Can the South China Sea Tribunal’s conclusions on traditional fishing rights lead to cooperative fishing arrangements in the region?*

Abstract
Disputes over territorial sovereignty have motivated states to take confrontational positions in respect of vessels from other states fishing in areas around disputed features in the South China Sea. This article suggests that the doctrine of traditional fishing rights, as expressed in the South China Sea Arbitral Award, could provide a legal mechanism that allows states to cooperate on fisheries management without compromising their sovereign claims. However the Tribunal’s conclusions on traditional fishing left a number of key questions unresolved that would need to be subject to further negotiation. There are considerable practical obstacles, especially a lack of political will, that would probably prevent such an agreement from coming to fruition. Nevertheless, this article provides an assessment of a potential option that could be used to foster cooperative fishing arrangements in a particularly contested maritime space.

Keywords
South China Sea, arbitration, traditional fishing rights, fisheries cooperation.

I Introduction

Fishermen have been at the centre of many of the incidents that have led to rising tensions in the South China Sea.¹ In particular, confrontations at sea have often involved allegations of unauthorised fishing occurring in areas of disputed sovereignty or jurisdiction. Where a state is seeking to perfect a sovereignty claim under international law, one of the requirements is that the state exercise effective control over the

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¹ See, for example, Keith Johnson and Dan de Luce, “Fishing Disputes Could Spark a South China Sea Crisis” Foreign Policy (7 April 2016) available at https://foreignpolicy.com/2016/04/07/fishing-disputes-could-spark-a-south-china-sea-crisis.
This can be supported by administrative action and the exercise of jurisdiction. As a result, fishing by foreign fishermen around a feature in the South China Sea claimed by a state has been seen as a threat to its sovereignty claim. It might be said that if a purported coastal state allowed fishing by foreign fishermen (particularly those from a rival claimant to the feature) this undermines the coastal state’s claim to sovereignty. Therefore, there is an incentive on claimant states to exclude fishermen from other states from the maritime zones around the feature on the basis that this helps to solidify the sovereignty claim. Much of the escalation of tension in the region is the result of attempts by various claimant states to exclude fishermen from the waters around South China Sea features. This situation also makes it difficult to achieve progress on cooperation for sustainable fishing in the region.

One aspect of the South China Sea arbitration that has attracted little attention is the Tribunal’s conclusion that there was a practice of fishing around Scarborough Shoal that established traditional fishing rights for fishermen from several countries, including the Philippines and China. Because the Tribunal could not consider questions about the sovereignty of the Shoal, finding that traditional fishing rights existed allowed it to address the exclusion of Filipino fishermen from their traditional grounds. The Philippines needed to establish that their fishermen had rights to fish in the area regardless of the question of which state holds sovereignty. The Tribunal accepted this argument.

Under international law, states are expected to observe the outcomes of international arbitral tribunals. If the parties were minded to seek a negotiated outcome to the disputes on the basis of the Award, traditional fishing rights could in principle provide a conceptual device to avoid the bitter disputes at sea that have arisen due to the sovereignty disputes. However, it is important to note that such an outcome is entirely dependent on the resolution of a number of complicated problems by the claimant states. The application of the concept of traditional fishing set out in the Award

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2 Island of Palmas Arbitration (United States v Netherlands) 2 UN Rep Intl Arbitration Awards 829 (1928).
3 See, e.g. Minquiers and Ecrehos case (France v United Kingdom) (Judgment) [1953] ICJ Reports 47.
4 South China Sea Arbitration (Philippines v China) (Award) Permanent Court of Arbitration PCA Case No 2013-9, 12 July 2016.
5 The Tribunal said that “there is evidence that the surrounding waters have continued to serve as traditional fishing grounds for fishermen, including those from the Philippines, Viet Nam and China (including Taiwan).” Ibid, at [761].
will never solve the fisheries issues without further agreement among the parties themselves. This makes the likelihood of such an outcome remote in practice.

China has declared that it does not accept the Tribunal’s jurisdiction over the dispute, nor the Award itself. If it does not recognise the legal conclusion that historic usage of the waters around Scarborough Shoal could create traditional fishing rights, the prospects of the concept of traditional fishing playing a greater role in resolving the dispute are vanishingly small. China has made claims to most of the South China Sea area on the basis of historic rights, so it seems unlikely that it would recognise the traditional rights of other fishermen. Any acceptance of China’s historic rights in the region in relation to the nine-dash line is, of course, anathema to littoral states. Although under current political conditions it is unlikely that China would be motivated to consider a negotiated outcome for fisheries, it is nevertheless useful to explore the possibilities based on traditional fisheries in case the political climate becomes more favourable.

This paper first sets out the background to fisheries in the South China Sea and the existing institutional framework. The pressure of relatively unregulated fishing in the South China Sea risks a collapse of ecosystems and fish stocks that are important for food security to littoral states. The next section of the article discusses the conclusions reached by the Tribunal in the South China Sea award in relation to historic rights in the EEZ and the territorial sea. Some of the criticisms of the conclusions are explored. The article then argues that traditional fishing rights could contribute to resolving tensions only if the disputant states were willing to apply the Award and only if they could reach agreement on significant matters. Finally, the serious impediments to such an outcome are explained, including China’s refusal to consider the Award as legitimate.

