

## REGIONAL FOCUS & CONTROVERSIES

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# Vietnam's Position on the Sovereignty over the Paracels & the Spratlys: Its Maritime Claims

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*The South China Sea has long been regarded as a major source of tension and instability in Pacific Asia. To clarify the position of claimants is a research task for creating the confidence building measures and promoting efforts to manage the possible conflicts in the region. The purpose of this article is to address the Vietnamese position on the sovereignty disputes over the Paracels and Spratlys, and maritime zones in the South China Sea. The Vietnamese position will be examined from three aspects: (1) the sovereignty of the Paracels and the Spratlys; (2) the maritime zones around these islands; and (3) the settlement of disputes in the South China Sea.*

### Keywords

Dispute Management, Maritime Zones, Paracels, Sovereignty, South China Sea, Spratlys

## 1. Introduction

The sovereignty disputes over the Paracels (Hoang Sa in Vietnamese / Xisha in Chinese)

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and Spratlys (Truong Sa in Vietnamese / Nansha in Chinese) – two groups of islands lying at the centre of the South China Sea (Bien Dong or, East Sea in Vietnamese/West Sea in the Philippines) have existed for more than a hundred years and eighty years, respectively. Initially, sovereignty disputes over the Paracels arose between two claimants, Vietnam and China. Due to geopolitical changes since the end of World War II, the development of science and technology in both civil and military aspect, the oil crisis, and the new maritime order created by the law of the sea between the 1970s and 1980s, the disputes have spread to the Spratlys and maritime zones around both archipelagos. There were also claimants such as Great Britain and Japan who had come and left, abandoning their claims to the islands. Since 1956, new claimants have appeared, particularly those of the late 1970s such as the Philippines, Malaysia, and Brunei. After two naval operations in 1974 and 1988, China occupied all of the Paracels and some rocks in the Spratlys. The 1995 Mischief accident between China and the Philippines led the ASEAN and China to negotiate a Code of Conduct (“COC”) in the South China Sea (“SCS”), the first result of which was the Declaration on the Conduct of Parties in the South China Sea (“DOC”), signed in 2002.<sup>1</sup> After the signing of the DOC, the situation in the SCS cooled down for some years. However, beginning in 2009, when the U-shape (nine dotted) line map was introduced by the Permanent Delegation of the People Republic of China (“PRC”) to the United Nations Commission on the Limits of the Continental Shelves (“CLCS”), statements were made about China’s ‘core interests’<sup>2</sup> and ‘national interests’<sup>3</sup> of the U.S. in the South China Sea, resulting in renewed tensions in the SCS and causing deep concerns to the world community. The complicated history of the disputes and unsuccessful efforts to find acceptable solutions to them have made the SCS disputes some of the most complicated cases in world politics.<sup>4</sup> At present, Vietnam and China<sup>5</sup> claim the both the Paracels and the Spratlys in its entirety, whereas Brunei, Malaysia, and the Philippines claim part, or most of the Spratlys. Much ink has been spilt to clarify the positions of claimants and to suggest

<sup>1</sup> See “ASEAN - China Declaration on the Conduct of Parties in the South China Sea,” signed during the 8<sup>th</sup> ASEAN Summit in Phnom Penh on November 14, 2002, available at <http://www.aseansec.org/13163.htm> (last visited on Mar. 30, 2012).

<sup>2</sup> Carlyle Thayer, *China’s Core interest in the South China Sea*, SCRIBD (Sep. 17, 2010), available at <http://www.scribd.com/doc/38047349/Thayer-China-s-Core-Interest-in-the-South-China-Sea> (last visited on Mar. 30, 2012).

<sup>3</sup> See “Remarks by Hilary Rodham Clinton, Secretary of State” at the National Convention Center, ARF 17, Hanoi, Vietnam, (July 23, 2010), available at <http://www.state.gov/secretary/rm/2010/07/145095.htm> (last visited on Mar. 30, 2012).

<sup>4</sup> Hungdah Chiu & Choon-ho Park, *Legal Status of the Paracels and Spratlys Islands*, 3 OCEAN DEV. & INTL. L. 3 (1975).

<sup>5</sup> In this paper, China and Taiwan are treated as one claimant since of the same position with regard to the Paracels and Spratlys disputes.

solutions.<sup>6</sup> Several reasons have been put forward to explain the complexity of the SCS disputes: the geostrategic location of the SCS; the territorial disputes over the Paracels and Spratlys and maritime areas in the SCS; the competition for control over natural resources in the area; the lack of clarity of the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”) on the status of islands and rocks, and national sentiments. To understand the situation, new research on the positions of claimants in light of new developments of international law and practices is necessary. This article does not attempt to give a comprehensive study of the position of all claimants and concerned parties. Nor has it any ambition to analyze all developments of international law which may impact the competition for sovereignty and maritime rights in the SCS. Vietnam is one of the claimants which has been the most affected by the SCS conflict. Thus, this article only addresses the Vietnamese position on the sovereignty disputes over the

<sup>6</sup> GREG AUSTIN, CHINA’S OCEAN FRONTIER: INTERNATIONAL LAW, MILITARY FORCE AND NATIONAL DEVELOPMENT (1998); BOB CATLEY & MALMUR KELIAT, SPRATLYS: THE DISPUTE IN THE SOUTH CHINA SEA (1997); Robert Beckman, *China, UNCLOS and the South China Sea*, ASIAN SOC’Y INT’L L. 3RD BIENNIAL CONFERENCE PAPER 12 (2011), available at <http://cil.nus.edu.sg/wp/wp-content/uploads/2009/09/AsianSIL-Beckman-China-UNCLOS-and-the-South-China-Sea-26-July-2011.pdf> (last visited on Mar. 30, 2012); John Chao, *South China Sea: Boundary Problems Relating to the Nansha and Hsisha Islands*, 9 CHINESE Y.B. INT’L L. & AFF. 66-156 (1989-1990); Lee G. Cordner, *The Spratly Islands Dispute and the Law of the Sea*, 25 OCEAN DEV. & INTL. L. 61 (1994); MONIQUE CHEMILLIER-GENDREAU, SOVEREIGNTY OVER THE PARACEL AND SPRATLY ISLANDS (2000); Jorge Coquia, *Maritime Boundary Problems in the South China Sea*, 24 U. BRIT. COLUM. L. REV. 117-125 (1990); COOPERATIVE MONITORING IN THE SOUTH CHINA SEA: SATELLITE IMAGERY, CONFIDENCE-BUILDING MEASURES, AND THE SPRATLY ISLANDS DISPUTES (John Baker & David Wiencek eds. 2002); ERIC DENÉCÉ, GÉOSTRATÉGIE DE LA MER DE CHINE MÉRIDIONALE ET DES BASINS MARITIMES ADJACENTS (1999); Daniel Dzurek, *The Spratly Islands Dispute: Who’s On First?*, 2 MAR. BRIEFING (1996); Alex Elferink, *The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?*, 32 OCEAN DEV. & INTL. L. 169-190 (2001); FISHING IN TROUBLED WATERS. PROCEEDINGS OF AN ACADEMIC CONFERENCE ON TERRITORIAL CLAIMS IN THE SOUTH CHINA SEA (Ronald Hill et al. eds. 1991), 97 Centre of Asian Studies Occasional Papers & Monographs; Xavier Furtado, *International Law and the Dispute Over the Spratly Islands: Whither UNCLOS?* 21 CONTEMP. SOUTHEAST ASIA 386-404 (1999); Marius Gjetnes, *The Spratlys: Are They Rocks or Islands?*, 32 OCEAN DEV. & INTL. L. 191-204 (2001); B.A. Hamzah, *Jurisdictional Issues and Conflicting Claims in the Spratlys*, 1:1 FOREIGN REL. J. 1-26 (1990); Christopher Joyner, *The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy and Geo-politics in the South China Sea*, 13 INT’L J. MAR. & COASTAL L. 193-236 (1998); VAN LOI LUU, THE SINO-VIETNAMESE DIFFERENCE ON THE HOANG SA AND TRUONG SA ARCHIPELAGOS (1996); R. HALLER-TROST, THE SPRATLY ISLANDS: A STUDY ON THE LIMITATIONS OF INTERNATIONAL LAW (1990); DIETER HEINZIG, DISPUTED ISLANDS IN THE SOUTH CHINA SEA: PARACELS, SPRATLYS, PRATAS, MACCLESFIELD BANK (1976); KRIANGSAK KITTICHAISAREE, THE LAW OF THE SEA AND MARITIME BOUNDARY DELIMITATION IN SOUTH-EAST ASIA (1987); Chiu & Park, *supra* note 4; VICTOR PRESCOTT, LIMITS OF NATIONAL CLAIMS IN THE SOUTH CHINA SEA (1999); VICTOR PRESCOTT, THE GULF OF THAILAND: MARITIME LIMITS TO CONFLICT AND COOPERATION (1998); Eric Hyer, *Special Issue: The South China Sea Territorial Disputes*, 12 AM. ASIAN REV. 1-209 (1994); WAR OR PEACE IN THE SOUTH CHINA SEA? (Timo Kivimaki ed. 2002); HONG THAO NGUYEN, LE VIETNAM ET SES DIFFÉRENDS MARITIMES DANS LA MER DE BIEN DONG MER DE CHINE MERIDIONALE (2004); Hong Thao Nguyen & Ramses Amer, *Managing Vietnam Maritime Boundary Disputes*, 38 OCEAN DEV. & INTL. L. (2007); MARWYN SAMUELS, CONTEST FOR THE SOUTH CHINA SEA (1982); MARK VALENCIA & JON VAN DYKE & NOEL LUDWIG, SHARING THE RESOURCES OF THE SOUTH CHINA SEA (1997); Hong Thao Nguyen & Ramses Amer, *A New Legal Arrangement for The South China Sea*, 40 OCEAN DEV. & INT’L L. 333-349 (2009); Zou Keyuan, *South China Sea Studies in China: Achievements, Constraints and Prospects*, 11 SING. Y.B. INT’L L. 85 (2007).

Paracels and Spratlys and maritime zones in the SCS. The Vietnamese position will be examined from three aspects: (1) the sovereignty of the Paracels and the Spratlys; (2) the maritime zones around these islands; and (3) the settlement of disputes in the SCS.

## 2. Vietnamese Position on the Sovereignty of the Paracels and Spratlys

The Paracels are an archipelago consisting of over 30 islands, islets, and reefs stretching over some 16,000 square kilometres of the ocean surface between North latitude 16° and 17° and East longitude 111° and 113°. The Spratlys cover an ocean space ten times bigger than Paracels, between 160,000 and 180,000 square kilometres, with more than 100 islands, islets, and reefs between North latitude 12° and 4° and East longitude 109° and 118°. The two groups of islands also have a large number of banks and shoals. The distances from the Paracels to the nearest points on the Vietnamese mainland (Da Nang port) and China's Hainan Island are 170 and 160 nautical miles ("nm"), respectively. In the case of the Spratlys, the distances are 250 nm to Cam Ranh Bay (Vietnam) and 520 nm to Chinese Hainan Island.<sup>7</sup> For a long time, those tiny features were only known as extremely dangerous sites for navigators or shelters for fishermen in the region.<sup>8</sup> In the early seventeenth century, the Vietnamese dynasties (Nguyen Lords and Kings, and Tay Son Rulers and Kings) were the first ones to exercise State functions over these uninhabited and distant islands. The first wave of permanent occupation of those uninhabited and resource-poor islets without fresh water occurred in the 1920s-1930s when France, which had represented the Vietnamese Kingdom in foreign affairs since 1884, sent permanent troops to the Paracels and the Spratlys. The second stage in the occupation of the Paracels by France and the Republic of China ("ROC") occurred after World War II. In the mid-1950s, after the withdrawal of France from Vietnam, the Republic of Vietnam (South Vietnam: "ROV") took control of the western part of the Paracels while China took control of the eastern part. In the Spratlys, Itu Aba (Ba Binh in Vietnamese) was occupied by Taiwanese troops; some other features were under the control of the ROV. The third stage of occupation occurred in 1970s-1980s when China seized the western part of the Paracels from the ROV in 1974. North and South Vietnam

<sup>7</sup> Ministry of Foreign Affairs of the Socialist Republic of Vietnam, *The Hoang Sa (Paracel) and Truong Sa (Spratly) Archipelagoes and International Law 32(1988)* [Vietnam White Paper 1988], available at <http://www.presscenter.org.vn/en//images/42905-bngvietnam88.pdf> (last visited on Mar. 30, 2012).

<sup>8</sup> Chemillier-Gendreau, *supra* note 6, at 16; Samuels, *supra* note 6, at 40.

became a reunified Vietnam (Socialist Republic of Vietnam: “SRV”) after the general election in 1976. The Philippine troops entered into the Spratlys dispute in the 1970s, while Malaysia took control of a feature for the first time in 1983. The fourth stage of occupation was marked by the first Chinese foothold in the Spratlys in 1988 after a short clash with Vietnamese navy transport ships in the area. The position of Vietnam and other claimants can be understood by dividing the history of the disputes into suitable periods. The actions of main parties will thus be examined in light of intertemporal law.

### *A. Before the Twentieth Century*

During the settlement of sovereignty disputes between States, the “principle of effectiveness” was formulated, and continues to be recognized under international law, treaties, customs, and international adjudications. Having its origins in Roman Law, developed by the Berlin Act of 1885 and Judge Max Huber in the Island of Palmas Award of 1928, ‘effectiveness’ (or in French, *effectivité*) refers to a mode of acquisition of a title “founded on the peaceful and continuous display of State authority over the island.”<sup>9</sup> Several cases have highlighted the principle that effective occupation as well as “continuous and peaceful exercise” of State authority entitle a country to exercise sovereignty over unclaimed (*res nullius*) and abandoned (*res derelicta*) territories such as the Palmas Island (U.S. v. Netherlands April 4, 1928), the Clipperton Island (Mexico/France May 28, 1931), Eastern Greenland (Denmark v. Norway April 5, 1953), or Minquiers and Ecrehous (England v. France, January 17, 1953). Two recent cases in South East Asia, Pulau Ligitan and Pulau Sipadan (Malaysia v. Indonesia, December 17, 2002) and Pedra Branca, Pulau Batu Puteh, Middle Rocks, and South Ledge (Singapore/Indonesia May 23, 2008) also stressed the significance of this principle.<sup>10</sup>

Only a State can become a title-holder of *terra res nullius* through effective occupation and “continuous and peaceful exercise” of State authority over a reasonable period of time. Occupation by private individuals will not create a title for their country. Discovery with the intention to possess can give rise to an inchoate title but is

<sup>9</sup> See *Island of Palmas Case* (Neth. v. U.S.), 2 R.I.A.A. 845-846 (Perm. Ct. Arb. 1928); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, 2001 I.C.J. (Mar. 16), cf. Separate Opinion of Torres Bernárdez, ¶¶ 73 & 76, available at <http://www.icj-cij.org/docket/files/87/7047.pdf> (last visited on Mar. 30, 2012).

<sup>10</sup> *Island of Palmas Case*, *id.* at 829; D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 190 (5th ed. 1998); *Judicial decisions involving questions of international law (Fr. v. Mex.)* by Victor Emmanuel, 26 AM. J. INT’L L. 394 (1932); *Legal Status of Eastern Greenland (Nor. v. Den.)* 1933 P.C.I.J. (ser. A/B) No. 53; *Minquiers and Ecrehos Case (Fr. v. Gr. Brit.)*, 1953 I.C.J. (Nov. 17); *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.)*, 2002 I.C.J. (Dec. 17), available at [www.icj-cij.org/docket/files/102/7714.pdf](http://www.icj-cij.org/docket/files/102/7714.pdf) (last visit on Mar. 30, 2012); *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.)*, 2008 I.C.J. (May 23), available at <http://www.icj-cij.org/docket/files/130/14492.pdf> (last visit on Mar. 30, 2012).

insufficient to ensure the right to possess *terra res nullius* territory. The inchoate title must be consolidated by realizing the State intention to possess *terra res nullius*, by the actual, effective occupation and administration for a certain period of time.<sup>11</sup>

International law also recognizes that in the case of claims on sparsely populated and remote territories, a permanent presence is not always necessary.<sup>12</sup> Quoting geographic references, some Chinese authors have maintained that the Paracels and Spratlys have been discovered, named, and managed by China since the East Han Dynasty (25-220 A.D.). However, according to studies carried out by Western scholars, no reference is made to Chinese sovereignty over the islets.<sup>13</sup>

The following six observations may be made with regard to the Chinese sources used to prove Chinese sovereignty over the Paracels and the Spratlys.

First, the sources are geographical monographs, references, or nautical books written by private geographers or navigators, or travel accounts by Chinese ambassadors abroad to describe the countries outside China. Obviously they are not official historical records of Chinese dynasties. *Nan Zhou Yi Wu Zhi* [Strange Things of the South, Jin Dynasty (265-419 A.D.)] by Wan Zhen, *Fu Nan Zhuan* [Phu Nam Story] by Kang Tai, Three Kingdoms - Wu (220-280 A.D.), *Yi Wu Zhi* [Memoris of Marvellous Things] by Yang Fu (Eastern Han period, 25-220 A.D.), *Ling Wai Dai Da* [Information on What is Beyond the Passes (a book in lieu of individual replies to questions from friends)] by Zhou Chufei (Sung Dynasty, 1178), *Zhu Fan Zhi* (Notes on Foreigners [Records of Foreign Peoples]) by Zhao Ju Guo (Sung Dynasty, 1225), *Dao Ji Zhi Lue* (General View of the Islands) by Wang Da Yuan (Yuan Dynasty, 1349), *Dong Xi Yang Kao* (Study of the Eastern and Western Seas) by Zhang Xie (1618), *Wu Bei Zhi* [Treatise on Armament Technology] (On the Seven Voyages of Zheng He, 1405-1433, in the Southern Seas and Indian Ocean) by Mao Yuan Ji (1628), *Haiguo Wenjihuan Lu* (Things Seen and Heard in Countries Overseas) by Chen Lunjong (1730- Qing Dynasty), *Hai Lu* (Notes on Sea Voyages) by Yang Brignam (1820), *Haiguo Tuzhi* (Notes on Foreign Countries and Navigation) by Wei Yuan (1841-1852)), and finally *Yinghuan Zhilue* (Summary Geography of the Globe) by Xu Jishe (1848). They mention 'magnetic stones' or, 'exotic things' in the sea without any exact description or reference to distances to the coast. Reference to these works by modern Chinese authors offer no solid scientific ground for concluding either that the locations mentioned in these works

<sup>11</sup> P. MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 149 (7th ed. 1997).

