

LEGAL ASPECT OF THE FISHERIES DISPUTE ON THE SOUTH CHINA SEA: BOUNDARIES AND FISHING ACTIVITIES*

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Abstract

After centuries of extensive high seas freedom of fishing, the introduction of the Exclusive Economic Zone (EEZ) and the adoption of the 1982 United Nations Convention on the Law of the Sea sought to provide a more effective framework for the management and conservation of marine living resources. The main focus of this article is the legal and environmental perspective of the sea, especially within the EEZ of a State. The EEZ is a reflection of the aspiration of developing countries toward economic development and their desire to gain greater control over the economic resources off their coasts, particularly their fish stocks, which in many cases were legally exploited by distant water-fleets of developed States (Lowe, 1999). Although States have already claimed their EEZ, fishing activities are still raised as issues from time to time. This article will discuss three points. First, it will outline the early development of fisheries and Coastal States' rights and duties based on jurisdiction over their exclusive zones; second, it will discuss the current maritime dispute in the South China Sea; and third, it will consider dispute resolution enforcement measures in resolving the conflict of maritime boundaries and fishing activities.

Abstrak

Selama beberapa abad, penangkapan ikan di laut lepas merupakan kebebasan yang dipraktikkan secara luas. Akan tetapi, dewasa ini konsep Zona Ekonomi Eksklusif (ZEE) dan Konvensi Hukum Laut PBB, dianggap dapat memberikan wadah yang lebih efektif untuk usaha manajemen dan konservasi terhadap sumber daya kelautan. Fokus utama dalam artikel ini adalah tinjauan hukum dan lingkungan terhadap laut, khususnya pada Zona Ekonomi Eksklusif (ZEE). ZEE adalah sebuah refleksi dari aspirasi negara-negara berkembang untuk mencapai pertumbuhan ekonomi dan untuk menguasai sumberdaya ekonomi mereka sendiri, khususnya sumberdaya perikanan yang pada praktiknya telah dieksploitasi secara ilegal oleh negara-negara lain yang mampu menggunakan armada jarak jauh untuk menangkap ikan (Lowe, 1999). Meskipun banyak negara yang telah mengklaim wilayah ZEE mereka, praktik perikanan merupakan suatu wacana yang masih menjadi perbincangan dari waktu ke waktu. Artikel ini akan membahas tiga hal terkait dengan isu-isu tersebut, pertama, perkembangan awal aktivitas perikanan dan kewajiban serta hak-hak dari negara-negara pantai, kedua, masalah kelautan yang timbul di Laut Cina Selatan, dan ketiga, penerapan penyelesaian sengketa maritim yang timbul mengenai perbatasan wilayah maritim dan kegiatan perikanan.

Keywords: fisheries, fishing, maritime fisheries, South China Sea dispute, Boundaries dispute.

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A. Early Development of Fisheries and States' Rights and Duties

The nature of marine fisheries has affected the regulation of the international law of fisheries. Fishery law was derived from the assumption that fisheries are common property natural resources, since free-swimming fish in the sea are not owned by anyone. Thus, property rights only arise when the fish are caught and thereby reduced into the possession of an individual fisherman.

In time, there arose a tendency for fish stocks to be fished above biologically optimum levels. This led to over-fishing as was the case with the Antarctic Whales and the California Sardine. Because there is an absence of regulation in marine fisheries, individual fishermen have no incentive to restrain their activities in order to prevent over-fishing. As a result, there is no guarantee that other fishermen will follow the example of an environmentally conscious peer. Consequently, an unregulated fishery will normally lead to over-fishing.

Prior to the Exclusive Economic Zone (EEZ) regime, around the year 1958 an Exclusive Fishing Zone (EFZ) regime of 200-miles was claimed by several coastal Latin American states. However, the claims were challenged by the US and disputes arose due to the failure of UNCLOS I and II to agree on the breadth of the territorial sea or to accord Coastal States any special rights of access to fish stocks beyond the territorial sea. This failure led to a wave of unilateral claims by Coastal States to twelve-mile EFZs, within which Coastal States had exclusive or priority access to the resources of the zone (Lowe, 1999). In the 1974 *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*,

such practices led the International Court of Justice to find no hesitation in pronouncing that the twelve-mile EFZ had become established as a rule of customary international law.

