

6 Balancing the rights of coastal states and user states in the post-UNCLOS age

Vietnam and navigational rights

*Hao Duy Phan**

Vietnam and UNCLOS: an overview

Pre-UNCLOS period

Being a maritime nation, Vietnam has a long coastline, stretching for 3,444 kilometres (km) from the Gulf of Tonkin to the Gulf of Thailand.¹ Its sea area is about three times larger than its land area² and is considered rich in fishery and oil and gas resources. The seacoast provides an important natural communication link to the outside world.³ Moreover, the coastal areas are where more than half of the country's population reside and more than half of its major cities are located.⁴

Given its maritime geography, it is not surprising that Vietnam started paying attention to the development of the international law of the sea quite early. Delegations under the name of Vietnam, either the Democratic Republic of Vietnam, the Republic of Vietnam or the Socialist Republic of Vietnam, were seated at all three United Nations conferences on the law of the sea.⁵ Because of its status as a member of the UN specialized agencies, the Republic of Vietnam was able to attend the first conference (UNCLOS I) and the second conference (UNCLOS II). For a variety of political reasons, the Democratic Republic of Vietnam was excluded from both UNCLOS I and UNCLOS II.⁶

When the third United Nations Conference on the Law of the Sea (UNCLOS III) started on 3 December 1973,⁷ both the Republic of Vietnam and the Democratic Republic of Vietnam were invited to attend. However, as they were preoccupied with the war at that time, their participation in the initial sessions of UNCLOS III was very limited.⁸ The Democratic Republic of Vietnam did not even participate in the first few sessions of the Conference.⁹

After the war in Vietnam ended, the Socialist Republic of Vietnam became a unified state and once again became involved with the development of the international law of the sea. First, it entered UNCLOS III at the sixth session in 1977 when the Conference was moving toward an informal composite negotiating text of the Convention (ICNT).¹⁰ At UNCLOS III, Vietnam generally supported the positions of the Group of 77 and the Non-Aligned Movement, especially when it comes to seabed mining issues and the Area under Committee I and marine scientific research, protection of the marine environment, and transfer of technology under Committee III.¹¹

Second, also in 1977, the Socialist Republic of Vietnam issued the Statement on the Territorial Sea, the Contiguous Zones, the Exclusive Economic Zone (EEZ) and the Continental Shelf (CS – the 1977 Statement) – its first official statement on the law of the sea as a newly unified state.¹² Most of the claims in the 1977 Statement reflected the progress and the expected outcome of the negotiation of UNCLOS III. However, some provisions were subject to criticism for using a straight baseline system that 'links the

furthest seaward points of the coast and the outermost point of Vietnamese offshore islands'¹³ and the use of the contiguous zone for security purposes.¹⁴

In 1980, when UNCLOS III was in its final stage and the Draft Convention on the Law of the Sea (Informal Text) was reached,¹⁵ Vietnam adopted Decree No. 30 on Regulations for Foreign Ships Operating in Vietnamese Maritime Zones (the 1980 Decree). The 1980 Decree consists of 26 articles divided into three chapters on general provisions; specific regulations for foreign ships operating in Vietnamese maritime zones and control and measures of application.¹⁶ Several provisions in the 1980 Decree were considered by maritime powers and legal experts as limiting navigational rights of user states in Vietnamese maritime zones.

Finally, in November 1982 when UNCLOS was only one month away from being adopted, Vietnam issued the Statement on the Territorial Sea Baseline (the 1982 Statement), announcing the specific coordinates to the straight baseline system it claimed back in 1977.¹⁷ The 1982 Statement, however, was viewed as not meeting the geographical criteria for the use of straight baselines as provided in Article 7 of UNCLOS and was subject to protest from a number of states.¹⁸

Vietnam continued its participation at UNCLOS III until the adoption of the Convention in 1982.¹⁹ Together with 129 other states, it voted in favour of the Convention and its related resolutions and decisions.²⁰ It signed UNCLOS on the day the Convention was opened for signature on 10 December 1982 in Montego Bay, Jamaica.²¹

Post-UNCLOS period

It took Vietnam more than a decade to ratify UNCLOS. During the 1980s, most of its attention was focused on much more pressing issues, including its internal problems, the conflict in Cambodia, tension with China, the US-led isolation, and sanctions regime against the country and its relationship with the Soviet Union. By the late 1980s, Vietnam began to adopt a new foreign policy approach. Its external relations were no longer confined to the Soviet Union-led socialist bloc but rather expanded for diversification and multilateralization. On 23 June 1994, the National Assembly of Vietnam adopted a resolution to ratify UNCLOS (the 1994 Resolution).²² The 1994 Resolution makes clear that, by ratifying UNCLOS, Vietnam is '[determined] to join the international community in establishing an equitable legal order and promoting maritime development and cooperation'.²³

