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The Effect of Historic Fishing Rights In Maritime Boundaries Delimitation

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The Effect of Historic Fishing Rights In Maritime Boundaries Delimitation

Leonardo Bernard*

I. Introduction

When the Exclusive Economic Zone (EEZ) regime was established by the Third United Nations Conference of the Law of the Sea (UNCLOS III)[1] it created a new fisheries regime for coastal States. The EEZ regime under Part V of the 1982 United Nations Convention of the Law of the Sea (LOS Convention)[2] grants coastal States exclusive rights to fisheries resources as far as 200 nautical miles (nm) from their coastlines.[3] It has been commonly asserted that the EEZ regime, which is now widely accepted as customary international law, precludes States from making claims to traditional or historic fishing rights in the EEZ of other States. Some States, however, have continued to assert historic fishing rights within the EEZ of other States, the most prominent example being China, which has consistently made claims to historic fishing rights within its infamous nine-dashed line in the South China Sea, which overlaps with the EEZs of the Philippines, Viet Nam, Malaysia and Brunei Darussalam.[4]

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1 The conference held its first session in 1973, and worked for several months each year until it finally adopted a convention in 1982.

2 *United Nations Convention on the Law of the Sea*, 10 December 1982, UNTS 1833 at 3 (entered into force 16 November 1994) [LOS Convention]. As of 19 February 2013, the LOS Convention have 165 parties (including the European Union), with Timor Leste acceded to the Convention on 8 January 2013.

3 The EEZ regime also grants coastal States exclusive rights to exploit the natural resources, both living and non-living, of the seabed and subsoil, and over other economic exploitation within the zone up to 200 nm from the coastlines; LOS Convention, *ibid*, Article 56(1)(a).

4 In the communication to the Commission on the Limits of the Continental Shelf (CLCS) in response to the Joint Submission of Malaysia and Viet Nam, China asserted that 'China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil (see attached map)', which referred to the nine-dashed line map. See CLCS, *Communication received from China with regard to the Joint Submission by Malaysia and the Socialist Republic of Viet Nam*, 7 May 2009, online: United Nations

This article argues that first, by accepting the EEZ regime, coastal States have given up any claims they may have had, with regard to fishing in the EEZ of other States, based on traditional or historic fishing rights. Second, although historic/traditional fishing rights may still exist alongside the EEZ regime, such rights are subject to recognition by the coastal State in whose EEZ the rights are being exercised. Finally, historic fishing rights may play a role in the delimitation of overlapping EEZs, but only in exceptional circumstances.

II. Definition of Historic Fishing Rights

The term historic fishing rights should not be confused with the term historic waters. Historic waters are 'waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercise sovereign rights with the acquiescence of the community of States'.[5] The International Court of Justice (ICJ) in the *Fisheries Jurisdiction* case stated that historic waters means 'waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title'.[6] The LOS Convention also recognizes the concept of historic waters, albeit limited only to the regime of historic bays.[7] Generally, there are three factors that must be proven in order to successfully establish title of historic waters over a certain ocean space: effective exercise of sovereignty, prolonged usage, and the recognition of other States.[8] These strict

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<http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf>.

5 LJ Bouchez, *The Regime of Bays in International Law* (Leyden: Sythoff, 1964) at 281; United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas*, No 112, United States Responses to Excessive National Maritime Claims (9 March 1992), at 8 [*Limits in the Seas*]; for general discussion of historic waters, see Clive R Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Leiden/Boston: Martinus Nijhoff Publishers, 2008).

6 *Fisheries Case (United Kingdom v Norway)* (1951) ICJ Rep 116 [*Anglo-Norwegian Fisheries Case*], at 130; see also *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v Honduras, Nicaragua intervening)* (1992) ICJ Rep 351, at para 384.

7 LOS Convention, *supra* note 2, Article 10(6); although the concept of historic title is not discussed in length in the LOS Convention, it is generally accepted that the concept rest upon customary international law; see *Continental Shelf (Tunisia/Libyan Arab Jamahiriya*, (1982) ICJ Reports, at 74 [*Tunisia/Libya*]; see also Clive R Symmons, *supra* note 5 at 9.

8 *Tunisia/Libya*, *ibid*, at 74*; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (1992) ICJ Reports, at 589; see International Law Committee, 'Juridical Regime of Historic Waters, Including Historic Bays', in *International Law Commission Yearbook*, vol II (1962) at 6; see also LJ Bouchez, *supra* note 5; Yehuda Z Blum, 'Historic Rights' in Rudolf Bernhardt, ed, *Encyclopedia of Public International Law*, Installment 7 (Amsterdam: North-Holland Publishing Co, 1984) at 121; Epsey Cooke Farrel,

requirements for establishing historic waters make it difficult for States to successfully claim part of their waters as historic waters. Currently, most claims of historic waters made by States are only unilateral claims that are not recognized by the international community.[9]

In comparison, a claim of *historic rights* means that a State is claiming to exercise certain rights, usually fishing rights, in what are usually deemed to be international waters.[10] The requirements that must be satisfied in order to successfully establish historic rights are the same as those required to establish historic waters: long-established activities and the continuous exercise of these activities that are recognized by other States.[11] Although the jurisprudence of decisions of international courts and tribunals reflects a reluctance to recognize a State's claim of historic rights, a State will have a better chance of successfully bringing a claim of historic rights than it would have bringing a claim of historic waters. This is because even though the elements for establishing historic rights are the same as those required for establishing historic waters, there are a few significant differences between the two concepts.

First, historic rights claims do not amount to a sovereignty claim. Historic rights merely give the claiming State fishing rights by long usage.[12] As the ICJ stated in the *Qatar/Bahrain* case, the historic pearling activities of Bahrain have never led to the recognition of a 'quasi-territorial right' to the fishing ground itself. This means that even if the historic pearling rights of Bahrain were recognized, it would not have amounted to sovereignty or any form of 'quasi-sovereignty' over the pearling banks or to the superjacent waters.[13] It would be easier for a State to provide evidence of historic fishing activities in an area of water as opposed to trying to establish an historic exercise of sovereignty over the

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The Socialist Republic of Vietnam and the Law of the Sea (The Hague: Martinus Nijhoff Publishers, 1998) at 68-69.

