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Vietnam's evolving claims in the South China Sea

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Vietnam is a claimant in the South China Sea disputes. Its claims for sovereignty of islands and maritime regions of the sea overlap either wholly or partly with those of Brunei, China, Taiwan, Malaysia, and the Philippines. This paper examines the evolution of the claims of unified Vietnam to maritime territories in the South China Sea since 1975 and compares them with the provisions of the United Nations Convention on the Law of the Sea (UNCLOS). To this end, the paper will look into Vietnam's policy positions, its responses to major incidents, and the outcomes of negotiations with its neighbours. It also examines Vietnam's legal actions to trace continuity and changes in its maritime regulations. After that, the paper attempts to map out the main determinants behind these changes.

Claimed maritime zones as security buffers before *Doi Moi*, 1986

After unification in 1975, Vietnam allegedly pursued expansive claims in its East Sea, internationally referred to as the South China Sea. Vietnam asserted its longstanding claim to sovereignty over the entire Paracel and Spratly clusters of islets – referred to in Vietnamese as Hoang Sa and Truong Sa respectively – on a historical basis. It published three White Papers in 1979, 1981 and 1988, and presented a wide range of historical data to prove its peaceful acquisition of – and continuous, effective administration over – the island groups by different Vietnamese state authorities since the feudal reign of the seventeenth century. Additionally, Hanoi contested the legitimacy of China's use of force to expel the Vietnamese from the Paracel Archipelago in January 1974 and some Spratly reefs in March 1988.

Hanoi also relied on the nascent legal order of the ocean to claim a range of rights and jurisdictions over a large expanse of maritime areas. However, four claims of Vietnam were seemingly inconsistent with the law of the sea provisions. First, in a statement published in May 1977, Hanoi claimed a full suite of maritime zones stipulated by UNCLOS not only for its mainland coast but also for its offshore 'islands and archipelagos'.¹ Though no specific names of islands and archipelagos were

mentioned, it is a reasonable assessment that Hanoi sought to establish Exclusive Economic Zones (EEZs) and continental shelf entitlements for the Spratly and Paracel features.² It was a controversial issue as to whether these insular features could be considered as fully fledged islands that could generate EEZs and continental shelves of their own: almost all these features are remote, small, barren, and largely unable to host permanent human habitation without regular supplies.

Second, Hanoi also proposed to apply the status of 'historic waters' and use the north-south red line in the 1887 Franco-Chinese Treaty as the boundary line in the Gulf of Tonkin. The Vietnamese legal experts argued in favour of the title of 'historic waters' on the basis of longstanding usage and control of the gulf on the part of France/Vietnam and China. Additionally, they stressed the important security and defense aspects of the gulf, recalling that invasion forces had used it as a staging ground in the past. By the argument of 'historic waters', Hanoi clearly wanted to exercise greater control of an area that was critical to its defence. Though the concept is a part of international customary law, it was a contentious issue and was not recognised by UNCLOS in 1982.

Third, in November 1982 Vietnam followed the practices of some countries in the region to delineate straight baselines deriving from the central and southern parts of its coastline.³ Some proximal offshore islands were selected as base points because they were said to constitute 'a fringe in the immediate vicinity of coast' as prescribed by UNCLOS, and play an important role in the defense system for the south of Vietnam.⁴ Nevertheless, some legal experts were critical of Vietnam's baseline position. They said that the straight baseline model enabled Vietnam to incorporate significant sea area into its internal waters, more than if low waterline and closing lines were used across the many mouths of the Mekong River.

2 Article 121 of UNCLOS 1982 stipulates that the island is entitled to the EEZ and continental shelf while rocks, which are unable to sustain human habitation and economic life of their own, are not.

3 Declaration on the Baseline of the Territorial Waters of the Socialist Republic of Vietnam, issued on 12 November 1982.

4 Hai Thanh, 'The Baseline of Vietnam's Territorial Waters', *Nhan Dan* (Hanoi), 15 November 1982.

1 Statement on Territorial Sea, Contiguous Zone, and Continental Shelf issued by the Socialist Republic of Vietnam on 12 May 1977.

Lastly, Hanoi also applied restrictions on foreign vessels' navigation through its territorial waters and contiguous zones. UNCLOS defends innocent passage, which is defined as traversing or proceeding to and from internal waters that is not prejudicial to the peace, good order or security of the coastal state.⁵ However, Vietnam adopted a number of rules that denied the right of innocent passage for warships not only in the territorial sea but in many circumstances also in the contiguous zone. Vietnam's Decree No. 30-CP dated 29 January 1980 on Regulations for Foreign Ships operating in Vietnamese Maritime Zones ruled that all foreign military vessels needed to apply for permission 30 days before traversing its territorial sea and contiguous zones.⁶

