



The Right to Fish and International Law in the South China Sea

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Protesters wearing fish-shaped hats gather outside the Chinese Consulate during a rally in suburban Makati, south of Manila, Philippines on Tuesday June 11, 2013. The group held the rally to oppose China's alleged continued intrusion and poaching activities in the West Philippine Sea. (AP Photo/Aaron Favila)

Summary

One of the most important disputes that exist between states surrounding the South China Sea is over fishing rights, as most of the states bordering the South China Sea assert an exclusive right to fish in parts of it. For example, the Philippines and Vietnam claim that they have an exclusive right over fisheries resources in the waters within 200 nautical miles (M) of their respective mainland coasts. China also declares the right to exploit fisheries resources in the South China Sea, but not only in the waters within 200 M from its mainland coast and from the Parcel Islands. By using the 'U-shaped line', China's claim extends beyond any possible exclusive economic zone (EEZ) limits that can be generated by its mainland and by any islands in the South China Sea over which it claims sovereignty. China, however, has not clarified the meaning of the U-shaped line map, nor the maritime zones generated by the islands in the South China Sea over which it claims sovereignty.

China's fishing right claim appears to be based on both EEZ entitlement and historic claim. China argues that the features in the South China Sea are entitled to a full-fledged EEZ and continental shelf as a group, but has yet to make any official declaration of the limit of its EEZ

claim from the islands. Additionally, China argues that they have a form of exclusive historic rights within the waters inside the U-shaped line but beyond the maritime zones generated from the islands. However, this unusually expansive and exclusive historic claim over such a huge body of water would unlikely be agreed to by the international community.

Whether historic title can trump the provisions of UNCLOS depends on the strength of the claim to historic title. If a state can provide an exceptionally strong basis to its historic claim, then maybe such historic title could be considered as an exception to the rules in UNCLOS. However, justifying a historic fishing right claim over the waters within the U-shaped line in the South China Sea is a Sisyphean task. This uphill battle to make a justifiable historic rights claim under international law has been severely limited by the high threshold of proof set by the ICJ. Moreover, such rights have mostly become obsolete since the advent of the EEZ and continental shelf concepts.

Introduction

There are a number of disputes that exist between states surrounding the South China Sea. One of the most important disputes is over fishing rights, as most of the states bordering the South China Sea assert an exclusive right to fish in parts of it. For example, the Philippines and Vietnam claim that they have an exclusive right over fisheries resources in the waters within 200 nautical miles (M) of their respective mainland coasts.^[1] The People's Republic of China (hereafter China) also declares the right to exploit fisheries resources in the South China Sea,^[2] but not only in the waters within 200 M from its mainland coast and from the Paracel Islands.^[3] By using the 'U-shaped line', China's claim extends beyond any possible exclusive economic zone (EEZ) limits that can be generated by its mainland and by any islands in the South China Sea over which it claims sovereignty.

China officially used the U-shaped line for the first time in 2009 in its response to the joint submission to the Commission on the Limits of the Continental Shelf (CLCS) made by Malaysia and Vietnam.^[4] In a 2011 communication to the United Nations, China further stated that it has indisputable sovereignty over the islands in the South China Sea and that it "enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof."^[5] China, however, has not clarified the meaning of the U-shaped line map, nor the maritime zones generated by the islands in the South China Sea over which it claims sovereignty.

This article focuses on the viability of using the U-shaped line to assert fishing rights under international law. The variety of possible interpretations of the U-shaped line will be discussed, as well as using the U-shaped line as a basis to claim historic waters or historic fishing rights. The article will also analyse the EEZ claims of the Philippines and Vietnam to see whether they are in accordance with the 1982 United Nations Convention on the Law of the Sea (UNCLOS).^[6] Finally, the article will discuss the overlap of fishing rights claims in the South China Sea, and how China's historic claim with respect to fishing is compatible with UNCLOS and other international law.

I. The Right to Fish under International Law

Before delving into the legal regime for fisheries under international law, it is important to remember that essentially, fisheries are a 'common property natural resource.'^[7] Thus, in principle, the nationals of every state are free to fish in the sea. The reality, however, is significantly more complex.

The importance of fishing resources has been recognized by nations since time immemorial. Ever since the rise of sovereign states with definite boundaries during the sixteenth century in Europe, it was generally accepted that coastal states enjoy certain rights to regulate fishing activities in the seas adjacent to their land territory.^[8] In 1605, for example, King James I of England enacted a statute to regulate fishing in England's coastal waters.^[9]

Even when Hugo Grotius published his seminal work '*Mare Liberum*' in 1609, in which he advocated that the sea should be open for all, he restricted his arguments of free seas to the high seas, and not to bays or narrow straits or any part of the sea that can be seen from the shore,^[10] implying that he recognized the idea that states have jurisdiction over coastal waters that could be controlled from the land.^[11] William Welwood, a Scottish jurist writing in response to Grotius, further argued that part of the sea along the coast must belong to the littoral state, based on the fact that the inhabitants of that country have traditionally fished there.^[12] In his subsequent work, *De jure Belli ac Pacis*, Grotius acknowledged the right of coastal states to appropriate gulfs, bays and straits enclosed by their land, but stressed that innocent passage cannot be forbidden in these parts of the ocean.^[13] By mid-nineteenth century, the concept of states having jurisdiction over a belt of water immediately adjacent to their coast as a prolongation of their territory had been universally accepted.^[14]

A. The Right to Fish in Territorial Seas

Although the idea of states having sovereignty over the territorial sea had crystallised by the early twentieth century, there was still no agreement as to its exact legal nature prior to the adoption of UNCLOS in 1982. Some scholars equated sovereignty over territorial sea with actual ownership, while others took the view that a more limited form of sovereignty existed, which only conferred jurisdiction rights on the littoral state.^[15] These debates continued even after the conclusion of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, which states that, "the sovereignty of a state extends to its territorial sea, subject to the provisions of the Convention and other rules of international law."^[16] Notwithstanding these debates, states generally agreed that coastal states had an exclusive right to regulate and exploit fisheries within their territorial sea, based on either sovereignty or upon certain rights states have over coastal waters. Thus, up until the mid-twentieth century, the exclusive right to fish only existed within the territorial sea of the coastal states.

These debates led to a second and very important issue regarding the territorial sea: its extent. The breadth of the territorial sea was inherently linked with the coastal states' interest in fisheries,^[17] which to a large extent coincided with the 3 M canon shot theory.^[18] Anything beyond the 3 M territorial sea of a state was viewed as high seas, free to all. This is also because up until the twentieth century, fishing was generally conducted by traditional means close to the coast.^[19]

By the early twentieth century, states had started to realize that they needed to have more control over the fishing resources beyond their territorial seas. In 1916, Spain's then Director-General of Fisheries urged the Spanish Government to extend Spain's territorial sea to include the 'continental shelf', as most of the edible species of fish were found in the continental shelf area that can go beyond the customary 3 M territorial sea.^[20] In order to exercise control over the resources in the territorial sea it was necessary for states to come into an agreement on the limits of the territorial sea, as any extension to this area would encroach on the rights of other states who may otherwise have enjoyed freedoms in areas that were previously regarded as the high seas.^[21]

The first and second United Nations Conferences on the Law of the Sea, in 1958 and 1960 respectively, failed to reach an agreement on the breadth of the territorial sea. Although the common state practice at that time was for coastal states to have 3 M territorial sea,^[22] there were some states that claimed 6 M,^[23] 12 M,^[24] 15 M,^[25] and even 200 M territorial seas.^[26] Prior to the third United Nations Conferences on the Law of the Sea (third Conference), it was clear that a compromise had to be reached between the maritime powers who wanted to maintain the 3 M territorial sea (in order to maximise their use of navigational freedoms associated with the high seas) and states who wanted to have a larger territorial sea (largely to advance their security or resources interests). Argentina and Peru were strong advocates of the 200 M territorial sea, while the maritime powers such as the United States, United Kingdom, and the then Soviet Union preferred the 3 M territorial sea to ensure the freedom of movement for their naval forces.^[27]

When the preparation for the third Conference began in 1970, the breadth of the territorial sea was one of the outstanding issues that needed to be addressed. By then, the United States had been convinced that free passage of warships and military aircraft would be guaranteed in international straits, ensuring free movement for their fleets through narrow areas that would otherwise have been territorial seas of two or more adjacent coasts.^[28] Thus, when the third and final law of the sea conference commenced in 1973, most states had already accepted the idea of a 12 M territorial sea. However, there were still some states that held out for a much wider territorial sea; this in turn led to another compromise and the creation of a whole new maritime zone, which is discussed below.

B. The Establishment of the EEZ Regime

During the third Conference between 1973 and 1982, the concept of the EEZ was introduced. A significant number of developing states at that time had an interest in claiming more areas of the ocean in order to allow for exploitation of resources, either through claims of a 200 M territorial sea or through claims of historic waters (this will be discussed below). Thus, the compromise of a 200 M EEZ was widely accepted by coastal states, as this limit would have put most of the resources within their jurisdiction, therefore nullifying the need to make excessive claims of historic waters or territorial sea.^[29] The EEZ regime was supported by most of the Asian, African and Latin American countries during the negotiations of the third Conference.^[30]

Not all states were happy with the establishment of the EEZ regime, especially the distant fishing states such as Japan and Thailand. Japan at the time had a massive long-distance fishing fleet,^[31] and prior to the conclusion of UNCLOS they were able to fish in almost every corner of the

ocean, since most of these waters were high seas. The EEZ regime would significantly limit the area where the Japanese fleets could fish. Likewise, Thailand fishermen had traditionally fished in the waters that would fall under the EEZ of their neighbours, such as Indonesia, Vietnam, India and Malaysia. These distant fishing states, however, were outnumbered in the third Conference, since at this point the idea of having exclusive jurisdiction to exploit resources within 200 M from the coast was very attractive to a lot of coastal states. The supporters of the EEZ regime had grown so large in number that the establishment of the EEZ regime was deemed inevitable.^[32] In the end, Japan relented and decided to approach other coastal states bilaterally in order to secure agreements that would allow Japanese fisherman to continue to fish in these states' EEZ.^[33] Once the limit of the EEZ was agreed, all states fell in line and agreed to 'only' a 12 M territorial sea.^[34]

