

# PERSPECTIVE

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## **Vietnam’s Position on the South China Sea Code of Conduct**

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### **EXECUTIVE SUMMARY**

- On 3 August 2018, the foreign ministers of the 10 ASEAN member states and China announced that they had adopted a Single Draft Negotiating Text (SDNT) which serves as the basis for negotiations on an ASEAN-China Code of Conduct (COC) in the South China Sea. The text sheds light on the initial positions of the negotiating parties, including Vietnam.
- Since Vietnam faces frequent tensions in the South China Sea, establishing a “substantive and effective” COC has long been a top priority of the country.
- An examination of Vietnam’s current position on the COC as reflected in the SDNT and its position in the 1990s shows that Vietnam has maintained a consistent position, especially regarding the COC’s geographical scope and the Contracting Parties’ duty to cooperate.
- New points in Vietnam’s current COC position include its emphasis on the COC being legally binding and the mechanisms for settling disputes arising from the implementation of the COC.
- Vietnam’s various demands regarding the Contracting Parties’ duty to cooperate derive mainly from its disappointments with the limitations of the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea in constraining China’s maritime assertiveness.
- As this is the initial stage of the negotiations, all parties are aiming high to create more room for possible compromises down the road. During the negotiations, Vietnam, as with other parties, may make concessions and adopt certain changes to its initial position.

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## INTRODUCTION

ASEAN member states and China are currently negotiating a Code of Conduct (COC) in the South China Sea to replace the largely political 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DOC). On 3 August 2018, remarkable progress was made when the foreign ministers of the 10 ASEAN member states and China announced that they had adopted a Single Draft Negotiating Text (SDNT) to serve as the basis for negotiations on the COC. The text sheds light on the initial positions of negotiating parties, including Vietnam. How ASEAN members and China work around their positions presented in the SDNT in the coming years will decidedly shape the outcome of the negotiations.

This essay analyses Vietnam's position on the COC by examining its inputs in the current SDNT and comparing them to Hanoi's previous position as reflected in the 1999 ASEAN COC for which Vietnam and the Philippines were two main drafters. Towards this end, the essay analyses Vietnam's position on four areas central to the COC, namely geographical scope, legal status, dispute settlement, and duty to cooperate. The overall purpose of the essay is to present a Vietnamese perspective of what constitutes a "substantive and effective" COC.

## VIETNAM'S PARTICIPATION IN THE COC PROCESS

As a claimant state in the South China Sea who faces frequent tensions due to clashes with other claimant states, especially China, Vietnam has long been endorsing the adoption of a COC in the South China Sea which could help better manage the disputes. In the 1990s, Vietnam sought to establish the principles of such a COC through both bilateral and multilateral means. Bilaterally, Vietnam and the Philippines adopted a Joint Statement on the Fourth Annual Bilateral Consultation on 7 November 1995, which provided for nine basic principles for a COC in the contested areas in the South China Sea. Multilaterally, in March 1999, ASEAN assigned to the Philippines and Vietnam the task of drafting an ASEAN COC, based on which ASEAN would work with China to adopt an ASEAN-China COC. In November 1999, the two countries submitted the draft COC to ASEAN's 3<sup>rd</sup> Informal Summit in Manila. The Chairman's press statement during the summit noted that:

On the South China Sea, the HOS/G [heads of state/government] reaffirmed the need for a regional Code of Conduct in the South China Sea. They noted the report of the Ministers that ASEAN now has a draft regional code of conduct, and further consultations will be made on the draft with a view to advancing the process on the adoption of the Code.<sup>1</sup>

The ASEAN COC was sent to China and in March 2000, the first ASEAN-China Consultation on the COC was held in Hua Hin, Thailand. However, differences remained between the two sides and there was little progress towards a COC. Eventually, ASEAN member states agreed to water down their position and decided to sign the ASEAN-China DOC on 4 November 2002 during the Eighth ASEAN Summit in Phnom Penh, Cambodia. The DOC did not fully meet the expectations of some ASEAN members, including Vietnam, because it did not specify the applicable geographical scope and did not ban the construction of new structures on submerged features,<sup>2</sup> two key provisions that Vietnam

