

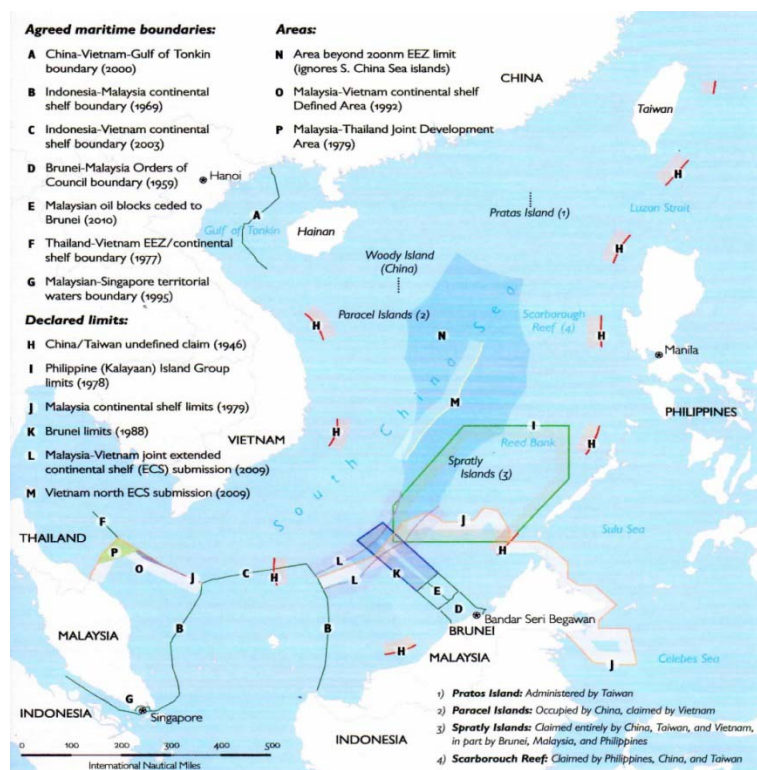
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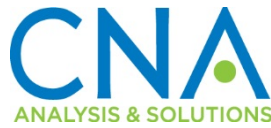
China versus Vietnam: An Analysis of the Competing Claims in the South China Sea

Raul (Pete) Pedrozo

With a Foreword by CNA Senior Fellow Michael McDevitt

August 2014





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Approved by:

August 2014

A handwritten signature in black ink that reads "Ken E. Gause". The signature is written in a cursive, flowing style.

Ken E. Gause, Director
International Affairs Group
Center for Strategic Studies

FOREWORD

This legal analysis was commissioned as part of a project entitled, “*U.S. policy options in the South China Sea.*” The objective in asking experienced U.S. international lawyers, such as Captain Raul “Pete” Pedrozo, USN, Judge Advocate Corps (ret.),¹ the author of this analysis, is to provide U.S. policy makers access to work that tests the various legal arguments that the respective claimants make in support of their claims, and weigh them against the relatively limited body of international case law associated with maritime disputes of this sort.

Importantly, this analysis of Vietnamese claims versus Chinese claims to the Paracel and Spratly archipelagoes was *not* undertaken as a prelude to a recommendation that the United States depart from its long held position of not taking a position on competing sovereignty claims in the South China Sea. That is not the intent, nor is it one of the recommendations of the project.

Captain Pedrozo’s findings are summarized below:

Based on the arguments and evidence submitted by the claimants and general principles of international law related to the acquisition of territory, it would appear that Vietnam clearly has a superior claim to the South China Sea islands.

Vietnam’s title to the Paracels is well founded in both history and law. Beginning in the early 18th century, Vietnam demonstrated a clear intent to assert sovereignty over the islands through the establishment of a government-sponsored company to exploit and manage the resources of the archipelago. That intent was confirmed by the annexation of the islands and symbolic acts of sovereignty in the early 19th century, followed by peaceful, effective, and continuous administration of the islands by successive Nguyen dynasties until the advent of the French colonial period. France continued to effectively administer the islands on behalf of Vietnam and physically took possession and occupied the Paracels in the 1930s. Thereafter, France continued to assert its sovereignty over the Paracels until its departure from Indochina in 1956. Following the French withdrawal, South Vietnam (and subsequently a united Vietnam) effectively administered the islands and never ceased to assert Vietnamese sovereignty over the archipelago, even after China illegally occupied a portion of the islands in 1956 and the entire archipelago in 1974.

On the other hand, the first demonstration of Chinese sovereignty over the Paracels did not occur until 1909, two centuries after Vietnam had legally and effectively established

¹ Captain Raul (Pete) Pedrozo, U.S. Navy (Ret.). Former Professor of International Law, U.S. Naval War College; Staff Judge Advocate, U.S. Pacific Command; and Special Assistant to the Under Secretary of Defense for Policy. The views expressed in this paper do not reflect the views of the U.S. government, the U.S. Department of Defense, or the U.S. Navy.

its title to the islands. Moreover, China's illegal occupation of Woody Island in 1956, and its occupation of the entire archipelago by force in 1974, clearly violate Article 2(4) of the UN Charter and accordingly do not confer a clear legal title to the Paracels.

With regard to the Spratlys, France annexed the islands as *terra nullius* in the 1930s—at the time, occupation by force was a valid method of acquiring sovereignty over territory. Great Britain, which had controlled some of the Spratly Islands in the 1800s, abandoned its claims following the French annexation and effective occupation, so French title to the Spratlys was legally and soundly established. France's title to the archipelago was ceded to South Vietnam in the 1950s and the South Vietnamese government (and subsequently a united Vietnam) effectively and peacefully controlled the islands until ROC forces illegally occupied Itu Aba Island in 1956 and PRC forces illegally occupied a number of islets in the archipelago in 1988.

The ROC's occupation of Itu Aba Island in 1946 and 1956, and the PRC's invasion of the Spratlys in 1988, violate Article 2(4) of the UN Charter and cannot confer clear title to the Spratlys to either Taiwan or China. The fact that China may have challenged Vietnamese sovereignty over the Spratlys between 1951 and 1988, rights that were legally ceded by France to Vietnam, does not in and of itself create a clear title for China.

The Pedrozo analysis differs in part from two other third party analyses, one by Dr. Marwyn S. Samuels, an American scholar, who wrote the first detailed study on the origins of the disputes among China, Vietnam and in the Philippines. A meticulous scholar who used Vietnam and Chinese sources, his *Contest for the South China*, holds up very well some 40 years later.² Samuels concluded that China had the better claim to the Paracels, but that China's claim to the Spratly's was "highly questionable."³ His judgments were partially echoed by Australian scholar Dr. Greg Austin, who has legal training. In his well-regarded *China's Ocean Frontier*, published in 1998.⁴ Austin found that China had "superior rights in the Paracels," but the legal complexity of the disputed Spratly claims meant that, "PRC claims to the entire Spratly group are at least equal to any other."⁵

Pedrozo's findings are supported by Professor Monique Chemillier-Gendreau in her work, *Sovereignty over the Paracel and Spratly Islands*. Professor Chemillier-Gendreau is a legal scholar and Professor Emeritus at Paris University-Diderot.⁶

In reviewing all of these works, it is clear to me that in the unlikely event these claims are ever taken to the International Court of Justice to resolve the disputes over sovereignty the

² Marwyn S. Samuels, *Contest for the South China Sea*, Methuen New York, 1982.

³ Ibid, p. 68.

⁴ Greg Austin, *China's Ocean Frontier: International Law, Military Force, and National Development*, Allen and Unwin, NSW, Australia, 1998.

⁵ Ibid, p. 161.

⁶ Monique Chemilleir-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, Springer (English translation), 2000.

process will be long and difficult. None of the claimants has what might be called an “open and shut” legal case—although the consensus among scholars seems to be that China’s claims in the Spratlys are weaker than those to the Paracels.

The reality on the ground is that China has occupied the entire Paracel group for 40 years, and short of military action by Vietnam to recapture the archipelago, will never leave. The issue is more complicated in the Spratlys. China, Taiwan, Vietnam, Malaysia and the Philippines all permanently occupy features in the Spratly group. Resolution of the dispute is likely in only four ways: judicial arbitration that all parties agree to undertake; all parties agree to freeze in place while tabling the issue of ultimate sovereignty in favor of a cooperative regime for resource exploitation and management; individual claimants reach an understanding with China ceding sovereignty claims in return for economic preference; or the use of force by the most powerful to expel rival claimants.

Michael McDevitt

Senior Fellow and Project Director

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I. INTRODUCTION*

The South China Sea stretches from Singapore and the Strait of Malacca in the southwest, to the Strait of Taiwan in the northeast. It is bounded on the east by the Philippine Islands, on the south by Borneo, on the west by Vietnam, and on the north by mainland China. The area includes several hundred small islands, rocks, atolls, islets, cays, shoals, sandbars, and reefs. Many are underwater at high tide, while others are permanently submerged even at low tide. These features, most of which are uninhabitable, are situated in three island chains (the Spratly, Paracel, and Pratas Islands), the Macclesfield Bank, and Scarborough Shoal.

The South China Sea links the Pacific and Indian oceans and is home to some of the world's busiest and most strategically important sea lines of communication. More than half of the world's oil tanker traffic and over half of the world's merchant fleet (by tonnage) sail through these waters every year. In addition, the South China Sea is rich in natural resources, including abundant fisheries and potentially large oil and natural gas deposits.¹ Sovereignty over the various land masses—and the resulting maritime zones that would flow from these features—would place many of these resources under the exclusive control of one nation. Competing claims to these resources could result in conflict, which, in turn, could affect the free flow of commerce through the region. Peaceful resolution of the dispute is, therefore, critical to maintaining regional peace and stability, as well as a vibrant world economy.

Pratas Island² and the Macclesfield Bank³ are claimed by Taiwan and China. No nation has challenged China's or Taiwan's claim to Pratas Island. However, Macclesfield Bank and its surrounding shoals are located beyond the territorial sea of any nation and are permanently submerged, even at low tide. Accordingly, these features may not be claimed by any nation. Although the International Court of Justice (ICJ) has stated that international law "is silent on the question whether low-tide elevations can be considered to be 'territory,'" and that there is no "customary rule which unequivocally permits or excludes appropriation of low-tide elevations," the few rules in the law of the sea that govern low-tide elevations "do not justify a general assumption that low-tide elevations are territory in the same sense as islands."⁴ Moreover, the Court noted that "it has never been disputed that islands constitute terra firma, and are subject to the rules and principles of territorial acquisition; [however,] the difference in

* This analysis is authored by Captain Raul (Pete) Pedrozo, U.S. Navy (Ret.). Former Professor of International Law, U.S. Naval War College, Staff Judge Advocate, U.S. Pacific Command, and Special Assistant to the Under Secretary of Defense for Policy. The views expressed in this paper do not reflect the views of the U.S. government, the U.S. Department of Defense, or the U.S. Navy.

¹ *South China Sea Report*, U.S. ENERGY INFORMATION ADMINISTRATION, last updated Feb. 7, 2013.

² Pratas Island (20°42'N., 116°43'E.) lies 160 miles southeast of Hong Kong and is composed of sand covered with scrubby brush. The island is governed by Taiwan and is home to a weather station located near the center of the east part of the island. NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY PUBLICATION 161, *Sailing Directions (Enroute), South China Sea and the Gulf of Thailand*, Thirteenth Edition (2011) [hereinafter Pub. 161].

³ Macclesfield Bank (15°45'N., 114°20'E.) is a submerged atoll about 75 miles long on its northeast-southwest axis and about half that wide at its broadest part. Pub. 161.

⁴ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment*, I.C.J. Reports 2001, p. 40, at pp. 101-103; *accord Sovereignty over Pedra Branca/Pulau Batu Puteh Middle Rocks and South Ledge (Malaysia/Singapore), Judgment*, I.C.J. Reports 2008, p. 12, at pp. 99-101.

effects which the law of the sea attributes to islands and low-tide elevations is considerable.”⁵ Accordingly, the Court concluded that “it is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory.”⁶ A similar, albeit more persuasive, argument could be made with regard to completely submerged features, such as Macclesfield Bank.⁷ Nonetheless, because China’s claim to Macclesfield Bank is not contested by Vietnam, it is not discussed in detail in this paper.

Scarborough Shoal⁸ is claimed by China, Taiwan, and the Philippines. The total area of the shoal, including its inner lagoon, is 150 square kilometers.⁹ The reef is situated about 170 nautical miles (nm) east of Macclesfield Bank, 115 nm off the Philippine island of Luzon (Zambales Province), and 472 nm from the Chinese coast.¹⁰ China argues that it discovered the shoal and has exercised effective control over it for hundreds of years. The Philippines claims that it has effectively occupied the shoal since 1946.¹¹ Because the dispute over the shoal does not involve Vietnam, it is not discussed in detail in this paper.

The Paracel Islands¹² are spread over a sea area of 15,000 to 16,000 square kilometers and are claimed by Vietnam, Taiwan, and China, but have been occupied by China since 1974. Most of the features in the South China Sea are in the Spratly Island¹³ chain and are spread over 160,000 to 180,000 square kilometers of ocean area. The Spratlys are claimed in their entirety by China, Taiwan, and Vietnam, and partially by the Philippines, Malaysia, and Brunei. All of the

⁵ *Id.*

⁶ *Id.*

⁷ Robert Beckman, *Scarborough Shoal: Flashpoint for Confrontation or Opportunity for Cooperation*, RSIS COMMENTARIES, No. 072/2012, Apr. 24, 2012 (“...under international law, Macclesfield Bank may not be capable of being subject to a claim of sovereignty because it is completely submerged.”) [*hereinafter* RSIS COMM. No. 072/2012].

⁸ Scarborough Reef (Scarborough Shoal) (15°08'N., 117°45'E.) consists of a narrow belt of barely submerged reef enclosing a lagoon. On the belt are scattered rocks, with over 20 rocks standing 1.5 to 2.5 meters high. Fishing vessels from China and the Philippines frequent the reef to exploit the abundant living resources around the shoal. The ruins of an iron tower stand close to the above channel opening. PUB. 161.

⁹ Zou Keyuan, *Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?*, INTERNATIONAL BOUNDARIES RESEARCH UNIT BOUNDARY AND SECURITY BULLETIN 71, Summer 1999, at p. 71 [*hereinafter* IBRU BULL. 71].

¹⁰ *Id.*

¹¹ The Philippines’ claim is based on a number of activities, including building and operating of a lighthouse on the shoal in 1965, conducting a number of hydrographic surveys and marine scientific research in the waters around the shoal, using the shoal as an impact range for military exercises and enforcing its laws on smuggling and illegal fishing. RSIS COMM. No. 072/2012; *see also* IBRU BULL. 71, at p. 74.

¹² The Paracel Islands (16°40'N., 112°20'E.) are made up of the Amphitrite Group, the Crescent Group, and several off-lying islands and coral reefs, some of which are covered with trees or vegetation. The Amphitrite Group (16°53'N., 112°17'E.) is the northeasternmost cluster of islands, reefs, and shoals in the Paracels. The Crescent Group lies 45 miles southwest of the Amphitrite Group and consists of several low sand islets and numerous reefs. The principal islands are covered with thick vegetation. PUB. 161.

¹³ The Spratly Islands lie in the southeast part of the South China Sea along an oblong area about 52,000 square miles in extent, northwest of the strategic Palawan Passage. The area is dotted with sunken reefs and coral atolls. The major axis of the area bears about 045°-225° for a distance of 340 miles with a maximum breadth along its minor axis of 175 miles. PUB. 161.

claimants, except Brunei, have established military outposts on a number of features.¹⁴ Vietnam occupies the most features, followed by the Philippines, China, Malaysia, and Taiwan.

The Paracel and Spratly Islands are situated beyond the geological continental shelf of any of the claimant states. Waters around the Paracels can reach a depth of over 1,000 meters (3,280 feet), while the Spratlys are separated from any mainland or major island by ocean trenches over 3,000 meters (9,842 feet) deep. Consequently, none of the claimant states can claim sovereignty over the islands “on the grounds that they belong, in geomorphological terms, to the continental shelf of any particular country.”¹⁵

This paper will only examine the claims of China/Taiwan and Vietnam with regard to the Paracel and Spratly Islands, as all of the activities of the other claimants occurred well past the critical date and can therefore not be used as a basis to claim sovereignty over any of the South China Sea islands. That is not to say that Malaysia, Brunei, or the Philippines may not have valid claims to some of the submerged features situated on their respective continental shelves under the United Nations Convention on the Law of the Sea (UNCLOS); rather, it means that an analysis of those potential claims is beyond the scope of this paper. The Philippines may also have a valid claim to Scarborough Shoal, which is not considered part of the Spratly Islands.¹⁶

II. ACQUISITION OF TERRITORY

In general, territorial sovereignty can be acquired in one of five ways: accretion, cession, conquest, occupation, and prescription. Accretion involves the expansion of existing territory under the sovereignty of a state through geographical or geological process (*e.g.*, volcanic activity). Cession occurs when one state transfers its territory to another state pursuant to a treaty. However, “the transferee cannot receive any greater rights than those possessed by the transferor.”¹⁷ Conquest—the acquisition of territory by force—was historically considered a lawful mode of acquiring sovereignty, but has been illegal since October 1945 following the entry into force of the *United Nations Charter* (see Article 2(4)).¹⁸ Prescription involves the occupation of another state’s territory over a long period of time. In order for prescription to apply, the occupying state must show that its display of state authority (*à titre de souverain*)

¹⁴ The South China Sea Online Resource, available at www.southchinasea.org/; see also Michael Bennett, *The People’s Republic of China and the Use of International Law in the Spratly Islands Dispute*, 28 STAN. J. INT’L L. 425, at pp. 439-440 (1997).

¹⁵ Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands* (Brill/Martinus Nijhoff Publishers, 2000), at p. 16 and Annex 18 (Note dated 8 March 1928 from Mr Bourgouin).

¹⁶ PUB. 161.

¹⁷ D. P O’Connell, *Territory*, INTERNATIONAL LAW 437, Vol. 1 (2nd ed.), Stevens & Sons, 1970 [*hereinafter* O’CONNELL INTERNATIONAL LAW (2nd ed.)]; see also James Crawford, *Acquisition and Transfer of Territorial Sovereignty*, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 217 (8th ed.), Oxford University Press, 2012 [*hereinafter* BROWNIE (8th ed.)].

¹⁸ Charter of the United Nations, June 26, 1945, Article 2(4) provides that “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state....” Accord M. Chemillier-Gendreau, note 15 *supra*. (“Wars of conquest, as a source of new sovereignty over a territory, are now prohibited. Conquest by force entails a situation of military occupation which is always illegal and which, failing an agreement concluded between the States concerned, cannot be transformed into law, even with the passage of time.”).

over the other state's territory was public, peaceful, and uninterrupted for a long period of time.¹⁹

Finally, a state may acquire sovereignty over territory that is not under the control of any other state (*terra nullius*) to the extent that the state effectively occupies the territory. Discovery alone, however, without subsequent acts of effective occupation, does not confer title to territory—"an inchoate title of discovery must be completed within a reasonable period by effective occupation of the region claimed to be discovered."²⁰ Moreover, an inchoate title will not "...prevail over the continuous and peaceful display of authority by another State; for such display may prevail even over a prior, definite title put forward by another State."²¹

A claim to sovereignty based on effective occupation "involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority."²² As discussed in the *Clipperton Island* case, besides the *animus occupandi*, effective occupation requires the actual, and not the nominal, taking of possession. "This taking of possession consists in acts, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there."²³

The degree of actual administration (*effectivités*) that must be established by the occupying state, however, may vary, particularly in cases of remote and uninhabited areas. Under such circumstances, tribunals have recognized that "sovereignty cannot be exercised in fact at every moment on every point of a territory" and that "[t]he intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved..."²⁴ Accordingly, some tribunals have "been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim...particularly...in the case of claims to sovereignty over areas in thinly populated or unsettled countries."²⁵ This exception to the general rule that there must be an actual and continuous display of authority by the occupying state is explained in detail in the *Clipperton Island* case.²⁶

¹⁹ O'CONNELL INTERNATIONAL LAW (2nd ed.), at p. 423; see also BROWNLIE (8th ed.), at p. 216.

²⁰ *Island of Palmas Case (Netherlands/U.S.A.)*, U.N. Rep., Vol. II, p. 829 (1928), at p. 846.

²¹ *Id.*

²² *Legal Status of Eastern Greenland Case (Denmark v. Norway)*, P.C.I.J., Series A/B, No. 53 (1933), at p. 45.

²³ *Clipperton Island Arbitration (Mexico v. France)*, 2 R.I.A.A. 1105 (1931), at p. 393. [The cited pages are from the English translation at 26 Am. J. Int'l L. 390, at 393-394 (1932).]

²⁴ *Island of Palmas Case (Netherlands/U.S.A.)*, U.N. Rep., Vol. II, p. 829 (1928), p. 831, at p. 840.

²⁵ *Legal Status of Eastern Greenland Case (Denmark v. Norway)*, P.C.I.J., Series A/B, No. 53 (1933), at p. 46. See also *Western Sahara Advisory Opinion*, I.C.J. Reports 1975, p. 12, at p. 43.

²⁶ *Clipperton Island Arbitration (Mexico v. France)*, 2 R.I.A.A. 1105 (1931), at pp. 393-394. [The cited pages are from the English translation at 26 Am. J. Int'l L. 390, at 393-394 (1932).] ("It is beyond doubt that...the actual...taking of possession is a necessary condition of occupation. ...Strictly speaking, and in ordinary cases, that only takes place when the state establishes in the territory itself an organization capable of making its laws respected. ...There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.")

III. CHINA

A. Chinese Claims

China's position regarding its sovereignty claims to the Paracel (Xisha) and Spratly (Nansha) Islands was most recently published in June 2000 by the Ministry of Foreign Affairs (MFA) of the People's Republic of China (PRC) in a document entitled *The Issue of South China Sea*.²⁷ In short, China's claim of indisputable sovereignty over the Paracel and Spratly Islands and their adjacent waters is based on several factors, including historical evidence, economic development, effective administration, and international recognition.²⁸

1. Historical Evidence

According to the MFA, China was the first nation to discover and name the South China Sea islands. References to the islands appear in a number of books dating as far back as the Han Dynasty (206 BC-220 AD). Yang Fu "described the geographic features of the South China Sea Islands..." in his book, *Yiwu Zhi (Records of Rarities)*.²⁹ A famous Chinese navigator of the East Wu State of the Three Kingdoms Period (220-280)—General Kang Tai—also mentions the islands in his book entitled *Funan Zhuan (Journeys to and from Phnom)*. The general, along with Zhu Ying, had been dispatched by Emperor Huangwu on a diplomatic mission to Funan (present-day Cambodia) via the South China Sea to meet with envoys from a number of states, including the State of Tianzhu (present-day India).³⁰ Similarly, hundreds of books published during the Jin (265-410), Tang (618-907), Song (960-1279), Yuan (1271-1368), Ming (1368-1644), and Qing (1644-1911) Dynasties refer to the South China Sea islands. These include the *Dao Yi Zhi Lue (Abridged Records of Islands and Barbarians)* written by Wang Dayuan, a prominent Chinese navigator of the Yuan Dynasty who made numerous voyages to the South China Sea, and the *Nanzhou Yuou Zhi (Records of Rarities in Southern Boundary)* by Wan Zhen, which documents the encounters of Chinese sailors of the Han era (206 BC-220 AD) with the

²⁷ Ministry of Foreign Affairs of the People's Republic of China, *The Issue of South China Sea* (June 2000), [hereinafter MFA, *The Issue of South China Sea*], available at <http://www.bbb0Td0003Fj/TT01Tf0.0na>

South China Sea islands on their return trip home from the Malay Peninsula.³¹ A book published during the South Song Dynasty (1127-1279)—*Qiong Guan Zhi (Records of the Qiong Prefecture and its Jurisdiction)*—likewise reflects that the Spratlys and Paracels were under the jurisdiction of the Qiong Prefecture (today's Hainan Province).³²

According to the MFA, Emperor Zhenyuan of the Tang Dynasty (785-805) included the South China Sea islands in the administrative maps of the Empire. Reference to the islands can also be found in a number of maps, including the *Hunyi Jiangli Lidai Guodu zhi Tu (Consolidated Map of Territories and Geography and Capitals of Past Dynasties)*, published during the Ming Dynasty, and the *Geng Lu Bu (Road Map)* of the Qing Dynasty.³³

Chinese scholars likewise attribute great importance to Chinese efforts during the Song, Yuan, Ming, and Qing Dynasties to include the South China Sea islands in the country's official maps as a demonstration of sovereignty. For example, *Zhu Fan Tu (Maps of the Various Barbarian Peoples)* of the North Song Dynasty is a collection "of ancient Chinese maps that referred to the South China Sea Islands as being subject to the Chinese rulers."³⁴ More specifically, the *Zhu Fan Tu (Maps and Charts of the Various Barbarian Peoples, the North Song Dynasties)* referred to the Spratlys and the sea area west of the Paracels as the outer limits of China's maritime boundary.³⁵ Thus, both the Paracels and Spratlys "were within the boundary of the Song Empire."³⁶

According to Chinese scholars, maps published in the Yuan Dynasty included the Paracel and Spratly Islands as Chinese territory.³⁷ Similarly, during the Ming Dynasty, "official Chinese maps [such as the *Hunyijiangli Hdai Guodu zhi Tu (Consolidated Map of Territories and Geography and Capitals of Past Dynasties (1402))*] continued to indicate China's sovereignty over the South China Sea Islands."³⁸ Ming-era maps were used by Admiral Zheng He during his Seven Voyages. Official records of the Ming Dynasty, such as *Qiong Guan Gu Zhi (Ancient Records on the Jurisdiction of Qiongzhou Fu)*, also refer to Chinese jurisdiction over the Spratlys and Paracels.³⁹ In *Zhengde Qiong Tai Zhi (Records of Qiong[zhou] and Tai[wan] During the Reign*

³¹ MFA, *The Issue of South China Sea*; see also Shen II, at pp. 111 and 113-116; Shen I, at pp. 19, 27-28. Historical evidence of the earliest Chinese presence in the Paracels can also be found in the Chronicles of the Sung Dynasty, "which states that the last Sung Emperor, pursued by a Yuan (Mongol) Dynasty general, fled to the Paracels in an attempt to reach Indo-China." Tao Cheng, *The Dispute Over the South China Sea Islands*, 10 TEX. INT'L L. J. 265 (1975), at p. 273.

³² References to the Spratlys and Paracels can also be found in other Song-related books, such as *Song Hui Yao Ji Gao (Selected Manuscripts of the Digests of the Song Dynasties)*, *Song Shi (The History of the Song Dynasties)* and *Zhu Fan Tu (Maps and Charts of the Various Barbarian Peoples, the North Song Dynasty)*. Shen II, at pp. 132-133; see also Shen I, at pp. 23-24.

³³ MFA, *The Issue of South China Sea*; see also Shen II, at p. 106.

³⁴ Shen II, at p. 126.

³⁵ Shen I, at p. 24.

³⁶ *Id.*, at p. 26.

³⁷ Some of these maps include: *Yuandai Jiangyu Tu Xu (Map of the Territory of the Yuan Dynasty Illustrated)*; *Shengjiao Chiang Bei Tu* of 1330 by Li Zemin, the *Hunyi Jiangli Tu (Consolidated Maps of the Territory [of the Yuan Dynasty])* of 1380, and the *Yu Di Tu (The Maps of the Territory [of Yuan])* drawn and illustrated by Zhu Siben (Yuan). Shen II, at pp. 126-127; see also Shen I, at pp. 28-29.

³⁸ Shen II, at p. 127. A similar reference is contained in the *Wubei Mishu Dili Fu Tu (A Geographical Map Annexed to the Secret Manual on Defense Preparations (1637))*. Shen I, at p. 30.

³⁹ Shen II, at p. 133.

of Emperor Zhengde), Tan Zhou recorded that “the sphere of jurisdiction of the Qiongzhou Prefecture included the...Xisha Islands and Nansha Islands.”⁴⁰

Qing Dynasty maps, such as the *Sihai Zongtu* (*General Maps of the Four Seas*), published in 1730 by Chen Lunjiong, continued to depict the position of the Paracels and Spratlys within the Qing boundary.⁴¹ Chen also published a book in 1730—*Haikuo Wenchien Lu* (*Notes on Lands Across the Sea*)—that described the geographic positions of the Spratly and Paracel Islands.⁴² Qing-era records (e.g., *Records of Wanzhou Subprefecture*, *Records of Qiongzhou Prefecture* and *Guangdong Tong Zhi* (*General Records of Guangdong Province*)) likewise reflect that the South China Sea islands, including the sea areas surrounding the islands, were within the jurisdiction of Wanzhou.⁴³

A number of Chinese scholars place discovery and naming of the South China Sea islands much earlier in Chinese history—as far back as the Xia Dynasty (2100-1660 BC). A book written during the Qin Dynasty (221-206 BC)—*Yi Zhou Shu* (*Scattered Books of the Zhou Dynasties*)—speaks of “tributes from the South Sea” being paid by the southern barbarians (including present-day Vietnam) to the rulers of the Xia Dynasty, and says that these tributes (turtles, pearl-carrying shellfish, hawksbill turtles, and other rarities) continued through the Shang Dynasty (1600-1050 BC), the Zhou Dynasties (1046-256 BC), the Qin Dynasty (221-206 BC) and

⁴⁰ Shen I, at pp. 29-30.

⁴¹ Other Qing-era maps cited in support of Chinese sovereignty over the South China Sea islands include:

- (1) *Da Qing Zhong Wai Tianxia Quan Tu* (*The Complete Sino-Foreign Maps of the Great Qing*) of 1709;
- (2) *Qing Ehi Sheng Fen Tu* (*Individual Maps of the Provinces Directly under the Administration of the Qing Empire*) of 1724;
- (3) *Huang Qing Ge Zhi Sheng Fen Tu* (*Individual Maps of the Provinces Directly under the Administration of the Royal Qing*) of 1755;
- (4) *Da Qing Wan Man Titong Quan Tu* (*The Complete Maps of the Unified Great Qing for Ten Thousand Years*) of 1767 charted by Zhu Xiling and revised by Huang Zhengsun;
- (5) *Qing Hui Fu Zhou Xian Ting Zong Tu* (*The Qing-Charted General Maps of the Capital Cities, Prefectures, Counties and Tings*) of 1800 charted by Xiao Feng;
- (6) *Da Qing Wan Man Titong Tianxia Quan Tu* (*The Complete Maps of the Whole Unified Country of Great Qing for Ten Thousand Years*) of 1803 charted by Yang Senzhong;
- (7) *Da Qing Wan Man Titong Dili Quan Tu* (*The Complete Geographical Maps of the Unified Great Qing for Ten Thousand Years*) of 1810;
- (8) *Da Qing Titong Tianxia Quan Tu* (*The Complete Maps of the Whole Unified Country of Great Qing*) of 1817;
- (9) *Gu Jin Di Tu Quan Tu* (*The Complete Maps of the Lands and Territories Then and Now*) of 1895;
- (10) *Da Qing Tianxia Zhonghua Ge Sheng Fu Zhou Xian Ting Dili Quan Tu* (*The Complete Geographical Maps of the Provinces, Capital Cities, Prefectures, Counties and Tings of the Whole China of the Great Qing*) of 1904 charted by Wu Changfa; and
- (11) *Da Qing Tianxia Zhonghua Ge Sheng Fu Zhou Xian Ting Dili Quan Tu* (*The Complete Geographical Maps of the Provinces, Capital Cities, Prefectures, Counties and Tings of the Whole China of the Great Qing*) of 1905 charted by Wang Xingshun.

Shen II, at pp. 127-128. A book written by Yang Bingnan in 1844—*Hai Lu* (*Illustrations of the Sea*)—records “the oration of Xie Qinggao, a Qing official..., in which the South China Sea islands were described in four groups...” and a sea chart (*Yiban Lu* (*Particular Illustrations*)) prepared by Zheng Guangzu during the same time period contains the locations of the “Dongsha, Zhongsha, Xisha and Nansha Islands.” Shen I, at pp. 33-35.

⁴² Shen I, at p. 32; see also Hungdah Chiu and Choon-Ho Park, *Legal Status of the Paracel and Spratly Islands*, OCEAN DEV. & INT’L L., 3:1 (1975), 1-28, at p. 10.

⁴³ Shen II, at pp. 133-134; see also Shen I, at p. 30.

the Han Dynasty (206 BC-220 AD).⁴⁴ References to the South China Sea islands also appear in *Shi Jing (The Classics of Poems)*, “a collection of...poems of the Spring and Autumn Period (475-221 BC)...” and two sets of classics of the Spring and Autumn Period authored by Zuo Qiuming—*Zuo Zhuan (Zuo’s Commentaries)* and *Guo Yu (Statements of the States)*—both of which indicate that the Zhou state “appeased the barbarians to make expeditions to the South China Sea....”⁴⁵

Based on these early works, Chinese scholars argue that the “South China Sea Islands were...destinations of Chinese expeditions and targets of conquests during the East Zhou Dynasty (770-221 BC) ...” and that “such discovery and conquest...naturally led the Chinese rulers and people to believe that the South China Sea Islands were part of China throughout history, from the Xia Dynasty...to the Qing Dynasty....”⁴⁶

Irrespective of whether the Spratlys and Paracels were discovered during the Xia or Han Dynasty, China maintains that it had “the earliest recorded contact with the islands.”⁴⁷ Accordingly, some Chinese and western scholars argue that discovery of the South China Sea islands, at the very least, vested China with an inchoate title to the islands, which China could perfect within a reasonable amount of time by taking final and decisive sovereign action over the claimed territory.⁴⁸

2. Economic Development

According to the MFA, Chinese fishermen have been exploiting the South China Sea islands since the Jin Dynasty (265-420).⁴⁹ In his article, *Chronicles of Guangzhou*, Fei Yuan makes reference to fishing and collection of coral samples by Chinese fishermen.⁵⁰ These activities became more organized during the early days of the Ming Dynasty (1368-1644). Fishermen from Haikou, Puqian, and Qinglan Ports, as well as Wenchang County, went to the islands to fish for sea cucumbers and other sea produce. Accounts of these fishing expeditions can be found in the *1868 Guide to the South China Sea*.⁵¹ These fishermen were guided by the *Road Map*, which showed the navigational routes and courses from Hainan Island and mainland China to the Paracel and Spratly Islands.

Chinese scholars indicate that fishing boats from Hainan Island (Wenchang and Qionghai Counties) and Leizhou Peninsula have continued to fish the waters of the South China Sea on an annual basis since the founding of the Republic of China in 1912. Evidence of these post-Qing

⁴⁴ Shen II, at pp. 102-103; see also Shen I, at pp. 15-16.

⁴⁵ Shen II, at pp. 103-104; see also Shen I, at p. 17.

⁴⁶ Shen II, at pp. 104-105; see also Shen I, at pp. 15-17.

⁴⁷ M. Bennett, note 14 *supra*; see also B. Murphy, note 29 *supra*, at p. 200 (“There is little doubt that the Chinese were the first to discover the Spratlys.”); B. Dubner, note 29 *supra*, at p. 309 (“Despite the disputed dates, China may claim the earliest recorded contact [with the Spratlys].”).

⁴⁸ H. Chiu and C. Park, note 42 *supra*, at pp. 17-18; see also B. Murphy, note 29 *supra*, at p. 200.

⁴⁹ According to some Chinese scholars, economic exploitation of the South China Sea began as early as the Xia Dynasty (2100-1600 BC). Shen II, at pp. 111 and 130. See also Tao Cheng, note 31 *supra*, at p. 274.

⁵⁰ Shen I, at p. 20.

⁵¹ MFA, *The Issue of South China Sea* (“...fishermen from Hainan Island went to Zhenhe Isles and Reefs and lived on sea cucumber and shells they got there. The footmarks of fishermen could be found in every side of the Nansha Islands and some of the fishermen would even live there for a long period of time. Every year, there were small boats departing from Hainan Island for the Nansha Islands to exchange rice and other daily necessities for sea cucumber and shells from the fishermen there. The ships used to leave Hainan Island in December or January every year and return when the southwesterly monsoon started.”). See also Shen II, at pp. 130-131.

Dynasty activities can be found in a number of Chinese and foreign sources, including a 1918 book written by Okura Unosuke entitled *Stormy Islands* (about a Japanese expedition to Beizi Island) and *A Survey of the New South Islands* (a Japanese publication that indicates Chinese fishermen resided on the islands and grew coconuts, papaya, sweet potato and vegetables). Records from a 1933 investigative trip to the Paracel Islands by Miyoshi and Matuo of Japan also discuss the presence of Chinese fishermen on Beizi (North) and Nanzi (South) Islands.⁵² Similarly, an account written in 1933 by Chinese historian and geographer Ling Chunsheng makes reference to the presence of Chinese fishermen on Amboyna Cay, Spratly Island, Itu Aba Island, Loaita Island, Thitu Island, Northeast Cay, Southwest Cay, Namyit Island, and West York Island in the Spratly archipelago.⁵³

Although the MFA acknowledges that early Chinese activities on the Spratlys were not state sponsored, it indicates that subsequent fishing and other productive activities were organized with the approval and support of the Chinese government. In addition, fishermen were required to pay taxes and fees to the Chinese government in order to exploit the resources of the Spratlys.

Chinese scholars additionally emphasize that in 1910 the Qing government invited Chinese merchants to submit contracts to administer the development and exploitation of the South China Sea Islands, indicating that the government would provide protection to the merchants and maintain order “to strengthen [China’s] territorial sovereignty and...protect [Chinese] titles and interests” in the two island groups.⁵⁴ This practice was expanded by the Republic of China (1912-1949), although Chinese scholars acknowledge that most of the development and exploitation activities occurred in the Paracels, not the Spratlys.⁵⁵ Following

⁵² MFA, *The Issue of South China Sea*; see also Shen II, at p. 131.

⁵³ Shen II, at pp. 141-142.

⁵⁴ *Id.*, at p. 135; see also Shen I, at p. 36.

⁵⁵ Examples of development and exploitation activities in the Paracels include:

- In 1917, a Chinese businessman of the Hai Li Company, He Cheng'en, applied to the Office of the Governor of Guangdong Province for permission to mine phosphorus ore.
- In 1919, a Chinese businessman, Deng Shiyang, applied to develop selected islands in the Paracels for planting and farming.
- In 1921, the Ministry of Internal Affairs of the Republic of China approved the application of a businessman from Guangdong, He Ruinian (Ho Shui-nien), to engage in fishing, reclamation and cultivation, as well as to develop and exploit minerals. The license was revoked when the Chinese government discovered that Mr. He had assigned his license to a Japanese company—the Nanxing Shiye Company.
- Between 1929 and 1931, the Guangdong Provincial government granted licenses to Chinese businessmen, including Song Xiquan and Yan Jingzhi, to exploit guano.
- In 1932, the Chinese government contracted with the China National Fertilizer Company (Zhonghua Guochan Feitian Gongsi) to develop and exploit natural resources in the Paracels.
- In 1932, the Industrial Testing Institute of the Department of Construction of the Guangdong provincial government began mining guano on the Paracel Islands.
- In 1933, the Department of Construction of the Guangdong provincial government made preparations to construct a Guano Fertilizer Producing Plant on the Paracels and made plans to develop all of the Paracel Islands.
- In 1947, the Committee on Natural Resources of China requested the central government to consider entrusting the Zhongyuan Qiye Gongsi (Zhongyuan Enterprise Co.) with mining guano in the Paracel Islands.

the establishment of the People's Republic of China in 1949, the new government continued to economically exploit the South China Sea islands.⁵⁶ Again, most of these activities were conducted in the Paracels.

The MFA and Chinese scholars assert that China has continued to assert its exclusive resource rights in the South China Sea. For instance, in June 14, 1976, the MFA reaffirmed that "China has maintained indisputable sovereignty over the Xisha Islands and Nansha Islands and their surrounding sea areas, and the natural resources in these areas are China's property."⁵⁷ A similar statement was made in September 1979 when the MFA "reiterated that China has indisputable sovereignty over the Xisha Islands and Nansha Islands and their surrounding sea areas, and the natural resources in these areas are China's property."⁵⁸ The following year, on July 21, 1980, the MFA issued a statement condemning an agreement between Vietnam and the Soviet Union to jointly explore and exploit oil and gas deposits on Vietnam's southern continental shelf. The statement reiterated that "the Xisha and Nansha Islands, just like the Dongsha and Zhongsha Islands, have always been part of Chinese territory; the natural resources in the above areas belong to China" and that "the Soviet-Vietnamese agreement and the like are invalid."⁵⁹ A similar position was taken in April 1996 after Petro Vietnam and

Shen I, at pp. 38-39, 45. See also Tao Cheng, note 31 *supra*, at p. 274; H. Chiu and C. Park, note 42 *supra*, at pp. 11-12; Stein Tønnesson, *An International History of the Dispute in the South China Sea*, EAST ASIAN INSTITUTE WORKING PAPER No. 71, Mar. 16, 2001, note 55, at p. 8; M. Chemillier-Gendreau, note 15 *supra*, at pp. 101-102, Annex 10 (*Note of 29 September 1932 from the Legation of the Chinese Republic in France to the Ministry of Foreign Affairs, Paris*), Annex 14 (*Letter of 6 October 1921, from the official in charge of the Consulate of France in Canton to the Président du Conseil, Minister for Foreign Affairs*).

⁵⁶ The following are examples of economic development of the South China Sea islands following the establishment of the People's Republic of China:

- From 1950 to 1952, the governments of Wenchang County, Qionghai County, Lingshui County, and others organized fishermen of Hainan to exploit the waters surrounding the Xishas and Nanshas; this practice has continued ever since.
- In 1953, the Aquatic Products Corporation of the Hainan Special Administrative Prefecture began to mine and exploit guano in the Xisha Islands.
- In May and June 1955, the Hainan Special Administrative Prefecture dispatched a survey and reconnaissance group to the Xishas to assess the natural resources on the islands.
- In April 1956, the Aquatic Products Department of Guangdong Province organized a reconnaissance team to investigate the aquatic resources in the Xisha Islands. A central working station was established on Yongxing Island, and branch stations were set up on other islands. More than 200 team members worked all over the islands. The team also set up Supply and Marketing Cooperatives (small shops), medical clinics, clubs, and power stations.
- In 1957, the Guano Corporation of the Hainan Special Administrative Prefecture mined guano and phosphate rocks on the Yongxing Island, with more than 100 workers participating. ...
- From the winter of 1959 to April 1960, the Aquatic Products Bureau of the Hainan Special Administrative Prefecture organized 131 fishing boats and 1,752 fishermen from the coastal counties to engage in large-scale fishing in the waters surrounding the Xisha and Nansha Islands.

Shen I, at p. 47.

⁵⁷ *Id.*, at p. 67. On January 1, 2014, new regulations took effect that require foreign fishing vessels to obtain prior approval from China to fish in the 2 million km² sea area administered by Hainan Province in the South China Sea (waters encompassed by the so-called "nine-dash line"). Brian Spegele, *Beijing Moves to Bolster Claim in South China Sea*, THE WALL STREET JOURNAL, Jan. 9, 2014, at p. A9.

⁵⁸ Shen I, at pp. 67-68.

⁵⁹ *Id.*, at p. 68.

Conoco announced that they had signed a contract for joint exploration and drilling in the Vanguard Bank (Wan'an Tan). In that case, the MFA reasserted "that China has incontestable sovereignty over the Nansha Islands and their adjacent waters."⁶⁰

Continued foreign investment in the region in the 21st century has prompted China to reiterate its opposition to any oil and gas exploitation in the South China Sea without Beijing's permission. On September 22, 2011, the Chinese Foreign Ministry condemned a deal between India's state-owned Oil and Natural Gas Corporation (ONGC) Videsh Ltd. and PetroVietnam to explore and develop oil and gas blocks in the South China Sea within Vietnam's claimed EEZ. The MFA's statement indicated that any hydrocarbon exploration in the South China Sea without Beijing's approval was an infringement on PRC sovereignty and, therefore, illegal and invalid.⁶¹ China reacted similarly in April 2012 to an announced deal between a Russian natural gas producer (Gazprom) and Vietnam Oil & Gas Group to develop two gas blocks in the South China Sea.⁶² Then, in May 2014, state-owned China National Offshore Oil Corporation (CNOOC) deployed its deep sea drilling rig HD-981 to the disputed waters south of the Paracels to conduct exploratory drilling for oil. A large number of government vessels, including seven PLAN warships, were deployed to support the operation.⁶³

China has additionally used its navy and civilian maritime law enforcement agencies to directly interfere with Vietnamese and Filipino resource exploration and exploitation activities within their respective claimed EEZs in the South China Sea. On March 2, 2011, for example, two China Maritime Surveillance (CMS) patrol boats (No. 71 and 75) forced the survey ship M/V *Veritas Voyager* that was conducting a seismic survey for oil and gas on behalf of the Philippine Department of Energy in the vicinity of Reed Bank (80 nm west of Palawan Island) to withdraw from the area. Forum Energy—the UK-based company that had been awarded the contract to conduct seismic surveys in the Sampaguita gas field—completed the survey at the end of March with the assistance of a Philippine Coast Guard vessel that was deployed to deter further Chinese interference with the *Voyager's* work. Following completion of the survey, the Philippines invited foreign investors and oil companies to bid for the right to explore for oil and gas in 15 different blocks off the west coast of Palawan. Beijing immediately protested Manila's actions, alleging that two areas (Blocks 3 and 4) fall under China's "indisputable sovereignty."⁶⁴

A similar incident occurred off the coast of Vietnam on May 26, 2011, when three CMS patrol vessels confronted the *Binh Minh 02*, a survey ship being operated by Petro Vietnam approximately 116 nm off Dai Lanh, within Vietnam's claimed EEZ and some 600 km south of China's Hainan Island. The incident ended when one of the CMS patrol vessels intentionally cut the cable being towed by the survey ship.⁶⁵ Two weeks later, on the 9th of June, a Chinese fishing vessel (No. 62226) that was operating with two CMS patrol vessels intentionally rammed

⁶⁰ *Id.*, at p. 71.

⁶¹ Michael Martina, *China paper condemns Vietnam-India energy cooperation*, REUTERS, Sept. 22, 2011.

⁶² *China Reaffirms Position on Oil, Gas Exploitation*, CHINA DAILY, Apr. 11, 2012.

⁶³ Ernest Bower & Gregory Poling, *Critical Questions: Separating Fact from Fiction about Myanmar's Rohingya*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, May 7, 2014.

⁶⁴ *Manila Rejects New Chinese Claim To Territory Just 50 Miles Away From Philippine Province*, THE WASHINGTON POST, Nov. 14, 2011; Ian Storey, *China and the Philippines: Implications of the Reed Bank Incident*, China Brief, Volume 11, Issue 8, THE JAMESTOWN FOUNDATION, May 6, 2011.

⁶⁵ *VN Demands China Stop Sovereignty Violations*, VIETNAM PLUS, May 29, 2011.

the survey cable of the *Viking II*. The Petro Vietnam ship was conducting a seismic survey approximately 60 nm off the southern coast of Vietnam, within Vietnam's claimed EEZ and over 1,000 km from Hainan Island.⁶⁶ China's official response to the *Binh Minh* incident indicated that:

China holds a consistent and clear-cut position on the South China Sea issue. China opposes Vietnam's oil and gas exploration activities within the waters under the jurisdiction of China which undermine China's rights and interests as well as jurisdiction over the South China Sea and violate the bilateral consensus on the South China Sea issue. Actions taken by China's competent authorities are regular maritime law enforcement and surveillance activities in the waters under the jurisdiction of China.⁶⁷

Fifteen months later, on November 30, 2012, Chinese vessels once again took action against the Vietnamese seismic research vessel *Binh Minh 02*, which was operating within Vietnam's claimed EEZ about 43 miles southeast of Con Co Island off the Vietnamese coast (Quang Tri Province).⁶⁸ The *Binh Minh 02* was conducting a seismic survey in Block 113, which is jointly owned by Petro Vietnam and Russia's Gazprom, when it was surrounded by a number of Chinese vessels. When the *Binh Minh* ordered the Chinese ships to depart the area, two of them cut the survey ship's exploration cable.⁶⁹

3. Effective Administration

The MFA claims that China has exercised sovereignty and effective jurisdiction over the South China Sea islands since the Yuan Dynasty (1271-1368).⁷⁰ To support its claims, the MFA cites the *Geography Book of the History of the Yuan Dynasty* and the *Map of the Territory of the Yuan Dynasty with Illustration*, both of which describe the islands as sovereign Chinese territory.⁷¹

a. Naval Patrols

The MFA notes the presence of naval patrols as further evidence that China exercised effective administration and control over the South China Sea islands beginning in the 13th century. For example, the *History of the Yuan Dynasty* has accounts of naval patrols and inspection activities by the navy on the islands.⁷²

Chinese scholars indicate that the practice of conducting naval patrols in the South China Sea occurred much earlier, beginning with the Han Dynasty (206 BC-220 AD) during the first century. In 43 AD, Admiral Ma Yuan conquered the territory of the Nanman regions/Rinan

⁶⁶ *Sea spat raises China-Vietnam tensions*, NAMVIET NEWS, June 10, 2011.

⁶⁷ Peter Lee, *Southeast Asia rises in US reset*, ASIA TIMES ONLINE, June 4, 2011.

⁶⁸ Jeremy Page, *Vietnam Accuses Chinese Ships*, THE WALL STREET JOURNAL, Dec. 4, 2012.

⁶⁹ Ben Bland and Leslie Hook, *Beijing accused of oil sabotage*, FINANCIAL TIMES, Dec. 4, 2012, p. 2.

⁷⁰ Some Chinese scholars place Chinese authority and control over the South China Sea islands as far back as the Han Dynasties (206 BC-220 AD). Shen II, at p. 132.

⁷¹ MFA, *The Issue of South China Sea*.

⁷² *Id.*

Prefecture (present day central/northern Vietnam).⁷³ The Han government also conducted naval expeditions to the Malay Peninsula via the Spratly Islands, and the Wu State of the Three Kingdoms Period sent envoys to India via the South China Sea.⁷⁴ Naval patrols continued during the Jin, Song, Yuan, Ming and Qing Dynasties to the Republican era.⁷⁵ Evidence of naval patrols during the Jin Dynasty can be found in Hao Yulin's *Guangdong Tong Zhi* (*The General Records of Guangdong*).⁷⁶ Similar patrols were undertaken during the Song Dynasty and recorded by Xei Lingyun in *Wudi Lei* (*In Memory of Emperor Wudi*) and Li Daoyuan in *Shui Jing Zhu* (*Commentaries on the Books of Waters*), as well as during the Yuan Dynasty (*Yuan Shi* (*History of the Yuan Dynasty*), *Shi Bi Zhuan* (*History about [General] Shi Bi*), and *Dao Yi Zhi Lue* (*Abridged Records of Islands and Barbarians*)).⁷⁷

Additionally, according to Chinese scholars, the Emperor of the Yuan Dynasty “dispatched the...astronomer Guō Shoujing...to the South China Sea [in 1279] to survey and measure the Xisha and Nansha islands and the adjacent sea area.”⁷⁸ Guō's base camp was in the Paracel Islands, and his research is recorded in the *Yuan Shi* (*History of the Yuan Dynasty*).⁷⁹ Two decades later, in 1292, an expeditionary force of the Yuan Empire, under the command of Shi Bi, was dispatched to Java and reportedly sailed through the Paracel and Spratly Islands.⁸⁰

During the Ming Dynasty, the MFA notes that “the Hainan Garrison Command...was responsible for inspecting and patrolling as well as exercising jurisdiction over the Xisha [Paracel], Zhongsha [Macclesfield Bank] and Nansha [Spratly] Islands.”⁸¹ To support its claim, the MFA points to the inscription on the Memorial Tablet of the Tomb of General Qian Shicai of the Hainan Garrison Command, which reads:

Guangdong [Province] is adjacent to the grand South China Sea, and the territories beyond the Sea all internally belong to the Ming State. General Qian led more than ten thousand soldiers and 50 huge ships to patrol tens of thousands of li⁸² on the South China Sea.⁸³

⁷³ “In his *Hou Han Shu* (*Books of the Latter Han Dynasty*), Xie Cheng recorded that Chen Mao, the Bieja...of Jiaozhi Province..., accompanied Zhou Chang, the Cishi...of Jiaozhou Province, in their naval inspection and patrolling cruise to the islands in the South China Sea....” Shen II, at p. 122; *see also* Shen I, at p. 18.

⁷⁴ Shen II, at p. 111.

⁷⁵ *Id.*, at p. 122; *see also* Su Hao, note 28 *supra*.

⁷⁶ Shen II, at p. 122 (“Bao Jing, the Administrator of nan Hai..., went on patrolling and inspection voyages in the South China Sea....”). *See also* Shen I, at pp. 20-21.

⁷⁷ Shen II, at pp. 123-124. The *Shi Bi Zhuan* (*Supplementary History*) of the *Yuan Shi* indicates that Chinese naval forces sailed through the Paracels and the Spratlys and landed on the islands of “Hundun Dayang, Ganlan..., Jialimada and Julian, where they...cut down lumbers to build small boats....” Shen I, at p. 27.

⁷⁸ Shen II, at pp. 126.

⁷⁹ Shen I, at p. 27.

⁸⁰ Shen II, at pp. 111-112; *see also* Shen I, at p. 27; Tao Cheng, note 31 *supra*, at p. 273; H. Chiu and C. Park, note 42 *supra*, at p. 10.

⁸¹ Shen II, at p. 125; *see also* MFA, *The Issue of South China Sea*.

⁸² A “li” is a Chinese unit of distance equal to about 500 meters.

⁸³ MFA, *The Issue of South China Sea*.

Chinese sources reflect that the areas patrolled by General Qian included the Paracels, the Spratlys, and Macclesfield Bank.⁸⁴ “A well-known navigator and high-ranking official of the Ming imperial court, Zheng He..., [also] led seven...large scale voyages through and beyond the South China Sea between 1405 and 1433...,” recording the location of the islands on detailed maps drawn between 1425 and 1430.⁸⁵ Zheng purportedly used the Paracels and other South China Sea islands “as stop-over points during voyages to and from the Indian Ocean and other destinations.”⁸⁶ He also “surveyed all the major South China Sea islands.”⁸⁷

Chinese scholars contend that the Qing Dynasty (1644-1911) continued to patrol the South China Sea and exercise administrative jurisdiction over the South China Sea islands. Between 1710 and 1712, Vice Admiral Wu Sheng of the Guangdong Navy “personally led his fleet to the South China Sea Islands and the vicinity to patrol the sea area: ...[the fleet] started from Qiongya [on Hainan Island] by way of Tonggu, passing through Qizhou Yang and Sigeng Sha, traveling three thousand lis....”⁸⁸ The Qing Dynasty additionally depicted the islands as Chinese territory on a number of official maps, including *A Map of Administrative Divisions of the Whole China of the 1724 Map of Provinces of the Qing Dynasty*, *A Map of Administrative Divisions of the Whole China of the 1755 Map of Provinces of the Imperial Qing Dynasty*, the *1767 Map of Unified China of the Great Qing for Ten Thousand Years*, the *1810 Topographical Map of Unified China of the Great Qing for Ten Thousand Years* and the *1817 Map of Unified China of the Great Qing for Ten Thousand Years*.⁸⁹

b. Administrative Control

The MFA states that there is a wealth of official government documents, as well as Chinese history books and official maps, which record the exercise of jurisdiction by successive Chinese governments over the South China Sea islands and recognize these islands as Chinese territory. The MFA further asserts that up until the beginning of the 20th century, China had exercised peaceful jurisdiction over the South China Sea Islands without any disputes.⁹⁰

Chinese scholars supplement the MFA’s White Paper with additional evidence to support China’s claims. One example cited by these scholars as evidence of China’s effective administration and control of the archipelagoes is the charting and opening of sea lanes through the South China Sea. The West Han rulers purportedly “established...close navigational and commercial ties with Southeast Asia, Sri Lanka and India through the usage of sea-routes in the South China Sea.”⁹¹ Chinese ships en route to Sri Lanka and other ports would necessarily pass through the South China Sea and the South China Sea islands. It was during the reign of Emperor Wudi of West Han that the South China Sea was renamed “Zhanghai.”⁹² A set of books written by a South Song official, Zhao Rukuo, in 1225—*Zhu Fan Tu (Maps and Charts of the Various Barbarian Peoples)* and *Zhu Fan Zhi (Records of the Various Barbarian Peoples)*—

⁸⁴ Shen I, at pp. 31-32.

⁸⁵ Shen II, at p. 112; see also H. Chiu and C. Park, note 42 *supra*, at p. 10.