In the wake of its UNCLOS ratification, Vietnam took various steps both domestically and on the international plane to implement the treaty. At the international level, it actively participated in the negotiation of the 1994 Agreement relating to the Implementation of Part XI of UNCLOS.²⁴ It eventually ratified the 1994 Agreement in 2006.²⁵ It has sent delegations to all meetings of the state parties to UNCLOS²⁶ and has also complied with the financial provisions under UNCLOS in making annual contributions to foster the operation of the bodies established therein.²⁷ In accordance with Article 76 of UNCLOS, it submitted information on the limits of the continental shelf beyond 200 nautical miles (nm) to the Commission on the Limits of the Continental Shelf, which included a joint submission with Malaysia.²⁸ It was elected as a member of the Council the International Seabed Authority in 2013 and 2014.²⁹ It has on many occasions expressed its support for the enhanced activities of the Commission on the Limits of the Continental Shelf and the judicial function of the International Tribunal for the Law of the Sea.³⁰

A review of the status of the conventions under International Maritime Organization (IMO) indicates that Vietnam has also ratified many treaties on navigation and shipping. The list includes, among others, the 1965 Convention on Facilitation of International

Maritime Traffic, the 1966 International Convention on Load Lines, the 1973 International Convention for the Prevention of Pollution from Ships and the 1978 Supplemented Protocol (MARPOL 73/78), the 1969 International Convention on Tonnage Measurement of Ships, the 1972 International Regulations for Preventing Collisions at Sea, the 1974 International Convention for the Safety of Life at Sea, the 1978 International Convention on the Standards of Training, Certification and Watch-keeping for Crew Members, the 1979 International Convention on Maritime Search and Rescue, the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, and the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.³¹

At the regional level, Vietnam is a member of the Association of Southeast Asian Nations (ASEAN)³² and has participated in the negotiation of all ASEAN instruments since 1995. Among many ASEAN instruments relevant to navigation and shipping, Vietnam has signed or ratified the 1975 Agreement for the Facilitation of Search of Ships in Distress and Rescue of Survivors of Ship Accidents, the 2005 ASEAN Framework Agreement on Multimodal Transport, the 2007 ASEAN Counter-Terrorism Convention, the 2009 ASEAN Framework Agreement on the Facilitation of Goods in Transit, and the 2009 ASEAN Framework Agreement on the Facilitation of Inter-state Transport.³³ It has also ratified the 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) and participated in the work of the Information Sharing Centre established under the Agreement.³⁴

When Vietnam's National Assembly decided to ratify UNCLOS, it asked the government to review all relevant national legislation to consider necessary promulgation and amendments of legislation in conformity with UNCLOS.³⁵ Many laws since then have been enacted to implement different provisions of UNCLOS, including the 2003 Law on National Border, the 2004 Fishery Law, the 2005 Maritime Code, the 2014 Environment Protection Law, and the 2015 Law on Sea and Island Natural Resources and Environment.³⁶

In particular significance is the Vietnam Law of the Sea (the 2012 Law) that the National Assembly adopted on 21 June 2012, which is the country's most comprehensive piece of legislation on the law of the sea. It covers all major aspects of the management and use of the sea, including the scope and regime of internal waters, territorial sea, contiguous zone, EEZ, continental shelf, regime of islands, archipelagos, activities in the Vietnamese sea areas, search and rescue, protection of marine resources and environment, marine scientific research, development of maritime economy, sea patrol and control, and maritime international cooperation.³⁷ The 2012 Law also clarifies many of Vietnam's legal positions on several issues. This law has brought Vietnamese legislation much closer to UNCLOS. The shift in Vietnam's regulations on navigational rights reflects its efforts to strike a balance between its rights as a coastal state and the rights of other user states in its maritime zones. It also reveals an evolution in the country's policies toward UNCLOS and its overall perception of the international maritime order in general. The case of navigational rights in Vietnamese law and policies in relation to UNCLOS will be the focus of the next section.

