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International Law Foundation and Feasibility Study of Establishing Marine Reserves in Disputed Sea Areas

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Abstract

The South China Sea region is one of the most biodiverse regions in the world, but due to overfishing, ship pollution and other factors, its biodiversity and environment have been greatly damaged. Marine protected areas have been widely recognized as effective tool for protecting the marine environment and conserving marine resources. However, the current lack of effective cooperation among protected areas in the South China Sea and the fact that some neighbouring countries are even zoning and managing disputed waters not only fail to effectively safeguard biodiversity, but also exacerbate regional tensions. There are already examples of successful cooperation in transboundary waters, which provide some ideas for cooperation in establishing protected areas in the South China Sea, and the successful environmental protection projects implemented by the United Nations Environment Programme in the South China Sea also set a good example for future cooperation among all parties in the South China Sea.

Keywords

Disputed Sea Area; Marine Protected Areas; Marine Environmental Protection

1. Overview of the Construction of Marine Protected Areas in Various Countries in the South China Sea

1.1 Overview of Marine Protected Areas

As technology advances, humans have gradually realized the enormous non-economic value of biological resources and can benefit from them. However, overfishing, ship pollution, climate change and other factors have caused incalculable and even irreversible damage to organisms and ecosystems. Human society has been taking a series of measures to protect the marine environment since the 1960s and 1970s. To this day, various mechanisms have been or are in effect, among which marine protected areas are considered an effective way to manage the marine environment and marine resources. The International Union for Conservation of Nature (IUCN) defines marine protected areas as "any intertidal or subtidal shelf area, including the overlying water and associated flora and fauna, historical and cultural attributes, which is enclosed and protected by legal procedures or other effective means." [1]

Currently, 16,653 marine protected areas have been established worldwide, covering 10.4% of the ocean area. Fish populations, coral reef numbers, and biodiversity in these protected areas have indeed recovered, and national practices are relatively rich, demonstrating their effectiveness. However, because countries can use the establishment of marine protected areas to formulate corresponding control measures, restrict the activities of other countries, and

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expand their jurisdiction and control over related sea areas, the establishment of marine protected areas has gradually degenerated into a “land grab”. In recent years, Vietnam, the Philippines, and Malaysia, neighboring countries of the South China Sea, have attempted to “legalize” islands and reefs with unclear sovereignty by legislating and other means to establish marine protected areas, even before maritime boundaries are fully demarcated, thereby expanding their own jurisdiction. If marine protected areas can be established and operated through international cooperation and coordination in disputed areas with unclear sovereignty, the marine environment can be effectively protected, biodiversity preserved, and friction between relevant parties reduced.

1.2 Analysis of the Establishment and Legality of Marine Protected Areas by Coastal States in the South China Sea

The South China Sea region is one of the world’s most complex areas of sovereignty disputes. To ease tensions and avoid military conflict, China has advocated for “shelving disputes and jointly developing” oil and gas resources. However, due to weak willingness among relevant countries or intervention from other powers, there are few cases of cooperation between China and neighboring countries in this area. Marine environmental protection is less politically sensitive; if relevant systems and rules are more perfected, cooperation among neighboring countries in the South China Sea is more likely. Therefore, analyzing the practices of various countries in establishing protected areas can provide insights for cooperative development.

1.2.1 Overview of Marine Protected Areas in Malaysia and the Development of Protected Areas in Disputed Areas

Malaysia boasts abundant marine resources, with coral reefs covering approximately 3,600 square kilometers. Marine protected areas were first established by the Malaysian Ministry of Fisheries in 1980. Subsequently, under the Fisheries Act 1985, most coral reef islands were designated as marine parks. This act was amended in 1994, dividing them into marine parks and marine reserves. Since the 1980s, the government has established and designated 42 marine protected areas off the coast of Peninsular Malaysia. The primary objective of Malaysian marine protected areas is to protect and restore overexploited fishery resources and safeguard coral reef ecosystems. However, due to a lack of regulatory measures to curb encroachment and overexploitation of fisheries, the management efficiency of the fisheries sector is low, and the actual results are not satisfactory.

Malaysia established a national park at Lukham Reef in 2018. Lukham Reef is located at the southern end of the Spratly Islands. In 1979, Malaysia issued a new map of its territorial sea and continental shelf. This ‘new map’ marked the continental shelf sovereignty claims of Sabah and Sarawak, including 12 islands and reefs in the southeastern part of the South China Sea within its claim range [3]. Lukham Reef is among them. Because Lukham Reef is geographically closer to Sarawak, Malaysia has taken advantage of its geographical location to continuously strengthen its control over it. The establishment of a marine park at Lukham Reef by Malaysia is not only for the purpose of protecting the marine environment and exploring its ecotourism value, but also to further strengthen its actual control over the disputed features through related jurisdictional activities, so as to demonstrate its legitimate status over the disputed area [4].