<sup>12</sup> See *Island of Palmas Case*, *supra* note 9, at 840; *Legal Status of Eastern Greenland*, *supra* note 10, at 46. Both dicta were confirmed in the recent Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, *supra* note 10, ¶¶ 63-69.

<sup>13</sup> Chemillier-Gendreau, *supra* note 6, at 58-64; Samuels, *supra* note 6, at 23-24. It reads: "A large quantity of historical works and documents as well as many archaeological finds prove beyond all doubt that the Xisha and Nansha Islands have been Chinese territories since antiquity."

are really the Paracels and the Spratlys, or that those locations have belonged to China for more than two thousand years.

Second, those names as Jiurulozhou, Wanlizhitang, Wanlichengsha, Qianlishitang, Qizhouyang, and Qizhousan have been used in several different ways, which make it difficult for foreign researchers to follow.<sup>14</sup> Chinese authors did not specify the location and names of the islands. This no doubt led to endless variations in translation and disagreements among scholars over the uniformity of the names. Simple references to these vague names cannot justify sovereignty. The names Xisha or Nansha did not exist until the beginning of the twentieth century. In 1935, the name Nansha denoted the Macclesfield Bank and has been used to refer to the Spratlys only since 1947.<sup>15</sup>

Third, the descriptions of those sandbanks are linked to the 'barbarian' nations of the south-west, which strongly suggest that those foreign territories did not belong to China. The *Zhongguo Dilixue Jiaokeshu* (Manual of Geography of China) compiled in 1905 and published in 1906, noted in the chapter Generalities (page 24) that the Chinese territory is bound "[i]n the South at North latitude 18° 13', the terminus being the coast of Yazhou, island of Hainan." In some Chinese history books, the Paracels were recognized as belonging to Vietnam. Hai Lu wrote: "Van Ly Truong Sa is a sandbank rising above the sea. Several thousand leagues in length, it forms a rampart on the periphery of the Kingdom of Annam (Vietnam)."<sup>16</sup>

Fourth, there is no convincing evidence about China's state management over these marine features.<sup>17</sup> For a period of two thousand years until 1909, only four events have been cited by Chinese authors to claim Chinese management.<sup>18</sup> However, a closer look at these claims paints a different picture. The events took place around the Hainan Island. There is neither proof, nor a name directly relating to the Paracels. The period of

<sup>14</sup> Chemillier-Gendreau, *supra* note 6, at 60.

<sup>15</sup> Quang Ngoc Nguyen, *Tu lieu lich su ve hai quan dao Hoang Sa, Truong Sa cua Vietnam* (Historical documents on the Paracels and Spratlys Islands of Vietnam), BDHD01 32-50 (2001).

<sup>16</sup> See Volume 13, folio 4, at 2 of *Hai Quoc Do Chi*, written in the 22<sup>nd</sup> year of the reign of Dasquang of the Qing (1730), Archives of the French Foreign Ministry (AS 1840 China 797).

<sup>17</sup> Samuels, *supra* note 6, at 25. It reads: "By the mid-19<sup>th</sup> Century, the literari cognitive map of the South China Sea had become more elaborate, but still barely touched upon the islands of the sea... There is no evidence here that the *Ching* State had in any sense absorbed the islands into the imperial domain."

<sup>18</sup> There are Wu Jing Zong Yao (with the preface by King Song Renzong 1023-1063) describing the Song dispatched its navy to patrol the Jiurulozhou; *Yuan Shi* (1349) noting of astronomical observations "beyond the Zhouya" (i.e. South of the Hainan island); Seven voyages in the Southern Seas carried out by Zheng He under the Ming dynasty (1405-1433); Quan Zhou Fu Zhi writing of patrol by General Wu Sheng (1710) passed by Tonggu, Qizhouyang, Sigensha. Crossing the Bien Dong in the course of nearly 30 years, sometimes passing by the Paracels, Zheng He did not occupy any island. See Jianming Shen, *International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands*, 21 HASTINGS INT'L & COMP. L. REV. (1997-1998). For the Vietnamese position, see Vietnam White Paper 1988, *supra* note 7; Chemillier-Gendreau, *supra* note 6; Luu, *supra* note 6, at 24.

one to two hundred years between these events do not support the existence of a continuous, non-interrupted period of Chinese management. While Chinese official records and books recognized that this country's maritime frontier stops at the Hainan Island, the existence of Chinese maritime patrols outside that limit could only be considered as speculation.<sup>19</sup> In addition, private activities of navigators or fishermen, if any, cannot serve to establish the Chinese sovereignty over the territories.

Fifth, in some cases since the nineteenth century, the conduct of the Chinese authorities showed that they did not have any claim over the Paracels. In French archives, the German ship 'Bellona' and the Japanese ship 'Imegi Maru' shipwrecked in the Paracels in 1895-1896,<sup>20</sup> which adversely affects the Chinese position. The copper transported by the two ships and insured by British companies, were stolen by Chinese fishermen. Officials in Hainan were requested by the British Minister in Beijing and Consulates in Hoihow to take precautionary measures to prevent looting and to transfer back the stolen copper. The Chinese authorities denied liability. The Viceroy of Canton countered the protests of the Minister of Great Britain in Peking by stating that: "The Paracels are abandoned islands, which belong no more to China than to Viet Nam, they are not administratively attached to any district of Hainan and no special authority is responsible for policing them."<sup>21</sup>

In analyzing these texts, one can no longer doubt that the Chinese authorities had no intention to assert sovereignty over the islands. These events confirmed China's indifference to the Paracels, even at the end of the nineteenth century. The Vietnamese books, *Phu Bien Tap Luc* (撫邊雜錄, - Miscellany on the Government of the Marches, 1776) and *Dai Nam Thuc Luc Chinh Bien* (Accounts about Dai Nam's Present Dynasty) discussed another case in which Chinese authorities gave assistance to Vietnamese sailors operating in the Paracels. In *Phu Bien Tap Luc*, Le Quy Don wrote as follows:

<sup>19</sup> In his GEOGRAPHY OF GUANGDONG published in 1909, Li Hanzhung writes more precisely: "Today, the maritime frontiers are limited in the South by the island of Hainan, beyond this limit is the Qizhouyang. The Admiral commanding the navy of Guangdong stopped his patrol there and returned [to his base]." See Luu, *supra* note 6.

<sup>20</sup> This incident is reported in a Note of May 6, 1921 from the Government General of Indochina (Directorate of Political and Indigenous Affairs). The text is more specific, reading as follows: "The mandarins protested, claiming that the Paracels were abandoned islands which belonged to China no more than to Annam, that they were not administratively attached to any district of Hainan and that no special authority was responsible for policing them." See No. 49 of August 8, 1899 from the Tsungli Yamen to Mr. Bax Ironside at Peking conveying the text of a communication received from the Governor-General of Liangkuang Provinces (i.e. Viceroy at Canton). It reads: "But on a wide expanse of ocean no particular coastguards can be said to be responsible, and how can the local authorities protect every spot in hundreds of miles of sea?" See P. A. LAPICQUE, A PROPOS DES ILES PARACELS 605-616 (1929); Chemillier-Gendreau, *supra* note 6, at 36-37.

<sup>21</sup> Letter No. 704 — A — Ex, dated 20 March 1930, from the Governor General of Indochina, Hanoi to the Minister for the Colonies, Paris. See Annex 5, Chemillier-Gendreau, *supra* note 6 at 166-167.

The shoals of Hoang Sa are in the proximity of Lianzhou, island of Hainan. Fishermen of our country sometimes met the fishing junks of the men of the North on the sea. On the high seas, people of the two countries asked one another about their activities. I myself saw a note which the Mandarin-Chief of the district of Wonchang of Qiongzhou addressed to the prefecture of Thuan Haa in which he said: "In the 18th year of the reign of Qianlong, ten military men native of the commune of An Vinh, company Cat Liem, district of Chu'o'Nghia of Annam, one day in the 7th month, arrived in Wanlichangsha for fishing and gathering merchandise. Eight of them set foot on land, leaving the two others to guard the junk. The mooring rope was broken by the wind, the junk was pushed by the waves as far as the port of Quang Lan, where the local authorities could verify the facts and sent these men to their native country. Seigneur Nguyen Phuc Chu ordered the Cai Ba of Thuan Hoa, Thuc Luong Hau, to make a note in answer."<sup>22</sup>

In addition, China put forward the argument that Vietnam had been its vassal before the French colonial period and consequently, that all actions by the feudal state of Vietnam over the Paracels were made on behalf of China.<sup>23</sup> In fact, the vassalage of Vietnam to China was only ever nominal; Vietnam was always an independent sovereign State.<sup>24</sup> When Vietnam signed the Treaty of Protectorate, known as the Patenôte Treaty with France on June 6, 1884,<sup>25</sup> China did not make any reservation on any vassal status of Vietnam to China. It shows that matters regarding Vietnam's sovereignty did not depend on China. Arguments related to a vassal regime do not help China's position because, while recognizing the Nguyen Lords and Kings's possession of the Paracels "on behalf of China," China — the 'Protectorate State' - recognized that it has neither any activity, nor had any element, *corpus* and *animus*, over the Paracels under international law.<sup>26</sup>

Finally, no evidence of international recognition of Chinese sovereignty over the Paracels or the Spratlys during the period from the Han Dynasty has been provided.

<sup>22</sup> LE QUY DON, PHU BIEN TAP LUC (Miscellany on the Government of the Marches), Book II (1994), mimeographed. (The name Nguyen Phuc Chu must be rather Nguyen Phuc Khoat because the first had died by that date). See Luu, *supra* note 6, at 44-45.

<sup>23</sup> Gerardo Valero, *Spraty Archipelago Dispute: Is the Question of Sovereignty Still Relevant?*, 18 MARINE POL'Y 401 (1994).

<sup>24</sup> The Official Yearbook of the Chinese Government included even Annam, Burma, Siam, Laos, Great Britain, the Netherlands, Italy, Portugal and the Holy Sea as its vassal States in the 19<sup>th</sup> century. See Jean-Pierre Ferrier, *Le conflit des îles Paracels et le probleme de la souverainete sur les îles inhabitees*, 21 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 180-181 (1975); Chemillier-Gendreau, *supra* note 6, at 76-77.

<sup>25</sup> See Treaty of Protectorate (Patenote Treaty) on June 6, 1884. Article 1, paragraph 2 of the Patenote Treaty reads: "France shall represent Annam in all its external relations." For details, see RAOUL ABOR, *CONVENTIONS ET TRAITES DE DROIT INTERNATIONAL INTERESSANT L' INDOCHINE* (1929); Luu, *supra* note 6, at 47.

<sup>26</sup> See *Minquiers and Ecrehos Case*, *supra* note 10 at 56.

The existence of dangerous islets had been recorded by Western explorers, at least since the fourteenth and fifteenth centuries under various names such as Pulo Pracela, Pracels, Isle Pracel, or Paracels.<sup>27</sup> The name Spratley was used for the first time in 1843.<sup>28</sup> Those archipelagos might be *terra res nullius* until the seventeenth century.

State actions to possess the Paracels and Spratlys were first recorded in official historical accounts under the Vietnamese Nguyen Dynasty at the beginning of the seventeenth century, and later in the Western and Chinese record books.

The following observations regarding the Paracels and Spratlys can be drawn from Vietnamese, Chinese, and Western documents about the Vietnamese activities concerning those features.

First, the descriptions of the islands and the Vietnamese State actions over them have been recorded in official historical accounts. Among them, the most important were made by the National Institute of History under the Nguyen Dynasty (Quoc Su Quan), including: *Dai Nam Thuc Luc Tien Bien* (Accounts of Dai Nam's Former Dynasties, 1600-1775) and *Dai Nam Thuc Luc Chinh Bien* (Accounts of Dai Nam's Present Dynasty, 1865-1882), *Dai Nam Nhat Thong Chi* (Geography of Reunified Dai Nam, 1865-1882), *Kham Dinh Dai Nam Hoi Dien Su Le* (The Dai Nam Administrative Repertory 1843-1851), Phan Huy Chu, *Lich Trieu Hien Chuong Loai Chi* (Regulations of Successive Dynasties by Subject-Matter, 1821), *Hoang Viet Dia Du Chi* (Geographical Treatise of Imperial Vietnam, 1833), *Viet Su Cuong Giam Khao Luoc* (Brief History of Vietnam 1876), etc. The activities, organization, and time of operations of the *Hoang Sa* and *Bac Hai* detachments in the Paracels and the Spratlys are described in a detailed and lively manner. In earlier documents such as *Phu Bien Tap Luc* (Miscellany on the Government of the Marches) by Le Qui Don, or *Toan Tap Thien Nam Tu Chi Lo Do Thu* (Route Map from the Capital to the Four Directions, 1686), a Vietnamese atlas compiled and drawn by Do Ba, *alias* Cong Dao, gives a valuable account of the existence of the *Hoang Sa* and *Bac Hai* detachments, at least during the seventeenth century. *Toan Tap Thien Nam Tu Chi Lo Do Thu* has a note attached to the map of Quang Ngai district, Quang Nam province, describing Hoang Sa as "an elongated sandbank lying in mid-sea known as the Golden Sandbank." The work also notes that:

<sup>27</sup> PIERRE-YVES MANGUIN, LES PORTUGAIS SUR LES COTES DU VIETNAM ET DU CAMPA. ÉTUDE SUR LES ROUTES MARITIMES ET LES RELATIONS COMMERCIALES, D'APRES LES SOURCES PORTUGAISES (16e, 17e, 18e siècle) (1972). See also Pierre-Yves Manguin, *La traversée de la mer de Chine méridionale, des détroits à Canton, jusqu'au XVIIe siècle (La question des îles Paracels)*, ASIE DE SUD-EST CONTINENTALE-ACTES DU XXIÈME CONGRES INTERNATIONAL DES ORIENTALISTES 110-115 (1976); GUNTER SCHILDER, AUSTRALIA UNVEILED: THE SHARE OF THE DUTCH NAVIGATORS IN THE DISCOVERY OF AUSTRALIA 278 Map N 18 (1976).

<sup>28</sup> Geoffrey Marston, *Abandonment of Territorial Claims: The Cases of Bouvet and Spratly Islands*, 57 BRIT. Y.B. INT'L L. 350 (1986).

In the middle of the sea emerges an elongated sandbank called Bai Cat Vang, about 400 dam<sup>29</sup> in length and 20 dam in width, facing the coastline between the harbor of Dai Chiem and that of Sa Vinh. During the South-West monsoon, foreign commercial ships sailing along the coast side of the sandbank would often be blown off course and run aground there. The same thing would happen to those sailing on the other side of the sandbank during the North-East monsoon. Men on board the wrecked ships often starved and wrecked cargoes amassed there... Every year, in the last month of winter, the Nguyens would send eighteen boats to Bai Cat Vang (Hoang Sa) to retrieve ship-wrecked cargoes, which included jewels, coins, arms and ammunition.<sup>30</sup>

*Dai Nam Thuc Luc Tien Bien 1844* (Accounts of Dai Nam's Former Dynasties 1600-1775) wrote:

Far out in the middle of the sea beyond the coast of An Vinh village, Binh Son subdistrict, Quang Ngai district there are over 130 sandbanks separated by sea distances of a full day's voyage or just a few watches' and scattered on a length of several thousand dam, hence the popular designation of Van Ly Hoang Sa. Fresh water springs are found on many sandbanks. Sea products there include sea-cucumbers, conches, tortoises, turtles, etc.

During the early days of the dynasty, the Hoang Sa detachment was created and it was made up of 70 men recruited from among An Vinh villagers. It set out every year in the third month and used to reach the islands after a three days and nights voyage. There the men collected articles from wrecked ships. Its home trip would normally begin in the eighth month of the year. In addition, there was a Bac Hai team whose members were recruited from Tu Chinh commune in Binh Thuan province or from Canh Duong village. The team was sent to Bac Hai areas and the island of Con Lon to gather articles from wrecked ships. The Bac Hai team was placed under the Hoang Sa detachment commander.<sup>31</sup>

Besides official historical records, the Vietnamese sources relating to the Paracels and the Spratlys include royal orders in the king's handwriting, comments, signature in red ink and seals, geographic records and maps, family annals, collection of folk-songs, and custom. They are preserved to the present day in Ly Son Island, the main naval base of

<sup>29</sup> Ly & dam are traditional distance measure units. One dam (or ly) is about 500 meters.

