

# The legal elephant in the room: Will Vietnam drag China to court over the South China Sea?

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Will Vietnam follow the Philippines' example and bring China to court over the territorial dispute in the South China Sea? It was the main question that was asked during the 11th South China Sea Conference held on 6 and 7 November 2019 in Hanoi, Vietnam. Co-organized by the Diplomatic Academy of Vietnam, the Foundation for East Sea Studies and the Vietnam Lawyers Association, this year's conference took place exactly a decade after its first iteration in 2009, again emphasising its subtitle 'Cooperation for Regional Security and Development'. Interestingly, the conference coincided with the twenty-fifth anniversary of the United Nations Convention on the Law of the Sea (UNCLOS). This fact was not lost on the hosts, since a special session was devoted to highlighting the importance of this legal framework governing the oceans, sometimes referred to as the constitution of the oceans. The treaty, concluded in 1982, came into force in 1994 after Guyana became the sixtieth

country to ratify the convention in 1994.

This yearly 'Track II' conference brings together officials, diplomats, scholars and experts from a wide variety of countries in a less formal setting, joining forces to foster solutions for the web of maritime disputes and related problems such as piracy, overfishing and environmental degradation. Moreover, the conference can be seen as a way for Vietnam to hedge against - and create leverage over - its giant neighbour China by internationalizing the South China Sea disputes, trying to involve both regional and non-regional actors in support of UNCLOS and, in doing so, garner support for the Vietnamese position as well. At this year's event, the most discussed topic seemed to be 'arbitration', a word that - until recently - was only sparingly used by Vietnamese diplomats in the context of the South China Sea disputes, because of the serious disadvantages that this legal option can also entail for Vietnam.

In light of the regular Chinese infringements on the Exclusive Economic Zones (EEZ's) of the other coastal states of the South China Sea, (EEZ's which were instituted under this UNCLOS Convention), it is interesting to note that during the UNCLOS negotiations from 1973 to 1982, China was an avid advocate for the delineation of maritime territorial and economic zones and sided with the smaller developing countries to propagate wider economic zones with more extensive rights for the coastal states. The U.S. on the other hand, has not ratified the convention because of Republican opposition in the Senate, but recognizes and follows the treaty as a codification of customary law.

### *The Disputes*

Six countries pursue overlapping claims to parts of the supposedly resource-rich South China Sea. The Peoples Republic of China ('China') lays claim to practically the entire sea, including the islands, islets, reefs and shoals based on alleged 'historical rights' and a map originally created in the Republic of China (present-day Taiwan), dating from 1947. This claim is displayed on maps by China through the so-called 'nine-dash-line' or U-shaped line'.<sup>ii</sup> This only vaguely-defined claim line encircles almost the entire sea until just off the coasts of Vietnam, the Philippines and even Brunei and Malaysia. China has been reinforcing its claim by

creating artificial islands on reefs and shoals and building runways, ports and military installations on top of these man-made islands since 2013. Taiwan tacitly employs a different, more limited interpretation of the line, claiming only the islands within the nine-dash-line.<sup>iii</sup> The other claimants have been gradually aligning their South China Sea policies to comply with UNCLOS, thus using international law as the 'great equalizer' against China's dominance.

Apart from conflicting maritime-territorial claims and the related claims on natural resources like oil, gas and fish, other complicating factors are also at play. The geopolitical strife between a rising China and the United States is most important, especially with regard to the presence of major maritime trade routes crisscrossing the South China Sea, which connects the Indian Ocean with the Pacific. And next to all these more or less tangible factors, nationalism is another important issue underlying the various national claims, as was evident during the anti-Chinese riots and protests in Vietnam in 2014 during a maritime standoff, that not only threatened Chinese-Vietnamese economic relations but even raised fears within the Vietnamese ruling communist party over domestic political stability, thus limiting further the scope for compromises for the Vietnamese government.<sup>iv</sup>

### *Internationalization of disputes: Vietnam*

The first conference in 2009 was initiated just after a period of relative calm had ended in the South China Sea. Much has been written about supposed Chinese assertiveness but it is sufficient to note here that the smaller littoral countries have regularly been feeling cornered by China's actions in the South China Sea.<sup>v</sup> A joint submission

by Malaysia and Vietnam in May 2009 to the Commission on the Limits of the Continental Shelf involving claims to seabed resources also spurred renewed tensions with China. Hedging against China's influence by internationalizing the South China Sea disputes seems to have been one of the prime objectives of the yearly conference, already from its inception.



