'Chinese Government'.

Yet from 1922 onwards a degree of concern surfaced at the idea that complaisance towards China might eventually serve Japanese ends.

All the above relates to the Paracels alone. As for the Spratlys, a letter dated 24 December 1927 from Governor General Pasquier to the Minister for the Colonies reported the interest shown by the Japanese in certain islands.⁴⁴ The Governor added:

It would seem that France has never voiced any claim to these islands, which belong more logically to the Indonesian archipelago than to the Indochinese peninsula.⁴⁵

A Note of 8 March 1928 similarly states:

The islands in question belong neither politically nor geographically to the coastline of Annam.⁴⁶

A further Note of 26 November 1928, addressed to the Under-Directorate for Asia and Oceania, questioned whether the islands (the Spratlys) were indeed

⁴² See note of 6 May 1921 from the General Government of Indochina. Annex 12.

⁴³ Quoted as the view of the Governor General of Indochina in a letter of 18 April 1921 from the Minister for the Colonies. Annex 16.

⁴⁴ M.S. Samuels (*op. cit.*) contends that, for the Japanese, it might have been feasible to discuss with France the status of the Spratlys, but not that of the Paracels, which at the time Japan considered to be a matter between itself and China.

⁴⁵ See Annex 17.

⁴⁶ Annex 18.

terra nullius and repeated that no decision had yet been taken as to French sovereignty over the Paracels.⁴⁷

Various letters or notes exchanged in 1929 between the Resident in Annam and the Chief Resident in Tonkin show that the status of the Paracels remained obscure for these senior officials. However, they also show that France never officially recognized China's rights and hesitated to develop its own rights owing to the climate of nationalist feeling in China.

What legal conclusions may be drawn from this period (from initial colonization until the late 1920s)?

- France had not clearly asserted its sovereignty; nevertheless it had never officially recognized Chinese sovereignty. Rather, in the correspondence analysed, it gave the impression of waiting for a propitious moment to recall its rights and then to negotiate them.

- Although it was not active in the archipelagos, it was not completely absent from them either. Such acts as it did carry out were unassertive and sporadic, and it may be asked whether they were actually a genuine factor in maintaining and consolidating effective occupation.

- This hesitant, half-hearted attitude being the act of the colonial power, not the initial holder of title to sovereignty, did not entail any interruption of the rights previously acquired by a people which was dominated at the time, therefore reduced to silence. All the more so in that France took no steps legally to renounce its rights in favour of some other sovereignty.

b) The second period of colonization (until World War II). The clear and official assertion of French sovereignty over both archipelagos

Finding himself obliged to reply to the New Phosphates Company of Tonkin, which sought to work the Paracels, the Governor General of Indochina, writing to the Minister for the Colonies on 17 December 1928 and denouncing '*the ever-increasing megalomania of Chinese nationalism*', clearly stated: '*It is therefore time for us to take the initiative and to assert rights which appear to be recognized both in historical documents and by geographical realities.*'⁴⁸

Seeking to buttress the French position, the Governor General asked the Chief Resident in Annam for full information, which the Resident supplied in the letter dated 22 January 1929, cited *supra*.⁴⁹ This document is extremely important. The Resident recalled the rights which Annam had

⁴⁷ Annex 19.

⁴⁸ Annex 20.

⁴⁹ Annex 8.

long asserted and maintained, then noted that Annam's coastal fishermen (at the time he wrote) no longer visited the islands. However, appearing to remember the status of *protectorate* initially granted and with it the possible and necessary expression of the views of the interested parties, he wrote as follows;

Our proteges, therefore, appear not to have asserted their ownership of the Paracels for many years, although His Majesty Than-Trong-Hue, former Minister for War who died in 1925, did affirm in a letter of 3 March of that year that 'the islands still belong to Annam, there is no dispute on this score'.

The Resident deplored the passive attitude of France faced with the Chinese claim of 1909.

Thus, even through the colonial system derived from the protectorate, the few people who had occasion to speak on behalf of Vietnam did so in terms which revealed the continued intention to act as sovereign.

The French Foreign Minister formally noted (in a letter of 26 February 1929) that there appeared to have been a reversal of the French position adopted in 1921, and requested further information.⁵⁰

As is often the case, Paris knew less about the situation than some local authorities. Writing to the Foreign Minister on 18 February 1929, the Minister for the Navy (standing in for the Minister for the Colonies) still urged a waiting game.

Even so, he referred to information which had reached him, stating:

Annam however possesses historical rights over this group of uninhabited islands which are much less open to question than those which Nationalist China might claim.⁵¹

Of all the authorities involved, Pasquier (Governor General of Indochina) was the slowest to understand both Annam's ancient rights and the interest the Paracels represented for France. On 3 April 1929, he sent a telegram which advocated maintaining the attitude adopted in 1921,⁵² However, in November the same year, a French Senator, Mr de Monzie, wrote to the Minister for the Colonies:

The rights of Annam, and therefore of France, to the Paracels seem to have been beyond dispute since the 17th century, and

⁵⁰ Annex 21.

⁵¹ Annex 22.

⁵² Annex 23.

the islands would be an excellent place to install a radio station to provide advance warning of typhoons.

The Ministry of the Colonies then urged Pasquier to explain his reticence, Pasquier studied the whole case, and his correspondence in March 1930 reflected the shift in his views. He became convinced of the validity of Annam's rights. However, his fears concerning China still prompted him to advocate a waiting game.⁵³

A Note from the Quai d'Orsay, signed Knobel and dated 19 June 1930, finally asked the correct legal question. Had the sovereignty plainly acquired by Annam been lost since it had not been exercised? The author concluded that it was not so. He relied on the study by P.A. Lapique, stating that the Paracels had not been abandoned and therefore had not become *res nullius*.

The Representative of France in China remarked that there had therefore been a return to the former view and noted the long absence of any protest by France against Chinese actions.⁵⁴

Governor Pasquier's letter dated 18 October 1930 put an end to France's hesitations."

Thenceforth, all French documents reflected the clarification of the situation. Annam had possessed rights since the 18th century. China had endeavoured to assert its rights only since 1909. Yet it could not be said that at that precise time Annam's rights had been extinguished. The French position was therefore to have the '*appearance of a simple exercise of pre-existing sovereign rights*'.⁵⁶

A further telegram of 19 July 1931 from the French Foreign Ministry revealed further hesitation; France did not rule out being obliged to recognize Chinese sovereignty.

Finally, on 4 February 1932, a Note was addressed to the Legation of China, asserting France's rights, but offering to take the matter to arbitration should China reject these rights.

China's reply was dated 29 September 1932. It was confused, the confusion springing from the names used for the islands (the Chinese referred to another archipelago, 150 miles away). Moreover, the reply relied on the Sino-French Treaty of 1887; yet, as expounded *supra*, the Treaty is irrelevant in this case.

⁵³ Telegram of 14 March 1930, Annex 24.

⁵⁴ Peking, 28 July 1930. Annex 25.

