Fisheries in the South China Sea: A Centrifugal or Centripetal Force?

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Abstract

The present paper intends to have a look at fisheries in the South China Sea in order to find out whether this particular issue is a problem solver or rather a problem creator in this region characterized by tense inter-State relationships at present. In this part of the world’s ocean, dominated by maritime features such as the Paracels and the Spratleys, i.e. shallow areas, sometimes drying only at low tide, and sometimes at high tide as well, fish is a plentiful resource relied upon by many fishermen of the surrounding countries as a source of income. If we take Europe as an example, fisheries seem to have the dual capability to either trigger disputes between States, resulting sometimes in outright fish wars, or to provide a means of furthering integration between States, such as has been accomplished by the European Common Fisheries Policy. In the South China Sea a similar duality can be witnessed. At times, fishermen have dramatically influenced the relations between

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I. Introduction

1. The present comment starts from the premise that fisheries can be a factor for bringing countries together, just as they can be a factor leading to confrontation between States. To better understand this duality from an international law point of view, it might be instructive to go back to the way this issue was introduced in general international law in the early 17th century by the Dutch jurist Hugo de Groot, or Hugo Grotius in Latin. His basic argument was that the oceans were so vast that anybody who would want to appropriate part of them and thus exclude others from fishing therein, would be regarded as a “seeker of immoderate power” and “he would not escape the stigma of monstrous cupidity”.1 This argument was later rephrased in his opus magnus written in 1625, where it was stated that the oceans were so vast that there was enough for all peoples to draw water, fish and navigate as they wished.2 When the law of the sea was finally codified in 1958,3 and later in 1982,4 these ideas were reflected in the freedom of fisheries on the high seas. That freedom, as a principle, still applies today.

1 Hugo Grotius, De Iure Praedae Commentarius [Commentary on the Law of Prize and Booty], trans. Gwladys L. Williams and Walter H. Zeydel (Geoffrey Cumberlege 1950), vol. 2, 239. This book, probably written in late 1604 to early 1605, was only found in 1864 and published four years later. The Latin text reads: “In tanto mari si quis usu promiscuo solum sibi imperium et dicionem exciperet, tarnen immodicae dominationis affectator haberetur; si quis piscatu arceret alios, insanae cupiditatis notam non effugeret” (id., 105).


2. But much has changed in this area. After an unabated growth trend until the early 1990s of world capture fisheries production, that is excluding aquaculture, the latter has stagnated and remained rather stable since then.\(^5\) Moreover, if one further refines these statistics to cover only the fish species that Grotius had in mind, namely marine capture and thus excluding inland capture, this trend has been overall negative since the early 1990s,\(^6\) clearly indicating that marine fisheries are not inexhaustible. Does this then mean that one of the fundamental premises on which Hugo Grotius based his argumentation turned out to be flawed since the end of the 20th century? This is an easy assumption to make today. However, it would not do full justice to the ingenuity of this extremely talented Dutch lawyer, for one should not forget that Grotius only defended the position of his client. Indeed Part XII of \textit{De Iure Praedae Commentarius}, which contained the first above-mentioned quote, was in fact identical, save some necessary adaptations to make it a free-standing publication, to his famous \textit{Mare Liberum}, first published in 1609 as an anonymous pamphlet.\(^7\) At that time Grotius worked for the Dutch government,\(^8\) defending the interests of the Great United Company of the East Indies whose ships needed to be able to rely on the freedom of navigation in


\(^6\) SOFIA 2010, above n.5, p. 5, Table 1 (covering the period 2004–2010), in combination with earlier FAO reports covering the period from 1990 until 2003 (http://www.fao.org/fishery/publications/sofia/en (accessed 8 November 2012)).

\(^7\) Hugo Grotius, \textit{Mare Liberum Sive De Iure Quod Batavis Competit Ad Indicana Commercia} [The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade] trans. Ralph van Deman Magoffin (Clarendon Press 1916) (hereinafter Mare Liberum). It was only after his work \textit{De Iure Praedae Commentarius} was found (above n.1), that this anonymous pamphlet could with certainty be attributed to Grotius because of the identical context. The above-cited statement on fisheries (above n.1) is no exception, for it can be found at 38. See also an online copy of the original book, posted on the occasion of the 400th anniversary of its publication in 2009, p. 30 (http://www.kb.nl/bladerboek/mareliberum/browse/book.html (accessed 8 November 2012)).

\(^8\) Later in his lifetime, he had to flee The Netherlands, and finally even became an envoy of the Swedish government in France in 1634. In that capacity he had to adjust his position to take into account the four nautical mile zone claimed by that country to prohibit inter alia fisheries in front of its coast. It is only through a letter of Grotius dated 20 May 1637, in which he commented on John Selden’s \textit{Mare Clausum}, that it can be inferred that he had come to accept a zone along the coast of undetermined breadth in which the coastal State would have exclusive fishing rights. Frans Eric René De Pauw, Het Mare Liberum van Grotius en Pattijn (Die Keure 1960), 79–80.
order to counter the monopoly claims by the Portuguese and the Spanish at that time. He consequently only used the freedom of fisheries as a secondary line of argumentation in order to prove with even more vigour his main point, namely the freedom of navigation. Grotius indeed readily admitted in *Mare Liberum* that his argumentation based on living resources rested on weaker grounds than that concerning navigation, for he argued that even if it were possible to prohibit fishing because “in a way it can be maintained that fish are exhaustible”, this still would not undermine his argumentation with respect to navigation because the sea is not “exhausted” by this use.

