边界与海洋研究
JOURNAL OF BOUNDARY AND OCEAN STUDIES
第2卷 第4期 2017年7月
Vol. 2 No. 4 July 2017

南海仲裁案庭外法理斗争：回顾与展望

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编者按：2017年1月18日，受外交部条法司委托，由国家领土主权与海洋权益协同创新中心和武汉大学中国边界与海洋研究院共同主办的“2017年菲律宾南海仲裁案专题研讨会”在武汉大学召开。来自武汉大学、南京大学、北京师范大学、中山大学、浙江大学、重庆大学、中南财经政法大学、西南政法大学、郑州大学、浙江工商大学、中国南海研究院、空军预警学院等近二十所高校和研究机构的四十多位专家学者就南海仲裁案的法律问题进行了系统全面而认真深入的研讨。外交部条法司马新民副司长就在南海仲裁案法理斗争中中国外交部门和国际法学界所做的主要工作以及我国未来的工作重点作了主旨发言。本文特摘其发言的主要内容做适当编排予以刊发。

一、 南海仲裁案庭外法理斗争回顾

2016年底，王毅外长在接受《人民日报》记者专访时谈及2016年外交工作在维护国家主权、安全、发展利益方面采取的重要举措，其中特别指出，“我们对菲律宾前政府提起的所谓南海仲裁案予以坚决回击，有效揭露了临时仲裁庭越权、扩权甚至滥权的非法行径，让阴谋和谎言无处遁形，让事实和真相大白于天下，推动南海问题重新回到直接当事国对话协商解决的正确轨道，有力维护了国家主权，维护了民族尊严，维护了地区稳定”。①

菲律宾于2013年1月单方面就中菲有关南海问题提起所谓强制仲裁。自那时起，应对南海仲裁案一直是我国外交工作的重点。南海仲裁案的应对是全方位的，包括从政治、法律、海上行动和舆论引导等多个方面综合施策。其中，法律战是这场斗争的基础和关键一环。三年多来，我国始终坚持“不接受、不参与”菲律宾所提仲裁的立场，直面挑战，大胆创新，攻坚克难，多措并举，持续有效开展庭外法律斗争，取得重要阶段性成果。具

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① 《中国特色大国外交攻坚开拓之年》，《人民日报》2016年12月22日第3版。

体而言，我国在南海仲裁案庭外法理斗争方面主要开展了以下工作：

（一）发表政府立场文件，奠定我国不接受、不参与仲裁的法理基础

针对我国不接受、不参与菲律宾所提仲裁的立场，某些国家和媒体污蔑我国“不遵守国际法”，国内一些民众和学者对仲裁案的敏感性和复杂性理解不足，对我国不接受、不参与仲裁亦感疑惑。根据有关部署，由外交部条法司牵头的法律工作团队历经一年奋战，起草了我国关于仲裁案管辖权问题的立场文件。2014 年 12 月 7 日，外交部受权发表《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》。该文件指出：菲律宾提请仲裁事项的实质是南海部分岛礁的领土主权问题，超出《联合国海洋法公约》（以下简称《公约》）的调整范围，不涉及《公约》的解释或适用；以谈判方式解决有关争端是中菲两国通过双边文件和《南海各方行为宣言》所达成的协议，菲律宾单方面将中菲有关争端提交强制仲裁违反国际法；即使菲律宾提出的仲裁事项涉及有关《公约》解释或适用的问题，也构成中菲两国海域划界不可分割的组成部分，而中国已根据《公约》的规定于 2006 年作出声明，将涉及海域划界等事项的争端排除适用仲裁等强制争端解决程序。仲裁庭对菲律宾提起的仲裁明显没有管辖权。各国有权自主选择争端解决方式，中国不接受、不参与菲律宾提起的仲裁具有充分的国际法依据。①

这是新中国成立以来我国首次出台反击南海问题“司法化”的政府立场文件。它从法律角度阐述了我国关于仲裁庭对菲律宾所提仲裁没有管辖权的立场和理据，阐明我国不接受、不参与仲裁于法有据，为我国应对仲裁案的政策主张奠定了法律根基。

我国公开发表政府立场文件，从法律上揭穿仲裁案的面纱，有力反击美国、菲律宾等国对我国不接受、不参与仲裁的质疑和炒作，充分彰显中国才是国际法的真正维护者的形象。学界公认该立场文件是中国国际法理论与实践发展进程中具有重大历史影响的里程碑。主要国家和国际舆论高度重视我国从法律角度回应仲裁案，积极评价我国政府立场文件的专业水准。立场文件的发表对仲裁庭产生重要影响，促使仲裁庭决定将管辖权和实体问题分开审理，客观上大大迟滞仲裁案进程。尽管仲裁庭最终仍罔顾我国政府立场文件的观点和理据，作出越权裁决，但立场文件所阐明的观点已为国际社会所周知，仲裁裁决的正当性、公正性受到广泛质疑。

（二）发表仲裁庭管辖权裁决批驳文章，为否定仲裁庭最后裁决的效力做好法律铺垫

仲裁庭于 2015 年 10 月 29 日就南海仲裁案管辖权问题作出裁决，片面认定对菲律宾有关诉求具有管辖权，强行将案件推进到实体审理阶段。一些国家借势炒作所谓仲裁庭管辖权问题由仲裁庭自行决定、裁决具有终局性、中国应受仲裁裁决约束等论调，企图陷中国于被动。为了维护我国利益和形象，中国国际法学会于 2016 年 6 月 10 日发表了针对仲裁庭管辖权裁决的长篇专业批驳文章——《菲律宾所提南海仲裁案仲裁庭的裁决没有法律效力》。

该文理据充分，论证扎实，引述了大量国际司法判例和权威国际法学家著作，从法律

① 参见《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 3 段。

角度全面、深入揭批了仲裁庭管辖权裁决在认定事实和适用法律方面的六大谬误：第一，错误地认定菲律宾所提诉求构成中菲两国有关《公约》解释或适用的争端；第二，错误地对不属于《公约》调整而本质上属于陆地领土主权问题的事项确定管辖权；第三，错误地对已被中国排除适用强制程序的有关海域划界的事项确定管辖权；第四，错误地否定中菲两国存在通过谈判解决相关争端的协议；第五，错误地认定菲律宾就所提仲裁事项的争端解决方式履行了“交换意见”的义务；第六，背离了《公约》争端解决机制的目的和宗旨，损害了《公约》的完整性和权威性。①

该文为我们从根本上否定仲裁程序的正当性、合法性，进而不接受、不承认仲裁庭的最后裁决提供了法律依据，起到了正本清源、提前消毒、釜底抽薪之效。该批驳文章通过国内外媒体广泛传播，受到各界高度关注和国际法学界的积极评价。

(三)推动俄罗斯与我国发表联合声明，系统阐明促进国际法的正义立场

经过广泛和深入的沟通，在俄罗斯总统普京 2016 年 6 月访华期间，中俄双方于 6 月 25 日发表了由两国外长签署的《中华人民共和国和俄罗斯联邦关于促进国际法的声明》。安理会两大常任理事国就重要国际法问题发表综合性联合声明，是国际关系史中的一次创新实践，分量很重，其中特别就《联合国海洋法公约》争端解决机制问题表明共同关切，有助于进一步揭露仲裁案的虚伪本质。该声明已由中俄双方通过联合国秘书长安排作为联合国大会文件和安理会文件散发，既体现了中俄两国在推动国际法治方面的贡献和建设性立场，同时对我国围绕南海仲裁案的整体应对工作产生了重大积极影响。美欧不少学者以及一些西方主流国际法网站均高度关注中俄联合声明，认为有关声明是中俄两国国际法政策和国家实践的重要体现。

(四)裁决出台当天发表政府声明，宣示捍卫南海权益的法律立场

2016 年 7 月 12 日下午，在南海仲裁案仲裁庭发布裁决后不到 1 小时，外交部受权发布《中华人民共和国政府关于在南海的领土主权和海洋权益的声明》(下称《权益声明》)和《中华人民共和国外交部关于应菲律宾共和国请求建立的南海仲裁案仲裁庭所作裁决的声明》(下称《裁决声明》)。

《权益声明》是新中国成立以来首次系统阐述中国在南海的领土主权和海洋权益。该声明明确指出，中国在南海的领土主权和海洋权益共包括四个方面：一是中国对南海诸岛，包括东沙群岛、西沙群岛、中沙群岛和南沙群岛拥有主权；二是中国南海诸岛拥有内水、领海和毗连区；三是中国南海诸岛拥有专属经济区和大陆架；四是中国在南海拥有历史性权利。该声明不仅系统展示我国南海诸岛的整体论主张，同时公开宣示“中国在南海拥有历史性权利”的重大立场。

《裁决声明》针对仲裁庭所作裁决一针见血地指出，“该裁决是无效的，没有拘束力，中国不接受、不承认”，强调“中国在南海的领土主权和海洋权益在任何情况下不受仲裁裁决的影响，中国反对且不接受任何基于该仲裁裁决的主张和行动”，并重申“在领土问

