Joint Development in a Semi-Enclosed Sea:

China’s Duty to Cooperate in Developing the Natural Resources of the South China Sea

China's insistence on resolving maritime disputes in the South China Sea (SCS) via bilateral negotiations has prevented the formation of a successful joint development agreement in the region. This Note argues that Part IX of the United Nations Convention on the Law of the Sea provides a solution to this problem. Specifically, this Note argues that the SCS is an “enclosed or semi-enclosed sea” under Part IX and that, because it is an “enclosed or semi-enclosed sea,” China is required to cooperate with other coastal states in developing the natural resources of the SCS. This Note further argues that China's insistence on bilateral negotiations violates this duty and that another coastal state could initiate binding arbitration to compel China to negotiate multilaterally.

INTRODUCTION

The South China Sea (SCS) is one of the most tumultuous places in the world. China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei all have competing claims over islands in the SCS, and they are constantly vying to assert their sovereignty. The stakes are high. The SCS contains potentially vast natural resources, and whoever owns the islands is entitled to any Exclusive Economic

1. In particular, the countries are competing over the Spratly and the Paracel archipelagos and the Scarborough Shoal. RONALD O’ROURKE, CONG. RESEARCH SERV., R42784, MARITIME TERRITORIAL AND EXCLUSIVE ECONOMIC ZONE (EEZ) DISPUTES INVOLVING CHINA: ISSUES FOR CONGRESS, 1–3 (2013) [hereinafter CRS Report].

2. Id.

Zone (EEZ) accompanying them. This would give the owner the right to develop most of the natural resources in the SCS.

Throughout the latter half of the twentieth century, outbreaks of violence in the SCS were common. Efforts by the claimants to establish dominance over the disputed territories frequently led to clashes. For instance, China attacked Vietnamese forces in the Paracel Islands in 1974, and in 1995 China's military ousted Philippine forces from Mischief Reef. Unilateral efforts by claimant states to explore natural resources also created conflict. In particular, China's partnership with Crestone in 1992 to explore oil near the Spratly Islands led to extensive disputes with Vietnam.

However, military violence has declined considerably ever since China and the ten members of the Association of Southeast Asian Nations (ASEAN) signed the Declaration on the Conduct of Parties in the South China Sea in 2002. In the declaration, the par-

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4. An EEZ is a maritime zone that can extend up to 200 nautical miles from the baseline of a coastal state. United Nations Convention on the Law of the Sea art. 57, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. A coastal state has sovereign rights to explore and exploit the natural resources in its EEZ. Id. art. 56.

5. This assumes that some of the islands in the SCS will be entitled to their own EEZs. However, as some scholars have pointed out, there is a real possibility that none of the islands may claim their own EEZs because they are not capable of sustaining human life. See Marius Gjetnes, The Spratlys: Are They Rocks or Islands? 32 OCEAN DEV. & INT'L L. 191 (2001) (arguing that it is unlikely any of the Spratly Islands can sustain human habitation or economic life on their own and that they would probably not be entitled to EEZs).


7. Id. Mischief Reef is a "barely submerged coral reef" that is part of the Spratly Islands. Daojiong Zha & Mark J. Valencia, Mischief Reef: Geopolitics and Implications, 31 J. CONTEMP. ASIA 86, 88 (2001). Since China's takeover of Mischief Reef, it has constructed and fortified so called "fishermen's shelters" on the Reef. Id. at 89.

8. "In May 1992, China signed a contract with the U.S. company Crestone to explore for oil near the Spratly Islands in an area that Vietnam claimed as its continental shelf." Zou Keyuan, Joint Development in the South China Sea: A New Approach, 21 INT'L J. MARINE & COASTAL L. 83, 88 (2006). Vietnam demanded that the exploration be terminated, and furiously protested. Id. In order to counterbalance the Crestone deal, Vietnam signed the so-called "Blue Dragon" contract with a consortium of oil companies led by Mobil. Wendy N. Duong, Following the Path of Oil: The Law of the Sea or Realpolitik—What Good Does Law Do in the South China Sea Territorial Conflicts?, 30 FORDHAM INT'L L.J. 1098, 1150–52 (2007). This further increased tension between Vietnam and China, and resulted in China using two warships to prevent Vietnam from re-supplying an oil rig Vietnam had moved into the area being explored by Crestone. Id.

9. Duong, supra note 8, at 1110.
ties undertook “to resolve their territorial and jurisdictional disputes by peaceful means.” 10 Indeed, since the signing of the Declaration there has been some positive cooperation amongst the claimant states. Notably, in March 2005, “state-owned oil companies in China, the Philippines and Vietnam signed an unprecedented tripartite agreement on joint seismic surveying activities.” 11

Despite such positive developments, tensions in the region remain high, 12 and the competing claims of sovereignty are unlikely to be resolved anytime soon. For one, it is unclear which nation(s) have title to the islands, as the claims are based on a variety of ambiguous historical arguments and current occupation. 13 Furthermore, the United Nations Convention on the Law of the Sea (UNCLOS) 14 only governs sea-use rights rather than issues of territorial sovereignty. 15 Consequently, the sovereignty dispute cannot be solved through the UNCLOS arbitration framework. 16


11. Keyuan, supra note 8, at 104.

12. Unlike the East China Sea, China has not yet asserted an Air Defense Identification Zone (ADIZ) over the SCS. However, it has instituted several provocative policies that aim to increase its dominance over the region. For instance, in November 2012, “China’s Hainan Province announced new rules that would allow its maritime police to board foreign vessels intruding into [China’s] waters.” Banyan: The Rocky Road to Revival, ECONOMIST, Dec. 15, 2012, at 46. Similarly, on January 1, 2014, new Chinese regulations came into effect that require all vessels to get permission from the Chinese government before fishing in its waters. The South China Sea: Hai-handed, ECONOMIST, Jan. 18, 2014, at 40. Because China claims virtually the entire SCS, these policies have caused a great deal of concern and uncertainty. Id.


15. Duong, supra note 8, at 1116.

16. See UNCLOS, supra note 4, art. 286 (stating that “[s]ubject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section”) (emphasis
Because the sovereignty issues are difficult to resolve, many commentators believe that a Joint Development Agreement (JDA) between the countries is the most feasible solution to the conflict. Under such an agreement, the countries could agree to manage and utilize jointly the natural resources in the SCS until sovereignty is determined.

