

# THE TONGAN BOX HISTORIC CLAIM: POTENTIAL LEGAL ISSUES

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*Tonga's claim to historic waters within a rectangle boundary has been referred to as an example of ambitious historic claims; it has re-gained some academic attention. This article will provide a brief history of the claims that Tonga has made with respect to the Tongan Box and then assess the Tongan Box historic claim against the legal requirements for establishing historic titles to maritime areas in international law.*

*Les Tonga ont de manière constante fait valoir leurs revendications sur la zone maritime territoriale comprises dans son domaine maritime traditionnel situé à l'intérieur d'une frontière rectangulaire (appelé 'Tongan Box'). Souvent présenté dans la littérature comme un exemple de réclamation sans réelle portée juridique, ce fondement connaît cependant un regain d'intérêt notamment dans le champ de recherches universitaire. Cet article présente un bref historique des réclamations formulées par les Tonga concernant le 'Tongan Box', pour ensuite les confronter aux conditions de validité requises pour qu'en droit international public, les titres historiques sur des zones maritimes puissent être légalement reconnus.*

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## **I INTRODUCTION**

In recent years, there has been revived interest in the doctrine of historic waters because of the high-profile *South China Sea* arbitration.<sup>1</sup> Against that background, Tonga's claim to historic waters within a rectangle boundary has been referred to as an example of ambitious historic claims and has re-gained some academic attention.<sup>2</sup>

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1 *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China) (Award)* PCA 2013–19, 12 July 2016.

2 See Sophia Kopela "Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration" (2017) 48(2) *Ocean Development & International Law* 181 at 193; Zuo 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) *Chinese Journal of International Law* 57 at 67; Law Explorer "Maritime historic rights and China's

On 24 August 1887, King George Tupou of Tonga issued a Royal Proclamation (1887 Proclamation) claiming all islands, rocks, reefs, foreshores and waters embraced by a rectangle boundary, known as the Tongan Box:<sup>3</sup>

WHEREAS it seems expedient to us that we should limit and define the extent and boundaries of Our Kingdom. We do hereby erect as Our Kingdom of Tonga all islands, rocks, reefs, foreshores and waters lying between the fifteenth and twenty-third and a half degrees of south latitude and between the one hundred and seventy-third and the one hundred and seventy-seventh degrees of west longitude from the Meridian of Greenwich.

The Tongan Box encloses Tonga's main islands and covers an area of approximately 395,000 square kilometres,<sup>4</sup> of which less than 750 square kilometres is land area.<sup>5</sup> Tonga claims the maritime area within the Tongan Box (the Tongan Box maritime area) as its historic waters (the Tongan Box Historic Claim). In its submissions to the United Nations Commission on the Limits of the Continental Shelf, the Tongan government stated that "[t]he Kingdom of Tonga is proud to have the longest continuous legal claim of historic title to maritime domain in the World" as a result of the 1887 Proclamation.<sup>6</sup>

As at May 2022, Tonga has yet to delimitate its boundary with its neighbours except Wallis and Futuna.<sup>7</sup> The Tongan Box Historic Claim, if valid, has the

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practice" (12 December 2015) Law Explorer <<https://lawexplores.com/maritime-historic-rights-and-chinas-practice/>>.

- 3 The government of Tonga "Executive Summary: A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf of The Kingdom of Tonga Pursuant to Part VI of and Annex II to the United Nations Convention on the Law of the Sea Part I", 11 May 2009, at 1, <[http://www.un.org/depts/los/clcs\\_new/submissions\\_files/ton73\\_14/Part\\_I\\_Executive\\_Summary.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/ton73_14/Part_I_Executive_Summary.pdf)>.
- 4 Yoichiro Sato "Protecting Tonga's Maritime Security" (2012) 38(5) *New Zealand International Review* 17 at 17.
- 5 The government of Tonga "Third National Communication on Climate Change Report", December 2019, at 6, <[https://unfccc.int/sites/default/files/resource/Final%20TNC%20Report\\_December%202019.pdf](https://unfccc.int/sites/default/files/resource/Final%20TNC%20Report_December%202019.pdf)>.
- 6 The government of Tonga, above n 3, at 1; The government of Tonga, "Executive Summary: A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf of the Kingdom of Tonga in the Western Part of the Lau-Colville Ridge Pursuant to Part VI of and Annex II to the United Nations Convention on the Law of the Sea", April 2014, at 1, <[http://www.un.org/depts/los/clcs\\_new/submissions\\_files/ton73\\_14/Part\\_I\\_Executive\\_Summary.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/ton73_14/Part_I_Executive_Summary.pdf)>.
- 7 Secretariat of Pacific Community "The Status of Pacific Regional Maritime Boundaries as of July 2020", 9 September 2020, SPC <<https://www.spc.int/updates/blog/2020/09/the-status-of-pacific-regional-maritime-boundaries-as-of-july-2020#:~:text=There%20are%2048%20shared%20or, boundaries%20remaining%20to%20be%20declared>>. There is no evidence that Tonga and any of its neighbours have delimited their boundaries since July 2020.