⁸⁶ Shen I, at p. 31.

⁸⁷ Tao Cheng, note 31 *supra*, at p. 273.

⁸⁸ Shen II, at p. 125; see also Shen I, at p. 35; M. Chemillier-Gendreau, note 15 *supra*, at p. 62.

⁸⁹ MFA, *The Issue of South China Sea*.

⁹⁰ *Id.*

⁹¹ Shen II, at p. 118.

⁹² Shen I, at p. 18.

similarly depict “navigational sea lanes from and to the Chinese mainland through the South China Sea Islands...”⁹³ Another set of books from the Song era, written by Zho Qufei—Lingwai Daida (Substitute Replies from Lingwai)—contain “a similar depiction of the sea routes through the Nansha Islands between China and other parts of the world....”⁹⁴ These sea routes, which were used by Zheng He to conduct his renowned seven voyages through and beyond the South China Sea between 1405 and 1433, “greatly facilitated China’s interactions with the outside world.”⁹⁵

Other acts of sovereignty cited by Chinese scholars to support China’s claim to the South China Sea islands “include the installation of facilities for fishing, forecasting and navigation, rescues of Chinese and foreign vessels in distress at sea,”⁹⁶ granting and revoking licenses to private companies for the exploration and exploitation of natural resources, and organizing large scale fishing and other production activities...” around the Spratlys and Paracels.⁹⁷

The *Qing Ji Waijiao Shi Liao* (*Historic Materials of the Diplomacy of the Qing Dynasty*) makes reference to “plans” by the Qing Customs and General Revenue Office between 1862 and 1874 “to erect lighthouses in the Dongsha [Pratas] Islands for facilitating navigation in the South China Sea.”⁹⁸ Similar plans were made in 1908 by the Qing Customs Office “to build lighthouses on the Xisha [Paracel] Islands upon the request of foreign countries.”⁹⁹

Following the 1911 Revolution, the new government of Guangdong Province placed the Paracels under the jurisdiction of Ya County (Ya Xian) of Hainan Province. This decision was reaffirmed by the Southern Military Government in 1921—on March 30, 1921, the Governor of Guangdong Province annexed the Paracel Islands and placed them under the jurisdiction of Hainan Island.¹⁰⁰ The MFA asserts that the Republic of China took a number of other measures to demonstrate Chinese sovereignty over the South China Sea islands. Some of the measures cited by the MFA include: (1) furnishing national flags to Chinese fishermen and fishing boats engaged in fishing in the Spratly Islands; (2) organizing trips to the Spratlys to survey their history and geography; and (3) authorizing “a map-printing and toponymic agency to rename and approve the names of all the islands on the South China Sea including the Nansha Islands...”¹⁰¹

In May 1928, the government of Guangdong Province deployed “a team of military officers, government officials and scientific and technological personnel” to the Paracels to conduct field surveys and investigations.¹⁰² Between 1932 and 1935, the Republic of China established an interagency Committee for the Review of Maps of Lands and Waters of China,

⁹³ Shen II, at p. 118.

⁹⁴ *Id.*, at pp. 119-120.

⁹⁵ *Id.*, at p. 121; *see also* Su Hao, note 28 *supra*.

⁹⁶ Examples of Chinese search and rescue operations cited by Chinese scholars include the 1755 rescue of 16 foreign sailors who were shipwrecked by a storm and the 1762 rescue of ships from Xianluo (current-day Thailand) that had been damaged in the vicinity of the Paracels. Shen I, at p. 35.

⁹⁷ Shen II, at p. 134.

⁹⁸ *Id.*

⁹⁹ *Id.*, at pp. 134-135; *see also* Shen I, at p. 36.

¹⁰⁰ M. Chemillier-Gendreau, note 15 *supra*, at p. 101.

¹⁰¹ MFA, *The Issue of South China Sea*; *see also* Su Hao, note 28 *supra*.

¹⁰² The team produced a detailed “Report of Surveys on the Xisha [Paracel] Islands.” Shen I, at p. 38. *See also* Tao Cheng, note 31 *supra*, at pp. 273-274.

which included officials from the Headquarters of the General Staff, the Ministry of Internal Affairs, the Ministry of Foreign Affairs, the Navy Command, the Ministry of Education and the Mongolian and Tibetan Affairs Commission. This committee examined and approved the names for 132 of the land features located in the Paracel and Spratly archipelagoes, as well as Macclesfield Bank.¹⁰³ The committee subsequently depicted these features on the 1935 *Zhongguo Nan Hai Ge Daoyu Tu (Map of the Islands in the South China Sea)*.¹⁰⁴ The following year, Bai Meichu—a famous Chinese geographer—drew up *The Whole Map of China After the Southward Expansion of the Sea Border*, which for the first time depicted “James Shoal at four degrees north latitude China’s southernmost point.”¹⁰⁵ Also, in 1936, the Chinese government “constructed meteorological observatories, radio stations, lighthouses and similar types of structures...” in the Paracels “in accordance with a resolution adopted by the 1930 Hong Kong Conference on Meteorology in the Far East....”¹⁰⁶

Following World War II, the Ministry of Internal Affairs, in consultation with the Chinese Navy and the government of Guangdong Province, appointed Xiao Ciyi and Mai Yunyu as Special Commissioners for the Paracel and Spratly Islands, respectively, in 1946. According to the MFA, the commissioners were tasked with taking over the two archipelagoes and erecting sovereignty markers on the islands.¹⁰⁷ In October and November 1946, ROC naval units visited the Paracels and Spratlys “and assisted in setting up radio and meteorological stations,” including a weather station on Itu Aba (Taiping) Island.¹⁰⁸ Ministry of Internal Affairs officials also conducted surveys “and other administrative functions with regard to selected islands and reefs of both island groups.”¹⁰⁹ Additionally, Nationalist troops were stationed on Itu Aba Island “to oversee and patrol neighboring islands and adjacent waters....”¹¹⁰

In 1947, the islets were temporarily placed under the administration of the ROC Navy and the Ministry of Internal Affairs “renamed 159 islands, reefs, islets and shoals in the South China Sea, including the Nansha Islands” and “subsequently publicized all the names for administrative purposes” in 1948.¹¹¹ Also, in June 1947, the government of Guangdong Province organized the *Exhibition Fair of Items and Rarities from the Xisha and Nansha Islands*. According to Chinese scholars, the exhibit contained more than 1,300 artifacts that provided further evidence of Chinese sovereignty over the South China Sea islands.¹¹² Archeological

¹⁰³ In 1983, the Chinese Toponymy Committee publicized the approved names of 287 islands, reefs, islets, and shoals on the South China Sea. MFA, *The Issue of South China Sea*.

¹⁰⁴ *Id.*; see also Shen II, at p. 128 (This was purportedly the first official map published by the Republic of China.); Shen I, at p. 39; Xu Zhiliang, Li Lixin, Fan Hong, and Zhou Xin, *The Border Significance of the South China Sea ‘Nine Dash Line’ in Chinese Historical Maps—Also a Discussion of Jurisdictional Rights Over Islands, Reefs, and Waters Within the ‘Nine Dash Line’*, BEIJING TAIPINGYANG XUEBAO (PACIFIC JOURNAL) 79-84, Feb. 25, 2013.

¹⁰⁵ Xu Zhiliang, Li Lixin, Fan Hong, and Zhou Xin, note 104 *supra*.

¹⁰⁶ Shen I, at p. 39.

¹⁰⁷ MFA, *The Issue of South China Sea*.

¹⁰⁸ Shen II, at p. 137; see also Shen I, at pp. 44-45.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* See also B. Murphy, note 29 *supra*, at p. 192; B. Dubner, note 29 *supra*, at p. 310.

¹¹¹ MFA, *The Issue of South China Sea*; see also Shen II, at pp. 107, 145; Shen I, at p. 45. According to Chinese scholars, no nation, including France and Vietnam, protested these actions. H. Chiu and C. Park, note 42 *supra*, at p. 14.

¹¹² Shen I, at p. 45. Other archeological discoveries cited by Chinese scholars to demonstrate China’s historical ties to the Paracel Islands and other areas in the South China Sea include:

reports that purportedly document the existence of a Chinese pagoda on Pattle Island have also been cited in support of China's claim to the South China Sea islands. However, the pagoda was destroyed, so there is no way to verify the accuracy of these reports.¹¹³

The origins of China's nine-dash line (then 11-dash line) in the South China Sea can be traced to the Kuomintang government of the Republic of China—the line first appeared in 1947 and was depicted on a map of the South China Sea in 1948. According to Chinese scholars, this map—*Nan Hai Zhudao Weizhi Tu (Map of Locations of South China Sea Islands)*—was intended to indicate the “traditional boundary of China's territory in the South China Sea.”¹¹⁴ Additionally, in February 1948, the Ministry of the Interior approved and published the *Republic of China Administrative Region Map*, which also depicted China's 11-dash line claim in the South China Sea.¹¹⁵ The rights conveyed by the line included “sovereignty over the islands in the South China Sea and...water resource development and jurisdiction, namely fishing rights.”¹¹⁶

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- Ancient Chinese coins discovered in the Paracels by Japanese fishermen in 1920 and Professor Wang Guangwei of Zhongshan University in 1947.
 - Ancient Chinese coins discovered by Fang Jun, Director of the Radio Station in the Pratas Islands, in 1935.
 - Between 1974 and 1975, archaeologists of Guangdong Province uncovered thousands of pieces of historical relics on the Paracel Islands, including pottery and porcelain items dating from the Southern Dynasty (420-589), the Sui Dynasty (581-618), the Tang Dynasty (618-907), the Song Dynasty (960-1279), the Yuan Dynasty (1206-1368), the Ming Dynasty (1368-1644), the Qing Dynasty (1644-1911), and modern times (1912-).
 - Between May and June 1991, a group of experts led by Professor Wang Hengjie uncovered historical Chinese relics in the Paracel Islands, including pottery and stoneware made in the primitive era (pre-21st century B.C.), the Spring and Autumn Period (770-476 B.C.), the Warring States Period (476-221), the Qin Dynasty (221-206 B.C.), the Han Dynasty (206 B.C.-220 A.D.), the Tang Dynasty (618-907), the Song Dynasty (960-1279), the Yuan Dynasty (1279-1368), the Ming Dynasty (1368-1644), and the Qing Dynasty (1644-1911).
 - Archaeologists discovered residential houses of the Ming and Qing dynasties (1368-1911) on the Paracel Islands in 1995.
 - Between April and May 1996, a research team discovered numerous stone sculptures, granite pillars, beams and other items “in the middle west of the South China Sea, to the northeast of Shanhu Island of the Xisha Islands, more than 200 nautical miles off the Chinese mainland,” including “a 300-year-old headless stone sculpture of a man dressed as an ancient minister,” a “small sculpture of a stone lion” and other sculptures, as well as “a great number of fragments of pottery and porcelain” from the Song (960-1279), Yuan (1271-1368), Ming (1368-1644) and Qing (1644-1911) dynasties.

Id., at pp. 48-50.

¹¹³ M. Chemillier-Gendreau, note 15 *supra*, at p. 62.

¹¹⁴ Shen II, at p. 129.

¹¹⁵ Xu Zhiliang, Li Lixin, Fan Hong, and Zhou Xin, note 104 *supra*. The 11-dash line was reaffirmed by the newly established government of the People's Republic of China in 1949, but was subsequently replaced by a nine-dash line in 1953 after Zhou En-lai authorized the elimination of two of the dashes in the Gulf of Tonkin. Li Jinming and Li Dexia, *The Dotted Line on the Chinese Map of the South China Sea: A Note*, OCEAN DEVELOPMENT & INTERNATIONAL LAW, 34:287-295, 2003.

¹¹⁶ *Id.* Reference to the U-shaped line was also included in China's 2009 protest to the UN regarding Vietnam's and Malaysia's submissions to the Commission on the Limits of the Continental Shelf (CLCS), which claimed extended continental shelves in the South China Sea. In both of these demarches, Beijing re-affirms that it has “indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof [as depicted on the U-shaped map].” The executive summary of Vietnam's submission to the Commission on the Limits of the Continental Shelf is available at http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm_clcs37_2009e.pdf. The

Then, in March 1948, over 100 ROC marines were deployed to the Paracels, Spratlys, and Macclesfield Bank to relieve previously stationed troops.¹¹⁷

After the People's Republic of China was founded in 1949, the government adopted the U-shaped line in all official Chinese maps depicting the South China Sea.¹¹⁸ Within this line, Beijing claims that it has "indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof [as depicted on the U-shaped map]."¹¹⁹ All of the South China Sea islands—the Spratly, Paracel, and Pratas Islands, Macclesfield Bank, and Scarborough Shoal—are contained within the line.

In April-May 1950, Taiwan withdrew all of its forces from the South China Sea islands, including Woody Island and Itu Aba Island, after Chinese Communist forces landed on Hainan Island.¹²⁰ Communist forces, however, did not occupy Woody or Itu Aba Islands after they were abandoned by the Nationalists. French garrisons maintained control of a number of the islands in the Crescent Group of the Paracels, but they too failed to occupy Itu Aba or Woody Islands following the departure of the Chinese Nationalist troops.¹²¹

Chinese scholars maintain that the intensity of the Chinese Civil War during the late 1940s and the harsh conditions prevalent in the South China Sea islands prevented China from "pursuing a more active program for the development and administration of the South China Sea Islands."¹²² These scholars argue that Taiwan's withdrawal from the region should not be viewed as an abandonment of China's sovereignty over the South China Sea islands for several reasons. First, even if Taiwanese authorities had "intended to 'abandon' the South China Sea islands, they could have done so only on behalf of their own political forces, not on behalf of China as a country, for the new Government in Beijing had replaced the Nationalists as the sole legitimate Government of China."¹²³ Second, Taiwan's withdrawal "was in fact based solely on military and political considerations"—fear of a Chinese Communist invasion of the islands—and that Taiwan "had no intention of abandoning the islands on behalf of China."¹²⁴

executive summary of the joint Vietnam/Malaysia submission to the Commission on the Limits of the Continental Shelf is available at

http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mysvnm_clcs33_2009e.pdf. Copies of China's protests to the Vietnamese and the Malaysian submissions are available at

http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf and

http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf.

¹¹⁷ Shen I, at p. 45.

¹¹⁸ *Id.*

¹¹⁹ Note Verbale, Permanent Mission of the People's Republic of China, CML/17/2009 and CML/18/2009, May 7, 2009, available at http://www.un.org/depts/los/clcs_new/commission_submissions.htm.

¹²⁰ Martin H. Katchen, *The Spratly Islands and the Law of the Sea: "Dangerous Ground" for Asian Peace*, ASIAN SURVEY, Vol. 17, No. 12 (Dec. 1977), pp. 1167-1181, at p. 1178; M. Bennett, note 14 *supra*, at p. 438; M. Chemillier-Gendreau, note 15 *supra*, at p. 116.

¹²¹ M. Chemillier-Gendreau, note 15 *supra*, at p. 40.

¹²² Shen I, at p. 45.

¹²³ *Id.*, at p. 46.

¹²⁴ *Id.*

Taiwanese forces returned to Itu Aba in 1956, after Tomas Cloma¹²⁵ claimed a portion of the Spratly Islands, and have maintained a presence on the island ever since—“the longest continuous occupation of any of the Spratlys since the dispute over the islands began.”¹²⁶ PRC forces occupied Woody Island around the same time.¹²⁷ Taiwan also purportedly continued to periodically inspect and survey the Spratly archipelago during this period. In October 1963, for example, the Ministry of National Defense, the Ministry of Internal Affairs, and the Naval General Headquarters conducted a joint inspection of Itu Aba Island, Spratly Island, Amboyna Cay, Thitu Island, Southwest Cay, Northeast Cay, West York Island, Loaita Island, Sandy Cay, and Namyit Island.¹²⁸ Three years later, a naval contingent deployed to Southwest Cay, Northeast Cay, Thitu Island, and Namyit Island to “re-erect Chinese national boundary tablets.”¹²⁹ Notwithstanding continued opposition to its claims, the Chinese government subsequently incorporated the Spratlys into Guangdong Province and Hainan Province. According to the MFA, China has continued to take effective actions to maintain its sovereignty over the islands.

c. Persistent Objector

Chinese scholars additionally point to China’s persistent and resolute objections to all foreign claims to the South China Sea islands as evidence of Beijing’s effective administration of the two island groups.¹³⁰ The first case cited by China is an 1883 incident involving a German survey vessel. After learning that Germans were conducting surveys in the Spratlys and Paracels without China’s consent, the Qing government “lodged strong protests” with Berlin and the Germans terminated the survey.¹³¹

Chinese scholars claim that China similarly protested French efforts to occupy the Paracel and Spratly Islands in the 1930s. Following France’s attempt to occupy the Paracels in December 1931, China lodged a diplomatic protest with the French Foreign Ministry on July 27, 1932, denying France’s claims to the archipelago.¹³² Two months later, on September 29th, China delivered a diplomatic note to the French government citing the 1887 Sino-French Treaty, highlighting long-time use of the islets by Chinese fishermen and indicating:

¹²⁵ Tomas Cloma was a Filipino lawyer and businessman who conducted a private expedition to the South China Sea and claimed a number of islands in his own name as “Freedomland.” *Id.*, at p. 1179. *See also* M. Bennett, note 14 *supra*, at p. 438.

¹²⁶ B. Murphy, note 29 *supra*, at p. 193; *see also* M. Katchen, note 120 *supra*, at pp. 1179-1180; S. Tønnesson, note 55 *supra*, at p. 11.

¹²⁷ S. Tønnesson, note 55 *supra*, at p. 14 and note 28 (“On 21 February 1956, the French warship *Francis Garnier* went near Woody Island and spotted the presence of ‘elements’ hosting the PRC flag, around thirty people, four engines, three barracks under construction and...a small ship with the PRC flag.”).

¹²⁸ H. Chiu and C. Park, note 42 *supra*, at p. 16.

¹²⁹ *Id.*

¹³⁰ Shen II, at pp. 134 and 140-152. It is important to note, however, that neither the MFA nor Chinese scholars cite any reference to Chinese protests of Vietnamese economic exploitation of the Paracels and Spratlys in the 17th, 18th, and 19th centuries. Such an omission clearly undercuts China’s argument that it was a persistent objector.

¹³¹ Shen II, at p. 140; *see also* Su Hao, note 28 *supra*; Shen I, at p. 35; H. Chiu and C. Park, note 42 *supra*, at p. 11.

¹³² French claims were purportedly “based on the alleged 1816 occupation of the...[Paracels] by the emperor of Vietnam and his alleged construction of temples and monuments there in 1835.” Shen I, at p. 40. *See also* Tao Cheng, note 31 *supra*, at p. 268; H. Chiu and C. Park, note 42 *supra*, at p. 12.

...that the Guangdong Provincial Government of China had granted applications to Chinese nationals to develop and exploit natural resources in the Xisha Islands, that China had long exercised sovereignty over these islands, that the Chinese Government was skeptical about the alleged Vietnamese activities in the Xisha Islands in 1816 and 1835, and that the Chinese Government would require the French to provide confirmation of the locations of the alleged Vietnamese-built monuments and temples.¹³³

French efforts to resolve the matter diplomatically failed.¹³⁴ A subsequent Chinese diplomatic exchange claimed that it would have been impossible for Vietnam to annex the Paracels in 1816 because, at the time, Vietnam was a Chinese vassal state:

...Based on our research and investigation, in 1816, An'nam was subject to China. Whether in terms of might or in terms of reason, it was impossible for An'nam to invade China's territory. What's more, in the history and books of China, there is no recordation whatsoever that the Xisha Islands were once occupied by [China's] vassal State An'nam. The records of the Vietnamese history must have been inconsistent with the facts. ...¹³⁵

China likewise protested France's subsequent occupation of the Paracel Islands on July 3, 1938. According to Chinese scholars, China's ambassador in Paris, William Koo, delivered a diplomatic note (dated July 18, 1938) to the French government objecting to the French invasion of the islands.¹³⁶

China repeated its objections after France renewed its claims to the South China Sea islands at the conclusion of the Second World War. On January 19, 1947, the Chinese Embassy in Paris "issued a public notice stating that the Xisha [Paracel] Islands are Chinese territory" after France reasserted its claims to the archipelago and landed troops on Pattle Island.¹³⁷ Two days later, the Ministry of Foreign Affairs "delivered a diplomatic note to the French Embassy in Nanjing to reject the French claims, stating that the Xisha Islands belong to China."¹³⁸ A week later, on January 28, the Foreign Ministry "delivered another diplomatic note to the French Embassy..." protesting France's occupation of Pattle (Shanhu) Island in the Paracels.¹³⁹ Talks aimed at resolving the dispute were held in Paris between February 25 and July 4, 1947;

¹³³ Shen I, at p. 40; H. Chiu and C. Park, note 42 *supra*, at p. 12; M. Bennett, note 14 *supra*, at p. 437; Todd C. Kelly, *Vietnamese Claims to the Truong Sa Archipelago [Ed. Spratly Islands]*, EXPLORATIONS IN SOUTHEAST ASIAN STUDIES, Vol. 3 (Fall 1999), University of Hawaii Manoa, available at <http://www.hawaii.edu/cseas/pubs/explore/todd.html>.

¹³⁴ T. Kelly, note 133 *supra*.

¹³⁵ Shen I, at pp. 41 and 58. France purportedly did not respond to this note for more than a year. H. Chiu and C. Park, note 42 *supra*, at p. 12. See also M. Chemillier-Gendreau, note 15 *supra*, Annex 10 (*Note of 29 September 1932 from the Legation of the Chinese Republic in France to the Ministry of Foreign Affairs, Paris*) ("...100 years ago Indochina was under Chinese tutelage. Since the Paracel Islands already formed part of China's territory, Indochina had no right to carry out acts of occupation on the possessions of its suzerain.").

¹³⁶ Shen I, at p. 43.

¹³⁷ Shen II, at p. 145; see also Shen I, at p. 45; Tao Cheng, note 31 *supra*, at pp. 269-270, 276; M. Chemillier-Gendreau, note 15 *supra*, at p. 40.

¹³⁸ *Id.*

¹³⁹ *Id.*

however, China rejected France's suggestion that the issue be resolved by an arbitral tribunal.¹⁴⁰

The MFA claims that China also protested France's occupation of nine of the Spratly Islands in 1933.¹⁴¹ According to Chinese scholars, China's protests were widely reported in the Chinese media. On July 26, 1933, *Shen Bao* reported that the Chinese Foreign Ministry had protested France's formal occupation of the Spratly Islands:

The...[Spratly] islands...have been inhabited by Chinese fishermen only, and have been recognized by the international community as China's territories. We are shocked to have received the official French journal announcing France's formal occupation. ...The Foreign Ministry...will put forward serious protests over the French actions.¹⁴²

A week later, on the 2nd of August, the newspaper reported that a similar protest was filed by the Guangdong provincial government:

The Southwest Commissioner is seriously concerned with the incidents of France occupying the...[Spratly] islands, and will do everything he can to preserve China's sovereignty over these island groups. ...the Yue [Guangdong] Provincial Government...has already lodged protests to the French authorities. ...¹⁴³

Two days later the Chinese government delivered a diplomatic note to French authorities reserving its position on China's rights to the Spratlys pending an investigation of the French actions:

The Chinese Government is very much concerned with...[the French-declared occupation of and sovereignty over nine islands in the South China Sea]. She hereby requests...the Minister of the French Legation to inquire into and ascertain the name, the exact location and the longitude and latitude of each island and report the same to the Chinese Government. Pending such investigation..., the Chinese Government reserves her titles *vis-à-vis* the...declaration of the French Government.¹⁴⁴

After confirming that the islands in question were in fact part of the Spratlys, the Chinese Ambassador to France—Wellington Koo (Gu Weijun)—protested France's occupation, "stating that those islands and the entire Spratly Islands (Nansha Islands) were the territory of the

¹⁴⁰ M. Chemillier-Gendreau, note 15 *supra*, at p. 40 and Annex 35 (*Telegram from Ministry of Foreign Affairs, Nanking, 8 March 1947*).

¹⁴¹ The nine features occupied by France were: Amboyna Cay, Spratly Island, Itu Aba Island, Loaita Island, Thitu Island, Northeast Cay, Southwest Cay, Namyit Island, and West York Island.

¹⁴² Shen II, at p. 143; *see also* H. Chiu and C. Park, note 42 *supra*, at p. 18; B. Murphy, note 29 *supra*, at pp. 191, 203.

¹⁴³ Shen II, at pp. 143-144.

¹⁴⁴ *Id.*, at p. 144; *see also* Shen I, at p. 41.

Republic of China.”¹⁴⁵ The MFA additionally argues that “it is a basic norm of international law that invasion does not entail sovereignty.”¹⁴⁶

The MFA claims that, since 1949, the PRC has maintained its position as a persistent objector, challenging “each and every foreign claim to and invasion of...the South China Sea Islands...”¹⁴⁷ For example, in April 1956, after South Vietnamese troops relieved the French forces on Pattle Island in the Paracels, China responded by deploying troops to the eastern part of the archipelago (Amphitrites Group).¹⁴⁸ Then in May 1956, the Chinese government protested the Philippine claim to seven of the Spratly Islands, reiterating that these “...islands have always been a part of Chinese territory” and that China “...has indisputable, legitimate sovereignty over these islands.”¹⁴⁹ Later that month, on May 29th, the Chinese Foreign Ministry issued a Declaration of Sovereignty over the Nansha (Spratly) Islands, emphasizing that “China’s legitimate sovereignty over the Nansha Islands shall under no circumstances be violated by any country on any ground or by any means.”¹⁵⁰ Without going into detail, the MFA claims that

¹⁴⁵ Shen II, at p. 144; *see also* Shen I, at p. 42; H. Chiu and C. Park, note 42 *supra*, at p. 13.

¹⁴⁶ *Chinese Foreign Ministry’s Memorandum on Question of Xisha and Nansha Islands*, XINHUA GEN. OVERSEAS NEWS SERV., May 12, 1988, *quoted in* M. Bennett, note 14 *supra*, at notes 15 and 93.

¹⁴⁷ Shen II, at pp. 145-152.

¹⁴⁸ M. Chemillier-Gendreau, note 15 *supra*, at p. 42.

¹⁴⁹ Shen I, at p. 66; *see also* Jeanette Greenfield, *China and the Law of the Sea*, in *THE LAW OF THE SEA IN THE ASEAN PACIFIC REGION 22* (James Crawford & Donald R. Rothwell eds., Martinus Nijhoff Publishers 1994), at p. 33; Xu Zhiliang, Li Lixin, Fan Hong, and Zhou Xin, note 104 *supra*; H. Chiu and C. Park, note 42 *supra*, at p. 135; B. Murphy, note 29 *supra*, at p. 193.

¹⁵⁰ Similar protests were made in January and February 1974 against South Vietnam’s claims to Taiping (Itu Aba) Island, Nanwei (Spratly) Island, and other islands in the Spratlys: “The Nansha Islands, Xisha Islands, Zhongsha Islands and Dongsha Islands, are all part of Chinese territory. The People’s Republic of China has indisputable sovereignty over these islands and their surrounding sea area.” Shen I, at pp. 66-67. In April 1984, China protested Vietnam’s “illegal occupation” of some of the Spratly Islands and “requested the Vietnamese to withdraw from all islands which it had occupied illegally.” *Id.*, at p. 69. Similarly, in November 1982 and May 1995, China protested Malaysia’s occupation of Swallow Reef (Danwan Jiao). *Id.*, at pp. 69, 71. *See also* M. Bennett, note 14 *supra*, at p. 439; M. Chemillier-Gendreau, note 15 *supra*, at p. 43. Other examples of claimed Chinese administrative control over the South China Sea islands include:

- In 1958, the Hainan Special Administrative Prefecture established an “Administrative Bureau of the Xisha, Nansha and Zhongsha Islands” with its headquarters stationed on the island of Yongxing, one of the Xisha Islands, the largest island in the South China Sea.
- In February and April 1959, China protested South Vietnam’s maltreatment of Chinese fishermen in the vicinity of Chenhang (Duncan) Island and Jinqing (Drummond) Island, reiterating that “the Xisha Islands are China’s territory.”
- In March 1969, the Administrative Bureau of the Zhongsha, Xisha and Nansha Islands was renamed “The Revolutionary Committee of the Xisha, Zhongsha and Nansha Islands of Guangdong Province.” At the same time, a People’s Armed Forces Department and a local Public Security Station were set up on Yongxing Island.
- In 1979, “The Revolutionary Committee of the Xisha, Zhongsha and Nansha Islands of Guangdong Province” was renamed “The Committee of Guangdong Province on the Affairs of the Xisha, Nansha and Zhongsha Islands,” placing these islands under the direct jurisdiction of Guangdong Province.
- In April 1988, upon the establishment of Hainan Province, the administrative organ for the South China Sea islands was renamed “The Committee of Hainan Province on the Affairs of the Xisha, Nansha and Zhongsha Islands,” transferring the jurisdiction over these islands from Guangdong Province to Hainan Province.

China has continued to assert indisputable sovereignty over the two archipelagoes into the 21st century.

d. Reaffirming Sovereignty

Following the Republic of Vietnam's occupation of Spratly Island in 1956 and Robert, Pattle, and Money Islands in the Paracel archipelago in 1957, China reaffirmed its claim of sovereignty over all of the South China Sea islands when it declared a 12-nautical mile territorial sea in 1958.¹⁵¹ Similar assertions were made in Article 2 of the 1992 territorial sea law,¹⁵² in China's declaration upon ratifying UNCLOS in 1996,¹⁵³ in Article 2 of the 1996 straight baseline law,¹⁵⁴ and in the 2009 *Law of the People's Republic of China on Island Protection*.¹⁵⁵

China additionally reaffirmed its sovereignty over all of the South China Sea islands and their adjacent waters and continental shelves in a demarche filed with the United Nations in 2009. The demarche protested the enactment of Republic Act 9522, which defines the new Philippine archipelagic baselines and re-asserts Filipino sovereignty over the Kalayaan Island Group (KIG) and Scarborough Shoal (Huangyan Island) in the South China Sea.¹⁵⁶ Specifically, Beijing asserted that the new Philippine law "illegally claims Huangyan Island...and some islands and reefs of Nansha Islands...of China as areas over which the Philippines...exercises sovereignty and jurisdiction."¹⁵⁷ Beijing then reiterated that "Huangyan Island and Nansha [Spratly] Islands

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- In August 1988, an Oceanic Meteorological Observation Station was set up on the Yongshu Reef in the Nansha Islands.

Shen I, at pp. 47-48, 65-71.

¹⁵¹ The Government of the People's Republic of China declares:

1. The breadth of the territorial sea of the People's Republic of China shall be twelve nautical miles. This provision applies to all territories of the People's Republic of China including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu Islands, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas.

Declaration of the Government of the People's Republic of China on China's Territorial Sea (Sept. 4, 1958), reprinted in U.S. DEPT. OF STATE LIMITS IN THE SEA NO. 43, *Straight Baselines: People's Republic of China*, July 1, 1972. The Republic of Vietnam allegedly did not protest the declaration. H. Chiu and C. Park, note 42 *supra*, at p. 15. Other examples of Chinese protests of foreign incursions into the Paracel and Spratly Islands include the arrest of 82 Chinese fishermen on Duncan Island in the Paracels by the Republic of Vietnam Navy in 1959 and U.S. reconnaissance activities in the territorial sea and airspace of the Paracels between 1960 and 1971. *Id.*, at p. 15-16.

¹⁵² *Law of the Territorial Sea and the Contiguous Zone* of 25 Feb. 1992.

¹⁵³ *Declaration of the People's Republic of China upon ratifying UNCLOS*, Jun. 7, 1996, available at http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China Upon ratification. China's declaration is consistent with its position on the disputed islands during the negotiations of UNCLOS. On July 2, 1974, the head of the Chinese delegation (Cai Shupan) stated: "The Xisha Islands and Nansha Islands in the South China Sea have always been an inalienable part of Chinese territory. The Chinese government and the Chinese people shall under no circumstances allow the Saigon Authorities to violate China's territorial sovereignty." Shen I, at p. 67.

¹⁵⁴ *Statement of the Chinese Government on the Baseline of the Territorial Sea of the People's Republic of China*, May 15, 1996, available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/CHN.htm>.

¹⁵⁵ *Law of the People's Republic of China on Island Protection*, Dec. 26, 2009, available at http://www.procedurallaw.cn/english/law/201001/t20100110_300174.html.

¹⁵⁶ REPUBLIC ACT NO. 9522, Mar. 10, 2009, *An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baselines of the Philippines and for Other Purposes*.

¹⁵⁷ The Permanent Mission of the People's Republic of China to the UN, Note CML/12/2009, 13 April 2009.

have been part of the territory of China since ancient time” and that China has “indisputable sovereignty” over the islands.¹⁵⁸

Reference to the China’s South China Sea claims also appears in a 2009 protest to the United Nations regarding Vietnam’s and Malaysia’s submissions to the Commission on the Limits of the Continental Shelf (CLCS) claiming extended continental shelves in the South China Sea.¹⁵⁹ In both of these demarches, Beijing re-affirms that it has “indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof [as depicted on the U-shaped map].”¹⁶⁰

In June 2012, Beijing established a new prefecture-level city—Sansha City (the “city of three sands”) to administer the Paracels (Xisha), Macclesfield Bank (Zhongsha), and the Spratlys (Nansha). The seat of government for the new city is on Woody Island (Yongxing) in the Paracels.¹⁶¹ Then, on November 29, 2013, the 5th Meeting of the Standing Committee of the 5th Hainan People’s Congress adopted the *Hainan Province’s Measures to Implement the Fisheries Law of the PRC*.¹⁶² These new regulation, which took effect on January 1, 2014, require foreign fishing vessels to obtain prior approval from Chinese authorities to operate in the sea area administered by Hainan Province—an area that includes over 2 million square kilometers of ocean space in the South China Sea (i.e., the waters contained within China’s “nine-dash line”).¹⁶³ Ships that fail to comply with the new regulations will be forced out of the area, will have their catch and equipment confiscated, and can be fined up to ¥500,000 (about \$82,000); in more serious cases, the vessel may also be confiscated.¹⁶⁴

e. Military Intervention

When deemed necessary and strategically opportune, China has also used military force to advance its sovereignty claims in the South China Sea. On January 20, 1974, Chinese forces expelled the South Vietnamese garrison from Pattle Island after a brief naval and land

¹⁵⁸ *Id.*

¹⁵⁹ The executive summary of Vietnam’s submission to the Commission on the Limits of the Continental Shelf is available at http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm_clcs37_2009e.pdf; The executive summary of the joint Vietnam/Malaysia submission to the Commission on the Limits of the Continental Shelf is available at

http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mysvnm_clcs33_2009e.pdf.

¹⁶⁰ Copies of China’s protests to the Vietnamese and Malaysian submissions are available at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf and http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf.

¹⁶¹ Pia Lee-Brago, *China Tightening Grip on Spratlys*, THE PHILIPPINE STAR, June 23, 2012.

¹⁶² Xinhua Wang, *PRC Approves Measures Requiring Approval of Foreign Fishing in Hainan-Administered Waters*, December 1, 2013, *cited in* CRAIG MURRAY & KIMBERLY HSU, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF REPORT, CHINA’S NEW FISHING REGULATIONS SEEK TO JUSTIFY AND CONSOLIDATE CONTROL IN THE SOUTH CHINA SEA 1 n.1 (Jan. 27, 2014).

¹⁶³ *Fisheries Law of the People’s Republic of China* (2004 Amendment) (promulgated by the Standing Comm. Nat’l People’s Cong. by Order No. 34 of the President of the People’s Republic of China, Jan. 20, 1986; Amended for the second time by the Standing Comm. Nat’l People’s Cong., Aug. 28, 2004), art. 35, *available at* <http://www.lawinfochina.com/display.aspx?id=3663&lib=law>.

¹⁶⁴ *Id.*, art. 46.

engagement.¹⁶⁵ A second clash between Chinese and Vietnamese naval forces occurred on March 14, 1988, in the vicinity of Johnson South Reef.¹⁶⁶ The skirmish resulted in the sinking of several Vietnamese ships and the death of over 70 Vietnamese sailors.¹⁶⁷ Following the engagement, China occupied a number of key islets in the Spratly archipelago—Cuarteron Reef (Huayang Reef), Eastern Gate Shoal (Dongmen Reef), Fiery Cross Reef (Yongshu Reef), Gaven Reefs (Nanxun Reef and Xinan Reef), Johnson South Reef (Chigua Reef), and Subi Reef (Zhubi Reef).¹⁶⁸

In 1995, China occupied Mischief Reef (Meiji Reef), which is claimed by Vietnam and the Philippines, and constructed a series of structures, purportedly to provide shelter for Chinese fishermen.¹⁶⁹ China has continued to build up the reef since the mid 1990s, including the installation of military radars and other monitoring equipment. Photographs taken in June 2012 reveal several new structures on the reef, including “a windmill, solar panels, a concrete platform suitable for use as a helipad and a basketball court.”¹⁷⁰ There is also evidence that China is improving its facilities at Johnson South Reef. Intelligence photographs released by the Philippines in May 2014 show “different stages of reclamation work being done by the Chinese on...[the] reef, apparently in preparation for the construction of an airstrip.”¹⁷¹

4. International Recognition

The MFA and Chinese scholars cite a number of events, beginning in the 19th century, to support China’s position that the international community recognizes its sovereignty claims to the South China Sea islands. China additionally relies on a number of World War II and post-war documents, statements, and publications to substantiate its position that it has indisputable sovereignty over the two island groups.

a. *The Sino-French Treaty of 1887*

Chinese scholars argue that France relinquished any claims it might have had to the Paracel and Spratly Islands when it signed the *Sino-French Treaty of 1887*, which delimited the border between China and Tonkin (northern Vietnam).¹⁷² The demarcation commission established by the *1885 Sino-French Treaty of Peace*, which was responsible for delineating the frontier between China and Tonkin, was unable to agree on all points along the line of demarcation. Accordingly, pursuant to Article 3 of the Treaty, the matter was referred back to the respective governments—France and China—to resolve the differences.

¹⁶⁵ Shen II, at pp. 146-148.

¹⁶⁶ *Id.*, at p. 149; see also B. Murphy, note 29 *supra*, at pp. 195 and 202; M. Bennett, note 14 *supra*, at p. 440; Christopher C. Joyner, *The Spratly Islands Dispute in the South China Sea: Problems, Policies, and Prospects for Diplomatic Accommodation*, at pp. 71-72, available at <http://www.southchinasea.org/online-publications/32-2/>; S. Tønnesson, note 55 *supra*, at p. 18; T. Kelly, note 133 *supra*.

¹⁶⁷ M. Chemillier-Gendreau, note 15 *supra*, at p. 46.

¹⁶⁸ *Id.*; see also T. Kelly, note 133 *supra*.

¹⁶⁹ *China Expanding Mischief Structures*, THE PHILIPPINE STAR, Sept. 3, 2012.

¹⁷⁰ *Id.*; see also C. Joyner, note 166 *supra*, at p. 73.

¹⁷¹ Pia Lee-Brago, *Photos reveal stages of China reclamation at reef*, THE PHILIPPINE STAR, May 16, 2014, available at <http://www.philstar.com/headlines/2014/05/16/1323659/photos-reveal-stages-china-reclamation-reef>.

¹⁷² *Convention Concerning the Delimitation of the Border between China and Tonkin*, signed at Beijing, June 26, 1887, available at <http://www.chinaforeignrelations.net/node/167>.

To that end, paragraph 2 of the 1887 Treaty (French text) provides, in part, that

...The isles which are to the east of the meridian of 105° 43' longitude east of Paris [*i.e.*, the meridian of 108°03'08" east of the Greenwich meridian], which is to say of the north-south line passing through the eastern point of the island of Tch'a-Kou or Quan-chan (Tra-co) [Chagu] and forming the border, are similarly assigned to China. The Go-tho [Jiutou] islands and other islands which are to the west of this meridian belong to Annam. ...¹⁷³

The translation of the Chinese text is somewhat different, providing, in part, that

As far as the islands in the sea are concerned, the red line drawn by the officials of the two countries responsible for delineating the boundary shall be extended southward from the eastern hill-top of Chagushe [or Wangzhu...] and constitutes the dividing line. The islands lying east of this line shall belong to China. The islands of Jiutousan [Gotho...] and other small islands west of this line shall belong to Vietnam.¹⁷⁴

Based on the Treaty, Chinese officials and scholars argue that all of the South China Sea islands lie east of 108°03'08" east longitude and that France, therefore, ceded the islands to China. Accordingly, they argue that Vietnam may not claim sovereignty over the islands as the successor state to France.¹⁷⁵

b. French Recognition before World War II

According to some Chinese scholars, France recognized China's sovereignty over the Paracels in 1921. On May 21st of that year, French Prime Minister Aristide Briand purportedly stated that "since the Chinese Government has established her sovereignty since 1909, it is impossible for us now to lay a claim on these islands."¹⁷⁶ These scholars cite the Chinese *Journal of Diplomatic Review* (No. 4, 1934) to support their position. China claims that the French Governor-General of Indochina also acknowledged that the Paracels belonged to China in the 1920s and that a French navigator made a similar statement in the early 1930s, indicating that Annam (Vietnam) did not have any relationship with the Paracels.¹⁷⁷

Additionally, Captain Rémy, the Commander of the Navy in Saigon, disclaimed French sovereignty over the Paracels in 1920. On September 20, 1920, the Japanese shipping company Mitsui Bussan Kaisha sent a letter to Captain Rémy indicating that it had discovered a phosphate deposit on the islands that it intended to exploit and asking whether the Paracels were French possessions. Captain Rémy responded on September 24th indicating that

¹⁷³ *Id.*

¹⁷⁴ Zou Keyuan, *Maritime Boundary Delimitation in the Gulf of Tonkin*, 30 OCEAN DEV. & INT'L LAW 235-254 (1999), at p. 238.

¹⁷⁵ *Id.*, at p. 240; see also Shen I, *supra*, at p. 35; Tao Cheng, note 31 *supra*, at p. 275; H. Chiu and C. Park, note 42 *supra*, at pp. 18-19; B. Dubner, note 29 *supra*, at p. 309; M. Bennett, note 14 *supra*, at pp. 446-447; M. Chemillier-Gendreau, note 15 *supra*, at p. 83, Annex 10 (*Note of 29 September 1932 from the Legation of the Chinese Republic in France to the Ministry of Foreign Affairs, Paris*).

¹⁷⁶ Shen I, at p. 40.

¹⁷⁷ H. Chiu and C. Park, note 42 *supra*, at p. 17.

There is no paper in the official documents of the Navy allowing the nationality of the Paracel Islands to be determined. Nevertheless, I think 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.¹⁷⁸

Three months later, an article reporting on the exchange between Captain Rémy and the Japanese company appeared in the January 2, 1921, edition of the Paris newspaper *L'Europe Nouvelle*:

Approximately 300 kilometres from the coast of Annam lies a group of deserted rocks, the Paracel Islands. Recently the Consul of Japan wrote to the Government of Indochina to ask whether France claimed ownership of the islands. The reply was negative. Did the official who drafted the reply not realize that one submarine base in the Paracel Islands would be sufficient to blockade the entire coastline of Indochina?¹⁷⁹

China points out that French ownership of the Paracels had been the subject of discussion between Paris and colonial authorities in Indochina earlier in the century. In 1909, the French Consul in Canton (Guangzhou)—Jean-Joseph Beauvais—wrote a letter to the Minister of Foreign Affairs in Paris to discuss possible French claims to the Paracels. Although Beauvais indicated that France may have a valid claim to the islands, he warned that claiming sovereignty over the Paracels may not be in best interests of France because it could fuel Chinese nationalism, which could be “more damaging to us than the possession of the Paracel Islands would be useful.”¹⁸⁰

China additionally asserts that, by 1921, some French officials were suggesting that France abandon its claims to the islands in exchange for other French interests in China. On March 30, 1921, the Governor of Kwangtung announced (Order No. 831 dated March 30, 1921, and published in the *Official Gazette of Kwantung* (No. 2619 of April 2, 1921)) that the “military Government of the south had decided to incorporate the Paracels into the sub-prefecture of Yai Hien, Hainan Island.”¹⁸¹ Two weeks later, the Minister for the Colonies sent a letter to the President du Conseil, Minister for Foreign Affairs, suggesting that “[i]t 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.”¹⁸² Several weeks later, an official from the Directorate for Political and Indigenous Affairs indicated in a note dated May 6, 1921, that a French concession

¹⁷⁸ M. Chemillier-Gendreau, note 15 *supra*, at p. 105, Annex 12 (Note dated 6 May 1921, from Directorate for Political and Indigenous Affairs, Government General of Indochina, Hanoi).

¹⁷⁹ *Id.*, at p. 106, Annex 12 (Note dated 6 May 1921, from the Directorate for Political and Indigenous Affairs, Government General of Indochina, Hanoi).

¹⁸⁰ *Id.*; see also S. Tønnesson, note 55 *supra*, at p. 7.

¹⁸¹ M. Chemillier-Gendreau, note 15 *supra*, at Annex 12 (Note dated 6 May 1921, from Directorate for Political and Indigenous Affairs, Government General of Indochina, Hanoi).

¹⁸² *Id.*, at Annex 16 (Note of 18 April 1921 from the Minister for the Colonies to the President du Conseil, Minister for Foreign Affairs).

on the Paracels could “...make it easier to settle the matter of compensation for the Tunnam railway” and that “in such a situation, the abandonment by France of all rights to ownership of the Paracels might seem like the compensation demanded” by the Chinese.¹⁸³

Despite France’s continued interests in the Paracels, the Kwangtung Provisional Council adopted a resolution to mine guano deposits in the Paracels on February 14, 1930. Two months later, Chinese officials and scholars assert that France implicitly recognized Chinese sovereignty over the Paracels at the 1930 Hong Kong Far Eastern Meteorological Conference. A resolution adopted during the conference provided that

The Conference recognizes the great importance to the Meteorology of the China Seas of the Meteorological Station established at Pratas by the Government of China. It expresses the hope and voices the desire that similar stations be established in zones not yet represented, especially on the Macclesfield Bank and the Paracels.¹⁸⁴

There is no evidence that the French-Indochina representative who attended the conference, Monsieur Bruzon, objected to the proposal. Accordingly, China argues that this request “proves that not only are the Paracel Islands internationally recognized as belonging to China, but that the French themselves share this view.”¹⁸⁵ The following year, China announced that it was inviting bids from foreign companies to exploit the phosphate deposits in the Paracels and, in early 1932, publicly called for bids.¹⁸⁶

c. French Recognition after World War II

Some Chinese and foreign scholars maintain that France tacitly acknowledged Chinese sovereignty over the South China Sea islands after World War II. Pursuant to General Order No. 1, Japanese forces in Vietnam north of 16° north latitude were instructed to surrender to Chinese Nationalist forces. The northern part of Vietnam was subsequently placed under Chinese occupation until March 1946, when Nationalist forces returned the occupied portion of Vietnam to France. Pursuant to an exchange of notes, China and France agreed that French forces would relieve Chinese troops stationed in Indochina north of the 16th degree of latitude (which included the Paracel and Spratly Islands) no later than March 31, 1946.¹⁸⁷ At the time, France allegedly did not inquire into the status of the Paracels or Spratlys; nor did France or Vietnam file a diplomatic protest when Nationalist forces remained on Woody Island and returned to Itu Aba Island in 1946. Similarly, France did not object when the Republic of China

¹⁸³ *Id.*, at Annex 12 (Note dated 6 May 1921, from Directorate for Political and Indigenous Affairs, Government General of Indochina, Hanoi).

¹⁸⁴ Resolution 4, CONFERENCE OF DIRECTORS OF FAR EASTERN WEATHER SERVICES, HONG KONG, 1930, at p. 58, available at <http://www.hko.gov.hk/mwg-internal/de5fs23hu73ds/progress?id=7sEupYOYvs>. See also H. Chiu and C. Park, note 42 *supra*, at p. 12.

¹⁸⁵ M. Chemillier-Gendreau, note 15 *supra*, Annex 10 (Note of 29 September 1932 from the Legation of the Chinese Republic in France to the Ministry of Foreign Affairs, Paris).

¹⁸⁶ *White Paper On the Hoang Sa (Paracel) & Truong Sa (Spratly) Islands*, Republic of Vietnam, Ministry of Foreign Affairs, Saigon (1974) [hereinafter MFA White Paper (1974)].

¹⁸⁷ *Exchange of Letters between China and France Relating to the Relief of Chinese Troops by French Troops in North Indochina*, Chungking, Feb. 28, 1946, U.N.T.S. Vol. 14, 1948, at p. 151. See also M. Chemillier-Gendreau, note 15 *supra*, at p. 40.

renamed the South China Sea islands in 1947 “and included them in the 1952 ROC-Japan bilateral peace treaty.”¹⁸⁸ Moreover, neither France nor Vietnam attempted to establish control over the Spratlys during the absence of Taiwanese forces from 1950 to 1956. Accordingly, even if France validly occupied the Spratlys in 1933, China maintains that France “relinquished its sovereignty over them after 1945” and, as the successor state to French rights in Vietnam, the Republic of Vietnam “clearly cannot invoke what was previously relinquished by its predecessor.”¹⁸⁹

d. Japanese Recognition

Chinese scholars argue that Japan also recognized China’s sovereignty over the Paracels in 1938 by declaring that French claims to the archipelago were “unjustifiable...given the fact that both France and the United Kingdom had previously recognized the Xisha [Paracel] Islands as part of China’s Hainan Administrative Prefecture.”¹⁹⁰ Japan also protested France’s occupation of the Spratlys in 1933.

Some scholars additionally maintain that Japan intended to return the two archipelagoes to China at the end of World War II, citing the separate agreements formally ending hostilities between the two Chinas and Japan—the 1952 *Treaty of Peace between the Republic of China and Japan* and the 1972 *Joint Communiqué of the Government of Japan and the Government of the People’s Republic of China*. Article 2 of the 1952 Peace Treaty provides that

It is recognized that under Article 2 of the Treaty of Peace with Japan signed at the city of San Francisco on 8 September 1951..., Japan has renounced all right, title, and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratly Islands and Paracel Islands.¹⁹¹

Chinese scholars argue that this provision, and a Japanese map published in 1952 and endorsed by Foreign Minister Matsuzaki, clearly reflects Japan’s intention to return the Spratlys and Paracels to China under both the 1951 *San Francisco Peace Treaty* and 1952 Treaty. The *Map of Southeast Asia of the Standard World Atlas*—“the first Japanese official world atlas after the 1951 San Francisco Peace Treaty”—clearly indicates that the Paracel and Spratly Islands were part of China.¹⁹²

The 1972 Joint Communiqué reaffirms the terms of the *Potsdam Proclamation*:

¹⁸⁸ H. Chiu and C. Park, note 42 *supra*, at pp. 17-19; see also B. Murphy, note 29 *supra*, at p. 204; M. Bennett, note 14 *supra*, at p. 437.

¹⁸⁹ *Id.*; see also C. Joyner, note 166 *supra*, at p. 61 (“The French...made no subsequent efforts to perfect title to the Spratlys by occupation. Nor did the French act by returning after Japan’s departure following World War II, or by acting after Japan formally relinquished all title and future claims to the islands at the San Francisco Conference of 1951. Consequently, France possessed no lawful title to the Spratly group to which Vietnam could succeed.”).

¹⁹⁰ Shen II, at p. 138; see also Shen I, at p. 43.

¹⁹¹ *Treaty of Peace between the Republic of China and Japan*, Apr. 28, 1952, entered into force Aug. 5, 1952, available at http://www.taiwandocuments.org/doc_all.htm.

¹⁹² Shen II, at pp. 139-140; see also H. Chiu and C. Park, note 42 *supra*, at p. 14; B. Dubner, note 29 *supra*, at p. 310.

The Government of the People's Republic of China reiterates that Taiwan is an inalienable part of the territory of the People's Republic of China. The Government of Japan full understands and respects this stand of the Government of the People's Republic of China, and it firmly maintains its stand under Article 8 of the Potsdam Proclamation.¹⁹³

As discussed below, the *Potsdam Proclamation* states that “the terms of the *Cairo Declaration* shall be carried out....”¹⁹⁴ In turn, the *Cairo Declaration* provides that Manchuria, Formosa (Taiwan), and the Pescadores (Penghu Islands) would be returned to China and that Japan would also be expelled from “other territories” that it had acquired by violence, but it does not indicate that these “other territories” would be returned to China.¹⁹⁵

e. World War II Documents

Japan invaded and occupied the Paracels and Spratlys, ousting the French garrisons on the islands at the beginning of World War II. In 1943, China, the United States and the United Kingdom agreed in Cairo:

...Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa [Taiwan], and the Pescadores [Penghu], shall be restored to the Republic of China. Japan will also be expelled from all other territories, which she has taken by violence and greed. ...¹⁹⁶

The MFA notes that “at that time, Japan put the Nansha [Spratly] Islands under the jurisdiction of Taiwan” and that “the territories to be restored to China as identified in the Cairo Declaration naturally included the Nansha Islands.”¹⁹⁷ The MFA further asserts that the 1945 *Potsdam Proclamation* reinforces that all territories taken from China by Japan should be restored.

f. Post-War Occupation

According to the MFA, China rightfully recovered the South China Sea islands in 1946. “An official map of the Nansha [Spratly] Islands was drawn and printed, the Nansha Islands were renamed..., and the earliest book of the physical and geography of the Nansha Islands was also compiled and printed.”¹⁹⁸ Additionally, the Chinese government “went through a series of

¹⁹³ *Joint Communiqué of the Government of Japan and the Government of the People's Republic of China*, Sept. 29, 1972, available at <http://www.taiwandocuments.org/japan01.htm>.

¹⁹⁴ *Potsdam Proclamation*, July 26, 1945, para. 8, available at http://www.taiwandocuments.org/doc_all.htm.

¹⁹⁵ *Cairo Declaration*, Nov. 1943, released Dec. 1, 1943, available at http://www.taiwandocuments.org/doc_all.htm.

¹⁹⁶ *Cairo Declaration*, Nov. 1943, released Dec. 1, 1943, available at http://www.taiwandocuments.org/doc_all.htm.

¹⁹⁷ MFA, *The Issue of South China Sea*; see also Shen II, at p. 139.

¹⁹⁸ MFA, *The Issue of South China Sea*.

legal procedures and announced to the whole world that China had resumed the exercise of sovereignty over the Nansha Islands.”¹⁹⁹

Chinese scholars likewise emphasize that China was the only country to dispatch naval forces and government officials to the Paracel and Spratly Islands “to formally accept the Japanese surrender and withdrawal in the South China Sea areas....”²⁰⁰ Accordingly, “it was only logical and natural for China as the legitimate title-holder to recover the South China Sea Islands from Japan” at the end of the Second World War.²⁰¹ In 1946, Nationalist naval forces were deployed to Itu Aba to build radio and meteorological stations and patrol neighboring islands and sea areas. Officials from the Ministry of Internal Affairs were also dispatched to conduct surveys and “engage in other administrative functions with regard to major islands and reefs of the Xisha and Nansha Islands.”²⁰²

g. San Francisco Peace Conference

The MFA additionally claims that Chinese sovereignty over the South China Sea islands was recognized during the drafting of the 1951 *Treaty of Peace with Japan*, citing a statement by the Head of the Delegation of the Soviet Union, Andrei Gromyko. In that statement, Deputy Minister Gromyko criticized the American-British draft of the treaty, indicating, in part, that

it is an indisputable fact original Chinese territories which were severed from...[China], such as Taiwan (Formosa), the Pescadores [Penghu Islands], the Paracel Islands and other Chinese territories, should be returned to the Chinese People’s Republic. ...The draft contains only a reference to the renunciation by Japan of its rights to these territories but intentionally omits any mention of the further fate of these territories.²⁰³

¹⁹⁹ *Id.*

²⁰⁰ Shen II, at p. 138. *See also* Shen I, at pp. 44-45 (“Japanese forces withdrew from the Xisha and Nansha Islands on August 26, 1945. From October through November 1946, the...Republic of China formally retook the Xisha, Nansha and other islands in the South China Sea, thus...reiterating China’s territorial sovereignty.”); Tao Cheng, note 31 *supra*, at pp. 269, 275 (“At the end of the Pacific War in 1946, the Japanese forces in both groups of islands formally surrendered to the representatives of China.”); M. Katchen, note 120 *supra*, at p. 1178.

²⁰¹ Shen II, at p. 138.

