

Chapter IV

Conclusions and Bases for a Settlement of the Dispute

Almost three centuries of history have set their stamp on the legal status of these archipelagos.

The bulk of the works hitherto published on this subject have made use of verifiable data from the most recent past, the period after World War II. Older historical data have generally been mentioned simply by reviewing documents drawn up by the States concerned or published by their national research centres. In this respect, there is a considerable imbalance in favour of the Chinese argument, which is the best publicized.

In this book, an effort has been made to take stock of the arguments expounded by the various States concerned and also to verify the historical arguments of the past using documentation in the French National School of Far Eastern Studies and French archives from the colonial period. This redressing of the balance as regards the sources consulted shows the case in a different light.

We will now see what the result of this is by posing the following two questions:

What picture can be given of the rights of each of the parties concerned?

What prospects does contemporary international law offer for settling a dispute of such complexity?

SUBSTANCE OF RIGHTS TO THE ARCHIPELAGOS

The facts illuminated through the various historical phases considered above confirm that the cases of the Paracels and the Spratlys must be dealt with separately.

The case of the Paracels

As regards the Paracels, only two States are concerned: Vietnam and China.

The rights of Vietnam are ancient and well founded even if China's claims assumed more concrete form through its occupation by force of part of the archipelago 39 years ago and of the rest 21 years ago.

The detailed examination of the historical titles attempted in the preceding pages, based on the most reliable documents, shows that the Vietnamese title has been clearly asserted since the beginning of the 18th century. The arguments put forward so far by China do not make it possible to confirm the existence of ancient legal ties between Imperial China and these territories such that they could be interpreted nowadays as ties of sovereignty. Vietnam's vassalage with respect to China, terminated with China's consent on the advent of France, could on no account leave China with any rights to the islands. While the Vietnamese title may have been weakened by the indifference of the colonial power during the early decades of colonization, it does not amount to effective abandonment since, from a certain point, France effectively administered the Paracels and clearly asserted its rights.

China's interest in these uninhabited lands only amounts to a claim of sovereignty after 1909. This claim was asserted in the face of a Vietnamese title established two centuries earlier.

During the first half of the 20th century, there were in all only three occasions when China expressed a desire to exercise its rights over the Paracels (1909, 1921, 1932), and even these were only made possible by lack of effective opposition from the colonial power.

The thrust of the whole corpus of the law of decolonization built up under the aegis of the United Nations has been to protect peoples, particularly when they have fallen under the hegemony of another power, from actions which might breach their inalienable rights.

The period of World War II and the following years created circumstances propitious to a (military) change of hands in the uninhabited islands on a number of occasions.

The French authorities, and simultaneously with them, the representatives of Vietnam, and, after the departure of the French, the representatives of Vietnam alone, occupied the islands as far as political circumstances permitted them to do and never ceased to assert their rights. The only hesitations on this score were after the second Vietnamese war, in certain statements by the representatives of the Democratic Republic of Vietnam. Although these can be explained by the circumstances and by the extreme dependence of that Government on China, they were not such as to affect the conclusion that Vietnam has a title superior to China's.

By its silence in the Cairo Declaration or in its bilateral peace treaty with Japan, Nationalist China abandoned the assertion of its rights. The claim of the People's Republic of China which emerged in 1951 has the appearance neither of the assertion of a title taken over from an earlier period nor of a

right derived from effective administration. In its favour, however, there remains an occupation by force in 1956 and another in 1974. Yet there are two obstacles to the transformation of this occupation into a title. The first lies in the contemporary peremptory norm of the prohibition of the use of force against the territorial integrity of a State. The second resides in Vietnam's reiterated declarations of protest against this unlawful occupation with a view to preserving its ancient rights, since:

Possession of a territory does not cease solely by virtue of the disappearance of its material manifestation, which must be accompanied by the intention to abandon it.¹

The case of the Spratlys

The situation of the Spratlys is quite different from that of the Paracels. Irrefutable proof of the two archipelagos being treated as one in the administration of the emperors of Annam is hard to find, even if there are traces of the subdivision of the maritime companies on the basis of different geographical areas. Whatever the pre-colonial situation may have been, the French attitude has not been the same for the two archipelagos.

