

Validity of International Law over Historic Rights: The Arbitral Award (Merits) on the South China Sea Dispute*

Atsuko Kanehara**

Abstract

This article examines validity of international law, UNCLOS, over historic rights, particularly focusing upon the Award on the South China Sea dispute.

The arbitral tribunal found that China's historic rights are contrary to UNCLOS by mainly emphasizing "comprehensiveness" of UNCLOS. This logic adopted by the arbitral tribunal seems different from the two kinds of logics that are to be applied to historic waters: first, to establish a general rule in permitting exceptions to it; and second, to deny a general rule due to varieties of international practices. As a third logic, in the 1951 Fishery Case, ICJ demonstrated logic that the Norwegian straight baseline method is an application of a general rule. By doing so, ICJ kept the sphere of legal regulation of a general rule over the Norwegian specific case.

For China's historic rights the arbitral tribunal did not adopt any of these kinds of logics. The tribunal's logic is critically analysed from the perspective of ensuring regulation of international law, UNCLOS, over those claims challenging against its regulation, such as claims to historic waters and historic rights.

From the same perspective, namely, keeping the sphere of international regulation over challenging phenomena, several findings in the Award are also considered. Since judicial and arbitral procedures that interpret and apply international law have close relation to maintenance of legal regulation of international law, particularly the tribunal's findings concerning its jurisdiction are also examined.

1. Introduction

(1) Purpose of this Article

On the 12th of July, 2016, the arbitral tribunal (tribunal) rendered its award (Award)¹ on the merits concerning the South China Sea dispute² between the Philippines and China. The Award mainly dealt with three points: first, legal effect of the so-called nine-dash line³ of China under international law; second, legal statuses of maritime features; and third, legal evaluations of Chinese activities, such as fishing, marine pollution, and law enforcement in a dangerous manner.

This paper will focus upon the first point. This is because it touches upon the fundamental

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** Atsuko Kanehara is a Professor at Sophia University, Faculty of Law.

¹ The South China Sea Arbitration (The Republic of Philippines v. The Republic of China), Award of 12 July 2016, <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>. All URLs cited in this paper were last accessed on the 15th May, 2017.

² In accordance with the case name defined by the tribunal, in this paper the dispute is referred to as the South China Sea dispute.

³ In the South China Sea, China has drawn a non-consecutive line that consists of nine dots. Within the

issue of what logic international law may apply in order to encompass maritime phenomena within its legal scope and in order to ensure its regulation over them. This paper will address this fundamental issue and call it an issue of validity of international law.

To clearly explain this purpose it is useful to confirm the formulations of the dispute or subjects of disputes both by the two party States and by the tribunal.

(2) The Formulations of the Dispute both by Party States and by the Tribunal

① Regarding a party State, the submission No. 2 of the Philippines reads:

China's claims to sovereign rights and jurisdiction, and to 'historic rights' with respect to the maritime areas of the South China Sea encompassed by the so called "nine dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's entitlements expressly permitted by UNCLOS; (the Award, 169. The numbers refer to the paragraphs and pages of the awards and the judgments cited there, unless otherwise indicated.)⁴

In comparison, as China did not formally participate in the arbitral procedure, any formal submissions were not provided on Chinese side.⁵ The Chinese Note Verbale dated at the 14th of April, 2011 states that:

China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence.⁶

In addition, the Award cited the Chinese statement dated at the 30th of October, 2015, which maintains that:

China's sovereignty and relevant rights in the South China Sea, formed in the long historical course, are upheld by successive Chinese governments, reaffirmed by China's

line, China has claimed rights over waters and seabed. It is called nine-dash line, nine-dotted line, and U-shaped line. In this paper it is referred to as nine-dash line. Domestically, China in 1948 issued an official map on which the nine (precisely, eleven)-dash line was drawn. Internationally it was not until China submitted to the Secretary General of the United Nations its Note Verbale dated at the 7th of May, 2009, in order to protest the joint submission by Viet Nam and Malaysia to the Commission of Limits of Continental Shelf in the same year, that China officially published the nine-dash line. CML/ 17/ 2009, CML/ 18/ 2009. The Note Verbales and the joint submission are available at http://www.un.org/depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm. There are many scholarly writings regarding the historical background of the nine-dash line. As a detailed survey, for instance, see, Zhiguo Gao and Bing Bing Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications," *The American Journal of International Law*, Vol. 107, 2013, pp. 100-108; Li Jinming and Li Dexia, "The Dotted Line on the Chinese Map of the South China Sea: A Note," *Ocean Development & International Law*, Vol. 34, pp. 287-290.

⁴ The Submission No. 1 of the Philippines reads:

China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by the United Nations Convention on the Law of the Sea.

⁵ While the foreign ministry of China issued its Position Paper on the 7th of December, 2014, which denied the jurisdiction of the tribunal, it did not formulate Chinese claims to rights and jurisdiction, and the subjects of the dispute. The Position Paper is available at http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

⁶ The Philippines protested the China's claim over the South China Sea on the 5th of April, 2011, in the Note Verbal No. 000228. In response, China issued Note Verbale which reads:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence. (CML/ 8/ 2011)

These Note Verbales are available at the URL cited in supra note 3.

domestic laws,⁷ on many occasions, and protected under international law including the United Nations Convention on the Law of the Sea (187).⁸

As another statement of China, on 12th of May, 2016, it states that

[T]he dotted line came into existence much earlier than the UNCLOS, which does not cover all aspects of the law of the sea. No matter from which lens we look at this, the Tribunal does not have jurisdiction over China's dotted line (200).⁹

Furthermore, interestingly, China's rights are evaluated as "sovereignty + UNCLOS + historic rights."¹⁰

Among Chinese scholars, some argue that China's claims to historic rights are based upon international law.¹¹ According to them, for instance, China's claim to historic rights supplements its claims to rights under the United Nations Convention on the Law of the Sea (UNCLOS).¹² Also some argue that while historic rights may take various forms depending on the contexts, such as delimitation of exclusive economic zones (EEZ) and continental shelf, distribution of fishery resources, international maritime navigation, marine environmental protection, utilization of mineral resources, and so on, the concept of historic rights is recognized by international law, and

⁷ The relevant domestic laws of China include Article 14 of the Exclusive Zone and Continental Shelf Act (26 June 1998) (available at www.npc.gov.cn/english/Law/2007-12/11/content_1383573.htm), and Article 2 of the revised Law on Marine Environmental Protection (25 December 1999), cited by Keyuan Zou, "Implementing Marine Environmental Protection Law in China: Progress, Problems and Prospects," *Marine Policy*, Vol. 23, No. 3, 1999, p. 211. The latter was further amended in 2014.

⁸ In the Chinese Note Verbale of the 7th of May, 2009, cited above (*supra* n. 3) it states that:
China has indisputable sovereignty over islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof, and that the above position is consistently held by the Chinese government, and is widely known by the international community.

See also, the Chinese Note Verbale of the 14th of April, 2011, cited above (*supra* n. 6). As an analysis of the Chinese Note Verbales and claims of other States including Indonesia and Malaysia, see, Nguyen-Dang Thang and Nguyen Hong Thao, "China's Nine Dotted Lines in the South China Sea: The 2011 Exchange of Diplomatic Note Between the Philippines and China," *Ocean Development & International Law*, Vol. 43, 2012, p. 35 *et seq.* A scholar points out that while the Chinese Note Verbale in 2009 does not mention the historical basis for the Chinese claims over the South China Sea, the Chinese Note Verbale in 2011 does. Melda Malek, "A Legal Assessment of China's Historic Claims in the South China Sea," *Australian Journal of Maritime and Ocean Affairs*, Vol. 5, (1), 2013, pp. 28-29.

⁹ The concept of "comprehensiveness" or "exclusiveness" emphasized by the tribunal is understood as responding to such China's claim. That will be examined later.

¹⁰ The President of the National Institute for South China Sea Studies, a Chinese Think Tank, specifically focusing on the South China Sea issues, expressed his view that reads:

The nine-dash line "...is based on the theory of 'sovereignty + UNCLOS + historic rights.' According to this theory, China enjoys sovereignty over all the features within this line, and enjoys sovereign right and jurisdiction, defined by the UNCLOS, for instance, EEZ and continental shelf...In addition to that China enjoys certain historic rights within this line, such as fishing rights, navigation rights and priority rights of resource development."

Cited by Zou Keyuan, "China and the South China Sea Conundrum: Any Prospective Solution in Future?," *German Yearbook of International Law*, Vol. 56, 2013, p. 16, footnote 14.

¹¹ Gao and Jia, *op. cit.*, *supra* n. 3, p. 98.

¹² *Ibid.*, p. 99. In addition, it is opined that since historic rights are recognized by international law, China's claim to rights in the South China Sea is based upon UNCLOS. It further argues that the claims to historic rights as being an exception to UNCLOS, as general international law, supplement the claims to rights recognized by it. Keyuan Zou and Xinchang Liu, "The U-Shaped Line and Historic Rights in the Philippines v. China Arbitration Case," in Shicun Wu and Keyuan Zou eds., *Arbitration Concerning the South China Sea-Philippines versus China*, Routledge, 2016, pp. 138, 142-143.

thus, UNCLOS may not deny historic rights.¹³

Considering the dispute was entertained by the dispute settlement procedure established under UNCLOS,¹⁴ it was totally natural and understandable that the Philippines formulated its submissions pursuant to it.¹⁵ On Chinese side, in some occasions it is maintained that China's rights are based upon history.¹⁶ If a right can be established by history, an existence of such a right not based upon law would be a serious challenge against international law. However, many Chinese statements and scholarly writings seek the ground for China's claims to historic rights in UNCLOS or customary international law or general international law. Thus, Chinese position is understood that although China's rights have formed themselves in a historical process, customary international law or general international law recognizes these rights. In this sense, it does not take a challenging position against international law as that history surpasses law.

Compared to these positions of party States to the dispute, how did the tribunal formulate the dispute or the subjects of the dispute?

② Concerning the characterization of this dispute, the award on jurisdiction and admissibility (Award on Jurisdiction)¹⁷ reads:

[A] dispute concerning the interaction of the Convention (UNCLOS, by the author) with *another instrument or body of law*, including the question of whether rights arising under *another body of law* were or were not preserved by the Convention, is unequivocally a dispute concerning the interpretation and application of the Convention (emphasis added) (168).¹⁸

¹³ *Ibid.*, pp. 138-139.

¹⁴ The arbitral tribunal was established under Annex VII of UNCLOS.

¹⁵ Regarding the fact that the Philippines intended to resolve the dispute by the dispute settlement procedure under UNCLOS, it is pointed out that such a procedure may not be successful, as the problems concerning the South China Sea include various issues, such as territorial sovereignty, maritime delimitation, international maritime navigation, maritime security, marine biological diversity, exploitation of mineral resources. Zou and Liu, *op. cit.*, *supra* n. 12, pp. 130-131. More specifically, it is opined that considering the Chinese Note Verbale of the 14th of April, 2011 (*supra* n. 6), basically China's claims on the South China Sea are grounded on the provisions concerning the territorial sea, the exclusive economic zone and continental shelf under UNCLOS, rather than historic rights deriving from the nine-dash line. Therefore, it is said that the Philippines mistakenly attributed all the China's claims to the nine-dash line, and that it distorted the legal nature and status of the line. *Ibid.*, p. 143. As an analysis from a wider perspective of dispute management in the South China Sea, Ngyuen Hong Thao and Ramses Amer, "A New Legal Arrangement for the South China Sea?" *Ocean Development & International Law*, Vol. 40, p. 333 *et seq.* It states that although Southeast Asia is known as a region with tradition of non-adjudication, this tradition has undergone important changes. The International Court of Justice has recently dealt with two sovereignty disputes over islands between Southeast Asian countries: the dispute over Pulau Ligitan and Pulau Sipadan between Indonesia and Malaysia (Judgment of 17 December 2002); and the dispute over Pedra Branca/ Pulau Batu Puteh, Middle Rocks and South Ledge between Malaysia and Singapore (Judgment of 23 May 2008). *Ibid.*, p. 341. The significance of the resolution of the South China Sea dispute by the tribunal needs to be assessed from such a perspective, which is beyond the purpose of this paper.

¹⁶ As an opinion that China's claims to rights in the South China Sea are based not only on UNCLOS but also on history, see, Robert Beckman, "The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea," *American Journal of International Law*, Vol. 107, 2013, p. 153.

¹⁷ The South China Sea Arbitration (The Republic of Philippines v. The Republic of China), Award on Jurisdiction and Admissibility, 29 October 2016, <http://www.pcacases.com/web/sendAttach/1506>.