<sup>30</sup> See Ministry of Foreign Affairs of the Socialist Republic of Vietnam, *The Hoang Sa And Truong Sa Archipelagoes Vietnamese Territories 9-11* (1981) [Vietnam White Paper 1981]. For the map, Vietnam White Paper 1981, at 19 (*Toan Tap Thien Nam Tu Chi Lo Do Thu / Route Map from the Capital to the Four Directions, 1686*), available at [http://www.google.co.kr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fngghien.cuubiendong.vn%2Ftrung-tam-du-lieu-bien-dong%2Fdoc\\_download%2F157-the-hoang-sa-and-truong-sa-archipelagoes-vietnamese-territories&ei=MMuCT7zKNM7mmAXQneT1Bw&usg=AFQjCNHC\\_qm-PrwFCXAE1YBwtsXiZw1Tzg&sig2=x5QhiW8R-fdeMyiXQkOAJg](http://www.google.co.kr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fngghien.cuubiendong.vn%2Ftrung-tam-du-lieu-bien-dong%2Fdoc_download%2F157-the-hoang-sa-and-truong-sa-archipelagoes-vietnamese-territories&ei=MMuCT7zKNM7mmAXQneT1Bw&usg=AFQjCNHC_qm-PrwFCXAE1YBwtsXiZw1Tzg&sig2=x5QhiW8R-fdeMyiXQkOAJg) (last visited on Mar. 30, 2012).

<sup>31</sup> *Id.* at 11.

the Hoang Sa detachment. In the Sino-Vietnamese Language Institute in Hanoi, one can find dozens of solo-notes of the Ministry for Public Works, Ministry for Internal Affairs, and other agencies of the King about enforcement activities of Vietnam's sovereignty over the islands. In the solo-note of the Ministry of Public Works on February 12, 1836 (the 17<sup>th</sup> year of Ming Mang's reign) the King in his own handwriting approved a report and gave orders to the garrison commander Phạm Hữu Nhật "to lead the fleet and to prepare 10 wooden posts to mark the visited places (each post is 5 *thuoc* long, 5 *tac* wide, and 1 *tac*<sup>32</sup> thick). Each post bears the following inscription engraved on one of its faces: the garrison commander Phạm Hữu Nhật of the navy has come here to Hoang Sa for reconnaissance and topographical survey and leaves this post to mark the fact."<sup>33</sup> This event was recorded in *Dai Nam Thuc Luc Chinh Bien*, Book No. 165. A solo-note from Quang Ngai province on July 19, 1838 (the 19<sup>th</sup> year of Ming Mang's reign) asked for tax exemptions for two ships carrying civilians and soldiers to the Paracels with the mission of surveying and measuring from March to June.<sup>34</sup>

The solo-note of the Ministry for Internal Affairs dated December 28, 1847 stated: "Every year in Spring, as a rule, a crew of soldiers is dispatched to visit Hoang Sa (Paracels), which belong to our home sea for improving knowledge on the routes. In the fifth year of Thieu Tri (1845), a royal order postponed the annual visit due to busy schedule."<sup>35</sup>

In the genealogies of the Pham and Dang families of Ly Son Island, some royal orders of King Ming Mang, which have been well preserved, show that young and strong swimmers were ordered to join the Hoang Sa detachment. After studying those documents, Monique Chemillier Gendreau drew the following conclusion: "They make it abundantly clear that the Vietnamese emperors pursued the task of organizing (as mentioned in an account of 1776) a maritime company whose purpose was the economic exploitation and maritime exploration of the archipelagos. These measures formed part of national policy with a concern for maritime interests."<sup>36</sup>

Second, the names Bai Cat Vang (Golden Sandbank), Hoang Sa (黃沙; English: Golden Sand), Vạn Ly Hoàng Sa (萬里黃沙; Ten-Thousand-Ly Golden Sand), Dai Truong Sa (大長沙; Great Long Sand), or Van Ly Truong Sa (萬里長沙; Ten-Thousand-Ly Long Sand) indicate an area with various Paracel and Spratly features.<sup>37</sup> In the early

<sup>32</sup> Tac, *thuoc* are measure units in the old feudal regime of Vietnam.

<sup>33</sup> The Royal Handwriting Collection under the Ming Mang Regime, vol. 64, at 143, conserved at the Sino-Vietnamese Institute, Hanoi-Vietnam.

<sup>34</sup> *Id.* at 146.

<sup>35</sup> The Seventh year of Thieu Tri's reign, in Book 51 of Thieu Tri's royal notes, at 235.

<sup>36</sup> Chemillier-Gendreau, *supra* note 6, at 76.

<sup>37</sup> National Committee for Border Affairs & Ministry of Foreign Affairs & Socialist Republic of Viet Nam, *The*

days, navigators and fishermen only knew that there was a large area of submerged cays dangerous for watercrafts in the middle of the SCS, without separating them into two distinct archipelagos. *Dai Nam Nhat Thong Chi* (Geography of Reunified Dai Nam 1865 to 1882), book VI, on the province of Quang Nghia, wrote:

To the East of the island Re (Ly Son), Binh Son district, is Hoang Sa, which can be reached from the Sa Ky coast in 3 to 4 days and nights with a favourable wind. The archipelago comprises in all more than 130 peaks separated from one another by one day or by a few geng. In the middle of the archipelago is the Hoang Sa (Yellow Sand Shoals, which spreads over one doesn't know how many thousand dam, commonly called Van Ly Truong Sa (Ten-Thousand-Ly Long Sand); fresh water, sea birds in innumerable flocks, holothurians, snails and goods from wrecked ships are found there.<sup>38</sup>

The popular Vietnamese names Hoang Sa (Cat Vang — Yellow Sand), Vạn Ly Truong Sa (Ten-Thousand-Ly Long Sand) are also used in the foreign articles. In an article, Memoir on the Geography of Cochichina, published in the Journal of the Asiatic Society of Bengal, September 1837, French Bishop J.L.Taberd described “Pracel or Paracels” as a part of Cochinchina’s territory.<sup>39</sup> He indicated that Cochinchinese people referred to Paracels as ‘Cat Vang.’<sup>40</sup> In *An Nam Dai Quoc Hoa Do* (Tabula Geographica Imperii Animistici, 安南大國畫圖: The Map of the An Nam Empire), published in 1838, Bishop Taberd depicted part of the Paracels and noted *Paracel seu Cat Vang* (Paracel or Cat Vang).<sup>41</sup> In his book, *The Universe, History and Description of All Peoples, Their Religions, Customs and Habits: Japan, Indochina, Ceylon, etc.*, Dubois de Jancigny spoke of the name Katvang (Paracels). Gutzlaff, an Englishman, in the article, Geography of Cochinchina inserted in the review Geographical Society of London of 1849, also calls it Katvang. *Li Da Yu Di Tu Mu* (List of Geographic Maps), by a Chinese author Yi Du Yang, which lists Chinese maps from the time of establishment of China to the Minh Dynasty, has a map on the district of Tu Di, near Guangdong, with the note, *Hoang Sa Chu* (Bai Hoang Sa; Yellow Sand).<sup>42</sup>

*Indisputable Sovereignty of Viet Nam over the Paracel Islands*, published online on Jan. 30, 2011, available at <http://www.biengioilanhtho.gov.vn/Media/bbg/News/Archives/vie/chu%20quyen%20tren%202%20quan%20dao%20Hoang%20Sa%20-%20Truong%20sa.pdf> (last visited on Mar. 30, 2012).

<sup>38</sup> Luu, *supra* note 6, at 35.

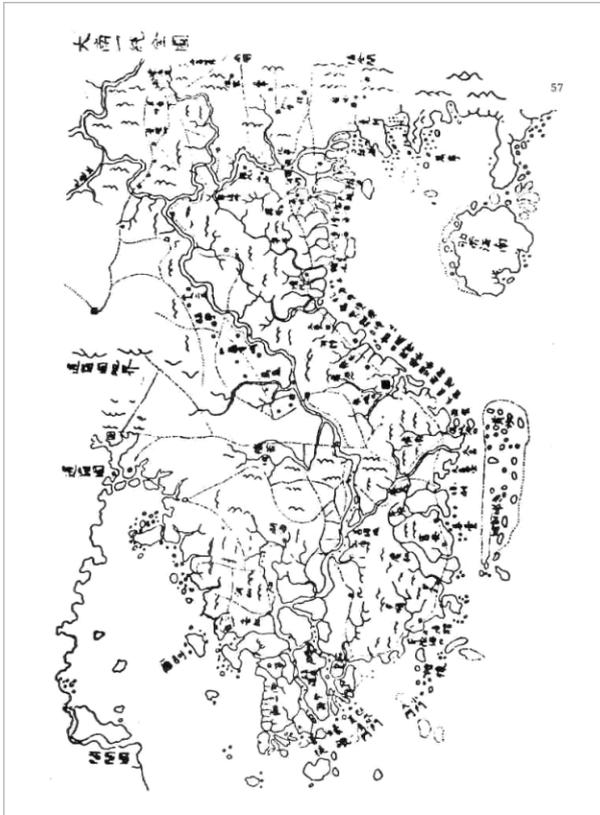
<sup>39</sup> Jean-Louis Taberd, *Note on the Geography of Cochinchina*, 6 J. ASIATIC SOC'Y BENGAL 737-745 (1837).

<sup>40</sup> *Id.*

<sup>41</sup> “Tabula Geographica Imperii Anamitici” is attached in the 1938 Latin-Annamese Dictionary (*Dictionarium Latino – Anamiticum*). See Luu, *supra* note 6, at 98.

<sup>42</sup> Nguyen, *supra* note 15, at 38.

Map 1: Dai Nam Nhat Thong Toan Do  
(The Complete Map of the Unified Dai Nam of 1838)



Source: *Dai Nam Nhat Thong Toan Do* (The Complete Map of the Unified Dai Nam, Ministry of Foreign Affairs of the Socialist Republic of Vietnam, *The Hoang Sa And Truong Sa Archipelagoes Vietnamese Territories* (1981) [Vietnam White Paper 1981], at 19. See also <http://biengioilanhtho.gov.vn/eng/Album.aspx> (last visited on Apr. 1, 2012).

Subsequently, during the Nguyen Dynasty, references to the two distinct archipelagos became clearer. The name, Hoang Sa was kept for the Paracels, and Truong Sa for the Spratlys. In *Dai Nam Nhat Thong Toan Do* (The Complete Map of the Unified Dai Nam), published in 1838, each archipelago has its own name: Van Ly Truong Sa and Hoang Sa. However, they are still presented on the map as a unit encircled by dotted lines. From an administrative point of view, ancient documents frequently mentioned another team called Bắc Hải, which was part of Hoang Sa detachment in charge of the southern part

of the SCS and Poulo Condore region.<sup>43</sup> Activities of the Bac Hai detachment appeared to concern the Spratlys area.<sup>44</sup> At the time, the number of islands and rocks of both archipelagos was estimated at approximately 130.

The inaccuracy of Vietnam's technical charts at that time can be seen in Portuguese and Dutch maps. The islands were represented by a series of points off the coast of Vietnam. It is difficult to distinguish the Spratlys from the Paracels. These points usually denote dangerous grounds to be avoided by marine vessels. They may be found in a number of western nautical maps depicting the Paracel and the Spratly Islands as a single archipelago located to the east of Viet Nam's mainland, *e.g.*:

- The map by Bartholomen Velho (1560) and an anonymous map in *Livro da Marinharia* in the book *Peragrinacao* (The way to travel), by FM Pinto, describe the maritime route from Malacca to Macao which goes through the Paracel Islands, known as Pulo Pracela and a submerged reef chain considered to be very dangerous for navigation.<sup>45</sup>
- The *Sinensis Oceanus* painting by the famous Dutchman Henricus Van Langren in 1595, portrays Hoang Sa and Truong Sa as a group of islands in the form of a flag offshore central Vietnam, separate from the coastal islands, with the caption, Isle Pracel and Costa de Pracel for the coast opposite to them.<sup>46</sup>
- In the *Indiae Orientalis Nova De Scriptio* map painted by the East India Company in 1633, the Paracels and Spratlys are portrayed as a group of islands off the coast with the largest island under the name of Pracels.
- The seventeenth and eighteenth century's Dutch nautical charts of with codes Ge D 8693, Ge B 220 in the National Library of France.
- A New Chart of the China Sea with Its Several Entrances, printed for Robert Sayer, London in 1791, demonstrates the difference between that nautical chart and the others in that it shows the Paracels archipelago according to the Draft of Cochinchina Pilot in 1764.<sup>47</sup>

<sup>43</sup> See Le Qui Don, *supra* note 22; Luu, *supra* note 6, at 39; Chemillier-Gendreau, *supra* note 6, at 72.

<sup>44</sup> Bac Hai (North Sea) is the name of the Spratlys, called by the Vietnamese and Chinese fishermen at that time to indicate the sea in the north of province Hatien and near to Puolo Condor. For references, see *Guangdongshengbowuguan* (Guangdong Museum), *Xishawenwu* (Study on things of Xisha Islands in the South China Sea) (Beijing, 1975), at 11, quoting *Shuilubo* (Book of Maritime Routes of Fishermen from Hainan Island) that described 29 shipping routes for *Donghai* (Paracel) and 11 routes to *Beihai* (Nansha).

<sup>45</sup> Manguin, *supra* note 27.

<sup>46</sup> Schilder, *supra* note 27.

<sup>47</sup> Hong Thao Nguyen, *Sang xu bo tot tim ban do Hoang Sa* (Going to Spain to find the map on the Paracels), VIETNAMNET (Apr. 3, 2009).

• *Annam Dai Quoc Hoa Do* (Tabula Geographica Imperri Animistici) painted by J.L. Taberd and published in 1838 by J. Silvestre.

Only later progress in science and navigation allowed a distinction between the two groups of islands. It was the Kergariou-Lochmaria survey mission that first helped distinguish the Paracels from the Spratlys in the south.<sup>48</sup>

Third, those sources provided proof of Vietnam's intention and activities in reaffirming that Bai Cat Vang belonged to Vietnam. *Dai Nam Thuc Luc Chinh Bien* writes: "The land of Hoang Sa belongs to our territorial sea and is of great strategic importance..." *Kham Dinh Dai Nam Hoi Dien Su Le* confirms: "Hoang Sa is an integral part of our territory and is of a great strategic importance."<sup>49</sup> *Dai Nam Nhat Thong Chi*, Book No. 6, writes, on the province of Quang Nghia: "In the East, the sand shoal of Hoang Sa spreads and joins the blue sea to make a rampart on the sea." In addition, other historical records and geographical studies have texts and maps which confirm that the Paracels were a part of Quang Ngai, such as *Su Hoc Bi Khao* (Historical Study) by Dang Xuan Bang, *Dia Du Toat Yeu* (Geography Compendium), *Quang Thuan Dao Su Tap* (Quang Thuan Master File), *Trung Ky Dia Du Luoc* (Central Geographical Terms), *Quang Ngai Tinh Chi* (Quang Ngai Province Study).

Fourth, the Vietnamese State activities in Paracels and Spratlys were comprehensive, continuous, peaceful, and uncontested. Five types of activities were implemented as follows:

1. The systematic exploitation of the islands;
2. The organization of the geographical surveys to better know the islands and routes, and to control and survey the sea;
3. The building of shrines and temples, and the planting of trees as a symbol of sovereignty over the islands;
4. The organization of local tax revenue collection and commercial exchanges with other countries; and
5. Providing assistance to foreign vessels in distress.

The texts in the above-records stated that under the Nguyen Rulers the State naval detachments Hoang Sa and Bac Hai were established. Every year, from March to August, they were sent to Paracels and Spratlys to collect remains from shipwrecks

<sup>48</sup> French National Archive, Mar. Box of files B. 4/276, at 161, 203. See also Chemillier-Gendreau, *supra* note 6, at 57. See also HONG THAO NGUYEN, LE VIETNAM ET SES DIFFERENDS MARITIMES DANS LA MER DE BIEN DONG (MER DE CHINE MERIDIONALE) 212 (2004).

<sup>49</sup> LONG TE VO, LES ARCHIPELS DE HOANG SA ET DE TRUONG SA SELON LES ANCIENS OUVRAGES VIETNAMIENS D'HISTOIRE ET DE GÉOGRAPHIE (1974); Chemillier-Gendreau, *supra* note 6, at 71.

(silver, tin, porcelain bowls, and copper guns).

With the establishment of a military unit dedicated to exploring the islands, the Vietnamese monarchs (Nguyen Lords and Kings, and Tay Son Rulers and Kings) made clear their determination to put Paracels and Spratlys under their sovereignty. This activity was conducted annually under state order. Even under the Tay Son Dynasty, the mission was maintained continuously during the time of internal conflict.<sup>50</sup> The soldiers of the Hoang Sa and Bac Hai detachments were exempted from personal tax collection and rewarded with money. Conversely, those who did not complete the task were punished according to the gravity of their failure.<sup>51</sup>

In the early years of his rule, King Gia Long paid attention to the mapping of the territory. *Dai Nam Thuc Luc Chinh Bien* and other historical records provide his programme. In 1815, King Gia Long ordered Pham Quang Anh of the Hoang Sa detachment to “go to the Hoàng Sa to study and to chart the maritime routes.” In the year Binh Ty, the 15<sup>th</sup> year of the reign of Gia Long (1816), the King ordered the navy and the Hoang Sa detachment to go in junks to the Hoang Sa to study and measure maritime routes. This programme was continued by King Ming Mang. More detailed instructions were given in the matter of cartography. *Dai Nam Thuc Luc Chinh Bien* recorded an instruction in 1836 as follows:

Everything shall be noted and described in detail for submission to the supreme attention of His Majesty. As soon as the junks reach any island or sandbank, regardless of what kind, they shall from that point measure the length, breadth, height, surface area, and circumference of that island or sandbank, the depth of the surrounding waters, identify any submerged sandbanks or reefs, record whether access is dangerous or poses no problem, undertake a careful examination of the terrain, take measurements and make a sketch.<sup>52</sup>

Temples and sovereignty markers were built and trees were planted as sovereign manifestations. They constitute the state management of the territory consistent with the requirements of international law (the *animus* and *corpus* elements and the continuous

<sup>50</sup> See the Royal Order signed by Tay Son Lord in 1786 urged: “Hoi Duc Hau commander of the Hoang Sa compaigny to bring four boats to Hoang Sa to collect all kinds of objects in gold, silver, copper, the small and big guns with tortoises, precious fishes for the Court upon under the law.” The Royal Handwriting Collection under the Tay Son Ruler, conserved at the Sino-Vietnamese Institute, Hanoi-Vietnam. See Luu, *supra* note 6, at 97

<sup>51</sup> The solo-note of Ministry of Public Works on July 13, 1837 (in the 18<sup>th</sup> year of Minh Mang Rulers) recorded the case of mariners Pham Van Bien, Vu Van Hung, Pham Van Sinh fined by 80 floggings for the delay departure. The commander of the garrison Truong Viet Soai, in the course of the voyage in 1836, did not return with the maps and for that was condemned to capital punishment. See Institute of National History, 165:2 *Dai Nam Thuc Luc Chinh Bien* (Accounts of Dai Nam’s Present Dynasty, 1865-1882), vol.165, pt. 2 (1848).