sought to include in the prospective COC. Nevertheless, the DOC remained a meaningful achievement in the management of the South China Sea disputes. Philippine Secretary of Foreign Affairs Blas F. Ople, for example, called the Declaration “a major leap for peace,” while Chinese Vice Foreign Minister Wang Yi said that it would allow peace to reign and help claimant countries focus on economic development.<sup>3</sup> Vietnam also treats the DOC as an essential tool to protect its interests in the South China Sea. A survey of statements by the spokesperson of the Vietnamese Ministry of Foreign Affairs (MOFA) shows that the DOC is frequently cited as a basis for Vietnam’s diplomatic protests against Chinese assertive actions in the South China Sea.<sup>4</sup>

However, over the years, the DOC has also shown its limitations, especially because of its non-binding nature and the consequent low level of enforcement. Since 2002, various incidents have happened in the South China Sea that put the effectiveness of the DOC into question. The most notable include the 2012 Scarborough Shoal stand-off between China and the Philippines; the 2014 oil rig crisis between China and Vietnam; and China’s construction and militarization of seven artificial islands in the Spratlys. Other lower-profile yet no less worrisome incidents involved China’s repeated harassments of Vietnam’s oil and gas operations in its Exclusive Economic Zone (EEZ), or China’s various violent attacks against Vietnamese fishermen, especially in the waters around the disputed Paracels. As such, establishing a “substantive and effective” COC has been a target for Vietnam as well as regional states.

At the 15<sup>th</sup> ASEAN-China Summit in Phnom Penh in 2012, leaders of ASEAN and China adopted a joint statement on the 10<sup>th</sup> anniversary of the DOC. In the statement, while praising the merits of the DOC in promoting peace, stability and mutual trust in the South China Sea, they also repeated the need to work towards a COC.<sup>5</sup>

In September 2013, ASEAN and China formally commenced consultations on a COC.<sup>6</sup> However, little progress was made in the subsequent years against the backdrop of rising tensions in the South China Sea due to various issues, such as the Philippines’ arbitration case against China, the 2014 oil rig crisis between Vietnam and China, and China’s construction of artificial islands in the Spratlys. It was not until after the historic ruling issued by the Arbitral Tribunal at The Hague in July 2016 that China began to consider fast-tracking COC consultations.<sup>7</sup> In February 2017, the 19<sup>th</sup> ASEAN-China Joint Working Group on the Implementation of the DOC (JWG-DOC) reached an agreement on the basic outline of the draft framework for the COC. The draft was refined in subsequent bilateral meetings before being officially adopted by the foreign ministers of China and ASEAN on 6 August 2017, in Manila.<sup>8</sup> One year later, on 3 August 2018, the two sides adopted the SDNT, which essentially transitioned the COC process from the “consultation” phase to the “negotiation” phase.

## **VIETNAM’S COC POSITION: NOW AND THEN**

As a major claimant state in the South China Sea, Vietnam has a significant stake in the outcome of the COC process. It has therefore repeatedly supported efforts by ASEAN and China to reach a COC. However, Vietnam seeks a COC that really works, not another political document that lacks teeth. Commenting on Chinese Premier Li Keqiang’s proposal in November 2018 that ASEAN and China should aim to reach a COC within three years,<sup>9</sup>

Vietnamese MOFA Deputy Spokesperson Nguyen Phuong Tra stated that “it is of utmost importance to reach a COC that is substantive and effective, in accordance with international law, especially the 1982 United Nations Convention on the Law of the Sea, thereby effectively contributing to peace, stability and security in the South China Sea as well as the broader region”.<sup>10</sup> In other words, Vietnam’s main concern is the substance of the prospective COC.

From a Vietnamese perspective, what constitutes a “substantive and effective” COC? A close look at Vietnam’s participation in the process shows that Vietnam has maintained a rather consistent position on the key issues of the COC. The following table compares Vietnam’s current position on the COC as reflected in the SDNT and its position in the 1990s as reflected in the drafting process of the ASEAN COC.