South China Sea claims map. Source: Hunt, K. (2016, August 2). Showdown in the South China Sea: How did we get here? Retrieved from CNN: <https://edition.cnn.com/2015/10/28/asia/china-south-china-sea-disputes-explainer/index.html>

This aim is evident with the erstwhile President of the Diplomatic Academy of Vietnam, Duong Van Quang, who in his opening speech in 2009 referred to regional cooperation initiatives like the 2002 ASEAN-China 'Declaration of Conduct of Parties in the South China Sea' and then goes on to conclude that

sovereignty and territorial disputes in the South China Sea have not been reduced: "Quite the contrary (...). Greater cooperation for security, stability and development in the South China Sea needs the devotion, intellectualism and responsibility of scholars inside and outside the region."<sup>vi</sup>

### *Internationalization: The Philippines*

In another bid to create greater international leverage over China, the Philippines in 2013 instituted an arbitral procedure against China under the United Nations Convention on the Law of the Sea in The Hague, triggered by the Chinese occupation of the previously Philippine-controlled Scarborough Shoal. On July 12, 2016, the tribunal unanimously ruled, amongst others, that there was no legal basis for China to claim historic rights to resources from the sea areas within the nine-dash line.<sup>vii</sup> China's defiant reaction to the ruling was to call it "null and void with no binding force" and to "neither accept nor recognize it".<sup>viii</sup> While this ruling marked a significant legal and political blow to the extensive 'historic' Chinese maritime claims in the South China Sea, there is no mechanism to enforce the ruling.

### *Duterte's 'pivot to China'*

Under the guidance of the current President of the Philippines, Rodrigo Duterte, who took office only twelve days before the tribunal's decision was issued, the Philippines almost immediately decided to put aside the arbitral ruling and mend ties with Beijing, in order to attract Chinese investments for infrastructure. Duterte also decided to pursue an 'independent foreign policy' by steering the Philippines away from its traditional security-partner,

the United States. Since the Philippines and Vietnam were traditionally China's most vocal opponents in the South China Sea, Duterte's 'pivot to China' effectively left Vietnam as the sole challenger of Beijing's claims in the South China Sea.<sup>ix</sup>

### *A complicated relationship: China and Vietnam*

Historically, the relationship between China and Vietnam has been a complicated one. Not unusual between a small and a much bigger neighbour, it has been an essentially 'unequal' relationship with feelings of both envy and admiration as well as aversion and fear. At first glance, China and Vietnam might seem quite similar, both culturally and politically. Vietnam has been subject to considerable Chinese cultural influence, and both countries are ruled by a communist party. But the relationship has been strained by a history of conflict and an almost continuous Chinese domination of modern-day Vietnam in the first millennium, not to mention much more recent conflicts like the 1974 Battle of the Paracel Islands (resulting in a complete Chinese control over the Paracel Island chain), the 1979 Sino-Vietnamese border-war and the navy skirmish at Johnson South Reef in the Spratly Island chain in 1988.

### *Legal option: It's complicated*

Ever since the Philippine victory in The Hague, speculation has been rife on the

question whether Vietnam will follow the Philippines example and also take China to court, either for conciliation, arbitration or litigation. But taking China to an international court might further escalate the already complicated relationship, not to mention the negative economic consequences it might have for Vietnam, considering its economic dependency with China. The sheer threat to bring the disputes before an international court already gives Vietnam some leverage over China but using this option would bring along multiple risks for the country, most especially in the realm of economics and trade. Hence, going to court is by no means the single preferred option for Vietnam to address China's maritime encroachment.