9 For example: Libya claimed the Gulf of Sidra as Libyan internal waters in 1973, which was protested by the US, Australia, France, Federal Republic of Germany, Norway and Spain; Cambodia and Viet Nam on 7 July 1982 made a claim to a part of the Gulf of Thailand as historic waters, which was met with protests from the US, Thailand, Singapore and Germany; see *Limits in the Seas, supra* note 5, at 13-121. China also claims some form of historic title over the South China Sea based on their nine-dashed line, which was challenged by the Philippines, Viet Nam, Malaysia and Brunei Darussalam, see *supra* note 4. The Philippines on 22 January 2013 submitted a legal challenge to China's nine-dashed line to arbitration under Annex VII of the LOS Convention, see Notification and Statement of Claim of the Philippines dated 22 January 2013.

10 Clive R Symmons, *supra* note 5, at 4.

11 *Tunisia/Libya, supra* note 7, at paras 98-99; *Fisheries Jurisdiction (United Kingdom v Iceland),* Merits, Judgment, (1974) ICJ Reports 3, at paras 63-65.

12 See Separate Opinion of Judge De Castro, *Fisheries Jurisdiction, ibid,* at 99.

13 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain,* Merits, Judgment (2001) ICJ Reports 40, at paras 235-236.

area. It is important to remember that a State's claim to historic rights does not mean that this right gives the claiming State sovereignty over the relevant body of water.

Second, an historic rights claim is not exclusive. Since the existence of historic rights in one area does not amount to sovereignty, it is possible for certain rights of other States to exist concurrently in the same body of water. In the *Eritrea/Yemen* arbitration, for example, the Tribunal declared that 'Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihood of this poor and industrious order of men' around the islands of *Hanis* and *Zuqar,* as well as around the islands of *Jabal al-Tayr* and the *Zubayr* group.[14]

Third, a claim of historic rights is specific, whether it is a historic right to fishing activities or historic rights over the fishing resources. Even when a State has claimed historic rights to fishing activities, the specific activities and the species of fish were clearly described. For example in *Qatar/Bahrain,* Bahrain claimed the historic rights of pearling;[15] in *Barbados/Trinidad and Tobago,* Barbados argued that it had historic rights of fishing for the flying fish in the waters of Trinidad and Tobago;[16] and in the *Jan Mayen* case, Norway claimed that its fishermen had traditionally conducted whaling, sealing and fishing for capelin in the waters between Jan Mayen and Greenland.[17]

Based on the elaboration above, we can conclude that although the threshold to prove historic fishing rights is not as high as proving historic waters, and although such a concept is recognized under customary international law, proving historic fishing rights is not an easy feat. The question, however, is how to reconcile the existence and recognition of historic fishing rights with the EEZ regime contained in the LOS Convention, which is binding on all States parties.

III. The Establishment of the EEZ Regime

Although the concept of the EEZ was only formally introduced during UNCLOS III, the importance of a 'fishing zone' to coastal States has been recognized since the 19th century. For example, in 1916, Spain's then Director-General of Fisheries urged the Spanish Government to extend Spain's territorial sea to include the

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14 *Eritrea v Yemen* (1998) Award of the Arbitral Tribunal in the First Stage - Territorial Sovereignty and Scope of the Dispute [*Eritrea/Yemen – Phase I*], at paras 525-526.

15 *Qatar/Bahrain, supra* note 13.

16 *Barbados v Trinidad & Tobago,* Award of the Arbitral Tribunal (2006) 45 ILM 798 [*Barbados/Trinidad and Tobago*], at para 247.

17 *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark v Norway*) (1993) ICJ Report 38 [*Jan Mayen* case], at para 15.

continental shelf, as most of the edible species of fish were found in the continental shelf area, although the claim did not expressly mention the term 'fishing zone'.[18] Similarly, the United States issued the Truman Proclamations in 1945. These unilateral declarations are the first influential recognition of the right of the coastal State to extend its jurisdiction over natural resources beyond the territorial sea. President Truman made two declarations on 28 September 1945. The first contained the United States' declaration of its right to explore the natural resources in the continental shelf contiguous from its land territory.[19] The second declaration, albeit over-shadowed by the first, was no less important. It stressed the United States' policy on the need for conservation zones and protection of fishery resources in areas of the high seas 'contiguous to its coasts', although it did not claim sovereignty over the living resources in those waters.[20]

The 1945 Truman Declarations asserted the right to regulate and control fishing activities in waters beyond the territorial sea of a coastal State, and it was no surprise that it prompted a trend of unilateral declarations by countries claiming 'entitlement' or 'sovereignty' over extended maritime zones.[21] In 1947, for example, Chile[22] and Peru[23] proclaimed sovereignty and jurisdiction over the seas adjacent to their coasts, up to a distance of 200 nm, in order to protect their offshore fishing industries from distant-water fishing fleets. Although there were inconsistencies in relation to the nature and geographical extent of sovereignty claims over offshore fishing activities following the Truman Declarations, these claims were important to the development of the EEZ regime. Although no agreement on any fishing zone regime was reached during the First United Nations Conference on the Law of the Sea (UNCLOS I) in 1958,[24] the post-

[18] League of Nations Committee of Experts for the Progressive Codification of International Law, *Questionnaire No 2: Territorial Waters* (1926) 20:3 AJIL Supp 62, at 125-126.

[19] 1945 US Presidential Proclamation No 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf (1945) 10 Fed Reg 12,305.

[20] 1945 US Presidential Proclamation No 2668, *Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas* (1945) 10 Fed Reg 12,304. See also Harry N Scheiber, 'Origins of the Abstention Doctrine in Ocean Law: Japanese-US Relations and the Pacific Fisheries, 1937-1958', (1989) 16 Ecology LQ 23.

