

Historic Waters and Rights Revisited : UNCLOS and Beyond ?

Professor of Doshisha University
Shigeki Sakamoto

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1. Introduction

Historic Waters and Rights Revisited

- * The purpose of this presentation is to examine the discussion on historic waters and rights in light of UNCLOS and customary international law. It is to look at, as one important example, which attracts the attention of many international lawyers all over the world, including in China, the legal meaning of the nine-dash line in the South China Sea from the academic perspective.

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2. Historic Waters or Historic Rights?

- * There are cases in which claims are made for “historic waters” or “historic rights” that are not terminology used in the UNCLOS.
- * According to the United States Department of States, “A historic claim might be one of sovereignty over the maritime space (‘historic waters’ or ‘historic title’) or, alternatively, some lesser set of rights (‘historic rights’) to the maritime space.” (Limits in the Seas, No.143, p.15.)
- * Due to time constraints, this presentation focuses on the subject of historic waters.

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Historic Waters

- * The doctrine of historic waters as such has not received much academic attention in the past.
- * Under the international law, there is no primary definition for “historic waters”. Although Article 10 (6) of the UNCLOS provides for “historic bay”, it acknowledges only the existence of such concept under the public international law. Consequently, it does not provide for the definition of such concept.

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Three Categories of Historic Waters

- * According to Professor O’Connell, the following three categories of seaward areas have been claimed as historic waters:
- * (1) bays which are greater than standard bays provided for in Article 10 of the UNCLOS;
- * (2) areas of waters linked to a coast by offshore feature but which are not enclosed under the standard rules;

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Three Categories of Historic Waters (continued)

- * (3) areas of seas which would, but for the claim, be high seas because not covered by any rules specially concerned with bays or delimitation of coastal waters.
- * As distinctive in the third category, the category of historic waters has not been supposed to be a general doctrine under the international law. Instead, it plays a role as a concept to explain the individual institution which was established in the historical context.

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ICJ Judgment in the *Continental Shelf (Tunisia/Libya)* Case

- * In the 1982 judgment in the *Continental Shelf (Tunisia/Libya)* case, ICJ ruled that “It seems clear that the matter continues to be governed by general international law which does not provide for a single “régime” for “historic waters” or “historic bays”. It is clearly the case that, basically, the notion of historic rights or waters and that of continental shelf are governed by distinct legal régimes in customary international law. The first régime is based on acquisition and occupation, while the second is based on the existence of rights ‘ipso facto and ab initio’.”(ICJ Reports, 1982, p.74, para.100)

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3. History of Nine-Dash Line

- * Recently, much academic attention has been paid to the legal meaning of “Nine-Dash Line” in the South China Sea claimed by China. In order to deepen understanding about historic waters and rights, this presentation discusses its background and attempts to provide legal analyses.

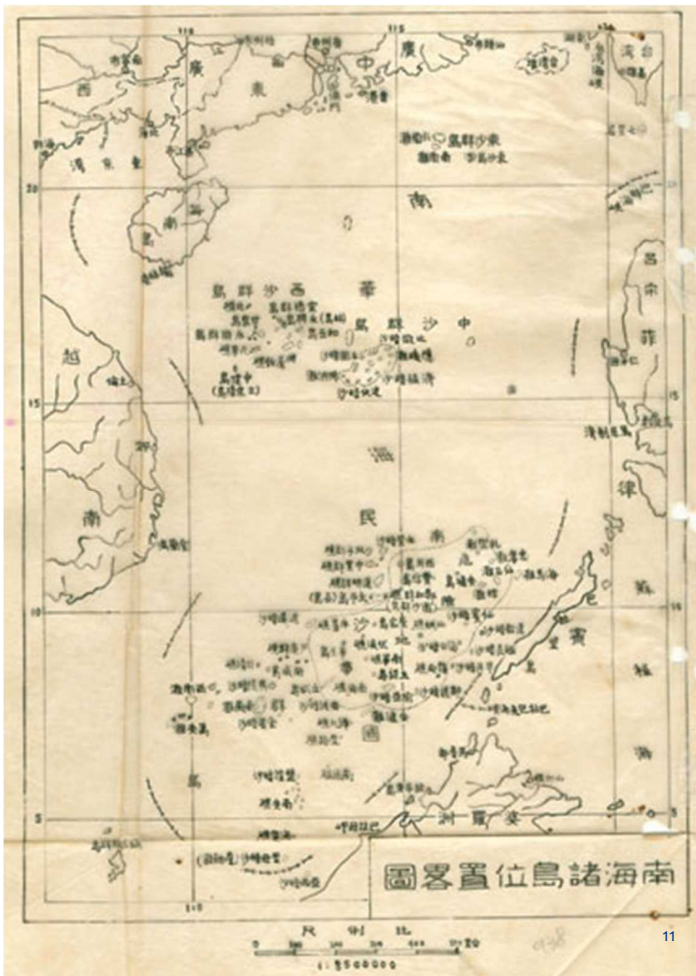
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Eleven-Dash Line in 1947

