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The Challenges of South China Sea Arbitration to the Law of the Sea（1）

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Abstract: The Philippines ignored the opposition of Chinese government and unilaterally initiated South China Sea Arbitration. The Arbitral Tribunal stubbornly continued the arbitral proceedings, by taking advantage of its functions and powers and the systematic defects of the United Nations Convention on the Law of the Sea, beyond and expanding its jurisdiction, rendered an illegal award which has serious errors in facts finding and application of laws. This award does not only impair the authority and uniformity of the regime of dispute settlement in the law of the sea, but also encroaches on the right of a state to choose means of dispute settlement of their own accord, thus the exclusionary declarations made by a state become unpredictable, and rights and interests of the non-participation state cannot be protected. Such award cannot resolve disputes but complicates South China Sea issues and disputes and makes them harder to deal with, places the system of the law of the sea into a mess, deprives its authority and imposes challenges, fails to

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promote the development of the law of the sea, but impair the development of the law of the sea. In a word, South China Sea Arbitration seriously impair basic functions of international arbitration institutions.

Key words: South China Sea Arbitration; Compulsory Arbitration Procedure; System of the Law of the Sea; Effects of Award

The Philippines unilaterally initiated the South China Sea Arbitration on 22 January 2013, according to Article 286, Article 287 and Annex VII of the United Nations Convention on the Law of the Sea (hereinafter referred to as the Convention) and the Arbitral Tribunal ignored the position of Chinese government (no acceptance and no participation) to stubbornly continue the Arbitration and issued an Award on Jurisdiction and Admissibility on 29 October 2015, and the so-called final award on 12 July 2016. All these have attracted a lot of attention from the international community.

The Arbitral Tribunal stubbornly continued the arbitral proceedings, by taking advantage of its functions and powers as well as the systematic defects of the Convention, beyond and expanding its jurisdiction, rendered an illegal award which has serious errors in facts finding and application of laws. Such award cannot resolve disputes but complicates South China Sea issues and disputes and makes them harder to deal with. Moreover, it brings attacks and damage to the current law of the sea and makes the system of the law of the sea a mess. It cannot promote the development of the law of the sea but brings serious challenges to the international order on the sea.

I. South China Sea Arbitration Damaging Functions of the Law of the Sea

One of basic functions of international justice or arbitration is dispute resolution, that is the so-called function of resolving disputes and settling differences. The claims made by the Philippines are neither disputes concerning the interpretation or application of the Convention nor real disputes between China and the Philippines, so the Arbitral Tribunal has no jurisdiction over claims made by the Philippines given that these claims are not legal disputes.

(I) The Issue over the Status and Nature of Maritime Features in Nansha Being Not a Dispute Jointly Recognized by Both Parties

It is well known that the core disputes between China and the Philippines are territorial disputes over some maritime features in Nansha and ensuing disputes over maritime delimitation, so according to Article 288 of the Convention and exclusionary declarations filed in writing by China to the Secretary-General of the United Nations in August 2006, without a special agreement between China and the Philippines, the Arbitral Tribunal has no jurisdiction over the claims. In other words, only a dispute jointly recognized by China and the Philippines is a real dispute that the Arbitral Tribunal is allowed and entitled to make arbitration.

In the light of the content of the Philippines' fifteen claims for arbitration, according to Chinese Government's Position Paper on Matter of Jurisdiction in South China Sea Arbitration Initiated by Philippines (7 December 2014, abbreviated as China's Position Paper), the Philippines' claims for arbitration are summarized as in three categories[1]: First, China's assertion of the "historic rights" to the waters, sea-bed and subsoil within the "nine-dash line" (i.e., China's dotted line in the South China Sea) beyond the limits of its entitlements under the Convention is inconsistent with the Convention; Second, China's claim to entitlements of 200 nautical miles and more, based on certain rocks, low-tide elevations and submerged features in the South China Sea, is inconsistent with the Convention; Third, China's assertion and exercise of rights in the South China Sea have unlawfully interfered with the sovereign rights, jurisdiction and rights and freedom of navigation that the Philippines enjoys and exercises under the Convention[2].

The Arbitral Tribunal shall first ascertain territorial sovereignty over relevant maritime features and complete relevant sea area delimitation before making decisions on the above-mentioned issues. It is thus obvious that, by requesting the Arbitral Tribunal to apply the Convention to determine the extent of China's maritime rights in the South China Sea, without first having ascertained sovereignty over the relevant maritime features, and by formulating a series of claims for arbitration to that effect, the Philippines contravenes the general principles of international law and international jurisprudence on the settlement of international maritime disputes. To decide upon any of the Philippines'

(1) For details of *China's Position Paper*, see http://www.gov.cn/xinwen/2014-12/07/content_2787663.htm, last visited on 26 October 2018.

(2) *Ibid*., p. 3, para. 8.

claims, the Arbitral Tribunal would inevitably have to determine, directly or indirectly, the sovereignty over both the maritime features in question and other maritime features in the South China Sea. Besides, such a decision would unavoidably produce, in practical terms, the effect of a maritime delimitation. Therefore, China maintains that the Arbitral Tribunal manifestly has no jurisdiction over the present case.(3) Thus, even the Arbitral Tribunal issued an award, it cannot resolve the core South China Sea disputes.