⁵⁵ See Annex 26.

⁵⁶ Official telegram of 4 July 1931. Annex 27.

Towards the end of this period, France at last asserted its rights over the Paracels in unequivocal terms. Some authors maintain that it did so formally in March 1925.⁵⁷ What is certain is that an initial decree (n° 156-SC), issued by the Governor General of Indochina on 15 June 1938, created a *delegation* (administrative unit) covering the Paracels, and incorporated them into the province of Thua Thien (Annam), and that a second decree of 5 May 1939 signed by Jules Brevie created two administrative *delegations*, one covering the Crescent group of islands, the other the Amphitrites. The officials heading the *delegations* were given the title of Delegates of the Resident of France in Thua Thien. They were supposed to reside on Pattle Island and Woody Island respectively.⁵⁸ The inhospitable nature of the islets must be borne in mind. It explains the gap between the intention to act as sovereign and actual administrative occupation. The latter happened gradually. Not until 1938 was there was a permanent military presence. However, contrary to the contentions of some Chinese authors, there was no 'use of force' against the Chinese, since there was nothing that might be characterized as a Chinese occupation.⁵⁹

All the correspondence analysed *supra* relates to the Paracels. France appears not to have adopted the same attitude for the two archipelagos. The Spratlys were a simpler matter. In March 1929, an application having been submitted to mine guano, Governor Pasquier saw no objection, adding however the rider:

Permit issued at the risks and perils of the parties concerned should this group of islands be validly claimed by some other power.⁶⁰

This reflected the doubt which persisted in the Governor's mind.

The French Foreign Minister asked the Consul of France in Manila about any claims the Philippines might have. The Consul replied on 22 March 1929 that the Philippines had shown no interest.

Nowhere in the case is there any trace of any Chinese claim whatsoever to the Spratlys throughout the colonial period.

Japan, however, did express an interest in 1929 in the form of an inquiry made by its Consul General in Hanoi. This spurred the French colonial administration into action.⁶¹

⁵⁷ See Jean-Pierre Ferrier, *op. cit.*, p. 182.

⁵⁸ See Annex 28.

⁵⁹ Jian Zhou, *op. cit.*, p. 306.

⁶⁰ Annex 29.

A communique of 23 September 1930 notified third States that France had occupied the Spratlys. A formal ceremony of occupation was held in April 1933. It was announced in the *Official Gazette* of 26 July 1933. Six islets were mentioned in the text and precisely described. The only protest against this assertion of sovereignty was lodged by Japan, China remained silent. On 21 December the same year, the Governor General of Cochin China, Mr J. Krautheimer, signed a decree incorporating these islets into the province of Ba Ria.⁶² Does this mean that France had asserted its sovereignty only over the specifically mentioned parts of the archipelago, leaving the status of the remaining islands and islets open? Here we come to a point of legal theory defended notably by the arbitrator Max Huber in his Island of Palmas Award. He contended that when a group of islands forms a unit, the fate of the main part may determine that of the remainder. In view of the fact that, however scattered they may be, these fragments of land form a geographical unit, and that in the years concerned (1930-1933) there were no other acts of taking possession, the theory of the unity of legal status is applicable here - all the more so in that archive documents, notably a letter from the French Ministry of Defence to the French Foreign Ministry, indicate that it was indeed France's intention to extend its occupation to the entire archipelago.⁶³

Thus, before World War II, the French authorities manifested their intention to act as sovereign over both archipelagos, taking effective possession of them, albeit after quite a long period of hesitation.

For the Paracels, this took the form of an assertion of the continuity of the rights of Annam. For the Spratlys, sovereignty was manifested on the basis of a situation of *terra nullius*.

Were rights established for States other than China or France?

There are two cases that need to be examined, though they will not detain us for long. These are the cases of Japan and Great Britain.

a) Japan

There was no Japanese claim prior to the months leading up to World War II. There was even an explicit lack of interest referred to by the Acting

⁶¹ 'La pousse nippone vers l'Ouest, Occupation des Spratleys' (1939) *Revue des troupes coloniales*, at p. 463.

⁶² Annex 30.

⁶³ Letter of 30 March 1932 from the Minister for Defence to the Foreign Minister. Annex 31.

Governor-General of Indochina in a letter dated 25 December 1927 to the Minister for the Colonies. In this letter, he mentioned that the Consul General of Japan had told him that the Paracels were of no interest to the Japanese Government.⁶⁴ Talks were held between Japan and France in Paris in August 1934, confirming Japan's renunciation of its claims.⁶⁵ However, in the course of its rise to military power in the late 1930s, Japan made a move towards the islands. Under the pretext of mining guano, Formosan militia led by Japanese officers set up a camp on the islands.

The Imperial Japanese Government annexed the islands by decree in 1937 and attached them to the administrative district of Formosa.⁶⁶ However, this was more lust for power than legal argument. The Japanese army occupied the Spratlys in 1939 and the Paracels a little later. France protested, but World War II was then looming on the horizon.

b) Great Britain

When in 1930 France began to indicate its intention to assert its sovereignty over the Spratlys, the British Consul General in Saigon informed the Foreign Office, noting that certain islets had apparently been occupied by British subjects in 1877 with the consent of Her Majesty's Consul General in Borneo. Voluminous diplomatic correspondence was exchanged on the matter and legal experts were consulted.

Yet Great Britain decided not to assert any rights, considering that the acts actually performed by the British subjects were too slender a basis to have constituted an 'inchoate title' and that, in any case, there had been no subsequent consolidation. This is why this case has been examined by authors under the heading: abandonment of territorial claims.⁶⁷

What can be said on the date when this period ends (1939)? Everything turns upon two interrelated matters with a legal dimension: were the rights acquired by Annam before the protectorate abandoned under the French administration? Was their abandonment greater in the case of the Spratlys than in that of the Paracels? Did this abandonment lead to the creation of a title for another power such as China or Japan?

On the first point, no abandonment can be discerned in legal terms. Indeed, in the last decade (before the War), there was even an affirmation or reaffirmation of France's rights. Yet the long period of French uncertainty or

⁶⁴ Quoted by J. Leune in *Mer et Colonies*, August-September 1938.

⁶⁵ See Ministry of Foreign Affairs Note, 10 August 1940, Annex 32.

⁶⁶ Same correspondence.

⁶⁷ Geoffrey Marston, 'Abandonment of Territorial Claims; the cases of Bouvet and Spratly Islands' (1986) 2 *British Yearbook of International Law*, VII.

hesitation put the Vietnamese title on ice as it were and there must be a question mark over its vitality after thawing out. Apart from the diplomatic correspondence, the legal force of other elements of the case needs to be weighed up. An example is a report by Chief Engineer Gauthier dated 26 November 1937 at Haiphong. It gives an account of a civilian mission aimed at displaying France's interest in the Paracels. True, from start to finish, the text of the report reveals, *on that date* (1937), his ignorance of the ancient links between these islands and Vietnam and for him the archipelago is not under French jurisdiction... or Chinese jurisdiction either for that matter. This administrative report is not binding on the official authorities. By entrusting Gauthier with this mission, these authorities, in other words the Governor-General, clearly had the exercise of French sovereignty in mind. By the time of the Decree of 15 June 1938 administratively attaching the Paracels to Indochina, that exercise became completely official.