- * In 1947, Republic of China internally circulated an atlas, drawing an eleven- dash line to indicate the geographical scope of its authority over South China Sea.
- * Two dashes were removed from the eleven-dash line in 1953, when the territorial title for the Bach Long Vi island (Gulf of Tonkin) was transferred from China to Vietnam. The first two lines lay within the Beibu Gulf or Gulf of Tonkin, bordered by Vietnam and China. When the nine-dash line emerged in the 1950s, the two states were politically close, with each having a three-mile territorial sea.

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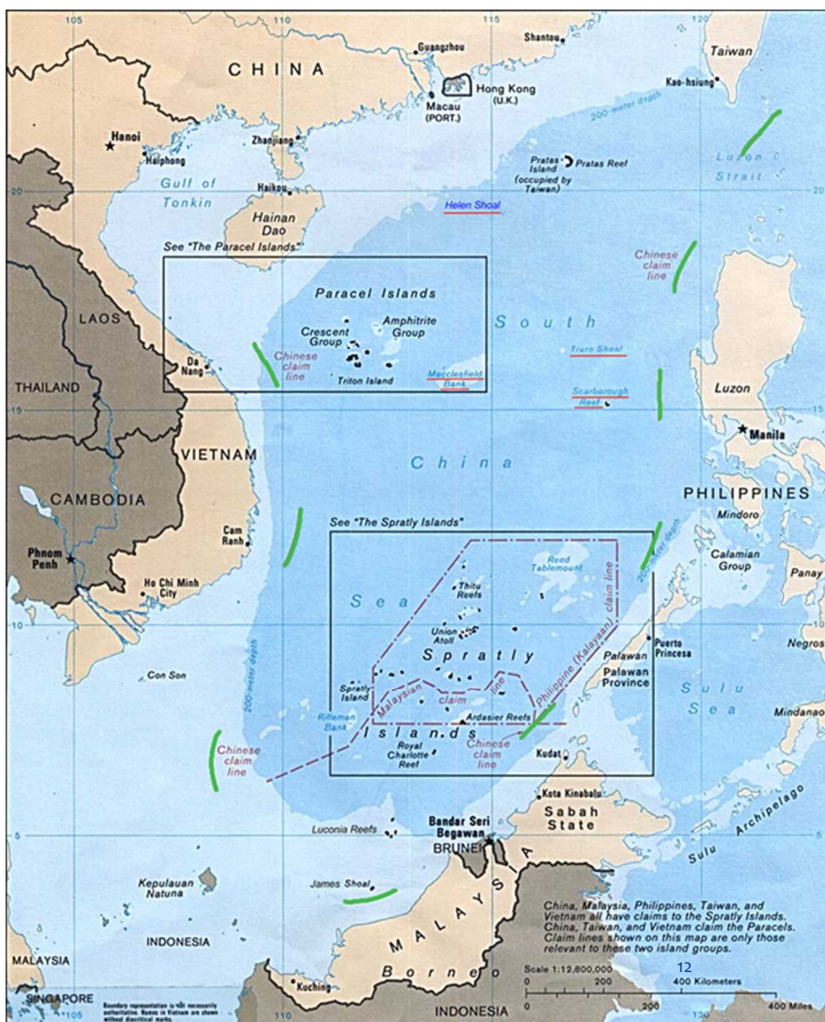
Eleven –Dash Line



China's first hand drawn map of the bull tongue line (Photo:hudong.cn)

<http://english.vov.vn/Politics/East-Sea/Chinas-ninedotted-line-a-vague-claim/256735.vov>

Nine-Dash Line



http://upload.wikimedia.org/wikipedia/commons/thumb/c/c/e/9_dotted_line.png/640px-9_dotted_line.png

Nine-Dash Line

- * The nine-dash line that encircles a large part of the South China Sea has attracted widespread attention since it was shown on a map attached to China's *note verbale* requesting the Commission on the Limits of the Continental Shelf not to consider the joint submission of Malaysia and Vietnam.
- * Notwithstanding its adherence to the UNCLOS, China claims almost the entirety of the South China Sea, and majority of the maritime features therein, as its own. Specifically, China claims "sovereignty" or "sovereign rights" over 70 % of the Sea's waters and underlying seabed within nine-dash line. (Notification and Statement of Claim by the Philippines, p.4,para.11.)

