The South China Sea Award and the Treatment of Traditional Fishing Rights within the Territorial Sea

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Decision commented on: The Matter of the South China Sea Arbitration, Between the Republic of Philippines and The People’s Republic of China, Award on the Merits (SCSA) of 12 July 2016 (Registry, the Permanent Court of Arbitration).

Pursuant to Articles 286, 287 and Article 1 of Annex VII of the Convention on the Law of the Sea (LOSC), on 22 January 2013, the Republic of Philippines instituted arbitral proceedings concerning the legal basis of maritime rights and entitlements in the South China Sea, the status of certain geographical features in the South China Sea, and the lawfulness of certain actions taken by China in the South China Sea. The Arbitral Tribunal (hereafter Tribunal) was fully constituted on 21 June 2013.

The Philippines made fifteen submissions to the Tribunal, of which submission No. 10 is the focus of this post. In this submission the Philippines requested the Tribunal to adjudge and declare that: “China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal” (SCSA, para. 112(B)(10)). Since both parties claimed sovereignty over the Scarborough Shoal and the issue of sovereignty is not yet settled and could not be resolved by this arbitration, the Philippines submission No. 10 is based on the alternative premise that if China is sovereign over Scarborough Shoal, then China has failed to respect the traditional fishing rights of Philippine fishermen within the territorial sea of that Shoal. The Tribunal had earlier decided (at paras 554 – 556) that the Shoal was a rock within the meaning of Article 121 of LOSC and thus capable of generating a territorial sea but not an exclusive economic zone (EEZ) or a continental shelf. The Tribunal was careful to state (para. 793) that its conclusions were not predicated on the assumption that either Party had sovereignty over the Shoal. Hence, the Philippines’ submission No. 10 involves one important issue: the application of traditional fishing rights (TFRs) within the territorial sea of another State. The Tribunal unanimously decided that it had jurisdiction to rule on this submission “to the extent that the claimed rights and alleged interference occurred within the territorial sea of Scarborough Shoal” (Award on Jurisdiction and Admissibility, para. 407). This is because the submission related neither to sovereignty nor maritime delimitation; nor does it engage any limitation or exception under Articles 297 and 298 of the LOSC that may exclude the jurisdiction of the Tribunal (Award on Jurisdiction and Admissibility, paras. 407 & 413(g)).

This post first provides the factual background to the dispute. Section two explores the status of TFRs in the different maritime zones under the LOSC (archipelagic waters and the EEZ), and pays special attention to Tribunal’s decision on the exercise of TFRs within the territorial sea of another State. Section three examines the link between TFRs and artisanal fishing and section four discusses some of the limitations of TFRs. Section five concludes.

1. Factual Background to the Dispute
The South China Sea is a semi-enclosed sea in the western Pacific Ocean, which lies to the south of China; to the west of the Philippines; to the east of Viet Nam; and to the north of Malaysia, Brunei, Singapore, and Indonesia (SCSA, para. 3). It is a crucial shipping lane, a rich fishing ground and home to highly biodiverse coral reef ecosystem; and composed of a number of features (which may be characterized either as islands, low-tide elevations or submerged reefs) existing just above or below water (SCSA, para. 3). The Scarborough Shoal is one such feature over which several States, including the Philippines and China, claim sovereignty (SCSA, para. 761). The waters surrounding Scarborough Shoal are rich in marine living resources, and serve as traditional fishing grounds for fishermen from neighboring Asian countries, including the Philippines, Viet Nam, and China (SCSA, para. 761). Historical cartography submitted to the Tribunal showed that Scarborough Shoal has historically served as one of the principal fishing grounds for Philippine fishermen (SCSA, para. 762).

Beginning in April 2012, a series of incidents occurred between Philippine and Chinese vessels at Scarborough Shoal when China took control of the area. China increased the numbers of its fishing vessels in the waters surrounding Scarborough Shoal and at the same time prohibited Philippine fishermen from fishing in the area. In the early June 2012, China blocked the entrance to the lagoon of Scarborough Shoal by deploying and anchoring its law enforcement vessels and establishing rope fences across those vessels (SCSA, para. 765). China in effect created a “no fishing zone” in the waters surrounding Scarborough Shoal, and its law enforcement vessels prohibited Philippine fishermen from entering the area (SCSA, paras. 767-769). Similarly, China enacted new laws, such as the 2012 Hainan Regulations and 2012 fishing ban around the Scarborough, thereby prohibiting fishing in the area; and only intermittently allowed Philippine fishermen to have access (SCSA, para. 767).

