# Maritime Energy Resources in Asia

## Legal Regimes and Cooperation

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Maritime Cooperation in Contested Waters: Addressing Legal Challenges in East and Southeast Asian Waters

Clive Schofield

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The semi-enclosed maritime spaces located off East and Southeast Asia are perhaps the most disputed maritime spaces in the world. They host a complex range of territorial and maritime disputes featuring multiple players. These disputes are also multifaceted in that they encompass a complex range of distinct yet often interrelated challenges, including excessive claims to baselines; territorial sovereignty disputes over numerous islands as well as discord over the capacity of predominantly small, isolated, and uninhabited insular features to support extensive claims to maritime spaces; fundamentally opposing views on the basis for maritime entitlements; and disputes over access to valuable marine resources. While many of these sources of contention are long-standing, significant recent developments have been evident, affecting these disputes in both positive and negative ways.

The inevitable consequence of this heady brew has been the existence of broad areas of overlapping claims to maritime jurisdiction in the East China Sea, South China Sea, and Gulf of Thailand. Where overlapping maritime claims exist, the resultant uncertainty over jurisdiction seriously complicates ocean resource management. The oceans remain an important source of living resources, with fisheries representing a major industry and playing a key food security role for many coastal states despite increasing rates of stock depletion. This is an especially acute concern in East and Southeast Asia, where fisheries provide the primary source of protein for hundreds of millions of people. Indeed, it has been suggested that the South China Sea alone accounts for as much as one-tenth of the global fish catch.

While this scenario would appear to urgently demand the comprehensive, ecosystem-wide, and thus transboundary management of these vulnerable living resources, overlapping claims to maritime jurisdiction and disputes undermine the achievement of such objectives. Instead, the sustainable management of, for example, fish stocks is severely hampered through, at the least, uncoordinated policies and, at the more severe end of the spectrum, potentially destructive and unsustainable competition for access to the resources in question. Moreover, such activities can lead to confrontation between rival fishing fleets, which in turn can lead to the involvement of the armed forces of the coastal states concerned, with the attendant potential for incidents, clashes, and ultimately escalation toward conflict. In short, rival maritime claims can act as a major irritant in bilateral and multilateral relations.

Offshore areas are also an increasingly important source of nonliving resources, most notably seabed energy resources, especially in the context of dwindling near-shore and onshore reserves of oil and gas, growing populations, and therefore rising resource demands, as well as improved technology that increasingly allows economically viable exploration and exploitation of offshore oil and gas resources under more hostile conditions, such as those found in deeper waters and further offshore. In this context it is important to note that the presence of overlapping claims generally tends to prevent access to any hydrocarbon resources that may be present in the disputed area. International oil and gas companies are known to be extremely reluctant to invest the enormous sums necessary to conduct offshore exploration, let alone exploitation, operations in the absence of fiscal and legal certainty and continuity. Seabed energy resources located in disputed areas, which could potentially have a crucial role to play in the economic well-being and political stability of the coastal states involved, therefore tend to remain untapped in the absence of maritime boundary delimitation or, alternatively, agreement on joint development. While discussion of marine resources tends to be framed in terms of access to fish and oil reserves, it should be noted that these are not the only resources that the oceans have to offer. A range of other
biological and mineral resources exist that are increasingly being exploited. Once again, the fact that broad maritime spaces off East and Southeast Asian shores are subject to competing maritime claims hampers the realization of the opportunities that these potential resources represent, as well as the proper management and protection of them.

It should also be observed that the maritime spaces of the East China Sea, South China Sea, and Gulf of Thailand include sea lanes of communication of global significance. The overlapping maritime claims and disputes that seem to pervade these waters represent a source of uncertainty and concern to marine users such as commercial shipping companies, as well as to the extraregional states with legitimate interests in freedom of navigation and the free and unfettered flow of global maritime trade.

The essays included in this report were commissioned as part of a National Bureau of Asian Research (NBR) project: “Maritime Energy Resources in Asia” (MERA). This is the second report arising from the MERA project. The first report outlined key geopolitical and strategic dimensions of the territorial and maritime disputes that beset the region, while providing insights into regional energy security concerns and the potential (or otherwise) of the seabed energy resources locked within disputed maritime areas to play a role in addressing these challenges. In contrast, this report addresses some of the key challenges and notable recent developments in the international legal sphere applicable to East and Southeast Asian maritime spaces. It then considers options for dispute settlement, or at least management, informed by these developments.

