



**HAL**  
open science

# The maritime dispute in South China Sea and warmongering effects of exclusive economic zoning in semi-enclosed seas

François Féral, Giuseppe Cataldi

## ► To cite this version:

François Féral, Giuseppe Cataldi. The maritime dispute in South China Sea and warmongering effects of exclusive economic zoning in semi-enclosed seas. 2016. <hal-04671728>

**HAL Id: hal-04671728**

**<https://hal.science/hal-04671728v1>**

Submitted on 16 Aug 2024

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire HAL, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.



Distributed under a Creative Commons CC BY-NC 4.0 - Attribution - Non-commercial use - International License

# **The maritime dispute in South China Sea and warmongering effects of exclusive economic zoning in semi-enclosed seas**

**Pr. Guiseppe Cataldi**

Napoli University L'orientale,  
ASSIDMER President

**Pr. François Féral**

Emeritus French *Via Domitia* University in Perpignan

On 12 July 2016 the Permanent Court of Arbitration in The Hague issued an arbitration award relating to disputes between China and the Philippines in the South China Sea in accordance with Annex VIII of the Convention Sea Law. The press release defines it as a "Sentence [unanimous] final binding". This arbitration concerned the existence of historical rights in the disputed area generating maritime rights and the status of the islands and islets of coral reefs in the South China Sea. The decision also ruled on the conventionality of unilateral interventions conducted by China in the South China Sea.

Many reactions have interpreted this decision as likely to contribute to the outcome of an immemorial conflict between China on one hand and on the other hand, not only the Philippines but also other coastal States already involved in marine claims otherwise ; these claims are mainly based on the uses of large coral areas set in the arbitration decision. The decision of the Tribunal is the culmination of a long painstaking process conducted for two States which ratified the Convention: in 1984 for the Philippines, in 1996 for China. We must salute the precision and quality of the fully documented judgment that recalls both the principles established in the United Nations Convention on the Law of Sea, but also draws on cases law which has defined key concepts which are here operational. The Philippines is obtained satisfaction on all of their requests and China appeared instead as the defaulting party to the dispute.

However, without questioning the indisputable legal content of that decision, we can question about the multiplication of difficulties of marine governance based on zoning principles established over thirty years by the Convention in a very particular context. This genesis shows that the application of the Convention may appear often today more as source of disorder than a legal safety factor and can also explain China's position in this complicated case.

## **I. Recall key concepts of the regime of maritime areas in the Sentence of July 12, 2016**

Without caricature this subtle decision, we can summarize the crux of the dispute on territorial sovereignty claims over various islands, islets and sand banks and the South China Sea claimed in whole or in part by China but also by Besides Taiwan, Vietnam, the Philippines, Malaysia and Brunei. We will remember in our second part of these multiple claims for maritime areas south China, west of the Philippines, east of Vietnam and north of Malaysia. Regarding specifically the dispute between China and the Philippines they are the islands and reefs of the Spratly Islands and Scarborough bench which are the subject of the territorial claim of China. The legal qualification of these islands and reefs is the real crux of our legal case which the tribunal in The Hague clearly met:

- Are these reefs a constitutive land space of a territory from which the maritime border baselines can be defined?
- Had China on these areas exclusive sovereign rights and historical allowing it to consider as part of its territory?

To these two questions the court answered clearly in accordance with the principles of the United Nations Convention on the Law of the Sea.

Regarding the geomorphologic kind (and anthropological) of the items in dispute, the Court decided under Articles 13 and 121 of the Convention, according to which "*elements*" discovered at high tide generate a right to a territorial sea of least 12 nautical miles, while the elements that are covered at high tide generate no right to a maritime area. Hydrographic expertise conducted by the Court observed that none of the element claimed by China in the Spratly zone had not "*the objective capacity in its natural state, either to support a stable community of people either an economic activity that does not depend on or external resources: they was only of extractive nature.*"

Regarding the recognition of previous historical rights to the Convention, the Court acknowledges that the Spratly Islands have been used by fishermen groups of different states including China and Japan, which has even used his guano. But the Court considered that the temporary use of these reefs by fishermen was "*not occupation by a stable community*" and that all these activities were only "*extractive nature.*" Finally accordingly, coral reefs discovered at high tide in the Spratly Islands are only "*rocks*" that do not melt exclusive economic zone or continental shelf.