However, a major roadblock to forming a JDA has been China’s insistence on bilateral negotiations. Although China has publicly stated that it is open to joint development, it refuses to negotiate multilaterally. In contrast, the other claimant states favor multilateral negotiations so that they can counterbalance China’s large size and disproportionate negotiating leverage. Some observers believe that China insists on bilateral negotiations because it knows such negotiations will not result in a successful JDA. This strategy allows

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17. A Joint Development Agreement (JDA) is an agreement between two or more countries “to pool any rights they may have over a given area and . . . undertake some form of joint management for the purposes of exploring for and exploiting offshore minerals.” David M. Ong, Joint Development of Common Offshore Oil and Gas Deposits: “Mere” State Practice or Customary International Law?, 93 AM. J. INT’L L. 771, 772 n.8 (1999) (quoting Ian Townsend-Gault, Joint Development of Offshore Mineral Resources—Progress and Prospects for the Future, 12 NAT. RESOURCES J. 275, 275 (1988)).

18. See Keyuan, supra note 8, at 90 ("[J]oint development is a most feasible mechanism by which to shelve the dispute so as to pave the way for co-operation pending the settlement of the territorial and/or maritime disputes . . . ."); see also David Whiting, The Spratly Island Dispute and the Law of the Sea, 26 DENV. J. INT’L L. & POL’Y 897, 914 (1998) (stating that joint development might be the quickest way to diffuse rising tensions in the region).

19. See Keyuan, supra note 8, at 90 (noting that a JDA can be used as a provisional arrangement pending the settlement of the territorial disputes); see also Christopher C. Joyner, The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy, and Geopolitics in the South China Sea, 13 INT’L J. MARINE & COASTAL L. 193, 215 (1998) ("The creation of a joint authority dedicated to the common development of resources within the Spratlys area may be the most appealing and logical solution for a territorial dispute as convoluted as this one.").

20. See Keyuan, supra note 8, at 105 ("China’s previous insistence in bilateral talks on the Spratlys issue has in fact blocked the way to seeking any possible joint development on a multilateral basis.").


22. See Whiting, supra note 18, at 912 (discussing China’s rejection of multilateral talks proposed by ASEAN); see also CRS Report, supra note 1, at 9–10 (noting that observers believe China resists multilateral negotiations because the ASEAN states could join together and present a united front against China, which would reduce the advantage it gets from being the largest State).

23. See M. Taylor Fravel, China’s Strategy in the South China Sea, 33 CONTEMP.
China time to consolidate its territorial claims in the SCS and further strengthen its negotiating position.24

While UNCLOS may not be able to resolve the sovereignty dispute, it might be able to facilitate the negotiation of a JDA. Part IX of UNCLOS, which is composed of Articles 122 and 123, deals with enclosed and semi-enclosed seas. Article 122 defines an enclosed or semi-enclosed sea, and Article 123 lays out a framework of cooperation for nations bordering such a sea.25 If these Articles impose a duty on the claimant states to cooperate in developing the SCS’s natural resources, then this duty might require China to acquiesce to multilateral negotiations.

Several commentators have noted the ambiguity of these two provisions and have questioned whether they impose a duty on coastal states to cooperate in developing natural resources.26 However, none have wholeheartedly tackled the issue. Furthermore, these Articles have yet to be interpreted by a tribunal.27 Hence, this Note aims to provide a much-needed in-depth analysis of the obligations imposed by UNCLOS Articles 122 and 123.

This Note makes three basic arguments. First, Part I argues

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SOUTHEAST ASIA 292, 300 (2011) (arguing that China pursues bilateral talks because it “can indicate a willingness to negotiate without actually having to talk and instead defer resolution of the dispute to buy time to consolidate its claims.”).

24. Id. at 299–300.

25. UNCLOS, supra note 4, arts. 122–23.

26. See Duong, supra note 8, at 1124–25 (noting the uncertainty of whether the SCS is an “enclosed or semi-enclosed sea” and whether Article 123 applies to the exploitation of natural resources); see also Kristin Noelle Casper, Oil and Gas Development in the Arctic: Softening of Ice Demands Hardening of International Law, 49 NAT. RESOURCES J. 825, 845 (2009) (“It is a ‘vexed question of whether the Arctic Ocean is a semi-enclosed sea over which Arctic coastal States are vested with special rights and duties of cooperation, as provided for in Articles 122 and 123’ of UNCLOS.”) (quoting Rosemary Rayfuse, Melting Moments: The Future of Polar Oceans Governance in a Warming World, 16 REV. OF EUR. COMMUNITY & ENVTL. INT’L L. 196, 210 (2007)).

27. The only arbitration that has involved UNCLOS Article 123 is the MOX Plant Case (Ir. v. U.K.), 42 I.L.M. 1187 (Perm. Ct. Arb. 2003). In the MOX Plant Case, Ireland initiated an arbitration against the United Kingdom claiming that it had violated UNCLOS Article 123, as well as several other international agreements, by establishing a nuclear fuel reprocessing facility that discharged radioactive waste in the Irish Sea. However, the tribunal never reached a decision on the merits. After the European Court of Justice decided the case based on these other treaties, Ireland withdrew its claim and the proceedings were terminated. MOX Plant Case (Ir. v. U.K.), Order No. 6: Termination of Proceedings (2008), available at http://www.pca-cpa.org/showfile.asp?f6_id=1112; Suzannah Linton & Firew Kebede Tiba, The International Judge in an Age of Multiple International Courts and Tribunals, 9 CHI. J. INT’L L. 407, 432–37 (2009).
that the SCS is an enclosed or semi-enclosed sea under UNCLOS Article 122. Second, Part II argues that, because the SCS is an enclosed or semi-enclosed sea, Article 123 imposes a duty on coastal states to cooperate in developing the SCS’s natural resources. Finally, Part III examines the implications of this duty to cooperate and determines that it includes a duty to negotiate in good faith, that China’s insistence on bilateral negotiations is in bad faith, and that other claimant states can unilaterally initiate binding arbitration to compel China to negotiate multilaterally.

I. THE SOUTH CHINA SEA IS AN ENCLOSED OR SEMI-ENCLOSED SEA

Before determining whether Article 123 imposes an obligation on border states to cooperate in exploiting the SCS’s natural resources, it is first necessary to determine whether the SCS is a an enclosed or semi-enclosed sea, as defined in Article 122. In answering this question, this Note follows the interpretive process set forth in the Vienna Convention on the Law of Treaties (VCLT).  