<sup>52</sup> Institute of National History, *id.*

actions). The *Dai Nam Thuc Luc Chinh Bien* wrote:

In the eighth month, in the autumn, of the year Quý Ty, the 14<sup>th</sup> year of the reign of Minh Mang (1833)... the King told the Ministry of Public Works: On Hoang Sa in the waters of Quang Nghia, in the distance, one can see the sky and the sea join in the same colour, which makes it difficult to estimate the depth of the sea. Recently, commercial vessels sunk there... In year late (1836), the Ministry of Public Works reported:... the land of Hoang Sa belongs to our territorial sea and is of great strategic importance... We have sent our men there to draw maps, but in view of the large area of the sea and of its distance, we have managed to carry it out in one place and we don't know how to continue the work... The King approved the report and gave order to the Suat Doi (Commander) of the navy, Pham Huu Nhat, to lead the fleet and to prepare 10 wooden posts to mark the visited places (each post is 5 tuoc long, 5 tac wide, and 1 tac thick). Each post bears the following inscription engraved on one of its faces: the Chanh Doi truong Suat Doi Pham Huu Nhat of the navy has come here to the Hoang Sa for reconnaissance and topographical measures, and leaves this witness-post to mark the fact.<sup>53</sup>

In 1849, the Englishman, J. Gutzlaff, wrote about the tax collection and fishermen protection of Vietnamese Kingdom on the Paracels as follows:

We should not mention here the Paracels (Katvang) which approach 15-20 leagues to the coast of Annam, and extend between 15°-17° N. Latitude and 111°-113° E. Longitude, if the King of Cochin-China did not claim these as his property, and many isles and reefs, so dangerous to navigators... From time immemorial, junks in large number from Hainan, have annually visited all these shoals, and proceeded in their excursions as far as the coast of Borneo... The Annam government, perceiving the advantages which it might derive if atoll were raised, keeps revenue cutters and a small garrison on the spot to collect the duty on all visitors, and to ensure protection to its own fishermen.<sup>54</sup>

The assistance which the Nguyen Rulers provided to foreign ships in the dangerous grounds was also recorded. At least two cases had been recorded regarding Dutch ships: the Gootebrok, wrecked in 1634 in the sea of the Paracels, and three Dutch sailed ships coining back from Japan and going to Batavia in 1714 near the Paracels, were surprised by a tempest.<sup>55</sup> Report of the Governor of Da Nang, dated the 11<sup>th</sup> year of Minh Mang (1830) recorded the assistance to a French merchant ship sunk in Hoang

<sup>53</sup> *Id.*

<sup>54</sup> J. Gutzlaff, *Geography of the Cochin-chinese Empire*, 19 J. GEOGRAPHICAL SOC'Y LONDON 93-94 (1849).

<sup>55</sup> Luu, *supra* note 5, at 43.

Sa.<sup>56</sup> By *Quoc Trieu Chinh Bien Toat Yeu* (National Dynasty Chronology) in 1836, a British merchant ship shipwrecked in an open ground near the Paracels. More than 90 sailors from this ship managed to reach the shores of Binh Dinh.<sup>57</sup> In all cases, Lords and Kings of the Nguyen gave them shelter, money, and food before repatriation.

Fifth, Vietnamese State activities on Paracels and Spratlys were noted in several foreign works, including the Chinese works. J.B. Chaigneau, Counsellor of Emperor Gia Long, writes in his memoirs as follows:

Cochinchina, the sovereign of which has today the title of Emperor, is composed of Cochinchina proper, Tonquin, a part of the kingdom of Cambodia, some uninhabited islands not far from the coast and the Paracels archipelago, composed of uninhabited reefs and rocks. It is only in 1816 that the present Emperor took possession of this archipelago.<sup>58</sup>

The Italian Compendium of Geography written by Adriano Balbi in 1850 (page 641) described the Annam Kingdom and its belongings as Paracels, Pirates Islands, and Puolo Condor. In the section dealing with Chinese geography of the same book, there was nothing about the Paracels or Spratlys.

Shi Da Shan, a Chinese high monk under the *Kangxi* reign, wrote in his *Story Overseas* (Volume III) that:

[T]he sandbanks, which had a width of one hundred miles dam, a very long length, out of sight, was called "Van Ly Truong Sa," no tree, no house. The junks so against the wind and attacked by the waves swirling would be either completely destroyed, or sailors deprived of rice and portable water would die of hunger. This place was far from Dai Viet to a seven days of navigation, i.e. about seven hundred dam (miles). In the time of the Lords (Nguyen), every year, they had sent the fishing junks sailing along of the sand to pick the gold, silver and gears on the shipwrecks.<sup>59</sup>

These facts, taken from Vietnamese historical documents and notes of various foreign authors, demonstrate that the Nguyen Lords and Kings of Vietnam, in the pre-colonial period, displayed specific interest in the archipelagos, and performed sovereign acts there at a time when no other State had shown any sovereign interest towards them.

<sup>56</sup> See Documents conserved in the Sino-Vietnamese Institute of Hanoi, Vietnam with the code VN/CT 1 Han, M M 11/27 (MM Q43/57), VN/ CT 3 Han, MM 11/27.6 (MM 43/59).

<sup>57</sup> See *Quoc Trieu Chinh Bien Toat Yeu*, vol. 3, folio 104a, conserved in the Sino-Vietnamese Institute of Hanoi.

<sup>58</sup> *Le Mémoire sur la Cochichine* de Jean Baptiste Chaigneau par Salles A, dans *Bulletin des Amis du vieux Hue* No. 3 Avril – Juin 1923, at 25-83.

<sup>59</sup> See SHI DA SHAN, HAIWAI JISHI (Record of Events of Overseas) 62 (2000); *Record of Events of Overseas*, vol. 3, sheets 23b & 24b, The Tokyo Bunko - Oriental Library [日本東洋文庫].

The establishment of sovereignty and administrative executions of Nguyen Lords and Kings over Hoang Sa and Truong Sa have the two factors, *animus* and *corpus*, required by the international law in regard of *terra res nullius*.<sup>60</sup> Vietnam was the owner of those archipelagos before the arrival of the French. Heinzig remarked:

Provided that the historical information given by Saigon is correct, we may accept that, as a state, Vietnam apparently was showing a definite interest in the Paracels somewhat earlier than did China.<sup>61</sup>

### ***B. From the Early Twentieth Century to the End of World War II***

International law on territorial acquisition has changed profoundly. The two obligations related to effective occupation formulated by the Berlin General Act of 1885. Originally applied only to African territories became the rule of general international law to guide the search for a legal solution to the territorial disputes. They have been consolidated and developed by numerous cases related to the acquisition of sovereignty over the uninhabited islands.<sup>62</sup> For *terra res nullius*, the rules for acquisition of sovereignty are effective, uninterrupted, and peaceful occupation, as well as an official notification of the occupation and rights of the claimant to other powers through the diplomatic channel. *Terra res derelictio*, abandoned territories, can be taken by a new claimant through its effective, uninterrupted, and peaceful occupation of the territory, and an official relinquishment of the old State possessing the sovereign title over that territory.<sup>63</sup> The territory can be also acquired through the way of cession from a State to a new one through international agreement. The use of force to conquer a territory was prohibited by the United Nations Charter and other international legal instruments. During the post war period, the right of self-determination of peoples has been recognized in international law. All armed actions or repressive measures directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence and the integrity of their national territory shall be respected.<sup>64</sup> Any attempt aimed at the partial or total disruption of the national unity and territorial

<sup>60</sup> *Legal Status of Eastern Greenland Case*, supra note 10, at 45. It reads: "A claim to sovereignty based not upon some particular act or title such as a treaty or cession but merely upon continued display of authority, involves two elements each of which must be show to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority."

<sup>61</sup> DIETER HEINZIG, *DISPUTES ISLANDS IN THE SOUTH CHINA SEA* 25 (1976).

<sup>62</sup> MALCOLM SHAW, *INTERNATIONAL LAW* 502-507 (6th ed. 2008).

<sup>63</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 138-139 (5th ed.1998).

<sup>64</sup> G.A. Res. 1514(XV) ¶4, U.N. Doc. A/L.323 and Add.1-6 (Dec. 14, 1960) titled, Declaration on the Granting of Independence to Colonial Countries and Peoples, available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/152/88/IMG/NR015288.pdf?OpenElement> (last visited on Mar. 30, 2012).

integrity of a country is incompatible with the purposes and principles of the Charter.<sup>65</sup>

The two archipelagos have been under the administration of Vietnamese Dynasties since at least the seventeenth century. The sovereign title over those islands has been consolidated and maintained for centuries, before the arrival of the French.

The French colonial authority in Indochina, which was responsible for the external relations of the Vietnamese Kingdom,<sup>66</sup> recognized its State succession status over the Hoang Sa islands from the Vietnamese Kingdom.<sup>67</sup> The French colonial authority carried out several acts to consolidate the sovereign title over Hoang Sa islands such as: granting licences for private companies to exploit the islands in 1898; preparing the establishment of navigational lighthouses in 1899;<sup>68</sup> and sending naval surveillance and scientific missions from 1925 to 1927. Several administrative decrees were issued by the French colonial authority for Hoang Sa. In Decree No. 156-SC dated June 15, 1932, the Governor General of Indochina established an administrative unit in the Parcel Islands under the name of “Delegation des Paracels” and merged the islands into Thua Thien Province. In a subsequent Decree on May 5, 1939, the French Governor General divided the archipelago into two Delegations: “Crescent et Dependences” and “Amphitrite et Dependences.” In spite of losing its independence, the Vietnamese took advantage of every opportunity to confirm their right of self-determination as a people. Than Trong Hue, War Minister of the Vietnamese Kingdom, in a letter dated March 3, 1925, stated that: “These islands still belong to Annam, there is no dispute on this score.”<sup>69</sup> By an imperial ordinance on March 30, 1938, Emperor Bao Dai confirmed the merger of the Parcel Islands with Thua Thien Province. A division of Vietnamese police was regularly stationed there. A newly found imperial ordinance signed by Emperor Bao Dai, the Honor Award, was presented to the division and officials stationed on the Paracels is further proof of the Vietnam’s exercise of authority over the islands.<sup>70</sup>

In that context, the expedition carried out by Chinese Admiral Li Zhun in 1909 was

<sup>65</sup> *Id.* ¶ 6.

<sup>66</sup> Patenote Treaty, *supra* note 25.

<sup>67</sup> Chemillier-Gendreau, *supra* note 6, at 108. The Official Telegram of 4 July 1931 by Governor of Indochina Mr. Pasquier reads: “Annam had possessed rights since the XVIII<sup>th</sup> century. The French position was therefore to have the appearance of the simple exercise of preexisting sovereign right.”

<sup>68</sup> In 1898, a private person, Mr. Chabrier, had asked permission to establish on the Paracels a base to supply for fishermen. In June 1899, the Governor General of Indochina, P. Doumer asked Paris to build a lighthouse in Paracels. But the plan failed due to lack of budget. See Note from the Ministry of Foreign Affairs to the Minister of Marine, Paris (Jan. 14, 1921), Archives of the MFA of the French Republic, AS 18-40, NS China, file 312, at 16-18. See Lapique, *supra* note 20, at 610.

<sup>69</sup> Chemillier-Gendreau, *supra* note 6, at 108.

<sup>70</sup> To quoc, *Them mot Chau ban khang dinh chu quyen Hoang Sa* (A new found imperial ordinance to reconfirm the sovereignty over the Paracels), HNSV NEWS (Dec. 25, 2009), available at <http://news.hnsv.com/viet-nam/them-mot-chau-ban-khang-dinh-chu-quyen-hoang-sa-28924/> (last visited on Mar. 30, 2012).

considered as a violation of Vietnam's firmly established title of possession over the Paracels. According to the Chinese reference,<sup>71</sup> two small gunboats investigated some of the Parcel Islands on June 6, 1909; they made some symbolic acts (hoisting the flag, firing cannons) to declare those islands a part of the "sacred territory of China" and returned to Guangzhou on June 7, 1909. A close look at this reference demonstrates that the expedition in 1909 was considered as a mission to discover the islands because of its symbolic acts. This disproves the argument that China had been the owner of the archipelagoes since the Sung, Ming, or Han Dynasties. How could China 'discover' a territory that it had previously owned? Distant countries far from the SCS, such as Portugal, England, and France have a series of documents and maps recording the administrative actions by the Emperor of Vietnam on the islands. The argument that China, a neighbour of the Vietnamese Kingdom, did not know about those activities is not convincing. If 1909 is taken as the critical date for the dispute over the Paracels, the official proof of each claimant would be considered carefully by an international tribunal.

The Spratlys were considered by France as a *terra res nullius*. On that basis, France sent the naval vessels to occupy it in 1930 and 1933. By a Decree on July 26, 1933, the French Government proclaimed the occupation to the whole world.<sup>72</sup> Furthermore, in December 1933, the Governor of Cochinchina, Mr. J. Krautheimer, signed decree 4762-CP to incorporate it into Ba Ria province under the Cochinchine Authority.<sup>73</sup> Only a single objection from Tokyo was recorded in the archives.<sup>74</sup> Before the French occupation, China showed complete indifference to the Spratlys. A Chinese Government report was released in Guangzhou in 1928. An official Note of the Republic of China Diplomatic Mission in Paris dated September 29, 1932, still asserted that: "The Amphitrite Group and the Crescent Group [of the Paracels] constitute part of the Chinese territory in the southernmost place."<sup>75</sup> The legal disputes over the Spratly Islands would probably have become more complicated if French authorities had retained sovereignty over the islands for themselves. However, this did not happen. With the Treaty of Ha Long Bay signed in March 1949, France officially transferred sovereignty over Cochinchina (which was a French colony), including the Spratlys, which was claimed to be possessed by the French Government since 1933, to the Bao

<sup>71</sup> See PEOPLE'S DAILY (Nov. 25, 1975)

<sup>72</sup> JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE No. 26, 7837 (1933).

<sup>73</sup> Chemillier-Gendreau, *supra* note 6, at 111 & 225 (Annex 30).

<sup>74</sup> Note du Service juridique du Ministère des affaires étrangères pour la Direction d'Asie-Océanie, le 6 Septembre 1946; Archives du Ministère des affaires étrangères de la République Française, AS 44-55, Dossier 213, at 16.

<sup>75</sup> Nguyen, *supra* note 48, at 232.

Dai Administration.<sup>76</sup> No matter whether the rights of the ancient Vietnamese Kingdom were lost or abandoned, the effective occupation by French authorities over the Spratlys additionally consolidated the historic rights of the Vietnamese Kingdom.

The San Francisco Peace Treaty of 1951 also supports Vietnam's position. In Article 2, paragraph (f) of the Treaty, Japan relinquished all rights, titles, and claims to the Paracels and Spratlys. Mr. A. Gromyko, Minister of Foreign Affairs of the USSR during the San Francisco Conference, offered a proposal to give those islands to the Chinese administration (who was absent from the Conference), which was rejected by a 48 to 3 vote. Based on the texts of the Cairo and Potsdam Declarations, Article 2 paragraph (f), which refers to the Paracels and Spratlys, was separated from the paragraph that refers to territories intended to be assigned to China. The text of the Cairo Declaration of 1943 classified the territories over which Japan had to relinquish all rights, titles, and claims into the three kinds: Pacific islands, Chinese territories, and other territories seized by force. The Declaration committed to "divest Japan of all the Pacific islands... to restore to the Chinese Republic all the territories such as Manchuria, Formosa, and the Pescadores which the Japanese had stolen from the Chinese, and to expel Japan from all other territories it has seized by force."<sup>77</sup> The Paracels and Spratlys islands were not referred to as Chinese territories during the three international conferences of Cairo, Potsdam, and San Francisco. Clearly, they were territories that Japan acquired through the use force and should have been returned to their prior owners. However, these conferences did not even suggest that the owner was China. The silence of the ROC at the Cairo and the Potsdam conferences regarding the Paracels and the Spratlys constitutes proof of the Chinese indifference to these islands.<sup>78</sup> On the other hand, at the San Francisco Conference of 1951, Prime Minister and Minister of Foreign Affairs Tran Van Huu from the Associated State of Vietnam solemnly declared that the two islands should belong to Vietnam.<sup>79</sup> This declaration did not elicit any protests from the other delegates of the Conference. When Japan relinquished the Paracels and Spratlys, it must have been in favour of Vietnam, the country that had long established its sovereignty before the French came and well before World War II. This is particularly true in the case of the Spratlys, because before World War II Japan was the only country that contested this archipelago with France.

