

Jurisprudential Analysis of Historical Rights in the South China Sea Dispute

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Abstract

This paper explores the legal basis and legitimacy of China's claimed historical rights in the South China Sea dispute. By reviewing the principles and precedents of international law regarding historical rights, and combining rich historical evidence, it is argued that China's territorial sovereignty over the South China Sea islands, historical rights within the U-shaped line, and traditional fishing rights in certain waters, all have a solid jurisprudential foundation that meets the constituent elements for the formation of historical rights, and should be recognized and protected under international law and the United Nations Convention on the Law of the Sea (UNCLOS). The paper also points out that the 2016 South China Sea Arbitration Award, which rejected China's historical rights claims, seriously deviates from objective facts and legal rules, lacking legitimacy. Historical rights play an important role in resolving the South China Sea dispute and maintaining regional peace and stability.

Keywords: South China Sea dispute, historical rights, U-shaped line, South China Sea Arbitration, traditional fishing rights

1. Introduction

Since the 1970s, the South China Sea disputes have become increasingly complex, attracting global attention as a hotspot issue. China maintains its indisputable sovereignty and rights in the South China Sea, a stance rooted in historical rights. In recent years, countries like the Philippines have challenged China's rights. In 2013, the Philippines initiated the South China Sea Arbitration, leading to the negation of China's historical rights claims. (Zou, K., & Liu, X., 2017) Clarifying the connotation and legal basis of China's historical rights in the South China Sea is crucial for safeguarding China's core interests and promoting the peaceful resolution of the South China Sea issue.

This paper analyzes domestic and international research on historical rights, combining historical materials and archaeological findings to thoroughly substantiate the legal status of China's historical rights in the South China Sea. It elucidates the connotation and constituent elements of historical rights under international law, and systematically elaborates on China's historical rights from three aspects: sovereignty over the South China Sea islands, historical rights within the U-shaped line, and traditional fisheries in some waters. In response to the South China Sea Arbitration Award's denial of China's historical rights, it analyzes the lack of legal and factual basis. The aim is to provide jurisprudential arguments for upholding China's legitimate rights in the South China Sea, promote the international community's correct understanding of the historical and legal relationships in the South China Sea issue, and explore new ideas for the ultimate resolution of disputes.

