

*Research Article*

# China's Unsubstantiated Claims on Baselines: Legal Consequences Affecting International Security

**Thi Kim Cuc Nguyen \***

*Faculty of Law, University of Pecs, Hungary & Ho Chi Minh City University of Law, Vietnam*

**Huu Phuoc Ngo**

*VNU-HCM University of Economics and Law, Vietnam*

**ABSTRACT:** For all nations, the stability of the global order is a significant concern. Despite the efforts of the international community, Asia's peace and security are threatened by China's aggressive behaviours in the South China Sea. Accordingly, China has claimed nearly the whole South China Sea as its territory, including water internationally acknowledged as belonging to other nations. States have the right to determine and declare their baselines for coastal areas, islands, and archipelagos that fall under their national sovereignty about international law of the sea. Because of the inconsistency with the rules of international law in general and the international law of the sea in particular, China's claims in this case are unsubstantiated. This article aims to determine China's violations to comply with their obligations under international law, especially in the South China Sea disputes. By using analysed and evaluated methods, this study pointed out the regulations that violate international law contained in documents such as the Declaration of China on the baselines of the territorial sea in 1996, the Coast Guard Law of China in 2021, the Maritime Traffic Safety Law of China in 2021, by using the comparative methods of these documents with the provisions of the international law, particularly the United Nations Convention on the Law of the Sea in 1982. The article also highlights the severe effects of China's behaviour on Vietnam, particularly the implementation of the two laws previously mentioned that violate Vietnam's territorial integrity in the Paracel and Spratly Islands. As a result, the paper suggests certain notes for Vietnam and other nations to void China's legal documents. These suggestions will contribute to protecting the sovereignty, sovereign rights, and jurisdiction of Vietnam, and the freedom of navigation and overflight of countries for nations across the world.

**KEYWORDS:** International Law; International Security; South China Sea.

\* Corresponding author, email: [ntkcuc@hcmulaw.edu.vn](mailto:ntkcuc@hcmulaw.edu.vn)

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## I. INTRODUCTION

On September 4, 1958, China's baseline was first laid out in the Declaration in China's Territorial Sea, namely at point 2 of this Declaration. Accordingly, China's baseline is the line composed of straight lines connecting basepoints on the mainland coast and the outermost of the coastal islands. Herein, the base points and geographical coordinates of these points have not been specified. Following that, on February 25, 1992, China promulgated the Law on the Territorial Sea and the Contiguous Zone, whereby only defines the straight baseline method and does not have any specific provisions on the basic points. Article 3 of this Law states, "The PRC's baseline of the territorial sea is designated with the method of straight baselines, formed by joining the various base points with straight lines." To concretize the vaguely defined baselines in the 1958 Declaration on China's Territorial Sea (the 1958 Declaration) and the 1992 Law on the Territorial Sea and Contiguous Zone, on May 15, 1996, China issued a Declaration on the baselines along the coast from the Northeast to Hainan Island and the baselines of the Paracel Islands under Vietnam's sovereignty, which China calls Xisha Island. Accordingly, China's baselines are determined by the straight baseline method, which is the basis for determining the territorial sea of the mainland, Hainan Island, and the Paracel Islands. However, it does not refer to the baseline from the last point on the land boundary with Money to point 1 (including the Bohai Bay area<sup>1</sup>), along the northern coast of the Gulf of Tonkin, or around other islands, it claims in the South China Sea. In this context, there are some violations of international law, that infringe upon Vietnam's sovereignty over the Paracel Islands and are contrary to the provisions of the United Nations Convention on the Law of the Sea 1982 (UNCLOS) on the determination of straight baselines.

Many changes and challenges in resolving issues in the South China Sea as China strengthens its unreasonable expansion by promulgating relevant laws; specifically, the Coast Guard Law of the People's Republic of China was proclaimed on January 22, 2021 (the 2021 CGL). These provisions have inured the power of China's coast guard to intimidate China's neighbours

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<sup>1</sup> Bohai Bay is one of three bays forming the Bohai Sea in Northern China. It is bordered by Hebei Province and Tianjin City.

and try to change the status quo in the South China Sea.<sup>2</sup> In the next stage, effective from September 1, 2021, the revised Maritime Traffic Safety Law of the People's Republic of China (the 2021 MTSL) stipulates the declaration obligation of foreign ships when passing through the waters claimed by China's demand.<sup>3</sup> Accordingly, these ships must report detailed information and comply with China's regulations on pilots.<sup>4</sup> These regulations are considered as being inconsistent with international law, including UNCLOS, on freedom of navigation, affecting international security.

There have been some works on China's claims on its baseline as well as provisions in two new laws promulgated by China in 2021. James Kraska stated that China has widespread use of straight baselines and does not apply them conservatively.<sup>5</sup> When it comes to the Paracel Islands' straight baseline claims, they were protested by some countries, including the United States, the Philippines, and Vietnam. In 1998, Vietnam stated in a note verbal that China's establishment of straight baselines of the Paracel archipelago, part of Vietnamese territorial sovereignty, run counter to international law is null and void.<sup>6</sup> On the contrary, Taisaku Ikeshima supposed that China's claims on the baseline as well as the so-called nine-dash line drawn by China in the South China Sea should be discussed with special reference to the arguments and opinions of Chinese scholars and writers, and Chinese approaches to this dispute as a whole.<sup>7</sup> Therefore, the problem of the dashed line is too difficult to solve solely under international law and requires more practical, comprehensive and multifaceted approaches.<sup>8</sup> Concerning the two

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<sup>2</sup> Wataru Okada, "China's Coast Guard Law Challenges Rule-Based Order: The international community must respond to China's maritime coercion.", *The Diplomat* (28 April 2021), online: <<https://thediplomat.com/2021/04/chinas-coast-guard-law-challenges-rule-based-order/>>.

<sup>3</sup> Binh Giang, "Luật an toàn hàng hải mới của Trung Quốc có hàm ý nguy hiểm với Biển Đông", *Tien phong* (3 September 2021), online: <<https://tienphong.vn/luat-an-toan-hang-hai-moi-cua-trung-quoc-co-ham-y-nguy-hiem-voi-bien-dong-post1372367.tpo>>.

<sup>4</sup> The Maritime Traffic Safety Law of the People's Republic of China, The MTS Law 2021, Article 30.

<sup>5</sup> James Kraska, "China's Excessive Straight Baseline Claims" in *Peaceful Maritime Engagement in East Asia and the Pacific Region* (Brill Nijhoff, 2022) at 153.

<sup>6</sup> *Ibid* at 157.

<sup>7</sup> Taisaku Ikeshima, *China's Dashed Line in the South China Sea: Legal Limits and Future Prospects* (Waseda University, 2013) at 18.

<sup>8</sup> *Ibid* at 38.

mentioned laws above, namely the 2021 CGL and the 2021 MTSL, Alex P. Dela Cruz argued that the 2021 CGL makes it difficult for rival claimants in the South China Sea to overcome China's military activities exception in respect of future UNCLOS dispute-settlement proceedings.<sup>9</sup> However, this work has not analyzed the relevant provisions in other laws, notably the 2021 MTSL concerning maritime activities in the context of both law promulgation in 2021. Similarly, Raule Pete Pedrozo analyzed various provisions of the 2021 CGL, especially the use of force provision affecting navigational freedoms, to determine whether they are consistent with international law, including UNCLOS.<sup>10</sup> Although it has been pointed out the inconsistency of some provisions in the 2021 CGL with international law<sup>11</sup>, this article has not shown the impact of this law, with the support of some relevant provisions in the 2021 MTSL, on the international security order. About the 2021 MTSL, Raul also gave analyses and comments about some specific provisions related to freedom of navigation in this Law and concluded that this law exceeded the permissible jurisdictional limits of international law, as reflected in UNCLOS.<sup>12</sup> Hu Zhang and Qiuwen Wang analyzed the inadequacies and problems embedded in China's new regulatory framework, notably the promulgation of the 2021 MTSL.<sup>13</sup>

Many works have discussed regulations on China's claims on the baseline as well as provisions in the 2021 CGL and the 2021 MTSL, notably the works mentioned above, including James Kraska's work, Taisaku Ikeshima's work, Alex P. Dela Cruz's work, Raule Pete Pedrozo's work, and Hu Zhang and Qiuwen Wang's work. However, no specific articles examined the systematic relevance of legal documents issued by China to international security as well

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<sup>9</sup> Alex P Dela Cruz, "Marching Towards Exception: The Chinese Coast Guard Law and the Military Activities Exception Clause of the Law of the Sea Convention" (2021) 8:2 *The Journal of Territorial and Maritime Studies* at 5.

<sup>10</sup> Raul (Pete) Pedrozo, "The China Coast Guard Law (2021): A New Tool for Intimidation and Aggression" (2021) 3:1 *Maritime Security* at 3.

<sup>11</sup> *Ibid.*

<sup>12</sup> Raul (Pete) Pedrozo, "China's Revised Maritime Traffic Safety Law" (2021) 97 *International Law Studies*.

