

THE APPLICATION OF THE LAW OF THE SEA IN ENCLOSED AND SEMI-ENCLOSED SEAS: A PATH TO RESOLVING THE SOUTH CHINA SEA DISPUTE

Basel Khaled al Saeed
Amina LA Houssine Talbi
Muhammad Zeeshan Ajmal
Mohamed Salah Adawi Ahmed

ABSTRACT

This article delves into the intricacies of the dispute, emphasizing the need for a comprehensive understanding and application of the United Nations Convention on the Law of the Sea (UNCLOS) within the context of enclosed and semi-enclosed seas. This article also explores potential solutions to the South China Sea dispute. It highlights the significance of adhering to UNCLOS and UN conventions as the framework for resolving this crisis. The South China Sea is the focal point of contention for three countries, making it a critical issue in Asia that requires careful examination. This article will examine the efforts made by international courts and various agreements to find a satisfactory resolution. These endeavors seek to allocate sections of the continental shelf to the conflicting states fairly and in line with the principles of international law.

Keywords: Maritime claims, People's Republic of China, South China Sea, UNCLOS

INTRODUCTION

The law of the sea is one of the oldest branches of international law, and its codification and progressive development have primarily stemmed from three significant United Nations Conferences. These conferences were held in 1958, 1960, and during the period from 1973 to 1982. Throughout its history, the development of maritime law has been shaped by the contributions of various authors, the practices of individual States, and the outcomes of international conferences and subsequent Conventions. Gradually, it has become an established principle that coastal States hold the right to assert sovereignty and exercise jurisdiction over the seas and seabed adjoining their coastlines. These claims have been made by coastal States for a variety of purposes, reflecting the evolving understanding of maritime boundaries and regulations.¹

Research on the South China Sea has a long history, encompassing various scientific disciplines. The country houses a specialized research institute, the Institute for the South China Sea, which operates under the Chinese Academy of Sciences. It is evident that Chinese scientists have a keen interest in conducting studies related to the South China Sea, and the outcomes of such research hold significant scientific and technological value for China's development. In contrast, research in the legal and political aspects of South China Sea studies in China started relatively late. A dedicated institution for South China Sea studies emerged, and its significance greatly increased after China took control of six reefs in the Spratly Islands in 1988. Given the unique nature of the South China Sea, research in this field falls within the broader framework of Southeast Asian studies and ocean studies.

Since the 1990s, there has been a growing emphasis on South China Sea studies, particularly in the legal and political context, focusing on international law. Due to the interdisciplinary nature of academic interest in the South China Sea.

Analysis of China's Maritime Claims in the South China Sea: International Law and Sovereignty Implications

The People's Republic of China (PRC) asserts "sovereignty" over around a hundred submerged features in the South China Sea, which are underwater at high tide and lie beyond the legal boundaries of any nation's territorial sea. These claims contradict international law, which does not recognize the sovereignty of such features or their ability to establish maritime zones like territorial seas. Furthermore, the PRC has either drawn or asserted its right to establish "straight baselines" that encircle islands, waters, and submerged features, creating extensive ocean spaces in the South China Sea. None of the four "island groups" claimed by the PRC in this region ("Dongsha Qundao," "Xisha Qundao," "Zhongsha Qundao," and "Nansha Qundao") meet the geographical criteria required under international conventions for using straight baselines.²

In terms of maritime zones, the PRC lays claim to internal waters, a territorial sea, an exclusive economic zone, and a continental shelf by treating each of its claimed South China Sea island groups as a unified entity. However, this approach goes against international law, which mandates that the outer limits of maritime zones should be measured from legally established baselines, typically the low-water line along the coast. Additionally, the PRC makes various jurisdictional claims within its declared maritime zones that are not by international law.³

¹ Charney, Jonathan I., 1984, "Ocean Boundaries between Nations: A Theory for Progress." The American Journal of International Law, Vol. 78, No. 3: 582-606.

² See "Limits in the Seas no. 150 People's Republic of China: Maritime Claims in the South China Sea", Office of Ocean and Polar Affairs Bureau of Oceans and International Environmental and Scientific Affairs U.S. Department of State, Jan (2022).

