研究会報告

早稲田大学国際法研究会

The Challenges of South China Sea Arbitration to the Law of the Sea（2・完）

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III. South China Sea Arbitration Not Conducive to Stability or Development of Maritime Order, Especially the Law of the Sea

It can be inferred from the Philippines' claims for arbitration that the Philippines initiated an arbitration just for negating China's maritime rights in South China Sea claimed according to historic rights, degrading legal status and nature of maritime features controlled by China to deprive China's opportunity of claiming more sea waters according to its controlled maritime features and increasingly isolate those maritime features, finding that China's behaviors and activities in maritime features of Nansha Islands and adjacent waters encroach on the Philippines' rights enjoyed according to the Convention, thus seeking foundations for the Philippines to acquire more rights in South China Sea. In other words, the crucial point of South China Sea Arbitration initiated by the

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Philippines is that the Philippines selectively utilizes articles on EEZ of the Convention and other articles to shift the core of jurisprudential dispute in South China Sea, i.e. from ownership over maritime features in South China Sea to legal status of maritime features and legal effect of nine-dash line of South China Sea, to achieve its goal of circumventing the real dispute over territorial sovereignty, encroaching China's sovereignty over maritime features and maritime interests.[(39)]

(I) No Effect in the Law of the Sea Produced by Interim Award and Final Award of the Arbitral Tribunal

1. Contents of Interim Award and Final Award Issued by the Arbitral Tribunal

On Oct. 29, 2015, the Arbitral Tribunal issued an Award on Jurisdiction and Admissibility[(40)], mainly finding that the Tribunal was properly constituted in accordance with Annex VII to the Convention; China's non-appearance in these proceedings does not deprive the Tribunal of jurisdiction; the Philippines' act of initiating this arbitration did not constitute an abuse of process; there is no indispensable third party whose absence deprives the Tribunal of jurisdiction; the 2002 China-ASEAN Declaration on Conduct of the Parties in the South China Sea, the joint statements of the Parties referred to as in paragraphs 231 to 232 of this Award, the Treaty of Amity and Cooperation in Southeast Asia, and the Convention on Biological Diversity, do not preclude, under Article 281 or 282 of the Convention, recourse to the compulsory dispute settlement procedures available under Section 2 of Part XV of the Convention; the Parties have exchanged views as required by Article 283 of the Convention; the Tribunal has jurisdiction to consider the Philippines' Submissions No. 3, 4, 6, 7, 10, 11 and 13, subject to the conditions noted in paragraphs 400, 401, 403, 404, 407, 408, and 410 of this Award; a determination of whether the Tribunal has jurisdiction to consider the Philippines' Submissions No. 1, 2, 5, 8, 9, 12, and 14 would involve consideration of issues that do not possess an exclusively preliminary character, and accordingly reserves consideration of its jurisdiction to rule on Submissions No. 1, 2, 5, 8, 9, 12 and 14 to the merits phase; the

(39)　See F. Ying and W. Shicun, *Overall Description of South China Sea Issue and Nansha Disputes*, 2016, p. 65.

(40)　See *The Republic of the Philippines v. The People's Republic of China, Award on Jurisdiction and Admissibility*, 29 October 2015.

Tribunal directs the Philippines to clarify the content and narrow the scope of its Submission 15, and reserves consideration of its jurisdiction over Submission No. 15 to the merits phase; the Tribunal reserves for further consideration and directions all issues not decided in this Award.[41]

