

*Rocking the Boat:
The Paracels, the Spratlys, and the South China Sea Arbitration
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On 12 July last year, the Permanent Court of Arbitration found overwhelmingly in favour 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 in the Paracel and Spratly groups.

To investigate the source of the conflict, one does not have to go back very far. In 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 clashes on 19-20 January 1974 involving some fifteen naval vessels, the South Vietnamese withdrew. Four Vietnamese had been killed, dozens had been wounded, and scores more were missing or captured. After this 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, this time on the Spratly Islands, a larger group of maritime features further to the south of the South China Sea. From 1971 to 1974, this group saw the arrival of armed garrisons, the construction of barracks and airfields, the extension of claims to reefs, the search for oil and gas, and the degradation of the marine environment — precisely the sort of activities which the Philippines accused China of in the recent arbitration. Back then, though, it was the Philippines, South Vietnam and Taiwan involved in these pursuits. China arrived later. While this does not excuse Beijing’s current actions, it does put a different complexion on the current claims within the South China Sea.

¹ PCA Case No 2013-19, *In the matter of the South China Sea arbitration* between the Republic of the Philippines and the People’s Republic of China (12 July 2016) (*Arbitration*), par. 1203.

By drawing on these earlier events, it is possible to construct a legal path to the current arbitration, based on the respective parties' claims to the Spratly features and the maritime zones around them. Having situated the arbitration within this legal debate, one can then critically appraise the Court's reasoning on its jurisdiction over the case, its utilisation of the historical facts, and its interpretation of the UN Law of the Sea Convention.

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 (PRC) 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 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,

² US State Department (State Department), 'EA press summary' (17 January 1974), par. 2. Unless otherwise stated, the archival material has been drawn from the Central Foreign Policy Files, RG 59, National Archives Records Administration (NARA).

³ Ibid.

⁴ US Consulate General Hong Kong to State Department, 'RVN/PRC dispute over South China Seas islands', (18 January 1974), Par. 4: NARA.

⁵ State Department, 'EA press summary' (17 January 1974), par. 2: NARA.

⁶ US Consulate General Hong Kong to State Department, 'RVN/PRC dispute over South China Seas islands', (18 January 1974), Par. 4: NARA.

⁷ State Department to US Embassy Saigon, 'Weekly wrap-up on East Asian affairs' (2 February 1974), par. 8: NARA. (For press reports see, for example, State Department, 'EA press summary' (18 January 1974), par. 1: NARA.)

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-defence. 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-defence, 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, 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; 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 is 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

⁸ State Department to US Embassy Saigon, 'PRC-GVN clash in Paracels' (21 January 1974), p. 2: NARA.

⁹ US United Nations mission (USUN), New York, to State Department, 'PRC letter to Security Council' (23 January 1974), p. 2: NARA.

¹⁰ Ibid.

¹¹ Ibid.

¹² US Consulate General Hong Kong to State Department, 'Peking celebrates its Paracels victory with an epic poem' (19 March 1974), par. 1: NARA.

¹³ Ibid., par. 3.

had used Komar-class vessels or Styx missiles during the engagement.¹⁴)

The Americans, 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 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

Other motives

Aside from self-defence, 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 the decisive factor at the time.

To begin with the potential oil deposits. China had 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 numerous occasions before the Paracels incident. On 29 December 1970, a *Renmin Ribao* (*People’s Daily*) editorial entitled ‘On China’s seabed and subsoil resources’ stated:

¹⁴ Ibid.

¹⁵ Ibid., par. 4.

¹⁶ Ibid., par. 2.

¹⁷ US Consulate General Hong Kong to State Department, ‘Peking’s calculations in the Paracels war’ (30 January 1974), pp. 1-2: NARA.

Taiwan Province and the islands appertaining thereto, including the Tiaoyu ... Huangwei, Chihwei, Nanhsiao, Peihshiao 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 UN 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[e]ignty 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

¹⁸ 'On China's seabed and subsoil resources', *Renmin Ribao* (29 December 1970), quoted in W. Chai (ed.), *The Foreign Relations of the People's Republic of China* (New York, Capricorn, 1972), p. 325. The islands referred to were part of the Diaoyu/Senkaku group in the East China Sea.

¹⁹ US Embassy Colombo to State Department, 'Paracel/Spratly Islands dispute' (3 April 1974) p. 2: NARA.

²⁰ *Ibid*, pp. 2-3.

²¹ *Ibid*, p. 2.

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 the neighbours 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. The withdrawal of the United States' forces from Vietnam in 1973 provided the Chinese with both opportunities and problems. The scaling back of the American Seventh Fleet in the vicinity of Vietnam enabled the Chinese to step up their own naval presence, including on and around the Paracels, in the areas adjacent to the sea-lanes running through the South China Sea. By the same token, they may have feared the Soviet Pacific Fleet's further encroachment into the South China Sea at the invitation of North Vietnam,²³ and might have wished to occupy the Paracels as a deterrent.

After the clash, they certainly moved fast to consolidate their hold. A documentary made three months after the incident showed scenes of docks, weather balloons, radar installations — and an oil drilling rig.²⁴ Later reports indicated that the Chinese were expanding their military facilities, and building wharves, harbours, breakwaters, offices,²⁵ warehouses, meteorological stations and marine products processing plants.²⁶ In the meantime, they also set up archaeological digs, which were reportedly unearthing items dating back to the Tang and Sung dynasties,²⁷ and which Beijing used as evidence to support its claim to historic title to the Paracels.²⁸

Yet it is the final argument, relating to Vietnam's claims to the Paracels, which goes furthest

²² US Consulate General Hong Kong to State Department, 'Peking's calculations in the Paracels war' (30 January 1974), par. 2: NARA.

²³ US Embassy Manila to State Department, 'Philippine reaction to Chinese seizure of Paracels' (22 January 1974), par. 4: NARA. (The Soviets dismissed rumours that the North Vietnamese would offer them a base at Cam Ranh Bay as 'a Chinese fabrication': US Embassy Moscow to State Department, 'Soviet views of China' (27 June 1975), par. 9; NARA.)

²⁴ US Consulate General Hong Kong to State Department, 'Oil rig on Paracel Islands' (11 June 1974), p. 1: NARA.

²⁵ State Department, 'EA press summary' (2 January 1975), p. 8: NARA.

²⁶ US Consulate General Hong Kong to State Department, 'People's Republic of China — Economic Review 2' (28 January 1975), par. 6: NARA.

²⁷ Ibid.

²⁸ State Department, 'EA press summary' (11 December 1974), p. 5: NARA.

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 earlier, while the American military forces were still on the scene. It was only once the Americans had removed themselves in 1973, 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 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 invade during the narrow window of opportunity that presented itself between the Americans' leaving 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, their intervention was militarily decisive, as was the diplomatic follow-up: in a public statement issued just after, Beijing declared that the Saigon authorities had intruded into 'China's 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 made its point to Vietnam, 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 Spratleys, 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.

Saigon's perspective

Needless to say, the Republic of Vietnam — South Vietnam — held a rather different view. The Paracels were theirs, not China's, and it was Saigon, not Beijing, which was acting in

²⁹ US Consulate General Hong Kong to State Department, 'NCNA reports PRC clashes with South Vietnamese' (20 January 1974), p. 2: NARA.