As for maritime features of Nansha Islands, the Arbitral Tribunal considers that human habitation is not a transient inhabitation on a certain feature but requires inhabitation by a stable community of people; however, there is no indication that anything fairly resembling a stable human community has ever formed on Nansha Islands, so in the opinion of the Arbitral Tribunal, all high-tide features in Nansha Islands (including Taiping Island, Zhongye Island, Xiyue Island, Nanwei Island, Nanzi Island and Beizi Island) cannot sustain human habitation or economic life of their own within the meaning of Paragraph 3 of Article 121 of the Convention. Accordingly, they are just rocks within the meaning of Paragraph 3 of Article 121 of the Convention and shall have no EEZ or continental shelf.(4) Although the Arbitral Tribunal has jurisdiction over interpretation and application of the Convention, it only has authority to interpret provisions in the Convention rather than make laws. Considering its content, the stringent interpretation of the regime of islands made by the Arbitral Tribunal is really a kind of new legislation, made beyond the tribunal's jurisdiction, so it is illegal and invalid, and hardly be accepted by the international community and subsequent cases. In addition, it plays no positive role in promoting the development of the law of the sea but challenges the system and authority of the law of the sea.(5)

(3) *Ibid.*, pp. 5-6, paras. 26-29.

(4) *In the Matter of the South China Sea Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China Award*, 12 July 2016, pp. 252-260, paras. 618, 621, 625 and 646.

(5) The stringency of the interpretation made by the Arbitral Tribunal is embodied in the following aspect: First, in connection with sustaining human habitation, to sustain means to provide that which is necessary to keep humans alive and healthy over a continuous period of time, according to a proper standard. Second, to sustain an economic life, the necessities

Meanwhile, from the perspective of paragraph structure of the regime of islands of the Convention, Paragraph 1 to Paragraph 3 of Article 121 are all about the regime of islands with details as follows: Paragraph 1 refers to islands in broad sense; Paragraph 2 is about islands in generalized sense, that is to say, the islands enjoying the same status with land territory may claim corresponding sea areas; Paragraph 3 is about rocks by regulating from the perspective of the effect of rocks rather than directly providing for the concept of rocks. In other words, rocks which sustain human habitation or economic life of their own may, same to islands, claim EEZ or continental shelf, so rocks are divided into two types of one being able to have EEZ or continental shelf and the other being unable to have EEZ or continental shelf. At the same time, Paragraph 3 is a restriction on Paragraph 2, so not all rocks may claim EEZ or continental shelf just as islands set forth in Paragraph 2 do. It is thus obvious that Paragraph 1 to Paragraph 3 of Article 121 of the Convention respectively have their own features and constitute an integral entirety of the regime of islands. The main reason for such vague regulation in Paragraph 3 of Article 121 is that it is unable to give a unified definition of the concept of rocks, human habitation, economic life of their own and so on, which can be proved from different opinions on the regime of islands in discussion of the Convention in the Third UN Conference on the Law of the Sea.(6)

Considering complexity of the regime of islands and diversity of forms of islands and rocks in international community, International Court of Justice and International Tribunal for the Law of the Sea avoid the issue of determining the nature of maritime features.(7) As mentioned above, although the Arbitral Tribunal

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provided shall not only satisfy the starting of economic life, but also the ongoing of economic life. In addition, such economic activity shall be sustained over a period of time. Third, the mere presence of a small number of persons on a feature does not constitute permanent or habitual residence. Rather, sustained human habitation would require that a feature be able to support, maintain, and provide food, drink, and shelter to some humans to enable them reside there permanently or habitually over an extended period of time. Fourth, for economic activity to constitute the economic life of a feature, the resources around which the economic activity revolves must be local, not imported. *Ibid.*, pp. 252-260, paras. 487, 489-490 and 500.

（6） J. Yongming, “Analysis of Legal Elements of Islands and Rocks-Studying from the Perspective of Okinotorishima”, *Political Science and Law*, 2010 (12), pp. 100-101. See also, *supra* note (4), pp. 252-260, paras. 522, 540-551.

has the jurisdiction over a dispute concerning the interpretation and application of the Convention, China has not ascertained or clarified the nature of maritime features of Nansha Islands so far, and China claims maritime rights in a way of regarding them as archipelago. For example, in Note Verbale of 7 May 2009, addressed to Secretary-General of the United Nations concerning Vietnam and Malaysia's joint application for delimitation of outer continental shelf and Vietnam's independent application for delimitation of outer continental shelf, the Permanent Mission of China to the United Nations stated that China has indisputable sovereignty over the South China Sea Islands and the adjacent waters, and enjoys sovereign rights and jurisdiction over corresponding sea waters, their sea-beds and subsoil. China's such position is well known to the international community.(8) Therefore, the issue of the status of Nansha maritime features, especially maritime features controlled by China is not a real or true dispute between China and the Philippines. The so-called dispute refers to disagreement on legal or factual issue, conflicts or opposition on legal claims or interests, namely, regarding a certain issue, two parities' competing arguments become obvious.(9) In other words, regarding the issue of status or nature of Nansha maritime islands especially maritime features controlled by China, China has not clarified their nature and status so far, nor claimed corresponding sea waters and rights on basis of any independent maritime feature, so they are not real disputes and thus cannot be submitted for arbitration.