This analysis illustrates the general philosophy of the 3rd Convention of Law of the Sea; establishing economic zones presented as a right of the coastal State, and has greatly reduced the scope and content of the historical rights and the legitimacy of shared maritime uses. Thus, the arbitration decision of July 2016 conditioned the recognition of these historical rights to the exercise of territorial sovereignty over some coral geomorphologic features ... but considered themselves as non generating maritime rights. "*To the extent that China had historical rights over resources in the waters of the South China Sea, these rights were extinguished by the entry into force of the Convention, as incompatible with the maritime areas system provided by the Convention.*"

Thus, the heart of the decision is primarily based on the idea that all of these "coral dust," are part of the high sea of the South China Sea and, therefore it is logical to apply implicitly on these spaces the maritime border zoning principles of the continental shelf and exclusive economic zones from the baselines of the coasts of the States concerned. In this yardstick, Hainan Island, the most advanced southern tip of China, is located at 2500 km of Spratly reefs and 1500 km of Scarborough; so in no case Hainan can be a baseline including these zones. However it must be noted that it is the same case for Vietnam whose coast is located itself at almost 2000 km of Spratly or Malaysia and Taiwan for Scarborough also involved in this case and which both claim sovereignty.

Other aspects of the decision are not anecdotal because China appears as a power that violated the sovereign rights of his neighbor; but these violations, however, stem from the denial of the possibility of territorialize islands and coral reefs of the South China Sea and to recognize the historical rights. So the question it is in fact the recognition of the legal regime of the high seas of these elements and including them in an economic zone as a single column of water; in our case, it is from the baselines of the Philippines from the west coast of the island of Palawan which is located within 200 miles of coral reefs of the Spratly reefs and from the west coast of Luzon which is close 200 miles of Scarborough reefs.

#### **I. The conflicts effects of the extension of areas of exclusive economic rights in semi-enclosed seas**

Is it the clear and documented decision of the Arbitral Tribunal in capacity to resolve the issue of maritime rights in the South China Sea?

The Tribunal first attached with caution to clarify that the dispute is not based on the willingness of China or the Philippines to affect the rights of one or the other but to "*fundamentally different understandings of respective rights [of the parties]*" ; he also assumed their "*good faith*" is "*a fundamental principle of international law*". By reference to Article 11 of Annex VII to the Convention, China and the Philippines are invited to finally comply with the sentence.

The legal significance of this decision is limited, even if the concepts for securing maritime boundaries have been clarified, because the Convention does "*not allow the Court to rule on*

*questions of sovereignty on the land territory and to determine boundary maritime between the Parties.*" Indeed these data must be established by agreements adopted by the parties because the principle that unilateral demarcation acts are not binding on third parties has long been clearly established by the International Court of Justice. Since the beginning of the process China has also said she was not enforceable against she confirmed this position at the publication of the decision. Here we can reflect on the tribulations of the application of Convention paved in good intentions but developed at a time and under very specific conditions. Some of its provisions show signs of maladjustment, based on the fact that they were thinking, in many cases, for application in oceanic areas. After decolonization realized during the fifties and sixties, the plundering of fishes stocks off the coasts of developing countries by industrialized countries threatened the very principles of freedom of the seas. The establishment of exclusive economic zones and the establishment of a common heritage that was to internationalize the ocean seabed resources were the compensation for the preservation of freedom of navigation and freedom of fishing in high sea. Huge previously shared common areas (admittedly sometimes to the benefit of more powerful) rocked under the control of coastal States. These boundaries were windfall effects for many countries, the first of which is France became maritime giant thanks to its overseas colonial islands with over ten million km<sup>2</sup>.

In fact, the expansion without dispute of borders of territorial waters to 12 miles and of economic zones extending the influence of the State to 200 miles were only possible on the straight coasts in the deserted ocean areas or around sparsely populated islands and of archipelagos frequently surrounded by vast ocean spaces. Conversely, when it was necessary to establish such zones seat on complex lines coasts, on gulfs and bays, on peninsulas, on nearby islands of the coasts or on islands with complicated forms involving different States, the implementation of the Convention generated many boundary maritime disputes.

Articles 122 and 123 of the 1982 Convention relating to the semi-enclosed seas which were mostly shared seas illustrate this inadequacy and obsolescence. Although these provisions do not alter the zoning principles, this exhortation to enhanced cooperation is a sign of their inadequacy to historical realities. The Mediterranean is the archetype of the inextricable zoning which led for decades its many riparian countries to wisely not establish exclusive economic zones, leaving the Mediterranean high seas extended beyond 12 miles of the territorial seas. Alas ecological crises, fisheries competitions and "smell of the oil" have opened Pandora's Box of the race at the borders and the 22 coastal States are now immersed in borders conflicts that spare almost no country. It clear that States have failed neither wanted to give priority to in Article 123 relating to enhanced cooperation: the duty to cooperate under this section has been interpreted by coastal States as a mere platonic invitation to negotiate rather than conclude genuine agreement generators explicit rights.