potential to affect boundary delimitation between Tonga and its neighbours. First, the Tongan Box itself overlaps with the 200-nautical mile exclusive economic zone (EEZ) declared by Fiji, the overlapping area being approximately 5,300 square kilometres.<sup>8</sup>

Second, Tonga has made partial submissions to claim an extended continental shelf (ECS) beyond 200 nautical miles and cited the Tongan Box Historic Claim in support of its ECS claim. As a result, there is overlap between Tonga's ECS and New Zealand's ECS and the two countries have started discussion about delimiting their ECSs.<sup>9</sup> Third, as historic waters are generally treated as internal waters or the territorial sea, it is possible for Tonga to claim a 200-nautical mile EEZ measured from the boundary of the Tongan Box,<sup>10</sup> although currently no evidence suggests that Tonga is likely to do so. However, if it does, that will: (1) significantly increase the overlap between Tonga's EEZ and that of Fiji, Niue, Samoa, and American Samoa, and thus push the lines of equidistance much closer to these countries;<sup>11</sup> and (2) create an overlap between the Tongan EEZ and the EEZ generated by New Zealand's Kermadec Islands, which would not exist if the Tongan EEZ is measured from the straight baseline around its main islands.<sup>12</sup>

Most existing publications that mention the Tongan Box historic claim – there are not many such publications – provide no or little assessment of the claim.<sup>13</sup> The

- 8 John Robert Victor Prescott and Grant Boyes "Undelimited Maritime Boundaries in the Pacific Ocean Excluding the Asian Rim" in Shelagh Furness and Clive Schofield (eds) *Maritime Briefing* (University of Durham, Durham, 2000) vol 2 no 8, at 26. The width of the EEZ that a State can claim is subordinate to its neighbors' internal waters, the territorial sea, or in the case of archipelagic States, archipelagic waters.
- 9 New Zealand Ministry of Foreign Affairs and Trade "Continental shelf" (undated) New Zealand Ministry of Foreign Affairs and Trade <<https://www.mfat.govt.nz/en/environment/oceans-and-fisheries/our-maritime-zones-and-boundaries/>>. The delimitation of extended continental shelves is a relatively new phenomenon, for further discussion, see Joanna Mossop *The Continental Shelf Beyond 200 Nautical Miles Rights and Responsibilities* (Oxford University Press, Oxford, 2016) chs 3.C and 10.A; Helmut Tuerk "Questions Relating to the Continental Shelf Beyond 200 Nautical Miles: Delimitation, Delineation, and Revenue Sharing" (2021) 97 *International Legal Studies* 232, <<https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2954&context=ils>>.
- 10 Article 57 of the UNCLOS provides: The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.
- 11 The relevant states may vary the equidistance line in delimitation or use other methods than the method of equidistance to delimit. For discussion about maritime boundary delimitation, see generally Youshifumi Tanaka *Predictability and Flexibility in the Law of Maritime Delimitation* (Bloomsbury, London, 2002).
- 12 See the map in Secretariat of Pacific Community, above n 7.
- 13 See Kopela, above n 2; Zuo and Liu, above n 2; James Michael Zimmerman "The Doctrine of Historic Bays: Applying An Anachronism in the Alabama and Mississippi Boundary Case" (1986) 23 *San Diego Law Review* 763 at 789 fn 171.

only existing thorough assessment of the claim is found in Broder et al's 1982 article "Ocean Boundaries in the South Pacific",<sup>14</sup> which was written before the adoption of the United Nations Convention on the Law of the Sea (UNCLOS).<sup>15</sup> Prescott and Boyes provided a brief analysis of the 1887 Proclamation in 2000.<sup>16</sup> In light of the ongoing discussion about ECS delimitation between New Zealand and Tonga, the Fijian government's recent effort in initiating negotiation with Tonga about boundary issues arising from Tonga's other historic water claim,<sup>17</sup> and the Secretariat of the Pacific Community (SPC)'s ongoing effort in assisting boundary delimitation in the South Pacific region,<sup>18</sup> it is timely to revisit the Tongan Box historic claim.

This article will provide a brief history of the claims that Tonga has made with respect to the Tongan Box and then assess the Tongan Box historic claim against the legal requirements for establishing historic titles to maritime areas in international law.

## ***II FROM TERRITORY WATERS TO HISTORIC WATERS: BRIEF HISTORY OF TONGA'S CLAIMS TO THE TONGAN BOX***

In the second half of the 19<sup>th</sup> century, there was mounting pressure from colonising powers such as Britain and Germany to annex Tonga.<sup>19</sup> According to the Tongan delegate to the Third United Nations Conference on the Law of the Sea, the rectangle boundary declared in the 1887 Proclamation was necessary to protect the country's territorial integrity and unity of its 150 islands.<sup>20</sup>

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14 Sherry Broder et al, "Ocean Boundaries in the South Pacific" (1982) 4(1) *University of Hawaii Law Review* 1 at 12.

