

Critique of the South China Sea Arbitration Award

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CONTENTS

Abstract.....	1
Foreword	2
Part I: There is a territorial and maritime delimitation dispute between China and the Philippines in the South China Sea.	4
I. Origin and nature of the territorial issue between China and the Philippines in the South China Sea	4
II. The geographical framework between China and the Philippines in the South China Sea and the emergence of their maritime delimitation dispute	8
Part II: The Philippines unilaterally initiated the South China Sea arbitration case, and the Arbitral Tribunal exceeded its jurisdiction.	11
I. The disputes between China and the Philippines in the South China Sea should be resolved preferably through negotiation as chosen by the two parties by mutual agreement	11
II. The essence of the subject-matter of the arbitration is the territorial sovereignty over several islands, reefs and other features in the South China Sea, and constitute an integral part of the maritime delimitation over which the Arbitral Tribunal has no jurisdiction	13
Part III: The South China Sea Arbitration Award has serious flaws on such issues as historic rights, outlying archipelagos of continental states, island regime.	16
I. The Arbitral Tribunal erroneously denies China's historic rights in the South China Sea.	16
II. The Arbitration Tribunal erroneously invalidates the integrity of	

Nansha Qundao	17
III. The Arbitral Tribunal erroneously decides the status of some features in Nansha Qundao.	20
Part IV. The composition and representativeness of the South China Sea Arbitration Tribunal	22
Part V. China's position and proposals on the proper settlement of the disputes in the South China Sea.....	23

Abstract

It has been eight years since the South China Sea Arbitration Award was issued. China's official position of "non-acceptance, non-participation and non-recognition" is widely known to the international community. Given the current legal disputes and the dynamics in the South China Sea after it was issued, the Arbitration Award has an increasingly notable and negative impact on the proper settlement of the disputes, maintenance of peace and stability in the South China Sea, healthy development of the bilateral relations between China and other claimant countries, and the ongoing consultations on the Code of Conduct in the South China Sea (COC) between China and the ASEAN countries.

This report takes stock of the essence of the disputes over the South China Sea, conducts analysis and rebuttal of the jurisdiction of the South China Sea Arbitration Award, the treaty interpretation and application of the Arbitration Award and the determination of facts in respect of historic rights, the status of outlying archipelagos of continental countries and the status of island, and the representativeness of the Arbitral Tribunal, which further exposes to the international community the fallacies of the Arbitration Award and its damage to the international rule of law.

Foreword

Eight years have passed since the “South China Sea Arbitration Award” was issued. Instead of providing a solution to the disputes of the South China Sea, the award has made the already complicated South China Sea issue even more difficult to resolve. It has brought shocks to the United Nations Convention on the Law of the Sea (UNCLOS) as a balanced and serious “package agreement”, and shaken the confidence of the States Parties in the proper use of the dispute settlement mechanism of UNCLOS in practice.

However, in recent years, there have been calls and actions both within and outside the region of the South China Sea for the award to be accepted as international law. Perhaps, it is out of misunderstanding by the ill-informed on third-party compulsory dispute settlement mechanisms, or misinterpretation by a small number of people on the rules of the law of the sea. But in the main, it reflects the attempts of certain countries in the region, based on false strategic judgments, to affirm the award and strengthen their unilateral claims, as well as the efforts by some forces outside the region to stir up trouble in the South China Sea by seeking to drive a wedge between China and ASEAN countries. All this will serve neither the sound development of the international rule of law nor enduring peace and order in the South China Sea.

The Arbitration Award is not a contribution to the international rule of law. Disregarding the basic fact that UNCLOS does not regulate matters of territorial sovereignty, the Arbitral Tribunal ignored China’s position and

opinions expressed through public channels, accepted the Philippines' claims intentionally designed to circumvent jurisdictional and other legal obstacles for it to initiate arbitral proceedings, and ruled on sovereignty over the islands and reefs in violation of the basic principles and the spirit of prudence and self-discipline that international judicial and arbitral institutions usually follow in their practice.

