

# Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration

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## I. Introduction

The contemporary relevance of historic titles and rights has been questioned following the adoption of the Law of the Sea Convention (LOSC),<sup>1</sup> the resulting endorsement of a significant expansion of the jurisdiction of the coastal state, and the consolidation of the jurisdictional regime of maritime zones. Historic titles and historic rights have been a complicated issue in the law of the sea both conceptually and practically. These concepts have attracted attention in academic literature mainly in papers discussing the validity of specific claims.<sup>2</sup> Few studies deal with the issue in a comprehensive way,<sup>3</sup> the most recent is by Clive Symmons *Historic Waters in the Law of the Sea: A Modern Reappraisal*.<sup>4</sup> On the other hand, historic claims have not been addressed comprehensively by international courts and tribunals. They have been invoked by litigants within the framework of maritime delimitation, and courts and tribunals have examined their validity and

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<sup>1</sup> U.N. Convention on the Law of the Sea, 1833 *U.N.T.S.* 397.

<sup>2</sup> See, for example: F. Francioni, "The Status of the Gulf of Sirte in International Law," 11 *Syracuse Journal of International Law and Commerce* (1984), pp. 311-326; D. Pharand, "Historic waters in international law with special reference to the Arctic," (1971) 21 *University of Toronto Law Journal*, p. 1; C. Symmons, "Historic waters and historic rights in the South China Sea: A critical appraisal" in S. Wu and M. Valencia (eds.), *UN Convention on the Law of the Sea and the South China Sea*, (Routledge, 2015), pp. 191-238; K. Zou, "Historic rights in the South China Sea" *ibid*, pp. 239-150; K. Zou, "Historic rights in international law and in China's practice," 32 *Ocean Development and International Law* (2001), pp. 149-168; and F. Dupuy and P.-M. Dupuy, "A legal analysis of China's historic rights claim in the South China Sea" 107 *American Journal of International Law* (2013), pp. 124-141.

<sup>3</sup> See, however, Y.Z. Blum, *Historic Titles in International Law* (Nijhoff, 1965); M. Wesley Clark, *Historic Bays and Waters: A Regime of Recent Beginnings and Continued Usage* (Oceana, 1994); A. Gioia "Historic Titles," *Max Planck Encyclopaedia of Public International Law* (2013); and Study prepared by the U.N. Secretariat, "Juridical Regime of Historic Waters, including Historic Bays" Doc. A/CN.4/143, (March 1962).

<sup>4</sup> C. Symmons, *Historic Waters in the Law of the Sea: A Modern Reappraisal* (Brill/M.Nijhoff, 2008).

relevance to the maritime boundary in this respect. Courts in the United States have also addressed the validity of historic waters claims by states vis-à-vis the federal government.<sup>5</sup> A number of issues are uncertain: the definition and scope of historic waters, titles and rights; the contemporary relevance of such claims in the light of the LOSC; and the conditions and requirements for their establishment.

The *South China Sea Arbitration*<sup>6</sup> between the Philippines and China raised important issues regarding the contemporary relevance and validity of historic claims. The Tribunal made some interesting pronouncements with respect to a crucial aspect related to the relationship between the LOSC and historic claims. This is the first time that a tribunal has contributed with such clarity to the issue of historic rights. However, as will be set out in this article, the reasoning and conclusions reached by the Tribunal are not without problems.

The aim of this article is to examine the concept of historic rights and titles in the law of the sea in the light of the *South China Sea Arbitration* and to assess the contribution of the *Awards* to the clarification of these concepts. The article first assesses the approach of the Tribunal with respect to the relationship between the LOSC and historic claims in general, and then it identifies certain types of historic rights and evaluates their contemporary relevance with reference to the jurisprudence of international courts and tribunals. It further examines the requirements for the establishment of historic rights with a focus on the Chinese historic claim as identified and discussed by the Tribunal, and finally it assesses the scope and content of the optional exception to the compulsory jurisdiction in article 298(1)(a)(i) LOSC regarding disputes involving historic titles and the decision of the Tribunal on jurisdiction.

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<sup>5</sup> See for example *Alaska v United States* 545 U.S. 75 (2005).

<sup>6</sup> *The Republic of the Philippines v the People's Republic of China, PCA Case N° 2013-19 in the matter of the South China Arbitration*, Award of 12 July 2016 (Merits), available on the Permanent Court of Arbitration website at <[www.pca-cpa.org](http://www.pca-cpa.org)>.

## II. Overview of the *South China Sea Arbitration Regarding Historic Rights and the Decision*

In its notification and statement of claim, the Philippines asked the Tribunal to:

declare that the parties' respective rights and obligations in regard to the waters, seabed and maritime features of the South China Sea are governed by UNCLOS, and that China's claims based on its 'nine dash line' are inconsistent with the Convention and therefore invalid.<sup>7</sup>

In its memorial, the Philippines clarified further its request:

1. China's maritime entitlements in the South China Sea, like those of the Philippines may not extend beyond those permitted by the LOSC.
2. China's claims to sovereign rights and jurisdictions and to historic rights with respect to the maritime areas of the South China Sea encompassed by the so-called nine-dash line are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under LOSC.<sup>8</sup>

In the *Jurisdiction Award*, the Tribunal clarified certain aspect related to the existence and scope of the dispute concerning historic rights. With respect to whether the dispute concerned the interpretation and application of the Convention as required by article 297, the Tribunal found that:

this is accordingly not a dispute about the existence of specific historic rights, but rather a dispute about historic rights in the framework of the Convention. A dispute concerning the interaction of the Convention with another instrument or body of law, including the question of whether rights arising under another body of law were or were not preserved by the Convention, is unequivocally a dispute concerning the interpretation and application of the Convention.<sup>9</sup>

The Tribunal also found that "the existence of a dispute over these issues is not diminished by the fact that China has not clarified the meaning of the nine-dash line or elaborated on its claim to

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<sup>7</sup> *Ibid.*, para. 28.

<sup>8</sup> *The Republic of the Philippines v the People's Republic of China, PCA Case N° 2013-19 in the matter of the South China Arbitration, Award on Jurisdiction and Admissibility* of 29 October 2015, available on the PCA website, *supra* note 6, para. 101.

<sup>9</sup> *Ibid.*, para 168.

historic rights.”<sup>10</sup> The Tribunal, however, linked its jurisdictional competence to deal with this issue with the merits of the case and especially the nature of China’s historic claim, and reserved a decision on its jurisdiction for the merits.<sup>11</sup>

In its *Award* on the merits, the Tribunal started by assessing whether it had jurisdiction to address the Philippines’ substantive submissions. For this, the Tribunal examined the nature and scope of China’s claim to historic rights while noting that: “China has never expressly clarified the nature or scope of its claimed historic rights. Nor has it ever clarified its understanding of the meaning of the ‘nine-dash line.’”<sup>12</sup> It examined China’s legislation, activities and official statements<sup>13</sup> and particularly stressed “China’s commitment to respect both freedom of navigation and overflight.”<sup>14</sup> It concluded that:

on the basis of China’s conduct, the Tribunal understands that China claims rights to the living and non-living resources within the ‘nine-dash line’, but (apart from the territorial sea generated by any islands) does not consider that those waters form part of its territorial sea or internal waters.<sup>15</sup>

These were found to be historic rights short of sovereignty. Different views have been expressed in the academic literature with respect to the scope of the Chinese historic claim and its link to the nine-dash line<sup>16</sup> ranging from the lack of any historic claim over the waters<sup>17</sup> to an historic claim to a EEZ/continental shelf “as ‘historic rights with tempered sovereignty’”.<sup>18</sup> The conclusion of the

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<sup>10</sup> *Ibid.*, para. 167.

<sup>11</sup> *Ibid.*, para. 398.

<sup>12</sup> *Ibid.*, para. 160 and *South China Sea Arbitration Award (Merits)*, supra note 6, para. 180.

<sup>13</sup> *South China Sea Arbitration Award (Merits)*, supra note 6, paras. 207-214.

<sup>14</sup> *Ibid.*, para. 213. See also reference to a statement of the Chinese Ministry of Foreign Affairs regarding an “insightful formulation by China of its claims in the South China Sea”, para. 206, footnote 199.

<sup>15</sup> *Ibid.*, para. 214.

<sup>16</sup> See an overview in L. Jinming and L. Dexia, “The dotted line on the Chinese map of the South China Sea: a note” 34 *Ocean Development and International Law* (2003), p. 291

<sup>17</sup> M. Sheng-Ti Gau, “Issues of jurisdiction in cases of default of appearance” in S. Talmon and B.B. Jia, (eds.) *The South China Sea Arbitration: A Chinese Perspective* (Hart, 2014), pp. 88-89.

<sup>18</sup> Zou, “Historic Rights in International Law,” supra note 2, p. 160: “since it is referable to the EEZ and continental shelf regimes, such a claim involves sovereign rights and jurisdiction but not full sovereignty”. Similarly, see: Z. Gao and B.B. Jia “The nine-dash line in the South China Sea: history, status and implications” 107 *American Journal of*

Tribunal in this respect appears justified. The fact that China has never sought to restrict freedom of navigation in practice<sup>19</sup> can lead to the conclusion that the historic claim – albeit ambiguous - is not a sovereignty claim to a territorial sea or internal waters.

With respect to the scope of the optional exception in article 298(1)(a)(i), especially concerning “historic title,” the Tribunal found that it had jurisdiction as China’s claim was not to a historic title as this refers to sovereignty claims.<sup>20</sup> This issue is examined in Section IV.

The Tribunal identified three distinct but interrelated questions which formed part of its reasoning for addressing the Philippines’ Submissions No. 1 and 2. The first and main question referred to the relationship between the LOSC and pre-existing rights to living and non-living resources:

[D]oes the Convention, and in particular its rules for the EEZ and continental shelf, allow for the preservation of rights to living and non-living resources that are at variance with the provisions of the Convention and which may have been established prior to the Convention’s entry into force by agreement or unilateral act?<sup>21</sup>

The second and third questions referred specifically to whether China had acquired “historic rights and jurisdiction over living and non-living resources in the waters of the South China Sea beyond the limits of the territorial sea” prior to the entry into force of the Convention (question 2) and “in the years since the conclusion of the Convention” (question 3).<sup>22</sup> The following section focuses mainly on the examination of the first question related to the relationship between historic claims and the LOSC.

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*International Law* (2013), p. 108. These authors refer to additional (to the LOSC) “historical rights of fishing, navigation, and other marine activities (including the exploration and exploitation of resources, mineral or otherwise.”

<sup>19</sup> See, for example, the Statement of Chinese Foreign Ministry Spokesman Chan Jian “News briefing by Chinese Foreign Ministry” cited in S. Yann-Huei and K. Zou, “Maritime legislation of mainland China and Taiwan: Developments, comparison, implications and potential challenges for the US” 31 *Ocean Development and International Law* (2000), p. 322.

<sup>20</sup> *South China Sea Arbitration Award (Merits)*, supra note 6, para. 229.