³⁰ US Liaison Office Peking to State Department, 'Position with respect to Spratley islands' (29 January 1974), par. 1: NARA.

self-defence. ‘As a small nation unjustly attacked by a big military power’, it 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 Ministry of Foreign Affairs published a statement claiming that the Paracels (as well as the Spratlys) were an integral part of the South Vietnam. This was based on two grounds: ‘geographical propinquity’, and long-standing ‘continuous and peaceful display of state authority’.³² The Vietnamese claims to the Paracels apparently dated back to 1802, when Emperor Gia Long set up the Hoang Sa Company to exploit resources in the vicinity.³³ They stated that the claim was reaffirmed in 1932 by the French Governor-General, Pierre Pasquier (who integrated the Paracels into the Thua Thien provincial administration). It was then confirmed in 1938 by Emperor Bao Dai, and decreed in 1961 by South Vietnam’s first president, Ngo Dinh Diem.³⁴ ‘All those acts,’ Saigon claimed, ‘were not challenged by any country, including communist China’.³⁵

The South Vietnamese also argued that they had rights by virtue of the fact that they occupied the Paracels: ‘Vietnamese authorities have consistently stationed troops and exercised administrative control over those archipelagos, and the Vietnam Navy regularly patrols and supervises navigational security in the area.’³⁶ This picture was actually less straightforward than was presented. The US State Department’s Bureau of Intelligence and Research reported, for example, that Robert Island seemed to have changed hands in the decades since the war: the Chinese being present on it in the 1950s, and the South Vietnamese occupying it in the early 1970s.³⁷ Even then, Vietnam did not have the Paracels

³¹ US Embassy Saigon to State Department: ‘PRC-GVN clash in Paracels’ (20 January 1974), par. 9: NARA.

³² US Embassy Saigon to State Department: ‘PRC-GVN clash in Paracels’ (21 January 1974), p. 2: NARA.

³³ USUN New York to State Department, ‘Texts of GVN letter’ (18 January 1974), p. 3: NARA.

³⁴ Ibid.

³⁵ Ibid. (They 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. Ibid, p. 4.)

³⁶ Ibid., p. 4.

³⁷ US Consulate General Hong Kong to State Department, ‘RVN/PRC dispute over South China Seas islands’, (18 January 1974), par. 2: NARA.

to itself, because the Chinese stationed personnel on Woody and Lincoln islands, and ‘PRC naval vessels are 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

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 saw as 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 based in the South Vietnam got the same treatment.⁴³ This needling was apparently successful, causing embarrassment to the Vietnamese communist authorities both north and south.⁴⁴

³⁸ Ibid., par. 3.

³⁹ US Embassy Manila to State Department, ‘Philippine reaction to Chinese seizure of Paracels’ (22 January 1974), par. 3: NARA.

⁴⁰ US Consulate General Hong Kong to State Department, ‘Peking’s calculations in the Paracels war’ (30 January 1974), par. 3: NARA.

⁴¹ State Department, ‘EA Press Summary’ (30 January 1974), par. 3: NARA.

⁴² US Embassy Saigon to State Department, ‘Saigon media treatment of Paracels issue’ (21 January 1974), par. 7: NARA.

⁴³ US Embassy Saigon to State Department, ‘GVN chides “PRG” for statement on the Paracels/Spratleys’ (11 February 1974), p. 4: NARA.

⁴⁴ US Embassy Saigon, ‘Embassy Saigon’s mission weekly’ (13 February 1974), p. 4:

The West disengages

Further afield, the United States and the colonial powers adopted a hands-off approach to the affair. The Americans' aim at the time was to extract themselves from Indochina in an orderly fashion; they had absolutely no interest in becoming embroiled in 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 US 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 [UN 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 do. Their first and often-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 defence attaché's staff in Danang, happened to be travelling on one of the Vietnamese vessels caught up in the clash, and was captured by the

NARA.

⁴⁵ US Embassy Saigon to State Department, 'PRC-GVN clash in Paracels' (20 January 1974), par. 1: NARA.

⁴⁶ State Department to US Embassy Saigon, 'PRC-GVN clash in Paracels' (19 January 1974), par. 1: NARA.

⁴⁷ US Embassy Saigon to State Department, 'PRC-GVN clash in Paracels' (20 January 1974), par. 1: NARA.

⁴⁸ *Ibid.*, par. 1.

⁴⁹ State Department to US Embassy Saigon, 'PRC-GVN clash in Paracels' (19 January 1974), par. 4: NARA.

⁵⁰ *Ibid.*, par. 3.

⁵¹ *Ibid.*

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 via International Committee of the Red Cross intermediaries to the Americans in Hong Kong eleven days later.⁵³

In the meantime, 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 Prime Minister Nguyen Van Thieu or Foreign Minister Vuong Van 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 UN Law of the Sea Conference, scheduled to open later in the year.⁵⁵ A few days later, 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 off.

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 Kong⁵⁷). The French also declined to give an opinion — despite having departed its Indochinese colonies only two decades earlier — making it clear they were ‘very reluctant to take any position on the dispute’, and stating that the competing claims were ‘very

⁵² State Department to US Embassy Saigon, ‘PRC-GVN clash in Paracels’ (19 January 1974), par. 1: NARA.

⁵³ US Consulate General Hong Kong, ‘Peking decision to effect mass release of SVN prisoners’ (16 February 1974), par. 1: NARA.

⁵⁴ State Department to CINCPAC, ‘GVN/PRC dispute in Paracels’ (26 January 1974), par. 3: NARA.

⁵⁵ Ibid.

⁵⁶ State Department, ‘Paracel Islands’ (28 January 1974), par. 3: NARA.

⁵⁷ State Department, ‘EA Press Summary’ (7 February 1974), par. 19: NARA.

complicated’, and that there would never be a ‘clear case’.⁵⁸

Shortly after the incident, the South Vietnamese Ambassador called on the Quai d’Orsay’s directeur d’Asie-Océanie, Henri Froment-Meurice, to request French support for inscribing the issue on the Security Council agenda. Froment-Meurice said he would ‘reflect on’ the question⁵⁹ (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 subsequently rewriting history.

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 show no signs of abating. On 19 January 1974, during the Paracels clash, the Chinese declared five Beijing-based Soviet diplomats *personae non gratae* for handing over radio equipment and receiving ‘counterrevolutionary’ papers from a Chinese contact.⁶² (The Soviets counterclaimed that the five had been trapped in an elaborate Chinese sting

⁵⁸ US Embassy Paris to State Department, ‘French position concerning Paracels and Spratleys (25 January 1974), par. 3: NARA.

⁵⁹ Ibid., par. 2.

⁶⁰ Ibid.

⁶¹ Ibid., par. 3.

⁶² US Embassy Peking to State Department, ‘Expulsion of Soviet diplomats’ (21 January 1974), par. 1: NARA.

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, opposing Asian collective security, succouring Western European reactionaries and letting down the Arabs.⁶⁴ On 24 January, *Renmin Ribao* (*People's Daily*) responded in kind, accusing the Soviets of fomenting 'counterrevolutionary opinion', purveying neo-Confucianism, and targeting China as a 'a colony of Soviet-revisionist social-imperialism'.⁶⁵

Given all this, it is unsurprising that the Soviets criticised 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 helpless victim of Chinese aggression.⁶⁷ Second, they seemed to have recognised 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 US Ambassador in Manila, suggested that 'Peking's persistent paranoia about Moscow' was a

⁶³ US Embassy Moscow to State Department, 'Soviet reactions to PRC expulsion of diplomats and to PRC-GVN clash' (22 January 1974), par. 2: NARA. Speculating on the reason behind the expulsions, the American Embassy 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' (US Embassy Peking to State Department, 'Expulsion of Soviet diplomats' (21 January 1974), par. 3: NARA).

⁶⁴ US Embassy Moscow to State Department, 'Soviet press mum on Chinese expulsion of Soviet diplomats but not on Hsisha incident' (21 March 1974), par. 1: NARA.

⁶⁵ US Embassy Peking to State Department, 'PRC anti-Confucius campaign turns spearhead against Soviets' (29 January 1974), par. 1: NARA.

⁶⁶ US Embassy Moscow to State Department, 'Soviets skirt pitfalls in heavy press treatment of Paracels dispute' (28 January 1974), par. 1: NARA.

⁶⁷ *Ibid.*, par. 2.

⁶⁸ *Ibid.*

⁶⁹ US Embassy Moscow to State Department, 'Soviet views of China' (27 June 1975), par. 1: NARA.

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 the 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:

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

Security Council dead-end

In the midst of the crisis, South Vietnam's Foreign Minister Bac instructed their 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 UN, John Scali, cabled the State Department from New York:

GVN plan to take Paracels issue to SC [Security Council] raises obvious and serious

⁷⁰ US Embassy Manila to State Department, 'Philippine reaction to Chinese seizure of Paracels' (22 January 1974), par. 4: NARA

⁷¹ Ibid.