[21] For more detailed discussion on the claims made immediately following the Truman Declaration, see Richard Young, 'Recent Development with Respect to the Continental Shelf' (1948) 42:4 AJIL 849, at 850; see also Scheiber, *ibid*.

[22] Presidential Declaration Concerning Continental Shelf of 23 June 1947, *El Mercurio*, Santiago de Chile, 29 June 1947.

[23] Presidential Decree No 781 of 1 August 1947, *El Peruano: Diario Oficial*, Vol 107, No 1983, 11 August 1947.

[24] UNCLOS I, however, managed to produce four conventions: Convention on the High Seas (entered into force on 30 September 1962), Convention on the Territorial Sea and the Contiguous Zone (entered into force on 10 September 1964), Convention on Fishing and

Truman Declaration positions of the Latin American countries that claimed 200 nm jurisdictions over fishing activities was the pre-cursor for the EEZ regime.

In 1960, the Second United Nations Conference on the Law of the Sea (UNCLOS II) was held, focusing on questions as to the breadth of the territorial sea and how far coastal States could extend their fishery rights beyond their territorial seas. However, the UNCLOS II failed to reach agreement on either issue. The UNCLOS III began in 1973 and lasted for nine years. It sought to resolve the two issues outstanding from the first two conferences, these being the breadth of territorial sea and limits of the fishing zone. During this conference, the concept of an Exclusive Fishing Zone, influenced by the various declarations of States regarding fishing jurisdiction up to 200 nm, evolved even further. In 1974, the concept of the EEZ was introduced in the conference to replace the freedom of fishing beyond the territorial sea and open access to the high seas fisheries up to 200 nm. The concept rapidly received strong support from most coastal States.[25]

The EEZ is neither under the sovereignty of the coastal State nor part of the high seas. It is a specific legal regime whereby coastal States have sovereign rights and jurisdiction over the natural resources in the body of water and subsoil up to 200 nm from the shore and where other States have certain rights and freedoms as provided for in the LOS Convention.[26] This means that within their EEZ, coastal States have an exclusive right to the fisheries and other living resources of the sea and to the oil and gas resources of the seabed and subsoil. Coastal States do not have any 'residual' jurisdiction in the EEZ and only have such jurisdiction as provided for in the LOS Convention, such as jurisdiction with regard to artificial islands, installations, marine scientific research and the protection and preservation of the marine environment.[27] With respect to jurisdiction over matters outside of economic activities or outside of those specifically provided for in the LOS Convention, the principles of jurisdiction governing the high seas apply in the EEZ of a coastal State.

It is clear from the discussions undertaken during the negotiation of the EEZ provisions in the LOS Convention that any claims of historic/traditional fishing rights made by non-coastal States are not compatible with the concept of

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Conservation of the Living Resources of the High Seas (entered into force on 20 March 1966), and Convention on the Continental Shelf (entered into force on 10 June 1964).

[25] John Stevenson and Bernard Oxman, 'The Third United Nations Convention on the Law of the Sea: The 1974 Caracas Session' (1975) 69 AJIL 1, at 2 [Stevenson and Oxman. '1974 Caracas Session']. Although the concept of extended fishing zones beyond the traditional territorial waters limits had been discussed and/or instituted in the previous decade, the concept of EEZ was first advanced by Ambassador Njenga of Kenya in the Asian-African Legal Consultative Committee in 1972; see *Report of The Thirteenth Session of the Asian-African Consultative Committee*, Lagos, 18 -25 January 1972.

[26] LOS Convention, s*upra* note 2, Articles 56 and 57.

[27] LOS Convention, s*upra* note 2, Article 56(b).

EEZ.[28] A coastal State's sovereign rights over all living resources within 200 nm as recognized in the EEZ has completely superseded the freedom of fishing beyond the territorial sea and open access to the high seas fisheries.[29] During the negotiation of Article 55 of the LOS Convention, Japan and the Soviet Union tried to 'soften' the EEZ regime, by proposing granting preferential rights to coastal States in relation to fisheries, rather than exclusive rights.[30] This concept would have allowed preferential rights of coastal States to overlap with the historic/traditional fishing rights of other States. Even the ICJ back then was trying (not so subtly) to influence the direction of the negotiation of UNCLOS III in its 1974 *Fisheries Jurisdiction* case judgment.[31] In that case, the Court acknowledged Iceland's right to establish a 50 nm fishing zone. However by still recognizing the United Kingdom's historic rights and economic dependency on certain fish stocks located in such a fishing zone,[32] the Court implied that Iceland did not have the right to claim an *exclusive* fishing zone.[33]

Australia and New Zealand proposed recognition of historic rights of developed distant-water fishing States, but clarified that such rights should also eventually be phased out.[34] Malta and Zaire also proposed that the right of the coastal States to exploit the living resources in their waters up to 200 nm should take into account the historic/traditional fishing rights of other States.[35] However, in the end, the view of States seeking a strong economic zone prevailed. The only consolation given to those looking for some form of recognition to historic rights was provided for in Article 62 of the LOS Convention, which allows other States access to the surplus of the allowable catch of the living resources in the EEZ of a coastal State. In giving this access, the coastal State must take into account the States whose nationals have habitually fished in the zone. However, such access is

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[28] During the 1974 Caracas Session, there was a widespread support for the coastal States' sovereign or exclusive rights for the purpose of exploration and exploitation of living resources within the 200 nm economic zone. See Stevenson and Oxman, '1974 Caracas Session', *supra* note 25, at 16-18.

[29] Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Dordrecht: Martinus Nijhoff Publishers, 1989), at xxv.

[30] Sea-Bed Committee, UN GAOR, 27th Sess, Supp No 21, UN Doc A/8721, at 158-161 & 188-196.

[31] *Fisheries Jurisdiction (United Kingdom v Iceland)*, Merits, Judgment, (1974) ICJ Reports 3 [*Icelandic Fisheries Jurisdiction*], at 26.

[32] *Icelandic Fisheries Jurisdiction, ibid*, at 27-28.