<sup>13</sup> Hu Zhang & Qiuwen Wang, "Maritime safety management of foreign vessels in China: New institutional developments and potential implications" (2022) 218 *Ocean & Coastal Management* at 1.

as the national sovereignty of countries involved in disputes in the South China Sea. This study conducted an in-depth analysis of provisions of China's legal documents, namely the 1996 Declaration on the baselines of the territorial sea (the 1996 Declaration), the 2021 CGL and the 2021 MTSL, violating international law and affecting international security. The primary purpose of this study was to determine China's violations to comply with their obligations under international law, especially in the South China Sea disputes. Under the international law of the sea, states have the right to declare the baselines for coastal areas, islands, and archipelagos that fall under their national sovereignty. However, in the South China Sea, China claimed almost the entire South China Sea as its territory, seriously violating international law. Thus, this article will clarify four main issues, including legal issues on the determination of baseline by UNCLOS, comments on the 1996 Declaration, the negative legal consequences of this Declaration about the 2021 CGL and the 2021 MTSL, and some key notes to invalidate these legal documents. This paper comprises three parts of the main discussion. The first part presents the international legal basis for determining baselines. The second part examines and comments on the 1996 Declaration and points out the reasons that China does not have the right to claim baselines on the Paracel Islands, infringing on Vietnam's sovereignty. The third part clarifies the negative legal consequences of this Declaration on regional and global peace, security, maritime and aviation, focusing on China's promulgation of legal documents related to the sea. Finally, some solutions are proposed for Vietnam, other countries in the region, and the world, to nullify the validity of the legal documents of China.

## II. METHODOLOGY

This study used analyzed and evaluated methods to examine the provisions in China's legal maritime framework that violate international law. The authors selected applicable laws, including UNCLOS, and relevant Chinese legal documents, namely the 1996 Declaration, the 2021 CGL and the 2021 MTSL and conducted three steps respectively. First, studying the international legal basis for determining baselines. It became a rationale for

comparing and assessing China's baseline claims with regulations under international law. Second, examining the provisions in the Declaration on the baselines of the territorial sea, evaluating and concluding the right to claim baselines on the Paracel Islands. Third, with comparative jurisprudence, this study identified the inconsistency between UNCLOS provisions and the 2021 CGL and the 2021 MTSL. It contributed to proposing recommendations to protect the international security, sovereignty, sovereign rights, and jurisdiction of Vietnam, the freedom of navigation and the overflight of countries in the region and the world.

### III. INTERNATIONAL LEGAL BASIS FOR DETERMINING BASELINES

According to UNCLOS, marine areas are divided into three categories corresponding to three different legal regimes: (i) marine areas under coastal State sovereignty including internal waters and archipelagic waters (for archipelago states) and territorial seas; (ii) marine areas which are subject to limited jurisdiction and in which a coastal State enjoys sovereign rights; (iii) marine areas located beyond national jurisdiction<sup>14</sup>. In terms of international law, if a coastal state wants to determine its internal waters, archipelagic waters, and territorial seas, the coastal state must determine the baseline. In other words, baselines are quite important to the delimitation of maritime boundaries.<sup>15</sup> Although the term "baseline" is not defined, UNCLOS provides for the method of determining baselines and legal issues related to the determination of baselines in Articles 5, 7, 13, and 47 of UNCLOS. Herein, there are two methods for determining baselines: the normal baselines method and the straight baselines method.

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<sup>14</sup> Dorota Pyć, "The Role of the Law of the Sea in Marine Spatial Planning" in Jacek Zaucha & Kira Gee, eds, *Maritime Spatial Planning* (Palgrave Macmillan, 2019) at 377.

<sup>15</sup> Sarra Sefrioui, "Adapting to Sea Level Rise: A Law of the Sea Perspective" in G Andreone, ed, *The Future of the Law of the Sea* (Springer, 2017) at 4.

### *A. The Normal Baseline Method*

Article 5 of the UNCLOS stipulates the definition of the normal baseline. This provision has adopted the spirit of the Geneva Convention on the 1958 Convention on the Territorial Sea and Contiguous Zone, in particular, Article 3 of this Convention has almost the same content. This is the method applied to determine most of the baselines in the world, applicable to countries with straight, flat coastlines, no convexities, no bends, no coastal islands, and no archipelagos. In this case, the coastal state will select a certain time of low-water marks<sup>16</sup> along the coast, determined by specific coordinates, to claim the baseline. This time can be the mean low water springs (MLWS) or the lowest astronomical tide (LAT). These are the two times chosen by most countries.<sup>17</sup> Alternatively, they may choose another time to determine this low-water line. It is important to choose what type of data to determine this low-water line because it involves determining the width of the internal water. This will benefit the coastal states when determining the extent of the sea areas under the sovereignty, sovereign rights and jurisdiction of the coastal state.

### *B. The Straight Baseline Method*

The straight baselines method was first specified in the 1958 Convention on the Territorial Sea and Contiguous Zone, namely in paragraph 1, Article 4. Accordingly, these baselines may be drawn in irregular geographical circumstances.<sup>18</sup> UNCLOS, namely Article 7, continues to recognize and develop the straight baselines method and this method should only be applied in localities “where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity” (paragraph 1) and “where because of the presence of a delta and other natural

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<sup>16</sup> James Kraska, *supra* note 5 at 150.

<sup>17</sup> Sam Bateman & Clive Schofield, *State practice regarding straight baselines in East Asia – Legal, Technical and Political issues in a Changing Environment* (Advisory Board on the Law of the Sea (ABLOS), 2008) at 3.

<sup>18</sup> Agim Demirali, “The Third United Nations Conference on the Law of the Sea and an Archipelagic Regime” (1976) 13:3 San Diego Law Review at 743.

conditions, the coastline is highly unstable” (paragraph 2). To avoid the abuse of the straight baselines method to determine baselines that are too far from the general direction of the coast or the shortening of base points that are not substantial enough to form a large inland water area, this method is strictly regulated by UNCLOS. In other words, this method should be applied sparingly, and where being used, it should be drawn conservatively to be consistent with UNCLOS.<sup>19</sup> Under Article 7, the determination of a straight baseline must comply with the following requirements:

Firstly, the drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast. This means that, when countries define baselines using the straight baselines method, the baselines must run along the general direction of the coast and must reflect the natural topography of the respective coastline.

Secondly, straight baselines shall not be drawn to and from low-tide elevations unless lighthouses or similar installations that are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition. This means that low-tide elevations are not necessarily a baseline from which to "draw to or from" to determine a straight baseline. Low-tide elevations are only considered as a baseline from which to draw baselines where lighthouses or similar structures frequently protrude above the water.

Thirdly, the system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone. Herein, the baselines of the coastal State shall not cover or separate the maritime zones of the opposing or contiguous State. If the determination of the baseline divides the waters of these states, it is an infringement on sovereignty, sovereign rights, and national jurisdiction, contrary to the provisions of UNCLOS.

Depending on the topographical features of the coast, the coastal state may apply either the conventional baseline method or the straight baseline method, or a combination of both, which is permitted by UNCLOS under

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<sup>19</sup> James Kraska, *supra* note 5 at 151.



Article 14. The determination of baselines is an act within the exclusive jurisdiction of the coastal State. Therefore, coastal states have the discretion to choose appropriate methods. However, if other countries in the region and around the world discover that the determination of the baseline of the coastal state is inconsistent with the provisions of the international law of the sea, especially the provisions of UNCLOS, these countries have the right to object to the determination of the baseline. The violation of the regulations on the method of determining the baseline of any country as well as the uncomplying the requirements set forth when applying the straight baseline method to expand the internal waters will directly affect the sovereignty, sovereign rights, jurisdiction, and freedoms of other states concerned under the provisions of UNCLOS.

#### IV. COMMENTS ON THE 1996 DECLARATION

According to the 1996 Declaration, the baseline of the People's Republic of China (China) is determined by the straight baseline method, which includes two systems. Firstly, territorial baselines whose land consists of 49 baselines running along geographical features adjacent to the coast of the mainland and Hainan Island. Point 1 is on the eastern tip of the Shandong peninsula (Shandong Gaojiao) and point 49 is on Hainan Island. Secondly, the baselines of the Paracel Islands, which is an archipelago under Vietnam's sovereignty that China calls Xisha Islands, located in the north of the South China Sea, are fabricated of 28 base points.

Although the number of base points has been clearly defined, this Declaration still lacks much specific and detailed information about the list of geographical coordinates of these points and the geodetic system. As a result, it violates the provisions of Article 16 of UNCLOS, which requires coastal States, when determining baselines, to ensure that they are shown on charts of an appropriate scale to determine the position of these baselines. If this requirement is not met, countries can substitute a list of geographical coordinates of the points, clearly stating the geodetic system used. After disclosing the above information under the above procedures, the coastal

State should send a copy of this content to the Secretary-General of the United Nations for deposit.

#### *A. The Baseline of the Mainland Coast to Hainan Island*

In terms of the topography of mainland China, most of the country's coastline does not meet either of the two geographical conditions for the application of the straight baseline method. In this case, not all base points are defined where “the coastline is deeply indented and cut into” or where “there is a fringe of islands along the coast in its immediate vicinity”.<sup>20</sup> Accordingly, almost all the waters bounded by the system of straight baselines that China has identified do not have a close relationship with the mainland. In addition, the coastal topography of this area is only relevant in the application of the normal baseline method.

This entire Chinese baseline has 48 segments that connect the 49 base points for a total of 1506.6 nautical miles starting from the northeast section of its coast to the west coast of Hainan Island. Which, the shortest length is segments 45-46 on Hainan Island with 0.086 nautical miles. The longest segment is 105.7 nautical miles (segments 8-9 off the northeast coast of China). Besides, 23 base segments are less than 24 nautical miles in length, accounting for 48%; 09 base segments with lengths from 24.1 nautical miles to 48 nautical miles, stood at 19%; 13 base segments with lengths from 48.1 nautical miles to 100 nautical miles, held 27%; 03 base segments with a length of over 100 nautical miles, made up 6%.<sup>21</sup>

Neither the UNCLOS nor the Convention on the Territorial Sea and the Contiguous Zone places a specific distance limit on the length of a straight baseline, however, in practice, countries around the world often determine the length of each segment between 20.85 and 41.70 nautical miles.<sup>22</sup> The United States supports the view that each base segment should have a

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<sup>20</sup> *Ibid* at 155.

<sup>21</sup> *Limits in the Seas - Straight Baseline Claim: China*, Background Paper, by Robert W Smith, Background Paper 117 (The United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, 1996) at 4.