(II) Claims for Arbitration Falling into the Exclusionary Declaration of China and thus Being Non-Arbitrable

It is well-known that one of important characteristics of the system of the

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(7) Z. Keyuan, "The Influence of Maritime Features Construction on Territorial Disputes in South China Sea: Challenges to International Law", *Asia-Pacific Security and Maritime Study*, 2015 (3), p. 10.

(8) See the Note Verbale Addressed to the Secretary-General of the United Nations by China concerning relevant countries' application for outer continental shelf and preliminary information, Research Team of the China Institute for Marine Development Strategy of State Oceanic Administration, *Research Report of Marine Development of China*, China Ocean Press, 2011 Edition, pp. 593-598.

(9) See *PCIJ*, *Series A*, No. 2, p. 11. For details of Judgment of Right of Passage Over Indian Territory of International Court of Justice, see *ICJ Reports 1960*, p. 34. For details of Judgment of El Salvador v. Honduras concerning the Land, Island and Maritime Frontier Dispute, see *ICJ Reports 1992*, p. 555, para. 326.

Convention（the Convention and its nine annexes）is the establishment of a comprehensive and systematic mechanism of dispute settlement. The system of the Convention does not only eliminate the defect of Four Geneva Conventions on the Law of the Sea of 1958 which discretely provides for the mechanism of dispute settlement, but also sets up a specific dispute settlement body-International Tribunal for the Law of the Sea and provides for different means for different disputes.(10) The key points are as follows: Every State shall settle their disputes by peaceful means and the Convention respects agreement between States on dispute settlement by peaceful means chosen of their own accord and endows every State with the right to freely choose the means of dispute settlement according to the principle of sovereign equality of states.(11) The main characteristics are as follows:

Firstly, there are different provisions concerning different types of disputes. A general maritime dispute is subject to Article 279 to Article 299 of Party XV; any international sea-bed dispute is subject to Section 5（Article 186-Article 191）of Part XV; any dispute with regard to marine scientific research shall be settled according to Section 6（Article 264）of Part XIII; in addition, there are different provisions according to different nature of disputes in Part XV.(12)

Secondly, there are optional procedures and compulsory procedures. The optional procedures（Article 297）are based on means set forth in Article 33 of the UN Charter. State Parties is obliged to settle their disputes by peaceful means which are set forth in Paragraph 1 of Article 33 of the UN Charter; if there is any agreement on dispute settlement between disputed parties, such agreement shall prevail. Meanwhile, the compulsory procedures provided for in Part XV apply only where no settlement has been reached by recourse to peaceful means chosen by the parties and the agreement does not exclude any further procedure（Article 280 and Paragraph 1 of Article 281）, namely, if the parties still continue their diplomatic negotiation or consultation, no compulsory procedure applies. If

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（10） J. Collier and V. Lowe, *The Settlement of Disputes in International Law*, Oxford, 2000 Edition, p. 84.

（11） A. R. Carnegie, “The Law of the Sea Tribunal”, *International and Comparative Law Quarterly*, Vol.28, 1979, pp. 669-684.

（12） M. Hayashi, Y. Shimada and M. Koga, *International Law of the Sea*（Second Edition）, Yushindo, 2016 Edition, p. 175（in Japanese）; 林司宣・島田征夫・古賀衛『国際海洋法〔第2版〕』（有信堂、2016年）175頁。

any party initiates compulsory arbitration procedure, it shall present evidences to prove that the dispute cannot be settled through peaceful means set forth in the agreement.(13)

Thirdly, there are limitations on compulsory procedures. Although the Convention provides for many kinds of means for compulsory procedures, they are basically subject to optional declarations of State Parties to a dispute and the compulsory jurisdiction of international court or tribunal is limited（Article 297-Article 298）. Namely, there are many defensive provisions excluding application of compulsory procedures, so it is not a system of thoroughly and completely compulsory procedures for dispute settlement.(14)

However, China submitted a written declaration to the Secretary-General of the United Nations according to Article 298 of the Convention on 25 August 2006, stating that China does not accept jurisdiction of any international justice or arbitration set forth in Section 2 of Part XV of the Convention with respect to any disputes set forth in Item (a), (b) and (c) of Article 298 of the Convention（namely, disputes concerning sea boundary delimitation, territory, military activities and so forth(15)）.

The exclusionary declaration made by China on 25 August 2006, once filed, automatically comes into effect. Without the consent of China, no other State can unilaterally invoke any of the compulsory procedures against China in respect of the exclusionary disputes.