The EEZ was a completely new regime under international law in which coastal states have the sovereign right to explore and exploit the natural resources of the sea, the seabed and subsoil up to 200 M from their coasts without impeding freedom of navigation.^[35] In other words, within the EEZ they have the exclusive right to the fisheries and other living resources of the sea and to the oil and gas and other non-living resources of the seabed and subsoil. They also have such jurisdiction as is necessary for them to exercise their sovereign rights,^[36] including limited jurisdiction over marine scientific research and protection and preservation of the marine environment.^[37] It is important to remember that the EEZ is neither an extension of the sovereignty of the coastal states from their territorial seas, nor part of the high seas.^[38] Within the EEZ, the jurisdiction of the coastal states is limited to the natural resources as provided in UNCLOS; and for other intents and purposes, the provisions of the high seas are applicable in the EEZ.^[39] Other states have the right to exercise high seas freedoms in the EEZ of any state, including the freedoms of navigation and overflight.^[40]

II. The Exception to the Rule: Historic Claims

In the past, a small number of states have claimed that they have, historically, exclusively used and exploited some areas of the ocean immediately adjacent to their land territory.^[41] Within these waters, these states have historically practised and enforced their jurisdiction exclusively; and, very importantly, this practice has been recognised by other states.^[42] Prior to the establishment of the EEZ regime, this was the only basis upon which a state could unilaterally claim exclusive fishing rights over an area of the ocean beyond the territorial sea.^[43]

In the context of the law of the sea, it is important to distinguish the different kinds of 'historic claim' according to the content of the claim. Historic claims refer to claims over historic title, which in turn may refer to either a claim of historic waters or historic rights.^[44] Both of these concepts are discussed below.

A. The Concept of Historic Waters

Historic water refers to a body of water that is treated like the internal waters of a state – such as lakes and rivers – and is an area over which the state has complete sovereignty.^[45] Unlike territorial seas, third states have no right of innocent passage or any other rights in these waters. Although the legal concept of historic waters only came into being in the mid-20th century, the

notion of treating some parts of the ocean like one's land territory had already existed for a significant period of time. Ancient civilizations, like the Greeks and Romans, treated the waters within their ports or within enclosed bays as their territory, exercising complete sovereignty. Whilst this practice was common, the claims were usually made over the parts of the ocean immediately adjacent to and enclosed by the land territory of the claiming state, which were considered vital to their security or economy.^[46] Thus, in the early 20th century, the concept of historic waters has become part of customary international law, but usually referred to areas close to the land.^[47]

The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone codified the customary international law on bays and acknowledged that certain type of bays may be considered as internal waters. The Convention defines a bay as, "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast."^[48] If the area of a bay is as large, or larger than, that of a semicircle whose diameter is a line drawn across its mouth,^[49] the coastal states can close the bay with a closing line no longer than 24 M, and the water within that bay is considered to be internal waters.^[50] These provisions on juridical bays were carried over to the 1982 UNCLOS almost unchanged.^[51]

Both Conventions also recognize another type of bay, that being 'a historic bay.'^[52] As mentioned previously, 'historic bays' are a distinct case of 'historic waters' that covers all sea areas over which a coastal state has acquired full sovereignty through an effective display of authority and the acquiescence of third states.^[53] The International Court of Justice (ICJ) confirmed in 1958 that there are certain exceptional circumstances where a coastal state can claim historic title over an area that cannot be considered as a juridical bay. In the *Anglo-Norwegian Fisheries* case between the United Kingdom and Norway, the United Kingdom argued that the LoppHAVET basin did not meet the criteria of a juridical bay, and therefore Norway could not close it with a closing line. Norway, however, relied on a historic title over the LoppHAVET basin, and provided evidence that it has been exercising exclusive authority over the basin since the 17th century without protests from any other states.^[54] The ICJ accepted this argument, and thus confirmed the legal concept of historic waters in modern international law.

Although international law recognizes the concept of historic waters, the idea of having complete sovereignty over a part of the ocean still runs counter to the idea of freedom of the seas. Even within the territorial sea, where the coastal states have complete sovereignty, there are some residual rights that still exist for third states, such as the right of innocent passage.^[55] Clearly, the practice of a state acquiring sovereignty over a body of water beyond what it would normally be entitled to is a derogation from the existing general rule of freedom of the seas.^[56] For this reason there is necessarily a high threshold that must be met before a state's claim of historic waters can be accepted.^[57] The coastal state has to be able to prove that it has exercised its sovereignty in the waters in question to the exclusion of other states over a long period of time, and that this practice has been accepted by other states.^[58]

Additionally, such exercise of sovereignty must be public,^[59] and the limits of such historically-claimed areas of water must also be 'clear and consistent.'^[60] This would give other states the opportunity of knowing that an 'exceptional' claim has been made and to be able to protest such

claim.^[61] These strict 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 states make are only unilateral claims that are not recognized by the international community.^[62]

B. The Concept of Historic Rights

The term ‘historic waters’ should not be confused with ‘historic rights.’ Both are legal concepts that exist under customary international law,^[63] but with different scope and legal application. A claim of historic right means that a state is claiming to exercise a certain right in relation to other states by effectively exercising those rights with the acquiescence of the states concerned.^[64] The requirements that must be satisfied in order to successfully establish a claim of historic rights are the same as those required to establish historic waters – in terms of proof of long-established activities and the continuous exercise of these activities with the acquiescence of other states.^[65] Having said that, although the jurisprudence from 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 making a claim to historic rights than to 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.^[66] Historic rights merely give the claiming state the right to conduct a specific activity – like fishing – due to long usage.^[67] 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.^[68] It is surely easier for a state to provide evidence of prolonged fishing activities in an area of water than to try to establish a prolonged exercise of sovereignty over the area. As noted above, 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 waters.

Second, a 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. For example, in the *Tunisia/Libya* case, Libya recognized Tunisia’s right to fish for sedentary species in the Gulf of Tunis, but claimed that such right was never purported to exclude foreigners from the exploitation of these fisheries.^[69] In the *Eritrea/Yemen* arbitration, the Tribunal declared that the recognition of Eritrea’s historic fishing right within Yemen’s territorial sea around the islands of *Hanis* and *Zuqar*, as well as around the islands of *Jabal al-Tayr* and the *Zubayr* group, did not exclude Yemen’s enjoyment of the same right, either based on history or on UNCLOS.^[70]

Third, a claim of historic rights must be specific, whether it is a historic right to fishing activities or historic rights over the fishing resources. State practice shows that when a state claimed a historic right over fishing activities, the specific activities and the species of fish were clearly described.^[71] For example, in *Tunisia/Libya*, Tunisia claimed the historic right over sponge fisheries;^[72] in *Qatar/Bahrain*, Bahrain claimed the historic right of pearling;^[73] 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;^[74] 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.^[75]

Based on the elaboration above, it is save to conclude that although the threshold to prove historic fishing rights is not as high as that for proving historic waters, and although such a concept is recognized under customary international law, establishing the existence of historic fishing rights is not an easy feat.

C. UNCLOS and Historic Claims

The establishment of the EEZ regime in UNCLOS meant that most of the then extant historic claims were absorbed into the new maritime zone, since those claims were generally located within the 200 M limit from the coastline.^[76] However, this does not mean that all historic right claims simply extinguished. The concept of historic title is an exceptional regime. Therefore, when the rules on bays and the delimitation of territorial seas were codified during the negotiation of UNCLOS, historic title was inserted in these provisions as an exception.^[77] The historic bay exception in UNCLOS allows a closing line to be drawn in such bays that did not meet the requirements in Article 10, particularly the ‘semi-circle’ test or the maximum width of mouth.^[78] The mention of historic title in Article 15 recognizes that a historic claim can affect the delimitation of territorial sea boundaries.^[79]

Historic Claim in the Territorial Sea

Article 15 of UNCLOS was worded in such a way that any legitimate claim of historic title of one state does not extinguish the territorial sea entitlement of another state, or *vice versa*. Instead, such a historic claim is used to adjust the territorial sea boundary line.^[80] However, the affected states must recognize such historic rights in order for them to be a factor in maritime delimitation.^[81]

Besides the two situations mentioned in UNCLOS, another way of preserving a historic claim in an overlapping territorial sea claims is shown in the delimitation case between Eritrea and Yemen. In that case, after awarding the sovereignty of *Hanish* and *Zuqar* Islands and the islands of *Jabal al-Tayr* and the *Zubayr* group to Yemen, the tribunal specifically stated that, “in the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved.”^[82] In the delimitation stage of the arbitral proceeding, both states argued that the boundary line should be adjusted to take into consideration their respective historic claims. As both disputing states recognized the historic claim of the other, the historic title exception provided in Article 15 of UNCLOS would not have been of much help in drawing the territorial sea boundary in this case. In the end, the arbitral tribunal decided to ignore the historic claims for the purposes of drawing the boundary line, using strict median line to determine the territorial sea boundary.^[83] After creating the boundary line, the arbitral tribunal then super-imposed the historic claim of each state to the other party’s territorial sea. Thus, traditional fishermen from both states can continue to fish on the other side of the territorial boundary.^[84] This solution

works not only because such historic rights have been practised peacefully from time immemorial, but also because both Eritrea and Yemen recognize each other's claim of historic titles.^[85]

Historic Claim in the EEZ

As the jurisdiction of coastal states in the ocean was expanded with the establishment of the EEZ regime, it was just a matter of time before an EEZ claim of a state overlapped with the historic claim of another state.^[86] With the expansion of coastal states' jurisdiction over fishing after the adoption of UNCLOS, what previously might have been a historic claim over parts of the high sea now became a historic claim over parts of the EEZ of another state.^[87]

Unlike the provisions on bays and territorial sea delimitation where historic title was expressly mentioned as an exception, historic title has not been expressly reserved in the rest of UNCLOS, particularly in the provisions dealing with the EEZ.^[88] However, a 'consideration' for traditional fishing in the EEZ is provided under Article 62 of UNCLOS, although the terms 'traditional' and 'historic' are not used.^[89] The article states that if a coastal state is unable to fully exploit the total allowable catch of fish within its EEZ, it may choose to permit other states to exploit the surplus.^[90] The article further provides that in considering giving third states access to such surplus, the coastal states should take into account "the need to minimize economic dislocation in states whose nationals have habitually fished in the zone."^[91]