The Arbitration Award was not written for fairness and justice. The fundamental role of international dispute settlement mechanisms is to maintain international equity and justice. However, against the principle of the land dominates the sea in international law, the arbitral ruling attempted to deny China's territorial sovereignty, firm up the outcomes of the Philippines' illegal occupation, and endorse the Philippines' unilateral claims by misinterpreting and misapplying UNCLOS and customary law, with a long list of fallacies in interpretation and application, fact-finding and admissibility of evidence.

The Arbitration Award is not a panacea for dispute resolution. The goal of international judicial and arbitral institutions is to settle disputes effectively. However, this objective can not be reached by an ill-founded ruling issued by an arbitral tribunal without legitimacy that was politically motivated, manipulated and rejected by the other party based on sound and sufficient legal grounds. The South China Sea issue is so complex as it is related to so many countries, intertwines disputes on territorial sovereignty with issues of maritime delimitation, and involves historical, political, legal and other factors. It can by no means be resolved by a ruling of injustice that takes sides with one party against the other.

Part I: There is a territorial and maritime delimitation dispute between China and the Philippines in the South China Sea.

Nanhai Zhudao is China's inherent territory. The activities of the Chinese people in the South China Sea date back to over 2,000 years ago. China is the first to have discovered, named, explored and utilized Nanhai Zhudao and relevant waters, and the first to have continuously, peacefully and effectively exercised sovereignty and jurisdiction over them. China's sovereignty over Nanhai Zhudao and relevant rights in the South China Sea have been established in the long course of history and are solidly grounded in history and law.

I. Origin and nature of the territorial issue between China and the Philippines in the South China Sea

As neighbors facing each other across the sea, China and the Philippines have had close contact in history, and the two nations have enjoyed friendship over generations. However, since the 1970s, the Philippines has been illegally occupying some of the islands and reefs of Nansha Qundao, thus creating the issue of territorial sovereignty with China over some of the islands and reefs in the South China Sea. In addition, with the development of the international law of the sea, a maritime delimitation dispute also arose between the two countries on certain maritime areas of the South China Sea.

The territory of the Philippines is defined by a series of international treaties, including the 1898 Treaty of Peace between the United States of America and the Kingdom of Spain (the Treaty of Paris), the 1900 Treaty between the United States of America and the Kingdom of Spain for

Cession of Outlying Islands of the Philippines (the Treaty of Washington), and the 1930 Convention between His Majesty in Respect of the United Kingdom and the President of the United States regarding the Boundary between the State of North Borneo and the Philippine Archipelago. China's Nanhai Zhudao is outside of the Philippines' territory. The current territorial issue between China and the Philippines in the South China Sea has its roots in the Philippines' invasion and illegal occupation of certain component features of China's Nansha Qundao. In the 1950s, the Philippines attempted to make moves on China's Nansha Qundao but eventually stopped because of China's firm opposition. Starting from the 1970s, the Philippines invaded and illegally occupied Mahuan Dao, Feixin Dao, Zhongye Dao, Nanyao Dao, Beizi Dao, Xiyue Dao, Shuanghuang Shazhou, and Siling Jiao of China's Nansha Qundao. In 1978, Philippine President Ferdinand Marcos signed Presidential Decree No. 1596 which designated some component features of China's Nansha Qundao and large areas of their surrounding waters as "Kalayaan Island Group", set up "Municipality of Kalayaan" and illegally included them in the Philippine territory. The Philippines has also enacted a series of national laws to lay its own claims of the territorial sea, exclusive economic zone and continental shelf, part of which conflicted with China's maritime rights in the South China Sea.

Since the 1980s, the Philippines has repeatedly taken moves that have complicated the disputes. For example, by building military facilities on the component features of China's Nansha Qundao it had illegally invaded and occupied, the Philippines attempted not only to establish a fait accompli of permanent occupation but also to expand its illegal seizure. The Philippines has repeatedly infringed China's maritime rights in an attempt to expand and entrench its illegal claims in the South China Sea.