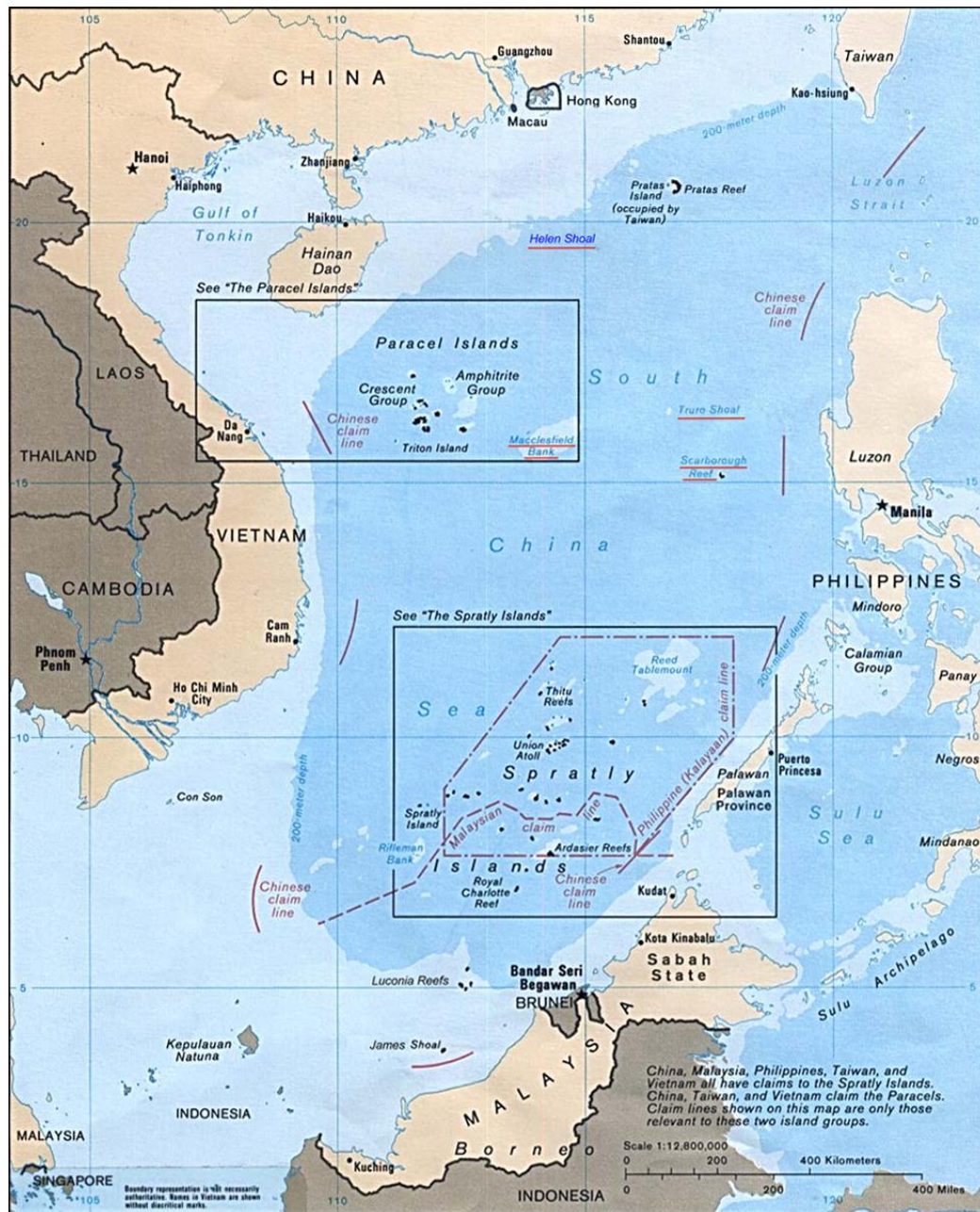


Figure 1. Map of China's South China Sea Islands

2. The Status and Elements of Historical Rights Under International Law

2.1 The Legal Connotation of Historical Rights

Historical rights refer to the special, preferential rights a country enjoys over a specific area based on its historical, long-term, continuous, and peaceful control or usage. They are an integral part of international law and play an important role in handling territorial and maritime disputes. Although historical rights are not directly mentioned in UNCLOS, the Convention recognizes related concepts in multiple places, indicating that the two are not incompatible. Historical rights are an umbrella concept, encompassing historical bays, waters, and other elements. A country can claim various historical rights over a maritime area. International jurisprudence, such as the *Anglo-Norwegian Fisheries Case*, the *Tunisia/Libya Continental Shelf Case*, and the *Eritrea v. Yemen Case*, all recognize the historical rights of the parties involved, establishing their legal status independent of UNCLOS.

Historical rights refer to a country's special and preferential rights over a specific land or maritime area, based on its historical, long-term, continuous, and peaceful control or usage of that region. They are an inseparable part of international law and play a crucial role in resolving territorial and maritime boundary disputes. (Gao, Z., Jia, Y., & Zhang, H. (Eds.), 2011)

Although UNCLOS does not directly mention historical rights, Articles 10, 15, and 298 acknowledge related concepts such as historic waters, bays, and titles.¹ This indicates that historical rights and UNCLOS are not incompatible. As an umbrella concept, historical rights encompass elements like historic bays and waters. A country can claim multiple historical rights over a maritime area, such as historical fishing rights and navigational rights.

In international jurisprudence, historical rights have been widely applied. In the 1951 Anglo-Norwegian Fisheries Case, the 1982 Tunisia/Libya Continental Shelf Case, and the 1998 Eritrea v. Yemen Case, the International Court of Justice and arbitral tribunals recognized the historical rights of the parties in disputed waters.²³⁴ These cases establish the legal status of historical rights as existing independently from UNCLOS.

2.2 Constituent Elements of Historical Rights

Claims to historical rights require three constituent elements: first, the claimant state has exercised effective jurisdiction over the specific waters for a long period; second, the jurisdictional acts are continuous and peaceful; third, other countries, especially interested states, acquiesce to or tolerate such jurisdiction. (Li, J., & Fu, K. (Ed.), 2018)

The claimant's jurisdiction over the relevant waters should reach a certain degree and scale. Acts such as exploitation, establishment of management agencies, military defense, and maritime law enforcement all serve as strong evidence. The jurisdiction must persist for a considerable period, generally exceeding the time limit for acquisitive prescription. Jurisdiction must be carried out peacefully without protests from other states. If faced with protests from interested states, the claimant should promptly respond to maintain the peaceful nature of the jurisdiction. The acquiescence of interested states is crucial, meaning they are aware of the claimant's jurisdictional acts for a considerable period without raising objections, thus acquiescing to such acts. The acquiescence of interested states can compensate for insufficient evidence of the claimant's jurisdiction and lower the standard for establishing historical rights. (Qu, B., 2012)

Historical rights have become an important part of customary international law. Although UNCLOS does not explicitly stipulate them, it reflects respect for historical rights. When a party claims special rights over specific waters based on historical practices, general international law should apply. Therefore, China's defense of its rights in the South China Sea based on historical rights not only has a solid historical foundation but also conforms to relevant principles of international law.