¹⁸ Such an understanding itself of a dispute concerning the interpretation and application of UNCLOS reflects an idea of how judicial or arbitral organs ensure their function of dispute resolution so that it relates to the question of how and to what extent international law realizes its regulation. Regarding the meaning of "a dispute concerning interpretation or application of law," *see*, Atsuko Kanehara,

The Award similarly reads:

The Tribunal is faced with the question of whether the Convention (UNCLOS, by the author) allows the preservation of rights to resources which are at variance with the Convention and established anterior to its entry into force. To answer this, it is necessary to examine the relationship between the Convention and *other possible sources of rights under international law* (emphasis added) (235).

By looking at these formulations of this dispute from a viewpoint of grounds for China's claims to rights in the South China Sea, the tribunal defined the grounds as "another instrument or body of law" and "other possible sources of rights under international law." Thus, while "another instrument" may differently imply, it is understood that the tribunal sought within law for the ground for China's claims to rights in the South China Sea.

(3) The Issue of Validity of International Law in this Dispute

The Philippines argued that any rights that China may have had in the maritime areas of the South China Sea beyond those provided for in UNCLOS were extinguished by China's accession to UNCLOS (188). In responding to this argument, as a conclusion, the tribunal denied the rights claimed by China, since they were superseded by those under UNCLOS.

What characteristics may be found in this logic of the tribunal? Was it the only applicable logic in determining the subjects of the dispute? Considering the discussion relating to historic waters and historic rights, and from a perspective of "elastic" interaction between UNCLOS and another "body of law," what evaluation is given to the Award?

These are questions of validity of international law or ensuring international regulation over any phenomena taking place on the sea. The Award applied UNCLOS solely between the party States to the dispute, the Philippines and China. Therefore, the analysis of this paper on the validity of UNCLOS will be conducted on the assumption of relation between party States to it. This paper does not intend to examine issues of a legal effect of the nine-dash line under international law and requirements for historic rights to be established under international law as such.¹⁹ It will somehow touch upon them and the logic in the Award on Jurisdiction in finding the

"Determination of the Dispute in the Southern Bluefin Tuna Case," *St. Paul's Review of Law and Politics (Rikkyo Hogaku)*, Vol. 60, 2002, pp. 138-152.

¹⁹ As comprehensive analyses of historic rights, for instance, see, Clive R. Symmons, *Historic Waters in the Law of the Sea*, Martinus Nijhoff Publishers, 2008; Leo J. Bouchez, *The Regime of Bays in International Law*, A. W. Sythoff, 1964. There are many works that deal with the legal effect of the nine-dash line with an examination of the requirements for a historic right to have a legal effect under international law. Among them, for instance, Tai Ikeshima, "China's Dashed Line in the South China Sea: Legal Limits and Future Prospects," *World Global Forum*, No. 10, 2013, pp. 33-36; Gao and Jia, *op. cit.*, *supra* n. 3, p. 123; Zou, *op. cit.*, *supra* n. 10, pp. 16-17; Li and Li, *op. cit.*, *supra* n. 3, pp. 292-294; Masahiro Miyoshi, "China's 'U-Shaped Line' Claim in the South China Sea: Any Validity under International Law," *Ocean Development & International Law*, Vol. 43, 2012, pp. 5-8; Peter A. Dutton, "An Analysis of China's Claim to Historic Rights in the South China Sea," in Yonn-Huei Song and Keyuan Zou eds., *Major Law and Policy Issues in the South China Sea*, Ashgate, 2014, p.71-73; Malek, *op. cit.*, *supra* n. 8, pp. 31-34; Kentaro Nishimoto, "Minami Shinakai ni Okeru Chugoku no Shuchou to Kokusaihou Jou no Hyouka (An Assessment from a Perspective of International Law of China's Claims in the South China Sea)," *78 Hogaku (Jurisprudence)*, 2014, pp. 238-246; Yasuyuki Yoshida, "Minami Sinakai ni Okeru Chugoku no 'Kyudansen' to Kokusaiho- Rekishiteki Suiiki to Rekishiteki Kenri wo Chusin ni (China's 'Nine-Dash Line' in the South China Sea and International Law- Historic Waters and Historic Rights)," *Kaikanko Senryaku Kenkyu (Japan Maritime Self-Defense Force Command and Staff College Review)*, June 2015 (5-1), p. 15 *et seq*; Shigeki Sakamoto, "Kyudansen no Hoteki Chii-Rekishiteki Suiiki to Rekishiteki Kenri no Kanten Kara (Legal Status of the Nine-Dash Line - form a Perspective of Historic Waters and Historic Rights)," in Yoshiro Matsui *et al* eds., *21 Seiki no Kokusaiho to Kaiyoho no Kadai (Agendas of International Law and the Law of the Sea in the 21st Century)*, Toshindo, 2016, pp. 170-182. Concerning

tribunal's jurisdiction in this case, but it will do so from the perspective of validity of international law.

In the following sections, in a different order from the Award, after clarifying the terminology of the Award regarding a historic right, the logic of the Award will be considered with respect to the nature of China's historic right, the relationship between China's historic rights and UNCLOS, exceptions from the compulsory procedures entailing binding decisions under Article 298, Paragraph 1 (a) (i) of UNCLOS. Some critical analysis will follow from the perspective of this paper.

2. The Nature of China's Historic Rights

(1) The Finding by the Tribunal

In order to decide the question of whether Chinese declaration of 2006²⁰ pursuant to Article 298, Paragraph 1 (a) (i) of UNCLOS²¹ made this dispute an exception to the jurisdiction of the tribunal, the tribunal considered the legal nature of the rights that China claims in the South China Sea (207-214).²² It examined the terms, such as historic rights, historic titles, and historic waters in interpreting Article 298, Paragraph 1 (a) (i) (217-225).

According to the tribunal, "[t]he term 'historic rights' is general in nature and can describe any rights that a State may possess that would not normally arise under the general international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty" (225). "Historic title" is historic sovereignty to land or maritime areas, and "historic waters" is simply a term for historic title over maritime areas, typically internal waters or territorial sea (225).²³ Depending on this terminology set by the tribunal, in this paper hereinafter "China's historic right(s)" will be used to describe the right(s) that China claims in the South China Sea.

Regarding China's historic rights, the tribunal found as follows. China's historic right is "formed in the long historical course" (206), and a right arising independently from UNCLOS (207, 211). The rights that China actually claims are a right for petroleum exploration (208) and a right for fishing regulation (210). In the sea areas where China exercises these rights, it respects freedom

the requirements for historic waters, many scholars mention the 1962 Report of the Secretariat of the General Assembly of the United Nations (1962 Report), *Juridical Regime of Historic Waters, Including Historic Bays*, A/ CN.4/ 143, *Yearbook of International Law Commission*, 1962, Vol. II, pp. 1-26.

²⁰ China's declaration of 2006 is available at: http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China after ratification.

²¹ Under Article 298, Paragraph 1 (a) (i), when signing, ratifying or acceding to UNCLOS, a State may declare that it does not accept any one or more of the procedures provided for in Section 2 of Part XV with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles.

²² The tribunal found that the Philippines' Submissions No. 1 and No. 2 would involve consideration of issues that did not possess an exclusively preliminary character, and it reserved consideration of its jurisdiction to rule on them until the merits stage (413).

²³ While the tribunal said that "historic waters" is simply a term for historic title over maritime areas, it referred to the judgment in the *Tunisia/ Libya Continental Shelf* case. It reads:

It seems clear that the matter continues to be governed by general international law which does not provide a single "régime" for "historic waters" or "historic bays," but only for a particular régime for each of the concrete, recognized cases of "historic waters" or "historic bays."

Continental Shelf (Tunisia/ Libya Arab Jamahiya), Judgment, *ICJ Reports 1982*, para. 100.

The tribunal defined a historic bay as simply a bay in which a State claims historic waters.

of navigation and overflight, and, thus, China does not consider that these sea areas form part of its territorial sea or internal waters (214). In sum, China claims rights to living and non-living resources within the nine-dash line (214).²⁴

Since the issue of Article 298 of UNCLOS will be succinctly dealt with later, it suffices here to confirm that the tribunal found its jurisdiction to entertain this dispute irrespective of China's declaration pursuant to Article 298, Paragraph 1 (a) (i). This is because China's claim does not mean the historic title under the provision but a historic right, and thus, the tribunal has jurisdiction over the dispute concerning the historic right (229).

Next, this characterization by the tribunal of China's historic rights will be examined in considering scholarly writings²⁵ with respect to historic rights and historic waters.

(2) Examination

① The tribunal concluded that China's historic rights were those to specific resources and activities. Nonetheless, considering that the nine-dash line indicates the scope of sea areas over which the historic rights are exercised, implication of "zone" is not necessarily excluded from

²⁴ According to Gao and Jia, China can assert historic rights within the nine-dash line in respect of fishing, navigation, and exploration and exploitation of resources. Gao and Jia, *op. cit., supra* n. 3, pp. 109-110. Similar understanding as that of the Award is seen in Zou's position in that he interprets the nine-dash line in relation to continental shelf and exclusive economic zone under UNCLOS. He recognizes two types of historic rights: one is exclusive with full sovereignty, such as historic waters and historic bays; and the other is nonexclusive without full sovereignty, such as historic fishing rights in the high seas. Based upon this distinction, he maintains that China's claim does not fit in either of the two types, and that it is understood by referring to the exclusive economic zone and continental shelf regimes. According to him, China's claim involves not full sovereignty but sovereign rights and jurisdiction in respect to marine scientific research, installation of artificial islands, and protection of the marine environment. He calls such rights "historic rights with tempered sovereignty." Zou Keyuan, "Historic Rights in International Law and in China's Practice," *Ocean Development & International Law*, Vol. 32, 2001, p.160. He seems to understand China's claim as implying "sea areas" rather than as historic rights to specific activities or resources, such as fishing, navigation, exploration and exploitation of resources. Even if the nine-dash line is understood as claims of historic rights to specific activities and resources, that understanding may not substantially exclude understanding that the nine-dash line reflects claims to sea areas. This is because even the former regards the nine-dash line as depicting the limits of waters to which the exercises of the historic rights reach. Also Zou considers China's claim as unique in the sense that it is not only a right to fisheries on the high seas, but in fact it goes beyond this. To him it seems that China has made precedent in international law relating to the concept of historic rights. Zou Keyuan, *op. cit., supra* n. 10, pp. 15-16. In sum, Zou's position is interpreted that as the nine-dash line reflects China's claims to exclusive economic zone and continental shelf, and even beyond their definitions of UNCLOS, China claims its exclusive economic zone and continental shelf. By interpreting in this way, Symmons' evaluation of Zou's position is understandable in that according to Symmons, Zou assumes "historic exclusive economic zone" and "historic continental shelf." Clive R. Symmons, "Rights and Jurisdiction over Resources and Obligations of Coastal States: Validity of Historic Rights Claims," *Tran Truong Thuy and Le Thuy Trang eds., Power, Law, and Maritime Order in the South China Sea*, Lexington Books, 2015, pp. 148-150. As another work that understands the nine-dash line as claims to historic exclusive zone and historic continental shelf, Jiao Yongke, "There Exists No Question of Redelimiting Boundaries in the Southern Sea," 17 *Ocean Development & Management*, Vol. 17, 2000, p. 52, cited by Florian Dupuy and Pierre-Marie Dupuy, "A Legal Analysis of China's Historic Rights Claim in the South China Sea," *American Journal of International Law*, Vol. 107, 2013, p. 135.

²⁵ Symmons who examines historic rights in detail, writes that while vagueness in terminology still remains, historic rights in their broadest sense, have been defined as "rights possessed by a State over maritime areas that would not normally accrue to it under the general rules of international law, but have been acquired by that State 'through a process of historical consolidation' and also are 'acquired vis-à-vis one or more States.'" Symmons, *op. cit., supra* n. 24, p. 147.

this tribunal's conclusion.²⁶ In this sense, the two interpretations are not exclusive to each other: first, interpretation of the nine-dash line as indicating claims to rights to specific activities and resources; and second, interpretation of the nine-dash line as indicating claims over zones. The difference between the two, if any, is that of weight placed on whether activities and resources, or zones.²⁷

China itself has not officially made clear the meaning of the nine-dash line (179),²⁸ and the reason is said to be China's strategy²⁹. According to scholars, especially Chinese ones, there may be four types of interpretation of the nine-dash line.³⁰ The nine-dash line signifies, first, the line determining that islands within it belongs to China,³¹ second, the line determining the zones over which historic rights are exercised (according to this interpretation, maritime features, such as islands and shoals within the line are Chinese territories, and sea areas except for internal waters become Chinese EEZ and continental shelf),³² third, the line is demarcating historic waters (according to this interpretation, China has historic rights to islands, shoals and surrounding sea areas of them, and all the sea areas within the line are Chinese historic waters, and therefore, passage and overflight of foreign vessels and aircraft are prohibited without

²⁶ On the other hand, relating to historic waters, as confirmed above, the Award defined it as simply a term for historic title over maritime areas, typically internal waters or territorial sea. In this regard, scholarly writings accord.

