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# 中国海洋法学评论

2017年卷第1期 总第25期

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## 卷首语

2016年7月12日,中菲南海仲裁案的仲裁庭发布了最终裁决,看似裁决已告一段落,但这场闹剧远没有落下帷幕。本期针对南海问题,再次设立专刊。

强制争端解决是《联合国海洋法公约》(以下简称“《公约》”)的一大创举,但从负责受理案件的司法机构到对敏感事项的权限限制等一系列问题,都要求各国必须做出众多妥协,这就导致《公约》第十五部分的措词非常复杂,有时还有些晦涩。第十五部分第一节规定了采取有拘束力的争端解决方法的前提条件,第二节则对这种解决方法作出了具体规定。法国学者 Geneviève Bastid Burdeau 从法理学的角度分析了强制解决方法的范围和限制。

学者余敏友和谢琼指出,仲裁庭2015年10月作出的《管辖权和可受理性问题裁决》,其中有关《公约》第283条规定之“交换意见的义务”论证,存在严重缺陷。首先,用来证明履行交换意见的义务的事实不属于第283条所指“交换意见”;其次,仲裁庭割裂了交换意见的义务与谈判义务之间的有机联系,从而使“交换意见的义务”本身毫无意义,有悖《公约》的目的。仲裁庭没有有效地确立自身的管辖权,因而其管辖权裁决完全错误。基于无效“管辖权裁决”作出的实体裁决,也将无效。

《中国海洋法学评论》从2016年年底就开始筹划批判南海仲裁案的有奖征文比赛,共收到全国14所高校法学院学生的35篇来稿,邀请7名国际海洋法领域专家组成评委会,进行匿名评审,本期也收录了前三名获奖作品。

善意原则对条约的缔结、履行、解释以及对维护整个条约法律秩序,都具有至关重要的作用。南海仲裁案从被菲律宾提起、仲裁庭受理到做出最终裁决的全过程,都呈现出对这项原则的违背。仲裁庭和菲律宾企图将《公约》作为工具以非法目的损害另一方当事国的正当权益。建立在违法性基础上的最终裁决已俨然违背了《公约》的目的和宗旨,应视为无拘束力。通过梳理善意原则的法理基础和司法实践,作者严永灵剖析了菲律宾所提起南海仲裁案中违背善意原则的具体表征。

作者罗萨同样从善意原则入手,研究善意原则在海洋划界背景下所具有的内涵,将菲律宾在仲裁过程中的行动与善意原则蕴含的主要要求对应,指出菲方在种种方面对善意原则的违背,并阐述仲裁庭在审理过程中的做法,表明其判决也绝非善意之裁决。最后,以菲律宾和仲裁庭反以善意原则评判中国的行为,总结两者诚信的缺失,是对这一国际法一般原则的根本破坏。

菲律宾一直声称对中国南海的部分岛礁及水域拥有主权及主权权利,为了谋求本国在南海的利益,一方面就南海部分岛礁单方面提起仲裁,主张中国的“断续线”违反《公约》,要求就其海洋权利做出裁定,把中国南海诸岛的主权和海洋权利割裂开来;另一方面,菲律宾企图将中国南海的部分岛礁进行“单岛定性”,通过“矮化”中国相关岛屿的性质,以达到损害中国海洋权益的目的。因此作者韩雨潇提出,中国应尽快在南海地区构建远洋群岛制度,从而更好的维护中国的岛屿主权与海洋权益。

此外,本期还收录了学者刘义杰研究南海《更路簿》中海外更路的成果。这些海外更路以本岛港群和南海诸岛港群为始发港,前往东南亚各地,是海南渔民开辟的从事海外贸易的航路,是我国古代海上丝绸之路的组成部分。海外更路的存在,证明我国海南渔民最早开发南海和管理利用南海,是南海诸岛自古就是我国领土的重要证据之一。

编辑部 谨识

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## EDITOR'S NOTE

On 12 July 2016, the Arbitral Tribunal constituted for the *South China Sea Arbitration* released the final award. The case seems to have been closed, however, the farce is not played out. In this context, the Journal presents this special issue focusing on the issues concerning the SCS.

Compulsory dispute settlement was one of the major innovations of the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS"). A number of compromises had to be found going from the choice of the competent adjudicating body to the limitations of competence concerning sensitive matters. Such concerns result in the rather complicated and sometimes obscure wording of Part XV of the UNCLOS with a first section providing the preconditions to the means entailing binding effects imposed in the second section. In this connection, French Professor Geneviève Bastid Burdeau explores the scope and limits of compulsory settlement methods under the scrutiny of the jurisprudence.

The Arbitral Tribunal of the *South China Sea Arbitration* released the Award on Jurisdiction and Admissibility on 29 October 2015. YU Minyou and XIE Qiong assert that the Award failed to make a proper reasoning on Article 283 ("the obligation to exchange views") of the UNCLOS. First of all, the facts provided to prove the fulfillment of the obligation to exchange views don't belong to the category of "views exchanging". Further, the Tribunal cuts off the relations between the obligation to exchange views and the obligation to negotiate; as a result, the former obligation becomes meaningless, which is contrary to the purpose of the UNCLOS. Accordingly, the Tribunal failed to effectively establish its jurisdiction over the case; and the decisions in the Award are erroneous. The final Award, which is founded on this Award, consequently will be also null and void.

Notably, the Journal organized an open submission contest criticizing the *SCS Arbitration* this year. As of April 2017, we had received 35 submissions from 14 universities in China. These submissions were blind reviewed by the committee consisting of seven experts in the field of the law of the sea. This

Issue includes the papers of the top three winners in the contest.

The principle of good faith plays a pivotal role in the conclusion, execution and interpretation of treaties, as well as the maintenance of the order of treaties and laws. From the Philippines' initiation of the *SCS Arbitration* against China, to the Arbitral Tribunal's acceptance and release of the final Award of the arbitration, the case is loaded with violation of the good faith principle. The Arbitral Tribunal and the Philippines intended to illegally jeopardize the legitimate rights and interests of China, the other party to the *Arbitration*, by utilizing the UNCLOS as a tool. The final Award, which is founded on illegal reasoning, is obviously contrary to the object and purpose of the UNCLOS; it thus shall be considered without binding force. Collating the jurisprudential basis of the good faith principle and the relevant judicial practices, YAN Yongling showcases the specific breaches of the principle in the *SCS Arbitration* filed by the Philippines.

LUO Sa, also from the perspective of the principle of good faith, explores the connotations of the principle in the context of maritime delimitation, identifies the Philippines' violation of the good faith principle in multiple aspects, by checking its actions taken during the course of the proceedings against the primary requirements of the principle, and showcases the absence of good faith in the Arbitral Tribunal's award, by presenting the behaviors of the Tribunal during its review of the case. Lastly, the author mentions that the Philippines and the Tribunal even check China's behaviors against the principle of good faith, and concludes that the lack of honesty and integrity of both the Philippines and the Tribunal causes fundamental detriment to this general principle of international law.

The Philippines had always alleged that it had sovereignty or sovereign rights over some features of China's SCS Islands and their adjacent waters. In order to seek its interests in the SCS, the Philippines, on the one hand, unilaterally initiated an arbitration against China with respect to some features, contending that the "dashed line" of China was contrary to the UNCLOS, and therefore requested the Arbitral Tribunal to adjudicate on its maritime entitlements. By doing so, it attempted to cut off the natural link between the sovereignty and maritime entitlements of China's SCS Islands. On the other hand, the Philippines attempted to define the nature of some features in the SCS individually. The Philippines, through degrading some of China's islands into rocks or low-tide elevations, aimed to undermine China's maritime entitlements

in the SCS. Against this backdrop, HAN Yuxiao proposes that China should, with the least possible delay, establish a mid-ocean archipelago regime in the SCS region, so as to better protect China's sovereignty over its islands and the pertinent maritime rights and interests.

Additionally, the current Issue also contains the research of LIU Yijie into the overseas routes recorded in the *Geng Lu Bu (Manual of Sea Routes)*. These overseas routes, starting from the ports of Hainan Island and of the SCS Islands to various regions of Southeast Asia, are the overseas trading routes opened by Hainan's fishermen. They constitute a part of the ancient Maritime Silk Road of China. The existence of these overseas routes demonstrates that the fishermen of Hainan, China, were the first to explore, exploit and manage the SCS waters, and these routes serve as compelling evidence proving that the SCS Islands have, since ancient times, been an inherent part of China's territory.

### **COLR Editorial**

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# 《联合国海洋法公约》中的强制争端 解决方法——从法理学的角度 看其范围和限制

Geneviève Bastid Burdeau\*

**内容摘要:** 强制争端解决是《联合国海洋法公约》(以下简称“《公约》”)的一大创举。要确保强制争端解决的有效性,就需要规定相关的前提条件和限制,以消除部分国家的顾虑和干扰。从选择受理案件的司法机构到对敏感事项的权限限制等一系列问题,都要求各国必须做出众多妥协,这就导致《公约》第十五部分的措词非常复杂,有时还有些晦涩。第十五部分第一节规定了采取有拘束力的争端解决方法的前提条件,第二节则对这种解决方法作出了具体规定。在过去15年中,很多争端都提交了仲裁或司法程序,这有利于明确和巩固《公约》第十五部分制定的规则。因此,《公约》的争端解决机制更有效地促进了“海洋宪章”实体规则的普遍适用。

**关键词:** 争端解决 强制程序 《联合国海洋法公约》

《联合国海洋法公约》(以下简称“《公约》”)第十五部分规定了将争端提交强制争端解决程序的义务,这是各国通过《公约》对海洋法进行大变革的最大亮点之一。在20世纪70年代末80年代初召开的第三届联合国海洋法会议中,参会国就对这一义务进行了商讨,当时的时代背景与如今大为不同。彼时尽管《联合国宪章》第33条已确立了和平解决争端的义务,但这种义务被视为一项避免使用武力的义务,而不等同于接受强制争端解决程序的义务。《国际法院规约》第36条强调,需要缔约国的同意才能将争端提交司法审判和国际法院。如其前身一样,国际法院也极其注重尊重被诉国的意志。这导致在很多提交给国际法院的案件中,被诉国频频提出初步异议,进而致使案件审理时间冗长。

在1958年于日内瓦召开的第一届联合国海洋法会议期间,参会国就已讨论

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制定一个有效的争端解决机制,尤其是针对大陆架定义的不确定性所引发的争端。一些国家,如德国,就需要这样的争端解决机制。然而,诸如印度等另外一些国家则反对扩大国际法院的任意管辖权。通过激烈的讨论,各国最后达成了一项关于强制解决争端的任择议定书,然而结果表明这份任择议定书并不成功,因为迄今为止只有38个国家签署了该项议定书,而且尚没有国家按照此议定书向国际法院提交争端。然而,1958年《捕鱼及养护公海生物资源公约》制定了一个强制争端解决机制,即如争端无法根据《联合国宪章》第33条<sup>1</sup>所规定的其他和平方式解决,则应提交五人特设委员会解决。

值得注意的是,第三届联合国海洋法会议是在冷战期间举行的,当时所有社会主义国家都在解决国家间争端的问题上保持克制的立场。这种立场源自国际法中严格的国家主权概念,它充分尊重一国选择是否接受国际义务的意志。就算是在非社会主义国家中,也有很多国家强烈反对这种国际法体系,即不经其明确表示接受某一强制解决的司法机构或仲裁机构管辖,就被诉为被告。

20世纪90年代,尤其是自1994年《马拉喀什协定》赋予世界贸易组织争端解决机构强制管辖权之后,有关国家主权在和平解决争端领域中局限性的观念得到了显著发展。但是,有关被诉国有义务参与争端解决程序,而无法对管辖权提出初步异议的事例,目前也就只有这么一个,而且仅限于不直接涉及国家主权问题的贸易争端。

回溯第三届联合国海洋法会议的历史背景可知,毫无疑问,对于国际法上国家间的争端解决问题,早在《马拉喀什协定》之前,《公约》第十五部分就迈出了最重要的一步。20世纪70年代早期涌现了大量有关争端解决的提案,主要是在联合国海底委员会框架下处理渔业争端的提案。1974年,第三届联合国海洋法会议在委内瑞拉首都加拉加斯召开,与会国提出必须将争端解决议题从其他讨论议题中单列出来,作为一个整体讨论。1976年,斯里兰卡常驻联合国代表及联合国大会主席汉密尔顿·谢利·阿梅拉辛格提出了第一个争端有效解决程序综合提案,他指出:

对于稳固和维持为就公约达成一致所作出的必要妥协,制定有效的争端解决程序的条款极其重要……有效的争端解决能保障公约立法文本的主旨和宗旨得到公正、一致解释。

对于公约中的争端解决条款应包括哪些具体内容,不同国家集团之间出现了重要分歧。就像在第三届联合国海洋法会议上强调而且此后也反复指出的一样,《公约》第十五部分是建立在一系列重大“妥协”的基础上。

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1 Convention on Fishing and Conservation of the Living Resources of the High Seas, Article 9.

## 一、《公约》中的妥协与海洋法争端 解决体系的大致范围

### (一)《公约》面临的挑战

从第三届联合国海洋法会议最初就出现的主要想法是,确保绝大多数争端都能得到强制解决,然而对于争端应该提交给哪个法院或法庭,各国却存在强烈的分歧。另外一个重大的分歧在于适用强制解决的争端范围,因为有些国家不愿接受法庭就其主权问题作出的裁决。

第一个挑战是寻找一个既能强制解决争端又对国家约束最小的准则。最后,主张国家有义务接受有拘束力的强制程序的阵营占了上风,但是与会国并未就负责受理案件的司法机构达成一致。一些国家如瑞士和日本,倾向于选择国际法院,另一些国家如法国和英国,则更愿意选择仲裁庭。第三类国家群体包含前苏联和东欧国家,他们倾向于设立特设仲裁庭,要求在渔业、污染或科研案件中适用特别程序规则。非洲和南美的一些国家则提议成立单一仲裁庭。在非洲和南美,还有些发展中国家不愿选择国际法院,而更愿意选择一个还能受理国际组织、企业和个人案件的仲裁庭。

第二个挑战是既保留强制争端解决的原则,又避免国家在其认为高度敏感的问题上做出过多保留。在第三届联合国海洋法会议之初,非正式谈判小组以及大部分与会国都有这方面的担忧。1975年,各国达成了一份敏感问题清单,这份清单的内容在该届会议其他阶段保持未变,<sup>2</sup>具体而言,其包括以下4类争端:

1. 有关沿海国根据其在《公约》下的监管管辖权和执行管辖权行使自由裁量权的争端,滥用权力者除外;
2. 有关海洋划界、历史性海湾及历史性权利的争端;
3. 有关军事活动的争端;
4. 涉及联合国安理会根据《联合国宪章》行使其职权的争端。

《公约》第十五部分反映了各国在第三届联合国海洋法会议中围绕上述2个挑战所达成的妥协,并明确规定了采用非司法手段和平解决争端的初步阶段。第十五部分由3个小节构成。第一节有关和平解决争端的义务;第二节有关强制程序,争端各方很可能自行决定将争端提交给哪个司法或仲裁机构;第三节则规定适用第二节的限制和例外。

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2 Myron H. Nordquist ed., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V, Dordrecht: Martinus Nijhoff Publishers, 1985, pp. 89-97.

## (二)《公约》第十五部分第一节规定的和平解决争端： 义务、权利及限制

《公约》第十五部分第一节参照《联合国宪章》第33条第1款，规定了用和平方法解决争端的一般义务，并取代了争端各方自行选择和平解决方式的一般原则。初看之下，第十五部分第一节并未增补《联合国宪章》第33条所列出的和平方法，第33条规定的和平方法包括“谈判、调查、调停、和解、公断、司法解决、区域机关或区域办法之利用，或其他和平方法”。

然而，首先必须强调的是，《公约》不仅根据《联合国宪章》第33条第1款将争端各方选择任何和平机制解决争端视为一种义务，而且还将其视作争端各方可以在“任何时候”享有的一种权利。这套规则试图保护争端方在进入司法或仲裁程序前或上述程序启动后，诉诸争端各方约定的一种解决方法的权利，也旨在保留将该类约定的解决方法用于争端的某些方面或用于判决或裁决的执行。《公约》第280条确定了这项权利，但这并非国际法上的创举，因为当时的国际社会已普遍认可争端方约定的解决方式具有优先适用性。《公约》第280条明确肯定这项权利就引出了一个问题，即争端方是否有权在“任何时候”行使这项权利，即使是已经进入审判阶段。第297条规定任何争端“如已诉诸第一节而仍未得到解决”，则应当提交至法院或法庭，很明显，这似乎要结束争端解决的初步阶段。当然，这不会妨碍争端各方随时协议其他解决方法，即使不能保证一定能解决争端。

《公约》第十五部分第一节规定了争端各方可能选择的3种解决方法，一是争端各方协议约定的解决方法，二是《公约》附件五第一节规定的调解，三是交换意见。上述这3种争端解决机制被视为依据第十五部分第二节采取司法和仲裁方式解决争端的“先决条件”，判例法就普遍援引这一条件。

### 1. 选择导致有拘束力裁判的其他解决方法的权利

根据《公约》第281条和282条的规定，有关《公约》解释或适用的争端各方，可以通过协议约定采用和平方法解决争端。第281条似乎强调争端各方就某一特定争议达成的特别协议，而第282条则规定了另一种情形，即根据一般性、区域性或双边协定，争端各方负有将争端提交导致有拘束力裁判的程序的义务。在2006年巴巴多斯/特立尼达和多巴哥共和国案<sup>3</sup>中，仲裁庭也提及了“特别协定”和一般性协定之间的区别。然而，两者之间的区别并非泾渭分明，因为有些协定可以同属两种协定类型。1976年2月24日菲律宾等国签署的多边条约《东南亚友好合作条约》就是如此。在中菲仲裁案中，仲裁庭根据《公约》第281条和第

3 Barbados and the Republic of Trinidad and Tobago, Award of the Arbitral Tribunal, PCA, para. 200.

282 条审查了这项条约。第 281、282 条引出的主要问题是判定《公约》第十五部分所规定的程序何时被排除适用,根据这 2 条的规定,要求争端各方明确有意将其争端提交给一个他们选择的导致有拘束力裁判的替代性程序。然而,即使结果相同,这 2 条所规定的解决方法依然存在不同。正如中菲仲裁案的仲裁庭在其管辖权与案件可受理性问题的裁决中所述,一方面,第 281 条要求“排除”第十五部分规定的程序,<sup>4</sup>接着又规定第十五部分将适用于“诉诸这些方法而仍未得到解决”以及争端各方间的协议“并不排除任何其他程序”的情形。另一方面,根据第 282 条,争端各方可选择将争端提交一个能替代第十五部分程序的“导致有拘束力裁判的程序”,除非争端各方决定重新采用第十五部分所规定的程序,否则这些程序将被排除。正如仲裁庭所总结的:“第 281 条和第 282 条之间的区别与《公约》体系的整体设计一致,据此,强制争端解决是默认规则。”<sup>5</sup>

在大部分案例中,法院或法庭将必须对缔约国援引的替代第十五部分程序的协议条款作出解释,首先确定其是否为具有法律拘束力的协议,其次甄别这个协议是否能提供一个导致有拘束力裁判的程序。

## 2. 交换意见的义务

最重要的是,《公约》第 283 条所规定的交换意见的义务也是诉诸第十五部分程序的先决条件。在争端初期,即使争端各方协议采用其他和平方式解决争端,也负有交换意见的义务,任何案件均不例外。交换意见的义务范围似乎非常笼统,如在东帝汶诉澳大利亚案中,澳方表示根据《公约》第 298 条建立的《公约》附件五下的调解程序没有相关权限,<sup>6</sup>2016 年 9 月 19 日,调解委员会对此问题作出了裁决,裁决中对该义务范围的界定也十分笼统。在裁决中,委员会陈述如下:

因此,根据《公约》,尤其是第十五部分,争端一方意图使用《公约》中关于争端解决的条款时,必须首先满足第十五部分第一节的要求,才能进入第二节中导致有拘束力裁判的程序或第三节中的强制调解程序。

第 283 条的措辞值得注意:谈判并非是一种义务,意味着需要讨论争端的实质部分,以及为了有可能在争端的某些方面甚至是主要问题上达成协议,各方将

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4 The Republic of the Philippines v. The People's Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 224.

5 The Republic of the Philippines v. The People's Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 224.

6 Decision on Australia's Objections to Competence, A Conciliation Commission Constituted under Annex V to the 1982 UNCLOS between the Democratic Republic of Timor Leste and the Commonwealth of Australia, PCA, para. 46.

考虑对方立场。在第 283 条的相关评述中,<sup>7</sup>以及在仲裁庭对查戈斯群岛案的裁决、<sup>8</sup>仲裁庭有关中菲仲裁案管辖权与可受理性问题的裁决<sup>9</sup>及“Duzgit Integrity”号仲裁案的裁决<sup>10</sup>中,这种差异均被考虑在内。有关交换意见的规定“旨在确保一国在被提起强制程序时不会完全措手不及”。<sup>11</sup>在 2015 年 10 月 29 日发布的有关中菲南海仲裁案管辖权与可受理性问题的裁决中,仲裁庭指出,“该条款的原本意图有时具有不确定性”。<sup>12</sup>正如大卫·安德逊恰如其分地指出:“‘交换意见’是一个描述性的词语,而并非是艺术的修饰辞令”,并补充说“迅速”这个词暗示着这种义务具有局限性。<sup>13</sup>

因此,交换意见的义务并非十分苛刻,而且也从未被认为可以阻碍仲裁庭的管辖权。因此,许多仲裁庭的立场,尤其是在查戈斯群岛海洋保护区仲裁案的裁决中,主要取决于一种非常流于形式和程序的方法。在查戈斯群岛海洋保护区仲裁案中,仲裁庭对 2 种义务作了区分。一种是第 283 条第 1 款中强调的“迅速就以谈判或其他和平方法解决争端一事交换意见”的义务。这是一种程序性要求,其首先意味着争端各方必须“就解决争端的方法交换意见”,其次“第 283 条不能被视为一项就争端的实质问题进行谈判的义务”。<sup>14</sup>

在上述案件中,仲裁庭认为很难将争端各方就实质问题进行的谈判和就争端首选解决方法进行的意见交换区分开来。<sup>15</sup>仲裁庭恰当地指出:

就第 283 条的目的来说,足够充分的沟通在本质上是实质性还是程序性

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- 7 See D. Anderson, Article 283 of the United Nations Convention on the Law of the Sea, in T.M. Ndiaye and R. Wolfrum eds., *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah*, Leiden/Boston: Brill, 2007, pp. 847~866.
  - 8 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 378.
  - 9 The Republic of the Philippines v. The People's Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 349.
  - 10 Malta v. Sao Tome and Principe, Award of 5 September 2016, PCA.
  - 11 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 382.
  - 12 The Republic of the Philippines v. The People's Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 332.
  - 13 D. Anderson, Article 283 of the United Nations Convention on the Law of the Sea, in T.M. Ndiaye and R. Wolfrum eds., *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah*, Leiden/Boston: Brill, 2007, p. 852.
  - 14 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 378. 这种立场被持异议的仲裁员所证实。Dissenting and concurring opinion of Judges Kateka and Wolfrum, para. 66.
  - 15 Barbados/Trinidad and Tobago, Award of 11 April 2006, paras. 201~205. “过渡刻板地套用第 283 条与外交谈判实际开展的方式不符。”

的？令人毫不惊讶的是，这个问题从第 283 条的法理来看常常含混不清。<sup>16</sup>

在中菲南海仲裁案中，也出现了对第 283 条解释的争论，并且仲裁庭同样也采用了流于形式的方法，即如果有证据表明曾就争端的解决方法举行过会谈，那么就满足第 279 条的要求。仲裁庭认为，“第 283 条第 1 款不要求争端各方就争端的实质性问题进行谈判。”<sup>17</sup> 这一要求并不高：

仲裁庭认为，即使是最正式的会谈，也被称为磋商而非谈判，并且任何协议的达成几乎肯定都需要经过比实际上历时更长、更为集中的讨论。<sup>18</sup>

然而，仲裁庭强调，要达到事先交换意见的主要目的，需满足两大决定性条件。首先，意见交换必须成功地明确争端各方对争议问题的立场；其次，各方必须同时“本着诚意进行协商，并且真正有意寻求各方均同意的解决争端的方法。”<sup>19</sup> 然而，国际法院<sup>20</sup> 认为，一方在与另一方交换意见时，并不需要参照某一特定协议，很多仲裁庭也承袭了这一观点。<sup>21</sup>

近年来的大部分案件中，例如“北极日出号”案<sup>22</sup> 和“Duzgit Integrity”号仲裁案<sup>23</sup> 中，仲裁庭并不按照明确的标准进行严格分析。相反，仲裁庭认为，只要双方交换过一些官方文件就满足了交换意见的要求，即使没有重要证据表明双方之间的通信提及争端解决方法或程序方面的内容。

巴巴多斯 / 特立尼达和多巴哥共和国案、<sup>24</sup> 查戈斯群岛案<sup>25</sup> 仲裁庭提及（其他仲裁庭未提及）的第 2 种义务源自第 283 条第 2 款，“一旦争端解决程序无法解

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16 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 381.

17 The Republic of the Philippines v. The People's Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 333.

18 The Republic of the Philippines v. The People's Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 349.

19 The Republic of the Philippines v. The People's Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 349.

20 Application of the Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) Preliminary Objections, Judgment 2011, ICJ, para. 30.

21 Malta v. Sao Tome and Principe, Award of 5 September 2016, PCA, para. 201. “仲裁庭并不认为马耳他必须明确指出其所依据的《公约》条款”。

22 Arctic Sunrise Arbitration (Netherlands v. Russian Federation), Award on the Merits of 14 August 2015, PCA N° 2014-02, para. 151.

23 Duzgit Integrity Arbitration (Malta v. Sao Tome and Principe), Award, 5 September 2016, para. 199.

24 Barbados and the Republic of Trinidad and Tobago, Award of the Arbitral Tribunal, PCA, para. 205.

25 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 378.

决争端,就要求进一步交换意见”。第283条第2款规定:

如果解决这种争端的程序已经终止,而争端仍未得到解决,或如已达成解决办法,而情况要求就解决办法的实施方式进行协商时,争端各方也应迅速着手交换意见。

至于交换意见的目的,查戈斯群岛案仲裁庭却避而不谈。援引联合国海洋法法庭在马来西亚诉新加坡案<sup>26</sup>中的观点,仲裁庭指出:“一国在其认为完全不可能达成协议时,没有义务继续交换意见。”<sup>27</sup>

最后,查戈斯群岛案仲裁庭没有继续解释第283条第2款,而是总结道:

此后,毛里求斯决定,双方已经没有必要就进一步协商的条件达成协议,于是毛里求斯选择通过仲裁强制解决争端。[……]因此,仲裁庭认为,毛里求斯已满足第283条规定的就争端解决交换意见的要求。<sup>28</sup>

上述裁决中的这一观点可能会招致诸多批评。在分清第283条第1款和第2款规定的2种不同的有关交换意见的义务后,仲裁庭似乎完全忽视了第2种义务,并将判定争端是否解决的权利留给了申请方。持异议的仲裁员均同意这个观点,并且强调随着海洋保护区的创立,情势发生了新的变化,因此毛里求斯作出诉诸仲裁的决定是合情合法的。只要“争端各方频繁的讨论和意见交换,有可能让各方达成互相让步”,<sup>29</sup>各方之间没有达成协议的事实就不起决定性作用。所以,由争端各方(一般是申诉方)自行判断选定的争端解决程序是否无法解决争议,这有可能是由于仲裁庭私下认为要求争端各方进行第二种类型的意见交换是不现实的。

值得注意的是,除查戈斯群岛案之外,在法理上很少有援引第283条第2款所规定义务的情况,这有可能是因为争端方没有提出这一点。巴巴多斯/特立尼达和多巴哥共和国案的仲裁庭就强调:“要求进一步交换意见(第283条第2款

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26 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 385; Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, *ITLOS Reports*, 2003, p. 10, para. 47.

27 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 385.

28 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, paras. 385~386.

29 The Republic of the Philippines v. The People's Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 349.

未明确进一步交换意见的目的)是不切实际的。”<sup>30</sup> 在法理上,《公约》第 283 条第 2 款下的义务似乎与第 1 款规定的义务并无差别,因此没有人援引前者,反而让申请方自行判断是否无法达成《公约》第十五部分第一节规定的争端解决方法,并决定是否提起第十五部分第二节规定的程序。第一节的规定为更有创意的义务预留了空间,以便将争端提交导致有拘束力裁判的强制性程序。

### (三)《公约》第十五部分规定的不同类型的权限

《公约》第十五部分第二节指出了国家之间 4 种主要的争端类型,这些争端都被第 286 条的一般管辖权条款所囊括:“任何有关《公约》解释或适用的争端”。

1. “蒙特勒准则”旨在保留争端各方选择解决争端方法的权利,但同时又要确保可以通过第三方案作出强制裁决。根据这一准则,争端各方具有第 287 条规定的选择程序的权利,与此同时,有关《公约》解释或适用的一般类型(而非特定类型)争端,可提交至有管辖权的法庭或法院。根据第 287 条,一国有自由发布声明,表明其选择的争端解决方法:国际海洋法法庭、国际法院或仲裁庭。如果争端各方选择的解决方法一致,则此方法优先适用。如不一致,除非争端各方决定采用约定的其他方法,否则应适用《公约》附件七规定的仲裁,如孟加拉诉缅甸案。

2. 国际海洋法法庭被明确赋予了上述一般规定之外的特别权限。第一项特别权限是临时性的。具体而言,其涉及争端所提交的仲裁庭在组建之前的临时措施,在此种情况下,可由国际海洋法法庭决定临时措施。但是,在仲裁庭完成组建后,国际海洋法法庭就具有裁定临时措施的专属权力,最近的“Enrica Lexie”号案就是典型案例。

第 292 条规定的第二项特别权限是辅助性的。该项权限涉及船舶的立即释放。除船舶扣留时起 10 日内各方另有协议外,这类争端可提交国际海洋法法庭。实践表明,通常情况下,此类案件大多提交给了国际海洋法法庭,而非其他法院或法庭,海洋法法庭也由此逐步制定了针对这类案件的重要审判规程。所以在实践中,这项权限似乎并不是辅助性的,反而是最为常见的。

3. 按《公约》第 288 条第 2 款的规定,《公约》规定的争端解决机制可扩展适用于其他与《公约》相关的公约。第 286 条处理有关《公约》的争端,但是《公约》规定的程序也适用于与海洋法相关的其他争端。例如,《跨界鱼类种群协定》就提及了《公约》中的争端解决程序。此外,与《公约》相关但未规定具体的争端解决方法的协定也适用相同的争端解决体系。第 288 条第 2 款确保了该体系的统一性。第 288 条第 2 款的条文如下:

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30 Barbados/Trinidad and Tobago, Award of 11 April 2006, para. 205.

第287条所指的法院或法庭,对于按照与本公约的目的有关的国际协定向其提出的有关该协定的解释或适用的任何争端,也应具有管辖权。

## 二、导致有拘束力裁判的强制程序 在法理上的范围、限制与例外

如前文所述,除了确定相关裁定机构之外,在联合国海洋法会议期间,与会国的第二大争论焦点在于是否能够将某些类型的争端排除在强制管辖之外。对许多国家来说,只有将特定事项排除在外,才能接受强制管辖。然而,《公约》第309条包含了对保留的一般禁止性规定,其规定“除非本公约其他条款明示许可,对本公约不得作出保留或例外。”这一则条款排除了缔约国作出保留的可能性。

有人认为,第309条的条文对维护《公约》主要规则的完整性至关重要。但另一方面,又有必要寻找一个折中方案,允许一些国家就某些问题作出保留。如何在不影响第309条规定的一般范围的情况下,允许争端解决条款存在适当的灵活性?

第297、298条中就可以找到上述灵活性,这2个条款构成了第十五部分第三节的核心,也为适用该部分第二节的限制和例外奠定了基础。

在考察第297、298条所规定的限制和例外之前,有必要先考虑一下几个法庭均面临的一个一般问题:法庭能否采用争端方引用的除《公约》之外的法律渊源,例如其他公约甚或是习惯法规则。依据《公约》第十五部分第二节行事的法庭在多大程度上有权适用除《公约》之外的其他法律渊源,以及判断这些法律渊源是否适用于相关争端?

### (一) 除《公约》之外其他可适用的法律渊源

毫无疑问,依照《公约》第十五部分行事的法庭或法院必须适用国际法的一般原则或次级规则,如《维也纳条约法公约》中的规则或国际责任方面的规则等。在某些情况下,争端方确实根据《公约》第288条第2款,援引了不直接“与《公约》目的有关”,但属于与海洋法密切相关的环境保护等领域的其他法律渊源,如相关公约。

仲裁庭在2016年7月12日的中菲仲裁案裁决中着重处理了《公约》与其他权利渊源(主要是习惯法规则)之前的关系问题。<sup>31</sup>第311条详细规定了《公约》同

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31 The Republic of the Philippines v. The People's Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 235.

其他公约的关系，“反映了国际法中不同法律主体之间相互影响的一般规则”。<sup>32</sup>《公约》第 293 条第 1 款规定，“根据本节具有管辖权的法院或法庭应适用和本公约和其他与本公约不相抵触的国际法规定”。

在“Duzgit Integrity”号仲裁案裁决中，仲裁庭考虑了第 288 条第 1 款和第 293 条第 1 款的综合效果，其中第 288 条第 1 款将仲裁庭的管辖权限制在有关《公约》解释或适用的争端范围内。仲裁庭称，其“无权判定这种在《公约》中无法找到依据的义务（包括人权义务）的违反情况”，<sup>33</sup>但仲裁庭援引了“北极日出”号仲裁案，指出其“在必要的情况下，可考虑与《公约》不相抵触的习惯国际法规则，包括人权标准。”<sup>34</sup>

在东帝汶和澳大利亚调解案中，东帝汶认为其与澳大利亚于 2006 年 1 月 12 日签署的《帝汶海特定海上安排条约》与《公约》相抵触，以此依据《公约》第 298 条提出通过调解程序终止上述条约中规定的两国海洋划界方案。考虑到《帝汶海特定海上安排条约》并不违背《公约》的规定，且东帝汶直至 2013 年 2 月 7 日才成为《公约》缔约国，相对于《帝汶海特定海上安排条约》，《公约》是两国之间较晚签订的条约，由此调解委员会拒绝了这一要求。<sup>35</sup>

对于《公约》与国际习惯法相结合的方面，中菲仲裁案的仲裁庭在最终裁决中考察了中国主张的历史性权利的问题。在裁决中，仲裁庭大篇幅审查了“历史性权利”这一表述的意思，其与历史性主权的差异，以及所主张权利的性质。<sup>36</sup>关键问题在于判定历史性权利是否在《公约》之前就已获得公认，以及《公约》是否规定历史性权利可以继续存在。在不进入实质讨论的情况下，必须强调的是，仲裁庭认为自身正在担负起确立习惯法规则存在（如能证明该规则存在的话）的使命，以决定其如何与《公约》的规则相结合。

## （二）《公约》第 298 条规定的例外

第 298 条采用的立法技术意在限制并规范强制管辖的例外情形。该条明确列出了属于例外情形的事项，任何缔约国均可事先声明这些事项不接受强制管辖。第 298 条允许缔约国将有限类型的争端排除在有拘束力的争端解决之外。这些例

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32 The Republic of the Philippines v. The People's Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 237.

33 Duzgit Integrity Arbitration (Malta v. Sao Tome and Principe), Award, 5 September 2016, para. 207.

34 Arctic Sunrise Arbitration (Netherlands v. Russia), Award on the Merits, paras. 190~192.

35 Conciliation between Timor-Leste and Australia, Decision on Australia's Objections to Competence, 19 September 2016, pp. 83~84.

36 The Republic of the Philippines v. The People's Republic of China, Award, 12 July 2016, paras. 215~262.

外源自《公约》缔约国作出的声明,并可在此后用于相关争端。因为缔约国无权起草文案,只能选择第 298 条下几款条文的表述,所以各国作出的保留之间的差别很重要。第 298 条列出了强制裁定的例外情形,他们刚好对应联合国海洋法会议期间所提出的 4 个问题中的 3 个:(1)关于划定海洋边界的第 15、74 和 83 条在解释或适用上的争端,或涉及历史性海湾或所有权的争端;(2)关于军事活动的争端;(3)正由联合国安全理事会执行《联合国宪章》所赋予的职务的争端。由于例外情形是由《公约》规定而非缔约国起草的,所以必须进行狭义、统一的解释。这是否意味着对“军事活动”等范围的解释能对抗所有作出此类声明的国家?其他仲裁庭是否能作出其他解释?

《公约》第十五部分第三节包含单方声明的一些程序方面的规则。一国在签署、批准或加入《公约》时,或在其后任何时间均可作出声明,也可以在任何时候撤回声明。作出的声明应交付存于联合国秘书长。第 298 条的引言部分似乎已经清楚地规定了声明的起草方式。第 298 条规定:

在不妨害根据第一节所产生的义务的情形下,一国可以书面声明对于下列各类争端的一类或一类以上,不接受第二节规定的一种或一种以上的程序:

大部分国家,包括中国在内,都交存了声明,排除了第 298 条列出的所有争端。严格依照第 298 条第 1 款第 a、b、c 项中允许的排除事项,仲裁庭的任务变成了判断争端的实体问题是否属于法定例外情形。声明起草者当然会援引第 298 条规定的例外情形,但是依照自裁管辖权原则,仲裁庭有权判断自身的管辖权范围,以及判断争端的实体问题是否明确涉及第 298 条规定的例外情形。

如果问题清楚足以在管辖权阶段解决的话,上述问题的判定将在管辖权阶段完成。明显超出第 298 条第 1 款规定范围的诉之声明就属于这种情况。在 2015 年 10 月 29 日发布的中菲仲裁案管辖权与可受理性问题的裁决中,仲裁庭认为,菲律宾要求将某些海中地物的法律地位判定为《公约》第 121 条规定的“岛屿”或“岩礁”或第 13 条规定的“低潮高地”,这类诉之声明不属于第 298 条规定的例外情形。这一判定是最终裁决,仲裁庭无需在实体阶段重新审议这一问题。

但是,有些国家,如俄罗斯,已经做出了声明,意图将第 298 条规定事项之外的其他一些事项排除在强制解决机制之外。因此,在提及第 298 条列出的 3 类争端后,俄罗斯在声明中补充道:

根据《公约》第 298 条的规定,针对关于行使主权权利或管辖权的执法活动的争端,其不接收《公约》第十五部分第二节规定的导致有拘束力的裁判程序……

这指的是第4种例外情形,该情形在第三届联合国海洋法会议中有所讨论,但最终却被归入了第297条。在荷兰与俄罗斯之间的“北极日出”号案中,仲裁庭在有关管辖权的裁决中指出:“俄罗斯的声明仅能适用于第298条允许的例外情形。”<sup>37</sup>仲裁庭还认为,“在解释俄罗斯的声明时,必须适当顾及《公约》中的相关规定。”<sup>38</sup>至于《公约》第309条禁止作出保留的规定,“如《公约》明确允许缔约国可以排除《公约》某一条款的法律效力,那么缔约国就可以作出该类排除。”<sup>39</sup>对于涉及专属经济区执法活动的争端,仲裁庭管辖权的唯一限制只能源自第297条第2款和第3款认可的限制。

对于第1种类型的争端(有关海洋划界、历史性海湾的争端),第298(1)(a)(i)条规定了适用第二节程序的例外,但这并不意味着争端各方没有义务解决他们之间的争端。争端各方有义务进行协商,如未在合理时间内解决争端,应争端任何一方要求,各方必须接受将争端事项提交给《公约》附件五第二节下的调解。有趣的是,第一起调解案例发生在东帝汶和澳大利亚之间,而且调解委员会最近还宣布其有权受理相关争端。如能效仿这一做法,调解机制就能帮助各国解决划界争端,这也可能是迈向强制解决的又一小步,即使提出的解决方案仅仅是双方谈判的一个基础而已。

### (三) 第297条规定的限制

一般而言,第297条处理沿海国被指控在行使其航行或飞越自由和权利时有违反《公约》规定的行为时可能产生的争端。该类限制可自动适用。

第297条第1款确定了一沿海国如被指控有违反《公约》或其他国际法规则的行为,则可适用第二节下的强制程序的原则。仲裁庭在查戈斯群岛案中就指出:“然而,第297条第1款的措词完全是肯定性的,未提及在哪些例外情形下仲裁庭不能行使管辖权。”<sup>40</sup>

第297条第2、3款肯定了一项原则:《公约》关于海洋科学研究(第297条第2款)或渔业(第297条第3款)的规定在解释或适用上的争端,应按照第二节解决。然而,第297条下的小款却规定了几个例外,规定沿海国在下述3种情况下无义务同意将争端提交第二节规定的解决程序,这3个例外情形是关于:

1) 沿海国为在专属经济区内或大陆架上进行海洋科学研究而行使权利或斟酌决定权所引起的争端(第297(2)(a)(i)条和第246条);

37 Arctic Sunrise Award on Jurisdiction, 26 November 2014, para. 72.

38 Arctic Sunrise Award on Jurisdiction, 26 November 2014, para. 70.

39 Arctic Sunrise Award on Jurisdiction, 26 November 2014, para. 70.

40 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 307.

2) 沿海国决定命令暂停或停止一项海洋科学研究计划所引起的争端(第297(2)(a)(ii)条和第253条);

3) 有关沿海国对专属经济区内生物资源的主权权利或此项权利的行使的争端(第297(3)(a)条)。

在查戈斯群岛海洋保护区案中,出现了一场有关第297条第1款的限制性的讨论。基于准备工作中进行的大量调查,仲裁庭声明:“因此,从公约文本来,第297条第1款重申而非限制了仲裁庭根据第288条第1款所享有的管辖权。”<sup>41</sup>因此,“不是说双方之间的争端必须属于第297条第1款规定的情况”,<sup>42</sup>仲裁庭才能继续进行程序。仲裁庭甚至得出结论称:专门针对管辖权作出限制的第297条第1款经过了几次修订,其结果是“该款扩大了仲裁庭对《公约》本身规定的4种情况之外涉及违反法律文书的某些争端的管辖权。”<sup>43</sup>

如上所述,自《公约》生效以后,强制管辖原则得到了广泛扩展。海洋法是国际法的重要领域之一,在近几年中,海洋法领域的裁定程序得到了快速发展。尽管涉及海洋划界和军事活动的问题仍然十分敏感,尽管很多国家还认为第298条规定的例外情形至关重要,但是现在已经有很多其他类型的争端都提交了第十五部分的裁定程序,逐渐巩固了《公约》大胆确立的体系。

(中译:谢红月、张琳萍)

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41 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 308.

42 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 317.

43 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 316.

# Compulsory Dispute Settlement Methods under the UNCLOS: Scope and Limits under the Scrutiny of the Jurisprudence

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**Abstract:** Ensuring the effectiveness of compulsory dispute settlement, which was one of the major innovations of the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS”), required to provide preconditions and limitations in order to meet States fears and preventions. A number of compromises had to be found going from the choice of the competent adjudicating body to the limitations of competence concerning sensitive matters. Such concerns result in the rather complicated and sometimes obscure wording of Part XV of the UNCLOS with a first section providing the preconditions to the means entailing binding effects imposed in the second section. The numerous disputes submitted to arbitration or to judicial settlement during the last fifteen years contributed to the clarification and strengthening of the rules of Part XV of the UNCLOS. Thus the dispute settlement system of the UNCLOS contributes more efficiently to the general application of the substantive rules of the so-called “Constitution of the Oceans”.

**Key Words:** Dispute settlement; Compulsory procedure; UNCLOS

The obligation to submit disputes to compulsory means of settlement enshrined in Part XV of the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS”) was one of the most striking features of the major reform of the law of the sea undertaken through the convention. This obligation was negotiated during the Third United Nations Conference on the Law of the Sea (UNCLOS III) in the late 1970s and early 1980s in a context quite different from the one we live in nowadays. At that time even if Article 33 of the UN Charter established an obliga-

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tion to settle disputes by peaceful means, this obligation was considered as an obligation to avoid the use of force but was not held as equivalent to an obligation to accept a compulsory settlement. The provisions of Article 36 of the Statute of the International Court of Justice (hereinafter “ICJ” or “the Court”) insist on the consent to be given by the States parties to the dispute to be submitted to judicial adjudication and the Court. Like its predecessor, the Court has always been extremely attentive to respect the will of the defendant State. This results in the most frequent occurrence of preliminary objections with a lengthy jurisdiction phase in cases submitted to the Court.

The inclusion of a provision providing an effective dispute settlement mechanism was already discussed during the First United Nations Conference on the Law of the Sea in Geneva in 1958, especially in relation with the uncertainties of the definition of the continental shelf. Some States like Germany would require such a mechanism. However many States, like India, were against the extension of the optional jurisdiction of the ICJ. The debates resulted in an optional protocol on the compulsory settlement of disputes, which revealed not very successful with only 38 parties up to now and no dispute submitted to the ICJ under this protocol. However the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas provided a compulsory mechanism of settlement through a special commission of five members in case the dispute could not be solved by another means of peaceful settlement as provided for in Article 33 of the UN Charter.<sup>1</sup>

It must also be recalled that the UNCLOS III took place during the cold war, when all communist countries adhered to a very restrictive position on the issue of interstate dispute settlement. This position was rooted in a strict conception of the sovereignty of the State in international law, which gives full respect to the will of the State to accept to be submitted to international obligations. But even among many other States there were also strong objections against a system in which they could be sued without having clearly accepted the jurisdiction of the judicial or arbitral body of compulsory settlement.

Since the 1990s, and especially with the compulsory jurisdiction conferred upon the dispute settlement organ of the WTO by the Marrakech Agreements in 1994, the perception of the limits of State sovereignty in the field of peaceful

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1 Convention on Fishing and Conservation of the Living Resources of the High Seas, Article 9.

settlement of disputes has significantly evolved. However this example of a system of State to State dispute settlement in which the defendant is obliged to participate in the proceedings without any possibility of raising preliminary objections to jurisdiction remains unique and limited to trade disputes without a direct impact upon sovereignty issues.

Coming back to the historical context of the UNCLOS III, the provisions of Part XV constituted, without any doubt, long before the Marrakesh Agreements, a most important step in the evolution of State to State settlement of disputes in international law. Many dispute settlement proposals emerged during the early 1970s, principally in the framework of the UN Seabed Committee and in relation to fisheries. When the UNCLOS III met in Caracas in 1974, it very rapidly appeared that the issue of the settlement of disputes had to be dealt as a whole, separately from other topics under discussion. The first comprehensive proposal for effective settlement procedures was made in 1976 by Hamilton Shirley Amerasinghe, permanent representative of Sri Lanka and first president of the conference, who stated:

*The provision on effective dispute settlement procedures is essential for stabilizing and maintaining the compromises necessary for attainment of agreement on a convention [...] Effective dispute settlement would be the guarantee that the substance and intention within the legislative language of the convention will be interpreted both consistently and equitably.*

An important opposition existed between different groups of States about the content of dispute settlement clauses to be included in the convention. As has been underlined at the time of the UNCLOS III and frequently recalled since, a series of essential compromises were found at the basis of Part XV of the UNCLOS.

## **I. The UNCLOS Compromise and the General Scope of the Dispute Settlement System for the Law of the Sea**

### *A. The Challenges Faced by the UNCLOS*

The main idea that emerged from the very beginning of the UNCLOS III was to ensure the compulsory settlement of the largest number of disputes. There were however strong disagreements about the court or tribunal to which the disputes

would be submitted. Another important disagreement emerged about the ambit of the compulsory settlement, some States being reluctant to accept decisions imposed upon them by a tribunal on sovereignty issues.

The first difficulty was to find a formula combining compulsory settlement together with a minimum of constraints for States. So the obligation to accept the principle of compulsory procedures entailing binding decisions finally prevailed but the States did not reach an agreement as for the competent adjudicating body. Some favoured the ICJ, like Sweden and Japan. Others like France and the UK privileged an arbitral tribunal. A third group, including the USSR and Eastern European countries, proposed special arbitral tribunals with specific procedural rules applying in fisheries, pollution or scientific research cases. And finally other States in Africa and South America proposed one single tribunal. Among the latter some developing States were reluctant to go to the ICJ and favoured a tribunal also accessible to international organizations, enterprises and individuals.

The second difficulty was to preserve the principle of compulsory settlement of disputes and to avoid reservations on issues considered by many States as highly sensitive. This concern appeared at the very beginning of the UNCLOS III in the informal negotiating group and was shared by a majority of the States. The list of these sensitive matters was agreed upon in 1975 and remained unchanged during the different phases of the Conference.<sup>2</sup> It included four categories of disputes concerning :

- The exercise of discretionary rights by a coastal State pursuant to its regulatory and enforcement jurisdiction under the Convention, except in cases involving an abuse of power,
- Maritime delimitations and historic bays and titles
- Military activities
- Situations in which the Security Council exercises its functions pursuant to the UN Charter.

Part XV of the UNCLOS reflects the compromises reached during the UNCLOS III on these two points and gives precisions about the preliminary phase of peaceful settlement by non-judicial means. Part XV is thus composed of three sections, the first one relates to the obligation of peaceful settlement of disputes, the second to compulsory procedures with a large possibility for the parties to the

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2 Myron H. Nordquist ed., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V, Dordrecht: Martinus Nijhoff Publishers, 1985, pp. 89-97.

dispute to decide on the judicial or arbitral body to which their dispute will be submitted, and the third one with limitations and exceptions to the applicability of Section 2.

*B. The Peaceful Settlement of Disputes under Part XV Section 1:  
Obligations, Rights, Limits*

Section I of Part XV of the UNCLOS provides for the general obligation to settle disputes by peaceful means, by reference to Article 33, Paragraph 1 of the UN Charter and takes over the general principle of freedom for the parties to the dispute to choose the peaceful means. At first sight it does not add much to the list of Article 33 which includes “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means”.

However it must be first underlined that the settlement of disputes by any peaceful mechanism chosen by the parties to the dispute is not only conceived in the UNCLOS as an obligation, pursuant to Article 33(1) of the UN Charter but also as a right available “at any time”. This is a formula which intends to preserve the right of the parties to resort to an agreed means before any jurisdictional or arbitral proceedings has been engaged but also after such a proceeding has been initiated, and also to reserve such agreed means to some aspects of the dispute or to the implementation of a judgment or award. The affirmation by Article 280 of UNCLOS of such a right does not properly constitute an innovation in international law since the priority of solutions reached by agreed means between the parties to a dispute is generally recognized as prevailing. The clear affirmation of a right raises a question about whether such a right could be claimed “at any time” even in the course of an adjudication procedure. Article 297 stating that any dispute shall be submitted to a court or tribunal “where no settlement has been reached by recourse to section I” clearly seems to put an end to the preliminary phase of dispute settlement. This, of course, would not prevent the parties to agree at any time on an alternative means of settlement, even if it does not guarantee to find a solution to the dispute.

As for the means to be chosen by the parties, three main possibilities are contemplated in Section 1 of Part XV: means of settlement agreed by them, conciliation in accordance with Annex V, Section I of the UNCLOS and exchange of views. These different mechanisms have been considered as “preconditions”

to judicial or arbitral settlement pursuant to Section 2, a qualification which is commonly recalled in the case law.

### **1. The Right to Choose Alternative Means Entailing Binding Decisions**

Pursuant to Articles 281 and 282 the parties to a dispute concerning the interpretation or application of the UNCLOS may agree on peaceful means to be used. Article 281 seems to address a special agreement concluded between the parties in view of a particular dispute, whereas Article 282 provides for the situation where the parties to a dispute have an obligation under general, regional or bilateral agreements to submit their dispute to a procedure entailing a binding decision. The distinction between an “*ad hoc* agreement” and a general agreement was recalled by the Tribunal in the *Barbados/Trinidad and Tobago* case in 2006.<sup>3</sup> However, the difference between the two is not clear cut. Some agreements can be considered as entering in both categories. Such was the case for the Treaty of Amity and Cooperation in Southeast Asia of 24 February 1976, a multilateral treaty to which the Philippines is a party. The Tribunal in the *Philippines/China* case examined this treaty in the light of Article 281 as well as of Article 282. The main question raised by these articles is to determine when the Part XV procedures are excluded, a solution, under both articles, requiring a clear intention by the parties to submit their dispute to an alternative procedure of their choice entailing a binding decision. However, there is a difference of approach between the two articles even if the result is identical. As the Tribunal clearly showed in the Award on Jurisdiction and Admissibility for the *Philippines/China* case, Article 281 on the one hand requires an “opting out” of Part XV:<sup>4</sup> Part XV procedures will then apply “where no settlement has been reached by recourse to such means” and the parties’ agreement “does not exclude any further procedure”. Pursuant to Article 282 on the other hand, the choice is made by the parties to submit the dispute “to a procedure that entails a binding decision” in lieu of Part XV procedures, which will be excluded unless the parties decide to come back to such procedures. As the Tribunal summarized: “[The] distinction between article 281 and 282 is consistent with the overall design of the Convention as a system whereby compulsory dispute

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3 Barbados and the Republic of Trinidad and Tobago, Award of the Arbitral Tribunal, PCA, para. 200.

4 The Republic of the Philippines v. The People’s Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 224.

resolution is the default rule”.<sup>5</sup>

In most cases the tribunal or the court will have to interpret the provisions of the agreements invoked by the parties as constituting an alternative to the Part XV procedures, first to determine if it constitutes a legally binding agreement and second to appreciate whether such an agreement provides a procedure entailing a binding decision.

## 2. The Obligation to Exchange Views

Most importantly, a precondition to the resort to Part XV procedures is the obligation to exchange views provided by Article 283. It applies in any case at the very beginning of the dispute, even if there is another peaceful means agreed by the parties. The scope of this obligation seems to be very general as appears in the recent decision of 19 September 2016 on Australia’s objections to competence in the matter of an Annex V conciliation procedure between Timor Leste and Australia established pursuant to Article 298,<sup>6</sup> in which the Conciliation Commission stated:

*Thus, under the Convention, and particular in Part XV, a party seeking to make use of the dispute provisions of the Convention must first meet the requirements of Section 1 of Part XV to enable access to the binding procedures of Section 2 or the compulsory conciliation procedures provided in Section 3.*

The wording of Article 283 is noticeable: it is not an obligation to negotiate, which would imply discussions on the substance of the dispute and an effort by each party to take into account the position of the other in order to possibly obtain an agreement on some points and even on the main object of the dispute. This difference has been taken into account by the commentators of Article 283<sup>7</sup> and by the tribunals in the *Chagos* award,<sup>8</sup> in the Award on Jurisdiction and Admissibility

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5 The Republic of the Philippines v. The People’s Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 224.

6 Decision on Australia’s Objections to Competence, A Conciliation Commission Constituted under Annex V to the 1982 UNCLOS between the Democratic Republic of Timor Leste and the Commonwealth of Australia, PCA, para. 46.

7 See D. Anderson, Article 283 of the United Nations Convention on the Law of the Sea, in T.M. Ndiaye and R. Wolfrum eds., *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah*, Leiden/Boston: Brill, 2007, pp. 847–866.

8 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 378.

in the *Philippines/China* case,<sup>9</sup> as well as in the *Duzgit Integrity* arbitration.<sup>10</sup> The requirement to exchange views “was intended to ensure that a State would not be taken entirely by surprise by the initiation of compulsory proceedings”.<sup>11</sup> The Tribunal in the *Philippines/China* award of 29 October 2015 recognizes the “uncertainty that has sometimes surrounded the intended meaning of that provision”.<sup>12</sup> As David Anderson rightly pointed: “The term ‘exchange of views’ is descriptive: it is not a term of art” and he added that the word “expeditiously” indicates the limited nature of the obligation.<sup>13</sup>

Thus the obligation to exchange views is not much demanding and it has never been considered as a bar to a tribunal jurisdiction. As a consequence, the positions of different arbitral tribunals, especially in the *Chagos Marine Protected Area* award, relied mainly on a rather formalistic and procedural approach. The Tribunal of the *Chagos Marine Protected Area* case made a distinction between two obligations. The first one is the obligation enshrined in Article 283(1) “to proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means”. The requirement is a procedural one. This means first that the parties must “exchange views regarding the means for solving the dispute” and, second, that “Article 283 cannot be understood as an obligation to negotiate the substance of the dispute”.<sup>14</sup>

However the Tribunal in this case recognizes the difficulty to neatly separate substantive negotiations concerning the parties to the dispute from exchanges of views on the preferred means of solving the dispute.<sup>15</sup> The Tribunal rightly observes that:

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9 The Republic of the Philippines v. The People’s Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 349.

10 Malta v. Sao Tome and Principe, Award of 5 September 2016, PCA.

11 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 382.

12 The Republic of the Philippines v. The People’s Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 332.

13 D. Anderson, Article 283 of the United Nations Convention on the Law of the Sea, in T.M. Ndiaye and R. Wolfrum eds., *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah*, Leiden/Boston: Brill, 2007, p. 852.

14 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 378. This position is approved by the dissenting arbitrators. Dissenting and concurring opinion of Judges Kateka and Wolfrum, para. 66.

15 Barbados/Trinidad and Tobago, Award of 11 April 2006, paras. 201~205. “An overly formalistic application of Article 283 does not accord with how diplomatic negotiations are actually carried out.”

*It is unsurprising that in the jurisprudence on Article 283 it is frequently not clear as to whether the communications that were considered sufficient for the purposes of Article 283 were substantive or procedural in nature.*<sup>16</sup>

The debate on the interpretation of Article 283 about the exchange of views once again emerged in the Philippines/China dispute and here again the Tribunal adopted the same formalistic approach: the requirement of Article 279 is met if there is evidence that meetings have been held with discussions about the means to solve the dispute. The Tribunal claimed that “Article 283(1) does not require the Parties to engage in negotiations regarding the subject matter of the dispute”.<sup>17</sup> The requirement level is not very high:

*The Tribunal recognises that even the most formal of these meetings were termed consultations, rather than negotiations, and that any agreement would almost certainly have required more sustained and intensive discussions than in fact occurred.*<sup>18</sup>

However the Tribunal wants to underline that these exchanges met two decisive requirements to accomplish the principal goals of prior exchanges. First, they succeeded to clarify the Parties’ respective positions on the issues in dispute, and second, both parties “approached them in good faith and were genuinely interested in seeking agreed solutions to the disputes between them”.<sup>19</sup> However the ICJ has affirmed,<sup>20</sup> followed by arbitral tribunals,<sup>21</sup> that it is not necessary for one party to refer to a specific treaty in its exchanges with the other.

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16 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 381.

17 The Republic of the Philippines v. The People’s Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 333.

18 The Republic of the Philippines v. The People’s Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 349.

19 The Republic of the Philippines v. The People’s Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 349.

20 Application of the Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) Preliminary Objections, Judgment 2011, ICJ, para. 30.

21 Malta v. Sao Tome and Principe, Award of 5 September 2016, PCA, para. 201. “The Tribunal does not consider that it was necessary for Malta to specify the provisions of the Convention that it relied upon”.

It can be verified in the most recent cases, such as the *Arctic Sunrise*<sup>22</sup> and the *Duzgit Integrity*<sup>23</sup> that the tribunals do not really enter into a strict analysis with precise criteria. Rather they affirm that the requirement for an exchange of views has been satisfied in view of the exchange of some official documents but without any serious evidence that this correspondence regards the means to settle the dispute and has even a procedural content.

The second obligation recalled by the tribunals in the *Barbados /Trinidad and Tobago*<sup>24</sup> as well as in the *Chagos* case,<sup>25</sup> but not by other tribunals, results from Article 283(2), which “requires a further exchange of views upon the failure of the dispute settlement procedure”. Article 283(2) provides:

*The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.*

Concerning the end of the exchange of views, the Tribunal in the *Chagos* case is rather evasive. Referring to the International Tribunal for the Law of the Sea (ITLOS) in the *Malaysia/Singapore* case,<sup>26</sup> the Tribunal states that: “a state is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted”.<sup>27</sup>

Finally the Tribunal in the *Chagos* case concludes without further explanation about Article 283(2) that:

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22 Arctic Sunrise Arbitration (Netherlands v. Russian Federation), Award on the Merits of 14 August 2015, para. 151.

23 Duzgit Integrity Arbitration (Malta v. Sao Tome and Principe), Award, 5 September 2016, para. 199.

24 Barbados and the Republic of Trinidad and Tobago, Award of the Arbitral Tribunal, PCA, para. 205.

25 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 378.

26 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 385; Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, *ITLOS Reports*, 2003, p. 10, para. 47.

27 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 385.

*Thereafter, Mauritius determined that the possibility of reaching agreement on the conditions for further negotiations had been exhausted and elected to proceed with compulsory settlement through arbitration [...] Accordingly, the Tribunal concludes that Mauritius has met the requirement of Article 283 to exchange views regarding the settlement.*<sup>28</sup>

This point of the award could raise some criticism. After having distinguished two distinct obligations to exchange views provided in Article 283(1) and (2), the Tribunal seems to completely drop the second one and leave to the Applicant alone the right to decide that no settlement has been reached. The dissenting arbitrators concur on that point and underline that the situation took a new turn with the creation of the marine protected area and that therefore the decision of Mauritius to resort to arbitration was justified. The fact that no agreement was reached is not decisive as far as “the Parties’ frequent discussions and exchanges left them well positioned to assess the likelihood of any mutually agreeable compromise”.<sup>29</sup> The finding that the procedure for the settlement of the dispute has failed is left individually to each party to the dispute (and presumably to the applicant), probably because the arbitral tribunals implicitly consider that the requirement of a second exchange of views is unrealistic.

It can be underlined that apart from the *Chagos* case, the obligation under Article 283(2) has rarely been invoked in the jurisprudence, probably because the parties do not raise the point. As the Tribunal in the *Barbados /Trinidad and Tobago* case underlined: “To require such a further exchange of views (the purpose of which is not specified in article 283(2)) is unrealistic”.<sup>30</sup> It seems that, in the jurisprudence, the obligation under Article 283(2) of the UNCLOS is not distinguished from the obligation under Article 283(1) and falls into disuse, leaving the applicant alone to find the failure to reach a settlement under Section 1 of Part XV of the UNCLOS and to decide to institute proceedings under Section 2. These provisions of Section 1 leave the place to the much more innovative obligation to submit the dispute to compulsory procedures resulting in binding decisions.

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28 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, paras. 385–386.

29 *The Republic of the Philippines v. The People’s Republic of China*, Award on Jurisdiction and Admissibility, 29 October 2015, para. 349.

30 *Barbados/Trinidad and Tobago*, Award of 11 April 2006, para. 205.

### *C. Different Types of Competences Addressed by Part XV of the UNCLOS*

Four main kinds of disputes between States are considered under Section 2 of Part XV of the UNCLOS. They are covered by the general jurisdiction provision of Article 286: “any dispute concerning the interpretation or application of the Convention”.

1. Disputes entering in the general category of disputes concerning the interpretation or application of the Convention and not belonging to one of the specific categories may be submitted to any court or tribunal having jurisdiction along with the choice of the parties as provided in Article 287 according to the so-called Montreux formula which aims at preserving choice of the means of settlement but to ensure a third party mandatory decision. According to this article, a State is free to make a declaration indicating the means of settlement it chooses: the ITLOS, the ICJ, or arbitral tribunals. If the choices of the parties to the dispute correspond, this common choice will prevail. If not, arbitration under Annex VII of the UNCLOS will take place unless the parties decide to recourse to another agreed means, as this was the case in the *Bangladesh v. Myanmar* dispute.

2. Specific competences beyond this general provision are expressly attributed to the ITLOS. The first one is temporary. It concerns provisional measures pending the constitution of an arbitral tribunal to which a dispute is submitted. In that case the provisional measures can be decided by the ITLOS. However as soon as the arbitral tribunal is constituted, it becomes exclusively competent to decide on provisional measures, as this recently occurred in the *Enrica Lexie* case.

The second specific competence provided by Article 292 is subsidiary. It concerns the prompt release of vessels. The disputes of this kind, unless otherwise agreed by the States parties to the dispute in a delay of 10 days from the time of detention, are submitted to the ITLOS. The experience shows that this is most often the case where the ITLOS has been generally seized instead of other courts or tribunal and has been able to develop an important jurisprudence in this type of disputes. So in practice this competence does not appear any more as subsidiary but on the contrary as the most frequent.

3. The settlement mechanisms under the UNCLOS can be extended to other conventions related with the UNCLOS as provided by Article 288(2). Article 286 addresses disputes arising under the UNCLOS, but other disputes relating to the law of the sea are also covered by the procedures provided in the Convention. For instance, the Straddling Fish Stocks Agreement refers to the procedures provided

in the UNCLOS and agreements related with the UNCLOS which do not provide specific means of solving disputes are submitted to the same system whose unity is ensured by Article 288(2):

*A court or tribunal referred to article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related with the purposes of the Convention, which is submitted to it in accordance with the agreement.*

## **II. Compulsory Procedures Entailing Binding Decisions in the Jurisprudence: Scope, Limitations and Exceptions**

As has already been mentioned, apart from the determination of the relevant adjudicating body, the second big debate about the settlement of disputes during the conference concerned the possibility to exclude some kinds of disputes from the compulsory jurisdiction. For many States compulsory jurisdiction was only acceptable if certain issues were excluded. The possibility to make reservations was excluded since the UNCLOS contains a general prohibition of reservations in Article 309: “No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of the Convention.”

This provision was considered as essential to preserve the integrity of the primary rules enshrined in the UNCLOS. But, on the other hand it was necessary to find a compromise opening the permission for some States to reserve some questions. How to allow some flexibility for the rules concerning the settlement of disputes without entailing the general scope of Article 309?

Such flexibility was found through Articles 297 and 298, which form the core of Section 3 of Part XV. These articles open the way to limitation and exceptions to the applicability of Section 2 of Part XV.

Before examining these limitations and exceptions provided by these articles, it is necessary to have a look at a general question which was faced by several tribunals: it concerns the possibility for a tribunal to rely on legal sources invoked by the parties outside the UNCLOS itself such as other conventions or even customary rules. To what extent is a tribunal acting under Part XV Section 2 entitled to apply other sources and to take position about the applicability to the dispute of these other sources?

### *A. Sources to Be Applied Besides the UNCLOS*

No doubt that a tribunal or court acting under Part XV has to apply general principles of international law or secondary rules of international law, such as the rules of the Vienna Convention on the Law of Treaties or the rules on international responsibility. In some cases the parties have invoked other sources like conventions, not directly “related to the purposes of this Convention”, pursuant to Article 288(2) but devoted to domains related with the law of the sea such as the protection of environment.

The Tribunal in the *Philippines/China* Award of 12 July 2016 has addressed extensively the issue of the relationship between the UNCLOS and other sources of rights, mainly customary rules.<sup>31</sup> Article 311 provides precise rules about the relationship between the UNCLOS and other conventions which “mirror the general rules of international law concerning the interaction of different bodies of law”.<sup>32</sup> As for Article 293(1), it provides “that a tribunal or a court having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention”.

In the *Duzgit Integrity* award, the Tribunal considered the combined effect of the provision of Article 288(1) which limits the jurisdiction of the Tribunal to disputes concerning the interpretation or application of the UNCLOS and Article 293(1). It stated that it “does not have jurisdiction to determine breaches of obligations not having their source in the Convention (including human rights obligations) as such”,<sup>33</sup> but that the Tribunal quoting the *Arctic Sunrise Arbitration* “may have regard to the extent necessary to rules of customary international law (including human rights standards) not incompatible with the Convention”.<sup>34</sup>

In the *Timor-Leste/Australia Conciliation*, Timor-Leste invoked the incompatibility of the Treaty between Australia and Timor Leste on Certain Maritime Arrangements in the Timor Sea (CMATS) of 12 January 2006, instituting a moratorium on maritime boundaries delimitation between the two States with the conciliation procedure under Article 298 of the UNCLOS. The Commission rejected the

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31 The Republic of the Philippines v. The People’s Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 235.

32 The Republic of the Philippines v. The People’s Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 237.

33 *Duzgit Integrity Arbitration* (Malta v. Sao Tome and Principe), Award, 5 September 2016, para. 207.

34 *Arctic Sunrise Arbitration* (Netherlands v. Russia), Award on the Merits, paras. 190~192.

argument, considering that CMATS does not derogate from the terms of the UNCLOS and that the UNCLOS to which Timor became a party on 7 February 2013 was the later treaty between the parties.<sup>35</sup>

Concerning the combination of the UNCLOS with customary rules of international law, the Tribunal in the *Philippines/China* Award addressed the issue regarding historic rights claimed by China. The Tribunal devoted a long passage of the award to examine the meaning of the expression of “historic rights”, the difference with historic titles and the nature of the rights claimed.<sup>36</sup> The crucial point was to determine whether such rights were recognized prior to the UNCLOS and whether the UNCLOS provides for the continued existence of historic rights. Without entering here in the substance of the debate, it must be underlined that the Tribunal considered that it entered in its mission to establish the existence of customary rules in order to determine, if such existence is proved, how it combines with the UNCLOS rules.

### *B. The Exemptions Authorized by Article 298*

The technique adopted in Article 298 is aimed at limiting and regulating the exemptions to the compulsory jurisdiction. A list of well-defined matters is provided, which may be exempted by a declaration filed in advance by any State party. Article 298 permits State parties to exclude a limited number of categories of disputes from binding dispute settlement. These exclusions result from declarations which may be made by the Parties to the UNCLOS and may be invoked later in a definite dispute. The difference with reserves is important since the States parties are not entitled to draft the text but can only choose the formulation proposed by the different items of Article 298. The list provided by Article 298 is a list of authorized exceptions to the compulsory adjudication. It corresponds to three of the four above mentioned issues which had been identified during the conference: (1) disputes concerning the interpretation or application of Articles 15, 73 and 83, relating to sea boundary delimitations or those involving historic bays and titles; (2) disputes concerning military activities; (3) disputes in respect of which the Security Council is exercising functions assigned to it by the UN Charter. As exceptions

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35 Conciliation between Timor-Leste and Australia, Decision on Australia’s Objections to Competence, 19 September 2016, pp. 83~84.

36 The Republic of the Philippines v. The People’s Republic of China, Award, 12 July 2016, paras. 215~262.

are provided by the UNCLOS, and not drafted by the States parties, they have to be interpreted narrowly and uniformly. Does this mean that an interpretation given for instance about the ambit of “military activities” will be opposable to all States having made the same declaration? Would it be possible for another tribunal to give another interpretation?

Section 3 of Part XV contains a few rules about the procedural aspects of these unilateral declarations. These declarations may be made upon signature, ratification or accession to the UNCLOS or at any moment and may be withdrawn at any moment. They have to be deposited with the Secretary-general of the UN. The way the declaration should be drafted seems to be clearly defined in the chapeau of Article 298 which states:

*a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes.*

Most States, including China, deposited declarations using the whole range of exclusions. With a strict reference to the exclusions permitted by sub-paragraphs a), b) and c) of Article 298(1), the task of a tribunal will then be to appreciate whether the subject matter of the dispute falls within the authorized exceptions. The exclusion will be of course invoked by the author of the declaration but it belongs to the tribunal, in application of the rule *Kompetenz-Kompetenz*, to appreciate the scope of its own jurisdiction and whether the subject matter of the dispute clearly relates to the exclusion as permitted by Article 298.

Such an appraisal will be operated at the jurisdiction phase if the issue is clear enough to be answered at this stage. This will be the case for submissions clearly falling outside the scope of Article 298(1). In the Award on Jurisdiction and Admissibility for the *Philippines/China* case of 29 October 2015, the Tribunal thus considered that Philippine submissions concerning the status of some maritime features as “islands” or “rocks” within the meaning of Article 121 of the UNCLOS or “low-tide elevations” within the meaning of Article 13 did not fall within any of the exclusions permitted by Article 298. This appreciation is a final one and the Tribunal does not have to reconsider it at the merits stage.

However some States, like the Federation of Russia, have made declarations in order to exclude some matters from the compulsory settlement mechanism beyond

the issues listed in Article 298. Thus after a reference to the list of Article 298, the declaration by the Federation of Russia added:

*in accordance with article 298 of the [Convention], it does not accept the procedures provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to ... disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction.*

This refers to the fourth category of exclusions which had been considered during the UNCLOS III but which have finally been included under Article 297. In the *Arctic Sunrise* dispute between the Netherlands and the Federation of Russia, the tribunal stated in its award on jurisdiction that: “Russia’s Declaration can only apply to an exception that is permitted under article 298”<sup>37</sup> and it considered that “Russia’s Declaration must be interpreted with due regard to the relevant provisions of the Convention”.<sup>38</sup> With regard to the prohibition of reservations by Article 309 of the Convention, “a State party may only exclude the legal effect of a provision of the Convention when such exclusion is expressly permitted by a provision of the Convention”.<sup>39</sup> As far as the dispute concerned law enforcement activities in the EEZ, the only limits to the jurisdiction of the Tribunal would thus result only from the limitations admitted by Article 297(2) and (3).

In disputes relating to the first category (disputes concerning maritime delimitations or involving historic bays) the exception to the applicability of section 2 procedures provided by Article 298(1)(a)(i) does not mean that the parties do not have the duty to solve their dispute. They have an obligation to negotiate and if no settlement has been reached within a reasonable period of time, they have to accept submission of the matter to conciliation under Annex V, Section 2 at the request of any party to the dispute. It is interesting to underline that such a conciliation started between Timor Leste and Australia and that the conciliation commission recently declared itself competent. If this first experience is followed, conciliation could help States to solve their delimitation disputes and this could be a new step towards the compulsory settlement even if the solution proposed is only a basis for negotiations between the parties.

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37 Arctic Sunrise Award on Jurisdiction, 26 November 2014, para. 72.

38 Arctic Sunrise Award on Jurisdiction, 26 November 2014, para. 70.

39 Arctic Sunrise Award on Jurisdiction, 26 November 2014, para. 70.

### *C. The Limitations Provided by Article 297*

Generally speaking, Article 297 deals with disputes which may arise about the way a coastal State exercises its freedoms and rights of navigation or over-flight in cases in which this use is alleged to be incompatible with the Convention. Such limitations would apply automatically.

Article 297(1) affirms the principle of the applicability of the compulsory procedures provided in Section 2 when it is alleged that a coastal State has acted in contravention with the UNCLOS or with other rules of international law. As the Tribunal mentioned in the *Chagos* case: “Article 297(1), however, is phrased entirely in affirmative terms and includes no exceptions to the jurisdiction the Tribunal may exercise”.<sup>40</sup>

The provisions of Article 297(2) and (3) confirm the principle: Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research (Article 297(2)) or to fisheries (Article 297(3)) shall be settled in accordance with section 2. However the same subparagraphs introduce limited exceptions permitting a coastal State not to be obliged to accept the submission to such settlement in three limited cases which concern:

1) disputes arising out of the exercise by the coastal State of a right or discretion with respect to marine scientific research in the EEZ and on the continental shelf (Articles 297(2)(a)(i) and 246);

2) disputes arising out of a decision by a coastal State to order the suspension or cessation of a marine scientific research project (Articles 297(2)(a)(ii) and 253); and,

3) disputes related to a coastal State’s sovereign rights with respect to living resources in the exclusive economic zone or the exercise of such rights (Article 297(3)(a)).

In the *Chagos Marine Protected Area* case a discussion arose about the limitative character of Article 297(1). The Tribunal declared, on the basis of an extensive survey of the travaux préparatoires: “textually, therefore, Article 297(1) reaffirms, but does not limit, the Tribunal’s jurisdiction pursuant to Article 288(1).”<sup>41</sup> Consequently “it is not necessary that the Parties’ dispute [...] fall within

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40 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, para. 307.

41 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, para. 308.

one of the cases specified in Article 297(1)”<sup>42</sup> to allow the tribunal to proceed. The Tribunal even comes to the conclusion that Article 297(1), which appears in an article devoted to limitations to jurisdiction, was modified several times with the result that “it expands the Tribunal’s jurisdiction to certain disputes involving the contravention of legal instruments beyond the four corners of the Convention itself”.<sup>43</sup>

As can be seen the principle of compulsory jurisdiction has considerably expanded with the entry into force of the UNCLOS. The law of the sea is one of the important matters of international law where adjudication developed considerably during the recent decades. Even if issues related with maritime delimitations and military activities are still very sensitive and if the exceptions provided by Article 298 are considered as essential by many States, numerous other disputes are now brought to adjudication under Part XV progressively strengthening the bold system established by the UNCLOS.

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42 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 317.

43 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, para. 316.

## 从《联合国海洋法公约》第283条 “交换意见的义务”看“南海仲裁案” 管辖权裁决的违法性

余敏友\* 谢琼\*\*

**内容摘要:** 菲律宾“南海仲裁案”仲裁庭2015年10月作出了《管辖权和可受理性问题裁决》(以下简称“管辖权裁决”),其中有关《联合国海洋法公约》第283条规定之“交换意见的义务”论证,存在严重缺陷。首先,用来证明履行交换意见的义务的事实不属于第283条所指“交换意见”;其次,仲裁庭割裂了交换意见的义务与谈判义务之间的有机联系,从而使“交换意见的义务”本身毫无意义,有悖《联合国海洋法公约》的目的。仲裁庭没有有效地确立自身的管辖权,因而其管辖权裁决完全错误。基于无效“管辖权裁决”作出的实体裁决,也将无效。

**关键词:** 《联合国海洋法公约》 交换意见的义务 “南海仲裁案”

### 一、引言

2013年1月22日,菲律宾针对中国就南海部分海域管辖权问题,根据《联合国海洋法公约》(以下简称“《公约》”)附件七,启动仲裁程序(以下简称“南海仲裁案”)。从启动仲裁案伊始,中方就表达了不接受、不参与的立场,理由之一就是菲方提交仲裁的诉求事项实质上涉及领土主权和海洋划界。中方早在2006年就根据《公约》第298条提交了排除性声明,不接受一切涉及主权和海洋划界的第三方仲裁和司法程序。2014年12月7日,《中华人民共和国政府关于菲律宾共和国所提南海仲裁案管辖权问题的立场文件》(以下简称“《立场文件》”)指出,

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仲裁庭对本案“明显没有管辖权”。<sup>1</sup> 2015 年 4 月，仲裁庭决定先处理中国在庭外对其管辖权的质疑，10 月 29 日，仲裁庭作出了《管辖权和可受理性问题裁决》（以下简称“管辖权裁决”）。<sup>2</sup>

在“管辖权裁决”中，仲裁庭裁定其对菲律宾所提 15 项诉求中的 7 项（第 3、4、6、7、10、11、13 项诉求）拥有管辖权，7 项诉求（第 1、2、5、8、9、12、14 项诉求）的管辖权需要和实体问题一并审理，第 15 项诉求有待菲律宾进一步澄清。该裁决具有明显的倾向性，尤其是有关《公约》第 283 条规定之“交换意见的义务”是否已经履行的论证，存在严重缺陷，在事实认定和法律适用上，存在明显漏洞。

## 二、善意履行《公约》第 283 条“交换意见的义务” 是确立仲裁庭管辖权的一个必备法律条件

### （一）确立《公约》附件七仲裁庭管辖权的法律要件

依据《公约》第十五部分和附件七的规定，确立《公约》附件七仲裁庭的管辖权应遵循“四个要件”：（1）主体适格，即“争端当事方”都是《公约》的缔约国；（2）客体适格，即当事方之间存在“争端”，且该争端关系到《公约》的解释或适用；（3）符合《公约》第 281 条、第 282 条、第 283 条和第 295 条规定的要求；（4）不属于《公约》第 297 条和第 298 条规定的限制或排除情形。<sup>3</sup> 由这四个要件组成的整个逻辑链必须完整，对这些要件的成立与否必须予以正面回答。其中《公约》第 283 条规定的“交换意见的义务”非常重要。即使当事方之间存在有关《公约》解释或适用的争端，如果当事方没有履行该义务，则就该争端不能启动《公约》第十五部分第二节的“强制程序”（包括附件七仲裁），相关法庭或仲裁庭对提起的案件没有管辖权。

在“管辖权裁决”中，本案仲裁庭除了没有论及第 295 条之外，其余要件都有所讨论，除了对争端的认定和争端有关《公约》解释或适用的论述完全不能成立外，在仲裁庭管辖权的 3 个前提条件中，有关第 283 条“交换意见的义务”是否履行的论证尤其不充分。

1 《中华人民共和国政府关于菲律宾共和国所提南海仲裁案管辖权问题的立场文件》（以下简称“《立场文件》”），2014 年 12 月 7 日，第 3 段，下载于 [http://www.fmprc.gov.cn/mfa\\_chn/ziliao\\_611306/tytj\\_611312/zcwj\\_611316/t1217143.shtml](http://www.fmprc.gov.cn/mfa_chn/ziliao_611306/tytj_611312/zcwj_611316/t1217143.shtml)，2016 年 3 月 20 日。

2 South China Sea Arbitration Case, Award on Jurisdiction and Admissibility, 29 October 2015, at <http://www.pcacases.com/web/sendAttach/1506>, 20 March 2016. [hereinafter “Award”]

3 刘衡：《论确立海洋争端强制仲裁管辖权的法律要件——以〈联合国海洋法公约〉附件七为视角》，载于《中国海洋法学评论》2015 年第 1 期，第 4-22 页。

## (二)《公约》第283条“交换意见的义务”与 第300条“善意履行《公约》义务”

《公约》第283条规定了诉前交换意见的具体义务。<sup>4</sup>该条名为“交换意见的义务”，共2款。<sup>5</sup>其中第1款要求争端当事方“对本《公约》的解释或适用发生争端，应迅速就以谈判或以其它和平方法解决争端一事交换意见”。如果争端当事方没有履行该积极义务，则不得诉诸包括附件七仲裁在内的《公约》第十五部分第二节规定的强制程序。据此，第一，适用第283条的前提应是当事方之间确定存在“有关《公约》解释或适用”的争端。第二，“交换意见”所针对的对象必须是该“争端”，而不能是其他事项，即争端具有同一性。第三，“交换意见”的行为须发生在该“争端”产生以后。第四，“交换意见”的内容应是用何种方式（谈判或其它和平方法）解决该争端。所以，“交换意见”的客体并不是“争端”，而是争端的“解决方式”。首先应就采用哪一种最合适的方式解决争端交换意见。<sup>6</sup>第五，“交换意见”是一项强制义务，<sup>7</sup>仅仅有“交换意见”的行为不能算履行了相关义务，还必须依据一定的标准来说明该义务已经履行完毕。最后，原则上“交换意见”应在争端产生后“迅速”进行。

从其“立法”目的来看，第283条确立的“交换意见义务”，目的并非全在“义务”本身，而在于强调“通过谈判解决争端”。“纳入‘交换意见’的义务旨在满足各代表团的期待，即争端当事方的首要义务应是尽一切努力通过谈判解决争端”。<sup>8</sup>“条文以一种间接的方式提及这一点，使得谈判成为交换意见基本义务的主要目的”。<sup>9</sup>“交换意见”是与谈判相关的术语。谈判可以视为交换意见的下一步。<sup>10</sup>同时，“交换意见的义务”之设计，也符合和平解决争端机制内在的“合作义务”，<sup>11</sup>

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4 José Manuel Cortés Martín, Prior Consultation and Jurisdiction at ITLOS, *The Law and Practice of International Courts and Tribunals*, Vol. 13, Issue 1, 2004, pp. 2~7, 14~17; 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. 241~246.

5 由于第283条第2款适用于争端解决协议的执行阶段，与本案无关，本文不讨论第2款。

6 José Manuel Cortés Martín, Prior Consultation and Jurisdiction at ITLOS, *The Law and Practice of International Courts and Tribunals*, Vol. 13, Issue 1, 2004, p. 16.

7 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.

8 Myron H. Nordquist ed., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V, Martinus Nijhoff Publishers, 1989, p. 29.

9 Myron H. Nordquist ed., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V, Martinus Nijhoff Publishers, 1989, p. 29.

10 Kari Hakapää, Negotiation, in R. Wolfrum ed., *Max Planck Encyclopedia of Public International Law*, Oxford: Oxford University Press, 2015, para. 16.

11 Anne Peters, International Dispute Settlement: A Network of Cooperational Duties, *European Journal of International Law*, Vol. 14, No. 1, 2003, p. 2.

也就是争端产生时,双方要为了解决相互之间的争端而努力。所以,只有争端双方“合作”的可能性穷尽无遗了,才可能将争端诉诸《公约》规定可单方面启动的强制程序。

《公约》第 300 条“善意履行《公约》义务”的规定,也适用于本条有关“交换意见的义务”。国际法院在 1974 年“核试验案”中指出:不管一项法律义务来自何处,有关创设和履行该义务的一项基本原则就是善意原则。体现善意的信任和信心是国际合作的内在要素,在众多领域日益盛行国际合作的时代,尤其需要强调这一点。<sup>12</sup>

善意履行国际义务在国际法中具有根本性的基础地位。<sup>13</sup>首先,国家主权平等原则派生的一项国际法基本规范是“国家非经其同意不受约束”,通过主权国家的明示同意或默示同意才能产生的国际法,是在相互寻求共识的基础上逐渐形成的一种较为确定的行为规范,虽然必要时可由外力加以强制实施,但主要依靠国家及其他国际法主体的自愿遵守和善意履行。其次,依照国际法建立的国际秩序和国际制度,实质上就是各国依照国际法而享有的权利和承担的义务。只有善意履行义务,才能保证各国依照国际法享有这些国际秩序和国际制度所产生的权益。善意履行国际义务不仅不与国家主权原则冲突,而且是实施国家主权原则的实际结果。在一般情况下,国际义务只有在依国家主权原则自愿承担的情况下才具有国际法上的约束力;违背国家主权原则的任何义务都没有法律效力。事实上,只有各国真诚履行国际义务,国家主权才能真正得到尊重。第三,国际法的有效性和国际秩序的稳定性,主要取决于各国是否忠实遵守国际法的规范和善意履行其承担的国际义务。如果国际义务得不到善意履行,国际社会成员之间就会相互失去信任,国际法就会名存实亡,各种国际合作制度就无法正常运作,国际秩序就无法维持。

综上,依照第 283 条和第 300 条的规定,判断“交换意见的义务”是否履行,必须依据如下基本标准:第一,在交换意见中应提及本争端涉及的《公约》具体条款。<sup>14</sup>第二,交换意见所讨论的事项必须是或者包括争端诉求所涉及的事项,如果讨论的是此种事项,而提起争端的是彼种事项,就该争端而言,这种交换意见就不是第 283 条规定的“交换意见”。第三,交换意见的时间必须发生在争端产生以后,仲裁程序启动以前。第四,交换意见必须具有一定的频率,在一定的时间内,双方进行了多次或者密集的讨论。这是“交换意见”作为一种“义务”的应有之义。第五,“交换意见的义务”不仅是一种形式义务,更是一种实质义务。这是善意履行

12 Nuclear Tests (Australia v. France), Judgment, *ICJ Reports 1974*, p. 268, para. 46.

13 Markus Kotzur, Good Faith (*Bona fide*), in R. Wolfrum ed., *Max Planck Encyclopedia of Public International Law*, Oxford: Oxford University Press, 2013, para. 25.

14 Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge: Cambridge University Press, p. 64.

义务的内在要求。

### (三) 有关《公约》“交换意见的义务”的国际实践

“南方蓝鳍金枪鱼案”是对第 283 条进行详细讨论的第一案。该案仲裁庭认为争端各方“已经进行了长时间、激烈和严肃的谈判”，且在谈判中申请方援引了《公约》，因而已经满足第 283 条所规定的义务。<sup>15</sup> 在“莫克斯核燃料厂案”中，英国辩称双方未能就通过谈判或其它和平方式解决争端交换意见，因而第 283 条之要求尚未满足。<sup>16</sup> 在“围海造地案”中，新加坡辩称双方尚未依据《公约》第 283 条的规定，“就以谈判或其它和平方式解决争端一事交换意见”，并认为该条使得“谈判”构成“启动第十五部分强制争端解决程序的先决条件”。<sup>17</sup> 拉奥法官在“个别意见”中支持新加坡，指出“有关交换意见的要求并非一个空洞的形式，不能由争端一方凭一时兴起来决定。必须善意履行这方面的义务，而对此加以审查是法庭的职责”。<sup>18</sup> 此后，附件七仲裁庭处理的“巴巴多斯诉特立尼达和多巴哥海洋划界案”<sup>19</sup>、“圭亚那诉苏里南海洋划界案”<sup>20</sup>和“‘极地曙光号’案”，<sup>21</sup> 以及国际

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15 Southern Bluefin Tuna Case (Australia and New Zealand v. Japan), Award on Jurisdiction and Admissibility, Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, 4 August 2000, para. 55, at [https://icsid.worldbank.org/apps/ICSIDWEB/Documents/Award%20on%20Jurisdiction%20and%20Admissibility%20of%20August%204\\_2000.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/Documents/Award%20on%20Jurisdiction%20and%20Admissibility%20of%20August%204_2000.pdf), 20 March 2016.

16 The MOX Plant Case (Ireland v. United Kingdom), Request for provisional measures, Order, ITLOS, 3 December 2001, para. 54, at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_10/Order.03.12.01.E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf), 20 March 2016.

17 Case Concerning Land Reclamation by Singapore in and around the Traits of Johor (Malaysia v. Singapore), Request for provisional measures, Order, ITLOS, 8 October 2003, paras. 33-34, at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_12/Order.08.10.03.E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/Order.08.10.03.E.pdf), 20 March 2016.

18 Case Concerning Land Reclamation, Separate Opinion of Judge Chandrasekhara Rao, para. 11.

19 In the Matter of an Arbitration between Barbados and the Republic of Trinidad and Tobago, Award, Arbitral Tribunal, paras. 201-203.

20 In the Matter of an Arbitration between Guyana and Suriname, Award, Arbitral Tribunal, paras. 408-410.

21 In the Matter of the Arctic Sunrise Arbitration between the Kingdom of the Netherlands v. the Russian Federation, Award on the Merits, Arbitral Tribunal, paras. 149-156.

海洋法法庭处理的“‘极地曙光号’案”(临时措施)<sup>22</sup>、“‘自由号’案”(临时措施)<sup>23</sup>等案件都涉及到第 283 条“交换意见义务”的规定。<sup>24</sup>

从实践来看,“交换意见”不需要正式的程序,也不必明确指出是第 283 条意义上的意见交换,只要争端各方在交流中谈及有关《公约》解释或适用的争端就足够了。<sup>25</sup>“国际海洋法法庭和仲裁庭都不太情愿裁定第 283 条义务尚未履行”,<sup>26</sup>从未出现过该要件未能满足的实例。多数实践明显偏离了法律明确规定和立法原意,受到学者的批评。<sup>27</sup>

### 三、“管辖权裁决”有关第 283 条 “交换意见的义务”的内容

“管辖权裁决”在第 332~352 段,对菲律宾是否已履行了《公约》第 283 条规定的“交换意见的义务”,进行了具体讨论。其证据包括中菲之间 1995 年和 1998 年的两轮磋商、2002 年签署的《南海各方行为宣言》(以下简称“《行为宣言》”)、中方 2009—2011 年的 3 个普通照会和菲律宾 2011 年的普通照会、2012 年中菲之间的新一轮磋商和 2012 年 4 月双方有关黄岩岛的讨论。经过简单而笼统的分析,仲裁庭得出了菲律宾已经履行完该义务的结论。

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22 The “Arctic Sunrise” Case (Kingdom of the Netherlands v. Russian Federation), Request for the Prescription of Provisional Measures, Order, ITLOS, 22 November 2013, paras. 72~75, [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.22/Order/C22\\_Ord\\_22\\_11\\_2013\\_orig\\_Eng.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf), 14 April 2016.

23 The “Ara Libertad” Case (Argentina v. Ghana), Request for the prescription of provisional measures, Order, ITLOS, 15 December 2012, paras. 68~72, at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.20/C20\\_Order\\_15.12.2012.corr.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15.12.2012.corr.pdf), 20 March 2016.

24 从实践来看,“南方蓝鳍金枪鱼案”仲裁庭比较慎重地对待了《公约》第 283 条规定的“交换意见的义务”,其他法庭都有逐步降低该条适用门槛的倾向。尤其是国际海洋法法庭在处理附件七仲裁庭初步管辖权的过程中,几乎将该条规定视为一种“空洞的形式”,偏离了法律的明确规定。这种做法对附件七仲裁庭明显产生了影响。降低第 283 条的适用门槛,有助于确立法庭的管辖权,这与近年来出现的国际性法院或法庭不断扩张自身管辖权的趋势是一致的。限于主题,本文对此不作专门分析。

25 Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge: Cambridge University Press, p. 64.

26 David Anderson, Article 283 of the UN Convention on the Law of the Sea, *Modern Law of the Sea*, Vol. 59, 2007, p. 866.

27 David A. Colson and Dr. Peggy Hoyle, Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Is the Southern Bluefin Tuna Tribunal Get It Right?, *Ocean Development and International Law*, Vol. 34, No. 1, 2003, pp. 59~82; 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. 237~254.

仲裁庭的论述存在严重缺陷,这些证据无法证明菲律宾满足了判断第283条规定义务是否履行的上述基本要求,该结论不能成立。首先,用来证明履行交换意见的义务的事实不属于第283条所指的“交换意见”;其次,仲裁庭割裂了交换意见的义务与谈判义务之间的有机联系,使得“交换意见的义务”本身没有意义,有悖“立法”目的。

### (一) 仲裁庭的观点

对于该项义务,仲裁庭首先指出,交换意见的内容应是争端的“解决方式”,而不是就争端事项展开谈判;其次,在实践中对争端解决方式的讨论常常与争端事项的谈判交织在一起。随后,仲裁庭提到中菲两国于1995年和1998年举行了两轮磋商,认为“这些磋商的确包括了在当时就解决双方之间争端的方式交换意见”。<sup>28</sup>接着仲裁庭又提到了《行为宣言》第4条,认为“《行为宣言》本身,连同就进一步创设‘行为准则’进行的讨论,表明各方已就争端解决方式交换了意见。”<sup>29</sup>

然而,仲裁庭很快意识到,客观事实并不支持菲律宾:

《行为宣言》签署于2002年。菲方强调的磋商发生于1995年和1998年。从双方交换意见的记录来看,当时双方之间的争端是关于南沙群岛主权和在美济礁的某些活动。菲方提交到本仲裁庭的争端的关键要件尚未产生。特别是,中方还没有发出2009年5月7日的普通照会,在菲方提交的第8项到第14项诉求中指称的多数中方行动也尚未发生。<sup>30</sup>

为改变对菲律宾不利的局面,仲裁庭“创造性地”断定:

本庭认为当事双方有关南海的不同争端具有相关性,承认当事双方可能会在启动仲裁程序之前就争端解决全面交换意见,结果却使争端进一步发酵或出现其他相关争端。但是,本仲裁庭并不需要具体确定此情况适用第283条,因为记录表明,直到菲方提起此仲裁前不久,双方还在持续就解决争端的方式交换意见。<sup>31</sup>

仲裁庭随后详细引用了2012年中菲之间的一轮磋商<sup>32</sup>和2012年4月有关黄

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28 Award, para. 334.