15 1833 UNTS. 397 (open for signature 10 December 1982, entered into force 16 November 1994).

16 Prescott and Boyes, above n 8, at 26.

17 Loop Pacific "Fiji to Pursue More Talks with Tonga Over Disputed Minerva Reefs", 19 February 2020, Loop Tonga <<https://www.looptonga.com/tonga-news/fiji-pursue-more-talks-tonga-over-disputed-minerva-reefs-90187>>.

18 Stuart Minchin, Director General of Pacific Community (SPC) "Celebrating the 20th Maritime Boundaries Session" (Opening Remarks at the Pacific Maritime Boundaries High Level Dialogue, Noumea, 18 November 2021) <<https://www.spc.int/updates/news/speeches/2021/11/celebrating-the-20th-maritime-boundaries-session>>.

19 Noel Rutherford (ed) *Friendly Islands: A History of Tonga* (Oxford University Press, Oxford, 1977) at 162.

20 Statement of Mr Tupou (Tonga), reprinted in II Third United Nations Conference on the Law of the Sea Official Records 100-01(1974), at 107, cited in L F E Goldie "Historic Bays in International Law – An Impressionistic Overview" (1984) 11(2) *Syracuse Journal of International Law and Commerce* 211 at 265.

In its 1968 Minerals Act, Tonga referred to the 1887 Proclamation when defining "land":<sup>21</sup>

"land" includes all submerged lands lying within the extent and boundaries of the Kingdom as defined by the Proclamation of 11 June 1887 namely, between the 15th and 23rd and a half degrees of south latitude and between the 173rd and the 177th degrees of west longitude;

In its 1973 Fisheries Protection Act, Tonga declared the waters within the Tongan Box as "territorial waters":<sup>22</sup>

"territorial waters of the Kingdom" means all waters within the area bounded by the fifteenth and twenty third and half degrees of south latitudes and the one hundred and seventy third and the one hundred and seventy seventh degrees of west longitudes, ...

At that time, Tonga was a party to the 1958 Convention on the Territorial Sea and the Contiguous Zone. Such provision would be inconsistent with the 1958 Convention's provision on a 12 nautical mile limit of the territorial sea. A few years later, the 1978 Tongan Territorial Sea and Exclusive Economic Zone Act, which repealed the 1973 Fisheries Protection Act,<sup>23</sup> appropriately defined the limits of the territorial sea consistently with the 1958 Convention.<sup>24</sup> There is no mention of the 1887 Proclamation in the Territorial Sea and Exclusive Economic Zone Act 1978.

At the international level, the Tongan Delegate restated the 1887 claim during a 1974 session of the Third United Nations Conference on the Law of the Sea.<sup>25</sup> Ambassador Tupou also stated that Tonga "was willing to review its claim [under the 1887 Proclamation] so that the Conference might bring into being a convention accommodating not only the legitimate interests of Tonga but also the interests of the world community".<sup>26</sup> Tonga communicated the 1887 claim to the United Nations in writing in 1974.<sup>27</sup>

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21 Minerals Act 1968 (Tonga), s 2.

22 Fisheries Protection Act 1973 (Tonga), s 2.

23 Territorial Sea and Exclusive Economic Zone Act (Tonga), s 31.

24 Ibid, ss 3, 5 and 6.

25 Statement of Mr Tupou (Tonga), above n 20, at 107.

26 2 UNCLOS III Official Record at 107, UN Sales No E. 75 V. 4 (1974), cited in Broder et al, above n14, at 15.

27 Letter from Acting Prime Minister of Foreign Affairs of Tonga to Secretary-General of the United Nations (June 25, 1974), reprinted in 29 UN GAOR, UN Doc ST/LEG/SER.B/18, cited in Broder et al, above n 14, at 11.

There appears to be very little public information about Tonga's position on the nature of its claims over the Tongan Box maritime area between 1975 and 2009. However, by 2009, Tonga's claim over the Tongan Box maritime area became a claim to "historic waters". Section 6 of the 2009 Tongan Maritime Zones Act provides that:<sup>28</sup>

6. Historic waters

(1) It is hereby declared that those parts of the sea that are within an area mentioned in subsection (2) are historic waters notwithstanding the fact that they may also be part of any other maritime zone.

(2) The areas referred to in subsection (1) are:

(a) the areas proclaimed by the Proclamation published on the 24th day of August, 1887 limiting and defining the extent of the Kingdom, being the islands, rocks, reefs, foreshores and waters lying between the fifteenth and twenty-third and half degrees of south latitudes and the one hundred and seventy-third and the one hundred and seventy-seventh degrees of west longitude;

....