① 中国国际法学会：《菲律宾所提南海仲裁案仲裁庭的裁决没有法律效力》，北京：法律出版社 2016 年版。

题和海洋划界争议上，中国不接受任何第三方争端解决方式，不接受任何强加于中国的争端解决方案”。

上述两项声明面向国内国际，鲜明、有力地表达了中国坚定捍卫南海权益的决心和法律立场。

(五)裁决作出后第一时间在香港主办国际法研讨会，有力批驳仲裁裁决

南海仲裁案最后裁决作出两天后，即 2016 年 7 月 15—16 日，中国国际法学会和香港国际仲裁中心在香港共同举办“海洋争端解决国际法研讨会”。这是在仲裁案最后裁决出台后全球范围内举办的首个高规格、国际化、专业性研讨会。除专设“南海仲裁案特别议题”外，研讨会紧扣仲裁裁决所涉的程序和实体问题进行研讨。

包括全国政协副主席董建华，泰国前副总理、亚洲和平与和解委员会主席素拉杰，国际法院和国际海洋法法庭法官，联合国国际法委员会委员和国际法研究院院士，中国国际法学会会长李适时在内的 200 多名知名国际法专家出席会议，涵盖五大洲以及内地、香港和台湾的代表。30 多名中外顶级专家(包括来自美国、英国、法国、德国、荷兰、比利时、加拿大、爱尔兰、印度、新加坡等对国际法有重要影响国家的专家)，从法理层面深入批驳或质疑仲裁裁决。中国国际法学会和香港国际仲裁中心在会后公开出版《海洋争端解决国际法研讨会论文集》。[①] 40 多家中外主流媒体全面、深入报道会议，形成有力声势，在国内、国际产生积极反响。

(六)利用各类法律平台，积极主动做工作

2016 年 9 月，外交部副部长刘振民在会见来华访问的国际法院院长时，系统阐述了中国在和平解决国际争端和正确运用法律方法的政策立场。自南海仲裁案提起以来，外交部条法司利用与美、英、法等国举行国际法和海洋法磋商之机，主动深入就南海仲裁案做法律外交工作，阐述我国法律立场，也产生了积极的效果。

我国还通过联合国大会法律委员会国际法周、联合国大会关于海洋和海洋法决议的磋商、《公约》缔约国会议、亚洲国际法学会、厦门国际法高等研究院等场合，积极阐述我国立场主张，反对有关国家对我国的不实指责，有力维护我国利益和形象。

(七)举行中外媒体吹风会，宣介我国法律立场和理据

2016 年 5 月 12 日，外交部条法司司长徐宏在北京召开中外媒体吹风会，从国际法角度阐明我国关于南海仲裁案的立场和理据，现场反响热烈。美国有线新闻网、英国广播公司、路透社、美国《华尔街日报》、英国《金融时报》、新加坡《海峡时报》等外国重要媒体以及中央电视台、中国日报等国内主流媒体予以大篇幅报道，吹风会实录(中英文版)还通过网络和新媒体广为传播，并向西方国家的法律官员散发，引起广泛关注。

仲裁庭在裁决中五次引用吹风会实录内容，将之作为中方法律立场的重要来源。国内有关专家称，吹风会不啻是一堂仲裁普法课，充分显示了中国在国际海洋法律方面的自

① *Proceedings on Public International Law Colloquium on Maritime Disputes Settlement*, Chinese Society of International Law and Hong Kong International Arbitration Centre, Hong Kong, 2016.

信，切实达到了把事实说清楚、把法理讲明白的宣传效果。国外一些学者表示，吹风会不回避尖锐问题，敢于从法律上硬碰硬，有利于其他国家更好理解中方立场。

(八)在国际海洋法法庭20周年纪念活动上，针对仲裁案有力发出中国声音

2016年10月5-6日，国际海洋法法庭在汉堡隆重举行纪念法庭成立20周年专题研讨会，主题为“国际海洋法法庭20年：法庭对法治的贡献”(20 Years of the International Tribunal for the Law of the Sea：the Contribution of the Tribunal to the Rule of Law)。全球150多名权威海洋法专家和各国代表(包括国际海洋法法庭全部现任法官和多位前任法官，国际法院院长龙尼·亚伯拉罕以及多位国际法院法官)，参加。其中，题为“国际海洋法法庭对法治的贡献：法律执业者的视角”的第三场研讨会(Panel 3：The Contribution of the Tribunal to the Rule of Law：the Point of View of Practitioners)备受关注。

在该研讨会上，针对两位主讲人——南海仲裁案菲律宾律师波义尔(Alan Boyle)和雷切尔(Paul Reichler)鼓吹南海仲裁案有利于巩固国际海洋法律体系、促进国际法治等错误言论，我作为与会中国代表团团长争得发言机会，阐明南海仲裁案的裁决不符合《维也纳条约法公约》和国际司法判例所确认的解释规则，强调仲裁庭超越《联合国海洋法公约》的授权，越权管辖菲律宾所提仲裁，并引述一些世界顶尖国际法专家对仲裁裁决的质疑和批评，揭示将南海仲裁案与国际法治相提并论的荒谬，反响积极。

国际海洋法法庭成立20周年纪念活动是国际海洋法领域的一次盛会。我国代表在这一关键和重要场合找准时机，运用专业的法律表述，平和理性、有理有据地阐释了中国对南海仲裁案的法律立场，赢得了多数与会人员的理解和尊重。藉由法庭及其全球直播平台和现场海洋法各界人士，我国对南海仲裁案的严正立场和法律观点获得有效传播，不仅有利于我国在政治上赢得国际社会的支持，而且有助于我国进一步争取国际法律界中的对华友好力量。

(九)引导和整合国内学术界资源，有力形成政学互动、官民配合、共同开展庭外法理斗争的局面

三年多来，外交部牵头建立起汇集内地、港台和海外华人一流法律专家的研究团队，积极调动国内学界力量，共同开展南海仲裁案庭外法理斗争。外交部条法司、边海司负责人在有关院校、研究机构、国际研讨会做专题讲座和主旨演讲数十次，引导各界理解和认同我国相关法律立场和理据。

中国国际法学会组织出版《中国国际法年刊南海仲裁案管辖权问题专刊》(2016年)，《中国国际法论刊》(Chinese Journal of International Law)、《国际法研究》和《边界与海洋研究》等权威学术刊物还开辟“南海仲裁案专栏”，刊载国内外学者高水平学术论文60多篇，从专业角度质疑或批驳仲裁裁决，产生积极反响。

总体看，我国围绕仲裁案展开的各项庭外法理斗争相互配合，环环相扣，成效显著。我国不接受、不参与菲律宾所提南海仲裁案赢得国际社会的理解和认同。我国所阐明的法理立场和理据在国际法上站得稳、立得住，许多国家和国际法学者认为中国在仲裁案中不输理，中国得道多助。

值得一提的是，在我国应对南海仲裁案的法律斗争中，一条重要的成功经验就是开拓创新。面对仲裁案这一前所未有的挑战，我国积极运筹，创造性地开展仲裁案庭外法理应对工作，创造多个“首次”：

一是就仲裁庭管辖权问题发表政府立场文件，首次以中国政府名义运用国际法的语言和方法，系统阐释我国有关政策主张。

二是中国国际法学会发表仲裁庭管辖权裁决批驳文章，首次以全国性权威学术团体的名义发表学术长文，客观上支持和呼应政府有关政策主张。

三是我国与俄罗斯发表关于促进国际法的联合声明，首次在两国历史上专门就国际法问题签署和发表政府间文件，是中俄在国际法和外交领域的创新实践。

四是形成全球华人国际海洋法学者共同批驳仲裁裁决的局面，在国际法领域，两岸四地和海内外华人国际法学人首次携手，共同应对南海仲裁案，为维护国家重大利益献计献策。

五是在香港举办涉及南海仲裁案的国际法研讨会，这是中国国际法学会首次在境外组织国际法研讨会，由中外国际法学者向国际社会阐释仲裁裁决的谬误。

二、 未来南海仲裁案法理应对工作

仲裁庭作出所谓最终裁决后，该案在法律程序上告一段落，一场“闹剧”已经落幕。政治上，从稳定周边大局和南海形势出发，我们需尽快翻过“仲裁案”这一页，但在法律上，必须清醒地认识到，尽管我们不承认裁决的法律效力，但仲裁程序并无纠错纠偏机制，裁决一旦作出，无法撤销，亦无法提出上诉，客观上对我不利。有关国家绝不会放弃利用所谓仲裁裁决做文章，也不能排除有些国家可能会利用裁决或仿效菲律宾对我国提起新的仲裁或司法程序。仲裁裁决对我国的不利影响具有长期性和复杂性，如何从法律上批倒南海仲裁案裁决，仍然任重道远。关于下一步法律应对问题，个人认为需要重点把握好以下几个方向性问题：

（一）充分认识国际法的双重性，认清南海仲裁案的政治案件本质

国际法的双重性表现为，国际法既是国际公平正义的象征，也是政治工具。一方面，“国际法作为正义的希望而存在”，[①] 它“具有在国家间关系上维护国际和平、安全和正义的一般功能”。[②] 另一方面，国际法是国际政治的法律表达，国际法的目的在于实现国家利益。国家利益是各国运用国际法的根本出发点和落脚点。马尔蒂·科斯肯涅米（Martti Koskenniemi）指出，“国际法的存在，维护了世界上那些居主导地位的人和机构所追求的价值、利益和偏好。它是权力的工具。”“法律是工具性的，但是，它是什么的工具这个问

① Martti Koskenniemi, “What is International Law for?” in Malcom D. Evans (ed.), *International Law*, 3rd ed., Oxford University Press, 2010, p. 52.