3. The Main Content of China's Historical Rights in the South China Sea

3.1 Sovereignty over the South China Sea Islands

China's sovereignty over the South China Sea islands is at the core of its historical rights in the region. Abundant literature and archaeological evidence indicate that China was the first to discover, name, and utilize the islands and reefs.

China's knowledge and development of the South China Sea can be traced back to the Qin and Han dynasties at the latest. Han dynasty texts such as "Records of Foreign Matters" and "Records of Foreign Matters in the Southern Provinces" document Chinese fishing activities in the South China Sea. (Han, Z., 1988) Later works from the Sui and Tang dynasties, such as "Records of the Lands beyond the Sea," "Records of Foreign Nations," "Brief Records of Island Barbarians," and "Route Books," provide more detailed accounts of Chinese activities on the South China Sea islands. (Yang, G., & Zhou, Z., 2010) These materials prove that the Chinese began developing the islands no later than the Sui and Tang dynasties, at least several centuries earlier than other countries.

Archaeological findings on the South China Sea islands in the 20th century further corroborate China's sovereignty. Since the 1920s, Chinese and foreign scholars have discovered a large number of ancient ceramics from the Tang and Song dynasties on multiple islands and reefs in the Paracel Islands, indicating that Chinese people were living on the islands at that time. In 1947, Chinese scholars conducted field surveys in the Paracels and found the remains of an ancient temple on Yongle Reefs, with inscriptions on the bells and tripods dating back to the Hongzhi years of the Ming dynasty. In the 1930s, Western countries repeatedly found traces of Chinese fishermen's dwellings on the Spratly Islands. These physical artifacts powerfully demonstrate China's continuous use and jurisdiction over the South China Sea islands.

¹ United Nations Conference on the Law of the Sea, (1982).

² North Sea Continental Shelf Cases, Judgement, I.C.J. Reports 1969.

³ Continental Shelf (Tunisia/Libya), Judgment, I.C.J. Reports 1982.

⁴ Eritrea/Yemen Arbitration, Award of the Arbitral Tribunal in the First Stage of the Proceedings, 1998.

In addition to discovering and utilizing the islands, the Chinese government has taken a series of jurisdictional measures. During the Yuan dynasty, Chinese cartographers traveled to the South China Sea to measure the altitude of the North Star, mapping China's territory. In the Ming and Qing dynasties, China placed the South China Sea islands under the jurisdiction of Guangdong and Guangxi provinces, dispatching officials to patrol them on multiple occasions. During periods of domestic turmoil and foreign encroachment, China strengthened its naval defense of the islands. For example, the Qing court sent naval forces to the South China Sea to suppress pirates and defend maritime frontiers.

After World War II, the Chinese government continuously took actions to declare and exercise sovereignty over the South China Sea islands, including taking over Japan's military strongholds in the region in 1946, reviewing and renaming the islands in 1947, and reaffirming sovereignty in a 1956 Foreign Ministry statement. (Chen, Q., 2017; Ministry of Foreign Affairs, 2000) Since then, China has organized numerous scientific expeditions, strengthened administrative management, and consolidated its sovereignty over the islands.

The objective fact is that the Chinese were the first to discover and utilize the South China Sea islands, and successive Chinese regimes have continuously exercised jurisdiction over them without interruption. According to the principle of first occupation in international law, China has acquired territorial sovereignty over the islands through peaceful, continuous, and effective rule. Foreign surveying and brief control of the islands all occurred after China's discovery and utilization and cannot negate China's pre-existing rights. China's sovereignty over the South China Sea islands is an indisputable fact.