⁷² Ibid., par. 5.

⁷³ USUN New York to State Department, 'Paracels in Security Council' (20 January 1974), p. 1: NARA.

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 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 UN Permanent Representative, Huang Hua, called on Facio to express his displeasure.⁷⁵ According to William Bennett, 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 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

⁷⁴ Ibid., p. 2.

⁷⁵ USUN New York to State Department, ‘Paracels in Security Council: China’ (21 January 1974), par. 1: NARA.

⁷⁶ Ibid.

⁷⁷ USUN New York to State Department, ‘Paracels in Security Council’ (22 January 1974), par. 4: NARA.

⁷⁸ State Department to US Embassy Saigon, ‘Security Council consideration of Paracels issue’ (21 January 1974), par. 2: NARA.

⁷⁹ Ibid.

South Vietnam, widely perceived as an American puppet, 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 UN Charter they would have had to gain nine affirmative votes out of fifteen, with abstentions being counted as negative votes. Winning this many votes was highly unlikely. Two permanent members, China and the Soviet Union, were expected to vote against inscription, while a majority of non-permanent members were expected to follow suit. As the Americans explained, the Council's makeup was 'especially unfortunate' from the West's point of view.⁸⁰ This was 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.⁸¹

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

Facio's consultations with Security Council members confirmed this lack of support. The Soviet representative admitted it would be 'awkward' for the USSR to back China, give their bad relations, but thought that the United States would also have trouble choosing 'between its old ally and its new friend'.⁸² The Indonesian representative said the issue as 'a most delicate one for Jakarta', and that Hanoi's view would have to be taken into account along with Saigon's.⁸³ The Australian and Austrian doubted a meeting would be fruitful.⁸⁴ The British representative hoped the problem would go away.⁸⁵ The French representative was vague and evasive.⁸⁶ The Peruvian had little to say.⁸⁷ Four representatives — from Britain,

⁸⁰ State Department to US Embassy Saigon, 'Prospects for SC Meeting on Paracels' (21 January 1974), par 2: NARA.

⁸¹ Ibid.

⁸² USUN New York to State Department, 'Paracels in Security Council' (22 January 1974), par. 3: NARA.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

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.⁸⁸ Several others, Indonesia included, speculated on whether South Vietnam was the true representative of Vietnam.⁸⁹

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, USSR); and five would abstain (Cameroon, France, Kenya, Mauritania, Peru).⁹⁰ So in Facio’s words, South Vietnam ‘will not get anywhere’.⁹¹ When this information was relayed back to Saigon, President Thieu pulled the plug on the proposal.⁹²

The South Vietnamese then switched their attention to another institution — the Southeast Asia Treaty Organisation (Seato) — where their way was blocked by the Americans.⁹³ The proposals 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.

The price of the Paracels

What, then, was the significance of China’s action in the Paracels? None of the players emerged entirely unscathed. South Vietnam staked its claim to them, and lost. North Vietnam kept silent, despite its own claims. The United States kept out — all it aspired to was a withdrawal from Indochina that avoided ignominy. The Soviet Union could wholeheartedly 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

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ USUN New York to State Department, ‘Paracels in Security Council’ (22 January 1974), par. 3: NARA.

⁹¹ USUN New York to State Department, ‘Paracels in Security Council’ (22 January 1974), par. 1: NARA.

⁹² US Embassy Saigon to State Department, ‘Paracels in the Security Council’ (24 January 1974), par 1: NARA.

⁹³ State Department to US Embassies Bangkok and Saigon, ‘GVN request that Seato consider Parcel issue’ (24 January 1974), par. 1: NARA.

reputation as the friend and protector of smaller states drowned in the South China Sea.

Even before the furore over the Paracels had died down, official attention shifted 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 in the Spratlys? If it chose to do so, it would have had to tangle with three states already *in situ*, starting with its old enemy, the Republic of China (Taiwan).

Taiwan had a good deal to fear from increased PRC activity in the South China Sea. Since 1956, it had occupied the largest feature in the Spratlys — Itu Aba (Taiping) — as well as the Pratas group further to the north in the South China Sea.⁹⁴ In the intervening decades, it had built various installations on Itu Aba,⁹⁵ including, it was rumoured, an airstrip.⁹⁶ By the 1970s, it garrisoned some 200-300 soldiers there,⁹⁷ who were rotated and supplied by ships from Taiwan every three months.⁹⁸ In other words, Itu Aba, like the Pratas group, was (and is) a Taiwanese garrison within a closed military area.⁹⁹

Yet although Taiwan and PRC were at loggerheads on most issues, they saw eye-to-eye on the issue of Chinese sovereignty in the South China Sea. Under the ‘one-China’ policy, they jointly claimed possession of the Paracel, Spratly, Pratas and Macclesfield Bank groups 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, US Ambassador to Taiwan, reported,

[I]n ROC view, Paracels (as Spratleys and Pratas, of course) are [i]ndisputably Chinese territory ... ROC has also avoided using Paracels clash as example of PRC

⁹⁴ US Consulate General Hong Kong to State Department, ‘RVN/PRC dispute over South China Seas islands’ (18 January 1974), par. 2: NARA.

⁹⁵ Ibid.

⁹⁶ US Embassy Taipei to US Embassy Manila, ‘Medevac from Itu Aba’ (7 November 1975), par. 4: NARA.

⁹⁷ US Embassy Taipei to State Department, ‘Conflicting claims to Spratleys’ (26 January 1974), par. 1: NARA.

⁹⁸ US Embassy Taipei to State Department, ‘ROC Navy resupply mission to Spratleys’ (5 February 1974), par. 2: NARA.

⁹⁹ US Embassy Taipei to US Embassy Belgrade, ‘Emergency visas for Republic of China’ (18 October 1974), par. 5: NARA.

‘bloodthirstiness’ or ‘warlike disposition’. With sole exception of [newspaper] *Lien Ho Pao*, ROC media have carefully downplayed Paracels news, and *Lien Ho Pao* was given very stiff reprimand for front-paging story.¹⁰⁰

Even so, Taiwan was not the sole occupant of the Spratlys. South Vietnam and the Philippines also claimed all or part of the group, and both of these other nations had already stationed troops on other features before the Paracels clash: the Vietnamese on Namyt, and the Philippines in ‘Kalayaan’. Furthermore, just after the Paracels incident, the South Vietnamese occupied five more features in the Spratlys. This gave Taiwan great cause for concern: 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.¹⁰¹ So in a move designed to calm Beijing, it 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.¹⁰²

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 the Republic of China in Taiwan inherited the Spratlys under the ‘one-China’ doctrine.

¹⁰⁰ US Embassy Taipei to State Department, ‘ROC views on the islands controversy’ (30 January 1974), p. 2: NARA.

¹⁰¹ Ibid.

¹⁰² US Embassy Taipei to State Department, ‘[]ROC reiterates claim to Spratleys’ (8 February 1974), pars. 2-3: NARA.

Even so, Premier Jiang Jingguo thought it best to keep troops on alert, and, according to Ambassador McConaughy, cancelled the resupply ship to the Paracels,¹⁰³ and the ‘regularly scheduled post-Lunar New Year “comfort mission” to Pratas’.¹⁰⁴ Without speculating about the nature of this latter mission, it can be surmised that the Taiwanese troops stationed in the South China Sea commenced the new year without the usual celebrations.

The legal basis of claims

The unsettled situation in the South China Sea compelled the various claimant states to articulate their legal claims to the Spratlys. In 1974, the treaty regime governing the law of sea was a work in progress. The UN had already convened two conferences. The first, held in 1958, produced treaties governing the continental shelf, high seas, and fishing, but no agreement on the width of the territorial sea. The second conference, held in 1960, was intended to answer this last question, but collapsed. The third conference, which opened in June 1974 and eventually produced the all-encompassing UN Convention on the Law of the Sea (UNCLOS)¹⁰⁵ would not be signed until 1982. Consequently, the Spratly claimants had to reach back to older legal regimes to make their case.

