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Background Brief:

China Considers Countermeasures if Vietnam Takes South China Sea Legal Action

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Over the past week there have been more open discussions in China about how China should react if Vietnam follows the Philippines and sues China over the South China Sea disputes. Chinese experts, in articles widely circulated on social media, argue that China should change its "three no's" strategy and answer the lawsuit, while taking countermeasures outside the courtroom even though the two countries share similar ideology.

We request your assessment of the following issues:

Q1. How do you assess the possibility that Hanoi will sue Beijing over the South China Sea dispute?

ANSWER: Vietnam has had contingency plans dating back more than six years to take legal action against China over their disputes in the South China Sea. This has taken the form of wide consultations with experts in international law, and the United Nations Convention on the Law of the Sea (UNCLOS) in particular. Vietnam reportedly has prepared draft legal arguments that are reviewed and revised from time to time.

It is important to clarify what legal issues Vietnam would raise – sovereignty issues or “disputes concerning the interpretation or application” of UNCLOS.

With respect to disputes in general, the UN Charter, Article 33, lays out the following:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

Vietnamese officials have on several occasions made reference to the UN Charter. Generally, if China and Vietnam cannot resolve their dispute(s), or have exhausted bilateral negotiations, both parties would have to agree to resolve their dispute by the other means listed in Article 33 of the UN Charter. Arbitration and judicial settlement require the consent of both parties. In other words, Vietnam cannot unilaterally “sue” China in an international tribunal. Failing mutual agreement, Vietnam could take its case to the UN Security Council where China has the right of veto.

UNCLOS Article 287, Part XV, outlines four dispute settlement mechanisms to resolve “disputes concerning the interpretation or application of this Convention.” However,

UNCLOS specifically exempts, *inter alia*, sovereignty, maritime boundary delimitation and military activities from its purview.

Signatories to UNCLOS are free to nominate one or more of the following four mechanisms: International Tribunal on the Law of the Sea, International Court of Justice, Arbitral Tribunal (Annex VII), and Special Arbitral Tribunal. If a state has not expressed its preference, as was the case with the Philippines and China, the default position is the Arbitral Tribunal. The Arbitral Tribunal can hear a state's claim even if the other party declines to participate. This was the case in the claims brought by the Philippines against China.

If Vietnam followed the Philippines' model, it could only raise issues that required the Arbitral Tribunal to interpret and/or apply UNCLOS. The Award by the Arbitral Tribunal would be final, not subject to appeal, and must be complied with by both parties immediately. But UNCLOS contains no enforcement mechanism.

If Vietnam took legal action and won this outcome would be a severe blow to China's prestige and international standing, particularly if China participated in proceedings.

More importantly, the Arbitral Tribunal Award would become part of international case law and binding on all signatories to UNCLOS. Vietnam could then apply political and diplomatic pressure on China by insisting that the Award be complied with, unlike the Philippines whose president set it aside. Vietnam's actions would provide a foundation for other members of the international community, particularly maritime powers, to weigh in to support Vietnam.

Vietnam's actions would put ASEAN in a bind. On the one hand, ASEAN continually intones its support for international law, including UNCLOS. On the other hand, ASEAN eschews confrontation, especially with China.

While there has been speculation of late that Vietnam is preparing to take legal action, sources in Hanoi report privately that no such action is imminent. Rather, Vietnam raises the legal option to constrain China from taking more aggressive action against Vietnam.

Chinese actions in 2019 and April this year have been highly provocative, such as conducting surveys in Vietnam's Exclusive Economic Zone (EEZ), harassing Vietnamese oil exploration, and sinking a Vietnamese fishing boat. But China has not maintained a permanent presence in Vietnam's EEZ nor harassed Vietnamese-occupied features or military forces in the South China Sea. In sum, no critical incident has taken place that has crystalized a dispute between China and Vietnam that compels legal action at this time.

Q2. How do you think Beijing would react if Vietnam initiated legal action?

If Vietnam took legal action against China at this time, amidst the war of words between Beijing and Washington over the coronavirus, it would be viewed by China as an incendiary act. Not only would China's propaganda machine go back into high gear to denounce the legality of Vietnam's actions and revive the "three no's" – non-recognition, non-participation, and non-compliance with the proceedings. But also, China would likely retaliate by imposing economic sanctions on Vietnam, step up

harassment of Vietnamese fishermen, and stage provocations by sending survey vessels and China Coast Guard ships into “disputed waters.”

China would bring intense diplomatic pressure on ASEAN members to remain silent and threaten to withdraw from the negotiations on a Code of Conduct.

China’s actions would invite a verbal and military response by the United States, such as naval presence patrols. Japan, Australia, India, and some European nations, such as France and the United Kingdom, would loudly condemn China’s actions. Tensions would persist throughout the entire time period it takes the Arbitral Tribunal to reach its final Award.

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