²⁰² Shen I, at pp. 44-45. *See also* H. Chiu and C. Park, note 42 *supra*, at pp. 13-14 (“In November 1946, the ROC government sent a naval contingent, with officials from the Ministry of Internal Affairs..., to take over the islets. ...Garrison forces were subsequently stationed on several islets...and...Chinese territorial stone tablets were erected on...Woody and...Itu Aba. A weather station and a radio station were also built on these two islets.”); M. Katchen, note 120 *supra*, at p. 1178 (“...after the Japanese surrender, ...the Republic of China sent a naval contingent with officials from the Ministry of Internal Affairs and the Kwangtung Provincial government to take over the islands.”); M. Bennett, note 14 *supra*, at pp. 437-438 (“In November 1946, the Chinese...government sent a naval contingent to retake the islands. During the following three years, the Guomindang government tried to develop the chain as its southernmost territory. It garrisoned troops on Taiping Island. The navy built a small weather station. Officials also made a comprehensive survey of the area, and in 1947, the Ministry of Internal Affairs published new names for many of the islands in the chain.”); S. Tønnesson, note 55 *supra*, at p. 11 (“...the Republic of China...sent naval expeditions both to the Paracels and the Spratlys in 1946-47, set up sovereignty markers, and established a permanent presence on Itu Aba and Woody Island....”).

²⁰³ Statement of the First Deputy Minister of Foreign Affairs of the USSR, A. A. Gromyko, at the San Francisco Conference of 1951, Sept. 8, 1951; *see also* T. Kelly, note 133 *supra*; SOUTH CHINA SEA STUDIES (2012), at p. 3; Nguyen Ba Dien, *Vietnam Continuously Exercises Its Sovereignty Over Hoang Sa, Truong Sa Archipelagos*, BienDong.Net, Aug. 9, 2012, available at [http://www.southchinasea.org/documents/studies/note 203; Historical documents on](http://www.southchinasea.org/documents/studies/note%20203; Historical documents on)

Gromyko then demanded that the Conference vote on his proposed amendments to the Treaty, which would have required Japan to, *inter alia*, renounce its rights to Taiwan, the Penghu Islands, Macclesfield Bank, and the Spratly and Paracel Islands in favor of China.²⁰⁴

At the same time, China downplays the importance of Vietnam's statement during the seventh plenary session of the Conference, which reaffirmed Vietnamese rights to the South China Sea islands. On September 7, 1951, the head of the Vietnamese delegation to the Conference, Prime Minister Tran Van Huu, stated "...as we must frankly profit from all the opportunities offered to us to stifle the germs of discord, we affirm our right to the Spratly and Paracel Islands, which have always belonged to Vietnam."²⁰⁵ None of the 51 nations represented at the Conference objected to this statement.²⁰⁶ China correctly points out, however, that neither the People's Republic of China nor the Republic of China was invited to participate in the San Francisco Peace Conference.²⁰⁷ Therefore, the two Chinas were not in a position to object to the Vietnamese statement at the Conference.

Nonetheless, Chinese Premier Zhou En-lai issued a lengthy statement criticizing the U.S.-UK draft on August 15, 1951. With regard to the South China Sea islands, in particular, Zhou reiterated China's claims, stating:

[The Paracel Islands and Spratly Islands] have always been China's territory. ...Although they [had] been occupied by Japan for some time during the war of aggression...they were all taken over by the then Chinese government following Japan's surrender. ... Whether or not the U.S.-British Draft Treaty contains provisions on this subject and no

Vietnam's sovereignty over Paracel and Spratly Islands, June 24, 2011, available at

<http://english.vietnamnet.vn/fms/special-reports/>; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

²⁰⁴ The Soviet amendment read as follows: "1. To Article 2.

(a) To include, instead of paragraphs (b) and (f), a paragraph reading follows: Japan recognizes full sovereignty of the Chinese People's Republic over Manchuria, the Island of Taiwan (Formosa) with all the islands adjacent to it, the Penlinletao Islands (the Pescadores), the Tunshatsuntao Islands (the Pratas Islands), as well as over the Islands of Sishatsuntao and Chunshatsuntao (the Paracel Islands, the group of Amphitrites, the shoal of Maxfield) and Nanshatsuntao Islands including the Spratly, and renounces all right, title and claim to the territories named here in." MFA White Paper (1974). See also Hong Thao Nguyen, *Vietnam's Position on the Sovereignty over the Paracels & Spratlys: Its Maritime Claims*, J. EAST ASIA INT'L L., V J EAIL (1) 2012, May 4, 2012, at p. 187; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; M. Chemillier-Gendreau, note 15 *supra*, at pp. 41 and 121.

²⁰⁵ MFA White Paper (1974); see also H. Chiu and C. Park, note 42 *supra*, at p. 8; SOUTH CHINA SEA STUDIES (2012), at p. 3; T. Kelly, note 133 *supra*; Nguyen Ba Dien, note 203 *supra*; H. Nguyen, note 204 *supra*, at p. 187; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; M. Chemillier-Gendreau, note 15 *supra*, at p. 41.

²⁰⁶ H. Chiu and C. Park, note 42 *supra*, at pp. 8 and 14; see also B. Murphy, note 29 *supra*, at pp. 192-193, 201; T. Kelly, note 133 *supra*; SOUTH CHINA SEA STUDIES (2012), at p. 3; Nguyen Ba Dien, note 203 *supra*; H. Nguyen, note 204 *supra*, at p. 187; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; M. Chemillier-Gendreau, note 15 *supra*, at p. 41.

²⁰⁷ Chinese scholars point out that Japan's renunciation of claims in the San Francisco Peace Treaty occur in "two different ways in terms of their recipients...: (1) in the case of Korea and the League Mandate territory the recipients are specifically mentioned; and (2) in the case of those territories acquired by Japan from Russia and China the names of the recipients are left open. This was understandable in view of the cold-war situation in which the Treaty was made." Tao Cheng, note 31 *supra*, at p. 276.

matter how these provisions are worked, the inviolate sovereignty of the People's Republic of China over Nanwei Islands [Spratly Islands] and Hsisha Islands [Paracel Islands] will not be in any way affected.²⁰⁸

Chinese scholars additionally argue that, despite Vietnam's statement at the Peace Conference, the fact that the Peace Treaty fails to

identify [to] whom the South China Sea islands should be returned is itself a rejection of Vietnam's claims. ...The Treaty's silence on the post-war status of the Xisha and Nansha Islands should not be interpreted as having left the issue of ownership open. Rather, it should be interpreted against recognizing any conflicting and ungrounded claims such as those advanced by the Vietnamese.²⁰⁹

A similar argument has been advanced by China regarding France's claims—as one of the major powers at the Peace Conference, France “would not have allowed the...Treaty to fail to specifically mention France as the recipient of the Paracels and Spratlys.”²¹⁰

h. International Civil Aviation Organization (ICAO) Conference

The MFA also believes that action taken at the first ICAO Conference on Asia-Pacific Regional Aviation in October 1955 supports China's sovereignty claims to the South China Sea islands. The Conference was held in Manila and was attended by 15 nations, including South Vietnam and Taiwan.²¹¹ According to the MFA, the conference determined that the Spratly, Paracel, and Pratas Islands “were located at the communication hub of the Pacific and therefore the meteorological reports of these islands were vital to world civil aviation service.”²¹² Accordingly, the conference unanimously adopted Resolution No. 24, asking Taiwan “to improve meteorological observation on the Spratly Islands four times a day.”²¹³ According to Chinese sources, none of the delegations present at the conference objected to the resolution.²¹⁴

²⁰⁸ Shen I, at p. 50; *see also* Shen II, at pp. 138, 145-146; J. Greenfield, note 149 *supra*, at p. 30; Xu Zhiliang, Li Lixin, Fan Hong, and Zhou Xin, note 104 *supra*; H. Chiu and C. Park, note 42 *supra*, at p. 14; B. Murphy, note 29 *supra*, at p. 201; M. Katchen, note 120 *supra*, at p. 1179; M. Bennett, note 14 *supra*, at pp. 447-448; H. Harry L. Roque, Jr., *China's Claim to the Spratly Islands under International Law*, 15 J. ENERGY & NAT. RESOURCES L. 189, 1997, at p. 196; M. Chemillier-Gendreau, note 15 *supra*, at pp. 41, 122.

²⁰⁹ Shen I, at pp. 51, 58-59.

²¹⁰ *Id.*, at p. 58; *see also* Tao Cheng, note 31 *supra*, at pp. 275-276; B. Murphy, note 29 *supra*, at p. 192.

²¹¹ Other nations attending included: Australia, Canada, Chile, Dominica, France, Laos, Japan, New Zealand, the Philippines, the Republic of Korea, Thailand, the United Kingdom, and the United States. MFA, *The Issue of South China Sea*.

²¹² *Id.*

²¹³ *Id.*; Taiwan similarly asserted its sovereignty over the Paracel and Spratly Islands at two sessions of the United Nations Cartographic Conference for Asia and the Far East—Manila (1964) and Teheran (1970). H. Chiu and C. Park, note 42 *supra*, at p. 16 and note 88.

²¹⁴ M. Chemillier-Gendreau, note 15 *supra*, at p. 42.

i. North Vietnamese Indifference

China additionally relies on statements and activities by North Vietnamese officials beginning in the mid 1950s to support its claim of sovereignty over the South China Sea islands. According to the MFA, on June 15, 1956, North Vietnamese Deputy Minister of Foreign Affairs Ung Van Khiem reportedly informed Mr. Li Zhi-ming, Chargé d'Affaires ad Interim of the Chinese Embassy in Vietnam, that “according to Vietnamese data, the Xisha and Nansha Islands are historically part of Chinese territory.”²¹⁵ Mr. Li Lu, Deputy Director of the Asia Division of the Vietnamese Foreign Ministry, who was present at the meeting, added that “judging from history, these islands were already part of China at the time of the Song Dynasty.”²¹⁶

China also points to a 1958 letter from the North Vietnamese Prime Minister to China’s Premier that ostensibly supports China’s claims to the Spratly and Paracel Islands. On September 4, 1958, China issued a declaration extending the breadth of its territorial sea from 3 to 12 nautical miles (nm). The declaration provided, in part, that

1) The breadth of the territorial sea of the People's Republic of China shall be twelve nautical miles. This provision applies to all territories of the People's Republic of China, including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu Islands and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas.

4) The principles provided in paragraphs 2) and 3) likewise apply to Taiwan and its surrounding islands, the Penghu Islands, the Dongsha Islands, and Xisha Islands, the Zhongsha Islands, the Nansha Islands, and all other islands belonging to China.²¹⁷

Ten days later, Prime Minister Pham Van Dong sent a letter to Premier Zhou En-lai expressing support for China’s territorial sea extension:

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. We would like to send our sincere regards.²¹⁸

²¹⁵ Shen I, at p. 53; *see also* T. Kelly, note 133 *supra*.

²¹⁶ Shen I, at p. 54.

²¹⁷ *Declaration of the Government of the People’s Republic of China on China’s Territorial Sea* (Sept. 4, 1958), reprinted in U.S. DEPT. OF STATE LIMITS IN THE SEA NO. 43, *Straight Baselines: People’s Republic of China*, July 1, 1972.

²¹⁸ *Letter from Prime Minister Pham Van Dong to Premier Zhou En-lai*, Sept. 14, 1958, M. Chemillier-Gendreau, note 15 *supra*, at pp. 43, 129. *See also* Shen I, at p. 54; B. Murphy, note 29 *supra*, at pp. 193, 204; B. Dubner, note 29 *supra*, at p. 309; SOUTH CHINA SEA STUDIES (2012), at p. 5; T. Kelly, note 133 *supra*; H. Nguyen, note 204 *supra*, at p. 190.

Chinese scholars also cite a statement issued by the North Vietnamese government on May 9, 1965, regarding the U.S. declared war zone for Vietnam and its adjacent waters, to support its position that Vietnam had previously recognized China's sovereignty over the Paracel Islands. The Vietnamese declaration indicated that "President Johnson of the United States has designated as the combat area the entire Vietnam and the water areas near it—an area about 100 nautical miles away from the Vietnamese coast and part of the territorial sea of the Xisha Islands of the People's Republic of China."²¹⁹ In addition, Chinese sources claim that, on May 31, 1969, the Vietnamese daily *Nhan Dan* published a story that recognized Chinese sovereignty over the Paracels: "On 10 May, a US military plane penetrated Chinese air space, above Yong Xing and Dong dao, two of the Xisha Islands, in the Chinese Province of Guangdong."²²⁰

Based on Vietnam's purported recognition of China's claims prior to 1975, some scholars contend that the principle of *estoppel* precludes Vietnam from taking a position contrary to its earlier stance regarding China's sovereignty over the South China Sea islands and that China's claim is therefore superior to that of Vietnam.²²¹

j. Other Supporting Publications

The MFA cites a number of foreign publications in support of its position that the international community recognizes China's claims to the South China Sea islands. These publications include:

- *The China Sea Directory*, published in Great Britain in 1867, describes the life of Chinese fishermen living in the Spratly Islands.²²²
- *China Sea Pilot*, compiled and printed by the Hydrography Department of the Royal Navy of the United Kingdom in 1912, has accounts of the activities of the Chinese people on the Nansha Islands in a number of places.²²³

²¹⁹ Shen I, at p. 54. The U.S. declared War Zone was defined as: Vietnam and contiguous waters, as used herein, is defined as an area which includes Vietnam and the water adjacent thereto within the following specified limits: From a point on the East Coast of Vietnam at the juncture of Vietnam with China southeastward to 21° N. Latitude, 108° 15'E. Longitude; thence, southward to 18° N. Latitude, 108° 15'E. Longitude; thence southeastward to 17° 30'N. Latitude, 111° E. Longitude; thence southward to 11° N. Latitude, 111° E. Longitude, thence southwestward to 7° N. Latitude, 105° E. Longitude; thence westward to 7° N. Latitude, 103° E. longitude, thence northward to 9° 30'N. Latitude, 103° E. Longitude, thence northeastward to 10° 15'N. Latitude, 104° 27'E. Longitude, thence northward to a point on the West Coast of Vietnam at the juncture of Vietnam with Cambodia. Executive Order 11216--*Designation of Vietnam and waters adjacent thereto as a combat zone for the purposes of section 112 of the Internal Revenue Code of 1954*, Apr. 24, 1965, available at <http://www.presidency.ucsb.edu/ws/?pid=59147>. See also SOUTH CHINA SEA STUDIES (2012), at pp. 5-6; M. Chemillier-Gendreau, note 15 *supra*, at pp. 44, 129.

²²⁰ M. Chemillier-Gendreau, note 15 *supra*, at p. 44.

²²¹ Shen I, at p. 57; see also H. Roque, note 208 *supra*, at pp. 204-205; B. Murphy, note 29 *supra*, at p. 205.

²²² Su Hao, note 28 *supra*.

²²³ "Hainan fishermen, who subsist by collecting trepang and tortoise shells, were found upon most of these islands; some of them remain for years amongst the reefs. Junks from Hainan annually visit the [Spratly] islands and reefs with supplies of rice and other necessities, for which the fishermen give trepang and other articles in exchange." H. Chiu and C. Park, note 42 *supra*, at p. 10. But see François-Xavier Bonnet, *Geopolitics of Scarborough Shoal*, IRASEC'S DISCUSSION PAPER #14, RESEARCH INSTITUTE ON CONTEMPORARY SOUTHEAST ASIA, Nov. 2012, at p. 17 (A secret report prepared by the Chinese Military Council in September 1933 provides that the: "*China Sea*

- *The Far Eastern Economic Review* (Hong Kong) contained an article on December 31, 1973, which quotes the British High Commissioner to Singapore as having said in 1970: "Spratly Island (Nanwei Island in Chinese) was a Chinese dependency, part of Kwangtung Province... and was returned to China after the war. We cannot find any indication of its having been acquired by any other country and so can only conclude it is still held by communist China."²²⁴
- *Le Monde Colonial Illustré* acknowledged the presence of Chinese people on the Spratly Islands (Nanwei Island, Nanzi Reef, Zhongye Island, and Nanwei Island), as well as thatched houses, water wells, and holy statues left by Chinese on Nanyue Island and a signboard with Chinese characters marking a grain storage on Spratly (Taiping) Island in its September 1933 issue.
- *Atlas International Larousse*, published in 1965 in France, marks the Paracel (Xisha), Spratly (Nansha) and Pratas (Dongsha) Islands by their Chinese names and gives clear indication of their ownership by China in brackets.
- *Yearbook of New China*, published in Japan in 1966, describes the coastline of China as 11 thousand kilometers long from Liaodong Peninsula in the north to the Spratly (Nansha) Islands in the south, or 20 thousand kilometers if including the coastlines of all the islands along its coast.
- *Yearbook of the World*, published in Japan in 1972, indicates that Chinese territory includes not only the mainland, but also Hainan Island, Taiwan, Penghu Islands as well as the Pratas (Dongsha), Paracel (Xisha), and Spratly (Nansha) Islands, and Macclesfield Bank (Zhongsha) in the South China Sea.
- *Columbia Lippincott World Toponymic Dictionary*, published in the United States in 1961, states that the Spratly (Nansha) Islands in the South China Sea are part of Guangdong Province and belong to China.
- *The Worldmark Encyclopedia of the Nations*, published in the United States in 1963, indicates that the islands of the People's Republic of China extend southward to include those isles and coral reefs in the South China Sea at the north latitude 4°.
- *World Administrative Divisions Encyclopaedia*, published in the United States in 1971, indicates that the People's Republic of China has a number of archipelagoes, including Hainan Island near the South China Sea, which is the largest, and a few others on the South China Sea extending to as far as the north latitude 4°, such as

Pilot...does not say to whom these islands belong and does not give any evidence of any Chinese administration, the presence of an official representative of China, or Chinese equipment and infrastructure. In conclusion, we have only one piece of evidence, our fishermen from Hainan, and we have never done anything on these islands."). See also SOUTH CHINA SEA STUDIES (2012) ("...Chinese fishermen's early presence was merely private/individual activities and thus cannot constitute effective occupation by a State as required by international law."); H. Nguyen, note 204 *supra*, at p. 169 ("Occupation by private individuals will not create a title for their country.").

²²⁴ This alleged statement is inconsistent with Britain's official position regarding French overseas possessions during World War II, which provided that the French were "highly sensitive about the restoration of all parts of their colonial empire to the *status quo ante* [which would arguably include the Spratlys and Paracels] and that the British Government will firmly support the French position in view of its desire for the closest possible relations with France." *Memorandum by the Deputy Director of the Office of European Affairs* (H. Freeman Matthews), Nov. 2, 1944, THE PENTAGON PAPERS, UNITED STATES-VIETNAM RELATIONS (1945-1967), Part V.B.1., at pp. 37-38, available at <http://www.archives.gov/research/pentagon-papers/>.

the Pratas (Dongsha), Paracel (Xisha), and Spratly (Nansha) Islands, and Macclesfield Bank (Zhongsha)

- A standard Vietnamese textbook on geography published in 1974 indicates that the islands from the Spratly (Nansha) and Paracel (Xisha) Islands to Hainan Island and Taiwan constitute a great wall for the defense of the mainland of China.²²⁵

IV. VIETNAM

A. Vietnam Claims

Vietnam's official position regarding its sovereignty claims to the South China Sea islands was first set out in a White Paper published by the Ministry of Foreign Affairs (MFA) in 1974. Like China, Vietnam claims sovereignty over all of the Hoang Sa (Paracel) and Truong Sa (Spratly) archipelagoes based on several factors, including historical evidence, economic development, effective administration, and international recognition.

1. Historical Evidence

Vietnam traces its initial presence in the Paracels to the 17th century. According to the MFA, evidence of Vietnamese sovereignty over the Paracel Islands can be found in the works of Do Ba in a series of maps of Vietnam in the third part of the *Hong Duc Atlas*. Notes accompanying the maps "indicate that as far back as the early 17th century, Vietnamese authorities had been sending...ships and men..." to the Paracels on a regular basis.²²⁶ The 17th-century atlas—*Toan Tap Thien Nam Tu Chi Lo Do Thu* (*Route Map from the Capital to the Four*

²²⁵ The MFA similarly cites a number of foreign maps that mark the South China Sea islands as part of Chinese territory, including:

- *The Welt-Atlas* published by the Federal Republic of Germany in 1954, 1961 and 1970;
- *World Atlas* published by the Soviet Union in 1954 and 1967;
- *World Atlas* published by Romania in 1957;
- *Oxford Australian Atlas* and *Philips Record Atlas* published by Britain in 1957;
- *Encyclopaedia Britannica World Atlas* published by Britain in 1958;
- *World Atlas* printed by the mapping unit of the Headquarters of the General Staff of the People's Army of Viet Nam in 1960;
- *Haack Welt Atlas* published by German Democratic in 1968;
- *Daily Telegraph World Atlas* published by Britain in 1968;
- *Atlas International Larousse* published by France in 1968 and 1969, respectively;
- *World Map Ordinary* published by the Institut Geographique National of France in 1968;
- *World Atlas* published by the Surveying and Mapping Bureau of the Prime Minister's Office of Viet Nam in 1972; and
- *China Atlas* published by Neibonsya of Japan in 1973.

MFA, *The Issue of South China Sea*; see also Shen I, at pp. 54-55.

²²⁶ MFA White Paper (1974); see also C. Joyner, note 166 *supra*, at p. 60; T. Kelly, note 133 *supra*; SOUTH CHINA SEA STUDIES (2012), at p. 2; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

Directions)—likewise indicates that the Paracel and Spratly Islands were under the control of the Nguyen family.²²⁷

Other maps, documents, and publications cited by Vietnam in support of its sovereignty claims over the two archipelagoes include: *Đại Nam thực lục tiền biên* (1600–1775) (*The Early Chapter of The Chronicles of Đại Nam*); *Đại Nam Thục Lục Chính Biên* (relating to the subsequent period); *Toản tập Thiên Nam tứ chí lộ đồ thư* (1630–1653) (*The Collection of the South's Road Map*); *Giáp Ngọ Bình Nam Do* (1774) (*The Map for the Pacification of the South in the Giáp Ngọ Year*); *Phủ biên tạp lục* (1776) (*Miscellany on the Pacification at the Frontier*); *Lịch triều hiến chương loại chí* (1821) (*Classified Rules of the Dynasties*); *The Authentic Writings on Đại Nam* (compiled between 1821 and 1844); *Đại Nam Nhất Thống Toàn Đồ* (1838) (*The Complete Map of the Unified Đại Nam*); *Kham Định Đại Nam Hội Diên Su Lê* (1843-1851) (*The Đại Nam Administrative Repertory*); *Đại Nam thực lục chính biên* (1848) (*The Main Chapter of The Chronicles of Đại Nam*); *Đại Nam nhất thống chí*—the geography and history of Đại Nam (*The Record of The Unified Đại Nam*) edited 1865-1882; *Hoàng Việt dư địa chí* (1833) (*Geography of The Viet Empire*); *Việt sử thông giám cương mục khảo lược* (1876) (*Outline of The Chronicles of The Viet History*); and other official documents of the Nguyen Dynasty on petitions and imperial decrees, as well as maps and documents made by other countries during the 17th, 18th, and 19th centuries.²²⁸

Some Vietnamese and Western scholars assert that Western writings dating back to the 17th century give some credence to Vietnam's historical claims. Portuguese and Dutch maps from the early 17th century purportedly identify the Paracels as Vietnamese territory.²²⁹ Additionally, in 1701, a Western missionary on board the French ship *Amphitrite* recorded in *Mystere des atolls—Journal de voyage aux Paracels* (*Mystery of the atolls—Journal of the voyage to the Paracel Islands*) that “the Paracel is an archipelago belonging to the Kingdom of An Nam.”²³⁰

Western writings from the 19th century likewise support Vietnam's historical evidence. A book published in 1837 by a French missionary in Cochinchina, Monseigneur Jean-Louis Taberd, entitled *Note on the Geography of Cochinchina*, described the Paracel Islands as part of Cochinchina and said that Cochinchines referred to the Paracels as “Cat Vang.”²³¹ A second book published by Monseigneur Taberd in 1838—*History and Description of the Religion, Customs, and Morals of All Peoples*—similarly recorded that the Paracels had been a dependency of Cochinchina for 34 years.²³² A depiction of the Paracels additionally appears in

²²⁷ M. Bennett, note 14 *supra*, at p. 434; see also T. Kelly, note 133 *supra*; SOUTH CHINA SEA STUDIES (2012), at p. 2. (This is “the first Vietnamese documentation of formal exercise of authority over the Truong Sa.”).

²²⁸ SOUTH CHINA SEA STUDIES (2012), at p. 2; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; M. Chemillier-Gendreau, note 15 *supra*, at pp. 66-67; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; H. Nguyen, note 204 *supra*, at p. 174.

²²⁹ T. Kelly, note 133 *supra*; see also SOUTH CHINA SEA STUDIES (2012), at p. 2.

²³⁰ *Historical documents on Vietnam's sovereignty over the Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

²³¹ Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; H. Nguyen, note 204 *supra*, at p. 177.

²³² H. Chiu and C. Park, note 42 *supra*, at p. 7.

Taberd's 1838 *An Nam Dai Quoc Hoa Do* (*Tabula geographica imperia Anamitici—The Map of the An nam Empire*).²³³

Jean-Baptiste Chaigneau's memoirs (*Memoires sur la Cochinchina*) also refer to Emperor Gia Long's annexation of the Paracels in 1816:

Cochinchina, the sovereign of which has today the title of Emperor, is composed of Cochinchina proper, Tonquin, a part of the Kingdom of Cambodia, some uninhabited islands not far from the coast and the Paracels archipelago, composed of uninhabited reefs and rocks. It is only in 1816 that the present Emperor took possession of this archipelago.²³⁴

Chaigneau was a French naval officer who played a leading role in Vietnam during the 19th century.

A reference to the Paracels as Vietnamese territory can also be found in *Japon, Indo-Chine, Empire Birman (ou Ava), Siam, Annam (ou Cochinchine), Péninsule Malaise, etc., Ceylan* by French explorer and author Adolphe Philibert Dubois de Jancigny.²³⁵ Additionally, in his 1849 article *Geography of the Cochinchinese Empire*, German missionary Karl Gützlaff "defined the Paracels as part of Vietnam's territory and noted the islands with the Vietnamese name 'Cat Vang'."²³⁶ Gützlaff additionally noted:

We should...mention here the Paracels. ...From time immemorial, junks in large number from Hainan, have annually visited these shoals, and proceeded in their excursions as far as the coast of Borneo. ...The Annam government, perceiving the advantages which it might derive if a toll were raised, keeps revenue cutters and a small garrison on the spot to collect the duty on all visitors, and to ensure protection of its own fishermen.²³⁷

Aldriano Balbi's *The Italian Compendium of Geography* (1850) similarly includes the Paracel, Pirate (Hà Tiên), and Puolo Condor (Côn Sơn) Islands within the Kingdom of Annam.²³⁸

A letter from the Chief Resident of Annam (Le Fol) to the Governor General of Indochina, dated January 22, 1929, likewise confirms that Vietnam effectively administered the Paracels from the early 18th century onwards:

...The Paracel archipelago...seems to have remained *res nullius* until the beginning of the last century. ...Monsignor Jean Louis Taberd...reports the occupation of the Paracels...in

²³³ Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

²³⁴ H. Chiu and C. Park, note 42 *supra*, at p. 7; *see also* Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; H. Nguyen, note 204 *supra*, at p. 183; M. Chemillier-Gendreau, note 15 *supra*, at p. 69.

²³⁵ H. Nguyen, note 204 *supra*, at p. 177.

²³⁶ Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; H. Nguyen, note 204 *supra*, at p. 177.

²³⁷ H. Nguyen, note 204 *supra*, at p. 182.

²³⁸ The Paracels and Spratlys are not mentioned in the Chinese section of the same book. *Id.*, at p. 183.

1816 by Emperor Gia Long.... Although doubts may be cast on the authenticity of the formal taking of possession by Gia Long himself, the occupation was nonetheless effective....²³⁹

Le Fol goes on to describe the detailed “information on the administration of the islands by former dynasties from the early years of the 19th century onwards.”²⁴⁰

Vietnamese and Western scholars also claim that Chinese writings and geographical documents confirm the accuracy of the aforementioned Western writings. For example, in 1730, Hai Lu wrote in *Hai Quoc Do Chi* that “...Truong Sa...forms a rampart on the periphery of the Kingdom of Annam (Vietnam).”²⁴¹ A map of Kwangtung (Guangdong) Province and a description of the Quiongzhou Prefecture published in 1731 do not mention either the Paracels or the Spratlys as part of China.²⁴² This omission was confirmed in Hoang Chao’s 1894 *Map of the Unified Empire*, which depicts Chinese territory as extending only as far south as Hainan Island. Likewise, the 1906 *Zhongguo Dilixue Jiaokeshu (Manual of Geography of China)* states in the Generalities chapter “that the Chinese territory is bound in the South at North latitude 18°13', the terminus being the coast of Yazhou, island of Hainan.”²⁴³ A similar report is found in Li Hanzhung’s *Geography of Guandong*, published in 1909—“Today the maritime frontiers are limited in the South by the island of Hainan....”²⁴⁴

2. Economic Development

The MFA asserts that systematic exploitation of the Paracels’ resources started as early as the 15th century, but certainly no later than 1653.²⁴⁵ Economic exploitation of the islands gradually evolved from the 15th century onward, leading to the establishment of the Hoang Sa Company by the Nguyen Dynasty “to ensure a rational exploitation of those islands.”²⁴⁶

According to the works of Do Ba, each year during the last month of winter, the Nguyen rulers would send a flotilla of 18 junks to salvage foreign commercial ships that had wrecked on the islands, obtaining large “quantities of gold, silver, coins, rifles and ammunitions.”²⁴⁷ Evidence of these salvage expeditions is recorded in the historical work of Le Qui Don²⁴⁸—*Phu Bien Tap Luc (Miscellaneous Records on the Pacification of the Frontiers)*:

²³⁹ M. Chemillier-Gendreau, note 15 *supra*, at p. 65, Annex 8 (*Letter of 22 January 1929, from the Chief Resident of Annam, Hué, to the Governor General of Indochina, Hanoi*).

²⁴⁰ *Id.*

²⁴¹ *Id.*, at p. 74; *see also* H. Nguyen, note 204 *supra*, at p. 171.

²⁴² M. Chemillier-Gendreau, note 15 *supra*, at p. 62.

²⁴³ *Id.*, at p. 75; *see also* H. Nguyen, note 204 *supra*, at p. 171.

²⁴⁴ H. Nguyen, note 204 *supra*, at p. 172.

²⁴⁵ MFA White Paper (1974); *see also* SOUTH CHINA SEA STUDIES (2012), at p. 2.

²⁴⁶ *Id.*; *see also* H. Roque, note 208 *supra*, at p. 192; T. Kelly, note 133 *supra*.

²⁴⁷ MFA White Paper (1974); *see also* B. Murphy, note 29 *supra*, at p. 203; H. Chiu and C. Park, note 42 *supra*, at p. 7; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; H. Nguyen, note 204 *supra*, at p. 174; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

²⁴⁸ Le Qui Don was a mandarin Chinese sent to Vietnam by the Chinese Court in order to serve as the Vice-Governor in the realm recently taken over by the Court from the Nguyen Lords. MFA White Paper (1974); *see also* M. Chemillier-Gendreau, note 15 *supra*, at pp. 64, 66, Annex 8 (*Letter of 22 January 1929, from the Chief Resident of Annam, Hué, to the Governor General of Indochina, Hanoi*).

...the Nguyen had created a Hoang Sa Company of 70 men.... Every year they take turns in going out to sea, setting out during the first month of the lunar calendar.... Each man...is given six months' worth of dry food. ...[I]t takes them three days before they reach the islands. They are free to collect anything they want, to catch...birds...and to fish for food. They...find the wreckage of ships which yield such things as bronze swords and copper horses, silver decorations and money, silver rings and other copper products, tin ingots and lead, guns and ivory, golden bee-hive tallow, felt blankets, pottery, and so forth. They also collect turtle shells, sea urchins and striped conches in huge quantities. The Hoang Sa Company does not come home until the eight[h] month of the year. They go to Phu Xuan (present-day Hue) to turn in the goods they have collected in order to have them weighed and verified, then get an assessment before they can proceed to sell their striped conches, sea turtles and urchins. Only then is the Company issued a certificate which [indicates] they can go home. ...²⁴⁹

Members of the Hoang Sa detachments were exempt from paying personal taxes and were rewarded monetarily for their efforts.²⁵⁰ By the same token, “those who did not complete the task were punished according to the gravity of their failure” or indiscretion.²⁵¹

By the early 18th century, exploitation of the Paracels had become less profitable. Le recorded that in 1702, “the Hoang Sa Company collected 30 silver ingots”; in 1704, “5,100 catties of tine [measures of pewter] were brought in”; in 1705, “126 ingots of silver were collected”; and between 1709 and 1713, “the company managed to collect only a few catties of tortoise shells and sea urchins.”²⁵² As a result, the duration of the operation was reduced from six to two months.²⁵³

The MFA claims that these expeditions demonstrate that by the 18th century the Nguyen Lords were “concerned with the economic possibilities of the...Paracel Islands” and “the fact that no counterclaims were made by any other nation is...proof that the Nguyen’s sovereign rights over the islands were not challenged by any country.”²⁵⁴ In fact, the MFA claims that

²⁴⁹ MFA White Paper (1974); see also T. Kelly, note 133 *supra*; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; H. Nguyen, note 204 *supra*, at pp. 175, 180-181; M. Chemillier-Gendreau, note 15 *supra*, at pp. 64-65 (Le’s account accurately places the archipelagoes as lying three days’ and three nights’ journey from the mainland).

²⁵⁰ H. Nguyen, note 204 *supra*, at p. 181; see also M. Chemillier-Gendreau, note 15 *supra*, at pp. 67, 69.

²⁵¹ Punishments ranged from floggings, to the death penalty. *Id.*

²⁵² MFA White Paper (1974); M. Chemillier-Gendreau, note 15 *supra*, at p. 65.

²⁵³ A geography book written by Phan Huy Chu in 1834—*Hoang Viet Dia Du Chi*—reflects that “the Hoang Sa Company...was still composed of 70 men.... However, they receive dry food and...go out to sea in the third month of the lunar calendar (rather than the first...). They begin their return journey in the six[th] month [rather than the eighth].” MFA White Paper (1974); see also Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

²⁵⁴ MFA White Paper (1974); accord M. Chemillier-Gendreau, note 15 *supra*, at p. 67 (At the very least, the establishment and operation of the Hoang Sa Company by various Vietnamese dynasties for the purpose of economically exploiting and exploring the South China Sea islands clearly reflect a “national policy with a concern for maritime interests.”). See also Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper. But see B.

Vietnamese exploitation of the Paracels during this time was carried out openly and peacefully, and was “acknowledged by the Chinese to be an exercise of legitimate rights over the islands.”²⁵⁵

Like its predecessor, the Tay Son Dynasty (1778-1802) continued to deploy the Hoang Sa flotillas to the Paracels to exploit its resources. An order issued in 1786 by Mandarin Superior Thuong Tuong Cong instructed the Commander of the Hoang Sa Flotilla, Hoi Duc Hau, to “lead four fishing boats to sail directly towards Hoang Sa [Paracels] and other islands on the sea to collect jewelries, copper items, guns of all size, sea turtles, and valuable fishes, and to return to the Capital to hand over all of these items in accordance with the current rules.”²⁵⁶

The MFA points out that a British publication from the early 19th century confirms that Vietnam was economically exploiting the Paracels. A book written by John Barrow in 1806—*A Voyage to Cochinchina*—recorded the travels of Count George Macartney, the British Envoy to the Chinese Court, in Cochinchina in 1793. The book contains a detailed description of the “types of boats used by the Cochinchinese in order to reach...the Paracel Islands where they collected trepang and swallow nests.”²⁵⁷

Economic exploitation of the phosphate deposits in the Paracels resumed in 1956 when the Ministry of Economy granted a license to Le Van Cang, a Saigon businessman, to exploit phosphate on Money, Roberts, and Pattle Islands.²⁵⁸ A license was subsequently granted to the Vietnam Fertilizers Company in 1959 to extract and transport phosphate to a Singaporean company (Yew Huatt)—the company exploited guano under this license until 1963.²⁵⁹ The following year, commercial exploitation of the Paracels was awarded to the Vietnam Phosphate Company. Between 1957 and 1962, over 24,000 metric tons of phosphate were extracted from the islands. Production ceased for 10 years due to insufficient returns, but interest in exploiting the islands resurfaced in 1973 after the Republic of Vietnam experienced a severe fertilizer shortage. A joint feasibility study was conducted that same year by the Vietnam Fertilizer Company and its Japanese partner—Marubeni Corporation of Tokyo.²⁶⁰ Following the study, Vietnamese authorities granted concessions to foreign companies to exploit phosphate deposits in the Paracels in July 1973.²⁶¹ These concessions were abruptly terminated when Chinese naval forces invaded and occupied the entire archipelago in 1974.

Following the unification of the country in 1975-76, the new government also entered into cooperative agreements with a number of countries, including Japan (July 1978) and the Soviet Union (July 1980), to explore and exploit hydrocarbon reserves in and around the Spratlys.²⁶²

Murphy, note 29 *supra*, at p. 203 (“The Vietnamese government presents no evidence to show that the ‘team’ set up by the Nguyens in the seventeenth century ever left mainland Vietnam to administer and exploit the Spratlys.”).

²⁵⁵ MFA White Paper (1974).

²⁵⁶ Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

²⁵⁷ MFA White Paper (1974).

²⁵⁸ *Id.*; see also Shen I, at p. 52; H. Nguyen, note 204 *supra*, at p. 188.

²⁵⁹ H. Nguyen, note 204 *supra*, at pp. 188-189; see also M. Chemillier-Gendreau, note 15 *supra*, at p. 18.

²⁶⁰ MFA White Paper (1974); see also Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

²⁶¹ Shen I, at p. 53; see also SOUTH CHINA SEA STUDIES (2012), at p. 3.

²⁶² Shen I, at pp. 55-56.

3. Effective Administration

According to the MFA, beginning in 1802, Vietnam progressively asserted its rights over the Paracel Islands. In 1815, Emperor Gia Long ordered Pham Quang Anh to survey and chart the sea routes around the islands.²⁶³ The following year, Vietnam formally took possession of the archipelago, following a formal flag raising ceremony.²⁶⁴ Legal experts from the French Foreign Ministry determined that “this annexation, even without effective occupation, seems to have been carried out in conformity with the international law of the time” and that “the annexation therefore conferred legal title to Annam.”²⁶⁵

The 1816 flag planting ceremony is recorded in Reverend Jean-Louis Taberd’s 1837 *Note on the Geography of Cochinchina* (printed in the *Journal of the Royal Asiatic Society of Bengal, India*)—“In 1816, [Emperor Gia Long]...went with solemnity to plant his flag and take formal possession of these rocks, which it is not likely anybody will dispute with him.”²⁶⁶ A similar report is contained in Jean-Baptiste Chaigneau’s *Notice sur la Cochinchine*:

“Cochinchina...includes Cochinchina proper, Tonkin, a few scarcely inhabited islands not far from the coastline and the Paracel archipelago.... It was in 1816 that...Emperor Gia Long took possession of this archipelago.”²⁶⁷

The first map published by the kingdom in 1830 included the Paracels (presumably including the Spratlys) as part of Vietnamese territory.²⁶⁸

Three years later, in 1833, Emperor Minh Mang ordered his Minister of Public Work to plant trees on some of the Paracel Islands as aids to navigation to prevent ships from “being wrecked in these not very deep waters.”²⁶⁹ According to the MFA, Vietnam executed this act to meet its international responsibilities and enhance safety of navigation for the international community.

The following year, Emperor Minh sent a naval detachment of 20 men under the command of Garrison Commander Truong Phuc Si to the Paracels to make a map of the area.²⁷⁰ Subsequently, in 1835, the emperor directed the Elephant Garrison Detachment under the command of Navy Commander Pham Van Nguyen to build a new temple on the island of Bach

²⁶³ Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; H. Nguyen, note 204 *supra*, at p. 181; M. Chemillier-Gendreau, note 15 *supra*, at p. 68.

²⁶⁴ MFA White Paper (1974) (“The progressive intensification of Vietnamese control over the Hoang Sa Islands reached a decisive and irreversible point at the beginning of the 19th century, when the reigning Nguyen dynasty developed a systematic policy toward complete integration of the archipelago into the national community.”); see also H. Roque, note 208 *supra*, at p. 192; B. Dubner, note 29 *supra*, at p. 311; H. Chiu and C. Park, note 42 *supra*, at p. 7; T. Kelly, note 133 *supra*; M. Chemillier-Gendreau, note 15 *supra*, at p. 35.

²⁶⁵ M. Chemillier-Gendreau, note 15 *supra*, Annex 38 (*Notes from the Legal Department, Paris, 6 September 1946*).

²⁶⁶ Reverend Taberd was the Bishop of Isauropolis at the time. *Id.*

²⁶⁷ *Id.*, at p. 69, Annex 38 (*Notes from the Legal Department, Paris, 6 September 1946*).

²⁶⁸ H. Roque, note 208 *supra*, at p. 192.

²⁶⁹ MFA White Paper (1974); see also Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; M. Chemillier-Gendreau, note 15 *supra*, at p. 68.

²⁷⁰ *Id.*

Sa (White-Sand Island).²⁷¹ The temple, which included a stone mark to its left and a brick screen in front, was completed in 10 days and was located seven truong (approximately 28 meters) distant from the old temple in the southwest part of the island.²⁷² A temple dedicated to the gods of Hoang Sa was also built on the beach of Quang Ngai in 1835.²⁷³

Because the islands were considered to be of great strategic importance, the Ministry of Public Works recommended that survey missions be dispatched to the Paracels each year “to explore the whole archipelago and to get accustomed to the sea routes there.”²⁷⁴ Accordingly, beginning in 1836, Emperor Minh developed a plan to systematically survey the entire archipelago:

Everything shall be noted and described in detail for submission to...The Emperor. As soon as the junks reach any island or sandbank..., they shall...measure the length, breadth, height, surface area and circumference of that island or sandbank, the depth of the surrounding waters, identify any submerged sandbanks or reefs, record whether access is dangerous or poses no problem, undertake a careful examination of the terrain, take measurements and make a sketch.²⁷⁵

That same year, the emperor dispatched a naval team under the command of Navy Commander Pham Huu Nhat to explore and map the entire Paracels. The team erected 10 sovereignty markers on several of the islands—on each marker was the inscription:

In the year Binh Than, 17th Year of the reign of Minh Mang, Navy Commander Pham Huu Nhat, commissioned by the Emperor to Hoang Sa to conduct map surveyings, landed at this place and planted this marker so to perpetuate the memory of the event.²⁷⁶

Data collected during the deployment was subsequently used to draw the *Detailed Map of the Dai Nam* (1838), which clearly reflected that the Paracels and Spratlys were part of Vietnam.²⁷⁷ Thereafter, a naval detachment was dispatched to the Paracels each spring to improve knowledge of the sea routes around the archipelago and “to levy taxes on the fishermen of the region.”²⁷⁸ Reports were also periodically prepared by the Ministry of the Interior, describing the expenditures and activities of the Hoang Sa Company.²⁷⁹

²⁷¹ *Id.*

²⁷² The old temple had a sign on it with the inscription “Van Ly Ba Binh.” There was also a well in the middle of the island. *Id.*

²⁷³ *Id.*; H. Chiu and C. Park, note 42 *supra*, at p. 7.

²⁷⁴ MFA White Paper (1974); *see also* T. Kelly, note 133 *supra*.

²⁷⁵ M. Chemillier-Gendreau, note 15 *supra*, at p. 69.

²⁷⁶ MFA White Paper (1974); *see also* Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; H. Nguyen, note 204 *supra*, at pp. 176, 181-182.

²⁷⁷ MFA White Paper (1974); *see also* H. Chiu and C. Park, note 42 *supra*, at p. 7; T. Kelly, note 133 *supra*. Compare B. Dubner, note 29 *supra*, at p. 311 (“An inaccurate 1838 Vietnamese map substantiates this claim, depicting the Spratlys as part of Vietnamese territory.”).

²⁷⁸ H. Nguyen, note 204 *supra*, at p. 176; M. Chemillier-Gendreau, note 15 *supra*, at p. 36.

²⁷⁹ M. Chemillier-Gendreau, note 15 *supra*, at p. 69.

Vietnamese scholars additionally point to a number of search and rescue operations conducted by the Nguyen Dynasty to support Vietnam's claim of sovereignty over the Paracel Islands. In this regard, assistance was provided to the Dutch ship *Gootebrok* in 1634 after the vessel wrecked in the vicinity of the Paracels.²⁸⁰ Assistance was similarly provided in 1714 to three Dutch vessels en route to Batavia from Japan after the vessels were caught by a severe storm near the archipelago.²⁸¹ A report of the Governor of Da Nang also documents assistance provided by Vietnamese officials to a French merchant ship that sunk in the Paracels in 1830.²⁸² Likewise, the crew of a British merchant vessel that shipwrecked near the Paracels in 1836 was provided shelter, money, and food by Vietnamese officials from Bình Định Province before the crew was repatriated.²⁸³

a. French Colonial Rule

Widespread persecution of French missionaries and onerous trade restrictions on French traders prompted France to invade Vietnam in 1858. French naval forces captured the cities of Tourane and Gia Dinh (Saigon) in 1858 and 1859, respectively. Two years later the French gained control of the provinces surrounding Gia Dinh. As a result, Vietnam ceded three provinces—Bien Hoa, Gia Dinh, and Dinh Tuong (later known as Cochinchina)—and the island of Con Son (Poulo Condore), as well as three ports in Annam (Central Vietnam) and Tonkin (Northern Vietnam), to France in the *First Treaty of Saigon* (1862).²⁸⁴ Cochinchina was formally declared a French territory in 1864. A decade later, the French attacked Hanoi and, in March 1874, forced the emperor to sign the *Second Treaty of Saigon*, which recognized France's "full and entire sovereignty" over Cochinchina.²⁸⁵ The city of Huế fell to French forces in August 1883 and a *Treaty of Protectorate* was signed the same month at the 1883 *Harmand Convention*, establishing a French protectorate over North (Tonkin) and Central Vietnam (Annam) and formally ending Vietnam's independence. The following year, in June 1884, Vietnamese officials signed the *Treaty of Huế*, "which confirmed the Harmand Convention agreement."²⁸⁶ At the conclusion of the Sino-French War (1884-1885), France gained control over northern Vietnam.²⁸⁷ French Indochina—modern-day Vietnam (Tonkin, Annam, and Cochinchina) and Cambodia—was subsequently established in 1887. Laos was added to the French colonial empire in 1893, following the Franco-Siamese War.²⁸⁸

According to the MFA, France (as the successor state to the Kingdom of Annam) continued to exercise sovereignty over the Paracels until Vietnam regained its independence after the Second World War. As early as 1898, there was already evidence that French colonial authorities envisaged sovereignty over the islands—a memorandum from the Ministry of the Colonies and the Government General of Indochina reported that:

²⁸⁰ H. Nguyen, note 204 *supra*, at p. 182.

²⁸¹ *Id.*

²⁸² *Id.*, at pp. 182-183.

²⁸³ *Id.*, at p. 183.

²⁸⁴ LIBRARY OF CONGRESS, FEDERAL RESEARCH DIVISION, *Country Studies: Vietnam*, available at lcweb2.loc.gov/frd/cs/vntoc.html.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

A journalist, Mr Chabrier, had declared his intention of establishing in the Paracels stores to sell provisions to fishermen. ...Mr Doumer replied...that Mr Chabrier's venture had no chance of success but that...it might be opportune to build a lighthouse in the archipelago in order to assert our [French] sovereignty. ...²⁸⁹

A number of scientific studies of the islands were subsequently conducted by the French, as well as a feasibility study for the construction of a lighthouse on one of the Paracel Islands.²⁹⁰ French warships were also tasked with securing the sea lanes for maritime traffic and conducting search and rescue operations for wrecked foreign ships in the Paracels.²⁹¹ By 1920, French customs officials in Indochina were making regular inspections to the islands to stem illicit traffic in weapons, munitions, and opium—solid proof of government administration of the islands.²⁹² In fact, French control was so pervasive in the Paracels that a Japanese company—the Mitsui Bussan Kaisha Company—requested permission from French authorities in Indochina to exploit phosphate deposits on Woody and Robert Islands.²⁹³

French activities in the Paracel Islands continued unabated and unchallenged throughout the 1920s and 1930s. Colonial institutions and private authors conducted a number of scientific studies on the islands. In 1925, the vessel *De Lanessan*, with a number of scientists from the Oceanographic Institute of Nha Trang, conducted a scientific mission to the Paracels that “confirmed the existence of rich beds of phosphate, which became the object of many detailed studies.”²⁹⁴ Scientific survey missions were also conducted by the French ships *Alerte*, *Astrobale*, and *Ingénieur-en-Chef Girod*, and are recorded in:

- Krempf, *La forme des recifs coralliens et le regime des vents alternants*, Saigon 1927.
- J. Delacour and P. Jabouille, *Oiseaux des iles Paracels*, Nha-trang, 1928.

²⁸⁹ M. Chemillier-Gendreau, note 15 *supra*, at p. 104.

²⁹⁰ Although the lighthouse project was supported by Indochina Governor General Paul Doumer, the plan was abandoned for lack of funds. MFA White Paper (1974); *see also* M. Chemillier-Gendreau, *supra*, at p. 37, Annex 5 (*Letter No. 704-A-Ex, dated 20 March 1930, from the Governor General of Indochina, Hanoi, to the Minister for the Colonies, Paris*) (“It is perhaps worth noting that Governor General Paul Doumer requested the colony’s technical services to look into the possibility of constructing a lighthouse on the islands as early as 1899. Budgetary considerations alone prevented the actual construction from going ahead.”); SOUTH CHINA SEA STUDIES (2012), at p. 2; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper, note 203 *supra*.

²⁹¹ MFA White Paper (1974).

²⁹² *Id.*; *see also* H. Chiu and C. Park, note 42 *supra*, at pp. 7-8; T. Kelly, note 133 *supra*; SOUTH CHINA SEA STUDIES (2012); M. Chemillier-Gendreau, note 15 *supra*, at pp. 37, 101, 104; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

²⁹³ The Japanese would later abandon the mining enterprise. H. Chiu and C. Park, note 42 *supra*, at p. 8; *see also* M. Chemillier-Gendreau, note 15 *supra*, at pp. 18, 37 (Japanese companies mined phosphates on the islands between 1924 and 1926.).

²⁹⁴ MFA White Paper (1974); *see also* H. Chiu and C. Park, note 42 *supra*, at p. 8; M. Chemillier-Gendreau, note 15 *supra*, at pp. 37, 104; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

- Notes of the Oceanographic Institute of Indochina in Nhatrang containing valuable scientific data about the Paracels (*e.g.*, 5th Note (1925-26), 22nd Note (1934)).²⁹⁵

In 1929, the Pierre de Rouville delegation proposed the construction of four lighthouses on Triton and Lincoln Islands and on Da Bac (the North) and Bombay Reefs.²⁹⁶ The following year, the crew of the French ship *La Malicieuse* landed on a number of features in the Paracels and planted flags and emplaced sovereignty columns, without objection from the Chinese government.²⁹⁷ Studies on the Paracel phosphate beds were also conducted:

- Maurice Clerget, *Contribution à l'étude des îles Paracels; les phosphates*. Nhatrang, Vietnam 1932.
- Lacroix, *Les ressources minérales de la France d'Outre-Mer*, tome IV (Paracels' phosphate: p. 165), Paris 1935.
- United Nations, ECAFE, *Phosphate Resources of Mekong Basin Countries*; 4. Vietnam, (1): Paracel Islands; Bangkok 1972.²⁹⁸

The MFA additionally asserts that the 1925 “*De Lanessan* survey mission also proved the existence of a continental shelf which reaches out in platforms from the Vietnamese coast into the sea: the Paracels rest on one of these platforms, and thus are joined to the coast of Vietnam by a submarine plinth.”²⁹⁹ This assertion, however, is highly questionable as the Paracels “lie well beyond the geological continental shelf...” of any of the six South China Sea claimants and therefore cannot “be considered to be the natural prolongation of the...” Vietnamese mainland.³⁰⁰

France continued to assert its sovereignty over the archipelago, protesting attempted Chinese incursions in the Paracels. On December 4, 1931, France diplomatically protested a Chinese government announcement that it intended to invite bids from foreign companies to exploit the phosphate deposits in the Paracels.³⁰¹ The French protest was renewed on April 24, 1932, after China publicly called for bids, citing its rights as the successor state to the Kingdom of Annam—*i.e.*, “the former rights exercised by the emperors of Vietnam, the official taking of possession by Emperor Gia Long in 1816, and the sending of Indochinese troops to guard the islands...”³⁰²

Attempts by France later that year to have the dispute resolved by an international tribunal were rejected by China.³⁰³ As a result, on June 15, 1932 (Decree No. 156-SC), the

²⁹⁵ MFA White Paper (1974).

²⁹⁶ Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

²⁹⁷ *Id.*; see also MFA White Paper (1974); M. Chemillier-Gendreau, note 15 *supra*, at p. 38.

²⁹⁸ MFA White Paper (1974).

²⁹⁹ *Id.*

³⁰⁰ M. Chemillier-Gendreau, note 15 *supra*, at p. 16.

³⁰¹ *Id.*, at pp. 38, 102; see also MFA White Paper (1974); Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 342 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

³⁰² *Id.*

³⁰³ M. Chemillier-Gendreau, note 15 *supra*, at pp. 38, 102.

Governor General of Indochina, Pierre Pasquier, designated the Paracels (Delegation des Paracels) as an administrative unit of Thua Thien (Huế) Province.³⁰⁴ Renewed efforts by France in 1937 to resolve the outstanding dispute with China over the islands through international arbitration met with Chinese opposition. Following the rebuff by China, the French colonial government dispatched the head of public works (Chief Engineer Gauthier) to the Paracels in order to “study the potential for maritime and air traffic facilities, and to build a lighthouse on Pattle Island.”³⁰⁵

The following year, Decree No. 156-SC was confirmed by Emperor Bao Dai in a Vietnamese imperial ordinance on March 30, 1938.³⁰⁶ Vietnamese troops under the command of French officers (Garde Indochinoise) were also sent to occupy the islands and erect sovereignty columns on a number of the features in the archipelago. The column on Pattle Island contained the following inscription in French:

Republique Francaise [French Republic]
Empire d’Annam [Kingdom of Annam]
Archipel des Paracels 1816 [Paracels Archipelago 1816]
Ile de Pattle 1938 [Pattle Island 1938]³⁰⁷

A lighthouse, meteorological station, and radio station were also constructed on Pattle Island.³⁰⁸ Then, on May 5, 1939, Governor General Joseph Jules Brévié divided the Paracel archipelago into two delegations—Crescent et Dependences (Crescent Group) and Amphitrite et Dependences (Amphitrite Group).³⁰⁹ Additionally, French civil service officers and Vietnamese police were permanently stationed on Pattle Island (Crescent Group) and Woody Island (Amphitrite Group) on a regular basis as a further demonstration of French sovereignty.³¹⁰

French and Vietnamese forces remained in the Paracels until 1956, with a hiatus of several years during Japan’s occupation of the islands in the Second World War. Pursuant to an exchange of notes, France and China agreed that French troops would relieve Chinese troops stationed in Indochina to the north of the 16th degree of latitude (which includes both the

³⁰⁴ *Id.*, at pp. 39, 113; see also MFA White Paper (1974); H. Chiu and C. Park, note 42 *supra*, at p. 8; H. Nguyen, note 204 *supra*, at p. 185.

³⁰⁵ M. Chemillier-Gendreau, note 15 *supra*, at pp. 38, 113.

³⁰⁶ *Id.*; see also SOUTH CHINA SEA STUDIES (2012), at p. 2; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 342 *supra*; H. Nguyen, note 204 *supra*, at p. 185; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

³⁰⁷ MFA White Paper (1974) (The dates reflect the taking of possession of the Paracels by Emperor Gia Long and the year the marker was erected.); see also M. Chemillier-Gendreau, note 15 *supra*, at p. 39; SOUTH CHINA SEA STUDIES (2012), at p. 2.

³⁰⁸ SOUTH CHINA SEA STUDIES (2012), at p. 2; see also Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s Sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

³⁰⁹ MFA White Paper (1974); see also H. Nguyen, note 204 *supra*, at p. 185; SOUTH CHINA SEA STUDIES (2012), at p. 2; M. Chemillier-Gendreau, note 15 *supra*, at p. 39.

