Discussion on the Improvement of the Compulsory Arbitration Procedure under the United Nations Convention on the Law of the Sea (UNCLOS)

-- Based on the South China Sea Arbitration Case

Sherry Yan, East China University of Political Science and Law; Zoe Chen, Hainan University; Layton Ren, Hainan University; Aria Jin, Hainan University; Judi Wang, Anhui University; Vincent Long, East China University of Political Science and Law; Selina Han, Hangzhou Dianzi University; Grace Shi, Anhui University.

Abstract:

The compulsory arbitration procedure of the United Nations Convention on the Law of the Sea (UNCLOS) has been adopted by more and more countries to settle maritime disputes due to its coerciveness, flexibility and convenience. However, UNCLOS has only been in force for more than 20 years and is the product of the compromise between developed countries and developing countries due to the balance of power and the game of interests. As a result, there are vague provisions in compulsory arbitration clauses that are liable to cause ambiguities or unclear interpretations. Some countries have maliciously misinterpreted relevant provisions on compulsory arbitration procedures, deliberately intensified inter-state conflicts and undermined the harmonious international maritime order with the intervention of major powers outside the region. In the South China Sea arbitration case, the inherent and institutional problems of UNCLOS compulsory arbitration procedure have been further exposed. As a country directly concerned about the interests of the South China Sea and a major contracting country with responsibility for maintaining world peace, China has the necessity to conduct an in-depth study on the UNCLOS compulsory arbitration procedure and put forward suggestions for improvement. To cope with the new round of disputes in the South China Sea represented by the South China Sea arbitration case and maintain the building of a harmonious world maritime order. Therefore, this paper focuses on the essence and value of international law (UNCLOS), combined with the South China Sea arbitration case, from the overview of the South China Sea disputes between China and the Philippines, the application of UNCLOS compulsory arbitration procedure, the main problems existing in the South China Sea arbitration case, and the improvement of UNCLOS compulsory arbitration procedure to explore the ways to improve UNCLOS compulsory arbitration procedure.

Key words:

South China Sea Arbitration case; United Nations Convention on the Law of the Sea; Compulsory arbitration proceedings; perfect

I. Overview of the South China Sea Disputes between China and the Philippines 3
1. Armed conflict in the South China Sea disputes between China and the Philippines 3
2. Legal adjudication of the South China Sea disputes between China and the Philippines 3
2.1 Composition of the Arbitral Tribunal 3
2.2 Arbitration and conciliation procedures 3
3. The jurisdiction and claims of the arbitral tribunal are admissible for hearing 4
4. Final award of the Arbitral Tribunal on jurisdiction 5
II. Application of UNCLOS compulsory arbitration procedure 5
1. Characteristics of compulsory arbitration procedures 5
1.1 Arbitrariness in application 5
1.2 Unilateralism in startup 6
1.3 Implementation uncertainty 7
2. Optional exceptions to compulsory arbitration proceedings 8
2.1 Disputes over maritime delimitation 8
2.2 Historic Gulf or historic rights disputes 9
2.3 Disputes over military activities 10
2.4 Disputes over law enforcement activities 11
2.5 Mixed disputes 12
3. Preconditions for the application of compulsory arbitration procedures 12
3.1 The application of other procedures was not agreed 12
3.2 Fulfill the obligation of good faith consultation 13
III. Major problems in the compulsory arbitration procedure in the South China Sea Arbitration Case 13
1. The Arbitral Tribunal misinterpreted the meaning of "historic rights" in the Optional exception 13
2. The UNCLOS requirement for "peaceful settlement of disputes by agreement" is unclear14
3. UNCLOS judgment of the "obligation to exchange views" of the standard is vague 15
4. The impartiality and independence of the selected arbitrators are in doubt 17
4.1 The tribunal as constituted has a distinctly position-oriented approach. 17
4.2 In the South China Sea Arbitration, the arbitral tribunal was not composed of arbitrators chosen by the Chinese and Filipino sides. 18
5. The conditions for the initiation of the "dual division" procedure cannot be reached or prevented in this case 20
IV. Improvement of UNCLOS compulsory arbitration procedure 24
1. Explain the relevant fuzzy concepts 24
1.1 Clarify the criteria for "settlement of disputes by agreement" 24
1.2 Define the judgment criteria for "obligation to exchange views" 25
2. Improvements to the arbitrator and expert development process 26
2.1 Improve the selection and appointment of arbitrators 26
2.1.1 Improve the withdrawal system of arbitrators 27
2.1.2 Appoint arbitrators who are familiar with disputes 27
2.2 The process of appointing experts should be transparent. 28
3. Compulsory mediation procedure in advance 29
V. Conclusion 30

I. Overview of the South China Sea Disputes between China and the Philippines

1. Armed conflict in the South China Sea disputes between China and the Philippines

Conflict in the South China Sea disputes between China and Philippine is the controversy about the sovereignty belongings of the island and reef, also the issue of maritime delimitation. The controversy started from the early 1950s, when U.S. troops in the Philippines arbitrarily developed Huang Yan Island as shooting range, completely ignoring China's sovereignty.

The armed conflicts happened for several of times since then. On April the 28th, 1997, 13 ham radio operators from Chinese, America and Japan set out to the Huang Yan Island from Guangzhou with two Chinese surveillance ships. When the ham radio operators were setting up radio working platform in Huang Yan Island, two Philippine military aircrafts passed overhead. Two days later, Philippine sent out three naval vessels to besiege the Chinese surveillance ships. On the same day, the Philippines also bombarded the monument to Chinese sovereignty. For the subsequent three days, Philippine sent out another 3 naval vessels. May the 3rd， the conflict in the South China Sea disputes ended with the voluntary left of Chinese surveillance ships.

Another controversial armed conflict is in 2012 when the Philippine navy surveillance ships discovered fishing-boats in Huang Yan Island then sent out the BPR Gregorio Pilar to arrest the boats and the fishermen, forcing them to admit their invading of Philippine. The two government then started fierce argument and armed conflict. In 2013, the Philippines foreign minister admitted China has already control the Huang Yan Island essentially that the Philippines vessels cannot enter the Island. Since then, conflicts between the two Country still happened occasionally.

2. Legal adjudication of the South China Sea disputes between China and the Philippines

2.1 Composition of the Arbitral Tribunal

The members of the Arbitral Tribunal are:

Judge Thomas A. Mensah (President)

Judge Jean-Pierre Cot

Judge Stanislaw Pawlak

Professor Alfred H. A. Soons

Judge Rüdiger Wolfrum

2.2 Arbitration and conciliation procedures

The arbitral tribunal convened a Hearing on Jurisdiction and Admissibility on 7 to 13 July 2015, rendered an Award on Jurisdiction and Admissibility on 29 October 2015, convened a hearing on the merits from 24 to 30 November 2015, and issued an inanimous award on 12 July 2016.

On 7 July 2015, case hearings began with the Philippines asking the arbitral tribunal to invalidate China's claims. The hearings were also attended by observers from Indonesia, Japan, Malaysia, Thailand and Vietnam. The case has been compared to Nicaragua v. United States due to similarities of the parties involved such as that a developing country is challenging a permanent member of the United Nations Security Council in an arbitral tribunal.

On 29 October 2015, the tribunal ruled that it had the power to hear the case. It agreed to take up seven of the 15 submissions made by Manila, in particular whether Scarborough Shoal and low-tide areas like Mischief Reef can be considered islands. It set aside seven more pointed claims mainly accusing Beijing of acting unlawfully to be considered at the next hearing on the case's merits. It also told Manila to narrow down the scope of its final request that the judges order that "China shall desist from further unlawful claims and activities."

