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中国海洋法学评论

2014年卷第2期 总第20期

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卷首语

《中国海洋法学评论》创刊的十年，恰是海洋法在中国日渐兴盛的十年，值此之际，在所有同仁和专家学者的共同戮力下，本刊完成了所有过刊的双语出版工作，并以套书的形式呈献给大家，希望可以促进中国海洋法相关方面的研究逐渐走向世界。

首先，本期收录了2篇关于海洋资源的文章。

自《联合国海洋法公约》（以下简称“《公约》”）于1994年生效以来，沿岸国扩张渔业管辖权至200海里成为世界海洋渔业管理体制之主流，并使得海洋渔业开发与养护转而聚焦在残余的公海渔业资源上，其中尤以高度洄游鱼种和跨界鱼种为众所关切。针对高度洄游鱼种，目前全球已成立多个区域性渔业管理组织负责保育及管理，近十年已通过数十项管理措施，使一些曾被过渔的资源鱼群逐渐恢复。但针对众多跨界鱼种资源的管理，则还在各国的利益争执下缓慢进展，在介绍了几种西北太平洋跨界鱼种的资源现况、管理方式，以及为何急需进行跨界合作管理以减缓其资源衰退状况的基础上，张水镛教授提出区域性渔业管理组织从上而下的管理模式需要冗长的公约讨论及费时的管理委员会建构，对于急切需要管理之鱼种资源可能缓不济急，而且也不适用于尚未有成立国际组织之共识的情况。因此，建议通过由下而上之国际合作方式，先进行科研合作，逐步建立共识与信心后，再成立合作管理机构，以便能实时解决资源危机，也可避开成立国际组织之政治疑虑。

《公约》在有关“区域”制度的规定中有多处提及了“垄断”一词，并规定了关于多金属结核的反垄断标准，但并未对“垄断”给出明确的定义。而在《“区域”内多金属硫化物探矿和勘探规章》和《“区域”内富钴铁锰结壳探矿和勘探规章》制定过程中，国际海底管理局也未能规定明确的反垄断标准，但国际海底管理局通过相关决定，要求法律和技术委员会及时拟订可能用来防止对“区域”内多金属硫化物和富钴铁锰结壳勘探开发实行垄断的适当标准，并向理事会报告其审议情况。学者张丹通过对《公约》以及国际海底管理局相关规章制定过程中有关反垄断问题讨论的回顾，阐明“区域”反垄断问题的含义，结合“区域”特殊的法律地位，提出对“区域”反垄断问题的几点认识。

在《公约》生效20年之际,我们收录了1篇研究《公约》制定的海洋法秩序的文章。

在《公约》为海洋建立的法律秩序中,海洋权利、自由纵横交错。“适当顾及”来源于国际习惯法、国际条约和一般法律原则,它是《公约》的一项原则,被用来解决《公约》中行使权利和自由之间的冲突。“适当顾及”是指一国行使其海洋权利或自由时意识并考虑到其他国家的利益,并在与自己行使权利或自由进行利益分析、平衡,以达到适当性标准。学者张国斌分析了“适当顾及”的渊源、国际法地位、衡量标准及实践中的运用,颇具启示。

此外,本期还收录2篇有关划界的文章,一篇解析了一个具体案例,另一篇则重在划界方法的讨论。

自东地中海地区特别是黎凡特盆地发现油气资源以来,周边沿海国纷纷加速提出专属经济区主张。其中,黎巴嫩与以色列海上油气争端成为了影响地区安全的热点问题。作者张维强和郑凡从相关海域划界协议以及黎以双方的各自主张入手,指出黎以两国相邻海域划界包括领海划界和专属经济区划界两部分,尚未勘定陆上边界也是两国海域划界问题的关键,并进一步考察了争端解决途径,指出合作开发是有效的解决方式,在考虑专属经济区的划界方案时,地理、地质考量因素较少,而应充分顾及社会、经济等因素的考量,以获得公平的划界结果。

1969年的北海大陆架案为国际海洋划界的具体方法抛下了一个疑问,1985年利比亚/马耳他案使用的“临时等距离线+特殊情况”的划界方法,因在多数情况下的客观、方便、公平,在最近20多年的国际司法判例中日益受到推崇。作者江雨遥认为,虽然通过国家实践与法律确信的 analysis,三步法在理论上并未达到习惯法的要求,但其不断得到巩固的事实在中日东海划界问题上无疑对中国愈加不利。中国应坚持一贯立场,贯彻公平原则,以协议方式争取最大的利益。

最后,我们有必要谈谈作为世界最强大的海权国家,美国至今仍游离于《公约》之外。尽管现在美国政府积极推动加入《公约》,但其复杂的国内政治、高度分化的国内舆论使得其在很长时间内难以完成这个任务,这就使美国力图在《公约》之外塑造对其有利的海洋秩序。学者牟文富分析,美国主要通过3种策略来塑造海洋秩序:习惯法主张、航行自由计划、在“防扩散安全倡议”框架下签订双边船舶登临协议去超越传统的海上管辖权,三者分别对应着权利基础、显示武装力量去维护和强化该权利基础的国家实践、重建对海上船舶管辖权制度的企图。

十年磨一剑,希望《中国海洋法学评论》在下一个十年里可以走得更稳健,

攀上新的高峰。

编辑部 谨识

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EDITOR'S NOTE

This year marks the tenth anniversary of the China Oceans Law Review. In the last decade, we have witnessed China's growing interests in the law of the sea. In the meanwhile, we have revised all the previous Issues with the support and efforts of all our colleagues, experts and scholars. Totally 20 Issues in bilingual version will be presented to you at the end of this year. We hope these Issues will help Chinese research in connection with the law of sea be known and recognized globally.

The current Issue starts with two papers addressing the issues relating to marine resources.

Since the entry into force of the United Nations Convention on the Law of the Sea (UNCLOS) in 1994, the fact that coastal States may expand their jurisdiction over the fishing resources to 200 nautical miles has become the mainstream management system for the world's marine fisheries. It also shifts the focus of development and conservation of marine fisheries on the remaining fishery resources in the high seas, especially the highly migratory species and the straddling fish stocks. Up to now, a number of regional fisheries management organizations (RFMO) have been established to conserve and manage highly migratory species. In the past decade, dozens of conservation and management measures directed at highly migratory species were passed, which have enabled some overfished resource groups to recover gradually. However, there has been slow progress in promoting management of many straddling stock resources due to conflicts of interest between relevant countries. Prof. Shui-Kai Chang introduces the current status of several straddling fish stocks distributed throughout the northwestern Pacific. He then discusses the corresponding management approaches, as well as the reasons why it urgently needs for rapid progress on straddling fish stock management and cooperation to mitigate resource depletion. The structure of the RFMO represents the top-down management model. However, this model requires lengthy discussion of conventions and time-consuming construction of management committees. Therefore, this model is not applicable to fishery resources requiring urgent

management, or those for which there is no consensus on the establishment of an international organization. In this connection, Prof. Chang recommends that the bottom-up management model should be adopted. This model is implemented through building of consensus and confidence based on scientific collaboration, and establishment of cooperative management organizations thereafter. This management model can facilitate the timely resolving of resource crises. It can also avoid the political impediments involved in setting up international organizations.

The term “monopoly” has never been given a clear definition in the UNCLOS, though it is mentioned in many provisions on the regime of the “Area” under the UNCLOS, which also contains anti-monopoly provisions in respect of polymetallic nodules. During the formulation of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, the International Seabed Authority (“the Authority”) failed to clearly stipulate anti-monopoly criteria. However, the Authority has adopted some relevant resolutions, requiring its Legal and Technical Commission to, in due course, elaborate the appropriate criteria that might be used to prevent monopolization with respect to the exploration and exploitation of polymetallic sulphides and cobalt-rich ferromanganese crusts in the Area and report its consideration to the Council of the Authority. In this context, ZHANG Dan further defines the issue of anti-monopoly in the Area based on a review of the relevant discussions during the formulation of the UNCLOS and the associated Regulations by the Authority. Meanwhile, the author shares predictions and suggestions regarding the issue after taking into special consideration the unique legal status of the Area.

This year also marks the twentieth anniversary of the UNCLOS which entered into force in 1994. To celebrate this special occasion, we have selected one paper dedicated to the research on legal order established under the UNCLOS.

In the legal order established by the UNCLOS for the seas and oceans, rights and freedoms of the sea interact with each other. The term “due regard”, derived from customary international law, international treaties and general legal principles, is a principle of the UNCLOS, which is used to settle the conflict between the exercise of rights and freedoms. “Due regard” means that a State should respect and take into account the interests of other States

whilst exercising its maritime rights or freedoms; and that a State analyzes and balances the interests between exercising its own rights or freedoms, so as to meet the criteria of due regard. In this connection, ZHANG Guobin explores the history of the term “due regard”, its status under international law, its criteria, and its role in practice, which is thought provoking.

This Issue also contains two articles concerning delimitation, with one focusing on analysis of a particular case and the other on delimitation methods.

Since the discovery of oil and gas resources in the eastern Mediterranean region, especially in the Levantine Basin, exclusive economic zone (EEZ) claims in that region by surrounding coastal States have greatly increased, especially between Israel and Lebanon, whose offshore oil and gas dispute has become a hot issue affecting regional security. ZHANG Weiqiang and ZHENG Fan start with an analysis of relevant maritime delimitation agreements and respective claims of the two States, and then come to the conclusion that the maritime delimitation between the two States should include the delimitation of both adjacent territorial waters and EEZs, and that undefined land boundaries are the crux of the solution to the maritime delimitation. As for the solution to the dispute, the authors propose that joint development can be an effective solution, and that in an effort to achieve equitable delimitation results, social and economic factors, rather than geographic and geological ones, should be given more importance in the development of the EEZ delimitation scheme.

The North Sea Continental Shelf cases, dated in 1969, left questions about the specific methods to be used in international maritime delimitations. The method used in the case between Libya and Malta (1985), namely the construction of a provisional equidistance line followed by adjustment or shifting based on special circumstances, has been widely accepted and adopted in the international judicial decisions in the last two decades, because of its objectiveness, convenience and equity most of the time. JIANG Yuyao argues that, although the analysis of State practices and *opinio juris* embodied no customary nature of the three-stage approach in theory, the fact that the approach has gained continuous confirmations undoubtedly disfavors China in the Sino-Japan delimitation of the continental shelf in the East China Sea. As such, China should stay firm in its position and fight for maximum benefits by agreement, based on the equitable principles.

At the end, we need to discuss the fact that the U.S., as a major maritime power, is not a party to the UNCLOS. Though the current U.S. government has

been positively promoting its accession to the UNCLOS, due to the complexity of its domestic politics and highly divided domestic opinions on the accession, it is difficult for the U.S. to join the UNCLOS in the foreseeable future. It is, therefore, necessary for the U.S., taking consideration of its national interests, to shape a favorable legal order for the seas outside the UNCLOS. MOU Wenfu contends that, the U.S. has employed three strategies in pursuing this goal: making claims based on customary international law, enforcing the Freedom of Navigation Program (FNP), and concluding bilateral ship-boarding agreements with other States under the framework of the Proliferation Security Initiative in order to go beyond the traditional jurisdictions at seas. Correspondingly, these strategies represent the legal basis of its rights, State practices where such basis of rights is maintained and reinforced through a display of armed forces and the attempt to reshape the regime of jurisdiction over ships at sea.

The China Oceans Law Review has been persistently dedicated to the research on the law of the sea in China for ten years. It is earnestly hoped that the Journal will achieve another milestone in the next decade.

COLR Editorial

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通过由下而上的跨界合作共同 养护西北太平洋跨界鱼种资源

张水锴*

内容摘要:自《联合国海洋法公约》于1994年生效以来,沿岸国扩张渔业管辖权至200海里已成为世界海洋渔业管理体制之主流,并使得海洋渔业开发与养护转而聚焦在残余的公海渔业资源上,其中尤以高度洄游鱼种和跨界鱼种为众所关切。针对高度洄游鱼种,目前全球已成立了多个区域性渔业管理组织负责保育及管理,近10年已通过数十项管理措施,使一些曾被过渔的资源鱼群逐渐恢复。但针对众多跨界鱼种资源的管理,则还在各国的利益争执下进展缓慢,其中,分布在日本、韩国、大陆和台湾海域间的几种西北太平洋跨界鱼种,几乎还未开始有利用国之间跨界合作管理的协商。本文介绍了几种西北太平洋跨界鱼种的资源现状、管理方式,以及为何急需进行跨界合作管理以减缓其资源衰退状况。区域性渔业管理组织的管理建构系从上而下的模式,先通过政治协商签署国际文件或公约,再据此成立渔业资源管理的实体或委员会及所属的次级委员会,最后经由科学单位的研究辩证以及管理层级的协商,拟订、通过各项资源保育管理措施来达到保育目标。这种模式需要冗长的公约讨论和费时的管理委员会建构,对于急切需要管理之鱼种资源可能缓不济急,而且也不适用于尚未有成立国际组织之共识的情况。因此,本文建议通过由下而上之国际合作方式,先进行科研合作,逐步建立共识与信心后,再成立合作管理机构,以便实时解决资源危机,也可避开成立国际组织之政治疑虑。

关键词: 跨界鱼种 由下而上国际合作 渔业管理 花腹鲭 乌鱼

一、前 言

根据联合国世界粮农组织2013年统计报告,全球渔业资源于2009年时仅剩12%处于适当(或低度)利用阶段,比35年前减少近30%;而过度利用的资源则

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提高到30%，为35年前之3倍，显示全球海洋渔业资源正迅速萎缩。为应对这样的危机，全球渔业发展的趋势已逐渐从“开发型”、“滥捕型”，转向以保育、合理利用，以及生产与生态并重的“管理型”，通过国际组织的管理决议或国家的管理措施约束、规范渔业的发展，未遵守相关规范者将不再享有公海作业权利。

《联合国海洋法公约》(以下简称“《公约》”)于1982年通过，并于1994年生效。基于广泛的国家实践及《公约》的规范，沿岸国可扩张其渔业管辖权至200海里，这已成为世界海洋渔业管理体制之主流。此一变革将世界传统已开发之95%渔业量划归沿岸国拥有，使得全球海洋渔业的开发与养护转而聚焦在残余的公海渔业资源上。其中尤以《公约》第63条、第64条及第66条所规定的跨界鱼种、高度洄游鱼种、以及鲑鱼所代表的溯河洄游鱼种为主要养护重点。¹

针对高度洄游鱼种(以鲑、旗、鲨类为主)，目前全球已成立了多个区域性渔业管理组织负责保育及管理，诸如大西洋鲑类国际保育委员会、印度洋鲑类委员会、中西太平洋渔业委员会、南方黑鲑保育委员会及美洲热带鲑类委员会等。通过国际组织的科学研究及辩论，以及管理层级的协商、施压，近10年已通过了数十项针对利用高度洄游鱼种之渔业的保育与管理措施，使得一些曾被过渔的资源系群能逐渐恢复，例如南方黑鲑资源历经多年的过度捕捞，曾达相当低的水平，但经过近10年来的加强管理，包括总可捕量的削减，已使资源逐渐恢复，分配给会员国的总可捕量也开始逐年调升。²曾经因资源水平过低而被提案列入《华盛顿公约》附录一禁止国际贸易的大西洋黑鲑，也在2011年大西洋鲑类国际保育委员会大幅降低总可捕量之后，资源显示逐渐恢复。³

除了上述由区域性渔业管理组织管理的高度洄游鱼种以及管理主体已很确定的溯河洄游鱼种之外，还急需为跨界鱼种建立管理制度或管理体制。许多跨界鱼种已由双边或多边的管理体制在进行管理，例如波罗的海跨界鳕鱼目前即由欧盟部长理事会在2007年通过的多年管理计划进行保育管理，但仍有许多跨界鱼种资源的管理在各国的利益争执下进展缓慢，⁴而分布在日本、韩国、大陆和台湾海

1 沙志一：《台湾远洋渔业回顾与展望》，载于中正基金会编：《台湾渔业政策研究》(2007年)，第34~63页。

2 CCSBT, Total Allowable Catch; Monitoring, Control And Surveillance, at <http://www.ccsbt.org/site/index.php>, 12 December 2013.