Vietnam and navigational rights before and after the ratification of UNCLOS: A paradigm shift

Navigation under UNCLOS

Navigation is one of the most important areas in the law of the sea.³⁸ It also represented one of the most difficult issues during the negotiation of UNCLOS.³⁹ There were many alliances and state groupings at UNCLOS III and they did not share the same views or common interests regarding the issue of navigation. The Maritime States Group and the Great Maritime Powers Group, for example, sought to protect their fleets' freedom of movement and objected to any attempts to limit their traditional navigational practice.⁴⁰ For members of the Coastal States Group, the aim was to promote their cause for extended coastal states jurisdiction in their maritime zones.⁴¹ Within the Coastal States Group, there was a Territorialist Sub-group that was fighting for a territorial sea of more than 12 nm. This Sub-group also espoused a strong view, claiming that the proposed 200 nm EEZ conforms as closely as possible to their territorialist concept, according to which the coastal states would have more jurisdictional and regulatory powers in their EEZs.⁴² In addition, the Group of Archipelagic States and the Group of Straits States were seeking to adopt a common position in the legal regime on passage through straits on archipelagic waters.⁴³ It was certainly not unusual for a state to belong to several groups since a state could have more than one vital area of interest.⁴⁴ The outcome of this group system and the complex negotiation structure is a delicate balance in UNCLOS between the interests of the maritime powers in maintaining their traditional rights of navigation and those of coastal states, straits states, and archipelagic states in exercising their sovereignty over their territorial sea or archipelagic waters as well as their sovereign rights over their EEZ and continental shelf.⁴⁵

The Convention, for example, recognizes that every state has the right to establish a territorial sea of 12 nm over which it has sovereignty, but it also retains for naval and merchant ships the right of innocent passage through the territorial sea of a coastal state.⁴⁶ Article 19 of the Convention provides that passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal state. It further provides that passage shall be considered to be prejudicial to the peace, good order, or security of the coastal states if it engages in (i) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal states; (ii) any exercise or practice with weapons of any kind; (iii) any act aimed at collecting information to the prejudice of the defence or security of the coastal states; (iv) any act of propaganda aimed at affecting the defence or security of the coastal states; (v) the launching, landing, or taking on board of any aircraft; (vi) the launching, landing, or taking on board of any military device; (vii) the loading or unloading of any commodity, currency, or person contrary to the customs, fiscal, immigration, or sanitary laws and regulations of the coastal states; (viii) any act of wilful and serious pollution; (ix) any fishing activities; (x) the carrying out of research or survey activities; (xi) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal state; and (xii) any other activity not having a direct bearing on passage.⁴⁷ In the territorial sea, submarines are required to navigate on the surface and to show their flag.⁴⁸ The coastal states may prevent passage that is not innocent or temporarily suspend passage without discrimination among foreign ships in specified areas of its territorial sea essential for the protection of its security, including weapons exercises.⁴⁹ The coastal states shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with the Convention.⁵⁰

Under UNCLOS, archipelagic states have sovereignty over archipelagic waters; similarly, states bordering straits used for international navigation have sovereignty over the straits.⁵¹ However, to ensure that the navigational rights of the maritime states would not be negatively affected, the Convention provides that the sovereignty or jurisdiction of

archipelagic states or states bordering straits must be exercised in accordance with two newly established passage regimes, namely, *archipelagic sea lanes passage* through archipelagic waters and *transit passage* in straits used for international navigation.⁵² Archipelagic sea lanes passage means the exercise of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious, and unobstructed transit between one part of the high seas or an EEZ and another part of the high seas or an EEZ.⁵³ Transit passage means the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an EEZ and another part of the high seas or an EEZ.⁵⁴ In straits used for international navigation, ships can sail in their normal modes⁵⁵ and states bordering straits shall not hamper transit passage or suspend transit passage.⁵⁶

UNCLOS allows the coastal states to have a contiguous zone of 24 nm from the baselines.⁵⁷ Within the contiguous zone, the coastal states may only exercise the control related to customs, fiscal, immigration, or sanitary laws and regulations.⁵⁸ This means that the contiguous zone is neither part of the territorial sea nor under the coastal state's sovereignty. Thus, the high seas freedom of navigation is applicable in it.⁵⁹

UNCLOS creates a new maritime zone, that is, the EEZ of 200 nm in which the coastal states have the sovereign rights to explore, exploit, conserve, and manage the natural resources of the waters superjacent to the seabed and to the seabed and its subsoil.⁶⁰ However, it also provides that in the EEZ of the coastal states, all other states enjoy the freedoms of navigation and overflight, of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms as long as they have due regard to the rights and duties of the coastal states and comply with the laws and regulations adopted by the coastal states in accordance with the Convention.⁶¹ Any conflicts arising in cases where the Convention does not attribute specific rights or jurisdiction to the coastal states or to other states within the EEZ should be resolved on the basis of equity and in the light of all the relevant circumstances, 'taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole'.⁶²

