ROCKING THE BOAT: THE PARACELS, THE SPRATLYS, AND THE SOUTH CHINA SEA ARBITRATION

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On July 12, 2016, the Permanent Court of Arbitration found overwhelmingly in favor of the Philippines in its dispute with the People's Republic of China over maritime entitlements in the South China Sea. This piece appraises the decision in light of the events leading up to the current controversy over the Paracel and Spratly groups.

To investigate the source of the conflict, one does not have to go back very far. In 1974, during the final stages of the Vietnam War, China ejected South Vietnam from the Paracel Islands—a group of tiny maritime features in the South China Sea claimed by both nations. After a classic "weekend war," China tried to dampen down the affair by swiftly releasing the prisoners and refusing to be drawn into an international debate.

Within days, though, there was more activity, when South Vietnam dispatched forces to occupy five features in the Spratly Islands, a larger group further to the south of the South China Sea. During this period, South Vietnam, the Philippines, and Taiwan all engaged in the fortification of their respective features—reinforcing garrisons, installing military hardware, building runways, and shooting at interlopers. The militarization of the Spratlys had begun; and well before China, the focus of the current arbitration, established a physical presence on the reefs in the vicinity.

By drawing on these earlier events, examined through the lens of United States' diplomatic correspondence of the time, it is possible to both construct a legal path to the arbitration based on the parties' claims to the Spratlys, and critically appraise the Tribunal's reasoning on its jurisdiction over the Philippines' claims against China.

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INTRODUCTION

On July 12, 2016, the Permanent Court of Arbitration found overwhelmingly in favor of the Philippines in its dispute with the People's Republic of China over maritime entitlements in the South China Sea.[1] This piece appraises the decision in light of the events leading up to the current controversy over the Paracel and Spratly groups.

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This piece examines the unfolding of the Paracels and Spratlys disputes through the lens of the United States' diplomatic correspondence between the State Department and its missions in Asia.

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[1] *South China Sea Arbitration* (Phil. v. China), PCA Case No. 2013-19, Award, ¶ 1203 (Perm. Ct. Arb. 2016) [hereinafter Arbitration], http://bit.ly/2twyRL7.

When the controversy ignited in 1974, the U.S. was still trying to disentangle itself from Vietnam, and had no intention of being inveigled by its Asian allies into commitments in the South China Sea. Consequently, it struck a determinedly neutral stance, stating that it took no position; a stance to which it formally adhered until 2016. But declared disinterest did not mean lack of interest, and behind the scenes, Washington played an active though little known role in trying to contain the conflict, by discouraging Saigon from pressing its Paracels claims in the Security Council, and trying to deter American oil companies from exploring Reed Bank.

This diplomatic correspondence, which the Permanent Court of Arbitration does not appear to have examined, casts a strong light on the interests and legal positions of the players in the South China Sea—interests which continue to govern the actions of China, the Philippines, Taiwan and Vietnam today. When chronicling the initial phases of the current disputes, American officials not only set out the parties' legal justifications for their actions, but also provided assessments of the merits of some of these positions. In the process, they also offered early insights into a central jurisdictional question addressed by the Tribunal: whether the Spratlys features should be defined as "islands" or "rocks" under Article 121 of the U.N. Convention on the Law of the Sea—the matter on which we shall conclude.

I. CHINA, THE VIETNAMS, AND THE PARACELS CLASH

A. China Grasps the Nettle

In January 1974, fifteen months before the end of the Vietnam War, the Republic of Vietnam (South Vietnam) accused the People's Republic of China (P.R.C.) of illegally occupying a marine feature in the Paracels group.[2] Beijing responded with a statement condemning Saigon's "brazen announcement"[3] and declaring that the attempt to incorporate the Paracels into South Vietnam was "illegal and null and void."[4] It also claimed that the Paracels (Hsisha), Spratlys (Nansha), Pratas (Tungsha) and Macclesfield Bank (Chungsha) were part of China's

[2] Cable from U.S. State Department to U.S. Embassy Saigon, Subj: EA Press Summary, par. 2 (Jan. 17, 1974) (National Archives Records Administration (NARA), Access to Archives Database (AAD) Document No. 1974STATE010818).

[3] *Id.*

[4] Cable from U.S. Consulate General Hong Kong to U.S. State Department, Subj: RVN/PRC Dispute over South China Seas Islands, par. 4 (Jan. 18, 1974) (1974HONGK00751).

territory,[5] and that it would "never tolerate" an infringement on its territorial integrity.[6]

A week later, South Vietnamese troops reportedly opened fire on men trying to raise a Chinese flag on Robert Island.[7] Things rapidly escalated. The South Vietnamese issued a statement giving their version of events just after the clash:

> On January 19th, 1974, at 0829 hours, Chinese troops opened fire on the Vietnamese troops on the island of Quang Hoa (also known as Duncan Island). At the same time, communist Chinese vessels engaged Vietnamese vessels stationed in the area, causing heavy casualties and material damages. On January 20th, 1974, communist Chinese warplanes which had been overflying the area on previous days, joined the action and bombed Vietnamese positions on the islands of Hoang Sa (Pattle) Cam Tuyen (Robert) and Vinh Lac (Money). By the evening of January 20th, 1974, Chinese troops ha[d] landed on all the islands of the Hoang Sa archipelago.[8]

Beijing claimed it had acted in self-defense. Within hours of the clash, the Foreign Ministry issued a statement declaring that the South Vietnamese had invaded Chinese islands, rammed Chinese fishing boats, killed Chinese fishermen, and opened fire on Chinese naval vessels,[9] and that it was only then that "[d]riven beyond the limits of forbearance, our naval units, fishermen and militiamen fought back heroically in self-defense, meting out due punishment to the invading enemy."[10] Not only that, Beijing added, but the South Vietnamese were deploying the tactic of "the guilty party filing the suit first" by claiming that China's had made a "sudden challenge" to Vietnam's proclaimed sovereignty over the Paracels when, "as is known to all, Hsisha, as well as Nansha, Chungsha and Tungsha islands, have always been China's territory."[11]

Two months later, the Chinese newspapers published an epic poem by Chang Yung-mei entitled "The Paracels War," which once again

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[5] Cable from State Department, Subj: EA Press Summary, par. 2 (Jan. 17, 1974) (1974STATE010818).

[6] Cable from U.S. Consulate General Hong Kong to U.S. State Department, Subj: RVN/PRC Dispute over South China Seas Islands, par. 4 (Jan. 18, 1974) (1974HONGK00751).

[7] Cable from U.S. State Department to U.S. Embassy Saigon, Subj: Weekly Wrap-up on East Asian Affairs, par. 8 (Feb. 2, 1974) (1974STATE022409). For press reports see, *e.g.*, Cable from State Department, Subj: EA Press Summary, par. 1 (Jan. 18, 1974) (1974STATE012431).

[8] Cable from U.S. Embassy Saigon to U.S. State Department, Subj: PRC-GVN Clash in Paracels, p. 2 (Jan. 21, 1974) (1974SAIGON00945).

[9] Cable from U.S. Mission to the United Nations to U.S. State Department, Subj: PRC Letter to Security Council on Paracel Islands, p. 2 (Jan. 23, 1974) (1974USUNN00232).

[10] *Id.*

[11] *Id.*

portrayed China as the aggrieved party.[12] In this poetic account of the battle, a Chinese fishing boat warned a South Vietnamese warship to leave the Paracels area; but instead of doing so, the South Vietnamese ship, now joined by a second, tried to ram the fishing boat. When a Chinese naval vessel intervened, it was harassed and then fired on by four Vietnamese warships. After a half-hour battle, the Chinese sunk a Vietnamese ship with hand grenades, "writing a new chapter in the history of people's war at sea."[13] (The poet, with some ingenuity, even managed to work in a denial that the Chinese had used Komar-class vessels or Styx missiles during the engagement.[14])

American officials, who pored over the poem, commented that its portrayal of the Chinese as the underdogs in the battle "appears aimed at deflecting the image of China bullying a small neighbor," as well as providing a suitable setting for displays of heroism and guerrilla tactics.[15] They also noted that,

> The poet reaffirms the PRC claim to the Paracel, the Spratly, and the Pratas island groups, calling them all Chinese fishing areas and asking rhetorically how China can allow them to be occupied by bandits. He also reiterates China's determination not to give up 'an inch of its land nor a drop of its water,' while disavowing any Chinese desire for the territory of others or a willingness to attack unless attacked.[16]

B. Beijing's Motives

Aside from self-defense, an American official in Hong Kong speculated on other possible Chinese motives for taking action in the Paracels, and came up with three: "Spiraling interest in the oil potential of the East Asian shelf area, concern that the communist Vietnamese might affirm Vietnam's claim, and the long-term strategic potential of the islands."[17] Each one of these issues was indeed significant in the grand scheme of things, but only one proved to be decisive at the time.

Regarding the potential oil deposits, China had on numerous occasions before the Paracels incident publicly pronounced both its desire to exploit the natural resources in the seas adjacent to its coastline, and its resolve to prevent other states from encroaching on these resources. On December 29, 1970, a *Renmin Ribao* (*People's Daily*) editorial entitled 'On China's seabed and subsoil resources' stated:

Taiwan Province and the islands appertaining thereto, including

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[12] Cable from U.S. Consulate General Hong Kong to U.S. State Department, Subj: Peking Celebrates its Paracels Victory with an Epic Poem, par. 1 (Mar. 19, 1974) (1974HONGK03095).

[13] *Id.* par. 3.

[14] *Id.*

[15] *Id.* par. 4.

[16] *Id.* par. 2.

[17] U.S. Consulate General Hong Kong to U.S. State Department, Subj: Peking's Calculations in the Paracels War, pp. 1-2 (Jan. 30, 1974) (1974HONGK01036).

> the Tiaoyu ... Huangwei, Chihwei, Nanhsiao, Peihsiao and other islands, are China's sacred territories. The resources of the sea-bed and subsoil of the seas around these islands and of the shallow seas adjacent to other parts of China all belong to China, their owner, and we will never permit others to lay their hands on them.[18]

China was just as vocal at an April 1974 U.N. Economic Commission for Asia and the Far East (ECAFE) meeting, convened a few months after the incident. The Chinese delegate complained that since the 1960s, the superpowers had "dispatched planes and surveying ships everywhere to barge at will into offshore areas of developing countries for prospecting sea-bed resources and stealing much resources intelligence."[19] Furthermore, he said, "certain countries" (i.e. Japan and South Korea) were encroaching on Chinese sovereignty by unilaterally declaring marine "joint development zones," while the "Chiang Kai-shek clique in Taiwan" had been concluding illegal deals with foreign states and enterprises.[20] China's sovereignty, he insisted, was not just over the seas adjacent to its coast, but also the seas adjacent to its islands:

> The delegation of the People's Republic of China hereby reiterates that all the seabed resources in China's coastal sea areas and those off her islands belong to China. China alone has the right to prospect and exploit these sea-bed resources ... prospecting and drilling activities carried out at will in China's coastal sea areas and those off her islands in disregard of China's sover[ei]gnty are illegal.[21]

Regarding the Paracels, one purpose of China's intervention was thus to warn off both the maritime superpowers and local rival claimants to resources in the South and East China seas. As an American official based in Hong Kong noted, "by brushing the hapless Vietnamese off their perches in the Paracels, Peking has cautioned claimants to other disputed territory on the shelf (including South Korea and Japan) to refrain from unilateral steps to advance or to exploit their positions."[22] China's message to one neighbor was clear: we *have* seized the Paracels, and we *can* seize the Senkakus.

The next possible motive for the intervention related to the strategic value of the Paracels themselves. On one hand, the Chinese obviously had much to gain from stepping up their presence in areas adjacent to

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[18] *On China's Seabed and Subsoil Resources*, Renmin Ribao [PEOPLE'S DAILY], Dec. 29,1970, (quoted in WINBERG CHAI, THE FOREIGN RELATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 325 (1972)). The islands referred to were part of the Diaoyu/Senkaku group in the East China Sea.

[19] Cable from U.S. Embassy Colombo to U.S. State Department, Subj: Paracel/Spratly Islands Dispute, p. 2 (Apr. 3, 1974) (1974COLOMB00907).

[20] *Id.* pp. 2-3.

[21] *Id.* p. 2.

[22] Cable from U.S. Consulate General Hong Kong to U.S. State Department, Subj: Peking's Calculations in the Paracels War, par. 2 (Jan. 30, 1974) (1974HONGK01036).

the sea-lanes running through the South China Sea. On the other, some speculated that they feared the Soviet Pacific Fleet's further encroachment into the South China Sea at the invitation of North Vietnam,[23] and occupied the Paracels as a deterrent.

After the clash, the Chinese certainly moved fast to consolidate their hold. A documentary made three months after the incident showed docks, weather balloons, radar and other defense installations—and an oil drilling rig.[24] Later reports indicated that they were further expanding their military facilities, as well as building wharves, harbors, breakwaters, offices,[25] warehouses, meteorological stations, and marine products processing plants.[26] At around the same time, the Chinese reported that they had unearthed items dating back to the Tang and Song dynasties in archaeological digs,[27] which were presented as evidence to support their claim to historic rights to the Paracels.[28]

Yet it is the final argument, relating to Vietnam's claims to the Paracels, which goes furthest in explaining why—and even more significantly, *when*—Beijing took action. China was unlikely to have picked a fight with South Vietnam over the Paracels while the American forces were still on the scene. It was only after 1973, once the Americans had mostly removed themselves, leaving Saigon to fight its own battles, that the risks to China diminished. Moreover, the intervention could not have taken place *later* than it did, because it was clearly only a matter of time before the North Vietnamese forces defeated the South Vietnamese and made their own claim to the Paracels. Beijing had to take advantage of the narrow window of opportunity that presented itself between the Americans' exit and the North Vietnamese assuming power.