② C. Tomuschat, “International Law: Ensuring the Survival of Mankind on the Eve of New Century”, *Recueil des Cours*, Vol. 281, 1999, p. 23.

题，无法脱离政治进程来确定，它本身是这个政治进程的一部分。”①从这个意义上说，国际法规则很难说是客观中立的，经常会出现“公说公有理、婆说婆有理”的情况。国际法是什么在很大程度上取决于其为谁所用，由谁解释，站在何种立场、基于何种利益和价值观来判断。各国都是根据自己的利益需求和价值观，推动形成对自己有利的国际法规则，对国际法作出对自己有利的解释。国际法从制定到解释和适用，都充满了国家权力的较量、利益的竞争与价值观的博弈。澳大利亚外交和贸易部前法律顾问理查德·罗威(Richard Rowe)在谈及国际条约起草时说，“不能将多边协议的谈判视为纯粹的法律起草工作，这一过程中总是存在着反映各国利益的政治背景，这需要我们在全面了解谈判主题和国际法的基础上，开展外交活动。”②国际法背后是各种力量之间的利益、价值的争斗。在海牙国际法讲习班的著名演讲中，路易斯·亨金(Louis Henkin)教授深刻地提出了国际法的政治、价值和功能问题。他指出，“政治”一词指“法律作为政治”和国际法作为国际政治制度中的法律，“价值”指国际法律制度存在的目的，“功能”指国际法处理国际生活实际需要的能力。国际法不是乌托邦的法律，而是真正的社会制度的规则。我们要了解国际法，就需要了解国际法所处的国际政治制度。国际法确实并且应当反映和促进一种价值观，即国际社会最高的道德信仰。大多数国际法规则在内容和适用方面需要结合实际，国际法的这个特点促进了国际关系的有序和平发展。③

我们要认清国际法的本质，既要高举国际法维护国际公平正义的旗帜，又要充分利用国际法，维护国家利益、政策和价值观。

国际法的双重性启示我们，既要把国际法当作维护国际公义的“金科玉律”，也要把国际法当作为国家服务的政治工具。我们要学会在运用国际法为国家利益和需要服务的同时，始终站在道义的制高点，营造一个关于通过法律维护“国际公平正义”的动人情景剧，更“优雅”地实现国家利益。

国际法的双重性也启示我们，国际法规则不是一些一成不变的教条，并非非黑即白。由于国际法的制定和确立没有统一的全球性立法机关，国际法也缺乏统一的全球性司法机关和执法机关加以解释、适用和执行，通常情况下国际法是由各国自我解释和适用的。因此，国际法的内容有一定的不确定性，在不少情况下存在不同解释和适用的空间。我们在运用国际法时，要善于趋利避害，以维护国家利益、国家政策和价值观为目的，寻找于我有利的法律依据，包括在证明国际条约、习惯国际法和一般法律原则的国家实践时，选择符合我国利益和需求的实践和学说。正如英国总检察长杰里米·赖特(Jeremy Wright)所说：“国际法这种固有的灵活性可能是其最重要的特质之一，这也是我们作为政府律师应

① Martti Koskenniemi, “What is International Law for?” In: Malcom D. Evans (ed.), *International Law*, 3rd ed., Oxford University Press, 2010, p. 52.

② Richard Rowe, “International Law and Diplomacy: the Art of the Possible”, *Melbourne Journal of International Law*, Vol. 15, 2014, p. 322.

③ Jonathan I. Charney; Donald K. Anton and Mary Ellen O'Connell, “Introduction: Politics, Values and Functions: International Law in the 21st Century”, *Scholarly Works*, 1998, p. 95.

当了解的现实”，“任何律师尤其是政府律师，都必须认识到，法律需要为社会服务，国际法同样如此”，“国际法领域的法律意见不应当是教条式的。作为政府律师，我们很少得出非黑即白的结论，而是基于风险提供建议，并力求建议能够反映该事项发生的所有背景”。① 围绕国家利益需求、政策取向和价值观确定和解释国际法，是各国普遍的做法。

国际法的双重性还启示我们，国际法是一把“双刃剑”。国际法作为国家重要的政治、外交工具，是维护国家权益的“国之重器”。国际法既可为我国所用，作为我国维护国家利益和价值观的利器，也可能成为他国牵制我国权益的工具。关键要看我国能否掌握国际法的话语权和主导权。但国际法也不是万能的，它只是国家维护权益和服务外交决策的工具之一，而非全部。著名美国国际法学家托马斯·弗兰克(Thomas M. Franck)指出，美国国际法学界和实务界正在采取一种不同的方法，就是“当国家在个案决定采取哪种策略最有利于拓展国家利益时，将国际法视为一种可用的外交工具，其规则制度只是政府决策诸多考虑因素之一。”②

菲律宾南海仲裁案不仅是一场重大的法律斗争，更是一场重大的政治斗争。菲律宾单方面提起仲裁，目的是恶意的，不是为了解决与中国的争议，也不是为了维护南海的和平与稳定。虽然菲律宾对其仲裁诉求进行了刻意的“包装”，但无法掩饰其仲裁诉求的实质是否定中国在南海的领土主权和海洋权益。仲裁庭为了管辖和裁判此案，口口声声称本裁决不处理中菲两国关于南海岛礁的领土主权争端，不处理中菲之间的海域划界，但分析仲裁裁决的种种谬误，不难发现，所谓的仲裁裁决就是企图否定中国在南海断续线内的历史性权利，企图否定中国南沙群岛部分岛礁的领土地位，以及南沙群岛作为整体主张领海、专属经济区和大陆架的权利，企图否定中国在南海海上行动的合法性。这是我们坚决不能接受和承认的。

菲律宾南海仲裁案完全是菲律宾等有关国家精心策划、蓄意挑起的针对我国南海领土主权和海洋权益的“法律战”。在法律上，菲律宾南海仲裁案裁决在程序和实体问题上均存在重大谬误，完全“一边倒”，明显有违客观公正，是国际案例中典型的反面教材。王毅外长曾表示，“仲裁案是披着法律外衣的政治闹剧”。

(二)深入揭批两个裁决，打掉其所谓合法性和权威性

前国务委员戴秉国曾评价道，所谓仲裁裁决就是“一张废纸”。我们必须从法律专业角度深刻揭示仲裁裁决的谬误和荒唐，将它批倒批臭，使其无法获得多数国家和国际法界的认可，使后面案件的当事方和国际法庭唯恐避之不及，从而让该裁决在事实上成为“一张废纸”。

对仲裁裁决，我们应在战略上藐视，战术上重视。要全面分析裁决，一方面，我们要深刻认识裁决对中国利益以及对国际社会整体利益的危害，有针对性予以揭露、驳斥和消

① “The Importance of International Law for Government Lawyers”, Jeremy Wright's keynote address to the Government Legal Service International Law Conference, 15 October 2015.

② Thomas M. Franck, “The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Disequilibrium”, *American Journal of International Law*, 2006, p. 89.

毒；另一方面，也要充分利用裁决中明确声称“不处理南海岛礁的领土主权归属”、“不在中菲之间进行海域划界”、“不处理南海的历史性所有权”等表述，以子之矛，攻子之盾，服务我国涉南海相关法律斗争。

揭批仲裁裁决首先要占据政治、道义和法律制高点，真正做到“政治上有利、道义上有理、法律上有据”。

揭批仲裁裁决的谬误，要“破”与“立”结合，以“破”为主，兼而有立。为维护我国在南海的海洋权利和国际海洋法制度的权威，我们需要“立”一般国际法上的历史性权利制度、一般国际法上的远海群岛制度，也需要“立”《公约》规定的岛屿制度，还需要坚守《公约》第十五部分规定的海洋争端解决制度的目的、宗旨和立法原意。

在法律依据上，揭批仲裁裁决的谬误，应立足于“现有法”，但也不能忽视“应有法”。以“现有法”为主，辅之以“应有法”。“现有法”主要是指《联合国海洋法公约》、习惯国际法、一般法律原则，同时司法判决、权威公法学家学说也可作为参考。“应有法”主要是指国际公平正义理念和国际通常做法。

在批驳方法上，规则和价值两个层面并重，兼顾政治和法律分析两个方面。一方面，要从法律规则方面找裁决存在的问题，如仲裁庭在适用条约解释规则、国际司法或仲裁判例、证据采信规则等方面存在不少错误，需要在系统梳理的基础上进行批驳。另一方面，要挖掘规则背后的政策取向和价值观。适用法律活动不仅仅是法律规则的解释和适用，在根本上还是一个价值和政策选择问题。不管是法律关系的定性，还是规则的解释和适用，抑或事实的认定和证据的采信，其背后无不都有某种价值观和政策的支撑。如果我们稍加分析，就不难发现，仲裁裁决的字里行间都渗透着仲裁员价值趋向和政策选择的蛛丝马迹。菲律宾南海仲裁案仲裁庭在价值观和政策取向上严重偏颇，政治化倾向明显，背离《公约》的宗旨和目的：不是定分止争维护秩序稳定，而是挑起矛盾和冲突；不是尊重当事方自愿程序优先，而是强化第三方强制程序；不是维护《公约》稳定和整体性以及国际社会整体利益，而是谋取狭隘的部门利益和个别国家的利益。菲律宾南海仲裁案仲裁庭在运作中犯的一个根本性错误，就是错误界定了仲裁庭的定位。国际司法或仲裁机构的功能是什么？一些人认为，国际司法或仲裁机构是国际社会的代理人(agent)，它不仅代表条约缔约国行使权力，还代表国际社会为维护公平正义行使权力，其职权不仅包括缔约国授权的解释或适用条约，还包括司法立法和司法治理。但更多的人认为，国际司法或仲裁机构是条约缔约国的代理人(agent)，其职权限于条约缔约国授权的范围，通常行使条约解释或适用的权力，而不包括司法立法和司法治理。《公约》下仲裁庭的职责是缔约国授予的解释或适用《公约》，不仅不能管辖涉及一般国际法规范的争端，也不能行使立法权力和司法治理权。但本案仲裁庭超越《公约》所赋予的职权范围，对涉及一般国际法的争端行使管辖，还以解释之名，行造法之实。此外，仲裁庭滥用自裁管辖权，还违反了“不告不理”的诉讼裁判原则。

