Chapter 7

POSSIBLE INTERNATIONAL ORIGINS OF HISTORIC CLAIMS TO WATERS: INTERNATIONAL JUDICIAL DECISIONS, PROCEEDINGS BEFORE INTERNATIONAL TRIBUNALS AND TREATIES

1. Types of State practice which may give rise to Historical Claims: The Problems in Alaska v. US (2005)

Evidence of the origin of a particular historic claim may most obviously arise from intraterritorial actions in the claimant State such in a decree, legislation or judicial decision (see below Chapter 10); but they may also arise, in whole or in part, from some external agency such as international treaty or adjudication. For example, in respect of the evidence of historic claim in Alaska v. US (2005) the Special Master made reference to the following1 to illustrate the diversity of the type of evidence there submitted to prove (or disprove) a title to historic waters. As he said:

The numerous exhibits [in the case] provide information about dozens of incidents in the [Alexander Archipelago’s] history. The exhibits include international treaties, statements made before international tribunals or in the course of international negotiations, and reports detailing the experiences of mariners plying the waters in the nineteenth and twentieth centuries. The exhibits also include historical accounts of the practices of Russia prior to its cession of Alaska to the United States in 1867, congressional reports and other documents, agency regulations, letters and memoranda of executive branch officials, geographical charts, and magazine articles. The documents come from many parts of the world over a 150 year period. The parties appear to have collected every kind of statement, in every possible form, regarding the status of the waters at issue.

Some of these various types of documentary evidence of a claim to historic waters will be discussed in relevant headings below. The Special Master in the above case also commented on the timescale of documentary evidence of alleged claim in the case – as seen, over an 150 year period; thus including the facts and documents relevant to the issue of historic title beginning in the 1820s (at the time of Russian occupation of Alaska), extending through the cession of Alaska to the USA in 1867, and continuing up to Alaska’s statehood in 1959, only ending in the 1970s when the US then made “international representations” (inconsistent with an historic waters claim) concerning Alaska’s coastline.2

2. International adjudication

2.1 Decision of an international tribunal: El Salvador/Honduras and the Gulf of Fonseca

A specific finding by an international tribunal as to the historic status of particular waters may (in time at least) have an effect even erga omnes and beyond the parties to a particular dispute submitted to an international tribunal. As the Memorial of El Salvador in El Salvador/Honduras3 stated regarding the Gulf of Fonseca (which had been (in the 10th question) found in the the famous 1917 judgment of a Latin American regional court (the Central American Court of Justice) to be an historic bay with the 3 riparian states as co-owners), “[e]ven if initially the judgment was binding in respect of the direct parties to the litigation, Nicaragua and El Salvador, the legal status recognised therein has been consolidated in the course of time, its effects extend[ing] to third states, and in particular . . . to Honduras”.4

El Salvador went on to argue that “[a]s to third States in general, the objective legal regime established on the basis of the judgment relies on the acquiescence and in some cases on the express recognition of third States, particularly the great maritime powers”.5 It cited in this connection a US diplomatic note of 1904 and the fact that “other

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2 Id., at p. 23.
4 Id., at pp. 176/77, para. 13.2.
5 Id., at p. 177, para. 13.3.