³ Hans Dieter-Evers, "Understanding the South China Sea: an explorative cultural analysis", IJAPS, Vol. 10, No. 1, Jan (2014).

The cumulative impact of these maritime claims is that the PRC asserts sovereignty or exclusive jurisdiction over a significant portion of the South China Sea. However, many other countries reject these claims and instead support the rules-based international maritime order in the South China Sea. Remarkably note that several other states also make claims to islands in the South China Sea that the PRC contests, but this study focuses solely on the maritime claims asserted by the PRC and does not assess the merits of sovereignty claims over the islands in the South China Sea made by the PRC or other countries.⁴

The legal status of enclosed and semi-enclosed seas according to international law

Part IX of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) addresses a specific category of maritime regions known as "enclosed or semi-enclosed seas." This segment of the convention comprises two key articles: Article 122, which defines these seas, and Article 123, which outlines the cooperation expected from states that share borders with these enclosed or semi-enclosed seas.⁵ The inclusion of this dedicated section within UNCLOS underscores the acknowledgment by the convention's drafters and negotiators of the unique geographic characteristics of such seas. Furthermore, it underscores the potential for collaborative efforts among adjacent states to manage activities and environmental preservation within these maritime areas. In essence, this section recognizes the distinctiveness of enclosed and semi-enclosed seas and emphasizes the importance of cooperation among bordering nations to govern these regions and safeguard their ecosystems effectively.

The definition of "enclosed or semi-enclosed sea" according to the United Nations Convention on the Law of the Sea (UNCLOS):

Article 122 of the United Nations Convention on the Law of the Sea defines the semi-enclosed sea as "a geographical feature, typically called a gulf, basin, or sea. It is characterized by its geographic configuration, surrounded by the territories of two or more coastal states". It is important to note that these enclosed or semi-enclosed seas are not entirely isolated bodies of water. They are connected to another sea or the open ocean by a narrow outlet. This connection distinguishes them from completely landlocked bodies of water.⁶

An enclosed or semi-enclosed sea can consist entirely or primarily of the territorial seas and exclusive economic zones (EEZs) of two or more coastal states. As UNCLOS outlines, multiple countries have jurisdiction over these seas and may exercise various rights and responsibilities within these areas. In practical terms, this definition is crucial within the framework of UNCLOS because it has implications for the delimitation of maritime boundaries, the rights of coastal states in these seas, and the management and protection of marine resources in these areas.⁷ UNCLOS provides specific provisions regarding the rights and responsibilities of coastal states and other states in enclosed or semi-enclosed seas to ensure the sustainable use and conservation of marine resources and to prevent conflicts among neighboring states. Some well-known examples of enclosed or semi-enclosed seas include the South China Sea, the Baltic, the Mediterranean, and the Gulf of Mexico. The definition helps clarify these important maritime areas' legal status and governance.⁸

The geographical reality or limitation of enclosed or semi-enclosed seas requires the bordering States to develop "intraregional" mechanisms to reduce, mitigate, or eliminate Competition and conflicts. The mechanism envisaged by the UNCLOS is described in Article 123.⁸

Article 123 outlines a mandate for States that share borders with an enclosed or semi-enclosed sea. It stipulates that these States must collaborate directly or through a relevant regional organization.⁹ Their primary aim should be to harmonize efforts in three key areas:

- Sustainable Resource Management: These States are expected to work together to oversee the responsible utilization, safeguarding, exploration, and harvesting of the sea's biological resources.
- Environmental Conservation: Their collective efforts should also ensure the safeguarding and preservation of the marine environment. This includes measures to protect and maintain the ecological balance and integrity of the sea.
- Scientific Research: The States must establish common policies and engage in collaborative scientific research initiatives. These joint scientific programs should aim to advance knowledge and understanding of the sea and its ecosystems.
- Subparagraph (d) refers to a provision or clause within a document or agreement that deals with the participation of entities outside the region in cooperation with states located within enclosed or semi-enclosed seas, as global or regional entities that have a specific level of authority and competence in certain areas or fields, as mentioned in Article 123(a), (b), or (c) of the document. These organizations can operate on a global or regional scale and may have responsibilities

⁴ Wilson, Brian, An Avoidable Maritime Conflict: Disputes Regarding Military Activities in the Exclusive Economic Zone", *Journal of Maritime Law & Commerce*, Vol. 41, No. 3, July (2010).

