

Follow-up on the South China Sea Arbitration Case

The South China Sea Arbitration Case: a Political Farce In a Legal Cloak

By Liu Yu, Senior Reporter of Outlook Weekly

The temporary Arbitral Tribunal on the South China Sea arbitration case filed by the Philippines on July 12th, 2016 made the so-called final award, which is illegal and invalid. In this regard, the Chinese side has repeatedly stated that the Philippine Aquino III government unilaterally filed the arbitration case that is against international law, that the provisional Arbitral Tribunal has no jurisdiction over the case, and that China neither accepts, nor participates, nor recognizes it. Many experts have emphasized in interviews that the South China Sea arbitration case is actually a political farce in a legal coat, and that the award by the Arbitral Tribunal was in disregard of facts and lawful ruling, thus, without any legal effect. These experts and scholars express their support to China's position on the South China Sea disputes, while calling for dialogue and consultation to resolve the issue of the South China Sea disputes peacefully.

A political farce cannot cover up sinister motives

The Philippines, regarding the South China Sea disputes, was unwilling to remain idle, but ready to make wiggling. Since the end of the 1970s, the Philippines has continued illegal occupation of and nibbling at through force a dozen islands of the South China Sea Islands, and launched large-scale construction projects and been busy at putting up military installations on some islands, but also constantly taken provocative acts at the sea. So the Philippines in the South China Sea disputes is not the victim, but the perpetrator, and during the Aquino III government period had repeatedly attacked China on the disputes over Huangyan Island, Ren'ai reefs and others. As the conspiracies failed one after another, the Aquino III government, acting in such a way of "a thief crying for stopping a thief", deliberately distorted the law, filed the South China Sea arbitration case to the International Court of Arbitration in the Hague, the main

motivations are as follows:

First, to utilize the international community's "sympathy for the weak" to put pressure on China. Because of the huge gap in strength between the Philippines and China, and Aquino III government put on a pitiable look to attract the international community's "sympathy", then to get the "leverage" effect. In the eyes of Aquino III, the arbitration case can be both "offensive and defensive", a measure to get initiatives from both sides of the coin. If he can win, the Philippines can take this as an excuse to launch a war of public opinion, further extends occupation of China's territorial Islands and waters, and can also attack China as the "rules breaker", "status destroyer" and "military expansionist". If the Philippines eventually loses, it can play a "Sadness" card in the international community, discredit China and slander China to suppress the Philippines in order to vilify the image of China.

Second, to divert the domestic attention in the Philippines so as to alleviate the pressure of its own incompetence. Coming to an end of office, the Aquino III government, because of corruption and other graft issues, witnessed rising opposition of the people on the island, coupled with the rise of the opposition forces on some local areas, the country began to run into a serious unrest. In order to divert public attention, to cover up various contradictions existing at home, Aquino III conducted a series of political gambling, created a so-called "China threat", and acted tough, with intention to challenge the Chinese in order to cater to the domestic populist sentiment.

Third, to meet the U.S. Asia-Pacific rebalancing strategy. The Philippines was once a colony of the United States, and currently is an important U.S. ally in the Asia-Pacific region, there are a lot of common strategic interests between the two countries. Since 2009 the United States dished out the "Asia-Pacific rebalancing" concept, the Aquino III government took the initiative to play a

"pawn" role, served as an "agent" for and opened the Subic Bay and other strategic ports to the United States. In order to show loyalty to the United States, Aquino III also understood well what the U.S. government intends by the Asia-Pacific rebalancing strategy, took an active step forward to challenge China, then directly filed the South China Sea arbitration case, became a cat's paw, and stood behind the United States to gain profits, and awaited a chance to further provoke against China.

Aquino III doings also resulted in a lot of criticism inside the Philippines. R. Duterte, Philippine new president, basically gives up the Aquino III diplomatic approach, emphasizes that his government, after announcement of the arbitration award, will not make a provocative statement, and is willing to have direct dialogues and bilateral consultations with China

This Arbitration process in essence is an act of power abuse

The essence of the Philippine arbitration case is a ultra vires, power expansion and power abuse, lack of legitimacy, the Arbitral Tribunal has no authority to make a ruling on the Nanhai- related issues, the main reasons are the following:

First, an Arbitral Tribunal shall have no authority to accept a case involving a sovereignty dispute. According to the relevant provisions of the "United Nations Convention on the Law of the Sea" (referred to as "the UN Convention"), the International Court of Arbitration in the Hague can only accept a relevant case wholly related to marine disputes, but unrelated to a sovereignty dispute case. However, the essence of the Philippine arbitration case involves territorial sovereignty, so the international arbitration court has no authority to accept it.