3. So even though the principle of the freedom of fisheries still exists today, it has been adjusted in accordance with the exhaustible nature of its very substance in at least two major ways since the entry into force of the United Nations Convention on the Law of the Sea (“1982 Convention”). Firstly, the concept of the freedom of fisheries on the high seas has been emasculated, for almost the entire stock of commercially exploited species moved from a regime of *res communis* to one where these resources were placed under the sovereign rights of the coastal State through the creation of the exclusive economic zone (EEZ). Secondly, its field of application has been seriously restricted, for the bottom of the oceans as well as the superjacent waters within the 200 nautical mile zone measured from any land or island have been excluded. Today these zones form part of the continental shelf or the Area, and the EEZ respectively.

4. These drastic changes did not, however, resolve the problem of overfishing on the high seas, for very soon the remaining 5 per cent of commercially exploited resources came under severe pressure, with the 1982 Convention ill-equipped to adequately deal with it. This has finally resulted in the fact that a number of

9 When later in time he had to rely on these same works to defend the cause of the Dutch monopoly of the trade with the East Indies against the English, who specifically confronted him with his own earlier writings, this required some shrewd manipulation of his earlier arguments as demonstrated by De Pauw (id., 49–65).


11 *Mare Liberum*, above n.7, 35. The Latin text reads: “Et si quicquam eorum prohibere posset, puta piscaturam qua dici quodammodo potest piscis exauriri, at navigationem non posset, per quam mari nihil petit.”

12 As succinctly stated by David Freestone, *Fisheries, High Seas*, in: Max Planck Encyclopedia of Public International Law Online (2009), 2 (www.mpepil.com): “The major significance of this [EEZ becoming part of customary international law] for the law of high seas fisheries was that up to 95% of exploitable fish stocks moved from the regime of the high seas to that of coastal jurisdiction.”

additional agreements have been negotiated in order to try to stem the tide of over-fishing on the high seas.\textsuperscript{14}

5. It has been the realization of this scarcity that suddenly increased the likelihood of this issue to create tensions between States. As long as there were enough living resources on the high seas, States could get along easily, on the sole condition that one did not prevent the other from making use of the same freedom of access. Once these resources became depleted, however, States became rivals. This suddenly increased the probability that the living resources of the high seas would become a bone of contention between them. Nevertheless, if properly addressed, these new challenges can also result in win–win situations, leading States to co-operate rather than to enter into a race to the bottom where everybody loses.

6. Since the Preston workshop in April 2012, where the present thoughts were first developed, was focused on the role of international law, this comment will take a closer look at the hard law with respect to fisheries in the South China Sea. But in order to do so in a more focused way, Section II will take a closer look at the topic researched, that is the South China Sea and the fisheries in that area. Section III will subsequently look into how fisheries can exert a centrifugal as well as centripetal force in the relationship between bordering States. Section IV will then analyse the international legal framework applicable in the South China Sea and how it has been applied in practice so far. Section V will finally try to draw some conclusions and suggest some possible ways forward.

II. The South China Sea and its fisheries

7. In order to better define the scope of the present comment this part will briefly touch on two issues relating to the subject matter treated, namely the spatial extent of the South China Sea and some specificities of the living resources to be found there. The following two sub-sections will deal with both of these aspects in turn.

II.A. Spatial extent

8. The focus of this paper is on the South China Sea, defined by the International Hydrographic Organization in 1953 as Area 49.\textsuperscript{15} It should be noted in this respect

\textsuperscript{14} For a short overview, see id., 435–454.

\textsuperscript{15} International Hydrographic Organization, Limits of Oceans and Seas (Special Publication N°28), (3d edn. Monégasque1953), 30–31 (http://www.iho.int/ihon_pubs/standard/S-23/S23_1953.pdf (accessed 8 November 2012)). The limits of Area 49 are defined as follows:

On the South. The Eastern and Southern limits of Singapore and Malacca Straits as far West as Tanjong Kedabu (1°06' N, 102°58' E) down the East coast of Sumatra to Lucipara Point (3°14' S, 106°05' E) thence to Tanjong Nanka, the Southwest extremity of
that the specific nomenclature used in this publication to describe the sea area in question, namely “South China Sea (Nan Hai)”, with express reference to China in the denomination as well as the Chinese name in parentheses following it, has no juridical implications whatsoever as to the legal ownership of these water areas,\(^\text{16}\) irrespective of the multiple references to China it may contain. The present comment has therefore no difficulty in using this official nomenclature in an article focusing on rules of international law applicable to this area, because the use of this nomenclature, no matter how widespread, can never on its own merits be relied upon in order to attribute to China any legal rights over this maritime expanse.\(^\text{17}\)

9. The spatial extent of the South China Sea, in other words, corresponds \textit{grosso modo} to the normal indication of this sea area on maps, the only exception being that the Gulf of Thailand, enclosed by a straight line running from Cape Ca