Although Paragraph 1 of Article 288 of the Convention provides that "A court or tribunal shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part". Paragraph 4 provides that "In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal".

For this, the Arbitral Tribunal, by circumventing the legal effect of such declaration that China does not accept jurisdiction of any international justice or arbitration, holds that the dispute relating to sea boundary delimitation excluded

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（13）　*Ibid.*, p. 176; 同上、176頁。

（14）　*Ibid.*; 同上。

（15）　For details of Exclusionary Declaration Submitted by China according to Article 298 of the United Nations Convention on the Law of the Sea, *China Oceans Law Review*, 2007（1）, p. 178.

by China shall be interpreted in narrow sense as only including matters concerning sea boundary delimitation itself. However, for China, the exclusionary disputes shall be interpreted in broad sense as including all matters and elements relating to sea boundary delimitation, because sea boundary delimitation is an integral and systematic project involving not only basis of rights and effect of maritime features, but also principles and ways of delimitation as well as all relevant factors that must be taken into account in order to attain an equitable solution. The Philippines' approach of splitting its maritime delimitation dispute with China and selecting some of the issues for arbitration, if permitted, will inevitably destroy the integrity and indivisibility of maritime delimitation and contravene the principle that maritime delimitation must be based on international law as referred to in Article 38 of the ICJ Statute and that "all relevant factors must be taken into account". This will adversely affect the future equitable solution of the dispute of maritime delimitation between China and the Philippines.(16)

Even disregarding the legal effect of the declaration that Chinese government does not accept jurisdiction of any international justice or arbitration, the fact that the Arbitral Tribunal decides on a dispute concerning the interpretation of the exclusionary issues legally damages the integrity of the system of the Convention, because such decision is conditioned upon the self-satisfaction of arbitrators. In terms of facts finding and laws application, the system of the Convention has serious defect in protecting rights of a party who does not appear before the arbitral tribunal,(17) because there exist no reasonable and feasible remedial measures in it.(18) Furthermore, even a State makes exclusionary

(16)　*supra* note（1）, para. 67, p. 11. For example, Paragraph 1 of Article 74 of the Convention provides that "The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, to achieve an equitable solution".

(17)　Article 9 of Annex VII Arbitration provides that "If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law".

(18)　For example, Paragraph 1 of Article 12 of Annex VII（Arbitration）provides that "Any

declaration, it is the Arbitral Tribunal who decides whether these disputes are arbitrable. This will bring unpredictability to exclusionary disputes for States, impair States' right to freely choose means of dispute settlement of their own accord, damage States' sovereignty, destroy the dispute settlement mechanism of the Convention, thus encroach on the integrity and authority of the system of the Convention.

The correct route under the Convention should be as follows: If the Philippines holds that the subject-matter of the Arbitration does not involve any dispute covered by China's 2006 declaration, since China holds a different view in this regard, the Philippines should first take up this issue with China, before a decision can be taken on whether or not it can be submitted for arbitration. Should the Philippines' logic in its present form be followed, any State Party may unilaterally initiate compulsory arbitration against another State Party in respect of a dispute covered by the latter's declaration in force simply by asserting that the dispute is not excluded from arbitration by that declaration. This would render the provisions of Article 299 meaningless.[(19)] Correspondingly, the exclusionary declarations made by States according to Article 298 of the Convention will be worthless due to its uncertainty, thus States' confidence in the system of the Convention will be shaken and the effect and function of the Convention in maintaining maritime order will be impaired.

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controversy which may arise between the parties to the dispute as regards the interpretation or manner of implementation of the award may be submitted by either party for decision to the arbitral tribunal which made the award".

(19)　*Supra* note（1）, para. 73, p. 11. Paragraph 1 of Article 299 of the Convention provides that "A dispute excluded under Article 297 or excepted by a declaration made under Article 298 from the dispute settlement procedures provided for in section 2 may be submitted to such procedures only by agreement of the parties to the dispute". Namely, the role of Article 297 and Article 298 of the Convention is to prevent a party from unilaterally submitting a dispute to such procedures in the Convention without prejudice to both parties' right to such procedures through agreement. J. G. Merrills, *International Dispute Settlement*（Fifth Edition）, 2011, pp. 2, 17, 174; J. G. 梅里尔斯〔著〕（韩秀丽、李燕纹、林蔚、石珏〔译〕）国际争端解决（第五版、2013年） 3 、21-22、221頁。

II. South China Sea Arbitration Challenging the Integrity of the System of Maritime Dispute Settlement in the Law of the Sea