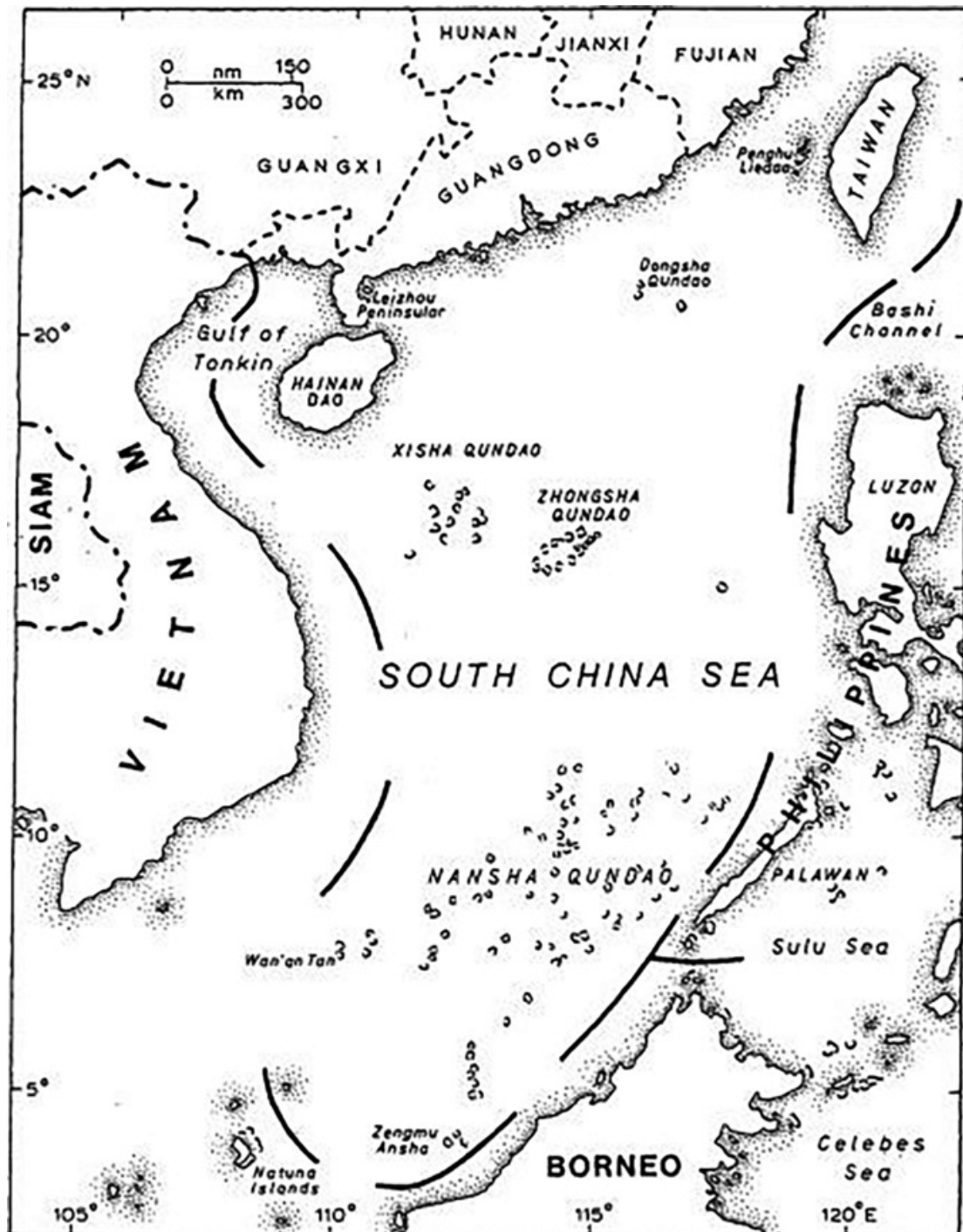


Figure 2. Map of the Location of the South China Sea Islands published by the Republic of China government in 1947

3.2 Historical Rights Within the U-Shaped Line

China enjoys historical rights in the waters within the U-shaped line in the South China Sea. This is because China's sovereignty and jurisdiction over the South China Sea islands are not limited to the islands and reefs themselves but also extend to the surrounding waters.