<sup>21</sup> *Ibid.*, para. 234

<sup>22</sup> *Ibid.*

### III. Historic Claims and the Law of the Sea Convention

The Tribunal concluded that “upon China’s accession to the Convention and its entry into force, any historic rights that China may have had to the living and non-living resources within the ‘nine-dash line’ were superseded, as a matter of law and as between the Philippines and China, by the limits of the maritime zones provided for by the Convention.”<sup>23</sup> The Tribunal relied on articles 311 and 293(1) of the LOSC. With respect to article 311, it noted that it “considers that this provision applies equally to the interaction of the Convention with other norms of international law, such as historic rights, that do not take the form of an agreement.”<sup>24</sup> The Tribunal pointed out that “these provisions mirror the general rules of international law concerning the interaction of different bodies of law, which provide that the intent of the parties to a convention will control its relationship with other instruments.”<sup>25</sup> According to the Tribunal, a combination of article 311 and 293(1) demonstrates that only those pre-existing rights that are either expressly “permitted or preserved such as in articles 10 and 15” or compatible with the LOSC would be preserved.<sup>26</sup> It further clarified how this incompatibility was to be ascertained:

such prior norms will not be incompatible with the Convention where their operation does not conflict with any provision of the Convention or to the extent that interpretation indicates that the Convention intended the prior agreements, rules or rights to continue in operation.<sup>27</sup>

The Tribunal noted that “where independent rights and obligations have arisen prior to the entry into force of the Convention and are incompatible with its provisions, the principles set out in

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<sup>23</sup> *Ibid.*, para. 262.

<sup>24</sup> *Ibid.*, para. 235.

<sup>25</sup> *Ibid.*, para. 237.

<sup>26</sup> *Ibid.*, para. 238(a).

<sup>27</sup> *Ibid.*, para. 238(b).

article 30(3) of the Vienna Convention and article 293 of the Convention provide that the Convention will prevail over the earlier, incompatible rights or obligations.”<sup>28</sup>

The approach of the Tribunal is problematic in several different respects. There is nothing in the reasoning of the Tribunal to explain why article 311, which explicitly refers to the relationship between the LOSC and conventions and international agreements, could be analogically applied to the relationship between the LOSC and historic rights as rules of customary international law. Similarly, it is unclear why the Tribunal considered that article 30(3) of the Vienna Convention on the Law of Treaties (VCLT)<sup>29</sup> would be applicable when this provision clearly refers to “successive treaties relating to the same subject matter.” What is more, article 293 of the LOSC concerns dispute settlement and the applicable law and not the relationship between the LOSC and other rules of international law, including historic rights. The relationship between treaties and customary international law is complex. The regulation of their relationship has been avoided in international instruments and it is regulated by customary international law and general interpretative principles (i.e. *lex posterior, lex specialis*).<sup>30</sup> Whereas it can be said that the principles concerning the relationship between treaties (*lex posterior, lex specialis*) can be applied in the relationship between treaties and custom, this does not mean that the relevant provisions of the VCLT, which explicitly regulates treaties, and the LOSC provisions concerning its relationship with other agreements would also apply to its relationship with customary international law or with pre-established rights. The only relevant provision that the LOSC entails with respect to customary international law, and which the Tribunal did not make reference to, is in its Preamble: “affirming that matters not regulated by this Convention continue to be governed by the rules and

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<sup>28</sup> *Ibid.*, para. 238(d).

<sup>29</sup> Vienna Convention on the Law of Treaties, 1155 *U.N.T.S.* 332.

<sup>30</sup> See H. Thirway, “The sources of international law” in M.D. Evans (ed.), *International Law* (4<sup>th</sup> ed., OUP, 2014), p. 109.

principles of general international law.”<sup>31</sup> There is no explicit provision in the LOSC prohibiting the preservation of such rights or nullifying them. Historic rights, which are established on the basis of a particularised regime and can thus be regarded as *lex specialis*, cannot be superseded by a general treaty without explicit reference to them.

The Tribunal further examined “whether the Convention nevertheless intended the continued operation of such historic rights, such that China’s claims should be considered not incompatible with the Convention.”<sup>32</sup> In order to answer this question, the Tribunal examined the regime of the exclusive economic zone (EEZ), and found that:

as a matter of ordinary interpretation, the (a) express inclusion of an article setting out the rights of other states and (b) attention given to the rights of other states in the allocation of any excess catch preclude the possibility that the Convention intended for other states to have rights in the EEZ in excess of those specified.<sup>33</sup>

The Tribunal clarified:

The notion of sovereign rights over living and non-living resources is generally incompatible with another state having historic rights to the same resources, in particular if such historic rights are considered exclusive, as China’s claim to historic rights appears to be.<sup>34</sup>

Similarly, for the continental shelf, the Tribunal found that “the provisions of the Convention concerning the continental shelf are even more explicit that rights to the living and non-living resources pertain to the coastal state exclusively.”<sup>35</sup>

The Tribunal also stressed the comprehensiveness of the regulatory regime of the LOSC and the intention of the drafters to settle all issues related to the law of the sea (especially related to jurisdictional claims) and to provide stability and order, as manifested in the closing statement of

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<sup>31</sup> The Philippines had argued that this is a matter regulated by the Convention. Philippines’ Memorial, para. 4.74, available on the PCA website, *supra* note 6.

<sup>32</sup> *South China Sea Arbitration Award (Merits)*, *supra* note 6, para. 239.

<sup>33</sup> *Ibid.*, para. 243.

<sup>34</sup> *Ibid.*, para. 243.

<sup>35</sup> *Ibid.*, para. 244.



the President of UNCLOS III and the LOSC Preamble.<sup>36</sup> Accepting the Philippines's argument in this respect, the Tribunal also found that:

the same objective of limiting exceptions to the Convention to the greatest extent possible is also evident in article 309, which provides that “no reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention”.<sup>37</sup>

This approach reflects views which have been expressed in academic literature especially related to historic rights in the EEZ and the continental shelf.<sup>38</sup>

Nevertheless, the Tribunal failed to consider the nature and rationale of historic rights which are linked to the non-disturbance and preservation of a continuous, long-established and accepted situation with the view to providing stability. This is obviously different from existing treaties which the Tribunal used as analogy. Historic titles/rights in this respect share elements with the concept of historic consolidation which, according to Jennings, relates to the “fundamental interest of the stability of territorial situations from the point of view of order and peace.”<sup>39</sup> The desired stability was also noted by the Tribunal in the *Grisbadarna Arbitration*: “it is a well-established principle of the law of nations that the state of things that actually exists and has existed for a long time should be changed as little as possible.”<sup>40</sup> Historic titles have been thought – admittedly not

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<sup>36</sup> *Ibid.*, para 245.

<sup>37</sup> *Ibid.*, para. 245.

<sup>38</sup> See Symmons, *supra* note 2, pp. 195-6, 204-5. Some support of this can also be found in the *U.N. Study on Historic Waters* (which refers to the impact of the Geneva Conventions), *supra* note 3, para. 75-77:

if the provisions of an article should be found to conflict with a historic title to a maritime area, and no clause is included in the article safeguarding the historic title, the provisions of the article must prevail as between the parties to the Convention. This seems to follow *a contrario* from the fact that articles 7 and 12 have express clauses reserving historic rights; articles without such a clause must be considered not to admit an exception in favour of such rights.

See also, *Limits in the Seas No 143: China: maritime claims in the South China Sea* (U.S. Department of State, 2014), p. 19 and R. Beckman, “China, UNCLOS and the South China Sea,” Asian Society of International Law Third Biennial Conference (August 2011), para. 34 available at <http://cil.nus.edu.sg/wp/wp-content/uploads/2009/09/AsianSIL-Beckman-China-UNCLOS-and-the-South-China-Sea-26-July-2011.pdf>.

<sup>39</sup> R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester University Press, 1963), p. 24.

<sup>40</sup> *Grisbadarna case* (Norway v Sweden), Award of the Tribunal of 23 October 1909, p. 6, available at <https://pcacases.com/web/view/77>.

without controversy - to be related to acquisitive prescription whose rationale is also to “preserve international order and stability.”<sup>41</sup>

Despite the fact that the *U.N. Study on Historic Waters* rejected the exceptional character of historic rights relying on the lack of clear and certain rules concerning maritime delimitation at the time,<sup>42</sup> the majority of writers accept that historic rights are exceptional rights which deviate from generally applicable rules.<sup>43</sup> Some authors have highlighted the overlap between concepts such as prescription, customary rights and historic rights. Fitzmaurice has referred to them as special rights:

different from, and in principle contrary to, the ordinary rules of law applicable, ... built up by a particular state or states through a process of prescription – leading to the emergence of a usage or customary or historic rights in favour of such state or states.<sup>44</sup>

McGibbon commenting on the category suggested by Fitzmaurice states that “the concepts of prescription, customary right and historic right overlap.”<sup>45</sup> These might be cases of special customary law referring to and regulating a particular and individualised situation. Historic claims originated from the fact that states “laid claim to and exercised jurisdiction over such areas of the sea adjacent to their coasts as they considered to be vital to their security or to their economy.”<sup>46</sup>

Historic rights should not be perceived to be incompatible with the LOSC but exceptions

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<sup>41</sup> Blum, supra note 3, p. 12.

<sup>42</sup> *U.N. Study on Historic Waters*, supra note 3, pp. 9-11.

<sup>43</sup> See an overview of this debate in D.P. O’Connell, *The Law of the Sea* Vol. I (Oxford University Press, 1982), pp. 420-3 and Blum, supra note 3, p. 247. See also *U.N. Study on Historic Waters*, supra note 3, p. 7-9, with respect to the views of scholars.

<sup>44</sup> G. Fitzmaurice, “The law and procedure of the ICJ, 1951-54: General Principles and sources of Law” 30 *British Yearbook of International Law* (1953), p. 68.

<sup>45</sup> I.C. McGibbon, “Customary International Law and acquiescence” 33 *British Yearbook of International Law* (1957), p. 122. Blum, supra note 3, pp. 52-57, regards historic rights as a category of special customary rights. H. Thirlway, “The law and procedure of the ICJ: 1960-1989 (Part II)”, 61 *British Yearbook of International Law* (1990), p. 82, suggests that “if practice apparently inconsistent with a general rule shows enough internal consistency it may reveal the existence of a local or special custom differing from the general rule; or of an exception to the general rule where special circumstances exist (e.g. the preferential fishing rights of a coastal state exceptionally dependent on fishing resources)”.

<sup>46</sup> *U.N. Study on Historic Waters*, supra note 3, pp. 6-7, para. 36.

recognised in general international law. Talmon argues that historic titles that “the rules on historic legal title and historic rights are quasi-superimposed as a separate layer of normativity over UNCLOS.”<sup>47</sup>

As noted by the Tribunal, the LOSC intended to create a comprehensive regime for the regulation of ocean affairs, but this does not presuppose that any previously-established regimes were eliminated, especially since no explicit provision was included to this effect.<sup>48</sup> The jurisdictional regime of the LOSC validated rights which might have been claimed as historic before, but it cannot be inferred from the Convention or its *travaux préparatoires* that states intended or were willing to generally waive any pre-established historic rights. Neither can this be inferred *a contrario* from article 15 as this provision relates to delimitation of the territorial sea and not generally to the preservation of historic rights.