⁵ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994).

⁶ Article 122, *Supra* note 5

⁷ Michail Ploumis "Exclusive Economic Zones in the South China Sea and the Eastern Mediterranean Sea: A Comparative Study on a Strategic Issue", *International Journal of Science and Research (IJSR)*, Vol 9 Issue 6, June (2020).

⁸ The Law of the Sea, National Legislation on the Exclusive Economic Zone, the Economic Zone And the Exclusive Fishery Zone. 1986, Office of the Special Representative of the Secretary General for the Law of the Sea, United Nations

⁹ Article 123, *supra* note 3.

related to the enclosed or semi-enclosed seas. In summary, this statement discusses a provision within a document or agreement that anticipates the participation of states from outside the specific region, referred to as "extra-regional States," and international organizations with regional or global authority in the areas outlined in Article 123(a), (b), or (c). These entities may become involved in cooperation efforts with states located within enclosed or semi-enclosed seas, possibly due to shared interests or responsibilities related to these seas.

In summary, Article 123 emphasizes the imperative for cooperation among neighboring States regarding managing living sea resources, protecting the marine environment, and pursuing joint scientific research endeavors. It uses phrases like "should cooperate" and "shall endeavor to coordinate" to underscore the importance of these cooperative efforts.

Article 121, Paragraph 3 and its Impact on South China Sea Maritime Claims: A Complex Issue of Natural Features and Man-Made Structures"

Utilizing Article 121, paragraph 3 has significant implications for the South China Sea's national maritime claims and maritime boundary delineations.¹⁰ One observer has highlighted that out of the over 170 features in the South China Sea, the majority are submerged banks and shoals, leaving approximately 36 small islands that remain above water during high tide. Among these islands, the largest is Itsu (also known as Tai-Ping), currently occupied by Taiwan, which measures around 1.4 kilometers in length and 400 meters in width, placing it in the "islet" category according to the Hodgson classification. Thitu Island (or Zhongye Dao, Pagasa Island in Tagalog), occupied by the Philippines, is the second-largest island with an area of roughly 0.27 square kilometers. These islands may surpass the criteria for being categorized as mere "rocks" under most definitions. However, a critical question arises concerning whether these relatively small features scattered across the South China Sea can genuinely "sustain human habitation or economic life of their own." Even if some of these 36 features are inhabited, they still rely on transporting food and water from the claiming country.

The challenge lies in discerning the natural attributes from the man-made alterations on many of these islands. Several nations have transformed these features by importing materials like sand, gravel, and cement to construct airstrips, harbors, and other facilities. According to the Law of the Sea (LOS) Convention, man-made structures, except those associated with harbor works, cannot serve as the baseline for determining offshore limits.

In the context of rocks, an intriguing situation emerges regarding China's stance on Article 121, paragraph 3. China has raised objections to Japan's use of Okinotorishima as a reference point for claiming an Exclusive Economic Zone (EEZ) and continental shelf. In a communication dated February 9, 2009, China emphasized its concern that Japan's submission regarding Oki-no-tori did not conform to the Convention's provisions. However, it appears inconsistent if China asserts sovereignty over all the islands in the Spratly group to claim EEZs and continental shelves, as this seems to contradict its position in Article 121, paragraph 3.

Article 121 of the Law of the Sea Convention: Implications for Sovereignty Disputes in the Spratly Islands and Beyond

Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS) deals with the legal status of archipelagic waters and the baselines from which the breadth of the territorial sea, contiguous zone, exclusive economic zone (EEZ), and continental shelf of an archipelagic state is measured. The regime of the archipelagic waters, including the determination of the breadth of the territorial sea, the contiguous zone, the exclusive economic zone, and the continental shelf, shall be determined by the relevant provisions of this Convention. This article provides guidelines for establishing archipelagic baselines, which serve as the basis for measuring the territorial sea, contiguous zone, exclusive economic zone, and continental shelf of an archipelagic state. It limits the length of these baselines, requires them to conform to the general shape of the archipelago, and specifies that islands used as base points must be permanently above the high-water mark. The specific maritime zones are determined by other provisions of the Convention.¹¹

