# THE SOUTH CHINA SEA: TEN MYTHS AND TEN REALITIES

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*at the 4th International Workshop on the South China Sea*
*organised by the Diplomatic Academy of Vietnam*
*and the Vietnam Lawyers Association*

*Ho Chi Minh City, 21 November 2012*

All too often, the public discourse on the conflicting claims to territorial sovereignty and maritime jurisdiction in the South China Sea renders an already complex subject even more complicated. The mass media and some academic commentators, who should know better, help this trend along by perpetuating, in the face of the facts and realities, certain myths related to the disputes. Some of these myths reflect nationalist sentiments in their purveyors' respective countries,expressed in public demonstrations and in traditional and non-traditional channels of communication. Indeed, some of them may have their roots in nationalist motivations.

A discussion of some of these myths and the contrary realities follows.

**Myth #1: Disputes in the South China Sea over territorial sovereignty or maritime jurisdiction can be "resolved" soon.**

Aside from legal considerations, three factors stand today in the way of the compromises and reciprocal concessions that are essential for a negotiated settlement of most international disputes.One of these factors is the strengtheningand diversification of a variety of internal political forces, together withthebroadening and deepening of these forces' influence on national decision-making. The broadening and deepeningof influence on decision-making are, in turn, a result of the opening up of societies to more and more expressions of public sentiment and also of the development and use of information technology for those expressions. The second factor is the shortened tenures, and, therefore, the increased insecurity, of many national decision-makers. The thirdfactor, exacerbated by the first two,is the intractability of what national policy-makers and those who influence them consider as the vital interests of their nations – or at least say publicly that they so consider them.These factors are getting increasingly difficult to overcome.The first two factors are rather self-evident. The third one is often overlooked.

In the case of the South China Sea, the individual claimants, as well as the United States as the global super-power, have national interests that clash and are incompatible with one another. The U. S., for example, does not wish to see any single power dominating East Asia. It insists on its freedom to use the sea, including the exclusive economic zone, especially the one projected from China's main coastline, to obtain sensitive and secret information. A related consideration is the freedom of navigation and overflight to protect international trade and military deployments, particularly the U. S.' own.

On the other hand, Chinainsists on control of the South China Sea for fear, among its many concerns,that other powers would use it again, no longer to impose centuries of humiliation on the country, as they did in the recent past and which would be impossible these days, but to contain and surround it and make more difficult the rise that China considers to be the inevitable realisation of its right as a major, powerful nation with a precious and influential civilisation. What right would China have to be considered as the Middle Country by its neighbours if it did not completely control the sea to its south or if it allowed another major power to do what it liked in the exclusive economic zone as projected from the Chinese mainland's coastline? That seems to be a question that may be in the minds of China's decision-makers. Another concern may be the fear that the sea may be used to deprive China of the materials and connections needed by its booming economy.

At the same time, the authorities on Taiwan cannot afford politically to be perceived as being less assiduous and forceful than Beijing in asserting China's rights in territorial questions.

IfVietnam gave up its rights to the Paracels and other features of the South China Sea, it would be hemmed in by Chinese power on the sea. Many in the Philippines still remember that Japanese forces invaded their country from jump-off points in the Spratlys; Chinese hordes could, among other Philippine concerns, do the same thing. The Philippines, therefore, has an interest in pushing its western boundary as far out on the sea as possible.

A vast expanse of the South China Sea lies between the two wings of Malaysia, not only dividing them, but also linking them together. As I state on page 80 of my book, *Where in the World is the Philippines?* (Singapore: Institute of Southeast Asian Studies, 2011), "Malaysia bases its claim (to land features and waters

in the South China Sea) on (their) location on its continental shelf and has invoked national security and their proximity to the Malaysian mainland in making the claim." I continue, "Since 1984, Brunei Darussalam has claimed an 'exclusive fishing zone' and a continental shelf projected from its coastline into the South China Sea." In 2009, Malaysia and Brunei Darussalam were reported to have reached an agreement reconciling their conflicting claims.

And then there are the oil and gas resources that might (or might not) be locked in the seabed of the South China Sea for exploitation by the energy-hungry countries. There are also the fish that used to teem in the waters of that sea for harvesting for the countries' fish-eating populations by their own fisher-folk.