Under the situation where China and the Philippines, as States Parties to the Convention, do not make written declaration on selecting one of procedures listed in Article 287 of the Convention, although the Philippines has the right to unilaterally initiate an arbitration according to Article 286, Paragraph 3 of Article 287 and Article 1 of Annex VII of the Convention, such initiation of arbitration shall meet many conditions.[20] The Philippines alleged that it initiated a compulsory procedure according to Article 286, Article 287 and Annex VII of the Convention with an aim to peacefully and permanently settle disputes between China and the Philippines. From the perspective of its form, the Arbitration initiated by the Philippines meets the aforesaid elements. In other words, the Philippines is qualified as a claimant to initiate an arbitration, namely it has a claimant's qualification. However, it is undeniable that the initiation of arbitration shall meet many preconditions, especially the requirements of fulfilling obligations of exhaustion of means set forth in relevant agreements and exchange of opinions, as well as burden of proof to show that the dispute cannot be settled by the above-mentioned means. This is the issue of admissibility and these preconditions are basic requirements of the system of the Convention. The Arbitral Tribunal did not only admit the arbitration application where obligations to exhaust peaceful means including negotiation for settling a dispute and exchange opinions on settling a dispute through negotiation, but also excluded the historic right out of the object regulated by the Convention, thus impairing the integrity of the system of dispute settlement in the Law of the Sea.

(I) No Exhaustion of Peaceful Means Including Negotiation by Both Parties to Settle Their Disputes

Article 281 of the Convention provides that "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no

(20) For example, Article 1 of Annex VII of the UNCLOS states: Any party to a dispute may submit the dispute to the arbitral procedure provided for in this Annex by written notification adressed to the other party or parties to the dispute.

settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure". Article 286 of the Convention provides that "Subject to section 3 (application of limitations and exceptions set forth in Section 2), any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to Section 1" (the general provisions), "be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section" (compulsory procedures resulting in binding decision). Therefore, the preconditional question which shall be solved first for applying relevant arbitration procedures to South China Sea Arbitration unilaterally initiated by the Philippines is whether means of dispute settlement in agreements between China and the Philippines including a series of joint statements between them and other regional instruments are exhausted and whether such agreements exclude compulsory arbitration procedure.(21) In reality, China and the Philippines have reached mutual understanding to advance final resolution of disputes in South China Sea through amicable consultation and negotiation. The Joint Statement between the People's Republic of China and the Republic of the Philippines concerning Consultations on the South China Sea and on Other Areas of Cooperation, issued on 10 August 1995, states that both sides "agreed to abide by" the principles that "Disputes shall be settled in a peaceful and friendly manner through consultations on the basis of equality and mutual respect"; that "a gradual and progressive process of cooperation shall be adopted with a view to eventually negotiating a settlement of the bilateral disputes"; and that "Disputes shall be settled by the countries directly concerned without prejudice to the freedom of navigation in the South China Sea". The Joint Statement of the China-Philippines Experts Group Meeting on Confidence-Building Measures, issued on 23 March 1999, states that the two sides reiterated their commitment to "The understanding to continue to work for a settlement of their difference through friendly consultations", and that "the two sides believe that the channels of consultations between China and the Philippines are unobstructed. They have agreed that the dispute should be peacefully settled through consultation". The Joint Statement between the Government of the

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(21) *Supra* note (1), paras. 40-44. See also, *China Adheres to the Position of Setting Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea* (July 2016), paras. 115-120.

People's Republic of China and the Government of the Republic of the Philippines on the Framework of Bilateral Cooperation in the Twenty-First Century, issued on 16 May 2000, states that, "The two sides commit themselves to the maintenance of peace and stability in the South China Sea. They agree to promote a peaceful settlement of disputes through bilateral friendly consultations and negotiations in accordance with universally-recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea. They reaffirm their adherence to the 1995 joint statement between the two countries on the South China Sea ...". The Joint Press Statement of the Third China-Philippines Experts' Group Meeting on Confidence-Building Measures, dated 4 April 2001, states that, "The two sides noted that the bilateral consultation mechanism to explore ways of cooperation in the South China Sea has been effective. The series of understanding and consensus reached by the two sides have played a constructive role in the maintenance of the sound development of China-Philippines relations and peace and stability of the South China Sea area[(22)]".

Meanwhile, the mutual understanding between China and the Philippines to settle relevant disputes through negotiations has been reaffirmed in multilateral instruments. For example, Paragraph 4 of the Declaration on the Conduct of Parties in the South China Sea signed on 4 November 2002 explicitly states that, "The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means ... through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea." The Joint Press Statement between the Government of the People's Republic of China and the Government of the Republic of the Philippines issued on 3 September 2004 states that, "They agreed that the early and vigorous implementation of the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea will pave the way for the transformation of the South China Sea into an area of cooperation". The Joint Statement between the People's Republic of China and the Republic of Philippines, issued on 1 September 2011, states that "They reiterated the commitment to settling their disputes in the South China Sea through peaceful

(22)　*Supra* note (1), paras. 31-34.

dialogue and reaffirmed their commitments to respect and abide by the Declaration on the Conduct of Parties in the South China Sea signed by China and the ASEAN member countries in 2002”.[23]