Article 121 of UNCLOS is a crucial element that could impact potential resolutions to the sovereignty disputes concerning the Spratly Islands, particularly its third paragraph, which deals with "rocks." The first paragraph defines an island as a naturally formed land surrounded by water, above water at high tide. The second paragraph specifies that, except for the provisions in paragraph 3, an island is entitled to various maritime zones, including a territorial sea, contiguous zone, exclusive economic zone (EEZ), and continental shelf. However, paragraph 3 of Article 121 introduces an exception, stating that rocks that cannot sustain human habitation or economic life of their own shall not have an exclusive economic zone or continental shelf. This provision was crafted to prevent a country from making extensive claims over ocean space and seafloor based on small features near its coast, particularly within its archipelagic claims. Nevertheless, the Philippines faced extensive debate and scrutiny in its Congress before passing the archipelagic straight baseline bill into law, as it was concerned about the potential implications for its position in the South China Sea sovereignty dispute. Ultimately, the law identified Kahayan and Scarborough Shoal islands as part of the Philippines' regime of islands.

The application of this provision remains challenging, with a recent focus on Japan's Okinotorishima Atoll. This atoll is essentially a seamount breaking the ocean's surface, and Japan has built protective structures around it to prevent its natural erosion. This has led to Japan claiming a substantial 125,600-square-mile EEZ around Okinotorishima, which has been contested by the People's

¹⁰ Article 121, United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994).

¹¹ Michail Ploumis "Exclusive Economic Zones in the South China Sea and the Eastern Mediterranean Sea: A Comparative Study on a Strategic Issue", International Journal of Science and Research (IJSR), Vol 9 Issue 6, Jun (2020).

Republic of China (PRC) and South Korea. China attempted to include the issue of Article 121, paragraph 3 on the agenda of the 2009 Meeting of States Parties to the LOS Convention but was unsuccessful.¹²

Article 121 of the UNCLOS Convention, especially its third paragraph concerning rocks, plays a significant role in disputes over sovereignty in areas like the Spratly Islands and has generated disputes in various situations, such as Japan's claim to Okinotorishima's EEZ and continental shelf.¹³

Geopolitical and Economic Significance of the South China Sea

The South China Sea is a region of immense geopolitical importance, characterized by territorial disputes and potential economic opportunities. It comprises two main areas: The Parcel Islands in the north and the Spratly Islands in the south. These territories are contested among various nations, including China, Vietnam, Malaysia, the Philippines, Taiwan, and Brunei. The ownership of these islands is crucial as it dictates maritime jurisdiction, which, in turn, impacts the exploitation of valuable resources such as oil, gas, and fisheries. This article explores the geopolitical dynamics and economic interests surrounding the South China Sea, focusing on the challenges posed by territorial disputes.¹⁴

Territorial Disputes in the South China Sea can be grouped into two areas:

The Parcel Islands: Located in the northern South China Sea, the Parcel Islands are at the center of territorial disputes involving China, Taiwan, and Vietnam. These disputes raise questions about sovereignty and territorial claims.

The Spratly Islands: In the southern South China Sea, the Spratly Islands consist of numerous small islands, reefs, and atolls. These territories are claimed, at least partially, by China, Malaysia, the Philippines, Taiwan, and Vietnam. The lack of precise surveys and issues regarding their submersion during high tide complicate the determination of maritime jurisdiction.

Territorial Occupancy:

The territorial features in the South China Sea are occupied by various nations, including the People's Republic of China (PRC), Malaysia, the Philippines, the Republic of China (ROC), and Vietnam. However, these territories lack permanent communities and require external support for sustenance.

Resource Potential:

The South China Sea's seabed is believed to hold economically viable oil and gas reserves, attracting interest from countries and oil companies. Additionally, the region boasts abundant fishing grounds and vital shipping routes for global trade.

