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Underscoring the Historical and Legal Basis for Settlement of Territorial Issues

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Democratic and free nation-states of the 21st century have repeatedly affirmed their strong commitment to international principles where sovereignty and international law are respected, freedom of navigation and overflight is valued, and respect for sovereignty, territorial integrity and rule of law is ensured. Amid highlighting the importance of peaceful resolution of disputes, the onus remains on respect for international legal and diplomatic processes, in accordance with the universally recognized principles of international law, notably the 1982 United Nations Convention on the Law of the Sea (UNCLOS). This Convention holds historic significance in the backdrop of developments since the United Nations Conferences on the Law of the Sea were held at Geneva in 1958 and 1960.Besides, there were precedents in the work of the Hague Conference for the Codification of International Law held in 1930 under the auspices of the League of Nations. Up to the end of its work, in 1956, the International Law Commission and the General Assembly proceeded through several drafts concerning different aspects of the law of the sea. It was only in the final report submitted to the General Assembly in 1956 that all provisions were systematically ordered as one body of draft articles covering the whole of the law of the sea. This final report was to be the main basis for the work of the 1958 Geneva Conference.[1]

The Geneva meetings accentuated the need for a new and generally acceptable Convention on the law of the sea. As a legal order for the seas and oceans that would facilitate international communication, the centrality of UNCLOS got further highlighted and globally accepted owing to the fact that issues pertaining ocean spaces remain closely interrelated with due regard for sovereignty

1 1958 Geneva Conventions on the Law of the Sea, Geneva, 29 April 1958, Archival Library of International Law, Office of Legal Affairs, United Nations.

of all States.[2] Besides, the focus simultaneously was on promoting peaceful use of the seas and oceans, equitable and efficient utilization of their resources, conservation of their living resources, and study, protection and preservation of the marine environment.[3]

The Role and Relevance of History in the Context of Territorial Issues

Historical claims have often been at the center of the debate and contest over territorial issues and related legal aspects. Historical narratives, re-interpretations, and/or distortions of history remain critically linked to colonial legacies and experiences, with the objective to redraw frontiers and expand spheres of influence by some nation-states in the name of history. A major ramification of this emerges in that some nation-states have failed to come to terms with the past, which has been instrumental in spurring competing/mutually reinforcing/overlapping themes of nationalisms, especially pertaining to certain territories in the maritime domain, and on land, in East, Southeast, and South Asia.

As a consequence, there have been attempts by these nation-states to justify territorial claims invoking various historical narratives, particularly those which existed in pre-modern times. In order to gain a comprehensive understanding of present territorial conflicts, it is imperative to consider and study historical perspectives, encompassing the stated period prior to the acceptance of modern international law. As seen in many cases in the past, international tribunals have examined historical factors in the context of historical/ancient titles and historical rights. The contextual relevance and lessons applying to key territorial issues continue to confront contemporary regional peace and security.

Legal Basis for Peaceful Settlement of Territorial Issues

Cases brought to the International Court of Justice (ICJ) – the independent subsidiary organ of the United Nations, usually fall within one of the ensuing categories. The case/cases may find channel either by referral through a special agreement between two or more states; by a treaty provision committing disputes arising under the treaty to the court; or, by the parties' statements of compulsory jurisdiction. The UNCLOS provides a number of binding and non-binding means towards the peaceful settlement of disputes. The history of the arbitral proceedings on jurisdiction and admissibility of cases to be filed includes various procedural requirements, as, was seen in case of *The Republic of the Philippines vs. the People's Republic of China*. The Arbitral Award made clear that the Tribunal has clear jurisdiction over many of The Philippines' claims and also that the Tribunal was satisfied that disputes between the Parties concerning the interpretation and application of the UNCLOS exist with respect to matters raised by the Philippines in all of its submissions. As far as the legal status of the award is concerned, UNCLOS, the international legal basis for the arbitration, clearly stipulates under Annex VII. Arbitration, *Article 11* pertaining to *Finality of Award:*