²⁷ One of the reasons why Zou, in his work referred to at *supra* n. 24, understands China's claims to rights as implicating claims over zones is that he attaches importance to Article 2 of 1999 Law on Marine Environmental Protection (revised) that reads:

[T]he Law shall apply to internal waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf of the People's Republic of China and *other sea areas under the jurisdiction of the People's Republic of China* (emphasis added)"

Zou *op. cit.*, *supra* n. 24 ("Historic Rights..."), p. 160.

²⁸ Mostly scholarly writings accord in such evaluation.

²⁹ Some scholars describe this Chinese attitude as strategic ambiguity. Beckman, *op. cit.*, *supra* n. 16, p. 156. See also, Nishimoto, *op. cit.*, *supra* n. 19, p. 228, footnote 16.

³⁰ Guoqiang Li, "Chugokku to Shuhen Kokka no Kaijo Kokkyo Mondai (Border Issues between China and Neighboring States)," *Kyokai Kenkyu (Border Studies)*, Vol. 1, 2010, pp. 51-52. As another categorization of Chinese scholarly writings regarding the meaning of the nine-dash line, see, Thang and Thao, *op. cit.*, *supra* n. 8, p. 50, note 11.

³¹ Recent Chinese scholars, in general, do not limit the meaning of the nine-dash line to determining that islands within it belong to China, and they consider the nine-dash line both from the aspect of China's claims over islands and other land areas, and from the aspect of China's claims over sea areas. Most of the works cited at *supra* n. 19 take such a method of examination as explained here. See also, Dupuy and Dupuy, *op. cit.*, *supra* n. 24, p. 126 *et seq.* There are also scholarly writings that place weight on China's sovereignty over lands, such as, Gao and Jia, *op. cit.*, *supra* n. 3. As for an examination of the nine-dash line from a perspective of China's sovereignty over islands, see, Jianming Shen, "The China's Sovereignty over the South China Sea Islands: A Historical Perspective," *Chinese Journal of International Law*, Vol. 1, 2002, p. 94 *et seq.*; by the same author, "International Rules and Historical Supporting China's Title to the South China Sea Islands," *Hastings International and Comparative Law Review*, Vol. 21, 1997, p. 1 *et seq.*

³² As in the arbitral procedure for the merits of the South China Sea dispute, territorial sovereignty over islands was not included in the subjects of the dispute, the limits of Chinese EEZs and continental shelf in the South China Sea cannot be determined based upon the Award. When the nine-dash line demarcates Chinese EEZs and continental shelf beyond 200 nautical miles, the second interpretation of the nine-dash line would mean that China claims EEZs and continental shelf based upon an inherent ground as the nine-dash line. Such EEZs and continental shelf are "historic EEZs" and "historic continental shelf" explained at *supra* n. 24.

China's permission),³³ and fourth, the line sets traditional Chinese borders. Regarding sea areas including seabed and subsoil, the understanding of the Award of China's historic rights is close to the second interpretation. However, while according to the second interpretation the nine-dash line determines the zones over which China's historic rights are exercised, and the zones become Chinese EEZs or continental shelf, it remains unclear whether the EEZs and continental shelf are not beyond the 200 nautical mile limit set by UNCLOS. The Award did not interpret the nine-dash line from a zonal perspective.

② Concerning the distinction between historic waters and historic rights, scholarly writings, in general, make distinction between the two. They find in the former sovereignty over sea areas, and in the latter rights short of sovereignty relating to specific activities and resources (sovereign rights).³⁴ In this regard, the Award seems to have taken the same position. In addition, it is said that while claims over historic waters are claims of rights toward international society, or rights *erga omnes*, claims to historic rights are vis-à-vis the one or plural related States.³⁵ Such understanding of historic rights is also reflected in an opinion that historic rights may be disputed solely between the related States, so that the disputes may be resolved by negotiation between those States with defining historic rights on a case-by-case basis.³⁶ A conclusion cannot be derived from scholarly writings as to whether there is difference in requirements for historic waters and those for historic rights.³⁷ Furthermore, it is opined that while most often adjacent States may claim historic waters, it is not the case for historic rights.³⁸

The tribunal did not examine all of these issues. This may be because once it could decide the issue of whether its jurisdiction was denied or not by Chinese declaration of 2006 pursuant to

³³ In Policy Guidelines for the South China Sea (SCS Guidelines) adopted on the 13th of April, 1993, the Republic of China demonstrated that the sea areas within the nine-dash line are historic waters. However, on the 15th of December, 2005, it terminated the SCS Guidelines, and recently it does not take such a position as claiming historic waters. Miahcel Sheng-Ti Gau, "The U-Shaped Line and a Categorization of Ocean Disputes in the South China Sea," *Ocean Development & International Law*, Vol. 43, p. 58.

³⁴ For instance, Ted L. McDorman, "The Law of the Sea Convention and the U-Shaped Line: Some Comments," in Shicun Wu and Keyuan Zou eds., *Arbitration Concerning the South China Sea-Philippines versus China*, Routledge, 2016, p. 150; by the same author, "Rights and Jurisdiction over Resources in the South China Sea: UNCLOS and the 'Nine-Dash Line,'" in S. Jayakumar et al. eds., *The South China Sea Disputes and Law of the Sea*, NUS Centre for International Law, Edward Elgar, 2014, p. 150; Zou and Liu, *op. cit.*, *supra* n. 12, p. 134. As a similar opinion, see, Symmons, *op. cit.*, *supra* n. 19, p. 6. In his recent work, Symmons divides historic titles into historic waters and historic rights, and explains the difference between the two by the elements mentioned here. Symmons, *op. cit.*, *supra* n. 24, p. 146.

³⁵ See the works cited at the footnote above (34). Sakamoto emphasizes that the denial by the Award of China's historic rights is not a denial of their opposability solely in relation to the Philippines, but a denial of their effect *erga omnes*. Sakamoto, *op. cit.*, *supra* n. 19, p. 200.

³⁶ Shabtai Rosenne, "Historic Waters in the Third United Nations Conference on the Law of the Sea," in Terry D. Gill & Wybo P. Heere eds., *Reflections on Principles and Practice of International Law: Essays in Honour of Leo J. Bouchez*, Martinus Nijhoff, 2000, p. 203.

³⁷ The tribunal, in considering the relationship between China's historic rights and UNCLOS, posed three questions, as explained later. The second question is whether China had held historic rights in the South China Sea prior to the entry into force of UNCLOS. When addressing it, the tribunal, based upon the 1962 Report, stated that historic waters are merely one form of historic rights, and that the process is the same for claims to rights short of sovereignty (265). Although reservation is needed that this part of the Award was in relation to the 1962 Report, the tribunal might not assume difference in requirements for historic waters and those for historic rights.

³⁸ Among the works cited at *supra* n. 34, for instance, McDorman (The Law of the Sea Convention...), p. 150; McDorman (Rights and Jurisdiction...), pp. 150-151. See also, Symmons, *op. cit.*, *supra* n. 24, pp. 146-147.

Article 298, Paragraph 1 (a) (i) of UNCLOS, it did not need to proceed to further examinations.³⁹

③ The tribunal declared that China's historic rights are independent from UNCLOS. However, as confirmed at the beginning of this article, the formulation of this dispute by the tribunal was as follows:

[T] he Tribunal is faced with the question of whether the Convention (UNCLOS, by the author) allows the preservation of rights to resources which are at variance with the Convention and established anterior to its entry into force. To answer this, it is necessary to examine the relationship between the Convention and *other possible sources of rights under international law* (emphasis added) (235).

Accordingly, it is clear that the tribunal did not seek for any grounds for China's historic rights that exist outside of law. For this very reason, the tribunal needed to proceed to the examination of the relationship between rights that are independent from UNCLOS and that should be based upon "other possible sources of rights under international law," on the one hand, and rights under UNCLOS, on the other hand (or, the relationship between UNCLOS and "other possible sources of "international law").⁴⁰

In the next section, the finding by the Award will be analyzed regarding the relationship between UNCLOS and China's historic rights.

3. The Relationship between UNCLOS and China's Historic Rights

(1) The Finding by the Tribunal

The tribunal posed three questions to be dealt with in addressing the issue of the relationship between UNCLOS and China's historic rights (234). First, does UNCLOS "and in particular its rules for the exclusive economic zone and continental shelf, allow for the preservation of rights to living and non-living resources that are at variance with the provisions" of UNCLOS? Second, prior to the entry into force of UNCLOS, did China have historic rights and jurisdiction over living and non-living resources in the waters of the South China Sea beyond the limits of the territorial sea? Third, has China in the years since the conclusion of UNCLOS established rights and jurisdiction over living and non-living resources in the waters of the South China Sea that are at variance with the provisions of UNCLOS? From the perspective of this paper, focus is placed on the first question.⁴¹

Regarding the first question, the line of argument of the Award is as follows. The tribunal declared that the applicable principle and rules are, first, Article 311 which deals with the relationship between UNCLOS and other sources, second, Article 293, Paragraph 1 of UNCLOS which provides for applicable law of the tribunal, and third, the principle reflected in Article 30, Paragraphs 2 and 3 of the Vienna Convention on the Law of Treaties - "the later treaty will

³⁹ However, as mentioned later, this did not hamper the tribunal from denying China's historic rights, so that the denial by it may contribute to resolution of disputes in the South China Sea. As such a position, see, Naoki Iwatsuki, "Minami Shinakai Chusaisaiban to Kokusai Hunso no Heiwateki Kaiketsu (The Arbitration of the South China Sea Dispute and Peaceful Solution of International Disputes)," *Hogaku Kyositsu (Legal Learning)*, No. 435, 2016, p. 52.

⁴⁰ The meaning of "independence" is related to "comprehensiveness" of UNCLOS that the tribunal emphasized. It will be discussed later.

⁴¹ With respect to the second question, the tribunal determined that the rights, which China has exercised, are a fishing right and a right of navigation, so that it has exercised the freedom of the high seas. Accordingly, these exercises of the rights did not produce historic rights (263-272). As for the third question, the tribunal stated that in order to amend conventions unilateral acts are not sufficient, and that regarding China's claim to historic rights there are not acquiescence by other States and the passage of sufficient time, either (273-275).

prevail to the extent of any incompatibility” - as general international law which regulates the interaction between bodies of law (235-237). Article 311 of UNCLOS is a provision addressing the relationship between UNCLOS, on the other hand, and other conventions and international agreements, on the other hand. According to the tribunal, “this provision applies equally to the interaction of UNCLOS with other norms of international law, such as historic rights, that do not take the form of agreement” (235). “Other norms of international law, such as historic rights” is understood to mean international norms relating to historic rights.

Such an interpretation of Article 311 by the tribunal may raise a doubt. There is an opinion that historic rights are those under general international law, and actually Chinese statements and Chinese scholars have voiced such an opinion. If so, the relationship between UNCLOS and historic rights means that between UNCLOS and general international law that prescribes historic rights. General international law takes a form of customary international law. The relationship between UNCLOS and customary international law is not necessarily the same as that between UNCLOS and other conventions and international agreements. While Article 311 deals with the relationship between UNCLOS and other conventions and international agreement, it does not expressly address the relationship between UNCLOS and customary international law. Nonetheless, the tribunal interpreted that Article 311 applies to the relationship between UNCLOS and customary international law, namely, “other norms of international law, such as historic rights.”

Considering that there is no priority between conventions and customary international law as sources of international law, the tribunal’s interpretation of Article 311 may have a reason in that it did not make any distinction between “other conventions and international agreement,” on the one hand, and customary international law, on the other hand. However, here it is needed to clearly recognize the effect that such tribunal’s interpretation of Article 311 may have. Some Chinese scholars argue that historic rights have been established under general international law (this is understood as customary international law), so that these rights cannot be denied solely for the reason of UNCLOS.⁴² It is not clear on what understanding of the relationship between UNCLOS and customary international law such an argument is based. Such an argument might place customary international law that gives grounds for historic rights and UNCLOS on an equal status. In that case, such an argument would lose any room to be approved by the tribunal’s interpretation of Article 311. This is because, according to its interpretation of Article 311, customary international law (that forms a basis for historic rights) may have its effect solely as far as it satisfies the requirements set by Article 311.