The fact that the maps of Indochina printed by France throughout this whole period do not include the archipelagos must also be interpreted. All the available maps drawn up during this period, more particularly the aeronautical and climatic maps, those relating to typhoons, do not go as far as the Paracels or mention them without any indication of sovereignty. None of them provides the slightest pointer.⁶⁸

It is easy to see why. French uncertainties were long-standing... they did not create a favourable climate for producing maps in support of an assertion of French sovereignty.

Furthermore, at that time no-one even considered the cartographic argument, since by virtue of well-established case-law (arbitration in the Island of Palmas or Temple of Preah Vihear cases), international law held that, in disputes regarding sovereignty between States, maps have no official value.

Hence, the title, which was nevertheless ultimately reclaimed by France, emerged from this period less strongly asserted. Yet it cannot possibly be said that it was destroyed, as two additional remarks support the conclusion that, in 1939, this title was still valid, held by the colonial power. That power did not perform the act of abandonment which, by creating a right for a third State, made abandonment irreversible. The colonial power was ignorant, prudent to excess, yet it remained keenly aware of its interests.

When it finally regained independence, the Vietnamese people had no cause to adopt such reticence or ignorance, which could not be imputed to it. The decrees of the recent period are essential.

⁶⁸ These are the maps indicated in the general bibliography at the end of this book.

Confronted by the difficult, chaotic yet genuine maintenance of this title, China, the only true rival power, and only as regards the Paracels, was slow off the mark and unsuccessful.

The exercise of the previous title, constructed patiently and at such length, was paralysed as a result of the colonial period and the administration of the islands was very sporadic. However, and despite this context, China's acts were neither sufficiently clear and continuous, or undisputed, to constitute a right.

Hence, the continuity of the right of France and of the right of pre-colonial Annam is genuine where the Paracels are concerned, even though established late in the day.

Where the Spratlys are concerned, France did not invoke the same link. It took possession of these islands as it would of a *terra nullius*. Did this amount to abandonment of the rights of Annam, that is, always assuming those rights were genuine? Respect for the right of peoples militates against this. And just as French hesitation over the Paracels could not destroy the ancient rights of Vietnam, so the attitude of France in regarding the Spratlys as *res nullius* before settling there could not completely efface the previous title if it was well established.

However, the problems of the two archipelagos differed since the French rights over the Spratlys, while lacking the patina of age and considered to be rights asserted over *terra nullius*, were stronger by virtue of the fact that, during the colonial period, they were not challenged by the claims of another State, as in the case of the Paracels. For China did not make any specific claim to the Spratlys throughout this whole period. And the Japanese claim was a late one, circumstantial and lacking any legal basis. So much so that, when the time came, the moment of decolonization that is, the question of Vietnam's succession to the title acquired by France could be raised without the hindrance of rival claims and even without necessarily being joined to the more ancient title of the emperors of Annam, which had been in cold storage much longer.

Yet for this archipelago it remained an open question. In 1933, France announced in unequivocal terms that it had taken possession of six islets. Did this also mean possession of the whole archipelago? The other claims in this period were weak, a belated show of interest by the Philippines and nothing else. Could it therefore be asserted that the subsidiary case follows the principal one? This is certainly the current Vietnamese view. This rule, which was still valid until the close of the 19th century, has been tightened in the 20th century. The occupation must be effective and must correspond to an overall administration. The nature of the locations concerned must

therefore be investigated to find out whether it is indeed the principal islets which have been acquired, with the result that this acquisition would also include the other islands as well. An examination of the situation in more recent periods will show how far this approach goes.

End of the colonial period (after World War II)

The chronology of events⁶⁹ and the discussion devoted to the question of the succession of States or of governments⁷⁰ have highlighted the situation, a highly complex one in legal terms, which obtained in Vietnam in the immediate post-war years.

However, as this situation was dominated by the presence of the French Expeditionary Force and a French administration (until 1954-1956), it is logical to lump these years together with the colonial history and to analyse them so as to include an examination of French positions.

In this confused period, the two elements - material or intentional - constituting the maintenance of the rights need to be identified. These elements involve Japan (though it would very soon be completely expelled from the region). Where Vietnam is concerned, they involve France, the Government of the Democratic Republic of Vietnam, and the Associated State of Vietnam. Where China is concerned, they involve the Government of Nationalist China and, after 1949, the Government of the People's Republic of China. There are also, as we shall see, certain elements from the Philippines.

The material elements

The disorder created by the end of World War II was reflected in the material situation in the archipelagos. Different troops succeeded one another there or shared the occupation of the archipelagos even though this was not always asserted as an intentional act of sovereignty. Sometimes, these are simply facts of war.

The Japanese army was present until the capitulation of Tokyo and would not leave the two archipelagos until 1946. The Treaty of Chung-King of 28 February 1946 had given the Chinese troops responsibility for disarming the Japanese soldiers north of the 16th parallel. This Treaty authorized Chiang Kai-shek to occupy the Paracels, which he would appear to have done in November 1946. He also occupied the Spratlys, despite having no

⁶⁹ Chapter I.

⁷⁰ Chapter III.

mandate to do so from the Allies, in December the same year.⁷¹ In support of this presence is the fact that, in 1947, the Ministry of the Interior of the then Chinese Government published an atlas in which China included the archipelagos. But contrary to the assertions of certain Chinese authors, this is not to say that China possessed 'historical' rights over the islands, as this inclusion was of late date and associated with particular circumstances.

In May 1946, France landed a French infantry unit from the *Savorgnan de Brazza* on certain islands, but it remained there for only a few months.

In late 1946, General Juin recommended the reoccupation of the Paracels in order to consolidate, as he put it, *our position in the legal debat*.⁷² In early January 1947, a French military mission arrived on Pattle Island.⁷³

In March the same year China re-established a foothold on Woody Island and protested against the French military presence.⁷⁴

The political situation worsened just as, at the diplomatic level, France and China decided to open talks.⁷⁵ The French were still present on Pattle Island (2 officers, 10 Europeans and 17 natives).⁷⁶ On 5 May 1949, the Chinese reiterated the administrative attachment of the Paracels to Hainan Island. In April 1950, Nationalist Chinese troops were evacuated from Woody Island only to be replaced by troops from the People's Republic of China.

France once again indicated its desire to refer the case to the International Court of Justice.

The presence of Communist Chinese troops in the Paracels in 1951 and in the following years has not been confirmed.

In July 1949, the French Navy requested instructions and reported that one of the Spratly Islands (Itu Aba) was occupied both by a detachment from Communist China and by a detachment from Nationalist China.