The tribunal scheduled the hearing on merits of the case from 24 to 30 November 2015.

3. The jurisdiction and claims of the arbitral tribunal are admissible for hearing

On 29 October 2015, the PCA published the award by the arbitral tribunal on Jurisdiction and Admissibility for the case. The tribunal found that it has jurisdiction to consider the following seven Philippines' Submissions. (Each number is the Philippines' Submissions number.) The tribunal reserved consideration of its jurisdiction to rule on Nos. 1, 2, 5, 8, 9, 12, and 14.

Philippines'position that Scarborough Shoal is a rock under Article 121(3).

Philippines' position that Mischief Reef, Second Thomas Shoal, and Subi Reef are low tide elevations that do not generate entitlement to maritime zones.

Whether Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations "that do not generate any maritime entitlements of their own".

Whether Johnson Reef, Cuarteron Reef, and Fiery Cross Reef do or do not generate an entitlement to an exclusive economic zone or continental shelf.

"premised on [the] fact that China has unlawfully prevented Philippine fishermen from carrying out traditional fishing activities within the territorial sea of Scarborough Shoal."

"China's failure to protect and preserve the marine environment at these two shoals [Scarborough Shoal and Second Thomas Shoal]."

Philippines' protest against China's "purported law enforcement activities as violating the Convention on the International Regulations for the Prevention of Collisions at Sea and also violating UNCLOS".

The tribunal stated in the award that there are continuing disputes in all of the 15 submissions from the Philippines, but for submissions such as No.3, No.4, No.6 and No.7, no known claims from the Philippines prior to the initiation of this arbitration exist, and that China was not aware of (nor had previously opposed) such claims prior to the initiation of arbitration. For Submissions No.8 to No.14, the tribunal held the view that the lawfulness of China's maritime activities in the South China Sea is not related to sovereignty.

4. Final award of the Arbitral Tribunal on jurisdiction

On 12 July 2016, the arbitral tribunal ruled in favor of the Philippines on most of its submissions. It clarified that while it would not "rule on any question of sovereignty and would not delimit any maritime boundary", China's historic rights claims over maritime areas (as opposed to land masses and territorial waters) within the "nine-dash line" have no lawful effect unless entitled to under UNCLOS. Mainland China rejected the ruling, as did Chinese Taiwan. Eight governments have called for the ruling to be respected, 35 issued generally positive statements noting the verdict but not called for compliance, and eight rejected it. The United Nations itself "doesn't have a position on the legal and procedural merits of the case or on the disputed claims", and on 12 July the Secretary-General"expressed his hope that the continued consultations on a Code of Conduct between ASEAN and China under the framework of the Declaration of the Conduct of Parties in the South China Sea will lead to increased mutual understanding among all the parties."

II. Application of UNCLOS compulsory arbitration procedure

1. Characteristics of compulsory arbitration procedures

1.1 Arbitrariness in application

Article 278, paragraph 1, of the Convention provides for four types of enforcement proceedings that may "lead to binding decisions: the International Tribunal for the Law of the Sea, the International Court of Justice, the Arbitral Tribunal constituted in accordance with Annex VII

and the Special Arbitral Tribunal constituted in Annex VIII." In general, dispute settlement mechanisms provide for the order in which dispute settlement methods are applied, but under article 278, paragraph 1, there is no order in which the four dispute settlement procedures are to be applied, and States parties may decide for themselves the order in which they apply. According to the United Nations update on 20 June 2017, a total of 37 countries have made the International Tribunal for the Sea the first choice; 20 countries have chosen the International Court of Justice as the first order: 8 countries have taken the arbitral tribunal composed of annex VII as the first option: 7 countries have taken the special arbitral tribunal as the first choice However, China has not chosen the application order of the procedure of article 287, and the application of the Philippines has not been counted by the United Nations, but according to the practice of the Philippines, the arbitration tribunal composed of annex VII should be used as the dispute settlement procedure in the first order. It can be seen from this that the compulsory arbitration procedure under Annex VII is arbitrary in its application.[1]

1.2 Unilateralism in startup

The so-called unilateralism means that one party to the dispute can directly submit the dispute to arbitration without the consent of the other party, and even if the other party to the dispute does not appear in court or does not defend the case for various reasons, the other party may request the arbitral tribunal to continue the proceedings and make an award, that is, the passive response of any party to the dispute will not hinder the conduct of the proceedings.[2]

In this regard, compulsory arbitration in the Convention breaks through the traditional sense of arbitration "consensual commencement", namely "contract" Therefore, the unilateralism of compulsory arbitration in procedural triggering is the most core meaning and expression of its compulsion. The "delicate balance" in the Convention implies that this unilateralism is not equated with arbitrariness, much less with oneness.[3] The will of the parties can determine the final outcome of the arbitration, and this unilateralism is unilateralism under a series of conditions.

When a country has a dispute, the parties usually prefer to resolve the dispute through

---

[1] Hu Zewen:“From the South China Sea arbitration case, we can see the improvement of the compulsory arbitration procedure of the United Nations Convention on the Law of the Sea”

[2] TUERK H. “ Reflections on the contemporary law of the sea”2012, pp123

[3] Zhou Jiang,Lv Mingwei: “On the conditions for the commencement of compulsory arbitration proceedings under the United Nations Convention on the Law of the Sea”,2016,12, p84

political means, and when the political means cannot resolve the dispute, it is resolved through international arbitration based on consent. The method of initiating compulsory arbitration is the final means of the dispute when the first two dispute resolution mechanisms are still unable to resolve the dispute. In this South China Sea arbitration case, the Philippines has avoided common dispute resolution channels and directly chosen to initiate compulsory arbitration procedures, which is unreasonable in itself.[4]

The Chinese government's principled position on the Philippines' unilateral initiation of the South China Sea arbitration case does not accept, participate, recognize or implement. China has stated that it excludes the compulsory dispute settlement procedure of the Convention and that the arbitral tribunal has clearly taken a biased position. The Philippines initiated arbitration in order to seek so-called legal means to achieve the purpose of harming China's sovereignty over the Nansha Islands and maritime rights and interests, and to seek support for its illegal claims and infringement actions. The Philippines' move is a political provocation cloaked in the cloak of law, which seriously damages political mutual trust between China and the Philippines and interferes with cooperation between countries in the region. Damaging the friendly atmosphere between China and ASEAN countries in implementing the Declaration on the Conduct of Parties in the South China Sea and discussing and drafting the Code of Conduct for Parties in the South China Sea poses a serious threat to peace and stability in the South China Sea. China is committed to peacefully settling disputes through bilateral consultations and negotiations, but does not accept any country to discuss the South China Sea issue with China on the basis of this ruling, nor does it accept any position or any activity expressed by any country on the basis of this ruling.[5]

1.3 Implementation uncertainty

International arbitration is divided into three types: international commercial arbitration, international investment arbitration and inter-state arbitration. In the field of international commercial and investment arbitration, the consent of the disputing party is the premise for the initiation of arbitration, so the disputing party will perform the content of the adjudication in

---

[4] Liu Bing, Li Na, Zhang Ran: “On the illegality of the initiation of compulsory arbitration proceedings and the composition of the arbitral tribunal in the South China Sea arbitration case” 2017,4,p95

