Chapter 4

HISTORIC RIGHTS AND DELIMITATION OF MARITIME ZONES


Both Art. 12 of the TSC(1958) and Art. 15 of the LOSC make reference to “historic title” as a reason for departing from the general rule for delimitation of a territorial sea between States, namely, failing agreement, a median line; but no mention is made of such a proviso in respects of either delimitation of overlapping EEZs or continental shelves (Arts 83 and 74 of the LOSC).\(^1\) The matter has, however, received some discussion in the latter contexts from the ICJ. For example, in Tunisia/Libya, Tunisia pleaded it had historic rights from past sedentary fishing activities. The ICJ whilst referring to the fact that the matter of Tunisia’s historic fishing rights might “be relevant for the decision” in a “number of ways”,\(^2\) found it not necessary in its judgment to take the issue into account. However, in his Separate Opinion in the case, Judge Arechaga opined that, by implication, the “historic factor could be relevant to continental shelf delimitation as a ’special circumstance’.\(^3\)

\(^2\) Supra, p. 4 at p. 75 para. 102.
\(^3\) Id., at p. 123, para. 80.
More recently in Qatar/Bahrain, the ICJ held, in relation to Bahrain’s alleged historic rights over pearling banks in an area of seabed in dispute, that even if pearling had been carried out by the nationals of one State only, this never led to the recognition of a quasi-territorial right to the fishing grounds or the superjacent waters, thus rejecting the claim that this constituted a “special circumstance”. Likewise, in the Eritrea/Yemen Arbitration, the tribunal found the traditional fishing regime not to be relevant in drawing a delimitation line.

1.1 The pleadings in Tunisia/Libya

In its pleadings in the case, Libya had argued that the claimed Tunisian historic rights were irrelevant and that it was “impossible to postulate Tunisian fishing rights affecting the continental shelf boundary prior to the establishment of the legal regime of the continental shelf” as it had “nothing in common with the kind of historic rights on which Tunisia relied”. In considering the relevance of “historic rights” in the context of “equitable principles” in UNCLOS III, Libya thus argued that the “location of an area of sedentary fisheries and even the fact that one State rather than another may, in the past have asserted control over such fisheries, has absolutely nothing to do with the physical attachment of the seabed to the adjacent landmass”; and “[w]hether the ‘historic rights’ are those of a coastal, or a non-coastal, State, such rights cannot affect in any way the facts of physical attachment or the ipso jure [continental shelf] rights of the State arising from those facts”.

2. Lack of Clarity on Historic Relevance

The relevance of claimed historic rights to maritime delimitation of the expanded maritime zones such as the continental shelf remains somewhat unclear in the light of the above caselaw, though State practice in recent times suggests that historic rights, even if considered irrelevant to delimitation issues, may still be independently taken

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6 See Libya’s Counter-Memorial, paras. 151–179, Pleadings, vol. 2, pp. 208–216 on effect of ‘Historic Fishing Rights’ on maritime delimitation. It cited (id., para. 256, p. 210) François having dealt with sedentary fisheries in his later Reports, but making no reference to their effect on boundaries. It went on to consider the relevance of “historic rights” to the delimitation of maritime boundaries” as reflected in the practice of States (id., at p. 211, para. 159).
7 Para. 169, at pp. 214–6.
8 Id., at para. 178.
9 Id., para. 178, p. 216. Only one situation allegedly involved “historic” fishing rights (rather than merely sedentary fishing rights): see Professor Jennings’ Reply, Pleadings, vol. V, at p. 278, which mentioned historical exclusive fishery rights, both to sedentary species and also swimming species caught by traditional devices permanently fixed to the seabed. He denied (id.) that Tunisia claimed “some form of acquisition of continental shelf rights” through the exercise of its historical fishery rights; but argued that these “ancient activities” evidenced the fact that there was a Tunisian natural prolongation in these parts; and (id.) that a continental