The complementary essays provided by Ian Townsend-Gault and Seokwoo Lee explore international legal regimes and the underlying legal basis for state cooperation in the world’s oceans. Townsend-Gault’s essay focuses on functional applications of the international law of the sea, arguing that functionally required maritime cooperation should be considered a natural aspect of a state’s responsibilities in regard to proper ocean management and environmental protection. His essay emphasizes that legal cooperation outlined in international law does not exist in a vacuum; rather, international law presupposes global commitments to sustainable development, species survival, and the protection and preservation of the marine ecosystem and biosphere. In his assessment, failure by states to cooperate on these issues would represent an abrogation of their legal responsibilities.

While Townsend-Gault’s essay addresses the functional approach to international law as it pertains to the oceans writ large, Lee delves deeper into the United Nations Convention on the Law of the Sea (UNCLOS) and the obligation to cooperate contained therein. After exploring international legal conventions that also contain clauses that emphasize cooperation, Lee analyzes the current status and adherence of states in Asia to the obligation to cooperate contained in UNCLOS. Through analysis of the operative clauses in the treaty, Lee finds that the convention “could be considered a prime example of obligations run amok.” He notes that there are many expressions of obligation contained in the treaty, primarily substantive in nature, which oblige states to undertake cooperation of a continuing nature as opposed to one-time activities.

However, conflicting interpretations of the language have led to differing implementations of the obligation to cooperate. In order to bring states to a common interpretation of UNCLOS, Lee therefore advocates amending the convention to clarify the complexities evidenced by the multiple and varied ways in which the treaty outlines the obligation to cooperate. Recognizing that such an amendment to the UNCLOS regime is unlikely, he proposes that states in Asia reach a common consensus that would bring state practice into conformity.
The essay I co-authored with Andi Arsana examines a complex emerging issue relevant to the East China Sea and South China Sea disputes—submissions on the part of coastal states to continental shelf areas located beyond 200 nautical miles (nm) from their coastal baselines. The outer limits of such “extended continental shelf” areas are definable in accordance with UNCLOS, but their proper definition is by no means easily enacted; requires interaction with the relevant UN scientific and technical body, the Commission on the Limits of the Continental Shelf (CLCS); and has been a source of tensions and disputes among coastal states sharing the same continental margin.

Indeed, the process of gathering information and marshaling an extended continental shelf submission is itself difficult, highly technical, and resource-intensive, causing some interested states severe challenges over a considerable number of years. These extended continental shelf submissions arguably add a new and complicating dimension to the overall regional landscape or seascape inasmuch as many of the interested states share the same continental margins. Consequently, their extended continental shelf submissions potentially overlap and therefore appear to provide a fresh source of discord in the context of the already complex and seemingly intractable disputes in East and Southeast Asia.

While conflicting claims to seabed entitlements may simply compound an already tense and difficult maritime situation, Arsana and I argue that the submission of outer continental shelf claims, though they may overlap, has an upside for the region. In particular, the extended continental shelf submissions that have been made have significant potential implications for the legal status of disputed islands in the South China Sea. This is the case because if these islands are capable of generating 200-nm maritime zones, then no extended continental shelf areas exist in the central part of the sea. That submissions have been made indicates that the states making them regard the disputed islands as being incapable of generating 200-nm claims. Were all the littoral states to agree on this interpretation, the scope of the disputed areas within the South China Sea would be substantially reduced. We conclude that the submission of continental shelf claims creates greater maritime transparency, with states now better able to discern the details of other nations’ maritime claims that may have previously been opaque. Indeed, the submissions made by states for parts of the central South China Sea and the reactions and counter-reactions to those submissions have proved especially instructive in the context of frequently ambiguous maritime claims. These developments are helpful because clarity with respect to maritime jurisdictional claims represents a fundamental starting point for the peaceful and equitable settlement of East and Southeast Asian maritime disputes.

The essay I co-authored with Dustin Kuan-Hsiung Wang then examines an issue that has been a source of long-standing uncertainty in the law of the sea—the regime of islands contained in Article 121 of UNCLOS and thus the maritime entitlements attributable to different types of insular features. This essay helps clarify the issue’s legal context, with particular reference to the disputed islands and rocks in the South China Sea. Wang and I note that Article 121, paragraph 3, of UNCLOS, which distinguishes “rocks” from other types of islands, remains ambiguous and open to conflicting interpretations. We further determine that the drafting history of Article 121 is generally unhelpful as an aid to clarifying interpretation of the regime of islands. There is also no consistent trend in state practice on the issue, and an authoritative ruling from an international court or tribunal is presently lacking. Accordingly, as of the time of writing, no reliable way to distinguish between these types of insular features has emerged, despite the fact that to do so is
critical to determining their capacity to generate claims to maritime jurisdiction. That said, coastal states and international adjudicative bodies have and continue to be faced with problematic issues related to islands, especially in the context of the delimitation of maritime boundaries. Arguably, a trend is emerging whereby small, isolated, sparsely inhabited or uninhabited islands are awarded only a reduced effect in the generation of maritime claims and in the context of the delimitation of maritime boundaries.