These moves have grossly violated China's sovereignty as well as its maritime rights in the South China Sea. Since 1997, the Philippines has also harbored territorial pretensions to China's Huangyan Dao and attempted to occupy it illegally. On 17 February 2009, the Philippine Congress passed Republic Act No. 9522, to illegally include China's Huangyan Dao and some component features of Nansha Qundao into the Philippines' territory.

The Philippines has concocted many excuses to cover up its invasion and illegal occupation of some islands and reefs of China's Nansha Qundao in order to pursue its territorial pretensions. For instance, it claims that: "Kalayaan Island Group" is not part of Nansha Qundao but *terra nullius*; Nansha Qundao became "trust territory" after the end of the Second World War; the Philippines has occupied Nansha Qundao because of "contiguity or proximity" and out of "national security" considerations; "some islands and reefs of Nansha Qundao are located in the exclusive economic zone and continental shelf of the Philippines"; the Philippines' "effective control" over the islands and reefs has become the "status quo" that cannot be changed.

The Philippines' territorial claim over part of Nansha Qundao is groundless from the perspectives of both history and international law.

First, Nansha Qundao has never been part of the Philippine territory. The territorial scope of the Philippines has already been defined by a series of international treaties. The United States, administrator of the Philippines in the colonial era, was clearly aware of these facts.

Second, the claim that "Kalayaan Island Group" is "*terra nullius*"

discovered by the Philippines is groundless. The Philippines claims that its nationals “discovered” the islands in 1956, and uses this as an excuse to single out some islands and reefs of China’s Nansha Qundao and name them “Kalayaan Island Group”. This is an attempt to create confusion over geographical names and concepts and dismember China’s Nansha Qundao. As a matter of fact, the geographical scope of Nansha Qundao is clear, and the so-called “Kalayaan Island Group” is part of China’s Nansha Qundao. Nansha Qundao has long been an integral part of China’s territory and is by no means “*terra nullius*”.

Third, Nansha Qundao is not a “trust territory” either. The Philippines claims that after the Second World War, Nansha Qundao became a “trust territory”, the sovereignty over which was undetermined. This claim finds no support in law or reality. The post-WWII trust territories were all specifically listed in the international treaties or the documents of the United Nations Trusteeship Council. Nansha Qundao was never included in them and was thus not a trust territory at all.

Fourth, neither “contiguity or proximity” nor national security is a basis under international law for acquiring land or insular territory. Many countries have territories far away from their metropolitan areas, in some cases even very close to the shores of other countries. Furthermore, it is just absurd to invade and occupy the territory of other countries on the grounds of national security.

Fifth, the Philippines claims that some islands and reefs of China’s Nansha Qundao are located within its exclusive economic zone and continental shelf and therefore should fall under its sovereignty or form part of its continental shelf. This claim seeks to deny China’s territorial sovereignty

on the basis of maritime limits provided for under UNCLOS, runs counter to the principle of international law that “the land rules the sea”, and is totally incompatible with the purposes and objectives of UNCLOS. Littoral states may not use the assertion of maritime rights as a justification for denying or infringing upon the territorial sovereignty of another state.

Sixth, the Philippines’ so-called “effective control” on the basis of its illegal seizure is null and void. The international community does not recognize “effective control” created through occupation by force. The Philippines’ “effective control” is mere occupation by naked use of force of some islands and reefs of China’s Nansha Qundao. Such occupation violates the Charter of the United Nations and the basic norms governing international relations and is unequivocally prohibited by international law. This so-called “effective control” based on illegal seizure cannot change the basic fact that Nansha Qundao is China’s territory. China firmly opposes any attempt to treat the seizure of some islands and reefs of China’s Nansha Qundao as a so-called “fait accompli” or “status quo”.

II. The geographical framework between China and the Philippines in the South China Sea and the emergence of their maritime delimitation dispute

At the heart of the disputes between China and the Philippines in the South China Sea lies the territorial issue over certain component features. This issue has a significant impact on their claims to maritime rights and interests in the South China Sea. China’s claims to maritime rights and interests based on Nansha Zhudao overlap with the Philippines’ claims based on the Philippine Islands. In addition, the Philippines has made illegal claims to China’s Huangyan Dao of Zhongsha Qundao and certain

component features of Nansha Qundao and misinterpreted the UNCLOS and presented various spurious assertions on the legal status of some individual component features, complicating the conflict of their maritime rights and the situation of maritime delimitation.