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Validity of Nine-Dash Line

- * As described below, the legal nature and meaning of the nine-dash line are very ambiguous, and its validity under the UNCLOS is very controversial.

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Relation between Map and Historical Right

- * As Professors Florian Dupuy and Pierre-Marie Dupuy has rightly pointed out, “the relation between the map and historic rights is unclear and maps do not constitute titles in international law.”
- * “It is uncertain whether the map has any legal relevance to the delimitation of China’s boundaries in the South China Sea, because China has never provided any explanation as to the meaning of nine-dash line.” (Florian Dupuy and Pierre-Marie Dupuy, “A Legal Analysis of China’s Historical Rights Claim in the South China Sea,” *A.J.I.L.* Vol.107 (2013), pp.131-132.)

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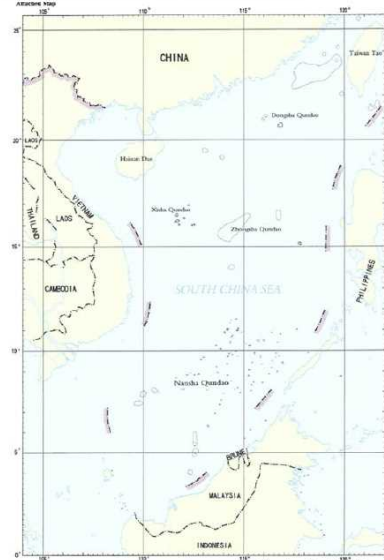
China’s Domestic Legislation

- * On 26 June 1998, China promulgated the Law on the Exclusive Economic Zone and the Continental Shelf, which provides that “the provisions of this Act shall not affect the historical rights of the People’s Republic of China” (Article 14).
- * This article seems to be aware of the presence of its so-called “nine-dash line” in the South China Sea.

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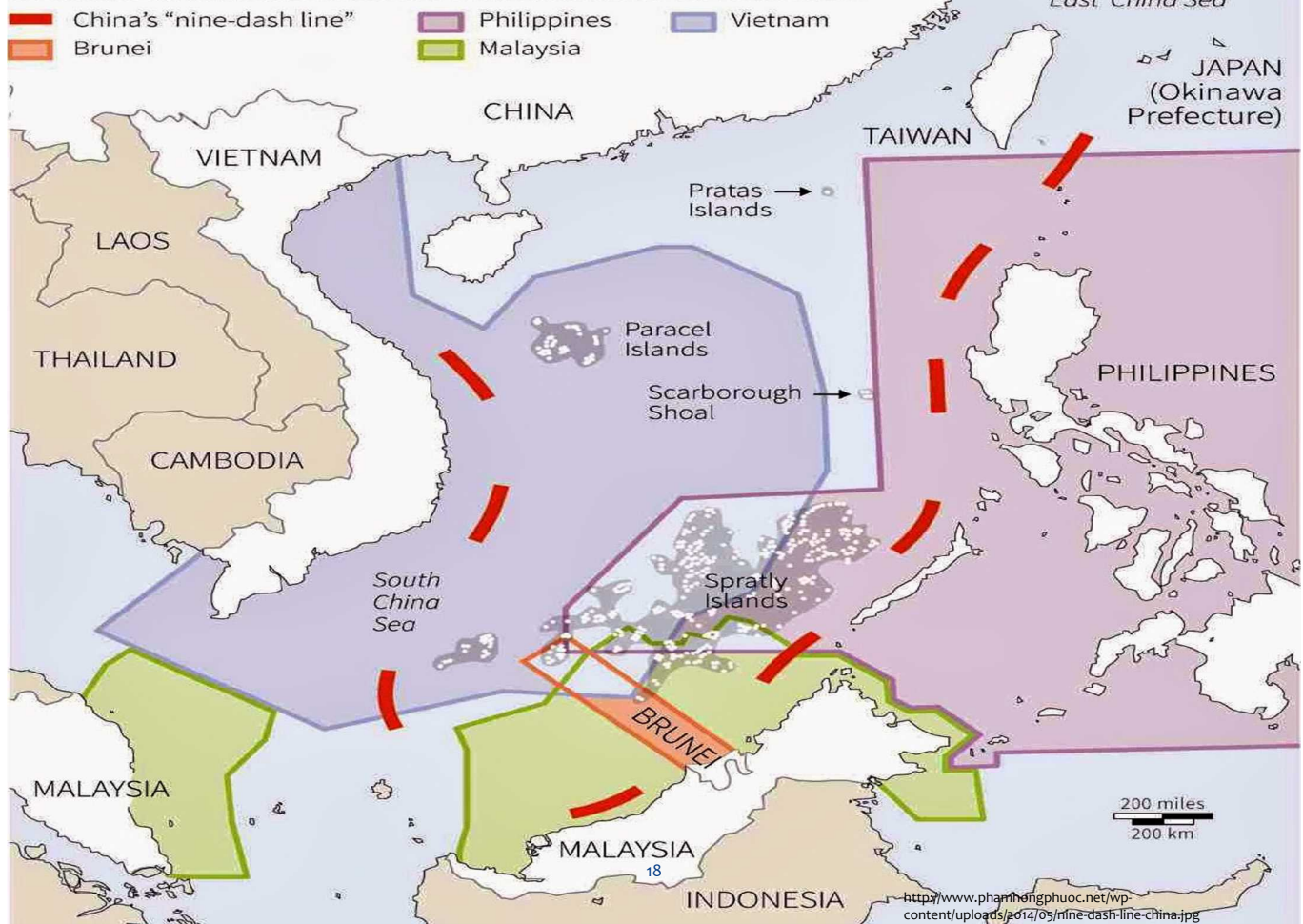
Map attached to China's Note Verbale in 2009