29 Award, para. 335.

30 Award, para. 336.

31 Award, para. 337.

32 Award, paras. 337~339.

岩岛的讨论。<sup>33</sup>

最后, 仲裁庭得出结论: “双方已交换意见, 且未能就解决它们之间争端的方式达成一致, 本仲裁庭认为第 283 条的要求已经得到满足。”<sup>34</sup>

## (二) 裁庭的论述存在严重缺陷, 结论不能成立

仲裁庭的上述论述建立在对《公约》第 283 条规定的错误理解之上, 存在下列 2 个严重问题:

### 1. 证明履行交换意见义务的事实不属于第 283 条规定的“交换意见”

首先, 交换意见的时间一定是在所针对的特定争端产生之后。仲裁庭在论证是否存在争端, 以及如果存在, 该争端是否有关《公约》解释和适用时, 并没有具体指出其所认为存在的各“争端”何时产生, 只是以 2009—2011 年间的 4 个照会为证。在这里, 仲裁庭提供的事例中, 包括 1995 年和 1998 年的两轮磋商, 以及 2002 年签署的《行为宣言》, 这 3 个时间点都在 2009 年以前。而且, 《公约》1995 年还未对中国生效,<sup>35</sup> 中菲之间的争端, 无论存在与否, 都不可能涉及《公约》的解释或适用。中国在《立场文件》中也指出:

既然菲律宾自己都认为, 其直到 2009 年才开始放弃以往与《公约》不符的海洋权利主张, 那么何谈中菲两国自 1995 年起已就与本仲裁案有关的《公约》解释或适用的问题交换意见。<sup>36</sup>

如前所述, 仲裁庭承认这里有问题, 表示菲方提起程序的很多“争端”还没有出现, 特别是仲裁庭作为主要论据的中国 2009 年照会, 以及菲方第 8~14 项诉求中所列中方行为的绝大多数都还没有发生。对此, 仲裁庭的解释是, 它认为“当事双方有关南海的不同争端具有相关性, 承认当事双方可能会在启动仲裁程序之前就争端解决全面交换意见, 结果却使争端进一步发酵或出现其他相关争端”。<sup>37</sup> 言下之意, 目前没有交换意见, 未来会交换意见的; 未来不是一定会交换意见, 但是存在交换意见的可能性。仲裁庭接着指出, 记录显示直到菲律宾启动仲裁前不久, 双方仍在就解决争端的方式交换意见, 所以不需要具体确定第 283 条的适用情况。<sup>38</sup> 仲裁庭的这种解释, 看似牵强附会, 其实是故意“糊弄”, 完全不符合第 283

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33 Award, paras. 340-341.

34 Award, para. 343.

35 中国于 1982 年 12 月 10 日签署了《公约》, 并于 1996 年 5 月 15 日批准《公约》。

36 《立场文件》, 第 50 段。

37 Award, para. 337.

38 Award, para. 337.

条的基本要求。

其次,就争端解决方式交换意见所指向的争端,一定是或者说一定包括仲裁庭所确认存在的“争端”,即讨论的主题事项与仲裁庭所界定“争端”的主题事项必须具有同一性。

仲裁庭所举其中一个发生在2011年之后的事例是2012年1月14日中菲之间的一次双边磋商。<sup>39</sup>在记录中,双方分别谈到了谈判和法律程序的问题,似乎有些许关于争端解决“方式”的意味。鉴于分别讨论的是“disputes in the West Philippine Sea”(菲律宾的提法)和“this dispute”(中国的提法),仲裁庭需要回答:上述“disputes”或者“dispute”是仲裁庭在裁决第五部分所确定存在的“争端”吗(无论是否成立)?只有在确定这些“争端”是仲裁庭在前面所确定存在的“争端”时,才能算第283条规定的“交换意见”。遗憾的是,仲裁庭没有提供答案——实际上它不可能提供答案。事实上,双边磋商讨论的“disputes”或者“dispute”,是双方之间围绕菲律宾所谓的“卡拉延岛群”的主权归属争端及其相关事宜,而不是仲裁庭前面确定存在的与主权无关的“争端”。

再次,就黄岩岛问题菲律宾尚未履行交换意见的义务。黄岩岛问题可能是中菲间所进行的唯一第283条意义上的一次意见交换。且不谈中菲有关黄岩岛问题的争端具体是什么争端。至少在双方讨论中,不再限于如何谈判的问题,而是明确提及了《公约》规定的第三方裁决机制。这当然是在就争端解决方式交换意见。但是,因为菲律宾发了一个照会以及中方作出了一个回复,就可以认定菲方履行了第283条交换意见的义务吗?就可因此作出“就争端解决方式达成协议的可能性不再存在”的结论吗?<sup>40</sup>在“围海造地案”中,仲裁庭认为马来西亚在短时间内就同一事项向新加坡连发了3个照会,而新加坡都断然拒绝或没有理会,才被视为“就争端解决方式达成协议的可能性不再存在”。<sup>41</sup>然而,中方对菲方的照会已经做出了善意的回应。这说明虽然双方存在分歧,但是沟通渠道是畅通的,无法得出双方达成协议的可能性已经不存在,因此菲律宾的做法不能被认为是善意履行义务之举。

最后,《行为宣言》第4条是中国和东盟各国就如何解决领土和管辖权争端达成的协议,即就如何解决上述争端已经有了确定性的意见(所涉当事国之间的友好磋商和谈判)。这根本不是第283条意义上的交换意见。根据1969年《维也纳条约法公约》第31条规定,条约应依其用语按其上下文并参照条约之目的及宗旨

39 Award, paras. 337~339.

40 Award, para. 343.

41 Case Concerning Land Reclamation by Singapore In and Around the Traits of Johor (Malaysia v. Singapore), Request for provisional measures, Order, ITLOS, 8 October 2003, paras. 39~40, at [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_12/12\\_order\\_081003\\_en.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/12_order_081003_en.pdf), 20 March 2016.

所具有之通常意义，善意解释之。因此，按通常含义解释，一方认为应该这样那样，另一方却认为应该那样这样，就同一事项相互表述各方意见，并朝达成协议的方向努力，但是双方之间并没有达成协议。“协议”和“交换意见”是性质完全不同的事物，仲裁庭是在指鹿为马。如果《行为宣言》只是一种意见交换，签署各方那么郑重其事地谈判、起草、通过、签署和批准，在国际法上恐怕也是空前绝后的事情了。

## 2. 仲裁庭曲解了第 283 条规定的义务

仲裁庭割裂了交换意见的义务与谈判义务之间的有机联系，使得“交换意见的义务”本身没有意义，有悖“立法”目的，破坏《公约》争端解决机制的微妙平衡。

仲裁庭认可《公约》争端解决机制是一系列妥协达成的微妙平衡，理解各条款需要结合“立法”背景仔细考虑，尤其不得违背“立法”目的。但是本案仲裁庭的做法是，尽量降低第 283 条的门槛，曲解第 283 条规定的义务，将交换意见的“义务”转化为交换意见的“行为”。在“管辖权裁决”中，交换意见义务的唯一要求便是要有交换意见的行为，不管该交换意见是否发生在争端产生以后，也不论交换意见针对的是此争端还是彼争端。这使得第 283 条规定的义务褪化成一种仅仅只是自动诉诸强制程序前需要经历的过程，没有任何其它价值。

如上所述，第 283 条的主要目的是鼓励当事方为确定以何种方式解决争端加强协商，防止争端从非强制程序自动转入强制程序，或从一种强制程序转入另一种强制程序。<sup>42</sup>同时，该条再次确认了通过谈判解决争端的重要性。<sup>43</sup>换言之，“交换意见的义务”隐含着努力导向“谈判的义务”。本条规定的“交换意见”被理解为谈判的一种形式。<sup>44</sup>沃尔夫鲁姆法官在“路易号案”的不同意见中指出：第 283 条提及谈判“明显表达了一个不同的目的，即不通过公约第十五部分第二节的（强制）程序解决争端。”<sup>45</sup>可在本案中，作为菲律宾指定仲裁员的沃尔夫鲁姆法官似乎已经完全忘了他的上述观点。在同一个案件中，特雷韦斯法官也指出，由申诉方承担提出诉求并邀请对方交换意见的责任，已为就“谈判或其他方式”解决争端

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42 A. O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 1987, p. 93.

43 Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge: Cambridge University Press, 2005, p. 33.

44 J. G. Merrills, *The Mosaic of International Dispute Settlement Procedures: Complementary or Contradictory?*, *Netherlands International Law Review*, Vol. 54, No. 2, 2007, pp. 364-366.

45 Dissenting Opinion of Judge Wolfrum, *The M/V “Louisa” Case, Saint Vincent and the Grenadines v. Kingdom of Spanish, Request for Provisional Measures, Order*, ITLOS, 23 December 2010, para. 27.

提供可能。<sup>46</sup> 遗憾的是,仲裁庭的裁决没有展示菲律宾做到了这一点,仲裁庭的证据中也找不到这一点。

中国在《立场文件》中表示“事实上,迄今为止,中菲两国从未就菲律宾所提仲裁事项进行过谈判。”<sup>47</sup> 中方的意思很简单,就菲方所称双方存在“争端”的事项,双方从未进行过任何讨论,包括一方观点是否被另一方“积极反对”因此构成争端等,当然就更谈不上就争端解决方式交换意见了。双方在这些事项上根本不存在争端,遑论有关《公约》解释或适用的争端,又何谈争端解决方式呢?即中菲此前围绕南海问题所进行的意见交换,并非针对菲律宾所提的仲裁事项。

综上,即使假设中菲之间就菲律宾所提仲裁事项存在有关《公约》解释或适用的争端,仲裁庭也没有证明菲律宾就这些争端履行了第283条规定的与中国“交换意见的义务”。恰恰相反,菲方所谓“交换意见”的事实回应了中方“通过谈判方式解决在南海的争端是中菲两国之间的协议”之声明。否则,即使从1995年起,双方不会十多年来一直坚持通过谈判试图解决“争端”。

#### 四、简短结论

南海仲裁案仲裁庭于2015年10月29日公布了“管辖权裁决”,全盘否定了中方在其《立场文件》中的论点和论证,却几乎照单全收了菲方的诉求和论述,如此,仲裁庭实际上已沦为菲方的“代理人”。研读这份“管辖权裁决”,很容易发现仲裁庭的论述破绽百出,反而只能得出菲律宾没有履行《公约》第283条“交换意见义务”的结论。

《公约》附件七仲裁庭管辖权的4个要件是一个完整的逻辑链,其中任何一个链条的断裂,都将导致整个逻辑链的断裂,从而无法有效确立仲裁庭的管辖权。仲裁庭有关菲律宾履行“交换意见的义务”的论述具有致命缺陷,其结论不能成立。即便假设中菲之间就菲律宾所提仲裁事项存在有关《公约》解释或适用的争端,菲律宾也没有履行“交换意见的义务”,仲裁庭不能对菲律宾提出的仲裁事项行使管辖权,其“管辖权裁决”是完全错误的。仲裁庭基于一个无效的“管辖权裁决”作出的最终裁决,无论其结果对中国有利还是不利,因此都是无效的。

(中译:李敬昌 校对:余敏友、谢琼)

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46 Dissenting Opinion of Judge Treves, *The M/V “Louisa” Case, Saint Vincent and the Grenadines v. Kingdom of Spanish, Request for Provisional Measures, Order*, ITLOS, 23 December 2010, para. 13.

47 《立场文件》,第45段。

# Why the Award on Jurisdiction and Admissibility of the South China Sea Arbitration Is Null and Void? – Taking Article 283 of the UNCLOS as an Example

YU Minyou\* XIE Qiong\*\*

**Abstract:** The Arbitral Tribunal of the *South China Sea Arbitration*, which was initiated unilaterally by the Philippines, declared its one-sided arguments in the Award on Jurisdiction and Admissibility (hereinafter “Award”) released on 29 October 2015. The Award failed to make a proper reasoning on Article 283 (“the obligation to exchange views”) of the United Nations Convention on the Law of the Sea (UNCLOS). First of all, the facts provided to prove the fulfillment of the obligation to exchange views don’t belong to the category of “views exchanging”. Further, the Tribunal cuts off the relations between the obligation to exchange views and the obligation to negotiate; as a result, the former obligation becomes meaningless, which is contrary to the purpose of the UNCLOS. Accordingly, the Tribunal failed to effectively establish its jurisdiction over the case; and the decisions in the Award are erroneous. The final Award, which is founded on this Award, consequently will be also null and void.

**Key Words:** UNCLOS; Obligation to exchange views; *South China Sea Arbitration*

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## I. Introduction

The Philippines initiated, on 22 January 2013, the arbitration procedure under Annex VII of the United Nations Convention on the Law of the Sea (hereinafter referred to as the “UNCLOS” or the “Convention”) against China on the issue of the jurisdiction over some parts of the South China Sea (hereinafter “*South China Sea Arbitration*”). China expressed its position of “non-acceptance” and “non-participation” in the proceedings since the beginning for several reasons, one of which is that the essence of the subject-matter submitted by the Philippines is the territorial sovereignty over several maritime features or concerned with maritime delimitation issues. China filed a declaration according to Article 298 of UNCLOS as early as 2006, which excludes disputes concerning maritime delimitation from compulsory arbitration and other compulsory dispute settlement procedures. Under the circumstance, China released its “Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the *South China Sea Arbitration* Initiated by the Republic of the Philippines” (hereinafter “Position Paper”) outside the Arbitral Tribunal on 7 December 2014, demonstrating that the Tribunal obviously lacked jurisdiction over the case.<sup>1</sup> In April 2015, the Tribunal decided to treat China’s challenges against its jurisdiction as preliminary objections, and issued the “Award on Jurisdiction and Admissibility” (hereinafter “Award”) on 29 October of the same year.<sup>2</sup>

In the Award, the Tribunal ruled that it had jurisdiction on seven of the Philippines’ 15 submissions (Submissions Nos. 3, 4, 6, 7, 10, 11 and 13), the jurisdiction on the other 7 claims (Submissions Nos. 1, 2, 5, 8, 9, 12 and 14) should be decided together with the merits issues, and Submission No. 15 should be clarified further by the Philippines. The Award showed a conspicuous favoritism towards the Philippines. In particular, when demonstrating whether the “obligation to exchange views” as provided in Article 283 of the UNCLOS has been fulfilled, the Tribunal extremely erred. During the fact-finding process and when applying the applicable laws, the Tribunal committed apparent mistakes.

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- 1 Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 December 2014, para. 3, at [http://www.fmprc.gov.cn/mfa\\_chn/ziliao\\_611306/tytj\\_611312/zewj\\_611316/t1217143.shtml](http://www.fmprc.gov.cn/mfa_chn/ziliao_611306/tytj_611312/zewj_611316/t1217143.shtml), 20 March 2016. [hereinafter “Position Paper”]
  - 2 South China Sea Arbitration Case, Award on Jurisdiction and Admissibility, 29 October 2015, at <http://www.pcacases.com/web/sendAttach/1506>, 20 March 2016. [hereinafter “Award”]

## **II. Performing in Good Faith the “Obligation to Exchange Views” as Provided in Article 283 of the Convention Is a Requisite for Establishing the Jurisdiction of an Arbitral Tribunal**

### *A. Legal Requirements to Establish the Jurisdiction of an Arbitral Tribunal under Annex VII*

According to Part XV and Annex VII of the Convention, to establish the jurisdiction of an Annex VII arbitral tribunal, four requirements must be met, including: (1) the eligibility of the subject, that is, the parties to a dispute must have ratified the Convention; (2) the eligibility of the object, i.e., there is a dispute between the parties and the dispute submitted to the arbitral tribunal should be a dispute “concerning the interpretation or application of the Convention”; (3) the preconditions provided in Articles 281, 282, 283 and 295 of the Convention should be fulfilled; and (4) no issues relating to Articles 297 and 298 of the Convention exist.<sup>3</sup> In practice, since each case concerns different disputes, arbitral tribunals may put emphasis on different points when analyzing. However, the logic chain of the four requirements must be complete. Among them, Article 283 of the Convention, “the obligation to exchange views”, is of much importance. Even if a dispute concerning the interpretation or application of the Convention exists between the parties, the non-fulfillment of the obligation will prevent the initiation of a compulsory procedure under Section 2, Part XV of the Convention. In that case, the tribunal will have no jurisdiction on the case initiated.

The Arbitral Tribunal discussed, in the Award, all the above requirements of the Convention, except Article 295. In the Award, the Tribunal failed to identify any disputes between the parties or to determine whether the disputes concern the interpretation or application of the Convention. Additionally, its reasoning on whether the “obligation to exchange views” as provided in Article 283 has been fulfilled is particularly questionable.

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3 LIU Heng, Legal Requirements for the Establishment of Jurisdiction over Compulsory Arbitration of Maritime Disputes: From the Perspective of Arbitration under Annex VII of the UNCLOS, *China Oceans Law Review*, Vol. 2015, No. 1, p. 30.

*B. “Obligation to Exchange Views” Provided in Article 283  
and “Good Faith” Provided in Article 300 of the Convention*

Article 283 of the Convention provides for the specific obligation to exchange views before the initiation of a judicial or arbitral case.<sup>4</sup> Article 283, titled “obligation to exchange views”, consists of two paragraphs.<sup>5</sup> The first paragraph requires that the parties to a dispute concerning the interpretation or application of the Convention should, after the dispute arises, promptly exchange views on solving the dispute through negotiation or other peaceful means. If the parties to the dispute fail to actively fulfill the obligation, they should not initiate the compulsory procedures under Section 2, Part XV, including the Annex VII Arbitration.

Firstly, the precondition of applying Article 283 should be that a real dispute concerning the interpretation or application of the Convention exists between the parties. Secondly, the views exchanged should be definitely related to the dispute, not any other issues. Thirdly, the behavior of “views exchanging” must happen after the dispute arises. Fourthly, the contents of the views exchanged must relate to the method to settle the dispute, such as negotiation or other peaceful means. Therefore, the object of “views exchanging” is not the “dispute”, but the “means to settle” the dispute. First of all, there should exist an exchange of views regarding its settlement by the most proper means.<sup>6</sup> Fifthly, “to exchange views” is a compulsory obligation.<sup>7</sup> The fulfillment of the obligation cannot be established by a mere action of views exchanging; instead, it must be assessed by certain standards. Finally, an exchange of views must proceed “expeditiously” when a dispute arises.

With respect to the intentions of the Convention drafters, the establishment of the “obligation to exchange views” by Article 283 is not aimed at the “obligation” itself only, but to emphasize the settlement of disputes by negotiations. “The

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4 José Manuel Cortés Martín, Prior Consultation and Jurisdiction at ITLOS, *The Law and Practice of International Courts and Tribunals*, Vol. 13, Issue 1, 2004, pp. 2~7, 14~17; 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. 241~246.

5 The second paragraph of Article 283 has no legal significance to the present case, it thus will not be examined in this paper.

6 José Manuel Cortés Martín, Prior Consultation and Jurisdiction at ITLOS, *The Law and Practice of International Courts and Tribunals*, Vol. 13, Issue 1, 2004, p. 16.

7 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.

insertion of Article 283 is the result of the insistence of certain delegations that the primary obligation should be that the parties to a dispute should make every effort to settle the dispute through negotiation.”<sup>8</sup> “The text refers to this obligation in an indirect fashion, making it the main objective of the basic duty ‘to exchange views’ regarding the peaceful means that the parties choose by which the dispute should be settled.”<sup>9</sup> As a scholar notes, “exchange of views” is a term related to negotiation, which can be seen as the next step to “exchange of views”.<sup>10</sup> In the meantime, the designation of “the obligation to exchange views” is in conformity with the “obligation of cooperation”,<sup>11</sup> which is inherent in the mechanism of peaceful settlement of disputes. When a dispute arises, the parties should make every effort to settle it. In this case, only when there is no possibility to cooperate, can the parties bring the dispute before the compulsory procedure under the Convention.

Furthermore, the provision of Article 300 of the Convention, “State Parties shall fulfill in good faith the obligation assumed under the Convention...”, necessarily applies to the obligation to exchange views. In the *Nuclear Tests Case*, the International Court of Justice pointed out that, “One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.”<sup>12</sup>

Good faith deploys a certain kind of constitutional quality within the international law scheme and beyond that is conceived to be the very foundation of all law.<sup>13</sup> Firstly, there is a basic rule in international law: “additional international obligations may be imposed on any subject of international law only with its consent”. This rule has its origin from the principle of sovereign equality. International law established by States’ implied or express consent, is a set of fixed rules generated from mutual consent. Although its implementation could be

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8 Myron H. Nordquist ed., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V, Leiden/Boston: Martinus Nijhoff Publishers, 1989, p. 29.

9 Myron H. Nordquist ed., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V, Leiden/Boston: Martinus Nijhoff Publishers, 1989, p. 29.

10 Kari Hakapää, Negotiation, in R. Wolfrum ed., *Max Planck Encyclopedia of Public International Law*, Oxford: Oxford University Press, 2015, para. 16.

11 Anne Peters, International Dispute Settlement: A Network of Cooperational Duties, *European Journal of International Law*, Vol. 14, No. 1, 2003, p. 2.

12 *Nuclear Tests (Australia v. France)*, Judgment, *ICJ Reports 1974*, p. 268, para. 46.

13 Markus Kotzur, Good Faith (*Bona fide*), in R. Wolfrum ed., *Max Planck Encyclopedia of Public International Law*, Oxford: Oxford University Press, 2013, para. 25.

obligatory, if necessary, international law mainly relies on voluntary observance and implementation in good faith by States and other subjects of international law. Secondly, the international order and regimes established according to the international law are, in essence, the rights enjoyed and obligations undertaken by the States under the international law. Only fulfilling the obligation in good faith can the States enjoy the rights and benefits arising from these international orders and regimes. Fulfillment of international obligations in good faith does not conflict with the principle of state sovereignty; it is, in fact, the outcome of the implementation of the latter principle. As a general rule, an international obligation becomes binding in international law only when the obligation is voluntarily assumed in line with the principle of state sovereignty; any international obligation created in contrary with the principle of state sovereignty is null and void. In actuality, only if every State sincerely fulfills its international obligations, can its state sovereignty be respected. Thirdly, the effectiveness of international law and the stability of international order rest, mainly, upon whether the States faithfully abide by the international rules and fulfill their international obligations in good faith. If international obligations can't be fulfilled in good faith, the members of international community would lose their mutual trust, the international law will become a mere empty name, international cooperation regimes will be incapable of normal functioning, and the international order will be jeopardized.

All in all, in accordance with Articles 283 and 300, to judge whether “the obligation to exchange views” has been fulfilled, several basic conditions must be considered. First, during an exchange of views, the parties to a dispute must mention that the dispute concerns some specific clauses of the Convention.<sup>14</sup> Second, the issues discussed during the exchange of views must be or include the issues in the claims; if the parties discuss something, but their claims pertain to something else, then such discussions do not belong to the category of “exchange of views” provided in Article 283. Third, views must be exchanged after the emergence of a dispute, but before the initiation of an arbitration. Fourth, both parties should exchange their views frequently in a given period. This is inherent in this obligation. Fifth, “the obligation to exchange views” is not an obligation in form, but a substantive one, which is an inherent requirement of carrying out one's obligations in good faith.

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14 Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge: Cambridge University Press, p. 64.

### *C. International Practices Concerning the “Obligation to Exchange Views” under the Convention*

To date, Article 283 has attracted many debates in practice. Actually, it has been discussed in most of the Annex VII arbitration awards. The *Southern Bluefin Tuna Fish Case* is the first one to discuss Article 283 in detail. The arbitral tribunal held that,

*negotiations have been prolonged, intense and serious. Since in the course of those negotiations, the Applicants invoked UNCLOS and relied upon provisions of it, ... those negotiations may also be regarded as fulfilling another condition of UNCLOS, that of Article 283.*<sup>15</sup>

In the *MOX Plant Case*, “considering that the United Kingdom contends that the requirements of Article 283 of the Convention have not been satisfied since, in its view, there has been no exchange of views regarding the settlement of the dispute by negotiation or other peaceful means”.<sup>16</sup> In the *Land Reclamation Case*, Singapore contended that the requirements of Article 283 had not been met, since there had been no exchange of views regarding the settlement of the dispute by negotiation or other peaceful means, and that Article 283 had made negotiations between the parties a precondition to the activation of Part XV compulsory dispute settlement procedures.<sup>17</sup> Judge Chandrasekhara Rao supported Singapore in his “Separate Opinions”, pointing out that “[t]he requirement of this article regarding exchange of views is not an empty formality, to be dispensed with at the whims of a disputant. The obligation in this regard must be discharged in good faith, and

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15 Southern Bluefin Tuna Case (Australia and New Zealand v. Japan), Award on Jurisdiction and Admissibility, Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, 4 August 2000, para. 55, at [https://icsid.worldbank.org/apps/ICSIDWEB/Documents/Award%20on%20Jurisdiction%20and%20Admissibility%20of%20August%204\\_2000.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/Documents/Award%20on%20Jurisdiction%20and%20Admissibility%20of%20August%204_2000.pdf), 20 March 2016.

16 The MOX Plant Case (Ireland v. United Kingdom), Request for provisional measures, Order, ITLOS, 3 December 2001, para. 54, at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_10/Order.03.12.01.E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf), 20 March 2016.

17 Case Concerning Land Reclamation by Singapore in and around the Traits of Johor (Malaysia v. Singapore), Request for provisional measures, Order, ITLOS, 8 October 2003, paras. 33–34, at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_12/Order.08.10.03.E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/Order.08.10.03.E.pdf), 20 March 2016.

it is the duty of the Tribunal to examine whether this is being done.”<sup>18</sup> Annex VII arbitration cases, like *Barbados v. Trinidad and Tobago*,<sup>19</sup> *Guyana v. Suriname*,<sup>20</sup> *Netherlands v. Russian Federation*,<sup>21</sup> and ITLOS provisional measures cases, like *Netherlands v. Russian Federation*,<sup>22</sup> *Argentina v. Nigeria*,<sup>23</sup> all have mentioned the obligation to exchange views under Article 283.<sup>24</sup>

In practice, “exchange of views” doesn’t need a formal procedure, or views are not required explicitly to be exchanged in accordance with Article 283. Some argue that if the parties have mentioned the disputes concerning the interpretation or application of the Convention, then the requirement is fulfilled.<sup>25</sup> And “[b]oth the International Tribunal for the Law of the Sea and arbitral tribunals have shown a reluctance to find that article 283 has not been completed with”.<sup>26</sup> Thus, in practice, there is no case where Article 283 was ruled to be unfulfilled. However, the fulfillment of the obligation to exchange views should be determined based on a case-by-case scenario. The awards of many cases deviated from the law and the

- 18 Case Concerning Land Reclamation, Separate Opinion of Judge Chandrasekhara Rao, para. 11.
- 19 In the Matter of an Arbitration between Barbados and the Republic of Trinidad and Tobago, Award, Arbitral Tribunal, paras. 201~203.
- 20 In the Matter of an Arbitration between Guyana and Suriname, Award, Arbitral Tribunal, paras. 408~410.
- 21 In the Matter of the Arctic Sunrise Arbitration between the Kingdom of the Netherlands v. the Russian Federation, Award on the Merits, Arbitral Tribunal, paras. 149~156.
- 22 The “Arctic Sunrise” Case (Kingdom of the Netherlands v. Russian Federation), Request for the Prescription of Provisional Measures, Order, ITLOS, 22 November 2013, paras. 72~75, at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.22/Order/C22\\_Ord\\_22\\_11\\_2013\\_orig\\_Eng.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf), 14 April 2016.
- 23 The “Ara Libertad” Case (Argentina v. Ghana), Request for the prescription of provisional measures, Order, ITLOS, 15 December 2012, paras. 68~72, at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.20/C20\\_Order\\_15.12.2012.corr.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15.12.2012.corr.pdf), 20 March 2016.
- 24 In practice, the arbitral tribunal of the *Southern Bluefin Tuna Fish Case* seriously considered the “obligation to exchange views” as provided in Article 283 of UNCLOS, while other tribunals tended to lower the threshold to apply this article. *Inter alia*, when the ITLOS examined the preliminary jurisdiction of the arbitral tribunal constituted under Annex VII, it almost regarded this article as an “empty formality”, deviating from the express legal provisions. This act of the ITLOS obviously affected the tribunals under Annex VII. Lowering the threshold to apply Article 283 helps to establish a tribunal’s jurisdiction, which is consistent with the tendency where international courts or tribunals seek to gradually expand their jurisdiction. The paper will not dwell on this issue for the sake of topic relevance.
- 25 Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge: Cambridge University Press, p. 64.
- 26 David Anderson, Article 283 of the UN Convention on the Law of the Sea, *Modern Law of the Sea*, Vol. 59, 2007, p. 866.

drafters' intention, inviting criticism from scholars.<sup>27</sup>

### **III. The Tribunal's Reasoning on the "Obligation to Exchange Views" under Article 283 in the Award**

The Philippines' fulfillment of Article 283 under the Convention was analyzed in paragraphs 332 to 352 of the Award. The factual proofs presented in the Award include two round negotiations between China and the Philippines in 1995 and 1998, the Declaration on the Conduct of Parties in the South China Sea in 2002 (hereinafter "DOC" or "Declaration on the Conduct"), China's three ordinary notes verbales issued in the period between 2009 and 2011, one ordinary note verbale delivered by the Philippines in 2011, a new round of Sino-Philippine negotiation in 2012 and bilateral discussions on the issues concerning Huangyan Dao in April 2012. After a brief and general analysis, the Arbitral Tribunal concluded that the Philippines had fulfilled this obligation.

However, the arguments of the Tribunal are full of serious flaws. The proofs above can't testify that the Philippines has satisfied the obligation of Article 283, therefore its conclusion can't be established. First of all, the facts used to prove the fulfillment of the obligation to exchange views do not belong to the category of "exchange of views" provided in Article 283. Further, the Tribunal cuts off the connection between the obligation to exchange views and the obligation to negotiate, rendering the former obligation meaningless, which is against the purpose of the Convention.

#### *A. Opinions of the Arbitral Tribunal*

As for the obligation to exchange views, the Arbitral Tribunal first pointed out that the views exchanged must concern the means to settle the dispute, rather than any negotiation on the dispute; however, a discussion on the means to settle a dispute is always mixed with a negotiation on the dispute. After that, the Tribunal

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27 David A. Colson and Dr. Peggy Hoyle, Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Is the Southern Bluefin Tuna Tribunal Get It Right?, *Ocean Development and International Law*, Vol. 34, No. 1, 2003, pp. 59~82; 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. 237~254.

argued that China and the Philippines had held two rounds of negotiations in 1995 and 1998, and these negotiations indeed included the exchange of views on the means of dispute settlement at that time.<sup>28</sup> The Arbitral Tribunal continued to mention Article 4 of the DOC, and held that the DOC and discussions on the Code of Conduct (hereinafter “COC”) indicated that the parties concerned had made an exchange of views on the means to settle the dispute.<sup>29</sup>

The Arbitral Tribunal quickly realized that, however, the objective facts didn’t support the Philippines:

*The DOC was signed in 2002. The consultations highlighted by the Philippines took place in 1995 and 1998. At that time, the dispute between the Parties that appears from the record of the Parties’ exchanges concerned sovereignty over the Spratly Islands and certain activities at Mischief Reef. Critical elements of the disputes that the Philippines has put before the Tribunal had not yet occurred. In particular, China had not yet issued its Notes Verbales of 7 May 2009, nor had it taken the majority of the actions complained of in the Philippines’ Submissions No. 8 to 14.*<sup>30</sup>

In order to reverse the disadvantages suffered by the Philippines, the Arbitral Tribunal presented the following astounding words:

*The Tribunal recognizes that the various disputes between the Parties concerning the South China Sea are related and accepts that it may occur that parties will comprehensively exchange views on the settlement of a dispute only to have that dispute develop further, or other related disputes arise, prior to the commencement of arbitral proceedings. But the Tribunal need not definitively determine the application of Article 283 to such a situation, because the record indicates that the Parties continued to exchange views on the means to settle the disputes between them until shortly before the Philippines initiated this arbitration.*<sup>31</sup>

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28 Award, para. 334.

29 Award, para. 335.

30 Award, para. 336.

31 Award, para. 337.

The Arbitral Tribunal then cited a round of bilateral negotiations in 2012<sup>32</sup> and the discussion on Huangyan Dao in April 2012<sup>33</sup> in details.

Finally, the Arbitral Tribunal concluded that “the Parties having exchanged views and failed to reach agreement on the approach for resolving the disputes between them, the Tribunal considers Article 283 to have been satisfied.”<sup>34</sup>

### *B. The Unreasonableness and Groundlessness of the Arbitral Tribunal’s Conclusion*

The Arbitral Tribunal’s analysis above-mentioned is built on an erroneous understanding of the obligation under Article 283, which has two serious problems.

The first problem is that the facts provided to prove the fulfillment of the obligation do not belong to the category of “exchange of views” in Article 283.

In the first place, views must be exchanged after a specific dispute occurs. When the Arbitral Tribunal discussed whether the dispute, if it exists, concerns the interpretation or application of the Convention, it failed to point out when “the dispute” occurred. It only listed four Notes Verbales issued during the period between 2009 and 2011 as evidences. The examples given by the Tribunal include two rounds of negotiations in 1995 and 1998, and the DOC signed in 2002. These three time points are all before 2009. Furthermore, the Convention did not come into effect for China in 1995.<sup>35</sup> Whether the dispute between China and Philippines exists or not, it cannot be concerned with the interpretation or application of the Convention. China has rightly pointed out that in the Position Paper,

*Therefore, given that the Philippines itself considers that only in 2009 did it start to abandon its former maritime claims in conflict with the Convention, how could it have started in 1995 to exchange views with China on matters concerning the interpretation or application of the Convention that are related to the present arbitration?*<sup>36</sup>

As previously mentioned, the Arbitral Tribunal admitted that the dispute in

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32 Award, paras. 337~339.

33 Award, paras. 340~341.

34 Award, para. 343.

35 China signed the Convention on 10 December 1982, and ratified it on 15 May 1996.

36 Position Paper, para. 50.

the procedure initiated by the Philippines did not arise prior to 2009. Especially, the Tribunal admitted that China had not yet issued its Notes Verbales of 2009, nor taken the majority of the actions claimed by the Philippines in its Submissions No. 8 to 14. The Arbitral Tribunal explained that it “recognizes that the various disputes between the Parties concerning the South China Sea are related and accepts that it may occur that parties will comprehensively exchange views on the settlement of a dispute only to have that dispute develop further, or other related dispute arise, prior to the commencement of arbitral proceedings”.<sup>37</sup> It means that the parties do not exchange their views at the moment, but they will do so in the future; even if they do not do so in the future, there is a possibility for them to do so. The Arbitral Tribunal continued to mention that “the Tribunal need not definitively determine the application of Article 283 to such a situation, because the record indicates that the Parties continued to exchange views on the means to settle the disputes between them until shortly before the Philippines initiated this arbitration.”<sup>38</sup> This general understanding of the Arbitral Tribunal is totally inconsistent with the basic requirements of Article 283, which is a sheer deceit.

Secondly, the dispute which the parties concerned exchange views on the means to settle must be or include the dispute confirmed by the Arbitral Tribunal. In other words, the subject-matter discussed during the exchange of views should be identical with the subject-matter of the dispute confirmed by the Arbitral Tribunal.

The Arbitral Tribunal also gave an example which happened after 2011: a bilateral consultation carried out on 14 January 2012.<sup>39</sup> The minutes of the discussions recorded that the parties had mentioned the issues of negotiation and legal procedure. It, in the weakest sense, seems that the discussions concern a little about the means to settle the dispute between the parties. But it should be noticed that the Philippines discussed “the disputes in the West Philippine Sea”, whereas China mentioned “this dispute”. The Arbitral Tribunal needs to answer whether these “disputes” or the “dispute” were/was the disputes or dispute established in Part V of the Award? Only when these “disputes” are the “disputes” identified by the Arbitral Tribunal above-mentioned can we say it was an “exchange of views” under Article 283. But the Arbitral Tribunal failed to offer an answer to this question – in fact, the tribunal was not able to offer such an answer. “These

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37 Award, para. 337.

38 Award, para. 337.

39 Award, paras. 337-339.

disputes” or “the dispute” discussed in the bilateral consultation are those related to sovereignty and matters concerning the so-called “Kalayaan Island Group”, but not the non-sovereignty disputes identified by the Arbitral Tribunal.

Again, the Philippines has not met the obligation to exchange views on the matters in connection with Huangyan Dao. Huangyan Dao matters may be the only occasion where China and the Philippines had exchanged views under Article 283. Despite of the absence of any talk about the specific dispute concerning Huangyan Dao, both parties not only discussed how to negotiate, but also clearly mentioned the third-party dispute settlement mechanism under the Convention, at least, in their bilateral discussions, which, to some extent, can be deemed as an exchange of views on the means to settle the dispute between them. However, can the Philippines be determined to have fulfilled the obligation to exchange views as provided in Article 283, only because the Philippines delivered a Note Verbale and China made a reply to it? Can the Philippines thus conclude “the possibilities of reaching agreement have been exhausted”?<sup>40</sup> In the *Land Reclamation Case*, the arbitral tribunal found that Malaysia sent three Notes Verbales to Singapore in a short period, but Singapore refused absolutely or ignored, therefore “the possibilities of reaching agreement have been exhausted”.<sup>41</sup> However, China had responded in good faith to the Philippine Note Verbale. In other words, even if there were differences between the two parties, the channels of communication keep open, which cannot lead to the conclusion that the possibility of concluding an agreement is exhausted. Thus, the action of the Philippines can’t be deemed as a fulfillment of the obligation in good faith.

Finally, Article 4 of the DOC is an agreement between China and ASEAN on how to solve territorial and jurisdictional disputes. This article indicates that the specific provisions on the means of resolving disputes are in place for the parties to invoke, i.e., through friendly consultations and negotiations by the parties to the disputes. However, it was not the exchange of views in the meaning of Article 283. Pursuant to Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object

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40 Award, para. 343.

41 Case Concerning Land Reclamation by Singapore in and around the Traits of Johor (Malaysia v. Singapore), Request for provisional measures, Order, ITLOS, 8 October 2003, paras. 39~40, at [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_12/12\\_order\\_081003\\_en.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/12_order_081003_en.pdf), 20 March 2016.

and purpose. In that case, “an exchange of views” should be interpreted that two parties articulate their different claims or opinions separately and make every effort to reach an agreement, but fail to reach such an agreement. “Agreement” is totally different from “an exchange of views” in their very nature; the Arbitral Tribunal however simply confused the two terms. If the DOC is merely an exchange of views, why the ratifying parties seriously negotiated, drafted, adopted, signed and ratified it as such?

The second problem is that the Arbitral Tribunal distorted the obligation of Article 283, cutting off the intimate connection between the obligation to exchange views and the obligation to negotiate, and making the “obligation to exchange views” meaningless. This distortion is against the purpose of the Convention and may destroy the delicate equilibrium among the dispute settlement mechanisms under the Convention.

The Arbitral Tribunal admitted that the dispute settlement mechanism under the Convention is the result of a delicate equilibrium reached after a series of compromises. The understanding of every clause needs to be considered carefully together with other texts and the context. In particular, it cannot be interpreted in a way against the purpose of the Convention. In the present case, however, the Arbitral Tribunal made every effort to lower the threshold of the application of Article 283, distort the obligation of Article 283, and degrade the obligation to exchange views to any act of views exchanging. In the present Award, the sole requirement to fulfill the obligation to exchange views is an act to exchange views, disregarding the views are exchanged after or before the dispute arises, or whether the views exchanged concern the dispute or not. In other words, the Arbitral Tribunal lowered the obligation under Article 283 to only the process before automatically resorting to the compulsory procedure, which further makes this article meaningless.

As mentioned above, Article 283 was aimed at encouraging States to exchange views expeditiously for the purpose of agreeing on a suitable settlement procedure, and was intended to prevent an automatic transfer of a dispute from either non-compulsory procedures to compulsory procedures, or from one forum of compulsory procedures to another.<sup>42</sup> Meanwhile, the importance of resolving

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42 A. O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 1987, p. 93.

disputes through negotiations is reaffirmed by Article 283.<sup>43</sup> That is to say, the obligation to exchange views implies an effort to encourage the parties to a dispute to perform their obligation to negotiate. Just as many scholars argue, an exchange of views is a form of negotiation.<sup>44</sup> Furthermore, in the *M/V Louis Case* (Provisional Measures), Judge Wolfrum pointed out in his dissenting opinion that the negotiations mentioned in Article 283 “have a distinct purpose clearly expressed in this provision namely to solve the dispute without recourse to the mechanisms set out in Section 2 of Part XV of the Convention.”<sup>45</sup> In the present case, however, Judge Wolfrum, the appointed arbitrator by the Philippines, seems to have forgotten his opinions expressed in the *M/V Louis Case*. Also in the *M/V Louisa Case* (Provisional Measures), Judge Treves affirmed that “the claimant State has the burden to state its claims and to invite the other party to an exchange of views, which, in order to constitute a good-faith request, must be open to the possibility of a settlement ‘by negotiation or other peaceful means’.”<sup>46</sup> But the Award of the *South China Sea Arbitration* fails to show that the Philippines has done so, neither can we find it in the proofs provided by the Arbitral Tribunal.

China mentioned in the Position Paper that “[b]ut the truth is that the two countries have never engaged in negotiations with regard to the subject-matter of the arbitration.”<sup>47</sup> China simply wants to declare that the “disputing” matters claimed by the Philippines have neither been discussed by both parties, nor the opinions of one party have been actively opposed by the other, therefore no dispute can exist on the matters. Accordingly, it is impossible for the two parties to have exchanged views on the means of settling the dispute between them. To be more frank, since no dispute exists between the two parties on the subject-matter, how can one say that this dispute concerns the interpretation or application of the Convention, and that both parties have exchanged their views about the means to

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43 Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge: Cambridge University Press, 2005, p. 33.

44 J. G. Merrills, *The Mosaic of International Dispute Settlement Procedures: Complementary or Contradictory?*, *Netherlands International Law Review*, Vol. 54, No. 2, 2007, pp. 364–366.

45 Dissenting Opinion of Judge Wolfrum, *The M/V “Louisa” Case, Saint Vincent and the Grenadines v. Kingdom of Spanish, Request for Provisional Measures, Order, ITLOS*, 23 December 2010, para. 27.

46 Dissenting Opinion of Judge Treves, *The M/V “Louisa” Case, Saint Vincent and the Grenadines v. Kingdom of Spanish, Request for Provisional Measures, Order, ITLOS*, 23 December 2010, para. 13.

47 Position Paper, para. 45.

settle their dispute? It should be noted that any previous exchanges of views on the South China Sea issues between China and the Philippines are not concerned with the matters claimed by the Philippines in this arbitration.

In summary, even if the matters claimed by the Philippines in the arbitration are concerned with the Sino-Philippine dispute on the interpretation or application of the Convention, the Arbitral Tribunal didn't demonstrate effectively that the Philippines had fulfilled the obligation to exchange views under Article 283. To the contrary, the so-called facts of "views exchanging" confirmed China's declaration that "China and the Philippines made an agreement to solve the South China Sea disputes by negotiation". Otherwise, both parties would not insist on settling "the dispute" through negotiations since 1995.

#### **IV. Brief Concluding Remarks**

The Award released on 29 October 2015 by the Arbitral Tribunal of the *South China Sea Arbitration* completely denied China's arguments and reasoning articulated in its Position Paper, but almost totally accepted the opinions and reasoning of the Philippines. The Arbitral Tribunal thus became an "agent" of the Philippines. A careful examination of the Award would reveal various flaws and mistakes made by the Arbitral Tribunal. One of its most severe mistakes is that the Tribunal wrongly ruled that the Philippines had fulfilled the "obligation to exchange views" under Article 283.

The four requirements to establish the jurisdiction of an arbitral tribunal under Annex VII must form a complete logic chain. Any one of the requirements, if unfulfilled, would break the whole chain, and make an arbitral tribunal unable to establish its jurisdiction. When discussing whether the "obligation to exchange views" provided in Article 283 of the Convention has been fulfilled, the Arbitral Tribunal made serious errors, thus its conclusion cannot be established. That is to say, even if there are disputes between China and the Philippines concerning the interpretation or application of the Convention, as alleged by the Philippines in the arbitration, the Philippines has not performed the "obligation to exchange views", therefore the Arbitral Tribunal's jurisdiction can't be established effectively, and the Award it issued should also be null and void. The final award, which is founded on this Award, consequently will be also null and void, no matter whether it is favorable or unfavorable to China.

## 《更路簿》中的海外更路试析

刘义杰\*

**内容摘要:**南海《更路簿》，除记载有从海南岛前往我国西沙、中沙和南沙群岛的往返更路外，还记载了从海南岛本岛及南海诸岛前往海外各地的更路，即海外更路。这些海外更路以本岛港群和南海诸岛港群为始发港，前往东南亚各地，是海南渔民开辟的从事海外贸易的航路，是我国古代海上丝绸之路的组成部分。海外更路的存在，证明我国海南渔民最早开发南海和管理利用南海，是南海诸岛自古就是我国领土的重要证据之一。

**关键词:**更路簿 海外更路 港群 南海诸岛 中转港

### 一、前言

我国帆船航海时期，船上用来导航的工具书，一般称作《海道针经》，或称《针路簿》，在我国海南岛地区，将这种航海指南称作《更路簿》。北宋末期（大约 11 世纪中叶），航海罗盘发明之后，航海家开始编撰这些航海指南。我国航海家正是依靠这些航海指南，开辟了通向各大洋的航路，形成了沟通世界的海上丝绸之路。而海南岛的航海家，同样使用航海罗盘导航，同样将航路记录并编辑成册，他们根据自己的航海习惯和特点命名这些航海指南。现在，我们将海南岛航海家使用的航海指南统称为《更路簿》。到 2016 年为止，在海南岛地区收集到的《更路簿》有 30 多种，这些《更路簿》中，除了海南渔民历代记录下来的通往南海诸岛的更路外，还有一些《更路簿》记载了从海南岛本岛以及南海诸岛尤其是南沙群岛前往海外的更路，我们将这种通往海外的更路统称为“海外更路”。

本文以《更路簿》中的海外更路为对象，通过梳理《更路簿》中的海外更路，从中揭示数百年来我国海南岛的航海家们不但在南海从事渔业生产活动，开发和管理南海诸岛，而且还以南海诸岛为起航港，开拓了通往东南亚一带的海外航路，

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构成了海外商业贸易网络。

## 二、《更路簿》海外更路简述

在目前征集到的《更路簿》中,我们仅统计通往海外及海外各港口间的更路。为方便叙述,我们将每种《更路簿》进行统一命名,即以持有者冠名,原有名称者也都暂且以《更路簿》为名。

1. 苏德柳《更路簿》,有从北海(南沙群岛)前往海外的更路6条;从海南岛前往海外的更路10条;海外各港口之间的更路164条,共计有海外更路180条。此外,该《更路簿》中,有《驶船更路定例》一则,专门阐述从海南岛东北部七洲列岛海域到越南中部沿海延伸到东南部昆仑岛海域之间的航行注意事项,这些往返更路也统计在其中。

2. 苏承芬《更路簿》与苏德柳《更路簿》源自同一母本,苏承芬本经过整理,较苏德柳本更加条理化,其中有关海外更路的条目与苏德柳《更路簿》基本相同,也有海外更路180条。

3. 吴淑茂《更路簿》,有从南沙群岛前往海外的更路2条,从海南岛前往海外的更路2条,还有28条更路为东南亚海域间的更路;共计有海外更路32条。

4. 王国昌《更路簿》,有从西沙群岛前往海外的更路1条,从南沙群岛前往海外的更路3条,从海南岛前往海外的更路2条,海外各港口之间的更路20条;共计有海外更路26条。

5. 麦兴铄《更路簿》,有从南沙群岛前往海外的更路1条,从海南岛前往海外的更路1条,海外各港口之间的更路16条;共计有海外18条。

6. 卢家炳《更路簿》,有从南沙群岛前往海外的更路1条,从海南岛前往海外的更路1条,海外各港口之间的更路11条;共计有海外13条。

7. 李根深《更路簿》,有从南沙群岛前往海外的更路1条,海外各港口之间的更路11条;共计有海外12条。

8. 王诗桃《更路簿》,有从南沙群岛前往海外的更路5条,从海南岛前往海外的更路2条,海外各港口之间的更路4条;共计有海外11条。

9. 黄家礼《更路簿》,有从南沙群岛前往海外的更路2条,海外各港口之间的更路5条;共计有海外7条。

10. 陈泽明《更路簿》有海外更路4条,林鸿锦《更路簿》有海外更路2条,卢鸿兰《更路簿》有海外更路2条,彭正楷《更路簿》有海外更路1条。

以上统计的488条海外更路,并不是全部的从海南岛本岛和南海诸岛始发通往海外的更路,因为仍然有一些《更路簿》散落在民间未被征集到或未被整理刊出,无法进行全面统计,相信将来会有更多的海外更路被“发现”。

### 三、海外更路中的港群

分析以上统计出来的海外更路,可见《更路簿》上的海外更路有5种:其一,从海南岛本岛始发前往海外的更路;其二,从西沙群岛始发前往海外的更路;其三,从南沙群岛始发前往海外的更路;其四,从海外港口返回海南岛的更路;最后是海外各港口间的更路。总体上看,海外更路可分成两大类:一是海南岛本岛及南海诸岛通往海外各港口的更路;二是海外各港口之间的更路。

从上述始发港的地理空间分布情况看,这些港口可以分为3个港群:海南岛本岛港群、南海诸岛港群和海外中转港群。

#### (一) 海南岛本岛港群

作为海外更路始发港的海南岛本岛港口不止一个,我们将这些始发港口统称作“本岛港群”,它们主要是:大洲岛、陵水港、榆林港、清澜港、潭门港、铺前港。

##### 1. 大洲岛

大洲岛是我国海上丝绸之路中一处重要的中转港口,所有前往东南亚和印度洋的航路都要经过此处,在明朝初年的《郑和航海图》上,大洲岛被标注为“独猪山”,同时,它还有“独珠山”、“独洲山”等称谓。在《更路簿》中,一般将其称作“大州”或“大洲”。大洲岛是从海南岛本岛驶往南海诸岛及海外航路上的一处主要港口,也是通往海外更路中最重要的望山。如苏德柳《更路簿》和苏承芬《更路簿》中就有“大洲与尖笔罗,艮坤丑未对,十八更”、<sup>1</sup>“大洲与外罗,丑未加乙线丁,式十更”、“大洲与新竹,子午癸丁对,式十八更”、“大洲与大佛,子午对,三十六更”的更路;吴淑茂《更路簿》中有“大州去外罗,癸丁丑未对,二十一更”的更路,如此等等更路,都是以大洲岛为始发港的更路。更路中的“尖笔罗”、“外罗”、“新竹”和“大佛”都位于今越南中部和南部沿海,大洲岛是船只从海南岛驶往越南、柬埔寨、泰国、马来西亚、新加坡和印度尼西亚等地的第一处停靠港。同时,这些更路也可作为返回大洲岛的指南。

##### 2. 陵水港

陵水港是海南岛东南部港口之一,位于大洲岛南面,从海南岛本岛始发的船舶也有以陵水港为始发港的,如在苏德柳和苏承芬《更路簿》中有“陵水与尖笔罗,丑未对,十六更”、“陵水与外罗,子午、癸丁对,十七更收”,2条更路都是以陵水港作为始发港,同样,与之相对的目的港也是越南中南部沿海各港口。

##### 3. 榆林港

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1 “更”不仅表示航行时间,还可以表示在一段时间内航行的距离,一更所代表的具体里程,学术界说法不一。认为一昼夜为十更者,曰百里为一更,或六十里为一更。

榆林港是海南岛最南面的港口,从这里出发,可以缩短航程,所以《更路簿》有以榆林港为始发港驶往越南中南部沿海各港口的更路,如在苏德柳和苏承芬《更路簿》中有“宇林与外罗,子午对,十四更”、“榆林与尖笔罗,子午、癸丁对,十四更”2条更路。

#### 4. 潭门港、清澜港、铺前港

在《更路簿》中,虽然没有直接从这3个港口始发前往海外的更路,但是,所有从南海诸岛港群始发的更路,追本溯源,也都是从这3个港口始发的,所以,也可以将这3个港口视作本岛港群中的一组。

## (二) 南海诸岛港群

海南渔民不仅从本岛的港口出发前往海外进行商贸活动,而且会根据海上作业特点,直接从西沙群岛和南沙群岛中的某一岛礁出发,形成了“南海诸岛港群”。组成南海诸岛港群的是西沙群岛的北礁、中建岛,南沙群岛的日积礁、南威岛、南屏礁、南通礁、皇路礁和安波沙洲。

### 1. 北礁

在葡萄牙文献中记作“Canto”,是粤语“广东”的注音,在我国清朝海图中又记作“干罩”、“研罩”,在《更路簿》中记作“干豆”。北礁是西沙群岛中靠近海南岛本岛的一座岛礁,从铺前港、清澜港和潭门港出发前往南海诸岛作业的渔船一般都以北礁作为第一个停靠港,因此,在众多的《更路簿》中,北礁(干豆)都是西沙群岛海外更路中的第一站。北礁也是西沙群岛中比较靠近越南中部沿海的岛礁,所以,也有从北礁前往越南港口的更路,如苏德柳和苏承芬《更路簿》中的“外罗与干豆,寅申对,六更”,即为以北礁为始发港前往越南中部沿海“外罗”的更路。

### 2. 中建岛

《更路簿》记作“半路峙”,这是西沙群岛中西南方的一座岛礁。从这里出发,可以直接到达越南南部的昆仑岛海域,因此,也会有船舶以中建岛为始发港。如王国昌《更路簿》中有“白云求,用丁收黎湾头,下是牛路峙,约五更”和“牛路峙用未,收昆仑,约十八更,或东风,用丁”2条更路,其中的“牛路峙”为“半路峙”的误写,这2条更路也都是以中建岛为始发港前往越南中部沿海的更路。

### 3. 日积礁

在《更路簿》中记作“乙辛”、“西头乙辛”和“西首乙辛”,是南沙群岛中位于西南部的一座岛礁。由于它是南沙群岛中较接近越南中南部沿海各港口的岛礁,因此是南沙群岛中海外更路最多的一个港湾。

苏德柳和苏承芬《更路簿》:“自乙辛回安南山,用巳亥,廿余更,对西北”、“乙辛与锣汉湾头,乾巽相对,二十二更,对西北。”

王诗桃《更路簿》:“自乙辛回安南山,用巳亥,廿更,西北”;“自乙辛去昆仑,

用卯酉，廿八更，有灯”；“自乙辛去浮罗利郁，用坤兼未，卅贰更收。”

王国昌《更路簿》：“自西头乙辛往六安，驶乾巽相对，二十二更，收，对西北驶收。”

林鸿锦《更路簿》：“自西首乙辛落洋，用向艮坤，六十五更，到地盘、东竹。”

吴淑茂《更路簿》：“自乙辛去地盘，用坤兼申一线，驶十五更，转回坤，三十四更收。”

从以上各家《更路簿》的记载看，日积礁（乙辛、西头乙辛、西首乙辛）通往海外的更路主要有3条：（1）通往越南中南部沿海各港口及昆仑岛的更路；（2）通往马来半岛海外雕门岛的更路；（3）通往印度尼西亚纳土纳群岛的更路。

#### 4. 南威岛

在《更路簿》中记作“鸟仔峙”、“鸟子峙”。与日积礁相邻，位于日积礁的东面，与日积礁一样，是海南岛船只从南沙群岛驶向海外的港口。

王国昌《更路簿》：“自鸟仔峙往地盘，用坤兼二线甲。”

黄家礼《更路簿》：“自鸟仔峙去地盘，用坤加二线申字，十五更，转回坤，四指<sup>2</sup>四更。”

吴淑茂《更路簿》：“自鸟仔峙去地盘，用坤兼二线申，驶十五更，转回坤，三十四更收。”

卢家炳《更路簿》：“自鸟仔峙驶之马雅，丹坤，四十九更收。”

南威岛（鸟仔峙）通往海外的航线主要有：（1）通往马来半岛雕门岛的航线；（2）通往阿南巴斯群岛的航线。

#### 5. 南屏礁

在《更路簿》中记作“墨瓜线”，位于南沙群岛的东南面，附近有北康暗沙、南康暗沙等，再往南就是曾母暗沙了。

苏德柳和苏承芬《更路簿》“自墨瓜线去浮罗丑未，用寅申加二线，二十五更”；“自墨瓜线去宏武盞，用甲庚，二十五更，西南。”

王诗桃《更路簿》：“自墨瓜线去浮罗，用寅申兼二线艮坤，廿五更收”；“自墨瓜线去供[洪]武盞，用甲庚，廿五更收。”

南屏礁（墨瓜线）是南沙群岛中最南面的岛礁之一，依据就近原则，从南屏礁起航的船舶就都驶向它南面的纳土纳群岛。据针位及更路，浮罗利郁或浮罗丑未为纳土纳群岛中的大纳土纳岛，洪武盞则是苏比岛。

#### 6. 南通礁

《更路簿》记作“丹积”或“丹节”，在南沙群岛的东南部，位于南屏礁和皇路礁之间。与南屏礁一样，它也仅有驶向纳土纳群岛的更路。

苏德柳与苏承芬《更路簿》：“自丹节去浮罗俐郁，用甲庚加一线，寅申，

2 四指，校之于吴淑茂本，实乃“三十”之误。

三十二更。”

王诗桃《更路簿》：“自丹节去浮罗利郁，用甲庚兼寅申，卅贰更收。”

王国昌《更路簿》：“自丹节往浮罗利郁，用甲庚加一线寅申，三十二更。”

如上，浮罗利郁为纳土纳群岛中的大纳土纳岛，3本《更路簿》中记载的从南通礁驶向大纳土纳岛的针位和更数都是一致的。

### 7. 皇路礁

《更路簿》记作“五百二”，在南沙群岛的东南部，南通礁的北面，它也仅有通往纳土纳群岛的更路。

王诗桃：《更路簿》：“自五百二去浮罗利郁，用寅申兼贰线甲庚，卅五更收。”

由于皇路礁的地理位置更靠北一些，所以，从它驶向大纳土纳岛的更路三十五更要比从南通礁前往大纳土纳岛三十二更的更路要长一些。

### 8. 安波沙洲

《更路簿》记作“锅盖峙”，位于南沙群岛的东南部。

王诗桃《更路簿》：“自锅盖峙去浮罗利郁，用寅申兼艮坤，卅五更收。”

## (三) 海外中转港群

无论是从海南岛本岛港群还是从南海诸岛港群始发的船只，在《更路簿》记载的更路中，大部分是驶向某一中转港，这些起到中转港作用的岛屿或港口，组成了一个海外中转港群，通过这些中转港，海南岛航海家开辟的航线覆盖了整个东南亚海域，形成了一个巨大的商业网络。构成海外中转港群的岛屿与港湾大致有3处：

### 1. 昆仑岛

位于今越南南部近海，历史上就是我国通往海外航路上的一处非常重要的中转港，是“下西洋”的必经之地。早在南宋时期，就总结出了“去怕昆仑，回怕七洲”的航海谚语。海南岛的航海家继承了我国航海家的航海传统，同样将昆仑岛作为一个重要的中转港，除了从海南岛本岛港群始发的船只外，从南海诸岛始发的船只也以昆仑岛为主要中转港。

《更路簿》中，从海南岛本岛出发驶向昆仑岛的港口主要有大洲岛、陵水港和榆林港，从南海诸岛始发的港口主要是南沙群岛西部的日积礁和南威岛。

昆仑岛与越南中南部沿海各口岸之间的航路是海南岛船只往返的重要航路，从海南岛本岛港群始发的船只，有时会先驶向越南中部的占婆岛（尖笔罗）、嘎那角（罗安头、六安、罗湾头等）和惹岛（外罗）等处，然后经过昆仑岛中转，可以驶向东南亚各地。向西进入曼谷湾，经过柬埔寨沿海向西北方向，可以直抵泰国南部的曼谷港。从昆仑岛驶向另一个中转港——雕门岛是海外更路中更重要的航路，由此可将东南亚海域的商业网络连成一体。昆仑岛是海外更路中最重要中

转港。在苏德柳和苏承芬等人的《更路簿》中，都有有关昆仑岛的更路，显示其在海外更路中的重要地位。

## 2. 雕门岛

在《更路簿》中一般记作“地盘”，在《顺风相送》中记作“地满山”，《东西洋考》中记作“地满”，在《指南正法》中记作“地盘山”，还有茶盘、地盘仔、苕盘、地盆山等等不同的称谓，此即今泰国湾西南部马来半岛东部近海的雕门岛，也译作“潮满岛”和“刁曼岛”，是我国通往马六甲海峡及前往马来半岛东部各口岸的主要中转港。《更路簿》中的海外更路，通往雕门岛的更路除有从海南岛本岛港群经昆仑岛前往的外，还有的是直接从南海诸岛港群如日积礁和南威岛驶向雕门岛的更路。如王国昌《更路簿》中“自鸟仔峙往地盘，用坤兼二线甲”，就是从南威岛向西南驶向雕门岛的更路。

## 3. 纳土纳群岛

位于马来半岛与加里曼丹岛之间的这个群岛，在我国南沙群岛的南面，今属印度尼西亚。这是我国古代海上丝绸之路中通往印度尼西亚东部各口岸的必经之处，《针路簿》中的“蜈蚣屿”即指纳土纳群岛，也专指大纳土纳岛。从南海诸岛始发前往印度尼西亚东部口岸和新加坡港的更路，都以该群岛作为中转港。驶向纳土纳群岛的更路主要从南沙群岛靠近东部的南屏礁、皇路礁和安波沙洲起航，在《更路簿》中，将大纳土纳岛称作“浮罗利郁”或“浮罗丑未”，将苏比岛称作“洪武釜”或“宏武釜”。

《更路簿》中，昆仑岛、雕门岛和纳土纳群岛只是众多中转港中比较重要的3处，还有其他如占婆岛、惹岛、哲马贾岛等也都处于更路的中间部位，也是海南岛航海家驶向东南亚海域从事商业贸易活动的中转港，它们构成了海南岛海外更路中的海外中转港群。

# 四、海外更路构成的商贸网络

通过对《更路簿》中更路的梳理，我们发现，海南岛渔民前往南海诸岛作业，不是单纯的渔业生产活动，而是与商贸活动连成一体的经济行为。他们将在南海诸岛的收获运往东南亚各地，经过贸易后，再将所得运回海南岛，在这片广袤的海域，织就了一个庞大且复杂的商业网络。它上可承继我国大陆起航通往海外的航路，下可另辟新路，成为海上丝绸之路的补充。

## 1. 南海更路

从海南岛本岛港群始发的更路，一般都先驶向西沙群岛从事渔业生产，经过一些修整和补充后，再从西沙群岛南下前往南沙群岛作业。由于季风和海流的影响，在南沙群岛作业后的船只不会沿原路返回，而是顺风南下或西行，前往东南亚

各口岸从事贸易活动并等待季风的到来,然后返航,经越南中南部各口岸,回到海南岛本岛。目前所征集到的《更路簿》,大部分都是以南海诸岛为主要活动海域的航海指南,所以,其中的更路主要是在南海诸岛间的航路指南,航路覆盖了南海诸岛,因此更路的数量非常庞大。南海诸岛的更路是海外更路的前奏,构成海外更路的前半段。

## 2. 海外更路

从海南岛驶向海外的更路由两部分组成,一部分从本岛港群出发前往海外,形成海南岛与海外之间的往返更路;另一部分经过南海诸岛港群始发前往海外。从南海诸岛始发的海外更路向西、向南辐射,覆盖了整个东南亚海域。这部分从南海诸岛港群始发的海外更路,也都是单向的更路,不会返回南海诸岛的始发港,而是在完成商贸活动后经越南中南部沿海口岸回到海南岛。

具体而言,《更路簿》记载的海外更路,有一些更路与我国传统的海上丝绸之路的西洋航线相重叠,或说是其中的一个组成部分。这些更路从广东珠江口外的万山群岛始发,经过海南岛东北部的七洲列岛南下,通过大洲岛后南下西洋。与传统海上丝绸之路上的下西洋航路完全相同,经海南岛驶向海外的更路首先抵达今越南中部和南部的各口岸,如越南沿海的占婆岛、惹岛、嘎那角、昆仑岛等口岸,它们都是海上丝绸之路中船只在海外中转的主要口岸,尤其是昆仑岛,是海上丝绸之路的枢纽,所有下西洋的船只都会以昆仑岛作为航标,是往返航线的必经之处。

从海南岛本岛港群始发的更路仅是海外更路网络中的一部分,这个海上商业贸易网络的大部分是从南海诸岛港群始发的船只构成的。从南海诸岛港群始发,更路主要从南沙群岛中的日积礁、南威岛始发驶向越南南部的昆仑岛和马来半岛东部的雕门岛,经昆仑岛中转后,一条更路绕过越南南部,向西进入泰国湾,经过柬埔寨沿海北上抵达泰国南部港口;一条向西南方向穿越泰国湾到雕门岛,以此作为中转港,抵达马来半岛东部的各口岸,如彭亨、丁机宜等。更主要的更路是从雕门岛南下到达马六甲海峡东部峡口的廖内群岛,最后抵达新加坡。按《更路簿》记载,新加坡是海南岛船只到达的最西南的港口,经新加坡港,还可驶向印度尼西亚的井里汶。

从南沙群岛的东南部如安波沙洲、皇路礁、南通礁和南屏礁始发的船只,则驶向位于它们南面的纳土纳群岛和阿南巴斯群岛,经过这2个群岛后再向南和向西航行,一条更路通向印度尼西亚的爪哇岛一带,一条向西通往新加坡。

综合以上更路的分布情况,我们可以看到,从本岛港群和南海诸岛港群始发的海南岛船只,其更路完全覆盖了东南亚这片海域,其活动范围从越南中部、南部沿海,泰国湾沿岸,马六甲海峡东部峡口海域到印度尼西亚爪哇岛一带。海南岛船只将其在南海海域收获的产品运送到越南、柬埔寨、泰国、马来西亚、新加坡和印度尼西亚沿海口岸从事商贸活动,然后北返,经雕门岛、昆仑岛等口岸回到海南

岛。

## 五、结 语

仅从部分《更路簿》中辑录出来的海外更路上看,就可以发现,海南岛渔民经过数百年在南海上的作业,逐渐形成了以本岛港群和南海诸岛港群为两个中心的海外更路网络,海南岛渔民打造的这个海外商贸网络,覆盖了整个东南亚海域,由于他们年复一年在这片海域活动,也形成了以昆仑岛和雕门岛为中心的海外更路港群。如此完整的海外更路,不是短时期内能够形成的,需要海南岛渔民长期的航海经历和经验总结后才有可能将这些更路记录在《更路簿》中,从而成为航海指南。

如果将《更路簿》中的海外更路与我国传统的《针路簿》进行比较的话,也会发现它们的表达方式一样,航线基本重叠,抵达的海域和口岸一致。这说明《更路簿》中的海外更路是我国海上丝绸之路的一个组成部分,具有同样悠久的历史。

# A Tentative Analysis on the Overseas Sea Routes Depicted in the Manual of *Geng Lu Bu*

LIU Yijie\*

**Abstract:** In addition to the sea routes between Hainan Island and the South China Sea (SCS) Islands, the *Geng Lu Bu* (Manual of Sea Routes) also records the routes from Hainan Island and the SCS Islands to overseas ports, which are also called “overseas sea routes.” These overseas routes, starting from the ports of Hainan Island and of the SCS Islands to various regions of Southeast Asia, are the overseas trading routes opened by Hainan’s fishermen. They constitute a part of the ancient Maritime Silk Road of China. The existence of these overseas routes demonstrates that the fishermen of Hainan, China, were the first to explore, exploit and manage the SCS waters, and these routes serve as compelling evidence proving that the SCS Islands have, since ancient times, been an inherent part of China’s territory.

**Key Words:** *Geng Lu Bu*; Overseas sea route; Group of ports; South China Sea Islands; Port of transshipment

## I. Introduction

China’s seas were once covered by sailboats, and during that period of nautical exploration, the book that was used to guide navigation was commonly known as “*Haidao Zhenjing*” (Book of Compass Routes), or “*Zhen Lu Bu*” (Manual of Compass Routes). In China’s Hainan region, such a navigation guide has long been

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referred to as the *Geng Lu Bu* (Manual of Sea Routes). Since the mariner's compass was invented in China's late Song Dynasty, approximately mid-11th century, mariners had embarked on the mission to compile such navigation guides. Based on these navigation guides, Chinese mariners opened many sea routes connecting China with the outside world. Eventually, these routes formed a part of the Maritime Silk Road of China. Hainan Island mariners used their compasses to get to know the direction in which they were sailing and then compiled their accounts of sea routes into books. Their navigation guides were named after considering their sailing habits and features. These compiled guides of the mariners of Hainan Island are collectively referred to today as the "*Geng Lu Bu*." As of 2016, over 30 editions of the *Geng Lu Bu* have been collected from the Hainan Island region. These editions of the *Geng Lu Bu* contain the sea routes connecting Hainan Island with the SCS Islands, as recorded and handed down by Hainan fishermen from generation to generation. Notably, some also record the sea routes from Hainan Island and the SCS Islands, particularly the Nansha Islands, to overseas ports, which are collectively called "overseas sea routes."

This paper focuses on the study of the overseas sea routes depicted in the *Geng Lu Bu*. By collating such overseas routes, the paper shows that the mariners of Hainan Island have engaged in fishery production activities in the SCS and explored and managed the SCS Islands for hundreds of years. In addition, departing from the SCS Islands, the mariners opened up many sea routes to the Southeast Asian region, which helped to establish a trade network between China and the outside world.

## **II. A Brief Account of the Overseas Sea Routes Stated in the *Geng Lu Bu***

This paper only examines the sea routes from China to overseas ports and those between foreign ports as described in all of the editions of the *Geng Lu Bu* that the author has collected so far. For the sake of convenience, each edition will be named after its owner in a uniform way, including those which have their original names.

1. The *Geng Lu Bu* by *Su Deliu* records six sea routes from Beihai (the Nansha Islands) to overseas ports, ten routes from Hainan Island to overseas ports, and 164 routes between overseas ports, totaling 180 routes. Additionally, this edition contains a chapter entitled "Routine Sea Routes for Vessels," which is dedicated

to the do's and don'ts of sailing from waters off the Qizhou Islands lying to the northeast of Hainan Island, to the central coast of Vietnam, and then to the waters surrounding the Con Son Island in the southeast of Vietnam. These sea routes are also included in the statistics above.

2. The *Geng Lu Bu* by *Su Chengfen* and the *Geng Lu Bu* by *Su Deliu* are from the same edition. After editing and proofreading, the edition by *Su Chengfen* is more systematic than the other, yet the numbers of overseas sea routes depicted in both editions are the same, i.e., both editions contain 180 overseas sea routes.

3. The *Geng Lu Bu* by *Wu Shumao* contains two sea routes from the Nansha Islands to overseas ports, two from Hainan Island to overseas ports, and 28 between the ports in the waters of Southeast Asia; 32 overseas routes in total.

4. The *Geng Lu Bu* by *Wang Guochang* records one route from the Xisha Islands to overseas ports, three from the Nansha Islands to overseas ports, two from Hainan Island to overseas ports, and 20 between overseas ports; 26 routes in total.

5. The *Geng Lu Bu* by *Mai Xingxian* includes one route from the Nansha Islands to overseas ports, one from Hainan Island to overseas ports, and 16 between overseas ports; 18 routes in total.

6. The *Geng Lu Bu* by *Lu Jiabing* records one route from the Nansha Islands to overseas ports, one from Hainan Island to overseas ports, and 11 between overseas ports; 13 routes in total.

7. The *Geng Lu Bu* by *Li Genshen* records one route from the Nansha Islands to overseas ports and 11 between overseas ports; 12 routes in total.

8. The *Geng Lu Bu* by *Wang Shitao* records five routes from the Nansha Islands to overseas ports, two from Hainan Island to overseas ports, and four between overseas ports; 11 routes in total.

9. The *Geng Lu Bu* by *Huang Jiali* depicts two routes from the Nansha Islands to overseas ports and five between overseas ports; seven routes in total.

10. The *Geng Lu Bu* by *Chen Zeming* keeps a record of four overseas sea routes; the *Geng Lu Bu* by *Lin Hongjin* records two; the *Geng Lu Bu* by *Lu Honglan* records two; and the *Geng Lu Bu* by *Peng Zhengkai* records one.

The 488 overseas sea routes numerated above are not exhaustive, whether starting from Hainan Island or from the SCS Islands, since some editions of the *Geng Lu Bu* held by private individuals or families have not yet been collected or collated for this paper. It is believed, therefore, that more overseas sea routes will “resurface” in the future.

### III. The Groups of Ports on the Overseas Sea Routes

A review of the overseas sea routes listed above shows that these routes can be divided into five categories: the first category includes the routes from Hainan Island to overseas ports; the second includes those from the Xisha Islands to overseas ports, the third includes those from the Nansha Islands to overseas ports, the fourth includes those from overseas ports back to Hainan Island; and the last includes those between overseas ports. More generally, these overseas routes can be divided into two categories: one is the routes from Hainan Island and the SCS Islands to overseas ports, and the other is the routes between overseas ports.

In terms of geographical distribution, the ports of departure above can be divided into three groups: (a) the group of ports of Hainan Island, (b) the group of ports of the SCS Islands, and (c) the group of foreign ports of transshipment.

#### *A. The Group of Ports of Hainan Island*

The overseas routes start from more than one port of Hainan Island. These ports of departure are called collectively “the group of ports of Hainan Island” in this paper, which primarily include Dazhou Island, Lingshui, Yulin, Qinglan, Tanmen, and Puqian ports.

##### **1. Dazhou Island**

Dazhou Island is a crucial port of transshipment located on the Maritime Silk Road of China. All of the sea routes bound for Southeast Asia and the Indian Ocean go by way of this island. The *Nautical Charts of Zheng He*, which was drawn in the early Ming Dynasty, marks the island as “Duzhushan” (独猪山).<sup>1</sup> The island also has other similar names, such as “Duzhushan” (独珠山) and “Duzhoushan.” It is usually called “Dazhou” (大州) or “Dazhou” (大洲) in the *Geng Lu Bu*. This island serves as an essential port on the sea routes from Hainan Island to the SCS Islands and the overseas ports, and as the most important mountain for observing sailing conditions on the routes to overseas ports. For example, the *Geng Lu Bu by Su Deliu* and the *Geng Lu Bu by Su Chengfen* record the following routes: “From Dazhou to Jianbiluo, please sail in the direction of Genkun-chouwei on the

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1 For the sake of limited space, only homophone names in Chinese are indicated in parentheses.

compass for 18 geng”;<sup>2</sup> “From Dazhou to Wailuo, please sail in the direction of Chouwei-jia-yixianding for 20 geng”; “From Dazhou to Xinzhu, please sail in the direction of Ziwu-guiding for 28 geng”; “From Dazhou to Dafo, please sail in the direction of Ziwu for 36 geng.” The *Geng Lu Bu* by *Wu Shumao* also describes a route: “From Dazhou to Wailuo, please sail in the direction of Guiding-chouwei for 21 geng.” These sea routes all start from Dazhou Island. The places mentioned above like “Jianbiluo,” “Wailuo,” “Xinzhu” and “Dafo” are situated on the present south central coast of Vietnam. Dazhou Island is the first port that a vessel calls after the start of a voyage from Hainan Island to Vietnam, Cambodia, Thailand, Malaysia, Singapore, Indonesia or other countries. These sea routes can also serve as guides to the voyage back to Dazhou Island.

## 2. Lingshui Port

Lingshui port is one of the ports situated at the southeast of Hainan Island and lying to the south of Dazhou Island. Some Hainan Island vessels choose to start their journeys from Lingshui port. For example, the *Geng Lu Bu* by *Su Deliu* and the *Geng Lu Bu* by *Su Chengfen* contain the following words: “From Lingshui to Jianbiluo, please sail in the direction of Chouwei for 16 geng”; “From Lingshui to Wailuo, please sail in the direction of Ziwu-guiding for 17 geng.” Both routes use Lingshui port as their port of departure; their ports of destination are located on the south central coast of Vietnam.

## 3. Yulin Port

Yulin port is the southernmost port of Hainan Island. A voyage can be shortened by starting from this port. Therefore, sea routes beginning from Yulin port to ports on the south central coast of Vietnam can be found in the *Geng Lu Bu*. For instance, the *Geng Lu Bu* by *Su Deliu* and the *Geng Lu Bu* by *Su Chengfen* record two routes: “From Yulin to Wailuo, please sail in the direction of Ziwu for 14 geng”; “From Yulin to Jianbiluo, please sail in the direction of Ziwu-guiding for 14 geng.”

## 4. Tanmen, Qinglan and Puqian Ports

The *Geng Lu Bu* fails to mention any overseas sea routes directly starting from these three ports; however, tracing their source, all sea routes starting from the group of ports of the SCS Islands depart from these three ports. Consequently,

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2 The Chinese word “geng” may mean the unit of time a ship sails and the miles a ship travels at a given time. Views in academia are not consistent as to how many miles one “geng” equals. Some argue that one night is divided into 10 geng, and one geng is approximately 50 or 30 km.

these three ports can be regarded as a part of the group of ports of Hainan Island.

### *B. The Group of Ports of the SCS Islands*

Hainan fishermen not only sailed overseas to engage in business and trading activities from the ports of Hainan Island, they also, after taking into account the peculiarities of offshore activities, started their journeys from an island or maritime feature of the Xisha and Nansha Islands. Such islands or features were formed into a group of ports of the SCS Islands, which include the Beijiao Reef and Zhongjian Island of the Xisha Islands, as well as the Riji Reef, Nanwei Island, Nanping Reef, Nantong Reef, Huanglu Reef and Anbo Shazhou of the Nansha Islands.

#### **1. Beijiao Reef**

It is referred to as “Canto,” a transliteration of Cantonese “Guangdong” in Portuguese documents. The reef is also referenced as “Ganzhao” ( 干 罩 ) or “Ganzhao” ( 研罩 ) in the nautical charts drawn in China’s Qing Dynasty. And the *Geng Lu Bu* records it as “Gandou.” Beijiao Reef is a feature of the Xisha Islands adjacent to Hainan Island. It serves as the first port that a fishing ship usually calls after the start of a journey from Puqian, Qinglan or Tanmen ports to the SCS Islands. Therefore, Beijiao Reef (Gandou) was recorded, in various editions of the *Geng Lu Bu*, as the first stop on the sea routes connecting the Xisha Islands with overseas ports. This reef is also a feature of the Xisha Islands located closer to the central coast of Vietnam. Hence, sea routes starting from Beijiao Reef to Vietnamese ports are also found in the *Geng Lu Bu*. For example, the *Geng Lu Bu by Su Deliu* and the *Geng Lu Bu by Su Chengfen* note the following: “To travel from Gandou to Wailuo, please sail in the direction of Yinshen for 6 geng.” These words precisely describe the sea route from Beijiao Reef to Wailuo, situated on the central coast of Vietnam.

#### **2. Zhongjian Island**

It is recorded as “Banluzhi” in the *Geng Lu Bu*. This island is situated at the southwest of the Xisha Islands. Ships starting their voyage from this island may directly reach the waters surrounding Con Son Island in southern Vietnam. For this reason, many ships also use Zhongjian Island as their port of departure. For example, the *Geng Lu Bu by Wang Guochang* records the following two sea routes: “Starting from Yunqiu, please navigate in the direction of Ding on the compass to reach Liwantou, and then sail about 5 geng to Niuluzhi”; “To travel from Niuluzhi to Con Son, please sail in the direction of Wei for about 18 geng; if the east wind

blows, use the direction of Ding.” “Niuluzhi” therein is actually “Banluzhi”. These two routes are also the routes starting from Zhongjian Island to the central coast of Vietnam.

### 3. Riji Reef

Recorded as “Yixin”, “Xitou Yixin” or “Xishou Yixin” in the *Geng Lu Bu*, Riji Reef is located at the southwest of the Nansha Islands. Compared to any other feature of the Nansha Islands, Riji Reef is situated closer to the south central coast of Vietnam. Because of its positioning, it has become the maritime feature that has the most overseas sea routes among the Nansha Islands.

The *Geng Lu Bu* by *Su Deliu* and the *Geng Lu Bu* by *Su Chengfen* note the following: “To travel from Yixin to Annanshan, please sail in the direction of Sihai (northwest) for more than 20 geng”; “To travel from Yixin to Luohan Wantou, please sail in the direction of Xunqian (northwest) for 22 geng.”

The *Geng Lu Bu* by *Wang Shitao* observes the following: “To travel from Yixin to Annanshan, please sail in the direction of Sihai (northwest) for 20 geng”; “To travel from Yixin to Con Son, please sail in the direction of Maoyou for 28 geng; then you will see a lighthouse”; “In order to travel from Yixin to Fuluo Liyu, please sail in the direction of Kun-jian-wei for 32 geng.”

The *Geng Lu Bu* by *Wang Guochang* notes the following: “To travel from Xitou Yixin to Liu’an, please sail in the direction of Xunqian (northwest) for 22 geng.”

The *Geng Lu Bu* by *Lin Hongjin* observes the following: “Starting from Xishou Yixin, sail in the direction of Genkun for 65 geng, then you will reach Dipan and Dongzhu.”

The *Geng Lu Bu* by *Wu Shumao* reads: “To travel from Yixin to Dipan, please sail in the direction of Kun-jian-shen-yixian for 15 geng; then navigate in the direction of Kun for 34 geng.”

The foregoing accounts of many editions of the *Geng Lu Bu* show that the sea routes connecting Riji Reef (also called “Yixin,” “Xitou Yixin,” “Xishou Yixin” in the *Geng Lu Bu*) with overseas ports mainly include: (a) the route from Riji Reef to ports on the south central coast of Vietnam, as well as to Con Son Island; (b) the route from Riji Reef to Pulau Tioman Island in the seas off Peninsular Malaysia; and (c) the route from Riji Reef to the Natuna Islands of Indonesia.

### 4. Nanwei Island

It is recorded as “Niaozizhi” ( 鸟仔峙 ) or “Niaozizhi” ( 鸟子峙 ) in the *Geng Lu Bu*. Adjacent to Riji Reef, Nanwei Island is situated to the east of this reef. Like

Riji Reef, Nanwei Island is a port for the ships of Hainan Island to travel overseas from the Nansha Islands.

The *Geng Lu Bu* by *Wang Guochang* notes the following: “To sail from Niaozi zhi to Dipan, use the direction of Kun-jian-erxian-jia on the compass.”

The *Geng Lu Bu* by *Huang Jiali* records the following: “In order to travel from Niaozi zhi to Dipan, please sail in the direction of Kun-jia-erxian-shen for 15 geng, then navigate in the direction of Kun for 44 geng.”<sup>3</sup>

The *Geng Lu Bu* by *Wu Shumao* notes the following: “In order to travel from Niaozi zhi to Dipan, please sail in the direction of Kun-jian-erxian-shen for 15 geng, then navigate in the direction of Kun for 34 geng.”

The *Geng Lu Bu* by *Lu Jiabing* records the following: “To travel from Niaozi zhi to Maya, sail in the direction of Dankun for 49 geng.”

The sea routes connecting Nanwei Island (also called “Niaozi zhi” in *Geng Lu Bu*) with overseas ports primarily include: (a) the route from Nanwei Island to the Pulau Tioman Island off Peninsular Malaysia; (b) the route from Nanwei Island to the Anambas Islands of Indonesia.

### 5. Nanping Reef

Located at the southeast of Nansha Islands, Nanping Reef is recorded as “Moguaxian” in the *Geng Lu Bu*, with Beikang Ansha, Nankang Ansha and other features in its vicinity, and with Zengmu Reef farther south.

The *Geng Lu Bu* by *Su Deliu* and the *Geng Lu Bu* by *Su Chengfen* note the following: “To travel from Moguaxian to Fuluo Chouwei, please sail in the direction of Yinshen-jia-erxian for 25 geng”; “To travel from Moguaxian to Hongwuluan, please sail in the direction of Jiageng (southwest) for 25 geng.”

The *Geng Lu Bu* by *Wang Shitao* observes the following: “To travel from Moguaxian to Fuluo, please sail in the direction of Yinshen-jian-erxian-genkun for 25 geng”; “To travel from Moguaxian to Gong[Hong]wuluan, please sail in the direction of Jiageng for 25 geng.”

Nanping Reef (Moguaxian) is one of the southernmost features of the Nansha Islands. In accordance with the principle of proximity, vessels setting out from Nanping Reef always head to the Natuna Islands situated at its southern side. Based on the compass needle position and sea routes, Fuluo Liyu or Fuluo Choumei refers to the Great Natuna Island of the Natuna Islands, and Hongwuluan refers to Subi

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3 A comparison with the edition of Wu Shumao shows that the number “44” is actually a miswriting of “34”.

Island.

### **6. Nantong Reef**

Situated at the southeast of the Nansha Islands and between Nanping Reef and Huanglu Reef, Nantong Reef is recorded as “Danji” or “Danjie” in the *Geng Lu Bu*. Similar to Nanping Reef, Nantong Reef only has overseas sea routes connecting itself with the Natuna Islands.

The *Geng Lu Bu* by *Su Deliu* and the *Geng Lu Bu* by *Su Chengfen* note the following: “To travel from Danjie to Fuluo Liyu, please sail in the direction of Jiageng-jia-yixian-yinshen for 32 geng.”

The *Geng Lu Bu* by *Wang Shitao* observes the following: “To travel from Danjie to Fuluo Liyu, please sail in the direction of Jiageng-jian-yinshen for 32 geng.”

The *Geng Lu Bu* by *Wang Guochang* says the following: “To travel from Danjie to Fuluo Liyu, please sail in the direction of Jiageng-jia-yixian-yinshen for 32 geng.”

As mentioned above, Fuluo Liyu refers to the Great Natuna Island of the Natuna Islands. The compass needle positions and sea routes connecting Nantong Reef with the Great Natuna Island, as described in the three above editions of the *Geng Lu Bu*, are consistent with each other.

### **7. Huanglu Reef**

Located at the southeast of the Nansha Islands and the north of Nantong Reef, Huanglu Reef is recorded as “Wubaier” in the *Geng Lu Bu*. Similarly, this reef only has overseas sea routes heading to the Natuna Islands.

The *Geng Lu Bu* by *Wang Shitao* observes the following: “To travel from Wubaier to Fuluo Liyu, please sail in the direction of Yinshen-jian-erxian-jiageng for 35 geng.”

Since Huanglu Reef is located farther north, the sea route starting from this reef to the Great Natuna Island (35 geng) is longer than that from Nantong Reef to the same island (32 geng).

### **8. Anbo Shazhou**

Situated at the southeast of the Nansha Islands, it is recorded as “Guogaizhi” in the *Geng Lu Bu*.

The *Geng Lu Bu* by *Wang Shitao* says the following: “From Guogaizhi to Fuluo Liyu, please sail in the direction of Yinshen-jian-genkun for 35 geng.”

### *C. The Group of Foreign Ports of Transshipment*

The majority of the sea routes depicted in the *Geng Lu Bu*, whether starting from the group of ports of Hainan Island or the group of ports of the SCS Islands, all head to certain ports of transshipment. The islands or ports serving as intermediate destinations constitute a group of foreign ports of transshipment. The mariners of Hainan Island opened up many sea routes through these ports of transshipment, which covered the entire waters of Southeast Asia and shaped a huge commercial network. Such islands or ports mainly involve the following three islands:

#### **1. Con Son Island**

Situated off the coast of southern Vietnam, the island is, historically, a crucial port of transshipment for ships plying between China and foreign countries; it is also a required stop for vessels cruising to the “Western Ocean.” Notably, the sailing proverb “When going overseas, sailors are afraid of Con Son; when coming back home, they are afraid of Qizhou” can be traced back to the Southern Song Dynasty (1127-1279). Following the sailing traditions of Chinese maritime explorers, the mariners of Hainan Island also used Con Son Island as a crucial port of transshipment. In addition to the vessels departing from the group of ports of Hainan Island, vessels starting from the group of ports of the SCS Islands also used Con Son as a principal port of transshipment.

According to the accounts of the *Geng Lu Bu*, vessels plying between Hainan Island and Con Son Island departed, in most cases, from Dazhou Island, Lingshui and Yulin ports; and vessels starting from the SCS Islands primarily used the ports of Riji Reef and Nanwei Island located at the west of the Nansha Islands.

The sea routes between Con Son Island and the ports scattered on the south central coast of Vietnam were vital routes for vessels traveling between Hainan Island and foreign lands. Vessels departing from the group of ports of Hainan Island, in some cases, first sailed to Cham Island (called “Jianbiluo” in the *Geng Lu Bu*), Ke Ga Cape (called “Luoantou”, “Liu’an” and “Luowantou” in the *Geng Lu Bu*), Cu Lao Re Island (called “Wailuo” in the *Geng Lu Bu*) or other islands situated in central Vietnam, and then used Con Son Island as a transshipment base to travel to all parts of Southeast Asia. Following this route, ships travelling westward could enter the Bay of Bangkok; sailing along and through the coast of Cambodia and then towards northwest, ships could directly reach the Bangkok Port located in southern Thailand. The overseas sea route from Con Son Island to

Pulau Tioman Island, another port of transshipment, is particularly important since it integrated the trade and commercial networks in the waters of the Southeast Asia together. Con Son Island serves as the most important transshipment base along the overseas sea routes. The fact that sea routes in connection with Con Son Island are described in the *Geng Lu Bu* by Su Deliu, Su Chengfen and others highlights the essential role the island plays in overseas sea routes.

## 2. Pulau Tioman Island

It is generally recorded as “Dipan” in the *Geng Lu Bu*, “Dimanshan” in *Shunfeng Xiangsong* (Voyage with a Tail Wind), “Diman” in *Dongxiyang Kao* (A Research on Eastern and Western Oceans), and “Dipanshan” in *Zhinan Zhengfa* (The True Art of Pointing South). It also has other names such as “Chapan”, “Dipanzi”, “Zhupan” and “Dipenshan”. These names all refer to today’s Pulau Tioman Island, which is located in the southwest of the Gulf of Thailand and off the eastern coast of Peninsular Malaysia. Pulau Tioman Island is also translated into “Chaoman Dao” (潮满岛) and “Diaoman Dao” (刁曼岛) in Chinese. It serves as the main port of transshipment for Chinese vessels to sail to the Strait of Malacca and the ports lying on the eastern side of Peninsular Malaysia. As per the accounts of the *Geng Lu Bu*, some of the overseas sea routes bound for Pulau Tioman Island start from the group of ports of Hainan Island by way of Con Son Island, and some others directly depart from the group of ports of the SCS Islands, including Riji Reef and Nanwei Island. For example, the *Geng Lu Bu by Wang Guochang* records a route for ships to sail southwestward from Nanwei Island to Pulau Tioman Island; it notes the following: “To travel from Niaozizhi to Dipan, use the direction of Kun-jian-erxian-jia on the compass.”

## 3. The Natuna Islands

This group of islands is located between Peninsular Malaysia and Kalimantan Island and to the south of China’s Nansha Islands. It now belongs to Indonesia. The Natuna Islands is a required stop when ships sail to the ports of eastern Indonesia along the Ancient Maritime Silk Road of China. “Wuqi Island” noted in the *Zhen Lu Bu* refers to the Natuna Islands or specifically the Great Natuna Island. All routes starting from the SCS Islands to the eastern ports of Indonesia and the Port of Singapore used the Natuna Islands as a transshipment base. The routes heading to the Natuna Islands mainly started from Nanping Reef, Huanglu Reef and Anbo Shazhou, located at the eastern Nansha Islands. In the *Geng Lu Bu*, the Great Natuna Island is called “Fuluo Liyu” or “Fuluo Chouwei”, and Subi Island is called “Hongwuluan” (洪武壑) or “Hongwuluan” (宏武壑).

Con Son Island, Pulau Tioman Island and the Natuna Islands are merely the more important ports of transshipment described in the *Geng Lu Bu*. Other ports of transshipment also include Cham Island, Cu Lao Re Island, and Jemaja Andriabu Island, which are situated at the middle of the overseas sea routes. These ports form a group of foreign ports of transshipment, which provided the base for the mariners of Hainan Island to engage in commercial and trade activities in the waters of Southeast Asia.

#### **IV. The Trading Network Connected by Overseas Sea Routes**

An analysis of the sea routes recorded in the *Geng Lu Bu* shows that the operations carried out on the SCS Islands by fishermen of Hainan Island are not merely fishery production activities, but also economic behaviors involving trade and business. These fishermen carried their fishery catches from the SCS Islands to Southeast Asia and traded with the locals. After that, they carried back the goods they got from the locals to Hainan Island. By doing this, these fishermen weaved a large and complex commercial network in this vast sea area. This network can be linked with sea routes from the mainland of China to foreign countries; moreover, it can be extended farther to open up new routes, becoming a supplement to the Maritime Silk Road.

##### **1. The SCS Routes**

Ships departing from the group of ports of Hainan Island would, in most cases, sail first to the Xisha Islands to engage in fishery production activities; after doing some repair and maintenance work and getting enough supplies, the ships would then sail southward to the Nansha Islands for fishing. Due to the influence of monsoon and ocean currents, ships, after fishing around the Nansha Islands, would not return to Hainan Island along the original routes. Instead, following the wind, these ships would sail southward or westward to carry out commercial activities in the ports of Southeast Asia, and then return to Hainan Island by way of the ports located on the south central coast of Vietnam when the monsoon came. Most editions of the *Geng Lu Bu* that have been collected are guides for navigation mainly in the waters adjacent to the SCS Islands. Therefore, the sea routes recorded therein are principally guides for sailing between the SCS Islands. Due to the number of SCS Islands involved in these routes, such sea routes are also great in number. The sea routes between the SCS Islands are the beginning or the first

segments of the overseas sea routes.

## 2. Overseas Sea Routes

The routes from Hainan Island to the foreign ports consist of two parts: one begins from the group of ports of Hainan Island to overseas ports, i.e., the sea routes between Hainan Island and overseas ports, and the other starts from the group of ports of the SCS Islands to overseas. The overseas sea routes starting from the SCS Islands extend westward and southward, covering the entire sea area of Southeast Asia. The overseas sea routes beginning from the group of ports of the SCS Islands are one-way journeys. In other words, ships would not return to the departing ports of the SCS Islands; instead, they would, after the end of some commercial and trade activities, return to Hainan Island by way of the ports on the south central coast of Vietnam.

