DISPUTE RESOLUTION BETWEEN THE PHILIPPINES AND CHINA: FISHING ACTIVITIES IN THE SOUTH CHINA SEA

Yordan Gunawan¹, Dwilani Irrynta², Caterina García Segura³, Pablo Pareja Alcaraz⁴

Universitas Muhammadiyah Yogyakarta, Universitat Pompeu Fabra

Abstract:

Chinese fishing vessels and maritime militias were found in Philippine waters on April 12, 2021. Diplomatic protests raised by the Philippines have been ignored by China, which still claims most of the South China Sea, although in 2016 The Permanent Court of Arbitration at The Hague under Annex VII of the United Nations (UN) Convention on the Law of the Sea (UNCLOS), ruled that such a claim is inconsistent with international law. In the article, the authors use a normative research method and a comprehensive literature review in which sources are obtained from secondary data. The results show that China violates the tribunal ruling by infringing the sovereign rights of the Philippines’ Exclusive Economic Zone (EEZ). For the avoidance and prevention of further issues between the two states, the establishment of a Provisional Measures Zone (PMZ) may be used as a settlement.

Key words: Fisheries, Philippines, China, South China Sea

Titulo en Castellano: Resolución de conflictos entre Filipinas y China: Actividades pesqueras en el Mar del Sur de China

Resumen:

El 12 de abril de 2021 se produjo un encuentro entre barcos pesqueros y milicias marítimas chinas en aguas filipinas. Las protestas diplomáticas planteadas por Filipinas han sido ignoradas por China, que sigue reclamando la mayor parte del Mar de China Meridional, aunque en 2016 el Tribunal Permanente de Arbitraje de La Haya, en virtud del Anexo VII de la Convención de las Naciones Unidas (ONU) sobre el Derecho del Mar (CNUDM), dictaminó que dicha reclamación es incompatible con el derecho internacional. En el artículo, los autores utilizan un método de investigación normativa y una amplia revisión bibliográfica en la que las fuentes se obtienen de datos secundarios. Los resultados muestran que China viola la sentencia del tribunal al infrin gir los derechos soberanos de la Zona Económica Exclusiva (ZEE) de Filipinas. Para evitar y prevenir nuevos problemas entre los dos estados, se puede utilizar como solución el establecimiento de una Zona de Medidas Provisionales (ZMP).

Palabras Clave: Pesquerías, Filipinas, China, Mar del Sur de China.

Copyright © UNISCI, 2022.

Las opiniones expresadas en estos artículos son propias de sus autores, y no reflejan necesariamente la opinión de UNISCI. The views expressed in these articles are those of the authors, and do not necessarily reflect the views of UNISCI.

¹ Yordan Gunawan is Lecturer at the Faculty of Law, Universitas Muhammadiyah Yogyakarta, Indonesia, and PhD student at the Facultat de Dret, Universitat Pompeu Fabra, E-mail<yordangunawan@umy.ac.id>
² Dwilani Irrynta. Department of Law, Faculty of Law, Universitas Muhammadiyah Yogyakarta, Indonesia.
³ Caterina García is Full Professor in International Relations. Facultat de Dret, Universitat Pompeu Fabra, E-mail<caterina.garcia@upf.edu>
⁴ Pablo Pareja Alcaraz is Professor of International Law and International Relations. Facultat de Dret, Universitat Pompeu Fabra, E-mail<pablo.pareja@upf.edu>

DOI: http://dx.doi.org/10.31439/UNISCI-141
1. Introduction

The South China Sea is a vast territorial water with enormous potential. The sea has abundant natural resources, including fisheries, coral reefs, petroleum, and natural gas, among others. In addition, the South China Sea has a significant role as one of the main international distribution routes for trade and shipping. As a territorial water that has economic, political, and strategic value, the South China Sea has been the object of regional disputes for years. Various countries – such as China, Indonesia, Malaysia, Taiwan, the Philippines, and Vietnam – dispute land and sea areas within the South China Sea. The prospect of gaining access to such vast natural riches has undoubtedly fueled competition for control of the South China Sea among these countries. The majority of the nations surrounding the South China Sea have claimed zones of varying sizes.5

With the involvement of many countries in disputes within the maritime areas of the South China Sea, it is essential to implement and enforce an adequate legal system. Moreover, the increasing tensions in the South China Sea have also led to an increase in the number of maritime incidents involving fishing vessels, maritime militias, and other vessels, some of which have even triggered diplomatic and security tensions between China and its neighbors in the South China Sea.6 As a result, resolutions to ensure stability and promote peace in the South China Sea are crucial.