Last but not least, UNCLOS provides that the coastal states have sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources.⁶³ The right of the coastal states over the continental shelf, however, do not affect the legal status of the superjacent waters and the air space above those waters and the exercise of the rights of the coastal state over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other states.⁶⁴

Navigational rights under Vietnam's law

Pre-UNCLOS period

The Socialist Republic of Vietnam issued its first instrument on the law of the sea in 1977 in the form of the Statement on the Territorial Sea, the Contiguous Zones, the Exclusive Economic Zone and the Continental Shelf, which was approved by the Standing Committee of the National Assembly.⁶⁵ The 1977 Statement claims a territorial sea of 12 nm, a contiguous zone of 24 nm, an EEZ of 200 nm and a CS to the outer edge of the continental margin or to a distance of 200 nm where the outer edge of the continental margin does not extend up to that distance.⁶⁶ These claims are in accordance with the progress and expected outcome of the negotiation at UNCLOS III. With the 1977 Statement, Vietnam became one of the pioneering states in establishing the EEZ in light

of the negotiation progress at UNCLOS III, thus contributing to the development and consolidation of the practice of states in this regard.⁶⁷

The 1977 Statement, however, also raises some concerns over Vietnam's possible use of the contiguous zone for security purposes.⁶⁸ While UNCLOS only allows the coastal states to exercise control necessary to prevent and punish infringement of its customs, fiscal, immigration, or sanitary laws within its territory or territorial sea, the 1977 Statement claims that Vietnam shall also exercise 'necessary control in its contiguous zone in order to see to *its security*' in addition to the permissible control over customs, immigration, sanitation, and fiscal matters.⁶⁹ It should be noted that during the negotiation of UNCLOS, a number of states proposed that security be included in the list of activities over which coastal states would have enforcement jurisdiction in their contiguous zones. These proposals were not accepted for inclusion in Article 33 of UNCLOS.⁷⁰

In 1980, the Vietnamese government adopted Decree No. 30 on Regulations for Foreign Ships Operating in Vietnamese Maritime Zones. The 1980 Decree raised concerns as well over a number of provisions related to the navigational rights of other states in Vietnam's territorial sea and contiguous zone. First, the 1980 Decree specifies the 1977 Statement on the use of the contiguous zone for security purposes by requiring foreign military ships to seek permission to enter the contiguous zones at least 30 days in advance and, after permission is granted, to notify the Vietnamese Ministry of Communications and Transport 48 hours before actually entering the zone.⁷¹ Before entering the contiguous zone, all ships must have their weapons in a 'non-operative position', with ammunition locked away and gun barrels covered.⁷² Foreign submarines when entering Vietnam's contiguous zone have to surface and hoist the flag of the country of their nationality.⁷³ These provisions do not appear to conform to Article 33 of UNCLOS on the contiguous zone.

Second, the 1980 Decree puts forward many conditions for foreign military ships when entering Vietnam's territorial sea that go beyond what is provided under UNCLOS. For example, it states that no more than three warships of the same nationality may be in the territorial sea of Vietnam at the same time. It also provides that the maximum stay of each ship in the territorial sea of Vietnam is one week.⁷⁴ Such requirements do not exist in UNCLOS provisions on the territorial sea.

Third, under the 1980 Decree, foreign ships must move along assigned routes and corridors and must not enter forbidden areas in the territorial sea of Vietnam.⁷⁵ There is no indication, however, whether the assigned routes follows the guidelines and criteria for establishment of sea lanes set out in Article 22 of UNCLOS.⁷⁶

Fourth, the 1980 Decree prohibits foreign ships from engaging in a list of activities that largely corresponds to the list in Article 19 of UNCLOS. It should be noted, however, that while the list in UNCLOS is applicable only in the territorial sea, the geographical scope for a number of forbidden activities under the 1980 Decree is extended to the contiguous zone.⁷⁷

To implement the 1980 Decree, in 1986, the Vietnamese government's Council of Ministers issued Decision No. 13 on Strengthening the Protection of Vietnam's Sovereignty and Security in Vietnam's Maritime Zones (the 1986 Decision). The 1986 Decision lists a series of measures to strengthen the coordination between relevant agencies of Vietnam to enforce the 1980 Decree. In 1988, the Chairman of the Council of Ministers further issued Order No. 85 (the 1988 Order), which specifies measures to settle violations by foreign ships in the maritime zones of Vietnam as provided by the 1980 Decree.