II Fisheries in the South China Sea

The fact that fisheries in the South China Sea are currently unsustainable is well known. Although the South China Sea is biologically rich, it has been put under pressure by overfishing and destructive fishing practices, as well as the impact of other activities including the construction of artificial islands.

1. Fisheries resources in the South China Sea
The South China Sea is a highly biodiverse region, with a greater variety of fish and coral species than in other comparable parts of the world. At the same time, the food resources of the region are important for food security. Coastal populations in the region obtain around half of their protein from fish.

Fish stocks in the South China Sea are under pressure. Between 10 and 12 million tons of fish are caught per year in the region. In 2012 the Food and Agriculture Organisation (FAO) and Asia Pacific Fisheries Commission reported that there have been significant changes in species composition, where the larger, valuable species have declined in abundance in comparison to the abundance of smaller, less valuable species. The report concluded that “the picture that emerges is one of a subregional fishery that has been under heavy fishing pressure for more than 30 years and which has been fished down considerably”. Approximately 80% of fish stocks are fully or over-exploited. A recent report estimated that marine resources have been fished to 5-30% of the level that existed in the 1950s. Most near-shore fisheries in Southeast Asia are overfished, and fisheries are under increasing pressure from overcapacity. One commentator has estimated that fishing levels in the South China Sea are more than twice the level at which they should be. The situation in the region has been described as “a present fisheries crisis and a looming fisheries catastrophe”.

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8 Adam Greer, ‘The South China Sea is really a Fishery Dispute’ The Diplomat (20 July 2016).
9 Simon Funge-Smith, Matthew Briggs and Weimin Miao, Regional Overview of Fisheries and Aquaculture in Asia and the Pacific 2012 (FAO, RAP Publication 2012/26, 2012) at 12.
13 McManus, supra n 6, at 206.
The fishing pressure is illustrated by the figure that there were over 1.77 million vessels fishing in the South China Sea in 2012, of which 86% were small scale vessels.\textsuperscript{15} The scale of this is illustrated by the fact that it has been estimated that this is 55% of the total fishing vessels operating worldwide.\textsuperscript{16} The sovereignty dispute has arguably led to an increase in capacity. McManus has reported that coastal states have encouraged boat building and subsidisation of fishing effort, which has exacerbated the already high pressure on fish stocks.\textsuperscript{17}

In addition to overcapacity, destructive fishing practices such as dynamite or cyanide fishing contribute to an ecosystem under stress.\textsuperscript{18} The loss of habitat due to these practices, as well as island-building activities, is having an impact on the sustainability of fishing in the South China Sea.\textsuperscript{19} Another contributing factor is the amount of land-based pollution that degrades fishery habitats.\textsuperscript{20} Finally, climate change can be expected add to the losses in marine ecosystems.\textsuperscript{21}

2. Existing Institutions and Agreements

Tensions caused by the territorial disputes over the features in the South China Sea have been an impediment to fisheries cooperation in the region. No regional fisheries management organisation has been established for South China Sea. Instead, cooperation has been restricted primarily to cooperation on scientific matters relating to marine pollution and increasing national capacity for fisheries management.

The existing institutions in the South China Sea for maritime cooperation include the Coordinating Body on the Seas of East Asia (COBSEA), which was established in 1981 as a United Nations Environmental Programme (UNEP) regional seas programme.\textsuperscript{22} Unlike other UNEP regional seas programmes, there is no treaty that

\textsuperscript{15} Stimson Center, \textit{supra} n 10, at 25.
\textsuperscript{16} Sumaila and Cheung, \textit{supra} n 11, at 8.
\textsuperscript{17} McManus, \textit{supra} n 6, at 207.
\textsuperscript{18} Stimson Center, \textit{supra} n 10, at 15.
\textsuperscript{19} Greer, \textit{supra} n 8.
\textsuperscript{20} Rosenberg, \textit{supra} n 7, at 66.
\textsuperscript{22} The original Action Plan involved five countries: Indonesia, Malaysia, Philippines, Singapore and Thailand). In 1994 the Action Plan was revised and five more countries became involved: Australia (no
underpins the arrangement. However, as with other UNEP regional seas programmes, the focus is on issues relating to pollution. In effect, COBSEA appears to have become defunct.\textsuperscript{23}

The Partnerships in Environmental Management for the Seas of East Asia (PEMSEA) developed out of a 1993 United Nations Development Programme initiative focused on preventing marine pollution.\textsuperscript{24} Over time it has broadened its scope and is now the implementing body for the Sustainable Development Strategy for the Seas of East Asia. PEMSEA’s work touches on fisheries to the extent that it is interested in the health of coastal and marine ecosystems through the lens of integrated coastal management. However, the projects are often local in scope.