**Myth #2:International law alone, including the 1982 UNCLOS, is sufficient for the peaceful settlement of the conflicting claims in the South China Sea.**

The member-states of the Association of Southeast Asian Nations, or ASEAN, and most other governments invoke, at least publicly, international law, including, in particular, the 1982 United Nations Convention on the Law of the Sea, which was opened for signature in December 1982 and entered into force in November 1994. All claimants to sovereignty and/or jurisdiction in the South China Sea – China, Vietnam, the Philippines, Malaysia, Brunei Darussalam – are parties to the 1982 UNCLOS.Although U. S. administrations of both parties have expressed their support of its "principles", the United Statesis not a party to the convention on account of opposition in the U. S. Senate, which is required by the U. S. Constitution, by at least a two-thirds majority, to give its "advice and consent" to the convention's ratification. China signed the 1982 UNCLOS on 10 December 1982 and ratified it on 7 June 1996.

It may be interesting to note that the accepted formulation in international circles, including in ASEAN and forums in which China is involved, on the South China Sea is "respect for the universally recognised principles of international law, including the 1982 UNCLOS", a good example of the usual internationally negotiated compromise. The compromise seems to be in the stress both on the "universally recognised principles"(but not necessarily the letter) of international law and on the explicit and specific citation of the 1982 UNCLOS.

Countries would make their policy choices on the basis of reinforcing the national argument and other aspects of the national interest. It must be remembered

that the application, if not the interpretation, of international law is often uncertain, flexible and dependent on sovereign states' conception of the national interest.In the absence of a world government, most of international law is often dependent on sovereign states for its implementation.

The Philippines' March 2009 baselines law and the joint submission by Malaysia and Vietnam to the United Nations Commission on the Limits of the Continental Shelf, as well the Philippines' "partial submission",in May of the same year sought to align these countries' respective claims closer to the provisions of the 1982 UNCLOS. The newly issued Viet Nam Law of the Sea, which is scheduled to take effect at the beginning of 2013, in fact seeks to give prevalence to the UNCLOS and other international agreements over Vietnam's national laws.

Nevertheless, even in the unlikely event that the territorial sovereignty issues are somehow resolved, there are still the inevitable overlaps of exclusive economic zones to be negotiated. It must be remembered that the 1982 UNCLOS provides for consultations over such overlaps between the countries concerned. It must also be made clear that the convention does *not* pass judgment on conflicting territorial or jurisdictional claims.

On 25 August 2006, China, likeseveral other countries,including France and the Republic of Korea, gave explicit notice of its refusalto subject itself to any of the dispute-settlement mechanisms provided for by the 1982 UNCLOS. Article 298 of the convention allows such opt-outs by states upon their signature to, ratification of, or accession to the convention or "at any time thereafter".

**Myth #3: China/Taiwan claims jurisdiction over all or almost all (land and water) of the South China Sea.**

Those who assert this do not cite any instance in which Chinese authorities on either side of the Taiwan Straits make such an all-encompassing claim. In fact, one of the problems with the Chinese claim is its lack of precision.In any case, no government is documented as having claimed all or almost all of the South China Sea.

On 7 May 2009, China sent a note to the UN Secretary-General protesting againstMalaysia and Vietnam's "joint submission"to the UN Commission on the Limits of the Continental Shelf of the same date. Vietnam's"executive summary" of that submission claimed "sovereignty over Hoang Sa (Paracels) and Truong

Sa(Spratlys) archipelagoes as well as more than 3000 islands and islets covering a large part of the East (South China) Sea", a claim that the Philippines similarly protested against in a note dated 4 August 2009.The Chinese *note verbale*, for the first time, officially submitted to the UN a copy of China's map bearing the nine-dashed, U-shaped line surrounding the South China Sea. It claimed "indisputable sovereignty over the islands in the South China Sea and the adjacent waters" and "sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map)". Without defining the extent of the "adjacent" or "relevant" waters, however, China has apparently chosen not to indicate the precise extent of its maritime claims – at least, not yet. At this juncture, it must be pointed out that the nine dashes – eleven, originally – are not precisely situated by the normal coordinates.

**Myth #4: Non-claimants to territorial sovereignty or maritime jurisdiction in the South China Sea have no stake or interest in developments there.**

All, whether claimant-states or non-claimants, particularly those that heavily use the South China Sea as a vital artery of commerce, have an enormous stake and a deep interest in peace and stability in the area, in the peaceful settlement of the disputes there, in the prevalence and observance of international law in the relations among nations, and in the freedom of navigation on and overflight over international waters. These include all ASEAN countries, claimants and non-claimants, and ASEAN as an association. They also include Japan, Korea, China, Taiwan, Hong Kong, the United States, several European, Latin American and African countries, and the oil exporters of the Middle East. While non-claimants, including those in ASEAN, do not take sides in the disputes over territorial sovereignty or maritime jurisdiction, all do have stakes and interests in peace and stability, in the non-use of force,and in the rule of law generally, especially those countries that trade heavily in or with East Asia.

