Note — Traditional Fishing Rights in International Law: The *South China Sea Arbitration*

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I INTRODUCTION

Prior to the adoption of the *Law of the Sea Convention* ('*UNCLOS*'),[1] fishers using traditional techniques generally enjoyed the right to exploit fish stocks freely under customary international law.[2] Moreover, if a community had engaged in an 'age-long exercise of fishing activities',[3] international law upheld its right to continue to fish in traditional waters in breach of any competing claim to sovereignty or exclusive rights.[4] Such rights have interchangeably been referred to as 'traditional fishing rights' (TFR) or 'artisanal fishing rights'.[5] However, it was unclear whether such rights survived the adoption of the *UNCLOS*. Further, if they had survived, the substance of TFR in contemporary international law was untested. In 2016, these matters were addressed by the *South China Sea Arbitration*.

This case note examines the finding of the tribunal in the *South China Sea Arbitration* that TFR are operable within territorial seas, but extinguished in exclusive economic zones (EEZs). This case note challenges the Tribunal's finding, arguing that state practice, academic commentary and the *UNCLOS* point to the opposite conclusion — that TFR operate in EEZs, but should not be recognised in territorial seas. The factual and legal backgrounds to the *South China Sea Arbitration* are examined, before turning to the accuracy of the Tribunal's finding.

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1 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

2 Sir Gerald Fitzmaurice, 'The Law And Procedure Of The International Court Of Justice, 1951-54: General Principles And Sources Of Law' (1953) 30 *British Yearbook of International Law* 1, 51–3; Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2nd ed, 2016) 154–9.

3 Yehuda Z Blum, *Historic Titles in International Law* (Nijhoff, 1965) 316.

4 Ibid 315–18; Fitzmaurice, above n 2, 51.

5 See *South China Sea Arbitration (Philippines v China) (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [795] ('*SCSA*'); *Fisheries Jurisdiction (United Kingdom v Iceland) (Merits)* [1974] ICJ Rep 3, 30; *Second Stage of the Proceedings between Eritrea and Yemen (Eritrea v Yemen) (Maritime Delimitation)* (1999) 22 RIAA 335, 359 ('*Eritrea and Yemen*').

II FACTUAL BACKGROUND

Claims over marine features in the South China Sea are a major source of political tension between East Asian and South East Asian states due to the strategic importance of the area.[6] As China has sought economic and military influence over the South China Sea, other states have sought to counter it.[7] Accordingly, the Philippines instigated the *South China Sea Arbitration* in 2013 in response to, inter alia, China's assertion of exclusive control over the contested Scarborough Shoal.[8] Amongst a total of 15 submissions to the Tribunal of the *South China Sea Arbitration*, the Philippines argued in submission 10 that China was denying Filipino fishers access to the Scarborough Shoal and that the denial of access was a breach of their traditional fishing rights.[9]

III JURISPRUDENTIAL BACKGROUND

Coastal states have typically claimed TFR on behalf of their citizens to justify extensions of their maritime boundaries (exclusive rights), or for the right to access and exploit resources within the maritime boundaries of other states (non-exclusive rights). Despite several recent attempts to extend maritime boundaries for *exclusive* fishing rights,[10] such claims have only been granted by an international body on one occasion since the adoption of the *UNCLOS*.[11] The cases that have developed *non-exclusive* TFR in international law cases are summarised below. Although the cases included have made substantial contributions to TFR law, none conclusively establish or deny the operation of *non-exclusive* TFR in any given maritime zone.

A *Cases Decided Prior to the 1982* UNCLOS

TFR in modern international law can be traced back to *Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals*.[12] In that case, an ad hoc arbitral tribunal exempted an indigenous

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6 Anne Hsiu-an Hsiao, 'China and South China Sea "Lawfare"' (2016) 52(2) *Issues and Studies* 1, 23.

7 Ibid.

8 Ibid 9.

9 *SCSA (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [758].

10 See, eg, *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between them (Barbados v Trinidad and Tobago) (Award)* (2006) 27 RIAA 147 ('*Barbados v Trinidad and Tobago*'); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia) (Judgment)* [2002] ICJ Rep 625; *Eritrea and Yemen (Award)* (1999) 22 RIAA 335.

11 See *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) (Judgment)* [1993] ICJ Rep 38; *Barbados v Trinidad and Tobago (Award)* (2006) 27 RIAA 147, 222–3. But see *Grisbådarna (Norway and Sweden)* (1909) 11 RIAA 147.