在批驳内容上，要从程序和实体两个方面展开批驳，重在证明裁决非法无效。在程序问题上，仲裁庭裁定其对菲律宾第 1 项至第 14 项诉求均有管辖权，裁定菲律宾的 14 项诉

求均具有可受理性。相关裁定主要存在以下四大错误：

一是超越《公约》规定的属事管辖范围。仲裁庭违反了管辖范围限于“有关公约的解释或适用的争端”的规定，错误地对涉及一般国际法的领土主权争端、历史性权利争端、大陆国家远海群岛的地位和海洋权利争端等行使了管辖权。

二是侵犯当事国自愿选择程序解决争端的权利。《公约》确立了当事方自愿程序优先、第三方强制程序补充的“双层”体系。[①] 仲裁庭侵犯了当事方自愿原则，首先违反了《公约》第 286 条有关当事方自愿程序优先的规定，同时侵犯了缔约国依据《公约》第 281 条协议选择争端解决方式的权利，还错误解释和适用《公约》第 283 条关于“交换意见义务”的规定。

三是错误否定当事国依据《公约》排除适用强制程序的效力。仲裁庭错误解释和适用《公约》第 297 条关于适用强制程序的限制规定，对涉及我国在南海活动的菲律宾诉求错误地行使管辖权。仲裁庭错误地解释和适用《公约》第 298 条关于适用强制程序的任择性例外规定，将该条所称“关于划定海洋边界的争端”一词狭义解释为“划定海洋边界本身的争端”，并将该条所称“历史性所有权”一词狭义解释为“对海域的历史性主权”，进而错误认定菲律宾诉求不涉及“关于划定海洋边界的争端”，错误认定我国在南海的历史性权利不属于“历史性所有权”，从而错误裁定我国依据《公约》第 298 条所作声明不能排除仲裁庭对菲律宾诉求的管辖。

四是背离国际裁判机构处理可受理性的一般规则和实践，默许和纵容菲律宾频繁变更诉求以及在程序后期新增诉求，错误认定菲律宾诉求可以受理。

在实体问题上，仲裁庭全盘否定中国在南海的领土主权和海洋权利，相关裁决主要存在五大错误：

一是错误地将《公约》作为缔约国海洋权利的唯一依据。仲裁庭错误解释和适用《公约》第 311 条关于《公约》与其他国际协定关系的规定以及《公约》第 293 条关于《公约》强制程序适用法律的规定，忽略《公约》前言关于“本公约未予规定的事项，应继续以一般国际法规则和原则为准据”的规定，错误地认为《公约》条款穷尽了关于海洋权利的所有规范，并通过否定一般国际法上的历史性权利、大陆国家远海群岛制度，进而否定中国在南海的历史性权利以及中国在南海的东沙群岛、西沙群岛、中沙群岛和南沙群岛分别作为大陆国家远海群岛的法律地位。

二是错误地否定中国在南海的历史性权利。仲裁庭无视一般国际法中的历史性权利制度与《公约》并行的事实；罔顾中国长期在南海的生产生活和管辖实践，将我国在南海主张的历史性权利错误地限定为针对生物资源和非生物资源的非主权性权利；从而错误裁定中国对南海断续线内生物和非生物资源可能拥有的历史性权利已被《公约》所取代，并且错误裁定我国在《公约》生效前以及生效后均未在南海海域取得和享有历史性权利。

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① Yoshifumi Tanaka, *The International Law of the Sea*, Cambridge University Press, 2nd edition, 2015, p. 420.

三是错误地否定我国南沙群岛、中沙群岛作为大陆国家远海群岛的法律地位。仲裁庭忽视大陆国家远海群岛属于《公约》未予规定的、由一般国际法调整的事项的事实，并贬损关于大陆国家远海群岛广泛的国家实践和法律确信，错误否认大陆国家远海群岛的习惯国际法规则，并曲解中国将南沙群岛、中沙群岛各自作为一个整体拥有领土主权和海洋权利的基本立场，从而错误地适用《公约》规定来处理中国南沙群岛、中沙群岛及其所属岛礁的法律地位和海洋权利问题，并错误否定我国南沙群岛、中沙群岛作为群岛享有的领土主权和海洋权利。

四是非法篡改《公约》第 121 条第 3 款关于“岛屿”的认定标准。仲裁庭违背条约解释规则，背离了第 121 条第 3 款有关规定的通常含义、立法目的和宗旨以及国家实践，将该条款中的“维持”一词错误解释为“自然维持”，将“人类居住”一词错误解释为“平民居住”，将“其本身的经济生活”一词错误解释为“自给自足”。仲裁庭肆意“造法”创设了新标准，并以此解释为依据错误认定南沙群岛、中沙群岛中的所有“高潮地物”都是“岩礁”，严重侵犯《公约》当事国的缔约权和我国的领土主权和海洋权益。

五是仲裁庭基于南沙群岛相关海域属于菲律宾专属经济区或大陆架的虚假事实和非法前提，或通过错误定性事实问题和法律问题等，错误认定我国在南海的有关活动非法。仲裁庭对我国的以下活动，包括对我国在南海的资源开发和管理活动，我国对菲律宾渔民在黄岩岛捕鱼的执法活动，对我国涉及海洋环境保护和保全的渔业捕捞活动和岛礁建设活动，我国在美济礁的建设活动，我国在黄岩岛领海驱离菲律宾船舶的执法活动，以及对于所谓中国在南海相关活动“加剧或扩大”争端问题等，在认定事实、采信证据以及解释和适用法律方面都存在严重错误。事实上，中菲之间尚未解决有关岛礁领土主权问题，更未进行海域划界，其权利主张的前提根本不存在。有关海域是否是菲律宾的专属经济区和大陆架还根本无从谈起，据此认定中国在南海活动非法，乃无稽之谈。

此外，仲裁庭所作裁定不仅危及中国的领土主权和海洋权益，而且具有明显的溢出效应，对国际法治构成严重挑战。仲裁庭错误界定《公约》与一般国际法之间的关系，错误否定习惯国际法中的历史性权利和大陆国家远海群岛制度，进而否定一般国际法在国际海洋法中的地位和作用，损害国际海洋法的完整性。仲裁庭背离“国家同意原则”，损害缔约国自主选择争端解决方式的权利，降低强制程序的适用门槛，损害《公约》争端解决机制的权威性和认受性。仲裁庭错误适用条约的解释方法，损害以《公约》为基础的海洋法律秩序的稳定性、确实性和可预见性。仲裁庭还背离其职责权限，构成国际法上的越权、侵权行为，还背离了《公约》的宗旨和目的，损害国际海洋法律秩序。仲裁庭的所作所为严重威胁国际社会整体利益。

（三）“当前”与“长远”结合，打好法律持久战

法律应对裁决，既要打好批驳裁决的攻坚战，更要着眼于长远，打一场维护我国国际法权利的持久战。

当前，除了打好批驳裁决的攻坚战外，还应加强对强制仲裁、强制调解等强制程序的研究，妥善应对可能的各种涉华争端。同时，推动在国内立法、执法和司法领域采取务实

行动，强化我国维护南海权益的国家实践。立法上，我们可以探讨在 1992 年《领海及毗连区法》、1998 年《专属经济区和大陆架法》以及 2016 年 7 月 12 日《中华人民共和国政府关于在南海的领土主权和海洋权益的声明》等法律和政策文件的基础上，如何进一步强化我国南海海洋权利主张，特别是将大陆国家远海群岛制度和南海历史性权利等进一步落到实处。执法上，一方面，针对仲裁庭在南海历史性权利、南海岛礁地位、我国海上行动等方面作出对我不利的裁决，以及美国及其部分盟国和部分南海沿海国以“执行裁决”为借口在南海滋事，我们宜排除干扰，积极稳妥、依法加强南海重点海区的管控力度，坚决防止其明里、暗里坐实裁决。另一方面，我们要通过海上执法进一步强化我国在南海的历史性权利、南海东沙群岛、西沙群岛、中沙群岛和南沙群岛各自的整体性等具体主张。司法上，依法主张和行使在南海海域的司法管辖权，积累对我有利的国家管辖实践，通过司法手段维权维护国家利益。