There is some indication from international jurisprudence that international courts and tribunals have accepted the preservation of historic rights in parallel to the jurisdictional regime established by the LOSC. In the *Tunisia/Libya Case*, the International Court of Justice (ICJ) stated that “historic titles must enjoy respect and be reserved as they have always been by long usage.”<sup>49</sup> In the *Gulf of Fonseca Case*, the ICJ repeated this statement and noted that it was “clearly necessary ... to investigate the particular history of the Gulf of Fonseca to discover what is the

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<sup>47</sup> S. Talmon, “Possible Preliminary objections to the Philippines’ claims” in Talmon and Jia, *supra* note 17, p. 51.

<sup>48</sup> See Barbados’s argument in *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*, decision of 11 April 2006, *U.N. Reports of International Arbitral Awards*, Vol XXVII, para. 140; see also para. 138: “it would be contrary to established methods of interpretation of treaties to read into a treaty an intention to extinguish pre-existing rights in the absence of express words to that effect’ and that acquired rights such as historic rights ‘survive unless explicitly terminated’”.

<sup>49</sup> *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, [1982] *I.C.J. Reports*, para. 100.

‘regime’ of the Gulf resulting therefrom.”<sup>50</sup> In the former case, the Court specifically referred to the draft (at that time) Law of the Sea Convention, and noted that:

nor does the draft convention of the Third Conference on the law of the Sea contain any detailed provisions on the “regime” of historic waters: there is neither a definition of the concept nor an elaboration of the juridical regime of “historic waters” or “historic bays”. There are, however, references to “historic bays” or “historic titles” or historic reasons in a way amounting to a reservation to the rules set forth therein.<sup>51</sup>

And the ICJ continued:

it seems clear that the matter continues to be governed by general international law which does not provide for a single “regime” for “historic waters” or historic bays but only for a particular regime for each of the concrete recognised cases of “historic waters” or “historic bays”.<sup>52</sup>

Referring to this pronouncement, Symmons observes that “the Court thus endorsed a potential particularised regime for each historic claim, and so for some diversity of types of historic regimes.”<sup>53</sup> In this respect, the question of supersession of historic rights by the LOSC cannot be answered *in abstracto*.<sup>54</sup> Since historic rights and titles create a special regime related to the specific historic circumstances, it cannot be considered that historic claims can be phased out as a whole, but the history of each individual situation needs to be examined taking into consideration the LOSC. This will depend on whether a historic claim meets the requirements for the establishment of historic rights in a specific maritime area.

The Philippines attempted to stress the uniqueness of the Chinese claim to an extensive maritime area to demonstrate that international law had never recognised such expansive maritime

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<sup>50</sup> *Case concerning Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, [1992] *I.C.J. Reports*, p. 589, para. 384.

<sup>51</sup> *Tunisia/Libya Case*, supra note 49, para. 100.

<sup>52</sup> *Ibid.*, para. 100.

<sup>53</sup> Symmons, supra note 2, p. 200.

<sup>54</sup> T. Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (Cambridge University Press, 2015), p. 486, discusses the relevance of historic rights in maritime delimitation noting that: “the problem cannot be dismissed in summary terms. Neither would predominance or subjection *in abstracto* of such rights provide a satisfactory answer. Conclusive answers have to rely upon the legal nature of the shelf and the EEZ and the doctrine of intertemporal law.”

claims based on historic reasons.<sup>55</sup> Similar views have been expressed in the academic literature.<sup>56</sup> Symmons argues that “the historic ‘EEZ-claim’ viewpoint also seems to ignore the precedents of history on exaggerated claims in the past where excessive claims such as by Czar Alexander’s no-go zone off Alaska were ‘stymied at birth by immediate protests from the major powers, [causing it to be almost immediately withdrawn].”<sup>57</sup> Talmon, on the other hand, suggests that sizeable historic claims were not uncommon; indeed the Philippines had raised a claim of historic rights covering the waters of its archipelago.<sup>58</sup> As noted by Blum “the common feature of all these claims seems to be the belief that a special relationship exists between the water area concerned and the land territory enclosing it,” but “the legality of such an historic claim is to be measured, in the words of Jessup, ‘not by the size of the area affected, but by the definitiveness and duration of the assertion and the acquiescence of foreign powers’.”<sup>59</sup> The validity of claims depends on whether the requirements for historic titles could be met, especially the element of acquiescence of other states, as it was unlikely that states would have acquiesced in expansive claims. On the other hand, some authors have acknowledged the “uniqueness” of the Chinese claim but have considered it to be a particularised regime of historic rights which could be established in customary international

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<sup>55</sup> *South China Sea Arbitration*, Merits Pleadings, Day 1, pp. 59-63, available on the PCA website, supra note 6: “In short, from the time of Grotius through the widespread acceptance of the UN Convention on the Law of the Sea, international law has not preserved, admitted or accepted claims to control vast areas of the sea in derogation or either the freedom of the seas or the rights of the immediately adjacent coastal state.”

<sup>56</sup> T. McDorman, “Rights and jurisdiction over resources in the South China Sea: UNCLOS and the nine-dash line” in S. Jayakumar, *et al* (eds.) *South China Sea Disputes and the Law of the Sea* (Elgar, 2014), p. 155, notes that “such a claim beyond near-shore waters would be exceptional and inconsistent with the history of the law of the sea where, until recently, what existed were narrow bands of national waters along a coast and wide expanses of high seas with which high seas freedom existed”.

<sup>57</sup> Symmons, supra note 2, p. 206.

<sup>58</sup> Talmon, supra note 47, pp. 49-50. See also Tonga’s claim to a rectangle of sea in the archipelago and comments by O’Connell, supra note 43, p. 418, with respect to its potential validity based on history: “History might validate the claim to the rectangle, as an exception to the law relating to the high seas, but only as a broadening of the area which could be claimed under the standard rules.”

<sup>59</sup> Blum, supra note 3, p. 256 quoting Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), p. 382.

law.<sup>60</sup> It has been suggested that “the Chinese claim to sovereignty over the islands in the South China Sea and the adjacent waters could be regarded as such a ‘particular regime’.”<sup>61</sup> The Tribunal did not specifically refer to the particularities of the Chinese historic claim in this part of its *Award*, but took a broader perspective concerning the impact of the LOSC on all pre-established historic rights/titles in areas beyond the territorial sea within the framework of the historic development of these zones.

The ICJ had discussed historic rights in the *Qatar/Bahrain Case*<sup>62</sup> and indirectly in the *Gulf of Maine Case*<sup>63</sup> with respect to maritime delimitation. Despite the fact that the Court rejected the arguments concerning the impact of any historic rights upon the maritime boundary on the basis of the facts in the *Cases*, it did not express any views concerning their general redundancy in the post-LOSC era. Both of these *Cases* are examined below with respect to the specific types of historic rights invoked and discussed by the Court. The Tribunal in the *Eritrea/Yemen Case* clearly accepted the relevance and applicability of historic rights despite the advent of the LOSC and the adoption of the relevant maritime zones. This *Case* referred to non-exclusive historic rights which are examined below, however, the Tribunal accepted the relevance of historic claims in both the territorial sea and areas beyond the territorial sea.<sup>64</sup> The reasoning of the Tribunal in the *Eritrea/Yemen Award* seems to advocate that historic rights are not contradictory but are complementary to the LOSC, and the Tribunal noted they have been accepted in international law

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<sup>60</sup> Zou, “Historic Rights in International Law,” supra note 2, p. 160, has noted that “China has set a precedent in the state practice relating to historic rights. It is not clear whether China’s practice establishes a rule in international law, but it may already be influencing the development of the concept of historic rights.” Similarly, see N. Hong, *UNCLOS and Ocean Dispute Settlement: Law and Politics in the South China Sea* (Routledge, 2012), pp. 70-71.

<sup>61</sup> Talmon, supra note 47, p. 53.

<sup>62</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), [2001] *I.C.J. Reports* 40.

<sup>63</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States), [1984] *I.C.J. Reports* 246.

<sup>64</sup> *Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation) Award of 17 December 1999*, *U.N. Reports of International Arbitration Awards*, Vol. XXII, para. 109.

with the view to preserving an existing regime for the sake of stability (and thus the reference to *servitude internationale*).<sup>65</sup>

In light of these general comments regarding the relationship between the LOSC and historic rights, the next section examines certain types of historic rights and their relationship with the regime of maritime zones established by the LOSC drawing from the jurisprudence of international courts and tribunals.

#### **IV. Types of Historic Rights and their Contemporary Relevance in the Law of the Sea**

##### **A. Historic Titles Entailing Sovereignty (Historic Waters)**

The ICJ in the 1951 *Anglo-Norwegian Fisheries Case* referred to “historic waters” as “usually [meaning] waters which are treated as internal waters, but which would not have that character if it were not for the existence of historic title.”<sup>66</sup> This demonstrates that historic titles normally refer to the exercise of sovereignty and would create historic waters resembling the regime of internal or territorial waters depending on the acceptance of the right of innocent passage.<sup>67</sup> The *U.N. Study* noted that “in principle, the scope of the historic title emerging from the continued exercise of sovereignty should not be wider in scope than the scope of the sovereignty actually exercised.”<sup>68</sup> Historic waters, albeit a development of the concept of historic bays, can refer to any maritime areas – not necessarily bays or enclosed waters – adjacent to the coast.<sup>69</sup> Symmons notes that “historic waters must necessarily be adjacent to the claimant’s land territory

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<sup>65</sup> *Territorial Sovereignty and Scope of the Dispute (Eritrea/Yemen)*, Award of 9 October 1998, *U.N. Reports of International Arbitration Awards*, Vol. XXII, para. 126.

<sup>66</sup> *Fisheries Case (United Kingdom v Norway)*, [1951] *I.C.J. Reports*, p. 130. Dupuy and Dupuy, *supra* note 2, p. 139: “historic waters can only be an extension of internal or territorial sea.”

<sup>67</sup> *U.N. Study on Historic Waters*, *supra* note 3, p. 6, paras. 33-34.

<sup>68</sup> *Ibid.*, p. 22, para. 164.

<sup>69</sup> *Ibid.*, para. 34, referred to “straits, archipelagos and generally to all those waters which can be included in the maritime domain of a state.”