Under Article 31 of the VCLT, the first step in interpreting a treaty is to determine the “ordinary meaning” of its terms. This “ordinary meaning” should be considered in light of the treaty’s “object and purpose,” and the terms should be viewed “in their context.” This context may be determined by looking at the whole text of the treaty, including its preamble and annexes. Additionally, Article 32 allows recourse to “supplementary means of interpretation,” such as the preparatory work of the treaty. These supplementary sources may be used whenever the interpretive method described in Article 31 fails to resolve the text’s ambiguity, or they may be used to “confirm the meaning” resulting from Article 31’s application.

In keeping with this framework, this Part begins by examining the text of Article 122 and mapping the features of the SCS to this text. It further looks at the preparatory work of Article 122 to shed light on its meaning. This interpretive process points to the conclusion that the SCS is an enclosed or semi-enclosed sea under Article 122. Consequently, states bordering the SCS must comply with any legal duty accompanying this status.

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29. Id. art. 31, para. 1.
30. Id. art. 31, para. 2.
31. Id.
32. Id. art. 32.
A. Mapping the Features of the South China Sea to the Text of Article 122

The definition of an enclosed or semi-enclosed sea is found in Article 122 of UNCLOS, which says:

For the purposes of this Convention, “enclosed or semi-enclosed sea” means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.33

Based on this text, there appear to be two ways in which a body of water may be considered an enclosed or semi-enclosed sea. It can either be: (1) “surrounded by two or more States and connected to another sea or ocean by a narrow outlet” (narrow outlet definition), or (2) “consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States” (territorial sea/EEZ definition). After mapping the features of the SCS to these two definitions, it appears to meet the territorial sea/EEZ definition. However, it is unclear whether the SCS meets the narrow outlet definition.

1. Physical Features of the South China Sea

The SCS is an arm of the Pacific Ocean that borders the Southeast Asian mainland.34 It has an area of about 1,423,000 square miles and is surrounded by China, Vietnam, the Philippines, Brunei, Malaysia, Borneo, and Indonesia.35 There are several straits that connect the SCS to other bodies of water. To the north, the Taiwan Strait connects the SCS to the East China Sea; to the east, the Luzon Strait connects the SCS to the Philippine Sea; and to the southwest, the Strait of Malacca connects the SCS to the Indian Ocean.36

2. Narrow Outlet Definition

The first way in which the SCS may be considered an en-

33. UNCLOS, supra note 4, art. 122.
35. Id.
36. Id.
closed or semi-enclosed sea under Article 122 is if it is “surrounded by two or more States and connected to another sea or the ocean by a narrow outlet.”37 The SCS is clearly surrounded by two or more states—“[l]ittoral political subdivisions” of the SCS include China, Taiwan, Vietnam, Thailand, Malaysia, Singapore, Indonesia, Brunei, and the Philippines.38

However, a more difficult question is whether the SCS is “connected to another sea or the ocean by a narrow outlet.” It is not entirely clear from this definition whether an enclosed or semi-enclosed sea must be completely landlocked with the exception of a single narrow outlet, or whether there can be multiple narrow outlets. Textually, Article 122 seems to support the latter interpretation. Even if a sea is connected to another body of water by several narrow outlets, it can still be said that it is connected to another body of water by “a narrow outlet.” But if, as some commentators have suggested, the narrow outlet definition is used to define an enclosed rather than a semi-enclosed sea, then the former interpretation makes more sense.39 It would be hard for a sea to have a multitude of outlets and be considered “enclosed.”

Assuming that the narrow outlet definition allows for more than one outlet, the SCS would meet the definition. Several straits that connect the SCS to other bodies of water could be considered “narrow.” The Taiwan Strait connects the SCS to the East China Sea and is only ninety-nine miles wide at its narrowest point;40 the Strait of Malacca connects the SCS to the Andaman Sea, and at some parts it is as narrow as forty miles;41 and the Luzon Strait, which lies between Taiwan and the Philippines, connects the SCS with the Philippine Sea. Admittedly, it might be a stretch to call the 199-mile-wide Luzon Strait a narrow outlet,42 but at the very least the Taiwan

37. UNCLOS, supra note 4, art. 122.


39. See 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 348 (Myron H. Nordquist et al. eds., 1995) [hereinafter COMMENTARY] (“The first part relates to an ‘enclosed sea,’ which consists of a body of water that is almost completely surrounded by land, having only a ‘narrow outlet’ to other waters.”).


 Strait and the Strait of Malacca would fit the definition.

3. Territorial Sea/EEZ Definition

Under the territorial sea/EEZ definition, the SCS could be considered an enclosed or semi-enclosed sea if it “consist[s] entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.” 43

Relevant here is whether the islands in the SCS can claim their own 200-mile EEZs. If they can, the SCS would consist “entirely” of EEZs, and it would definitely be an enclosed or semi-enclosed sea under this definition. 44 Under UNCLOS Article 121, an island is only entitled to an EEZ if it can “sustain human habitation or economic life.” 45 Although it is uncertain whether any of the islands are “capable of sustaining human life,” commentators have suggested that they cannot. 46

Nevertheless, the SCS would still probably meet the territorial sea/EEZ definition. Maps depicting maritime zones in the SCS show that EEZs of the coastal states cover the majority of the SCS, even excluding any EEZs claimed by the islands. 47 True, the word “primarily” is not defined in UNCLOS, but because EEZs clearly cover over half of the SCS, this would likely be considered “primarily” under the plain meaning of the word. 48

43. UNCLOS, supra note 4, art. 122.

44. For further discussion, see Christopher C. Joyner, The Spratly Islands Dispute: Legal Issues and Prospects for Diplomatic Accommodation, in COOPERATIVE MONITORING IN THE SOUTH CHINA SEA: SATELLITE IMAGERY, CONFIDENCE-BUILDING MEASURES, AND THE SPROATLY ISLANDS DISPUTES 17, 18 (John C. Baker & David G. Weineck eds., 2002), who states:

Should all the claimant governments declare exclusive economic zones or continental shelf delimitations seaward from points fixed by those Spratly features over which they now assert sovereignty, practically the entire ocean and seabed in the South China Sea would be crisscrossed by conflicting claims of national jurisdiction. This would convert much of that ocean region, now legally comprised of high seas and international seabed area, into a semi-enclosed sea.