So China grasped the nettle, spurred by economic and strategic motives, but also by political expediency—it was more internationally palatable for them to eject their unpopular South Vietnamese enemies than their erstwhile North Vietnamese friends. When it came, the military intervention was decisive, and its diplomatic follow-up was forthright: in a public statement issued just after the incident, Beijing declared that the Saigon authorities had intruded into "China's

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[23] Cable from U.S. Embassy Manila to State Department, Subj: Philippine Reaction to Chinese Seizure of Paracels, par. 4 (Jan. 22, 1974) (1974MANILA00775). The Soviets dismissed rumours that the North Vietnamese would offer them a base at Cam Ranh Bay as "a Chinese fabrication." Cable from U.S. Embassy Moscow to U.S. State Department, Subj: Soviet Views of China, par. 9 (Jun. 27, 1975) (1975MOSCOW08994).

[24] Cable from U.S. Consulate General Hong Kong to U.S. State Department, Subj: Oil Rig on Paracel Islands, p. 1 (Jun. 11, 1974) (1974HONGK06572).

[25] Cable from U.S. State Department to All East Asian and Pacific Diplomatic Posts, Subj. EA Press Summary, p. 8 (Jan. 2, 1975) (1975STATE000668).

[26] Cable from U.S. Consulate General Hong Kong to U.S. State Department, Subj: People's Republic of China—Economic Review 2, par. 6 (Jan. 26, 1975) (1975HONGK00976).

[27] *Id.*

[28] Cable from U.S. State Department to All East Asian and Pacific Diplomatic Posts, Subj: EA Press Summary, p. 5 (Dec. 11, 1974) (1974STATE271136).

territorial waters and air space around and over the Hsisha Islands," and would "eat their own bitter fruit" if they attempted to take further action.[29]

Having secured the Paracels and having warned off Saigon, China then acted with equal dispatch to draw a line under the issue. It promptly returned the prisoners captured during the clash, decreased the air and naval operations in the vicinity of the Paracels, stopped air and naval operations around the Spratlys, and refrained, at least in the short term, from making propaganda statements about the success of the operation.[30] As far as Beijing was concerned, the matter was closed.

C. Saigon's Perspective

Needless to say, South Vietnam took a rather different view of the matter. The Paracels were theirs, not China's, and it was Saigon, not Beijing, which was acting in self-defense. "As a small nation unjustly attacked by a big military power," the Foreign Ministry stated on 20 February, "the Republic of Vietnam appeals to all justice- and peace-loving nations of the world to resolutely condemn the brutal acts of war by communist China."[31]

Just days before the clash, the South Vietnamese authorities had declared that the Paracels (as well as the Spratlys) were an integral part of South Vietnam. This was based on two grounds: "geographical propinquity," and long-standing "continuous and peaceful display of state authority."[32] The Foreign Minister, Vuong Van Bac, stated that Vietnam's claims to the Paracels dated back to 1802, when Emperor Gia Long set up the Hoang Sa Company to exploit resources in the vicinity.[33] Further, these claims were reaffirmed in 1932 by the French Governor-General, Pierre Pasquier (who integrated the Paracels into the Thua Thien provincial administration); confirmed in 1938 by Emperor Bao Dai; and decreed in 1961 by South Vietnam's first president, Ngo Dinh Diem.[34] Such actions, Bac concluded, "were not challenged by any country, including communist China."[35]

The Foreign Minister also argued that the Vietnamese had rights by

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[29] Cable from U.S. Consulate General Hong Kong to U.S. State Department, Subj: NCNA Reports PRC Clashes with South Vietnamese, p. 2 (Jan. 20, 1974) (1974HONGK00769).

[30] Cable from U.S. Liaison Office Peking to U.S. State Department, Subj: Position with Respect to Spratley Islands (Jan. 29,1974) (1974PEKING00178).

[31] Cable from U.S. Embassy Saigon to U.S. State Department: Subj: PRC-GVN Clash in Paracels, par. 9 (Jan. 20, 1974) (1974SAIGON00866).

[32] Cable from U.S. Embassy Saigon to U.S. State Department: Subj: PRC-GVN Clash in Paracels, p. 2 (Jan. 21, 1974) (1974SAIGON00945).

[33] Cable from U.S. Mission to the United Nations, to U.S. State Department, Subj: Texts of GVN Letter, p. 3 (Jan. 18, 1974) (1974USUNN00175).

[34] *Id.*

[35] *Id.* Bac also claimed that none of the fifty-one countries attending the 1951 San Francisco Conference, which set the Allies' peace terms with Japan, "raised any objection" to Vietnam's claim to sovereignty over the Paracels after Japan's surrender. *Id.* p. 4.

virtue of the fact that they occupied the Paracels. The authorities had, he stated, "consistently stationed troops and exercised administrative control over those archipelagos, and the Vietnam Navy regularly patrols and supervises navigational security in the area."[36] Yet the situation was by no means clear-cut. The U.S. State Department's Bureau of Intelligence and Research reported, for example, that Robert Island seemed to have changed hands since the war, with a Chinese presence on it in the 1950s, and the South Vietnamese occupying it in the early 1970s.[37] Even then, South Vietnam did not have the Paracels to itself: the Chinese had stationed personnel on Woody and Lincoln islands, and "PRC naval vessels [were] frequently seen in the area carrying out re-supply of its personnel and maneuvers in the open water between the Paracels and Hainan Island."[38]

D. Hanoi's Silence

The South Vietnamese were not the only ones wrong-footed by the incident. The North Vietnamese also saw the Paracels as being part of Vietnamese territory, but could do nothing to stop them from falling into China's hands. As one diplomatic observer noted, they were "now irretrievably lost."[39] To make things worse, Hanoi then faced the unpalatable choice of either backing their enemy in Saigon over what they considered to be a rightful claim, or yielding to their patron in Beijing over what they saw as an illegal annexation. Surrendering to the inevitable, they chose the latter option, privately communicating their displeasure to the Chinese, but rarely commenting publicly on the issue—although when they did, they pointedly observed that territorial disputes should be settled by negotiation.[40]

The South Vietnamese, noting Hanoi's public silence on the issue, chided the North Vietnamese for failing to defend Vietnam's sovereignty. They issued a communiqué accusing its leaders of denying their "Vietnamese ancestral roots" by declining to take joint action against China,[41] while the Saigon media lambasted them for being "running dogs" and of "humbly bowing to ... their bosses, the Red Chinese."[42] The communist Provisional Revolutionary Government

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[36] *Id.*

[37] Cable from U.S. Consulate General Hong Kong to U.S. State Department, Subj: RVN/PRC Dispute over South China Seas Islands, par. 2 (Jan. 18, 1974) (1974HONGK00751).

[38] *Id.* par. 3.

[39] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Philippine Reaction to Chinese Seizure of Paracels, par. 3 (Jan. 22, 1974), (1974MANILA00775).

[40] Cable from U.S. Consulate General Hong Kong to U.S. State Department, Subj: Peking's Calculations in the Paracels War, par. 3 (Jan. 30, 1974) (1974HONGK01036).

[41] Cable from U.S. State Department to U.S. Embassy Saigon, Subj: EA Press Summary, par. 3 (Jan. 30 1974) (1974STATE019887).

[42] Cable from U.S. Embassy Saigon to State Department, Subj: Saigon Media Treatment of Paracels Issue, par. 7 (Jan. 21, 1974) (1974SAIGON00944).

based in South Vietnam got the same treatment.[43] This needling was apparently successful, causing embarrassment to Vietnamese communists in both the north and south.[44]

II. INTERNATIONAL REACTIONS TO THE INCIDENT

A. The West Disengages

Further afield, the United States, the United Kingdom, and France, each adopted a strictly hands-off approach to the affair.

The Americans' aim was to extract themselves from Indochina in an orderly fashion, and they had no appetite for a row with China over the Paracels. As soon as reports of the clash came through, they turned down Vietnamese requests for aerial reconnaissance,[45] instructed the US Navy to stay well away from the area,[46] and initially declined to take part in the search for survivors.[47] In Saigon, Graham Martin, the U.S. Ambassador, tried to calm the situation. In the midst of the crisis he cabled Washington to explain that he was impressing on South Vietnamese officials: "(1) necessity to play it cool (2) avoid any action that would lead to escalation (3) try to move conflict immediately to diplomatic arena such as UNSC [U.N. Security Council] and (4) that under no foreseeable circumstances could we foresee the possibility of U.S. military force involvement in any way."[48] According to the State Department, the incident was the "last thing" they needed during their withdrawal from Vietnam.[49]

As events unfolded, the Americans worked out a three-point message designed to show that they had played no part in the conflict, and had no intention of doing so. Their first and oft-repeated point was that the United States government "takes no position on conflicting claims to Paracels, but strongly desires peaceful resolution of dispute."[50] The second and third points were flat denials: "We do not know circumstances under which present clash arose," and "US military forces are not involved."[51] There was a fly in the ointment, though. Gerald Kosh, an American member of a defense attaché's staff in

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[43] Cable from U.S. Embassy Saigon to U.S. State Department, Subj: GVN Chides "PRG" for Statement on the Paracels/Spratleys, p. 4 (Feb. 11, 1974) (1974SAIGON01851).

[44] Cable from U.S. Embassy Saigon to U.S. State Department, Subj: Embassy Saigon's Mission Weekly Feb 7-13, 1974, p. 4 (Feb 13, 1974) (1974SAIGON01966).

[45] Cable from U.S. Embassy Saigon to U.S. State Department, Subj: PRC-GVN Clash in Paracels (Jan. 20, 1974) (1974SAIGON00862).

[46] Cable from U.S. State Department to U.S. Embassy Saigon, Subj: PRC-GVN Clash in Paracels, par. 1 (Jan. 19, 1974) (1974STATE012641).

[47] Cable from U.S. Embassy Saigon to U.S. State Department, Subj: PRC-GVN Clash in Paracels, par. 1 (Jan. 20, 1974) (1974SAIGON00862).

[48] *Id.*

[49] Cable from U.S. State Department to U.S. Embassy Saigon, Subj: PRC-GVN Clash in Paracels, par. 4 (Jan. 19, 1974) (1974STATE012641).

[50] *Id.* par. 3.

[51] *Id.*

Danang, happened to be travelling on one of the Vietnamese vessels caught up in the clash, and was captured by the Chinese. (A telegram from Saigon to the State Department said, "We do not know why he is there."[52]) Whatever the reason, Kosh complicated the affair, especially when the press picked up on him after the Chinese released him to the Americans via International Committee of the Red Cross intermediaries in Hong Kong eleven days later.[53]

While this was taking place, State Department officials, having worked out their line on the issue, did what they could to encourage the South Vietnamese to pursue the conflict through legal and diplomatic channels. They instructed Ambassador Martin to inform President Nguyen Van Thieu or Foreign Minister Bac that it was in the interests of neither Saigon nor Washington to exacerbate the conflict, which might draw China into the Vietnam war: "We do not suggest that GVN [Government of Vietnam] take actions prejudicial to their legal position on sovereignty of the Paracels or fail to defend themselves, but we believe that further naval clashes should, if possible, be avoided."[54] Instead, they suggested that Saigon take its grievances to the United Nations, the International Court of Justice, or the U.N. Conference on the Law of the Sea, scheduled to reconvene later in the year.[55] After a few days they backed this up with a threat to Saigon that further military action against China would "work directly against our efforts to secure sufficient military and economic assistance for Vietnam from [U.S.] Congress."[56] In short, both Beijing *and* Washington were instructing Saigon to back down.

In the meantime, those European colonial powers who had earlier laid claim to the South China Sea also chose to remain neutral on the issue. The British kept their mouths shut (one press report suggested that they were worried about retaliatory Chinese pressure on Hong Kong[57]). The French also declined to give an opinion, stating that the competing claims were "very complicated," that there would never be a "clear case," and that they were "very reluctant to take any position on the dispute."[58]

Shortly after the incident, the South Vietnamese Ambassador called on the Quai d'Orsay's directeur d'Asie-Océanie, Henri Froment-Meurice,

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[52] *Id.* par.1.

[53] Cable from U.S. Consulate General Hong Kong to U.S. State Department, Subj: Peking Decision to Effect Mass Release of SVN Prisoners, par. 1 (Feb. 16, 1974) (1974HONGK01746).

[54] Cable from U.S. State Department to U.S. Commander-in-Chief Pacific Fleet (CINCPAC), Subj: GVN/PRC Dispute in Paracels, par. 3 (Jan. 26, 1974) (1974STATE012653).

[55] *Id.*

[56] Cable from U.S. State Department to U.S. Embassy Saigon, Subj: Paracel Islands, par. 3 (Jan. 28, 1974) (1974STATE018390).

[57] Cable from U.S. State Department to All East Asian and Pacific Diplomatic Posts, Subj: EA Press Summary, par. 19 (Feb. 7, 1974) (1974STATE025982).