Thus, the 1982 Convention signed to establish peace and to help develop and balanced sharing of wealth, is the paradoxical example of a "Law making disorder" by generating countless conflicts where borders delimitation most remain outstanding. This new maritime order opened a general border dispute to determine the new boundaries of the zoning, conflicts that have only grown with the expansion of operating capacity on mineral resources.

## **II. A joint management of the South China Sea: maritime armistice of the border sea war**

The Convention thus shows often powerless to provide relevant solutions for the management of semi-enclosed seas which for centuries subject to common and intricate use of zones. In fact, all the seas have known and still know these turf wars that worsen inexorably because of environmental and fishing as well as gas or oil deposit discoveries. It is observed that the principles of economic zoning are often practically unenforceable and wisdom wants us renounces in favor of management mechanisms and joint and cooperative responsibility, as do the authors of the Convention have invited the States Parties .

If we return to the South China conflict, it is clear that the prospect of defining the new maritime border has increased tensions between coastal countries and it is unlikely that these borders can be legally established. Rather, the idea of maritime borders is fueling competition in an endless conflict sharpened further by promising oil exploration. Each country the first of which China, intends to "score points" with the prospect of a «marine border victory" that we know yet impossible without unanimous agreement. Caught in logic of border, countries, all signatories of the Convention, are in the situation of the Red Queen from Lewis Carroll, running to stay in the same place and looking his goal going away more quickly and further when his race is accelerating.

The history of this area, also recognized by the Court, established that the coral reefs in the South China Sea was the subject of occupation during ages and by multiple forms from all populations surrounding this semi-enclosed sea. This rich and strategic fishing area is also a maritime traffic corridor among the most intense in the world and the place is particularly threatened by risks of confrontation and ecological disasters.

So there is a divorce firstly between context of immemorial uses of a semi-closed sea riches shared in a common sea and secondly the acquisitive windfall for a single State-users. This effect is caused by the border zoning of this semi-enclosed sea as an ocean-cut in term of various economic areas. The Arbitral Tribunal has carefully applied the principles defining the territories from which the baselines of the maritime zoning should apply in South China Sea: it considered that the reef areas, their geographical configuration could not generate rights. He then concluded that the uses, navigators' habits, and fishermen' attendances of different coastal countries, if well established and old ones did not generate maritime rights.

The implementation of principles of the maritime borders according to the rules of the Convention has therefore switched these reef areas in the economic zone of only one of the coastal States, in denial of their former shared uses. As mentioned above, considering that the reefs of the South China Sea are just the high seas and that historic rights have no place, the Law of the Sea Montego Bay has led the protagonists in a border war and of sovereignty only way to keep their traditional uses. For China define the reef as her territories and amplify there a sovereign presence appears as the only way to keep his own marine uses.

The border strategy based on the principles of the Convention, therefore, leads to a legal impasse it does not appear that the parties are on way to give up their claims. Touching on the idea of sovereignty, border paradigm thus appears dangerously warmongering. The wisdom is to not polarize on this diabolical zoning to focus more pragmatically to common purpose and cooperative, and on the protection of these sensitive areas. According to what is practiced in many disputed maritime areas and at the same invitation of the Convention, the realistic way is for the moment to give up for the States establish maritime borders in South China Sea and to commit in a joint management on disputed areas with a negotiated and balanced sharing agreement on the marine resources.

This would involve the establishment of a shared management system of in dispute space which would be neither the high-sea status neither the national economic zone: according to the current principles of the Law of the Sea nothing opposes this regionalization the South China Sea management.

Obviously this negotiated cooperative way is easier to suggest than to implement while it's borrowed by the most pragmatic coastal States in West Africa and Central, Mediterranean, America Central ... in these cases, the establishment or maintenance of a sui generis area is justified by special geographical configurations or political reasons that lead States to limit their demands beyond the territorial sea to reduce the scope of the obligations of the institution of an exclusive area. The special zone also reduces the risk of conflict with adjacent or opposite States. As we have said, these practices are encouraged by the Convention that constantly encourages cooperation the States Parties in Article 59, and more specifically Articles 122 and 123 about the semi-enclosed seas.

The prospect of this negotiated path has probably led China to be " *against* to the trial rather than *in* the trial" by adopting two strategies that are only apparently contradictory, but always far of an Arbitration or a Court. In the territorial logic, she makes a "*presential* consolidation" with its

nationals, its activities and its infrastructures in the claimed areas; on the basis of Article 123, China claims at the same time by its diplomatic efforts the conclusion of inter-states conventional solutions.

For the South China Sea, this cooperation is based on the implicit recognition of former shared rights but it would secure the seat of the Philippines in a confrontation with a Great Powerful State which cannot lose face before the international community, especially in its areas of Regional influence. This communalization of the South China Sea may also open a virtuous management page towards an environment coral-reef area attacked by the race for maritime borders which is open with no prospect of settlement.