<sup>22</sup> *Ibid*.

maximum length of no more than 20.85 nautical miles.<sup>23</sup> Accordingly, the US argued that 20.85 nautical miles seem to have been implicitly provided for in UNCLOS, namely paragraph 3, Article 7. Therefore, it cannot arise that an international sea area with a width of more than 10 nautical miles from the lowest water level can ensure the factor of “close association” to become the internal waters of a coastal state. This “implicit” regulation continues to be consolidated based on the provisions of paragraph 2, Article 8. Accordingly, it referred to the obligation to ensure the right of innocent passage in areas where a straight baseline has been drawn into the internal waters of waters not previously considered to be internal waters. The right of innocent passage is a regime applied in the territorial sea, where the maximum width is 12 nautical miles from the baselines. The guarantee of the right of innocent passage is intended to continue to maintain pre-existing rights in waters of a territorial nature before the emergence of straight baselines under the provisions of UNCLOS. Thus, relative to the breadth of the territorial sea, no straight baseline exceeds 20.85 nautical miles (24 mi). From the above analysis, it can be confirmed that the length and position of many straight baselines of China do not meet the criteria specified in UNCLOS.

In terms of topography, China’s coastline from the Shandong peninsula (point 1) to the Shanghai area (base point 11), is flat, without coastal islands. Along the coastline of this area, there are only a few depressions that can meet the criteria of a legal bay as provided for in Article 10 of UNCLOS. Specifically:

Firstly, the base points from point 1 to point 5 are near the Shandong peninsula, where there are no indentations and no coastal islands. Between points 2 and 3, two coastal indentations may have legal bay closure lines drawn on their respective entrances. However, neither the legal bay closure line nor the 12-nautical-mile territorial sea is affected by the other features located on the seaward side of the bay closure line.

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<sup>23</sup> Warren Christopher, *U.S. Department of State Dispatch Supplement, Law of the Sea Convention – Letters of Transmittal and Submittal And Commentary* (U.S. Department of State Dispatch Supplement, Law of the Sea Convention, 1995) at 6.

Secondly, China's coastline from baseline 5 to base 8 is relatively flat, with a few small indentations that can be closed by legal bay closures. Points 6, 7, and 8 are located on very small islands about 121.63 nautical miles from the coast (from 119°5'E to 122°15'E). Base segments 6-7 and 7-8 are separated by 70.46 nautical miles and 62.38 nautical miles, respectively. There is only one other small islet near segments 6-7 and none near segments 7-8. Given the paucity of islands, this offshore area cannot be considered "fringed" with islands. Therefore, the territorial seas in this area must be determined according to the normal baselines method as provided for in Article 5 of UNCLOS, which is the low-water line of these islets and the low-water line on the mainland. In this area, China has claimed about 1,175 sq. nm (4,023 sq.km.) of the territorial sea that should remain high seas and about 600 sq. nm (2,055 sq. km) of internal waters that should be high seas. In addition, there is a significant area that has been claimed as internal waters that should be territorial seas.<sup>24</sup>

Thirdly, segments 8-9 (105.73 nm), 9-10 (22.24 nm), and 10-11 (87.05 nm) are situated off the east coast of China in an area of extensive low-tide elevations.<sup>25</sup> On the chart used for this analysis, point 9 is located in water less than 3 meters in depth. Point 10 is situated on a low-tide elevation that is more than 10.42 nm from the mainland.<sup>26</sup> There are no islands in the vicinity of the mainland near segments 8-9 and 9-10. Except for the several rivers that empty into the Yellow Sea and the East China Sea in this area, the mainland coast is relatively smooth. Under UNCLOS, a Coastal State may use the low-water line of a low-tide elevation as the baseline from which to measure the territorial sea only if that low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea as measured from the mainland or an island and above that elevation shall be lighthouses or similar structures permanently protruding above the water.<sup>27</sup> The low-tide low-tide elevations, including point 10, depicted on DMA

<sup>24</sup> Robert W Smith, *supra* note 21 at 6.

<sup>25</sup> According to Article 13 of UNCLOS 1982, A low-tide elevation "is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide".

<sup>26</sup> Points 9 and 10 were plotted on DMA chart 94260, 5th ed., Aug. 26, 1995, 1:300,000. The chart was compiled, in part, from China chart 9306, 1976 ed., corrected to 1986, 1:300,000.

<sup>27</sup> The United Nations Convention on the Law of the Sea, UNCLOS 1982, Article 13.

chart 94260 cannot be used to determine the territorial sea because no part of any of these low-tide elevations is within 12 miles of the mainland or an island. In addition, UNCLOS states that “straight baselines cannot be drawn to and from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition”.<sup>28</sup> However, it is believed that no such conditions exist in this region off China's coast. Therefore, in the area defined by baselines 8-9, 9-10, and 10-11, the appropriate baseline is the lowest waterline of land. As such, in this region, China has claimed approximately 6,831 sq. km of the territorial sea that should be high seas, about 1,880 sq. km of internal waters that should be high seas, and a large area of internal waters that should be the territorial sea. Basepoint 11, is located east of Shanghai, near the mouth of the Yangtze River, on a small isolated island and cannot be part of a straight baseline system.

From about 30°50'N (southeast of Shanghai and landward of point 12) to about 27°30'N, in the vicinity of point 18 (on Nanjishan Liedao), there are fringing islands near the mainland that would meet the fringing island's requirement. However, except for points 16 and 17, and possibly point 18, the other points are on small islands isolated from other coastal islands. Points 12 and 13, for example, appear to be situated on rocks about 51.12 nautical miles from the mainland and more than 13.90 nautical miles from the Ma'an Qundao (Ma'an Liedao) island group, where the straight baseline method may be applicable. Points 14 and 15 are also located on islands that do not meet the requirement that the fringe of islands is “along the coast in its immediate vicinity.”<sup>29</sup>

Baseline segments connecting points 18 through 24 are located along the western fringe of the Taiwan Strait.<sup>30</sup> Although the coastline in this area can be characterized as being deeply indented and surrounded by islands, the baseline system as claimed by China is still inconsistent with UNCLOS.

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<sup>28</sup> The United Nations Convention on the Law of the Sea, UNCLOS 1982, Article 7.4.

<sup>29</sup> Robert W Smith, *supra* note 21 at 7.

<sup>30</sup> It is noted that base points 19 and 22 are located on islands administered by Taiwan and that the straight baseline system encloses other islands that are administered by Taiwan.

Accordingly, points 19 and 20 are on features isolated from the “fringe” by about 18.24 nautical miles. Segments 18-19 are 63.59 nautical miles long, segments 19-20 are 12.42 nautical miles, and segments 20-21 are 43.70 nautical miles long enclosing waters that are not “closely linked to the land domain”. Similarly, points 22, 23, and 24 are geographical features that are not a part of fringing islands. The coastal area landward of these points does have fringing islands “along the coast in its immediate vicinity” on which straight baselines could be drawn.

Three base segments 24-25 (26.75 nautical miles), 25-26 (0.95 nautical miles), and 26-27 (38.05 nautical miles) are not justifiable in those islets on which points 24, 25, and 26 sit are not fringing islands. From the inland coastline of points 24 to 27, there are several juridical bays and territorial seas in this area that should be drawn from the low-water line of the islands and mainland, and the juridical bay closing lines.

Three base segments 27-28 (73.50 nautical miles), 28-29 (69.94 nautical miles), 29-30 (5803 nautical miles), and 30-31 (22.06 nautical miles) connect base points located on islands islets and rocks. The land portion of segments 27-28 has an indentation or two that could be closed off by juridical bay closures. However, point 28, is an isolated islet 16.50 nautical miles from the mainland to the sea. Basepoint 31 is an isolated rock, straight baseline segments would be appropriate from point 30 extending to the northwest to connect some large coastal islands to the mainland.

Baseline segments 31-32 (93.65 nautical miles) connect the rock at point 31 to a small island off the northeast coast of Hainan Island. This segment cuts off eastern access lines to the Hainan Strait, an international strait. By determining the base point without substance, China has "enclosed" very large areas of high seas and claimed them as internal waters. It should be noted that Hainan Island does not have fringing islands, but only a few scattered islands are situated off the coast. In addition to some small bays present, the baseline in this area, according to UNCLOS, should be the normal baseline.<sup>31</sup>

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<sup>31</sup> Robert W Smith, *supra* note 21 at 8.

### *B. The Baseline on Paracel Islands*

China has created 28 basepoints and connected them to enclose the Paracel Islands under Vietnam's sovereignty, which China calls Xisha Island.<sup>32</sup> These claims have been protested by Vietnam, the US and the Philippines.<sup>33</sup> Especially, 28 base points on the Paracel Islands are determined by China in 05 groups: group 1 includes points 1 to 3; group 2 includes points 4 to 8; group 3 includes points 9 to 15; group 4 includes points 16 to 23; group 5 includes points 24 to 28.

According to UNCLOS, China cannot and does not have the right to claim baselines on the Paracel Islands for the following reasons.

Firstly, it is not possible to determine a straight baseline for the Paracel Islands, under Articles 46 and 47 of UNCLOS. An "archipelagic State" stipulated in Article 46 of UNCLOS, is "a state constituted wholly by one or more archipelagos and may include other islands". According to Article 47 of UNCLOS, only an archipelagic State can draw straight baselines of the archipelago. Therefore, as a mainland country, China cannot define baselines for any of the archipelagos. At the same time, China does not have the authority to define baselines on the Paracel Islands because the archipelago belongs to Vietnam's sovereignty.