国际诉讼或仲裁是一场没有硝烟的法律战争。要赢得这场法律战，就要立足长远，逐步打造中国的国际法律共同体，并逐步建立体现中国国家实践和价值观的国际法法理(Jurisprudence)。国际法对中国而言是“舶来品”。从 1864 年通过美国传教士丁韪良介绍到中国，国际法在中国落地只有一个半世纪的历史。历史上国际法曾是欧洲列强之间的法律，二战后随着以《联合国宪章》为基础的国际法律秩序的确立，国际法现在虽已成为国际社会全体成员共同的法律。但西方国家利用国际法源于欧洲的先天优势和后天的悉心经营，长期主导国际法的发展、解释和适用，形成了以西方国际法教育界、学术界、律师界、司法和仲裁界为核心的国际法律职业共同体。相比西方国家，我国的国际法力量薄弱，话语权和影响力有限。要改变这种现状，就必须多措并举，从国际法教育、科研、人才培养、执业等方面综合施策，全方位打造与我国国际地位和实力相称的国际法学术和实务人才队伍、理论学说和国家实践。

同时，可推动通过国家实践或对《公约》的解释和适用发展国际法。目前，不少国家和许多国际法学家都认为仲裁庭对《公约》第 121 条第 3 款有关岩礁的解释犯了错误，有人提出可以推动通过国际司法机构发表咨询意见的方式，也有人提出通过国际法专家专门就第 121 条第 3 款的解释发表一项共同声明，发展相关国际实践，还有人提出呼吁国际社会正视《公约》需要完善之处，适时推动国际社会通过定期审查、修约、制订新的执行协定和发表共同解释性声明等方式对《公约》相关规定作出适当调整。这些提议都值得研究，我们必须从我国的利益和实际需要出发，从国际社会整体利益出发，维护国际海洋法律秩序。

在海洋事务和海洋法问题上，我们既面临前所未有的挑战，也面临史无前例的机遇。我们国际法学者应抓住这一历史机遇，更加积极参与国际法进程，在国际法议题设置、条约制定、习惯国际法形成、一般法律原则的确定以及国际法的解释和适用等方面更加有所作为，宣介中国的国家实践、“中国政策”和“中国理念”，不断增加中国对国际法的塑造力和影响力。建设一个对国际法有强大影响力的创新型大国，不仅是我国走向世界大国的必然要求，也是必由之路，中国国际法学者应该为此作出更大的贡献。

Fighting Lawfare Outside the Tribunal: Retrospect and Prospect of China's Legal Response to the South China Sea Arbitration

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1. Retrospect of China's Legal Response to the South China Sea Arbitration

In January 2013, the Philippines unilaterally initiated compulsory arbitration with respect to certain issues with China in the South China Sea ("the South China Sea Arbitration" or "the Arbitration"). The handling of the South China Sea Arbitration has ever since been a focus of China's diplomacy. China's efforts in handling the Arbitration is multi-faceted, encompassing the taking of political and legal measures, maritime operations, and public opinion guidance. Among them, legal response is a fundamental and key facet. During the last three years, China adhered to the position of "non-recognition and non-participation" of the Arbitration. It confronted the challenge, took innovative measures, overcame the immense difficulties, and took multiple measures to respond to the lawfare outside the Tribunal established at the request of the Philippines ("the Tribunal") persistently and effectively. The achievements that it has made are remarkable. Specifically, China's response to the lawfare outside the Tribunal consists of the following:

(1) The release of China's official Position Paper laid a legal basis for China's non-acceptance of and non-participation in the Arbitration.

China's position of "non-recognition and non-participation" of the Arbitrationwas distorted, by a few countries and media, to be "non-compliance with international law". Due to the lack of a thorough comprehension of the sensitivity and complexity of the Arbitration, there were also Chinese people and scholars who doubted China's decision of "non-recognition and non-participation". A group of international lawyers headed by the Department of Treaty and Law of the Chinese Ministry of Foreign Affairs (MFA), after a year's research, drafted the *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* ("Position Paper"), which was released on December 7, 2014 by the MFA under authorization of the Central Government. In the Position Paper, China took the position that "[t]he essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention"; "China and the Philippines have agreed, through bilateral instruments and

the Declaration on the Conduct of Parties in the South China Sea, to settle their relevant disputes through negotiations. By unilaterally initiating the present arbitration, the Philippines has breached its obligation under international law"; "[e]ven assuming, arguendo, that the subject-matter of the arbitration were concerned with the interpretation or application of the Convention, that subject-matter would constitute an integral part of maritime delimitation between the two countries, thus falling within the scope of the declaration filed by China in 2006 in accordance with the Convention, which excludes, interalia, disputes concerning maritime delimitation from compulsory arbitration and other compulsory dispute settlement procedures"; and "the Arbitral Tribunal manifestly has no jurisdiction over the present arbitration. Based on the foregoing positions and by virtue of the freedom of every State to choose the means of dispute settlement, China's rejection of and non-participation in the present arbitration stand on solid ground in international law".

The Position Paper is the first of its kind, since the founding of the People's Republic of China ("PRC"), in its response to the "judicialization" of South China Sea issues. It elaborated on China's official position that the Tribunal does not have jurisdiction on the Arbitration and expounded on the legal grounds for the position. The Position Paper made it clear that China's policy of "non-acceptance and non-participation" is well-founded in law, which laid a legal basis for China's policies in responding to the Arbitration.

The Position Paper is a milestone with historic significance in the development of China's theories and practice of international law. The legal approach that China adopt in response to the Arbitration drew extensive attentions from major countries and the public, and the professional standard of its Position Paper was commended. Due to the release of the Position Paper, the Tribunal decided to bifurcate the proceedings and the process of the case was prolonged. The views and legal arguments expounded in the Position Paper, which questioned the legitimacy and impartiality of the Tribunal's award, became well known to the international community. Regretfully, the Tribunal deliberately ignored China's views and legal arguments and arbitrated *ultra vires*.

(2) The release of CSIL position paper on the Tribunal's jurisdiction laid a legal basis for the negation of the validity of the Tribunal's "Final Award".

The Tribunal issued its Award on Jurisdiction and Admissibility ("Award on Jurisdiction") on October 29, 2015, whereby it established its jurisdiction over part of the submissions of the Philippines and reserved consideration of other submissions for the stage of merits. A few countries seized the opportunity to propagate the views that it is the Tribunal that decides on the jurisdiction, the Tribunal's awards are binding and final, and China is legally bound by its awards. In order to maintain China's national interests and defend its image, the Chinese Society of International Law (CSIL) released a position paper entitled *The Tribunal's Award in the "South*

China Sea Arbitration" Initiated by the Philippines Is Null and Void ("the CISL position paper") on June 10, 2016, to expose the Tribunal's errors in the establishment of its jurisdiction.

The CISL position paper, which is carefully argued and well supported by international jurisprudence and the writings of highly-qualified publicists, pointed out six grave errors that the Tribunal made in the determination of facts and the application of law in its Award on Jurisdiction. First, the Tribunal errs in finding that the claims made by the Philippines constitute disputes between China and the Philippines concerning the interpretation or application of the United Nations Convention on the Law of the Sea (UNCLOS); Second, the Tribunal errs in taking jurisdiction over claims which in essence are issues of sovereignty over land territory and are beyond the purview of the UNCLOS; Third, the Tribunal errs in taking jurisdiction over claims concerning maritime delimitation which have been excluded by China from compulsory procedures in line with the UNCLOS; Fourth, the Tribunal errs in denying that there exists between China and the Philippines an agreement to settle the disputes in question through negotiation; Fifth, the Tribunal errs in finding that the Philippines had fulfilled the obligation to "exchange views" regarding the means of disputes settlement with respect to the claims it made; Sixth, the Tribunal's Award deviates from the object and purpose of the dispute settlement mechanism under the UNCLOS, and impairs the integrity and authority of the Convention.

The CISL position paper clarified many fundamental matters of the Arbitration and laid a legal basis for China's negation of the legitimacy and validity of its proceedings, and its "non-acceptance and non-recognition" of the Tribunal's so-called "Final Award". The release of the position paper was covered by national and international media, and received attentions from various circles and positive comments in the academia of international law.

(3) The Joint Declaration with the Russian Federation systematically expounded on the righteous position of promoting international law.

Through extensive and in-depth consultations, China and Russia released *The Declaration of the People's Republic of China and the Russian Federation on the Promotion of International Law* ("Joint Declaration"), which was signed by the Foreign Ministers of the two countries on June 25, 2016 during President Putin's visit to China. The signing of a joint declaration with such comprehensiveness on significant issues of international law between two major permanent members of the Security Council is a momentous innovation in the history of international relations. In particular, the two countries expressed their common concerns on the dispute settlement mechanism of the UNCLOS, which helped to expose the conspiracies behind the South China Sea Arbitration. The Joint Declaration, which was circulated via the Secretary-General of the United Nations as a document of the General Assembly and the Security Council, exhibited the contributions and constructive attitude of China and Russia in promoting international law, and played an effective role in China's comprehensive response to the Arbitration. A large number

of Western scholars and media paid close attention to the Joint Declaration and took the statements therein as reflecting the position and practice of China and Russia in the field of international law.

(4) China released statements on the day when the Tribunal issued its "Final Award" to reaffirm its legal position on safeguarding its rights and interests in the South China Sea.

On the afternoon of July 12, 2016, less than an hour after the Tribunal's issuance of its so-called "Final Award", the Chinese MFA issued the *Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea* ("Statement on Rights and Interests") and the *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of* 12 *July* 2016 *of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines* ("Statement on Award") under authorization of the Central Government.