3 ICCAT, Executive Summary of Atlantic Bluefin Tuna Stock Assessment, at http://www.iccat.org/Documents/SCRS/ExecSum/BFT_EN.pdf, 12 December 2013; Japanese Times, Bluefin Tuna Recovery Could See Catch Quota Hiked in 2014, at <http://www.japantimes.co.jp/news/2013/11/10/national/>, 22 November 2013; 张水锴：《太平洋黑鲑限渔，资源恢复有望》，载于《中国时报》2013年12月13日第A14版。

4 FAO, Papers Presented at the Norway-FAO Expert Consultation on the Management of Shared Fish Stocks, at <http://ftp.fao.org/docrep/FAO/006/y4652e/y4652e00.pdf>, 12 December 2013; Torbjorn Trondsen, Thorolfur Matthiasson and James A. Young, Towards a Market-Oriented Management Model for Straddling Fish Stocks, *Marine Policy*, Vol. 30, Issue 3, 2006, pp. 199~206.

域间的几种西北太平洋跨界鱼种,则几乎还未开始有利用国之间跨界合作管理的协商。

本文将介绍几种分布在西北太平洋的跨界鱼种的资源现况、管理方式,以及为何急需尽快进行跨界合作管理以减缓其资源衰退状况,并建议通过由下而上的国际合作方式来养护跨界鱼种资源。

二、西北太平洋跨界鱼种

根据《公约》第 63 条第 1 款,当跨界鱼种同时出现在 2 个以上沿海国家之专属经济海域时,这些国家应直接或通过适当的分区域或区域组织,设法就必要措施达成协议,协调并确保这些种群之养护与发展。由于跨界鱼种分布范围横跨一个以上国家,无法单靠一个国家之政策予以养护,因此需要通过跨界合作方式来共同养护跨界鱼种资源。以下将介绍分布于西北太平洋的几种跨界鱼种的资源状况及管理方式。

(一) 花腹鲭

花腹鲭属于中上层洄游性鱼类,主要分布于西太平洋,新西兰、澳洲、菲律宾、大陆、台湾、日本及夏威夷等海域,东太平洋墨西哥沿近海域,以及北印度洋和红海。全世界之年产量可达 1 万公吨至 5 万公吨,为重要的食用鱼种。全球鲭鱼渔获量自 1950 年起,便以每年平均 5.5 万公吨之速度逐年增加,至 1966 年围网渔船开始蓬勃发展,鲭鱼渔获量遂以每年平均 22.2 万公吨之速度逐年快速增加;然而自 1979 年起,全球鲭鱼渔获量开始以每年平均 16.8 万公吨之速度逐年递减,在 1993 年至 2006 年间,全球鲭鱼之渔获量约维持在 200 万至 300 万公吨之间。⁵ 而根据台湾学者研究调查,发现鲭鱼已出现“过渔”现象,不仅渔获体长变小,而且成熟年龄也降低;另有学者表示,过去鲭鱼渔船以大型围网渔船为主,但在 1990 年后被扒网取代,因为扒网渔法所需人力少、效率高。然后,扒网渔法导致小鱼混获率高,因而对渔业资源造成严重的破坏。⁶

目前台湾“渔业署”已对鲭鱼渔业订定相关养护措施,包含国际要求的监测、管制及侦查 3 方面,规定渔民提供渔捞及买卖数据(监测);禁止大型围网渔船在距岸 12 海里内作业、限制作业渔船艘数、订定禁渔期等(管制);核准捕捞渔船必

5 廖正信、李国添、魏良佑:《台湾鲭鱼渔业之发展概况》,载于《海大渔推》第 41 期,第 1~17 页。

6 钟丽华:《鲭鱼过渔,明年起每年 6 月休渔》,载于《台湾自由时报》2012 年 10 月 29 日第 A11 版。

须安装船位回报器及接受观察员登船观测(侦查)。由于台湾东北部鲭鱼渔场除了有台湾进行捕鱼作业外,亦有大陆、日本、韩国之渔民前往捕捞鲭鱼,若未共同订定相关养护措施,将无法遏止鲭鱼资源持续恶化之情形发生,故唯有与资源利用国一同商订区域性渔业资源养护的相关管理措施,方能使该项资源达成资源永续利用之目标。

(二) 乌鱼

乌鱼为鲯类鱼科,属广温性鱼类,从水温 8°C 至 24°C 均可发现其踪迹,分布于全世界各温、热带沿岸海域,每年冬季12月至来年1月,由大陆沿岸成群洄游至台湾西南海岸产卵,因此又被称为“信鱼”。由乌鱼鱼卵所制成的乌鱼子因风味独特、价格昂贵,可以高价出售,故台湾渔民戏称每年来的乌鱼是他们的年终奖金。依据台湾学者目前之研究显示,⁷台湾产的乌鱼与分布于大陆长江口至闽江口的乌鱼属同一系群,大陆沿岸乌鱼的捕获量与洄游至台湾产卵的母鱼数量有关,而台湾乌鱼的捕获量、产卵量又与洄游大陆的回归量有关。回顾历年台湾乌鱼之渔获量,可发现其波动起伏相当剧烈,1970年初期乌鱼之年平均产量约100万尾,1978年至1985年达200万尾,为历史高点。1986年至1993年则下降至50万尾,1998年至2012年之年平均产量仅余36万尾;在经过多年低水平的产量后,2012年乌鱼之渔获尾数增加至约70.7万尾,为近15年之新高点,⁸然而2013年预估之产量又回到历年的低点。

乌鱼为大陆与台湾人民共同利用之渔业资源,大陆地区虽然通常不食用乌鱼,但却以乌鱼壳(去内脏的乌鱼)形式外销,因其有利可图,造大陆地区渔民大量捕捞乌鱼,使得台湾历年乌鱼渔获量变动剧烈。乌鱼目前虽尚未被国际自然保育联盟列入濒危名单中,但依据台湾“渔业署”之数据显示,台湾对于该鱼种之年渔获量不但未见稳定成长,反而是趋减少的情况。虽然部分研究表示,台湾之乌鱼渔获量减少是由于全球气候变迁,乌鱼洄游路径改变所造成,⁹但最主要的原因可能是大陆地区大量渔民加入乌鱼捕捞行列。大陆渔民大量使用快速拦截式拖网,在乌鱼洄游南下台湾海峡前即大量捕捞,由于大量捕捞的渔获物都在要产卵前期,不仅经济效益不高,且未留下产卵的机会而伤害乌鱼的永续生态。大陆捕

7 吴全橙、吴继伦:《乌鱼的产卵生态及其年渔获量变动》,下载于<http://www.tfrin.gov.tw/friweb/frinews/enews0083/index.html>,2013年12月12日

8 吴全橙、吴继伦:《乌鱼的产卵生态及其年渔获量变动》,下载于<http://www.tfrin.gov.tw/friweb/frinews/enews0083/index.html>,2013年12月12日。

9 吴全橙、吴继伦:《乌鱼的产卵生态及其年渔获量变动》,下载于<http://www.tfrin.gov.tw/friweb/frinews/enews0083/index.html>,2013年12月12日。

捞乌鱼的渔船规模仍持续扩张,快速拖网渔船已达 100 多艘,¹⁰为使此项渔业资源达到永续利用,台湾与大陆地区应通过合作,共同监控两地之乌鱼渔获量变动情形以及乌鱼体型大小等相关统计资料,以共同养护跨界鱼种资源。

(三) 飞鱼卵

飞鱼属洄游性鱼类,每年 3 月至 4 月间游经台湾东部海域,其中尖头细身飞鱼大量在台湾东北部海域产卵,而形成主要渔季在 4 月至 7 月间的飞鱼卵渔业。渔民利用飞鱼产卵于海草之特性,将草席铺设于海面,使飞鱼穿梭于草席中产卵,以收取附着于草席上之飞鱼卵。虽因此带来大量经济效益,但若过度捕获,将造成飞鱼逐年减少;且飞鱼在食物链中属于低阶消费者,为中大型洄游性鱼类之重要食物来源,故飞鱼卵的过度利用将会直接影响到整体生态资源。¹¹目前主要的飞鱼卵渔业来自台湾及大陆,而日本也会利用该飞鱼卵之亲鱼,因此飞鱼卵资源的变动牵涉到日本、大陆和台湾三方。¹²

飞鱼卵渔业作业位置位于台湾东北海域,除了台湾船队于该区进行捕捞作业外,大陆船队亦以倍数以上之渔船数量于该渔场进行捕捞。¹³为保育飞鱼资源,台湾方面已订定相关管理措施,同样有类似花腹鲭之监测、管制、侦查措施,要求从业者提供捕捞信息,采核准制管理捕捞渔船,并限制捕捞期间及总可捕捞量等,但大陆地区的管制措施较不严谨,进而衍生出台湾渔船在海上与大陆渔船交易飞鱼卵之问题;因此台湾飞鱼卵渔业虽受总容许渔获量管制,但实际渔获量却往往受到低估。目前有关飞鱼卵渔业之管理方式属预警式措施,系在科学证据缺乏前之保护措施,笔者研究已证实东北部飞鱼卵之亲鱼主要应为尖头细身飞鱼,并已完成其成长速度之研究,¹⁴但有关其生殖生物学研究、资源学研究、渔获纪录等皆未臻完善(缺乏大陆渔船之渔获数据),因而无法作出正确资源评估,亦无法准确提出兼具高经济价值以及可永续利用该资源之渔获水平。因此,为有效管理及监控飞

10 陈朝福:《捕捞乌鱼渔业式微,高雄渔民仍以乌金为贵》,下载于 <http://www.epochtimes.com/b5/6/1/23/n1199955.htm>, 2013 年 12 月 12 日。

11 Shui-Kai Chang, Chih-Wei Chang and Evelyn Ame, Species Composition and Distribution of the Dominant Flying Fishes (Exocoetidae) Associated with the Kuroshio Current, South China Sea, *Raffles Bulletin of Zoology*, Vol. 60, 2012, pp. 539~550.

12 张水锴、林忠晖:《台湾黑潮海域飞鱼的优势种和时空分布》,载于《渔业推广》第 308 期,第 10~15 页;张水锴:《尖头细身飞鱼及白鳍飞鱼于西北太平洋时空分布及各区域相关性探讨 (III)》。

13 王贵郎:《两岸竞捞飞鱼卵,我船限 40 万公斤》,下载于 <http://www.cooloud.org.tw/node/16563>, 2013 年 12 月 12 日。

14 Chih-Wei Chang, Chung-Hui Lin, Yung-Song Chen, Meng-Hsien Chen and Shui-Kai Chang, Age Validation, Growth Estimation and Cohort Dynamics of the Bony Flying Fish *Hirundichthys Oxycephalus* off Eastern Taiwan, *Aquatic Biology*, Vol. 15, 2012, pp. 251~260.

鱼卵渔业资源,藉由两岸合作共同商订相关资源养护措施将为必要之手段。

(四) 鬼头刀

鬼头刀为大洋性表层洄游鱼类,广泛分布于热带及亚热带区海域,包括南海及台湾东部海域,常成群出现于开放性水域,偶尔也可于沿岸水域发现其踪迹。鬼头刀为大产量之经济实用性鱼种,主要的捕捞渔具为延绳钓、曳绳钓、流刺网、定置网等。台湾高雄东部海域之渔汛期为3月至8月,盛渔期为5月;北部之鱼汛期则为10月下旬至来年2月中旬。目前研究显示南海及台湾、日本海域的鬼头刀为同一系群,¹⁵各海域的捕捞行为都将影响到整体资源。

鬼头刀虽尚未被国际自然保育联盟列入濒危名单中,但因其成长速度快,重金属污染少,未来在渔业市场中之重要性将逐年增加。台湾近几年的鬼头刀产量在持续下降,虽然目前仍无科学证据显示资源有问题,但仍应尽早建立跨界管理机制,共同监控及管理此项资源,以达渔业资源永续利用之目标。

(五) 南海诸鱼种

南海位于东南亚,为西太平洋的一部分,被大陆、台湾、菲律宾群岛、马来群岛及中南半岛所环绕,海域面积约350万平方公里。由于南海地处低纬度地区,属于热带海域,适合珊瑚礁生长,礁岛散布于其中,成为南海区域鱼类及海水生物之温床,因此海洋资源非常丰富,常见重要经济鱼种如鲭类、鲹类及鲷类皆可于南海发现其踪迹。依据“大蓝海洋”¹⁶所搜集到的资料及科学研究结果,南海海域渔获量增加相当快速,1997年约580万吨,10年后的2006年约达640万吨,约增长10%。至于其渔业资源状况,该组织的科学家将南海的渔业资源状况分为以下5种,分别为渔业发展阶段、资源开发阶段、资源过度利用阶段、资源衰竭阶段以及资源恢复阶段。根据这些科学评估,在南海区域内约有20%的鱼种资源在2000年代已呈衰竭状态,无法再被利用,而此数据与1990年代相较之下,约增加10%。另外,约有10%之鱼种正处于过度利用(过渔)状态。现在的渔获量约有10%还来自被过渔的资源,其余有80%来自开发阶段(尚未过渔)的鱼种资源,另外还有10%则来自渔业发展阶段的鱼种资源。

15 Shui-Kai Chang, Gerard DiNardo, Jessica Farley, Jon Brodziak and Zih-Lun Yuan, Possible Stock Structure of Dolphin Fish (*Coryphaena Hippurus*) in Taiwan Coastal Waters and Globally Based on Reviews of Growth Parameters, *Fisheries Research*, Vol. 147, 2013, pp. 127~136.