Banka Island, through this island to Tanjong Berikat the Eastern point (2°34' S, 106°51' E), on to Tanjong Djamang (2°36' S, 107°37' E) in Billiton, along the North coast of this island to Tanjong Boeroeng Mandi (2°46' S, 108°16' E) and thence a line to Tanjong Sambar (3°00' S, 110°19' E) the Southwest extreme of Borneo. On the East. From Tanjong Sambar through the West coast of Borneo to Tanjong Sampanmangio, the North point, thence a line to West points of Balabac and Secam Reefs, on to the West point of Bancalan Island and to Cape Buliluyan, the Southwest point of Palawan, through this island to Cabuli Point, the Northern point thereof, thence to the Northwest point of Busuanga and to Cape Calavite in the island of Mindoro, to the Northwest point of Lubang Island and to Point Fuego (14°08' N) in Luzon Island, through this island to Cape Engano, the Northeast point of Luzon, along a line joining this cape with the East point of Balintang Island (20° N) and to the East point of Y'Ami Island (21°05' N) thence to Garan Bi, the Southern point of Taiwan (Formosa), through this island to Santyo (25° N) its North Eastern Point. On the North. From Fuki Kaku the North point of Formosa to Kiushan Tao (Turnabout Island) on to the South point of Haitan Tao (25°25' N) and thence Westward on the parallel of 25°24' North to the coast of


\(^{17}\) In this respect, a further argument \textit{ex abundanti} can be found in the express statement in the preface of the third edition of this publication, contained in its third paragraph, where it is stated that “[t]hese limits have no political significance whatsoever” (International Hydrographic Organization, above n.15, 2). Similar caveats are to be found on the accompanying maps (id., sheets 1-3, notes on top of the map in fine). Nevertheless, see Fengbing Wu, Historical Evidence of China’s Ownership of the Sovereignty over the Spratly Islands, in: China Institute for Marine Development Strategy (ed.), Selected Papers of the Conference on the South China Sea Islands (Ocean Press 1992), 111 [in Chinese], as mentioned by Keyuan Zou, China and Maritime Boundary Delimitation: Past, Present and Future, in: R. Amer and K. Zou (eds.), Conflict Management and Dispute Settlement in East Asia (Ashgate 2011), 161 fn.98.
Mau on the Vietnamese coast to the estuary of the river Kelantan on the Thai side, has been excluded since it is listed as a totally separate entry.\textsuperscript{18} A definition such as this, arrived at by hydrographers, also apparently makes sense for an article focusing on fisheries, because it corresponds roughly with the large marine ecosystem described by the Sea Around Us project of the University of British Columbia as the South China Sea.\textsuperscript{19} The countries bordering this sea are consequently Brunei Darussalam, China, Indonesia, Malaysia, the Philippines and Vietnam.\textsuperscript{20}

10. Taiwan, forming the north-eastern boundary of Area 49, deserves special attention. Since its status as a State under contemporary international law is debated,\textsuperscript{21} one could argue that it does not belong in the group of States bordering the South China Sea mentioned above. On the other hand, it cannot be denied that

\begin{itemize}
\item \textsuperscript{18}Namely Area 47. See International Hydrographic Organization, above n.15, 23.
\item \textsuperscript{19}For a visualization, see the map available at http://www.seaaroundus.org/lme/36.aspx (accessed 8 November 2012). Under this definition, the area is even somewhat smaller, for the closing line of the Gulf of Thailand has the same entrance point on the Vietnamese side, namely Cape Ca Mau, but it then runs in an almost due southern direction to the southern tip of West Malaysia. Also in the north this large marine ecosystem does not include the whole western shore of Taiwan, but only part of it before linking it with mainland China. Nevertheless, by and large the areas are similar, both excluding the Gulf of Thailand.
\item \textsuperscript{20}Singapore is not listed since it is mainly located in Area 46(b), namely Singapore Strait. See International Hydrographic Organization, above n.15, 23. After the International Court of Justice recently attributed the sovereignty over Pedra Branca to Singapore (Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008, ICJ Reports (2008), 93), this country at present is certain to possess territory just inside the South China Sea as defined above (see above n.15). Nevertheless, the impact on the maritime area over which it will be able to claim sovereignty or sovereign rights in the area seems minimal at best (as argued by Robert C. Beckman and Clive H. Schofield, Moving Beyond Disputes Over Island Sovereignty: ICJ Decision Sets Stage for Maritime Boundary Delimitation in the Singapore Strait, 40 Ocean Development and IL (2009), 1–35), especially when viewed from the fisheries perspective in the South China Sea as a whole, which forms the main focus of attention of the present article. This country will therefore not be specifically addressed in the present comment.
\item \textsuperscript{21}This is not the place to treat this issue in any detail. Suffice it to say that its status has been described as “a non-state territorial entity which is capable of acting independently on the international scene, but is most probably de jure part of China”. See Malcolm N. Shaw, International Law (6th edn. Cambridge University Press 2008), 235. Taiwan is not a member of the United Nations, and the chances of it ever becoming a member are rather slim, as indicated by failed past attempts, as stressed by Peter Malanczuk, Akehurst’s Modern Introduction to International Law (7th edn. Routledge 1997), 372. Because many multi-lateral international conventions are only open to members of the United Nations, specialized agencies thereof or States in general, Taiwan has not been able to become a party to most
Taiwan is very active as far as fishing on the high seas is concerned, possessing what has been labelled as “one of the world’s most renowned distant water fishing fleets”.