Second, some ten years ago, China had made a Statement of Exclusion. China is one of the main parties to the UN Convention, officially joined in 1996, and strictly "fulfills its rights and obligations in terms of the UN Convention", and in 2006 on the basis of the provisions of Article 298 of the UN Convention, made a clear statement to exclude the issues involved in maritime delimitation disputes from the compulsory dispute settlement procedures such as arbitration. Therefore, the government of Aquino III, who filed the compulsory arbitration case, has violated the basic principle of "estoppel" in international law, and the Arbitral Tribunal has no jurisdiction what so ever over the arbitration case filed by the Philippines.

Third, the Philippines violates the basic

principles of international law, the priority for the two sides to negotiate. The international documents such as the UN Charter, "Declaration on Principles of International Law" identify the bilateral consultation and negotiation as the primary means of peaceful settlement of international disputes, "the UN Convention" also requires the parties to resolve maritime disputes through negotiations first. Both China and the Philippines in their joint statements, joint communiqués and other bilateral agreements express agreement to resolve the disputes between them through negotiations. But the Philippines's unilateral recourse to the third party to solve the problem, which is clearly contrary to the basic spirit of consultation first.

Fourth, contrary to the basic spirit of the "presence of both sides" simultaneously in the international law. In line with the relevant spirit of international law, the development of any arbitration case must be made by both parties in presence at the same time in order to carry out a substantive discussion. Before announcement of the arbitration award, the consent of both parties also must be obtained, hence ensuing the lawful enforcement. But because the Philippine arbitration case itself is a violation of the spirit of international law, China, certainly, cannot accept it, thus taking the position of "neither involving, nor accepting, and nor recognizing it". Without China's participation in the case, the ruling by the Arbitral Tribunal on the issue is completely void and invalid, cannot produce any binding force on the Chinese side.

Fifth, the historical facts cannot be constrained by the laws to be enacted later on. Since ancient times, the South China Sea is China's territorial waters naturally, not only can be found in the Chinese historical records, the historical maps albums or textbooks of the United States, Japan, Vietnam, the Philippines and other countries also have a lot of evidence. Thus Chinese sovereignty over the South China Sea Islands and adjacent waters has the historical basis and beyond all dispute, has a solid legal basis, and the dotted-line had been fully formed as early as in the late 1940s. But the "UN Convention" was reached preliminarily in 1982 by various countries, according to "actual fact" principle of international law, as the "UN Convention" later adopted does not have the authority and qualification to rule the legitimacy of the dotted-line emerged much earlier.

So from any point of view, the Arbitral Tribunal has no jurisdiction over the arbitration case, whose behavior of making an award, which is

illegal and invalid, is completely contrary to the spirit of the "UN Convention", and is only a political farce in a legal coat. Thus, China does not involve in, nor accept the arbitration, does not recognize nor enforce the ruling, but defends its legitimate rights and interests on the basis of international law and also maintains the integrity and authority of the "UN Convention".

The ruling seriously damages the international rule of law

William Jones, an American expert on international issues, and Global Strategy Information magazine Washington bureau chief believes that as China's government has repeatedly stated, the temporary Arbitral Tribunal has no right to speak on the issue of territorial sovereignty, ... and this interim Arbitral Tribunal cannot make a ruling on the territorial sovereignty, which is completely beyond the scope of international law. ...From the beginning, the whole arbitration is to blame China for not complying with international law, or ask it to completely abandon the territorial claims. ...to put pressure on China, but also do everything possible to maintain the position of the Philippines. ... However, the Philippines new government may adopt a different strategy, because the new president has expressed the hope through negotiations to resolve the dispute, unlike his predecessor, Aquino III.