This provision, although acknowledging third states that might have traditionally fished in the waters that are now part of the EEZ of another state, was not intended to have traditional fishing rights superseding the coastal state's rights under the EEZ regime.^[92] The coastal state is solely responsible for determining its own total allowable catch, and therefore the surplus, if any.^[93] Furthermore, the provision only requires the coastal states to 'consider' other states that have habitually fished in their EEZ, but the final decision remains at the discretion of the coastal state. Lastly, and very importantly, there is no means to challenge any decision made by the coastal states with regards to the fishing capacity, allowable catch and access within their own EEZ, as this issue is excluded from the compulsory dispute settlement mechanism under Chapter XV of UNCLOS.^[94] Thus, after the establishment of EEZ, third parties' past fishery practices are merely one of several considerations – not rights; and not even prioritised – that the coastal state may take into account in its discretion as to surplus catch allocation.^[95] This suggests that the sovereign rights of the coastal state in the EEZ trump any third state's traditional or historic rights.^[96]

III. EEZ Claims in the South China Sea

All states bordering the South China Sea claim an EEZ measured from the baselines along their mainland coasts, or in the case of the Philippines and Indonesia, from archipelagic baselines.^[97] It is generally agreed that the archipelagic baselines employed by Indonesia and the Philippines around their main archipelago are consistent with UNCLOS.^[98] In the case of the straight baselines used by China, Malaysia, Vietnam and the Republic of China (hereafter Taiwan), although their use may be of questionable legality,^[99] they only have minimal impact on the outer limit of their EEZ claims measured from those baselines.^[100] Notwithstanding these

baselines declarations, none of the claimant states in the South China Sea has issued official charts or lists of geographic coordinates showing the outer limit lines of their EEZs claimed from their mainland as required by UNCLOS.^[101]

The situation surrounding the islands in the South China Sea is even more unclear. None of the states that claim sovereignty over the islands in the South China Sea has issued charts or coordinates of the baselines from the islands they are claiming.^[102] They also have not declared if they are using any low-tide elevations within 12 M from such islands as basepoints.^[103] Even though China has declared straight baselines around the Paracel Islands,^[104] it has yet to do the same for the rest of the Spratly Islands, over which it claims sovereignty. Malaysia and Vietnam also did not claim any EEZs or extended continental shelf from any of the Spratly Islands they are claiming.^[105] Thus, Malaysia and Vietnam appear to be taking the position that sovereign rights to explore and exploit the resources in the South China Sea should be determined primarily by the EEZ and continental shelf measured from their mainlands.^[106]

The Philippines has also not claimed any maritime zones from the Spratly Islands, and it appears that the Philippines too considered that none of the islands in the Spratly Group are entitled to more than 12 M territorial sea. This is one of the issues that have been raised in the arbitration case between the Philippines and China, in which the Philippines argued that none of the islands in the Spratly Group is capable of generating an EEZ or continental shelf, and that China cannot rely on the U-shaped line as a basis of their maritime claim.^[107] In essence, the Philippines is questioning the basis upon which China can lay claim to the resources in the South China Sea.

The position of Taiwan is more complicated.^[108] In 1993, Taiwan described the U-shaped line as representing the limit of its historic water claim.^[109] More recent statements, however, seem to indicate that Taiwan's position has shifted to one that is more in-line with UNCLOS.^[110] As recently as 2014, President Ma of Taiwan clarified that all maritime claims should begin with land.^[111] This suggests that Taiwan's maritime claim would be based on the islands and rocks in the South China Sea.^[112] In this regard, Taiwan has officially claimed that Itu Aba, the largest island in the Spratlys, is an island under Article 121(1) of UNCLOS,^[113] which can generate an EEZ and continental shelf. Taiwan, however, has not made any official statements in regard to other islands that it claims in the South China Sea.

IV. China's Claim to Fishing Rights in the South China Sea

In 1947, the government of the Republic of China (current day Taiwan) released a map illustrating the South China Sea, which included eleven dashes in a U-shaped form encompassing a large part of the South China Sea.^[114] The map did not seem to be drawn to any particular scale; and provided no coordinates of the location of these eleven dashes, nor did it provide any definition of what the dashes represent.^[115] Although there are several writings suggesting that the map was drawn to show islands and features considered being under China's jurisdiction,^[116] to date there has been no official statement agreeing or disagreeing with such interpretation.

The map was never used by the Republic of China in any official international communications, nor has it ever been submitted to the Secretary General of the United Nations, which is what

states commonly do with regards to their agreed boundaries.^[117] When the People's Republic of China was recognized as the official government of China, it adopted the U-shaped map drawn by Taiwan.^[118] However, the Chinese government has also never provided any explanation as to what the dashes mean. The map did not seem to affect any state practice at that time in the usage of the ocean, and other littoral states bordering the South China Sea continue to exercise freedom of fishing in areas beyond their territorial seas.^[119]

When China attached the U-shaped line map to its official Note Verbale of 6 May 2009 to the Secretary-General of the United Nations in protest to the Joint Submission by Vietnam and Malaysia, questions arose as to the significance of the map with respect to China's maritime claims in the South China Sea. The Note Verbale stated 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 (see attached map)."^[120] China so far has declined to clarify whether it is claiming rights and jurisdiction only in the EEZ measured from the islands or whether it is claiming rights and jurisdiction in all the waters inside the U-shaped line.

A. The U-Shaped Line as a Territorial Sea Limit

One view claims that the U-shaped line represents China's unilateral maritime boundaries.^[121] If the U-shaped line were a maritime boundary, the waters within these lines would be Chinese territory, thus granting China an exclusive right to fish within these waters. This view, however, is not strongly supported by international law.^[122] First, it is not clear what kind of boundary the U-shaped line represents. When the map was first drawn, the EEZ regime had not yet been established, and the common practice for a territorial sea claim was 3 M.^[123] As noted by Professor Tommy Koh^[124] – former President of the third Conference – and Chris Chung,^[125] at the time of the drawing of the 1947 map, the Republic of China supported the 3 M territorial sea practice and had adopted legislation implementing such a practice.^[126] The U-shaped line, however, does not follow the 3 M rule from any Chinese land territory or claimed islands,^[127] which means that at the time of drawing, it was not meant to represent a territorial sea boundary. It is also not feasible to suggest that the U-shaped line indicated the outer limit of China's continental shelf. In 1947, the concept of continental shelf was still a novel one and the Republic of China had not declared its support of the continental shelf concept at the time that the map was drawn.^[128]

Second, if the U-shaped line represents China's maritime boundaries, the method of drawing the boundary remains unclear. The customary method for drawing maritime boundaries in 1947 was the use of the median line, which could be adjusted depending on the relevant circumstances. Despite some claims that the U-shaped line was drawn as the median line between China and adjacent states,^[129] this method was not used in all parts of the U-shaped line.^[130] There are also other acceptable methods for drawing maritime boundaries, such as perpendicular line, equity or thalweg, which can be alternatives if drawing a median line would not yield an equitable result. However, none of these methods seem to have been used in constructing the U-shaped line.^[131] Moreover, drawing dash lines is not a common practice with respect to declaring maritime boundaries, especially those without proper coordinates.^[132] State practice consistently shows maritime boundaries in continuous lines complete with their coordinates.^[133] Not to mention that

international law does not recognize ‘unilateral boundaries.’^[134] Maritime boundaries are by their definition to be agreed by all parties involved, which is not the case with the U-shaped line.

Third, the view that the U-shaped line represents a maritime boundary is also not supported by China’s practice. In the past, China has never interfered with the fishing activities of the other littoral states. Professor Zou Keyuan pointed out in his 2001 article that China’s occasional exercise in the South China Sea did not seem to affect the freedom of fishing in the area.^[135] Furthermore, the PRC’s Declaration on the Territorial Sea in 1958 expressly stated that there is a belt of high seas separating the South China Sea islands from China’s mainland.^[136] Thus, the U-shaped line cannot be considered a maritime boundary line, and China cannot claim fishing rights in the waters within the U-shaped line based on the territorial sea concept.

B. The U-Shaped Line as the EEZ Limit

Under international law, if a state claims an EEZ from an island over which it claims sovereignty or from other land territory, it must make a formal claim.^[137] Making such a claim gives the claimant state sovereign rights to explore and exploit the natural resources of both the seabed and subsoil, and the superjacent waters within its EEZ.^[138] Since the U-shaped line predates the concept of the EEZ, the line cannot be a claim of China’s EEZ. However, the offshore geographic features in the South China Sea that meet the definition of an island in Article 121(1) of UNCLOS are entitled in principle to an EEZ.^[139] In this case, even though China has stated that the Spratly Islands are entitled to an EEZ and continental shelf,^[140] China has not made a formal claim of EEZ from any of the Spratly Islands.^[141]

In any case, even if all the islands in the South China Sea were capable of generating an EEZ, and even if China had made a formal claim and declared the limits of these zones, the EEZs would still not be sufficient to encompass all of the area covered by the U-shaped line. In spite of this, China maintains that it has ‘jurisdiction’ in the all waters within the U-shaped line,^[142] including jurisdiction over fishing activities. Thus, China’s claim to fishing rights cannot rest on the EEZ concept alone.

C. The U-Shaped Line as Historic Claim Limit

Another view is that the U-shaped line represents an area of China’s historic waters,^[143] or at least an area in which China claims historic rights. On 14 April 2011, in response to Malaysia and Vietnam’s Joint CLCS Submission, China issued a second *Note Verbale* that seemed to suggest that China is also claiming historic rights to resources in all the areas inside the U-shaped line.^[144] China has also made several official statements on this issue, either claiming that UNCLOS preserves China’s claim of historic rights, or arguing that China’s historic rights have not been extinguished by UNCLOS.^[145]

Moreover, there have been writings by Chinese academics asserting that China claims historic rights and jurisdiction in the waters inside the line.^[146] Some of them have opined that in practice China has been asserting not only historic rights of fishing in the waters inside the U-shaped line, but also historic rights to other maritime activities, including the right to explore and exploit oil and gas.^[147] So China’s claim not only rests on the EEZ claim that might be generated from the

islands, but also on the notion of historic rights within the U-shaped line. The question then arises: is China's claim of historic rights strong enough to meet the high threshold of proof under international law? And if it does, how do we reconcile these rights with the overlapping EEZ claims of other littoral states in the South China Sea? Both questions will be discussed below.