The arguments raised by Chinese scholars that the Franco-Chinese Treaty of June 26, 1887<sup>80</sup> gave the Paracels and Spratlys to China by virtue of their being East of East

<sup>76</sup> *Id.* at 242.

<sup>77</sup> See Cairo Declaration of 1943, available at <http://avalon.law.yale.edu/wwii/cairo.asp> (last visited on Mar. 30, 2012).

<sup>78</sup> See Chemillier-Gendreau, *supra* note 5, at 120; Nguyen, *supra* note 48, at 242-244.

<sup>79</sup> See LE MONDE (Sept. 9-10, 1951).

<sup>80</sup> See the official Note of the Republic of China ("ROC") Diplomatic Mission in Paris dated on September 29, 1932. Nguyen, *supra* note 48, at 232. Renmin Ribao Peking N. 3 of July 1956, Chinese authors claimed that Paracels and

longitude 108° is fallacious as that treaty did not apply to islands outside the Gulf of Tonkin. Furthermore, that treaty was superseded when China and Vietnam concluded the Agreement on the Delimitation of Territorial Waters, Exclusive Economic Zones (“EEZ”), and Continental Shelves in the Gulf of Tonkin on December 25, 2000.<sup>81</sup>

### C. *After World War II*

After World War II, the ROC occupied the eastern part of the Paracels and Itu Aba (Ba Binh in Vietnamese), an island in the Spratlys. At the same time, France and the Bao Dai Administration reoccupied the western part of the Paracels and some islands in the Spratlys. The eastern part of the Paracels came under the control of the PRC in 1956. The western part of the Paracels was taken by Chinese force in 1974. The PRC gained its first foothold in the Spratly archipelago in 1988 by force. Since then, China has expanded its control over nine reefs in the Spratly area. The Philippines officially claimed sovereignty over almost the entire Spratly archipelago (called Kalayaan Island Group [KIG] by the Philippines), with the exception of the Spratly Island itself, for the first time in 1978. Malaysia claimed sovereignty over the southern part of the Spratly archipelago by its 1979 maps. In this context, in 1976, a reunified Vietnam continued to maintain the position that the sovereign titles for the Paracels and Spratlys, consolidated for a long time by the Nguyen Lords and Kings as well as by the French and Saigon Administrations, had never been abandoned. The ROV took the titles, rights, and claims over from the French on the islands in conformity with the 1954 Geneva Accords - Three Agreements on the Cessation of Hostilities for Vietnam, Laos, and Cambodia.<sup>82</sup> As the rightful title-holder, South Vietnam conducted administrative organizations, economic investigation and exploitation, and effective protection of those archipelagos.

In 1956, the Ministry of Economy of the ROV granted licenses in the Paracels to exploit guano on the island Quang Anh, Huu Nhat, and Phu Lam for Le Van Cang. In

Spratlys lying east of the frontier line traced by the Franco-Chinese Treaty of 26 June 1887, *i.e.* the 108° 03' 13" E would be under the Chinese administration. In fact, the text of Franco-Chinese Treaty of 26 June 1887 said that: “The north-south line passing through the eastern point of island of Tcha’s-Kou or Ouan-Chan (Tra Co) which form the boundary, are also allocated to China. The island of Gotho (Kao Tao) and other islands west of this meridian belong to Annam.” The purpose of the text is allocation of coastal islands in the Gulf of Tonkin. It did not mention the two archipelagos.

<sup>81</sup> Zou Keyuan, *The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin*, 34 OCEAN DEV. & INTL. L. 22-24 (2005); Hong Thao Nguyen, *Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf*, 34 OCEAN DEV. & INTL. L. 41-44 (2005); Ted McDorman, *People’s Republic of China-Vietnam*, 5 INT’L MAR. BOUNDARIES 3755 – 3758 (2005).

<sup>82</sup> MIKE GRABEL, THE PENTAGON PAPERS(v.1): THE DEFENSE DEPARTMENT HISTORY OF UNITED STATES DECISIONMAKING ON VIETNAM, *Origins of the Insurgency in South Vietnam, 1954-1960*, (Ch. 5/Sec. 2) 270-282 (1971), available at <http://www.mtholyoke.edu/acad/intrel/pentagon/pent12.htm> (last visited on Mar. 30, 2012).

1959, a license was granted to the Phosphate Company of Vietnam, who undertook the guano exploitation until 1963. In 1973, a joint study was carried out by the Company and its Japanese partner Marubeni Corporation. Administratively, the Paracels were moved from Thua Thien Province to Quang Nam Province by Decree N 174-NV of July 13, 1961. The ROV Navy patrolled regularly in the waters surrounding the islands.

With respect to the Spratlys, the ROV Navy landed on the Spratly Islands and erected a monument asserting sovereignty on August 22, 1956. By Decree 143/VN of October 20, 1956, the Spratly Islands were incorporated into Phuoc Tuy Province. From June 11 to 16 of 1961, the escort ships Van Don and Van Kiep (HQ02 and HQ06) were dispatched to inspect Song Tu Dong, Thi Tu, Loai Ta and An Bang in the Spratly Islands. The naval units landed on the Truong Sa, An Bang, Loai Ta, Thi Tu, Song Tu Dong, Song Tu Tay, Nam Yet in 1962, 1963 and 1964 in order to erect sovereignty pillars on them. On September 6, 1973, by Decree N 420 - BNV/HCDP/26, the ROV government incorporated the Spratly Islands into Phuoc Hai Commune, Dat Do District, Phuoc Tuy Province.<sup>83</sup>

The seizing of the Paracels by force in 1974 by China constitutes a breach of the fundamental principles of international law and cannot create a legal title to the archipelagos. This position has been firmly reaffirmed in several White Books published by Ministries of Foreign Affairs of Vietnam (both ROV and SRV);<sup>84</sup> the Government Declarations on the Vietnamese maritime zones and straight baselines in 1977 and 1982; the 1994 Resolution of National Assembly on ratification of the UNCLOS and the official speeches of the Vietnamese leadership. For instance, Vietnamese Prime Minister Nguyen Tan Dung reaffirmed in front of the National Assembly on November 25, 2011, that: “We have sufficient legal and historical evidence to assert that Hoang Sa and Truong Sa belong to Vietnam. We are the owner of the two archipelagos from the 17th century, since before any country claimed them.”<sup>85</sup> At present, Vietnam controls more than twenty islands, cays, and reefs in the Spratly archipelago.

China maintains its position that the Paracels and the Spratlys belongs to it and that Vietnam has more than once recognized China’s sovereignty over these islands.<sup>86</sup> This

<sup>83</sup> Information and Press Department, Ministry of Foreign Affairs, Vietnam’s Sovereignty over the Hoang Sa and Truong Sa Archipelagoes (1979) [Vietnam White Paper 1979]; Vietnam White Paper 1981, *supra* note 30; Vietnam White Paper 1988, *supra* note 7.

<sup>84</sup> *Id.*

<sup>85</sup> Ban Bien Tap, *Vietnamese PM Nguyen Tan Dung’s explanatory report at 2<sup>nd</sup> session of 13<sup>th</sup> NA*, (Dec. 5, 2011), available at <http://nguyentandung.us/vietnamese-pm-nguyen-tan-dung-s-explanatory-report-at-2nd-session-of-13th-na.html> (last visited on Mar. 30, 2012).

<sup>86</sup> Su Hao, *China’s Positions and Interests in the South China Sea: A Rational Choices in its Cooperative Policies* (CSIS, 2006), available at <http://csis.org/publication/chinas-positions-and-interests-south-china-sea-rational-choices-its-cooperative-policies> (last visited on Mar. 30, 2012).

claim relies on a letter by the late Vietnamese Prime Minister, Pham Van Dong, addressed to the late Chinese Premier, Zhou Enlai, in 1958 regarding the breadth of the territorial waters of China, the Declaration of the Government of the Democratic Republic of Vietnam (“DRV”) regarding the fixation of the limits of combat zones by the U.S. military in 1965, and the speech made by Deputy Minister of Foreign Affairs of the DRV Ung Van Khiem in 1956. Based on this evidence, China claims that Vietnam has recognized its sovereignty over the Paracels and Spratlys islands.<sup>87</sup> We will not consider Ung Van Khiem’s statement because there is no neutral evidence. Mr. Ung Van Khiem had no competence to recognize or relinquish any territory. The speech, if it had existed, was not made in the context of territorial negotiations. The two other documents must be considered in the context of the division of Vietnam in the period of 1954-1975 alongside the extremely close ties of the two socialist countries, China and Vietnam, “who are at the same time comrades and brothers.”<sup>88</sup>

On September 4, 1958, under the threat from the seventh fleet of the U.S. Navy in the Taiwan Strait, China announced the decision to extend the breadth of its territorial sea to 12 nm. This statement involved the Chinese mainland and all the islands belonging to China included the Xisha and Nansha Islands.<sup>89</sup> On September 14, 1958, PM Pham Van Dong addressed a letter to his counterpart PM Zhou Enlai: “We would solemnly inform you that the Government of the Democratic Republic of Vietnam recognizes and approves the Declaration made on September 4, 1958 by the Government of the People's Republic of China regarding the decision taken with respect to China's territorial sea.” In the White Book of 1979, the SRV Ministry of Foreign Affairs considered that the Chinese interpretation of the letter of September 14, 1958, by Prime Minister Pham Van Dong as a recognition of Chinese sovereignty over these islands was a distortion, when the intention and meaning of the text was only to recognize the 12 nm breadth of the Chinese territorial sea.<sup>90</sup> Does the silence on the status of the Hoang Sa and Truong Sa in Pham Van Dong’s letter constitute acquiescence to Chinese sovereignty over the islands? Does it have any legal effect to estop Vietnam from claiming sovereignty in the future? The answers are ‘negative.’<sup>91</sup>

A unilateral act will create binding legal consequences to the State which carries out such an act only if this unilateral act has been done within the limits of the State’s competence, in conformity with the norms of international law, and not contrary to *jus*

<sup>87</sup> Austin, *supra* note 6 at 126-130. See Ministry of Foreign Affairs(China), Documents and Other Materials concerning the Recognition by the Vietnamese Government that the Xisha and Nansha Islands are Chinese Territory (1980).

<sup>88</sup> Luu, *supra* note 6, at 75-78.

<sup>89</sup> See *Declaration on China’s Territorial Sea*, 1:28 PEKING REV. 21 (Sept. 9, 1958).

<sup>90</sup> Vietnam White Paper 1979.

<sup>91</sup> For the official explanation, see Vietnam White Paper 1988, *supra* note 7, at 20-23.

*cogens* principles. The true intentions of the State which made the unilateral declaration should be interpreted very carefully. Restrictions upon the independence of States cannot therefore be presumed.<sup>92</sup> The ICJ in the Nuclear Tests Case recalls that: “If States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.”<sup>93</sup> Through State practices and the Court’s judgments,<sup>94</sup> the International Law Commission (“ILC”) gives guidelines for defining unilateral acts and their legal force.<sup>95</sup> According to the ILC, to determine the legal effects of unilateral declarations, it is necessary to take account of the content, the factual circumstances in which they were made, and to the reactions to which they gave rise. A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In case of doubt as to the scope of the obligations resulting from such a declaration, these obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated.<sup>96</sup>

In applying those guidelines, we have some remarks on the text of the letter of PM Pham Van Dong, and the circumstances in which it was formulated.

First, the DRV at that time was not in control of the Paracels and Spratlys. By the Geneva Accords, Vietnam was divided temporally into two Administrations at the 17<sup>th</sup> parallel, pending reunification through free general elections. China is one of the signatories of the Geneva Accords. The two archipelagos Paracels and Spratlys, lying under the 17<sup>th</sup> parallel, were under the administration of the ROV. At that time, the DRV neither had *de jure* title nor exercised *de facto* sovereignty over the Paracels and Spratly. It had no right to give up the territory that it did not have.<sup>97</sup> Even the South Vietnamese Authorities, the two opposing governments, the ROV, and the Provisional

<sup>92</sup> The S.S. *Lotus* Case (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7) available at [http://www.worldcourts.com/pcij/eng/decisions/1927.09.07\\_lotus.htm](http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm) (last visited on Mar. 30, 2012).

<sup>93</sup> *Nuclear Tests* Case (Austl. v. Fr.), 1974 I.C.J. 267, ¶ 44; *Nuclear Tests* Case (N.Z. v. Fr.), 1974 I.C.J. 473, ¶ 47.

<sup>94</sup> *Island of Palmas* Arbitration (Neth. v. U.S.), 2 Report of International Arbitral Awards (U.N. Ser.) 829, in DAVID HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 190 (5<sup>th</sup> ed.1998); *Legal Status of Eastern Greenland* Case, *supra* note 10; *Temple at Prear Vihear* Case (Cambodia v. Thai.), 1962 I.C.J. 6 (June 15); *North Sea Continental Shelf* Case (Ger. v. Neth.), 1969 I.C.J. 26, ¶ 30 (Feb. 20); *Burkina Faso v. Mali* (Frontier Dispute), 1986 I.C.J. 574 (Dec. 22); *Nuclear Tests* Case (Austl. v Fr.), *id.* at 253-267; *Nuclear Tests* Case (N. Z. v Fr.), *id.* ¶¶ 457-473; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* Case (Bosn.& Herz. v. Serb. & Montenegro), 1996 I.C.J. 622 (July 11); *Pedra Branca/Pulau Batu Puteh* Case, *supra* note 10.

<sup>95</sup> U.N. International Law Commission, 58<sup>th</sup> sess. (2006), Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_9\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_9_2006.pdf) (last visited on Mar. 30, 2012).

<sup>96</sup> *Id.* acts 3 & 7.

<sup>97</sup> Chemillier-Gendreau, *supra* note 6, at 130.

Revolutionary Government of the Republic of South Vietnam (“PRG”) created in 1969, only had the right of administration over the two islands, but not the right to concede any part of the territory to foreigners. In 1974, the PRG strongly replied upon the Chinese use of force when made the following three-point declaration:<sup>98</sup>

- Sovereignty and territorial integrity are sacred problems for every people;
- With regard to the problem of frontiers and territories, there exist between neighbouring countries differences left behind by history. These differences, sometimes very complex, call for minute examination; and
- The countries concerned should examine this problem in a spirit of equality, mutual respect, and as good neighbours, should resolve it through negotiations.

The declaration recognized the existence of a dispute, recalling that sovereignty and territorial integrity are sacred issues for all peoples, further calling for negotiation. On February 14, 1975, the Foreign Ministry of the ROV proclaimed the White Book on the historic and legal rights of Vietnam over the two archipelagos Hoang Sa and Truong Sa. Consistent with the principle of respect for territorial integrity and the right of self-determination under international law and the 1954 Geneva Accords, the fate of the territorial parts of Vietnam must be determined by the people of the reunified country. Vietnam was reunified in 1976 and the representative body of the Vietnamese people was the National Assembly elected in 1976. The reunified Vietnam, known as the SRV, inherited the territory of the PRG through general election in 1976. The Vietnamese Constitutions of 1980 and 1992, the 1994 Resolution by the National Assembly, and the Law on national boundaries in 2003 reaffirmed that the Paracels and Spratlys are part of Vietnamese territory.

Second, the Vietnamese Constitutions of 1946 and 1957 provided that the territorial transfer would be decided by referendum. The declaration by PM Pham Van Dong did not have a constitutive character for giving up territory. In the case concerning sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge (Malaysia/Singapore) regarding the Singapore argument that the Johor Authority recognized Singapore sovereignty over those islands,<sup>99</sup> the Court took a position not to consider the Johor reply as having a constitutive character in the sense that it had a conclusive legal effect on Johor.<sup>100</sup> The text of PM Pham Van Dong does not have any

<sup>98</sup> Vietnam White Paper 1981, *supra* note 30, at 139.

<sup>99</sup> For details, see S. JAYAKUMAR & T. KOH, *PEDRA BRANCA: THE ROAD TO THE WORLD COURT* (2009).

<sup>100</sup> *Pedra Branca/Pulau Batu Puteh Case*, *supra* note 10, ¶ 227.

constitutive character regarding South Vietnamese territory. Consequently, it had no conclusive legal effect on the fate of the Paracels and Spratlys.

Third, the DRV has never denied the claims and activities reaffirming sovereignty over the Paracels and Spratlys by South Vietnam. If PM Pham Van Dong's letter had recognized the sovereignty of China, the next logical step would have been a declaration to reject the sovereignty of the ROV government. This never occurred, either in 1956 or 1974. The DRV continued to support the stance of the PRG.

Fourth, the name of the Chinese text in 1958 is the Declaration on China's territorial sea. PM Pham Van Dong's letter recognizes and approves the decision regarding the 12 nm breadth for China's territorial sea. It did not contain any renunciation of sovereignty over the islands in favour of China. The transfer of territorial sovereignty from one State to another is normally executed by treaty. Immediately after the struggle against the French colonial army in November 2, 1957, the Central Committee of the ruling Vietnam Labor Party sent a letter to the Central Committee of the Communist Party of China proposing that the two parties had to respect the status quo over territorial issues left by history, and resolve all disputes through peaceful negotiations at a convenient time. The letter of November 1957 said: "The border issue is an important issue to be settled by the present legal principles or determined by the two governments."<sup>101</sup> In April 1958, the Central Committee of the Communist Party of China gave a positive response to its counterpart. The territorial issues left by history were understood as being solely concerned with land borders; no mention was made regarding the Paracels or Spratlys. During the war against the United States, it was agreed that all potential disputes between the two brother countries were to be settled at a convenient time through negotiations. The declaration made by PM Pham Van Dong was not in the context of a dispute between Hanoi and Beijing. The ICJ adjudicated: "Nothing prevents the parties from coming to an agreement by way of common sense: it is an agreement with the conditions of reciprocity."<sup>102</sup> Some authors compared the letter made by PM Pham Van Dong with the Ihlen Declaration in the *Greenland Case*.<sup>103</sup> The Ihlen Declaration was made in the context of finding the solution for Groenland and Spitzberg. The Ihlen Declaration was not 'open handed.' It 'recognized' Denmark's sovereignty over Groenland in exchange for Danish recognition of Norway's

<sup>101</sup> Vu Duong Ninh (ed.), *Bien gioi tren dat lien Viet Nam – Trung Quoc* [China – Vietnam Land boundary], Hanoi (Cong An Nhan Dan ed. 2011).