Heinz Coffman, a retired professor of law at University of Potsdam in Germany, supports Chinese stance on the South China Sea issue, saying that the Arbitral Tribunal established upon the Philippine unilateral request is unreasonable,because according to the reached agreement between the two sides, both countries promise by negotiation to solve the emerging dispute. ...The provisional establishment of the Arbitral Tribunal only leads to draw a conclusion that some countries want to cook the situation, so that the third party have the opportunity to get involved and to impose pressure.

Russian satellite news network military observer V. Baranets believes that the case of the South China Sea arbitration is a political farce dressed in the cloak of the law. ...The award of the provisional Arbitral Tribunal is obviously affected by the United States, and China should not accept it. ... that the South China Sea issue cannot be resolved by the legal system represented by the temporary Arbitral Tribunal. If the United States continues to interfere in regional affairs,the situation in the South China Sea once becomes

tense or even chaotic, the stability and development of the Asia-Pacific region and the global political and economic situation at large is bound to be affected.

China wins a growing support

A just cause enjoys abundant support. Regarding the South China Sea disputes, the Chinese position in the Philippine arbitration case has won expression of support to China by more than 70 countries and regional leaders in the world. Since ancient times, the South China Sea is China's inherent territory, cannot be separated, neither can it be easily denied by an individual arbitral ruling. China is unlikely to accept any imposed scheme, but the result of the arbitration is just a piece of printed paper. At present, the constructive attitude to properly control differences, temporarily hold the dispute, to start a dialogue as soon as possible, to promote the South China Sea a sea of cooperation, a sea of peace and a sea of friendship. Cambodian Prime Minister Hun Sen said the outcome of the arbitration is resulted from a political motivation,.. and will have a negative impact on the ASEAN region.

Various sides agree to China's proposal to adopt a negotiated settlement of the dispute. General Secretary of Equatorial Guinea ruling party Osa said that related to territorial and maritime disputes, the two sides concerned should, based on the Charter of the United Nations, and through bilateral consultations and negotiations, reach a peaceful settlement within the scope of international law.

In violation of the "UN Convention", contrary to the "Declaration on the Conduct of the Parties in the South China Sea", and undermining the stability of international relations --- international legal experts denounce the Philippine arbitration case illegal and unreasonable. Abraham Sofaer, former legal adviser to the U.S. State Department said that the international judicial and arbitral institutions ... should maintain the respect for limits of the international treaties and reservations by a sovereign state, ... but the Arbitral Tribunal had announced jurisdiction over the Philippine "man-made needs", ... which damaged credibility of the international judicial and arbitral institutions. Chris O'Mosley, former legal adviser to the Foreign Affairs Department of the United Kingdom, pointed out that the "Declaration on the Conduct of the Parties in the South China Sea" is the official document of common negotiations, ... the Philippine side, in defiance of commitment to the

"Declaration", and insisting on an arbitration, violates the principle of good faith.

The South China Sea would have been stable without storms. Multinational experts and scholars have criticized the trick played by the countries concerned, called for the return to negotiations and consultations to resolve the dispute. American experts on international issues, the Global Strategy Information journal Washington bureau chief William Jones argued that the temporary Arbitral Tribunal established at the Philippine unilateral request can only lead people come to the conclusion... that some countries think things will deteriorate, allow the third party to have the opportunity to get in. ... In order to exert pressure, the U. S. warships are also constantly in the waters to 'show muscle', ... the main reasons to drive the situation gradually tense.

S. Dujarric, a spokesman for UN Secretary General said that the Secretary General has urged all parties, through dialogue, to resolve disputes in a peaceful and friendly manner, and ... has always hoped ASEAN and China continuously to conduct consultations in the framework of the "Declaration on the Conduct of the Parties in the South China Sea" and ... enhance mutual understanding between the parties. Mora, vice president of the Party of the European Left, said that the South China Sea issue should be resolved directly between the two sides concerned, ...the settlement of disputes should not be interfered by external forces, ...to internationalize the South China Sea disputes is a serious mistake. International Court of Justice former judge A. Koroma stressed that a peaceful settlement of a dispute through negotiations is the practice of international law.... the peaceful settlement of the conflict of interests and friendly co-existence among countries around the South China Sea are the best way to solve the South China Sea disputes.