³¹⁰ *Id.*

Paracels and Spratlys) no later than March 31, 1946.³¹¹ Accordingly, French forces embarked on the *Savorgnan de Brazza* were dispatched to re-occupy the Paracels in June 1946. However, events in the ongoing French-Vietminh war forced the French garrison to withdraw from the Paracels in September 1946.³¹² Nonetheless, French Chief of Staff of National Defense General Alphonse Pierre Juin urged the Chairman of the Committee on Indochina to reoccupy the Paracels in October 1946 to consolidate France's legal position:

...it is of the utmost importance for France to prevent any sign of occupation by a foreign power of the islands which command access to the future base at Cam-Ranh and dominate the sea route Cam-Ranh-Canton-Shanghai. If it transpires that the occupation of the Paracels leads to a resumption of the discussion on our rights of sovereignty, it will...consolidate our position in any future legal debate on this matter between France and China.³¹³

Additionally, all ships planning to call on the Paracels were required to request permission from the French High Commission in Saigon before stopping at the archipelago.³¹⁴

Upon learning that Chinese Nationalist forces sent to the Paracels to accept the surrender of the Japanese garrison had remained in the archipelago following the withdrawal of Allied occupation forces from French Indochina in 1946, France issued a formal diplomatic protest on January 13, 1947.³¹⁵ The warship *Le Tonkinois* was also deployed to the area on January 17, 1947, to eject the Chinese Nationalists from Woody Island. However, realizing that they were outnumbered, the French-Vietnamese forces re-grouped and established their headquarters on Pattle Island.³¹⁶ Later that year, the weather station that had operated on Pattle Island from 1938 to 1944 was rebuilt and became operative in late 1947 under international station code 48860.³¹⁷

That same year, France again suggested that the dispute be submitted to the International Court of Justice for resolution, but China refused, insisting that French troops

³¹¹ M. Bennett, note 14 *supra*, at pp. 440-441; see also M. Katchen, note 120 *supra*, at p. 1179; *Exchange of Letters between China and France Relating to the Relief of Chinese Troops by French Troops in North Indochina*, Chungking, Feb. 28, 1946, U.N.T.S., Vol. 14, 1948, at p. 151; M. Chemillier-Gendreau, note 15 *supra*, at pp. 40, 116.

³¹² M. Bennett, note 14 *supra*, at pp. 440-441; see also M. Katchen, note 120 *supra*, at p. 1179; S. Tønnesson, note 55 *supra*, at p. 11; M. Chemillier-Gendreau, note 15 *supra*, at p. 40; SOUTH CHINA SEA STUDIES (2012), at p. 5.

³¹³ M. Chemillier-Gendreau, note 15 *supra*, at p. 116, Annex 33 (*Letter from General Juin, Chief of Staff of National Defense, to the Chairman of the Committee on Indochina, 7 October 1946*).

³¹⁴ *Id.*, at pp. 117-118.

³¹⁵ M. Bennett, note 14 *supra*, at pp. 440-441; M. Katchen, note 120 *supra*, at p. 1179.

³¹⁶ *Id.*; see also S. Tønnesson, note 55 *supra*, at p. 11 ("France...made an unsuccessful attempt to force a Chinese garrison to leave Wood Island. When the Chinese refused, France instead established a permanent presence, on behalf of Vietnam, on Pattle Island in the western part of the Paracels."); Nguyen Ba Dien, note 203 *supra* ("...after the Second World War, the French, following their return to Viet Nam, set warships to the Hoang Sa archipelago...to rebuild the meteorological station on the Pattle Island and to resist Chinese land-grabbing attempts."); *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; M. Chemillier-Gendreau, note 15 *supra*, at p. 40.

³¹⁷ M. Bennett, note 14 *supra*, at pp. 440-441; M. Katchen, note 120 *supra*, at p. 1179; SOUTH CHINA SEA STUDIES (2012), at p. 2; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

immediately withdraw from the islands.³¹⁸ Consideration was given to unilaterally seek a judgment from the Court, but the Legal Department of the French Ministry of Foreign Affairs determined in 1950 that it was “preferable to defer settlement of the dispute before the court until such time as a single, unchallenged governmental authority has been established in both China and Vietnam.”³¹⁹ The French hydrographic survey ship *Ingenieur en chef Girod* subsequently deployed to the Paracels in 1953 to conduct oceanographic, geologic, geographic, and ecological studies.³²⁰

Contemporaneously with its activities in the Paracels, France was also solidifying its sovereignty claims to the Spratly archipelago. In 1927, the *De Lanessan* conducted an initial scientific survey of the Spratlys.³²¹ Three years later, the *La Malicieuse* conducted a second survey of Spratly Island (Ile de la Tempete (Tempest Island), but this time the French survey team hoisted the French flag over the island—the first recorded instance of a sovereignty marker being placed on any of the Spratly Islands.³²² On September 23, 1930, France delivered a communiqué to the other Great Powers notifying them that France had occupied the Spratlys on the grounds that the islands were *terra nullius*.³²³

In November 1928, the New Phosphates Company of Tonkin applied to the Governor of Cochinchina for a permit to exploit phosphate deposits in the Spratlys.³²⁴ Subsequently, France dispatched the *Alerte*, the *Astrolabe*, and the *De Lanessan* to the Spratlys in April 1933 to officially take physical possession of the archipelago. French author H. Cocherousset published an account of the expedition in a newspaper article printed in *L’Eveil economique de l’Indochine* (No. 790 of May 28, 1933):

The three vessels first...visited Spratley and confirmed French possession by means of a document drawn up by the Captains, and placed in a bottle which was subsequently embedded in cement. Then the *Astrolabe* sailed south west to a point 70 miles from Spratley..., and arrived at the caye (sandy island) of Amboine.... Possession was taken of the island in the manner related above. ...Meanwhile, the *Alerte* sailed towards the atoll Fiery Cross (or Investigation) at a point about 80 miles north-west of Spratly.... ...At the same time the *De Lanessan* proceeded towards the London reefs, at about 20 miles north-east of Spratly. ...The *De Lanessan* and *Astrolabe* later sailed north where, about 20 miles from the Tizard bank, is situated the Loaita bank, an atoll of the same kind. The two vessels took formal possession of the main island.... ...The *Alerte* for its part visited

³¹⁸ M. Chemillier-Gendreau, note 15 *supra*, at pp. 116, 118, Annex 35 (*Telegram from Ministry of Foreign Affairs, Nanking, 8 March 1947*), Annex 36 (*Wire from Agence France Presse, Nanking, of 31 May 1947 and telegram of 3 June 1947*) and Annex 42 (*Note of 15 May 1950 from the Directorate for Asia-Oceania*).

³¹⁹ *Id.*, Annex 11 (*Internal Ministry of Foreign Affairs Note of 25 May 1950, addressed to the Directorate for Asia by the Legal Adviser*).

³²⁰ Nguyen Ba Dien, note 203 *supra*; see also *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

³²¹ M. Chemillier-Gendreau, note 15 *supra*, at p. 37; see also MFA White Paper (1974); H. Chiu and C. Park, note 42 *supra*, at p. 8; T. Kelly, note 133 *supra*; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

³²² *Id.*

³²³ M. Chemillier-Gendreau, note 15 *supra*, at pp. 38, 97, 111.

³²⁴ M. Chemillier-Gendreau, note 15 *supra*, at p. 38.

the Thi-Thu reef, at about 20 miles north of the Loaita bank, and took possession of an island and of this atoll, still by means of the same ritual. ...³²⁵

Further north, the *Alerte* and *De Lanessan* took possession of the atoll named “North Danger” and two nearby sandy cayes. The French justified their occupation of the islands on “the need to construct lighthouses and other navigational aids for the safety of international navigation in the area...,”³²⁶ a reasonable ground for intervention given the unknown hazards to navigation in the archipelago.

Following the expedition, the French Ministry of Foreign Affairs published a notice in the *French Journal Officiel* (July 26, 1933, page 7837):

Notice concerning the occupation of certain islands by French naval units.

The French government has caused the under mentioned isles and islets to be occupied by French naval units:

1. Spratley Island, situated 8°39' latitude north and 111°55' longitude east of Greenwich, with its dependent isles (Possession taken April 13, 1930).
2. Islet caye of Amboine, situated at 7°52' latitude north and 112°55' longitude east of Greenwich, with its dependent isles (Possession taken April 7, 1933).
3. Itu Aba Island situated at latitude 10°2' north and longitude 114°21' east of Greenwich, with its dependent isles (Possession taken April 10, 1933).
4. Group of two islands [North East Cay and Shira Island] situated at latitude 11°29' north and longitude 114°21' east of Greenwich, with their dependent isles (Possession taken April 10, 1933).
5. Loaita Island, situated at latitude 10°42' north and longitude 114°25' east of Greenwich, with its dependent islands (Possession taken April 12, 1933).
6. Thi Tu Island, situated at latitude 11°7' north and longitude 114°16' east of Greenwich, with its dependent islands (Possession taken April 12, 1933).

The above-mentioned isles and islets henceforward come under French sovereignty (this notice cancels the previous notice inserted in the Official Journal dated July 25, 1933, page 7784).³²⁷

By claiming the islands with their “dependent” islets/islands, it was France’s intention to claim sovereignty over the entire archipelago.³²⁸

³²⁵ MFA White Paper (1974); see also T. Kelly, note 133 *supra*; SOUTH CHINA SEA STUDIES (2012), at p. 2; M. Chemillier-Gendreau, note 15 *supra*, at p. 38.

³²⁶ Tao Cheng, note 31 *supra*, at p. 269.

³²⁷ MFA White Paper (1974); see also S. Tønnesson, note 55 *supra*, at p. 8; H. Roque, note 208 *supra*, at p. 192; SOUTH CHINA SEA STUDIES (2012), at p. 2; T. Kelly, note 133 *supra*; M. Chemillier-Gendreau, note 15 *supra*, at pp. 38, 111.

France also provided notice of the occupation to China, Great Britain (Borneo, Brunei, and Malaya), Japan, the Netherlands (Indonesia), and the United States (the Philippines) between July and September 1933. The United States remained silent on the issue, as did the Netherlands.³²⁹ After several exchanges with the French, Great Britain determined that it did not have “title to Spratly Island because *inter alia* there had never been any formal annexation or any open display of sovereignty and that...discovery giving at most only an inchoate title would be insufficient”³³⁰

China and Japan, on the other hand, purportedly questioned the French occupation. China reportedly protested the French action in July and August of 1933, stating that the Spratlys were sovereign Chinese territory.³³¹ Vietnam denies that these diplomatic exchanges occurred. Japan protested France’s actions, arguing that 12 of the Spratly Islands were Japanese territory based on discovery in 1920 and economic exploitation of the islands by a Japanese fertilizer company.³³² Six years later, in late March 1939, Japan announced that it was placing the Spratly Islands under the administrative jurisdiction of Formosa (Taiwan).³³³ The Japanese declaration was met with a strong protest from the French government on April 4, 1939, reaffirming that the Spratlys were part of Annam (Vietnam).³³⁴ Annamese militia was additionally deployed to counter a Japanese deployment of Formosan militia that had established a camp in the Spratlys, and a French warship on patrol in the South China Sea called on the Spratlys.³³⁵ Two years later, Japan invaded the Spratlys and forcibly occupied the archipelago.³³⁶

Following the announced annexation of the Spratlys in July 1933, a headquarters for the French administrative office and guard detachment for the archipelago was established on Itu Aba Island. In December 1933, Governor General Pasquier signed Decree No. 4762-CP (dated December 21, 1933), assigning the Spratlys to the Cochinchinese province of Bà Rịa (French Indochina).³³⁷ A radio station and weather station were subsequently built on Itu Aba by the

³²⁸ M. Chemillier-Gendreau, note 15 *supra*, at p. 111, Annex 31 (*Letter of 30 March 1932 from the Minister for National Defence (Navy) to the Minister for Foreign Affairs - Directorate for Political Affairs and Trade (Asia-Oceania)*).

³²⁹ MFA White Paper (1974); see also SOUTH CHINA SEA STUDIES (2012), at p. 2.

³³⁰ *Id.*; accord Geoffrey Marston, *Abandonment of Territorial Claims: The Case of Bouvet and Spratly Island*, 57 BRIT. Y. INT’L L. 337 (1986), at p. 350. See also T. Kelly, note 133 *supra*; SOUTH CHINA SEA STUDIES (2012), at p. 2; M. Chemillier-Gendreau, note 15 *supra*, at p. 112.

³³¹ Shen II, at p. 144; see also Shen I, at p. 42; H. Chiu and C. Park, note 42 *supra*, at p. 13; T. Kelly, note 26 *supra*.

³³² Shen I, at p. 42; see also Tao Cheng, note 31 *supra*, at p. 269; H. Chiu and C. Park, note 42 *supra*, at p. 12; M. Katchen, note 120 *supra*, at p. 1178; M. Bennett, note 14 *supra*, at p. 437; MFA White Paper (1974); H. Roque, note 208 *supra*, at p. 192; T. Kelly, note 133 *supra*.

³³³ H. Roque, note 208 *supra*, at p. 192; see also SOUTH CHINA SEA STUDIES (2012), at p. 2; T. Kelly, note 133 *supra*.

³³⁴ MFA White Paper (1974). See also H. Chiu and C. Park, note 42 *supra*, at p. 8; T. Kelly, note 133 *supra*; SOUTH CHINA SEA STUDIES (2012), at p. 2; M. Chemillier-Gendreau, note 15 *supra*, at p. 39, Annex 32 (*Note from the Ministry of Foreign Affairs, Directorate for Political Affairs and Trade, (Asia), 10 August 1940*).

³³⁵ M. Chemillier-Gendreau, note 15 *supra*, Annex 32 (*Note from the Ministry of Foreign Affairs, Directorate for Political Affairs and Trade, (Asia), 10 August 1940*).

³³⁶ MFA White Paper (1974); see also H. Chiu and C. Park, note 42 *supra*, at p. 8.

³³⁷ MFA White Paper (1974); see also B. Murphy, note 29 *supra*, at p. 203; H. Chiu and C. Park, note 42 *supra*, at p. 9; T. Kelly, note 133 *supra*; SOUTH CHINA SEA STUDIES (2012), at p. 2 (The decree was implemented by the Governor of Cochinchina, Jean-Félic Krautheimer); Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s*

Indochina Meteorological Service in 1938, and operated under French administration until the Japanese invasion of the island in 1941. The meteorological station was assigned international code number 48919 and data provided by the station was listed by the World Meteorological Organization as originating in Cochinchina.³³⁸ The French also continued to conduct scientific surveys in the archipelago—for example, they provided a valuable geographic and aerologic study of the region in the 22nd *Report of the Oceanographic Institute of Indochina (Rapport sur le fonctionnement de l'Institut Oceanographique de l'Indochine, 22, Note, Saigon 1934)*.³³⁹

France similarly engaged in a series of acts in the Spratlys after the Second World War, to include diplomatic and military activities, in order to substantiate French sovereignty over the archipelago until French troops were finally withdrawn from Indochina in August 1956. The French battleship *Chevreud* was deployed to the Spratlys in October 1946 to re-assert French interests in the archipelago and its crew installed a sovereignty stele on Itu Aba Island.³⁴⁰ When France learned that Chinese naval units had occupied Itu Aba in November 1946, French authorities protested the action, demanding that the Nationalist troops withdraw from the island.³⁴¹ Similarly, in May 1956, after Tomas Cloma proclaimed his so-called “Freedomland,” which encompassed part of the Spratly archipelago, the French Charge d’Affaires in Manila reminded the Philippine government that the Spratlys had been sovereign French territory since 1933.³⁴² During the same period, the French Navy vessel *Dumont d’Urville* was deployed to Itu Aba in a demonstration of French-Vietnamese interest in the archipelago.³⁴³ Notwithstanding French efforts to maintain control over the archipelago, the Republic of China sent troops to re-occupy Itu Aba Island on June 8, 1956, and has maintained a garrison on the island ever since.

b. Return to South Vietnamese Control

Vietnam slowly began to regain its independence from France after the Second World War. On March 11, 1945, Emperor Bao Dai declared Vietnam’s independence, but abdicated five months later on August 19, 1945, in favor of the Revolutionary Government of Ho Chi Minh, which controlled Tonkin and Annam, but not Cochinchina.³⁴⁴ The following month, on September 2, 1945, Ho proclaimed Vietnam’s independence and created the Democratic Republic of Vietnam.³⁴⁵ Subsequently, in March 1946, France signed an agreement with the Democratic Republic of Vietnam recognizing “the Vietnamese Republic as a Free State having

sovereignty over Paracel and Spratly Islands, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; H. Nguyen, note 204 *supra*, at p. 186; M. Chemillier-Gendreau, note 15 *supra*, at p. 38, 111, Annex 30 (*Decree by the Governor of Cochinchina (J. Krautheimer), Saigon, 21 December 1933*).

³³⁸ MFA White Paper (1974); *see also* T. Kelly, note 133 *supra*; H. Chiu and C. Park, note 42 *supra*, at p. 9; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

³³⁹ MFA White Paper (1974).

³⁴⁰ SOUTH CHINA SEA STUDIES (2012), at p. 3; *see also* T. Kelly, note 133 *supra*.

³⁴¹ *Id.*

³⁴² MFA White Paper (1974).

³⁴³ *Id.*

³⁴⁴ M. Chemillier-Gendreau, note 15 *supra*, at p. 89.

³⁴⁵ *Declaration of Independence, Democratic Republic of Vietnam*, Sept. 2, 1945, available at <http://www.unc.edu/courses/2009fall/hist/140/006/Documents/VietnameseDocs.pdf>.

its own government, its own Parliament, its own Army and its own Finances, forming part of the Indochinese Federation and of the French Union.”³⁴⁶

On June 27, 1947, France established a Provisional Central Government of Vietnam in Saigon. The *Ha Long Bay Agreement* was signed on June 5, 1948, allowing for the creation of a unified State of Vietnam (Tonkin, Annam, and Cochinchina) associated with France within the French Union (then including Laos and Cambodia).³⁴⁷ According to the MFA, this new State of Vietnam included both the Paracel and Spratly Islands—recall that in 1932, the Paracels were designated as an administrative unit of Thua Thien Province (Annam) and in 1933, the Spratlys were designated as an administrative unit of Bà Rịa Province (Cochinchina).³⁴⁸ The following year, on March 8, 1949, France signed the *Élysée Agreement* with the State of Vietnam under Emperor Bao Dai, agreeing to recognize the independence of Vietnam and transferring administrative power of the state to the Vietnamese government.³⁴⁹ In April, French High Commissioner Léon Pignon confirmed that France “considered the Paracels to be a crown dependency of Annam....”³⁵⁰ Later that year, on July 5th, the French government proclaimed the unification of Tonkin, Annams and Cochinchina into the State of Vietnam within the French Union.

On October 14, 1950, France formally turned over defense of the Paracels to Republic of Vietnam forces, with General Phan Van Giao (governor of Central Vietnam) presiding over the ceremony.³⁵¹ The following year, Premier Tran Van Huu reaffirmed Vietnamese sovereignty over the Paracel and Spratly archipelagoes at the San Francisco Peace Conference: “...as we must frankly profit from all the opportunities offered to us to stifle the germs of discord, we affirm our right to the Spratly and Paracel Islands, which have always belonged to Vietnam.”³⁵² None of the 51 nations present at the conference, including France, objected to this statement.³⁵³ With the signing of the Geneva Accords in July 1954, France recognized the full independence of the State of Vietnam.³⁵⁴

The Vietnamese Navy assumed responsibility for the defense of the archipelago in August 1956. South Vietnamese forces occupied Pattle Island and Robert Island in April and July 1956, respectively.³⁵⁵ That same year, the Department of Mining, Technology, and Small Industries conducted surveys on Pattle, Money, Robert and Drumond Islands.³⁵⁶ Vietnamese

³⁴⁶ *Accord between France and the Democratic Republic of Vietnam*, Mar. 6, 1946, reprinted in *The Pentagon Papers*, Gravel Edition, Vol. 1, Chap. 1 (Boston: Beacon Press, 1971), at pp. 18-19.

³⁴⁷ The Pentagon Papers, Gravel Edition, Vol. 1, Chap. 2 (Boston: Beacon Press, 1971).

³⁴⁸ MFA White Paper (1974); see also H. Chiu and C. Park, note 42 *supra*, pp. 8-9; B. Murphy, note 29 *supra*, at p. 203; SOUTH CHINA SEA STUDIES (2012), at p. 2.

³⁴⁹ The Pentagon Papers, Gravel Edition, Vol. 1, Chap. 2 (Boston: Beacon Press, 1971).

³⁵⁰ M. Chemillier-Gendreau, note 15 *supra*, at p. 119, Annex 43 (*Telegram of 23 April 1949 from Saigon*).

³⁵¹ *Id.*, at pp. 41, 116; MFA White Paper (1974); see also SOUTH CHINA SEA STUDIES (2012), at p. 3.

³⁵² MFA White Paper (1974); see also H. Chiu and C. Park, note 42 *supra*, at p. 8; SOUTH CHINA SEA STUDIES (2012), at p. 3; T. Kelly, note 133 *supra*; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; H. Nguyen, note 204 *supra*, at p. 187; M. Chemillier-Gendreau, note 15 *supra*, at p. 41.

³⁵³ *Id.*; see also B. Murphy, note 29 *supra*, at pp. 192-193, 201.

³⁵⁴ The Geneva Accords.

³⁵⁵ Shen I, at pp. 51-52.

³⁵⁶ Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

Marines subsequently assumed the defense of the islands in 1957; however, the Vietnamese Navy continued to regularly patrol the waters around the archipelago “in order to check illegal occupants on the many islands.”³⁵⁷

French scientists were also granted permission to conduct scientific studies of the Paracels on behalf of Vietnam, including a number of studies on marine and land shells by Edmond Saurin:

- *Notes sur les iles Paracels* (Geologic archives of Vietnam No. 3), Saigon 1955.
- *A propos des galets exotiques des iles Paracels* (Geologic archives of Vietnam No. 4), Saigon 1957.
- “Faune Malacologique terrestre des iles Paracels” (*Journal de Conchiliologie*, Vol. XCVIII), Paris 1958.
- *Gasteropodes marins des iles Paracels*, Faculty of Sciences, Saigon, Vol. I: 1960; Vol. II: 1961.³⁵⁸

A study on the islands’ flora, entitled *Contribution de la connaissance de la flore des iles Paracels* (Faculty of Sciences, Saigon 1957), was additionally published in 1957 by French scientist H. Fontaine, in cooperation with a Vietnamese colleague³⁵⁹ According to the MFA, “these scientific achievements, accomplished over a long period of time, could only have been achieved by a country exercising sovereignty over these islands to the fullest extent.”³⁶⁰

Beginning in 1959, defense responsibilities were transferred to the Regional Forces of Quang Nam Province.³⁶¹ In February, South Vietnamese forces occupied Duncan Island, evicting over 80 Chinese fishermen who were living on the island.³⁶² Then, in March, Vietnamese troops occupied Drummond Island.³⁶³

In 1960, the first Vietnamese officials were posted to the Paracels to administer the islands. Nguyen Ba Thuoc became the first civilian officer appointed by an independent Vietnam on December 14, 1960 (Arrete No. 241-13NV/NV/3).³⁶⁴ The following year, the Paracels were transferred from the jurisdiction of Thua Thien Province back to Quang Nam Province (Decree No. 174-NV of July 13, 1961) and given the status of a “Xa” (village of the mainland).³⁶⁵

³⁵⁷ MFA White Paper (1974).

³⁵⁸ *Id.*; see also Henri Fontaine, *Edmond Saurin (1904-1977)*, *ASIAN PERSPECTIVES* XXIII(1), 1980, pp. 71-98.

³⁵⁹ MFA White Paper (1974).

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *SOUTH CHINA SEA STUDIES* (2012), at p. 3; see also Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper. China claims that the fishermen were illegally abducted by the Vietnamese. Shen I, at pp. 51-52.

³⁶³ *Id.*

³⁶⁴ MFA White Paper (1974); see also H. Chiu and C. Park, note 42 *supra*, at p. 8.

³⁶⁵ In 1969, the Paracel Islands became part of the village of Hoa Long, Hoa Vang District, Quang Nam Province (Decree No. 709-BNV/HCDP/26 dated October 21, 1969). *Id.*; see also Shen I, at p. 52; *SOUTH CHINA SEA STUDIES* (2012), at p. 3; Nguyen Ba Dien, note 203 *supra*; H. Nguyen, note 204 *supra*, at p. 189; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; M. Chemillier-Gendreau, note 15 *supra*, at p. 127.

In May 1971, South Vietnamese forces conducted a survey on Triton Island in the Paracels.³⁶⁶ The Chinese, however, continued to make incursions into the archipelago. As a result, South Vietnam issued a statement on July 14, 1971, reaffirming its sovereignty over the archipelago.³⁶⁷

On January 21, 1974, PRC forces invaded the Paracels and ousted the South Vietnamese garrison occupying the Crescent Group. In February 1974, the Saigon government issued a lengthy proclamation condemning the Communist Chinese invasion.³⁶⁸ A diplomatic note was also sent to the signatories of the *Paris Peace Accords of 1973*,³⁶⁹ calling for a special session of the Security Council.³⁷⁰ The Provisional Revolutionary Government of South Vietnam likewise expressed its concern, albeit guarded, over the Chinese invasion of the archipelago indicating that “considering the complex nature of the problem, it needed to be examined on the basis of the principles of equality, mutual respect, friendship and good neighbourliness and settled by negotiation.”³⁷¹ Later that year, South Vietnam reaffirmed its sovereignty over the Paracels at the March meeting of the Economic Commission for the Far East and at the July meeting of the Third United Nations Conference on the Law of the Sea.³⁷²

At the same time it undertook these activities in the Paracels, South Vietnam also began to exercise sovereignty over the Spratly archipelago as the successor state to French claims after the French withdrew from Indochina. On June 1, 1956, the Republic of Vietnam’s Ministry of Foreign Affairs issued a statement confirming Vietnamese sovereignty over the Spratlys after

³⁶⁶ Shen I, at p. 52.

³⁶⁷ SOUTH CHINA SEA STUDIES (2012), at p. 3; M. Chemillier-Gendreau, note 15 *supra*, at p. 44.

³⁶⁸ Proclamation by the Government of the Republic of Vietnam:

The noblest and most imperative task of a Government is to defend the sovereignty, independence and territorial integrity of the Nation. ...

In the face of the illegal military occupation by Communist China of the Paracels Archipelago which is an integral part of the Republic of Vietnam, the Government of the Republic of Vietnam deems it necessary to solemnly declare before world opinion, to friends and foes alike, that:

The Hoang Sa (Paracel) and Truong Sa (Spratly) archipelagoes are an indivisible part of the territory of the Republic of Vietnam. The Government and People of the Republic of Vietnam shall not yield to force and renounce all or part of their sovereignty over those archipelagoes.

As long as one single island of that part of the territory of the Republic of Vietnam is forcibly occupied by another country, the Government and People of the Republic will continue their struggle to recover their legitimate rights. ...

The Government of the Republic of Vietnam is determined to defend the sovereignty of the Nation over those islands by all and every means. ... Proclamation by the Government of the Republic of Vietnam, Feb. 14, 1974, available at http://www.nguyenthaihocfoundation.org/lichsuVN/tuyenbo_vnch.htm; see also SOUTH CHINA SEA STUDIES (2012), at p. 3; H. Nguyen, note 204 *supra*, at p. 192; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; M. Chemillier-Gendreau, note 15 *supra*, at p. 127.

³⁶⁹ The signatories of the *Agreement on Ending the War and Restoring Peace in Vietnam* (Jan. 27, 1973) were the Democratic Republic of Vietnam (North Vietnam), the Republic of Vietnam (South Vietnam), the Provisional Revolutionary Government of South Vietnam, and the United States.

³⁷⁰ SOUTH CHINA SEA STUDIES (2012), at p. 3; see also M. Chemillier-Gendreau, note 15 *supra*, at p. 45.

³⁷¹ M. Chemillier-Gendreau, note 15 *supra*, at pp. 45 and 128.

³⁷² SOUTH CHINA SEA STUDIES (2012), at p. 3; see also M. Chemillier-Gendreau, note 15 *supra*, at pp. 45, 127; T. Kelly, note 133 *supra*; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

Tomas Cloma proclaimed his so-called “Freedomland” in the eastern portion of the archipelago.³⁷³ Then, in mid June, Foreign Minister Vu Van Mau reaffirmed his country’s sovereignty over the island chain, recalling “that five years earlier the head of the Vietnamese Delegation at the San Francisco Peace Conference had solemnly reaffirmed Vietnamese sovereignty over the Truong Sa archipelago and that the statement was not challenged by any participating country, including China and the Philippines.”³⁷⁴ In October, administrative control of the Spratlys was assigned to Phuoc Tuy Province (Decree No. 143/NV of October 22, 1956).³⁷⁵

Faced with growing Chinese and Filipino incursions into the Spratlys, the South Vietnamese Navy launched a series of operations to reassert control over the archipelago. In August 1956, the crew of the cruiser *Tuy Dong* (HQ-04) was directed to erect sovereignty steles and build flag poles to hoist the Vietnamese flag on many of the Spratly Islands.³⁷⁶ In 1961, crew members from the Vietnamese cruisers *Van Kep* and *Van Don* landed on Southwest Cay, Thitu Island, Loaita Island, and Amboyna Cay to erect sovereignty steles and raise the Vietnamese flag.³⁷⁷ The cruisers *Tuy Dong* and *Tay Ket* engaged in similar activities in 1962 on Spratly Island and Namyt Island.³⁷⁸ The following year, the sovereignty steles on all of the main islands in the Spratlys were rebuilt by crew members of the Navy vessels *Huong Giang*, *Chi Lang* and *Ky Hoa*:

- May 19, 1963, steles on Truong Sa Island (Spratly proper)
- May 20, 1963, steles on An Bang Island (Amboyna Cay)
- May 22, 1963, steles on Thitu and Loaita Islands
- May 24, 1963, steles on Song Tu Dong (North East Cay) and Song Tu Tay (South West Cay).³⁷⁹

Regular navy patrols of the archipelago continued through 1964,³⁸⁰ although the frequency of the patrols was significantly reduced after 1963 as a result of the ongoing conflict with North Vietnam. Between 1960 and 1967, South Vietnamese naval units also conducted a number of

³⁷³ *Id.*; see also B. Dubner, note 29 *supra*, at p. 311; T. Kelly, note 133 *supra*.

³⁷⁴ *Id.*; see also H. Chiu and C. Park, note 42 *supra*, at p. 9.

³⁷⁵ B. Murphy, note 29 *supra*, at p. 204; accord B. Dubner, note 29 *supra*, at p. 311. See also H. Chiu and C. Park, note 42 *supra*, at p. 9 (Decree No. 143/NV 2 as reconfirmed and readjusted in 1958 (Decree No. 76/BNV/HC 9 ND of March 20, 1958) and 1959 (Decree No. 34/NV of January 27, 1959)); T. Kelly, note 133 *supra*; Nguyen Ba Dien, note 203 *supra*; H. Nguyen, note 204 *supra*, at p. 189; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; M. Chemillier-Gendreau, note 15 *supra*, at pp. 43, 127.

³⁷⁶ MFA White Paper (1974); see also H. Nguyen, note 204 *supra*, at p. 189 (“...the ROV Navy landed on Spratly Islands and erected a monument asserting sovereignty on August 22, 1956.”); M. Chemillier-Gendreau, note 15 *supra*, at pp. 117, 125.

³⁷⁷ MFA White Paper (1974); see also Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; H. Nguyen, note 204 *supra*, at p. 189.

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ H. Chiu and C. Park, note 42 *supra*, at p. 8.

survey and mapping expeditions on 14 of the Spratly Islands features, including Amboyna Cay, Thitu Island, Loaita Island, and North Danger Reef.³⁸¹

Continued counterclaims by the other Spratly claimants during the 1970s resulted in sharp protests by the Saigon government. In April 20, 1971, the MFA delivered a diplomatic note to the Malaysian government outlining Vietnam's position in support of its sovereignty claims to the archipelago.³⁸² Three months later, in a statement issued on July 15, 1971, the MFA reaffirmed Vietnamese sovereignty over the two island groups.³⁸³ In May 1973, Vietnam conducted surveys on Pagasa Island, Loaita Island and Northeast Cay, and, in July, it occupied Namyt Island in the Spratlys.³⁸⁴ Also in July, the Ministry of Agricultural Development and Land's Institute of Agricultural Research conducted a survey of Namyt Island.³⁸⁵ Subsequently, on September 6, 1973, the South Vietnamese government transferred administration of Amboyna Cay and Spratly, Itu Aba, Loaita, Thitu, Namyt, and Sin Cowe Islands to the Phuoc Hai Commune, Dat Do District, Phuoc Tuy Province (Decree No. 420—BNV/HCDP/26).³⁸⁶ Diplomatic notes were also delivered to Taiwan (January 29, 1974) and the Philippines (February 12, 1974) rejecting Taipei's and Manila's respective claims to the Spratlys as unfounded.³⁸⁷ Later that year, South Vietnam reaffirmed its sovereignty over the Spratlys at the March meeting of the Economic Commission for the Far East and at the July meeting of the Third United Nations Conference on the Law of the Sea.³⁸⁸

c. Post-unification Administration

On April 30, 1975, Viet Cong and North Vietnamese troops captured Saigon, bringing an end to the Vietnam War. The following year, on July 2, 1976, the Democratic Republic of Vietnam and the Provisional Revolutionary Government of the Republic of South Vietnam (PRG) merged to form the Socialist Republic of Vietnam (SRV). Following unification of the country, the SRV inherited the Paracels and Spratlys from the Republic of Vietnam/PRG (South Vietnam) and continued to assert sovereignty over the two archipelagoes.

North Vietnamese troops replaced the South Vietnamese garrisons on Southwest Cay, Sand Cay, Sin Cowe Island, Spratly Island and Amboyna Cay in April 1975.³⁸⁹ The following month, the Vietnamese government incorporated the Paracel and Spratly Islands into the territory of Vietnam and renamed the archipelagoes Hoang Sa and Truong Sa.³⁹⁰ In March 1976,

³⁸¹ The Chinese viewed these activities as illegal. Shen I, at p. 52.

³⁸² MFA White Paper (1974); *see also* T. Kelly, note 133 *supra*; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; M. Chemillier-Gendreau, note 15 *supra*, at p. 127.

³⁸³ SOUTH CHINA SEA STUDIES (2012), at p. 3; M. Chemillier-Gendreau, note 15 *supra*, at p. 44.

³⁸⁴ *Id.*

³⁸⁵ Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

³⁸⁶ *Id.*; *see also* H. Nguyen, note 204 *supra*, at p. 189; M. Chemillier-Gendreau, note 15 *supra*, at pp. 44 and 127.

³⁸⁷ MFA White Paper (1974).

³⁸⁸ SOUTH CHINA SEA STUDIES (2012), at p. 3; *see also* M. Chemillier-Gendreau, note 15 *supra*, at pp. 45, 127; T. Kelly, note 133 *supra*; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

³⁸⁹ Shen I, at p. 55; *see also* SOUTH CHINA SEA STUDIES (2012); M. Chemillier-Gendreau, note 15 *supra*, at p. 45.

³⁹⁰ Hoang Sa and Truong Sa districts are currently under the jurisdiction of the City of Da Nang and the Province of Khánh Hòa, respectively. *Id.*

Vietnam incorporated the Spratly Islands into Đồng Nai Province.³⁹¹ The following year, on May 12, 1977, the government of Vietnam issued a *Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf*, which stated, in part, that

5. The islands and archipelagoes [*i.e.*, the Spratlys and Paracels], forming an integral part of the Vietnamese territory and beyond the Vietnamese territorial sea..., have their own territorial seas, contiguous zones, exclusive economic zones and continental shelves....³⁹²

In September 1982, the Paracels were placed under the administrative control of Quang Nam-Da Nang Province.³⁹³ Two months later, on November 12th, the government of Vietnam issued a statement on the territorial sea baselines of Vietnam, which included the Paracel and Spratly Islands:

(4) The baseline for measuring the breadth of the territorial sea of the Hoang Sa and Truong Sa Archipelagoes will be determined in a coming instrument in conformity with paragraph 5 of the 12 May 1977 statement of the Government of the Socialist Republic of Viet Nam.³⁹⁴

A series of diplomatic protests were issued over the next 30 years to challenge Chinese, Taiwanese, Filipino, and Malaysian incursions into the Spratlys.³⁹⁵ Additionally, between February 1987 and July 1989, Vietnamese forces occupied Bo Reef, West Reef, Ladd Reef, Pigeon Reef, East Reef, Cornwallis South Reef, Collins Reef, Lansdowne Reef, Alison Reef, Petley Reef, South Reef, Prince of Wales Bank, Bombay Shoal, and Vanguard Bank to counter continued Chinese forays into the Spratly archipelago.³⁹⁶

³⁹¹ Shen I, at p. 55.

³⁹² *Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of 12 May 1977*, available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/regionslist.htm>; see also M. Chemillier-Gendreau, note 15 *supra*, at p. 45.

³⁹³ Additional administrative measures regarding the Paracels were taken in June 1996 (annexed the Paracels into the city of Da Nang) and April 2007 (establishment of Truong Sa town, Song Tu Tay and Sinh Ton Communes under Truong Sa District. Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

³⁹⁴ *Statement of 12 November 1982 by the Government of the Socialist Republic of Viet Nam on the Territorial Sea Baseline of Viet Nam*, available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/regionslist.htm>; see also M. Chemillier-Gendreau, note 15 *supra*, at p. 46.

³⁹⁵ For example, on March 25, 1983, the Vietnamese MFA protested Malaysia's claim to three of the islands in the Spratly archipelago (see M. Chemillier-Gendreau, note 15 *supra*, at p. 45). More recently, on December 3, 2007, Vietnam strongly protested China's decision to establish Sansha City to administer the Spratly and Paracel Islands. Similarly, on March 12, 2009, Vietnam protested the Philippines' new archipelagic baselines, which refers to some of the Spratly Islands as Philippine territory. And on May 8, 2009, Vietnam sent a diplomatic note (No. 86/HC-2009) to the UN Secretary-General rejecting China's U-shaped line in the South China Sea (see Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper).

³⁹⁶ Shen I, at p. 56; see also T. Kelly, note 133 *supra*.

An economic and scientific complex was constructed in the archipelago in August 1989.³⁹⁷ In addition, Vietnam dispatched “the first organized fishing fleet...to exploit the East Sea fisheries...” and constructed a series of civilian installations, “...including scientific stations and lighthouses” on a number of the occupied islets.³⁹⁸

Official acts, decrees, resolutions, laws, diplomatic correspondence, etc., taken by the SRV since unification of the country have continued to demonstrate sovereignty over both the Spratly and Paracels Islands. For example, Vietnam’s declaration upon ratifying the United Nations Convention on the Law of the Sea in 1994 reaffirmed Vietnamese sovereignty over the disputed archipelagoes:

...The National Assembly reiterates Viet Nam's sovereignty over the Hoang Sa and Truong Sa archipelagoes and its position to settle those disputes relating to territorial claims as well as other disputes in the Eastern Sea through peaceful negotiations in the spirit of equality, mutual respect and understanding, and with due respect of international law, particularly the 1982 United Nations Convention on the Law of the Sea....³⁹⁹

Similarly, Vietnam delivered a *note verbale* to the United Nations in August 1998 protesting China’s 1998 Law on the Exclusive Economic Zone and the Continental Shelf of the People’s Republic of China, which provides, in part:

...On this occasion, we would like to reiterate that Viet Nam has indisputable sovereignty over the two archipelagoes, namely...Paracels and...Spratlys, and possesses sufficient historical evidence as well as legal grounds to assert its sovereignty over these two archipelagoes. ...⁴⁰⁰

Vietnam’s responses to Chinese and Filipino protests regarding its submission to the UN Commission on the Limits of the Continental Shelf claiming an extended continental shelf in the South China Sea, likewise reiterate Vietnamese sovereignty over the Spratly and Paracel Islands:

...The...Paracels and...Spratlys archipelagoes are parts of Viet Nam’s territory. Viet Nam has indisputable sovereignty over these archipelagoes. China’s claim over the islands and adjacent waters in the...South China Sea as manifested in the [nine-dashed line] map attached with the Notes Verbale CLM/17/2009 and CLM/18/2009 has no legal, historical or factual basis, therefore is null and void. ...⁴⁰¹

³⁹⁷ M. Chemillier-Gendreau, note 15 *supra*, at p. 46.

³⁹⁸ T. Kelly, note 133 *supra*.

³⁹⁹ *Socialist Republic of Vietnam Declaration upon Ratification of UNCLOS*, July 25, 1994, available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

⁴⁰⁰ *Viet Nam: Dispute regarding the Law on the Exclusive Economic Zone and the Continental Shelf of the People’s Republic of China which was passed on 26 June 1998*, reprinted in UN LAW OF THE SEA BULL., No. 38, 1998, at p. 55.

⁴⁰¹ *Note Verbale No. 86/HC-2009*, May 8, 2009, available at http://www.un.org/depts/los/clcs_new/clcs_home.htm.

...Viet Nam wishes to take this opportunity to reaffirm its consistent position that Viet Nam has indisputable sovereignty over the...Paracels and...Spratlys archipelagoes.⁴⁰²

...Paracel and...Spratly Archipelagoes are integral parts of Vietnamese territory. Viet Nam has sufficient historical evidences and legal foundation to assert her sovereignty over these two archipelagoes. ...⁴⁰³

More recently, Article 1 of the 2012 Law of the Sea specifically provides that the new law applies, *inter alia*, to “the Paracel and Spratly archipelagos....”⁴⁰⁴ According to the MFA, these actions clearly reflect an intent on the part of Vietnam to retain sovereignty over the South China Sea islands.

4. Right of Cession

Vietnam’s claim of sovereignty over the South China Sea islands is based, in part, on the right of cession from the French claims to the two archipelagoes in the 1930s.⁴⁰⁵ International law recognizes that a state may cede sovereignty over a particular territory to another state.⁴⁰⁶ Vietnam claims that France validly exercised sovereignty over the South China Sea islands in the 1930s, and that France ceded the islands to Vietnam (South Vietnam) after it became an independent state. As a result, the SRV has an indisputable claim to the islands by right of cession.⁴⁰⁷

5. International Recognition

The MFA claims that, as early as 1634, the *Journal of Batavia*, published by the Dutch East Indies Company, recognized Vietnamese sovereignty over the Paracel Islands.⁴⁰⁸ Portuguese and Dutch maps from the early 17th century likewise identify the islands as Vietnamese territory.⁴⁰⁹

Further evidence of foreign recognition of Vietnamese claims to the Paracels can also be found in documents from the 18th century. According to the MFA, in 1701, a Western missionary on board the French ship *Amphitrite* recorded in *Mystere des atolls—Journal de voyage aux Paracels (Mystery of the atolls—Journal of the voyage to the Paracel Islands)* that “the Paracel is an archipelago belonging to the Kingdom of An Nam.”⁴¹⁰ Similarly, a 1768 note written by French Admiral Charles Henri d’Estaing to M. de la Borde following the admiral’s

⁴⁰² Note Verbale No. 240/HC-2009, Aug. 18, 2009, available at http://www.un.org/depts/los/clcs_new/clcs_home.htm.

⁴⁰³ Note Verbale No. 77/HC-2011, May 3, 2011, available at http://www.un.org/depts/los/clcs_new/clcs_home.htm.

⁴⁰⁴ Law of the Sea of Viet Nam, Law No. 18/2012/QH13, June 21, 2012, available at <http://vbqppl.mpi.gov.vn/en-us/Pages/default.aspx?itemId=f3ce9fdd-4e38-4a45-a2fd-d94999684dfa&list=documentDetail>.

⁴⁰⁵ Vietnam also claims sovereignty over the islands based on discovery and effective occupation. B. Murphy, note 29 *supra*, at p. 203.

⁴⁰⁶ BROWNIE 217 (8th ed.).

⁴⁰⁷ B. Murphy, note 29 *supra*, at p. 198.

⁴⁰⁸ *Id.*

⁴⁰⁹ T. Kelly, note 133 *supra*; see also SOUTH CHINA SEA STUDIES (2012), at p. 2.

⁴¹⁰ MFA White Paper (1974).

aborted raid against the city of Huế recorded that Vietnamese naval “vessels frequently cruised between the Paracels and the coast and thus would have reported...his approach...” to the city.⁴¹¹ A subsequent memoir from Admiral d’Estaing to M. de Magon in 1759 indicated that the cannons emplaced on the walls of Lord Vo Vuong’s palace had been taken from ships wrecked on the Paracels.⁴¹²

According to the MFA, Western writings from the 19th century continued to recognize Vietnam’s control of the Paracels. A book written by John Barrow in 1806—*A Voyage to Cochinchina*—documents the travels of Count George Macartney—the British Envoy to the Chinese Court—in Cochinchina in 1793. The book contains a detailed description of the “types of boats used by the Cochinchinese in order to reach...the Paracel Islands where they collected trepang and swallow nests.”⁴¹³ Additionally, a book by French missionary Monseigneur Jean-Louis Taberd published in 1837—*Note on the Geography of Cochinchina*—described the Paracel Islands as part of Cochinchina and that Cochinchines referred to the Paracels as “Cat Vang.”⁴¹⁴ A second book published by Taberd in 1838—*History and Description of the Religion, Customs, and Morals of All Peoples*—likewise recorded that the Paracels had been a dependency of Cochinchina for 34 years.⁴¹⁵ A depiction of the Paracels as Vietnamese territory also appears in Taberd’s 1838 *An Nam Dai Quoc Hoa Do (Tabula Geographica Imperii Annamitici—The Map of the An nam Empire)* and an 1862 “geography book written under the auspices of the (French) Ethnography Society”—*Tableau de la Cochinchine*.⁴¹⁶ Similarly, French naval officer Jean-Baptiste Chaigneau’s memoirs (*Memoires sur la Cochinchine*) refer to Emperor Gia-long’s annexation of the Paracels in 1816.⁴¹⁷

A reference to the Paracels as Vietnamese territory can also be found in *Japon, Indo-Chine, Empire Birman (ou Ava), Siam, Annam (ou Cochinchine), Péninsule Malaise, etc., Ceylan* by Adolphe Philibert Dubois de Jancigny.⁴¹⁸ Additionally, in his 1849 article *Geography of the Cochinchinese Empire*, German missionary Karl Gützlaff “defined the Paracels as part of Vietnam’s territory and noted the islands with the Vietnamese name ‘Cat Vang’.”⁴¹⁹ Gützlaff additionally noted that the government of Annam kept revenue cutters and a small garrison on the Paracels to collect duty on all visitors to the archipelago, “and to ensure protection of its

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; H. Nguyen, note 204 *supra*, p. 177.

⁴¹⁵ H. Chiu and C. Park, note 42 *supra*, at p. 7.

⁴¹⁶ MFA White Paper (1974); see also Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

⁴¹⁷ H. Chiu and C. Park, note 42 *supra*, at p. 7 (“Cochinchina, the sovereign of which has today the title of Emperor, is composed of Cochinchina proper, Tonquin, a part of the Kingdom of Cambodia, some uninhabited islands not far from the coast and the Paracels archipelago, composed of uninhabited reefs and rocks. It is only in 1816 that the present Emperor took possession of this archipelago.”); see also Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; H. Nguyen, note 204 *supra*, at p. 183; M. Chemillier-Gendreau, note 15 *supra*, at p. 69.

⁴¹⁸ H. Nguyen, note 204 *supra*, at p. 177.

⁴¹⁹ Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; H. Nguyen, note 204 *supra*, at p. 177; M. Chemillier-Gendreau, note 15 *supra*, at p. 69.

own fishermen.”⁴²⁰ Aldriano Balbi’s *The Italian Compendium of Geography* (1850) likewise includes the Paracel, Pirate (Hà Tiên), and Puolo Condor (Côn Sơn) Islands within the Kingdom of Annam.⁴²¹

The MFA additionally claims that the Japanese government tacitly acknowledged French sovereignty over the Paracels in 1927 after a dispute arose between France and Japan over the Spratly Islands. According to a letter written by the Governor General of Indochina to the Minister for the Colonies on March 20, 1930, the Japanese Counsel General in Hanoi (Mr. Kurosawa) was instructed by his government to unofficially inquire of the French authorities about the status of several groups of islands in the South China Sea. The Paracels, however, were explicitly excluded from the discussions by the Japanese because the ownership of the Paracel Islands was not in dispute with France.⁴²²

According to the MFA and some Western scholars, Chinese authors and old Chinese geographical documents describing the limits of the Chinese Empire confirm the accuracy of these Western writings. In 1730, Hai Lu wrote in *Hai Quoc Do Chi* that “...Truong Sa...forms a rampart on the periphery of the Kingdom of Annam (Vietnam).”⁴²³ A 1731 map of Kwangtung (Guangdong) Province and a description of the Quiongzhou Prefecture do not mention either the Paracels or the Spratlys.⁴²⁴ This omission is confirmed in Hoang Chao’s 1894 *Map of the Unified Empire*, which shows Chinese territory as extending only as far as Hainan Island.⁴²⁵ Twentieth century Chinese writings also confirm that Hainan Island was the southernmost point of Chinese territory. The 1906 *Zhongguo Dilixue Jiaokeshu* (*Manual of Geography of China*) states in the Generalities chapter “that the Chinese territory is bound in the South at North latitude 18°13’, the terminus being the coast of Yazhou, island of Hainan.”⁴²⁶ A similar record is found in Li Hanzhung’s *Geography of Guandong* published in 1909: “Today the maritime frontiers are limited in the South by the island of Hainan....”⁴²⁷

Following France’s annexation of Spratly Island in 1930, the British Foreign Office determined in 1932 that the United Kingdom did not have “title to Spratly Island because *inter alia* there had never been any formal annexation or any open display of sovereignty and that, in

⁴²⁰ H. Nguyen, note 204 *supra*, at p. 182 (“We should...mention here the Paracels. ...From time immemorial, junks in large number from Hainan, have annually visited these shoals, and proceeded in their excursions as far as the coast of Borneo. ...The Annam government, perceiving the advantages which it might derive if a toll were raised, keeps revenue cutters and a small garrison on the spot to collect the duty on all visitors, and to ensure protection of its own fishermen.”).

⁴²¹ The Paracels and Spratlys are not mentioned in the Chinese section of the same book. *Id.*, at p. 183.

⁴²² MFA White Paper (1974); accord M. Chemillier-Gendreau, note 15 *supra*, Annex 5 (*Letter No. 704-A-Ex, dated 20 March 1930, from the Governor General of Indochina, Hanoi, to the Minister for the Colonies, Paris*) (“...in 1927...[the Japanese Government] requested its Consul General in Hanoi to make an unofficial approach on the islands in the South China Sea. The Paracels were specifically excluded from this inquiry, since Mr. Kurosawa, on the instructions of his Ministry, was aware that he could not discuss the status of this archipelago with a representative of France.”).

⁴²³ H. Nguyen, note 204 *supra*, at p. 171; see also M. Chemillier-Gendreau, note 15 *supra*, at p. 74.

⁴²⁴ M. Chemillier-Gendreau, note 15 *supra*, at p. 62.

⁴²⁵ *Id.*, at p. 75.

⁴²⁶ H. Nguyen, note 204 *supra*, at p. 171; see also M. Chemillier-Gendreau, note 15 *supra*, at p. 75.

⁴²⁷ H. Nguyen, note 204 *supra*, at p. 172.

default of this, discovery giving at most only an inchoate title would be insufficient⁴²⁸ Subsequently, during the negotiations of the San Francisco Peace Treaty, the Foreign Office indicated in 1947 that the United Kingdom was “not prepared to contest the French claim to sovereignty [to the Spratly Islands] which is considered to be good in law.”⁴²⁹ Australia likewise supported the French position.⁴³⁰

V. CONCLUDING ANALYSIS

A. Evaluation of China’s Position

China argues that its claims to the South China Sea islands are valid based on its extensive and continuous display of authority over the archipelagoes following their discovery during the Han Dynasty. China’s discovery of the islands vested it with an inchoate title, which China perfected by its repeated exercise of authority over the archipelagoes throughout history. These extensive activities, which include government-sponsored exploitation of the islands, repeated naval patrols to the region, and numerous scientific surveys of the islands, demonstrate effective administrative control and sovereignty over the South China Sea islands.

1. Discovery versus Awareness

China claims to have been the first nation to discover the South China Sea islands as early as the Han Dynasty (206 BC-220 AD). To support its claim, China cites a number of ancient books and maps that allegedly describe the geographic features of the Spratlys and Paracels and place the disputed islands within the maritime boundaries of the Chinese empire.

Some Western scholars agree that there is considerable historical evidence to support China’s claims to the South China Sea islands, citing the use of the islands by Chinese fishermen and the mapping and naming of the islands, as well as China’s expressed intent not to abandon title to the islands.⁴³¹ Vietnamese and most Western scholars, however, disagree with this position, indicating that China’s historical evidence and isolated and sporadic contact by Chinese fishermen are insufficient to establish sovereignty over the South China Sea islands under international law, and that the validity of China’s claim is therefore “subject to doubt.”⁴³²

⁴²⁸ G. Marston, note 330 *supra*, at p. 350. Beginning in 1934, Spratly Island and Amboyna Cay were no longer mentioned in the British Colonial Office List. S. Tønnesson, note 55 *supra*, at p. 7. *See also* M. Chemillier-Gendreau, note 15 *supra*, at p. 112.

⁴²⁹ G. Marston, note 330 *supra*, at p. 355.

⁴³⁰ M. Chemillier-Gendreau, note 15 *supra*, at p. 118.

⁴³¹ J. Greenfield, note 149 *supra*, at pp. 29, 32 (“...for many centuries, ...Chinese fishermen used these islands as landing posts and they were mapped. China has also continuously expressed its intention not to abandon its title to the islands. ...There are collections of old maps, not all Chinese, which would bear out Chinese historic links to the islands, in terms of discovery, exploration and naming of the islands. ...China, therefore, has quite strong historical arguments in its favour. China’s modern (post-1945) presence in the South China Sea is therefore regarded by it as a consistent reiteration of historic rights.”); *see also* Jeanette Greenfield, *China’s Practice in the Law of the Sea* (Oxford 1992), at p. 158.

⁴³² M. Bennett, note 14 *supra*, at pp. 434-435, 446; *accord* C. Joyner, note 166 *supra*, at p. 59; H. Roque, note 208 *supra*, at p. 195 (“A major obstacle to a statement of China’s legal title to the Spratlys is the dearth of primary sources and official documents detailing such legal basis.”) and p. 197 (“The Chinese position has since been

Whether Chinese navigators actually charted the South China Sea as claimed is questionable given that Chinese mariners traditionally used the inner sea routes along the coasts of Hainan Island and mainland Vietnam. However, even if true, this action does not demonstrate China's effective administration and control of the South China Sea islands. General awareness of the location and existence of the Spratly and Paracel Islands by Chinese mariners is insufficient to demonstrate that China actually "discovered" the islands in a legal sense.⁴³³ Undoubtedly, as evidenced by both Chinese and Vietnamese historical records, geographers and navigators from various lands were aware of the presence of the islands.⁴³⁴ However, when determining sovereignty over territory, international law makes a clear distinction "between the concept of geographical awareness and that of discovery, their legal effects being fundamentally different."⁴³⁵

...[A]n island or an archipelago, can easily have been known from time immemorial to navigators frequenting those parts, to geographers keen to extend their work to include all territories regardless of who owns them, yet at the same time never have formed the object of any 'discovery' producing legal effect.⁴³⁶

Accordingly, most of the works cited by China in support of its claims fall into the category of documents that "merely prove a general knowledge of the area, but are not useful to the legal argument."⁴³⁷

Moreover, the historical evidence provided by China to justify its claims not only is unconvincing but also contains a number of flaws and contradictions. Ancient Asian empires did not exercise sovereignty over territory, but rather were characterized by undefined and changing borders. Thus, the concept of effective occupation did not exist in the Confucian legal system applicable in China until the 1900s. Chinese emperors ruled over persons, not territory,

expounded on by scholars of Chinese descent and whose objectivity is suspect."); Hong Thao Nguyen, *Vietnam's Position on the Sovereignty over the Paracels & Spratlys: Its Maritime Claims*, J. EAST ASIA INT'L L., V JEA11 (1) 2012, May 4, 2012, at p. 170 ("...the sources are geographical monographs, references, or nautical books written by private geographers or navigators, or travel accounts by Chinese ambassadors abroad to describe the countries outside China. Obviously they are not official historical records of Chinese dynasties."); Florian Dupuy and Pieere-Marie Dupuy, *A Legal Analysis of China's Historic Rights Claim in the South China Sea*, AM. J. INT'L L., Vol. 107, No. 1 (Jan. 2013), pp. 124-141, at pp. 136, 141 ("Mere reliance on alleged historical evidence of the kind invoked by Chinese commentators is insufficient to establish sovereignty over the waters enclosed by the nine-dash line or the islands of the South China Sea."); SOUTH CHINA SEA STUDIES (2012), at p. 4 ("China asserted that it was the first country to find the archipelagoes.... This argument, however, is not backed up by official historical documents. ...[M]ost of these documents are travel accounts, monographs, and navigation books demonstrating knowledge of ancient people about territories belong to not only China but also other countries. Moreover, in these documents, the territories which China now claims to be the Paracels and Spratlys are named inconsistently, thus there are no convincing arguments that those territories are really the Paracels and Spratlys.").