[58] Cable from U.S. Embassy Paris to U.S. State Department, Subj: French Position Concerning Paracels and Spratleys, par. 3 (Jan. 25, 1974) (1974PARIS02298).

to request French support for inscribing the issue on the Security Council agenda. Froment-Meurice said he would "reflect on" the question[59] (later events indicate that the outcome of the reflection was "no"). The Ambassador also asked for access to the French archives to help establish their Paracels claim, but the Quai flannelled: opening the archives would not be easy because the files in their Saigon embassy were in a mess, and the files back in France were in several different locations.[60]

When the Americans questioned the French about their position, sous-directeur Asie Henri Bolle stated that France, as the one-time "protecting" power of Indochina, had merely "espoused the views of the Annamite empire, which had continually held that Paracels and Spratleys were Vietnamese territory."[61] This comment suggests either that France was merely acting as an agent for the Annamite royal family during the colonial era, or that its officials were retrospectively rewriting history.

B. The Sino-Soviet Rift

This brings us to another major third party: the Soviet Union. China's relations with the United States had improved during the *détente* years, but its relations with the Soviet Union had worsened. After armed border clashes between China and the Soviets in 1969, tensions between them showed no signs of abating.

On January 19, 1974, on the same weekend as the Paracels clash, the Chinese declared five Beijing-based Soviet diplomats *personae non gratae* for handing over radio equipment and for receiving "counterrevolutionary" papers from a Chinese contact.[62] (The Soviets counterclaimed that the five had been trapped in an elaborate Chinese sting involving klieg lights, movie cameras, and pre-positioned crowds of people.[63])

The same day, the Soviet newspaper *Izvestia* berated China for, among other things, opposing *détente*, recognizing Pinochet's regime, undermining Soviet disarmament efforts, resisting Asian collective security, succoring Western European reactionaries, and letting down

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[59] *Id.* par. 2.

[60] *Id.*

[61] *Id.* par. 3.

[62] Cable from U.S. Liaison Office Peking to U.S. State Department, Subj: Expulsion of Soviet Diplomats, par. 1 (Jan. 21, 1974) (1974PEKING00131).

[63] Cable from U.S. Embassy Moscow to U.S. State Department, Subj: Soviet Reactions to PRC Expulsion of Diplomats and to PRC-GVN Clash, par. 2 (Jan. 22, 1974) (1974MOSCOW01036). Speculating on the reason behind the expulsions, the U.S. Liaison Office in Beijing suggested that the Chinese might simply have had enough of "heavy-handed Soviet efforts to collect intelligence here," such as an earlier attempt to "drive off with Chinese mailbox ripped off a wall." Cable from U.S. Liaison Office Peking to U.S. State Department, Subj: Expulsion of Soviet Diplomats, par. 3 (Jan. 21, 1974) (1974PEKING00131).

the Arabs.[64] On 24 January, *Renmin Ribao* responded in kind, accusing the Soviets of fomenting "counterrevolutionary opinion," purveying neo-Confucianism, and targeting China as "a colony of Soviet-revisionist social-imperialism."[65]

Given all this, it is unsurprising that the Soviets criticized China for its intervention in the Paracels: according to *Pravda*, this incident demonstrated Beijing's desire to dominate Asia and distract attention from its domestic problems.[66] But they could not say much more than that. First, they had a problem casting the Saigon regime—which they had long derided as an American stooge—as the hapless victim of Chinese aggression.[67] And second, they seemed to have recognized China's claim to the Paracels by labelling maps with the Chinese name: "Hsisha (Paracel)."[68] (A Soviet source claimed later that the maps were a mere technicality, and that they considered the status of the Paracels to be "undetermined."[69])

Drawing together the strands of the Sino-Soviet relationship, William Sullivan, the U.S. Ambassador in Manila, suggested that "Peking's persistent paranoia about Moscow" was a strong motive for China's action in the Paracels.[70] The Americans were withdrawing from Indochina, the Soviet Pacific Fleet was growing fast, and the North Vietnamese were on the brink of victory. Sullivan speculated that China's intervention was a doubly pre-emptive move: "the first preemption may have been against a North Vietnamese occupation of the islands (using newly acquired Soviet-built naval craft); and the second preemption may have been against the ultimate Soviet use of the island cluster as a support facility for the Soviet fleet, which Moscow would expect to arrange with a grateful Hanoi leadership."[71]

Whether or not this scenario was seriously contemplated, the Chinese attempts to prevent the Soviet Pacific Fleet from establishing a foothold in the South China Sea also assisted the Americans. As Sullivan noted:

> [O]ur private reaction to the Chinese move [in the Paracels] may have to be somewhat different from our ritual pious public

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[64] Cable from U.S. Embassy Moscow to U.S. State Department, Subj: Soviet Press Mum on Chinese Expulsion of Soviet Diplomats But Not on Hsisha Incident, par.1 (Mar. 21, 1974), (1974MOSCOW00955).

[65] Cable from U.S. Liaison Office Peking to U.S. State Department, Subj: PRC Anti-Confucius Campaign Turns Spearhead against Soviets, par. 1 (Jan. 29, 1974) (1974PEKING00175).

[66] Cable from U.S. Embassy Moscow to U.S. State Department, Subj: Soviets Skirt Pitfalls in Heavy Press Treatment of Paracels Dispute, par. 1 (Jan. 28, 1974) (1974MOSCOW01321).

[67] *Id.* par. 2.

[68] *Id.*

[69] Cable from U.S. Embassy Moscow to U.S. State Department, Subj: Soviet Views of China, par. 1 (Jun. 27, 1975) (1975MOSCOW08994).

[70] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Philippine Reaction to Chinese Seizure of Paracels, par. 4 (Jan. 22, 1974) (1974MANILA00775).

[71] *Id.*

> protestations against peace-breakers. It could mean, at least in the short run, that a significantly useful facility for a major hostile navy has been turned into a relatively insignificant island outpost for a minor hostile navy.[72]

This might explain, at least in part, why the Americans gave the South Vietnamese so little support when they tried to take their complaint about the Paracels to the Security Council.

C. Security Council Dead-end

In the midst of the crisis, South Vietnam's Foreign Minister Bac instructed its observers at the United Nations to lodge a formal request for a Security Council meeting on the Paracels to consider whether China had engaged in "aggression" and to contemplate "urgent action to correct the situation." [73] On hearing this news, the American Ambassador to the U.N., John Scali, cabled the State Department from New York:

> GVN plan to take Paracels issue to SC [Security Council] raises obvious and serious complications for us. Vietnamese would seem to have no chance of favorable SC decision and little prospect of any kind of advantage. The further they press the[ir] case the greater the likelihood of Vietnamese humiliation and of problems for us. Our situation would be extremely a[w]kward even if Vietnamese had clear legal title to disputed islands.[74]

Shortly afterwards, Gonzalo Facio Segreda, the Security Council President, began to take soundings among members as to whether the meeting should be inscribed on the Security Council agenda. When the Chinese delegation was informed, their U.N. Permanent Representative, Huang Hua, called on Facio to express his displeasure. [75] According to William Bennett, the American deputy representative, Huang was in "high dudgeon," insisting to Facio that the Paracels were an "exclusively internal matter of China" and that Facio's consultation with Security Council members was a "violation of Chinese sovereignty."[76] Facio stood his ground over the consultations and later privately expressed his annoyance over the "heavy-handed Chinese attempt to pressure him."[77]

In Washington, meanwhile, Tran Kim Phuong, the South Vietnamese Ambassador, visited Assistant Secretary of State for East Asian and Pacific Affairs Arthur Hummel and his deputy Monteagle

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[72] *Id.* par. 5.

[73] Cable from U.S. Mission to the United Nations to U.S. State Department, Subj: Paracels in Security Council, p. 1 (Jan. 20, 1974) (1974USUNN00188).

[74] *Id.* p. 2.

[75] Cable from U.S. Mission to the United Nations to U.S. State Department, Subj: Paracels in Security Council: China, par. 1 (Jan. 21, 1974) (1974USUNN00203).

[76] *Id.*

[77] Cable from U.S. Mission to the United Nations to U.S. State Department, Subj: Paracels in Security Council, par. 4 (Jan. 22, 1974) (1974USUNN00219).

Stearns at the State Department. Phuong stated that his government "wished to bring to public light this 'clear case of violence' by a superpower and permanent SC member against a small neighbor."[78] Hummel and Stearns responded that they were not asking the Vietnamese to withdraw the request, but they had "considerable doubt" as to what a meeting would accomplish: the Chinese would claim provocations over the Paracels, and other Security Council members might rebuff South Vietnam's claims.[79]

South Vietnam would have gained an especially unsympathetic hearing in the 1974 session of the United Nations. In order to even inscribe the meeting under the terms of Article 27(2) of the U.N. Charter, it would have had to gain nine affirmative votes[80] out of fifteen, with abstentions being counted as negative votes.[81] The chance of winning sufficient votes was slim. At least one permanent member, China, was expected to vote against inscription, while more non-permanent members were expected to follow suit.[82] As the Americans explained, the Council's makeup in that session was "especially unfortunate" to the West because:

> India, which was occasionally helpful, has been replaced by Iraq. Sudan which despite its radical orientation has had responsible SC rep, is replaced by Mauritania. Yugoslavia, which has occasionally been very unhelpful but still played independent role, has been replaced by Byelorussia.[83]

Of the remaining non-permanent members, four more—Cameroon, Indonesia, Kenya and Peru—were non-aligned states, which, while not necessarily approving China's conduct against a smaller state, were not likely to affirmatively support South Vietnam.[84]

Facio's consultations with Security Council members confirmed this lack of support. The Soviet representative admitted it would be "awkward" for the U.S.S.R. to back China, given their bad relations, but thought that the United States would also have trouble choosing "between its old ally and its new friend."[85] The Indonesian representative said the issue was "a most delicate one for Jakarta" and that Hanoi's view would have to be taken into account along with Saigon's.[86] The Australian and Austrian representatives doubted a

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[78] Cable from U.S. State Department to U.S. Embassy Saigon, Subj: Security Council Consideration of Paracels Issue, par. 2 (Jan 21, 1974) (1974STATE013405).

[79] *Id.*

[80] *See* U.N. Charter art. 27, ¶ 2.

[81] Cable from U.S. State Department to U.S. Embassy Saigon, Subj: Prospects for SC Meeting on Paracels, par. 4 (Jan. 21, 1974) (1974STATE013407).

[82] *Id.* par. 3.

[83] *Id.* par. 2.

[84] *Id.* par. 3.

[85] Cable from U.S. Mission to the United Nations to U.S. State Department, Subj: Paracels in Security Council, par. 3 (Jan. 22, 1974) (1974USUNN00208).

[86] *Id.*

meeting would be "fruitful."[87] The British representative hoped the problem would go away.[88] The French representative was vague and evasive.[89] The Peruvian representative had little to say.[90] Four representatives—from Britain, Indonesia, Iraq and Peru—questioned whether South Vietnam had the right to raise an issue before the Security Council when it was not "seated" as a member of the United Nations.[91] Several others, Indonesia included, speculated on whether South Vietnam was the true representative of Vietnam.[92]

Based on these soundings, Facio concluded that five members would vote for the meeting's inscription (Australia, Austria, Costa Rica, United Kingdom, United States); five would vote against (Byelorussia, China, Indonesia, Iraq, U.S.S.R.); and five would abstain (Cameroon, France, Kenya, Mauritania, Peru).[93] So, in Facio's words, South Vietnam "will not get anywhere."[94] When this information was relayed back to Saigon, President Thieu pulled the plug on the proposal.[95]

The South Vietnamese then switched their attention to another institution—the Southeast Asia Treaty Organization (SEATO)—which elicited a "strongly negative" response from the Americans.[96] The proposal to bring the case to the International Court of Justice never got off the ground. There was nothing more they could do to raise their case in the international arena.

D. The Price of the Paracels

What, then, was the significance of China's action in the Paracels? None of the players emerged unscathed. South Vietnam staked its claim and lost. North Vietnam stayed silent. The United States kept out—it aspired only to a clean break from Indochina. The Soviet Union could endorse neither China nor South Vietnam. The old colonial powers looked the other way. Even the main beneficiary, China, paid a price: its carefully cultivated image as an advocate of peace in the region drowned in the South China Sea.

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[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Cable from U.S. Mission to the United Nations to U.S. State Department, Subj: Paracels in Security Council, par. 3 (Jan. 3, 1974) (1974USUNN00219).

[94] Cable from U.S. Mission to the United Nations to U.S. State Department, Subj: Paracels in Security Council, par. 1 (Jan. 22, 1974) (1974USUNN00208).

[95] Cable from U.S. Embassy Saigon to U.S. State Department, Subj: Paracels in the Security Council (Jan. 24, 1974) (1974SAIGON01040).

[96] Cable from U.S. State Department to U.S. Embassies Bangkok and Saigon, Subj: GVN Request that SEATO Consider Paracel Issue, par. 1 (Jan. 24, 1974) (1974STATE015405).

III. THE FOCUS SHIFTS TO THE SPRATLYS

A. *New Controversies Brew*

Even before the furor over the Paracels had died down, official attention shifted across to the Spratlys, the loose cluster of islets, cays, and submerged reefs scattered across the southeastern corner of the South China Sea. The question was: after the Paracels incident, would China strike next at this group, to which it also laid claim? If it did so, it would have to contend with other claimants, whose military forces already occupied some of the features.

