

The origin and constraint of the consultation on the "South China Sea Code of Conduct" and China's response

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Abstract

Consultations between China and ASEAN countries on the text of the "Code of Conduct in the South China Sea" (hereinafter referred to as the "Guidelines") in Siem Reap, Cambodia, have entered the second round. Although it has been more than 20 years since the signing of the Declaration on the Conduct of Parties in the South China Sea, which is the basis for the formulation of the "Guidelines", it is not easy to implement. By the way, there are still major obstacles, which continue to follow-up "South China Sea Code of Conduct" specific consultations. It mainly faces disputes such as the legal nature of the "guideline", the space scope and the free navigation of warships in the South China Sea. In the subsequent consultation process, we must adhere to the orientation of China's interests, legally binding some provisions in the legal nature, and apply the space scope to the waters of the South China Sea Islands and restrict the navigation of warships in the waters. Freedom, actively build rules of order in the South China Sea, and promote peace, stability and long-term stability in the South China Sea.

Keywords

South China Sea; South China Sea Code of Conduct; South China Sea Situation.

1. Introduction

As a semi-enclosed sea, the South China Sea is rich in spatial, energy and fishery resources, with a high value of marine biodiversity, making it one of the most ecologically significant areas on Earth. At the same time, the South China Sea plays an irreplaceable key role in the economic development of our country and the neighbouring countries, possesses superior location advantages, and is the necessary channel for our country to the East Indian Ocean and the Pacific Ocean. According to the statistics, more than 64% of our country's foreign trade and import/export of petroleum need to be carried out through the South China Sea for sea transport, in addition, there are about 50,000 merchant ships and 50% of the oil tankers passing through the South China Sea every year in the world. ^[1]As the South China Sea has significant political and economic strategic interests, the excessive and destructive development of the South China Sea by the coastal countries has led to severe pollution of the marine environment of the South China Sea, the depletion of energy and fishery resources, and the degradation of the ecosystem of the South China Sea, which is a tragedy of the commons.

Lately, the regional situation in the South China Sea has been grim, and the disputes and conflicts between extra-territorial powers and coastal countries in the South China Sea over the sovereignty of islands and the delimitation of maritime areas are endless, such as the United States' attempt to adopt the "Asia-Pacific rebalancing" strategy, and the "core interests of the South China Sea", declaring that For example, the United States is trying to adopt the strategy of "rebalancing in the Asia-Pacific region" and claiming "core interests in the South China Sea" to restore its dominant position in the South China Sea, while Viet Nam is attempting to seize its strategic interests in the South China Sea on the grounds of France's infringement, plundering and illegal management of the South China Sea reefs and maritime areas; The

Philippines has also attempted to claim ownership of some of the islands and reefs in the South China Sea on the basis of official documents, maps and leaders' statements made in favour of that country during the colonial period of Spain and the United States. Considering the overall situation of regional stability and development, China and ASEAN countries have made efforts to plan economic and security cooperation in the Asia-Pacific region, promote the in-depth integration of the Belt and Road Initiative, and build a system of rules in the South China Sea. "The "Code of Conduct in the South China Sea (COC)" was born, China will work with ASEAN stakeholder countries to maintain security and stability in the South China Sea region. [2]"China will work with all ASEAN stakeholder countries to maintain the security and stability of the South China Sea region with the goal of "strategic autonomy", exclude the interference of extra-territorial powers led by the United States, and manage the mutual relations among the countries in the region, so as to truly give full play to the effectiveness of the COC in settling disputes and stopping disputes, and in promoting the peace and stability of the South China Sea region as well as its sustainable development.

2. Origins: The Historical Traceability of the "Code of Conduct in the South China Sea" Consultations

With the end of the Cold War and the disintegration of the bipolar relationship between the United States and the Soviet Union, the geopolitical pattern of the Southeast Asian region has undergone corresponding changes, and has begun to gradually enter a new phase of the Southeast Asian order centred on ASEAN, with multilateralism as the main principle. At the same time, the regional situation in the South China Sea also presents the distinctive characteristics of multilateralism under the framework of the new order. 2022 is the year when China and ASEAN countries signed the first political document on the South China Sea issue - Declaration on the Conduct of Parties in the South China Sea (hereinafter referred to as the Declaration of the Conduct of Parties in the South China Sea, hereinafter referred to as the Declaration). Parties in the South China Sea (hereinafter referred to as the Declaration) is a significant moment of the twentieth anniversary of the first political document signed between China and ASEAN countries on the South China Sea issue. Since the signing of the Declaration, the situation in the South China Sea region has been generally stable and controllable, and a number of bilateral and multilateral official consultative mechanisms and multidisciplinary transnational cooperation have been established, with a series of fruitful and concrete practices achieved. [3] Article 10 of the Declaration reaffirms the need for in-depth implementation of the relevant provisions, active exploration of the formulation of the Guidelines, the promotion of the partnership of good-neighbourliness and mutual trust, and the creation of a peaceful, friendly and harmonious environment in the South China Sea region. From the implementation of the Declaration to the conclusion of the Guidelines is a gradual process, and all parties should seek common ground while reserving differences, and steadily push forward the consultations on the Guidelines within the framework of the implementation of the Declaration. Since its official launch in 2013, the consultations on the "Guidelines", despite the complexity of the process due to the different positions of the parties, have made a lot of positive progress under the continuous promotion of the "Guidelines". The process of formulating the "Guidelines" can be reclassified into the following three stages according to the time line:

2.1. Stage of the initial proposal for a "Code of Conduct in the South China Sea"

As early as the 1990s, countries in the South China Sea began to pay attention to the South China Sea issue. In 1992, the six founding members of ASEAN, namely Singapore, Malaysia, Thailand, Indonesia, Brunei and the Philippines, issued a Declaration on the South China Sea at the 25th ASEAN Foreign Ministers' Meeting (hereinafter referred to as the "Malania Declaration" as the current ASEAN Foreign Ministers' Meeting was held in Malania, Philippines), focusing on the

discussion of the dispute over the Spratlys Islands, and began to advocate the formulation of a "code of conduct in the South China Sea". [4]The Declaration on the South China Sea (also known as the "Maranha Declaration" as the ASEAN Foreign Ministers' Meeting was held in Maranha, Philippines, hereinafter referred to as the "Maranha Declaration") focuses on the disputes over the Spratly Islands, and initiates the initiative to formulate a "Code of Conduct in the South China Sea. The Maranha Declaration states that any adverse development in the South China Sea will directly affect the peace and stability of the region, but since the region is directly related to the sovereignty and jurisdiction of all parties, it is necessary to put forward a proposal to appropriately resolve the disputes between the parties, and proposes to use the Treaty of Amity and Cooperation in Southeast Asia (TACSEA) as the framework for formulating a code of international conduct over the South China Sea (hereinafter referred to as "a code of international conduct over the South China Sea"). It is proposed that the framework of the Treaty of Amity and Co-operation in Southeast Asia be used to formulate a code of international conduct over the South China Sea.[5] Since the Maranhas Declaration, ASEAN foreign ministers and summits have taken the South China Sea issue as a key topic for discussion, and the communiqué of the 29th ASEAN foreign ministers in 1996 pointed out that ASEAN countries would actively promote the formulation of a code of conduct over the South China Sea, which would lay the foundation for long-term stability in the South China Sea. While ASEAN member states have reached a consensus, they have also maintained active contacts and consultations with China. In 1997, the leaders of China and ASEAN countries held their first meeting and agreed on the basic principles for dealing with the South China Sea issue, and after the meeting, they jointly issued the Joint Statement of the China-ASEAN Summit Meeting.

2.2. Drafting stage of the text of the "Code of Conduct in the South China Sea"

As the regional issues and maritime situation in the South China Sea became more and more complicated due to the continuous interference of extra-territorial powers, China and the ten ASEAN countries reached an agreement on concluding the "Guidelines" and started the drafting stage of the conceptual text of the "Guidelines", which was formally clarified by the Philippines and Vietnam at the ASEAN Regional Forum (ARF) in 1999. In 1999, at the ASEAN Regional Forum (ARF), it was made clear that the Philippines and Vietnam would draft the conceptual text of the "Guidelines", and in May, the Philippines handed over the draft text to Vietnam for discussion, and the draft of the "Guidelines" submitted by the Philippines and Vietnam was adopted at the ARF in November of the same year, and then handed over to China. China has always been committed to resolving disputes directly with the disputing parties in a peaceful manner through friendly consultation, [6]but the draft "Guidelines" were concluded between ASEAN as a whole and China, which was clearly contrary to China's views, and therefore the fifth "China-ASEAN Senior Officials' Meeting" between China and ten ASEAN countries was held in 1999, and China and the ten ASEAN countries were invited to the meeting. As a result, the fifth "China-ASEAN Senior Officials Meeting" between China and ten ASEAN countries in 1999 failed to reach a consensus on this key issue, and there was a certain degree of conflict. In addition, the formulation of the "Guidelines" was stalled for a time due to previous disagreements with China over the geographical scope of application, restrictions on the construction of controlled and uncontrolled islands and reefs, military activities, and whether to detain and arrest fishermen in the disputed area. At the 35th ASEAN Foreign Ministers' Meeting in 2002, Malaysia proposed to highlight the political rather than legal nature of the document, and to first formulate an interim document that is less legally binding than the Guidelines, i.e., the Declaration (see above, the full name of the Declaration on the Conduct of Parties in the South China Sea), which was agreed upon by the ASEAN Foreign Ministers' Meeting, and to which China agreed with ASEAN's resolution.[7] The ASEAN Foreign Ministers' Meeting reached an agreement on this, and the Chinese side also agreed to the ASEAN resolution. Finally, at the China-ASEAN Leaders' Meeting in 2002, the eleven governments

formally signed the Declaration, and the process of formulating the "Guidelines" has achieved a milestone result.