16 大蓝海洋为一个国际组织之网站,该组织为研究渔业对全球生态系统之影响而于1999年设立,下载于<http://www.seaaroundus.org/>。

由于南海各岛屿之主权归属尚未明朗,该海域之捕捞行为无法受单一国家之法律规范,目前对区域内之岛屿及海域宣称拥有部分或全部主权之国家或地区包括大陆、台湾、越南、马来西亚、菲律宾及文莱等。虽然各自宣称有管辖权,但在主权之争尚未定案的情况下,渔业资源的利用却未受到管制,亟需通过跨界的合作进行与政治无关的科学研究与管理,否则呈衰竭状态的鱼种将会持续增加,海洋生态也将持续被破坏到无法恢复的情况。

三、由上而下的国际合作模式

(一) 由上而下的国际合作模式

国际上在近几世纪就已认识到海洋渔业资源已被过度利用,为共同保育这些渔业资源,国际渔业管理组织大都采取由上而下的模式。这个模式,以高度洄游鱼种鲱鱼之渔业管理组织为例,即先通过政治协商签署国际文件或公约,再根据该国际文件成立渔业资源管理的实体或委员会,依据委员会下设的科学次委员会的科学研究与建议,经由委员会的政治协商拟订保育管理措施(如管理建议案、决议案以及其他保育管理措施),并通过各国的执行及委员会内部的监督机制来保育与管理辖区海域内的渔业资源。

这种方式也应用在许多跨界鱼种上,例如负责管理南太平洋区跨界鱼种的国际组织——南太平洋区域渔业管理组织,系由新西兰、澳大利亚及智利等3国共同倡议成立,目的在于保育及管理其他区域性渔业管理组织未纳入管理之非高度洄游鱼类,目前最重要的管理鱼种为该海域的鱿鱼。从认识到南太平洋区需要针对跨界鱼种进行管理,到2004年联合国粮农组织提议成立以来,历经多年政治磋商,该组织才于2011年成立,开始讨论辖区内资源的管理。以下以北太平洋之跨界鱼种秋刀鱼为例进一步说明这种模式。

秋刀鱼为西北太平洋重要渔业资源之一,属表层洄游性鱼类,于冬季时南下洄游至黑潮温暖水域产卵,夏季时北上洄游至亲潮冷水索饵,主要以棒受网渔法捕获。根据联合国世界粮农组织数据显示,于西北太平洋海域进行秋刀鱼捕捞之国家和地区主要为日本、台湾、俄罗斯及韩国等,而台湾之渔获量仅次于日本,为世界第二捕捞秋刀鱼地区。由于秋刀鱼肉质鲜美,除了可新鲜食用外,亦可加工制成罐头食品或钓饵之用,具有极高的利用价值。该鱼种资源主要分布于西北太平洋,洄游范围甚广,横跨数国,因此其管理需要各利用国的共同合作方能达成。

联合国于2006年秋决议要保育北太平洋的底层及跨界鱼种资源,经过数年凝聚国际共识后,于2010年开始召开“北太平洋渔业委员会”筹备会议。第一届至第三届筹备会议于韩国釜山、日本东京及美国阿拉斯加举行,2013年3月于中

国舟山市召开第四届筹备会议,共有美国、日本、韩国、俄罗斯、加拿大、菲律宾、大陆及台湾、联合国粮农组织等共 60 位代表参加。第五届会议于 2013 年 9 月在台湾高雄市召开,有前述国家、地区、单位共 80 余位代表参加。

第五届会议在针对管辖鱼种之资源评估等议题,以及讨论北太平洋渔业委员会成立后所需制订之养护管理措施时,为避免组织成立的旷日费时,影响秋刀鱼资源的保育管理,先决定于 2014 年召开秋刀鱼研讨会,确保秋刀鱼资源状况将列入下届会议讨论议程,以达成秋刀鱼资源永续之目标。

这种由上而下的国际合作管理模式,需要相关国家或地区具有成立国际组织合作管理之共识,另外由于组织成立需要的时程相当长,因此该模式也只能针对管理急迫性仍不高的鱼种。同时,对于成立国际组织仍有许多政治争议的情况,以及鱼种资源已被过度利用的情况,由上而下的模式就较不适用。

(二) 由下而上的国际合作模式

相较于由上而下的国际合作模式,由下而上的合作模式比较单纯,对资源的保护较及时。这种模式先从比较没有政治敏感性的资料搜集及科学研究的合作开始,一面建立对资源的基本渔业统计信息,并先进行资源状况的研究,同时逐步建立合作默契与共识,待时机成熟时,即可推动官方合作的共同管理措施。

这种模式早期曾应用在高度洄游鱼种南方黑鲔的保育上。南方黑鲔,俗名“油串”,分布于南半球的三大洋(南太平洋、印度洋和南大西洋)南纬 30 度到 50 度之间。因其捕获地点位于太平洋及印度洋之纬度海域,日本人又称其为印度鲔。南方黑鲔为一种生长缓慢的大型洄游鱼类,生命周期相当长,一般成长至 10 至 12 岁才成熟产卵,故此鱼种一旦发生过渔情况,便很难恢复。¹⁷ 澳洲南方黑鲔渔业于 1950 年开始发展,日本于 1952 年即有捕捞南方黑鲔专业船,新西兰黑鲔渔业则迟至 1980 年才开始发展。由于南方黑鲔肉质鲜美,适合制作高质量的生鱼片及寿司,具高经济价值,故其年渔获量自 1956 年持续上升,1961 年达到高峰后开始逐年递减。为达到保育、管理及永续利用南方黑鲔资源之目标,1982 年日本、澳洲及新西兰三国开始每年进行科学合作研究,共同监控南方黑鲔之资源量,1984 年开始自律性设定渔获配额。在建立研究及管理南方黑鲔资源合作默契及共识的 10 年后,三国于 1993 年签署《南方黑鲔保育公约》,并于 1994 年成立“南方黑鲔保育委员会”,其成立宗旨为“经由适当的管理,确保南方黑鲔保育与最适利用”,依据科学次委会之资源研究结果与建议,每年举行年会决定总容许渔获量及各缔约国之配额量,通过缔约国之合作及适当管理,达到南方黑鲔之保育及最

17 张水锴著:《南方黑鲔,价格高昂又争议频传的珍贵资源》,台北:财团法人台湾对外渔业合作发展协会 2000 年版,第 150 页。

适利用之目标。这种由下而上的模式,使南方黑鲷资源能提早得到保护,并在合作共识建立后推动成立国际组织。

四、结 语

在现今的保育意识下,养护跨界鱼种资源为全球各界重视之议题。在本文第二节之论述中,以西北太平洋海域之数种跨界鱼种为例,说明进行跨界合作管理之迫切需要。而在本文第三节则进一步说明如何通过国际合作达到跨界合作共同养护跨界鱼种资源之目标。

国际合作管理之方式一般可分为2种,一种为由上而下地通过成立国际组织来进行,例如目前在北太平洋所成立的北太平洋渔业委员会,藉由成立国际组织来管理秋刀鱼资源。然而此种管理方式需要冗长的公约讨论和费时的管理委员会建构,对于迫切需要管理之鱼种资源可能缓不济急,而且也不适用于尚未成立国际组织、不存在国际共识之情况。另一种管理方式为由下而上地通过数据搜集与科研合作,逐步建立共识与信心后,再成立合作管理机构或甚至成立正式国际组织,如南方黑鲷保育委员会。此种管理方式可较弹性地先对资源状况进行了解,并推动合作管理,解决现时的资源危机,也可避开成立国际组织之政治疑虑,待有共识和信心之后再逐步推动成立国际组织。

对于迫切需要管控之跨界鱼种资源,采用由下而上之国际合作方式,将为较有效率之策略。由下而上之国际合作方式主要是通过资料搜集与科研合作来达成。首先,统计资料为科研之基础,有统计数据各资源利用国才有讨论的基础及合作诱因。因此,搜集各资源利用国完整及准确之渔获记录,将为国际合作之第一步。其次,科研成果为各国共同管理之依据,且因科研合作较为客观,因此而产生之利益争议相对较少,故可藉由制造共同语言(看法)来解读科研内容,之后再延伸至资源状况评估。最后依据科研成果,通过双边或多边协调会议,或通过现有科研组织,共同建议合适的管理措施,如设置合适的禁渔期、禁渔法、各国总容许渔获量等,以达共同养护跨界鱼种之目标。

由于由上而下之国际合作方式,需要冗长的讨论及各国间的共识,费时又费力,因此不适用于有政治敏感性或迫切需要管理之鱼种资源。西北太平洋跨界鱼种中有许多资源同时被日本、韩国、大陆及台湾所利用。台湾的特殊政治地位使得要在此海区成立“国际性”的渔业管理组织将会遇到很多争议及阻碍,另外南海海域更有主权上的争议,不是短时间可以解决的。因此若要及时养护管理这些跨界鱼种资源,本文建议先通过由下而上的跨界合作,藉由调查及科研开启国际合作之第一步,除了因调查与科研合作之政治敏感度较低,较易达到跨界合作、共同保育资源之目标外,亦可藉由科研基础吸引投资,达到“维护现有渔业开发的永续”

或“开创未来合作开发的契机”之目标。

Conserving Northwestern Pacific Straddling Fish Stocks through Bottom-Up Transboundary Collaboration

Shui-Kai CHANG*

Abstract: Since the entry into force of the United Nations Convention on the Law of the Sea (UNCLOS) in 1994, the fact that coastal States may expand their jurisdiction over the fishing resources to 200 nautical miles has become the mainstream management system for the world's marine fisheries. It also shifts the focus of development and conservation of marine fisheries on the remaining fishery resources in the high seas, especially the highly migratory species and the straddling fish stocks. Up to now, a number of regional fisheries management organizations (RFMOs) have been established to conserve and manage highly migratory species. In the past decade, dozens of conservation and management measures directed at highly migratory species were passed, which have enabled some overfished resource groups to recover gradually. However, there has been slow progress in promoting management of many straddling stock resources due to conflicts of interest between relevant countries. As for the straddling fish stocks in the northwestern Pacific between Japan, South Korea, and Chinese Mainland and Taiwan, there have been almost no negotiations over collaboration and management among the resource utilizing countries. This article introduces the current status of several straddling fish stocks distributed throughout the northwestern Pacific. It then discusses the corresponding management approaches, as well as the reasons why it urgently needs for rapid progress on straddling fish stock management and cooperation to mitigate resource depletion. The structure of the RFMO represents the top-down management model. Application of this model initially involves signing of an international instrument or convention through political consultation, and then the

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establishment of an organization or commission and its sub-committee to manage fishery resources in accordance with the international instrument or convention. Finally, the conservation objective is to be reached based on the scientific research and debates of research institutes, management-level negotiations and the drawing up and adoption of conservation management measures. However, this model requires lengthy discussion of conventions and time-consuming construction of management committees. Therefore, this model is not applicable to fishery resources requiring urgent management, or those for which there is no consensus on the establishment of an international organization. In this connection, the article recommends that the bottom-up management model should be adopted. This model is implemented through building of consensus and confidence based on scientific collaboration, and establishment of cooperative management organizations thereafter. This management model can facilitate the timely resolving of resource crises. It can also avoid the political impediments involved in setting up international organizations.

Key Words: Straddling fish stock; Bottom-up international collaboration; Fishery management; Scomber Australasicus; Mullet

I. Preface

According to United Nations Food and Agriculture Organization (FAO) Statistical Yearbook 2013, only 12% of global fishery resources were under-exploited or moderately exploited in 2009, a reduction of nearly 30% compared with that of 35 years ago. In contrast, the share of overexploited resources rose to 30%, three times that of 35 years ago, demonstrating a rapid decline in global marine fishery resources. To cope with this crisis, global fishing industry trends have gradually turned away from expansion and excess capture, instead moving in the direction of a management system that emphasizes both conservation and reasonable utilization and places equal value on both production and ecology. The development of fisheries has been constrained and regulated by the managerial decisions made by international organizations or management measures issued by countries. Those who fail to comply with the relevant regulations will no longer be entitled to operate in the high seas.

Passed in 1982, the United Nations Convention on the Law of the Sea (UNCLOS) entered into force in 1994. Based on UNCLOS rules and the practices covering a wide range of countries, coastal States may expand their jurisdiction

over the fishing industry to 200 nautical miles, which has become the mainstream management system for the world's marine fisheries. Due to this change, 95% of the traditionally exploited fisheries worldwide come under the possession of coastal States, which shifts the focus of development and conservation of global marine fisheries on the remaining fishery resources in the high seas. Especially, the conservation of straddling fish stocks, highly migratory species, and salmon and other anadromous species provided under Articles 63, 64 and 66 of the UNCLOS should serve as the main focus.¹

Up to now, a number of regional fisheries management organizations have been established to conserve and manage highly migratory species (mainly tunas, sailfish and sharks), such as the International Commission for the Conservation of the Atlantic Tunas (ICCAT), the Indian Ocean Tuna Commission (IOTC), the Western and Central Pacific Fisheries Commission (WCPFC), the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), and the Inter-American Tropical Tuna Commission (IATTC). In the past decade, scientific research and debates conducted by international organizations, and management-level negotiations and pressures have led to the passage of dozens of conservation and management measures directed at highly migratory species, which have enabled some overfished resource groups to recover gradually. For example, southern bluefin tuna resources, which suffered from many years of overfishing, had reached very low levels. However, after a decade of strengthened management and reductions in total allowable catch (TAC), we have begun to see a gradual increase in tuna resources, with a yearly rise in TAC allocated to member countries.² Initially, Atlantic tunas were listed in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), reflecting their very low numbers. However, in the wake of a significant reduction of the Atlantic tuna TAC by the ICCAT in 2011, resource levels appear to be gradually recovering.³

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- 1 Sha Zhiyi, Retrospect and Prospect of Deep-Sea Fishery of Taiwan, in Chiang Kai-shek Foundation ed., *Research on Fishery Policies of Taiwan*, 2007, pp. 34–63. (in Chinese)
 - 2 CCSBT, Total Allowable Catch; Monitoring, Control And Surveillance, at <http://www.ccsbt.org/site/index.php>, 12 December 2013.
 - 3 ICCAT, Executive Summary of Atlantic Bluefin Tuna Stock Assessment, at http://www.iccat.org/Documents/SCRS/ExecSum/BFT_EN.pdf, 12 December 2013; Japanese Times, Bluefin Tuna Recovery Could See Catch Quota Hiked in 2014, at <http://www.japantimes.co.jp/news/2013/11/10/national/>, 22 November 2013; Shui-Kai Chang, Fishing of Pacific Tunas Banned; Hopeful of Recovering Resources, *China Times*, 13 December 2013, p. A14. (in Chinese)

In addition to the aforementioned highly migratory species managed by regional fisheries management organizations and the anadromous fish whose management authorities are clearly defined, there remains an urgent need to establish a system for straddling stock management. Many straddling stocks are managed by bilateral or multilateral management systems. For example, straddling cod stock in the Baltic Sea is conserved and managed in accordance with the Multiyear Management Plan for Cod Fishing in the Baltic Sea, which was passed by the EU Council of Ministers in 2007. However, there has been slow progress in promoting management of many straddling stock resources due to conflicts of interest between relevant countries.⁴ As for the straddling fish stocks in the northwestern Pacific between Japan, South Korea, and Chinese Mainland and Taiwan, there have been almost no negotiations over collaboration and management among the resource utilizing countries.

This article introduces the current status of several straddling fish stocks distributed throughout the northwestern Pacific. It then discusses the corresponding management approaches, as well as the reasons why it urgently needs for rapid progress on straddling stock management cooperation to mitigate resource depletion. The author then recommends conservation of straddling stocks through bottom-up international collaboration.

II. Straddling Fish Stocks in the Northwestern Pacific

According to Paragraph 1, Article 63 of the UNCLOS, when straddling fish stocks appear in the exclusive economic zones of two or more coastal States, these countries should seek, either directly or through appropriate sub-regional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks. Because the distribution ranges of straddling fish stocks span more than one country, their conservation is impossible based on the policies of only a single country. Therefore, transboundary collaboration is necessary to conserve straddling fish stocks. The status of several straddling fish stocks in the northwestern Pacific and their corresponding

4 FAO, Papers Presented at the Norway-FAO Expert Consultation on the Management of Shared Fish Stocks, at <http://ftp.fao.org/docrep/FAO/006/y4652e/y4652e00.pdf>, 12 December 2013; Torbjorn Trondsen, Thorolfur Matthiasson and James A. Young, Towards a Market-Oriented Management Model for Straddling Fish Stocks, *Marine Policy*, Vol. 30, Issue 3, 2006, pp. 199~206.

management mechanisms are stated as follows.