China and the Philippines are neighbors facing each other across the sea, and “States with opposite or adjacent coasts” as referred to in Articles 74 and 83 of UNCLOS. China’s Nanhai Zhudao consist of Dongsha Qundao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao. These archipelagos each include, among others, islands, reefs, shoals and cays of various numbers and sizes. China’s claims to maritime entitlements have always been based on each archipelago as a unit. Among these archipelagos, Zhongsha Qundao and Nansha Qundao face the Philippines across the sea, with less than 200 nautical miles to the coast of the Philippine Islands. Obviously, this forms a geographical framework of maritime delimitation and gives rise to the fact of maritime delimitation between China and the Philippines in the South China Sea, with their claims of continental shelf and exclusive economic zone overlapping. Moreover, from the mainland, Hainan Dao, Xisha Qundao and Dongsha Qundao, China may claim a continental shelf beyond 200 nautical miles in the South China Sea.

China and the Philippines both have claimed maritime rights and entitlements in the South China Sea. On the basis of the practice of the Chinese people and the Chinese government in the long course of history and the position consistently upheld by successive Chinese governments, and pursuant to China’s national law and under international law, including the 1958 Declaration of the Government of the People’s Republic of China on China’s Territorial Sea, the 1992 Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone, the 1998 Law of the

People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, the 1982 United Nations Convention on the Law of the Sea, and the 1996 Decision of the Standing Committee of the National People's Congress of the People's Republic of China on the Ratification of the United Nations Convention on the Law of the Sea, Nanhai Zhudao shall have internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf. In addition, China has historic rights in the South China Sea.

The Philippines proclaimed its internal waters, archipelagic waters, territorial sea, exclusive economic zone and continental shelf according to, among others, the Philippines' Republic Act No. 387 of 1949, Republic Act No. 3046 of 1961, Republic Act No. 5446 and Presidential Proclamation No. 370 of 1968, Presidential Decree No. 1599 of 1978, and Republic Act No. 9522 of 2009. In the South China Sea, the Philippines has claimed an exclusive economic zone and continental shelf from the coast of the Philippine Islands.

The above-mentioned maritime rights and entitlements claimed by the two States overlap, giving rise to a maritime delimitation dispute.

Part II: The Philippines unilaterally initiated the South China Sea arbitration case, and the Arbitral Tribunal exceeded its jurisdiction.

I. The disputes between China and the Philippines in the South China Sea shall be resolved preferably through negotiation as chosen by the two parties by mutual agreement

Pursuant to Article 281 of UNCLOS, if the States Parties which are parties to a dispute concerning the interpretation or application of UNCLOS have agreed to seek settlement of the dispute by a peaceful means of their own choice, the compulsory settlement procedures, such as arbitration, apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

In 2002, representatives of China and ASEAN countries, including the Philippines, jointly signed the Declaration on the Conduct of Parties in the South China Sea (DOC), Article 4 of which clearly stipulates 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 UNCLOS. A number of bilateral documents between China and the Philippines also refer to the agreement of both parties to settle the disputes by negotiation. These provisions are consistent and constitute an agreement between China and the Philippines, whereby the two countries have assumed the obligation to settle the disputes through negotiation.

The Arbitral Tribunal, however, holds that the multilateral and bilateral documents of China and the Philippines, including the DOC, are merely

political documents in nature and could not establish a binding relationship of rights and obligations for the parties. Even if the DOC and other documents are legally binding agreements, China and the Philippines have held negotiations and consultations on the disputes for many years without being able to resolve them. Even if documents such as the DOC are binding agreements creating a relationship of rights and obligations, there are no explicit provisions excluding the application of other procedures.