12 *(United Kingdom v United States) (Award)* (1893) 28 RIAA 263, 271.

population from regulations concerning the hunting of seals so long as they used traditional hunting techniques.[13] Private rights, as a source of international law, were protected again in *Questions Relating to Settlers of German Origin in Poland*.[14] In that case, a post-war treaty transferred German land to Poland, but German settlers held contractual property rights to some of the transferred land. The settlers sought to enforce their contractual rights against the Polish Government.[15] Their claims were upheld on the basis that such private rights prevailed against other sources of international law.[16] Consequently, the construction of an international border between Germany and Poland had no effect on the settlers' contractual rights.[17]

Two further cases developed the pre-eminence of private rights against other sources of international law. In 1960, *Right of Passage over Indian Territory* enforced the right to innocent passage by persons when it was based on 'a constant and uniform practice'.[18] Then in 1974, *Fisheries Jurisdiction* confirmed that non-exclusive fishing rights could be recognised when a state's fishers have 'for many years engaged in fishing in the waters'.[19]

B *Cases Decided After the 1982* UNCLOS

The first case since the adoption of the 1982 *UNCLOS* to consider non-exclusive TFR in international law was *Eritrea and Yemen*. In that case, non-exclusive TFR held by Eritrean fishers were imposed within Yemeni waters.[20] On first impression, the Award appears to recognise TFR by stating that such rights prevail against the *UNCLOS*: the Tribunal stated that TFR are enforceable wherever they exist, and that they are 'not qualified by the maritime zones specified under the [*UNCLOS*].'[21] The Tribunal's finding is contentious because the terms of the arbitration agreement in that case allowed other sources of law to be applied.[22] The case was instead decided on principles of Islamic law, despite the absence of any argument on this basis by the parties.[23] In general, the application of

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13 Ibid.

14 *Questions Relating to Settlers of German Origin in Poland (Advisory Opinion)* [1923] PCIJ (ser B) No 6 ('*Settlers of German Origin').*

15 Ibid 33.

16 Ibid 38.

17 Ibid.

18 *Right of Passage over Indian Territory (Portugal v India) (Merits)* [1960] ICJ Rep 6, 40.

19 *Fisheries Jurisdiction (Merits)* [1974] ICJ Rep 3, 28.

20 *Eritrea and Yemen (Award)* (1999) 22 RIAA 335, 361.

21 Ibid.

22 Ibid 357.

23 Michael W Reisman, 'Eritrea-Yemen Arbitration (Award, Phase II: Maritime Delimitation)' (2000) 94 *American Journal of International Law* 721, 728; *contra* Sophia Kopela, 'Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration (2017) 48(2) *Ocean Development and International Law* 181, 194.

the *UNCLOS* was overlooked in *Eritrea and Yemen*.[24] Nevertheless, the case is the first instance of non-exclusive TFR being recognised by an international judicial body in international law since the adoption of the 1982 *UNCLOS*.

Three other cases, discussed below, have touched on TFR, but none have conclusively denied or confirmed the recognition of TFR in any given maritime zone. In *Abyei Arbitration*, traditional grazing rights held by 'people settling within and in the vicinity of the Abyei Area' were upheld notwithstanding the construction of an international border.[25] Although in this case the grazing rights in question were protected in a bilateral agreement, the Tribunal found that the historic rights of graziers would have been protected without such a treaty on the basis that 'traditional rights to the use of land (or maritime resources)' will not be extinguished without an explicit prohibition.[26]

Barbados v Trinidad and Tobago is the only case to touch on TFR operating specifically within an EEZ. In this case Barbados argued both exclusive and non-exclusive TFR unsuccessfully. The argument for exclusive rights was rejected because the evidence did not substantiate traditional fishing in the waters claimed by Barbados to the standard required for an altered maritime border.[27] Further, the Tribunal held that it lacked jurisdiction to decide whether the EEZ of Trinidad and Tobago could be subject to Barbadian TFR.[28] However, it is noteworthy that the Tribunal both recognised the existence of TFR and did not deny the possibility that TFR could operate within the EEZ of Trinidad and Tobago in law.[29]

Chagos Marine Protected Area raised the possibility that TFR could operate within the territorial sea.[30] In that case, a marine protected area declared by the United Kingdom was challenged by Mauritius because its treaty of independence established fishing rights within the territorial sea of the Chagos Archipelago.[31] An arbitral tribunal found that 'general rules' of international law apply within the territorial sea.[32] The substance of these general rules was not defined. However it was determined that bilateral agreements were not included.[33] Notably, the Tribunal was not required to