It is consequently quite surprising why so few of these countries are sufficiently assertive on these issues or why so many of them stress their neutrality instead of their interests.

**Myth #5: Disputes in the South China Sea can be resolved only through bilateral, as against multilateral, negotiation.**

Until the nature, location and extent of all the claims in the South China Sea are clarified, it will be difficult to determine with any certainty which disputes are purely bilateral (two-sided) and which of them involve more than two claimants. On the basis of the claims that have actually been made, it can be said that only the Paracels, which are claimed by China/Taiwan and Vietnam and no one else, and, pending the clarification of the Vietnamese claims, probably the area around Scarborough Shoal (Bajo de Masinloc in Spanish, Panatag in Tagalog, and Huangyan Dao in Chinese) can be identified as subject to bilateral negotiations. In any case, aside from the sovereignty and jurisdictional claims, other countries also have a stake and interests in the area.

In this regard, it is important to remember that, like other significant ASEAN instruments, the Declaration on the Conduct of Parties (DoC) was signed, in November 2002, by individual ASEAN states and not by ASEAN as an association.This was before the entry into force of the ASEAN Charter, which conferred legal personality upon the association. Nevertheless, it is also important to note that the DoC was signed by the ministers of *all ASEAN countries*, claimants and non-claimants alike, as wellas by China's special envoy, negotiated between the senior officials of *all ASEAN countries* and China, and concluded on the occasion of the *ASEAN-China Summit meeting*. All ASEAN states and China adopted the guidelines of the DoC.

Earlier, all (then-six) foreign ministers of the association had issued the 1992 ASEAN Declaration on the South China Sea. Since then, the ASEAN leaders, together and on the occasion of their summit meetings, have, through the statements of their chairman, repeatedly reiterated their commitment to the 1992 ASEAN Declaration or the 2002 DoC or both.

In any event, ASEAN states normally consult among themselves in working out their positions or stances on major international issues, and nobody has the right to tell them whether and when to consult and what to consult about. Indeed, most, if not all, states have an interest in a strong and united ASEAN.

Moreover, if their chairman's statements and other public documents are to be believed, the ASEAN Regional Forum, the ASEAN+1 Post-Ministerial Conferences, the ASEAN Defense Ministers Meeting Plus, and the East Asia Summit have all discussed matters pertaining to the South China Sea.

**Myth #6: All have an interest in the *early* conclusion of a code of conduct in the South China Sea.**

Some countries *do* have an interest in the prolongation of the pendency or discussions on a code of conduct in the South China Sea. While the code of conduct is under pendency, negotiation or discussion, it can be alleged that any country that is not a claimant, e.g., the U. S., has no right to get involved in the disputes. Any country-claimant that denies non-claimant countries' right to have a stake and interest in the peace and stability of the region and in freedom of navigation in and overflight over the South China Sea stands to benefit from the pendency of a code of conduct for the South China Sea.

In the meantime, an instrument, originally intended to be a code of conduct, had to be downgraded to a political declaration, awkwardly but cleverly called the Declaration on the Conduct of Parties in the South China Sea (DoC), because of uncertainties as to where such an instrument would apply. Those uncertainties arose largely from the disagreement on whether the instrument would cover the Paracels, on which the Vietnamese insisted, or not, about which the Chinese were adamant. Until now, nobody has been able to explain how a "legally binding" code would differ from a political declaration in terms of legal enforceability, particularly in the light of the "incidents" that seem to have violated the DoCsince its conclusion in 2002 and thus eroded the spirit of confidence-building between ASEAN and China. However, a code of conduct can be made stronger than a political declaration through the inclusion of dispute-settlement mechanisms and the like.

All the ten ASEAN states have expressed their wish not only for the "early conclusion" of a code of conduct on the South China Sea, most recently in the foreign ministers' statement of 20 July 2012, but also for starting, as early as possible, negotiations with China on its contents. However, in an apparent compromise internally as well as externally, China has insisted on negotiating with ASEAN on a code of conduct only when "the conditions are ripe". It remains unclear just when and by whom those conditions can be considered as being "ripe".

**Myth #7: Calling the South China Sea the "West Philippine Sea" unambiguouslystrengthens the Philippine claim.**

In a certain sense, it *does*strengthen the Philippine claim. Calling what is universally known as the South China Sea the West Philippine Sea can be seen as assertingin an additional way the Philippines' claims in that body of water and the land features in it.