Together the 1977 Statement, the 1980 Decree, the 1986 Decision, and the 1988

Order were perceived as limiting navigational rights of other states in Vietnam's maritime zones contrary to international law of the sea.⁷⁸ The fact that Vietnam had not ratified UNCLOS at that time does not release it from the obligation to refrain from acts which would defeat the object and purpose of the Convention,⁷⁹ not to mention that several provisions on navigation in UNCLOS were considered as reflecting customary international law. The United States protested in 1982 and repeatedly conducted operational assertions against these provisions in 1982, 1983, 1985, 1986, 1996 through 2002, and 2010 through 2012.⁸⁰

Post-UNCLOS period

Vietnam started to open its door in the late 1980s and early 1990s. It finally decided to ratify UNCLOS in 1994.⁸¹ In 1996, it issued Decree No. 55 on Visits of Foreign Military Ships (the 1996 Decree), which is its first domestic legal document that refers to UNCLOS as a legal basis.⁸² The 1996 Decree only regulates activities of foreign military ships visiting Vietnam and does not deal with military ships exercising navigational rights through Vietnam's maritime zones. Included in the 1996 Decree is a provision that prohibits foreign ships from engaging in a list of activities that largely corresponds to the list in Article 19 of UNCLOS; however, unlike the 1980 Decree, the list in the 1996 Decree is only applicable to vessels anchoring or operating within licensed harbours of Vietnam, and not to vessels passing through Vietnam's maritime zones.⁸³

In 2001, the government adopted Decree No. 41 on Activities of the Vietnam's Sea Police Forces (the 2001 Decree), which also has several references to international law of the sea. The 2001 Decree provides that enforcement activities of the Vietnam's Sea Police Forces in Vietnam's maritime zone will be conducted in accordance with international treaties to which Vietnam is a party.⁸⁴ It further provides that the Ministry of Foreign Affairs of Vietnam has the responsibility to advise Vietnam's Sea Police Forces to settle violations committed in Vietnam's maritime zones as provided in international treaties to which the country is a party.⁸⁵

Another step forward was made in 2003 when the National Assembly adopted the Law of National Boundaries (the 2003 Law). The 2003 Law states in Article 2 that the legal regimes concerning the contiguous zone, the EEZ and the CS are regulated in accordance with UNCLOS. The 2003 Law also, for the first time, acknowledges that vessels of all states has the *right of innocent passage* through Vietnam's territorial sea.⁸⁶ It further provides that passage is innocent so long as it is not prejudicial to the peace, good order, security, and marine environment of Vietnam as provided in Vietnamese law and UNCLOS.⁸⁷ This is the country's first legal document on law of the sea that requires that, if there is a conflict between the 2003 Law and an international treaty on the same subject to which Vietnam is a party, relevant authorities, agencies, and individuals shall implement the provisions of the international treaty.⁸⁸ A similar provision on the primary status of international treaties over domestic law is also found in the 2005 Maritime Code.⁸⁹

This process of oceans legislation reform culminated in 2012 with the adoption of the Law of the Sea (the 2012 Law). Under this law, UNCLOS becomes a guiding principle for the management and protection of the sea.⁹⁰ International law, international treaties and UNCLOS are referred to in 40 provisions of the 2012 Law.⁹¹ It is also clearly stated in this law that Vietnam shall respect and protect the rights and interests of foreign vessels in its maritime zones in conformity with international treaties to which the state is a party.⁹² The 2012 Law reaffirms the primary role of UNCLOS in case there are differences between its

provisions and those under UNCLOS.⁹³ It also clarifies the relationship between its provisions and those in previous legal documents on the same matters, stating that in case there are differences the 2012 Law shall prevail.⁹⁴ It, therefore, could be argued that in the Vietnamese legal hierarchy, the 2012 Law of the Sea ranks below UNCLOS but above all other domestic legal documents on the same matters. This demonstrates the important role of UNCLOS in Vietnam's maritime legal order and maritime policy.