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24 *SCSA (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [259], [803].
25 *Abyei Arbitration (Government of Sudan v Sudan People's Liberation Movement/Army) (Final Award)* (2009) 30 RIAA 145, 407.
26 Ibid 408, 412.
27 *Barbados v Trinidad and Tobago (Award)* (2006) 27 RIAA 147, 222–3.
28 Ibid 226.
29 Ibid.
30 *Chagos Marine Protected Area (Mauritius v United Kingdom) (Award)* (UNCLOS Arbitral Tribunal, 18 March 2015).
31 Ibid [514]–[517].
32 Ibid.
33 Ibid.

consider whether TFR could be considered a 'general rule' of international law operable within territorial seas.[34]

IV DECISION

In the *South China Sea Arbitration*, the Tribunal was required to determine: first, the nature of TFR; second, whether TFR survived the adoption of the *UNCLOS*; and third, if TFR survived, whether China breached Filipino TFR on the Scarborough Shoal. Fortunately, the Tribunal embraced its opportunity to clarify TFR under international law and provided some guidance on when TFR ought to be recognised in international law. However, the nature of TFR could have been further developed, and the differential treatment of TFR in various maritime zones by the Tribunal is problematic.

A *The Nature of Traditional Fishing Rights*

The Tribunal found that TFR are historic private rights possessed by fishers to exploit the living resources of the sea.[35] In international law, those rights were said to prevail against claims of sovereignty and international borders whenever possible.[36] Therefore individuals using traditional fishing practices are prima facie entitled to continue to fish in the waters of a foreign state on the basis of their TFR. In this respect, the nature of TFR was untouched by the Tribunal; the pre-*UNCLOS* understanding of TFR was affirmed.

The Tribunal was unwilling to establish a legal test to determine what is and is not 'traditional fishing',[37] although a variety of definitions for 'traditional fishing' were discussed. For example, the Tribunal noted that 'artisanal fishing' is antonymous with 'industrial fishing'[38] and that traditional fishing is 'simple and carried out on a small scale, using fishing methods that largely approximate those that have been historically used in the region.'[39] These definitions from earlier cases and soft law instruments were accepted uncritically. The Tribunal merely accepted that 'some' of the fishing conducted by both parties on the Scarborough Shoal was 'traditional'.[40]

B *Have Traditional Fishing Rights Survived the Adoption of the* UNCLOS*?*

Having discussed the nature of TFR, the Tribunal considered whether such rights survived the *UNCLOS*. For the purpose of the Award, the Tribunal

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34 Ibid [456].
35 *SCSA (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [798].
36 Ibid [799].
37 Ibid [806].
38 Ibid [797].
39 Ibid.
40 Ibid [807].

was only required to determine whether TFR operated in territorial seas, not other maritime zones, as they had already classified Scarborough Shoal as a 'rock' entitled to a territorial sea only.[41] Nevertheless, the Tribunal also considered two other maritime zones: archipelagic waters and the EEZ.[42]

For the territorial sea, the Tribunal reasoned that TFR could be recognised by virtue of the ruling in *Chagos Marine Protected Area* that general rules of international law apply to territorial seas.[43] It reached this conclusion on the basis that the *UNCLOS* was not intended to alter such rights within the territorial sea.[44] Therefore TFR could be recognised in territorial seas.

In the archipelagic zone the Tribunal found that TFR were expressly protected by art 51(1) of the *UNCLOS*.[45] In contrast, in the EEZ the Tribunal found that TFR were extinguished in accordance with the intention of the drafters of the *UNCLOS*.[46] It reached this conclusion on the basis that art 62(3) of the *UNCLOS* requires coastal states to exercise their sovereign rights in the EEZ in such a way that minimises the economic dislocation of foreign fishers, and that art 62(3) therefore extinguished and replaced TFR in that maritime zone.[47]

The Tribunal's application of the *UNCLOS* to these different maritime zones produces a bizarre result. Traditional fishers retain their entitlement to fish in another state's territorial sea: the zone closest to a state's shores, and the most important for state security and resource management.[48] Yet traditional fishers cannot fish in another state's EEZ: the zone further from the shore where the coastal state possesses only sovereign rights.[49] The drafters of the *UNCLOS* could not have intended this — either the *UNCLOS* was erroneously drafted or the Tribunal's interpretation and application of it was inaccurate.