45. UNCLOS, supra note 4, art. 121.

46. See Gjetnes, supra note 5, at 199–201 (arguing that it is unlikely that any of the Spratly islands can sustain human habitation or economic life on their own and that they would probably not be entitled to an EEZ).

47. See CRS Report, supra note 1, at 12 fig.4 (showing a map of the SCS with the EEZs that are claimed by the states bordering the SCS, excluding any EEZs that might be claimed by the islands).

48. See Primarily Definition, WEBSTER’S DICTIONARY, available at
In sum, based on the text of Article 122, it is unclear whether the SCS meets the narrow outlet definition because that definition might require only one narrow outlet. But it does seem to meet the territorial sea/EEZ definition because EEZs cover more than half of the SCS. Thus, the SCS appears to be an enclosed or semi-enclosed sea under Article 122.

However, it is still helpful to examine the drafting history of Article 122 in order to “confirm” this interpretation.

B. Article 122 Drafting History

Attempts to define an enclosed or semi-enclosed sea were first made in the Second Committee at the second session of the United Nations Conference on the Law of the Sea. During the debates in this session, references were frequently made to the SCS as an example of a semi-enclosed sea, along with other bodies of water such as the Persian Gulf, the Caribbean Sea, and the Mediterranean Sea. Several draft articles were submitted, and a proposal by Iran was incorporated in the Main Trends Working Paper as Provi-
sion 221. Under this proposal, there were separate definitions for enclosed and semi-enclosed seas.

However, this strict distinction between an enclosed and a semi-enclosed sea was dropped in the third session of the Conference. During this session, the Chairman of the Second Committee was tasked with preparing an informal draft based on the debates and the proposals that member states had submitted. Articles 133–35 of this “Informal Single Negotiating Text” (ISNT) dealt with enclosed and semi-enclosed seas. Article 133 defined an “enclosed or semi-enclosed sea” as follows:

For the purposes of this part, the term “enclosed or semi-enclosed sea” means a gulf, basin or sea surrounded by two or more States and connected to the open seas by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

This definition dropped the distinction between enclosed and semi-enclosed seas, but indicated that “[i]f a sea met either of the criteria set out, it would be considered an enclosed or semi-enclosed sea.”

This definition remained the same through the remaining sessions, and it is essentially identical to what is now Article 122. But, there were proposals to change it. Notably, some proposals suggested that the narrow outlet definition be revised to refer to “one or more straits or narrow outlets.” And others would have required a sea to meet both definitions in order to be considered an enclosed or semi-enclosed sea. However, none of these proposals had enough support to be accepted.

This drafting history helps to illuminate several meanings underlying Article 122’s text. First, the history confirms that meeting either of the two definitions is sufficient to qualify as an enclosed or semi-enclosed sea. This is demonstrated by the Second Committee’s

55. COMMENTARY, supra note 39, at 348–49.
56. Id. at 348.
57. VUKAS, supra note 50, at 268.
58. Id.
59. COMMENTARY, supra note 39, at 349.
60. Id.
61. Id. at 350.
62. Id. at 349–50.
63. Id. at 350.
failure to adopt proposals that would require both definitions to be met. Second, it supports the conclusion that a sea must have only one outlet in order to meet the narrow outlet definition. This is shown by the Second Committee’s refusal to adopt proposals that would revise the Article to say “one or more straits or narrow outlets.” Finally, the history shows that the drafters cited the SCS as an example of a semi-enclosed sea. Thus, even though the SCS might not meet the narrow outlet definition because it has more than one outlet, the fact that it was used as an example strengthens the conclusion that the SCS meets the territorial sea/EEZ definition.

C. Conclusion

Based on the text and drafting history of Article 122, it is clear that the SCS is an enclosed or semi-enclosed sea as defined by the Article. While the drafting history implies that the SCS does not meet the narrow outlet definition, it also shows that the SCS was considered by the drafters to be an example of an enclosed or semi-enclosed sea. This confirms that the SCS meets the territorial sea/EEZ definition because it consists “primarily” of EEZs. Because it is only necessary to meet one of the two definitions, the SCS is an enclosed or semi-enclosed sea. This status is significant because, as the next Part concludes, states bordering an enclosed or semi-enclosed sea have a legal duty to cooperate when they develop natural resources within that sea.

II. Article 123 Imposes a Duty on Coastal States to Cooperate in Developing the Natural Resources of the South China Sea

UNCLOS Article 123 addresses the rights and duties of states bordering an enclosed or semi-enclosed sea,64 stating:

States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:

(a) to coordinate the management, conservation, exploration and exploitation of the living resources of

64. Id. at 365.
the sea;
(b) to coordinate the implementation of their rights, and duties with respect to the protection and preservation of the marine environment;
(c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
(d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.65

Article 123 emerges from the recognition that "activities undertaken by one State in an enclosed or semi-enclosed sea may have a direct impact on the rights, duties and interests of other States bordering that sea."66 Because of this reality, it is desirable that states work together and coordinate their activities. But does Article 123 require such cooperation or merely encourage it? Furthermore, if it does require cooperation, does this duty to cooperate extend to the development of natural resources?

In answering these questions, this Note continues to apply the VCLT's interpretive process. This Part begins by parsing the "ordinary meaning" of Article 123's text; next, it examines the Article in relation to UNCLOS as a whole; and, finally, it turns to the preparatory work of UNCLOS. This interpretive process reveals that, on balance, the strongest interpretation of Article 123 is that it requires coastal states to cooperate with regard to any exercise of rights or performance of duties under UNCLOS. Because developing natural resources is a right under UNCLOS,67 China would have a duty to cooperate with other coastal states in exploiting the natural resources of the SCS.

A. Analyzing Article 123 in Isolation

Standing alone, Article 123's text is confusing. Primarily, this confusion stems from the text's mixture of exhortatory and ob-

65. UNCLOS, supra note 4, art. 123.
66. COMMENTARY, supra note 39, at 365.
67. UNCLOS gives coastal states the right to develop natural resources in their EEZs and the right to enter into agreements with neighboring states on the development of natural resources where the extent of their EEZs is still under dispute. See UNCLOS, supra note 4, art. 56 (giving coastal states the right to exploit natural resources in their EEZs); see also id. art. 74 (giving states with opposite or adjacent coasts the right to enter into provisional arrangements of a practical nature pending the delimitation of their EEZs).
ligatory language. For example, while the first sentence uses the encouraging word "should," the second sentence uses the more commanding word "shall." This structure lends itself to three possible interpretations: (1) border states have no legal duty to cooperate whatsoever (no legal duty interpretation); (2) border states have a legal duty to cooperate in any exercise of rights or performance of duties under the Convention (broad legal duty interpretation); or (3) border states have a legal duty to cooperate, but only in performing those activities listed in subsections (a)–(d) (limited legal duty interpretation).