Other options are to align with other countries to withstand Chinese pressure, although this option has its limitations too because of the famous 'Three No's' governing Vietnam's defence policy since 1998, principles that were most recently reaffirmed in the Defence White Paper that was released in 2019: no military alliances, no siding with one country against another, and no foreign military bases on Vietnamese soil. Although the 2019 Defence White Paper added a fourth 'No' - 'no use or threatening to use force in international relations' - there seems to be some room for informal alliances.<sup>x</sup>

Vietnam already has good relations with India and Russia. Recently, both the U.S. and Europe have moved towards significantly improving relations with Vietnam. Earlier this year, the EU and Vietnam signed a free trade agreement and an agreement concerning cooperation in crisis-management operations.<sup>xi</sup> In 2016, Washington lifted the decades-long arms ban on Vietnam and in 2018 a U.S. aircraft carrier made a historic and highly symbolic port call to the Vietnamese city of Danang, the first carrier-visit since the Vietnam war ended in 1975. But as has been noted above, these significant developments are not an indication that Vietnam is soon willing to establish more formal alliances.<sup>xii</sup>

### *Intimidation and incursions*

The year 2019 saw a marked escalation in Chinese intimidation, consisting not so much of a 'vertical' escalation of violence but rather consisting of a 'horizontal escalation' of not only substantially more intimidations and infringements on the gas exploration activities of its neighbours, but also a greater intensity and longer duration than in previous years. This more assertive behaviour occurs usually - but not exclusively - in relation to gas exploration activities by these countries in areas that, on the one hand, fall within their respective Exclusive Economic Zones (EEZ) or its legal extension called the Continental Shelf, but which simultaneously fall

within the nine-dash line, and thus are considered by China to be under Chinese jurisdiction.<sup>xiii</sup>

### *Incursions: The Philippines*

Already in 2011, China obstructed Filipino oil and gas exploration by a seismic survey vessel within the Philippine EEZ at Reed (or Recto) Bank. Again in 2014 China sent an oil rig with escorts into disputed waters in between Vietnam and the Chinese-controlled Parcel Islands, which prompted Vietnam to also dispatch its coastguard to hinder the deployment of the rig. This eventually led to a months-long standoff involving dozens of ships on both sides, including violent ramming and the sinking of one Vietnamese fishing ship.<sup>xiv</sup>

In 2019, Chinese intimidation peaked when, starting in January, dozens of Chinese maritime militia vessels swarmed the Filipino-held Thitu Island, effectively isolating the island by applying the so-called cabbage-strategy, wrapping the island with concentric layers of ships akin to cabbage leaves.<sup>xv</sup> Doing so, China took the risk of jeopardising the warming Chinese-Philippine ties, ties that earlier resulted in a Memorandum of Understanding (MoU) concerning joint oil and gas exploration signed the year before.<sup>xvi</sup> In April 2019 even hundreds of vessels were spotted around the tiny islet, pos-

sibly in response to Philippine construction upgrades to island facilities and new construction work on a nearby sandbank.<sup>xvii</sup>

In June 2019, the same Reed Bank was the location of the ramming and sinking of a Philippine fishing vessel by a Chinese vessel, leaving 22 fishermen floating in the water until they were rescued by Vietnamese fishermen. The vessel ramming the fishing boat is suspected to belong to the Chinese Maritime Militia, who operate 'fishing boats' manned by paramilitary forces.<sup>xviii</sup>

### *Incursions: Vietnam and Malaysia*

Already in 2017 and again in 2018, Vietnam ended oil exploration activities in Vietnamese waters by the Spanish energy firm Repsol after China reportedly threatened to attack Vietnamese outposts in the Vanguard Bank region of the South China Sea, supposedly in a bid to force Vietnam into joint exploitation of energy fields that, according to UNCLOS, belong solely to Vietnam.<sup>xix</sup>