(Table 1 Relevant normative documents in the South China Sea region)

main part	name	Time
ASEAN	Declaration on the Question of the South China Sea	1992
China and ASEAN	Joint Statement of the China-ASEAN Summit Meeting	1997
China and ASEAN	Declaration on the Conduct of Parties in the South China Sea	2002
ASEAN	ASEAN Proposed Elements for a Regional Code of Conduct in the South China Sea	2012
Philippine	Philippine Draft Code of Conduct in the South China Sea	2012
Indonesia	Zero Draft of a Regional Code of Conduct in the South China Sea	2012
China and ASEAN	Terms of Reference of the Panel of Eminent Persons	2015
China and ASEAN	Guidelines for the Hotline Platform for Senior Diplomatic Officials of China and ASEAN Countries for Responding to Maritime Emergencies	2016
China and ASEAN	Joint Statement of China and ASEAN Countries on the Application of the Rules for Unplanned Encounters at Sea in the South China Sea	2016

2.3. Formal Consultation Stage of the "Code of Conduct in the South China Sea"

China respects the willingness of ASEAN countries to discuss the Guidelines, and is willing to join hands with ASEAN to actively promote the consultation process of the Guidelines. At the Sixth Senior Officials' Meeting on the Implementation of the Declaration held between China and ASEAN countries in 2013, all parties considered that the time had come for the successful implementation of the Guidelines, and announced the official resumption of the consultations on the Guidelines. At the Sixth Senior Officials' Meeting on the Implementation of the Declaration held between China and ASEAN countries in 2013, all parties considered that the successful implementation of the Declaration signalled that the time had come for the consultations on the Guidelines to be resumed. ^[8]At the Eighth Senior Officials' Meeting on the Implementation of the Declaration in 2014, the most notable achievement was the clarification of the "dual-track approach" to the South China Sea issue, namely, first, the disputing parties in the South China Sea should adopt direct negotiation and consultation to resolve their disputes; and second, China will continue to work with ASEAN countries to jointly safeguard peace and stability in the South China Sea. The proposal of the "dual-track approach" provides an efficient and new solution to resolve disputes in the South China Sea region. In 2017, China and ASEAN held the 14th Senior Officials' Meeting and the 21st Joint Working Group Meeting on the implementation of the Declaration, which clarified the basic framework of the "Guidelines" and determined the basic principles of the "Guidelines" and the "Guidelines" for the South China Sea. "This meeting clarified the basic framework of the Guidelines and defined the textual structure of the Guidelines and the key elements contained therein, ^[9]taking a historic step forward towards the finalisation of the Guidelines. In May 2022, China and ASEAN countries held the

36th Joint Working Group Meeting on the Implementation of the Declaration in Siem Reap, Cambodia, to continue to push forward the review of the text of the "Guidelines", which was optimised to make the structure more reasonable and the key elements clearer. "In May 2022, China and ASEAN countries will hold the 36th Joint Working Group Meeting on the Implementation of the Declaration in Siem Reap, Cambodia, to continue the second reading of the text of the Guidelines, and look forward to more positive results.

3. Constraints: Focus of Disputes in the "Code of Conduct in the South China Sea" Negotiations

Since the official launch of the consultation process on the Guidelines in 2013, China and ASEAN countries have made a lot of positive progress through their joint efforts, such as the formation of the consultation concept of "step-by-step and consensus" at the Sixth Senior Officials' Meeting in 2013, and the confirmation of the consultation method of "sorting out consensus, from easy to difficult and by consensus" at the Eighth Senior Officials' Meeting in 2014. At the 8th Senior Officials Meeting in 2014, the consultative approach of "sorting out consensus, moving from easy to difficult, and reaching consensus" was confirmed. ^[10]With the continuous advancement of the formulation process, the consultations on the text of the Guidelines have entered a period of high-frequency consultations and a stage of substantive consultations. After the consultations entered the "deep water zone", the differences between China and ASEAN countries have been increasing, and there are many difficult issues to be resolved, including the legal nature of the Guidelines, the scope of spatial application, and the freedom of navigation of warships, among other controversial points in the negotiations. The "Guidelines" involves the political and economic interests of the claimant countries, and shoulders the mission of constructing the maritime rules of stability and order in the South China Sea region, coupled with the frequent intervention of extra-territorial powers in the "Guidelines", the consultation process of the "Guidelines" is full of challenges. "The consultation process is full of challenges and uncertainties.