(on an analogy with the territorial sea regime).”<sup>70</sup> Reference in article 10 of the LOSC of an exception to the delimitation of the territorial sea would imply that the LOSC recognises historic titles in areas adjacent to the coast. This was confirmed by the Tribunal in the *South China Sea Arbitration* which noted that articles 10 and 15 of the LOSC have preserved historic bays and historic titles in the territorial sea.<sup>71</sup> The Tribunal also distinguished between the broader concept of historic rights and historic titles and noted that the latter refers to “claims of sovereignty over maritime areas derived from historical circumstances.”<sup>72</sup>

## **B. Historic Rights Short of Sovereignty**

The Tribunal in its attempt to provide clarity with respect to “a cognizable usage among the various terms for rights deriving from historical processes” noted that:

the term “historic rights” is general in nature and can describe any rights that a state may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access that fall well short of a claim of sovereignty.<sup>73</sup>

In contrast, “historic title ... is used specifically to refer to historic sovereignty to land or maritime areas.”<sup>74</sup> Historic rights short of sovereignty, however, take two different and distinct forms which were not clearly distinguished by the Tribunal: historic rights short of sovereignty which have a quasi-territorial or zonal impact beyond the territorial sea; and non-exclusive historic rights (mainly related to fishing rights). These types can be identified in the arguments of litigants before international tribunals and in the *dicta* of international and tribunals addressing relevant claims.

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<sup>70</sup> Symmons, *supra* note 4, p. 6. See also L.J. Bouchez, *The Regime of Bays in International Law* (Sythoff, 1964), p. 238, “impossible for a non-coastal state to be entitled over a [historic] sea area situated near the coast of other states”.

<sup>71</sup> *South China Sea Arbitration Award (Merits)*, *supra* note 6, para. 238(a).

<sup>72</sup> *Ibid.*, para. 226.

<sup>73</sup> *Ibid.*, para. 225. See similarly, Dupuy and Dupuy, *supra* note 2, p. 137.

<sup>74</sup> *Ibid.*



(i) ***Historic rights short of sovereignty which have a quasi-territorial or zonal impact beyond the territorial sea***

The establishment, and the type, of historic rights depend on the activities performed by a state over a specific maritime area. Whereas the exercise of sovereignty (activities *a titre de souverain*) could lead to the establishment of historic titles and historic waters, the exercise of exclusive sovereign rights (short of sovereignty) could lead to the establishment of historic rights with a quasi-territorial zonal impact beyond the territorial sea. This could relate to both the continental shelf and the EEZ depending on the activities performed and their zonal impact. The scope of the zonal impact would be determined and restricted to these activities, for example, exclusive fishing rights or exploitation of resources. It seems that this is how the Philippines and the Tribunal perceive the Chinese historic claim – as a zonal historic claim short of sovereignty but based on sovereign rights related to exclusive fishing rights and exploitation of resources.

In cases of maritime delimitation, states and international courts and tribunals have referred to the possibility of the existence of such rights. Tunisia, in the *Tunisia/Libya Case*, referred to the “acquisition ... of historic rights over a substantial area of sea-bed” based on “long-established interests and activities of its population in exploiting the fisheries of the bed and waters of the Mediterranean off its coasts.”<sup>75</sup> This argument related to the maritime boundary which, according to Tunisia’s submissions, should not encroach upon areas of the seabed where it had established historic rights.<sup>76</sup> The ICJ accepted generally the need to respect existing historic titles but did not examine the validity of the Tunisian claim as it found that the maritime delimitation line did not encroach upon the areas over which Tunisia was claiming historic rights.<sup>77</sup> In the *Qatar/Bahrain Case*, the Court examined the claim put forward by Bahrain with respect to historic rights based

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<sup>75</sup> *Tunisia/Libya Case*, supra note 49, para. 98.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*, para. 121.

on pearling. It found that there was evidence that “fishermen from all neighbouring countries were engaged in pearling activities in the banks” and therefore there was no exclusivity in the exercise of the activities. It also noted that “even if it had been found that this activity was exclusively performed by Bahrain, this activity seems in any event never to have led to the recognition of an *exclusive quasi-territorial right* (emphasis added) to the fishing grounds themselves or to the superjacent waters.”<sup>78</sup> This may imply that the activities need to be performed not only exclusively but also with an *animus domini* and that one activity may not suffice to demonstrate such *animus*.<sup>79</sup> However, what can also be implied is that the ICJ did not preclude the possibility of the existence of “exclusive quasi-territorial rights” over certain maritime areas. A similar argument was raised by Barbados in the *Trinidad and Tobago/Barbados Arbitration* where it argued that the maritime delimitation should take into account “a centuries-old history of artisanal fishing.”<sup>80</sup> Trinidad and Tobago conceded that:

recent decisions have suggested that historic activity, whether in the form of fishing activities or other forms of resource exploitation, could be relevant to delimitation [but] only if they led to, or were bound up with, some form of recognition of territorial rights on the part of the state concerned.<sup>81</sup>

The Tribunal found that there was no evidence of any traditional fishing rights as historicity was lacking,<sup>82</sup> and, therefore, rejected Barbados’s argument for an adjustment of the equidistance line. In an *obiter dictum* the Tribunal noted that “determining an international maritime boundary

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<sup>78</sup> *Qatar/Bahrain Case*, supra note 62, para. 236.

<sup>79</sup> See Clark, supra note 3, p. 114, note 242 and A. Gioia, “Tunisia’s claim over adjacent seas and the doctrine of ‘historic rights’” 11 *Syracuse Journal of International Law and Commerce* (1984), p. 347: “a state cannot claim a vast area of sea as internal waters on the sole basis of ‘historic rights’ previously acquired for fishing purposes, unless it is possible to consider that those ‘historic rights’ were in fact indicative of a right of full sovereignty.”

<sup>80</sup> *Barbados/Trinidad and Tobago Arbitration*, supra note 48, paras. 125-129, also arguments para. 133-142.

<sup>81</sup> *Ibid.*, para. 145.

<sup>82</sup> *Ibid.*, para. 266, the Tribunal found that “the practice of long-range Barbadian fishing for flying fish, in waters which then were the high seas essentially began with the introduction of ice boats in the period 1978-1980, that is, some six to eight years before Trinidad and Tobago in 1986 enacted its Archipelagic Waters Act. ... Those short years are not sufficient to give rise to a tradition”.

between two states on the basis of traditional fishing on the high seas by nationals of one of those states is altogether exceptional”, and doubted the existence of a rule of international law in this respect.<sup>83</sup> It further noted that this finding “does not however mean that the argument based upon fishing activities is either without factual foundation or without legal consequences.”<sup>84</sup> With respect to Barbados’s argument about “establishing a right of access for Barbadian fishermen to flying fish within the EEZ of Trinidad and Tobago,” the Tribunal found that this was outside its jurisdiction.<sup>85</sup>

The *Gulf of Maine Case* is often invoked as evidence of the supersession of historic rights by the LOSC,<sup>86</sup> and was discussed in this respect by the Tribunal in the *South China Sea Arbitration*.<sup>87</sup> In this *Case*, the United States had not invoked historic rights, but had referred to fishing and other maritime activities “as a major relevant circumstance for the purpose of reaching an equitable solution to the delimitation problem.”<sup>88</sup> The Chamber of the ICJ did not refer to historic rights either, but mentioned the resemblance between U.S. claim and historic rights.<sup>89</sup> It found that the maritime areas had been open to and “indeed fished by very many nationals” of other countries, with the result that any fishing activities by U.S. nationals were part of the freedom of the high seas.<sup>90</sup> It was noted that the United States “may have been able at certain places and times ... to achieve an actual predominance for its fisheries” but that this “preferential situation”

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<sup>83</sup> *Ibid.*, para. 269.

<sup>84</sup> *Ibid.*, para. 273.

<sup>85</sup> *Ibid.*, para. 283.

<sup>86</sup> See Symmons, *supra* note 4, p. 28 note 28 and U.S. Limits in the Seas (China), *supra* note 38, p. 20.

<sup>87</sup> *South China Sea Arbitration Award (Merits)*, *supra* note 6, para. 256.

<sup>88</sup> *Gulf of Maine Case*, *supra* note 63, para. 233.

<sup>89</sup> The Chamber noted that the U.S. reasoning was “somewhat akin to the invocation of historic rights, though that expression has not been used.” *Ibid.*, para. 233.

<sup>90</sup> *Ibid.*, para. 235.

did not continue following the adoption of 200 nm fishery zones.<sup>91</sup> The Chamber thus rejected the relevance of this factor to the maritime delimitation.

Despite the fact that international courts and tribunals have not accepted the existence of such rights due to lack of evidence, they have not precluded their possibility – though they have applied a high evidentiary threshold. Two issues however might be problematic. The first concerns the establishment of historic rights over the continental shelf. It has been suggested that no historic rights can be acquired on the continental shelf as this exists *ipso facto* and *ab initio* and therefore cannot be subjected to prescription.<sup>92</sup> This argument is often associated with comments made by the ICJ in the *Tunisia/Libya Case*:

it is clearly the case that, basically the notion of historic rights or waters and that of the continental shelf are governed by distinct legal regimes in customary international law. The first regime is based on acquisition and occupation, while the second is based on the existence of rights “*ipso facto* and *ab initio*”. No doubt both may sometimes coincide in part or in whole, but such coincidence can only be fortuitous [...].<sup>93</sup>

Interestingly, Tunisia argued that the historic rights it acquired were in line with the natural prolongation aspect of the contemporary concept of the continental shelf.

[T]he historic titles which Tunisia acquired in the course of centuries have come to anticipate the appearance of the legal concept of natural prolongation, and after the appearance of that concept in international law, those titles have come to be the manifestation of part of the prolongation. So far from contradicting the natural prolongation, they afford the most apt illustration of it ... drawn from history.<sup>94</sup>

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<sup>91</sup> *Ibid.*

<sup>92</sup> Symmons, *supra* note 4, pp. 203-5. See also K. Zou, *Law of the Sea in East Asia: Issues and Prospects* (Routledge, 2005), p. 150, where he notes: “China has to prove that its historic rights existed prior to the establishment of the customary rules on the continental shelf. Otherwise, China’s claim is only relevant to the EEZ non continental shelf area.”

<sup>93</sup> *Libya/Tunisia Case*, *supra* note 49, para. 100. Libya had argued that the fishing practice of one state could not “in principle prevail over the inherent and *ab initio* rights of another state in respect of its natural prolongation.” *Ibid.*, p. 72, para. 98.