[5] Huang Wei, Ha Lisi: "Application of the Mandatory Procedures of the United Nations Convention on the Law of the Sea – Proceedings of an International Symposium Focusing on Arbitration in the South China Sea" 2016.5, p20

accordance with the adjudication result regardless of whether the adjudication result is beneficial to itself. Even in the event of non-enforcement by one party, the other party may apply to the relevant judicial authorities for enforcement in accordance with the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (In the field of inter-State arbitration, however, in order to maintain a good international image, arbitral awards in which the State participates voluntarily are also enforced, and most of the awards of the Permanent Court of International Arbitration are effectively enforced.) However, compulsory arbitral proceedings under Annex VII to the Convention are not subject to the consent of the disputing parties to commence, and therefore the non-participating party will not enforce the final award in the event that a party is unwilling to participate in the arbitral proceedings and the commencement is compelled.[6]

2. Optional exceptions to compulsory arbitration proceedings

2.1 Disputes over maritime delimitation

Professor Yu Minyou pointed out that the core appeal of the Philippines is the claim of denying China's historical rights in the "dotted line" of the South China Sea and its waters. On the issue of sovereignty over islands and reefs in the South China Sea, on the one hand, the Philippines attempted to take advantage of the opportunity of unilaterally forcing international arbitration to stir up the issue of territorial sovereignty into the arbitration process, weaken the legal basis for China's territorial sovereignty, and then create momentum for its future sovereignty; On the other hand, it attempts to deny China's sovereignty over the South China Sea islands. Therefore, the essence of the Philippines' forced arbitration case is a matter of territorial sovereignty, not the interpretation or application of the Convention. In order to determine the jurisdiction of the arbitral tribunal, the Philippines has distorted China's historic rights and even considered the islands and reefs in the South China Sea to be terra nullius, challenging the post-war international legal order based on the Charter of the United Nations.

In the current South China Sea arbitration case, the dispute between China and the Philippines includes two aspects, one is the dispute over the territorial sovereignty of the islands and reefs in the South China Sea, and the other is the dispute over the maritime delimitation

[6] Hu Zewen:“From the South China Sea arbitration case, we can see the improvement of the compulsory arbitration procedure of the United Nations Convention on the Law of the Sea”

related to territorial sovereignty. However, the United Nations Convention on the Law of the Sea can only adjudicate disputes over the delimitation of the sea, but not disputes over territorial sovereignty. This shows that in 2013, the Philippines unilaterally filed a compulsory arbitration with an international arbitration institution, and its legal basis was the United Nations Convention on the Law of the Sea, which was wrong, and could not resolve the territorial dispute between China and the Philippines, and could only initiate compulsory arbitration on the issue of maritime delimitation. On the issue of maritime delimitation, the Chinese Government had made an exclusionary declaration in 2006 in accordance with article 298 of the United Nations Convention on the Law of the Sea concerning compulsory arbitration of maritime delimitation disputes.[7]

2.2 Historic Gulf or historic rights disputes

Professor Saunders pointed out that the jurisdiction over historical claims lies firstly in whether the dispute involves the interpretation and application of the Covenant, and secondly, in whether jurisdiction is excluded. After analyzing both scenarios, he questioned the effective resolution of disputes in the South China Sea by arbitration and expressed concern about the impact of the case on the UNFCCC's dispute settlement mechanism. Dr. Tan argued that the historic bay or the optional exclusion of ownership applies to the South China Sea arbitration, and that the arbitral tribunal must deny it jurisdiction over the Philippines' claims in this regard.

In a substantive award, the arbitral tribunal makes a clear determination of the relationship between the historic right and the Covenant. There are four possibilities for China's ruling on the issue of historical rights within the "dotted line" in the South China Sea: First, it is directly and comprehensively denied, declaring that it is neither compatible with the Convention nor recognized by any rule of international law; Secondly, recognizing the legitimacy of historic rights in general or customary international law, but not compatible with the Covenant, which has been superseded by the Covenant's system of maritime rights; Third, fully recognize the legitimacy of historic rights and their compatibility with the Covenant, but declare that China's claims do not meet the substantive requirements of historic rights;Fourth, it fully recognizes the legitimacy of historic rights and their compatibility with the "Covenant," but does not judge whether China meets the substantive requirements of historical rights, and handles them in vagueness and

[7] Liu Bing, Li Na, Zhang Ran: “On the illegality of the initiation of compulsory arbitration proceedings and the composition of the arbitral tribunal in the South China Sea arbitration case” 2017,4,p95

shelving, requiring further proof. The total negation of historical rights is unlikely, after all, many examples of "historic" rights can be found in the Covenant, general international law or customary international law, so it is more likely to at least determine the legitimacy of historical rights in general or customary international law. Combined with the large number of arguments made by the Philippines during the trial and the questions and answers between the arbitral tribunal and the Philippines, to what extent will the arbitral tribunal accept the Philippines' viewpoint and deny China's historic rights, which is to directly deny the compatibility of historical rights with the Convention and to find that the historical rights have been replaced by the maritime rights system of the Convention? Or do they affirm the compatibility of the two, but conclude that China's claim within the "dotted line" in the South China Sea does not meet the substantive requirements of historical rights? This is a very significant problem.[8]

2.3 Disputes over military activities

With regard to the application of the compulsory arbitration procedure of UNCLOS in disputes over military activities, Article 298, paragraph 1 (b) is the only clause in UNCLOS that uses the term "military activities": (b) disputes over military activities, including those of government vessels and aircraft engaged in non-commercial services, and disputes over law enforcement activities that are not under the jurisdiction of courts or tribunals according to Article 297, paragraphs 2 and 3.

It can be seen that the interpretation of the relevant concepts in this arbitration procedure on the application of disputes over military activities is too vague and broad. This clause neither explains the definition of military activities, nor gives relevant examples in this respect, which makes the application of relevant clauses in actual arbitration activities controversial. In some focus cases in the South China Sea and the Black Sea, before the dispute is resolved, there are cases where the jurisdiction of the arbitration tribunal is challenged due to Article 298, Paragraph 1, Item B.

Especially in recent years, it has become more and more common for countries to use military forces and law enforcement forces to carry out all kinds of maritime activities at the same time, and the boundaries between them have become increasingly blurred. It wasn't until 2019 that

[8] Huang Wei, Ha Lisi: "Application of the Mandatory Procedures of the United Nations Convention on the Law of the Sea – Proceedings of an International Symposium Focusing on Arbitration in the South China Sea" 2016.5, p20

the International Tribunal for the Law of the Sea first put forward a resolution criterion to distinguish the ambiguous boundary issues involved in this clause: focusing on objectively evaluating the nature of relevant activities, while considering the relevant circumstances in individual cases[9].

2.4 Disputes over law enforcement activities

The definition of disputes over law enforcement activities can be directly seen in article 297, “Disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3.”(In short, the disputes over law enforcement activities) The meaning behind UNCLOS’s definition of this concept is generally referred to the action or compulsory measure to compel relevant behavioral agent to conform the country’s law.

The direct definition of “Law Enforcement” in article 297 has not listed out any relevant activities, however, there are other terms using “enforcement of laws” or “enforcement” has discussed the issue. For example, in article 73. Enforcement of Laws and Regulations of the Coastal State, it listed out some measures “boarding, inspection, arrest and judicial proceedings” to ensure compliance with the laws and regulations. In the section 6, it also discussed the law enforcement with respect to pollution in the sea area.

Although UNCLOS has defined the concept of law enforcement and listed out some of relevant activities, it is still limited and vague. As it is often mixed up with military activities in many occasions, also there isn’t any regulations or methods to distinguish the two kinds of activities. In the legal practice of the international community, with the frequent communication among countries, the vague definition has aroused many controversial events. Some countries might intensify deployment of naval forces to meet the standard of military activities that explained by the International Tribunal for the Sea in 2019. [10]The tribunal emphasized that the nature of the activity cannot be determined solely by the nature of the vessels and persons involved in the activity, and the determination of the nature of the activity by the parties concerned.