Not including Taiwan in an article on fisheries in the South China Sea would therefore seem rather odd. The international community has tackled this specific problem by introducing the new notion of “fishing entities”. Even though the application of this new concept in practice is far from perfect, it has allowed Taiwan to become bound by certain multi-lateral treaty obligations, and sometimes even to draw rights from them. It is with these caveats that the present comment will include Taiwan in the discussion.

II.B. Fisheries in the South China Sea

11. The South China Sea benefits from a number of natural conditions which make it a very rich fishing ground when compared to other regions of the world. The alternating monsoons deserve special attention, for the changing wind and surface current patterns resulting from this climate are said to have a positive impact on the distribution and abundance of flora and fauna in the sea, making it the area with the highest species diversity in the world. When compared to multi-lateral instruments relating to fisheries, unless specific provisions have been provided for to that extent in the agreements themselves.


23 As far as the real value generated by fishing in the South China Sea’s large marine ecosystem is concerned, the earnings of Taiwan are comparable to those of Indonesia, Malaysia and the Philippines, and are only dwarfed by those of Vietnam (x6) and China (x14). See the most recent statistics (2005) as compiled by the Sea Around Us project (see above n.19 and accompanying text) (http://www.searroundus.org/lme/36/14.aspx (accessed 8 November 2012)).

24 This denomination in itself is interesting, for in international law the notion of entity has been defined in the following manner: “Elément dont la qualification juridique est douteuse, non précisée—souvent à dessein—par le locuteur ou sur laquelle il ne veut pas se prononcer.” Jean Salmon (ed.), Dictionnaire de droit international public (Bruylant 2001), 432.


27 Carmen A. Ablan and Len R. Garces, Exclusive Economic Zones and the Management of Fisheries in the South China Sea, in: S. A. Ebbin, A. H. H. Hoel and
other surrounding sea areas, the South China Sea is furthermore characterized by the co-habitation of various species and the relatively smaller quantity in each group.28

12. At the same time, these wind and current patterns make it apparently possible to distinguish different meso-scale transboundary units for managing fisheries in the South China Sea, with each bordering country represented in at least two of these sub-regions.29 It is also worth stressing that two hotspots from an international legal point of view, namely the Paracels and the Spratley islands, are at the same time described as island groups which might be significant beyond their natural boundaries as a source of fish recruits in the South China Sea,30 leading some authors to plead in favour of the creation of marine parks in those highly contested areas.31

13. Contrary to the general downward trend of marine capture fisheries worldwide,32 the latest statistics from the Southeast Asian Fisheries Development Centre (SEAFDEC) indicate that in the South China Sea between 2003 and 2007 there has been an increase by about 6.5 per cent in quantity and even by


29 Carmen A. Ablan and Len R. Garces, above n.27, 145–146. As can be deduced from the map displayed on p. 145.

30 Id., 138.

31 See e.g., John W. McManus, Shao Kwang-Tsao, and Szu-Yin Lin, Toward Establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan, 41 Ocean Development and IL (2010), 270.

32 See above n.6 and accompanying text.
about 31 per cent in value of marine capture fisheries. This tendency seems to be corroborated by more recent statistical information for the larger Southeast Asian region: If the global marine capture has decreased, the production trend in the Southeast Asian region has been increasing at a rate of about 251,100 metric tons per year.

14. Most States surrounding the South China Sea have thus been able to steadily increase their marine catches up till the present. But as remarked by the Food and Agriculture Organization (FAO), one should be careful: "Despite this apparently positive situation, there are reasons for concern regarding the state of the resources, with most stocks being either fully exploited or overexploited (many also depleted), particularly in the western part of the South China Sea."

15. If one adds to this global picture the fact that a substantial number of fisheries commercially exploited in the South China Sea are transboundary in nature, with the most frequently caught species in quantity of marine catch, namely 13.5 per cent of the total regional production, being tuna, a highly migratory species, it becomes obvious that co-operation between bordering States is necessary if these resources are ever to be conserved and managed in an effective and sustainable manner.

III. Fisheries as a factor of co-operation or confrontation

16. When taking Europe as a point of comparison, it can be demonstrated that fisheries can be an element of co-operation in the relationship between States as well as an activity leading rather to confrontation.

17. The notion of "cod war" found its introduction into international law by means of the dispute that arose between Iceland and the United Kingdom at the end of the 1950s. Other instances of such "cod wars" later surfaced in Europe,
with Iceland changing position from a coastal State to a distant water fishing nation,\textsuperscript{39} but other species have also given rise to serious inter-State tension, such as the fish war pitting Europe against Canada fought just outside the Canadian 200 nautical mile zone in the Atlantic, resulting first in the arrest of the Spanish fishing vessel \textit{Estai} and later in the conclusion of an agreement.\textsuperscript{40}

18. These disputes occur not only between States having opposing interests, such as distant water fishing nations wanting to secure access to the resource while coastal States rather intend to manage the resource for national use, but also sometimes between very close countries with a common primary aim.