These are positive developments, with implications for the disputed islands of East and Southeast Asia. They suggest that even if some of the disputed islands were deemed capable of generating extended claims to maritime jurisdiction, their maritime entitlements would very likely be severely restricted, especially when pitted against the surrounding mainland and main island territories. Acceptance of this view by, for example, the South China Sea claimant states would result in a significant narrowing of the area of overlapping maritime claims, thus simplifying the dispute.

In their essay, Jianwei Li and Ramses Amer examine historical and contemporary maritime disputes in the South China Sea as well as the various approaches to conflict management employed in the region. Their historical survey finds that, over time, the South China Sea has been a relatively stable region, with its enduring territorial disputes managed through a variety of measures. Several bilateral and multilateral disputes linger in the region, however, in spite of the 2002 negotiation of the Declaration on the Conduct of Parties (DoC).

Li and Amer highlight the many complexities of the South China Sea disputes, but display optimism about the progress that can be made through peaceful means. They note that while the DoC and the dialogue between China and the Association of Southeast Asian Nations (ASEAN) have been positive developments for the region, greater efforts are needed. Formal agreements have their benefits, as do less formal joint development ventures and other forms of conflict management. Li and Amer further assert that a lack of progress in negotiations and settlement regimes is not due to the method of settlement but is rather a result of a failure in political will. As was seen in the collapse of several agreements between Cambodia, Thailand, and Vietnam, many countries’ domestic politics do not support agreements on hotly contested maritime delimitation issues. With regard to the South China Sea and the surrounding region, political will at multiple levels is the key factor in managing conflict on delimitation issues.

In an analysis aimed at applying recent developments in approaches to the delimitation of maritime boundaries to the current boundary disputes in East and Southeast Asia, Lowell Bautista examines the 2009 International Court of Justice (ICJ) ruling on the maritime delimitation dispute between Romania and Ukraine in the Black Sea. In applying the ICJ’s landmark Black Sea methodology to Asia, Bautista aims to highlight the opportunities and drawbacks of such an approach.

The Black Sea case, which articulates a clear, three-stage approach to maritime delimitation, has the potential to serve as a good blueprint for resolving East and Southeast Asian maritime delimitation disputes. Bautista concludes that the Black Sea methodology should be applied to Asian disputes and the relevant considerations of each delimitation dispute taken into account. While the Black Sea methodology potentially offers an attractive way forward, Bautista notes that the mechanism for actually settling Asian disputes is unclear. Most maritime boundaries are settled through international negotiations, but states should look to international jurisprudence to provide authoritative interpretations of international law. Many methods of dispute resolution
remain available outside of international tribunals, but Bautista notes that at the heart of maritime delimitation settlements, disputing states must be willing to cooperate on a multilateral basis, submit to international law, negotiate in good faith, and manage political dynamics to allow for resolution.

Tara Davenport’s essay examines the entrance of Asian states into joint development arrangements (JDA), the substantive negotiations leading to these arrangements, and the factors that contribute to the success of regional JDAs. With the aim of extracting historical lessons for today’s seemingly intractable Asian maritime boundary issues, Davenport examines JDAs from the 1970s to the present day.

Ultimately, Davenport demonstrates that Asian states have profound incentives to enter JDAs to exploit the hydrocarbon resources of the South China Sea and East China Sea rather than accept the status quo. She finds that nations enter into JDAs to satisfy interests that include access to resources, securing investment, and accessing the technical capacity for energy exploration. Davenport also finds that, in negotiating JDAs, greater success is seen in negotiations that include strong legal footing, good bilateral relations between the negotiating states, and transparency in the talks to garner public support from domestic audiences. Provisions of successful JDAs, she further notes, adapt their institutional frameworks to the needs of the states, settle revenue-sharing issues (though revenue may not always be split equally), and contain agreement on downstream activity to the most detailed extent possible.

Collectively, these essays, in keeping with the MERA project as a whole, are animated by a desire to bolster efforts toward the peaceful settlement of the persistent territorial and maritime disputes that so bedevil friendly diplomatic relations among the states of East and Southeast Asia. As alluded to above, the previous report arising from the project traced the geopolitical and strategic dimensions of territorial and maritime disputes. Building on this foundation, the present report offers scholarly yet distinctly policy-oriented analysis of key international legal developments, concerns, and challenges. A range of avenues whereby obstacles to cooperation may be addressed with a view to promoting the fundamental aim of dispute settlement, or at least management, are provided. It is the sincere hope of the MERA team that these essays will provide some modest assistance to the interested parties in building peaceful maritime cooperation and enhanced regional ocean governance throughout the presently contested waters of the East China Sea, South China Sea, and Gulf of Thailand.