China is ambitious to define a straight baseline on the Spratly Islands (in terms of geographical structure, the Paracel are like the Spratly). However, this ambition was rejected in the Award of 12 July 2016 by the Arbitral Tribunal established under Annex VII of UNCLOS to settle the Philippines-China case.<sup>34</sup> Paragraph 575 of this Award affirmed that UNCLOS provided, in Article 7, for States to apply the straight baselines

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<sup>32</sup> Paracel Islands of Vietnam are located in the North of the South China Sea, from about 15°45' to 17°15' north latitude, 111°0' to 113°0' east longitude, about 120 nautical miles from Ly Son Island (Quang Ngai). This is a coral complex, including 37 islands, shoals, reefs, and coral dunes. For details, see Van Doanh, "Vi tri dia ly va dieu kien tu nhien cua quan dao Hoang Sa", *National Defence Journal* (21 September 2015), online: <<http://tapchiquptd.vn/vi/bien-dao-viet-nam/vi-tri-dia-ly-va-dieu-kien-tu-nhien-cua-quan-dao-hoang-sa/8110.html>>.

<sup>33</sup> James Kraska, *supra* note 5 at 157.

<sup>34</sup> *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)*, 2013 Permanent Court of Arbitration.

under certain circumstances. In the Tribunal's view, under any circumstances, the application of the straight baselines to the Spratly would be contrary to UNCLOS. Herein, Article 7 of UNCLOS provides that the application of straight baselines does not include offshore archipelagos. Although UNCLOS does not explicitly exclude the use of straight baselines in other circumstances. However, the Tribunal held that the permission to use straight baselines under Article 7, along with the conditional permission for some countries to draw archipelagic baselines under Articles 46 and 47 of UNCLOS, ruled out the possibility of using a straight baseline for other circumstances, whereby, this case concerns offshore archipelagos that do not meet the conditions for archipelagic baselines. Therefore, the conditions in Articles 7 and 47 of UNCLOS become meaningless for any other interpretation.<sup>35</sup>

On the other hand, based on China's claim to consider the entire Spratly archipelago as a unified entity with the implication that, "The Spratly Islands should be surrounded by a system of straight baselines or archipelagic baseline", the Award of 12 July 2016 affirmed, only the archipelagic state has the right to use the archipelagic baseline. Specifically, the ruling affirmed that China's above-mentioned position and the claim were not accepted and emphasized that the use of archipelagic baselines (a baseline that encloses an entire archipelago) is controlled in a manner that is strictly by UNCLOS. This strict control is based on the provision of paragraph 1 of Article 47 to limit the use of archipelagic baselines to "archipelagic States" only.<sup>36</sup> The archipelagic States, in Article 46 of UNCLOS, are defined as states "constituted wholly by one or more archipelagos and may include other islands". The Philippines is an archipelagic state (because it is made up entirely of an archipelago), so it has the right to use archipelagic baselines. However, China is made up primarily of territory on the Asian mainland, and thus cannot meet the "archipelagic state" definition.<sup>37</sup> Reaffirming this, the Tribunal concluded that "no evidence that any deviations from this rule have amounted to the formation of a new rule of customary international law

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<sup>35</sup> *Ibid* at 575.

<sup>36</sup> *Ibid* at 573.

<sup>37</sup> *Ibid*.



that would permit a departure from the express provisions of the Convention”.<sup>38</sup> In this regard, the Committee on Baselines under the International Law of the Sea, in Resolution 1/2018, concluded that “in the case of offshore outlying archipelagos, a State is unable to proclaim archipelagic baselines unless it meets the criteria of being an archipelagic State”.<sup>39</sup>

Secondly, the Paracel Islands belong to Vietnam’s sovereignty as well as an integral part of the territory of Vietnam.

### *Before France’s occupation*

In terms of international law, following the 1958 Declaration, in the 1996 Declaration, China blatantly declared the baseline on the Paracel Islands, which belongs to Vietnam's sovereignty. This declaration is considered a serious violation of international law, infringing on Vietnam’s sovereignty. As Vietnam is the first country to establish sovereignty over the Paracel Islands when the archipelago is a derelict territory, this establishment is consistent with the principle of detecting and actual appropriation in international law. Specifically, in the first half of the 17th century, Nguyen Lord sent the “Hoang Sa team”, of the Quang Ngai district, to go to the Paracel Islands and the “Bac Hai team”, of the Binh Thuan district, to go to the Spratly Islands to collect goods, equipment on stranded ships and carry out fisheries. These activities are recorded in many historical documents, such as: “The Compendium of Thien Nam Tu Chi Lo” by Do Ba Tu Cong Dao compiled in 1686<sup>40</sup>, “Phu Bien Tap Luc?” by Le Quy Don compiled in

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<sup>38</sup> *Ibid* at 576.

<sup>39</sup> ILA, *Resolution 1/2018 – Committee on baselines under the International Law of the Sea* (Sydney, Australia: ILA, 2018) at 11.

<sup>40</sup> This document depicted Paracel and Spratly Islands as parts of Quang Ngai District, Quang Nam Province as follows: “The long sandbank called Golden Sandbank, around 400 miles long and 20 miles wide, emerges in the sea, facing the coastline between the harbour of Dai Chiem and that of Sa Vinh...”. For details, see Ta Quang, “Spratly and Paracel Islands in Vietnamese and international ancient books and maps”, *National Defence Journal* (22 October 2014), online: <<http://tapchiquptd.vn/en/research-and-discussion/spratly-and-paracel-islands-in-vietnamese-and-international-ancient-books-and-maps/6404.html>>.

1776<sup>41</sup>, "The Imperial Calendar and the Charter" by Phan Huy Chu compiled in 1821, "Dai Nam Thuc Luc Tien Bien" compiled from 1844 to 1848, "Dai Nam Thuc Luc Chinh Bien" compiled from 1844 to 1848, "Dai Nam Nhat Thong Chi" by The National History of the Nguyen Dynasty compiled in 1910, "Kham Dinh Dai Nam Hoi Filling History", etc.<sup>42</sup> In addition to domestic historical documents, these activities are also recorded by foreign historical documents such as the Diary of Batavia in 1636, the Diary of Overseas in 1696, and the "An Nam Dai Quoc" graphics in 1838.<sup>43</sup> Especially, "Hoang Trieu Truc Tinh Dia Du Toan Do" compiled in 1904<sup>44</sup>, the map of the entire China territory during the Qing Dynasty, also identified, the southernmost of China's territory as Hainan Island.<sup>45</sup> In addition to collecting and fishing, the Nguyen Dynasty conducted activities of measuring, surveying, stele marking and marker planting to exercise sovereignty over the Paracel Islands in the continuous years 1834, 1835, and 1836. Thus, both in terms of history and international law, the Nguyen Dynasty established sovereignty over these two archipelagos since they did not belong to any country's territory.<sup>46</sup>

### *During France's invasion*

During the French invasion of Vietnam, as a representative of the feudal court of Annam, France had taken many activities to strengthen Vietnam's sovereignty over the Paracel Islands by patrolling, controlling, and sending

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<sup>41</sup> *Ibid.* This book indicated that Dai Truong Sa (including the Paracel and the Spratly Islands) belong to Quang Ngai Prefecture. The book said that: "A Vinh Commune, Binh Son District, Quang Ngai Prefecture has a mountain outside its seaport. This 30-mile-wide mountain is called Re Island. It takes four watches to reach the island, on which there is a ward named Tu Chinh with beans-growing inhabitants. Further offshore are the Dai Truong Sa Islands..."

<sup>42</sup> Le Van Bao & Nguyen Thanh Minh, "Process of Establishment of The State of Vietnam For the Two Islands of Hoang Sa and Truong Sa" (2022) 8:3 *The Journal of the Middle East and North Africa Sciences* at 1.

<sup>43</sup> For details, see Nguyen Dinh Dau, *Vietnam's sovereignty over the South China Sea and Paracel Islands – Spratly Islands* (VNUHCM Publishing House, 2014) at 257-269.

<sup>44</sup> This book includes maps drawn by Diogo Ribeiro in 1528, Sébastien Calbot in 1544, Giacomo Gastaldi in 1548, Andreas Homen in 1559, Barthomeu Velho in 1560, Lazaro Luis in 1563, Abraham Ortelius in 1584, Matteo Ricci in 1602, Martini in 1655, *Sinae propriae* in 1782.

<sup>45</sup> Nguyen Dinh Dau, *supra* note 43.

<sup>46</sup> Nguyen Dinh Dau, *supra* note 43 at 33-73; at 77-122.

troops to occupy the islands. For administrative management, the Vietnamese government merged the Spratly Islands into Ba Ria - Vung Tau province and established an administrative unit in the Paracel Islands in Thua Thien province. Furthermore, many constructions were built on both archipelagos. In 1925 and 1927, France conducted surveys and naval patrols in the Paracel Islands. In 1931 and 1932, France protested the Government of China on behalf of the Kingdom of Annam when authorities in Guangdong province called for bids to exploit guano in the Paracel islands. During the 1920s and 1930s, French Navy warships and customs vessels made frequent visits to the Paracel Islands.<sup>47</sup>

After the Second World War, France returned to the Paracel and Spratly Islands. On March 8, 1949, the Ha Long Agreement was signed and the State of Vietnam, belonging to the French Union, was founded. With this event, France officially handed over the management of the entire territory of Vietnam, including the Paracel and Spratly Islands<sup>48</sup>. On October 14, 1950, under the chairmanship of the Chief Governor of the Central Part of Vietnam, Phan Van Giao, the management of Paracel and Spratly Islands was officially handed over to the SOV by the French Government.<sup>49</sup> On September 6, 1951, at the San Francisco Peace Conference, the concurrently Prime Minister and Minister of Foreign Affairs of the State of Vietnam the South Vietnamese Government, Tran Van Huu, officially declared and affirmed Vietnam's longstanding sovereignty over the two archipelagos. He affirmed that “it is necessary to truly make use of all opportunities, to smother seeds of future conflict. We affirm our long-established sovereignty over Truong Sa<sup>50</sup> and Hoang Sa<sup>51</sup> archipelagos”<sup>52</sup>. After that, the government of

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<sup>47</sup> Carlyle A Thayer, “Vietnam’s Strategy of ‘Cooperating and Struggling’ with China over Maritime Disputes in the South China Sea” (2016) 3:2 *Journal of Asian Security and International Affairs* at 200-220.