C *Did China Interfere with Filipino Fishers' TFR?*

Having found that TFR can be recognised in territorial seas, the Tribunal then found that China had interfered with the TFR of Filipino fishers within the territorial sea of the Scarborough Shoal.[50] Although preventing access to the living resources of the sea may be lawful if it is for the protection of fish stocks, the Tribunal found that China allowed their own nationals to

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41 Ibid [280], [305], [333]–[334], [539]–[556], [759].
42 Ibid.
43 Ibid [809]. The Tribunal also noted that such laws could include environmental protection provisions within the *UNCLOS*.
44 Ibid [804].
45 Ibid.
46 Ibid.
47 Ibid.
48 Kopela, above n 23, 195–6.
49 Ibid.
50 *SCSA (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [810].

fish in the same waters proving that their purpose was illegitimate.[51] The Tribunal did not identify a legal test for interference with TFR. It nevertheless found that there was interference in the circumstances before it as China had completely prevented access to the Scarborough Shoal over significant periods of time.[52]

V COMMENT

The *South China Sea Arbitration* Tribunal's differential treatment of TFR within the territorial sea and the EEZ is surprising because it permits foreign fishers access to a state's waters right up to their shores, while denying those same individuals the right to fish within an EEZ.[53] This note argues that the more compelling interpretation of state practice and the *UNCLOS* is that TFR are extinguished in territorial seas, but survive untouched in EEZs.

TFR should not have been recognised in territorial seas as it is contrary to state practice and academic commentary. During the mid-20th century, states typically denied TFR in their territorial seas altogether, or phased out TFR over a number of years through bilateral agreements.[54] Blum wrote in 1966 that a state can 'exclude from its territorial waters all foreign fishermen.'[55] Today, state practice indicates that TFR are usually only operable within territorial seas if they are protected by an agreement.[56] This is supported by the views of contemporary academics: 'coastal states … possess absolute rights to regulate all resource activity within the territorial sea.'[57] Even if the Tribunal was correct to affirm that territorial seas are subject to general rules of international law, state practice and academic commentary suggest that TFR can only be recognised beyond the territorial sea.

The Tribunal's decision can be attributed to two misconceptions. First, the Tribunal appears to have mistakenly applied *Fisheries Jurisdiction*. The Tribunal relied on the case to find that all territorial seas are subject to TFR.[58] However, in that case the International Court of Justice found that it was only Iceland's unilaterally declared 50 nautical mile 'fisheries zone' that was subject to the historic rights of the United Kingdom.[59] That Iceland held absolute and exclusive rights to its 12 nautical mile territorial seas was

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51 Ibid [812].
52 Ibid.
53 Kopela, above n 23, 195–6.
54 Blum, above n 3, 315–24.
55 Ibid 315.
56 Polite Dyspriani, *Traditional Fishing Rights: Analysis of State Practice* (The United Nations-Nippon Foundation Fellowship Programme 2010-11) 24–7.
57 Rothwell and Stephens, above n 2, 77.
58 *SCSA (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [802].
59 *Fisheries Jurisdiction* [1974] ICJ Rep 3, 23–4.

uncontested.[60] Second, the Tribunal's reasoning can be attributed to an erroneous application of *Abyei Arbitration*. Although it is a recent authority that sovereign territory can be subjected to private rights, it is distinguishable on the bases that the case did not concern maritime zones, did not apply the *UNCLOS*, and the grazing rights relevant to the case were protected in a bilateral agreement.[61] Conversely, those two cases establish a strong legal basis for recognising TFR in the EEZ.

Contrary to the finding in the *South China Sea Arbitration*, this note suggests that the *UNCLOS* does not extinguish TFR in EEZs because it does not explicitly prohibit them, and that state practice and academic commentary tend to support the recognition of TFR in that zone.[62] The Tribunal in the *South China Sea Arbitration* reasoned that art 62(3) of the *UNCLOS* precludes recognition of TFR because the provision replaces TFR.[63] However, the impugned article only creates a positive obligation upon coastal states to consider foreign fishers, not a prohibition of TFR. Consequently, TFR could be recognised in EEZs where appropriate as such private rights are generally not extinguished absent 'an explicit prohibition to the contrary'.[64]

VI CONCLUSION

It is not clear whether the Tribunal's decision will be authoritative for the operation of TFR within territorial seas or EEZs. Neither have yet been considered in a subsequent international case. However, since the Award, China has acquiesced to Filipino fishing within the territorial sea of the Scarborough Shoal.[65]

More broadly, it was unfortunate that the Tribunal was unwilling to specify legal tests for 'traditional' fishing and interference with TFR. Nevertheless, the *South China Sea Arbitration* is important to this area of law because it recognised TFR and reinforced the pre-eminence of private rights based on traditional practice in international law.

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60 Ibid.
61 *Abyei Arbitration (Final Award)* (2009) 30 RIAA 145, 407.
62 Kopela, above n 23, 195–6.
63 *SCSA (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [804].
64 *Abyei Arbitration (Final Award)* (2009) 30 RIAA 145, 408.
65 Martin Petty, 'At Strategic Shoal, China Asserts Power Through Control, and Concessions', *Reuters* (online) 10 April 2017 <http://www.reuters.com/article/us-southchinasea-china-philippines-exclu-idUSKBN17B124>.