⁴³³ M. Chemillier-Gendreau, note 15 *supra*, at p. 56.

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.*, at p. 56.

⁴³⁷ *Id.*, at pp. 59-60.

and maritime boundaries were nonexistent.⁴³⁸ As noted by Professor Mohan Malik of the Asia-Pacific Center for Security Studies,

China's claim to the Spratlys on the basis of history runs aground on the fact that the region's past empires did not exercise sovereignty. In pre-modern Asia, empires were characterized by undefined, unprotected, and often changing frontiers. The notion of suzerainty prevailed.⁴³⁹

"Suzerainty" occurs where a dominant state—in this case China—controls the foreign relations of a vassal state—Vietnam—but allows the vassal state to exercise sovereign authority in its internal affairs.⁴⁴⁰ According to Professor Malik, unlike nation-states, "the frontiers of Chinese empires were neither carefully drawn nor policed but were more like circles or zones, tapering off from the center of civilization to the undefined periphery of alien barbarians."⁴⁴¹ Moreover, "in its territorial disputes with neighboring India, Burma, and Vietnam, Beijing always took the position that its land boundaries were never defined, demarcated, and delimited."⁴⁴²

China appears to take the opposite position with regard to its territorial disputes in the South China Sea. "China's claim that its land boundaries were historically never defined and delimited [therefore] stands in sharp contrast with..." China's position that its "maritime boundaries were always clearly defined and delimited."⁴⁴³ In Professor Malik's view, herein lies the basic contradiction in China's untenable position regarding its land and maritime boundaries—in short, "sovereignty is a post-imperial notion ascribed to nation-states, not ancient empires."⁴⁴⁴

Professor Stein Tønnesson of the University of Oslo's Centre for Development and the Environment reached a similar conclusion about the pre-modern period evidence used by some of the South China Sea claimants to support their positions:

First, maritime power was volatile. The hegemony in the South China Sea shifted between several states. Second, the Spratly and Paracel Islands were mainly seen as a source of danger. And third, there was not at the time any concept of national sovereignty. Islands were discovered, described, and to some extent exploited, but they were not claimed or disputed in a legal sense.⁴⁴⁵

Similarly, Professor Herminio Roque of the University of the Philippines and Chairman of the Center for International Law in Manila agrees that it is a *non-sequitur* "to say that either

⁴³⁸ See Mohan Malik, *Historical Fiction: China's South China Sea Claims*, WORLD AFFAIRS JOURNAL (MAY/JUNE 2013); S. Tønnesson, note 55 *supra*, at p. 5; H. Roque, note 208 *supra*, at p. 204.

⁴³⁹ M. Malik, note 438 *supra*.

⁴⁴⁰ "suzerainty." Merriam-Webster.com.2014, www.merriam-webster.com (Jan. 2, 2014).

⁴⁴¹ M. Malik, note 438 *supra*.

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ S. Tønnesson, note 55 *supra*, at p. 5.

China or Vietnam exercised effective occupation of the Spratlys during the pre-modern times....”⁴⁴⁶ According to Professor Roque, the concept of “effective occupation...did not exist in either of their legal systems” during the pre-modern era.”⁴⁴⁷ Professor Roque explains:

The ancient Confucian legal system, applicable to both China and Vietnam until the 1900s, does not have a counterpart...of what is traditionally now known in international law as “effective occupation.” The concept in Chinese law was that a ruler had jurisdiction over persons, and not over territory. Sovereignty was a function of social organisation, history and loyalty of subjects. Territorial jurisdiction was measured in terms of zones of influence, rather than physical boundaries. Maritime boundaries were unheard of as sovereignty (over persons) was co-terminus with the coast. The ocean, and the islands found therein, were relevant only to navigation, *i.e.*, areas of hazards which must be avoided. Control over maritime areas was limited to ports and waterways and merely to guard against smuggling and piracy. Clearly, all these characterisations of the prevailing law in both countries negate the existence of effective occupation until recent years when both countries integrated the Western concept of territorial sovereignty into their respective legal systems.⁴⁴⁸

Moreover, most Asia experts agree that Chinese mariners “were latecomers to the South China Sea.”⁴⁴⁹ It was the ancestors of today’s Indonesians, Malaysians, Filipinos, and Vietnamese that dominated “the seafaring history of the region at least for the first millennium of the current era.”⁴⁵⁰ Malaysian sailors crossed the Indian Ocean 1,000 years before the seven voyages of Admiral Zheng He in the 15th century.⁴⁵¹ And it was the Cham Empire—present-day central Vietnam—that dominated South China Sea trade until it was conquered by Vietnam in the 15th century.⁴⁵² By comparison, the traditional route used by early Chinese navigators was the inner passage along the coasts of Hainan Island and Annam (mainland Vietnam), not the outer passage through Macclesfield Bank and the Paracels.⁴⁵³ China’s “discovery” of the two archipelagoes in a “legal” sense is therefore dubious at best.

2. Probative Value of Historic Maps

China cites a number of historic maps to support its claim that the Paracel and Spratly Islands have been recognized as Chinese territory since ancient times. Vietnamese and foreign scholars, however, reject the argument that the Paracels and Spratlys were included within the Chinese Empire, indicating that early Chinese maps and documents depict Hainan Island (Qiongzhou) as the southern-most part of China. Chinese maps and documents cited by Vietnamese scholars to support their position include, *inter alia*, the encyclopedia *Gǔjīn*

⁴⁴⁶ H. Roque, note 208 *supra*, at p. 204.

⁴⁴⁷ *Id.*, at p. 203.

⁴⁴⁸ *Id.*, at pp. 203-204.

⁴⁴⁹ Philip Bowring, *China’s Invented History*, THE WALL STREET JOURNAL (OPINION ASIA), June 4, 2012..

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ F. Bonnet, note 223 *supra*, at p. 13; see also M. Chemillier-Gendreau, note 15 *supra*, at p. 61.

TúshūJichéng (Complete Atlas on the Past and Present) completed by the Qing Dynasty in 1706; maps included in the encyclopedia *Zhífāng Diǎn* (Dictionary of Administrative Units), including *Zhífāng Zǒngbùtú* (General Map of the Administrative Units, Number 1), *Guǎngdōng Jiāngyùtú* (Territorial Map of Guǎngdōng, Number 157), and *Qióngzhōufǔ Jiāngyùtú* (Territorial Map of Qiongzhou Prefecture, Number 167); and *Guǎngdōng Tōngzhì* (Annals of Guǎngdōng), made during the reign of Emperor Jiājing of the Ming Dynasty (1522–1567).⁴⁵⁴

Moreover, as Vietnamese and Western scholars correctly point out, international tribunals have treated maps with a considerable degree of caution and have consistently held that maps, particularly those submitted by the parties to a dispute, carry very little probative weight in determining ownership of a disputed territory. As stated by the ICJ in the *Frontier Dispute* case:

...in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights.⁴⁵⁵

An exception to this rule may apply in cases where a map falls “into the category of physical expressions of the will of the State or States concerned..., for example, when maps are annexed to an official text of which they form an integral part.”⁴⁵⁶ However, except in this clearly defined case, “maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.”⁴⁵⁷

None of the cartographic material cited by China is either part of a legal instrument in force or part of a boundary treaty concluded between China and Vietnam (or France) and, therefore, cannot of itself support China’s claim to sovereignty over the South China Sea islands.

⁴⁵⁴ SOUTH CHINA SEA STUDIES (2012), at p. 4.

⁴⁵⁵ *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, I.C.J. Reports 1986, p. 554, at pp. 582-583. *Accord Island of Palmas Case (Netherlands/U.S.A.)*, R.I.A.A., Vol. II, p. 829 (1928), p. 831, at pp. 852-854, available at http://legal.un.org/riaa/vol_II.htm; *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, I.C.J. Reports 1999, p. 1045, at pp. 1096-1100; *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, I.C.J. Reports 2002, p. 625, at pp. 666-668; *Case Concerning the Frontier Dispute (Benin/Niger)*, I.C.J. Reports 2005, p. 90, at pp. 117-120; *Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, I.C.J. Reports 2007, p. 659, at pp. 722-724. See also F. Dupuy and P. Dupuy, note 432 *supra*, at pp. 133-134.

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.* (“[M]aps can...have no greater legal value than that of corroborative evidence endorsing a conclusion at which the court has arrived by other means unconnected with the maps. In consequence, except when the maps are in the category of a physical expression of the will of the State, they cannot in themselves alone be treated as evidence of a frontier, since in that event they would form an irrebuttable presumption, tantamount in fact to legal title. The only value they possess is as evidence of an auxiliary or confirmatory kind, and this also means that they cannot be given the character of a rebuttable...presumption such as to effect a reversal of the onus of proof.”) Other factors that the Court may take into consideration when determining the probative weight to be given to a map “relate to the neutrality of their sources towards the dispute in question and the parties to that dispute.” *Id.*

3. Inchoate Title and Effective Occupation

Even if China did discover the South China Sea islands as claimed, international tribunals have uniformly held that discovery alone, without subsequent acts of effective occupation, does not confer title to territory. In the *Island of Palmas* case, the Permanent Court of Arbitration held that “an inchoate title of discovery must be completed within a reasonable period by effective occupation of the region claimed to be discovered.”⁴⁵⁸ Effective occupation “involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.”⁴⁵⁹ Furthermore, an inchoate title cannot “...prevail over the continuous and peaceful display of authority by another State; for such display may prevail even over a prior, definite title put forward by another State.”⁴⁶⁰

China claims that it has maintained a peaceful and continuous display of authority over the South China Sea islands since at least the 14th century. According to a number of international scholars, however, “the records supporting this claim are sparse and unconvincing.”⁴⁶¹

For the most part, China relies on records showing that Chinese fishermen from Hainan Island sporadically lived on some of the Spratly Islands for short periods of time while they were engaged in fishing activities in the region. China likewise traces its economic exploitation of the archipelagoes to these non-state-sponsored fishing activities, although it claims that later exploitation activities were organized and approved by the Chinese government. As further evidence of its effective administration of the archipelagoes, Beijing additionally cites: the presence of naval patrols in the South China Sea; search and rescue operations; construction of meteorological installations, lighthouses and radio stations; and scientific, hydrographic and topographic surveys of the islands and their surrounding waters. A careful review of China’s position reveals that there is simply no credible evidence of peaceful and continuous occupation of or display of authority over the islands by the Chinese government that is necessary to confer sovereignty under prevailing international law.⁴⁶²

Under prevailing international law, as articulated by the ICJ in the *Fisheries Case*, when determining issues of territorial sovereignty, “the independent activity of private individuals is of little value unless it can be shown that they have acted in pursuance of a licence or some other authority received from their Governments or that in some other way their Governments

⁴⁵⁸ *Island of Palmas Case (Netherlands/U.S.A.)*, U.N. Rep., Vol. II, p. 829 (1928), p. 831, at p. 846.

⁴⁵⁹ *Legal Status of Eastern Greenland Case (Denmark v. Norway)*, P.C.I.J., Series A/B, No. 53 (1933), at pp. 45-46.

See also J. Greenfield, note 149 *supra*, at p. 30 (“If China were to rely on its original discovery of the islands, modern law also requires that an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered.”).

⁴⁶⁰ *Island of Palmas Case (Netherlands/U.S.A.)*, R.I.A.A., Vol. II, p. 829 (1928), at p. 846.

⁴⁶¹ B. Murphy, note 29 *supra*, at p. 201. Accord M. Bennett, note 14 *supra*, at pp. 435 and 446; C. Joyner, note 166 *supra*, at p. 59; M. Chemillier-Gendreau, note 15 *supra*, at pp. 56-64, 73-74; H. Roque, note 208 *supra*, at p. 202.

⁴⁶² B. Murphy, note 29 *supra*, at pp. 201-202; accord M. Bennett, note 14 *supra*, at pp. 446 (“Although Chinese fishermen...may have been the first occupants of the Spratlys, there is no evidence of the type of effective authority over the islands required to confer sovereignty under the prevailing international law standard.”); SOUTH CHINA SEA STUDIES (2012) (“...Chinese fishermen’s early presence was merely private/individual activities and thus cannot constitute effective occupation by a State as required by international law.”); H. Nguyen, note 204 *supra*, at p. 169 (“Occupation by private individuals will not create a title for their country.”).

have asserted jurisdiction through them.”⁴⁶³ Thus, acts by private individuals do not qualify as “state” action unless they are immediately followed up or sanctioned by government authorities. As the ICJ observed in the *Pulau Ligitan and Pulau Sipadan* case, “activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority.”⁴⁶⁴

There is absolutely no credible evidence that the private, non-proprietary acts of a few Chinese fishermen were taken at the behest of, or were subsequently sanctioned by, Chinese authorities. Thus, the private activities relied upon by China do not constitute acts *à titre de souverain*, reflecting the intention and will to act as a sovereign.⁴⁶⁵ In a similar situation, the arbitrator in the *Aves Island* case determined that

[*Translation*] Having regard to the established fact that the inhabitants of Saint-Eustache, a Dutch possession, fish for turtles and collect eggs on Aves Island, this practice, implying as it does merely temporary, precarious occupation of the island and being not the exercise of an exclusive right, but the consequence of the abandonment of fishing by the inhabitants of neighbouring countries or by the island’s legitimate owner, cannot found the right of sovereignty.⁴⁶⁶

Accordingly, the fact that Chinese fishermen temporarily lived on some of the South China Sea islands for short periods of time does not constitute the effective occupation or administration by a state that is required to confer sovereignty under international law. This conclusion is supported by a secret report prepared by the Chinese military in 1933, which indicated that there is no “evidence of any Chinese administration, the presence of an official representative of China, or Chinese equipment and infrastructure. ...[W]e...have never done anything on these islands.”⁴⁶⁷

Although China acknowledges that early Chinese economic development of the South China Sea islands was not state sponsored, it asserts that, beginning with the Qing Dynasty in 1910, subsequent activities in the archipelagoes were organized with the approval and support of the Chinese government. Government involvement was expanded by the Republic of China (1912-1949) and later by the People’s Republic of China (PRC). Government activities included such things as the collection of taxes and fees from Chinese fishermen and granting licenses to Chinese merchants to develop and exploit the islands.

⁴⁶³ *Fisheries Case (United Kingdom v. Norway)*, I.C.J. Reports 1951, p. 116, at p. 184.

⁴⁶⁴ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625, at p. 683; see also M. Chemillier-Gendreau, note 15 *supra*, at p. 54.

⁴⁶⁵ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625, at p. 683.

⁴⁶⁶ *Arbitral award relating to the issue of control and sovereignty over Aves island, raised between Venezuela and the Kingdom of the Netherlands*, 30 June 1865, R.I.A.A., Vol. XXVIII, pp. 115-124, at p. 122. [Original text: *Considérant que, s’il est bien établi que les habitants de Saint-Eustache, possession néerlandaise vont pêcher des tortues et cueillir des œufs à l’île d’Aves, ce fait ne peut pas servir d’appui au droit de souveraineté, car il implique seulement une occupation temporaire et précaire de l’île, étant donné qu’il n’est pas, en l’espèce, la manifestation d’un droit exclusif, mais la conséquence de l’abandon de la pêche par les habitants des contrées voisines ou par son maître légitime.*]

⁴⁶⁷ F. Bonnet, note 223 *supra*, at p. 17.

Whether these activities actually occurred is open to question, as no independent evidence has been provided to corroborate that the Chinese government engaged in such activities.⁴⁶⁸ Moreover, even if true, virtually all of the examples cited by Chinese scholars involve economic exploitation of the Paracels and occurred nearly 250 years after the Vietnamese government authorized and organized the systematic exploitation of the Paracels, and, to a lesser degree, the Spratlys (e.g., Hoang Sa Company). Additionally, the absence of documented government administration in the Spratlys prior to the founding of the PRC in 1949 undercuts China's claims that it effectively administered, and has indisputable sovereignty over, both of the South China Sea islands groups.

It is also interesting to note that many of the ancient works cited by scholars to support China's position link the South China Sea islands to the southern barbarian nations (present day Vietnam). These works describe the exploitation of the islands by the southern barbarians in order to pay "tributes" to the rulers of the various Chinese dynasties. This linkage "strongly suggests that...[the Spratlys and Paracels] did not belong to China."⁴⁶⁹ Moreover, the payment of tributes by Vietnam clearly cuts against the MFA's argument that China was the first nation to discover, occupy, and exploit the South China Sea islands. By acknowledging that the Nguyen emperors occupied and exploited the Paracels, albeit to pay tributes to their protectorate state, China implicitly admits that it neither physically possessed or controlled the Paracels, nor intended to act as a sovereign over the islets—both of which are required to demonstrate sovereignty over territory under international law.⁴⁷⁰

Evidence of China's alleged naval patrols to the South China Sea, at best, demonstrates nothing more than a general awareness of the existence of the South China Sea islands. There is no evidence in any of the documents cited by the Chinese government or scholars that reflects that China actually occupied or administered the islands during these patrols. In addition, Asia experts question the early naval exploits touted by the MFA and Chinese scholars. With the exception of the seven voyages of Admiral Zheng He,

Chinese navigators were not brave mariners who named and took control of the islands and reefs of the South China Sea, as depicted by the present Chinese scholars. These mariners feared the high seas and simply followed the traditional routes along the coast of Hainan and Vietnam (Annam) (or the inner passage...⁴⁷¹

Foreign mariners, on the other hand, used the outer passage through Macclesfield Bank, which the Chinese called "Hong Mao Qian" (the bank of the barbarians with red hair)—the Chinese translation of "'Banc des Anglais (English Bank)'" which appeared on French maps before it was renamed Macclesfield" after the first British ship that discovered the bank.⁴⁷² References to the bank by Chinese authors during the mid-19th century, in works such as Wang Wen Tai's *Hong*

⁴⁶⁸ *But see* Shen II, at pp. 131-132.

⁴⁶⁹ H. Nguyen, note 204 *supra*, at p. 171. A "tribute" is defined in the Oxford dictionary as a "historical payment made periodically by one state or ruler to another, especially as a sign of dependence."

⁴⁷⁰ *The Minquiers and Ecrehos case, Judgment of November 17th, 1953: I.C.J. Reports 1953*, p. 47.

⁴⁷¹ F. Bonnet, note 223 *supra*, at p. 13; *see also* M. Chemillier-Gendreau, note 15 *supra*, at p. 61-62; P. Bowring, note 449 *supra*.

⁴⁷² F. Bonnet, note 223 *supra*, at p. 13.

mao fan ying ji li kao lue (*To Study the Foreigners 1843*), were “simply the result of interviews of European mariners and consultation of foreign charts.”⁴⁷³ Moreover, the fact that Macclesfield Bank “did not have a Chinese name and was outside the traditional route of the Chinese navigators...” refutes China’s claim of discovery.⁴⁷⁴

Vietnamese and Western scholars also downplay the importance of the astronomical observations taken by Guō Shoujing in the Paracels in 1279, asserting that Guō’s observations “were only astronomical research activities” and can therefore not be used by China to “legitimize any sovereignty status over the territories from which the observations were made.”⁴⁷⁵ Similarly, Western scholars question whether an expeditionary force under the command of Shi Bi was actually dispatched to Java in 1292. The invasion force allegedly sailed through the Paracel and Spratly Islands.⁴⁷⁶ However, Western scholars note that the route of the invasion force and the islands recorded in the *Yuan Shi* are unclear.⁴⁷⁷ Moreover, the text is devoid of any reference to territorial control of the two archipelagoes by Chinese authorities.⁴⁷⁸

Some Vietnamese and Western scholars likewise argue that “the historical evidence used by China to support its claim is insufficient and weak according to international law” because it fails to “demonstrate any occupation, effective administration, or sovereignty.”⁴⁷⁹ The Song Dynasty naval patrols to the Paracels, recorded in *Wǔjīng Zǒngyào* (*Military General Records*), do not demonstrate any Chinese possession of the archipelago, but rather simply reflect Chinese awareness of the islands.⁴⁸⁰ Moreover, Chinese naval patrols beyond Hainan “could only be considered as speculation.”⁴⁸¹ According to some Western scholars, the naval missions recorded in the *Wǔjīng Zǒngyào* (*Military General Records*) did not actually go to the Paracels, but rather were geographical reconnaissance expeditions to the Indian Ocean.⁴⁸² Similarly, Admiral Wu Sheng’s alleged patrol to the Paracels between 1710 and 1712 “was in fact a patrol around Hainan Island and did not go as far as the Paracels.”⁴⁸³ This conclusion is supported by a close reading of the itinerary noted on the map documenting the patrol—“Departing from Qiongya, he passed by Tong Gu and traversed Qizhouyang and Sigengsha, thus

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

⁴⁷⁵ SOUTH CHINA SEA STUDIES (2012), at p. 4.

⁴⁷⁶ Shen II, at pp. 111-112; *see also* Shen I, at p. 27; Tao Cheng, note 31 *supra*, at p. 273; H. Chiu and C. Park, note 42 *supra*, at p. 10.

⁴⁷⁷ M. Chemillier-Gendreau, note 15 *supra*, at p. 61.

⁴⁷⁸ *Id.*

⁴⁷⁹ SOUTH CHINA SEA STUDIES (2012), at p. 4; *see also* H. Nguyen, note 204 *supra*, at pp. 171-172 (“...there is no convincing evidence about China’s state management over these marine features. For a period of two thousand years until 1909, only four events have been cited by Chinese authors to claim Chinese management. ...The events took place around the Hainan Island. There is neither proof, nor a name directly relating to the Paracels. The period of one to two hundred years between these events do not support the existence of a continuous, non-interrupted period of Chinese management”). *Accord* M. Chemillier-Gendreau, note 15 *supra*, at pp. 60-61 (Although naval patrols during the Northern Song Dynasty confirm “China’s knowledge of the Paracels, it does not show that China took possession of them.”).

⁴⁸⁰ SOUTH CHINA SEA STUDIES (2012), at p. 4; *accord* Monique Chemillier-Gendreau, note 15 *supra*, at pp. 60-61.

⁴⁸¹ H. Nguyen, note 204 *supra*, at p. 172.

⁴⁸² SOUTH CHINA SEA STUDIES (2012), at p. 4; *accord* Monique Chemillier-Gendreau, note 15 *supra*, at pp. 60-62.

⁴⁸³ SOUTH CHINA SEA STUDIES (2012), at p. 4.

covering 3,000 li.”⁴⁸⁴ Qiougys (Hoihow) is a small town in the northern part of Hainan Island; Tong Gu is a mountain located on the north-east portion of the island; Qizhouyang refers to the Taya Islands that lie to the north-east of Hainan; and Sigengsha is a sandbank located to the west of the island.⁴⁸⁵

It is also important to note that China’s first purported act of sovereign control in the Paracels did not occur until 1883, when China “allegedly protested a German survey of the [Paracel] Islands,”⁴⁸⁶ although it is questionable whether China, in fact, delivered such a protest.⁴⁸⁷ The first verifiable act of Chinese sovereignty over the Paracels did not occur until 1909, when the Qing government deployed three warships and 170 men under the command of Lee Chun to the Paracels in May to erect markers, raise the Chinese flag, and conduct cannon-shooting ceremonies on some of the islands to demonstrate Chinese sovereignty over the archipelago.⁴⁸⁸ This event demonstrates, however, that China was uncertain as to its rights to the Paracels—if the Qing government truly believed that China had indisputable sovereignty over the islands, it would not have needed to engage in these symbolic acts of sovereignty.⁴⁸⁹ Moreover, the detachment left the islands within 24 hours and Chinese officials would not return to the archipelago for another 20 years.⁴⁹⁰ Furthermore, the naval deployment was preceded by an exploratory expedition in April—additional evidence that the Chinese had limited knowledge of the islands prior to 1909.⁴⁹¹

More importantly, these symbolic acts occurred nearly 100 years after Vietnamese officials, at the direction of Emperor Gia Long, formally took possession of the archipelago and conducted a flag-raising ceremony in 1816, and nearly 45 years after Emperor Minh Mang dispatched a Vietnamese naval unit to build a pagoda and erect sovereignty tablets on some of the islets in the Paracels.⁴⁹² China’s demonstration of sovereignty, therefore, took place well after Vietnam had effectively occupied and administered the islands. In addition, given the chaotic conditions that ensued following the successful conclusion of the Chinese Revolution in 1911, the abdication of the Qing emperor in February 1912, and the inability of the new Nationalist government to unite the country for the next 30 years, China was clearly not in a position politically or militarily “to uphold its claim to...[the Paracels] through effective occupation and utilization.”⁴⁹³ Under these circumstances, China’s inchoate title, if it existed at

⁴⁸⁴ M. Chemillier-Gendreau, note 15 *supra*, at p. 62.

⁴⁸⁵ *Id.*

⁴⁸⁶ H. Roque, note 208 *supra*, at p. 202.

⁴⁸⁷ Some Western scholars have determined that this incident is not based on “verifiable references.” M. Chemillier-Gendreau, note 15 *supra*, at p. 99. Additionally, Vietnamese scholars argue that, even if the protest was made, it “was only a diplomatic action and did not have any legal status as China’s sovereignty had not been established.” *SOUTH CHINA SEA STUDIES* (2012), at p. 4.

⁴⁸⁸ Shen II, at pp. 107 and 135; *see also* Shen I, at p. 36; Tao Cheng, note 31 *supra*, at p. 273; M. Chemillier-Gendreau, note 15 *supra*, at pp. 37, 99, Annex 10 (*Note of 29 September 1932 from the Legation of the Chinese Republic in France to the Ministry of Foreign Affairs, Paris*), Annex 13 (*Note dated 4 May 1909 from Mr Beauvais, Consulate of France in Canton*).

⁴⁸⁹ M. Chemillier-Gendreau, note 15 *supra*, at p. 99.

⁴⁹⁰ H. Chiu and C. Park, note 42 *supra*, at p. 7; *see also* Shen I, at p. 38; Tao Cheng, note 31 *supra*, at pp. 273-274; *SOUTH CHINA SEA STUDIES* (2012), at p. 4; M. Chemillier-Gendreau, note 15 *supra*, at p. 37.

⁴⁹¹ M. Chemillier-Gendreau, note 15 *supra*, at p. 99.

⁴⁹² MFA White Paper (1974); *see also* M. Katchen, note 120 *supra*, at p. 1178.

⁴⁹³ S. Tønnesson, note 55 *supra*, at p. 7.

all, cannot “prevail over the continuous and peaceful display of authority by another State [*i.e.*, Vietnam]” for over a century.⁴⁹⁴

Nevertheless, China argues that following the 1911 Revolution, the new government of Guangdong Province placed the Paracels under the jurisdiction of Ya County (Ya Xian) of Hainan Province. This decision was reaffirmed by the Southern Military Government in 1921—on March 30, 1921, the Governor of Guangdong Province annexed the Paracel Islands and placed them under the jurisdiction of Hainan Island.⁴⁹⁵ However, according to the Vietnamese MFA, this action went unnoticed by the international community because it was recorded only in provincial records and, therefore, Vietnamese and French officials were not in a position to protest the act because they were unaware that the annexation of the islands had occurred.⁴⁹⁶ Additionally, the Chinese annexation was not followed up with any physical occupation of the islands by the provincial government.⁴⁹⁷ More importantly, any act taken by the Guangdong government had little legal effect because the Southern Military Government was not recognized by the central government of China or by any of the Great Powers.⁴⁹⁸ Based on this lack of international recognition, when France subsequently learned of the annexation, the French Legation in China chose to ignore the order, to avoid stirring up Chinese nationalism.

China claims that an interagency committee examined and approved the names for 132 land features in the South China Sea between 1932 and 1935.⁴⁹⁹ The committee subsequently depicted these features on the 1935 *Zhongguo Nan Hai Ge Daoyu Tu* (*Map of the Islands in the South China Sea*).⁵⁰⁰ It should be noted, however, that when the committee began its work in 1932, the Paracels were still considered the southernmost part of China. According to Vietnamese scholars, a September 1932 diplomatic note from China to France confirmed that the Paracels “form the southernmost part of Chinese territory.”⁵⁰¹ It was not until the committee completed its work in 1935 that the Spratlys, Macclesfield Bank, and Scarborough Shoal were included as Chinese territory.⁵⁰² By that time, France had already occupied the Paracels and legally annexed the Spratlys as *terra nullius*.

China’s subsequent illegal occupation of Woody Island (Amphitrite Group) in 1946⁵⁰³ and the entire archipelago in 1974⁵⁰⁴ violated Article 2(4) of the UN Charter⁵⁰⁵ and *The*

⁴⁹⁴ *Island of Palmas Case (Netherlands/U.S.A.)*, R.I.A.A.U.N. Rep., Vol. II, p. 829 (1928), p. 831, at p. 846.

⁴⁹⁵ M. Chemillier-Gendreau, note 15 *supra*, at p. 101.

⁴⁹⁶ MFA White Paper (1974); see also SOUTH CHINA SEA STUDIES (2012), at p. 4.

⁴⁹⁷ *Id.*

⁴⁹⁸ M. Chemillier-Gendreau, note 15 *supra*, at p. 37.

⁴⁹⁹ In 1983, the Chinese Toponymy Committee publicized the approved names of 287 islands, reefs, islets, and shoals on the South China Sea. MFA, *The Issue of South China Sea*.

⁵⁰⁰ *Id.*; see also Shen I, at p. 128 (This was purportedly the first official map published by the Republic of China.); Shen I, at p. 39; Xu Zhiliang, Li Lixin, Fan Hong, and Zhou Xin, note 104 *supra*.

⁵⁰¹ SOUTH CHINA SEA STUDIES (2012), at p. 4.

⁵⁰² F. Bonnet, note 223 *supra*, at p. 15.

⁵⁰³ Pursuant to General Order Number 1, Japanese forces in Vietnam north of 16° north latitude were instructed to surrender to Chinese Nationalist forces—“...the senior Japanese commanders and all ground, sea, air and auxiliary forces within China (excluding Manchuria), Formosa and French Indo-China north of 16 north latitude shall surrender to Generalissimo Chiang Kai-shek....” Supreme Commander for the Allied Powers, General Order No. One, Sept. 2, 1945. China and France agreed in February 1946 that French troops would relieve Chinese Nationalist forces stationed in Indochina north of the 16th degree of latitude (which included both the Paracel and Spratly Islands) no later than March 31, 1946. As an occupation force, the Nationalist troops had a legal obligation to

Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.⁵⁰⁶ Accordingly, China's illegal occupation in 1946 and subsequent seizure of the Paracels by force in 1974 does not create a valid legal title to the archipelago under international law.

With regard to the Spratlys, China's first "verifiable" sovereign act did not occur until 1933 when China allegedly protested France's annexation of the archipelago,⁵⁰⁷ although some scholars question whether China actually filed the protest.⁵⁰⁸ However, even if China did protest the annexation, it did not take steps to evict the French or occupy any of the islands. The fact that China may have diplomatically challenged France's annexation does not, without more, create a title in favor of China over the Spratlys. Nor can China's protest deprive France's occupation of the Spratlys of its character as an effective manifestation of French sovereignty over the islands.

At the time France annexed and effectively and peacefully occupied the Spratlys in 1933, occupation (conquest) was still a valid method of acquiring territory under the prevailing international law. Conquest did not become illegal until October 1945, after the entry into force of the UN Charter. Nationalist China's occupation of Itu Aba Island in 1946⁵⁰⁹ and 1956⁵¹⁰ and Communist China's occupation of several features in the Spratly Islands in 1988⁵¹¹ and 1995,⁵¹² therefore, were accomplished in violation of the UN Charter and, like China's occupation and seizure of the Paracels, do not create a valid legal title to the Spratlys under international law.

depart French Indochina by the 31st of March—this they failed to do. *Exchange of Letters between China and France Relating to the Relief of Chinese Troops by French Troops in North Indochina*, Chungking, Feb. 28, 1946, U.N.T.S. Vol. 14, 1948, at p. 151.

⁵⁰⁴ On January 20, 1974, Chinese forces expelled the South Vietnamese garrison from Pattle Island, the largest feature in the Crescent Group of the Paracel, after a brief naval and land engagement.

⁵⁰⁵ *Charter of the United Nations*, signed June 26, 1945, entered into force Oct. 24, 1945 (Article 2(4) prohibits member states from using force "against the territorial integrity or political independence of any state....").

⁵⁰⁶ UNGA Res. A/RES/25/2625 (Oct. 24, 1970), *The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* ("...no territorial acquisition resulting from the threat or use of force shall be recognized as legal.").

⁵⁰⁷ H. Roque, note 208 *supra*, at p. 204.

⁵⁰⁸ Some Western scholars have determined that this incident is not based on "verifiable references." M. Chemillier-Gendreau, note 15 *supra*, at p. 99.; *accord* B. Dubner, note 29 *supra*, at p. 309; M. Bennett, note 14 *supra*, at p. 439.

⁵⁰⁹ See note 743 for a discussion of General Order Number 1. As in the case of the Paracels, Chinese Nationalists forces occupying Itu Aba Island after WWII failed to withdraw from the island in March 1946, as required by the *Exchange of Letters between China and France Relating to the Relief of Chinese Troops by French Troops in North Indochina*, Chungking, Feb. 28, 1946, U.N.T.S. Vol. 14, 1948, at p. 151.

⁵¹⁰ Following Tomas Cloma's claim to some of the Spratly Islands in 1956, Taiwanese forces returned to Itu Aba over Vietnamese objection and have maintained a presence on the island ever since.

⁵¹¹ On March 14, 1988, Chinese and Vietnamese naval forces clashed in the vicinity of Johnson South Reef, resulting in the sinking of several Vietnamese ships and the death of over 70 Vietnamese sailors. Following the engagement, China occupied six islets in the Spratlys—Cuarteron Reef (Huayang Reef), Eastern Gate Shoal (Dongmen Reef), Fiery Cross Reef (Yongshu Reef), Gaven Reefs (Nanxun Reef and Xinan Reef), Johnson South Reef (Chigua Reef), and Subi Reef (Zhubi Reef).

⁵¹² China occupied Mischief Reef (Meiji Reef) in 1995 and over the years has constructed a series of structures, including the installation of military radars and other monitoring equipment, a concrete platform suitable for use as a helipad, a windmill, and solar panels.

In short, China has failed to produce any credible or verifiable evidence that it actually occupied and continuously displayed authority over the disputed islands. Therefore, even if China was the first to discover the Paracels and the Spratlys, thereby vesting China with an inchoate title to the islands, it failed to take final and decisive sovereign action within a reasonable period of time in order to perfect that title.

a. Remote and Uninhabited Territories

Nonetheless, Chinese scholars argue that, even though contemporary international law requires that there must be an actual and continuous display of authority to perfect an inchoate title in normal territorial situations, a less stringent standard should apply to the Paracels and Spratlys given the “enormous irregularity and abnormality of the South China Sea islands.”⁵¹³ These scholars cite both the *Island of Palmas* and the *Eastern Greenland* cases to support their position. If the exception articulated in these cases applies, China would only be required to demonstrate that it took some symbolic act over the archipelagoes in order to perfect its sovereignty claims to the islands.

The arbitrator in the *Palmas* case acknowledged that

Manifestations of territorial sovereignty assume...different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved....⁵¹⁴

Similarly, the court in the *Eastern Greenland* case admitted that in cases of claims to sovereignty over areas in thinly populated or unsettled countries, tribunals have “been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim.”⁵¹⁵

Chinese scholars further point out that this exception to the general rule was applied by the arbitrator in the *Clipperton Island* case in deciding that France had acquired sovereignty over an island even though it had not taken any action toward the island for 39 years after discovering it:

It is beyond doubt that...besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking, and in ordinary cases, that only takes place when the state establishes in the territory itself an organization capable of making its laws respected. ...There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the

⁵¹³ Shen II, at p. 155.

⁵¹⁴ *Island of Palmas Case (Netherlands/U.S.A.)*, R.I.A.A., Vol. II, p. 829 (1928), p. 831, at p. 840.

⁵¹⁵ *Legal Status of Eastern Greenland Case (Denmark v. Norway)*, P.C.I.J., Series A/B, No. 53 (1933), at p. 46. See also *Western Sahara Advisory Opinion*, I.C.J. Reports 1975, p. 12, at p. 43.

first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.⁵¹⁶

Chinese scholars argue that a similar situation exists in the South China Sea and that the exception to the general rule of actual and continuous display of authority should apply to the Paracel and Spratly islands:

Few territorial features in the world...can more adequately be described as remote and/or uninhabited than the South China Sea Islands. ...Given the high abnormality and uninhabitability of the South China Sea Islands that China undeniably discovered, it is clear that the general rule of territorial acquisition does not apply; rather, the exception to the general rule governs. In other words, China did not, and does not, need to display such extensive acts of sovereignty as required by the general rule...in order to perfect or maintain her already established sovereignty over the Xisha and Nansha Islands.... All that may be required of China under the exception...is to exhibit some form of symbolic authority over these self-discovered uninhabitable territories, a test which China has far more than satisfied over a period of more than two thousand years.⁵¹⁷

Although an exception to the general rule of actual and continuous display of authority exists, it is narrow and China cannot rely on it to substantiate its claim to the South China Sea islands. First, and foremost, the *Clipperton Island* case requires some level of state action—*i.e.*, “when the *occupying state makes its appearance* there, at the *absolute and undisputed disposition of that state (emphasis added)*.” Isolated and sporadic contact with the islands by private individuals does not qualify as “state” action. Acts by private individuals will only be considered as relevant by a tribunal when they are immediately followed up or sanctioned by government authorities.⁵¹⁸ In the instant case, there is simply “no reliable evidence that any Chinese Government ever made any act of authority over the islands at all.”⁵¹⁹ Thus, the private activities relied upon by China do not constitute acts *à titre de souverain* reflecting the intention and will to act in that capacity,⁵²⁰ a fact acknowledged by the Chinese Military Council in a secret report prepared in 1933—there is no

⁵¹⁶ *Clipperton Island Arbitration (Mexico v. France)*, 2 R.I.A.A. 1105 (1931), at pp. 393-394. [The cited pages are from the English translation at 26 Am. J. Int'l L. 390, at 393-394 (1932).]

⁵¹⁷ Shen II, at pp. 155-156.

⁵¹⁸ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625, at p. 683 (“...activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority.”); see also M. Chemillier-Gendreau, note 15 *supra*, at p. 54.

⁵¹⁹ M. Bennett, note 14 *supra*, at p. 436; accord H. Roque, note 208 *supra*, at pp. 202-203 (China alludes “merely to the presence of fishermen and sightings of the islands by some of its nationals. Certainly..., these are hardly the type of activities accepted as clear and convincing indicia of *animus possedendi*.”); SOUTH CHINA SEA STUDIES (2012), at p. 4 (“...Chinese fishermen’s early presence was merely private/individual activities and thus cannot constitute effective occupation by a State as required by international law.”); H. Nguyen, note 204 *supra*, at p. 169 (“Occupation by private individuals will not create a title for their country.”).

⁵²⁰ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625, at p. 683.

...evidence of any Chinese administration, the presence of an official representative of China, or Chinese equipment and infrastructure [on the Spratlys]. In conclusion, we have only one piece of evidence, our fishermen from Hainan, and we have never done anything on these islands.⁵²¹

Secondly, the Court in the *Eastern Greenland* case qualified its pronouncement that “very little in the way of the actual exercise of sovereign rights” may be required to establish territorial sovereignty with a very important caveat—*i.e.*, that the lower standard can be applied “provided that the other State could not make out a superior claim.” As discussed above, the first verifiable act of sovereignty by the Chinese government in the Paracels occurred in 1909.⁵²² These events occurred nearly 100 years after Vietnam took formal possession of the archipelago in 1816.⁵²³

Similarly, there is no credible evidence of official Chinese government activities in the Spratlys prior to 1933 when France declared sovereignty over nine of the islands (and their dependent isles) in the archipelago. China’s protest of France’s annexation of the Spratlys was premised on the presence of Chinese fishermen on some of the islands. These private and isolated acts of Chinese fishermen are not evidence of official Chinese government administration and control of the islands.⁵²⁴ Consequently, the exception to the general rule of actual and continuous display of authority does not apply.

It is also important to note that a Chinese map published in 1909 included the Paracel Islands, but not the Spratlys, Macclesfield Bank, or Scarborough Shoal, as part of Guangdong Province, the implication being that China did not consider these other features to be parts of its national territory.⁵²⁵ This conclusion is supported by an event that occurred after the French annexed the Spratlys. On July 26, 1933, the Chinese consul in Manila (Mr. Kwong) went to the U.S. Coast Guard and Geodetic Survey in the Philippines to ascertain the position of the nine Spratly Islands claimed by France. To his surprise, he discovered “that the Spratly Islands and the Paracel Islands were different and far apart.”⁵²⁶ This complete lack of knowledge about the location of the Spratlys was documented in a letter from Mr. Wang Gong Da, the director of the *Peiping News*, to China’s foreign affairs secretary (Mr. Lou):

The Spokesperson of the Foreign Affairs said that a protest was prepared if...it was proven that the nine islands...were part of Xisha [the Paracels]. Don’t make a diplomatic blunder; these islands are not part of Xisha. Triton Island [in Xisha] is the southernmost part of our territory. South of Triton Island, there is no connection with the Chinese

⁵²¹ F. Bonnet, note 223 *supra*.

⁵²² Shen II, at pp. 107 and 135; *see also* Shen I, at p. 36; Tao Cheng, note 31 *supra*, at p. 273.

⁵²³ MFA White Paper (1974); *see also* M. Katchen, note 120 *supra*, at p. 1178.

⁵²⁴ *Fisheries Case (United Kingdom v. Norway)*, I.C.J. Reports 1951, p. 116, at p. 184; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625, at p. 683.

⁵²⁵ F. Bonnet, note 223 *supra*, at p. 14.

⁵²⁶ *Id.*, at p. 16.

territory. Our so-called experts, geographers, Navy representative, etc., are a shame to our country.⁵²⁷

When it was discovered that the Spratlys and Paracels were two separate groups of islands, “the Chinese government did not protest the French claim on the nine islands.”⁵²⁸ It was not until the interagency Committee for the Review of Maps of Lands and Waters of China (discussed below) completed its work in 1935 that the Spratlys, Macclesfield Bank, and Scarborough Shoal were included as Chinese territory on official Chinese maps.⁵²⁹

b. Suzerain and Vassal

China also argues that, in 1816, Annam (Vietnam) was subject to China and that it was therefore impossible for Vietnam, as a vassal state, to invade and occupy Chinese territory (the Paracels).⁵³⁰ This argument, however, is flawed. First, although Vietnam was incorporated into the Han Empire in 111 BC and colonized by China for the next 1000 years, Vietnam achieved its independence from China in 939 AD and successfully repelled Chinese invasions over the next 900-plus years (with one exception) until it was incorporated into the French Empire in the 1800s. Granted, despite its independence, Vietnam remained a vassal state and continued diplomatic relations with China through the payment of tributes.⁵³¹ However, when Emperor Gia Long officially took possession of the Paracels in 1816, the formal relationship of suzerainty with China did not preclude Vietnam from exercising sovereign acts, such as the incorporation of new territories into the kingdom.⁵³² By definition, “suzerainty” occurs where a dominant state—in this case China—controls the foreign relations of a vassal state—Vietnam—but allows the vassal state to exercise sovereign authority in its domestic affairs.⁵³³ As the suzerain, China controlled Vietnam’s international affairs. However, the suzerain-vassal relationship still allowed Vietnam to exercise its domestic sovereignty, such as the acquisition of new territory.

⁵²⁷ *Id.*, at p. 17.

⁵²⁸ *Id.*

⁵²⁹ *Id.*, at p. 15. Vietnamese scholars point out that a diplomatic note delivered by China to France in September 1932 confirmed that the Paracel Islands were the southernmost part of China. SOUTH CHINA SEA STUDIES (2012), at p. 5.

⁵³⁰ M. Chemillier-Gendreau, note 15 *supra*, Annex 10 (*Note of 29 September 1932 from the Legation of the Chinese Republic in France to the Ministry of Foreign Affairs, Paris*) (“...100 years ago Indochina was under Chinese tutelage. Since the Paracel Islands already formed part of China’s territory, Indochina had no right to carry out acts of occupation on the possessions of its suzerain.”).

⁵³¹ China briefly seized control of Vietnam, once again, in 1407. The occupation ended with the defeat of the Chinese army by Vietnamese resistance forces in 1428. Vietnam’s suzerainty relationship with China ended in 1883 when it was incorporated into the French Empire with the signing of the *Treaty of Protectorate* at the 1883 *Harmand Convention*. LIBRARY OF CONGRESS, FEDERAL RESEARCH DIVISION, *Country Studies: Vietnam*, available at lcweb2.loc.gov/frd/cs/vntoc.html. A “tribute” is defined in the Oxford dictionary as an “historical payment made periodically by one state or ruler to another, especially as a sign of dependence.”

⁵³² MFA White Paper (1974); accord M. Chemillier-Gendreau, note 15 *supra*, at pp. 76-79 (“The Kingdom of Vietnam...was founded in the 11th century by the creation of a political power and administration independent of China, but (prudently) acknowledging Chinese suzerainty.”).

⁵³³ “suzerainty.” Merriam-Webster.com.2014, www.merriam-webster.com (Jan. 2, 2014).

4. Persistent Objector

China additionally points out that its persistent objections to all foreign claims to the Paracels and Spratlys further demonstrate that it effectively administered the archipelagoes. The first example cited by China is an 1883 incident involving a German ship conducting surveys in the South China Sea without China's consent. According to the MFA, the Qing government lodged a protest with Berlin and the Germans terminated the survey.

Western scholars have determined, however, that this "incident is not based on verifiable references" and is inconsistent with other Chinese inaction during the same time period given that, in 1885, the German Admiralty published a two-sheet chart entitled *Die Paracel-Inseln (The Paracel Islands)*.⁵³⁴ The chart documented the work of a German expedition to the Paracels between 1881 and 1884. For three months each year during this time period, the German Navy sent the SMS *Freya* and the warship *Illtis* "to study and map the Paracel Islands without either seeking the permission of or incurring protest by the Chinese government."⁵³⁵ Based on these events, it is doubtful that China lodged the protest as alleged. Alternatively, if the protest was made, it was obviously ignored by the German government.

The accuracy of China's claim regarding the 1883 incident is also colored by the fact that China did not raise similar objections to other events that occurred around the same timeframe.⁵³⁶ Scarborough Shoal was first surveyed by the Philippine-based Spanish frigate *Santa Lucia* in April 1800. The results of the survey were published in a chart in 1808.⁵³⁷ A more detailed survey was conducted by the British ship HMS *Swallow* in May 1866.⁵³⁸ Both of these surveys were conducted without Chinese consent or objection. Documents held by the Spanish Hydrographic Office (*Anuario de la Dirección de Hidrografía*, año 4, número 56, 1866) also describe search and rescue operations conducted by Spanish Navy units based in the Philippines to assist mariners in distress on the shoal, a responsibility that was later transferred to the U.S. Coast Guard after the United States took possession of the Philippines after the Spanish-American War.⁵³⁹ There is no evidence that China objected to these activities.

The British were also actively engaged in the Spratlys during this timeframe. In 1877, an American and two British citizens sought permission from the British Colony of Labuan⁵⁴⁰ "to hoist the British flag over Spratly Island and...Amboyna Cay, ...having discovered that they were uninhabited and contained workable deposits of guano."⁵⁴¹ Permission was granted by the Acting Governor of Labuan and Acting Consul-General in Borneo "subject to the approval of the

⁵³⁴ M. Chemillier-Gendreau, note 15 *supra*, at p. 99. Additionally, Vietnamese scholars argue that, even if the protest was made, it "was only a diplomatic action and did not have any legal status as China's sovereignty had not been established." SOUTH CHINA SEA STUDIES (2012), at p. 4.

⁵³⁵ F. Bonnet, note 223 *supra*, at p. 14; accord David Hancox and Victor Prescott, *A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst Those Islands*, INTERNATIONAL BOUNDARIES RESEARCH UNIT, MARITIME BRIEFING, VOL. 1, NO. 6, at p. 36.

⁵³⁶ F. Bonnet, note 223 *supra*, at p. 14.

⁵³⁷ *Id.*, at pp. 8-9; accord D. Hancox and V. Prescott, note 535 *supra*, at p. 24.

⁵³⁸ F. Bonnet, note 223 *supra*, at p. 9.

⁵³⁹ *Id.* ("...when, on May 8, 1913, the Swedish steamship *Nippon* went aground on Scarborough Shoal, the Bureau of Navigation in Manila sent the Coast Guard cutter *Mindoro* to help the stranded crew.").

⁵⁴⁰ In 1846, the Sultan of Brunei ceded Labuan to Britain. The island became a Crown Colony in 1848.

⁵⁴¹ G. Marston, note 330 *supra*, at p. 344.

Secretary of State for Foreign Affairs.”⁵⁴² If “the islands were not worked and turned to account within ten years,” or if they were left unworked for more than five years, the claim would lapse.⁵⁴³ The claim was subsequently registered with the Office of the Consul-General in Borneo and “a notice advising of the 1877 claim was duly published in the Government Gazettes of the Colonies of Hong Kong and the Straits Settlements.”⁵⁴⁴ This is the first recorded evidence in modern times of any state claiming sovereignty over some of the Spratly Islands, yet there is no indication that China protested the British claim.⁵⁴⁵

Similarly, in 1889, after an investigation determined that the former “licensees had abandoned their operations and that the islands were uninhabited and unoccupied,” another guano exploiter—the Central Borneo Company—sought permission to work the islands in 1888.⁵⁴⁶ The Colonial Office, with the concurrence of the Foreign Office, granted the guano lease to the company in 1889 on the same terms as conditions as the previous lease. As in the preceding case, there is no indication that China objected to these activities. China’s failure to intervene in these events, which occurred over an extended period of time and were publicly notified to the international community, is further evidence that China did not effectively control or administer the Spratly Islands during the 19th century. On the other hand, it is understandable that Vietnam did not object to any of these events since, at the time, it was a vassal state of either China or France.

Following France’s annexation of Spratly Island in 1930, the British Foreign Office determined in 1932 that the United Kingdom did not have “title to Spratly Island because *inter alia* there had never been any formal annexation or any open display of sovereignty and that, in default of this, discovery giving at most only an inchoate title would be insufficient....”⁵⁴⁷ Subsequently, during the negotiations of the San Francisco Peace Treaty, the Foreign Office indicated in 1947 that the United Kingdom was “not prepared to contest the French claim to sovereignty [to the Spratly Islands] which is considered to be good in law.”⁵⁴⁸

China’s persistent objector argument is also at odds with an incident that occurred in the late 1890s. In 1895 the German vessel *Bellona* shipwrecked on North Reef in the Paracels. The following year, the Japanese vessel *Imegu Maru* suffered a similar fate on the Amphitrites. Both vessels were “carrying cargoes of copper insured with British companies.”⁵⁴⁹ After efforts to salvage the vessels failed, Chinese fishermen systematically looted the wrecks and “offered

⁵⁴² *Id.*; see also S. Tønnesson, note 55 *supra*, at p. 7.

⁵⁴³ *Id.*

⁵⁴⁴ *Id.*

⁵⁴⁵ Spratly Island and Amboyna Cay were mentioned in every annual edition of the British Colonial Office List from 1891 to 1933. *Id.*

⁵⁴⁶ G. Marston, note 330 *supra*, at p. 344.

⁵⁴⁷ *Id.*, at p. 350. Beginning in 1934, Spratly Island and Amboyna Cay were no longer mentioned in the British Colonial Office List. S. Tønnesson, note 55 *supra*, at p. 7; see also M. Chemillier-Gendreau, note 15 *supra*, at p. 112.

⁵⁴⁸ G. Marston, note 330 *supra*, at p. 355.

⁵⁴⁹ M. Chemillier-Gendreau, note 15 *supra*, at pp. 36-37, 98, Annex 5 (*Letter No. 704-A-Ex, dated 20 March 1930, from the Governor General of Indochina, Hanoi, to the Minister for the Colonies, Paris*), Annex 12 (*Note dated 6 May 1921, from the Directorate for Political and Indigenous Affairs, Government General of Indochina, Hanoi*), Annex 15 (*Letter dated 4 May 1909 from Mr. Beauvais, Consul of France in Canton, to the Minister for Foreign Affairs, Paris*).

to sell the looted copper [to the insurance companies] for half its value.”⁵⁵⁰ The insurance companies refused the offer and requested the Minister of Great Britain in Peking and the Consul of Great Britain in Hoihow to intervene on their behalf with the Chinese government. As requested, Minister and Consul Mr. O’Brien Butler demanded that the Chinese government impound the copper, stating that Chinese authorities in Hainan “had been informed of the wrecks as soon as they occurred, that they should have taken precautions to prevent the looting, and that they should be held responsible.”⁵⁵¹ In response, the Chinese government denied ownership of the archipelago, indicating that the Paracels “were abandoned islands which belonged no more to China than they did to Annam, that they were not administratively attached to any district of Hainan and that no special authority was responsible for policing them.”⁵⁵² A similar response was provided when Britain complained about the lack of navigational aids on the Paracels after two British ships collided with a Chinese fishing vessel near the islands. Again, China “disclaimed responsibility on the ground that it did not own the islands.”⁵⁵³ It is apparent from these incidents that China did not intend to claim sovereignty over the Paracels.

Although the Chinese response in both of these cases did not recognize Vietnamese sovereignty over the Paracels, it clearly rejected the notion that the islands were part of the Chinese Empire and undercuts China’s claims that it has effectively administered the islands since the Yuan Dynasty (1271-1368). Furthermore, there is no evidence that China protested the planting of flags and emplacement of sovereignty columns on a number of the features in the Paracel archipelago by the crew of the French ship *La Malicieuse* in 1930.⁵⁵⁴

China challenged France’s subsequent attempt to occupy the Paracels in December 1931, lodging a protest with the French government on July 27, 1932. The July protest was followed up on September 29, 1932, by a second diplomatic note challenging France’s claims to the islands. A subsequent diplomatic exchange highlighted that Vietnam was under Chinese tutelage in the early 1800s and therefore could not validly occupy Chinese territory.⁵⁵⁵ China repeated its objections when France formally occupied the Paracels on July 3, 1938. It should be noted, however, that the letter only asserted China’s claims to the Paracels—there was no mention of the Spratlys in the diplomatic correspondence.⁵⁵⁶

China also claims to have protested France’s occupation of nine of the Spratly Islands in 1933, but there is no independent evidence to corroborate that the protest actually was made. The diplomatic note cited by Chinese scholars is not dated; nor is it mentioned in the *Memorandum on Four Large Archipelagoes of the Republic of China in South Sea*, which was

⁵⁵⁰ *Id.*

⁵⁵¹ *Id.*

⁵⁵² *Id.*; see also H. Chiu and C. Park, note 42 *supra*, at p. 7; H. Nguyen, note 204 *supra*, at p. 172.

⁵⁵³ H. Roque, note 208 *supra*, at p. 192. *But see* Tao Cheng, note 31 *supra*, at p. 268 (“With regard to the...allegation..., the Chinese government was reported to have produced all relevant documents to prove it was a fabrication.”).

⁵⁵⁴ MFA White Paper (1974); see also M. Chemillier-Gendreau, note 15 *supra*, at p. 38.

⁵⁵⁵ *Id.*, Annex 10 (*Note of 29 September 1932 from the Legation of the Chinese Republic in France to the Ministry of Foreign Affairs, Paris*) (“...100 years ago Indochina was under Chinese tutelage. Since the Paracel Islands already formed part of China’s territory, Indochina had no right to carry out acts of occupation on the possessions of its suzerain.”).

