

CNEAS Issue Brief

Application of Law of the Sea: Senkaku Islands and the East China Sea Dispute

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Introduction: Sea as a Transnational Issue and the East China Sea

The seas have been in the mind of lawmakers and nations for the sole reason of exerting control and dominance over them for the seas do not only provide a means of transportation but also are a newfound source for many of the resources which will only increase the prowess and dominance of a country – if one sees from a strategic and geopolitical point of view. This expansionist approach towards the sea is becoming increasingly evident with many of the territorial disputes China has with multiple countries – from Vietnam, and the Philippines to Japan.

Seas are not only necessary to facilitate international trade, which is increasingly becoming a central driving force of an increasingly interdependent global economy. They also are like hidden treasures with a range of resources like minerals and oil in the seabed, the fisheries, and many others which every nation, if given the full access, would love to exploit to their benefit and seas are also serving the security interests for states. Therefore, issue of seas and who has control of where and to what extent is a transnational issue at its core, because of which national laws are inadequate to solve the problem in the most productive and peaceful manner.

International law and institutions established by the law of the sea, can only play a significant role if the nations which are a part of the contestation are willing to cooperate and allow international organisations to be the negotiators while adhering to the frameworks of international law. As exemplified by the case of the South China Sea (SCS), China does not seem to be in favour of this idea and prefers to settle claims over Senkaku Islands and the East China Sea (ECS) with bilateral arrangements primarily with Japan since it does not recognise Taiwan. China calls the Senkaku Islands the Diaoyu Islands and claims that it had control over

it since the Ming Dynasty (1368-1644). To understand the intricacies of the dispute and the claims it becomes pertinent to first investigate the East China Sea issue and followed by a brief look at the issue of the Senkaku Islands.

This research also analyses the progress made so far on this issue concerning the framework established by international law. It also delves into but its limitations primarily because of the increasing Chinese unwillingness to adhere to the provisions of the United Nations Convention on the Law of the Sea (UNCLOS), as shown by the case of China v/s Philippines over their claims on the South China Sea. Given the current geopolitical tensions in East Asia, permanent solution seems to be like a distant dream. The case study will be concluded by an analysis of the situation and relies on secondary sources for the purpose.

The East China Sea Dispute

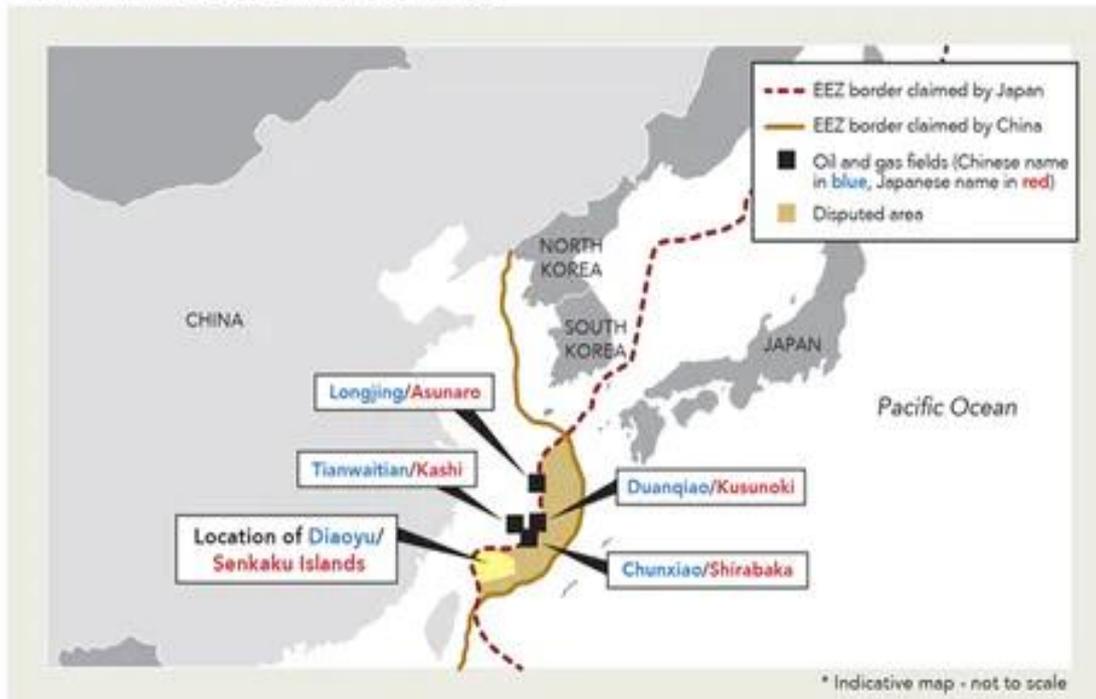
The 1960s lacked a comprehensive international law framework, which could have ameliorated some of the conflicts. China at the time did not recognise Taiwan and South Korea, which further fuelled discord and instability in East Asia. This became one of the flashpoints in the East China Sea dispute. What fuelled the movements of nations was the discovery of oil resources in the seabed of the region – and no country would not want the maximum access to these valuable resources. The Senkaku Island issue and situation in Taiwan only add much more complexity to the issue and that's how it becomes different from the SCS.