Though these claims were made prior to the signing of UNCLOS in December 1982, the Vietnamese were obviously aware of the consensus reached at UNCLOS negotiations at related points of time. Hanoi's radical interpretations of the law of the sea primarily reflected its national security concerns in the post-war period. Because of Vietnam's elongated mainland territory, the maritime corridor provides a platform from which to maintain the cohesion of the north and south, thereby helping to retain national unity. The longstanding history of struggles for national independence clearly shaped its self-defensive apprehension of international affairs. Vietnam's limited naval capabilities and the lack of a hinterland created a critical consciousness of its coastal vulnerabilities. Vietnamese leaders seized the opportunity created by the emerging oceanic order to create a buffer zone around its coast. It should be noted that the Vietnamese notion of international law at that time was heavily influenced by socialist ideology and Soviet scholarship, which highlighted socialist and capitalist confrontation. Thus, international law was seen as a tool to further sovereignty rather than a means of regulating relations among nations; there was no regret for not being strictly loyal to legal texts. Last but not least, Hanoi clearly deferred to its alliance with the Soviet Union in protection of its territories.

Shifts in Vietnam's maritime interests after *Doi Moi*

Since the mid-1980s, economic development had become the highest priority for the Vietnamese leadership. Amid a severe socio-economic crisis, the Communist Party of Vietnam (CPV) initiated a package of reforms, known as *Doi Moi*, intended to transform the crippled, centrally planned economy into a market economy. Economic reform was followed by foreign policy reorientation. Departing from traditional advocacy of socialist internationalism and the deliberate use of force, Hanoi asserted its new foreign policy of diversification and multilateralisation in order to create a peaceful and stable external environment favourable to economic development. To this end, Vietnam decisively moved to improve its relations with neighbouring countries. These changes delineated the contours of Vietnam's maritime interests.

In the first place, as peace and stability in all the frontiers became a pressing need, Hanoi grew increasingly interested in maintaining the status quo and self-restraint, and in promoting settlement of the offshore islands disputes. Though convinced that its claims had a better historical and legal basis than those of others, Hanoi was not in the position to press its territorial claims forcefully, given its modest naval and air capabilities as compared with China, and the absence of a counterbalancing ally. Also, overt competitive strategies – such as the aggressive pursuit of territorial integrity or offensive military capacity – could derail its focus on economic development and its efforts to expand cooperation with its neighbours. Therefore, the disputes over the island groups were viewed as historical differences that should be resolved peacefully.

In addition to this, because Vietnam's top priority shifted to economic development, physical control of the remote, barren islets became less pressing while the rights to maritime resources and safety at sea gained importance. For the initial phase of *Doi Moi*, in the face of the US-led embargo offshore crude oil was Vietnam's major source of hard currency and the key attraction for foreign investment. The marine fishing industry also grew quickly, providing an important source of protein and a livelihood base for many communities inhabiting the 3260 km coastline, as well as products for export. Moreover, Vietnam's increased trade with the world's markets has made maritime transportation more important. As a result,

5 Article 18 and 19, United Nations Convention on the Law of the Sea, signed in 1982.

6 Article 3 (c), Vietnam's Decree No. 30-CP dated January 29 1980 on Regulations for Foreign Ships operating in Vietnamese Maritime Zones.

Vietnam has become increasingly interested in freedom and safety of navigation.

The shifts in Vietnam's maritime interests have been manifest in key documents regarding maritime development. On 22 September 1997, the CPV Politburo issued Directive 20-CT/TW on the industrialisation and modernisation of the Vietnamese maritime economy. On 9 February 2007, the CPV Central Committee adopted Resolution 09-NQ/TW on Vietnam's maritime strategy to 2020. The details of these documents remain classified, but the key principles were mentioned in the media. The goal was to develop Vietnam into a major maritime power to better exploit and control its maritime domain. The idea was that the development of a maritime economy would lay a strong foundation for national defence, maritime security and international cooperation. In this vein, a strong maritime economy was regarded as of paramount strategic importance to the defence of the country.

Changes in Vietnam's law of the sea claims

After *Doi Moi*, Vietnam maintained its longstanding claim to the Paracels and Spratlys in their entirety, and on a historical basis. There has been no indication that Hanoi would move to clarify the limits of its claim to the archipelago and specific islands, or would be willing to make any compromise on these offshore territories. The Vietnamese leaders would resist any call to reveal their bottom line before China, the biggest claimant, clarifies its sovereignty claims and before the legal regimes which could be applied to these features are decided. However, commentators have observed that Vietnam has prudently adopted some important changes to make its law of the sea claims more consistent with UNCLOS. The sequence of events demonstrates that this behaviour is more the product of strategic and economic necessity than anything else. China's legally unjustifiable claims and its assertive actions figured significantly in this shift in Vietnam's approach.

First, Vietnam dropped its claim to a regime of 'historic waters' in the Gulf of Tonkin. On 25 December 2000, Vietnam and China signed an agreement that mapped out a single line defined by coordinates for both EEZ and continental shelf boundaries. The coordinates defined in the

agreement showed that an equidistant line with slight modifications that reflect the impact of the coastal and mid-ocean islands was used as a boundary line. It is apparent that Vietnam's claim to 'historical waters' would set a precedent legitimising China's so-called U-shaped line claim, which encompasses 80 per cent of the South China Sea. China also argued that the red line in the 1887 Franco-Chinese Treaty was intended to divide the islands and was not a maritime boundary. China's arguments prompted Hanoi to keep to the UNCLOS text closely in order to identify a more reasonable way to divide the gulf.