Challenges in Establishing Jurisdiction:

The key challenge in harnessing the economic potential of the South China Sea lies in establishing undisputed territorial control. According to international law, a country's entitlement to an Exclusive Economic Zone (EEZ) or continental shelf from small islands, rocks, and atolls is uncertain. The South China Sea's geopolitical significance stems from its territorial disputes and the potential for resource exploitation. To fully tap into the region's economic opportunities, countries must resolve territorial disputes and establish clear maritime jurisdiction. Uncertainty in this regard hinders investment in resource exploration and development, resolving these disputes crucial for the region's stability and economic growth.¹⁵

Assessment of the Current South China Sea Situation and Future Prospects:

Given their strategic importance and the potential resources they hold, the islands in the South China Sea represent significant obstacles to achieving peace and development in the region. The key to progress lies in finding mutually acceptable, legally sound, and practical solutions for maritime boundaries. This process should begin by identifying areas in the South China Sea where only two countries have conflicting claims and then proceed to address the more complex central area, which involves multiple claimants. To facilitate this, it is proposed that an external entity, whether an organization, government, or group of experts, offer nonbinding advice and recommendations on allocating areas to respective states or creating joint development initiatives. The potential benefits are immense, as countries can collaborate and share the advantages offered by the South China Sea's waters and seabed resources.¹⁶

It's worth noting that both the Republic of China (ROC) and the People's Republic of China (PRC) initially laid claims to all the islands and waters in the South China Sea within the U-shaped boundary lines. To understand the common position of these two Chinese governments in the South China Sea, we must examine their claims, practices, and interpretations, particularly regarding the nature of the discontinued U-shaped lines. The claims and related legislation of the ROC in maritime zones should also be considered. The discontinuous U-shaped boundary lines are constructed using the median line principle, which places the lines midway between the insular features claimed by the ROC and the opposite land masses of the other South China Sea bordering

¹² The origin of the Chinese claims to islands, rocks, and shoals in the South China Sea can be traced back to a 1946 map created by the ROC's Department of the Territories and Boundaries within the Ministry of the Interior. This map outlined their territorial claims using a "U-shaped" line that encircled the South China Sea. Following the events of 1949, the PRC took over the ROC's claims in the South China Sea and adopted a similar "U-shaped" boundary line on their maps. However, it's important to note that the ROC has continued to assert its territorial claims in the region. For a visual reference, you can view the 1946 ROC Map and the more recent PRC Map included in its 2009 Note CML/17/2009.

¹³ See the Judgment of the International Court of Justice on the Continental Shelf (Libyan Arab Jamahiriya /Malta), June 3 (1985).

Available at: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/LBY.htm>

¹⁴ Oxman, Bernard H., 2006 "The Territorial Temptation: A Siren Song at Sea", The American Journal of International Law.

¹⁵ Robert W. Smith, "Maritime Delimitation in the South China Sea: Potentiality and Challenges", Ocean Development and International Law 41(3), July (2010). pp. 214-236

¹⁶ Robert W. Smith, *supra* note 7

states. These lines do not serve as baselines separating territorial waters from internal waters. Instead, they indicate all insular features under ROC or PRC sovereignty. However, the legal status of these U-shaped lines, in terms of territorial waters or internal waters, remains ambiguous, and whether the insular features are entitled to maritime zones like an Exclusive Economic Zone (EEZ) and continental shelf depends on the unclear legal distinction between islands and rocks that cannot sustain human habitation or economic activities.¹⁷

Taiwan faces diplomatic challenges when engaging with other claimant states, even though it controls the largest island in the Spratly Islands. To address this, the Indonesian government has initiated and sponsored an international mechanism known as the Workshops on Managing Potential Conflicts in the South China Sea (SCS Workshops). The interactions between Taiwan and China adopting a joint project proposal by Taiwan and China at the 2009 SCS Workshops is a significant milestone in Taiwan's involvement in the workshop process. This development raises questions about the implications for future interactions and actions taken by various actors within and beyond the region.¹⁸

Establishing Marine Protected Areas (MPAs) in undisputed marine areas does not require bilateral or multilateral cooperation. However, cooperation becomes essential in disputed waters and demands political will and policy input. The Spratly Islands, known for their marine biodiversity and critical habitats for endangered species, play a crucial ecological role in the South China Sea. Taiwan has a strong capacity for biodiversity research, which makes it well-suited to promote the Spratly Islands as an international Marine Peace Park. John W. McManus, Kwang-Tsao Shao, and Szu-yin Lin, in their article "Toward Establishing the Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan," argue that protecting the natural resources of the Spratly Islands is essential for maintaining fisheries and economically important ecosystems in the South China Sea's coastal areas. They contend that this priority should outweigh the social, economic, and environmental costs associated with military activities in the region. They also highlight that recent improvements in cross-strait relations between Taiwan and China since 2008 present an opportunity for Taiwan to advocate for establishing the Spratly Islands as an international Marine Peace Park.