Heinz Coffman, a former law professor at University of Potsdam in Germany, stressed the South China Sea arbitration case is a political farce dressed in the law cloak, ... if the situation in the South China Sea becomes tense and chaotic, stability and development in Asia-Pacific region and political and economic situation in the world at large will be affected. Pakistan political strategist

Ali said that China insists on the development of friendly and cooperative relations with all neighboring countries, including the Philippines, ... if the two sides can carry out a direct dialogue, the results may be better.

Canada Free Press correspondent in the UN Joseph Klein believes that the "UN Convention" clarifies that it would not end the historic sovereignty, ... the Arbitral Tribunal actually went along with the Philippines to bypass the bilateral negotiations, but the bilateral negotiations are repeatedly promised by both sides. ... The temporary Arbitral Tribunal behaved autocratically, and undermined the process to resolve a dispute through diplomacy and negotiations, served its own narrow interests and damaged the national sovereignty and international law by its power abuse.

Catherine Merton, East Asia Studies China expert of the University of Sheffield's told reporters that all China's actions in the South China Sea are not for the purpose of implementing the so-called marine hegemony, ... but continue to maintain the historic rights in the South China Sea, and safeguard her legitimate rights. ... She believes that arbitration has never been the only way to solve the dispute, and the parties involved should continue to work hard to maintain continuous implementation of the Declaration on the Conduct of the Parties in the South China Sea.

In summary, the so-called South China Sea arbitration case is the product created and cooked by the Philippines, manipulated by the United States behind the scenes, and purposely cooperated by the temporary Arbitral Tribunal, and is a political farce, thus it currently has not enjoyed popular support, and there are leaders of more than 70 countries and regions clearly supportive of China position in Philippines-filed arbitration case. No matter how the situation changes, China is always committed to maintaining peace and stability in the South China Sea region, adheres to the peaceful and friendly consultations and negotiations to resolve the disputes, and promotes a Sea of cooperation, a Sea of peace and a Sea of friendship in the South China Sea with a constructive attitude to properly manage differences through dialogue and consultation.

Why the South China Sea Arbitration Case Undermines the World Marine Order

By Ye Qiang, China Research Institute of South China Sea

There are various indications that the so-called Arbitral Tribunal on the South China Sea disputes arbitration has become a tool for a few Western countries such as the United States, Japan and some others outside the region to play political games with China and challenge China's inherent rights and legitimate claims in the South China Sea, and it is generally predicted that the Arbitral Tribunal would support some of the Philippine appeal demands. However, on July 12, 2016, the announced so-called final ruling shocked the international community. The Arbitral Tribunal, without authorization, expanded its authority to infringe on sovereignty and territorial rights of China, having not only ignored the basic premise stipulated in the UN Convention on the Law of the Sea (UN Convention) that the state party sovereignty should be properly considered and protected, but also completely departed from the purpose underpinned by the UN Convention to promote the peaceful settlement of disputes and seriously damaged the integrity and authority of the UN Convention, and undermined the world marine order.

Having ignored China's position and imposed the arbitration

On January 22, 2013, without a consultation with the Chinese government, and in the absence of China's consent, the Philippine government, in accordance with Article 287 and Annex VII of the UN Convention, unilaterally pushed the mandatory arbitration procedure on the South China Sea dispute between the two countries.

Although the Philippines cleverly packaged its appeal demands into the dispute the UN Convention can have the interpretation and application, but its core is still the disputes on ownership of the territory and maritime delimitation. A territorial sovereignty dispute does not fall into the scope of adjustment by the UN Convention, and the maritime delimitation

dispute is excluded by the Chinese government from using mandatory arbitration procedures in its Statement 2006.

At the same time, China and the Philippines have reached a consensus on settlement of the dispute through negotiations and consultations. The two countries signed a number of bilateral documents during the years 1995-2011, which all clearly define the South China Sea disputes between the two countries should be resolved through friendly negotiations and consultations. In addition, Article 4 of the Declaration on the Conduct of Parties in the South China Sea (DOC) signed between China and ASEAN also clearly stipulates that the relevant South China Sea disputes should be resolved through negotiations and consultations by the parties directly involved. On the basis of the principles of international law that an agreement must be complied with and an estoppel be prohibited, the Philippine act of unilaterally filing the arbitration case not only broke its commitment, but also violated the principles of international law.