19. In this respect, the quickly changing relationship between Estonia and Latvia right after the disappearance of the former Soviet Union from the political world map can be instructive. These two countries, together with Lithuania, had formed a common front against the former Soviet Union in their quest for renewed independence. Nevertheless, immediately after independence, the tension over fisheries in the Gulf of Riga rose quickly between Estonia and Latvia, finally resulting in an outright fish war during the spring of 1995, which took until July 1996 to be definitively settled,\textsuperscript{41} namely by means of a conclusion of a maritime boundary agreement.\textsuperscript{42}

\textsuperscript{39}Thorir Gudmundsson, Cod War on the High Seas: Norwegian-Icelandic Dispute over “Loophole” Fishing in the Barents Sea, 64 Nordic JIL (1995), 557–573.
\textsuperscript{40}For a brief account, see e.g. David Freestone, Canada and the EU Reach Agreement to Settle the Estai Dispute, 10 IJ Marine and Coastal Law (1995), 397–411.
\textsuperscript{42}Agreement between the Republic of Estonia and the Republic of Latvia on the Maritime Delimitation in the Gulf of Riga, the Strait of Irbe and the Baltic Sea. Estonia and Latvia, signed on 12 July 1996, 12 IJ Marine and Coastal Law (1997), 372. This agreement entered into force on 10 October 1996. It is interesting to note that although fisheries formed the crux of the whole problem, the maritime boundary agreement does not even refer to it in its operative part. The separation of the question of fishing rights from that of the maritime boundary
20. On the other hand, it is sufficient to merely refer to the European Common Fisheries Policy as a vehicle for closer co-operation between the member States of the European Union on the topic of fisheries.43

21. In the South China Sea one finds the same opposing tendencies. On the one hand, there already have been many confrontations at sea over fishing vessels. Reference can be made, for instance, to the incident between China and the Philippines around Scarborough Shoal in early April 2012.44 On April 10, Chinese vessels prevented the Philippine Navy from detaining Chinese fishermen charged with poaching endangered corals, giant clams and live sharks. After a standoff lasting four days between a Chinese maritime survey ship and a Philippine coastguard vessel, the Chinese fishing vessels finally left the area.45 As has been said, such clashes are not exceptional in the South China Sea46 and at times they result in severe loss of human lives.47 A factor further increasing the likelihood of similar clashes in

was apparently only decided at the last minute between the parties. See Erik Franckx, Estonia—Latvia (Report-Number 10-15), above n.41, 3003 and especially 3003 fn.45.

43 For a good recent account, see Robin R. Churchill and Daniel Owen, The EC Common Fisheries Policy, (Oxford University Press 2010), 597.
44 This is not a new area of dispute between China and the Philippines but has been a bone of contention between them for at least 15 years. For a good overview, see Keyuan Zou, Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?, 7 IBRU Boundary and Security Bulletin (1999), 71–81.
45 China and Philippines End Fishing Standoff, The Guardian, 14 April 2012 (http://www.guardian.co.uk/world/2012/apr/14/china-philippines-end-fishing-standoff (accessed 8 November 2012)).
47 Press reports in 2006–2007 made mention for instance of Vietnamese fishermen being killed or wounded by Chinese patrol vessels and gunboats. See Thuy Tran Truong, Recent Developments in the South China Sea: Unconstrained Waves of Tension, in: F. R. De Leon et al., above n. 46, 41–46. The most deadly incident so far occurred in January 1988 with 74 Vietnamese sailors killed. But China also complains that its fishermen have at times been fired upon. See Li Mingjiang, China’s South China Sea Policy: Claims and Changing Contexts, in: F. R. De Leon et al., above n.46, 195, 201.
the South China Sea is most certainly the disputed nature of many of the offshore features to be found there, not only as to who owns them but also as to the exact maritime zones generated by them in accordance with Article 121 of the 1982 Convention.

22. But the South China Sea area also has its success story as far as co-operation in the field of fisheries is concerned, namely the Gulf of Tonkin.48 This gulf, located in the western extremity of the South China Sea, is characterized by similar natural conditions to the latter, making it a very rich area from a fisheries point of view. Fishermen of both countries had traditionally fished in that area, but as it turned out, most of the mature fish are to be found on the Vietnamese side.49 As relations between both parties deteriorated, shooting incidents started taking place.50 An agreement was reached on Christmas day 2000 (Sino-Vietnamese 2000 Fishery Agreement),51 but it took more than three years for this instrument to enter into force together with a maritime boundary agreement, which was signed on the same day in 2000 as the fisheries agreement (Sino-Vietnamese 2000 Delimitation Agreement).52 The exact relationship between the two agreements is special and gave rise to difficulties between the parties: China wanted to include the fisheries issue in the Sino-Vietnamese 2000 Delimitation Agreement, whereas Vietnam rather saw it as two separate issues. The negotiations leading up to these two agreements have therefore been labelled as “parallel to but independent from” one another.53

48 Contrary to the South China Sea, a nomenclature full of references to China, the Gulf of Tonkin and especially its Chinese translation into “Beibu”, seems rather to be a denomination with Vietnamese connotations, since it means “northern”. Keyuan Zou, Gulf of Tonkin: Sino-Vietnamese Fishery Agreement of the Gulf of Tonkin, 17 International Journal of Marine and Coastal Law (2002), 127 fn.1. Once again it should be stressed that from an international legal point of view, this fact by itself is irrelevant when trying to obtain sovereignty or sovereign rights over this area (see above nn.16–17 and accompanying text).