For International Court, there are two main steps to define whether or not an issue can be

---

[9] Detention of Ukrainian Vessels,Order,para.66

[10] See also *Detention of Ukrainian Vessels*, Order, paras. 64-65

applied to article 298 term 1: Firstly, identify the topic of the dispute; Secondly, evaluate the nature of the relevant activities involved in the dispute.[11] However, the steps have not been used correctly in the case of South China Sea Arbitration. Consequently, the vague definition of law enforcement has brought a lot of controversies in the international society.

2.5 Mixed disputes

Many disputes concerning the interpretation or application of the UNCLOS involve concurrent conflicts in two aspects, namely land and sea, which gives rise to mixed disputes. The

There are two problems of the jurisdiction over mixed disputes: the Vagueness in Provisions under UNCLOS and the Artificial Re-characterisation of Real Claims[12]。

In judicial practices, the most common type of mixed dispute is the dispute that relates to the territorial sovereignty and other marine disputes. Speaking generally, the legal doctrines dealing with the acquisition of land territory have a natural affinity for the realist international relations paradigm (sometimes thought to be the dominant paradigm in the discipline). By contrast, the doctrines for assignment of rights to maritime spaces do not fit so easily within this power-based model, but have been very much dependent on the creation and recognition of norms. [13]

Territory is always seen as the core interest of a country. Therefore, rather than the legal means, powerful countries always deal with this kind of problems by diplomatic negotiations. In the contrast, in order to qualify for jurisdiction, some parties to the dispute does not bring a separate claim to territorial sovereignty over land, but usually presents the actual dispute as a convention dispute. The “Philippines v. China” Case is a typical example. This artificial re-characterisation makes it hard to distinguish their real claims.

3. Preconditions for the application of compulsory arbitration procedures

3.1 The application of other procedures was not agreed

UNCLOS has stipulated the preconditions for the application of compulsory arbitration procedures. The UNCLOS takes the self-determined method as its priority in the dispute

[11] KONG Ling-jie, HAN Qian. The distinction between disputes concerning military activities and law enforcement activities under Article 298 of UNCLOS [J].Chinese Journal Maritime Law,2022,33(3):42-53

[12] (Chen Qi-chao “A Study on Jurisdiction over Mixed Disputes: A Reflection on UNCLOS Dispute Settlement Mechanism”)

[13] (L. Brilmayer, Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator,33 New York University Journal of International Law and Politics 714-716(2001).)

settlement system, which is cemented by the setting of some preliminary conditions, while the compulsory arbitration is just supplementary.[14]But what if the parties of disputes do not agree with each other? Article 287 of the UNCLOS plays a critical role within the system for compulsory jurisdiction under this treaty, as it assures that disputes submitted to that system (whatever broad or narrow it might be) always fall under the jurisdiction of a compulsory procedure entailing a binding decision. According to the Article 287 Paragraph 5, when the parties of dispute do not agree on the means of dispute settlement, this dispute can only be settled by the arbitration under Annex VII.

The South China Sea Arbitration Tribunal has made its award on jurisdiction and admissibility rejected the valid agreement between China and the Philippines to settle their disputes by negotiations and , which erroneously applied preconditions for the application of compulsory arbitration procedures.

3.2 Fulfill the obligation of good faith consultation

With the conflicts among different countries increasing, using UNCLOS and the peaceful settlement to solve these problems has become a general trend. Article 300 has expressly provided the principle of good faith. Some scholars consider that there are three kinds of definitions. First, as a standard of construction of law, it requires legal provisions to be explained in good faith; Second, as a standard of morality, it requires the subject of international law to be honest and keep their word. Third, it is a faith that faults can be forgiven in some situations。. UNCLOS reiterates the obligation of good faith in Charter of the United Nations. Good faith can not work alone. Only when good faith combine with other rules can it work greatly. For example, ships of some countries may sail though the South China sea. In one hand, we need to consider the freedom of navigation of these countries. In the other hand, we also need to defend our sovereignty. We refuse to accept those who want to violate our sovereignty under cover of the freedom of navigation. Good faith will be adapted if we find these actions.

III. Major problems in the compulsory arbitration procedure in the South China Sea Arbitration Case

1. The Arbitral Tribunal misinterpreted the meaning of "historic rights" in the Optional

[14] Pan Jun-wu, The Preconditions to the South China Sea Arbitration's Jurisdiction——An Example for Abuse of the Legal Process under the UNCLOS, Chinese Year Book of International Law(2016)

exception

Article 198 of UNCLOS provides that States parties to the Convention may declare the following five types of disputes: maritime delimitation disputes, historical bays or historical title disputes, military activities disputes, law enforcement activities disputes, and mixed disputes excluding the application of compulsory arbitration procedures. In accordance with Article 298 of UNCLOS, on August 25, 2006, China submitted to the Secretary-General of the United Nations a declaration that the Chinese Government does not accept any international judicial or arbitral jurisdiction as stipulated in Section 2 of Part XV of UNCLOS, and the two parties can settle the dispute only through bilateral consultation and negotiation. However, the arbitral tribunal did misinterpret the provisions of Article 298 of UNCLOS, misunderstand the wording, and directly deny that the "historic right" asserted by China belongs to the category of optional exception on the grounds that it is different from "historic bay" and "historic ownership" stipulated in the Convention. Invalidating the reservation clause applicable to Article 298 excluding UNCLOS by China and making an arbitral award against China. But in fact, China advocates the "historic rights" in include historic waters, and at the same time, in the gulf of historic include historic fishing rights and other rights, and the historic rights also get general recognition of the members of the international community, including the Philippines, the arbitration tribunal shall fairly correct definition to the discussion of "historic rights". It can be seen that the reason why the Arbitral Tribunal misinterprets the meaning of "historic Gulf or historic ownership dispute" in the optional exception is not only the political tendency that the arbitral Tribunal is deliberately manipulated by the United States and other western powers, but also the ambiguity of the definition standard of the concept of UNCLOS itself.

2. The UNCLOS requirement for "peaceful settlement of disputes by agreement" is unclear

The UNCLOS has confirmed the principle that every country should settle the disputes by peaceful means. This requirement can be seen in Article 279. Obligation to Settle Disputes by Peaceful Means which stipulated that “States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter. ”

As a supplementary elaboration of the main principle, dispute settlement procedures under

Part ⅩⅤ are the important methods to settle marine disputes. This part is divided into 3 sections, the first section is about the voluntary selection process by the parties; the second section discussed compulsory procedures entailing binding decisions; the last section stipulated limitations and exceptions to applicability of section 2.

Party self-selection procedure takes precedence in dealing with disputes. As the first step to settle disputes, the party should choose voluntarily to settle disputes by peaceful means. [15]Only when the party did not choose or abandon the chance of voluntary choosing, or the peaceful means cannot settle the dispute can the party refer disputes to third-party enforcement proceedings if meet certain conditions. Consequently, while party's choice is in priority, the third-party compulsory settlement procedures take a back seat.

This principle should also be applied equivalently applied in the case of South China Sea Arbitration. The Philippine initiated arbitration as it claimed the dispute has already met the prerequisite of starting the enforcement program, which can be summarized as four conditions:

(1) The procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure. (Article281, Term1)

(2) If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit. (Article281, Term2)

(3) Obligations under General, Regional or Bilateral Agreements. (Article282)

(4) When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means. (Article283, Term1)

However, the UNCLOS has no clear rules on whether the parties have exhausted means other than compulsory procedures, also it is very difficult to define if there is any possibility that the dispute can continue to be resolved by peaceful means. This lack of explanation has aroused controversy in the case of South China Sea Arbitration.

