Compulsory Arbitration in the United Nations Convention on the Law of the Sea from Procedural and Substantive Perspectives

-- Take the South China Sea arbitration case between China and the Philippines as an example

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Abstract: The compulsory arbitration procedure of the United Nations Convention on the Law of the Sea (UNCLOS) has been applied by more and more countries to settle maritime disputes due to its coerciveness, flexibility and convenience. However, the Convention has only been in force for more than 20 years. It is the product of a compromise between developed and developing countries under the balance of power and the game of interests. Therefore, there are vague provisions in the compulsory arbitration clause, which is easy to cause ambiguity or unclear interpretation. Moreover, some countries have maliciously misinterpreted relevant provisions on compulsory arbitration procedures, deliberately intensified conflicts between states and undermined the harmonious international maritime order through the intervention of major powers outside the region. In the South China Sea arbitration case, the inherent and institutional problems of the compulsory arbitration procedure under the Convention have been further exposed. As a country directly related to the interests of the South China Sea and a major State party responsible for maintaining world peace, it is necessary for China to conduct an in-depth study on the compulsory arbitration procedures under the Convention and put forward suggestions for improvement. We should respond to the new round of disputes in the South China Sea represented by the South China Sea arbitration, and uphold the building of a harmonious world maritime order. Therefore, starting from the background overview of the South China Sea disputes, this paper explores the defects of compulsory arbitration in UNCLOS from the perspective of procedure and substance, and puts forward suggestions for improving and innovating compulsory arbitration.

Keywords: United Nations Convention on the Law of the Sea, South China Sea Arbitration case, procedural and substantive perspective, improvement and construction

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CONTENT

1.Background overview of the South China Sea Arbitration Case between China and the Philippines

China's understanding of Nansha Islands can be traced back to the Qin and Han Dynasties. By the Ming and Qing Dynasties, China had clearly defined its sovereignty and jurisdiction over Nansha Qundao. Authoritative maps published in the Ming and Qing Dynasties included Nansha Qundao in China's territory.....

On April 10, 2012, Chinese fishing boats were obstructed and interfered with by Philippine warships while conducting fishing operations off the Huangyan Island. Later, Chinese maritime surveillance ships and fishery administration ships arrived and stopped the Philippine warship's provocation. In the following more than a month, the two sides in a variety of ways a tit-for-tat struggle under the various channels, and on June 21, 2012, China has established regional three shashi with extremely high efficiency, as a whole under the jurisdiction of xisha, zhongsha and nansha islands, and quickly implement three shashi relevant administrative, economic, military and other system and measures.

On January 22, 2013, seeing that the provocation failed to achieve its goal, the Philippines initiated the South China Sea arbitration with the World Maritime Tribunal. However, throughout the arbitration process, China has always adopted the attitude of "non-acceptance, non-participation, non-recognition and non-implementation". On July 12, 2016, the arbitral tribunal ruled in favor of the Philippines, rejecting the "nine-dash line" and declaring that China has no "historic ownership" of the South China Sea.

Looking at the whole arbitration case, it can be seen that the Philippines and the arbitral tribunal have abused the compulsory arbitration procedure to a large extent, distorting the interpretation and arbitrary application of the procedure, distorting facts and interfering with interests in substance. From this perspective, this paper explores the defects of the arbitration in the field of procedure and substance.

2.the achievement and resistance of the "dual division" starting procedure conditions -- formal perspective and legal effect

From the procedural perspective, the compulsory arbitration procedure stipulated in the United Nations Convention on the Law of the Sea is more judicialized than the general arbitration procedure, that is, "enforceable".[3] The core meaning of this "enforceability" is "unilateral", that is, one party to a dispute may directly submit the dispute to arbitration without seeking the consent of the other party. Even if the other party fails to appear in court or defend the case for various reasons, the other party may also request the arbitration tribunal to continue the proceedings and make a ruling.[4] Thus, it is distinguished from "agreement" and "contract" in general arbitration. At the same time, although "unilateral" is the trigger condition of compulsory arbitration procedure, it still needs to operate within a certain boundary, which requires a "delicate balance". The form of this "delicate balance"[5] can be divided into positive conditions and negative conditions, that is, only when positive conditions are achieved without negative conditions can the "trigger" further enter the "start", and the legal effects such as jurisdiction, judgment and constraint can be produced.

2.1 Positive conditions for the commencement of compulsory arbitration proceedings

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[3] Antoni Oster, “Modern Treaty Law and Practice”, China Renmin University Press, 2009, p. 402.
[4] See article 287 and annex VII, article 9, of the Convention.
[5] Zhou Jiang and Lv Mingwei, "On the Initiation Conditions of Compulsory Arbitration Proceedings in the United Nations Convention on the Sea", Studies on China's Maritime Law, No.4, 2016, pp. 83-91.

Positive condition is positive condition, if the lack of the program can not start; There are four kinds of positive conditions in current practice.

2.1.1 Subject qualification conditions

Either on the basis of Part XV and article 2 of annex VII of the Convention or on the basis of general principles of treaty law.[6] It is known that the State initiating the arbitration proceedings must generally be a "contracting State". While it is possible for articles 285 and 291 to apply to entities other than States Parties, they are also "commensurately applied"; In other words, the Convention takes the application of States Parties as the principle and other subjects as the exception.

2.1.2 Conditions of jurisdiction type

Courts or arbitral tribunals have different jurisdiction over different types of disputes. In accordance with Article 288 of UNCLOS, the relevant jurisdiction in this case is "disputes of interpretation and application" and "disputes of interpretation and application of agreements", which gives rise to two central questions -- what is a "dispute"? What is the interpretation and application of the Convention or related agreements?