Other organisations have important contributions to make in respect of fishing in the South China Sea, but are not fisheries management organisations. The Asia Pacific Fishery Commission is a regional fishery body under the FAO with a recommendation and coordination role as well as a focus on capacity building.\textsuperscript{25} The Southeast Asian Fisheries Development Centre (SEAFDEC) was established in 1967 and aims to improve fisheries development and management in member countries.\textsuperscript{26} It primarily deals with coastal fisheries management and research. Finally, the Regional Plan of Action to Promote Responsible Fisheries (RPOA) was endorsed by 11 countries in 2007 in an effort to address illegal, unreported and unregulated fishing in the South China Sea, the Sulawesi Seas and the Arafura-Timor Seas.\textsuperscript{27}

There are also bilateral agreements in the region, including the Sino-Vietnamese Tonkin Gulf agreements. These agreements establish principles for reciprocal fishing access in the EEZs of China and Vietnam as well as creating a cooperative mechanism


\textsuperscript{24} www.pemsea.org/about-PEMSEA/history. PEMSEA has eleven country partners: Cambodia, People’s Republic of China, Indonesia, Japan, Democratic Peoples Republic of Korea, Peoples Democratic Republic of Lao, the Philippines, Republic of Korea, Singapore, Timor-Leste and Viet Nam. It also has a number of non-country partners and collaborating organisations.

\textsuperscript{25} See www.fao.org/apfic.

\textsuperscript{26} See www.seafdec.org. Member countries are Brunei Darussalam, Cambodia, Indonesia, Japan, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

\textsuperscript{27} Joint Ministerial Statement, ‘Regional Ministerial Meeting on Promoting Responsible Fishing Practices including Combating IUU Fishing in the Region’ 4 May 2007.
for the fish stocks. A Joint Fishery Committee establishes conservation and management measures. The arrangements have reportedly worked well even in times of tension between the parties. However, it has been noted that they only apply to certain areas and lack transparency and accountability.

Despite the apparent plethora of institutions and forums, there is still a lot of room for progress to be made on the coordination of fisheries management measures in the region. Overcapacity in the fishing fleet, subsidies to fishermen and the overlapping maritime claims make cooperation in this area very difficult. Lack of trust is an enormous barrier to making progress.

3.   Fisheries Disputes as a Source of Conflict

Much has been written about the fact that many of the incidents raising tension levels in the South China Sea have arisen during efforts by littoral states to enforce fisheries laws. China has been at the centre of many of the disputes, exacerbated by the fact that China is using a maritime militia comprised of fishing vessels to exercise control over disputed waters. However, the increasing conflict also reflects the growth in the number of Chinese fishing vessels that have been forced to move from inshore fishing to more distant areas. Competition for increasingly scarce resources, for populations highly dependent on fish as a source of protein, has raised the stakes for the countries involved. Hongzou and Bateman have argued that the narrative link between Chinese fishing vessels and ongoing jurisdictional disputes results in a ‘securitisation’ of fishing, which threatens to elevate the issue to an existential threat. This, in turn, undermines the possibility of achieving cooperation in the context of fisheries. It seems that the parties themselves have used security language to describe the fisheries

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28 Rosenberg, supra n 7, at 72.
29 Ibid, at 74.
32 Hongzhou Zhang and Sam Bateman, ‘Fishing Militia, the Securitization of Fishery and the South China Sea Dispute’ (2017) 39 Contemporary Southeast Asia 288-314, at 289. The authors point out that Vietnam also has a fishing militia, and Filipino law enforcement will sometimes disguise themselves as fishing vessels. See also Jonathan G Odom, ‘Guerillas in the Sea Mist: China’s Maritime Militia and International Law’ (2018) 3 Asia-Pacific Journal of Ocean Law and Policy 31-94.
33 Zhang and Bateman, supra n 32, at 293-4.
35 Zhang and Bateman, supra n 32, at 302.
situation. In August 2016, the Chinese Defence Minister Chang Wanquan reportedly warned that China should prepare for a people’s war at sea in order to safeguard sovereignty.36

4. Solutions suggested by scholars

Suggestions for resolution of these issues include calls for the negotiation of a regional fisheries agreement.37 In order to neutralise the impact of the sovereignty disputes, these calls sometimes recommend some form of suspension of sovereignty claims, similar to the solution in the Antarctic Treaty.38 Another solution is to negotiate provisional arrangements pursuant to articles 74 and 83 of UNCLOS.39 Others have suggested that the Sino-Vietnam agreements could be a model that is expanded to allow more general fisheries cooperation.40 More bespoke cooperative models have been proposed, possibly in the context of a Code of Conduct between China and ASEAN states.41 However, as long as maritime nationalism dominates among the parties to the conflicts, without a corresponding sense of collective obligation to protect the resources

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36 Jesse Johnson, ‘China must prepare for “people’s war at sea” defense chief says’ Japan Times (3 August 2016) at www.japantimes.co.jp/news/2016/08/03/asia-pacific/china-must-prepare-people-s-war- sea-defense-chief-says/#.Wy5-AqczY2x. See also Clive H Schofield, Rashid Sumaila and William Cheung, ‘Fishing, not Oil, is at the Heart of the South China Sea Dispute’ (2016) The Conversation 1-5.
40 Warner, supra n 21, at 255.
of the region, progress is difficult. Another challenge has been China’s insistence on seeking bilateral rather than multilateral solutions to the disputes. This has not diminished calls for multilateral cooperation, but China’s position is a serious impediment to progress in this area. This means that joint development agreements formed at a bilateral level may be more likely to succeed.