However, the so-called temporary Arbitral Tribunal, which is established at the Philippine unilaterally request was still pushing the procedure hard. In July 2015, the Arbitral Tribunal opened the hearing on the case's jurisdiction and admissibility, and made a ruling on the issue on October 29th of the same year, having identified the Philippine 15 claim demands were explanatory and applicable to the UN Convention, and not involved in territorial sovereignty and maritime delimitation, negated the exclusive effect of jurisdiction of the Arbitral Tribunal by the Chinese government Statement 2006, pointed out that the DOC has no legally binding, not recognized settlement of disputes through negotiations and consultations, and emphasized that the Philippines's conduct did not constitute a abuse of power and had performed its duty to exchange views already. This means that the Chinese hope that the Arbitral Tribunal makes

an impartial ruling, and terminates this arbitration case at the trial stage regarding the jurisdiction was shattered.

The Arbitral Tribunal was still forcing the arbitration procedures, which is a malicious use of the loopholes and ambiguity of some relevant provisions in the UN Convention, and a show of imposing its authority above the law.

The UN Convention does not necessitate a conclusion of a special agreement as the necessary condition for launching arbitration proceedings. This means that any State party to the UN Convention may at any time be pushed into the arbitral proceedings by another state party, regardless of the willingness of the state concerned. The arbitral mechanism designed by Annex VII of the UN Convention provides convenience for the rapid and efficient handling of maritime disputes, but can also become a tool for some individual countries to achieve political ends by abusing the arbitral procedures.

Meanwhile, formation of the Arbitral Tribunal is not affected by only one party's participation. In the case of both parties to a dispute are sovereign states, an Arbitral Tribunal shall be composed of five arbitrators. In the circumstance of both parties involved in the arbitration, each party shall appoint its arbitrator, and the agreement shall be reached to appoint another 3 arbitrators. However, if one party does not get involved, it is unable to reach an agreement on the appointment of arbitrators, then according to the provisions of the UN Convention, the other party may request chief of the International Tribunal of the Law of the Sea to appoint arbitrators. This means that, as long as one related-party insists a request, the other party refuses to participate in the arbitration and to appoint an arbitrator, an Arbitral Tribunal can still be set up. The UN Convention also stipulates whether an Arbitral Tribunal shall have jurisdiction over a case is its own decision. Even if one party does not show in court, as long as the other party requests, an Arbitral Tribunal may continue to hear the case and make a ruling.

One thing that should never be forgotten, however, is that sovereign states are the founders, explainers, users and revisers of the international law. The dispute settlement body, which can be understood as a judiciary organ, must perform duty under the framework of international law in accordance with laws concerned. In accordance

with law means a comprehensive and objective interpretation and application of the principles and rules of international law, safeguarding integrity of the purpose of legislation and the system of international law, and maintaining the stability and impartiality of the international order.

The UN Convention is concluded at the third United Nations Conference on the Law of the Sea after 9-year negotiations by delegates of more than 150 countries and regions. At the fourth stage meeting of 1975, the delegates, targeted at maritime disputes unable to be settled after non-mandatory procedures such as negotiations and mediations, unfolded discussions on whether to apply compulsory dispute settlement procedures and the application scope of this procedure. The vast majority of countries adopted a cautious attitude, and believed that the mandatory procedures should be restricted by a number of conditions and the respect of the will of a state party should be put in the first place. This stance is taken up by the adopted UN Convention text, such as Articles 280 and 281 prioritize the respect of parties to choose a method of dispute settlement; Article 298 gives parties the rights to exclude from using compulsory settlement mechanism on some dispute subject matters. Therefore, in the use of compulsory arbitration mechanism, an arbitral tribunal actually should have a higher standard of jurisdiction and ruling.

The reckless expansion of the jurisdiction runs counter to the purpose for concluding the UN Convention

Both China and the Philippines are the parties to the UN Convention, and are bound by the Part XV of the UN Convention, i.e. the settlement of a dispute. And this section is subdivided into three paragraphs, and the logical relationship between them is elaborated clearly in the Article 286, i.e. submitting for the mandatory dispute settlement procedures in the second paragraph must be subject to the general provisions of the first paragraph and the limitations and exceptions of the second paragraph applicable for the third paragraph. In other words, if the dispute settlement methods the parties concerned voluntarily choose fail in the first paragraph, but neither within the third paragraph exclusion and limits, applicability is

possible under the second paragraph. Therefore, regarding the legal basis— Article 287-- for the Philippines to file the arbitration case, this clause of the UN Convention clearly belongs to the Second section of Part XV--- a procedure selection. According to the logical structure of the UN Convention text, this clause could not override the First section and Third section of Part XV.