First of all, the elements of a "dispute" under UNCLOS can be glimpsed from the South China Sea Arbitration case. Generally speaking, they include differences of law and fact, disputes and reasoning discretion.[7]

Second, the concept of "interpretation" and "application" of UNCLOS and its related agreements is not difficult to explain. The difficulty lies in the jurisdiction of interpretation and application of UNCLOS and its related agreements when they are identified as "disputes". A typical case is the "Southern Tuna Case". First, Japan considers this dispute not a "scientific dispute" but a "legal dispute". The other is that the case is an application of the 1993 Convention rather than the Convention.[8]

It can be seen from the above cases that the court or arbitral tribunal is the final arbiter of the interpretation and application of the "dispute". However, it is precisely because of its considerable discretion, diverse interpretations of the nature of the "dispute", and ambiguity of the "reasoning" used to identify the "dispute" that the arbitral tribunal will be more inclined to review the jurisdiction of the comprehensive standard, such as based on final opinions, policy changes, relevant statements and other evidence.[9]

2.1.3 Exchange of views

The Convention imposes an obligation on the parties to a dispute to exchange views, both

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[6] See Article 34 of the Vienna Convention on the Law of Treaties (1969) : Treaties do not create obligations for third States without their consent.

[7] Zhou Jiang and Lv Mingwei, "On the Initiation Conditions of Compulsory Arbitration Proceedings in the United Nations Convention on the Sea", Studies on China's Maritime Law, No.4, 2016, pp. 83-91.
The author points out that the difference between law and fact is not very different from the general "dispute" elements. Further, being contested means that such a disagreement is explicitly opposed by the other party before the process begins; Furthermore, differences and objections do not need to be expressed in straightforward words, and can be reasoned on the basis of attitudes and positions, and the arbitral tribunal shall decide.

[8] For the "Southern tuna" case of two major controversies: if purely based on the interpretation of the first point of dispute, it is obviously based on the two sides of different positions of interpretation, is a "scientific dispute". However, this paper argues that "scientific disputes" are the substance of their disputes, which inevitably leads to disputes over the provisions carrying the content, that is, disputes over the "laws" that prescribe how to resolve different "scientific disputes". Therefore, the rhetoric of "scientific dispute" rather than "legal dispute" has some meaning of opposing substance and form carrier, but it also reflects a problem, that is, the nature of "dispute" is diverse and difficult to identify. On the second point of dispute, the Tribunal found that it had jurisdiction as long as, by a general judgment, the dispute in question appeared to the Tribunal to involve the Convention.

[9] Fisheries Jurisdiction Case (Spain v. Canada), Judgment, I.C.J., 4 December 1998, p.31.
and Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, paras. 262-263.

before the commencement of the dispute settlement procedure and after the procedure has not been effective. So what is an exchange of views? Through a search of the Convention as a whole, the term "exchange of views" exists only in article 283, which is not further explained; That is to say, we can only analyze the content of the article itself and other auxiliary perspectives.

First of all, from a textual perspective: the exchange of views in Articles 283 (I) and 2 of UNCLOS is based on "means of settlement" and "means of implementation", that is to say, it is the exchange of views on means rather than the substance of the dispute.

However, as can be seen from Article 283, this means refers to "negotiations" or "other peaceful means". Methods such as negotiation inevitably involve more or less substance; Therefore, the exchange of views cannot be considered purely as a procedure.[10]

Secondly, from the perspective of legislation, Chairman Amela Singh's remarks on exchange of views in his memorandum[11] can be summarized as "Imposing an obligation to exchange views is to give the parties full freedom to use the means of their choice". In other words, article 283 of the Convention was not drafted as a coercive procedure intended to limit the means of dispute settlement; It is more like a "reminder" to show that the two parties to the dispute should exchange views, otherwise misunderstanding will be amplified, the treaty will be ignored and so on, which may lead to the risk of invalid legal proceedings due to the lack of jurisdiction of one country.

Furthermore, although it is more like a "reminder" and not a "mandatory procedure", this paper believes that this kind of non-mandatory is aimed at the way of choice, and is necessarily mandatory for the performance of the exchange of views, that is to say, compulsory arbitration cannot be initiated without the performance of the exchange of views. At the same time, the compulsory obligation of "exchange of views" also requires that the act of "exchange of views" alone cannot be regarded as the fulfillment of the relevant obligation, and the obligation must be explained to have been fulfilled according to certain standards.[12]

2.1.4 Exhaustion of local remedies

Article 295 of the Convention provides that any dispute concerning the interpretation or application of the Convention may be referred to compulsory proceedings only if "local remedies have been exhausted" as required by international law. The Oppensea International Law provides a substantive interpretation[13] of what constitutes "exhaustion of local remedies", and from its provisions, it can be found that this is more a kind of rule applied when the host causes damage to the private rights of the nationals of other countries. It applies to the disputes between countries and individuals, but not between countries.

2.2 Negative conditions for the commencement of compulsory arbitration proceedings

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[10] Kwiatkowska, "The Southern Blackfin Tuna Arbitral Tribunal Did Get it Right: A Comentary and Reply to the Article by David, A Colson and Dr Reggy Hoyle ", Ocean Development and International Law 34: 369-395, 2003. It holds that there are many treaties corresponding to most maritime disputes. If the exchange of views under UNCLOS is simply regarded as a procedure, then under the doctrine of "procedure and entity parallel", international law and the legal system of relevant states will act as special laws to adjust disputes and even include treaties before disputes actually occur. This is clearly incompatible with the purpose of the obligation to exchange views.

[11] A/CONF. 62/WP. 9/Add.1.

[12] Yu Minyou and Xie Qiong, "The Illegality of the Jurisdiction Award in the South China Sea Arbitration Case from the Perspective of the Obligation of Exchange of Views in Article 283 of UNCLOS", China Maritime Law Review, No. 1, 2017, pp. 34-60.

[13] Oppensea International Law considers "exhaustion of local remedies" to mean "when the treatment accorded by a State to an alien in its territory is not consistent with its international obligations, but can still provide the alien with the required treatment by subsequent action." It is an accepted rule that the International Tribunal will not entertain international claims brought by the home State of the alien on behalf of the alien or himself unless the alien has exhausted all legal remedies available to him in the State concerned."

The negative condition is the resistance condition, the existence of which can not start the compulsory arbitration procedure; There are four kinds of negative conditions in current practice.