Liberated by the absence of any Chinese claim to the islands further away, France, during the colonial period, was less hesitant about manifesting its presence than in the Paracels.

It asserted its rights as first occupant and not as the successor of Annam. But it was *not challenged by anyone* (not even by Great Britain, which abandoned all claim), so that French rights were very soundly established.

The claim of the Philippines was not voiced until the 1970s. Taiwan's claim is highly opportunistic, linked as it is to Taiwan's relief of the islands from Japanese troops after the War (although Taiwan was not authorized to take such action). Malaysia's claim is of more recent date.

The People's Republic of China began to speak of a claim to the Spratlys in 1951. But this was an abstract claim, devoid of any trace of effective occupation of these islands remote from Chinese territory. Not until very recently (1988) were there the beginnings of partial occupation, as the result of military action.

Hence it can be said of the Chinese attitude between 1951 and 1988 that *'the mere fact of challenging territorial sovereignty does not create a title for*

¹ Paul Fauchille, 'Le conflit de limites entre le Bresil et la Grande-Bretagne' (1904) *Revue generate de droit international public* at p. 138.

the State adopting this attitude'.² As for the armed occupation, one can but call to mind the strong prohibition of the occupation of territories by force in contemporary international law.

However, where the Spratlys are concerned, the problem nevertheless remains of the immense area of this archipelago (160,000 square kilometres), of its relative unity and of the effective extent of the occupation by the various States claiming title.

Two hypotheses need to be considered regarding Vietnam's contemporary claim. If the evidence of the administration of the islands by the emperors of Annam is adequate, Vietnam does have a title to the Spratlys which has the same validity as its title to the Paracels. For in that case, it was through ignorance of Vietnamese history that France claimed to occupy this archipelago as *terra nullius*. And the succession of the rights must be restored. On the other hand, if Vietnam's ancient rights to the Spratlys are challenged, the French argument that it 'discovered' the archipelago raises a different set of problems. Whatever its origin, the French title was accompanied by concrete occupation which ceased only to be succeeded by the Vietnamese occupation in 1956. True, Taiwan and the Philippines then also established a foothold in the archipelago.

France's position has never been totally clarified. The French argument being that of sovereignty as first occupant, that sovereignty can only be terminated if expressly abandoned. Despite their confusion, can the debates, particularly in the Assembly of the French Union in 1952, be regarded as heralding a desire to abandon the islands? And is that desire confirmed by France's diplomatic silence on this matter? Or, on the contrary, must it be accepted that the case regarding the Spratlys will not be definitively settled unless France once again makes its views known?

Supposing France were definitively removed from this case, cannot Vietnam be regarded as successor to the rights established by France,³ on the basis both of the Vietnamese occupation hard on the heels of the independence of South Vietnam and also of the fact that France had administratively attached the islands to Cochin China? And that therefore the islands could but share the fate of the territory to which they were attached?

However, if the Franco-Vietnamese title, on the basis of one argument or another, proves the most ancient and soundly based, does it apply to all the lands? Is there room for other partial occupations which took place at a later date, but which might nevertheless have engendered rights - for instance on

² Suzanne Bastid, *op. cit.*, p. 451.

³ The decree of 21 December 1933 attached the islets to one of the provinces of Cochin China: Ba Ria.

the periphery of this vast set of islands, where these shards of land lie just off the coasts of other States such as the Philippines or Malaysia? A purely legal answer to this question is difficult.

On the other hand, it is easy to see that China's claim to the Spratlys has no legal basis and is just one aspect of a maritime expansion policy. On this point, the People's Republic of China even overlooks its deep-seated antagonism to Taiwan and endorses the claims of the rival Chinese Government.⁴

PROSPECTS FOR A SETTLEMENT

International law requires States to negotiate. This is the meaning of Article 33 of the Charter, to which the various parties involved in this dispute are signatories.

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Yet it is impossible to overlook the fact that the Security Council largely lacks the objectivity required of a decision-making organ, owing to the special place given to permanent members armed with the right of veto. True, the Charter does provide, in Article 27, paragraph 3, for the abstention of any member involved in a dispute, but there remains the considerable political might of the Great Powers.