[33] Churchill criticized the Court's judgment in this case, saying that the Court trying to rule on a question being discussed in the Third Law of the Sea Convention (of the establishment of the exclusive economic zone); see Robin R Churchill, 'The Fisheries Jurisdiction Cases: The Contribution of the International Court of Justice to the Debate on Coastal States' Fisheries Rights', (1975) 24 Int'l & Comp LQ 82, at 104.

[34] Sea-Bed Committee, *supra* note 30, at 183-187.

[35] Sea-Bed Committee, *supra* note 30, at 114-115.

dependent on the coastal State's consent and the coastal State has the discretion to deny this access to other States.

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So what happened to historic fishing rights after the establishment of the EEZ regime? Post-1982, most unilateral claims of historic fishing rights were abandoned, since almost all of these claims were in waters within 200 nm off the coast of the States that were claiming such historic fishing rights. In other words, most of the historic fishing rights claims that existed immediately post-1982 were absorbed into the EEZ regime. The ICJ in its 1982 decision on *Tunisia/Libya* recognized the emerging concept of the EEZ, even though the LOS Convention had just been adopted and was not yet in force. The ICJ stated that Tunisia's claim of historic rights and titles basically formed parts of their EEZ, since the area of waters in which Tunisia claimed such rights were well within 200 nm off their coast.[36] In practice, however, some States still recognize historic rights that existed prior to the Convention. For example, India and Sri Lanka agreed on the delimitation of a boundary in the historic waters of Palk Bay, in which traditional fishing rights of both countries' fishermen are recognized and protected.[37] Japan established a 200 nm fishery zone after the adoption of the LOS Convention in 1982, but by terms of their 1977 Law on Provisional Measures relating to the Fishery Zone, Japan still recognized the fishing rights of fishermen from Korea and China.[38] The boundary agreement between Australia and Papua New Guinea also recognizes the 'traditional way of life and livelihood' in the established protected zone.[39] The Arbitral Tribunal in *Eritrea/Yemen* also recognized the existence of traditional fishing rights of Eritrea's fishermen to continue to have access to and use of waters around the islands, the islands themselves, as well as access to Yemen's port.[40]

Thus, it is clear that although historic/traditional fishing rights of a third State in the EEZ regime continue to exist, the rights are subject to recognition and approval by the coastal States.

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[36] *Tunisia/Libya*, *supra* note 7, at para 100.

[37] *Agreement Between India and Sri Lanka on the Boundary in Historic Waters Between the Two Countries and Related Matters 1974* (entered into force 8 July 1975). Note, however, that other States had protested India's and Sri Lanka's claim of historic waters in Palk Bay, see *Limits in the Seas*, *supra* note 5, at 14.

[38] This ended, however, in 1996 when Japan issued Law No 74 of 14 June 1996 on the Exclusive Economic Zone and the Continental Shelf; see Yutaka Kawasaki-Urabe and Vivian L Forbes, 'Japan's Ratification of UN Law of the Sea Convention and Its new Legislation on the Law of the Sea', IBRU Boundary and Security Bulletin, winter 1996 – 1997.

[39] *1978 Treaty concerning Sovereignty and Maritime Boundaries in the area between Australia and PNG*; see also David Joseph Attard, *The Exclusive Economic Zone in International Law* (Oxford: Clarendon Press, 1987), at 268.

[40] *Eritrea/Yemen – Phase I*, *supra* note 14.

IV. Historic Fishing Rights as Special Circumstances in Maritime Delimitation

A. *General Rule for Maritime Boundaries Delimitation*

The LOS Convention, which was concluded in 1982, establishes a legal framework for all activities in the oceans and sets out the maritime zones that can be claimed from territory and/or features. The general rule for delimiting the territorial sea is set out in Article 15 of the LOS Convention, which states that the boundary should be the median line between the two States.[41] The LOS Convention does not, however, provide any specific method for delimitation of the EEZ or continental shelf. The LOS Convention provisions on the delimitation of boundaries in overlapping EEZ and continental shelf claims are set out in Articles 74 and 83.[42] The general principle is that EEZ and continental shelf boundaries are to be delimited by agreement on the basis on international law in order to reach an equitable solution.[43] Thus, it was left to State practice and decisions of international courts or tribunals to provide the method of delimitation for the EEZ and continental shelf, in order to achieve an equitable solution.

The lack of specific method of delimitation of the EEZ and continental shelf in the LOS Convention was partially influenced by the decision of the ICJ in the *North Sea Continental Shelf* cases in 1969, which had a huge impact on the development of the method for delimitation of the continental shelf. In its judgment, the ICJ rejected the use of the median line principle, which was enshrined in Article 6 of the 1958 Convention on the Continental Shelf,[44] stating that the median line principle was not a customary rule since it was not used in the Truman Proclamation (which used the equitable principle),[45] and that its inclusion in the delimitation provisions of the 1958 Continental Shelf Convention was

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41 LOS Convention, s*upra* note 2, Article 15.

42 The ICJ has recognized that the principles of maritime delimitation enshrined in Articles 74 and 83 of the LOS Convention reflect customary international law, see *Territorial and Maritime Dispute between Nicaragua and Colombia (Nicaragua* v *Colombia), Judgment, ICJ Reports 2012* [*Nicaragua/Colombia*], at para 139; see also *Qatar/Bahrain, supra* note 13, at para 167.

43 LOS Convention, s*upra* note 2, Articles 74 and 83.

44 *1958 Convention on the Continental Shelf*, 29 April 1958, UNTS 499, at 311 (entered into force 10 June 1964) online: UN Treaties Series <http://treaties.un.org/doc/Treaties/1964/06/19640610%2002-10%20AM/Ch_XXI_01_2_3_4_5p.pdf>.