2.2.1 "Abuse of power to prevent"

Article 300 of the Convention provides for "good faith" performance and "abuse of rights" deterrence. On the one hand, the "good faith" performance should be a positive obligation. This paper believes that the "good faith" performance should be a general formulation, so it should fully include the positive conditions in the initiation of compulsory arbitration proceedings.

On the other hand, by what judgment is "abuse of power"? In practice, for example in the Virginia case, the Court held that the invocation of article 300 must clarify which specific rights and obligations of the Convention the other party had violated.[14] The same is true in the South China Sea Arbitration case. In other words, Article 300 is more of a "catch-all" provision, whose substantive meaning depends on the circumstances of the dispute.

2.2.2 "Agreement Resistance"

Articles 281 and 282 of the Convention embody the protection of agreements between States parties in the event of or prior to a dispute. By comparing these two articles, it can be roughly divided into two types: agreement resistance before the occurrence of a dispute (Article 282) and agreement resistance after the occurrence of a dispute (article 281).

First, as regards obligations under general, regional or bilateral agreements concluded by the parties, the following requirements can be drawn from Article 282 of UNCLOS: first, the parties to the dispute have reached an agreement; Second, a party to the dispute requests instructions; Third, procedures for submitting such disputes to a binding judgment; Fourth, the exception is otherwise agreed by the parties to the dispute.

The second is the procedure to be applied by the parties to a dispute in the event that the dispute has not been settled. It follows from Article 281 of the Convention that: first, to seek the settlement of the dispute by peaceful means of their own choice; Second, recourse to this method has not been solved; Third, the agreement of the parties to the dispute does not preclude any other procedure. In paragraph 2, a special provision is made that the time limit contained in the agreement shall expire before article 281 can be applied.

2.2.3 "ex officio exception"

Paragraph 2 and 3 of article 297 of the Convention provide for a series of exclusions applicable to Section II, of which paragraphs 2 (a) and 3 (a) are exclusions of the ex ante exception, whereby a particular State is not obliged to refer the dispute to the settlement procedure in Section II in case of such an exception; (b) is a supplementary provision for compulsory conciliation. By comparison with item (a), "ex parte exception" mainly involves Marine scientific research and the sovereignty of biological resources in the exclusive economic zone, which has little relevance to this case; However, it should be noted that as an "obligatory" exception, it is not like an "optional" exception. The former need not be declared, while the latter need to be declared.[15]

2.2.4 "Selective exception"

Article 298 of the Convention then provides for an "optional exception". According to paragraph 1, the elements of such an exception are as follows: the subject being a State party, without prejudice to the obligations arising from section I of the Convention, and a written

[14] The M/V "Virgina G" Case (Panama v. Guinea-Bissau), Judgment, ITLOS, 4April 2014, para.399.

[15] Zhou Jiang and Lv Mingwei, "On the Initiation Conditions of Compulsory Arbitration Proceedings in the United Nations Convention on the Sea", Studies on China's Maritime Law, No.4, 2016, pp. 83-91.

declaration. At the same time, there are three specific types of disputes,[16] first, maritime delimitation or disputes involving historic bays or ownership rights; second, disputes over military activities and law enforcement activities; and third, disputes over the implementation of the functions conferred by the United Nations Charter by the United Nations Security Council. And this case has direct relevance for "maritime delimitation and historic bay ownership" and "law enforcement activities".

First of all, the issue of maritime delimitation often leads to the increase or decrease of territory, resulting in the simultaneous occurrence of maritime rights and interests and territorial sovereignty disputes, which fall under the jurisdiction of "hybrid disputes". Underpinning this argument is the fact that Article 121 of the Convention recognizes that islands (a type of land) can also have their own exclusive economic zones and continental shelves, which complicates such cases and complicates sovereignty and maritime rights.

However, from the principle of "land determines the sea" in the law of the sea, we can know that land sovereignty is the premise of determining maritime rights and interests, and we should not abandon substantive disputes and only pursue formal disputes. In practice such as the Chagos Islands Arbitration the arbitral tribunal put forward the "weight of dispute" theory in which the shoe market is the predominant in the dispute over sovereignty.[17] However, in the South China Sea arbitration case, the "center of gravity of dispute" theory was not applied, and it did not carefully consider whether the case involved territorial sovereignty. Instead, it was decided that the issue of territorial sovereignty was not involved when China should not appeal.[18]

Second, to the problem of law enforcement activities "polar dawn" points out that the activities not only need to conform to is "about exercise sovereign rights or jurisdiction over the dispute law enforcement activities", must also be considered the second and third paragraph of article 297 of the convention, only comply with the stipulations of article 297 at the same time does not belong to a court or court of jurisdiction, in order to apply the phrase "law enforcement activity".[19]

2.3 The "Four thresholds" of jurisdiction -- from "none" to "have" before and after crossing the legal effect

Although there are positive and negative conditions for initiating compulsory arbitration proceedings, they should not be satisfied in every case. Generally, in international compulsory arbitration cases applying UNCLOS, the core of the "dual division" is integrated into the "four thresholds", which is the most core of all conditions, and also a package and balanced provision.[20] When the "four thresholds" are successfully "crossed", the legal effect of jurisdiction will be from "none" to "have". However, the South China Sea arbitration case does not meet the "four

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[16] One is maritime delimitation or disputes involving historic bays or ownership rights; Second, disputes between military activities and law enforcement activities; The third is the dispute over the United Nations Security Council's implementation of the functions entrusted to it by the Charter of the United Nations.

[17] Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award of 18 March 2015, paras. 299, 211.

[18] As for the above point of view, this paper holds that the fact that most maritime delimitation issues involve state sovereignty does not mean that sovereignty issues can be regulated by UNCLOS. On the contrary, in the South China Sea Arbitration case, the arbitral tribunal circumvented state sovereignty and instead ruled that the Philippines' arbitration claim did not involve territorial sovereignty disputes, which shows that the issue of sovereignty does not apply to UNCLOS. Otherwise, it can dispense with the nature of the case and thus apply compulsory arbitration under the Convention.