A. Scomber Australasicus

Blue mackerel (*scomber australasicus*) is a migratory pelagic fish and is mainly distributed in the northern Indian Ocean, the Red Sea, the western Pacific, and the eastern Pacific near Mexico, as well as the seas of New Zealand, Australia, the Philippines, Chinese Mainland and Taiwan, Japan and Hawaii. It is an important edible fish, with a global annual output of 10,000 to 50,000 tonnes. In the years after 1950, global mackerel catch increased by an average of 55,000 tonnes per year. After 1966, due to the rapid development of seiners, the global mackerel catch increased by an average of 222,000 tonnes per year. However, after 1979, the global catch of mackerel began to decline by an average of 168,000 tonnes per year. Between 1993 and 2006, global catch fluctuated approximately between two and three million tonnes.⁵ An investigation by a scholar from Taiwan revealed a phenomenon of mackerel overfishing, as well as smaller body length and lower age of maturity. Another scholar showed that mackerel and scad fishing ships were mainly large-scale seiners in the past. Seiners were replaced by dredges in the years after 1990, because they required less manpower and led to higher efficiency. However, the by-catch rate for small fishes increased, and fishery resources were seriously damaged as a result.⁶

Up to now, the Taiwan “Fisheries Agency” has set forth the relevant measures for conservation of mackerel and scad fisheries, including the three international requirements of monitoring, control and surveillance. It is stipulated that fishermen should provide fishing and trading data (monitoring). Other measures include the banning of operation of large-scale seiners within 12 nautical miles offshore, constraints on the number of operating fishing ships, closed fishing seasons (control). Approved fishing ships must also be installed with ship position reporting devices and accept on-board inspection by observers (surveillance). In addition to fishermen from Taiwan, those from China Mainland, Japan, and South Korea also operate in mackerel fisheries grounds located at the northeast of Taiwan.

5 Liao Zhengxin, Li Guotian and Wei Liangyou, Development of Mackerel Fisheries in Taiwan: A Brief Overview, *Fisheries Extension of Taiwan Ocean University*, No. 41, pp. 1~17. (in Chinese)

6 Zhong Lihua, Mackerel Overfished; Fishing of Mackerel to Be Closed in June Every Year since Next Year, *Liberty Times*, 29 October 2012, p. A11. (in Chinese)

If the relevant countries or regions fail to collaborate in adopting a common set of conservation measures, it will be impossible to prevent mackerel resources from being overexploited and depleted. Therefore, mackerel resources may be utilized sustainably only after all the countries utilizing such resources jointly negotiate over the regional management measures related to conservation of fishery resources.

B. Mullet

Mullet is a eurythermic fish belonging to the family Mugilidae and is distributed worldwide in tropical and temperate coastal waters ranging from 8 °C to 24°C. From December to January, hordes of mullet migrate from the coast of China Mainland to the southwestern coast of Taiwan to spawn; for this reason it is known as the “fish of message.” Mullet roe is unique in flavor and high in price, so fishermen in Taiwan jokingly refer to migrating mullet as their year-end bonuses. Based on recent research by Taiwan scholars,⁷ the mullet produced in Taiwan and the mullet distributed from the Yangtze River estuary to the Minjiang estuary belong to the same species. In addition, the catch of mullet along the coast of China Mainland is related to the number of female mullet migrating to Taiwan to spawn. Similarly, the catch and egg-laying amount of the mullet in Taiwan is related to the number of mullet migrating back to China Mainland. Looking back on recent years, the catch of mullet in Taiwan is found to have fluctuated significantly. In the early 1970s, the average annual output of mullet was about one million. From 1978 to 1985, it amounted to two million, hitting a record high. From 1986 to 1993, it dropped to 500,000. From 1998 to 2012, it dropped as low as 360,000. After years of decreasing production, in 2012, the catch of mullet increased to approximately 707,000, a new high point in nearly 15 years.⁸ However, 2013 output is estimated to have dropped to the lowest point in several years.

Mullet resources are shared by Chinese Mainland and Taiwan. Chinese mainlanders do not usually eat mullet, but they catch large quantities of mullet,

7 Wu Quancheng and Wu Jilun, Changes in the Spawning Ecology and Annual Catch of Mullet, at <http://www.tfrin.gov.tw/friweb/frienews/enews0083/index.html>, 12 December 2013. (in Chinese)

8 Wu Quancheng and Wu Jilun, Changes in the Spawning Ecology and Annual Catch of Mullet, at <http://www.tfrin.gov.tw/friweb/frienews/enews0083/index.html>, 12 December 2013. (in Chinese)

gut them, and harvest their shells for sale in a profitable export market, resulting in major fluctuations in mullet catch in Taiwan each year. So far, mullet has not yet been included in the endangered list by the International Union for Conservation of Nature (IUCN). However, based on the data of Taiwan “Fisheries Agency”, the catch of mullet in Taiwan has not only failed to show stable growth, but has in fact declined. According to some studies, the decline in Taiwanese mullet catch results from global climatic variations, which change the migrating routes of mullet.⁹ However, the main reason for the decline in the catch of mullet in Taiwan may be the participation of the fishermen in China Mainland into fishing of mullet. China Mainland fishermen’s extensive use of fast-intercepting trawls to catch mullet before they migrate south to the Taiwan Strait has damaged the ecological sustainability of mullet, not only by lowering economic efficiency but also by capturing large quantities of fish before they have the opportunity to spawn. The number of fast trawlers used by China Mainland to catch mullet has reached more than 100 and is still increasing.¹⁰ To secure sustainable utilization of mullet resources, Chinese Mainland and Taiwan should cooperate to monitor variations in the catch of mullet between them, the sizes of mullet caught, and other relevant statistical data, so as to conserve straddling fish stocks jointly.

C. Flying Fish Roe

Flying fish is a migratory fish that migrates through the waters east of Taiwan between March and April each year. Large quantities of *hirundichthys oxycephalus* spawn on seagrass in the waters northeast of Taiwan mainly from April to July every year, forming the flying fish roe production industry. Many fishermen take advantage of this feature of flying fish spawning by laying straw mats on the seas for the fish to spawn amongst, which facilitates the collection of roe. This has brought large economic benefit. However, if too much flying fish roe is caught, the number of flying fish will decline year by year. Furthermore, flying fish occupies a low-level position in the food chain and is an important food source of large and

9 Wu Quancheng and Wu Jilun, Changes in the Spawning Ecology and Annual Catch of Mullet, at <http://www.tfrin.gov.tw/friweb/frienews/enews0083/index.html>, 12 December 2013. (in Chinese)

10 Chen Zhaofu, The Fishery of Mullet Is Declining, but People in Kaohsiung Still Value Mullet as Their Year-end Bonuses, at <http://www.epochtimes.com/b5/6/1/23/n1199955.htm>, 12 December 2013. (in Chinese)

medium-sized migratory fish. Therefore, overexploitation of flying fish roe will impose a direct impact on the entire ecological resources.¹¹ At present, the main flying fish roe producers are Chinese Mainland and Taiwan. Japan also makes use of flying fish roe broodstock, so any variations in flying fish roe resource availability can affect the three parties of Japan, and Chinese Mainland and Taiwan.¹²

Fleets from both Chinese Mainland and Taiwan, in the waters northeast of Taiwan, harvest the flying fish roe. The number of fishing ships from China Mainland is twice as many as that of Taiwan.¹³ In order to conserve flying fish resources, Taiwan has set forth relevant management measures, which are similar to measures for monitoring, control and surveillance of scomber australasicus, requiring operators to provide information on fishing. The approval system is employed to manage fishing ships and fishing seasons and the TAC are also restricted. However, the control measures of China Mainland are less stringent, which has led to the problem of flying fish roe sales between Chinese Mainland and Taiwan fishing ships on the sea. Therefore, although the TAC restricts flying fish roe catch in Taiwan, the actual catch is always underestimated. The current flying fish roe management model depends on early warning measures developed without sufficient scientific evidence. This author's previous research has confirmed that the flying fish roe broodstock in northeast of Taiwan are *hirundichthys oxycephalus*, and he has completed a study on the growth speed of such fish.¹⁴ Nevertheless, studies on reproductive biology, resource science, catch records, and similar topics related to such fish have not yet been completed due to a lack of fishery catch data from China Mainland. Therefore, no reliable evaluation of resources can be made

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- 11 Shui-Kai Chang, Chih-Wei Chang and Evelyn Ame, Species Composition and Distribution of the Dominant Flying Fishes (Exocoetidae) Associated with the Kuroshio Current, South China Sea, *Raffles Bulletin of Zoology*, Vol. 60, 2012, pp. 539~550.
 - 12 Shui-Kai Chang and Chung-Hui Lin, Dominant Species of Flying Fish in Waters of Kuroshio Currents in Taiwan and Their Spatial and Temporal Distribution, *Fishery Extension*, No. 308, pp. 10~15 (in Chinese); Shui-Kai Chang, Investigation of Spatial and Temporal Distribution of *Hirundichthys Oxycephalus* and *Cheilopogon Unicolor* in the Northwest Pacific and Correlation between Various Areas (III). (in Chinese)
 - 13 Wang Guilang, Competition in Fishing Flying Fish Roe between Chinese Mainland and Taiwan; the Ships Registered in Taiwan Are Allowed to Fish Only 0.4 Million Kilograms, at <http://www.cooloud.org.tw/node/16563>, 12 December 2013. (in Chinese)
 - 14 Chih-Wei Chang, Chung-Hui Lin, Yung-Song Chen, Meng-Hsien Chen and Shui-Kai Chang, Age Validation, Growth Estimation and Cohort Dynamics of the Bony Flying Fish *Hirundichthys Oxycephalus* off Eastern Taiwan, *Aquatic Biology*, Vol. 15, 2012, pp. 251~260.

in this article, nor can the author put forward a precise level of catch that combines both high economic value and long-term sustainability. In order to manage and monitor the flying fish roe resources effectively, it is necessary to negotiate over resource conservation measures through cross-strait collaboration.

D. Dolphin Fish

Dolphin fish (*Coryphaena hippurus*) is a pelagic migratory fish widely distributed in tropical and subtropical waters, including the South China Sea and the waters east of Taiwan. Dolphin fish often appear in open waters in schools and occasionally appear in coastal waters. Dolphin fish is an economically useful fish with high output, and is caught mainly with long line fishing gear, trolling lines, drift nets, fixed nets and similar gears. Every year, in the waters east of Kaohsiung, Taiwan, the fishing season lasts from March to August and peaks in May; in the waters north of Kaohsiung, Taiwan, the fishing season lasts from late October to mid-February of the following year. Current studies have demonstrated that dolphin fish in the South China Sea and those in the waters of Taiwan and Japan are of the same population.¹⁵ Therefore, fishery operations in each sea area will have collective influences on all resources.

Dolphin fish have not been included on the IUCN endangered species list. Because they grow very fast and suffer little heavy metal pollution, the market for dolphin fish is projected to grow more and more important in coming years. Dolphin fish yield in Taiwan has experienced a persistent decline in recent years. Despite a continuing lack of scientific evidence demonstrating the resource problem, transboundary management mechanisms must be established as soon as possible to jointly monitor and manage these resources and achieve the goal of sustainable fisheries utilization.

E. South China Sea Species

The South China Sea, a part of the western Pacific situated in the Southeast Asian region, is surrounded by Chinese Mainland and Taiwan, the Philippines,

15 Shui-Kai Chang, Gerard DiNardo, Jessica Farley, Jon Brodziak and Zih-Lun Yuan, Possible Stock Structure of Dolphin Fish (*Coryphaena Hippurus*) in Taiwan Coastal Waters and Globally Based on Reviews of Growth Parameters, *Fisheries Research*, Vol. 147, 2013, pp. 127-136.

Malaysia and Indochina Peninsula, with a sea area of about 3.5 million square kilometers. As the South China Sea is at low tropical latitude, it is suitable for the growth of coral reefs. With many reef islands serving as a breeding ground for various fishes and sea creatures, the South China Sea is rich in marine resources, including such economically important species as mackerels, scads, and tunas. According to collected data and scientific research results of “Sea around Us”,¹⁶ catch in the South China Sea has increased quite rapidly. In 2006, it was about 6.4 million tonnes, an increase of about 10% compared with about 5.8 million tonnes in 1997. The organization’s scientists categorize the South China Sea fishery resources situation into the following five status: developing, exploited, over-exploited, collapsed and rebuilding. Based on these scientific assessments, about 20% of fishery resources in the South China Sea had been exhausted and could no longer be utilized in the 2000s, an increase of about 10% compared to the 1990s. In addition, about 10% of fish species are being overexploited. Currently, about 10% of the catch comes from these overexploited resources, about 80% comes from fish stocks that have not been overexploited (exploited status) and other 10% comes from those in the developing status.

Currently, the countries or regions claiming all or part of the sovereignty over the islands or waters in the South China Sea include Chinese Mainland and Taiwan, Vietnam, Malaysia, the Philippines, and Brunei. Owing to ongoing disputes over the sovereignty of each individual island, there is no way to regulate fishing activities in this sea area according to the laws of any single country, and fishery resources in the sea area are still being exploited without supervision. There is an urgent need for transboundary cooperation on apolitical scientific research and management. Otherwise, more and more fish stocks will be exhausted and the marine ecosystem will continue to be destroyed until beyond recovery.

III. Top-Down International Collaboration Model

A. Top-Down International Collaboration Model

In recent centuries, the overexploitation of marine fishery resources has be-

16 Sea around Us is the name of the website of an international organization established in 1999 to study the influence of fisheries on global ecological systems. At <http://www.seaaroundus.org/>.

come internationally recognized. In order to jointly protect these fishery resources, most international fisheries management organizations have adopted a top-down model. For example, looking at the fisheries management organization for tuna, a highly migratory species, application of this model initially involves signing of an international instrument or convention through political consultation, and then the establishment of an organization or commission to manage fishery resources in accordance with the international instrument. Based on the scientific research and recommendations of the scientific sub-committee affiliated to such commission, the commission engages in political consultation to draw up conservation management measures, which can include management recommendations, resolutions, and other conservation management measures. Fishery resources within the jurisdictional waters are then conserved and managed through implementation by participating countries and oversight mechanisms within the commission.

This model is also applied to many straddling fish stocks. For example, the South Pacific Regional Fisheries Management Organization (SPRFMO) is an international organization responsible for the management of straddling fish stocks in the South Pacific. SPRFMO was established based on a proposal put forward by New Zealand, Australia and Chile to conserve and manage the moderately migratory fish stocks that are not managed by other regional fisheries management organizations. At present, the organization focuses on squid in the South Pacific. The establishment of the organization in 2011 to start discussions on jurisdictional resource management was the result of years of negotiations, starting from time when the importance of the management of straddling fish stocks in the southern Pacific was recognized to the year 2004, when the FAO put forward an establishment proposal. In the following paragraph, this model will be further illustrated through the example of saury, a type of northern Pacific straddling fish.

Saury, a surface migratory fish, is one of the important fishery resources in the Northwest Pacific. In winter it migrates south to the warm waters of the Kuroshio current for spawning, and in summer it migrates north to the cold waters of the Oyashio current for feeding. Saury is mainly caught via rod nets. According to FAO data, the main saury fishing countries and regions in the Northwest Pacific are Japan, Taiwan, Russia and South Korea. As the second largest saury fishing area, Taiwan's catch is second only to that of Japan. Because of their high quality meat, saury can be eaten immediately after they are caught, or processed into canned food or bait, and they receive a high price. Saury resources are distributed across several countries in the Northwest Pacific, so management of saury resources may

be achieved only through collaboration between resource utilizing countries.

In the fall of 2006, the United Nations passed a resolution to conserve demersal and straddling fish stocks in the North Pacific. After an international consensus was gradually reached over the course of several years, the first preparatory meeting of the North Pacific Fisheries Commission was held in 2010 in Busan, South Korea. The second and third preparatory meetings were held in Tokyo (Japan) and Alaska (US), respectively. In March 2013, a total of 60 representatives from the US, Japan, South Korea, Russia, Canada, the Philippines, Chinese Mainland and Taiwan, the FAO, and other stakeholders took part in the fourth preparatory meeting held in Zhoushan City, China. The fifth preparatory meeting was held in Kaohsiung, Taiwan in September 2013, and more than 80 representatives from the aforementioned countries, regions and organizations participated.