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) may be a means of resolving the South China Sea disputes, whether those are bilateral or multinational. In addition, the content and principles contained in the Convention may accommodate the resolution of disputes that occur within the South China Sea. For instance, the arbitral tribunal of the Permanent Court of Arbitration (PCA) in The Hague issued its ruling on the Philippines’ claims against China regarding a dispute between the two countries over maritime jurisdiction in the South China Sea.7 However, with China deeming the decision null and void, the question arises of whether or not the Convention can indeed resolve disputes within the South China Sea.

The dispute between China and the Philippines in the South China Sea first emerged when Chinese fishing vessels fished in the West Philippines Sea, which the Philippines claims to be part of its exclusive economic zone (EEZ). With the presence of Chinese maritime militia, the Philippines felt that its sovereignty was threatened and accordingly raised diplomatic protests. However, such protests were ignored by China. Following this, the Philippines commenced maritime drills within the West Philippines Sea, which subsequently led China to demand such activity be stopped on the grounds of respect for its sovereignty.

The territorial disputes within the South China Sea have become very heated and demand legal clarity, although it appears that a complete and timely resolution of these matters remains highly unlikely.8 The Award of the PCA (in 2016), which historically had been considered by many international relations and legal scholars to have the potential of shaping a practice of dispute settlement in the future,9 does not seem to completely resolve the disputes.

---

9 Truong, Giang Nguyen, op. cit., p. 51.
in the South China Sea, particularly those between China and the Philippines. A cooperative
management regime with which to handle the overlapping legal enforcement and jurisdictions
within the areas of the South China Sea is still lacking.\textsuperscript{10} It is a significant issue that remains in
need of resolution, especially regarding the fishery disputes between the Philippines and China,
which have produced a long-standing and seemingly endless conflict. On these grounds, the
paper is presented as an analysis of the disputes between the two countries – starting with the
history of China–Philippines relations, followed by the arbitral proceedings issued by the
Philippines to the PCA along with the rulings of the court, right up to the contemporary situation
and current events – in order to find and recommend a suitable means of settling such disputes,
namely the establishment of a fisheries management agreement.

2. Methodology

The authors use a method of normative legal research which is also known as doctrinal legal
research. The research is conducted by examining library materials or secondary data collected
from legal documentation such as statutory regulations, journals, books, news, and other
documents in order to find legal principles, rules, and doctrines that are relevant to the issues
discussed. Further, the authors use two approaches in conducting the research: the statute
approach, which examines various legal rules, and the case approach, which studies the
application of legal norms in law practice. Through the research, the authors examine the
arbitral proceedings and Awards ruled by the PCA in 2016 and analyze the 1997 Sino–Japanese
Agreement signed by China and Japan in order to find a means by which to resolve disputes
between the Philippines and China.

3. Discussion

3.1. Historical Overview

Disputes over sovereignty between countries in the South China Sea, such as over the Spratly
Islands and other islands and reefs, have been issues for thousands of years.\textsuperscript{11} Brunei and
Malaysia asserted their claims based on the continental shelf extension. Meanwhile, Vietnam
cited historical claims relating to all the Spratly Islands. China and Taiwan claimed because
they were the first to occupy the islands as early as 206 BC and then managed the islands until
AD 220. However, evidence to support these claims is sparse and disjointed. On the other hand,
the Philippines claimed most of the Spratly Islands under the rights of discovery made by a
Filipino businessman and lawyer named Tomas Cloma in 1947. At the time, he declared the
islands were ‘terra nullius’ (undiscovered territory).\textsuperscript{12}

On February 8, 1995, Filipinos found a Chinese flag flying over the Philippine-claimed
Mischief Reef, barely 200 kilometers from the Philippine Palawan Island.\textsuperscript{13} Several of the eight
Chinese vessels in the area were armed. China’s presence appeared threatening and attracted
the attention of many countries in Southeast Asia, including Brunei, Malaysia, Taiwan,
Vietnam, and of course, the Philippines. China occupied Mischief Reef by constructing
octagonal huts on stilts which Chinese officials said would be used as shelters by their

\textsuperscript{10} Hsiao, Amanda: ‘Opportunities for Fisheries Enforcement Cooperation in the South China Sea’, \textit{Marine Policy},
\textsuperscript{11} Stanley E. Mayer, \textit{Incident at Mischief Reef: Implications for the Philippines, China, and the United States},
\textsuperscript{12} \textit{Ibid.}, p. 3.
\textsuperscript{13} \textit{Ibid.}, p. 1.
fishermen; this raised tensions and concerns across the South China Sea. Following this, the Philippines raised a protest through the Association of Southeast Asian Nations.\(^\text{15}\)

Further, in 1997, the Philippine navy intercepted two Chinese vessels near Scarborough Shoal, the uninhabited reef known in China as Huangyan Island, which is 230 kilometers (145 miles) off the Philippines and about 1,000 kilometers (600 miles) from China.\(^\text{16}\) The captains of the Chinese vessels protested the action of the Philippine navy, stating that China considered Scarborough Shoal as part of its territory. However, the Philippines rejected the claim, which was followed by the withdrawal of the Chinese vessels to avoid escalating tensions. Then, in mid-May, a group of Filipino congressmen sailed and planted the Philippine flag on the reef at Scarborough Shoal.\(^\text{17}\) In subsequent years, the Philippines often detained Chinese fishers for allegedly fishing illegally in the area: four Chinese fishermen were killed, while three were injured.\(^\text{18}\) In 2006 a Filipino armed fishing vessel attacked a Chinese fishing vessel.