Section 8 of that Act further provides that Tonga extends its sovereignty to its internal waters, historic waters, territorial sea, and archipelagic waters.<sup>29</sup> Tonga restated the same historic claim in its 2009 and 2014 submissions to the United Nations Commission on the Limits of the Continental Shelf.<sup>30</sup>

### ***III THE LEGAL CONCEPT OF HISTORIC WATERS***

The UNCLOS recognises the concepts of "historic waters" and "historic title",<sup>31</sup> but contains no definition of either, let alone criteria for establishing their limits. The legal regime of historic waters is by and large found in customary international law. One of the most authoritative definitions of the term "historic waters" was given by the International Court of Justice (ICJ) in the *Fisheries* case, in which 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 [a] historic title".<sup>32</sup> The ICJ

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28 Maritime Zones Act (Tonga) 2009. But see Prescott and Boyes, above n 8, at 26.

29 Ibid.

30 The government of Tonga, above n 3, at 1; the government of Tonga, above n 6, at 1.

31 Arts 10, 15, and 298, the UNCLOS.

32 *Fisheries (United Kingdom v Norway)* [1951] ICJ Reports 116 at 130.

endorsed the same definition in the *El Salvador/Honduras* case in 1992.<sup>33</sup> According to an influential 1962 UN study (the 1962 study), a claim to historic waters is a claim "by a State, based on an historic title, to a maritime area as part of its national domain".<sup>34</sup> In the *SCS* arbitration, the Tribunal noted that:<sup>35</sup>

'Historic title' ... is used to specifically refer to historic sovereignty to land or maritime areas. 'Historic waters' is simply a term for historic titles over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea.

It is generally agreed that a claim to historic waters is a claim to sovereignty over the maritime area concerned.<sup>36</sup> Whether the historic waters in question are to be considered part of internal waters or the territorial sea would in principle depend on the sovereignty exercised over the area.<sup>37</sup> Such sovereignty exercised over historic waters, akin to that exercised over internal waters or the territorial sea, is distinguishable from the more limited sovereign rights that states exercise over EEZs.

Although the majority of established historic waters are historic bays, it is generally accepted that historic waters may exist in mid-ocean archipelagos.<sup>38</sup> However, precedents of proven claims to historic waters in mid-ocean archipelagos appear to be extremely rare.<sup>39</sup> The lack of relevant precedents adds difficulty to the assessment of the Tongan Box historic claim, which concerns waters in mid-ocean archipelagos.

#### ***IV LEGAL REQUIREMENTS FOR ESTABLISHING TITLE TO HISTORIC WATERS: OVERVIEW***

The existence of a historic title to a maritime area is, to a large extent, a matter of appreciation depending on the specific circumstances of the case.<sup>40</sup> The 1962 study

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33 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* [1992] ICJ Reports 351 at 588.

34 United Nations "Juridical Regime of Historic Waters Including Historic Bays – Study Prepared by the Secretariat", UN Doc A/CN.4/143 (9 March 1962) at [87].

35 *The South China Sea Arbitration*, above n 1, at [225].

36 United Nations, above n 34, at [85].

37 *Ibid.*, at [189]. A State has the obligation to allow innocent passage of foreign ships through its territorial sea, but not its internal waters.

38 *Ibid.*, at [29] and [34].

39 See Clive Symmons *Historic Waters and Historic Rights in the Law of the Sea* (Brill, Leiden, 2019), ch 3.1.1.

40 Yoshifumi Tanaka *The International Law of the Sea* (3<sup>rd</sup> ed, Cambridge University Press, Cambridge, 2015) at 70.

noted that claims of historic titles should be evaluated on a case-by-case basis, because it would be "extremely difficult, not to say impossible, to arrive at a list which would be really final" and might induce states to overstate both their claims and their opposition to the claims of other states.<sup>41</sup> A similar view was endorsed by the ICJ in the *Tunisia/Libya* case:<sup>42</sup>

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

Nevertheless, the 1962 study identified three basic requirements for determining whether a state has acquired a historic title to a maritime area: (1) effective exercise of sovereignty over the maritime area by the claiming state; (2) continuity of such effective exercise of sovereignty; and (3) acquiescence or toleration of foreign states.<sup>43</sup> These three basic requirements have since been widely cited with approval by international and national judicial and arbitral bodies as well as many authors.<sup>44</sup> The following discussion assesses the Tongan Box historic claim against these three requirements.<sup>45</sup>

## ***V ASSESSMENT OF THE TONGAN BOX HISTORIC CLAIM***

### ***A Effective Exercise of Sovereignty***

The first requirement is that the claiming state must have effectively exercised sovereignty over the maritime area.<sup>46</sup> It is generally accepted that mere proclamation and national legislation asserting sovereignty over the waters concerned per se would

41 United Nations, above n 34, at 26.

42 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (merits)* [1982] ICJ Reports 18, at [100].