The tribunal may apply international law under Article 293, unless it is not at variance with UNCLOS. The tribunal could have determined the customary international law that gives a ground for historic rights, and assessed China’s historic rights by applying the customary international law. After these considerations it could have decided the relationship between UNCLOS and China’s historic rights. Furthermore, the tribunal could have reflected the historic rights under the customary international law in interpreting and applying the relevant provision of UNCLOS, such as provisions that prescribe the EEZ regime. In place of examining these possibilities, the tribunal intended to decide the effect of the customary international law on which historic rights are based, by applying Article 311. It can be questioned whether the party States to UNCLOS have agreed to such interpretation of Article 311. Even if the tribunal’s interpretation is approved, it can be maintained solely between the party States to UNCLOS. In that case, the effect of the customary international law that forms a basis for historic rights may be determined by such interpretation of Article 311.

In addition, according to the tribunal’s opinion, Article 311 and Article 293, Paragraph

⁴² For instance, Zou and Liu, *op. cit.*, *supra* n. 12, p. 139.

1⁴³“mirror the general rule of international law concerning the interaction of different bodies of law, which provide that the intent of the parties to a convention will control its relationship with other instruments (237).”⁴⁴ It is undeniably a general rule of international law that the intent of the parties to a convention decides the interaction of the convention with other bodies of law. However, it requires an examination whether whole the contents of Article 311 have been established as general international law. Unless it is approved, the rules contained in Article 311 concerning the interaction of UNCLOS with other bodies of law would apply solely to UNCLOS and solely between party States to UNCLOS.⁴⁵

From the provisions and rules that the tribunal referred to, it derived four propositions concerning the relationship between UNCLOS and other bodies of law. Concerning historic rights to living and non-living resources, first, when UNCLOS explicitly provides for them, and they take a form of an agreement that Article 311 prescribes, they shall remain unaffected.⁴⁶ Second, while UNCLOS does not expressly permit or preserve a prior agreement, rule of customary international law, or historic rights, such prior norms will not be incompatible with UNCLOS where their operation does not conflict with any provisions of UNCLOS or to the extent that interpretation indicates that UNCLOS intended the prior agreement, rules, or rights to continue in operation. Third, where rights and obligations arising independently of UNCLOS are not incompatible with its provisions, Article 311, Paragraph 2 provides that their operation will remain unaffected. Fourth, where independent⁴⁷ rights and obligations have arisen prior to the entry into force of UNCLOS and are incompatible with its provisions, the principles set out in Article 30, Paragraph 3 of the Vienna Convention on the Law of Treaties and Article 293⁴⁸ of UNCLOS provide that UNCLOS will prevail over the earlier, incompatible rights and obligations (238).

Assuming these propositions, after the tribunal found that no articles of UNCLOS expressly provide the continued existence of historic rights to the living and non-living resources (239), it moved onto an examination of whether China’s historic rights should be considered not incompatible with UNCLOS. Its examination covered the relevant provisions of UNCLOS (240-245), the drafting process of UNCLOS and establishment of the EEZ regime (248-254), and

⁴³ It is not plainly explicable whether the reference to Article 293, Paragraph 1 is needed here. That provision reads:

A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

It might be said that the reference to this provision by the tribunal here is for the reason that this provision forms a ground for the supremacy of UNCLOS over other bodies of law.

⁴⁴ The tribunal referred to Article 30, Paragraph 2 and Paragraph 3 of the Vienna Convention on the Law of Treaties.

⁴⁵ The relation between historic rights or the rules that prescribe them, on the one hand, and the rules contained in UNCLOS, on the other hand, becomes complicated in cases in which non-party States are involved. As for an examination of the relationship between treaties and historic rights as exceptions to them, see, the 1962 Report, paras. 73-78.

⁴⁶ As the cases that fall under the first proposition, the tribunal referred to Article 10 and Article 15 of UNCLOS. Article 10, Paragraph 6 provides that the rules concerning bays do not apply to historic bays. Article 15 provides that the median line method concerning territorial sea delimitation does not apply to cases in which historic titles are involved.

⁴⁷ The “independence” mentioned in the third and the fourth propositions may be understood as that from UNCLOS. Such remarks by the tribunal of the “independence” are based upon its finding that China’s historic rights are independent from UNCLOS, as confirmed above.

⁴⁸ The reference to Article 293 here also raises a doubt concerning its necessity and appropriateness. However, it might be understood that the tribunal referred to the provision as a ground for supremacy of UNCLOS over other international law rules.

precedents (257-260). Then, it reached the conclusion that China's claim to historic rights to living and non-living resources within the nine-dash line is incompatible with UNCLOS (261). It is not easily understood which propositions among the second, third, and fourth propositions, referred to above was applied by the tribunal. Nonetheless, the critical point is that by this conclusion the tribunal definitely denied the arguments of China and Chinese scholars that China's historic rights, having established prior to UNCLOS, cannot be denied by it.⁴⁹

Here, the above mentioned point needs to be recalled that the conclusion of the tribunal is based upon the application of Article 311 of UNCLOS, and that whether whole the contents of the article reflect general international law requires further examination. Unless this point is affirmed, the tribunal's conclusion may be applied solely between party States to UNCLOS, when party States approve the tribunal's interpretation of Article 311. When a non-party State to UNCLOS claims historic rights and denies the regulation of UNCLOS over the claims, party States to UNCLOS could not necessarily oppose to such an argument by applying the tribunal's conclusion.

(2) The "Comprehensiveness" of UNCLOS

① When the tribunal decided that China's historic rights are at variance with UNCLOS considering its relevant provisions and its drafting process, it emphasized above all the "comprehensiveness" of UNCLOS (231, 245, 261). From the perspective of this paper, namely that of validity of international law, the "comprehensiveness" requires most detailed scrutiny.

As to the meaning of comprehensiveness, the tribunal seems to imply the following two meanings. First, UNCLOS covers all the sea areas including seabed and subsoil, and it regulates all the uses of the sea. It may be described as the material or spatial coverage of UNCLOS, and the comprehensiveness is the word to express this meaning (231).⁵⁰ Second, rather than other international law rules, it is UNCLOS that establishes the ocean regimes and that regulates the uses of the sea (245)⁵¹. This meaning, although it is somehow close to exhaustiveness, may be described as exclusiveness.⁵² These two meanings are not exclusive to each other. Nonetheless, it may not be denied to derive the two meanings from the tribunal's ruling. The first, the comprehensiveness of UNCLOS, means denial of any vacuums of UNCLOS, as it regulates all the

⁴⁹ As a typical example of it, see, Li, *op. cit.*, *supra* n. 30, p. 52. The Chinese statement on the 12 of May, 2016, referred to by the tribunal (200), stated that:

[T]he dotted line came into existence much earlier than UNCLOS, which does not cover all aspects of the law of the sea, and that the tribunal does not have jurisdiction over China's dotted line.

It is interpreted that the nine-dash line (and China's historic rights being claimed within the line) may not be, at least legally, assessed by UNCLOS. Gao and Jia take a position that China's historic rights are prior to UNCLOS and that they continue their operation even under UNCLOS. Gao and Jia, *op. cit.*, *supra* n. 13, p. 123.

⁵⁰ Looking at the Preamble of UNCLOS, the tribunal stated that UNCLOS intends to settle "all issues" relating to the law of the sea and that it emphasizes the desirability of establishing "a legal order for the sea (245)." However, Paragraph 8 of the Preamble of UNCLOS, assumes existence of issues that UNCLOS does not addresses, and provides that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law." The tribunal, for an unknown reason, did not mention it.

⁵¹ This is understanding based upon the tribunal's reference to Article 309 of UNCLOS that prohibits reservations and exceptions to UNCLOS. Nevertheless, as the tribunal also referred to the Preamble of UNCLOS, as confirmed *supra* note 50, it is not determinable whether it placed weight on either of the two meanings, or it intended to mean both.

⁵² McDorman uses the term of exhaustiveness, and he denies the exhaustiveness of UNCLOS regarding the rights that States claim regarding sea areas and natural resources. McDorman, *op. cit.*, *supra* n. 34 (Rights and Jurisdiction...), p. 153.

regimes of the sea and all the uses of the sea.⁵³ In comparison, the second, the exclusiveness of UNCLOS, gives priority to it over other international rules, if there is any, which provide for the ocean regimes and regulates all the uses of the sea.

Looking at the tribunal's logic, it did not accept such an argument that China's relevant rights in the South China Sea are protected by international law including UNCLOS,⁵⁴ as far as those rights are to living and non-living sources of EEZ of the Philippines. This is because UNCLOS is comprehensive in terms of determination of the EEZ and continental shelf regimes, and, thus, UNCLOS supersedes any rights that are prior to UNCLOS and at variance with it. While the tribunal used the term comprehensiveness, it may be interpreted not only that UNCLOS regulates all the sea areas and all the uses of the sea, but also that UNCLOS supersedes any rights and obligations with grounds apart from UNCLOS and being not in conformity with it. If this is the case, the "comprehensiveness" mentioned by the tribunal is understood as containing the two meanings that are explained here.

With respect to the logical consequences of the "comprehensiveness," the terms used by the tribunal, such as "independence" and "exception" are so closely related to the "comprehensiveness" that they require some consideration. As confirmed before, the tribunal regarded China's historic rights as independent from UNCLOS.⁵⁵ Its meaning should be clarified in relation to the comprehensiveness of UNCLOS. On the one hand, if UNCLOS is comprehensive in that it regulates all the sea areas and all the uses of the sea, the sea areas and the uses of the sea that are independent from UNCLOS are not regulated by it, so that they would not come into existence under UNCLOS. On the other hand, if UNCLOS is exclusive in that solely UNCLOS establishes the ocean regimes and regulates the uses of the sea excluding other international law rules regarding them, if any, the "independence" means that other international regulation on the ocean regimes and the uses of the sea would be excluded and surpassed by UNCLOS.⁵⁶

② Regarding the term "exception" used by the tribunal, the following observation is important. The tribunal posed the three questions concerning the relationship between UNCLOS and China's historic rights. In addressing the second question, namely that of whether China had acquired the historic rights prior to the entry into force of UNCLOS, the tribunal stated that historic rights are exceptional rights and that they come into existence by acquiescence by other States in the historical process (268). The "exception" also relates to the comprehensiveness of UNCLOS. However, the tribunal mentioned "exceptional rights" in relation to the international order of the sea that was prior to UNCLOS. It did not so in relation to UNCLOS. If historic rights form exceptions in relation to UNCLOS, and UNCLOS are both comprehensive and exclusive

⁵³ Sakamoto, referring to Paragraph 8 of the Preamble of UNCLOS that provides as reproduced at *supra* n. 50, argues there are no vacuums under international law. It does not mean that UNCLOS is comprehensive to deny vacuums, but that the issues remaining unregulated by UNCLOS will be regulated by general international law. Therefore, his position is to deny "vacuums" of general international law. Shigeki Sakamoto, "Historic Waters and Rights Revisited: UNCLOS and Beyond?," in *The Rule of Law in the Sea of Asia-Navigational Chart for Peace and Stability* (not for sale), Paper submitted for the International Symposium of the Law of the Sea hosted by the Ministry of Foreign Affairs of Japan, 12-13 February, 2015, p. 67.

⁵⁴ The tribunal referred to the Chinese statement of the 30th of October, 2015, which maintains that China's sovereignty and relevant rights are protected under international law including UNCLOS (187). As Chinese similar statement of 2011, see, *supra* n. 6.

⁵⁵ See, Section 2 (1) of this paper.

⁵⁶ These logical consequences are applied, at least in assuming cases between party States of UNCLOS. In cases between non-party States or between a non-party State and a party State, they may conclude different agreements from UNCLOS that regulated the sea areas and uses of the sea. Such agreements as establishing special laws are not excluded by UNCLOS between non-party States, and between a non-party State and a party State.

in the meanings as explained here, as a logical consequence, neither exceptional ocean regimes nor exceptional uses of the sea can exist or they should be excluded, unless UNCLOS expressly admits the exceptions. The tribunal did not discuss this point. It only confirmed that UNCLOS does not contain any explicit provisions that permit historic rights to living and non-living resources. While the tribunal did not provide further examination, even if the second question was answered affirmatively, there would be no room for historic rights, as being exceptional rights, to be preserved in relation to UNCLOS that is comprehensive and exclusive. If this is the case, the significance would be doubtful in posing the second question.