In response to the applications by Malaysia and Vietnam regarding recognition of the continental shelf extension, a ‘nine-dash line’ map was submitted by China to the United Nations (UN) in 2009. The claim made by China was to “indisputable sovereignty over the islands in the South China Sea and the adjacent waters.”\(^\text{19}\) Several countries protested, including Indonesia, Malaysia, the Philippines, and Vietnam. China’s historic rights within the so-called ‘nine-dash line’ led to complexities regarding the dispute resolution process.\(^\text{20}\)

In the same year, the Philippines passed a baselines law regarding identification of its archipelagic baselines. Although the law did not consider the Kalayaan and Scarborough Shoals as part of Philippine territory, they fell into the ambiguous category of “regime of islands under the Republic of the Philippines.”\(^\text{21}\) China considered the law to be illegal, and later the Chinese Embassy raised a protest in Manila. Furthermore, the Philippine plans to extract oil from the Reed Bank, which is 100 kilometers west of Palawan and well within the Philippine EEZ, were also opposed by China.\(^\text{22}\) In other words, various economic activities that were carried out unilaterally in the disputed area were opposed by China.

In early 2011, two Chinese patrol boats confronted a survey ship belonging to the Philippine Department of Energy while exploring oil and gas at the Reed Bank, 150 kilometers east of the Spratly Islands and 250 kilometers west of the Philippine island Palawan.\(^\text{23}\) According to Philippine sources, the two Chinese patrol boats ordered the Philippine ship to leave the area as they maneuvered dangerously close to it twice.\(^\text{24}\) In response to the action taken by the two Chinese patrol boats, the unarmed Filipino survey ship requested the assistance of two reconnaissance aircraft from the Philippine air force. However, the Chinese boats had

\(^\text{15}\) Ibid.
\(^\text{16}\) Ibid.
\(^\text{18}\) Zhang, Hongzhou and Bateman, Sam, op.cit., p. 292.
\(^\text{19}\) The Associated Press, op.. cit.
\(^\text{22}\) Ibid.
already left the area before the planes arrived. Nevertheless, the Philippines raised a diplomatic protest over the actions of the Chinese patrol boats.

Tensions between China and the Philippines resumed when a Philippine air force surveillance plane found eight Chinese fishing vessels around Scarborough Shoal in April 2012. The Philippine president at the time immediately ordered the navy to enhance its monitoring activities and enforce its laws concerning fisheries and marine environmental protection. After discovering a large amount of coral, giant clams, and sharks that had allegedly been collected illegally, the Philippines attempted to capture some Chinese fishing boats. However, two Chinese marine surveillance vessels arrived and positioned themselves in front of the Philippine warships, thereby preventing capture of the fishing boats. Chinese marine surveillance vessels also informed that Philippine ships should not enter the territory of Chinese waters. In other words, China opposed the Philippines’ territorial rights to the shoal, which is only 224 kilometers from the province of Zambales in Luzon, and well within the Philippines’ EEZ, which extends outwardly up to 200 nautical miles.

On January 22, 2013, the Philippines officially notified China that it had instituted arbitral proceedings against China under Annex VII of the 1982 UNCLOS. Since the Philippines realized that it was outside the scope of UNCLOS, they did not seek the PCA’s determination over whether China or the Philippines enjoys sovereignty over the disputed islands that both countries claim. In addition, the Philippines did not seek the court to delimit maritime boundaries over the islands in question, on the grounds that China had raised a clear statement to refuse compulsory dispute resolution on such matters. Nonetheless, the action that the Philippines took angered China. Consequently, China affirmed its position of neither accepting nor participating in the arbitral proceedings.

In February 2014, the Philippine government protested the action at Scarborough Shoal taken by a Chinese government vessel, which had fired a water cannon on the grounds of driving away Filipino fishers. However, China ignored the protest and referred to its sovereignty as “indisputable.” Furthermore, eleven Chinese fishermen from Tanmen, who were suspected of poaching hundreds of sea turtles, were arrested by Philippine authorities at Half Moon Shoal, a disputed territory in the Spratly Islands, in May 2014. The Filipino fishermen collected the sea turtles and then sold them to the Tanmen fishermen. Five months later, another group of Tanmen fishermen, who acquired twenty-four sea turtles from the Filipino fishermen at Half Moon Shoal, were caught by the China coast guard (CCG).