Whether or not China and the Philippines have reached an agreement on the settlement of disputes through negotiation is not centered on whether or not documents such as the DOC are political or legally binding in form. What is important is that in the relevant documents, China and the Philippines refer only to the settlement of disputes by negotiation, never to other means such as arbitration, and repeatedly use the words “agree”, “confirm, and “commit”, reflecting a clear intention to create a relationship of rights and obligations with respect to the matter of negotiation and to exclude other ways of dispute settlement, which is also corroborated by the context in which the relevant documents were reached and the subsequent practice of China and the Philippines. In practice, China and the Philippines have only conducted negotiations on the territorial sovereignty of the islands and reefs in question, but have not yet conducted negotiations on maritime delimitation, much less on the matters covered by the Philippines’ arbitration claims. In other words, China’s and the Philippines’ efforts to settle their disputes through negotiation are far from exhausted. Therefore, the prerequisites outlined in Article 281 of UNCLOS have not been met, and compulsory settlement procedures such as arbitration shall not be initiated.

II. The essence of the subject matter of the arbitration is the territorial sovereignty over several islands, reefs and other features in the South China Sea, which constitute an integral part of the maritime delimitation over which the Arbitral Tribunal has no jurisdiction

Under UNCLOS, the jurisdiction of the Arbitral Tribunal is limited to disputes concerning the interpretation and application of UNCLOS. Issues of territorial sovereignty do not fall within the scope of matters regulated by UNCLOS. In addition, China made a declaration under UNCLOS in 2006 to exclude disputes relating to maritime delimitation from the application of compulsory settlement procedures, including arbitration. Therefore, the Arbitral Tribunal in the South China Sea arbitration case had no jurisdiction over the disputes over territorial sovereignty and maritime delimitation between China and the Philippines.

The Philippines has summarized its claims for arbitration in three categories: First, China's assertion of the "historic rights" to the waters, seabed 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 UNCLOS is inconsistent with UNCLOS. 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 UNCLOS. 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 UNCLOS. The Philippines has asserted that its claims are unrelated to the disputes with China over territorial sovereignty and maritime delimitation.

However, the arbitration matters raised by the Philippines have already covered the main steps and major issues in the determination of sovereignty and the conduct of maritime delimitation.

Regarding the first category of claims presented by the Philippines for arbitration, the formation and development of China's historic rights in the South China Sea and the process of China's establishment of its sovereignty over Nanhai Zhudao are one and the same, and the areas in which the Philippines claims the existence of China's historic rights overlaps with the areas in which the two sides have yet to delimit their boundaries. Therefore, the issue of territorial sovereignty and maritime delimitation between China and the Philippines cannot be dealt with separately.

Regarding the second category of claims by the Philippines, the maritime rights of certain maritime features in the South China Sea cannot be considered in isolation from the issue of its sovereignty. Only countries with sovereignty over the islands and reefs in question can make maritime claims based on these islands and reefs. It is on that basis that the compatibility of the maritime claims in question with UNCLOS can be assessed. Therefore, if the sovereignty over the component features is undetermined, the prerequisite for claiming maritime rights based on the component features does not exist and does not constitute a concrete and real dispute that can be submitted to arbitration. In addition, whether low-tide elevations can be appropriated as territory is in itself a question of territorial sovereignty. UNCLOS is silent on this issue of appropriation.

Regarding the third category of the Philippines's claims, China maintains that the legality of China's actions in the waters of Nansha Qundao and

Huangyan Dao rests on both its sovereignty over the relevant features and the maritime rights derived therefrom. The Philippine claim is premised on the condition that the relevant maritime areas are under the jurisdiction of the Philippines. Therefore, in order to adjudicate the Philippines' claim, it is necessary to determine the sovereignty over the component features and to complete the maritime delimitation.

The claims made by the Philippines necessarily involve the handling of issues of territorial sovereignty and maritime delimitation. The former does not fall within the interpretation and application of UNCLOS; the latter has been excluded from the arbitration proceedings by China. Therefore, the Arbitral Tribunal has no jurisdiction.

Part III: The South China Sea Arbitration Award has serious flaws on such issues as historic rights, outlying archipelagos of continental states, island regime.