It is possible to understand that the tribunal defined the requirements for historic rights as the historical process of creation and no protests from other States. Then, is it customary international law or general international law that provides for those requirements for historic rights to exist? The tribunal gave no mention concerning this point. The statement of the tribunal that historic rights are exceptional rights set forth a presupposition based upon which it reached the conclusion that as China's rights in the South China Sea were derived from the principle of the freedom of the high seas, the exercise of rights permitted by international law did not create historic rights, as being exceptions to the law.⁵⁷

In the argument concerning historic waters, there has been a division of opinions as to whether or not they set exceptions to a general rule. The logics applied in the argument bear critical importance from the perspective of a way for international law to ensure its regulation over claims to historic rights. In relation to "historic waters," as a general rule mainly the rules of maritime delimitation and demarcation of maritime zones are assumed. In comparison, in relation to "historic rights" it is likely that rules concerning the regimes of territorial sea, EEZ, and continental shelf are presupposed as general rules. Despite this difference, as far as focus is placed upon the logics themselves, it is not unreasonable to consider that the logics in the argument of "historic waters" are expected to be also applied in the argument of "historic rights."

With bearing this in mind, next, succinct examination will be given of the argument concerning historic waters, in order to evaluate the logic applied by the tribunal in the Award in dealing with historic rights.

(3) Definitions of Exceptions and a General Rule as Logics Applied in Order for Securing International Regulation

① As an analysis of the legal regime of historic waters, the 1962 Report⁵⁸ provides an important starting point.⁵⁹ It demonstrates denial of the logic that regards historic waters as exceptions to a general rule of international law. It reads:

[T] he widely held opinion that the régime of "historic waters" constitutes an exception to the general rule of international law regarding the delimitation of the maritime domain of the State is debatable. The realistic view would seem to be not to relate "historic waters"

⁵⁷ The tribunal found that historical navigation and fishing as well as trade in the South China Sea represented the freedom of the high seas, so that they did not create historic rights. According to it, when China ratified UNCLOS which established the EEZ regime, China relinquished the freedom of the high seas (269-271).

⁵⁸ As a detailed analysis of the 1962 Report, see, Ko Nakamura, "(Rekishiteki Suiiki no Seido no Hotenka ni Tsuite-Rekishiteki Wan wo Hukumu Rekishiteki Suiiki no Horitsu Seido · Kokusai Rengo no Jimukyoku ni Yotte Junbi Sareta Kenkyu Kiroku ni Kanren Shite-(The Codification of the Regime of Historic Waters-The Legal Regime of Historic Waters Including Historic Bays and Research and Report Provided by The Secretariat of the United Nations-)," *Hogaku Kenkyu (Journal of Law, Politics, and Sociology)*, Vol. 38, No. 4, 1965, p. 30 *et seq.*

⁵⁹ As for the background for this research, see, the 1962 Report, pp. 1-6; Rosenne, *op. cit.*, *supra* n. 36, pp. 193-195.

to such rules as an exception or not an exception, but consider the title to “historic waters” independently, on its own merits. As a consequence one should avoid, in discussing the theory of “historic waters,” to base any proposed principles or rules on the alleged exceptional character of such waters.⁶⁰

The opposition to the logic that defines historic waters as exceptions to a general rule is based upon the understanding that as general rules on bays and other rules concerning maritime delimitation have not been established, so that historic waters cannot form exceptions to general rules that do not exist.⁶¹

In contrast to this, there is a position that the legal regime of historic waters is defined as exceptions to a general rule.⁶² Critical importance exists in the reasons for adopting such a logic. A scholarly writing explains that such a logic is needed for claims to historic waters, or a preexisting law to survive a changing law.⁶³ Another scholar points out the impossibility of establishing a general rule without permitting exceptions to it,⁶⁴ and in this sense, historic waters fulfil the function of a safety valve (*une soupape de sûreté*).⁶⁵ In sum, the object of these positions is to give somehow elasticity, which is called a safety valve, to international law in its regulation in that it permits preservation of some effects of preexisting laws and historic waters. By admitting exceptions as a safety valve, when facing different and incoherent international practice it would become possible to derive international rules. It is true that by admitting exceptions, general rules may be hampered from effectively regulating. To avoid such a risk, at least to a certain degree, a possible way is to ensure dispute settlement procedures, particularly judicial or arbitral procedures that legally define exceptions in interpreting and applying the general rule concerned. Here it may suffice to point out that possibility. Looking at UNCLOS, Article 10, Paragraph 6 provides that the rule of bays is not applied to historic bays.⁶⁶ In this regard, by permitting exceptions a general rule concerning bays could be established. In the same manner, Article 15 recognizes that a historic title as well as special circumstances set exceptions to which the general rule concerning territorial sea delimitation is not applied.⁶⁷ In the same line of argument, the tribunal in the Award confirmed that Article 12 of the 1958 Convention on Territorial Sea and Contiguous Zone and Article 15 of UNCLOS expressly provide for historic titles (221, 223).⁶⁸

② When the logics proposed by the 1962 Report and in the scholarly writings concerning “historic

⁶⁰ The 1962 Report, para. 184.

⁶¹ As for such positions and the Norwegian claims in the Fishery Case, see, *ibid.*, paras.49-53.

⁶² The 1962 Report introduces the position that defines the legal regime of historic waters as an exception, and the British claims in the Fishery Case, paras. 42-48.

⁶³ Andrea Gioia, “Historic Titles,” in Rüdiger Wolflum ed., *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, Vol. IV, p. 817, para. 11.

⁶⁴ Gilbert Gidel, *Droit international public de la mer*, Vol. III, Topos Verlag, 1934, p. 651.

⁶⁵ When both the general rule and its exceptions are established as customary international law rules, it is not explicable why the former has priority over the latter in the sense that the latter forms an exception to the former. The 1962 Report, para. 54.

⁶⁶ The Virginia Commentary interprets that Article 10, Paragraph 6 provides for historic bays as “exceptions” to the general rule of bays. Sataya N. Nandan and Shabtai Rosenne, eds., *United Nations Convention on the Law of the Sea 1982 - A Commentary*, Vol. II, Martinus Nijhoff Publishers, 1993, Article 10, 10. 1, 10.5 (e).

⁶⁷ *Ibid.*, Article 15, 15. 1, 15. 12 (a).

⁶⁸ Here the tribunal did not refer to Article 10, Paragraph 6, while it did in para. 238 of the Award. The reason for that is not clear. It referred to the mention of the 1962 Report of the Fishery Case as a precedent which reads:

‘Historic waters’ are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title (para. 220 of the Award).

waters” are applied to “historic rights,” there will be the two logics: first, historic rights are exceptions to general rules; and second, they do not form exceptions. The difference between the two is mainly resulted from the different judgment concerning the possibility to set forth the assumed general rules. In other words, the both logics are the same in respecting concrete and individual circumstances that introduce claims to historic rights. While the first logic admits such weight on the concrete and individual circumstances as forming exceptions to general rules, the second logic admits such weight on them as denying general rules. In addition to the two logics, in presupposing an existence of general rules, in contrast to the first logic, the third logic can be proposed, which assumes a general rule that regulates historic rights with concrete and individual circumstances without admitting them as exceptions to the rule. In the Award, since UNCLOS, as a general rule, is presupposed, the contrast between the first and the third logics is significant rather than the contrast between the first and the second logics.

Regarding the third logic, although it is the case relating to historic waters, the logic applied by the International Court of Justice (ICJ) in the Fishery Case is remarkable.⁶⁹ It adopted the logic that defined the Norwegian straight baseline method as one application of a general rule, not as an exception to it. The United Kingdom maintained that there was a 10 nautical mile rule concerning a closing line of a bay, and that exceptions to it may be permitted on historic grounds (130. For this case, the numbers indicate pages in the judgment).⁷⁰ ICJ denied existence of such a general rule.⁷¹ It determined that Norwegian straight baseline method is not an exception to general international law, but one application of it to a specific case (131). In reaching this conclusion, regarding the general international law, ICJ defined three considerations:⁷² first, the drawing of baselines not departing to any appreciable extent from the general direction of the coast; second, the more or less close relationship existing between certain sea areas and the land formations which divide or surround them; and third, certain economic interests peculiar to a region, the reality and importance of which are clearly evidences by a long usage (133).⁷³ The three considerations may be understood as setting forth the requirements for the legality of the Norwegian unilateral measure.

In reality, ICJ determined not the legality but the opposability of the Norwegian straight baseline method in relation solely to the UK.⁷⁴ The opposability in relation to the UK is different

⁶⁹ Fisheries Case (United Kingdom v. Norway), Judgment of December 18th, 1951, *ICJ Reports 1951*, p. 116.

⁷⁰ While the UK adopted the logic that historic waters form exceptions to a general rule, Norway alleged that Norwegian straight baseline method is one application of general international law to a special case. As for detailed analyses of the positions of the two parties, see, the 1962 Report, paras. 46-53; Nakamura, *op. cit.*, *supra* n. 58, pp. 39-41.

⁷¹ In this regard, ICJ stated (130) as reproduced at *supra* n. 68.

⁷² While here ICJ used the term “considerations,” at page 129 of the judgment, it did the term “principle” in describing almost the same contents. It states that:

[T]he *principle* that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea (emphasis added).

Considering the part of the judgment, the three “considerations” may be expressed as “requirements” for legal or valid baselines under general international law. In this regard, Okuwaki, as seen at *infra* n. 75, interpreted the three “considerations” as “requirements” in Japanese.

⁷³ These three considerations are reflected in Article 4 of the 1958 Convention on Territorial Sea and Contiguous Zone, and maintained in Article 7 of UNCLOS.

⁷⁴ ICJ examined whether Norway coherently adopted the straight baseline method, and whether there were protests by other States (136-139). Then, it found that the actual Norwegian straight baselines were not diverted from the general direction of the coast, and that even there were basepoints that were diverted from the general direction of the coast, it was due to consideration of traditional rights of fishing, being reserved to its inhabitants. ICJ also admitted considerations of such traditional rights

from the legality *erga omnes*. Although legality and opposability need to be examined in detail as to the Fishery Case, here it suffices to point out the issue. Before determining the opposability, ICJ declared the two important presuppositions that have been frequently cited: first, the act of delimitation is necessarily a unilateral act; and second, the validity of the delimitation with regard to other States depends upon international law (131).⁷⁵ The conclusion that the Norwegian straight baseline method is one application of general international law to a specific case was derived when ICJ faced the conflict of two logics: first, the Norwegian straight baseline method forms exception to a general rule; and second, it is application of a general rule to a specific case.⁷⁶

Thus, ICJ encompassed Norwegian straight baseline method, which was based upon special circumstances including historical one, within the legal sphere of the general rule by defining the method as one application of the rule.⁷⁷ In addition, the general rule was declared as one that admitted consideration of concrete and individual circumstances of the case concerned, in examining the three conditions that were set forth by ICJ.

of fishing, when they were founded on the vital needs of the population and attested by very ancient and peaceful usage (142). It cannot be easily understood the reason why ICJ did not find the legality of the Norwegian straight baselines solely based upon the three considerations that it set forth, and the reason why the coherency of Norwegian straight baseline method and no protest from other States were needed to be considered in addition to the examination of the three considerations in order to determine the opposability of the Norwegian straight baseline method in relation to the UK. In this regard, Eto points out that although the line of argument of ICJ is not easy to be traced, its weight is clearly shifted to the consideration of attitudes of other States from application of the standards of general international law. Junichi Eto, "Ippoteki Koi no Kokusaiho jo no Koka - Gyogyou Jiken (The Effect of Unilateral Acts under International Law- The Fishery Case)," in Yamamoto *et al* eds., *Kokusaiho Hanrei Hyakusen (100 Cases in International Law)*, Yuhikaku, 2001, p. 13. ICJ did not find the legality of Norwegian straight baseline method but it did its opposability in relation to the UK. Difference between legality and opposability may form one reason for the not understandable line of argument of ICJ. In order for finding legality of Norwegian straight baseline method, three considerations may be enough. In contrast, in order for finding opposability of it, further examination of the two factors, which ICJ examined, may be needed. However, as ICJ did not determine legality of it, any conclusion could not be derived that the three "consideration" are "requirements" for legality of it. Thus, as explained at *supra* n. 72, in this paper, the three considerations are not regarded as "requirements" for the legality of straights baselines.