Validity of China's Historic Rights Claim under International Law

If the U-shaped line is China's claim to historic rights,^[148] we need to analyse China's historic claim and determine whether it meets the requirements set out in international law. As discussed above, in order to successfully claim a historic right, a state needs to show that it has conducted a specific activity in the claimed area for a long period of time, and that other states affected by this activity have recognized the claimant's right to do so. With respect to the first element, any claims to historic rights must specify what *kind of right* the state is claiming. If it is a historic right of fishing, the kind of catch generally must be specified.^[149] Even in the case of *Eritrea/Yemen*, where no specific catch was identified in relation to the traditional fishing rights claim, the claim was specific enough to only include artisanal fishing and exclude industrial fishing activities.^[150] In the case of China, it seems to claim the exclusive right over all kinds of fishing activities within the U-shaped line, whether they are artisanal or industrial.^[151] Although such a wide claim is unprecedented, technically it is possible to justify such claim under international law, *if* the other elements for claiming historic rights were fulfilled.^[152]

The second element is that the state claiming the historic right must prove that it has exercised this right for a long enough period of time.^[153] This is where it gets more difficult for China to justify its historic claim. Although there is no clear indication of the time period for such historic right to be practised, precedents show that such long usage must have lasted for 'as long as international law requires' it.^[154] There has been a suggestion that successful claim should normally have existed for at least 100 years.^[155] China may be able to provide historical evidence that their artisanal fishermen have historically been fishing in the South China Sea for more than 100 years.^[156] However, it would be difficult to present the same argument for industrial fishing, which only has existed in the past century.^[157] Even Barbados' claim that its fishermen had been fishing for flying fish in Trinidad & Tobago's EEZ for thirty years was not enough to establish historic fishing rights.^[158]

The last element that China must prove in order to justify its historic claim is the recognition (or acquiescence) of its claim by other states, especially those that are affected by China's historic claim. All the precedents emphasise that such historic fishing rights must be recognised by other states in order to be accepted. In *Jan Mayen*, Norway and Greenland recognised that fishermen from both countries had traditionally fished in the disputed waters.^[159] In *Eritrea/Yemen*, Yemen recognised that Eritrean fishermen had traditionally fished around their islands.^[160] In the *Mauritius v UK* arbitration, Mauritius argued that the basis for their traditional fishing rights in the territorial sea and EEZ of the Chagos archipelago was merely that they had been exercised 'for many years in the waters in question,' and that its long-standing rights were confirmed by decades of the United Kingdom's own practice.^[161] In contrast, in the South China Sea, there is no indication that any littoral states have recognized that China has traditional fishing rights in the waters within the U-shaped line.

Moreover, any historic claim should use the word ‘historic’ from the first time it was formally made,^[162] otherwise, such “*late reference* to alleged ‘historicity’ of claim may be fatal to such claim.”^[163] In the years following the publication of the U-shaped line map, China did not mention any entitlement based on historic rights in its domestic legislation or official documents.^[164] When China ratified UNCLOS in 1996, China attached a declaration stating that it enjoys sovereign rights and jurisdiction over the EEZ and continental shelf, but did not make any mention of historic rights.^[165] The first mention of the term ‘historic rights’ only appeared in 1998 when China adopted its Law on EEZ and Continental Shelf,^[166] which stated that “[t]he provisions of this Act shall not affect the historical rights of the People’s Republic of China.”^[167] China’s 1998 Law, however, did not make any reference to the South China Sea or the U-shaped line. Not until 2009 did China use the U-shaped line map in an official document.^[168] Thus, the fact that China did not even mention ‘historic rights’ in relation to the U-shaped line until relatively recently is not working in China’s favour.

If proof of a legitimate historic right claim were not already difficult enough, China appears to be creating another hurdle for itself in that it seems to claim that their historic rights within the U-shaped line are exclusive in nature. Whilst China has not claimed the waters within the U-shaped line as internal or territorial waters,^[169] they have certainly acted as though they are the only state with the right to exploit the resources, conduct marine scientific research, build installations and enact regulations to conserve the environment in the waters within the U-shaped line.^[170] China also has been imposing a fishing moratorium in the waters south of 26.5 degrees of north latitude in the South China Sea between mid-May and end of July every year since 1999.^[171]

It would thus appear that China is claiming the waters within the U-shaped line as a historic and beefed-up version of the EEZ. This is an even more difficult proposition under international law for China to prove for a number of reasons. Firstly, China has never exercised exclusive jurisdiction over resources in the waters within the U-shaped line, either prior or after the publication of the 1947 map.^[172] Foreign vessels have been and are still sailing or fishing in these waters.^[173] Secondly, gaining recognition for such a ‘historic EEZ’ claim from the other states neighbouring the South China Sea would be next to impossible, given that three of these states have submitted formal claims to areas in the South China Sea that fall within China’s U-shaped line. Without such recognition, China’s claim of a ‘historic EEZ’ will remain a unilateral claim that bears no weight under international law.

The Overlap between China’s Historic Claim and Other States’ EEZ Claim

Even if it could be asserted that China has a legitimate basis to claim a ‘historic EEZ’ within the U-shaped line, can such claim trump the EEZ entitlement of other states under UNCLOS? Some scholars argue that since China’s historic rights predates UNCLOS, China’s claim should prevail over the EEZ entitlement of other state parties.^[174] Under international law, however, once a state ratified or acceded to a treaty, the state concerned is bound by the rules laid down in that treaty.^[175] Whatever rules that may apply to that state before are superseded by that treaty. In this case, the EEZ regime in UNCLOS limits the application of historic claims, as the EEZ regime put a large area of the ocean under the coastal states’ jurisdiction, despite the traditional practice of other states in the same area. Thus, when China ratified UNCLOS, China agreed to be bound by the rules UNCLOS created, including the rules regarding historic titles and EEZ regime.^[176]

All issues that were previously regulated under general international law no longer apply to China, as long as UNCLOS regulated such issues.^[177]

Since UNCLOS does not allow any reservation,^[178] can China be a persistent objector to the EEZ rules?^[179] Some scholars argue that the mention of ‘historical rights’ in China’s 1998 Law on EEZ and continental shelf refers to the U-shaped line.^[180] However, it is hard to accept China as a persistent objector to the EEZ regime.

The persistent objector concept only applies when a customary rule is in the process of emerging, and it cannot be invoked by states who were already engaged in the activity that is the subject of the rule.^[181] In this case, the EEZ rule was emerging during the negotiation of the third Conference. In 1979, Professors Douglas Johnston and Edgar Gold observed that not only had the EEZ rules been widely accepted, but there was “not a single deviant [s]tate in terms of mileage of the areas claimed, even in the face of obvious geographical limitations in semi-enclosed seas.”^[182] During the negotiation of UNCLOS, China was a strong supporter of the EEZ regime,^[183] and had never tabled any objections or exception to the concept.^[184] Furthermore, China declared an EEZ from its mainland in 1998,^[185] at which time the EEZ regime was already established as customary international law,^[186] thus preventing China from invoking the persistent objector argument. Thus, it is hard to argue that a recent claim of historic right, such as the case of China’s, can trump a well-established international rule, especially a rule that China also has observed.

V. Conclusion

Traditionally, the exclusive right over fisheries only existed in the waters immediately adjacent to land territory of a state. The need to extend the sovereignty of coastal states to the territorial sea was partly because of the need to protect the interest of local fishermen. Technology, however, increasingly permitted fishermen to go where the fish are, thus establishing the modern fishing industry that is no longer confined to the territorial sea.^[187] This led to states claiming fishing rights in waters beyond their territorial seas, basing it on ‘historic rights.’ Thus, states originally made historic claims over waters immediately adjacent to their coasts, but beyond their territorial seas (whatever the breadth may have been), such as historic rights over pearling claimed by Bahrain,^[188] sponge fishing claimed by Tunisia,^[189] and chank fishing claimed by Sri Lanka.^[190]

The need to accommodate this expanding coastal states’ interest in fisheries was one of the precursors of the EEZ regime, which extends the coastal states’ exclusive right to fish up to 200 M from their coast. The establishment of the EEZ regime in UNCLOS was thus intended to absorb the historic fishing claims,^[191] as was shown by the strong opposition to a general idea of historic claims during the negotiation of UNCLOS,^[192] and from the scarce mention of the term historic title in the final text.^[193]

Despite of the fact that historic title is not provided as an exception to the EEZ regime in UNCLOS, it is generally accepted that the concept of historic title still exist under customary international law.^[194] Such right, however, cannot undermine the sovereignty of the adjacent coastal state.^[195] Currently, historic rights that are ‘accepted’ under international law are those

that are based on long-standing usage and recognized by the affected states – such as in the case of *Eritrea/Yemen*,^[196] or those that are based on a reciprocal basis, where immediate neighbouring states have for many years consensually allowed cross-boundary fishing on an agreed mutual/reciprocal basis – such as in the case of Ireland and Northern Ireland.^[197] Both forms of historic rights have strong basis in international law,^[198] and – more importantly – have recognitions from the affected coastal states. In both cases, such ‘historic’ practice does not undermine the sovereignty of the adjacent coastal state as provided in Article 2(2) of UNCLOS.^[199]

In the South China Sea, Vietnam, Malaysia and the Philippines claim fishing rights up to 200 M from their mainland coasts, based on their EEZ entitlement that UNCLOS provides. So far, none of them has claimed any EEZ from the islands in the South China Sea. Indonesia also claims a 200 M fishing zone from its archipelagic baseline in the Natuna Islands. Taiwan argues that Itu Aba Island, which it occupies, is entitled to a full EEZ and continental shelf, but it has not issued any official position on the rest of the islands in the South China Sea or to the possible meaning of the U-shaped line, which it also adopted.