1.2.2 Overview of Vietnam’s marine protected areas and the construction of protected areas in disputed areas

Vietnam’s marine protected areas are divided into three types: national parks, marine species and habitat conservation areas and aquatic life nature reserves. The objects of protection are marine landscapes such as coral reefs, habitats of rare animals and marine species, and are also distinguished according to area. The specific management mechanism is that the government formulates and plans the site selection and rules of marine protected areas, and the actual operation is handled by a dedicated management committee, which is a public non-profit organization [2].

In May 2010, Vietnamese Prime Minister Nguyen Tan Dung issued Decree No. 742/QD- TTg, announcing the establishment of 16 marine protected areas by 2020. Among them, the Nam Ngum Island Marine Protected Area encompasses the waters of China’s Spratly Islands. According to Vietnam’s plan, this protected area will cover 350 square kilometers, including 200 square kilometers of marine area, making it Vietnam’s largest marine protected area upon completion. Currently, the other marine protected areas under Decree No. 742/QD- TTg have been completed and put into use, except for the Nam Ngum Island Marine Protected Area, whose implementation plan was only proposed in 2012 without public release, and no subsequent action has been taken. Many of Vietnam’s 16 marine protected areas are located along its maritime defense chain and will be used as important military and logistical bases. This indicates that marine protected areas are not only a means to achieve Vietnam’s long-term maritime protection goals but also bear an important responsibility in its maritime security strategy.

1.2.3 Overview of Philippine Marine Protected Areas and the Development of Protected Areas in Disputed Areas

The Philippine archipelago, comprising over 7,000 islands, boasts one of the highest levels of marine biodiversity in the world. However, overfishing and destructive fishing have posed a significant threat to the Philippine coral reef ecosystem. Therefore, the Philippines is actively establishing marine protected areas to address the degradation of the Coral Triangle and other habitats. Currently, the Philippines has developed a relatively comprehensive approach to establishing and implementing protected areas. This involves first dividing the marine area into zones and formulating and improving legal regulations; second, strengthening law enforcement; and third, using scientific monitoring and assessment to build a database of protected areas and enhance information feedback. A key characteristic of Philippine marine protected areas is the involvement of non-governmental forces. One of the most representative marine protected areas in the Philippines—the Apo Island Marine Protected Area—follows a community-based management approach. Furthermore, the average size of Philippine marine protected areas is very small, mostly less than 0.1 square kilometers, and located near the coast of islands, yet their protective effect is not weak.

In November 2016, the Philippines announced by executive order that it would designate the lagoon area of Scarborough Shoal (Huangyan Island) as a marine protected area and a no-fishing zone. This was a unilateral decision by the Philippines, but since China had already banned fishing in the area, the executive order had already indirectly achieved its effect. However, the lagoon area is the island's internal waters, and the Philippines' decision to designate the lagoon area as a no-fishing zone by executive order implicitly suggests its claim to sovereignty over the island.

2. The international legal basis and feasibility of establishing marine protected areas in the South China Sea

2.1 The International Legal Basis for Environmental Protection Cooperation in the South China Sea

2.1.1 United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (hereinafter referred to as the "Convention") was concluded relatively early, and the concept of marine protected areas does not appear in this article or the entire text. However, it does contain provisions on marine environmental protection and cooperation among relevant obligated parties. For example, Article 77 of the Convention stipulates the sovereign rights of coastal states to conserve and exploit natural resources and their jurisdiction over the protection and preservation of the marine environment. Part XII specifically addresses the protection and preservation of the marine environment, with Section I outlining the general obligations of states and measures to reduce environmental pollution. From these provisions, it is clear that the Convention not only establishes the source of the right to establish marine protected areas—namely, the sovereign rights of states over their jurisdictional waters—but also stipulates that marine environmental protection is a universal obligation, which must be undertaken by both coastal and non-coastal states. More specifically, Article 123 of the Convention stipulates the obligation of cooperation among coastal states in enclosed or semi-enclosed seas. The South China Sea is composed of the territorial seas and exclusive economic zones of two or more coastal states, which meets the definition of a semi-closed sea as stipulated in Article 122 of the Convention. However, Article 123 of the Convention is not a mandatory obligation to cooperate, but only sets forth a general requirement for cooperation between closed or semi-closed sea states, encouraging coastal states to "endeavor" to cooperate directly or through appropriate regional organizations [5].

2.2.2 Convention on Biological Diversity

Article 8 of the Convention on Biological Diversity stipulates that each Contracting Party shall, as far as possible and where appropriate, (a) establish a system of protected areas or areas where special measures are required to protect biodiversity; and (b) where necessary, develop guidelines for the selection, establishment and management of protected areas or areas where special measures are required to protect biodiversity. This provides Contracting Parties with relatively clear and specific obligations to establish marine protected areas.