A curtain-raiser for the Spratlys controversy took place in 1971 when the Philippines protested against Taiwan’s military presence on Itu Aba. In Manila on 10 July, President Ferdinand Marcos emerged from a National Security Council meeting about the Spratlys, and read out a Presidential communique 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.’¹⁰⁶ This, Marcos added, was a serious threat to

¹⁰³ US Embassy Taipei to State Department, ‘ROC Navy resupply mission to Spratleys’ (5 February 1974), par. 2: NARA.

¹⁰⁴ US Embassy Taipei to State Department, ‘ROC views on the islands controversy’ (30 January 1974), par. 3: NARA.

¹⁰⁵ United Nations Convention on the Law of the Sea (UNCLOS) (signed 10 December 1982, entered into force 16 November 1994) 1833 *UNTS* 3.

¹⁰⁶ US Embassy Manila to State Department, ‘Spratley Islands’ (23 January 1973), par. 2: NARA.

the Philippines' national security.¹⁰⁷

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 8 September 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'.¹⁰⁸ 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 South China Sea groups fell instead under 'the de facto trusteeship of the Allied powers' that had signed the treaty.¹⁰⁹ The Philippines was one of the signatories of the Peace Treaty (and was hence, in their view, a trusteeship power), whereas Taiwan and China had not and were not.

The Filipinos first used this 'trusteeship' argument in 1957, shortly after Taiwan had established a permanent garrison on Itu Aba, when they issued a statement affirming that the Spratlys remained under Allied trusteeship.¹¹⁰ They used it again in 1971, when Marcos issued the aforementioned Presidential communiqué stating 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',¹¹¹ and that Taiwan should withdraw its troops.¹¹² 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.¹¹³

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 Philippines' second legal argument relating

¹⁰⁷ Ibid., par. 3.

¹⁰⁸ Treaty of Peace with Japan (Peace Treaty) (signed 8 September 1951, entered into force 28 April 1952) *United Nations Treaty Series* 136 (UNTS) 45, 50.

¹⁰⁹ US Embassy Manila to State Department, 'Spratley Islands' (23 January 1973), par. 5: NARA.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid., par. 6.

¹¹³ US Embassy Manila to State Department, 'GOP protests ROC and GVN show of force in Spratleys' (6 February 1974), par. 6: NARA.

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’.¹¹⁴ These features, Marcos said at his 1971 press conference, ‘are regarded as *res nullius* and may be acquired according to the modes of acquisition recognised under international law — among which is occupation and effective administration’.¹¹⁵ 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).¹¹⁶ 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).¹¹⁷ By February 1974, they had constructed a weather station on Thitu and a lighthouse on Northeast Cay,¹¹⁸ and reportedly stationed around thirty troops on each feature.¹¹⁹

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 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 (the physical line dividing the two entities was left deliberately vague¹²⁰).

On 30 January 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 the features that, historically, had been seen as constituting the Spratlys.¹²¹ Eight days later, Juan Arreglado, former Legal Counsel for the Department of Foreign Affairs, argued that the Spratlys should be held *res communis* for all the Allied

¹¹⁴ US Embassy Manila to State Department, ‘Spratley Islands’ (23 January 1973), par. 8: NARA.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.* p. 9.

¹¹⁷ US Embassy Manila to State Department, ‘Spratlys’ (28 February 1974), p. 2: NARA.

¹¹⁸ US Embassy Manila to State Department, ‘Spratlys’ (14 February 1974), par. 1: NARA.

¹¹⁹ State Department, ‘EA press summary’ (28 March 1974), par. 7: NARA.

¹²⁰ US Embassy Manila to State Department, ‘GOP claims to Spratlys and Kalayaans’ (8 February 1974), par. 3: NARA.

¹²¹ US Embassy Manila to State Department, ‘Philippine position with respect to Spratley [] Islands’ (30 January 1974), par. 2: NARA.

signatories, and that the Philippines, as a signatory, had the right to occupy them without obtaining permission from any nation.¹²² Six days after that, Executive Secretary Alejandro Melchor argued 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.¹²³ As well as some of these more legalistic arguments, Manila presented more straightforward economic and security claims: one was that ‘Kalayaan’ might produce petroleum and oil, which would resolve the Philippines’ energy crisis; another (recalling that Japan 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.¹²⁴

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 US 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’.¹²⁵ 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 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.¹²⁶

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

¹²² US Embassy Manila to State Department, ‘GOP claims to Spratlys and Kalayaans’ (8 February 1974), par. 1: NARA.

¹²³ US Embassy Manila to State Department, ‘Spratlys’ (15 February 1974), par 5: NARA.

¹²⁴ Ibid., pars. 2, 6.

¹²⁵ State Department to US Consulate General Hong Kong, ‘Spratley Islands’ (8 February 1974), par. 2: NARA;

¹²⁶ Ibid.

occupation and administration of territory is a primary foundation for establishing sovereignty in absence of international settlement'.¹²⁷ But it also noted that 'Phil occupation could hardly be termed uncontested in face of claims and protests of Chinese and Vietnamese'.¹²⁸

No treaty coverage of Spratlys

The Americans were not the only ones paying attention to the Philippines' legal arguments. The Chinese were following them too, and rejected them. In 1974, they invited Sven Hirdman, the Swedish Deputy Chief of Mission in Beijing, to visit the International Organisation and Treaty Law department of the Chinese Ministry of Foreign Affairs. There, officials communicated their concerns to him about the implications of the Filipino claims that 'Kalayaan' was not part of the Spratlys.¹²⁹ 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.¹³⁰ 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.¹³¹ Hirdman was reportedly 'impressed' by these arguments.¹³²

The Chinese may not have been aware of it, but Washington had arrived the same conclusion. They agreed, for example, that the Spratly marine features 'all fall outside Philippine territory as ceded to US by 1898 Treaty with Spain'.¹³³ They also agreed that post-war treaties setting out the territorial limits of the Philippines did not include the Spratlys.

¹²⁷ State Department to US Embassy Manila, 'US MDT Commitment and Spratlys' (9 June 1975), par. 5: NARA.

¹²⁸ Ibid.

¹²⁹ US Embassy Peking to State Department, 'PRC view on Philippine claim to Spratlys' (1 March 1974), par. 1: NARA.

¹³⁰ Ibid.

¹³¹ Ibid., par. 2.

¹³² Ibid., par. 3.

¹³³ State Department to US Embassy Manila, 'US MDT commitment and Spratlys' (9 June 1975), par. 3: NARA.

The Americans focused their attention on the Mutual Defence 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 [US 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.¹³⁴

Under Article 5 of the MDT, the United States and the Philippines were committed 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’.¹³⁵

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.¹³⁶

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 US-administered UN Trust Territories or Okinawa.¹³⁷ The Philippines did not administer islands under these conditions because ‘US does not consider Japanese Peace Treaty created de facto Allied power trusteeship over Spratlys, and we would

¹³⁴ Ibid., par. 3.

¹³⁵ Ibid., par. 2; Mutual Defense Treaty between the Republic of the Philippines and the United States of America (MDT) (signed 30 August 1951, entered into force 27 August 1952) 177 *UNTS* 133, www.gov.ph.

¹³⁶ Ibid.

¹³⁷ Ibid., par. 4.

not regard the Spratlys as thus being islands under jurisdiction of either party (or both).¹³⁸

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 recognised either the Philippines’ or the other states’ claims to the Spratlys.¹³⁹ 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 stationed in notoriously disputed territories such as Spratleys for purpose of establishing or enforcing claim to that disputed territory.’¹⁴⁰ They also noted that the MDT had to be interpreted in the light of Article 1, which obliged them to refrain from ‘threat or use of force in any manner inconsistent with UN Charter’.¹⁴¹ Looking forward, they 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’.¹⁴²

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 5,¹⁴³ 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’.¹⁴⁴

The Americans did not accept the Filipino *res nullius* argument either. During the negotiations over the renewal of the MDT in 1976, this came up in an exchange between Ambassador Sullivan and the Filipino negotiators, Senator Emmanuel Palaez and General Romeo Espino, over the occupied features in the northeast Spratlys, including the reef

¹³⁸ Ibid.

