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**PUBLIC AND PRIVATE INTERNATIONAL LAW: AN INTRODUCTION TO
INTERNATIONAL ARBITRATION**

**HISTORIC RIGHTS AND HISTORIC TITLES IN MARITIME
TERRITORIES: AN ANALYSIS OF THE CONCEPTS IN THE LIGHT
OF THE UNITED NATIONS CONVENTION OF THE LAW OF THE SEA
AND THE SOUTH CHINA SEA ARBITRATION**

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**HISTORIC RIGHTS – HISTORIC TITLES – SOUTH CHINA SEA ARBITRATION – INTERNATIONAL
ARBITRATION – LAW OF THE SEA**

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On May 15th, 2016, Ambassador Zhan Yongxin of the People's Republic of China stated: "*China is actually the victim with regards to the South China Sea issue. The Chinese people were the first to discover, name and develop the South China Sea Islands.*" In the past few years, much academic attention was given to the South China Sea Arbitration between *The People's Republic of China v. The Republic of Philippines*. At the heart of the arbitration lies the complex and malleable nature of 'historic rights' in the context of maritime disputes, often referred to as 'historic waters' or 'historic titles'. The *China v. Philippines* arbitration raised considerable questions about the contemporary relevance and the legitimacy of historic claims in the modern framework of international maritime law.

As historic rights over territories often constitute the essence of a community, whether national or minority, there is a clear subtlety and complexity when assessing their existence. Historic rights are profoundly linked to traditions, customs and spirituality. They evolve through time and space as the history of a nation is influenced by various factors and expands notably through cultural, economic, or military endeavours throughout the years. As a result, determining the legitimacy of a nation's claim to exert influence or power over a territory represents an undeniable difficulty for international law. Central to this difficulty is the inherently subjective nature of historic ties to land and maritime spaces. In this context, the 2016 South China Sea Arbitration award represents an unprecedented advancement for the development and clarification of the notion of historic rights and the exercise of sovereignty in delimited maritime areas. Indeed, this case perfectly depicts the intricate interplay between the interpretation of the Law of the Sea, particularly Exclusive Economic Zones (EEZ), while simultaneously addressing historic rights and claims over overlapping maritime areas.

Consequently, this paper focuses on the analysis of historic water rights in light of the United Nation Convention on the Law of the Sea (UNCLOS). Using the South China Sea Arbitration as a focal point, it undertakes a comparative analysis of this case alongside other UNCLOS arbitration awards. The addresses the subtlety of defining historic water rights and highlights the necessity for international law to produce a clearer definition of the notion. Indeed, it approaches the analysis by emphasizing the pressing need for international law to provide a more precise and consistent framework. It highlights a critical gap within the Law of the Sea, which questions how historic rights constitute an interpretative notion which often serves as a tool for advancing national interests rather than reflecting an indisputable connection to a territory.

Additionally, this paper examines the inherent tension between a nation's unilateral pursuit of power and the multilateral legal principles that seek to curtail such ambitions. It first addresses the complexity of historic rights and titles in maritime areas, focusing on the vague and indeterminate nature of these concepts within the UNCLOS framework and the issues they raise. The analysis then turns to historic rights as interpreted in the South China Sea Arbitration, drawing comparisons with other notable cases, such as the *Anglo-Norwegian Fisheries* case of 1949. Finally, this paper reflects on the current state of the UNCLOS framework, evaluating its practical application in modern maritime claims and its potential for future refinement.

First and foremost, the term ‘historic rights’ is inherently ambiguous as no treaty provisions explicitly define the concept. While the United Nations Convention on the Law of the Sea (UNCLOS) serves as the primary legal basis for maritime claims, it does not specifically address the legal regime and elements governing historic rights, titles or waters.