Among these was Taiwan, which had since 1956 taken possession of the largest feature in the Spratlys—Itu Aba (Taiping)—as well as the Pratas group further to the north.[97] In the intervening decades, it had built various installations on Itu Aba,[98] including, it was rumored, an airstrip.[99] By the 1970s, it garrisoned some 200-300 soldiers there,[100] who were rotated and supplied by ships from Taiwan every three months.[101] In other words, Itu Aba, like the Pratas group, was (and still is) a Taiwanese garrison within a closed military area.[102]

Yet although Taipei and Beijing were at loggerheads on most issues, they saw eye-to-eye over Chinese sovereignty in the South China Sea. Under the "one-China" principle, they jointly claimed possession of the Paracels, Spratlys, the Pratas group, and Macclesfield Bank on behalf of a united China. And it was for this reason that Taipei made every effort to cool down the Paracels controversy. As the Walter McConaughy, U.S. Ambassador to Taiwan, reported,

> [I]n ROC [Republic of China] view, Paracels (as Spratleys and Pratas, of course) are [i]ndisputably Chinese territory ... ROC has also avoided using Paracels clash as example of PRC "bloodthirstiness" or "warlike disposition." With sole exception of [newspaper] *Lieh Ho Pao*, ROC media have carefully downplayed Paracels news, and *Lien Ho Pao* was given very stiff reprimand for front-paging story.[103]

Even so, one problem Taiwan faced was that it was not the sole occupant of the Spratlys: the Philippines and South Vietnam were also

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[97] Cable from U.S. Consulate General Hong Kong to U.S. State Department, Subj: RVN/PRC Dispute over South China Seas Islands, par. 2 (Jan. 18, 1974) (1974HONGK00751).

[98] *Id.*

[99] Cable from U.S. Embassy Taipei to U.S. Embassy Manila, Subj: Medevac from Itu Aba, par. 4 (Nov. 7, 1975) (1975TAIPEI07195).

[100] Cable from U.S. Embassy Taipei to State Department, Subj: Conflicting Claims to Spratleys, par. 1 (Jan. 26, 1974) (1974TAIPEI00508).

[101] Cable from U.S. Embassy Taipei to State Department, Subj: ROC Navy Resupply Mission to Spratleys, par. 2 (Feb. 5, 1974) (1974TAIPEI00751).

[102] Cable from U.S. Embassy Taipei to U.S. Embassy Belgrade, Subj: Emergency Visas for Republic of China, par. 5 (Oct. 18, 1974) (1974TAIPEI06378).

[103] Cable from U.S. Embassy Taipei to U.S. State Department, Subj: ROC Views on the Islands Controversy, p. 2 (Jan. 30, 1974) (1974TAIPEI00602).

in the mix. Another problem was that immediately after the Paracels clash, the latter had occupied five more Spratlys features. This development was of great concern to Taiwan: if China responded militarily to South Vietnam (which was one of Taiwan's few anti-communist allies in the region), it too might be drawn into a confrontation with China.[104] So in a move designed to placate Beijing, Taipei had proclaimed:

> [T]he government of the Republic of China has lodged a strong protest with the Vietnamese government, and reaffirmed its position to the effect that these [Spratly] islands are inherently part of the territories of the Republic of China and that the Republic of China's sovereignty over them is not to be doubted ... These islands had been occupied by Japan during the Second World War. They were restored to the Republic of China, when, after the war, in December 1946, the Chinese government despatched a naval contingent to take them over from the Japanese.[105]

This statement is significant because it refers to the Spratlys being "*inherently* part of the territories of the Republic of China"—meaning the Republic of China in existence *before* the 1949 split between the two Chinas. (This point is reiterated in the final sentence, which states that the Spratlys were restored to the Republic of China in December 1946, three years before the split.) The emollient message to Beijing was clear: after 1949 *both* the People's Republic of China and Taiwan inherited the Spratlys under the "one-China" principle.

Even so, Taiwan's Premier Jiang Jingguo thought it best to keep troops on alert, and, according to Ambassador McConaughy, cancelled both the resupply ship to the Paracels[106] and the "regularly scheduled post-Lunar New Year 'comfort mission' to Pratas."[107] It can be surmised that the Taiwanese troops stationed on the features commenced the new year without their usual celebrations.

B. The Philippines' Trusteeship Argument

The unsettled situation in the South China Sea compelled the various claimants to articulate their legal claims to the Spratlys. In 1974, the treaty regime governing the law of the sea was a work in progress. The U.N. had already convened two conferences: the first conference, held in 1958, produced treaties governing the territorial sea, continental shelf, high seas, and fishing, but reached no agreement on

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[104] *Id.*

[105] Cable from U.S. Embassy Taipei to State Department, Subj: [ ]ROC Reiterates Claim to Spratleys, pars. 2-3 (Feb. 8, 1974) (1974TAIPEI00807).

[106] Cable from U.S. Embassy Taipei to U.S. State Department, Subj: ROC Navy Resupply Mission to Spratleys, par. 2 (Feb. 5, 1974) (1974TAIPEI00751).

[107] Cable from U.S. Embassy Taipei to U.S. State Department, Subj: ROC Views on the Islands Controversy, par. 3 (Jan. 30, 1974) (1974TAIPEI00602).

the width of the territorial sea and fishing limits; the second conference, held in 1960, was convened to answer these outstanding questions, but collapsed.[108] The crucial third conference, which began considering substantive issues in June 1974, eventually produced the all-encompassing U.N. Convention on the Law of the Sea (UNCLOS),[109] but this would not enter into force until November 1994.[110] Consequently, the Spratly claimants had to reach for pre-UNCLOS law of the sea doctrines to make their case.

A curtain-raiser for the Spratlys controversy took place in 1971 when the Philippines protested about Taiwan's military presence on Itu Aba. In Manila on July 10, President Ferdinand Marcos emerged from a National Security Council meeting about the Spratlys, and read out a Presidential *communiqué* to the assembled press: "The Council has verified that one of these islands—the island of Itu Aba, known to us as Ligaw—is now under occupation by Nationalist Chinese forces who have fortified the island with gun emplacement and who have on a number of occasions, fired warning shots on reconnaissance aircraft and maritime vessels."[111] This, Marcos added, was a serious threat to the Philippines' national security.[112]

The Filipinos then set out the first of their legal arguments against China's and Taiwan's claims to the Spratlys. They looked to the Peace Treaty with Japan, concluded in San Francisco on September 8, 1951, which stated in Article 2(f) that Japan would renounce "all right, title and claim to the Spratly Islands and to the Paracel Islands."[113] The treaty did not specify that the Paracels and Spratlys, once renounced by Japan, should be passed to another recipient. The Filipinos offered their own interpretation: that both groups fell instead under "the de facto trusteeship of the Allied powers" that had signed the treaty.[114] (Note: the Philippines was a party to the Peace Treaty, whereas China and Taiwan were not.[115])

The Filipinos had first used this "trusteeship" argument in 1957, shortly after Taiwan had established a permanent garrison on Itu Aba,

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[108] For an overview and documentation arising from the first two U.N. Law of the Sea conferences, see *United Nations Law of the Sea Conference, 1958*, UNITED NATIONS http://bit.ly/1p9R06q; and *Second United Nations Conference on the Law of the Sea, 1960*, UNITED NATIONS, http://bit.ly/1kHbwqW.

[109] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter *UNCLOS*].

[110] For an overview and documentation arising from the third U.N. Law of the Sea conference, see *Third United Nations Conference on the Law of the Sea, 1973-1980*, UNITED NATIONS, http://bit.ly/2jZMVWk.

[111] U.S. Embassy Manila to U.S. State Department, Subj: Spratley Islands, par. 2 (Jan. 23, 1973) (1973MANILA00858).

[112] *Id.* par. 3.

[113] Treaty of Peace with Japan, art. 2, ¶ f, Sept. 8, 1951, 3 U.S.T.S 3161, 136 U.N.T.S 45.

[114] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Spratley Islands, par. 5 (Jan. 23, 1973) (1973MANILA00858).

[115] Treaty of Peace with Japan, *supra* note 113, pmbl., n.1.

when they issued a statement affirming that the Spratlys remained under Allied trusteeship.[116] They used it again in 1971, when Marcos issued the aforementioned Presidential *communiqué* reiterating that by virtue of the trusteeship conferred by the peace treaty, "no one may introduce troops on any of these islands without the permission and consent of the allied powers,"[117] and that Taiwan should withdraw its troops.[118] They used it once more in 1974, again in protest against the Taiwanese at Itu Aba (and Vietnamese elsewhere in the Spratlys), urging that this matter be brought to the attention of the Allied signatories or the United Nations.[119]

C. The Status of "Kalayaan"

As well as protesting Taiwan's occupation of Itu Aba, the Philippines itself claimed a number of features in an area covering the northeast of the Spratlys, which it dubbed "Kalayaan" (Freedomland). This brings us to the Filipinos' second legal argument relating to the South China Sea. "Kalayaan," they claimed, was a "53 island group" comprising islands, islets, reefs, cays and banks "which Filipino explorer Tomas Cloma explored and occupied from 1950 to 1974."[120] These features, Marcos said at his 1971 press conference, "are regarded as *res nullius* and may be acquired according to the modes of acquisition recognized under international law—among which is occupation and effective administration."[121] At the time, he said, the Philippines were in effective occupation and control of Nanshan Island (in Tagalog, Lawak), Thitu (Pagasa), and Flat Island (Patag).[122] Over the next two-and-a-half years, they expanded their occupation to five features: Nanshan Island, Thitu, West York Island (Likas), Northeast Cay (Parola), and Loaita Island (Kota).[123] By February 1974, they had constructed a weather station on Thitu and a lighthouse on Northeast Cay,[124] and reportedly stationed around thirty troops on each feature.[125]

In early 1974, they took a firmer line over the occupation of the features in the South China Sea than they had done previously, while

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[116] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Spratley Islands, par. 5 (Jan. 23, 1973) (1973MANILA00858).

[117] *Id.*

[118] *Id.* par. 6.

[119] Cable from U.S. Embassy Manila to U.S. State Department, Subj: GOP Protests ROC and GVN Show of Force in Spratleys, par. 6 (Feb. 6, 1974) (1974MANILA01389).

[120] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Spratley Islands, par. 8 (Jan. 23, 1973) (1973MANILA00858).

[121] *Id.*

[122] *Id.* par. 9.

[123] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Spratlys, p. 2 (Feb. 28, 1974) (1974MANILA02335).

[124] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Spratlys, par. 1 (Feb. 14, 1974) (1974MANILA01730).

[125] Cable from U.S. State Department to U.S. Embassy Saigon, Subj: EA Press Summary, par. 7 (Mar. 28, 1974) (1974STATE062701).

embellishing their arguments on trusteeship and *res nullius*. They made a careful distinction between the Spratlys, which they claimed were still under Allied trusteeship, and "Kalayaan," which they claimed was governed by customary international law permitting the occupation of unclaimed territory—although the physical division between the two entities was left deliberately vague.[126]

On January 30, 1974, Foreign Secretary Carlos Romulo produced an *aide memoire* contending that "Kalayaan" was *res nullius* because it was made up of new volcanic and coral outcrops that had appeared after older features that, historically, had been seen as constituting the Spratlys.[127] Eight days later, Juan Arreglado, former Legal Counsel for the Department of Foreign Affairs, produced a different argument, claiming that the Spratlys should be held *res communis* for all the Allied signatories, and that the Philippines, as a signatory, had the right to occupy them without obtaining permission from any nation.[128] Six days after that, Alejandro Melchor, Executive Secretary, produced still more arguments, stating that the Philippines had claimed the islands based on the fact of their occupation, and that they had "assumed an international obligation" with respect to the "safe navigation of commerce" in the South China Sea.[129]

As well as some of these more legalistic claims, Manila also presented more straightforward arguments based economics and security: one was that "Kalayaan" might produce petroleum and oil, which would resolve the Philippines' energy crisis; another (alluding to the fact that Japan had used the features as a staging area for their 1941 invasion of the Philippines) was that its occupation could provide a buffer against hostile forces.[130]

The "trusteeship" and "*res nullius*" arguments for the Philippines' occupation of some features in the Spratlys was given short shrift by Washington. As the State Department made clear, the U.S. government "does not rpt [repeat] not consider that Spratleys were placed under 'de facto trusteeship of the Allied powers' as a result of provisions of 1951 treaty with Japan."[131] It continued:

> Peace Treaty does not rpt not however decide question of sovereignty, since Allied agreement was not possible. As [John Foster] Dulles said at San Francisco Peace Conference in 1951 it was necessary to let the future resolve doubts such as this "by

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[126] Cable from U.S. Embassy Manila to U.S. State Department, Subj: GOP Claims to Spratlys and Kalayaans, par. 3 (8 Feb. 8, 1974) (1974MANILA01478).

[127] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Philippine Position with Respect to Spratley [Is]lands, par. 2 (Jan. 30, 1974) (1974MANILA01114).

[128] Cable from U.S. Embassy Manila to U.S. State Department, Subj: GOP Claims to Spratlys and Kalayaans, par. 1 (Feb. 8, 1974) (1974MANILA01478).