In 1973, documents presented at the meetings of the United Nations Committee on the Peaceful Uses of the Seabed and Ocean Floor proclaimed the right to establish 'an exclusive economic zone' with limits not exceeding 200 miles (Brownlie, 2003). Within the EEZ, rights and duties of Coastal States are regulated in Art.56(1) of the United Nations Convention on the Law of the Sea (UNCLOS). Art. 56(1) of UNCLOS stipulates that Coastal States have sovereign rights for the purpose of exploring and exploiting, conserving and managing the fish stocks within the zone. In Art.61(3), Coastal States must take into account fishing patterns, the interdependence of stocks and any generally recommended sub-regional, regional or global minimum standards. Art. 62(1) further governs that Coastal States are required to promote the objective of optimum utilization of the living resources of its EEZ. Finally, they must also establish the allowable catch for each fish stock within its EEZ as regulated in Art.61 (1).

In the *Fisheries Jurisdiction Case*, the International Court of Justice upheld the concept of preferential rights. As stated in its reports, "preferential rights of fishing in adjacent waters in favour of the Coastal State in a situation special dependence on its coastal fisheries, this preference operating in regard to other States concerned in the exploitation of the same fisheries. "This concept has survived in customary law in spite of the absence of any reference to it in

the Law of the Sea Convention of 1982 (Brownlie, 2003).

The sovereign right of States to exploit their own resources pursuant to their own environmental policies, expressed in Principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment, Principle 2 of the 1992 Rio Declaration on Environmental and Development ('Rio Declaration'), and Art.193 of UNCLOS, has long been established as a rule of international custom (Sands, 2003). However, the sovereignty of States over their natural resources is not absolute (Winter, 2009). It is qualified by treaties and customary international law relating to the conservation of natural resources and environmental protection (Boyle, 2002). Art.2 (3) UNCLOS states accordingly that "[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law". Similarly, in exercising its rights and duties within the EEZ, the Coastal State must have "due regard" to the rights and duties of other States and act in a manner compatible with the provisions of UNCLOS.

The conservation and management of fishery resources in the EEZ is the subject of Part V of UNCLOS. Furthermore, offshore fisheries management is also affected by the 1995 Agreement for the implementation of the Provisions of the UNCLOS of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks ('UN Fish Stocks Agreement'). In addition to specific treaty provisions, environmental standards for national fisheries management may emanate from other sources of international law, such as international custom or general principles of the law (Sands, 2003).

Regarding Coastal States' jurisdiction over their exclusive zones in exploiting their own natural resources, Art.73 of UNCLOS expressly rules that they have the power to take reasonable measures of enforcement of their rights and jurisdiction within the zone in accordance with both the standards of general international law and, where applicable, the provisions of the Convention of 1982.

B. Maritime Fisheries Disputes in the South China Sea

The South China Sea is surrounded by Asia's most populous and fastest growing countries. For them, the sea is not only a vital source of food but is a major component of the economy and foundation for employment for the majority of the population living along the coast of the South China Sea (Schlick, 2009).

Over 90 % of commercially important fish stocks are found within EEZs (Barnes, 2006). However, exclusive Coastal State jurisdiction has not subsequently put an end to the decline of fish stocks. In fact, it has been suggested that even the most developed States have failed in managing and conserving fisheries in their EEZs effectively (Christie, 2004).

The most direct threat to fish stocks in the South China Sea is related to unsustainable fishing operations. In recent years, fish catch has rapidly increased and the fishing resources of the South China Sea have reached a critical stage. Although basically fisheries are categorized as renewable resources, every fish stock underlies a maximum sustainable yield and any increase in fishing efforts above this level will impair the self-regenerating capacity of the species.

While less developed countries with limited naval capacity mainly rely on extensive use of resources in their coastal waters, distant fishing countries like China conduct their fishing operations in the EEZ of other countries leading to the phenomena of illegal, unreported, and unregulated fishing.