**Table 1: Vietnam's Position on 1999 ASEAN COC and Current COC Negotiation**

<b>Issue</b>	<b>On ASEAN COC</b>	<b>On current COC negotiation</b>
<b>Geographical scope</b>	- Applicable to both the Paracels and the Spratlys and disputed waters.	- Applicable to all disputed features and overlapping maritime areas claimed under the 1982 UNCLOS in the South China Sea.
<b>Legal status</b>	- Not stated	- Contracting States consent to be bound by the COC - The COC is subject to ratification in accordance with the respective internal procedure of the signatory states; the instrument of ratification will be deposited with the ASEAN Secretary General who will register the COC with the United Nations. - No Contracting Party may hold any reservation when signing the COC.
<b>Dispute settlement</b>	- Not stated	- Disputes are settled through friendly negotiations, enquiry, mediation, conciliation and other means as may be agreed upon by the disputing Contracting Parties. Failing that, disputants may also utilize the dispute settlement mechanism under relevant provisions of the Treaty of Amity and Cooperation in Southeast Asia. - Nothing in the COC prevents the peaceful settlement of disputes through arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means decided by the parties concerned. - For monitoring the implementation of COC, a Commission led by foreign ministers or their representatives will be set up.

<p><b>Duty to cooperate</b></p>	<ul style="list-style-type: none"> <li>- Peaceful settlement of international disputes;</li> <li>- Prohibition against use of force and threats of force;</li> <li>- Exercise of self-restraint;</li> <li>- Search for and adoption of confidence building measures;</li> <li>- Cooperation in maritime activities such as marine environmental protection; marine scientific research; safety of navigation and communication; search and rescue operations; and combating transnational crime;</li> <li>- Consultation;</li> <li>- Respect for the freedom of international air and maritime navigation;</li> <li>- No construction of new structures on submerged features.</li> </ul>	<p>27 points, including:</p> <ul style="list-style-type: none"> <li>- Respect for maritime zones as provided for and established in accordance with the 1982 UNCLOS;</li> <li>- 60 days notification of impending joint/combined military exercise/drill;</li> <li>- No construction on any artificial island; no militarization of features;</li> <li>- No blockade of vessels carrying provisions or personnel for rotation;</li> <li>- No declaration of an Air Defense Identification Zone (ADIZ) in the South China Sea;</li> <li>- No simulated attacks at the vessels and aircraft of other countries.</li> </ul>
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*Source: Author's compilation based on Nguyen Hong Thao<sup>11</sup> and Carl Thayer.<sup>12</sup>*

Regarding the geographical scope, Vietnam consistently looks for a COC that is applicable to both the Paracels and the Spratlys, as well as the disputed waters in the South China Sea. This is because Vietnam wants to treat the Paracels, half of which was forcefully seized by China from the Republic of Vietnam in 1974, as disputed territory (China does not consider the Paracels as such). Moreover, China's law-enforcement authorities have frequently harassed or attacked Vietnamese fishermen in the waters around the Paracels. The most recent example involved a Vietnamese fishing vessel moored near Da Loi island in the Paracels on 6 March 2019 when a China Maritime Surveillance vessel chased and fired water cannon at it. The boat later sank after hitting rocks while being chased.<sup>13</sup> From Hanoi's perspective, it is therefore necessary for the COC to cover the Paracels to prevent similar incidents from happening and driving up maritime tensions between China and other states.

Regarding the legal status of the COC, during the 1990s, Vietnam and other ASEAN member states did not raise this issue since ASEAN members at that time mainly considered the prospective COC as a tool for confidence building primarily aimed at promoting self-constraint among claimant states. Moreover, by their nature, COCs are "soft law" which naturally does not require strong enforcement mechanisms being put into place. The implementation of such COCs is based on the goodwill of participating countries. However, the reality over the past two decades, with recurring violations of the DOC by signatory states, shows that such a belief is misplaced, and a non-binding COC will have little effect in fulfilling its intended purpose of maintaining peace and stability in the South China Sea. Therefore, this time around, Vietnam tends to lay strong emphasis on the COC being legally binding, by proposing contracting states to be bound by the COC in full without any reservation. At the same time, Vietnam's request for the COC to be ratified by signatory

states in accordance with their respective internal procedure means that Vietnam treats the COC as “hard law” despite its nomenclature.