<sup>94</sup> *Ibid.*

Despite the fact that the approach of the ICJ has been interpreted as rejecting historic rights in the context of the delimitation of the continental shelf,<sup>95</sup> the ICJ noted the different ways of claiming such rights (juridical and historic) but did not say that historic rights cannot play a role in the delimitation of the continental shelf. Two dissenting Judges took different positions. Judge Oda clearly rejected the relevance of historic rights for the delimitation of the continental shelf,<sup>96</sup> while Judge Arechaga argued that a legal concept such as the continental shelf “cannot by itself have the effect of abolishing or denying acquired or existing rights.”<sup>97</sup> O’Connell argued that “the difficulty about this [“enjoyment of exclusive or particular benefits leading to entitlement to the area in derogation of the standard rules”] is that the continental shelf doctrine of ‘inherency’ is deliberately aimed against the operation of the ordinary rule relating to historic rights, so that what is excluded as a matter of doctrine cannot be allowed to re-enter as a matter of exception.”<sup>98</sup> Tanaka finds that these two concepts, namely historic rights based on acquisition and the continental shelf being *ipso facto* and *ab initio* “are incompatible,” but seems to leave the issue open by saying “hence the Court has to face the difficult question of the compatibility between the Grisbadarna rule and the concept of the continental shelf.”<sup>99</sup> A middle position recognising the customary nature of the

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<sup>95</sup> Cottier, *supra* note 54, p. 486, argues that “the fact that the Court suggested that matters may be different in the context of the EEZ (not invoked by the parties) suggests that the majority of the court thought historic rights irrelevant in the context of the self.”

<sup>96</sup> *Tunisia/Libya Case*, *supra* note 49, Dissenting Opinion by Judge Oda, p. 211 para. 88.

<sup>97</sup> *Ibid.*, Separate Opinion by Judge Arechaga, para. 82:

[A] new legal concept, consisting in the notion introduced in 1958 that continental shelf rights are inherent or *ab initio* cannot by itself have the effect of abolishing or denying acquired and existing rights. That would be contrary to elementary legal notions and to basic principles of intertemporal law. It would be absurd to contend that the Truman proclamation or the 1958 Convention abolished or disregarded pre-existing rights over the continental shelf, when, on the contrary, they embodied or assimilated those rights into the new doctrine.

Symons, *supra* note 4, p. 204, refers to Arechaga’s view as “somewhat isolated”. See also Cottier, *supra* note 54, pp. 486-7: “From a historic perspective of the shelf, which only emerged in customary law in the early 1960s, it follows that the existence of historical rights cannot be excluded.”

<sup>98</sup> D.P.O’Connell, *The International Law of the Sea* Vol. II (Oxford University Press, 1984), p. 713; see also O’Connell, *supra* note 43, p. 482.

<sup>99</sup> Y. Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart, 2006), p. 301.

continental shelf as *ipso facto* and *ab initio* has been expressed by Gioia who noted that “these ‘historic rights’ might only survive if it were proved that they have in fact continued to be exercised with the acquiescence of the state concerned after the establishment of the customary rules on the continental shelf.”<sup>100</sup> A critical issue would be the continuation of relevant activities and acquiescence of other states following the establishment of the customary rule on the continental shelf.

However, it should be noted that in cases of overlapping continental shelves, historic rights do not necessarily contradict the inherent character of the continental shelf, as they determine the extent of the continental shelf and not its existence. A state cannot claim historic rights over the continental shelf of another state, but could potentially claim rights over parts of the overlapping continental shelves vis-à-vis another coastal state. Indeed, the ICJ in the *Tunisia/Libya Case* recognised that the historic rights claimed by Tunisia over the seabed “may be relevant in a number of ways”, for example to provide an indication of an established maritime boundary, ensuring that there is no encroachment over these rights by this boundary.<sup>101</sup> Therefore, such historic quasi-territorial claims may be relevant with respect to the existence of a maritime boundary and for maritime delimitation purposes in overlapping EEZs and continental shelves. Tanaka, though generally critical of the relevance of historic rights to the continental shelf, noted that “states will not regard a line disregarding their historic rights as equitable.”<sup>102</sup> With respect to the delimitation of the continental shelf and the EEZ, the reference to “equitable solution” in articles 74 and 83 of the LOSC could entail acknowledgement of historic rights as circumstances to be taken into

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<sup>100</sup> Gioia, *supra* note 79, p. 372.

<sup>101</sup> See *Tunisia/Libya Case*, *supra* note 49, para. 102, regarding the existence of a maritime boundary see para 95 and Separate Opinion by Judge Arechaga, *supra* note 97, para. 79.

<sup>102</sup> Tanaka, *supra* note 99, p. 301.

account in maritime delimitation.<sup>103</sup> It should however be noted that international courts and tribunals have not found that historic rights have impacted the maritime delimitation based on the facts of the cases before them<sup>104</sup> and there is limited state practice where historic rights had an impact upon a maritime boundary.<sup>105</sup>

To what extent are such historic rights possible or relevant outside a maritime delimitation framework? A significant difference would be that in the case of maritime delimitation these rights operate in a bilateral way (*vis-à-vis* the other littoral state(s)), whereas in the case of non-overlapping zones, the rights would operate *erga omnes*.<sup>106</sup> This outcome might be uncommon but not necessarily impossible. Gioia argues that “there is in principle no reason why an historic title could not be invoked in order to acquire sovereignty over a wider belt of territorial sea, or even special sovereign rights falling short of full territorial sovereignty beyond the territorial sea”, but admits that “the recent evolution of the law of the sea – the recognition of a 12-mile belt of territorial waters and the birth of the new institutions of the continental shelf and of the EEZ – appears to have made reliance on exceptional historic titles no longer necessary in order to justify such claims.”<sup>107</sup> The South China Sea Tribunal has precluded the survival of such rights as a matter

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<sup>103</sup> See also Gioia, *supra* note 3, para. 18; Cottier, *supra* note 54, p. 488; and Separate Opinion by Judge Arechaga, *supra* note 97, p. 123, para. 80. To the contrary, Dissenting Opinion by Judge Oda, *supra* note 96, p. 211 para. 88. Judge Oda relied on the explicit provision regarding historic titles for the delimitation of the territorial sea, and the lack for one for the continental shelf in the 1958 Geneva Convention [499 *U.N.T.S.* 311]. Judge de Arechaga explained this discrepancy at para. 80, p. 123 by pointing out that historic factors are within a wider framework of “special circumstances” to be taken into account for the delimitation of the continental shelf.

<sup>104</sup> Interestingly, R. Kolb, *Case Law on Equitable Maritime Delimitation: Digest and Commentaries* (Brill/Nijhoff, 2003), p. 185, argues with respect to the *Tunisia/Libya Case* that “the Court ended up giving full protection to these waters without examining whether either their extent or the claim had been materially established. However, it is reasonable to suppose that the Court’s approach to this question rested implicitly in the full recognition of those rights, both procedurally and substantively”.

<sup>105</sup> Symmons, *supra* note 4, p. 47, refers to the bilateral maritime delimitation agreement between India and Sri Lanka. See also Tanaka, *supra* note 99, pp. 305-6.

<sup>106</sup> See *ibid.*, pp. 243-4 on the issue of “opposability” with respect to the establishment of historic titles.

<sup>107</sup> Gioia, *supra* note 3, para. 17.

of law and not of factual realities. Kolb referring to the *Grisbadarna Arbitration* and the *Tunisia/Libya Case* pointed out that for the Court:

historic rights were not an ordinary relevant circumstance, one which must be weighed against other relevant circumstances so that the Court could finally reach a decision. On the contrary, they were the basis of a prescriptive title which in principle might result in the attribution of the area in question to one of the states in dispute. Here one is dealing not with relevant circumstances of a “relative” or “indicative” nature, but with a relevant circumstance that is “absolute” or “dispositive” in its nature.<sup>108</sup>

Taking into account the approach of the ICJ in the *Tunisia/Libya Case* which advocated respect for established historic rights, but also the lack of a general theory and the importance of historic particularised regimes, any historic claims should be treated on their own merits according to the historical particularities of the claim.

**(ii) *Non-exclusive historic rights and traditional fishing rights***

Non-exclusive historic rights, in contrast to the category discussed above, relate to activities performed in a non-exclusive way, do not have a zonal impact, and would thus be recognised in the maritime zones of another state.<sup>109</sup> Blum refers to two types of such historic rights: passage and fishing rights.<sup>110</sup> International courts and tribunals have mainly discussed fishing rights within the framework of maritime delimitation cases. The Tribunal in the *Eritrea/Yemen Arbitration* referred to such traditional fishing activities and found that “by its very nature [the traditional fishing regime] is not qualified by the maritime zones specified under the United Nations Convention.”<sup>111</sup> The Tribunal accepted the preservation of these rights of “free access and

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<sup>108</sup> Kolb, supra note 104, p. 185.

<sup>109</sup> *Ibid.*, p. 508. With reference to maritime delimitation, this author distinguishes – on the basis of the “rights’ content and subject matter” - between exclusive rights “reserved to one of the states and its citizens” and non-exclusive rights incurred with the participation of the citizens of both states in the various activities.

<sup>110</sup> Blum, supra note 3, p. 315.

<sup>111</sup> *Eritrea/Yemen Arbitration*, supra note 64, para. 109.



enjoyment for the fishermen of both Eritrea and Yemen.”<sup>112</sup> It is worth quoting the exact dictum of the Tribunal with respect to such rights.

the conditions that prevailed during many centuries with regard to the traditional openness of Southern Red Sea marine resources for fishing, its role as means for unrestricted traffic from one side to the other, together with the common use of the islands by the populations of both coasts, are all important elements capable of creating certain “historic rights” which accrued in favour of both parties through a process of historical consolidation as a sort of “*servitude internationale*” falling short of territorial sovereignty. Such historic rights provide a sufficient legal basis for maintaining certain aspects of a *res communis* that has existed for centuries for the benefit of populations on both sides of the Red Sea.<sup>113</sup>

The Tribunal clarified the traditional fishing regime as follows: it “is not an entitlement in common to resources nor is it a shared right in them. Rather, it entitles both Eritrean and Yemeni fishermen to engage in artisanal fishing around the islands which, in its Award on sovereignty, the Tribunal attributed to Yemen.”<sup>114</sup> Judge Oda in his separate opinion in the *Tunisia/Libya Case*, which rejected the relevance of historic rights for the delimitation of the continental shelf, noted that “this is not incompatible with the principle that any historic fishing rights based on longstanding practice should be respected whatever the status of the submerged areas under the new regime.”<sup>115</sup> The Tribunal in the *Barbados/Trinidad and Tobago Arbitration* also touched upon this issue with respect to access to specific fish species (fly-fishing) regardless of the existence of the boundary.

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<sup>112</sup> *Eritrea/Yemen Arbitration (Territorial Sovereignty)*, supra note 65, para. 527.

<sup>113</sup> *Ibid.*, para. 126. McDorman, supra note 56, argues that the Award indicates that “a historic fishing right ascribed to foreign fishers within the waters of a coastal state does not trump coastal state sovereignty” and that it “supports the view that historic fishing rights by a third state in waters otherwise under the jurisdiction of a coastal state are not necessarily extinguished by UNCLOS” and concludes that “as the Eritrea/Yemen arbitration makes clear, historic rights in limited circumstances may exist that, while they do not undermine the sovereignty of the adjacent coastal state, require tolerance and attention to be paid by the coastal state.” This author does not seem to differentiate between the regimes in the territorial sea and EEZ.

<sup>114</sup> *Eritrea/Yemen Arbitration (Maritime Delimitation)*, supra note 64, para 103.