China’s fishing right claim appears to be based on both EEZ entitlement and historic claim.^[200] First, they argue that the features in the South China Sea are entitled to a full-fledged EEZ and continental shelf as a group. Yet, China has not made any official declaration of the limit of its EEZ claim from the islands. Second, they argue that they also have a form of exclusive historic rights within the area the U-shaped line encompasses, but beyond the maritime zones generated from the islands. However, the view that the U-shaped line represents China’s historic claim that is akin to an EEZ does not seem to be attainable. The EEZ concept is a fairly new one, thus claiming ‘EEZ-like rights’ under the historic title concept would unlikely be agreed to by the international community.^[201] Professor Clive Symmons put it best, stating that “such modern-day zonal claims cannot be inter-temporarily back-dated to an earlier period in history.”^[202] Thus, after the conclusion of UNCLOS, such ‘adjacency historic claims’ should now be analysed in the context of the EEZ regime (or – for historic claim over sedentary species – in the context of the continental shelf regime).^[203]

If a historic title is in conflict with the EEZ provisions, and there is no exception provided in those provisions to safeguard historic titles; the provisions of the EEZ must prevail between the parties to UNCLOS.^[204] In this situation, the application of Article 62 of UNCLOS seems to override any former traditional fishing rights if they now fall within the EEZ of another state.^[205] On the other hand, there are those who argue that the EEZ, as a new legal concept, cannot by itself abolish or deny any acquired or existing rights.^[206] Some argue further that since UNCLOS does not deal with the concept of historic claims in relation to the EEZ, the Convention has no impact on such historic claims.^[207]

The International Law Commission in its study of historic waters tried to balance the two by concluding that in such a case, UNCLOS leaves the matter, including the existence and proof of historic title, in the hands of the state at the entry into force of the Convention.^[208] The answer to the question of whether historic title can trump the provisions of UNCLOS thus seems to depend on the strength of the claim to historic title. If a state can provide an exceptionally strong basis to

its historic claim, then maybe such historic title could be considered as an exception to the rules in UNCLOS.

In that regard, justifying a historic fishing right claim over the waters within the U-shaped line in the South China Sea is a Sisyphean task. Not only because the ability to make a justifiable historic rights claim under international law has been severely limited by the high threshold of proof the ICJ set,^[209] but also because such rights have mostly become obsolete since the advent of the EEZ and continental shelf concepts.^[210] Furthermore, it is doubtful if China can fulfil all the elements of a historic title claim in the South China Sea,^[211] especially since it is unlikely that other littoral states would give their recognition or acquiescence to such claims.^[212]

Recognition seems to be the most important factor in preserving the right of a third state to fish in the EEZ of another state, notwithstanding whether or not such right is based on history. In the case between Mauritius and the United Kingdom, the Mauritius fishermen were granted the right to fish in the latter's EEZ around Chagos archipelago based on the United Kingdom's undertakings.^[213] Here, as was the case in *Eritrea/Yemen*, such historic rights may be conducted in limited circumstances and on a consensual basis.^[214] Thus, these rights can be characterized as continuing because of the consent or acquiescence of the affected adjacent coastal state.^[215]

China is likely to ignore any award from the arbitration tribunal in the proceeding brought by the Philippines. At the same time, sticking to a position that is not well supported by international law or the international community would only aggravate the tensions in the region.^[216] If China feels strongly that it has historic fishing rights in the South China Sea, China has to be able to convince other states to accept such a claim. As an alternative, entering into some kind of fishing arrangement with other littoral states in the South China Sea might be the best solution for China.

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Footnotes:

^[1] Philippines' Presidential Decree No 1599 of 1978 establishing an EEZ; Philippines' Republic Act No 9522 of 2009 defining the Archipelagic Baselines of the Philippines; Vietnam's

Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of 1977; Vietnam's Statement on the Territorial Sea Baseline of 1982; The Law of the Sea of Vietnam 2012, Art 15.

^[2] Communications Received from China with regard to Malaysia and Vietnam's Joint CLCS Submission (14 April 2011).

^[3] China's Exclusive Economic Zone and Continental Shelf Act 1998 (China's Law on EEZ and CS). The Paracel Islands are also claimed by Vietnam.

^[4] In the communication to the Commission on the Limits of the Continental Shelf (CLCS) in response to the Joint Submission of Malaysia and Vietnam, 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 U-shaped line map. See CLCS, *Communication received from China with regard to the Joint Submission by Malaysia and the Socialist Republic of Vietnam*, 7 May 2009, online: United Nations <http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf>.

^[5] *Supra* note 2; Communications Received from China with regard to the Submission made by Vietnam (14 April 2011).

^[6] United Nations Convention on the Law of the Sea, 10 December 1982, UNTS 1833, 3 (entered into force 16 November 1994). As of December 2015, UNCLOS has 167 parties (including the European Union and the State of Palestine).

^[7] RR Churchill and AV Lowe, *The Law of the Sea*, 3rd ed (Manchester University Press: 1999), 281.

^[8] *Ibid*, 71.

^[9] C John Colombos, *The International Law of the Sea*, 6th ed (Longmans Green & Co: Great Britain, 1967), 147.

^[10] Hugo Grotius, *The Free Sea*, translated by Richard Hakluyt (Indianapolis: Liberty Fund, 2004), 32-33.

^[11] Churchill and Lowe, *supra* note 7, 71.

^[12] Welwood was concerned about Dutch fishermen fishing for herring in Scottish coastal waters and depleted the stock, see William Welwood, *An Abridgement of All Sea-Lawes*, 1613, Title XXVI (Digital Edition edited by Colin Mackenzie, 2011).

[13] Scott Truver, *The Strait of Gibraltar and the Mediterranean* (The Netherlands: Sijthoff & Noordhoff, 1980), 148; see also Erik Brüel, *International Straits, A Treatise on International Law* (London: Sweet & Maxwell, 1947), 48-49.

[14] Colombos, *supra* note 9, 87; Churchill and Lowe, *supra* note 7, 205.

[15] Colombos, *ibid*, 89.

[16] The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, Art 1.

[17] Shigeru Oda, 'Fisheries under the United Nations Convention on the Law of the Sea' (1983) 77 *AJIL* 739-755, 740.

[18] This theory came from the assumption of how far a state is capable to control its territory, see Colombos, *supra* note 9, 87.

[19] Wilbert McLeod Chapman, 'Fisheries Resources in Offshore Waters', in Lewis M Alexander, ed, *The Law of the Sea: Offshore Boundaries and Zones* (The Ohio State University Press: 1966) 87-105, 91.

[20] League of Nations Committee of Experts for the Progressive Codification of International Law, 'Questionnaire No 2: Territorial Waters' (1926) 20:3 *AJIL Supp* 62, 125-126. Note that the term 'continental shelf' used here refers to the region extending from the coastline to a great step that marks the beginning of the abysmal region, see *ibid*, 126.

[21] Oda, *supra* note 18.

[22] Those who claimed 3 M territorial seas, *inter alia*: Jordan, see Jordanian Fisheries Act No. 25, 2 December 1943; United Kingdom, see Territorial Waters Jurisdiction Act 1878; United States, see Letter to Certain Foreign Ministers of November 8, 1793 proclaiming a three-mile Territorial Sea of the United States.

[23] Those who claimed 6 M territorial seas, *inter alia*: Dominican Republic, see Act No. 186 of 13 September 1967 on the Territorial Sea, Contiguous Zone, Exclusive Economic Zone and Continental Shelf; Greece, see Law No. 230/1936 concerning the extension of the territorial waters of the Kingdom of Greece; Turkey, see Law No. 476 on Territorial Waters, 1964.

[24] Those who claimed 12 M territorial seas, *inter alia*: Canada, see 1970 Territorial Sea And Fishing Zones Act: Chapter T-8; China, see Declaration of the Government of the People's Republic of China on China's Territorial Sea, dated 4 September 1958; France, see Law No. 71-1060 of 14 December 1971 regarding the delimitation of French territorial waters.

[25] Those who claimed 15 M territorial seas, *inter alia*: Albania, see Decree No. 4650 on the boundary of the People's Republic of Albania dated 9 March 1970; Venezuela, see Act of 27 July 1956 concerning the Territorial Sea, Continental Shelf, Fishery Protection and Air-Space.

[26] Those who claimed a 200 M territorial seas, *inter alia*: Argentina, see Law No. 17,094 of Dec. 29, 1966; Congo, see Ordinance No. 049/77 of 20 December amending article 2 of Ordinance 26/71 of 18 October 1971; Ecuador, see Civil Code as amended by Decree No. 256-CLP of 27 February 1970.

[27] Shigeru Oda, 'Proposals Regarding a 12-Mile Limit for the Territorial Sea by the United States in 1970 and Japan in 1971: Implications and Consequences' (1991) 22 *ODIL* 189-197, 191.

[28] *Ibid.*

[29] Pell stated that establishing a longer fisheries limit than a territorial one is the best of both worlds. See Clairborne Pell, 'Preface', in Lewis M Alexander, ed, *The Law of the Sea: Offshore Boundaries and Zones* (The Ohio State University Press, 1967), x.

[30] Although the concept of extended fishing zones beyond the traditional territorial water 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.

[31] Japan tried to 'soften' the EEZ regime, by proposing granting preferential rights to coastal states in relation to fisheries, rather than exclusive rights, see Sea-Bed Committee, UN GAOR, 27th Sess, Supp No 21, UN Doc A/8721, 158-161 & 188-196.

[32] John Stevenson and Bernard Oxman, 'The Third United Nations Convention on the Law of the Sea: The 1974 Caracas Session' (1975) 69 *AJIL* 1, 2.

[33] On the flip side, Japan established a 200 M fishery zone in 1977, but by terms of their Law on Provisional Measures relating to the Fishery Zone, Japan still recognized the fishing rights of fishermen from South Korea and China, which is Japan's way to protest the establishment of the EEZ regime. However, this ended in 1996 when Japan ratified UNCLOS and 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.

[34] For a list of states that claimed 12 M territorial seas, around or after the conclusion of the third Conference, see U.S. Department of State, *Limits in the Seas No. 36: National Claims to Maritime Jurisdictions*, 8th Revision, 25 May 2000.

[35] UNCLOS, Arts 56 and 57.

[36] *Ibid.*, Art 73.

[37] *Ibid.*, Art 56(1)(b).

^[38] The legal status of EEZ was heavily debated during the third Conference until the states reached a compromise of ‘*sui generis*’. For detailed discussion on the status of the EEZ, see Bernard Oxman, ‘An Analysis of the Exclusive Economic Zone as Formulated in the Informal Composite Negotiating Text’, in Thomas A Clingan Jr, ed, *The Law of the Sea: State Practice in Zones of Special Jurisdiction* (The Law of the Sea Institute: University of Hawaii, 1982), 57-78.

^[39] UNCLOS, Art 58(2).

^[40] *Ibid*, Art 58(1).

^[41] Clive R Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Leiden/Boston: Martinus Nijhoff Publishers, 2008), 18.