Map 1: China's Dashed-Line Map from Notes Verbales of 2009



“Limits in the Seas No. 143: China, Maritime Claims in the South China Sea (December 5, 2014)”

TERRITORIAL CLAIMS IN THE SOUTH CHINA SEA



Position Paper of China on the Matter of Jurisdiction in the South China Sea Arbitration

- * On 7 December 2014, the Ministry of Foreign Affairs of the People's Republic of China released a Position Paper on the Matter of Jurisdiction in the South China Sea Arbitration initiated by the Republic of the Philippines.
- * The Position Paper reiterates its firm standing that the Chinese Government will neither accept nor participate in the Arbitration, and elaborates at length on the legal basis for its position that the Arbitral Tribunal does not have jurisdiction over this case.

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Indisputable Sovereignty over the South China Sea Islands and the Adjacent Water

- * In this position paper, China claims that “China has indisputable sovereignty over the South China Sea islands (the Dongsha (Pratas) Islands, the Xisha (Parcel) Islands, the Zhongsha (Macclesfield Bank and certain rocks, sand banks, and reefs) Islands and the Nansha (Spratly) Islands) and the adjacent water.
- * Chinese activities in the South China Sea date back to over 2,000 years ago. China was the first country to discover, name, explore and exploit the resources of the South China Sea Islands and the first to continuously exercise sovereign powers over them” (Position Paper on 7 December 2014, para.4).

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Relevant Maritime Rights and Interests in the South China Sea

- * “Both the Declaration of the Government of the People’s Republic of China on the Territorial Sea of 1958 and the Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone of 1992 expressly provides that the territory of the People’s Republic of China includes, among others, the Dongsha Islands, Xisha Islands and the Nansha Islands. All those acts affirm China’s territorial sovereignty and the relevant maritime rights and interests in the South China Sea.” (Ibid..)

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The Validity of, and Respect for Historic Rights

- * Judge Gao and Professor Jia explain that China’s claim can also be based on a historic title that, as discussed in *Eritrea v. Yemen*, can potentially be established through common knowledge of the possession of a territory.
- * According to them, in *Continental Shelf Case between Tunisia and Libya*, ICJ did show the significance of historical fishing rights in the context of maritime claims in which access to resources is a central issue. The disputes in the South China Sea are obviously of such a kind. (Zhiguo Gao and Bing Bing Jia, “The Nine-Dash Line in the South China Sea: History, Status and Implications”, *A.J.I.L.*, Vol.107 (2013) pp.121-122.)

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China's Practice in the South China Sea

- * With respect to China's state practice in the South China Sea, it is important to examine questions such as to what extent China has exercised its jurisdiction within the nine-dash line and whether, in the course of these actions, there has been any protest from other countries.
- * Needless to say, submitting the map of the nine-dash line to the UN does not clarify the China's jurisdiction claim in the South China Sea. Furthermore, it is clear that the nine-dash line has not been accepted by the countries concerned.