Hence China, a permanent member, has prevented the Security Council from taking any initiative in this field, particularly in 1988, when Vietnam attempted to bring the matter before the Council.

Negotiations do not therefore depend on mediation by third parties and will only be possible bilaterally for the Paracels, and, for the Spratlys, multilaterally between the States concerned. Negotiations would depend on a genuine will to negotiate.

⁴ See Michael Bennett, 'The People's Republic of China and the Use of International Law in the Spratly Islands Dispute' (1991-1992) *Stanford Journal of International Law* at p. 448.

True, the development and reinforcement of regional organizations, particularly with Vietnam's recent entry into ASEAN (1995), may favour such negotiations.

Yet in the present state of affairs the prospect of settling the dispute on a negotiated basis is almost nil. In the case of the Paracels, China maintains that there is nothing to negotiate. It holds the archipelago by military force, backing this up by an emphatic claim to sovereignty.

In the case of the Spratlys, bilateral or multilateral diplomatic meetings since 1988 have prompted China to develop the idea of reserving the issue of sovereignty and negotiating a formula which would allow the States concerned jointly to develop the wealth of the area. The other States do not agree, but have thus reached an impasse. Of all the partners involved, Vietnam is the one which appears to be the most tempted by a judicial settlement. However, access to the International Court of Justice is voluntary, between States which have accepted in advance the compulsory jurisdiction clause, which is a general way of recognizing the jurisdiction of the judicial organ of the United Nations. Neither China, nor Vietnam, nor Malaysia have signed this clause. The Philippines recognized the jurisdiction of the Court in 1972, but with reservations which exclude the present dispute.⁵ It is not therefore possible for one of the States concerned to bring the matter before the Court by means of a unilateral application, and to benefit from the Court's jurisdiction on that basis. There remains a second possibility of bringing the matter before the Court (or any other international tribunal which States might wish to approach), namely a special agreement. Under this, two or more States agree between themselves to bring a dispute before the Court (the terms of the dispute being defined by the parties themselves). The current circumstances hardly favour such a solution. This is regrettable. On this point, the sovereignty of States impedes any significant advance in international law and in its role in peace between nations, since true law can hardly exist without conflicts being justiciable. The option offered to States on the pretext of scrupulously respecting their sovereignty, namely of refusing to submit their conflicts with other States to a tribunal, renders international law crude and imperfect.

Such a tribunal does however exist, in the institution of the International Court of Justice, the judicial organ of the United Nations. China has a judge at the Court. Therefore it does not reject the principle of the existence of such a court. In a host of documents China has stated loud and clear that it has irrefutable evidence of its ancient historical rights to the archipelagos.

⁵ See the declaration by the Philippines, (1993-1994) *Yearbook of the International Court of Justice*, at pp. 117-118.

What has it to fear in expounding its arguments before a broad court such as the one in The Hague?

Granted, this study has shown that Vietnam's rights, particularly its rights to the Paracels, are more certain, being more clearly established on the basis of the available documents. If China has further, unpublished documents at its disposal, what does it have to fear in submitting them to the Court? If nothing in its history has created a title in its favour more solid than that constructed by the Emperors of Annam, the judicial *disputatio* would enable the judges to establish, on the basis of events since French colonization, how that title has been maintained. Keeping the Paracels by force without clarifying these questions means fuelling a future source of discord comparable, all other things being equal, to the Falklands.

In the case of the Spratlys, there again, expounding legal arguments under the spotlight of judicial proceedings would be a factor of peace, whereas the current, highly unstable situation is pregnant with menace.

In the case of the Spratlys, a special agreement between any two of the five contenders (six if we count Brunei) would be most likely be a powerful factor triggering general proceedings for a settlement. This would place the other claimant States in an embarrassing situation: either they would run the risk of the islands' fate being settled by the Court without them and perhaps to their disadvantage, or, by applying for permission to intervene, they would also become party to the proceedings so that they could set out their rights and seek to protect them.

Were this to happen, the case of the Spratlys as a whole would be brought before the Court.