[19] The Arctic Sunrise Arbitration (the kingdom of the Netherlands v. the Russian federation), Award on Jurisdiction of 26 November 2014, para. 69.

[20] See "Foreign Ministry Explains South China Sea Arbitration Case: Relevant Arbitral Tribunal Has no Legal Effect", People's Daily, May 13, 2016.

thresholds", so the arbitral tribunal has no jurisdiction over the case, and the award has no legal effect fundamentally.

The first threshold is that if the relevant matter submitted for arbitration is beyond the provisions of the Convention, the compulsory arbitration procedure cannot be applied. 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. It has been clearly stated in the document issued by the Philippines on January 23, 2013 that the purpose of the arbitration is to "protect national territory and sovereignty". The purpose of its appeal is "to obtain a 'lasting' settlement of the dispute", that is, a "confirmation of ownership", etc., which can be known. Considering the position of the Chinese Foreign Ministry, the arbitral Tribunal has no jurisdiction because the case is a territorial sovereignty dispute that does not apply to UNCLOS.

The second threshold is that States parties to the Convention have the right to declare that they will not accept compulsory arbitration if the dispute involves maritime delimitation, historic bays or titles, military activities or law enforcement activities. Such exclusions also have legal effect with respect to other States parties. In 2006, China submitted a government declaration excluding compulsory arbitration in respect of its rights under Article 298 of UNCLOS. Over the same period, more than 30 countries have made similar declarations, which have become an important factor in the application of compulsory arbitration under the Convention.

The third threshold is that compulsory arbitration should not be initiated if the parties themselves choose to settle the dispute by other means. Article 4 of the Declaration on the Conduct of Parties in the South China Sea (DOC) signed by ASEAN countries in 2002 provides for "negotiation" and other means of settlement.[21] According to Article 279 of the Convention, the exclusionary content of "peaceful means" can be found in Article 33, paragraph 1, of the Charter of the United Nations; It is known that "negotiation" and "consultation" should be an independent type of "peaceful means" rather than a generalized concept. In other words, China, the Philippines and other countries have previously chosen "peaceful means" other than "arbitration" to settle disputes, which should be protected according to Article 280 of UNCLOS.

The fourth threshold is that the parties are obliged to first exchange views on the matter in dispute. The Philippine side has pointed out that the "consultations between China and the Philippines on the South China Sea issue" and other negotiations since 1995, as well as the subsequent "exchange of views" through diplomatic letters at several bilateral meetings. However, since the establishment of diplomatic ties between China and the Philippines in 1986 and 2013, the 19 diplomatic consultations between the two countries have focused on "China-Philippines friendship and cooperation" rather than the focus of this dispute.[22] In other words, the "exchange of views" mentioned by the Philippines is not the "exchange of views on disputed points" mentioned in UNCLOS. China, on the other hand, supports the exchange of views by "peaceful means".[23] Consultations, negotiations and other procedures for exchanging views were also conducted.

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[21] It stipulates: "Territorial and jurisdictional disputes shall be settled by peaceful means through friendly consultations and negotiations between sovereign States concerned".

[22] Cao Qun, "South China Sea Disputes and International Arbitration: The Philippines' False Claim", International Studies, No. 4, 2013.

[23] See "on January 23, 2013 foreign ministry spokesperson hong lei held a regular press conference", the Chinese foreign ministry, https://news.12371.cn/2014/01/20/ARTI1390221697165217.shtml. Last accessed: October 7, 2022, 21:26.
The Foreign Ministry has repeatedly said: "China is committed to resolving disputes through bilateral consultation and negotiation..... Do not take any action that will complicate or magnify the problem ".

3. Is UNCLOs a Neutral Angel or a Puppet of Interests -- The transformation of zero-sum game under the abuse of compulsory arbitration

From a substantive point of view, the provisions of UNCLOS on dispute settlement are made in accordance with the purposes and provisions of the Charter, and fully protect the autonomy of will between the parties to a dispute. To a certain extent, UNCLOS is neutral and non-biased, and it is an "angel" for the practical settlement of disputes. However, whether the "of the south China sea to arbitration or related cases international form, there is a degree of" hegemony "colour - to the convention applies depends on the" explanation ", and "explanation" depends on the interests of the so-called "great power", this will obviously make the convention from the angel "neutral" to "the interests of the puppet". To solve the problem of phenomenon, we should explore its essence. Therefore, we should make further research on the phenomenon and nature of this "puppet", so as to clarify the "great power game" under the "China-Philippines South China Sea arbitration case".

3.1 Phenomenon Perspective -- "Deception" or "axiom"

On July 12, 2016, the Arbitral tribunal of the South China Sea Arbitration made the final "award" in which China lost the case, finding that China has no "historic ownership" of the waters in the South China Sea. It issued a "verdict", a mass of jargon that sought to prove one thing -- that the decision was based on justice, that the Philippines had acted justly, and that "under justice, justice is immortal". But in essence, the wrong way, with continuous "efforts", the road will only go more and more "crooked". From the beginning and end of the South China Sea arbitration case between China and the Philippines, whether it is "justifying itself" or "accusing China of injustice", it is all a "fraud". This is also an important camouflage for "hegemonism" -- "packaging itself", denying the conflict of interests and "framing other countries". This can be seen from the actions of the United States, which holds "human rights" above "sovereignty" and interferes in the relations between Hong Kong, Taiwan and the mainland. The case outside the "right", is actually a "trick".[24]

One of the trickery: "packing itself" : In the "China-Philippines South China Sea arbitration case", the Philippines relied on the "hegemonism" behind it to "pack" a phenomenon -- falsely claiming that only compulsory arbitration can solve the South China Sea issue and advocating the fairness and justice of the arbitral tribunal.