In the Statement on Rights and Interests, for the first time since the establishment of the PRC, China elaborated, in a systematic manner, on its territorial sovereignty and maritime rights and interests in the South China Sea. China expressly pointed out that with respect to its territorial sovereignty and maritime rights and interests in the South China Sea, *inter alia*, (1) China has sovereignty over *Nanhai Zhudao*, consisting of *Dongsha Qundao*, *Xisha Qundao*, *Zhongsha Qundao* and *Nansha Qundao*; (2) China has internal waters, territorial sea and contiguous zone, based on *Nanhai Zhudao*; (3) China has exclusive economic zone and continental shelf, based on *Nanhai Zhudao*; (4) China has historic rights in the South China Sea. In the Statement, China reiterated its claim of Nanhai Zhudao as unities, and reaffirmed the vital position that "China has historic rights in the South China Sea".

In the Statement on Award, China pointed out that "the award [rendered on 12 July 2016 by the Tribunal] is null and void and has no binding force. China neither accepts nor recognizes it", highlighted that "China's territorial sovereignty and maritime rights and interests in the South China Sea shall under no circumstances be affected by those awards. China opposes and will never accept any claim or action based on those awards", and reiterated that "regarding territorial issues and maritime delimitation disputes, China does not accept any means of third party dispute settlement or any solution imposed on China".

Through the above two statements, China expressed its firm determination and legal position to safeguard its rights and interests in the South China Sea in explicit and strong terms.

(5) The Public International Law Colloquium on Maritime Disputes Settlementwas held to criticize the Tribunal's Award immediately after its issuance.

On July 15 and 16, two days after the Tribunal issued its "Final Award", the Public International Law Colloquium on Maritime Disputes Settlement co-organized by the CSIL and the Hong Kong International Arbitration Centre (HKIAC) was held in Hong Kong. It is the first high-level, international and professional colloquium on the Arbitration held around the globe after the

Tribunal's issuance of its "Final Award". Participants gathered to debate on procedural and substantive issues of the Arbitration at, among others, the special session on the "South China Sea Arbitration".

Over 200 renowned scholars of international law from five continents, including the Mainland, Hong Kong and Taiwan of China, participated in the colloquium. The colloquium was attended by Tung Chee-Kwa, Vice Chairman of the National Committee of the Chinese People's Political Consultative Conference, Surakiart Sathirathai, Former Deputy Prime Minister of Thailand and Chairman of Asian Peace and Reconciliation Council (APRC), and Li Shishi, member of the United Nations International Law Commission and *Institut de droit international*, and President of the CSIL. Over 30 leading experts, including those from countries with significant influence in the development of international law, such as the United States, the United Kingdom, France, Germany, the Netherlands, Belgium, Canada, Ireland, India, and Singapore, criticized and expressed their doubt and concern on the Tribunal's awards from the legal perspective. After the colloquium, the Proceedings were published by the CSIL and the HKIAC. Over 40 Chinese and overseas media covered the colloquium in a comprehensive and in-depth manner, which were well received in China and abroad.

(6) China's legal positions on the Arbitration were elaborated at various legal platforms.

In September 2016, Vice Foreign Minister Liu Zhenmin, at a meeting with visiting President of the International Court of Justice (ICJ), systematically introduced China's policies and positions of settling international disputes peacefully and utilizing legal means in the settlement. Since the Philippines' initiation of the Arbitration, the Department of Treaty and Law of the Chinese MFA also took the opportunity of its consultations with their counterpart of other countries (such as the United States, the United Kingdom, and France) on international law and the law of the sea, to elaborate on China's legal positions on the South China Sea.

China also elaborated on its positions and views and denounced some countries' groundless accusation, in order to protect its interests and image, e. g. at the "International Law Week" at the Sixth Committee of the General Assembly, consultations on the law of the sea and negotiations of resolutions on the law of the sea at the General Assembly, Meeting of the Contracting Parties of the UNCLOS, Asian Society of International Law, and Xiamen Academy of International Law.

(7) Briefing to Chinese and overseas media were held to introduce and promote China's position and legal ground.

On May 12, 2016, Director-General Xu Hong of the Department of Treaty and Law of the MFA held a briefing with Chinese and overseas media in Beijing to elaborate on China's position and ground on the South China Sea Arbitration from the perspective of international law. The briefing was covered in detail by influential foreign media such as CNN, BBC, Reuters, the Wall Street Journal, the Financial Times, and the Straits Times, as well as mainstream Chinese

media like CCTV and China Daily. The Chinese and English versions of the minutes of the briefing were widely circulated online and by new media, and communicated to legal officers of Western countries.

The briefing was cited five times by the Tribunal in its Award of July 12, 2016, and taken as an importance source of China's legal position. It is taken by Chinese experts as a mini-course on the Arbitration, which shows China's confidence in the area of international law of the sea and clarified many factual and legal issues. A number of overseas experts mentioned that China's response to sensitive issues, which the Arbitration involves, in the briefing helped other countries to have a better understanding of China's position on the case.

(8) China's position on the Arbitration was voiced at the celebrations of the 20th anniversary of the ITLOS.

On October 5-6, 2016, the International Tribunal for the Law of the Sea (ITLOS) held a symposium, on "20 Years of the International Tribunal for the Law of the Sea: the Contribution of the Tribunal to the Rule of Law", in Hamburg to commemorate its 20th anniversary. Over 150 leading experts in the field of the law of the sea and government representatives, including all current judges and many former judges of the Tribunal, as well as Ronny Abraham, President of the ICJ, participated in the symposium. Among the various panels of the symposium, Panel 3 on "the contribution of the Tribunal to the Rule of Law: the point of view of practitioners" was of the utmost interest to participants.

In response to the false statements made by Alan Boyle and Paul Reichler, both counsels of the Philippines, that the South China Sea Arbitration was beneficial to strengthening the legal regime of the sea and promoting the international rule of law, the author, who headed the Chinese delegation, stated that the Tribunal's awards are inconsistent with the Vienna Convention on the Law of Treaties and rules of treaty interpretation established by international jurisprudence, stressed that the Tribunal's exercise of jurisdiction over the Arbitration is beyond the authorization of the UNCLOS, and refuted the ridiculous labelling of the case as promoting the international rule of law. In his statements, the author cited similar doubts and criticisms shared by leading experts of international law.

The symposium commemorating the 20th anniversary of the ITLOS is a grand occasion in the area of the law of the sea. The rational and professional illustration of China's legal position on the Arbitration gained the understanding and respect from many participants. Through the ITLOS and its live broadcasting, as well as participants at present, China's solemn position and legal views were effectively communicated to the world, and supported by an increasing number of people in the international community and the circle of international law.

(9) The academia was guided to collaborate with the government in the legal response to the Arbitration.

During the past three years, the MFA took the lead to establish a research team, which

consists of leading Chinese legal experts from Mainland China, Hong Kong, Taiwan, and overseas. Scholars in China were mobilized to join in the legal response to the South China Sea Arbitration. Officials at the Department of Treaty and Law, as well as the Department of Boundary and Ocean Affairs, delivered dozens of presentations and keynote speeches at universities, research institutions, and international symposiums, which gave people a better understanding of China's position and legal grounds.

The CSIL organized and published the *Special Issue on the Jurisdiction of the South China Sea Arbitration of the Chinese Yearbook of International Law* (2016). Leading journals such as *Chinese Journal of International Law*, *Chinese Review of International Law* and *Journal of Boundary and Ocean Studies*, established special columns on the South China Sea Arbitration, in which over 50 quality papers written by Chinese and overseas scholars were published.

Overall speaking, in the legal response to the South China Sea Arbitration, there have been very good interactions among different circles which led to great achievements. China's position of "non-acceptance and non-recognition" of the Arbitration was recognized and understood by the international community. As China's position and arguments are well-founded in international law, many countries and international lawyers were of the view that China's position on the Arbitration is justifiable.

Much experience was gained in the legal response to the South China Sea Arbitration. Against this unprecedented challenge, China mapped out and implemented a strategy of responding to the Arbitration which are innovative in many aspects.

First, the release of China's official Position Paper on the jurisdiction of the Tribunal is the first time that the country systematically expounded on its relevant policies and positions in the name of the Chinese government and in the terms of international law.

Second, the release of the CISL position paper criticizing the Tribunal's establishment of jurisdiction is the first time that the national academic body, based on objective legal analysis, publishes a full-length article which provides support to relevant policies and positions of the government.

Third, the Joint Declaration between China and Russia on the Promotion of International Law is the first in history that the two countriessign and release an inter-governmental instrument specifically on international law, which is an innovation in the field of international law and foreign affairs between the two countries.

Fourth, leading Chinese experts of the law of the sea from around the world joined in the criticism of the Tribunal's awards. For the first time in the field of international law, Chinese scholars of international law from the Mainland, Taiwan, Hong Kong and Macau of China as well as overseas joined hands to cope with the Arbitration and to contribute ideas and suggestions to safeguard fundamental interests of the country.

Fifth, the Public International Law Colloquium on the Arbitration held in Hong Kong is the

first academic event that the CSIL organizes outside Mainland China. It provided a platform for Chinese and overseas scholars to debate the errors that the Tribunal made.