In international law, historic rights are acquired and exist “*over certain land or maritime areas acquired by a State, through a continuous and public usage from time immemorial and acquiescence by other States, although those rights would not normally accrue to it under general international law.*”¹ The term historic ‘rights’ is often conflated with related concepts such as historic titles, historic waters or historic bays. While historic titles are exceptional in their nature, as they are considered to be a derogation from general international law, historic rights have a broader meaning encompassing both sovereign and non-sovereign claims. Indeed, they serve as the “*genus under which one can place the species ‘historic waters’ and ‘historic bays’ as a ‘species of ‘historic waters.’*”² Therefore, historic rights are acquired through a process of consolidation involving an undisturbed exercise of sovereignty over a territory. In *Eritrea v. Yemen* (1998), the arbitral tribunal indicated that the concept of ‘historic rights’ can be considered as “*something falling short for sovereignty*”. The acquisition of this sovereignty is recognized by international law through occupation, cessation, prescription or conquest involving the particular territorial area. Regarding historic waters, the International Court of Justice in the *Anglo-Norwegian Fisheries* (1951) case gave the following definition: “*By ‘historic waters’ are usually meant waters which are treated as internal waters, but which would not have that character were it not for the existence of an historic title.*”³ Thus, ‘historic rights’ are general in nature, encompassing ‘historic titles’ which are inherently linked to ‘historic waters’, as they imply sovereignty over maritime territories.

Analysing the South China Sea Arbitration is particularly relevant in order to fully grasp the complexity and malleability of the concepts of ‘historic rights’ and ‘historic titles’. Indeed, from the 1950's onwards, tensions have escalated in the South China Sea due to competing claims for sovereignty over the Paracel and Spratly Islands and surroundings islets. In the pursuit of dominance over maritime spaces, China has gradually and forcefully claimed preeminence over the Philippines, Vietnam and Malaysia in the South China Sea. From the expulsion of the South Vietnamese garrison and the takeover of islets from the Philippines to the mapping of the Nine-Dash line and to the building of artificial islands capable of hosting military bases, China has used military actions to assert sovereignty over the sea.

Hence, in January 2013, the Philippines initiated legal actions against China under Annex VII of the UNCLOS due to the growing disputes in the South China Sea. Although China did not participate in the proceedings, it remained bound by the eventual future ruling. The case revolved around China’s claims to historic in the South China Sea, specifically concerning the Nine-Dash-line. This delimited area is claimed by China based on a 1948 map

¹ Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* 299 (Hart Publishing, 2006).

² Erik Franckx and Marco Benatar, *Dots and Lines in the South China Sea: Insights from the Law of Map Evidence*, 2 *ASIAN J. INT’L L.*, 89, 95-96 (2012).

³ *Fisheries Case*, *supra* note 15, at 130.

which depicts the country's maritime rights in the sea. The Philippines demanded, *inter alia*, a review of the so-called 'historic rights' claimed by China, challenging their existence from a historical perspective. It argued that China's rights, even if they existed in the past, would have been void and nullified upon China's accession to the UNCLOS. According to the Philippines, China's claims to historic rights only emerged in 2009, with no evidence proving Chinese activities predating the early 20th century. Therefore, the complexity of this case lies in the interpretation of China's Nine-Dash line and the broader issue it represents: On which basis can a country claim sovereignty over a territory when interpretations of 'historic rights' remains highly contested and inconsistently defined? As Florian Dupuy and Pierre-Marie Dupuy observe, this ambiguity underscores the challenges of the Law of the Sea. Specifically, for the South China Sea Arbitration as in this case "*It is uncertain whether the map has any legal relevance to the delimitation of China's boundaries in the South China Sea, because China has never provided any explanation as to the meaning of Nine-Dash line.*"⁴. The arbitral Tribunal also specified that "*China has never expressly clarified the nature or scope of its claimed historic rights. Nor has it ever clarified its understanding of the meaning of the 'nine-dash line'*"⁵.

Furthermore, from China's perspective, it claims to have 'discovered' the maritime areas of the South China Sea prior to the 18th century, asserting historic rights on this basis. According to Liu Xiaoming, the former Chinese ambassador, China was the first nation to discover, settle, and administer the islands, dating back as early as 200 BC. To substantiate its claims, China appears to rely on factual evidence, which it views as essential in order to the legitimize its historic rights. Indeed, historical records describe the islands during China's Three Kingdoms Period and other maps from the 16th century depict some islands as Chinese territory. This raises a critical question: How can international law invalidate evidence of a nation's historical presence in maritime territories? Beijing asserts that the mere presence of Chinese activities underpins its contemporary claims to sovereignty over the South China Sea. This precisely highlights the complexity of the concept of historic rights and titles. Indeed, it appears to be so fluid and malleable that interpretations vary widely whether a mere physical presence constitutes a 'historic right' according to international law. However, the arbitral tribunal ruled that the 'historic rights' claimed by China, failed to meet the criteria required

under international law. Therefore, the physical presence of Chinese activities does not appear to constitute historic rights. Why is it the case?