In October 1950, the French Government officially handed over control of the archipelagos, or rather, of the Paracels, there being no effective presence in the Spratlys, to the Bao Dai Government. Yet it was not until 1956 that the administration of South Vietnam, in the wake of the

⁷¹ See Pierre Bernard Lafont, *op. cit.*, pp. 249 and 254.

⁷² See this letter dated 7 October 1946 to the President of the Committee on Indochina. Annex 33.

⁷³ See report of 29 January 1947. Annex 34.

⁷⁴ Pierre Bernard Lafont suggests the date of 7 January 1947 (p. 249). The French Ministry of Foreign Affairs, March 1947. Telegram of 8 March 1947. Annex 35.

⁷⁵ See documents of 31 May and 3 June 1947. Annex 36.

⁷⁶ See telegram of 25 January 1951. Annex 37.

withdrawal of the French Expeditionary Force from Indochina, took over the French garrison on Pattle Island (Paracels).

The same year, the People's Republic of China occupied the other part of the archipelago from which it never withdrew.

Also the same year (1956), the South Vietnamese Navy occupied some of the Spratly Islands and set up a boundary-marker there indicating sovereignty.

From this confused period, which is that of the first war of Indochina (1945-1954), and the ensuing months, scarcely any facts can be derived pointing to a sovereign administration of the archipelagos.

However, what is recognized is: that a (partial) French, and subsequently South Vietnamese, presence was always maintained in the Paracels or rather on *one* island in that archipelago; that France was somewhat guarded with respect to the occupation of the Spratlys, while still retaining an interest in them even though they were occupied by the Vietnamese from 1956 onwards; that Nationalist then Communist China was present in part of the Paracels until 1950 then again from 1956 onwards; that the two Chinas were present much more fleetingly in the Spratlys; that the Philippines then displayed interest in the Spratlys or at least certain islets in that archipelago.

However, in a period of political and military confusion such as the one under consideration here, intentions are decisive. They must therefore be scrupulously examined.

The multi-faceted element of intention

The claims of sovereignty, first made unilaterally, subsequently formed the subject of multilateral debate on the occasion of international declarations or agreements.

a) France

The diplomatic correspondence enlightens us as to French intentions in this period. The Government in Paris maintained its rights and reaffirmed them on every occasion.

Even after the Agreements of 6 March 1946, it was considered that '*It is for France, on behalf of Annam, to assert its rights in the wider world.*'⁷⁷ That included both the Paracets *and* the Spratlys. In a telegram of August 1946, the French High Commissioner in Saigon indicated to the naval attache that France controlled the Paracels and that every ship planning to

⁷⁷ Note of 6 September 1946. Annex 38.

put into port there must request authorization to do so from the High Commissioner.

The Paracels were the subject of negotiations with (Nationalist) China from February to July 1947. These talks were unproductive but were an opportunity for France to reaffirm its rights and to propose that they be put to arbitration.

Later on (from 1951 to 1955), the French Ministry of Foreign Affairs even sought to assert that the Spratlys could not be Vietnamese, that their attachment to Cochin China had been purely administrative and that these (French) islands were now to come under the French Department of Overseas Territories.⁷⁸ This argument was reiterated in a Note from the Department for Asia-Oceania of 11 July 1955... It was not to resurface after that date even though France never explicitly abandoned the Spratlys. On 16 June 1955, General Jacquot, French Commissioner General in Indochina, referred to a secret letter of agreement of 15 March 1949 addressed to Emperor Bao Dai, in which the High Commissioner, commenting on the Agreements of 8 March 1949, apparently recognized Vietnam's sovereignty over the Paracels though remained silent on the Spratlys.⁷⁹ The French position during this period was recognized and supported by other countries. An example was Great Britain which turned to France in 1948 with a request for permission to use Lincoln Island for military exercises, and a further example was the Australian Government which said it was prepared, on the occasion of the drafting of the peace treaty with Japan, to back up the claims of the French Union.

b) China

The intentions of the Chinese were also very clear as regards the Paracels.

Any passage by a French vessel was challenged and protests were sent to the French Consul in Canton.⁸⁰ In 1947, negotiations on the Paracels were held in Paris because holding them in Nanking was impossible owing to the intransigence of Chinese public opinion. In the negotiations, the Chinese took a very hard line and made the evacuation of Pattle Island by the French detachment a precondition of pursuing the talks.⁸¹ This was Nationalist China, which would appear to have pulled out in May 1950, though the People's Republic of China took over the Chinese claims on its own behalf

⁷⁸ See letter from J. Letoumeau, 7 May 1951. Annex 39.

⁷⁹ See letter of 16 June 1955 from General Jacquot. Annex 40.

⁸⁰ Official letter dated 29 April 1949 from the Special Delegate of *Wai Kiao Pou*. Annex 41.

⁸¹ See Note dated 15 May 1950 from the Directorate for Asia-Oceania. Annex 42.

and asserted them in no uncertain terms, not only for the Paracels but the Spratlys as well.

c) Vietnam

During this period, the representatives of the Vietnamese people reaffirmed the sovereignty of Vietnam. The French authorities indicated this in a telegram dated 23 April 1949 to the Ministry of Foreign Affairs, in which it was stated that a lecture by Bao Dai's *directeur de cabinet* had provoked an incident on the subject of the Paracels. And Mr Pignon, author of the telegram, explained that he had been obliged to give an assurance that the High Commissioner '*considered the Paracels to be a crown dependency of Annam*' and that he would support the Vietnamese in this dispute.⁸² This underscores the long-standing nature of Vietnamese intentions.

d) The Philippines

Lastly, the Philippines joined the fray in 1950 regarding part of the Spratlys at least, stating that they would not tolerate occupation of the islands by any hostile force.

As we see, since the end of World War II, there has been an abundance of intentions to act as sovereign forming the highly complex fabric of this case.

e) Multilateral declarations or agreements

In the multilateral context, is there any room for a little objectivity in a case dominated by tension between the subjective opinions of States?

Japanese desires with regard to the archipelagos, already expressed before the War and exemplified by the Japanese military occupation, were destroyed by the Japanese defeat and subsequent disarmament.

Even before the end of the War, through the Cairo Declaration of 1943, published on 1 December 1945, the heads of government of the United States, China and the United Kingdom:

Announced that they proposed to divest Japan of all the Pacific islands captured or occupied since the beginning of the First World War, to restore to the Chinese Republic all the territories, such as Manchuria, Formosa and the Pescadores, which the Japanese had stolen from the Chinese and to expel Japan from all the other territories it had seized by force.⁸³

⁸² Telegram of 23 April 1949. Annex 43.