¹³⁹ State Department to US Embassy Manila, ‘US MDT commitment and Spratlys’ (9 June 1975), par. 9: NARA.

¹⁴⁰ Secretary of State to Consulate General Hong Kong, ‘Spratley Islands’ (8 February 1974), par. 1: NARA.

¹⁴¹ State Department to US Embassy Manila, ‘US MDT commitment and Spratlys’ (9 June 1975), par. 6: NARA.

¹⁴² Ibid., par. 11.

¹⁴³ Ibid., par. 10.

¹⁴⁴ State Department to US Delegation, ‘Briefing memorandum’ (8 August 1976), par. 12: NARA.

known as Reed Bank (also the subject of the recent arbitration).¹⁴⁵ In the hasty transcription of the meeting, with typos and uneven punctuation, Sullivan said, referring to Thitu: ‘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.’¹⁴⁶

Vietnam moves in

The Philippines occupied features in the north of the group — ‘Kalayaan’ — between 1971 and 1974. Then the South Vietnamese moved in to occupy more features from 1973 to 1974. The scramble for the Spratlys had begun.

In August 1973, Saigon stationed 64 men on Namyit Island (in Vietnamese, Nam Yet).¹⁴⁷ Then on 30 January 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).¹⁴⁸ 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.¹⁴⁹ The US 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

¹⁴⁵ US Embassy Manila to State Department and Department of Defense, ‘Mutual Defense Treaty — Reed Bank’ (30 July 1976), p. 2: NARA.

¹⁴⁶ Ibid. Original ellipses.

¹⁴⁷ US Embassy Saigon to State Department, ‘GVN announcement of garrisoning of Spratly Islands’ (23 February 1974), par. 5: NARA.

¹⁴⁸ US Embassy Saigon to State Department, ‘Spratly Islands’ (31 January 1974), par. 1: NARA. The UPI report incorrectly listed Southwest Cay as (Philippines-occupied) Northeast Cay.

¹⁴⁹ Ibid., par. 3.

toward any forces which might be in the area and not to attempt to land troops on any occupied islands'.¹⁵⁰ The press speculated on Saigon's motives: to find offshore oil, to preempt 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.¹⁵¹

These newly occupied features were barely habitable low-lying crescent-shaped reefs or sandbars enclosing shallow lagoons. There was little or no fresh water, and little vegetation to provide shade, fuel and building materials. According to an official report, the South Vietnamese headquarters were located on Namyt Island, under the command of First Lieutenant Doan Cam Tiem, and the troops were divided between Namyt and four other features (but not Amboyna Cay, as originally reported, because it was only two hectares and barely a metre above sea level).¹⁵² The troops took with them weapons, shelters, bedding, sampans and gear to catch food with¹⁵³ (mainly fish and birds). The following month, Saigon reportedly sent 500 tons of construction materials out to the features, along with engineers to assist with the building of bunkers and permanent housing.¹⁵⁴

All this shows that the Spratlys were 'invaded' long before the Chinese arrived on the scene. The largest feature, Itu Aba, was occupied by Taiwan in 1956, and ten more were occupied by the Philippines and South Vietnam by 1974. All three constructed defence 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 in the area, the Taiwanese three warships, and the Philippines, two trawlers.¹⁵⁵ All parties kept one eye on each other, and the other on the not-so-sleepy Chinese giant.

The big question

¹⁵⁰ Ibid., par. 4.

¹⁵¹ State Department, 'EA press summary' (6 February 1974), pars. 1, 28: NARA.

¹⁵² US Embassy Saigon to State Department, 'GVN announcement of garrisoning of Spratly Islands' (23 February 1974), par. 5: NARA.

¹⁵³ Ibid., par. 7.

¹⁵⁴ State Department, 'EA press summary' (12 March 1974), par. 1: NARA.

¹⁵⁵ State Department, 'EA press summary' (28 March 1974), par. 7: NARA.

How would China respond to Saigon's latest moves in the South China Sea? On 4 February 1974, Beijing gave their answer. The Foreign Ministry warned that it would 'not tolerate infringement on China's territorial integrity' in the Spratlys,¹⁵⁶ but crucially, it did not threaten immanent action.

Even so, the various occupants of the Spratlys had the jitters, and attempted to engage the United States in the discussion about the implications of a Chinese strike in 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'.¹⁵⁷ And the Filipinos made clear to the Americans their concerns about China inserting itself into the area of shipping lanes through the South China Sea.¹⁵⁸

The Americans refused to be drawn. The State Department line was to say nothing. If really pressed, officials were to say only that 'the U.S. takes no position on the sovereignty of these islands'.¹⁵⁹ (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'.¹⁶⁰) When Deputy Assistant Secretary Stearns met Phuong just after China's statement, he suggested that Saigon focussed on defeating the North Vietnamese rather than on baiting the Chinese out of 'wounded national pride'.¹⁶¹ 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

¹⁵⁶ State Department to US Embassy Kuala Lumpur, 'Weekly round-up on Easy Asian affairs (11 February 1974), par. 17: NARA.

¹⁵⁷ State Department to US Embassy Saigon: 'Paracels/Spratlys' (7 February 1974), par. 6: NARA.

¹⁵⁸ US Embassy Manila to State Department, 'Philippine position with respect to Spratley Islands' (30 January 1974), par. 6: NARA.

¹⁵⁹ State Department to US Embassy Colombo, 'Paracels/Spratly islands dispute' (2 April 1974), par. 3: NARA.

¹⁶⁰ Ibid.

¹⁶¹ State Department to US Embassy Saigon, 'Paracel/Spratley islands' (6 Feb 74), par. 2: NARA.

would be unenthusiastic about strengthening Saigon for further gun-boat skirmishes with Chinese.¹⁶²

Behind the scenes, the Americans did not believe that China was considering an assault on the Spratlys.¹⁶³ This assessment was based on three calculations. First, they assumed the China would not want to embroil itself in a dispute against Taiwan, the Philippines, and other Southeast Asian states during the delicate period of transition following the United States' withdrawal from the region.¹⁶⁴ Second, they predicted that Chinese would find it even more difficult to make a legal case for self-defence in the Spratlys than they had in the Paracels.¹⁶⁵ 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,¹⁶⁶ 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'.¹⁶⁷

Hanoi ousts Saigon from Spratlys

In April 1975, another event rocked the region: the South Vietnamese regime disintegrated. Two weeks before a North Vietnamese tank ripped the gates off the Presidential Palace in Saigon, Hanoi despatched 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 twenty-nine South Vietnamese soldiers and four radio and weather station operators.¹⁶⁸ According to Filipino reports from a salvage vessel and marine units in the vicinity:

¹⁶² Ibid.

¹⁶³ State Department, 'Weekly wrap-up on East Asian affairs (2 February 1974), par. 9: NARA.

¹⁶⁴ US Consulate General Hong Kong to State Department, 'Peking and the Spratlys' (2 February 1974), par. 4: NARA.

¹⁶⁵ State Department to US Embassy Saigon: 'Paracels/Spratlys' (7 February 1974), par. 4: NARA.

¹⁶⁶ Ibid., par. 2.

¹⁶⁷ US Liaison Office Peking to State Department, 'Position with respect to Spratley Islands' (29 January 1974), par. 2: NARA.

¹⁶⁸ US Embassy Saigon to State Department, 'Disputed territories in South China Sea' (18 April 1975), par. 1: NARA.

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.¹⁶⁹

Southwest Cay was only 3,000 metres from Northeast Cay, which was occupied by the Philippines. One South Vietnamese soldier swam from one to the other, and ‘defected’ to the Filipino side.¹⁷⁰ The North Vietnamese reportedly shipped the rest of the South Vietnamese prisoners back to Danang, and started to build up fortifications to Southwest Cay on the side facing Northeast Cay.¹⁷¹ By 7 May, the new Vietnamese government proclaimed the liberation of all the features from the South Vietnamese.¹⁷²

Meanwhile, back on Northeast Cay and Southwest Cay, the Vietnamese and Filipinos watched 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 Philippines flag flying to signal its claim to the feature.¹⁷³ The absence of any daytime activity on the feature 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 short while, Vietnamese will occupy Parola and demonstrate their warm feelings of fellowship with their Philippine neighbors.’¹⁷⁴

The Vietnamese did indeed land on Northeast Cay, and they hauled down the Philippine flag, but then, contrary to Sullivan’s expectation, they departed again.¹⁷⁵ This suggests that while the new government in 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

¹⁶⁹ Ibid., par. 1.