3.1. Dispute as to the legal nature of the "guidelines"

In international law, a code of conduct is usually regarded as a non-legally binding document, but under special circumstances, a code of conduct may incorporate legally binding rules or binding rules that are voluntarily observed by States, in which case the code of conduct is a mixture of legally binding and non-legally binding. Since the implementation of the Declaration, there have been cases of violation of the Declaration by the countries concerned, and ASEAN countries realise that a non-legally binding code of conduct can hardly maintain peace and stability in the South China Sea region, ^[11]and hope that a legally binding code of conduct can be formulated to ensure the stability of the South China Sea. The ASEAN countries realise that it is difficult to maintain peace and stability in the South China Sea without legally binding guidelines, and hope to formulate legally binding "guidelines". At the Leaders' Meeting on East Asia Cooperation held in Indonesia in 2011, Marty Natalegawa, then Foreign Minister of Indonesia, said that he hoped to formulate a legally binding "Code of Conduct in the South China Sea", so that the South China Sea issue could be resolved within a legal framework; Vietnam has also proposed a "Code". Vietnam has also proposed that the Code should be legally binding and that if the country concerned withdraws from the Code, it should be decided by the Committee or by consensus of all countries and take effect after 12 months. "The Philippines agrees with the above viewpoints and believes that the Declaration is not legally binding, which leads to disputes over its implementation by the countries concerned, and that it is not sufficient for the management of disputes in the South China Sea, so it expects the formulation of legally binding, comprehensive and enforceable Guidelines. ^[12]The Philippines agrees with the above view that the Declaration is not legally binding, which has led to disputes over its implementation by the

countries concerned, and that it has major shortcomings in the management of disputes in the South China Sea. In addition, in 2017, ASEAN Secretary General Le Luong Minh, after the adoption of the framework of the Guidelines, stated that the Guidelines should be legally binding in order to ensure their effectiveness, which shows that there is a general consensus within ASEAN on the nature of the Guidelines and the need for them to be legally binding. "This shows that ASEAN countries are basically in agreement on the nature of the Guidelines and hope that the Guidelines will be legally binding."^[13] During the consultation process, China has always stressed that the Guidelines are a political document for promoting good neighbourliness and maintaining peace and stability in the South China Sea, rather than a legal document for resolving disputes over territories and demarcation of boundaries. According to Luo Yongkun, a scholar in China, a legally binding Code of Conduct would be in conflict with the 2000 agreement between China and ASEAN that the Code of Conduct is a political document aimed at promoting good-neighbourliness and regional stability, not a legal document for resolving specific disputes. It conflicts with the view that "the code of conduct is a political document aimed at promoting good neighbourliness and regional stability, rather than a legal document for resolving specific disputes" reached between China and ASEAN in 2000^[14], and it is not conducive to the harmony and stability of the South China Sea region to make the code legally binding before the disputes over sovereignty over the South China Sea islands and reefs and the jurisdiction are completely resolved. The core of peace and stability in the South China Sea lies in whether all parties have the sincere will to conscientiously abide by the corresponding treaties and agreements in good faith, which cannot be eliminated simply by relying on a binding document.

3.2. Dispute over the spatial scope of application of the Guidelines

There are 28 islands and reefs in the South China Sea, of which 9 are under China's de facto control, and these 9 islands and reefs are connected to the "South China Sea 9-dash line" in the usual sense. 21st century, China's comprehensive strength has been significantly improved, and in order to further strengthen the construction of offshore engineering, optimise the working environment for personnel stationed on the reefs, and better safeguard China's territorial sovereignty, China has invested a lot of energy in the construction of islands and reefs in the South China Sea. In the 21st century, China's comprehensive strength has increased significantly, and in order to further strengthen the construction of offshore engineering, optimise the working and living environment for personnel stationed on the reefs, and better safeguard China's territorial sovereignty, China has invested a great deal of energy in the South China Sea to carry out the construction of islands and reefs,^[15] and the construction of islands and reefs in the South China Sea has been carried out since 2014, which mainly involves Yongshu Reef, Hwayang Reef, Chigua Reef, Nanfengyu Reef, and Subi Reef, with a total area of about 12 square kilometres. During the negotiation process of the "Guidelines", the disagreement on the spatial scope of application of the "Guidelines" has been increasing (see Table 2), which has become an important difficulty affecting the subsequent negotiation. Malaysia is of the view that the scope of application of the Guidelines should be limited to the Paracel and Spratly Islands, which are at the centre of the issue, and that China's previous construction on the Huayang Reefs has already had an impact on Malaysia's sovereignty; the Philippines, on the other hand, maintains that the scope of application of the Guidelines relates to the South China Sea, and that the Chinese side has no control over the spatial application of the Guidelines. The Philippines insists that the scope of application of the "Guidelines" covers the South China Sea, and that China's expansion of the islands and reefs affects the interests of the Philippines' EEZ to a certain extent; Vietnam's position tends to be the same as Malaysia's, demanding that the scope of application of the "Guidelines" include the Xisha Islands and the Spratly Islands, and expressing its dissatisfaction with China's construction and expansion of the islands and reefs in the South China Sea. China, on the other hand, is of the view that the

Guidelines, ^[16]as maritime rules for crisis management and cooperation mechanisms in the South China Sea, should focus on waters where multiple parties have disputed jurisdiction, and that the spatial scope of application should be locked in the waters of the Spratly Islands, while other waters, which are only subject to bilateral disputes or are not subject to any disputes at all, do not need to be included in the spatial scope of the Guidelines, and that the previous construction of the islands and reefs was entirely motivated by Malaysia. The previous construction of the islands and reefs was entirely within the scope of sovereignty, did not target or affect any party, and was consistent with China's territorial sovereignty and maritime rights and interests.