⁸³ Lazar Focsaneanu, 'Les traites de paix du Japon' (1960) *Annuaire Francais de Droit International* at pp. 256 *et seq.*

The Spratlys and Paracels clearly form part of the *other territories*. The Cairo plan was to expel Japan from them. But unlike Manchuria, Formosa or the Pescadores, the archipelagos concerned here do not form part of the territories '*stolen*' from China which the three Governments together proposed to restore to it. Now, China itself was party to the Declaration, Marshal Chiang Kai-shek having been present in person in Cairo, where the talks lasted several days. The omission of the archipelagos from this part of the 1943 Cairo Declaration is remarkable. It cannot have been fortuitous. There was neither reservation nor separate declaration by China regarding these territories. China's interest in these islands at that time was therefore not decisive. At all events, China had been obliged to remain silent on this point, unable as it was politically to assert its uncertain claims before the States assembled there, whose number included France, in other words, a partner which had never recognized China's rights over the islands and had even, on several occasions, proposed to China that the matter be referred to the International Court of Justice.

Some years later, the peace treaty with Japan was to be drawn up. In 1951, the United States of America and the United Kingdom were the host powers at the San Francisco Conference. Fifty-five States were invited, including the Associated States of Vietnam, Laos and Cambodia. It was decided not to invite either of the Chinese Governments to attend.⁸⁴ The Treaty was signed on 8 September 1951 between Japan and 48 Allied Powers. The repercussions of this for the archipelagos in the South China Sea were extremely important.

Under Article 2 of the Treaty, Japan renounced all rights, titles and claims to a number of territories, the Spratlys and Paracels among them. However, following a French recommendation, the Treaty did not effect any devolution of these territories. The People's Republic of China protested, admittedly not from within the Conference since it had not been invited to attend, by a Declaration of 15 August 1951.

The absence of attribution was to generate much comment and lead to various theories.

According to D.P. O'Connell, four solutions were considered:⁸⁵ a condominium over the abandoned territories of all the States at war with Japan; joint sovereignty to be acquired solely by the States parties to the peace

⁸⁴ Owing to the disagreement between the United States and Great Britain, the former recognizing only Nationalist China and the latter having recognized the People's Republic of China.

⁸⁵ D.P. O'Connell, 'The Status of Formosa and the Chinese Recognition Problem' (1956) *American Journal of International Law* at pp. 405 *et seq.*

treaty (which excluded China, absent from San Francisco); return to the status of *terra nullius* by *derelictio* (this was the position put forward by Maurice Faure in the French Assembly during the debate on ratification); appropriation by the occupants of these territories after Japan's departure.

It should be noted that the latter solution would have led to the division of the Paracels between France and China and to the attribution of the Spratlys to France if anything. However, this solution lacked any legal basis. The title, and the rivalry in the maintenance of the title, were so clearly established prior to the Japanese occupation that, once that episode was over, the historical depth and acquired validity of the claims of each party could be carefully examined. And in that process of investigation, all elements count, including, and above all, the public declarations and silences or reservations which followed or accompanied these declarations. Hence, the conditions in which the cessation of hostilities with Japan was effected require detailed examination.

At the request of Mr Gromyko (the USSR being present in San Francisco), an amendment was tabled at the plenary meeting of 5 September 1951. It envisaged the recognition by Japan of the sovereignty of the People's Republic of China over a series of territories including the Paracels and the Spratlys. Yet this amendment was *rejected* on that occasion by 46 of the countries present. Only Poland and Czechoslovakia supported the USSR.⁸⁶

The (Nationalist) Republic of China, concluding a peace treaty of its own with Japan on 28 April 1952, formally took note of Japan's renunciation of all rights to the islands, but did not have any claim of its own included in this (bilateral) treaty. While San Francisco was not a particularly favourable context for a successful outcome to the Chinese claim, bilateral negotiations were much more so. However, the text only mentions Japan's renunciation and does not put forward any proposals with respect to devolution. It is difficult therefore to agree with the authors who assert that this text implied recognition by Japan of Chinese sovereignty over these islands.⁸⁷ In reality, a

⁸⁶ Unaware of this fact, Pan Shiyong writes: '*At the end of World War II, Japan returned the Nansha Islands, which it had occupied during the war, to the Chinese Government. No one in the international community challenged or protested against China's resuming its sovereignty and ownership of the Nansha Islands*'. (Pan Shiyong, 'The Petropolitics of the Nansha Islands - China's Indisputable Legal Case', p. 128). There are two errors here: Japan actually returned the islands, but without their being assigned to China. And the international community refused to accept the Chinese claim.

⁸⁷ Jian Zhou, *op. cit.*, pp. 257-258 or Steven Kuan-Tsyh Yu, 'Who Owns the Paracels and Spratlys? An Evaluation of the Nature and Legal Basis of the Conflicting Territorial Claims' (1989-1990) 9 *Chinese Yearbook* at p. 12.

rigorous argument based on the general rules for the interpretation of treaties leads to the opposite conclusion that the text's silence on this point leaves the question of the future status of the archipelagos completely open.

True, the People's Republic of China for its part, speaking through Mr Chou en-Lai, Minister for Foreign Affairs, stated on 15 August 1951, in connection with the draft peace treaty with Japan, that '*the Paracels and the Spratlys have always been Chinese territories*'.

However, the very terms of the (individual or collective) peace treaties with Japan, the declarations made in them or from which these treaties stem, signify that Nationalist China, which after 1949 took over the mantle of continuity from the former single Chinese Government, did not make any claim to the archipelagos on the occasion of the Cairo Declaration and bilaterally recognized Japan's renunciation without putting forward a claim of its own.

These two elements, the latter having all the solemnity of treaty instruments and the former substantial political force, warrant the conclusion that at that time the Republic of China ceased asserting rights to the disputed islands.

However, this does not settle the question of the claim reiterated loud and clear by the representatives of the People's Republic of China very soon after they had seized power. Did that claim have any basis since the surviving predecessor State (the Republic of China) had, through its silence, renounced its rights? Could it be argued that it had renounced them in favour of the People's Republic of China? This is not plausible in the context of relations between the two States, which is a context of breakdown.

Consequently, Chou En-lai's claim, made on 15 August 1951, and rejected by the Conference on 5 September with the Soviet amendment, had no basis and the San Francisco Conference and surrounding events weakened the position of China which, as we have seen, had always been expressed as challenging Vietnam's previous positions and exercising the balance of power.

How then is one to sum up the situation in 1954/56, when France quit Indochina?

Leaving aside the claim to the Spratlys by the Philippines, a claim which barely surfaces, it will be seen that, over this long period (1884-1954/56), the Franco-Vietnamese positions on the one hand and the Chinese positions on the other fluctuated, though to varying degrees.

France left behind the hesitations of the early colonial period, which hesitations may well have weakened its title. It actually administered the two archipelagos until the Japanese occupation. In the Paracels it did so in a clear

(though belated) affirmation of succession to the rights of Annam, and in the Spratlys as the occupant of a *terra nullius*.