The Philippines claimed that these measures significantly curtailed its fishermen from conducting their fishing activities, and severely affected their ability to earn their livelihood (SCSA, para. 767). The Philippines claimed that, by excluding its fishermen from the traditional fishing grounds at Scarborough Shoal, China violated its obligations under the LOSC and requested the Tribunal to rule on the matter.

2. The Status of TFRs across Maritime Zones under the LOSC

In her survey of state practice Polite Dyspriani defines traditional fishing rights as fishing rights granted to certain groups of fishermen who have habitually fished in certain areas over a long period of time (at 2). As I highlighted in an earlier post on the Chagos Award, there are two broad categories of TFRs: (1) TFRs exercised in a certain traditional fishing area by traditional inhabitants or indigenous peoples within the limits of their national maritime jurisdiction; and, (2) TFRs exercised by nationals of one State in another State’s maritime jurisdiction on the ground of habitual fishing practice and historic attachment to the fishing ground. It is the second category of TFRs that is in dispute in the South China Sea case. This category of TFRs may emanate either from the doctrine of vested rights or claimed based on the principle of historic title, as applied in the case of Eritrea/Yemen Arbitration (hereafter EYA), where the parties requested the Tribunal to “decide in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles” (EYA, phase I, para. 2). The South China Sea Arbitral Tribunal, however, confined itself to an analysis of the relationship between TFRs and the LOSC, since its jurisdiction is limited to the interpretation and application of the provisions of the Convention. Indeed it should be noted that the South China Tribunal is not in complete agreement with the EYA Award insofar as the EYA Award was prepared to recognize the survival of historic fishing rights in the EEZ. The South China Sea Tribunal rejects that proposition. The Tribunal attributes this
difference of opinion to the different applicable law provisions under which the two tribunals were operating (SCSA, paras 259 & 803).

The LOSC provides different treatment for TFRs in the different maritime zones: archipelagic waters, the territorial sea, and the exclusive economic zone. This section first discusses the status of TFRs in the archipelagic waters and the EEZ and pays special emphasis to the ruling of the Tribunal regarding the application of TFRs within the territorial Sea of another State.

2.1. TFRs within Archipelagic Waters

The concept of archipelagic States and waters is a new addition to the law of the sea regime, which was only accepted during the negotiations at UNCLOS III. Archipelagic waters are those waters enclosed by archipelagic baselines over which archipelagic States exercise sovereignty (LOSC, Art. 49(1)). Nonetheless, the LOSC imposes an obligation on archipelagic States to recognize TFRs of adjacent neighboring States within these archipelagic waters. In other words, the LOSC expressly recognizes that TFRs within the archipelagic waters of archipelagic States survive the adoption of the Convention. Thus, Article 47(6) of the LOSC provides that:

If a part of the archipelagic water of an archipelagic State lies between two parts of an immediately adjacent neighboring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters ... shall continue and be respected. (emphasis added)

These rights arise from the fact of the traditional exercise of those rights by the neighboring State(s) within waters that are now under the sovereignty of archipelagic States. The expression “existing rights and all other legitimate interests” traditionally exercised by other States is broad and may encompass a number of rights including, inter alia, TFRs. Indeed, Article 51(1) of the LOSC strengthens this line of interpretation with a specific reference to the traditional fishing rights of neighboring States:

Without prejudiced to article 49, an archipelagic State... shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighboring States in certain areas falling within archipelagic waters. (emphasis added)

The LOSC further requires the States concerned to regulate the terms and conditions for the exercise of such traditional fishing rights and other legitimate activities, including the nature, extent and the areal limit to which the right applies by concluding bi-lateral agreements (LOSC, Art. 51(2)). Generally, while Article 47(6) implicitly recognizes TFRs, Article 51(1) of the LOSC provide express recognition for such rights in much detail. Hence, both provisions serve as clear legal bases for, and underscore the importance of, traditional fishing to the immediately adjacent neighbouring States within the archipelagic waters of archipelagic States.