¹⁷⁰ US Embassy Manila to State Department, ‘GOP concern over NVN incursion into Spratley area’ (24 April 1975), par. 3: NARA.

¹⁷¹ Ibid.

¹⁷² US Embassy Manila to State Department, ‘Spratly Islands’ (7 May 1975), par. 1: NARA.

¹⁷³ US Embassy Manila to State Department, ‘Spratley Islands’ (27 May 1975), par. 2: NARA.

¹⁷⁴ Ibid., par 4.

¹⁷⁵ US Embassy Manila to State Department, ‘GOP action in Spratly island area’ (27 August 1974), par 1: NARA.

Filipino marines soon returned to Northeast Cay, and remain there to this day.

Activity on Reed Bank

This brings us to final episodes relating to the South China Sea in the mid-1970s, which revolve around an 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.¹⁷⁶ 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’.¹⁷⁷ Bearing in mind that UNCLOS, which specifies a 200 nautical mile exclusive economic zone, was still in the process of being negotiated, the Philippines claimed the Reed Bank on two grounds: first, its proximity to the Philippines (without specifically claiming it as being within its exclusive economic zone), and second, as part of its continental shelf.¹⁷⁸ (On the latter, Manila was not deterred by the fact that the 1600 m deep Palawan Trench ran as a dividing line between Palawan and Reed Bank: Solicitor General Estelito Menoza claimed that the Trench was part of the continental shelf — not a boundary to it.¹⁷⁹)

Another issue, which complicated the dispute over the Spratlys, is that from 1972 onwards, the Philippines quietly began to parcel up Reed Bank — some two million hectares — and to solicit applications for oil exploration concessions.¹⁸⁰ By August 1975, a number of oil companies, including American companies, had applied.¹⁸¹ 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,

¹⁷⁶ Reference to Reed Bank being submerged at high tide is made at: US Embassy Manila to State Department and Defense Department, ‘Mutual Defense Treaty — Reed Bank’ (30 July 1976), p. 3: NARA.

¹⁷⁷ US Embassy Manila to State Department, ‘Petroleum concessions and the Spratly dispute’ (8 February 1974), par. 1: NARA.

¹⁷⁸ *Ibid.*, par. 3.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*, par 1.

¹⁸¹ US Embassy Manila to State Department, ‘Melchor’s call on SecDef Tokyo’ (28 August 1975), par. 7: NARA.

inter alia, respecting the Senkakus.’¹⁸² 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’.¹⁸³

According to the cables, Sullivan 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.¹⁸⁴ Both apparently ignored the advice, and Brinkerhoff started spudding a well at Reed Bank in April 1976.¹⁸⁵ Manila was well aware that Sullivan was warning off US companies,¹⁸⁶ and stepped up its protection of the Brinkerhoff/Salen operation on Reed Bank, providing air and marine surveillance, and anchoring a patrol boat adjacent to the Brinkerhoff drilling barge.¹⁸⁷ Sullivan had no doubt that Brinkerhoff’s involvement was deliberate: 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’.¹⁸⁸

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.¹⁸⁹ 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 ... off islands in

¹⁸² US Embassy Manila to State Department, ‘Petroleum concessions in the Spratly areas’ (5 September 1975), par. 7: NARA.

¹⁸³ Ibid., par. 1.

¹⁸⁴ State Department to US Embassy Manila, ‘American drilling in Reed Bank area’ (24 April 1976), par. 2: NARA.

¹⁸⁵ Ibid., par. 1; US Embassy Manila to State Department, ‘American drilling in Reed Bank area’ (4 May 1976), par. 1: NARA.

¹⁸⁶ Ibid., par. 4.

¹⁸⁷ US Embassy Manila to State Department, ‘Spratly Islands’ (6 May 1976), par. 2: NARA.

¹⁸⁸ US Embassy Manila to State Department, ‘Philippine involvement in Spratly Islands’ (24 May 1976), par. 6: NARA.

¹⁸⁹ State Department to US Embassy Manila and CINPAC, ‘[P]hilippine involvement in Spratly Islands’ (21 May 1976), par. 1: NARA.

event of conflict'.¹⁹⁰ This airstrip soon proved useful for other reasons. According to intelligence received by the Americans, the Filipinos were flying small but armed T-28s out to Thitu from Palawan, which were then carrying out aerial photographic reconnaissance missions over the Vietnamese garrison on Southwest Cay and the Taiwanese garrison on Itu Aba.¹⁹¹ On 14 May 1976, the Vietnamese on Southwest Cay fired on a Filipino T-28 engaged in one of these sorties.¹⁹² The arrival of the oil companies on Reed Bank threatened to ignite what was already a combustible situation.

The Mutual Defence Treaty bluff

All this posed a conundrum for the United States — a conundrum that would be exploited by Manila during the negotiations over the renewal of the MDT, which included the decision as to whether to renew the leases on US's Clark air base and Subic Bay naval base on mainland Philippines. At issue was the commitment of each party of the MDT to meet the 'common dangers' provision set out in Article 4.¹⁹³ 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? Of course it would. But would 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 as an example of bad faith, with the United States presented as defending only what was important to itself, and not what was important to the Philippines, which, as Sullivan noted, would have 'strong negative consequences on our base talks'.¹⁹⁴

Throughout the summer of 1976, the Manila government pressed Washington for an explicit statement about the United States' obligations to the Philippines over Reed Bank under

¹⁹⁰ US Embassy Manila to State Department, 'Philippine interest in Spratleys' (12 January 1976), par. 3: NARA.

¹⁹¹ State Department to US Embassy Manila and CINPAC, '[P]hilippine involvement in Spratly Islands' (21 May 1976), par. 1: NARA.

¹⁹² *Ibid.*, par. 2.

¹⁹³ MDT, art. 4; www.gov.ph.

¹⁹⁴ US Embassy Manila to State Department, 'Philippine involvement in Spratly Islands' (24 May 1976), par. 7: NARA.

Articles 4 and 5 of the MDT in the event of an ‘emergency’.¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷

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 U.S.’ in the event of an attack by the militarily superior Chinese or Vietnamese forces.¹⁹⁸

The Americans pushed back. During the MDT negotiations, as Sullivan reported, he explained repeatedly that:

- (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 claim and that we

¹⁹⁵ US Embassy Manila to State Department, ‘Philippines base negotiations: daily summary no. 10’ (3 July 1976), par. 5: NARA.

¹⁹⁶ State Department to Secretary, ‘Marcos-Robinson meeting’ (6 August 1976), par. 2: NARA.

¹⁹⁷ US Embassy Manila to US Embassy Canberra, ‘U.S. defense commitment to the Philippines’ (2 August 1976), par. 4: NARA.

¹⁹⁸ *Ibid.*

would hope that there can be a peaceful solution among the various claimants.¹⁹⁹

The continental shelf question

Sullivan's references to the Palawan Trench raised an intriguing law of the sea issue. The Philippines claimed that Reed Bank was part of the continental shelf — irrespective of the Palawan Trench running between Palawan and Reed Bank — and thus part of the territory covered by defence obligations set out by the MDT.²⁰⁰ To support this claim, the Philippines apparently relied on Article 1 of 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'.²⁰¹ Although the Philippines had no demonstrable plans to plumb the depths of the Palawan Trench for resources,²⁰² 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.²⁰³

The Americans countered the Philippines claim 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.²⁰⁴ Between themselves, though, the Americans admitted that this legal position was not conclusive.²⁰⁵ Referring to Article 6 of the 1958 Geneva Convention on the Continental Shelf, they acknowledged the long-held American view that the boundaries of continental shelves

¹⁹⁹ US Embassy Manila to State Department, 'Philippines base negotiations: daily summary no. 10' (3 July 1976), par. 5: NARA.