It is thus obvious that the term “agree” employed in the bilateral instruments between China and the Philippines when referring to settlement of their disputes through negotiations evinces a clear intention to establish an obligation between the two countries in this regard. At the same time, the term “undertake” employed in the Declaration on the Conduct of Parties in the South China Sea shows an obligation to agree on carrying out negotiation which is binding upon the two sides. In other words, although the Declaration on the Conduct of Parties in the South China Sea is holistically a political instrument, we cannot deny the legally binding force of some provisions in it, for example, Paragraph 4 of the Declaration on the Conduct of Parties in the South China Sea, namely, both parties is obliged to resolve their territorial and jurisdictional disputes through friendly consultations and negotiations. Although the above-mentioned bilateral instruments and the Declaration on the Conduct of Parties in the South China Sea do not use such an express phrase as “exclude other procedures of dispute settlement”, as the arbitral tribunal in the Southern Bluefin Tuna Case stated in its Award, “the absence of an express exclusion of any procedure ... is not decisive”.[24]

In addition, in respect of significant issues relating to territorial sovereignty and maritime rights, China always insists on peaceful settlement of disputes by means of negotiations between the countries directly concerned and have gained certain achievements,[25] which was well known to international community including the Philippines.

To sum up, as for the disputes between China and the Philippines in the South China Sea, including the Philippines’ claims in this arbitration, the only means of settlement as agreed by the two sides is negotiations, to the exclusion of any other means including compulsory arbitration procedures.[26]

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(23)　*Ibid*., paras. 35-37.

(24)　*Ibid*., paras. 38-41, pp. 6-7.

(25)　Since 1960s, China has successfully resolved land boundary disputes with twelve out of its fourteen neighbors, delimiting and demarcating some 20,000 kilometers in length of land boundary in the process, which accounts for over 90% of the total length of China’s land boundary. In addition, China and Vietnam established, following negotiations, a maritime

(II) No Exhaustively Fulfilling Obligations by Both Parties to Exchange Views for Dispute Settlement through Negotiations

Article 283 of the Convention provides that "When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means". The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

The Philippines claims that, the two countries have been involved in exchanges of views since 1995 regarding the subject-matter of the Philippines' claims for arbitration, without however reaching settlement, and that in its view, the Philippines is justified in believing that it is meaningless to continue the negotiations, and therefore the Philippines has the right to initiate arbitration. But the truth is that the two countries have never engaged in negotiations regarding the subject-matter of the Arbitration. To the contrary, the exchanges of views between China and the Philippines in relation to their disputes have so far pertained to responding to incidents at sea in the disputed areas and promoting measures to prevent conflicts, reduce frictions, maintain stability in the region, and promote measures of cooperation. They are far from constituting negotiations even on the evidence presented by the Philippines.[27]

Among peaceful means of international dispute settlement, the so-called negotiation means that parties to the dispute directly harmonize their propositions through diplomatic measures or procedures and seek a way of dispute settlement. It is a general and most primitive means of dispute

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boundary between the two States in Beibu Bay (i.e. China-Vietnam Agreement on the Delimitation in Beibu Bay, and China-Vietnam Agreement on Fisheries, entered into force on 30 August 2014). See Accounts of Interviewing Ouyang Yujing, the Director-General of the Department of Boundary and Ocean Affairs of the Ministry of Foreign Affairs, on South China Sea issues by Chinese and Foreign Media (6 May 2016), http://www.fmprc.gov.cn/web/wjbxw_673019/t1361270.shtml, last visited on 26 October 2018.

(26) Under international law, regardless of the designation or form an instrument employ, as long as it intends to create rights and obligations for the parties, these rights and obligations are binding between the parties. *Supra* note (1), para. 38, p. 7.

(27) *Ibid.*, p. 708, paras. 45 and 47.

settlement.[28] In other words, the negotiation is a basic means of settling various international disputes because the negotiation is not only a possible means of dispute settlement but also a strategy to prevent disputes.[29]

In the judgment of the Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area（Canada v. United States of America）（12 October 1984）, the International Court of Justice states that parties to the dispute are obliged to carry out negotiations for reaching an agreement with good faith and obtaining active and positive results with real intention.[30] The International Court of Justice also states in the Judgment of North Sea Continental Shelf Case（20 February 1969）that parties to the dispute shall assume an obligation to carry out negotiations to seek an agreement. Such negotiations shall not be only a formality but parties are obliged to make negotiations meaningful instead of persistently insisting on their respective positions even not intending to revise original positions.[31] The above-mentioned opinions of the International Court of Justice show that parties to the dispute shall, during negotiations, adhere to their obligations of sincerity, positive efforts to reach an agreement.

It should be noted that, under international law and judicial practice, general exchanges of views, without having the purpose of settling a given dispute, do not constitute negotiations. For example, In Georgia v. Russian Federation, the ICJ held that, "Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims. As such, the concept of 'negotiations' … requires – at the very least – a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute" and "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question".[32]

（28） See S. Tabada, *New Notes on International Law*（Volume II）, Toshindo, 1991 Edition, p. 70（in Japanese）; 田畑茂二郎『国際法新講〔下巻〕』(東信堂、1991年) 70頁。

（29） Merrills, *supra* note（19）, pp. 2, 17, 174; 韩、李、林、石〔译〕)、前掲書（注19）、3、21-22、221頁。

（30） *ICJ Reports 1984*, para. 87. S. He and G. Wang（Chief Editors）, *Disputes and Peaceful Development in East China Sea and South China Sea*, Cross-Strait Interflow Prospect Foundation 2012 Edition, p. 265.