International Legal Obligations for Peaceful Resolution of East and South China Sea Disputes

The East and South China Seas are regions where numerous countries, all members of the United Nations except for Taiwan, and most parties to the United Nations Convention on the Law of the Sea (UNCLOS), except Taiwan and Cambodia, are entangled in sovereignty and maritime disputes. These conflicts raise significant questions related to international law, particularly concerning the obligations outlined in the United Nations Charter and UNCLOS when it comes to resolving disputes through peaceful means.

According to Article 2 of the UN Charter, all these countries are obligated to resolve their disputes peacefully to prevent jeopardizing international peace, security, and justice. They are also required to avoid threats or the use of force in their international relations, which would be inconsistent with the UN's objectives.

Additionally, Article 279 of UNCLOS mandates these countries to settle any disputes arising from the interpretation or application of the Convention through peaceful means, aligning with Article 2, paragraph 3 of the UN Charter. This includes utilizing methods like negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resorting to regional agencies or arrangements, or other peaceful means of their choice, as specified in Article 33, paragraph 1 of the Charter.

Under Article 301 of UNCLOS, while exercising their rights and fulfilling their duties as per the Convention, these countries bordering the East and South China Seas must refrain from using or threatening force against the territorial integrity or political independence of any nation, or any actions that contradict the principles of international law outlined in the UN Charter.

U.S. Involvement in East and South China Sea Disputes: A Recap of Key Statements and Actions

Amid escalating tensions in the East and South China Seas, the United States has been increasingly involved in addressing maritime issues in the region. In September 2010, during a conflict between China and Japan triggered by the arrest of a Chinese fishing boat captain near the Diaoyutai/Senkaku islands by the Japanese Coast Guard, the US government issued a statement. This statement confirmed that the Diaoyutai/Senkaku Islands fell under the scope of Article 5 of the 1960 U.S.-Japan Treaty of Mutual Cooperation and Security, obligating the United States to fulfill its alliance responsibilities. Additionally, Secretary of State Hillary Clinton emphasized at the 17th ASEAN Regional Forum in July 2010 that the United States, like all nations, had a national interest in freedom of navigation, open access to Asia's maritime areas, and respect for international law in the South China Sea.

Secretary Clinton also clarified that the United States did not take sides in sovereignty and maritime disputes in the South China Sea but urged claimants to pursue their claims by the UN Convention on the Law of the Sea and customary international law. In July 2011, she called on all parties to clarify their claims in the South China Sea consistent with international law and legitimate claims to land features.

In September 2012, Kurt Campbell, Assistant Secretary of the Bureau of East Asian and Pacific Affairs, testified before the Senate Foreign Relations Committee Subcommittee on East Asian and Pacific Affairs. He reiterated that the United States did not take a

¹⁷ Wang, K. H. (2010). The ROC's maritime claims and practices with special reference to the South China Sea. *Ocean Development and International Law*, 41(3), pp.237-252.

¹⁸ Yann-huei Song, "The South China Sea Workshop Process and Taiwan's Participation", *Ocean Development and International Law* 41(3):253-269, Aug (2010).

position on the ultimate sovereignty of disputed islands in the Sea of Japan, the East China Sea, and the South China Sea. Campbell emphasized the importance of peaceful resolution and maintaining peaceful regional relations.

More recently, in December 2012, Congress passed H.R. 4310 (National Defense Authorization Act for Fiscal Year 2013), expressing concerns about the Diaoyutai/Senkaku Islands situation. Congress highlighted U.S. national interests in freedom of navigation, peace and stability, adherence to international law, and unimpeded lawful commerce in the East China Sea. Congress urged parties involved to exercise self-restraint, resolve differences constructively, and avoid coercion or the use of force. It reaffirmed the U.S. government's position that while not taking a stance on sovereignty, it acknowledged Japan's administration of the islands and its commitment to help defend Japan under the Treaty of Mutual Cooperation and Security.