First of all, only compulsory arbitration can solve the South China Sea issue, which is a big misinterpretation of people's understanding of domestic law and the application of territorial sovereignty disputes. From the perspective of the international situation, if the so-called "arbitration" is the "best" way to solve international disputes; If all disputes can be resolved through international judicial institutions, why is it that conflicts, such as those that lie behind the border in Kashmir, have not been brought to justice? This paper holds that the sovereignty of the international community and even the conflicts of all sides are essentially related to the national interests of a country. As a result, there is nothing more than his "heart" for reaction way of its own interests, "mediation", "negotiation" on this level is far more than its own interests balance in the international judicial institutions, let its free discretion, such as mandatory arbitration disputes should be resolved disputes and ease a way of international relations.

Second, advocating should one of the most important fair is based on the perspective of the Philippines is based on the error of "explore" and concluded, whether its out of their own selection,

[24] See LingShuo, Feng Wuyong, Philippines: “the south China sea to arbitration: six tricks surrounding the south China sea”, xinhua net, http://news.enorth.com.cn/system/2016/07/18/031067239.shtml. Last accessed: October 7, 2022, 21:28.

the arbitration tribunal has jurisdiction, the essence of the case, on the surface about the south China sea issue is the essence of "the delimitation of the sea", China does not appear in court should be "ruling against". As for the case itself, the nature of islands and reefs in the South China Sea and maritime rights, the core disputes of the arbitration, are related to national territorial sovereignty and maritime delimitation. The former cannot be adjusted by UNCLOS, while the latter is excluded by the 2006 Declaration of Exclusion. Then the "object" of the dispute in this case can no longer initiate compulsory arbitration. What is the significance of discussing the implementation of arbitration procedures and the outcome of arbitration on this basis?

The second deception: "Framing Other countries" : In the "China-Philippines South China Sea arbitration case", another Angle of "hegemonism" is that of making false statements about China's intention to turn the South China Sea into an "inner lake", Miao's accusation that China threatens freedom of navigation, and the accusation that China is splitting ASEAN. However, there is no such word as "Neihu" in China's official expression. The reason for this kind of speech can be traced back to the arbitrary "label" of the media.

Further, what is the position on which these opinions depend? For example, "transforming the South China Sea into a lake" is in essence to label China as "the big bully the small". What "jeopardizing freedom of navigation" actually harms is "freedom of navigation operations"; The essence of "splitting ASEAN" is to destroy the "centripetal force" among ASEAN countries. It can be seen that the media of framing comments rely on the core position, is still behind in order to the interests of the "hegemony", even as "divide the association of south-east Asian nations (asean)" this speech and one of the asean countries the Philippines national interests of the opposite, is still prevalent in "of the south China sea to arbitration", to be "hegemony" regardless of any national survival, the interests of their body.

3.2 Essential Perspective -- "Zero-sum" and "Non-Zero-sum"

An essential reason for the "abuse" of compulsory arbitration in this case is that the relevant countries have generalized the game between countries as a "zero-sum" game, and even mixed with a distorted color of "non-zero-sum" game.

From the perspective of game theory, "zero-sum" game is a kind of competitive relationship of the essence. The increase of one party's interest will inevitably lead to the reduction of the other party's interest. The "non-zero-sum" game is a "win-win" and a "cooperative" game. The "South China Sea" issue is complex. There are competing interests of different countries for resources and complex geopolitical competition.[25] However, no matter whether China is engaged in the South China Sea issue with the United States or other countries, there is a "zero-sum" and "non-zero-sum" game. For example, it is "zero-sum" in geopolitics, military security and other areas, while it is "non-zero-sum" in the areas of resources, freedom of navigation and regional cooperation.[26]

First of all, looking back on this case, why is one of the main reasons for saying "abuse" is that the game between countries is a "zero-sum game"? Considering all non-zero-sum issues in the South China Sea, such as freedom of navigation and regional cooperation, as "zero-sum" games, relevant countries will be convinced that only by depriving China of all rights in the South China Sea can their interests be maximized. Thus spreading public opinion, interpreting the Convention and abusing arbitration by hook or by hook. Although the core issue in the China-Philippines

[25] Li Honggu, "Complex South China Sea", Sanlian Life Weekly, November 12, 2010.
[26] Liping Xia, Zhengnan Nie, "The South China Sea Policy of the United States in the 21st Century and the Game between China and the United States in the South China Sea", Social Science, No. 10, 2016, pp. 28-40.

South China Sea arbitration case is undoubtedly territorial sovereignty, what if the "hegemonic power" only intervenes in the issue of sovereignty and tries every means to prove that the South China Sea is not China's territory, just to change its sovereignty over the South China Sea to that of the Philippines? Obviously, this is not in line with the intention of the "hegemonic power". It can be seen that its main purpose of considering all "zero-sum" is to further gain benefits for itself, such as unrestricted freedom of navigation and resource development, in addition to sovereign intervention.

Second, why is the "non-zero-sum" game mixed with distortions also a major cause of the "abuse" of compulsory arbitration? Since there is no cooperation in such fields as geopolitics and sovereignty, this paper calls the "hegemonic powers" who try to interfere in sovereignty, and try to "cooperate" and "get a piece of the pie" in territorial sovereignty a "distorted" and "non-zero-sum" game. Once this kind of game occurs, it means that the "hegemonic power" wants to disintegrate China's core rights in the South China Sea in essence, so as to obtain huge benefits. However, this also means that the "cost" to the "hegemon" is high. Therefore, they will choose all means, even challenge the international order, in order to obtain the "highest degree of benefits"; The "abuse" of compulsory arbitration is the best way for them to challenge the international judicial order and distort international laws to obtain direct effects.

4. Improvement and construction of "Compulsory Arbitration" under the Convention

4.1 Program correction and replacement

From the perspective of the whole compulsory arbitration process of the "China-Philippines South China Sea arbitration case", there are major flaws in the formation of the arbitration tribunal and the application and interpretation of the law, except for the disputes over which the arbitral tribunal has no jurisdiction. At the same time, this also reflects that the provisions of compulsory arbitration procedure are not perfect, but its judicial effectiveness is indeed a huge impact, in order to balance "risk" and "effectiveness" should be better explored.