[129] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Spratlys, pars. 2, 5 (Feb. 15, 1974) (1974MANILA01792).

[130] *Id.* pars. 2, 6.

[131] Cable from U.S. State Department to U.S. Consulate General Hong Kong, Subj: Spratley Islands, par. 2 (Feb. 8, 1974) (1974STATE017663).

invoking international solvents other than this treaty." While final disposition of sovereignty issue should be left to decision by Allied powers, no trusteeship as such was created.[132]

That said, the State Department was of the view that the Philippines was not precluded from expanding its territory in the Spratlys by legitimate means, but this expansion would have to meet certain requirements. A memo observed that, "Continuous, effective and uncontested occupation and administration of territory is a primary foundation for establishing sovereignty in absence of international settlement."[133] However, it also noted that "Phil occupation could hardly be termed uncontested in face of claims and protests of Chinese and Vietnamese."[134]

D. Manila's Treaty-based Claims

The Americans were not the only ones paying attention to the Philippines' legal arguments. The Chinese were following them too, and, unsurprisingly, they rejected them.

In 1974, Chinese officials invited Sven Hirdman, the Swedish Deputy Chief of Mission in Beijing, to visit the International Organization and Treaty Law Department of the Chinese Ministry of Foreign Affairs.[135] There, these officials communicated their concerns to him about the implications of the Filipino claims that "Kalayaan" was not part of the Spratlys.[136] They argued that the 1898 Treaty of Paris between the United States and Spain, and the 1946 amended Constitution of the Philippines—which both defined the territory of the Philippines—placed these features outside its territorial limits.[137] The Chinese also rejected the Filipino claims to the features by virtue of occupancy, stating that Chinese ships had visited them long before anyone else, and that they had Ming Dynasty records to prove it.[138] Hirdman was reportedly "impressed" by these arguments.[139]

The Chinese may not have been aware of it, but Washington had arrived at the same conclusion about the legal status of the Philippines' claims. They agreed, for example, that the Spratly marine features "all fall outside Philippine territory as ceded to U.S. by 1898 Treaty with Spain."[140] They also agreed that post-war treaties setting out the

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[132] *Id.*

[133] Cable from U.S. State Department to U.S. Embassy Manila, Subj: US MDT Commitment and Spratlys, par. 5 (Jun. 9, 1975) (1975STATE133765).

[134] *Id.*

[135] Cable from U.S. Liaison Office Peking to U.S. State Department, Subj: PRC View on Philippine Claim to Spratlys, par. 1 (Mar. 1, 1974) (1974PEKING00352).

[136] *Id.*

[137] *Id.*

[138] *Id.* par. 2.

[139] *Id.* par. 3.

[140] Cable from U.S. State Department to U.S. Embassy Manila, Subj: US MDT Commitment and Spratlys, par. 3 (Jun. 9, 1975) (1975STATE133765).

territorial limits of the Philippines did not include the Spratlys.

The Americans focused their attention on the Mutual Defense Treaty (MDT), which it had agreed with the Philippines in October 1951, just a month after the conclusion of the Peace Treaty with Japan. The State Department noted that when the MDT was signed,

> GOP [Government of Philippines] had asserted no claim to any of Spratly Islands, and had protested neither Vietnamese nor Chinese claims, which had been reiterated at time of negotiation of 1951 Japanese Peace Treaty. USG [U.S. Government] announced publicly at that time it considered sovereignty question undetermined. Furthermore ... USG maps accompanying presentation of MDT also exclude Spratlys from territories covered by MDT.[141]

Under Article 5 of the MDT, the United States and the Philippines were committed to mutual defense in the event of armed attack on "the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific, or on its armed forces, public vessels or aircraft in the Pacific."[142]

With respect to the first element, the Americans concluded that the Spratlys could not be considered to be "metropolitan territory" as they were not part of the Philippines' uncontested sovereign jurisdiction and did not appear on the maps used during the negotiations.[143] With respect to the second element, the Spratlys could not be regarded as "island territories under its jurisdiction in the Pacific" because, the Americans argued, this provision was designed at the time to cover territories administered by a party under an international agreement, such as the U.S.-administered U.N. Trust Territories or Okinawa.[144] The Philippines did not administer islands under these conditions because the "US does not consider [the] Japanese Peace Treaty [to have] created de facto Allied power trusteeship over Spratlys, and we would not regard the Spratlys as thus being islands under jurisdiction of either party (or both)."[145] Finally, on the third element regarding attacks on "armed forces, public vessels and aircraft in the Pacific," the Americans decided that the MDT "does not obligate us to support this type of deployment in event of armed attack" because it had not recognized either the Philippines' or the other states' claims to the Spratlys.[146]

Referring back to the treaty negotiations, they stated that they had "found nothing ... to indicate that treaty protection of armed forces of party in Pacific was intended to extend to such forces as may be

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[141] *Id.*

[142] *Id.* par. 2; Mutual Defense Treaty between the Republic of the Philippines and the United States of America, Aug. 30, 1951, 3 U.S.T. 3947.

[143] Cable from U.S. State Department to U.S. Embassy Manila, Subj: US MDT Commitment and Spratlys, par. 3 (Jun. 9, 1975) (1975STATE133765).

[144] *Id.* par. 4.

[145] *Id.*

[146] *Id.* par. 9.

stationed in notoriously disputed territories such as Spratleys for purpose of establishing or enforcing claim to that disputed territory."[147] They also noted that the MDT had to be interpreted in light of Article 1, which obliged them to refrain from the "threat or use of force in any manner inconsistent with U.N. Charter."[148] Looking forward, the United States wanted to avoid creating a precedent for a situation in which "Phils ever tried to invoke MDT with respect to Sabah" or "NATO were invoked by either side in Greece-Turkey territorial disputes."[149]

In conclusion, the United States' commitment to the Philippines could not be "boot-strapped into commitment for defense of territory not included in first two categories" of Article 5,[150] especially if it had the effect of propelling them into "a military confrontation with the PRC or Vietnam ... [when] they were merely countering Philippine acts against territories to which they have strong claims."[151]

The Americans did not accept the Filipino *res nullius* argument either. During the negotiations over the renewal of the MDT in 1976, the issue of contested claims came up in an exchange between Ambassador Sullivan and the Filipino negotiators, Senator Emmanuel Pelaez and General Romeo Espino, over the Philippines-occupied features in the northeast Spratlys, including the reef area known as Reed Bank.[152] In the hasty transcription of the meeting, Sullivan, referring to Thitu, stated:

> "The occupation of the islands themselves—I guess you have the biggest one—the one where you have your airstrip ..."
> Senator Pelaez – "The Reed Bank however, is not so much ... is not in the Spratlys."
> Amb. Sullivan – "Well, that depends on who defines the Spratly."
> Gen Espino – [ ] "That is a different group["]
> Amb. Sullivan – "The Chinese say it is Nan Sha and has been theirs since 1412."[153]

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[147] Cable from U.S. Secretary of State to U.S. Consulate General Hong Kong, Subj: Spratley Islands, par. 1 (Feb. 8, 1974) (1974STATE017663).

[148] Cable from U.S. State Department to U.S. Embassy Manila, Subj: US MDT Commitment and Spratlys, par. 6 (Jun. 9, 1975) (1975STATE133765) (quoting Mutual Defense Treaty between the Republic of the Philippines and the United States of America, Aug. 30, 1951, 3 U.S.T. 3947).

[149] *Id.* par. 11.

[150] *Id.* par. 10.

[151] Cable from U.S. State Department to U.S. Delegation, Subj: Briefing Memorandum: Philippine Aide Memoire on the US Commitment, par. 12 (Aug. 8, 1976) (1976STATE196878).

[152] Cable from U.S. Embassy Manila to U.S. State Department et al., Subj: Mutual Defense Treaty—Reed Bank, p. 2 (Jul. 30, 1976) (1976MANILA11299).

[153] *Id.* (ellipses in original).

IV. THE SPRATLYS CARVE-UP BEGINS

A. Vietnam Moves In

From 1971 onwards, the Philippines occupied a number of features in the northeast of the group, and then, from 1973 onwards, the South Vietnamese occupied a number of others. The scramble for the Spratlys had begun.

In August 1973, Saigon stationed 64 men on Namyit Island (in Vietnamese, Nam Yet).[154] Then on January 30, 1974, just ten days after the Paracels clash, it dispatched a new task force reportedly consisting of a cutter, a patrol craft escort, and an LSM carrying 136 men to occupy five more features in the Spratlys: Sin Cowe Island (Sinh Ton), Spratly Island (Truong Sa), Amboyna Cay (An Bang), Southwest Cay (Song Tu Tay) and Sand Cay (Son Ca).[155] Of the men on the LSM, 17 were to relieve some of the troops already stationed on Namyit and the rest were to be distributed in groups of 20 to 30 around the five features.[156] Ambassador Martin reported to Washington that the task force commander had been ordered to occupy only unoccupied features, and "not to engage in any hostile action toward any forces which might be in the area and not to attempt to land troops on any occupied islands."[157] The press speculated on Saigon's motives: to find offshore oil, to pre-empt China from occupying them (or handing them over to Hanoi), to ignite anti-Chinese nationalist sentiment, to distract attention from domestic problems, and to embarrass the North Vietnamese and the PRG.[158]

These newly occupied features were low-lying reefs or sandbars, some of them shaped like "inner-tubes" enclosing shallow lagoons.[159] According to an official report, the South Vietnamese headquarters were located on Namyit Island, under the command of First Lieutenant Doan Cam Tiem, and the troops were divided between Namyit and four other features (but not Amboyna Cay, as originally reported, because it was only two hectares and barely a metre above sea level).[160] The troops took with them weapons, shelters, bedding, sampans, and gear with which to catch food[161] (mainly sea-life and birds). The following month, Saigon

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[154] Cable from U.S. Embassy Saigon to U.S. State Department, Subj: Spratly Islands, par. 3 (Jan. 31,1974) (1974SAIGON01347).

[155] *Id.* The UPI report incorrectly listed "Southwest Cay" (Song Tu Tay) as Philippines-occupied "Northeast Cay."

[156] *Id.*

[157] *Id.* par. 4.

[158] Cable from U.S. State Department to All East Asian Diplomatic Posts, Subj: EA Press Summary, par. 1 (Feb. 6, 1974) (1974STATE024979).

[159] Cable from U.S. Embassy Bangkok to U.S. State Department, Subj: Chinese Seizure of the Paracels, par. 2 (Feb. 4, 1974) (1974BANGKO01573).

[160] Cable from U.S. Embassy Saigon to U.S. State Department, Subj: GVN Announcement of Garrisoning of Spratly Islands, par. 5 (Feb. 23, 1974) (1974SAIGON02411).

[161] *Id.* par. 7.

reportedly sent 500 tons of construction materials out to the features, along with engineers to assist with the building of bunkers and permanent housing.[162]

All this shows that the Spratlys already had been "invaded" in recent years before China got in on the act. The largest feature, Itu Aba, had been occupied by Taiwan in 1956, and ten more features had been occupied by the Philippines and South Vietnam between 1971 and 1974. All three nations constructed defense facilities and housing, as well as piers, lighthouses, weather stations, and airstrips. And all three mounted patrols: in March 1974, for example, it was reported that the South Vietnamese kept two warships and the Taiwanese kept three warships in the area.[163] All these parties kept one eye on each other and the other on the not-so-sleepy Chinese giant.

B. The Big Question

How would China respond to Saigon's latest moves in the South China Sea? On 4 February 1974, the Foreign Ministry in Beijing gave its answer. It warned that it would "not tolerate infringement on China's territorial integrity" in the Spratlys[164]—but, crucially, it did not threaten immediate action.

Even so, the various occupants of the Spratlys were jittery, and attempted to engage the United States in the discussion about the implications of a Chinese strike at the Spratlys. South Vietnam's Ambassador Phuong told the Americans that if China took action, it would be "a more serious situation than in the Paracels" because it would "place the PRC in a busy ocean area with potential for economic exploitation" and "cast doubt on the possibility of detente in Southeast Asia."[165] The Filipinos, meanwhile, made clear to the Americans their concerns about China inserting itself into the area of shipping lanes through the South China Sea.[166]

The Americans refused to be drawn. The State Department line was to say nothing, or, if really pressed, to say only that "the U.S. takes no position on the sovereignty of these islands."[167] (The American delegate to ECAFE was told to avoid referring even to a "dispute" over the Spratlys, as it would "likely occasion sharp PRC retort."[168]) When

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[162] Cable from U.S. State Department to U.S. Embassy Saigon, Subj: EA Press Summary, par. 1 (Mar. 12, 1974) (1974STATE049497).

[163] Cable from U.S. State Department to U.S. Embassy Saigon, Subj: EA Press Summary, par. 7 (Mar. 28, 1974) (1974STATE062701).

[164] Cable from U.S. State Department to U.S. Embassy Kuala Lumpur, Subj: Weekly Round-up on Easy Asian Affairs, par 17 (Feb. 11, 1974) (1974STATE027235).

[165] Cable from U.S. State Department to U.S. Embassy Saigon, Subj: Paracels/Spratlys, par. 6 (Feb. 7, 1974) (1974STATE025541).

[166] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Philippine Position with Respect to Spratley [ ]Islands, par. 6 (Jan. 30, 1974) (1974MANILA01114).

