

## Chapter I

### Background Information on The Paracels and Spratlys

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

#### GEOGRAPHICAL BACKGROUND

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

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

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

#### *General facts*

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

---

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

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

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

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

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

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

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

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

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

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

*The Paracels*

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

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

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

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

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

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

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

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

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

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

---

2

See map in Annex 3.

3

See list of islands and islets in Annex 4.

4

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

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

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

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

The economic resources can be divided into three groups:

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

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

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

---

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

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

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

Since the full-scale Chinese occupation of the archipelago, and particularly from 1974 onwards, when the Chinese occupied the western part of the islands (the Crescent group), Chinese activities throughout the archipelago have intensified. Woody Island, the only one with a surface area sufficient to support costly infrastructures, has been equipped with an airstrip and an enlarged harbour. And a harbour was built by the Chinese Navy on Triton Island in 1982.<sup>6</sup>

### *The Spratlys*

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

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

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

<sup>6</sup>

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

<sup>7</sup>

See the list of islands in Annex 4.

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

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

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

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

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

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

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

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

---

<sup>8</sup>

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

<sup>9</sup>

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

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

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

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

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

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

#### THE LEGAL ISSUE

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

*Category of territory and identification of the dispute*

*The nature of the disputed territories*

Examining the nature of the territories means asking two questions:

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

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

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

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

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

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

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

---

<sup>10</sup> International Court of Justice, *Reports*, 1953, at pp. 49 and 53.

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

<sup>14</sup> *Ibid.*

## Thank You for previewing this eBook

You can read the full version of this eBook in different formats:

- HTML (Free /Available to everyone)
- PDF / TXT (Available to V.I.P. members. Free Standard members can access up to 5 PDF/TXT eBooks per month each month)
- Epub & Mobipocket (Exclusive to V.I.P. members)

To download this full book, simply select the format you desire below