In the fifth preparatory meeting, there were discussions of topics such as evaluation of fish stocks within the jurisdiction of certain countries, conservation and management measures to be developed after the establishment of the North Pacific Fisheries Commission, and other issues. In order to avoid unnecessary waste of time in establishing the organization, which would affect conservation and management of saury resources, the decision was made to convene a saury discussion seminar in 2014. This was done to ensure that the saury resource situation would be included on the agenda of the next meeting and to achieve sustainable development of saury resources.

In this top-down international collaboration management model, it is necessary to reach a consensus among the countries or regions concerned. In addition, the establishment of relevant organizations requires a great deal of time. Therefore, this top-down model applies only to fish stocks that do not require urgent management. In cases that involve overexploited fish resources or continuing political disputes over the establishment of international organization, a top-down model would not be appropriate.

B. Bottom-Up International Collaboration Model

Compared to the top-down international collaboration model, the bottom-up collaboration model is relatively simple and can achieve protection of resources in a timelier manner. The model relies initially on the collaboration of non-politically sensitive data collection and scientific research. On one hand, basic statistical information about fishery resources is collected and progress is made on research

into the resource situation. At the same time, the countries or regions concerned gradually have a tacit understanding and consensus on the need to establish collaboration. Then, when the timing is appropriate, governments can push for official joint management measures.

This model has previously been applied to southern bluefin tuna, a large and highly migratory fish whose popular name is “oil string (*Youchuan* in Chinese)”. Southern bluefin tunas are widely distributed in three oceans in the southern hemisphere (the South Pacific, Indian Ocean and South Atlantic), ranging from latitudes of 30 to 50 degrees south. Because southern bluefin tunas are usually captured in the Pacific Ocean and the Indian Ocean, the Japanese also calls them Indian tunas. They grow very slowly, have a very long life cycle, and do not mature or spawn until they are 10 to 12 years old, so any recovery will be very difficult once they are overexploited.¹⁷ Australia’s southern bluefin tuna fishery began to develop in 1950 and Japan have had professional fishing ships harvesting southern bluefin tuna as early as 1952. In contrast, the southern bluefin tuna fishery in New Zealand did not begin to develop until 1980. Southern bluefin tunas are delicious and are suitable for the production of high quality sashimi and sushi, so they are of high economic value, and annual catch continued to rise from 1956 to 1961. The annual catch reached a peak in 1961 and then began to decline year by year. In order to achieve their target of conservation, management and sustainable use of tuna resources, in 1982 Japan, Australia and New Zealand began to conduct collaborative scientific research annually and monitor southern bluefin tuna resources. In 1984, they began to set forth self-imposed catch quotas. Within the next ten years, the three countries had established a tacit consensus on research and management collaboration on the southern bluefin tuna issue, and in 1993 they signed the Convention for the Conservation of Southern Bluefin Tunas. In 1994, they established the CCSBT, to “ensure, through appropriate management, the conservation and optimum utilization of southern bluefin tuna.” The CCSBT is also intended to hold annual meetings, determining TAC and resource quotas for each signatory State according to the findings and recommendations of the scientific sub-committee, and achieve conservation and optimum utilization of southern bluefin tunas via proper management and collaboration between the signatory States. This

17 Shui-Kai Chang, *Southern Bluefin Tunas, an Expensive and Valuable Resource with Frequent Disputes*, Taipei: Overseas Fisheries Development Council of Taiwan, 2000, p. 150. (in Chinese)

bottom-up model allows for protecting southern bluefin tuna resources in early period and pushing for the establishment of an international organization after reaching a consensus on collaboration.

IV. Conclusion

Due to the current conservation awareness, conservation of straddling fish stocks has become a topic of deep importance to the global community. In section two of this article, the urgent need to carry out transboundary collaboration and management is illustrated, taking the straddling species in the northwestern Pacific as an example. Section three of this article further describes how to achieve transboundary collaboration and conservation of straddling fish stocks through international cooperation.

There are two general models of international collaboration and management. The first is the top-down management model, in which management is carried out through establishment of international organizations, for example, the North Pacific Fisheries Commission established in the North Pacific to manage saury resources. However, this management model requires lengthy discussion of conventions and time-consuming construction of management committees. Therefore, this management model is not applicable to fishery resources requiring urgent management, those for which no international organization has been established, or those on which there is no international consensus. The second is the bottom-up management model, which is implemented through gradual building of consensus and confidence based on data collection and scientific collaboration, and establishment of cooperative management organizations or even formal international organizations thereafter, such as the CCSBT. This management model can provide greater flexibility in advancing understanding of the resource situation, as well as pushing for cooperative management and resolving immediate resource crises. It can also avoid the political impediments involved in setting up international organizations, by delaying the gradual establishment of these organizations until consensus and confidence have been achieved.

When dealing with straddling fishery stocks that urgently need controls, pursuing a bottom-up international collaboration model will serve as a more effective tactic. This model mainly relies on data collection and collaborative research. Initially, statistical data provides a foundation of scientific research, as well as a basis for discussion and incentive for cooperation for resource utilizing

countries. Therefore, collecting complete and accurate catch records of the resource utilizing countries serves as a first step in international collaboration. Secondly, as the basis of the co-management among various countries, the results of scientific research are relatively objective and the conflicting interests arising therefrom will be less. Resource utilizing countries may find common language and views through scientific research to interpret the contents of such research, and then reach a joint assessment of the resource situation. Lastly, based on research results, through bilateral or multilateral negotiations or existing research organizations, countries may make joint recommendations for appropriate management measures, such as setting up appropriate fishing season closures, fishing ban laws, TACs for various countries, and other measures to achieve the objective of conserving straddling fish stocks.

Owing to the great effort, time intensiveness, and need for consensus based on tedious negotiations between countries, the top-down international collaboration model is not suitable for fish stocks that require urgent management or involve sensitive political issues. Many of the straddling fish stocks in the northwestern Pacific are simultaneously utilized by Japan, South Korea and Chinese Mainland and Taiwan. The special political status of Taiwan means that any attempt to establish “internationalism” in fishery management organizations will run into many controversies and obstacles. Additionally, several sovereignty disputes exist in the South China Sea, which are not resolvable on a short-term timeline. Therefore, this article recommends that bottom-up international collaboration be applied as the model for timely conservation and management of these straddling fish stocks. Investigation and scientific research should be employed as the first step to initiate international collaboration because collaboration on investigation and scientific research is not particularly politically sensitive, and will facilitate transboundary collaboration and joint conservation of resources. Scientific research can also provide a foundation to attract investment, so as to achieve the objectives of “ensuring sustainable development of existing fisheries” and “creating opportunities for future cooperative development”.

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浅议“区域”的反垄断问题

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内容摘要:《联合国海洋法公约》在有关“区域”制度的规定中有多处提及了“垄断”一词,并规定了关于多金属结核的反垄断标准,但并未对“垄断”给出明确的定义。在《“区域”内多金属硫化物探矿和勘探规章》和《“区域”内富钴铁锰结壳探矿和勘探规章》的制定过程中,国际海底管理局认为《联合国海洋法公约》附件三所规定的关于多金属结核的反垄断标准,不能有效适用于多金属硫化物和富钴铁锰结壳,因此致力于在2个新规章中载明新的反垄断条款。尽管如此,国际海底管理局最终通过的2个规章中却未能规定明确的反垄断标准,但国际海底管理局通过相关决定,要求法律和技术委员会及时拟订可能用来防止对“区域”内多金属硫化物和富钴铁锰结壳勘探开发实行垄断的适当标准,并向国际海底管理局理事会报告其审议情况。本文拟通过回顾《联合国海洋法公约》以及国际海底管理局相关规章制定过程中有关反垄断问题的讨论,阐明“区域”反垄断问题的含义,并结合“区域”的特殊法律地位,提出对“区域”反垄断问题的几点认识。

关键词: 国际海底区域 规章 反垄断

一、引言

《联合国海洋法公约》(以下简称“《公约》”)将“区域”及其资源确定为人类的共同继承财产,由国际海底管理局(以下简称“管理局”)代表全人类来行使对“区域”内资源的权利。管理局有4个主要机构:大会、理事会、秘书处、企业部。大会是管理局的最高权力机关;理事会是管理局的执行机关;秘书处负责执行大会和理事会指定的日常任务;企业部是管理局专门从事国际海底开矿业务的机构,其职务目前由秘书处代行。此外,管理局还成立了2个专门性的常设附属机构:法律和技术委员会(以下简称“法技委”)和财务委员会。

根据《公约》,“区域”内的勘探和开发活动应按照公约有关规定和管理局制

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定的规则、规章和程序进行。管理局在 2000 年、2010 年和 2012 年先后就“区域”内的 3 种矿产资源,即多金属结核、多金属硫化物和富钴铁锰结壳,通过了 3 个规章——《“区域”内多金属结核探矿和勘探规章》、《“区域”内多金属硫化物探矿和勘探规章》和《“区域”内富钴铁锰结壳探矿和勘探规章》。¹在反垄断问题上,《“区域”内多金属结核探矿和勘探规章》完全照搬了《公约》附件三第 6 条第 3 款(c)项规定的关于多金属结核的“反垄断”标准。²在《“区域”内多金属硫化物探矿和勘探规章》和《“区域”内富钴铁锰结壳探矿和勘探规章》的制定过程中,法技委曾建议将反垄断标准列入 2 个规章内,但是,法技委同时认为,《公约》附件三所规定的关于多金属结核的反垄断规定,不能有效适用于多金属硫化物和富钴铁锰结壳。法技委提出的理由有二:一是该规定明确仅适用于多金属结核;二是如果适用于多金属硫化物和富钴铁锰结壳,从科学角度考虑,该规定不具有实际意义。³

由于各方存在较大分歧,管理局未能在 2 个规章中明确列明具体的反垄断标准,只是对反垄断问题进行了原则性规定,即“法律和技术委员会可建议核准某一工作计划,如果委员会确定核准该计划不会使缔约国或缔约国支持的实体垄断‘区域’内有关多金属硫化物(或富钴铁锰结壳)的活动或排除其他缔约国在‘区域’内开展有关多金属硫化物(或富钴铁锰结壳)的活动。”⁴同时,理事会以“决定”的方式,要求法技委及时拟订可能用来防止对“区域”内多金属硫化物和富钴铁锰结壳活动实行垄断的适当标准,并向理事会报告其审议情况。⁵2013 年 7 月管理

1 3 个规章的文本参见:《大会关于〈“区域”内多金属结核探矿和勘探规章〉的决定》(ISBA/6/A/18), 下载于 <http://www.isa.org.jm/en/sessions/2000>, 2011 年 3 月 29 日;《国际海底管理局大会有关“区域”内多金属硫化物探矿和勘探规章的决定》(ISBA/16/A/12/Rev.1), 下载于 <http://www.isa.org.jm/files/documents/CH/16Sess/Assembly/ISBA-16A-12Rev1.pdf>, 2010 年 5 月 12 日;《国际海底管理局大会关于“区域”内富钴铁锰结壳探矿和勘探规章的决定》(ISBA/18/A/11), 下载于 <http://www.isa.org.jm/files/documents/CH/18Sess/Assembly/ISBA-18A-11.pdf>, 2013 年 8 月 26 日。

2 即如果提议的勘探工作计划所涉区域的一部或全部有下列情况,委员会不应建议核准该勘探工作计划:……(c) 提议的工作计划已经由一个缔约国提出或担保,而且该缔约国已持有:(1) 在非保留区域进行勘探和开发多金属结核的工作计划,而这些区域连同工作计划申请书所包括的区域的两个部分之一,其总面积将超过围绕提议的工作计划所包括的区域任一部分之中心的 40 万平方公里圆形面积的 30%;或(2) 在非保留区域进行勘探和开发多金属结核的工作计划,而这些区域合并计算构成海底区域中未予保留或未依据第 162 条第 2 款(x)项不准开发的部分的总面积的 2%。

3 《审查“区域”内多金属硫化物探矿和勘探规章草案的未决问题》(ISBA/16/C/WP.1), 下载于 <http://www.isa.org.jm/files/documents/CH/16Sess/Council/ISBA-16C-WP1.pdf>, 2010 年 5 月 12 日。

4 《“区域”内多金属硫化物探矿和勘探规章》和《“区域”内富钴铁锰结壳探矿和勘探规章》第 23 条第 7 款。

5 《理事会关于“区域”内多金属硫化物探矿和勘探规章的决定》(ISBA/16/C/12), 下载于 <http://www.isa.org.jm/files/documents/CH/16Sess/Council/ISBA-16C-12.pdf>, 2010 年 5 月 12 日;《理事会关于“区域”内富钴铁锰结壳探矿和勘探规章的决定》(ISBA/18/C/23), 下载于 <http://www.isa.org.jm/files/documents/CH/18Sess/Council/ISBA-18C-23.pdf>, 2013 年 8 月 26 日。

局第19届会议期间,法技委在审议《“区域”内多金属结核探矿和勘探规章》修正草案过程中,就“区域”的反垄断问题进行了一般性讨论,认为应将有关反垄断问题作为其今后工作的一个优先事项。

二、“区域”反垄断问题概述

根据《公约》,管理局的企业部可独立或和其他国家或实体合作勘探开发“区域”资源,即缔约国或国营企业、或在缔约国担保下的具有缔约国国籍或由这类国家或其国民有效控制的自然人、法人或符合《公约》规定的上述各方的组合,可与管理局以协作方式勘探开发“区域”资源。⁶换言之,企业部、国家(缔约国)、实体(包括自然人、法人或其他组织)都可以从事“区域”资源的勘探开发活动。

《公约》明确提及“垄断”一词的条款主要有4条:(1)第150条“关于‘区域’内活动的政策”(g)项规定,“增进所有缔约国,不论其社会和经济制度或地理位置如何,参加开发‘区域’内资源的机会,并防止垄断‘区域’内活动”。(2)第155条“审查会议”第1款(d)项规定,(审查会议应……详细审查)“是否防止了对‘区域’内活动的垄断”。第2款规定,“……(审查)会议还应确保继续维持本部分规定的关于下列各方面的各项原则:排除对‘区域’的任何部分主张或行使主权,各国的权利及其对于‘区域’的一般行为,和各国依照本公约参与勘探和开发‘区域’资源,防止对‘区域’内活动的垄断……”。⁷(3)《公约》附件三第6条“工作计划的核准”第4款规定,“……如果管理局确定第3款(c)项所述工作计划的核准不致使一个缔约国或由其担保的实体垄断‘区域’内活动的进行,或者排除其他缔约国进行‘区域’内活动,管理局可核准这种计划”。(4)《公约》附件三第7条“生产许可的申请者的选择”第5款规定,“申请者的选择应考虑到有必要使所有缔约国,不论其社会经济制度或地理位置如何,都有更多的机会参加‘区域’内活动,以避免对任何国家或制度有所歧视,并防止垄断这种活动。”⁸

除在上述条款明确提及“垄断”一词外,《公约》附件三第6条“工作计划的核准”第3款(c)项中还对多金属结核的反垄断标准进行了具体的规定,即“提议的工作计划已经由一个缔约国提出或担保,而且该缔约国已持有:(1)在非保留区域进行勘探和开发多金属结核的工作计划,而这些区域连同工作计划申请书所包括的区域的两个部分之一,其总面积将超过围绕提议的工作计划所包括的区域

6 《联合国海洋法公约》第153条。

7 根据《关于执行1982年12月10日〈联合国海洋法公约〉第十一部分的协定》,《联合国海洋法公约》第155条第1款有关审查会议的规定已不适用。

8 根据《关于执行1982年12月10日〈联合国海洋法公约〉第十一部分的协定》,《联合国海洋法公约》附件三第7条已不适用。

任一部分之中心的 40 万平方公里圆形面积的 30%；或（2）在非保留区域进行勘探和开发多金属结核的工作计划，而这些区域合并计算构成海底区域中未予保留或未依据第 162 条第 2 款（x）项不准开发的部分的总面积的 2%”。否则，管理局将不予核准申请者提出的矿区申请。