The no legal duty interpretation is problematic because it cannot explain the use of "shall" in the second sentence. If Article 123 was not intended to create any legal duty, employment of the mandatory word "shall" in the second sentence makes little sense. Of course, "shall" is followed by the word "endeavour," which might seem to relax any existing legal duty. However, the use of the word "endeavour" does not negate the mandatory character of the provision as signified by "shall." Rather, it seems to signify that the duty simply requires a good faith effort, rather than actual success. Consequently, under the legal duty interpretation, the use of "shall" must be explained away as a mistake. Such an explanation lacks a firm foundation.

The broad legal duty interpretation also has difficulties. The only part of Article 123 that addresses cooperation in such broad circumstances is the first sentence, which notably uses the non-obligatory term "should." The use of "shall" in the second sentence only appears to modify the activities listed in subsections (a)–(d).

The limited legal duty interpretation is the only one able to account for the conflicting use of "should" and "shall." Under this interpretation, it could be argued that the first sentence is merely an introductory phrase that sets the context. The second sentence is the operative part of the article, and because it uses the word "shall," it creates a legal duty. However, that duty is limited to the activities listed in subsections (a)–(d) because only that list is modified by the word "shall."

Thus, based on the text alone, the limited legal duty interpretation appears to be the strongest. Under this interpretation, the duty to cooperate would not extend to developing natural resources because such activity is not listed in subsections (a)–(d). However, Article 123 is not a paragon of legislative drafting that justifies a purely textual analysis. And after analyzing how Article 123 relates to

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68. This good faith effort required under Article 123 is discussed more infra Part III.A.
UNCLOS as a whole and examining the Article’s drafting history, it is clear that the broad legal duty interpretation is the most plausible.

**B. Analyzing Article 123 in Relation to UNCLOS As a Whole**

When Article 123 is read alongside other provisions in UNCLOS, it is clear that it would be rendered redundant if it only created a duty to cooperate in carrying out the activities listed in subsections (a)–(d). This is because other provisions in UNCLOS already require cooperation for each of these activities.

First, Article 123(a) says that border states shall “coordinate the management, conservation, exploration and exploitation of the living resources of the sea.” However, there are already several provisions of UNCLOS that deal with the development of living resources. For instance, Article 61(2) says that coastal states should ensure that the living resources in their EEZ are not “endangered by over-exploitation” and that “[a]s appropriate, the coastal State and other international organizations, whether subregional, regional or global, shall cooperate to this end.” Article 63 says that when a stock of species occurs within two or more EEZs, or when it occurs within an EEZ and any area adjacent to the EEZ, then coastal states must “coordinate and ensure the conservation and development” of these stocks. Also, Articles 117 and 118 require all states to cooperate in conserving and managing living resources in the high seas. Thus, under these Articles, a coastal state would have to cooperate in the conservation and utilization of living resources despite 123(a).

Second, 123(b) provides that border states shall “coordinate the implementation of their rights, and duties with respect to the protection and preservation of the marine environment.” However, UNCLOS Article 197 already says that all member states “shall cooperate on a global basis and, as appropriate, on a regional basis . . . for the protection and preservation of the marine environment.” Thus, 123(b) appears redundant as well.

Third, 123(c) commands border states to “coordinate their

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69. UNCLOS, *supra* note 4, art. 61(2) (emphasis added).
70. *Id.* art. 63.
71. *Id.* art. 117 (“All States have the duty to take, or to co-operate with other States in taking, such measures . . . as may be necessary for the conservation of the living resources of the high seas.”); *id.* art. 118 (“States shall co-operate with each other in the conservation and management of living resources in the areas of the high seas.”).
72. *Id.* art. 197.
scientific research policies and undertake where appropriate joint programmes of scientific research in the area.” Yet, marine scientific research is already covered in Part VIII of UNCLOS. Article 242 of that Part says that states “shall . . . promote international co-operation in marine scientific research for peaceful purposes.”

Finally, 123(d) tells border states “to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.” Assuming that the “provisions of this article” are the activities listed in (a)–(c), then this subsection is also redundant. The other Articles that cover the subject matter discussed in subsections (a)–(c) already implore states to cooperate in this manner. For instance, Articles 61(2) and 197 tell states to cooperate “as appropriate” with international organizations in the management of living resources and preserving the marine environment. And Article 242 says that states should “promote international cooperation” in order to coordinate scientific research.

Thus, if Article 123 is interpreted as only imposing a duty to cooperate in performing the duties listed in subsections (a)–(d) then it is superfluous. These subsections essentially repeat what is already covered in other articles of UNCLOS. It would not actually impose any new duties on states bordering an enclosed or semi-enclosed sea. This redundancy casts doubt on the limited legal duty interpretation and opens up the possibility that the duties listed in subsections (a)–(d) are not exclusive. Consequently, it is necessary to seek further clarification from Article 123’s drafting history.

C. Drafting History of Article 123

The issue of enclosed or semi-enclosed seas first arose during the second session of the Conference. During this session, most of the debate on the issue concerned whether special rules were needed for enclosed and semi-enclosed seas. Many states argued that special rules were needed because of the unique characteristics of these seas, such as their small area and the presence of multiple overlap-

73. *Id.* art. 242.
74. *Id.* arts. 62, 197.
75. *Id.* art. 242.
76. VUKAS, *supra* note 50, at 266.
77. *Id.* at 266–67.
ping EEZs.78 Most of the delegations were concerned that these distinctive characteristics made special rules necessary to prevent problems in navigation, pollution, and development of living and natural resources.79

Because no fewer than eighteen speakers had stressed the special features of enclosed and semi-enclosed seas,80 several draft articles were submitted for consideration.81 These draft articles resulted in Articles 133–34 being incorporated into the ISNT in the third session of the Conference.82 Article 134 set forth a framework of cooperation for states bordering an enclosed or semi-enclosed sea:

States bordering enclosed or semi-enclosed seas shall cooperate with each other in the exercise of their rights and duties under the present Convention. To this end they shall, directly or through an appropriate regional organization:

(a) Co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea;

(b) Co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;

(c) Co-ordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;

(d) Invite, as appropriate, other interested States or international organizations to co-operate with them in furtherance of the provisions of this article.83

Article 135 qualified the reach of Article 134 stating, “The provisions of this part shall not affect the rights and duties of coastal or other States under other provisions of the present Convention, and shall be applied in a manner consistent with those provisions.”84

In the fourth session, the Chairman made several important


80. Id. at 410.

81. VUKAS, supra note 50, at 266–67.

82. COMMENTARY, supra note 39, at 359–60.

83. Id.

84. Id. at 360.
changes to the Articles. In Article 134, “shall” in the first sentence was changed to “should,” and the word “endeavour” was added to the second sentence. 85 Also, Article 135 was dropped entirely. 86 The Chairman explained these changes by saying, “I have responded to the expressions of dissatisfaction with the provisions in the [ISNT] by making less mandatory the co-ordination of activities in such seas.” 87

In the remainder of the sessions, several proposals were made to restore the more mandatory word “shall” and to restore Article 135. However, these proposals were not accepted. The wording of Article 134 remained the same and became what is now Article 123. Article 135 was never reinstated. 88

It is clear from this history that the delegates disagreed on whether the provision that is now Article 123 should give rise to a legal duty. The Chairman needed to respond to these competing views and write an article that could achieve consensus. The changing of “shall” to “should” was part of this compromise. The Chairman explicitly stated that he made the change as a response to those delegations calling for less of an obligation, and he said that the revision made “less mandatory the co-ordination of activities in such seas.” 89 However, the phrase “less mandatory” adds some confusion. Something is either mandatory or it is not. Puzzling language aside, this odd phrase does seem to show that the Article was intended to create some legal duty. Had it not, the drafters would have presumably used a word like “optional” instead. Thus, the drafting history rules out the interpretation that Article 123 does not give rise to any legal duty.

However, both the limited legal duty and the broad legal duty interpretations still remain feasible. On the one hand, the changing of the word “shall” to “should” speaks strongly in favor of the limited legal duty interpretation. While the Chairman did not explicitly say this change was intended to limit the duty to cooperate in performance of the listed activities, he did say that it was intended to make the Article “less mandatory.”

On the other hand, the removal of Article 135 implies that Article 123 was intended to alter the duties of coastal states. But because subsections (a)–(d) are redundant, if states only had a duty to

85. Id. at 362.
86. Id.
87. Id.
88. See id. at 363–65.
89. Id. at 362.
cooperate in performing these activities, then Article 123 would not actually create any new legal duties. Thus, the removal of Article 135 supports the broad legal duty interpretation. Furthermore, debates in the Second Committee suggest that the underlying purpose behind Article 123 would be furthered by requiring cooperation in activities beyond those listed in subsections (a)–(d). The debates demonstrate that Article 123 was enacted because the delegates wanted to prevent difficulties that might arise due to the unique nature of enclosed and semi-enclosed seas. For instance, one of the recurring concerns was that special rules were needed to avoid navigational conflicts in these seas.\[90\] Likewise, as the Thailand delegate pointed out, the risk of conflict over natural resources is especially high in enclosed or semi-enclosed seas.\[91\] Yet nothing in subsections (a)–(d) deals with navigation or the development of natural resources. This broader purpose behind Article 123 seems to tip the scale in favor of the broad legal duty interpretation.

In summary, the drafting history of Article 123 does not unequivocally point to one interpretation. Rather, it can be used to support the argument that the duty to cooperate is limited to those activities listed in (a)–(d), or to support the interpretation that this duty applies whenever a state exercises its rights or duties under UNCLOS in an enclosed or semi-enclosed sea. However, the purpose behind Article 123 would not be fully met if the duty to cooperate did not extend beyond those activities listed in subsections (a)–(d). Consequently, the more plausible interpretation is that Article 123 creates a broad legal duty to cooperate whenever a coastal state exercises its rights or performs its duties under UNCLOS in an enclosed or semi-enclosed sea.

**D. Conclusion**

After first examining the text of Article 123, then its relation to UNCLOS as a whole, and lastly its drafting history, the meaning of the Article is still far from obvious. However, on balance, the strongest interpretation is that Article 123 imposes a broad legal duty on coastal states to cooperate with regard to any exercise of their rights or duties under UNCLOS. Although the text of the Article points to the interpretation that any duty is limited to performing the activities listed in (a)–(d), this interpretation would render it redundant. Furthermore, the drafting history demonstrates that the purpose

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91. *id.* at 411.
behind the Article is to prevent conflicts that are likely to arise in an enclosed or semi-enclosed sea. A broad duty to cooperate would better fulfill this purpose because it would include navigation and the development of natural resources.

Equity further tips the scale in favor of this conclusion. Equity is a basic principle underlying UNCLOS,92 and the preamble to the Convention endorses this principle. The preamble recognizes the "desirability of establishing through this Convention . . . a legal order for the seas and oceans which will facilitate . . . the equitable and efficient utilization of their resources."93 It further says, "the achievement of these goals will contribute to the realization of a just and equitable international economic order. . . ."94

The conclusion that states must cooperate in developing natural resources is the most equitable interpretation. As this Note discusses in the next Part, this interpretation would give all border states a seat at the negotiating table and would prevent China from negotiating in bad faith. Consequently, the best interpretation of Article 123 is that it imposes a duty on coastal states to cooperate in developing natural resources in an enclosed or semi-enclosed sea.

III. IMPLICATIONS OF THE DUTY TO COOPERATE

Several implications arise from the conclusion that Article 123 creates a legal duty to cooperate in the development of natural resources. First, this duty would likely mean that coastal states would have to negotiate with one another in good faith. Second, negotiating in good faith would require China to stop insisting on bilateral negotiations. Finally, if China continues to insist on bilateral negotiations, another coastal state could unilaterally initiate binding arbitration against China for violation of its duty under Article 123. Even if no state initiates such arbitration against China, the threat of arbitration could be a powerful bargaining tool and might finally cause China to acquiesce to multilateral negotiations.