<sup>102</sup> *Burkina Faso v. Mali Case*, *supra* note 94, ¶ 574.

<sup>103</sup> See Austin, *supra* note 6 at 125-130, 149; R. HALLER-TROST, THE CONTESTED MARITIME AND TERRITORIAL BOUNDARIES OF MALAYSIA: AN INTERNATIONAL LAW PERSPECTIVE 321 (1998); Daniel Dzurek, *The Spratlys Island Dispute: Who's on first?*, 2 MAR. BRIEFINGS 53 (1996); Jianming Shen, *International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands*, 21 HASTINGS INT'L & COMP. L. REV. 57 (1997).

sovereignty over Spitzberg. The letter of PM Pham Van Dong contained no similar reciprocity. It is thus very difficult to regard the declaration of PM Pham Van Dong as a renunciation of sovereignty over the islands.

Fifth, during the war, Vietnam relied quite heavily on material assistance from China. This put Hanoi in an awkward position. The letter endorsed only the application of the principle of 12 nm for the breadth of the territorial sea. It was an act of good will from North Vietnam to support China, which faced the risk of an invasion by the United States as it was manoeuvring close to the Taiwan Strait. The reservation on the status of the Paracels and Spratlys was not expressed because PM Pham Van Dong had no competence with respect to them.

Monique Chemillier Gendreau remarks that: "It is true that Pham Van Dong's declaration confines itself strictly to recognition of the breadth of the Chinese territorial sea. So it is incorrect to assert that Vietnam had also "reaffirmed its recognition of China's claim" to the archipelagos."<sup>104</sup> No recognition of Chinese sovereignty was made by either the DRV or the ROV.

Does the letter of PM Pham Van Dong have the effect of estoppel? "You can't have your cake and eat it, too" is a principle which prevents States from acting inconsistently to the detriment of others.<sup>105</sup> According to Ian Brownlie, it is now clear that the essence of estoppels is the element of conduct which detrimentally causes the other party, in reliance of such conduct, to change its position and suffer some prejudice.<sup>106</sup> In the *North Sea Continental Shelf* Case, the ICJ pointed out that: "The party relying on estoppels must show, among other things, that it has taken distinct acts in reliance [of] the other party's statement."<sup>107</sup>

The letter of PM Pham Van Dong did not fulfil all conditions, especially the condition on 'detrimental reliance' necessary to create the estoppel for China. First, China did not prove that its position on the Xisha and Nansha has changed detrimentally due to reliance on North Vietnam's declaration. Second, China kept silent over the U.S. Armed Forces' declaration regarding the combat zone in the SCS in 1965, which included the Paracels. Did this imply Chinese indifference to the defence of its claims over the Paracels before the foreign invasion? Third, the estoppel principle is applied to the acts of one author on an issue in a continuous period of history. In this case, how would estoppel be applied to the conducts of two distinct governments that is, the DRV and SRV? The first had no territorial competence over

<sup>104</sup> Chemillier-Gendreau, *supra* note 6, at 129.

<sup>105</sup> *Fisheries Case* (U. K. v. Nor.), 1951 I.C.J. ¶ 116; *Temple of Preah Vihear Case*, *supra* note 94, at 6 & 26.

<sup>106</sup> Brownlie, *supra* note 63, at 646.

<sup>107</sup> *North Sea Continental Shelf Case*, *supra* note 94, ¶ 30.

the islands in question. The second is a successor of the former DRV and ROV, and has the right to choose which entity's rights and obligations to inherit. The SRV inherits the rights and actions of South Vietnam, which alone has jurisdiction over the Paracels and Spratlys.<sup>108</sup>

### **3. Vietnamese Position on the Maritime Zones around the Islands**

The development of the International Law of the Sea gives rise to maritime delimitation problems between the opposite and adjacent States. Being located in the middle of the SCS, the Paracels and the Spratlys directly affect the issue of maritime delimitation between the offshore islands and the mainland territory of coastal States. It has an enormous impact on the extension of continental shelves, the freedom and security of navigation, and the management of resources. The UNCLOS has created a new kind of dispute in the SCS. The maritime delimitation of offshore islands is closely linked to the determination of sovereignty over them and the regime of their maritime zones. In this part, we will look at the Vietnamese position on the maritime zones around the islands. Three questions will be examined: the Vietnamese position on the maritime zones under the UNCLOS; the regimes of Paracels and Spratlys islands; and the maritime disputes relating to the islands.

#### ***A. Vietnamese Position on the Maritime Zones under the UNCLOS***

After its reunification, Vietnam took part in the Third Conference of the United Nations on the Law of the Sea in 1977, and signed the UNCLOS in 1982. With the Government's Declaration on Vietnam's maritime zones on May 12, 1977, Vietnam led the region in establishing a territorial sea of 12 nm and an EEZ of 200 nm. The Government of the SRV clearly stated the principles for delimiting its territorial sea, contiguous zone, exclusive economic zone, and continental shelf in accordance with the provisions of the Working Draft of the UNCLOS. The 1977 Declaration and the Vietnamese Government's November 12, 1982 Declaration on the baseline used for determination of Vietnam's

<sup>108</sup> Chemillier-Gendreau, *supra* note 6, at 130. It reads: "The fact nevertheless remains that this particular moment in the history of the partition of Vietnam blurs the Vietnamese position. The now reunified Vietnam (through the victory of the North) must decide to which entity it is successor on this point. The territorial logic reinforces succession to the rights and actions of South Vietnam, which alone has jurisdiction from the geographical standpoint."

territorial sea created a basic legal foundation for the building of Vietnam's system of marine legislation.

On June 23, 1994, during its 5<sup>th</sup> session, the Ninth National Assembly of Vietnam passed the Resolution on the Ratification of the UNCLOS. The Resolution reflected the determination of Vietnam to build a just and equitable legal order for the seas, encouraging marine development and cooperation. It also confirmed the sovereignty of Vietnam over its internal waters and territorial sea, sovereign rights, and jurisdiction over the contiguous zone, the EEZ, and the continental shelf on the basis of the provisions of the UNCLOS and principles of international law.<sup>109</sup>

With its accession to the UNCLOS, Vietnam is entitled to a territorial sea of 12 nm, an EEZ of 200 nm, a continental shelf of at least 200 nm, which is expandable to 350 nm measured from the baseline, or to 100 nm measured from the isobar of 2,500 meters in depth. For the Paracels and Spratlys, the baselines and surrounding maritime zones will later be fixed in conformity with the UNCLOS. The Convention has served as a firm international legal ground for the struggle to protect Vietnam's seas and continental shelf, as well as its legitimate rights and interests on the sea and its sovereignty over the Hoang Sa and Truong Sa archipelagos. The UNCLOS is a common legal basis for the settlement of disputes over the maritime delimitation between Vietnam and its neighbours, contributing to creating an environment for stability, peace, cooperation, and development in the East Sea of Vietnam (SCS).

## ***B. Legal Status of Paracels and Spratlys Islands***

The question of determining the marine zones of the Paracels and Spratlys islands<sup>110</sup> was mentioned in the Resolution of the Ninth National Assembly (5<sup>th</sup> session) of the SRV on June 23, 1994, upon the ratification of the UNCLOS.<sup>111</sup>

Due to the complicated nature of the disputes over the Paracels and Spratlys, and pending negotiations, Vietnam has not defined the scope of maritime zones around the islands. The baseline and the maritime zones around the islands will be defined in future legislations, such as the Law on Maritime Zones of Vietnam, or by the

<sup>109</sup> Hong Thao Nguyen & Hai Oanh Hoang, *The Implementation of the 1982 Convention in Vietnam*, 2 PETROVIETNAM 36-44 (2005).

<sup>110</sup> *Id.*

<sup>111</sup> The resolution states that: "It is necessary to distinguish the settlement of dispute over Hoang Sa and Truong Sa from the issues of protection of the marine zones and the continental shelf under the sovereignty, sovereign rights and jurisdiction of Vietnam based on the principles and criteria of the UN Convention on the Law of the Sea 1982." *Id.*

agreements on delimitation with other concerned parties.<sup>112</sup> Through official documents on maritime zones issued by Vietnam and its practices, however, the regime of islands in the SCS must be defined according to the following three conditions: (1) The regime of offshore islands must be in conformity with the UNCLOS; (2) The regime of offshore islands cannot affect the natural extension of the continental shelf from the Vietnamese mainland as per the UNCLOS; and (3) The offshore islands cannot be given equal treatment with the land in maritime delimitation.

Paracels and Spratlys consist of a number of islands, rocks, and low-tide elevations, some of whose exact data are not yet available. However, it is generally agreed that most of them cannot sustain human habitation. Regular garrisons on the islands have been operated since World War II. The unclear definition of 'rocks' under article 121 (3) of the UNCLOS leads to different interpretations regarding the legal status of Paracels and Spratlys. Unresolved questions may include: (1) What size and height would be required in order to qualify an object as an island or rock?; (2) When is a rock capable of sustaining human habitation?; (3) In the case of uninhabited rocks, if people and governments supply construction works, water, and food, would it be possible to meet the requirements of Article 121 (3)?; (4) In relation to a rock, what is the definition of "an economic life of its own"?; (5) If a lighthouse, runway, meteorological, hydrological station, bird sanctuary, marine park, gas and oil exploration station, or other economic projects are built on a rock, would this qualify as distinct economic life?; (6) Do islands and rocks have the same regime as mainland regime?; (7) Can they be treated as mainland to get full territorial water rights, the EEZ, or continental shelf?; and (8) What is the effect of islands and rocks in delimiting the maritime zones of the mainland?<sup>113</sup> Michael Richardson and Pan Shiyong consider that in the Spratlys, only the Ba Binh island (English: Itu Aba / Chinese: Taiping Dao) satisfies the conditions under Article 121 (3) and is qualified to have its own EEZ and continental shelf.<sup>114</sup> Accounting for current operations to consolidate management of claimant parties, Yann Huei Song considers that five islands and rocks that can have their own EEZs and continental shelves.<sup>115</sup> They

<sup>112</sup> Hong Thao Nguyen, *Building a Law on Maritime Zones of Vietnam*, 12:144 VIETNAM L. & LEGAL F. 12-18 (2006).

<sup>113</sup> Hong Thao Nguyen, *South China Sea – Three Stages, Four Challenges, Two Regional Approaches and One Belief*, THE SOUTH CHINA SEA: TOWARDS A REGION OF PEACE, SECURITY AND COOPERATION 281-285 (2011), Proceedings of the International Workshop co-organized by the Diplomatic Academy of Vietnam and Vietnam Lawyers Association (Nov. 1-12, 2010)

<sup>114</sup> Michael Richardson, *Energy and Geopolitics in the South China Sea: Implication for ASEAN and the Dialogue Partners* (April 2009), DISCUSSION FORUM: INST. SOUTHEAST ASIAN STUD., available at [http://www.iseas.edu.sg/aseans\\_tudiescentre/ascd2.htm](http://www.iseas.edu.sg/aseans_tudiescentre/ascd2.htm) (last visited on Mar. 30, 2012); SHIYONG PAN, THE PETROPOLITICS OF THE NANSHA ISLANDS – CHINA'S INDISPUTABLE LEGAL CASE 162 (1996).

<sup>115</sup> Yann Huei Song, *The Application of Article 121 (3) of the Law of the Sea Convention to the Five Selected Disputed Islands in the South China Sea*, THE SOUTH CHINA SEA: COOPERATION FOR REGIONAL SEC. & DEV. 44-45 (Proceedings of

are as follows: Phu Lam Island (English: Woody Island/Chinese: Yongxing Dao), Thi Tu Island (English: Thitu Island/Chinese: Dao Zhongye/Pilipino: Pagasa), Ba Binh (English: Itu Aba/Chinese: Taiping Dao), Truong Sa (English: Spratly/Chinese: Nanwei), Hoa Lau (English: Swallow Reef/Chinese: Dan Wan Jiao/Malay: Layang Layang). Although each of these islands has an area of less than 1km<sup>2</sup>, almost all have a runway and military and civil constructions. Some islands have civilians and bases for tourism. R. W. Smith noted that many experts on the law of the sea would argue that most of, if not all, the islands in the SCS should be considered as rocks under Article 121 (3), and thus could not generate full maritime zones.<sup>116</sup> State practice and past judgments by the ICJ suggest that in view of their size, living conditions, and economic life of their own, rocks and islands in the SCS can not have the same legal effect as the mainland in generating maritime zones.<sup>117</sup>

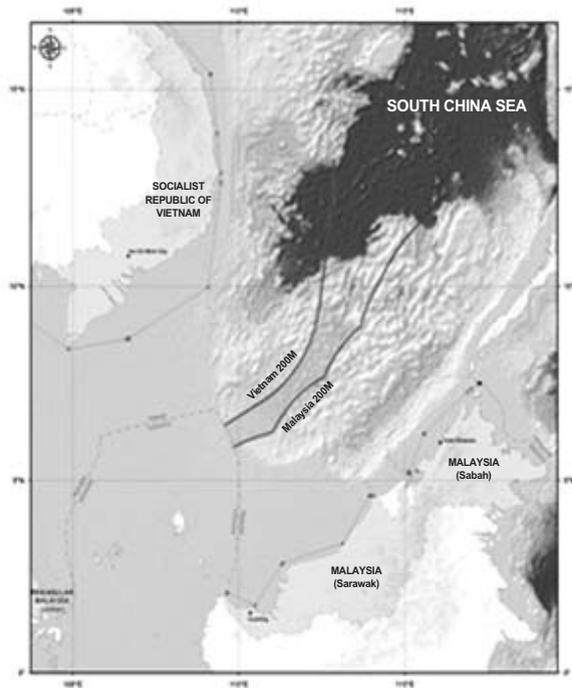
The Tu Chinh Bank case pushed Vietnam into expressing a clearer position on the regime of islands. On May 8, 1992, the Chinese National Offshore Oil Company signed with Crestone (American Oil Company) as so-called “contract on petroleum exploration on North Vanguard 21” covering the Tu Chinh bank (Chinese: Wan An Bei) on the continental shelf of Vietnam. China argued that the bank located in waters adjacent to their ‘Nansha’ (Spratlys) archipelago, so it also belongs to the ‘territory’ of China. On May 19, 1992, the Vietnamese Permanent Mission to the United Nations sent a note to State members of the organization to confirm that the Tu Chinh area “is located on the continental shelf of Vietnam, outside the periphery of the Truong Sa

the International Workshop co-organized by the Diplomatic Academy of Vietnam and Vietnam Lawyers Association, November 26-27, 2009, Hanoi, Vietnam).

- <sup>116</sup> Robert Smith, *Maritime Delimitation in the South China Sea: Potentiality and Challenges*, 41 OCEAN DEV. & INT'L L. 227 (2010). See also John Van Dyke & Dale Bennett, *Islands and the Delimitation of Ocean Space in the South China Sea*, 10 OCEAN Y.B. 54 (1993). Van Dyke and Bennett propose a 12-mile territorial sea for rocks in the Spratlys islands. See John Van Dyke & Robert Brooks, *Uninhabited Islands: Their Impact on the Ownership of the Ocean's Resources*, 12 OCEAN DEV. & INT'L L. 265 (1983); Jonathan Charney, *Rocks That Cannot Sustain Human Habitation*, 93 AM. J. INT'L L. 872 (1999); Barbara Kwiatkowska & Alfred Soons, *Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Owns*, 21 NETH. Y.B. INT'L L. 167-168 (1999); Robert Beckman & Clive Schofield, *Moving Beyond Disputes Over Islands Sovereignty: ICJ Decision Sets Stage For Maritime Boundary delimitation in the Singapore Strait*, 40 OCEAN DEV. & INT'L L. 10 (2009); Barry Hart Dubner, *The Spratly Rocks Dispute – A Rockapelago’ Defies Norms of International Law*, 9 TEMP. INT'L & COMP. L. J. 304-305 (1995); Alex Elferink, *The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?*, 32 OCEAN DEV. & INT'L L. 174 (2001).
- <sup>117</sup> Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, 18 R.I.A.A. (1977); *North Sea Continental Shelf Case*, *supra* note 94; the *Continental Shelf Case* (Tunis. v. Libyan Arab Jamahiriya), 1982 I.C.J. (Feb. 24); *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. (Oct. 12); the *Continental Shelf Case* (Libyan Arab Jamahiriya v. Malta) 1985 I.C.J. (June 3); *Delimitation of Maritime Areas between Canada and the French Republic*, 31 I.L.M. 1149-1178 (1992); *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Den. v. Nor.) 1993 I.C.J. (June 14); *Maritime Delimitation in the Black Sea* (Rom. v. Ukr.), Application 2004 I.C.J. (Sept. 16).

Archipelago.”<sup>118</sup> In fact, the Tu Chinh bank consists of the low-tide elevations located on the prolongation of the southern continental shelf of Vietnam. It is over 50 nm from the nearest island of Truong Sa (Spratlys) archipelago and separated from this archipelago by a 2,000 meters deep trench. Thus, it can not be regarded as ‘dependent’ on any island of this archipelago. The Tu Chinh area does not clearly belong to the territory, or continental shelf of China. It is 600 nm from mainland China, almost twice of maximum distance of 350 nm from the baselines provided under the international law of the sea.