However, the Arbitral Tribunal ignored the logical structure of the above rules, which on the one hand led to the smallest obstacles for formation of the Arbitral Tribunal, and on the other hand, to a serious violation of the legitimate rights and interests of China in the case.

First of all, according to the intention of States parties to conclude the instrument, the Annex VII -- Arbitration is only a supplement to mandatory dispute settlement mechanism, which together with the dispute settlement procedures the parties concerned voluntarily choose constitute a double-tiered structure of dispute settlement mechanism in the UN Convention. And, compared with the voluntary choosing process, mandatory procedure is still secondary. If Article 287 existence will result in a compulsory dispute settlement procedures any State Party can straightforwardly file a case for it on any dispute, and whether the exceptions and limitations by the First section and the Second section respectively are legitimate and valid is reviewed by the court or tribunal under Article 287, which would, then, completely override the double-tiered structure, thus placing the mandatory procedure above the voluntary choosing process and the statement on selective exclusion. Any arbitrator who has a clear head will not come up with such a ridiculous conclusion contrary to the purpose of the instrument through explaining the law text.

China does not accept the arbitration, for which its legal basis includes two aspects: One is the two sides have already agreed to resolve the South China Sea dispute through negotiations. Two is the Chinese Government in 2006 issued the Statement pointing out that it does not accept mandatory dispute settlement procedure including arbitration for those disputes on the relevant maritime delimitation, historic waters or historic ownership Title, military activities and functional performance in the UN Security Council. The former is based on Article 280 and

Article 281 of the UN Convention's mandate, which is under the First section. The latter is under the authorization of Article 298, which is under the authority of the Third section. Therefore, before applying the procedures specified in the Second section of Article 287, priority consideration must be given to exclude the application of procedures in the Second section restricted by the First section and Third section. This means that parties to a dispute are not allowed to initiate an arbitration at will, and chief of the International Tribunal of the Law of the Sea is not authorized to appoint arbitrators and has an arbitral tribunal formed without restrictions.

Second, concerning the arbitral tribunal, the legal documents that create and authorize it are not merely limited to Article 287 and Annex VII of the UN Convention, but include all dispute settlement procedures, i.e. the First section and the Third section of Part XV of the UN Convention, and a National Statement made according to Article 298 of the UN Convention, as well as customary regulations and international practice to solve peacefully international disputes. China does not accept the arbitration, for which its legal basis includes two aspects: One is the two sides have already agreed to resolve the South China Sea dispute through negotiations. Two is the Chinese Government in 2006 issued the Statement pointing out that it does not accept mandatory dispute settlement procedure including arbitration for those disputes on the relevant maritime delimitation, historic waters or historic ownership Title, military activities and functional performance in the UN Security Council. The former is based on Article 280 and Article 281 of the UN Convention's mandate, which is under the First section. The latter is under the authorization of Article 298, which is under the authority of the Third section. Therefore, before applying the procedures specified in the Second section of Article 287, priority consideration must be given to exclude the application of procedures in the Second section restricted by the First section and Third section. This means that parties to a dispute are not allowed to initiate an arbitration willfully, and chief of the International Tribunal of the Law of the Sea is not authorized to appoint arbitrators and has an Arbitral Tribunal formed without restrictions.

Even if Article 287 of the UN Convention is applicable, the Arbitral Tribunal shall also clarify the legal meaning of the procedure of choice, and the choice to issue a statement by the related parties. International practices show that Article 287 in existence in no way means that it is legitimate for one party to a dispute to directly file the arbitration case. Under this system, the authorized referee duties scope of state is determined by the relations with other countries with which a particular statement is made, and the legal nature of the statement for choice is “potential bilateral agreement” between the parties to a dispute, and the applicable rules shall be interpreted in good faith.