A. The Duty to Cooperate Includes a Duty to Negotiate in Good Faith

While Article 123 contains no express duty to negotiate in

92. Duong, supra note 8, at 1170.
93. UNCLOS, supra note 4, pmbl. (emphasis added).
94. Id. (emphasis added).
good faith, it is likely implied from the duty to cooperate for two reasons. First, UNCLOS Article 300 says that "[p]arties shall fulfill[l] in good faith the obligations assumed under this Convention . . . "95 As argued in the previous Part, cooperation in the development of natural resources is an "obligation" under Article 123. Consequently, states bordering an enclosed or semi-enclosed sea have to cooperate in good faith. And to the extent negotiations are part of this cooperation, states have to negotiate in good faith.

Second, the International Court of Justice (ICJ) has found an implied duty to negotiate in good faith in provisions similar to Article 123. For instance, in Cameroon v. Nigeria, the ICJ found an implied duty to negotiate in good faith in UNCLOS Articles 74 and 83, which say that the delimitation of EEZs and continental shelves between states shall be effected "by agreement on the basis of international law."96 Likewise, in the Barbados/Trinidad and Tobago Maritime Delimitation Award, the ICJ found an implied duty to negotiate in good faith in UNCLOS Article 63, which requires states to agree on measures of conservation and management for stocks of fish located in two or more EEZs.97

In light of Article 300 and these decisions, any duty to cooperate under Article 123 would also imply a duty to negotiate in good faith. Consequently, China is required to negotiate in good faith whenever it is negotiating with other border states over the natural resources in the SCS.

B. China's Insistence on Bilateral Negotiations is Not in Good Faith

While China has been open to the idea of joint development for some time, it has consistently resisted the idea of multilateral negotiations. Instead, it insists on negotiating with its rival claimants one-on-one.98 China would likely argue that its pursuit of bilateral

95. Id. art. 300.

96. Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea Intervening), Judgment, 2002 I.C.J. 303, ¶ 244 (Oct. 10) ("like all similar obligations to negotiate in international law, the negotiations [under Articles 74 and 83] have to be conducted in good faith."); UNCLOS, supra note 4, arts. 74, 83.

97. Barbara Kwiatkowska, The Landmark 2006 UNCLOS Annex VII Barbados/Trinidad and Tobago Maritime Delimitation (Jurisdiction & Merits) Award, 39 GEO. WASH. INT’L L. REV. 573, 586 (2007) ("[T]he five-member Tribunal unanimously found it appropriate to adjudge that both parties were under a duty codified in Article 63 to agree upon measures of conservation and management of the stocks and to negotiate in good faith and conclude a new fisheries agreement.").

98. See CRS Report, supra note 1, at 8 n.16, 9.
negotiations is in good faith and that bilateral negotiations can lead to a successful JDA. China might point to the fact that many successful JDAs have been negotiated bilaterally. Consequently, China might claim, there is no reason to think that bilateral negotiations will prevent the formation of a successful JDA for the SCS.

Despite the fact that bilateral JDAs have been successful in the past, in this context, China’s insistence on bilateral negotiations reduces cooperation among states and stymies the purpose behind Article 123. According to the ICJ, the principle of good faith means that parties to a treaty must “apply it in a reasonable way and in such a manner that its purpose can be realized.” 99 As discussed in the previous section, the purpose of Article 123 is to ensure that states cooperate with each other when they carry out their rights and duties in a semi-enclosed sea. 100

However, China’s insistence on bilateral negotiations will lead to more conflict among claimant states because: (1) a bilaterally negotiated JDA would be unacceptable to the claimant states left out of the negotiations, and (2) China appears to be using bilateral negotiations as a delaying strategy so that it can increase its control over the SCS. Consequently, China’s push for bilateral negotiations is not really furthering cooperation, but it is actually preventing such cooperation.

1. A Bilaterally Negotiated JDA Would Be Unacceptable to the Claimant States Left Out

Bilateral negotiations can lead to fruitful JDAs in some circumstances. However, in this case, a bilateral JDA involving China would create additional tension in the SCS because it would be unacceptable to the other claimant states left out of negotiations. It would be unacceptable because, first, it would provide for the development of resources that those states believe is rightfully theirs. Furthermore, it would heavily favor China at the expense of all the other claimant states.

First, it is unlikely that the states left out of negotiations would accept an agreement allowing China and another state to develop the resources they claim. This conclusion is supported by previously bilaterally negotiated JDAs in areas with multiple claims. For instance, when Japan and South Korea entered into a JDA for the

100. See supra notes 89–90 and accompanying text.
East China Sea, China protested furiously.\footnote{Keyuan, supra note 8, at 106.} Similarly, when China and the Philippines began negotiating a JDA, Vietnam found it unacceptable.\footnote{Id.} Because a bilaterally negotiated JDA would inevitably alienate the other claimant states, it would only create additional hostility rather than resolve the conflicts in the SCS.

Moreover, China would enjoy such a power imbalance in any bilateral negotiations that any resulting JDA would heavily favor China. Many observers believe that this is one of the reasons China pursues such negotiations.\footnote{CRS Report, supra note 1, at 9–10; Fravel, supra note 23, at 292.} Indeed, China is the most militarily and economically dominant of the claimant states. And due to its preeminence, multinational enterprises have an incentive to support China "because of their substantial economic stake in China as a consumer or supplier market."\footnote{Duong, supra note 8, at 1102.} These companies will likely play a major role in structuring any negotiated solution and will further tip the scale in favor of China.\footnote{Id.} Such an outcome would be even more difficult for the other claimant states to accept.

2. China’s Insistence on Bilateral Negotiations Is a Delaying Strategy

Because the other claimant states would not accept a bilaterally negotiated JDA, it is unlikely that another state would be willing to enter into bilateral negotiations with China in the first place. China is likely aware of this, and as one commentator has observed, China appears to be pursuing bilateral negotiations as part of a "delaying strategy."\footnote{Fravel, supra note 23, at 292.} By insisting on a method of negotiations that will not achieve results, China has been able to buy more time to strengthen its jurisdictional claims.\footnote{Id. at 303–10 (describing the ways in which China is consolidating its claims in the SCS); see also supra note 12.}

Over the past decade, China has increased supervision of fishing within the SCS, interfered with any hydrocarbon exploration conducted by other states, modernized its naval capabilities, and conducted patrols in the parts of the SCS that it claims.\footnote{Id.} China has also placed a number of vessels permanently "on station" at its facilities
in the Spratlys, and it has conducted military exercises in the SCS.\textsuperscript{109} All these activities strengthen China's claim over the SCS while weakening the claims of its rival states.\textsuperscript{110} It might be a mere coincidence that China's aggressive tactics to assert control over the SCS coincide with its calls for bilateral negotiations, which are clearly a nonstarter. However, these activities seem to at least undermine China's claim that its pursuit of bilateral negotiations is in good faith.