Map 2: Vietnam-Malaysia Joint Submission



Source: Malaysia and the SRV, Joint Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in respect to the southern part of the South China Sea, Part I: Executive Summary (May 2009), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/mys\\_vnm2009executivesummmary.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009executivesummmary.pdf) (last visited on Apr. 24, 2012).

<sup>118</sup> Statement of the Ministry of Foreign Affairs of the Socialist Republic of Vietnam on the Agreement between Chinese and U.S. Oil Companies for the Exploration and Exploitation of Oil and Gas on the Continental Shelf of Vietnam, Press Release No. 08/BC, Vietnamese Mission to the United Nations, May 19, 1992.

The Spratlys islands can not sustain human habitation or economic life of their own, either. Therefore, they cannot have their own continental shelf, nor be regarded as an 'archipelagic State' based on which continental shelf could be claimed. This position is supported by the international community. Greg Torode mentioned that: "Not only has China no right to the Spratly Islands, but no island in the archipelago is big enough to claim a 320 km zone effectively destroying China's claim to the Wan' an Bei field."<sup>119</sup> From geological considerations, such as distance and depth provided in the UNCLOS, it is easily concluded that this area belongs to the continental shelf from the Vietnamese mainland.<sup>120</sup>

In implementing the obligations of the member States of the UNCLOS to lodge claims for extended continental shelves before the May 13, 2009 deadline, Malaysia and Vietnam submitted a joint proposal on May 6, 2009. The following day,<sup>121</sup> Vietnam also presented its own partial submission relating to the north area, located northwest of the SCS.<sup>122</sup> Both submissions present claims for extended continental shelves from the mainland; the two countries assert they are without prejudice to the maritime delimitation with other relevant coastal States. Vietnam and Malaysia pursued a policy of separating the submission for extended continental shelf beyond 200 nm from maritime disputes over insular formations. The Paracels and Spratly archipelagos, subjects to sovereignty claims in the SCS, were not mentioned as base points.<sup>123</sup> Both States seem to share the view that the disputed insular formations remain subject to negotiations, and all or almost all of them must have only territorial seas. The conducts of Brunei and the Philippines show that they have the same position on the regime of islands. In its preliminary information provided to the CLCS, Brunei informs that its future submission will be based on the continuous natural

<sup>119</sup> Greg Torode, *Vietnam offered profits of oilfield*, THE MORNING HOANAM POST, (Sept. 5, 1994).

<sup>120</sup> Mark Valencia, *The South China Sea: Potential Conflict and Cooperation*, YOGYAKARTA WORKSHOP ON MANAGING POTENTIAL CONFLICTS IN THE SOUTH CHINA SEA 2 (1992). It reads: "The area in question ... is bathymetrically continuous with the Vietnamese continental shelf and geographically and bathymetrically separated from the Spratlys islands proper."

<sup>121</sup> Malaysia-Vietnam, Executive Summary – Joint Submission in respect to the southern part of the South China Sea (May 7, 2009). See the website of the Commission on the Limits of the Continental Shelf ("CLCS"), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/mys\\_vnm2009executivesummary.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009executivesummary.pdf) (last visited on Apr. 24, 2012).

<sup>122</sup> See Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982. Partial Submission in respect of Vietnam's extended continental shelf: North area (VNM-N), Pt. I (Executive Summary): VNM-N-ES-DOC April 2009; Commission on the Limits of the Continental Shelf Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission, Submission of Socialist Republic of Viet Nam, available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/vnm2009n\\_executivesummary.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm2009n_executivesummary.pdf) (last visited on Apr. 24, 2012).

<sup>123</sup> Hong Thao Nguyen & Ramses Amer, *Coastal States in the South China Sea and Submissions on the Outer Limits of the Continental Shelf*, 42 OCEAN DEV. & INT'L L. 245-263 (2011).

prolongation of the adjacent shelf - not from the Spratly Island but from the territory of Brunei.<sup>124</sup> Under the 2009 Archipelagic Baseline Law, the Philippines put the Kalayaan Islands Group and Scarborough Shoal under “a regime of islands under the Republic of the Philippines.”<sup>125</sup> In the Note N. 000228 of April 5, 2011 sent by the Permanent Mission of the Philippines to the Secretary General of the United Nations in response to China’s Notes CML/17/2009 and CML/18/2009 dated May 7, 2009, the Philippines emphasized that “under the international law principle of *“la terre domine la mer”*... at any rate, the extent of the waters that are ‘adjacent’ to the relevant geographical features are definite and determinable under the UNCLOS, specifically under Article 121 (Regime of Islands) of this said Convention.”<sup>126</sup> On August 5, 2011 the Philippine Secretary of Foreign Affairs Albert F. del Rosario proposed to set an ASEAN Zone of Peace, Freedom, Friendship, and Cooperation (“ZoPFFC”). Under the ZoPFFC, the Philippines proposed that the relevant disputed features in the West Philippine Sea (a part of the SCS) be segregated from the undisputed waters in accordance with international law, specifically the UNCLOS.<sup>127</sup> Almost all countries in the region agreed on the status of 12 nm territorial sea for insular formations in the SCS, except the Chinese which have a ‘double standard’ on the regime of islands. In the SCS, China claims that:

[U]nder the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, as well as the Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and Continental Shelf of the People’s Republic of China (1998), China’s Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone and Continental Shelf.<sup>128</sup>

<sup>124</sup> See Brunei Darussalam’s Preliminary Submission concerning the Outer Limits of its Continental Shelf (May 12, 2009), available at [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/preliminary/brn2009preliminaryinformation.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/preliminary/brn2009preliminaryinformation.pdf) (last visited on Mar. 30, 2012).

<sup>125</sup> The Philippine Republic Act No. 9522, An Act to Amend Certain Provisions of Republic Act No. 3046, as amended by Republic Act No. 5466, to Define the Archipelagic Baselines of the Philippines, and for Other Purposes, approved 10 March 2009, available at [http://www.lawphil.net/statutes/repacts/ra2009/ra\\_9522\\_2009.html](http://www.lawphil.net/statutes/repacts/ra2009/ra_9522_2009.html) (last visited on Mar. 30, 2012).

<sup>126</sup> CLCS, The Philippines Note Verbale No. 000228 (April 5, 2011), available at [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/phl\\_re\\_chn\\_2011.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf) (last visited on Apr. 24, 2012). See also Dang Thang Nguyen & Hong Thao Nguyen, *China’s Nine Dotted Lines in the South China Sea: The 2011 Exchange of Diplomatic Notes Between the Philippines and China*, 43 OCEAN DEV. & INT’L L. 47/Appendix 1(2012) (last visited on Mar. 30, 2012).

<sup>127</sup> Foreign Affairs Secretary Albert F. del Rosario refers to the China’s “nine dash line.” See Press Release from the Department of Foreign Affairs of the Philippines on August 8, 2011, available at <http://www.gov.ph/2011/08/05/secretary-del-rosario-says-china%E2%80%99s-9-dash-line-is-%E2%80%9Ccrux-of-the-problem%E2%80%9D-in-wps-proposes-preventive-diplomacy%E2%80%9D-solutions/> (last visited on Mar. 30, 2012).

<sup>128</sup> Note Verbale No. CML/8/2011 dated April 14, 2011 of the Permanent Mission of the People’s Republic of China to the United Nations [China Note Verbale on April 14, 2011] (in response to the Philippines Note Verbale No. 000228), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2011\\_re\\_phl\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf) (last visited on Mar. 30, 2012).

The extension of the EEZ and continental shelves surrounding the Paracels and Spratlys overlap the EEZs and continental shelves extending from the mainland coasts of the other coastal countries in the SCS. Based on its claims, China opposed the normal activities of Vietnamese vessels Binh Minh 02 and Viking 02 on the continental shelf of Vietnam,<sup>129</sup> as well as the activities of the Philippines in the Reed Bank in 2011. However, China takes an opposite stance with regard to Oki-no-Tori Shima, which is used as the base point for Japan to claim extended continental shelves beyond 200 nm in the East China Sea.<sup>130</sup> According to China, Oki-no-Tori Shima is in fact a rock as per Article 121 (3) of the UNCLOS; it is only entitled to a 12 nm territorial sea. On the other hand, China holds that using archipelagic baselines around the Paracels in 1996 with the intention to claim full maritime zones for the islands, a stance that has been criticized by the United States, Vietnam, and other nations as inconsistent with the UNCLOS.<sup>131</sup> This policy is opposite with the international and regional conscience and the law of the sea.<sup>132</sup>

Vietnam claims sovereignty over land features on historic grounds, in conformity with the international law on acquisition. On the other hand, China claims on historic ground not only the features, but also the waters inside the “nine dotted line” on its maps. This line first appeared in 1947 with 11 dashes drawn in a ‘U-shape.’ Two of these dashes in the Tonkin Gulf area were later deleted.<sup>133</sup> Then, the line has come to be known as the ‘interrupted lines’ or ‘nine-dash lines.’ Only in 2009, in a map attached to the Note Verbale of May 7, 2009, objecting to the Malaysia-Vietnam joint submission and

<sup>129</sup> See *Chinese boats ‘harass’ Vietnam oil ship*, UPSTREAMONLINE, available at <http://www.upstreamonline.com/live/article258870.ece> (last visited on Mar. 30, 2012).

<sup>130</sup> Permanent Mission of the People’s Republic of China to the United Nation, New York, Note CML2/2009, Feb 2, 2009 with reference to the Japan’s Submission dated of 12 November 2008 to the Commission on Limits of the Continental Shelf concerning the outer limit of continental shelf beyond 200 nautical miles, available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/jpn08/chn\\_6feb09\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf) (last visited on Mar. 30, 2012).

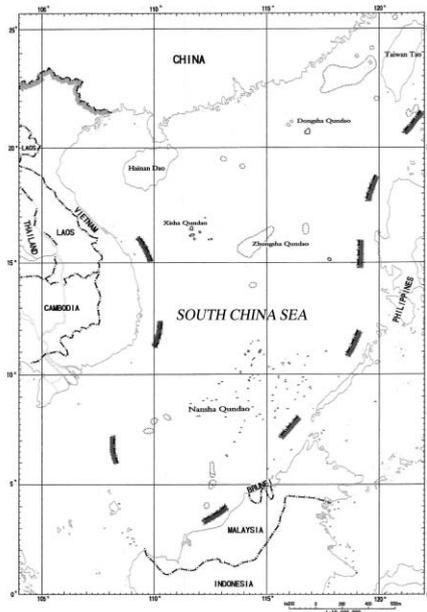
<sup>131</sup> U.S. State Department, Limits in the Seas No. 117, Straight Baselines Claim: China (July 9, 1996), available at <http://www.state.gov/documents/organization/57692.pdf> (last visited on Mar. 30, 2012). See also LAW OF THE SEA BULLETIN 32 (1996).

<sup>132</sup> Ian Storey, *Recent Developments in the South China Sea: Cause for Concern*, in WORKSHOP: THE SOUTH CHINA SEA: COOPERATION FOR REGIONAL SEC. & DEV. at 160-166 (Nov. 26-27, 2009); Leszek Buszynski, *Rising Tensions in the South China Sea and Implications for Regional Security*, WORKSHOP: THE SOUTH CHINA SEA: TOWARDS A REGION OF PEACE, SEC. & COOPERATION, at 89-101 (Nov. 11-12, 2010).

<sup>133</sup> Yann-huei Song & Peter Yu, *China’s Historic Waters in the South China Sea: An Analysis from Taiwan*, R.O.C., 12 AM. ASIAN REV. 83-101 (1994); Jiangming Shen, *International Law Rules and Historical Evidences Supporting China’s Title to the South China Sea Islands*, 21 HASTINGS INT’L & COMP. L. REV. 1-75 (1997-98); Keyuan Zou, *The Chinese Traditional Maritime Boundary Line in the South China Sea and its Legal Consequences for the Resolution of the dispute over the Spratly Islands*, 14 INT’L J. MAR. & COASTAL L. 52 (1999); Jiangming Shen, *China’s Sovereignty over the South China Sea Islands: A Historical Perspective*, 1 CHINESE J. INT’L L. 94-157 (2002); Jinming Li & Dexia Li, *The Dotted Line on the Chinese Map of the South China Sea: A Note*, 34 OCEAN DEV. & INTL. L. 287-295 (2003).

Vietnam's individual submission on extended continental shelves to the CLCS, China, for the first time in its history, notified the United Nations of its claims in the SCS by using the dotted line. The text of the Note Verbale emphasized that China has "indisputable sovereignty over the islands in the SCS and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil."<sup>134</sup> The "nine dotted line" runs near the east of the Vietnamese coastline, the north of the Malaysian State of Sarawak, along the coast of Brunei Darussalam and the Malaysian State of Sabah, and near the west of the Philippines, encompassing 80 percent of the SCS.

Map 3: U-Shape Line



Source: Map attached to the Note Verbale No. CML/17/2009 dated 7 May 2009 of the Permanent Mission of the People's Republic of China to the United Nations (protesting Malaysia-Vietnam Joint Submission to the Commission on the Limits of the Continental Shelf), *available at* [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/chn\\_2009re\\_vnm.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf) (last visited on Mar. 30, 2012).

<sup>134</sup> See Note Verbale No. CML/17/2009 dated 07 May 2009 of the Permanent Mission of the People's Republic of China to the United Nations (protesting Malaysia-Vietnam Joint Submission to the Commission on the Limits of the Continental Shelf); Note Verbale No. CML/18/2009 dated 07 May 2009 of the Permanent Mission of the People's Republic of China to the United Nations (protesting Vietnam Submission to the Commission on the Limits of the Continental Shelf). See also the CLCS website, *available at* [http://www.un.org/Depts/los/clcs\\_new/submission\\_files/submission\\_mysvnm\\_33\\_2009.htm](http://www.un.org/Depts/los/clcs_new/submission_files/submission_mysvnm_33_2009.htm) (last visited on Mar. 30, 2012).

China has never revealed exactly what it claims within the “nine dotted line.” Chinese scholars have, however, run the whole gamut of interpretations as to the nature of the line, from a national boundary claim,<sup>135</sup> (that on either all features and of the waters as historic waters,<sup>136</sup> or the islands and their adjacent waters),<sup>137</sup> to a claim of ownership of the islands and historic rights in the SCS.<sup>138</sup> Based on these arguments, China has imposed a unilateral moratorium on fishing since 1999 and arrested fishermen of other coastal States traditionally fishing in their EEZs. China has challenged the “freedom of navigation” in the SCS by harassing U.S. Navy ships.<sup>139</sup> The Chinese stance based on the “nine-dotted line” is criticized by the international community. Several countries, both claimants and non-claimants in the SCS, presented the Notes Verbales to the United Nations to protest these lines. Vietnam stated that the included map with this line has “no legal, historical or factual basis, and therefore is null and

<sup>135</sup> Zou, *supra* note 134, at 52; Li & Li, *supra* note 134. See also Hong Thao Nguyen, *China’s Nine Broken Line in the Bien Dong Sea (South China Sea) in the Light of International Law*, VIETNAM NEWS, at 4 (May. 18, 1997).

<sup>136</sup> See Pan, *supra* note 114; Peter Yu, *The Chinese (Broken) U-shaped Line in the South China Sea: Points, Lines, and Zones*, 25 CONTEMP. SOUTHEAST ASIA, republished at J. INT’L & STRATEGIC AFF. 405-430 (2003); Kuan-Hsiung Wang, *The ROC’s Maritime Claims and Practices with Special Reference to the South China Sea*, 41 OCEAN DEV. & INTL. L. 237-252 (2010); Yann-huei Song & Peter Yu, *China’s ‘Historic Waters’ in the South China Sea: An Analysis from Taiwan, R.O.C.*, 12 AM. ASIAN REV. 83-101 (1994).

<sup>137</sup> See China Note Verbale on April 14, 2011, *supra* note 128, China claims that: “The China’s Nansha islands is fully entitled to Territorial Sea, Exclusive Economic Zone and Continental Shelf,” available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2011\\_re\\_phl\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf) (last visited on Mar. 30, 2012). See also Zhiguo Gao, *The South China Sea: From Conflict to Cooperation?*, 25 OCEAN DEV. & INTL. L. 346 (1994), The Judge of the ITLOS stated that: “The boundary line on the Chinese map is merely a line that delineates ownership of islands rather than a maritime boundary in the conventional sense.”

<sup>138</sup> See Article 14 of the Economic Zone and Continental Shelf Act, adopted at the third session of the Standing Committee of the Ninth National People’s Congress of the People’s Republic of China (June 26, 1998), available at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn\\_1998\\_eez\\_act.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf) (last visited on 24 April 2012). See also Yann-Huei Song and Zou Keyuan, *Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States*, 31 OCEAN DEV. & INTL. L. 303-345 (2000); Ji Guoxing, *Outer Continental Shelf Claims in the South China Sea: A New Challenge to the China’s U shaped line*, in INTERNATIONAL WORKSHOP: NON-TRADITIONAL SECURITY COOPERATION IN THE SOUTH CHINA SEA IN HAIKOU (May 20-22, 2010); Nozomu Hayashi, *Official says Beijing has ‘Historical Rights’ over South China Sea*, ASAHI SHIMBUN(Daily) Jan. 26, 2012, available at <http://ajw.asahi.com/article/asia/AJ201201260061> (last visited on Mar. 30, 2012). In the interview with Asahi Shimbun, Wu Shicun, president of the National Institute for South China Sea Studies, in Haikou, Hainan province, explained the rationale for Beijing’s territorial claims that: all islands lying within the “cow’s tongue”(nine dotted line) belong to China, and that China has ‘historical rights,’ including fishing rights, over the surrounding waters.