^[42] See International Law Committee, *Juridical Regime of Historic Waters, Including Historic Bays*, UN Doc A/CN.4/143 (1962) ILC Yearbook, vol II (*UN Juridical Regime*), 6; see also LJ Bouchez, *The Regime of Bays in International Law* (Leyden: Sythoff, 1964), 281.

^[43] A state could still enter into a bilateral agreement to grant another state access to fishery resources within its territorial sea. See for example, the *Mauritius v UK* arbitration, where the tribunal confirmed that Mauritius was granted fishing rights by the UK in the territorial sea of the Chagos Archipelago, *The Chagos Marine Protected Area Arbitration (Mauritius v UK)*, Award, 18 March 2015(*Mauritius v UK*), para 451.

^[44] Clive R Symmons, ‘Historic Waters and Historic Rights in the South China Sea: A Critical Appraisal’ in Sichun Wu, *et al*, eds., *UN Convention on the Law of the Sea and the South China Sea* (Ashgate, 2015) 191-238, 192.

^[45] The ICJ defined historic waters as “waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title,” see *Fisheries Case (United Kingdom v Norway)* (1951) ICJ Rep 116 (*Anglo-Norwegian Fisheries Case*), 130. Bouchez identified historic waters as “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,” see Bouchez, *supra* note 42. See also 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), 8.

^[46] *UN Juridical Regime*, *supra* note 42, para 36.

^[47] Symmons, *supra* note 44, 206.

^[48] 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, Art 7.

^[49] *Ibid*, Art 7(2).

^[50] *Ibid*, Art 7(4).

^[51] UNCLOS, Art 10.

^[52] *Supra* note 16, Art 7(6); *ibid*, Art 10(6).

^[53] Andrea Gioia, 'Tunisia's Claims over Adjacent Seas and the Doctrine of Historic Rights' (1984) 11:2 *Syracuse Journal of International Law & Commerce*, 345.

^[54] *Anglo-Norwegian Fisheries Case*, *supra* note 45, 142.

^[55] UNCLOS, Art 17.

^[56] *UN Juridical Regime*, *supra* note 42, para 39; Gioia, *supra* note 53, 329.

^[57] *UN Juridical Regime*, *ibid*, para 40.

^[58] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, (1982) ICJ Reports, Judgment (*Tunisia/Libya*), 74; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (1992) ICJ Reports, 589; see International Law Committee, *supra* note 42; see also Bouchez, *supra* note 42; Yehuda Z Blum, 'Historic Rights' in Rudolf Bernhardt, ed, *Encyclopedia of Public International Law*, Installment 7 (Amsterdam: North-Holland Publishing Co, 1984) 121; Epsey Cooke Farrel, *The Socialist Republic of Vietnam and the Law of the Sea* (The Hague: Martinus Nijhoff Publishers, 1998) 68-69.

^[59] *UN Juridical Regime*, *supra* note 42, para 96.

^[60] Symmons, *supra* note 41, 132-133.

^[61] *Ibid*, 128-129.

^[62] 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 Vietnam 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 45, 12-16.

^[63] Although the concept of historic title is not discussed in length in UNCLOS, it is generally accepted that the concept rest upon customary international law; see *Tunisia/Libya*, *supra* note 58,74; see also Symmons, *supra* note 41, 9.

^[64] Gioia, *supra* note 53, 328.

^[65] *Tunisia/Libya*, *supra* note 58, paras 98-99; *Fisheries Jurisdiction (United Kingdom v Iceland)*, Merits, Judgment, (1974) ICJ Reports 3, paras 63-65.

^[66] Gioia, *supra* note 53, 329.

[67] See Separate Opinion of Judge De Castro, *Fisheries Jurisdiction*, *supra* note 65, 99.

[68] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment (2001) ICJ Reports 40 (*Qatar/Bahrain*), paras 235-236.

[69] See *Counter Memorial of the Libyan Arab Jamahiriya (Tunisia v Libyan Arab Jamahiriya)*, 1980 ICJ Pleadings (II Continental Shelf) 41-73 (Counter Memorial dated 1 Dec 1980), 53.

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

[71] Contrast this with the *Mauritius v UK* arbitration, where the Tribunal doubted if the UK's undertaking to grant access to fisheries resources in the waters surrounding the Chagos Archipelago can be limited to the type and scale of fishing actually practiced in the archipelago the time of the undertaking, *supra* note 43, 450. It is important to note, however, that the tribunal based Mauritius' entitlement to fishing rights in the territorial sea of the Chagos Archipelago on the UK's undertaking, and not on any historic rights, *ibid*, para 456.

[72] *Tunisia/Libya*, *supra* note 58, para 98.

[73] *Qatar/Bahrain*, *supra* note 68.

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

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

[76] Symmons, *supra* note 41, 295, see also *Tunisia/Libya*, *supra* note 58, para 100.

[77] UNCLOS, Arts 10(6) & 15.

[78] Symmons, *supra* note 41, 19-20.

[79] UNCLOS, Art 15.

[80] The impact of the 'historic title' exception for territorial sea delimitation is minimal, see Symmons, *supra* note 44, 197. One of the few cases where traditional fishing rights successfully affected the drawing of a territorial sea boundary was the drawing the territorial sea boundary between Norway and Sweden in 1909, which took into account the Grisbadarna fishing bank that had long been fished by Swedish fishermen; see *Norway v Sweden (Grisbadarna case)* (1909) Unofficial English Translation of the Award of the Arbitral Tribunal, online: http://www.pca-cpa.org/showfile.asp?fil_id=166.

[81] For further discussion on how traditional or historic fishing rights can influence maritime delimitation, see Leonardo Bernard, 'The Effect of Historic Fishing Rights in Maritime

Boundaries Delimitation’, in Harry N Scheiber and Moon Sang Kwon, eds, *Securing the Ocean for the Next Generation*, (Berkeley: Berkeley Law School, 2013) 327-354.

^[82] *Eritrea/Yemen – Phase I*, *supra* note 70, para 526.

^[83] The tribunal even ignored the *Jabal al-Tayr* and the *Zubayr* islands completely in drawing the boundary, see *Eritrea v Yemen* (1999) Award of the Arbitral Tribunal in the Second Stage – Maritime Delimitation [*Eritrea/Yemen – Phase II*], paras 147-148.

^[84] The tribunal stated that “the traditional fishing regime operates throughout those waters beyond the territorial waters of each of the Parties, and also in their territorial waters and ports,” see *ibid*, para 109.

^[85] Compare this to the exceptional ‘voisinage’ fishery rights, which can extend beyond mere artisanal fishing between close neighbouring states on a reciprocal historic basis. See for example the Ireland/Northern Ireland situation, where the fishermen of both areas enjoy the special reciprocal fishery rights in each other’s territorial sea; see Clive R Symmons, *Ireland and the Law of the Sea*, 2nd ed (Round Hall Sweet & Maxwell, 2000), 161.

^[86] Referring to the debate of whether states can extend their fishery zones, O’Connell stated that “most traditional fishing rights are opposable to states extending their fishery limits,” see Daniel P O’Connell, *The International Law of the Sea*, vol I, Ivan A Shearer, ed, (Oxford: Clarendon Press, 1982), 538.

^[87] Some scholars correctly predicted in 1966 that “[a]ny seaward extension of a coastal State’s jurisdiction over fisheries may involve claims by foreign countries to historic rights to those fisheries.” See William T Burke, Northcutt Ely, Richard Young, Bernard E Jacob, Bruce A Harlow and Quincy Wright, ‘A Symposium on Limits and Conflicting Uses of the Continental Shelf’, in Alexander, *supra* note 29, 137.

^[88] The only other mention of historic title in UNCLOS is in Art 298(1)(a)(i), where the issue of historic bays or title in relation to maritime delimitation was excluded from the dispute settlement mechanism.

^[89] See *ibid*, Art 62, which can be argued as implying non-recognition of traditional fishing rights in general.

^[90] *Ibid*, Art 62(2).

^[91] *Ibid*, Art 62(3).

^[92] Similar doubts can be cast upon China’s historic claim over the continental shelf in the South China Sea. For the context of this chapter, such claim is relevant since it would give China the exclusive right to fish sedentary species. However, the doctrine that continental shelf is an inherent right of the coastal state seem to be “deliberately aimed against the operation of any

historic rights previously required,” see Zou Keyuan, ‘Historic Rights in International Law and in China’s Practice’ (2001) 32:2 *Ocean Development & International Law* 149-168, 162.

^[93] UNCLOS, Art 61(1).

^[94] *Ibid*, Art 297(3)(a).

^[95] This should not come as a surprise, as prior to the third Conference most states have no history of fishing beyond their territorial sea. Thus, they did not have any particular interest in recognizing the concept of historic right. See Burke, *et al*, *supra* note 87.

^[96] See also Robert Beckman, ‘The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea’, (2013) 107 *American Journal of International Law, Agora: The South China Sea* 142-163, 158.

^[97] See Territorial Waters of Brunei Act, 1982; Law No 1/1973 Concerning Indonesian Continental; Law No 5/1983 on the Indonesian Exclusive Economic Zone; Law No 6/1996 regarding Indonesian Water; Government Regulations No 38/2002 on the Geographical List of Coordinates of the Indonesian Archipelagic Baselines (as amended by Government Regulations No 37/2008); Malaysian Exclusive Economic Zone Act No 311; Malaysian Baselines of Maritime Zones Act 660, 2006; Malaysian Territorial Sea Act 750, 2001; China’s Law on the Territorial Sea and the Contiguous Zone 1992 (China’s Law on Territorial Sea and Contiguous Zone); China’s Law on EEZ and CS, *supra* note 3; Philippines’ Presidential Decree No 1599 of 1978, *supra* note 1; Philippines’ Republic Act No 9522 of 2009, *supra* note 1; Vietnam’s Statement of 1977, *supra* note 1; Vietnam’s Statement of 1982, *supra* note 1; The Law of the Sea of Vietnam, *supra* note 1; Taiwan’s Law on the Territorial Sea and Contiguous Zone 1998; Taiwan’s Law on the Exclusive Economic Zone and the Continental Shelf 1998.

^[98] J Ashley Roach and Robert W Smith, *Excessive Maritime Claims*, 3rd ed (Martinus Nijhoff Publishers, 2012) 209 & 213.

