



The South China Sea Arbitration
Award of 12 July 2016

225. The purpose of this extended recitation is to emphasise that there exists, within the context of the law of the sea, a cognizable usage among the various terms for rights deriving from historical processes. The term ‘historic rights’ is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty. ‘Historic title’, in contrast, is used specifically to refer to historic sovereignty to land or maritime areas. ‘Historic waters’ is simply a term for historic title over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea, although “general international law . . . does not provide for a single ‘régime’ for ‘historic waters’ or ‘historic bays’, but only for a particular régime for each of the concrete, recognised cases of ‘historic waters’ or ‘historic bays’.”²³⁰ Finally, a ‘historic bay’ is simply a bay in which a State claims historic waters.

“Historic rights”

“Historic title” (territorial sovereignty):

“Historic waters”

“Historic bay”

Article 298
Optional exceptions to applicability of section 2

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

- (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;

HISTORIC WATERS, INCLUDING HISTORIC BAYS

“several controversial problems”

“obscurity”

“lack of precision”

“agreement far from complete”

*“a definition of ‘historic waters’... is...
not possible”*

Juridical régime of historic waters, including historic
bays – Study prepared by the Secretariat

(UN doc. A/CN.4/143)

“legal vacuum”

“rather contradictory” “obscure”

“hardly understandable”

“uncertainty and confusion”

*“one of the most mysterious aspects in the
present international law of the sea”*

“theoretical conundrum”

*“evasive nature of two subsequent treaties
of codification”*

(various authors)

Et sane ut occuparetur totus Oceanus, nemo, existimare potest non esse difficillimum, si tamen occuparetur, ut fretum aut **sinus**, ut totus Orbis veteribus occupari a Principibus dictus est, aequè etiam in dominium occupantis posset transire.

SELDEN, *Mare clausum seu de dominio maris libri duo*, 1635

Non de mari interiore hic agimus, quod terris unquam infusum alicubi etiam fluminis latitudinem non excedit ... In hoc autem oceano non de **sinu**, aut freto, nec de omni quidem eo, quod e littore conspici potest, controversia est.

ANONYMOUS (but **GROTIUS**), *Mare liberum sive de jure, quod batavis competit ad Indicana commercia dissertatio*, 1609

tout ce que nous avons dit des parties de la mer voisines des côtes, se dit plus particulièrement & à plus forte raison, des rades, **des bayes** & des détroits, comme plus capables encore d'être occupés, & plus importants à la sûreté du pays.

VATTEL, *Les droit des gens, ou principes de la loi naturelle, appliqué à la conduite & aux affaires des nations & des souverains*, 1758

DE' DOVERI

DE' PRINCIPI NEUTRALI

VERSO

I PRINCIPI GUERREGGIANTI,

E DI QUESTI

VERSO I NEUTRALI.

LIBRI DUE.

*Suave mari magno, turbantibus aequora ventis,
E terra magnum alterius spectare laborem;
Non quia vexari quemquam est jucunda voluptas,
Sed, quibus ipse malis caveas, quia cernere suave est.
Suave etiam belli certamina magna tueri
Per campos instructa, tua sine parte pericli.*

LUCRET. LIB. II.



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ta; e sarebbe difficil cosa il dire se la giurisdizione sugli orli de' mari sia da contarsi tralle cose favorevoli, o tralle odiose, e sia perciò da ristringersi, o da ampliarsi ¹. Mi parrebbe peraltro ragionevole, che senza attendere a vedere se in atto tenga il Sovrano del territorio costrutta taluna torre o batteria, e di qual calibro di cannoni la tenga montata, si determinasse fissamente, e da per tutto la distanza di tre miglia dalla terra, come quella, che sicuramente è la maggiore ove colla forza della polvere finora conosciuta si possa spingere una palla, o una bomba. Ma ne' luoghi ove la terra s' incurva, ed apre baya, o golfo riman ricevuto tralle nazioni più culte di supporfi tirata una linea da punta a punta di quella terra ferma, o delle isolette, che sporgono oltre ai promontorj della terra ferma, e rispettarfi come territorio tutto quel seno di mare, ancorchè le distanze dal mezzo di esso alle terre d'intorno fossero da ogni parte maggiori delle tre miglia ².

Cre-

Ferdinando Galiani (1782) found it reasonable to establish a **fixed distance of 3 n.m. from the coast**, corresponding to the maximum cannot-shot range, and enclose bays by drawing a straight line from head to head.

“OLD” THEORY OF HISTORIC WATERS

Historic waters were invoked to determine the **seaward extent** of the marine territory of the coastal State

(there were no rules on baselines)

“NEW” THEORY HISTORIC WATERS

Historic waters are invoked to determine the **internal limit** of what had become the “territorial sea”

(attempt to influence the placing of the baseline)

AIM: TO CHALLENGE THE RULES FOR THE CLOSING OF JURIDICAL BAYS

**THE NORTH ATLANTIC COAST
FISHERIES CASE**

PARTIES: Great Britain, United States of America.