[167] Cable from U.S. State Department to US Embassy Colombo, Subj: Paracels/Spratly Islands Dispute, par. 3 (Apr. 2, 1974) (1974STATE065649).

[168] *Id.*

Deputy Assistant Secretary Stearns met Phuong just after China's statement, he suggested that Saigon should focus on defeating the North Vietnamese rather than baiting the Chinese out of "wounded national pride."[169] Stearns continued:

> Quite aside from obvious disadvantages Saigon would have in a shoving contest with Peking, [he] thought that dispute could badly damage prospects for getting additional military and economic aid for Vietnam from Congress. Even those on [Capitol] Hill who generally favored our efforts to help GVN defend itself against North Vietnam would be unenthusiastic about strengthening Saigon for further gun-boat skirmishes with Chinese.[170]

Behind the scenes, the Americans did not believe that China was considering an assault on the Spratlys.[171] This assessment was based on three calculations. First, they assumed that China would not want to embroil itself in a dispute with Taiwan, the Philippines, and other Southeast Asian states during the delicate period of transition following the United States' withdrawal from the region.[172] Second, they predicted that the Chinese would find it even more difficult to make a legal case for self-defense in the Spratlys than they had in the Paracels.[173] Finally, they calculated that the Chinese lacked the military reach to sustain an assault on the Spratlys: while the Paracels incident had shown that they could carry out short-range air operations using antique IL-28s,[174] the distances between China's air bases on Hainan and Liuchow peninsula and the Spratlys "may be such as to limit PRC use of airpower (Mig-15s, 17s, 19s and IL-28s), if not rule it out entirely."[175]

C. Hanoi Ousts Saigon

In April 1975, another event rocked the region: the disintegration of the South Vietnamese regime. Just weeks before a North Vietnamese tank famously ripped the gates off the Presidential Palace in Saigon, Hanoi dispatched naval vessels across the South China Sea to wrest the Spratly features from their South Vietnamese occupants. On 14 April, they launched an amphibious assault on Southwest Cay, which was occupied at the time by 29 South Vietnamese soldiers and four radio

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[169] Cable from U.S. State Department to U.S. Embassy Saigon, Subj: Paracel/Spratley Islands Secret, par.2 (Feb. 6, 1974) (1974STATE025259).

[170] *Id.*

[171] Cable from U.S. State Department to U.S. Embassy Saigon, Subj: Weekly Wrap-Up on East Asian Affairs, par. 9 (Feb 2, 1974) (1974STATE022409).

[172] Cable from U.S. Consulate General Hong Kong to U.S. State Department, Subj: Peking and the Spratlys, par. 4 (Feb. 2, 1974) (1974HONGK01194).

[173] Cable from U.S. State Department to U.S. Embassy Saigon, Subj: Paracels/Spratlys, par. 4 (Feb, 7, 1974) (1974STATE025541).

[174] *Id.* par. 2.

[175] Cable from U.S. Liaison Office Peking to U.S. State Department, Subj: Position with Respect to Spratley Islands, par. 2 (Jan. 29, 1974) (1974PEKING00178).

and weather station operators.[176] According to Filipino reports from a salvage vessel and marine units in the vicinity:

> An unidentified craft was observed discharging UDT team on Southwest Cay. Shortly thereafter, an explosion was heard, and an NLF [National Liberation Front] flag was observed flying on the island. Radio contact with the island was also lost on or about that time.[177]

Southwest Cay was only 3,000 meters away from Northeast Cay, which was occupied by the Philippines. One member of the South Vietnamese force swam from one feature to the other, and "defected" to the Filipino side.[178] The North Vietnamese reportedly shipped the rest of the South Vietnamese as prisoners back to Danang, and started to build up fortifications on Southwest Cay.[179] By May 7, the new Vietnamese government proclaimed the liberation of all the features from the South Vietnamese.[180]

Meanwhile, back on Northeast Cay and Southwest Cay, the Vietnamese and Filipinos surveyed each other across the water. To prevent a clash, the Philippines decided to withdraw their marines on Northeast Cay under the cover of darkness, leaving just the Filipino flag flying to signal its claim to the feature.[181] The absence of any daytime activity would soon have become apparent to the Vietnamese, camped just a short distance away, and, as Ambassador Sullivan dryly noted in Manila, "I would ... expect that, in [a] short while, Vietnamese will occupy Parola and demonstrate their warm feelings of fellowship with their Philippine neighbors."[182]

The Vietnamese did indeed land on Northeast Cay, and they hauled down the Filipino flag, but then, contrary to Sullivan's expectation, they departed again.[183] This suggests that while the Socialist Republic of Vietnam was keen to claim the features previously occupied by South Vietnam, it did not intend to pick a fight with the other claimants to the Spratlys. The Filipino marines soon returned to Northeast Cay,[184] and they remain there to this day.[185]

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[176] Cable from U.S. Embassy Saigon to U.S. State Department, Subj: Disputed Territories in South China Sea, par. 1 (Apr. 18, 1975) (1975SAIGON05275).

[177] *Id.*

[178] Cable from U.S. Embassy Manila to U.S. State Department, Subj: GOP Concern over NVN Incursion into Spratley Area, par. 3 (Apr. 24, 1975) (1975MANILA05250).

[179] *Id.*

[180] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Spratly Islands, par. 1 (May 7, 1975) (1975MANILA06055).

[181] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Spratley Islands, par. 2 (May 27, 1975) (1975MANILA07196).

[182] *Id.* par 4.

[183] Cable from U.S. Embassy Manila to U.S. State Department, Subj: GOP Action in Spratly Island Area, par.1 (Aug. 27, 1975) (1975MANILA11980).

[184] *Id.*

[185] Arbitration, *supra* note 1, ¶ 405.

D. Activity on Reed Bank

This brings us to some final episodes relating to the South China Sea in the mid-1970s, which revolved around the area of the Spratlys known as Reed Bank. Located in the vicinity of the Filipino-occupied Nanshan and Flat islands (Lawak and Patag), this was a vast bank of reefs and shoals some 180 nautical miles off the coast of Palawan in the Philippines. Like the rest of the Spratlys, Reed Bank fell outside the aforementioned 1898 Treaty of Paris which defined the territorial limits of the Philippines, but within the area that Manila claimed as "Kalayaan."[186] Bearing in mind that UNCLOS (which specified that an exclusive economic zone extended to 200 nautical miles) was still in the process of being negotiated, the Philippines claimed Reed Bank on two other grounds: first, its proximity to the Philippines, and second, as part of its continental shelf.[187]

From 1972 onwards, the Philippines quietly began to divide up Reed Bank—some two million hectares—and solicit applications for oil exploration concessions.[188] By August 1975, a number of oil companies, including American companies, had applied. [189] Ambassador Sullivan proposed warning the American companies of the risks of engaging in commercial activities in disputed waters: "We have in mind perhaps a warning of the type previously issued to Gulf, inter alia, respecting the Senkakus." [190] The State Department agreed, recommending he tell them that "because of the conflicting international claims in the Reed Bank area USG will continue strongly to advise American companies against participating in oil exploration or drilling there."[191]

According to the cables, Sullivan thus warned two American outfits—Brinkerhoff Maritime Drilling Corporation and Salen Group—that the United States could not provide protection for American personnel or vessels operating in the area.[192] Both apparently ignored the advice, and Brinkerhoff started spudding a well at Reed Bank in April 1976.[193] Manila was aware that Sullivan was warning off U.S. companies,[194] and stepped up its protection of the Brinkerhoff/Salen operation on Reed Bank, providing air and marine surveillance, and

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[186] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Petroleum Concessions and the Spratly Dispute, par. 1 (Feb. 8, 1974) (1974MANILA01524).

[187] *Id.* par. 3.

[188] *Id.* par 1.

[189] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Melchor's Call on SecDef Tokyo, par. 7 (Aug. 28, 1975) (1975MANILA12020).

[190] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Petroleum Concessions in the Spratly Areas, par. 7 (Sep. 5, 1975) (1975MANILA12464).

[191] *Id.* par. 1.

[192] Cable from U.S. State Department to US Embassy Manila, Subj: American Drilling in Reed Bank Area, par. 2 (Apr. 24, 1976) (1976STATE099563).

[193] *Id.* par. 1; Cable from U.S. Embassy Manila to U.S. State Department, Subj: American Drilling in Reed Bank Area, par. 1 (May 4, 1976) (1976MANILA06164).

[194] *Id.* par. 4.

anchoring a patrol boat adjacent to the Brinkerhoff drilling barge.[195] Sullivan bad no doubt that the Philippines' involvement with Brinkerhoff was calculated: the Manila government, he wrote, "had previously attempted [to] interest two fairly large U.S. petroleum companies in exploration of Reed Bank area, partly because U.S. has only available commercial technology for operating in this environment and partly because Marcos wants U.S. to have a direct interest in this confrontation."[196]

At the same time, the Philippines also stepped up its activities on the features it already occupied, and by 1976, it had constructed an airfield and stationed artillery on Thitu.[197] As Sullivan commented, the major weakness in the Philippines' posture hitherto had been its inability to move its forces around except by sea: the construction of the airstrip was "presumably designed to meet need for ability to move forces rapidly on and—more likely—rapidly off islands in event of conflict."[198] This airstrip soon proved useful for other reasons. According to intelligence received by the Americans, the Filipinos were flying small armed T-28s from Palawan out to Thitu. These aircraft were then carrying out aerial photographic reconnaissance missions over the Vietnamese garrison on Southwest Cay and the Taiwanese garrison on Itu Aba.[199] This activity did not go unnoticed, and on May 14, 1976, the Vietnamese on Southwest Cay fired on a Filipino T-28 carrying out one of these sorties.[200] The arrival of the oil companies on Reed Bank threatened to ignite what was already a combustible situation.

E. The Mutual Defense Treaty Bluff

All of this posed a conundrum for the United States—a conundrum that would be exploited by Manila during negotiations over the renewal of the MDT, which included the decision on whether to renew the leases on the Americans' Clark Air Base and Subic Bay Naval Base on Luzon in the Philippines. At issue was the commitment of each party of the MDT to meet the "common dangers" provision set out in Article 4.[201] Would the United States take action alongside the Philippines to protect its own forces at Clark and Subic Bay against "common dangers" posed by a third state to the Philippines? Yes, of course it would. And would

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[195] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Spratly Islands, par. 2 (May 6, 1976) (1976MANILA06304).

[196] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Philippine Involvement in Spratly Islands, par. 6 (May 24, 1976) (1976MANILA07149).

[197] Cable from U.S. State Department to U.S. Embassy Manila and CINCPAC, Subj: [P]hilippine Involvement in Spratly Islands, par. 1 (May 21, 1976) (1976STATE124807).

[198] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Philippine Interest in Spratleys, par. 3 (Jan. 12, 1976) (1976MANILA00571).

[199] Cable from U.S. State Department to U.S. Embassy Manila and CINCPAC, Subj: [P]hilippine Involvement in Spratly Islands, par. 1 (May 21, 1976) (1976STATE124807).

[200] *Id.* par. 2.

[201] Mutual Defense Treaty between the Republic of the Philippines and the United States of America, *supra* note 142, art. 4.

the United States take action alongside the Philippines to protect Reed Bank against "common dangers" posed by another claimant to the Spratlys? No, it would not. This was held up by the Philippines as an example of bad faith: the United States was prepared to defend only what was important to itself, not to the Philippines, and this, as Sullivan noted, would have "strong negative consequences on our base talks."[202]

Throughout the summer of 1976, Manila pressed Washington for an explicit statement about the United States' obligations to the Philippines over Reed Bank under Articles 4 and 5 of the MDT in the event of an "emergency."[203] President Marcos got involved, stating that progress on the negotiations over the military bases was directly related to a satisfactory American response to the Philippines' Reed Bank claims.[204] Without this clarification, the Philippines would demand that the Americans pay rent or compensation for the bases, on the grounds that there was no genuine mutuality in the United States-Philippines alliance.[205]

This was a bluff, and both parties knew it. The Americans took the view that the Filipinos, who feared an assault from a rival claimant to the Spratlys, adopted this tactic to strengthen, rather than weaken ties with the United States. They wanted the Americans to go on record as saying that they were willing to defend the Philippines' claims to the Spratlys—thereby gaining "maximum insurance from [the] U.S." in the event of an attack by the militarily superior Chinese or Vietnamese forces.[206]

The Americans pushed back. During the MDT negotiations, Sullivan (as he reported back to Washington), explained repeatedly to the Filipino negotiators:

> (1) that US and Phils have differing interpretations of the status of the claimed areas west of the Palawan Trench—the Reed Bank and the Spratlys;
>
> (2) that we have a differing interpretation on the continental shelf, viewing the Palawan Trench as a derogation of the continuity of the continental shelf;
>
> (3) that we are aware of the claims in this area of the Philippines, Vietnam, the PRC, the Republic of China, and perhaps France, and consider this a d[i]sputed area;
>
> (4) that we will do nothing that might diminish the Philippine

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[202] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Philippine Involvement in Spratly Islands, par. 7 (May 24, 1976) (1976MANILA07149).

[203] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Philippines Base Negotiations: Daily Summary No. 10, par. 5 (Jul. 3, 1976) (1976MANILA09675).

[204] Cable from U.S. State Department to U.S. Delegation Secretary, Subj: Marcos-Robinson meeting, par. 2 (Aug. 6, 1976) (1976STATE195292).