Like UNCLOS, the 2012 Law of the Sea regulates navigation activities of foreign vessels by maritime zones. The Law provides that, in its EEZ, Vietnam 'respects *freedoms of navigation and overflight*, the right of the laying of submarine cables and pipelines and *lawful uses of the sea by other states*' in accordance with this Law and international treaties to which the state is a party, including UNCLOS.⁹⁵ This marks the first time a Vietnamese legal document formally acknowledges freedom of navigation and overflight in the EEZ. Article 37 of the 2012 Law includes a list of activities that are not permitted to be undertaken in Vietnam's exclusive zone, most of which are consistent with UNCLOS such as piracy, illegal exploitation of living resources, illegal construction of artificial islands, unlawful marine scientific research, and pollution of the marine environment. The only provision on the EEZ in the 2012 Law that has been subject to criticism is the requirement that, when exercising the freedoms of navigation and overflight in the exclusive economic zone of Vietnam, organizations or individuals are not permitted to conduct acts against Vietnam's sovereignty, defence, and security. The United States protested against this provision in 2013.⁹⁶

In the contiguous zone, the 2012 Law provides that, in addition to the rights and jurisdiction over natural resources as provided in UNCLOS, Vietnam can only exercise control to prevent and punish acts of infringement of its legislation on customs, tariff, health, or immigration committed in the territory or the territorial sea of Vietnam.⁹⁷ This provision is consistent with Article 33 of UNCLOS. It is worth noting that, unlike the 1980 Decree, the 2012 Law of the Sea makes no reference to claims over security matters in the contiguous zone. As the Law supersedes previous legal documents on the same matters, it in effect terminates the provisions regulating military activities in the contiguous zone in the 1980 Decree.⁹⁸

The 2012 Law also makes clear that Vietnam's sovereignty in its territorial sea shall be exercised in accordance with UNCLOS,⁹⁹ according to which vessels of all states shall enjoy the right of innocent passage.¹⁰⁰ Innocent passage of foreign vessels shall be conducted on the basis of international treaties to which Vietnam is a party, including UNCLOS.¹⁰¹ The specific requirement in the 1980 Decree that all ships must have their weapons in a 'non-operative position' in the territorial sea of Vietnam no longer exists. There is also no requirement that only up to three warships of the same nationality be in the territorial sea of Vietnam at the same time or that the maximum stay be only one week.

The 2012 Law requires that foreign submarines surface and fly their national flags¹⁰² and foreign nuclear-powered ships carry documents and observe special precautionary measures established for such ships under international law when entering the country's territorial sea.¹⁰³ These requirements are consistent with UNCLOS provisions.¹⁰⁴ The 2012 Law also provides that Vietnam may temporarily suspend the exercise of innocent passage in specified areas in Vietnam's territorial sea if such suspension is essential for the protection of its security,¹⁰⁵ which is again allowed under UNCLOS.¹⁰⁶ It further specifies that the temporary suspension shall be made public domestically and internationally on the 'Maritime Notice' in accordance with international maritime practice at least 15 days before the temporary suspension.¹⁰⁷ The 2012 Law has a list of activities

that could be construed as prejudicial to Vietnam's peace, good order, and security, which is almost identical to the list in Article 19 of UNCLOS.¹⁰⁸ Unlike the 1980 Decree, the list in the 2012 Law is only applicable in the territorial sea, and not in the contiguous zone.

The only provision on navigation in the territorial sea in the 2012 Law that arguably goes further than UNCLOS is Article 12(2), which requires foreign military vessels exercising the right of innocent passage through Vietnam's territorial sea to give *prior notice* to the Vietnamese competent authorities before entering the state's territorial sea.¹⁰⁹ Compared to Article 3(c) of the 1980 Decree, which requires foreign military ships to seek permission from the Vietnamese government 30 days in advance before entering the contiguous zone, Article 12(2) of the 2012 Law of the Sea is a step forward in a more open direction as it does not require permission and is not applicable to the contiguous zone. Still, one could argue that the prior notice requirement is not entirely consistent with UNCLOS as it might affect the right of innocent passage of foreign military vessels.

The National Assembly of Vietnam, when adopting the Law, did have a debate on this requirement.¹¹⁰ Several members of the National Assembly suggested that the Law should require foreign military vessels to obtain permission before entering the territorial sea of Vietnam. Some even suggested the Law should provide a specific timeline for submitting and granting permission that foreign military ships can follow. The National Assembly Standing Committee, however, made the case that a requirement for permission in advance could be understood as violating the right of innocent passage under UNCLOS. As a compromise, it proposed instead that the Law would follow the practice of a number of other states in requiring foreign military ships to merely give a prior notice, the purpose of which is mainly to ensure the safety of navigation for ships moving in the territorial sea of Vietnam and to assist the competent authorities of Vietnam to manage the state's territorial sea. The provision, however, does not specify the period of notice as many members of the National Assembly had urged due to a concern such a specification would, contrary to UNCLOS, set more restrictive conditions for foreign military ships to exercise the right of innocent passage. Eventually, the view of the Standing Committee prevailed in arguing that a prior notice requirement without a specific timeline would represent a balance between the rights of Vietnam as the coastal state and those of user states in its territorial sea.