²⁰⁰ US Embassy Manila to State Department, 'U.S. obligations under Mutual Defense Treaty' (29 July 1976), pars. 1, 4: NARA.

²⁰¹ Convention on the Continental Shelf (signed 19 April 1958, entered into force 10 June 1964) 499 *UNTS* 311, 312.

²⁰² State Department to US Embassy Manila, 'Visit of DepSec Robinson: briefing papers — Spratly Islands and Reed Bank' (4 August 76), par. 6: NARA.

²⁰³ *Ibid.*

²⁰⁴ US Embassy Manila to State Department, 'Philippines base negotiations: daily summary no. 10' (3 July 1976), pars. 5-4: NARA.

²⁰⁵ State Department to US Embassy Manila, 'Visit of DepSec Robinson: briefing papers — Spratly Islands and Reed Bank' (4 August 76), pars. 4, 7: NARA.

between neighbouring states should be determined *by agreement* in accordance with equitable principles.²⁰⁶ 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.

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Moreover, Article 6(2) of the Convention provided for circumstances when agreement between neighbouring 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*'.²⁰⁸ If the Philippines had been party to the Convention, and another state — say, China — exercised sovereign jurisdiction over the Spratlys, the Philippines could claim the Reed Bank on the basis of either equidistance or 'special circumstances'.²⁰⁹ 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'.²¹⁰

While this debate was unfolding, Marcos travelled to Beijing to meet Mao Zedong and senior Chinese ministers, and 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'.²¹¹ Deng Xiaoping had apparently replied that the

²⁰⁶ Ibid., par. 4.

²⁰⁷ Ibid.

²⁰⁸ Convention on the Continental Shelf (n 201) 312. Emphases added.

²⁰⁹ State Department to US Embassy Manila, 'Visit of DepSec Robinson: briefing papers — Spratly Islands and Reed Bank' (4 August 76), par. 5: NARA.

²¹⁰ Ibid.

²¹¹ US Embassy Manila to State Department, 'Spratly Islands dispute' (9 August 1976), par. 3:

Nationalists also still occupied Taiwan, ‘which was of more importance to Peking than Itu Aba’.²¹² When Marcos pursued the matter, Deng had suggested that at least for the time being, ‘status quo could continue even though PRC regarded all the islands as Chinese’.²¹³ Marcos reportedly took this to be a tacit agreement that the Chinese would turn a blind eye to the Filipinos’ occupation of the Spratly features.²¹⁴

Back in Manila, Sullivan, considering this exchange, concluded that Marcos’s ultimate goal in the Spratly 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.²¹⁵ 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’.²¹⁶ This tactic is still being pursued today.

The Tribunal’s jurisdiction

At the time, it was widely anticipated that China would follow up the invasion of the Paracels with an invasion of Spratly. Yet it did not. Political commentators opined that the cost of antagonising Seato, the Association of Southeast Asian Nations (Asean), or the non-aligned states was simply too great. And military observers suggested that China lacked the capacity to extend its air cover as far as Spratly, and thus could not be guaranteed a lasting victory. The most likely reason, though, was that China felt that it had made its point with the Paracels, and was prepared to tolerate the *status quo* in the Spratly, provided no other claimant rocked the boat.²¹⁷ If this was indeed the case, then it raises a crucial point about

NARA.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ US Embassy Manila to State Department, ‘Philippine involvement in Spratly Islands’ (24 May 1976), par. 3: NARA.

²¹⁵ US Embassy Manila to State Department, ‘Spratly Islands dispute’ (9 August 1976), par. 6: NARA.

²¹⁶ Ibid.

²¹⁷ US Consulate General Hong Kong to State Department, ‘Peking’s calculations in the Paracels war’ (30 January 1974), par. 5: NARA.

the recent award made by the Permanent Court of Arbitration, to which we now turn.

The Philippines requested the Tribunal to declare that China's claim to the South China Sea within the 'nine-dash line' exceeded its UNCLOS entitlements;²¹⁸ that the disputed Scarborough Shoal and certain Spratlys features did not generate any marine entitlements;²¹⁹ that China was interfering with the Philippines' maritime fishing, oil exploration, navigation, and construction activities;²²⁰ and that China was both 'failing to protect' and 'inflicting severe harm' on the marine environment.²²¹ All the elements of the drama that has been unfolding since the seventies were present here: the contested claims to the Spratlys features, the militarisation of the South China Sea, the armed interference with fishermen, the aerial surveillance of rivals' features — even the disruption of exploratory activity on Reed Bank.²²² 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.²²³ As is well known, China rejected the Philippines' move to arbitration and did not participate in or accept the outcome of the proceedings.²²⁴

In 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.²²⁵ 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).²²⁶ 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 was *no* overlap: 'where — for instance — a State claims maritime zones in an area understood by

²¹⁸ *Arbitration*, par. 7.

²¹⁹ *Ibid.*, par. 8

²²⁰ *Ibid.*, par. 9.

²²¹ *Ibid.*

²²² *Ibid.* pars. 656-657.

²²³ *Ibid.*, pars. 9, 764.

²²⁴ *Ibid.*, par. 11.

²²⁵ *Ibid.*, par. 5.

²²⁶ *Ibid.*, pars. 202-203; UNCLOS (n 105) 136.

other States to form part of the high seas or the Area for the purposes of the Convention.²²⁷

Of particular interest here are the Philippines' requests for declarations on the UNCLOS status and entitlement to exclusive economic zones and continental shelves (maritime zones) of reefs occupied by China within near or within the Philippines' exclusive economic zone.²²⁸ Even if the Tribunal found that none of the reefs generated their own maritime zones — and it did so find²²⁹ — this was not the end of it. If any *other* feature entitled to maritime zones and claimed by China 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 298²³⁰ 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 'islands' (as defined by UNCLOS) within the entire Spratlys group — which, as we recall, was claimed by China.

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.²³¹

²²⁷ Ibid., par. 155, citing the Tribunal's previous Award on Jurisdiction and Admissibility, issued on 29 October 2015.

²²⁸ Ibid., pars. 643-647 (on Submissions 3, 5, 6, 7), pars. 303-304 (on Submissions 4, 6).

²²⁹ Ibid., par. 1203B.

²³⁰ Ibid., pars. 630, 1203A.

²³¹ UNCLOS (n 105) 66. Emphasis added.

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. The Tribunal reasoned inversely — and without much reflection²³² — that islands *must* therefore be able to sustain ‘human habitation or economic life of their own’ in order to generate the maritime zones. They applied this formula to all of the Spratlys features, including its largest, Itu Aba, 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’.²³³

Was its reasoning persuasive? Taking as its starting point the phrase ‘human habitation’, the Tribunal began to construct a far 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’,²³⁴ or, put another way, inhabitation by a ‘stable community of people for whom the feature constitutes a home and on which they can remain’.²³⁵ 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’.²³⁶)

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

²³² It simply asserts, in the context of a different discussion, 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’ (par. 494).

²³³ *Arbitration*, par. 632.

²³⁴ *Ibid.*, par. 618.

²³⁵ *Ibid.*, par. 542.

²³⁶ *Ibid.*

island (did people live there or not?) but further, specifying that any 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 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.²³⁷ It also declared that the garrisoned soldiers were not there of their own accord, but only to perform their military functions, and would not stay on 'if the official need for their presence were to dissipate'.²³⁸ And it also stated that the presence of some civilians, recently arrived, was 'motivated by official considerations' connected with the disputes over the features' sovereignty.²³⁹ Whether true or not (the assertions are not supported by sources), it gave the appearance of the Tribunal straining towards the classification of the features as rocks rather than islands.