<sup>115</sup> *Tunisia/Libya Case*, Judge Oda’s dissenting opinion, supra note 96, p. 211 para. 88.

It implied that theoretically this may be possible, but that it did not have jurisdiction due to article 297(3)(a) of the LOSC.<sup>116</sup>

The Tribunal in the *South China Sea Arbitration* referred to non-exclusive historic rights as fishing rights or rights of access<sup>117</sup> and discussed them in relation to traditional fishing rights in the territorial sea and the EEZ. The Philippines invoked such rights (though refraining from calling them historic) to justify their claim concerning the Tribunal’s jurisdiction with respect to activities of Philippine fishermen in the territorial sea of Scarborough Shoal and the infringement of their rights by China.<sup>118</sup> The Tribunal in the *Jurisdictional Award* cited the *Eritrea/Yemen Arbitration* and accepted “that traditional fishing rights may exist even within the territorial waters of another state.”<sup>119</sup> In the *Merits Award*, the Tribunal accepted the Philippines’ argument regarding the preservation of traditional fishing rights in a state’s territorial sea and found that China had breached international law by not respecting the traditional fishing rights of Filipino fishermen.<sup>120</sup>

The South China Sea Tribunal relied on what it described as the international law on traditional fishing and distinguished between the territorial sea and EEZ on the basis of their history and evolution. The core of the Tribunal’s position and description of such rights is as follows.

The legal basis for protecting artisanal fishing stems from the notion of vested rights and the understanding that, having pursued a livelihood through artisanal fishing over an extended period, generations of fishermen have acquired a right, akin to property, in the ability to continue to fish in the manner of their forbearers. Thus, traditional fishing rights extend to artisanal fishing that is carried out largely in keeping with the

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<sup>116</sup> The *Barbados/Trinidad and Tobago Arbitration*, supra note 48, para. 272, “decided that the pattern of fishing activity in the waters off Trinidad and Tobago was not of such a nature as to warrant the adjustment of the maritime boundary. This does not, however, mean that the argument based upon fishing activities is either without factual foundation or without legal consequences”. On the lack of jurisdiction, see para. 283.

<sup>117</sup> *South China Sea Arbitration Award (Merits)*, supra note 6, para. 225.

<sup>118</sup> Submission 10 reads: “China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal.” *Ibid.*, para. 758.

<sup>119</sup> *South China Sea Arbitration, Award on Jurisdiction and Admissibility*, supra note 8, para. 407.

<sup>120</sup> *South China Sea Arbitration Award (Merits)*, supra note 6, para. 814. The Tribunal also pointed out that “this decision is entirely without prejudice to the question of sovereignty over Scarborough Shoal”.

longstanding practice of the community, in other words to “those entitlements that all fishermen have exercised continuously through the ages,” (*Eritrea/Yemen* case, para. 104) but not to industrial fishing that departs radically from traditional practices.<sup>121</sup>

The rights recognised and discussed by the Tribunal are private rights belonging to individuals and their communities but not the state. It thus invoked relevant case law related to respect for the rights of foreign nationals in cases of land boundary delimitation.<sup>122</sup> However, the approach of the Tribunal in the *Eritrea/Yemen Arbitration* upon which the South China Sea Tribunal relied was rather unclear about the nature of the recognised rights. The Tribunal in the *Eritrea/Yemen Arbitration* referred to “certain ‘historic rights’ which accrued in favour of both parties” implying that the rights belong to the states, and then continued to state that “this right entitles the fishermen of both states to engage in artisanal fishing.”<sup>123</sup> In its *Award* on maritime delimitation the Tribunal referred to the non-application of “the western legal fiction ... whereby all legal rights, even those in reality held by individuals, were deemed to be those of the state.”<sup>124</sup> These may be considered to be hybrid rights belonging to the state for the benefit of its nationals but also to those nationals themselves. It has been suggested that historic (fishing) rights belonging to the state normally arise due to the activities of individuals without necessary involvement of the state.<sup>125</sup> This is in contrast to historic titles or exclusive historic rights which require some sovereign *animus*. In terms of their establishment, the South China Sea Tribunal noted that “traditional fishing rights are customary rights, acquired through long usage”<sup>126</sup> and in this respect, they share some of the requirements of

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<sup>121</sup> *Ibid.*, para. 798.

<sup>122</sup> *Ibid.*, para. 799.

<sup>123</sup> *Eritrea/Yemen Arbitration* (Territorial Sovereignty), supra note 65, para. 126.

<sup>124</sup> *Eritrea/Yemen Arbitration* (Maritime Delimitation), supra note 64, para. 101. The South China Sea Tribunal quoted this to support its consideration of these rights as private rights and not rights belonging to the state. *South China Sea Arbitration, Award (Merits)*, supra note 6, para. 798.

<sup>125</sup> G. Fitzmaurice, “The law and procedure of the ICJ, 1951-1954: General principles and sources of law” 30 *British Yearbook of International Law* (1953), p. 51 and Blum, supra note 3, p. 314.

<sup>126</sup> *South China Sea Arbitration Award (Merits)*, supra note 6, para. 806.

historic rights, namely a certain activity and passage of time. However, it seems that the threshold for the recognition of these rights may be lower than historic rights.<sup>127</sup>

The scope and beneficiaries of these rights are not very clearly identified by the South China Sea Tribunal. Such traditional/artisanal fishing rights are normally linked with the rights of local people to pursue their livelihood, and their exercise relates to the traditions and customs of a community.<sup>128</sup> The issue of dependence on fishing resources for livelihood has also been invoked with respect to fishing practices impacting on maritime delimitation.<sup>129</sup> In the *Trinidad and Tobago and Barbados Arbitration*, Barbados invoked human rights instrument to support and strengthen its argument with respect to the rights of fishermen regarding fly-fishing in the area.<sup>130</sup> The content and the scope of the right will depend on the performed activities. In this sense, traditional artisanal rights have a qualitative element related to the fishing gear, the customs and traditions of a community. The South China Sea Tribunal referred to international instruments with respect to artisanal fishing<sup>131</sup> and provided the following characteristics for these rights (in contrast to industrial/commercial fishing).

[T]he essential defining element of artisanal fishing remains, as the tribunal in *Eritrea v Yemen* noted, relative. The specific practice of artisanal fishing will vary from region to region, in keeping with local customs. Its distinguishing characteristic will always be that, in contrast with industrial fishing, artisanal fishing will be simple and carried out on a small scale, using fishing methods that largely approximate those that have historically been used in the region.<sup>132</sup>

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<sup>127</sup> *Ibid.*, paras. 805-6. With respect to evidence, the Tribunal noted that “matters of evidence should be approached with sensitivity” and specifically referred to the fact that the stories of these traditional fishermen “have not been the subject of written records’ and ‘that certain livelihoods have not been considered of interest to official record keepers or to the writers of history does not make them less important to those who practise them.”

<sup>128</sup> *Ibid.*, para. 798.

<sup>129</sup> See, for example, *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)*, [1993] *I.C.J. Reports*, paras. 73-76. This is the only case where fishing practices were clearly taken into account for the delimitation of the maritime boundary. See also *Barbados and Trinidad and Tobago Arbitration*, *supra* note 48, paras. 247-252, 267.

<sup>130</sup> *Barbados/Trinidad and Tobago Arbitration*, *supra* note 48, para. 136.

<sup>131</sup> *South China Sea Arbitration Award (Merits)*, *supra* note 6, para. 797.

<sup>132</sup> *Ibid.*, para. 797.

These elements would normally be found in local communities of neighbouring states.

The South China Sea Tribunal further found that such traditional artisanal rights have been preserved only in the territorial sea and not in the EEZ. The Tribunal justified this discrepancy between the two zones by stressing that “the law reflects the particular circumstances of the creation of the exclusive economic zone.”<sup>133</sup> The Tribunal argued that “under the law existing prior to the exclusive economic zone, [...] [t]he expansion of jurisdiction was considered equivalent to the adjustment of a boundary or a change in sovereignty, and acquired rights, in particular to fisheries, were considered protected.”<sup>134</sup> The Tribunal reviewed the fishing regime in the EEZ and concluded that it “does not consider it possible that the drafters of the Convention intended for traditional or artisanal fishing rights to survive the introduction of the exclusive economic zone.”<sup>135</sup>

A number of comments can be made. Before the adoption of the LOSC, the boundaries of the territorial sea were elusive, and fishing (including traditional fishing) was undertaken in areas regardless of the boundaries adopted and consolidated later. Not all states had territorial seas of 12 nm. This is evident in the *Eritrea/Yemen Arbitration* where the Tribunal rightly noted that these fishing rights continue to exist regardless of the maritime zone and thus even beyond the territorial sea.<sup>136</sup> The Tribunal in the *South China Sea Arbitration* disagreed with the dictum of the Tribunal in the *Eritrea/Yemen Arbitration* and attempted to distinguish the two cases, accepting the relevant argument advanced by the Philippines. The main reason was the applicability of article 293 of the LOSC (upon which the Tribunal had relied to conclude that historic rights had been superseded by the LOSC). The Tribunal noted that the *Eritrea/Yemen Arbitration* “was not an arbitration under

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<sup>133</sup> *Ibid.*, para. 801.

<sup>134</sup> *Ibid.*, para. 802.

<sup>135</sup> *Ibid.*, para. 803.

<sup>136</sup> *Eritrea/Yemen Arbitration* (Maritime Delimitation), supra note 64, para. 109.

Annex VII to the Convention and that arbitral tribunal was not bound by article 293 to apply only the Convention and rules of law not incompatible therewith.”<sup>137</sup> It found that “instead, the parties’ arbitration agreement empowered the arbitral tribunal in the second stage of the proceedings to render its decision ‘taking into account the opinion that it will have formed on questions of territorial sovereignty, the UN Convention on the law of the sea, and any other pertinent factor’<sup>138</sup>” and concluded that “the Arbitral Tribunal in *Eritrea v Yemen* was thus empowered to – and in the Tribunal’s view did – go beyond the law on traditional fishing as it would exist under the Convention.”<sup>139</sup> This is an unconvincing argument. It appears illogical that the *Eritrea/Yemen* Tribunal, which had been asked to apply the LOSC, would also apply (or would be free to apply) rules incompatible to the LOSC. Reference to “other factors” does not give a Tribunal *carte blanche* to apply whatever rules it considers relevant even when they are contrary to the LOSC. It is also interesting that despite the fact that the parties asked the Eritrea/Yemen Tribunal to take into account historic titles in the first phase of the Arbitration regarding sovereignty over the islands,<sup>140</sup> there is no such mention with respect to the second phase on maritime delimitation. The preservation of traditional/historic rights regardless of the maritime zones reflects the realities and circumstances of a maritime area and not necessarily (general) legal developments.

Examining the historic development of both the territorial sea and the EEZ, commonalities can be identified with respect to the debate about the continuation of pre-existing fishing practices or rights of third states. The issue of non-exclusive historic fishing rights was discussed at UNCLOS II as part of the regime of the territorial sea especially due to the trend of unilateral

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<sup>137</sup> *South China Sea Arbitration Award (Merits)*, supra note 6, para. 259.