Specifically, some of the overseas sea routes described in the *Geng Lu Bu* overlap with the “Western Ocean Route” of the traditional Maritime Silk Road of China, or the former can be said to constitute a part of the latter. These routes start from the Wanshan Islands off the Pearl River mouth of Guangdong Province; they would extend southward by way of the Qizhou Islands situated to the northeast of Hainan Island, and then enter the Western Ocean by way of Dazhou Island. These routes are identical with the “Western Ocean Route” of the traditional Maritime Silk Road. Ships departing from Hainan Island to overseas ports would first reach the ports of today’s central and southern Vietnam, such as the Vietnamese coastal ports of Cham Island, Cu Lao Re Island, Ke Ga Cape and Con Son Island. These ports served as the primary transshipment base for ships sailing along the Maritime Silk Road. In particular, Con Son Island stands as a hub on the Maritime Silk Road. All the vessels sailing toward or back from the Western Ocean would pass the island and use it as a navigation mark.

The sea routes starting from the group of ports of Hainan Island are only a part of the network of overseas sea routes. This marine trade network is mainly connected by ships starting from the group of ports of the SCS Islands. Ships starting from the group of ports of the SCS Islands primarily departed from Riji Reef and Nanwei Island of the Nansha Islands and then sailed toward Con Son Island, situated at southern Vietnam, and Pulau Tioman Island, off the east coast of Peninsular Malaysia. After transferring at Con Son Island, some ships could bypass southern Vietnam, sailing westward to the Gulf of Thailand, then moving along the coast of Cambodia, and finally sailing northward to Thailand’s southern ports. Some other ships traveled southwestward to Pulau Tioman Island by sailing through

the Gulf of Thailand; using Pulau Tioman Island as a transshipment base, the ships could then reach many ports of east Peninsular Malaysia, including Pahang and Terengganu. Following a more frequently used route, ships could travel southward from Pulau Tioman Island until reaching Riau Archipelago, located at the east entrance to the Strait of Malacca, and finally arrive at Singapore. In accordance with the accounts of the *Geng Lu Bu*, Singapore is the southwesternmost port that the vessels of Hainan Island may reach; by way of Singapore, ships may also sail towards the Cirebon of Indonesia.

Ships departing from the southeast of the Nansha Islands, such as Anbo Shazhou, Huanglu Reef, Nantong Reef and Nanping Reef, would sail southward to the Natuna Islands and the Anambas Islands; after passing these two group of islands, ships could follow one sea route to sail southward to the Java Island of Indonesia, or they could also travel westward in accordance with another sea route to Singapore.

An examination on the distribution of the sea routes above reveals that the sea routes guiding the navigation of ships of Hainan Island departing from the group of ports of Hainan Island and that of the SCS Islands fully cover the sea areas of Southeast Asia, ranging from the waters off the central and southern coasts of Vietnam, the coast of the Gulf of Thailand, and the eastern entrance to the Strait of Malacca, to the areas surrounding the Java Island of Indonesia. The ships of Hainan Island convey the catches obtained from the SCS waters to ports of Vietnam, Cambodia, Thailand, Malaysia, Singapore and Indonesia, which would be traded on the local markets. After such trading activities, ships would then return to Hainan Island by way of Pulau Tioman Island, Con Son Island, or/and other ports.

## V. Conclusions

The overseas sea routes recorded in only a few editions of the *Geng Lu Bu* are enough to tell that the fishermen of Hainan Island, after fishing in the SCS waters for hundreds of years, built a network of overseas sea routes centered on the group of ports of Hainan Island and that of SCS Islands. This network covers the entire waters of Southeast Asia. Due to these fishermen's work and effort in this sea area year after year, a group of ports of overseas sea routes was also shaped centering on Con Son Island and Pulau Tioman Island. Such unbroken overseas routes cannot be established in a short time. Rather, it requires the sailing experiences and techniques accumulated by the fishermen of Hainan Island over a long period

of time. Because of such experiences and techniques, those routes were able to be recorded in the *Geng Lu Bu* and became the navigation guides for mariners.

A comparison between the overseas sea routes described in the *Geng Lu Bu* and those in the *Zhen Lu Bu* would also show that the ways that the two manuals describe routes are virtually identical, the sea routes recorded in them basically overlap with each other, and the waters and ports that the ships could reach following these routes are identical, too. These findings demonstrate that the overseas sea routes stated in the *Geng Lu Bu* constitute a part of the Maritime Silk Road of China and prove that these routes have a longstanding record as a part of China's trade history.

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# 善意原则在菲律宾所提起 南海仲裁案中的适用评析

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**内容摘要:**善意原则是国际法的基本原则,主要体现在善意履行国际义务,特别是条约义务方面。善意原则对条约的缔结、履行、解释以及对维护整个条约法律秩序,都具有至关重要的作用。南海仲裁案从被菲律宾提起、仲裁庭受理到做出最终裁决的全过程,都呈现出对一项原则的违背,即善意原则。南海仲裁案中,仲裁庭和菲律宾都“默契”地利用1982年《联合国海洋法公约》(以下简称“《公约》”)的空白处,滥用《公约》所赋予的权利,恶意地使用各种文字解释技巧,随意造出各种“突破性”的概念或标准,企图将《公约》作为工具以非法的目的去损害另一方当事国的正当权益。建立在违法性基础上的最终裁决已俨然违背了《公约》的目的和宗旨,应视为无拘束力。本文旨在通过梳理善意原则的法理基础和司法实践,剖析菲律宾所提起南海仲裁案中违背善意原则的具体表征。

**关键词:**南海仲裁案 善意原则 滥用权利 具体表征

## 一、引言

虽然距离“南海仲裁案”最终裁决出炉已接近1年,但是此案带来的影响依然萦绕于争端双方,有利害关系的第三方,乃至整个国际社会的氛围中,其影响力的深度和广度实在不容小觑。菲律宾依据1982年《联合国海洋法公约》(以下简称“《公约》”)的第十五部分和附件七,于2013年1月对我国提起了仲裁。当年5月组成仲裁庭,菲律宾顺利地提出了15项诉求,接着仲裁庭在2015年10月发布了有关管辖权和可受理性的裁决,宣布对该案具有管辖权,此后仲裁庭和菲律宾“你中有我,我中有你”,相互补充,使尽他们的“洪荒之力”,终于“修成正果”,于2016年7月12日迎来最终裁决的出台。然而,这个仲裁案表面上无懈可击,

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实际上却漏洞百出。不管是在菲方提起仲裁方面,还是仲裁程序运行,一直到最终裁决出炉的全过程,始终充斥着各种违背国际法原则、滥用程序和非公正的做法,其中违背善意原则的表现极其明显。

自从最终裁决出炉以来,我国政府及学界从未停止对这一裁决的非法性进行论证和批驳,并提出诸多建树性的观点,为维护我国南海诸岛的合法权益提供了强有力的理论支撑。但考虑到该案影响恶劣且深远,我们需要更深入地了解相关的国际法理论,才能更好地巩固和维护我国的正当权益。现今的很多研究专业性较足,但是研究的角度过于单一,大多集中于该案本身的程序和实体层面的分析,却很少有上升和拓宽至与此案相关的一些具有代表性且权威性的理论层面,如善意原则。善意原则是国际法的基本原则,主要体现在善意履行国际义务,特别是条约义务方面。善意原则对条约的缔结、履行、解释以及对维护整个法律秩序,都具有举足轻重的作用,对我国维护南海诸岛的正当权益更具有现实性的意义。因此,本文立足于善意原则这项一般国际法原则背后的法理和实践基础,剖析善意原则在菲律宾所提起的南海仲裁案中的适用问题,以期为维护我国南海的合法权益提供更多的理论支撑,同时也期望引发国际社会思考和重视善意原则对建构和稳定国际秩序的重要性。在探讨善意原则在南海仲裁案中的适用情况之前,本文将先对善意原则的法理基础进行梳理和分析。

## 二、善意原则的内涵、地位和局限性

理论是实践的先导,想要探讨和深究善意原则在国际司法实践中的具体适用,前提是要对相关的基础性理论有一定程度的了解和掌握,这样才能确保实践目标不偏离理论的目的和宗旨。善意原则的法理基础能够为我们较深入地厘清“善意”在条约解释中甚至在整个法律体系中的地位 and 重要作用。作为条约解释诸要素的灵魂,善意原则贯穿于条约解释的整个过程,而善意解释是善意履行国际义务的前提。善意原则作为一般法律原则和国际法的基本原则,不仅仅局限于条约特定词语或短语的解释,而且时常通过在个案中对解释要素和方法进行指导、限制、评价、平衡和调节来实现其实质性价值和作用。

### (一) 善意原则的内涵

要理解善意原则的内涵,首先要对“善意”一词进行界定。“善意”起初来源于私法领域,与宗教观念相关联。<sup>1</sup>“善意”在英文上表述为“Good Faith”,在拉

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1 George Mousourakis, *Fundamentals of Roman Private Law*, Berlin/Heidelberg: Springer, 2012, p. 34.

丁文则被称为“Bona Fides”。在《牛津英语习语词典》中，“善意”意指“做对事情的意图”，而其对立词“恶意”意指“在人与人的关系中没有信赖”和“不诚实的态度”，该词典对“善意”的词语本意作了通常解释。在第十版《布莱克法律词典》中，则将“善意”描述为4种思想状态，分别为：（1）在信念和目的上的诚实；（2）对其职责或义务的忠实；（3）在特定贸易或生意中遵守有关公平交易的合理商业准则；或（4）没有欺诈或寻求过分支处的意图。<sup>2</sup>这里揭示了“善意”中“诚实”、“合理”的基本含义，同时也间接地排除了具有“恶意”性质的行为。上述2部词典对“善意”的定义，往往是将“善意”置于平等主体之间的关系中，特别是私人的契约关系抑或是条约关系的语境中进行理解，普遍以诚信作为要求进行相互规制，于是就延伸出现今的诚实信用原则。因而诸多学者就误以为善意和诚信是等同的，可以交叉使用，甚至将“good faith”都直接译为“诚信”。但实际上，诚实信用只是善意原则的诸多要素之一。在词源上，诚实不能与善意划等号；在内容上，善意所涵盖的范围远远比诚信要宽，而诚信的适用局限于协议关系的范围内。虽然诚信原则涵盖了善意原则的主要范围，尤其是在国际法层面上，如所谓“善意履行国际义务”中的“善意”就单指“诚信”。然而，仅靠诚信原则，“是不足以在实践中贯彻正义原则的，因为很多权利义务的产生和发展不以协议的存在为前提”。<sup>3</sup>因此要注意将善意和诚信原则区分开。当然，由于诚信是善意的组成部分，诚信原则就是善意原则的合理延伸和具体表达，其地位和作用也是不可估量的。有人认为“善意”的内涵为“理性、合理”，且为处于发展中的高度抽象概念，覆盖于条约缔结、履行和解释的全过程。<sup>4</sup>同样地，也有人认为“有时善意似乎基本上是‘理性’的同义词。”<sup>5</sup>在“尼加拉瓜诉美国案”中，国际法院在解释条约时考虑了“善意”的作用，认为“从善意的要件来看，似乎应当同样根据条约法来看待这些要件，条约法为撤回或终止未包含有效期条款的条约规定了一段合理时间。”<sup>6</sup>

善意原则源自国内法，随后被引入国际法，但其含义在国际法和国内法上是相通的。著名学者奥康奈尔认为：“国际法上的善意原则是一项基本原则，由此引出条约必须遵守原则和其他特别地和直接地与诚实、公正和合理相关的规则。这些规则在任何特定时间的适用，取决于在该时间国际社会流行的关于诚实、公正和合理的主导标准。”<sup>7</sup>这个解释契合了善意的本质，是对善意原则适用于国内和

2 Bryan A. Garner ed., *Black's Law Dictionary*, 10 edition, Eagan: Thomson West, 2014.

3 罗国强著：《国际法本体论》，北京：法律出版社2008年版，第159、164~165页。

4 冯寿波：《论条约的“善意”解释——〈维也纳条约法公约〉第31.1条“善意”的实证研究》，载于《太平洋学报》2015年第5期，第3页。

5 冯寿波：《论条约的“善意”解释——〈维也纳条约法公约〉第31.1条“善意”的实证研究》，载于《太平洋学报》2015年第5期，第4页。

6 *Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984*, para. 63.

7 John F. O'Connor, *Good Faith in International Law*, Aldershot: Dartmouth Publishing Co. Ltd., 1991, p. 124.

国际法时的高度概括和总结。早在1954年《国际法研究会的决议》中,特别报告人沃多克提及杰拉德·菲茨莫里斯的6项原则时,就提出要将这些原则中的“整体性原则”和“有效性原则”与善意相联系起来。<sup>8</sup>在国际法委员会研讨第72条草案时,大部分人支持“以善意解释且考虑了条约的目的和宗旨总是一定会寻求赋予文本以意义。”<sup>9</sup>虽然上述决议和草案都没有明确提及善意原则,但却已成为构建法律框架体系的基础性要素和衡量标准,实则为善意原则的缩影。除诚信原则外,禁止权利滥用原则和保护合法期望原则也是善意原则的组成部分。这些原则体现于赋予每一当事方以相同的条件,提高了法律制度的合法性,使得“在接受了协议之后,任一方当事国都不能改变义务以仅仅满足一己之目的。”<sup>10</sup>

综上所述,善意原则一直以来就是一个发展中的概念,至今并没有形成统一和确切的概念。但这并不影响善意原则在国际社会,特别是在构建和维护国际法律秩序中发挥的根本性作用。因为善意原则凝聚着国际社会的共识,实实在在地反映着世界各国对正义的价值追求。尽管“善意”的内容和种类难以穷尽,但基于国际法和国内法的诸多实践,我们依然可以清晰地证明:善意原则是一项基本原则,“诚信”、“公正”、“合理”是善意的基本含义或特征,而违背这些特征或要求的则是属于“恶意”的结果。

## (二) 善意原则的地位和作用

1969年《维也纳条约法公约》序言第3段提出,各当事国“鉴悉自由同意与善意之原则以及条约必须遵守规则乃举世所承认”,可知善意原则在创立和履行国际法律义务方面有支柱性的地位。<sup>11</sup>从中可得出,善意履行国际义务是条约法创立时各当事国达成的共识。实际上,早在欧洲国际法的萌芽时期,就有诸多著名国际法学者一直主张和强调善意原则在国际关系中的重要性和地位。如雨果·格劳秀斯坚持认为,善意原则要求,甚至与敌人、海盗、反叛者和异教徒之间的条约也应当维持。<sup>12</sup>随着世界各大法律体系的不断发展和推进,善意原则备受关注和推崇。“善意在每种法律秩序中都是一项内在的制度”,“善意原则提出了一个有目共睹的明显的社会行为规则”,<sup>13</sup>这表明了它在当代法律体系中的地位。在国

8 Richard K. Gardiner, *Treaty Interpretation*, Oxford: Oxford University Press, 2008, p. 169.

9 Richard K. Gardiner, *Treaty Interpretation*, Oxford: Oxford University Press, 2008, p. 170.

10 Thomas Cottier, Krista N. Schefer: 《WTO 中的善意及合法期望之保护》(韩秀丽译、高波校), 载于《国际经济法学刊》2005年第3期, 第183页。

11 赵建文:《条约上的善意原则》, 载于《当代法学》2013年第4期, 第122页。

12 Oliver Dörr and Kirsten Schmalenbach eds., *Vienna Convention on the Law of Treaties: A Commentary*, New York: Springer Science & Business Media, 2011, p. 435.

13 E·左莱尔:《国际法上的善意原则》, 转引自[法]M·维拉利:《国际法上的善意原则》(刘昕生译), 载于《国外法学》1984年第4期, 第54页。

际法中,善意原则在条约法领域的适用尤为突出。当然,“善意原则同样适用于个人之间的关系和国家之间的关系……它应当是所有法律制度的基本原则”。<sup>14</sup>

此外,诸多案例也明确地指出了善意原则的地位,如在“美国对日本若干热轧钢产品反倾销案”中,世界贸易组织上诉机构指明:“善意原则既是法律的一般原则也是国际法的一般原则,规范着反倾销协定及其他协定”。<sup>15</sup> 国际法院在著名的“核试验”案判决第 49 段中指出:“支配法律义务创立和履行的基本原则之一,无论义务的渊源为何,是善意原则。……正如条约必须遵守这项条约法规则是基于善意原则一样,根据单方宣言而产生的国际义务的约束性也是基于这项原则”。<sup>16</sup> 这明确地表达出,善意原则是构成条约结构基础的一部分。虽然善意原则来源于自然法,属于道义领域的一项原则,但这并不意味着它只是停留于“思想上的原则”。善意原则确实依赖于个人的心理因素而存在,但善意原则还涉及行为规则,善意要求人们的意思表示必须与其真实意志相一致,也就是说,善意排除任何内在的真实与外在表现之间的脱节。<sup>17</sup>

在国际法上,善意原则发挥着根本性的作用。从法国学者 M·维拉利的观点来看,任何人忽视善意原则是构成整个国际法结构基础的一部分,都可能使国际法降低为一套空洞无物的法律形式。<sup>18</sup> 这表明了善意在国际社会法律的产生和履行过程中属于绝对必要的因素,推动了整个国际法律体系的正常运行,以至于有人将其称为“机器之油”。善意原则在《国际法院规约》中被称为“文明各国所承认的一般法律原则”。<sup>19</sup> 其意在指出善意原则属于国际法的渊源部分,是文明各国所共同追求的价值。从“诚实”、“公正”、“合理”等这些要素来看,善意原则有助于改变国际法上的“无法”状态和消除规范冲突,有助于排除恶意行为的侵蚀,从而减少出现偏离公平结果和利益平衡的现象。实际上,善意原则起着维护法律秩序的精神和价值的作用,确保社会实质性正义的实现。“即使条约法的确不以善意原则为基础,那么它也密切地与善意原则联系在一起;因为这一原则从条约缔结到终止始终支配着条约”。<sup>20</sup> 由此可知,有些条约虽然没有写明善意原则,但这并不影响和改变其在支配国际法法律义务创立和履行中的事实基础,其依然是举世

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14 Bin CHENG, *General Principle of Law as Applied by International Courts and Tribunals*, London: Stevens and Son, 1953, p. 105.

15 United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R, Report of the Appellate Body, 24 July 2001, para. 101.

16 Nuclear Tests (New Zealand v. France), Judgment, *ICJ Reports 1974*, para. 49.

17 E·左莱尔:《国际法上的善意原则》,转引自[法]M·维拉利:《国际法上的善意原则》(刘昕生译),载于《国外法学》1984年第4期,第55页。

18 E·左莱尔:《国际法上的善意原则》,转引自[法]M·维拉利:《国际法上的善意原则》(刘昕生译),载于《国外法学》1984年第4期,第57页。

19 Statute of the International Court of Justice, Article 38(1).

20 郑斌(Bin CHENG)著,韩秀丽、蔡从燕译:《国际法院与法庭适用的一般法律原则》,北京:法律出版社2012年版,第106页。

公认的一般法律原则和国际法的基本原则。

由于善意存在于人们的意识形态中,这导致善意原则自身无法单独实施和发挥作用,因此需要与其他具体规则原则相结合,才能表现出其法律效果和实质性意义。世界贸易规则在内的国际法的诸多规则亦是如此,通常都是通过将抽象的原则转化为具体规则进行适用。善意原则作用于条约法缔结、履行和解释的全过程。在条约缔结过程中,善意原则一是要求国家要以诚实、公正和合理的态度进行缔约;二是规制国家恶意缔约行为,排除恶意缔约行为的合法性或有效性,以防止破坏条约的目的和宗旨。在条约履行过程中,根据善意原则的本意,善意履行条约是一般国际法的一项义务,必须要诚实、公正和合理地履行条约;善意原则在条约解释中的实践最为丰富,因为善意原则是条约解释的总原则,同样要求诚实、公正和合理地进行解释,<sup>21</sup>倘若背离了这些要求,极易滋生诸如权利滥用等问题,进而导致不公正结果的出现。菲律宾所提南海仲裁案就是这样一个典型的例子。

### (三) 善意原则的不足和局限性

每项事物都是利弊共生,善意原则也不例外,善意原则的局限性在于其自身的高度抽象性。特别是在诸多条约解释中,善意原则的抽象性让我们难以准确地把握和适用。“善意解释作为一项总的原则,要确定该原则的具体内容是困难的,很可能找不到一个无可争辩的、客观的、获得公认的衡量标准。”<sup>22</sup>这揭示了善意原则在适用条约解释时没有绝对的方法和规则。善意原则的局限性在条约解释方面的体现最为明显和关键,如“美国《1974年贸易法》第301~310节案”的专家组认为:

对《维也纳条约法公约》在第三方争端解决中要求应对条约进行善意解释,这是众所周知地困难或至少是需要慎重处理,这尤其是因为对当事方之一可能存在的不诚实的非难。因此,我们更愿意考虑哪个解释表明了“更大的善意”,并仅仅处理这个解释。<sup>23</sup>

由此可知,善意原则在条约解释中处于发展的状态,其地位和作用亦是如此,需要依据特定的社会历史条件和具体个案进行确定。由于善意原则常常被视为一项道义原则,倘若从纯粹的道德范围来看的话,其实际的说服力和权威性就会被

21 赵建文:《条约法上的善意原则》,载于《当代法学》2013年第4期,第123~124页。

22 Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Disputes Settlement*, London: Cmmerron May Ltd., 2002, p. 499, 转引自张东平著:《WTO司法解释论》,厦门:厦门大学出版社2005年版,第189页。

23 WT/DS152/R, 22 December 1999, para. 7.64.

削弱,并容易被一些非法的恶意思想和行为占据上风,从而导致与善意原则相违背的不公正、不合理的结果出现。特别是当“解释和适用之间的边界线变得模糊不清”<sup>24</sup>时,善意原则的具体界定又依赖于其他原则的转化和表达,这就使其发挥的作用受到一定程度的限制。从诸多实践中可知,善意原则属于一种方向性的原则,它引导我们遵守公正、平等、合理、诚实等价值理念。从另一个角度来看,这也意味着善意原则并非永恒不变和完全绝对的,也并非无拘无束,而是有其界限和限制的。在国际法上,“善意只能成为基本原则之一,而不能代替最基本的原则——主权平等。”<sup>25</sup>在国际法体系的发展中,善意原则毕竟只属于其中一部分,不能过分地夸大,也不能完全取代其他也同样属于体系中组成部分的内容。“善意”原则往往是在法律条文出现“不明”或“空隙”的情况下,才会被适用和发挥作用。然而,在很多情况下,善意原则仅仅被视为一种“思想上的重视”,并没有真正地被应用于实践中和发挥其应有的实质性价值,这就造成了现今“理论和实践相疏离”的尴尬局面。

### 三、善意原则的集中体现和具体适用

#### (一) 善意原则在国际法律文件内的集中体现

善意原则作为一项古老的总原则,从罗马法,到西方各国的法律领域,随后又被引入普通法系,最后成为“文明各国所承认的一般法律原则”。不论是在国内还是在国外的法律体系发展进程中,善意原则都起着维护整体法律体系稳定运转的“机器之油”的作用。尤其在“二战”结束后,善意原则在国际法上的地位和发挥的作用愈加明显,随即被载入大量的国际法律文件中。由于篇幅限制,下文仅罗列一些具有代表性和权威性的国际法律文件。1945年《联合国宪章》第2条第2款指明:“各会员国应一秉善意,履行其依本宪章所担负之义务,以保证全体会员国由加入本组织而发生之权益。”根据善意原则的要求,善意履行国际义务是各国共同合作的必要条件,也是今后各缔约国实现合法权益的保证。随后,1969年《维也纳条约法公约》第18条、第26条以及第31条第1款表明了善意原则覆盖条约的缔结、条约的履行和条约的解释等全过程,缔约国在这3个过程中都要遵循善意原则的要求。善意原则在此条约中得到进一步确立。在1970年《关于联合国宪章建立友好关系及合作之国际法原则之宣言》中,明确地强调各国均有义务善

24 Richard K. Gardiner, *Treaty Interpretation*, Oxford: Oxford University Press, 2008, p. 168.

25 罗国强著:《国际法本体论》,北京:法律出版社2008年版,第169页。

意履行按照《联合国宪章》承担的义务。<sup>26</sup> 同样地,在1982年《公约》第157条关于国际海底管理局的第4款也明确指出:“管理局所有成员应善意履行按照本部分承担的义务,以确保其全体作为成员享有的权利和利益。”善意原则在国际贸易条约方面的应用也极为广泛,相应的法律文件也很多。如1980年《联合国国际货物销售合同公约》第7条第1款也表明了在对该公约进行解释时,除了顾及该公约的国际性质和促进其适用的统一外,还要考虑在国际贸易上遵循善意的需要。虽然没有像上述公约那样明确指出善意原则的地位,但也是清晰地揭示了善意原则是条约解释中的必备要素。

一直被视为“海洋法宪章”的《公约》,在其第300条规定:“缔约国应该诚意履行根据本公约承担的义务并应以不致构成滥用权利的方式,行使本公约所承认的权利、管辖权和自由。”该条清晰地指出了禁止缔约国滥用《公约》覆盖范围内的权利,一方面可以看出,禁止权利滥用原则实则是属于善意原则的延伸和派生物,另一方面也反映出善意原则限制了国家行使条约范围内的权利。从上述国际法律文件的内容中不难看出,在条约法中善意履行条约和善意解释条约是紧密联系,相辅相成的。可以说“善意履行条约以善意解释为必要前提条件,因为不善意即扭曲解释条约,必然导致不善意履行条约的结果。”<sup>27</sup> 综上所述,善意原则遍及各种国际法律文件中,备受认可,其要求善意履行国际义务的立场也愈加鲜明和清晰。

## (二) 善意原则在国际(准)司法实践中的适用

在当今的国际法中,诸多的条约都附有“争端解决”条款,当各当事国之间解决不了争端时,可能就会出现引入第三方争端解决机制的情况,善意原则的作用和价值也因此被体现出来。本文侧重讨论善意原则在国际(准)司法实践中的适用情况,以为下文分析菲律宾所提南海仲裁案奠定基础。由于“善意”原则的内涵没有统一和明确的标准,在国际(准)司法实践中势必会考虑《维也纳条约法公约》第31条善意解释的习惯国际法义务。此外,善意原则在大多数情况下都需要借助其他具体原则和规则进行适用和发挥实质性的法律效果,如有效性原则。有效性原则也属于善意原则派生的部分,<sup>28</sup> 冯寿波先生将“有效性原则”的含义理解

26 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, General Assembly (25th Session) Resolution No. 2625 (XXV), U.N.Doc.A/8082, p. 121, at [http://www.unoosa.org/pdf/gares/ARES\\_25\\_2625E.pdf](http://www.unoosa.org/pdf/gares/ARES_25_2625E.pdf), 22 May 2017.

27 李浩培著:《条约法概论》,北京:法律出版社1987年版,第329页。

28 Richard K. Garadiner, *Treaty Interpretation*, Oxford: Oxford University Press, 2008, p. 168.

为“与其无效不如使之有效。”<sup>29</sup> 该原则隐含着缔约方有想要使一个条约的条款有某种效果,而不是绝对地使其毫无意义的意义。正如国际法院在“英伊石油公司案”中,从原则上承认:“解释条约应使约文中的每一个字都有其理由和意义。”<sup>30</sup> 在《维也纳条约法公约》第31条的第一个草案中,国际法委员会已将有效性原则和“善意”以及“目的和宗旨”相联系起来,归入该条约的第31条第1款中。<sup>31</sup> 这表明了条款的有效性需要向条约的目的和宗旨方向发展,这也是善意原则的应有之意。在1994年的“利比亚—乍得案”中,国际法院借助有效性原则来理解条约文本和确认其结果。<sup>32</sup> 随后,有效性原则逐渐地被各种国际争端解决机构认可和适用。如世界贸易组织上诉机构在对1996年“日本酒水案”进行裁决时,指出:“作为源自《维也纳条约法公约》第31条规定的条约解释的一般规则之条约解释的根本准则是有效性原则。”<sup>33</sup> 有效性原则延伸出条约解释者应将条约视为一个整体进行全方位的理解和解释的要求。上诉机构也认为“条约解释者必须以赋予条约所有适用条款以意义的和谐方式来理解之。”<sup>34</sup>

当然除了上述借助有效性原则发挥作用外,善意原则还被适用于各类案件中,发挥关键性的作用。如著名的1974年“核试验案”,国际法院在对此案做出裁决时指明:“善意原则是调整法律义务创设和履行过程的一个基本法律原则。”<sup>35</sup> 可以说善意原则是国际法院做出裁决时必须纳入考虑范围的要素之一。善意原则是举世公认的一般法律原则和国际法的基本原则,规制各国权利的行使,往往被当作解决争端案件的主导性标准。如在1998年“美国龟虾案”中,世贸上诉机构在对1994年《关税与贸易总协定》第20条进行解释和适用时认为:“我们此处的任务是解释该开头语中的语言,以酌情从国际法的诸一般法律原则中探究另外的解释指导。”<sup>36</sup> 这里体现了善意的一般原则性。如前文所述,善意原则规制和促进整个条约的运行,善意履行条约和善意解释条约已成为一项习惯国际法义务。在1997年“加布奇科沃—大毛罗斯工程案”中,国际法院认为:“善意履行条约是有关条约的目的,并且是缔结该条约的当事国的意图,其优先于条约字面含义

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29 冯寿波:《论条约的“善意”解释——〈维也纳条约法公约〉第31.1条“善意”的实证研究》,载于《太平洋学报》2015年第5期,第7页。

30 [英]劳特派特(Hersch Lauterpacht)修订,王铁崖、陈体强译:《奥本海国际法(上卷·第二分册)》,北京:商务印书馆1972年版,第365页。

31 Richard K. Gardiner, *Treaty Interpretation*, Oxford: Oxford University Press, 2008, p. 179.

32 Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, *ICJ Reports 1994*, paras. 27-28.

33 Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 1996, p. 12.

34 Argentina – Safeguard Measures on Imports of Footwear, WT/DS121/AB/R, para. 81.

35 Nuclear Tests (Australia v. France), Judgment, *ICJ Reports 1974*, p. 268.

36 United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998, para. 158.

的适用。”<sup>37</sup>“诚实”、“公正”、“合理”是善意原则的组成部分,时常体现在各类争端解决实践中。如在2000年“智利酒精饮料案”中,上诉机构认为:“无论如何,世界贸易组织成员不应该被假定通过采纳新措施的方式继续以前的保护或歧视。这或许会接近一个不守信用的推定。”<sup>38</sup>与此案相类似的还有2002年“欧盟沙丁鱼贸易描述案”,上诉机构强调“我们必须假定世界贸易组织成员将善意遵守其条约义务,正如《维也纳条约法公约》第26条规定的约定必须遵守原则所要求的那样,每个世贸组织成员必须假定每个成员的善意。”<sup>39</sup>这2个案例充分体现了“诚实”是善意原则要求中的具体表述。自从上诉机构在审理“美国汽油案”中点明,《维也纳条约法公约》第31条中的善意原则是国际条约解释的习惯规则以来,在之后诸多世贸组织的争端解决实践中,“上诉机构、专家组、仲裁员,以及争端方都接受条约善意解释这一原则,并且在具体争端中加以适用。翻开任何一份争端解决报告,在有关协议解释部分,几乎都可以看到‘善意’一词,看到协议善意解释的要求。”<sup>40</sup>

2004年“莱茵河污染仲裁案”进一步巩固了善意原则的习惯国际法规则地位,该案仲裁庭认为:“《维也纳条约法公约》第32条中‘准备工作’和‘缔约情况’均反映了善意的适用。”<sup>41</sup>这表明就算不是缔约国,同样要受到善意原则的拘束。实践表明,即使条约尚未生效,依然不影响善意原则的适用。如在1926年“希腊—土耳其案”中,仲裁庭认为:“对于已签署但尚未生效的条约,缔约方有义务不从事减损条约条款重要性,从而对条约造成损害的任何事情,这是一项法律原则……实际上不过是善意原则的一种表述,而善意原则是所有法律所有条约的基础。”<sup>42</sup>从国际常设法院关于条约解释的实践中可以看出,考虑当事国的真实意图时,要按照条约的目的和宗旨来解释才有可能使争端往“公正”结果的方向发展,这也是善意原则的本意。如国际常设法院在对条约进行解释时,认为:“条约义务应根据缔约方在缔结条约时的共同的真正的意图来履行,即根据条约的精神,而不仅仅是其文字。这是善意原则最重要的方面之一,与条约是缔约双方意思一致的概念

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37 Gabčíkovo – Nagymaros Project (Hungary v. Slovakia), Judgment, *ICJ Reports 1997*, para. 142.

38 Chile – Taxes on Alcoholic Beverages, WT/DS87/AB/R, WT/DS110/AB/R, 13 December 1999, para. 74.

39 European Communities – Trade Description of Sardines, WT/DS231/AB/R, 26 September 2002, para. 278.

40 韩立余:《善意原则在WTO争端解决中的适用》,载于《法学家》2005年第6期,第151页。

41 Geogre Pinton Case, France v. Mexico, 19 October 1928; Richard K. Gardiner, *Treaty Interpretation*, Oxford: Oxford University Press, 2008, pp. 174–175.

42 Oliver Dörr and Kirsten Schmalenbach eds., *Vienna Convention on the Law of Treaties: A Commentary*, New York: Springer Science & Business Media, 2011, p. 224.

是统一的。”<sup>43</sup>

此外,专家组和上诉机构对“美国对日本若干热轧钢产品反倾销案”进行“客观审查”的行为,属于善意原则中“公正”要求的具体表现。善意原则中“合理”的要求,则体现在“美国国民在摩洛哥的权利案”中,国际法院认为海关当局在行使做出估价的权力时应当合理且善意。

综上所述,善意原则在国际(准)司法实践中的适用极其广泛,且深受认可。在国际争端解决实践中,善意原则调整的对象并不仅仅局限于争端当事国,还包括有利害关系的第三方、争端解决机构等主体。善意原则俨然已成为国际法律体系构建和运转的根本性基础,特别是在国际争端解决中,倘若无视善意原则,则争端的解决毫无意义,甚至还会不断侵蚀和破坏各国共同构建的国际法律体系,直至崩溃。

### (三) 善意原则与滥用权利的关系

善意原则在条约法领域的实践较为丰富,因此其自身延伸的具体原则和规则也不少。“条约必须信守”、“平衡利益关系”、“禁止权利滥用”、“禁止反言”以及“合法期待之保护”等法律原则都是从善意原则中派生出来的,并在不同的情形中发挥着独特的法律功效。<sup>44</sup>由于菲律宾所提南海仲裁案中涉及滥用权利行为为明显和突出,因此本文侧重探讨善意原则和滥用权利理论的关联性。

冯寿波先生认为:“权利滥用理论意指禁止国家权利的滥用,并要求只要对权利的主张涉及条约义务,就必须善意地行使权利。因此,成员方对条约权利的滥用,其结果是损害了其他成员方的条约权利,也是对自身条约义务的违反。”<sup>45</sup>也就是说成员国权利的行使需要与义务相匹配,倘若以损害其他成员国利益的恶意方式来行使权利,则违背了善意履行条约的义务,即背离条约的目的和宗旨。从另一层面来看,滥用权利行为的出现一般以有协议为前提。“滥用权利理论”体现了善意原则中“诚信”的要求,即与善意原则有重合范围,但国际法院原则上承认的禁止权利滥用理论只是善意原则在行使权利方面的适用。<sup>46</sup>

实际上,善意原则与权利滥用理论的关联早就存在于西方一些国家的法律体系中,并明确被记载在条文中。如《瑞士民法典》规定:“每个人都必须善意地行

43 Bin CHENG, *General Principle of Law as Applied by International Courts and Tribunals*, London: Stevens and Son, 1953, pp. 114~116.

44 刘敬东著:《WTO 法律制度中的善意原则》,北京:社会科学文献出版社 2009 年版,第 7 页。

45 冯寿波:《论条约的“善意”解释——〈维也纳条约法公约〉第 31.1 条“善意”的实证研究》,载于《太平洋学报》2015 年第 5 期,第 6 页。

46 郑斌(Bin CHENG)著,韩秀丽、蔡从燕译:《国际法院与法庭适用的一般法律原则》,北京:法律出版社 2012 年版,第 125 页。

使权利与履行义务;权利的明显滥用不受法律保护。”<sup>47</sup> 又例如《西班牙民法典》第7条规定:“权利的行使必须要符合善意的原则,法律不支持权利的滥用以及反社会的权利行使。”<sup>48</sup> 该条款直接确认了善意原则与权利的滥用之间存在法律上的关联。不少学者也一致认为禁止权利滥用理论与善意原则的关联性体现在普通法系中。<sup>49</sup> 同样地,在国际法上,善意原则与权利滥用之间的关联也颇受重视。如前文已提及的《公约》第300条指出,善意原则与权利滥用之间存在紧密联系。由于“诚信”原则是善意原则的主要组成部分,那么违背“诚信”原则的行为也必然属于违背善意原则的范围。根据郑斌先生的观点来看,禁止权利滥用理论主要存在4个特征:恶意行使权利、虚假权利行使、权利和义务相互依赖以及滥用自由裁量权,这些其实也是滥用权利的表现形式。<sup>50</sup> 要想判断是否属于违反善意原则的权利滥用的范围,首先就是要确定哪些是属于滥用权利的行为。因此,下文将以上述4个特征为出发点,具体分析善意原则与禁止权利滥用理论之间的关联性。

其一,诸多大陆法系国家的实践证明,恶意行使权利属于禁止权利滥用理论的重要方面。<sup>51</sup> 在1892年海狗仲裁庭程序中,仲裁庭庭长清晰地承认禁止恶意行使权利在国际法上的适用。另外,美国一方自己也主张:“自由只限于无碍和无害,并且不损害任何沿海国正当利益的行使。”<sup>52</sup> 这表明自由是存在界限的,一旦跨越这个界限,则要被法律所规制。正印证了那句古老的法律谚语:“法律不容忍恶意”。<sup>53</sup> 因此,倘若纯粹是为了对另一方造成损害而行使所谓的“权利”,则此种“权利”是被法律所禁止的。<sup>54</sup> 在1926年“德国利益案”中,德国承认:“没有任何权利的行使是不受限制的,并且除了损害他人没有其他重要动机的权利行使则构成

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47 罗刚:《论法律现实主义视角下国际法上的善意原则与程序性权利的滥用——以南海仲裁案为例》,载于孔庆江主编:《国际法评论(第七卷)》,北京:清华大学出版社2016年版,第19页。

48 《西班牙民法典》第7条第1款以及第2款第1句。

49 Michael Byers, *Abuse of Right: An Old Principle, A New Age*, *McGill Law Journal*, Vol. 47, 2002, pp. 389-431.

50 郑斌(Bin CHENG)著,韩秀丽、蔡从燕译:《国际法院与法庭适用的一般法律原则》,北京:法律出版社2012年版,第125-140页。

51 H. C. Gutteridge, *Abuse of Rights*, *Cambridge Law Journal*, Vol. 5, 1933, p. 22.

52 John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, Vol. I, Washington: Government Printing Office, 1898, p. 892.

53 Further Response to the United States of America Counter-claim submitted by the Islamic Republic of Iran, Oil Platforms (Islamic Republic of Iran v. United States of America), 24 September 2001, p. 105, note. 45, at <http://www.icj-cij.org/docket/files/90/8636.pdf>, 23 May 2017.

54 郑斌(Bin CHENG)著,韩秀丽、蔡从燕译:《国际法院与法庭适用的一般法律原则》,北京:法律出版社2012年版,第126页。

权利滥用。”<sup>55</sup> 这表明带有恶意所行使的权利属于权利的滥用，即属于违背善意原则的行为。加之，恶意行使权利已普遍地被国际司法机构和各国在争端解决中所排除和禁止，理应不能得到法律认可和保护。

其二是虚假权利行使。虚假权利行使的前提是为了规避法律和规避条约义务。为了规避理应适用的法律，通过捏造或包装所谓的“事实”，以合法的形式来掩盖非法的目的，进而达到规避法律和履约义务的行为，这种行为明显违背法律的规定，应属非法和无效的行为。1929年“Walter F. Smith 案”中就出现了虚假行使权利的情况。一国为了得到私人财产而不是为了公共利益而实施征收的行为，被认定违背了善意原则，并被裁决为非法的。<sup>56</sup> 在国际法上，善意原则的“诚信”要求各国应以符合条约目的和宗旨为出发点真诚地行使被赋予的每一项权利，而为了规避法律规则或应履行的义务而虚假行使权利的行为，都是不能被法律所容忍的。正如在 1932 年“上萨瓦自由区及节克斯区案”中，由于法国有义务维持边境地区不受关税壁垒的约束，因此国际常设法院在裁决时就认为：“对于权利滥用的情况，必须持保留态度，因为无疑法国不得通过以控制警戒线为掩盖建立关税壁垒来规避维持自由区的义务。”即恶意地去规避应承担的法律义务而行使的权利不应受法律保护。<sup>57</sup>

其三，权利和义务相互依赖。按照郑斌的观点：“当一国承担一项条约义务时，它所享有的权利中与该条约义务直接冲突的部分在冲突的范围内受到限制或抵消。”<sup>58</sup> 可知，当一国承担了某项义务后，其所享有的权利或多或少都会受到一定程度地限制。可以说，善意履行国际义务就是对各国权利的一般限制。在 1910 年“北大西洋海岸渔业仲裁案”中，仲裁庭就指出：

根据要以完全的善意履行条约义务的国际法原则来划分有关界限，所以，排除对条约主体事项任意立法权利，对于这些客体限于与条约相符来限制行使受条约约束的国家主权。<sup>59</sup>

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55 Case concerning Certain German Interests in Polish Upper Silesia (The Merits), Speech of German Agent (Series C-No. 11, Vol. I, pp. 136 et seq.) and German Memorial (pp. 375 et seq.), PCIJ, 1926.

56 Walter Fletcher Smith Claim (Cuba, USA), 1929, *Reports of International Arbitral Awards*, Vol. II, p. 917, at [http://legal.un.org/riaa/cases/vol\\_II/913-918.pdf](http://legal.un.org/riaa/cases/vol_II/913-918.pdf), 25 May 2017

57 Case of the Free Zones of Upper Savoy and the District of Gex, Judgment, Series A/B, No. 46, PCIJ, 1932, p. 16. See also the Court's Order made on 6 December 1930, in the same case, Series A, No. 24, PCIJ, p. 12; Oscar Chinn Case, Judgment, Series A/B, No. 63, PCIJ, 1934, p. 86.

58 郑斌(Bin CHENG)著,韩秀丽、蔡从燕译:《国际法院与法庭适用的一般法律原则》,北京:法律出版社 2012 年版,第 128 页。

59 The North Atlantic Coast Fisheries Case (Great Britain, United States), 7 September 1910, *Reports of International Arbitral Awards*, p. 188, at [http://legal.un.org/riaa/cases/vol\\_XI/167-226.pdf](http://legal.un.org/riaa/cases/vol_XI/167-226.pdf), 24 May 2017.

可知,善意原则促进了各国权利和义务之间相互共存的密切联系。特别是当一方行使权利时,必须遵循善意原则的“诚信”、“合理”要求。只有满足这些要求,才可被视为与义务相符。一旦逾越这些界限,一方故意以损害其他方利益的手段或方式来行使权利,则属于滥用权利的范围,被认为与善意履行条约义务相违背,即违反了条约。因此,善意原则有利于促进权利的行使与义务的精神相一致的方向发展,从而保持各缔约国各自利益之间的合理平衡。此外,1926年“德国利益案”也是反映权利和义务相互依存的典型例子。同年,在“北美疏浚公司案”中,墨西哥—美国总求偿委员会在谈及“世界范围的滥用国家保护权或国家管辖权”时,清楚地声明:

国际法目前的发展阶段对每一个国际法庭施加以庄严义务,即要在国家管辖范围内的主权权利和国家保护其国民的主权权利之间寻求适当和充分的平衡。任何国际法庭都不应或不可以规避查明对这两种权利该有的限制,这种限制将使两种权利符合国家的一般规则和原则。<sup>60</sup>

这里揭示了权利和义务相互共存的理论已经发展和上升为一般法律义务,而不是仅局限于条约中。因此,我们可以认为善意地行使权利意味着各国必须要以符合其各种条约义务或一般法律义务的方式来行使权利,也意味着真正地追求权利所旨在保护的那些利益,不论这些利益是根据条约还是一般国际法取得。<sup>61</sup>

其四,滥用自由裁量权。不论是个人或国家在行使权利时都或多或少享有一定的自由裁量权,因此滥用自由裁量权的现象既可以发生在个人身上,也可以发生在国家之中。当一个主体享有自由裁量权时,必须要善意地行使该权利,即要符合“诚信”、“合理”,逾越这些界限,则可能构成权利的滥用。但是自由裁量权属于意识形态的范围,要确定是否属于滥用自由裁量权,难度是相当大的。在1951年“英挪渔业案”中,国际法院将“合理”、“适度”作为标准,适用于判断挪威在划定基线方面是否存在“明显的滥用自由裁量权”的情况。<sup>62</sup>根据国际司法实践可以看出,即使滥用自由裁量权属于主观方面的判断,极难把握,但这并不意味着判定滥用自由裁量权几乎成为不可能。实际上,如果能够严格审查行使权利者的主观方面,与其客观行为相结合,并且根据个案的具体情况,以及结合以往的国际实践进行综合判断,是否存在恶意损害或明显不合理的行为,则可以判定法律

60 North American Dredging Company of Texas (U.S.A. v. United Mexican States), 31 March 1926, *Reports of International Arbitral Awards*, p. 27, at [http://legal.un.org/riaa/cases/vol\\_IV/26-35.pdf](http://legal.un.org/riaa/cases/vol_IV/26-35.pdf), 24 May 2017.

61 郑斌(Bin CHENG)著,韩秀丽、蔡从燕译:《国际法院与法庭适用的一般法律原则》,北京:法律出版社2012年版,第135~136页。

62 Fisheries Case (United Kingdom v. Norway), *ICJ Reports 1951*, pp. 141~142.

所规制或排除的滥用权利是否存在。但是,确定是否存在滥用自由裁量权行为,依然成为诸多国际司法实务中的困扰因素和艰巨任务,加之“权利滥用是不能推定的”限制,<sup>63</sup>在控制滥用自由裁量权方面尤其困难。在国际法院发表的第一份咨询意见案中就充分体现了这一点。无论是根据《联合国宪章》第4条第1款内容的具体规定,还是受《联合国宪章》基本宗旨和原则的广泛约束,法官们都赞成投票权所固有的自由裁量权必须要予以善意行使。<sup>64</sup>实践表明,对于任何法律体系,善意地行使权利所固有的自由裁量权是不可或缺的。诚然,善意原则与禁止权利滥用理论之间的联系极其紧密,善意原则协调和平衡不同利益的相互冲突,确保权利在“诚实”、“合理”、“公正”范围内行使,防止权利滥用的出现,从而促进和保障整个法律体系能够正常和平稳地运转。

#### 四、菲律宾所提起南海仲裁案中 违背善意原则的具体表征

《公约》被誉为“海洋法宪章”,其地位举足轻重,但其自身也存在诸多局限性。《公约》的诸多条款内容不清晰,模糊性强,缺乏规制滥诉的制度,在国际海洋争端解决中,这些不足极易给那些心存非法意图的主体滥用权利留下空隙,进而为他们的非法目的所服务。而善意原则作为一般的法律原则,不仅能够弥补《公约》的不足,还能引导争端解决向《公约》的精神和宗旨的方向进行发展,进而确保实现争端解决的合理性和公正性。由此可知,善意原则是《公约》解释和适用的基础性方面,行使权利者必须要受善意原则的调整和拘束。

在菲律宾所提南海仲裁案中,从被提起、受理、审理到最终裁决的做出,整个过程都充满违背善意原则的滥用权利行为,不管是菲律宾还是仲裁庭。菲律宾以损害中国南海主权为目的恶意地对《公约》所赋予的权利进行滥用,为了达到其非法目的,玩弄文字游戏,为自己非法意图对《公约》的条款进行片面地解释,捏造所谓的“事实”争端,无视《公约》的目的和宗旨,践踏国际法的秩序和尊严,将《公约》作为其实现非法目的的“国际法工具”。而作为争端解决机制中的裁决者,仲裁庭理应审慎地行使手中神圣的“自由裁量权”,向《公约》的精神、目的和宗旨所要求的方向和平解决争端。然而,仲裁庭不仅有意规避其职责和义务,还变本

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63 Case concerning Certain German Interests in Polish Upper Silesia (The Merits), Judgment, Series A, No. 7, PCIJ, 1926, p. 30; Case of the Free Zones of Upper Savoy and the District of Gex (Second Phase), Order, Series A, No. 24, PCIJ, 1930, p. 12; Case of the Free Zones of Upper Savoy and the District of Gex, Judgment, Series A/B, No. 46, PCIJ, 1932, p. 167.

64 Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, *ICJ Reports 1948*, pp. 63, 71, 79 et seq., 91, 92, 93, 103, 115.

加厉地利用《公约》争端解决机制中所赋予的自由裁量权,有默契地配合和帮衬菲律宾的恶意行为,亵渎国际法,将争端的解决推向恶性的边缘。菲律宾和仲裁庭这种共同配合,使用非法“包装”诉求的手法和“技术性”解释的行为明显属于善意原则中的权利滥用,其造成的结果(仲裁的最终裁决)就是对《公约》的实质性违反,欠缺合理性和公正性,理应归于非法和无效的范畴。本部分将从程序性和实体性两个方面,对南海仲裁案中菲律宾和仲裁庭的权利滥用行为进行具体剖析,以论证我国的合法性立场。

### (一) 程序性方面

程序正义起源于西方法律文化和制度,在西方的司法实践中较为丰富,与实体正义相对,并被誉为“看得见的正义”。在国际争端解决机制中,程序的合法性和正当性是实体性正义的决定性因素,一旦程序性方面存在缺陷和不足,势必会影响到个案的正义。由此可见,程序正义受实体正义的引导和制约,实体正义的实现又有赖于程序正义的保障,两者是紧密联系、对立统一的辩证关系。正义是善意原则的直接来源,善意原则是一般的国际法原则,国际司法机构的运行都受其调整,不论是在程序性方面还是实体性方面。善意原则属于国际法中程序性方面的一部分制度基础。有人将善意原则在程序性方面的具体延伸,称之为“程序性善意”。<sup>65</sup>程序性善意早在罗马法时代“善意占有之诉”中就已显现出来并被适用,裁决者依其授权和要求在程序上对行为的伦理方面进行考察,确定是否存在善意,以助于做出一个公正的裁决。<sup>66</sup>随后,“程序性善意”被国际争端解决机构适用并认可,如“程序性善意”被WTO确立并明文写入《争端解决谅解》中。<sup>67</sup>诉诸程序的“成效性”<sup>68</sup>、“善意地诉诸争端解决程序”<sup>69</sup>以及“善意地进入磋商”<sup>70</sup>等都是其具体表现。由此可知,程序性善意指为了真诚和友好地解决争端,在遵循条约的目的和宗旨的前提下,利用争端解决机制的灵活性,促使争端朝着正当

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65 罗刚:《论法律现实主义视角下国际法上的善意原则与程序性权利的滥用——以南海仲裁案为例》,载于孔庆江主编:《国际法评论(第七卷)》,北京:清华大学出版社2016年版,第19页。

66 Heinrich Honsell, *Römisches Recht*, 7th edition, Berlin/Heidelberg: Springer, 2010, pp. 84-86.

67 Marion Panizzon, Fairness, Promptness and Effectiveness: How the Openness of Good Faith Limits the Flexibility of the DSU, *Nordic Journal of International Law*, Vol. 77, No. 3, 2008, pp. 275-300.

68 WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 3(7).

69 WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 3(10).

70 WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 4(3).

和公正的方向发展。在菲律宾所提南海仲裁案中，菲律宾和仲裁庭的权利滥用正是基于对程序性善意的违背，进而导致缺乏“正当性”和“公正性”结果的出现。

在菲律宾所提南海仲裁案中，程序性方面最突出的问题就是仲裁庭是否存在管辖权，这个问题事关菲律宾所提强制性仲裁的合法性基础。菲律宾通过援引《公约》第十五部分第二节争端解决方式中的附件七仲裁，单方向中国提起强制性仲裁程序。一般来说，要启动附件七的强制性仲裁最起码要符合“先决性条件”（如《公约》第300条中的善意履行条约义务并不得滥用权利）、“前置性条件”（《公约》第283条中的交换意见的义务）以及“限制性条件”（不受《公约》第298条“排除性声明”的限制）等门槛性要件。然而，菲律宾却恶意地规避《公约》中的义务，采取“碎片化”的切割、转换等方式包装其仲裁诉求。仲裁庭则一开始就基于大胆假设，对《公约》中的条款进行类推，自己设定各种违背《公约》精神的标准，偷换概念，减少或故意不履行论证职责，滥用自由裁量权，为菲律宾不符合提起强制性仲裁程序的门槛性条件开设各种“通道”，试图合力将中国“抓进”仲裁程序中。这一切皆源自违背善意原则的权利滥用行为，下面我们将检视菲律宾和仲裁庭的主要违法行为。

### 1. 菲律宾滥用权利的行为极其明显和恶劣

权利的滥用是一个极其难处理的法律问题，因为它需要紧密结合合法的伦理层面进行判断和确定，而伦理问题又具有明显的模糊性，实务中极难把握。鉴于此，国际条约和一些国家的国内法在伦理方面都设定了法律条款，以防止权利行使者因道德问题而影响到正义的实现。善意原则存在的价值，恰恰是为了处理这种法律伦理问题。《德国民法典》第242条、《法国民法典》第1134条第3款、《联合国宪章》第2条第2款、《维也纳条约法公约》第31条第1款以及《公约》第300条都包含规制伦理问题的规定，这都是善意原则的体现。可知，善意原则是处理伦理问题的一般法律原则。菲律宾行为的恶意性和违法性是建立在未遵守诸如《公约》第300条善意履行国际义务和禁止权利滥用的法律伦理规范前提下，无视抑或是有意违背国际法上的善意原则，这从根本上动摇和破坏了二战后国际法秩序的稳定。

第一，菲律宾违反“先决性条件”，规避《公约》第300条善意履行国际义务及禁止权利滥用的明确规定，实则违背善意原则，构成对《公约》的违反。所谓“先决性条件”（主要涉及《公约》第300条），是指缔约方在行使权利时，应善意履行国际义务并不得出现滥用权利的行为，其实这种要求就是善意原则的具体表述。

《维也纳条约法公约》第26条的规定同样也是表达此种目的。国际法院在审理1997年“盖巴契科夫—拉基马洛水塔工程案”中，就指出“每个生效的条约对缔约方都有拘束力，并且必须要被善意履行”、“善意原则要求当事方以合理以及可

以实现其目的的方式运用条约”。<sup>71</sup> 缔约方在适用条约解决争端时,应结合条约的目的和缔约方在缔约时达成的共识,合理和善意地履行条约的义务。然而,菲律宾为了达到损害我国领土主权的目,不仅违背当初承认与中国有领土争端的声明,还采用欺骗性的手段,首先,将其领土主权主张切割成碎片,然后重新包装出15项仲裁诉求,使其表面看起来与领土主权争端不相关;然后,假意地承认与我国存在领土主权争端,以便为其所主张的岛礁建立法律上的利益;最后,又故意地向仲裁庭强调不要裁决领土主权问题。<sup>72</sup> 通过这类加工和包装,菲律宾使其提出的15项仲裁诉求符合《公约》中“争端”的要求,进而突破“先决性条件”的法律障碍,掩盖其非法意图。按照国际常设法院的解释,争端是指两方之间在事实或法律方面的分歧以及法律利益与观点上的冲突。<sup>73</sup> 菲律宾与我国在南海上存在领土主权的争端,这是众所周知的,而我国于2006年根据《公约》第298条做出了排除性的保留声明。菲律宾为了避开我国根据《公约》作出的“排除性声明”,恶意地捏造“虚拟性”争端,规避领土主权争端的事实真相,滥用《公约》赋予缔约国的权利,进而达到损害我国权益的目的。很明显,菲律宾提起单方强制性仲裁程序并不是真诚地想解决争端,而是想借助《公约》这个“海洋法宪章”,为其非法意图提供表面上的“合法”依据,以至于能够大张旗鼓地损害我国的海洋权益。

第二,菲律宾表面上假意地符合“前置性条件”(《公约》第280条、第281条以及第283条),实则违背了善意原则及其派生的“禁止反言原则”、“诚信原则”,同样构成对《公约》的违反。《公约》第280条强调了当事国之间存在的条约可以阻止强制性仲裁程序的启动,第281条也强调“只有诉诸这种方法仍未得到解决……才适用本部分规定的程序”,这也是在表达协议的存在制约程序的提起。而第283条则强调了提前进行意见交换的义务。禁止反言原则是善意原则派生出来的,意指不允许一方当事国通过违背先前所做的允诺行为而损害另一方当事国的权益,旨在维护国际关系中行为的一致性。<sup>74</sup> 不过,由于其在普通法系和大陆法系中均存在丰富的制度基础并被国际司法实践重用和认可,其效力不仅仅局限于国际关系中的道德因素,还制约权利的行使和义务的履行。

基于南海问题的复杂性,东盟各国和中国共同制定和签署了《南海各方行为宣言》(以下简称“《宣言》”),<sup>75</sup> 旨在通过协议的方式解决南海问题。本案中要判

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71 Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, *ICJ Reports 1997*, pp. 78-79.

72 Memorial of the Philippines (The Republic of the Philippines v. The People's Republic of China), 30 March 2014, para. 1.16. [hereinafter “Memorial”]

73 The Mavrommatis Palestine Concessions, Judgment, Series A, No. 2, PCIJ, 1924, p. 11.

74 罗刚:《国际法的真相和中菲南海仲裁案的硬伤》,下载于 <http://www.aisixiang.com/data/100801.html>, 2017年3月27日。

75 下载于 [http://asean.org/?static\\_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-3&category\\_id=32](http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-3&category_id=32), 2017年5月13日。

断菲律宾是否违反了“前置性条件”，则需要论证《宣言》是否属于前2个条款中所指的“协议”。菲律宾在其诉状中声称《宣言》的前言只出现了“声明”并没有使用“协议”一词，《宣言》中出现的“承诺”并不具有强制意义的“同意”，此外，菲律宾还声称，根据《宣言》的签订背景，也可以认为中国与东盟成员国家并没有表示《宣言》有法律上的约束力，只是各国相互妥协下做出的不具有拘束力的政治性文件。<sup>76</sup> 菲律宾的观点过于武断和片面，只是简单地凭借文字用语就直接否定和扭曲签署《宣言》的所有国家的共同意图。正如《维也纳条约法公约》第2条第1款所指出的：“条约者，为国家所缔结而以国际法为准之国际书面协议，不论其载于一项单独文书或两项以上相互有关之文书内，亦不论其特定名称如何。”<sup>77</sup> 鉴于此，无论国际文件使用何种名称，如条约、声明、宣言、临时协定、备忘录等用词，只要签署、批准、接受或赞同文件的当事方存在创设权利和义务的意图，则其在国际法上的效力就是相同的。<sup>78</sup> 可见，《宣言》是否具有约束力不能简单地只以文件之名来确定，而是取决于中国和东盟各国在签署时是否有创设权利和义务的意图。此外，在《牛津高阶英语词典》等权威词典中，“undertake”一词的文义解释都有“to agree”的内涵。加之“undertake”还曾被1907年《海牙和平解决国际争端公约》适用并反复多次出现在此公约的第23条、第41条、第43条以及第75条等原文中，可知“undertake”在该公约中具有法律约束力的表示。<sup>79</sup> 在2002年共同签署《宣言》时，菲律宾已“承诺”通过“友好磋商和协商的方式”解决南海问题，并且各签署国都在通过此方式致力于落实《宣言》、《宣言》之后的行动指南、制定南海海洋合作计划等，这些都表示签署当事国有创设权利和义务的意图。当然，不可避免地会面临一些无法达成结果的窘境，但并不能因此一刀切地认为《宣言》是不具有约束力的政治文件，因为《宣言》的签署国从未停止过通过他们“承诺”的方式解决南海争端的具体问题。而且菲律宾持续地参与制定《宣言》的各种后续行动、方针和计划并启动项目，其实证明了菲律宾也愿意通过“承诺”的方式接受相应的拘束。由此可知，《宣言》是中国与东盟各国一致同意签署的兼具政治和法律性质的国际文件，属于《公约》第280条和第281条中的一种“协议”，可以排除强制性仲裁程序的启动。<sup>80</sup> 此外，菲律宾在其第11项仲裁诉求中，认为中国在黄岩岛

76 Memorial, para. 7.55.

77 《维也纳条约法公约》，下载于 [http://www.fmprc.gov.cn/mfa\\_chn/ziliao\\_611306/tyti\\_611313/t83909.shtml](http://www.fmprc.gov.cn/mfa_chn/ziliao_611306/tyti_611313/t83909.shtml)，2017年4月2日。

78 Thomas Buergenthal and Sean D. Murphy, *Public International Law*, 3rd edition, Eagan: West Group, 2002, pp. 102~103; Robert Jennings and Arthur Watts eds., *Oppenheim's International Law, Volume 1 (Peace)*, 9th edition, London/New York: Addison Wesley Longman Inc., 1996, pp. 1208~1209.

79 1907 Convention for the Pacific Settlement of International Disputes, Articles 23, 41, 43, 75.

80 宋燕辉：《由〈南海各方行为宣言〉论“菲律宾诉中国案”仲裁法庭之管辖权问题》，载于《国际法研究》2014年第2期，第31页。

和仁爱礁没有尽到《公约》中保护海洋环境的义务,但事实上,菲律宾从未就海洋环境问题依据《公约》善意地履行交换意见的义务,<sup>81</sup>也没有有效地履行用尽当地救济的义务。<sup>82</sup> 菲律宾主张其已履行交换意见和用尽当地救济的义务,但是依然持续参加中国与东盟各国共同举办的有关南海问题解决的会议,会议中,菲律宾也并没有发表过异议或做出相关的保留。因此,菲律宾的立场与其国际实践不一致,是为了掩盖“争端正处于多边框架下进行有效但没有随即见效的协商”的事实真相,是违反善意原则下“禁止反言原则”及“诚信原则”的表现。

第三,菲律宾单方提起强制性仲裁程序的行为不符合《公约》第十五部分第三节的“限制性条件”。菲律宾所提的事项本质上属于领土主权和海域划界问题,领土主权问题不属于《公约》的调整范围,而海域划界问题则属于我国在2006年做出的排除性声明的范畴。菲律宾若是想顺利地提起该仲裁程序,除了要受《公约》第280条和第281条等前置性条件的限制,还要符合《公约》第298条的“限制性条件”。为了规避我国在2006年的排除性声明和表面应付《公约》的“限制性条件”,菲律宾不惜一切代价切割自己领土主权的完整性,然后运用文字技巧将自己的领土主权包装成单个海洋地物的权源问题,以至于能够与划界争端属于排除性声明事项划清界限。《公约》序言明确指出:“意识到各海洋区域的种种问题都是彼此密切相关的,有必要作为一个整体来加以考虑。”<sup>83</sup> 这表明菲律宾破坏争端完整性的做法违背了《公约》的精神。此外,菲律宾并没有善意地解释《公约》第298(1)(a)(i)条的真实含义,而是恶意地规避海洋划界问题,通过“权利自残”<sup>84</sup>的方式切割其领土主权的完整性,以达到将我国在南海的领土主权碎片化和限制我国海洋权益主张的目的。在其15项仲裁诉求中,菲律宾主张黄岩岛、赤瓜礁、华阳礁和永暑礁都不能产生专属经济区或大陆架,美济礁、仁爱礁、渚碧礁、南薰礁以及西门礁(包括东门礁)都不能产生领海、专属经济区或大陆架,这些被主张限制权利的海洋地物,实际上都处于我国的实际控制范围内。其实,菲律宾很早以前就在各种国际场合和文件中承认其对这些海洋地物存在领土主权,如菲律宾在2011年4月5日编号为000228的外交照会中就认为其对“卡拉延群岛中的地物享有主权及管辖权”。<sup>85</sup> 此外,菲律宾国内的最高法院在审理 *Magallona v. Ermita* 案中曾表示菲律宾国会将卡拉延群岛定性为菲律宾共和国的岛屿制度,菲律宾拥

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81 UNCLOS, Article 283(1).

82 UNCLOS, Article 295.

83 UNCLOS, Preamble, para. 3.

84 罗刚:《论法律现实主义视角下国际法上的善意原则与程序性权利的滥用——以南海仲裁案为例》,载于孔庆江主编:《国际法评论(第七卷)》,北京:清华大学出版社2016年版,第24页。

85 The Philippines, Communication dated 5 April 2011, at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/phl\\_re\\_chn\\_2011.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/phl_re_chn_2011.pdf), 16 February 2016.

有其中地物的领土主权，这是符合菲律宾宪法规定的。<sup>86</sup> 为了能够成功地启动强制性仲裁程序，菲律宾做出与其自身国家实践相矛盾的行为，规避《公约》第 298 条的限制条件，明显违反了善意原则衍生出来的“禁止反言原则”及“诚信原则”。菲律宾使用障眼法，形式上通过和平的法律途径来解决争端，实质上是想借助《公约》的争端解决机制或程序来损害中国的海洋权益，其行为的恶性性极其明显，实际上是滥用权利的一种表现，已经严重背离了《公约》的目的和宗旨。

## 2. 仲裁庭违背善意原则，通过滥用管辖权来进行“司法造法”

在菲律宾单方提起的南海仲裁案中，仲裁庭是否存在管辖权一直是争议最大的问题。要确定仲裁庭是否存在管辖权，先要清楚什么是管辖权、由谁来确定管辖权、行使管辖权时要受哪些因素的制约、以及超越管辖权的裁决有何效果等等。也就是说，我们需要先对管辖权的基础性理论进行了解，才能更好地分析仲裁庭在中菲南海仲裁案中的管辖权问题。管辖权在国内和国际上都有深厚的司法基础，且在司法实践中被普遍适用。根据 1923 年成立的美国—墨西哥求偿委员会的观点，管辖权是一项法庭根据创设该法庭的法律，或规定其管辖权的其他法律审判案件的权力。<sup>87</sup> 可知，管辖权来源于法律的创设，有权必有责，享有者在享有管辖权的同时也要承担相应的责任，并为创设该管辖权的法律所服务。同时也表示管辖权的享有者在行使时存在一定的界限，享有者要在规定的界限内行使，不能越权行使。因此，法院不能对其无管辖权的案件中的事实进行审理并做出裁判，这是源自“一切司法制度皆有的共同理念”，即在无管辖权的情况下做出的裁决可能会被视为无拘束力或无效，国际法庭都认为管辖权是一个根本性的问题。<sup>88</sup> 如 1831 年美加之间的“东北边界仲裁案”、<sup>89</sup> 1910 年“奥里诺科轮船公司仲裁案”<sup>90</sup> 等案件都印证了这一点。

上述案例表明，未获得授权（即缺乏管辖权），以及无视仲裁庭的章程而就提

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86 高圣惕：《论南海仲裁案裁决在管辖权及可受理性问题上的事实与法律谬误》，载于《边界与海洋研究》2017 年第 1 期，第 18 页。

87 Genie Lantman Eltom (U.S.A.) v. United Mexican States, 13 May 1929, *Reports of International Arbitral Awards*, p. 533, at [http://legal.un.org/riaa/cases/vol\\_IV/529-534.pdf](http://legal.un.org/riaa/cases/vol_IV/529-534.pdf), 24 May 2017; Salem Case (Egypt, USA), 8 June 1932, *Reports of International Arbitral Awards*, p. 1205, at [http://legal.un.org/docs/?path=../riaa/cases/vol\\_II/1161-1237.pdf&lang=O](http://legal.un.org/docs/?path=../riaa/cases/vol_II/1161-1237.pdf&lang=O), 24 May 2017; Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Dissenting Opinion by Judge *ad hoc* Daxner, *ICJ Reports 1948*, p. 39.

88 Mavronmmatis Palestine Concessions, Dissenting Opinion by M. Moore, Series A, No. 2, PCIJ, 1924, pp. 57-60.

89 John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, Vol. 1, Washington: Government Printing Office, 1898, pp. 85-161.

90 James Brown Scott ed., *The Hague Court Reports*, 1st Series, Oxford: Oxford University Press, 1916, pp. 505-506.

起仲裁的目的或适用的法律原则(即超越职权)所做出的裁决,都是无效的。<sup>91</sup>换句话说,仲裁庭必须依照创设其权利和义务的协议所组成,且不得做出违背协议目的和宗旨的行为,特别是不得违背协议中有关适用的法律或法律原则的强制性规定来做出裁决,否则将会导致无效的可能性。在管辖权问题上,国际常设法院认为:“本法院管辖权取决于当事方的意愿。”<sup>92</sup>可见,有利害关系的当事方是管辖权确立和行使的重要因素。正如国际法院在1923年的“东加利里亚案”中所指出的那样,“国际法中久已确立的做法是,未经其同意,不得强迫任何国家把其与其他国家间发生的争端提交调解或仲裁,或其他任何种类的和平解决方法。”<sup>93</sup>换言之,当事国的同意赋予了法院以管辖权。国际法院在1948年“科孚海峡案”中也赞成了这一观点。<sup>94</sup>在确立管辖权范围的权力方面,国际常设法院在第16号咨询意见中认为:“一般来说,任何拥有管辖权的机构都有权首先自行确定其管辖权范围。”<sup>95</sup>由于管辖权自身具有司法性质,因此是构成司法判决正当性的来源。<sup>96</sup>由此,在确定自身管辖权范围时,法庭应该限制性地解释其权力。这一看法体现在众多国际案例中,例如,国际常设法院在1932年“上萨瓦自由区及节克斯区案”中指出:“法院并没有质疑法国政府所援引的规则,像赋予法院管辖权的每一条款一样,任何特别协定都必须严格地加以解释。”<sup>97</sup>“但不能以严格解释为幌子,适用该规则解释该特别协定,由此法院不仅不能彻底地阐述真正的诉争问题,并且其将危害到对这一诉争问题的解答。”<sup>98</sup>1919年的“希腊—保加利亚案”和1927年的“霍茹夫工厂案案”也都承认这一观点。

根据上述论述可知,国际司法实践大多数都赞成采取严格解释来限制管辖权的行使,避免出现因超越管辖权而导致受案结果的不公或无效的现象。但是,由于管辖权的确立和行使具有一定的自由裁量权的性质,易受主观因素的影响,并

91 郑斌(Bin CHENG)著,韩秀丽、蔡从燕译:《国际法院与法庭适用的一般法律原则》,北京:法律出版社2012年版,第267页。

92 Rights of Minorities in Upper Silesia (Minority Schools), Judgment, Series A, No. 15, PCIJ, 1928, p. 22; Anglo-Iranian Oil Co. Case (Jurisdiction), Judgment of 22 July 1952, ICJ Reports 1952, p. 103.

93 Status of Eastern Carelia, Advisory Opinion, Series B, No. 5, PCIJ, 1923, p. 27.

94 Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment on Preliminary Objection, ICJ Reports 1948, pp. 27~28.

95 Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, Series B, No. 16, PCIJ, 1928, p. 20; Zeltweg-Wolfsberg and Unterdrauburg-Woellan Railways Case (Preliminary Objection), 1934, Reports of International Arbitral Awards, Vol. III, p. 1803, at [http://legal.un.org/docs/?path=../riaa/cases/vol\\_III/1795-1815.pdf&lang=O](http://legal.un.org/docs/?path=../riaa/cases/vol_III/1795-1815.pdf&lang=O), 25 May 2017.

96 张华:《国际海洋争端解决中的“不应诉”问题》,载于《太平洋学报》2014年第12期,第8页。

97 Case of the Free Zones of Upper Savoy and the District of Gex, Judgment, Series A/B, No. 46, PCIJ, 1932, pp. 138~139.

98 Case of the Free Zones of Upper Savoy and the District of Gex, Judgment, Series A/B, No. 46, PCIJ, 1932, p. 139.

存在一定的道德风险。倘若管辖权被恶意地行使和滥用,那么做出的相应裁决也会欠缺正当性和公正性。在国际司法实践中,存在不少滥用管辖权的例子。如毛里求斯诉英国的“查戈斯群岛海洋保护区仲裁案”和由次区域渔业委员会提交给国际海洋法法庭的“专属经济区非法捕鱼的船旗国责任问题咨询意见案”中,都展现了当前国际争端解决机构在“权力自限”和“权力扩张”之间的博弈。国际司法或仲裁机构在国际争端解决中行使其管辖权时,不应违背各成员国组建该机构的目的,随意地扩张或滥用其权力,这不仅有损“司法公信力”,还会破坏既有秩序的稳定。相反,在行使职权时,特别是管辖权时,他们理应比一般的国际机构要承担更多的“谨慎义务”,即司法节制原则。<sup>99</sup>在仅靠“司法节制”原则不足以防止管辖权的滥用,还必须依靠其他法律规则或原则的共同约束,特别是作为“各文明国家所承认的一般法律原则”,即善意原则。因此,国际争端解决机构在行使管辖权的过程中也要遵循善意原则。然而,在菲律宾所提南海仲裁中,仲裁庭并没有遵循司法节制原则和善意原则,而是绝对地扩大自身的权力,任意地进行法律解释,偏离了各国缔结《公约》的共同目的,并最终做出了有失公正性的裁决。

其一,仲裁庭在没有进行善意性审查的情况下就随意作出裁决,例如,其仅引用个别化的意见就直接认定菲律宾遵循了《公约》第300条。我国坚持认为,菲律宾单方提起强制仲裁的行为属于非法滥用程序权利的行为。因此,菲律宾是否善意履行义务和是否有滥用权利的行为是本案的主要争议点,同时也是菲律宾成功提起仲裁程序的“先决性条件”之一和法律基础。在这种极具争议的情况下,作为裁决者,仲裁庭理应秉持更加谨慎的态度善意地处理这个问题。然而,仲裁庭却有意地避重就轻,漠视审查菲律宾滥用仲裁程序的问题,只是简单地引用2006年“巴巴多斯诉特立尼达和多巴哥案”<sup>100</sup>直接就认定菲律宾单方提起的仲裁行为符合《公约》第300条的规定,不存在权利滥用的行为。这种武断的认定违反了《国际法院规约》第38条的规定,个别化的意见并不能成为国际法规则。司法机构应善意地遵循“以事实为依据,以法律为准绳”,结合具体案情来裁决。而在中菲仲裁案中,仲裁庭并没有客观审查案件的事实,也没有相应的法律适用过程。而只是单独地援引一个孤案,在《管辖权及可受理性裁决》中仅用不到2页纸的篇幅,就对菲律宾提起仲裁的行为是否构成权利滥用进行认定。<sup>101</sup>这种裁决欠缺事实基础和法律依据,明显不符合善意原则“合理性”和“合法性”的要求。

其二,仲裁庭违背《公约》的精神,对《公约》第281条恶意地进行严格解释。

99 叶强:《从“两案”看我国周边海洋权益斗争面临的国际司法干预挑战》,载于《世界知识》2015年第10期,第25~27页。

100 The Republic of the Philippines v. The People's Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 126.

101 罗刚:《论法律现实主义视角下国际法上的善意原则与程序性权利的滥用——以南海仲裁案为例》,载于孔庆江主编:《国际法评论(第七卷)》,北京:清华大学出版社2016年版,第21页。

在国际法上,国际争端解决程序的启动大多是以双方当事国同意为前提。国际法院在上述的“东加利里亚案”中强调了这一事实,其在“和平条约解释案”中再次申明:“争端当事国的同意是法院在诉讼案件中行使管辖权的基础”。<sup>102</sup>《公约》的争端解决机制中虽然包含了自愿性程序和强制性程序2种选择,但是,《公约》在争端解决机制的选择方面依然遵循“以双方当事国同意为前提”的国际法共识。以自愿为先,强制为后,放宽法律解释的标准是《公约》设置争端解决机制的基本精神。<sup>103</sup>因此,在中菲南海仲裁案中,《宣言》是否属于《公约》第281条的“协议”是菲律宾提起仲裁程序的“前置性条件”。《公约》第281条并没有对“协议”的性质进行明确的规定,更没有具体指明和要求该“协议”必须具有法律约束力。在这种情况下,条约解释者应依据《维也纳条约法公约》第31条第1条的规定,进行善意解释。具有司法职能性质的仲裁机构,更要注意遵守司法节制原则。而仲裁庭为了扩大其职权的范围,认为“法无明文规定即自由”,进而将《公约》第281条的“协议”解释为“必须是具有法律约束力”的那种“协议”,这种严格和苛刻的解释方式不仅漠视和违反了条约解释中的善意原则,还严重背离了《公约》在争端解决机制中自由选择的精神。<sup>104</sup>

其三,仲裁庭为了确立其管辖权,违背《公约》的目的和宗旨,对《公约》第298条中“争端”的性质进行整体性解释。根据《公约》第288条以及《公约》附件七的规定,仲裁庭的管辖权范围仅限于“有关本《公约》的解释或适用的任何争端”。我国在2006年做出的保留事项是否属于《公约》第298条排除性声明的“争端”,即“该争端”的性质及其界定会影响到仲裁庭管辖权的确立,一旦“争端”被排除在《公约》适用及解释的范围外,那么仲裁庭将无权管辖该“争端”。因此,仲裁庭要处理的问题有2个,一个是确定争端的性质,另一个是确定该争端是否涉及《公约》的解释或适用。<sup>105</sup>争端性质的确定是本案的关键点和转折点。在国际法上,普遍认为争端是指双方之间法律或事实认识的不同,或是法律观点或利益的冲突。<sup>106</sup>正如罗伯特·詹宁斯所言:“在技术和实践意义上,一个‘法律争端’

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102 Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, *ICJ Reports 1950*, p. 71; Nottebohm Case (Preliminary Objection), Judgment of 18 November 1953, *ICJ Reports 1953*, p. 122; Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question), Judgment of 15 June 1954, *ICJ Reports 1954*, p. 32; Phosphates in Morocco, Judgment, Series A/B, No. 74, PCIJ, 1938, p. 24.

103 罗刚:《国际法的真相和中菲南海仲裁案的硬伤》,下载于 <http://www.aisixiang.com/data/100801.html>, 2017年3月27日。

104 罗刚:《国际法的真相和中菲南海仲裁案的硬伤》,下载于 <http://www.aisixiang.com/data/100801.html>, 2017年3月27日。

105 张祖兴:《评南海仲裁案仲裁庭对历史性权利相关问题的处理》,载于《东南亚研究》2016年第6期,第47页。

106 The Mavrommatis Palestine Concessions, Judgment (Objection to the Jurisdiction of the Court), Series A, No. 2, PCIJ, 1924, p. 11.

就是被加工、还原为一个适合法院判决的形式，即一系列特定的待决定的问题。”<sup>107</sup>在对争端的性质进行界定时，“法院或仲裁庭应‘不仅’要考虑主张及最后诉求的陈述，还应关注‘外交换文、公开声明及其他相关证据’，以及诉讼启动前后当事国的行为。”<sup>108</sup>在本案中，仲裁庭认为：

当一方拒绝明确地反对一项主张，或拒绝对提交给强制仲裁的事项采取立场的时候，仲裁庭有权考虑当事方的行为或者，在需要做出回应的情况下保持沉默的事实，并做出合理的推断。此外，必须客观地评价争端是否存在。仲裁庭有义务不允许对当事方间的通信或当事国立场表述的刻意含糊做出过于技术性的评估，以免其妨害通过仲裁对真正争端的解决。<sup>109</sup>

仲裁庭提出的以上标准不无道理。但是，仲裁庭在适用这些标准时，凡是有妨碍管辖权确立和行使的，大多被排除在外，不但有意地规避和减少自己的论证义务，还刻意地扭曲我国的立场和声明。在事实不清，证据不足的情况下，就直接对菲律宾所提的“争端”的性质做出既不涉及领土主权，也不属于海洋划界问题的不适当论断。<sup>110</sup>实际上，仲裁庭采用的解释手法与菲律宾的基本一致，都是通过破坏争端的“整体性”，将其分割成一个个小争端，然后在适用技术性的解释手法和论证方式，凡是质疑管辖权确立和行使的法律障碍，统统被排除在外，特别是中国在2006年时依据《公约》第298条做出的排除性声明。其实，双方当事国都已承认该争端本质上是领土主权和海洋划界问题，这在两国的外交声明和文件中都有体现，同时这在国际社会上也是众所周知的。而仲裁庭为了确立和维护其管辖权，选择漠视了这一事实。

其四，仲裁庭没有善意地履行其《公约》附件七第9条中的一般性查明义务。

《公约》附件七第9条表明，在一方不出庭时，不妨碍程序的进行，但要仲裁庭承担一定的责任，即“不但要查明对该争端确有管辖权，而且查明所提要求在事实上和法律上均确有根据”，这是仲裁庭应承担的一般性查明义务，它并不只适用于“一方不到案”的情形。<sup>111</sup>规定争端一方不出庭不妨碍程序进行，表明了在此情况下仲裁庭享有一定的自由裁量权来决定是否要继续推进程序。但同时仲裁庭也要受到

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107 Robert Jennings, Reflection on the term “dispute”, in *Collected Writings of Sir Robert Jennings*, Vol. 2, The Hague/Boston: Kluwer Law International, 1998, p. 584.

108 Memorial, para. 7.11.

109 *The Republic of the Philippines v. The People’s Republic of China*, Award on Jurisdiction and Admissibility, 29 October 2015, para. 163.

110 *The Republic of the Philippines v. The People’s Republic of China*, Award on Jurisdiction and Admissibility, 29 October 2015, paras. 152, 153, 155.

111 [斯里兰卡]M. C. W. 平托：《〈联合国海洋法公约〉的解释与“国际法治”》，载于《边界与海洋研究》2016年第2期，第43页。

一定的限制,即仲裁庭要以事实为基础,以法律为准绳,认真地考虑和审查争端一方不出庭的情况。本案中,我国坚持质疑管辖权而“不出庭”,这表示我国不同意程序,而如前所述,“国家同意是法院在诉讼案件中行使管辖权的基础”。在这种情况下,仲裁庭不能仅依据仲裁自身的程序规则将其简单地作为“不出庭”处理。加之,《公约》有关争端解决的条款并没有对在争端一方不同意和不出庭的情况下,仲裁庭将如何进行程序的问题做出具体的规定。<sup>112</sup>从另一层面来看,其实就涉及到一个问题,就是在这种“不出庭”的情况下,仲裁庭到底是应发挥司法能动性,还是采取司法自限的路径?针对这个问题,总结了国际法院将近70年司法经验的瑞士法学家罗伯特·科博做出解答:司法能动性和司法自限属于国际法院司法政策的范畴,选择何种路径取决于不同的因素。具体而言,在案件涉及国际危机局势时,国际法院在适用法律时宜采取一种谨慎和限制性的态度;当争端当事国的政治关系较为紧张,或者是争端当事国之间的情况不允许激进的判决时,采取谨慎的态度有益于双方达成谅解;当案件涉及的法律问题恰好同时构成多边条约谈判的主题,而该条约将会修改现行规则时,法院为避免干涉多边的立法功能,也采取限制性立场。<sup>113</sup>上述理性的观点与《公约》的精神相契合,适用上述观点有益于本争端的和平解决。南海仲裁案中本身涉及有利害关系的多方当事国,且他们之间一直都在积极开展各种会议及做出相应的行为来促使争端的解决。特别是各国基于共识签订了《宣言》,签署和接受该宣言的各缔约国一直都在积极地落实该宣言的具体内容,进而为创设他们的权利和义务做准备。基于南海仲裁案的复杂性,仲裁庭理应善意履行《公约》附件七第9条一般性的查明义务,并且采取司法自限的立场,即恪守司法节制原则。但是,仲裁庭为了“抓权(管辖权)”背道而驰,完全不顾争端的和平解决,绝对地行使其自由裁量权,已构成对《公约》的违反。

其五,仲裁庭滥用证据,导致事实的认定有明显缺陷。在《管辖权及可受理性裁决》中,仲裁庭为了证明菲律宾第3、4、6、7项诉求涉及中菲之间的“争端”,援引了中菲两国2011年外交照会作为证据。<sup>114</sup>不过两国2011年的外交照会都是针对中国2009年外交照会的内容相互展开交流。可知,对中菲两国2011年的外交照会的解释和适用不能脱离中国2009年外交照会的内容。但是,仲裁庭却有意地漠视中国2009年外交照会的存在,只是选择性地援引了中菲两国2011年的外交照会,便直接得出结论:菲律宾第3、4、6、7项诉求可以反映中菲两国关于海中地物法律地位的争端。事实上,在菲律宾2011年外交照会中,并没有指出卡拉延群岛中具体的海中地物,只是主张这些海中地物“享有”产生领海、专属经济区

112 [斯里兰卡]M. C. W. 平托:《〈联合国海洋法公约〉的解释与“国际法治”》,载于《边界与海洋研究》2016年第2期,第43页。

113 Robert Kolb, *The International Court of Justice*, Oxford: Hart Publishing, 2013, p. 1175.

114 *The Republic of the Philippines v. The People's Republic of China, Award on Jurisdiction and Admissibility*, 29 October 2015, p. 66.

及大陆架的“资格”。<sup>115</sup> 这种代表性的官方声明,跟菲律宾第3、4、6、7项诉求的“结构”不符。在本案中,菲律宾调整其立场,主张卡拉延群岛中没有任何海中地物符合岛屿的资格(享有领海、专属经济区及大陆架)。<sup>116</sup> 这种前后自相矛盾的做法极其明显,仲裁庭却视而不见,而是将矛头转向中国,并扭曲中国外交照会的真实意思。中国2011年外交照会使用南沙群岛的“整体”(而不是其中任何具名岛礁)来主张《公约》规范下的海域权利(即领海、专属经济区及大陆架),并没有单独地指明任何南沙群岛的海中地物和讨论其到底具不具备产生这些海域的资格。<sup>117</sup> 而仲裁庭在中国未曾做出的主张和菲律宾前后自相矛盾的声明下,仅依据两国2011年外交照会的往来就得出了双方存在真实“争端”的结论。可见,仲裁庭随意地适用证据,造成明显而重大的事实缺陷。

## (二) 实体性方面

仲裁庭为了巩固自身的“绝对”管辖权,无视《公约》的目的和宗旨,通过“司法造法”的方式,自己设定了众多标准并提出了许多背离国际社会共识的观点。在实体性问题上,仲裁庭和菲律宾默契地主张同样的立场并隐秘地通过“三把钥匙”,竭力地架空断续线内的权利内涵,进而损害我国在南海海域主张的权利。这“三把钥匙”分别是:第一,为了排除《公约》第298条排除性声明的适用,片面地扭曲“断续线”内历史性权利的内涵,撇清其与“历史性所有权”的关系;第二,通过“司法造法”的方式,仲裁庭自己设定出新的岛礁标准,曲解《公约》第121条有关岛礁的规定,将南海诸岛的海洋权利全部冻结,进而达到排除海洋划界问题的目的;第三,是在不涉及海洋划界问题的情况下,绝对地支持菲律宾有关专属经济区或大陆架方面的权利主张。只要完成了前面2个核心任务,仲裁庭和菲律宾就可以任意而为,第三点的出现肯定在他们掌控之中。

### 1. 恶意地曲解“断续线”中历史性权利的内涵,违背《公约》的目的和宗旨

在2016年7月12日公布的《最终裁决》中,仲裁庭的意见可归为3点:其一,《公约》中的“历史性所有权”是指对海湾以及其他近海岸水域所主张的历史性主权,而中国主张的“断续线”内的历史性权利只是指向线内的资源,并非是南海水

115 The Philippines, Communication dated 5 April 2011, pp. 2~3, at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/phl\\_re\\_chn\\_2011.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/phl_re_chn_2011.pdf), 16 February 2016.

116 The Republic of the Philippines v. The People's Republic of China, Final Transcript Day 1-Jurisdiction Hearing, 7 July 2015, pp. 44~45.

117 高圣惕:《论南海仲裁案裁决在管辖权及可受理性问题上的事实与法律谬误》,载于《边界与海洋研究》2017年第1期,第17页。

域的历史性所有权；<sup>118</sup>其二，《公约》已经对海洋区域的权利做了全面的分配，考虑了对资源的既存权利的保护，并将该资源性权利纳入条约中，成为海洋权利的组成部分。尽管历史上中国以及其他国家的航海者和渔民都曾利用了南海岛屿，但这只是反映了公海自由而非历史性权利的行使，因此不能证明中国在历史上曾经对该水域或其资源行使了排他性的控制权；<sup>119</sup>其三，即使中国曾对南海水域的资源享有历史性权利，这些权利也随着《公约》的生效而不复存在。因此，中国对“断续线”内海洋区域的资源主张历史性权利没有法律依据。<sup>120</sup>

关于“断续线”内的历史性权利的具体内涵一直没有确定，目前主要存在2种解释：一种是使用权（主权权利）方向的狭义解释，另一种是所有权（主权）方向的广义解释。<sup>121</sup>很显然，仲裁庭是使用了狭义解释，即认为我国“断续线”历史性权利只是涉及“对生物和非生物资源的权利”。仲裁庭认定的依据主要来自菲律宾提供的3项证据：2011年7月6日，为抗议菲律宾在断续线内公布石油开发区块，中国驻马尼拉大使馆照会菲律宾外交部提出抗议；中国海洋石油总公司在2012年公布南海地区9个开放招标区块；2012年5月，中国政府发布《农业部南海区渔政局关于2012年南海海域伏季休渔的公告》，该公告规定：“在北纬12度至‘闽粤海域交界线’的中华人民共和国管辖的南海海域（含北部湾）实施休渔期。”<sup>122</sup>菲律宾提交这3项证据意在证明一个事实，即中国在南海主张的历史性权利不是对海洋的主权主张，而是对断续线内所有水体和海床的生物和非生物资源的排他性权利。<sup>123</sup>仲裁庭则完全采纳了菲律宾的证据和观点，认为中国在“断续线”内的历史性权利主张是具有排他性的权利主张。但是，以上3项证据不能充分地反映中国历史性权利的性质，它们只是中国依据《公约》规定来主张和行使在断续线内的专属经济区和大陆架权利的行为。<sup>124</sup>加之，中国在断续线内主张的历史性权利不具有排他性，因为在签署《公约》和宣布专属经济区权利以前，中国从未限制或

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118 Summary of the Tribunal's Decisions on Its Jurisdiction and on the Merits of the Philippines' Claims.

119 Summary of the Tribunal's Decisions on Its Jurisdiction and on the Merits of the Philippines' Claims.

120 Summary of the Tribunal's Decisions on Its Jurisdiction and on the Merits of the Philippines' Claims.

121 罗刚：《国际法的真相和中菲南海仲裁案的硬伤》，下载于 <http://www.aisixiang.com/data/100801.html>，2017年3月27日。

122 The Republic of the Philippines v. The People's Republic of China, Award, 12 July 2016, paras. 207~213.

123 The Republic of the Philippines v. The People's Republic of China, Final Transcript Day 1 – Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, 24 November 2015, p. 27.