从上述有关“垄断”的条款文本来看，《公约》强调反垄断的宗旨有二：一是保障和增进缔约国参与勘探和开发“区域”内资源的机会；二是防止少数国家或实体垄断“区域”资源的勘探开发。从规制“垄断”的手段上看，《公约》主要是对国家可申请的多金属结核勘探和开发的矿区面积进行限制，以防止单一国家获得对“区域”某个局部区域或“区域”某一百分比的控制。

需要指出的是，《公约》虽仅对几种申请主体中的“国家”提出的多金属结核申请进行了直接的限制，但并不意味着对实体的申请没有限制。如果一国（直接以国家为主体进行申请）已经申请并获得对“区域”某个局部地区或“区域”某一百分比的合同矿区，那么该国不可以再提出新的申请（直接以国家为主体提出）或者进行担保。由于实体的申请需要国家进行担保，而一个国家如果因上述规定失去了担保的资格，那么该国的实体也将无法进行新的申请。此外，第三次联合国海洋法会议最后文件附件决议二《关于对多金属结核开辟活动的预备性投资》对先驱投资者的申请进行了限制，该决议第 4 段规定，“先驱投资者不得登记一个以上的开辟区”。由于决议中所指的前驱投资者既包括国家也包括实体，因此，该规定也表明了《公约》缔约国试图对实体的申请进行限制的意图。

“垄断”一词所指称的含义非常丰富，并没有一个统一的法律上的定义。有学者对垄断的含义进行梳理，认为垄断可以作垄断者论、垄断状态论、市场势力论和垄断行为论。⁹一般来说，反垄断所禁止的主要是滥用垄断地位的行为。反垄断立法可分为反垄断国内立法和反垄断国际立法。反垄断国内法有着丰富的实践，规制的垄断行为主要包括：限制竞争的行为，经济力量过度集中的行为，滥用市场优势的行为。¹⁰《中华人民共和国反垄断法》第 3 条列举的垄断行为包括：经营者达成垄断协议，经营者滥用市场支配地位，具有或者可能具有排除、限制竞争效果的经营者集中。在国际层面，尚缺乏统一的反垄断国际立法，主要是依靠国内反垄断法的域外适用和国家间的双边条约来规制垄断行为。在国际领域规制的垄断行为主要包括：跨国兼并，出口卡特尔，制定不合理的转移价格，在技术转让中附加限制条款。¹¹

笔者认为“区域”的反垄断问题与国际法或国内法意义上的反垄断并不相同。首先，对“区域”矿区的“圈占”，需要按照管理局有关规章提出申请，管理局规章

9 赵杰著：《论垄断》（博士论文），北京：中共中央党校 2006 年版，第 8~11 页。

10 王传丽主编：《国际贸易法》（第五版），北京：法律出版社 2012 年版，第 365 页。

11 易继明著：《国际领域的反垄断立法》，载于《科技与法律》1997 年第 1~3 期合刊，第 222 页。

中规定了申请者需具备的资格和条件,管理局对申请的审议实行“先到先得”的原则,因此,即使某些申请者具有经济、科技等方面的“垄断”优势,也不会对其他申请者参与“区域”资源勘探开发的竞争构成限制。其次,对“区域”资源的勘探开发需要按照管理局制定的勘探和开发规章进行,并与管理局签订相应的合同。根据《公约》和《关于执行1982年12月10日〈联合国海洋法公约〉第十一部分的协定》,管理局核准的开发工作计划,应指明预计的生产进程,其中包括按该工作计划估计每年生产的矿物最高产量等。上述制度安排使得承包者无法滥用其市场优势来控制产量、价格,影响贸易。

因此,与其说“区域”反垄断问题是法律问题,不如说是一种政治上的安排。由于“区域”已知的几种类型的优质矿物资源分布有限,且在地理上的分布相对集中,因此,在有关条约、规章的制定过程中,有关各方试图对某一国家或实体就某种资源在“区域”某一地理范围内的申请面积以及在整个“区域”范围内可申请的矿区总面积进行限制,防止“区域”的优质资源或大部分资源被少数国家或实体所圈占,进而使得本国或本国的实体能够有地可圈,这才是“区域”反垄断问题的实质。

三、《公约》制定过程中有关反垄断问题的讨论

在《公约》协商的早期阶段,有关各方就认识到有必要限制个别国家或实体在“区域”开发活动中占据支配地位。前苏联在《公约》有关“区域”内活动的政策、审查会议相关条款讨论中,提出增加专门的一款,以防止某一国家或私人公司集团垄断区域资源的勘探和开发。挪威在《公约》有关审查会议条款的讨论中提出,审查会议应审查是否有效地“防止对‘区域’内活动的垄断,使之成为任何审查必须遵循的指导原则之一。”¹²上述建议最终都为《公约》所采纳。

在反垄断标准问题上,各国提出了很多具体的建议。1974年由欧洲八国提交的提案建议给每个申请者设置每类资源6个合同的上限。¹³1975年的非正式单一协商案文附件一第8款(f)项规定,缔约国或由缔约国担保的自然人或法人所获得的合同所包括的面积应被限于不超过开放供勘探和开发的区域的总面积的一个百分比。¹⁴1978年在第七期会议续会上,前苏联提出,一项反垄断条款应包含3个要素:限制可给予一个缔约国及其国营企业和私人公司的合同总数;在同一期间

12 撒切雅·南丹(Satya Nandan)主编,毛彬等译:《1982年〈联合国海洋法公约〉评注》,北京:海洋出版社2009年版,第285页。

13 Belgium, Denmark, France, Germany (Federal Republic of), Italy, Luxembourg, Netherlands, United Kingdom of Great Britain and Northern Ireland: Working Paper, A/CONF.62/C.1/L.8.

14 Informal Single Negotiating Text, Part I, A/CONF.62/WP.8/PartI.

内有多项合同提交的情况下,与已经持有或先前曾取得过一定数量合同的申请者相比,应优先选择从未取得过任何合同的申请者;限制在“区域”的某一部分可给予一个缔约国的合同数量,以防止开采前景最好的矿址的集中。¹⁵

1979年第一协商小组主席编写和修订的折中方案提出了针对多金属结核的具体反垄断标准,为《公约》相关规定的出台奠定了基础。该建议案文为:“(v)提交或担保该拟议的工作计划的缔约国已被核准:(i)40万平方千米圆形面积内的3项对未依据以下第5款之三划为保留区的地点的勘探和开发工作计划。(ii)对未按照以下第5款之三划为保留区,其合计面积达到未依据该款划为保留区或由管理局依据第163条第2款第(xii)项取消资格的总海底区域面积的3%的地点的勘探和开发工作计划。”¹⁶1980年非正式综合协商案文第二次修订稿对上述多金属结核的反垄断标准进行了修改,最终形成了《公约》附件三第6条第3款(c)项。其修改包括以下几点:第一,与附件三其他规定不同,该项规定只限适用于关于多金属结核的合同,不包括其他资源。第二,(i)目中的限制由面积40万平方千米的圆形区域中的3处矿址改为超过这样一个区域的面积的30%。第三,(ii)目中的限制由非保留海底区域的3%降低到该区域的2%。¹⁷

通过对《公约》反垄断问题讨论的简要回顾,可以得出以下结论:第一,虽然反垄断问题在《公约》制定过程中已得到高度关注,但是谈判各方存在较大分歧,

《公约》最终对反垄断问题的处理是十分模糊的;第二,在反垄断的主体方面,《公约》试图限制的是以国家和实体为申请主体而提出的申请,并未触及是否限制一个国家可担保的申请数目或矿区总面积的问题;第三,在具体的反垄断标准上,《公约》仅对几种申请主体中的“国家”提出的多金属结核的申请进行了直接的限制,但这种限制对“实体”的申请也可能产生影响;第四,从有关讨论情况来看,反垄断只是针对“区域”同一种资源的申请进行限制,而非对各种资源的申请总数进行限制。

四、新资源规章制定过程中反垄断问题的讨论情况

综观2个资源规章制定过程中有关反垄断问题的讨论,有2个问题最值得关注:一是对每份申请书所包括的区块组群进行地理范围上的限制,即“同一地理范围”问题;二是关联申请者概念的提出以及对关联申请者矿区申请的限制。上述2

15 撒切雅·南丹(Satya Nandan)主编,毛彬等译:《1982年〈联合国海洋法公约〉评注》,北京:海洋出版社2009年版,第606页。

16 撒切雅·南丹(Satya Nandan)主编,毛彬等译:《1982年〈联合国海洋法公约〉评注》,北京:海洋出版社2009年版,第606~607页。

17 撒切雅·南丹(Satya Nandan)主编,毛彬等译:《1982年〈联合国海洋法公约〉评注》,北京:海洋出版社2009年版,第607页。

个问题反映了管理局对于多金属硫化物和富钴铁锰结壳反垄断立法的意图和主要考虑。

(一) 同一地理范围问题

根据《“区域”内多金属硫化物探矿和勘探规章》和《“区域”内富钴铁锰结壳探矿和勘探规章》，每份矿区申请书所包括的区域由区块组成，区块需要按照规章要求排列为区块组群，区块组群不一定毗连但须邻近，且应局限在同一地理范围内：多金属硫化物的区块组群应局限在一个不超过 30 万平方千米的长方形区域内；富钴铁锰结壳的区块组群应局限在一个不超过 550 千米 × 550 千米的地理区域内。¹⁸

管理局的相关文件说明了上述规定的意图。¹⁹ 管理局认为，与多金属结核相比，多金属硫化物与富钴铁锰结壳资源的矿床与分布特征是单个矿床的面积相当小，就目前知识而言，没有一个已发现的单个矿床能够满足经济上有利可图的开采规模，因此可以假定，将来的承包者势必要同时经营几个不同的矿点。但如果允许承包者任意选择非毗连区块，则可能造成“挑肥拣瘦”的现象，进而将其他可能的承包者排除在外。管理局认为，从技术角度出发，需要将勘探区分隔成由互不毗连的区块组成的组群，以确保最后确定的组群分布在面积广大的地区，以便找到这些资源。设定“同一地理范围”这一条件，可以防止某些国家将最有潜力的矿区占为己有，形成垄断。

综上所述可以看出，管理局设置“同一地理范围”的目的，是为了防止申请者提出的区块组群分布过于分散，防止申请者“挑肥拣瘦”，将有潜力的矿区据为己有，并限制其他申请者的申请。这意味着，管理局今后出台的反垄断标准很可能对申请者在“区域”某一地理范围内的申请数目或申请矿区总面积进行限制，以防止申请者垄断“区域”内最好的矿址。否则，如果申请者可以不受限制地申请，那么，管理局设置“同一地理范围”将毫无意义。

(二) 关联申请者问题

关联申请者的规定最早出现在 2001 年管理局秘书处编写的《关于多金属硫

18 《“区域”内多金属硫化物探矿和勘探规章》和《“区域”内富钴铁锰结壳探矿和勘探规章》第 12 条。

19 The Exploration and Mine Site Model Applied to Block Selection for Cobalt-rich Ferromanganese Crusts and Polymetallic Sulphides. Part I: Cobalt-rich Ferromanganese Crusts; and the Exploration and Mine Site Model Applied to Block Selection for Cobalt-Rich Ferromanganese Crusts and Polymetallic Sulphides. Part II: Polymetallic Sulphides, at <http://www.isa.org.jm/en/sessions/2006/documents>, 22 July 2008.

化物和富钴铁锰结壳的示范条款草案》中，该示范条款规定，“关联申请者的申请书所包括的总区域不得超过本条第2和3款规定的限制。就本条款而言，申请者与另一申请者有关联关系指申请者直接或间接控制或受控于另一申请者，或与另一申请者受相同的控制。”²⁰

在2009年管理局第15届会议上，印度提出，在任何时候，同一国家担保的所有勘探工作计划以及根据勘探合同分配给关联实体（即使这些实体由不同国家担保）的总面积都不应超过规章的规定。加拿大认为，法技委的建议不能解决理事会的主要关切，即避免同一实体的分支机构提出过度或者不适当数量的申请。加拿大认为，印度建议增加“在任何时候”是有帮助的，可以减少一个实体另行进行担保申请或开展新的活动的可能性。美国支持加拿大的观点，要求制定防止任何实体垄断区域活动的条款。²¹印度的建议后来还获得了德国的支持。²²

由于关联申请者的概念过于模糊，加之各方存在较大分歧，管理局最终放弃了这一建议案文。其实，关联申请者的提议主要是借鉴了第三次联合国海洋法会议最后文件附件决议二第4段，即“先驱投资者不得登记一个以上的开辟区”的规定。管理局的一份题为《“区域”内多金属硫化物与富钴铁锰结壳探矿和勘探规章草案分析——第一部分：与探矿有关的规定、重叠主张和反垄断规定》的文件对此进行了说明，该文件指出，“根据决议二，在多金属结核的情况下，每个先驱投资者限有一个勘探地点。因此，在2001年秘书处编写的关于硫化物和结壳的示范条款草案中，列有一项防止关联申请者提出多个申请的规定……”。²³

因此，暂且不论关联申请者的含义为何，从管理局的立法意图和有关讨论情况来看，反垄断的目的似乎是要限定一个申请者——无论是以国家为申请主体还是以实体为申请主体，也不论是仅提出一份申请亦或是提出多份申请——可以申请的矿区总面积。

五、对“区域”反垄断问题的认识

20 Model Clause 3, Paragraph 4 of the Model Clauses for Proposed Regulations for Prospecting and Exploration for Polymetallic Sulphides and Cobalt-rich Ferromanganese Crusts in the Area, at <http://www.isa.org.jm/en/sessions/2001>, 22 July 2008.

21 International Seabed Authority: Press Release (SB/15/11), at <http://www.isa.org.jm/en/sessions/2009/press>, 3 June 2009.

22 International Seabed Authority: Press Release (SB/16/5), at <http://www.isa.org.jm/en/sessions/2010/press>, 12 May 2010.

23 Paragraph 16 of Analysis of the Draft Regulations on Prospecting and Exploration for Polymetallic Sulphides and Cobalt-rich Ferromanganese Crusts in the Area, Part I: Provisions Relating to Prospecting, Overlapping Claims and the Anti-Monopoly Provision, at <http://www.isa.org.jm/files/documents/EN/12Session/Council/ISBA12-C2PartI.pdf>, 1 May 2013.