In the situation which France gradually found itself facing as the World War gave way to the War in Indochina, it maintained both its presence and its claim until, through its departure, it left (South) Vietnam to take over where France left off. However, in the commentary on the San Francisco Treaty (or certain Ministry of Foreign Affairs Notes), where the idea was mooted that France might wish to keep the archipelagos for itself, not for Vietnam, its tone was ambiguous.⁸⁸

Throughout this whole period, the representatives of Vietnam were not able to speak as a State. However, when they spoke, whether in 1925 (the former Minister for War to the Emperor), in 1949 (Bao Dai's *directeur de cabinet*), or in 1951 (the representative of the Associated State of Vietnam in San Francisco), their position was always the same. The archipelagos had long been Vietnamese. And so they must remain.

This desire, this intention, combined with the French presence (after the period of hesitation), provides support for the maintenance of the title in favour of Vietnam.

Despite certain weaknesses, the Chinese case is not totally devoid of content.

Before the War, while China may have made its opinion known sporadically, it nevertheless did so repeatedly (1909, 1921 and 1932). Since the War, Chinese interest in the Paracels has been persistent. Where these islands are concerned, China has shown great tenacity.

The abandonment by Nationalist China (by omitting to put forward a claim in the peace treaty with Japan) might be considered as a position dictated by political circumstances, which would give further credence to the idea of the succession of one China to the other. For China never indicated any acquiescence in the Annamese or French claim. It did not do so through the mouthpiece of the local mandarins in 1896, for although making it clear that the islands were not Chinese, they added that neither did they belong to Annam either. Nor did China do so later, since in 1938, when France occupied the archipelagos, it was understood that the rights of the two parties would be reserved.⁸⁹ It would therefore be difficult to find any trace of genuine Chinese acquiescence in the Franco-Vietnamese title, unless drawing on documents not yet published.

⁸⁸ See M. Samuels, *op. cit.*, p. 68.

⁸⁹ Legal Department Note, 6 September 1946. Annex 38.

It is here that the notion of the critical date comes back into its own. The first possibility is to opt for the 1880s. A strong conception of the right of peoples to self-determination and of respect for the territorial integrity of peoples under colonial domination prompts a choice of 1884 as the critical date, as well as the assertion that nothing which happened later can be taken into consideration if it breached a long-established right acquired by the people. However, two other critical dates selected from the period under consideration can be suggested. The 1930s, and in particular 1937, when France first proposed to China to go to arbitration, may be considered as another point in the crystallization of the dispute. It has been seen above that, on these dates, France still possessed a title superior to that of China over both archipelagos (for different reasons). Lastly, the years 1954/56 (chosen as the critical date by Jean-Pierre Ferrier) were decisive by virtue of the reappearance of the Vietnamese people on the international stage (even though speaking through two States).

Each of these three 'critical dates' opens up a perspective which appears favourable to the Vietnamese argument.

However, it must be acknowledged that the post-war years confused matters a great deal, in that, although the Franco-Vietnamese title was not destroyed, the conditions in which it was exercised were problematic. It must also be acknowledged that the Chinese claim, although originally unfounded (i.e. in 1909) and greatly weakened by the San Francisco Conference, must be seen together with the duration of the Chinese presence in the islands, even if unlawfully established through the use of force and therefore unable to produce any legal effects.

It now remains to consider the fate of the archipelagos during recent decades.

THE POST-COLONIAL PERIOD

In 1956 French troops left the region, and France no longer made any claim to the Paracels on its own behalf. It still claimed the Spratlys, without however maintaining an effective French presence.

Of the two Chinas (for there are still two Chinese States), Taiwan has since been largely absent from the whole issue (not totally so in the case of the Spratlys).

The history of Vietnam has been tumultuous and the four decades 1956-1995 cannot be analysed as a single period. They comprised two very different parts. The years 1956-1975 were those of the second Vietnam war. The country was split into two States as a result of the Geneva Agreements.

The attitude of both South and North must be examined, along with any contradictions between them.

After 1975, the year of victory and of Vietnamese reunification, matters are more simple.

The period of the division of Vietnam (1956-1975)

Over these 19 years, the situation in Vietnam was once again one of war. The country was torn asunder, its two halves at war with each other. The superpowers were involved. China and the USSR supported the Republic in the north; the United States waged war and supported the '*Saigon administration*', or the State of Vietnam.

However, in the South there was also a Provisional Revolutionary Government, the PRG.

Our analysis must first consider the actual situation in the territory of the archipelagos, then pinpoint the declarations indicative of intention.

The material elements

The Geneva Agreements of 1954 effectively divided Vietnam. The South, below the 17th parallel, included the archipelagos. It was recalled *supra* how the troops of the Government of Saigon took over from the departing French troops.

They replaced the French troops in the part of the Paracels not occupied by the Chinese, so that between 1956 and 1974 the Crescent group of islands was occupied by South Vietnamese troops, and the Amphitrite group by those of the People's Republic of China. In January 1974, China seized the western Paracels following violent clashes, and from then on the whole of the Paracels was under its military control.⁹⁰

In 1956 Saigon's troops also occupied the Spratlys, or at least some islands, where a boundary-marker denoting Vietnamese sovereignty was erected.

However, in March 1956 a Filipino citizen, Tomas Cloma, claimed to have occupied the entire Spratlys archipelago (in a private capacity). A Filipino expedition landed 29 men on one island, which received the name

⁹⁰ The Vietnamese documents contain reports that as early as 1959 China had attempted to land on the western part of the archipelago, with soldiers disguised as fishermen. However the landing was repelled by the South Vietnamese forces and 82 Chinese were captured (see *The Hoang Sa and Truong Sa Archipelagos and International Law*, Foreign Ministry of the Socialist Republic of Vietnam, April 1988).

Freedomland.⁹¹ Since then the Philippines have gradually extended their occupation, occupying three islands in 1968 and subsequently a further three which were then fortified,

Taiwan occupied Itu Aba Island on a date which varies depending on the author consulted.⁹²

Thus, between 1956 and 1975, the Spratlys were occupied in part by three States.

In order to evaluate the rights of each party, the facts must, however, be seen in the light of intentions.

The elements of intention

Several governments then expressed the intention to act as sovereign. The situation was different in each archipelago.

a) The displays of intention of the People's Republic of China

Since Chou en-Lai's speech of 1951,⁹³ the People's Republic of China has steadfastly reiterated its intention to act as sovereign. The intention is strongly expressed in the case of the Paracels and is accompanied by a *de facto* occupation. The partial occupation of 1956 was extended to the whole of the archipelago in 1974. It is a military occupation, which is not recognized in international law if there is a previous titleholder. China, however, does not accept this argument and reiterates its intention, claiming to have retaken islands which have belonged to it since time immemorial. China also claims that in March 1959 the administrative prefecture of Hainan set up an office on one of the islands in the Paracels to deal with matters in the Xisha-Nansha-Zhongsha Islands, 'which in March 1969 was reportedly renamed the Revolutionary Committee of the Xisha-Zhongsha-Nansha of Kwangtung Province'.⁹⁴ This is clearly the mark of an effective administration, albeit one constructed on the basis of an occupation carried out under illegal conditions, which prevents the administration having legal effects.