2.2. TFRs within the EEZ

The LOSC does not impose express obligation on the coastal State to recognize TFRs within its EEZ. However, the Convention does require the coastal State to take traditional fishing practices into account while giving access to foreign nationals to the surplus of its EEZ living resources. Article 62(3) of the LOSC provides that: “In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors including, inter alia,... the need to minimize economic dislocation in States whose nationals have habitually fished in the zone”. In other words, the LOSC requires the coastal State to give ‘due regard’ to such
traditional rights of fishing in its determination of giving access to the surplus of its EEZ resources even though the final decision in giving such access to any surplus resources remains at the discretion of the coastal State concerned. This loose obligation of the coastal State to “take into account” the interests of “States whose nationals have habitually fished in the zone” is clearly far weaker than a provision that grandparents existing traditional rights. Indeed the South China Sea Arbitral Tribunal held that:

[T]he inclusion of this provision [Art. 62(3)]—which would be entirely unnecessary if traditional fishing rights were preserved in the exclusive economic zone—confirms that the drafters of the Convention did not intend to preserve such rights (SCSA, para. 804(b)). (emphasis added)

In other words, the “extensive attention given to the question of fishing by nationals of other States in the EEZ and the degree of control over fisheries that was ultimately given to the coastal State” preclude the possibility “for traditional or artisanal fishing rights to survive the introduction of the exclusive economic zone” (SCSA, para. 803). Thus, the Tribunal unequivocally concluded that the LOSC extinguishes TFRs within the EEZ of another State (SCSA, para. 804(b)).

That said, the Tribunal did acknowledge that parties in any particular case may elect to continue such rights through other mechanisms outside the Convention. The Tribunal held that: “The Convention does not preclude that States may continue to recognize traditional fishing rights in the exclusive economic zone in their legislation, in bilateral fisheries access agreements, or through regional fisheries management organizations” (SCSA, para. 804(b)). It went on to say that even though not required by the LOSC, the recognition of TFRs through such other mechanisms “would, in most instances, be commendable” (SCSA, para. 804(b)). The Tribunal, in effect, encourages coastal States to continue to recognize and respect such rights in a wide variety of ways outside the LOSC.

2.3. The Decision of the Tribunal on the Survival of TFRs within the Territorial Sea

The LOSC does not expressly address the survival of TFRs within the territorial sea. However, the South China Sea Arbitral Tribunal concludes that the general language of Article 2(3) of LOSC should be read as protecting such rights. This section discusses the findings of the Tribunal in more depth.

In the South China Sea case, the Philippines argued that because of a continuous fishing practice for a long period of time, “traditional fishing in the territorial sea of another State is protected by general international law as incorporated through Article 2(3) of the LOSC” (SCSA, para. 777). Article 2(3) of the LOSC provides that “the sovereignty over the territorial sea is exercised subject to this Convention and other rules of international law”. It follows that, even though the Convention does not expressly provide for TFRs within the territorial sea, the term “other rules of international law” under Article 2(3) of the LOSC encompasses such rights. In this regard, Philippines argued that Article 2(3) “imposes substantive obligations informed by general rules of international law, including the preservation of pre-existing rights” (SCSA, para. 774). In other words, Philippines claimed that there is “a general rule of international law that requires a State to respect long and uninterrupted fishing by the nationals of another State in its territorial sea” (SCSA, para. 775).

The Tribunal began by referring to the treatment of this issue in the Award of the Chagos Marine Protected Area Arbitral Tribunal (hereafter CAA). The CAA Tribunal found that “Article 2(3) contains an obligation on States to exercise their sovereignty subject to ‘other rules of international law’” in the territorial sea (CAA, para. 514). In
other words, Article 2(3) is not merely descriptive, but imposes substantive obligation on the coastal State that may arise not only from the LOSC but also from “other rules of international law”.