43 United Nations, above n 34, at [132].

44 Eg *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v Honduras)*, above n 33; *The South China Sea Arbitration*, above n 11; *Croatia v Slovenia (Award)* PCA, 2012-04, 29 June 2017; Donat Pharand "Canada's Sovereignty Over the Northwest Passage" (1989) 10 *Michigan Journal of International Law* 653 at 656; Broder et al, above n 14. But see Symmons, above n 39, at 184: "these supposed international legal requirements ... have never been clarified in law of the sea treaties, least of all in the LOSC; so they can only exist in international customary law, with all the problems of lack of clarity of rules that attends this source of international law".

45 Vital interest has sometimes been referred to a fourth factor, however, the mainstream view is that it is not a requirement. See United Nations, above n 34, at [134]-[140]; Symmons, above n 39, ch 20.

46 United Nations, above n 34, at [96] and [100].



not suffice to constitute effective exercise of sovereignty.<sup>47</sup> Therefore, it is clear that the 1887 Proclamation and Tongan legislation per se would not suffice to constitute effective exercise of sovereignty over the Tongan Box maritime area.

An authority "more limited in scope than sovereignty" would not suffice to establish a basis for a claim of historic waters.<sup>48</sup> The exercise of sovereignty entails the exercise of exclusive control and jurisdiction over the relevant area. In the SCS arbitration, China's commitment to respect both freedom of navigation and overflight in the South China Sea was regarded as evidence showing that China did not claim or exercise sovereignty over the maritime area within the nine-dash line.<sup>49</sup>

The 1962 study provided an illuminating example illustrating the difference between the exercise of sovereignty and the exercise of an authority short of sovereignty: a state could not claim an area as its historic waters based on a limited right (such as the right to fish) in an area or on the mere fact that its citizens have fished in the area for a long time; in contrast, if the state asserts exclusive rights to fish by its citizens in the area and has kept foreign fishermen away from the area or has taken actions against them, the state has exercised sovereignty over the area, which would constitute a valid basis for the state's claim of historic waters.<sup>50</sup> It follows that the mere fact that Tongan citizens have fished in the Tonga Box maritime area or used the maritime area for navigation or other purposes would not constitute a valid basis for Tonga's historic claim.

Incidentally, acts of private individuals generally are insufficient for proving effective exercise of sovereignty.<sup>51</sup> As noted by Judge Hsu Mo in his separate opinion in the *Fisheries* case, "individuals, by undertaking enterprises on their own initiative, for their own benefit and without any delegation of authority by their Government, cannot confer sovereignty on the State".<sup>52</sup> Thus to meet the requirement of effective exercise of sovereignty, Tonga must prove that the Tongan State or its organs have done the necessary to effect exclusive control and jurisdiction over the Tongan Box maritime area.

Although it is difficult to specify categorically what kind of acts amounts to effective exercise of sovereignty, the most persuasive evidence would include the

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47 Ibid, at 98. See also Symmons, above n 39, at 261, with further references.

48 Ibid.

49 *The South China Sea Arbitration*, above n 1, at [213].

50 United Nations, above n 34, at [86].

51 Ibid, at [95].

52 *Fisheries (United Kingdom v Norway)*, above n 32, Judge Hsu Mo, Separate Opinion, at 157.

exclusion of foreign vessels or their subjection to special permission.<sup>53</sup> Bourquin noted that there were some borderline case; for example, certain activities, such as the placing of beacons or lights may "sometimes appear to be an act of sovereignty, while in other circumstances it may have no such significance".<sup>54</sup> On the converse, in the *SCS* arbitration, the Tribunal found that the following activities did not constitute exercise of sovereignty: (1) issuance of a notice by a Chinese state-owned company of open blocks for petroleum exploration adjacent to the western edge of the nine-dash line,<sup>55</sup> (2) objection to the Philippines' award of petroleum blocks with the nine-dash line,<sup>56</sup> and (3) declaration of a "Summer Ban on Marine Fishing in the South China Sea Maritime Space".<sup>57</sup>

In their 1982 article, Broder et al noted that historical accounts of Tongan action to enforce sovereignty over the Tongan Box maritime area did not appear to exist and that Tonga had not attempted to confront naval and fishing vessels that sailed into the Tongan Box in more recent times.<sup>58</sup> Indeed, it appears that no public information in English or Chinese shows that the Tongan State or its organs have confronted unauthorised foreign vessels that entered or were attempting to enter the Tongan Box in recent years. This, of course, does not necessarily mean that Tongan acts of enforcement in relation to the Tongan Box historic claim do not exist. For example, it is not impossible that such acts were documented in archives or publications in the Tongan language that the author of this article does not read and therefore has not been able to examine. In any case, the burden of proof lies with Tonga as to whether it has enforced the relevant laws in the Tongan Box maritime area.<sup>59</sup>

Given its relatively remote geographical location, Tonga may argue that a reduced level of evidence is required to prove effective exercise of sovereignty in relation to the Tongan Box claim. For example, in *Raptis v South Australia*, Stephen J stated that "the remoteness of the [maritime] area [in question] from foreign States and from international sea routes admits of a lesser degree of usage and control than

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53 Pharand, above n 44, at 656; Gidel *Droit international public de la mer*, vol III (1934), at 633, cited in United Nations, above n 34, at [89]; Bourquin "*Les baies historiques*" in *Melatiges Georges Sausser-Hall* (1952) 37-51, at 43, cited in United Nations, above n 34, at [90].