In practice, though, the prior notice requirement does not seem to be enforced. The United States' acts of challenge by repeatedly dispatching its military vessels to the territorial sea of Vietnam without prior notification, for example, have never led to any official protests from Vietnam. In January 2016, for example, when the United States USS Curtis Wilbur, an Arleigh Burke-class guided missile destroyer, sailed without any notification within the territorial sea of Triton Island, which is part of the Paracel Islands occupied by China but claimed by Vietnam,¹¹¹ Vietnam did not file any protest. In fact, it even issued a statement supporting the United States' acts and saying that Vietnam respects the right of innocent passage through the territorial sea conducted in accordance with relevant rules of international law, in particular Article 17 of UNCLOS.¹¹² The statement conveniently makes no reference to either Article 12 of the 2012 Law of the Sea on prior notice or Article 37 on acts that can affect Vietnam's security.¹¹³

Conclusion: UNCLOS in Vietnam's perception of the international maritime order

Evidence from Vietnam's behaviours in recent years indicates that there has been a major change in Vietnam's perception of UNCLOS and the role of UNCLOS in the international

maritime order. Specifically, the state has paid more attention to the impact of UNCLOS while formulating its foreign policy. It has also relied more on UNCLOS to buffet its maritime claims and referred to the treaty with some regularity as a source of guidance in drafting its domestic law.

At the international level, Vietnam continues to highlight the significance of UNCLOS in maintaining the world's maritime order. It actively participates in various instruments that have been adopted to implement UNCLOS. It is worth noting that the state has repeatedly touted UNCLOS as the most important law of the sea document that has met the desire and expectations of the international community for a fair international legal order of the oceans.¹¹⁴ The government's representative has also called for a full implementation of UNCLOS, which includes the respect for the rights the coastal states have in their maritime zones.¹¹⁵ Also, the country has frequently emphasized the importance of the 'comprehensive and effective dispute settlement system which offers States Parties important peaceful means for the settlement of their maritime disputes, thus protecting their legitimate interests as well as the interest of the international community'.¹¹⁶ This is a clear departure from the position it took in the negotiation of UNCLOS in which it 'firmly opposed' any compulsory third-party settlement because that would violate 'the principle of the sovereign equality of states'.¹¹⁷

At the domestic level, Vietnam has established a relatively comprehensive domestic legal framework to facilitate its implementation of UNCLOS. Recent laws, including the 2003 Law on National Border, the 2004 Fishery Law, the 2005 Maritime Code, the 2014 Environment Protection Law, the 2015 Law on Sea and Island Natural Resources and Environment and, in particular, the 2012 Law of the Sea have helped to bring the country's legislation much closer to UNCLOS. The old legal documents adopted in the pre-UNCLOS period have all been replaced and superseded. The picture is not perfect though, as one can still argue that a few provisions in Vietnamese laws, including the straight baselines system, are not consistent with international law and UNCLOS. But it is clear that UNCLOS plays an increasingly prominent role in Vietnam's domestic legal order. Article 2 of the 2012 Law of the Sea, for example, states that in case there are differences between the provisions of the Law on the one hand and those of an international treaty to which Vietnam is a party on the other hand, then provisions of the international treaty shall prevail.¹¹⁸ This is in accordance with the new Constitution of Vietnam which provides that Vietnam shall comply with all treaties to which it is a party.¹¹⁹ This is also in accordance with the 2016 Treaty Law, which provides that when a domestic legal document and a treaty to which the state is a party contain incompatible provisions on the same matter, the treaty shall prevail;¹²⁰ and the 2016 Law on Promulgation of Legal Normative Documents, which provides that the promulgation of domestic legal documents shall not create any obstacles to the implementation of treaties to which Vietnam is a party.¹²¹