In order to strengthen the statement rejecting the arbitration process in The Hague, China issued a position paper in December 2014. This was done because the arbitration panel did not have jurisdiction over the case, as it concerned issues of sovereignty and boundary definition, which the UN Convention does not cover. Moreover, the position paper emphasized that both countries had agreed to only carrying out negotiations between

---

26 Ibid.
29 The Associated Press, *op. cit.*
30 Zhang, Hongzhou and Bateman, Sam, *op.cit.*, pp. 298-299.
31 The Associated Press, *op. cit.*
themselves in resolving their dispute, as stipulated in the bilateral agreements and the Declaration on the Conduct of Parties in the South China Sea. In October 2015, the panel ruled that at least seven of the fifteen claims filed by the Philippines fell within its jurisdiction. However, China decided not to participate in the hearing, which took place in November.

Without prejudice to the question of sovereignty over Scarborough Shoal, the PCA held that the traditional fishing rights, which the Filipino fishermen around Scarborough Shoal are entitled to, had been interfered with by China. In addition, the sovereign rights of the Philippines in its EEZ had also been violated by China. By constructing artificial islands at seven features in the Spratly Islands and carrying out illegal fishing activity, and by harvesting marine resources, China had violated the obligations constituted by the Convention to protect the marine environment. Further, the historical rights of the nine-dash line claimed by China within the waters of the South China Sea were also considered void. The Philippines welcomed the legally binding decision. On the other hand, China, which refused to take part in the tribunal, stated that it would not comply.

3.2. Current Situation

In early March 2021, the National Task Force for the West Philippine Sea (NTF–WPS) discovered more than 200 Chinese fishing vessels on Whitsun Reef, also known as Julian Felipe Reef, which is located at the heart of the Spratly Islands and is the most significant shallow coral formation in the Union Bank. The Chinese vessels were alleged to have been anchored there since December 2020. This dispute could lead to maritime insecurity, which appears to be a serious issue. It can be examined using two models: traditional security and non-traditional security. Traditional security dangers involving state actors have given rise to the international community increasingly focusing their attention on non-traditional issues. Although these vessels did not appear to engage in fishing activity, their presence, which was twice the size of the Philippine fishing fleet, raised concerns because they had interfered with the sovereignty of the Philippine EEZ.

In addition, these vessels were also considered to be very dangerous because they consisted of fishing vessels and militias. This allegation was based on a report made by the NTF–WPS, which observed that maritime militias crewed the Chinese fishing vessels. These militias operated civilian vessels, which are usually engaged in commercial fishing; however, they may also conduct maritime surveillance and support naval operations. In addition, the Philippines also alleged that the presence of these vessels “may be a prelude to occupation and building of a naval base.” Accordingly, the Philippine minister of foreign affairs protested to the Chinese Embassy on March 21, 2021.

However, the Chinese Embassy rejected the protests, stating that the vessels referred to were only fishing vessels, not militia vessels as alleged by the Philippines, and had been positioned there to avoid strong winds due to the bad maritime situation. In addition, the

33 Ibid.
37 Ibid.
38 Chavez, op.cit.
presence of these Chinese vessels at Whitsun Reef, which is part of the Spratly Islands, cannot be considered to have interfered with the sovereignty of the Philippine EEZ because the area has been, and still is, claimed by China in the nine-dash line, even though the decision of the PCA in 2016 nullified this claim. Nevertheless, the statements of the Chinese Embassy were refuted by the Philippine minister of national defense, who observed that the Chinese vessels had remained at Whitsun Reef even though the weather had improved.

The United States, a security ally of the Philippines, provided support by sending an aircraft carrier and assault ship to Whitsun Reef, and escorts of cruisers, destroyers, and submarines. As another challenge to China, the United States coordinated with the Philippines to conduct sovereignty patrols by deploying its corvette and missile frigates. Such actions succeeded as the Philippine coast guard (PCG) discovered that most Chinese vessels had to leave the area. However, there were several vessels which scattered to other reefs. Meanwhile, six of them were tied together in a lagoon on Whitsun Reef.39

The six Chinese fishing vessels remained docked at the reef, as witnessed by subsequent patrols that were conducted by the PCG about two weeks apart. Such a situation raised concerns once again for the Philippines. It is usually unknown for fishing vessels to linger for weeks in one place, especially when there is perfect weather for fishing elsewhere, as their inactivity would cause a reduction in income and incur significant economic costs. Therefore, the suspicion arose that the vessels had indeed been assigned to remain there.