45 *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v the Netherlands)* (1969) ICJ Rep 3 [*North Sea Continental Shelf* cases], at paras 86-87.

subject to reservations.[46] The ICJ also stated that the use of the median line/equidistance principle in certain circumstances (in this case Germany's concave coastline) could lead to unnatural or unreasonable results.[47] The ICJ, thus, came up with new criteria, and stated that the delimitation of continental shelf between adjacent States should be equitable and take into account relevant circumstances.[48] Although the ICJ in this case narrowed the relevant circumstances to primarily geographical considerations,[49] the Court said that relevant circumstances could include the natural resources located within the continental shelf areas involved,[50] which arguably includes the presence of sedentary fisheries.

The principles of delimitation of EEZ and continental shelf, however, have further developed since the conclusion of UNCLOS III in 1982. In the *Libya/Malta* decision, ICJ explained that equidistance may be applied if it leads to an equitable solution.[51] The ICJ went further in the *Qatar/Bahrain* decision, stating that for the delimitation of maritime zones beyond 12 nm, it would first draw the provisional equidistance line before considering whether there are circumstances that lead to an adjustment of that line.[52] More recently, in the 2009 *Black Sea* case between Romania and Ukraine, the ICJ introduced a three stage approach to maritime delimitation: (i) establish provisional equidistance line; (ii) consider whether there any factors which call for an adjustment of the equidistance line to reach an equitable result; and (iii) verify that that line does not lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coast lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line.[53] The International Tribunal for the Law of the Sea (ITLOS) confirmed this approach as the preferred method of delimitation of the EEZ and continental shelf in its decision of the delimitation of EEZ and outer continental shelf between Bangladesh and Myanmar.[54] Most recently, in its judgment on the delimitation dispute between

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46 *Ibid*, at para 63.

47 *North Sea Continental Shelf* cases, s*upra* note 45, at para 63.

48 *North Sea Continental Shelf* cases, s*upra* note 45, at paras 92-94.

49 *North Sea Continental Shelf* cases, s*upra* note 45, at para 95.

50 *North Sea Continental Shelf* cases, s*upra* note 45, at para 97.

51 *Libya/Malta*, *supra* note 8, at para 62.

52 *Qatar/Bahrain*, *supra* note 13, at para 176.

53 *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (2009) ICJ Rep 61, at paras 116-122; for full analysis of this case, see Jon M Van Dyke, 'The Romania-Ukraine Decision and Its Effect on East Asian Maritime Delimitations', in Jon M Van Dyke, *et al* (eds), *Governing Ocean Resources: New Challenges and Emerging Regimes* (a Law of the Sea Institute publication, Martinus Nijhoff/Brill, 2013).

54 *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (2012) Judgment, ITLOS Case No 16 [*Bangladesh/Myanmar*]

Nicaragua and Colombia, the ICJ stated that unless it is unfeasible to do so, the Court would normally use the three stage approach to effect delimitation between overlapping EEZ or continental shelf.[55]

State practice and case law have thus clarified the preferred method for delimitation of maritime zones, including for the EEZ. However, it is not clear what effect should be given to historic fishing rights in any maritime boundary delimitation.

B. *The Role of Historic Fishing Rights in the Delimitation of Maritime Boundaries*

Although they do not entail sovereignty and even though their existence is subject to the EEZ regime of coastal States, historic fishing rights may play a role in the delimitation of overlapping maritime boundaries, especially in the delimitation of the territorial sea. The significance of historic fishing rights in water columns was acknowledged in Article 12 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, which states that the equidistance method of delimitation does not apply where it is necessary by reason of historic title to delimit the territorial seas in a way that is at variance with this method.[56] Similar words are used in Article 15 of the LOS Convention, which states that the median line may be adjusted to take into account 'historic title or other special circumstances'.[57]

Despite the reference to historic title in Article 15, the role of historic fishing rights in the delimitation of the EEZ is not clearly spelt out in the LOS Convention. The relevance of historic use and economic dependency to boundary delimitation of fishery zones, however, has been recognized even prior to UNCLOS III, since fishing resources, unlike hydrocarbon resources in the continental shelf, have been exploited for centuries.[58] Even prior to the conclusion of the LOS Convention, fisheries interests were considered as one of the factors to be taken into account in the delimitation of territorial sea boundaries between States. The Permanent Court of Arbitration (PCA) in drawing the territorial sea boundary between Norway and Sweden in 1909 took into account the Grisbadarna fishing bank, which had long been fished by Swedish fishermen, and

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at para 455, online: ITLOS <http://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR.140-E.pdf>.

55 *Nicaragua/Colombia*, *supra* note 42, at paras 190-199.

56 *1958 Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 15 UST 1606 (entered into force 10 September 1964), Article 12, online: UN Treaties Series <http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_territorial_sea.pdf.

57 LOS Convention, *supra* note 2, Article 15.

58 Edward Collins Jr and Martin A Rogolf, 'The International Law of Maritime Boundary Delimitation' (1982) 34 Maine Law Review 1, at 54.

awarded the bank to Sweden.[59] However, international courts and tribunals have displayed caution when taking into account historic/traditional fishing rights for the purpose of drawing maritime boundaries, and have been careful not to give too much weight to historic fishing rights in order to ensure that the final line is equitable for all parties. In the Grisbadarna arbitration, for example, even after taking into account the historic use and economic dependency of Swedish fishermen on the Grisbadarna bank, the provisional maritime boundary line, which was based solely on geographical considerations, was only modified slightly to give the bank to Sweden.[60]

Another case of maritime boundaries dispute prior to the LOS Convention where historic fishing rights played a significant role is the 1951 *Anglo-Norwegian Fisheries.* In this case, Norway sought to rely on 'historic title clearly referable to the waters of Lopphavet, namely the exclusive privilege to fish and hunt whales granted at the end of the 17th century'.[61] The ICJ acknowledged that traditional fishing rights of Norway in Lopphavet basin, based on very ancient and peaceful usage, should be taken into account in drawing the delimitation line.[62] This consideration of historic rights was used by the ICJ to support the use of straight baselines in closing the Lopphavet basin, which extended over 44 nm across. It is important to note, however, that the consideration of economic factors and historical rights in this case was unique, because geographical factors clearly established the right to use straight baselines to close the Lopphovet basin.[63]