Therefore, in the case of the South China Sea arbitration, the Statement made by the Chinese Government in 2006 in accordance with Article 298 of the UN Convention must be defined as a bilateral agreement with the Philippines, and meanwhile should be interpreted in good faith in relation to the scope of the subject matter to be excluded by the Chinese Government intention. The Arbitral Tribunal also has an obligation to read from the context -- including a series of diplomatic statements and declarations made by China since it returned the arbitration notice to the Philippines on February 19, 2013 -- to determine whether the arbitration agreement between China and the Philippines is reached. If the Arbitral Tribunal could respect the established basic principles of international law and the long-term practice of the International Court of Justice, it is not difficult for it to draw a conclusion that China and the Philippines have not reached an agreement on the arbitration for the dispute settlement. Therefore, the established Arbitral Tribunal and announced jurisdiction by its ruling are all but serious *ultra vires*.

Placing the UN Convention over the customary international law

The ruling on the entity issues made by the Arbitral Tribunal on July 12, 2016, in terms of identifying facts and applying laws, is full of errors and loopholes, pride and prejudice, and is the award of *ultra vires* and infringement. The Arbitral Tribunal wrongly interpreted the national historic rights, and inland countries' islands in ocean system under international law, and willfully expanded its authority to handle

problems that should be taken up by the customary international law, willfully denied the customary law system, and negated China's rights under customary practice.

The Arbitral Tribunal ruled that the historical rights and interests upheld by China within the dotted-line in the South China Sea are inconsistent with the spirit of the UN Convention. Anyone who has a little knowledge of the Chinese claims in the South China Sea knows the time of China's Government official announcement of the dotted-line can be traced back to the year 1948, far earlier than the year 1982 when the UN Convention was born. The dotted-line in the South China Sea is not produced by the UN Convention. Thus, regulations established later cannot be used as the legal basis and premises to tailor the legitimacy of the previously existing rights and interests. Besides, the UN Convention Preface clearly stipulates that the matters which the UN Convention has not specified should continue to have the general rules and principles of international law as the basis. The Arbitral Tribunal was, out of context, using the UN Convention in this case, separating the integrity and the organic connection between the different clauses of the UN Convention, between the UN Convention and the customary international law, and between legal rules and legal principles, and made a serious error in applying law.

The Arbitral Tribunal wrongly interpreted the standards on a island under the Third section of Article 121 of the UN Convention, and willfully worked out standards to determine whether the state parties concerned have an agreement, and whether some islands have the legal status on which the international judicial practice has always avoid touching, downplayed all oceanic evidences China has upheld for the South China Sea to those “without island status”, thus, in serious violation of China's territorial sovereignty, sovereign rights and oceanic jurisdiction.

Since ancient time, there are two kinds of ideas about the order of the sea: closed waters (*Mare Clausum*) and open waters (*Mare Liberum*). These two major principles of the law of the sea have developed up to date into a principle of domination, and a principle of freedom on the high seas. The UN Convention is the result of combining and expanding the two

principles, and absorbs since the modern time the diversified ideas of marine rights of coastal states, such as the system of the continental shelf and exclusive economic zone, meanwhile safeguards the principle of freedom on the high seas, such as limiting the rights of the coastal states in the exclusive economic zone only to economic activities.

There is only one clause on the island system in the UN Convention, that is, Article 121. The oceanic evidences (islands, reefs, low-tide heights, etc.) in broad sense have complex geographical features and diverse legal status, can produce different marine rights and interests and has different effect in maritime delimitation. These contents are too much to be tailored by single clause. However, because a fundamental property of the reefs legal status is directly related to a country's territorial sovereignty -- those islands that can be supportive of human life or of human economic activities undoubtedly belong to the national territory; low-tide heights and reefs are difficult to be recognized as part of the national territory under the UN Convention system; and between the above-mentioned two kinds of typical marine evidences, there are tens of thousands of different islands, reefs, beaches in various shapes, etc., hence, a judgment on their legal status directly leads to expanding or reducing sovereignty and territory of a country. The Arbitral Tribunal attempted to deny islands status of the Nansha Islands and the islands property, and in essence, pinched one kind of marine law -- the freedom on the high seas -- against another principle -- the land dominating the ocean, and would seriously damage the stability and integrity of the contemporary system of the law of the sea.