⁹¹ See Charles Rousseau (1972) *Revue Generale de Droit International Public*, Paris, at p. 830.

⁹² Charles Rousseau mentions 1971, but as the date of the Filipino protest against the occupation by Nationalist China. J.R.V. Prescott gives the date as 1956. It would appear that 1971 was rather the date of a military reinforcement of the Taiwanese presence, Taiwan having been present since 1956.

⁹³ See p. 122.

⁹⁴ (1988) *Novelles sinologiques*, at p. 22.

In the case of the Spratlys, the Chinese also make their intention plain. However, China cannot base its claim on any true occupation or administration. The extension to the Nansha Islands of the administrative office set up in 1959 was the result of a fiction. The description of the islands by people who have visited them leaves no room for doubt on this subject. Nationalist China, on the other hand, maintains its claims on the basis of an actual presence.

b) Vietnam's manifestations of intention

During the war years, a divided Vietnam voiced its claims in a manner which may appear contradictory.

The Government of South Vietnam never abandoned its unequivocal intention of maintaining its sovereign rights to the two archipelagos.

Various decrees were issued concerning the administration of the islands and their incorporation into Vietnam's territorial organization. A decree concerning the Paracels was issued on 13 July 1961 (creation of the administrative unit of Dinh Hai), and a further decree of 21 October 1969 merged Dinh Hai and Hoa Long.

The Spratlys were incorporated into Phuoc Tuy Province on 22 October 1956. Under a decree of 6 September 1973, issued by the Ministry of the Interior of South Vietnam, they were incorporated into the municipality of Phuoc Hai, in the district of Dat Do, Phuoc Tuy Province.

Meanwhile the Saigon administration lodged protests against China's conduct on several occasions. The *Journal d'Extreme-Orient* of 4 June 1956 reported that the Vietnamese Secretary of State for Foreign Affairs had lodged a protest against a declaration concerning the islands made by the spokesman of the Chinese Foreign Minister on 29 May of the same year.

A further protest was lodged on 20 April 1971, this time with Malaysia, and on this occasion Vietnamese sovereignty over the two archipelagos was reasserted by South Vietnam's Foreign Ministry.

Lastly, in January 1974, following the taking of the Paracels by Chinese forces, the Government of the Republic of Vietnam protested to the United Nations, published a policy document on the archipelagos and forcefully condemned the unlawful acts of the People's Republic of China. The Saigon administration took advantage of the second session of the Third United Nations Conference on the Law of the Sea, held in Caracas in June 1974, to reiterate its rights to both archipelagos.

We could draw the line here and say that there is sufficient detail to prove that the intention to act as sovereign is maintained on the part of Vietnam. The territorial partition at the 17th parallel placed both archipelagos in South Vietnam's zone. It was therefore for the Saigon administration, the Saigon

administration alone, to voice its claims to the islands. It did so. Moreover, it did so as the successor to the former rights of France over the two archipelagos, France having itself assumed the succession, at least in the case of the Paracels, to the rights enjoyed by precolonial Vietnam.

However, the attitude adopted by the other Vietnamese Governments deserves close scrutiny, since China uses that attitude as an argument.

The Provisional Revolutionary Government of the Republic of South Vietnam (PRG) adopted a position in 1974 which recognized the existence of a dispute, recalling that *Sovereignty and territorial integrity are sacred issues for all peoples'* and calling for negotiation.⁹⁵ Thus *both* the Governments which claimed to represent South Vietnam (and which therefore had territorial responsibility for the administration of the archipelagos) had a common attitude on this point. The Western press presented matters differently, since an article in *Le Monde* dated 27-28 January 1974 stated:

In Paris, the delegate of the PRG to the conference held at La Celle St-Cloud dismissed Saigon's proposal for the adoption of a joint resolution condemning 'the violent occupation of the Paracels by China', since, according to him, this type of dispute must be settled by negotiation.

In fact the disagreement concerned the method rather than the substance of the dispute, the Provisional Revolutionary Government finding it difficult to condemn China, which had hitherto been its political ally in the Vietnam War.

There remains the Government of the Democratic Republic of Vietnam. China claims that this Government renounced sovereignty, advancing three facts in support of this.⁹⁶

On 15 June 1956, the Deputy Minister for Foreign Affairs of the Democratic Republic of Vietnam, receiving the acting Charge d'Affaires of the Chinese Embassy in Vietnam, reportedly asserted:

According to the documents available to Vietnam, the Xisha Islands and the Nansha Islands, on the basis of the historical evidence, form part of Chinese territory.

⁹⁵ The protest was mentioned in an article published in *Nhan Dan* on 26 February 1988, and was summarized in the feature 'The Hoang Sa and Truong Sa archipelagos (Paracels and Spratlys)' (1984) *Le Courrier du Vietnam*, Hanoi, at p. 139.

⁹⁶ For example in a brochure entitled: 'Documents and Other Materials concerning the Recognition by the Vietnamese Government that the Xisha and Nansha Islands are Chinese Territory'.

Has this comment been confirmed? Was it purely verbal or was there a written record of it?

As these questions remain unanswered, this statement cannot be seen as a legally valid pronouncement.

China also relies on a declaration by the Government of the Democratic Republic of Vietnam dated 9 May 1965 and relating to the combat zone of the American armed forces.

North Vietnam is said to have denounced the fact that this zone included:

A portion of Chinese territorial waters contiguous to the Xisha Islands which belong to the People's Republic of China.⁹⁷

Lastly, the declaration referred to a statement of 14 September 1958 by Pham Van Dong, Prime Minister in the Government of the Democratic Republic of Vietnam. Previously, on 4 September, China had publicized the fact that it was extending the breadth of its territorial sea to 12 nautical miles. It was indicated that this involved mainland China and all the islands belonging to China, the Paracels and Spratlys among them, were specifically included.

The Note by Pham Van Dong states:

We would solemnly inform you that the Government of the Democratic Republic of Vietnam recognizes and approves the declaration made on 4 September 1958 by the Government of the People's Republic of China regarding the decision taken with respect to China's territorial sea.

The Government of the Democratic Republic of Vietnam respects that decision and will instruct its responsible national bodies that, in the event of contact at sea with the People's Republic of China, the stipulation regarding the breadth of the Chinese territorial sea as being 12 nautical miles will be scrupulously respected.

Articles published by the daily *Nhan Dan* in 1969 and 1970, referring to Chinese airspace '*above the Paracels*' aggravated the situation.

To assess these events, two facts need to be taken into account: the precise significance of the North Vietnamese attitude and North Vietnam's place among the partners concerned.

It is true that Phan Van Dong's declaration confines itself strictly to recognition of the breadth of the Chinese territorial sea. So it is incorrect to assert that Vietnam had also '*reaffirmed its recognition of China's claim*' to

⁹⁷ (1988) 8 *Nouvelles sinologiques* at p. 30.

the archipelagos.⁹⁸ Nevertheless, its silence on the affirmation of Chinese sovereignty over the islands can be interpreted as acquiescence, all the more so as it is backed up by the declaration relating to the combat zones and the articles in *Nhan Dan*.