I. The Arbitral Tribunal erroneously denies China's historic rights in the South China Sea.

The Arbitral Tribunal argues that UNCLOS is the only basis for establishing maritime rights, superseding any pre-existing historic rights under general international law. The tribunal also interprets China's historical claims in the South China Sea as "historic rights to the living and non-living resources in the waters of the South China Sea within the 'nine-dash line'" which was invalidated as conflicting with the exclusive economic zone and continental shelf regimes under UNCLOS. The Arbitral Tribunal also argues that there is no evidence that China has ever exercised control over the resources of the South China Sea and that China is merely using the exercise of the freedom of the high seas as a justification for denying what it recognized as China claimed historic rights.

This logic of the Arbitral Tribunal is seriously flawed. Although UNCLOS expresses "the desire to settle.....all issues relating to the law of the sea", it does not and cannot exhaust all issues relating to the law of the sea and cannot replace China's historic rights in the South China Sea under general international law. As noted by Professor David Freestone, a renowned academic on international law, the consensus approach adopted in the drafting of UNCLOS and its outcome as a package deal necessarily implied many compromises, and, as the most immediate result, there are still a considerable number of issues that have not yet been fully resolved in UNCLOS. UNCLOS expressly mentions in Paragraph 8 of its Preamble

that “matters not regulated by this Convention continue to be governed by the rules and principles of general international law”. In fact, UNCLOS recognizes that historic rights are not a matter for UNCLOS to regulate, still less does it contain any provision stating that historic rights are conflict with the regime of exclusive economic zone and continental shelf. On the contrary, UNCLOS deals with the relationship between historic rights and UNCLOS in a manner that respects historic rights in Articles 10, 15, 51 and 298.

Over the years, China has claimed and enjoyed maritime rights in the South China Sea in accordance with international law, including UNCLOS, and has never relinquished any of its long-time established historic rights. China’s historic rights can coexist with its exclusive economic zone and continental shelf rights. The Arbitral Tribunal’s denial of China’s claim to historic rights in the South China Sea on the grounds that UNCLOS has superseded all historic rights that are not in full conformity with the provisions of UNCLOS is an oversimplified and erroneous approach.

II. The Arbitration Tribunal erroneously invalidates the integrity of Nansha Qundao

The Arbitral Tribunal denies China’s claim to maritime rights in Nansha Qundao as a whole on the grounds that UNCLOS only provides for the regime of archipelagic States and does not make a specific provision for outlying archipelagos of mainland countries.

This logic of the Arbitral Tribunal is seriously flawed. Claiming maritime rights to the archipelago as a whole is a long-established rule of customary international law. Archipelagos in the general sense can be categorized into

three main groups: first, offshore archipelagos of coastal states; second, outlying archipelagos of continental states; and third, archipelagos in the middle of the ocean. The definition of “archipelago” in Article 46 of UNCLOS indicates its concept in the general sense. Upon the entry into force of UNCLOS, the integrity and related rights of offshore archipelagos of coastal states are absorbed by Article 7 (Straight baselines), and those of mid-oceanic archipelagos are absorbed by Part IV (Archipelagic States). The fact that UNCLOS does not provide for the integrity and related rights of outlying archipelagos of continental states does not mean, in the light of the history of international treaties, that UNCLOS negates the regime of outlying archipelagos of continental states, but rather that it continues to be regulated by the rules of customary international law, as a matter pending in UNCLOS.

As a matter of fact, at present, approximately 20 continental states worldwide possess outlying archipelagos, with 17 of them having established straight baselines for their outlying archipelago as a whole. The relevant practice, which has run before and after UNCLOS, reflects a high degree of universality and consistency. It has been tacitly recognized and accepted by most other members of the international community, and accumulated sufficient state practice and *opinio juris*. It should be noted in particular that these are all mainland countries with outlying islands whose interests are “specially affected”, and whose practice is broad and representative and most relevant to the identification of customary international law. The relevant practice is sufficient to prove that customary international law in respect of outlying islands of mainland countries has long been established and is continuing and developing.