2. Retrospect of China's Legal Response to the South China Sea Arbitration

With the issuance of the so-called "Final Award" by the Tribunal, the South China Sea Arbitration, as legal procedures, has come to a conclusion. In politics, the Award must be discarded for the stability of boundaries and the South China Sea. However, in law we must be conscious that although the Chinese government does not recognize the validity of the Award, it is nonetheless detrimental to China's interests due to the lack of a mechanism of remedies. Once an award is made, it cannot be nullified or appealed. The Award remains to be utilized against China. It is possible that some other countries are to follow the practice of the Philippines to initiate arbitral or judicial proceedings against China. The detrimental effect of the Award to China will be long-lasting and complex. It is therefore an arduous task to cope with the Tribunal's awards from legal perspective.

(1) The dual nature ofinternational law and the essence of the South China Sea Arbitration as a political case

International law has a dual nature, in the sense that it is not only a symbol of international justice but also a political instrument. On the one hand, "international law exists as a promise of justice", and "it has a general function to fulfill, namely to safeguard international peace, security and justice in relations between States". On the other hand, international law is the expression of international politics in legal terms. Its object is to actualize national interests, which is the fundamental point of departure for States in their utilization of international law. What international law is depends upon, to a great extent, the subject which employs and interprets it, as well as the position, interest and value based on which it is interpreted. States promote and interpret rules of international law in a manner that is favorable to their interests and values. The making, interpretation and application of international law are all mixed with the contest of national power, the competition of interests, and the gaming of values. International law is not the law of a utopia, but the law of a real social system. To understand international law, we need to understand the system of international politics in which it functions. International law does and should reflect and promote value, i. e. the highest moral beliefs of international society. Finally, much of international law is also practical in content and application. Such functional international law promotes orderly and peaceful international relations.

With a clear understanding of the nature of international law, we should not only uphold international justice, but also employ international law to safeguard national interests, policies and values.

Due to the dual nature of international law, we should not only take international law as the "infallible law" for maintaining international justice, but also take it as a political instrument in

service of national interests. In utilizing international law for national interests, we should also take account of morality and international justice.

The dual nature of international law implies that its rules are neither static nor black-or-white. Like the lack of a centralized international legislative body for international law, there is no centralized international judicial or enforcing body for the interpretation, application and implementation of international law. International law is often interpreted and applied by States themselves. Therefore, there are uncertainties in the substance of international law, leaving room for different interpretation and application in many occasions. It is only common practice that international law is made and interpreted in accordance with the need of national interests, policy orientations and values.

The dual nature of international law also implies that it is a "double-edged sword". As an important political and diplomatic instrument, international law is a significant asset for countries to maintain their interests. It can be used to maintain the interests and values of the country, but can also be used by others to hamper its interests. International law is one of the instruments, but not all, for maintaining national interests and serving diplomatic decision-making. To Thomas M. Franck, a renowned American international lawyer, a rather different approach is emerging among international law professors and practitioners, i. e. "international law as a disposable tool of diplomacy, its system of rules merely one of many considerations to be taken into account by government when deciding, transaction by transaction, what strategy is most likely to advance the national interest".

The South China Sea Arbitration is not a simple legal case, but also a political battle. The Philippines' unilateral initiation of the Arbitration is ill-willed, i. e. not to resolve its disputes with China, or to maintain peace and stability in the South China Sea. The way how it presented its submissions in disguise does not hide its fundamental purpose of denying China's territorial sovereignty and maritime rights in the South China Sea. The Tribunal, in order to exercise jurisdiction over the case, purported that it does not deal with the two countries' disputes on territorial sovereignty over maritime features in the South China Sea, or the maritime delimitation between them. An evaluation of the Tribunal's awards, however, reveals that the awards were an attempt to deny China's historic rights in the South China Sea within the dashed line, China's territorial sovereignty over maritime features in the South China Sea, China's claim of territorial sea, exclusive economic zone and continental shelf based on each of the *Nansha Qundao* as a unity, and the legality of China's maritime operations in the South China Sea.

(2) The exposure of the Tribunal's errors and the criticism against the legality and integrity of its awards

Mr. Dai Bingguo, former State Councilor, once said that the Tribunal's awards were "nothing more than a piece of waste paper". We must expose the errors and absurdity of the awards in depth, criticize them thoroughly so that it become awards that are unacceptable to most

countries and the academia, and that should be neglected or avoided by parties and international tribunals in future cases. Only by then will the awards become truly "a piece of waste paper".

Strategically we should despisethe awards of the Tribunal, but tactically we should take them all seriously. The awards should be studied comprehensively. On the one hand, we must realize their damage to China's national interests and the common interests of the international community, and expose, criticize and eliminate their errors in a targeted manner. On the other hand, we should try to pierce its shield with its spear, by using its assertions that the Tribunal does not address the territorial sovereignty of maritime features in the South China Sea, maritime delimitation between the two countries, or historic title in the South China Sea.

The Tribunal's awards should be criticized from the perspectives of politics, morality and law. The assessment should be made in a manner that is beneficial in politics, justifiable in morality, and well-founded in law.

While exposing the Tribunal's errors in the awards, we should also "tell our own story". In order to safeguard our maritime rights in the South China Sea and maintain our authoritative role in the international legal regime of the sea, we should argue for historic rights and the regime of outlaying archipelagos under general international law, and the regime of islands under UNCLOS. We should also upheld the object and purpose and drafters' intentions of the mechanism of dispute settlement under Part XV of the UNCLOS.

In making legal arguments, we should emphasize on *lex lata*, but shall not neglect *lex ferenda*. *Lex lata*, for our purpose in this article, mainly includes the UNCLOS, customary international law, and general principles of law, while international judicial practice and the writings of highly-qualified publicists should also be taken into account. *Lex ferenda* refers to the idea of international justice and common practice of the international community.

With respect to the means of criticism, we should focus on both rules and values, and give due consideration to political analysis and legal analysis. On the one hand, we should expose the errors that the Tribunal made in rules of international law, e. g. in its application of rules of treaty interpretation, international judicial or arbitral practice, and rules of evidence. On the other hand, we should identify its policy orientations and values behind the rules. The application of law is not merely interpretation and application of rules, but fundamentally a question of value and policy choice. The characterization of legal relations, the interpretation and application of rules, the determination of facts and the adoption of evidence are all guided by certain values and policies. As it is not difficult to see, the arbitrators betrayed their values and policy choices in the words of the awards. The Tribunal's values and policy orientations are significantly biased and highly politicalized. There is a deviation from the objects and purposes of the UNCLOS, i. e. not to settle disputes for maintaining regional order and stability, but to instigate conflicts and confrontations; not to respect the parties' own choice of procedures, but to rely on third-party compulsory procedures; not to maintain the stability and integrity of the

UNCLOS and the common interests of the international community, but to seek benefits for some organizations and countries. One of the most fundamental mistakes that the Tribunal committed in the proceedings is the wrong role it played. What is the function of international judicial or arbitral bodies? Some are of the view that as the agent of the international community, their authority is exercised not only on behalf of all contracting parties, but also on behalf of the international community in the maintenance of justice. Their function, therefore, include not only the interpretation and application of international law authorized by the contracting parties, but also "judicial legislation" and "judicial governance". The majority view, however, is that international judicial or arbitral bodies are the agent of contracting parties, with their authority limited to those given by them, which includes the interpretation and application of treaties, but not "judicial legislation" and "judicial governance". Therefore, the job of courts and tribunals under the UNCLOS is to interpret and apply the Convention, which does not include jurisdiction over disputes involving rules of general international law, or the power of law-making or judicial governance. In the South China Sea Arbitration, however, the Tribunal manifestly exceed its authority given by the UNCLOS, by exercising jurisdiction over disputes regulated by general international law, and attempting to make law in the name of treaty interpretation. In addition, it abused its power to determine its jurisdiction, and violated the principle of *non ultra petita*.

The Tribunal's awards should be criticized in terms of both procedural issues and merits, with a focus on its illegality and invalidity. As far as procedural issues are concerned, the Tribunal established its jurisdiction over the Philippines' Submissions 1-14, and ruled that they are all admissible. The Tribunal erred in four aspects:

First, the Tribunal exceeded its jurisdiction *ratione materiae*, which is limited to "disputes concerning the interpretation or application of the UNCLOS", and erroneously exercised jurisdiction over disputes concerning territorial sovereignty, historic rights, the status of outlaying archipelagos and maritime rights under general international law.

Second, the Tribunal infringed upon the parties' right to choose means of disputes settlement on their own will. The UNCLOS establishes a two-layer dispute settlement mechanism which prioritizes means of the parties' free choice and is complemented by third-party compulsory procedures. The Tribunal violated the principle of free will of the parties, by erroneously interpreting and applying Article 286 of the Convention regarding the priority of procedures of the parties' free choice, Article 281 regarding the choice of means of dispute settlement by agreement, and Article 283 regarding the obligation to exchange views.

Third, the Tribunal erroneously denied the validity of the parties' exclusion of compulsory procedures made in accordance with the UNCLOS. It erred in the interpretation and application of Article 297 of the Convention regarding the limitation on the application of compulsory procedures, and in exercising jurisdiction over the Philippines' submissions regarding China's operations in the South China Sea. It erroneously interpreted "disputes concerning maritime

delimitation" as "disputes over maritime delimitation", erroneously interpreted "historic title" as "historic sovereignty over maritime areas", and proceeded to erroneously conclude that the Philippines' submissions do not involve "disputes concerning maritime delimitation" and that historic rights that China claims in the South China Sea do not constitute "historic title". The Tribunal then erroneously found that China's declaration made under Article 298 of the Convention does not bar it from exercising jurisdiction over the Philippines' submissions.