Admittedly, these facts were situated in the very special political and military context of the events then unfolding. For reasons due to circumstances, the Government of the Democratic Republic of Vietnam exercised its power only north of the 17th parallel. This partition left the administration of the archipelagos under the control of the South Vietnamese Government. As we have seen, that Government had always been attentive to the question of Vietnamese sovereignty over the archipelagos and was to continue to be so until it ceased to exist in 1975.

The political allies of the Hanoi Government in South Vietnam were represented by the Provisional Revolutionary Government of the Republic of South Vietnam. Nothing they did suggests that they went back on their desire not to interrupt the thread of Vietnamese sovereignty over the islands.

In this context, any declarations, statements or pronouncements by the North Vietnamese authorities had no bearing on the title of sovereignty. This was not the government with territorial jurisdiction over the archipelagos. One cannot abandon something one has no authority over. Furthermore, this was a government entirely in the hands of its allies, engaged as it was in an all-out struggle against American might. The fact that, for the common military cause, one party or another made use of neighbouring territories, friendly territories or territories which were quite simply unable to put up any opposition, is an example of the sort of provisional territorial arrangements found in other war situations. International law cannot draw any conclusions from this as regards continuity of the legal title. The fact nevertheless remains that this particular moment in the history of the partition of Vietnam blurs the Vietnamese position. The now reunified Vietnam (through the victory of the North) must decide to which entity it is successor on this point. The territorial logic reinforces succession to the rights and actions of South Vietnam, which alone has jurisdiction from the geographical standpoint.

c) The other manifestations of intention

There are few traces of the intentions of the Government of Taiwan.

⁹⁸ Bradford L. Thomas, 'The Spratly Islands Imbroglia: A Tangled Web of Conflict', in *International Boundaries and Boundary Conflict Resolution*, 1989, p. 415.

In 1956 however, the Taiwanese Government, faced with the claims of the Philippines to the Spratlys, sought to invoke its rights.⁹⁹ And the strengthening of the fortifications on Itu Aba was accompanied in 1971 by talks with the Government of the Philippines in which each party reasserted its claims.

The position of the Philippines fluctuated somewhat as regards its intentions. The first manifestation of sovereignty by this State (over the Spratlys) was in 1951. Yet 20 years later, the Government of the Philippines not only occupied several islands while stating that it had no territorial claim to this archipelago, but at the same time was in talks on this subject with Nationalist China.

So in 1975 the situation was as follows:

In the Paracels, 100-per-cent occupation by China, strongly maintained claims by South Vietnam and an attitude of the Democratic Republic of Vietnam obscured by the events of the war.

In the Spratlys, a persistent and very clear Vietnamese claim by the Saigon Government in continuity with the French taking of possession, and also the many flimsily argued claims of the two Chinas and the Philippines.

All these States, with the exception of the People's Republic of China, occupy some small islands.

France has remained silent since 1956, though it has never formally abandoned its rights over the Spratlys.

The return to a reunified Vietnam after the 1975 victory

The years after 1975 were to bring few changes to the Paracels. The islands have been under military occupation by the People's Republic of China, the eastern part since 1956 and the western part since 1974. The infrastructures in the Paracels have been substantially developed by the Chinese People's Army.

In the Spratlys, after April 1975, Vietnamese forces took over from the detachments of the previous Saigon administration on the islands it had occupied. In 1977, the Philippines stepped up their military presence on seven of the islands in the archipelago.¹⁰⁰ Malaysia occupied certain atolls in September 1983. Lastly, in March 1988, China dispatched troops to certain cays in the Spratlys, a naval incident led to the loss of Vietnamese vessels and the deaths of a large number of Vietnamese sailors. Since that date, the

⁹⁹ See Charles Rousseau, *op. cit.*, pp. 830 *et seq.*

¹⁰⁰ *Le Monde*, 12 May 1978.

Chinese Navy has maintained its presence in the archipelago. Taiwan maintains a garrison on the largest of the Spratlys, Itu Aba.

The claims, however, have become more widespread. China maintains its claims to both archipelagos and seizes every opportunity to recall its historical rights and to reaffirm its sovereignty. Its attitude is not merely to claim the protruding lands as such, but also to stake its continued claim to the whole of the South China Sea in the name of historical rights. The basis of these rights is not indicated, and this despite China's accession to the Convention on the Law of the Sea.¹⁰¹ China's oil policy clearly shows this, consisting as it does in granting concessions to American oil companies for maritime areas situated in zones which, under the terms of the Convention, Vietnam is entitled to claim for its own exclusive use.¹⁰² The Philippines have developed their claims to part of the Spratlys. Taiwan persists in its claims. Late on the scene, Malaysia claims to have a few rights.

Vietnam is extremely vigilant in pursuing its assertion of sovereignty over the two archipelagos in their entirety. This claim is part and parcel of the context of the continuity of the rights of the ancient Empire of Annam, then of France on behalf of Vietnam under colonial rule, France having effectively occupied the two archipelagos. The use of force by China to occupy the Paracels in 1956, but above all in 1974, then certain islets in the Spratlys in 1988, meant that Vietnam lost the factual element of its claim. The Vietnamese Government seems to be at great pains not to allow this to become abandonment through the absence of signs of intent. It is therefore anxious to multiply such signs and wastes no opportunity to recall its rights. This it has done in various ways, through acts, communiques or declarations.

Some of these were administrative instruments attaching islands to certain provinces: the decree of 13 July 1961 by Ngo Dinh Diem, President of the Republic of Vietnam; the decree of 6 September 1973 by the Ministry of the Interior of the Republic of Vietnam; the decision of 9 December 1982 by the Council of Ministers of the Socialist Republic of Vietnam. Others included acts relating to the maritime territory, the publication of official reports or other heavily documented works, political declarations on the occasion of international meetings, protests against acts of the People's Republic of China, Nationalist China or any other State concerning the archipelagos, such as those of 30 December 1978, 7 August 1979, 5 February 1980, and 11 August 1980 or declarations in the framework of certain international organizations, in particular at the Conference of the

¹⁰¹ See Frederic Lasserre, *Le Dragon et la mer. Strategies geopolitiques chinoises en Mer de Chine du Sud* (Montreal, Harmattan Inc., 1996), pp. 181 *et seq.*

¹⁰² See 'Drawn to Fray' (1997) *Far Eastern Economic Review* (3 April).

World Meteorological Organization in 1975 at Colombo and at the 7th session of the Meteorological Conference of Region II (Asia) at Geneva in June 1980.

During this period, the dispute, which undoubtedly crystallized earlier, leads each party steadfastly to act in such a way as to maintain and improve its position.

Hence, as things stand, two States are rivals for the Paracels and, France aside, five are rivals for the Spratlys.