Similar to the issue of legal status, during the 1990s, Vietnam did not raise the issue of dispute settlement regarding the implementation of the prospective COC. This was because, as mentioned above, Vietnam and other ASEAN members did not envision the prospective COC to be legally binding, making it unnecessary to devise mechanisms to settle disputes regarding its implementation. Currently, since Vietnam would like to have a binding COC, it has proposed measures to settle disputes arising from COC implementation, such as friendly negotiations, enquiry, mediation, conciliation, or dispute settlement mechanisms under relevant provisions of the Treaty of Amity and Cooperation in Southeast Asia.

Notably, Vietnam also makes it clear that nothing in the COC should prevent other peaceful means of dispute settlement, such as arbitration, judicial settlement, and resort to regional agencies or arrangements. This implies that Vietnam wants to keep open the legal option in dealing with China regarding both territorial and maritime disputes as well as disputes arising from COC implementation. This stance is understandable given Vietnam’s persistent efforts in accumulating historical and legal evidence to prepare for a “legal showdown” in which Vietnam will resort to international adjudication to address its grievances against China in the South China Sea, especially regarding China’s forceful seizure of the Paracels in 1974. In a press conference during the oil rig crisis in 2014, for example, then-Prime Minister Nguyen Tan Dung stated that Vietnam was considering different options to protect its maritime interests against China’s encroachments, including legal means in accordance with international law.<sup>14</sup> It should also be noted that when the Philippines submitted its arbitration case against China’s South China Sea claims in 2013, China strongly protested the motion by citing the DOC provision that the Parties should resolve differences through “consultations and dialogues”.

Finally, regarding the duty to cooperate, Vietnam’s reported list of demands reflects what it views as necessary to make the COC substantive and effective. While the demands of Vietnam as well as other ASEAN members as reflected in the 1999 ASEAN COC were broad and non-specific, Hanoi’s demands for the currently negotiated COC are much more specific and based on its experiences in dealing with China during the implementation of the 2002 DOC. For example, its demand for Parties to respect the maritime zones as provided for and established in accordance with the 1982 UNCLOS seems to derive from China’s past incursions into its EEZ (e.g. the 2014 oil rig crisis) or China’s constant harassments of Vietnam’s oil exploration operations within its EEZ. The requests for no construction on artificial islands or no militarization of features were made against the backdrop of China building and militarizing artificial islands in the South China Sea in recent years. Similarly, the demand for no blockade of vessels carrying provisions or personnel for rotation arose from China’s past attempts to block Vietnam’s supplies to its features in the Spratlys. Meanwhile, Vietnam’s objection to any Party’s declaration of an ADIZ in the South China Sea is based on its longstanding support for freedom of international air and maritime navigation as well as its concern that Beijing will at some point establish an ADIZ over the South China Sea, like what it did in the East China Sea in 2013. Hanoi’s call for the ban is therefore a wise pre-emptive move that will put Beijing in the spotlight should it consider this option.<sup>15</sup>

## CONCLUSION

The above analysis shows that Vietnam's position on the COC has been rather consistent over the past 20 years. However, its position on the currently negotiated COC is more specific and largely derived from its disappointments with the 2002 DOC's limitations in constraining China's maritime assertiveness. Some Vietnamese officials that the author talked to tend to believe that "it is better to have no deal than a bad deal". As such, Vietnam has made clear what the COC should include to become a "good deal". In other words, these demands constitute the core of what Vietnam considers a "substantive and effective" COC from its perspective.

Vietnam's long list of demands seems to be a tall order for many observers. However, as the negotiations are in its initial stage, all parties are aiming high to create more room for possible compromises down the road. During the negotiations, Vietnam as well as other parties may make some concessions by dropping or changing certain non-core demands. However, as of March 2019, the Parties are still in the process of finishing the first out of three readings of the SDNT. As such, it is still too early to know if Vietnam will modify any point in its initial position.

Vietnam's ASEAN chairmanship in 2020 will provide Hanoi with an opportunity to highlight the South China Sea issue in ASEAN's agenda. To demonstrate its leading role, Vietnam may also try to accelerate the COC negotiations. However, as emphasized by MOFA Deputy Spokesperson Nguyen Phuong Tra, Vietnam will push for a substantive and effective COC rather than try to achieve a symbolic agreement within a set time frame. Other negotiating parties, especially China, will most likely also hold to their core demands. As such, the COC negotiations should be expected to be a challenging and time-consuming exercise. Painful trade-offs between achieving a COC early and making it as substantive and effective as possible will present difficult choices for all parties involved.