（31） *ICJ Reports 1969*, p. 47. He and Wang, *ibid.*, p. 265.

The obligation to exchange views for dispute settlement through negotiations is affirmed by a resolution of the United Nations General Assembly on 8 December 1998. Such resolution on Principles and Guidelines for International Negotiations provides for principles and obligations for States to conduct negotiations, mainly including that negotiations should be conducted in good faith; States should adhere to the mutually agreed framework for conducting negotiations; States should endeavor to maintain a constructive atmosphere during negotiations and to refrain from any conduct which might undermine the negotiations and their progress; States should facilitate the pursuit or conclusion of negotiations by remaining focused throughout on the main objectives of the negotiations; States should use their best endeavors to continue to work towards a mutually acceptable and just solution in the event of an impasse in negotiations.[33]

In addition, just as mentioned above, on 1 September 2011, China and the Philippines issued a Joint Statement between the People's Republic of China and the Republic of Philippines, reiterating the commitment to settling their disputes in the South China Sea through negotiations. But, before negotiations could formally begin, the Philippines sent on 10 April 2012 a naval vessel of Del Pilar to the waters of China's Huangyan Island to seize Chinese fishing boats together with the Chinese fishermen on board, thus causing the incident of Huangyan Island. In the face of such provocations, China was forced to take responsive measures to safeguard its sovereignty. In June 2012, after several solemn representations made by China, the Philippines withdrew relevant vessels and personnel from Huangyan Island.[34] Thereafter, China once again proposed to the Philippine Government that the two sides restart the China-Philippines consultation mechanism for confidence-building measures. That proposal again fell on deaf ears. On 26 April 2012, the Philippine Department of Foreign Affairs delivered a Note Verbale to the Chinese Embassy in the Philippines, proposing

(32) *Supra* note (1), para. 46, pp. 7-8.

(33) N. Tanaka, K. Yakushiji and S. Sakamoto (Chief Editors), *Basic Documents of International Law 2014*, Toshindo, 2014 Edition, p. 881 (in Japanese); 田中則夫・坂元茂樹・薬師寺公夫編『ベーシック条約集2014』（東信堂、2014年）881頁。

(34) The State Council Information Office of the People's Republic of China, *supra* note (21), para. 113.

that the issue of Huangyan Island be referred to a third-party adjudication body for resolution and indicating no willingness to negotiate.[35]

It is thus obvious that China and the Philippines did not thoroughly exchange views and the previous exchanges of views regarding the South China Sea issue between the two countries did not concern the subject-matter of the Philippines' claims for arbitration, so the Philippines has no reason and right to unilaterally submit the so-called disputes for arbitration.

（III）　The Limitation and Wrongfulness of the Arbitral Tribunal in Issuing an Award on Historic Rights Just Based on the Convention

China enjoys sovereignty, sovereign rights and jurisdiction over South China Sea which are not totally according to the Convention, but also justified according to general international laws or customary international laws, the so-called Intertemporal Law, the relationship between historic rights and the Convention. The dispute of the Philippines' Submissions No. 1 and 2 concerns the source and scope of maritime rights enjoyed by the two countries in South China Sea area. The Tribunal holds that China's claim to historic rights, other rights and jurisdiction in South China Sea area beyond the limits of China's maritime zones as provided for by the Convention were superseded by the Convention, so such claim is incompatible with the Convention and without lawful effect in excess of the limits. Meanwhile, the Tribunal concludes that historic rights is general in nature and can be used to indicate any right including sovereignty,[36] because the Convention is an overall and comprehensive legal instrument.[37] In other words, the Arbitral Tribunal holds that the Convention superseded all rights based on historic rights. Are all contents of historic rights incorporated and absorbed in the Convention from the perspective of the system of the Convention? The answer is no.

Firstly, provisions of the Convention are compatible with historic rights, but the latter is superior to various rights in sea waters set forth in the Convention.

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(35)　*Supra* note（1）, para. 48, p. 8.

(36)　*Supra* note（4）, pp. 116-117 and 96, paras. 276-278 and 225.

(37)　For example, the Preamble of the Convention states that the States Parties to the Convention are conscious that the problems of ocean space are closely interrelated and need to be considered as a whole, and recognize the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans.

The historic rights were originated from the term of historic bays. The International Court of Justice put forward the concept of historic waters in Judgment of 18 December 1951 of Anglo-Norwegian Fisheries and confirmed that coastal states enjoy sovereignty not only in bays but also in other maritime areas adjacent to the coast.[38] Namely, the origin of historic rights is general international law. Meanwhile, the historic rights include exclusive rights (titles) and non-exclusive rights (rights to use). Although the Third United Nations Conference on the Law of the Sea conducted several consultations on issues such as historic bays and historic waters, but the final version of the adopted system of the Convention did not clearly provides for definitions, nature and elements of historic bays, historic waters and historic titles. However, there exist terms such as historic titles and historic bays in articles of the Convention, for example, Article 10, Article 15, Article 50 and Article 298 of the Convention. These articles of the Convention give general or exceptional regulations on historic rights without rejecting historic rights, so they are compatible.