The Court's task would not be easy, since only Vietnam and France have acquired true historical titles to the archipelago, even if the extent and scope of such titles are uncertain. Whatever solution is found will require a genuine effort of imagination and co-operation by both the parties and the judges.

One solution would be to create a condominium, a legal regime established by treaty, under which several States would jointly exercise over a single territory the powers normally exercised by a single State. Power would be shared, something which might be achieved under various arrangements. It is a compromise solution, embodying international collaboration restricted to the management of a single space. By reducing political tension, a condominium would be a bulwark against the threat of regional imperialism by a single power.

These risks are great in the South China Sea owing to the growing strength of the Chinese Navy.

A condominium over the Spratlys might take the form of an agreement between all States concerned to create an international joint development agency with a twofold objective: securing the safety of navigation in the region by maintaining buoys and lighthouses; managing the resources of the sea or seabed which, under the Convention on the Law of the Sea, belong to the holder of title to sovereignty over land above sea level. Sovereignty would be jointly managed by the group of States having concluded the agreement governing the condominium. This would lead to the award of mining and fisheries concessions.

The agency would be financed by contributions from the States parties to the condominium, enabling it to operate. The agency would redistribute the profits to the States parties.

The crucial point would be fixing States' respective shares in the agency, such shares controlling their contribution of the budget but also their share of the profits.

It will not be easy to determine the shares of the various parties, since there are not only true islands but also tiny slivers of land scattered over a large maritime area, alongside the barely submerged shoals and banks which pose such a threat to navigation and which geological movement might push clear of the water at some time in the future.⁶

In an endeavour to overcome this real difficulty, some authors have suggested sectors as a solution,⁷ whereby States would share exploration rights in delimited zones, based on the main islands under their control. The same authors endorse the Chinese proposal for joint development of the area, leaving settlement of the question of sovereignty in abeyance. They thus suggest a formula for sharing development rights between the States of the region, totally disregarding previously acquired titles.⁸

These various solutions and the very fact of entrusting the framing of such solutions to the international Court of Justice may appear Utopian at present, but with the unrest facing the world, and the speed of change, it may perhaps soon appear imperative, in order to rescue States from the impasse into which their rivalries have led them. The future will belong to solutions which take account of interdependence. The road leading to a solution is

⁶ For the Chinese claim on this point, see Zhou, *op. cit.*, p. 544.

⁷ Mark J. Valencia, *South-East Asian Seas: Oil under Troubled Waters*, (Oxford, New York: Oxford University Press, 1983), pp. 124 *et seq.*

⁸ See Mark Valencia, Jon van Dyke & Noel Ludwig, *Sharing the Resources of the South China Sea* (Martinus Nijhoff, 1997). For an analysis which insists in taking legal titles into account, see Jonathan I. Charney, 'Central East Asian Maritime Boundaries and the Law of the Sea' (1995) *American Journal of International Law*, vol. 89, n°4, at p. 729.

negotiation in good faith, not the option of superior force. This is why China's current political position, the proposal jointly to develop the wealth of the archipelago, whilst reserving the question of sovereignty, is unacceptable to the partners, reflecting as it clearly does the hegemonic claim that might is right.

The peoples of the region, embarking impatiently and eagerly on the journey to long-awaited economic growth, need all their natural resources. The resources of the sea are decisive. Their peaceful exploitation requires the delimitation of maritime spaces. Yet there can be no delimitation unless the question of sovereignty is settled first. This indicates how important the question of sovereignty over the Paracels and Spratlys is. It is hoped that this book has helped to shed some light on it.

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Dong Thanh
Le Courrier du Vietnam
L 'eveil de l'Indochine
Far Eastern Economic Review
Le Figaro
Le Journal des Coloniaux - l'armee coloniale
Liberation
Mer et Colonies
Le Monde
Le Monde colonial illustre
Le Monde Diplomatique
Newsweek

Pekin - Informations

La Revue generale de droit international public (international events column)

Temps nouveaux

ARBITRAL JUDGMENTS OR AWARDS

Aves Island case

Netherlands - Venezuela

Award of 30 June 1865

Bulama Island case

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United Kingdom - Brazil

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