Following the *North Sea Continental Shelf* cases, however, the ICJ seemed to be reluctant to take into account historic/traditional fishing rights as a factor in delimitation of maritime boundaries. Such was the case in the *Gulf of Maine* dispute between Canada and the United States in 1984. In that case, the ICJ rejected the suggestion of both Canada and the United States that historic fisheries activities should be taken into account in determining the single maritime boundary between the two States. Instead, after drawing a provisional boundary line based almost entirely on geographical criteria, the Court looked to see whether such a line was equitable in light of 'all the relevant circumstances', and completely ignored the traditional fishing practices of the parties. In its judgment, the Court clearly stated that the ICJ will only consider fisheries as relevant circumstances if the Court's provisional line likely entails 'catastrophic repercussions for the livelihood and economic well-being of the population of the

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59 *Norway v Sweden (Grisbadarna* case*)* (1909) Unofficial English Translation of the Award of the Arbitral Tribunal, online: PCA <http://www.pca-cpa.org/showfile.asp?fil_id=166>.

60 *Grisbadarna* case, *ibid*, at 8.

61 *Anglo-Norwegian Fisheries* case, *supra* note 6, at 142.

62 *Anglo-Norwegian Fisheries* case, *supra* note 6, at 142.

63 Collins and Rogolf, *supra* note 58, at 56.

countries concerned'.[64] The Court's decision to draw the boundary line without considering the historical fishing practices of both States drew heavy criticisms from both Canada and the United States, as the disruption caused to historical fishing patterns in the area gave rise to serious violation problems along the boundary.[65] Notwithstanding the criticism, the ICJ's reference to 'catastrophic repercussions' in relation to the effect of fishing activities on maritime boundary delimitation was followed in subsequent cases.[66] A year after the *Gulf of Maine* decision, the Arbitral Tribunal in Guinea and Guinea Bissau held that fishing activities as an economic circumstance were not sufficient enough reason to justify departure from the provisional boundary line.[67]

In its 1993, however, the ICJ took a different view and considered fishing activities as a factor in adjusting the provisional line in determining the maritime boundaries between Greenland (Denmark) and Jan Mayen (Norway). In that case, the ICJ observed that the delimitation line between both parties should ensure equitable access to the capelin fishery resources, which was important for both States.[68] In their submissions to the Court, both parties stressed their coastal communities' dependence on the exploitation of the resources in the waters between Greenland and Jan Mayen, especially access to capelin stock, whaling and sealing, and also emphasized the traditional character of different types of fishing carried out by the populations concerned.[69] The ICJ found that the median line proposed by Norway was too far to the west for Denmark to be assured equitable access to the capelin stock, and adjusted the median line eastwards.[70] However, it is important to note, that fisheries interests were not the main reason the ICJ decided to adjust the median line. Rather, it was the length of the coast of Greenland compared to the coast of Jan Mayen that influenced the Court to adjust the median line in favour of Greenland to achieve an equitable result. Access to the capelin stock was only considered by the ICJ in deciding *how far east* the median line should be adjusted.

In 1999, an Arbitral Tribunal decided to recognize the traditional fishing rights of Eritrea fishermen that exist within the territorial sea of Yemen. In that case, both parties claimed traditional fishing rights in the waters around the Hanish and Zuqar islands and the islands of Jabal al-Tayr and the Zubayr group,

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64 *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (1984) ICJ Rep 246, at para 237.

65 See Glen J Herber, 'Fisheries Relations in the Gulf of Maine: Implications of an Arbitrated Maritime Boundary' (1995) 19:4 Marine Policy 301, at 303.

66 See *Barbados/Trinidad and Tobago*, *supra* note 16, at para 241.

67 *Arbitration Tribunal for the Delimitation of a Maritime Boundary between Guinea and Guinea-Bissau* (1985) 77 ILR 635, at paras 121-123.

68 *Jan Mayen* case, *supra* note 17, at para 75.

69 *Jan Mayen* case, *supra* note 17, at para 73.

70 *Jan Mayen* case, *supra* note 17, at para 76.

which are under the sovereignty of Yemen.[71] Both parties agreed to ask the Tribunal whether the nature of this traditional fishing regime should be a consideration in the delimitation of the international boundary between them, which included the territorial sea, EEZ and continental shelf. This traditional fishing regime was one of the main contentions during the first stage of the arbitration, where both parties claimed sovereignty over the islands of Hanis and Zuqar, as well as the islands of Jabal al-Tayr and the Zubayr group. In awarding the sovereignty of these islands to Yemen, the Tribunal declared that 'Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihood of this poor and industrious order of men'.[72]

During the second stage of the arbitration, when the Tribunal was tasked with drawing the maritime boundaries in the northern and southern parts between Eritrea and Yemen, Eritrea submitted that in order to ensure the fulfilment of the order relating to traditional fishing rights in the award of the first stage of arbitration concerning sovereignty of the islands, a joint resource zone was needed.[73] Yemen argued that 'the traditional fishing regime should not have any impact on the delimitation of the maritime boundaries', and that it was for Yemen, in exercising its sovereignty, to ensure the preservation of the traditional fishing regime of both parties.[74] Both parties argued that they had always dominated fishing activities in the area, that their Red Sea coastal population was dependent on fishing, and that their fishermen had long fished in the waters around the islands of Hanis and Zuqar, as well as the islands of Jabal al-Tayr and the Zubayr group. The Tribunal found that it was impossible and unnecessary for it to conclude which country was more dependent on fishing than the other, but that it was sufficient to say that fishing, fishermen and fisheries were of importance to both parties.[75]

In determining the territorial sea boundary in the southern part between Eritrea and Yemen, the Tribunal recognized that fishermen from both parties had, from time immemorial, used the islands of Hanis, Zuqar, Jabal al-Tayr and the Zubayr group for fishing and related activities.[76] Moreover, fishermen from both parties had always used these islands as way stations and as places of shelter, and not just as fishing grounds. These special factors 'constituted a local tradition entitled to the respect and protection of the law'.[77] The Tribunal further observed