50 Keyuan Zou, above n.48, 140.

51 Id., 143–148, where an English translation of the text of the agreement can be found. A Common Fishery Zone is inter alia created (id., Part II) which will be regulated by a Sino-Vietnamese Joint Committee for Fishery (id., Part V).


53 Thao Nguyen Hong, Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf, 35 Ocean Development and IL (2005), 30.
The Sino-Vietnamese 2000 Delimitation Agreement has only one provision with respect to fisheries that moreover does not explicitly refer back to the Sino-Vietnamese 2000 Fishery Agreement,\textsuperscript{54} while the latter contains a general reference to the Sino-Vietnamese 2000 Delimitation Agreement in its preamble and some technical references in two of its articles.\textsuperscript{55} Even though both agreements have been labelled a “package deal”,\textsuperscript{56} it should be remembered that the Sino-Vietnamese 2000 Fishery Agreement is limited in time. It has been negotiated for a period of 12 years and one automatic extension of three years afterwards, meaning that it will last for a total of 15 years after which new negotiations will be necessary if co-operation is to be continued.\textsuperscript{57} Even though the Sino-Vietnamese 2000 Fishery Agreement causes much hardship on the Chinese side,\textsuperscript{58} it is generally considered by both sides as a positive development\textsuperscript{59} and has been assessed by outsiders as “working well”.\textsuperscript{60}

\textsuperscript{54} Sino-Vietnamese 2000 Delimitation Agreement, above n.52, Art. 8 only states in the most general of terms that “[t]he Parties have agreed to consult” on fishery related matters.

\textsuperscript{55} Sino-Vietnamese 2000 Fishery Agreement, Preamble, para.2. Only two articles refer back to the Sino-Vietnamese 2000 Delimitation Agreement: Art. 3, because the Common Fishery Zone, established by the Sino-Vietnamese 2000 Fishery Agreement, is measured outward on both sides starting from the delimitation line, and Art. 21 which refers back to maps annexed to the Sino-Vietnamese 2000 Delimitation Agreement (see above n.51).

\textsuperscript{56} Guifang Xue, Improved Fisheries Co-operation: Sino-Vietnamese Fisheries Agreement for the Gulf of Tonkin, 21 IJ Marine and Coastal Law (2006), 231.

\textsuperscript{57} Sino-Vietnamese 2000 Fishery Agreement, above n.51, Art. 22(2). Besides the Common Fishery Zone (see above nn.51 and 55), located between the Gulf’s closing line and 20° N and forming the pièce de résistance of this agreement, a Transitory Fishing Zone was also established north of 20° N. The latter was only meant to be operational during four years, even though the parties decided to postpone the expiry date from 30 June to 31 October 2008 (Li Jianwei and CHEN Pingping, China–Vietnam Fishery Cooperation in the Gulf of Tonkin Revisited, in: T. Tran Truong (ed.), The South China Sea: Towards a Region of Peace, Security and Cooperation (The Gioi Publishers 2011), 303, 310), this zone has now ceased to be operative.

\textsuperscript{58} Implying that tens of thousands of fishermen would have to be laid off. See LI Jianwei and CHEN Pingping, above n.57, 315 and Yu Yunjun, and Mu Yongtong, above n.49, 256–257.

\textsuperscript{59} LI Jianwei and CHEN Pingping, above n.57, 315–317.

\textsuperscript{60} David Rosenberg, above n.26, 74.
IV. International law applicable in the South China Sea with respect to fisheries

23. The first document which springs to mind when addressing the hard law applicable in the South China Sea is the 1982 Convention, also called the Constitution for the Oceans. This document is fully operational in the South China Sea, as defined in the present paper, because all bordering States have ratified this international legal instrument, with the exception of Taiwan which is excluded from becoming a member in accordance with its Articles 305–307.

24. Contrary to other parts contained in the 1982 Convention, Part VII, entitled "High Seas", was not very innovative. The international community reacted to this shortcoming and the problem of overfishing on the high seas which soon emerged through the adoption of a number of legally binding and non-binding documents. As already stated above, only the former will form part of the present analysis. Three additional instruments need to be mentioned that were specifically drafted to address this problem: The so-called FAO Implementation Agreement of 1993, the UN Fish Stocks Agreement of 1995 and finally the FAO Port State Agreement of 2009. All three try to tackle the problem each primarily from a different angle, namely the flag State, regional fisheries management organizations and the port State, respectively. But despite the fact that in the South China Sea most species of fish, and certainly the most important ones as far as commercial exploitation is concerned, are straddling or highly migratory in nature, it is noteworthy that very few


62 See above n.14 and accompanying text.


65 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Multi-lateral convention, signed on 25 November 2009. This agreement has not yet entered into force (ftp://ftp.fao.org/docrep/fao/meeting/018/k6339e.pdf (accessed 8 November 2012)).
Table 1: Adherence to high seas fisheries agreements

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<th>FAO Implementation Agreement 1993</th>
<th>UN Fish Stocks Agreement 1995</th>
<th>FAO Port State Agreement 2009</th>
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1 Excluded from acceptance in accordance with Art. 10(1).
2 Excluded from signing in accordance with Art. 37. Nevertheless, according to Art. 1(3) the agreement applies mutatis mutandis to fishing entities.
3 Excluded from ratification in accordance with Art. 38. Nevertheless, according to Art. 1(3) the agreement applies mutatis mutandis to fishing entities.
4 Excluded from signing in accordance with Art. 25.
5 Excluded from ratification in accordance with Art. 26.