Based on one of China's claims as written in China Papers, the environmental interdependence between the States and the ecosystem of the South China Sea has long been ignored. The conversation regarding the region's fishing resources are of common interest, but given the overlapping claims and the highly political nature of the conflict, has long been placed in a minor light. The unavailability of reliable information and uncertainty regarding the sea's resources is due to ongoing disputes over sovereignty in the South China Sea, with several countries claiming sovereignty over parts of these waters for several decades (Novicio, 2003). Being the largest fishing state in the world, China has long been criticised for its unsustainable, illegal fishing practices within and outside its territorial waters (Schlick, 2009).

C. Legal Enforcement of Dispute Resolution in Fishery Conflicts and the Concept of Sustainable Fisheries Law on the South China Sea

The UNCLOS has not yet resolved ownership disputes in the South China Sea, however, multilateral, informal meetings have taken place annually since 1990 and through these, an attempt has been made by the littoral countries of the region to establish an environmental action programme for the South China Sea (Schlick, 2009).

There are several possible methods of settlements to be taken into consideration is

negotiation, especially to settle the boundary disputes that led to fisheries conflict in the South China Sea. The negotiation process should be guided by its principles and other relevant principles of international law which provides guidelines for an agreement accepted by the parties. It is emphasized that good faith must guide all phases of negotiation and those negotiations must be conducted in a spirit of fairness and effectiveness. Apart from other internationally relevant instruments, the General Assembly of the UN adopted a resolution containing the principles of international negotiation as described below (Jamine, 2007):

- a. Negotiations should be conducted in good faith;
- b. States should take due account of the importance of engaging, in an appropriate manner, in international negotiations, the States whose vital interests are directly affected by the matter in questions;
- c. The purpose and object of all negotiations must be fully compatible with the principles and norms of international law, including the provisions of the [United Nations] Charter;
- d. States should adhere to a mutually agreed framework for conducting negotiations;
- e. States should endeavour to maintain a constructive atmosphere during negotiations and to refrain from any conduct which might undermine the negotiations and their process;
- f. States should facilitate the pursuit of conclusion of negotiations by remaining focused throughout on the

main objectives of the negotiations;
and

- g. States should use their best endeavours to continue to work towards a mutually acceptable and just solution in the event of an impasse in negotiations (General Assembly, 1999).

Based on the UN General Assembly Resolution 53/101 in 1999, it is clear that the principles of maritime boundary negotiation are not different from other kinds of negotiation in diplomacy. Good faith, in particular, is regarded as the main principle and feature of any international negotiation. Maritime boundary delimitation negotiations are extremely complex and require a variety of specialized skills. The core requirements for a successful negotiation team are the presence of political, legal, and technical components (Jamine, 2007).

Once the desire for delimitation has been established, the relevant legislation put in place, and the political decision taken by the parties to seek a delimitation agreement, preparations for negotiation may get under way. It is worth pointing out that this phase is often crucial to a successful delimitation negotiation, and should not be underestimated, rushed or curtailed. The proper groundwork for negotiation of the maritime boundaries delimitation agreement must include a report, prepared on the hydrographical and technical factors likely to affect the delimitation process by a component expert (Jamine, 2007).

The delimitation agreement is the final product of boundary delimitation negotiation and the form of the final agreement must be in accordance with international rules. In this regard, the 1969 Vienna Convention on the

Law of Treaties is the framework instrument which codifies the rules on the conclusion and effects of treaties. Apart from the 1969 Vienna Convention on the Law of Treaties, parties to a negotiation should consider any effects of their own constitutional rules on treaties. In the South China Sea dispute, it is necessary for the six States who raised claims on the Spratly Islands to set up a delimitation agreement.

In the South China Sea dispute, in the view of bilateral negotiations between China and the Philippines, the role of Taiwan for any kind of successful conciliation cannot be undermined. Though there is not direct agreement on joint fishery management between China and the Philippines, a current trend towards shelving territorial disputes and cooperating in the development of fishery resources can be interpreted into other agreement of resource development (Schlick, 2009).