⁵⁵⁶ M. Chemillier-Gendreau, note 15 *supra*, at p. 103.

issued by the Ministry of Foreign Affairs of the Republic of China in February 1974.⁵⁵⁷ Moreover, there is no evidence that any of the parties to the 1922 *Nine-Power Treaty*—the United States, United Kingdom, Japan, France, Italy, Belgium, the Netherlands, Portugal, or China—complained about the alleged illegal occupation. Article I of the treaty requires the contracting powers, other than China, “to respect the sovereignty, the independence, and the territorial and administrative integrity of China.”⁵⁵⁸ As previously discussed, China has alleged that both Great Britain and Japan recognized Chinese sovereignty over the South China Sea islands. If that is true, it is logical that the British and Japanese governments would have invoked the treaty and objected to France’s occupation of the islands in the 1930s.

Nonetheless, even assuming that the note was delivered, China’s protest was based not on official government activities or regulation of the islands, but rather “primarily on the grounds that there were Chinese [fishermen] residing on them.”⁵⁵⁹ These fishermen were not sponsored by the government and resided on the islands for only short periods of time given the inhospitableness of the islands.⁵⁶⁰ As discussed above, this lack of effective government administration of or official government presence in the Spratlys was acknowledged by the Chinese Military Council (CMC) in a September 1933 report, which concluded that the Chinese government had “never done anything on these islands” to assert its sovereignty.⁵⁶¹

The fact that a handful of Chinese fishermen temporarily lived on some of the Spratly Islands does not equate to effective government administration and control and, therefore,

⁵⁵⁷ H. Chiu and C. Park, note 42 *supra*, at note 59.

⁵⁵⁸ *Treaty Between the United States of America, Belgium, the British Empire, China, France, Italy, Japan, the Netherlands, and Portugal*, Feb. 6, 1922, available at http://avalon.law.yale.edu/20th_century/tr22-01.asp. The dispute settlement provision of the treaty (Article VII) provides that “The Contracting Powers agree that, whenever a situation arises which in the opinion of any one of them involves the application of the stipulations of the present Treaty, and renders desirable discussion of such application, there shall be full and frank communication between the Contracting Powers concerned.”

⁵⁵⁹ H. Chiu and C. Park, note 42 *supra*, at p. 12; *see also* Shen I, at p. 42 (“At the time of the occupation, the French Government stated that the islands in question were *terra nullius*, but conceded that during their occupation, ‘the only people living on the islands were Chinese.’”); M. Katchen, note 120 *supra*, at p. 1178.

⁵⁶⁰ Tao Cheng, note 31 *supra*, at p. 267; *accord* B. Murphy, note 29 *supra*, at p. 188 (“Until the second half of...[the 20th] century, the Spratlys were almost entirely ignored by the world community. The only resources the islands offered were small guano and phosphate deposits, seashells, turtle meat, and fish. These resources were enough to attract only occasional exploitation by adventurous fishermen and phosphate miners. The tiny size, remoteness, and vulnerability of the islands to tropical storms made them unattractive to permanent settlement.”); B. Dubner, note 29 *supra*, at p. 299 (“Without external assistance, the islands have no permanent inhabitants and are too small to sustain permanent, independent settlements. Most of them are covered by bushes, guano, a few coconut, and plantation trees.”); C. Joyner, note 166 *supra*, at p. 57 (“The Spratlys are too small and barren to support permanent human settlement independently, and few have fresh water or any significant land-based resources.”); H. Roque, note 208 *supra*, at p. 190; M. Chemillier-Gendreau, note 15 *supra*, at p. 16 (“...the islands are uninhabited. Their small size has never allowed any human development. Traditionally, they have served as outposts for seasonal fishermen. That aside, they have harboured only garrisons or, very recently in the Paracels, a population of administrative origin...”); and p. 20 (“The [Spratlys] islands do not have and have never had a native population.”).

⁵⁶¹ F. Bonnet, note 223 *supra*, at p. 17. *See* text accompanying note 97 *supra*.

does not support China's claim of indisputable sovereignty over the South China Sea islands.⁵⁶² As stated by Judge McNair in his dissenting opinion in the *Anglo-Norwegian Fisheries* case:

Another rule of law that appears to me to be relevant to the question of historic title is that some proof is usually required of the exercise of State jurisdiction, and that the independent activity of private individuals is of little value unless it can be shown that they have acted in pursuance of a licence or some other authority received from their Governments or that in some other way their Governments have asserted jurisdiction through them.⁵⁶³

Thus, to be considered relevant, acts by private individuals must be immediately followed up or sanctioned by government authorities.⁵⁶⁴ In the instant case, there is no evidence that the Chinese Government ever authorized or approved these acts.⁵⁶⁵

Moreover, at the time France annexed and effectively occupied the Spratlys (1933) and Paracels (1938), occupation (conquest) was still a recognized method of acquiring territory under international law.⁵⁶⁶ France's actions in the Paracels, as the successor state to Annam, and its occupation of *terra nullius* in the Spratlys (as Great Britain had abandoned its claims), were a clear manifestation of French sovereignty over the two archipelagoes. China's protest of these acts cannot deprive France's effective occupation of its legal effect.⁵⁶⁷

The Chinese Foreign Ministry, nonetheless, disagrees with this position, arguing that "it is a basic norm of international law that invasion does not entail sovereignty."⁵⁶⁸ China's view,

⁵⁶² C. Joyner, note 166 *supra*, at p. 59 ("Evidence of...permanent settlement is not compelling in the case of China's claim to the Spratlys."); accord M. Bennett, note 14 *supra*, at pp. 434-435 ("Despite the official government position that the Spratly Islands formed an integrated part of its territory, the continuous Chinese presence seems to have consisted of fishermen from Hainan Island, who would temporarily settle on the islands to fish and collect tortoise shells. These stays appear to have been brief, and it is unlikely that the huts and other structures they built survived their departures. ...[T]he question arises as to whether isolated contacts by individual Chinese fishermen are sufficient to establish sovereignty over the Spratlys under international law. Thus the validity of the PRC's official position is subject to doubt.").

⁵⁶³ *Fisheries Case (United Kingdom v. Norway)*, I.C.J. Reports 1951, p. 116, at p. 184.

⁵⁶⁴ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625, at p. 683; see also M. Chemillier-Gendreau, note 15 *supra*, at p. 54.

⁵⁶⁵ M. Bennett, note 14 *supra*, at p. 436; accord H. Roque, note 208 *supra*, at pp. 202-203 (China alludes "merely to the presence of fishermen and sightings of the islands by some of its nationals. Certainly..., these are hardly the type of activities accepted as clear and convincing indicia of *animus possedendi*"); SOUTH CHINA SEA STUDIES (2012), at p. 4 ("...Chinese fishermen's early presence was merely private/individual activities and thus cannot constitute effective occupation by a State as required by international law."); H. Nguyen, note 204 *supra*, at p. 169 ("Occupation by private individuals will not create a title for their country.").

⁵⁶⁶ M. Katchen, note 120 *supra*, at p. 1179.

⁵⁶⁷ *The Minquiers and Ecrehos case, Judgment of November 17th, 1953*: I.C. J. Reports 1953, p. 47, at p. 66 ("By a British Treasury Warrant of 1875, constituting Jersey as a Port of the Channel Islands, the "Ecrehou Rocks" were included within the limits of that port. This legislative Act was a clear manifestation of British sovereignty over the Ecrehos at a time when a dispute as to such sovereignty had not yet arisen. The French Government protested in 1876 on the ground that this Act derogated from the Fishery Convention of 1839. But this protest could not deprive the Act of its character as a manifestation of sovereignty.").

⁵⁶⁸ *Chinese Foreign Ministry's Memorandum on Question of Xisha and Nansha Islands*, XINHUA GEN. OVERSEAS NEWS SERV., May 12, 1988, quoted in M. Bennett, note 14 *supra*, at notes 15 and 93.

however, is clearly a misinterpretation of the prevailing international law in effect when France occupied the archipelagoes—“invasion and conquest have had such a pervasive effect on the creation of modern international boundaries, their legal significance cannot be denied.”⁵⁶⁹ French occupation of the Spratlys and the Paracels occurred peacefully and openly, at a time when neither of the island groups was under the effective control of any nation.⁵⁷⁰ Accordingly, when Japan renounced its right to the South China Sea islands in the 1951 *San Francisco Peace Treaty*, title to the two archipelagoes reverted back to its previous sovereign—France.

Both the ROC and the PRC repeated their objections after France renewed its claims to the South China Sea islands at the conclusion of the Second World War. All of these actions, however, occurred well after the “critical date.” Consequently, an international tribunal would most likely consider the ROC’s and PRC’s actions as self-serving acts that occurred after the dispute arose and therefore are irrelevant to the determination of sovereignty.

5. International Recognition

China cites a number of events, beginning in the 19th century, to support its position that the international community recognizes Chinese sovereignty over the South China Sea islands. China also relies on a number of World War II and post-war documents, statements, and publications to substantiate its position that it has indisputable sovereignty over the island groups. China’s argument in this regard, however, is not persuasive.

a. *The Sino-French Treaty of 1887*

China maintains that France relinquished its claims to the Paracel and Spratly Islands when it signed the Sino-French Treaty of 1887, which delimited the border between China and Tonkin (northern Vietnam).⁵⁷¹ Paragraph 2 of the 1887 Treaty (French text) provides, in part, that “[...]the isles which are to the east of the meridian of 105° 43' longitude east of Paris [the meridian of 108°03'08" east of the Greenwich meridian]...are similarly assigned to China.”⁵⁷²

Based on the treaty, Chinese officials argue that all of the South China Sea islands lie east of 108°03'08" east longitude and that France, therefore, ceded the islands to China. Accordingly, they argue that Vietnam may not claim sovereignty over the islands as the successor state to France. While some scholars agree with this argument, most do not.⁵⁷³

Scholars that support the Chinese position indicate that neither Vietnam nor France has “persuasively responded to the Chinese invocation of the 1887 Sino-French Convention..., which explicitly provided that the islands east of a delimitation line should belong to China” and that “both the Paracels and Spratlys are situated east of that line.”⁵⁷⁴ China’s position is not, however, supported by a plain reading of the treaty text or subsequent actions of the parties to

⁵⁶⁹ “Certainly the PRC’s own boundaries would have to be redrawn if no border established through military conquest were ever valid.” M. Bennett, note 14 *supra*, at pp. 440-441; H. Roque, note 208 *supra*, at p. 201.

⁵⁷⁰ M. Bennett, note 14 *supra*, at p. 441.

⁵⁷¹ Convention Concerning the Delimitation of the Border between China and Tonkin, signed at Beijing, June 26, 1887, available at <http://www.chinaforeignrelations.net/node/167>.

⁵⁷² *Id.*

⁵⁷³ See J. Greenfield, note 149 *supra*, at p. 32; H. Chiu and C. Park, note 42 *supra*, at p. 11. Compare M. Chemillier-Gendreau, note 15 *supra*, at pp. 81, 83-86; Z. Keyuan, note 174 *supra*, at pp. 239, 245; B. Dubner, note 29 *supra*, at p. 309; H. Nguyen, note 204 *supra*, at pp. 187-188.

⁵⁷⁴ J. Greenfield, note 149 *supra*, at p. 32; H. Chiu and C. Park, note 42 *supra*, at p. 11.

the dispute. Moreover, it ignores a French diplomatic note by Monsieur Paul Chargueraud-Hartmann of the Under-Directorate for Asia (dated August 16, 1933), delivered to the Chinese legation in Paris on September 27, 1933, that stated, in part, that the 1887 Treaty did not apply to the Paracels “because the islets are 200 mi east of the delimitation line, which should be considered as a local one applicable only to the Mancay area in northern Vietnam.”⁵⁷⁵

A similar position was taken by France in 1937 and expressed in a diplomatic note dated October 10, 1937:

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.⁵⁷⁶

After reviewing the text of the treaty, Professor Zou Keyuan concurs with the French assessment, noting that,

...upon careful examination of the texts of the Treaty, ...the meaning of the...Chinese version indicates that the red line drawn on the attached map was a line to divide the islands in the Gulf of Tonkin rather than a line of maritime boundary. The line, which ended at about 21°23' north latitude on the map, involved only the land and coastal islands of the two sides. Such a line was simply a form of geographical shorthand to avoid the need to name all the islands, and such a technique was used widely at that time in state practice. Even from the French version, ...the wording “forming the border” ...is actually a line equivalent to the red line mentioned in the Chinese version.⁵⁷⁷

Professor Zou further concludes that the purpose of the treaty

⁵⁷⁵ H. Chiu and C. Park, note 42 *supra*, at p. 13; *see also* M. Chemillier-Gendreau, note 15 *supra*, at p. 84.

⁵⁷⁶ M. Chemillier-Gendreau, note 15 *supra*, at pp. 85-86.

⁵⁷⁷ Zou Keyuan, note 174 *supra*, at p. 239; *accord* B. Dubner, note 29 *supra*, at p. 309. *See also* H. Nguyen, note 204 *supra*, at pp. 187-188; M. Chemillier-Gendreau, note 15 *supra*, at pp. 83-84 (“The object and purpose of the 1887 Treaty were the delimitation of the frontier between Tonkin and China.... The Convention relates to the land territories. ...The frontier to be delimited was that between Tonkin and China. Only this part of the present Vietnam was concerned.... 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. ...”).

...was to demarcate the boundary between China and Vietnam according to the Sino-French Treaty of June 9, 1885. There was no mention of the Gulf of Tonkin and only part of the Gulf close to the land was shown on the attached map. Thus the representatives from both parties had no authorization and/or intention to delimit the maritime boundary in the Gulf of Tonkin.⁵⁷⁸

A similar argument can be made with respect to a determination of sovereignty of the South China Sea islands. Chinese and French negotiators clearly did not have the authorization or the intent to make such a determination in 1887. In short, as Professor Zou correctly points out, “the 1887 boundary line decided only the ownership of the coastal islands and did not include mid-ocean islands such as Bach Long Vi Island in the Gulf of Tonkin” or the more distant South China Sea islands.⁵⁷⁹

This conclusion is supported by the fact that Bach Long Vi Island, which is located west of the 1887 boundary line, was “handed over to Vietnam under a decision of...Mao Tse-tung” in the 1950s “to show solidarity of the Sino-Vietnamese friendship and brotherhood.”⁵⁸⁰ If the boundary line had been intended to apply to mid-ocean islands, Bach Long Vi Island would have already been Vietnamese territory and China would not have needed to transfer sovereignty of the island to Vietnam. Furthermore, if China really believed that it acquired title to the Spratlys under to the 1887 Treaty, why did it wait until 1946 to occupy any of its islets?⁵⁸¹

Professor Zou’s conclusions are also supported by the subsequent negotiation of the *Sino-Vietnamese Maritime Boundary Agreement in the Gulf of Tonkin*.⁵⁸² The 2000 Agreement delimits the territorial sea, exclusive economic zone, and continental shelf of the two nations in the Gulf of Tonkin.⁵⁸³ Had the 1887 Treaty intended to delimit the maritime boundary between China and Annam (Vietnam), the 2000 Agreement would not have been necessary.

b. French Recognition before World War II

China claims that French Prime Minister Aristide Briand recognized Chinese sovereignty over the Paracels on May 21, 1921. China also asserts that the Governor-General of French Indochina and a French navigator likewise purportedly acknowledged that the Paracels belonged to China in the 1920s and 1930s, respectively. The MFA has not, however, provided independent evidence to corroborate these claims. Moreover, China’s assertions are at odds

⁵⁷⁸ *Id.*

⁵⁷⁹ Zou Keyuan, note 174 *supra*, at p. 245; accord M. Chemillier-Gendreau, note 15 *supra*, at p. 81.

⁵⁸⁰ Zou Keyuan, note 174 *supra*, at p. 245.

⁵⁸¹ Taiwanese forces occupied Itu Aba Island in the Spratly archipelago in 1946. Chinese forces did not occupy any of the islets until 1988. B. Dubner, note 29 *supra*, at p. 310.

⁵⁸² *Agreement between the People’s Republic of China and the Socialist Republic of Viet Nam on the delimitation of the territorial seas, the exclusive economic zones and continental shelves in Beibu Bay/Bac Bo Gulf*, Dec. 25, 2000 (entry into force: June 30, 2004), reprinted in CENTRE FOR INTERNATIONAL LAW, NATIONAL UNIVERSITY OF SINGAPORE, *CIL Selected Documents on Joint Development and the South China Sea*, Oct. 6, 2011, at p. 81.

⁵⁸³ During the negotiations of the boundary treaty, the head of the Chinese delegation (Han Nianlong) reiterated China’s sovereignty claims to the Paracel and Spratly Islands, stating that “the Xisha Islands and Nansha Islands have always been an inalienable part of Chinese territory. The Vietnamese part should come back to its original position of recognizing that fact, respect China’s sovereignty over these two sets of islands, and withdraw all its personnel from those islands of the Nansha Islands which it occupies.” Shen I, at p. 68.

with other official French declarations, letters, and documents issued during the same time period.⁵⁸⁴

The MFA correctly points out that the Commander of the Navy in Saigon disclaimed French sovereignty over the Paracels in 1920 during an exchange with the Japanese shipping company Mitsui Bussan Kaisha. However, China fails to mention that the Commander did so in his personal capacity and without authorization from the Governor of Cochinchina.⁵⁸⁵ In addition, a subsequent news report on the exchange between Captain Rémy and the Japanese company prompted the French government to re-evaluate its position on French rights to the archipelagoes.⁵⁸⁶

French ownership of the Paracels had been the subject of discussion between Paris and colonial authorities in Indochina earlier in the century. In 1909, the French Consul in Canton (Guangzhou)—Jean-Joseph Beauvais—wrote a letter to the Minister of Foreign Affairs in Paris to discuss possible French claims to the Paracels. After discussing the strategic location of the islands—“the Paracels are of some importance to France: lying halfway between Saigon and Hong Kong, they pose a major threat to shipping and may need a lighthouse”—Beauvais indicated that “France has as many rights to the islands as China.”⁵⁸⁷ Moreover, Beauvais highlighted that China had previously denied ownership of the Paracels, citing the incidents discussed above involving the looting of the German vessel *Bellona* and the Japanese ship *Imegu Maru* that had shipwrecked in the Paracels in 1895 and 1896, respectively. He concluded that “it would therefore seem that, were it in our interest to prevent the Chinese Government from seizing this group of reefs, we could perhaps, with a little research, easily find arguments clearly demonstrating our right as well as irrefutable evidence of its.”⁵⁸⁸ However, Beauvais warned that claiming sovereignty over the Paracels may not be in best interests of France because it could fuel Chinese nationalism, which could be “more damaging to us than the possession of the Paracel Islands would be useful.”⁵⁸⁹ Thus, the French government believed it had a valid claim to the archipelago, but feared that publicly asserting sovereignty could be counterproductive for other French interests in China.

⁵⁸⁴ See Tao Cheng, note 31 *supra*, at p. 268 (“The French colonial authorities in Indo-China had shown their interest in the Paracel Islands and the Spratly Islands as early as the first decade of the present [20th] century and again in the 1920’s. The Chinese suspicion of French designs on these islands was at least partially responsible for Admiral Li Chun’s 1907 mission and Shen Peng-fei’s 1928 visit to the Paracel Islands.”). During the 1907 mission, Admiral Li purportedly “established a Chinese territorial marker on Drummond Island...to commemorate the inspection.” H. Chiu and C. Park, note 42 *supra*, at p. 11.

⁵⁸⁵ M. Chemillier-Gendreau, note 15 *supra*, Annex 12 (*Note dated 6 May 1921, from Directorate for Political and Indigenous Affairs, Government General of Indochina, Hanoi*) (“There is no paper in the official documents of the Navy allowing the nationality of the Paracel Islands to be determined. Nevertheless, I think 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.”)

⁵⁸⁶ *Id.*, at p. 106, Annex 12 (*Note dated 6 May 1921, from the Directorate for Political and Indigenous Affairs, Government General of Indochina, Hanoi*).

⁵⁸⁷ *Id.*, at pp. 104-105, Annex 13 (*Note dated 4 May 1909 from Mr Beauvais, Consulate of France in Canton*), Annex 15 (*Letter dated 4 May 1909 from Mr. Beauvais, Consul of France in Canton, to the Minister for Foreign Affairs, Paris*).

⁵⁸⁸ *Id.*

⁵⁸⁹ *Id.*; see also S. Tønnesson, note 55 *supra*, at p. 7.

By 1921, some French officials were suggesting that France abandon its claims to the islands in exchange for other French interests in China. On March 30, 1921, the Governor of Kwangtung announced (Order No. 831 dated March 30, 1921, and published in the *Official Gazette of Kwantung* (No. 2619 of April 2, 1921)) that the “military Government of the south had decided to incorporate the Paracels into the sub-prefecture of Yai Hien, Hainan Island.”⁵⁹⁰ Two weeks later, the Minister for the Colonies sent a letter to the President du Conseil, Minister for Foreign Affairs, suggesting that “[i]t 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.”⁵⁹¹ Several weeks later, an official from the Directorate for Political and Indigenous Affairs indicated in a note dated May 6, 1921, that a French concession on the Paracels could “...make it easier to settle the matter of compensation for the Tunnam railway” and that “in such a situation, the abandonment by France of all rights to ownership of the Paracels might seem like the compensation demanded” by the Chinese.⁵⁹²

The fact that France was considering “negotiating” the abandonment of its claim to the Paracels implies that French officials believed France had rights to the islands.⁵⁹³ Nonetheless, either the negotiations did not take place or France was unsuccessful in gaining the necessary concessions from the Chinese government regarding non-cession and non-fortification of the islands. Accordingly, by 1922, French officials began to realize that complaisance towards China’s claims could serve Japanese interests.⁵⁹⁴

The decision to assert French claims to the islands as the successor state to the Kingdom of Annam began to take shape in 1928. Having been informed that the Governor of Hainan Island, General Gaston Hoang, had intentions of claiming the Paracels as Chinese territory, Acting Governor General of Indochina Eugène Jean Louis René Robin informed the Minister for the Colonies on December 17, 1928, that “it is...time for us to take the initiative and to assert rights which appear to be recognized both in historical documents and by geographical realities.”⁵⁹⁵ The following month, Chief Resident of Annam Le Fol provided the Governor General with historical evidence to support Annam’s prior sovereignty over the archipelago, citing the actions of Emperors Gia Long and Minh Mang, and the exploits of the Hoang Sa Company.⁵⁹⁶ A month later, on February 26, 1929, a note from the Ministry for Foreign Affairs informed the Ministry for the Colonies of the change in the French position regarding the Paracels:

⁵⁹⁰ M. Chemillier-Gendreau, note 15 *supra*, at Annex 12 (Note dated 6 May 1921, from Directorate for Political and Indigenous Affairs, Government General of Indochina, Hanoi).

⁵⁹¹ *Id.*, at Annex 16 (Note of 18 April 1921 from the Minister for the Colonies to the President du Conseil, Minister for Foreign Affairs).

⁵⁹² *Id.*, at Annex 12 (Note dated 6 May 1921, from Directorate for Political and Indigenous Affairs, Government General of Indochina, Hanoi).

⁵⁹³ *Id.*, at p. 106.

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.*, at p. 107, Annex 20 (Letter No. 2276, dated 17 December 1928, from the Acting Governor General of Indochina, Hanoi, to the Minister for the Colonies, Paris).

⁵⁹⁶ *Id.*, at pp. 107-108, Annex 8 (Letter of 22 January 1929, from the Chief Resident of Annam, Hué, to the Governor General of Indochina, Hanoi).

...the Indochinese administration now supports the view that France has sovereignty over the archipelago and to that end puts forward historical arguments which it intends to develop in a Note to be sent to you shortly. As you point out, the Indochinese administration thus appears to advocate...a position contrary to that decided upon by the French Government in 1921..., which apparently entailed recognizing Chinese sovereignty over the archipelago, subject to the application of the Franco-Chinese Agreements of 2 and 15 March 1897, and of 4 and 10 April 1898.⁵⁹⁷

A letter from the Ministry of the Navy to the Ministry of Foreign Affairs likewise recorded the change in France's position, as well as noting that Annam's claims to the Paracels were superior to that of Nationalist China:

...Mr. Robin currently supports the argument of national sovereignty, based on historical documents which...have not been mentioned before. ...[T]he position apparently agreed, in 1921..., was to recognize Chinese rights to the islands under certain conditions of security and non-cession. ...Annam however possesses historical rights over this group of uninhabited islands which are much less open to question than any Nationalist China might claim, and France, which has a duty to safeguard the integrity of the kingdom under its protection, would do well not to allow itself to be taken by surprise by the fait accompli of Chinese possession which it would no doubt be obliged to accept.⁵⁹⁸

On February 14, 1930, the Kwangtung Provisional Council adopted a resolution to mine guano deposits in the Paracels. Governor General Pierre Marie Antoine Pasquier informed the Ministry of the Colonies of the Chinese action, noting that the

French Government has never officially recognized Chinese sovereignty over [the] archipelago, nor definitively abandoned asserting historical and geographical rights [of the] Empire of Annam, which it had only considered formally relinquishing for reasons [of] political expediency and in exchange [for] guarantees re[ference] non-fortification and non-cession [of the] archipelago to foreign powers. Failing such agreement..., we cannot remain indifferent to [a] fresh assertion [of] sovereignty by Chinese authorities.⁵⁹⁹

Two months later, China claims that France implicitly recognized Chinese sovereignty over the Paracels at the 1930 Hong Kong Far Eastern Meteorological Conference. France purportedly joined other delegations in requesting that the Republic of China construct a weather station in the Paracels. A resolution adopted during the conference provided that

⁵⁹⁷ *Id.*, at p. 108, Annex 21 (Note No. 268, dated 26 February 1929, from the Minister for Foreign Affairs (Directorate for Asia and Oceania), Paris, to the Minister for the Colonies, Political Directorate, Third Bureau, Paris).

⁵⁹⁸ *Id.*, at p. 108, Annex 22 (Letter of 18 February 1929 from the Minister for the Navy, acting Minister for the Colonies, Paris, to the Minister of Foreign Affairs (Directorate for Political Affairs and Trade (Asia-Oceania), Paris).

⁵⁹⁹ *Id.*, at p. 109, Annex 24 (Official telegram of 14 March 1930, from the Governor General of Indochina, Hanoi, to the Ministry of the Colonies, Paris).

The Conference recognizes the great importance to the Meteorology of the China Seas of the Meteorological Station established at Pratas by the Government of China. It expresses the hope and voices the desire that similar stations be established in zones not yet represented, especially on the Macclesfield Bank and the Paracels.⁶⁰⁰

There is no evidence that the French-Indochina representative who attended the conference, Monsieur Bruzon, objected to the proposal. Accordingly, China argues that this request “proves that not only are the Paracel Islands internationally recognized as belonging to China, but that the French themselves share this view.”⁶⁰¹ However, as French authorities correctly pointed out in a subsequent diplomatic note regarding this matter, “the conference was a scientific one and did not deal with political questions.”⁶⁰² In other words, French support for the resolution was not a tacit recognition of Chinese sovereignty over the Paracels. It should also be noted that the delegate from the Zikawei Observatory, Father Louis Froc, while expressing support for the proposal, was ambivalent as to the status of the Paracels, indicating that “there has always been the doubt...as to what flag would be hoisted” over the station.⁶⁰³

Subsequently, on June 19, 1930, the Ministry of Foreign Affairs determined that, based on a 1929 study by P. A. Lopicque (*A propos des lies Paracels* (Saigon, Les editions d'Extreme-Asie)), “the Paracels had not been abandoned and therefore had not become *res nullius*.”⁶⁰⁴ Four months later, the Governor General put an end to France’s reluctance to assert its rights to the Paracels, informing the Minister for the Colonies that historical documents and maps in the possession of the French government were

...sufficient to establish incontrovertibly that Annam took effective possession of the archipelago well before 1909, the date on which the Chinese appear first to have expressed their claims to sovereignty over the Paracels...[and that] the French administration has never ceased to show interest in the archipelago.⁶⁰⁵

On July 31, 1931, a telegram from the Ministry of the Colonies instructed the Governor General that France’s legal position on the Paracels “could be strengthened by [a] surveillance mission...[to the] Paracel archipelago...” but warned that the mission should “have [the]

⁶⁰⁰ Resolution 4, CONFERENCE OF DIRECTORS OF FAR EASTERN WEATHER SERVICES, HONG KONG, 1930, at p. 58, *available at* <http://www.hko.gov.hk/mwg-internal/de5fs23hu73ds/progress?id=7sEupYOYvs>. *See also* H. Chiu and C. Park, note 42 *supra*, at p. 12.

⁶⁰¹ M. Chemillier-Gendreau, note 15 *supra*, Annex 10 (*Note of 29 September 1932 from the Legation of the Chinese Republic in France to the Ministry of Foreign Affairs, Paris*).

⁶⁰² H. Chiu and C. Park, note 42 *supra*, at p. 13.

⁶⁰³ REPORT OF THE CONFERENCE OF DIRECTORS OF FAR EASTERN WEATHER SERVICES, HONG KONG, 1930, at p. 21, *available at* <http://www.hko.gov.hk/mwg-internal/de5fs23hu73ds/progress?id=7sEupYOYvs>. The Zikawei Observatory was established by French Jesuits in Shanghai, China, in 1872 to carry out meteorological observations in the South China Sea. Hong Kong Observatory blog, *available at* <http://www.hko.gov.hk/blog/en/archives/00000047.htm>.

⁶⁰⁴ M. Chemillier-Gendreau, note 15 *supra*, at p. 109.

⁶⁰⁵ *Id.*, at p. 109, Annex 26 (*Letter No. 1512-A.Ex dated 18 October 1930 from the Governor General of Indochina, Hanoi, to the Minister for the Colonies, Paris*).

appearance of [a] simple exercise [of] pre-existing sovereign rights” and should avoid taking actions that could be perceived as “taking possession” of the islands.⁶⁰⁶

When China proclaimed later that year that it was inviting bids from foreign companies to exploit the phosphate deposits in the Paracels, France protested the announcement by a diplomatic note dated December 4, 1931.⁶⁰⁷ The French filed a second protest on April 24, 1932, after China publicly called for bids, citing “the former rights exercised by the emperors of Vietnam, the official taking of possession by Emperor Gia Long in 1816, and the sending of Indochinese troops to guard the islands....”⁶⁰⁸ Then on June 15, 1932 (Decree No. 156-SC), Governor General Pasquier designated the Paracels (Delegation des Paracels) as an administrative unit of Thua Thien (Huế) Province.⁶⁰⁹ A French offer on February 4, 1932, to take the dispute over the islands to arbitration was rejected by the Chinese government on September 29, 1932.⁶¹⁰

Failing to achieve a negotiated settlement of the issue, the French colonial government solidified its control over the archipelago between 1937 and 1939. The head of public works was dispatched to the Paracels in 1937 to “study the potential for maritime and air traffic facilities, and to build a lighthouse on Pattle Island.”⁶¹¹ The following year, Decree No. 156-SC was confirmed by Emperor Bao Dai in a Vietnamese imperial ordinance on March 30, 1938.⁶¹² Then, on May 5, 1939, Governor General Joseph Jules Brévié divided the Paracel archipelago into two delegations—the Crescent Group and the Amphitrite Group.⁶¹³ Additionally, French civil service officers and Vietnamese police were permanently stationed on Pattle Island (Crescent Group) and Woody Island (Amphitrite Group) on a regular basis.⁶¹⁴ Taken as a whole, these French activities clearly contradict China’s assertion that France recognized Chinese sovereignty over the Paracels during the 1920s and 1930s.

During this timeframe, France’s attitude towards the Spratly Islands was likewise ambivalent, but official French records reflect that French authorities viewed the islands as *terra nullius*.⁶¹⁵ On September 23, 1929, France informed the other Great Powers that it had

⁶⁰⁶ *Id.*, at 109, Annex 27 (*Telegram of 4 July 1931 from the Ministry of the Colonies to the Government General [of Indochina]*).

⁶⁰⁷ MFA White Paper (1974); see also M. Chemillier-Gendreau, note 15 *supra*, at p. 38; Nguyen Ba Dien, note 203 *supra*; *The Indisputable Sovereignty of Viet Nam over the Paracel Islands*, NATIONAL COMMITTEE OF BORDER AFFAIRS, MINISTRY OF FOREIGN AFFAIRS, SOCIALIST REPUBLIC OF VIET NAM, Jan. 30, 2011, available at <http://southeastasiansea.wordpress.com/> [hereinafter NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper]; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 206 *supra*.

⁶⁰⁸ *Id.*

⁶⁰⁹ MFA White Paper (1974); see also H. Chiu and C. Park, note 42 *supra*, at p. 8; H. Nguyen, note 204 *supra*, at p. 185; M. Chemillier-Gendreau, note 15 *supra*, at pp. 39, 113.

⁶¹⁰ M. Chemillier-Gendreau, note 15 *supra*, at pp. 38, 109.

⁶¹¹ *Id.*, at pp. 38, 113.

⁶¹² *Id.*; see also SOUTH CHINA SEA STUDIES (2012), at p. 2; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; H. Nguyen, note 204 *supra*, at p. 185; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

⁶¹³ MFA White Paper (1974); see also H. Nguyen, note 204 *supra*, at p. 185; SOUTH CHINA SEA STUDIES (2012), at p. 2; M. Chemillier-Gendreau, note 15 *supra*, at p. 39.

⁶¹⁴ *Id.*

⁶¹⁵ *Id.*, Annex 17 (*Letter dated 26 December 1927 from the Acting Governor General of Indochina, Hanoi, to the Minister for the Colonies, Paris*), Annex 18 (*Note dated 8 March 1928 from Mr Bourgouin*), Annex 19 (*Note dated*

occupied the Spratlys on the grounds that the islands were *terra nullius*. Formal occupation took place in April 1933 and was publicized in the Official Gazette on July 26, 1933. The Spratlys were subsequently incorporated into Bà Rịa Province on December 21, 1933 by the Governor of Cochinchina.⁶¹⁶ Based on the foregoing, it is clear that France did not recognize China's claims to the Spratlys.

c. French Recognition after World War II

Some Chinese and foreign scholars additionally maintain that France tacitly acknowledged China's sovereignty over the South China Sea islands after World War II. To support their position, these scholars cite France's failure to protest the return of Nationalist Chinese troops to Itu Aba Island and Woody Island in 1946, as well as French and Vietnamese inaction when ROC forces were absent from Itu Aba between 1950 and 1956. Accordingly, even if the French validly occupied the Spratlys and the Paracels in 1930s, France relinquished its sovereignty over the islands in 1945 and therefore did not possess a lawful title to which Vietnam could succeed as the successor state to French rights to the archipelagoes.

These assertions are clearly inconsistent with French and Vietnamese sovereign activities in the South China Sea islands following the conclusion of the war. In June 1946, a French infantry platoon, embarked on the *Savorgnan de Brazza*, was dispatched to re-occupy the Paracels, but was compelled to withdraw from the islands in September 1946 as a result of the ongoing French-Indochina war. Nonetheless, when French officials learned that the Chinese Nationalist occupation force had not withdrawn from the Paracels in March 1946 as required by the Exchange of Letters between China and France,⁶¹⁷ France lodged a diplomatic protest on January 13, 1947. A few days later, on January 17, the warship *Le Tonkinois* was deployed to the Paracels to dislodge the Chinese Nationalists from Woody Island. Realizing that they were outnumbered, however, those in the combined French-Vietnamese force regrouped and established their headquarters on Pattle Island.

Later in January 1947, the advice-boat *Commandant Duboc*, under the command of Captain Hennequin, deployed to the Paracels to evaluate the condition of the existing infrastructure on Pattle Island and determine the viability of maintaining French forces in the archipelago. Captain Hennequin's report to the Commander of the Navy in Indochina recommended that France retain possession of the islands—in light of “the substantial facilities built on the island by the Government General and their present state of conservation..., sufficient efforts should be undertaken “to see that this island remains a possession of Indochina.”⁶¹⁸ The existing weather station on Pattle Island was subsequently refurbished and became operational in late 1947 under international station code 48860, and the French

26 November 1928, addressed to the Under-Directorate for Asia and Oceania), Annex 29 (Encoded telegram of 8 March 1929).

⁶¹⁶ *Id.*, Annex 30 (Decree by the Governor of Cochin China (J. Krautheimer), Saigon, 21 December 1933).

⁶¹⁷ *Exchange of Letters between China and France Relating to the Relief of Chinese Troops by French Troops in North Indochina*, Chungking, Feb. 28, 1946, U.N.T.S. Vol. 14, 1948, at p. 151.

⁶¹⁸ M. Chemillier-Gendreau, note 15 *supra*, Annex 34 (Confidential Report of 29 January 1947 on French naval mission to Pattle Island from Captain Hennequin, Commander, 8th division of advice-boats and Captain, advice-boat *Commandant Duboc*, to Rear Admiral, Commander of the Navy in Indochina).

hydrographic survey ship *Ingenieur en chef Girod* conducted oceanographic, geologic, geographic, and ecological studies in the archipelago in 1953.

The French similarly engaged in a series of activities in the Spratlys, to include diplomatic and military acts, in order to substantiate French sovereignty over the archipelago until French troops were finally withdrawn from Indochina in August 1956. The French battleship *Chevreud* deployed to the Spratlys in October 1946 to re-assert French interests in the archipelago and install a sovereignty stele on Itu Aba Island. When France learned that Chinese naval units had illegally occupied Itu Aba in November 1946, French authorities protested the action, demanding that the Nationalist troops withdraw from the island.

France likewise opposed Philippine incursions into the Spratly archipelago. In May 1956, after Tomas Cloma proclaimed his so-called “Freedomland,” which encompassed part of the Spratly archipelago, the French Charge d’Affaires in Manila reminded the Philippine government that the Spratlys had been sovereign French territory since 1933. The French Navy vessel *Dumont d’Urville* also visited Itu-Aba Island in 1956 to demonstrate French-Vietnamese interest in the archipelago.⁶¹⁹

Based on these extensive activities discussed above, China’s assertion that France tacitly acknowledged Chinese sovereignty over the South China Sea islands after World War II is tenuous, at best.

d. Japanese Recognition

Chinese scholars also argue that Japan recognized China’s sovereignty over the Paracels in 1938 by declaring that French claims to the archipelago were not justified given that both France and Great Britain had previously recognized that the Paracels were Chinese territory. China’s position in this regard is clearly inconsistent with the previously discussed French activities in the South China Sea during the first half of the 20th century. It also ignores the fact that Japan was at war with China and had ulterior motives for opposing French claims to the South China Sea islands. On September 18, 1931, Japan invaded and occupied Manchuria. Following a series of skirmishes between Japanese and Chinese forces, Japan launched a full-scale invasion of China on July 7, 1937. By recognizing Chinese sovereignty over the South China Sea islands, Japan was free to invade the Spratlys (in March 1939) and the Paracels (in April 1939) because it was at war with China. It is therefore unlikely that Japan truly recognized Chinese sovereignty of the Paracels over that of France.

Moreover, China’s position does not comport with Britain’s official position regarding French overseas possessions during World War II, which recognized that the French were “highly sensitive about the restoration of all parts of their colonial empire to the *status quo ante* [which would arguably include the Spratlys and Paracels] and that the British Government will firmly support the French position in view of its desire for the closest possible relations with France.”⁶²⁰ It also ignores a British diplomatic note protesting Japan’s announcement in March 1939 that it was placing the Spratly Islands under the administrative jurisdiction of Formosa (Taiwan). The note, dated April 10, 1939, provided:

⁶¹⁹ *Id.*, at p. 43.

⁶²⁰ *Memorandum by the Deputy Director of the Office of European Affairs* (H. Freeman Matthews), Nov. 2, 1944, THE PENTAGON PAPERS, UNITED STATES-VIETNAM RELATIONS (1945-1967), Part V.B.1., at pp. 37-38, available at <http://www.archives.gov/research/pentagon-papers/>.

I have the honour to inform your Excellency that His Majesty's Government in the United Kingdom have been notified of the decision of Your Excellency's Government published on March 31st last to include the Spratley Islands under the jurisdiction of the Governor General of Formosa.

I am instructed to inform your Excellency that His Majesty's Government are unable to admit that the claim of the Japanese Government has any legal foundation and that they deplore the procedure adopted by them in this matter as it can only complicate still further the situation in the Far East.⁶²¹

The 1939 British note is consistent with prior British recognition of French sovereignty over the Spratlys during the 1930s. In 1937, the British Admiralty and Air Ministry proposed leasing Itu Aba or Thitu Islands from the French in order to build an airfield in the Spratlys, a clear recognition of French sovereignty over the islands.⁶²² Similarly, in the course of a debate in the British House of Commons in April 1939, the Foreign Office indicated "that the Spratlys were claimed in full sovereignty by the French Government."⁶²³ Britain remained steadfast in its support of the French claims to all of the South China Sea islands after the war, requesting permission to use Lincoln Island in the Paracels for military exercises in 1948.⁶²⁴

With respect to the Spratlys, Japan protested France's 1933 occupation of nine of the islands in the archipelago, indicating that 12 of the Spratly Islands were Japanese territory based on discovery in May 1920 and economic exploitation of the islands by a Japanese fertilizer company.⁶²⁵ Japan's protest did not, however, recognize Chinese sovereignty of the Spratlys and therefore does not support China's claim to the islands.

The argument that Japan intended to return the South China Sea islands to China at the end of World War II, relying on the separate agreements formally ending hostilities between the two Chinas and Japan, is likewise misplaced. As discussed above, Article 2 of the 1952 *Treaty of Peace between the Republic of China and Japan* simply states that Japan renounced its

⁶²¹ G. Marston, note 330 *supra*, at p. 354; *see also* T. Kelly, note 133 *supra*; M. Chemillier-Gendreau, note 15 *supra*, at Annex 32 (*Note from the Ministry of Foreign Affairs, Directorate for Political Affairs and Trade, (Asia), 10 August 1940*); U.S. DEPT. OF STATE, *Foreign Relations of the United States, Southward Advance of Japanese Expansionist Movement: Hainan and the Spratly Islands*, 1939, vol. III, at p. 117. The United States took a similar position in a diplomatic note delivered to the Japanese Ambassador in Washington on May 17, 1939: "...the Government of the United States does not consider that all islands or reefs within the extensive area delimited in the Japanese memorandum could properly be treated as one island group or that the action of Japan in blanketing within the territory of Japan islands or reefs with respect to which the Japanese Government has heretofore exercised no acts which might properly be regarded as establishing a basis for claim to sovereignty has any international validity." *Id.*, at p. 118.

⁶²² Bob Hackett, Sander Kingsepp, and Anthony Tully, *Japanese Occupation South China Sea Islands—1937-1941* (Rev. 1), RISING STORM—THE IMPERIAL JAPANESE NAVY AND CHINA (1931-1941), 2012, *available at* http://www.combinedfleet.com/SouthChinaSea_t.htm; *see also* M. Chemillier-Gendreau, note 15 *supra*, at Annex 32 (*Note from the Ministry of Foreign Affairs, Directorate for Political Affairs and Trade, (Asia), 10 August 1940*).

⁶²³ M. Chemillier-Gendreau, note 15 *supra*, at p. 39.

⁶²⁴ *Id.*, at p. 118.

⁶²⁵ Shen I, at p. 42; *see also* Tao Cheng, note 31 *supra*, at p. 269; H. Chiu and C. Park, note 42 *supra*, at p. 12; M. Katchen, note 120 *supra*, at p. 1178; M. Bennett, note 14 *supra*, at p. 437; S. Tønnesson, note 55 *supra*, at p. 8.

rights to Taiwan, the Penghu Islands, and the South China Sea islands.⁶²⁶ It does not, however, put forward any proposals with respect to devolution of the island groups. If the intent of this article was to transfer title to Taiwan, explicit devolution of rights in Taiwan's favor should have been included in the treaty. In fact, some scholars have argued that Taiwan, by failing to explicitly include a clear devolution of rights in its favor in the treaty with Japan, in effect "ceased asserting [its] rights to the disputed islands."⁶²⁷ Moreover, the Chinese position fails to take into account that, following the conclusion of the 1952 Treaty, Japan and France exchanged diplomatic notes indicating "that the new treaty had not, in the view of Japan, entailed any change in relation to the San Francisco Treaty."⁶²⁸

Even assuming that Japan renounced its rights to the Spratlys and Paracels in favor of Taiwan, Japan did not have the authority to transfer title of the islands to the ROC. Japan's claims to the South China Sea islands were obtained by armed aggression against France. Upon conclusion of the war, Japan renounced its rights and the title to the islands reverted back to its legitimate sovereign—in this case, France. Taiwan could not receive any greater rights to the South China Sea islands than those possessed by Japan at the conclusion of the war.⁶²⁹

Similarly, the 1972 *Joint Communiqué* offers little in the way of support for the Chinese position. The Communiqué simply states that Article 8 of the *Potsdam Proclamation* would apply.⁶³⁰ As discussed in the following section, neither the *Potsdam Proclamation* nor the *Cairo Declaration* support China's claim to the South China Sea islands.

e. World War II Documents

The *Cairo Declaration* provided that

...Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa [Taiwan], and the Pescadores [Penghu], shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed. ...⁶³¹

⁶²⁶ *Treaty of Peace between the Republic of China and Japan*, Apr. 28, 1952, entered into force Aug. 5, 1952, available at http://www.taiwandocuments.org/doc_all.htm ("It is recognized that under Article 2 of the Treaty of Peace with Japan signed at the city of San Francisco on 8 September 1951..., Japan has renounced all right, title, and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratly Islands and Paracel Islands.").

⁶²⁷ M. Chemillier-Gendreau, note 15 *supra*, at p. 122.

⁶²⁸ S. Tønnesson, note 55 *supra*, at p. 13.

⁶²⁹ The common law principle of "nemo dat quod non habet" provides that "the transferee cannot receive any greater rights than those possessed by the transferor." BROWNIE 217 (8th ed.).

⁶³⁰ *Joint Communiqué of the Government of Japan and the Government of the People's Republic of China*, Sept. 29, 1972, available at <http://www.taiwandocuments.org/japan01.htm> ("The Government of the People's Republic of China reiterates that Taiwan is an inalienable part of the territory of the People's Republic of China. The Government of Japan full understands and respects this stand of the Government of the People's Republic of China, and it firmly maintains its stand under Article 8 of the Potsdam Proclamation.").

⁶³¹ *Cairo Declaration* (November 1943), released Dec. 1, 1943, available at http://www.taiwandocuments.org/doc_all.htm.

The *Potsdam Proclamation* reaffirmed this commitment, stating that “the terms of the *Cairo Declaration* shall be carried out....”⁶³²

China’s reliance on the World War II declarations to support its claim to the South China Sea islands is clearly misplaced. The *Cairo Declaration*, as reinforced by the *Potsdam Proclamation*, only provides that China would recover Manchuria, Formosa (Taiwan), and the Pescadores (Penghu Islands) after the war. The next sentence simply provides that Japan would be expelled from “other territories” which it had taken by violence, but it does not indicate that these “other territories” would be returned to China. Although not specifically stated, the only logical conclusion is that these “other territories” included the Spratly and Paracel Islands, which were seized by violence from France, not China.⁶³³ These islands would, therefore, be restored to France, not China, at the conclusion of the war.

China also emphasizes that “Japan put the Nansha [Spratly] Islands under the jurisdiction of Taiwan” during the war and that “the territories to be restored to China as identified in the Cairo Declaration [and Potsdam Proclamation] naturally included the Nansha Islands.”⁶³⁴ However, the fact that Japan placed the Spratlys under the jurisdiction of Taiwan is irrelevant to a determination of sovereignty over the islands. It was logical for Japan to place the Spratlys under the administration of Taiwan, as Taiwan was Japan’s closest territory to the South China Sea.

Moreover, the implication that the Paracels and Spratlys were part of Taiwan and should, therefore, have been returned to China at the conclusion of the war is clearly inconsistent with the terms of the *Treaty of Shimonoseki*. Taiwan and the Penghu Islands were ceded to Japan by China in 1895 at the conclusion of the first Sino-Japanese War (1894-1895). Article 2 of the *Treaty of Shimonoseki* provides, in part, that

China cedes to Japan in perpetuity and full sovereignty the following territories...:

(b) The island of Formosa [Taiwan], together with all islands appertaining or belonging to the said island of Formosa.

(c) The Pescadores Group [Penghu Islands], that is to say, all islands lying between the 119th and 120th degrees of longitude east of Greenwich and the 23rd and 24th degrees of north latitude.⁶³⁵

The phrase “islands appertaining or belonging to...Formosa” in Article 2b most likely refers to Lü Tao (Green Island) and Lan Yü (Lanyu), two small islands that lie to the east of Taiwan, as well as 11 other small islets adjacent to the main island and the 64 islands that comprise the Penghu (Pescadores) Islands.⁶³⁶ Moreover, both the Paracels and the Spratlys lie well south of 23

⁶³² *Potsdam Proclamation*, July 26, 1945, para. 8, available at http://www.taiwandocuments.org/doc_all.htm.

⁶³³ M. Chemillier-Gendreau, note 15 *supra*, at p. 120.

⁶³⁴ MFA, *The Issue of South China Sea*.

⁶³⁵ *Treaty of Shimonoseki*, Apr. 17, 1895, entered into force May 8, 1895, available at http://www.taiwandocuments.org/doc_all.htm.

⁶³⁶ Chiao-min Hsieh, *Taiwan-Ilha Formosa: A Geography in Perspective*, (London, 1964), pp. viii-372, at p. 6. See also Peter Upton, *International Law and the Sino-Japanese Controversy over Territorial Sovereignty of the Senkaku Islands*, 52 B.U. L. REV 763 (1972), at p. 771.

degrees north latitude, and were, therefore, not considered by Japan or China to be a part of Taiwan or the Penghu Islands in 1895.

The same can be said for 1943. Had the Allied Powers considered the South China Sea islands to be part of Taiwan, they would have been mentioned in the *Cairo Declaration* along with Taiwan's other outlying island group—the Pescadores. It is also important to note that Generalissimo Chiang Kai-shek was present at the Cairo Conference, yet “he did not have any reference to these islands included in the final Declaration....”⁶³⁷ Surely, if the Spratlys and Paracels were considered to be Chinese territory prior to the war, Chiang Kai-shek would have demanded that the archipelagoes be returned to Chinese control at the Conference.⁶³⁸

Other World War II documents support this conclusion. In December 1941, President Roosevelt reassured French Marshal Pétain that that the United States would recognize French sovereignty over its former colonies and that the United States had “no desire to see existing French sovereignty over...any of the French colonies pass to the control of any other nation.”⁶³⁹ One year later, on November 2, 1942, the United States reassured France

...that the restoration of France to full independence, in all the greatness and vastness which it possessed before the war in Europe as well as overseas, is one of the war aims of the United Nations. It is thoroughly understood that French sovereignty will be re-established as soon as possible throughout all the territory, metropolitan and colonial, over which flew the French flag in 1939.⁶⁴⁰

In 1939, the French flag flew over the Spratlys and the Paracels. Similarly, at the Tehran Conference in November-December 1943, the Allied Powers recognized French sovereignty over Indochina.⁶⁴¹

f. Post-War Occupation

China maintains that Nationalist forces accepted the surrender of Japanese forces in the South China Sea at the end of World War II and rightfully “retook” possession of the Paracel and Spratly Islands on behalf of China in 1946. This position is seriously misplaced. Nationalist Chinese troops did, in fact, occupy the islands at the conclusion of the Second World War. However, these troops were simply sent to Itu Aba and Woody Islands to disarm and accept the

⁶³⁷ MFA White Paper (1974); see also Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; M. Chemillier-Gendreau, note 15 *supra*, at p. 120.

⁶³⁸ *Id.*; accord H. Nguyen, note 204 *supra*, at p. 187 (“The silence of the ROC at the Cairo and Potsdam conferences regarding the Paracels and Spratlys constitutes proof of the Chinese indifference to these islands.”).

⁶³⁹ Several months later, on April 13, 1942, the Acting U.S. Secretary of State delivered a note to the French Ambassador in Washington indicating that the U.S. government “recognizes the sovereign jurisdiction of...France over the territory of France and over French possessions overseas.” *United States Position with Respect to French Territory After the War*, Jan. 7, 1944, THE PENTAGON PAPERS, UNITED STATES-VIETNAM RELATIONS (1945-1967), Part V.B.1., at pp. 27-28, available at <http://www.archives.gov/research/pentagon-papers/>.

⁶⁴⁰ *Letter of Robert D. Murphy to General Henri Giraud*, Nov. 2, 1942, THE PENTAGON PAPERS, UNITED STATES-VIETNAM RELATIONS (1945-1967), Part V.B.1., at p. 16, available at <http://www.archives.gov/research/pentagon-papers/>.

⁶⁴¹ *Memorandum of Conversation between President Roosevelt and Marshal Stalin*, Nov. 28, 1943, THE PENTAGON PAPERS, UNITED STATES-VIETNAM RELATIONS (1945-1967), Part V.B.1., at pp. 24-25, available at <http://www.archives.gov/research/pentagon-papers/>.

surrender of the Japanese forces that had been stationed there during the war. General Order Number 1, issued by General Douglas MacArthur on September 2, 1945, directed that “the senior Japanese commanders and all ground, sea, air and auxiliary forces within China (excluding Manchuria), Formosa and French Indo-China north of 16 north latitude shall surrender to Generalissimo Chiang Kai-shek,” while Japanese forces in French Indo-China south of 16 degrees north latitude would surrender to the British (Supreme Allied Commander South East Asia Command).⁶⁴² The order was not intended to transfer title of the Spratly and Paracels Islands to China.

Subsequently, the Republic of China and France agreed in February 1946 that French troops would relieve Chinese Nationalist forces stationed in Indochina north of the 16th degree of latitude (which included both the Paracel and Spratly Islands) no later than March 31, 1946.⁶⁴³ As an occupation force, the Nationalist troops had a legal obligation to depart French Indochina by the 31st of March, but they failed to do so. The fact that Chinese forces illegally remained on Itu Aba and Woody Islands after the Allied occupation of Indochina formally ended in March 1946 was a clear violation of Article 2(4) of the UN Charter and, therefore, does not provide China with clear title to the two archipelagoes.⁶⁴⁴ Accordingly, China’s claim to the South China Sea islands, based on its post-war occupation, has no legal basis under international law.

g. San Francisco Peace Conference

The MFA claims that Chinese sovereignty over the South China Sea islands was recognized during the drafting of the 1951 *Treaty of Peace with Japan*. In this regard, the MFA cites a statement by the Head of the Delegation of the Soviet Union, Andrei Gromyko, which criticized the American-British draft of the treaty for failing to return the South China Sea islands to China.⁶⁴⁵

China’s reliance on Gromyko’s statement to support its position on the South China Sea islands, however, is problematic for a number of reasons. First, Gromyko’s demand for a vote was overwhelmingly defeated by the Conference by a vote of 46 to 3 (with 1 abstention).⁶⁴⁶

⁶⁴² Supreme Commander for the Allied Powers, General Order No. One, Sept. 2, 1945, *available at* http://www.taiwandocuments.org/doc_all.htm.

⁶⁴³ *Exchange of Letters between China and France Relating to the Relief of Chinese Troops by French Troops in North Indochina*, Chungking, Feb. 28, 1946, U.N.T.S. Vol. 14, 1948, at p. 151. *See also* M. Chemillier-Gendreau, note 15 *supra*, at p. 40.

⁶⁴⁴ *Charter of the United Nations*, signed June 26, 1945, entered into force Oct. 24, 1945. *Accord* M. Chemillier-Gendreau, note 15 *supra*, at p. 26 (“Contemporary international law (Charter of the United Nations, Article 2, paragraph 4) prohibits the use of force against the territorial integrity of a State. So military occupation denounced as such cannot, ever, in any way, become a valid, recognized title.”).

⁶⁴⁵ Statement of the First Deputy Minister of Foreign Affairs of the USSR, A. A. Gromyko, at the San Francisco Conference of 1951, Sept. 8, 1951 (“...original Chinese territories which were severed from...[China], such as Taiwan (Formosa), the Pescadores [Penghu Islands], the Paracel Islands and other Chinese territories, should be returned to the Chinese People’s Republic. ...The draft contains only a reference to the renunciation by Japan of its rights to these territories but intentionally omits any mention of the further fate of these territories. ...”).