Nansha Qundao constitutes a geographic, economic and political entity that

meets the definition of “archipelago” under UNCLOS. Historically, the Chinese people and successive Chinese Governments have also regarded Nansha Qundao as a whole, which has been recognized by the international community, particularly by neighboring countries. For example, Article 2 of the 1951 San Francisco Peace Treaty stipulates that “Japan renounces all rights, title and claim to the Spratly Islands and to the Paracel Islands”, clearly recognizing Nansha Qundao and Xisha Qundao as a whole as the basis for claiming maritime rights. In 1958, China made the Declaration on the Territorial Sea in accordance with international law, stipulating that the method of delimiting the territorial sea with straight lines and baselines applied to all territories of China, including Nansha Qundao. The then Prime Minister of the Government of Vietnam, Pham Van Dong, sent a note to the Premier of the State Council of the People’s Republic of China, Zhou Enlai, solemnly stating that the Government of Vietnam recognizes and endorses the Chinese Government’s Declaration on the Territorial Sea and respects this decision. The 1992 Law on the Territorial Sea and the Contiguous Zone further confirms the claim to maritime rights based on Nansha Qundao as a whole.

Therefore, Nansha Qundao of China, as an outlying archipelago of a mainland country, is a self-contained national territory recognized by international law. The legal status of the archipelago as a whole and its maritime rights built upon this basis are well-established customary international law. Having existed prior to the entry into force of UNCLOS, they are a matter pending under UNCLOS after it entered into force. Rather than contradicting UNCLOS, they remain subject to the regulation of customary international law. It is not justified under the law for the Arbitral Tribunal to deny China’s rights to Nansha Qundao as a whole and to its maritime rights by advocating that UNCLOS is supreme and unique or

should come first.

III. The Arbitral Tribunal erroneously decides the status of some features in Nansha Qundao.

According to Article 121 of UNCLOS (Regime of Islands), an island is a naturally formed area of land, surrounded by water, which is above water at high tide. The territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined as applicable to other land territories. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

In interpreting this provision, the Arbitral Tribunal added several qualifications for the determination of islands, such as new natural and self-criteria for “cannot sustain”, new criteria of settlement and human community for “human habitation”, and new criteria of self-sufficiency for “economic life of their own”. In essence, it has rewritten the provision into “only islands in a natural state which can sustain human community habitation and economic life of their own shall have exclusive economic zones and continental shelves”, thus substantially raising the threshold for the identification of islands. This self-imposed law-making function of the Arbitral Tribunal is contrary to the original intent of UNCLOS and deviates from the relevant practice.

Based on this mistake, the Arbitral Tribunal completely ignored the fact that many islands in China’s Nansha Qundao and Zhongsha Qundao feature dense vegetation, a wide range of fruits, vegetables and livestock, remarkable agricultural potential, a long history of fishermen, and frequent

commercial activities. It makes a ruling that all the “high-tide features” are “rocks”. Even Taiping Dao is no exception.

The Arbitral Tribunal has misinterpreted and misapplied UNCLOS in its determination of the islands, and come to a clearly absurd conclusion that has been extensively questioned and criticized by the academia of international law.

Part IV. The composition and representativeness of the South China Sea Arbitration Tribunal

The constitution of an international court or tribunal should represent, to the greatest extent feasible, the main forms of civilization, the principal legal systems, or the geographical regions in the world where judges or arbitrators come from. This requirement is conducive to safeguarding the impartiality of the court or tribunal. It provides a pre-emptive bar to the possible prejudices of judges or arbitrators, helping to guarantee that the judgment or award be made in accordance with international law, not some one-sided understanding of it, and ultimately to settle the dispute in a way that is the most acceptable to the parties.

In the South China Sea arbitration, the five arbitrators are from Germany, Poland, France, the Netherlands and Ghana. Among them, none is from Asia, four are European Union citizens from civil law countries; and the only one from outside Europe had spent the better part of his life in Europe.