3. UNCLOS judgment of the "obligation to exchange views" of the standard is vague

---

[15] MA Xin-min Procedural Issues in the awards of South China Sea Arbitration n [J], Jilin University Journal Social Sciences Edition [J] Vol.57 No.2 March, 2017

The obligation of exchange of views is a bilateral settlement mechanism when disputes arise between the parties to the United Nations Convention on the Law of the Sea. It is a means and a basic obligation. According to Article 283 of the United Nations Convention on the Law of the Sea, if there is a dispute between the parties, they should quickly exchange views on the peaceful settlement of the dispute or the implementation of the solution.

As mentioned above, only when the parties have no choice or give up the opportunity of voluntary choice, or the dispute cannot be resolved by peaceful means, the parties can submit the dispute to a third party for execution under certain conditions. Whether this obligation is fulfilled or not involves the jurisdiction of the dispute, as well as whether the parties concerned can directly initiate compulsory proceedings. In reality, the ambiguous interpretation of the obligation to exchange opinions in Article 283 is controversial in many international cases. In the South China Sea arbitration case, the focus of the application of Article 283 is mainly the dispute of fully fulfilling the standard of obligation to exchange opinions. The Chinese side believes that the argument about whether the "obligation to exchange opinions" stipulated in Article 283 of the Convention has been fulfilled has serious defects, and there are obvious loopholes in fact finding and law application.

According to international practice and past cases, although countries have different judgments on the standard of full performance of the obligation to exchange views, the standard of complete performance of the obligation is the same[16]. That is, when a country thinks that the exchange of views between the two sides can no longer be carried out, it can claim that the obligation of exchange of views has been fulfilled. What is controversial is the extent to which the obligation can be considered to have been fulfilled.

Some countries hold the view that the time and frequency of exchange of views are the criteria for judging whether the obligations have been fulfilled. If the time is long and the number of times is high, the obligation will be fully fulfilled, and vice versa. Other countries hold the view that a country's outright refusal and unwillingness to negotiate indicates that the obligation has been fully fulfilled, because there is no possibility for the obligation to continue. However, the outright refusal and unwillingness to negotiate may be caused by the unreasonable and unfair

[16] Liu Heng: On the Legal Elements of Establishing Compulsory Arbitration Jurisdiction over Maritime Disputes-From the Perspective of Annex VII of the United Nations Convention on the Law of the Sea, China Maritime Law Review, No.1, 2015, pp.4-22.

demands of one party, which makes it impossible for the other party to fulfill its obligation to exchange views[17]. In the South China Sea arbitration case, China's claim on performance standards is mainly judged by the former.

China believes that there are huge flaws in the discussion on whether the Philippines has fulfilled the "obligation to exchange views" stipulated in Article 283 of the Convention. After a simple and general analysis, the arbitral tribunal came to the conclusion that the Philippines has fulfilled this obligation. This is unreasonable. This is mainly caused by the vague concept of "exchange of views" in Article 283. The arbitration tribunal pointed out that the content of the exchange of views should be the "solution" of the dispute, rather than the negotiation of the disputed matters. China believes that the arbitration tribunal's argument is based on the misinterpretation of Article 283 of the Convention, which is a misinterpretation of Article 283. China's proposition 1. It is proved that the fact of performing the obligation of exchanging opinions does not belong to the "exchanging opinions" stipulated in Article 283: a. The time of exchanging opinions must be after the specific dispute against which it is directed; B. The subject matter discussed must be identical with the subject matter of the "dispute" defined by the arbitration tribunal. 2. The arbitral tribunal misinterpreted the obligations stipulated in Article 283: The practice of the arbitral tribunal in this case is to lower the threshold of Article 283 as far as possible, misinterpret the obligations stipulated in Article 283, and transform the "obligation" of exchanging opinions into the "behavior" of exchanging opinions. It makes the obligation stipulated in Article 283 fade into a process that only needs to be experienced before resorting to compulsory procedure automatically, and has no other value. The conclusion is that China has never discussed any dispute with the Philippines. It can be seen that in the peaceful settlement of disputes, the ambiguity of the concept of Article 283 leads to differences in understanding, which seriously affects the judgment of performance standards.

4. The impartiality and independence of the selected arbitrators are in doubt

4.1 The tribunal as constituted has a distinctly position-oriented approach.

Impartiality is an important criteria to measure if an international arbitration institution can be established, also an essential foundation of the arbitration result. The South China Sea

[17] Mariano J.Aznar, The Obligation to Exchange Views before the International Tribunal for the Law of the Sea:A Critical Appraisal, Revue Belge de Droit International, Vol.47, No.1, 2014, pp.245~246.

Arbitration Tribunal was established by some Western forces taking advantage of the shortcoming of the convention, the arbitration result has represented their interest.

The South China Sea Arbitration is a temporary arbitration court, different from permanent arbitration tribunal, it is set up according to the need of specific dispute. As a result, the arbitration result is based on the agreement of both parties, arbitrament's enforcement totally rely on the choice of the party. Therefore, the composition of arbitrators must represent the will of both sides. However, the arbitration institution cannot be up to standard, as the president of the International tribunal for the Law of the Sea is actually the real organizer of this arbitration institution. [18]Because during the process of electing arbitrator, China refused to designate any arbitrator to be one of them to compose five-member arbitration court. Under this circumstance, except the one arbitrator designated by Philippine is reserved, the rest 4 should be designated by the president according to the regulation of the annex 7 of the UNCLOS.

The composition of authoritative international court or arbitration institution often shows diversity of cultural background to fully represent the different culture and the main legal system, making the arbitration result more fair. However, in the case of South China Sea Arbitration, 4 out of 5 arbitrators come from European. The issue of South China Sea is a complicated dispute over Asia and need veteran export to make rigorous decision. The composition of the South China Sea arbitration institution shows the curtness of the designation of arbitrators.

4.2 In the South China Sea Arbitration, the arbitral tribunal was not composed of arbitrators chosen by the Chinese and Filipino sides.

This ad hoc arbitration tribunal has no direct relationship with the Permanent Court of Arbitration (PCA). The only thing that matters is that the Permanent Court of Arbitration provides secretarial services to the arbitration tribunal in this case, and leases the Peace Palace in The Hague to the arbitration tribunal as the venue for hearing. The ad hoc arbitral tribunal has nothing to do with the International Court of Justice (ICJ), also located in The Hague, which is the main judicial organ of the United Nations and established in accordance with the Charter of the United Nations. In addition, the ad hoc arbitration tribunal is not directly related to the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, Germany.

---

[18] Yu Xiangdong, Cui Haoran. An Analysis of the Impartiality of the Provisional Arbitral Tribunal in the South China Sea Arbitration Case, Southeast Asian Studies No. 2, 2017.