54 Bourquin, above n 53, at 43.

55 *The South China Sea Arbitration*, above n 1, at [208].

56 *Ibid*, [209].

57 *Ibid*, [210].

58 Broder et al, above n 14, at 18.

59 United Nations, above n 34, at [149].

might otherwise be required to support a claim by a coastal State".<sup>60</sup> In *Alaska v United States*,<sup>61</sup> the expert witness for Alaska argued that evidence of activities relating to the maritime area concerned was limited due to the remoteness and the limited human uses of the area and that therefore less evidence should be required to establish the historic claim.<sup>62</sup>

Similar views were expressed by Pharand and Edeson. The former stated that: "the extent of control will vary, depending on the size of the maritime area, its remoteness and the degree of its usability" and that "[i]n remote areas such as the Arctic, for example, the actual control might be limited, but nonetheless sufficient".<sup>63</sup> The latter noted that for maritime areas far removed from populated areas and major shipping lanes, activities demonstrating effective control arguably need not be as intense as would otherwise be required.<sup>64</sup>

In addition, the mere fact that the claiming state has not taken concrete action to enforce the relevant laws in relation to its historic claim does not necessarily preclude the claim; it is possible that no such enforcement action has been necessary because foreign nations have consistently respected the historic claim.<sup>65</sup> Broder et al submitted that "[n]o doubt, Tonga's location has served as a natural protection against hostile incursions into its ocean boundaries by other nations, thereby eliminating the need for confrontations".<sup>66</sup> Indeed, especially in light of the absence of objection from other countries in relation to the claim, if Tonga has not taken any concrete action to enforce the relevant laws, in the absence of evidence to the contrary, it may be able to argue that no occasion has arisen which required enforcement.

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60 *A Raptis & Son v South Australia* (1977) ILR 32, at [26]. For further discussion about this case, see D P O'Connell "Bays, historic waters and the Implications of *A Raptis & Son v South Australia*" (1978) 52 Australian Law Journal 64.

61 *Alaska v United States* 545 US 75 (2005).

62 Professor Charney's Report, at 15, cited in Symmons, above n 39, at 270. In this case, only one statement was made to claim the maritime areas concerned as inland waters and only one foreign vessel was seized as enforcement; the US Supreme Court found that these incidents were not enough to establish continuous assertion of exclusive authority and therefore not enough to support an inland historic waters claim.

63 Pharand, above n 44, at 656.

64 W R Edeson "The Validity of Australia's Possible Maritime Historic Claims in International Law" (1974) 48 Australian Law Journal 295 at 296.

65 United Nations, above n 34, at [99]

66 Broder et al, above n 14, at 18.

What if other nations can prove that their naval or fishing vessels operated in the Tongan Box without authorisation from Tonga and that Tonga has never taken any measure against them? As noted in the 1962 study, in relation to effective exercise of sovereignty, "it is essential that, to the extent that action on the part of the State and its organs was necessary to maintain authority over the area, such action was undertaken".<sup>67</sup> Obviously, confronting intruding foreign vessels is necessary for maintaining a state's sovereignty over its historic waters. If a state is aware of the presence of unauthorised foreign vessels in its claimed historic waters and takes no action to confront them,<sup>68</sup> such inaction normally would undermine the state's historic claim. However, Broder et al submitted that in the case of Tonga, Tonga's relatively small size and poor economic condition should be given due consideration.<sup>69</sup> They argued that "[p]ermitting the extinction of Tonga's claim just because it did not directly confront these incursions would promote an intolerable policy, for mighty nations could then arbitrarily change ocean boundaries of South Pacific island communities simply by sailing into their waters".<sup>70</sup> Tonga is a small developing country with limited resources. Its islands are scattered and the country's navy has only a few vessels.<sup>71</sup> Its ability to monitor and confront foreign vessels is therefore limited. It would seem too strict to preclude Tonga's claim merely because it was not able to keep all foreign vessels away from the Tongan Box maritime area. However, Tonga should provide evidence showing that, to the extent that its capacity and resources allows and to the extent that action was necessary, it has taken action to keep unauthorised foreign vessels away from the Tongan Box maritime area.

It is also worth mentioning that in recent years there were reports of the Tongan Navy confronting foreign vessels from the other alleged Tongan historic waters,<sup>72</sup>

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67 United Nations, above n 34, at [99].