<sup>138</sup> *Eritrea/Yemen Arbitration (Maritime Delimitation)*, supra note 46, Annex I – Arbitration Agreement, article 2(3).

<sup>139</sup> *South China Sea Arbitration Award (Merits)*, supra note 6, para. 259.

<sup>140</sup> *Eritrea/Yemen Arbitration (Territorial Sovereignty)*, supra note 65, para. 2, the arbitration agreement on the issue of sovereignty between the parties provided that “... concerning questions of territorial sovereignty, the Tribunal shall decide in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles”.

expansion of the territorial sea of the coastal state in parts of the high seas which used to be open to fishermen from different countries. It was disputed whether these discussions even concerned historic rights<sup>141</sup> as they focused on states which had been fishing in the specific areas even for 5-10 years legally as part of the freedom of the high seas. This discussion was about continuation of access to the resources despite the expansion of the territorial sea.<sup>142</sup> The discussions were centred in finding a compromise for the transition to the exclusive fishing right of the coastal state ensuring that third states which used to fish in the area were not adversely affected. Blum notes that following the inability of the Conference to decide on this issue, fishing rights of third states in the territorial sea were subsequently dealt with through bilateral fishing agreements.<sup>143</sup>

The only provision where the LOSC has explicitly referred to traditional fishing rights is article 51 regarding archipelagic waters. Archipelagic states have the obligation to recognise “traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring states in certain areas falling within archipelagic waters”. The terms and details of these rights are to be regulated by bilateral agreement between the states concerned. Could this be an indication that traditional fishing rights have been rejected in other maritime zones? The South China Sea Tribunal found that in combination with article 62 of the LOSC, this is the case for the EEZ, but not for the territorial sea. With respect to the EEZ, the Tribunal relied on the *travaux* of the LOSC EEZ regime and especially of article 62(3)<sup>144</sup> which has also been invoked in the academic

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<sup>141</sup> See comments by France and Australia cited in Blum, *supra* note 3, pp. 318-9. Blum argued that “it is difficult to see how rights of such a temporary nature, which are to be enjoyed only for a definite period of time and not in perpetuity, are to be regarded as ‘historic rights’ in the meaning normally attached to this term”. See also D.W. Bowett, “The Second UN Conference on the Law of the Sea” 9 *International and Comparative Law Quarterly* (1960), p. 424.

<sup>142</sup> Some delegations opposed the recognition of existing fishing practices/rights as this would discriminate against newly-emergent states and states without distant fleets due to lack of economic resources. Blum, *supra* note 3, p. 317.

<sup>143</sup> *Ibid.*, p. 319.

<sup>144</sup> *South China Sea Arbitration Award (Merits)*, *supra* note 6, para. 804 (b), notes that “the Tribunal considers that the inclusion of this provision – which would be entirely unnecessary if traditional fishing rights were preserved in the EEZ – confirms that the drafters of the Convention did not intend to preserve such rights.” See also similar argument with respect to article 51(1) regarding archipelagic waters at *ibid.*, para. 804 (a).

literature as evidence that pre-existing historic rights have been superseded by the LOSC.<sup>145</sup> This provision was the outcome of negotiations with respect to the regulatory and management regime concerning how a coastal state would exercise its sovereign rights to ensure optimum utilisation. In this framework, suggestions were made for access to the resources of third states mainly developing and disadvantaged states. Some states referred to “traditional fishing by foreign fishermen”, “states that have normally fished for a resource”, access to the living resources of the economic zone “on the basis of equity and of long and mutually recognised use.”<sup>146</sup> Article 62(3) of the LOSC refers to those who have “habitually fished in the zone;” this “habitual fishing” may not be considered to be the same as historic rights which require more than the habitual exercise of an activity. It cannot be concluded with certainty that it was the intention of states to eliminate any historic rights in EEZs. Also this cannot be perceived as a clear indication that the private rights of individuals, such as the type of traditional/artisanal fishing rights accepted by the South China Sea Tribunal, have been phased out without an explicit provision.<sup>147</sup> States, mainly neighbouring, have invoked such rights and in some instances these rights have been recognised in bilateral maritime negotiations agreements.<sup>148</sup> These rights should be examined on a case-by-case basis taking into account the local circumstances and the intention of the relevant states.

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<sup>145</sup> Symmons, supra note 2, pp. 195-6 and R. Beckman, “The UN Convention on the Law of the Sea and the maritime disputes in the South China Sea” 107 *American Journal of International Law* (2013), p. 158.

<sup>146</sup> A.N. Nandan and A. Rosenne (eds.), *UNCLOS 1982: A Commentary* Vol. II (Martinus Nijhoff, 2002), p. 627.

<sup>147</sup> The Tribunal invoked and quoted the *Question relating to Settlers of German Origin in Poland, Advisory Opinion, PCIJ Series B, No. 6, p. 36* and the *Abyei Arbitration Government of Sudan v Sudan Pospel's Liberation Movement/Army) Final Award of 22 June 2009, RIAA Vol. XXX, para. 766*; according to the latter: “traditional rights, in the absence of an explicit agreement to the contrary, have usually been deemed to remain unaffected by any territorial delimitation”. *South China Sea Arbitration Award (Merits)*, supra note 6, para. 799. This referred to “explicit agreement to the contrary” which is not the case with the EEZ LOSC provisions that have no direct and explicit reference to these rights.

<sup>148</sup> Tanaka, supra note 99, pp. 305-6. See also L. Bernard, “The effect of historic fishing rights in maritime boundaries delimitation” in Proceedings from the 2012 LOSI-KIOST Conference on Securing the Ocean for the Next Generation, p. 9. available at <https://www.law.berkeley.edu/files/Bernard-final.pdf>.



The South China Sea Tribunal having referred to fishing rights of third states in other maritime zones and stressed the scope and nature of the territorial sea.

(c) Finally, in the territorial sea, the Convention continued the existing legal regime largely without change. The innovation in the Convention was the adoption of an agreed limit of 12 nautical miles on the breadth of the territorial sea, not the development of its legal content. The Tribunal sees nothing that would suggest that the adoption of the Convention was intended to alter acquired rights in the territorial sea and concludes that within that zone – in contrast to the exclusive economic zone – established traditional fishing rights remain protected by international law.<sup>149</sup>

The Tribunal seems to be relying on the absence of a provision regarding historic/traditional fishing in the territorial sea. It did not explain why states would accept (or have accepted) such a restriction in a zone in which they exercise sovereignty (and which is very important both for economic and security reasons), but not in a maritime zone farther away from their coasts in which they exercise sovereign rights. This argument also contradicts the argument advanced by the Tribunal concerning the non-preservation of historic rights due to the lack of an explicit provision preserving such rights, but also the incompatibility of such rights with the regime of the LOSC. Nor is this approach supported by relying on article 2(3) of the LOSC – “The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law” – and the lack of such a provision in the LOSC regarding other maritime zones.<sup>150</sup> The rationale of article 2(3) was to ensure that the maximum of state competence, namely sovereignty, is exercised in line with international rules<sup>151</sup> and not as the coastal state unilaterally desires. What is more, article

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<sup>149</sup> *South China Sea Arbitration Award (Merits)*, supra note 6, para. 804.

<sup>150</sup> For the Philippines’ argument, see *South China Sea Arbitration*, Merits Pleadings, Day 2, supra note 55, pp. 164-174.

<sup>151</sup> The provision was transferred verbatim from article 2 of the Geneva Convention on the Territorial Sea and Contiguous Zone, 516 *U.N.T.S.* 205. The ILC’s Commentary on article 2 of its draft articles of 1956 mentioned: “(3) Clearly, sovereignty over the territorial sea cannot be exercised otherwise than in conformity with the provisions of international law. (4) Some of the limitations imposed by international law on the exercise of sovereignty in the territorial sea are set forth in the present articles which cannot, however, be regarded as exhaustive. Incidents in the territorial sea raising legal questions are also governed by the general rules of international law, and these cannot be specially codified in the present draft for the purposes of their application to the territorial sea. That is why ‘other rules of international law’ are mentioned in addition to the provisions contained in the present articles.” Report of the ILC

58(2) of the LOSC clearly provides that “other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part”.

There is no convincing reason for the differentiation between the territorial sea and the EEZ with respect to traditional/historic fishing rights, especially for the type of individual rights recognised by the South China Sea Tribunal. The existence and relevance of these rights should be examined on the basis of the circumstances of each maritime area and should be respected to the extent that their establishment can be ascertained.

#### **V. Requirements for the Establishment of Historic Rights/Titles**

The Tribunal only briefly discussed the requirements and criteria for the establishment of historic rights. Despite the fact that it had already provided an answer to the Philippines’ submissions (No. 1-2) and had accepted that any historic rights in the EEZ and continental shelf have been superseded by the LOSC, it found it relevant to “consider what would be required for it to find that China did have historic maritime rights to the living and non-living resources within the nine-dash line”.<sup>152</sup>

The Tribunal acknowledged the criteria identified by the *U.N. Study on Historic Waters* and specifically referred to the “continuous exercise of the claimed right by the state asserting the claim and acquiescence on the part of other affected states.”<sup>153</sup> It also found that despite the fact that the *U.N. Study* referred to the establishment of historic titles/waters, “the process is the same for claims to rights short of sovereignty.”<sup>154</sup> The Tribunal made some generally uncontroversial comments concerning the type of evidence which would be required for China (or any state) to

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to the General Assembly (Doc. A/3159), *Yearbook of the ILC* 1956 Vol. II, p. 265. See also Nandan and Rosenne, *supra* note 146, pp. 72-3.

<sup>152</sup> *South China Sea Arbitration Award (Merits)*, *supra* note 6, para. 267

<sup>153</sup> *Ibid.*, para. 265.

<sup>154</sup> *Ibid.*

prove the existence of historic rights. It noted that “either party’s historical use of the islands of the South China Sea is of no interest with respect to the formation of historic rights,”<sup>155</sup> and found that much of the evidence related to the islands (and therefore supporting the sovereignty aspects of the dispute) “has nothing to do with the question of whether China has historically had rights to living and non-living resources beyond the limits of the territorial sea in the South China Sea and therefore is irrelevant to the matters before this Tribunal.”<sup>156</sup> It also pointed out that “the exercise of freedoms permitted under international law cannot give rise to a historic right; it involves nothing that would call for the acquiescence of other states and can only represent the use of what international law already freely permits.”<sup>157</sup> This is in line with the *dictum* of the Chamber in the *Gulf of Maine Case*, and confirms that the exercise of activities needs to be as an exception to the established regime. The exercise of activities to the exclusion of others would, however, provide evidence that a state is exercising exceptional rights regardless of the potential freedom of the high seas. This is admitted by the Tribunal: “it would be necessary to show that China had historically sought to prohibit or restrict the exploitation of such resources by the nationals of other states and that those states had acquiesced in such restrictions.”<sup>158</sup> In cases of non-exclusive fishing rights, however, such rights can be preserved even if they were initially exercised as part of the freedom of the high seas as these rights form part of a shared regime according to the dictum of the Tribunal in the *Eritrea/Yemen Arbitration*.