(Table 2: Points of contention on the spatial scope of the Guidelines)

disputing parties	Main areas of contention	Applicability to non-disputed areas
China	Spratly Islands waters	no
Philippine	Huangyan Island and some Spratly Islands	yes
Vietnam	Paracel and Spratly Islands	no
Malaysia	Paracel and Spratly Islands	no
Indonesia	Natuna Islands	no
Brunei	Islands and reefs within the continental shelf and exclusive economic zone (Nantong Reef)	no

3.3. Dispute over the freedom of navigation of "code" warships

The South China Sea, as one of the most important sea trade routes in the world, has become the focus of controversy among countries in recent years over the freedom of navigation in the South China Sea. From the perspective of historical development, China and the coastal countries in the South China Sea are not traditional maritime powers, and have always maintained a cautious attitude towards the "freedom of navigation". With the development of science and technology, today's level of military technology has made it possible for foreign ships to carry out a series of behaviors that jeopardize the national security of the coastal countries, such as proximity reconnaissance, intelligence gathering and military surveying in the exclusive economic zone and even in the high seas. In the late 20th century, China reached a consensus with the littoral states of the South China Sea on the freedom of navigation in the South China Sea, creating a convergence of interests on this issue, as the Malaysian government emphasized before ratifying UNCLOS, "The Government of Malaysia is of the view that the provisions of the Convention do not give license to other countries to carry out military exercises, particularly those in their EEZs without the consent of the littoral states. littoral states to conduct exercises using weapons or explosives in their exclusive economic zones without the consent of the littoral states." ^[17]Indonesia argued that "warships and other vessels are required to declare their transit in advance and are not allowed to stop or anchor illegally within 100 nautical miles." Vietnam declared that "the entry of foreign military vessels into its contiguous zone requires the prior consent of the Vietnamese government." China also insisted that "foreign military vessels entering China's territorial waters should be authorized by the Chinese government." However, in recent years, due to the constant instigation of the U.S., which accuses China of encroaching on the South China Sea, some littoral states have given up part of their jurisdiction and taken ambiguous stances on the issue of military navigation in the territorial sea, the contiguous zone, and the exclusive economic zone, in order to use the U.S. power to check and balance China in the negotiation process of the "Guidelines". On the issue of territorial waters, contiguous zone and exclusive economic zone, the position is more

ambiguous and vague. Since the Obama administration approved the first "freedom of navigation" operation in 2012, it has repeatedly invaded the waters of China's Spratly Islands under the banner of "freedom of navigation" (see Table 3), and China and the United States have engaged in a number of fierce conflicts. In 2021 alone, the U.S. Navy intruded into the territorial waters of the South China Sea islands and reefs manned by the Chinese side or adjacent waters as many as five times, the U.S. Navy destroyer McCain intruded into the Xisha Islands on February 15; the U.S. Navy destroyer Russell intruded into the Spratly Islands on February 17; and the U.S. Navy destroyer Russell intruded into the Spratly Islands on May 20 Spratly Islands on February 17; the destroyer USS Russell intruded into the Spratly Islands on February 17; the destroyer USS Wilbur intruded into the Spratly Islands on May 20; the destroyer USS Benford intruded into the Spratly Islands on July 12; the destroyer USS Benford intruded into the Spratly Islands on September 18; and the destroyer USS McCain intruded into the Spratly Islands on September 18 "On September 18, the USS Benford intruded into the Meiji Reefs of the Nansha Islands. The U.S., as a traditional maritime power and a global maritime country, promotes the absolute "freedom of navigation" doctrine, coupled with its political stance to contain China, has intentionally thrown out the "South China Sea core interests" on various international occasions to create the issue of "freedom of navigation in the South China Sea", which is the most important issue in the South China Sea. Freedom of navigation in the South China Sea" on various international occasions, under the pretext of meddling in the South China Sea disputes, in order to satisfy its intention of safeguarding its geo-economic and political interests in the South China Sea and its hegemony in the Asia-Pacific region.

4. Breaking the ice: China's Response to the "Code of Conduct in the South China Sea" Negotiations

The South China Sea issue has a bearing on the overall situation of bilateral relations between China and ASEAN, and the basic framework of the Guidelines has reached consensus since the textual consultations on the Guidelines entered a period of high-frequency consultations in 2017. Against the backdrop of the new Crown Pneumonia epidemic, the consultations on the Guidelines have overcome all difficulties and obstacles, and the process is still advancing, and has now entered the second round of reading of the text.^[18] However, the progress of the consultations on the Guidelines may not be straight forward due to the key issues. It is easier to reach a consensus on the Guidelines as a crisis management and cooperation mechanism for the South China Sea region, but for the issues of "legal nature As a crisis management and cooperation mechanism, it is easier to reach a consensus on the "Guidelines", but for the "legal nature", "spatial scope of application", "freedom of navigation of warships" and other controversial focuses, communication and coordination among all parties is still needed. However, there is no doubt that in the subsequent consultations, China should always insist that the Guidelines must be in line with China's national interests, and closely integrate the formulation of the Guidelines with the construction of the "China-ASEAN Community of Destiny". China will closely integrate the formulation of the Guidelines with the building of the "China-ASEAN Community of Destiny",^[19] continue to play the role of a responsible big country, actively participate in the reform and construction of the governance system in the South China Sea region, safeguard peace, stability and unity in the South China Sea, and continue to contribute to China's wisdom and Chinese solutions.