<sup>48</sup> Vu Thanh Ca, “The continuation of Vietnam’s sovereignty over Hoang Sa and Truong Sa archipelagos”, *Political Theory Online Journal – Research Journal and Scientific Voice of Ho Chi Minh National Academy of Politics* (2016), online: <<http://lyluanchinhtri.vn/home/en/index.php/theory-research/item/327-the-continuation-of-vietnam%E2%80%99s-sovereignty-over-hoang-sa-and-truong-sa-archipelagos.html>>.

<sup>49</sup> *Ibid.*

<sup>50</sup> Truong Sa archipelago is best known in the West as the Spratly Islands.

<sup>51</sup> Hoang Sa archipelago is best known in the West as the Paracel Islands.

<sup>52</sup> Vu Thanh Ca, *supra* note 48.

the Republic of Vietnam, which was known before as the State of Vietnam, sent its troops to be stationed there and administered these two archipelagos under the 1954 Geneva Agreement. Accordingly, Vietnam was temporarily partitioned on the 17th parallel, and the Republic of Vietnam temporarily managed half of Vietnam from the 17th parallel to the south while waiting for the unification of the country by free general elections. During this period, all legitimate governments of Vietnam have always affirmed and maintained their sovereignty continuously and peacefully over the two archipelagoes through state activities. The Republic of Vietnam had decided to merge the Paracel Islands in Thua Thien Province into Dinh Hai commune in Hoa Vang District, Quang Nam Province, and merge the Spratly Islands into Phuoc Hai commune, Dat Do District, Phuoc Tuy Province.<sup>53</sup>

In April 1956, the Republic of Vietnam took over the Western group of islands of the Paracel Islands. While not having time to deploy on the islands in the Eastern group of the Paracel Islands, the Chinese army secretly occupied this group of islands. In January 1974, when China used its air force and navy to illegally capture the Western group of Paracel Islands, the Republic of Vietnam denounced China for violating Vietnam's sovereignty over the Paracel Islands. On January 20, 1974, the Provisional Revolutionary Government of the Republic of South Vietnam issued a Statement in protest of this action.<sup>54</sup> On February 14, 1975, the Ministry of Foreign Affairs of the Republic of Vietnam published a White Paper on the historical and legal evidence of the sovereignty of Vietnam over the Paracel and Spratly Islands.<sup>55</sup>

*From the year 1975*

In April 1975, the naval forces of the Republic of Vietnam on Truong Sa, Son Ca, Nam Yet, Song Tu Tay, Sinh Ton, and An Bang islands were replaced by those of the Liberation Army of South Vietnam. On 30 April 1975, the country was reunified, and Hoang Sa and Truong Sa archipelagos

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<sup>53</sup> Nguyen Dinh Dau, *supra* note 43 at 131-194.

<sup>54</sup> Vu Thanh Ca, *supra* note 48.

<sup>55</sup> Nguyen Dinh Dau, *supra* note 43 at 213.

were handed over to the management of the Provisional Revolutionary Government of the Republic of South Vietnam.<sup>56</sup>

On 2 July 1976, through the general election, the Democratic Republic of Vietnam and the Republic of South Vietnam were unified into the Socialist Republic of Vietnam. Since then, as the inheritor of ownership of the Hoang Sa and Truong Sa archipelagos from the previous governments, the State has continuously maintained and protected the sovereignty of Vietnam over them.

Following that, all documents, including 1980, 1992 and 2013 Constitution of Vietnam (Art.1), Declaration dated May 12, 1977, on territorial sea, contiguous zone, exclusive economic zone, and continental shelf (Art.5), Declaration dated November 12, 1982, on baseline used for measuring the breadth of the territorial sea (Art.4), Law dated June 17, 2003, on National Border (Art.1), Law dated June 21, 2012, on the law of the sea (Art.1), affirm that the Paracel and Spratly Islands belong to Vietnam's territory. Especially, when ratifying UNCLOS, the National Assembly of Vietnam stated, in the Resolution dated June 23, 1994, that "The National Assembly of Vietnam once again affirms Vietnam's sovereignty over the two Paracel and Spratly Islands, and advocates resolving disputes related to the South China Sea through peaceful negotiation, in the spirit of equality, mutual understanding and respect, respect for international law, especially UNCLOS, respect the sovereignty and jurisdiction of coastal states over their exclusive economic zones and continental shelves".<sup>57</sup>

All historical and legal bases mentioned above are the most convincing shreds of evidence to affirm that Vietnam is the first country to establish sovereignty over the Paracel islands under the principle of effective occupation which was recognized by international law and developed from the Berlin West African Conference of 1884-1885<sup>58</sup>. Accordingly, a country

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<sup>56</sup> Vu Thanh Ca, *supra* note 48.

<sup>57</sup> Article 4, The National Assembly Resolution of Vietnam dated June 23, 1994, on ratifying the UNCLOS 1982.

<sup>58</sup> The Berlin West Africa Conference of 1884-1885 as well as its General Act played an important role in creating a legal and political framework for the subsequent partition of Africa. Accordingly, they transformed Africa into a conceptual terra nullius, silencing native resistance through the subordination of their claims to sovereignty. One of three main matters addressed in this

has its sovereignty over a new territory under the principle of effective occupation if the following five factors are satisfied, namely:

A territory over which the state claims its sovereignty is *terra nullius*<sup>59</sup> (a territory without a master), including *res derelictae* (abandoned lands<sup>60</sup>)

Accordingly, the territory is not under the sovereignty of any country at the time of establishing sovereignty. In the *Island of Palmas* case<sup>61</sup>, the US claimed its sovereignty over the island of Palmas due to Spain's cession under the Treaty of Paris. However, the Arbitrator, Max Huber, rejected this argument because the Spaniards, when withdrawing from this island in 1666, made express reservations as to the maintenance of their sovereign rights. On the contrary, the Netherlands has proved its sovereignty on the title of peaceful and continuous display of state authority over the island. It established and exercised its authority at different epochs between 1700 and 1898, as well as in the period between 1898 and 1906. Before that, from 1677 onwards, this island connected with the East India Company, and thereby with the Netherlands, by contracts of suzerainty.<sup>62</sup> Up to the contestation made by the US in 1906, no contestation or other action or protest was the exercise of territorial rights by the Netherlands over Palmas. Thus, the *Island of Palmas* was not *terra nullius* at the time of the coming into force of the Treaty of Paris because it belonged to the Netherlands. That means Spain could not be able to have ceded to the US its title derived from discovery. Similarly, in the ICJ Advisory Opinion of 16 October 1975 on *Western Sahara*, regarding Question I "Was Western Sahara at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?", the

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Conference was a definition of formalities for the new effective occupation. For details, see Matthew Craven, "Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade" (2015) 3:1 *London Review of International Law*, online: <<https://doi.org/10.1093/lril/lrv002>> at 31-59.

<sup>59</sup> *Terra nullius* is a legal term that defines a territory that has not been claimed by any country or has never been placed under the control of any state. This territory may be inhabited; however, no state organization performs management activities there.

<sup>60</sup> Abandoned land is a territory that was previously occupied by a state, then this possessing state has renounced its sovereignty over that territory.

<sup>61</sup> *Island of Palmas (or Miangas) (The Netherlands / The United States of America)*, 1925 Permanent Court of Arbitration.

<sup>62</sup> *Ibid.*

Court affirmed that the answer to this question in the negative<sup>63</sup>. This means Western Sahara is not terra nullius because, at the time of colonization, Western Sahara was inhabited by peoples who were socially and politically organized in tribes and under chiefs competent to represent them<sup>64</sup>. Moreover, there were agreements between the chiefs of the local tribes and the King of Spain. In other words, there was a de facto state that already existed there at the time of colonization by Spain because no rule of international law, in the view of the Court, requires the structure of a state to follow any particular pattern.<sup>65</sup> By comparing this definition of terra nullius with the historical and legal evidence mentioned above, it could be affirmed that Vietnam was the first country to establish sovereignty over the Paracel Islands when it still belonged to no one.

*Acts of establishing sovereignty are performed by the state*

This second element was recognized in the Award of the Arbitral Tribunal in the First Stage on Territorial Sovereignty and Scope of the Dispute between Eritrea and Yemen on October 9th, 1998. Accordingly, both sides, in this case, had presented evidence to prove the use, presence and public performance of state power, strengthening their possession over the Red Sea Islands. In the view of the Court, the intention to claim the islands à titre de souverain can be evidenced by showing a public claim of right or assertion of sovereignty to the Islands as well as legislative acts openly seeking to regulate activity on the Islands.<sup>66</sup> Supporting the element of state acts in establishing sovereignty, in the Judgment of 17 December 2002 concerning sovereignty over Pulau Ligitan and Pulau Sipadan between Indonesia and Malaysia, the ICJ also stated that “activities by private persons cannot be seen as effective if they do not take place based on official regulations or under governmental

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<sup>63</sup> *Western Sahara*, Advisory Opinion, by International Court of Justice, Advisory Opinion (International Court of Justice, 1975) at 82.

<sup>64</sup> *Ibid* at para 81.

<sup>65</sup> *Ibid* at para 94.