Second, Vietnam also moved to clarify the outer limits of the maritime zones it claimed. In a joint submission with Malaysia to the Commission on the Limits of the Continental Shelf (CLCS) in May 2009, Hanoi provided precise coordinates for the limits of the EEZ and extended continental shelf – beyond 200 nm – measured from the baseline of its mainland coastline. No EEZ or continental shelf was delineated for the Spratly and Paracel features. Supposedly, Vietnam implied that the South China Sea offshore islands might be rocks that were not entitled to an EEZ and continental shelf, or may have very limited weight in maritime delimitation. Clearly, if Vietnam was of the view that the Spratly and Paracel features had EEZs and continental shelves of their own, it could negatively influence the CLCS's work. This positional change dates to China's contract with US Crestone Energy Cooperation in 1992. In this contract China offered the right to Crestone to explore the Vanguard Bank area (Tu Chinh in Vietnamese), which is 700 nm from mainland China but only 135 nm from the Vietnamese coast, or 84 nm from Vietnamese coastal islands. China brazenly argued that this area was part of the 'adjacent waters' of the Spratlys, which it claimed, while Vietnam maintained that Tu Chinh lies fully in its continental shelf.⁷ This contract created tensions throughout the 1990s. Despite its signature of the Declaration on Conduct of the Parties in the South China Sea in 2002, China carried out a wide range of unilateral measures to establish de facto control over the area within the nine-dash line. On many occasions China harassed and seized Vietnamese fishing vessels, prevented Vietnamese ships from carrying out exploration activities, and exerted pressure on foreign companies involved. China's

7 Thao, Nguyen Hong. 'Vietnam and the Code of Conduct for the South China Sea.' *Ocean Development and International Law*, vol.32, no. 2, 2001, p.106.

unreasonably expansive claim and muscling actions pushed Vietnam into formulating a clearer position on its claimed maritime zones. Though anticipating that China would protest against its submission, Vietnam persisted with survey and data collection and submitted CLCS reports as an assertion of its rights under UNCLOS.

Vietnam also modified its controversial position regarding the right of innocent passage. The right is recognised in the Law of the Sea of Vietnam, adopted by the National Assembly in June 2012. The law was adopted in the context of increased tension resulting from China's illegal seizure of Vietnamese fishing boats and cable-cutting incidents relating to Vietnamese survey ships. In its previous legal instruments Vietnam demanded that the military vessels proceeding through its territorial sea and contiguous zone must have its authorisation 30 days before passage. The new maritime law stipulates that for these vessels to traverse its territorial sea, they must provide prior notification to competent authorities in Vietnam:⁸ no specific timeframe is mentioned. The change indicated Vietnam's compliance with international law – in contrast to China – particularly UNCLOS 1982.

However, to the disappointment of many legal experts – and after considerable debate among Vietnamese experts on this issue – the new law does not entail any revisions to the baseline models proposed in the 1982 Declaration. The law also stipulates that 'in case of differences between this law and international treaties to which the Socialist Republic of Vietnam is a party, the provisions of these international treaties will be applied.'⁹ Seemingly, this provision was designed to leave the door open for changes resulting from negotiated agreements in the future.

In short, Vietnam's claim to sovereignty over the Paracel and Spratly archipelagos in their entirety as based on justifications of historical use remains unchanged. However, after Doi Moi, Hanoi has carefully redefined its claims to maritime zones and jurisdictions to make them more consistent with international law, particularly UNCLOS 1982. Specifically, the Vietnamese government has clarified the limits of its EEZ and continental shelf claim measured from the baseline of its mainland,

the implication of which is that the Spratly and Paracel features do not qualify as fully fledged islands. It abandoned its claim to 'historic waters' in relation to the Gulf of Tonkin, paving the way to the conclusion of the Vietnam–China agreement on maritime delimitation in the gulf on the basis of UNCLOS in 2000. Vietnam also modified its stance to recognise the right of innocent passage of foreign military vessels in its territorial sea. These cooperative changes on the part of Vietnam have been shaped by two important developments. First, Vietnam has been increasingly interested in exploring and exploiting maritime resources for its own development. Second, China's expansive claims and its assertive actions to enforce these claims may have made the Vietnamese leaders aware that the costs of radically bending international law to Vietnam's own advantage were greater than the benefits gained. Consequently, Hanoi has gradually moved from an approach that seeks to maximise its gains at the expense of international law to a strategy that minimises Vietnam's potential loss.

8 Article 12 (2), Vietnam Law of the Sea, Adopted in June 2012.

9 Article 2 (2), Vietnam Law of the Sea, Adopted in June 2012.