> *The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute.*

In its 12 July 2016 verdict in a case filed in 2013 by Manila concerning maritime entitlements and the status of features in the South China Sea, among other issues, namely, *The South China Sea Arbitration* at The Hague-based Permanent Court of Arbitration, the award was highly favorable and

2 For more details see, United Nations Convention on the Law of the Sea, The Preamble.

3 Ibid.

unanimous for The Philippines in *The Republic of The Philippines vs. The People's Republic of China*. The Tribunal ruled that China's 'nine-dash line' claim and accompanying claims to historic rights have no validity under international law. The Tribunal also reasoned that there was no strong evidence that China "had historically exercised exclusive control over the waters or their resources".[4]

The argument that Chinese navigators and fishermen, as well as those of other States, had historically made use of the islands in the South China Sea made "no evidence" that China had historically exercised exclusive control over the waters or their resources. The Tribunal examined the history of the Convention and its provisions concerning maritime zones and concluded that the Convention was intended to comprehensively allocate the rights of States to maritime areas. The Tribunal also noted that the question of pre-existing rights to resources (in particular fishing resources) was carefully considered during the negotiations on the creation of the exclusive economic zone and that a number of States wished to preserve historic fishing rights in the new zone.[5]

More importantly, the Tribunal found that China's claim of historic rights to resources was incompatible with the detailed allocation of rights and maritime zones in the Convention and concluded that, to the extent China had historic rights to resources in the waters of the South China Sea, such rights were extinguished by the entry into force of the Convention to the extent they were incompatible with the Convention's system of maritime zones. The Tribunal considered that prior to the Convention, the waters of the South China Sea beyond the territorial sea were legally part of the high seas, in which vessels from any State could freely navigate and fish.[6]

Accordingly, the Tribunal concluded that historical navigation and fishing by China in the waters of the South China Sea represented the exercise of high seas freedoms, rather than a historic right, and that there was no evidence that China had historically exercised exclusive control over the waters of the South China Sea or prevented other States from exploiting their resources. The Tribunal's verdict stated that, as between the Philippines and China, there was no legal basis for China to claim historic rights to resources, in excess of the rights provided for by the Convention, within the sea areas falling within the 'nine-dash line'.[7]

Paul S. Reichler, lead counsel and advocate for The Republic of The Philippines in the Arbitration case at The Hague argues that great powers do set an example when it comes to obligations, be it positive or negative, asserting that if States refuse to honor their legal obligations, then so will other States – thereby rendering international adjudication as a hollow exercise.[8] Given that geographical proximity among States is permanent and disputes between neighbors inevitable, if State A does not comply with the judgment or award resolving the current dispute, how can it expect its neighbor, State B, to comply with one in a forthcoming dispute? By refusing to comply, State A will have removed judicial or arbitral recourse from the list of possible means

4 *Official Press Release, The South China Sea Arbitration* [*The Republic of The Philippines vs. The People's Republic of China*] Permanent Court of Arbitration, The Hague, July 12, 2016.

5 Ibid.

6 Ibid.

7 Ibid.

8 Paul S. Reichler, "The Rule of Law and the Path to a Just and Lasting Peace in the South China Sea," *Japan Review,* vol.1, no.2, Winter 2017.

of resolving a future dispute that cannot be resolved diplomatically.[9]

The importance of history and adherence to rule of law in settling territorial issues needs to be underscored and strengthened as nation-states vie for greater influence, stature, and respect at the international stage. This would be demonstrated best by virtue of states being law-abiding, and complying with international judgments and awards. In what could be inferred as perils of domestic politics for a few nations, and the objectives of their communist regime to craft a strong national identity, it appears that these nation-states are incessantly engaged in an ongoing, wholesale revision of their foreign policy orientation.The so-called 'national identity' is being artificially constructed through innumerable historical fictions and recreations that further their national interests, which in turn, are determining the revisionist and combative foreign policy pursued through state action.

9 Ibid.