<sup>66</sup> *The Government of The State of Eritrea v The Government of The Republic of Yemen*, 1996 Permanent Court of Arbitration at para 241.

authority"<sup>67</sup>, and thus these activities “do not constitute acts à titre de souverain”<sup>68</sup>. As a result, the ICJ rejected Indonesia’s view that Pulau Ligitan and Pulau Sipadan belong to Indonesia's sovereignty due to the discovery of this country's fishermen. In contrast, the ICJ noted that the activities taken by Malaysia in these islands, including legislative, administrative and quasi-judicial acts, “show a pattern revealing an intention to exercise state functions”<sup>69</sup> and concluded that Malaysia has sovereignty over these two islands. The acts of establishing and exercising sovereignty over the Paracel Islands are the activities of Vietnam’s feudal state, namely the Nguyen Dynasty.

*Acts of establishing sovereignty are performed based on the peace*

In this case, the method of establishing sovereignty over the territory by aggression has been excluded. In other words, the establishment of sovereignty over territory is only recognized by international law by the discovery, occupation, and declaration over terra nullius. This means that sovereignty can only be established if no country opposes it. In the Judgment of 5 April 1933 concerning the Legal Status of Eastern Greenland between Denmark and Norway, as known as the Eastern Greenland case, the question of whether or not objection has been mentioned in determining the parties’ sovereignty over Greenland. Accordingly, the Danish Government stated that its sovereignty has been expressed in succession for a long time in international documents and legislative enactments. These documents’ contents have been brought to the knowledge of the countries concerned and to which no objection has ever been raised.<sup>70</sup> Compared with Vietnam’s case over the Paracel Islands’ sovereignty, the historical pieces of evidence have proved that Vietnam is the first country to peacefully establish its sovereignty since the Paracel Islands were a territory without a master.

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<sup>67</sup> *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, 2002 International Court of Justice at 625, at para 140.

<sup>68</sup> *Ibid* at para 141.

<sup>69</sup> *Ibid* at para 148.

<sup>70</sup> *Legal Status of Eastern Greenland*, 1933 International Court of Justice at 61.



*Acts of establishing sovereignty existed and have been performed continuously, without interruption*

In this case, the element “actually existed” has a particularly important meaning in the legal possession of the territory. Acts of establishing sovereignty existed, which means the state establishing sovereignty has to prove the continuous display of the actual power, expressed by state and law, over the claimed territory to govern that territory. Thus, the purpose of the first discovery was simply to notify other states that the possessing state had a primary claim to the territory. This discovery, to be considered legally valid, must be reinforced through actual possession for a specified time. As can be seen, the continuous display was mentioned in some specific cases concerning sovereignty disputes, namely the Island of Palmas case, Sovereignty and Maritime Delimitation in the Red Sea case and Minquiers and Ecrehos case. In the Island of Palmas case, as confirmed in the Award of the Tribunal, in case of a dispute, the continuous and peaceful display of state functions is considered the most reliable and natural criterion for determining territorial sovereignty.<sup>71</sup> Similarly, in the Award of the Arbitral Tribunal in the First Stage on Territorial Sovereignty and Scope of the Dispute between Eritrea and Yemen on October 9th, 1998, evidence of the display of functions of state and governmental authority has been analyzed. Accordingly, the modern international law of the acquisition or attribution of the territory generally requires that there be: an intentional display of power and authority over the territory through the exercise of jurisdiction and state functions, on a continuous and peaceful basis.<sup>72</sup> The establishment and exercise of national sovereignty over the territory on a continuous basis without interruption must be closely related to a peaceful occupation. The claimant state is obligated to demonstrate its possession for a sufficiently long period to enable effective enforcement of its sovereign acts. In particular, the

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<sup>71</sup> In the matter of an Arbitration under an agreement to Arbitrate dated 3 October 1996 between The Government of The State of Eritrea and The Government of The Republic of Yemen, the Award of The Arbitral Tribunal in the first stage of the proceedings (Territorial Sovereignty and Scope of The Dispute). For details, see Permanent Court of Arbitration, 01/23/1925 *Island of Palmas (or Miangas) (The Netherlands / The United States of America)*, *supra* note 61 at 10.

<sup>72</sup> Permanent Court of Arbitration, 1996 *The Government of The State of Eritrea v The Government of The Republic of Yemen*, *supra* note 66 at 239.

importance of possession, as well as the actual display of sovereign enforcement, have been mentioned by ICJ in the Judgement of November 17th, 1953, related to the *Minquiers and Ecrehos* case. In the opinion of the Court, what is of decisive importance is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups.<sup>73</sup> That means possession is important evidence contributing to proving that a claimant state has sovereignty over a territory. In other words, one party cannot claim territory without evidence proving its possession. Compared with Vietnam's case over the Paracel Islands' sovereignty, the historical pieces of evidence have proved that the Paracel Islands, at least from the middle of the 17th century until China's invasion in 1974, has been a constituent part of Vietnam's territory.

*Acts of establishing sovereignty are international admission*

Accordingly, when a state established and exercised its sovereignty over any certain territory, there was no objection from any other state. This admission can be presented in express (expression of agreement) or implied (silence or no objection) form. In the case concerning the territorial dispute between Libya and Chad, the ICJ focused on the attitudes of the parties when matters pertinent to the frontiers came up before international fora.<sup>74</sup> Accordingly, Chad repeatedly expressed its views and raised the issues before some international organizations, including the Organization of African Unity (OAU), the UN General Assembly as well as the UN Security Council. On the contrary, Libya made a statement only once, before the OAU stating that the frontier defined by the Treaty of 1935 was valid.<sup>75</sup> Facing Chad's reports on the territorial dimensions, as set out and submitted by France, Libya did not challenge.<sup>76</sup> In addition, Libya did not submit documents to the OAU and failed to participate in the Committee of Experts set up by the OAU-

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<sup>73</sup> *The Minquiers and Ecrehos case*, 1953 International Court of Justice at 47, 57.

<sup>74</sup> *Ibid* at para 68.

<sup>75</sup> *Ibid* at para 69.

<sup>76</sup> *Ibid* at para 68.

related discussions on disputed territory.<sup>77</sup> As considered a matter of urgency, Chad repeated its complaints to the UN Security Council in 1983, 1985 and 1986, respectively, however, Libya did not attempt to plead its case before the Council since it considered that the Council has no jurisdiction to settle a territorial dispute. Considering Chad's performance, as a result, the Court realized the consistency of Chad's conduct concerning the location of its boundary.<sup>78</sup> Generally, when a situation arises, a reaction expressing a point of view is required. However, if no reaction takes place, failure to object will be considered acceptance of an arising situation. Thus, in any dispute over territory in which one disputing party has agreed to acknowledge the conduct of the other disputing party, by no objection, it could be evidence against any act to negate a prior act. In the case concerning the territorial dispute between Libya and Chad, the frontiers claimed by Chad have been agreed upon in implied form. Similarly, in the Eastern Greenland case, the Permanent Court of International Justice recognized Danish sovereignty over Greenland due to various agreements concluded by Norway with Denmark or to which both states were contracting parties, recognizing Greenland as a part of Denmark.<sup>79</sup> For instance, the Commercial Treaty concluded between Denmark and the United Kingdoms of Sweden and Norway in 1826, through Article 5 providing for the scope of application of some articles, admitted that Greenland is a colony of Denmark as well and confirmed that Norway also agreed with this statement.<sup>80</sup> In addition, the Universal Postal Conventions of 1920, 1924 and 1929, to which Denmark and Norway are contracting parties, said that "... Greenland, is part of Denmark".<sup>81</sup> Especially, in the opinion of the Court, Norway, at the time of the termination of the Union between Denmark and Norway (1814-1819), undertook not to dispute Danish sovereignty over Greenland.<sup>82</sup> Compared with Vietnam's case over the Paracel Islands' sovereignty, since the Nguyen Dynasty established and exercised its sovereignty over the Paracel Islands

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<sup>77</sup> *Ibid* at para 71.

<sup>78</sup> *Ibid*.

<sup>79</sup> International Court of Justice, 04/05/1933 *Legal Status of Eastern Greenland*, *supra* note 70 at para 183.

<sup>80</sup> *Ibid* at para 184.

<sup>81</sup> *Ibid* at para 185.

<sup>82</sup> *Ibid* at para 172.

until 1909, there had been no objection from Chinese feudal dynasties. The Qing Dynasty, in its national map, had identified that the southernmost point of China's territory was Hainan Island. Xisha Islands, also known as the Paracel Islands claimed by Vietnam, was not mentioned.

## V. NEGATIVE LEGAL CONSEQUENCES ON REGIONAL AND GLOBAL PEACE, SECURITY, MARITIME, AND AVIATION

Following the 1996 Declaration, China continued to issue some legal documents related to the sea, typically the 2021 CGL<sup>83</sup> and the 2021 MTSL<sup>84</sup>. In general, some provisions of the two laws are contrary to the UNCLOS, infringing on Vietnam's sovereignty, sovereign rights, and jurisdiction as well as threatening peace, security, maritime and aviation operations of countries in the region and the world. These domino-like legal consequences were raised from the 1996 Declaration and continued to exist when the above two laws were issued.

### *A. The 2021 Coast Guard Law*

As mentioned above, some provisions in the 2021 CGL are contrary to international law, notably UNCLOS. Accordingly, this Law defined the extent of maritime zones contrary to the provision of UNCLOS. Article 3 of this Law states that "This Law shall apply to maritime police agencies... in the sea areas under the jurisdiction of the People's Republic of China... and the air above them". Although referring to the sea areas under China's jurisdiction, this Law does not define this term's definition. In this case,

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<sup>83</sup> This Law was approved on January 22nd, 2021, and took effect on February 1st, 2021. This Law was introduced seven years after China conducted the consolidation of some civilian law enforcement authorities related to maritime issues to establish the Coast Guard Bureau. This Bureau, which had been under the command of the State Council, was transferred to the People's Armed Police Force under the unified command of the Central Military Commission in 2018. See Japan Ministry of Defense, "The Coast Guard Law of the People's Republic of China", *Japan Ministry of Defense*, online: <[https://www.mod.go.jp/en/d\\_act/sec\\_env/ch\\_ocn/index.html](https://www.mod.go.jp/en/d_act/sec_env/ch_ocn/index.html)>.