（一）今后可能出台的反垄断标准

综合《公约》和管理局新资源规章制度制定过程中有关反垄断问题的讨论,笔者认为管理局今后可能出台的反垄断标准如下:第一,只是针对同一种资源进行限制,而非对各种资源的总数进行限制;第二,在反垄断的主体方面,既可能对以国家为申请主体也可能对以实体为申请主体提出的申请进行限制(国有企业待遇似乎应同于其他实体)。对担保国可担保的申请数目或可担保的矿区总面积进行限制的可能性不大;第三,对同一申请者,无论是以国家为申请主体还是以实体为申请主体,对可以申请的总矿区面积进行限制的可能性较大,而非限制其可提交申请的数目;第四,为防止申请者垄断“区域”内最好的矿址,对申请者在“区域”某一地理范围内的申请数目或申请矿区总面积进行限制的可能性较大。

（二）反垄断标准不宜过于严格

如前所述,“区域”反垄断问题主要是基于政治上的考虑而非经济或法律上的实际需要。制定严格的反垄断标准将损害“‘区域’及其资源是人类共同继承财产”这一原则。根据《公约》,对“区域”内资源的一切权利属于全人类,由管理局代表全人类行使,因此,管理局应在无歧视的基础上公平分配从“区域”内活动取得的财政及其他经济利益。管理局从“区域”内活动取得的财政及其他经济利益的方式有2种,一是企业部通过开发保留区获得利益,或者是企业部通过承包商提供的联合企业安排中的股份获得收益;二是管理局按照开发规章和开发合同,对其他承包商开发“区域”资源收取“特许权使用费”而获得收益。出于政治安排,限制有能力的申请者从事“区域”资源的勘探开发活动,无疑会迟滞“区域”资源的勘探开发,管理局也无法获得相应的“资源经济收益”,分配给国际社会,造福全人类。概言之,笔者认为,在“区域”反垄断问题上,不应为保障少数国家或实体参与“区域”资源勘探开发的利益,而牺牲整个国际社会的利益。

（三）对发展中国家和发展中国家实体应给予优惠

按照《公约》,除企业部外,任何国家或实体向管理局提出勘探申请(就保留区提出的申请除外)时,需提出2块具有同等估计商业价值的矿区,管理局指定其中一个矿区作为管理局的保留区,另一块矿区则作为合同区,分配给申请者。保留区对于企业部以及发展中国家及其实体参与“区域”的勘探开发尤为重要。《公约》附件三第9条赋予了企业部和发展中国家及其实体在保留区活动的优先权。企业部有在保留区进行活动的取舍权,可决定自行或成立联合企业勘探开发保留

区的资源。在考虑成立联合企业时,企业部应提供发展中国家及其国民有效参加的机会。如果企业部无意在保留区进行活动,发展中国家或其实体有权申请勘探开发保留区的资源。

《“区域”内多金属硫化物探矿和勘探规章》和《“区域”内富钴铁锰结壳探矿和勘探规章》在形式上保留保留区制度的同时,提出了联合企业股份安排作为备选方案:申请者可以选择提供保留区,也可以选择为企业部提供一个联合企业安排中的股份来代替提供保留区的义务。²⁴ 由于多金属硫化物和富钴铁锰结壳具有三维性质,申请者如果选择提交保留区,需要确定2个估计商业价值相等的矿址,而这需要进行大量而昂贵的勘探工作,因此,备选方式的提出将促使申请者更多地选择联合企业股份安排的方式,而放弃选择提出保留区的方式。事实上,自管理局通过上述2个规章后共收到了5项多金属硫化物申请和3项富钴结壳申请,²⁵ 其中仅俄罗斯政府在2013年2月提出的富钴结壳申请中提出了保留区,其他申请者均采用了联合企业股份安排的方式。保留区的这种负增长,无疑会减少发展中国家及其实体参与“区域”勘探开发的机会。因此,笔者认为,在“区域”反垄断问题上,应该给予发展中国家及其实体以优惠待遇,对发展中国家或其实体提出的申请不作反垄断限制,或者设置更为宽松的限制。

24 联合企业安排在申请者签订开发合同之时生效,企业部在联合企业安排中应获得至少20%的股份参与;其中10%应为无偿获得,无须向申请者作出任何直接或间接支付,并在一切方面同申请者所持股份享有平等待遇;另10%的股份应在一切方面同申请者所持股份享有平等待遇,但在申请者收回其对联合企业安排投入的全部股本之前,企业部不得就这部分分享任何利润。申请者还应向企业部提供机会,使其可以在同申请者在一切方面享有平等待遇的基础上增加股份参与,增购30%联合企业安排的股份,或企业部可能选择的较小份额。参见《“区域”内多金属硫化物探矿和勘探规章》、《“区域”内富钴铁锰结壳探矿和勘探规章》第19条。

25 5个多金属硫化物矿区申请者分别是:中国大洋矿产资源研究开发协会、俄罗斯政府、韩国政府、法国海洋开发研究所、印度政府。3个富钴铁锰结壳矿区申请者分别是:中国大洋矿产资源研究开发协会、日本石油天然气金属矿产资源公司、俄罗斯政府。

A Preliminary Discussion over the Legislation on Anti-monopoly in the Area

ZHANG Dan*

Abstract: The term “monopoly” has never been given a clear definition in the United Nations Convention on the Law of the Sea (hereinafter “the Convention”), though it is mentioned in many provisions on the system of the “Area” under the Convention, which also contains anti-monopoly provisions in respect of polymetallic nodules. During the formulation of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, the International Seabed Authority (hereinafter “the Authority”) held that the provisions under Annex III of the Convention related to the anti-monopoly criteria with regards to polymetallic nodules could not be effectively applied to polymetallic sulphides and cobalt-rich ferromanganese crusts, hence the Authority determined to set out new anti-monopoly provisions in the two new Regulations. Even so, the two Regulations as finally adopted by the Authority still failed to clearly stipulate anti-monopoly criteria. However, the Authority has adopted some relevant resolutions, requiring its Legal and Technical Commission (LTC) to, in due course, elaborate the appropriate criteria that might be used to prevent monopolization with respect to the exploration and exploitation of polymetallic sulphides and cobalt-rich ferromanganese crusts in the Area and report its consideration to the Council of the Authority. This article seeks to further define the issue of anti-monopoly in the Area based on a review of the relevant discussions during the formulation of the Convention and the associated Regulations by the Authority. Meanwhile, it shares predictions and suggestions regarding the issue after taking into special consideration the unique legal status of the Area.

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Key Words: International seabed area; Regulations; Anti-monopoly

I. Introduction

The United Nations Convention on the Law of the Sea (hereinafter “the Convention”) declares that the Area and its resources are the common heritage of mankind, and that the right over resources in the Area should be exercised by the International Seabed Authority (hereinafter “the Authority”) on behalf of mankind as a whole. The Authority has four organs: the Assembly, its highest authority; the Council, its executive organ; the Enterprise, through which the Authority carries out international seabed mining operations; and the Secretariat, which performs daily tasks assigned by the Assembly and Council and acts on the Enterprise’s behalf. In addition, the Authority has established two specialized permanent subsidiary bodies, namely, the Legal and Technical Commission (LTC) and the Finance Committee.

In accordance with the Convention, all activities of exploration and exploitation of the Area resources shall be carried out in compliance with relevant provisions under the Convention as well as the rules, regulations, and procedures prescribed by the Authority. In an effort to regulate the exploration and exploitation of the three types of resources in the Area – polymetallic nodules, polymetallic sulphides, and cobalt-rich ferromanganese crusts – the Authority adopted the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area in 2000, the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area in 2010, and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area in 2012.¹ The anti-monopoly provisions under the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area are little more than a reiteration of the anti-monopoly criteria

1 The Decision of the Assembly on the Regulations for Exploration and Exploitation for Polymetallic Nodules in the Area (ISBA/6/A/18), at <http://www.isa.org.jm/en/sessions/2000>, 29 March 2011; the Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (ISBA/16/A/12/Rev.1), at <http://www.isa.org.jm/files/documents/CH/16Sess/Assembly/ISBA-16A-12Rev1.pdf>, 12 May 2010 (in Chinese); and the Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (ISBA/18/A/11), at <http://www.isa.org.jm/files/documents/CH/18Sess/Assembly/ISBA-18A-11.pdf>, 26 August 2013. (in Chinese)

on the prospecting and exploration for polymetallic nodules specified under Annex III, Article 6, Paragraph 3(c) of the Convention.² During the formulation of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, though the LTC proposed that anti-monopoly criteria be incorporated into the two Regulations, it had, at the same time, expressed its view that the anti-monopoly criteria established specifically for polymetallic nodules in the Annex III of the Convention were not applicable to polymetallic sulphides and cobalt-rich ferromanganese crusts for the following two reasons: first, provisions found in the Annex III of the Convention clearly state that itself apply only to polymetallic nodules; second, if the same provisions were applied to the prospecting and exploration of polymetallic sulphides and cobalt-rich ferromanganese crusts, the implementation would run counter to the dictates of science.³

However, due to major divergences among the parties involved, the Authority failed to clearly stipulate anti-monopoly criteria in the two Regulations above, instead providing only a general principle: “The Legal and Technical Commission may recommend approval of a plan of work if it determines that such approval would not permit a State Party or entities sponsored by it to monopolize the conduct of activities in the Area with regard to polymetallic sulphides (or cobalt-rich ferromanganese crusts) or to preclude other States Parties from activities in the Area with regard to polymetallic sulphides (or cobalt-rich ferromanganese crusts).”⁴ In a decision released by it, the Council of the Authority requested that

2 If part or all of the area covered by the proposed plans of work meet the following conditions, the Authority shall not approve such plans: ... (c) the proposed plan of work has been submitted or sponsored by a State Party which already holds: (i) plans of work for exploration and exploitation of polymetallic nodules in non-reserved areas that, together with either part of the area covered by the application for a plan of work, exceed in size 30 per cent of a circular area of 400,000 square kilometres surrounding the centre of either part of the area covered by the proposed plan of work; (ii) plans of work for the exploration and exploitation of polymetallic nodules in non-reserved areas which, taken together, constitute 2 per cent of the total seabed area which is not reserved or disapproved for exploitation pursuant to article 162, paragraph (2)(x).

3 The Review of Outstanding Issues with Respect to the Draft Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (ISBA/16/C/WP.1) , at <http://www.isa.org.jm/files/documents/CH/16Sess/Council/ISBA-16C-WP1.pdf>, 12 May 2012. (in Chinese)

4 Article 23, Paragraph 7 of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area.

the LTC duly elaborate the appropriate criteria that might be used to prevent monopolization of activities in the Area with respect to polymetallic sulphides and cobalt-rich ferromanganese crusts and report to the Council for its consideration.⁵ During its consideration of the Draft Amendments to Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area at the 19th Annual Session of the Authority in July 2013, the LTC, after a general discussion of the question of anti-monopoly in the Area, held that the question should be put as a priority in its future work.

II. A Review of the Anti-monopoly Question in the Area

According to the Convention, the exploration and exploitation of the resources in the Area shall be carried out by the Enterprise of the Authority independently or together with other States or enterprises, namely in association with the Authority by States Parties, or by State enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the requirements provided under the Convention.⁶ In other words, the Enterprise, States (States Parties), and entities (including natural or juridical persons and other organizations), all can be engaged in the exploration and exploitation of resources in the Area.

The term “monopoly” is mentioned explicitly in four articles of the Convention: (1) Article 150 (g), “Policies relating to activities in the Area” states

the enhancement of opportunities for all States Parties, irrespective of their social and economic systems or geographical location, to participate in the development of the resources of the Area and the prevention of monopolization of activities in the Area.

5 Decision of the Council of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (ISBA/16/C/12), at <http://www.isa.org.jm/files/documents/CH/16Sess/Council/ISBA-16C-12.pdf>, 12 May 2010 (in Chinese); Decision of the Council of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (ISBA/18/C/23), at <http://www.isa.org.jm/files/documents/CH/18Sess/Council/ISBA-18C-23.pdf>, 26 August 2013. (in Chinese)

6 Article 153 of the Convention.

(2) Paragraph 1(d) of Article 155, concerning the “Review Conference”, notes that the Review Conference shall consider in detail “whether monopolization of activities in the Area has been prevented.” Article 155, Paragraph 2 prescribes that

*[The Review Conference] shall also ensure the maintenance of the principles laid down in this Part with regard to the exclusion of claims or exercise of sovereignty over any part of the Area, the rights of States and their general conduct in relation to the Area, and their participation in activities in the Area in conformity with this Convention, [and] the prevention of monopolization of activities in the Area ...*⁷

(3) Annex III, Article 6, Paragraph 4, “Approval of plans of work,” stipulates that

The Authority may approve plans of work covered by paragraph 3(c) if it determines that such approval would not permit a State Party or entities sponsored by it to monopolize the conduct of activities in the Area or to preclude other States Parties from activities in the Area.

(4) Annex III, Article 7, Paragraph 5 states on the subject of “Selection among applicants for production authorizations” that

*Selection shall be made taking into account the need to enhance opportunities for all States Parties, irrespective of their social and economic systems or geographical locations so as to avoid discrimination against any State or system, to participate in activities in the Area and to prevent monopolization of those activities.*⁸

Not only has the term “monopoly” been explicitly mentioned in these provisions, but there are also specific provisions that address the anti-monopoly

7 In accordance with the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, the provisions on the Review Conference under Article 155, Paragraph 1 of the Convention are no longer applicable.

8 In accordance with the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, the provisions under Article 7, Annex III of the Convention are no longer applicable.

criteria with regards to activities of polymetallic nodules in the Area in Annex III, Article 6, Paragraph 3(c), “Approval of plans of work,” which stipulates that

the proposed plan of work has been submitted or sponsored by a State Party which already holds: (i) plans of work for exploration and exploitation of polymetallic nodules in non-reserved areas that, together with either part of the area covered by the application for a plan of work, exceed in size 30 per cent of a circular area of 400,000 square kilometres surrounding the centre of either part of the area covered by the proposed plan of work; (ii) plans of work for the exploration and exploitation of polymetallic nodules in non-reserved areas which, taken together, constitute 2 percent of the total seabed area which is not reserved or disapproved for exploitation pursuant to article 162, paragraph (2)(x).

Otherwise, the Authority will not approve any application for a plan of work.

Based on the analysis of the above provisions in connection with “monopoly,” we can conclude that there are two purposes for the Convention to emphasize anti-monopoly: first, to ensure and enhance the opportunities for State Parties to participate in the exploration and exploitation of resources in the Area; second, to prevent a small number of States or entities from monopolizing the exploration and exploitation of resources in the Area. In an effort to eliminate “monopolization,” the Convention does so mainly by limiting the mining area eligible for States’ applications to explore and exploit polymetallic nodules. This is to prevent a single State from acquiring control over a certain part (or percentage) of the Area.

It should be noted that although the Convention has only imposed direct restrictions on the application of States for the exploration and exploitation of polymetallic nodules, this does not imply that it has imposed no limits on the applications of entities. If a State applicant has acquired through application a contract on exploration in a certain part of the Area or a certain percentage of the Area, that State shall be no longer eligible to put forward another application, as a State applicant, or sponsor new applications. Entities must be sponsored by a State to apply, and if the State is no longer qualified to sponsor new applications due to the above reason, then entities within the said State shall also not be eligible to submit a new application. In addition, certain restrictions have been imposed on the application of pioneer investors by Resolution II Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules under an annex to the Final

Act of the Third United Nations Conference on the Law of the Sea. Paragraph 4 of the Resolution stipulates that, “no pioneer investor may be registered in respect of more than one pioneer area.” As the “pioneer investors” referred in the Resolution can be both States and entities, the provision also shows the intent of State Parties to the Convention to impose restrictions on the application of entities.

Without a unified definition in law, the term “monopoly” is rich in meanings, which, according to some scholars, can be interpreted from the perspectives of the actor, state, and action of a monopoly as well as market powers.⁹ Anti-monopoly legislation is generally designed to mainly prevent the abuses of monopoly. This type of legislation can be domestic or international in scope. The former aims at encouraging competition, preventing the excessive concentration of economic power and curtailing abuse of market edge.¹⁰ For instance, Article 3 of the Anti-monopoly Law of the People’s Republic of China states that monopolistic behaviors comprise the following: (1) monopolistic agreements concluded by business operators; (2) abuse of dominant market positions by business operators; and (3) concentration of business operators that eliminates or restricts competition or might be eliminating or restricting competition. Due to the lack of unified and widely-accepted international anti-monopoly legislation, monopolistic behaviors, such as cross-border merging, export cartels, unreasonable transfer pricing, and restrictive clauses in technology transfer, are regulated chiefly by means of the extraterritorial application of domestic anti-monopoly legislation and bilateral treaties between States.¹¹

Careful comparison shows that the anti-monopoly provisions for the Area are quite at odds with domestic and international anti-monopoly legislation. Above all, according to relevant regulations of the Authority, which provide for, among other things, the qualifications and conditions of applicants, applications shall be submitted to the Authority for its consideration in the order in which they are received before approval can be acquired for the exploitation of resources in the Area. In this way, even if some applicants enjoy a monopolistic advantage in such areas as economy, science or technology, this will in no way restrict competition

9 Zhao Jie, *On Monopoly* (doctoral thesis), Beijing: Party School of the Central Committee of C.P.C., 2006, pp. 8~11. (in Chinese)

10 Wang Chuanli, *International Trade Laws* (5th Edition), Beijing: Law Press China, 2012, p. 365. (in Chinese)

11 Yi Jiming, Anti-monopoly Legislation at the International Level, *Science Technology and Law*, Nos. 1~3 (combined issue), 2009, p. 222. (in Chinese)

from other applicants for participation in the exploration and exploitation of resources in the Area. Furthermore, the exploration and exploitation of resources in the Area shall be carried out in compliance with the Authority's relevant regulations on exploration and exploitation and a contract shall be entered into between operators and the Authority. According to the Convention and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, the plans of work for exploration approved by the Authority shall specify production estimates, including the highest estimated annual mineral output under the plan of work. These institutional arrangements prevent contractors from monopolizing output, interfering with price, and affecting trade by abusing their market advantage.