Japan and China have been engaging in negotiations after seeing Chinese increasing aggression and presence in 1997, though it has shown progress and growing areas of cooperation, they are still of a minimal reach and the changing geopolitical picture and ever-increasing Chinese aggression are only making things worse.

In the current geopolitical scenario, it has full potential to become one of the flashpoints of conflict between China and US allies in the region. The situation is sensitive and unpredictable. Therefore, ideally, it would be best if there is the involvement of an international body – approved by both sides to help negotiate the terms between China and Japan and possibly assist in the proceedings as per the law of the sea. The following map shows the claims made by both China and Japan as per their interpretation of the UNCLOS and here you will notice how the

ownership of the Senkaku Islands has the potential to completely change the maritime dynamics.

FIG. CHINA-JAPAN DISPUTE OVER EAST CHINA SEA



Source: Oil & Gas Journal. 'China, Japan Clash over the East China Sea', 17 December 2015. <https://www.ogj.com/home/article/17294763/china-japan-clash-over-east-china-sea>.

Senkaku Islands Dispute

Senkaku Islands have been under Japanese control formally since 1895. This dispute is over a group of uninhabited islands which have been and still are in Japanese control. China claimed sovereignty over the territory in the 1970s citing that the islands have always belonged to China historically. In recent years, with the increasing deployment of military ships from both sides, these islands, which are in the northeast of Taiwan make the situation very precarious. This, in turn, becomes an essential part of the ECS issue because these islands are believed to be potentially rich in resources both the countries covert and the Exclusive Economic Zone claimed by each of them covers the areas surrounding the islands completely.¹

¹ Global Conflict Tracker. 'Tensions in the East China Sea'. <https://cfr.org/global-conflict-tracker/conflict/tensions-east-china-sea>.

Role of International Law and Organisations in East China Sea Dispute

Though theoretically speaking, this is a classic case for the domain of the law of the sea, on the ground level, international law and organisations could so far only play a very limited role to settle the dispute and restore peace in the region. The main reason behind this is a lack of cooperation from China. Now, we will reflect upon the role played by UNCLOS and the institutions established by it so far vis-à-vis the ECS issue.

Role of UNCLOS

The United Nations has consistently strived for peaceful and legal usage of the seas in the spirit of cooperation. UNCLOS is a landmark law to be able to ensure that. It shifted the narrative from “freedom of high seas” to “common heritage of mankind” concerning the seas and maritime resources – which is a very radical shift towards more egalitarian access to the seas, which countries of the Global South were desperately rooting for. It not only took the previously existing laws into its framework but also expanded upon them with provisions like freedom of navigation and the creation of Exclusive Economic Zones at 200 nautical miles from the baseline.

In the context of the East China Sea dispute, Japan and China ratified the UNCLOS in 1996. Immediately after ratification, Japan amended its Law on the Territorial Sea and the Contiguous Zone and enacted the Law on the Exclusive Economic Zone (EEZ) and the Continental Shelf. It claims that its EEZ consists of areas of the sea extending from the baseline of Japan which are measured 200 nautical miles (nm) from the nearest point of the Japanese baseline and its subjacent seabed and its subsoil. Continental Shelf claimed by Japan is as follows – 1) “areas of the sea extending from the baseline of Japan to the line in which every point is 200 nm from the nearest point of baseline of Japan”; 2) “the areas of the sea adjacent seaward to the areas of the sea referred to”. And, in case of overlapping with the EEZ and the continental shelf claimed by other states, the problem of maritime boundary delimitation should

be resolved by drawing a median line, or a line which would be agreed by Japan and the country concerned in place of the median line.²

China, on the other hand, enacted its Law on the Exclusive Economic Zone and Continental Shelf in 1998. According to Article 2 of this law, the EEZ of China is an area beyond and adjacent to its territorial sea extending to 200 nm from the baselines from which the breadth of the Chinese territorial sea is measured. China does exercise its sovereign rights and jurisdiction in its EEZ and continental shelf. An interesting thing to note is Article 14 of this law, which states, “The provisions of this Act shall not affect the historical rights of the People’s Republic of China”.³

Therefore, in the current context, the interpretation of UNCLOS via the national laws implemented in China and Japan is the basis of claims made by the two nations with respect to claiming sovereignty over the disputed area of the ECS. Despite the attempts to solve the overlapping claims via bilateral talks and treaties, instead of resolving the problem, there is increasing military tension in the region, with Senkaku Islands having a high chance of becoming a military base.

