Notes on the Historic Waters Regime and the Bay of Fundy

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Introduction

Historic waters are an orphaned offshore international legal regime. All the other offshore international legal regimes, e.g., internal waters, territorial sea, 200-nautical mile zones, are grounded in multilateral treaties, in particular, the 1982 United Nations Convention on the Law of the Sea (LOS Convention).1 The historic waters regime, however, was left out of the LOS Convention, as well as the 1958 Convention on the Territorial Sea and Contiguous Zone.2 Both multilateral treaties note that “historic bays” (aligned with historic waters)3 exist, albeit in a round-about manner, where it is stated that the juridical bay provisions in the conventions do not apply to historic bays.4 Neither convention provides any indication of when historic waters exist or the consequence of waters being historic.5 As stated by the International Court of Justice in the 1982 Libya-Tunisia Case: “It is clearly the case that…the notion of historic rights or

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3 See Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening), [1992] International Court of Justice Reports 351, at para. 383 [hereinafter the Gulf of Fonseca Case].


5 Case Concerning the Continental Shelf (Tunisia/Libya), [1982] International Court of Justice Reports 18, at para. 100 [hereinafter Libya/Tunisia Case].
waters...are governed by...customary international law.” Symmons, in his recent study, points out that the international legal rules regarding historic waters are “vague and difficult to apply” precisely because of the reliance that must be had on customary international law. The 1962 U.N. Secretariat Study “Juridical Regime of Historic Waters, Including Historic Bays” notes that:

[T]he concept of “historic waters” has its root in the historic fact that States through the ages claimed and maintained sovereignty over maritime areas which they considered vital to them without paying much attention to divergent and changing opinions about what general international law might prescribe... As international law of the sea evolved with 3-nautical mile territorial seas and then 12-nautical mile territorial sea, the historic waters concept was seen as being “necessary in order to maintain a State’s title to some areas of water which might escape the codification formula...”

Regarding what rights attach to historic waters, the International Court in the 1951 Anglo-Norwegian Fisheries Case stated:

By “historic waters” are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title.

The Court in the 1982 Tunisia-Libya Continental Shelf Case commented, however, that:

international law...does not provide for a single “regime” for “historic waters” or “historic bays,” but only for a particular regime for each of the concrete, recognized cases of “historic waters” or “historic bays.”

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11 *Libya-Tunisia Case*, *supra* note 5, at para. 100. This was cited with approval in the *Gulf of Fonseca Case*, *supra* note 3, at para. 384.