COMPROMIS: 27 January 1909.¹

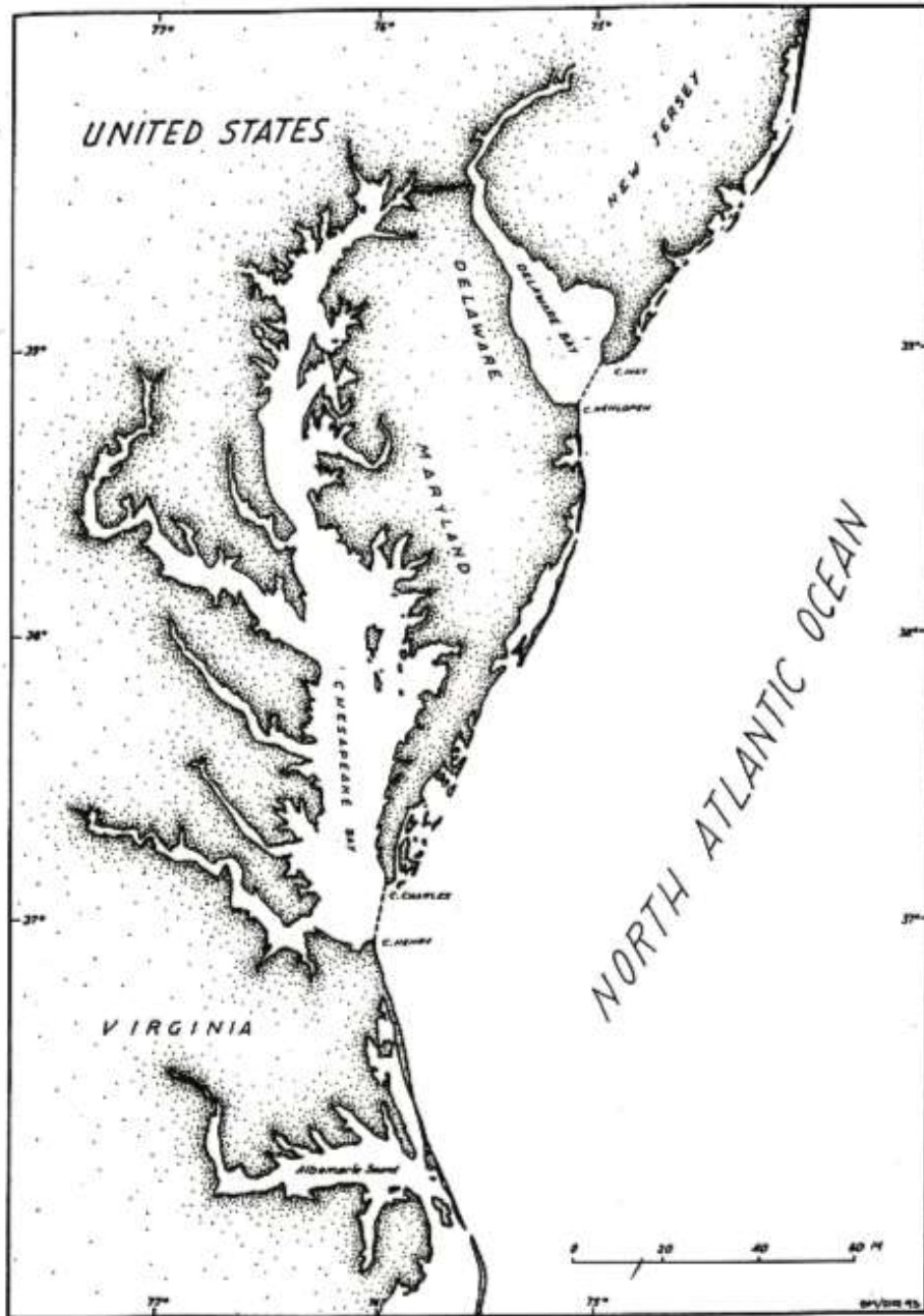
**ARBITRATORS: Permanent Court of Arbitration: H. Lammash;
A. F. de Savornin Lohman; G. Gray; Luis M. Drago;
Sir Charles Fitzpatrick.**

AWARD: 7 September 1910.



Question 5. From where must be measured the “ three marine miles of any of the coasts, bays, creeks, or harbours ” referred to in the said Article?

Question 6. Have the inhabitants of the United States the liberty under the said Article or otherwise to take fish in the bays, harbours, and creeks on that part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands, or on the Magdalen Islands?



*“... no nation had jurisdiction over any bay, gulf, or other arm of the sea extending into its territory exceeding twice the range of cannon-shot, which, between the United States and Great Britain, was identified with 3 marine miles, except by force of an **affirmative international assertion** by that nation of jurisdiction over any particular body of water based upon the existence and avertment of **facts constituting good reason** for allowing the claim in that particular case; such, for example, as the *relation between the extent of the penetration of the water inland and its width, the degree of usefulness for municipal purposes, the necessity of exclusive use as a means of defence to the vital interests of the country.* And the grounds thus alleged must have commended themselves to the nations of the world, so as to lead to **acquiescence** in the claim”*

*Proceedings in the North Atlantic Coast Fisheries Arbitration
before the Permanent Court of Arbitration*

ALLEGED “CONSTITUTIVE ELEMENTS” OF THE THEORY OF HISTORIC WATERS

EXERCISE OF AUTHORITY

It coincides with the very nature of a “claim”, irrespective of its reasons.