Vietnam's policy change and legislative evolution in the area of maritime issues and navigational rights in particular are the result of its own reassessment of geopolitical realities and national interests. The adoption of the 1977 Statement and the 1980 Decree reflected Vietnam's heightened sensitivity and overwhelming preoccupation with national security in the midst of the Cold War. The country was stretching to cope with the aftermath of the Vietnam war, the military confrontation from the Pol Pot regime in Cambodia, the isolation and sanctions imposed by the United States and its allies, and the suspicions, tension, and rivalries in its relationships with China and many ASEAN member states.¹²² Toward the end of the Cold War, Vietnam began to re-evaluate its security environment and reassess its foreign policy in response to the changing context

both domestically and internationally. Along that line, Vietnam has concluded that UNCLOS would offer or facilitate a more level playing field for all states, especially small ones, to protect their legal rights in the oceans, including the rights to explore and exploit natural resources for economic development, and peacefully settle their disputes. It has, therefore, become increasingly interested in promoting the role of UNCLOS as a 'constitutive multilateral treaty' on the oceans in laying the legal foundation for the establishment of all major maritime areas.¹²³ Given its evolving perception of international law, its priority and desire for a peaceful environment and economic development and in the context of the South China Sea disputes with its neighbours, it is expected that Vietnam will continue to rely more heavily on international law and UNCLOS in its foreign and oceans policy in the years to come.

Notes

* The views expressed in this chapter are those of the author and do not necessarily represent the position of his affiliations.

- 1 See Central Intelligence Agency, *The World Factbook: Vietnam*, available at www.cia.gov/library/publications/the-world-factbook/geos/vm.html (last visited 1 April 2016).
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- 3 Epsey Cooke Farrell, *The Socialist Republic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime* (The Hague: Nijhoff, 1998), 7.
- 4 Nguyen Chu Hoi and Hoang Ngoc Giao, 'National Maritime Policy: A Vietnamese Case Study' in *Routledge Handbook of National and Regional Oceans Policy* edited by Bilianca Cicin-Sain, David Vanderzwaag and Miriam Balgos (New York: Routledge, 2015), 444–61, at 446.
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- 6 The Soviet Union led the protest against the omission of the Democratic Republic of Vietnam at UNCLOS I and UNCLOS II; the protest, however, did not succeed. See Epsey Cooke Farrell, *The Socialist Republic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime* (The Hague: Nijhoff, 1998), 33.
- 7 See United Nations, *Third Conference on the Law of the Sea, Volume I, Summary Records of Plenary Meetings of the First (New York, 3–15 December 1973) and Second (Caracas, 20 June to 29 August 1974) Sessions, and of Meetings of the General Committee, Second Session*, available at <http://legal.un.org/diplomaticconferences/lawofthesea-1982/Vol1.html> (last visited 1 April 2016).
- 8 For an overview of the Vietnam war, see Spencer C. Tucker (ed.), *The Encyclopedia of the Vietnam War: A Political, Social, and Military History* (2nd edn, ABC-CLIO, 2011).
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- 11 See Epsey Cooke Farrell, *The Socialist Republic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime* (The Hague: Nijhoff, 1998), 33–39. For information on the membership and common interests of the traditional groups at the Conference, see Myron H. Nordquist, *United Nations Convention on the Law of the Sea 1982: A Commentary – Volume I*, Martinus Nijhoff Publishers (Dordrecht/Boston/Lancaster, 1985), 81–85.
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- 13 Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of 12 May 1977, paragraph 1, available at www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/VNM.htm (last visited 1 April 2016).
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 - 16 Decree No. 30 of the Government Council of the Socialist Republic of Vietnam on Regulations for Foreign Ships Operating in Vietnamese Maritime Zones, adopted 29 January 1980, available at <http://faolex.fao.org/docs/pdf/vie4470.pdf> (last visited 1 April 2016).
 - 17 Statement of 12 November 1982 by the Government of the Socialist Republic of Vietnam on the Territorial Sea Baseline of Vietnam, available at www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/VNM.htm (last visited 1 April 2016).
 - 18 Vietnam argued that the Vietnamese coast meets both the geographical criteria for the use of straight baselines – a “deeply indented” coast or “a fringe of islands along the coast in its immediate vicinity” and that it base points “[do] not deviate in any way from the general ‘s-shaped’ direction” of the coast. Many states and observers, however, maintain that the Vietnamese baselines do not meet the criteria and depart to an appreciable extent from the general direction of its coast. See, for example, United States Department of States, *Limits in the Sea No. 99 – Straight Baselines: Vietnam* (Washington D.C., 1983) available at www.state.gov/documents/organization/58573.pdf (last visited 1 April 2016).
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 - 20 See Myron H. Nordquist, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1985), 133–34.
 - 21 See Epsey Cooke Farrell, *The Socialist Republic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime* (The Hague: Nijhoff, 1998), Chapter 2. See also United Nations Treaty Collection, *Status of the United Nations Convention on the Law of the Sea*, available at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en (last visited 1 April 2016).
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- 25 See United Nations Treaty Collection, *Status of the United Nations Convention on the Law of the Sea*, available at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en (last visited 1 April 2016).
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