III The findings of the Tribunal on traditional fishing rights

Historic and traditional rights arose in two ways in the South China Sea arbitration. First, the Philippines challenged China’s nine-dash line to the extent that it was inconsistent with its EEZ, arguing that historic rights could not override sovereign rights created by UNCLOS. Second, the Philippines argued that China could not exclude Filipino fishermen from the waters around Scarborough Shoal because they were exercising traditional fishing rights in the territorial sea. The latter claim was made because the Tribunal could only decide on matters arising under UNCLOS. Issues as to the sovereignty of particular features were outside the scope of its jurisdiction under Part XV of UNCLOS. Therefore, the Tribunal would not be able to determine which state had coastal state rights over the Shoal.

The notion of historic rights engenders considerable confusion. In the Tribunals’ decision it discussed historic title and waters, historic rights and traditional rights. It concluded that historic title referred to claims to sovereignty over maritime areas, and so China’s claim to the resources in the area within the nine-dash line could not be a claim to historic title because it was not a claim to sovereignty per se. In contrast, historic rights may include sovereignty, but also may encompass more limited rights. Kopela suggests that there is a further distinction between historic rights, short of sovereignty, that establish exclusive rights, and nonexclusive traditional fishing rights. The Tribunal appeared to classify China’s claim to the nine-dash line as the former, and the claim by the Philippines to traditional fishing around Scarborough Shoal as the latter.

42 Morton, supra n 34, at 938.
43 Historic waters and historic title are discussed at length in Clive R Symmons, Historic Waters in the Law of the Sea (Martinus Nijhoff, 2008).
44 South China Sea Award, supra n 4, at [225].
45 Ibid, at [228].
1 The nine-dash line

In 2009 China circulated to other states a map showing a nine-dash line around the features in the South China Sea. China claims that the map, which dates back to at least 1948, illustrates an area within which China exercises historic rights. The problem is that the nine-dash line runs very close to the shore of the Philippines and other littoral states in the South China Sea. Although China has never clarified the meaning of the claim to historic rights, the Tribunal concluded that some of China’s actions in the region indicated that China claims rights to the living and non-living resources within the nine-dash line. The Tribunal found that the claim was not to historic title, in the sense of claiming sovereignty over an area that would not otherwise be permitted under international law, but to historic rights that are less than full sovereignty.

The Tribunal concluded that UNCLOS overrode any pre-existing claims to historic rights over resources in the area that became the EEZ. This conclusion was based both on the wording of articles 56 and 62, and also the history of the UNCLOS negotiations. It found that the EEZ was intended to establish the sovereign rights of the coastal state to the exclusion of the rights of other states. Although a coastal state is required to take into account the interests of states that had historically fished in the area in allocating any extra catch, this is up to the discretion of the coastal state. The Tribunal distinguished other international cases that appeared to support the possibility

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49 South China Sea Award, supra n 4, at [214].
50 Therefore, the nine-dash line was not covered by China’s invocation of the exceptions to compulsory jurisdiction in article 298(1) of UNCLOS. South China Sea Award, supra n 4, at [229]. The Tribunal considered it had jurisdiction to address the complaint by the Philippines.
51 Ibid, at [243].
52 Ibid, at [254].
53 UNCLOS, Art 62(3).
of historic rights belonging to other states existing in the EEZ.\textsuperscript{54} Therefore, it concluded that, if China’s assertion was that its historic rights overrode the Philippines’ sovereign rights to resources in its own EEZ, this was incompatible with UNCLOS.\textsuperscript{55}

2 Traditional rights in the territorial sea around Scarborough Shoal

In contrast to the decision that China’s claim to the nine-dash line, including fishing rights, was incompatible with UNCLOS, the Tribunal found that it was possible to exercise traditional fishing rights in another state’s territorial sea.

The Tribunal suggested that there was no inconsistency between its conclusion that historic rights were extinguished by the EEZ, and the conclusion that traditional fishing rights in the territorial sea around the Scarborough Shoal continue to exist.\textsuperscript{56} This position is based on the argument that the law of the sea has always acknowledged the role of historic rights in exercising jurisdiction in the territorial sea.\textsuperscript{57} However, when UNCLOS was negotiated, the new scheme of the EEZ clearly excluded the possibility of historic or traditional fishing rights persisting in that zone.\textsuperscript{58} In contrast, UNCLOS continued the regime of the territorial sea largely without change from the pre-existing legal position, therefore providing for the continuation of historic rights in the territorial sea.\textsuperscript{59} Article 2(3) obliges states to exercise their sovereignty subject to other rules of international law, with the Tribunal found includes traditional fishing rights.\textsuperscript{60}

Historic fishing rights can be created when generations of fishermen have traditionally fished in a particular area so that there is a right “akin to property” in the ability to continue to fish.\textsuperscript{61} Two important qualifications apply, according to the

\textsuperscript{54} These included the Gulf of Maine case (discussed at [256]), the Fisheries Jurisdiction cases (discussed at [258]), Eritrea v Yemen (discussed at [259]), the Chagos Marine Protected Area case (discussed at [260]).