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4. Four Legal Interpretations of Nine-Dash Lines

- * In China, there are four legal interpretations of nine-dash line as follows:
- * (1) the idea that the line serves as the 'line of attribution of the islands therein' or the line drawn on the map in order to display the will or intention of China regarding the occupation of the islands therein;
- * (2) the line delineates the 'scope of the historical rights', including the realm in which the rights to conduct fishery and develop resources have historically been exercised by China;

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Four Legal Interpretations of Nine-Dash Lines (continued)

- * (3) the interpretation of the line as the ‘limits of historic waters’ that indicate the bounds which China’s sovereignty historically and traditionally reaches;
- * (4) the concept of the line as the ‘traditional border line’, according to which the traditional sphere of Chinese influence is delineated.
- * What makes this issue particularly difficult is that China has not specified its maritime claims. If China considers the nine-dash line as delineating “historic waters”, is their claim justifiable under the international law?

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5. Analysis of Nine-Dash Line from the Viewpoint of International Law

- * Professor Kuen-chen Fu of Xiamen University expressed his view that the issue of the nine-dash line cannot be solved under UNCLOS, which has no provision regarding the historical right except for Articles 10(6) and 15(Remarks made during the Law of the Sea Conference titled “Global Challenge and the Freedom of Navigation” in Seoul in 2013).
- * However, the UNCLOS establishes a legal framework to govern all uses of the oceans. And the preamble of the UNCLOS provides that “matters not regulated by this Convention continue to be governed by the rules and principles of general international law.”

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Some Comments to Professor Fu's Argument

- * There is no legal vacuum in international law. And it includes the rules as those concerning the historic rights or historic waters, although such rules may be inadequate.
- * In addition, the UNCLOS provides for the conditions of the islands having EEZ or continental shelf, as well as the limit of EEZ. Accordingly, Chinese claim over the wide maritime area, the islands and features in the South China Sea cannot be justified under the UNCLOS.
- * Therefore, the question regarding the legality of the nine-dash line claim should be judged in light of the UNCLOS and general international law.

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Key Role of International Law including UNCLOS

- * Fortunately, all of the states bordering the South China Sea – Brunei Darussalam, China, Indonesia, Malaysia, the Philippines, and Vietnam – are parties to the UNCLOS. Taiwan, which also borders the South China sea, has taken steps to make its legislation in conformity with the UNCLOS. (Robert Beckman, “The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea,” A.J.I.L., Vol.107 (2013), p.142.)

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Validity of Rule of Non-Retroactivity

- * However, according to a Chinese official, the UNCLOS is not applicable to the nine-dash line under the rule of non-retroactivity, because it entered into force in 1994, 47 years later since the Chinese government submitted the official nine-dashed line map. Is this allegation valid?

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UNCLOS as Code of Conduct and Dispute Settlement Regime

- * If a state established a 100 nautical mile breadth of its territorial sea 50 years before and has claimed the territorial sea extending up to 100 nautical miles even after it became a party to the UNCLOS, the UNCLOS would be worthless as a code of conduct.
- * Part XV of UNCLOS established a comprehensive mechanism for the settlement of disputes regarding the interpretation and application of the UNCLOS. It requires state parties to settle their disputes by the peaceful means stated in the Charter of the United Nations.

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Dispute Settlement Mechanism in UNCLOS

- * When a dispute concerning the interpretation or application of UNCLOS exists, pursuant to Article 279 in Section 1, state parties are obliged to settle the dispute by peaceful means in accordance with Article 2(3) of the UN Charter.
- * If no settlement is reached by recourse to Section 1, then, under Article 286, the dispute must be submitted, subject to the exceptions and limitations contained in Section 3, at the request of any party to it, to the court or tribunal which has jurisdiction under Section 2.

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Declaration by the People's Republic of China under Article 298 UNCLOS, 25 August 2006

- * However, Article 297 in Section 3 embodies general limitation to the applicability of Section 2 procedures, those limitations being “general” in the sense that all state parties are automatically entitled to invoke opting-out clauses in relation to categories of dispute referred to in Article 297.
- * The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention, including disputes concerning sea boundary delimitations or those involving historic bays or titles.

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6. Conclusion

- * As Professor Ikeshima has rightly pointed out, “the solution of the dispute over the South China Sea is not confined to the argument regarding a judgment on the legal meaning of the dashed line that is issued within the framework of international law, but also entail a plan for maintain peace and stability in the maritime area by eradicating the fundamental confrontational factors including the territorial dispute through peaceful means and cooperation among all the states concerned.” (Taisaku Ikeshima, “China’s Dashed Line in the South China Sea: Legal Limits and Future Prospects,” *World Global Forum* No.10, 2013, p.37.)

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Search for Adopting Legally Binding Normative instrument over the South China Sea

- * China and the ASEAN states parties should, through diplomatic negotiations, continue their effort to “upgrade” the 2002 ‘Declaration of the Conduct of the States concerned in the South China Sea’ (DOC), which is a political document, to a ‘Code of Conduct’ (COC), which should be a legally binding normative instrument.

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