As mentioned above, historic rights include not only exclusive rights but also non-exclusive rights. The rights enjoyed by coastal states in sea waters set forth in the Convention, especially in the EEZ and continental shelf, are mainly the sovereign rights and jurisdiction. The sovereign rights in the aforesaid sea areas in the Convention are mainly for exploring and exploiting, conserving and managing the natural resources within the sea waters, whether living or non-living, and with regard to other activities for the economic exploitation and exploration of the zone; the jurisdiction in the aforesaid sea waters are with regard to the establishment and use of artificial islands, installations and structures, marine scientific research, the protection and preservation of the marine environment.[39]

Indeed, the Convention has some but not exhaustive regulations on historic rights including traditional right of fishing and right of navigation, which are reflected in the aforesaid provisions (for example, Article 10, Article 15, Article 298), so the view that the connotation of historic rights is totally superseded by the Convention is untenable.[40] In other words, the Convention conferring the coastal

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(38) J. Yu, On Constituents of Historic Rights, *Chinese Review of International Law*, 2014 (2), pp. 37-38.

(39) For example, Article 56 and Article 77 of the Convention.

(40) *Supra* note (4), p. 111, paras. 261-262.

states with rights in sea waters conferred cannot deprive all rights enjoyed according to historic rights, for example, the exclusive jurisdiction enjoyed by coastal states over sea bed, sea floor and their subsoil resources according to historic rights.

Secondly, China exercises exclusive control over South China Sea islands according to historic rights. From the perspective of history, rights exercised by China in South China Sea areas mainly include the right of fishing and the right of navigation within the scope of historic rights. This is a fact. However, the Arbitral Tribunal has errors in fact finding that China did not exercise exclusive rights in such sea areas. For example, in August 1956, First Secretary Donald E. Webster of the United States institution in Taiwan made an oral request to China's Taiwan authorities for permission for the United States military personnel to conduct geodetic survey in Huangyan Island, Shuangzi Reefs, Jinghong Island, Hongxiu Island and Nanwei Island of Zhongsha Islands and Nansha Islands. China's Taiwan authorities later approved the above request. In December 1960, the United States government sent a letter to China's Taiwan authorities to "request permission be granted" for its military personnel to carry out survey at Shuangzi Reefs, Jinghong Island and Nanwei Island of Nansha Islands. China's Taiwan authorities approved this application.[41] China has also continuously opposed to resource exploitation of other countries within nine-dash line of South China Sea. However, in the interest of sustaining peace and stability in the South China Sea, China has exercised great restraint and not taken substantive blocking activities, which cannot be deemed as a foundation of China's failure to exercise jurisdiction over sea waters with nine-dash line of South China Sea.

Although the connotation of historic rights in South China Sea and the scope of sea waters claimed according to historic rights in domestic laws of China and relevant declarations of Chinese government are not clear enough, China's historic rights in South China Sea cannot be denied.[42]

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(41) Statement on Policy of Republic of China on the South China Sea (21 March 2016), p. 22. See also, The State Council Information Office of the People's Republic of China, *supra* note (21).

(42) For example, Article 14 of the Law of China on the Exclusive Economic Zone and the Continental Shelf (26 June 1998) states that the provisions in this Law shall not affect the historic rights that the People's Republic of China enjoys. Paragraph 1 of Article 2 of the

（Translated by Dr. Chen Ling）

【付記】
本稿は、上海社会科学院の金永明教授が早稲田大学に訪問学者として2017年７～８月に滞在した際の研究成果の一部である。金永明教授は、中国を代表する国際法学者の１人であり、南シナ海における中国の活動について国際法学の観点から多くの論稿を発表している。訪問学者として滞在中も積極的に日本の国際法学者との研究交流を行っていた。日本の国際法学会における一般的理解と異なる部分もあるが、中国の主導的学者の見解を知る貴重な機会になると考え、早稲田法学に寄稿していただいた次第である。本稿の日本語による簡約及びコメントは次号に掲載する予定である。

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Marine Environment Protection Law of China (23 August 1982) states that this law is applicable to internal waters, territorial sea, contiguous zone, EEZ, continental shelf of the People's Republic of China and other sea waters governed by the People's Republic of China. Article 3 of Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea (12 July 2016) states that China has territorial sovereignty and maritime rights and interests in the South China Sea, including, inter alia: i. China has sovereignty over South China Sea Islands, consisting of Dongsha Islands, Xisha Islands, Zhongsha Islands and Nansha Islands; ii. China has internal waters, territorial sea and contiguous zone, based on South China Sea Islands; iii. China has EEZ and continental shelf, based on South China Sea Islands; iv. China has historic rights in the South China Sea. For details of Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea, see http://world.people.com.cn/n 1 /2016/0712/c1002-28548370.html, last visited on 26 October 2018.