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<sup>1</sup> "Chairman's Press Statement on ASEAN 3rd Informal Summit Manila, Philippines, 28 November 1999", available at <[https://asean.org/?static\\_post=chairman-s-press-statement-on-asean-3rd-informal-summit-manila-philippines-28-november-1999](https://asean.org/?static_post=chairman-s-press-statement-on-asean-3rd-informal-summit-manila-philippines-28-november-1999)>

<sup>2</sup> Nguyen Dang Thang & Nguyen Thi Thanh Ha, "Một số suy nghĩ về Bộ Quy tắc Ứng xử ở Biển Đông" (Some thoughts on the South China Sea COC), paper presented at international conference "South China Sea Disputes: History, Geopolitics and International Law", Ha Noi, 26 April 2011.

<sup>3</sup> "Asean, China sign pact on disputed Spratlys", *CNN*, November 4, 2002.

<sup>4</sup> An archive of statements by Vietnam's MOFA spokesperson is available at <[http://www.mofa.gov.vn/vi/tt\\_baochi/pbnfn](http://www.mofa.gov.vn/vi/tt_baochi/pbnfn)>.

<sup>5</sup> "Joint Statement of the 15th ASEAN-China Summit on the 10th Anniversary of the Declaration on the Conduct of Parties in the South China Sea", 19 November 2012, available at <<https://www.asean.org/>>

<sup>6</sup> <https://www.nbr.org/publication/new-commitment-to-a-code-of-conduct-in-the-south-china-sea/>

<sup>7</sup> "Asean urges self-restraint in South China Sea activities, no mention of tribunal ruling", *The Straits Times*, 25 July 2016, <<https://www.straitstimes.com/asia/se-asia/asean-foreign-ministers-address-south-china-sea-issue-in-communicate-but-not-tribunal>>

<sup>8</sup> For an overview of the framework, see Ian Storey, “Assessing the ASEAN-China Framework for the Code of Conduct for the South China Sea”, *ISEAS Perspective*, no. 62 (2017), 08/08/2017.

<sup>9</sup> “Asean and China should aim to conclude talks on maritime code of conduct in 3 years: PM Lee”, *The Straits Times*, 4 November 2018, <<https://www.straitstimes.com/singapore/asean-and-china-should-aim-to-conclude-talks-on-maritime-code-of-conduct-in-3-years-pm-lee>>

<sup>10</sup> The statement is available at <[http://www.mofa.gov.vn/vi/tt\\_baochi/tcbc/ns181122164946](http://www.mofa.gov.vn/vi/tt_baochi/tcbc/ns181122164946)>

<sup>11</sup> Nguyen Hong Thao, “Vietnam and the Code of Conduct for the South China Sea”, *Ocean Development & International Law* 32, no.2 (2001): 105-130.

<sup>12</sup> Carl Thayer, “A Closer Look at the ASEAN-China Single Draft South China Sea Code of Conduct”, *The Diplomat*, 3 August 2018, <<https://thediplomat.com/2018/08/a-closer-look-at-the-asean-china-single-draft-south-china-sea-code-of-conduct/>>

<sup>13</sup> “Vietnam protests to China over South China Sea boat sinking”, *The Straits Times*, 22 March 2019, <<https://www.straitstimes.com/asia/east-asia/vietnam-protests-to-china-over-south-china-sea-boat-sinking>>

<sup>14</sup> “Thủ tướng: 'Không đánh đổi chủ quyền lấy hữu nghị viên vông’”, *VnExpress*, 22 May 2014, <<https://vnexpress.net/the-gioi/thu-tuong-khong-danh-doi-chu-quyen-lay-huu-nghi-vien-vong-2994075.html>>

<sup>15</sup> Le Hong Hiep, “How to Read Hanoi’s Position on the South China Sea COC?”, *ISEAS Commentary*, 03 January 2019, <<https://www.iseas.edu.sg/medias/commentaries/item/8797-how-to-read-hanois-position-on-the-south-china-sea-coc-by-le-hong-hiep>>

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