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71 *Eritrea v Yemen* (1999) Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation) [*Eritrea/Yemen – Phase II*] at paras 56-57.
72 *Eritrea v Yemen – Phase I, supra* note 14.
73 *Eritrea/Yemen – Phase II, supra* note 71, at para 89.
74 *Eritrea/Yemen – Phase II, supra* note 71, at para 90.
75 *Eritrea/Yemen – Phase II, supra* note 71, at para 64.
76 *Eritrea/Yemen – Phase II, supra* note 71, at para 95.
77 *Eritrea/Yemen – Phase II, supra* note 71, at para 95.

that the traditional fishing regime is not limited to the territorial waters of certain islands, and boundaries between the two parties were not required to be drawn by reference to claimed past patterns of fishing. Since the regime had existed for the benefit of the fishermen of both countries throughout the region, by its very nature it is not qualified by the maritime zones specified in the LOS Convention.[78] This was the Tribunal's way of saying that the existence of such traditional fishing rights would not affect the drawing of the territorial sea boundary between the two States. The traditional fishing regime operates throughout those waters beyond the territorial waters of each party, as well as in their territorial waters and ports.

Thus, the existence and protection of this traditional fishing regime did not depend upon the drawing of international boundaries by the Tribunal. The Tribunal instead relied on an Islamic legal concept that has been the basis for the existence and recognition of the traditional fishing regime in the said waters. Such Islamic legal concept ignored the principle of 'territorial sovereignty' and recognizes the existence of continuous cross-relationships between the fishermen of the two parties, even having a professional fishermen's arbitrators (*aq 'il*) to settle disputes in accordance with local customary law.[79] Hence, the Tribunal still recognized the existence of the traditional fishing regime for Eritrea's fishermen, as well as for Eritrea's fishermen to continue to have access to and use of the waters around the islands, the islands themselves, as well as access to Yemen's port.[80]

The *Jan Mayen* case in 1993 and the *Eritrea/Yemen* arbitration in 1999 indicate a change in the views of international courts and tribunals with regard to fishing rights and the delimitation of maritime boundaries. However, the catastrophic repercussions doctrine adopted in the *Gulf of Maine* case continues to be the threshold that must be met before fishing rights will have any effect on maritime boundary delimitation. For example, in the 2006 delimitation case between Barbados and Trinidad and Tobago, Barbados contended that the delimitation of EEZ boundaries in the western part between the two States should take into consideration the history of Barbadians fishing in the waters off Tobago, that Barbadian fisherfolk were critically dependent on the access to such fisheries, and that the fisherfolk of Trinidad and Tobago did not fish in those waters, and thus did not depend upon that fishery for their livelihood.[81] Trinidad and Tobago denied Barbados' claims, maintaining that Barbadian fisherfolk only started fishing in the waters off Tobago in the late 1970s, and thus, this could not be

[78] *Eritrea/Yemen – Phase II, supra* note 71, at para 109.
[79] *Eritrea v Yemen – Phase I, supra* note 14, at paras 129-130.
[80] *Eritrea/Yemen – Phase II, supra* note 71, at para 110.
[81] *Barbados/Trinidad and Tobago, supra* note 16, at para 250.

considered as a historic tradition.[82] Trinidad and Tobago also argued that Barbados did not critically depend on fisheries, and that in fact, fisheries only represented less than one percent of the gross national product of Barbados.[83]

The Tribunal agreed with Trinidad and Tobago and rejected Barbados' argument. The Tribunal further stated that even if the fisherfolk of Trinidad and Tobago have preferred inshore fishing to fishing in the waters off Tobago, 'it does not justify the grant to Barbadian fisherfolk of a right of access to flying fish in the EEZ of Trinidad and Tobago'.[84] Although the Tribunal decided that fishing activities in the waters off Trinidad and Tobago did not warrant the adjustment of the provisional equidistance line as the EEZ boundary in the western part between the States, it did not mean that the argument based upon fishing activities was not and cannot be considered.[85] The Tribunal stressed that determining an international maritime boundary between two States on the basis of traditional fishing by nationals of one of those States can only be done in exceptional cases, and that this case was not one of them.[86]

The Tribunal also looked into Barbados' request to allow Barbadian fishermen access to the stocks of flying fish in the waters of Trinidad and Tobago, despite the fact that the Tribunal did not adjust the equidistance line.[87] In its consideration, the Tribunal noted that taking fishing activity into account in order to determine the boundary was not the same thing as considering fishing activity in order to rule upon the rights and duties of the parties in relation to fisheries with waters that fall into the EEZ of one party.[88] The Tribunal then draw a distinction between the facts of the case and the *Eritrea/Yemen* case. In the *Eritrea/Yemen* case, the Tribunal was given powers to consider the historic rights of the parties. It is therefore understandable that the Tribunal in that case found that any pre-existing traditional fishing rights in the region, which included the right of access, were not extinguished even though the waters in question fell under the jurisdiction of one party.[89]

The Tribunal stated that in the present case, such a dispute fell outside of the jurisdiction of the Tribunal.[90] However, since both Barbados and Trinidad and Tobago requested the Tribunal to express its view on the issue of Barbadian fishing within the EEZ of Trinidad and Tobago, the Tribunal stated that in this case both parties were under a duty 'to agree upon the measures necessary to co-

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82 *Barbados/Trinidad and Tobago*, *supra* note 16, at paras 254-255.
83 *Barbados/Trinidad and Tobago*, *supra* note 16, at para 256.
84 *Barbados/Trinidad and Tobago*, *supra* note 16, at para 268.
85 *Barbados/Trinidad and Tobago*, *supra* note 16, at para 272.
86 *Barbados/Trinidad and Tobago*, *supra* note 16, at para 269.
87 *Barbados/Trinidad and Tobago*, *supra* note 16, at para 273.
88 *Barbados/Trinidad and Tobago*, *supra* note 16, at para 276.
89 *Barbados/Trinidad and Tobago*, *supra* note 16, at para 279.
90 *Barbados/Trinidad and Tobago*, *supra* note 16, at para 283.