Outside of the UNCLOS legal framework, the *Sawhoyamaxa Indigenous Community v. Paraguay* case illustrates how historic rights can be intrinsically tied to property rights over ancestral land and the traditional means of livelihood of a community. In this case, the

⁴ Florian Dupuy and Pierre-Marie Dupuy, "A Legal Analysis of China's Historical Rights Claim in the South China Sea," A.J.I.L.L. Vol.107 (2013), pp.131-132.)

⁵ The South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China) (Award) PCA Case No 2013-19, 12 July 2016, para 180.

InterAmerican Court adopted a culturally and historically informed approach by recognizing the unique relationship between the land and the Sawhoyamaya community. It addressed the significance of spirituality and customs in relation to historic rights and how these rights extend beyond mere physical presence through time. The *Sawhoyamaya* case provides a valuable insight when compared to maritime disputes, as it allows to consider how subjective aspects can be taken into consideration before granting sovereign rights over a territory. Indeed, similarities can be established with the *Anglo-Norwegian Fisheries* case, which constitutes an interesting basis of comparison with the South China Sea Arbitration.

In September 1949, the United Kingdom brought a case before the International Court of Justice regarding the delimitation of the Norwegian fisheries zone, as defined in a 1935 decree. The dispute centered on the British claim regarding Norway's baselines delimitations which seemed not to comply with principles of international law. The British government argued that the Norwegian delimitation system was unknown to them and could not serve as the foundation for the enforcement of historic titles. In its ruling, the Court gave weight to geographical and historical factors, examining Norway's historical control over the specified maritime areas. Interestingly, the Court concluded that Norway had acted in accordance with international law, noting that "*the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose;*"⁶. Furthermore, it also stated that the British government had failed to contest these delimitations for over sixty years. Consequently, *Anglo-Norwegian Fisheries* case underscores key principles for recognizing historic rights. Indeed, for the practice of these historic rights to be accepted, they must be exercised consistently over a considerable time-period, notorious and generally tolerated by the international community.

Analysing the South China Sea Arbitration in the light of the Fisheries case judgment provides a nuanced understanding of the complexities surrounding the concept of 'historic rights'. Notably, China's claim to historic rights within the Nine-Dash line fails to meet the criteria established under general international law. The outcome of the Fisheries case established that for historic rights to be relevant, there should be a continuous, effective and uncontested exercise of them by other States up to the present times. This standard was not met in China's case as has never exercised continuous and uncontested authority over the maritime area encompassed by the Nine-Dash line. Historic titles, therefore, cannot be created by the mere exercise and activities of a certain country over a maritime area, particularly when such claims are actively disputed. In China's case, the historic rights in question have largely been rejected rather than acknowledged by other littoral States. Thus, the Fisheries case demonstrated

that a prolonged period of inaction or silence can nullify a state's claim to historic rights. These rights are not absolute over time, and historic activities within a specific territory cannot be the only factor determining their legitimacy. Indeed, a silence of sixty years was sufficient for the claim of the United Kingdom to be void. Ultimately, historic rights can, therefore, be lost as a consequence of prolonged silence. Similarly, in *Malaysia v. Singapore* (2005), concerning the Pedra Branca island, Malaysia's failure to assert its sovereignty led to the loss of its historic

⁶ Fisheries Case (United Kingdom v Norway) (Merits) [1951] ICJ Rep 116, para 80.

titles. This principle that historic rights require a continuous acknowledgement was confirmed by the U.N Study on Historic Waters, which stated that there is a clear necessity for states to have a continuous and uncontested exercise of these historic rights before other states.

Hence, the South China Sea Arbitration depicts the clear inadequacy between China's conduct and claims in the region and principles of international law. China's historical and ongoing activities in maritime territories do not suffice to establish exclusive sovereignty. Indeed, the fact that the Nine-Dash line interpretation was not clearly evoked in the light of international law and that there was widespread opposition from other states to China's actions reflects a clear violation of UNCLOS principles. The tribunal unequivocally invalidated China's claim to historic rights within the Nine-Dash line. While China had certain activities in the South China Sea, there is no evidence to suggest that it has historically exercised exclusive control over these waters and their resources to the exclusion of other regional states. Additionally, these claims are nowadays incompatible with the Exclusive Economic Zone (EEZ) regime provided by UNCLOS. In fact, while UNCLOS considered the possibility to recognize pre-existing rights over resources, the provision was ultimately rejected which puts aside the validity of China's claims.