It is obvious that the composition of the Tribunal does not represent a global cross-section of geographical areas, leading forms of culture or legal and historical perspectives. There was no member from Asia. This problematic constitution resulted in a tribunal that lacked meaningful cognizance of and thus took little account of Asian cultures, diplomatic and legal traditions, and other regional factors which should have informed its decision making in the Arbitration.

Part V. China's position and proposals on the proper settlement of the disputes in the South China Sea

I. China opposes and does not accept any claim or action based on the Arbitration Award, and has spared no efforts to settle, on the basis of respecting historical facts, the disputes with the Philippines and other countries directly concerned, through negotiation and consultation in accordance with international law and practice.

According to international law, whichever mechanism or way is chosen to settle disputes between states, shall be based on “state consent” and cannot go against the will of the sovereign state. However, in the South China Sea arbitration case, the Philippines abused the dispute settlement mechanism of UNCLOS by unilaterally initiating arbitration. The Arbitral Tribunal exceeded its jurisdiction over a matter that should not have been subject to its jurisdiction, subjectively interpreted and applied UNCLOS in a manner that was clearly erroneous in determining the facts. The South China Sea arbitration case runs counter to the general principles and universal practices of international arbitration, deviates from the goals and purposes of UNCLOS, which is to promote peaceful settlement of disputes, undermines the integrity and authority of UNCLOS, violates the principle of “state consent” and infringes on China's legitimate rights as a sovereign state and a party to UNCLOS. China opposes and does not accept any claims or actions based on the South China Sea Arbitration Award.

China always abides by the purposes and principles of the Charter of the United Nations and is committed to upholding and promoting the international rule of law. It respects and acts in accordance with international law. While firmly safeguarding its territorial sovereignty and

maritime rights and interests, China adheres to the position of settling disputes through negotiation and consultation and managing differences through rules and mechanisms. It endeavors to achieve win-win outcomes through mutually beneficial cooperation. It maintains that the issue of maritime delimitation in the South China Sea should be settled equitably through negotiation with countries directly concerned in accordance with international law, including UNCLOS. Pending the final settlement of this issue, all relevant parties must exercise self-restraint in the conduct of activities that may complicate or escalate disputes and affect peace and stability.

II. China is committed to making the South China Sea a sea of peace, cooperation and friendship.

China is firm in upholding its sovereignty over Nanhai Zhudao and its surrounding waters. Some countries have made illegal territorial claims over and occupied by force some islands and reefs of Nansha Qundao. These illegal claims and occupation constitute gross violations of the Charter of the United Nations and basic norms governing international relations. They are null and void. China consistently and resolutely opposes such actions and demands that relevant states stop their violation of China's territory.

China believes, pending the final settlement of maritime disputes, the states concerned should exercise restraint and make every effort to enter into provisional arrangements of a practical nature, including establishing and improving dispute management rules and mechanisms, engaging in cooperation in various sectors, and promoting joint development while shelving differences, so as to uphold peace and stability in the South China

Sea region and create conditions for the final settlement of disputes.

China consistently maintains that the Parties push forward consultations on the COC for the South China Sea under the framework of full and effective implementation of the DOC, with a view to achieving an early conclusion based on consensus. To properly manage risks at sea, pending the conclusion of the COC, China proposed “Preventive Measures to Manage Risks at Sea”. This proposal has been unanimously accepted by all ASEAN Member States.

China is committed to maintaining peace and stability in the South China Sea with other countries in the region and upholding the freedom of navigation and overflight in the South China Sea enjoyed by other countries under international law. China urges countries outside this region to respect the efforts in this regard by countries in the region and to play a constructive role in maintaining peace and stability in the South China Sea.

The South China Sea is a bridge of exchanges and a bond of peace, friendship, cooperation and development between China and its neighbors. Peace and stability in the South China Sea are vital to the security, development and prosperity of the countries and the well-being of the people in the region. To realize peace, stability, prosperity and development in the South China Sea region is the shared aspiration and responsibility of China and the ASEAN Member States. There is no alternative to giving up confrontation and conducting cooperation if they are to realize long-term peace and stability in the South China Sea.