Though UNCLOS is an effective legal framework to be able to solve this dispute, but the reason neither can this law nor the institutions established by it can effectively do anything is primarily because of the Chinese sheer unwillingness to let a “third party” negotiate. It’s a classic China move to prefer bilateral talks and treaties, over multilateral ones to reduce its accountability to international law as much as possible.

Role of Commission on the Limits of Continental Shelf (CLCS)

One of the institutes established as a result of the provisions provided by UNCLOS which has a very significant role in the East China Sea dispute is the Commission on the Limits of

² Song, Yann-huei. ‘Peaceful Proposals and Maritime Cooperation between Mainland China, Japan, and Taiwan in the East China Sea: Progress Made and Challenges Ahead’. In Vol. 22 (2016), *Asian Yearbook of International Law*, edited by Seokwoo Lee, Hee Eun Lee, Lowell Bautista, and Keyuan Zou, 20–49. Volume 22 (2016). Brill, 2019. <https://www.jstor.org/stable/10.1163/j.ctvrk3zz.6>.

³ Song, Yann-huei. ‘Peaceful Proposals and Maritime Cooperation between Mainland China, Japan, and Taiwan in the East China Sea: Progress Made and Challenges Ahead’. In Vol. 22 (2016), *Asian Yearbook of International Law*, edited by Seokwoo Lee, Hee Eun Lee, Lowell Bautista, and Keyuan Zou, 20–49. Volume 22 (2016). Brill, 2019. <https://www.jstor.org/stable/10.1163/j.ctvrk3zz.6>.

Continental Shelf (CLCS). The purpose of CLCS is to facilitate the implementation of the UNCLOS in respect of the establishment of the outer limits of the continental shelf beyond 200 nm from the baselines from which the breadth of the territorial sea is measured.⁴

In the case of the East China Sea dispute, this institution is very significant because its observations are essential for determining the domain of control. China, South Korea and Japan will have concerns concerning their respective territorial sea and EEZ as denoted by the UNCLOS. However, with the Senkaku Islands issue between China and Japan, the larger East China Sea issue becomes more complex as these islands are detrimental to determining the maritime territory of both China and Japan especially.

In 2012, China has made a partial submission to the CLCS, identifying the outer limits of China's continental shelf. In response to that, South Korea also made its partial submission, which expectedly was overlapping China's claim. On the other hand, Japan asked the Commission to not consider China's submission as the distance between the coasts in the area covered is less than 400 nm and as per Article 83 of UNCLOS, the delimitation must be in effect by agreement of the parties, thereby maintaining its position that the islands are under Japanese control, and they are inherently a part of Japan.⁵

It will be according to the submission of CLCS that the ITLOS will be able to pass a ruling once this case is under trial and implement the provisions of UNCLOS accordingly.

Role of International Seabed Authority (ISBA)

The exact role of ISBA after the resolution of the conflict is dependent upon the ruling of the ITLOS and submissions of the CLCS which will demarcate the maritime territorial borders of China, South Korea, and Japan. From here, ISBA will be responsible for regulating the extraction of resources like minerals from the seabed of areas that fall beyond the national jurisdiction of the nations concerned. This is not to suggest that it is not playing its role but with such heavy territorial contestations, it is going to make their job difficult and not yield the best possible results.

⁴ 'FUNCTIONS OF THE CLCS'. https://www.un.org/depts/los/clcs_new/commission_purpose.htm.

⁵ Opinio Juris. 'East China Sea Dispute: What Is the Role of International Law?', 4 January 2013. <http://opiniojuris.org/2013/01/04/east-china-sea-dispute-what-is-the-role-of-international-law/>.

Role of the International Tribunal for the Law of the Sea (ITLOS)

ITLOS can only carry forward its work in this case when the countries are willing to cooperate with it to be able to carry out proceedings alongside taking cues from the reports and findings of both CLCS and ISBA. Though it is the central institutional organisation which can implement the provisions of UNCLOS via its rulings – it faces the same limitation as mentioned in the case of UNCLOS, if countries are unwilling to cooperate and will reject the ruling especially if it is not in their favour. However, if all the countries are willing to cooperate and stick to their word throughout, then it has the potential to fully solve this dispute.

Concluding Analysis – the East China Sea and Senkaku and Taiwan Factor

This is a classic case of international laws not being able to be effective on the ground level due to a lack of cooperation from the states involved. Though UNCLOS is quite comprehensive law by itself we can see that the law of the sea needs eventual innovations to be able to match the requirements of our times. For instance, the environmental angle with climate change and sustainable usage of resources – there is still a lot left to do in this aspect. In the case of the East China Sea, if this leads to military escalation, then it would not only affect the countries involved but the whole world as it would obstruct the trade routes. Therefore, it needs to be handled and paid more attention to in a more matured manner. The Senkaku island issue along with the tryst between Taiwan and China are major catalysts which can prove to be detrimental to the way the maritime situation builds up here and the international community and organisations are having a hard time catching up.

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