After China rejected the Philippines’ request for them to move their vessels away from the Philippines’ territorial waters, the Department of Foreign Affairs once again lodged a diplomatic protest. Due to the continued presence of the Chinese vessels over the next two days, the PCG and the Bureau of Fisheries and Aquatic Resources began conducting maritime drills in the disputed areas to secure the Philippines’ maritime jurisdiction. These drills included navigation, small boat operations, maintenance, and logistical operations.40 Further, the Philippines increased the intensity of the drills by deploying eight ships that carried maritime specialists, lawyers, and medical workers to Bajo De Masinloc and Pag-asa Island. Afterward, these eight vessels were also used to conduct maritime drills in the Batanes group of islands, Benham Rise, and in the southern and eastern portions of the Philippines.41

In response to the action taken by the Philippines regarding maritime drills in the West Philippine Sea, China’s Ministry of Foreign Affairs called on the Philippines to stop any actions that would complicate the situation in the disputed areas of the South China Sea. In addition, the Philippines was also asked to respect China’s sovereignty rights and interests. Subsequently, the Ministry reaffirmed that China has sovereignty over the Spratly Islands (or Nansha Islands) and Pag-asa Island, and Scarborough Shoal, which the Chinese refer to as Zhongye Island and Huangyan Island,42 and are within the jurisdiction of Chinese waters. However, the Philippine foreign minister and several senators again refuted such a claim since the PCA had already confirmed that such areas fall under the sovereign rights of the Philippines because they are part of its EEZ.

41 Ibid.
In addition, the Philippine foreign minister exacerbated the situation by using profanity on one of his social media accounts when asking China to move their vessels away from the Philippine waters in the South China Sea. In response, China asked the Philippines to respect and appreciate its country and to adhere to the basic ethics of diplomacy so that mutual trust would not be damaged. In a televised remark in early May, the Philippine president, Rodrigo Duterte, expressed his aggravation. He stated that being rude and disrespectful is not helpful when facing a conflict. Although both countries insist on not compromising on their claim to sovereignty in the South China Sea, Duterte said, the Philippines still owes thanks to China for donating hundreds of thousands of doses of the COVID-19 vaccine.

Since Rodrigo Duterte took office as president of the Philippines in 2016, the country has lodged more than seventy diplomatic protests against China over fisheries and other related matters within the South China Sea. It seemed those protests were not being taken seriously by China as the conflicts that occurred between the two countries continued. When Rodrigo Duterte visited China in October 2016 to seek a solution, he made a verbal fishing agreement with the Chinese president, Xi Jinping, who has advocated greater bilateral cooperation in several areas, including fisheries. Nevertheless, the presidential spokesperson and the national security adviser of the Philippines denied the verbal agreement, stating that there was no such agreement between the two countries but only a verbal discussion between the two leaders in a meeting. Although it was noted as a verbal agreement by the Philippine presidential legal adviser that would remain legally enforceable and binding as long as there was mutual consent, under his presidency Duterte stated that no country is allowed to carry out unlawful activities within the Philippine waters, whether fishing, military training, or other activities.

3.3. Analysis of the 2016 Tribunal at The Hague

Due to Philippine concerns regarding access to fisheries, oil and gas resources, security issues, the modernization of the Chinese military, and a sharp increase in unilateral actions taken by China over recent years, and after the efforts toward bilateral resolution had failed, the Philippines brought the conflict with China to a tribunal at The Hague through Annex VII of the UNCLOS dispute resolution procedure regarding violations of maritime rights in the Philippine EEZ within the South China Sea in January 2013. In addition, the Philippines also challenged other actions that had been taken by China, such as their seizing control over Scarborough Shoal, the blocking of Philippine fishing and energy exploration activities, and the dangerous and damaging practices of Chinese fishers capturing protected species and harvesting live corals. Because the issues related to sovereignty seemed challenging to resolve, along with China’s intransigence, and the fact that almost all the claims involved a lack of clarity, mistrust, and other geopolitical factors, the Philippines believed that bringing China under compulsory arbitration would be an appropriate means of at least resolving the issues related to maritime rights between the two countries.

Three years later, in 2016, a five-judge tribunal of the PCA in The Hague released the Award for the Philippine claims regarding maritime conflicts and activities carried out by China in the disputed area. Although China officially and publicly announced its refusal of and non-participation in the arbitration process, the court accepted jurisdiction over the Philippine claims and held a final and binding ruling. The Philippines, which had suffered high costs in security, as well as in their diplomatic, and to a lesser extent even economic relations with China, was

---

44 Seemann, op. cit., p. 9.
45 Williams, op. cit.
ultimately justified in its decision to seek arbitration as a peaceful approach to conflict resolution as the ruling turned out to be in favor of the Philippines.  