68 In the case of historic territorial sea, innocent passage is allowed in accordance with the UNCLOS.

69 Broder et al, above n 14, at 18.

70 Ibid.

71 In 2000, the Tongan navy had only three coast guard vessels and one royal yacht: PBS "Tonga: Closed for Security Concerns" (undated) PBS <<https://www.pbs.org/frontlineworld/stories/spain/tonga.html#:~:text=TONGA%3A%20Closed%20for%20Security%20Concerns&text=In%202000%2C%20despite%20the%20small,%2C%20headquartered%20in%20Piraeus%2C%20Greece>>.

72 See Michael Field "Fiji offers talks on ownership of Minerva Reefs" (15 June 2011) Stuff <<https://www.stuff.co.nz/world/south-pacific/5146130/Fiji-offers-talks-on-ownership-of-Minerva-Reefs>>; New Zealand Herald "Watch: NZ yacht involved in tense standoff with Tongan Navy at a safe-haven reef", (7 August 2020) New Zealand Herald <<https://www.nzherald.co.nz/nz/watch-nz-yacht-involved-in-tense-standoff-with-tongan-navy-at-a-safe-haven-reef/GARHLDQZJBBOIB2PM2V6XSP6VU/>>.

namely the waters within a 20 nautical mile radius from the Minerva Reefs.<sup>73</sup> Given that the Minerva Reefs are located outside the Tongan Box, further away from Tonga's main islands, it would seem unconvincing to deny that Tonga does have some capacity to monitor activities of foreign vessels and, in the event of any intrusions, to expel foreign vessels from the Tongan Box maritime area.

### ***B Continuity of the Exercise of Sovereignty***

If Tonga successfully establishes that it has exercised sovereignty over the Tongan Box maritime area, it must further establish that such exercise of sovereignty has continued for a considerable time.<sup>74</sup> In this regard, the length of time required is a question of evaluation and can only be determined on a case-by-case basis.<sup>75</sup>

If Tonga is able to establish that it has effectively exercised sovereignty over the Tongan Box maritime area since the 1887 Proclamation, then 135 years have passed. In the *Fisheries* case, Judge Hackworth found that Norway, who "applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose [in 1949]",<sup>76</sup> namely 80 years, had "proved the existence of an historic title to the disputed areas of water".<sup>77</sup> It appears that 100 years is often considered sufficiently long.<sup>78</sup> In light of these, 135 years would seem long enough to meet the continuity requirement.

The question of whether the 1887 Proclamation can be validly regarded as the point from which Tonga started effectively exercising sovereignty over the Tongan Box maritime area is worth some attention. There appears to be some doubt as to whether the 1887 Proclamation can be regarded as a claim to sovereignty over the Tongan Box maritime area. For example, Symmons opined that it appeared to be a "convenient description of claimed land territory" which was later opportunistically expanded into historic maritime claims as time progressed and the economic benefits became apparent.<sup>79</sup> Prescott and Boyes noted that arguably the 1887 Proclamation "need[ed] to be placed in the context of what constituted the norms of international

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73 For discussion about this historic claim, see Lili Song "The curious history of the Minerva Reefs: Tracing the origin of Tongan and Fijian claims over the Minerva Reefs" (2019) 54(3) *Journal of Pacific History* 417.

74 United Nations, above n 34, at [80] and [101].

75 *Ibid.*

76 *Fisheries (United Kingdom v Norway)*, above n 32, at 138.

77 *Ibid.*, Judge Hackworth's declaration, at 144.

78 Symmons, above n 39, ch 17.

79 *Ibid.*, at 76 and 409.

law and international practice at the time of the Proclamation".<sup>80</sup> Similar limits proclaimed in the 19<sup>th</sup> century, such as the one proclaimed by Britain and Germany in the Solomon Islands and the one proclaimed by Spain and the United States in the Philippines,<sup>81</sup> are normally considered to serve "only to distinguish which features standing above high-water belong to the country or countries concerned".<sup>82</sup> On the other hand, Tonga may emphasize that the 1887 Proclamation does explicitly refer to the waters within the Tongan Box as part of the Tongan Kingdom.

If the 1887 Proclamation is not a claim to sovereignty over the Tongan Box maritime area, Tonga may have to rely on its Fisheries Protection Act 1973, which recognised the Tongan Box maritime area as part of Tonga's territorial sea as the starting point of its effective exercise of sovereignty over the Tongan Box maritime area and that would significantly reduce the duration of its historic claim to about 50 years.