On July 12, 2016, the Permanent Court of Arbitration issued an final award of South China Sea Arbitration.[42] The so-called final award finds in total favor of the Philippines and even rule in its favor beyond its claims by negating China's position and proposition in South China Sea and thus causing serious damage to China's rights and interests in South China Sea. This award has aroused severe criticism and disputes due to the obvious lack of impartiality and reasonableness. The Tribunal's final award includes the following two aspects: (1) In relation to its jurisdiction, the Tribunal finds every Submission of the Philippines is a dispute related to the Convention, so it has jurisdiction to consider these submissions. (2) In relation to the merits of the Parties' disputes, the Tribunal finds as follows: Firstly, China has no legal basis to enjoy historic rights in resources of sea waters within nine-dash line (that is dotted line of South China Sea) in excess of limits of China's maritime entitlements under the Convention; Secondly, all maritime features of Nansha Islands (including Taiping Island, Zhongye Island, Xiyue Island, Nanwei Island, Beizi Island and Nanzi Island) which are above water at high tide are legally rocks that generate no entitlement to an EEZ or continental shelf. In addition, the Tribunal holds that the Convention does not provides for that a series of islands such as those of Nansha Islands may jointly generate entitlements to sea areas. Thirdly, China has, through blocking the Philippines' petroleum exploitation in Reed Bank, attempts to prevent fishermen from the Philippines from engaging in fishing within its EEZ, failure to prevent fishermen from Chinese flagged vessels from engaging in and even protection of their fishing within the Philippines' EEZ at Mischief Reef and Second Thomas Shoal, construction of artificial islands, installations, and structures at Mischief Reef without the authorization of the Philippines, encroached on the Philippines' sovereign rights over its EEZ and continental shelf. In addition, the Tribunal considers that, in sea waters adjacent to Huangyan Islands, China has unlawfully limited and prevented fishermen from the Philippines from engaging in traditional fishing; with respect to the

(41) *Ibid.*, p. 149, para. 413.

(42) See *supra* note (4).

protection and preservation of the marine environment, the Tribunal concludes that China's construction of artificial islands, installations, and structures has caused harm to marine environment and China failed to fulfill its obligations of preventing fishermen from Chinese flagged vessels from fishing in a manner that is severely destructive of environment and harvesting of endangered species. Fourthly, the Philippines requested the Tribunal to find that China's certain conducts, especially land reclamation and building large artificial islands in Nansha Islands after initiation of this arbitration, illegally aggravated and extended the Parties' dispute. Regarding this, the Tribunal finds that China has breached its obligations, as a party to the dispute, not to allow any step of any kind to be taken which might aggravate or extend the dispute during such time as dispute resolution proceedings were ongoing.[(43)]

2. Award of the Arbitral Tribunal Damaging Authority of Arbitration Institution and Imposing No Binding Force on China

From the provisions of the system of the Convention, although China does not appear before the Arbitral Tribunal, the final award is binding upon China. For example, Article 9 of Annex VII to the Convention states 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. Article 11 of Annex VII states that 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. Article 12 of Annex VII states that any controversy which may arise between the parties to the dispute about 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. For this purpose, any vacancy in the tribunal shall be filled in the manner provided for in the original appointments of the members of the tribunal; any such controversy may be submitted to another court or tribunal under Article 287 by agreement of all the parties to the dispute. Article 296 of the Convention states

(43)　*Ibid.*, pp. 471–477, para. 1203.

that any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.

However, against the background that China insists on the position of non-acceptance, non-participation and non-recognition from beginning to end, the award issued by the Arbitral Tribunal is obviously ineffective in resolving South China Sea disputes and developing the law of the sea because such award is not recognized by China and thus will not be enforced.[44]

Generally speaking, international judicial or arbitration organs mainly have the following three functions: the first one is the dispute settlement.; the second one is the interpretation or application of laws; the third one is the promotion of legal order.[45] If the award of South China Sea Arbitration is evaluated in terms of the three functions of international judicial or arbitration organs, the following conclusions can be made.

In the first place, the Arbitral Tribunal cannot resolve core disputes between China and the Philippines（disputes concerning territorial sovereignty over maritime features of Nansha Islands and maritime delimitation）because it has no jurisdiction over them; meanwhile, as for the so-called subsidiary disputes between China and the Philippines, because submissions made by the Philippines are not real disputes between China and the Philippines, the award plays no role in resolving disputes and settling differences and is of no effect under the situation of lack of China's recognition. In other words, the so-called award issued by the Arbitral Tribunal cannot play a role in dispute settlement.