<sup>84</sup> This Law was adopted on April 29th, 2021, and came into force on September 1st, 2021. This Law is an amendment to the 1983 Maritime Traffic Safety Law (amended on November 7th, 2016). The 2021 MTSL consists of 10 chapters with 122 articles, compared with the previous revision of 12 chapters with 53 articles. See *Maritime Traffic Safety Law of the People's Republic of China*, 2021.

according to Raul Pedrozo, it is somewhat ambiguous, perhaps intentionally.<sup>85</sup> Due to this lack of definition, the basis for determining “sea areas under the jurisdiction” would be the 1958 Declaration and the 1996 Declaration as well as China’s unreasonable claims in the South China Sea. These documents have focused the attention of Vietnam as well as the international community because of their direct impact on the sovereignty, sovereign rights, jurisdiction, rights and freedoms of other countries on the seas and oceans under the UNCLOS provisions. China’s position on the maritime zones in the South China Sea so far has conflicted with the UNCLOS. Specifically, China has unilaterally claimed sovereignty along the nine-dash line<sup>86</sup>, accounting for more than 80% of the South China Sea, including the Paracels and Spratly Islands under Vietnam's sovereignty. In 2016, the Arbitral Tribunal constituted under Annex VII to the UNCLOS to settle the South China Sea Arbitration case rejected the nine-dash line claim<sup>87</sup> and affirmed that China's claims of historic rights to living and non-living resources within the nine-dash line are contrary to the UNCLOS<sup>88</sup>. In addition, the Tribunal also concludes that upon China’s accession to the UNCLOS and its entry into force, any historic rights that China may have had to the living and non-living resources within the nine-dash line were superseded.<sup>89</sup> As a result, China’s unilateral claim of sovereignty over the South China Sea has no legal basis, contrary to UNCLOS. However, since the Award of 12 July 2016 in the matter of the South China Sea was announced, China still refused to implement this Award and the 2021 CGL continued using “sea areas under the jurisdiction” without meaning clarification.

As analyzed in Part III of this article, concerning baseline determination, China already applied the straight baseline method with the Paracel Islands.

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<sup>85</sup> Raul (Pete) Pedrozo, *supra* note 10 at 4.

<sup>86</sup> To justify its claims, China submitted to the Commission on the Limits of the Continental Shelf a note verbal dated May 7th, 2009, showing a U-shaped line consisting of nine segments of a dashed line drawn in the South China Sea. For details, see Taisaku Ikeshima, *supra* note 7 at 22.

<sup>87</sup> Permanent Court of Arbitration, 01/22/2013 *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, *supra* note 34 at 1203, B(2).

<sup>88</sup> *Ibid* at 261.

<sup>89</sup> *Ibid* at 262.

In addition, China also announced the so-called nine-dash line claim. This illegal claim has turned more than 80% of the South China Sea<sup>90</sup> into “sea areas under China’s jurisdiction”, as known as the sea areas under “Four-Sha” and turned a large area of Japan’s exclusive economic zone and continental shelf in the East China Sea<sup>91</sup> into “sea areas under China’s jurisdiction”. As a result, China has illegally extended its various maritime zones<sup>92</sup>, directly infringing upon Vietnam’s sovereignty over the Paracels and Spratlys islands, Vietnam’s sovereign rights and rights under Vietnam’s jurisdiction in the contiguous zone, the exclusive economic zone and the continental shelf under the UNCLOS. Similarly, it also infringes on Japan’s sovereign rights and its jurisdiction over its exclusive economic zone and continental shelf in the East China Sea.

The 2021 CGL contains some provisions that are incompatible with international law, namely the UNCLOS, concerning the freedoms of navigation and overflight of countries in the region and the world. Accordingly, China's coast guard has the right to forcibly dismantle buildings, structures or fixed or floating devices in the waters for those who refuse to stop illegal activities or fail to dismantle within the time limit (Art.20). These dismantlings would potentially constitute an illegal use of force inconsistent with the fundamental principles of the UN, prescribed in Article 4. 2 of the UN Charter. Furthermore, this regulation will be the basis for China to make an excuse to increase the deployment of coast guard ships to maritime zones that China claims illegally due to the pretext of its fishermen's protection. According to the UNCLOS, ships of all states enjoy the right of innocent passage through the territorial sea (Art.17), warships and other government ships operated for non-commercial purposes are subject to enjoy immunities (Art.32) and ships and aircraft of all states in the contiguous zone and the exclusive economic zone enjoy the freedom of

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<sup>90</sup> Henk Schulte Nordholt, “What are Beijing’s motivations?: The South China Sea dispute” (2016) 40:3 *Atlantisch Perspectief* 34–38 at 34.

<sup>91</sup> Rebecca Strating, “Maritime and Sovereignty Disputes in the East China Sea”, *The National Bureau of Asian Research* (9 February 2021), online: <<https://www.nbr.org/publication/maritime-and-sovereignty-disputes-in-the-east-china-sea/>>.

<sup>92</sup> Raul (Pete) Pedrozo, “Maritime Police Law of the People’s Republic of China” (2021) 97 *International Law Studies* at 467.

navigation and overflight (Art.58). Compared to the relevant articles in the 2021 CGL, including Articles 21, 22, 47 and 49, it could be seen that China deliberately takes advantage of the ambiguity in the provisions of maritime zones in the so-called nine-dash line claim to limit the legitimate rights and freedoms of other states. Article 21 allowed the Coast Guard to have the right to take measures such as forced eviction and forced tow away for warships and other government ships operated for non-commercial purposes. Under Articles 22, 47 and 49, the Coast Guard also has the right to take all necessary measures, including the use of weapons, in some specific cases, including the case of foreign ships entering the sea areas under China's jurisdiction without obeying the order to stop the ship. In the opinion of China, ships of all states, including warships, when operating maritime zones under the UNCLOS are subject to be forcibly evicted or forced towed away (Art.21), attacked by hand-held weapons (Art.47) or attacked directly by weapons (Art.49). All these regulations are contrary to the UNCLOS. While the UNCLOS has granted immunity to warships and government ships operated for non-commercial purposes from coastal states' jurisdiction, China grants its coast guard the power to force eviction and tow away. Specifically, the prohibition of the threat or use of force principle has been violated by China through the provision of authorizing the use of force, taking all necessary measures including the use of weapons (Art.22), or the threat of force, taking warning and control measures (Art.21), against foreign ships, including ships that are subject to privileges and immunities under international law.

About the sea areas beyond the territorial sea, according to Article 25 of the 2021 CGL, China's coast guard agencies may designate temporary maritime warning areas in waters under China's jurisdiction to (i) implement maritime security and defence tasks, (ii) combat illegal and criminal activities at sea, (iii) deal with emergencies at sea, (iv) protect marine resources and the ecological environment, (v) be in other circumstances that require the delineation of a temporary maritime warning zone. These provisions, generally, are also contrary to the UNCLOS. Under Articles 58, 86, 87, and 89 of the UNCLOS, beyond the territorial sea, ships of all states enjoy the freedom of navigation, and no country can turn any part of the high seas into

maritime zones under their sovereignty. However, China allowed its coast guard agencies to designate maritime warning areas to restrict or prohibit the passage and stay of ships and personnel in all maritime zones under its jurisdiction, including zones beyond the territorial sea. In these zones, coastal states only are entitled to adopt laws and regulations for the prevention, reduction, and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage (Art.211), but have no power to impede foreign vessels from exercising their right of innocent passage. In addition, in the exclusive economic zone, the jurisdiction of the coastal states is limited to the control of pollution from ships by enacting laws and regulations that are consistent with and at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference (Art.211). Similarly, the coastal states may establish safety zones, not exceeding a distance of 500 metres around the artificial islands, installations, or structures, in the exclusive economic zone and continental shelf, to ensure the safety of navigation, installations and structures (Art.60.5, Art.80). As could be seen that these permitted actions, under the UNCLOS, do not include the designation of maritime warning areas, so this designation is contrary to the Convention.

### *B. The 2021 Maritime Traffic Safety Law*

Like the 2021 CGL, some provisions related to maritime zones under China's jurisdiction in the 2021 MTSL are not consistent with international law, especially the UNCLOS. Accordingly, Article 2 of this Law provides that this Law shall apply to the navigation, berthing, operation, and other activities related to maritime traffic safety in the sea areas under the jurisdiction of China. As mentioned and analyzed above in Section A of the 2021 CGL, despite mentioning the term "sea areas under the jurisdiction", both laws do not clearly explain its content. This is a deliberate ambiguity so that China can take advantage of enacting laws and regulations that violate the sovereignty, sovereign rights as well as the jurisdiction of the relevant coastal states.



With a so-called view to strengthening maritime traffic control, maintaining maritime traffic order, protecting the safety of life and property, and safeguarding the rights and interests of China, the 2021 MTSL has some provisions that have the nature of obstructing or complicating the normal activities of foreign ships in maritime zones under the UNCLOS. Article 30 of this Law, which sets forth mandatory requirements for vessels of foreign nationality to apply for pilotage service, is not consistent with the UNCLOS, namely Article 24. Accordingly, the coastal state shall not impose requirements on foreign ships that have the practical effect of denying or impairing the right of innocent passage, and in this case, the mandatory application of pilotage services is a wrongful requirement, intentionally. The requirement of pilotage is contrary to the spirit of the right of innocent passage designed for ships of all states, whether coastal or landlocked.