\textsuperscript{55} South China Sea Award, supra n 4, at [269]-[271].

\textsuperscript{56} Some commentators have expressed doubt about this aspect of the Tribunal’s decision. See Thomas J Schoenbaum, ‘The South China Sea Arbitration Decision: The Need for Clarification’ (2016) 110 American Journal of International Law 290-295, at 294; Nong Hong, ‘The South China Sea Arbitral Award: Political and Legal Implications for China’ (2016) 38 Contemporary Southeast Asia 356-361, at 357.

\textsuperscript{57} South China Sea Award, supra n 4, at [802].

\textsuperscript{58} Ibid, at [803].

\textsuperscript{59} Ibid, at [804]. The Tribunal also noted that historic fishing rights in archipelagic waters are expressly protected according to article 51(1).

\textsuperscript{60} Ibid, at [808].

\textsuperscript{61} Ibid, at [798].
Tribunal. First, these are private rights, not rights held by states.\(^{62}\) This is true to a certain extent, although it can be argued that such rights are hybrid in that they belong to the state for the benefit of its nationals but also to the nationals themselves.\(^{63}\) Whatever the character of the right, it is clear that such traditional rights are unaffected by changes in sovereignty or delimitation.\(^{64}\) Second, the rights are 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”.\(^{65}\)

On the facts, the Tribunal considered that some artisanal fishing has taken place around Scarborough Shoal by fishermen from the Philippines, China, Taiwan and Vietnam, although it did not rule out the prospect that some of the fishing was also industrial in nature.\(^{66}\) It also did not rule out that fishermen from other states may also have participated in such fishing. Traditional fishing rights can be regulated by the coastal state,\(^{67}\) but the Tribunal did not have jurisdiction to consider whether the Philippines or China were the coastal state in relation to the Scarborough Shoal. However, it was able to say that when China excluded Filipino fishermen while allowing Chinese fishermen to access the area, it violated the Filipino fishermen’s traditional fishing rights.\(^{68}\)

3 Critiques of the Award

The Tribunal’s findings on historic rights in respect of the nine dash line and the Scarborough Shoal have generated considerable academic debate. Most of the criticisms of the award have been directed at the Tribunal’s findings in relation to the nine dash line. One criticism is that the Tribunal went too far in arguing that UNCLOS extinguished all traditional fishing rights in the EEZ.\(^{69}\) Instead, it is claimed that traditional rights can only be determined on a case-by-case basis.\(^{70}\) It has also been pointed out that excluding traditional rights for foreign fishers in the EEZ, over which

\(^{62}\) Ibid, at [799].
\(^{63}\) Kopela, supra n 46, at 193. Kopela suggests that the threshold for recognition of traditional fishing rights may be lower than for historic rights. See also Eritrea v Yemen, at para 101.
\(^{64}\) South China Sea Award, supra n 4, at [799].
\(^{65}\) Ibid, at [798].
\(^{66}\) Ibid, at [805], [807].
\(^{67}\) Ibid, at [809].
\(^{68}\) Ibid, at [812].
\(^{69}\) Kopela, supra n 46, at 195.
\(^{70}\) Ibid.
the coastal state has sovereign rights, but upholding them for the territorial sea, over which the coastal state has sovereignty, seems counter-intuitive.\textsuperscript{71}

IV Conditions for traditional fishing rights to lead to cooperative fisheries management

In an ideal world, the parties to the arbitration would observe its findings. It is an accepted principle of international law that, where a tribunal has jurisdiction over a dispute, the result is binding on the parties.\textsuperscript{72} The following discussion depends, in part, on an acceptance of the legitimacy of the Tribunal’s finding. It would not be strictly necessary if the parties accepted that traditional fishing rights could be created in the territorial seas around the features without accepting the rest of the Award, but a negotiated outcome may be much more difficult to achieve in that case.

It should be noted that, if the Tribunal’s decision were to be fully implemented, the tension over fisheries issues would be greatly reduced. The effect of the arbitral award was to limit maritime claims around the features in the South China Sea to territorial seas. This would clarify the rights of littoral states to EEZs as well as establishing an area of high seas in the centre of the Sea.\textsuperscript{73} It would also restrict the maritime spaces under dispute.

The advantages of recognising traditional rights over a part of the ocean is that the practical result is that a coastal state must respect the continuation of fishing in that area by the foreign fishermen that hold the rights. Where traditional fishing is undertaken by foreign fishers, this does not undermine the claim for sovereignty because the traditional fishing is perfectly consistent with such a claim. A failure to exclude those fishermen is not evidence of a failure to exercise effective control or jurisdiction over the feature. Therefore, the fact that fishing by fishing vessels from a range of states continue to fish there could not be used to undermine a sovereignty claim to the feature. This conclusion would be even stronger if there was an agreement


\textsuperscript{72} See article 296 of UNCLOS in relation to disputes arising under the Convention. Note also that the tribunal or court has competence to decide on the matter of jurisdiction. See the Nottebohm Case (Liechtenstein v Guatemala) (Preliminary Objection) 1953 ICJ Reports 111, at 119.