⁷⁵ Okuwaki focusses upon the fact that ICJ found the opposability of Norwegian straight baseline method as a unilateral act, when the three "considerations" (Okuwaki translated "considerations" into "yoken" which means "requirements" in Japanese) are affirmatively determined. According to him, in this context the opposability is used as a concept that resides within the world of legal rules not as a concept to evaluate the effect of unilateral domestic measures in case of a vacuum of law, which means non-existence of a legal rule relating to a closing line of a bay. Therefore, the opposability is admitted as far as the unilateral measures remain within the discretion that international law allows. Naoya Okuwaki, "Katei to Shite no Kokusaiho - Jisshoshugi Kokusaiho Ron ni Okeru Ho no Henka to Jikan no seigyo (International Law as a Process - Changes of Law and Restriction on Law by Time in the Positivist International Law Theory-)," 22 *Sekaiho Nenpo (Yearbook of World Law)*, 2003, p. 75.

⁷⁶ Opposing the first logic alleged by the UK, Norway stated that:
The Norwegian Government does not rely upon history to justify exceptional rights, to claim areas of sea which the general law would deny; it invokes history, together with other factors, to justify the way in which it applies the general law (133).

⁷⁷ A different evaluation of the judgment places weight on the finding of ICJ that considering the publicity, together with other international factors, the straight baseline method became solid by the coherent and long practice. That practice proves that other States did not regard Norwegian straight baseline method as being at variance with international law. Tomoyuki Yuyama, "Rekishiteki Suiiki ni Kansuru Beikoku SAiko Saibansho no Hanrei (Jurisprudence of the Supreme Court of the US Relating to Historic Waters)," 333 · 334 *Ritsumeikan Hogaku (Ritsumeikan Law Review)*, 2010, pp. 1682-1683.

The logic of ICJ is evaluated as follows. The logic itself ensures international regulation over claims to rights based upon historic facts and other circumstances (in Norway's case, they are claims to sovereignty over internal waters and territorial sea demarcated by drawing straight baselines), in that it keeps such claims to rights being under international regulation as one application of a general rule of international law. In this very sense, the logic maintains international regulation and validity of international law over such claims to rights. If it is the case, however, reservation should be immediately added that as a result of international regulation over those claims to rights, the contents of the rights will not necessarily become clear and objective enough. When the three conditions set forth by ICJ are "requirements" for legality of straight baselines under international law, the contents cannot be said to be objective enough, and the judgment as to whether they are satisfied may not be easy.

③ When, in accordance with the first logic, historic rights are regarded as "exceptions" to a general rule, a general rule maintains to be a law even in facing opposing phenomena to it. In this sense, to admit exceptions would make a general rule elastic so that it would not stop being a law, by allegations of phenomena contrary to it. When, in accordance with the third logic, considerations of historic rights are regarded as application of a general rule, in this very sense, in other words, by allowing considerations of concrete and individual circumstances, it would bear elasticity, too. Either of the two logics has the common nature to provide a general rule, a law, with elasticity.⁷⁸ The first logic and the third logics may be substantially distinguished from each other, only if in the case of the third logic a general rule precisely provides in detail for concrete and individual circumstances to be considered, so that legal assessment of those circumstances is possible as a consequence of "interpretation" or "application" of a general rule. In order to keep such substantial difference between the two logics, in addition to appropriate drafting of a general rule to precisely prescribe concrete and individual circumstances, to secure the "interpretation" and "application" of a general rule, as a legal function, in evaluating in legal terms of those circumstances is critically important, through proper dispute settlement procedures, particularly judicial or arbitral procedures that interpret and apply a general rule.

Different from these logics, it may be opined that the requirement for historic waters are determined by considering concrete and individual circumstances on a case-by-case basis. Such a position may be seen in the judgment of the Tunisia/ Libya Continental Shelf Case.⁷⁹ ICJ stated that:

[I] t seems clear that the matter (of historic waters or historic bays, added by the author) continues to be governed by general international law which does not provide for a *single* "régime" for "historic waters" or "historic bays," but only for a particular régime for each of the concrete, recognized cases of "historic waters" or "historic bays" (italics original) (100).

In addition, there is a scholarly writing that does not admit establishment of general international law relating to historic waters.⁸⁰ Such a position is led by a judgement that due to

⁷⁸ In this regard, regarding Tunisian claims to historic rights in the Tunisia/ Libya Continental Shelf Case, one scholar pointed out that they were not claims to historic rights and claims of exceptions to a general rule, either. According to this scholar, Tunisia alleged factors to be considered in drawing straight baselines. Such an idea is similar to that of this paper in admitting that both exceptions to a general rule, on the one hand, and drafting of a general rule to allow considerations of concrete and individual circumstances, on the other hands, are common as a way to respect individual and concrete claims to rights. Andrea Gioia, "Tunisia's Claims over Adjacent Seas and the Doctrine of 'Historic Rights,'" *Syracuse Journal of International Law*, vol. 11, 1984, p. 339. The same idea is found in the examination of Tunisian claims by posing a question: whether they were claims of historic waters, or claims of straight baselines, *ibid.*, p. 345 *et seq.*

⁷⁹ *Op. cit.*, *supra* n. 23, p. 18.

⁸⁰ Rosenne, *op cit.*, *supra* n. 36, p. 203. If this position denies that title to historic waters and the definition

too much variety of claims to historic waters to derive common elements, although there is an attempt to set forth the requirements for historic waters,⁸¹ it is not possible to precisely define them,⁸² or it is even inappropriate to do that. Such suggestion of the inappropriateness may lead to a conclusion that historic rights are not matters for legal regulation, and that they should be considered as extra legal issues. Actually, after the 1962 Report was released, ILC did not work on the issue, and in 1967 many members of ILC raised a doubt about the timing of ILC's intensive works on this issue, because it provoked political claims.⁸³ Such a doubt, too, reflects the idea that the issue of historic waters do not fall within a sphere of legal regulation.

Whatever the legal status of historic waters may have under international law, it is really true that the issue strongly requires consideration of concrete and individual circumstances of each case. Doubtlessly, it holds true with historic rights.

Thus far, the possible logics have been analyzed, which are applied to the issue of historic waters, and historic rights, too. Based upon this analysis, evaluation can be given on the logic which the tribunal adopted in the Award.

(4) The Logic of the Tribunal in the Award with Respect to Regulation by UNCLOS over Historic Rights

① The tribunal found that China's historic rights are independent from UNCLOS, and that UNCLOS is comprehensive. Independence from UNCLOS signifies no ground for China's historic rights under UNCLOS. Therefore, as far as comprehensiveness of UNCLOS is presupposed, the conclusion that rights under UNCLOS superseded China's historic rights (and that China's historic rights are not preserved as exceptions to UNCLOS) is said to be logically self-evident. The tribunal regarded China's historic rights as exceptions in relation to the legal ocean order prior to UNCLOS. However, it did not mention possible status of China's historic rights as exceptions to UNCLOS. Irrespective of that, as a logical conclusion derived from the comprehensiveness of UNCLOS, exceptions to it would not be admitted, unless UNCLOS

are regulated by customary international law and general international law, historic waters would go beyond the sphere of international law regulation. In this regard, attention should be paid to the analysis conducted in the 1962 Report. It introduces two positions regarding historic waters: first, they form exceptions to a general rule, and second, they are not be defined as exceptions to a general rule. The logic of the second position is that as there has not established a general rule relating to bays, exceptions to a general rule is unthinkable. The point is that this position denies a general rule relating to historic waters, but it does not mean denial of legal regulation itself over historic waters. The 1962 Report, paras. 49-50.

⁸¹ The 1962 Report proposes three requirements for historic waters: first, the authority exercised over the area by the State claiming it is as "historic waters"; second, the continuity of such exercise of authority; and third, the attitude of foreign States. The 1962 Report, para. 185. In Japan, in the Tekisada case in which the legal status of Setonaikai was disputed, both Wakayama District Court and Osaka High Court declared two requirements for historic waters: first, the claims to internal waters have become continuous and historical practice; and second, inexistence of disputes over the claims. Judgment of 15 July of 1974, Wakayama District Court, *Hanrei Jiho (Law Cases Report)*, No. 844, p. 105; Judgment of 19 November 1976, Osaka High Court, *Hanrei Jiho (Law Cases Reports)*, No. 844, p. 102.

⁸² Scovazzi seems to take such a position. Tullio Scovazzi, "Le régime des eaux historiques," in D. Pharand & U. Leanza eds., *The Continental Shelf and the Exclusive Economic Zone: Delimitation and Legal Regime*, Martinus Nijhoff, 1993, p. 326 *et seq.*

⁸³ Report of the Commission on the Work of Its 19th Session, A/ 6709/ Rev. 1 and Rev. 1/ Corr.1, para. 45. In a preliminary work for the 1962 Report, opinions were divided into two possibilities: first, inductive method to examine State practice; and second presupposing a general rule relating to historic waters. The second position was based upon a worry about extravagant claims to be found in State practice, and in that sense, such a political consideration might provoke a doubt about verification of State practice. The 1962 Report, para. 62; Nakamura, *op. cit.*, *supra* n. 58, p. 32.

expressly provides for exceptions.

Referring to the first, second, and third logics explained above, the tribunal's logic is different from the first logic, in that it did not admit exceptions to a general rule, namely UNCLOS. Although by express provisions they would be admitted, the tribunal's logic rather placed emphasis on the comprehensiveness of UNCLOS. Is it proper to deny any grounds for historic rights under UNCLOS, except for in cases of Article 10, Paragraph 6 (historic bays), Article 15 (historic titles), and Article 298, Paragraph 1 (a) (i) (historic bays, historic titles)?⁸⁴ In this regard, doubt is raised concerning the propriety, because the tribunal denied China's historic rights not in terms of the opposability in relation to the Philippines, but in terms of the effect *erga omnes*.⁸⁵ The tribunal's logic is also different from the second logic that denies existence of a general rule, as the tribunal presupposes UNCLOS.

② As the final choice, did the tribunal adopt the third logic so that it considered China's historic rights in interpreting and applying the provisions of UNCLOS? Did it secure international regulation by UNCLOS over historic rights by providing UNCLOS with such elasticity as considerations of historic rights with concrete and individual circumstances?

With regard to territorial sea, the tribunal admitted artisanal, traditional fishing of the Philippines in territorial seas (805 *et seq.*). This is because Article 2, Paragraph 3 of UNCLOS contains an obligation on States to exercise their sovereignty subject to "other rules of international law" that include the rules on the treatment of a vested right, such as traditional fishing rights. Some provision among those regarding the EEZ regime is interpreted as indicating considerations of historic rights. Depending on such a provision, without hampering the comprehensiveness of UNCLOS that the tribunal emphasized, historic rights would have room to be preserved.

Concerning the provisions on the EEZ regime, the tribunal examined Article 56, Paragraph 1, Article 58, and Article 62. Article 62, Paragraph 3 may be interpreted as reflecting considerations of historic rights to fishing. Scholarly writings point out that this provision indirectly admits historic rights to fishing.⁸⁶ In contrast, irrespective of reference to the provision (804), the tribunal interpreted the provision as follows. It does not intend to preserve historic fishing rights, while it does not exclude them being based upon domestic laws of coastal States and international agreements. As a conclusion, the tribunal found that by establishing the EEZ and continental shelf regimes UNCLOS superseded historic rights to living and non-living resources.⁸⁷ It is voiced that as UNCLOS "overwrote" historic fishing rights by Article 62, Paragraph 3, there would be no room for historic fishing rights beyond that.⁸⁸

The tribunal's interpretation of UNCLOS is not easily understood in that while it admitted historic fishing rights (vested rights) within territorial sea under Article 2, Paragraph 3, in EEZ, despite the existence of Article 62, Paragraph 3, it denied an intention of UNCLOS to preserve historic fishing rights. Particularly considering that although coastal States have full sovereignty over territorial seas, they have solely sovereign rights with limitation on its purpose and function over EEZs, the tribunal's conclusion is not easy to understand. One possible explanation for the tribunal's position would be different understandings by the tribunal of the territorial sea

⁸⁴ Article 46 (b) is also related to historic rights.

⁸⁵ Sakamoto emphasizes this point. Sakamoto, *op. cit. supra* n. 35, p. 200.

⁸⁶ McDorman, *op. cit., supran.* 34 (Rights and Jurisdiction...), p. 157; McDorman, *op. cit., supra* n. 34 (The Law of the Sea Convention...), p. 153; Symmons, *op. cit., supra* n. 24, p. 148.

⁸⁷ Submission No. 10 of the Philippines referred to Article 62, Paragraph 3 as a provision addressing a traditional fishing right, in alleging the preservation of such a right as the Philippines enjoys at Scarborough Shoal (782-783).

⁸⁸ Nishimoto, *op. cit., supra* n. 19, pp. 243-244.

and EEZ regimes. On the one hand, the EEZ regime bears the *sui generis* nature (Article 55) that UNCLOS itself regulates, and UNCLOS does not permit diversion from it unless there are domestic laws and international agreements to provide for historic fishing rights. On the other hand, with regard to territorial seas, UNCLOS intends to respect restriction imposed on sovereignty by “other rules of international law.”