Historical records show that China's jurisdiction over the waters around the South China Sea islands has a long history. Place names in Song dynasty literature such as "Thousand-Mile Stone Weir," "Ten-Thousand-Mile Stone Weir," "Changsha," and "Myriad Islands" cover vast waters around the Paracels and Spratlys, considered part of Chinese territory. (Zhao, R., 2000) Maps from the Ming and Qing dynasties often used island and reef names to refer to the surrounding waters. The "Ten-Thousand-Mile Changsha Stone Weir" referred to the entire South China Sea, reflecting China's jurisdictional claims over the waters. (Wan, M., 2003)

The Chinese government has implemented various jurisdictional measures in the waters within the U-shaped line. During the Ming and Qing dynasties, patrol fleets were dispatched to expel foreign encroachment, protect the rights of fishermen, and patrol waters roughly equivalent to today's U-shaped line area. During the Republic of China era, the navy patrolled the Paracel Islands several times, reiterating sovereignty over the islands and nearby waters. After the founding of the People's Republic of China, the country strengthened maritime law enforcement, with the navy, police, and maritime surveillance agencies patrolling the waters within the U-shaped line. These actions demonstrate China's policy of peaceful utilization of the South China Sea, maintaining regional stability, and resolutely safeguarding its sovereignty, security, and maritime rights.

Prior to the 1970s, China's peaceful exercise of sovereignty within the U-shaped line was not publicly opposed by countries within or outside the region. It was only later that a few countries expressed concerns about the line, but this cannot erase the historical rights China has established in the South China Sea. Research has found that when historical rights conflict with newly emerged maritime legal regimes, historical rights often take precedence.

China's claim to historical rights within the U-shaped line in the South China Sea meets the constituent elements. China has engaged in economic activities in these waters for over a thousand years, and the government has implemented management measures there for hundreds of years. China's jurisdictional acts have been continuous and peaceful, without protests from interested states. Therefore, China's historical rights in the waters within the U-shaped line should be recognized and respected under international law.

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3.3 Traditional Fishing Rights in Some Waters

In addition to the two aforementioned types of historical rights, China also enjoys traditional fishing rights in the South China Sea. Chinese fishermen have been fishing in the South China Sea for their livelihood since ancient times, gradually forming traditional fishing grounds.

The South China Sea is rich in fishery resources and has been an important source of subsistence for Chinese fishermen. According to records, Chinese fishing in the Paracel Islands can be traced back to at least the Tang and Song dynasties. During the Ming and Qing dynasties, fishermen from Hainan frequently visited the South China Sea islands to fish or repair fishing gear. This shows that fishing by Chinese fishermen in the South China Sea had become a fixed way of life.

In modern times, the scale and scope of Chinese fishermen's activities in the South China Sea have expanded. During the Republic of China era, the Paracel fisheries had become an important part of China's marine economy. Every year, thousands of fishing boats would visit the Paracels, establishing supply stations on the

islands and forming fishing bases of a certain scale. In 1947, China established a fishery company in the Paracels to manage the production and lives of fishermen there. After the founding of the People's Republic of China, the state strongly supported the development of the South China Sea fisheries. In 1959, China established a fishing ground on Yongxing Island in the Paracels, providing a large amount of seafood for the country every year.

The traditional fisheries formed by China in specific waters of the South China Sea are an important part of its historical rights. In 1998, China's Law on the Exclusive Economic Zone and the Continental Shelf explicitly stated that it does not affect the historical rights enjoyed by China. This indicates that China's traditional fishing activities in the South China Sea are protected by law.¹ Although China advocates "setting aside disputes and pursuing joint development," it has never renounced its legitimate rights and interests in the South China Sea's fishery resources.

The historical fishing rights of Chinese fishermen in the South China Sea should be recognized under international law. In the *Eritrea v. Yemen* case, the tribunal confirmed that the fishermen of both countries had a common fishing tradition in the Red Sea and awarded them equal fishing rights. China's fishing history in the South China Sea is far longer than that of Eritrean fishermen, with a larger scale and being necessary for survival, and thus should be protected by international law.² Countries in the South China Sea region should learn from history, respect each other's traditional rights, and properly handle disputes through dialogue and consultation.

In summary, China possesses three types of historical rights in the South China Sea: territorial sovereignty over the islands, historical jurisdiction within the U-shaped line, and traditional fishing rights in some waters. These rights have ample historical basis, reflecting the Chinese people's long-term understanding, utilization, and protection of the resources and environment in the South China Sea, constituting an important part of China's inherent territory and maritime rights. International law must fully consider these "old rights" and not completely negate them. As new international legal rules emerge, a balance should be sought between preserving existing rights and maintaining the stability of the maritime order.