Fourth, the Tribunal disregarded general rules andinternational judicial practice regarding the admissibility of claims. It tacitly consented and tolerated the Philippines' frequent revision of its original submissions and addition of new submissions at later stages of the proceedings, and erroneously found that the submissions were admissible.

With respect to the merits, theTribunal denied China's territorial sovereignty and maritime rights in the South China Sea. Its award is erroneous in five aspects.

First, the Tribunal erroneously took the UNCLOS as the solesource for its States Parties' maritime rights. It erred in the interpretation and application of Article 311 regarding the relationship between the Convention and other international agreements, and Article 293 regarding the applicable law in compulsory procedures. It neglected the statement that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law" written in the preamble of the convention, and erroneously found that the provisions of Convention are exhaustive of all rules regarding maritime rights. The Tribunal, by denying the regimes of historic rights and outlaying archipelagos under general international law, attempted to negate China's historic rights in the South China Sea and the legal status of China's *Dongsha Qundao*, *Xisha Qundao*, *Zhongsha Qundao* and *Nansha Qundao* in the South China Sea as its outlaying archipelagos.

Second, the Tribunal erroneously denied China's historic rights in the South China Sea. It ignored the fact that the regime of historic rights under general international law operates in parallel to the UNCLOS, and erroneously interpreted China's claim of historic rights in the South China Sea as non-sovereign rights on living and non-living resources, by ignoring China's long-lasting practice of production, living and exercising jurisdiction in the South China Sea. The Tribunal also erroneously found that China's possible historic rights over living and non-living resources in the South China Sea within the dashed line have been superseded by the Convention, and that China did not acquire and enjoy historic rights in the waters prior to and subsequent to the entry into force of the UNCLOS.

Third, the Tribunalerroneously denied the legal status of China's *Nansha Qundao* and *Zhongsha Qunda* as its outlaying archipelagos. The Tribunal ignored the fact that outlaying archipelagos are not regulated by the UNCLOS, but under general international law. It played down the significance of extensive State practice and *opinio juris* on maintaining outlaying archipelagos and erroneously denied the existence of rules of customary international law regarding

outlaying archipelagos. By distorting China's fundamental position of claiming territorial sovereignty and maritime rights taking its *Nansha Qundao* and *Zhongsha Qundao* as a whole respectively, the Tribunal erroneously applied the provisions of the UNCLOS to deal with the legal status and maritime entitlements of China's *Nansha Qundao*, *Zhongsha Qundao* and maritime features therein, and thus erroneously denied the territorial sovereignty and maritime rights that China enjoys over its *Nansha Qundao* and *Zhongsha Qundao* as archipelagos.

Fourth, the Tribunal unlawfullymisinterpreted the standards of "islands" under Article 121 (3) of the UNCLOS. Deviating from rules of treaty interpretation, and the ordinary meaning, objects and purposes as well as state practice regarding Article 121 (3), the Tribunal misinterpreted "sustain" to be "sustain in the natural condition", misinterpreted "human habitation" to be "civilian habitation", and misinterpreted "economic life of their own" to be "self-sufficient". Through reckless law-making and the creation and application of new standards, the Tribunal erroneously found that all high-tide elevations in *Nansha Qundao* and *Zhongsha Qundao* are "rocks", thus encroaching upon the treaty-making power of contacting parties of the UNCLOS and China's territorial sovereignty and maritime rights.

Fifth, the Tribunal erroneously found that China's activities in the South China Sea are illegal, based on the false and unlawful premise that the relevant waters are part of the Philippines' exclusive economic zone and continental shelf, and through erroneous determination of facts and law. The Tribunal erred in the determination of facts, adoption of evidence and interpretation and application of law in its finding that China aggravated and extended the disputes, through its exploitation and management of resources in the South China Sea, law-enforcement activities over fishing activities by Philippine fishermen at *Huangyan Dao*, fishing and construction activities involving damage to the maritime environment, construction activities at *Meiji Jiao*, and law enforcement activities expelling Philippine vessels in the territorial sea of *Huangyan Dao*. As a matter of fact, China and the Philippines have yet resolved their disputes of territorial sovereignty over maritime features in the South China Sea, not to mention maritime delimitation. The prerequisite on which the founding was made does not exist at all. As it remained to be decided whether the waters are part of the Philippines' exclusive economic zone and continental shelf, it is groundless to decide that China's activities in the South China Sea are unlawful.

In addition, the award of the Tribunal not only jeopardizes China's territorial sovereignty and maritime rights, but also poses a significant challenge to the international rule of law. The Tribunal erroneously defined the relationship between the UNCLOS and general international law, erroneously denied the regimes of historic rights and outlaying archipelagos under customary international law, and denied the status and function of general international law in the law of the sea, thus undermining the integrity of international law of the sea. Deviating from the principle of "state consent", the Tribunal undermined the contracting parties' right to choose means of

dispute settlement at their own will, lowered the threshold for the application of compulsory procedures, and hampered the integrity and acceptability of voluntary means of dispute settlement. The Tribunal's erroneous application of rules of treaty interpretation also undermined the stability, certainty and predictability of the legal order of the sea built upon the UNCLOS. The Tribunal acted beyond the limit of its authority and duty, which amounts to acts *ultra vires* and infringement upon States' legitimate rights. Its acts in contrary to the objects and purposes of the Convention undermined the international legal order of the sea. Its acts threatened the common interests of the international community.

(3) To fight a protracted lawfare with present actions and long-term plans

The legal response to the South China Sea Arbitration requires us not only to win the battle of rebutting the Tribunal's awards, but also to fight a long-lasting war to protects China's rights enjoyed under international law.

Apart from rebutting theawards, we should study compulsory procedures such as compulsory arbitration and compulsory conciliation, so as to be ready to handle possible arising disputes. A pragmatic approach is called for in domestic legislation, enforcement and judiciary, to strengthen China's practice of maintaining its interests in the South China Sea. As far as legislation is concerned, we should discuss how China could strengthen its claims of maritime rights in the South China Sea, in particular the advancement of the regime of outlaying archipelagos and historic rights, on the basis of current laws and policies, such as the 1992 *Law on the Territorial Sea and the Contiguous Zone*, the 1998 *Law on the Exclusive Economic Zone and the Continental Shelf*, and the *Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea* released on July 12, 2016. With respect to law enforcement, on the one hand, in consideration that the Tribunal ruled against China on the existence of historic rights, status of maritime features, and legality maritime operations in the South China Sea, and that the United States, some of its allies and some littoral States of the South China Sea may attempt to cause chaos in the name of "implementing the awards", we should eliminate the possible interference, strengthen the control and management of key areas in the South China Sea steadily and according to law, and prevent them from putting the awards into effect in public or secretly. On the other hand, we should consolidate our claims of historic rights and the four archipelagos as a whole respectively in the South China Sea. As far as judiciary is concerned, we should claim and exercise judicial jurisdiction in maritime areas in the South China Sea in accordance with law, accumulate the practice of national jurisdiction favorable to China, and maintain rights and interest through judicial measures.

International adjudication or arbitration is a lawfare without gunpowder smoke. To win the lawfare, it is important to have a long-term perspective, to build a Chinese community of international law, and to establish the jurisprudence of international law reflecting Chinese

practice and values. To China, international law is an "imported goods", which has a history of only one and half a century since its introduction to China by American churchman William Alexander Parsons Martin in 1864. International law used to be the law regulating the relations among European powers. After the WWII, the international legal order built on the Charter of the United Nations was established. Although it is now the law regulating relations among all members of the international community, the development, interpretation and application remain dominated by western powers due to the inherent advantage of being the place of its origin and their tradition of studies. There exists a professional community of international law, which is composed of its education, research, practicing, adjudication and arbitration. In contrast, China's capability of international law is weak, with limited power of discourse and influence. To change the status quo, multiple measures are called for to promote the education, research, and practicing of international law; and teams of researchers and practitioners should be built, and theories and state practice of international law compatible with China's international status and capability should be promoted.

In addition, we should consider promoting the development of international law by means of state practice and the interpretation and application of the UNCLOS. Currently, there are quite a few countries and scholars of international law who are of the view that the Tribunal's interpretation of Article 121(3) regarding islands and rocks is erroneous. Various proposals have been made, e. g. to seek an advisory opinion from international judicial bodies, to release a joint statement on the interpretation by experts of international law, to develop relevant State practice, and to amend the Convention by periodical review, amendment, negotiation of a new implementation agreement, or issuance of a statement on interpretation. These proposals are worth studying. And we must uphold the international legal order of the sea, in order to safeguard China's national interests and practical needs, as well as the common interests of the international community.

In the fields of maritime affairs and the law of the sea, there are unprecedented challenges and opportunities. This is a historic opportunity for experts of international law to participate in the development of international law actively; to play a more constructive role in setting the agenda of international law, the negotiation of treaties, the formation of customary international law, the determination of general principles of law, and the interpretation and application of international law; to introduce and promote China's practice, "Chinese policies" and "Chinese concepts" to enhance China's influence in the development of international law. Capacity-building of international law is not only a requirement but also a path for China to become a major power, in which Chinese experts of international law should and will make make greater contributions.

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