On January 18, 2013, during a meeting with Japanese Foreign Minister Fumio Kishida in Washington, Secretary Clinton reiterated the long-standing American policy on the Diaoyutai/Senkaku Islands issue and U.S. treaty obligations. She emphasized that the United States did not take a position on sovereignty but recognized the Japanese administration of the islands. Furthermore, she called on all parties to prevent incidents and resolve disagreements peacefully while opposing unilateral actions undermining the Japanese administration.

The Role of Article 123 UNCLOS in the Caribbean Sea Region

The Caribbean Sea is another often-cited example of a semi-enclosed sea; the Caribbean Sea is a semi-enclosed sea connected to the Atlantic Ocean, bordered by several countries, including South American nations like Venezuela and Colombia to the south, Central American countries to the southwest, and various islands such as the Greater and Lesser Antilles. This region covers an extensive area of about 2,754,000 square kilometers. Many of the countries along the Caribbean Sea are small, developing economies with limited resources, making it challenging for them to address sustainable fisheries development and marine environment protection. Two key entities play a significant role in this area: the Caribbean Community (CARICOM) and the Caribbean Common Market. These organizations were established through the 1973 Treaty of Chaguaramas.¹⁹

After thoroughly examining the implementation of Article 123 of the 1982 UNCLOS in the Caribbean Sea, this section derives several important lessons from this case. The lesson is drawn from academic assessments that evaluate the effectiveness and shortcomings of various outputs such as Action Plans, conventions, associated protocols, mechanisms, and organizational efforts, as well as the outcomes or changes that have or have not occurred in these two case study regions. These lessons can offer valuable insights into discussions related to regional cooperation in the South China Sea, especially when considering the application of Article 123 of UNCLOS in that region.

Insights from UNCLOS Article 123 for South China Sea Cooperation

Part IX of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), particularly Article 123, was designed to establish a cooperative obligation among countries bordering enclosed or semi-enclosed seas. Its purpose is to manage activities and interrelations in shared marine environments. This provision should be applied by the South China Sea bordering states. However, recent disputes over claims to the outer continental shelf at the UN Commission on the Limits of the Continental Shelf (CLCS),²⁰ in 2009 have cast doubt on the prospects of cooperation in the South China Sea.

Looking at experiences in the Caribbean Sea region, we can draw several lessons that might apply to the South China Sea.

Firstly, involving the UN system, such as UNEP or FAO, doesn't guarantee regional cooperation success, especially since Taiwan, a significant player, is excluded from UN activities.

Secondly, dealing with a large number of participating states and a wide diversity of interests can create operational difficulties in regional cooperation. The South China Sea has fewer bordering states compared to the Caribbean regions, making it potentially more feasible for a smaller group to succeed.

Thirdly, considering the involvement of other interested states or international organizations, as outlined in Article 123(3) of UNCLOS, can be problematic. These external actors may prioritize their interests over the regional program's goals, potentially pulling the region in different directions.²¹

Another benefit of the Caribbean region is that overly complex mechanisms and ambitious goals can overwhelm participating countries' capacities and political will. UNCLOS Article 123 allows for bilateral and multilateral cooperation, suggesting that a regional organization supported by a simple multilateral agreement could benefit less sensitive and complex issues in the South China Sea, such as fisheries conservation, marine environment protection, and joint scientific research.

The critical unanswered question is whether other South China Sea bordering states are willing to treat Taiwan as an equal partner in regional engagement. If these limited partners genuinely want to cooperate for the region's benefit and can set aside territorial and maritime disputes in favor of non-territorial issues outlined in Article 123, such as marine resource conservation, environmental protection, and joint scientific research, there is hope for regional cooperation and development.

¹⁹ The Caribbean's relationship with UNCLOS is characterized by widespread acceptance of the Convention by regional States in formal legal terms. It has been adopted, ratified, or accepted by all the Caribbean Sea's neighboring countries (except Colombia, the United States of America, and Venezuela). Caribbean State Parties are subject to the obligation of "pacta sunt servanda" codified in Article 26 of the Vienna Convention on the Law of Treaties 1969, like the other 168 State Parties to UNCLOS.

²⁰ Convention on the Continental Shelf, Geneva, 29 April (1958).