In the second place, regarding the function of interpretation or application of laws, because China did not appear before the Arbitral Tribunal nor officially defend the case, the Tribunal cannot comprehensively clarify and collect all facts, thus cannot make correct decisions but just satisfy itself in fact finding and application of law. Furthermore, the Arbitral Tribunal went beyond its jurisdiction such as determination of the status of Taiping Island, delimitation in disguise and stringent interpretation of the regime of islands. These go beyond the function of interpretation and application of laws of the Arbitral Tribunal and are certainly of no effect.[46]

（44）　See D. Tamada, *Legal Effects of International Courts Judgment*, Yuhikaku Publishing Co., Ltd., 2012 Edition, p. 148（in Japanese）; 玉田大『国際裁判の判決効論』（有斐閣、2012年）148頁。

（45）　*Ibid.*

Finally, as for the function of promoting legal order, although an arbitral award is only binding upon parties to this arbitration, an international case definitely plays an role in promoting refinement of legal system during the development of the law of the sea, so it is still greatly questionable whether such award of the Tribunal of stringent interpretation of the regime of islands, including the usage of the term of high-tide features and recognition or explanation of the regime of island without involvement of State practices, determination of non-existence of islands in Nansha Islands and denial of legitimacy of China's historic rights in South China Sea can be cited by subsequent similar judicial cases in international community and national practices. In other words, the Arbitral Award is of no effect in promoting international law including the law of the sea, not to mention maintenance of the order of the sea including South China Sea, so such award does not play a role in promoting legal order at all.(47)

According to Article 296 of the Convention, the content within binding force is definite and the final decision of a tribunal is binding upon parties. The limitation of the aforesaid principle of binding force is that such principle is only applicable when the question at issue is the same to the dispute settled by the tribunal.(48) The sameness of the question at issue is mainly reflected in the

(46)　The general reasons for invalidity of a judgment of a court or an arbitration award mainly include ineffectiveness of agreement, beyond jurisdiction, lack of foundations for a decision, corruption of arbitrators, serious breach of basic procedural rules. See, *ibid.*, p. 55. The correcting procedure for a wrong judgment of a court is a revision (re-trial) which is based on the factors as follows: wrong fact finding in original judgment, and discovery of a new fact. The details are set forth in Article 61 of Statute of the International Court of Justice; while according to Article 12 of Annex VII to the Convention, any controversy which may arise between the parties to the dispute about 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.

(47)　For example, Item 4 of Paragraph 1 of Article 38 of Statute of the International Court of Justice states that the Court shall apply, subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Article 60 states that the judgment is final and without appeal.

(48)　See G. Shengxi, "On Issues of Inadmissibility of South China Sea Arbitration between China and the Philippines, Invalidity of the Arbitral Award and No Jurisdiction of the Arbitral Tribunal", *China Oceans Law Review*, 2015 (2), pp. 12-13.

following aspects: the parties are the same, the claims are the same and causes are the same.[49] It can be seen from the above-mentioned analysis that issues in question between China and the Philippines are not the same, so the award of the Arbitral Tribunal is obviously not binding. Meanwhile, the Arbitral Tribunal did have defects in objectively and comprehensively facts finding and application of laws and there is no determining standard or remedy mechanism to ensure rights and interests of the non-participating party, which is also an important reason for China not to accept the award.

（II）Adverse Influences of Award of South China Sea Arbitration

As discussed above, the Philippines' unilateral initiation of South China Sea Arbitration has brought adverse influences to the system of the Convention and South China Sea disputes themselves, done no good to the development of the law of the sea, but resulted in many negative influences, thus in incompliance with legal functions of the Convention.