4.1.1 Improve the arbitrator selection system

Article 3 of Annex VII of UNCLOS stipulates the requirements for the composition of an arbitral tribunal, but it only refers to the number of arbitral tribunal members and the provisions on their appointment. More detailed provisions, such as the obligations in the appointment process and the withdrawal system, are not provided for. At the same time, the types of special arbitration only apply to fisheries, the environment, scientific research and navigation as specified in Annex VIII, and there is no "special" application to similar specialized cases not covered by special arbitration.

First of all, this paper believes that the system of arbitrator withdrawal should be improved, and the obligations in the process of appointment should be further stipulated. Take the South China Sea arbitration case between China and the Philippines as an example. Since China did not participate in the arbitration, the arbitrator on the Chinese side was appointed by Shunji Yanai of Japan. As a representative of Japan's right-wing forces, he was closely related to the Diaoyu Islands case. At the same time, China's non-participation makes it clear that "the Philippines will pay twice" and "the fact that these people took the Philippines' money to arbitrate has a lot to do with the lopsided award", which also shows the arbitrators' arbitrary actions driven by their interests.[27] Therefore, the avoidance system should be improved. For example, the disclosure

[27] DE yong jian: "bottom" from the beginning to the end "of the south China sea to arbitration, in addition,

system should be established by combining the arbitrator list in Annex VII of the Convention;[28] Extending the duration of withdrawal from arbitration, and withdrawing persons from compulsory arbitration; Arbitrators having territorial disputes (interests) with respect to the States concerned shall be excluded;[29] Relief for disobedience and avoidance.[30]

At the same time, because the appointment and working process of the arbitrator in this case have not been disclosed, it is very likely to appear the situation of "private right"; Therefore, this paper believes that the whole process of arbitrators' self-selection, work and award should be notified to relevant countries to make the award process transparent.

Secondly, arbitration should be "specialized" according to the case. Although the arbitrators of this case have experts in hydrology, navigation and coral reef ecology, none of them know much about the history and politics of Asia or even the South China Sea. That is to say, experts should be "specialized" in the "core" of the case, rather than the appearance of the case. Therefore, THIS paper holds that we should appoint arbitrators who are familiar with the core dispute of the case, and select and arbitrate the case in a special way.

4.1.2 Further interpretation of the vague concepts in the Convention

In the application process of UNCLOS, there are many undefined concepts, which are usually interpreted differently by one party based on its own opinion, resulting in reduced application efficiency and the wrong direction of application. The three interpretive disputes arising from the South China Sea arbitration case between China and the Philippines are "settlement by agreement", "exchange of views" and "existence of evidence". These are also common disputes over legal interpretation in many international practices, which should be further explained.

One is to explain the "resolve" : first, to the four constitutive requirements Article 282 in Convention,[31] the problems that arise widely in practice should be further explained. As for the time when the parties to the dispute reach an agreement, it should be before the dispute occurs. For example, it was used by the Southern Tuna Tribunal to settle the 1993 Convention; In the Mox Nuclear Fuel Plant case, the court used this article to resolve the EC Treaty, etc.; As can be seen, article 282 is a treaty established to settle disputes before they arise; At the same time, for example, the Declaration in this case, which is not a separate declaration by a State and is "relied upon" by States, should also be included.[32] The question "unless otherwise agreed by the parties to the dispute" shall mean that the parties have not otherwise agreed to retain the relevant procedures applicable to Section 2 of Part XV of the Convention.[33] Secondly, further explanation should be

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https://www.chinanews.com.cn/gn/2016/07-13/7938355.shtml. Last accessed: October 7, 2022, 21:31.

[28] The Uniform Arbitration Act of the United States provides for the disclosure system of arbitrators. The appointed or selected arbitrators are obliged to sign a statement to the parties or the arbitration board, and voluntarily disclose facts and circumstances that may affect their impartiality or independence. If it is not disclosed, the parties may raise an objection to cancel the arbitration award accordingly.

[29] Hu Zewen: “Improvement of the Compulsory Arbitration Procedure under the United Nations Convention on the Law of the Sea from the South China Sea Arbitration Case”.

[30] For example, according to the Korean Arbitration Law, a party who refuses to accept the withdrawal request can request the court to make a decision on the withdrawal within 30 days. Clause 3 and 4 of Article 17 of the Arbitration Law of Taiwan Region of China stipulate that the award shall be opposed within 14 days, etc.

[31] According to the foregoing, article 282 of the Convention requires that the parties to the dispute have reached an agreement; A party to the dispute requests instructions; To refer such disputes to procedures leading to binding adjudication; Exception where the parties to the dispute otherwise agree.

[32] Chris Whomersley: "The South China Sea: The Tribunal in the Case Brought by the Philippines against China-A Critique ", China Journal of International.2016:24.

[33] South China Sea Arbitration (Philippines v. China), Award on Jurisdiction and Jurisdiction, 29 October 2015, para. 291.

given to the widespread problems arising in practice from the three constituent elements of Article 281 of the Convention.[34] With regard to the question of "timing for self-selection of peaceful means", although it was a major problem more commonly encountered in international cases, it was not difficult to draw from the interpretation of article 281 itself that it should be pursued "in the event of a settlement", and that the application of article 281 was therefore after the occurrence of the dispute. On the question of "what is the nature of the method", according to the arbitral tribunal's finding in the "Land reclamation case" that the negotiation between Singapore and Malaysia does not impede the effectiveness of seeking arbitration, we know that this "peaceful method" should be a non-coercive method.

Second, the interpretation of "exchange of views" : as mentioned above, the fulfillment of "exchange of views" requires certain judgment standards, which is the key point that needs to be clarified in practice and should be further explained in legislation. In practice, there are two criteria to judge the obligation of "exchange of views", one is "deadlock", the other is "exhaustion"; That is, when a comparable standard is reached, there is no compulsory "exchange of views". However, there are some differences between the two standards in different maritime dispute cases. For example, in the "Johor Reclamation case in Singapore", the failure to reach a settlement through consultation is a kind of "deadlock". In the case of St. Vincent and the Grenadine Islands v. Spain, a deadlock is a complete failure of exchange of views from which the dispute cannot be resolved.[35] Comprehensive practice, this paper holds that the standard of "deadlock" is that the process of case resolution is blocked and the "exchange of views" becomes a formality again. For example, "Malaysia v. Singapore Johor Reclamation case" explains "exhaustion" as "difficult to obtain positive results"; In the Southern Tuna case, the "exhaustion" standard is "the possibility of reaching an agreement has been exhausted."[36] Based on the comprehensive practice, this paper believes that the standard of "exhaustion" is that there is no possibility of a satisfactory settlement of the case.