The South China Sea Tribunal fully agreed with this interpretation but expanded it to include recognition for and respect of TFRs within the territorial sea of the coastal state. In its view:

Traditional fishing rights constitute a vested right, and the Tribunal considers the rules of international law on the treatment of the vested rights of foreign nationals to fall squarely within the ‘other rules of international law’ applicable in the territorial sea (SCSA, para. 808). (emphasis added)

The message in the Tribunal’s conclusion is clear and unambiguous: TFRs are customary rights that are entitled to the same protection as other vested rights under “other rules of international law” as provided under Article 2(3) of the LOSC, and the coastal State has a substantive obligation to recognize and protect those rights. Hence, the failure of the coastal State to allow the continuation of the existing TFRs within its territorial sea is a violation of Article 2(3) of the LOSC. This conclusion constitutes one of the greatest contributions of the Tribunal with respect to the regime of TFRs. While it does not protect all TFRs (since the ruling is confined to the territorial sea) it will protect most such rights since “the vast majority of traditional fishing takes place in close proximity to the coast” and thus within the territorial sea (SCSA, para. 804(c)).

On the basis of the above analysis, the Tribunal held that the act of China from May 2012 onwards to prevent fishing by Philippine fishermen at Scarborough Shoal, while permitting its own nationals to continue fishing in the area, “is not compatible with the respect due under international law to the traditional fishing rights of Filipino fishermen” (SCSA, para. 812). The Tribunal found no “corresponding circumstances that would have justified taking action against Filipino fishermen engaged in their traditional livelihood or that would have warranted continuing to exclude Filipino fishermen from Scarborough Shoal” (SCSA, para. 812).

The Tribunal, however, stressed that “it would have reached exactly the same conclusion had the Philippines established control over Scarborough Shoal and acted in a discriminatory manner to exclude Chinese fishermen engaged in traditional fishing” (SCSA, para. 812). The Tribunal in a way achieved a double purpose: it affirmed the TFRs not only of Filipino fishermen but also of the Chinese fishermen in the waters surrounding Scarborough Shoal.

3. Linking TFRs with Artisanal Fishing

The South China Sea Arbitral Tribunal unequivocally links TFRs with artisanal fishing without defining the latter. Indeed, there is no universally accepted definition for artisanal fishing. The UN Food and Agriculture Organization’s (FAO) study on small-scale and artisanal fisheries acknowledged that defining small-scale and artisanal fishing is a challenge, because the terms have been used for decades by various stakeholders “to represent different point of views and socio-economic dimensions in different national contexts” (at 1). Thus, rather than defining artisanal fishing, the Tribunal identified its key features as follows:

The specific practice of artisanal fishing will vary from region to region, in keeping with local customs. Its distinguishing characteristic will always be that, in contrast with industrial fishing, artisanal fishing will be
simple and carried out on a small scale, using fishing methods that largely approximate those that have historically been used in the region (SCSA, para. 797). (emphasis added)

Hence, the Tribunal indicated that artisanal fishing is understood in contrast to ‘industrial fishing’; and that it is conducted by fishing households or communities using relatively small fishing vessels, and mainly for local consumption or subsistence purposes. The Tribunal also made it clear (at para. 797) that the nature of artisanal fishing is relative, and that its key defining elements (for example, the size and capacity of fishing vessels and the purpose of fishing) vary from country to country. Nonetheless, the expression “using fishing methods that largely approximate those that have historically been used in the region” in the Tribunal’s conclusion does not mean that artisanal fishing practices are frozen in time. Indeed, the phrase “approximate those that have historically been used”, shows that improvements in fishing methods are allowed, without losing their traditional character. In this regard, phase II of the Eritrea/Yemen Arbitral Award held that “the term ‘artisanal’ is not to be understood as applying in the future only to a certain type of fishing exactly as it is practiced today…. It does not exclude improvements in powering the small boats, in the techniques of navigation, communication or in the techniques of fishing” (EYA, phase II, para.106).