124 黄瑶：《中国在南海断续线内的合法权益——以南海仲裁案裁决评析为视角》，载于《学术前沿》2016年第23期，第25页。

禁止他国渔民在断续线内从事开采活动。<sup>125</sup>实际上,中国在断续线内“对生物和非生物资源的权利(主权权利)”完全立足于对线内诸岛的所有权(主权),该等权利(主权权利)不可能脱离所有权(主权)的观念而独立存在。<sup>126</sup>但是,仲裁庭为了巩固其绝对管辖权,片面地曲解“断续线”内中国的历史性权利,并认定其缺乏合理的事实基础和充足的法律依据。

仲裁庭明显将《公约》视为海洋法的唯一依据,滥用权利并且推断《公约》已对相近权利采取了默示吸收的做法。这里就涉及到条约法中的权利吸收问题。事实上,《公约》第311条第2款及第5款表明,对其他权利的存在要尊重,非但没有默示地合并其他权利,反而经常明示地对诸如海事规则设定的权利等进行提醒。<sup>127</sup>通常条约法对某种权利的吸收,是设定专门的合并条款,默示并不构成有效的权利吸收。<sup>128</sup>此外,通过考察《公约》的性质可知,虽然《公约》建立在对习惯法的编纂基础上,但其规则本质上仍然属于条约法规则,用一般国际法规则的概念模糊习惯国际法和条约法规则所形成的差异是不合理的,这不符合国际社会的共识。<sup>129</sup>同时,《公约》不是海洋法的唯一依据,这是《公约》自己在其序言中强调和认可的,即《公约》在海洋法律秩序中并不具有超越性的地位,也并未对一切海洋事务做出规定。对于《公约》的空白部分,仍然由一般国际法调整。<sup>130</sup>不难看出,仲裁庭在认定中国“断续线”内历史性权利时,存在权利滥用的倾向,是恶意地违背《公约》的目的和宗旨,其做出的相应裁决应视为无效。

## 2. 仲裁庭通过“司法造法”,设定激进的标准来判断岛礁的地位,进而排除海洋划界的问题

为了彻底地排除《公约》第298条中“海洋划界”的排除性事项,保障其管辖权的行使,仲裁庭通过“司法造法”的手段,对《公约》第121条第3款进行异化解释,重新设定了“岛屿”的新标准,如此,仲裁庭将我国“断续线”内的海中地物全部“岩礁化”,并否定了我国在线内的合法性权利,进而防止出现海洋权利重叠及划界问题。在裁决书中,仲裁庭对第121条进行解释时认为,判断一个海洋地物是否为岛屿取决于其客观承载力,即在自然状态下,该海中地物是否能维持一个稳定的

125 黄瑶:《中国在南海断续线内的合法权益——以南海仲裁案裁决评析为视角》,载于《学术前沿》2016年第23期,第25页。

126 罗刚:《国际法的真相和中菲南海仲裁案的硬伤》,下载于<http://www.aisixiang.com/data/100801.html>,2017年3月27日。

127 李志文、马玉:《南海仲裁案中国立场的主权理论解读》,载于《太平洋学报》2016年第9期,第3页。

128 李志文、马玉:《南海仲裁案中国立场的主权理论解读》,载于《太平洋学报》2016年第9期,第3页。

129 李志文、马玉:《南海仲裁案中国立场的主权理论解读》,载于《太平洋学报》2016年第9期,第3页。

130 《公约》序言:“确认本公约未予以规定的事项,应继续以一般国际法的规则和原则为准则”。

人类社群,且人类在该海洋地物的经济生活不依赖外来资源或纯采掘性的经济活动。<sup>131</sup>南沙群岛诸多岛礁正被不同的沿海国控制,并在其上建设设施、驻扎人员,通过外来资源的支持对岛礁加以改变以加强可居住性,但是这不能证明他们在自然状态下具备维持稳定的人类社群的能力。因此,仲裁庭认为南沙群岛所有高潮时高于水面的岛礁(诸如太平岛、中业岛、西月岛、南威岛、北子岛、南子岛)在法律上均属于无法产生专属经济区或者大陆架的“岩礁”。<sup>132</sup>

仲裁庭设定的这种激进的标准并不符合《维也纳条约法公约》第31条第1款中善意解释条约的要求,同时也欠缺直接证据或实地考察的证据支持。特别是对判断岛礁承载力的“人类居住”的弹性条款进行了“不合理”的限制解释。仲裁庭通过对第121条第3款“cannot”一词进行简单的字面解释,就直接否认驻扎在岛礁上的官方人员不是自然居民,进而不具有作为岛屿的承载能力。这种片面的解释不符合《公约》的精神。仔细分析可知,对于《公约》第121条第3款中的“人类居住”,《公约》并没有对人类的身份做出明确的规定,至少没有直接否定官方人员的居住。此外,海中地物上存在政府的设施,恰好证明了该地物具有某种“维持人类居住”的能力。仲裁庭通过引用日本渔业和肥料开采企业在20世纪20—30年代的短暂性活动作为标准,并以此来认定我国渔民千百年来的捕鱼活动不具有“维持人类居住或经济生活”的性质。<sup>133</sup>这种认定充满了偏颇和恶意的倾向。

### (三) 中国是否违反善意原则?

在菲律宾所提南海仲裁案中,菲律宾认为中国采取武力威胁的方式来驱离在黄岩岛长期、持续作业的菲律宾渔民,这不仅使南海情势更加复杂化、扩大化,也危害到南海地区之和平与稳定。<sup>134</sup>即菲律宾主张中国违背《宣言》中保持克制的义务,通过不和平的手段激化了南海的局势,违背了善意原则。但实际上,中国在黄岩岛的执法行为是由于菲律宾先采取威胁和武力使用的手段,派出军舰试图强行扣留中国籍渔船。尤其是菲律宾在2014年3月,利用国际社会各国在南海周边忙于搜救失踪马航370客机之际,趁机派船载建材到仁爱礁海域,企图强化菲律宾非法坐滩的废弃军舰,<sup>135</sup>进而想趁机非法强占中国领土。菲律宾这种挑衅的

131 The Republic of the Philippines v. The People's Republic of China, Award, 12 July 2016, para. 500.

132 The Republic of the Philippines v. The People's Republic of China, Award, 12 July 2016, para. 626.

133 栗广:《1930年代美国对南海争端的立场评析》,载于《太平洋学报》2016年第7期,第68页。

134 Memorial, paras. 7.71~7.73.

135 宋燕辉:《由〈南海各方行为宣言〉论“菲律宾诉中国案”仲裁法庭之管辖权问题》,载于《国际法研究》2014年第2期,第30~31页。

做法已违背了当初在签署《宣言》时达成的共识，更加激化了南海的局势。中国对此作出的回应是正当且合法的，并不构成对善意原则的违背。然而菲律宾一方面否认《宣言》的效力，<sup>136</sup> 反对中国援引该《宣言》，一方面又在 2014 年 8 月 1 日外交部声明中提出解决南海问题的倡议，要求各方遵守《宣言》第 5 条的规定，并且全面、有效执行《宣言》。菲律宾这种前后矛盾、言行不一致的做法，明显违背了国际法上的“禁止反言原则”以及“诚信原则”，<sup>137</sup> 构成了对善意原则的违背。

在解决南海问题上，中菲两国之间已签订了一系列文件，如 1995 年 8 月 10 日《中华人民共和国和菲律宾共和国关于南海问题和其他领域合作的磋商联合声明》、1999 年 3 月 23 日《中菲建立信任措施工作小组会议联合公报》、2000 年 5 月 16 日《中华人民共和国政府和菲律宾共和国政府关于 21 世纪双边合作框架的联合声明》、2001 年 4 月 4 日《中国—菲律宾第三次建立信任措施专家会议联合新闻声明》、2002 年 11 月 4 日《宣言》、2004 年 9 月 3 日《中华人民共和国政府和菲律宾共和国政府联合新闻公报》以及 2011 年 9 月 1 日《中华人民共和国和菲律宾共和国联合声明》等。上述中菲各项双边文件和《宣言》的相关规定一脉相承，始终坚持以《联合国宪章》宗旨和原则、《公约》、《东南亚友好合作条约》、和平共处五项原则以及其他公认的国际法原则作为解决争端问题的基本准则。<sup>138</sup> 尤其是各国在解释相互达成的协议和履行国际义务时，要遵守善意原则，不得为了获取不正当的利益，而对协议作出违反原意的曲解。中国自始至终一直坚守着这些基本准则并不断将其运用到南海争端的和平解决当中，如 2004 年 9 月 3 日《中华人民共和国政府和菲律宾共和国政府联合新闻公报》、2005 年 3 月 14 日《南中国海部分海域联合海洋地震工作协议》、2005 年 4 月 28 日《中华人民共和国和菲律宾共和国联合声明》以及 2007 年 1 月 16 日《中华人民共和国和菲律宾共和国联合声明》等，都表明中国坚持致力于维护南海地区的和平与稳定。

## 五、总结与反思

善意是国际条约的基础；善意限定国际法上的权利；各国对法律道义上的承认也主要以善意为基础；全部的国际往来都建筑在诚实和信用上，如果无视善意，那么在国际法上构建起来的合法性就会崩溃。<sup>139</sup> 善意解释是条约必须遵循的前提，因为解释是履行条约的一部分，因此必须善意地研究有关资料并对他们进行评

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136 Memorial, para. 7.51.

137 2014 年 12 月 7 日《中华人民共和国政府关于菲律宾共和国所提南海仲裁案管辖权问题的立场文件》，第 52 段。

138 2014 年 12 月 7 日《中华人民共和国政府关于菲律宾共和国所提南海仲裁案管辖权问题的立场文件》，第 31~37, 53~54 段。

139 [奥]菲德罗斯等著，李浩培译：《国际法》，北京：商务印书馆 1981 年版，第 777~778 页。

价。<sup>140</sup> 善意原则有助于克服文本解释方法中可能存在的僵化弊端,为实现条约解释与实施正义目标留下灵活性的空间。<sup>141</sup> 而在菲律宾所提南海仲裁案中,菲律宾和仲裁庭都明显地违背了善意原则,滥用《公约》赋予的权利,将其作为实现其政治目的的国际法工具,公然地破坏国际法的既有秩序,该案的裁决应被视为无拘束力。善意原则,特别是其中的善意履行国际义务要求与我国一直以来主张的外交理念和立场相契合。因此,善意原则将有利于我国在南海的主权权益维护,我国应注重和加大对善意原则的运用,特别是在涉及国际规则的制定时。

菲律宾所提的南海仲裁案于我国而言既是一个大警钟,时刻提醒中国有些国家会将国际法作为工具来攻击或损害其国家利益,并由此获得所谓的“合法权益”;同时也为我国及国内学术界在国际法上的探索提供了一个有益的研究素材,这有利于促进和提高我国在国际法研究和运用上的水平和能力,以应对和防止今后有像菲律宾和仲裁庭一样带有恶意目的的主体利用同样的手段来损害我国合法权益的情况。这个仲裁案持续了3年多,其影响力不容小觑。对于此案的影响,我国切勿太过悲观,而应秉持客观和理性的态度来看待这个仲裁案。此外,我国,特别是国内学界,也不应该仅仅停留在该案上或者随着该案的落幕而渐渐停止研究,我们应更加深入地剖析背后的原因和探寻相应的出路。作为正在崛起中的大国,理应认识到国际法和国家利益的辩证统一关系,努力提高运用国际法的水平和能力,这将有利于维护我国的国家利益。此外,我国还应积极地了解现有国际法规则,并参与新国际法规则的制定及执行,努力改变由西方国家主导的国际法秩序。

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140 [英]劳特派特修订,王铁崖、陈体强译:《奥本海国际法(上卷·第二分册)》,北京:商务印书馆1972年版,第204页。

141 冯寿波:《论条约的“善意”解释——〈维也纳条约法公约〉第31.1条“善意”的实证研究》,载于《太平洋学报》2015年第5期,第8页。

# Application of the Good Faith Principle to the SCS Arbitration Initiated by the Philippines Against China

YAN Yongling\*

**Abstract:** The principle of good faith, a basic principle of international law, is mainly manifested in the performance of international obligations, especially treaty obligations, in good faith. This principle plays a pivotal role in the conclusion, execution and interpretation of treaties, as well as the maintenance of the order of treaties and laws. From the Philippines' initiation of the South China Sea (SCS) arbitration against China, to the Arbitral Tribunal's acceptance and release of the final award of the arbitration, the case is loaded with violation of the good faith principle. In the SCS Arbitration, the Arbitral Tribunal and the Philippines, appearing to have reached a covert agreement, took advantage of the vacuum left by the 1982 United Nations Convention on the Law of the Sea (UNCLOS) to abuse their rights under the convention, and to arbitrarily coin all kinds of notions or standards unheard of, by employing all tricks of text interpretation in bad faith. By doing so, they intended to illegally jeopardize the legitimate rights and interests of China, the other party to the Arbitration, by utilizing the UNCLOS as a tool. The final award, which is founded on illegal reasoning, is obviously contrary to the object and purpose of the UNCLOS; it thus shall be considered without binding force. Collating the jurisprudential basis of the good faith principle and the relevant judicial practices, the paper aims to showcase the specific breaches of the principle in the SCS Arbitration filed by the Philippines.

**Key Words:** Sino-Philippine SCS Arbitration; Principle of good faith; Abuse of rights; Specific manifestation

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## I. Introduction

Nearly one year has been elapsed since the final award for the Sino-Philippine South China Sea (SCS) Arbitration was released in July 2016. However, the influences of the Arbitration on the parties to the Arbitration, some interested third-parties, and the entire international community, are far reaching and profound. Such influences cannot be neglected. The Philippines, in accordance with Part XV and Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), initiated an arbitration against China in January 2013. An Arbitral Tribunal for the case was constituted in May of the same year, to which the Philippines conveyed its 15 Submissions. Then the Tribunal issued its Award on Jurisdiction and Admissibility in October 2015, declaring that it had jurisdiction over the case. Afterwards, the Tribunal and the Philippines “conspired” and spared no efforts to deliver an award favorable to the Philippines, which was ultimately issued on 12 July 2016. This Arbitration left, *prima facie*, no room for criticism, but is actually full of loopholes. The whole process of the Arbitration, from the Philippines’ initiation of the arbitration, to the continuing of the arbitral process, and then to the release of the final award, is riddled with deviations from the international law, abuses of procedures and unfairness. Among them, their violation of the good faith principle is most conspicuous.

Since the release of the final award, the Chinese government and scholars have never stopped demonstrating and criticizing the illegality of this award. They have offered a variety of constructive proposals, giving strong theoretical supports to China’s efforts to safeguard its legal rights and interests with respect to the SCS Islands. However, the better strengthening and protection of China’s legitimate rights, due to the far-reaching but harmful impacts of the case, demands deeper understanding of the pertinent theories of the international law. At present, many researches, despite of their professionalism, are carried out from a single perspective, mainly focusing on the procedures and the merits of the case, but rarely on some typical and authoritative theories relating to the case, such as the principle of good faith. The principle of good faith, being a basic principle of international law, primarily requires the parties concerned to perform their international obligations in good faith, especially the obligations under treaties. This principle plays a vital role in the conclusion, performance and interpretation of treaties, as well as the maintenance of the whole legal order. It also bears practical significance to China’s safeguarding of its legitimate rights and interests to the SCS

Islands. In this context, the paper, based on the legal theories and practices related to the principle of good faith, a general principle of international law, explores the application of the principle to the SCS Arbitration initiated by the Philippines. By doing so, it aims to provide more theoretical supports to China's protection of its legal entitlements in the SCS, and also to inspire the international community to consider and pay more attention to the importance of this principle to the building and stability of the international order. Before embarking on the application of the good faith principle to the SCS Arbitration, the paper will first collate and analyze the legal bases of the principle.

## II. The Connotations, Status and Limitations of the Good Faith Principle

Theory guides practice. In order to discuss and explore the specific application of the good faith principle in international judicial practices, we should first get to know and understand the basic theories in this regard, so that the goal of practice may not deviate from the object and purpose of theory. The jurisprudential basis for the good faith principle can help us probe into the status and the pivotal role of "good faith" in treaty interpretation and even the entire legal system. As the core element governing the interpretation of treaties, the good faith principle guides the whole process of treaty interpretation. And discharging international obligations in good faith is preconditioned on interpretation in good faith. The good faith principle, as a general legal principle and a basic principle of international law, not only governs the interpretation of certain terms or phrases under a treaty, but also, in some cases, often guides, limits, assesses, balances or regulates the elements and methods of interpretation, so that its substantial values and functions can come into play.

### *A. The Connotations of the Good Faith Principle*

To understand the connotations of the good faith principle, we must first define the term "good faith". The concept of good faith originated from private law and initially appeared to be linked with the notion of divine law.<sup>1</sup> "Good faith" is the modern-day English translation of the Latin phrase "*bona fides*". In accordance

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1 George Mousourakis, *Fundamentals of Roman Private Law*, Berlin/Heidelberg: Springer, 2012, p. 34.

with the *Oxford Dictionary of English Idioms*, “good faith” means “the intention to do something right”, and its opposed term “bad faith” means lack of trust in human interactions and “a dishonest attitude”. This is a general explanation of the term “good faith”. As per the *Black’s Law Dictionary (10th edition)*, “good faith” describes four kinds of state of mind denoting (a) honesty of belief or purpose, (b) faithfulness to one’s duty or obligation, (c) observance of reasonable commercial standards of fair dealings in trade or commerce; and (d) freedom from intention to defraud or seek an unconscionable advantage.<sup>2</sup> This explanation unveils the basic meanings of good faith – “honesty” and “reasonableness”, and also indirectly excludes behaviors done in bad faith from the scope of good faith. The definitions of “good faith” offered by the two dictionaries above tend to understand “good faith” in the context of interactions between equal subjects, especially in private contractual or treaty relations, and generally demand such subjects to act honestly, so as to regulate their behaviors. Against this backdrop, the present-day principle of honesty and credibility was created. As a result, the notion “good faith” is sometimes misunderstood to be equivalent to and exchangeable with honesty and credibility. And some scholars even translated “good faith” into “诚信 (honesty and credibility)” in Chinese. However, honesty and credibility, actually, are only two of the elements inherent in the principle of good faith. In terms of etymology, honesty is not equal to good faith. Additionally, good faith covers much wider scope than honesty and credibility; the latter merely applies to agreement relationships. The principle of honesty and credibility covers the main content of the good faith principle, *inter alia*, on international law; for example, “good faith” in the provision “to perform international obligations in good faith” simply means “honesty and credibility”. Nevertheless, the principle of honesty and credibility alone is “not sufficient to implement the principle of justice in practice, since the creation and development of many rights and obligations are not preconditioned on the existence of an agreement.”<sup>3</sup> Therefore, the two principles should be differentiated from each other. Given that honesty and credibility are two elements of good faith, the principle of honesty and credibility is, certainly, a reasonable extension and concrete expression of the good faith principle. The former principle also has an inestimable status and role. It is argued that “good

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2 Bryan A. Garner ed., *Black’s Law Dictionary*, 10th edition, Eagan: Thomson West, 2014.

3 LUO Guoqiang, *On the Noumena of International Law*, Beijing: Law Press China, 2008, pp. 159, 164~165. (in Chinese)

faith”, denoting “rationality and reasonableness”, is a highly abstract concept that is still developing. The concept governs treaties from the time of their conclusion and implementation, to the time of their interpretation.<sup>4</sup> And some also asserted that “sometimes it seems little more than a synonym for ‘reasonable’”.<sup>5</sup> In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, when interpreting treaties, the International Court of Justice (ICJ) took into account the role of “good faith” and pointed out that “It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.”<sup>6</sup>

The principle of good faith has its origin in municipal law and was later incorporated into international law. Notably, its meanings on international law are identical with those on domestic law. As John F. O’Connor noted, “The principle of good faith in international law is a fundamental principle from which the rule *pacta sunt servanda* and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by the compelling standards of honesty, fairness and reasonableness prevailing in the international community at that time.”<sup>7</sup> This explanation is consistent with the nature of good faith, which highly generalized the application of the principle of good faith in domestic and international laws. As early as in the 1954 Resolution of the Institute of International Law, when mentioning the six principles formulated by Sir Gerald Fitzmaurice, the Special Rapporteur (Waldock) proposed that good faith should be linked with two of the six principles: “principle of integration” and “principle of effectiveness”.<sup>8</sup> In the International Law Commission debate about draft Article 72, the preponderant view was that “An interpretation given in good faith and taking account of the object and purpose of a treaty would always necessarily seek to give a meaning to the text.”<sup>9</sup> Although the afore-mentioned resolution and draft did not expressly

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4 FENG Shoubo, On the Treaty Interpretation in “Good Faith”: An Empirical Research on “Good Faith” in Art. 31.1 of VCLT, *Pacific Journal*, Vol. 22, No. 5, 2015, p. 3. (in Chinese)

5 FENG Shoubo, On the Treaty Interpretation in “Good Faith”: An Empirical Research on “Good Faith” in Art. 31.1 of VCLT, *Pacific Journal*, Vol. 22, No. 5, 2015, p. 4. (in Chinese)

6 *Military and Paramilitary Activities in and against Nicaragua*, *Nicaragua v. United States of America*, Jurisdiction and Admissibility, Judgment, *ICJ Reports 1984*, para. 63.

7 John F. O’Connor, *Good Faith in International Law*, Aldershot: Dartmouth Publishing Co. Ltd., 1991, p. 124.

8 Richard K. Garadiner, *Treaty Interpretation*, Oxford: Oxford University Press, 2008, p. 169.

9 Richard K. Garadiner, *Treaty Interpretation*, Oxford: Oxford University Press, 2008, p. 170.

mention the principle of good faith, the views expressed there became the basic element and standard for the creation of a legal framework, which virtually are the epitome of the good faith principle. Here, the principle of good faith encompassed the elements of the doctrine of prohibition of abuse of rights and the protection of legitimate expectations, in addition to the doctrine of honesty and credibility. These in turn heighten a legal system's legitimacy by placing each participant on equal ground. "No one participant may, following the acceptance of the agreement, alter the obligations so as to suit its own purposes only."<sup>10</sup>

To sum up, the principle of good faith has always been a concept that is still developing, which has not become a unified and precise notion so far. Nonetheless, this fact is without prejudice to the fundamental role that the principle plays in the international community, *inter alia*, in the construction and maintenance of the international legal order, because the principle represents the consensus of the international community, and really mirrors the pursuit of justice by each State. The contents and varieties of "good faith" cannot be exhausted, however, based on the practices in both international and national laws, we can unequivocally demonstrate that: the principle of good faith is a basic principle; "honesty and credibility", "fairness" and "reasonableness" are the basic meanings or features of good faith; and violation of such features or requirements is a result of "bad faith".

### *B. The Status and Role of the Good Faith Principle*

Paragraph 3 of the Preamble of the 1969 Vienna Convention on the Law of Treaties (VCLT) states that all the parties to the convention "[note] that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized". This paragraph reveals the dominant role that the principle of good faith plays in the formation and performance of international legal duties.<sup>11</sup> It follows that to fulfill international obligations in good faith is a consensus reached by the States concerned at the time of the formation of law of treaties. In fact, when the international law was still in its infancy in the Europe, many well-known publicists had always insisted and emphasized on the importance and status

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10 Thomas Cottier and Krista N. Schefer, HAN Xiuli trans., GAO Bo proofread, Good Faith and the Protection of Legitimate Expectations in the WTO, *Journal of International Economic Law*, No. 3, 2005, p. 183. (in Chinese)

11 ZHAO Jianwen, The Principle of Good Faith under Treaties, *Contemporary Law Review*, No. 4, 2013, p. 122. (in Chinese)

of the good faith principle in international relations. For example, Hugo Grotius insisted that good faith demands that even *pacta* with enemies, pirates, rebels and infidels should be diligently kept.<sup>12</sup> With the development and advancement of each legal system in the world, the principle of good faith has drawn great attentions and respect. “Good faith [is] an institution immanent in every legal order”, and “the principle of good faith refers to a rule of social conduct obvious in the sight of everybody.”<sup>13</sup> These highlight the status of the principle in contemporary legal system. The application of the principle of good faith in the law of treaties is especially prominent in international law. Certainly, “The principle of good faith is thus equally applicable to relations between individuals and to relations between nations ... It should, therefore, be the fundamental principle of every legal system”.<sup>14</sup>

The status of the good faith principle has also been manifested in many legal precedents. For example, in the *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, the World Trade Organization (WTO) Appellate Body opined, “the principle of good faith ... is ... a general principle of law and a principle of general international law, that informs the provisions of the Anti-Dumping Agreement, as well as the other covered agreements.”<sup>15</sup> The ICJ pointed out, in paragraph 49 of the Judgment of the *Nuclear Tests (New Zealand v. France)*, that “One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith ... Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.”<sup>16</sup> This statement articulates that the principle of good faith constitutes a part of the foundation of the treaty structure. The good faith principle, despite of its source from natural law, is an ethical principle, which, however, does not imply it is only a “subjective one”. This principle, indeed, rests upon individual psychology, but refers also to rules of behavior. In particular, good faith requires

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12 Oliver Dörr and Kirsten Schmalenbach eds., *Vienna Convention on the Law of Treaties: A Commentary*, New York: Springer Science & Business Media, 2011, p. 435.

13 E. Zoller, *Good Faith in Public International Law*, quoted by Michel Virally, LIU Xinsheng trans., Notes and Comments, Review Essay: Good Faith in Public International Law, *Peking University Law Journal*, No. 4, 1984, p. 54. (in Chinese)

14 Bin CHENG, *General Principle of Law as Applied by International Courts and Tribunals*, London: Stevens and Son, 1953, p. 105.

15 United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R, Report of the Appellate Body, 24 July 2001, para. 101.

16 Nuclear Tests (New Zealand v. France), Judgment, *ICJ Reports 1974*, para. 49.

that the expressed will be consistent with the real will. In other words, good faith excludes any separation between reality and appearances.<sup>17</sup>

The principle of good faith plays a fundamental role in international law. French Professor M. Virally contends that ignoring that the good faith principle forms part of the foundation of the whole international legal structure may run the risk of reducing international law to a set of hollow legal formulas.<sup>18</sup> This contention shows that good faith is an element absolutely necessary in the formation and implementation of international social laws, which facilitates the proper functioning of the international legal system as a whole. In this sense, good faith is called “the oil of machine”. In the Statute of the ICJ, the principle of good faith is listed as one of “the general principles of law recognized by civilized nations”,<sup>19</sup> which aims to tell that this principle, as a source of international law, is a common value sought by all civilized nations. As perceived from its constituent elements such as “honesty”, “fairness” and “reasonableness”, the principle of good faith is able to help change the “lawless” state in international law, eliminate conflicts of rules, exclude the negative effects of malicious behaviors, and further to reduce deviation from fair results and balance of interests. This principle, in fact, keeps the spirit and value of the legal order, ensuring the attainment of substantial justice in the society. “The law of treaties is closely bound with the principle of good faith, if indeed not based on it; for this principle governs treaties from the time of their formation to the time of their extinction”.<sup>20</sup> This shows that the lack of express mentioning of the good faith principle in some treaties, does not affect or alter the factual basis supporting its governing of the creation and performance of the legal obligations under international law; instead, it remains a general legal principle and a basic principle of international law that is universally recognized.

Since good faith rests upon individual psychology, the principle of good faith cannot work on its own. In this connection, its legal effects and substantive significances can be realized only when it is applied in combination with other

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17 E. Zoller, *Good Faith in Public International Law*, quoted by Michel Virally, LIU Xinsheng trans., Notes and Comments, Review Essay: Good Faith in Public International Law, *Peking University Law Journal*, No. 4, 1984, p. 55. (in Chinese)

18 E. Zoller, *Good Faith in Public International Law*, quoted by Michel Virally, LIU Xinsheng trans., Notes and Comments, Review Essay: Good Faith in Public International Law, *Peking University Law Journal*, No. 4, 1984, p. 57. (in Chinese)

19 Statute of the International Court of Justice, Article 38(1).

20 Bin CHENG, HAN Xiuli and CAI Congyan trans., *General Principles of Law as Applied by International Courts and Tribunals*, Beijing: Law Press China, 2012, p. 106. (in Chinese)

specific rules and doctrines. The same is true for the rules of international law, including world trade rules. These abstract rules, in most cases, are applied after translating into concrete rules. The principle of good faith governs the conclusion, implementation and interpretation of a treaty. During the conclusion of a treaty, this principle requires the States to sign a treaty honestly, fairly and reasonably on the one hand; on the other hand, it regulates any malicious conclusion of a treaty, illegalizes or invalidates such malicious acts, so as to prevent the object and purpose of a treaty from being impaired. During the implementation of a treaty, in line with the original meanings of the good faith principle, States should execute the treaty in an honest, just and reasonable manner, since to perform a treaty in good faith is an obligation under general international law. Examples are most abundant with respect to the application of this principle to treaty interpretation. The principle of good faith is the overall principle governing the interpretation of treaties, which requires that treaties be explained honestly, justly and reasonably.<sup>21</sup> Deviation from such requirements, if any, would easily give rise to problems like abuse of rights, further leading to unfair results. The SCS Arbitration initiated by the Philippines is a perfect example in this regard.

### *C. Deficiencies and Limitations of the Good Faith Principle*

Every coin has two sides. The principle of good faith is no exception. The principle is extremely abstract, which is one of its limitations. *Inter alia*, when interpreting treaties, the abstract character of the principle makes it difficult to rightly understand and apply the principle. “Interpretation in good faith is a general principle. It is challenging to fix its concrete contents. In this connection, standards that are indisputable, objective and universally recognized are, probably, nowhere to be found.”<sup>22</sup> This fact indicates that there are no fixed methods or rules in the application of the good faith principle to treaty interpretation. The limitation of the principle is best and most apparently seen in treaty interpretation. For example, in the *United States – Sections 301–310 of Trade Act 1974*, the Panel asserted that,

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21 ZHAO Jianwen, *The Principle of Good Faith on the Law of Treaties*, *Contemporary Law Review*, No. 4, 2013, pp. 123–124. (in Chinese)

22 Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Disputes Settlement*, London: Cmmerron May Ltd., 2002, p. 499, quoted from ZHANG Dongping, *On WTO Judicial Interpretation*, Xiamen: Xiamen University Press, 2005, p. 189. (in Chinese)

*It is notoriously difficult, or at least delicate, to construe the requirement of the Vienna Convention that a treaty shall be interpreted in good faith in third party dispute resolution, not least because of the possible imputation of bad faith to one of the parties. We prefer, thus, to consider which interpretation suggests “better faith” and to deal only briefly with this element of interpretation.*<sup>23</sup>

This assertion suggests that the good faith principle is still developing when it comes to treaty interpretation; so are its status and role, which should be determined on a case-by-case basis after considering the specific social and historical conditions. The good faith principle is usually deemed as an ethical one. If simply perceived from ethical sphere, its real persuasiveness and authority may be reduced, and some illegal and malicious thoughts and behaviors would easily get the upper hand, leading to unfair and unreasonable results, in contravention with the spirit of the principle. Particularly, when “the borderline between interpretation and application becomes blurred”,<sup>24</sup> the exact definition of the good faith principle is dependent on the translation and expression of other principles, which, to some extent, limits the role of the good faith principle. Practices tell that the principle of good faith is a directional principle, which guides us to follow such value and ideas as fairness, equality, reasonableness and honesty. On the other hand, it also means that this principle is neither invariable, definite, nor without any limits; rather, it has its borderline and limitations. In international law, “good faith may only become a basic principle, but not replace the most basic principle – sovereign equality.”<sup>25</sup> In the development of the system of international law, the principle of good faith is merely a part of the system, which cannot be over-exaggerated or completely substitute other parts of the system. This principle may be applied and come into play usually when the pertinent legal provisions are equivocal or absent. Under most circumstances, this principle is only stressed “subjectively”. In other words, it has not, really, been put into practice, and its essential values have not been obtained, resulting in an embarrassing separation of theory from practice.

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23 WT/DS152/R, 22 December 1999, para. 7.64.

24 Richard K. Garadiner, *Treaty Interpretation*, Oxford: Oxford University Press, 2008, p. 168.

25 LUO Guoqiang, *On the Noumena of International Law*, Beijing: Law Press China, 2008, p. 169. (in Chinese)

### **III. Main Embodiment and Specific Application of the Good Faith Principle**

#### *A. The Good Faith Principle Embodied in International Legal Instruments*

The good faith principle is an ancient general principle. From its incorporation into the Roman law, the national law of every Western State, and then into the system of common law, it ultimately becomes a “general principle of law recognized by civilized nations”. During the development of Chinese or foreign legal systems, the good faith principle, resembling the “oil of machine”, keeps the stable operation of the entire legal system. Particularly, after the end of World War II, the principle became more prominent in respect of its status and role in international law, and was later incorporated into a large number of international legal instruments. The following pages will cite only some of the representative and authoritative instruments, for the sake of limited space.

Article 2(2) of the 1945 Charter of the United Nations specifies, “All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.” In accordance with the requirements of the good faith principle, to perform international obligations in good faith, as a necessary condition for cooperation between States, ensures the attainment of the legitimate rights and interests of each State. Then Articles 18, 26 and 31(1) of the VCLT express that the good faith principle governs the conclusion, implementation and interpretation of treaties, which means that the States Parties should abide by the requirements of the principle. By virtue of these articles, the principle of good faith was further established in the VCLT. The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations articulates that every State shall fulfill in good faith the obligations assumed by it in accordance with the Charter of the United Nations.<sup>26</sup> Likewise, Article 157(4) of the UNCLOS, in connection with the

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26 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, General Assembly (25th Session) Resolution No. 2625 (XXV), U.N.Doc.A/8082, p. 121, at [http://www.unoosa.org/pdf/gares/ARES\\_25\\_2625E.pdf](http://www.unoosa.org/pdf/gares/ARES_25_2625E.pdf), 22 May 2017.

International Sea-Bed Authority, provides that “All members of the Authority shall fulfill in good faith the obligations assumed by them in accordance with this part in order to ensure to all of them the rights and benefits resulting from membership.” The principle of good faith is also widely adopted in international trade treaties. Legal instruments in this regard are also great in number. For example, Article 7(1) of the 1980 United Nations Convention on Contracts for the International Sale of Goods states that in the interpretation of this convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. This convention also clearly shows that the principle of good faith is essential in the interpretation of treaties, although it does not, like the other conventions listed above, highlight the status of the principle.

The UNCLOS, always considered as the “constitution of the oceans”, provides in its Article 300: “States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.” This provision prohibits the States Parties from abusing the rights recognized by the UNCLOS. On the one hand, it can be seen that the principle of prohibition of abuse of rights is actually derived from the principle of good faith. On the other hand, it shows that a State’s exercise of rights recognized by a treaty is subject to the principle of good faith. The international legal instruments above tell that, in the law of treaties, implementation and interpretation of treaties in good faith are closely linked with and complementary to each other. In other words, “implementation of treaties in good faith is, necessarily, preconditioned on interpretation in good faith, since interpretation of treaties in bad faith, i.e., distortion of treaties, would certainly result in performance of treaties not in good faith.”<sup>27</sup> In sum, the principle of good faith, which can be found in all sorts of international legal instruments, has been widely recognized. Its requirement on discharging international obligations in good faith becomes increasingly clear and distinct.

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27 LI Haopei, *Introduction to the Law of Treaties*, Beijing: Law Press China, 1987, p. 329. (in Chinese)

## *B. The Application of the Good Faith Principle in International (Quasi) Judicial Practices*

In the current international law, many treaties contain provisions on “dispute settlement”. When the parties concerned cannot resolve their disputes, they may recourse to third-party dispute settlement mechanisms. In that case, the value and importance of the principle of good faith will be highlighted. This paper focuses on the application of the good faith principle in international (quasi) judicial practices, so as to pave the way for the following analysis for the *SCS Arbitration* initiated by the Philippines. Due to the absence of unified and definite standards for the good faith principle, the duty to interpret in good faith under Article 31 of the VCLT, as an obligation under customary international law, would certainly be considered in international (quasi) judicial practices. Additionally, the principle of good faith, in most cases, must apply and exert substantive legal effects by virtue of other concrete principles and rules, such as the principle of effectiveness. The principle of effectiveness is also derived from the principle of good faith.<sup>28</sup> In the view of Mr. FENG Shoubo, the principle of effectiveness means that “it is better to render a provision effective than ineffective.”<sup>29</sup> In other words, this principle implies that the contracting parties intend to make a clause of a treaty effective, rather than meaningless. In the *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, the ICJ admitted in principle that “a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text.”<sup>30</sup> In the first draft of Article 31 of VCLT, the International Law Commission, linking the principle of effectiveness with “good faith” and “object and purpose”, subsumed the elements of the principle under Article 31(1).<sup>31</sup> It indicates that the effectiveness of a clause requires that the clause be interpreted in such a way that is consistent with the object and purpose of the treaty, which is immanent in the principle of good faith. In *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, 1994, the ICJ interpreted the text of the treaties involved and confirmed the relevant outcomes, in accordance

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28 Richard K. Gardiner, *Treaty Interpretation*, Oxford: Oxford University Press, 2008, p. 168.

29 FENG Shoubo, On the Treaty Interpretation in “Good Faith”: An Empirical Research on “Good Faith” in Art. 31.1 of VCLT, *Pacific Journal*, Vol. 22, No. 5, 2015, p. 7. (in Chinese)

30 Hersch Lauterpacht ed., WANG Tieya and CHEN Tiqiang tans., *Oppenheim’s International Law, Vol. 1, No. 2*, Beijing: The Commercial Press, p. 365. (in Chinese)

31 Richard K. Gardiner, *Treaty Interpretation*, Oxford: Oxford University Press, 2008, p. 179.

with the principle of effectiveness.<sup>32</sup> Thereafter, this principle was gradually recognized and applied by all kinds of international dispute settlement bodies. For example, when ruling on the *Japan – Taxes on Alcoholic Beverages*, 1996, the WTO Appellant Body alleged that “A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness (*ut res magis valeat quam pereat*).”<sup>33</sup> As per the principle of effectiveness, a treaty interpreter should comprehensively read and construe the treaty in its entirety. The Appellant Body also believed that “a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.”<sup>34</sup>

As described above, the principle of good faith works through the principle of effectiveness. In addition to that, the good faith principle has also been applied to various cases, where it played a crucial role. For instance, when ruling on the *Nuclear Tests (Australia v. France)*, 1974, the ICJ articulated that “One of the basic principles governing the creation and performance of legal obligations ... is the principle of good faith.”<sup>35</sup> It follows that the principle of good faith is one of the elements that the ICJ has to consider when making a ruling. The principle of good faith is a general legal principle and a basic principle of international law, which is recognized universally. It governs a State’s exercise of rights, and is often deemed as the dominant standard guiding the resolution of disputes. For example, in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 1998, the WTO Appellate Body, when interpreting and applying Article 20 of the General Agreement on Tariffs and Trade, 1994, argued that “our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.”<sup>36</sup> This statement shows the general character of good faith. As stated above, the principle of good faith governs and promotes the performance of a treaty; to implement and construe a treaty in good faith has become an obligation of customary international law. In *Gabčíkovo – Nagymaros Project (Hungary v. Slovakia)*, 1997, the ICJ stated

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32 Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, *ICJ Reports 1994*, paras. 27–28.

33 Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 1996, p. 12.

34 Argentina – Safeguard Measures on Imports of Footwear, WT/DS121/AB/R, para. 81.

35 Nuclear Tests (Australia v. France), Judgment, *ICJ Reports 1974*, p. 268.

36 United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998, para. 158.

that performing a treaty in good faith concerned “the purpose of the treaty, and the intentions of the parties in concluding it, which should prevail over its literal application.”<sup>37</sup> “Honesty”, “fairness” and “reasonableness” are the elements immanent in the principle of good faith, which are, now and again, reflected in the practices concerning the settlement of disputes. For example, in *Chile – Taxes on Alcoholic Beverages*, 2000, the WTO Appellate Body held that “Members of the WTO should not be assumed, in any way, to have continued previous protection or discrimination through the adoption of a new measure. This would come close to a presumption of bad faith.”<sup>38</sup> In a similar case, i.e., *European Communities – Trade Description of Sardines*, 2002, the Appellate Body stressed that “We must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of *pacta sunt servanda* articulated in Article 26 of the Vienna Convention ... every Member of the WTO must assume the good faith of every other Member.”<sup>39</sup> The two cases fully demonstrate that “honesty” is a specific requirement of the good faith principle. Since the Appellate Body, during its consideration of the *United States – Standards for Reformulated and Conventional Gasoline*, pointed out that the good faith principle articulated in VCTL Article 31 was the customary rule for the interpretation of international treaties, in the practices with respect to WTO dispute resolution, “appellate bodies, panels, arbitrators and the parties concerned all have accepted the principle of interpreting treaties in good faith, and applied this principle in resolving actual disputes. Almost every report on dispute settlement contains, in the part regarding agreement interpretation, the term “good faith”, as well as the requirement on interpretation in good faith.”<sup>40</sup>

The status of the good faith principle, as a rule of customary international law, has been further consolidated in the *Rhine Chlorides Arbitration concerning the Auditing of Accounts (The Netherlands/France)*, 2004. The tribunal of the *Netherlands/France* case considered that “this application of good faith was reflected in article 32 of the Vienna rules, with its reference to the preparatory work

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37 Gabčíkovo – Nagymaros Project (Hungary v. Slovakia), Judgment, *ICJ Reports 1997*, para. 142.

38 Chile – Taxes on Alcoholic Beverages, WT/DS87/AB/R, WT/DS110/AB/R, 13 December 1999, para. 74.

39 European Communities – Trade Description of Sardines, WT/DS231/AB/R, 26 September 2002, para. 278.

40 HAN Liyu, Application of the Good Faith Principle to WTO Dispute Settlement, *Jurists Review*, No. 6, 2005, p. 151. (in Chinese)

and surrounding circumstances.”<sup>41</sup> It suggests that a State shall also be bounded by the principle of good faith, even if it is not a contracting party to a treaty. Further, practices indicate that the application of the good faith principle is not affected, even if a treaty has not come into effect. For example, in the *Megalidis* case of 1926, the Greco-turkish mixed arbitral tribunal found that “prior to the entry into force of the treaty, the Contracting Parties have an obligation, after signature, to refrain from any action that might impair the treaty by reducing the importance of its clauses. This principle is a mere manifestation of good faith. And the principle of good faith is the basis of all laws and treaties”.<sup>42</sup> The practices relating to treaty interpretation of the Permanent Court of International Justice (PCIJ) reveal that, when considering the real intentions of the parties, the treaty should be interpreted in accordance with its object and purpose, so that disputes may move towards the direction of “equitable” resolution, as originally intended by the good faith principle. For example, when interpreting treaties, the PCIJ held: “treaty obligations should be carried out according to the common and real intention of the parties at the time the treaty was concluded, that is to say, the spirit of the treaty and not its mere literal meaning. This is one of the most important aspects of the principle of good faith and is in accordance with the notion that a treaty is an accord of will between contracting parties.”<sup>43</sup>

Additionally, the panel and the Appellant Body’s objective examination of the *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* is a concrete manifestation of the requirement of “fairness” as embodied in the good faith principle. The principle’s requirement on “reasonableness” is reflected in the *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, the ICJ held that the customs authorities should exercise their powers of making the valuation reasonably and in good faith.

To sum up, the principle of good faith is widely applied and recognized in international (quasi) judicial practices. In the practices relating to the settlement of disputes between States, the principle not only governs the parties to a dispute, but also any interested third parties, and the dispute settlement bodies. The principle

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41 Geogre Pinton Case, *France v. Mexico*, 19 October 1928; Richard K. Garadiner, *Treaty Interpretation*, Oxford: Oxford University Press, 2008, pp. 174~175.

42 Oliver Dörr and Kirsten Schmalenbach eds., *Vienna Convention on the Law of Treaties: A Commentary*, New York: Springer Science & Business Media, 2011, p. 224.

43 Bin CHENG, *General Principle of Law as Applied by International Courts and Tribunals*, London: Stevens and Son, 1953, pp. 114~116.

has obviously become the fundamental basis for the creation and functioning of the international legal system. Particularly, in the settlement of international disputes, ignoring the principle would render any resolution meaningless, and even gradually impair, destroy and collapse the international legal system jointly created by all the States.

### *C. The Relationship Between the Good Faith Principle and Abuse of Rights*

Given that the principle of good faith is abundantly applied in the field of the law of treaties, many doctrines and rules are extended from it. “*Pacta sunt servanda*”, “balance of interests”, “prohibition of abuse of rights”, “estoppel”, “protection of legitimate expectations”, and other legal principles are all derived from the principle of good faith, which exert their unique legal effects in different situations.<sup>44</sup> Signs of abuse of rights are most visible and prominent in the *SCS Arbitration* filed by the Philippines, the paper, therefore, will focus on the links between the principle of good faith and the theory of abuse of rights.

In the words of FENG Shoubo, “the theory of abuse of rights means that States are prohibited from abusing rights, and are required to exercise their rights in good faith, as long as their claims to rights involve obligations under treaties. Hence, if a contracting party abuses its rights under a treaty, it would undermine the rights of other contracting parties under the treaty, which is also a violation of its own obligations under the treaty.”<sup>45</sup> That is to say, the rights exercised by a contracting State should match with its obligations. If it performs its rights in a malicious way that impairs the rights of other contracting States, it would breach its obligation to perform the treaty in good faith, as well as defeat the object and purpose of the treaty. On the other hand, an abuse of rights occurs, generally, on the precondition of the existence of an agreement. The theory of abuse of rights mirrors the requirement of the good faith principle on “honesty and credibility”. In other words, this theory overlaps, to some extent, with the good faith principle. The theory of abuse of rights, recognized in principle by the ICJ, is merely an

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44 LIU Jingdong, *The Principle of Good Faith in WTO Legal System*, Beijing: Social Sciences Academic Press (China), 2009, p. 7. (in Chinese)

45 FENG Shoubo, On the Treaty Interpretation in “Good Faith”: An Empirical Research on “Good Faith” in Art. 31.1 of VCLT, *Pacific Journal*, Vol. 22, No. 5, 2015, p. 6. (in Chinese)

application of this principle to the exercise of rights.<sup>46</sup>

The link between the principle of good faith and the theory of abuse of rights has, in fact, been recorded in the legal systems of some Western States for a long time. For example, the Swiss Civil Code prescribes that “everyone must, in the exercise of his rights and in the performance of his duties, act with truth and faith. The open misuse of a right finds no protection in the law.”<sup>47</sup> Spanish Civil Code, Article 7, provides that “rights must be exercised in accordance with the requirements of good faith. The law does not support abuse of rights or the antisocial exercise of rights.”<sup>48</sup> This provision directly confirms the legal link between the principle of good faith and abuse of rights. And a large number of scholars unanimously believe such a link is embodied in the system of common law.<sup>49</sup> Likewise, this link is also attached with much importance in international law. As stated previously, Article 300 of the UNCLOS has pointed out the close link between the principle of good faith and abuse of rights. Since the principle of honesty and credibility forms a major part of the good faith principle, a behavior which has violated the former principle has, necessarily, breached the latter principle. In the view of Prof. Bin CHENG, the theory of prohibition of abuse of rights primarily has four characteristics: the malicious exercise of a right, the fictitious exercise of a right, interdependence of rights and obligations, and abuse of discretion, which are, as a matter of fact, the manifestation of abuse of rights.<sup>50</sup> To judge whether a behavior falls under the scope of abuse of rights in contravention with the principle of good faith, we must first determine what behavior constitutes an abuse of rights. Hence, the following paragraphs will, from the perspective of the four characteristics, concretely analyze the links between the principle of good faith and the theory of prohibition of abuse of rights.

Firstly, the practices of many civil law countries demonstrate that, the

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46 Bin CHENG, HAN Xiuli and CAI Congyan trans., *General Principles of Law as Applied by International Courts and Tribunals*, Beijing: Law Press China, 2012, p. 125. (in Chinese)

47 LUO Gang, The Principle of Good Faith and Abuse of Procedural Rights in International Law from the Perspective of Legal Realism – Taking the *SCS Arbitration* as an Example, in KONG Qingjiang ed., *International Law Review*, Vol. 7, Beijing: Tsinghua University Press, 2016, p. 19. (in Chinese)

48 Spanish Civil Code, Article 7(1), and the first sentence of Article 7(2).

49 Michael Byers, Abuse of Right: An Old Principle, A New Age, *McGill Law Journal*, Vol. 47, 2002, pp. 389–431.

50 Bin CHENG, HAN Xiuli and CAI Congyan trans., *General Principles of Law as Applied by International Courts and Tribunals*, Beijing: Law Press China, 2012, pp. 125–140. (in Chinese)

malicious exercise of a right is an important aspect of the theory of prohibition of abuse of rights.<sup>51</sup> In the *Fur Seal Arbitration*, 1892, the president of the arbitral tribunal unequivocally acknowledged the application of the prohibition of malicious exercise of a right in international law. Additionally, the United States, a party to the arbitration, also alleged that freedom was only limited to imposing no obstruction or harm, without jeopardizing any coastal State's exercise of its legitimate interests.<sup>52</sup> This suggests that freedom has boundaries. Any acts going beyond the boundaries would be regulated by laws, just as the legal proverb goes: "*Malitiis non est indulgendum*".<sup>53</sup> Therefore, any exercise of a right for the sole purpose of causing damages to the other party is prohibited by law.<sup>54</sup> In the *Case concerning Certain German Interests in Polish Upper Silesia*, 1926, Germany admitted that no rights could be exercised without any restrictions, and an exercise of rights for the purpose of causing damages to the others, but without other important motives, should constitute an abuse of rights.<sup>55</sup> This statement means that the exercise of a right in bad faith constitutes an abuse of rights, which violates the principle of good faith. Apart from that, the malicious exercise of rights, which is generally excluded and prohibited by international judicial bodies and States in the settlement of disputes, should not be recognized and protected by law.

The second is about the fictitious exercise of a right. Any fictitious exercise of rights is for the purpose of evading either a rule of law or a treaty obligation. In order to evade the applicable laws, a party may fabricate or package the alleged "facts", and cover up its unlawful purposes through legal means, so as to evade legal and contractual obligations. Such behaviors obviously go against legal provisions, therefore should be deemed as illegal and ineffective. Fictitious exercise of a right can be found in the *Walter F. Smith Case*, 1929. A State's seizure of a property for personal rather than public interests was considered contrary to the

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51 H. C. Gutteridge, Abuse of Rights, *Cambridge Law Journal*, Vol. 5, 1933, p. 22.

52 John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party, Vol. 1*, Washington: Government Printing Office, 1898, p. 892.

53 Further Response to the United States of America Counter-claim submitted by the Islamic Republic of Iran, Oil Platforms (Islamic Republic of Iran v. United States of America), 24 September 2001, p. 105, note. 45, at <http://www.icj-cij.org/docket/files/90/8636.pdf>, 23 May 2017.

54 Bin CHENG, HAN Xiuli and CAI Congyan trans., *General Principles of Law as Applied by International Courts and Tribunals*, Beijing: Law Press China, 2012, p. 126. (in Chinese)

55 Case concerning Certain German Interests in Polish Upper Silesia (The Merits), Speech of German Agent (Series C-No. 11, Vol. I, pp. 136 et seq.) and German Memorial (pp. 375 et seq.), PCIJ, 1926.

principle of good faith and illegal.<sup>56</sup> In international law, the element “honesty and credibility” inherent in the principle of good faith requires every State sincerely exercise its rights, in compliance with the object and purpose of a treaty. Any fictitious exercise of rights for the purpose of evading either a rule of law or a contractual obligation will not be tolerated by law. For example, in the *Free Zones of Upper Savoy and the District of Gex*, 1932, since France was obliged to maintain the zones free from customs barriers, the PCIJ stated in the award that “A reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under guise of a control cordon.” In other words, the exercise of rights for the purpose of evading legal obligations in bad faith should not be protected by law.<sup>57</sup>

The third concerns the interdependence of rights and obligations. In the words of Prof. Bin CHENG, “When a State assumes a treaty obligation, those of its rights which are directly in conflict with this obligation are, to that extent, restricted or renounced.”<sup>58</sup> To put it simply, when a State assumes an obligation, its rights would be restricted to some different extent. To perform international obligations in good faith can be said to have imposed a general restriction on the rights of States. In *North Atlantic Coast Fisheries*, 1910, the arbitral tribunal argued that:

*Because the line in question is drawn according to the principle of international law that treaty obligations are to be executed in perfect good faith, therefore excluding the right to legislate at will concerning the subject-matter of the Treaty, and limiting the exercise of sovereignty of the States bound by a treaty with respect to that subject-matter to such acts as are consistent with the treaty.*<sup>59</sup>

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56 Walter Fletcher Smith Claim (Cuba, USA), 1929, *Reports of International Arbitral Awards*, Vol. II, p. 917, at [http://legal.un.org/riaa/cases/vol\\_II/913-918.pdf](http://legal.un.org/riaa/cases/vol_II/913-918.pdf), 25 May 2017

57 Case of the Free Zones of Upper Savoy and the District of Gex, Judgment, Series A/B, No. 46, PCIJ, 1932, p. 16. See also the Court’s Order made on 6 December 1930, in the same case, Series A, No. 24, PCIJ, p. 12; Oscar Chinn Case, Judgment, Series A/B, No. 63, PCIJ, 1934, p. 86.

58 Bin CHENG, HAN Xiuli and CAI Congyan trans., *General Principles of Law as Applied by International Courts and Tribunals*, Beijing: Law Press China, 2012, p. 128. (in Chinese)

59 The North Atlantic Coast Fisheries Case (Great Britain, United States), 7 September 1910, *Reports of International Arbitral Awards*, p. 188, at [http://legal.un.org/riaa/cases/vol\\_XI/167-226.pdf](http://legal.un.org/riaa/cases/vol_XI/167-226.pdf), 24 May 2017.

It can be perceived that the principle of good faith enhances the interdependence of rights and obligations of States. *Inter alia*, when a party exercises its rights, it must comply with the requirements of “honesty and credibility” and “reasonableness” as embodied in the principle of good faith. Only when these requirements are satisfied, can that party be considered having fulfilled the obligation in this regard. Where such boundaries are overridden, and a party intentionally exercises its rights by such means as undermine the interests of other parties, that party should be deemed to have violated the obligation to perform a treaty in good faith, which constitutes a breach of the treaty. In this connection, the principle of good faith helps to push the exercise of rights in line with the spirit of the obligations, so as to reasonably balance the interests of all contracting States. The *German Interests* case, 1926, is another typical example mirroring the interdependence of rights and obligations. In *North American Dredging Co. of Texas* case of the same year, when discussing the “world-wide abuse either of the right of national protection or of the right of national jurisdiction”, the Mexico/ U.S.A. General Claims Commission clearly stated:

*The present stage of international law imposes upon every international tribunal the solemn duty of seeking for a proper and adequate balance between the sovereign right of national jurisdiction, on the one hand, and the sovereign right of national protection of citizens on the other. No international tribunal should or may evade the task of finding such limitations of both rights as will render them compatible within the general rules and principles of international law.*<sup>60</sup>

The statement above reveals that the theory of the interdependence of rights and obligations has developed and elevated into a general obligation on law, rather than being only limited to treaties. Therefore, the *bona fide* exercise of a right implies an exercise which is consistent with all treaty obligations or ordinary legal obligations, and also an exercise that is genuinely in pursuit of those interests which the right is destined to protect, whether these interests be secured by treaty

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60 North American Dredging Company of Texas (U.S.A. v. United Mexican States), 31 March 1926, *Reports of International Arbitral Awards*, p. 27, at [http://legal.un.org/riaa/cases/vol\\_IV/26-35.pdf](http://legal.un.org/riaa/cases/vol_IV/26-35.pdf), 24 May 2017.

or by general international law.<sup>61</sup>

The fourth is about the abuse of discretion. An individual or a State may enjoy certain discretion when exercising his or its rights. Therefore, both the individual and the State have the possibility to abuse discretion. When a subject enjoys discretion, it shall exercise its discretion in good faith in line with the standards of “integrity” and “reasonableness”. Overriding these standards would possibly constitute an abuse of rights. However, it is really challenging to judge whether an act constitutes an abuse of discretion or not, due to the ideological character of discretion. In the *Fisheries Case (United Kingdom v. Norway)*, 1951, the ICJ assessed whether Norway had committed “manifest abuse of discretion” during its delineation of baselines, against the standards of “reasonableness” and “moderation”.<sup>62</sup> As perceived from international judicial practices, even if the determination of an abuse of discretion is “subjective” and demanding, it does not mean that it is almost impossible to judge such an abuse. In fact, it is possible to judge whether an abuse of a right governed or excluded by the law exists or not, if the subjective aspects, together with the objective behaviors of the right exerciser, are scrutinized on a case-by-case scenario, by reference to previous international practices and the existence of manifestly malicious or unreasonable conduct *vel non*. Nevertheless, it remains, undeniably, a troubling factor and difficult task in international judicial practices to determine the existence of an abuse of discretion. And the provision that “abuse of a right cannot be presumed”,<sup>63</sup> adds to the difficulty in regulating or controlling abuse of rights. This fact is fully shown in the first advisory opinion rendered by the ICJ. Whether in virtue of Article 4(1) of the Charter of the United Nations, or being bounded by the basic purpose and principles of the UN Charter, all judges agreed that the discretion inherent in the vote should be exercised in good faith.<sup>64</sup> Practices tell that, it is absolutely necessary to exercise the discretion immanent in a right in good faith, no matter in what legal system. The principle of good faith is, indeed, closely linked with the

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61 Bin CHENG, HAN Xiuli and CAI Congyan trans., *General Principles of Law as Applied by International Courts and Tribunals*, Beijing: Law Press China, 2012, pp. 135-136. (in Chinese)

62 *Fisheries Case (United Kingdom v. Norway)*, *ICJ Reports 1951*, pp. 141-142.

63 *Case concerning Certain German Interests in Polish Upper Silesia (The Merits)*, Judgment, Series A, No. 7, PCIJ, 1926, p. 30; *Case of the Free Zones of Upper Savoy and the District of Gex (Second Phase)*, Order, Series A, No. 24, PCIJ, 1930, p. 12; *Case of the Free Zones of Upper Savoy and the District of Gex*, Judgment, Series A/B, No. 46, PCIJ, 1932, p. 167.

64 *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion, *ICJ Reports 1948*, pp. 63, 71, 79 et seq., 91, 92, 93, 103, 115.

theory of prohibition of abuse of rights. This principle harmonizes and balances conflicting interests, ensuring that rights are exercised in an “honest”, “reasonable” and “just” manner, and preventing the emergence of abuse of rights, so as to drive and guarantee the normal and stable operation of the whole legal system.

#### **IV. Specific Manifestations of Violation of the Good Faith Principle in the SCS Arbitration Filed by the Philippines**

The UNCLOS is regarded as the “constitution of the oceans”. Despite of its decisive position, the convention also has limitations. With regards to the settlement of international marine disputes, some UNCLOS provisions are ambiguous but not specific. Apart from that, the UNCLOS lacks a regime regulating the abuse of litigation. Such deficiencies may leave a loophole, where the subjects with unlawful intents may abuse their rights for illegal purposes. As a general legal principle, the principle of good faith is able to fix up the deficiencies of the UNCLOS, and also orient the addressing of disputes in the direction compliant with the spirit and purpose of the UNCLOS, so as to ensure that the disputes may be resolved in a reasonable and fair fashion. It shows that the principle of good faith is fundamental in the interpretation and application of the UNCLOS. A right exerciser must be regulated and bounded by the principle.

From the Philippines’ bringing of the *SCS Arbitration* against China, to the Tribunal’s acceptance and deliberation of the case, then to release of the final award, the case is riddled with abuse of rights in violation of the good faith principle, no matter perceived from the Philippines’ or the Tribunal’ side. The Philippines maliciously abused its rights under the UNCLOS, with a view to undermining China’s sovereignty within the SCS. In order to achieve its unlawful objects, the Philippines played word tricks to partially construe the UNCLOS provisions. Ignoring the object and purpose of UNCLOS, it fabricated many “disputes”, which disturbed the order and trampled on the dignity of international law. In other words, the Philippines utilized the UNCLOS as a “tool of international law” to pursue its unlawful purposes. The Tribunal, acting as an umpire in the dispute settlement mechanism, is supposed to exercise its “discretion” prudently, seeking to peacefully settle disputes as required by the spirit, object and purpose of the UNCLOS. Nevertheless, the Tribunal intentionally evaded its responsibilities and obligations, and further abused its discretion granted by the

dispute settlement mechanism under the UNCLOS, to “tacitly” cooperate with the Philippines and assist the latter in its malicious conducts. By doing so, the Tribunal disrespected the international law, placing dispute settlement on the edge of malignancy. The “cooperation” between the Philippines and the Tribunal, the Philippines’ “disguising” of its submissions through unlawful means, and their “technical” interpretation of legal provisions, obviously constitute abuse of rights, contrary to the principle of good faith. As a result, the final award released by the Tribunal substantially breached the UNCLOS, which is neither reasonable nor fair, and shall be considered null and void. This section will, based on the procedural and substantive aspects, examine the abuse of rights by the Philippines and the Tribunal, with a view to demonstrating China’s legitimate position.

### *A. Procedural Aspect*

Procedural justice, rooted in Western legal culture and system, is widely applied in the judicial practices of Western States. Closely linked with substantive justice, procedural justice is regarded as the “visible justice.” In the mechanism of international dispute settlement, procedural legality and legitimacy are decisive factors of substantive justice. Problems and deficiencies of a legal process, if any, would necessarily affect the justice of a case. This shows that substantive justice directs and governs procedural justice, but the attainment of substantive justice needs the guarantee provided by procedural justice. Closely linked, the two form a unity of opposites. Justice is the direct source of the good faith principle, which, as a general principle of international law, governs the operation of international judicial organs, both in procedural and substantive aspects. The principle of good faith is a part of the institutional foundations for international law with respect to procedures. Some call the extension of this principle in the procedural aspect as “procedural good faith”.<sup>65</sup> Procedural good faith appeared as early as in the “*actio publicaca*” from the Roman law era, and had already been applied in this era. An umpire, in accordance with its authority and the relevant requirements, examined ethical aspects of a behavior on procedure, to determine whether good faith existed

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65 LUO Gang, *The Principle of Good Faith and Abuse of Procedural Rights in International Law from the Perspective of Legal Realism – Taking the SCS Arbitration as an Example*, in KONG Qingjiang ed., *International Law Review*, Vol. 7, Beijing: Tsinghua University Press, 2016, p. 19. (in Chinese)

or not, with a view to helping deliver a just ruling.<sup>66</sup> Procedural good faith was later applied and recognized by international dispute settlement bodies. For instance, procedural good faith was established by WTO, and expressly written into the Understanding on Rules and Procedures Governing the Settlement of Disputes.<sup>67</sup> Among others, to “exercise its judgment as to whether action under these procedures would be fruitful”,<sup>68</sup> to “engage in these procedures in good faith in an effort to resolve the dispute”,<sup>69</sup> and to “enter into consultations in good faith”,<sup>70</sup> are concrete manifestations of procedural good faith. Accordingly, procedural good faith means to sincerely and friendly settle disputes, in line with the object and purpose of a treaty, to orient the settlement of disputes in a rightful and just direction, by making use of the flexibility of the dispute settlement mechanism. In the *SCS Arbitration* initiated by the Philippines, the Philippines’ and the Tribunal’s abuse of rights is based on their violation of procedural good faith, leading to outcomes short of “legitimacy” and “justice”.

In the *SCS Arbitration* initiated by the Philippines, the most prominent problem, procedurally, is whether the Tribunal has jurisdiction over the case, which concerns the foundation of legitimacy for the Philippines’ initiation of the compulsory arbitration. Invoking Annex VII arbitration, one of the means to settle disputes under Section 2, Part XV of the UNCLOS, the Philippines unilaterally brought a compulsory arbitral procedure against China. As a general rule, some threshold requirements, at least, should be met, in order to initiate Annex VII compulsory arbitration: prerequisites such as the fulfillment of obligations under the UNCLOS in a manner which would not constitute an abuse of rights (UNCLOS Article 300), pre-requirements like the performance of the obligation to exchange views (UNCLOS Article 283), and restrictive requirements such as not being subject to the “declaration” made in accordance with UNCLOS Article 298. Nonetheless, the Philippines maliciously evaded its obligations under the UNCLOS,

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66 Heinrich Honsell, *Römisches Recht*, 7th edition, Berlin/Heidelberg: Springer, 2010, pp. 84–86.

67 Marion Panizzon, Fairness, Promptness and Effectiveness: How the Openness of Good Faith Limits the Flexibility of the DSU, *Nordic Journal of International Law*, Vol. 77, No. 3, 2008, pp. 275–300.

68 WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 3(7).

69 WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 3(10).

70 WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 4(3).

and “disguised” its submissions by fragmentizing and converting its claims. On the other hand, the Tribunal, based on its bold hypotheses, raised some presumptions about the provisions of the UNCLOS. It created a number of standards incompliant with the spirit of the UNCLOS, surreptitiously swapped concepts, and reduced its obligation to expound and verify the Philippines’ claims or intentionally failed to discharge this obligation. Worse still, it abused its discretion to open a green channel for the Philippines, so that the latter may, *prima facie*, satisfy the threshold requirements for the start of a compulsory arbitration. By doing so, the Philippines and the Tribunal attempted to jointly “squeeze” China into the arbitral procedure. All these behaviors are originated from abuse of rights in violation of the good faith principle. The following pages will dwell on the principal illegal behaviors of the Philippines and the Tribunal.

### **1. Obvious and Malicious Abuse of Rights by the Philippines**

The abuse of rights is a delicate question in law, since it needs to be assessed and determined in consideration of the ethical aspects of law. Ethical issues are very hazy, and therefore difficult to handle in practice. For this reason, international treaties and the national laws of some countries generally contain legal provisions on ethical issues, with an aim to prevent the right exerciser from affecting the realization of justice for ethical problems. The value of the good faith principle lies exactly in dealing with such legal-moral issue. Article 242 of German Civil Code, Article 1134(3) of the Napoleonic Code, Article 2(2) of the UN Charter, Article 31(1) of the VCLT, and Article 300 of the UNCLOS, all include provisions governing ethical issues, which are manifestations of the good faith principle. These articles indicate that the principle of good faith is a general legal principle applied to handle ethical issues. The bad faith and illegality of the Philippines’ behaviors is presumed based on its failure to conform with some legal-moral regulations, such as the fulfillment in good faith of international obligations and prohibition of abuse of rights provided in UNCLOS Article 300, and on its disregard or deliberate violation of the good faith principle in international law. Such behaviors fundamentally disturbed and undermined the stability of the order of international law established after World War II.

First, the Philippines failed to satisfy the “prerequisite”. It evaded the explicit provision regarding the fulfillment in good faith of international obligations and prohibition of abuse of rights under Article 300 of UNCLOS. Such behaviors, in reality, breached the principle of good faith, as well as the UNCLOS. The “prerequisite”, mainly relating to Article 300 of UNCLOS, requires that a

contracting party, when exercising its rights, shall perform its international obligations in good faith and refrain from abusing its rights. Such requirements are actually the specific manifestations of the good faith principle. Article 26 of the VCLT is drafted for the same purpose. In the *Gabčíkovo-Nagymaros Project*, 1997, the ICJ held that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”, and “The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.”<sup>71</sup> When the contracting parties try to settle their disputes by invoking the treaty concerned, they should reasonably perform their obligations under the treaty in good faith, taking into account the object of the treaty and the consensus reached upon the conclusion of the treaty. However, in order to jeopardize the territorial sovereignty of China, the Philippines went against the statement where it acknowledged the existence of territorial disputes with China, and even adopted some deceptive measures. It first fragmentized its claims to territorial sovereignty into several pieces, and then repacked them into 15 Submissions, which appeared, *prima facie*, irrelevant to disputes over territorial sovereignty. Afterwards, it pretended to admit the existence of territorial disputes with China, with an aim to validate the legal entitlements of the maritime features claimed by it. Lastly, it deliberately underlined that the Tribunal was not invited to adjudicate on any question of sovereignty over islands, rocks or any other maritime features.<sup>72</sup> Through such disguising and deceptive means, the Philippines made its 15 Submissions seemingly compliant with the UNCLOS requirements on “disputes”, further breaking the legal barrier set by the “requisite”, and concealing its illegal intentions. As per the PCIJ, “a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”<sup>73</sup> As we all know, the Philippines has disputes with China over territorial sovereignty in the SCS, while China had, in line with Article 298 of UNCLOS, made a declaration in 2006, excluding such disputes from compulsory procedures. In order to bypass this declaration, the Philippines fabricated some “fictitious” disputes to conceal the real disputes over territorial disputes, and abused its rights under the UNCLOS, intending to prejudice the rights and interests of China. Apparently, the Philippines

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71 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *ICJ Reports 1997*, pp. 78–79.

72 Memorial of the Philippines (The Republic of the Philippines v. The People’s Republic of China), 30 March 2014, para. 1.16. [hereinafter “Memorial”]

73 *The Mavrommatis Palestine Concessions*, Judgment, Series A, No. 2, PCIJ, 1924, p. 11.

unilaterally brought the compulsory arbitral procedure, not for the purpose of resolving disputes in good faith. Instead, presuming on the UNCLOS (“the constitution of oceans”), it tried to provide a *prima facie* legal basis for its unlawful intentions, and further to aggressively damage the maritime rights and interests of China.

Second, the Philippines, *prima facie*, conformed with the “pre-requirements” (UNCLOS Articles 280, 281 and 283), but violated, in reality, the principle of good faith and the doctrines of estoppel and integrity derived from the former principle, which also constitutes a breach of the UNCLOS. Article 280 of the UNCLOS underlines that any treaty between the parties to a dispute may preclude the recourse to a compulsory arbitration. Article 281 states that “the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means”, which also articulates that the existence of an agreement may bar the initiation of a procedure. And Article 283 stresses the obligation to exchange views in advance. Estoppel is a doctrine derived from the principle of good faith, whereby a party is prevented from impairing the rights and interests of any other party by making assertions that are contradictory to its prior promises. This doctrine aims to keep the consistency of conducts in international relations.<sup>74</sup> However, since this doctrine has solid foundation in both common and civil law systems, and has been widely applied and recognized in international judicial practices, it not only governs the moral aspects in international relations, but also the performance of rights and obligations.

Due to the complexity of SCS issues, ASEAN States and China jointly formulated and signed the Declaration on the Conduct of Parties in the South China Sea (DOC),<sup>75</sup> seeking to settle the SCS issues through agreement. In the present case, to determine whether the Philippines had violated the “pre-requirements”, the status of the DOC as an “agreement”, as referred to by Articles 280 & 281, or not should be demonstrated first. In the Memorial, the Philippines alleged that the DOC only used the term “declaration” but not “agreement” in its preamble, and the term “undertake” in the DOC did not mean “agree” with a mandatory nature. Additionally, it claimed that the circumstances surrounding the DOC’s

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74 LUO Gang, *The Truth of International Law and Fundamental Flaws in the SCS Arbitration between China and the Philippines*, at <http://www.aisixiang.com/data/100801.html>, 27 March 2017. (in Chinese)

75 At [http://asean.org/?static\\_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-3&category\\_id=32](http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-3&category_id=32), 13 May 2017. (in Chinese)

adoption provide further evidence that it was not intended to be a legally binding instrument, but a non-binding political instrument adopted on the basis of a series of compromises reached by the States.<sup>76</sup> These views of the Philippines are arbitrary and one-sided, since it denied and distorted the objectives the signatory States of the DOC undertook to achieve, simply by virtue of some terms used by the DOC. As provided by Article 2(1) of VCLT, “‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”<sup>77</sup> That is to say, international instruments, whatever their particular designations (treaty, statement, declaration, interim agreement or memorandum), have identical effect under international law, as long as the parties which signed, ratified, accepted or endorsed the instruments have an intent to create rights and obligations.<sup>78</sup> Therefore, the determination of the status of the DOC as a legally binding document *vel non*, cannot simply rely on the name of the document; rather, it depends on whether China and the ASEAN States had an intent to create rights and obligations upon its conclusion. Apart from that, according to the explanations provided by *Oxford Advanced Learner’s Dictionary* and other authoritative dictionaries, the term “undertake” includes the meaning “to agree”. Notably, the term “undertake” was used by 1907 Convention for the Pacific Settlement of International Disputes, and repeatedly appeared in the text of its Articles 23, 41, 43 and 75. It shows that the word “undertake” articulates a legally binding effect in that convention.<sup>79</sup> When signing the DOC in 2002, the Philippines “undertook” to resolve SCS issues through “friendly consultations and negotiations”. All the signatory States are committed to implementing the DOC and the guides to actions formulated after the execution of the DOC, as well as the preparation of plans for cooperation on the SCS, which shows that the signatory States have an intent to create rights and obligations. Of course, these States may inevitably encounter some dilemmas where a settlement cannot be reached,

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76 Memorial, para. 7.55.

77 Vienna Convention on the Law of Treaties, at [http://www.fmprc.gov.cn/mfa\\_chn/ziliao\\_611306/tyti\\_611313/t83909.shtml](http://www.fmprc.gov.cn/mfa_chn/ziliao_611306/tyti_611313/t83909.shtml), 2 April 2017.

78 Thomas Buergerthal and Sean D. Murphy, *Public International Law*, 3rd edition, Eagan: West Group, 2002, pp. 102~103; Robert Jennings and Arthur Watts eds., *Oppenheim’s International Law, Volume 1 (Peace)*, 9th edition, London/New York: Addison Wesley Longman Inc., 1996, pp. 1208~1209.

79 1907 Convention for the Pacific Settlement of International Disputes, Articles 23, 41, 43, 75.

however, it cannot lead to the arbitrary view that the DOC is a political document without binding force, since these signatory States have never stopped resolving specific SCS issues through the way they “undertook” to take. Additionally, the Philippines’ continuous participation in the drafting of the follow-up actions, guides and programs concerning the DOC and its start of such programs, evinces its willing to be bounded by the DOC through the way it “undertook” to take. That is to say, the DOC is an international instrument with both political and legal nature signed between China and the ASEAN States. It belongs to a kind of “agreement” provided in Articles 280 and 281 of the UNCLOS, which may preclude the recourse to any compulsory arbitral procedure.<sup>80</sup> Furthermore, the Philippines, in its Submission 11, argued that China breached its obligation to protect marine environment at the Huanyan Island and Ren’ai Reef, as provided under the UNCLOS. However, the truth is that the Philippines had never, according to the UNCLOS, fulfilled its obligation to exchange views with China in good faith with respect to marine environmental issues,<sup>81</sup> nor the obligation to exhaust local remedies.<sup>82</sup> On the one hand, the Philippines alleged that it had performed its obligations to exchange views and exhaust local remedies; nevertheless, on the other hand, it still attended all meetings convened by China and the ASEAN States regarding the settlement of SCS issues. In such meetings, the Philippines failed to express any objections or make any relevant reservations. In this connection, its position was inconsistent with its acts in the international arena. By doing so, the Philippines purported to hide the truth that “the disputes are being negotiated effectively under a multilateral framework, although without immediate effect”, which violated the doctrines of estoppel and integrity embodied in the principle of good faith.

Third, the Philippines’ unilateral initiation of the compulsory arbitration does not conform with the “restrictive requirements” as prescribed in UNCLOS Part XV, Section 3. The matters submitted by the Philippines concern, in essence, territorial sovereignty and marine boundary delimitation. Notably, territorial sovereignty issues are not governed by the UNCLOS, and delimitation issues are excluded by the declaration made by China in 2006. If the Philippines wants to successfully start

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80 Song Yann-huei, “The South China Sea Arbitration Case Filed by the Philippines against China”: A Discussion on Preliminary Objections to the Tribunal’s Jurisdiction, *Chinese Review of International Law*, No. 2, 2014, p. 31. (in Chinese)

81 UNCLOS, Article 283(1).

82 UNCLOS, Article 295.

the arbitral procedure, apart from the pre-requirements provided for in Articles 280 and 281 of the UNCLOS, it still has to meet the “restrictive requirements” under Article 298. For the purpose of evading China’s declaration of 2006, and coping with the “restrictive requirements” under the UNCLOS in a perfunctory way, the Philippines spared no effort to disguise its territorial sovereignty claims into issues concerning the entitlements of each and every marine feature, by fragmentizing its territorial sovereignty and using word tricks. It ultimately attempted to exclude its claims from the delimitation disputes covered in China’s declaration of 2006. The Preamble of the UNCLOS explicitly states that “Conscious that the problems of ocean space are closely interrelated and need to be considered as a whole.”<sup>83</sup> In this sense, the Philippines’ disintegration of its disputes with China has derogated from the spirit of the UNCLOS. Additionally, the Philippines failed to construe the true meaning of Article 298(1)(a)(i) in good faith. Instead, it maliciously evade delimitation issues; it disintegrated its territorial sovereignty by “harming its own rights”,<sup>84</sup> with an aim to fragmentize China’s territorial sovereignty within the SCS and limit China’s claims to maritime rights and interests. In its 15 Submissions, the Philippines argued that Huangyan Island, Chigua Reef, Huayang Reef and Yongshu Reef were not entitled to exclusive economic zone (EEZ) and continental shelf; and that Meiji Reef, Ren’ai Reef, Zhubi Reef, Nanxun Reef and Ximen Reef (including Dongmen Reef) were not able to generate territorial sea, EEZ or continental shelf. The marine features named above, in fact, are located within the areas under the control of China. As a matter of fact, the Philippines had, on many international occasions and in a great number of international documents, admitted its territorial sovereignty over these marine features, long before the start of the arbitration. For example, the Philippines, in the diplomatic note of 5 April 2011 (No. 000228), stated “the Republic of the Philippines has sovereignty and jurisdiction over the geological features in the Kalayaan Island Group”.<sup>85</sup> In addition, during the deliberation of the *Magallona v. Ermita* case, the Supreme Court of the Philippines mentioned that the Philippine Congress had identified the Kalayaan Island Group as “regime of islands”, and the Philippines enjoyed territorial sovereignty over

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83 UNCLOS, Preamble, para. 3.

84 LUO Gang, *The Principle of Good Faith and Abuse of Procedural Rights in International Law from the Perspective of Legal Realism – Taking the SCS Arbitration as an Example*, in KONG Qingjiang ed., *International Law Review*, Vol. 7, Beijing: Tsinghua University Press, 2016, p. 24. (in Chinese)

85 The Philippines, Communication dated 5 April 2011, at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/phl\\_re\\_chn\\_2011.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/phl_re_chn_2011.pdf), 16 February 2016.

the features of Kalayaan Island Group, which was consistent with Philippine constitution.<sup>86</sup> In order to successfully start the compulsory arbitral proceeding, the Philippines acted inconsistently with its state practices to avoid the restrictive requirement under UNCLOS Article 298, which obviously breached the doctrines of estoppel and integrity derived from the principle of good faith. The Philippines, *prima facie*, tried to settle its disputes with China through pacific and legal means, but, in essence, intended to impair the maritime rights and interests of China by resorting to the dispute settlement mechanism or procedures under the UNCLOS. This sham is obviously willful, since it represents an abuse of rights, severely derogating from the object and purpose of the UNCLOS.

## 2. The Tribunal Violated the Principle of Good Faith and “Created Law When Deciding the Case” by Abusing Its Jurisdiction

In the *SCS Arbitration* unilaterally filed by the Philippines, one of the most controversial issues concerns the jurisdiction of the Tribunal. To address this issue, we should first make clear the following questions: what is jurisdiction? who determines the jurisdiction of a tribunal? what factors govern the exercise of jurisdiction? and what effect does an award made beyond the jurisdiction of a tribunal have? That is to say, we need first understand the basic theories of jurisdiction, before exploring the jurisdiction issue in the *SCS Arbitration*. Jurisdiction has solid judicial foundation both home and abroad, and was widely applied in judicial practices. In the view of the American-Mexican General Claims Commission set up in 1923, jurisdiction is the power of a tribunal to determine a case conformably to the law creating the tribunal or some other law defining its jurisdiction.<sup>87</sup> It follows that jurisdiction is created by law. Rights coexist with obligations. The enjoyer of jurisdiction should also undertake duties corresponding to its jurisdiction, and serves for the purpose of the law creating itself. And the enjoyer should also exercise its jurisdiction within, but not beyond, the prescribed limits of its power. Hence, courts should not deliberate and rule on any facts

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86 Michael Sheng-ti Gau, The Jurisdiction and Admissibility Rulings of the South China Sea Arbitration: Errors in Law and in Fact, *Journal of Boundary and Ocean Studies*, Vol. 2, No. 1, 2017, p. 18. (in Chinese)

87 Genie Lantman Eltom (U.S.A.) v. United Mexican States, 13 May 1929, *Reports of International Arbitral Awards*, p. 533, at [http://legal.un.org/riaa/cases/vol\\_IV/529-534.pdf](http://legal.un.org/riaa/cases/vol_IV/529-534.pdf), 24 May 2017; Salem Case (Egypt, USA), 8 June 1932, *Reports of International Arbitral Awards*, p. 1205, at [http://legal.un.org/docs/?path=../riaa/cases/vol\\_II/1161-1237.pdf&lang=O](http://legal.un.org/docs/?path=../riaa/cases/vol_II/1161-1237.pdf&lang=O), 24 May 2017; Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Dissenting Opinion by Judge *ad hoc* Daxner, *ICJ Reports 1948*, p. 39.

involved in a case over which they lack jurisdiction. This is based on a common notion encompassed in all judicial regimes. That is, judgments, if rendered in excess of jurisdiction, may be treated as null and void, and international tribunals have universally regarded the question of jurisdiction as fundamental.<sup>88</sup> *United States-Canada Northeastern Boundary Arbitration*, 1831,<sup>89</sup> and *Orinoco Steamship Company Case (United States of America/Venezuela)*, 1910,<sup>90</sup> among others, have proved this fact.

The above cases show that not only unauthorized decisions (lack of jurisdiction), but also decisions arrived at in disregard of the constitution of a tribunal, either as to the object of the submission or the legal principles to be applied (excess of competence), are null.<sup>91</sup> In other words, a tribunal should be constituted in accordance with the agreement creating its rights and obligations, and should not act in contravention to the object and purpose of the agreement. *Inter alia*, decisions should not be rendered in violation of the compulsory provisions under the agreement relating to applicable laws or legal principles; otherwise, the decisions would be considered as null. With respect to the issue of jurisdiction, the PCIJ held that “The Court’s jurisdiction depends on the will of the Parties.”<sup>92</sup> Consequently, the parties to a case form a critical factor in the establishment and exercise of jurisdiction. As noted by the ICJ, in the *Eastern Carelia*, 1923, that “It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.”<sup>93</sup> That is to say, the jurisdiction of a court is established on the basis of the consent of the parties to a case. This contention was echoed by the ICJ in the *Corfu Channel* case, 1948.<sup>94</sup> With regards to the power to

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88 Mavronmmatis Palestine Concessions, Dissenting Opinion by M. Moore, Series A, No. 2, PCIJ, 1924, pp. 57~60.

89 John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, Vol. 1, Washington: Government Printing Office, 1898, pp. 85~161.

90 James Brown Scott ed., *The Hague Court Reports*, 1st Series, Oxford: Oxford University Press, 1916, pp. 505~506.

91 Bin CHENG, HAN Xiuli and CAI Congyan trans., *General Principles of Law as Applied by International Courts and Tribunals*, Beijing: Law Press China, 2012, p. 267. (in Chinese)

92 Rights of Minorities in Upper Silesia (Minority Schools), Judgment, Series A, No. 15, PCIJ, 1928, p. 22; Anglo-Iranian Oil Co. Case (Jurisdiction), Judgment of 22 July 1952, *ICJ Reports 1952*, p. 103.

93 Status of Eastern Carelia, Advisory Opinion, Series B, No. 5, PCIJ, 1923, p. 27.

94 Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment on Preliminary Objection, *ICJ Reports 1948*, pp. 27~28.

determine the extent of jurisdiction, the PCIJ stated, in Advisory Opinion (No. 16), that “as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction.”<sup>95</sup> Jurisdiction is of a judicial character, it therefore constitutes a source of the legitimacy of judicial decisions.<sup>96</sup> In that case, when determining the extent of its jurisdiction, the court should interpret its power in a restrictive fashion. This view is reflected in a huge number of international cases. For example, the PCIJ, in the *Free Zones of Upper Savoy and the District of Gex*, 1932, pointed out that, “The Court does not dispute the rule invoked by the French Government, that every Special Agreement, like every clause conferring jurisdiction upon the Court, must be interpreted strictly,”<sup>97</sup> “but that rule could not be applied in such a way as to give the Special Agreement, under the guise of strict interpretation, a construction according to which it would not only fail entirely to enunciate the question really in dispute, but would, by its very terms, have prejudged the answer to that question.”<sup>98</sup> This view was shared in both *Greco-Bulgarian case*, 1919, and *Chorzów Factory case*, 1927.

The statements above shows that international judicial practices, in most cases, favored strict interpretation, so as to limit the exercise of jurisdiction, and avoid to rendering the outcome of a case unfair or null due to excess of competence. However, since the establishment and exercise of jurisdiction is, to some extent, of a discretionary character, it is easily affected by subjective factors, and vulnerable to moral risks. If the jurisdiction is willfully exercised and abused, the corresponding decision would be short of legitimacy and justice. Examples of abuse of jurisdiction are abundant in international judicial practices. For example, both *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, and *Request for Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ* submitted by the Sub-Regional Fisheries Commission to the ITLOS, showcase the current game between “self-restriction of power” and “expansion of power” of

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95 Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, Series B, No. 16, PCIJ, 1928, p. 20; Zeltweg-Wolfsberg and Unterdrauburg-Woellan Railways Case (Preliminary Objection), 1934, *Reports of International Arbitral Awards*, Vol. III, p. 1803, at [http://legal.un.org/docs/?path=../riaa/cases/vol\\_III/1795-1815.pdf&lang=O](http://legal.un.org/docs/?path=../riaa/cases/vol_III/1795-1815.pdf&lang=O), 25 May 2017.

96 ZHANG Hua, The Emerging Problem of Non-appearance in the UNLCOS Dispute Settlement Mechanism, *Pacific Journal*, Vol. 22, No. 12, 2014, p. 8. (in Chinese)

97 Case of the Free Zones of Upper Savoy and the District of Gex, Judgment, Series A/B, No. 46, PCIJ, 1932, pp. 138~139.

98 Case of the Free Zones of Upper Savoy and the District of Gex, Judgment, Series A/B, No. 46, PCIJ, 1932, p. 139.

international dispute settlement bodies. An international judicial or arbitral body, when exercising its jurisdiction in the settlement of inter-State disputes, shall not arbitrarily expand or abuse its rights, contrary to the goal for which the member States established it. Such behaviors would not only impair judicial credibility, but also prejudice the stability of the existing order. Moreover, such a judicial or arbitral body is obliged to be more prudent, when exercising its authorities and powers, especially jurisdiction. In other words, it should adhere to the principle of judicial restraint.<sup>99</sup> However, the mere “principle of judicial restraint” is not sufficient to prevent the abuse of jurisdiction, which should be jointly regulated by other legal rules or principles, especially the principle of good faith – one of “the general principles of law recognized by civilized nations”. Therefore, an international dispute settlement body should also comply with the principle of good faith when exercising its jurisdiction. However, in the *SCS Arbitration* brought by the Philippines, the Tribunal failed to follow the principles of judicial restraint and good faith. Specifically, it definitely expanded its power and arbitrarily construed some legal provisions, deviating from the common goal for which the States Parties signed the UNCLOS. All these ultimately result in a partial award.

First, the Tribunal arbitrarily delivered its decisions without conducting examination and review in good faith. For example, it directly ruled that the Philippines complied with UNCLOS Article 300 by only invoking some individual and partial views. China insists that the Philippines’ unilateral initiation of the compulsory arbitration amounts to an unlawfully abuse of its procedural rights. In this connection, whether the Philippines has fulfilled its obligations in good faith and abused its rights is a main point in this dispute, and also one of the “prerequisites” and legal basis for the Philippines’ successful start of an arbitral procedure. Under such a controversial circumstance, the Tribunal, as an umpire, should handle the issue in good faith with more prudent attitude. Conversely, the Tribunal deliberately beat around the bush: it disregarded the examination of the Philippines’ abuse of arbitral procedure, but directly determined that the Philippines’ unilateral filing of the arbitration was consistent with Article 300 of UNCLOS, without abuse of rights, by simply invoking *Barbados v. Trinidad*

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99 YE Qiang, Challenges for China Concerning International Judicial Intervention in Its Battle for Maritime Rights and Interests with Neighboring States: A Perspective from Two Cases, *World Affairs*, No. 10, 2015, pp. 25–27. (in Chinese)

and Tobago, 2006.<sup>100</sup> Such an arbitrary decision violated Article 38 of the Statute of the International Court of Justice, since partial views cannot become a rule of international law. Judicial organs should rule on a case, following, in good faith, the principle of “taking facts as the basis and the law as criterion” and taking into account the details of the case. However, in the *SCS Arbitration*, the Tribunal failed to objectively examine the facts involved in the case, or apply the relevant laws. It, in not more than two pages of the Award on Jurisdiction and Admissibility, adjudicated on whether the Philippines’ filing of the arbitration had constituted an abuse of right, by simply invoking one case.<sup>101</sup> This award is ill-founded in fact and law, obviously derogating from the requirements of “being reasonable” and “legitimate”, as embodied in the principle of good faith.

Second, the Tribunal, deviating from the spirit of the UNCLOS, strictly interpreted UNCLOS Article 281 in bad faith. On international law, the start of an international dispute settlement procedure, in most cases, is subject to the consent of the parties to a dispute. The ICJ underlined this point in the *Eastern Carelia* case, and also reiterated, in the *Interpretation of Peace Treaties Case*, that “The consent of States, parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases.”<sup>102</sup> The dispute settlement mechanisms under UNCLOS include both voluntary and compulsory ones, however, the selection of such mechanisms still subjects to the “consent of the parties to a dispute”, which is commonly recognized in the international law. Resorting to voluntary mechanism first and compulsory one second, and relaxing the standard of legal interpretation is the basic spirit that the UNCLOS seeks for the establishment of dispute settlement mechanisms.<sup>103</sup> Therefore, in the Sino-Philippine *SCS Arbitration*, whether the DOC can be treated as an “agreement” within the meaning of Article 281 is a “pre-

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100 The Republic of the Philippines v. The People’s Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 126.

101 LUO Gang, The Principle of Good Faith and Abuse of Procedural Rights in International Law from the Perspective of Legal Realism – Taking the *SCS Arbitration* as an Example, in KONG Qingjiang ed., *International Law Review*, Vol. 7, Beijing: Tsinghua University Press, 2016, p. 21. (in Chinese)

102 Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, *ICJ Reports 1950*, p. 71; Nottebohm Case (Preliminary Objection), Judgment of 18 November 1953, *ICJ Reports 1953*, p. 122; Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question), Judgment of 15 June 1954, *ICJ Reports 1954*, p. 32; Phosphates in Morocco, Judgment, Series A/B, No. 74, PCIJ, 1938, p. 24.

103 LUO Gang, The Truth of International Law and Fundamental Flaws in the *SCS Arbitration* between China and the Philippines, at <http://www.aisixiang.com/data/100801.html>, 27 March 2017. (in Chinese)

requirement” that the Philippines has to meet, if it intends to initiate an arbitral procedure. Article 281 has no explicit provision on the nature of “agreement”, nor any specific requirement that the “agreement” should be legally binding. Under this circumstance, the treaty interpreter shall, as per Article 31(1) of VCLT, construe the term in good faith. Arbitral bodies with judicial capacities should put more efforts in complying with the principle of judicial restraint. However, the Tribunal, for the purpose of expanding its power, assumed that it had the freedom to construe a term where an express provision was absent. Based on this assumption, it construed the “agreement” under Article 281 as the agreement with legally binding force. Such a strict and rigid interpretation not only disregarded and violated the principle of good faith in terms of treaty interpretation, but also severely derogated from the spirit of UNCLOS which encourages the freedom of choice in dispute settlement mechanisms.<sup>104</sup>

Third, the Tribunal, with the view of establishing its jurisdiction, construed the nature of the “dispute” under UNCLOS Article 298 as a whole, defeating the object and purpose of UNCLOS. In accordance with Article 298 and Annex VII of UNCLOS, the Tribunal’s jurisdiction is only limited to “any dispute concerning the interpretation or application of the UNCLOS”. Whether or not the matters covered in the reservation made by China in 2006 should be considered as a dispute that is, in line with the declaration under Article 298, excluded from compulsory procedures, is critical to the establishment of the Tribunal’s jurisdiction. That is to say, the nature of the “dispute” and its definition concern the establishment of the Tribunal’s jurisdiction. If the “dispute” does not concern the application or interpretation of the UNCLOS, the Tribunal would have no jurisdiction over it. Accordingly, the Tribunal must deal with two issues: one is to determine the nature of the dispute, and the other is to decide whether the dispute concerns the interpretation or application of the UNCLOS.<sup>105</sup> The determination of the nature of the dispute serves as a critical and turning point in the Arbitration. It is generally recognized in international law that a dispute is a disagreement on a point of law or

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104 LUO Gang, *The Truth of International Law and Fundamental Flaws in the SCS Arbitration between China and the Philippines*, at <http://www.aisixiang.com/data/100801.html>, 27 March 2017. (in Chinese)

105 ZHANG Zuxing, *South China Sea Arbitration: A Critical Review of the Rulings by the Tribunal concerning Historic Rights Claim*, *Southeast Asian Studies*, No. 6, 2016, p. 47. (in Chinese)

fact, a conflict of legal views or of interests between two persons.<sup>106</sup> In the view of Robert Jennings, a legal dispute, in the technical and practical sense, is a series of pending issues that are processed and restored into a form capable of being decided by a court.<sup>107</sup> When defining the nature of a dispute, “a court or tribunal should consider ‘not only’ the statement of claim and final submissions, but also ‘diplomatic exchanges, public statements and other pertinent evidence’, as well as the conduct of the parties both prior to and after the commencement of legal proceedings.”<sup>108</sup> In the present case, the Tribunal asserted that:

*First, where a party has declined to contradict a claim expressly or to take a position on a matter submitted for compulsory settlement, the Tribunal is entitled to examine the conduct of the Parties – or, indeed, the fact of silence in a situation in which a response would be expected – and draw appropriate inferences. Second, the existence of a dispute must be evaluated objectively. The Tribunal is obliged not to permit an overly technical evaluation of the Parties’ communications or deliberate ambiguity in a Party’s expression of its position to frustrate the resolution of a genuine dispute through arbitration.*<sup>109</sup>

The criteria put forward by the Tribunal are not utterly unreasonable. However, when applying these criteria, the Tribunal, in most cases, excluded those barring the establishment and exercise of its jurisdiction. It, on the one hand, deliberately evaded and reduced its obligation to expound and verify the Philippines’ claims, but on the other hand, it intentionally distorted China’s position and statements. Under the circumstance where facts are unclear and evidences are insufficient, the Tribunal directly arrived at the wrong decision that the “dispute” submitted by the Philippines neither concerned territorial sovereignty nor maritime delimitation.<sup>110</sup> In fact, when it comes to treaty interpretation, the Tribunal, resembling the Philippines, chose to fragmentize the whole dispute into pieces, and then excluded

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106 The Mavrommatis Palestine Concessions, Judgment (Objection to the Jurisdiction of the Court), Series A, No. 2, PCIJ, 1924, p. 11.

107 Robert Jennings, Reflection on the term “dispute”, in *Collected Writings of Sir Robert Jennings*, Vol. 2, The Hague/Boston: Kluwer Law International, 1998, p. 584.

108 Memorial, para. 7.11.

109 The Republic of the Philippines v. The People’s Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 163.

110 The Republic of the Philippines v. The People’s Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, paras. 152, 153, 155.

those legal barriers challenging the establishment and exercise of its jurisdiction, especially the declaration made by China in 2006 in accordance with UNCLOS Article 298. Actually, both China and the Philippines had admitted that their dispute, in essence, concerned territorial sovereignty and maritime delimitation, which is also mirrored in their diplomatic statements and documents, and widely known in the international arena. Nevertheless, the Tribunal, for the purpose of establishing and protecting its jurisdiction, chose to disregard this fact.

Fourth, the Tribunal failed to discharge its general obligation to ascertain the facts as provided for in UNCLOS Annex VII, Article 9. This Article 9 prescribes that absence of a party shall not constitute a bar to the proceedings, but the arbitral tribunal shall undertake certain responsibilities: it “must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.” This is a general obligation, whose application is not limited to the situation where a party does not appear before the arbitral tribunal.<sup>111</sup> The provision that “absence of a party shall not constitute a bar to the proceedings” indicates that the arbitral tribunal, in this situation, has some discretion to decide whether or not to continue the proceedings. Nonetheless, the arbitral tribunal shall also subject to some restrictions. Specifically, it should, in line with the principle of taking facts as the basis and the law as criterion, seriously consider and examine the absence of a party. In the present case, China did not appear before the Tribunal due to its doubts over the Tribunal’s jurisdiction, which shows that China disagrees with the proceedings. As described above, the consent of States is the basis of the court’s jurisdiction in contentious cases. In this case, the Tribunal cannot simply, as per the procedural rules of arbitration, treat China’s conduct as “non-appearance”. Additionally, the provisions regarding dispute settlement under the UNCLOS did not specify how the arbitral tribunal should continue the proceedings, when a party to a dispute fails to give its consent or appear before the tribunal.<sup>112</sup> Seen from another angle, it actually concerns a question: in the absence of a party, should the arbitral tribunal adopt the strategy of judicial activism or restraint? Robert Kolb, a Swiss jurist who has summarized nearly 70 years of the judicial experiences of

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111 M. C. W. Pinto, The Interpretation of United Nations Convention on the Law of the Sea and the International Rule of Law, *Journal of Boundary and Ocean Studies*, No. 2, 2016, p. 43. (in Chinese)

112 M. C. W. Pinto, The Interpretation of United Nations Convention on the Law of the Sea and the International Rule of Law, *Journal of Boundary and Ocean Studies*, No. 2, 2016, p. 43. (in Chinese)

the ICJ, answered the question in the following way: judicial activism and restraint fall under the scope of the judicial policies issued by the ICJ. The choosing of the two depends on various elements. Specifically, where a case involves international crises, the Court had better adopt a cautious and restrictive attitude in the application of laws; where the political relations between the parties to a dispute are tense, or where the circumstances between the parties do not allow any aggressive decisions, adopting a cautious attitude may contribute to the reaching of understanding by the parties. When the legal issues involved in a case coincidentally constitute the subject of the negotiation concerning a multilateral treaty, and that treaty may alter current rules, the Court, for the purpose of avoiding intervening with multilateral legislative function, should also adopt a restrictive position.<sup>113</sup> This rational perspective is consistent with the spirit of UNCLOS; adopting this perspective would contribute to the resolution of the disputes between China and the Philippines in the present case. The *SCS Arbitration* involves more than two States in interest, and these States have always been active in holding all kinds of conventions and taken corresponding measures, with a view to facilitating the settlement of their disputes. *Inter alia*, all the States concerned signed the DOC. All the States Parties which have signed and accepted the declaration have always been dedicated to implementing its specific provisions, in an effort to create rights and obligations for themselves. Given the complexity of the *SCS Arbitration*, the Tribunal is supposed to fulfill the general obligation to ascertain the facts under UNCLOS Annex VII, Article 9, and adopt the strategy of judicial restraint, or comply with the principle of judicial self-restraint. Nevertheless, in order to “maintain its power (jurisdiction)”, it acted against the principle above in the following way: it utterly disregarded the pacific settlement of disputes, and absolutely exercised its discretion, which amounts to a breach of the UNCLOS.