In May 2019, probably with the same objective, a Chinese coast guard vessel attempted to prevent the operations of a drilling rig near the Luconia Shoals off the coast of East-Malaysia's Sarawak State, in a block licensed to Sarawak Shell, a subsidiary of Royal Dutch Shell.<sup>xx</sup>

From June to October 2019, the same coast guard vessel patrolled the area near Vanguard Bank on the Vietnamese

Continental Shelf, but also within the nine-dash line, hindering the activities of Russia's Rosneft, which had contracted a Japanese oil rig to drill a new production well licensed on behalf of Vietnam. For resupply the Chinese vessels now used the newly built island base on Fiery Cross Reef, proving its value for China's further encroachment on the region.

In addition to these assertions, between early July and late October 2019, China sent a seismic survey ship and at least four escorting vessels to conduct four surveys at two other energy blocks in the Vietnamese EEZ. Vietnam sent nine ships to closely follow the survey ship, causing a tense standoff. Making a bold statement by this time not giving in to Chinese pressure, Vietnam even decided to extend the operation schedule of the oil rig. Eventually China withdrew the survey ship and its escort in late October.

### *The elephant in the room*

This chain of events probably led Vietnam to take the - so far - quite unusual step to signal that a legal option to confront China is on the table.<sup>xxi</sup> Vietnam's Deputy Minister of Foreign Affairs Le Hoai Trung in his keynote speech to the aforementioned November 2019 conference expressly stated that "we have experience in promoting cooperation to address overlapping disputes through negotiations and other means (...)

which include fact-finding, mediation, conciliation, negotiation, arbitration and international litigation."<sup>xxii</sup> This previously publicly unheard suggestion was characterised by British expert and panellist Bill Hayton as finally addressing 'the elephant in the room.'

### *Pushback*

In a possible sign of growing Chinese anxiety of Vietnam's efforts to internationalise the disputes taking effect, some push-back became visible this year, for instance from a China-based think tank blaming Vietnam for 'using international academic conferences to promote its national position' and from the Chinese Ministry of Foreign Affairs, urging Vietnam 'not to complicate matters'.<sup>xxiii</sup> Also, during the current negotiations over a 'Code of Conduct' for the South China Sea, which have been dragging on since 2002, since 2017 China is trying with renewed efforts to insert a paragraph explicitly excluding 'outside powers' from regional disputes resolution efforts and energy exploration.<sup>xxiv</sup> Earlier China has repeatedly been accused of trying to extend these negotiations as long as possible, in the meantime taking small incremental steps towards total control of the area. In this context, observers have referred to the 'salami slice' and 'talk and take' strategy.<sup>xxv</sup>

### *European perspective*

A possible growing European engagement with the region could be derived from an increased participation of European diplomatic representatives at the South China sea conferences. While the number of participants roughly doubled over the course of ten years, the number of diplomatic representatives from EU countries roughly quadrupled.<sup>xxvi</sup>

From a European perspective it is important to keep up engagement with peacefully resolving of the South China Sea disputes and the quest for compromises based on UNCLOS. In the first place because the European Union itself is firmly embedded in international law and cooperation and strongly committed to the rule of law.<sup>xxvii</sup> Secondly, because developments and possible conflicts in the region can have indirect and direct economic, security and defence implications for Europe.<sup>xxviii</sup> And

thirdly, Europe too is facing challenges to the rule of UNCLOS, especially in the Sea of Azov and even closer to the European Union, in the Eastern Mediterranean, where relatively recent gas findings have reignited long simmering maritime-territorial delimitation disputes, especially surrounding a still divided Cyprus, as well as creating new ambitions, new divisions and new alliances.<sup>xxix</sup>

In other words, the South China Sea disputes have a direct relevance for Europe and are well worth monitoring closely. Especially 2020 will be a particularly interesting year to watch developments regarding Vietnam, not only because of possible legal developments, but also because the country will have a central role acting both as ASEAN-Chair and as a non-permanent member of the United Nations Security Council.

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