In sum, China's insistence on bilateral negotiations leads to more conflict than cooperation. Any bilaterally negotiated JDA would be unacceptable to the states left out because it would ignore their competing territorial claims and it would heavily favor China. China understands this reality and it seems to be pursuing bilateral negotiations as part of a delaying strategy, rather than an effort to cooperate genuinely in developing with the other states. Consequently, a tribunal would likely find that China's insistence on bilateral negotiations is in bad faith. In order to fulfill its duty to negotiate in good faith, China must acquiesce to multilateral negotiations involving all of the claimant states. This would allow the ASEAN states to join together and present a united front to China. Only then would China's dominance be counterbalanced, and only then would all interested parties be able to play a role in negotiating the JDA.\textsuperscript{111}

C. Rival Claimant States Can Unilaterally Initiate Arbitration Against China for Violating Its Duty to Negotiate in Good Faith

If China continues to insist on bilateral negotiations, the other claimant states will not be left helpless. A rival claimant could unilaterally initiate binding arbitration by arguing that China breached its duty to negotiate in good faith under Article 123.

UNCLOS contains an extremely "sophisticated and detailed system for international dispute settlement."\textsuperscript{112} The provisions for dispute resolution are set forth in Part XV of the Convention. Section 1 of that Part says that parties shall settle disputes over the Convention "by peaceful means."\textsuperscript{113} But if states fail to reach an agree-

\textsuperscript{109} Fravel, supra note 23, at 309–10.
\textsuperscript{110} Id. at 293.
\textsuperscript{111} CRS Report, supra note 1, at 9.
\textsuperscript{113} UNCLOS, supra note 4, art. 279.
ment, Section 2 allows for compulsory proceedings. Under Article 286 of that Section, a party can submit to a tribunal "any dispute concerning the interpretation or application" of UNCLOS. However, Section 3 lays out some exceptions. Article 297 provides for some "automatic" exceptions, and Article 298 allows for some "exceptional" exceptions. Under Article 297, disputes regarding a state's "sovereign rights or jurisdiction" are only subject to the compulsory procedures in certain specified circumstances, and, under Article 298, a state can declare at any time that it does not accept compulsory proceedings regarding certain disputes, such as those involving sea boundary delimitation or historic bays or titles.

Under this framework, another state bordering the SCS could initiate compulsory arbitration based on the claim that China has breached its duty to cooperate under Article 123. The dispute would involve China's duty under Article 123, and would therefore concern the "interpretation or application" of UNCLOS as required under Article 286. Furthermore, none of the exceptions listed in Articles 297 or 298 would apply. Article 297 would not apply because this dispute would involve China's duties under the Convention, rather than their "sovereign rights or jurisdiction." And Article 298 would not apply because disputes concerning a state's duty to cooperate in developing natural resources are not listed as optional under that Article. So, even if China issued a written declaration saying that it would not accept compulsory arbitration of the dispute, a tribunal would still have jurisdiction.

Nonetheless, China will likely argue that the UNCLOS arbitration framework does not apply to this dispute. It might contend that it has rightful title to the islands in the SCS, and, therefore, it is entitled to an EEZ encompassing the majority of the SCS. Thus, even if Article 123 does impose a duty to cooperate, China might claim that this duty could not apply to actions in its own EEZ.

However, this argument is fallacious for two reasons. First, it is a defense on the merits rather than an argument against jurisdiction. Even assuming that most of the SCS is part of China's EEZ, a tribunal would still have to determine whether Article 123 may impose a duty on China to cooperate in its own EEZ. This would re-

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114. Id. art. 286.


116. UNCLOS, supra note 4, art. 297.

117. Id. art. 298.
quire an interpretation of UNCLOS Article 56, which governs a state's rights and duties within its EEZ. Thus, adjudicating the dispute would still require an interpretation of UNCLOS. Because Article 286 allows unilaterally initiated arbitration for any dispute "concerning the interpretation or application" of UNCLOS, a tribunal would still have jurisdiction. Second, the argument is incorrect on the merits. While Article 56 gives states "sovereign rights for the purposes of... exploiting... natural resources," it also says that states exercising this right must "act in a manner compatible with the provisions of this Convention." Thus, even assuming that China is entitled to a 200-mile EEZ extending from the islands, its "sovereign right" to exploit natural resources in its EEZ can still be qualified by a duty to cooperate imposed by Article 123.

Although a tribunal would have jurisdiction over this dispute, the ASEAN member states should not rush to initiate arbitration. While it is likely that a tribunal would find that China has a duty to negotiate in good faith, it is not guaranteed. Furthermore, unilaterally initiated arbitration could engender hostility between China and the state compelling arbitration. Such hostility would hinder progress on other important issues, such as sovereignty over the islands.

Consequently, it would be wise to hold off on arbitration until it is clear that no sustainable solution can be reached without it. But even if claimant states never unilaterally compel arbitration, Article 123 can still be a powerful tool. Because Article 123 likely requires China to negotiate in good faith, other claimant states can back up their calls for multilateral negotiations with the threat of arbitration. This threat might prod China to agree to multilateral negotiations.

CONCLUSION

Over ten years have passed since the Declaration on the Conduct of Parties in the South China Sea. Yet, the SCS is as volatile as ever. The coastal states are no closer to resolving their claims of sovereignty, and China's insistence on bilateral negotiations has prevented the formation of a JDA.

Despite its ambiguities and imperfections, Part IX of UNCLOS can facilitate the successful negotiation of a JDA. The SCS is an enclosed or semi-enclosed sea under Article 122. And because it is an enclosed or semi-enclosed sea, a tribunal would likely find that Article 123 imposes a duty on coastal states to cooperate in developing the natural resources of the SCS. This duty to cooperate requires China and the other coastal states to negotiate in good faith,
and this good faith duty means that China cannot continue to insist on bilateral negotiations.

China will probably resist the notion that UNCLOS requires it to negotiate multilaterally. However, the threat of compulsory arbitration might cause it to acquiesce. Even if China continues to resist multilateral negotiations, another coastal state could act on the threat of arbitration. While compulsory arbitration might create additional hostility, it might be the only option the other claimant states have if China continues to insist on bilateral negotiations.

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