\textsuperscript{73} Yen Hoang Tran, ‘The South China Sea Arbitral Award: Legal Implications for Fisheries Management and Cooperation in the South China Sea’ (2017) 6 Cambridge International Law Journal 87-94.
between the parties as to the existence and nature of the traditional fishing rights. In such a scenario, the importance of excluding vessels from an area using force is vastly diminished and removes a key source of tension that is making the South China Sea situation so serious.

However, there are real, and probably insurmountable, challenges to overcome before traditional fishing rights in a disputed area could resolve some of the tensions in the region. In sum, it would be necessary for the relevant states to reach a negotiated agreement on how traditional fishing rights would be exercised in the region and how they would be enforced. Such an agreement, either bilateral or multilateral, could be seen as similar to a provisional agreement negotiated under article 74(3) of UNCLOS, or it could be intended to endure beyond the resolution of the sovereignty and maritime delimitation disputes, depending on the views of the parties. The agreement would be necessary because a simple acknowledgement of the existence of traditional fishing rights would not resolve all the issues that would arise. The following paragraphs discuss some of these issues and potential solutions, although the states involved would be free to determine how they resolved the problems. A failure to agree on these matters would tend to revert the debate to one about sovereignty because much of what would have to be agreed would be based on issues that a coastal state would normally determine. Given the current political situation, the ability of the states to reach such an agreement must be seen as a low possibility.

First, there is the question of what activities would be covered by the traditional rights. The Tribunal excluded industrial fishing that departed from traditional methods, without being clear about precisely how to distinguish between industrial and traditional fishing.\textsuperscript{74} The Tribunal equated traditional fishing with artisanal fishing.\textsuperscript{75} The FAO defines “artisanal fishing” as “traditional fisheries involving fishing households (as opposed to commercial companies) using [a] relatively small amount of capital and energy, relatively small fishing vessels (if any), making short fishing trips, close to shore, mainly for local consumption”.\textsuperscript{76} The Tribunal in the arbitration between Eritrea and Yemen case found that a history of artisanal fishing created rights to non-exclusive fishing rights. That Tribunal said, in relation to such fishing:\textsuperscript{77}

\textsuperscript{74} Ibid, at [806].
\textsuperscript{75} Ibid, at [795].
\textsuperscript{77} Second stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation) (Award) (1999) XXII RIAA 335, para 106.
The term ‘artisanal’ is not to be understood as applying in the future only to a certain type of fishing exactly as it is practised today. ‘Artisanal fishing’ is used in contrast to ‘industrial fishing’. It does not exclude improvements in powering the small boats, in the techniques of navigation, communication or in the techniques of fishing; but the traditional regime of fishing does not extend to large-scale commercial or industrial fishing …

The Tribunal in the South China Sea case noted that what is ‘traditional’ can differ from place to place. It found that the distinguishing characteristic was that 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”.78 Thus, determinations about what amounts to traditional fishing must be done on a case by case basis, and will usually be done by the coastal state.79

It seems reasonable that small scale fishing could be included in traditional fishing rights but not industrial fishing vessels. However, making the distinction between these groups in practice could be very difficult. For many centuries the majority of fishing in the South China Sea was small scale and traditional, often using gill nets or hooks80 Trawling became common in the 1960s, largely replacing traditional fishing methods as the predominant fishing method.81 Modernisation of the fishing fleet has continued since independence of many of the coastal states,82 and some of the fishing that has taken place in recent years has been done by large vessels, which in part reflects investment by some littoral states in expanding the capacity of their fishing fleet.

This would be a key aspect that states would need to agree on in any compromise or agreement based on traditional fishing. One possible option would be to agree on the maximum size of any vessel that could undertake traditional fishing. However, in light of claims that access to fisheries resources is one of the key drivers

78 South China Sea Award, supra n 4, at [797].
for state behaviour in the region, it would be difficult for states to reach an agreement limiting the size and nature of the vessels in the territorial waters of the South China Sea features if this excluded a significant portion of one state’s fishing fleet.

A second challenge would be deciding which features could be said to be covered by traditional fishing rights. It might be argued, for example, that Scarborough Shoal is unique and more likely to be the subject of artisanal fishing from the Phillippines than other features in the region that are further from the coast. However, the Tribunal was clear in that it was not only Filipino fishermen who had traditional rights in respect of Scarborough Shoal, but that fishermen from China and Viet Nam also undertook traditional fishing there. The Shoal is approximately 500 nautical miles from Viet Nam and China, so the location of a feature close to a mainland will not be a conclusive factor. This opens up the possibility that other features in the South China Sea could be said to be the site of traditional fishing.