Regarding the right of innocent passage, the regulations are provided quite detailed under the UNCLOS. When exercising the right of innocent passage through the territorial sea, ships of all states, whether coastal or land-locked, have the following obligations: (i) passing takes place in conformity with the UNCLOS and with other rules of international law (Art.17, Art.19.1), (ii) passing shall be continuous and expeditious, including stopping and anchoring in some specific cases (Art.18), (iii) passing is not prejudicial to the peace, good order or security of the coastal states (Art.19.1), (iv) submarines and other underwater vehicles are required to navigate on the surface and to show their flag (Art.20), (v) passing shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea (Art.21.4), (vi) passing with carrying documents and observing special precautionary measures established for specific ships by international agreements for certain types of special ships (Art.23). There is no provision of the UNCLOS stating the obligation to report to the competent authorities of the coastal states when enjoying the right of innocent passage. As a result, the 2021 MTSL, when providing that submersibles, nuclear-powered vessels, vessels carrying radioactive substances or other poisonous and harmful substances and other vessels may endanger the maritime traffic safety of China shall report to the

maritime safety authority<sup>93</sup>, is contrary to the regulation on the right of the innocent passage under the UNCLOS.

### *C. Vietnam's Response to China's Unilateral Behaviors*

To deal with China's unilateral activities in the South China Sea to protect legitimate rights and interests recognized by international law, especially the UNCLOS, Vietnam shall continue to take some following actions, including:

Firstly, Vietnam shall resolutely protect and exercise sovereignty, sovereignty rights and jurisdiction over the maritime zones and islands that Vietnam has established by international law, especially the UNCLOS. So far, China has continuously violated the maritime zones under Vietnam's sovereignty. For instance, from the beginning of 2023 until now, China has deployed many so-called "survey and research vessels" to operate in Vietnam's exclusive economic zone (EEZ), such as the case of the Haiyang Dizhi 4 in early March 2023.<sup>94</sup> However, it is noteworthy that Chinese survey Xiang Yang Hong 10 and other coast guard ships and fishing vessels recently violated the nation's EEZ established by regulations of the UNCLOS. According to Reuters, the ship Xiang Yang Hong 10 and its escorts have appeared in Vietnam's EEZ since May 8.<sup>95</sup> In response to China's unlawful activities, the Vietnamese Ministry of Foreign Affairs and competent Vietnamese agencies have communicated many times with the Chinese side and implemented measures by international law and Vietnamese law in a bid to ensure the lawful and legitimate rights and interests of Vietnam. Furthermore, Vietnam requests that Chinese relevant agencies immediately stop trespassing activities, as well as withdraw all so-called "survey and research vessels" and

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<sup>93</sup> The Maritime Traffic Safety Law of the People's Republic of China, The MTS Law 2021, Article 54.

<sup>94</sup> Vietnam News, "Vietnam closely follows developments in East Sea, resolutely protects rights", *Vietnam News* (28 March 2023), online: <<https://vietnamnews.vn/politics-laws/1503125/vietnam-closely-follows-developments-in-east-sea-resolutely-protects-rights.html>>.

<sup>95</sup> Laurie Chen & Krishn Kaushik, "Chinese militia boats cross Indian, ASEAN warships exercising in the South China Sea", *Reuters* (9 May 2023), online: <<https://www.reuters.com/world/asia-pacific/chinese-militia-boats-cross-indian-asean-warships-exercising-south-china-sea-2023-05-08/>>.

other coast guard and fishing vessels out of Vietnam's territorial waters. These measures contribute to maintaining peace, cooperation and development in the South China Sea.

Secondly, Vietnam must collaborate closely with other ASEAN nations to persist in their opposition to China's unilateral actions that are inconsistent with international law and the Declaration on the Conduct of the Parties in the South China Sea. This is necessary to safeguard the legitimate rights and interests of ASEAN. In this case, four ASEAN member states, namely Vietnam, the Philippines, Malaysia, and Brunei, are involved in maritime sovereignty disputes within the South China Sea. The remaining nations collectively enjoy significant economic and strategic advantages, particularly in the areas of free trade, security, and defence. Hence, the actions of China pose a threat not only to the interests of member states, such as Vietnam but also to the collaborative and developmental environment within the ASEAN region. The collaboration between Vietnam and ASEAN nations in opposition to China's unlawful actions is expected to safeguard the mutually shared interests of ASEAN and its majority of member states.

Thirdly, Vietnam shall engage in close collaboration with ASEAN nations and China to expedite the negotiation and establishment of a Code of Conduct in the South China Sea (COC), which will serve as a replacement for the Declaration on the Conduct of Parties in the South China Sea (DOC). The COC is intended to serve as the legal framework for the ASEAN+ region, encompassing both ASEAN and China, to foster a stable, peaceful, and prosperous South China Sea region. The DOC, which came into existence in 2002, plays an important role in averting hostilities, upholding tranquillity and stability in the South China Sea, and fostering favourable outcomes for the region. Nevertheless, empirical evidence indicates that the DOC has certain limitations given the increasingly complicated developments in this area. Accordingly, the DOC is not legally binding, so the parties involved lack political will and have not agreed on the application of the provisions. Upon implementation of the COC, this issue will be resolved, and all members will be obligated to adhere to the regulations established by the COC. Furthermore, the COCS will establish

a system for monitoring and managing instances of non-compliance, which the DOC has been unable to accomplish.

Furthermore, what is needed is that Vietnam cooperate with other major powers such as the US, France, Germany, the UK, Japan, India, and the EU to continue to strongly oppose the 2021 CGL and the 2021 MTSL through global and regional forums such as the United Nations, EU, ASEAN, and G7, especially the forum in the framework of the International Maritime Organization and the International Civil Aviation Organization to discuss, evaluate, and issue resolutions on the illegality of the two aforementioned laws for international maritime and aviation activities to require China to comply with its obligations to member states from these organizations. These compliances contribute to protecting the right to freedom of navigation and overflight in the South China Sea by international law, including UNCLOS.

## VI. CONCLUSION

In terms of international law, some provisions in the 1958 Declaration, the 1996 Declaration, as well as the two latest laws, namely the 2021 CGL and the 2021 MTSL, infringed on international law of the sea. Accordingly, these regulations violate Vietnam's territorial sovereignty over the Paracels and Spratlys Islands as well as seriously threaten international maritime and aviation security and safety. With the promulgation of all the above declarations and laws, China is gradually perfecting its strategy in the South China Sea for monopoly, which infringes its obligations related to determining baselines under international law, especially UNCLOS. This strategy consists of five stages, including (i) making claims contrary to the international law on maritime zones and islands in the South China Sea, including the Paracels and Spratlys islands under Vietnam's sovereignty (China has already done it since 1958), (ii) using force to illegally occupy Paracels islands (in 1974<sup>96</sup>) and some geographical features of the Spratlys

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<sup>96</sup> Benar News, "China puts missile bases on disputed South China Sea islands", *Benar News* (25 January 2023), online: <<https://www.benarnews.org/english/news/philippine/missile-bases-01252023082010.html>>.

Islands (in 1988<sup>97</sup> and 1995<sup>98</sup>), (iii) building up, embellishing and constructing islands and artificial works on Paracels and Spratlys islands (since 2013<sup>99</sup>), (iv) militarizing Paracels Islands and seven geographical features in Spratlys Island (since 2015<sup>100</sup>), (v) promulgating laws and regulations to manage the maritime zones and islands identified and illegally occupied, typically the establishment of Sansha city under Hainan province in 2012, the enactment of the 2021 CGL and the 2021 MTSL.

Therefore, to deal with China's unilateral activities in the South China Sea and protect legitimate rights and interests recognized by international law, especially the UNCLOS, Vietnam shall resolutely protect and exercise sovereignty, sovereignty rights, and jurisdiction over the maritime zones and islands that Vietnam has established by international law, especially the UNCLOS. Furthermore, Vietnam must collaborate closely with other ASEAN nations to persist in their opposition to China's unilateral actions that are inconsistent with international law and the DOC. In addition, Vietnam shall engage in close collaboration with ASEAN nations and China to expedite the negotiation and establishment of the COC, which will serve as a replacement for the DOC and establish a system for monitoring and managing instances of non-compliance, which the DOC has been unable to accomplish. More importantly, Vietnam shall cooperate with other major powers to continue to strongly oppose the enactment of China's unlawful legal documents through global and regional forums, contributing to protecting the right to freedom of navigation and overflight in the South China Sea by international law, including UNCLOS.

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<sup>97</sup> China occupied illegally six islands since 1988, namely: Fiery Cross Reef, Hughes Reef, Subi Reef, Gaven Reef, Cuarteron Reef, and McKennan Reef. For details, see Center for Strategic & International Studies, "Fiery Cross Reef and Strategic Implications for Taiwan", *Center for Strategic & International Studies* (10 December 2014), online: <<https://www.csis.org/analysis/fiery-cross-reef-and-strategic-implications-taiwan>>.

<sup>98</sup> China occupied illegally Mischief Reef since 1999. For details, see *Facing China: Crises or Peaceful Coexistence in the South China Sea*, by Peter Kreuzer (Frankfurt: Peace Research Institute Frankfurt, 2015) at 15.

<sup>99</sup> ASIA Maritime Transparency Initiative, "China Island Tracker", *ASIA Maritime Transparency Initiative*, online: <<https://amti.csis.org/island-tracker/china/>>.

<sup>100</sup> Steven Stashwick, "Missiles and Signals in the Paracel Islands", *The Diplomat* (1 April 2016), online: <<https://thediplomat.com/2016/04/missiles-and-signals-in-the-paracel-islands/>>.

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## COMPETING INTEREST

The authors declared that they have no competing interests.

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