4.1. Making some provisions legally binding

The Mapp's Encyclopedia of Public International Law defines a code of conduct as "a normative tool containing a set of written rules and principles to guide and regulate a general or specific area of concern. However, it often focuses on specific behaviors and creates a consistent standard of conduct." As mentioned earlier, because codes of conduct may have a mixture of

both legally binding and non-legally binding attributes, they can be applied to both binding treaties, agreements, etc. and non-legally binding declarations, guidelines, etc. Therefore, whether the text of a code of conduct is legally binding or not is not conclusive in international law, and its implementation effect and role should be based largely on the corresponding procedural elements - the suitability of the drafting body, the legitimacy and authority of the drafting venue, the specific procedures for signing and ratification, and so on. 2018 Since then, China's position on the nature of the Guidelines has shifted from a political attribute to one that can be explored, as noted in the November joint statement between China and ASEAN countries and the ASEAN Strategic Partnership Vision 2030, which states, "Comprehensively and effectively implement the Declaration and make use of the consensus of the ASEAN community to promote the implementation of the Declaration. Implement the Declaration and reach and adopt a substantive and effective guideline on the basis of consensus at an early date", and similarly, in July 2019, when attending the China-ASEAN Foreign Ministers' Meeting in Bangkok, Thailand, China's then-Foreign Minister Wang Yi said that the "guideline" would undoubtedly have practical effect, and believed that the future guideline would be effective if reached. It is believed that the "guidelines" to be reached in the future will be a high-quality regional rule that is more effective, more in line with the actual needs of the region, and with more substantive content." [20]The above statement indicates that the differences between China and ASEAN on the legal nature of the Guidelines are narrowing, which will give them room for maneuver in future consultations and broaden the consensus reached on the Guidelines.

However, although the "Guidelines" impose the same restrictions on the countries concerned and give them the same rights and obligations, they have different impacts on China and the ASEAN countries in the course of their implementation. "Before the implementation of the Guidelines, China could rely on its strong comprehensive national power and scientific and technological strength to build up its islands and reefs, and exercise stronger control over the sea areas under its sovereignty, but after the implementation of the Guidelines, China will be subjected to more restrictions, while ASEAN countries' behavior in the South China Sea will be restricted. However, after the implementation of the "Guidelines", China will be subject to more restrictions, which will have little practical impact on the behavior of ASEAN countries in the South China Sea. The deeper intention of the ASEAN countries to make the Guidelines legally binding is to limit China's rights defense actions in the South China Sea and to consolidate ASEAN's existing and anticipated interests in the South China Sea. Taking into account the controversial focus of the negotiations on the Guidelines and China's fundamental interests, it would be prudent to make some of the provisions legally binding. First, the provisions of the Guidelines that directly reflect existing international jus cogens norms can be made legally binding. As the existing international jus cogens norms have already been universally recognized and voluntarily observed by the international community, the specific application of these provisions in the Guidelines is of course legally binding. For example, the provisions of the draft Guidelines on "Protection of the Marine Environment and Biodiversity", "Search and Rescue at Sea" and "Respect for Freedom of Navigation and Overflight" have already been incorporated into the Code of Conduct for the Protection of the Marine Environment and Biodiversity. Provisions such as "protection of the marine environment and biodiversity", "search and rescue at sea" and "respect for freedom of navigation and overflight" in the draft Guidelines have long been recognized in the Charter of the United Nations and the United Nations Convention on the Law of the Sea, and are internationally recognized as obligations that should be observed and fulfilled in good faith, and should be given a legally binding character. Secondly, provisions in multilateral or bilateral documents signed with ASEAN or among ASEAN member States that corroborate and reinforce each other can be legally binding. [21]The "Guidelines" are the rules of the sea for the crisis management and cooperation mechanism in the South China Sea region, which aim at forming more consensus in the region

and promoting peace and stability in the region as well as the rational exploitation of resources, and the rules quoted in the "Guidelines" from the existing documents between China and ASEAN (including ASEAN member states) have already been binding. The rules quoted in the Guidelines from existing documents between China and ASEAN (including ASEAN member States), which have long been finalized into a text by consensus, can be given a legally binding character and used to strengthen the rules of order in the South China Sea region.