The claims of the Philippines can be divided into four general categories. The first and most disputed claim was over the nine-dash line that covered almost all areas within the South China Sea. Over the years, China has claimed historic sovereign rights and several other rights over the area within the line. However, China has never clarified whether the line represents a claim to the islands and their adjacent waters or a boundary of national sovereignty over all the enclosed waters.  

As UNCLOS has regulated the rights and obligations of each State Party regarding waters, seabed, and maritime features in the South China Sea, the Philippines challenged China’s claim since it was considered contrary to the Convention. The PCA confirmed that the Convention had indeed comprehensively regulated the rights of each State Party to maritime areas within the South China Sea. Thus, the nine-dash line drawn unilaterally by China has no legal basis and is not recognized by international law. Moreover, China has also ratified and adopted the Convention since 1996. Consequently, China’s historical right would be null if it does not follow UNCLOS. Therefore, the claim of China regarding the nine-dash line is invalid.

Second, the Philippines sought the PCA to determine whether certain land features in the Spratly Islands claimed by both countries have a territorial sea of 12 nautical miles and an EEZ of up to 200 nautical miles. China claimed that various land features in the Spratly Islands, which are sufficiently characterized as shoals or reefs, are considered to be entitled to a territorial sea and an EEZ, leading to overlapping territorial claims between countries. Meanwhile, the Philippines argued that shoals and coral reefs do not have an EEZ, especially low tide elevations (LTEs) or submerged banks. Under UNCLOS, a ‘rock’ is entitled to a territorial sea of not more than 12 nautical miles, but not an EEZ. Meanwhile, neither an LTE nor a submerged bank are entitled to such rights. Therefore, the PCA ruled that certain land features, such as Mischief Reef and Second Thomas Shoal, are within the Philippine EEZ and do not overlap with China’s territories.

Third, actions taken by China, such as preventing Philippine fishing activity, damaging the marine environment, and operating dangerous law-enforcement vessels around Scarborough Shoal, were considered to have violated UNCLOS and interfered with the Philippines’ sovereign rights in its EEZ. Therefore, the Philippines requested a declaration from the PCA over those violations. The Court, then, ruled that China had indeed violated the Philippines’ sovereign rights in its EEZ.

The PCA considered China’s actions in the disputed area and found that China had violated the sovereign rights of the Philippines in its EEZ by interfering with Philippine oil exploration at Reed Bank. China had also interfered with Philippine fishing activity since it failed to prevent its fishermen from fishing on Mischief Reef and Second Thomas Shoal. In addition, China also prohibited Philippine vessels from conducting fishing activity within the Philippine EEZ. Meanwhile, regarding fishing at Scarborough Shoal, both countries have traditional fishing rights that UNCLOS does not negate. Thus, China’s action to prevent Filipino fishers from fishing near Scarborough Shoal in May 2012 violated Philippine rights. Subsequently, Chinese law-enforcement vessels illegally created a severe collision risk on two

---

46 Seemann, Loc. cit.
47 Williams, Loc. cit.
occasions at Scarborough Shoal, which is also considered a violation of maritime safety obligations.

Furthermore, China also committed violations by building artificial islands or installations on seven features in the Spratly Islands without the Philippines’ permission. Based on a public statement issued by China, the construction was not military activity; thus, it was not exempt from jurisdiction under the Convention. In building these constructions, China caused severe damage to the coral reef environment, and has thus violated its obligations under the Convention to protect the marine environment. In addition, China has also failed to stop its citizens from harvesting and capturing turtles, corals, giant clams, and other marine resources that are threatened with extinction, causing great harm to the environment.

Fourth, during the arbitration process between the two countries, China conducted land reclamation and created artificial islands in the Spratly Islands. In other words, China exacerbated the situation and extended the dispute by conducting activities related to dredging, artificial island-building, and construction. By building a large island on Mischief Reef and an LTE within the Philippine EEZ, China has caused irreparable damage to the marine ecosystem and permanently destroyed evidence of the natural conditions within the area in question. In addition, China has also illegally interfered with the Philippines’ navigational rights near Scarborough Shoal, prevented the rotation and supply of Filippino personnel stationed at the Second Thomas Shoal, and endangered the health of the personnel there. Therefore, although UNCLOS has no jurisdiction over disputes involving military activities, such as the dispute in the Second Thomas Shoal, the PCA found that China has extended the dispute through large-scale land reclamation and construction of artificial islands in the Philippines EEZ.