The parties could take two approaches in deciding which features are covered by traditional fishing rights. First, they could rely on historical evidence to determine which features did experience historic fishing by fishermen from various countries. A number of commentators have acknowledged that fishermen from most of the littoral countries have historically accessed the reefs and shoals in the South China Sea, and indeed the presence of fishermen formed part of the legal justification for some claims. Secondly, a legal fiction could be used to argue that all features in a particular area are subject to the regime of traditional fishing, without requiring specific evidence that it had occurred.

A third issue is how the parties would deal with the need for regulation of the fishing effort. The Tribunal found that traditional fishing rights would still be subject to regulation by the coastal state, although it was not within its jurisdiction to actually

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84 South China Sea Award, supra n 4, at [805].
identify which state had sovereignty over the Scarborough Shoal. This factor has the potential to derail any compromise based on traditional rights in a situation where sovereignty is disputed. The danger is that the claimant states may wish to retain control over regulation of fishing, which returns the problem to the question of sovereignty. The most logical solution would be to establish a mechanism for cooperative decision making about issues such as the maximum sustainable yield or area closures. This is not easy to do, but some reference to other fisheries agreements may provide some guidance. Examples include the agreements China has signed with Japan, South Korea and Viet Nam, which each establish Joint Fisheries Committees, although they have differing responsibilities under the different agreements. Although disputes about sovereignty are not delimitation disputes and so articles 74 and 83 of UNCLOS do not directly apply, the example of a “without prejudice” agreement allowing for cooperation pending a settlement of a dispute is one worth considering.

Fourth, it is important to note that the Tribunal’s findings only related to the territorial sea, not the EEZ of a particular feature. This is for two reasons. First, the Tribunal concluded that the EEZ regime extinguished any pre-existing historic fishing rights. Second, it found that none of the features in the Spratly Islands were capable of generating an EEZ under article 121(1) of UNCLOS. Both of these conclusions cause some impediment if states wish to seek recognition for traditional rights around features beyond 12 nautical miles.

In relation to the compatibility between the EEZ and traditional fishing rights, the conclusion that traditional rights did not survive the creation of the EEZ might mean that states will not be willing to consider traditional rights beyond the territorial sea. However, the Award does not rule out the coastal state entering into a bilateral agreement that gives effect to traditional rights as recognised by the parties. The Tribunal concluded that states “may continue to recognise traditional fishing rights in the exclusive economic zone in their legislation, in bilateral fisheries access

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86 South China Sea Award, supra n 4, at [809], [812]
88 Kuan-Hsiung Wang, supra n 37, at 537.
agreements, or through regional fisheries management organisations”, although this was not required under UNCLOS.89

Related to this question is whether traditional fishing can occur behind the baselines of a disputed feature, such as in the lagoon of an atoll. The Tribunal did not address this issue, which is surprising considering the Scarborough Shoal is the largest atoll in the South China Sea. It is possible that the Tribunal considered that traditional fishing applied also to the internal waters, but it is impossible to tell in light of its silence on this point.

The Award concluded that UNCLOS negotiators did not intend for traditional fishing rights to survive the introduction of the EEZ.90 However, the Tribunal concluded that UNCLOS left the regime of the territorial sea unchanged, which meant that private historic rights could be recognised irrespective of sovereignty.91 Following this logic, it may be possible to argue that the regime of internal waters was also left largely as is by UNCLOS, meaning that traditional rights could also exist there. There is some support for this in the Eritrea v Yemen arbitration, where the Tribunal found that the traditional rights of fishermen extended to the right to use the islands “for drying fish, for way stations, for the provision of temporary shelter, and for the effecting of repairs”.92 These activities take place on the territory of the islands and would therefore equate to internal waters.93

Article 2(3) requires states to exercise their sovereignty over the territorial sea subject to other rules of international law. The absence of an equivalent to article 2(3) of UNCLOS for internal waters does not necessarily mean that traditional rights cannot exist in internal waters.94 Indeed, UNCLOS barely mentions the legal rules applying to internal waters, presumably on the basis that internal waters are equated to territory. In a separate opinion in the ARA Libertard case, Judges Wolfrum and Cot advanced the opinion that the regime of internal waters is primarily based on customary international

89 South China Sea Award, supra n 4, at [804]
90 Ibid, at [803]
91 Ibid, at [799], [802], [804].
92 Eritrea v Yemen, Second stage, at para 103.
93 The relevance of the Eritrea v Yemen arbitration for the law of the sea was challenged by the South China Sea Tribunal: see para 259. However, the existence of private historic rights on the territory of another state has been recognised in some cases. See, e.g. Rights of Passage over Indian Territory (Portugal v India) (Merits) [1960] ICJ Reports 6, at 40.
94 Compare South China Sea Award, supra n 4, at [808]. The absence of an equivalent to article 2(3) may have implications for the jurisdiction of a tribunal under Part XV of UNCLOS in relation to issues involving internal waters.
law, and not UNCLOS. This implies that traditional rights in internal waters have to be considered separate from the rules for other maritime zones. It is not necessary in this article to resolve this matter apart from saying that it is open to interpretation that traditional fishing rights could apply to internal waters. However, the issue of fishing in internal waters could also provide a serious obstacle to any resolution relying on traditional fishing rights.