Fifth, the Tribunal abused evidences, resulting in the obvious flaws found in the phase of facts ascertaining. In the Award on Jurisdiction and Admissibility, the Tribunal, for the purpose of proving that Submissions 3, 4, 6 and 7 of the Philippines concerned the dispute between the two States, invoked the diplomatic notes between the two parties in 2011 as evidences.<sup>114</sup> However, these notes of 2011 were issued in response to the notes delivered by China in 2009. Consequently, the

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113 Robert Kolb, *The International Court of Justice*, Oxford: Hart Publishing, 2013, p. 1175.

114 *The Republic of the Philippines v. The People's Republic of China*, Award on Jurisdiction and Admissibility, 29 October 2015, p. 66.

interpretation and application of the notes of 2011 cannot be isolated from China's notes of 2009. Nevertheless, the Tribunal intentionally ignored the existence of notes of 2009; it selectively invoked the notes of 2011 to directly reach the conclusion: the Philippines' Submissions 3, 4, 6 and 7 could reflect the dispute between China and the Philippines with respect to the legal status of some maritime features. In fact, the note delivered by the Philippines in 2011 did not mention any specific features of the "Kalayann Island Group"; in the note, the Philippines merely claimed that these features were "entitled" to territorial sea, EEZ and continental shelf.<sup>115</sup> Such typical official statements are inconsistent with the "structure" of the Philippines' Submissions 3, 4, 6 and 7. However, in the present arbitration, the Philippines changed its position, claiming that none of features of the "Kalayann Island Group" can be qualified as an island capable of generating territorial sea, EEZ and continental shelf.<sup>116</sup> The Tribunal turned a blind eye to such obviously self-contradictory conducts of the Philippines, but criticized China and distorted the real meanings of China's diplomatic notes. In China's notes of 2011, China claimed the maritime entitlements (i.e., territorial sea, EEZ and continental shelf) under the UNCLOS based on the Nansha Islands in its entirety, rather than any named features. These notes neither separately mentioned any features of the Nansha Islands, nor discussed whether these features were entitled to such marine areas.<sup>117</sup> Facing the claims that China has never raised, and the self-contradictory statements of the Philippines, the Tribunal, simply based on the diplomatic notes communicated between the two parties in 2011, arrived at the conclusion that real "dispute" existed between them. It is submitted that the Tribunal arbitrarily used evidences, leading to obvious and severe fallacies in fact.

### *B. Substantive Aspect*

The Tribunal, for the sake of consolidating its "absolute" jurisdiction, disregarded the object and purpose of the UNCLOS, created new criteria through "judicial lawmaking" and expressed many views derogating from the common

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115 The Philippines, Communication dated 5 April 2011, pp. 2~3, at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/phl\\_re\\_chn\\_2011.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/phl_re_chn_2011.pdf), 16 February 2016.

116 The Republic of the Philippines v. The People's Republic of China, Final Transcript Day 1-Jurisdiction Hearing, 7 July 2015, pp. 44~45.

117 Michael Sheng-ti Gau, The Jurisdiction and Admissibility Rulings of the *South China Sea Arbitration*: Errors in Law and in Fact, *Journal of Boundary and Ocean Studies*, Vol. 2, No. 1, 2017, p. 17. (in Chinese)

understanding of the international community. With regards to substantive issues, the Tribunal and the Philippines tacitly took the same position, and did their utmost to cryptically render the rights within the “dashed line” meaningless through “three keys”, so as to impair the rights that China claimed in the SCS. The three keys are detailed as follows: firstly, in order to exclude the application of the declaration made under UNCLOS Article 298, they wrongly distorted the connotations of the historic rights within the “dashed line”, and distanced historic rights from historic title; secondly, the Tribunal, through “judicial lawmaking”, created new criteria for assessing an island, and misinterpreted the provisions about island under Article 121, so as to vitiate the maritime entitlements of all islands in the SCS, and further to exclude maritime delimitation issues from the dispute submitted by the Philippines; thirdly, in the absence of maritime delimitation issues, the Tribunal definitely supported the Philippines’ claims of rights to EEZ or continental shelf. Once the first two tasks are completed, the Tribunal and the Philippines may act arbitrarily. And the third one is certainly under their control.

**1. Malicious Misinterpretation of the Connotations of the Historic Rights within the “Dashed Line” against the Object and Purpose of the UNCLOS**

The Tribunal’s views, in the final award released on July 12, 2016, can be summarized into three points. Firstly, the Tribunal held that the historic title under UNCLOS refers to claims of historic sovereignty over bays and other near-shore waters, while China claimed historic rights to resources within the “dashed line”, but did not claim historic title over the waters of the SCS.<sup>118</sup> Secondly, in the view of the Tribunal, the UNCLOS comprehensively allocated the rights of States to maritime areas; considering the protection of pre-existing rights to resources, such rights to resources were incorporated into the final text of the Convention, and became a part of maritime rights. Although Chinese navigators and fishermen, as well as those of other States, had historically made use of the islands in the SCS, such historical navigation and fishing represented the exercise of high seas freedoms, rather than a historic right, and that there was no evidence that China had historically exercised exclusive control over the waters and resources of the SCS.<sup>119</sup> Thirdly, the Tribunal concluded that even if China had historic rights to resources in the waters of the SCS, such rights were extinguished by the entry into force of

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118 Summary of the Tribunal’s Decisions on Its Jurisdiction and on the Merits of the Philippines’ Claims.

119 Summary of the Tribunal’s Decisions on Its Jurisdiction and on the Merits of the Philippines’ Claims.

the Convention; accordingly, there was no legal basis for China to claim historic rights to resources within the sea areas falling within the “dashed line”.<sup>120</sup>

No consensus has been reached over the concrete connotations of the historic rights within the “dashed line”. Currently, there are mainly two interpretations: one tends to interpret these historic rights narrowly as rights to use (sovereign rights), and the other tends to construe them broadly as title (sovereignty).<sup>121</sup> Apparently, the Tribunal chose the narrow interpretation. In other words, the Tribunal held that China’s historic rights within the “dashed line” only covered “rights to living and non-living resources”. This finding of the Tribunal was principally based on three evidences presented by the Philippines: a). on 6 July, 2011, the Embassy of China in Manila issued a note verbale to the Department of Foreign Affairs of the Philippines, protesting against the Philippines’ announcement of blocks for petroleum exploration within the “dashed line”; b). in 2012, the China National Offshore Oil Corporation (CNOOC) issued a notice of nine open blocks for petroleum exploration in the SCS; c). in May 2012, the Fishery Bureau of Nanhai District under the Chinese Ministry of Agriculture announced a Summer Ban on Marine Fishing in the South China Sea Maritime Space. The announcement provided that “All productive activity types ... shall be prohibited ... in the South China Sea areas from 12° north latitude up to the ‘Common Boundary Line of Fujian-Guangdong Sea Areas’ (including the Gulf of Tonkin) under the jurisdiction of the People’s Republic of China.”<sup>122</sup> The Philippines produced the three evidences to demonstrate that China’s claims of historic rights in the SCS were not claims to sovereignty over the sea, but exclusive rights to the living and non-living resources of the waters and seabed enclosed by the “dashed line”.<sup>123</sup> The Tribunal completely accepted the evidences and views of the Philippines, asserting that China’s claims to historic rights within the “dashed line” were exclusive in nature. Nevertheless, the three evidences listed above cannot fully reflect the nature of China’s historic rights. They merely represent China’s claims and exercise,

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120 Summary of the Tribunal’s Decisions on Its Jurisdiction and on the Merits of the Philippines’ Claims.

121 LUO Gang, *The Truth of International Law and Fundamental Flaws in the SCS Arbitration between China and the Philippines*, at <http://www.aisixiang.com/data/100801.html>, 27 March 2017. (in Chinese)

122 *The Republic of the Philippines v. The People’s Republic of China*, Award, 12 July 2016, paras. 207~213.

123 *The Republic of the Philippines v. The People’s Republic of China*, Final Transcript Day 1 – Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, 24 November 2015, p. 27.

in virtue of the UNCLOS, of its rights to its EEZ and continental shelf falling within the “dashed line”.<sup>124</sup> Additionally, the historic rights China claimed within the “dashed line” are not exclusive, since China had never, prior to its signing of the UNCLOS and pronouncement of its rights to EEZ, limited or prevented the fishermen of other States from exploiting the resources within the “dashed line”.<sup>125</sup> China’s rights (sovereign rights) to the living and non-living resources lying within the “dashed line”, as a matter of fact, are fully based on its title (sovereignty) to the islands enclosed by this line. Such rights (sovereign rights) cannot exist separately from the notion of title (sovereignty).<sup>126</sup> However, the Tribunal, for the purpose of consolidating its absolute jurisdiction, misinterpreted China’s historic rights within the “dashed line”, and held that such rights had no reasonable factual basis, nor any sufficient legal basis.

Apparently, the Tribunal considered the UNCLOS as the sole legal basis in the law of the sea, abused its rights and presumed that the UNCLOS had incorporated identical rights into its final text in a tacit fashion. This relates to the issue of rights incorporation under the law of treaty. In fact, UNCLOS Article 311(2)&(5) shows that the Convention respects the existence of other rights, and it did not tacitly incorporate other rights, but rather explicitly reminded States Parties of such rights as created by maritime rules.<sup>127</sup> Generally, the incorporation of certain rights under the law of treaty, in most cases, is done by setting out a special article of consolidation; tacit incorporation does not amount to an effective incorporation of rights.<sup>128</sup> Apart from that, an examination of the nature of the UNCLOS tells that the Convention was formulated on the basis of the codification of customary law, but its rules, in nature, remain the rules of treaty law. It is unreasonable to blur the differences between rules of customary international law and treaty law by using the concept of rules of general international law, which is also inconsistent with the

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124 HUANG Yao, China’s Lawful Rights and Interests within the South China Sea Dashed-line: Based on the Analysis of the *South China Sea Arbitration Award*, *Frontiers*, No. 23, 2016, p. 25. (in Chinese)

125 HUANG Yao, China’s Lawful Rights and Interests within the South China Sea Dashed-line: Based on the Analysis of the *South China Sea Arbitration Award*, *Frontiers*, No. 23, 2016, p. 25. (in Chinese)

126 LUO Gang, The Truth of International Law and Fundamental Flaws in the *SCS Arbitration* between China and the Philippines, at <http://www.aisixiang.com/data/100801.html>, 27 March 2017. (in Chinese)

127 LI Zhiwen and MA Yu, Interpretation of the Sovereignty Theory for China’s Position to the *South China Sea Arbitration Case*, *Pacific Journal*, No. 9, 2016, p. 3. (in Chinese)

128 LI Zhiwen and MA Yu, Interpretation of the Sovereignty Theory for China’s Position to the *South China Sea Arbitration Case*, *Pacific Journal*, No. 9, 2016, p. 3. (in Chinese)

consensus among the international community.<sup>129</sup> Furthermore, the UNCLOS is not the sole legal basis in the law of the sea, which is underlined and acknowledged by the UNCLOS itself in the Preamble. That is to say, the UNCLOS does not have a supremacy over other laws in the realm of the law of the sea, nor regulate all the matters relating to the sea. Matters not regulated by the UNCLOS continue to be governed by general international law.<sup>130</sup> It is not hard to see, the Tribunal, when adjudicating on China's historic rights within the "dashed line", abused its rights, which amounts to a malicious breach of the object and purpose of the UNCLOS. Consequently, the decision made in this connection should be treated as null and void.

**2. The Tribunal, through "Judicial Lawmaking", Created Aggressive Criteria to Judge the Status of a Feature, with a View to Excluding Maritime Delimitation from the Dispute Submitted by the Philippines**

In order to completely exclude the matters submitted by the Philippines from maritime delimitation issues which fall within the exception to compulsory jurisdiction under UNLCOS Article 298, and further to guarantee the exercise of its jurisdiction, the Tribunal, through "judicial lawmaking", misinterpreted Article 121(3) and created new criteria for judging an "island". In doing so, it reduced all of China's features encompassed by the "dashed line" into "rocks" and denied China's legitimate rights within the "dashed line", further to prevent the emergence of overlapping maritime entitlements and delimitation issues. In the Award, the Tribunal opined, when interpreting Article 121, that whether a maritime feature could be qualified as an island depended on its objective carrying capacity; in other words, it depended on whether a feature itself was capable of sustaining human habitation and supporting an independent economic life, without relying predominantly on the infusion of outside resources or serving purely as an object for extractive activities.<sup>131</sup> Many features in the Nansha Islands were being controlled by different coastal States. These States constructed infrastructure and stationed personnel on the features, and improved their habitability through the infusion of outside resources. However, this did not constitute evidence that a

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129 LI Zhiwen and MA Yu, Interpretation of the Sovereignty Theory for China's Position to the *South China Sea Arbitration Case*, *Pacific Journal*, No. 9, 2016, p. 3. (in Chinese)

130 UNCLOS, Preamble: "Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law."

131 *The Republic of the Philippines v. The People's Republic of China*, Award, 12 July 2016, para. 500.

feature was capable of sustaining human habitation of its own. Therefore, in the words of the Tribunal, all the high-tide features in the Nansha Islands (including, for example, Taiping Island, Zhongye Island, Xiyue Island, Nanwei Island, Beizi Island and Nanzi Island) were legally “rocks” that did not generate an EEZ or continental shelf.<sup>132</sup>

The aggressive criteria set by the Tribunal are not compliant with the requirement of interpreting treaties in good faith as provided for in Article 31(1) of VCLT, nor supported by direct evidences or evidences from field study. *Inter alia*, the Tribunal, unreasonably and restrictively, construed the term “human habitation”, one of the flexible standard for assessing the carrying capacity of a feature. The Tribunal, through literally interpreting the word “cannot” contained in Article 121(3), directly denied that the official personnel stationed on a feature were indigenous population, therefore the feature lacked the carrying capability of an island. Such a one-sided interpretation does not conform to the spirit of the UNCLOS. A careful examination of the UNCLOS reveals that, with regards to “human habitation” under Article 121(3), the Convention did not expressly provide for the identity of “human”, at least did not directly exclude the habitation of official personnel. Additionally, the existence of government facilities on a feature can serve exactly as an evidence that the feature is capable of “sustaining human habitation”. By reference to the temporary activities conducted by several Japanese fishing and guano mining enterprises in the 1920s and 1930s, the Tribunal decided that the fishing activities of Chinese fishermen for centuries did not have the nature of “sustaining human habitation or economic life.”<sup>133</sup> Such a decision is biased and malicious.

### *C. Had China Violated the Principle of Good Faith?*

In the *SCS Arbitration* filed by the Philippines, the Philippines alleged that China, through threat of force, expelled the Philippine fishermen who had been fishing around the Huangyan Island continuously for a long period, which not only exacerbated or complicated the SCS situation, but also affected the peace and

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132 The Republic of the Philippines v. The People’s Republic of China, Award, 12 July 2016, para. 626.

133 LI Guang, The Analysis of the United States’ Position on the South China Sea Dispute in 1930s, *Pacific Journal*, Vol. 24, No. 7, 2016, p. 68. (in Chinese)

stability of the SCS.<sup>134</sup> In other words, the Philippines claimed that China breached its obligation to exercise self-restraint under the DOC, and aggravated the SCS situation by unpeaceful means, which constituted a violation of the good faith principle. However, as a matter of fact, it is the Philippines' aggressive actions that forced China to take law enforcement activities. Specifically, the Philippines sent warships, attempting to forcefully detain the fishing boats of Chinese nationality, through use of force or threat of force. *Inter alia*, in March 2014 when other States were busy in searching for Malaysia Airlines Flight 370 around the SCS, the Philippines seized the chance to send building materials by ships to the sea areas surrounding the Ren'ai Reef, attempting to consolidate its old warship which ran aground on the Ren'ai Reef.<sup>135</sup> By doing so, the Philippines intended to seize the opportunity to illegally occupy China's territory. Such provocative behaviors went against the consensus reached by the signatory States at the conclusion of the DOC, and also exacerbated the situation in the SCS. China's response to such provocative behaviors is rightful and legal, which does not amount to a breach of the good faith principle. The Philippines, on the one hand, denied the effect of the DOC<sup>136</sup> and protested against China's invocation of the DOC, but on the other hand, it raised, in a statement of its Ministry of Foreign Affairs on 1 August, 2014, a proposal to address the SCS issues, requesting all parties concerned to abide by Article 5 of the DOC, and implement the DOC in a comprehensive and effective way. Such self-contradictory statements and actions of the Philippines, obviously, went against the principles of estoppel and integrity,<sup>137</sup> amounting to a breach of the good faith principle.

With respect to the resolution of SCS issues, China and the Philippines have already signed a series of documents, including the Joint Statement between the People's Republic of China and the Republic of the Philippines concerning Consultations on the South China Sea and on Other Areas of Cooperation (10 August 1995), the Joint Statement of the China-Philippines Experts Group Meeting on Confidence-Building Measures (23 March 1999), the Joint Statement

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134 Memorial, paras. 7.71~7.73.

135 Song Yann-huei, *The South China Sea Arbitration Case Filed by the Philippines against China: A Discussion on Preliminary Objections to the Tribunal's Jurisdiction*, *Chinese Review of International Law*, No. 2, 2014, pp. 30~31. (in Chinese)

136 Memorial, para. 7.51.

137 Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 December 2014, para. 52.

between the Government of the People's Republic of China and the Government of the Republic of the Philippines on the Framework of Bilateral Cooperation in the Twenty-First Century (16 May 2000), the Joint Press Statement of the Third China-Philippines Experts' Group Meeting on Confidence-Building Measures (4 April 2001), the DOC (4 November 2002), the Joint Press Statement between the Government of the People's Republic of China and the Government of the Republic of the Philippines (3 September 2004), and the Joint Statement between the People's Republic of China and the Republic of the Philippines (1 September 2011). These bilateral instruments are consistent with the pertinent provisions of the DOC, which all insist on using the purposes and principles of the UN Charters, the UNCLOS, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law as the basic norms to resolve State-to-State disputes.<sup>138</sup> Particularly, when interpreting the agreement between them and discharging international obligations, the States concerned shall follow the principle of good faith and refrain from misinterpreting the agreement against its originally intended meaning, with a view to gaining illegitimate interests. China has always persisted in following these basic norms and using them to peacefully settle SCS disputes. For example, the Joint Press Statement between the Government of the People's Republic of China and the Government of the Republic of the Philippines (3 September 2004), the Agreement for Joint Marine Seismic Undertaking in Certain Areas in the South China Sea (14 March 2005), the Joint Statement of the People's Republic of China and the Republic of the Philippines (28 April 2005) and the Joint Statement of the People's Republic of China and the Republic of the Philippines (16 January 2007), all indicate that China has always been committed to maintaining the peace and stability of SCS areas.

## V. Conclusions and Reflections

Good faith serves as the basis of international treaties. It regulates the rights under international law. States' moral recognition of law is mainly based on good faith. All international communications are build on honesty and credibility. If

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138 Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 December 2014, paras. 31~37, 53~54.

good faith is disregarded, the legality derived from international law would be extinguished.<sup>139</sup> Interpretation in good faith is the precondition of *pacta sunt servanda*, since interpretation is a part of treaty performance. In this connection, the study and comments on relevant documents should be done in good faith.<sup>140</sup> The principle of good faith may help to address the rigid shortcomings that are possibly inherent in textual interpretation, and give some flexibilities to interpretation of treaties and realization of justice.<sup>141</sup> In the *SCS Arbitration* initiated by the Philippines, both the Philippines and the Tribunal obviously breached the principle of good faith. They abused their rights under the UNCLOS, and used the UNCLOS as a tool of international law to attain their political goals, which brazenly undermined the existing order of international law. Therefore, the award delivered by the Tribunal should be deemed as legally unbinding. The principle of good faith, especially its requirement on performing international obligations in good faith, is consistent with the diplomatic philosophy and position that China has always been pursuing. As such, this principle will contribute to China's protection of its sovereignty and rights in the SCS. Hence, China should pay much attention to the application of this principle, and apply it under more circumstances, especially when the formulation of international rules are involved.

The *SCS Arbitration* initiated by the Philippines, on the one hand, gives a warning to China, which keeps reminding China that some States may attack other States or impair their rights by using the international law as a tool, with a view to obtaining the alleged "lawful rights and interests". On the other hand, the arbitration also provides, in the realm of international law, a meaningful research topic for China and Chinese scholars, which would help raise the level and ability of research and application of international law in China, and cope with and prevent subject with willful intents, like the Philippines and the Tribunal, from using the same means to jeopardize China's legal rights and interests. The *SCS Arbitration* lasted for more than 3 years, whose influences cannot be underestimated. We should not be over pessimistic about such influences. Instead, we should treat it objectively and reasonably. China, especially Chinese scholars, should not merely dwell on

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139 Alfred Verdross et al., LI Haopei trans., *International Law*, Beijing: Commercial Press, 1981, pp. 777-778. (in Chinese)

140 Hersch Lauterpacht ed., WANG Tiewa and CHEN Tiqiang tans., *Oppenheim's International Law, Vol. 1, No. 2*, Beijing: The Commercial Press, p. 204. (in Chinese)

141 FENG Shoubo, On the Treaty Interpretation in "Good Faith": An Empirical Research on "Good Faith" in Art. 31.1 of VCLT, *Pacific Journal*, Vol. 22, No. 5, 2015, p. 8. (in Chinese)

this arbitration or gradually stop studying it along with the end of the case; rather, it shall further explore the reasons behind and find the countermeasures. China, as a rising power, should be conscious of the dialectical unity between international law and State interests, and improve its ability and level to employ international law, which will contribute to the protection of its national interests. Aside from that, China should also take the initiative to understand the existing rules of international law, and participate in the formulation and implementation of new ones, striving to change the order of international law dominated by the Western States.

Translator: XIE Hongyue

# 善意原则视角下的中菲南海仲裁案

罗 萨\*

**内容摘要:** 文章以善意原则这一抽象的国际法基本原则为视角,分析南海仲裁案中菲律宾和仲裁庭之行为。第一部分研究善意原则在海洋划界背景下所具有的内涵。一方面,海洋划界争端的当事国受到善意原则的规制,特别以善意协商为代表,包括积极开展协商、充分进行协商和持续欢迎协商等;另一方面,善意原则也指引着争端解决机构作出真正合法合理的裁决。具体到仲裁案中,第二部分将菲律宾在仲裁过程中的行动与善意原则蕴含的主要要求相对应,指出菲方在种种方面对善意原则的违背。第三部分阐述仲裁庭作为争端解决机构,在审理过程中展示的做法,表明其判决也绝非善意之裁决。最后,文章以菲律宾和仲裁庭反以善意原则评判中国的行为,总结两者诚信的缺失,是对这一国际法一般原则的根本破坏。

**关键词:** 善意原则 中国 菲律宾 仲裁庭 南海仲裁案

## 一、前 言

善意原则是国际法的基本原则之一,规制着国际法主体行使其权利的方式、履行其义务的态度,在国际法实践中发挥着极为重要的作用。随着《联合国海洋法公约》(以下简称“《公约》”)等海洋法公约逐步界定了专属经济区和大陆架的概念,国家对这些海域的主张也引发了新的分歧与冲突,海洋划界争端不断引发世界关注。而善意原则也指引着海洋划界行动,对于沿海国之间争端的解决具有重大的实践意义。

2013年1月22日,菲律宾依据《公约》第十五部分及附件七,单方面就与中国的南海争端启动仲裁程序。2015年10月29日,仲裁庭公布《关于管辖权和可受理性问题的裁决》。仲裁庭宣布其对菲律宾提交的15项诉求中的7项具有管辖权,并保留对其他8项诉求的管辖权问题的审议至实体问题阶段;也即菲律宾提交

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的所有15项诉求,被全部送入第二阶段庭审。2016年7月12日,仲裁庭发布了最终裁决,对中国南海断续线等一系列权利主张作出否定。至此,无论是争端当事方菲律宾,还是第三方司法机构仲裁庭,其种种做法都有违善意原则这一国际法基本原则的精神。

中菲南海仲裁案自启动以来,已经引发了学界极大的关注;但相关研究主要侧重于对菲律宾各项诉求,以及对仲裁庭之裁决特别是建立管辖权之初步裁决的深入剖析,即集中于法律依据和法理论证的角度。本文并未就仲裁相关法理依据作深入分析,而是站在善意原则的角度,更多地关注由法律原则产生的、更为抽象的义务,这是文章创新之处;由此,也希望能够对中国应对中菲南海争端作出浅薄的贡献。

## 二、善意原则与海洋划界

### (一) 善意原则概述

善意原则作为国际法的一项基本原则,在法律的所有领域和体制中都扮演着重要并且是基础性的角色。首先,自20世纪以来,众多国际性的多边公约都以明示或默示的方式,将善意原则纳入其内涵。例如《联合国宪章》(以下简称“《宪章》”)第2条规定的7项基本原则中,第2项原则即会员国应善意地履行宪章义务;<sup>1</sup>又如,《维也纳条约法公约》(以下简称“VCLT”)序言即规定,善意原则为举世所承认,并在约文中数次明确提到“善意”一词。<sup>2</sup>另外,涉及国际法不同领域的司法判例,也通过其裁决肯定了善意原则的地位,如国际法院在1974年“核试验案”中指出,善意原则是监督国家履行其法律义务的基本原则之一;<sup>3</sup>在国际贸易领域,世界贸易组织(以下简称“WTO”)的争端解决机构也在其众多裁决中运用了善意原则。最后,该原则是国际法一般原则,也是习惯国际法的要求,这一点也早已为学界所公认。<sup>4</sup>可见,善意原则的地位和影响力已得到普遍的肯定;国际法的最基本规范,正是善意之原则。<sup>5</sup>

同样为人们所公认的是,善意原则的具体含义难以进行明确的定义。起源于

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1 《联合国宪章》,1945年,第2条第2款。

2 《维也纳条约法公约》,1969年,序言;第26条;第31条第1款;第46条第2款;第69条第2款(b)项。

3 Nuclear Tests Cases (Australia v. France), Judgment, *ICJ Reports 1974*, para. 46.

4 J. F. O'Connor, *Good Faith in International Law*, Aldershot: Dartmouth Publishing, 1991, p. 124; Reviews of Books, *University of Toronto Law Journal*, Vol. 12, Issue 1, 1957, p. 106; Malcolm Shaw, *International Law*, Cambridge: Cambridge University Press, 2014, p. 73.

5 Thomas Cottier, Krista N. Schefer: 《WTO中的善意及合法期望之保护》(韩秀丽译、高波校),载于《国际经济法学刊》2005年第3期,第181页。

罗马民法的善意原则,体现了对诚信契约和诚信诉讼的要求。诚信契约意即,契约双方在履行合约时应本着善意的初衷,承担因诚信要求而衍生的补充义务;诚信诉讼则要求,当事方在诉讼中善意行使诉讼权利,同时法官在解释和理解当事人约定和行使自由裁量权时,应本着善意,公平公正地做出裁判。伴随历史的进程,善意原则也普遍融入西方各国的法律制度,并随着国际交往的不断发展而走上国际法的舞台。国际法意义上的善意原则,最先来源于约定必须遵守;<sup>6</sup> WTO 甚至把二者视作同义,并在相当数量的贸易争端中,结合具体案件对善意原则的内涵作出各有侧重的阐述。的确,作为基本法律原则,善意原则关注的不仅仅是行动过程中的某一或某些环节,而是对一切行动的整体规制,因此这一原则的含义是多面的,也是开放而包容的。《布莱克法律辞典》将“善意”一词定义为包含如下几种思想状态:信念或目的的诚实,忠诚于其义务,在贸易或商业中遵守公平交易的合理商业标准,没有欺诈或谋求不合理利益的意图。<sup>7</sup> “善意”要求行为主体的合情合理、诚实守信,它难以被赋予客观的衡量标准,而更倾向于主观上的定义。

值得特别注意的是,在国际法实践之中,善意原则不可凭空存在。国际法院指出,善意原则本身并不能单独构成法律义务的来源。<sup>8</sup> 对善意原则的违反不是抽象的、凭空的,这种违反可能建立在对条约的违反之上,或与对另一方利益造成损害相关,或是以违背某项义务为基础。例如,在“核试验案”中,法国曾声明停止在南太平洋的核试验,尽管声明是单方面自愿的,国际法院认为善意原则要求法国必须遵守其声明。<sup>9</sup> 在“关于《1995 年临时协议》的申请案”中,国际法院需要判断当事国马其顿是否违反善意协商的义务,该义务基于一份临时协议的规定。<sup>10</sup> 正如 WTO 上诉机构所阐明的,要构成违背善意原则,需要满足两个要件,一是在对某具体法条或义务的违反,二是不仅仅存在单纯的违反。<sup>11</sup>

因此,善意原则作为一项缺乏明确行为模式的概念,其含义还需要结合具体的适用环境,结合国际实践进行探究——正所谓“可以被说明但无法被定义”。<sup>12</sup> 在海洋划界这一语境下,善意原则也起到了指引作用。

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6 Thomas Cottier、Krista N.Schefer:《WTO 中的善意及合法期望之保护》(韩秀丽译、高波校),载于《国际经济法学刊》2005 年第 3 期,第 181 页。

7 Bryan A. Garner ed., *Black's Law Dictionary*, Eagan: West Group, 2004, p. 2038.

8 Nuclear Tests Cases (Australia v. France), Judgment, *ICJ Reports 1974*, para. 46.

9 Nuclear Tests Cases (Australia v. France), Judgment, *ICJ Reports 1974*, paras. 46~51.

10 Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment, *ICJ Reports 2011*, para. 127.

11 United States – Continued Dumping and Subsidy Offset Act of 2000, Appellate Body Report, 2003, para. 298.

12 Reviews of Books, *University of Toronto Law Journal*, Vol. 12, Issue 1, 1957, p. 106.

## (二) 海洋划界中的善意原则之于当事国

国际法的基本原则作为对国际条约与国际习惯的补充,对于国际法的各个领域、各个方面都具有重要意义,<sup>13</sup>海洋法自然也不例外。《公约》第300条明文规定,缔约国应善意履行根据公约承担的义务,<sup>14</sup>从而对各国的海洋划界行动提出了总括性的要求,更有着深厚的内涵。当然,善意原则本身并不凭空产生新的法律义务。本文将要探讨的种种义务也都基于实体法而存在,而善意原则支撑着这些义务的实现:它是对履行这些义务的监督,更是对履行义务之态度的监督。<sup>15</sup>

### 1. 善意展开协商的义务

《公约》第74条与第83条,就专属经济区和大陆架界限的划定做出了规定:此两条的第1款均指出,海洋边界应由有关国家协议划定,以便得到公平解决。<sup>16</sup>因此,这一规定蕴含着成员国就海洋划界展开协商的义务;国际法院的多项判例也将该条款下的义务与善意原则联系起来。善意展开协商的含义可进一步具体为以下2点。

第一,善意协商之义务意味着,一国单方面进行的海洋划界可能是无效的。诚然,两国之间可能不会展开正式的协商谈判,而是采取一系列国家行为进行互动:一国单方面主张,而另一国并未表示反对,以默许的方式最终形成了默示的海域边界。但由于《公约》明文规定了海洋边界的确立方式——协定优先的方式,则一旦其他国家对该国的划界主张提出抗议,该国单方面的行为即已经构成了对《公约》的违反。不得单方面采取可能对其他国家造成影响的行动,这是善意履行《公约》义务的要求,也将在国际法的其他领域找到辅证。

适用于WTO成员国的《关税与贸易总协定》(以下简称“GATT”)是WTO的前身,也是WTO法关于货物贸易最重要的协定之一;其第20条引言规定,成员国不应采取任意或不合理歧视的手段。<sup>17</sup>在“美国龟虾案”的最终判决中,WTO争端解决机构明确指出GATT第20条引言是善意原则的一种表达。<sup>18</sup>在该案中,美国针对进口的虾产品设立了一项法规,但并未事先与所有受到影响的国家就法规进行协商。WTO上诉机构认为,美国单方面通过和实施这一法规的行为是不合理的,并且没有考虑各国不同的具体情况,是武断的行为。<sup>19</sup>可见,各国

13 詹宁斯、瓦茨修订,王铁崖等译:《奥本海国际法》,北京:中国大百科全书出版社1995年版,第23页。

14 《联合国海洋法公约》,1982年,第300条。

15 Malcolm Shaw, *International Law*, Cambridge: Cambridge University Press, 2014, p. 74.

16 《联合国海洋法公约》,第74条第1款,第83条第1款。

17 《关税与贸易总协定》,1947年,第20条引言。

18 United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, 1998, para. 158.

19 United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, 1998, paras. 172, 177.

应达成一致，而不是单方面独断地进行主张，这一点在国际法各领域都是不争的事实，与善意原则这一国际法一般原则相符。

既然如此，善意展开协商的第二点含义也就自然而然、不言而喻：各国应当就海洋划界问题进入协商，开启谈判，寻求达成协议。在“北海大陆架案”中，国际法院认为大陆架划界相关的具体法规，以正义和善意的基本原则为基础，各国进入协商的义务。<sup>20</sup>“缅因湾案”更明确地将协商的义务与善意原则联系起来：“海域划界应通过善意协商，由协议达成……”<sup>21</sup>2002年，“喀麦隆—尼日利亚案”又一次确认了善意协商的义务。<sup>22</sup>

总而言之，在海洋划界中，国家首先应善意地开展协商，寻求与其他相关国家达成共同的协议；而一切单方面行动——包括单方面划界、勘探、开发等等，都是有违《公约》精神的。

## 2. 善意进行协商以寻求达成协议的义务

相比开启协商，在意图达成协议的目标下继续进行协商，才更是一国善意的试金石。国家应就协商付出多大的努力？怎样程度的协商才是“足够的”？是否协商过程中出现任何一点的相持不下，都足以令当事国转而付诸争端解决程序？

《公约》无法回答这些更具主观性的问题；但通过这些问题，善意进行协商的重要性已可见一斑。究竟能否和平、友好地完成海洋划界，很大程度上依赖于各国进行协商的善意。本文希望强调的是，善意原则下协商的义务不仅仅是程序上的，有意义的协商才是关键，这要求双方真诚地进行协商，尽一切努力，寻求以协议方式完成划界。

首先，各国都有各自更倾向使用的划界方法，其偏好的方法可能不尽相同，但这并不是当事国逃避协商合作的理由。在第三次联合国海洋法会议漫长的谈判过程中，众多国家围绕大陆架和专属经济区的划界规则展开了激烈争论，并形成了两派观点。巴哈马等24国组成的一派支持中间线法为首要原则，阿尔及利亚等32国为代表的另一派则认为，中间线原则并不优先于其他多种划界原则，海洋划界应将衡平原则放在首位。然而无论支持哪一种划界方法，两派的提案都不

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20 North Sea Continental Shelf Cases, Judgment, *ICJ Reports 1969*, para. 85.

21 Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, *ICJ Reports 1984*, para. 112(1).

22 Land and Maritime Boundary between Cameroon and Nigeria, Judgment, *ICJ Reports 2002*, para. 244.

约而同地承认,海域界线应由国家间的协议确立。<sup>23</sup> 当事国海洋划界主张中的种种分歧,可以采取灵活变通的方式,善意地协商解决。前国际法院院长布斯塔曼特·伊·里韦罗法官在其关于“北海大陆架案”的独立意见中说,关于大陆架的协商需要引入善意和灵活的要素,这些要素可以协调保持和平睦邻关系的需要与法律的严谨性。<sup>24</sup> 该案判决更指出,当事国有义务开展有意义的协商,而不是固执己见。<sup>25</sup> 在该案中,当事方——丹麦与荷兰两国——在判决前一直坚持中间线原则,而不愿作任何让步,这被判定为与有意义的灵活协商义务相悖。<sup>26</sup> 此处也再次体现了善意原则提倡灵活合理、反对独断僵化的内涵,与WTO法对独断和不合理歧视的禁止相互印证,异曲同工。

由此,应当说各国海洋划界之主张无论有怎样的分歧,在协商解决分歧这一点上都不应存在争议。然而,国家实践表明,一些国家更倾向于协商之外的其他方式;但根据上文已列出的《公约》规定,海洋划界问题又必须首先经过协商寻求解决,未果才可付诸其他程序,主要指《公约》第十五部分的争端解决程序。国家是否具有协商的真诚实意,以及这一真意到底到达了何种程度,构成了善意进行协商所面临的第2个问题。

根据国际法院所述,既然需要进行有意义的协商以寻求取得一致,那么在付诸种种努力进行这类协商之前,争端解决机构应避免对实体问题作出不成熟的裁判。法庭审议的初步事宜应为:上诉方是否确实履行了其协商的义务。<sup>27</sup> 本文认为,上诉方对待协商的态度,是其是否遵循善意原则要求的一项关键证明,这在中菲南海仲裁案中也具有特别的意义。遗憾的是,判例法对此尚没有明确的表述,仅能依靠对判决隐含之意以及学者观点的解读,寻找善意协商的踪迹。

国际法院曾在判决中阐明,协商的义务意味着当事方怀着达成协议的目标参与到谈判中,而并非只为完成这一程序上的前提要件,但实际上却意在进入后续的其他程序。<sup>28</sup> 据此,在进入第三方争端解决程序之前,国家应充分展开真诚的协

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23 Informal Proposal by Bahamas, Barbados, Canada, Colombia, Cyprus, Democratic Yemen, Gambia, Greece, Guyana, Italy, Japan, Kuwait, Malta, Norway, Spain, Sweden, United Arab Emirates, United Kingdom and Yugoslavia (later joined by Cape Verde, Chile, Denmark, Guinea-Bissau and Portugal), UN General Assembly Document NG7/2; Informal Proposal by Algeria, Bangladesh, Benin, Burundi, Congo, France, Iraq, Ireland, Ivory Coast, Kenya, Liberia, Libya, Madagascar, Maldives, Mali, Mauritania, Morocco, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Poland, Romania, Senegal, Syria, Somalia, Turkey, Venezuela and Vietnam, UN General Assembly Document NG 7/10.

24 North Sea Continental Shelf Cases, Separate Opinion of President J. L. Bustamante Y Rivero, *ICJ Reports 1969*, p. 58.

25 North Sea Continental Shelf Cases, Judgment, *ICJ Reports 1969*, para. 85.

26 North Sea Continental Shelf Cases, Judgment, *ICJ Reports 1969*, para. 87.

27 Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law*, Cambridge: Cambridge University Press, 2015, p. 682.

28 North Sea Continental Shelf Cases, Judgment, *ICJ Reports 1969*, para. 85.

商,而非仅仅做“表面功夫”。在国际海洋法法庭审理的“马来西亚—新加坡围海造地案”中,一位法官便明确指出了这点:“交换意见之要求并非一项空洞的形式,不可为争端方随意舍弃。该义务必须善意履行。”<sup>29</sup>正如《布莱克法律辞典》之释义所说,真诚,是善意协商最基本的要义。

在“爱琴海大陆架案”中,希腊更倾向于以第三方程序解决与土耳其的划界争端,而土耳其则坚持协商优先。当然,希腊更偏好司法程序的解决方法,这一事实本身不能说明其在协商中就不具备真意,并且希腊也确实同意与土耳其协商。但希腊在1975年10月2日的外交照会中也明确表示,争端应“首先提交国际法院”,而“不排除随后继续进行协商”。<sup>30</sup>其一系列的声明和行动也都表明,希腊在没有与土耳其开展充分协商的情况下,就将争端提交了国际法院;从法院自身对事实的陈述也能看出,双方仅仅进行了初步的、程序上的对话,而尚未“充分展开严肃认真、灵活适当的善意协商”。<sup>31</sup>希腊同时也将该问题提交了联合国安理会,安理会在对此作出的决议中“要求”双方恢复直接谈判,并“呼吁它们竭尽力量,保证谈判产生双方都可接受的解决方法”。<sup>32</sup>应当说,安理会也认为双方在此之前进行的协商并不充分,努力达成特别协定的解决方式应当优先于司法程序。<sup>33</sup>

土耳其在案件审理过程中坚持,协商尚不成熟,双方应当回到谈判中去;只有那些善意协商确实无法解决的问题,并且只有在确实面临这类问题的时刻,才能将其诉诸法庭。<sup>34</sup>鉴于土耳其的观点,法庭应有义务检验双方在进入司法程序之前,是否充分履行了它们协商的义务;假如协商是初步的、表面的,甚至有当事方缺乏协商的真意,只是为了满足使用其他方法的程序要件,这类行为就不符合善意原则下协商的要求。

法庭完全有立场裁判争端是否尚处于协商的初步阶段,可能适用的解决方案还远远没有为双方所探讨,也即协商的义务是否被“足够、充分”地履行。<sup>35</sup>国际法院并未对此给出明确的观点;<sup>36</sup>但无论是“爱琴海大陆架案”之裁决,还是上文

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29 Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Separate Opinion of Chandrasekhara Rao, *ITLOS Reports 2003*, para. 11.

30 Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, *ICJ Reports 1978*, para. 20.

31 Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law*, Cambridge: Cambridge University Press, 2015, p. 683.

32 Security Council Resolutions, S/RES/395, 1976.

33 Leo Gross, The Dispute between Greece and Turkey Concerning the Continental Shelf in the Aegean, *The American Journal of International Law*, Vol. 71, Issue 1, 1977, p. 32.

34 Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, *ICJ Reports 1978*, paras. 21, 28; UN Doc S/PV.1950, United Nations, 13 August 1976.

35 Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law*, Cambridge: Cambridge University Press, 2015, p. 686.

36 Cottier 教授因此也将本案称为被国际法院“错过的机会”。

已谈到的“北海大陆架案”等,亦或是学者们的真知灼见,都指向这一完全合理的结论:当事国应以达成一致为目标,真诚地参与协商,这意味着以灵活、合理的态度,充分考虑各种可能的划界方法,而不是使协商沦为了一项表面程序。

### 3. 其他争端解决程序不构成对协商的妨碍

上文提到的“爱琴海大陆架案”同时证明,即使争端方已经将争议付诸司法程序,也并不妨碍协商在法庭之外继续进行。实际上,作为上诉方的希腊也并未排除协商,而是优先选择第三方程序而已;在案件审理阶段,当事两国仍然继续进行了多次谈判,甚至同意大陆架划界问题应努力由协商解决。<sup>37</sup>

协商作为最有效也是最自然的争端解决方式,其地位早已为国际社会反复确认。国际法院在1974年“渔业管辖权案”中,将协商称作“显然是和平解决争端的最合适方法。”<sup>38</sup>安理会关于爱琴海大陆架问题的决议,更进一步支持了这一点。仅仅因为一国将争端诉诸协商之外的其他程序,并不能断言其行动是恶意的,<sup>39</sup>这也是善意原则对国家行为进行善意推定的要求;但另一方面,既然并非恶意,该国也就不应放弃协商的努力,在其他争端解决程序之外,协商仍然可以继续或重启,这也是该国的确遵循善意原则的有力证明。

## (三) 海洋划界中争端解决机构的善意

《公约》第十五部分建立了综合的海洋争端解决机制,由此,各国可以选择的第三方争端解决方法包括调解、国际海洋法法庭、国际法院、附件七仲裁和附件八特别仲裁。这些方法所指向的第三方争端解决机构,也应当根据善意原则行事,探寻能够为所有当事国接受的、真正具有意义的结果。尽管适用于国际司法机构的国际规约并没有明文提到善意原则,但国际争端要真正得以解决,需要争端解决机构与当事方共同的努力,这一点是确凿无疑的。因而争端解决机构不可因其作为“裁判员”,行动可能不会招致惩罚,就任意行事;这类做法也的确鲜有发生,国际司法实践一贯体现出对善意裁决的认同。

上文已经详细分析了协商在海洋划界中的优先地位,这一重要地位正是由国际法院等争端解决机构反复确认的。为了确保协商发挥其应有的作用,不仅当事国应善意进行协商,争端解决机构也应作出相应的努力。

首先,在合理地用尽协商的可能方案之前,也即,未能确定经善意协商后仍存

37 *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, *ICJ Reports 1978*, paras. 20, 24-26.

38 *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Judgment, *ICJ Reports 1974*, para. 73.

39 *Aegean Sea Continental Shelf (Greece v. Turkey)*, Separate Opinion of Judge Lachs, *ICJ Reports 1974*, p. 52.

在无法解决的问题时，争端解决机构不应就实体问题作出裁判。这要求判决机构考量当事方是否确实善意履行了协商义务。

第二，第三方机构的善意当然并不代表它们永远不应当作出裁判，或是想方设法逃避裁判。但是，根据不同案件的具体情形，一项最终确定的、没有进一步协商余地的判决，可能无法为当事一方完全接受。在这种情况下，可能产生2种结果：轻则判决效力受到减损，重则有适得其反之效——判决有利的一方要求将结果付诸实施，不利的一方则拒绝实施，双方矛盾加剧，争端解决机构非但未能解决争端，反而弄巧成拙。另外，国际司法的有效性，尚依赖于国家自愿的服从；<sup>40</sup> 故司法机构更有必要坚持中立，坚持客观的法律原则作出裁判。鉴于以上原因，第三方机构在面临上述类似情况时，应作出鼓励协商的裁决，而不是不留余地的、终结性的决定。

“北海大陆架案”就是这方面的范例，法庭最终的决定是，海洋界线应当根据衡平原则，经协议达成，协商过程中应考虑法庭指出的各项因素。<sup>41</sup> “渔业管辖权案”更明确提出善意协商，判定当事国“有义务进行善意谈判以寻求公平解决分歧”，以及“充分考虑对方所享有的权益”。<sup>42</sup> 法庭在最终判决中所提供的也许不是可以直接付诸实施的方法，不是一目了然的明确结果，而是一种指引和鼓励，引导各国就和平解决其争端付出更多努力。

将司法解决争端的方式简单视为直接友善协商的替代方法，这一说法已经不再准确了。它更应当成为一种互动的方法，不仅没有削减争端解决体制的效力，反而为及时、有效的协商助力。<sup>43</sup> 以裁决要求各国重回谈判桌，从而取得争端的和平解决，或许这才是争端解决机构所能作出的最有意义之贡献。争端解决机构，正如其名，应当为争端最终获得解决而考虑，为国际法律规则和原则得到遵循和守护而考虑；这是其作为第三方机构对争端方的善意，更是对国际法之长期稳定发展的善意。

#### （四）条约必须遵守；不得减损条约的目的及宗旨

条约必须遵守，是国际社会赖以存在和运行的一大基石，是国家善意最基本

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40 Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law*, Cambridge: Cambridge University Press, 2015, p. 688.

41 North Sea Continental Shelf Cases, Judgment, *ICJ Reports 1969*, para. 101(C), (D).

42 Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Judgment, *ICJ Reports 1974*, paras. 78-79.

43 Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law*, Cambridge: Cambridge University Press, 2015, p. 690.

的体现之一;善意原则最初的内涵,就在于条约信守。<sup>44</sup> VCLT 第 26 条明文要求国家善意履行有效之条约;《宪章》也有类似的规定。早在百年之前,国际法实践也已确认了这一点:1910 年“北大西洋渔业案”判决指出,任何国家均有义务善意履行条约所产生之义务。<sup>45</sup>

另一方面, VCLT 第 31 条阐述了条约解释之通则,其第 1 款规定,条约应依其用语、按其上下文、并参照条约之目的及宗旨所具有之通常意义,进行善意解释。第 18 条也规定,只要国家表示接纳了条约,则在条约生效之前也不得妨碍其目的及宗旨;该条款也被视为对善意原则的表达。<sup>46</sup> 对条约的遵守,也意味着对其目的与宗旨的认同,意味着促进而不是破坏条约目的及宗旨的实现,这也是善意原则的基本要求之一。<sup>47</sup> 条约的目的及宗旨,代表着缔约国的共同期望;“期望乃法律之命脉”,<sup>48</sup> 在善意原则之下,缔约国根据条约产生的合法期望应当受到保护。

《公约》序言是对《公约》整体目标的表达,其中明确指出,与海洋法相关的一切问题都应本着互相谅解和合作的精神进行解决。由此可见,《公约》基本目标的实现有赖于国家间的理解与合作,这也再次强调了上文分析的协商之重要地位。此外,保持开明、灵活、诚恳的态度,行动透明而不带有保留或隐藏的目的,等等——凡此种种善意的表现,显然都是“互相谅解与合作精神”的题中之义。

为了实现在海洋划界中达成最终协议的目标,《公约》还做出了更加具体的规定。第 74 条第 3 款和类似的第 83 条第 3 款,敦促各国作出临时安排,且临时安排不得危害或阻碍最后协议的达成。“圭亚那一苏里南案”仲裁庭认为,以上条款包含 2 项义务:一是致力于推进临时制度和具体措施,从而为争议地区的暂时开发利用扫除障碍;二是尽一切努力,不危害或阻碍取得最终协议。<sup>49</sup> 这要求善意协商,且双方的一些行为,例如苏里南威胁使用武力的行为,构成了对达成最终协议的危害。<sup>50</sup>

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44 J.F. O'Connor, *Good Faith in International Law*, Aldershot: Dartmouth Publishing, p. 124; Thomas Cottier, Krista N. Schefer: 《WTO 中的善意及合法期望之保护》(韩秀丽译、高波校),载于《国际经济法学刊》2005 年第 3 期,第 181 页。

45 李浩培著:《条约法概论》,北京:法律出版社 2003 年版,第 277 页。

46 Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law*, Cambridge: Cambridge University Press, 2015, p. 667, note 53.

47 Anthony D'Amato, Good Faith, in Rudolf Bernhardt ed., *Encyclopaedia of Public International Law*, Oxford: Oxford University Press, 2000, p. 599.

48 Stephen M. Schwebel, The Compliance Process and the Future of International Law, in *Proceedings of the American Society of International Law*, 1981, p. 182.

49 Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration between Guyana and Suriname, Award, 2007, paras. 460, 467.

50 Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration between Guyana and Suriname, Award, 2007, paras. 460, 484.

总之,不得减损条约目的及宗旨很大程度上需要各国努力协商,并有义务避免采取阻碍协商进程的行为。各国有义务信守条约之规定,善意行使自身权利,履行自身义务,促进条约目的及宗旨的实现。

### (五) 真诚——善意原则之核心

通过以上对善意原则多方面内涵的阐述,应当说,善意原则并不具有清晰、准确的含义,并没有一套客观、严格的检验标准;其一切要求,都与“真诚”这一抽象的品质紧密相连。然而,善意原则作为国际法基本原则的意义也正在于此。为了更好地发挥法律原则的作用,填补国际条约和习惯尚未覆盖的空白,善意原则的范畴恰恰应当是灵活和广泛的。<sup>51</sup>真心与诚意是善意原则的试金石;<sup>52</sup>以真诚为核心,善意原则总体上要求国家抱着开明的态度,在争议中以灵活的方式考虑所有可能方法,致力于协商合作,并采取诚实的行动。

## 三、南海仲裁案中菲律宾行为对善意原则之违背

国际法上的善意原则,对海洋划界争端中当事方和第三方仲裁机构的行动,都做出了颇有分量的指导,应当为各方所重视。中国与菲律宾在南海主张的专属经济区和大陆架存在重叠,且对南海诸岛的主权归属存在争议,双方之间的争端是主权争端和海洋划界争端。因而争端当事方菲律宾,以及争端解决机构仲裁庭均应遵循善意原则。但审视案件全程,菲律宾和仲裁庭的行为已屡屡违背了善意原则之于海洋划界的指引。

### (一) 善意协商的关键地位

争端方开启协商的行动本身,就是善意的表示,而本着寻求协议解决冲突的目标将协商进行下去,也是双方善意的有力体现。在这方面,不得不说菲方的行为已将善意原则破坏殆尽。

#### 1. 菲律宾未就仲裁展开协商

首先,争端当事国不仅应启动协商,还应致力于协商的持续开展。中菲已经

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51 R. Summers 教授就将善意原则称为“安全阀”,指出其定义应当是开放而不是封闭的。See Robert S. Summers, “Good Faith” in General Contract Law and the Sales Provisions of the Uniform Commercial Code, *Virginia Law Review*, Vol. 54, Issue 2, 1968, p. 266.

52 For example, J.F. O’Connor, *Good Faith in International Law*, Aldershot: Dartmouth Publishing, 1991, p. 118; Andrew D. Mitchell, Good Faith in WTO Dispute Settlement, *Melbourne Journal of International Law*, Vol. 7, Issue 2, 2006, p. 339.

进行过多次友好协商,双方共同作出的一系列双边声明就是协商成果的代表;这一点也得到了菲律宾的承认。在仲裁案诉讼过程中,菲方代表曾总结道,中菲多年来已就南海争端各个议题展开了协商,包括中国的“历史性权利”、黄岩岛和南沙群岛的海洋权利、相关海域的捕鱼和航行权、在相关海域内进行岛礁建设等方面。<sup>53</sup>

然而,菲方代表在仲裁庭面前隐去的事实是,两国有关南海争端的协商进程,在2012年黄岩岛事件之后几乎戛然而止。该事件发生半年后,菲律宾单方面发起仲裁,在此之前从未就仲裁事项与中国协商;菲方共提出15项诉求,没有任何一项曾与中国协商甚至交换意见。

既然中菲之间已经存在协商的通道,则有任何新的观点或提议,首先都理应继续经这一通道向对方提出,否则两国多年来对协商合作的努力经营和长期付出就将付诸东流。假如菲律宾有意提交仲裁,或认为协商已入僵局、第三方的介入将帮助取得进展,那么应直接向中国做出提议,听取中方对其诉求之意见。但实际情况却是,菲方不仅没有就具体的任何一类诉求与中国商讨,甚至,其准备将整个中菲争端提交仲裁的这一意图都没有向中国吐露。2012年4月26日,菲律宾在其照会中提出要将黄岩岛问题提交第三方司法机构,这也是菲方在发起仲裁前,就进入司法程序一事向中国递交的唯一表述;而就是这唯一的一份文件,从善意原则的角度审视也是漏洞百出。照会仅提出将黄岩岛问题提交司法程序,而没有提及南沙群岛等其他问题;没有说明第三方司法机构具体指国际法院、国际海洋法法庭还是仲裁机构;没有表达任何要与中国谈判的意愿,且文件的性质——由外交部发出的普通照会——本身也表明,菲方之意仅限于做一通知。<sup>54</sup>随后,2013年1月22日,菲即声明将发起仲裁。

根据以上事实可知,菲律宾的行动没有履行充分协商的义务;严格地说,就发起仲裁一事而言,菲律宾甚至没有试图与中国开启新的协商。

## 2. 菲律宾之“协商”缺乏真意

即使真如菲律宾所争辩的,在发起仲裁前已经进行了协商,其对待协商的态度也不堪一击。本文强调,上诉方对于协商是否具有真意,是其是否遵循善意原则要求的关键证明,这一点可从两个方面得到检验:一是,作为上诉方的国家是否确实进行了充分协商,还是仅仅协商,以不至于公然违反《公约》规定的程序要件;二是,司法程序启动后如有可能,上诉方是否仍愿意参与到协商中去。菲律宾之行为未能经住任何一项考验。

案件初步审议过程中,仲裁庭曾提问,“若《公约》第283条确实要求当事方首先就争端实体问题进行协商,则这类协商应具体到怎样的程度,以及菲律宾是

53 Final Transcript Day 2 – Hearing on Jurisdiction and Admissibility, the Republic of Philippines v. the People’s Republic of China, PCA, pp. 28–32.

54 《中华人民共和国政府关于菲律宾共和国所提南海仲裁案管辖权问题的立场文件》(以下简称“《立场文件》”),2014年12月7日,第48段。

否已就其具体的每项诉求与中国充分交换了意见。”<sup>55</sup> 仲裁庭这一问题问到了点子上。菲方作出了这样的回答：“就诉求实质进行逐项协商是不必要的；只要从整体上就争端交换了意见，就满足了第 283 条的要求……；就《公约》各项具体条款交换意见也是不必要的。”<sup>56</sup> 菲律宾将协商贬为浮于表面的程序需要，这一意图在以上回答中可谓呼之欲出。既然诉求反映了菲国在南海争端中的主要观点，其实质自然应在协商中讨论，否则协商意义何在？菲方这一说法已经自证，其仲裁开始前进行的所谓协商根本不具诚意。另外，协商谈判与第三方仲裁同为解决争端的方式，就这一最终目的而言，两者并无二致。既然菲方认为争端涉及多项议题，故而列出林林总总 15 项诉求请仲裁庭一一裁决，那么，若真意希望和平解决这种种议题，在协商中又怎能不逐项逐条地交换意见？试想，假如一场谈判中，一方甚至连自己的具体主张都没有告知对方，也就更谈不上“听取”或“交换”意见，则谈判的实质内容何在？再者，“只要交换了意见，就满足了第 283 条要求”的用语，几乎是明确地承认，协商对菲方而言只不过是表面程序。可见菲方已决心倚仗仲裁，在此基础上，即使其就仲裁事宜与中国有过对话，这种对话也失去了意义。因为，菲方根本不是怀着寻求取得一致的目标与中国“协商”（假如还能被称为协商的话）的，甚至可能恰恰相反——毕竟失败的协商更是进入仲裁程序的强大理由。我国不应，更不愿对菲律宾作这样近乎恶意的推定，但菲方对待协商的态度着实难以令人信服。

善意原则之要义，就在于诚意履行条约赋予之义务，避免使条约在事实上归于无效。因此，即使菲方曾经有过所谓“协商”的举动，也仍未善意履行《公约》对于协商的规定。

### 3. 仲裁不妨碍协商的继续

最后，作为上诉方的当事国仍然愿意甚至欢迎继续协商，这也是其善意履行和平解决争端之义务的上佳体现。“爱琴海大陆架案”的当事双方并未因为争端已经进入司法程序，就停止协商的步伐，而是继续进行了数次谈判。<sup>57</sup> 正如该案的一位法官在其独立意见中所指明的，由于国家间争端往往错综复杂、涉及多个层面，多种途径相结合的方式可能更有助于争端解决；因此国家可以选择的解决途径是互补的，并非互不相容。<sup>58</sup> 也许，有些海洋划界争端在几种争端解决方式同时适用的情况下，反而更能促进争端的解决；无论如何，可以肯定的是，第三方争端解决

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55 Final Transcript Day 2 – Hearing on Jurisdiction and Admissibility, the Republic of Philippines v. the People’s Republic of China, PCA, p. 32.

56 Final Transcript Day 2 – Hearing on Jurisdiction and Admissibility, the Republic of Philippines v. the People’s Republic of China, PCA, pp. 34~35.

57 Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, *ICJ Reports 1978*, paras. 24~26.

58 Aegean Sea Continental Shelf (Greece v. Turkey), Separate Opinion of Judge Lachs, *ICJ Reports 1978*, p. 52.

机构的介入并不阻碍协商的进行,甚至,这些机构往往都鼓励和呼吁继续协商。

不幸的是,南海仲裁案被提交以来数年,中菲之间协商的进程已陷入停滞。对于中国一再呼吁重启协商的意愿,菲国一律一口回绝。2013年1月菲提交仲裁后,中国驻菲大使馆随即请菲方通过双边谈判解决争端,而菲律宾总统府发言人的回应是,中国的邀请来得太迟了,“让我们在法庭见”。<sup>59</sup>至今,菲律宾在政府新闻发布会等官方场合已多次作出类似的表态,认为中国的立场要求菲首先承认“整个南中国海属于中国”,在仲裁结果出炉之前不会进行双边磋商。<sup>60</sup>

正在进行的司法程序根本不构成协商之阻碍,问题之根本在于,当事方究竟是否存有以协商优先解决争端的善意。这一善意之于菲方是大有疑问的,显然它根本不愿为双边合作作出努力,一再拒绝与中国协商。自相矛盾的是,菲律宾同时又宣称自己遵守争端解决的相关法律,甚至呼吁国际社会遵循法律规定以和平解决争端。<sup>61</sup>既然如此,菲方就更应当铭记,无论是《宪章》、《公约》等国际公约,还是国际法一般原则善意原则,都要求争端当事国首先致力于有意义的、充分的协商。

## (二) 条约必须遵守、不减损条约目的及宗旨之义务

### 1. 《公约》的规定、目的及宗旨

《公约》约文反复肯定了协商合作的重要性。第280条声明,不损害当事国任何时候协议采用自行选择的和平方法之权利;第281条指出,如已协议用自行选择的和平方法来谋求解决争端,则只有在诉诸这种方法而仍未解决时才适用《公约》规定的解决程序;第283条,缔约国对《公约》的解释或适用发生争端,则应迅速就以谈判或其他和平方法解决争端一事交换意见。仅在关于争端解决的第十五部分中,明文提到谈判等“和平方法”一词的就有4项条款;<sup>62</sup>表达了应当优

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59 朱晓磊:《中国吁菲律宾就领土争端谈判》,下载于<http://world.huanqiu.com/exclusive/2013-01/3577769.html>,2017年1月30日。

60 See Response of the DFA Spokesperson to the Recent Statement of the Chinese Ministry of Foreign Affairs on the West Philippine Sea Issue, at <http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/332-response-of-the-dfa-spokesperson-to-the-recent-statement-of-the-chinese-ministry-of-foreign-affairs-on-the-west-philippine-sea-issue>, 1 February 2017; 朱艳芳:《菲律宾称2016年前不会和中国重启南海争端双边谈判》,下载于[http://news.ifeng.com/a/20141211/42697421\\_0.shtml](http://news.ifeng.com/a/20141211/42697421_0.shtml),2017年2月1日; Statement before the Permanent Court of Arbitration, at <http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/6795-statement-before-the-permanent-court-of-arbitration>, 1 February 2017.

61 PHL Stresses Adherence to Rule of Law as Key to Peaceful Settlement of Disputes; Highlights World Development Challenges and Calls on UN Reforms, at <http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/4202-phl-stresses-adherence-to-rule-of-law-as-key-to-peaceful-settlement-of-disputes-highlights-world-development-challenges-and-calls-on-un-reforms>, 1 February 2017.

62 《联合国海洋法公约》,第279~281、283条。

先协商之意的,或是指向了要求协商之条款的文字,更比比皆是。例如第286条,已诉诸该部分第一节而仍未解决的、关于《公约》解释及适用的争端,才可提交具有约束力的强制裁判程序;而第一节则强调将双边协商放在优先地位。《公约》以复杂的、相互照应的条款,构建出一套争端解决机制,却又几乎是小心翼翼地确保双边协商的争端解决方法不仅不受这一机制的干扰,更位于这一机制之上。对《公约》的信守,已然要求各国充分展开协商,诚意进行合作。

而关于《公约》的目的及宗旨,其序言和第十六部分的一般规定都作出了指引:与海洋法相关的一切问题都应本着互相谅解和合作的精神进行解决;缔约国应诚意履行其义务,并不致构成滥用权利的方式,行使其权利、管辖权和自由。如果说《公约》有关自行协商的明文规定,尚能够经任何双边对话得到表面上的满足,而无需关注谈判实质,那么《公约》追求的目的和宗旨,则对成员国的善意提出了更高的要求。

事实表明,菲律宾在仲裁案酝酿期间、启动之时以及进程之中,均未与中国进行协商,或是确实旨在寻求共识的真意协商。因此,首先,假如菲律宾提交仲裁的争端果真如其所称,是关于《公约》的解释及适用的争端,则应根据《公约》第283条,与中方就以和平方法解决争端交换意见。但菲从未就其任何诉求询问中国意见,故而已经违反了《公约》明文条款,违反了条约必须遵守之要求。

退一步讲,即使中菲关于仲裁一事有过交流——如菲方所坚称的——这种交流也毫无诚意。原因在于菲律宾认为没有必要具体商讨其诉求,从而使双方可能开展的任何协商沦为表面功夫。由此,菲律宾抛弃了协商的目标,忽视了合作的真谛,减损了《公约》的目的及宗旨。

## 2. 中菲之间多项双边及多边协议的规定、目的及宗旨

除了《公约》本身,中菲更有一系列《公约》所指的协定,对两国争端的解决方式作了明确要求。中国与菲律宾就以友好协商解决南海争端早有共识;自1995年以来,中菲之间多项联合声明等官方文件都明确指出,双方争议将通过双边友好协商加以解决。<sup>63</sup>2002年签署的《南海各方行为宣言》(以下简称“《宣言》”)更有如下规定:各方以《宪章》宗旨和原则等公认的国际法原则作为处理国家间关系的基本准则;各方承诺根据公认的国际法原则,通过友好磋商和谈判,以和平方式解决领土和管辖权争议。<sup>64</sup>协商的地位也得到了现任菲律宾政府的确认,2011年中菲联合声明重申以和平对话处理争议,并重申将遵守《宣言》。<sup>65</sup>中国坚持认为,中菲一系列双边文件以及包含中菲两国的多边文件,都构成具有约束力的协议,也即《公约》第280条和281条所指的协议,要求两国承担以协商解决争端的义务。

63 中国关于仲裁案的立场文件引用了多份此类声明,参见《立场文件》,第31~34段。

64 《南海各方行为宣言》,2002年,第1、4条。

65 《立场文件》,第37段。

以下以《宣言》为例做进一步分析。

首先,《宣言》属于对中菲具有约束力的政治协议。VCLT 第2条第1款规定:“称‘条约’者,谓国家间所缔结而以国际法为准之国际书面协定,不论其载于一项单独文书或两项以上相互有关之文书内,亦不论其特定名称如何。”<sup>66</sup> 一项协议之所以称其为协议,关键在于当事方具有创设国际法上权利与义务的意思表达。<sup>67</sup> 未经签署的文件,例如新闻公报,也可能成为协议,<sup>68</sup> 包含有法律义务的会议记录等文件,也可能成为协议。<sup>69</sup> 因此,当事方的意图和文件使用的文字,才是决定文件是否成为具有约束力之协议的要素。

《宣言》明文规定,以《宪章》宗旨和原则以及《公约》等国际法原则,作为处理国家间关系的基本准则;各方经《宣言》承诺,根据公认的国际法原则,由直接有关的主权国家通过友好磋商和谈判,以和平方式解决它们的领土和管辖权争议。<sup>70</sup> 这说明《宣言》包含了明确的行为规则。对“承诺”一词的使用,也彰显了缔约国确立相互之间义务的意图。<sup>71</sup> 另外,《宣言》是由中国外交部副部长和东盟成员国外交部部长或外交大臣所签署的,也即政府的官方代表。<sup>72</sup> 综上,《宣言》应被视为具有法律约束力的协议文件。

因此,《宣言》所规定之“由直接有关的主权国家通过友好磋商和谈判”解决争议的方法,才是菲律宾应当坚持的方式。而《宣言》之序言也宣告了其宗旨所在:为和平与永久解决有关国家间分歧和争议创造有利条件。菲律宾不仅没有主动履行与中国协商的义务,面对中国提出的协商请求也是一律回绝,这一行为是对《宣言》的违背,同时也超出了对《宣言》的违背,是对《宣言》目的及宗旨的破坏。

第二,根据菲律宾在诉讼中的论辩,《宣言》并非有约束力的协议,只是一份政治性文件。菲方也分析了“承诺”一词,认为这一用语和“同意”的效力是不同的,各国仅是“声明”它们的“承诺”。<sup>73</sup> 但《布莱克法律辞典》对“承诺”的解释,却无法支撑菲方观点;该词的含义包括承担一项义务,或作出正式的承诺,或以保

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66 《维也纳条约法公约》,第2条第1款。

67 詹宁斯、瓦茨修订,王铁崖等译:《奥本海国际法》,北京:中国大百科全书出版社1995年版,第1203页。

68 詹宁斯、瓦茨修订,王铁崖等译:《奥本海国际法》,北京:中国大百科全书出版社1995年版,第1209页。

69 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment, ICJ Reports 1994, para. 41(1).*

70 《南海各方行为宣言》,2002年,第1、4条。

71 《立场文件》,第38段。

72 原文为“声明……经由主要官方代表签署,且此声明含有包括明确行为规则这种已获同意之结论的话,此文件就对当事国家具有约束力。”詹宁斯、瓦茨修订,王铁崖等译:《奥本海国际法》,北京:中国大百科全书出版社1995年版,第1189页。

73 *Memorial of the Philippines, the Republic of Philippines v. the People's Republic of China, PCA, 2014, paras. 7.51. [hereinafter "The Memorial"]*

证的方式行事。<sup>74</sup> 这些用词是毫不含糊的,无论哪一项解释都表明了行为人确定的意图。菲方扭曲解释《宣言》用语,这已然有违善意解释条约的要求;同时,将《宣言》视作没有约束力的文件从而任意行事,也漠视了《宣言》所有签署国当时创设相关义务的意图。正如前文所述,条约的宗旨反映了所有缔约国共同的期望,而不是某一方任意的观点;对条约目的及宗旨的保护,也是对各国共同的合法期望之保护,这是缔约国相互之间应当展现的善意。

第三,菲律宾还提出,中国与东盟成员国在4个领域多项问题上都无法达成共识,故《宣言》只是妥协的产物,这一签署时期的情况也表明《宣言》不具有约束力。<sup>75</sup> 然而,《宣言》的实施情况只能证明相反的结论。中国与东盟各国随后继续签订了《宣言》后续行动指南,包括与菲律宾发布联合声明重申遵守《宣言》。<sup>76</sup> 菲律宾自身持续参与了《宣言》签署以来的协商会议,却从未在会上表示无法与中国沟通的类似意见。恰恰在菲方提交其诉状前夕,2014年3月18日,落实《宣言》的第十次联合工作组会议召开,菲律宾与中国代表双双参会;会议的目的正是要落实《宣言》。假如菲国认为《宣言》不具有约束力从而根本不打算履行其要求,又何必参与落实《宣言》的协商进程?或者,在这一进程中,菲国又为何不提出其异议?毫无疑问,菲方一边参与《宣言》的落实,一边公然背离《宣言》要求,如此行事自相矛盾,毫无诚意。

最后,即使《宣言》被认作不具有约束力的文件——仲裁庭初步裁决也的确如此裁定——如上文所述,当事国自行协商之方式也得到了《公约》的肯定。从而,菲律宾既不主动协商,也不接受中国提议之协商,更明确表示仲裁期间均不参与协商的“三不”行为,仍然证明其置《公约》的目的及宗旨于不顾,违背了善意原则。

#### 四、仲裁庭对善意原则之违背

《公约》既然创建了争端解决机制,致力于海洋和平的宗旨,也需要争端解决机构的守护。面对错综复杂的海洋划界争端,要寻求能够真正为所有当事方接受的解决途径,不仅需要当事国自身的努力,也考验着第三方解决机构的智慧。

##### (一) 对当事方真意履行协商义务之检验

争端解决机构就实体问题作出裁判之前,首先应当判断的是当事方是否已充分合理地进行了协商。这要求判决机构考量,双方是否确实善意履行了协商义务。

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74 Bryan A. Garner ed., *Black's Law Dictionary*, Eagan: West Group, 2004, p. 4741.

75 The Memorial, para. 7.55.

76 《中华人民共和国和菲律宾共和国联合声明》,2011年9月1日。

根据上文的论述,该义务主要分为2步,即双方是否就提交审议之事项进行了协商,以及双方在协商过程中是否付出了真诚的努力。

对第一步的检验相对而言更易于完成,无需裁判机构深入探究协商的实质,只需要确定相关议题是否被摆在了双方的谈判桌上。然而,即便在这一步上,本案仲裁庭的决定也令人不敢苟同。例如,在对《公约》第283条进行审议时,仲裁庭在初步裁决中判定,中菲已经就“菲律宾提交仲裁的争端”交换了意见,从而满足了第283条的要求。<sup>77</sup>作为证据,仲裁庭引用了2012年1月14日,中菲外交部副部长之间进行的一次磋商内容。恰恰在仲裁庭引用的文字里,菲国代表对中国代表说道:“您方提倡双边讨论的方式。而我们已经开始使用法律的途径。”<sup>78</sup>结合英文版本所使用的时态,菲方代表的陈述几乎明白地承认了,甚至早在黄岩岛事件发生之前,菲国就“已经”开始着手法律解决。既如此,仲裁庭怎能将这一陈述视为“与中国交换意见”之证据?第二,菲国在本次磋商中提出的争端解决方式是多边谈判,而不是司法程序。<sup>79</sup>根据仲裁庭之判断,本次磋商是中菲存在交换意见的有效证据;那么只能说,菲律宾在这一磋商中欺骗了中国。《公约》第283条的要求是就解决争端的和平方法交换意见,故菲国至少应在这场磋商中告知中国,它打算将南海争端提交仲裁,但在该磋商中它主张的却是完全不同的另一种解决方法。也就是说,仲裁庭的结论又指出了菲律宾违反善意原则对诚实信用之要求的另一处表现。但是,要把菲国代表在这场协商中所付出的努力归为欺骗,于情于理都委实令人难以接受,因而唯有得出结论:中菲本次协商并不是有关仲裁案事宜之协商,仲裁庭之判断并不合理。

除此以外,仲裁庭还引用了菲律宾2012年就黄岩岛问题向中国发出的照会作为依据。然而,该照会仅仅是关于黄岩岛及其专属经济区的问题,不涉及其他,也没有提出打算采用哪一种司法程序。<sup>80</sup>仲裁庭却说道,双方已经“清楚明白地”就“菲律宾提交仲裁的争端”交换了意见。<sup>81</sup>种种事实如此明确和显而易见,仲裁庭却能够得出如此结论,这已经不是单纯的观点判断问题,而是对善意原则的漠视。

如果说对争端方是否开展协商的裁判,仲裁庭尚能自圆其说;在第二步也即协商是否真诚、充分的检验上,仲裁庭则几乎对相关证据视而不见,毫无疑问是缺乏

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77 Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of Philippines v. the People's Republic of China, Award on Jurisdiction and Admissibility, 2015, para. 342. [hereinafter “Award on Jurisdiction and Admissibility”]

78 Award on Jurisdiction and Admissibility, para. 339.

79 Award on Jurisdiction and Admissibility, para. 339.

80 Note Verbale from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1137, 26 April 2012.

81 Award on Jurisdiction and Admissibility, para. 342.

善意的裁决。仍然以其对《公约》283 条的检验为例,仲裁庭自己指出,外交上的意见交换往往不会注重区分程序性问题和实质性问题;在实践中,双方对实体问题的意见,可能也体现出双方对如何解决或不解决争端的意见。<sup>82</sup>既然仲裁庭已经如此承认,则对双方协商的内容就更有必要认真审议。然而如上文所述,仲裁庭所列举的 2 项材料,甚至都无法构成菲律宾就仲裁开启了协商的证明,更不必说其协商中的诚意究竟几何。另外,前文也引述了菲方诉讼代表的发言,其认为,就诉求实质进行逐项协商是不必要的,只要从整体上交换了意见就满足了第 283 条的要求。<sup>83</sup>这些观点已经表明菲律宾仅视协商为一项程序,早已无意在双边合作之中继续投入精力。面对菲国如此明显的态度,仲裁庭仍然判定其满足了协商之要求,只能说仲裁庭也同样抛弃了协商的意义。毫无意义的协商显然不符合《公约》,也不符合任何国际性条约对双边合作、和平解决争端的追求,从这一角度,仲裁庭之裁决也减损了《公约》目的及宗旨,再次与善意原则相背离。

## (二) 仲裁庭对法律与事实的漠视

仲裁庭对中菲之间这一明显关于领土主权和海洋划界的争端宣布具有管辖权,随后在最终判决中,否定了中国在南海享有之历史性权利,否定了南海 U 形线之有效性,也否定了南沙群岛拥有专属经济区和大陆架之可能性。实体审议时仲裁庭罔顾法律、历史与事实之处几乎不胜枚举,在此仅以中国的历史性权利问题为例进行分析。

中国尚未对南海 U 形线的性质,以及在南海享有的历史性权利之内容做出过明确的界定。在仲裁庭看来,中国主张的这种权利具有排他性;仲裁庭进而判定,中国主张的 U 形线及其范围内的历史性权利无效。<sup>84</sup>

从善意原则的视角出发,这一判决歪曲了事实,未能诚实可信地处理证据。首先,中国的确声明过,我国在南海 U 形线内享有一系列历史上形成的权利;但中国从未表示,不允许其他国家在南海行使其合法权利。事实上,仲裁庭也注意到中国反复声明,尊重和支持各国依国际法在南海享有的航行自由。<sup>85</sup>结合南海多年来的实际航行状况,事实已表明中国并未妨碍其他国家在南海,包括在 U 形线范围以内行使其正当权利。然而判决却指,历史性权利“通常是排他的”,<sup>86</sup>并推

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82 Award on Jurisdiction and Admissibility, para. 332.

83 Final Transcript Day 2 – Hearing on Jurisdiction and Admissibility, the Republic of Philippines v. the People’s Republic of China, PCA, pp. 34–35.

84 Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of Philippines v. the People’s Republic of China, Award, 2016, para. 278. [hereinafter “Award”]

85 Award, para. 212.

86 Award, para. 268.

定中国主张的历史性权利也是排他的,从而影响了其他国家的权利。问题在于,仲裁庭从何处得出了历史性权利就是排他的这一结论?判决本身也承认,“历史性权利”的概念在国际法中尚未明确;<sup>87</sup>具体到中国的声明和实践,则更无法得出这一论断。显然,这是仲裁庭对历史性权利和中国主张的臆断。

第二,仲裁庭以中国对油气资源、渔业资源等的主张为例,认为中国在解释对这些资源所享有的权利时,并没有提到其权源是由于相关区域位于中国的专属经济区和大陆架范围内,而是由于中国在历史上享有的权利。例如,针对菲律宾在礼乐滩海域 GSEC-101 区块等多个油气田的开发行为,中国表示反对的声明措辞都是,相关区域位于中国享有历史性权利和管辖权的范围内,而没有言及专属经济区或大陆架。<sup>88</sup>仲裁庭由此断定,中国对这些权利的主张不是基于《公约》规定的专属经济区和大陆架权利,而是单纯基于历史性权利。<sup>89</sup>问题是,仲裁庭自己也指出,假如中国就南沙群岛主张专属经济区和大陆架,则以上区域均位于中方依据《公约》主张的范围内。<sup>90</sup>中国在论及其对油气资源所享有的权利时,未从专属经济区和大陆架的角度做明言解释,并不一定就代表在事实上就不享有由此具备的权利。

第三,判决认为,在 U 形线范围内、而在中国专属经济区和大陆架范围外的部分,当中方的权利主张与菲方主张的专属经济区和大陆架范围重叠时,便是中国有违《公约》。<sup>91</sup>然而,中菲之间存在海洋划界争端,其各自主张的专属经济区和大陆架范围本来就有争议;既然如此,仲裁庭又怎么能在这一争议获得解决之前,就断言是中方侵犯了菲方权利?在此,判决显然有失公允,也再次违背了善意原则之基本内涵。

《公约》没有明文要求,根据其附件七成立的仲裁庭应遵循善意原则;但前文已经指出,仲裁庭等司法机构既旨在解决争端,维护国际司法之正义,便理应以身作则。应当说,仲裁庭作出有违善意的裁决,所造成的影响比菲律宾更加严重。因为菲律宾仅仅是一项争端的当事方,是国际社会众多成员中的一份子,它对国际法基本原则的违反可以为司法机构所纠正;然而仲裁庭作为国际司法机构,假如不仅不对这类违反行为进行辨别,甚至自己也无视事实、歪曲证据,则是对国际法之一般原则的严重损害。

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87 Award, para. 226, the text reads “Other ‘historic rights’... are nowhere mentioned in the Convention.”

88 Memorandum from the Acting Assistant Secretary for Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs, 10 March 2011; Note Verbale from the Embassy of the People’s Republic of China in Manila to the Department of Foreign Affairs, Republic of the Philippines, No. (11) PG-202, 6 July 2011; Award, para. 209.

89 Award, para. 209.

90 Award, para. 209.

91 Award, para. 232.

### (三) 未能做出真正有利于和平解决争端之裁决

从初步裁决而言,仲裁庭已在相当程度上漠视了善意原则,但这并不代表其不能在实体裁决中有所补救。无论裁判机构对具体事项怎样解读,其最终判决的目的都在于使国际冲突归于平息,使争端双方归于和平,这是作为争端解决机构的最基础义务,可以说也是其最根本之善意。然而,2016年7月出炉的最终裁决,不仅未对初步裁决中善意的缺失进行弥补,甚至变本加厉,通篇毫无善意。至此,本案仲裁庭的做法对于中菲之间争端的和平解决而言,不仅毫无增益,甚至可谓适得其反。

国际法作为国际关系历史发展的产物,永远不能与国际关系相互孤立看待。中菲南海争端,正如所有的国家间争端,都不仅仅是国际法上的问题,同时也牵涉复杂的国际政治考量,牵涉双方未来关系的发展走向。也正是因此,外交途径才始终是解决任何一项争端的优先方式;在合理的情况下,国际司法机构作出鼓励协商的最终裁决是极为必要的,这不是对其责任的逃避,而是根据实际作出最有利于争端解决的决定,代表着国际法对国际社会成员的善意。

从这一角度出发,中菲南海仲裁案,正有必要得到这样一份鼓励性质的最终决定。中国已反复声明不接受、不参与仲裁案,因而即使仲裁庭作出任何不利于中国的判决,中国也有充分立场不将其裁决付诸执行。更何况,鉴于仲裁庭在初步裁决中已然有失善意,其决定早已招致中国乃至外国学者质疑。本案仲裁庭在中国国内几乎已成众矢之的,不仅中国政府坚持仲裁庭没有管辖权,<sup>92</sup>学界更从种种角度深入剖析了管辖权判决的荒谬之处。中国既认定仲裁庭没有管辖权,则其随后做出的最终裁决也将被视为缺乏法律效力。如此一来的结果,轻则中菲双方就裁决结果僵持不下,最终裁决被束之高阁,毫无意义;重则,中国坚持仲裁无效,菲律宾倚仗裁决要求执行——双方有关南海问题的分歧进一步加深,争端反而加剧,裁决适得其反。前者无疑将减损国际司法之有效性和权威性,不利于国际法的发展;后者则进一步损害国际关系友好发展,威胁国际社会之和平稳定。

遗憾的是,本案仲裁庭一意孤行,未能客观评判中菲南海争端过程中的事实。最终裁决发布之后,不仅中国义正辞严地进行批驳,菲律宾在新上任总统的领导下,也转向重回协商,而将裁决束之高阁。仲裁庭的宗旨本应是,促成中菲争端解决,还南中国海以和平安宁;然而其却在与善意原则相背离的道路上愈行愈远,可谓枉费了争端“解决”机构之名。

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92 外交部条法司司长徐宏就菲律宾所提南海仲裁案接受中外媒体采访实录,下载于 <http://www.fmprc.gov.cn/ce/cebe/chn/zclc/t1362765.htm>, 2017年1月17日; 2015年10月30日外交部发言人陆慷主持例行记者会,下载于 [http://www.fmprc.gov.cn/web/wjdt\\_674879/fyrbt\\_674889/t1310668.shtml](http://www.fmprc.gov.cn/web/wjdt_674879/fyrbt_674889/t1310668.shtml), 2017年1月17日。

## 五、菲律宾与仲裁庭之根本不足

无论是争端当事方善意进行协商的要求、信守条约的要求、促进条约宗旨之实现的要求,还是作为第三方争端解决机构对当事方以上义务进行善意检验的职责,其根基都在于各方行动的诚信。真诚的主观品质,辐射出多方面的要求,涵盖了一项争端的方方面面。

例如,真诚行事还可以解释为,争端方行为透明,客观呈现事实。中菲南海争端中的任何议题,实际上都是关于领土主权和海洋划界之争端;但菲国却竭力包装其主张,提出判定海洋地物法律性质等表面诉求,<sup>93</sup>刻意掩藏其背后真实意图。这种对事实的扭曲、对争端本质的掩盖,自然也违反了透明、客观和诚信的要求。

又如,菲律宾在其抗议中国对南海主张的照会中,声明“卡拉延群岛”中的海洋地物所产生的领海、专属经济区和大陆架,其主权或主权权利属于菲律宾。<sup>94</sup>菲方主张的“卡拉延群岛”完全由南沙群岛的一部分岛礁组成;因而,菲律宾已经承认南沙群岛中的部分地物能够产生专属经济区和大陆架。那么,中国在比南沙群岛某一岛礁范围更大,也在比“卡拉延群岛”范围更大的南沙群岛整体的基础上,主张群岛的专属经济区与大陆架,似乎更不应产生异议。因此这一证据根本不足以反映中菲对此存在争端,但仲裁庭却得出了相反结论。<sup>95</sup>这也是仲裁庭未能客观审查事实之体现。

最后也是最具讽刺意味的一点在于,菲律宾和仲裁庭在仲裁过程中多次明言提及善意原则,意指中国行动有违善意。菲国认为,在黄岩岛、仁爱礁、美济礁等海域,中国违反《公约》规定的保护海洋环境之义务,岛礁建设损害海洋环境,且未阻止本国渔民的破坏性行为;据此,中国未能善意履行《公约》赋予的义务。<sup>96</sup>菲国所提第14项诉求又称,中国在仁爱礁的一系列行动令争端恶化。菲方认为,《公约》第300条是对善意和禁止权力滥用之基本原则的叙述,它要求各国致力于缩小分歧,而不是恶化争议。

显然,善意原则要求争端当事国积极以和平方式化解分歧,而不是相互刺激、加剧争端,这一点毋庸置疑。但问题在于,正是菲律宾自1999年以来,一直以一艘破败军舰在仁爱礁坐滩,甚至试图在此修建固定设施。菲国指责中国,在2013

93 关于菲方对其诉求的伪装,罗国强教授详细归纳出4种手法,参见罗国强:《南海仲裁案初步裁决评析》,载于《外交评论:外交学院学报》2016年第2期,第26页。

94 The Permanent Mission of the Republic of the Philippines to the United Nations, Note Verbale 000228, United Nations Documents, 2011.

95 Award on Jurisdiction and Admissibility, para. 170.

96 Day 3 – Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, the Republic of Philippines v. the People’s Republic of China, PCA, p. 45.

年仲裁启动后继续在仁爱礁采取行动,从而构成加剧、恶化争议的行为,然而,正是菲国于2014年3月公开宣称,要将其在仁爱礁的军舰建成为永久设施。作为南沙群岛的一部分,中国绝不会坐视仁爱礁的领土主权遭此挑衅,因而采取了必要措施。作为挑起争端一方的菲律宾,又有何立场反指中国是南海和平的破坏者?

可悲的是,仲裁庭眼中只看得到中国一方的行动,而对菲国挑衅在先的行为视而不见。仲裁庭认定,不仅菲方明确提出的美济礁、仁爱礁等地,中国在南海共7处地物上的岛礁建设等行动,均为恶化争端之举。<sup>97</sup>仲裁庭奇怪地“忘记”了,正是菲国一方首先挑战中国主权主张,而单单关注中国一方的行动。这种对事实明显刻意的无视,怎能说是善意的裁决?更进一步,仲裁庭还认为,中国的举措对仲裁构成了阻碍,令仲裁帮助争端获得解决的目的受到损害。但是,真正妨碍争端获得解决的,难道不正是这份虚伪不实的裁决吗?实际上,裁决的核心内容在于推导出中菲两国根本不存在海域划界争端的结论,从而南沙所涉地物位于菲律宾大陆架范围内,因此,这些地物自动归菲国所有。这一结论源于仲裁庭3点关键的认定,即:中国“历史性权利主张”无效;南沙群岛作为整体产生海洋权利之主张无效;南沙所有地物均不属于“岛屿”。然而,此3点认定无一不是罔顾事实之语。中国主张的“历史性权利”绝非排他的权利,但仲裁庭妄加判断;《公约》并未规定远洋群岛不可适用群岛基线,至少不应断言群岛不可作为整体产生自身的专属经济区和大陆架,但仲裁庭武断否定;至于“岛屿”的构成标准,更是缺乏明确规定,但仲裁庭却无视事实证据,有故意抬高“岛屿”标准之嫌。事实上,要充分辨析仲裁在此3项问题中的不实之处,还需长篇累牍;但就本文的主旨而言则不再展开,仅强调一点,即仲裁庭认为中菲两国不存在海域重叠,这一结论虚假不实,荒谬至极。在此基础上的所有裁决,都不可能有利于争端的解决,而只会带来相反效果。

菲律宾和仲裁庭以种种行为肆意践踏善意原则,却还堂皇援引该原则妄议中国行动,其在仲裁过程中的言行前后不一、自相矛盾,其对待善意原则的态度几可谓“合则用、不合则弃”。由此,菲律宾和仲裁庭对这一国际法基本原则、国际社会基本行事准则的破坏,不得不说已是登峰造极。

本文所探讨的善意原则之内涵,还远未穷尽,也无法穷尽。以真心与诚意为核心,善意原则自然体现在行为主体的一举一动之中。中菲南海仲裁案在2016年7月终于落下帷幕,不幸的是,所谓的“最终判决”几乎完全支持了菲方提出的所有诉求。审视菲律宾和仲裁庭行为,其不符善意原则之处早已不胜枚举,本文仅选取了寥寥几例;这不可不谓为善意原则之殇。

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97 Award, para. 1177.

## 六、结 语

国际争端之解决,及其对世界和平的维护,特别需要各行为主体遵循善意原则的指引。具体到海洋划界争端之中,善意原则衍生出层层内涵,主要包括:

1. 对于争端当事方,应以取得一致为协商目标,善意开展协商并诚意进行协商;善意履行双方间条约规定之义务,不得减损条约目的及宗旨;此外,其行动始终保持着真诚的本质。

2. 对于参与其中的争端解决机构,应充分认识到当事方在善意原则下所负有的责任,并对争端事实做善意的客观检验;其裁决应秉承解决争端的宗旨,真正推动国际社会向和平迈进。

中菲南海争端是领土主权和海洋划界争端。无论当事一方菲律宾还是争端解决机构仲裁庭,其种种行为都有违上述的各项要求,这无疑是对善意原则的极大破坏。

作为国际法一般原则,内涵深邃的善意原则是国际社会运行的一块基石;它是国际行动的最低准绳,也是整个人类社会对美德的崇高追求。善意原则不容漠视与侵犯,而面对中菲南海仲裁案缺乏善意的无效裁决,这一点更应为致力于国际法发展的全体国际社会成员所注意。

## **Sino-Philippine Arbitration on South China Sea Disputes: A Perspective from the Principle of Good Faith**

LUO Sa\*

**Abstract:** This paper, from the perspective of the principle of good faith, an abstract and basic principle on international law, examines the deeds of both the Philippines and the Tribunal in the Arbitration on South China Sea Disputes. The first section explores the connotations of the principle in the context of maritime delimitation. On the one hand, the parties to a maritime delimitation dispute are governed by this principle. For example, the parties are obligated to negotiate in good faith, including to actively enter into negotiations, conduct sufficient talks and keep welcoming negotiations. On the other hand, the principle also requires dispute settlement bodies to make their decisions in a legal and reasonable manner. The second section identifies the Philippines' violation of the good faith principle in multiple aspects, by checking its actions taken during the course of the proceedings against the primary requirements of the principle. The third section showcases the absence of good faith in the Arbitral Tribunal's award, by presenting the behaviors of the Tribunal, as a dispute settlement body, during its review of the case. Lastly, the paper mentions that the Philippines and the Tribunal even check China's behaviors against the principle of good faith. And the paper concludes that the lack of honesty and integrity of both the Philippines and the Tribunal causes fundamental detriment to this general principle of international law.

**Key Words:** Principle of good faith; China; The Philippines; Arbitral Tribunal; South China Sea Arbitration

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## I. Introduction

The principle of good faith, a basic principle of international law, governs how the subject of international law exercises its rights and the attitude it has when performing its obligations. This principle plays a significant role in the practice of international law. The United Nations Convention on the Law of the Sea, hereinafter referred to as the “UNCLOS” or the “Convention”, as well as other conventions on the law of the sea defined the concepts of exclusive economic zone (EEZ) and continental shelf. In this context, many States compete to lay claims to these marine areas, giving rise to new conflicts and confrontations. Unceasing disputes on maritime delimitation have garnered global attentions. The principle of good faith also gives guidance to maritime delimitation, bearing great significances to the settlement of disputes between coastal States in practice.

On 22 January 2013, the Philippines, in accordance with Part XV and Annex VII of the UNCLOS, initiated an arbitral proceeding against China over the South China Sea (SCS) disputes between the two States. On 29 October 2015, the Arbitral Tribunal released the Award on Jurisdiction and Admissibility. The Arbitral Tribunal stated that it had jurisdiction to consider seven of the Philippines’ 15 Submissions and reserved consideration of its jurisdiction to rule on the left eight Submissions to the merits phase. In other words, all the 15 Submissions of the Philippines would be considered in the second phase of trial. On 12 July 2016, the Tribunal issued its final award, which denied a series of China’s claims, including the dashed-line in the SCS. In this connection, both the Philippines, a party to the disputes, and the Tribunal, a third-party judicial body, have in practice violated the spirit of the principle of good faith, a basic principle of international law.

The SCS arbitration has garnered great attentions from the academia ever since its initiation. However, previous academic researches primarily focus on the analysis of each Submission of the Philippines, as well as the Tribunal’s award, particularly the preliminary rule on the establishment of the Tribunal’s jurisdiction. Such researches are conducted mainly from the perspectives of legal basis and legal reasoning. This paper will not give an in-depth exploration of the legal basis relating to the SCS arbitration. Instead, it will, from the perspective of the principle of good faith, focus on some more abstract obligations arising out from the legal principle, which is an innovation of the paper. The author hopes that this paper may contribute to China’s efforts to deal with the SCS disputes with the Philippines.

## II. The Principle of Good Faith and Maritime Delimitation

### *A. An Overview of the Principle of Good Faith*

The principle of good faith, as a fundamental principle on international law, plays an important and basic role in all the spheres and systems of law. Firstly, since the 20th century, this principle has been, explicitly or implicitly, incorporated into many international or multilateral conventions. For example, the second principle of the seven principles provided for in Article 2 of the Charter of the United Nations (hereinafter “UN Charter”) states that all Members shall fulfill in good faith the obligations assumed by them in accordance with the present Charter;<sup>1</sup> the Vienna Convention on the Law of Treaties (VCLT) states in its preamble that the principle of good faith is universally recognized, and uses the term “good faith” many times in the text.<sup>2</sup> Additionally, judicial precedents concerning different fields of international law also confirmed the status of the principle of good faith in the relevant decisions. For instance, the International Court of Justice (hereinafter “ICJ” or “the Court”) pointed out, in the *Nuclear Tests Cases* of 1974, the principle of good faith was one of the basic principles governing the performance of legal obligations by States.<sup>3</sup> In international trade, the dispute settlement mechanisms of World Trade Organization (WTO) also applied the principle of good faith in many of their decisions. This principle is a general principle of international law and a requirement of customary international law, which is widely recognized in the academia.<sup>4</sup> It follows that the status and the influence of the principle of good faith has been universally recognized, and the most basic norm of international law is the principle of good faith.<sup>5</sup>

It is also widely recognized that the specific connotations of the principle of good faith are difficult to be defined definitely. This principle is derived from

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1 Charter of the United Nations, 1945, Article 2(2).