Even if Article 62, Paragraph 3 is interpreted as providing for consideration of historic rights, a clear conclusion is difficult to derive regarding the degree to which China’s historic rights are preserved. This is because the article stops at providing that:

“[I]n giving access to other States …the coastal State shall take into account … the need to minimize economic dislocation in States whose nationals have habitually fished in the zone.”

In the end, the tribunal did not see such significance in Article 62, Paragraph 3 as examined here. There is no idea to be seen in the tribunal to provide UNCLOS, which is comprehensive, with such elasticity as considering China’s historic rights in “interpreting” and “applying” the article.⁸⁹ As a matter of logic the tribunal might be said to be coherent in that without seeing the significance of Article 62, Paragraph 3, based upon the comprehensiveness of UNCLOS it regarded China’s historic rights as having been superseded by it. Nonetheless, incorporation of considerations of historic rights into legal function of interpretation and application of Article 62, Paragraph 3 could be possible without hampering the comprehensiveness of UNCLOS. By doing so, the tribunal could have substantially given legal assessment to China’s claim to historic rights.

③ Furthermore, the tribunal seems to apply the same logic regarding the relationship between historic rights and the EEZ regime to that between historic rights and the continental shelf regime. It did not expressly make any distinction between the two regimes.⁹⁰ It found that China’s historic rights are superseded in the sea areas (and seabed) to which the EEZ regime or the continental shelf regime applies under UNCLOS (247). The tendency of disregarding distinction between the EEZ and the continental shelf regimes is seen also in the Award on the Merits of the Arctic Sunrise Arbitration.⁹¹ In this case, the arbitral tribunal seemed to equate the EEZ and the continental shelf regimes in relation to non-living resources.⁹² Such an equation is also opined by some scholars.⁹³ In the South China Sea dispute, the tribunal found that China’s historic rights

⁸⁹ The tribunal interpreted the arbitral award on the Eritrea v. Yemen arbitration that the preservation of the traditional fishing practices was a result of the application of the applicable laws in that case (259, 803).

⁹⁰ Regarding continental shelf, the tribunal mentioned Article 77 and Article 81 (244).

⁹¹ The Arctic Sunrise Arbitration (Netherlands v. Russia), Award on the Merits of 14 August 2015, <https://pcacases.com/web/sendAttach/1438>, for instance, paras. 278, 330.

⁹² Atsuko Kanehara, “Haitateki Keizaisuiiki no Engankoku no Kenri-Arctic Sunrise go Jiken wo Sozai to Shite - (The Rights of Coastal States of Exclusive Economic Zones- An Analysis of the Arctic Sunrise Arbitration),” *Jochi Hogaku Ronshu (Sophia Law Review)*, Vol. 64, No. 3 · 4, 2017, pp. 245-246, 254, 269-271.

⁹³ Irrespective of the fact that difference is pointed out between the EEZ and the continental shelf regimes regarding living resources, with respect to non-living resources, the two regimes are said to overlap each other. D. D. Rothwell and T. Stephens, *The International Law of the Sea*, the 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2016, p. 125. In comparison, although it was somehow in a different context, so-called “grey areas” also have some implications on the relationship between the two regimes. The “grey areas” were determined by the International Tribunal of the Law of the Sea and the arbitral tribunal on the Bay of Bengal Case. They mean that seabed of one State’s EEZ may become extended continental shelf of the other State. Admission of grey areas may imply that the EEZ regime applies solely to water areas, and it is the continental shelf regime that applies to seabed both within and beyond 200 nautical miles. In the following judgment and award grey areas were found. Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of

are at variance with both the EEZ and the Continental shelf regimes in relation to living and non-living resources.

With respect to continental shelf, some scholars doubt acquisition of historic rights over continental shelf.⁹⁴ The tribunal in the Award mentioned Article 77 of UNCLOS, and it equated the EEZ and the continental shelf regimes in terms of living and non-living resources. It did not declare any special meaning of the article relating to the continental shelf regime.⁹⁵ The right of a coastal State over continental shelf, as declared by ICJ in the North Continental Shelf Case,⁹⁶ “*ipso facto*” and “*ab initio*” belongs to it, and occupation and other measures are not needed for it to establish its right over continental shelf.⁹⁷ This nature is frequently described as “inherency.” As a logical consequence, it is argued that the rights to continental shelf is not based upon UNCLOS and the 1958 Convention on Continental Shelf, but based upon customary international law.⁹⁸ Even it is argued that initially the basis of the rights to continental shelf can be traced to the principle “land dominates sea,”⁹⁹ so that they are established by this very fundamental principle without being based upon treaties and customary international law.¹⁰⁰

Bengal (Bangladesh/ Myanmar), Judgment of 14 March 2012, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf, paras. 463-476; In the Matter of the Bay of Bengal Maritime Boundary Arbitration between The People's Republic of Bangladesh and The Republic of India, Award, 7 July 2014, <https://pcacases.com/web/sendAttach/383>, paras. 498-508. It is pointed out that admission of grey areas connotes supremacy of rights to (extended) continental shelf over rights to seabed of EEZs. T. L. McDorman, “The Continental Shelf,” in D. D. Rothwell *et al* eds., *The Oxford Handbook of the Law of the Sea*, Oxford University Press, 2015, p. 200.

⁹⁴ Nishimoto, *op. cit.*, *supra* n. 19, p. 245.

⁹⁵ The rights of coastal States to EEZs are based upon the *sui generis* regime established under Article 55 of UNCLOS. In contrast, the rights of coastal States to continental shelves bear inherency in accordance with Article 77. In this sense, the two kinds of rights may be distinguished.

⁹⁶ North Sea Continental Shelf Cases (Federal Republic of Germany/ Denmark; Federal Republic of Germany/ Netherlands), Judgment of 20 February 1969, *ICJ Reports 1969*, p. 3.

⁹⁷ Based upon this point it is said that historic rights cannot be claimed against rights of coastal States to continental shelves. McDorman, *op. cit.*, *supra* n. 34 (Rights and Jurisdiction…), p. 160; McDorman, *op. cit.*, *supra* n. 34 (The Law of the Sea Convention…), pp. 152-153.

⁹⁸ In the Odeko Nihon Case, it was ruled that although Japan was not a party to the 1958 convention on Continental Shelf, it may enjoy the rights based upon customary international law relating to the continental shelf regime. Judgment of 22 April 1982, Tokyo District Court, *Gyosei Jiken Saiban Rei Shu (Administrative Cases Reports)*, Vol. 33, No. 4, p. 868.

⁹⁹ In the Fishery Case, ICJ stated that: [i] t is the land which confers upon the coastal State a right to the waters off its coast (133). Similar remarks are found in the judgment of the North Sea Continental Shelf Case (30), *op. cit.*, *supra* n. 96, and the judgment in the Bay of Bengal Case (409), *op. cit.*, *supra* n. 93.

¹⁰⁰ As a different opinion concerning the “inherency” of the rights to continental shelf, it is voiced that One of the aims behind the propagation of the doctrine was to annul any priority of claim in time or nature over the rights of the coastal State, so that, for example the doctrines of historic rights or acquisitive prescription would not be available.

Daniel Patrick O’Connell, edited by I. A. Shearer, *The International Law of the Sea*, Vol. I, Clarendon Press, 1982, p. 482; see also, *ibid.*, vol. II, p. 713; Gioia, *op. cit.*, *supra* n. 78, pp.

371-372. Regarding the territorial sea regime, O’Connell stated that:

There is no precedent for a successful claim to continued fishing rights in waters newly converted to territorial waters, so that the claim made in this case of adjacent fishery zone had the appearance of a novel institution - in the absence of treaty rights - which could be rationalized only on the basis of practice. However, the practice has favoured phasing-out rather than maintenance of rights, and phasing-out presupposes a concession rather than a recognition of a right, so that, it is difficult to regard the practice as more than diplomatic expediency, although it has been widespread, and therefore politically influential. While most traditional fishing rights are opposable to states extending their fishery limits…only when derived from treaty, it is possible for them to derive from

Such arguments would provoke an issue of validity of international law, or maintenance of international regulation over the rights to continental shelf. Here, it suffices to point out the fact that concerning the rights to continental shelf, too, there would be an issue of validity of international law,¹⁰¹ because the tribunal in the Award did not touch upon the issue. As a matter of logic, it was enough for the tribunal to emphasize the comprehensiveness of UNCLOS and to find the contradiction between China's historic rights and the rights to continental shelf under UNCLOS, in order to deny China's historic rights. In the Award there was no need to address the issue of the inherency of the rights to continental shelf. Apart from this, there would be an argument concerning the relationship between historic rights and the rights to continental shelf that are "inherent."¹⁰² Here it is also meaningful to note that there is an opinion that while in relation to the rights to EEZ historic rights may be considered, in relation to the rights to continental shelf, because of the "inherent" nature, no historic rights may be claimed.¹⁰³

4. Concluding Remarks

(1) A Doubt Concerning the Logic of the Tribunal in the Award

This paper examined the Award from the perspective of the logic for international regulation by

a domestic legal source in the coastal State, although in this case it is questionable whether the coastal State may not revoke them without breach of international law.

Ibid., Vol. I, p. 538.

¹⁰¹ The issue of validity of international law or maintenance of international regulation may be raised in relation to outer continental shelf. It would be questioned on what basis non-party States to UNCLOS enjoy the rights to outer continental shelf, and if they do, whether they should comply the procedures including those relating to the Commission of Limits of Continental Shelf that was established by UNCLOS. As an opinion that emphasizes that the rights of a coastal State to outer continental shelf exist "ipso facto" and "ab initio" as being declared by ICJ in the judgment of the North Sea Continental Shelf Case, see, Ted L. McDorman, "The International Legal Framework and the States Activities Regarding the Continental Shelf beyond 200-n. Miles in and Adjacent to the East and South China Sea," in Jon M. Van Dyke et al. eds., *Governing Ocean Resources-New Challenges and Emerging Regimes, A Tribute to Judge Choon-Ho Park*, Martinus Nijhoff Publishes, 2013, p. 169. Nonetheless, he cited an opinion that a coastal State's "inherent" right to continental shelf under Article 77, Paragraph 3 of UNCLOS does not remove from the coastal State the burden of demonstrating its entitlement. Ted L. McDorman, "The Outer Continental Shelf in the Arctic Ocean: Legal Framework and Recent Developments," in Davor Vidas ed., *Law, Technology and Science for Oceans in Globalization - IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf*, Martinus Nijhoff Publishers, 2010, pp. 504-506. See also, Atsuko Kanehara "200 Kairi wo Koeru Tairikudana no Genkai Settei wo Meguru Itikosatsu (Some Considerations Concerning the Limitation of Outer Continental Shelf)," Murase and Eto eds., *Kaiyo Kyokai Kakutei no Kokusaiho (International Law of Maritime Delimitation)*, Toshindo, 2008, pp. 109-116.

¹⁰² In his Separate Opinion in the Tunisia/ Libya Continental Shelf Case, Aréchaga stated that:
 "[A] new legal concept, consisting in the notion introduced in 1958 that continental shelf rights are inherent or 'ab initio' cannot by itself have the effect of abolishing or denying acquired and existing rights. That would be contrary to elementary legal notions and to basic principles of intertemporal law."

Separate Opinion of Judge Jiménez Aréchaga, *op. cit.*, *supra* n. 23, para. 82, cited by Gioia, *op. cit.*, *supra* n. 78, p. 372.

It was not indicated by him what the elementary notions and basic principles of intertemporal law are. If they were the concept and/ or principle of non-retroactivity, according to them, law could not deny or change acquired and existing rights. As an observation on this point, see, Gioia, *op. cit.*, *supra* n. 78, p. 372.

¹⁰³ See, *supra* n. 97.

UNCLOS and its validity over China's claims to historic rights.