4. The South China Sea Arbitration Award's Negation of China's Historical Rights Claims

On July 12, 2016, the arbitral tribunal established at the unilateral request of the Philippines rendered its final award in the South China Sea Arbitration, completely rejecting China's historical rights claims in the South China Sea, seriously violating facts and law. This award, lacking legal and factual basis, has not been widely accepted by China and the international community.

4.1 Errors Regarding Jurisdiction

First, the South China Sea arbitration case involves territorial sovereignty and maritime delimitation, which are not subject to the compulsory jurisdiction under the UNCLOS. China has made an exclusionary declaration under Article 298 of the UNCLOS, refusing to accept compulsory arbitration (Liu, Y., 2018). The arbitral tribunal obviously violated the UNCLOS by acting *ultra vires*. Second, the issues raised by the Philippines for arbitration essentially all involve territorial sovereignty, such as requesting to determine the maritime status of the waters claimed by China in the South China Sea and deny the status of China's islands and reefs. In effect, this is requesting the arbitral tribunal to rule on territorial sovereignty in the South China Sea (Luo, G., & Chen, Z., 2015), which is beyond the jurisdiction of the UNCLOS or any international judicial body. The arbitral tribunal disregarded China's legitimate rights and interests and abused its power in handling these issues, in serious violation of international law.

4.2 Errors in Determining Historic Rights

The arbitral tribunal held that the historic rights claimed by China are incompatible with the UNCLOS ignoring the effect of historic rights as part of general international law. Historic rights coexist with treaty law without contradiction, and are an important component of international law. They cannot lose effect due to the entry into force of the UNCLOS. In fact, even if a contracting state accepts the UNCLOS, it may retain its original historic rights.

The arbitral tribunal denied China's traditional fishing rights, misinterpreting Article 62 of the UNCLOS. This article concerns the procedural provisions on the allocation of "allowable catch surplus" in the exclusive economic zone and does not involve historic rights. China's historic fishing rights in traditional fishing grounds in the South China Sea should not be confused with the fishing rights under the UNCLOS.

The arbitral tribunal did not consider the arguments and evidence submitted by the Philippines regarding China's actual control over the South China Sea. Instead, it listed in detail the surveying and mapping activities of the

¹ Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, (1998).

² The South China Sea Arbitration Award, (2016).

UK and Japan in the South China Sea, attempting to use this to prove that China does not have sovereignty over the South China Sea. This reflects the arbitral tribunal's lack of objectivity and fairness in treating evidence, selectively using evidence favorable to its own side, violating the basic requirements of fairness and impartiality in arbitration proceedings.

In summary, the South China Sea arbitration award acted ultra vires on jurisdictional issues, disregarded facts on substantive issues, and completely denied China's historic rights in the South China Sea, in serious violation of international law. This illegal and invalid award cannot be the basis for judging China's rights and interests in the South China Sea.

5. Conclusion

The South China Sea has always been China's inherent territory. The productive activities of the Chinese people in the South China Sea can be traced back more than 2,000 years, far ahead of other countries. For hundreds of years, the Chinese government has continuously exercised jurisdiction over the South China Sea islands through surveying, patrolling, and administrative management. Based on its sovereignty over the South China Sea, historic rights within the U-shaped line, and traditional fishery in certain waters, China's historic rights in the South China Sea have been indisputably established long ago.

China's claim to historic rights in the South China Sea is fully supported by historical facts and legal basis. It meets all the elements for the establishment of historic rights, namely long-term use, continuity, peacefulness, and acquiescence by other states. Any act denying this right shows ignorance of history and disrespect for China's sovereignty. The arbitral tribunal in the South China Sea arbitration case exceeded its jurisdiction and completely denied China's historic rights in the South China Sea. Its award not only lacks factual basis, but is also riddled with errors in the application of law, and is very detrimental to the maintenance of regional peace and stability.

Under the current complex situation in the South China Sea, with extra-regional powers vying to intervene, upholding China's historic rights in the South China Sea is crucial. This is the inevitable requirement for safeguarding the legitimate rights and interests of China as a coastal state of the South China Sea and is also the key link to restore the historical status of the South China Sea and achieve mutual trust and cooperation. Any superficial solution that disregards history can hardly fundamentally resolve the South China Sea disputes. Only by respecting the history of the South China Sea can we create a future for the South China Sea. China is willing to strengthen exchanges with all parties, enhance understanding, and properly resolve disputes through negotiation and consultation on the basis of respecting historic rights, and work together to build a peaceful, friendly, and cooperative South China Sea.

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