

Rights and Jurisdiction over
Resources and Obligations of
Coastal States: Validity of Historic
Rights Claims

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General Points

- Little deep analysis of topic;
- Only 3 references in UNCLOS (Art.10(6) (bays), Art.15 (ts delimitation) and Art.298 (dispute settlement exceptions));
- No explicit mentions of “historic rights”(but cf Art 62(3) UNCLOS);
- Thus rules (similar to hws?) dependant on customary law (as in UNCLOS preamble);
- Phrase ‘historic title’ used in UNCLOS and by ICJ (1951); but no consistent terminology;
- Tribunal in *Eritrea/Yemen* did not distinguish between HRs and historic title (“but indicated that it accepted the notion of HRs as something falling short of territorial sovereignty”(Gao & Jia);

General Points ctd

- Eg., ‘historic claims’; ‘historic waters’(which include historic bays)(‘HWs)’historic rights’ (‘HRs),’traditional rights’ (*Eritrea/Yemen*),’established rights’ (*Icelandic case*); and see Art 62(3) UNCLOS (“habitually” exercised rights);
- ‘Historic **rights**’ (fishing) differ in 3 ways from ‘historic waters’ (re sovereignty claim, subjective/objective applicability) and adjacency;
- Phrase may even include HWs;

Historic Rights(HRs) – What Types/Rules?

- See description in *Eritrea/Yemen* Arbitration (formed through “a process of historical consolidation as a sort of servitude internationale”);
- Rights which would not normally accrue to a State “under the general rules of IL” through a process of consolidation (Blum);
- Nb dictum of ICJ in *Tunisia/Libya* case, as repeated in *Gulf of Fonseca* case re HWs (“particular regime” for each case) – similar rule would apply to HRs;
- Only indirect mention in UNCLOS Art.62(3)(“States whose national have habitually fished in the [EEZ]”);
- Implies phasing out/ elimination of such past rights by new *juridical rules*;

Application of Supposed Rules to the SCS Dispute

- **3 traditional rules** mentioned re HWs also relevant to HRs (incl. especially long period of continuous and effective exercise of jurisdiction, and international acquiescence);
- Such rights may be ***shared in same area*** as in SCS and this common factor may have downgrading effect (cf *Eritrea/Yemen*);
- Nine-Dashed Line – any past Chinese claim to HWs? HRs eo nomine in past? Should word “*historic*” be actually used in past claim? (Cf SCS – 1948 critical date?) - to alert other States?;
- Nine-dashed line not necessarily a depiction of area in which *HRs* as such are claimed;
- Cf Art.14 of Chinese Law on the EEZ and CS (the provisions of this law shall not affect *historic rights* enjoyed [by China]);
- No mention of ***fishery HRs*** as such – historic EEZ/CS claim?

What Continuing Legal Effect Today for HRs?

- Cf limited relevance in delimitation of zones – no ref to ‘HRs’ in UNCLOS EEZ/CS provisions;
- Cf ***Libya/Tunisia, Eritrea/Yemen*** (reciprocal fishery rights either side of line), ***Barbados/Trinidad*** cases;
- Even ref to “historic title” in Art.15 of UNCLOS has had little importance in its delimitation (cf the Sri Lanka/India delimitation in Palk Bay/ Gulf of Manaar (1973)(“historical and other evidence”) and Gulf of Tonkin Agreement);
- Little relevance under UNCLOS generally (Art.62(3); even duty to recognise traditional fishing rights in Art.51 in archipelagic waters is subject to conditions; cf though dicta in *Eritrea/Yemen*;

Permissible Types of HWs Interrelating with HRs

- Historic fishing zone? (nb varying widths evident as this zonal competence developed since 1950s;(not commensurate exercise for HWs proper) - even past HRs re fisheries tended to concern specific types of fish/natural resources;
- Can there be a claim now to a *historic cs*?
- Better view is that HRs to “other” resources and marine activities than fishing (contra, eg., Gao & Jia) is impermissible under UNCLOS because of ‘*inherency*’ rule;

Any Feasible Legal Effect of HRs Claim in SCS?

- Is HRs fishery claim mere fall-back position in SCS? Or 'thin-end of the wedge' argument to sovereign EEZ/CS rights?(cf Keyuan's argument);
- Better view is that alleged HRs to fisheries or seabed resources are now subsumed under EEZ/CS provisions of UNCLOS;
- Pre-UNCLOS 'acquired rights' doctrine now virtually non-existent (but cf dicta in *Libya/Tunisia, Eritrea/Yemen*);
- So HRs claims today possibly only a relevant consideration in EEZ delimitation;

- Past claim to HRs beyond ts cannot now be intertemporally backdated to pre-UNCLOS times (eg sedentary fisheries as in *Libya/Tunisia*) as they are now essentially overridden by *juridical* rights;
- This is esp. true of past claimed ***seabed*** rights (cf ICJ in *Libya/Tunisia* (HRs and cs “governed by distinct legal regimes in customary IL” (ie, acquisition/occupation / “***existence of rights ipso facto and ab initio***”));

- .Cf Judge Arechaga in *Libya/Tunisia* (cs new legal concept introduced in 1958 cannot abolish or deny “acquired or existing rights”);
- .Thus in case of cs previous HRs (eg sedentary fisheries), these are now superceded;

Conclusion

- HR doctrine is of little or no importance in the contemporary law of the sea, even in cases of maritime delimitation;
- The nine-dashed lines has no obvious relevance to a HRs claim (cf a HWs claim) ;
- It remains to be seen whether recent Philippines reference of dispute to arbitration (without mention of HW/HR claim) may lead tribunal nonetheless to examining such doctrines.