2 Vienna Convention on the Law of Treaties, 1969, Preface, Articles 26, 31(1), 46(2), 69(2) (b).

3 *Nuclear Tests Cases (Australia v. France)*, Judgment, *ICJ Reports 1974*, para. 46.

4 J. F. O’Connor, *Good Faith in International Law*, Aldershot: Dartmouth Publishing, 1991, p. 124; Reviews of Books, *University of Toronto Law Journal*, Vol. 12, Issue 1, 1957, p. 106; Malcolm Shaw, *International Law*, Cambridge: Cambridge University Press, 2014, p. 73.

5 Thomas Cottier and Krista N. Schefer, HAN Xiuli trans., GAO Bo proofread, Good Faith and the Protection of Legitimate Expectations in the WTO, *Journal of International Economic Law*, No. 3, 2005, p. 181. (in Chinese)

Roman civil law, reflecting a requirement on “*bona fide contract*” and “*actio bonae fidei*”. “*Bona fide contract*” means that the two parties to a contract, when performing the contract, should undertake any additional obligations incurred by the requirement of honesty, in accordance with their original purpose of goodwill. And the term “*actio bonae fidei*” requires the parties to an action exercise their litigious rights in good faith during an action, and the judge justly and fairly make his decisions in good faith when interpreting and understanding the agreements reached by the parties, and exercising his discretions. As history progresses, the principle of good faith was widely incorporated into the legal systems of many Western States, and then found its way into international law with the deepening of international exchanges. The principle of good faith in the ambit of international law firstly derived from the concept that agreements should be abided by.<sup>6</sup> WTO uses the two concepts interchangeably. In a considerable number of trade disputes, WTO expounded, on a case-by-case basis, the good faith principle with emphasis upon different aspects of the principle. Virtually, as a basic legal principle, this principle does not only focus on a step or steps of acts, but also regulates all acts. Therefore, it is an open-ended and inclusive principle with multifaceted connotations. According to *Black’s Law Dictionary*, the term “good faith” is ordinarily used to describe that state of mind denoting (a) honesty of belief or purpose, (b) faithfulness to one’s duty or obligation, (c) observance of reasonable commercial standards of fair dealings in trade or commerce; and (d) freedom from intention to defraud or seek an unconscionable advantage.<sup>7</sup> “Good faith” demands an individual to be reasonable, honest and faithful. With no technical assessment criteria, the term tends to be defined subjectively.

Notably, in the practice of international law, the principle of good faith cannot exist *in vacuo*. The ICJ stated that the principle of good faith cannot create any legal obligations by itself.<sup>8</sup> A violation of the principle of good faith is not abstract or baseless. Instead, such a violation possibly stems from breaches of treaties, or relates to damages to the interests of another party, or bases on the violation of an obligation. For example, in the *Nuclear Tests Cases*, the French Government announced its decision to terminate nuclear tests in the South Pacific Ocean.

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6 Thomas Cottier and Krista N. Schefer, HAN Xiuli trans., GAO Bo proofread, Good Faith and the Protection of Legitimate Expectations in the WTO, *Journal of International Economic Law*, No. 3, 2005, p. 181. (in Chinese)

7 Bryan A. Garner ed., *Black’s Law Dictionary*, Eagan: West Group, 2004, p. 2038.

8 *Nuclear Tests Cases (Australia v. France)*, Judgment, *ICJ Reports 1974*, para. 46.

Despite of the unilateral nature of the declaration, the ICJ held that the principle of good faith required that such an declaration be respected.<sup>9</sup> In the *Application of the Interim Accord of 13 September 1995*, the Court needed to consider whether the Applicant Macedonia had breached its obligation to negotiate in good faith, which was created by an Interim Accord.<sup>10</sup> As stated by the Appellate Body of WTO, to constitute a violation of the principle of good faith, two requirements should be satisfied: the first is that a party should be found to have violated a substantive treaty provision or obligation; the second is that it should be proved to be more than mere violation.<sup>11</sup>

In sum, the principle of good faith is a concept without any definite behavior patterns. It should be interpreted under the context where it is used, and explored after considering the relevant international practices. In other words, this principle can be illustrated but not defined.<sup>12</sup> It also provides a guiding effect in the field of maritime delimitation.

### *B. The Principle of Good Faith in Relation to the Parties to a Maritime Delimitation Case*

The basic principles of international law, as a supplement to international treaties and customs, play a vital role in every field and aspect of international law,<sup>13</sup> and the law of the sea is no exception in this connection. Article 300 of the UNCLOS explicitly provides that States Parties shall fulfill in good faith the obligations assumed under the Convention.<sup>14</sup> This provision lays out the general requirements on maritime delimitation between States, which contains rich implications. The principle of good faith certainly cannot create new legal obligations *in vacuo*. Each obligation to be discussed in the following pages exists on the basis of substantive laws, and the principle of good faith supports the

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9 Nuclear Tests Cases (Australia v. France), Judgment, *ICJ Reports 1974*, paras. 46–51.

10 Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment, *ICJ Reports 2011*, para. 127.

11 United States – Continued Dumping and Subsidy Offset Act of 2000, Appellate Body Report, 2003, para. 298.

12 Reviews of Books, *University of Toronto Law Journal*, Vol. 12, Issue 1, 1957, p. 106.

13 Robert Jennings and Arthur Watts eds., WANG Tieya et al. trans., *Oppenheim's International Law*, Beijing: Encyclopedia of China Publishing House, 1995, p. 23. (in Chinese)

14 United Nations Convention on the Law of the Sea, 1982, Article 300. [hereinafter “UNCLOS”]

fulfillment of such obligations: it supervises on the performance of such obligations, and more on the attitude towards obligation performing.<sup>15</sup>

### 1. The Obligation to Negotiate in Good Faith

Articles 74 and 83 of the UNCLOS provide for the delimitation of exclusive economic zones (EEZs) and continental shelves; paragraph 1 of both articles states that the maritime delimitation between States shall be effected by agreement in order to achieve an equitable solution.<sup>16</sup> Hence, this provision implies an obligation for States Parties to negotiate in respect of maritime delimitation. Many legal precedents of ICJ also link the obligation under this provision with the principle of good faith. The meaning of “to negotiate in good faith” could be further explained in the following two aspects.

First, the obligation to negotiate in good faith means that the maritime boundary delineated by a State unilaterally may be void and null. Admittedly, it is possible that two States may not conduct official negotiations, but may communicate by taking a series of State actions. A State raises a claim unilaterally, which the other State concerned makes no objection to. In this case, a tacit maritime boundary is created ultimately by acquiescence. However, since the UNCLOS has provided for the means to establish maritime boundary (by agreement in priority), the unilateral action of a State, if its maritime claims are opposed by any other States, may breach the UNCLOS. To carry out the obligations under the UNCLOS in good faith requires that a State should not take any actions with possible prejudice to other States. This requirement can also find its supports in other fields of international law.

The General Agreement on Tariffs and Trade (GATT), which is the predecessor of WTO and applicable to WTO Members, is one of the most important agreements concerning goods trades among WTO law. The chapeau of Article XX of GATT provides that Members should not apply such measures in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries.<sup>17</sup> In the final rulings of *the United States – Import Prohibition of Certain Shrimp and Shrimp Products*, the dispute settlement body of WTO articulated that the chapeau of Article XX was one expression of the principle of good faith.<sup>18</sup> In this

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15 Malcolm Shaw, *International Law*, Cambridge: Cambridge University Press, 2014, p. 74.

16 UNCLOS, Articles 74(1) and 83(1).

17 General Agreement on Tariffs and Trade, 1947, Chapeau of Article XX.

18 United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, 1998, para. 158.

case, the United States enacted a regulation on the import of shrimp products without negotiating with all the countries affected by the regulation in advance. The WTO Appellate Body opined that the United States' unilateral adoption and implementation of this regulation was unjustifiable, as it failed to take into account the different circumstances of the countries affected and such a regulation constituted arbitrary discrimination between countries.<sup>19</sup> It follows that all countries concerned should reach an agreement, and no country may claim unilaterally and arbitrarily. This is an undisputable fact in all fields of international law, and compatible with the principle of good faith, a general principle of international law.

Based on the first meaning described above, the second meaning of "to negotiate in good faith" is self-evident. States concerned should enter into negotiations with a view to arriving at an agreement on issues concerning maritime delimitation. In the *North Sea Continental Shelf Cases*, the ICJ argued that actual rules of law governing the delimitation of continent shelves were established on a foundation of general precepts of justice and good faith, and the States concerned were under an obligation to enter into negotiations.<sup>20</sup> The *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case connected the obligation to negotiate with the principle of good faith in even a clearer way: "Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith..."<sup>21</sup> In 2002, the *Land and Maritime Boundary between Cameroon and Nigeria* case further confirmed the obligation to negotiate in good faith.<sup>22</sup>

In a nutshell, with respect to maritime delimitation, a State should negotiate in good faith with other States concerned with a view to reaching an agreement. All sorts of unilateral actions, including unilateral delimitation, exploration and exploitation, are in contravention with the spirit of the UNCLOS.

## **2. The Obligation to Negotiate in Good Faith with a View to Reaching an Agreement**

Compared to entering into negotiations, to negotiate with a view to reaching an agreement serves as a better touchstone to test a State's good faith. How much

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19 United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, 1998, paras. 172, 177.

20 North Sea Continental Shelf Cases, Judgment, *ICJ Reports 1969*, para. 85.

21 Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, *ICJ Reports 1984*, para. 112(1).

22 Land and Maritime Boundary between Cameroon and Nigeria, Judgment, *ICJ Reports 2002*, para. 244.

effort should a State make during a negotiation? What kind of negotiation is “sufficient”? Whether any stalemate reached during a negotiation is sufficient to enable a party to a dispute to resort to dispute settlement procedures? UNCLOS cannot provide an answer to such subjective questions. However, these questions highlight the importance of negotiating in good faith. Whether the delimitation of maritime boundary can be effected in a peaceful and friendly manner depends, greatly, on the good faith that the States concerned use in negotiations. The paper underlines that the obligation to negotiate in good faith is not merely to go through a formal process of negotiation, but to conduct meaningful negotiations, which is really critical. This requires that the parties concerned negotiate sincerely and honestly with a view to effecting a delimitation by agreement.

First, each State may favor different delimitation methods. However, such differences cannot be used as the grounds to evade negotiation and cooperation. In the lengthy discussions and negotiations conducted during the Third United Nations Conference on the Law of the Sea, the rules regarding the delimitation of continental shelves and EEZs were intensely debated, and two distinct views upheld by two groups of interests appeared. The Bahamas Group of 24 favored equidistance as a general principle. On the other hand, the Algerian Group of 32 considered that equidistance should not have an inappropriate privilege on any other multi-method approach. Instead, the latter Group proposed that delimitation of maritime boundary should be effected based on equitable principles. Despite of such differences, the proposals of both groups affirmed that maritime delimitation should be effected by agreement.<sup>23</sup> All kinds of conflicting claims to marine areas could be flexibly settled by negotiation in good faith. In the *North Sea Continental Shelf Cases*, ICJ Former President Bustamante Y Rivero noted, in his Separate Opinion, that factor of good faith and flexibility which reconciled the needs of peaceful neighbourly relations with the rigidity of the law needed to be introduced into the negotiations on the continental shelf.<sup>24</sup> The Judgment of the case stated

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23 Informal Proposal by Bahamas, Barbados, Canada, Colombia, Cyprus, Democratic Yemen, Gambia, Greece, Guyana, Italy, Japan, Kuwait, Malta, Norway, Spain, Sweden, United Arab Emirates, United Kingdom and Yugoslavia (later joined by Cape Verde, Chile, Denmark, Guinea-Bissau and Portugal), UN General Assembly Document NG7/2; Informal Proposal by Algeria, Bangladesh, Benin, Burundi, Congo, France, Iraq, Ireland, Ivory Coast, Kenya, Liberia, Libya, Madagascar, Maldives, Mali, Mauritania, Morocco, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Poland, Romania, Senegal, Syria, Somalia, Turkey, Venezuela and Vietnam, UN General Assembly Document NG 7/10.

24 *North Sea Continental Shelf Cases*, Separate Opinion of President J. L. Bustamante Y Rivero, *ICJ Reports 1969*, p. 58.

that the parties were under an obligation to conduct meaningful negotiation, which would not be the case when either of them insisted upon its own position.<sup>25</sup> In the *North Sea Continental Shelf Cases*, the parties (the Kingdoms of Denmark and the Netherlands) insisted on the equidistance principle and were reluctant to compromise before the day of the judgment. Such actions were found to contradict the obligation to flexibly conduct meaningful negotiations.<sup>26</sup> This case also shows that the principle of good faith calls for flexibility and reasonableness, and opposes arbitrariness and rigidity, which is consistent with the prohibition of arbitrary and unjustifiable discrimination between countries as provided in WTO law.

It follows that States should have no controversy over the resolution of dispute through agreement, even if they have conflicting claims in a delimitation case. Nevertheless, state practices reveal that some States prefer other methods to delimitation by agreement. In accordance with the UNCLOS provisions as listed above, the issues concerning maritime delimitation should first be settled through negotiations. Only when such negotiations fail, can the parties concerned resort to other procedures, mainly the dispute settlement procedures under UNCLOS Part XV. Does a State enter into negotiations with another State with sincerity and honesty, and what is the extent of their sincerity and honesty? This is the second question in terms of negotiation in good faith.

As noted by the ICJ, since the parties concerned should enter into meaningful negotiations with a view to concluding agreements, a dispute settlement body shall refrain from delivering any immature rulings on the merits of a dispute prior to such negotiations. A preliminary issue that a court should consider is whether the applicant has *de facto* performed its obligation to negotiate.<sup>27</sup> The author asserts that the applicant's attitude towards negotiations is a critical factor determining whether it has complied with the requirements of the good faith principle. This factor has special significance to the Sino-Philippine SCS Arbitration. Unfortunately, case law contains no explicit provisions in this regard. The obligation to negotiate in good faith is only implied in some judgments or found in the interpretations or understandings of scholars.

The ICJ expressed, in one of its judgments, that the obligation to negotiate

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25 North Sea Continental Shelf Cases, Judgment, *ICJ Reports 1969*, para. 85.

26 North Sea Continental Shelf Cases, Judgment, *ICJ Reports 1969*, para. 87.

27 Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law*, Cambridge: Cambridge University Press, 2015, p. 682.

requires that the parties enter into negotiations with a view to arriving at an agreement, and not merely go through a formal process of negotiation as a sort of prior condition with an actual intention to proceed to other procedures.<sup>28</sup> In other words, prior to the initiation of any third-party dispute settlement procedure, the States concerned should conduct sincere negotiations, not merely a formal process. In the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, which was submitted to the International Tribunal for the Law of the Sea (ITLOS), a judge articulated that “The requirement ... regarding exchange of views is not an empty formality, to be dispensed with at the whims of a disputant. The obligation in this regard must be discharged in good faith.”<sup>29</sup> As explained in *Black’s Law Dictionary*, honesty is the core of negotiation in good faith.

In the *Aegean Sea Continental Shelf (Greece v. Turkey)* case, Greece inclined to resolve its delimitation dispute with Turkey through a third-party procedure, while Turkey insisted on resolving their dispute through negotiations first. The fact that Greece favored the method of settling dispute through judicial procedures does not necessarily suggest that Greece lacked good faith during negotiations. Actually, Greece agreed to negotiate with Turkey. Nonetheless, in a Note of 2 October 1975, the Greek Government expressed that their dispute “would first be formally submitted to the Court” and that “talks were not excluded to follow.”<sup>30</sup> A series of declarations made and actions taken by Greece showed that Greece had submitted their dispute to the ICJ before negotiating with Turkey sufficiently. And the facts stated by the ICJ also demonstrated that both parties had only conducted preliminary or procedural talks, but not “sufficiently serious and flexible negotiations conducted in good faith”.<sup>31</sup> Greece, at the same time, submitted the issue to the UN Security Council. The Security Council called upon, in its resolution on this issue, both parties to resume direct negotiations and “appeals to them to do everything within their power to ensure that these negotiations will result in mutually acceptable solutions.”<sup>32</sup> This could be interpreted as an indication

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28 North Sea Continental Shelf Cases, Judgment, *ICJ Reports 1969*, para. 85.

29 Land Reclamation in and around the Straits of Johor (*Malaysia v. Singapore*), Separate Opinion of Chandrasekhara Rao, *ITLOS Reports 2003*, para. 11.

30 Aegean Sea Continental Shelf (*Greece v. Turkey*), Judgment, *ICJ Reports 1978*, para. 20.

31 Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law*, Cambridge: Cambridge University Press, 2015, p. 683.

32 Security Council Resolutions, S/RES/395, 1976.

that the Council also held that the parties had not conducted sufficient negotiations before submitting the dispute to the Council, and that the dispute should be settled first by means of a special agreement rather than by judicial procedures.<sup>33</sup>

While the case was pending before the Court, Turkey insisted that both parties should resume their talks due to the immaturity of their previous negotiations; only the matters irresolvable through negotiations in good faith may be submitted to the ICJ when such matters arise.<sup>34</sup> In the views of Turkey, the ICJ should be obligated to examine whether or not the parties have fully performed their duties to negotiate before entering into any judicial procedures; if the negotiations are *prima facie*, and a party even lacks the *bona fides* to negotiate or negotiate only to meet the procedural requirements so as to resort to other means, such negotiations may not comply with requirements of negotiations in good faith.

The ICJ was in a good position to decide whether the negotiations between the parties were at a preliminary phase, or whether the possible solutions were far from being discussed by the parties. In other words, the ICJ may determine whether or not the obligation to negotiate has been discharged sufficiently and fully.<sup>35</sup> The ICJ failed to give a conclusive answer in this regards.<sup>36</sup> However, the judgments of the *Aegean Sea Continental Shelf* case and *North Sea Continental Shelf Cases*, as well as the insights of scholars all support a reasonable conclusion: the States concerned should take up negotiations in good faith with a view of reaching agreements, which means that they should take into account, flexibly and reasonably, all possible delimitation methods, rather than making negotiation a *prima facie* procedure.

### **3. Other Dispute Settlement Procedures Cannot Constitute an Impediment to Negotiations**

The above-mentioned *Aegean Sea Continental Shelf* case also demonstrates that the submission of a dispute to judicial procedures cannot constitute an impediment to the continuing of negotiations outside the Court. Virtually, the Applicant Greece did not exclude negotiations; it only gave the priority to third-

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33 Leo Gross, The Dispute between Greece and Turkey Concerning the Continental Shelf in the Aegean, *The American Journal of International Law*, Vol. 71, Issue 1, 1977, p. 32.

34 Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, *ICJ Reports 1978*, paras. 21, 28; UN Doc S/PV.1950, United Nations, 13 August 1976.

35 Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law*, Cambridge: Cambridge University Press, 2015, p. 686.

36 Prof. Cottier also argued that this case was an opportunity missed by the ICJ.

party procedures. While the case was pending before the Court, Greece and Turkey resumed their negotiations, and even agreed that the question of the delimitation of the Aegean continental shelf would be resolved through negotiations.<sup>37</sup>

Negotiations are, of course, the most cost-efficient and natural avenue to settle disputes. This status of negotiations has been confirmed repeatedly by the international community. In the *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, 1974, the ICJ proposed that “the most appropriate method for the solution of the dispute is clearly that of negotiation.”<sup>38</sup> The Security Council Resolution on the *Aegean Sea Continental Shelf* further supports this point. We cannot consider a State’s act to be taken in bad faith, only because it resorted to procedures other than negotiations.<sup>39</sup> This is also a requirement imposed by the principle of good faith to deduce a conclusion about any State’s behaviors in good faith. However, on the other hand, since the State chooses other procedures not in bad faith, that State should not stop negotiation endeavors; apart from other dispute settlement procedures, negotiations may still be continued or restarted, which is a convincing evidence proving that the State has indeed complied with the principle of good faith.

### *C. The Good Faith of Dispute Settlement Body in Maritime Delimitations*

UNCLOS Part XV established a comprehensive mechanism of maritime disputes settlement. Under this mechanism, States may select one or more of the following third-party means for settlement of disputes, including conciliation, ITLOS, ICJ, arbitration under Annex VII and special arbitration under Annex VIII. The third-party dispute settlement bodies involved here should also act in line with the principle of good faith, seeking meaningful solutions acceptable to both parties concerned. Although the principle of good faith is not expressly mentioned in the international statutes for international judicial bodies, the actual settlement of disputes between States, undoubtedly, needs the concerted efforts of dispute settlement bodies and the parties involved. In this connection, a dispute settlement

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37 *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, *ICJ Reports 1978*, paras. 20, 24–26.

38 *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Judgment, *ICJ Reports 1974*, para. 73.

39 *Aegean Sea Continental Shelf (Greece v. Turkey)*, Separate Opinion of Judge Lachs, *ICJ Reports 1974*, p. 52.

body should not act arbitrarily by virtue of its status as an “umpire”, who may not be punished for his actions. In fact, such arbitrary acts rarely happened, as international judicial practices always show that judgment in good faith is recognized.

The priority of maritime delimitation by negotiations has been elaborated above. Such a priority has been reiterated by dispute settlement bodies like the ICJ. In order to ensure the effect of negotiations, not only the parties concerned should conduct negotiations in good faith, but the dispute settlement bodies should also make corresponding efforts.

First, a dispute settlement body is not supposed to deal with the merits before the avenue of negotiations has been reasonably exhausted, or before it is not able to confirm that an issue cannot be settled upon good faith negotiations. This needs the settlement body to consider whether or not the parties concerned have discharged their duties to negotiate in good faith.

Second, the good faith of third-party bodies, certainly, does not mean that they should never deliver any judgments, or avoid rendering any judgments by all means. However, considering the circumstances of different cases, a final judgment without any room for further negotiations may not be fully acceptable to one of the parties concerned. This situation may lead to two consequences: the effect of a judgment would be jeopardized or impaired if the consequence is mild; and it would have an effect exactly opposite of its wish, if it is severe. Specifically, the party to which the judgment is favorable would request to implement the judgment, but the other party would refuse to do so. In that way, the conflicts between the two would be aggravated. The dispute settlement body would fail to resolve the dispute; worse still, it would exacerbate the situation. Additionally, the effect of international judiciary function is dependent on voluntary compliance and acceptance of States.<sup>40</sup> Therefore, it is essential for judicial bodies to contribute an intermediate step towards a more acceptable settlement based on objective legal principles. For these reasons, third-party bodies, when in similar situations, can render judgments encouraging negotiations, rather than trying to bring about final settlement.

The *North Sea Continental Shelf Cases* is an example in this regard. In the case, the Court found that delimitation should be effected by agreement in

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40 Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law*, Cambridge: Cambridge University Press, 2015, p. 688.

accordance with equitable principles, and in the course of negotiations, the factors indicated by the Court should be taken into account.<sup>41</sup> In the *Fisheries Jurisdiction* case, the Court expressly proposed for negotiations in good faith, and held that the States concerned “are under mutual obligations to undertake negotiations in good faith for the equitable solution of their differences” and “to pay due regard to the interests of other States”.<sup>42</sup> The Court may not provide, in the final judgment, a direct solution or clear-cut settlement, but a guide or encouragement calling upon States to put greater efforts in peaceful settlement of their disputes.

It is no longer accurate to say that judicial settlement is simply an alternative to direct and friendly negotiations. It should be seen and perceived as a matter of interaction, which does not impair the effect of dispute settlement mechanism, but instead contributes to timely and effective negotiations.<sup>43</sup> To render a judgment, which requires the States involved to resume negotiations pursuing to peacefully settle their disputes, may be the most meaningful contribution that a dispute settlement body can make. The dispute settlement body, as its name suggests, should act in consideration of the final resolution of disputes, and the compliance and observance of international legal rules and principles. This is the good faith that a third-party body should have towards the disputants for the long-term and stable development of international law.

#### *D. Pacta Sunt Servada and Non-impairment of the Objects and Purposes of Treaties*

The rule that treaties should be observed is the cornerstone for the existence and functioning of the international community. It is one of the basic manifestations of the good faith of States. The principle of good faith means, originally, *pacta sunt servada* (agreement should be respected).<sup>44</sup> Article 26 of VCLT requires explicitly that States perform every treaty in force in good faith. The UN Charter contains

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41 North Sea Continental Shelf Cases, Judgment, *ICJ Reports 1969*, para. 101(C), (D).

42 Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Judgment, *ICJ Reports 1974*, paras. 78~79.

43 Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law*, Cambridge: Cambridge University Press, 2015, p. 690.

44 J.F. O'Connor, *Good Faith in International Law*, Aldershot: Dartmouth Publishing, p. 124; Thomas Cottier and Krista N. Schefer, HAN Xiuli trans., GAO Bo proofread, Good Faith and the Protection of Legitimate Expectations in the WTO, *Journal of International Economic Law*, No. 3, 2005, p. 181. (in Chinese)

similar provisions. Practice of international law confirmed this point as early as more than one hundred years ago: the award of the *North Atlantic Coast Fisheries* case of 1910 pointed out that every State must have the duty to perform the obligations arising out of a treaty.<sup>45</sup>

On the other hand, Article 31 of VCLT provides for the general rule of interpretation of treaties, and paragraph 1 of this article states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. And Article 18 provides that a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty. This article is also an expression of the principle of good faith.<sup>46</sup> Observing a treaty implies a recognition to the objects and purposes of the treaty, and gives pushes rather than injuries to the achievement of such objects and purposes, which is also a basic requirement of the good faith principle.<sup>47</sup> The objects and purposes of a treaty represent the common expectations of the States to a treaty. “Expectations are the vitals of the law”.<sup>48</sup> Under the principle of good faith, the legal expectations of States Parties arising from a treaty should be protected.

The UNCLOS articulated its overall object in its Preamble, which explicitly provides that all issues relating to the law of the sea should be settled in a spirit of mutual understanding and cooperation. This shows that the attainment of the basic object of UNCLOS depends on the mutual understanding and cooperation between States, and also reiterates, as analyzed above, the importance of negotiations. In addition, among others, adopting an open, flexible and sincere attitude, and taking transparent actions without reserved or hidden purposes, obviously, are inherent in the “spirit of mutual understanding and cooperation”.

In order to obtain the goal of concluding a final agreement on maritime delimitation, the UNCLOS sets out more specific provisions. Articles 74(3)

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45 LI Haopei, *An Introduction to Treaty Law*, Beijing: Law Press China, 2003, p. 277. (in Chinese)

46 Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law*, Cambridge: Cambridge University Press, 2015, p. 667, note 53.

47 Anthony D’Amato, Good Faith, in Rudolf Bernhardt ed., *Encyclopaedia of Public International Law*, Oxford: Oxford University Press, 2000, p. 599.

48 Stephen M. Schwebel, The Compliance Process and the Future of International Law, in *Proceedings of the American Society of International Law*, 1981, p. 182.

and 83(3), similar in text, urge the States concerned to enter into provisional arrangements, and not to jeopardize or hamper the reaching of the final agreement. The Arbitral Tribunal of the *Arbitration between Guyana and Suriname* held that the provisions above include two obligations: The first obligation was designed to promote interim regimes and practical measures that could pave the way for provisional utilization of disputed areas; the second obligation was to try every effort not to hamper or jeopardize the reaching of a final agreement on delimitation.<sup>49</sup> The obligation imposed on the Parties a duty to negotiate in good faith. And some of the Parties' conducts, such as Suriname's threat of force, jeopardized the reaching of a final agreement.<sup>50</sup>

In short, not to defeat the objects and purposes of a treaty, to a great extent, needs the negotiation efforts of the States concerned, which are also obligated to evade actions that may hamper negotiations. Every State has the duty to observe the provisions of a treaty, and perform its rights and obligations in good faith, so as to promote the obtainment of the objects and purposes of the treaty.

### *E. Honesty – the Core of the Good Faith Principle*

The description of the multi-faceted meanings of the good faith principle, as mentioned above, indicates that the principle does not have clear and accurate connotations. We cannot find a set of objective and strict standards to assess the principle. All the requirements of the principle are closely associated with the abstract quality of honesty, which, however, is precisely the meaning of it as a basic principle of international law. In order to better play the function of legal principles, and fill up the gaps of international treaties and customs, the scope of the good faith principle should be flexible and broad.<sup>51</sup> *Bona fides* serves as the touchstone of the

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49 Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration between Guyana and Suriname, Award, 2007, paras. 460, 467.

50 Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration between Guyana and Suriname, Award, 2007, paras. 460, 484.

51 Professor R. Summers called the principle of good faith a “safety valve” and argued that this principle should be open-ended rather than sealed off in a definition. See Robert S. Summers, “Good Faith” in General Contract Law and the Sales Provisions of the Uniform Commercial Code, *Virginia Law Review*, Vol. 54, Issue 2, 1968, p. 266.

principle.<sup>52</sup> With honesty as its core, the principle generally requires every State to be committed to negotiations and cooperation by taking up honest actions in a dispute, flexibly taking into account all possible avenues with an open attitude.

### **III. The Philippines' Violation of the Good Faith Principle in the SCS Arbitration**

Since the principle of good faith under international law gives considerable guidance to the parties to a maritime delimitation dispute and third-party arbitral bodies, it should be paid due attentions. The EEZs and continental shelves claimed by China in the SCS overlap with those claimed by the Philippines. Both States have disputes over the sovereignty of some SCS islands. Such disputes fall into the category of sovereignty and maritime delimitation disputes. Consequently, the Philippines, a party to the dispute, and the Arbitral Tribunal, acting as a dispute settlement body, should comply with the principle of good faith. Nevertheless, a review of the whole case reveals that both the Philippines and the Arbitral Tribunal have acted, repeatedly, against the guidance of the good faith principle to the delimitation of marine boundary.

#### *A. The Critical Status of Negotiation in Good Faith*

The start of negotiations by the disputants is, in itself, a symbol of good faith. And the continuing of such negotiations with a view to reaching a settlement by agreement also fully manifests the good faith of both parties. In this connection, the Philippines has greatly jeopardized the principle of good faith.

#### **1. The Philippines' Lack of Negotiations with Respect to the Arbitration**

First, the parties to a dispute must enter into negotiations, and also try every effort to continue such negotiations. China and the Philippines have conducted friendly negotiations on many occasions, whose results include a series of bilateral declarations jointly made by them. This fact is acknowledged by the Philippines. In the course of the arbitration, a Philippine representative concluded that both

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52 For example, J.F. O'Connor, *Good Faith in International Law*, Aldershot: Dartmouth Publishing, 1991, p. 118; Andrew D. Mitchell, Good Faith in WTO Dispute Settlement, *Melbourne Journal of International Law*, Vol. 7, Issue 2, 2006, p. 339.

parties have, over many years, negotiated on every issue involved in the SCS disputes between them, including China's claim of "historic rights", the maritime entitlements generated by Huangyan Island and the Nansha Islands, fishing and navigation rights in the relevant waters, and the construction of artificial islands in the relevant waters, etc..<sup>53</sup>

However, the fact that the Philippine representative hid from the public is that after the Huangyan Island Event happened in 2012, negotiations regarding the SCS disputes stopped abruptly. Six months after the event, the Philippines unilaterally initiated an arbitration against China, without any prior negotiations with China over the matters submitted to arbitration. The Philippines has never negotiated or exchanged views with China on any one of its 15 Submissions.

Since there is an avenue for China and the Philippines to negotiate with each other, any new views or proposals are supposed to be mutually exchanged through this avenue. Otherwise, the longstanding and huge efforts made by both States on negotiation and cooperation over the years would be wasted. When the Philippines intended to initiate an arbitration against, or believed that their negotiations had reached an impasse whose progress needed the intervention of a third party, it was supposed to propose directly to China and hear China's views in respect to its Submissions. However, the truth is that the Philippines failed to negotiate with China regarding any sort of its Submissions; further, it even did not express its intention to submit their disputes before an arbitral tribunal. On 26 April 2012, the Philippines delivered a *note verbale* to China, proposing that the issue of Huangyan Island be referred to a third-party judicial body for resolution. This is the only document that the Philippines, before its initiation of the arbitration against China, delivered to China concerning the start of a judicial procedure. However, from the perspective of good faith principle, this only document is also full of loopholes. The *note verbale* merely proposed to submit the issue of Huangyan Island to a judicial procedure, without mentioning the Nansha Islands and other issues, or saying that the third-party judicial body refers to the ICJ, ITLOS or an arbitral body, nor indicating any willingness to negotiate with China. The nature of the document, i.e., an ordinary *note verbale* issued by the Ministry of Foreign Affairs, shows in itself that this document was intended by the Philippines to be no more

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53 Final Transcript Day 2 – Hearing on Jurisdiction and Admissibility, the Republic of Philippines v. the People's Republic of China, PCA, pp. 28–32.

than a notification.<sup>54</sup> However, the Philippines declared, on 22 January 2013, that it would start an arbitration process against China.

The above facts demonstrate that the Philippines has failed to fulfill its obligation to sufficiently negotiate with China. Technically, it even did not attempt to start negotiations with China regarding its initiation of arbitration.

## 2. The Absence of Honesty in the Philippines' Negotiations

Even if, *quod non*, the Philippines, as alleged by itself, has conducted negotiations before the start of the arbitration, its attitude towards negotiations is questionable. The paper contends that the degree of honesty which the applicant has towards negotiations is a critical factor to determine whether it has observed the good faith principle. This point may be assessed in two aspects: first, whether the applicant State has actually conducted sufficient negotiations, rather than mere negotiations aiming not to openly violate the procedural requirements under the UNCLOS; second, whether the applicant remains willing to enter into negotiations, if possible, after the start of a judicial procedure. However, the deeds of the Philippines cannot stand the test in any one of two aspects above.

During the preliminary review of the case, the Tribunal asked: assuming Article 283 requires an negotiation on the substance of the parties' dispute, at what level of specificity must such a negotiation occur, and whether the Philippines has sufficiently exchanged views with respect to each of its specific, individual submissions".<sup>55</sup> This question is right to the point, to which the Philippines answered: "it is not necessary to exchange views on the substance of each and every submission *per se*; as long as there has been an exchange of views on the general subject matter of the dispute, broadly construed, Article 283 is satisfied...; there is no need for an exchange of views to touch upon specific articles of the Convention."<sup>56</sup> The Philippines degraded negotiations into a *prima facie* procedural requirement, which can be seen clearly in its answers presented above. Now that the Submissions reflect the Philippines' primary arguments in its disputes with China in the SCS, the substance of the disputes must naturally be discussed in their negotiations. Otherwise, such negotiations would lose their meanings. The above

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54 Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 December 2014, para. 48. [hereinafter "Position Paper"]

55 Final Transcript Day 2 – Hearing on Jurisdiction and Admissibility, the Republic of Philippines v. the People's Republic of China, PCA, p. 32.

56 Final Transcript Day 2 – Hearing on Jurisdiction and Admissibility, the Republic of Philippines v. the People's Republic of China, PCA, pp. 34–35.

answer of the Philippines proves *per se* that the so-called negotiations conducted prior to the initiation of the arbitration totally lack honesty and sincerity. On the other hand, both negotiations and third-party arbitration are means to settle disputes, which are identical in terms of their final aims. The Philippines alleged that its disputes with China involved a number of issues, and therefore it presented 15 Submissions to the Tribunal for resolution. In that case, if it sincerely hoped to settle such issues, how could it fail to exchange views with China on each and every Submission? Assuming that in a negotiation, if one party fails even to inform the other party of its specific claims, then how to mention a “hearing” or “exchange” of views, and what is the substance of such a negotiation? Furthermore, the saying that “Article 283 is satisfied as long as there has been an exchange of views” admitted unequivocally that negotiation is a *prima facie* procedural requirement to the Philippines. It follows that the Philippines has resolved to submit the dispute before an arbitral body. Given such a resolution, its talk with China on the issue of arbitration, if any, becomes meaningless. That is because the Philippines did not “negotiate”, if it can be called “negotiate”, with China with a view to reaching an agreement, maybe even the opposite. A failed negotiation is, after all, a strong excuse to enter into an arbitral process. China should not and is unwilling to make such a presumption that is nearly malicious; however, the Philippines’ attitude towards negotiations is indeed unconvincing.

The substance of the good faith principle is to perform one’s obligations assumed under a treaty in good faith, so as not to make the treaty *de facto* null and void. Hence, even if, *quod non*, the Philippines has conducted the so-called “negotiations”, it has failed to implement the provisions concerning negotiations under UNCLOS.

### 3. Arbitration Does Not Hamper the Continuing of Negotiations

Finally, that the applicant State remains willing to negotiate and even welcomes such negotiations also best demonstrates that it has fulfilled the obligation to settle disputes in good faith through peaceful means. The parties to *Aegean Sea Continental Shelf* case did not, as their dispute had been submitted to judicial process, stop their negotiations; instead they continued their negotiations on several occasions.<sup>57</sup> Just as a judge of this case noted in his separate opinions, since State to State disputes frequently involve intricate and multi-dimensional issues, it

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57 *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, *ICJ Reports 1978*, paras. 24–26.

is desirable to apply several methods at the same time or successively; thus the various instruments and fora to which States may resort are not incompatible, for all are mutually complementary.<sup>58</sup> In some maritime delimitation disputes, applying several methods at the same time, if all are applicable, may better contribute to the resolution of such disputes. Anyway, it is certain that the intervention of a third-party dispute settlement body would not hamper the conducting of any negotiations; instead, such bodies often encourage and call for the resumption of negotiations.

Unfortunately, the negotiations between China and Philippines had stagnated during the years after the initiation of the SCS arbitration. The Philippines rejected all of China's proposals to restart negotiations. Immediately after the Philippines' filing of the arbitration in January 2013, the Chinese embassy in Manila invited the Philippines to resolve their disputes through bilateral negotiations. However, the Philippine presidential spokesman said that China's invitation was too late; "let's meet at the tribunal".<sup>59</sup> To date, the Philippines has made similar declarations at its government press conferences and on other occasions. Asserting that China insisted to demand it to firstly recognize that "the SCS in its entirety belongs to China", the Philippines would not continue bilateral discussions prior to the release of the final award of the arbitration.<sup>60</sup>

An ongoing judicial process does not, in the slightest sense, impede the conduction of any negotiations. The fundamental question lies in whether the parties concerned have the good faith to settle their disputes through negotiations first. In this connection, the good faith of the Philippines is greatly questionable; it is, apparently, reluctant to make efforts in bilateral cooperation, since it has repeatedly rejected to talk with China. Paradoxically, the Philippines, at the same time, alleged that it adhered to the laws in relation to settlement of disputes, and

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58 Aegean Sea Continental Shelf (Greece v. Turkey), Separate Opinion of Judge Lachs, *ICJ Reports 1978*, p. 52.

59 ZHU Xiaolei, China Calls on the Philippines to Talk on Their Territorial Disputes, at <http://world.huanqiu.com/exclusive/2013-01/3577769.html>, 30 January 2017. (in Chinese)

60 See Response of the DFA Spokesperson to the Recent Statement of the Chinese Ministry of Foreign Affairs on the West Philippine Sea Issue, at <http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/332-response-of-the-dfa-spokesperson-to-the-recent-statement-of-the-chinese-ministry-of-foreign-affairs-on-the-west-philippine-sea-issue>, 1 February 2017; ZHU Yanfang, The Philippines Said that It Would Not Restart Bilateral Talks with China on the South China Sea Disputes before 2016, at [http://news.ifeng.com/a/20141211/42697421\\_0.shtml](http://news.ifeng.com/a/20141211/42697421_0.shtml), 1 February 2017 (in Chinese); Statement before the Permanent Court of Arbitration, at <http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/6795-statement-before-the-permanent-court-of-arbitration>, 1 February 2017.

even called upon the international community to peacefully settle disputes by complying with the rules of laws.<sup>61</sup> Such being the case, the Philippines should keep in mind that both the international conventions such as the UN Charter and the UNCLOS, and the principle of good faith (a general principle of international law) require the disputants to first negotiate in a meaningful and sufficient fashion.

*B. Pacta Sunt Servada and the Obligation Not to Impair  
the Objects and Purposes of Treaties*

**1. The Provisions, Objects and Purposes of UNCLOS**

The language of the UNCLOS repeatedly affirmed the importance of negotiation and cooperation. Article 280 states that the right of any States Parties to agree at any time to settle a dispute between them by any peaceful means of their own choice would not be impaired. Article 281 provides that if the States Parties have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in the UNCLOS apply only where no settlement has been reached by recourse to such means. Article 283 stipulates that when a dispute arises between States Parties concerning the interpretation or application of the UNCLOS, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means. A mere Part XV (Settlement of Disputes) contains four articles mentioning expressly negotiation or other “peaceful means”.<sup>62</sup> Words expressing the priority of settlement by negotiation or referring to the articles providing for the settlement by negotiation can be found in numerous provisions of the UNCLOS. For example, Article 286 provides that any dispute concerning the interpretation or application of the UNCLOS may, only when no settlement has been reached by recourse to section 1, be submitted to compulsory procedures entailing binding force; while section 1 stresses the priority of bilateral negotiations. The UNCLOS established a dispute settlement mechanism by setting out complex and mutually complementary provisions. It carefully ensures that the settlement of disputes through bilateral

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61 PHL Stresses Adherence to Rule of Law as Key to Peaceful Settlement of Disputes; Highlights World Development Challenges and Calls on UN Reforms, at <http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/4202-phl-stresses-adherence-to-rule-of-law-as-key-to-peaceful-settlement-of-disputes-highlights-world-development-challenges-and-calls-on-un-reforms>, 1 February 2017.

62 UNCLOS, Articles 279~281, 283.

negotiations would not be jeopardized by this mechanism; instead, the former would enjoy a priority over the mechanism. It has already become a fact that the adherence to the UNCLOS requires the States Parties to sufficiently negotiate and sincerely cooperate.

Regarding the objects and purposes of the UNCLOS, its Preamble and the general provisions of Part XVI have laid down the guiding principle: all issues relating to the law of the sea should be settled in a spirit of mutual understanding and cooperation. States Parties shall fulfill in good faith the obligations and shall exercise the rights, jurisdiction and freedoms in a manner which would not constitute an abuse of right. If the express requirement on voluntary negotiation can be said to be *prima facie* satisfied by conducting any bilateral dialogues, without focusing on the substance of such dialogues, then the objects and purposes of the UNCLOS impose higher demands on the States Parties in respect of their good faith.

A number of facts indicate that the Philippines, when preparing to file the arbitration and initiating the arbitration, and during the consideration of the case, had never talked with China, or sincerely negotiated with China with a view to concluding an agreement. In this connection, first, where the disputes submitted by the Philippines really, as it alleged, concern the interpretation or application of the UNCLOS, then it shall, in accordance with Article 283, exchange views with China regarding the settlement of their disputes by peaceful means. However, the Philippines, in fact, has never consulted China concerning any one of its Submissions. Consequently, it has breached the express provisions of the UNCLOS, and the rule of *Pacta Sunt Servada*.

Even if, *quod non*, the Philippines has, as alleged by itself, talked with China over the arbitration, such talks lack sincerity, to say the least. Since the Philippines asserts that it is not necessary to exchange views to touch upon specific contents of its Submissions, any negotiations that may be taken up by the parties become *prima facie*. In that case, the Philippines has abandoned the object of negotiation, ignored the true meaning of cooperation and impaired the objects and purposes of the UNCLOS.

## **2. Provisions, Objects and Purposes of Many Bilateral or Multilateral Agreements between China and the Philippines**

Aside from the UNCLOS, China and the Philippines have signed a series of agreements referred to in the UNCLOS, which set out the explicit requirements on the means to settle disputes between States. There has been a long-standing

agreement between China and the Philippines on resolving their disputes in the SCS through friendly consultations and negotiations. The joint statements between the two States, as well as other official documents issued since 1995, all specified that their disputes should be settled through friendly consultations and negotiations.<sup>63</sup> The Declaration on the Conduct of Parties in the South China Sea (DOC), signed in 2002, contains the following provisions: The Parties reaffirm their commitment to the purpose and principles of the Charter of the United Nations which shall serve as the basic norms governing State-to-State relations; the Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means through friendly consultations and negotiations, in accordance with universally recognized principles of international law.<sup>64</sup> The importance of negotiation has also been acknowledged by the current Philippine Government. The 2011 Joint Statement between China and the Philippines reiterated their commitment to addressing their disputes through peaceful dialogue and reaffirmed their commitments to respect and abide by the DOC.<sup>65</sup> China insists that the bilateral instruments and multilateral instruments to which China and the Philippines are parties, constitute agreements with binding force, i.e., the agreements within the meaning of UNCLOS Articles 280 and 281. On that basis, they have undertaken a mutual obligation to settle their disputes through negotiations. The following pages will provide a further analysis taking the DOC as an example.

Firstly, the DOC is a political agreement having binding force upon China and the Philippines. Article 2(1) of the VCLT states: “‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.<sup>66</sup> An agreement is called an agreement mainly because the parties to the agreement have expressed to create rights and obligations on international law.<sup>67</sup> An unsigned instrument, such as a press communiqué, can also constitute an agreement.<sup>68</sup> Documents, including minutes

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63 China’s Position Paper invoked a number of such statements, see Position Paper, paras. 31~34.

64 Declaration on the Conduct of Parties in the South China Sea, 2002, Articles 1, 4.

65 Position Paper, para. 37.

66 Vienna Convention on the Law of Treaties, Article 2(1).

67 Robert Jennings and Arthur Watts eds., WANG Tieya et al. trans., *Oppenheim’s International Law*, Beijing: Encyclopedia of China Publishing House, 1995, p. 1203. (in Chinese)

68 Robert Jennings and Arthur Watts eds., WANG Tieya et al. trans., *Oppenheim’s International Law*, Beijing: Encyclopedia of China Publishing House, 1995, p. 1209. (in Chinese)

creating legal obligations for the parties concerned, may also become agreements.<sup>69</sup> Therefore, the intentions of the parties concerned, along with the words used in a document, are the factors determining whether or not the document constitutes an agreement entailing binding force.

The DOC articulates that the purposes and principles of the UN Charter, the UNCLOS, and other principles of international law shall serve as the basic norms governing State-to-State relations; that the Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means through friendly consultations and negotiations by sovereign States directly concerned, in accordance with universally recognized principles of international law.<sup>70</sup> These provisions demonstrate that the DOC contains clear rules of conduct. The employment of the term “undertake” also evinces an intention to establish an obligation between the two States in this regard.<sup>71</sup> Additionally, the DOC was jointly signed by the Vice Foreign Minister of China, and the foreign ministers or secretaries of the member States of the Association of Southeast Asian Nations (ASEAN), i.e., government representatives.<sup>72</sup> To sum up, the DOC should be considered as an agreement with legal force.

Therefore, the Philippines should insist that the disputes be settled “through friendly consultations and negotiations by sovereign States directly concerned”, as provided for in the DOC. The Preamble of the DOC also declares its purpose: to enhance favourable conditions for a peaceful and durable solution of differences and disputes among countries concerned. The Philippines not only failed to proactively perform its obligation to negotiate with China, but also refused all of China’s requests for talk. In this connection, the Philippines violated the DOC, and beyond that, it impaired the objects and purposes of the DOC.

Secondly, the Philippines argued, in the proceeding, that the DOC was not intended to be a legally binding agreement, but nothing more than a political instrument. It also analyzed the term “undertake”, contending that it was different

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69 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment, *ICJ Reports 1994*, para. 41(1).

70 Declaration on the Conduct of Parties in the South China Sea, 2002, Articles 1, 4.

71 Position Paper, para. 38.

72 A declaration, if signed by the primary government representatives, and including definite rules of conduct and other conclusions agreed, this document should be binding upon the States involved. Robert Jennings and Arthur Watts eds., WANG Tieya et al. trans., *Oppenheim’s International Law*, Beijing: Encyclopedia of China Publishing House, 1995, p. 1189. (in Chinese)

from the term “agree” in effect in that States solely “state” their “undertakings”.<sup>73</sup> Nevertheless, the explanation given by the *Black’s Law Dictionary* to the word “undertake” is unable to support the Philippines’ argument; the word “undertake” denotes the assumption of an obligation, the making of a formal promise, or acting in surety.<sup>74</sup> The words used in the explanation is unambiguous, whichever indicates the intention of the doer. The Philippines distorted the interpretation of the terms employed in the DOC, which obviously breached the requirement that a treaty be interpreted in good faith. In addition, acting arbitrarily by regarding the DOC as a document without binding force, also overlooked the intention of the signatory States to DOC when creating the relevant obligations. As described previously, the purpose of a treaty mirrors the common aspiration of all States Parties, rather than the viewpoints of a single party. The protection of a treaty’s objects and purposes is also a kind of protection to the legal aspiration of all States Parties, which is the mutual good faith that should be shown by States Parties.

Thirdly, the Philippines argued that the DOC was signed as something of a stop-gap measure in light of the inability of the ASEAN member States and China to achieve consensus on four major areas of disagreement; that the circumstances surrounding the DOC’s adoption indicated that it was not a legally binding instrument.<sup>75</sup> However, the implementation of the DOC provides a different story. ASEAN member States and China, subsequently, signed the guidelines for future actions of the DOC. For example, China issued a joint statement with the Philippines, reaffirming their commitments to the DOC.<sup>76</sup> The Philippines has participated in numerous consultations held after the conclusion of the DOC, where it has never expressed the kind of views indicating that it was impossible to negotiate with China. Right before the Philippines’ submission of its memorial, the 10th ASEAN-China Joint Working Group Meeting on the Implementation of the DOC was held on 18 March 2014. Representatives from both the Philippines and China participated in the meeting. The object of the meeting was precisely to implement the DOC. If the Philippines believed that the DOC was not legally binding and thus did not intend to discharge the requirements thereunder, why

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73 Memorial of the Philippines, the Republic of Philippines v. the People’s Republic of China, PCA, 2014, paras. 7.51. [hereinafter “The Memorial”]

74 Bryan A. Garner ed., *Black’s Law Dictionary*, Eagan: West Group, 2004, p. 4741.

75 The Memorial, para. 7.55.

76 Joint Statement of the People’s Republic of China and the Republic of the Philippines, 1 September 2011.

bother to participate in the consultations concerning the implementation of the DOC? Or, why did the Philippines fail to raise any objections during such consultations? On one hand, the Philippines participated in the implementation of the DOC; on the other hand, it blatantly deviated from the requirements of the DOC. Such self-contradictory actions show, indisputably, the absence of good faith on the Philippines' side.

Finally, even if, *quod non*, the DOC was considered a document without binding force, as the Tribunal found in its preliminary decision, the means of settlement by negotiation between the parties is also affirmed by the UNCLOS. However, the Philippines refused to take the initiative to talk with China, rejected China's proposal for negotiation, and clearly expressed its decision not to enter into negotiations. Such facts provide further evidence that it has disregarded the objects and purposes of the UNCLOS, and further gone against the principle of good faith.

#### **IV. The Tribunal' Breach of the Good Faith Principle**

Given that the dispute settlement mechanism is established, the UNCLOS, which is committed to the peace of the oceans, also needs the protection from dispute settlement bodies. Maritime delimitation disputes are intricate and complex, the seeking of settlement means acceptable to all parties involved, hence, requires the efforts of all parties and the wit and intelligence of third-party settlement bodies.

##### *A. The Examination of the Parties' Fulfillment of Their Obligation to Negotiate in Good Faith*

Before rendering any judgment on the merits of a dispute, the dispute settlement body should first decide whether the parties concerned have, sufficiently and reasonably, conducted negotiations. It requires the adjudication body to examine whether or not the parties concerned have actually performed their obligation to negotiate in good faith. Based on the statement above, this obligation can be examined through two steps: the first is to examine whether the parties have negotiated over the matters submitted to a third party body; the second is to consider whether the parties have good faith during the course of negotiations.

The first step is easier to complete, since it is not necessary for the adjudication body to explore the substance of negotiations, which only needs to decide whether

the relevant issues have been put on the negotiation table. However, the decision of the Tribunal of the present case, even in this step, is unconvincing. For instance, when considering Article 283 of UNCLOS, the Tribunal held, in its preliminary award, that China and the Philippines had exchanged views regarding the disputes that “the Philippines has presented in these proceedings”, and thus Article 283 had been satisfied.<sup>77</sup> The Tribunal quoted as evidence the content of a consultation between the vice foreign ministers of the two States made on 14 January 2012. Nevertheless, exactly in this quotation, the Philippine representative said to the Chinese counterpart: “You are for bilateral discussion. We have embarked on a path that uses the law...”<sup>78</sup> The tense used in this statement of the Philippines suggests that it almost acknowledged unequivocally that the Philippines “had”, even before the occurrence of the Huangyuan Island Event, embarked on a path that uses the law. Under this circumstance, how can the Tribunal employ this statement as an evidence to prove that the Philippines has exchanged views with China? Additionally, the Philippines, in that consultation, proposed to adopt multilateral dialogue, rather than judicial process, to settle its disputes with China.<sup>79</sup> That consultation, as determined by the Tribunal, is an effective evidence proving that the Philippines has exchanged views with China. Then we have to say that the Philippines deceived China in the consultation. UNCLOS Article 283 requires an exchange of views regarding dispute settlement by peaceful means. Consequently, the Philippines should, at least, inform China in that consultation that it intended to submit their disputes in the SCS to arbitration. Nonetheless, it proposed, in that consultation, another dispute settlement means which is totally different from arbitration. That is to say, the conclusion of the Tribunal reveals another aspect indicating that the Philippines has gone against the requirement on honesty and credibility imposed by the good faith principle. Yet it is still hard to accept the conclusion that the efforts made by the Philippines in that consultation are nothing more than a fraud. Therefore, we can only conclude: that consultation was not concerning the issue of arbitration, and thus the decision of the Tribunal in this regard is unreasonable.

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77 Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of Philippines v. the People’s Republic of China, Award on Jurisdiction and Admissibility, 2015, para. 342. [hereinafter “Award on Jurisdiction and Admissibility”]

78 Award on Jurisdiction and Admissibility, para. 339.

79 Award on Jurisdiction and Admissibility, para. 339.

Apart from the consultation mentioned above, the Tribunal also invoked the *note verbale* issued by the Philippines in 2012 to China concerning the issue of Huangyan Island. However, the *note verbale* involved nothing more than the issues of Huangyan Island and its EEZ, without mentioning other issues or its intention to adopt which judicial proceedings.<sup>80</sup> However, the Tribunal stated that the Parties had “unequivocally” exchanged views regarding the disputes that “the Philippines has presented in these proceedings”.<sup>81</sup> The facts are clear and obvious, but the Tribunal still made such an incredible conclusion. This is not purely a question of the Tribunal’s misjudgment on an argument; instead, it is also the Tribunal’s disregard of the good faith principle.

If the Tribunal’s decision on whether the parties have conducted negotiations can still be said to sound plausible, then in the second step where the sincerity and sufficiency of the negotiations are examined, the Tribunal nearly turned a blind eye to all relevant evidences, whose award, therefore, is undoubtedly absent of good faith. Here, we will also take the consideration of UNCLOS Article 283 as an example. The Tribunal pointed out that diplomatic communications and exchanges did not divide neatly between procedural and substantive matters; that in practice, the Parties’ views on the substantive matters between them may shed a great deal of light on their respective views on how the dispute may – or may not – be settled.<sup>82</sup> Now that the Tribunal acknowledged this fact, it is of more necessity to carefully review the contents of negotiations between the Parties. However, the two evidences provided by the Tribunal, as previously mentioned, cannot even prove that the Philippines has started the negotiations with China, not to say how much good faith it has made in such negotiations. Furthermore, the agent of the Philippines, as quoted above, argued that “it is not necessary to exchange views on the substance of each and every submission *per se*; as long as there has been an exchange of views on the general subject matter of the dispute, broadly construed, Article 283 is satisfied.”<sup>83</sup> These arguments indicate that the Philippines has perceived negotiation as a mere procedure, with no intention to put more efforts in bilateral cooperation for a long time. Seeing such obvious attitudes of the

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80 Note Verbale from the Department of Foreign Affairs of the Philippines to the Embassy of the People’s Republic of China in Manila, No. 12-1137, 26 April 2012.

81 Award on Jurisdiction and Admissibility, para. 342.

82 Award on Jurisdiction and Admissibility, para. 332.

83 Final Transcript Day 2 – Hearing on Jurisdiction and Admissibility, the Republic of Philippines v. the People’s Republic of China, PCA, pp. 34–35.

Philippines, the Tribunal still held that the Philippines satisfied the requirement on negotiation. We have no choice but to say that the Tribunal has also ignored the meaning of negotiation. Meaningless negotiation, apparently, is neither consistent with the spirit of the UNCLOS, nor with the goals of any international treaties to seek bilateral cooperation and resolution of disputes through peaceful means. In this connection, the award of the Tribunal impaired the objects and purposes of the UNCLOS, and went against the principle of good faith once again.

### *B. The Tribunal's Disregard of Law and Facts*

The Tribunal declared that it had jurisdiction over the disputes between China and the Philippines which obviously concerned with the territorial sovereignty and maritime delimitation. Subsequently, the Tribunal, in the final award, denied China's historic rights in the SCS, the validity of the U-shaped line, as well as the possibility that the Nansha Islands may have EEZ and continental shelf. In the merits phase, the Tribunal acted in defiance of laws, history and facts on uncountable occasions. The following pages will provide an analysis taking the issue of China's historic rights as an example.

China has not clearly defined the nature of the U-shaped line and contents of its historic rights in the SCS. In the view of the Tribunal, such rights claimed by China were exceptional, and therefore the U-shaped line and China's claims to historic rights encompassed by the relevant part of the U-shaped line were without lawful effect.<sup>84</sup>

From the perspective of good faith, the Tribunal's decision above distorted the facts, and failed to deal with the evidences honestly. Firstly, it is true that China declared that it had historic rights in the areas enclosed by the U-shaped line. However, it has never said that other States were not allowed to exercise their legal rights in the SCS. In fact, the Tribunal also noted that China had repeatedly stated that it respected and safeguarded the freedom of navigation in the SCS to which all countries were entitled under international law.<sup>85</sup> The actual navigation situations of the SCS for years show that China has not impeded any other States' exercise of their legal rights in the SCS, including the areas enclosed by the U-shaped line. The

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84 Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of Philippines v. the People's Republic of China, Award, 2016, para. 278. [hereinafter "Award"]

85 Award, para. 212.

Tribunal however asserted, in the award, that historic rights were, in most instances, exceptional rights.<sup>86</sup> It then presumed that the historic rights claimed by China were exceptional, which affected the rights of other States. The problem is that how can the Tribunal conclude that historic rights are exceptional? The Tribunal, in the Award, also admitted that the notion of “historic right” had not been defined on international law.<sup>87</sup> Then, after considering China’s specific statements and practice, it has less grounds to reach the conclusion above. Such a conclusion is, evidently, the Tribunal’s assumption on historic rights and China’s claims.

Secondly, the Tribunal took China’s claims to petroleum and fishery resources as an example, holding that China did not mention that its rights with respect these resources were based on the fact that the relevant areas were located within its EEZ and continental shelf, instead, China considered its rights to stem from historic rights. In the view of the Tribunal, China’s objections to the Philippines’ exploration of the Reed Bank/GSEC101 and other petroleum blocks, for instance, were merely based on the claim that these blocks were situated in the waters of which China has historic rights and jurisdiction, without mentioning EEZ or continental shelf.<sup>88</sup> The Tribunal then concluded that China’s claims to these rights were not based on a theory of entitlement to EEZ and continental shelf rights under the UNCLOS, but on historic rights.<sup>89</sup> However, the question lies in that the Tribunal has also pointed out that the area of the Philippines’ petroleum blocks was covered by entitlements claimed by China under the Convention, if China claimed EEZ and continental shelf from the Nansha Islands.<sup>90</sup> The fact that China did not explain its rights to the petroleum resources from the perspective of EEZ and continental shelf does not, necessarily, represent that China does not enjoy the rights derived from its entitlement to EEZ and continental shelf.

Thirdly, the Tribunal argued, in the award, that with respect to the part of area encompassed by the U-shaped line but outside the EEZ and continental shelf of China, when China’s claim for rights extended to areas that would be considered

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86 Award, para. 268.

87 Award, para. 226, the text reads “Other ‘historic rights’... are nowhere mentioned in the Convention.”

88 Memorandum from the Acting Assistant Secretary for Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs, 10 March 2011; Note Verbale from the Embassy of the People’s Republic of China in Manila to the Department of Foreign Affairs, Republic of the Philippines, No. (11) PG-202, 6 July 2011; Award, para. 209.

89 Award, para. 209.

90 Award, para. 209.

to form part of the entitlement of the Philippines to an EEZ or continental shelf, China would be at variance with the UNCLOS.<sup>91</sup> Nevertheless, since China and the Philippines have dispute over the delimitation of their marine boundaries, the scope of the EEZ and continental shelf claimed by the two States, respectively, is controversial in itself. In that case, how can the Tribunal, before the settlement of the delimitation dispute, decide that China infringed the rights of the Philippine side? In this regard, the award is apparently unfair to China, which goes against the basic connotation of the good faith principle once again.

The UNCLOS does not specify that the arbitral tribunal constituted under its Annex VII should comply with the principle of good faith. However, as described above, judicial bodies, including arbitral tribunals, which are established to resolve disputes and maintain the fairness of international justice, are supposed to set themselves an example to others. It should be said that the Tribunal may exert more severe impacts than the Philippines, if it renders its award not in good faith. The Philippines is only a party to a dispute and a member of the international community. Its violation of the basic rules of international law can be corrected by the judicial bodies. In contrast, the Tribunal is an international judicial body *per se*. It will extensively impair the general rules of international law, if it fails to identify such violations and even ignores facts and misinterprets evidences.

### *C. The Tribunal's Failure to Issue an Award Really Contributing to the Peaceful Resolution of Disputes*

The preliminary award of the Tribunal is indicative of the Tribunal's defiance of the good faith principle to a great extent. However, it does not mean that the situation cannot be remedied in the award delivered at the merits phase. No matter how the adjudication body interprets each specific issue, its final award is aimed at appeasing international conflicts, and encouraging the parties to a dispute to make peace, which is the most fundamental obligation of the dispute settlement bodies, and also their basic good faith. However, the final award released in July, 2016, failed to make up the good faith that was absent in the preliminary award. Instead, it even went further, as no good faith can be found in the whole text of the award. To this point, the Tribunal of the present case cannot contribute to the resolution of the disputes between China and the Philippines. The result will even turn out to be

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91 Award, para. 232.

just the opposite of its wish.

The international law, as a result of the historical development of international relations, cannot be treated separating from the latter. The Sino-Philippine disputes in the SCS, like all State-State disputes, are not solely an issue of international law. They also involve complex international political considerations and future development of the relations between the Parties. For these reasons, any disputes should always be addressed by diplomatic means in priority. In a similar vein, under reasonable circumstance, it is extremely necessary for an international judicial body to make a final award encouraging negotiations. By doing so, the judicial body is not evading its responsibilities, but making a decision based on the actual situation that will best contribute to the settlement of disputes. It is a signal of good faith from the international law to the members of the international community.

From the perspective above, the SCS arbitration between China and the Philippines needs nothing more than such a award encouraging negotiations. Given that China has reiterated that it would not accept or participate in the arbitration, it has sufficient grounds not to implement the award, even if the Tribunal delivered any award unfavorable to China. Moreover, due to the lack of good faith in the preliminary award of the Tribunal, its decisions have already invited the question and doubts from academia home and even abroad. The Tribunal of the case has almost become the target of public criticism in China. The Chinese Government insists that the Tribunal lack jurisdiction over the case;<sup>92</sup> and scholars explored, from various perspectives, the fallacies of its award on jurisdiction. Since China holds that the Tribunal lacks jurisdiction, the final award it issued later should also be considered to be without legal effect. In that case, the parties would be locked in a stalemate regarding the final award, which would be eventually laid aside and become meaningless, if the consequence is mild. On the other hand, it would have an effect exactly opposite of its wish, if the consequence is severe enough. Specifically, China would insist that the award be null and void, but the Philippines would request to implement the award. In that way, their conflicts and disputes

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92 Transcript of the Chinese and Foreign Media' Interview with XU Hong, the Director-General of Department of Treaty and Law of Chinese Ministry of Foreign Affairs, Regarding the SCS Arbitration Initiated by the Philippines, at <http://www.fmprc.gov.cn/ce/cebe/chn/zclc/t1362765.htm>, 17 January 2017(in Chinese); Foreign Ministry Spokesman LU Kang's Regular Press Conference on 30 October 2015, at [http://www.fmprc.gov.cn/web/wjdt\\_674879/fyrbt\\_674889/t1310668.shtml](http://www.fmprc.gov.cn/web/wjdt_674879/fyrbt_674889/t1310668.shtml), 17 January 2017. (in Chinese)

concerning the issue of SCS would be further aggravated or exacerbated. The former consequence would undoubtedly impair the effect and authoritativeness of international justice, and prejudice the development of international law; the latter would further undermine the friendly development of international relations, and threaten the peace and stability of the international community.

Regretfully, the Tribunal of the present case, acting arbitrarily and willfully, failed to objectively review the facts of the Sino-Philippine disputes. After the release of the final award, China rightly criticized it, and the Philippines, under the leadership of its newly elected president, also determines to renegotiate with China and put the award aside. The purpose of the Tribunal is supposed to contribute to the resolution of the Sino-Philippine disputes, and to restore the peace of SCS. However, the Tribunal went farther and farther on the way deviating from the good faith principle. It is appropriate to say that the Tribunal has abused its name as a dispute settlement body.

## V. The Philippines and the Tribunal's Fundamental Deficiency

Be it the requirement imposed on the parties to a dispute to negotiate in good faith, the rule of *pacta sunt servada*, the requirement to contribute to the attainment of a treaty's purpose, or the duty of a third-party dispute settlement body to review the obligations above in good faith, the very foundation is the honesty of each party when taking actions. The objective quality of *bona fides* reflects many requirements, covering multiple aspects of a dispute.

For example, acting in good faith can also be interpreted that the disputants act transparently and depict facts objectively. Any issues involved in the Sino-Philippine disputes in the SCS are, in practice, concerning the disputes over territorial sovereignty and maritime delimitation. However, the Philippines spared no effort to package its claims into some *prima facie* submissions, such as the consideration of the legal nature of certain marine features,<sup>93</sup> deliberately hiding its true intention behind. Such distortion of facts and hiding of the substance of the disputes, naturally, goes against the requirements on transparency, objectivity and

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93 Professor LUO Guoqiang lists four ways that the Philippines employed to disguise its real submissions. See LUO Guoqiang, A Comment on the Preliminary Award on the South China Sea Arbitration, *Foreign Affairs Review*, No. 2, 2016, p. 26. (in Chinese)

honesty.

For another example, the Philippines, in its *note verbale* protesting against China's claims in the SCS, stated that it enjoyed the sovereignty or sovereign rights to the territorial sea, EEZ or continental shelf generated by the marine features of "Kalayaan Island Group".<sup>94</sup> The "Kalayaan Island Group" claimed by the Philippines is entirely composed by some features of the Nansha Islands. It follows that the Philippines has admitted that some features of the Nansha Islands are entitled to EEZ and continental shelf. In that case, it should not be disputable for China to claim EEZ and continental shelf on the basis of the Nansha Islands in its entirety, which is larger than any one feature of the Nansha Islands, and also bigger than the "Kalayaan Island Group". Therefore, this evidence is insufficient to prove that China and the Philippines have disputes in this regard. Nevertheless, the Tribunal made an opposite decision.<sup>95</sup> This also demonstrates that the Tribunal failed to examine the facts in an objective way.

The last but the most ironical point is that the Philippines and the Tribunal, during the course of the arbitration, expressly mentioned the good faith principle on several occasions, implying that China had not acted in good faith. In the view of the Philippines, China violated its obligations to protect and preserve the marine environment in the waters surrounding Huangyan Island, Ren'ai Reef, Meiji Reef and other features; China's land creation and construction work damaged the marine environment; and it made no effort to control the harmful activities of its fishermen; therefore China has not performed the obligations under the UNCLOS in good faith.<sup>96</sup> In its Submission No. 14, the Philippines alleged that China had aggravated the dispute by taking a series of actions in the waters at, and adjacent to, Ren'ai Reef. The Philippines argued that UNCLOS Article 300 articulated the basic principle of good faith and the prevention of abuse of rights, which required States to narrow their differences, rather than aggravate their disputes.

The good faith principle, indisputably, calls for the parties to a dispute to actively address their differences through peaceful means, rather than to provoke each other to exacerbate their dispute. However, the problem is that the Philippines illegally ran an old warship aground on the Ren'ai Reef in 1999 and has never

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94 The Permanent Mission of the Republic of the Philippines to the United Nations, Note Verbale 000228, United Nations Documents, 2011.

95 Award on Jurisdiction and Admissibility, para. 170.

96 Day 3 – Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, the Republic of Philippines v. the People's Republic of China, PCA, p. 45.

acted to remove the warship from the Chinese reef for the last 18 years, but even attempting to build facilities there. The Philippines accused China of continuing actions on or around the reef after the start of the arbitration in 2013, which aggravated or escalated their disputes. However, the truth is that the Philippines publicly declared, in March, 2014, that it would build the warship aground on the Ren'ai Reef into a permanent facility. In this context, China took necessary measures, since China would never sit by and watch other States challenge its territorial sovereignty over the Ren'ai Reef, which is a part of its Nansha Islands. On what grounds can the Philippines, being the party provoking the dispute, accuse China of destroying the peace in the SCS?

Sadly, the Tribunal only saw the actions on the Chinese side, but turned a blind eye to the prior provocation made by the Philippines. The Tribunal considered that China's construction of artificial islands on seven features in the SCS, in addition to the Meiji Reef, Ren'ai Reef and other features identified by the Philippines, aggravated the disputes between the Parties.<sup>97</sup> The Tribunal, weirdly, "forgot" the fact that the Philippines first challenged China's claims of sovereignty, but solely focused on the actions on the Chinese side. In view of such deliberate disregard of facts, how can the award be considered to be made in good faith? Further, the Tribunal held that China's actions obstructed the progress of arbitration, which impaired its purpose to help the settlement of disputes. However, does not the deceptive award really hamper the resolution of disputes? In fact, the award primarily aims to conclude that China and the Philippines do not have disputes over maritime delimitation, therefore the relevant features of the Nansha Islands are located within the Philippine continental shelf, and these features would belong to the Philippines automatically. This conclusion is based on three critical findings of the Tribunal: China's claims of historic rights are ineffective; China's claims of maritime rights generated by the Nansha Islands in its entirety are invalid; no feature of the Nansha Islands qualifies as an "island". Nonetheless, none of the three findings is well-founded in facts. The "historic rights" claimed by China is by no means exceptional; but the Tribunal arbitrarily decided otherwise. No provisions can be found in the UNCLOS that archipelagic baselines do not apply to mid-ocean archipelagos. A group of islands, at least, cannot be assumed to be not entitled to EEZ and continental shelf in its entirety. However, the Tribunal arbitrarily denied this entitlement. There is no express stipulation on the criteria of "island", yet the

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97 Award, para. 1177.

Tribunal seems to have elevated the criteria on purpose by disregarding the factual evidences. In fact, a sufficient exploration of the problems lying in the Tribunal's three findings needs much more pages, which would not be pursued in this paper. For the purpose of the paper, we only underscore the falsehood and absurdity of the Tribunal's finding that there is no overlapping sea areas between China and the Philippines. No decision based on this finding can contribute to the settlement of disputes; instead, it will only bring effect opposite to its wish.

The Philippines and the Tribunal recklessly infringed on the principle of good faith, nevertheless they still invoked this principle to falsely discuss China's actions without respect. In the course of the arbitration, their words and actions were inconsistent and self-contradictory. They employed the principle of good faith when convenient and abandoned it on unfavorable conditions. As such, the damages that they brought to this basic principle of international law and fundamental rule of conduct for the international community have attained a level never known before.

The connotations of the good faith principle under discussion are far from exhaustion and cannot be exhausted. With sincerity and honesty as its core, the principle is, naturally, mirrored in every move and action of the doer. The Sino-Philippine Arbitration on SCS Disputes was closed eventually in July, 2016. Regrettably, the so called "final award" nearly supports all the Submissions raised by the Philippines. An examination of the behaviors of the Philippines and the Tribunal reveals numerous violations of the good faith principle, from which the paper only cited a couple of examples. Such violations will hugely impair the principle.

## **VI. Conclusions**

The settlement of international disputes, and accordingly the maintenance of world peace, needs, especially, each doer to comply with the good faith principle. In the context of maritime delimitation disputes, this principle involves multiple connotations, mainly including:

Firstly, the parties to a dispute should enter into and conduct negotiations in good faith, with a view to arriving at agreements. They should perform their obligations assumed under the treaties between them in good faith, without prejudice to the objects and purposes of such treaties. Furthermore, their actions should always keep the essence of sincerity.

Secondly, the dispute settlement body involved should be fully aware of the

duties assumed by the parties under the principle of good faith, and objectively examine the facts associated with the dispute in good faith. Its award or judgment should aim to resolve the dispute, and really advance the peace progress of the international community.

The Sino-Philippine disputes in the SCS concern territorial sovereignty and maritime delimitation. Be it the Philippines (a party to the disputes), or the Tribunal (a dispute settlement body), their behaviors failed to meet the requirements above, which, undoubtedly, enormously undermined the principle of good faith.

As a general principle of international law, the good faith principle, which has profound connotations, is a cornerstone supporting the functioning of the international community. It is the minimal criteria for international actions, also the goodness highly pursued by the entire human being. This principle should not be ignored or infringed. In the context of the invalid award of the Sino-Philippine Arbitration on SCS Disputes made not in good faith, this principle should be paid more attention by all the members of the international community which is committed to the development of international law.

Translator: XIE Hongyue

## 南海仲裁案中菲律宾主张 “单岛定性”问题探析

韩雨潇\*

**内容摘要:** 在南海岛礁争端中, 菲律宾是侵占中国南海岛礁较多的国家, 其一直声称对中国南海的部分岛礁拥有主权, 菲律宾为了谋求本国在南海的利益, 一方面就南海部分岛礁单方面提起仲裁, 主张中国的“断续线”违反《联合国海洋法公约》, 要求就其海洋权利做出裁定, 把中国南海诸岛的主权和海洋权利割裂开来; 另一方面, 菲律宾企图将中国南海的部分岛礁进行“单岛定性”, 尤其是对处于中国实际控制的岛礁进行定性, 通过“矮化”中国相关岛屿的性质, 以达到损害中国海洋权益的目的。针对菲律宾将中国南海诸岛进行碎片化处理的恶意企图, 中国应尽快在南海地区构建远洋群岛制度, 从而更好地维护中国的岛屿主权与海洋权益。

**关键词:** 南海仲裁案 领土争端 远洋群岛 《联合国海洋法公约》

在中国对南海诸岛及其附近海域进行开发利用的历史过程中, 从没有任何一个国家对中国南海诸岛的主权、管辖权提出过挑战, 无论从历史上还是从法理上来说, 中国对南海诸岛及其附近海域均具有不可争辩的主权。菲律宾虽宣称对中国南海诸岛的部分岛屿拥有主权及主权权利, 但是 20 世纪中期以前, 没有任何法律文件或者官方领导人讲话表明菲律宾的领土范围包括中国的南海诸岛。20 世纪中期开始, 随着南海丰富的油气资源、生物资源、空间资源、旅游资源等被不断发现, 极大提升了南海的战略与军事价值, 加之《联合国海洋法公约》(以下简称“《公约》”) 在 1994 年的生效、亚太格局的变化, 促使菲律宾对南沙群岛产生了浓厚的兴趣。自 20 世纪 70 年代以来, 菲律宾陆续派兵对南沙群岛进行武力侵占, 先后非法占据了我国南沙群岛的 9 个岛礁(见表 1)。

2013 年 1 月 22 日, 菲律宾不顾中方的强烈反对, 就中菲南海争端单方面提起强制仲裁程序, 质疑中国在南海海域所主张的权利的正当性。菲律宾在南海仲裁

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\* 韩雨潇, 武汉大学国际问题研究院、国家领土主权与海洋权益协同创新中心 2015 级国际法学博士生。电子邮箱: hyx312@qq.com。

案中对南海部分岛礁提出“单岛定性”的主张,其根本目的就是企图将南海诸岛肢解开来,使中国无法从整体上维护南海地区的领土主权和海洋权益。2016年7月12日,仲裁庭对南海仲裁案做出“最终裁决”,否定了中国在“断续线”内南海海域的主权权利、管辖权及历史性权利。仲裁庭在审议岛礁的地位时,认定《公约》并未规定如南沙群岛的一系列岛屿可以作为一个整体共同产生海洋区域。<sup>1</sup>面对菲律宾咄咄逼人的进攻态势,中国有必要从法理的角度对南沙群岛的群岛地位进行探讨并构建群岛制度,从而有力地回击菲律宾碎片化南沙群岛的恶意企图。

表1 菲律宾非法侵占的中国南沙岛礁

菲律宾非法侵占的南沙岛礁	侵占日期
马欢岛	1970年9月11日
费信岛	1970年9月
中业岛	1971年5月9日
南钥岛	1971年7月14日
北子岛	1971年7月30日
西月岛	1971年7月30日
双黄沙洲	1978年3月4日
司令礁	1980年7月28日
仁爱礁	1999年5月

数据来源:李金明:《南海争端与国际海洋法》,北京:海洋出版社2003年版,第8页。

## 一、驳斥菲律宾在南海仲裁案中 对南海部分岛礁“切割”的主张

### (一) 菲律宾企图以《公约》为法律依据,割裂南沙岛礁主权与海洋权利之间的关系,进而全盘否定中国在南海的主权

2016年7月12日仲裁庭发布了南海仲裁案的仲裁裁决。菲律宾在仲裁过程中一共提出了15项诉求,其中第2项诉求是针对中国南海的“断续线”,菲律宾认为中国以南海“断续线”为依据主张海洋权利,这种做法不符合《公约》的规定,仲裁庭应认定是无效的,试图从根本上否定中国在南海地区的所有权利。菲律宾这种诉求十分荒谬,因为其申请仲裁的实体问题不属于《公约》规制的范围,因此

1 Eleventh Press Release, The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China), p. 10, at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>, 21 March 2017.

《公约》并不能作为处理中菲南海争端的法律依据。<sup>2</sup>《公约》序言指出：“在妥为顾及所有国家主权的情形下，为海洋建立一种法律秩序……本公约未予规定的事项，应继续以一般国际法的规则和原则为准据。”也就是说，由于《公约》并没有对领土主权争端进行规定，所以岛屿争端的解决应适用一般国际法的规则。《奥本海国际法》认为：“习惯是国际法以及一般法律的最古老和原始的渊源”，而“法律不溯及既往”早已成为习惯法并获得国际社会公认。根据一般国际法，当《公约》与习惯法发生抵触时，习惯法将优于《公约》。<sup>3</sup>依据“法律不溯及既往”，中国“断续线”的划定比《公约》生效要早47年，不能用现行法律去约束和指导过去的行为，而中国对于南沙群岛的主权及其附近水域的历史性权利是有着充分的历史和法理依据来佐证的，并且也得到了国际社会的广泛承认，同时，“断续线”的划定并不属于《公约》的管辖范围，其本身是历史问题，所以菲律宾认为中国的“断续线”违反《公约》的诉求并不成立。

菲律宾2013年1月22日向中国发出了《关于西菲律宾海的通知和主张声明》（以下简称“《声明》”），其中第五部分阐述了菲律宾请求仲裁庭予以裁决的13项诉求，其中第10~13项诉求是针对南海海域权利的，请求仲裁庭认定菲律宾在南海相关海域享有专属经济区和大陆架的权利。<sup>4</sup>南海相关海域的专属经济区和大陆架权利是从领土主权派生而来的，菲律宾这种割裂南沙群岛主权与海洋权利之间的关系，直接要求仲裁庭对海洋权益进行仲裁的诉求也是不符合国际法中“陆地支配海洋”的原则。国际法院早在1969年北海大陆架案的判决中就明确指出，“陆地支配海洋”是国际法的一项基本原则，陆地是一个国家对其领土向海洋延伸的部分行使权力的法律渊源，也就是说拥有岛屿或者陆地主权才是一个国家拥有该陆地或岛屿附近海域主权权利和海洋权益的基础。<sup>5</sup>按照传统国际法对国家领土取得方式的认定，只有先占、割让、征服及添附这几种方式，<sup>6</sup>并没有通过取得大陆架或专属经济区来确定岛屿归属的方式。所以，菲律宾没有拥有南沙群岛的主权却要求仲裁庭对南海相关海域的权利进行仲裁的诉求是十分荒谬的。

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2 Eleventh Press Release, *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, p. 6, at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>, 21 March 2017.

3 郑海麟：《南海仲裁案的国际法分析》，载于《太平洋学报》2016年第8期，第4页。

4 Notification and Statement of Claim on West Philippine Sea, pp. 17~19, at <http://www.dfa.gov.ph/images/UNCLOS/Notification%20and%20Statement%20of%20Claim%20on%20West%20Philippine%20Sea.pdf>, 22 March 2017.

5 国家海洋局政策研究室编：《国际海域划界条约集》，北京：海洋出版社1989年，第79页。

6 杜蘅之：《国际法大纲（上册）》，台北：台湾商务印书馆1971年版，第216~217页。

## (二) 菲律宾主张只有群岛国才可适用“群岛原则”， 以割裂式的思维认定南海部分岛礁属于不符合《公约》 岛屿定义的岩礁、礁石，不可拥有专属经济区、毗连区 甚至是领海

根据《公约》第四部分对群岛国制度的规定，群岛原则即群岛国可以依据其在群岛中确定的领海基点划定直线群岛基线，其领海、毗连区、专属经济区、大陆架的宽度应从群岛基线量起，群岛基线所包围的水域为群岛水域，群岛国主权及于群岛水域，但是其他国家在尊重群岛国主权的前提下，在该水域也享有无害通过权、传统捕鱼权等权利。<sup>7</sup> 菲律宾属于以群岛为基本领土的国家，海洋资源的开发和利用决定了其国家未来的发展，出于其本国利益考量，菲律宾曾经联合印度尼西亚在 1958 年前后就主张建立一个专门适用于群岛国家的组合制度。随后菲律宾于 1961 年 6 月 17 日颁布《关于确定菲律宾领海基线的法案》，声称菲律宾群岛周围、各岛之间和连接各岛的全部水域，不论其宽度和面积如何，始终被视为菲律宾陆地领土的附属物，构成菲律宾内陆和内水水域的一部分。<sup>8</sup> 也就是说菲律宾是以群岛为中心划定其领海，并用 80 段直线基线划定了菲律宾的领海基线。所以说，菲律宾是在国际海洋法实践中第一个提出群岛理论概念的国家，而当时的群岛原则还没有得到国际法和国际社会的承认。在 1973 年第三次联合国海洋法会议筹备委员会会议上，菲律宾、斐济、印度尼西亚、毛里求斯四国首次联合提出群岛原则，但是它们反对将群岛制度扩大适用于大陆国家的远洋群岛，并在随后提出的《群岛条文草案》第 1 条声称：“该群岛条文草案只适用于群岛国。”<sup>9</sup> 菲律宾等群岛国认为群岛国设立群岛制度可以更好地保护国家安全和经济利益，所以只有群岛国在划定领海或专属经济区时才有适用群岛制度的客观需要。1982 年出台的《公约》对群岛国的群岛制度做了专门的规定，但是《公约》并没有明确大陆国家的远洋群岛问题，菲律宾想以《公约》作为大陆国家不适用群岛制度的法律依据，这显然是不合理的，因为大陆国家的远洋群岛问题属于《公约》中的法律空白，而法律未规定事项并不能当然认为是法律禁止事项，大陆国家适用群岛原则也不当然构成违背《公约》义务或者滥用权利，更不是违反一般国际法规则或者原则，所以群岛国基于政治、经济安全等理由主张群岛原则，大陆国家远洋群岛和群岛国的群岛在地理上并无差别，大陆国家也可以基于政治、经济、安全等理由对其

7 《联合国海洋法公约》，下载于 <http://www.un.org/zh/law/sea/los/index.shtml>，2017 年 3 月 22 日。

8 海洋国际问题研究会编：《中国海洋邻国海洋法规和协定选编》，北京：海洋出版社 1984 年，第 60 页。

9 Office for Ocean Affairs and the Law of the Sea, *Archipelagic States – Legislative History of Part IV of the United Nations Convention on the Law of the Sea*, New York: U.N. Publications, 1990, pp. 7~9.

远洋群岛适用群岛原则。

由于南海地区地形复杂,大量岩礁难以定性为《公约》范畴内的岛屿,而根据《公约》第121条第3款的规定,不符合《公约》岛屿定义的岩礁是不能依据其主张专属经济区和大陆架的,但在群岛制度体系之下,可以将群岛内的各个岩礁、岛屿作为一个整体,以群岛整体为依据主张主权权利,作为一个整体的群岛是由岛屿及其周围的岩礁共同组成,同时,在群岛制度下群岛基线的运用也将更多的水域划入群岛水域。菲律宾在仲裁申请中对南海部分岛礁的法律性质及法律地位进行分别认定,反对大陆国家适用群岛制度,其根本目的就是想从岛礁的性质入手,割裂一个完整的南沙群岛,企图在南海地区人为地制造一些主权真空地带,损害中国领土主权的完整性。其实菲律宾早已经把南海地区的岛礁视为群岛,其在1978年6月11日发布的第1596号总统令和7月15日颁布的第1599号总统令中,将南沙群岛的33个岛礁、沙洲宣布为菲律宾领土,非法划归巴拉望省的一个独立自治区,把这个范围内的岛群命名为“卡拉延群岛”,2009年3月10日,菲律宾又通过了“第9522号共和国法案”即“领海基线法”,为所谓的“卡拉延群岛”与其他岛屿划定了领海基线。<sup>10</sup>同时,针对菲律宾的诉求,仲裁庭其实也注意到菲律宾选取中国南沙部分岛礁定性的行为是不合理的:“由于菲律宾的主张建立在中菲之间不存在专属经济区或大陆架的海洋权利的重叠上,仲裁庭认为应分析中国所主张的所有南海岛礁的海洋权益,不管这些岛礁是否目前由中国占领。”<sup>11</sup>

### (三) 菲律宾通过对南海岛礁性质进行分别认定来主张其所谓的“南海权益”,实际上想避开中菲双方关于《公约》排除声明的适用

2006年8月25日,中国根据《公约》第298条的规定向联合国秘书长提交声明,排除强制仲裁程序适用于海洋划界、历史性权利等海洋争端。<sup>12</sup>菲律宾不顾中国政府对于《公约》的排除性声明申请强制仲裁。根据南海仲裁案的裁决书,菲律宾的第1~2项仲裁请求是诉请仲裁庭裁定中国的“断续线”因违背《公约》的规定而不具备法律效力,从而否定中国在南海的主权及相关权利;第3~7项请求涉及黄岩岛、美济礁、仁爱礁、渚碧礁、西门礁、南薰礁等岛礁的法律地位认定问

10 郭渊:《地缘政治与南海争端》,北京:中国社会科学出版社2011年,第273~281页。

11 The Republic of the Philippines v. The People's Republic of China, Award, 12 July 2016, para. 154, at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>, 24 March 2017.

12 中国根据《联合国海洋法公约》第298条提交排除性声明,下载于 <http://wcm.fmprc.gov.cn/pub/chn/gxh/zlb/tyfg/t270754.htm>, 2017年3月24日。

题,<sup>13</sup> 这些仲裁请求表面上是菲律宾主张对其所谓“南海权利”的维护,实际上是针对海域划界和岛礁归属的问题。菲律宾也曾经针对《公约》提出过排除性声明,其于1982年12月10日公布的《菲律宾对于签署1982年〈联合国海洋法公约〉的宣言》第4条声明:“该种签署不应该侵害或损害菲律宾运用其主权权力于其领土之主权,例如卡拉延群岛及其附属之海域。”<sup>14</sup> 显然,菲律宾想要以“通过对南海部分岛礁的性质认定来维护其在南海的合法权利”为幌子,证明其提起仲裁只是为了解决与中国在南海问题上的纠纷,不属于超越仲裁庭审理范围的领土主权争端,这不仅是为了避开中国提出的排除性声明,也是为了绕过菲律宾曾经针对《公约》提出的排除性声明。

## 二、中国态度:中国南沙群岛是不可分割的群岛

### (一) 仲裁庭对相关岛礁的定性不能否定南海诸岛的整体性

菲律宾在南海仲裁案中提出了对黄岩岛、美济礁、仁爱礁、渚碧礁、南薰礁、西门礁、赤瓜礁、华阳礁分别进行定性的诉求,根据其诉求可以看出菲律宾对相关岛礁性质所持的态度(见表2)。菲律宾认为判定属于“低潮高地”的岛礁不可以享有领海、专属经济区和大陆架,并且不能通过占领或者其他方式取得主权,属于“岩礁”的岛礁不可以享有专属经济区和大陆架,菲律宾企图用化整为零的方式来否定南海诸岛的整体性,从而否定中国在南海诸岛及其附近海域的主权与管辖权。根据《公约》第13条的规定,因低潮高地在涨潮期间会淹没在水中,不能与岛屿一样拥有领海、专属经济区以及大陆架,也就是说,《公约》既没有条文明确规定低潮高地不是领土,也没有规定不能通过先占取得低潮高地的主权,只是规定低潮高地本身所能产生的海洋权利与岛屿有所区别,所以即使相关岛礁被判定为“低潮高地”,也不意味着中国丧失了该岛礁的领土主权。就岩礁而言,根据《公约》第121条第3款规定,岩礁应该属于一种特殊的岛屿,由于其不能维持人类居住或其本身的经济生活,所以不能享有专属经济区和大陆架,但是却可以享有领海。<sup>15</sup> 可见,《公约》并没有给“岩礁”下具体定义,有关“维持人类居住或其本身的经济生活”的条件也没有明确的规定,所以菲律宾诉求中的赤瓜礁、华阳礁的性质无法依据《公约》纳入“岩礁”。

《公约》第46条规定了对群岛的要求,即在本质上构成一个地理、经济和政

13 The South China Sea Arbitration, p. 5, at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>, 21 March 2017.

14 吴士存主编:《南海问题文献汇编》,海口:海南出版社2001年,第234页。

15 《联合国海洋法公约》,下载于 <http://www.un.org/zh/law/sea/los/index.shtml>, 2017年3月22日。

治的实体,或在历史上已经被视为这种实体。从历史角度看,早在东汉时期杨孚《异物志》中记载的“涨海”就是中国古代对包括南海诸岛在内的南中国海的称谓;到了宋代,对南沙群岛、西沙群岛采用了更加形象的称呼,“长沙”、“千里长沙”、“万里长沙”一般指的是西沙群岛,“石塘”、“千里石塘”、“万里石塘”一般指的是南沙群岛。其后中国的历代文献及官方资料对西沙群岛、南沙群岛也均有记载,如明清广东的地方志把“千里长沙”、“万里石塘”列在疆域范围之内。<sup>16</sup> 从中国古代文献记载中不难发现,中国历史上一直把南海诸岛视为一个整体,所以给南海诸岛如西沙群岛、南沙群岛等整体命名。

从地理、政治和经济角度上看,南海是一个半封闭型的边缘海,海内分布着200多个岛礁,根据它们与海平面的高度差可分为岛屿、沙洲、礁、暗沙和暗滩5种类型,其中露出海面的很少,大部分都是淹没在水下,南海诸岛就是这些岛、洲、沙、滩、礁的总称。南海海底为中国盆地,盆地的边缘与四周陆地间,才有狭宽不一的大陆礁层,也就是说,南海诸岛为一个独立的地理单元,西沙、中沙、南沙和东沙群岛各自又构成了一个独立的区域,形成了各自的大陆架区,所以菲律宾诉求中主要涉及的女沙群岛可以说在地理上是自成一体的。<sup>17</sup> 中国最早开发和经营了南海诸岛,早在明代时,就有中国渔民到南海诸岛去捕捞和开发,渔民祖辈相传留下的航海指南《更路簿》更是具体记载了中国渔民前往西沙和南沙群岛的航程、航向等,证明了中国自明清以来就开发了南海诸岛。20世纪70年代,厦门大学南洋研究所调查组经过实地考察,在南沙群岛的太平、中业、南威等岛屿上发现了明清时代渔民建立的水井、茅屋、石碑等。<sup>18</sup> 中国历代政府从未停止过对南海诸岛行使主权及行政管理,将南海诸岛的长沙、石塘列入中国疆域管辖范围之内,新中国成立之后出版的地图也都标明南海诸岛属于中国,中国政府也多次发表声明,重申中国对南沙群岛、西沙群岛的主权。1959年中国广东省海南行政区公署在西沙群岛的永兴岛设立西沙、南沙、中沙群岛办事处,履行中国对南海诸岛的行政管辖权,1988年海南省将西沙群岛、南沙群岛、中沙群岛的岛礁及附近海域纳入管辖范围,2012年6月21日,经中国国务院正式批准,撤销三沙办事处,建立地级三沙市,政府驻西沙永兴岛。可见,南海诸岛无论从自然地形上还是从历史上看,都在本质上构成了一个地理、经济和政治的实体。

16 袁古洁:《国际海洋划界的理论与实践》,北京:法律出版社2001年,第224~225页。

17 郭渊:《地缘政治与南海争端》,北京:中国社会科学出版社2011年,第301~302页。

18 韩振华主编:《我国南海诸岛史料汇编》,上海:东方出版社1988年,第519页。

表2 菲律宾仲裁请求涉及的南海岛礁

序号	岛礁名称	地理坐标	当前面积 (平方公里)	地理形态	菲律宾 请求定性
1	黄岩岛	北纬 15°7'00", 东经 117°51'00"	139	中沙群岛中的一个环礁。	岩礁
2	美济礁	北纬 9°54'00", 东经 115°32'00"	46	形状极似一张张大的小孩嘴巴。	低潮高地
3	仁爱礁	北纬 9°44'00", 东经 115°52'00"	51.62	形状类似小丑鞋子的珊瑚环礁。	低潮高地
4	渚碧礁	北纬 10°54'48", 东经 114°03'04"	16.1	形状类似一颗杏仁。	低潮高地
5	南薰礁	北纬 10°12'50", 东经 114°14'00"	1.85	南薰礁大致呈肾脏形, 其南部约 4.5 公里处有另一珊瑚礁小南薰礁。	低潮高地
6	西门礁 (东门礁)	北纬 9°54'00", 东经 114°28'00" (东门礁: 北纬 9°54'35", 东经 114°29'50")	2.7 东门礁: 2	东、西门礁形似两个足印, 相距仅仅 0.8 海里。	低潮高地
7	赤瓜礁	北纬 9°43'9", 东经 114°16'57"	9.4	形状似被咬了一口 的冬瓜。	岩礁
8	华阳礁	北纬 8°53'00", 东经 112°51'00"	7.6	形似一个横放的茄 子, 东西长而南北 窄。	岩礁
9	永暑礁	北纬 9°37'00", 东经 112°58'00"	108	形似一支鹅毛笔。	岩礁

数据来源: 百度百科、维基百科、谷歌地图、菲律宾诉状

## (二) 国际法依据

### 1. 大陆国家远洋群岛可适用直线基线及历史性权利的法律依据

1935年7月12日挪威发布国王敕令, 宣布北纬 66°28'48" 以北的 4 海里海域为挪威专属渔区, 根据该敕令, 在挪威沿岸以及其外缘确定 48 个领海基点, 并把这些基点用直线连接起来划出挪威的领海基线。英国认为挪威采取的直线基线划法违背了国际法, 并且此类基线的划定会使一部分公海变为挪威的专属渔区, 虽然英挪两国就此进行多次谈判但均未成功, 因此英国于 1949 年向国际法院提起了诉讼。1951 年 12 月 18 日, 国际法院对“英挪渔业案”作出判决: 挪威北部海

岸地带具有独特的结构且极为曲折,群山环抱中的峡湾和海湾的存在造成海岸线的断续相间,沿岸还包含无数的岛屿、小岛和干礁,形成了一个小岛群(挪威称之为“石垒”),也就是说挪威海岸的陆地和海洋之间并没有清晰的分界线,“石垒”的外界构成了其海洋的边界。国际法院认为,领海带必须沿着海岸的一般走向划定,为了测算领海的宽度,国家实践一般采用低潮线,因为这一标准对沿海国最为有利,并且清晰地体现了领海附属于陆地领土的特点。但低潮线不是一成不变的,海岸轮廓的不规则加大了确定适用低潮线的复杂性,所以在海岸线极为曲折的地方,或者近邻海岸有一系列岛屿,在划定包括领海在内的管辖海域时,可适用更实际的方法使领海带的形状更为简明,即采用连结各适当点的直线基线法,所以国际法院认为挪威划定的基线不违反国际法。<sup>19</sup>

“英挪渔业案”对厘清现有基线划定方法的国际法规则起到了重要作用,案件结束后,挪威这种有别于传统基线划法却又基于特殊地理情形的直线基线法也被各国广泛采纳。第三次联合国海洋法会议的主席阿米拉辛格指出:“在英挪渔业案中国际法院考虑的是直线基线适用于海岸线极为曲折和海岸旁存在群岛的情况,但同时国际法院也指出了领海法的一般原则,即领海带必需沿着海岸线画出,而这对远洋群岛问题的解决能发挥一定的作用。”<sup>20</sup> 1958年第一次联合国海洋法会议通过的四公约之一《领海及毗连区公约》第4条明确规定了接近海岸的一系列岛屿划定直线基线的方法,“英挪渔业案”的判决可以说是《领海及毗连区公约》确定直线基线法的基础。“英挪渔业案”中国际法院也考量了挪威在该海域的历史性权利问题,认为挪威当地居民百年来完全依赖此地渔业生活形成了历史性权益,挪威的划界方式符合国际法的规定。应当说,该案也可以为中国主张南海断续线内历史性权利提供国际法层面的支持。格林·菲尔德认为,中国破碎的海岸以及众多岛屿的地理特征说明中国有资格适用直线基线,而这似乎也符合“英挪渔业案”所体现的原则。<sup>21</sup> 所以,从法律角度来看,虽然《公约》只规定了“群岛国的群岛制度”,并未规定大陆国家的群岛制度构建,但是国际法院关于“英挪渔业案”的判决及《领海与毗连区公约》第4条为大陆国家远洋群岛采用直线基线提供了法律依据。

## 2. 大陆国家远洋群岛适用直线基线的他国实践

布朗利对国家实践的种类作出了如下列举:外交文书、政策声明、新闻发布、国家立法、国际和国内司法判例、条约和其他国际文件的内容、联合国大会有关

19 Fisheries Case (United Kingdom v. Norway), pp. 127~130, at <http://www.icj-cij.org/docket/files/5/1809.pdf>, 28 March 2017.