States bordering this area are either a party to the first instrument, or the second one, or a signatory to the third one, as indicated in Table 1 above.

Moreover, the poor adherence rate in the South China Sea to these instruments is indicative of their limited overall success so far. The 38 States parties to the FAO Implementation Agreement of 1993 and 78 States parties to the UN Fish Stocks Agreement of 1995, contrast sharply with the 163 States parties to the 1982 Convention, numbers each time to be augmented by one international organization, that is, the European Union. It seems therefore particularly unproductive to try to rely on the novel aspects of the UN Fish Stocks Agreement of 1995, such as its Article 8(4) which denies non-members access to the fisheries resources managed by a regional fisheries management organization unless they agree to apply the conservation and management measures established by such organization. Such an

68 The status of this agreement is available at http://www.fao.org/legal/treaties/037s-e.htm (accessed 8 November 2012). As stated earlier (see above n.65) this convention has not yet entered into force. Only one South China Sea State has so far signed the document, namely Indonesia.
69 Kuan-Hsiung Wang, Resolution to Fishery Disputes in the South China Sea through Regional Cooperation and Management. Paper presented at the Third
argumentation negates the basic *pacta tertiis* rule in international law as well as the carefully drafted wording of the agreement itself.\(^{70}\)

25. In order to sidestep this difficulty, some have argued that the 1982 Convention itself might well be read to restrict the freedom of third States with respect to management decisions taken by a regional fisheries management organization more than generally believed. But even under this particular interpretation of the 1982 Convention, one has to conclude that imposing an “obligation on the third states to accept the conservation and management measures adopted by an RFMO [regional fisheries management organization] would probably be overstretching the duty to co-operate and the obligation of negotiation in the LOS Convention”.\(^{71}\)

26. Others have turned to international organizations, established for a purpose not directly related to high seas fisheries, but which could potentially have an impact on the conservation and management of high seas fishing resources. In order to overcome the deficiencies of the three agreements specifically aimed at high seas fishing, listed in Table 1, three conditions need to be fulfilled: (1) the organization must have a wide membership, (2) it must have a tested and effective system of dispute settlement and (3) its field of application must not exclude living resources of the high seas. One could think, in this respect, of a number of conventions such as, in chronological order, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 1973,\(^{72}\) the Convention on Biological

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71 Tore Henriksen, Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations, 40 Ocean Development and IL (2009), 91.

Diversity (CBD) of 1992\textsuperscript{73} and the WTO Agreement of 1994.\textsuperscript{74} With 176, 193 and 157 members at present, respectively, they all seem to pass the first hurdle without difficulty. The CITES and the WTO, especially, have a developed system of dispute settlement,\textsuperscript{75} and of these two organizations CITES has lately become very much involved in the protection of commercially exploited marine species and has sought co-operation with FAO in this respect.\textsuperscript{76}

27. How does all this translate to the South China Sea? Table 2 below seems to be crystal clear. If Table 1 was characterized by the almost total absence of interest of States bordering the South China Sea,\textsuperscript{77} Table 2 conveys a completely opposite image, namely that all the States involved are party to all the agreements listed. Even Taiwan is a member of one of them.

28. It might therefore not seem unreasonable to suggest that States in the South China Sea should seriously explore this avenue as a possible way forward to conserve and manage the straddling and highly migratory fish stocks of the area. In a recent study the present author has tried to take a closer look at the manner in which CITES has so far been applied specifically to the Asia-Pacific region.\textsuperscript{78} Not that it provides the account of an easy way forward, but at least it indicates the attempts that have already been made, and what their fate has been so far. The interaction between FAO giving advice, on the one hand, and CITES taking decisions on the other, is a most interesting new development.

29. Before concluding this part, a final remark seems warranted concerning an often encountered argument in the specialized literature and conference gatherings


\textsuperscript{74} Agreement Establishing the World Trade Organization. Multi-lateral convention, signed on 15 April 1994. This agreement entered into force on 1 January 1995 (http://www.wto.org/english/docs_e/legal_e/04-wto.pdf (accessed 8 November 2012)).

\textsuperscript{75} With respect to CITES, see Rosalind Reeve, Policing International Trade in Endangered Species: The CITES Treaty and Compliance (Earthscan 2002), 346, and with respect to WTO, see Kati Kulovesi, The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation (Kluwer Law International 2011), 295.

\textsuperscript{76} Margaret A. Young, Protecting Endangered Marine Species: Collaboration Between the Food and Agriculture Organization and the CITES Regime, 11 Melbourne JIL (2010), 441–490.

\textsuperscript{77} As duly stressed by Aldo Chircop, Regional Cooperation in Marine Environmental Protection in the South China Sea: A Reflection on New Directions for Marine Conservation, 41 Ocean Development and IL (2010), 343.