But the drawbacks of "deadlock" or "exhaustion" are obvious,[37] as they are known in academia did not form a stable definition standard. In practice, therefore, the criteria for "exchange of views" are relatively loose and, in general, Article 283 of the Convention is unlikely to be an obstacle as long as the applicant State can produce some evidence of the exchange.

Furthermore, it is not enough to consider an exchange of views as long as there is some evidence to prove it, which may lead to the emergence of a new formalism -- that is, I have exchanged views, but I do not know them. This was the same objection in the Chagos Islands case, where the tribunal pointed out that Article 283 required the parties to a dispute to be "clearly" aware of the differences.[38] And should be a common "true meaning". So what is "true meaning"? This article holds that it can be judged from the behavior of the parties to the dispute, the rationality of the opinion itself, and whether there is obvious contradiction between the opinion

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[34] According to the foregoing, article 281 of the Convention consists of the following elements: seeking the settlement of disputes by peaceful means of their own choice; Recourse to this approach remains unresolved; The agreement of the parties to the dispute does not preclude any other proceedings. In paragraph 2, a special provision is made that the time limit contained in the agreement shall expire before article 281 can be applied.

[35] Ma Deyi, "Obligations of Exchange of Views under Article 283 of the United Nations Convention on the Law of the Sea: Questions and Reviews", Politics and Law, No. 4, 2018, pp. 102-110.

[36] Australia and New Zealand v. Japan (2000) 119 ILR 508, paras. 25-28.

[37] Geraldine Giraudeau, A Slight Revenge and a Growing Hope for Mauritius and the Chagossians: The UNCLOS Arbitral Tribunal's Marine Protected Area (Mauritius v. United Kingdom), Revista de Direito International, Brasiha v 12, n, 2 2015, p. 704-726.

[38] Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award of 18 March 2015.

and the case.

The third is to explain "there is evidence" : in this case, due to China's absence from the court, the arbitral tribunal can only apply Article 9 of Annex VI to UNCLOS to make a judgment on China's "historic ownership" of the South China Sea. The arbitral tribunal based its judgment on the submission of the Philippines; Second, based on China's diplomatic documents, legislation, maps, opinions of scholars and media reports, and appointed relevant experts to accept the "amicus curiae" documents, seems to be very "intentional". But the interpretation of the material out of context, such as "China's oil and gas blocks the development of public bidding work of the Philippines protest" the evidence, China has undergone three protest, but only quoted the contents of the protest, no quotes then explained that just launched "oil" rights according to the source historic rights. Ignoring the contradictions between the Philippines' materials, such as the 1958 Declaration of the People's Republic of China on the Territorial Sea and the 1992 Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, it can be concluded that Dongsha, Xisha, Zhongsha and Nansha Islands claim sovereignty as a whole, and claim the exclusive economic zone and continental shelf as a whole. However, the Philippines' evidence is based on the claim of exclusive economic zone and continental shelf by a single island in the archipelago, which is clearly contradictory.

It can be seen that the judgment of "definite evidence" is easily "non-neutral" "discretionary". Therefore, this paper holds that "there is evidence" should be further explained, and the contradiction between evidence and evidence should be examined, and whether the evidence can be verified mutually, rather than truncating the applicable evidence of one party. And the reasonable evidence should also be treated equally, for example, the use of Hainan "Geng Lu Bu (routing book)" to prove China's territory of the South China Sea in different historical periods[39] should be regarded as equally effective as other evidence, because it is a "less consumed" first hand evidence to a certain extent, and its historical nature cannot be ignored. At the same time, it is necessary to improve the supervision and relief system for the examination of "definite evidence" to prevent the arbitral tribunal from abusing its discretion.

4.1.3 To try "compulsory mediation" as a prerequisite for international disputes

The use of compulsory procedures is provided for in section 2 of Part XV of the Convention, Article 287 (4)[40] where the parties to a dispute have accepted the same procedure for the settlement of the dispute, the dispute may only be referred to that procedure unless the parties agree otherwise. It is also shown that "mediation" may also apply to "compulsory procedure". At the same time, mediation can better reflect the intentions of both sides and reduce the "risk" of controlling national interests in the hands of the judiciary. To a certain extent, the contradiction between the parties can be avoided. Also, the 12-month reporting period of the conciliation committee can prevent the delay of the settlement of the case to the greatest extent. And "forced mediation" front is, as a "compulsory arbitration" filed an important premise (after the first cutting), it not only have the feasibility of "compulsory mediation", also can offer the reference to the relevant content for "mandatory arbitration", in the compulsory mediation points, for example the factual problem, if the follow-up still produced compulsory arbitration proceedings, Then the arbitral tribunal may draw lessons from and apply this part to reduce the time of repeated

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[39] Yang Haolin, “Laying Out the Most Powerful Facts -- A discussion on the creation of the documentary Our New Road Book -- Historical Evidence that Sansha Belongs to China”, News Front, 21,2017, pp. 48-50.

[40] If the parties to a dispute have accepted the same procedure for the settlement of the dispute, the dispute may only be referred to that procedure unless the parties agree otherwise.

investigation. And there are many countries "recognition" basis, for example, countries such as Italy, Germany and Australia have introduced compulsory mediation as a pre-procedure.

As for the preliminary attempts of "compulsory mediation", the first is that "compulsory mediation" cannot go beyond the essence of mediation, which is only the compulsory procedure rather than the compulsory content and result.[41] But this kind of compulsion can adopt judge and statutory compulsion mix way. For example, some U.S. statutes allow the court to order mediation without the consent of the parties and impose sanctions on the parties if they fail to comply with the order. Some states also empower the court to enforce mediation in special types of cases, such as divorce and guardianship.