ordinate and ensure the conservation and development' of the flying fish stocks, since the flying fish stocks could be considered as a species that occur within the EEZ of two States, as provided for in Article 63(1) of the LOS Convention.[91] Since Trinidad and Tobago had stated its willingness to find a reasonable solution to the dispute over the flying fish stocks, the Tribunal found that Trinidad and Tobago was obliged to negotiate in good faith an agreement with Barbados that would give Barbadians access to fisheries within its EEZ. [92]

V. Conclusion

The role of historic fishing rights in maritime delimitation seems to have received from commentators to date only a small amount of attention. However, even if historic rights and economic dependency on fisheries only result in a minor modification of a maritime boundary line, issues of fishing rights are still an important factor to be considered by States when negotiating maritime boundaries. State practice seems to indicate that States prefer to resolve fisheries issues by agreements to cooperate for conservation, development, and equitable exploitation of the fishing resources, rather than fighting over how to adjust the boundary line to the satisfaction of both parties.[93]

The wide acceptance of the LOS Convention also means that State parties (all 164 of them) are obliged to recognize each other's rights over their respective EEZs. Part V of the LOS Convention was clearly drafted so that the economic rights of coastal States in their EEZ have greater weight than any rights accorded to other States by customary international law.[94] The concept of historic fishing rights only survived in the LOS Convention to the extent that the coastal State, when giving access to surplus fish, would take such rights into consideration.[95] This means that a State's claim to historic fishing rights within waters 200 nm off the coast of another State is subject to the coastal State's exclusive fishing rights in that zone as accorded by the LOS Convention.

In cases where historic fishing rights of a third State continues to exist within the EEZ of a coastal State, such rights were usually recognized through bilateral agreements between the States concerned. Indeed, the ICJ also stated that the most appropriate solution for a dispute between rights of the coastal State based on the EEZ and the rights of a third State based on historic rights is negotiation.[96] International courts and tribunals seem to be more comfortable

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91 *Barbados/Trinidad and Tobago*, *supra* note 16, at paras 285-286.
92 *Barbados/Trinidad and Tobago*, *supra* note 16, at paras 288 and 292.
93 Collins and Rogolf, *supra* note 58, at 58.
94 Collins and Rogolf, *supra* note 58, at 60.
95 LOS Convention, s*upra* note 2, Article 62(3).
96 *Icelandic Fisheries Jurisdiction*, *supra* note 31, at 31.

deciding maritime boundaries which were mainly based on geographical factors, leaving fisheries issues to be decided by mutual agreement of the parties.[97]

There is little precedent to suggest that international courts or tribunals give much weight to fisheries factors in determining maritime boundaries. This is somewhat ironic, since the creation of the EEZ was to put increased resources, including fisheries, under the jurisdiction of the coastal States. Most of the time, however, fisheries interests or historic fishing rights were non-detrimental factors in the delimitation of EEZ. One of the reasons why claims to historic fishing rights are not normally relevant to boundary delimitation is because such historic rights are not exclusive.[98] In the case of the South China Sea, for example, China, Viet Nam and the Philippines all claim that there their fishermen have traditionally or historically fished in at least some parts of the oceans area in question. No single claimant State can therefore claim an exclusive fishing right based on historic title. If, for example, China's claim of historic fishing rights is recognized, such recognition does not preclude the rights of other claimants in the South China Sea, either based on the EEZ regime or historic fishing rights. The non-exclusivity of historic fishing rights also means that they do not raise a legitimate claim to sovereignty or title to territory, but only give rise to right of the State making the claim to continue fishing within the waters in question.[99]

This does not mean that historic/traditional fishing rights would not be taken into consideration in maritime delimitation. Such fishing rights, however, can only be considered as relevant circumstances in maritime delimitation in exceptional circumstances, known as the '*Gulf of Maine* exception', that provides for catastrophic social and economic repercussions if fisheries rights are ignored.[100] The decision in the case between Barbados and Trinidad and Tobago also reiterated that only in exceptional cases can fishing activity be deemed to be 'circumstances relevant' to maritime delimitation.[101] The only example of the ICJ taking into consideration fishing rights in determining maritime boundaries was in the *Jan Mayen* case, when the ICJ considered the realities of access to the capelin stocks in adjusting the boundary line between Denmark and Norway.[102] But again, this was only an additional consideration, as the extreme difference in

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[97] Such was the case in the *Gulf of Maine* decision, where the ICJ refused to consider fisheries interests as a factor in drawing the maritime boundaries between the United States and Canada, even though both parties specifically asked the Court to take fishing into consideration; see *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (1984) ICJ Rep 246 [*Gulf of Maine*].

[98] Collins and Rogolf, *supra* note 58, at 58.

[99] Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law', 30 Brit YB Int'l L 1, at 50.

[100] *Gulf of Maine*, *supra* note 97, at para 237.

[101] *Barbados/Trinidad and Tobago*, *supra* note 16, at para 269.

[102] *Jan Mayen* case, *supra* note 17, at para 76.

coastal length between Greenland and Jan Mayen was deemed to be the main factor justifying the adjustment of the provisional median line.

Furthermore, the *Eritrea/Yemen* arbitration shows that even if historic fishing rights are recognized in overlapping maritime zones, they did not modify the boundaries between Eritrea and Yemen. This case shows how, in certain circumstances, historic fishing rights can exist within the maritime zones as defined by the LOS Convention. Although the traditional fishing rights did not affect the delimitation of boundaries between Eritrea and Yemen, the Tribunal recognized that both parties have equal traditional fishing rights over the overlapping territorial sea, which should be maintained by the parties.

In conclusion, although the LOS Convention is silent on how traditional/historic fishing rights can exist within the EEZ of another State, there are certain circumstances where such rights exist and must be respected. However, such circumstances are rare and exceptional. Additionally, claims of historic fishing rights are subject to recognition by the coastal States, and coastal States are under no obligation to recognize them, since by accepting the EEZ regime, States have given up any claims they may have had based on traditional or historic fishing rights.