²¹ Rothwell, Donald, 2008, "The law of maritime boundary delimitation between States: a history of its development to the present day". L.L.M. dissertation, University of Alberta, Canada, (1984).

Sovereign Rights and Jurisdiction in Joint Resource Development in the South China Sea: Balancing Cooperation and Conflict Resolution

The development of resources in the South China Sea has significant implications for resource utilization and sovereign rights and jurisdiction allocation. This region's future joint development agreement will have provisions concerning the exercise and distribution of sovereign rights and jurisdiction, particularly regarding oil and natural gas resources. Given the prevailing political will to set aside differences and pursue joint development, the involved states must establish mutually agreed-upon rules governing the activities of each other's personnel and vessels within the Joint Development Zone (JDZ) designated for oil and gas exploration and exploitation.²²

To prevent jurisdictional disputes between these states, it is prudent to refrain from asserting jurisdiction over the vessels and personnel of the other party and only exercise jurisdiction over vessels flying their respective flags.²³ This approach aligns with past practices, such as Article 7 of the 2000 Sino-Japanese Fishery Agreement, which dictates that in Exclusive Economic Zones (EEZs) with overlapping claims yet unlimited, both states will avoid exercising jurisdiction over each other's fishing vessels and will only enforce flag State jurisdiction over their ships.²⁴

From a practical standpoint, resolving jurisdictional conflicts within a JDZ typically involves first delimiting the EEZ and continental shelf. After delimitation, each state exercises coastal State jurisdiction within their respective EEZs and continental shelves located in the JDZ by UNCLOS provisions, thus mitigating jurisdictional conflicts. Before delimitation, a cooperative model may be employed, necessitating a strong foundation of mutual trust between involved states and specific agreements governing the application of laws, regulations, and jurisdiction, including provisions addressing jurisdiction over third-party states. However, when states merely cooperate in resource development within a JDZ situated in an undelimited EEZ or continental shelf and do not exert jurisdiction over the activities, vessels, or individuals of the other party, there may be challenges in effectively managing resource conservation, environmental protection, and marine scientific research. Ships from a third state, with authorized navigation permissions would fall under the jurisdiction of the granting state.²⁵ Unpermitted ships would be subject to overlapping jurisdiction, creating potential conflicts in that scenario.

CONCLUSION

The South China Sea dispute is a complex issue involving multiple countries with competing territorial and maritime claims. International law, particularly the United Nations Convention on the Law of the Sea (UNCLOS), is crucial in addressing this matter, as it distinguishes between features in the region that can sustain human habitation or economic life and those that cannot, impacting maritime claims and boundaries. The area holds great geopolitical and economic importance for trade, fisheries, and potential oil and gas resources. Territorial disputes hinder economic opportunities.

Efforts to resolve the dispute involve international courts and agreements, but challenges persist in reconciling the claims of various nations and determining the status of man-made alterations to natural features. Lessons from other regions, like the Caribbean, show that regional cooperation is possible, but external actors and issue complexity can be obstacles. Simplifying mechanisms and focusing on non-territorial matters like marine resource conservation may facilitate cooperation.

Ultimately, the key to progress is finding mutually acceptable, legally sound, and practical solutions for maritime boundaries based on international law, including UNCLOS, and prioritizing peaceful resolution and cooperation. Resolving the South China Sea dispute is crucial for regional stability and growth, given its high economic and geopolitical significance.

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²³ Subra note 15, PP.245–287

²⁴ CHISAKO T. MASUO, "Governing a Troubled Relationship: Can the Field of Fisheries Breed Sino-Japanese Cooperation?", Cambridge University Press, Feb 5 (2013).

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Basel Khaled al Saeed *,
PhD Candidate, International Law,
Zhongnan University of Economics and Law,
Email: basboos@windowslive.com

Amina LA Houssine Talbi,
International Law,
Zhongnan University of Economics and Law,
Email: Talbiamina34@gmail.com

Muhammad Zeeshan Ajmal**,
PhD Candidate, International Law,
Zhongnan University of Economics and Law,
Email: ajmalzeeshan10@gmail.com

Mohamed Salah Adawi Ahmed,
PhD Candidate, International Law,
Zhongnan University of Economics and Law,
Email: adawimohamed12111987@gmail.com