20 C. F. Amerasinghe, *The Problem of Archipelagoes in the International Law of the Sea, International and Comparative Law Quarterly*, Vol. 23, Issue 3, 1974, p. 544.

21 Jeanette Green Field, *China's Practice in the Law of the Sea*, Gloucestershire: Clarendon Press, 1992, p. 72.

表3 典型国家建立群岛制度的实践

基线分类	群岛名称	制度概况	相关国内法令
	斯瓦巴德群岛 (挪威)	围绕斯瓦巴德群岛确定了196个基点,并将斯瓦巴德群岛分为五个部分,对于群岛中的主岛作为一部分单独划定领海基线,对于距离主岛较远的其他岛礁,并未直接将其纳入主岛的领海基线内,而是对其各自单独适用直线基线。	2001年6月1日关于斯瓦尔巴群岛周围挪威领海界限条例的皇家法令
	加拉帕戈斯群岛 (厄瓜多尔)	适用直线基线,在加拉帕戈斯群岛设定8个基点,划出8段直线基线,规定基线内水域性质为内水。	1. 1938年和1951年总统法令 2. 1970年2月27日第256-CLP号法令 3. 1971年6月28日第959-A号最高法令
直线基线	加纳里群岛 (西班牙)	采用了“分割”的方法,将整个群岛依据地理位置“分割”为东西两个部分,将东部岛屿群组作为一个整体划定领海基线,对于西部岛屿群组,则就其中除哥梅拉岛之外的4个群岛各自单独作为一个整体,划定相应的领海基线。	1977年8月5日2510/1977号皇家法令
	福克兰群岛 (英国)	福克兰群岛领海基线的划定适用直线基线。就福克兰群岛设定22个领海基点,划定21条直线基线,总长度共计362海里,其中最长的两段直线基线长度为41.2海里和35海里。	1989年福克兰群岛法令
	凯尔盖朗群岛 (法国)	在凯尔盖朗群岛设定32个领海基点,划定31条直线基线,其中最长的一段达到19.7海里。	1978年第78-112法令
	拉克沙群岛 (印度)	强调群岛在划定领海基线并做出相应的海域权利主张时应将其作为一个整体来看待,而不应拆分开来。在拉克沙群岛确定了13个基点,所有直线基线的长度总计约560海里。	1. 1976年5月28日第80号法令 2. 2009年5月11日印度政府公报第736号

混合基线	法罗群岛 (丹麦)	就划定法罗群岛的领海基线选定了 10 个基点，采用了直线基线与正常基线相结合的划界方法，领海宽度 12 海里。	<ol style="list-style-type: none"> <li>1. 1959 年 4 月 27 日第 130 号法令</li> <li>2. 1963 年 4 月 24 日第 156 号法令</li> <li>3. 1999 年第 200 号法令</li> <li>4. 2002 年 4 月 30 日第 240 号法令</li> <li>5. 2002 年 5 月 16 日第 306 号法令</li> </ol>
	亚速尔群岛 (葡萄牙)	亚速尔群岛的基线是由正常基线和直线基线划定的，将亚速尔群岛分为三个部分，一共设定了 29 个领海基点，每个部分单独作为一个完整的整体分别适用直线基线。	1985 年 11 月 29 日 495/85 号法令

法律问题的决议等。<sup>22</sup>通过对一些典型国家关于远洋群岛制度方面资料的整理(见表3),发现很多大陆国家在其远洋群岛采用的直线基线在《公约》生效之前就已经存在,还有一部分国家是采用混合基线制度,在《公约》生效之后,仍然维持原有立法或依据《公约》采用新的立法形式确定在远洋群岛适用直线基线,这证明了大陆国家在远洋群岛采用直线基线是稳定的国家实践行为。

很多国家不仅在国内法上明确表示在远洋群岛上适用直线基线,还向联合国秘书长递交了照会。2011年3月9日,厄瓜多尔政府向联合国秘书长递交照会,要求记录和宣传其2010年8月2日颁布的第450号执行法令,该法令附有2010年7月12日部长级协议0081和清楚地显示厄瓜多尔加拉帕戈斯洋中群岛直线基线的海图IOA42。<sup>23</sup>葡萄牙2011年5月向大陆架界限委员会提交了外大陆架提案,其提交的附图明确显示了其实践中混合使用了直线基线和正常基线。印度政府2009年5月11日的政府第736号公报阐述了在拉克沙群岛适用直线基线,同时印度于2010年1月29日向联合国秘书长交存该群岛的领海基点坐标和海图。<sup>24</sup>

### 3. 中国的国内法规定及在西沙群岛的国家实践

中国在西沙群岛的实践也早于《公约》的存在,所以中国的国家实践并非是援引《公约》第7条作为国际法依据。新中国成立之后,中国政府于1958年公布了《关于领海的声明》,确定中国的领海宽度为12海里,采用直线基线法划定领海,并说明了领海制度适用于台湾及南海诸岛,用政府声明的形式确认了南海诸岛及其水域自古以来就是中国的海洋国土。1973年中国代表团向联合国海底委员会提出的《关于国家管辖范围内海域的工作文件》指出:“岛屿相互距离较近的群岛或列岛,可视为一个整体,划定领海的范围。”<sup>25</sup>1992年中国政府制订了《领海及毗连区法》,在第2条具体列举属于中国的群岛和岛屿,以立法的形式再次重申和确认了南海诸岛为中国的固有领土,为南沙群岛领海基线的确定做了法律上的充分准备。1996年5月15日中国颁布《中国政府关于领海基线的声明》,宣布中国大陆领海的部分基线和西沙群岛的领海基线,在第二部分中标明了西沙群岛的28个领海基点,也就是说,中国将西沙群岛视为统一的整体,用直线基线将西沙群岛的领海基点连接起来,构成西沙群岛的领海基线。

22 贾兵兵:《国际公法:和平时期的解释与适用》,北京:清华大学出版社2015年,第32~33页。

23 洪农、李建伟、陈平平:《群岛国概念和南(中国)海——〈联合国海洋法公约〉、国家实践及其启示》,载于《中国海洋法学评论》2013年第1期,第193页。

24 M.Z.N.76.2010.LOS of 17 February 2010, at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn\\_s/mzn76ef.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn76ef.pdf), 29 April 2017.

25 赵理海:《关于南海诸岛的若干法律问题》,载于《法制与社会发展》1995年第4期,第56~57页。

### 三、在南海地区构建远洋群岛制度的意义

#### (一) 从群岛的整体性角度划界，明晰中国在南海的主权

南海诸岛数量庞大。以存在争议最多的南沙群岛为例，虽然其岛屿众多，但平时露出水面的仅有 36 个，高潮时露出水面的也只有 25 个，如果对南沙群岛的单个岛礁进行界定，很难符合《公约》第 121 条岛屿的标准，还会导致国际社会对该岛礁的法律地位产生质疑，从而使中国在南海的管辖水域受到限缩，也就是说，该岛礁将很难获取专属经济区、大陆架甚至是领海。为南海诸岛中的每个岛礁单独划基线只会使中国在南海地区的领海范围被分割，领海与公海纵横交错在一起，中国在南海地区的主权范围就更加模糊。在南海地区构建远洋群岛制度，就可以从群岛的整体性角度进行划界，把南海地区的岛礁视为若干独立的群岛并确定群岛基点及划定领海基线，不仅可以缓解岛礁性质在主权争议中的尴尬地位，还可以明晰中国在南海的主权范围，其影响和意义极为重大。

#### (二) 有效解决中菲南海争端

中菲南海争端主要就是针对岛礁主权归属及海域划界的争端。菲律宾的领海基线是依据群岛原则划定的，以群岛为中心，把位于群岛外缘岛屿之外，但是在条约界线之内的全部水域称作菲律宾的领海，而所谓的“条约边界线”是指 1989 年《美西巴黎条约》、1900 年《美西华盛顿条约》以及 1930 年《英美条约》中所提到的全部水域所构成的菲律宾领海的外部界限。菲律宾这种领海基线的划法等于把群岛中各岛屿之间的大片公海海域变成了本国的管辖水域，并把基线内的整个海域变为内水。菲律宾还将群岛基线立法，并从群岛基线划出专属经济区和大陆架，不仅将中国在南沙群岛的 33 个岛礁、沙洲、沙滩划为菲属岛屿，其专属经济区的外部界线还侵入了中国的传统疆界线。为了维护菲律宾所谓的“南海主权”，菲律宾一方面反对中国这样的大陆国家在其远洋群岛上构建群岛制度，其理由是只有由岛屿组成的国家才能适用群岛制度，并且《公约》没有规定大陆国家可以适用群岛制度。另一方面，菲律宾提出对南海部分岛礁分别进行定性，那么如果南沙群岛中的一些岛礁被界定为岩礁或低潮高地，将会对中菲的海洋划界产生重要影响，中国将无法依据这些岛礁在南海主张专属经济区和大陆架，菲律宾的目的就在于通过否定南海诸岛的整体性，限缩中国在南海的主权范围从而给菲律宾非法占领南海岛礁披上“合法”的外衣。虽然《公约》没有明确规定大陆国家可以划定群岛基线，但是《公约》也没有否定大陆国家可以为其远洋群岛构建群岛制度，大陆国家可以为其远离大陆的群岛划定直线基线，基线内的水域是内水或者是领

海,而不是群岛水域。中国也可以采用直线基线的方法围绕南海中的岛群划定群岛基线,在群岛制度之下的岩礁、礁石等与岛屿共同组成了一个群岛,海洋划界时应作为一个整体来看。所以中国可以通过构建远洋群岛制度对南海岛礁行使绝对主权,从而粉碎菲律宾企图侵占中国南海岛礁的阴谋。

### (三) 冲破美国的岛链封锁

南海的地理位置极端重要,不仅是沟通印度洋和太平洋的重要海上通道,还是连通大洋洲和亚洲大陆的交通要冲。美国制订的“岛链战略”是其亚太战略的重要组成部分,依照亚太地区海上地形特点,又分为第一岛链和第二岛链,目的是为了封锁中俄等国家的海上之路。南海是美国第一岛链的一个重要支点,其与朝鲜半岛相呼应,构成所谓的“新月防线”,从海上构成对中国的围堵封锁,所以南海在美国的“岛链战略”中具有极为重要的位置。南海只要不在中国控制之下,美国就可以依据第一岛链全面封锁中国;反之,“新月防线”将不复存在,美国制订的“岛链战略”将被打破,美国在亚太地区的防线只能被迫退回第二岛链。菲律宾因其综合国力孱弱,为了维护其在南海的所谓“主权”,实现其在南海的战略目标,千方百计的拉拢域外大国介入南海争端。美国则支持菲律宾侵占中国的岛礁,希望通过菲律宾牵制中国,否定中国在南海地区拥有的主权,从而维护其“岛链战略”。此外,亚太地区提供的大部分原料的进口都要通过南海航线进入美国,如果南海的海上贸易通道受到破坏,会使美国的经济发展受到影响,同时还将阻断日本大部分的石油和天然气进口。所以美国多次声称,其在南海地区的利益诉求主要是保持南海国际航道的畅通,而中国政府也在各种场合多次明确表示,中国维护南沙群岛的主权和海洋权益并不会影响外国船舶和飞机根据国际法所享有的航行自由和飞越自由。

在南海构建远洋群岛制度,中国在划定领海基线并主张相应的海域权利时可将群岛作为整体来看待,从而有力回击美菲利用《公约》的空白否定与质疑中国在南海的主权。同时,中国还可以借鉴《公约》的规定,在相关水域设定无害通过权及群岛海道通过权,中国划分出来以供外国船舶自由通行的航运水道必然是由主权国多方综合考量,且能够安全航行的水道,中国对这些水道的管理和维护,也会有利于国际航运的安全,这样既保证了中国在该区域的绝对主权,又可以保障他国船只在该区域的自由航行和安全。可以说,在南海地区构建远洋群岛制度不仅可以维护中国在南海的主权,还可以突破美国对中国的岛链封锁。

### (四) 推动现行海洋法规则的发展

自1982年《公约》诞生已经走过了30多年,虽然其确立了人类利用和管理

内水、领海、毗连区、大陆架、专属经济区等海洋区域的基本法律框架,但是在群岛制度方面的规定却存在诸多缺陷,《公约》规定的群岛制度是妥协的产物,由于一些国家的反对,《公约》在起草过程中搁置了关于大陆国家远洋群岛的争议,许多国际法学者都坦诚指出,《公约》回避大陆国家远洋群岛能否适用群岛制度问题是政治和外交因素影响的结果。<sup>26</sup> 随着越来越多的国家已经将直线基线运用于本国的远洋群岛海域划定,《公约》还停留在1982年的共识之上,未能根据国家实践及国际惯例的变化及时调整。菲律宾出于本国的利益,背离《公约》原则与精神,对《公约》进行恶意解释,抓住并利用《公约》的妥协性和滞后性为自己的侵占事实寻找所谓的“国际法依据”,更加激化了南海地区的争端。法律常常以既往的传统为基础逐渐地发生变化,而不是发生根本性的变化。一些价值观念最初也是通过不具有约束力的“软法”得到表达,转而影响公共舆论、政治议程以及填补条约法中的空白。各国显然不会就所有新的海洋问题展开正式谈判,这样《公约》所带有的精心设计的修正<sup>27</sup> 机制就很难得到运用,在这种情况下,通过处理具体海洋问题的全新区域性或全球性条约、国家实践、政府间组织的实践则会推动海洋法新规则的建立。中国把从《公约》群岛国制度引申出来的大陆国家远洋群岛制度用于南海岛礁,并非只关注本国在南海地区的主权和主权权利,而是努力探寻各国在南海地区存在激烈争端的根源,以此为基础提出切实可行的解决方案。中国在远洋群岛制度框架下,在南海地区寻求与各相关国家和平解决争端,合作共赢,积极探索,为推动国际海洋规则的发展作出贡献。

## 四、针对中菲南海仲裁所涉南沙群岛的 群岛制度构建建议

### (一) 南沙群岛的基线划定

中国在南沙群岛划定基线应该依据大量国家实践的惯常做法,即以直线基线的方法来划定。南沙群岛也满足适用直线基线的条件,原因包括三点:第一,从地理上看,根据国际法院对于“英挪渔业案”的判决,划定直线基线的地理标准为“海岸极为曲折”或者“海岸临近一个群岛”,众多岛礁构成的南沙群岛其轮廓极为曲折,符合国际法院“海岸极为曲折”的条件;第二,国际法院认为,领海带必须沿着海岸的一般走向划定,由于基线内的海域必须充分接近陆地领土,使其受内水

26 卜凌嘉、黄靖文:《大陆国家在其远洋群岛适用直线基线问题》,载于《中山大学法律评论》2013年第2辑,第110页。

27 《联合国海洋法公约》第155条和第312~314条,下载于<http://www.un.org/zh/law/sea/los/index.shtml>,2017年3月22日。

制度支配,中国选择在南沙群岛适用直线基线就是为了尊重海岸、岛屿的自然轮廓,充分考虑南沙群岛的自然地理走向;第三,南海仲裁案中菲律宾提出的“单岛定性”,实际上忽略了我国南沙群岛的整体性,从地理、经济和政治的角度来看,组成南沙群岛的岛、礁、沙、滩以及相连的水域已经在本质上构成一个实体,或在历史上已被视为这种实体。<sup>28</sup>南沙群岛已被视为一个整体且已经得到了国际法学界和国际社会的认可。目前已公布的远洋群岛的基线划定均遵循了整体性原则,对于这一问题,中国也以立法的形式在《关于国家管辖范围内海域的工作文件》<sup>29</sup>中对群岛的整体性做出了确认,1992年2月25日通过的《中华人民共和国领海及毗连区法》也再次确认采用直线基线法划定南海各群岛的领海基线。

针对直线基线的合理适用问题,若以南沙群岛为整体并连接外缘岛礁适当的基点来划定直线领海基线容易导致基线内海域过大,对周边国家包括航行自由、海洋资源开采等多方面海洋利益产生影响,从而招致他国的非议。由于南沙岛礁众多且情况复杂,虽然将其视为一个整体,但在划定基线时可对整个群岛进行分割,以多个群礁的方式划定基线,并且不将基线内的全部水域都定性成“内水”。

## (二) 充分做好构建群岛制度的法律准备, 顺应海洋权益法制化的潮流

海洋法是平衡各国海洋权益的基础,《公约》规定了各国管理和利用海洋的法律框架。在当前的形势下,各国海洋权益的维护日趋法制化,国家间海洋争端的解决都离不开完备的海洋法制。此外,《公约》也不是一个静态不变的法律体系,需要在实践中不断完善。我国也必须顺应这一潮流,充分利用法律武器来维护自身的海洋权益。《公约》作为一部通过各国协商一致达成的“海洋宪章”,难免有妥协和折中的内容,为了照顾各方面的利益,《公约》中的一些条文规定模棱两可,处于不同立场或利益的国家可以从不同角度进行解释。因此,中国需要加强对《公约》的研究与应用,力求在实施过程中用好用足其法律制度,如对南海断续线法律地位的研究及明确中国的历史性所有权,在法理上找到有力根据,以求和平解决问题。虽然中国的海洋法律体系已经初步建立,但还存在很多问题和不足。比如中国1996年颁布的《中华人民共和国政府关于中华人民共和国领海基线的声明》虽然宣布了大陆领海的部分基线和西沙群岛的领海基线,并提出了中国政府将会再行宣布中华人民共和国其余的领海基线,但是迄今二十年过去了,海阳岛到成山头的基线以及南海其他群岛的基线仍未公布,而很多拥有远洋群岛的大陆国家

28 郑雨晨:《大陆国家的洋中群岛制度的演变及其对我国南海诸岛的影响》(硕士论文),北京:外交学院2016年版,第34页。

29 《关于国家管辖范围内海域的工作文件》第1条第6款:“岛屿相互距离较近的群岛或列岛,可视为一个整体,划定领海范围。”

早在《公约》出台之前就已经颁布实施了相关法律。不难发现,中国的海洋立法存在明显滞后性,而《公约》的贯彻和执行必须依赖国内法制建设,可以说,《公约》的成败与否很大程度上取决于一国的法制建设水平。近年来,无论国内还是国际层面,海洋格局和权益都发生了巨大变化,所以应该针对新情况、新问题,通过国内立法完善和细化《公约》中不明确、不具体、甚至不完善的条款(正如大陆国家的远洋群岛制度),真正建立起完善的海洋法律体系,在开发海洋、利用海洋、维护中国海洋权益方面做到有法可依,才能最大限度地维护中国对南海诸岛的主权。此外,中国还应该积极参与联合国关于海洋方面的国际法规讨论和制定,积极参加国际学术会议,让世界了解中国的立场和观点,让国际海洋法规能够反映中国合理的权益诉求。

### (三) 新形势下中国对于中菲南海争端的策略思考

菲律宾与中国的南海主权争端一直都比较激烈,近年来在域外大国的支持下,菲律宾在南海问题上不断挑战中国。随着2016年6月30日,杜特尔特当选新一任的菲律宾总统,就任后打破阿基诺三世时期推行的亲美政策,推行“不依赖美国”的独立外交政策,虽然其依然承认南海仲裁的结果,但对通过国际仲裁解决南海问题不抱希望,多次强调不会与中国发生战争,愿意与中国通过合资的方式共同开发南海油气资源,并欢迎中国帮助菲律宾改善基础设施。<sup>30</sup>杜特尔特政府虽然不大可能距离美国远一点,但是不难发现其策略转变为如何在不得罪美国的同时与中国修好,从而实现两头通吃,既享受美国提供的安全保障,又搭上中国经济发展的快车。<sup>31</sup>去年10月杜特尔特总统访问中国期间,中菲两国元首达成了妥善处理南海问题的重要共识,双方重回对话协商妥善处理南海问题的正确轨道。<sup>32</sup>

《中菲双方联合声明》专门就南海问题进行了详细阐述,并在第40条<sup>33</sup>中明确提出“由直接有关的主权国家通过友好磋商和谈判,以和平方式解决领土和管辖权争议”,这就等于以政府文件的形式进一步固化了双方的官方立场,可以说,中菲

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30 Duterte Favours Making Deal with China over Dispute, at <http://globalnation.inquirer.net/138487/duterte-favors-making-deal-china-dispute>, 31 March 2017.

31 张洁:《南海博弈:美菲军事同盟与中菲关系的调整》,载于《太平洋学报》2016年第7期,第33页。

32 2017年3月30日外交部发言人陆慷主持例行记者会, [http://www.fmprc.gov.cn/web/fyrbt\\_673021/t1450196.shtml](http://www.fmprc.gov.cn/web/fyrbt_673021/t1450196.shtml), 2017年3月30日。

33 《中华人民共和国与菲律宾共和国联合声明》第40条:“双方就涉及南海的问题交换了看法。双方重申争议问题不是中菲双边关系的全部。双方就以适当方式处理南海争议的重要性交换了意见。双方重申维护及促进和平稳定、在南海的航行和飞越自由的重要性,根据包括《联合国宪章》和1982年《联合国海洋法公约》在内公认的国际法原则,不诉诸武力或以武力相威胁,由直接有关的主权国家通过友好磋商和谈判,以和平方式解决领土和管辖权争议。”

关系目前出现了历史性的转圜。但就目前形势来说,由于主权问题中菲分歧较大,短时间内中菲恐怕很难达成协议,但如果要等到争议解决之后才能进行合作,那么合作就永远不会存在,相对而言,“搁置争议,共同开发”作为中菲南海争端的临时解决方法是较为现实可行的,中国也应针对新情况对“搁置争议,共同开发”战略进行新思考。

首先,促进“搁置争议,共同开发”原则的具体化。《南海各方行动宣言》在某种意义上可以说是“搁置争议,共同开发”的体现,但是并不具有法律约束力,缺乏可供操作的具体内容,这样各国就会根据本国的利益需求,产生不同的理解或主张。2016年《中菲双方联合声明》第41条表明:“双方承诺全面、有效落实《南海各方行动宣言》,愿共同努力在协商一致基础上早日达成‘南海各方行为准则’。”<sup>34</sup>《南海各方行为准则》是对《南海各方行动宣言》的具体落实,《中菲双方联合声明》充分表明了中菲两国就南海问题坦诚交换意见,并赞同以和平友好协商的方式寻求问题的妥善解决。具体到南沙群岛问题,在搁置岛礁主权争议的前提下,共同开发是在实行划界前的过渡期内,在不损害双方主权立场、法律立场的情况下进行的合作。中菲两国需要以协议的方式共同勘探和开采主权争议区域内的矿产资源,共享开发收益,而在南沙海域没有争议的油气富集地区,中国应当尽快展开勘探开发,建立起钻井平台和采油平台,显示存在,为后续的相关国家实践奠定基础。<sup>35</sup>中国仍然坚持南海诸岛的主权,时刻保持对南海问题的关注和研究,以期在稳定、和谐、互信的良好氛围中,早日和平解决中菲南海争端。

其次,应该努力消除实现“搁置争议,共同开发”的障碍。中菲在南海问题上的信息不对称是实现“搁置争议,共同开发”的最大障碍,彼此互相防范导致在对抗中不断加码,因此双方未能搁置争议,反而争议不断,各自开发。中菲南海争端的解决,需要双方建立和保持畅通的沟通渠道,使各方在南海问题上的信息透明。根据2016年《中菲两国的联合声明》第42条<sup>36</sup>的规定,中菲之间将建立一个专门针对南海问题定期举行会晤的双边磋商谈判机制,并且双方同意探讨在其他领域开展合作。中菲定期磋商机制的建立,将会增进双方了解相互之间有关南海问题的立场、观点,形成双方积极互动的局面,通过对话缩小分歧,从而减少双方的战

34 《中华人民共和国与菲律宾共和国联合声明》第41条:“双方回顾了2002年《南海各方行为宣言》和2016年7月25日于老挝万象通过的中国—东盟外长关于全面落实《宣言》的声明。双方承诺全面、有效落实《宣言》,愿共同努力在协商一致基础上早日达成‘南海行为准则’。”

35 薛桂芳:《蓝色的较量——维护我国海洋权益的大博弈》,北京:中国政法大学出版社2015年版,第265页。

36 《中华人民共和国与菲律宾共和国联合声明》第42条:“双方同意继续商谈建立信心措施,提升互信和信心,并承诺在南海采取行动方面保持自我克制,以免使争议复杂化、扩大化和影响和平与稳定。鉴此,在作为其他机制的补充,不损及其他机制基础上,建立一个双边磋商机制是有益的,双方可就涉及南海的各自当前及其他关切进行定期磋商。双方同意探讨在其他领域开展合作。”

略误判。总之，通过对话协商来解决争端，中菲两国的国家利益必定会得到最大限度的实现。

## 五、结 论

自2012年4月“黄岩岛”事件以来，菲律宾便扬言要将“黄岩岛”事件提交国际海洋法法庭，目的是想使南海争端国际化，借此赢得国际舆论的支持。同时，菲律宾还企图对中国南沙部分岛礁进行“单岛定性”，使中国在南海地区的四大群岛被完全肢解开来，从而否定中国在南海地区的主权与管辖权。由于大陆国家构建远洋群岛法律制度在先例、国家实践、法理基础等方面均有着充分的依据，所以中国应当尽快在南海地区构建远洋群岛法律制度，从而更好地维护中国的海洋权益。

## An Analysis on the Determination of the Nature of Some Islands Individually as Requested by the Philippines in the *South China Sea Arbitration*

HAN Yuxiao\*

**Abstract:** In the disputes over the islands and reefs in the South China Sea (SCS), the Philippines is a State having occupied many features in the SCS. It alleged that it had sovereignty over some features of China's SCS Islands. In order to seek its interests in the SCS, the Philippines, on the one hand, unilaterally initiated an arbitration against China with respect to some features, contending that the "dashed line" of China was contrary to the United Nations Convention on the Law of the Sea, and therefore requested the Arbitral Tribunal to adjudicate on its maritime entitlements. By doing so, it attempted to cut off the natural link between the sovereignty and maritime entitlements of China's SCS Islands. On the other hand, the Philippines attempted to define the nature of some islands in the SCS individually, especially those controlled actually by China. The Philippines, through degrading some of China's islands into rocks or low-tide elevations, aimed to undermine China's maritime entitlements in the SCS. With respect to the Philippines' malicious intent to fragmentize China's SCS Islands, China should, with the least possible delay, establish a mid-ocean archipelago regime in the SCS region, so as to better protect China's sovereignty over its islands and the pertinent maritime rights and interests.

**Key Words:** *South China Sea Arbitration*; Territorial disputes; Mid-ocean archipelago; United Nations Convention on the Law of the Sea

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During China's historically development and exploitation of the islands in the South China Sea (SCS), no States had ever raised any challenges to China's sovereignty and jurisdiction over these islands. China has, both historically and jurisprudentially, indisputable sovereignty over the SCS Islands and their adjacent sea areas. The Philippines alleged that it had sovereignty and sovereign rights over some islands in the SCS; however, prior to the mid-20th century, no legal instruments or speeches of government leaders contain words telling that the territory of the Philippines includes the SCS Islands of China. The strategic and military significances of the SCS was hugely raised by the gradual discovery of rich oil, gas, living, space, and tourism resources in the SCS since the mid-20th century. Additionally to that, the United Nations Convention on the Law of the Sea (hereinafter referred to as the "UNCLOS" or the "Convention") entered into force in 1994, and the political landscapes of the Asian Pacific Region were altered. All these intrigued the Philippines to cast its covetous eyes on the Nansha Islands. Since 1970s, the Philippines successively sent troops to encroach upon the Nansha Islands by force, and illegally occupied nine features of China's Nansha Islands (see Table 1).

On 22 January 2013, the Philippines, disregarding the strong protests from China, unilaterally initiated a compulsory arbitral procedure against China, which challenged the legitimacy of China's claims to rights in the SCS waters. In this arbitration, the Philippines requested to define the nature of some islands in the SCS individually, attempting to disintegrate the SCS Islands, and further make China unable to protect its territorial sovereignty and maritime rights and interests in the SCS region as a whole. On 12 July 2016, the Arbitral Tribunal constituted for the arbitration (hereinafter referred to as "Tribunal") released the final award, denying China's sovereign rights, jurisdiction and historic rights within the "dashed-line" in the SCS. When reviewing the status of some islands or rocks, the Tribunal held that the UNCLOS did not provide for a group of islands such as the Nansha Islands to generate maritime zones collectively as a unit.<sup>1</sup> Facing the Philippines' aggressive attacks, it is necessary for China to discuss, jurisprudentially, the status of the Nansha Islands as a group of islands (archipelago), and establish a regime of archipelago, so as to expose and criticize the Philippines' malicious intent to

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1 Eleventh Press Release, *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, p. 10, at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>, 21 March 2017.

fragmentize the Nansha Islands.

**Table 1 Features of the Nansha Islands Illegally Occupied by the Philippines**

Features of the Nansha Islands Illegally Occupied by the Philippines	Date of Occupation
Mahuan Island	11 September 1970
Feixin Island	September 1970
Zhongye Island	9 May 1971
Nanyao Island	14 July 1971
Beizi Island	30 July 1971
Xiyue Island	30 July 1971
Shuanghuang Shazhou	4 March 1978
Siling Reef	28 July 1980
Ren'ai Reef	May 1999

Source: LI Jinming, *South China Sea Dispute and the Law of the Sea*, Beijing: China Ocean Press, 2003, p. 8. (in Chinese)

## **I. Refutation Against the Philippines' Proposal to "Fragmentize" Some Islands in the *SCS Arbitration***

### *A. The Philippines Intended to Cut off, Using the UNCLOS as a Tool, the Link between the Sovereignty and Maritime Rights of the Nansha Islands, and Further to Totally Vitate China's Sovereignty in the SCS*

On 12 July 2016, the Tribunal released the final award for the *SCS Arbitration*. The Philippines raised 15 Submissions in the arbitral procedure. Among them, Submission No. 2 concerns China's "dashed-line" in the SCS. The Philippines alleged that China's claims to rights with respect to the maritime areas of the SCS encompassed by the "dashed line" were contrary to the UNCLOS, and therefore requested the Tribunal to decide that such claims were without lawful effect. In doing so, the Philippines attempted to fundamentally deny all of China's rights in the SCS. This submission is rather absurd, because the essence of the subject-matter of the arbitration was beyond the scope of the UNCLOS, which cannot be

invoked as the legal basis to settle the disputes between the Philippines and China.<sup>2</sup> The Preamble of the UNCLOS states: “establish through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans ... matters not regulated by this Convention continue to be governed by the rules and principles of general international law.” That is to say, since the UNCLOS contains no provisions concerning the dispute over territorial sovereignty, the settlement of disputes over islands should be governed by the rules of general international law. *Oppenheim’s International Law* notes, “Custom is the oldest and the original source of international law as well as of law in general.” And “*lex prospicit non respicit*” has become a rule of customary law for a long time, and was widely acknowledged in the international community. In accordance with general international law, the customary law will have a supremacy over the UNCLOS, if the two are in conflict.<sup>3</sup> The “dashed-line” was drawn 47 years earlier than the entry into force of UNCLOS. In line with the rule “*lex prospicit non respicit*”, current laws cannot be applied to govern and regulate previous conducts. China’s sovereignty over the Nansha Islands and historic rights to their adjacent waters are based on sufficient historical and jurisprudential evidences, which have also been widely recognized by the international community. Apart from that, the drawing of the “dashed-line” is not governed by the UNCLOS; it is a historical issue. Therefore, the Philippines’ claim that China’s “dashed line” was contrary to the Convention is not founded in law and fact.

Part V of the Notification and Statement of Claim of the Republic of the Philippines (hereinafter referred to as “Statement of Claim”) issued by the Philippines to China on 22 January 2013, articulated 13 Submissions that the Philippines requested the Tribunal to adjudicate. Submissions No. 10~13 concern the rights to the SCS waters, requesting the Tribunal to determine the Philippines’ entitlements to exclusive economic zone (EEZ) and continental shelf in the relevant waters of the SCS.<sup>4</sup> The entitlements to EEZ and continental shelf in the relevant waters of the SCS are derived from territorial sovereignty. However, the

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2 Eleventh Press Release, The South China Sea Arbitration (The Republic of the Philippines v. The People’s Republic of China), p. 6, at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>, 21 March 2017.

3 ZHENG Hailin, International Law Analysis of the *South China Sea Arbitration Case*, *Pacific Journal*, Vol. 24, No. 8, 2016, p. 4. (in Chinese)

4 Notification and Statement of Claim on West Philippine Sea, pp. 17~19, at <http://www.dfa.gov.ph/images/UNCLOS/Notification%20and%20Statement%20of%20Claim%20on%20West%20Philippine%20Sea.pdf>, 22 March 2017.

Philippines, through cutting off the link between the sovereignty and maritime rights of the Nansha Islands, directly asked the Tribunal to rule on its maritime entitlements. This request is inconsistent with the rule of “the land dominates the sea” on international law. In the judgment of the *North Sea Continental Shelf Case*, 1969, the International Court of Justice (ICJ) explicitly pointed out that, “the land dominates the sea” was a basic rule of international law, and the land was the legal source of the power which a State may exercise over territorial extensions to seaward. In other words, the sovereignty over an island or land is the basis for a State to enjoy the sovereign rights and maritime entitlements to waters at the vicinity of the island or land.<sup>5</sup> Traditional international law asserts several modes of acquiring territory as, occupation, cession, conquest, and accretion.<sup>6</sup> However, the ownership of an island cannot be obtained by acquisition of continental shelf or EEZ. Therefore, the request of the Philippines, which lacked the sovereignty over the Nansha Islands, to Tribunal to adjudicate on its rights to the relevant waters of SCS is ridiculous.

*B. The Philippines Alleged That the Archipelagic Doctrine Was Merely Applicable to Archipelagic States, and That Some Islands in the SCS Were Not Qualified as Islands under the UNCLOS, but “Rocks” or “Reefs” That Did Not Generate EEZ, Contiguous Zone, or Even Territorial Sea*

In accordance with the UNCLOS Part IV (Archipelagic States), an archipelagic State may draw straight archipelagic baselines based on the territorial sea base points of the archipelago. The breadth of its territorial sea, contiguous zone, EEZ and continental shelf shall be measured from archipelagic baselines. The sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines, described as archipelagic waters, where other States enjoy, among others, right of innocent passage and traditional fishing rights, upon the precondition that the sovereignty of the archipelagic State is respected.<sup>7</sup> The Philippines is a country whose territory mainly consists of islands. The exploration and exploitation

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5 Policy Research Office of State Oceanic Administration, *Collection of International Maritime Delimitation Treaties*, Beijing: China Ocean Press, 1989, p. 79. (in Chinese)

6 DU Hengzhi, *An Outline of International Law (I)*, Taipei: The Commercial Press, Ltd., 1971, pp. 216-217. (in Chinese)

7 UNCLOS, at <http://www.un.org/zh/law/sea/los/index.shtml>, 22 March 2017.

of marine resources is critical to the future development of the whole country. Considering its own state interests, the Philippines, together with Indonesia, proposed around 1958 to establish a combined regime specially for archipelagic States. It promulgated An Act to Define the Baselines of the Territorial Sea of the Philippines (1961 Republic Act No. 3046) on 17 June 1961, which states that all the waters around, between and connecting the various islands of the Philippine archipelago, irrespective of their width or dimension, have always been considered as necessary appurtenances of the land territory, forming part of the inland or internal waters of the Philippines.<sup>8</sup> That is to say, the Philippines delineated its territorial sea by using the Philippine archipelago as the center, and used 80 sections of straight baselines to draw the baseline from which the Philippine territorial sea was measured. In this sense, the Philippines is the first State which raised the theoretical concept of archipelago. At that time, the archipelagic doctrine has not been acknowledged by the international law or community. At one session of the Preparatory Committee for the Third United Nations Conference on the Law of the Sea (1973), four States – the Philippines, Fiji, Indonesia, Mauritius – jointly put forward the archipelagic doctrine, but they all objected to extending the application of the archipelago regime to the mid-ocean archipelagoes of continental States. Article 1 of the Draft Articles on Archipelago, which was proposed by them later, also stated that this Draft only applied to archipelagic States.<sup>9</sup> The Philippines and other archipelagic States held that the establishment of a regime for archipelagos would better protect their national security and economic interests, therefore, only archipelagic States have the objective need to apply the archipelago regime when drawing their territorial sea or EEZ. The UNCLOS of 1982 contains special provisions regarding the archipelago regime of archipelagic States, however, it did not expressly address the issue concerning the mid-ocean archipelagoes of continental States. It is, obviously, unreasonable for the Philippines to invoke the UNCLOS as the legal basis to support its claim that the archipelago regime did not apply to continental States. The reasons are listed as follows: firstly, the issue concerning the mid-ocean archipelagoes of continental States is a legal vacuum left

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8 Institute of International Oceanic Studies, *Selection of Marine Laws, Regulations and Agreements of China's Marine Neighbors*, Beijing: China Ocean Press, 1984, p. 60. (in Chinese)

9 Office for Ocean Affairs and the Law of the Sea, *Archipelagic States – Legislative History of Part IV of the United Nations Convention on the Law of the Sea*, New York: U.N. Publications, 1990, pp. 7~9.

by the UNCLOS, and the matters uncovered in the law should not be considered as the matters prohibited by law; secondly, a continental State's application of the archipelagic doctrine does not necessarily amount to a breach of the obligations or an abuse of rights under the UNCLOS, not to say a violation of the rules or principles of general international law. Since, geographically, the mid-ocean islands of continental States are no different from the islands of archipelagic States, the continental States may also, for political, economic and security concerns, require to apply the archipelagic doctrine to its mid-ocean islands, just like the archipelagic States.

Due to the complex topography of the SCS region, a great number of rocks are difficult to be defined as islands under the UNCLOS. As per Article 121(3), rocks disqualified as islands under UNCLOS are not entitled to EEZ or continental shelf. However, under the archipelago regime, a State may claim its sovereign rights based on a group of islands in its entirety, which consists of islands and their surrounding rocks. Additionally, under the archipelago regime, more waters, when applying archipelagic baselines, would be enclosed into archipelagic waters. In its Memorial, the Philippines defined the legal nature and status of each and every feature in the relevant waters of the SCS, and opposed continental States' application of archipelago regime, with a view to fragmentizing the whole Nansha Islands, from the perspective of analyzing the nature of some features. By doing so, it attempted to create a sovereignty vacuum in the SCS region, and undermine the integrity of China's territorial sovereignty. As a matter of fact, the Philippines had already treated the islands in the SCS as groups of islands. For example, in its Presidential Decrees No. 1596 (released on 11 June 1978) and No. 1599 (released on 15 July 1978), the Philippines declared a cluster of 33 islands, islets and cays as its territory, and stated that such area constituted as a distinct and separate municipality of the Province of Palawan and shall be known as "Kalayaan Island Group". On 10 March 2009, the Philippines adopted the Republic Act No. 9522 (i.e., An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baseline of the Philippines and for Other Purposes), which defined the baseline of territorial sea for "Kalayaan Island Group" and other islands.<sup>10</sup> When examining the Philippines' Submissions, the Tribunal was also aware of the unreasonableness in the Philippines' definition

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10 GUO Yuan, *Geopolitics and South China Sea Disputes*, Beijing: China Social Sciences Press, 2011, pp. 273~281. (in Chinese)

of the nature of some features of the Nansha Islands. “To the extent that a claim by the Philippines is premised on the absence of any overlapping entitlements of China to an exclusive economic zone or to a continental shelf, the Tribunal considers it necessary to consider the maritime zones generated by any feature in the South China Sea claimed by China, whether or not such feature is presently occupied by China.”<sup>11</sup>

*C. The Philippines Claimed Its “Rights and Interests in the SCS” by Defining the Nature of Some Features Individually, with an Actual Purpose to Avoid the Application of the Declaration Excluding Compulsory Procedures under the UNCLOS to the Dispute between China and the Philippines*

On 25 August 2006, China, in line with Article 298 of UNCLOS, delivered a declaration to the Secretary-General of the United Nations, excluding maritime disputes, such as those concerning sea boundary delimitations and historic rights, from compulsory arbitral procedures.<sup>12</sup> However, the Philippines, disregarding China’s declaration above, unilaterally filed a compulsory arbitration against China. As per the award of the *SCS Arbitration*, the Philippines requested, in Submissions No. 1~2, the Tribunal to decide that China’s “dashed line” was contrary to the UNCLOS and without lawful effect, and to further deny China’s sovereignty and relevant rights in the SCS; Submissions No. 3~7 relate to the determination of the legal status of Huangyan Island, Meiji Reef, Ren’ai Reef, Zhubi Reef, Ximen Reef, Nanxun Reef and other features.<sup>13</sup> These Submissions, *prima facie*, asked for protection of the rights and interests that the Philippines claimed in the SCS, but actually concerned the issue of maritime delimitation and the ownership of some features. The Philippines also made declarations under the UNCLOS. Article 4 of the Understanding Made upon Signature (10 December 1982) of the 1982 United Nations Convention on the Law of the Sea of the Philippines stated: “Such

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11 The Republic of the Philippines v. The People’s Republic of China, Award, 12 July 2016, para. 154, at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>, 24 March 2017.

12 China Delivered a Declaration Excluding Compulsory Procedures under Article 298 of the United Nations Convention on the Law of the Sea, at <http://wcm.fmprc.gov.cn/pub/chn/gxh/zlb/tyfg/t270754.htm>, 24 March 2017. (in Chinese)

13 The South China Sea Arbitration, p. 5, at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>, 21 March 2017.

signing shall not in any manner impair or prejudice the sovereignty of the Republic of the Philippines over any territory over which it exercises sovereign authority, such as the Kalayaan Islands, and the waters appurtenant thereto.”<sup>14</sup> Apparently, the Philippines attempted, using the pretext to protect its legal rights in the SCS through defining the nature of some features in the SCS, to demonstrate that its initiation of the arbitration was for the purpose of settling its dispute with China concerning the SCS, which was not a territorial sovereignty dispute beyond the jurisdiction of the Tribunal. By doing so, the Philippines aimed to avoid both China’s and the Philippines’ declarations described above.

## II. China’s Position: the Nansha Islands Constitutes an Integral Archipelago

### *A. The Tribunal Cannot Deny the Integrity of the SCS Islands Based on Its Determination of Some Relevant Islands*

In the *SCS Arbitration*, the Philippines requested the Tribunal to determine the nature of Huangyan Island, Meiji Reef, Ren’ai Reef, Zhubi Reef, Nanxun Reef, Ximen Reef, Chigua Reef and Huayang Reef, respectively. The Submissions show the Philippines’ position towards the nature of some relevant features (see Table 2). The Philippines contended that the features which were decided as “low-tide elevations” could neither generate territorial sea, EEZ or continental shelf, nor acquire sovereignty through occupation or other means, and those decided as “rocks” could not generate EEZ or continental shelf. The Philippines intended to deny the integrity of the SCS Islands by breaking up the whole into parts, and further to deny China’s sovereignty and jurisdiction over the SCS Islands and the adjacent sea areas. In accordance with Article 13 of the UNCLOS, since low-tide elevations may be submerged at high tide, they cannot have territorial sea, EEZ or continental shelf as islands. That is to say, the UNCLOS neither specified that low-tide elevations were not territory, nor provided that the sovereignty over low-tide elevations cannot be acquired through occupation. It merely provided that the maritime entitlements of low-tide elevations were different from those of islands. In this case, even if a feature is defined as a low-tide elevation, it does not mean that

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14 WU Shicun ed., *Compilation of Documents on South China Sea Issues*, Haikou: Hainan Press, 2001, p. 234. (in Chinese)

China lost the territorial sovereignty over the feature. As far as “rocks” concern, a rock, under Article 121(3) of UNCLOS, is a special kind of islands. Since it cannot sustain human habitation or economic life of its own, a rock cannot generate EEZ or continental shelf, but it is entitled to territorial sea.<sup>15</sup> The UNCLOS failed to precisely define the rock and the condition of “sustaining human habitation or economic life of its own”, therefore, Chigua Reef and Huayang Reef cannot be defined as “rocks” in line with UNCLOS.

As per Article 46 of UNCLOS, archipelago should be natural features which form an intrinsic geographical, economic and political entity, or which historically have been regarded as such. Historically speaking, “Zhanghai” recorded in the *Yiwu Zhi* (Record of Foreign Matters), written by Eastern Han Yang Fu, refers to today’s SCS, which included the SCS Islands. In the Song Dynasty, Nansha and Xisha Islands got more vivid names: “Changsha”, “Qianli Changsha” and “Wanli Changsha” generally refer to Xisha Islands, and “Shitang”, “Qianli Shitang” and “Wanli Shitang” generally refer to Nansha Islands. Literatures and official documents thereafter also contain records about Xisha Islands and Nansha Islands. For example, in the Ming and Qing Dynasties, local chronicles of Guangdong Province enclosed “Qianli Changsha” and “Wanli Shitang” into the territory of the province.<sup>16</sup> It is not difficult to find from ancient Chinese documents that, China has, historically, always treated the SCS Islands as a whole, and named Xisha, Nansha, and other groups of islands in the SCS in their entirety.

Geographically, politically and economically, the SCS is a semi-enclosed marginal sea. The sea has over 200 features. According to their height difference with the sea level, these features can be divided into five categories: islands, cays, reefs, shoals and banks. Most of these features are submerged under water, with a few above the water. These islands, cays, reefs, shoals and banks are collectively called the “SCS Islands”. The seabed of the SCS is the basin of China. Continental shelves can only be found between the margin of the basin and its surrounding land. That is to say, the SCS Islands constitutes an independent geographical unit; Xisha, Zhongsha, Nansha and Dongsha Islands form, respectively, independent regions of their own, and have their own continental shelves. In this connection, the Nansha Islands mentioned in the Philippines’ Submissions, geographically, is a separate

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15 UNCLOS, at <http://www.un.org/zh/law/sea/los/index.shtml>, 22 March 2017.

16 YUAN Gujie, *The Theory and Practice of the International Maritime Delimitation*, Beijing: Law Press China, 2001, pp. 224~225. (in Chinese)

unit.<sup>17</sup> China first developed and managed the SCS Islands. Chinese fishermen had, as early as the Ming Dynasty, fished around and developed the SCS Islands. *Geng Lu Bu* (Manual of Sea Routes), a navigation guide which has been handed down by Hainan fishermen from generation to generation, records, among others, voyages and sailing directions from Hainan Island to Xisha and Nansha Islands. This book also demonstrates that China has developed the SCS Islands since the Ming and Qing Dynasties. In the 1970s, an investigation team of the Institute of Southeast Asian Studies, Xiamen University, found wells, huts, stone tablets and other things on Taiping Island, Zhongye Island, Nanwei Island and other features of the Nansha Islands, which were built by fishermen in the Ming and Qing Dynasties.<sup>18</sup> The governments of past dynasties have never stopped exercising sovereignty over and administrating the SCS Islands, and including Changsha and Shitang of the SCS Islands into the territory of China. Maps published after the establishment of the People's Republic of China also indicate that the SCS Islands belongs to China. Chinese government also made statements on numerous occasions, reiterating China's sovereignty over Nansha and Xisha Islands. In 1959, the Government of Hainan Administrative District of Guangdong Province, set up an administration office of Xisha, Nansha and Zhongsha Islands on Yongxing Island, responsible for exercising administrative jurisdiction over the SCS Islands. In 1988, Hainan Province included Xisha, Nansha and Zhongsha Islands as well as their adjacent waters into its jurisdiction. On 21 June 2012, upon the official approval of China State Council, the Sansha Office of Administration was replaced by prefecture-level Sansha City. The government office was located on Yongxing Island of Xisha Islands. It follows that the SCS Islands, both geographically and historically, constitutes, in essence, a geographical, economic and political entity.

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17 GUO Yuan, *Geopolitics and South China Sea Disputes*, Beijing: China Social Sciences Press, 2011, pp. 301~302. (in Chinese)

18 HAN Zhenhua ed., *Collection of the Historical Materials of the SCS Islands*, Shanghai: Orient Publishing Center, 1988, p. 519. (in Chinese)

**Table 2 The SCS Islands Involved in the Philippines' Submissions**

No.	Name of feature	Geographical coordinates	Current area (km <sup>2</sup> )	Geographical appearance	Nature of the feature that the Philippines requested the Tribunal to define
1	Huangyan Island	15°7'00" N 117°51'00" E	139	It is an atoll of the Zhongsha Islands.	Rock
2	Meiji Reef	9°54'00" N 115°32'00" E	46	It is open-mouth shaped.	Low-tide elevation
3	Ren'ai Reef	9°44'00" N 115°52'00" E	51.62	It is a clown-shoe-shaped coral atoll.	Low-tide elevation
4	Zhubi Reef	10°54'48" N 114°03'04" E	16.1	It is an almond-shaped reef.	Low-tide elevation
5	Nanxun Reef	10°12'50" N 114°14'00" E	1.85	It is roughly kidney-shaped. Another coral atoll named Xiaonanxun Reef is located 4.5 km at its southern side.	Low-tide elevation
6	Ximen Reef (Dongmen Reef)	9°54'00" N 114°28'00" E (Dongmen Reef: 9°54'35" N 114°29'50" E)	2.7 (Dongmen Reef: 2)	0.8 nautical miles apart, these two reefs look like two footprints.	Low-tide elevation
7	Chigua Reef	9°43'9" N 114°16'57" E	9.4	It looks like a wax gourd with a corner bitten off.	Rock

8	Huayang Reef	8°53'00" N 112°51'00" E	7.6	Looking like a laying eggplant, it is wide from east to west, and narrow from south to north.	Rock
9	Yongshu Reef	9°37'00" N 112°58'00" E	108	It is a quill-shaped reef.	Rock

Source: Baidu encyclopedia, Wikipedia, Google map and the Philippines' Memorial

## *B. Basis of International Law*

### **1. The Legal Basis Supporting That Straight Baselines and Historic Rights Are Applicable to Continental States**

The Government of Norway issued a royal decree on 12 July 1935, declaring that the waters four nautical miles northward of 66°28.8' N should be the Norwegian fisheries zone. In accordance with the decree, Norway drew its straight baselines joining 48 outermost points of its coasts and outermost land. The U.K. asserted that the method of straight baseline adopted by Norway was against the international law, and the drawing of such baselines would turn a part of the high seas into Norwegian fisheries zone. Both States had negotiated over the issue for several times, but such negotiations failed. Under this circumstance, the U.K. filed, in 1949, an application instituting proceedings before the ICJ against Norway. On 18 December 1951, the ICJ issued the judgment of the *Fisheries Case (United Kingdom v. Norway)*, stating that the northern coastal zone of Norway was of a very distinctive configuration; the coast line was broken by large and deeply indented fjords and bays; the coastal zone concerned included numerous islands, islets, and reefs, forming a group of islands known by the name of the “skjærgaard” in Norway; there was no clear dividing line between land and sea of Norwegian coast; what really constituted the Norwegian coast line was the outer line of the “skjærgaard”. The ICJ held that the belt of territorial waters must follow the general direction of the coast; for the purpose of measuring the breadth of the territorial sea, the low-water mark was generally adopted in the practice of States, since this criterion was the most favourable to the coastal State and clearly showed the character of territorial waters as appurtenant to the land territory. However, the low-water mark was not permanent. The sinuosities of coasts added to the complexity of the application of the low-water mark rule. Where a coast was deeply indented and cut into, or where it was bordered by a series of islands, a more practical method should be applied in delimiting the waters, including territorial sea, which gave a simpler form to the belt of territorial waters. This method consisted of selecting appropriate points on the low-water mark and drawing straight lines between them. Therefore, the ICJ found that the baselines drawn by Norway were not contrary to the international law.<sup>19</sup>

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19 *Fisheries Case (United Kingdom v. Norway)*, pp. 127~130, at <http://www.icj-cij.org/docket/files/5/1809.pdf>, 28 March 2017.

The *Fisheries Case (United Kingdom v. Norway)* played an essential role in clarifying rules of international law regarding the existing methods to draw baselines. After the end of the *Fisheries Case*, the method of straight baselines adopted by Norway, which took into account special geographical conditions, but was different from conventional method of baselines, has been widely adopted by other States. C. F. Amerasinghe, the president of the Third United Nations Conference on the Law of the Sea, noted, “Although in the *Norwegian Fisheries Case* the Court was specifically considering only the questions of straight baselines for the purpose of measuring the territorial sea off a deeply indented coast and off a coast with archipelagoes, there were some general principles on the law of the territorial sea which it stated and which might prove of some assistance in regard to the problem of mid-ocean archipelagoes ... [the belt of territorial waters must follow] the general direction of the coast.”<sup>20</sup> The Convention on the Territorial Sea and the Contiguous Zone, one of the four conventions adopted in the First United Nations Conference on the Law of the Sea in 1958, clearly provides for, in Article 4, the method of drawing straight baselines for a fringe of islands along the coast. The judgment of the *Fisheries Case* could be said to serve as the basis for the method of straight baselines established in the Convention on the Territorial Sea and the Contiguous Zone. In the *Fisheries Case*, the ICJ also considered Norway’s historic rights in the waters under question, contending that local populations of Norway had made a living upon fishing in this area for hundreds of years. Therefore, the delimitation method adopted by Norway was consistent with the international law. This case can provide, on the international level, support to China’s claim to historic rights within the “dashed-line” in the SCS. The fact that China’s coast lines are broken and bordered by numerous islands, in the words of Jeanette Green Field, indicates that China can apply straight baselines, which seems to comply with the principle reflected in the *Fisheries Case*.<sup>21</sup> From the legal perspective, the UNCLOS merely provides for the archipelago regime for archipelagic States, without explicit provisions regarding the construction of the same regime for continental States. However, the ICJ judgment of the *Fisheries Case* and Article 4 of the Convention on the Territorial Sea and the Contiguous Zone provide the legal basis for continental States to adopt straight baselines to

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20 C. F. Amerasinghe, *The Problem of Archipelagoes in the International Law of the Sea, International and Comparative Law Quarterly*, Vol. 23, Issue 3, 1974, p. 544.

21 Jeanette Green Field, *China’s Practice in the Law of the Sea*, Gloucestershire: Clarendon Press, 1992, p. 72.

encircle their mid-ocean archipelagoes.

## **2. Practices Relating to Straight Baselines Adopted by Other Continental States to Encircle Their Mid-Ocean Archipelagoes**

Brownlee classified state practices into several categories, which include, among others, diplomatic instruments, policy statements, press releases, national legislation, international and domestic judicial precedents, treaties and other international instruments, as well as the resolutions of UN General Assembly concerning legal issues.<sup>22</sup> A collation of the documents in association with the mid-ocean archipelagic regime of some representative States (see Table 3) reveals: a) a great number of continental States had used straight baselines to encircle their mid-ocean archipelagoes before the entry into force of the UNCLOS, and some adopted the regime of mixed baselines; b) after the entry into force of the UNCLOS, these States kept their original legislation, or adopted new legislation, in accordance with the UNCLOS, to apply straight baselines to encircle their mid-ocean archipelagoes. All these demonstrate that continental States' adoption of straight baselines with respect to their mid-ocean archipelagoes has become stable state practices.

A number of States not only articulated in their national laws that they adopted straight baselines with respect to their mid-ocean archipelagoes, but also delivered notes to UN Secretary-General to ask for the same. On 9 March 2011 Ecuador sent a note to the UN Secretary-General asking to record and disseminate its Executive Decree No. 450 of 2 August 2010, which approved and ordered publication of Ministerial Agreement 0081 of 12 July 2010 and Nautical Chart IOA42. The attached map clearly showed Ecuador's straight baselines around its oceanic Galápagos Islands.<sup>23</sup> The maps attached in the Submission made by Portugal, in May 2011, on the outer limits of continental shelf beyond 200 nautical miles from the baselines, to the Commission on the Limits of the Continental Shelf (CLCS) clearly show that Portugal used both straight baselines and normal baselines in practice. The Gazetteer of India dated 11 May 2009 (No. 736) stated that straight baselines were applicable to Lakshadweep. On 29 January 2010, India deposited with the UN Secretary-General a list of geographical coordinates of points defining

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22 JIA Bingbing, *Public International Law: Its Interpretation and Application in Time of Peace*, Beijing: Tsinghua University Press, 2015, pp. 32–33. (in Chinese)

23 HONG Nong, LI Jianwei and CHEN Pingping, The Concept of Archipelagic State and the South China Sea: UNLCOS, State Practice and Implication, *China Oceans Law Review*, No. 1, 2013, p. 223.

**Table 3 Practices of Representative States Relating to the Establishment of Archipelago Regime**

Classification of baselines	Name of archipelago	Overview of regime	Relevant domestic laws and decrees
	Svalbard (Norway)	196 base points were selected around Svalbard Archipelago, which was divided into five parts. The baseline of territorial sea of the principal island of the archipelago was drawn separately. Other islands and reefs lying relatively far away from the principal island were not directly enclosed within the baseline of the principal island; instead, straight baselines were applied to them.	Regulations of 1 June 2001 Relating to the Limit of the Norwegian Territorial Sea around Svalbard (Royal Decree of 1 June 2001)
	The Galapagos Islands (Ecuador)	Straight baselines were applied with respect to the Galapagos Islands. 8 sections of straight baselines connecting 8 base points selected were drawn for the Galapagos Islands. The waters enclosed by the baselines were defined as internal waters.	1. Presidential Decrees of 1938 and 1951 2. Decree No. 256-CLP of 27 February 1970 3. Supreme Decree No. 959-A of 28 June 1971
Straight baselines	Canary Islands (Spain)	The whole Canary Islands was divided, in line with its geographical locations, into two parts: the eastern and western groups of islands. Baselines were drawn with respect to the eastern group of islands as a whole. As for the western group of islands, baselines were drawn with respect to each of the four archipelagoes (except La Gomera Island) individually.	Royal Decree No. 2510/1977 of 5 August 1977
	Falkland Islands (UK)	Straight baselines were applied to draw the baseline from which the breadth of the territorial sea of the Falkland Islands was measured. 21 sections of straight baselines connecting 22 base points selected were drawn for measuring the territorial sea of the Falkland Islands. These baselines were 362 nautical miles in total. Among them, top two longest sections of the baselines were 41.2 and 35 nautical miles, respectively.	Act of Falkland Islands, 1989

Kerguelen Islands (France)	31 sections of straight baselines connecting 32 base points selected were drawn for the Kerguelen Islands. The longest segment was up to 19.7 nautical miles.	Decree No. 78-112 of 1978
Lakshadweep (India)	When drawing the baseline of the territorial sea of an archipelago and making the relevant maritime claims, one should treat the archipelago as a whole, rather than disintegrate it into pieces. 13 base points were selected for measuring the territorial sea of the Lakshadweep Archipelago. The straight baselines connecting these points were around 560 nautical miles in total.	<ol style="list-style-type: none"> <li>1. Decree No. 80 of 28 May 1976</li> <li>2. Gazetteer of India dated 11 May 2009 (No. 736)</li> </ol>
Faroe Islands (Denmark)	10 base points were selected for measuring the territorial sea of the Faroe Islands. The method of using straight baselines together with normal baselines was adopted to delineate 12 nautical miles of territorial sea of the Faroe Islands.	<ol style="list-style-type: none"> <li>1. Decree No. 130 of 27 April 1959</li> <li>2. Decree No. 156 of 24 April 1963</li> <li>3. Act No. 200 of 7 April 1999</li> <li>4. Decree No. 240 of 30 April 2002</li> <li>5. Executive Order No. 306 of 16 May 2002</li> </ol>
Azores (Portugal)	The baseline of Azores was composed of normal baselines and straight baselines. The Azores Islands was divided into three parts, and 29 base points were selected for measuring its territorial sea. Straight baselines were applied to the three parts respectively.	Decree-Law No. 495/85 of 29 November 1985
Mixed baselines		

the baselines of Lakshadweep as well as its nautical chart.<sup>24</sup>

### **3. Relevant Provisions of China's Domestic Law and State Practices with Respect to the Xisha Islands**

The activities of the Chinese people on the Xisha Islands took place earlier than the adoption of the UNCLOS. China did not, in this connection, invoke UNCLOS Article 7 as the international legal basis. After the founding of the People's Republic of China, Chinese government promulgated in 1958 the Declaration of the Government of the People's Republic of China on China's Territorial Sea. The Declaration states that the breadth of the territorial sea of China shall be 12 nautical miles drawn by the method of straight baselines. This regime of territorial sea applies to Taiwan and SCS Islands. It confirmed, through government statements, that China had owned the SCS Islands and its adjacent waters since ancient times. In 1973, Chinese delegation sent the Working Paper on Sea Area within National Jurisdiction to the United Nations Sea-Bed Committee, which stated that "a group or a fringe of islands that are relatively close to each other may be considered as a single entity when drawing territorial seas."<sup>25</sup> In 1992, Chinese government formulated the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone. Article 2 of the Law enumerates the archipelagoes and islands belonging to China. It reiterates and confirms, through legislation, that the SCS Islands forms an inherent part of Chinese territory. Further, it paved the way legally for the drawing of the baselines of the territorial sea surrounding the Nansha Islands. On 15 May 1996, China promulgated the Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea, announcing the baselines of part of its territorial sea adjacent to the mainland and those of the territorial sea adjacent to its Xisha Islands. Part 2 of the Declaration marked 28 base points of the territorial sea around the Xisha Islands. That is to say, China treats the Xisha Islands as an integrated whole. The baseline of the territorial sea adjacent to the Xisha Islands is composed of straight baselines connecting the base points selected for this group of islands.

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24 M.Z.N.76.2010.LOS of 17 February 2010, at [http://www.un.org/Depts/los/LEGISLATION ANDTREATIES/PDFFILES/mzn\\_s/mzn76ef.pdf](http://www.un.org/Depts/los/LEGISLATION_ANDTREATIES/PDFFILES/mzn_s/mzn76ef.pdf), 29 April 2017.

25 ZHAO Lihai, On Some Legal Issues Relating to the SCS Islands, *Law and Social Development*, No. 4, 1995, pp. 56-57. (in Chinese)

### **III. Significances of Establishing a Mid-Ocean Archipelagic Regime in the SCS**

#### *A. To Delineate the Maritime Zones of a Group of Islands in Its Entirety, Making China's Sovereignty Clear in the SCS*

The islands and reefs scattered in the SCS are great in number. Take the most controversial Nansha Islands for example. Although the features in the Nansha Islands are large in number, only 36 of them are above water at ordinary times, and merely 25 are above water at high tide. A feature of the Nansha Islands, if defined individually, will be difficult to meet the standard of “island” under Article 121 of the UNCLOS. It would further lead the international community to challenge the legal status of the feature, and reduce the jurisdictional waters of China in the SCS. In other words, it would be difficult for the feature to have its own EEZ, continental shelf, and even territorial sea. If baselines are drawn separately for each and every feature in the SCS, the territorial sea of China in the SCS would be carved up. In that case, territorial sea would overlap with the high seas, and the scope of China's sovereignty in the SCS would further be blurred. Therefore, to establish a regime of mid-ocean archipelago in the SCS has far-reaching impacts and significances. Specifically, China should treat the SCS Islands as several separate groups of islands, and then draw the baseline of the territorial sea for each group of islands in its entirety by connecting the base points selected. By doing so, China may change the embarrassing position of a feature in a sovereignty dispute, but also clarify the scope of China's sovereignty in the SCS.

#### *B. To Effectively Settle the Dispute Between the Philippines and China in the SCS*

The Sino-Philippine dispute in the SCS mainly concerns the sovereignty of some features and maritime delimitation. The baselines of the Philippine territorial sea were drawn in accordance with the archipelagic doctrine. All the waters centering the Philippine archipelago, which lie beyond the outermost islands of the Philippine archipelago but within the treaty boundary, are called the Philippine territorial sea. The “treaty boundary” means the outer limits of the Philippine territorial sea consisting of all the waters mentioned in the Treaty of Paris of 1898 between Spain and the United States, the Treaty of Washington (1900) between

Spain and the United States, and the Convention between the United States and Great Britain (1930). The method that the Philippines employed to draw the baselines of its territorial sea would turn a large area of the high seas lying between the islands of the Philippine Archipelago into its jurisdictional waters, and turn the waters enclosed by the baselines into its internal waters. Additionally, the Philippines passed legislation regarding the archipelagic baselines, and drew its EEZ and continental shelf from the baselines. By doing so, the Philippines included 33 of Chinese islands, reefs, shoals and banks in the Nansha Islands into its insular territory, which, in turn, made the outer limits of its EEZ intrude into the traditional boundary line of China. In order to protect its alleged “sovereignty in the SCS”, the Philippines, on the one hand, opposed the establishment of an archipelagic regime by continental States, like China, for their mid-ocean archipelagoes, on the pretext that the archipelagic regime applied only to archipelagic States and the UNCLOS failed to provide that this regime was applicable to continental States. On the other hand, the Philippines proposed to determine the nature of some features in the SCS individually. If some of these features are defined as rocks or low-tide elevations, it would have great impacts on the maritime delimitation between China and the Philippines. Specifically, China may not claim EEZ and continental shelf for these features, if they are defined as rocks or low-tide elevations. The Philippines attempted to, through denying the entirety of the SCS Islands, limit or reduce the scope of China’s sovereignty in the SCS, and “legitimize” its illegal occupation of some features in the SCS. Although the UNCLOS did not express that continental States may draw archipelagic baselines, it did not also deny the continental States of their right to construct an archipelagic regime for their mid-ocean archipelagoes. That is to say, continental States may possibly draw straight baselines for their distant archipelagoes. The waters enclosed by the baselines should be internal waters or territorial sea, rather than archipelagic waters. China may also use the method of straight baselines to draw the archipelagic baselines with respect to its groups of islands in the SCS. Under the archipelagic regime, a string of rocks, reefs, islands, and other features forms an archipelago, which should be treated as a whole in maritime delimitation. Therefore, by establishing a mid-ocean archipelagic regime, China may exercise absolute sovereignty over the SCS Islands, and further foil the Philippines’ plot to occupy the SCS Islands of China.

*C. To Break Through the Island Chain Blockade  
Set by the United States*

The geographical location of the SCS is of great importance. It is not only a key sea passage connecting Indian Ocean and Pacific Ocean, but also a vital transportation hub connecting Oceania with the continent of Asia. The “island chain strategy” prepared by the United States constitutes an essential part of its Asia-Pacific strategy. The island chain, in line with the marine topographic features of the Asia-Pacific region, is divided into first and second island chains. The “island chain strategy” is designed to block the sea passage of China, Russia and other States. The SCS, a vital pivot on the first island chain, together with the Korea Peninsula, forms the so-called “crescent defensive line”, which was devised to obstruct China at the sea. Consequently, the SCS holds a very important position in the “island chain strategy” of the United States. If the SCS is not under the control of China, the United States may completely contain China within the first island chain; otherwise, the “crescent defensive line” would be no longer in existence, the “island chain strategy” made by the United States would fail, and the United States would be compelled to retreat to the second island chain with respect to its defence in the Asia-Pacific region. The Philippines, as a State with weak comprehensive national power, tried every means to persuade great powers outside the region to intervene in the SCS disputes, with a view to protecting its alleged “sovereignty” in the SCS, and achieving its strategic goal in the region. The United States supported the Philippines’ occupation of China’s islands and reefs in the SCS, with the purpose to contain China through the hands of the Philippines, to deny China’s sovereignty in the SCS region, and further to safeguard its “island chain strategy”. Additionally, the majority of the raw materials imported from the Asian-Pacific region are shipped to the United States through the sea routes in the SCS. The destruction of these routes would affect the economic development of the United States, and hinder the import of most oil and gas to Japan. Therefore, the United States repeatedly claimed that its main concern in the SCS region was to keep the international waterway in the region unobstructed. In response to that, the Chinese government had, on many occasions, expressed that China’s protection of its sovereignty over the Nansha Islands and the relevant maritime entitlements would not prejudice the freedom of navigation and overflight enjoyed by foreign ships or aircraft under international law.

If a mid-ocean archipelagic regime is constructed in the SCS, China may,

when drawing the baselines of territorial sea and claiming the relevant maritime entitlements, treat each of certain groups of islands in the SCS as a whole. By doing so, China could effectively refute the Philippines and the United States, which denied and challenged China's sovereignty in the SCS by taking advantage of the vacuum left by the UNCLOS. In the meantime, China may, by reference to the provisions of the UNCLOS, design right of innocent passage and right of archipelagic sea lanes passage in relevant waters. The sea lanes designated by China for the free passage of foreign ships are, certainly, lanes suitable for safe navigation, which are decided by the sovereign State after comprehensive considerations. China's management and maintenance of these lanes would help ensure the safety of international navigation. In other words, it would guarantee China's absolute sovereignty in the region, and also ensure the free passage and safety of foreign ships in the region. In a word, to establish a mid-ocean archipelagic regime in the SCS would not only protect China's sovereignty in the SCS region, but also break the island chain blockage set up by the United States.

*D. To Advance the Development of the Current Rules  
of the Law of the Sea*

More than three decades have passed since the adoption of the UNCLOS in 1982. The UNCLOS established the basic legal framework for the exploitation and management of internal waters, territorial sea, contiguous zone, continental shelf, EEZ and other marine areas. However, its provisions concerning the archipelagic regime are suffered from defects, since this regime is a result of compromises. Due to the objections from some States, the controversies over the mid-ocean archipelagoes of continental States were put off during the draft of the text of the Convention. As many publicists honestly noted, that the UNCLOS avoided to addressing the question whether the archipelagic regime should be applicable to the mid-ocean archipelagoes of continental States was decided by the influences of political and diplomatic factors.<sup>26</sup> An increasing number of States have applied the straight baselines to draw the waters of their mid-ocean archipelagoes. Nevertheless, the UNCLOS still inflexibly sticks to the consensus reached in 1982, and failed

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26 BU Lingjia and HUANG Jingwen, The Issue Concerning the Continental States' Application of Straight Baselines to Their Distant Archipelagoes, *Sun Yat-sen University Law Review*, No. 2, 2013, p. 110. (in Chinese)

to, in line with state practices and the change of international customs, timely adjust itself. For the sake of its national interests, the Philippines construed the UNCLOS in bad faith, derogating from the principles and spirit of the Convention. Making use of the compromises found in and the lagging nature of the UNCLOS, the Philippines sought the legal basis from international law (the UNCLOS) to support its occupation of China's islands in the SCS, which further escalated the disputes in the SCS. Laws, under most cases, may gradually (but not fundamentally) change on the basis of existing conventions. Some values and concepts, which were originally expressed by soft laws without binding force, may later affect public opinions, political agendas and fill up the gap of treaty law. Apparently, States are not able to negotiate formally over all emerging issues relating to the oceans and seas, as such, the amendment mechanism well designed under the UNCLOS<sup>27</sup> will be difficult to be put into use. In this case, the adoption of new regional or global treaties addressing such issues, as well as state and intergovernmental practices with respect to such issues, would push the creation of new rules of the law of the sea. China should apply the mid-ocean archipelagic regime of continental States, which was derived from the regime of archipelagic State, to its SCS Islands. In doing so, China does not merely focus on its sovereignty and sovereign rights in the SCS area; instead, it endeavors to find the root causing the fierce conflicts in the SCS, and then explore practicable solutions based on it. China should, under the legal framework of mid-ocean archipelagoes, work on its initiative to cooperate with the States concerned to peacefully settle their disputes in the SCS, and further to contribute to the development of the rules of the law of the sea.

#### **IV. Suggestions on the Construction of an Archipelagic Regime for the Nansha Islands Involved in the Sino-Philippine Arbitration**

##### *A. Drawing of the Baselines of the Nansha Islands*

The baselines of the Nansha Islands should be drawn by using the method of straight baselines, which is generally adopted in the practice of States. The Nansha Islands is eligible for applying the straight baselines on the following

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27 UNCLOS, Articles 155, 312~314, at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm), 22 March 2017.

grounds. Firstly, geographically speaking, in accordance with the ICJ judgment of *Norwegian Fisheries Case*, the method of straight baselines is applied where a coast was deeply indented and cut into, or where it was bordered by a fringe of islands; the Nansha Islands consisting of many features is sinuous in configuration, therefore it meets the condition “where a coast was deeply indented and cut into”. Secondly, the ICJ asserted that the belt of territorial waters must follow the general direction of the coast. The sea areas lying within the baselines should be sufficiently closely linked to the land domain to be subject to the regime of internal waters. In this connection, China’s application of the straight baselines to the Nansha Islands shows, precisely, its respect to the natural configuration of the coasts and features of the Nansha Islands, as well as the full consideration to the geographic direction of the Nansha Islands. Thirdly, the Philippines’ request to define the nature of each and every feature in the Nansha Islands individually in the *SCS Arbitration*, as a matter of fact, ignored the integrity of the Nansha Islands. The islands, reefs, shoals and banks constituting the Nansha Islands, as well as the adjacent waters, have formed an intrinsic geographical, economic and political entity, or historically have been regarded as such.<sup>28</sup> The Nansha Islands has been considered as a single entity, which has also been acknowledged by the academia of international law and the international community. Currently, the baselines of mid-ocean archipelagoes that have been published were drawn following the principle of integrity. In this regard, China also confirmed, through legislation, the integrity of a group of islands in the Working Paper on Sea Area within National Jurisdiction.<sup>29</sup> The Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone, adopted on 25 February 1992, reconfirmed that the method of straight baselines was applied to draw the baselines of the groups of islands in the SCS.

With regards to the reasonable application of the straight baselines, if the Nansha Islands is treated as a whole, and its baselines are drawn by the method of straight baselines joining the appropriate points around the outermost features of the Nansha Islands, the sea areas enclosed by the baselines may possibly become too large. This would affect the maritime interests of other States bordering the

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28 ZHENG Yuchen, *The Evolution of the Regime of Mid-Ocean Archipelago of Continental States and Its Implication for China’s South China Sea Islands* (Master Dissertation), Beijing: China Foreign Affairs University, 2016, p. 34. (in Chinese)

29 Article 1(6) of the Working Paper on Sea Area within National Jurisdiction states: “a group or a fringe of islands that are relatively close to each other may be considered as a single entity when drawing territorial seas.”

SCS, such as the freedom of navigation and the exploitation of marine resources, and then invite their criticism. Although the Nansha Islands should be treated as a single entity, due to the large number of features in this group of islands and its complex situation, this group of islands should be subdivided into smaller groups when drawing baselines; additionally, not all the waters enclosed by the baselines should be defined as “internal waters”.

*B. To Fully Prepare Legally for the Establishment of an Archipelagic Regime, and to Follow the Trend of Protecting Maritime Rights and Interests Through Laws*

The law of the sea serves as the basis for balancing the maritime rights and interests among different States. The UNCLOS set out the legal framework for the management and exploitation of the oceans and seas. Under the current circumstance where an increasing number of States tend to protect their maritime rights and interests through laws, the marine disputes between States can hardly be settled without a complete legal system of the sea. Apart from that, the UNCLOS is not a static legal system; instead, it needs to be improved in practice. China must follow the trend to protect its own maritime rights and interests through laws. Since the UNCLOS is the “constitution of the oceans” agreed by States upon negotiations, it inevitably contains provisions resulting from compromises. Taking into account the interests of all the parties concerned, the UNCLOS laid out some ambiguous provisions, which could be interpreted by States from different standpoints for their own interests. Hence, China needs to put more efforts into the research and application of the UNCLOS, striving to make full use of the legal regimes under the UNCLOS in practice. For example, China should do further research into the legal status of the “dashed line” in the SCS, and ascertain China’s historic title in the relevant waters. It should find convincing grounds from jurisprudence, seeking to pacifically settle its disputes with other States. China’s legal system with respect of the seas and oceans, although established preliminarily, is problematic and deficient. For example, the Declaration of the Government of the People’s Republic of China on the Baselines of the Territorial Sea, 1996, announced the baselines of part of its territorial sea adjacent to the mainland and those of the territorial sea adjacent to its Xisha Islands, and stated that the Chinese government would announce the remaining baselines of China. Nonetheless, after two decades, China still has not declared the baselines of its territorial sea

from Haiyang Island to Chengshantou Cape, nor the baselines encircling other groups of islands in the SCS. In contrast, many continental States with mid-ocean archipelagoes had enacted the relevant laws before the adoption of the UNCLOS. Therefore, the lagging of China's marine legislation is quite obvious. However, the implementation and performance of the UNCLOS depends on the construction of the pertinent national legal system. In other words, the success of the UNCLOS depends, to a great extent, on the level of legal construction of States. In recent years, the marine landscape and interests, both on the national and international level, changed immensely. Facing new situation and new problems, China should adopt national laws to improve and clarify the equivocal, vague or even defective provisions of the UNCLOS, such as the mid-ocean archipelagic regime for continental States. China should set up such a complete legal system of the sea that it may have laws to follow in the exploration and exploitation of the seas and the protection of its marine rights and interests, and that it may maximally protect its sovereignty over the SCS Islands. Aside from that, China should also actively participate in the discussion on and formulation of the international regulations concerning the oceans and the seas organized by the United Nations. It should take the initiative to attend international academic symposiums, with the aim to make its standpoints understood, and make such international regulations reflect China's reasonable claims of rights.

### *C. The Strategy That China Should Adopt in Its Dispute with the Philippines in the SCS under New Circumstances*

The Philippines has always had severe dispute with China over the sovereignty of some features in the SCS. In recent years, the Philippines, supported by extraterritorial powers, challenged China continuously on the SCS issue. On 30 June 2016, Duterte was elected as the new president of the Philippines. After taking office, Duterte, reversing the pro-American policies pursued by the Aquino III administration, pursued a foreign policy independent of the United States. He harbored no hope of solving the SCS dispute through international arbitration, although he also acknowledged the result of the *SCS Arbitration*. Duterte repeatedly stressed that the Philippines would not open fire with China, and it was willing to jointly explore the oil and gas resources in the SCS with China through joint ventures. He also expressed its welcome for China to assist

the Philippines in improving its infrastructures.<sup>30</sup> Although it is not possible for the Duterte administration to distance itself from the United States, it changed its strategy, aiming to restore its relationship with China without offending the United States. That is to say, it endeavors to obtain the benefits from both sides: to get the security guarantee provided by the United States on the one hand, and to take a free ride in the express train of China in economic development on the other hand.<sup>31</sup> During President Duterte's visit to China last October, the two heads of State reached the important consensus to properly handle the SCS issue, taking the two sides back to the right track of properly handling the SCS issue through dialogue and consultation.<sup>32</sup> The Joint Statement of the People's Republic of China and the Republic of the Philippines specially discussed the SCS issue. Its Article 40<sup>33</sup> articulates that the territorial and jurisdictional disputes should be addressed by sovereign States directly concerned by peaceful means through friendly consultations and negotiations. It amounts to a further consolidation of the official positions of both States through government documents. It implies that, currently, there is room for change in the Sino-Philippine relations. However, under current circumstance, it is still difficult for the two States to reach an agreement within a short period, due to their great differences over sovereignty issues. And cooperation between the two would never take place if cooperation can only be carried out after the resolution of their dispute. Comparatively speaking, "shelving differences and seeking joint development" can be used as a feasible solution to their dispute in the SCS for the time being. China should reconsider this strategy in the new situation.

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30 Duterte Favors Making Deal with China over Dispute, at <http://globalnation.inquirer.net/138487/duterte-favors-making-deal-china-dispute>, 31 March 2017.

31 ZHANG Jie, The South China Sea Game: U.S. – Philippines Military Alliance and Sino-Philippine Relations Adjustment, *Pacific Journal*, No. 7, 2016, p. 33. (in Chinese)

32 Foreign Ministry Spokesperson Lu Kang's Regular Press Conference on 30 March 2017, at [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2511\\_665403/t1450255.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1450255.shtml), 30 May 2017.

33 Joint Statement of the People's Republic of China and the Republic of the Philippines, Article 40, "Both sides exchange views on issues regarding the South China Sea. Both sides affirm that contentious issues are not the sum total of the China-Philippines bilateral relationship. Both sides exchange views on the importance of handling the disputes in the South China Sea in an appropriate manner. Both sides also reaffirm the importance of maintaining and promoting peace and stability, freedom of navigation in and overflight above the South China Sea, addressing their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the Charter of the United Nations and the 1982 UNCLOS."

First, China should facilitate the concretizing of the principle of “shelving differences and seeking joint development”. The Declaration on the Conduct of Parties in the South China Sea (DOC), in a sense, embodies this principle. However, this declaration is not legally binding, and lacks concrete and implementable provisions. In this case, States would, in line with the requirements of their national interests, construe the DOC differently or raise varying claims based on it. Article 41 of the Joint Statement of the People’s Republic of China and the Republic of the Philippines, 2016, states, “Both sides commit to the full and effective implementation of DOC in its entirety, and work substantively toward the early conclusion of a Code of Conduct in the South China Sea (COC) based on consensus.”<sup>34</sup> The COC is a framework used to implement the DOC. The Joint Statement of the People’s Republic of China and the Republic of the Philippines fully shows that the two States sincerely exchanged views on issues regarding the SCS, and agreed to appropriately handle these issues through peaceful and friendly negotiations. With respect to the issue of the Nansha Islands, joint development, on the condition that the dispute over the sovereignty of some features is shelved, is a kind of cooperation conducted in the interim period prior to the completion of maritime delimitation between the two States, without prejudice to the positions of both sides on sovereignty and legal issues. China and the Philippines need to conclude agreements to jointly explore and exploit the mineral resources in the areas riddled with sovereignty disputes and share the incomes incurred therefrom. In the waters around the Nansha Islands which are rich in oil and gas but free from disputes, China should, with the least delay, embark on exploration and exploitation work, and build oil drilling and production platforms, so as to showcase its presence in the area and pave the way for subsequent state practice.<sup>35</sup> China still insists on its sovereignty over the SCS Islands, and always keeps an eye and studying on the SCS issues, seeking to peacefully settle its dispute with the Philippines in the SCS at an early date, in a stable, harmonious and pleasant atmosphere where both States

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34 Joint Statement of the People’s Republic of China and the Republic of the Philippines, Article 41, “ Both sides recall the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC) and the Joint Statement of the Foreign Ministers of ASEAN Member States and China on the Full and Effective Implementation of the DOC adopted in Vientiane on 25 July 2016. Both sides commit to the full and effective implementation of DOC in its entirety, and work substantively toward the early conclusion of a Code of Conduct in the South China Sea (COC) based on consensus.”

35 XUE Guifang, *Blue Game: A Great Game with Respect to the Protection of China’s Maritime Rights and Interests*, Beijing: China University of Political Science and Law Press, 2015, p. 265. (in Chinese)

trust each other.

Second, China should make great efforts to eliminate the barriers preventing the principle of “shelving differences and seeking joint development” from implementing. On the SCS issues between China and the Philippines, information asymmetry constitutes the biggest obstacle preventing the principle from implementing. Both parties are on guard against each other, leading to fiercer conflicts and confrontations. In that case, both parties failed to shelve their dispute, but even created more disputes. They exploited the resources in the area separately. The resolution of the Sino-Philippine dispute in the SCS needs the establishment and maintenance of a smooth communication channel. In accordance with Article 42 of the Joint Statement of the People’s Republic of China and the Republic of the Philippines, 2016,<sup>36</sup> the two States would create a bilateral consultation mechanism, where the two would meet regularly on issues concerning the SCS, and they also agreed to explore other areas of cooperation. The establishment of such a consultation mechanism would help the two sides better understand each other’s position and views towards the SCS issues, and actively interact with each other. They would narrow their differences through dialogues, and further reduce the risk of strategic miscalculation. In a word, the national interests of the States would be maximally reached if their dispute can be settled through negotiations.

## V. Conclusions

Since the occurrence of the Huangyan Island Event in April 2012, the Philippine government spread the word that it would submit the event to the International Tribunal for the Law of the Sea for adjudication, with a view to internationalizing the SCS dispute, and winning the support of international public opinion. In the meantime, the Philippines, by defining the nature of some features in the Nansha Islands individually, attempted to fragmentize China’s four groups of islands in the SCS, and further to deny China’s sovereignty and jurisdiction in

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36 Joint Statement of the People’s Republic of China and the Republic of the Philippines, Article 42, “Both sides agree to continue discussions on confidence-building measures to increase mutual trust and confidence and to exercise self-restraint in the conduct of activities in the South China Sea that would complicate or escalate disputes and affect peace and stability. In this regard, in addition to and without prejudice to other mechanisms, a bilateral consultation mechanism can be useful, which will meet regularly on current and other issues of concern to either side on the South China Sea. Both sides also agree to explore other areas of cooperation.”

the SCS region. As described above, it is well founded, both seen from precedents, state practice, and jurisprudence, that a continental State may establish a legal regime for its mid-ocean archipelagoes. Therefore, China should, with the least delay, create a legal regime for its mid-ocean archipelagoes in the SCS, so as to better protect its maritime rights and interests.