In another sense, it does *not* strengthen the Philippine claim, no matter how popular it turns out to be among those Filipinos who think about these things. Instead, it tends to undermine the Philippine attempt, made in the country's baselines law of March 2009, to align its South China Sea claim more closely with the requirements of the 1982 UNCLOS. Thus, by going against its own move, the Philippines, in calling the South China Sea the West Philippine Sea, coulddiminish the moral and legal advantage that the country now enjoys.

"South China Sea" generally refers to that part of the Pacific Ocean that is south of the Chinese mainland and the island of Taiwan, west of the Philippines, northeast of the Malaysian peninsula and Singapore, north of Indonesia, northwest of Sabah, Sarawak, Brunei Darussalam and Indonesian Borneo, and east of Vietnam. European seafarers first called it the South China Sea, or its equivalent in other European languages, in order to distinguish it from nearby bodies of water, from other parts of what had come to be known,as early as the 16$^{th}$ century, as the China Sea. The International Hydrographic Organization, an80-member inter-governmental body founded in 1921 and headquartered in Monaco, adopted the name "South China Sea". (The organisation was re-named in 1970 from the original International Hydrographic Bureau.) The name "South China Sea" was also given to that body of water in order to mark the trade route from Europe and South Asia to China.

However, the Chinese themselves call it Nan Hai, or Southern Sea, that is, south of China, but not South China Sea. The Vietnamese have named it BiénĐông, or Eastern Sea, that is, east of Vietnam, but not East Vietnamese Sea. This is because both China and Vietnam seem to prefer to keep their maritime claims ambiguous. (In the case of the latter, this may be so at least until the entry into force of Vietnam's Law of the Sea at the beginning of 2013.)

On the other hand, in its baselines law of March 2009, the Philippines declared a "regime of islands" in accordance with Article 121 of the 1982 UNCLOS for the land features in the Spratlys that it claims and for Scarborough Shoal (or Bajo de Masinloc, as the text of the law calls it). Now, applying to the contested body of water

the appellation “West Philippine Sea” seems to run counter to the March 2009 legal declaration, which was apparently intended to bring the Philippine claim closer to the requirements of the 1982 UNCLOS. For the nomenclature“West Philippine Sea”, as a replacement for South China Sea, seems to indicate that the Philippines is claiming jurisdiction over all of that body of water.

Which is which? A regime of islands according to the 1982 UNCLOS or an, at least, ambiguous claim to some or all of the waters of the South China Sea? It can be said that claiming all of the waters beyond what the 1982 UNCLOS allows would be contrary to that international convention.

In any case, the Philippines has not, at least not publicly or, as far as I know, officially, indicated where the “West Philippine Sea” begins and where it ends. In the face of this inability or unwillingness, the use of this appellation seems to be a mere public-relations exercise – not a trivial matter – that is apparently successful in gaining public support for the Philippine positions on the South China Sea among the Philippine public.

At the same time, it is important to remember that nobody has undertaken, again at least not officially or in public, the relatively easy task of designating which of the land features that are subject to conflicting claims are islands and which are rocks according to the definitions in Article 121 of the 1982 UNCLOS. This kind of “strategic ambiguity”, it must be pointed out,is not a unique practice in international relations.

**Myth #8: The authorities on Taiwan have a claim in the South China Sea that is distinct from that of the People’s Republic of China.**

China and Taiwan are often listed separately as claimants to the land features and waters of the South China Sea. This is inaccurate and misleading. Chinese on both sides of the Taiwan Straits and the states that recognise the People’s Republic of China – and most of the international community do – affirm that there is only one China.Most other states recognise only one China and the People’s Republic as the only legitimate government of that China.

At the same time, it would not be politically acceptable for the authorities on Taiwan to be viewed by Chinese, including particularly Taiwan’s own electorate, as being “softer” than those on the mainland on matters of territory, sovereignty and

national pride. This is one of the reasons why, although they differ on many other foreign-policy issues, Beijing and Taipei have exactly the same views on territorial questions, such as the China-India border dispute, one of the last of the many territorial conflicts that used to roil China's relations with its neighbours.

Some interesting questions: Can or will Taiwan, independently of Beijing, clarify the nature and location of the nine dashes surrounding the South China Sea on Chinese official maps? It was, after all, the Kuomintang, now ruling Taiwan as it has done in most of its history, thatfirst issued the map with the dashed line in 1948, when that party was still recognised by almost allother countries as being in effective control of all of China and before it fled to Taiwan. Would this not reinforce the perception, not least on the part of Taiwan's own electorate, that Taipei is "softer" than Beijing on territorial and maritime disputes? On the other hand, would this not reinforce the notion of Taiwan's independence that increasing numbers of people on that island are said to want to uphold?