The tribunal, on the one hand, did not adopt the logic that admits exceptions to a general rule, setting aside the cases in which provisions expressly permit exceptions. On the other hand, it did not follow the logic to leave room for considerations of concrete and individual rights, such as historic rights in interpreting and applying a general rule. These two logics provide a law with elasticity, in that the former assumes a general rule which admits exceptions to it, and in that the latter assumes a general rule which permits considerations of rights based upon concrete and individual circumstances. In sum, the tribunal denied to give elasticity to UNCLOS in either way. It is doubtful whether such interpretation of UNCLOS is the best one in order to ensure the regulation and the validity of UNCLOS when it faces claims to historic rights that strongly require considerations of concrete and individual circumstances. The tribunal's logic that emphasizes the comprehensiveness of UNCLOS may have a risk of making UNCLOS inflexible so that validity of UNCLOS as a law and regulation by UNCLOS over various phenomena would fall in danger. Neither the tribunal maintains validity of UNCLOS as a law that would be maintained if it were interpreted as permitting exceptions in case of phenomena being at variance with it, unless it explicitly admits exceptions. Nor the tribunal keeps the regulation of UNCLOS over historic rights based upon concrete and individual circumstances, which would be preserved if it were interpreted as giving the room for considerations of those circumstances. In the end, it did not substantially give legal assessment to China's claim to historic rights.¹⁰⁴

One of the most important rulings of the Award is that the tribunal clearly denied China's historic rights by emphasizing the comprehensiveness of UNCLOS. However, assessment to be given is that it was not successful to build logic for UNCLOS and international law to secure incessantly and in a solid manner their validity as laws in facing various phenomena to be expected to be legally regulated. International law really needs to keep its validity as a law and its regulation over emerging phenomena and claims to rights based upon pre-existing laws, as well.

Regarding an issue of validity of international law, in addition to the issue of the logic of how to regulate phenomena, which has been thus far analyzed in this paper, dispute settlement procedures, particularly judicial or arbitral procedures that interpret and apply laws have a close relation to it. Thus, in the ending part

of this paper, the finding of the Award on Article 298, Paragraph 1 (a) (i) and the tribunal's determination of jurisdiction to entertain the dispute will be succinctly addressed.

(2) The Finding of the Tribunal in the Award on Article 298, Paragraph 1 (a) (i) of UNCLOS

① The tribunal concluded that the dispute concerning China's historic rights are not excluded from its jurisdiction by Chinese declaration of 2006 pursuant to Article 298, Paragraph 1 (a) (i), for the reason that according to the tribunal, China's historic rights are rights to living and non-living resources being different from historic titles under the article. Considering the scholarly writings in relation to historic waters and historic rights that were referred to above,¹⁰⁵ it is well grounded to make distinction between titles to historic waters and rights, short of sovereignty, to particular activities and resources. Nevertheless, it is not clear whether Article 298, Paragraph 1 (a) (i) was drafted with intention to give the term "title" such a definitely limited meaning as excluding

¹⁰⁴ As observed above, in Section 3 (1), the Tribunal's interpretation of Article 311 of UNCLOS is also said to prevent it from determining the customary international law that may give grounds for historic rights and providing substantial consideration on China's claim to historic rights in accordance with the customary international law, if there is any.

¹⁰⁵ Section 2 (2).

a right to particular activities and resources.¹⁰⁶ If the tribunal reached this conclusion in the situations that the interpretation of the term historic titles has not been established yet,¹⁰⁷ and that there is not generally shared view of its meaning,¹⁰⁸ the tribunal's position may be understood as remarkable interpretation in limiting the meaning of the term titles. That means the tribunal adopted interpretation by which possibility of compulsory dispute settlement procedures entailing binding force (hereinafter referred to as judicial procedures as far as no misunderstanding would be expected) increases.¹⁰⁹ It is not difficult to speculate existence of motivation for jurisdiction of the tribunal at the background for such interpretation by the tribunal.

② Another point is to be raised, concerning the tribunal's interpretation of the term historic titles. Article 298, Paragraph 1 (a) (i) might not make definite distinction between historic bays or titles, on the one hand, and historic rights on the other hand. If it is the case, the object of the article could be to deny judicial procedures for any claims to "historic" things (claims to historic bays, historic waters and historic rights), and thus, to deny interpretation and application of law by judicial procedures in relation to any claims to "historic" things.¹¹⁰ In other words, the object of UNCLOS could be to deny legal regulation over any claims to "historic" things, at least in the sense that interpretation and application of UNCLOS by judicial procedures are not given to these things.¹¹¹ In contrast, if the tribunal's interpretation of Article 298, Paragraph 1 (a) (i) purported to limit the meaning of historic bays or titles, in other words to limit exceptions to judicial procedures, so that it kept "wide" jurisdiction of judicial procedures, such interpretation,

¹⁰⁶ The Virginia Commentary does not provide commentaries to the provision. Myron H. Nordquist et al eds., *United Nations Convention on the Law of the Sea 1982 - A Commentary*, Vol. V, Article 298. Accordingly it did not give support to either of interpretations of "titles," that by the tribunal and other.

¹⁰⁷ Donald R. Rothwell. "Conciliation and Article 298 Dispute Resolution Procedures under the Law of the Sea Convention," in Shicun Wu and Keyuan Zou eds., *Arbitration Concerning the South China Sea - Philippines versus China*, Routledge, 2016, p. 62.

¹⁰⁸ It is pointed out that while under Article 298, Paragraph 1 (a) (i) historic bays have specific meaning, it does not the case for historic titles, which may have wider meaning than historic titles under Article 15 of UNCLOS. McDorman, *op. cit., supra* n. 34 (Rights and Jurisdiction...), p. 152; McDorman, *op. cit., supra* n. 34 (The Law of the Sea Convention...), p. 152; Zou and Liu, *op. cit., supra* n. 12, p. 144. As understanding of the terms, historic rights, historic titles, and historic waters, the tribunal's terminology may be a possible one. However, in State practice and scholarly writings these terms are sometimes used interchangeably, and thus, it is said that they do not have coherent meanings. Concerning the terminology in scholarly writings, see, Li and Li, *op. cit., supra* n. 3, pp. 291-293. As to the incoherency in State practice, see, McDorman, *op. cit., supra* n. 34 (The Law of the Sea Convention...), p. 150. Symmons opines that under Article 298, Paragraph 1(a) (i) "title" has wider meaning than "bay" to include claims to historic rights. Symmons, *op. cit., supra* n. 24, pp. 146, 155.

¹⁰⁹ Zou maintains that China can invoke exclusion of the dispute over the nine-dash line from jurisdiction of judicial procedures in accordance with Article 298, Paragraph 1 (a) (i) and that China has preferred bilateral negotiations to judicial procedures regarding territorial and maritime disputes. Zou Keyuan, "China's U-Shaped Line in the South China Sea Revisited," *Ocean Development & International Law*, Vol. 43, 2012, p. 29. In his other work, Zou defines China's historic rights as "tempered sovereignty" that is different from both an exclusive right and a non-exclusive right to fishing on the high seas. Although he suggests that China can invoke Article 298, Paragraph 1 (a) (i), it cannot be judged whether this position is consistent with his understanding of China's historic rights, as he does not provide any interpretation of "titles" under the provision.

¹¹⁰ Strupp criticizes the Chinese scholarly writings that interpret the object of Article 298, Paragraph 1 (a) (i) as to freeze the situations prior to UNCLOS. Michael Strupp, "Maritime and Insular Claims of the PRC in the South China Sea under International Law," *Zeitschrift für Chinesisches Recht*, Bd. 16, 2004, pp. 8-9.

¹¹¹ As an analysis of the conciliation under UNCLOS as a possible dispute settlement procedure for the South China Sea dispute, in case in which the tribunal denies its jurisdiction to entertain it, see, Rothwell, *op. cit., supra* n. 106, pp. 55-69.

although possibly different from the object of UNCLOS, may widen the sphere of legal regulation by UNCLOS, as far as interpretation and application of UNCLOS by judicial procedures are concerned.

③ In contrast, the tribunal in the Award took a position that may increase exceptions to judicial procedures in interpretation of Article 298, paragraph 1 (a) (i), which means limiting its jurisdiction.

The tribunal denied (215) the Philippines' argument that historic bays and titles under Article 298, Paragraph 1 (a) (i) should be interpreted in connection with maritime delimitation (191).

However, in the drafting process there existed an opinion that purported to provide for the disputes concerning maritime delimitation separately from those concerning historic bays, and an opinion that combined the two types of disputes. The latter was adopted.¹¹² Considering this, the fact that the tribunal separated the disputes concerning historic bays or titles from those concerning maritime delimitation, is understood as interpretation that may increase exceptions to judicial procedures. This is because according to the tribunal's interpretation, the disputes concerning historic bays or titles form exceptions to judicial procedures, which are independent from exceptions of disputes concerning maritime delimitation.

(3) Relation between Interpretation of Article 62, Paragraph 3 of UNCLOS and Dispute Settlement Procedures

Relating to regulation by UNCLOS, in this paper a possibility was already suggested to interpret Article 62, Paragraph 3 as allowing considerations of historic rights. In that case, historic rights are considered by interpreting and applying the provision of UNCLOS, which enables UNCLOS, a law, to regulate them and to legally appreciate them. In doing that, the tribunal could have substantially assessed China's historic rights. Such interpretation of Article 62, Paragraph 3, from a logical perspective, would not hamper the comprehensiveness of UNCLOS that the tribunal emphasized. A reservation should be immediately added, however, that even if such interpretation of Article 62, Paragraph 3 is adopted, whether UNCLOS can legally assess historic rights with concrete and individual circumstances would depend on the following factors: first, to what extent the provision precisely and objectively provides for the contents of concrete and individual circumstances that are to be considered in its interpretation and application; and second, to what extent judicial or arbitral procedures are used, which fulfill the function of interpretation and application of Article 62, Paragraph 3.

From this perspective, it is noted that Article 297, Paragraph 3 (a) disputes concerning Article 62, Paragraph 3 form exceptions to compulsory judicial or arbitral procedures. Accordingly, even if the tribunal had adopted such interpretation of Article 62, Paragraph 3 as allowing consideration of historic rights so that historic rights as being within the reach of its regulation are to be legally assessed, it would have been difficult for judicial or arbitral procedures to treat disputes concerning claims to historic rights. To the extent that Article 297, Paragraph 3 (a) excludes the disputes concerning claims to historic rights from compulsory judicial and arbitral procedures, so that application of UNCLOS by these procedures to those disputes are not ensured, UNCLOS is said to release historic rights from its regulation.

(4) The Finding of the Jurisdiction of the Tribunal in This Case

Finally, it is useful to consider the characteristic of the tribunal's finding of its jurisdiction over this dispute. The tribunal, in the Award on Jurisdiction and Admissibility, defined this dispute as follows:

“[A] dispute concerning the interaction of the Convention (UNCLOS, by the author) with

¹¹² The Virginia Commentary, *op. cit.*, *supra* n. 106, Article 298. 17.

another instrument or body of law, including the question of whether rights arising under *another body of law* were or were not preserved by the Convention, is unequivocally a dispute concerning the interpretation and application of the Convention (emphasis added)” (168).

Here the tribunal included a dispute concerning the interaction of UNCLOS with another instrument or body of law in the disputes concerning interpretation or application of UNCLOS. It might be said that by doing this, the tribunal widened the concept of a dispute concerning interpretation or application of UNCLOS, so that the number of disputes that are subject to the dispute settlement procedures under UNCLOS would increase.¹¹³ Although wide possibility is not guaranteed, to the extent that at least some of these disputes are subject to judicial or arbitral procedures that interpret and apply UNCLOS, its regulation over them is ensured. In that sense, the tribunal's definition of a dispute concerning interpretation or application of UNCLOS may demonstrate its positive attitude toward widening the sphere of regulation by UNCLOS.

This paper focused upon the logic of the tribunal relating to regulation by UNCLOS from a perspective of validity of international law. It raised a doubt to the tribunal's logic in the Award. ICJ in the judgment of the Fishery Case ruled that the Norwegian straight baseline method is one application of a general rule, and scholarly writings define claims to historic waters as exceptions to a general rule. The logics found in them are really devices to provide international law with elasticity, in order to maintain legal regulation over phenomena that require considerations of concrete and individual circumstances, and in order to keep it as a law even in facing exceptional phenomena. In sum, these logics are devices in order to keep validity of international law. In contrast to them the tribunal's logic in the Award is problematical.

As examined in the ending part of this article, the goal of ensuring validity of UNCLOS is not achieved solely by devising logic of international regulation. The dispute settlement procedures, mainly judicial or arbitral procedures that interpret and apply UNCLOS, are closely related to the achievement of the goal. Furthermore, in the South China Sea dispute, the tribunal's logic of legal regulation is applied solely to the interaction between a body of law concerning historic rights, and the EEZ and the continental shelf regimes. For other issues, UNCLOS would need different logical devices in order to maintain its validity and regulation. The tribunal's logic is only one possibility. Accordingly, how to ensure validity of UNCLOS, validity of international law still requires further considerations including examination of dispute settlement procedures.

¹¹³ As an analysis of the concept of a dispute concerning interpretation or application of international law, Kanehara, *op. cit.*, *supra* n. 18.