2.2.3 Other conventions or declarations

In addition to the aforementioned global conventions, the Declaration on the Conduct of Parties in the South China Sea (hereinafter referred to as the "Declaration") is an important declaratory treaty signed by the littoral states of the South China Sea. Article 6 of the Declaration stipulates that "before a comprehensive and permanent settlement of the disputes, the parties concerned may explore or carry out cooperation in areas including marine environmental protection ... " Regarding disputed islands and reefs, Article 5 stipulates that "the parties undertake to exercise self-restraint and refrain from actions that would complicate or escalate the disputes or affect peace and stability, including refraining from inhabiting currently uninhabited islands, reefs, shoals, sandbars or other natural features, and to handle their differences in a constructive manner." This provides a legal basis for cooperation in marine environmental protection and for the parties not to take unilateral actions in disputed areas. However, the Declaration is a soft law in nature; its content is relatively abstract and general, and it does not have binding force. It serves more as a political declaration to pave the way for the subsequent formulation of other legal rules, and in practice, countries rarely use it as a direct source of law.

2.2 Feasibility Analysis of Establishing a Marine Protected Area in the South China Sea

Currently, there are three main models of marine protected areas: those under national jurisdiction, those entirely located on the high seas, and those combining both. Marine protected areas under national jurisdiction are the most numerous and representative. A typical example of a protected area entirely located on the high seas is the "South Orkney Islands Southern Shelf Marine Protected Area," established and operated under the auspices of the Commission for the Conservation of Antarctic Marine Living Resources. Marine protected areas that are partly under national jurisdiction and partly located on the high seas primarily operate through regional cooperation, with coastal states relinquishing some of their rights through treaties, which are then exercised by international organizations or individual states. The Paglas Protected Area in the Mediterranean adopts this model.

While international cooperation is highly beneficial for environmental protection, sovereignty issues often pose a significant obstacle, especially when relations between states are already strained. In such situations, developing tools that promote cooperation and provide assurances (recognition) without affecting pending jurisdictional claims can effectively ease tensions and facilitate cooperation. The Paglas Nature Reserve in the Mediterranean is a successful example of coastal states cooperating to establish a protected area.

Under the 1959 Antarctic Treaty, the legal status of the Antarctic region is currently frozen, which is a key reason for the establishment of protected areas in the Mediterranean. The Protocol on Specially Protected Areas and Biodiversity of the Convention for the Protection of the Mediterranean from Pollution (SPA/BD Protocol), revised in 1995, also established a "conservation caveat" in advance, similar to the Antarctic Treaty, enabling different parties to come together and reach an agreement. The meaning behind this "caveat" is relatively simple: establishing intergovernmental cooperation does not affect any outstanding legal or political issues concerning the determination of national jurisdiction. Similarly, the existence of any such legal or political issues should neither jeopardize nor delay the adoption of necessary measures for establishing special protected areas in the Mediterranean. The SPA/BD Protocol strengthens the international legal precedent established by the Antarctic Treaty for transboundary marine protection initiatives in all sea areas and has strong reference value. However, whether the meaning behind this "caveat" can be applied to the South China Sea region and function effectively remains quite questionable. Some scholars have pointed out that historical conflicts and mutual hostility exist between Southeast Asian countries and between China and Southeast Asian countries, while these countries also harbor contradictions regarding China's rise. The foundation of mutual trust for cooperation is weak. Furthermore, the need for industrial economic development among the South China Sea littoral states sometimes means that environmental protection is not considered a priority in national policy. In reality, successful cases of environmental protection cooperation in the South China Sea region are few and far between. Therefore, these factors suggest that rules that have proven highly effective in the Mediterranean region may not be as effective in the South China Sea.

3. Revelation

Currently, the practice of marine protected areas in the South China Sea is mostly unilateral action by individual countries. Not only is there a lack of a detailed and overarching standard text for this region, but the rules formulated by each country also vary significantly, making it difficult to achieve a consistent consensus in cooperation. Furthermore, are the countries in the South China Sea truly willing to cooperate in establishing protected areas in disputed regions? Based on existing practices, the motives of countries like Vietnam, Malaysia, and the Philippines in establishing protected areas are not entirely pure; they even place environmental protection after factors such as territorial disputes. However, completely denying the willingness of countries to cooperate is too extreme. As declared in the Declaration on the Conduct of Parties in the South China Sea, all countries in the South China Sea hope to maintain a peaceful environment in the region to promote economic prosperity and development. These countries are also actively seeking cooperation in less sensitive areas. For example, the "Reversing Environmental Degradation Trends in the South China Sea and the Gulf of Thailand" project, led by the United Nations Environment Programme (UNEP), has been implemented relatively smoothly, demonstrating the effect of UNEP's efforts to "depoliticize environmental cooperation" in the South China Sea. While disputes in the South China Sea will undoubtedly continue for a long time to come, the successful operation of this project proves the possibility of cooperation and provides a highly valuable reference for future environmental protection cooperation.

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