\textsuperscript{78} Erik Franckx, CITES as an Alternative for Effective Fisheries Management in the Asia-Pacific Region, Chinese (Taiwan) YIL and Affairs (forthcoming 2012).
Table 2: Adherence to agreements with potential impact on high seas fisheries

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1 Excluded from becoming a party in accordance with Art. 1(h).
2 Excluded from becoming a party in accordance with Arts. 34–35.
3 Party since 1 January 2002 in accordance with Art. 12 (“separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements”) under the name “Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)”.

in this respect, namely that Article 123 of the 1982 Convention, entitled “Cooperation of States bordering enclosed or semi-enclosed seas”, entails a legal obligation for States of a semi-enclosed sea, such as the South China Sea, to co-operate with one another, including in the area of fisheries. This would be an easy way out with respect to the South China Sea, for Article 123 does not differentiate between the maritime zones involved, thus sidestepping the difficult sovereignty and legal qualification issues of offshore features in the South China Sea.

However, a careful analysis of Article 123 indicates that it is highly noteworthy that this article is but one of two single instances where the 1982 Convention uses the combination of the words “should cooperate”, whereas in most other

79 This article reads in part:

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 the sea...


81 See above para.21 in fine.
instances it uses “shall cooperate”. The present author has recently argued that this article of the 1982 Convention is not the place to look for a legal obligation imposed on States bordering a semi-enclosed sea. Other obligations may be imposed by general international law on neighbouring States in general, not specifically related to semi-enclosed seas, but whose *raison d’être* is well adapted to be applied *a fortiori* in such constrained waters. This is not the place to develop these thoughts more in detail, as this will be done later in a separate publication. Suffice it to say at present that the duty to co-operate has found its most extensive interpretation so far in the field of environmental law, more than in the specific area of fisheries.

V. Conclusions

30. In as highly disputed an area as the South China Sea, closer co-operation in the field of fisheries seems to be a desired way forward.

31. If one looks more closely at the international legal toolbox to develop such co-operation, some instruments to be found there are clearly better suited than others. Those probably of lesser use are Article 123 of the 1982 Convention and also, awaiting ratification by the countries surrounding the South China Sea, for the time being the following agreements: the FAO Implementation Agreement of 1993, the UN Fish Stocks Agreement of 1995 and the FAO Port State Agreement of 2009—the latter instrument pending entry into force, as well. More promising are, within the framework of the 1982 Convention, Articles 74(3) and 83(3), and outside that framework a number of widely ratified conventions such as the WTO and CITES.


84 As judiciously stated by one author: “Cooperation in the utilization of fishery resources is a feasible and practical way to start a regional cooperation regime. It sidesteps the issue of sovereignty and focuses upon a common interest, namely the utilization of the living resources” (Kuan-Hsiung Wang, above n.36, 542).

The fact that Taiwan is a member of WTO might militate in favour of this organization. It is indeed the only multi-lateral agreement listed in Tables 1 and 2 to which Taiwan is a member. Nevertheless, it is believed that CITES may prove especially useful, because it relies on a kind of port State jurisdiction through its system of import and export permits, which is exactly what the recent FAO Port State Agreement of 2009 tries to introduce at present with respect to fisheries.

32. The fear is that if no such co-operation starts to develop, more unilateral measures such as the Chinese yearly fishing ban since 1998\(^{86}\) might be expected, even though their effectiveness is less than certain.\(^{87}\)

33. Instances of successful co-operation in the area do exist and may well serve as an example for other bilateral and, who knows, maybe even multi-lateral agreements in the future. One extremely difficult hurdle the Sino-Vietnamese Fisheries Agreement did not have to overcome was the so-called nine-dashed line claim of China, for even if this line originally consisted of 11 dashes, two of them being located inside the Gulf of Tonkin, the latter were mysteriously removed during the 1950s, as was written elsewhere by the present author.\(^{88}\) As indicated by the difficulties China and Vietnam are encountering at present when trying to extend the fisheries co-operation outside the Gulf of Tonkin, it would be beneficial for any future co-operation in the area of fisheries in the South China Sea if China were finally willing to clarify its position under international law with respect to the exact meaning of this line.

34. After such a long period of concentration on non-living resources,\(^{89}\) the time seems ripe for coastal States to seriously turn their attention to co-operation in the field of fisheries, before marine capture fisheries in the South China Sea start to decline as well, following the global trend worldwide. For if this occurs, one can expect the centrifugal forces to increase, leading to more tension between the bordering States.

\(^{86}\) Carmen A. Ablan and Len R. Garces, above n.27, 140. Moreover, it is interesting to note that this unilateral fishing ban apparently also applies inside the Gulf of Tonkin, despite the existence of a Sino-Vietnamese Joint Committee for Fishery to regulate the Common Fishery Zone. See above n.51. That no agreement was reached in this Committee can be inferred from Li Jianwei and CHEN Pingping, above n.57, 312.


\(^{88}\) Erik Franckx and Marco Benatar, Dots and Lines in the South China Sea: Insights from the Law of Map Evidence, 2 Asian JIL (2012), 89, 106. About the erasing of these two segments see also id., p. 91.

\(^{89}\) South China Sea oil and gas reserves may not be as important to the region as is often taken for granted. See Nick A. Owen and Clive H. Schofield, Disputed South China Sea Hydrocarbons in Perspective, 36 Marine Policy (2012), 809–822.