**Myth #9: The validity of a country's claim to a piece of territory and its adjacent waters depends on their proximity to that country's mainland.**

Some claimants to land features in the South China Sea base their claims, at least partly, on the proximity of those features to the mainland of the claimant. As the Chinese have repeatedly pointed out, such an assertion has no basis in international law. If it had, then not so many states would recognise the validity of, for example, the United Kingdom's claim to sovereignty over the Falklands/Malvinas, which are much farther from Great Britain than they are from Argentina. There are other such instances around the world.The proximity argument, however, seems to be persuasive to the popular mind.

**Myth #10: The Association of Southeast Asian Nations, orASEAN, can "resolve" the disputes in the South China Sea among its member-states.**

There are legal, sovereignty and jurisdictional disputes among some ASEANstates in the South China Sea. Some commentators ask, with some exasperation, why ASEAN cannot "resolve" these disputes.

However, ASEAN is not an adjudicating body. It, therefore, cannot definitively and legally "resolve" by itself territorial or maritime disputes among its

members, much less between any of them and China/Taiwan. Nevertheless, ASEAN as a group can unite behind the principles of international law and the non-use and non-threat of force, particularly in seeking to settle disputes, and thus help to prevent the disputes from escalating into armed conflict. In fact, it has done so by signing the Declaration on the Conduct of Parties in the South China Sea of November 2002 (DoC), adopting the guidelines for the implementation of the DoC, and issuing the 20 July 2012 statement on the South China Sea, which re-affirm the ASEAN stand committing the association to the non-use of force and the peaceful settlement of disputes.

More formally, the 1976 Treaty of Amity and Cooperation in Southeast Asia provides for a High Council that is "to take cognizance of the dispute or the situation (that is 'likely to disturb regional peace and harmony') and shall recommend to the parties in dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation". Resort to the High Council requires the consent of all parties to the dispute. So far, the High Council has never been convened.

The parties to the treaty,aside from all ASEAN members, are now the European Union and, in addition to the ASEAN ten, 19 non-ASEAN states, including China, Japan, the two Koreas, Australia, India, Pakistan, Turkey, Russia and the United States of America. Brazil is waiting in the wings. Aside from adhering to some kind of mechanism for settling disputes peacefully, the parties to the treatyalso assure one another that they will refrain from the use or threat of force in seeking to settle inter-state disputes and that they will not interfere in one another's internal affairs.

ASEAN can promote mutual confidence among its members and between them and China. It has done so in the Indonesia-led and -hosted informal "Workshops on Managing Potential Conflict in the South China Sea", in which officials from both the People's Republic and Taiwan take part, and through cooperative projects emanating from those workshops, the ASEAN Regional Forum, and other activities.

***Conclusion***

Let us then be clear.

The sovereignty and jurisdictional issues in the South China Sea cannot be resolved anytime soon because of the domestic and other political forcespreventing decision-makers in claimant-states from making the compromises that make

international agreements possible. The application of international law can be subject to different interpretations; the interpretations are often driven by the decision-makers' and/or nationalist elements' conception of the national interest. In this regard, nobody can document the allegation that any state has claimed all or almost all the waters of the South China Sea.

At the same time, most members of the international community, claimants and non-claimants alike, have a stake and interest in peace and stability in the South China Sea area, the non-use and non-threat of force there, the peaceful settlement of disputes between states, the rule of international law, and freedom of navigation and overflight in accordance with the 1982 UNCLOS.

Most of the disputes in the South China Sea involve more than two parties; most of them, therefore, cannot be addressed in bilateral negotiations alone. Some states have an interest in the protracted pendency of or prolonged negotiations on a code of conduct on the South China Sea as an argument against those that are not party to the negotiations from having anything to do with the area of the disputes. The Philippine reference to the South China Sea as the West Philippine Sea may undermine the country's position of not claiming all of the South China Sea. Mainland China and Taiwan do not have separate claims with respect to the South China Sea.

The geographical distance of a piece of land or water claimed by a state from the mainland of that state generally has nothing to do with the validity of its claim. ASEAN is not an adjudicating body that can "resolve" legal, sovereignty or jurisdictional disputes among or between its members.

In discussing the issues with respect to the disputes in the South China Sea, let us at least be clear about the facts.

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