The resulting rule difference is that there are significant differences between the International Court of Justice, the Tribunal for the Law of the Sea and Annex VII arbitration in the selection of magistrates. The Statute of the International Court of Justice stipulates a detailed and strict procedure for the selection of judges[19]: the Secretary-General of the United Nations invites the nominating unit to propose candidates in writing; The United Nations General Assembly and the Security Council are elected from the list of candidates for judges; The General Assembly and the Security Council independently elect judges; Candidates who get an absolute majority of votes in the General Assembly and the Security Council shall be considered elected. The Statute of the Tribunal for the Law of the Sea also stipulates that its judges[20] shall be invited by the Secretary-General of the United Nations (later by the Registrar of the Court) to nominate candidates for judges from all States parties (each State party shall nominate no more than two judges); Compile the list of candidates on the basis of nominating the Secretary-General, and convene the Conference of States Parties to the Convention for the first time; Only the candidate who gets the most votes and a 2/3 majority of the States parties present and voting can be elected as a judge, and this majority includes more than half of the States parties, and the number of States parties attending the meeting is not less than 2/3 of all the States parties. However, according to Articles 2-3 of Annex VII, the selection of arbitrators only requires that "the Secretary-General of the United Nations shall compile and maintain a list of arbitrators, and each State Party shall have the right to nominate four arbitrators. If the nomination list of the State Party is less than four, it has the right to make additional nominations ". At the same time, it is stipulated that the arbitration tribunal shall be composed of five arbitrators, one appointed by the initiator of arbitration+one appointed by the respondent (if no appointment is made, it shall be appointed by the president of the arbitration tribunal)+three appointed by the parties to the dispute (and one of them shall be appointed by the president of the International Tribunal for the Law of the Sea through consultation). If none of the above arbitrators can be appointed or reached by agreement, it shall be appointed by the president of the International Tribunal for the Law of the Sea. It can be seen that the arbitration in Annex VII has no specific provisions on the nomination procedure of

[19] Articles 2 to 15 (14 articles in total) of the Statute of the International Court of Justice specify the composition of the court, the qualifications and election of judges, and Article 31 of the Statute specifies the selection of judges in specific cases.

[20] Article 2, Article 4 of the Statute of the Tribunal for the Law of the Sea.

arbitrators, and there is no voting and selection procedure. Instead, it is mainly based on the appointment and consultation of the parties, supplemented by the appointment of the president of the Tribunal for the Law of the Sea. If no arbitrator can be appointed or agreed, the arbitrator shall be appointed by the President of the International Tribunal for the Law of the Sea.

As a temporary arbitration tribunal, there is no strict procedure for appointing arbitrators, and even in the process of appointment and negotiation between the parties, the process requirements are not observed. And China and the Philippines did not appoint any arbitrators in this case. All five arbitrators were appointed by Ryui Junji, the former president of the court, despite the strong opposition of China. Obviously, the setting of "personal decision-making system" does not conform to the conditions contained in the word "sufficient", which requires the arbitral tribunal to "ensure that each party to the dispute has a sufficient opportunity to state its opinions and put forward its claims" when formulating the rules of procedure. This practice does not have any other supervision and power checks and balances, which makes it possible for the whole arbitration procedure to be built towards "unsupervised personal decision-making system", which does not meet the requirements of procedural fairness.

5. The conditions for the initiation of the "dual division" procedure cannot be reached or prevented in this case

The compulsory arbitration procedure stipulated in the United Nations Convention on the Sea is more judicial than the general arbitration procedure, that is, "enforceable". [[[] See Antony Oster: Modern Treaty Law and Practice, China Renmin University Press, 2009 edition, page 402.]] The core meaning of this "enforceability" is a kind of "unilateralism", that is, one party to the dispute can directly submit the dispute to arbitration without consulting the other party's consent. Even if the other party to the dispute does not appear in court or defend the case for various reasons, the opposite party can request the arbitration tribunal to continue the procedure and make an award; [21]Thus, it is distinguished from "agreement" and "contract" in general arbitration. At the same time, although "unilateralism" is the trigger condition for mandatory arbitration proceedings, it is not arbitrary, nor does it mean that one party's will can determine the arbitration result, but it still needs a "delicate balance".[22]Divide this binary balance into positive conditions

---

[21] See article 287 and article 9 of annex VII to the Convention.
[22] See A/CONF.

and negative conditions, and you need to reach positive conditions without negative conditions to make "trigger" further enter "start".

Positive conditions are positive conditions, and the program cannot be started in case of lack of positive conditions; In general, the positive conditions in the current practice should include the conditions of subject qualification, the conditions of jurisdiction type, the exchange of views and the exhaustion of appropriate remedies. The negative condition is the rejection condition, which can not start the compulsory arbitration procedure; However, in the current practice, the negative conditions should generally be summarized as "power abuse prevention", "agreement prevention", "natural exception prevention" and "optional exception prevention".

Although there are many positive and negative conditions for starting compulsory arbitration proceedings, they should not be satisfied in every case; Generally, in international compulsory arbitration cases where the Convention is applicable, the core of "dual division" is integrated into "four thresholds", which is the core condition of all conditions, as well as a package of balanced provisions;[23] When the "four thresholds" are successfully "crossed", the legal effect of jurisdiction will change from "none" to "there". The "South China Sea arbitration case" does not meet the "four thresholds", so the arbitral tribunal has no jurisdiction over the case, and the award has no legal effect at all.

The first threshold is that if the relevant matters submitted for arbitration exceed the provisions of the Convention, compulsory arbitration procedures cannot be adopted. In this case, the essence of the arbitration initiated by the Philippines is the issue of territorial sovereignty over some islands and reefs in the South China Sea, which is clearly stated in the document issued by the Philippines on January 23, 2013 that the purpose of the arbitration is to "protect the national territory and sovereignty"; The purpose of its appeal is to "make the dispute obtain a 'lasting' settlement", that is, a kind of "ownership confirmation", which can be known. The Chinese Ministry of Foreign Affairs holds that the case is a territorial sovereignty dispute, which is not applicable to the Convention, so the arbitral tribunal has no jurisdiction.

The second threshold is that if the relevant disputes involve maritime delimitation, historic bays or ownership, military activities or law enforcement activities, the States parties to the

---

[23] See: The Ministry of Foreign Affairs explains the South China Sea arbitration case in detail: the relevant arbitration tribunal has no legal effect, published in the People's Daily, May 13, 2016 edition.

Convention have the right to declare that they will not accept compulsory arbitration. This exclusion also has legal effect for other States parties. In 2006, China made a government declaration on the rights conferred by Article 298 of the Convention, which excludes compulsory arbitration; At the same time, more than 30 countries made similar declarations, which have become one of the important factors for the application of compulsory arbitration in the Convention.

The third threshold is that if the parties choose other methods to settle the dispute, they should not initiate compulsory arbitration. Article 4 of the Declaration on the Conduct of Parties in the South China Sea signed by ASEAN countries in 2002 stipulates "negotiation" and other solutions [stipulates that "the territorial and jurisdictional disputes shall be resolved peacefully by the relevant sovereign countries through friendly consultations and negotiations".] According to Article 279 of the Convention, the enumeration of "peaceful means" can be seen in Article 33, paragraph 1, of the Charter of the United Nations; It can be seen that "negotiation" and "consultation" should be an independent "peaceful way" rather than a broad concept. That is to say, China, the Philippines and other countries have previously chosen "peaceful means" to settle disputes other than "arbitration", which should be protected according to Article 280 of the Convention.

The fourth threshold is that the parties have the obligation to exchange views on the dispute matters first. The Philippines once referred to the "exchange of views" conducted by diplomatic letters in the "China Philippines Consultation on the South China Sea" and other negotiations since 1995 and subsequent bilateral meetings. However, since the establishment of diplomatic relations between China and the Philippines in 1986 to 2013, China and the Philippines have conducted 19 diplomatic consultations, focusing on "China Philippines friendly cooperation" rather than the focus of the dispute in this case;[24] That is to say, the "exchange of views" mentioned by the Philippines is not the "exchange of views on controversial points" mentioned in the Convention. On the other hand, China supports the exchange of views in a "peaceful way".[25]Among them, the Ministry of Foreign Affairs has repeatedly said: "China is always

---

[24] See Cao Qun: South China Sea Disputes and International Arbitration: The Philippines' Misjudgment, published in Research on International Issues, 2013, Issue 4.