[205] Cable from U.S. Embassy Manila to U.S. Embassy Canberra, Subj: U.S. Defense Commitment to the Philippines, par. 4 (Aug. 2, 1976) (1976MANILA11355).

[206] *Id.*

claim and that we would hope that there can be a peaceful solution among the various claimants.[207]

F. The Continental Shelf Question

Sullivan's reference to the Palawan Trench was of particular interest, given the contemporaneous debates taking place at the U.N. Conference on the Law of the Sea. The Filipinos claimed that Reed Bank was part of their continental shelf, and thus part of the territory covered by defense obligations set out by the MDT.[208] They were seemingly undeterred by the fact that the shelf was split lengthways by the 1,600-meter-deep Palawan Trench, which ran between Palawan in the Philippines and Reed Bank beyond it: Solicitor General Estelito Menoza claimed that the trench was part of the shelf—not a boundary to it.[209]

To support this claim, the Philippines apparently relied on Article 1 of the 1958 Geneva Convention on the Continental Shelf (to which it was not a party), which stated that the term "continental shelf" referred to "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."[210] Although the Philippines had no demonstrable plans to plumb the depths of the Palawan Trench for resources,[211] its ground for treating it as part of its continental shelf was based on the existing state practice, which suggested that trenches were not regarded as terminating the continental shelf.[212]

The Americans countered by arguing that the Palawan Trench interrupted the contiguity of the Philippine continental shelf, placing Reed Bank beyond the Philippines' territorial jurisdiction, and thus beyond the remit of the MDT.[213] Between themselves, though, the Americans admitted that this legal position was not conclusive.[214]

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[207] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Philippines Base Negotiations: Daily Summary No. 10, par. 5 (Jul. 3, 1976) (1976MANILA09675).

[208] Cable from U.S. Embassy Manila to U.S. State Department, Subj: U.S. Obligations under Mutual Defense Treaty, pars. 1, 4 (Jul. 29, 1976) (1976MANILA11209).

[209] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Petroleum Concessions and the Spratly Dispute, par. 3 (Feb. 8, 1974) (1974MANILA01524).

[210] Convention on the Continental Shelf, art. 1, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311.

[211] Cable from U.S. State Department to U.S. Embassy Manila, Subj: Visit of DepSec Robinson: Briefing Papers—Spratly Islands and Reed Bank, par. 6 (Aug. 4, 1976) (1976STATE193353).

[212] *Id.*

[213] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Philippines Base Negotiations: Daily Summary No. 10, par. 5 (Jul. 3, 1976) (1976MANILA09675).

[214] Cable from U.S. State Department to U.S. Embassy Manila, Subj: Visit of DepSec Robinson: Briefing Papers—Spratly Islands and Reed Bank, pars. 4, 7 (Aug. 4, 1976) (1976STATE193353).

Referring to Article 6 of the aforementioned Convention, they acknowledged the long-held U.S. view that the boundaries of continental shelves between neighboring states should be determined *by agreement* in accordance with equitable principles.[215] When coming to agreement:

> We recognize it as possible that states may agree to disregard trenches in the shelf between them, or that equitable principles may support a state's desire to leap a nearby trench. An example of an agreement to disregard a trench is that between Norway and Great Britain where the trench falls just off Norway's coast. We ourselves have disregarded trenches off the Pacific coast, and are involved currently in a complex dispute with Canada over the Gulf of Maine, in which we argue that equitable principles should be a major determining factor in delimitation of the shelf.[216]

Moreover, Article 6(2) of the Convention provided for circumstances when agreement between neighboring states was absent, stating that "unless another boundary line is justified by *special circumstances*, the boundary shall be determined by application of the principle of *equidistance*."[217] If the Philippines had been party to the Convention, and another state—say, China—exercised sovereign jurisdiction over the Spratlys, the Philippines could claim Reed Bank on the basis of either equidistance or "special circumstances."[218] But the Philippines was bound by neither treaty nor custom (as "the Convention in this regard is not regarded as binding customary international law") and this allowed it to adopt an "even more aggressive stance on the right to part of Reed Bank."[219]

While this debate was unfolding, Marcos travelled to Beijing to meet Mao Zedong and senior Chinese ministers. A year later, in 1976, he recounted parts of their conversation back to the Americans. Among other things, he said he had reminded the Chinese that several countries occupied the Spratlys, and had enquired whether they intended to "chase Chinese Nationalists out of Itu Aba."[220] Deng Xiaoping had apparently replied that the Nationalists also still occupied Taiwan, "which was of more importance to Peking than Itu Aba."[221] When Marcos pressed the matter, Deng had suggested that at least for the time being, the "status quo could continue even though [the] PRC

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[215] *Id.* par. 4.

[216] *Id.*

[217] Convention on the Continental Shelf, *supra* note 210, art. 6(2) (emphases added).

[218] Cable from U.S. State Department to U.S. Embassy Manila, Subj: Visit of DepSec Robinson: Briefing Papers—Spratly Islands and Reed Bank, par. 5 (Aug. 4, 1976) (1976STATE193353).

[219] *Id.*

[220] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Spratly Islands Dispute, par. 3 (Aug. 9, 1976) (1976MANILA11802).

[221] *Id.*

regarded all the islands as Chinese." [222] Marcos reportedly took this to be a tacit agreement that the Chinese would turn a blind eye to the Filipinos' occupation of the Spratlys features.[223]

Back in Manila, Sullivan, considering this exchange, concluded that Marcos's ultimate goal in the Spratlys was to carve out a space for the Philippines that was focused less on the small land features and more on the potentially petroleum-rich seabeds and subaqueous formations in the vicinity of Reed Bank and elsewhere. [224] Marcos would "take whatever he can get," he said, "but his game ... is apparently to advance claims to as much as he can credibly encompass, so that he can fall back to a North Sea type seabed partition which will give him something west of the Palawan Trench."[225] This tactic is still being pursued today.

V. THE TRIBUNAL STEPS IN

A. *Maintaining the* Status Quo

Back in the 1970s, it was widely expected that China would follow up the take-over of the Paracels with an invasion of the Spratlys—but as it turned out, it did not. Observers speculated that the cost to China of antagonizing the members of SEATO or the Association of Southeast Asian Nations (ASEAN) was simply too great, and suggested that China lacked the capacity to extend its air cover or sustain a victory over the Spratlys.[226] The most likely reason, though, was that China felt that it had made its point forcefully enough in the Paracels, and was prepared to tolerate the *status quo* in the Spratlys provided that no other claimant rocked the boat.[227]

If this was the case, then it raises a vital point about the recent award made by the Permanent Court of Arbitration, to which we now turn.

B. *A Question of Jurisdiction*

When bringing its case at The Hague, the Philippines mounted a four-pronged challenge to China's activities within the Spratlys. It asked the Tribunal to declare that China's claim to the South China Sea

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[222] *Id.*

[223] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Philippine Involvement in Spratley Islands, par. 3 (May 24, 1976) (1976MANILA07149).

[224] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Spratly Islands Dispute, par. 6 (Aug. 9, 1976) (1976MANILA11802).

[225] *Id.*

[226] See, for example, Cable from U.S. Consulate General Hong Kong to U.S. State Department, Subj: Peking and the Spratlys, pars. 2, 4 (Feb. 2, 1974) (1974HONGK01194); Cable from U.S. Liaison Office Peking to U.S. State Department, Subj: Position with Respect to Spratley Islands, par. 2 (Jan. 29, 1974) (1974PEKING00178).

[227] Cable from U.S. Consulate General Hong Kong to U.S. State Department, Subj: Peking's Calculations in the Paracels War, par. 5 (Jan. 30, 1974) (1974HONGK01036).

within the "nine-dash line" exceeded its UNCLOS entitlements;[228] that the disputed Scarborough Shoal and certain Spratlys features did not generate any marine entitlements;[229] that China was interfering with the Philippines' maritime fishing, oil exploration, navigation, and construction activities;[230] and that China was both "failing to protect" and "inflicting severe harm" on the marine environment.[231]

All the elements of the drama that has been unfolding since the 1970s were present here: the contested claims to the Spratlys area, the militarization of the South China Sea, the aerial surveillance of rivals' features—even the exploratory activity on Reed Bank.[232] Yet the Philippines also gave a new environmentalist twist to the proceedings with its claims that China had damaged reef ecosystems and the marine environment by, among other things, building artificial islands on reefs and acquiescing to the harvesting of giant clams.[233]

As is well known, China rejected the Philippines' move to arbitration and did not participate in or accept the outcome of the proceedings.[234]

When responding to the Philippines' requests, the Tribunal was operating under two jurisdictional restraints. First, UNCLOS does not deal with land territory, so the Tribunal could not decide a state's sovereignty over the Spratlys features themselves; it could only consider the maritime zones that surrounded them.[235] Second, China had in 2006 made a declaration to UNCLOS precluding international court decisions about sea boundary delimitation, in accordance with Article 298(1)(a)(i).[236] Consequently, the Tribunal could not make a decision about *overlapping* maritime claims, as this would have involved sea boundary delimitation. It could only make a decision about claimed entitlements if there were *no* overlap: "where—for instance—a State claims maritime zones in an area understood by other States to form part of the high seas or the Area for the purposes of the Convention."[237]

Of particular interest were the Philippines' requests for declarations on the status of reefs occupied by China near or within the Philippines' exclusive economic zone, and, connected to that, the entitlement of these reefs to certain maritime zones—namely, exclusive economic zones and continental shelves.[238]

Even if the Tribunal found that none of the reefs generated these

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[228] Arbitration, *supra* note 1, ¶ 7.

[229] *Id.* ¶ 8

[230] *Id.* ¶ 9.

[231] *Id.*

[232] *Id.* ¶¶ 656-657.

[233] *Id.* ¶¶ 9, 764.

[234] *Id.* ¶¶ 11.

[235] *Id.* ¶ 5.

[236] *Id.* ¶¶ 6, 202-203; UNCLOS, *supra* note 109, art. 298.

[237] *Id.* ¶ 155 (citing *South China Sea Arbitration* (Phil. v. China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶ 156 (Perm. Ct. Arb. 2015), http://bit.ly/2aDybcN).

[238] *Id.* ¶¶ 643-647 (on Submissions 3, 5, 6, 7), ¶¶ 303-304 (on Submissions 4, 6).

maritime zones—and it did so find[239]—this was not the end of it. If any *other* feature claimed by China and entitled to maritime zones was situated within 200 nautical miles of certain reefs, "the resulting overlap and the exclusion of boundary delimitation from the Tribunal's jurisdiction by Article 298" [240] would prevent the Tribunal from addressing the majority of the fifteen submissions—namely, submissions 3, 4, 5, 6, 7, 8, 9, 12(a) and (c), and 15. In other words, the Tribunal's jurisdiction over these would be triggered *only* if there were no maritime-zone-generating features within the entire Spratlys group—which, as we recall, was claimed in its entirety by China.

C. "Islands" and "Rocks"

This brings us to Article 121 UNCLOS, which defines "islands," which generate maritime zones, and non-islands—"rocks"—which do not. It states:

> 1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
> 2. 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.
> 3. Rocks which cannot sustain *human habitation or economic life of their own* shall have no exclusive economic zone or continental shelf.[241]

In other words, Article 121 first defines an island; second, provides a rule about islands (they generate the same maritime zones as other land territory); and third, sets out an exclusion—namely, rocks. The Tribunal addressed the exclusion. As indicated by Article 121(3), rocks cannot sustain "human habitation or economic life of their own" and do not generate the aforementioned maritime zones. It reasoned inversely—and without much reflection—that islands *must* therefore be able to sustain "human habitation or economic life of their own" in order to generate the maritime zones.[242] The Tribunal applied this formula to all of the Spratlys features, including its largest, Itu Aba, occupied by Taiwan, and concluded that "neither Itu Aba, nor any other high-tide feature in the Spratly Islands, is a fully entitled island for the purposes of Article 121 of the Convention."[243]

Was this reasoning persuasive? Taking as its starting point the phrase "human habitation," the Tribunal began to construct a far

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[239] *Id.* ¶ 1203B.

[240] *Id.* ¶¶ 630, 1203A.

[241] UNCLOS, *supra* note 109, art. 121 (emphasis added).

[242] It asserts, for example, that "if a feature is capable of sustaining either human habitation or an economic life of its own, it will qualify as a fully entitled island." Arbitration, *supra* note 1, ¶ 494.

[243] *Id.* ¶ 632.

narrower definition of an island than appeared in Article 121. To meet the standard, it would have to have "non-transient inhabitation ... by a stable community of persons who have chosen to stay and reside on the feature in a settled manner,"[244] or, put another way, inhabitation by a "stable community of people for whom the feature constitutes a home and on which they can remain."[245] These descriptions encompass three ideas: that humans inhabit an island voluntarily, that they are constituted as a "community," and that this community is "stable," "settled," and "non-transient." (The Tribunal adds to this rather rigid concept of community the caveat that it "need not necessarily be large, and in remote atolls a few individuals or family groups could well suffice."[246])

This adds a lot of baggage to two plain words, "human habitation"—and goes beyond the UNCLOS drafters' intent. The drafters, after all, were simply discussing the *absence* of human habitation from a rock, which is easy to establish (did people live there or not?). The Tribunal, by contrast, was not merely considering the *presence* of human habitation on an island (did people live there or not?) but further, specifying that such presence had to be *voluntary*, *communal* and *non-transient*.