⁶⁴⁶ *Western Powers Foil Soviet Attempt To Stall San Francisco Conference*, THE EVENING CITIZEN (OTTAWA, CANADA), Sept. 8, 1951. *See also* H. Roque, note 208 *supra*, at p. 193; T. Kelly, note 133 *supra*; SOUTH CHINA SEA STUDIES (2012), at p. 3; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly*

Second, the final text of Article 2 of the Treaty treats Japan's renunciation of rights to Taiwan and the Penghu Islands and the Spratly and Paracel Islands in two separate subparagraphs.⁶⁴⁷ Thus, albeit not specifically stated in the text, Japan presumably renounced its rights to Taiwan and the Penghus in favor of China and its rights to the Spratlys and the Paracels in favor of France. Finally, Vietnam reaffirmed its rights to the South China Sea islands during the seventh plenary session of the Conference. On September 7, 1951, the head of the Vietnamese delegation to the Conference, Prime Minister Tran Van Huu, stated "...as we must frankly profit from all the opportunities offered to us to stifle the germs of discord, we affirm our right to the Spratly and Paracel Islands, which have always belonged to Vietnam."⁶⁴⁸ None of the 51 nations represented at the Conference objected to this statement.⁶⁴⁹

Granted, neither the PRC nor the ROC was invited to participate in the San Francisco Peace Conference. Therefore, the PRC was not in a position to object to the Vietnamese statement at the Conference. Nonetheless, Chinese Premier Zhou En-lai did issue a lengthy statement criticizing the U.S.-UK draft on August 15, 1951, and reiterating China's claims to the South China Sea islands.⁶⁵⁰ So the fact that the PRC did not object to the Vietnamese statement at the Conference is of little consequence.

It should be noted, however, that in 1951 not all nations recognized the PRC as the legitimate government of China. The lawful representative of China to the United Nations between 1945 and 1971 was the Republic of China (ROC).⁶⁵¹ The ROC joined the United Nations

Islands, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; H. Nguyen, note 204 *supra*, at p. 187; M. Chemillier-Gendreau, note 15 *supra*, at pp. 41 and 121.

⁶⁴⁷ Article 2 of the *Treaty of Peace with Japan* (Sept. 8, 1951) provides that:

(a) Japan recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.

(b) Japan renounces all right, title and claim to Formosa and the Pescadores.

(c) Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of 5 September 1905.

(d) Japan renounces all right, title and claim in connection with the League of Nations Mandate System, and accepts the action of the United Nations Security Council of 2 April 1947, extending the trusteeship system to the Pacific Islands formerly under mandate to Japan.

(e) Japan renounces all claim to any right or title to or interest in connection with any part of the Antarctic area, whether deriving from the activities of Japanese nationals or otherwise.

(f) Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands.

⁶⁴⁸ MFA White Paper (1974); *see also* H. Chiu and C. Park, note 42 *supra*, at p. 8; SOUTH CHINA SEA STUDIES (2012), at p. 3; T. Kelly, note 133 *supra*; Nguyen Ba Dien, note 203 *supra*; H. Nguyen, note 204 *supra*, at p. 187; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; M. Chemillier-Gendreau, note 15 *supra*, at p. 41.

⁶⁴⁹ H. Chiu and C. Park, note 42 *supra*, at pp. 8 and 14; *see also* B. Murphy, note 29 *supra*, at pp. 192-193, 201; T. Kelly, note 133 *supra*; SOUTH CHINA SEA STUDIES (2012), at p. 3; Nguyen Ba Dien, note 203 *supra*; H. Nguyen, note 204 *supra*, at p. 187; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; M. Chemillier-Gendreau, note 15 *supra*, at p. 41.

⁶⁵⁰ "[The Paracel Islands and Spratly Islands] have always been China's territory. ...Whether or not the U.S.-British Draft Treaty contains provisions on this subject and no matter how these provisions are worked, the inviolate sovereignty of the People's Republic of China over Nanwei Islands [Spratly Islands] and Hsisha Islands [Paracel Islands] will not be in any way affected." Shen I, at p. 50. *See also* Shen II, at pp. 138, 145-146.

⁶⁵¹ UNGA Res. A/RES/26/2758 (Oct. 25, 1971), *Restoration of the lawful rights of the People's Republic of China in the United Nations*.

in 1945 and retained its membership and seat on the Security Council until October 25, 1971. On that date, the United Nations General Assembly passed Resolution 2758, recognizing the People's Republic of China as the only lawful representative of China to the United Nations and expelling the Republic of China from the organization.⁶⁵² Therefore, Zhou En-lai's statement did not necessarily reflect the Chinese government's official position on this matter and there is no evidence that the ROC publicly objected to Prime Minister Tran's statement.

Chinese scholars nevertheless argue that, despite Vietnam's statement at the Peace Conference, the fact that the 1951 Peace Treaty fails to "identify whom the South China Sea islands should be returned is itself a rejection of Vietnam's claims."⁶⁵³ A similar argument has been advanced by China regarding French claims—as one of the major powers at the Peace Conference, France "would not have allowed the...Treaty to fail to specifically mention France as the recipient of the Paracels and Spratlys."⁶⁵⁴

Of course, these arguments ignore the fact that Article 2 of the Treaty is silent on the post-war status of all the territories over which Japan renounced its rights. Moreover, as mentioned above, Japan's renunciation of rights to Taiwan and the Penghu (Pescadores) Islands on the one hand, and the Spratly and Paracel Islands on the other, is contained in two separate subparagraphs of Article 2 of the 1951 Treaty. Had the drafters of the treaty intended to return the islands to only one nation, they would not have included them in two separate subparagraphs. This bifurcation is also consistent with the *Cairo Declaration*, which specifically states that only Manchuria, Formosa (Taiwan), and the Pescadores (Penghu Islands) would be returned to China at the end of the war. Thus, as the Vietnamese Foreign Ministry correctly points out, it is clear that each subparagraph in Article 2 of the Treaty is relevant to the rights of one particular country:

- subparagraph (b)—the rights of China to Formosa and the Pescadores;
- subparagraph (c)—the rights of the Soviet Union to the Kurile Islands and a portion of Sakhalin
- subparagraph (d)—the trusteeship rights conferred upon the United States

⁶⁵² UNGA Res. A/RES/26/2758 (Oct. 25, 1971), *Restoration of the lawful rights of the People's Republic of China in the United Nations*.

The General Assembly,

Recalling the principles of the Charter of the United Nations,

Considering that the restoration of the lawful rights of the People's Republic of China is essential both for the protection of the Charter of the United Nations and for the cause that the United Nations must serve under the Charter,

Recognizing that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council,

Decides to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.

⁶⁵³ Shen I, at pp. 51, 58-59.

⁶⁵⁴ *Id.*, at p. 58. See also B. Murphy, note 29 *supra*, at p. 192.

- subparagraph (f)—the rights of France/Vietnam to the Spratly and Paracel Islands.⁶⁵⁵

Vietnam's position regarding Article 2 of the Treaty is supported by statements made in 1952 during a debate in the Assembly of the French Union regarding the meaning of the *Peace Treaty with Japan*. Commenting on the failure of the Treaty to specify to whom the South China Sea islands would be returned, the Rapporteur of the Foreign Relations Committee—Nguyen Khac Su—stated that “...these islands have long formed part of the territory of Vietnam. We venture to hope that, in the future negotiations which cannot come too soon, their legal restitution will be effected in a spirit of friendly understanding.”⁶⁵⁶ Maurice Schumann, Secretary of State in the Ministry of Foreign Affairs, similarly stated that “...the Spratlys and Paracels form part of the dominion of the French Union” and the Counselor of the Assembly, Buu Kinh, also recalled Vietnam's rights to the archipelagoes.⁶⁵⁷

The absence of a specific reference to France in the 1951 Treaty can also be explained by the fact that there was a split within the alliance regarding French control over Indochina after the war, which, in and of itself, is a recognition of French sovereignty over Indochina, including the South China Sea islands. China, the Soviet Union, and the United States favored placing Indochina under a system of trusteeship, while Great Britain favored returning the former French colony to France. The split was not, however, over the validity of French sovereignty over Indochina, but rather over France's collaboration with the Nazis and poor French administration of its former colony.⁶⁵⁸

President Roosevelt's position can be traced to the *Atlantic Charter*, which espoused support for national self-determination and independence.⁶⁵⁹ The United States maintained its

⁶⁵⁵ MFA White Paper (1974).

⁶⁵⁶ M. Chemillier-Gendreau, note 15 *supra*, at pp. 41-42.

⁶⁵⁷ *Id.*, at p. 42. It should be noted, however, that the Rapporteur for the act of ratification of the Treaty, Maurice Faure, stated during the debate that he considered that the islands had become *terra nullius*. This statement, however, is clearly inconsistent with French statements and acts in both the Paracels and Spratlys during the 1950s discussed below. *Id.*

⁶⁵⁸ At the Tehran Conference in 1943, Marshal Stalin indicated that “France should not get back Indo-China and that the French must pay for their criminal collaboration with Germany.” President Roosevelt “said he was 100% in agreement with Marshal Stalin..., that after 100 years of French rule in Indo-China, the inhabitants were worse off than they had been before” and “that he had discussed with Chiang Kai Shek the possibility of a system of trusteeship for Indo-China....” *Memorandum of Conversation between President Roosevelt and Marshal Stalin*, Nov. 28, 1943, THE PENTAGON PAPERS, UNITED STATES-VIETNAM RELATIONS (1945-1967), Part V.B.1., at pp. 24-25, available at <http://www.archives.gov/research/pentagon-papers/>. The British were opposed to the idea of a trusteeship because they feared “the effect it would have on their own possessions and those of the Dutch.” The British “have never liked the idea of trusteeship because it is...aimed at future independence.” *Memorandum by President Roosevelt to the Secretary of State*, Jan. 24, 1944, THE PENTAGON PAPERS, UNITED STATES-VIETNAM RELATIONS (1945-1967), Part V.B.1., at p. 30, available at <http://www.archives.gov/research/pentagon-papers/>. At the Yalta Conference in February 1945, President Roosevelt “said he...had in mind a trusteeship for Indochina. He added that the British did not approve of this idea as they wished to give it back to the French since they feared the implications of a trusteeship as it might affect Burma.” *Memorandum of Conversation between President Roosevelt and Marshal Stalin*, Feb. 8, 1945, THE PENTAGON PAPERS, UNITED STATES-VIETNAM RELATIONS (1945-1967), Part V.B.1., at p. 59, available at <http://www.archives.gov/research/pentagon-papers/>.

⁶⁵⁹ “The President of the United States...and the Prime Minister...[of] the United Kingdom...deem it right to make known certain common principles in the national policies of their respective countries.... Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned. Third, they

position of ambivalence towards Indochina until shortly before the death of President Roosevelt on April 12, 1945.⁶⁶⁰ On April 3rd of that year, Secretary of State Stettinius released a statement regarding the proposal to establish the United Nations that, *inter alia*, addressed the issue of territorial trusteeship:

As to territorial trusteeship, it appeared desirable that the Governments represented at Yalta, in consultation with the Chinese Government and the French Provisional Government, should endeavor to formulate proposals for submission to the San Francisco conference for a trusteeship structure as a part of the general Organization. This trusteeship structure, it was felt, should be designed to permit the placing under it of the territories mandated after the last war, and such territories taken from the enemy in this war as might be agreed upon at a later date, and also such other territories as might voluntarily be placed under trusteeship. No discussion was had at Yalta or is contemplated prior to, or at, San Francisco regarding specific territories.⁶⁶¹

The following day, Secretary Stettinius informed French Ambassador Bonnet that the United States would provide assistance to "French Forces in Indo-China...to undertake operations against the Japanese in Indo-China, provided such action does not interfere with operations planned elsewhere."⁶⁶² Thereafter, the issue of trusteeship status for Indochina became a matter for the French to decide.

This policy continued under the Truman administration. In June 1945, the U.S. Ambassador to China was informed that the establishment of a trusteeship in Indochina would not occur without the consent of the French government.⁶⁶³ Three months later, the French overthrew the government of the Democratic Republic of Vietnam, established by Ho Chi Minh on the 2nd of September, and declared that French authority had been restored in

respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them...." *Atlantic Charter*, Aug. 14, 1941, available at <http://avalon.law.yale.edu/wwii/atlantic.asp>.

⁶⁶⁰ See *Memorandum by President Roosevelt to the Secretary of State*, Aug. 28, 1944, THE PENTAGON PAPERS, UNITED STATES-VIETNAM RELATIONS (1945-1967), Part V.B.1., at p. 35; *Memorandum by President Roosevelt to the Secretary of State*, Oct. 16, 1944, THE PENTAGON PAPERS, UNITED STATES-VIETNAM RELATIONS (1945-1967), Part V.B.1., at p. 37; *Memorandum by President Roosevelt to the Under Secretary of State*, Nov. 3, 1944, THE PENTAGON PAPERS, UNITED STATES-VIETNAM RELATIONS (1945-1967), Part V.B.1., at p. 40; *Extract from Under Secretary of State Stettinius Diary*, Jan. 1, 1945, THE PENTAGON PAPERS, UNITED STATES-VIETNAM RELATIONS (1945-1967), Part V.B.1., at p. 45; *Memorandum for the Secretary of State*, Mar. 17, 1945, THE PENTAGON PAPERS, UNITED STATES-VIETNAM RELATIONS (1945-1967), Part V.B.1., at p. 30, available at <http://www.archives.gov/research/pentagon-papers/>.

⁶⁶¹ *Statement by Secretary of State Stettinius on Representation in the Assembly of the Proposed United Nations Organization*, U.S. STATE DEPT. BULLETIN, Apr. 3, 1945, available at <http://www.ibiblio.org/pha/policy/1945/450403a.html>.

⁶⁶² *Note from the Secretary of State to the French Ambassador (Bonnet)*, Apr. 4, 1945, THE PENTAGON PAPERS, UNITED STATES-VIETNAM RELATIONS (1945-1967), Part V.B.1., at p. 72, available at <http://www.archives.gov/research/pentagon-papers/>.

⁶⁶³ THE PENTAGON PAPERS, VIETNAM AND THE UNITED STATES (1940-1950), Vol. I, at p. A-21, available at <http://www.archives.gov/research/pentagon-papers/>.

Cochinchina.⁶⁶⁴ The following month (October 1945), the United States issued its policy regarding Indochina:

US has no thought of opposing the reestablishment of French control in Indochina and no official statement by US GOVT has questioned even by implication French sovereignty over Indochina. However, it is not the policy of this GOVT to assist the French to reestablish their control over Indochina by force and the willingness of the US to see French control reestablished assumes that French claim to have the support of the population of Indochina is borne out by future events.⁶⁶⁵

h. International Civil Aviation Organization (ICAO) Conference

China additionally relies on actions taken at the first ICAO Conference on Asia-Pacific Regional Aviation held in Manila in October 1955 to support its claims to the South China Sea islands.⁶⁶⁶ The Conference unanimously adopted Resolution No. 24, asking Taiwan “to improve meteorological observation on the Spratly Islands four times a day.”⁶⁶⁷ According to Chinese sources, none of the delegations present at the conference, including South Vietnam, objected to the resolution.

The significance of the ICAO resolution is minimal, at best, and is not international recognition of Chinese sovereignty over the Spratly Islands. Clearly, Taiwan was in the best position geographically and physically to perform the increased meteorological observations because it occupied both the Pratas Island and Itu Aba Island (albeit illegally) and had constructed a weather station on Itu Aba in 1946. That is not to say, however, that ICAO or its member states recognized Taiwanese sovereignty over these islands.

i. North Vietnamese Indifference

China also should not rely on statements and activities by North Vietnamese officials in the mid 1950s and early 1960s to support its claim over the South China Sea islands. First, there is no independent evidence to corroborate China’s assertion that the North Vietnamese Deputy Minister of Foreign Affairs and the Deputy Director of the Asia Division of the Foreign Ministry acknowledged at a meeting with Chinese officials in June 1956 that the Spratly and Paracel Islands were historically part of China. The alleged statements, therefore, cannot be viewed as legally valid pronouncements.⁶⁶⁸ Nor is there evidence that these officials had the authority to make such a pronouncement. As Vietnamese scholars point out, a deputy foreign minister and other lower-ranking government officials generally do “not...have the authority to represent a State in such matters.”⁶⁶⁹ Therefore, assuming that the statements were made as alleged, they

⁶⁶⁴ *Id.*, at p. A-22.

⁶⁶⁵ *Id.*, at p. A-23.

⁶⁶⁶ Other nations attending included: Australia, Canada, Chile, Dominica, France, Laos, Japan, New Zealand, the Philippines, the Republic of Korea, Thailand, the United Kingdom, and the United States. MFA, *The Issue of South China Sea*.

⁶⁶⁷ *Id.*

⁶⁶⁸ M. Chemillier-Gendreau, note 15 *supra*, at pp. 128-129.

⁶⁶⁹ SOUTH CHINA SEA STUDIES (2012), at p. 5; *see also* H. Nguyen, note 204 *supra*, at p. 190 (“...Ung Van Kheim’s statement...,if it had existed, was not made in the context of territorial negotiations.”).

would not be legally binding on the government of Vietnam. Nonetheless, given that South Vietnam (not North Vietnam) was the successor state to France's title to the Paracels and Spratlys, "no statement made by...[North Vietnam] can be said to have been made in the context of a dispute or negotiation over these archipelagoes between it and China...."⁶⁷⁰

Second, Prime Minister Pham Van Dong's letter to Chinese Premier Zhou En-lai concerning China's territorial sea declaration in September 1958 simply expresses support for China's 12 nm territorial sea extension—it does not recognize Chinese sovereignty over the Paracel and Spratly Islands.⁶⁷¹ Moreover, even if viewed as a renunciation of rights to the islands, South Vietnam (as the successor state to France), not North Vietnam, was in control of the Paracel and Spratly Islands in 1958. *The Geneva Accords of 1954* divided North and South Vietnam at the 17th parallel pending reunification through free elections to be held by July 20, 1956.⁶⁷² Both the Paracels (16°30'N-112°00'E) and the Spratlys (10°N-114°E) lie south of the 17th parallel; therefore, both were under South Vietnamese administration.⁶⁷³ As a result, North Vietnam "neither had de jure title nor exercised de facto sovereignty over the Paracels and Spratlys" and was not in a position to relinquish the territory.⁶⁷⁴ In short, North Vietnam had nothing to renounce.⁶⁷⁵

Any North Vietnamese expression of support for China must also take into consideration the political realities of the 1950s.⁶⁷⁶ Following the division of Vietnam in 1954, North Vietnam relied almost exclusively on China for material and political support in its war against the South. It would have been problematic, at best, for North Vietnam not to express support for its Communist ally, which was at the time facing its own military threat from U.S. naval activities in the Taiwan Strait.⁶⁷⁷ The same can be said for the statement issued by North Vietnam in May

⁶⁷⁰ *Id.*

⁶⁷¹ H. Nguyen, note 204 *supra*, at pp. 190, 193; accord M. Chemillier-Gendreau, note 15 *supra*, at pp. 129-130 ("...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 claims to the archipelagoes.").

⁶⁷² *Agreement on the Cessation of Hostilities in Viet-nam*, July 20, 1954 [*hereinafter* The Geneva Accords], available at http://avalon.law.yale.edu/20th_century/inch001.asp.

⁶⁷³ H. Nguyen, note 204 *supra*, at p. 191; accord M. Chemillier-Gendreau, note 15 *supra*, at pp. 127-128 ("The territorial partition at the 17th parallel placed both archipelagoes 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...as the successor to the former rights of France over the two archipelagoes....").

⁶⁷⁴ *Id.*

⁶⁷⁵ H. Nguyen, note 204 *supra*, at p. 191; accord SOUTH CHINA SEA STUDIES (2012), at p. 6; M. Chemillier-Gendreau, note 15 *supra*, at p. 130 ("...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.").

⁶⁷⁶ M. Chemillier-Gendreau, note 15 *supra*, at p. 130 ("...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.").

⁶⁷⁷ On August 24, 1958, "after Chinese Communists began heavy shelling of the Kinmen Islands and there were renewed indications of naval activity in Taiwan Straits, units of the Seventh Fleet moved to the Taiwan area to support the Republic of China in a firm stand against aggression. As tension remained high and warlike action continued, ship reinforcements, including aircraft carriers, were sent to the area. By October the tension lessened and the situation became somewhat stabilized." *The New Navy (1954-1959)*, Naval History and Heritage

1965 regarding the U.S.-declared war zone for Vietnam and its adjacent waters, and the May 1969 news story in the Vietnamese daily *Nhan Dan*, both of which purportedly recognized Chinese sovereignty over the Paracels.

In 1988, the Vietnamese government acknowledged the existence of Pham's letter to Zhou, but the MFA explained the historical context in which the statements were made:

...the nation was embroiled in a desperate war for survival when the statements were made; therefore what appeared to be a concession of the Truong Sa to the PRC was actually just a strategic move to deny the United States use of the archipelago and the East Sea. Hanoi believed that any PRC sovereignty over the Truong Sa would be temporary: Viet Nam trusted China in all sincerity and believed that after the war all territorial problems [between the two countries] would be suitably resolved. ...⁶⁷⁸

Therefore, when Pham wrote the letter in 1958, Vietnam did not intend to permanently relinquish its claims to the Paracels.

Nevertheless, China argues that the principle of *estoppel* precludes Vietnam from taking a position contrary to its earlier stance regarding Chinese sovereignty over the South China Sea islands. Although *estoppel* is a well-settled principle of international law that has been applied by the ICJ to resolve a number of territorial disputes, a careful analysis of the Court's application of this principle to the facts of the current dispute does not support China's position with regard to Vietnam.

The ICJ has applied *estoppel* in limited cases where (1) a clear and consistent statement, declaration, or representation (or past conduct) made by one party to another is (2) relied upon by the other party to its detriment or to the advantage of the party making the statement, etc.⁶⁷⁹ China has not provided sufficient evidence to satisfy either of these elements.⁶⁸⁰

Command, p. 223, <http://www.history.navy.mil/avh-1910/PART08.PDF>. See also H. Nguyen, note 204 *supra*, at p. 194.

⁶⁷⁸ T. Kelly, note 133 *supra*.

⁶⁷⁹ *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, I.C.J. Reports 1962, p. 6, 32 ("Even if there were any doubt as to Siam's acceptance of the map in 1908..., the Court would consider...that Thailand is now precluded by her conduct from asserting that she did not accept it. ...France, and through her Cambodia, relied on Thailand's acceptance of the map. ...it is immaterial whether or not this reliance was based on a belief that the map was correct. It is not now open to Thailand...to deny that she was ever a consenting party to it."); *North Sea Continental Shelf*, I.C.J. Reports 1969, p. 3, 26 ("...it appears to the Court that only the existence of a situation of *estoppel* could suffice to lend substance to this contention—that is to say if the Federal Republic were now precluded from denying the applicability of the conventional regime, by reason of past conduct, declaration, etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance of such conduct, detrimentally to change position or suffer some prejudice. ..."); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* I.C.J. Reports 1984, p. 392, 415 ("...*estoppel* may be inferred from the conduct, declarations and the like made by a State which is not only clearly and consistently evinced acceptance by that State of a particular regime, but also had caused another State or States, in reliance on such conduct, detrimentally to change position or suffer some prejudice. ..."); *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, I.C.J. Reports 1990, p. 92, 118 ("So far as Nicaragua relies on *estoppel*, the Chamber will only say that it sees no evidence of some essential elements required by *estoppel*: a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it. ...")

To begin, Prime Minister Pham's letter to Premier Zhou expressed support for China's 12 nm territorial sea extension, not Chinese sovereignty over the South China Sea islands, and indicated that Vietnam would respect the breadth of China's territorial sea as being 12 nm. The letter, unquestionably, does not represent a "clear and consistent" recognition of Chinese sovereignty over the South China Sea islands and therefore fails to meet the first element of *estoppel*. The same is true for the statements purportedly made during the 1960s. Moreover, there is no evidence that China relied on any of these statements to its detriment—since 1949, the PRC has continued to assert China's indisputable sovereignty over all of the South China Sea islands and has protested or taken action against "each and every foreign claim to and invasion of...the South China Sea Islands...."⁶⁸¹ Accordingly, *estoppel* does not apply to the current dispute.

Similarly, it is highly unlikely that the ICJ or other tribunal would find that the Vietnamese government's statement in 1965 regarding the U.S.-declared war zone for Vietnam and its adjacent waters warrants application of the principle of *estoppel*. In a similar situation involving Singapore and Malaysia, the ICJ held that *estoppel* did not apply even though one of the parties to the dispute had specifically stated that it did not claim ownership over a disputed rock.⁶⁸²

The *Pedra Branca (Malaysia/Singapore)* case involved a dispute between Malaysia and Singapore regarding sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge. On June 12, 1953, the Colonial Secretary of Singapore wrote a letter to the British Advisor to the Sultan of Johor requesting information about Pedra Branca, which is situated about 40 miles from Singapore, in order to determine the boundaries of Singapore's territorial waters. Specifically, the Colonial Secretary said,

It is now desired to clarify the status of Pedra Branca. I would therefore be most grateful to know whether there is any document showing a lease or grant of the rock or whether it has been ceded by the Government of the State of Johore or in any other way disposed of.⁶⁸³

The letter was passed to the State Secretary of Johor and three months later, on September 21, 1953, the Acting State Secretary of Johor replied: "I have the honour to refer to your letter...dated 12th June 1953..., on the question of the status of Pedra Branca Rock...and to inform you that the Johore Government does not claim ownership of Pedra Branca."⁶⁸⁴ No further correspondence was exchanged between the parties and Singaporean authorities took no public action upon receipt of the letter.

⁶⁸⁰ SOUTH CHINA SEA STUDIES (2012), at p. 6; accord H. Nguyen, note 204 *supra*, at pp. 194-195.

⁶⁸¹ Shen II, at pp. 145-152.

⁶⁸² *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, I.C.J. Reports 2008, p. 12.

⁶⁸³ *Id.*, at p. 73.

⁶⁸⁴ *Id.*, at p. 74.

First, Singapore argued that Johor's reply was "a formal or express disclaimer of title"; second, Singapore invoked the principle of *estoppel*; and third, Singapore "contended that the reply was a binding unilateral undertaking."⁶⁸⁵

With regard to the first issue, the Court held that it did "not consider the Johor reply as having a constitutive character in the sense that it had a conclusive legal effect on Johor."⁶⁸⁶ Rather, the Court found that the reply was simply "a response to an enquiry seeking information" and that "its denial of ownership was made in that context."⁶⁸⁷ Similarly, regarding Singapore's position that the reply was a binding unilateral undertaking, the Court indicated "that when it is claimed that States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for...."⁶⁸⁸ The Court then observed that the reply "was not made in response to a claim by Singapore or in the context of a dispute between them" and that, therefore, the denial of ownership could not "be interpreted as a binding undertaking."⁶⁸⁹ The same analysis would apply to Vietnam's statement about the 1965 war zone.

Finally, with regard to the application of *estoppel*, the Court pointed out that "a party relying on an *estoppel* must show, among other things, that it has taken distinct acts in reliance on the other party's statement..." and that Singapore had not pointed to any such acts.⁶⁹⁰ On the contrary, after receiving the reply, Singapore "had no reason to change its behavior..." and its actions after 1953 "were a continuation and development of the actions it had taken over the previous century."⁶⁹¹ Therefore, *estoppel* did not apply. Similarly, there is no evidence that China has relied on the Vietnamese statement or changed its behavior with regard to its sovereignty claims in the South China Sea. Like Singapore, China's actions after the Vietnamese statements were made simply constitute a continuation of actions it had taken since the 1940s. Consequently, *estoppel* does not apply.

j. Other Supporting Publications

China additionally cites a number of foreign publications to support its position that the international community recognizes the PRC's claims to the South China Sea islands. Although the list is extensive, none of the cited documents reflect official government recognition of China's claims; therefore, they are of little probative value in assessing China's claimed sovereignty over the disputed islands.

B. Evaluating Vietnam's Position

Vietnam believes that the broad range of actions taken by Vietnamese and French authorities over several hundred years provides incontrovertible evidence of Vietnam's comprehensive, continuous, peaceful and uncontested effective control of the Paracels. According to the MFA, Vietnamese sovereignty was first established between the 15th and 18th

⁶⁸⁵ *Id.*, at p. 81.

⁶⁸⁶ *Id.*

⁶⁸⁷ *Id.*, at pp. 81-82.

⁶⁸⁸ *Id.*, at p. 82.

⁶⁸⁹ *Id.*

⁶⁹⁰ *Id.*, at p. 81.

⁶⁹¹ *Id.*

centuries; consecrated by Emperors Gia Long and Minh Ming in the 19th century; temporarily assumed by the French during the second half of the 19th century and first half of the 20th century; and finally continued in an open, peaceful and normal manner by an independent Vietnam. These actions include, *inter alia*, (1) approving international contracts connected with the islands' economy; (2) conducting law enforcement operations against illegal Chinese aliens and illicit trafficking in weapons and opium; (3) conducting systematic exploitation of the islands' natural resources; (4) providing guarantees to other states; (5) stationing troops and civilian government officials on the islands; (6) protesting Chinese and Japanese incursions; (7) building shrines and temples; (8) collecting tax revenues; (9) organizing and conducting state-sponsored surveys and scientific studies of the islands; (10) organizing and conducting hydrographic surveys of the sea routes and planting of trees on the islands to enhance safety of navigation; (11) providing assistance to foreign ships in distress; and (12) securing the sea lanes for maritime traffic.

Vietnam asserts that France, on behalf of Vietnam, also conducted various activities that confirmed French sovereignty over the Spratly Islands, particularly in 1933 when France formally annexed and occupied a number of features in the archipelago on behalf of Vietnam. At the time, France's annexation of the islands was strictly in compliance with existing international law and state practice. Although Japan successfully challenged France's occupation between 1941 and 1945, Japan was forced to relinquish her claims to the South China Sea islands following the 1951 San Francisco Peace Conference and sovereignty of the islands reverted back to France. Thereafter, French and Vietnamese actions, both before and after the war, clearly demonstrate an effective and active presence in the archipelago, as well as a peaceful exercise of sovereignty over the Spratly Islands.

1. Historical Evidence and Maps

Vietnam bases its claims to the Paracels and Spratlys, in part, on a series of historical documents and maps dating back to the 15th century. China counters Vietnam's assertions, noting that the Paracel Islands described in Vietnamese historical records do not include the Spratlys and are in reality coastal islands off Central Vietnam.⁶⁹² Similarly, some Western scholars believe that Vietnam's historical claims, like China's, are somewhat vague, and there is some doubt as to the authenticity and accuracy of its historical records and maps in that they fail to "specifically identify and distinguish between the Spratly and Paracel archipelagoes."⁶⁹³

Nevertheless, there is some independent evidence from non-Vietnamese sources that supports Vietnam's assertion that the government has been sending ships and men to the Paracels on a regular basis as far back as the early 17th century. Portuguese and Dutch maps from the early 17th century purportedly identify the Paracels as Vietnamese territory.⁶⁹⁴ These maps are consistent with the 1701 writings of a Western missionary on board the French ship *Amphitrite* (*Mystere des atolls—Journal de voyage aux Paracels* (*Mystery of the atolls—Journal of the voyage to the Paracel Islands*)), which reflect that the Paracels belonged to the Kingdom of

⁶⁹² M. Bennett, note 14 *supra*, at p. 434; see also T. Kelly, note 133 *supra*.

⁶⁹³ C. Joyner, note 166 *supra*, at pp. 60-61. As is the case with China's cartographic evidence, Vietnamese historic maps carry very little probative weight in determining the status of the South China Sea island

⁶⁹⁴ T. Kelly, note 133 *supra*; see also SOUTH CHINA SEA STUDIES (2012), at p. 2.

Annam.⁶⁹⁵ Even Chinese writings (Hai Lu's *Hai Quoc Do Chi*) of the same era (1730) confirm Vietnamese sovereignty over the Paracels.⁶⁹⁶ Additionally, a Chinese map of Kwangtung (Guangdong) Province and a description of the Quiongzhou Prefecture published in 1731 do not mention either the Paracels or the Spratlys as part of China.⁶⁹⁷

Western writings from the 19th century likewise support Vietnam's historical claims to the Paracels based on occupation and control. A book published in 1837 by French missionary Monseigneur Jean-Louis Taberd—*Note on the Geography of Cochinchina*—described the Paracel Islands as part of Cochinchina.⁶⁹⁸ A second book published by the Monseigneur in 1838—*History and Description of the Religion, Customs, and Morals of All Peoples*—similarly recorded that the archipelago had been a dependency of Cochinchina for 34 years.⁶⁹⁹ A depiction of the Paracels as Vietnamese territory additionally appears in Taberd's 1838 *An Nam Dai Quoc Hoa Do (Tabula geographica imperia Anamitici—The Map of the An nam Empire)*.⁷⁰⁰

Jean-Baptiste Chaigneau's memoirs (*Memoires sur la Cochinchina*) likewise refer to Emperor Gia Long's annexation of the Paracels in 1816.⁷⁰¹ A reference to the Paracels as Vietnamese territory can also be found in *Japon, Indo-Chine, Empire Birman (ou Ava), Siam, Annam (ou Cochinchine), Péninsule Malaise, etc., Ceylan* by the French explorer and author Adolphe Philibert Dubois de Jancigny.⁷⁰² Additionally, in his 1849 article *Geography of the Cochinchinese Empire*, German missionary Karl Gützlaff "defined the Paracels as part of Vietnam's territory and noted the islands with the Vietnamese name 'Cat Vang'."⁷⁰³ The article discusses Vietnamese economic development of the archipelago, as well as the presence of Vietnamese revenue cutters and a small naval garrison in the Paracels to collect duties from foreign fishermen and protect Vietnamese fishermen.⁷⁰⁴ Aldriano Balbi's *The Italian Compendium of Geography* (1850) similarly includes the Paracel, Pirate (Hà Tiên), and Puolo

⁶⁹⁵ *Historical documents on Vietnam's sovereignty over the Paracel and Spratly Islands*, note 203 *supra*; see also NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper ("...the Paracel is an archipelago belonging to the Kingdom of An Nam.").

⁶⁹⁶ M. Chemillier-Gendreau, note 15 *supra*, at p. 74 ("...Truong Sa...forms a rampart on the periphery of the Kingdom of Annam (Vietnam).").

⁶⁹⁷ *Id.*, at p. 62.

⁶⁹⁸ Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; H. Nguyen, note 204 *supra*, at p. 177.

⁶⁹⁹ H. Chiu and C. Park, note 42 *supra*, at p. 7.

⁷⁰⁰ Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

⁷⁰¹ "Cochinchina, the sovereign of which has today the title of Emperor, is composed of Cochinchina proper, Tonquin, a part of the Kingdom of Cambodia, some uninhabited islands not far from the coast and the Paracels archipelago, composed of uninhabited reefs and rocks. It is only in 1816 that the present Emperor took possession of this archipelago." H. Chiu and C. Park, note 42 *supra*, at p. 7; see also M. Chemillier-Gendreau, note 15 *supra*, at p. 69.

⁷⁰² H. Nguyen, note 204 *supra*, at p. 177.

⁷⁰³ Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; H. Nguyen, note 204 *supra*, at p. 177.

⁷⁰⁴ H. Nguyen, note 204 *supra*, at p. 182 ("We should...mention here the Paracels. ...From time immemorial, junks in large number from Hainan, have annually visited these shoals, and proceeded in their excursions as far as the coast of Borneo. ...The Annam government, perceiving the advantages which it might derive if a toll were raised, keeps revenue cutters and a small garrison on the spot to collect the duty on all visitors, and to ensure protection of its own fishermen.").

Condor (Côn Sơn) Islands within the Kingdom of Annam.⁷⁰⁵ A Chinese map from 1894—Hong Chao’s *Map of the Unified Empire*—which depicts Chinese territory as extending only as far as Hainan Island, confirms the accuracy of these Western writings.

A letter from Chief Resident of Annam Le Fol to the Governor General of Indochina, dated January 22, 1929, confirms that Vietnam effectively occupied the Paracels from the early 18th century onwards and provides detailed information about the administration of the islands by former Vietnamese dynasties from the early years of the 19th century onwards.⁷⁰⁶ Chinese writings from the early 20th century confirm the Chief Resident’s information. The 1906 *Zhongguo Dilixue Jiaokeshu (Manual of Geography of China)*, states in the Generalities chapter “that the Chinese territory is bound in the South at North latitude 18°13', the terminus being the coast of Yazhou, island of Hainan.”⁷⁰⁷ A similar report is found in Li Hanzhung’s *Geography of Guandong*, published in 1909, which indicates that China’s maritime frontiers in the south ended at Hainan Island.⁷⁰⁸

Thus, while the historical evidence submitted by both claimants is subject to doubt, independent sources appear to corroborate Vietnam’s position over that of China, particularly with regard to the Paracels.

2. Economic Development

There is also considerable corroborated evidence that Vietnam systematically exploited the Paracels since at least the middle of the 17th century, if not earlier. The exploits of the Hoang Sa Company, under the direction of various Vietnamese dynasties, are well documented in the historical works of Le Qui Don (*Phu Bien Tap Luc (Miscellaneous Records on the Pacification of the Frontiers)*), a representative of the Chinese Court in Vietnam.⁷⁰⁹ Items recovered from shipwrecks during the annual government-sponsored expeditions were handed over to government officials for assessment at the conclusion of each expedition. Members of the Company were exempt from paying personal taxes and were rewarded monetarily by the government for their efforts.⁷¹⁰ These expeditions were conducted openly and peacefully for over 150 years without Chinese objection.

A book written by John Barrow in 1806—*A Voyage to Cochinchina*—which recorded the travels of the British Envoy to the Chinese Court (Count George Macartney) in Cochinchina in 1793, confirms that Vietnam was economically exploiting the Paracels. The book contains a detailed description of the efforts of the Hoang Sa detachments.⁷¹¹

⁷⁰⁵ The Paracels and Spratlys are not mentioned in the Chinese section of the same book. *Id.*, at p. 183.

⁷⁰⁶ M. Chemillier-Gendreau, note 15 *supra*, at Annex 8 (*Letter of 22 January 1929, from the Chief Resident of Annam, Hué, to the Governor General of Indochina, Hanoi*) (“...The Paracel archipelago...seems to have remained *res nullius* until the beginning of the last century. ...Monsignor Jean Louis Taberd...reports the occupation of the Paracels...in 1816 by Emperor Gia Long.... Although doubts may be cast on the authenticity of the formal taking of possession by Gia Long himself, the occupation was nonetheless effective....”).

⁷⁰⁷ *Id.*, at p. 75.

⁷⁰⁸ H. Nguyen, note 204 *supra*, at p. 172 (“Today the maritime frontiers are limited in the South by the island of Hainan....”).

⁷⁰⁹ M. Chemillier-Gendreau, note 15 *supra*, at Annex 8 (*Letter of 22 January 1929, from the Chief Resident of Annam, Hué, to the Governor General of Indochina, Hanoi*).

⁷¹⁰ *Id.*, at pp. 67, 69.

⁷¹¹ MFA White Paper (1974).

Economic exploitation of the South China Sea islands continued under French rule after Vietnam became a part of the French Empire in 1887. French authorities in Indochina granted licenses for the exploitation of phosphate deposits in both the Paracels and the Spratlys in the 1920s and 1930s. After Vietnam regained its independence, licenses were granted by the South Vietnamese Ministry of Economy to both domestic and international companies to exploit phosphate deposits in the Paracels—Le Van Cang (1956),⁷¹² Vietnam Fertilizers Company (1959-1963),⁷¹³ Vietnam Phosphate Company (1960),⁷¹⁴ and the Vietnam Fertilizer Company and Marubeni Corporation of Tokyo joint venture (1973).⁷¹⁵

Following the unification of the country in 1975-76, the new government entered into cooperative agreements with a number of countries, including Japan (July 1978) and the Soviet Union (July 1980), to explore and exploit hydrocarbon reserves in and around the Spratlys.⁷¹⁶

3. Effective Occupation and Administration

Vietnam has additionally presented convincing evidence that it effectively occupied and administered the Paracels, beginning in 1802 and culminating in the formal annexation of the archipelago by Emperor Gia Long in 1816.⁷¹⁷ In 1946, legal experts from the French Foreign Ministry determined that this annexation and flag-raising ceremony were carried out in conformity with the international law of the time and that “the annexation therefore conferred legal title to Annam.”⁷¹⁸

The 1816 annexation and flag-planting ceremony are recorded in Reverend Jean-Louis Taberd’s 1837 “Note on the Geography of Cochinchina” (printed in the *Journal of the Royal Asiatic Society of Bengal, India*).⁷¹⁹ A similar report is contained in Jean-Baptiste Chaigneau’s *Notice sur la Cochinchine*.⁷²⁰ The first map published by the kingdom, in 1830, included the Paracels (and presumably included the Spratlys) as part of Vietnamese territory.⁷²¹ Search and rescue services were also provided to foreign ships that wrecked near the Paracels (e.g., a French merchant ship in 1830 and a British merchant vessel in 1836).⁷²²

In 1833, Emperor Minh Mang reinforced Vietnam’s sovereignty and administrative control of the Paracels by ordering the planting of trees on the islands to enhance safety of navigation in the hazardous waters around the archipelago.⁷²³ A mapping expedition of the

⁷¹² *Id.*; see also H. Nguyen, note 204 *supra*, at p. 188.

⁷¹³ M. Chemillier-Gendreau, note 15 *supra*, at p. 18.

⁷¹⁴ MFA White Paper (1974); see also *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*.

⁷¹⁵ *Id.*; see also SOUTH CHINA SEA STUDIES (2012), at p. 3.

⁷¹⁶ Shen I, at pp. 55-56.

⁷¹⁷ H. Roque, note 208 *supra*, at p. 192; see also B. Dubner, note 29 *supra*, at p. 311; H. Chiu and C. Park, note 42 *supra*, at p. 7; M. Chemillier-Gendreau, note 15 *supra*, at p. 35.

⁷¹⁸ M. Chemillier-Gendreau, note 15 *supra*, at Annex 38 (*Notes from the Legal Department, Paris, 6 September 1946*).

⁷¹⁹ *Id.*

⁷²⁰ *Id.*, at p. 69.

⁷²¹ H. Roque, note 208 *supra*, at p. 192.

⁷²² Early evidence of Vietnamese search and rescue efforts in the islands dates back to 1634 (assistance provided to the Dutch ship *Gootebrok*) and 1714 (assistance provided to three Dutch vessels). H. Nguyen, note 204 *supra*, at pp. 182-183.

⁷²³ M. Chemillier-Gendreau, note 15 *supra*, at p. 68.

islands was conducted the following year by a naval detachment and, in 1835, naval personnel were deployed to the Paracels to build a temple on Bach Sa (white-sand) Island.⁷²⁴ Additionally, a plan to systematically survey and explore the islands was completed in 1836.⁷²⁵ That same year, Emperor Minh dispatched a naval detachment to explore and map the entire archipelago and erect sovereignty markers on several of the islands.⁷²⁶ Data collected during this expedition were used to draw the *Detailed Map of the Dai Nam* (1838), which clearly reflected that the Paracels and Spratlys were part of Vietnam.⁷²⁷ Thereafter, a naval detachment was deployed to the Paracels each spring to improve knowledge of the sea routes around the archipelago and to collect taxes on fishermen exploiting the region.⁷²⁸ Reports were also periodically prepared by the Ministry of the Interior describing the expenditures and exploitation activities of the Hoang Sa Company in the Paracels.⁷²⁹

These acts of sovereignty by successive Nguyen emperors were conducted openly and peacefully, without objection by China.⁷³⁰ Therefore, not only did China fail to exercise sovereignty over the archipelago, but, by its silence, it acquiesced in Vietnam's claim to the islands.

a. Effective Administration During the French Colonial Period

Effective occupation and control over the South China Sea islands continued under French colonial rule until Vietnam regained its independence after World War II. An 1898 memorandum from the Ministry of the Colonies to the Government General of Indochina discussed the building of a lighthouse in the Paracels in order to assert French sovereignty.⁷³¹ Scientific studies of the islands were conducted, and French warships were tasked with securing the sea lanes for maritime traffic and conducting search and rescue operations for wrecked ships.⁷³² By 1920, French customs officials in Indochina had begun making regular deployments to the islands to counter illegal trafficking in weapons, munitions, and opium.⁷³³

French activities in the Paracel Islands continued unabated and unchallenged throughout the 1920s and 1930s. French colonial institutions conducted a series of scientific missions to the islands beginning in 1925, when scientists from the Oceanographic Institute of Nha Trang, embarked on the French vessel *De Lanessan*, confirmed the existence of rich phosphate deposits in the archipelago.⁷³⁴ Subsequent scientific survey missions were conducted by the French ships *Alerte*, *Astrobale*, and *Ingénieur-en-Chef Girod* in 1927, 1928,

⁷²⁴ *Id.*

⁷²⁵ *Id.*, at p. 69.

⁷²⁶ MFA White Paper (1974); see also *Historical documents on Vietnam's sovereignty over the Paracel and Spratly Islands*, note 203 *supra*; see also NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

⁷²⁷ H. Chiu and C. Park, note 42 *supra*, at p. 7; T. Kelly, note 133 *supra*. Compare B. Dubner, note 29 *supra*, at p. 311.

⁷²⁸ M. Chemillier-Gendreau, note 15 *supra*, at p. 36.

⁷²⁹ *Id.*, at p. 69.

⁷³⁰ *Id.*, at p. 74.

⁷³¹ *Id.*, at p. 104.

⁷³² MFA White Paper (1974).

⁷³³ H. Chiu and C. Park, note 42 *supra*, at pp. 7-8; T. Kelly, note 133 *supra*; M. Chemillier-Gendreau, note 15 *supra*, at pp. 37, 101, 104.

⁷³⁴ H. Chiu and C. Park, note 42 *supra*, at p. 8; see also M. Chemillier-Gendreau, note 15 *supra*, at pp. 37, 104.

and 1934.⁷³⁵ In 1929, the Pierre de Rouville delegation proposed that lighthouses be constructed on Triton and Lincoln Islands, as well as on Da Bac (the North) and Bombay Reefs.⁷³⁶ The crew of the French ship *La Malicieuse* also landed on a number of islets in the Paracels in 1930 and planted flags and emplaced sovereignty columns, without objection from the Chinese government.⁷³⁷

In contrast, during this same timeframe, France zealously protested attempted Chinese incursions in the Paracels. On December 4, 1931, France diplomatically protested an announcement by the Chinese government that it intended to invite bids from foreign companies to exploit the phosphate deposits in the Paracels.⁷³⁸ France renewed its protest on April 24, 1932, after China publicly called for bids, citing Vietnam's former rights to the islands as its legal basis.⁷³⁹

After China rejected France's offer to have the Paracel dispute settled by an international tribunal, the Governor General of Indochina designated the Paracels as an administrative unit of Thua Thien (Huế) Province on June 15, 1932 (Decree No. 156-SC).⁷⁴⁰ In 1937, the head of public works was dispatched to the Paracels by the French colonial government to evaluate the possibility of constructing maritime and air traffic facilities on the islands, as well as build a lighthouse on Pattle Island.⁷⁴¹ Also in 1937, a second attempt to resolve the outstanding dispute through international arbitration met with Chinese opposition. As a result, Vietnamese troops (Garde Indochinoise) under the command of French officers occupied the islands and erected sovereignty columns on a number of the islets in the archipelago.⁷⁴² A lighthouse, meteorological station, and radio station were also constructed on Pattle Island.⁷⁴³

The following year, in March 1938, Emperor Bao Dai confirmed Decree No. 156-SC in a Vietnamese imperial ordinance.⁷⁴⁴ Then, on May 5, 1939, the Governor General of Indochina divided the Paracel archipelago into two delegations—the Crescent Group and the Amphitrite Group.⁷⁴⁵ Following the division, French civil service officers and Vietnamese police were permanently stationed on Pattle Island (Crescent Group) and Woody Island (Amphitrite Group) on a regular basis.⁷⁴⁶

French/Vietnamese forces remained in the Paracels until 1956, with a hiatus of several years during Japan's occupation of the islands during the Second World War. In February 1946, France and China agreed that French troops would relieve Chinese troops stationed in

⁷³⁵ MFA White Paper (1974).

⁷³⁶ *Historical documents on Vietnam's sovereignty over the Paracel and Spratly Islands*, note 203 *supra*; see also NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

⁷³⁷ M. Chemillier-Gendreau, note 15 *supra*, at p. 38.

⁷³⁸ *Id.*, at pp. 38, 102.

⁷³⁹ *Id.*

⁷⁴⁰ *Id.*, at pp. 39, 113.

⁷⁴¹ *Id.*, at pp. 38, 113.

⁷⁴² *Id.*, at p. 39

⁷⁴³ SOUTH CHINA SEA STUDIES (2012), at p. 2; see also NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*.

⁷⁴⁴ M. Chemillier-Gendreau, note 15 *supra*, at pp. 38, 113.

⁷⁴⁵ *Id.*, at p. 39.

⁷⁴⁶ *Id.*

Indochina north of the 16th degree of latitude (which includes both the Paracels and Spratlys) no later than March 31, 1946.⁷⁴⁷ Accordingly, French forces were dispatched to re-occupy the Paracels in June 1946. Although these forces were withdrawn from the Paracels three months later due to the ongoing French-Vietminh War, French Chief of Staff of National Defense General Alphonse Pierre Juin urged the Chairman of the Committee on Indochina to reoccupy the Paracels in October 1946 in order to consolidate France's legal position vis-à-vis China.⁷⁴⁸ Additionally, all ships calling on the Paracels were required to request permission from the French High Commission in Saigon.⁷⁴⁹

Upon learning that Chinese Nationalist forces sent to the Paracels to accept the surrender of the Japanese garrison had illegally remained in the archipelago following the withdrawal of Allied occupation forces from French Indochina in 1946, France issued a formal diplomatic protest on January 13, 1947.⁷⁵⁰ The warship *Le Tonkinois* was also deployed to the area on January 17, 1947, to eject the Chinese Nationalists from Woody Island. Realizing that they were outnumbered, however, the French-Vietnamese forces retreated to Pattle Island.⁷⁵¹ Later that year, the weather station that had operated on Pattle Island from 1938 to 1944 was rebuilt.⁷⁵² That same year, France again suggested that the ongoing dispute be submitted to the ICJ for resolution, but China refused, insisting that French troops be immediately withdrawn from the islands.⁷⁵³ The French hydrographic survey ship *Ingenieur en chef Girod* was subsequently deployed to the Paracels in 1953 to conduct oceanographic, geologic, geographic and ecological studies.⁷⁵⁴

As previously discussed, China's assertion of sovereignty over the Paracels is also contrary to its statement in 1896 concerning the vessels *Bellona* and *Imegu Maru*. When confronted by British authorities after the shipwrecked vessels were looted by Chinese fishermen, the Qing (Ch'ing) government denied ownership of the islands, stating "that the Paracels were abandoned islands which belonged no more to China than they did to Annam, that they were not administratively attached to any district of Hainan and that no special authority was responsible for policing them."⁷⁵⁵ A similar response was provided when Britain

⁷⁴⁷ *Id.*, at pp. 40, 116; *Exchange of Letters between China and France Relating to the Relief of Chinese Troops by French Troops in North Indochina*, Chungking, Feb. 28, 1946, U.N.T.S. Vol. 14, 1948, at p. 151.

⁷⁴⁸ M. Bennett, note 14 *supra*, at pp. 440-441; M. Katchen, note 120 *supra*, at p. 1179; S. Tønnesson, note 55 *supra*, at p. 11; M. Chemillier-Gendreau, note 15 *supra*, at p. 40; M. Chemillier-Gendreau, note 15 *supra*, at Annex 33 (*Letter from General Juin, Chief of Staff of National Defense, to the Chairman of the Committee on Indochina, 7 October 1946*).

⁷⁴⁹ *Id.*, at pp. 117-118.

⁷⁵⁰ M. Bennett, note 14 *supra*, at pp. 440-441; *see also* M. Katchen, note 120 *supra*, at p. 1179.

⁷⁵¹ *Id.*; *see also* S. Tønnesson, note 55 *supra*, at p. 11; M. Chemillier-Gendreau, note 15 *supra*, at p. 40.

⁷⁵² M. Bennett, note 14 *supra*, at pp. 440-441; M. Katchen, note 120 *supra*, at p. 1179.

⁷⁵³ M. Chemillier-Gendreau, note 15 *supra*, at Annex 35 (*Telegram from Ministry of Foreign Affairs, Nanking, 8 March 1947*), Annex 36 (*Wire from Agence France Presse, Nanking, of 31 May 1947 and telegram of 3 June 1947*), Annex 42 (*Note of 15 May 1950 from the Directorate for Asia-Oceania*).

⁷⁵⁴ *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; *see also* NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

⁷⁵⁵ M. Chemillier-Gendreau, note 15 *supra*, at Annex 5 (*Letter No. 704-A-Ex, dated 20 March 1930, from the Governor General of Indochina, Hanoi, to the Minister for the Colonies, Paris*), Annex 12 (*Note dated 6 May 1921, from the Directorate for Political and Indigenous Affairs, Government General of Indochina, Hanoi*), Annex 15 (*Letter dated 4 May 1909 from Mr. Beauvais, Consul of France in Canton, to the Minister for Foreign Affairs, Paris*),

complained about the lack of navigational aids on the Paracels after two British ships collided with a Chinese fishing vessel near the islands. Again, China disclaimed any responsibility, indicating that it did not own the islands.⁷⁵⁶

Contemporaneously with its activities in the Paracels, France also solidified its sovereignty over the Spratly archipelago. In 1927, the *De Lanessan* conducted an initial scientific survey of the islands.⁷⁵⁷ The following year, in November 1928, the New Phosphates Company of Tonkin applied to the Governor of Cochinchina for a permit to exploit phosphate deposits in the Spratlys.⁷⁵⁸ Then in 1930, a French survey team from the *La Malicieuse* conducted a second survey of Spratly Island and hoisted the French flag over the island—the first recorded instance of a sovereignty marker being placed on any of the Spratly Islands.⁷⁵⁹ Thereafter, on September 23, 1930, France notified the other Great Powers that it had occupied the Spratlys on the grounds that the islands were *terra nullius*.⁷⁶⁰ China correctly points out that the French found Chinese fishermen living on the island during the expedition. However, as previously discussed, the fact that a handful of Chinese fishermen sporadically lived on the island for short periods of time is irrelevant to the determination of sovereignty over the archipelago.⁷⁶¹

Subsequently, France dispatched the *Alerte*, the *Astrobale*, and the *De Lanessan* to the Spratlys in April 1933 to officially take physical possession of the archipelago.⁷⁶² Three months later, the French MFA published a notice in the French Journal Officiel (July 26, 1933, page 7837) notifying the international community that French naval units had effectively occupied Spratly Island (with its dependent isles), Islet caye of Amboine (with its dependent isles), Itu Aba Island (with its dependent isles), North East Cay and Shira Island (with their dependent isles), Loaita Island (with its dependent islands), and Thi Tu Island (with its dependent islands).⁷⁶³ Individual notifications were additionally provided to China, Great Britain, Japan, the Netherlands, and the United States.⁷⁶⁴ By claiming the features along with their “dependent” islets/islands, France clearly intended to claim sovereignty over the entire archipelago.⁷⁶⁵

Annex 26 (*Letter No. 1512-A.Ex dated 18 October 1930 from the Governor General of Indochina, Hanoi, to the Minister for the Colonies, Paris*); see also H. Chiu and C. Park, note 42 *supra*, at p. 7.

⁷⁵⁶ H. Roque, note 208 *supra*, at p. 192.

⁷⁵⁷ M. Chemillier-Gendreau, note 15 *supra*, at p. 37; see also H. Chiu and C. Park, note 42 *supra*, at p. 8; T. Kelly, note 133 *supra*.

⁷⁵⁸ M. Chemillier-Gendreau, note 15 *supra*, at p. 38.

⁷⁵⁹ *Id.*; see also H. Chiu and C. Park, note 42 *supra*, at p. 8; T. Kelly, note 133 *supra*.

⁷⁶⁰ M. Chemillier-Gendreau, note 15 *supra*, at pp. 38, 97, 111.

⁷⁶¹ See text accompanying notes 264-272, notes 585-589, and notes 898-902 *supra*. See also B. Murphy, note 29 *supra*, at pp. 201-202. Accord M. Bennett, note 15 *supra*, at pp. 434-435, 446; C. Joyner, note 166 *supra*, at p. 59; H. Roque, note 208 *supra*, at p. 200; Dissenting Opinion of Judge McNair in the *Fisheries Case (United Kingdom v. Norway)*, I.C.J. Reports 1951, p. 116, at p. 184.

⁷⁶² M. Chemillier-Gendreau, note 15 *supra*, at p. 38.

⁷⁶³ S. Tønnesson, note 55 *supra*, at p. 8; see also H. Roque, note 208 *supra*, at p. 192; T. Kelly, note 133 *supra*; M. Chemillier-Gendreau, note 15 *supra*, at pp. 38, 111.