4.2. Limitation of the spatial area of application to the waters of the Spratly Islands

"There is no doubt that the Guidelines, as the South China Sea rules of the crisis management and cooperation mechanism, should be applied to the maritime areas where jurisdictional disputes exist, a point on which there is a consensus between China and most of the ASEAN countries. However, the Declaration reached in 2002 (see above, "Declaration on the Conduct of Parties in the South China Sea") does not contain a provision on the scope of spatial application, and treats the issue in an ambiguous manner, using the general concept of "South China Sea area". There is considerable dispute among the parties as to whether the spatial scope of application of the Guidelines should be applied to the entire South China Sea region or only to some specific disputed areas: Viet Nam attempts to continue the claim made during the period of the Declaration by including the Paracel Islands in the spatial scope of application of the Guidelines; The Philippines advocates the inclusion of the Sabah area in the spatial scope of application, while Indonesia firmly opposes the inclusion of the Natuna Islands in the spatial scope of application. Only by clarifying the specific geographical scope of application of the Guidelines and eliminating the disputes among all parties can the consultations on the text of the Guidelines be pushed forward vertically in a sustained manner.

China must not sacrifice its national interests for the sake of peace and stability in the South China Sea, which involves its sovereignty and territorial integrity, and must firmly adhere to this principle without wavering. First, China should firmly limit the spatial application of the Guidelines to the waters of the South China Sea archipelago in the subsequent consultations. The situation in the Nansha Islands is more complicated than that in the Xisha Islands, Dongsha Islands and Zhongsha Islands. China only occupies nine of the islands and reefs in the Nansha Islands, while the other islands and reefs are occupied by Vietnam, the Philippines, Malaysia, Indonesia and Brunei, and there are many disputes within ASEAN over the waters of the Nansha Islands, and the confrontation between various countries in the Nansha Islands over the reefs and islands is common, which makes the situation unusually tense, and thus the waters of the Nansha Islands should be included in the "Guidelines". Therefore, the waters of the Spratly Islands should be included in the spatial scope of application of the Guidelines, and the characteristics of the crisis management and cooperation mechanism of the Guidelines should be utilized to guide and regulate the behaviors of all parties in the South China Sea. [22] Second, the Xisha Islands, Dongsha Islands and Zhongsha Islands are not disputed and should be excluded from the scope of application of the Guidelines. The Xisha Islands, Dongsha Islands and Zhongsha Islands have always been under China's actual possession and effective jurisdiction, and there is no maritime issue of overlap or co-management with other countries' waters, which is fully based on domestic and international laws. Huangyan Island and Xisha Islands are China's inherent territories, and although there are sovereignty disputes with Vietnam and the Philippines, they do not constitute disputes in the sense of international law. According to the definition of dispute given by the International Court of Justice in *Greece v. United Kingdom*, a dispute is a difference in fact or law and a conflict of legal views and interests between two countries. In practice, it is difficult to reach a consensus on the "disputed area" between Vietnam, the Philippines and China, and it is difficult for one party's claim to be recognized by the other, as they all believe that "sovereignty rests with us" and deny that there

is a dispute over the sovereignty of the islands and reefs. In response to the above problems, China has the ability, willingness and experience to resolve disputes through the political means of bilateral negotiations and consultations, such as as early as the 1980s, China and Vietnam in the Gulf of Tonkin demarcation through negotiations, the use of international law of the sea, including the United Nations Convention on the Law of the Sea, and the customary rules of the law of the sea, and combined with the actual situation in the Gulf of Tonkin, the signing of the agreement on the delimitation of the territorial sea, the exclusive economic zone and the continental shelf, in 2002, the use of peaceful means of successful delimitation of the Beibu Gulf. The delimitation of maritime areas and the allocation of fishery resources in the Gulf of Tonkin were successfully accomplished in a peaceful manner.

4.3. Freedom of navigation of warships in separate maritime areas

At the end of the 20th century, China and ASEAN member states formed a consensus on the defense of national sea defense, and unanimously rejected the involvement and interference of extra-territorial countries in the South China Sea region, and China and ASEAN countries, such as Vietnam, the Philippines, Indonesia, Malaysia, etc., put forward different degrees of constraints and limitations on the transit of warships in the South China Sea area under their respective jurisdictions and drills. However, with China's comprehensive national strength and military practice significantly increased, the asymmetry of strength between the two sides is more and more obvious, ASEAN countries began not to exclude or even invite the United States and other extra-territorial powers to intervene in the "South China Sea Code of Conduct" consultations, in order to achieve the purpose of "checks and balances" on China. The ASEAN countries' stance on the free navigation of warships in the South China Sea is therefore in line with that of the US, or at least not opposed to it. [23]As some ASEAN countries act as the spokespersons for U.S. interests in the South China Sea during the negotiation process of the Guidelines, the issue of freedom of navigation of warships in the South China Sea is an urgent point of contention in the negotiation of the Guidelines. In order to maintain peace and stability in the South China Sea and safeguard China's legitimate rights and interests in the South China Sea, the following points should be insisted on in the future consultations on the Guidelines:

First, the innocent passage of warships in the territorial sea of the South China Sea requires prior authorization or notification by the coastal State. Although Article 17 of the United Nations Convention on the Law of the Sea (hereinafter referred to as "the Convention") stipulates that ships of all States, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea, the term "ships" here cannot be interpreted to include "warships". However, the term "ships" in this context cannot be interpreted to include "warships", and according to the rules of interpretation of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to such terms in the light of the object and purpose of the treaty and in the light of their context. Section III, subsection C, of the Convention provides that if a warship fails to comply with the laws and regulations of the coastal State, it may be required to leave immediately. It shows that the Convention has already noted the special legal status of warships, warships as a national instrument of force, freedom of navigation in the territorial sea of other countries without prior notification or authorization, obviously pose a potential threat to the sovereignty and security of other countries, and the original intent of the Convention is not consistent with the original intent of the Convention, so in the case of ambiguity in the provisions should be interpreted in favor of sovereignty over territorial sea, and moreover, there are more than 40 countries around the world explicitly require that Moreover, more than 40 countries in the world have explicitly required prior notification or authorization for the innocent passage of foreign warships through the territorial sea, reflecting the consensus of the international community today.

Secondly, the navigation of warships in the contiguous zone of the South China Sea should be subject to the security jurisdiction of the coastal State. The contiguous zone, as an extension of the territorial sea, has now become a recognized system of international law, and article 33 of the United Nations Convention on the Law of the Sea and article 24 of the Convention on the Territorial Sea and the Contiguous Zone expressly provide that the coastal State may exercise such control as may be necessary for the purpose of preventing and punishing infringements of its customs, fiscal, immigration or health laws and regulations within its territory or territorial sea. It is clear that the coastal State may exercise control over the contiguous zone, and in view of historical limitations and the lag in legislative technology, the above matters should be recognized as a non-exhaustive list, and the more important jurisdiction of national security can of course be encompassed within the control of the coastal State. What's more, the United States in the judicial practice of the jurisdiction of the contiguous zone is also open to interpretation of the matters, in 1975, "Sun Maru v. United States", the judge that the coastal state of course has the right to create a contiguous zone on the basis of the enumeration of the four matters, but there is no restriction to prevent the establishment of a contiguous zone for the purpose of fisheries law enforcement, it can be seen that in order to exercise the exercise of a same attributes of the right to create a contiguous zone The creation of a contiguous zone for the exercise of a right with the same attributes could be recognized by the international community.

Finally, the military activities of warships in the exclusive economic zone of the South China Sea should be regulated. On the basis of article 87 of the Convention, which grants non-littoral States the freedom of navigation and overflight, the freedom to lay submarine cables and pipelines, and other lawful uses of the sea related to these freedoms, such as the use of the sea in connection with the operation of ships, aircraft, cables and pipelines, the United States believes that warships are free to carry out military activities in other countries' exclusive economic zones, such as military exercises, military surveys and so on. However, articles 58 and 301 of the Convention also set limits on "lawful uses of the sea", which should be carried out with due regard for the rights of the littoral States and in accordance with the laws and regulations of the littoral States and the relevant rules of international law, so as to avoid any threat to or impact on the territorial integrity or political independence of other States. In most cases, military activities are neither reasonable nor necessary, and are not beneficial to the coastal state or even to mankind as a whole, but are merely a means for oceanic powers to gain control of the sea. Australian scholar Sam Bateman argues that military activities do not conform to the concept of "due regard" of the convention, for example, if military activities are carried out in the exclusive economic zone (EEZ) of a coastal state where fish stocks are active, they are not in line with the principle of "due regard". If military exercises are conducted in the EEZs of littoral states where fish stocks are active, they will certainly have an impact on the natural resources and environment of the littoral states. Therefore, when warships navigate in the EEZ of the South China Sea, they should avoid military activities as much as possible, and when they have to carry out military activities, they should be controlled within a reasonable range, so as to respect the sovereignty of the littoral states of the South China Sea and the order of the South China Sea region.

5. Conclusion

The stability of the situation in the South China Sea has a great impact on the peace and development of the Asia-Pacific region and even the whole world, and is an indispensable condition for China's peaceful rise. The "Guidelines", as the rules of the South China Sea for crisis management and regional cooperation, are not a "divine needle" for resolving the tensions in the South China Sea. "The real solution to the conflict between the parties in the

South China Sea is to establish a community of destiny in the South China Sea and to form a consensus on the values of the geopolitical countries in the South China Sea. Throughout the consultation process, we should fully take into account the special situation in the South China Sea and the claims of all parties, balance the interests of China and ASEAN countries, and strive to resolve differences, eliminate obstacles and reach a "guideline". Secondly, the rule of law is one of the most important achievements of the political civilization of human society. When dealing with disputes, countries around the world should not unilaterally emphasize "priority", pursue unilateralism, and put their domestic laws above international law; instead, they should take international law as an important basis for resolving disputes, and apply laws and rules to safeguard their national interests. China should emphasize the significance of international law in resolving the South China Sea issue, accumulate rich experience in dealing with current and possible future conflicts in the sea, demonstrate to the world that China is capable of and confident in resolving disputes through peaceful means, such as negotiation and consultation, within the framework of international law, and provide China's solutions and wisdom in resolving similar disputes in the world in the future.

Fund projects

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