^[99] *Ibid*, 76-82.

^[100] The questionable use of straight baselines is relatively unimportant when identifying the areas of potential overlapping maritime claims in the South China Sea. See Robert C Beckman and Clive H Schofield, ‘Defining EEZ Claims from Islands: A Potential South China Sea Change’ (2014) 29:2 *International Journal of Marine and Coastal Law* 193 – 243, 198.

^[101] UNCLOS, Art 75. However, the outer limits of the EEZ claims of Malaysia and Vietnam are shown on the maps contained in their submissions to the CLCS, see Joint Submission by Malaysia and the Socialist Republic of Vietnam to the CLCS, ‘Outer Limits of the Continental Shelf beyond 200 nautical miles from the Baselines: Submission to the Commission’ (6 May 2009) [Malaysia and Vietnam’s Joint CLCS Submission], Executive Summary.

^[102] UNCLOS, Art 16.

[103] *Ibid*, Art 13(2).

[104] Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea of the People's Republic of China (15 May 1996); but it is doubtful if such straight baseline is consistent with international law, since only 'archipelagic States' are allowed to draw straight baselines around mid-ocean archipelagos, and China is not an 'archipelagic State', see UNCLOS, Arts 46 and 47(1); see also Roach and Smith, *supra* note 98, 98.

[105] Malaysia and Vietnam's Joint CLCS Submission, *supra* note 101.

[106] See Gregory Poling, 'Rationalizing U.S. Goals in the South China Sea', (2015) 3:9 *Journal of Political Risk*, 7. However, they are not precluded from claiming an EEZ from the islands some point in the future if they decide it is in their interests to do so.

[107] Republic of the Philippines Department of Foreign Affairs Manila, Notification and Statement of Claims, No 13-0211 (22 January 2013) online: <https://www.dfa.gov.ph/>. Although in its Statement of Claims the Philippines intentionally excluded any reference to historic waters, in the jurisdiction hearing they submitted that the essence of the dispute concerns China's claim to historic rights in the South China Sea, see *Arbitration between the Republic of the Philippines and the People's Republic of China*, Award on Jurisdiction and Admissibility, 29 October 2015, PCA Case No 2013-19, para 140.

[108] For a detailed discussion on Taiwan's position in the South China Sea, see Lynn Kuok, 'Tides of Change: Taiwan's evolving position in the South China Sea and why other actors should take notice', East Asia Policy Paper No 5 (The Brookings Institution: Centre for East Asia Policy Studies, May 2015).

[109] The 1993 Policy Guidelines for the South China Sea referred the U-shaped line as "the historic water limit (...) under the jurisdiction of the Republic of China, where the Republic of China possesses all rights and interests." For the guidelines, see Kuan-Ming Sun, 'Policy of the Republic of China towards the South China Sea' (1995) 19:5 *Marine Policy* 408, Appendix I.

[110] The 1993 Policy Guidelines were terminated on 15 December 2005. See Chris PC Chung, 'Drawing the U-Shaped Line: China's Claim in the South China Sea, 1946-1974', *Modern China*, I-35, 11 August 2015, 24.

[111] 'Transcript of New York Times interview with President Ma Ying-jeou of Taiwan', *The New York Times*, 31 October 2014, online: http://www.nytimes.com/2014/11/01/world/asia/transcript-of-new-york-times-interview-with-president-ma-ying-jeou-of-taiwan.html?smid=tw-share&_r=0.

[112] See Kuok, *supra* note 108, 6-7. See also Yann-huei Song, 'Recent Developments in the South China Sea: Taiwan's Policy, Response, Challenges and Opportunities', paper submitted to the *Managing Tensions in the South China Sea* conference, held by CSIS on 5-6 June 2013, 6-7.

[113] Ministry of Foreign Affairs, Republic of China (Taiwan), *Statement on the South China Sea*, 7 July 2015, online:

http://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&sms=5B9044CF1188EE23&s=EDEBCA08C7F51C98.

[114] *The Location Map of the South China Sea* 南海諸島位置圖, 1947 (Government of the Republic of China, 1947).

[115] Chung, *supra* note 110, 2.

[116] See Li Jinming and Li Dexia, 'The Dotted Line on the Chinese Map of the South China Sea: A Note' (2003) 34 *Ocean Development and International Law* 287-95, 289-290; Chung, *ibid*, 6-7.

[117] UNCLOS, Arts 16(2), 75(2) & 84(2).

[118] Two dotted lines in the Gulf of Tonkin were removed in 1953, leaving the PRC's map with nine dashes. See Li and Li, *supra* note 116, 290.

[119] Zou, *supra* note 92, 161.

[120] Communications Received from China with regard to Malaysia and Vietnam's Joint CLCS Submission (7 May 2009); Communications Received from China with regard to the Submission made by Vietnam, (7 May 2009).

[121] Li Jinming and Li Dexia called it China's 'traditional maritime boundary line', see Li and Li, *supra* note 116.

[122] Nong Hong argued that the 'boundary theory' is weak under international law, and that it is even criticised by some Chinese scholars, see Nong Hong, 'Interpreting the U-Shape Line in the South China Sea', *China-US Focus* (15 May 2012), online: <http://www.chinausfocus.com/peace-security/interpreting-the-u-shape-line-in-the-south-china-sea/>..

[123] Tommy Koh, 'The Origins of the 1982 Convention on the Law of the Sea' (1987) 29 *Malaya Law Rev* 1-17, 9.

[124] *Ibid*, 7-8.

[125] Chung, *supra* note 110, 8.

[126] *Ibid*.

[127] Chung noted that the line branches off to the area between northern Borneo and the southern tip of the Philippines' Palawan, and that the line on this segment was about 13.5 M from either side; see *ibid*, 16.

[128] *Ibid*, 18.

[129] See Li and Li, *supra* note 116, 290.

[130] Chung, *supra* note 110, 15.

[131] Florian Dupuy and Pierre-Marie Dupuy, 'A Legal Analysis of China's Historic Rights Claim in the South China Sea' (2013) 107 *AJIL* 124, 132.

[132] Symmons, *supra* note 44, 221.

[133] Erik Franckx and Marco Benatar, 'Dots and Lines in the South China Sea: Insights from the Law of Map Evidence' (2012) 2:1 *Asian Journal of International Law* 89-118, 106-107, 109-110.

[134] *Ibid*, 101.

[135] Zou, *supra* note 92, 161.

[136] *Declaration on China's Territorial Sea*, as quoted in U.S. Department of State, *Limits in the Seas No. 43: Straight Baselines: People's Republic of China*, 1 July 1972, 20.

[137] Beckman and Schofield, *supra* note 100, 203.

[138] UNCLOS, Art 56(1).

[139] *Ibid*, Art 121(2).

[140] CLCS, Communications Received from China with regard to Malaysia and Vietnam's Joint CLCS Submission (14 April 2011); CLCS, Communications Received from China with regard to the Submission made by Vietnam (14 April 2011).

[141] UNCLOS obliges coastal states to publicise their EEZ limits in appropriate ways, see UNCLOS, Art 75; see also Beckman and Schofield, *supra* note 100, 203.

[142] Beckman and Schofield, *ibid*.

[143] Most scholars have abandoned this view, as the idea of claiming historic water over such a huge body of waters located hundreds of nautical miles away from the mainland contradicts the very concept of historic water. See for example, Ted L McDorman, 'Rights and Jurisdiction over the Resources in the South China Sea: UNCLOS and the Nine-Dash Line', in S Jayakumar, *et al*, eds, *The South China Sea Disputes and the Law of the Sea* (Edward Elgar, 2014), 160; see also Dupuy and Dupuy, *supra* note 131, 139.

[144] CLCS, *supra* note 140.

[145] See Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference on September 15, 2011*, 16 September 2011, online: <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t860126.htm>.

[146] Yann-Huei Song, *United States and Territorial Disputes in the South China Sea: A Study of Ocean Law and Politics* (School of Law, University of Maryland, 2002), 73; Zou, *supra* note 92, 160-63; Zhiguo Gao and Bingbing Jia, 'The U-shaped Line in the South China Sea: History, Status, and Implications' (2013) 107 *American Society of International Law*, 123-24.

[147] Hong, *supra* note 122; Gao and Jia, *ibid* 108, 124; Zou Keyuan, 'China's U-Shaped Line in the South China Sea Revisited' (2012) 43 *Ocean Development & International Law* 18-34, 22.

[148] This seems to be the popular view amongst Chinese scholar, see Hong, *ibid*. However, Chung convincingly argued that until 1974, "[China] did not hold to, nor did it attempt to enforce, a historic rights waters interpretation of the [U-shaped] line," see Chung, *supra* note 110, 20.

[149] *Tunisia/Libya*, *supra* note 58; *Qatar/Bahrain*, *supra* note 68; *Barbados/Trinidad and Tobago*, *supra* note 74; *Jan Mayen* case, *supra* note 75.

[150] *Eritrea/Yemen – Phase II*, *supra* note 83, para 106. See, however, *Mauritius v UK*, *supra* note 43.

[151] See Fisheries Law of the People's Republic of China, Art 2: 'All productive activities of fisheries, ... in the inland waters, tidal flats, territorial waters and exclusive economic zones of the People's Republic of China and in *all other sea areas under the jurisdiction of the People's Republic of China* shall be conducted in accordance with this Law' [*italics added*].

[152] However, past exercise of jurisdiction by China in the waters within the U-shaped line has been inconsistent. Li Jinming and Li Dexia stated that China has "seldom practised this kind of exclusive rights over waters within the line," see Li and Li, *supra* note 116, 292; Zou called the exercise of authority in the area by China 'infrequent', see Zou, *supra* note 92, 161.

[153] See Separate Opinion of Judge De Castro, *Fisheries Jurisdiction*, *supra* note 65, 99.

[154] The ILC concluded that "it must remain a matter of judgment when sufficient time has elapsed for usage to emerge," see *UN Juridical Regime*, *supra* note 42, para 104.

[155] It has been suggested that as a working rule, the alleged historic claim should usually have existed for least a century, see Symmons, *supra* note 41, 157.

[156] This does not exclude the possibility that fishermen from other littoral states have also historically been fishing in the South China Sea. See Melda Malek, 'A legal assessment of China's historic claims in the South China Sea', (2013) 5:1 *Australian Journal of Maritime & Ocean Affairs* 28-36, 34.