### ***C Acquiescence or Toleration by Other States***

The third requirement is acquiescence or toleration by other states, especially neighbouring states, of the continuous effective exercise of sovereignty over a considerable time.<sup>83</sup> Inaction from other countries is sufficient.<sup>84</sup>

In its 2014 submission to the Commission on the Limits of the Continental Shelf, Tonga stated that its claim under the 1887 Proclamation had "never been reacted against or objected to by any State".<sup>85</sup> There seems to be no evidence contrary to that assertion. In the 1980s, Broder et al,<sup>86</sup> as well as Buchholz,<sup>87</sup> noted that protest

80 Prescott and Boyes, above n 8, at 26.

81 For discussion about these boundaries, see John Robert Victor Prescott "Maritime Jurisdiction in Southeast Asia: A Commentary and Map" (East-West Center Environmental and Policy Institute Research Report No. 2, 1981) at 12.

82 Prescott and Boyes, above n 8, at 26.

83 But see United Nations, above n 34, at [80]: "More controversial is the third factor, the position which the foreign States may have taken towards this exercise of authority. Some writers assert that the acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by these States is sufficient". See also *Fisheries (United Kingdom v Norway)*, above n 32, at 139.

84 *Ibid.*

85 Government of Tonga, above n 3, at 1.

86 Broder et al, above n 14, at 19.

87 Hanns Jürgen Buchholz, *Law of the Sea Zones in the Pacific Ocean* (Institute of Southeast Asian Studies, Singapore, 1987), at 85.

against Tonga's claim under the 1887 Proclamation had never been recorded. More recent publications have made the same observation.<sup>88</sup>

Notably, the Tonga-France (Wallis and Futuna) boundary drawn in the 1980s appears to have given consideration of the Tongan Box. Although the 1980 Tonga-France Treaty, which makes no reference to the 1887 Proclamation or Tonga's historic use of any maritime area, provides that the equidistance method was to be used for the delimitation,<sup>89</sup> the boundary line eventually drawn appears to be much closer to the islands of Wallis and Futuna than it is to the main islands of Tonga. And the top left point of the Tongan Box appears to fall right on the boundary line drawn.<sup>90</sup> Information about the precise coordinates of Tonga-France (Wallis and Futuna) boundary and examination of relevant archives about the drawing of the boundary would help clarify whether the Tongan Box historic claim was given effect in the delimitation.<sup>91</sup>

It should be noted that, after a historic title to a marine area has emerged as a result of fulfilment of the three requirements discussed above, it is not possible for other states to reverse the process by raising an objection to the historic title.<sup>92</sup> For example, if Fiji wants to argue that its declaration of a 200-nautical mile EEZ in the early 1980s constitutes an objection to the Tongan Box historic claim, Tonga probably can argue that, provided that it has effectively exercised sovereignty over the Tongan Box maritime area since 1887 with the general tolerance of foreign states, its historic title was established by the early 1980s, ie nearly 100 years after 1887, and thus cannot be invalidated retrospectively.

## **VI LOOKING AHEAD**

This article demonstrates that there are strengths and weaknesses in the Tongan Box claim. In contrast to the tension between the countries involved in the South

88 Jonathan Charney and Lewis Alexander (eds) *International Maritime Boundaries* (Martinus Nijhoff, Dordrecht, 1996) at 1012; Prescott and Boyes, above n 8, at 26.

89 Convention between the Government of the French Republic (Wallis and Futuna) and the Government of the Kingdom of Tonga on the delimitation of economic zones, Tonga-France, 1183 UNTS 343 (signed 11 January 1980, entry into force 11 January 1980), art 1 and Preamble [6] and [7]. The treaty does not fix the coordinates, which is extremely rare for maritime boundary delimitation treaties, see Davor Vidas, David Freestone, and Jane McAdam (eds) *International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise* (Brill, Leiden, 2018) at 37.

90 See Prescott and Boyes, above n 8, figure 7, at 25.

91 But see Ewan W Anderson *International Boundaries: A Geopolitical Atlas* (Routledge, New York, 2003) 297: "The maritime boundary [between Tonga and Wallis and Futuna] is an equidistant line but was constructed using Niua Fo'ou Island, which is well distant from the main Tongan group".

92 United Nations, above n 34, at 121.

China Sea disputes, Tonga and its neighbours have shown remarkable willingness to achieve consensus, consistent with the Pacific Way. As mentioned above, in 1974 Tonga expressed willingness to review its 1887 claim.<sup>93</sup> In 1977, the Fijian Foreign Minister, Joji Kotobalavu, noted the existence of the "historical claim of Tonga, which we shall have to take into account in negotiations".<sup>94</sup> It is likely that the relevant parties will solve the issue of the Tongan Box historic claim through peaceful negotiation rather than litigation, but they will no doubt negotiate in the shadow of the law.

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93 Statement of Mr Tupou (Tonga), above n 20, at 107.

94 Joji Kotobalavu "The South Pacific and the Law of the Sea" in Douglas Johnston (ed), *Regionalization of the Law of the Sea: proceedings / Law of the Sea Institute, eleventh annual conference, November, 14-17, 1977, University of Hawaii, Honolulu, Hawaii* (Ballinger Publishing Company, Cambridge (Mass), 1977) p 317; see also Broder et al, above n 14, at 19.