Having identified some of the characteristics features of artisanal fishing, the South China Sea Tribunal clearly noted that TFR is a right that accrues to artisanal fishers. The Tribunal held that “artisanal fishing rights attach to the individuals and communities that have traditionally fished in an area. These are not the historic rights of States, as in the case of historic titles, but private rights” available to such communities (SCSA, para. 798). Accordingly, the Tribunal concluded that “traditional fishing rights extend to artisanal fishing that is carried out largely in keeping with the longstanding practice of the community,… but not to industrial fishing that departs radically from traditional practices” (SCSA, para. 798). According to the Tribunal, “the legal basis for protecting artisanal fishing stems from the notion of vested rights and the understanding that, having pursued a livelihood through artisanal fishing over an extended period, generations of fishermen have acquired a right, akin to property, in the ability to continue to fish in the manner of their forebears” (SCSA, para. 798). Moreover, the South China Sea Arbitral Tribunal provides the underlying rational for the protection of TFRs of artisanal fishers in the following terms:

The attention paid to traditional fishing rights in international law stems from the recognition that traditional livelihoods and cultural patterns are fragile in the face of development and modern ideas of interstate relations and warrant particular protection (SCSA, para. 794). (emphasis added)

Thus, the recognition of TFRs in international law aims to protect and preserve traditional livelihoods and cultural patterns of artisanal fishers. Generally, the Tribunal re-affirmed (as in the case of Eritrea/Yemen Arbitration) that artisanal fishers are the main subjects of TFRs.

4. The Limitations of TFRs

The exercise of traditional fishing rights in the waters of neighbouring States is subject to certain limitations. First, TFRs are exercised without prejudice to the sovereignty of the coastal and/archipelagic States concerned (LOSC, Arts. 49 & 51(1)). Thus the exercise of TFRs cannot affect the sovereign right of the coastal State concerned to regulate the living resources so as to ensure their proper conservation and “to restrict environmentally harmful practices” (SCSA, para. 809). Second, TFRs are not transferable to or shared with third States or with their
nationals (LOSC, Art. 51(1)). It is a right available only to adjacent neighbouring States by reason of historic attachment to the fishing area, and, hence, cannot pass to third parties. While LOSC expressly provides for these two limitations in connection with archipelagic waters, these limitations may also apply equally with respect to TFRs within the territorial sea. Third, TFRs should follow a similar manner of fishing as has been traditionally conducted. With regard to this limitation, the South China Sea Arbitral Tribunal held that:

In keeping with the fact that traditional fishing rights are customary rights, acquired through long usage, the Tribunal notes that the methods of fishing protected under international law would be those that broadly follow the manner of fishing carried out for generations: in other words, artisanal fishing in keeping with the traditions and customs of the region (SCSA, para. 806). (emphasis added)

The Tribunal, however, neither specified any precise threshold for the type of fishing methods that would qualify as artisanal fishing, nor did it clarify how and when traditional fishing practices may gradually change with the advent of technology that disqualify entitlements to TFRs. Given that traditional fishing practices are relative and vary from nation to nation depending on their particular custom, it is difficult to establish a universal threshold of fishing practice that qualify for TFRs; rather that fact should be examined on a case-by-case basis. The coastal and/ or archipelagic State, within whose waters TFRs are exercised, is entitled in the first instance to make such assessment. In this regard, the Tribunal held that “customary international law … [does not] prevent the coastal State from assessing the scope of traditional fishing to determine, in good faith, the threshold of scale and technological development beyond which it would no longer accept that fishing by foreign nationals is traditional in nature” (SCSA, para. 809). The requirement of ‘good faith’ serves as a useful tool to prevent the coastal State from abusing its right of assessment.

5. Concluding Remarks

This Award establishes an important norm with respect to the recognition of TFRs within the territorial sea of another State. In doing so the Award goes well beyond the Award in the Chagos MPA arbitration where the Tribunal declined to rule on the TFRs claimed by Mauritius on the ground that it had already found that Mauritius was entitled to fishing rights in the territorial sea based on the Lancaster House Undertaking (CAA, para. 456). In so doing, the Chagos MPA Arbitral Tribunal missed the opportunity to clarify the issue of TFRs independently of the existing agreement between the parties in dispute. The South China Sea Arbitral Tribunal has seized that missed opportunity and rendered a useful ruling on the application of TFRs within the territorial sea of another State. The Tribunal did so even if its jurisdiction was not wide enough to allow it to apply other principles. The fact that China did not participate in the arbitration does not affect the status of the award. As stated by Article 11 of Annex VII to the Convention, “[t]he award shall be final and without appeal … It shall be complied with by the parties to the dispute”.

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