Although the ruling by the PCA is final and binding, it has drawn criticism from public international law experts on the matters related to the applicable substantive and procedural rules. There are substantial grounds for questioning the validity of the main findings of the Court regarding the jurisdiction and merits of the Award. For instance, substantial doubts were raised regarding China’s claims relating to maritime rights and the territorial title of land and maritime areas in the South China Sea, since these matters are not within the jurisdiction of the Convention to comprehensively resolve international disputes. Furthermore, China’s historical claim to the nine-dash line in the South China Sea is also highly questionable because of the difference between ‘historic titles’ and ‘historic rights’: under Article 298, the former do not fall under the jurisdiction of the Convention. However, the observations related to these two matters are considered to have no apparent basis in international law. Even if the Court is correct in citing Article 289 that ‘historic titles’ form only a tiny part of ‘historic rights,’ the Court has abundant evidence that China does claim ‘historic titles’ against the nine-dash line in the form of sovereignty claims.

Furthermore, the Court could equally have concluded that Mischief Reef is a ‘high tide feature’; under Article 121(3) such an area is at least entitled to the territorial sea. If the Court had reached such a conclusion, then some of the Philippines’ claims regarding Mischief Reef and its territorial sea would not have fallen under the jurisdiction of the Court. In addition, according to the National Institute for South China Sea Studies, the decision taken by the Court not to analyze several high tide features in the Spratly Islands, such as Loaita Island, Nanshan Island, and Sin Cowe Island is considered an inappropriate shortcut by many public international law experts.

49 Williams, op. cit.
51 Ibid., p. 152.
international law experts. By not analyzing those features, the Court has failed to assert its jurisdiction, which consequently violated its obligation under Article 9 of Annex VII.

In addition, the Court is also considered to have no jurisdiction over several actions taken by China in the South China Sea, which the Philippines claim. The PCA was also deemed to have misinterpreted Article 298(1)(b) regarding military exemptions. Furthermore, many specific merits of the findings of the Court related to isolated incidents or were based on limited evidence. Therefore, the action of a Chinese law-enforcement vessel at Scarborough Shoal, which was claimed by the Philippines to be a violation of Article 94, does not appear to be a true violation, since the shoal is constituted as a territorial sea while Article 94 is not applicable to areas of a territorial sea.52

3.4. Fisheries Management Agreement as a Dispute Resolution

As discussed above, the dispute between the Philippines and China over fisheries and other related matters in the South China Sea is an issue that has arisen over decades and persists to the present day. Various measures have been taken to resolve the dispute in question between the two countries, from lodging diplomatic protests about each other to bringing the dispute to the arbitration tribunal of the PCA in The Hague. Even so, the dispute between the Philippines and China continues. Therefore, the question arises of whether it is feasible to establish a fisheries management agreement to resolve the dispute.

In general, it can be said that a fisheries management agreement is a form of maritime law enforcement aimed at preventing incidents at sea that usually involve fishing vessels. Because a fisheries management regime is absent in the South China Sea, the territorial waters hosting abundant natural resources often experience incidents between two or more countries. Territorial disputes in the South China Sea, which have occurred between various countries, have concerned matters related to the security of the marine environment. In addition, the stock of fish keeps decreasing along with the destruction of the maritime environment. If a fisheries management agreement were to be presented amid the overlapping claims within the South China Sea, responsibilities could be divided between the relevant maritime law enforcement agencies (MLEAs). Subsequently, a set of standard enforcement practices could be set up through the agreement.53

Despite the merits of a fisheries management agreement that could very likely resolve disputes within the South China Sea, there are, of course, various obstacles that need to be overcome. Many countries are involved in disputes in the South China Sea, both countries in Asia, and also external parties, such as the United States and Australia54. In addition, the disputes that occur are a series of multiple conflicts involving different countries in each conflict. Overlapping territorial claims where it is not even ascertained whether the claim in question is lawful or not makes the situation even more complicated. Moreover, these claims are not based on the same interpretation of UNCLOS. For instance, the historical claim made by China includes all coral reefs within the nine-dash line and rights to additional waters.55

In the case of the China–Philippines fisheries dispute, the Philippines needs to push for a significant and effective agreement while additionally seeking to develop regional cooperation with China to ease maritime tensions and settle the long-standing dispute. However, according to a Philippine maritime law expert, Jay Batongbacal, the Philippines faces

52 Ibid., p. 153.
53 Hsiao, op. cit.
legal limits in concluding agreements under its domestic law, such as the 1987 Constitution of the Republic of the Philippines, which prohibits joint development within its EEZ with another sovereign state. In addition, Presidential Decree No. 8770 requires the Philippine government to have full authority over any exploration contract. On such grounds, Antonio Contreras, a political scientist at De La Salle University, Manila, argues that such an agreement would not be equal for both countries, but would rather consist of the Philippines giving China permission to conduct fishing activities within its EEZ.