[25] see: "Foreign Ministry Spokesperson Hong Lei held a regular press conference on January 23, 2013", https://news.12371.cn/2014/01/20/ARTI1390221697165217.shtml. Last visit time: 21:26,

committed to resolving disputes through bilateral consultations and negotiations... and does not take any action to complicate or expand the issue." The exchange of views was also conducted through consultation and negotiation.

6. Is the Convention a neutral angel or a puppet of interests - zero sum game transformation under the abuse of compulsory arbitration

From the perspective of substance, the provisions of the Convention on dispute settlement are made in accordance with the purposes and provisions of the Charter, and also fully protect the autonomy of the parties to the dispute. To a certain extent, it is neutral and impartial, and is an "angel" to effectively resolve disputes. However, whether from the perspective of the "China Philippines South China Sea Arbitration Case" or the international form of related cases, there is a certain degree of "hegemonism" - the application of the Convention depends on "interpretation", while "interpretation" depends on the interests of the so-called "big powers", which will obviously change the Convention from a "neutral angel" to a "puppet of interests". To solve the problem of phenomenon, we should explore its essence, so we should further study the phenomenon and nature of this "puppet" to clarify the "big country game" under the "China Philippines South China Sea arbitration case".

One of the essential reasons for the "abuse" of compulsory arbitration in this case is that the relevant countries generally regard the game between countries as a "zero sum" game, even with a distorted "non zero sum" game.

From the perspective of game theory, "zero sum" game is a kind of competitive relationship with essence, and the increase of one party's interests is bound to have the decrease of the other party's interests; The "non zero sum" game is a "win-win" and a "cooperative" game. The "South China Sea" issue is complex, with different countries competing for resources for interests, as well as complex geopolitical rivalries;Whether China and the United States or other countries are involved in the South China Sea issue, there is a "zero sum" and "non zero sum" game. For example, there is a "zero sum" game in geopolitics, military security and other fields, while there is a "non zero sum" game in resources, freedom of navigation, regional cooperation and other

---

October 7, 2022.

fields. [26]

First of all, in this case, why is it said that one of the main reasons for "abuse" is that the game between countries is generally considered as a "zero sum game"? Because the South China Sea region, such as freedom of navigation, regional cooperation and other matters that are originally "non zero sum" games, are all regarded as "zero sum" games, the relevant countries will wholeheartedly believe that only by depriving China of all rights in the South China Sea can they maximize their own interests; So as to spread public opinion, interpret the Convention and abuse arbitration by any means. Although the core issue in the "China Philippines South China Sea Arbitration Case" is undoubtedly territorial sovereignty, it is assumed that if the "hegemonic powers" only intervene in the sovereignty issue, they will do everything to prove that the South China Sea is not China's territory, just to change the sovereignty of the South China Sea into Philippine sovereignty? Obviously, this is not in line with the intention of "hegemonic countries". It can be seen that the main purpose of considering "zero sum" is to further obtain the benefits that can be obtained for them in addition to sovereign intervention - such as unrestricted freedom of navigation, resource development, etc.

Secondly, why is the distorted "non-zero sum" game also a major reason for the "abuse" of compulsory arbitration? Since such fields as geopolitics and sovereignty cannot be cooperated, this paper calls "distorted" "non-zero sum" game for "hegemonic countries" trying to interfere in sovereignty and "cooperate" and "share" in territorial sovereignty. Once such a game occurs, it means that the "hegemonic power" wants to essentially disintegrate China's core rights in the South China Sea in order to obtain huge benefits; However, it also means that the "cost" of "hegemonic power" is high. Therefore, they will not choose any means, or even challenge the order of the international community, in order to obtain the "highest level of benefits"; "Abuse" of compulsory arbitration is the best way to challenge the international judicial order and distort international law in order to obtain direct effects.

IV. Improvement of UNCLOS compulsory arbitration procedure

1. Explain the relevant fuzzy concepts

1.1 Clarify the criteria for "settlement of disputes by agreement"

---

[26] See Xia Liping and Nie Zhengnan: U.S. South China Sea Policy in the 21st Century and the South China Sea Game between China and the United States, published in Social Science, 2016, No. 10, pp. 28-40.

Determine whether the dispute parties have solve disputes through agreement, not just by simple file name that need to be considered a party concerned ever participated in or choice of words make binding international law and should also be given the complexity and particularity of dispute occurs areas simple nested in previous cases judgment logic is inappropriate, It is also necessary to consider that if the cause of "harm" to a party concerned is "reliance" on the expression of the other party concerned, the arbitral tribunal should abide by the principle of "estoppel", but it is difficult to operate in concrete terms due to a combination of factors. Based on this, the author thinks that may be agreed in the parties confirm the applicable agreement means to resolve international disputes, retained by writing a standard rule out compulsory arbitration application protocol, and in the international law of the sea or the UN international law commission for the record, in case one party concerned opted to be submitted to the mandatory arbitration procedure.

1.2 Define the judgment criteria for "obligation to exchange views"

The judgment of the South China Sea arbitration case further enlarges the dispute that the judgment standard in the obligation of exchanging opinions is unclear. The obligation to exchange opinions was originally used as a means to resolve disputes, but now it has become a dispute because of the unclear standards. The author believes that the standard of fully fulfilling the obligation of exchanging opinions is the core of all disputes. The discussion on the terms, contents and ways of performance of the obligation to exchange views is to determine the standards of performance. The international standards that define the obligation of exchange of views, especially those that are fully implemented, will no longer make countries need to have a big dispute about the application of treaties and make complicated identification of the nature of disputes before settling disputes, thus greatly simplifying the dispute settlement process.

International precedents play a decisive role in judging the obligation to exchange views[27]. In other words, the criterion for judging this obligation should not exist independently, but should be combined with the context of treaties and relevant international jurisprudence. According to previous cases, international judicial institutions are generally lenient in judging the nature of disputes, so it can be regarded as an international practice. The author believes that under the

[27] Gao Jianjun: Research on Dispute Settlement Mechanism of the United Nations Convention on the Law of the Sea [M], China University of Political Science and Law Press, 2014.

premise of this international practice, any document exchange and bilateral dialogue between the two parties to the dispute prove that they are aware of the existence of the dispute. Even if the Convention is not invoked and the dispute is not explicitly specified, it can be considered that the exchange of views on the dispute has fulfilled their obligations. In addition, in order to avoid the complicated procedure of determining the application of the Convention, even if other international treaties are involved, as long as the Convention is involved at the same time, the dispute can be determined to be applicable to this Convention. As for the problem that the relaxation of the judgment standard of the obligation of exchange of views may lead to the serious subjective tendency of the judicial organ's judgment on this obligation, if the parties concerned have exchanged views in good faith, it can be included in the judgment standard of the obligation of exchange of views, and if the standards are relaxed, the performance of the obligation should be strictly examined, so as to avoid the problem that the determination of the standards under the trend of such relaxation standards damages the rights of the contracting parties.

2. Improvements to the arbitrator and expert development process

The choice of arbitrator and expert witness played a decisive role in the outcome of the case. In general, arbitrators are required to be particular about maintaining their neutrality. [28] While arbitration proceedings need to be made more efficient and they also need to be made fairer. The choice of arbitrator should be made by mutual consent, and the choice of the arbitrator will be important in helping to enhance the fairness of the arbitration process. The parties are often able to agree on a mutually acceptable arbitrator.[29] However, in the South China Sea arbitration case, there were certain problems with the procedures for the testimony of arbitrators and experts, and the arbitral tribunal did not disclose information about the choice of arbitrators to China.