In situations where an agreement cannot be reached by the parties, dispute must be resolved through peaceful means. If a dispute or other related problems arise, States are required to apply Part XV of UNCLOS ("Settlement of Disputes"). In particular Art.279, which stipulates that "State Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Art.2(3), of the Charter of United Nations and to this end, shall seek a solution by the means indicated in Art.33(1), of the Charter. Then, where no settlement has been reached, Art.286 states that the dispute shall be submitted at the request of any party to the dispute to a court or tribunal having jurisdiction under the section. Art.287 defines tribunals as follows:

- a. The International Tribunal for the Law of the Sea (ITLOS) established in accordance with Annex VI;
- b. The ICJ;
- c. An arbitral tribunal constituted in accordance with Annex VII; and
- d. A special arbitral tribunal constituted in accordance with Annex VII for one or more of the categories disputes specified therein.

States are free to choose one or more these means by a written declaration to be made under Art.287 of UNCLOS and deposited with the UN Secretary General. This legal framework has been subsequently reaffirmed, and expanded upon, through several declarations and resolutions of the UN General Assembly (Jamine, 2007). This means that States are free to choose the method of dispute resolution in good faith. If they can settle disputes directly through negotiations or conciliation, whether bilaterally or regionally, they have right to do so. But if there is no such solution, they are obliged to choose one of the four possible forums outlined above. Not surprisingly, among the dispute settlement mechanisms available to States, diplomatic negotiation is the most frequently used. It is the simplest and the most common procedure, and it is successful more often than not. States not party to UNCLOS, but who are members of the UN are also covered subject to the UN Charter which also calls for the settlement of disputes through peaceful means.

Several agreements regarding conservation of fisheries resources have been made, but the concept of sustainable use of fisheries resources have developed. Older agreements refer to the conservation of

living resources or maximum sustainable yield. Later agreement speaks also of sustainable utilization or sustainable use. The idea of sustainable use is common to all of these terms. Although sustainable use represents one element of the notion of sustainable development, it is first and foremost an independent concept, whose legal status and implications must be considered separately (Boyle, 2002).

The concept of sustainable use is derived from the primary obligation of Coastal States contained in Art.61(2) UNCLOS, which sets out their obligation to the conservation of the living resources in their EEZs and has been developed to the determination of total allowable catch level as one measure in the concept. 'Proper' conservation and management measures can be understood as measures appropriate within the overall context of fishery in question, for example, as environmentally sound and consistent with international law (Donahue, 1999). The establishment of the determination of Total Allowable Catch (TAC) based on Art.61 (1) UNCLOS implicitly states that the determination of the actual TAC level in each individual case is subject to the discretion of the Coastal State. But in setting TAC levels, the Coastal State remains bound by the primary obligations to ensure that the living resources in the EEZ are not endangered by over exploitation, and to maintain populations of target species at, or restore them to sustainable levels (Christie, 2004).

D. CONCLUSION

Besides mineral and oil, another natural resource that plays an important economical aspect of a state is fisheries. UNCLOS have already set out the fisheries zone within the Exclusive Economic Zone (EEZ). The EEZ is a

reflection of the aspiration of developing countries for economic development and their desire to gain greater control over the economic resources off their coasts, particularly their fish stocks, which in many cases were legally exploited by distant water-fleets of developed States. The South China Sea dispute is one of the cases that constitute a borders dispute; it involved claims over the Spratly Island on the South China Sea which led to the maritime fisheries conflicts between China and four other ASEAN States. Based on the reports of fisheries activities, the occurrence of illegal fishing on the South China Sea has increased. These incidents were deemed to be caused by increasing demand and depleting stocks. As a consequence, fishing disputes are likely to increase in the South China Sea. A possible method of settlement involves negotiation, especially to settle the boundary disputes that led to the fisheries conflict in the South China Sea. Once the desire for delimitation has been established, the relevant legislation put in place, the political

decision must be taken by the parties to seek a delimitation agreement. This agreement is the final product of boundary delimitation negotiation. In cases where an agreement cannot be reached by the parties, dispute must be resolved through peaceful means as stated in Part XV of UNCLOS ("Settlement of Disputes"), in particular, Art.279. Regarding depleting fish stocks, some agreements regarding conservation of fisheries resources have been made, but the new concept of sustainable use of fisheries resources have developed. The concept of sustainable use is derived from the primary obligation of Coastal States contained in Art.61 (2) UNCLOS, which sets out the obligation of Coastal States with regard to the conservation of the living resources in their EEZs and has been developed to the determination of total allowable catch level as one measure in the concept to maintain populations of target species at, or restore them to sustainable levels.

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