From this point forward, the concept of 'historic rights' remain insufficiently defined in both treaty law and international jurisprudence, posing a significant challenge to the coherence of the international legal framework. Even though the South China Sea Arbitration has shed some light on the subject, by depicting how historic rights are declared irreconcilable with other sovereign rights and principles guaranteed by the UNCLOS, a definitional gap still exists. This ambiguity stems from the sensitive nature of historic rights. Indeed, they are inevitably linked to territorial sovereignty, economic interests, and traditional and cultural concerns. As a result, this malleable concept constitutes a clear challenge for international law to define whether subjective claims can be seen as legitimate. The recognition of historic rights under UNCLOS is a contentious subject matter as their acknowledgment could unfairly disadvantage less powerful nations unable to assert claims beyond their borders. On the other hand, some states view the recognition of historic rights as essential for safeguarding historic waters and ensuring a long-standing political and economic sovereignty. This dichotomy creates a double standard that undermines the stability and precision of the international legal framework. This gap of definition leaves states and tribunals to navigate these claims on a case-by-case basis, resulting in inconsistencies.

Rather interestingly, Article 298(1)(a)(i) of the UNCLOS presents a notable exception to the Convention's binding resolution mechanism. Indeed, it allows States to declare their non-compliance with binding obligations when it comes to the interpretation of Articles 15, 74 and 83. These articles define principles of sea boundary delimitations regarding historic waters and bays. This exemption, under Article 298(1)(a)(i), creates a lacuna in the international law framework for resolving sea boundary disputes, as it permits States to not accept compulsory procedures for settlements under section 2 of Part XV of UNCLOS. The rationale behind this exception stems from the lack of international on the principles that should govern maritime delimitation disputes. This absence of agreement highlights the often politically sensitive nature of 'historic rights' which inevitably leaves a gap in the broader international legal for maritime disputes.

This principle of exception in maritime dispute resolution presents significant challenges, particularly when states adopt unilateral and non-cooperative stances. The South China Sea Arbitration exemplifies the profound effect that such exceptions can have on regional power dynamics and unresolved regional disputes. China's immediate rejection of the 2016 arbitral award, declaring it "null and void", with no binding force, underscore the persistent challenges facing the UNCLOS. How can international law prevail when major powers, such as China, despite being party to the UNCLOS, refuse to comply with arbitration rulings? In the short term, such actions exacerbate tensions in the South China Sea, while in the long run, China's non-cooperative and forceful conduct, sends a troubling message that adherence to international law is optional. This threatens to undermine the rules-based international order. The complexity of maritime disputes involving 'historic rights' lies in balancing the need to protect legitimate claims with preventing powerful states from using the concept to justify illegitimate domination over maritime territories. The complexity lies in determining whether these rights are legitimately claimed. This is particularly delicate when the concept has, as its essence, an intangible nature.

All in all, the concepts of 'historic rights' and 'historic titles' remain inherently ambiguous in their existence, exercise and application within the framework international law. Although the South China Sea Arbitration award has significantly contributed to clarifying the concepts and helped specify their nature, it, however, they continue to be subject to interpretation in contemporary legal discourse. Due to their malleable essence, the need to specify their framework of existence appears of considerable importance within the UNCLOS. The comparative analysis between the South China Sea Arbitration and the Anglo-Norwegian Fisheries case of 1949 illustrates the evolving nature of historic rights and titles in the context of maritime disputes. Both cases highlight how these rights are not absolute and can be subject to changes over time, reflecting the dynamic nature of international law. Indeed, these rights can be intrinsically linked to a nation's identity, cultural or territorial, while simultaneously being contested in their existence due to the way they are asserted. In the absence of clear specifications regarding their legitimate existence, 'historic rights' may be exploited to serve a nation's geopolitical ambitions, thereby creating lacuna within the international legal system. While the South China Sea Arbitration allowed a broader understanding of the 'historic rights' concept, China's conduct since 2013 until today puts at risk the fundamental principles of international law, particularly jeopardizing the peace and stability purportedly guaranteed by the UNCLOS.

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