Translator: XIE Hongyue

## “一带一路”国际合作高峰论坛 圆桌峰会联合公报

(2017年5月15日)

1、我们，中华人民共和国主席习近平、阿根廷总统马克里、白俄罗斯总统卢卡申科、智利总统巴切莱特、捷克总统泽曼、印度尼西亚总统佐科、哈萨克斯坦总统纳扎尔巴耶夫、肯尼亚总统肯雅塔、吉尔吉斯斯坦总统阿坦巴耶夫、老挝国家主席本扬、菲律宾总统杜特尔特、俄罗斯总统普京、瑞士联邦主席洛伊特哈德、土耳其总统埃尔多安、乌兹别克斯坦总统米尔济约耶夫、越南国家主席陈大光、柬埔寨首相洪森、埃塞俄比亚总理海尔马利亚姆、斐济总理姆拜尼马拉马、希腊总理齐普拉斯、匈牙利总理欧尔班、意大利总理真蒂洛尼、马来西亚总理纳吉布、蒙古国总理额尔登巴特、缅甸国务资政昂山素季、巴基斯坦总理谢里夫、波兰总理希德沃、塞尔维亚总理、当选总统武契奇、西班牙首相拉霍伊、斯里兰卡总理维克勒马辛哈于2017年5月15日出席在北京举行的“一带一路”国际合作高峰论坛圆桌峰会。我们也欢迎联合国秘书长古特雷斯、世界银行行长金墉、国际货币基金组织总裁拉加德出席。会议由中华人民共和国主席习近平主持。

### 时代背景

2、当前，世界经济深度调整，机遇与挑战并存。这是一个充满机遇的时代，各国都在追求和平、发展与合作。联合国2030年可持续发展议程为国际发展合作描绘了新蓝图。

3、在此背景下，我们欢迎各国积极开展双边、三方、区域和多边合作，消除贫困，创造就业，应对国际金融危机影响，促进可持续发展，推进市场化产业转型，实现经济多元化发展。我们高兴地注意到，各国发展战略和互联互通合作倡议层出不穷，为加强国际合作提供了广阔空间。

4、我们进一步认识到，世界经济面临诸多挑战，虽在缓慢复苏，但下行风险犹存。全球贸易和投资增长依然低迷，以规则为基础的多边贸易体制有待加强。各国特别是发展中国家仍然面临消除贫困、促进包容持续经济增长、实现可持续发展等共同挑战。

5、我们注意到，“丝绸之路经济带”和“21世纪海上丝绸之路”（“一带一路”倡议）能够在挑战和变革中创造机遇，我们欢迎并支持“一带一路”倡议。该倡议加强亚欧互联互通，同时对非洲、拉美等其他地区开放。“一带一路”作为一项重

要的国际倡议,为各国深化合作提供了重要机遇,取得了积极成果,未来将为各方带来更多福祉。

6、我们强调,国际、地区和国别合作框架和倡议之间沟通协调能够为推进互联互通和可持续发展带来合作机遇。这些框架和倡议包括:2030年可持续发展议程、亚的斯亚贝巴行动议程、非洲2063年议程、文明古国论坛、亚太经合组织互联互通蓝图、东盟共同体愿景2025、亚欧会议及其互联互通工作组、商旅驿站关税倡议、中国和中东欧国家合作、中欧海陆快线、中间走廊倡议、中国—东盟互联互通平台、欧盟东部伙伴关系、以平等、开放、透明为原则的欧亚伙伴关系、南美洲区域基础设施一体化倡议、东盟互联互通总体规划2025、欧亚经济联盟2030年经济发展基本方向、气候变化巴黎协定、跨欧洲交通运输网、西巴尔干六国互联互通议程、世界贸易组织贸易便利化协议等。

7、我们重申,在“一带一路”倡议等框架下,共同致力于建设开放型经济、确保自由包容性贸易、反对一切形式的保护主义。我们将努力促进以世界贸易组织为核心、普遍、以规则为基础、开放、非歧视、公平的多边贸易体制。

### 合作目标

8、我们主张加强“一带一路”倡议和各种发展战略的国际合作,建立更紧密合作伙伴关系,推动南北合作、南南合作和三方合作。

9、我们重申,在公平竞争和尊重市场规律与国际准则基础上,大力促进经济增长、扩大贸易和投资。我们欢迎推进产业合作、科技创新和区域经济一体化,推动中小微企业深入融入全球价值链。同时发挥税收和财政政策作用,将增长和生产性投资作为优先方向。

10、我们主张加强各国基础设施联通、规制衔接和人员往来。需要特别关注最不发达国家、内陆发展中国家、小岛屿发展中国家和中等收入国家,突破发展瓶颈,实现有效互联互通。

11、我们致力于扩大人文交流,维护和平正义,加强社会凝聚力和包容性,促进民主、良政、法治、人权,推动性别平等和妇女赋权;共同打击一切形式的腐败和贿赂;更好应对儿童、残疾人、老年人等弱势群体诉求;完善全球经济治理,确保所有人公平享有发展机遇和成果。

12、我们决心阻止地球的退化,包括在气候变化问题上立即采取行动,鼓励《巴黎协定》所有批约方全面落实协定;以平等、可持续的方式管理自然资源,保护并可持续利用海洋、淡水、森林、山地、旱地;保护生物多样性、生态系统和野生生物,防治荒漠化和土地退化等,实现经济、社会、环境三大领域综合、平衡、可持续发展。

13、我们鼓励政府、国际和地区组织、私营部门、民间社会和广大民众共同参与,建立巩固友好关系,增进相互理解与信任。

### 合作原则

14、我们将秉持和平合作、开放包容、互学互鉴、互利共赢、平等透明、相互

尊重的精神，在共商、共建、共享的基础上，本着法治、机会均等原则加强合作。为此，我们根据各自国内法律和政策，强调以下合作原则：

(1) 平等协商。恪守《联合国宪章》宗旨和原则，尊重各国主权和领土完整等国际法基本准则；协商制定合作规划，推进合作项目。

(2) 互利共赢。寻求利益契合点和合作最大公约数，兼顾各方立场。

(3) 和谐包容。尊重自然和文化的多样性，相信所有文化和文明都能够为可持续发展作贡献。

(4) 市场运作。充分认识市场作用和企业主体地位，确保政府发挥适当作用，政府采购程序应开放、透明、非歧视。

(5) 平衡和可持续。强调项目的经济、社会、财政、金融和环境可持续性，促进环境高标准，同时统筹好经济增长、社会进步和环境保护之间的关系。

### 合作举措

15、我们重申需要重点推动政策沟通、设施联通、贸易畅通、资金融通、民心相通，强调根据各国法律法规和相关国际义务，采取以下切实行动：

(1) 加强对话协商，促进各国发展战略对接，注意到“一带一路”倡议与第六段所列发展计划和倡议协调发展，促进欧洲、亚洲、南美洲、非洲等地区之间伙伴关系的努力。

(2) 就宏观经济问题进行深入磋商，完善现有多双边合作对话机制，为务实合作和大型项目提供有力政策支持。

(3) 加强创新合作，支持电子商务、数字经济、智慧城市、科技园区等领域的创新行动计划，鼓励在尊重知识产权的同时，加强互联网时代创新创业模式交流。

(4) 推动在公路、铁路、港口、海上和内河运输、航空、能源管道、电力、海底电缆、光纤、电信、信息通信技术等领域务实合作，欢迎新亚欧大陆桥、北方海航道、中间走廊等多模式综合走廊和国际骨干通道建设，逐步构建国际性基础设施网络。

(5) 通过借鉴相关国际标准、必要时统一规则体制和技术标准等手段，实现基础设施规划和建设协同效应最大化；为私人资本投资基础设施建设培育有利、可预测的环境；在有利于增加就业、提高效率的领域促进公私伙伴关系；欢迎国际金融机构加强对基础设施建设的支持和投入。

(6) 深化经贸合作，维护多边贸易体制的权威和效力；共同推动世界贸易组织第11次部长级会议取得积极成果；推动贸易投资自由化和便利化；让普通民众从贸易中获益。

(7) 通过培育新的贸易增长点、促进贸易平衡、推动电子商务和数字经济等方式扩大贸易，欢迎有兴趣的国家开展自贸区建设并商签自贸协定。

(8) 推动全球价值链发展和供应链联接，同时确保安全生产，加强社会保障体系；增加双向投资，加强新兴产业、贸易、工业园区、跨境经济园区等领域合作。

(9) 加强环境、生物多样性、自然资源保护、应对气候变化、抗灾、减灾、提高灾害风险管理能力、促进可再生能源和能效等领域合作。

(10) 加强通关手续等方面信息交流,推动监管互认、执法互助、信息共享;加强海关合作,通过统一手续、降低成本等方式促进贸易便利化,同时促进保护知识产权合作。

(11) 合作构建长期、稳定、可持续的融资体系;加强金融设施互联互通,创新投融资模式和平台,提高金融服务水平;探寻更好服务本地金融市场的机会;鼓励开发性金融机构发挥积极作用,加强与多边开发机构的合作。

(12) 为构建稳定、公平的国际金融体系作贡献;通过推动支付体系合作和普惠金融等途径,促进金融市场相互开放和互联互通;鼓励金融机构在有关国家和地区设立分支机构;推动签署双边本币结算和合作协议,发展本币债券和股票市场;鼓励通过对话加强金融合作,规避金融风险。

(13) 加强人文交流和民间纽带,深化教育、科技、体育、卫生、智库、媒体以及包括实习培训在内的能力建设等领域务实合作。

(14) 鼓励不同文明间对话和文化交流,促进旅游业发展,保护世界文化和自然遗产。

### **愿景展望**

16、我们携手推进“一带一路”建设和加强互联互通倡议对接的努力,为国际合作提供了新机遇、注入了新动力,有助于推动实现开放、包容和普惠的全球化。

17、我们重申,促进和平、推动互利合作、尊重《联合国宪章》宗旨原则和国际法,这是我们的共同责任;实现包容和可持续增长与发展、提高人民生活水平,这是我们的共同目标;构建繁荣、和平的人类命运共同体,这是我们的共同愿望。

18、我们祝贺中国成功举办“一带一路”国际合作高峰论坛。

## “一带一路”建设海上合作设想

(国家发展改革委、国家海洋局, 2017年6月20日)

2013年,中国国家主席习近平先后提出共建“丝绸之路经济带”和“21世纪海上丝绸之路”的重大倡议。2015年,中国政府发布《推动共建丝绸之路经济带和21世纪海上丝绸之路的愿景与行动》,提出以政策沟通、设施联通、贸易畅通、资金融通、民心相通为主要内容,坚持共商、共建、共享原则,积极推动“一带一路”建设,得到国际社会的广泛关注和积极回应。

为进一步与沿线国加强战略对接与共同行动,推动建立全方位、多层次、宽领域的蓝色伙伴关系,保护和可持续利用海洋和海洋资源,实现人海和谐、共同发展,共同增进海洋福祉,共筑和繁荣21世纪海上丝绸之路,国家发展和改革委员会、国家海洋局特制定并发布《“一带一路”建设海上合作设想》。

### 一、时代背景

海洋是地球最大的生态系统,是人类生存和可持续发展的共同空间和宝贵财富。随着经济全球化和区域经济一体化的进一步发展,以海洋为载体和纽带的市场、技术、信息等合作日益紧密,发展蓝色经济逐步成为国际共识,一个更加注重和依赖海上合作与发展的时代已经到来。“独行快,众行远”。加强海上合作顺应了世界发展潮流与开放合作大势,是促进世界各国经济联系更趋紧密、互惠合作更加深入、发展空间更为广阔的必然选择,也是世界各国一道共同应对危机挑战、促进地区和平稳定的重要途径。

中国政府秉持和平合作、开放包容、互学互鉴、互利共赢的丝绸之路精神,致力于推动联合国制定的《2030年可持续发展议程》在海洋领域的落实,愿与21世纪海上丝绸之路沿线各国一道开展全方位、多领域的海上合作,共同打造开放、包容的合作平台,建立积极务实的蓝色伙伴关系,铸造可持续发展的“蓝色引擎”。

### 二、合作原则

求同存异,凝聚共识。维护国际海洋秩序,尊重沿线国多样化的海洋发展理念,照顾彼此关切,弥合认知差异,求大同,存小异,广泛协商,逐步达成合作共识。

开放合作,包容发展。进一步开放市场,改善投资环境,消除贸易壁垒,促进贸易和投资便利化。增强政治互信,加强不同文明之间的对话,倡导包容发展、和谐共生。

市场运作,多方参与。遵循市场规律和国际通行规则,充分发挥企业的主体作用。支持建立多利益攸关方伙伴关系,推动各国政府、国际组织、民间社团、工商界等广泛参与海上合作。

共商共建,利益共享。尊重沿线国发展意愿,兼顾各方利益,发挥各方比较优势,共谋合作、共同建设、共享成果,促进发展中国家消除贫困,推动形成海上合作的利益共同体。

### 三、合作思路

以海洋为纽带增进共同福祉、发展共同利益,以共享蓝色空间、发展蓝色经济为主线,加强与21世纪海上丝绸之路沿线国战略对接,全方位推动各领域务实合作,共同建设通畅安全高效的海上大通道,共同推动建立海上合作平台,共同发展蓝色伙伴关系,沿着绿色发展、依海繁荣、安全保障、智慧创新、合作治理的人海和谐发展之路相向而行,造福沿线各国人民。

根据21世纪海上丝绸之路的重点方向,“一带一路”建设海上合作以中国沿海经济带为支撑,密切与沿线国的合作,连接中国—中南半岛经济走廊,经南海向西进入印度洋,衔接中巴、孟中印缅经济走廊,共同建设中国—印度洋—非洲—地中海蓝色经济通道;经南海向南进入太平洋,共建中国—大洋洲—南太平洋蓝色经济通道;积极推动共建经北冰洋连接欧洲的蓝色经济通道。

### 四、合作重点

围绕构建互利共赢的蓝色伙伴关系,创新合作模式,搭建合作平台,共同制定若干行动计划,实施一批具有示范性、带动性的合作项目,共走绿色发展之路,共依海繁荣之路,共筑安全保障之路,共建智慧创新之路,共谋合作治理之路。

#### (一) 共走绿色发展之路

维护海洋健康是最普惠的民生福祉,功在当代、利在千秋。中国政府倡议沿线国共同发起海洋生态环境保护行动,提供更多优质的海洋生态服务,维护全球海洋生态安全。

保护海洋生态系统健康和生物多样性。加强在海洋生态保护与修复、海洋濒危物种保护等领域务实合作,推动建立长效合作机制,共建跨界海洋生态廊道。联合开展红树林、海草床、珊瑚礁等典型海洋生态系统监视监测、健康评价与保护修复,保护海岛生态系统和滨海湿地,举办滨海湿地国际论坛。

推动区域海洋环境保护。加强在海洋环境污染、海洋垃圾、海洋酸化、赤潮监测、污染应急等领域合作,推动建立海洋污染防治和应急协作机制,联合开展海洋环境评价,联合发布海洋环境状况报告。建立中国—东盟海洋环境保护合作机制。在中国—东盟环境合作战略与行动计划框架下,推动开展海洋环境保护合作。倡议沿线国共同发起和实施绿色丝绸之路使者计划,提高沿线各国海洋污染防治能力。

加强海洋领域应对气候变化合作。推动开展海洋领域的循环低碳发展应用示范。中国政府支持沿线小岛屿国家应对全球气候变化,愿意在应对海洋灾害、海平面上升、海岸侵蚀、海洋生态系统退化等方面提供技术援助,支持沿线国开展海岛、海岸带状况调查与评估。

加强蓝碳国际合作。中国政府倡议发起 21 世纪海上丝绸之路蓝碳计划,与沿线国共同开展海洋和海岸带蓝碳生态系统监测、标准规范与碳汇研究,联合发布 21 世纪海上丝绸之路蓝碳报告,推动建立国际蓝碳论坛与合作机制。

## (二) 共创依海繁荣之路

促进发展、消除贫困是沿线各国人民的共同愿望。发挥各国比较优势,科学开发利用海洋资源,实现互联互通,促进蓝色经济发展,共享美好生活。

加强海洋资源开发利用合作。与沿线国合作开展资源调查、建立资源名录和资源库,协助沿线国编制海洋资源开发利用规划,并提供必要的技术援助。引导企业有序参与海洋资源开发项目。积极参与涉海国际组织开展的海洋资源调查与评估。

提升海洋产业合作水平。与沿线国共建海洋产业园区和经贸合作区,引导中国涉海企业参与园区建设。实施一批蓝色经济合作示范项目,支持沿线发展中国家发展海水养殖,改善生活水平,减轻贫困。与沿线国共同规划开发海洋旅游线路,打造精品海洋旅游产品,建立旅游信息交流共享机制。

推进海上互联互通。加强国际海运合作,完善沿线国之间的航运服务网络,共建国际和区域性航运中心。通过缔结友好港或姐妹港协议、组建港口联盟等形式加强沿线港口合作,支持中国企业以多种方式参与沿线港口的建设和运营。推动共同规划建设海底光缆项目,提高国际通信互联互通水平。

提升海运便利化水平。加强与有关国家的沟通协调,围绕规范国际运输市场、提升运输便利化水平等方面紧密合作。加快与有关国家在口岸监管互认、执法互

助、信息互换等方面的合作。

推动信息基础设施联通建设。共建覆盖 21 世纪海上丝绸之路的信息传输、处理、管理、应用体系以及信息标准规范体系和信息安全保障体系,为实现网络互联互通、信息资源共享提供公共平台。

积极参与北极开发利用。中国政府愿与各方共同开展北极航道综合科学考察,合作建立北极岸基观测站,研究北极气候与环境变化及其影响,开展航道预报服务。支持北冰洋周边国家改善北极航道运输条件,鼓励中国企业参与北极航道的商业化利用。愿同北极有关国家合作开展北极地区资源潜力评估,鼓励中国企业有序参与北极资源的可持续开发,加强与北极国家的清洁能源合作。积极参与北极相关国际组织的活动。

### (三) 共筑安全保障之路

维护海上安全是发展蓝色经济的重要保障。倡导互利合作共赢的海洋共同安全观,加强海洋公共服务、海事管理、海上搜救、海洋防灾减灾、海上执法等领域合作,提高防范和抵御风险能力,共同维护海上安全。

加强海洋公共服务合作。中国政府倡议发起 21 世纪海上丝绸之路海洋公共服务共建共享计划,倡导沿线国共建共享海洋观测监测网和海洋环境综合调查测量成果,加大对沿线发展中国家海洋观测监测基础设施的技术和设备援助。中国政府愿加强北斗卫星导航和遥感卫星系统在海洋领域应用的国际合作,为沿线国提供卫星定位和遥感信息应用与服务。

开展海上航行安全合作。中国政府愿承担相应的国际义务,参与双多边海上航行安全与危机管控机制,共同开展打击海上犯罪等非传统安全领域活动,共同维护海上航行安全。

开展海上联合搜救。在国际公约框架下,中国政府愿承担相应的国际义务,加强与沿线国信息交流和联合搜救,建立海上搜救力量互访、搜救信息共享、搜救人员交流培训与联合演练,提升灾难处置、旅游安全等海上突发事件的共同应急与行动能力。

共同提升海洋防灾减灾能力。倡议共建南海、阿拉伯海和亚丁湾等重点海域的海洋灾害预警报系统,共同研发海洋灾害预警报产品,为海上运输、海上护航、灾害防御等提供服务。支持南海海啸预警中心业务化运行,为周边国家提供海啸预警服务。推动与沿线国共建海洋防灾减灾合作机制,设立培训基地,开展海洋灾害风险防范、巨灾应对合作研究和应用示范,为沿线国提供技术援助。

推动海上执法合作。加强与沿线国对话,管控分歧,在双多边框架下推动海上执法合作,建立完善海上联合执法、渔业执法、海上反恐防暴等合作机制,推动构筑海上执法联络网,共同制定突发事件应急预案。加强与沿线国海上执法部门

的交流合作,为海上执法培训提供必要帮助。

#### (四) 共建智慧创新之路

创新是引领海洋可持续发展的源动力。深化海洋科学研究、教育培训、文化交流等领域合作,增进海洋认知,促进科技成果应用,为深化海上合作奠定民意基础。

深化海洋科学研究与技术合作。与沿线各国共同发起海洋科技合作伙伴计划,联合开展 21 世纪海上丝绸之路重点海域和通道科学调查与研究、季风—海洋相互作用观测研究以及异常预测与影响评估等重大项目。深化在海洋调查、观测装备、可再生能源、海水淡化、海洋生物制药、海洋食品技术、海上无人机、无人船等领域合作,加强海洋技术标准体系对接与技术转让合作,支持科研机构和企业共建海外技术示范和推广基地。

共建海洋科技合作平台。与沿线国共建海洋研究基础设施和科技资源互联共享平台,合作建设海洋科技合作园。推进亚太经合组织海洋可持续发展中心、东亚海洋合作平台、中国—东盟海洋合作中心、中国—东盟海洋学院、中国—东亚海环境管理伙伴关系计划海岸带可持续管理合作中心、中马海洋联合研究中心、中印尼海洋与气候中心、中泰气候与海洋生态系统联合实验室、中巴联合海洋研究中心、中以海水淡化联合研究中心等建设,共同提高海洋科技创新能力。

共建共享智慧海洋应用平台。共同推动国家间海洋数据和信息产品共享,建立海洋数据中心之间的合作机制和网络,共同开展海洋数据再分析研究与应用,建设 21 世纪海上丝绸之路海洋和海洋气候数据中心。共同研发海洋大数据和云平台技术,建设服务经济社会发展的海洋公共信息共享服务平台。

开展海洋教育与文化交流。继续实施中国政府海洋奖学金计划,扩大沿线国来华人员的研修与培训规模。推动实施海洋知识与文化交流融通计划,支持中国沿海城市与沿线国城市结为友好城市,加强与沿线国海洋公益组织和科普机构的交流与合作。弘扬妈祖海洋文化,推进世界妈祖海洋文化中心建设,促进海洋文化遗产保护、水下考古与发掘等方面的交流合作,与沿线国互办海洋文化年、海洋艺术节,传承和弘扬 21 世纪海上丝绸之路友好合作精神。

共同推进涉海文化传播。加强媒体合作,开展跨境采访活动,共建 21 世纪海上丝绸之路媒体朋友圈。创新传播方式,共同打造体现多国文明、融合多语种的媒介形态。携手开展涉海文艺创作,共同制作展现沿线各国风土人情、友好往来的文艺作品,夯实民意基础。

#### (五) 共谋合作治理之路

建立紧密的蓝色伙伴关系是推动海上合作的有效渠道。加强战略对接与对话磋商,深化合作共识,增进政治互信,建立双多边合作机制,共同参与海洋治理,为深化海上合作提供制度性保障。

建立海洋高层对话机制。与沿线国建立多层次、多渠道的沟通磋商与对话机制,推动签署政府间、部门间海洋合作文件,共同制定合作计划、实施方案和路线图,共同推动重大项目实施。推动建立 21 世纪海上丝绸之路沿线国高层对话机制,共同推动行动计划的实施,共同应对海洋重大问题。办好中国—小岛屿国家海洋部长圆桌会议、中国—南欧国家海洋合作论坛。

建立蓝色经济合作机制。设立全球蓝色经济伙伴论坛,推广蓝色经济新理念和实践,推动产业对接与产能合作。共同制定并推广蓝色经济统计分类国际标准,建立数据共享平台,开展 21 世纪海上丝绸之路沿线国蓝色经济评估,编制发布蓝色经济发展报告,分享成功经验。打造海洋金融公共产品,支持蓝色经济发展。

开展海洋规划研究与应用。共同推动制定以促进蓝色增长为目标的跨边界海洋空间规划、实施共同原则与标准规范,分享最佳实践和评估方法,推动建立包括相关利益方的海洋空间规划国际论坛。中国政府愿为沿线国提供海洋发展规划相关培训与技术援助,为制定海洋发展规划提供帮助。

加强与多边机制的合作。支持在亚太经合组织、东亚合作领导人系列会议、中非合作论坛、中国—太平洋岛国经济发展合作论坛等多边合作机制下,建立海洋合作机制与制度规则。支持联合国政府间海洋学委员会、东亚海环境合作伙伴、环印度洋联盟、国际海洋学院等发挥作用,共同组织推进重大计划和项目。

加强智库交流合作。推动沿线国智库对话交流,合作开展战略、政策对接研究,共同发起重大倡议,为共建 21 世纪海上丝绸之路提供智力支撑。中国政府支持国内智库与沿线国相关机构和国际性海洋组织建立战略合作伙伴关系,推动建立 21 世纪海上丝绸之路智库联盟,打造合作平台与协作网络。

加强民间组织合作。鼓励与沿线国民间组织开展海洋公益服务、学术研讨、文化交流、科技合作、知识传播等活动,推动民间组织合作与政府间合作相互促进,共同参与海洋治理。

## 五、积极行动

中国政府高度重视与有关国家的海上合作,加强战略沟通,搭建合作平台,开展了一系列合作项目,总体进展顺利。

高层引领推动。在中国与相关国家领导人的见证下,与泰国、马来西亚、柬埔寨、印度、巴基斯坦、马尔代夫、南非等国签署了政府间海洋领域合作协议、合作备忘录和联合声明,与多个沿线国开展战略对接,建立了广泛的海洋合作伙伴关

系。

搭建合作平台。在亚太经合组织、东亚合作领导人系列会议、中国—东盟合作框架等机制下建立了蓝色经济论坛、海洋环保研讨会、海事磋商、海洋合作论坛、中国—东盟海洋合作中心、东亚海洋合作平台等合作机制。相继举办 21 世纪海上丝绸之路博览会、21 世纪海上丝绸之路国际艺术节、世界妈祖海洋文化论坛等一系列以 21 世纪海上丝绸之路为主题的活动，对增进理解、凝聚共识、深化海上合作发挥了重要作用。

加大资金投入。中国政府统筹国内资源，设立中国—东盟海上合作基金和中国—印尼海上合作基金，实施《南海及其周边海洋国际合作框架计划》。亚洲基础设施投资银行、丝路基金对重大海上合作项目提供了资金支持。

推进内外对接。中国政府鼓励环渤海、长三角、海峡西岸、珠三角等经济区和沿海港口城市发挥地方特色，加大开放力度，深化与沿线国的务实合作。支持福建 21 世纪海上丝绸之路核心区、浙江海洋经济发展示范区、福建海峡蓝色经济试验区和舟山群岛海洋新区建设，加大海南国际旅游岛开发开放力度。推进海洋经济创新发展示范城市建设，启动海洋经济发展示范区建设。

促成项目落地。马来西亚马六甲临海工业园区建设加紧推进。巴基斯坦瓜达尔港运营能力提升，港口自贸区建设、招商工作稳步推进。缅甸皎漂港“港口+园区+城市”综合一体化开发取得进展。斯里兰卡科伦坡港口城、汉班托塔港二期工程有序推进。埃塞俄比亚至吉布提铁路建成通车，肯尼亚蒙巴萨至内罗毕铁路即将通车。希腊比雷埃夫斯港已建设成为重要的中转枢纽港。中国与荷兰合作开发海上风力发电，与印尼、哈萨克斯坦、伊朗等国的海水淡化合作项目正在推动落实。海底通信互联互通水平大幅提高，亚太直达海底光缆（APG）正式运营。中马钦州—关丹“两国双园”、柬埔寨西哈努克港经济特区、埃及苏伊士经贸合作区等境外园区建设成效显著。

展望未来，中国政府愿用信心和诚意与沿线各国共同推进“一带一路”建设海上合作，共享机遇，共迎挑战，共谋发展，共同行动，珍爱共有海洋，守护蓝色家园，共同推动实现 21 世纪海上丝绸之路的宏伟蓝图。

# AGREEMENT ON ENHANCING INTERNATIONAL ARCTIC SCIENTIFIC COOPERATION

(Arctic Council, 11 May 2017)

The Government of Canada, the Government of the Kingdom of Denmark, the Government of the Republic of Finland, the Government of Iceland, the Government of the Kingdom of Norway, the Government of the Russian Federation, the Government of the Kingdom of Sweden, and the Government of the United States of America (hereinafter referred to as the “Parties”),

**Recognizing** the importance of maintaining peace, stability, and constructive cooperation in the Arctic;

**Recognizing** the importance of the sustainable use of resources, economic development, human health, and environmental protection;

**Reiterating** the urgent need for increased actions to mitigate and adapt to climate change;

**Emphasizing** the importance of using the best available knowledge for decision-making;

**Noting** the importance of international scientific cooperation in that regard;

**Fully taking into account** the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, in particular the provisions in Part XIII on marine scientific research as they relate to promoting and facilitating the development and conduct of marine scientific research for peaceful purposes;

**Recalling** the Kiruna Declaration on the occasion of the Eighth Ministerial meeting of the Arctic Council held in May 2013 and the Iqaluit Declaration on the occasion of the Ninth Ministerial meeting of the Arctic Council held in April 2015;

**Recognizing** the ongoing development of the International Polar Partnership Initiative as determined by the Executive Council of the World Meteorological Organization;

**Recognizing** the significance of the research priorities as determined by the International Conference on Arctic Research Planning;

**Recognizing** the efforts of the Arctic Council and its subsidiary bodies;

**Recognizing** the significant scientific expertise and invaluable contributions to scientific activities being made by non-Parties and specifically by the Arctic Council Permanent Participants and Arctic Council Observers;

**Recognizing** the substantial benefit gained from the financial and other investments by the Arctic States and other nations in the International Polar Year and its outcomes, including in particular new scientific knowledge, infrastructure and technologies for observation and analysis;

**Recognizing** the excellent existing scientific cooperation already under way in many organizations and initiatives, such as the Sustaining Arctic Observing Networks, the International Arctic Science Committee, the University of the Arctic, the Forum of Arctic Research Operators, the International Network for Terrestrial Research and Monitoring in the Arctic, the World Meteorological Organization, the International Council for the Exploration of the Sea, the Pacific Arctic Group, the Association of Polar Early Career Scientists, indigenous knowledge institutions, the International Arctic Social Sciences Association, and many others; and

**Desiring** to contribute to and build upon existing cooperation and make efforts to develop and expand international Arctic scientific cooperation, Have agreed as follows:

#### **Article 1 Terms and definitions**

For the purposes of this Agreement:

“Facilitate” means pursuing all necessary procedures, including giving timely consideration and making decisions as expeditiously as possible;

“Participant” means the Parties’ scientific and technological departments and agencies, research centers, universities and colleges, and contractors, grantees and other partners acting with or on behalf of any Party or Parties, involved in Scientific Activities under this Agreement;

“Scientific Activities” means efforts to advance understanding of the Arctic through scientific research, monitoring and assessment. These activities may include, but are not limited to, planning and implementing scientific research projects and programs, expeditions, observations, monitoring initiatives, surveys, modelling, and assessments; training personnel; planning, organizing and executing scientific seminars, symposia, conferences, workshops, and meetings; collecting, processing, analyzing, and sharing scientific data, ideas, results, methods, experiences, and traditional and local knowledge; developing sampling methodologies and protocols; preparing publications; and developing,

implementing, and using research support logistics and research infrastructure;

“Identified Geographic Areas” means those areas described in Annex 1.

### **Article 2 Purpose**

The purpose of this Agreement is to enhance cooperation in Scientific Activities in order to increase effectiveness and efficiency in the development of scientific knowledge about the Arctic.

### **Article 3 Intellectual property and other matters**

Where appropriate, cooperative activities under this Agreement shall take place pursuant to specific implementing agreements or arrangements concluded between the Parties or Participants pertaining to their activities, particularly the financing of such activities, the use of scientific and research results, facilities, and equipment, and dispute settlement. Through such specific agreements or arrangements, the Parties shall, where appropriate, ensure, either directly or through the Participants, adequate and effective protection and fair allocation of intellectual property rights, in accordance with the applicable laws, regulations, procedures, and policies as well as the international legal obligations of the Parties concerned, and address other matters that may result from activities under this Agreement.

### **Article 4 Entry and exit of persons, equipment, and material**

Each Party shall use its best efforts to facilitate entry to, and exit from, its territory of persons, research platforms, material, samples, data, and equipment of the Participants as needed to advance the objectives of this Agreement.

### **Article 5 Access to research infrastructure and facilities**

The Parties shall use their best efforts to facilitate access by the Participants to national civilian research infrastructure and facilities and logistical services such as transportation and storage of equipment and material for the purpose of conducting Scientific Activities in Identified Geographic Areas under this Agreement.

### **Article 6 Access to research areas**

1. The Parties shall facilitate access by the Participants to terrestrial, coastal, atmospheric, and marine areas in the Identified Geographic Areas, consistent with international law, for the purpose of conducting Scientific Activities.

2. The Parties shall facilitate the processing of applications to conduct marine scientific research under this Agreement consistent with the 1982 United Nations Convention on the Law of the Sea.

3. The Parties also shall facilitate joint Scientific Activities that require airborne scientific data collection in the Identified Geographic Areas, and that are subject to specific implementing agreements or arrangements concluded between

the Parties or Participants pertaining to those activities.

**Article 7 Access to data**

1. The Parties shall facilitate access to scientific information in connection with Scientific Activities under this Agreement.

2. The Parties shall support full and open access to scientific metadata and shall encourage open access to scientific data and data products and published results with minimum time delay, preferably online and free of charge or at no more than the cost of reproduction and delivery.

3. The Parties shall facilitate the distribution and sharing of scientific data and metadata by, as appropriate and to the extent practicable, adhering to commonly accepted standards, formats, protocols, and reporting.

**Article 8 Education, career development and training opportunities**

The Parties shall promote opportunities to include students at all levels of education, and early career scientists, in the Scientific Activities conducted under this Agreement to foster future generations of researchers and to build capacity and expertise to advance knowledge about the Arctic.

**Article 9 Traditional and local knowledge**

1. The Parties shall encourage Participants to utilize, as appropriate, traditional and local knowledge in the planning and conduct of Scientific Activities under this Agreement.

2. The Parties shall encourage communication, as appropriate, between holders of traditional and local knowledge and Participants conducting Scientific Activities under this Agreement.

3. The Parties shall encourage holders of traditional and local knowledge, as appropriate, to participate in Scientific Activities under this Agreement.

**Article 10 Laws, regulations, procedures, and policies**

Activities and obligations under this Agreement shall be conducted subject to applicable international law and the applicable laws, regulations, procedures, and policies of the Parties concerned. For those Parties that have subnational governments, the applicable laws, regulations, procedures, and policies include those of their subnational governments.

**Article 11 Resources**

1. Unless otherwise agreed, each Party shall bear its own costs deriving from its implementation of this Agreement.

2. Implementation of this Agreement shall be subject to the availability of relevant resources.

**Article 12 Review of this Agreement**

1. The Parties shall meet no later than one year after the entry into force of this Agreement, as convened by the depositary, and from then on as decided by the Parties. The Parties may elect to convene such meetings in conjunction with meetings of the Arctic Council including inviting Arctic Council Permanent Participants and Arctic Council Observers to observe and provide information. Scientific cooperation activities with non-Parties related to Arctic science may be taken into account when reviewing the implementation of this Agreement.

2. At such meetings the Parties shall consider the implementation of this Agreement, including successes achieved and obstacles to implementation, as well as ways to improve the effectiveness and implementation of this Agreement.

**Article 13 Authorities and contact points**

Each Party shall designate a competent national authority or authorities as the responsible point of contact for this Agreement. The names of and contact information for the designated points of contact are specified in Annex 2 to this Agreement. Each Party shall promptly inform the other Parties in writing through its competent national authority or authorities and through diplomatic channels of any changes to those designations.

**Article 14 Annexes**

1. Annex 1 referred to in Article 1 constitutes an integral part of this Agreement and is legally binding.

2. Annex 2 referred to in Article 13 does not constitute an integral part of this Agreement and is not legally binding.

3. At meetings of the Parties referred to in Article 12, the Parties may adopt additional legally non-binding Annexes. Annex 2 referred to in Article 13 may be modified as provided in that Article.

**Article 15 Settlement of disputes**

The Parties shall resolve any disputes concerning the application or interpretation of this Agreement through direct negotiations.

**Article 16 Relationship with other international agreements**

Nothing in this Agreement shall be construed as altering the rights or obligations of any Party under other relevant international agreements or international law.

**Article 17 Cooperation with non-Parties**

1. The Parties may continue to enhance and facilitate cooperation with non-Parties with regard to Arctic science.

2. Parties may in their discretion undertake with non-Parties cooperation described in this Agreement and apply measures consistent with those described in this Agreement in cooperation with non-Parties.

3. Nothing in this Agreement shall affect the rights and obligations of the Parties under agreements with non-Parties, nor preclude cooperation between the Parties and non-Parties.

#### **Article 18 Amendments to this Agreement**

1. This Agreement may be amended by written agreement of all the Parties.

2. An amendment shall enter into force 30 days after the date on which the depositary has received the last written notification through diplomatic channels that the Parties have completed the internal procedures required for its entry into force.

#### **Article 19 Provisional application, entry into force, and withdrawal**

1. This Agreement may be applied provisionally by any signatory that provides a written statement to the depositary of its intention to do so. Any such signatory shall apply this Agreement provisionally in its relations with any other signatory having made the same notification from the date of its statement or from such other date as indicated in its statement.

2. This Agreement shall enter into force for a period of five years 30 days after the date of receipt by the depositary of the last written notification through diplomatic channels that the Parties have completed the internal procedures required for its entry into force.

3. This Agreement shall be automatically renewed for further periods of five years unless a Party notifies the other Parties in writing at least six months prior to the expiration of the first period of five years or any succeeding period of five years of its intent to withdraw from this Agreement, in which event this Agreement shall continue between the remaining Parties.

4. Any Party may at any time withdraw from this Agreement by sending written notification thereof to the depositary through diplomatic channels at least six months in advance, specifying the effective date of its withdrawal. Withdrawal from this Agreement shall not affect its application among the remaining Parties.

5. Withdrawal from this Agreement by a Party shall not affect the obligations of that Party with regard to activities undertaken under this Agreement where those obligations have arisen prior to the effective date of withdrawal.

#### **Article 20 Depositary**

The Government of the Kingdom of Denmark shall be the depositary for this

Agreement.

DONE at Fairbanks, Alaska, United States of America this 11th day of May, 2017. This Agreement is established in a single copy in the English, French, and Russian languages, all texts being equally authentic. The working language of this Agreement shall be English, the language in which this Agreement was negotiated. The Depository shall transmit certified copies of this Agreement to the Parties.

# **Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)**

## **Summary of the Judgment of 2 February 2017**

### **I. INTRODUCTION (PARAS. 15-30)**

The Court first notes that Somalia and Kenya are adjacent States on the coast of East Africa. Somalia is located in the Horn of Africa. It borders Kenya to the south-west, Ethiopia to the west and Djibouti to the north-west. Somalia's coastline faces the Gulf of Aden to the north and the Indian Ocean to the east. Kenya, for its part, shares a land boundary with Somalia to the north-east, Ethiopia to the north, South Sudan to the north-west, Uganda to the west and Tanzania to the south. Its coastline faces the Indian Ocean. Both States signed the United Nations Convention on the Law of the Sea (UNCLOS) on 10 December 1982. Kenya and Somalia ratified UNCLOS on 2 March and 24 July 1989, respectively, and the Convention entered into force for the Parties on 16 November 1994. Under Article 76, paragraph 8, of UNCLOS, a State party to the Convention intending to establish the outer limits of its continental shelf beyond 200 nautical miles shall submit information on such limits to the Commission on the Limits of the Continental Shelf (CLCS). The role of the Commission is to make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf beyond 200 nautical miles. With regard to disputed maritime areas, under Annex I of the CLCS Rules of Procedure, entitled "Submissions in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes", the Commission requires the prior consent of all States concerned before it will consider submissions regarding such areas.

The Court recalls that, on 7 April 2009, the Kenyan Minister for Foreign Affairs and the Somali Minister for National Planning and International Cooperation signed a "Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to grant to each other No-Objection in respect of submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on

the Limits of the Continental Shelf'. On 14 April 2009, Somalia submitted to the Secretary-General of the United Nations preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles. On 6 May 2009, Kenya deposited with the CLCS its submission with respect to the continental shelf beyond 200 nautical miles. In June 2009, the MOU was submitted by Kenya to the Secretariat of the United Nations for registration and publication pursuant to Article 102 of the Charter of the United Nations. The Secretariat registered it on 11 June 2009, and published it in the United Nations Treaty Series. In the following years, both Parties raised and withdrew objections to the consideration of each other's submissions by the CLCS. Those submissions are now under consideration.

On 28 August 2014, Somalia instituted proceedings against Kenya before the Court, requesting the latter to determine, on the basis of international law, the complete course of the single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean, including the continental shelf beyond 200 nautical miles. As basis for the Court's jurisdiction, Somalia invoked the declarations recognizing the Court's jurisdiction as compulsory made by the two States. Kenya, however, raised two preliminary objections: one concerning the jurisdiction of the Court, the other the admissibility of the Application.

## **II. THE FIRST PRELIMINARY OBJECTION: THE JURISDICTION OF THE COURT (PARAS. 31-134)**

In its first preliminary objection, Kenya argues that the Court lacks jurisdiction to entertain the present case as a result of one of the reservations to its declaration accepting the compulsory jurisdiction of the Court, which excludes disputes in regard to which the parties have agreed "to have recourse to some other method or methods of settlement". It asserts that the MOU constitutes an agreement to have recourse to another method of settlement. It adds that the relevant provisions of UNCLOS on dispute settlement also amount to an agreement on the method of settlement.

The Court first considers the MOU and whether that instrument falls within the scope of Kenya's reservation. It begins by examining the legal status of the MOU under international law. It explains that should it find the MOU valid, the Court will embark on its interpretation and outline what effects, if any, the MOU has in respect of the jurisdiction of the Court in this case. If the Court reaches the

conclusion that the MOU does not render Kenya's reservation to its optional clause declaration under Article 36, paragraph 2, of the Court's Statute applicable in the present case, it will then address Kenya's submission that the case falls outside the Court's jurisdiction because of the provisions of Part XV of UNCLOS.

*A. The Memorandum of Understanding (paras. 36-106)*

**1. The legal status of the MOU under international law (paras. 36-50)**

The Court considers that in order to determine whether the MOU has any effect with respect to its jurisdiction, it is appropriate first to address the issue whether the MOU constitutes a treaty in force between the Parties.

Under the customary international law of treaties, which is applicable in this case since neither Somalia nor Kenya is a party to the 1969 Vienna Convention on the Law of Treaties, an international agreement concluded between States in written form and governed by international law constitutes a treaty. The MOU is a written document, in which the Parties record their agreement on certain points governed by international law. The inclusion of a provision addressing the entry into force of the MOU is indicative of the instrument's binding character. Kenya considered the MOU to be a treaty, having requested its registration in accordance with Article 102 of the Charter of the United Nations, and Somalia did not protest that registration until almost five years thereafter. Furthermore, it is clear from the actual terms of the MOU, which make express provision for it to enter into force upon signature, and the terms of the authorization given to the Somali Minister, that this signature expressed Somalia's consent to be bound by the MOU under international law. The Court concludes that the MOU is a valid treaty that entered into force upon signature and is binding on the Parties under international law.

**2. The interpretation of the MOU (paras. 51-105)**

The Court turns to the interpretation of the MOU. This instrument consists of seven paragraphs, which are unnumbered. In order to facilitate references to the paragraphs, the Court considered it convenient to insert numbering in its analysis.

In interpreting the MOU, the Court applies the rules on interpretation to be found in Articles 31 and 32 of the Vienna Convention, which it has consistently considered to be reflective of customary international law. Article 31, paragraph 1, of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". These

elements of interpretation – ordinary meaning, context and object and purpose – are to be considered as a whole. Paragraph 2 of Article 31 sets out what is to be regarded as context. Article 31, paragraph 3, provides that there shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation or application of the treaty, any subsequent practice which establishes such an agreement, and any relevant rules of international law applicable in the relations between the parties.

The sixth paragraph of the MOU is at the heart of the first preliminary objection under consideration. It is, however, difficult to understand that paragraph without a prior analysis of the text of the MOU as a whole, which provides the context in which any particular paragraph should be interpreted and gives insight into the object and purpose of the MOU. The Court therefore proceeds first of all to such an analysis, before examining the sixth paragraph.

The Court observes that the title of the MOU and its first five paragraphs indicate the purpose of ensuring that the CLCS could proceed to consider submissions made by Somalia and Kenya regarding the outer limits of the continental shelf beyond 200 nautical miles, and to issue recommendations thereon, notwithstanding the existence of a maritime dispute between the two States, thus preserving the distinction between the ultimate delimitation of the maritime boundary and the CLCS process leading to delineation. The sixth paragraph, on which the Parties' arguments focused in particular since Kenya contends that it contains the agreed dispute settlement method regarding the Parties' maritime boundary, provides that delimitation in the disputed areas "shall be agreed between the two coastal States on the basis of international law after the Commission has concluded its examination of the separate submissions made by each of the two coastal States and made its recommendations ...". The question for the Court is whether the Parties, in that sixth paragraph, agreed on a method of settlement of their delimitation dispute other than by way of proceedings before the Court, and agreed to wait for the CLCS's recommendations before any such settlement could be reached.

The subject-matter of the sixth paragraph of the MOU relates to "[t]he delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles ...". The use of the word "including" implies that the Parties intended something more to be encompassed by delimitation in "the areas under dispute" than delimitation in respect of the continental shelf beyond 200 nautical miles. The Parties have

explicitly given a meaning to the term the “area under dispute” as the area in which the claims of the two Parties to the continental shelf overlap, without differentiating between the shelf within and beyond 200 nautical miles. In addition, the text as a whole makes it apparent that the MOU was concerned, in so far as it addressed delimitation, solely with the area of the continental shelf, both within and beyond 200 nautical miles from the two States’ respective coasts. The sixth paragraph therefore relates only to delimitation of the continental shelf, “including the delimitation of the continental shelf beyond 200 nautical miles”, and not to delimitation of the territorial sea, nor to delimitation of the exclusive economic zone. Accordingly, even if, as Kenya suggests, that paragraph sets out a method of settlement of the Parties’ maritime boundary dispute, it would only apply to their continental shelf boundary, and not to the boundaries of other maritime zones.

The Court turns to the question of whether the sixth paragraph, by providing that the delimitation of the continental shelf between the Parties “shall be agreed... on the basis of international law after the Commission has concluded its examination of [their] separate submissions ... and made its recommendations...”, sets out a method of settlement of the Parties’ maritime boundary dispute with respect to that area.

The Court recalls that, according to the applicable rule of customary international law, the sixth paragraph of the MOU must be interpreted in good faith in accordance with the ordinary meaning given to its terms in their context and in light of the object and purpose of the MOU. Pursuant to Article 31, paragraph 3 (c) of the Vienna Convention, “[a]ny relevant rules of international law applicable in the relations between the parties” should be taken into account, together with the context. In this case, both Somalia and Kenya are parties to UNCLOS, which is expressly mentioned in the MOU. UNCLOS therefore contains such relevant rules. Moreover, given that the sixth paragraph of the MOU concerns the delimitation of the continental shelf, Article 83 of UNCLOS, entitled “Delimitation of the continental shelf between States with opposite or adjacent coasts”, is particularly relevant.

The Court considers that it is reasonable to read the sixth paragraph of the MOU in light of Article 83, paragraph 1, of UNCLOS. In that context, the reference to delimitation being undertaken by agreement on the basis of international law, which is common to the two provisions, is not prescriptive of the method of dispute settlement to be followed and does not preclude recourse to dispute settlement procedures in case agreement could not be reached. The sixth paragraph of the

MOU goes beyond the wording of Article 83, paragraph 1, by inclusion of the second part of the clause under consideration, providing that “delimitation ... shall be agreed ... after the Commission has concluded its examination . . . and made its recommendations...”. It is clear from the case file that Kenya did not consider itself bound by the wording of the sixth paragraph to wait for the CLCS’s recommendations before engaging in negotiations on maritime delimitation, or even reaching agreements thereon, and could at least commence the process of delimitation before that of delineation was complete. However, Kenya has advanced the argument that negotiations on maritime delimitation could not be finalized and, therefore, that no final agreement could be reached, until after the recommendations of the CLCS had been received. It may be the case that, as the Parties agree, the endpoint of their maritime boundary in the area beyond 200 nautical miles cannot be definitively determined until after the CLCS’s recommendations have been received and the outer limits of the continental shelf beyond 200 nautical miles established on the basis of those recommendations. This is consistent with Article 76, paragraph 8, of UNCLOS. A lack of certainty regarding the outer limits of the continental shelf, and thus the precise location of the endpoint of a given boundary in the area beyond 200 nautical miles, does not, however, necessarily prevent either the States concerned or the Court from undertaking the delimitation of the boundary in appropriate circumstances before the CLCS has made its recommendations.

The Court does not consider that the sixth paragraph of the MOU can be interpreted as precluding the Parties from reaching an agreement on their maritime boundary, or either of them from resorting to dispute settlement procedures regarding their maritime boundary dispute, before receipt of the CLCS’s recommendations. The Parties could have reached an agreement on their maritime boundary at any time by mutual consent. Moreover, read in light of Article 83, paragraph 1, of UNCLOS, the use of the phrase “shall be agreed” in the sixth paragraph does not mean that the Parties have an obligation to conclude an agreement on a continental shelf boundary; it rather means that the Parties are under an obligation to engage in negotiations in good faith with a view to reaching an agreement. The Parties agree that the sixth paragraph did not prevent them from engaging in such negotiations before receipt of the CLCS’s recommendations. There is no temporal restriction contained in the sixth paragraph on fulfilling this obligation to negotiate. The fact that the Parties set an objective as to the time for concluding an agreement does not, given that this paragraph is not prescriptive of a method of settlement to be followed, prevent a Party from resorting to dispute

settlement procedures prior to receiving the recommendations of the CLCS. Furthermore, both Somalia and Kenya are parties to UNCLOS, which contains in Part XV comprehensive provisions for dispute resolution, and both States have optional clause declarations in force. The Court does not consider that, in the absence of express language to that effect, the Parties can be taken to have excluded recourse to such procedures until after receipt of the CLCS's recommendations. Finally, the MOU repeatedly indicates that the CLCS process leading to delineation is to be without prejudice to delimitation, treating the two as distinct.

In summary, the Court observes the following in respect of the interpretation of the MOU. First, its object and purpose was to constitute a no-objection agreement, enabling the CLCS to make recommendations notwithstanding the existence of a dispute between the Parties regarding the delimitation of the continental shelf. Secondly, the sixth paragraph relates solely to the continental shelf, and not to the whole maritime boundary between the Parties, which suggests that it did not create a dispute settlement procedure for the determination of that boundary. Thirdly, the MOU repeatedly makes clear that the process leading to the delineation of the outer limits of the continental shelf beyond 200 nautical miles is to be without prejudice to the delimitation of the maritime boundary between the Parties, implying – consistently with the jurisprudence of this Court – that delimitation could be undertaken independently of a recommendation of the CLCS. Fourthly, the text of the sixth paragraph of the MOU reflects that of Article 83, paragraph 1, of UNCLOS, suggesting that the Parties intended to acknowledge the usual course that delimitation would take under that Article, namely engaging in negotiations with a view to reaching agreement, and not to prescribe a method of dispute settlement. Fifthly, the Parties accept that the sixth paragraph did not prevent them from undertaking such negotiations, or reaching certain agreements, prior to obtaining the recommendations of the CLCS.

Given the foregoing, the Court considers that the sixth paragraph of the MOU reflected the expectation of the Parties that, in light of Article 83, paragraph 1, of UNCLOS, they would negotiate their maritime boundary in the area of the continental shelf after receipt of the CLCS's recommendations, keeping the two processes of delimitation and delineation distinct. As between States parties to UNCLOS, such negotiations are the first step in undertaking delimitation of the continental shelf. The Court does not, however, consider that the text of the sixth paragraph, viewed in light of the text of the MOU as a whole, the object and purpose of the MOU, and in its context, could have been intended to establish

a method of dispute settlement in relation to the delimitation of the maritime boundary between the Parties. It neither binds the Parties to wait for the outcome of the CLCS process before attempting to reach agreement on their maritime boundary, nor does it impose an obligation on the Parties to settle their maritime boundary dispute through a particular method of settlement.

In line with Article 32 of the Vienna Convention, the Court has examined the travaux préparatoires, however limited, and the circumstances in which the MOU was concluded, which it considers confirm that the MOU was not intended to establish a procedure for the settlement of the maritime boundary dispute between the Parties.

### **3. Conclusion on whether the reservation contained in Kenya's declaration under Article 36, paragraph 2, is applicable by virtue of the MOU (para. 106)**

The Court concludes that the MOU does not constitute an agreement "to have recourse to some other method or methods of settlement" within the meaning of Kenya's reservation to its Article 36, paragraph 2, declaration, and consequently this case does not, by virtue of the MOU, fall outside the scope of Kenya's consent to the Court's jurisdiction.

#### *B. Part XV of the United Nations Convention on the Law of the Sea (paras. 107-133)*

The Court next considers whether Part XV of UNCLOS (entitled "Settlement of disputes") amounts to an agreement on a method of settlement for the maritime boundary dispute within the meaning of Kenya's reservation.

It first recalls that Part XV, entitled "Settlement of disputes", comprises three sections. Section 1 sets out general provisions regarding the peaceful settlement of disputes. It requires States parties to settle disputes concerning the interpretation or application of the Convention by peaceful means (Art. 279) but expressly provides that they are free to employ "any peaceful means of their own choice" (Art. 280). States parties may agree between themselves to a means of settlement that does not lead to a binding decision of a third party (e.g., conciliation). However, if no settlement has been reached by recourse to such means, either of those States parties may submit the dispute to the court or tribunal having jurisdiction under Section 2 of Part XV, unless their agreement to such means of settlement excludes the procedures entailing a binding decision in Section 2 (Art. 281, para. 1). Finally, while Article 282 makes no express reference to an agreement to the Court's

jurisdiction resulting from optional clause declarations, it nevertheless provides that an agreement to submit a dispute to a specified procedure that applies in lieu of the procedures provided for in Section 2 of Part XV may not only be contained in a “general, regional or bilateral agreement”, but may also be reached “otherwise”.

The phrase “or otherwise” in Article 282 thus encompasses agreement to the jurisdiction of the Court resulting from optional clause declarations. Both Kenya and Somalia recognize this interpretation of Article 282 and agree that if two States have accepted the Court’s jurisdiction under the optional clause with respect to a dispute concerning the interpretation or application of UNCLOS, such agreement would apply to the settlement of that dispute in lieu of procedures contained in Section 2 of Part XV. It is equally clear that if a reservation to an optional clause declaration excluded disputes concerning a particular subject, there would be no agreement to the Court’s jurisdiction falling within Article 282, so the procedures provided for in Section 2 of Part XV would apply to those disputes, subject to the limitations and exceptions that result from the application of Section 3.

In the present case, however, the Court must decide whether Article 282 should be interpreted so that an optional clause declaration containing a reservation such as that of Kenya falls within the scope of that Article. The travaux préparatoires of UNCLOS make clear that the negotiators gave particular attention to optional clause declarations when drafting Article 282, ensuring, through the use of the phrase “or otherwise”, that agreements to the Court’s jurisdiction based on optional clause declarations fall within the scope of Article 282.

Article 282 should therefore be interpreted so that an agreement to the Court’s jurisdiction through optional clause declarations falls within the scope of that Article and applies “in lieu” of procedures provided for in Section 2 of Part XV, even when such declarations contain a reservation to the same effect as that of Kenya. The contrary interpretation would mean that, by ratifying a treaty which gives priority to agreed procedures resulting from optional clause declarations (pursuant to Article 282 of UNCLOS), States would have achieved precisely the opposite outcome, giving priority instead to the procedures contained in Section 2 of Part XV. Consequently, under Article 282, the optional clause declarations of the Parties constitute an agreement, reached “otherwise”, to settle in this Court disputes concerning interpretation or application of UNCLOS, and the procedure before this Court shall thus apply “in lieu” of procedures provided for in Section 2 of Part XV.

As previously noted, Kenya’s acceptance of the Court’s jurisdiction extends to “all disputes”, except those for which the Parties have agreed to resort to a

method of settlement other than recourse to the Court. In the present case, Part XV of UNCLOS does not provide for such other method of dispute settlement. Accordingly, this dispute does not, by virtue of Part XV of UNCLOS, fall outside the scope of Kenya's optional clause declaration.

A finding that the Court has jurisdiction gives effect to the intent reflected in Kenya's declaration, by ensuring that this dispute is subject to a method of dispute settlement. By contrast, because an agreed procedure within the scope of Article 282 takes precedence over the procedures set out in Section 2 of Part XV, there is no certainty that this intention would be fulfilled were this Court to decline jurisdiction.

### *C. Conclusion (para. 134)*

In light of the Court's conclusion that neither the MOU nor Part XV of UNCLOS falls within the scope of the reservation to Kenya's optional clause declaration, the Court finds that Kenya's preliminary objection to the jurisdiction of the Court must be rejected.

## **III. THE SECOND PRELIMINARY OBJECTION: THE ADMISSIBILITY OF SOMALIA'S APPLICATION (PARAS. 135-144)**

The Court then considers Kenya's preliminary objection to the admissibility of Somalia's Application. In support of its contention that the Application is inadmissible, Kenya makes two arguments.

First, Kenya claims that the Application is inadmissible because the Parties had agreed in the MOU to negotiate delimitation of the disputed boundary, and to do so only after completion of CLCS review of the Parties' submissions. The Court having previously found that the MOU did not contain such an agreement, it must also reject this aspect of Kenya's second preliminary objection.

Secondly, Kenya states that the Application is inadmissible because Somalia breached the MOU by objecting to CLCS consideration of Kenya's submission, only to consent again immediately before filing its Memorial. According to Kenya, the withdrawal of consent was a breach of Somalia's obligations under the MOU that gave rise to significant costs and delays. Kenya also contends that a State "seeking relief before the Court must come with clean hands" and that Somalia has

not done so. The Court observes that the fact that an applicant may have breached a treaty at issue in the case does not per se affect the admissibility of its application. Moreover, the Court notes that Somalia is neither relying on the MOU as an instrument conferring jurisdiction on the Court nor as a source of substantive law governing the merits of this case. Thus, Somalia's objection to CLCS consideration of Kenya's submission does not render the Application inadmissible.

In light of the foregoing, the Court finds that the preliminary objection to the admissibility of Somalia's Application must be rejected.

#### **IV. OPERATIVE PART (PARA. 145)**

For these reasons,

THE COURT,

(1) (a) by thirteen votes to three,

Rejects the first preliminary objection raised by the Republic of Kenya in so far as it is based on the Memorandum of Understanding of 7 April 2009;

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Crawford, Gevorgian;

AGAINST: Judges Bennouna, Robinson; Judge ad hoc Guillaume;

(b) by fifteen votes to one,

Rejects the first preliminary objection raised by the Republic of Kenya in so far as it is based on Part XV of the United Nations Convention on the Law of the Sea;

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Crawford, Gevorgian; Judge ad hoc Guillaume;

AGAINST: Judge Robinson;

(2) by fifteen votes to one,

Rejects the second preliminary objection raised by the Republic of Kenya;

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Crawford, Gevorgian; Judge ad hoc Guillaume;

AGAINST: Judge Robinson;

(3) by thirteen votes to three,

Finds that it has jurisdiction to entertain the Application filed by the Federal

Republic of Somalia on 28 August 2014 and that the Application is admissible.

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Crawford, Gevorgian;

AGAINST: Judges Bennouna, Robinson; Judge ad hoc Guillaume.

Vice-President YUSUF appends a declaration to the Judgment of the Court; Judge BENNOUNA appends a dissenting opinion to the Judgment of the Court; Judges GAJA and CRAWFORD append a joint declaration to the Judgment of the Court; Judge ROBINSON appends a dissenting opinion to the Judgment of the Court; Judge ad hoc GUILLAUME appends a dissenting opinion to the Judgment of the Court.

#### **Declaration of Vice-President Yusuf**

1. Vice-President Yusuf agrees with the Court's decision on the preliminary objections raised by Kenya and the reasoning that led the Court to its decision. Nevertheless, the circumstances in which the present dispute regarding the jurisdiction of the Court has arisen call for some observations to be made.

2. The Memorandum of Understanding ("MOU") in this case was drafted, as a matter of fact, by Ambassador Hans Wilhelm Longva of Norway in the context of assistance provided by Norway to African States, which enabled them to make submissions or submit preliminary information to the Commission on the Limits of the Continental Shelf ("CLCS") within the time-limits prescribed by the States parties to the UN Convention on the Law of the Sea.

3. Many African States lack the requisite geological, geophysical, and hydrological technical expertise to compile a submission to the CLCS; in this respect, Norway's assistance was invaluable. However, this technical assistance should be distinguished from the drafting and conclusion of the MOU, which is a legal and policy matter that could have easily been directly negotiated by the two neighbouring States.

4. More than 50 years after their independence, it is surprising that Somalia and Kenya are in dispute over an agreement that they neither negotiated nor drafted. International law in the twenty-first century is more important than ever; its effects pervade the daily lives of people throughout the world. As the scope of international law has increased, so too has the importance of ensuring that each State actively participates in the creation of international legal instruments and rules which affect its peoples and resources, and understands the obligations that it

takes on.

5. No Government can afford today to put its signature to a bilateral legal instrument which it has neither carefully negotiated nor to which it has hardly contributed. This applies especially to African Governments, which, due to their painful historical experience with international legal agreements concluded with foreign powers, should pay particular attention to the contents of such agreements.

### **Dissenting opinion of Judge Bennouna**

In the case brought by Somalia concerning maritime delimitation in the Indian Ocean, the Court has rejected Kenya's first preliminary objection concerning the existence of another method of dispute settlement under paragraph 6 of the memorandum. The issue being one of interpretation of that paragraph, the Court referred to the general rule of interpretation enshrined in Article 31 of the Vienna Convention on the Law of Treaties. It lays down, as a starting point, the ordinary meaning of the terms of the treaty. But the Court proceeded differently and assumed that paragraph 6 was difficult to understand without an overall analysis of the context in which it should be interpreted, as well as its object and purpose. In doing so, the Court reversed the general rule of interpretation and reached the conclusion that the sixth paragraph did not constitute another method of settlement of the maritime dispute and therefore did not trigger Kenya's reservation. The reasoning by analogy between paragraph 6 and Article 83 of UNCLOS has led the Court to erroneous conclusions since these provisions are not comparable. In particular, unlike Article 83 of UNCLOS, paragraph 6 contains a precise time constraint. Ultimately, the Court has come to give a different meaning to the terms of the sixth paragraph which is unrelated to their ordinary meaning, holding that they do not establish a dispute settlement procedure likely to fall within the scope of Kenya's reservation.

### **Joint declaration of Judges Gaja and Crawford**

Judges Gaja and Crawford disagreed with the reasons of the majority on issues of both jurisdiction and admissibility concerning the MOU.

On jurisdiction, they reasoned that paragraph 6 of the MOU, by setting an obligation to negotiate, would not affect the Court's jurisdiction unless it fell within Kenya's optional clause reservation. The words "other method ... of settlement" in Kenya's reservation contemplate a method of resolving the dispute. But negotiations in good faith may not result in such a resolution. In order for

negotiations to be caught by Kenya's reservation, either the Parties must have agreed to reach an agreement by negotiation (i.e., a *pactum de contrahendo*) or negotiation would have to be stipulated as the exclusive method of settlement. The Parties agree that paragraph 6 of the MOU does not impose an obligation to reach an agreement. Neither is there any ground for suggesting that the Parties intended to exclude resort to other methods of settlement if negotiations failed. Thus paragraph 6 was not caught by Kenya's optional clause reservation.

On admissibility, Judges Gaja and Crawford reasoned that paragraph 6 of the MOU bound each party to refrain from taking unilateral action to trigger dispute settlement before the CLCS had made its recommendation. However, the Parties were free to derogate from this time-limit, which they did in 2014 by commencing negotiations without reserving their position under paragraph 6. By doing so, they set aside the time-limit in paragraph 6, making the Application of Somalia admissible.

#### **Dissenting opinion of Judge Robinson**

Judge Robinson disagrees with the majority's rejection of Kenya's first preliminary objection. However, the opinion focuses on the rejection of the second basis advanced by Kenya for its first preliminary objection since, in his view, it is more problematic because of the very serious implications it has for the interpretation and application of the carefully elaborated provisions of Part XV of UNCLOS.

Under Article 36, paragraph 2, of the Court's Statute, both Kenya and Somalia accepted the Court's jurisdiction subject to certain reservations. With regard to the reservation relevant to this case, Kenya accepted the Court's jurisdiction over all disputes other than: "Disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement".

Given this lucid and unambiguous text, Judge Robinson argues that it is wholly unreasonable for the majority to conclude that the optional clause declarations between Kenya and Somalia constitute an agreement that falls within the scope of Article 282 when Part XV of UNCLOS sets out in Article 287 other methods of settlement.

Judge Robinson takes issue with the numerical criterion – the majority's conclusion relies on the fact that "more than half of the then-existing optional clause declarations" contained the Kenyan-type reservation – used by the majority

to determine whether the travaux préparatoires can be construed as excluding the Kenyan-type reservation. He suggests that what is required is a qualitative evaluation of the impact of Kenya's reservation on the optional clause declarations of both States and that the signal failure of the majority decision is its refusal to carry out such an evaluation. In his view, such an evaluation clearly shows that the consensual bond required for optional clause declarations to found the jurisdiction of the Court cannot take root in the environment created by Kenya's reservation and that, therefore, there is no agreed procedure within the terms of Article 282 of UNCLOS to be applied in lieu of the procedures in Part XV.

He concludes that the net effect of the majority Judgment is to turn Article 287, paragraph 3, of UNCLOS on its head by treating the ICJ as the default mechanism when that provision assigns that role to the Annex VII Tribunal referred to in Article 287, paragraph 1, subparagraph (c).

#### **Dissenting opinion of Judge ad hoc Guillaume**

Judge ad hoc Guillaume disagrees with the Court's decision to reject the first preliminary objection raised by Kenya in so far as it is based on the Memorandum of Understanding (MOU) of 7 April 2009. He takes the view that paragraph 6 of the MOU, interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of the MOU's object and purpose, establishes a method of settlement for the maritime delimitation dispute between Somalia and Kenya. By agreeing to it, the Parties undertook to negotiate with a view to reaching an agreement once the Commission on the Limits had reviewed their respective submissions concerning the outer limits of the continental shelf beyond 200 nautical miles.

Judge ad hoc Guillaume further considers that the discussions held by the Parties in 2014 cannot be construed as a subsequent agreement on the interpretation of paragraph 6 of the MOU, or as the expression of a renunciation by Kenya of its rights under that paragraph. Finally, in his view it cannot be argued that the obligation to negotiate contained in paragraph 6 has been exhausted. Judge ad hoc Guillaume therefore concludes that, in view of Kenya's reservation to its declaration made under Article 36, paragraph 2, of the Statute – which excludes disputes in regard to which the parties to the dispute have agreed to have recourse to some other method of settlement – the Court should have found that it lacks jurisdiction.

## **CHINA MINMETALS CORPORATION SIGNS EXPLORATION CONTRACT WITH THE INTERNATIONAL SEABED AUTHORITY**

JAMAICA, Kingston (12 May 2017) — The International Seabed Authority and China MINMETALS Corporation have signed a 15-year exploration contract for polymetallic nodules.

The exploration contract was signed on Friday, 12 May in Beijing, China by the Secretary-General of the International Seabed Authority, Michael Lodge and the Chairman of China MINMETALS Corporation, He Wenbo.

The allocated area covers a surface area of 72,745 km<sup>2</sup> of the Clarion-Clipperton Fracture Zone in the Pacific Ocean.

At the signing ceremony, Secretary-General Lodge said “China, and indeed the whole world, is facing a tremendous challenge – how can we meet an increasing metal demand in an environmentally sustainable way? In two weeks’ time, we shall be meeting at the United Nations in New York to discuss the challenges for the implementation of Sustainable Development Goal 14; the conservation and sustainable use of the ocean and its resources”.

“If we are serious about developing a blue economy, based on sustainable use of marine resources, and a low carbon future, we are going to need an increased supply of metals for the world economy. Renewable technologies for example require two to three times more steel per megawatt generated than conventional infrastructure. Increased supplies of strategic metals such as cobalt and tellurium will also be needed”.

“We also need to acquire these minerals without increasing our overall carbon footprint”.

China is also sponsoring another contractor with the Authority for the exploration for polymetallic nodules in the Clarion Clipperton Zone since 2001, and for which a five-year extension was signed recently between Secretary-General Lodge and COMRA Secretary-General Liu Feng.

China also sponsors COMRA in contracts for exploration for polymetallic sulphides in the Southwest Indian Ridge and for exploration for cobalt-rich ferromanganese crusts in the West Pacific Ocean.

# 中华人民共和国测绘法

(1992年12月28日第七届全国人民代表大会常务委员会第二十九次会议通过 2002年8月29日第九届全国人民代表大会常务委员会第二十九次会议第一次修订 2017年4月27日第十二届全国人民代表大会常务委员会第二十七次会议第二次修订)

## 第一章 总 则

**第一条** 为了加强测绘管理,促进测绘事业发展,保障测绘事业为经济建设、国防建设、社会发展和生态保护服务,维护国家地理信息安全,制定本法。

**第二条** 在中华人民共和国领域和中华人民共和国管辖的其他海域从事测绘活动,应当遵守本法。

本法所称测绘,是指对自然地理要素或者地表人工设施的形状、大小、空间位置及其属性等进行测定、采集、表述,以及对获取的数据、信息、成果进行处理和提供的活动。

**第三条** 测绘事业是经济建设、国防建设、社会发展的基础性事业。各级人民政府应当加强对测绘工作的领导。

**第四条** 国务院测绘地理信息主管部门负责全国测绘工作的统一监督管理。国务院其他有关部门按照国务院规定的职责分工,负责本部门有关的测绘工作。

县级以上地方人民政府测绘地理信息主管部门负责本行政区域测绘工作的统一监督管理。县级以上地方人民政府其他有关部门按照本级人民政府规定的职责分工,负责本部门有关的测绘工作。

军队测绘部门负责管理军事部门的测绘工作,并按照国务院、中央军事委员会规定的职责分工负责管理海洋基础测绘工作。

**第五条** 从事测绘活动,应当使用国家规定的测绘基准和测绘系统,执行国家规定的测绘技术规范和标准。

**第六条** 国家鼓励测绘科学技术的创新和进步,采用先进的技术和设备,提高测绘水平,推动军民融合,促进测绘成果的应用。国家加强测绘科学技术的国际交流与合作。

对在测绘科学技术的创新和进步中做出重要贡献的单位和个人,按照国家有关规定给予奖励。

**第七条** 各级人民政府和有关部门应当加强对国家版图意识的宣传教育,增强公民的国家版图意识。新闻媒体应当开展国家版图意识的宣传。教育行政部门、学校应当将国家版图意识教育纳入中小学教学内容,加强爱国主义教育。

**第八条** 外国的组织或者个人在中华人民共和国领域和中华人民共和国管辖的其他海域从事测绘活动,应当经国务院测绘地理信息主管部门会同军队测绘部门批准,并遵守中华人民共和国有关法律、行政法规的规定。

外国的组织或者个人在中华人民共和国领域从事测绘活动,应当与中华人民共和国有关部门或者单位合作进行,并不得涉及国家秘密和危害国家安全。

## 第二章 测绘基准和测绘系统

**第九条** 国家设立和采用全国统一的大地基准、高程基准、深度基准和重力基准,其数据由国务院测绘地理信息主管部门审核,并与国务院其他有关部门、军队测绘部门会商后,报国务院批准。

**第十条** 国家建立全国统一的大地坐标系统、平面坐标系统、高程系统、地心坐标系统和重力测量系统,确定国家大地测量等级和精度以及国家基本比例尺地图的系列和基本精度。具体规范和要求由国务院测绘地理信息主管部门会同国务院其他有关部门、军队测绘部门制定。

**第十一条** 因建设、城市规划和科学研究的需要,国家重大工程项目和国务院确定的大城市确需建立相对独立的平面坐标系统的,由国务院测绘地理信息主管部门批准;其他确需建立相对独立的平面坐标系统的,由省、自治区、直辖市人民政府测绘地理信息主管部门批准。

建立相对独立的平面坐标系统,应当与国家坐标系统相联系。

**第十二条** 国务院测绘地理信息主管部门和省、自治区、直辖市人民政府测绘地理信息主管部门应当会同本级人民政府其他有关部门,按照统筹建设、资源共享的原则,建立统一的卫星导航定位基准服务系统,提供导航定位基准信息公共服务。

**第十三条** 建设卫星导航定位基准站的,建设单位应当按照国家有关规定报国务院测绘地理信息主管部门或者省、自治区、直辖市人民政府测绘地理信息主管部门备案。国务院测绘地理信息主管部门应当汇总全国卫星导航定位基准站建设备案情况,并定期向军队测绘部门通报。

本法所称卫星导航定位基准站,是指对卫星导航信号进行长期连续观测,并通过通信设施将观测数据实时或者定时传送至数据中心的固定观测站。

**第十四条** 卫星导航定位基准站的建设和运行维护应当符合国家标准和要求,不得危害国家安全。

卫星导航定位基准站的建设和运行维护单位应当建立数据安全保障制度,并遵守保密法律、行政法规的规定。

县级以上人民政府测绘地理信息主管部门应当会同本级人民政府其他有关部门,加强对卫星导航定位基准站建设和运行维护的规范和指导。

### 第三章 基础测绘

**第十五条** 基础测绘是公益性事业。国家对基础测绘实行分级管理。

本法所称基础测绘,是指建立全国统一的测绘基准和测绘系统,进行基础航空摄影,获取基础地理信息的遥感资料,测制和更新国家基本比例尺地图、影像图和数字化产品,建立、更新基础地理信息系统。

**第十六条** 国务院测绘地理信息主管部门会同国务院其他有关部门、军队测绘部门组织编制全国基础测绘规划,报国务院批准后组织实施。

县级以上地方人民政府测绘地理信息主管部门会同本级人民政府其他有关部门,根据国家和上一级人民政府的基础测绘规划及本行政区域的实际情况,组织编制本行政区域的基础测绘规划,报本级人民政府批准后组织实施。

**第十七条** 军队测绘部门负责编制军事测绘规划,按照国务院、中央军事委员会规定的职责分工负责编制海洋基础测绘规划,并组织实施。

**第十八条** 县级以上人民政府应当将基础测绘纳入本级国民经济和社会发展规划,将基础测绘工作所需经费列入本级政府预算。

国务院发展改革部门会同国务院测绘地理信息主管部门,根据全国基础测绘规划编制全国基础测绘年度计划。

县级以上地方人民政府发展改革部门会同本级人民政府测绘地理信息主管部门,根据本行政区域的基础测绘规划编制本行政区域的基础测绘年度计划,并分别报上一级部门备案。

**第十九条** 基础测绘成果应当定期更新,经济建设、国防建设、社会发展和生态保护急需的基础测绘成果应当及时更新。

基础测绘成果的更新周期根据不同地区国民经济和社会发展的需要确定。

### 第四章 界线测绘和其他测绘

**第二十条** 中华人民共和国国界线的测绘,按照中华人民共和国与相邻国家缔结的边界条约或者协定执行,由外交部组织实施。中华人民共和国地图的国界线标准样图,由外交部和国务院测绘地理信息主管部门拟定,报国务院批准后公布。

**第二十一条** 行政区域界线的测绘,按照国务院有关规定执行。省、自治区、

直辖市和自治州、县、自治县、市行政区域界线的标准画法图，由国务院民政部门 and 国务院测绘地理信息主管部门拟定，报国务院批准后公布。

**第二十二条** 县级以上人民政府测绘地理信息主管部门应当会同本级人民政府不动产登记主管部门，加强对不动产测绘的管理。

测量土地、建筑物、构筑物和地面其他附着物的权属界址线，应当按照县级以上人民政府确定的权属界线的界址点、界址线或者提供的有关登记资料和附图进行。权属界址线发生变化的，有关当事人应当及时进行变更测绘。

**第二十三条** 城乡建设领域的工程测量活动，与房屋产权、产籍相关的房屋面积的测量，应当执行由国务院住房城乡建设主管部门、国务院测绘地理信息主管部门组织编制的测量技术规范。

水利、能源、交通、通信、资源开发和其他领域的工程测量活动，应当执行国家有关的工程测量技术规范。

**第二十四条** 建立地理信息系统，应当采用符合国家标准的基础地理信息数据。

**第二十五条** 县级以上人民政府测绘地理信息主管部门应当根据突发事件应对工作需要，及时提供地图、基础地理信息数据等测绘成果，做好遥感监测、导航定位等应急测绘保障工作。

**第二十六条** 县级以上人民政府测绘地理信息主管部门应当会同本级人民政府其他有关部门依法开展地理国情监测，并按照国家有关规定严格管理、规范使用地理国情监测成果。

各级人民政府应当采取有效措施，发挥地理国情监测成果在政府决策、经济社会发展和社会公众服务中的作用。

## 第五章 测绘资质资格

**第二十七条** 国家对从事测绘活动的单位实行测绘资质管理制度。

从事测绘活动的单位应当具备下列条件，并依法取得相应等级的测绘资质证书，方可从事测绘活动：

- (一) 有法人资格；
- (二) 有与从事的测绘活动相适应的专业技术人员；
- (三) 有与从事的测绘活动相适应的技术装备和设施；
- (四) 有健全的技术和质量保证体系、安全保障措施、信息安全保密管理制度以及测绘成果和资料档案管理制度。

**第二十八条** 国务院测绘地理信息主管部门和省、自治区、直辖市人民政府测绘地理信息主管部门按照各自的职责负责测绘资质审查、发放测绘资质证书。具体办法由国务院测绘地理信息主管部门商国务院其他有关部门规定。

军队测绘部门负责军事测绘单位的测绘资质审查。

**第二十九条** 测绘单位不得超越资质等级许可的范围从事测绘活动,不得以其他测绘单位的名义从事测绘活动,不得允许其他单位以本单位的名义从事测绘活动。

测绘项目实行招投标的,测绘项目的招标单位应当依法在招标公告或者投标邀请书中对测绘单位资质等级作出要求,不得让不具有相应测绘资质等级的单位中标,不得让测绘单位低于测绘成本中标。

中标的测绘单位不得向他人转让测绘项目。

**第三十条** 从事测绘活动的专业技术人员应当具备相应的执业资格条件。具体办法由国务院测绘地理信息主管部门会同国务院人力资源社会保障主管部门规定。

**第三十一条** 测绘人员进行测绘活动时,应当持有测绘作业证件。

任何单位和个人不得阻碍测绘人员依法进行测绘活动。

**第三十二条** 测绘单位的测绘资质证书、测绘专业技术人员的执业证书和测绘人员的测绘作业证件的式样,由国务院测绘地理信息主管部门统一规定。

## 第六章 测绘成果

**第三十三条** 国家实行测绘成果汇交制度。国家依法保护测绘成果的知识产权。

测绘项目完成后,测绘项目出资人或者承担国家投资的测绘项目的单位,应当向国务院测绘地理信息主管部门或者省、自治区、直辖市人民政府测绘地理信息主管部门汇交测绘成果资料。属于基础测绘项目的,应当汇交测绘成果副本;属于非基础测绘项目的,应当汇交测绘成果目录。负责接收测绘成果副本和目录的测绘地理信息主管部门应当出具测绘成果汇交凭证,并及时将测绘成果副本和目录移交给保管单位。测绘成果汇交的具体办法由国务院规定。

国务院测绘地理信息主管部门和省、自治区、直辖市人民政府测绘地理信息主管部门应当及时编制测绘成果目录,并向社会公布。

**第三十四条** 县级以上人民政府测绘地理信息主管部门应当积极推进公众版测绘成果的加工和编制工作,通过提供公众版测绘成果、保密技术处理等方式,促进测绘成果的社会化应用。

测绘成果保管单位应当采取措施保障测绘成果的完整和安全,并按照国家有关规定向社会公开和提供利用。

测绘成果属于国家秘密的,适用保密法律、行政法规的规定;需要对外提供的,按照国务院和中央军事委员会规定的审批程序执行。

测绘成果的秘密范围和秘密等级,应当依照保密法律、行政法规的规定,按照

保障国家秘密安全、促进地理信息共享和应用的原则确定并及时调整、公布。

**第三十五条** 使用财政资金的测绘项目和涉及测绘的其他使用财政资金的项目，有关部门在批准立项前应当征求本级人民政府测绘地理信息主管部门的意见；有适宜测绘成果的，应当充分利用已有的测绘成果，避免重复测绘。

**第三十六条** 基础测绘成果和国家投资完成的其他测绘成果，用于政府决策、国防建设和公共服务的，应当无偿提供。

除前款规定情形外，测绘成果依法实行有偿使用制度。但是，各级人民政府及有关部门和军队因防灾减灾、应对突发事件、维护国家安全等公共利益的需要，可以无偿使用。

测绘成果使用的具体办法由国务院规定。

**第三十七条** 中华人民共和国领域和中华人民共和国管辖的其他海域的位置、高程、深度、面积、长度等重要地理信息数据，由国务院测绘地理信息主管部门审核，并与国务院其他有关部门、军队测绘部门会商后，报国务院批准，由国务院或者国务院授权的部门公布。

**第三十八条** 地图的编制、出版、展示、登载及更新应当遵守国家有关地图编制标准、地图内容表示、地图审核的规定。

互联网地图服务提供者应当使用经依法审核批准的地图，建立地图数据安全管理制度，采取安全保障措施，加强对互联网地图新增内容的核校，提高服务质量。

县级以上人民政府和测绘地理信息主管部门、网信部门等有关部门应当加强对地图编制、出版、展示、登载和互联网地图服务的监督管理，保证地图质量，维护国家主权、安全和利益。

地图管理的具体办法由国务院规定。

**第三十九条** 测绘单位应当对完成的测绘成果质量负责。县级以上人民政府测绘地理信息主管部门应当加强对测绘成果质量的监督管理。

**第四十条** 国家鼓励发展地理信息产业，推动地理信息产业结构调整和优化升级，支持开发各类地理信息产品，提高产品质量，推广使用安全可信的地理信息技术和设备。

县级以上人民政府应当建立健全政府部门间地理信息资源共建共享机制，引导和支持企业提供地理信息社会化服务，促进地理信息广泛应用。

县级以上人民政府测绘地理信息主管部门应当及时获取、处理、更新基础地理信息数据，通过地理信息公共服务平台向社会提供地理信息公共服务，实现地理信息数据开放共享。

## 第七章 测量标志保护

**第四十一条** 任何单位和个人不得损毁或者擅自移动永久性测量标志和正在使用中的临时性测量标志,不得侵占永久性测量标志用地,不得在永久性测量标志安全控制范围内从事危害测量标志安全和使用效能的活动。

本法所称永久性测量标志,是指各等级的三角点、基线点、导线点、军用控制点、重力点、天文点、水准点和卫星定位点的觇标和标石标志,以及用于地形测图、工程测量和形变测量的固定标志和海底大地点设施。

**第四十二条** 永久性测量标志的建设单位应当对永久性测量标志设立明显标记,并委托当地有关单位指派专人负责保管。

**第四十三条** 进行工程建设,应当避开永久性测量标志;确实无法避开,需要拆迁永久性测量标志或者使永久性测量标志失去使用效能的,应当经省、自治区、直辖市人民政府测绘地理信息主管部门批准;涉及军用控制点的,应当征得军队测绘部门的同意。所需迁建费用由工程建设单位承担。

**第四十四条** 测绘人员使用永久性测量标志,应当持有测绘作业证件,并保证测量标志的完好。

保管测量标志的人员应当查验测量标志使用后的完好状况。

**第四十五条** 县级以上人民政府应当采取有效措施加强测量标志的保护工作。

县级以上人民政府测绘地理信息主管部门应当按照规定检查、维护永久性测量标志。

乡级人民政府应当做好本行政区域内的测量标志保护工作。

## 第八章 监督管理

**第四十六条** 县级以上人民政府测绘地理信息主管部门应当会同本级人民政府其他有关部门建立地理信息安全管理和技术防控体系,并加强对地理信息安全的监督管理。

**第四十七条** 地理信息生产、保管、利用单位应当对属于国家秘密的地理信息的获取、持有、提供、利用情况进行登记并长期保存,实行可追溯管理。

从事测绘活动涉及获取、持有、提供、利用属于国家秘密的地理信息,应当遵守保密法律、行政法规和国家有关规定。

地理信息生产、利用单位和互联网地图服务提供者收集、使用用户个人信息的,应当遵守法律、行政法规关于个人信息保护的规定。

**第四十八条** 县级以上人民政府测绘地理信息主管部门应当对测绘单位实行信用管理,并依法将其信用信息予以公示。

**第四十九条** 县级以上人民政府测绘地理信息主管部门应当建立健全随机抽查机制,依法履行监督检查职责,发现涉嫌违反本法规定行为的,可以依法采取下

列措施:

(一) 查阅、复制有关合同、票据、账簿、登记台账以及其他有关文件、资料;

(二) 查封、扣押与涉嫌违法测绘行为直接相关的设备、工具、原材料、测绘成果资料等。

被检查的单位和个人应当配合,如实提供有关文件、资料,不得隐瞒、拒绝和阻碍。

任何单位和个人对违反本法规定的行为,有权向县级以上人民政府测绘地理信息主管部门举报。接到举报的测绘地理信息主管部门应当及时依法处理。

## 第九章 法律责任

**第五十条** 违反本法规定,县级以上人民政府测绘地理信息主管部门或者其他有关部门工作人员利用职务上的便利收受他人财物、其他好处或者玩忽职守,对不符合法定条件的单位核发测绘资质证书,不依法履行监督管理职责,或者发现违法行为不予查处的,对负有责任的领导人员和直接责任人员,依法给予处分;构成犯罪的,依法追究刑事责任。

**第五十一条** 违反本法规定,外国的组织或者个人未经批准,或者未与中华人民共和国有关部门、单位合作,擅自从事测绘活动的,责令停止违法行为,没收违法所得、测绘成果和测绘工具,并处十万元以上五十万元以下的罚款;情节严重的,并处五十万元以上一百万元以下的罚款,限期出境或者驱逐出境;构成犯罪的,依法追究刑事责任。

**第五十二条** 违反本法规定,未经批准擅自建立相对独立的平面坐标系统,或者采用不符合国家标准的基础地理信息数据建立地理信息系统的,给予警告,责令改正,可以并处五十万元以下的罚款;对直接负责的主管人员和其他直接责任人员,依法给予处分。

**第五十三条** 违反本法规定,卫星导航定位基准站建设单位未报备案的,给予警告,责令限期改正;逾期不改正的,处十万元以上三十万元以下的罚款;对直接负责的主管人员和其他直接责任人员,依法给予处分。

**第五十四条** 违反本法规定,卫星导航定位基准站的建设和运行维护不符合国家标准、要求的,给予警告,责令限期改正,没收违法所得和测绘成果,并处三十万元以上五十万元以下的罚款;逾期不改正的,没收相关设备;对直接负责的主管人员和其他直接责任人员,依法给予处分;构成犯罪的,依法追究刑事责任。

**第五十五条** 违反本法规定,未取得测绘资质证书,擅自从事测绘活动的,责令停止违法行为,没收违法所得和测绘成果,并处测绘约定报酬一倍以上二倍以下的罚款;情节严重的,没收测绘工具。

以欺骗手段取得测绘资质证书从事测绘活动的,吊销测绘资质证书,没收违法所得和测绘成果,并处测绘约定报酬一倍以上二倍以下的罚款;情节严重的,没收测绘工具。

**第五十六条** 违反本法规定,测绘单位有下列行为之一的,责令停止违法行为,没收违法所得和测绘成果,处测绘约定报酬一倍以上二倍以下的罚款,并可以责令停业整顿或者降低测绘资质等级;情节严重的,吊销测绘资质证书:

- (一)超越资质等级许可的范围从事测绘活动;
- (二)以其他测绘单位的名义从事测绘活动;
- (三)允许其他单位以本单位的名义从事测绘活动。

**第五十七条** 违反本法规定,测绘项目的招标单位让不具有相应资质等级的测绘单位中标,或者让测绘单位低于测绘成本中标的,责令改正,可以处测绘约定报酬二倍以下的罚款。招标单位的工作人员利用职务上的便利,索取他人财物,或者非法收受他人财物为他人谋取利益的,依法给予处分;构成犯罪的,依法追究刑事责任。

**第五十八条** 违反本法规定,中标的测绘单位向他人转让测绘项目的,责令改正,没收违法所得,处测绘约定报酬一倍以上二倍以下的罚款,并可以责令停业整顿或者降低测绘资质等级;情节严重的,吊销测绘资质证书。

**第五十九条** 违反本法规定,未取得测绘执业资格,擅自从事测绘活动的,责令停止违法行为,没收违法所得和测绘成果,对其所在单位可以处违法所得二倍以下的罚款;情节严重的,没收测绘工具;造成损失的,依法承担赔偿责任。

**第六十条** 违反本法规定,不汇交测绘成果资料的,责令限期汇交;测绘项目出资人逾期不汇交的,处重测所需费用一倍以上二倍以下的罚款;承担国家投资的测绘项目的单位逾期不汇交的,处五万元以上二十万元以下的罚款,并处暂扣测绘资质证书,自暂扣测绘资质证书之日起六个月内仍不汇交的,吊销测绘资质证书;对直接负责的主管人员和其他直接责任人员,依法给予处分。

**第六十一条** 违反本法规定,擅自发布中华人民共和国领域和中华人民共和国管辖的其他海域的重要地理信息数据的,给予警告,责令改正,可以并处五十万元以下的罚款;对直接负责的主管人员和其他直接责任人员,依法给予处分;构成犯罪的,依法追究刑事责任。

**第六十二条** 违反本法规定,编制、出版、展示、登载、更新的地图或者互联网地图服务不符合国家有关地图管理规定的,依法给予行政处罚、处分;构成犯罪的,依法追究刑事责任。

**第六十三条** 违反本法规定,测绘成果质量不合格的,责令测绘单位补测或者重测;情节严重的,责令停业整顿,并处降低测绘资质等级或者吊销测绘资质证书;造成损失的,依法承担赔偿责任。

**第六十四条** 违反本法规定,有下列行为之一的,给予警告,责令改正,可以并

处二十万元以下的罚款;对直接负责的主管人员和其他直接责任人员,依法给予处分;造成损失的,依法承担赔偿责任;构成犯罪的,依法追究刑事责任:

(一) 损毁、擅自移动永久性测量标志或者正在使用中的临时性测量标志;

(二) 侵占永久性测量标志用地;

(三) 在永久性测量标志安全控制范围内从事危害测量标志安全和使用效能的活动;

(四) 擅自拆迁永久性测量标志或者使永久性测量标志失去使用效能,或者拒绝支付迁建费用;

(五) 违反操作规程使用永久性测量标志,造成永久性测量标志毁损。

**第六十五条** 违反本法规定,地理信息生产、保管、利用单位未对属于国家秘密的地理信息的获取、持有、提供、利用情况进行登记、长期保存的,给予警告,责令改正,可以并处二十万元以下的罚款;泄露国家秘密的,责令停业整顿,并处降低测绘资质等级或者吊销测绘资质证书;构成犯罪的,依法追究刑事责任。

违反本法规定,获取、持有、提供、利用属于国家秘密的地理信息的,给予警告,责令停止违法行为,没收违法所得,可以并处违法所得二倍以下的罚款;对直接负责的主管人员和其他直接责任人员,依法给予处分;造成损失的,依法承担赔偿责任;构成犯罪的,依法追究刑事责任。

**第六十六条** 本法规定的降低测绘资质等级、暂扣测绘资质证书、吊销测绘资质证书的行政处罚,由颁发测绘资质证书的部门决定;其他行政处罚,由县级以上人民政府测绘地理信息主管部门决定。

本法第五十一条规定的限期出境和驱逐出境由公安机关依法决定并执行。

## 第十章 附 则

**第六十七条** 军事测绘管理办法由中央军事委员会根据本法规定。

**第六十八条** 本法自 2017 年 7 月 1 日起施行。

# 南极考察活动环境影响评估管理规定

(国家海洋局, 2017年5月18日)

## 第一章 总则

**第一条** 为加强南极考察活动的环境管理, 防止南极考察活动对南极环境和南极生态系统造成不良影响, 保障南极考察活动的顺利实施, 履行《南极条约》、《关于环境保护的南极条约议定书》规定的国际法律义务, 根据《国务院对确需保留的行政审批项目设定行政许可的决定》、《南极考察活动行政许可管理规定》等有关规定, 制定本规定。

**第二条** 本规定所称环境影响评估, 是指在拟议阶段就南极考察活动对南极环境和生态系统可能造成的影响进行分析、预测和评估, 提出预防或减轻不良环境影响的措施。

本规定所称南极考察活动, 指南纬 60 度以南的地区, 包括该地区的所有冰架开展的以探索和认知自然和人文要素为目的的探险、调查、勘察、观测、监测、研究及其保障等形式的活动。

本规定所称轻微或短暂影响, 是指《关于环境保护的南极条约议定书》中所规定的轻微或短暂影响。

**第三条** 公民、法人或其他组织拟组织开展南极考察活动的, 应当在申请开展南极考察活动之前依照本规定进行环境影响评估。

**第四条** 南极考察活动环境影响评估应当遵循客观、公开、公正原则。

开展南极考察活动应当坚持对南极环境和生态系统产生不利影响最小化的原则。

**第五条** 国家海洋行政主管部门归口管理南极考察活动的环境影响评估工作, 其主要职责是:

(一) 制定南极考察活动环境影响评估管理规章制度;

(二) 编制和发布南极考察活动环境影响评估文件框架内容、适用语言和格式的要求;

(三) 负责南极环境影响评估文件的审查、备案和报送国际组织工作;

(四) 负责南极考察活动环境影响评估管理工作的监督、检查和协调;

(五) 组织开展南极考察活动环境影响评估管理的科学研究、国际合作与技

术交流；

- (六) 负责制定南极考察活动环境影响的评估指标体系及标准规范；
- (七) 建立南极考察活动环境影响评估的基础数据库。

## 第二章 环境影响评估文件

**第六条** 公民、法人或者其他组织在申请开展南极考察活动之前应当对南极考察活动方案进行环境影响评估，并填写完整的中、英文环境影响评估表。

公民、法人或者其他组织根据环境影响评估表的结论，如活动可能对南极环境及相关生态系统产生相当于或大于轻微或短暂影响的，应当编制中、英文环境影响评估报告书，根据申请开展的南极考察活动对南极环境影响程度的不同分为全面环境影响评估报告书和初步环境影响评估报告书。如活动可能对南极环境及相关生态系统产生小于轻微或短暂影响的，无须编制环境影响评估报告书。

**第七条** 在南极建设、改造考察站、机场和码头等大型人工建造物以及开展国家海洋行政主管部门认定的其他可能对南极环境和生态系统产生大于轻微或短暂影响活动的，应当提交全面环境影响评估报告书。

**第八条** 全面环境影响评估报告书包括以下内容：

(一) 南极考察活动负责人或机构信息、环境影响评估报告书编制人和顾问专家信息、拟开展的活动和环境影响评估情况简介；

(二) 活动方案，包括拟开展活动的目的、意义、必要性、时间、区域、路线、内容、交通工具、保障措施、废弃物处理方式、拟带入南极的物品、特殊活动事项等；

(三) 活动区域初始环境描述；

(四) 环境影响评估时使用的方法和数据；

(五) 活动对南极环境产生的直接影响及对南极环境累积影响的分析、预测和评估；

(六) 活动对南极环境产生的间接影响及对科学研究和其他用途或价值的影响的分析、预测和评估；

(七) 活动的替代方案及影响；

(八) 不开展活动的替代方案及影响；

(九) 预防和减缓措施及其技术论证；

(十) 活动对环境影响的监测方案；

(十一) 环境风险应急预案；

(十二) 认知差距；

(十三) 结论。

全面环境影响评估报告书可以自行或者委托有编制南极考察活动环境影响

评估报告能力的机构编制。

**第九条** 除根据《南极考察活动行政许可管理规定》和本规定第七条应当进行全面环境影响评估的情形外,在南极地区开展相关活动,对南极环境产生轻微或短暂影响的,应当编制初步环境影响评估报告书。

**第十条** 初步环境影响评估报告书包括以下内容:

(一) 南极考察活动负责人、环境影响评估报告书编制人信息,拟开展的活动和环境影响评估情况简介;

(二) 活动方案,包括南极考察活动的目的、意义、必要性、时间、区域、路线、内容、交通工具、保障措施、废弃物处理方式、拟带入南极的物品、特殊活动事项等,以及对其他科学研究、本区域用途和价值方面的影响等;

(三) 活动区域初始环境描述;

(四) 活动对南极环境产生的直接影响、间接影响及对南极环境累积影响的分析、预测和评估,并说明进行环境影响评估时使用的方法、数据等;

(五) 活动的替代方案及影响;

(六) 预防和减缓措施及其技术论证、监测方案;

(七) 认知差距;

(八) 结论。

初步环境影响评估报告书可以自行或者委托有编制南极考察活动环境影响评估报告能力的机构编制。

**第十一条** 环境影响评估文件应当中、英文版本表述一致,内容真实、准确,能够客观反映本次南极考察活动对于南极环境和生态系统的实际影响,提出的预防或减缓措施应当真实、可行。

**第十二条** 有下列情形之一的,应当依照本管理规定重新进行环境影响评估:

(一) 改变活动目的、内容及预期目标的;

(二) 改变在南极的活动路线的;

(三) 超过批准的有效期限进行活动的;

(四) 应当编制初步环境影响评估报告书或全面环境影响评估报告书而未编制的;

(五) 其他重大事项改变的。

**第十三条** 经批准开展南极考察活动的,应当严格按照获准方案进行,并尽可能采取各种措施将其活动对南极环境和生态系统的影响降到最低。

### 第三章 评估文件的受理与审查

**第十四条** 需要进行初步环境影响评估的南极考察活动申请者应当于每年的4

月 1 日至 4 月 30 日之间,在向国家海洋行政主管部门提交的南极考察活动申请文件中包含环境影响评估表和初步环境影响评估文件。

需要进行全面环境影响评估的南极考察活动,应当至少于活动开始前 15 个月之前向国家海洋行政主管部门提交申请文件,申请文件中应包含全面环境影响评估文件。

国家海洋行政主管部门应当将审查合格的全面环境影响评估文件提交南极条约协商会议审议,审议时间不计入南极考察活动许可审查期限。

**第十五条** 南极考察活动环境影响评估报告的审查应当在南极考察活动许可审查期限内完成。

**第十六条** 审查机关视情况可以邀请相关专业的专家对环境影响评估文件进行评审。专家评审可以采取审查会、函审或其他形式,由不少于 5 人的单数相关专业专家组成专家评审组。专家评审组出具评审意见,并对评审结论负责。

**第十七条** 审查机关将环境影响评估报告的审查结果告知申请者,该结果作为国家海洋行政主管部门审批该南极考察活动申请的重要依据。

**第十八条** 中外合作开展南极考察活动,根据合作协议,应当由中方进行环境影响评估的,按本规定执行,应当由外方进行环境影响评估的,参与该活动的中方公民、法人或者其他组织可向国家海洋行政主管部门提交该国官方批准的环境影响评估文件,国家海洋行政主管部门经审核后可视为有效。南极考察活动申请人仍应当依法提交南极考察活动申请文件。

## 第四章 监督管理

**第十九条** 南极考察活动结束后,公民、法人或者其他组织的负责人应当编写报告书,并在 30 日内提交国家海洋行政主管部门。

报告书的内容应当包括本次南极考察活动对环境实际产生的影响和已经采取的减缓措施及其效果。

**第二十条** 国家海洋行政主管部门依法向南极派遣南极考察活动监督检查人员,对经过批准开展的南极考察活动及其对于南极环境和生态系统造成的影响进行监督检查。

**第二十一条** 未按照环境影响评估文件的内容说明开展活动、积极采取预防和减缓措施消除环境影响的,或是实际开展的活动对南极环境和生态系统的影响严重超出环境影响评估结论的,现场监督检查人员应当责令其立即停止活动,限期离开南极。对于情节严重的,国家海洋行政主管部门可以不予批准其再次开展南极考察活动。

## 第五章 附则

**第二十二条** 南极考察活动以外的其他极地活动的环境影响评估管理工作参照本规定执行。

**第二十三条** 本规定由国家海洋行政主管部门负责解释。

**第二十四条** 本规定自颁布之日起施行。

## 《中国海洋法学评论》稿约

《中国海洋法学评论》(*China Oceans Law Review*), ISSN: 1813-7350, 是由厦门大学海洋法与中国东南海疆研究中心、香港理工大学董浩云国际海事研究中心、台湾中山大学海洋事务研究所、澳门大学高级法律研究所以及大连海事大学海法研究院两岸四地五校联合主办, (香港) 中国评论文化有限公司出版的海洋法领域中英双语对照的优秀国际学术期刊。《中国海洋法学评论》秉承“海纳百川, 有容乃大”的精神, 力求刊发海内外与海洋法律、海洋政策相关的一切研究成果, 热忱欢迎专家学者不吝赐稿, 兹立稿约如下:

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