Inhabitants and 'habitation'

What, then, are the prerequisites for 'human habitation'? Drawing on the Tribunal's own cited sources as well as some of the previously cited archival documents, we will focus on Itu Aba, the largest feature in the Spratlys. The record of occupation may not be complete, but the Tribunal notes that from the early 1920s to 1929, a Japanese guano mining company occupied Itu Aba, stationing up to 600 people on the feature in 1927,²⁴⁰ and that two more Japanese companies re-occupied it in the late 1930s, stationing 130 people on the feature.²⁴¹ The Japanese government formally took control of it in 1939,²⁴² and held it until the end of the war in 1945, after which they relinquished it under the terms of the Peace Treaty.²⁴³ Thereafter, the Tribunal cites the Philippines to the effect that Taiwan occupied Itu Aba

²³⁷ Ibid., 618.

²³⁸ Ibid., Par. 620.

²³⁹ Ibid.

²⁴⁰ Ibid., pars. 602, 606.

²⁴¹ Ibid., par. 602.

²⁴² Ibid., pars. 361, 602.

²⁴³ Peace Treaty (n 108), 50.

from 1946 to 1950.²⁴⁴ Curiously, the Tribunal does not say when Taiwan re-occupied the feature, but other sources indicate that they did so in 1956 (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).²⁴⁵ By 1974, the archival documents indicate that some 200-300 Taiwanese troops were stationed on Itu Aba.²⁴⁶ In other words, save for some missing years in the 1930s and 1950s, this particular feature has been continuously occupied for almost a century by either the Japanese or the Taiwanese.

Could these occupying companies or garrisons have sustained their personnel on the feature's own supply of food and water? The answer seems to be: yes, at least some of those personnel. 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).²⁴⁷ As well as sea-catch, the feature is capable of supporting agriculture: one 1919 report indicated 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'.²⁴⁸ Photographs taken of the feature in 1951 showed it to be 'thickly wooded',²⁴⁹ and modern satellite images — even Google maps — show what looks to be fairly extensive vegetation and tree cover.²⁵⁰

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

²⁴⁴ Ibid., par. 430.

²⁴⁵ US Consulate General Hong Kong to State Department, 'RVN/PRC dispute over South China Seas islands' (18 January 1974), par. 2: NARA; US Embassy Manila to State Department, 'Spratley Islands' (23 January 1973), pars. 5-6: NARA.

²⁴⁶ US Embassy Taipei to State Department, 'Conflicting claims to Spratleys' (26 January 1974), par. 1: NARA.

²⁴⁷ *Arbitration*, par. 583.

²⁴⁸ Ibid., par. 586.

²⁴⁹ Ibid., par. 592.

²⁵⁰ Until recently. Taiwan complained that Google maps showed its Itu Aba military installations too clearly, and asked for them to be blurred: C. Mele, 'For Taiwan, Google images of disputed island are too clear', *New York Times* (23 September 2016), nytimes.com.

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 ...²⁵¹

Nonetheless, the Court fails to conclude that Itu Aba is an island. Instead it makes a logical jump from the previous paragraph to the next, which states:

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.²⁵²

Given that the Tribunal linked the status of the features to its jurisdiction, one might have expected that it would have expressed itself more clearly in this passage, which began to explain why, in its view, the Spratlys features were rocks. Instead, the paragraph invites challenge. First it stated 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, food, and populations numbering several hundred people. Then it raised the bar, stating that the features’ ‘capacity even to enable human survival appears to be distinctly limited’ — which begs the response that if the features are habitable, then they 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.) Finally, the qualifying words throughout — ‘obviously’, ‘appears to be’, ‘not definitively’ — suggest that the Tribunal had not quite made up its mind, and was equivocating.

²⁵¹ *Arbitration*, par. 615.

²⁵² *Ibid.*, par. 616. Emphases added.

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.

The Tribunal stated that, other than a feature's physical attributes, the most reliable indication 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.²⁵³

Let us apply this to Itu Aba. It is not true that this feature has suffered from 'depopulation' — far from it. With the exception of periods in the 1930s and 1950s, the records show that it has been populated continuously since the early 1920s, and by substantial numbers of people: the aforementioned 600 labourers in 1927; the 200-300 troops in 1974. These are not settled populations, however — the phosphate workers were possibly recruited (or dragooned) from Japan's then-colony of Formosa,²⁵⁴ and were probably present for only a few years; the troops were recruited (or conscripted) from Taiwan's armed forces, and were on rotation. The question, then, is why others did not make Itu Aba their home.

At this point, the Tribunal fails to consider the most obvious reason — that people were not *allowed* to settle. It does, however, list some of the historical reasons for populations not taking root — 'War, pollution, and environmental harm' — and we will take war as our example. During conflict, humans may not be able to settle an island 'for a prolonged period'

²⁵³ Ibid., par. 549. Emphases added.

²⁵⁴ See for example, the reference to 'Formosan' labourers in *ibid.*, par. 619.

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 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 Marcos's complaint in 1971 about their firing on aircraft and vessels.²⁵⁵ 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 thus may 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. As we know, though, a finding of just *a single island* in the Spratlys would have entailed it renouncing its jurisdiction over most of the Philippines' submissions because of the consequent overlap of maritime zones. In the event, the Tribunal decided not to exercise this judicial restraint, and arrived at a decision that delivered a decisive blow to China, and clipped Vietnam and Taiwan in the backswing. In short, it altered the *status quo* in the South China Sea.

Conclusion

The current disputes in the South China can be traced back to the early 1970s, when China's intervention against South Vietnam in the Paracels rippled across the South China Sea to the Spratlys. The Philippines and South Vietnam soon made their own interventions, occupying many of the Spratlys features, alongside an earlier occupier, Taiwan. So this maritime controversy is old news, with the only significant new element being China inserting itself into the Spratlys alongside the others. As for the Paracels, when the *South China Morning Post* carried a story in February 2017, based on American sources, about Beijing 'boosting military presence in Paracels',²⁵⁶ it was simply echoing the aforementioned Chinese documentary, broadcast on local television in June 1974 some forty-three years earlier, telling much the

²⁵⁵ US Embassy Manila to State Department, 'Spratley Islands' (23 January 1973), par. 2: NARA.

²⁵⁶ K. Huang, 'Beijing "boosting military presence in Paracels"', *South China Morning Post* (10 February 2017), p. A3.

same story.²⁵⁷

It was also in the 1970s that we also see another pattern of conduct come to the fore; a pattern that is still being repeated today: the disengagement of the other Security Council members (all themselves major maritime powers) from the South China Sea dispute. The French and British zipped their lips. The Soviets were more vocal, but did not intervene. The Americans repeated its mantra that it ‘takes no position on conflicting claims... but strongly desires peaceful resolution of dispute’.²⁵⁸ Among themselves, of course, American officials were occasionally more candid. One high-level State Department cable, produced as a briefing during the MDT negotiations with the Philippines in 1976, stated with respect to the Philippines’ previous legal positions:

[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.²⁵⁹

Now the award has been handed down, giving the Philippines almost everything it asked for. But what would have been the outcome if the Tribunal had decided that Itu Aba (or some other feature) *was* an island, and opted to renounce its jurisdiction over the relevant Philippines’ submissions? From the outside, it would appear that as a question of law, the decision would have been based on a less overloaded interpretation of Article 121 on the issue of ‘human habitation’. And as a question of policy, the decision might have been seen as a balm rather than an irritant — the latter testified to by the protests from Beijing and Taipei and the muted response from Hanoi. Even Manila may now be paying the price: it is notable how, just four months after the decision was released, Filipino President Rodrigo Duterte declared that the arbitration would ‘take a back seat’ during his visit to Beijing.²⁶⁰ Perhaps it was proving to be too much of a good thing.

²⁵⁷ US Consulate General Hong Kong to State Department, ‘Oil rig on Paracel Islands’ (11 June 1974), p. 1: NARA.

²⁵⁸ State Department to US Embassy Saigon, ‘PRC-GVN clash in Paracels’ (19 January 1974), par. 3: NARA.

²⁵⁹ State Department to US Embassy Manila, ‘Visit of DepSec Robinson: briefing papers — Spratly Islands and Reed Bank’ (4 August 76), par. 2: NARA.

²⁶⁰ C. Deogracias, ‘Duterte allows Xi to take lead on South China Sea issue’, *Philippines Star* (20 October 2016), philstar.com.