The Tribunal's more selective approach was apparent when it rejected the idea that humans who lived on the features but did not meet all three conditions could constitute "human habitation." It thus stated that the fishermen who reportedly occupied the features at one time or other were not the "natural" population of the Spratlys, but mere itinerants, because they were not described as being "of Itu Aba" or "of Thitu" and were not accompanied by their families.[247] It also declared that garrisoned soldiers— on, say, Itu Aba or Thitu—were not there of their own accord, but only because they were performing their military duties, and would not stay on "if the official need for their presence were to dissipate."[248] Finally, it also stated that civilians, recently arrived on the features, were only present courtesy of the governments concerned, for reasons "motivated by official considerations" connected with the disputes over the features' sovereignty.[249] Whether true or not (these assertions are not supported by sources), the Tribunal appears to be straining towards the classification of the features as rocks rather than as islands.

D. Inhabitants and "Habitation"

What, then, are the prerequisites for "human habitation"? Drawing

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[244] *Id.* ¶ 618.
[245] *Id.* ¶ 542.
[246] *Id.*
[247] *Id.* ¶ 618.
[248] *Id.* ¶ 620.
[249] *Id.*

on the Tribunal's own cited sources as well as some of the previously cited U.S. cable traffic from the 1970s and earlier, we will focus on Itu Aba, the largest feature in the Spratlys. The record may not be complete, but it is detailed enough to present a picture of near-continuous habitation over the last century. The Tribunal notes that from the early 1920s to 1929, a Japanese guano mining company occupied Itu Aba, stationing up to 600 people there in 1927.[250] After that, two more Japanese companies re-occupied it in the late 1930s, stationing 130 people on the feature.[251] In 1939, the Japanese government assumed direct control of Itu Aba[252] and held it until the end of the war, after which they relinquished it under the terms of the Peace Treaty.[253] From 1946 to 1950, according to Filipino sources cited by the Tribunal, Taiwan took over the occupancy of Itu Aba.[254] Then, from 1956 onwards, according to American sources not cited by the Tribunal, Taiwan occupied it on a more permanent basis[255] (prompting the Philippines to pointedly declare in 1957 that the Spratlys fell under the *de facto* power of the Allied signatories of the Peace Treaty with Japan).[256] In 1974, the Americans indicated that some 200-300 Taiwanese troops were stationed on Itu Aba.[257]

In other words, save for some missing years in the 1930s and 1950s, this particular feature has been continuously inhabited for almost a century.

Could these occupying companies or garrisons have sustained at least some of their personnel on the feature's own supply of food and water—thus indicating habitability? The answer seems to be: yes, they could. The Tribunal considered evidence indicating that fresh potable water is available on Itu Aba: two reports from 1919 and 1994 suggested that water on the feature was of good quality (although a third stated that the underground water was salty).[258] As well as sea-catch, the feature is capable of supporting agriculture: one 1919 report indicated that there was an abundance of banana trees, while another from 1933 suggested that papaya trees planted by the Japanese had seeded across the feature, and there were also "fine palm fields, pineapple fields and sugar cane fields."[259] Photographs taken of the feature in 1951 showed it

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[250] *Id.* ¶¶ 602, 606.

[251] *Id.* ¶ 602.

[252] *Id.* ¶¶ 361, 602.

[253] Treaty of Peace with Japan, *supra* note 113, at 50.

[254] Arbitration, *supra* note 1, ¶ 430.

[255] Cable from U.S. Consulate General Hong Kong to U.S. State Department, Subj: RVN/PRC Dispute over South China Seas Islands, par. 2 (Jan. 18, 1974) (1974HONGK00751).

[256] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Spratley Islands, pars. 5-6 (Jan. 23, 1973) (1973MANILA00858).

[257] Cable from U.S. Embassy Taipei to U.S. State Department, Subj: Conflicting Claims to Spratleys, par. 1 (Jan. 26, 1974) (1974TAIPEI00508).

[258] Arbitration, *supra* note 1, ¶ 583.

[259] *Id.* ¶ 586.

to be "thickly wooded,"[260] while modern satellite images—even Google Maps—show what looks to be extensive vegetation and tree cover.[261]

The Tribunal acknowledged that this evidence suggests that Itu Aba could support at least some people:

> There is historical evidence of potable water, although of varying quality, that could be combined with rainwater collection and storage. There is also naturally occurring vegetation capable of providing shelter and the possibility of at least limited agriculture to supplement the food resources of the surrounding waters. The record indicates that small numbers of fishermen, mainly from Hainan, have historically been present on Itu Aba ... and appear to have survived principally on the basis of the resources at hand ...[262]

That provides strong evidence of Itu Aba's habitability. Yet, the Tribunal fails to conclude that it is an island. Instead it makes a logical jump from this paragraph to the next one, which suggests that Itu Aba, as a "principle feature" of the Spratlys, is not habitable after all:

> The principal features of the Spratly Islands ... are *not obviously habitable*, and *their capacity even to enable human survival appears to be distinctly limited*. In these circumstances, and with features that fall close to the line in terms of their capacity to sustain human habitation, the Tribunal considers that *the physical characteristics of the features do not definitively indicate the capacity of the features*. Accordingly, the Tribunal is called upon to consider the historical evidence of human habitation and economic life on the Spratly Islands and the implications of such evidence for the natural capacity of the features.[263]

Given that the Tribunal linked the "rocks" or "islands" status of the features to its jurisdiction, one might have expected that it would have expressed itself more clearly in this passage, which attempts to explain why, in the Tribunal's view, the Spratlys features were uninhabitable "rocks." Instead, the paragraph invites challenge.

It begins by stating that the features are "not obviously habitable"—despite the fact that at least one, Itu Aba, clearly *is* habitable, because of the presence of water and food sources, as well as populations numbering several hundred people. Then it raises the bar, claiming that the features' "capacity even to enable human survival appears to be distinctly limited"—which raises the question: if a feature such as Itu

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[260] *Id.* ¶ 592.

[261] *See* Taiping Island, GOOGLE MAPS, http://bit.ly/2tZVbgG. On the quality of these images, see Taiwan's complaint that Google Maps showed its Itu Aba military installations too clearly, and asked for them to be blurred: Christopher Mele, *For Taiwan, Google Images of Disputed Island Are Too Clear*, N.Y. TIMES (Sept. 23, 2016), http://nyti.ms/2u03zNg.

[262] Arbitration, *supra* note 1, ¶ 615.

[263] *Id.* ¶ 616 (emphases added).

Aba is demonstrably habitable, it must also be survivable. (The phrase, "distinctly limited" clarifies nothing, because it is not clear whether the limit refers to the *duration* of human life on a feature, or the *number* of people the feature might support.)

The first two sentences of the passage are also notable for the number of qualifying words and phrases: "obviously," "close to," "appears to be," "not definitively." These suggest that the Tribunal was equivocating.

Still, one should ask why, despite the presence of water and food, humans have not *settled* on the Spratlys. While the Tribunal goes some way towards answering this question, it does not take the final step, which would lead to a different conclusion than the one it actually reached.

It argues that other than a feature's physical attributes, the most reliable marker of an island's capacity to support human habitation "will usually be the historical use to which it has been put." Thus,

> In such circumstances, the Tribunal should consider whether there is evidence that human habitation has been prevented or ended by forces that are separate from the intrinsic capacity of the feature. *War, pollution, and environmental harm* could all lead to the *depopulation*, for a prolonged period, of a feature that, in its natural state, was capable of sustaining human habitation. In the absence of such intervening forces, however, the Tribunal can reasonably conclude that a feature that has never historically sustained a human community lacks the capacity to sustain human habitation.[264]

Let us apply this to formula to Itu Aba. Although the feature has been populated almost continuously since the early 1920s, and by substantial numbers of people, there have been no *settled* populations—the phosphate workers[265] may have been recruited or dragooned from Japan's then-colony of Formosa (later Taiwan), and were probably present for only a few years; the troops[266] were recruited or conscripted by Taiwan's armed forces and served on rotation. The question, then, is why others did not make Itu Aba their home.

The Tribunal lists some of the historical reasons for populations not taking root—"War, pollution, and environmental harm"—and we will take "war" as our example. During armed conflict, humans may not be able to settle an island "for a prolonged period" because it is occupied by military forces prepared to take lethal action to defend it. Now apply this to the Spratlys. Although there has been no full-blown war in the immediate vicinity since 1945, the situation has been identical in every other respect so far as settlement goes. Humans have not been able to

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[264] *Id.* ¶ 549 (emphases added).

[265] See, for example, the reference to "Formosan" labourers at *id.* ¶ 619.

[266] Cable from U.S. Embassy Taipei to State Department, Subj: ROC Navy Resupply Mission to Spratleys, par. 2 (Feb. 5, 1974) (1974TAIPEI00751).

set up home in, say, Itu Aba, *even had they wanted to*, for the simple reason that it is a garrisoned island within a military zone, occupied by forces not averse to firing on interlopers: recall, for example, Marcos's allegation in 1971 about shots being fired at aircraft and vessels.[267] If potential inhabitants had shown up within its territorial waters, they would have been swiftly escorted out of the area—at gunpoint. *That* is why Itu Aba has not been settled.

It may thus be argued that the Tribunal should have found Itu Aba, and perhaps a few other features, to be an island, generating an exclusive economic zone and a continental shelf. This would have allowed for a less overloaded interpretation of Article 121 on the question of "human habitation." But as we know, a finding of even *a single island* in the Spratlys would have entailed the Tribunal renouncing its jurisdiction over many of the Philippines' submissions because of the consequent overlap of maritime zones. In the event, it decided not to exercise this restraint, and arrived at a decision that not only delivered a decisive blow to China, but also clipped Vietnam and Taiwan in the backswing. In short, it altered the *status quo* in the South China Sea.

CONCLUSION

The current disputes can be traced back to the mid-1970s, when China's intervention against South Vietnam in the Paracels rippled across the South China Sea to the Spratlys. While not wishing to underplay the dangers of the militarization of the area, some perspective is important: the world is now witnessing the latest stage of a process, not a dramatic new event. So, when the *South China Morning Post* carried a story earlier this year, based on American sources, about Beijing "beefing up" its military presence in the Paracels,[268] it was not reporting anything particularly unusual: it was simply echoing the themes of the aforementioned Chinese documentary, broadcast on local television some 43 years earlier, which told much the same story.[269] Not only that, but China, although a very significant player in the Spratlys, is far from being the only player. It is one thing to note, as have innumerable editorials, that China is constructing runways and military installations on the reefs; it is quite another to add, as is rarely done, that Taiwan, the Philippines and Vietnam have been doing precisely this on the features for four decades or more.

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[267] Cable from U.S. Embassy Manila to U.S. State Department, Subj: Spratley Islands, par. 2 (Jan. 23, 1973) (1973MANILA00858).

[268] Kristin Huang, *China "Beefing Up Military" on Disputed Islands in the South China Sea, Says US Think Tank*, SOUTH CHINA MORNING POST (Feb. 10, 2017), http://bit.ly/2twF9KG.

[269] Cable from U.S. Consulate General Hong Kong to U.S. State Department, Subj: Oil Rig on Paracel Islands, p. 1 (Jun. 11, 1974) (1974HONGK06572).

By focusing on the South China Sea disputes as a process, it is possible to identify both the continuities and discontinuities in the claimants' legal positions over the years. One of the most notable aspects of the events of the 1970s was the parties' attempts to invoke the law to justify their respective claims, based, variously, on historic rights, *res nullius*, the Treaty of Peace with Japan, and the Mutual Defense Treaty. Observers in Washington, who then occupied a ringside seat to the disputes by dint of their patronage of regimes in Saigon, Taipei, and Manila, occasionally let slip their views of the claimants' arguments, despite the United States' avowed neutrality.[270] In 1976, for example, one high-level State Department cable dispatched during the MDT negotiations stated:

> [W]e take no position on merits of the various claimants cases concerning the Spratlys. You should know, however, that as a technical legal matter the Philippines claim is probably the least convincing of the lot.[271]

Be that as it may, the entry into force of UNCLOS in 1994 provided the claimants with new opportunities to advance different and perhaps more compelling legal claims. This eventually led one of them, the Philippines, to the door of the Permanent Court of Arbitration. It was a path worth taking, because the Tribunal's award, handed down in July 2016, gave Manila almost everything it had asked for. That said, it was notable how, just four months after the decision, President Rodrigo Duterte, when invited to Beijing on a state visit, declared that the arbitration would "take a back seat" during his talks with the Chinese.[272] The law is one thing; politics is quite another.

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[270] Cable from U.S. State Department to U.S Embassy Saigon, Subj: PRC-GVN Clash in Paracels, par. 3 (Jan. 19, 1974) (1974STATE012641).

[271] Cable from U.S. State Department to U.S. Embassy Manila, Subj: Visit of DepSec Robinson: Briefing Papers—Spratly Islands and Reed Bank, par. 2 (Aug. 4, 1976) (1976STATE193353).

[272] Charmaine Deogracias, *Duterte Allows Xi to Take Lead on South China Sea Issue*, PHILIPPINES STAR (Oct. 20, 2016), http://bit.ly/2tVTGkk.