A fifth question would be how to ensure compliance by fishing vessels exercising traditional rights. This is another difficult problem. Under usual circumstances the coastal state would have the right to enforce any regulations on fishing vessels which could relate to fishing equipment, the level of catch and any environmental protection measures. In the case of disputed sovereignty over a feature, allowing a foreign state (and especially one with a claim to sovereignty) to exercise any form of jurisdiction, even over their own vessels, in the internal waters or territorial sea might be seen as an obstacle to perfecting a sovereignty claim. In theory, if the exercise of jurisdiction was subject to a “without prejudice” clause that would be revised if and when sovereignty is resolved, this could be sufficient to keep the sovereignty issues from interfering. However, in practice, it will be difficult to persuade a state claiming sovereignty over a feature to allow other claimant states to exercise jurisdiction over that state’s own fishermen, given that this would not normally be permitted in a territorial sea even when traditional fishing rights are being exercised. Agreement on this point would be a requirement for an enduring cooperative arrangement.

If claimant states were willing to accept that traditional fishing rights exist in the territorial sea around features in the South China Sea without affecting sovereignty, this could open the door for cooperative approaches to fisheries in some parts of the region. In order to be truly effective, either bilateral or multilateral agreements would have to establish:

- To which features the rights apply;
- What amounts to traditional fishing as opposed to industrial fishing;
- How each state would limit the fishing effort in order to ensure sustainability;

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96 According to Judges Wolfrum and Cot, this would mean that a Tribunal established according to Part XV of UNCLOS may not have jurisdiction over a dispute involving internal waters. At [34].
• What would happen in internal waters and beyond 12 nautical miles;
• How enforcement would be dealt with;
• That nothing in the agreement affected the claims to sovereignty.

As already discussed, agreement on these points would be extremely difficult, if not impossible, even if the parties to the arbitration and other littoral states accepted the Tribunal’s findings.

V The positions of the parties

It must be acknowledged that there are serious difficulties in achieving the outcome outlined above. Some of these have been outlined in the previous section, and relate to whether states can reach agreement on some of the issues about how traditional rights can be exercised in practice. However, the biggest obstacle is the attitude of the parties to the Tribunal’s decision.

China’s position on the Award has been clear and unequivocal. China’s official statement, made on the day that the arbitral award was released, reiterated its position on the historic rights and claims in the South China Sea and its preference to resolve disputes based on negotiation. 97 It has been suggested that this represented a hardening of China’s official claims. 98

China has also made it very clear that it rejects the outcome of the arbitration, arguing both that the Tribunal had no jurisdiction and that the Award was biased against it. 99 It is highly possible that the Chinese government will reject out of hand any approach based on the Award. Any de facto acceptance of the Award would be highly objectionable to China. 100 China has also preferred to take a bilateral approach to resolving issues in the region, avoiding discussions about the issues in regional forums. 101 The argument based on historic fishing rights promoted by the Tribunal also

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100 Feng Zhang, supra n 98, at 454.
101 Nong Hong, supra n 56, at 356.
appears inconsistent with the nature of the rights apparently claimed by China as a result of the nine-dash line, which appear to amount to a claim to exclusive rights, possibly ruling out a shared approach to control of resources.

Others have been more optimistic, predicting that although China rejects the arbitral award, it may provide an opportunity for all the major actor to “recalibrate their policies”. Some commentators have suggested that China has taken a relatively cooperative approach in relation to the Filipino fishermen, not challenging those operating in the vicinity of Scarborough Shoal. It is not clear whether this is because China implicitly accepts this aspect of the Tribunal’s decision or because China has made a decision to be more conciliatory to the Philippines of late. One strongly suspects it is the latter.

It should be mentioned, of course, that the concept of traditional fishing rights predates the Tribunal’s decision. If this option is to have any traction in moving the parties towards a cooperative solution, then it may be possible to refer to such precedent in support. However, this may be seen as a basis for reopening the debate about historic fishing rights in the EEZ, which the Philippines would be keen to avoid.

VI Conclusion

At first glance, the findings of the Tribunal in relation to traditional fishing rights in the territorial sea around disputed features in the South China Sea appear to open the door to a lessening of tension around fishing activities in the region. Because, under this framework, some fishing activities could be undertaken without threatening the “effective control” of the coastal state, it is possible to envisage bilateral or even multilateral agreements that allow for some traditional fishing without involving any concession by the coastal state in relation to sovereignty over the feature. Such agreements would need to deal with a range of issues such as the features to which the rights apply, what sorts of fishing is permitted, as well as how fishing is to be regulated.

102 Feng Zhang, supra n 98, at 442.
and enforced. These are challenging matters to resolve in the context of disputed claims to sovereignty over the features.

There are several other problems that are likely to make it almost impossible to achieve in practice, given the current position of the claimant states. The most serious obstacle is China’s rejection out of hand both the jurisdiction and the conclusions of the Tribunal, which means that any attempt to reach a conclusion based on the Tribunal’s findings will be almost impossible. However, the concept of traditional fishing does introduce another consideration into the debate around fishing in the South China Sea and, theoretically, could be a basis on which compromises could be made if the political atmosphere changed in the region.