⁷⁶⁴ The Netherlands (occupying Indonesia) and the United States (occupying the Philippines) remained silent on the issue. Great Britain determined that it never perfected its inchoate title to the islands and therefore did not have title to the Spratlys. China and Japan, however, purportendly questioned France’s occupation.

⁷⁶⁵ M. Chemillier-Gendreau, note 15 *supra*, at Annex 31 (*Letter of 30 March 1932 from the Minister for National Defence (Navy) to the Minister for Foreign Affairs - Directorate for Political Affairs and Trade (Asia-Oceania)*).

Following the announced annexation of the Spratlys in July 1933, a headquarters for the French administrative office and guard detachment for the archipelago was established on Itu Aba Island. In December 1933, Governor General Pasquier signed Decree No. 4762-CP (dated December 21, 1933), assigning the Spratlys to the Cochinchinese province of Bà Rịa (French Indochina).⁷⁶⁶ A radio station and weather station were subsequently built on Itu Aba by the Indochina Meteorological Service in 1938—data provided by the weather station was listed by the World Meteorological Organization as originating in Cochinchina.⁷⁶⁷ The French also continued to conduct scientific surveys in the archipelago.⁷⁶⁸

On April 4, 1939, France reasserted its sovereignty over the Spratlys, reaffirming that the islands were part of Annam (Vietnam), after Japan announced that it was placing the islands under the administrative jurisdiction of Taiwan.⁷⁶⁹ The Annamese militia was additionally deployed to counter a Japanese deployment of Formosan militia that had established a camp in the Spratlys, and a French warship on patrol in the South China Sea called on the Spratlys.⁷⁷⁰ China, on the other hand, did not protest either the Japanese declaration or the deployment of Annamese and Formosan militia to the islands.

In October 1946, the French battleship *Chevreud* was deployed to the Spratlys to reassert French interests in the archipelago and its crew installed a sovereignty stele on Itu Aba Island.⁷⁷¹ When France learned that Chinese naval units had occupied Itu Aba in November 1946, French authorities protested the action, demanding that the Nationalist troops withdraw from the island.⁷⁷² A decade later, when Tomas Cloma of the Philippines proclaimed his so-called “Freedomland” in May 1956, France (even though it had withdrawn from Indochina), reminded the Philippine government that the Spratlys were sovereign French territory.⁷⁷³ During the same time period, the French Navy vessel *Dumont d’Urville* was deployed to Itu Aba Island in a demonstration of French-Vietnamese interest in the archipelago.⁷⁷⁴

Chinese scholars claim that the Shanghai newspaper *Shen Bao* reported that China protested France’s formal occupation of the Spratly Islands on July 26, 1933.⁷⁷⁵ A week later, the newspaper reported that a similar protest was filed with French officials by the Guangdong

⁷⁶⁶ *Id.*, at Annex 30 (*Decree by the Governor of Cochin China (J. Krautheimer), Saigon, 21 December 1933*). See also H. Chiu and C. Park, note 42 *supra*, at pp. 8-9; B. Murphy, note 29 *supra*, at p. 203; T. Kelly, note 133 *supra*.

⁷⁶⁷ H. Chiu and C. Park, note 42 *supra*, at p. 9; see also T. Kelly, note 133 *supra*.

⁷⁶⁸ MFA White Paper (1974).

⁷⁶⁹ M. Chemillier-Gendreau, note 15 *supra*, at Annex 32 (*Note from the Ministry of Foreign Affairs, Directorate for Political Affairs and Trade, (Asia), 10 August 1940*). See also H. Chiu and C. Park, note 42 *supra*, at p. 8; T. Kelly, note 133 *supra*.

⁷⁷⁰ M. Chemillier-Gendreau, note 15 *supra*, at Annex 32 (*Note from the Ministry of Foreign Affairs, Directorate for Political Affairs and Trade, (Asia), 10 August 1940*).

⁷⁷¹ T. Kelly, note 133 *supra*.

⁷⁷² *Id.*

⁷⁷³ MFA White Paper (1974).

⁷⁷⁴ *Id.*

⁷⁷⁵ Shen II, at p. 143 (“The...[Spratly] islands...have been inhabited by Chinese fishermen only, and have been recognized by the international community as China’s territories. We are shocked to have received the official French journal announcing France’s formal occupation. ...The Foreign Ministry...will put forward serious protests over the French actions.”); see also H. Chiu and C. Park, note 42 *supra*, at p. 18; B. Murphy, note 29 *supra*, at pp. 191, 203.

provincial government.⁷⁷⁶ Two days later, on August 4th, the Chinese government allegedly delivered a diplomatic note to French authorities reserving its position on China's rights to the Spratlys pending an investigation of the French actions.⁷⁷⁷ After confirming that the nine islands in question were in fact part of the Spratly archipelago, Ambassador Wellington Koo (Gu Weijun) formally protested France's occupation, stating that the Spratly Islands were sovereign Chinese territory.⁷⁷⁸ China's argument that it protested France's occupation of the Spratlys in 1933 is questionable, at best.

Vietnamese officials deny that these diplomatic exchanges occurred. Some scholars have similarly questioned whether China actually protested France's occupation of the Spratlys, observing that the protest note cited by Chinese scholars is not dated and is not mentioned in the February 1974 *Memorandum on Four Large Archipelagoes of the Republic of China in South Sea*.⁷⁷⁹ Nevertheless, even if China did object to the occupation, its protest was based, not on official governmental regulation or effective control of the Spratlys, but rather, primarily on the grounds that Chinese fishermen were living on some of the islets.⁷⁸⁰

As discussed above, under prevailing international law, when determining issues of territorial sovereignty, "the independent activity of private individuals is of little value unless it can be shown that they have acted in pursuance of a licence or some other authority received from their Governments or that in some other way their Governments have asserted jurisdiction through them."⁷⁸¹ In the case of the Spratlys, there is simply no reliable evidence that Chinese fishermen acted pursuant to government authority or that the Chinese government subsequently sanctioned these private acts.⁷⁸² Thus, the private activities relied upon by China do not constitute acts *à titre de souverain* reflecting the intention and will to act

⁷⁷⁶ Shen II, at pp. 143-144 ("The Southwest Commissioner is seriously concerned with the incidents of France occupying the...[Spratly] islands, and will do everything he can to preserve China's sovereignty over these island groups. ...the Yue [Guangdong] Provincial Government...has already lodged protests to the French authorities.").

⁷⁷⁷ *Id.*, at p. 144 ("The Chinese Government is very much concerned with...[the French-declared occupation of and sovereignty over nine islands in the South China Sea]. She hereby requests...the Minister of the French Legation to inquire into and ascertain the name, the exact location and the longitude and latitude of each island and report the same to the Chinese Government. Pending such investigation..., the Chinese Government reserves her titles *vis-à-vis* the...declaration of the French Government."); see also Shen I, at p. 41.

⁷⁷⁸ Shen II, at p. 144; see also Shen I, at p. 42; H. Chiu and C. Park, note 42 *supra*, at p. 13; T. Kelly, note 133 *supra*.

⁷⁷⁹ H. Chiu and C. Park, note 42 *supra*, at note 59; see also F. Bonnet, note 223 *supra*, at p. 17 ("Following the discovery that the Spratly Islands and the Paracel Islands were two different groups, the Chinese government did not protest the French claim on the nine islands").

⁷⁸⁰ H. Chiu and C. Park, note 42 *supra*, at p. 12; see also Shen I, at p. 42 ("At the time of the occupation, the French Government stated that the islands in question were *terra nullius*, but conceded that during their occupation, 'the only people living on the islands were Chinese.'"); M. Katchen, note 120 *supra*, at p. 1178.

⁷⁸¹ *Fisheries Case (United Kingdom v. Norway)*, I.C.J. Reports 1951, p. 116, at p. 184. *Accord Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625, at p. 683 ("...activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority."); see also M. Chemillier-Gendreau, note 15 *supra*, at p. 54.

⁷⁸² M. Bennett, note 14 *supra*, at p. 436; accord H. Roque, note 208 *supra*, at pp. 202-203 (China alludes "merely to the presence of fishermen and sightings of the islands by some of its nationals. Certainly..., these are hardly the type of activities accepted as clear and convincing indicia of *animus possedendi*."); SOUTH CHINA SEA STUDIES (2012), at p. 4 ("...Chinese fishermen's early presence was merely private/individual activities and thus cannot constitute effective occupation by a State as required by international law."); H. Nguyen, note 204 *supra*, at p. 169 ("Occupation by private individuals will not create a title for their country.").

in that capacity and therefore do not support China's claim of indisputable sovereignty over the Spratly archipelago.⁷⁸³

China's position also ignores the fact that, at the time of France's occupation of the Spratlys in 1933, conquest—followed by effective occupation—was a valid method of acquiring territory under prevailing international law.⁷⁸⁴ China's protest, even if it did occur, is therefore irrelevant to the determination of French sovereignty over the Spratly Islands.

In short, there is considerable evidence that France did not intend to abandon its claims in the Spratlys and that it engaged in a series of activities that substantiate French effective control of the archipelago until French troops were withdrawn from Indochina and replaced by South Vietnamese naval forces in August 1956.

b. Effective Administration by South Vietnam

Vietnam started to exercise sovereign control of the South China Sea islands in the 1950s as France slowly began to withdraw from Indochina. On October 14, 1950, France formally turned over defense of the Paracels to Vietnamese forces.⁷⁸⁵ The following year, Premier Tran Van Huu reaffirmed Vietnamese sovereignty over the Paracel and Spratly archipelagoes at the San Francisco Peace Conference.⁷⁸⁶ None of the 51 nations present at the conference objected to this statement, and there is no evidence that the ROC ever opposed the statement.⁷⁸⁷ At the time, the ROC occupied the Chinese seat at the United Nations.

The Vietnamese Navy assumed responsibility for the defense of the archipelago in August 1956, and South Vietnamese forces occupied Pattle Island and Robert Island in April and July 1956, respectively.⁷⁸⁸ That same year, the Department of Mining, Technology, and Small Industries conducted surveys on Pattle, Money, Robert, and Drumond Islands in the Paracels.⁷⁸⁹ Vietnamese Marines subsequently took over the defense of the islands in 1957; however, the Vietnamese Navy continued to regularly patrol the waters around the archipelago.⁷⁹⁰ Beginning in 1959, defense responsibilities were transferred to the Regional Forces of Quang Nam Province.⁷⁹¹ In February of that same year, South Vietnamese forces occupied Duncan Island,

⁷⁸³ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625, at p. 683. *See also* C. Joyner, note 166 *supra*, at p. 59 ("Evidence of...permanent settlement is not compelling in the case of China's claim to the Spratlys."); *accord* M. Bennett, note 14 *supra*, at pp. 434-435 ("Despite the official government position that the Spratly Islands formed an integrated part of its territory, the continuous Chinese presence seems to have consisted of fishermen from Hainan Island, who would temporarily settle on the islands to fish and collect tortoise shells. These stays appear to have been brief, and it is unlikely that the huts and other structures they built survived their departures. ...[T]he question arises as to whether isolated contacts by individual Chinese fishermen are sufficient to establish sovereignty over the Spratlys under international law. Thus the validity of the PRC's official position is subject to doubt."); SOUTH CHINA SEA STUDIES (2012), at p. 5; H. Nguyen, note 204 *supra*, at p. 169.

⁷⁸⁴ M. Katchen, note 120 *supra*, at p. 1179; *see also* M. Bennett, note 14 *supra*, at pp. 440-441.

⁷⁸⁵ M. Chemillier-Gendreau, note 15 *supra*, at pp. 41, 116.

⁷⁸⁶ *Id.*, at p. 41.; *see also* H. Chiu and C. Park, note 42 *supra*, at p. 8; T. Kelly, note 133 *supra*.

⁷⁸⁷ *Id.*; *see also* B. Murphy, note 29 *supra*, at pp. 192-193, 201.

⁷⁸⁸ Shen I, at pp. 51-52.

⁷⁸⁹ *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

⁷⁹⁰ MFA White Paper (1974).

⁷⁹¹ *Id.*

evicting over 80 Chinese fishermen that were illegally living on the island.⁷⁹² And in March, Vietnamese troops occupied Drummond Island.⁷⁹³

French scientists were also granted permission to conduct scientific studies of the Paracels on behalf of South Vietnam (1955, 1957, 1958, and 1961).⁷⁹⁴ In 1960, the first South Vietnamese officials were posted to the Paracels to administer the islands.⁷⁹⁵ The following year, jurisdiction over the Paracels was transferred back to Quang Nam Province (Decree No. 174-NV of July 13, 1961) and given the status of a “Xa” (village of the mainland).⁷⁹⁶

Continued Chinese incursions in the Paracels in the 1970s prompted South Vietnam to reaffirm its sovereignty over the archipelago in a statement issued on July 15, 1971.⁷⁹⁷ That same year, in May, Vietnamese forces conducted a survey on Triton Islands (Paracels).⁷⁹⁸ A lengthy proclamation was issued in February 1974 condemning the Communist Chinese invasion of the Paracels on January 21, 1974.⁷⁹⁹ A diplomatic note was also sent to the signatories of the *Paris Peace Accords of 1973*, calling for a special session of the Security Council.⁸⁰⁰ The Provisional Revolutionary Government of South Vietnam likewise expressed its concern, albeit guarded, over the Chinese invasion.⁸⁰¹ Later that year, South Vietnam reaffirmed its sovereignty over the Paracels at the March meeting of the Economic Commission for the Far East and at the July meeting of the Third United Nations Conference on the Law of the Sea.⁸⁰²

Following the French withdrawal from Indochina in 1956, South Vietnam also began to exercise sovereignty over the Spratly archipelago as the successor state to French claims. On June 1, 1956, the Republic of Vietnam confirmed Vietnamese sovereignty over the Spratlys after Tomas Cloma established his so-called “Freedomland” in the eastern portion of the archipelago.⁸⁰³ Then in mid June, South Vietnam’s Foreign Minister reaffirmed Vietnamese sovereignty over the island chain.⁸⁰⁴ In October, administrative control of the Spratlys was assigned to Phuoc Tuy Province pursuant to Decree No. 143/NV of October 22, 1956.⁸⁰⁵

⁷⁹² SOUTH CHINA SEA STUDIES (2012), at p. 3; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

⁷⁹³ *Id.*

⁷⁹⁴ MFA White Paper (1974); *see also* H. Fontaine, note 358 *supra*.

⁷⁹⁵ MFA White Paper (1974); *see also* H. Chiu and C. Park, note 42 *supra*, at p. 8.

⁷⁹⁶ In 1969, the Paracel Islands became part of the village of Hoa Long, Hoa Vang District, Quang Nam Province (Decree No. 709-BNV/HCDP/26 dated October 21, 1969). MFA White Paper (1974); *see also* Shen I, at p. 52; H. Nguyen, note 204 *supra*, at p. 189; M. Chemillier-Gendreau, note 15 *supra*, at p. 127.

⁷⁹⁷ M. Chemillier-Gendreau, note 15 *supra*, at p. 44.

⁷⁹⁸ Shen I, at p. 52.

⁷⁹⁹ Proclamation by the Government of the Republic of Vietnam, Feb. 14, 1974, *available at* http://www.nguyenthaihocfoundation.org/lichsuVN/tuyenbo_vnch.htm; *see also* M. Chemillier-Gendreau, note 15 *supra*, at p. 127.

⁸⁰⁰ M. Chemillier-Gendreau, note 15 *supra*, at p. 45.

⁸⁰¹ *Id.*, at pp. 45, 128.

⁸⁰² *Id.*, at pp. 45, 127.

⁸⁰³ MFA White Paper (1974); *see also* B. Dubner, note 29 *supra*, at p. 311.

⁸⁰⁴ *Id.*; *see also* H. Chiu and C. Park, note 42 *supra*, at pp. 8-9; B. Murphy, note 29 *supra*, at pp. 192-193, 201.

⁸⁰⁵ B. Murphy, note 29 *supra*, at p. 204; *accord* B. Dubner, note 29 *supra*, at p. 311. *See also* H. Chiu and C. Park, note 42 *supra*, at p. 9; M. Chemillier-Gendreau, note 15 *supra*, at pp. 43, 127.

Faced with increasing Chinese and Filipino incursions in the Spratlys (Itu Aba Island and “Freedomland”), the South Vietnamese Navy launched a series of operations to reassert control over the archipelago. In August 1956, the crew of the cruiser *Tuy Dong* (HQ-04) was directed to erect sovereignty steles and hoist the Vietnamese flag on many of the Spratly Islands.⁸⁰⁶ In 1961, crew members from the Vietnamese cruisers *Van Kep* and *Van Don* landed on Southwest Cay, Thitu Island, Loaita Island, and Amboyna Cay to erect sovereignty steles and raise the Vietnamese flag.⁸⁰⁷ The cruisers *Tuy Dong* and *Tay Ket* engaged in similar activities in 1962 on Spratly Island and Namyt Island. In 1963, the sovereignty steles on all of the main islands in the Spratlys were rebuilt by crew members of the Navy vessels *Huong Giang*, *Chi Lang*, and *Ky Hoa* (Spratly Island, May 19, 1963; Amboyna Cay, May 20, 1963; Thitu and Loaita Islands, May 22, 1963; and North East and South West Cays, May 24, 1963).⁸⁰⁸ Regular naval patrols of the archipelago continued through 1964,⁸⁰⁹ although the frequency of the patrols was significantly reduced after 1963 as a result of the ongoing conflict with North Vietnam. Vietnamese naval units also carried out a number of survey and mapping expeditions in the region between 1960 and 1967.⁸¹⁰

Continued counterclaims by other claimants to the Spratlys during the 1970s resulted in sharp protests by the Saigon government. In April 20, 1971, the MFA delivered a diplomatic note to the Malaysian government outlining Vietnam’s position in support of its sovereignty claims in the archipelago.⁸¹¹ Three months later the MFA reaffirmed Vietnamese sovereignty over the Spratlys in a statement issued on July 15, 1971.⁸¹² In May 1973, Vietnam conducted surveys on Pagasa Island, Loaita Island, and Northeast Cay, and, in July, occupied Namyt Island in the Spratlys.⁸¹³ Also in July, the Ministry of Agricultural Development and Land’s Institute of Agricultural Research conducted a survey of Namyt Island.⁸¹⁴ Then, on September 6, 1973, the Spratlys were incorporated into Phuoc Tuy Province (Decree No. 420—BNV/HCDP/26).⁸¹⁵ Diplomatic notes were also delivered to Taiwan (January 29, 1974) and the Philippines (February 12, 1974) rejecting Taipei’s and Manila’s respective claims to the Spratlys as unfounded.⁸¹⁶ Later that year, South Vietnam reaffirmed its sovereignty over the island chain at the March 1974 meeting of the Economic Commission for the Far East and at the July 1974 meeting of the Third United Nations Conference on the Law of the Sea.⁸¹⁷

⁸⁰⁶ M. Chemillier-Gendreau, note 15 *supra*, at pp. 117, 125.

⁸⁰⁷ MFA White Paper (1974); *see also* H. Nguyen, note 204 *supra*, at p. 189.

⁸⁰⁸ MFA White Paper (1974); *see also* *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

⁸⁰⁹ H. Chiu and C. Park, note 42 *supra*, at p. 8.

⁸¹⁰ Shen I, at p. 52.

⁸¹¹ M. Chemillier-Gendreau, note 15 *supra*, at p. 127.

⁸¹² *Id.*, at p. 44.

⁸¹³ Shen I, at p. 52.

⁸¹⁴ *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

⁸¹⁵ M. Chemillier-Gendreau, note 15 *supra*, at pp. 44, 127.

⁸¹⁶ MFA White Paper (1974).

⁸¹⁷ SOUTH CHINA SEA STUDIES (2012), at p. 3; *see also* M. Chemillier-Gendreau, note 15 *supra*, at pp. 45, 127; T. Kelly, note 133 *supra*; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

Based on the foregoing, the other South China Sea claimants cannot argue convincingly that South Vietnam did not exercise effective control of the South China Sea islands or that Saigon intended to abandon its claims to the two island groups. Nevertheless, some scholars have noted that, despite the extensive diplomatic initiatives by Saigon, South Vietnam did not physically occupy any of the Spratly Islands until 1973.⁸¹⁸ However, given the harsh conditions and remote location of the islands, as well as the ongoing civil war on the mainland, it is understandable that South Vietnamese military units were not deployed to the Spratlys between 1956 and 1973.⁸¹⁹

c. Post-unification Administration

Following unification of the country on April 30, 1975, the Socialist Republic of Vietnam inherited South Vietnam's title to the Paracels and Spratlys and continued to assert sovereignty over the two archipelagoes. In April 1975, North Vietnamese troops replaced the South Vietnamese garrisons on Southwest Cay, Sand Cay, Sin Cowe Island, Spratly Island, and Amboyna Cay.⁸²⁰

In May 1975, the Vietnamese government incorporated the Paracel and Spratly Islands into the territory of Vietnam and renamed the archipelagoes Hoang Sa and Truong Sa.⁸²¹ The following year, Vietnam incorporated the Spratly Islands into Dong Nai Province in March 1976.⁸²² On May 12, 1977, the Vietnamese government issued a *Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf*, which reaffirmed, in part, that the Spratlys and Paracels formed an integral part of Vietnamese territory.⁸²³

In September 1982, the Paracels were placed under the administrative control of Quang Nam-Da Nang Province.⁸²⁴ Two months later, on November 12, the Government of Vietnam issued a statement on the territorial sea baselines of Vietnam, which included both the Paracel and Spratly Islands.⁸²⁵ Then, on March 25, 1983, Vietnam protested Malaysia's claim to three islets in the archipelago.⁸²⁶ In a further demonstration of sovereignty, Vietnamese forces subsequently occupied Bo Reef, West Reef, Ladd Reef, Pigeon Reef, East Reef, Cornwallis South

⁸¹⁸ B. Murphy, note 29 *supra*, at p. 204.

⁸¹⁹ *Island of Palmas Case (Netherlands/U.S.A.)*, U.N. Rep., Vol. II, p. 829 (1928), p. 831, at p. 840; *Legal Status of Eastern Greenland Case (Denmark v. Norway)*, P.C.I.J., Series A/B, No. 53 (1933), at p. 46; *Western Sahara Advisory Opinion*, I.C.J. Reports 1975, p. 12, at p. 43; *Clipperton Island Arbitration (Mexico v. France)*, 2 R.I.A.A. 1105 (1931), at pp. 393-394. [The cited pages are from the English translation at 26 Am. J. Int'l L. 390, at 393-394 (1932).]

⁸²⁰ Shen I, at p. 55; see also M. Chemillier-Gendreau, note 15 *supra*, at p. 45.

⁸²¹ *Id.*

⁸²² Shen I, at p. 55.

⁸²³ *Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of 12 May 1977*, available at <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/VNM.htm>.

⁸²⁴ Additional administrative measures regarding the Paracels were taken in June 1996 (annexed the Paracels into the city of Da Nang) and April 2007 (establishment of Truong Sa town, Song Tu Tay and Sinh Ton Communes under Truong Sa District. *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

⁸²⁵ *Statement of 12 November 1982 by the Government of the Socialist Republic of Viet Nam on the Territorial Sea Baseline of Viet Nam*, available at <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/VNM.htm>.

⁸²⁶ M. Chemillier-Gendreau, note 15 *supra*, at p. 45

Reef, Collins Reef, Lansdowne Reef, Alison Reef, Petley Reef, South Reef, Prince of Wales Bank, Bombay Shoal, and Vanguard Bank between February 1987 and July 1989 to counter continued Chinese inroads in the archipelago.⁸²⁷ An economic and scientific complex was also constructed in the Spratlys in August 1989.⁸²⁸ In addition, a government-organized fishing fleet was dispatched to exploit the East Sea fisheries and the government built a series of civilian installations, including scientific stations and lighthouses, on a number of the occupied islets.⁸²⁹

Official acts, decrees, resolutions, laws, diplomatic correspondence, etc., taken by the Socialist Republic of Vietnam since unification of the country have continued to demonstrate sovereignty over both the Spratly and Paracels Islands. Vietnam's declaration upon ratifying the United Nations Convention on the Law of the Sea in 1994 reaffirmed Vietnamese sovereignty over the disputed archipelagoes.⁸³⁰ Similarly, Vietnam delivered a *note verbale* to the United Nations in August 1998 protesting China's 1998 *Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China*, which provides, in part, that Vietnam had indisputable sovereignty over the two island groups.⁸³¹

On December 3, 2007, Vietnam strongly protested China's decision to establish Sansha City to administer the Spratly and Paracel Islands.⁸³² Similarly, on March 12, 2009, Vietnam protested the Philippines' new archipelagic baselines, which refers to some of the Spratly Islands as Philippine territory.⁸³³ On May 8, 2009, Vietnam sent a diplomatic note to the UN Secretary-General rejecting China's U-shaped line in the South China Sea and reaffirming Vietnamese sovereignty over the Spratlys and Paracels.⁸³⁴ A similar position was taken by Hanoi

⁸²⁷ Shen I, at p. 56.

⁸²⁸ M. Chemillier-Gendreau, note 15 *supra*, at p. 46.

⁸²⁹ T. Kelly, note 133 *supra*.

⁸³⁰ *Socialist Republic of Vietnam Declaration upon Ratification of UNCLOS*, July 25, 1994, available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

⁸³¹ *Viet Nam: Dispute regarding the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China which was passed on 26 June 1998*, reprinted in UN LAW OF THE SEA BULL., No. 38, 1998, at p. 55.

⁸³² *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper).

⁸³³ *Id.*

⁸³⁴ *Note Verbale No. 86/HC-2009*, May 8, 2009, available at http://www.un.org/depts/los/clcs_new/clcs_home.htm. Most international maritime law experts and foreign governments (including the other South China Sea claimants), however, would agree that China's U-shaped claim in the South China Sea has no basis in international law or state practice. Vietnam, for example, has asserted that "China's claim over the islands and adjacent waters in the Eastern Sea (South China Sea) as manifested in the [U-shaped] map attached with Notes Verbale CLM/17/2009 and CLM/18/2009 has no legal, historical or factual basis, [and] therefore is null and void." *Note Verbale*, Permanent Mission of the Socialist Republic of Vietnam to the United Nations, No. 86/HC-2009 (8 May 2009), http://www.un.org/depts/los/clcs_new/commission_submissions.htm. Similarly, the Philippines has stated that "the claim...by the People's Republic of China on the relevant waters as well as the seabed and subsoil thereof (as reflected in the so-called nine-dash line map attached to Notes Verbales CML/17/2009...and CML/18/2009...)...would have no basis under international law, specifically UNCLOS. *Note Verbale*, Philippine Mission to the United Nations, No. 000819 (4 August 2009) and 000228 (5 April 2011), at http://www.un.org/depts/los/clcs_new/commission_submissions.htm. Even Indonesia, which is not a party to the dispute, has protested China's claim, indicating that the "so called nine-dotted-lines map as contained in...circular note Number CML/17/2009...clearly lacks international legal basis and is tantamount to upset[ting] the UNCLOS 1982." ⁸³⁴ *Note Verbale*, Permanent Mission of the Republic of Indonesia, No. 480/POL-703/VII/10 (8 July 2010),

in response to the Philippines' protest of Vietnam's submission to the UN Commission on the Limits of the Continental Shelf claiming an extended continental shelf for Vietnam in the South China Sea.⁸³⁵ Additionally, Vietnam's new *Law of the Sea* (2012) specifically applies to both the Paracel and Spratly archipelagos.⁸³⁶

Based on the foregoing, it is clearly apparent that the unified Vietnam has not abandoned its legitimate claims to the South China Sea islands.

4. Right of Cession

International law recognizes that a state may cede sovereignty over a particular territory to another state.⁸³⁷ Therefore, provided that Vietnam can prove that France validly exercised sovereignty over the South China Sea islands in the 1930s, and that France ceded the islands to Vietnam (South Vietnam) after it became an independent state, the SRV would have an indisputable claim to the islands by right of cession.⁸³⁸

Some scholars, however, are skeptical that the right of cession applies to the Spratlys because France purportedly did not relinquish control of the islands to Vietnam after it was granted independence.⁸³⁹ A letter written in 1951 by Jean Letourneau, French Minister of State with responsibility for relations with Associated States, to the Minister for Overseas Territories suggested that the Spratlys remained French territory following the establishment of the new State of Vietnam and should therefore be placed under the control of the French Department of Overseas Territories:

...Since 1933, when the French Government effectively took possession of the Spratlys on behalf of France and up to the present day, these islands were included, for administrative purposes, under the former Government General of Indochina.... Political developments since then in the former Indochinese Federation and which resulted in the replacement of the latter by the three new Associated States have in no way prejudiced France's rights over this archipelago. ...[T]he fact that the Spratlys were for a time attached to Cochin China simply for administrative convenience cannot be relied on by the new State of Vietnam as justification for rights it never possessed. ...[U]nless it is considered...that the French High Commissioner in Saigon should retain the administration of these territories within his powers, it would appear...that the Spratlys

http://www.un.org/depts/los/clcs_new/commission_submissions.htm. The United States has also questioned the validity of the "nine-dashed line." On February 5, 2014, Assistant Secretary of State Daniel Russel testified before the House Committee on Foreign Affairs Subcommittee on Asia and the Pacific. During his testimony, Secretary Russel indicated, in part, that "any use of the 'nine-dash line' by China to claim maritime rights not based on claimed land features would be inconsistent with international law." Daniel R. Russel, Assistant Secretary, Bureau of East Asian and Pacific Affairs, Testimony Before the House Committee on Foreign Affairs Subcommittee on Asia and the Pacific (Washington, DC), Maritime Disputes in East Asia, Feb. 5, 2014, available at <http://www.state.gov/p/eap/rls/rm/2014/02/221293.htm>.

⁸³⁵ *Note Verbale No. 77/HC-2011*, May 3, 2011, available at

http://www.un.org/depts/los/clcs_new/clcs_home.htm.

⁸³⁶ *Law of the Sea of Viet Nam*, Law No. 18/2012/QH13, June 21, 2012.

⁸³⁷ BROWNIE 217 (8th ed.).

⁸³⁸ B. Murphy, note 29 *supra*, at p. 198.

⁸³⁹ H. Roque, note 208 *supra*, at p. 204 ; see also M. Chemillier-Gendreau, note 15 *supra*, at pp. 118, 124.

should now come under the French Department of Overseas Territories, on the same basis as other French territories in the Pacific. ...⁸⁴⁰

An internal note written by the French Ministry of Foreign Affairs in 1957 similarly indicated that France had not claimed the Spratlys on behalf of Vietnam, but rather, for itself:

The French Government considers that the Spratly islands, taking official possession of which was the subject of a notice published in the Official Journal of 26 July 1933, are French. The sovereignty of these islands is also claimed by the governments of Beijing, Taipei and Saigon. Manila communicated support for a claim made privately in the last year by one of its nationals.⁸⁴¹

Accordingly, although France may have ceded the Paracels to Vietnam, it did not do so with regard to the Spratlys. The efficacy of this argument is highly problematic, however, given the multitude of official actions taken by the French government dating back to the 1930s that bring into question the true intent of the 1951 letter and 1957 note and lead to a different conclusion.

On June 14, 1932, the Governor General of Indochina designated the Paracels as an administrative unit of Thua Thien (Huế) Province in Annam (Decree No. 156-SC).⁸⁴² The following year, on December 22nd, Governor General Pasquier assigned the Spratlys to the Cochinchinese (French Indochina) Province of Bà Rịa (Decree No. 4762-CP).⁸⁴³ Then, on April 4, 1939, in response to Japan's announcement that it was placing the Spratlys under the administrative jurisdiction of Taiwan, the French government filed a strongly worded protest, indicating that the islands were part of Vietnam.⁸⁴⁴

⁸⁴⁰ M. Chemillier-Gendreau, note 15 *supra*, at p. 118, Annex 39 (*Letter of 7 May 1951 from the Minister of State with responsibility for relations with Associated States to the Minister for Overseas Territories*).

⁸⁴¹ "Le gouvernement français considère que les îles Spratly, dont la prise de possession officielle a fait l'objet d'un avis publié au Journal Officiel du 26 juillet 1933, sont françaises. La souveraineté de ces îles est également revendiquée par les gouvernements de Pékin, de Taïpei et de Saïgon. Celui de Manille vient d'appuyer une revendication formulée, l'an dernier, à titre privé, par un de ses ressortissants." Note pour le Secrétaire Général a.s. des Iles Spratly, Ministère des Affaires Étrangères, Asie-Océanie, No. 20 JMB/GM, 20.2.57, pp. 389-392, dos. 522, Chine 1956-67, série Asie-Océanie, MAE, reprinted in S. Tønnesson, note 55 *supra*, at p. 12 (note 28).

⁸⁴² Emperor Bao Dai confirmed the French decree in a Vietnamese imperial ordinance on March 30, 1938. MFA White Paper (1974); see also H. Chiu and C. Park, note 42 *supra*, at p. 8; H. Nguyen, note 204 *supra*, at p. 185; SOUTH CHINA SEA STUDIES (2012), at p. 2; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; M. Chemillier-Gendreau, note 15 *supra*, at pp. 39 and 113; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

⁸⁴³ MFA White Paper (1974); see also B. Murphy, note 29 *supra*, at p. 203; H. Chiu and C. Park, note 42 *supra*, at p. 9; T. Kelly, note 133 *supra*; SOUTH CHINA SEA STUDIES (2012), at p. 2 (The decree was implemented by the Governor of Cochinchina, Jean-Félic Krautheimer.); M. Chemillier-Gendreau, note 15 *supra*, at pp. 39, 111, Annex 30 (*Decree by the Governor of Cochin China (J. Krautheimer), Saigon, 21 December 1933*); Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; H. Nguyen, note 204 *supra*, at p. 186.

⁸⁴⁴ MFA White Paper (1974); see also H. Roque, note 208 *supra*, at p. 192; SOUTH CHINA SEA STUDIES (2012), at p. 2; T. Kelly, note 133 *supra*; H. Chiu and C. Park, note 42 *supra*, at p. 8; M. Chemillier-Gendreau, note 15 *supra*, at p. 39.

A decade later, on June 5, 1948, France and Vietnam signed the *Ha Long Bay Agreement*, which allowed for the creation of a unified State of Vietnam (Tonkin, Annam, and Cochinchina) associated with France within the French Union.⁸⁴⁵ The following year, on March 8, 1949, France signed the *Élysée Agreement* with the State of Vietnam, agreeing to recognize the independence of Vietnam and transferring administrative power of the state to the Vietnamese government.⁸⁴⁶ Then, on July 5, 1949, the French government proclaimed the unification of Tonkin, Annam and Cochinchina into the State of Vietnam within the French Union. Based on the assignment of the Paracels to Annam in 1932 and the Spratlys to Cochinchina in 1933, the new State of Vietnam included both of the archipelagoes.

French inaction with regard to the Spratlys during the 1950s likewise draws into question the validity of the 1951 letter and 1957 note. There is no evidence that France attempted to include a provision in Article 2 of the San Francisco Peace Treaty that would have returned the Spratly Islands to French control after the war. Nor did France object to the statement by Prime Minister Tran at the Peace Conference that reaffirmed Vietnamese sovereignty over the Spratly and Paracel Islands.⁸⁴⁷ France also did not challenge Foreign Minister Vu Van Mau's statement several weeks later that reaffirmed Vietnam's sovereignty over the archipelago,⁸⁴⁸ or the Vietnamese decree (Decree No. 143/NV of October 22, 1956) that assigned administrative control of the Spratlys to Phuoc Tuy Province.⁸⁴⁹ Vietnam's placement of sovereignty steles on a number of the Spratly Islands in 1956,⁸⁵⁰ 1961,⁸⁵¹ 1962,⁸⁵² and 1963⁸⁵³ also went unchallenged by France. If France had really intended to retain title over

⁸⁴⁵ The Pentagon Papers, Gravel Edition, Vol. 1, Chap. 2 (Boston: Beacon Press, 1971), pp. 1-52.

⁸⁴⁶ *Id.*

⁸⁴⁷ MFA White Paper (1974); see also H. Chiu and C. Park, note 42 *supra*, at p. 8.; SOUTH CHINA SEA STUDIES (2012), at p. 3; T. Kelly, note 133 *supra*; Nguyen Ba Dien, note 203 *supra*; H. Nguyen, note 204 *supra*, at p. 187; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper; B. Murphy, note 29 *supra*, at pp. 192-193, 201.

⁸⁴⁸ *Id.*

⁸⁴⁹ B. Murphy, note 29 *supra*, at p. 204; accord B. Dubner, note 29 *supra*, at p. 311. See also H. Chiu and C. Park, note 42 *supra*, at p. 9 (Decree No. 143/NV 2 as reconfirmed and readjusted in 1958 (Decree No. 76/BNV/HC 9 ND of March 20, 1958) and 1959 (Decree No. 34/NV of January 27, 1959)); T. Kelly, note 133 *supra*; Nguyen Ba Dien, note 203 *supra*; H. Nguyen, note 204 *supra*, at p. 189; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

⁸⁵⁰ In August 1956, the cruiser *Tuy Dong* (HQ-04) was assigned the mission of erecting sovereignty steles and building flag poles to hoist the Vietnamese flag on a number of the Spratly Islands. MFA White Paper (1974); see also H. Nguyen, note 204 *supra*, at p. 189 ("...the ROV Navy landed on Spratly Islands and erected a monument asserting sovereignty on August 22, 1956.").

⁸⁵¹ In 1961, crew members from the Vietnamese cruisers *Van Kep* and *Van Don* landed on Southwest Cay, Thitu Island, Loaita Island and Amboyna Cay to erect sovereignty steles and raise the Vietnamese flag. MFA White Paper (1974); see also H. Nguyen, note 204 *supra*, at p. 189; Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

⁸⁵² In 1962, the cruisers *Tuy Dong* and *Tay Ket* erected sovereignty steles and raised the Vietnamese flag on Spratly Island and Namyt Island. *Id.*

⁸⁵³ In 1963, the sovereignty steles on all of the main islands in the Spratlys were rebuilt by crew members of the Navy vessels *Huong Giang*, *Chi Lang* and *Ky Hoa*: May 19, 1963 steles on Spratly Island; May 20, 1963 steles on Amboyna Cay; May 22, 1963 steles on Thitu and Loaita Islands; and May 24, 1963 steles on North East Cay and South West Cay. *Id.*

the Spratlys as stated in the two documents, it certainly would have challenged Vietnam's comprehensive, open, and effective display of authority over the archipelago. Thus, regardless of whether Vietnam's historical claims are valid, Hanoi may claim sovereignty over the South China Sea islands as the successor state to France, which effectively occupied the two island groups in the 1930s.⁸⁵⁴

Nevertheless, some scholars argue that France relinquished its sovereignty over the South China Sea islands after the Second World War by failing to re-occupy the islands after 1945, and failing to assert a claim to the archipelagoes at the 1951 San Francisco Peace Conference.⁸⁵⁵ Accordingly, as the successor state to France, Vietnam had nothing to succeed to because its predecessor had previously relinquished its sovereignty over the islands. This argument, however, ignores a series of steps taken by France and Vietnam after the war to re-assert sovereignty over the Spratlys and Paracels.

French forces did not return initially to the Spratlys or Paracels after 1945 because Chinese Nationalist forces were tasked with accepting the surrender of Japanese forces in French Indochina north of 16 degrees north latitude.⁸⁵⁶ However, in June 1946, the Bougainville-class aviso *Savorgnan de Brazza* was dispatched to the Paracels to re-occupy the islands.⁸⁵⁷ Although French forces were withdrawn from the archipelago three months later, when France learned that the ROC occupation force illegally remained on Woody Island (Paracels) and Itu Aba Island (Spratlys) after the Allied occupation of Indochina officially ended in March 1946, the French government diplomatically protested the incursion on January 13, 1947.⁸⁵⁸

The warship *Le Tonkinois* was also deployed to the Paracels on January 17, 1947, to try (albeit unsuccessfully) to eject the Chinese Nationalists from Woody Island.⁸⁵⁹ Subsequently, the French established a headquarters on Pattle Island and, in late 1947, the French garrison rebuilt the weather station that had operated on the island from 1938 to 1944.⁸⁶⁰ The French hydrographic survey ship *Ingenieur en chef Girod* was later deployed to the Paracels, in 1953, to conduct oceanographic, geologic, geographic, and ecological studies.⁸⁶¹

⁸⁵⁴ H. Nguyen, note 204 *supra*, at p. 187.

⁸⁵⁵ B. Murphy, note 29 *supra*, at p. 205; *see also* H. Chiu and C. Park, note 42 *supra*, at p. 18; Tao Cheng, note 31 *supra*, at p. 272.

⁸⁵⁶ General Order Number 1 (September 2, 1945) provided, in part, that "the senior Japanese commanders and all ground, sea, air and auxiliary forces within China (excluding Manchuria), Formosa and French Indo-China north of 16 north latitude shall surrender to Generalissimo Chiang Kai-shek...." Supreme Commander for the Allied Powers, General Order No. One, Sept. 2, 1945.

⁸⁵⁷ H. Chiu and C. Park, note 42 *supra*, at p. 13; *see also* S. Tønnesson, note 55 *supra*, at p. 11; M. Chemillier-Gendreau, note 15 *supra*, at pp. 39, 116; SOUTH CHINA SEA STUDIES (2012).

⁸⁵⁸ M. Bennett, note 14 *supra*, at pp. 440-441; M. Katchen, note 120 *supra*, at p. 1179; M. Chemillier-Gendreau, note 15 *supra*, at p. 40.

⁸⁵⁹ M. Bennett, note 14 *supra*, at pp. 440-441; *see also* M. Katchen, note 120 *supra*, p. 1179; S. Tønnesson, note 55 *supra*, at p. 11 ("France...made an unsuccessful attempt to force a Chinese garrison to leave Wood Island. When the Chinese refused, France instead established a permanent presence, on behalf of Vietnam, on Pattle Island in the western part of the Paracels.").

⁸⁶⁰ M. Bennett, note 14 *supra*, at pp. 440-441; M. Katchen, note 120 *supra*, at p. 1179; SOUTH CHINA SEA STUDIES (2012).

⁸⁶¹ Nguyen Ba Dien, note 203 *supra*; *Historical documents on Vietnam's sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

France similarly engaged in a series of activities in the Spratlys to substantiate French sovereignty over the archipelago until French troops were ultimately withdrawn from Indochina in August 1956. In October 1946, the French battleship *Chevreud* was deployed to the Spratlys and installed a sovereignty stele on Itu Aba Island to re-assert French interests in the archipelago.⁸⁶² The following month, when France learned that Chinese naval units had illegally occupied Itu Aba, French authorities protested the action, demanding that the Nationalist troops withdraw from the island.⁸⁶³ France likewise protested Philippine incursions in the Spratlys after Tomas Cloma proclaimed his so-called “Freedomland” in the eastern part of the archipelago in May 1956, reminding the Philippine government that the Spratlys had been French territory since 1933.⁸⁶⁴ The Bougainville-class aviso *Dumont d’Urville* was also dispatched to Itu Aba Island to demonstrate French-Vietnamese interest in the archipelago.⁸⁶⁵

Diminished French activity in the South China Sea in the early 1950s is understandable, given the remoteness of the islands, French military setbacks in the ongoing war, and the emergence of an independent Vietnam. Moreover, given its new status as an independent nation, it was logical for Vietnam, not France, to assert sovereignty over the archipelagoes at the San Francisco Peace Conference in 1951. Overall, these events do not demonstrate intent on the part of France to abandon its claims to the South China Sea islands until it ceded its sovereignty over the archipelagoes to South Vietnam at the conclusion of the French-Indochina War.

5. International Recognition

Ample independent evidence exists to support a conclusion that the international community has recognized Vietnamese sovereignty over the Paracel and Spratly Islands since the 17th century. The *Journal of Batavia*, published by the Dutch East Indies Company in 1634, recorded incidents showing Vietnamese jurisdiction over the Paracels.⁸⁶⁶ Portuguese and Dutch maps from the early 17th century likewise identify the islands as Vietnamese territory.⁸⁶⁷

Evidence of foreign recognition of Vietnamese sovereignty over the Paracels can also be traced to documents from the 18th century. *Mystere des atolls—Journal de voyage aux Paracels* (*Mystery of the atolls—Journal of the voyage to the Paracel Islands*), written in 1701, reflects that the Paracels belonged to the Kingdom of Annam.⁸⁶⁸ Similarly, a note written by French Admiral Charles Henri d’Estaing in 1768, following his aborted raid against the city of Huế, recorded the presence of Vietnamese naval vessels in the Paracels.⁸⁶⁹ A subsequent memoir from the Admiral in 1759 indicated that the cannons emplaced on the walls of Lord Vo Vuong’s palace had been taken from ships wrecked on the Paracels.⁸⁷⁰

Western writings from the 19th century likewise recognize Vietnam’s control of the Paracels. John Barrow’s *A Voyage to Cochinchina* (1806) contains a detailed description of the

⁸⁶² SOUTH CHINA SEA STUDIES (2012), at p. 3; see also T. Kelly, note 133 *supra*.

⁸⁶³ *Id.*

⁸⁶⁴ MFA White Paper (1974).

⁸⁶⁵ *Id.*

⁸⁶⁶ MFA White Paper (1974).

⁸⁶⁷ T. Kelly, note 133 *supra*; see also SOUTH CHINA SEA STUDIES (2012), at p. 2.

⁸⁶⁸ MFA White Paper (1974).

⁸⁶⁹ *Id.*

⁸⁷⁰ *Id.*

types of boats used by the Hoang Sa Company to exploit the resources of the islands.⁸⁷¹ Additionally, books and maps published by French missionary Monseigneur Jean-Louis Taberd—*Note on the Geography of Cochinchina* (1837),⁸⁷² *History and Description of the Religion, Customs, and Morals of All Peoples* (1838), and *An Nam Dai Quoc Hoa Do (Tabula Geographica Imperii Annamitici—The Map of the An nam Empire)* (1838)—describe the Paracels as part of Cochinchina. Similarly, Jean-Baptiste Chaigneau’s memoirs (*Memoires sur la Cochinchina*) refer to Emperor Gia Long’s annexation of the Paracels in 1816.⁸⁷³ A reference to the Paracels as Vietnamese territory can also be found in Adolphe Dubois de Jancigny’s *Japon, Indo-Chine, Empire Birman (ou Ava), Siam, Annam (ou Cochinchine), Péninsule Malaise, etc., Ceylan*;⁸⁷⁴ German missionary Karl Gützlaff’s *Geography of the Cochinchinese Empire* (1849);⁸⁷⁵ Aldriano Balbi’s *The Italian Compendium of Geography* (1850);⁸⁷⁶ and the French geography book *Tableau de la Cochinchine* (1862).⁸⁷⁷

Vietnam has also correctly pointed out that Japan tacitly acknowledged French sovereignty over the Paracels in 1927 after a dispute arose between France and Japan over the Spratly Islands. According to a letter written by the Governor General of Indochina to the Minister for the Colonies on March 20, 1930, the Japanese Counsel General in Hanoi was instructed to unofficially inquire of the French authorities about the status of several groups of islands in the South China Sea. The Paracels, however, were explicitly excluded from the discussions by the Japanese because the question of ownership of the Paracel Islands was not in dispute with France.⁸⁷⁸

Chinese authors and Chinese geographical documents describing the limits of the Chinese Empire confirm the accuracy of these Western writings. Hai Lu’s *Hai Quoc Do Chi* (1730),⁸⁷⁹ a 1731 map of Kwangtung (Guangdong) Province, a description of the Quiongzhou Prefecture,⁸⁸⁰ Hoang Chao’s *Map of the Unified Empire* (1894),⁸⁸¹ *Zhongguo Dilixue Jiaokeshu (Manual of Geography of China)* (1906),⁸⁸² and Li Hanzhung’s *Geography of Guandong* (1909) all indicate that the terminus of Chinese territory in the South was Hainan Island.⁸⁸³

Finally, the British Foreign Office determined in 1932 that the United Kingdom had not perfected its inchoate title to the Spratlys and therefore could not effectively claim sovereignty over the archipelago.⁸⁸⁴ Subsequently, during the negotiations of the *San Francisco Peace*

⁸⁷¹ *Id.*

⁸⁷² *Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

⁸⁷³ H. Chiu and C. Park, note 42 *supra*, at p. 7; *see also* M. Chemillier-Gendreau, note 15 *supra*, at p. 69.

⁸⁷⁴ H. Nguyen, note 204 *supra*, at p. 177.

⁸⁷⁵ M. Chemillier-Gendreau, note 15 *supra*, at p. 69.

⁸⁷⁶ *Id.*, at p. 183.

⁸⁷⁷ MFA White Paper (1974); *see also Historical documents on Vietnam’s sovereignty over Paracel and Spratly Islands*, note 203 *supra*; NATIONAL COMMITTEE OF BORDER AFFAIRS White Paper.

⁸⁷⁸ M. Chemillier-Gendreau, note 15 *supra*, at Annex 5 (*Letter No. 704-A-Ex, dated 20 March 1930, from the Governor General of Indochina, Hanoi, to the Minister for the Colonies, Paris*).

⁸⁷⁹ *Id.*, at p. 74.

⁸⁸⁰ *Id.*, at p. 62.

⁸⁸¹ *Id.*, at p. 75.

⁸⁸² *Id.*

⁸⁸³ *Id.*, at p. 172.

⁸⁸⁴ *Id.*, at p. 112; *see also* S. Tønnesson, note 55 *supra*, at p. 7.

Treaty, the Foreign Office indicated in 1947 that the United Kingdom would not contest France's claims to sovereignty over the Spratly Islands, which Britain considered to be good in law.⁸⁸⁵ Australia likewise supported French claims to the archipelago.⁸⁸⁶

On balance, there is sufficient independent evidence to support the conclusion that the international community recognized French/Vietnamese sovereignty of the South China Sea islands over that of China/Taiwan.

C. Final Thoughts

Based on the arguments and evidence submitted by the claimants and general principles of international law related to the acquisition of territory, it would appear that Vietnam clearly has a superior claim to the South China Sea islands.

Vietnam's title to the Paracels is well founded in both history and law. Beginning in the early 18th century, Vietnam demonstrated a clear intent to assert sovereignty over the islands through the establishment of a government-sponsored company to exploit and manage the resources of the archipelago. That intent was confirmed by the annexation of the islands and symbolic acts of sovereignty in the early 19th century, followed by peaceful, effective, and continuous administration of the islands by successive Nguyen dynasties until the advent of the French colonial period. France continued to effectively administer the islands on behalf of Vietnam and physically took possession and occupied the Paracels in the 1930s. Thereafter, France continued to assert its sovereignty over the Paracels until its departure from Indochina in 1956. Following the French withdrawal, South Vietnam (and subsequently a united Vietnam) effectively administered the islands and never ceased to assert Vietnamese sovereignty over the archipelago, even after China illegally occupied a portion of the islands in 1956 and the entire archipelago in 1974.

On the other hand, the first demonstration of Chinese sovereignty over the Paracels did not occur until 1909, two centuries after Vietnam had legally and effectively established its title to the islands. Moreover, China's illegal occupation of Woody Island in 1956 and its occupation of the entire archipelago by force in 1974 clearly violate Article 2(4) of the UN Charter and accordingly do not confer a clear legal title to the Paracels.

With regard to the Spratlys, France annexed the islands as *terra nullius* in the 1930s—at the time, occupation by force was a valid method of acquiring sovereignty over territory. Great Britain, which had controlled some of the Spratly Islands in the 1800s, abandoned its claims following the French annexation and effective occupation, so French title to the Spratlys was legally and soundly established. France's title to the archipelago was ceded to South Vietnam in the 1950s and the South Vietnamese government (and subsequently a united Vietnam) effectively and peacefully controlled the islands until ROC forces illegally occupied Itu Aba Island in 1956 and PRC forces illegally occupied a number of islets in the archipelago in 1988.

The ROC's occupation of Itu Aba Island in 1946 and 1956, and the PRC's invasion of the Spratlys in 1988, violate Article 2(4) of the UN Charter and cannot confer clear title to the Spratlys to either Taiwan or China. The fact that China may have challenged Vietnamese sovereignty over the Spratlys between 1951 and 1988, rights that were legally ceded by France

⁸⁸⁵ G. Marston, note 330 *supra*, at p. 355.

⁸⁸⁶ M. Chemillier-Gendreau, note 15 *supra*, at p. 118.

to Vietnam, does not in and of itself create a clear title for China. On the contrary, China's claim to the Spratlys has no legal basis in international law.

Although China's claims to the Macclesfield Bank and Scarborough Shoal are not contested by Vietnam and have not been discussed in detail in this paper, it should be noted that it is highly questionable whether China (or Taiwan) can validly claim sovereignty over these two features.

Macclesfield Bank and its surrounding shoals are located beyond the territorial sea of any nation and are permanently submerged at low tide. Therefore, these features may not be claimed by China or any other nation. Although the ICJ has stated that "international treaty law is silent on the question whether low-tide elevations can be considered to be 'territory,'" and that there is no "customary rule which unequivocally permits or excludes appropriation of low-tide elevations," the few rules in the law of the sea that govern low-tide elevations "do not justify a general assumption that low-tide elevations are territory in the same sense as islands."⁸⁸⁷ Moreover, the Court noted that "it has never been disputed that islands constitute terra firma, and are subject to the rules and principles of territorial acquisition; [however,] the difference in effects which the law of the sea attributes to islands and low-tide elevations is considerable."⁸⁸⁸ Accordingly, the Court concluded that "it is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory."⁸⁸⁹

China's claim that it discovered Scarborough Shoal and has exercised effective control over the reef for hundreds of years suffers from the same infirmity as its claims to the Spratly and Paracel Islands discussed herein. There is absolutely no independent evidence to corroborate China's assertion that it discovered and effectively occupied the shoal, which is situated 170 nautical miles east of Macclesfield Bank and over 470 nautical miles from the Chinese coast.⁸⁹⁰ Moreover, China's position that Scarborough Shoal is associated with the Macclesfield Bank is untenable—most experts agree that the shoal cannot actually be part of the bank from a geographical standpoint.⁸⁹¹

Philippine claims to Scarborough Shoal, on the other hand, can be traced to Spanish and American activities in the area during the late 19th and early 20th centuries.⁸⁹² The shoal was first surveyed by the Philippine-based Spanish frigate *Santa Lucia* in April 1800 and the results published in a chart in 1808.⁸⁹³ Documents held by the Spanish Hydrographic Office (*Anuario de la Dirección de Hidrografía*, año 4, número 56, 1866) also describe search and rescue operations conducted by Spanish Navy units based in the Philippines to assist mariners in distress on the shoal, a responsibility that was later transferred to the U.S. Coast Guard after

⁸⁸⁷ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment*, I.C.J. Reports 2001, p. 40, at pp. 101-103; *accord Sovereignty over Pedra Branca/Pulau Batu Puteh Middle Rocks and South Ledge (Malaysia/Singapore), Judgment*, I.C.J. Reports 2008, p. 12, at pp. 99-101.

⁸⁸⁸ *Id.*

⁸⁸⁹ *Id.*

⁸⁹⁰ If the term "Zhongsha Islands" is regarded merely as the English equivalent of "Macclesfield Bank," then Scarborough Shoal does not form part of this group. Nevertheless, in the Chinese conception, the term "Zhonghsa Qundao" is not limited only to Macclesfield Bank, but includes Scarborough Reef and other shoals. *Id.*

⁸⁹¹ R. Beckman, note 7 *supra*; *accord* Z. Keyuan, note 9 *supra*.

⁸⁹² F. Bonnet, note 223 *supra*.

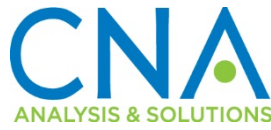
⁸⁹³ *Id.*, at pp. 8-9; *accord* D. Hancox and V. Prescott, note 535 *supra*, at p. 24.

the United States took possession of the Philippines after the Spanish-American War.⁸⁹⁴ These activities occurred without Chinese consent or protest. Manila claims to have effectively occupied the reef after it gained its independence from the United States in 1946 and subsequently built and operated a lighthouse on the shoal in 1965.⁸⁹⁵ Over the years, Philippine authorities have also conducted numerous hydrographic and scientific research surveys in the surrounding waters, have used the shoal as an impact range for military exercises, and have exercised law enforcement jurisdiction over smuggling and illegal fishing activities, all of which demonstrate Philippine sovereignty over the reef.⁸⁹⁶

⁸⁹⁴ *Id.*

⁸⁹⁵ R. Beckman, note 7 *supra*; accord Z. Keyuan, note 9 *supra*, at p. 74.

⁸⁹⁶ *Id.*



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