Firstly, it seriously impairs the authority and integrity of the system of the Convention, inclusive of undermining the legislative purposes and objectives of the Convention, encroaching on States' rights in selecting means of dispute settlement, especially resulting in unpredictability of jurisdiction over disputes set forth in exclusionary declarations made by States and thus making States lose confidences in the system of the Convention. Meanwhile, there will emerge disputes such as relationship between historic rights and the Convention, new elements of islands in international community.

Secondly, it will influence the original function of bilateral and multilateral instruments in deferring disputes. The Arbitral Tribunal narrowly interpreted a bilateral or multilateral 'agreement' as a legal agreement, or the Tribunal holds that the DOC was not intended by signatory states to be a legally binding agreement with respect to dispute resolution but rather an aspirational political document. For this, States' willingness to reach a consensus through such political means will be decreased and trust-building measures between States cannot be improved and implemented, thus making settlement of South China Sea disputes harder.[50]

Thirdly, other states will follow the Philippines to initiate arbitral or judicial proceedings against China concerning South China Sea and East China Sea

（49）See Tamada, *supra* note（44）, p. 39.

（50）See *supra* note（40）, pp. 82-88, paras. 212-226.

issues in order to seek more maritime interests and rights, thus resulting in destruction of maritime order, complication of relevant disputes and then encroaching China's national sovereignty and rights.

Fourthly, some countries, especially the USA, will take more actions and conduct more activities in South China Sea according to the so-called final award, including exercising the so-called activities of freedom of navigation independently or together with other countries（1+X）, to impose more security threats on China in South China Sea and increase China's difficulty in response, thus resulting in consistent predicament in legal response in South China Sea and armament race.

Fifthly, the award that the Arbitral Tribunal went beyond its jurisdiction to incorporate Meiji Reef, Ren'ai Reef and Lile Shoal into the EEZ of the Philippines is illegal and a real delimitation in disguised form, damaging rules on judicial or arbitral procedures for maritime dispute settlement established by the Convention and resulting in arbitrariness and disorder in maritime dispute settlement.

IV. Epilogue

South China Sea Arbitration is the first arbitration case concerning maritime disputes responded by China after its accession to the Convention. It is predictable that China will face similar cases. It is not deniable that, in the South China Sea Arbitration maliciously initiated by the Philippines, the arbitrators took advantage of their functions and powers as well as the systematic defects of the Convention, beyond and expanding their jurisdiction, rendered an illegal award with serious errors in facts finding and application of laws, which cannot resolve disputes or play a role in settling differences. To the contrary, such award complicates South China Sea disputes, impairs the integrity and authority of the Convention, deprives states parties to the Convention of the right to choose means of dispute settlement of their accord, unavoidably undermines the principles of international law and systems established after the World War II and encroaches on China's rights and interests in South China Sea, therefore, the policy and position of non-acceptance, non-participation and non-recognition of Chinese government are based on international law with the aim to protect the integrity and authority of the Convention, thus should be respected.

Therefore, China shall take South China Sea as an opportunity to not only systematically research the dispute settlement mechanism of the Convention, but also propose opinions and suggestions on correction of systematic defects in the Convention for contributing to enrichment and improvement of the system of the Convention.