With respect to activities on the continental shelf related to exploitation of natural resources, the Tribunal argued that it is “theoretically impossible” for such activities to lead to historic rights as “seabed mining was a glimmer of an idea when the seabed Committee began the

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<sup>155</sup> *Ibid.*, para. 267.

<sup>156</sup> *Ibid.*, para. 264.

<sup>157</sup> *Ibid.*, paras. 268-269.

<sup>158</sup> *Ibid.*, para. 270.

negotiations that led to the Convention. Offshore oil extraction was in its infancy and only recently became possible in deep water areas.”<sup>159</sup> This does not, however, preclude activities related to the exploitation of other resources of the continental shelf, especially sedentary species (i.e. sponge or pearl fishing), though admittedly solely one activity may not lead to historic rights over a certain maritime zone.

## **VI. Article 298(1)(a)(i) Optional Exceptions to Jurisdiction and Disputes Involving Historic Titles**

In the *Jurisdiction Award*, the Tribunal found that its jurisdiction would depend on the nature of the Chinese historic claim and on whether this was excluded by article 298 of the LOSC regarding disputes involving “historic bays or titles.”<sup>160</sup> In the *Merits*, the Tribunal examined the scope and definition of “historic titles” in the framework of this optional exception and the nature and scope of China’s claim.<sup>161</sup> As mentioned above, the Tribunal agreed with the approach of the Philippines with respect to the nature and the scope of the Chinese historic claim in the South China Sea, as historic rights to the living and non-living resources and not as a historic sovereignty claim. With respect to the scope of the optional exception of article 298(1)(a)(i), the Tribunal rightly rejected the Philippines’ narrow reading based on a textual interpretation of the English text of the Convention that this exception refers only to disputes related to maritime delimitation involving historic bays and titles. The Tribunal noted that the English text entailed some ambiguity and then referred to the equally authentic Chinese, French, Russian and Spanish versions of the

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<sup>159</sup> *Ibid.*, para. 270.

<sup>160</sup> *South China Sea Arbitration Award on Jurisdiction and Admissibility*, supra note 8, para. 168. Talmon argued (according to Symmons “unconvincingly”; Symmons, supra note 2, p. 234, note 249) that “as historic titles do not concern the application or interpretation of UNCLOS, they are not subject to the compulsory jurisdiction under articles 286 and 288(1) – and that the question of whether the PRC’s claims are invalid or unlawful cannot be answered without deciding upon historic titles and rights which are outside the jurisdiction of the tribunal.” Talmon, supra note 47, pp. 10 and 48 *et seq.*

<sup>161</sup> *South China Sea Arbitration Award (Merits)*, supra note 6, para. 206.

Convention to conclude that “the broader exception in the non-English texts, ‘for disputes ... involving historic bays or titles’ best reconciles the different versions.”<sup>162</sup>

With respect to the scope of the concept of historic titles in article 298, the Tribunal accepted the interpretation suggested by the Philippines, and distinguished between “historic titles” and “historic rights short of sovereignty” which the Tribunal had concluded was the case of the Chinese claim. The Tribunal noted that although “the ordinary meaning of this term [historic title] already implies a notion of property, the Tribunal considers that the meaning of the Convention’s reference to ‘historic titles’ should be understood in the particular context of the evolution of the international law of the sea.”<sup>163</sup> It then provided a brief overview of the inclusion of the concept of historic titles in the LOSC, and concluded that “the reference to ‘historic titles’ in article 298(1)(a)(i) of the Convention is accordingly a reference to claims of sovereignty over maritime areas derived from historical circumstances.”<sup>164</sup>

As analysed above, historic titles are normally associated with the exercise of sovereignty over the waters. A narrow interpretation of “historic titles” in article 298(1)(a) would concern sovereignty claims over the waters. Symmons argues that this is “a very semantic argument in the light of the loose terminology relating to historic maritime claims.”<sup>165</sup> The LOSC does not have any reference to historic rights, and as mentioned above, two types of historic rights short of sovereignty could be discerned – historic rights with a zonal quasi-territorial impact and non-

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<sup>162</sup> *Ibid.*, paras. 215-6

<sup>163</sup> *Ibid.*, para. 217.

<sup>164</sup> The Tribunal noted that “this usage was understood by the drafters of the Convention”. *Ibid.*, para. 226.

<sup>165</sup> See Symmons, *supra* note 2, p. 234, note 249. S. Yee, “The South China Sea Arbitration (The Philippines v China): Potential jurisdictional obstacles or objections” 13 *Chinese Journal of International Law* (2014), p. 730, also points out that “often ‘historic title’ and ‘historic rights’ – a broader term – are used interchangeably, and thus historic title may be interpreted to cover both claims regarding sovereignty rights – territorial titles – and claims relating to non-sovereignty rights or non-territorial rights”.

exclusive historic rights. The Tribunal did not distinguish between the different types of historic rights short of sovereignty.

In the case of non-exclusive historic rights, it can be easily assumed that there is no entitlement over maritime space and that, therefore, they would normally relate to activities within the framework of an existing maritime zone belonging to another state. These rights are, therefore, outside the scope of the optional exception of article 298(1)(a). They may, however, come under other exceptions. For example, historic fishing rights in the EEZ would be “excluded” by virtue of article 297(3)(a). On the other hand, historic rights with a quasi-territorial zonal impact create an entitlement, though short of sovereignty, over a maritime area due to the exclusivity in the exercise of sovereign rights. Although a narrow interpretation would restrict the optional exception of article 298(1)(a) to sovereignty claims, a contextual interpretation would also require such quasi-titles based on sovereign rights to be excluded. In most instances, at least as invoked before courts and tribunals, these rights will arise within the framework of maritime delimitation as circumstances to be taken into account for the designation of the boundary line and would thus be covered by the maritime delimitation optional exception (article 298(1)(a)). It may appear contradictory (and against the object and purpose of the optional exception) that historic rights with a quasi-territorial impact which are not regulated by the LOSC but by customary international law can be solved via compulsory jurisdiction by virtue of article 293, but historic titles with respect to internal and territorial waters, which are explicitly provided for by the LOSC, are excluded.

The Tribunal did not engage in a teleological interpretation of the provision which was also part of the Philippines’ argument. The Philippines argued that “an exclusion from jurisdiction for claims of historic rights incompatible with the Convention would undermine the object and

purpose of the Convention, including both its dispute settlement and its substantive provisions.”<sup>166</sup> This is contradictory as to what extent the historic rights are incompatible with the Convention will require the examination of the substantive aspects which might be excluded by article 298(1)(a) and would not, therefore, undermine the object and purpose of the Convention and the dispute settlement system. Nonetheless, the question which was the core of the Tribunal’s discussion, namely whether the LOSC has generally superseded historic rights would still pass the threshold of jurisdiction as it would not refer to the assessment of a specific historic claim, but to the interaction of the LOSC with historic titles/rights.<sup>167</sup>

## VII. Conclusion

The Tribunal in the *South China Sea Arbitration* significantly restricted the scope and contemporary relevance of historic claims. It found that the LOSC supersedes any previous historic titles/rights apart from those explicitly recognised in articles 10 and 15, namely historic bays and historic titles in the territorial sea/internal waters. This article disagrees with the reasoning of the Tribunal and argues that the consideration of the preservation of historic rights cannot be made *in abstracto* but only with reference to the specific instance of historic rights. It is true that since the adoption of the LOSC and the expansion of the jurisdiction of the coastal state, pre-existing historic claims have been validated and have become juridical based on the maritime zones recognised by the LOSC. Nevertheless, this does not preclude the potential existence of historic rights alongside the LOSC regime as long as the requirements for their establishment have been met. Historic rights relate to a particularised regime which reflects a continuous, long-established and undisturbed

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<sup>166</sup> *South China Sea Arbitration*, Merits Pleadings, Day 1, supra note 55, p. 52.

<sup>167</sup> Beckman, **supra note 38**, p. 26 para. 114 agrees with the narrow interpretation of historic titles, and argues that “if China were to argue that it has the right under international law to exercise historic rights in the waters inside the nine dashed lines, a dispute could arise over whether such rights are consistent with UNCLOS, and such dispute would not be excluded by the declaration”..

situation. They should be assessed on a case-by-case basis according to the historical particularities and realities of the claim.

Whereas there is consensus that historic titles may exist with respect to the territorial sea/internal waters (normally referred to as historic waters), the issue of historic rights short of sovereignty is more controversial. Two types of such rights have been identified in this article based on claims by states within the framework of maritime delimitation disputes and the jurisprudence of international courts and tribunals – historic rights short of sovereignty which have a quasi-territorial or zonal impact beyond the territorial sea; and non-exclusive historic rights.

Non-exclusive historic rights have mainly been accepted with respect to historic fishing rights. The South China Sea Tribunal recognised the existence of traditional fishing rights of fishermen of the littoral states in the area around the Scarborough Shoal. There is some uncertainty about the scope of these rights, but they seem to be closely linked to the fishing communities, their livelihood, traditions and customs including fishing methods. These have been presented by the Tribunal as rights belonging to individuals and not to states. However, the distinction between non-exclusive historic rights belonging to the state and traditional fishing rights belonging to individuals is not very clear and it has been suggested that these may be hybrid rights belonging to the individuals but also to the state of their nationality to the extent that they benefit these individuals. The Tribunal accepted that these rights have been preserved only in the territorial sea and not in the EEZ distinguishing this case from the arbitration award in the *Eritrea/Yemen Arbitration* which accepted the preservation of such rights even beyond the territorial sea. This article has argued that there is no convincing argument to differentiate between the territorial sea and the EEZ and the potential preservation of such rights depend on historic circumstances and realities of the area and the requirements for the establishments of such rights.



The issue of the potential historic rights short of sovereignty with a zonal impact beyond the territorial sea is more complicated and controversial. Arguments have been raised by states within the framework of maritime delimitation disputes and have been examined by international courts and tribunals. Despite the fact that courts and tribunals have not accepted the claims due to lack of evidence, they have not precluded their potential relevance in the law of the sea. In overlapping maritime zones, these rights relate to the location of the maritime boundary and the extent of a state's maritime zones vis-à-vis another coastal state. To what degree these rights can be accepted outside the framework of maritime delimitation is unclear and it would relate to the specific circumstances of each situation. With the exception of the Chinese claim, no such claim has been raised outside a maritime delimitation context.

It is true that excessive claims could destabilise the jurisdictional regime established by the LOSC. However, the nature and rationale of historic rights is to preserve stability and order based on the acceptance of a certain regime for a long period of time. Historic rights reflect an undisturbed and long established situation and particular circumstances and realities of a maritime area, but require a high threshold of evidence as they form an exception to the general rules.