[157] Chapman, *supra* note 19, 91.

[158] *Barbados/Trinidad and Tobago*, *supra* note 74, para 266.

[159] *Jan Mayen case*, *supra* note 75.

[160] *Eritrea/Yemen – Phase II*, *supra* note 83.

[161] *Mauritius v UK*, *supra* note 43, para 415.

[162] This is “to inform other states that an ‘exceptional’ claim has been made and to put them on notice of it for a possible protest,” Symmons, *supra* note 44, 211. See also *UN Juridical Regime*, *supra* note 42, para 96.

[163] Symmon, *ibid*, 212. For example, the United States in 1991 protested Australia’s historic bays claim due to the latter’s failure to identify the particular bays as ‘historic’ when the opportunity arose several times in the 20th century; or Japan’s protest to Russia that the latter’s past assertion of jurisdiction over Peter the Great Bay had not referred to it as being historic. See Symmons, *supra* note 41, 104-105.

[164] Judge Zhiguo Gao wrote in 1994 that “... careful study of Chinese documents reveals that China has never claimed the entire water column of the South China Sea, but only the islands and their surrounding waters within the line.” See Zhiguo Gao, ‘The South China Sea: From Conflict to Cooperation?’, (1994) 25:3 *Ocean Devel & Int’l L*, 346.

[165] People’s Republic of China, *Chinese Declaration Upon Ratification*, 7 June 1996, Multilateral Treaties Deposited with the Secretary-General, Vol 3, Part 1, Chapters 12-29, and Part 2, UN Doc ST/LEG/SER.E/26, 1 April 2009, 450, para 1.

[166] Chung noted that China’s Law on EEZ and CS adopted in 1998 was the first time China indicated that “it possibly held such rights in the region, but it did not clarify what these entailed and where they applied.” See Chung, *supra* note 110, 21.

[167] China’s Law on EEZ and CS, *supra* note 3, Art 14.

[168] See CLCS, *supra* note 4.

[169] China Foreign Ministry Spokesperson Hong Lei stated that “China’s position on the South China Sea is clear and consistent. China safeguards its sovereignty and maritime rights and interests in the South China Sea, which does not affect freedom of navigation in the South China Sea enjoyed by countries according to international law. In fact, freedom of navigation in the South China Sea is out of question,” in China Foreign Ministry, Regular Press Conference (21 June 2011), online: www.fmprc.gov.cn/eng/xwfw/s2510/t833157.htm; see also Statement of PRC Foreign Ministry Spokesman Chan Jian, ‘News Briefing by Chinese Foreign Ministry,’ Beijing Review (8–14 May 1995), 22, cited in Yann-Huei Song and Zou Keyuan, ‘Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States’, (2000) 31 *Ocean Devel & Int’l L* 303, 310–12.

[170] See Chung, *supra* note 110, 2 & 4. See also Poling, *supra* note 106, 8.

[171] This year's moratorium was lifted on 1 August 2015, see CRI, *South China Sea Fishing Ban Lifted*, 1 August 2015, online: http://english.cri.cn/12394/2015/08/01/4161s889863_4.htm.

[172] Chung, *supra* note 110, 8.

[173] Li and Li, *supra* note 116, 292.

[174] See Zou Keyuan and Liu Xinchang, 'The Legal Status of the U-Shaped Line in the South China Sea and Its Legal Implications for Sovereignty, Sovereign rights and Maritime Jurisdiction' (2015) 14 *Chinese JIL*, para 32.

[175] Vienna Convention on the Law of Treaties, 23 May 1969, UNTS 1155, 331 (entered into force 27 January 1980) [Law of Treaties], Art 26.

[176] Robert C Beckman, 'International Law, UNCLOS and the South China Sea', in Robert Beckman, *et al*, eds, *Beyond Territorial Disputes in the South China Sea: Legal Framework for the Joint Development of Hydrocarbon Resources* (Edward Elgar, 2013), 63.

[177] Symmons, *supra* note 44, 207.

[178] UNCLOS, Art 309. Under treaty law, when ratifying or acceding to a treaty, a state may make reservations to declare that they are not bound by certain rules laid out in such treaty, unless such treaty does not allow reservations; see Law of Treaties, Art 19. The drafters of UNCLOS intentionally crafted a treaty where each provision is a package deal that ties to the other provisions. Thus, opting-out of a provision would unravel the whole compromise reached by the states negotiating the Convention; see Douglas M Johnston and Edgar Gold, 'Extended Jurisdiction: the Impact of UNCLOS III on Coastal State Practice', in Clingan, *supra* note 38, 14-15.

[179] Persistent objector refers to the ability of a dissenting state to opt out of an emerging customary international law rule, see Ian Brownlie, *Principles of Public International Law* (Oxford University Press: 1966), 8.

[180] Zou, *supra* note 147, 21.

[181] International Law Association, Committee on Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law*, Final Report of the Committee (2000), 27.

[182] Johnston and Gold, *supra* note 178, 18.

[183] Andres Aguilar, 'The Patrimonial Sea', in Lewis M Alexander, ed, *The Law Of The Sea: Needs and Interests of Developing Countries* (University of Rhodes Island: 1973) 161-165, 165.

[184] Johnston and Gold, *supra* note 178, 18.

[185] China's Law on EEZ and CS, *supra* note 3.

[186] *Continental Shelf (Libyan Arab Jarnahiriya/Malta)* (1985) ICJ Rep 13, para 43; see also International Law Association, 'Principles Applicable to Living Resources Occurring Both Within and Without the Exclusive Economic Zone or in Zones of Overlapping Claims' (1992) 65 *Int'l L Ass'n Rep Conf* 254, 256.

[187] Chapman, *supra* note 19, 92.

[188] *Qatar/Bahrain*, *supra* note 68.

[189] *Tunisia/Libya*, *supra* note 58, para 98.

[190] Symmons, *supra* note 41, 47.

[191] Symmons, *supra* note 44, 195-196.

[192] 'US Delegation Report of Third Session, 1975', in *Reports of the United States Delegation to the Third United Nations Conference on the Law of the Sea* (Honolulu: Law of the Sea Institute, 1983), 94.

[193] Symmons stated that UNCLOS "has not only not defined 'historic rights'; it does not even use the phrase *as such*." See Symmons, *supra* note 44, 211.

[194] The Arbitral Tribunal in the arbitration between the Philippines and China acknowledges that traditional fishing rights may exist within the territorial waters of another state, see Award on Jurisdiction and Admissibility, *supra* note 107, para 407. See also *Tunisia/Libya*, *supra* note 58, para 100.

[195] McDorman, *supra* note 143, 159.

[196] *Eritrea/Yemen – Phase II*, *supra* note 83, para 126.

[197] See Symmons, *supra* note 85.

[198] The ILC stated that since historic title is an exceptional situation, the basis of such title must be exceptionally strong, see *UN Juridical Regime*, *supra* note 42, para 40.

[199] Compare this with the *Mauritius v UK* arbitration, where the Tribunal ruled that Mauritius is entitled to fish in the territorial sea of the Chagos archipelago based on the undertakings given by the UK, *supra* note 43, para 456.

[200] Communications received from China with regard to Malaysia and Vietnam's Joint CLCS Submission, *supra* note 140.

[201] Malek, *supra* note 156, 33.

[202] Symmons, *supra* note 44, 196.

[203] Symmons, *ibid.*

[204] In the current dispute with China, the Philippines argued that “UNCLOS supersedes and nullify any ‘historic rights’ that may have existed prior to the Convention,” see Award on Jurisdiction and Admissibility, *supra* note 107, para 168. See also *UN Juridical Regime*, *supra* note 42, para 75.

[205] See the discussion on UNCLOS and Historic Claims above.

[206] Judge Arachega in *Tunisia/Libya* advocated the preservation of ‘pre-existing rights’ that was acquired prior to the establishment of the continental shelf regime; See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, (1982) ICJ Reports, Separate Opinion of Judge Jimenez de Arachega, para 82. Symmons argued, however, that any ‘acquired rights’ must be subservient to any supervening judicial claim, even if such rights predates UNCLOS; see Symmons, *supra* note 44, 197.

[207] Zou and Liu, *supra* note 174; see also Dupuy and Dupuy, *supra* note 131, 138.

[208] See *UN Juridical Regime*, *supra* note 42, para 78. Although the study refers to the 1958 Convention, the same principle can be applied *vis-à-vis* UNCLOS.

[209] See for example, *Anglo-Norwegian Fisheries Case*, *supra* note 45; *Qatar/Bahrain*, *supra* note 68; and *Tunisia/Libya*, *supra* note 58.

[210] Symmons, *supra* note 44, 211.

[211] The legal requirements for these rights are similar to those for historic waters, continuous usage over a long period of time and acquiescence. See Symmons, *ibid.*

[212] There are those who argue that the lack of protest from the first publication of the U-shaped line map in 1948 until the 1990’s indicates acquiescence, see Li and Li, *supra* note 116, 290; see also Tang Qifang, ‘On the dotted line’, *The Beijing Review*, 17 February 2013. This lack of protest, however, may be attributed to three things. First, China did not make its historic claim official until 1998, see China’s Law on EEZ and CS, *supra* note 3. Second, before 1998, China has never attempted to enforce an exclusive claim within the U-shaped line, see Poling, *supra* note 106, 6. Third, the U-shaped line map was never used in any official international communications or documents until 2009, see CLCS, *supra* note 4. Thus, other littoral states can only protest once China has made an official claim, see Symmons, *supra* note 44, 230; see also Franckx and Benatar, *supra* note 133, 114.

[213] *Mauritius v UK*, *supra* note 43, para 415.

[\[214\]](#) *Eritrea/Yemen – Phase II, supra* note 83.

[\[215\]](#) Compare this with the situation in the Gulf of Tonkin, where China refused to recognize the historic water claim made by Vietnam; see Zou, *supra* note 92, 157-158.

[\[216\]](#) Here a parallel can be drawn to the 200 M territorial sea claim put forward by some Latin American States prior to UNCLOS, to which McDougal observed that allowing such claim would cause “complete disintegration of the common interest.” He then stated that “if a State makes a claim which it cannot make with promise of reciprocity to other States, it is inviting resort to coercion and violence.” See Myres S. McDougal, ‘International Law and the Law of the Sea’ in Alexander, *supra* note 29, 8-9.