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 characteristics of disputes, for example, the two countries agree that there must be a link to resort to arbitration, so the participation boundary between mediation and arbitration should be distinguished. Participation in mediation does not mean participation in compulsory arbitration procedure. For example, if two countries participate in compulsory mediation but no agreement is reached, and then enter into compulsory arbitration but one country does not join, it cannot be said that this country has participated in the compulsory arbitration procedure.

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

4.2 Substantive measurement and construction

As the complex disputes, such as the South China Sea issue, involve the interests of many major countries and their interference, there will be disputes, such as disputes, which cannot be resolved "once and for all" through a single means. Therefore, the theory of "divide and rule" can be applied to solve the practical problems such as multinational confrontation and great power game.[42]

First, governance can be distinguished according to the importance of national interests in situations where there is no single means to achieve "one-and-done". According to the importance of interests, national interests can be divided into core interests, important interests and general interests, etc.[43] According to the 2011 white paper "China's Peaceful Development", China's core interests are known.[44] Important and general interests can also be derived from this.[45] Although the three support each other, in order to ensure core interests, a country can sacrifice important and general interests in a specific situation. Taking the four islands as an example, since Xisha, Zhongsha and Dongsha are located in the sea area under China's control, the integrity of

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[41] Fuhua Wang, "On Compulsory Mediation Before Litigation", Journal of Shanghai Jiaotong University, No.2, 2010, pp. 19-27.

[42] Chen Jianfeng, Divide and Rule: A Study on Ways to Manage the South China Sea Issue, International Review, No. 1, 2014, pp. 84-95.

[43] Wang Gonglong, "National Core Interests and Their Definition", Journal of Shanghai Institute of Administration, No. 6, 2011.

[44] It states that China's core interests include: "national sovereignty, national security, territorial integrity and national unity, the overall stability of the national political system and society established by the Chinese Constitution, and the basic guarantee for sustainable economic and social development."

[45] Important interests refer to the interests that do not threaten or erode the political and cultural existence of a country, but are related to national development.
General interest refers to the peripheral interests of core and important interests, which can promote a country to play a greater role in the arrangement and combination of international architecture rights.

sovereignty in these areas should be firmly maintained and regarded as "core interests". And due to the nansha region there are five parties "quartet" occupation, "the six and seven parties" development of the reality of the situation, the sovereign cannot be completely stripped, so you can continue to facts "shelve dispute, common development" strategy, set up the mechanism of multilateral cooperation development, the resources as an important benefit view, which is beneficial to its sovereignty of the core.

Secondly, in many international disputes, such as the South China Sea issue, relevant countries have adopted "alliance"[46] in the game. To make the problem multifaceted; This will complicate dispute resolution. Therefore, we should divide "Hezong" and split "Lianheng".

Take the "South China Sea arbitration case between China and the Philippines" as an example. "Unity" is mainly due to the fear of ASEAN countries about the increase of China's comprehensive national strength. The best way to dispel this fear is to strengthen "South-South dialogue". The cause of "alignment" is more than "fear" -- the intervention of "hegemonic powers"; In order to eliminate the tendency of "two sides attack", some scholars put forward that China should take the road of "the mean"; First, it does not squeeze the influence of the United States and does not oppose the development of relations between the United States and ASEAN without harming the core national interests. This can ease China-Us relations. The second is to support ASEAN to lead ASEAN, so that ASEAN can see that China does not regard it as a "chess piece", but has the "great power bearing" of establishing diplomatic relations. This will enable ASEAN countries to compare China with other big powers, so as to trust China more and unite with China.

Whether it is the specific means of "divide and rule" or the exploration of the nature of the state game, it can be concluded that in order to improve compulsory arbitration and make it a "balance" rather than a "straw in the wall", tracing back to the source is to make each country not only focus on its own interests, but should take into account the interests of other countries. The best way to do this is to build a new world order -- a community with a shared future for mankind. Therefore, countries should explore and practice the idea of a community of shared future for mankind, so that the relatively weak countries can trust the big countries based on this idea, and the big countries will not arbitrarily interfere in international affairs because of the view of "sharing interests".

5.the conclusion

Regardless of the application of the "procedure" or the "substance", the "China-Philippines South China Sea arbitration case" is nothing but a "clown trick" by the Philippines and relevant supporting countries. However, as a "great power" China, we should not only be limited by the South China Sea arbitration case itself. We should take the procedural and substantive flaws of the case as a mirror and guard against potential problems. New solutions should also be sought and China's experience brought forward.

With regard to the procedural and substantive defects, it should be noted that the "binary division" and the "four thresholds" are not only the standards of applying the dispute cases in the Convention, but also can provide a theoretical and practical reference for our country's arbitration system; It should also be noted that the essence of the game is not only a feature of international cases, but also a constructive theory for the study of nationals and nations.

The construction of new schemes, such as improving the selection and appointment of

[46] Including the “Hezong” and “Lianheng”.
"Hezong" means uniting small countries against big ones; "Alignment" means relying on big countries to fight small ones.

arbitrators, vague concept interpretation, "compulsory mediation" in advance, and division and rule, can not only reflect the concrete implementation of the construction of a community of shared future for mankind by major countries, but also demonstrate China's wisdom. At the same time, it can also be applied to the practice of benefiting the people.

In other words, in the South China Sea arbitration case between China and the Philippines, we not only clarified our position as a major country and rejected the "law of the jungle" at sea. We have also learned international experience from the arbitration case and the development of major countries.

To sum up, the South China Sea arbitration is a case of stupidity by the perpetrators, ignorance by the followers, and treachery by those behind it. As the saying goes, "Virtue cannot be isolated without neighbors", China's propositions and actions have been recognized and supported by many countries in the international community. Major countries are never limited to short-term interests. I believe that the long-term considerations that China has made since the South China Sea arbitration will be proven to be successful over time.

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