It is the most dynamic.

It must come from a State.

(continued)

TEMPORAL ELEMENT

It does not indicate a precise length of time.

It does not indicate when oppositions must occur to prevent acquiescence.

It seems to imply both "long usage" and "continuity".

It is the most subjective.

It matters only after publicity.

Tempus enim ex suapte natura vim nulla effectricem habet.

GROTIUS

(continued)

ACQUIESCENCE

It is the most important.

It is not clear whom it should come from, nor how.

The effects of a late opposition are not clear.

PARADOXES OF THE THEORY OF HISTORIC WATERS

Historic waters reverse the progress achieved in the law of the sea:
sea “**possessed**” against sea “measured”

(continued)

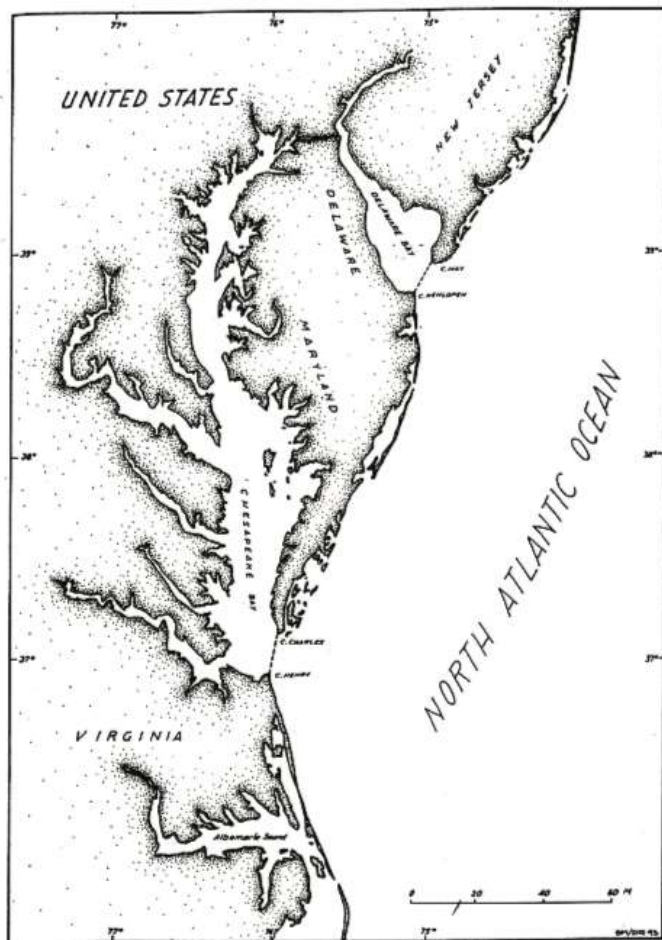
Historic waters are particularly resistant to codification.

However, allowing an exception to the rules, they allowed the reaching of consensus around those same rules.

*“la théorie des « eaux historiques », de quelque nom qu’on la désigne, est une **théorie nécessaire** ; elle joue en quelque sorte le rôle de soupape de sûreté en matière de délimitation des espaces maritimes ; la repousser serait ruiner la possibilité d’aboutir à des règles générales sur cette matière du droit international public maritime”*

GIDEL, Le droit international public de la mer, 1932-1934

(continued)



Who invented the new theory of historic waters?

(continued)

PART XV

Article 298

Optional exceptions to applicability of section 2

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PART II

Article 10

Bays

6. The foregoing provisions do not apply to so-called "historic" bays, or in any case where the system of straight baselines provided for in article 7 is applied.

Article 15

Delimitation of the territorial sea between States with opposite or adjacent coasts

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

Article 8
Internal waters

1. Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.
2. Where the establishment of a straight baseline **in accordance with the method set forth in article 7** has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.

RESILIENCE OF THE UNCLOS?

HISTORIC RIGHTS

PCA Case N° 2013-19

IN THE MATTER OF THE SOUTH CHINA SEA ARBITRATION

In relation to the merits of the Parties' disputes, the Tribunal:

- (1) DECLARES that, as between the Philippines and China, the Convention defines the scope of maritime entitlements in the South China Sea, which may not extend beyond the limits imposed therein;
- (2) DECLARES that, as between the Philippines and China, China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the 'nine-dash line' are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention; and further **DECLARES that the Convention superseded any historic rights, or other sovereign rights or jurisdiction, in excess of the limits imposed therein;**

HISTORIC BAYS AND TITLES (HISTORIC WATERS)

PREAMBLE

The States Parties to this Convention,

Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law,

*"it seems clear that the matter continues to be governed by general international law **which does not provide for a single 'régime' for 'historic bays', but only for a particular régime for each of the concrete, recognized cases of 'historic waters' or 'historic bays'**"*

Continental Shelf case (Tunisia/Libya, 1982)