The abuse of power undermines the authority on the dispute settlement mechanism of the UN Convention

Arbitration, as a kind of dispute settlement in parallel with filing a suit between two parties to a dispute, has a long history, and is widely used by all countries in the modern world, which constitutes the basis of modern legal system. The foundation of a fair arbitration is the voluntary choice of parties concerned. As a permanent mechanism, the judiciary is mandatory. Therefore, the justice of the judiciary is dominated by the authorized political organs --- for example, the

state is responsible for the fairness of its country's judiciary court system. And a prerequisite for parties to file arbitration is the voluntary principle. In particular, some professional arbitration institutions are often based on social organizations and become the latter in the political state -- civil society binary structure. This means that the fairness of an arbitration is based on the cognition of the parties concerned. International arbitration is even more so, an international dispute submitted to arbitration shall require agreement reached by the parties to the dispute. As the British International law expert Brownlie said that there is no general obligation to resolve disputes by international law, ... seeking dispute resolution in a formal legal procedure depends on consent of the parties concerned, ... respecting the parties intention is an inevitable result of the sovereign equality of all states.

Review of ad hoc arbitration system can find in history a common choice for parties concerned, i.e. arbitration personnel often with noble character and high prestige, profound knowledge, fairness with people and familiar with the situation, which is also a basic required qualification for an arbitrator. For example, during ancient Rome period, various cities would submit disputes to the Senate of Rome for arbitration, the arbitration on the territorial dispute in 1493 between Spain and Portugal was undertaken by Pope Alexander VI.

While, of the composition of the South China Sea disputes Arbitral Tribunal, four arbitrators are from Europe, one from Africa. Whether they are familiar with the complex history and geopolitical status quo of the South China Sea, now seems to be questioned. What's more, some of the arbitrator's legal professional ethics is also flawed. For example, Holland arbitrator Alfred Soons has long argued that defining legal status of islands is an integral part of the maritime delimitation. But in this case, the professor changed his position that the determination of a reef legal status can be decoupled from its maritime delimitation, which was used as a reason to ignore China's Statement on the Exclusion. This uncharacteristical and uncertain position does not conform to qualification of an arbitrator's identity and fairness, and made the seriousness of international law a trifling matter.

Meanwhile, it is worth noting that the legal accountability of international institutions has been the general concerns of the international community. In 2002, the 54 Session of the United Nations Committee on International Law included the international organization accountability in its work program, and research work has been carried out with important progress achieved. The 66th United Nations General Assembly adopted the resolution on Responsibility of International Organizations Draft, thus, the legal system framework of the international organizations responsibility is initially formed. With this trend, the temporary nature and the lack of accountability mechanisms of an arbitral tribunal, to a certain extent, encouraged some arbitrators to take irresponsible attitude to the international politics. How the

interim Arbitral Tribunal bears the losses on the parties concerned caused by its wrong ruling, the parties concerned and the international community having the Arbitral Tribunal legally accountable require parties to the UN Convention to consider.

After the ruling, some senior law experts held that the Arbitral Tribunal made a bold innovative ruling, and kept in mind the mandate to hear and decide the case with a developing view. Therefore, In essence, the purpose of the South China Sea arbitration case is not meant to solve the dispute between China and the Philippines, the Western forces with the help of the UN Convention mechanism and the Arbitral Tribunal discretion attempted to “re-legislate” for the South China Sea disputes.

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This approach makes Chinese people bitterly disappointed, and also overshadows the relationship between China and South Korea. National development, and national rejuvenation are not separated from the peaceful and stable surrounding environment. The THAAD system deployed in South Korea will not help to resolve the Peninsula nuclear issue, but can only stimulate the DPRK to go farther and farther on the road to nuclear and missile development, and push the Peninsula into a vicious spiral of escalating military confrontation.

Looking at the whole world, West Asia and North Africa have suffered much from turmoil. With chaotic domestic situation and civil unrest, how can a country expects to engage in development. The United States and other

Western countries forced their military intervention into these regions, thoroughly broke the original balance, and can hardly get away with it..

Whether it is the historical lessons of South Korea itself, or the harsh reality of West Asia and North Africa are enough to get the South Korean authorities on alert, and consider the consequences the forced introduction of the THAAD system may produce. If the South Korean government and leaders value the national security and people's well-being and harmony, they should stay away from confrontation mentality and the cold war thinking, adhere to good-neighbor friendship, respect and take care of the interests of neighboring countries.