<sup>139</sup> Carlyle Thayer, *Recent Development in the South China Sea: Implications for Peace, Stability and Cooperation in the Region*, INTERNATIONAL WORKSHOP ON THE SOUTH CHINA SEA IN HANOI (Paper presented to the Second International Workshop on the South China Sea: Cooperation for Regional Security and Development, co-sponsored by the Diplomatic Academy of Vietnam and the Vietnam Lawyers’ Association) (Nov. 27, 2009), available at <http://www.scribd.com/doc/42829909/Thayer-Recent-Developments-in-the-South-China-Sea-Implications-for-Regional-Security> (last visited on Mar. 30, 2012).

void.”<sup>140</sup> According to Indonesia, China has “no clear explanation as to the legal basis, the method of drawing, and the status of those separated dotted-lines.”<sup>141</sup> Therefore, according to Indonesia, the “so-called “nine-dotted line map” as contained in the above circular note number CML/17/2009 dated May 7, 2009, clearly lacks international legal basis and is tantamount to upset the UNCLOS.”<sup>142</sup> The Philippines, by their Note Verbale of April 5, 2011, invoke the principle that “the land dominates the sea” to strongly challenge the validity of the nine-dotted line.<sup>143</sup> This position is supported by Secretary Hilary Clinton at the 17<sup>th</sup> ASEAN Regional Forum (“ARF”) Meeting in Hanoi on July 23, 2010. There, she stated that: “Consistent with customary international law, legitimate claims to maritime space in the South China Sea should be derived solely from legitimate claims to land features.”<sup>144</sup>

Some remarks can be made with regard to the Chinese “nine dotted line.” First, regardless whether it was globally published in 1947,<sup>145</sup> or officially introduced to the international community only on May 7, 2009, the meaning of the “nine dotted line” has been unclear. Second, the origin of this line is merely a private publication.<sup>146</sup> Third, the “nine dotted line” is neither stable, nor clearly defined. This line initially had eleven segments, and then nine segments. Could it have been changed arbitrarily without official reason? This line has also been drawn without specific coordinates. According to international law, a boundary line must be stable, certain, and final.<sup>147</sup> Would the “nine dotted line” be considered as a boundary line without specific coordinates, with the interrupted line and voluntary changes? Such an unclearly defined and unstable line

<sup>140</sup> Note Verbale No. 86/HC-2009 dated 08 May 2009 of the Permanent Mission of the Socialist Republic of Vietnam to the United Nations (in response to Notes Verbale No. CML/12/2009 of 13 April 2009, CML/17/2009 of 07 May 2009 and CML/18/2009 of 07 May 2009 of the Permanent Mission of the People’s Republic of China to the United Nations) (Vietnam’s 2009 Note Verbale). See the CLCS website, available at [http://www.un.org/Depts/los/clcs\\_new/submission\\_files/submission\\_mysvnm\\_33\\_2009.htm](http://www.un.org/Depts/los/clcs_new/submission_files/submission_mysvnm_33_2009.htm) (last visited on Mar. 30, 2012).

<sup>141</sup> Note Verbale No. 480/POL-703/VII/10 dated 08 July 2010 of the Permanent Mission of the Republic of Indonesia to the United Nations (in response to Note Verbale No. CML/17/2009 dated 07 May 2009 of the Permanent Mission of the People’s Republic of China) (Indonesia’s 2010 Note Verbale), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/idn\\_2010re\\_mys\\_vnm\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf) (last visited on Mar. 30, 2012).

<sup>142</sup> *Id.*

<sup>143</sup> Note Verbale of the Philippines on 05 April 2011, *supra* note 126.

<sup>144</sup> Thayer, *supra* note 2.

<sup>145</sup> Kuan-Hsiung Wang, *The ROC’s Maritime Claims and Practices with Special Reference to the South China Sea*, 41 OCEAN DEV. & INT’L L. 238 (2010).

<sup>146</sup> Erik Franckx & Marco Benatar, *Dotted Lines in the South China Sea: Fishing for (Legal) Clarity*, 2 ASIAN J. INT’L L. 91 (2012), at n. 5, Zou Keyuan mentions the existence of an even earlier line in the South China Sea drawn up by a Chinese cartographer, Hu Jinjie, in 1914 and subsequently in the 1920s and 1930s. Nonetheless, it must be stressed that: (1) these earlier apparitions are prior to the first official map depicting the ‘U line’ and (2) the aforementioned atlases were compiled by individuals, thus acting in personal capacity.

<sup>147</sup> *Temple at Prear Vihear Case*, *supra* note 94, at 35.

may neither satisfy the provisions of international law, nor support a legitimate claim. Fourth, before the “nine dotted line” was printed by the ROC Ministry of Interior, France sent naval vessels and troops to reoccupy the Paracels and Spratly Islands in 1946 to maintain the sovereign title it inherited from both the Vietnamese Dynasties and the 1933 French operations to possess Spratly Islands in accordance with international law. This was a symbolic act to oppose China’s intention of claiming the two archipelagos in drawing the “nine dotted line.” Fifth, the 1951 San Francisco Peace Treaty did not mention the “nine dotted line.” Furthermore, the statement of Prime Minister Zhou Enlai in 1951 on the draft Treaty of San Francisco did not mention the “nine dotted line.” Therefore, it is wrong to claim that there has been international recognition of the “nine dotted line.” Sixth, the actual dispute between Vietnam and China on sovereignty over the two archipelagos of Hoang Sa and Truong Sa as well as the demands of the Philippines, Malaysia, Brunei for the Spratly Islands entirely or partly show that it is impossible for the “nine dotted line” in the SCS to be recognized by the other countries. Seventh, even countries not involved in the dispute, such as the United States and Indonesia, have expressed their disagreement over this line. Eighth, China itself has not at any stage recognized, by subsequent practice or official documents, the significance of the “nine dotted line.” It has declared that outside the 12 nm territorial sea of the Chinese islands there is the high sea (Declaration on China’s Territorial Sea of 1958), continuous zone (Law on Territorial Seas and Contiguous Waters Zone of 1992), the EEZ, and continental shelf (Chinese EEZ and Continental Shelf Act of 1998). However, the limits of these maritime zones drawn in accordance with the UNCLOS have never coincided with the “nine dotted line.” In the *Dubai/Sharjan* case of 1981, the Arbitral Award mentioned that: “The principle of the stability of boundaries – boundaries established here by administrative decisions and not arising by Treaty or in consequence of an arbitral award – depends precisely upon their recognition and effective application in subsequent practice.”<sup>148</sup> Obviously, the “nine dotted line” has not got any recognition or effective application in subsequent practice.

In addition, the Chinese argument that the “nine dotted line” indicates historic waters is not convincing.<sup>149</sup> First, *Travaux Préparatoires* to the UN Conference on the Law of the Sea of 1958, in the list of the world’s historic waters, do not mention the U-shaped historic waters in the SCS. Second, according to Article 15 of the UNCLOS, the concept of historic title can be applied only during the delimitation of the territorial sea of 12 nm between States with the opposite or adjacent coasts in exceptional case. There is no

<sup>148</sup> INTERNATIONAL LAW REPORTS, vol. 91, at 584 (Lauterpacht & Greenwood eds. 1993).

<sup>149</sup> Franckx & Benatar, *supra* note 146, at 216.

provision in the UNCLOS for historic titles to the sea beyond 12 nm from the baseline, while the “nine dotted line” is several hundred nautical miles from China’s coast. Third, the concept of historic waters is inconsistent with the laws, regulations, and official statements of China on territorial waters, the EEZ, and the continental shelf. By the 1958 Declaration on the Territorial Sea, China recognized the high sea outside the territorial sea. China’s 1996 ratification of the UNCLOS implies that whatever historic rights were claimed by China over natural resources before that date, in areas that are now the EEZ or continental shelf of other States, must be given up, because legal relations between State members of the UNCLOS including China are now governed by the Convention. China cannot use its domestic law as an excuse not to fulfil its international obligations under the UNCLOS.<sup>150</sup> Fourth, the “nine dotted line” is arbitrarily drawn; it starts from neither the mainland, nor an island. It is inconsistent with the principle that: “The land dominates the seas.” Such a line cannot grant the claimant country a marine zone that would be inconsistent with the provisions of the UNCLOS, or sovereignty over the islands and reefs within this line. Fifth, the “nine dotted line” affects not only countries having sovereignty disputes, but also the rights and freedoms of navigation, the maritime and airspace security of the regional and the world communities.

#### **4. Vietnamese Position on the Settlement of Disputes in the South China Sea**

Having been a victim of the use of force in the sovereignty disputes over the Paracels and the Spratlys, Vietnam recognizes very well the value of peace; it tries to pursue peaceful settlement of disputes in the SCS. This position has been reaffirmed in all Vietnamese official texts and speeches, such as the Government Declarations of 1977 and 1982. The National Resolution on ratification of the UNCLOS in 1994 states that:

The National Assembly reaffirms the sovereignty of Vietnam over the two archipelagos of Hoang Sa and Truong Sa and Vietnam advocates the settlement of differences related to Bien Dong through peaceful negotiations, based on equity, understanding, and mutual respect in conformity with international law, especially the UN Convention on the Law of the Sea 1982, respect of the sovereignty and jurisdiction of the coastal States in the EEZ and the continental shelf. While endeavouring to advance the negotiations for seeking fundamental and long-term

<sup>150</sup> Beckman, *supra* note 6 at 13; Vienna Convention on the Law of Treaties art. 27.

solutions, the parties involved must maintain stability and the status-quo, avoid complicating the situation, avoid the use of force or the threat of using force.<sup>151</sup>

In addition, Vietnam also advocates the settlement of maritime disputes through direct negotiations in good faith on the basis of mutual respect for the legitimate rights and interests of the involved parties in order to reach an agreement on an equitable and reasonable solution accepted by all the parties. This view of Vietnam is entirely in accordance with Article 33 of the United Nations Charter, Articles 74 and 83 of the UNCLOS, and other international law and custom.

In Southeast Asia, Vietnam has taken the lead in the settlement of maritime delimitation issues in accordance with the UNCLOS. It has signed the Agreement on Maritime Delimitation with Thailand on August 9, 1997, the Agreement on the Delimitation of Bac Bo (Tonkin) Gulf, the Agreement on Fishery Cooperation in Bac Bo Gulf with China on December 25, 2000, and the Agreement on the delimitation of the continental shelves with Indonesia on June 26, 2003.<sup>152</sup>

Vietnam has, however, not stuck to a rigid view. In negotiations to reach a final delineation solution, if necessary and on the basis of mutual agreement, Vietnam and its counterpart countries may elect to make provisional arrangements in the spirit of Articles 74 and 83 of the UNCLOS. Vietnam has recognized historical waters under the joint management with Cambodia since 1982. In 1992, it has reached an agreement with Malaysia on joint petroleum exploitations in the overlapping area, and then, accelerated negotiations on joint petroleum exploitations in the overlapping areas of Vietnam, Thailand, and Malaysia (negotiations started in 1998). The form of joint exploitation has been also applied to delimited areas such as the Common Fishery Zone and the Transitory Fishery Zone with China in Bac Bo Gulf (entered into force on June 30, 2004). With its practice and experience, Vietnam is one of the countries which have the most joint exploitation agreements in the world. However, Vietnam has never accepted the idea of “Chinese sovereignty, setting aside disputes and pursuing joint development.”<sup>153</sup>

Regarding disputes in the SCS, Vietnam has taken many initiatives in seeking peaceful settlement through both bilateral and multilateral channels. A forum has been created for negotiations on maritime issues with China since 1993. In 1994, the Joint Oceanographic

<sup>151</sup> Nguyen & Hoang, *supra* note 109.

<sup>152</sup> Ramses Amer & Hong Thao Nguyen, *Vietnam's Border Disputes: Legal and Conflict Management Dimension*, 12 ASIAN Y.B. INT'L L. 111-128 (2005-2006).

<sup>153</sup> China's then prime minister Li Peng launched the Chinese proposal and model for joint development in 1990. For details on the proposal as well as a detailed overview of China's policies toward the South China Sea in the 1990s, see LAI TO LEE, *CHINA AND THE SOUTH CHINA SEA DIALOGUES* (1999). See also Nguyen & Amer, *A New Legal Arrangement for the South China Sea*, *supra* note 6.

Marine Scientific Expedition in the SCS has been initiated by the leaders of Vietnam and the Philippines. This initiative has been repeated several times in the following years. In November 1995, Vietnam signed with the Philippines a document on an eight-principle code of conduct in the East Sea of Vietnam (SCS). Clause 7.16 of the Hanoi Declaration of the 6<sup>th</sup> ASEAN Summit in 1998 proposed that the ASEAN member countries vigorously step up efforts in formulating a Code of Conduct in the East Sea of Vietnam among the parties concerned. Vietnam and the Philippines have drafted the ASEAN Code of Conduct<sup>154</sup> and made great contributions to the signing of the ASEAN — China DOC on December 4, 2002.<sup>155</sup> The DOC was the first political document, opening the way for marine cooperation activities among the related parties in less sensitive fields in order to build confidence and trust.

In 2005, the “Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area” was signed by the three national oil companies of China, the Philippines, and Vietnam: the Chinese National Offshore Oil Company (“CNOOC”), the Philippines National Oil Company (“PNOC”), and the PETROVIETNAM. The Agreement was considered as a first step to implement the DOC.<sup>156</sup> In 2010, when Vietnam was the Chairman of ASEAN, the 17<sup>th</sup> ARF and the 1st ASEAN Defence Ministers Meeting (“ADMM”) and Conferences in Hanoi reiterated the necessity to strength the conflict management mechanism in the SCS. In 2011, during the 18<sup>th</sup> AMM meetings in the Indonesian island of Bali, the ASEAN and China agreed to the Guidelines for the implementation of the Declaration on the Conduct of Parties in the South China Sea (DOC Guidelines). This shows the determination of Vietnam and other members of the ASEAN to persuade China of the need to control and manage disputes in the SCS.<sup>157</sup>

In October 2011, Vietnam concluded with China the Agreement on Basic Principles Guiding the Settlement of Sea Issues.<sup>158</sup> This Agreement will help the two sides speed up negotiations on marine issues and seek fundamental and long-term solutions acceptable to both sides. At the same time, they actively discuss ways of finding transitional and

<sup>154</sup> Hong Thao Nguyen, *Vietnam and the Code of Conduct for the South China Sea*, 32 OCEAN DEV. & INTL L. 105-130 (2001)

<sup>155</sup> Hong Thao Nguyen, *The 2002 Declaration on the Conduct of Parties in the South China Sea: A Note*, 34 OCEAN DEV. & INTL L. 279-285 (2003). See also Wu Shicun & Ren Huaifeng, *More than a Declaration: A Commentary on the Background and the Significance of the Declaration on the Conduct of Parties in the South China Sea*, 3 CHINESE J. INT’L L. 311-19 (2003).

<sup>156</sup> Nguyen & Amer, *A New Legal Arrangement for the South China Sea*, *supra* note 6.

<sup>157</sup> Thuy Chung, *ASEAN-China agree on East Sea guidelines*, VIETNAMNET BRIDGE (July 20, 2011), available at <http://english.vietnamnet.vn/en/politics/10911/asean-china-agree-on-east-sea-guidelines.html> (last visited on Mar. 30, 2012).

<sup>158</sup> VNA, *Vietnam-China Joint Statement*, October 16, 2011, available at <http://vna/Agreement15102011seapinciples/vietnam-china-joint-statement-2011.htm> (last visted on Mar. 30, 2012).

temporary measures that do not affect each side's stance and policies, including research and discussions on cooperation for mutual development. The basis of settlement of maritime disputes in the SCS can be summarized as follows:

- Legal regime and principles defined by international law, including the 1982 UN Convention on the Law of the Sea;
- Agreements and common perceptions reached by the high-ranking leaders; and
- Adherence to the principles and spirit of the ASEAN-China DOC.

The sea-related disputes between Vietnam and China (the Paracels and maritime areas outside the mouth of the Tonkin Gulf) shall be settled through friendly talks and negotiations. Vietnam holds the position that disputes relating to other countries (the Spratlys disputes) shall be settled through negotiations with other parties concerned.<sup>159</sup>

## 5. Conclusion

In this article, the author has addressed both the Vietnamese position on the sovereignty disputes over the Paracels and Spratlys, and the maritime zones in the SCS. The disputes in the SCS have existed for a long time. They have been seriously affecting the economic development of every affected coastal State, regional stability and peace, and the interests of the international community. The settlement of these disputes requires the efforts of all claimants, of the whole region, and of the international community. In summary, the Vietnamese position to the disputes in the SCS is based on the three points: (1) Vietnam's sovereignty over the Paracels and Spratlys; (2) adherence to the UNCLOS in the determination and delimitation of the maritime zones of islands; and (3) rejection of the "nine dotted line," the main obstacle to any settlement of dispute in the SCS by peaceful means.

The key elements to resolving this impasse must be based on confidence and trust between parties, and willingness to respect and follow international law. The sovereignty disputes need to be solved directly by the parties involved through peaceful means. Maritime disputes must be dealt with on the basis of compliance with the UNCLOS. Bilateral issues must be resolved on a bilateral basis. On the other hand,

<sup>159</sup> VNA, Vietnam-China Sign Agreement on Basic Sea Principles, October 12, 2011, *available at* <http://vna\Agreement15102011seaprinciples\vn-china-sign-agreement-on-basic-sea-principles-1.47607.htm> (last visited on Mar. 30, 2012).

multilateral issues must be resolved on a multilateral basis. The latter path is what Vietnam has chosen.