Given these obstacles, the regulation of fisheries enforcement in the South China Sea area must be temporary and without prejudice to sovereignty claims because the determination of maritime boundaries cannot be determined within a short time. Various cooperation mechanisms that are effective and sufficient in reducing and preventing the conflicts at sea in question – such as the development of cooperative platforms for maritime law enforcement agencies, the adoption of a set of operational standards for MLEAs, and the establishment of fisheries and environmental management enforcement zones – have been recommended by experts. Accordingly, a Provisional Measures Zone (PMZ) may suit dispute resolution between the Philippines and China.

The PMZ was first formulated in the 1997 Sino–Japanese Fisheries Agreement. With overlapping EEZs between China and Japan, the PMZ is drawn 52 miles from the coasts of each of the two countries. Under the agreement, provisions related to managing fisheries and other related matters within the PMZ are regulated by a committee known as the Japan–China Joint Fisheries Committee. The formation of the committee itself and all the decisions made by the committee are based on consent from both countries. For instance, the committee determines the number of fish caught, the variety of marine species that may or may not be harvested, and the terms and methods for fishing and harvesting. In addition, the implementation of the agreement must be constantly reviewed and supervised by the committee.

Furthermore, each of the Chinese and Japanese fishing vessels in the PMZ is subject only to its own country’s jurisdiction. Accordingly, each state is obliged to take necessary measures and enforcement only in respect of its own citizens. In other words, neither China nor Japan can take action against citizens or ships that are not their own. In the case of a violation committed by one country, the law enforcers of the other country may notify the authorities of the country that committed the violation. Then, the law enforcers in question must take appropriate measures against the violation.

In fisheries disputes that occur in the context of overlapping territorial claims, addressing territorial boundary tensions by joint enforcement is a fundamental measure for alleviating conflicts between countries. A provisional fishery agreement that clearly recognizes territorial disputes is very important since the overlapping zone claimed by the disputed countries can be managed cooperatively for the interests of each party for the purpose of the economy, environmental protection, welfare, and scientific development. Russia and Norway, for instance, exchange observers on each other’s control vessels and coordinate satellite

---

58 Jennings, op. cit.
59 Hsiao, op.cit., p. 3.
60 Ibid., p. 2.
surveillance systems through the Joint Fisheries Commission, which was established in 1995\textsuperscript{61} and has contributed to the emergence of a coordinated response to fishing activities.

Similarly, Taiwan and Japan concluded a provisional fishery agreement in 2013 that classified the areas surrounding the Senkaku Islands as a non-specific zone,\textsuperscript{62} thereby considering territorial sovereignty as a distinct issue; the main principle of this is that natural resources may be shared although sovereignty cannot be segmented or ceded. The concept of a PMZ is also applied under the 2013 Taiwan-Japan Fisheries Agreement, which divided the overclaiming claim area into two zones: in other words, waters where the other party’s laws are not applicable and a special cooperation zone. As a result, the provisional fishery agreement reduced tensions and helped to promote stability in the East China Sea, and fishermen have avoided potential arrest or penalties imposed by the claims of the opposing country.

Thus, it seems feasible that the PMZ, which was established under the 1997 Sino–Japanese Fisheries Agreement, could be applied to resolve the maritime dispute between the Philippines and China, considering that the two countries are unwilling to relinquish their overlapping territorial claims. Although conditions between China and Japan differ in comparison with those between the Philippines and China, the provisions related to the PMZ can be adjusted and mutually agreed upon by establishing a fisheries management agreement and forming a Joint Fisheries Committee. In addition, such measures may also be applied to resolve similar disputes pertaining to overlapping claims between other countries (such as Indonesia, Vietnam, Malaysia, and Brunei) that occur within the South China Sea. In fact, all claimants can establish a provisional agreement through a multinational treaty. Moreover, such an agreement is in accordance with Article 74(3) of UNCLOS, which urges all disputed countries to enter into provisional agreements in an effort to reach understanding and cooperation.

4. Conclusion

The maritime dispute between the Philippines and China over their territorial claims within the South China Sea has continued for two decades. Even though the Permanent Court of Arbitration (PCA) in The Hague has ruled an Award on the Philippines’ claims regarding its sovereign rights and EEZ, China refused the ruling and insisted that its claim related to historical rights is valid, although it is contrary to UNCLOS. In addition, the Award issued by the Court has drawn criticism and controversy, mainly questioning the jurisdiction of UNCLOS. Since the dispute between the two countries is seemingly endless, the authors find that the Philippines and China may take a measure by concluding a fisheries management agreement that provides for a middle ground known as a provisional measures zone (PMZ) as a means of resolving their dispute. With the presence of a PMZ, the Philippines and China can establish a common area for fishing that lies in the overlapping area between the Philippines’ EEZ and the area of China’s historical claims.


Bibliography