2.1 Improve the selection and appointment of arbitrators

Today, there is a need to improve the selection and appointment of arbitrators in arbitration proceedings in international territories. It is clear from the South China Sea arbitration case that the process of selecting arbitrators was highly unfair and led directly to the absurd

---

[28] Chatterjee, C. "Bias in Arbitrators and Bias against Arbitrators." Journal of World Investment, vol. 3, no. 2, April 2002, pp. 369-394.

[29] Beatty, Marion. Labor-Management Arbitration Manual. New York, E.E. Eppler.

outcome of the arbitration. There is currently a need to improve the system of withdrawal of arbitrators and the appointment of arbitrators familiar with disputes in the arbitration process.

2.1.1 Improve the withdrawal system of arbitrators

The sweepingly adverse and unanimous decision puts China in a newly acute set of choices. Beijing can continue its already adumbrated policy of "four noes" toward the Court and its process and verdict: no participation, no acceptance, no recognition, and no enforcement.[30]

Therefore, to avoid the recurrence of situations such as the South China Sea arbitration case, which may call into question the fairness of the arbitration process, the following recommendations are made about the procedure for the withdrawal of arbitrators: firstly, when removing an arbitrator, full consideration should be given to the relationship between the arbitrator and the interests of both parties, and if there is a strong relationship between the arbitrator and either country, then full consideration and full protection of the arbitral state's should be given to the withdrawal of the arbitrator. The arbitrator's legitimate right of appeal should be fully considered. Secondly, full consideration should be given to whether the arbitrator is guilty of corruption or bribery. However, corruption and bribery are sometimes difficult to detect because of their secrecy. This requires the arbitration system to have a transparent system of income for the arbitrators to avoid corruption and bribery. Thirdly, the composition of the tribunal needs to be considered with due regard to the inherent bias of the arbitrators, for example, whether they have made statements in public that are biased. Fourthly, fair rights of challenge and recourse should be given to the parties to the arbitration. The exercise of the right of withdrawal presupposes that the arbitrating state needs to have sufficient platform and space to express its views and sufficient time and communication channels to challenge the arbitrators. Therefore, in the arbitration of territorial issues in the law of the sea, the arbitral tribunal needs to guarantee sufficient and equal time for communication between the two states to guarantee the credibility, fairness, and reasonableness of the arbitral award.

2.1.2 Appoint arbitrators who are familiar with disputes

Arbitral awards under the UN Convention on the Law of the Sea differ significantly from

---

[30] Jacques deLisle, The South China Sea Arbitration Decision: China Fought the Law, and the Law Won….Or Did It?, https://www.fpri.org/article/2016/07/south-china-sea-arbitration-decision-china-fought-law-law-won/.

those in other ordinary commercial disputes, as the UN Convention on the Law of the Sea is applied more to the question of the boundary between the territory of a state and the sea. Therefore, an arbitral award based on the UNCLOS will involve the issue of national territorial sovereignty and has a strong public international law character. Take the South China Sea arbitration case as an example, the wrongful ruling in the South China Sea arbitration case will profoundly affect the sovereignty and territorial integrity of China. It is precise because of the strong public law nature of arbitral awards in the field of the law of the sea that more specialized arbitrators are required in such arbitration proceedings. Arbitrators need to have more specialist knowledge and a deeper and fairer understanding of the case.

In conducting an arbitration, firstly, the arbitrator needs to have the basic qualities of an arbitrator. They need to maintain a fair and neutral position and the need to accurately inform the parties to the arbitration proceedings, in particular information about the process of selection and appointment of the arbitrator.

Secondly, arbitrators need to have a basic knowledge of the law of the sea. Knowledge of the law of the sea consists of two parts, the first part being knowledge of the legal aspects of the sea and the second part being geographical knowledge of the sea, continental shelf, etc. The law of the sea is part of public international law and is studied more by scholars of law, but there are specialisms and it is quite possible that someone with knowledge of law may not know geography, especially of terminologies such as breaklines, nine-dash lines, and U-shaped lines. In addition, the wide variation in geography from continent to continent and country to country requires the arbitrator to have a very specialized understanding of the maritime area of a particular dispute.

2.2 The process of appointing experts should be transparent.

The arbitral tribunal in this case appointed five experts in succession, including a hydrographic expert, a safety of navigation expert and three experts on coral reef ecology, but the tribunal did not clearly disclose the transparent process for appointing these experts.

One of the results of the opaque appointment of these experts is that after becoming an arbitrator in the Philippines' South China Sea arbitration case, a professor changed his previous position and instead argued that the determination of the legal status of the islands and reefs could be delinked from the issue of maritime delimitation. This is unacceptable to any fair referee: the appointment process of experts directly related to the outcome of the award is opaque; The

positions of experts before and after appointment have changed in principle. To promote the fairness of adjudication in related disputes, both parties to the dispute jointly select experts or judicial institutions select experts recognized by both parties to the dispute, formulate a set of strict selection criteria to select experts, and conduct the selection procedure of experts under the supervision of all parties concerned. Obviously, there is still a huge room for improvement in this process, which can better guarantee the fairness of adjudication.

3. Compulsory mediation procedure in advance

Section 2 of Part XV of the Convention provides for the use of compulsory procedures. Article 287 (4) [If the parties to the dispute have accepted the same procedure to settle the dispute, unless otherwise agreed by the parties, the dispute may only be submitted to that procedure.] It also shows that "conciliation" can also apply to "compulsory procedure". At the same time, mediation can better reflect the intentions of both parties and reduce the "risk" of holding national interests in the hands of judicial institutions; To some extent, it can avoid intensifying the contradiction between the parties; It is also because the mediation committee's 12-month reporting period can prevent cases from being solved in a delayed manner to the greatest extent. The "mandatory mediation" is an important prerequisite for the "mandatory arbitration" (mediation before arbitration), which not only has the feasibility of "mandatory mediation", but also provides a reference for "mandatory arbitration", [For example, for the factual issues pointed out in the compulsory mediation, if the subsequent compulsory arbitration procedure still occurs, the arbitral tribunal can learn from and apply this part of the content to reduce the time for repeated investigations.] It also has the "recognition" basis of many countries. [For example, in Italy, Germany, Australia and other countries, compulsory mediation has been introduced as a pre procedure.]

For the pre attempt of "compulsory mediation", the first is that "compulsory mediation" cannot go beyond the essence of mediation, which is just procedural coercion rather than content and result coercion,[31] This kind of compulsion can be mixed by judges and statutory compulsion. [For example, some laws and regulations in the United States allow the court to order mediation without the consent of the parties. If the parties do not comply with the mandatory order, they will

[31] see Wang Fuhua: On Pre litigation Compulsory Mediation, published in Journal of Shanghai Jiaotong University, 2010, Issue 2, pp. 19-27.

be punished. At the same time, some states also give the court compulsory mediation in special types of cases, such as divorce, guardianship and other family cases.]

Second, we should pay attention to the construction and improvement of legislation. For its specific application, we should also refer to "compulsory procedure" as mentioned above to meet the procedural provisions of "dual division".

Third, under certain dispute characteristics, for example, the two countries agreed that there must be a link to resort to arbitration, then the boundary between mediation and arbitration should be distinguished. Participation in mediation does not mean participation in compulsory arbitration procedures. [For example, if the two countries have participated in the compulsory mediation but have not reached an agreement, and then enter into the compulsory arbitration but one country does not join, it cannot be said that this country has participated in the compulsory arbitration procedure.]

Fourth, the advance of compulsory mediation should not restrict the subsequent compulsory arbitration, nor affect the finality of arbitration.

V. Conclusion

First and foremost, it is of great significance to explain and understand the relevant fuzzy concepts. Secondly, more improvements to the arbitrator and expert development process are encouraged. Last but not the least, compulsory mediation procedure in advance might help the promotion of the application of arbitration procedures.