（Translated by Dr. Chen Ling）

【付記】

本論文の概要と参考文献は下記の通りである。

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（概要）

南シナ海仲裁裁判の海洋法に対する挑戦

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フィリピン政府は、中国政府が反対の立場にたっているにもかかわらず、これを無視し、南シナ海問題に関して一方的に提訴を行った。国連海洋法条約附属書VII の下で設立された仲裁裁判所は、管轄権を認定し、その地位及び国連海洋法条約体系の制度的欠陥を利用することで、自身の権限を拡大し、事実認定と法の適用などにおいて重大な誤りのある違法な判決を行った。当該判決は海洋法の紛争解決制度の権威性と統一性を害するだけでなく、国家が自主的に紛争解決方法を選択する権利をも侵害することになり、また国家による選択的除外事項の範囲が予見不能なものになることで、出廷しない国家の権益を守ることができないような結果を招いた。こうした判決は、南シナ海問題を一層複雑にさせ、その解決も困難にしてしまっている。当該判決が海洋法の体系を混乱させ、その権威を失わせることで、海洋法の発展を促進するどころか、海洋法の発展を阻害することにもなる。換言すれば、南シナ海仲裁裁判は国際裁判の基本機能を深刻に侵害しているといえるのである。このことは、以下の 3 つの場面において具体的に現れている。第一の場面は、「権原取得紛争」（entitlement dispute）を解決できない点に現れる。南シナ海仲裁判決は、中国とフィリピンの両国間に存在する紛争の実質部分を解決できないため、中国が仲裁判決に反対し続ける状況の中では、両国間に今なお横たわる問題を解決できない。このことからも、仲裁裁判に付託され、裁判所の決定した事項は両国間に存在する真実の紛争を対象としたとはいえないのである。第二の場面は、法の解釈あるいは適用に関する裁判所の権限を踰越している点に現れる。歴史的権利に関する定義を含め、仲裁裁判所は国連海洋法条約の制度のみを考慮し、一般国際法の内容に言及していない。また、島の制度に関する厳格な判断をしたことによって、裁判所は、法の解釈の範囲を超えた

立法的役割を果たしたといえる。第三の場面は、法秩序の発展の促進機能を発揮できていない点に現れる。裁判所は、島の要件を含め、現実の国家実行と異なる判断をしているため、本判決が後の事件においても先例として受け入れられる内容を有しているかどうかは確実でない。さらに、事件を付託するための条件に関する基準が低すぎるため、附属書 VII の仲裁事件の増加が危惧される。また、選択的除外事項を狭く解釈したり、領域主権・海洋境界画定・権原取得と様々な論点が混在する紛争を技術的に分離したりするなど、本件における仲裁裁判所の判断内容は、司法裁判または仲裁裁判の拡張主義の傾向を生み出し、好ましからざる影響を生み出す可能性がある。

（参考文献）

本稿に示された金永明教授の見解は、当然、学者としての個人的な見解である。しかしながら、中国の代表的な国際法学者の 1 人である金永明教授の見解を知ることは、中国側の理解・主張を知るうえで重要な参考資料になると思われる。なお、中国国際法学会の名において南シナ海仲裁判決に関する議論を行っている論文集としては下記のものを参照していただきたい。

Chinese Society of International Law, “The South China Sea Arbitration Awards: A Critical Study”, Chinese Journal of International Law, Volume. 17, Issue 2（2018）.

See at https://academic.oup.com/chinesejil/article/17/ 2 /207/4995682

国際法の場合、学者の意見であっても、出身国の政府の見解を踏まえた法解釈を行うことは稀ではない。しかし、それは政治的主張とは異なるものであり、法解釈の技法・方法論を共有することを通じて、議論を法律化していく努力、すなわち、国際法対話が何よりも重要になる。

本稿では、日本の国際法学者による研究業績が引用されているが、主に海洋法や国際裁判の一般的文脈におけるものに限定されている。他方で、日本の学会においても、これまで、南シナ海仲裁判決に関する多くの論稿が上梓されてきた。ここでは紙幅の都合もあり、わが国の議論をリードし、また金永明教授の指導教授でもあった坂元茂樹・同志社大学教授の論稿の一部を下記に紹介するにとどめる。

坂元茂樹「九段線の法的地位―歴史的水域と歴史的権利の観点から―」松井芳郎・富岡仁・坂元茂樹・薬師寺公夫・桐山孝信・西村智朗編『21 世紀の国際法と海洋法の課題』（東信堂、2016年）164-204頁。

Shigeki Sakamoto, “Legal Status of the Nine-Dash Line: Historic Waters or Historic Rights”『同志社法学』第69巻 3 号（2017年）1-51頁。