The question of anti-monopoly in the Area then becomes more of a political issue than a legal one. In the Area, several known types of high-quality mineral resources are geographically concentrated and limited in amount. In signing the relevant treaties and drafting relevant regulations, the parties concerned attempt to impose restrictions on the mining area that can be applied with regards to a particular type of resources in the Area and the total mining area which can be applied for by a particular State or entity in the whole Area. With an aim to prevent the best or the bulk of resources from being monopolized by several States or entities, these collective restrictions make it possible for States who impose them or their entities to have their own share in the Area. Achieving a globally inclusive framework should be the ultimate objective of anti-monopoly legislation in the Area.

III. Discussions on the Question of Anti-monopoly in the Area during the Formulation of the Convention

In the early stages of Convention negotiations, relevant parties noted the necessity of preventing any individual State or entity from dominating the exploitation of resources in the Area. During discussions on Convention provisions touching on the Review Conference and policies governing the activities within the Area, the former Soviet Union proposed that a special provision be added that would prevent a State or a private corporate group from monopolizing the exploration and exploitation of resources within the Area. In the discussions concerning the Convention's provisions on the Review Conference, Norway pointed out that the Review Conference should review whether the monopolization

of activities within the Area have been effectively prevented, which it held should be considered as one of the guiding principles for any review.¹² Both of these States' suggestions were adopted by the Convention.

Many States offered specific suggestions on defining anti-monopoly criteria in the Area. In a working paper submitted by eight European States in 1974, it was proposed that an applicant should not hold more than six contracts in respect of each category of resources.¹³ As has been provided for under Annex I, Article 8(f) of the Informal Single Negotiating Text 1975, for contracts secured by State Parties or natural or judicial persons sponsored by them, the contracted area shall not exceed a certain percentage of the total area open for exploration and exploitation in the Area.¹⁴ At the follow-up of the seventh meeting in 1978, the former Soviet Union suggested that an anti-monopoly provision should contain three elements: first, restrictions should be imposed on the total number of contracts that can be obtained by a State Party or by its State-owned or private enterprises; second, under circumstances where there is more than one applicant applying for contracts of exploration in the same area at the same time, applicants who have not obtained any contract before take precedence over those who are holding contracts or have previously obtained a certain number of contracts; third, restrictions should be imposed on the number of contracts that can be obtained by a State Party that applies for exploitation in a particular part of the Area for the purpose of avoiding the concentration of mining sites with the best prospects.¹⁵

In a compromise proposal he drafted and revised in 1979, the president of the First Consultative Group proposed detailed anti-monopoly criteria for the exploitation of polymetallic nodules in the Area, paving the way for the adoption of similar provisions in the Convention. The proposal stated that

(v) the following proposed plans of work submitted or sponsored by State Parties have been approved: (i) three plans of work for exploration and exploitation within a circular area of 400,000 square kilometers in mining

12 Satya Nandan ed., translated by Mao Bin et al., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Beijing: China Ocean Press, 2009, p. 285. (in Chinese)

13 Belgium, Denmark, France, Germany (Federal Republic of), Italy, Luxembourg, Netherlands, United Kingdom of Great Britain and Northern Ireland: Working Paper, A/CONF.62/C.1/L.8.

14 Informal Single Negotiating Text, Part I, A/CONF.62/WP.8/PartI.

15 Satya Nandan ed., translated by Mao Bin et al., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Beijing: China Ocean Press, 2009, p. 606. (in Chinese)

*area which have not been designated as a reserved area pursuant to Article 5(3); and (ii) plans of work for exploration and exploitation in an mining area within 3 per cent of the total seabed area which has not been designated as a reserved area pursuant to Article 5(3) or has been disapproved for exploitation pursuant to article 162, paragraph (2)(x) by the Authority.*¹⁶

Several amendments were made to the anti-monopoly criteria on the exploration and exploitation of polymetallic nodules in the Second Revised Draft of the Informal Composite Negotiating Text, some of which were later codified in Article 6(3)(c) of Annex III to the Convention. The amendments contained in this article include the following: first, unlike other provisions found in Annex III, this provision only applies to contracts in respect of polymetallic nodules, excluding other types of resources; second, the restriction of three mining sites within a circular area of 400,000 square kilometers laid out in Item (i) was loosened under Article 6(3)(c)(i) to prevent only activities that exceed in size 30% of a circular area of 400,000 square kilometres; third, the upper limit of “3% of the total non-reserved seabed area” stated in Item (ii) was lowered in Article 6(3)(c)(ii) to “2% of the total non-reserved seabed area.”¹⁷

The above review of the discussions on the formulation of anti-monopoly provisions in the Convention allows the following conclusions to be drawn: first, although great attention was attached to the question of anti-monopoly in the formulation of the Convention, interests remain divided among negotiating parties, leading ultimately to ambiguous anti-monopoly provisions in the Convention; second, in terms of the parties subject to anti-monopoly provisions, the Convention, while restricting applications put forward by States and entities, fails to take into consideration limitations on the number of applications or the total mining area that can be sponsored by a State; third, with regard to detailed anti-monopoly criteria, though the Convention has imposed direct restrictions only on State applications in respect of polymetallic nodules, the applications of entities may also be affected by such restrictions; fourth, anti-monopoly provisions in the Convention only restrict the application in respect of a single type of resources in the Area, but these provisions do not limit the total number of applications in respect of all types of

16 Satya Nandan ed., translated by Mao Bin et al., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Beijing: China Ocean Press, 2009, pp. 606~607. (in Chinese)

17 Satya Nandan ed., translated by Mao Bin et al., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Beijing: China Ocean Press, 2009, p.607. (in Chinese)

resources.

IV. Discussions over the Question of Anti-monopoly in the Formulation of the Two New Regulations

Two anti-monopoly restrictions mentioned during discussions leading to the formulation of the two Regulations are particularly noteworthy: first, the restriction on the clusters of blocks within one and the same geographical area; second, the restriction on the mining areas available to “affiliated applicants,” a concept first introduced during these discussions. These two restrictions reflect the Authority’s intention and consideration to lay down regulations to prevent monopoly in respect of polymetallic sulphides and cobalt-rich ferromanganese crusts in the Area.

A. The Restriction of “One and the Same Geographical Area”

According to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, the area covered by each application for a plan of work for exploration of polymetallic sulphides or cobalt-rich ferromanganese crusts shall be comprised of blocks, which shall be arranged by the applicant in clusters as per the Regulations, and need not be contiguous but shall be proximate and confined within the same geographical area. Specifically, clusters of polymetallic sulphides blocks shall be confined within a rectangular area not exceeding 300,000 square kilometres in size while those of cobalt-rich ferromanganese crusts cannot exceed an area measuring 550 kilometres by 550 kilometres.¹⁸

The intent of the above provisions is explicated in relevant documents published by the Authority.¹⁹ According to the Authority’s analysis, it can be assumed that in the future, contractors will undertake exploitation in several

18 Article 12 of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area.

19 The Exploration and Mine Site Model Applied to Block Selection for Cobalt-rich Ferromanganese Crusts and Polymetallic Sulphides. Part I: Cobalt-rich Ferromanganese Crusts; and the Exploration and Mine Site Model Applied to Block Selection for Cobalt-Rich Ferromanganese Crusts and Polymetallic Sulphides. Part II: Polymetallic Sulphides, at <http://www.isa.org.jm/en/sessions/2006/documents>, 22 July 2008.

different mining sites at the same time, for an individual deposit of either poly-metallic sulphides or cobalt-rich ferromanganese crusts is much smaller than that of polymetallic nodules. To date, there have been no individual deposits discovered with an exploitation scale large enough to be economically profitable; thus, if contractors were allowed to freely choose clusters of blocks which are neither contiguous nor proximate, they would inevitably “cherry pick” those with better prospects and restrict the applications of other prospective contractors. Therefore, the Authority requires that each exploration area be designated as several clusters made up of discontinuous blocks, such that the exploration project’s surface area covers a rather large swath, increasing the chances that the seabed resources will be found. By confining the plan of work’s mining area to clusters within one and the same geographical area, the monopolization by certain States on the mining areas with the best prospects can be avoided.

It can be concluded from the above that the “one and the same geographic area” restriction is imposed by the Authority to prevent applicants from selecting clusters of blocks that are too widely dispersed and to ensure applicants are not too picky about clusters of blocks, “cherry picking” those with the best prospects and restricting other applicants’ applications. In concrete terms, this suggests that in the future the Authority will impose restrictions on the number of applications allowed or the total mining area available within a particular geographic area in its future anti-monopoly criteria, with the goal of preventing applicants from monopolizing the best mining sites in the Area. After all, if such restrictions were not imposed on applicants, the Authority’s “one and the same geographical area” restriction would become meaningless.

B. The Restrictions on Affiliated Applicants

Restrictions on affiliated applicants were first included in the Model Clauses for Proposed Regulations for Prospecting and Exploration for Polymetallic Sulphides and Cobalt-rich Ferromanganese Crusts in the Area. This document, drafted by the Secretariat of the Authority in 2001, stipulates that

The total area covered by applications by affiliated applicants shall not exceed the limitations set out in paragraphs 2 and 3 of this regulation. For the purposes of this regulation, an applicant is affiliated with another applicant if an applicant is, directly or indirectly, controlling, controlled by or under

*common control with another applicant.*²⁰

At the 15th session of the Authority in 2009, India suggested that the total area covered at any given time by plans of work for exploration sponsored by the same State or allocated under a contract for exploration to affiliated entities, even if such affiliated entities sponsored by different States, shall not exceed the limitations set out in the regulation of the Authority. Canada held that the LTC's proposed text did not address the Council's primary objectives which, among other things, was to avoid an excessive or undue number of applications from affiliates of the same entity, and that India's proposed inclusion of the phrase "at any one time" was a useful indicator, because it reduced the possibility of an entity making additional sponsorship applications or conducting new activity. Supporting the view expressed by Canada, the USA observer called for a language that would prevent any one entity from monopolizing activities in the Area.²¹ Germany later expressed its support of India's proposed text.²²

Given the vagueness of the concept "affiliated applicant," in addition to significantly different viewpoints among the parties, the Authority at last abandoned the proposed text. It turns out that the proposal concerning "affiliated applicant" is based on the provision "no pioneer investor may be registered in respect of more than one pioneer area", which was specified in Paragraph 4 of Resolution II Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules under an annex to the Final Act of the Third United Nations Conference on the Law of the Sea. The Authority has elaborated on this issue in the document entitled "Analysis of the Draft Regulations on Prospecting and Exploration for Polymetallic Sulphides and Cobalt-rich Ferromanganese Crusts in the Area, Part I: Provisions Relating to Prospecting, Overlapping Claims and the Anti-Monopoly Provision", clarifying that

In the case of polymetallic nodules, under Resolution II, pioneer investors were limited to one exploration site each. For that reason, the draft model

20 Model Clause 3, Paragraph 4 of the Model Clauses for Proposed Regulations for Prospecting and Exploration for Polymetallic Sulphides and Cobalt-rich Ferromanganese Crusts in the Area, at <http://www.isa.org.jm/en/sessions/2001>, 22 July 2008.

21 International Seabed Authority: Press Release (SB/15/11), at <http://www.isa.org.jm/en/sessions/2009/press>, 3 June 2009.

22 International Seabed Authority: Press Release(SB/16/5), at <http://www.isa.org.jm/en/sessions/2010/press>, 12 May 2010.

*clauses for sulphides and crusts prepared by the Secretariat in 2001 (ISBA/7/C/2) contained a provision designed to prevent multiple applications by affiliated applicants...*²³

Therefore, if we put aside the exact definition of “affiliated applicant” and consider the issue from the perspective of the Authority’s legislative intent and relevant discussions, we can conclude that the anti-monopoly provisions are designed to restrict the total area covered by the plan of work application submitted by an applicant, regardless of whether it be a State or an entity and whether it have put forward one or multiple applications.

V. Some Predictions and Suggestions Concerning Anti-monopoly in the Area

A. Possible Future Anti-monopoly Criteria

Based on the above review and analysis of the discussions on anti-monopoly during the formulation of the Convention and the Authority’s two new Regulations, it follows that future anti-monopoly criteria established by the Authority may have following characteristics: first, restrictions will be imposed on the area covered by the plan of work for the exploration of one and the same type of resource, rather than the total amount of area in respect of all types of resources; second, as for the parties subject to anti-monopoly provisions, restrictions can be imposed on both State applicants and entity applicants, that is, State-owned enterprises and other entities should be treated equally in this context. Restrictions are not likely to be imposed on the number of applications or the total mining area that can be sponsored by a State; third, for applications put forward by a single/standalone applicant, whether it be a State or an entity, it is likely that restrictions will be imposed on the total mining area covered by its applications, instead of limiting the total number of applications allowed; fourth, for the purpose of preventing some applicants’ monopoly on the best mining sites in the Area, it is likely that

23 Paragraph 16 of Analysis of the Draft Regulations on Prospecting and Exploration for Polymetallic Sulphides and Cobalt-rich Ferromanganese Crusts in the Area, Part I: Provisions Relating to Prospecting, Overlapping Claims and the Anti-Monopoly Provision, at <http://www.isa.org.jm/files/documents/EN/12Session/Council/ISBA12-C2PartI.pdf>, 1 May 2013.

restrictions will be imposed on the total number of applications by an applicant for exploration within a particular geographic area or the total mining area covered by its applications.

B. The Anti-monopoly Criteria Should Not Be Too Rigorous

Since the question of anti-monopoly, as mentioned earlier, arises mainly out of political considerations rather than actual economic or legislative needs, the imposition of rigorous anti-monopoly criteria will undermine the principle that the Area and its resources are the common heritage of mankind. According to the Convention, all rights to resources in the Area lie with mankind as a whole and are exercised by the Authority on its behalf. Therefore, the Authority shall allocate on the basis of equitability revenues and other economic interests gained through its activities within the Area, which include those gained from the Enterprise's exploration of the reserved areas or its shares in joint ventures with contractors, as well as those gained through its collection of royalties from contractors for exploiting the Area resources in compliance with applicable regulations and contracts. Overtly political measures that hamper capable applicants to explore and exploit the Area resources will undoubtedly discourage such activities and prevent the Authority from receiving the due economic profits of harvesting the Area resources. These profits are intended to be allocated among the international community or used to bring benefits to all mankind. In a word, it is clearly not advisable to ensure the interests of a small number of States or entities applying to explore and exploit the Area resources at the expense of the entire international community's interests.

C. Preferential Treatment Should Be Given to Developing States and Their Entities

In accordance with the Convention, each application, other than those submitted by the Enterprise or by any other entities for reserved areas, shall cover a total area divided into two parts of equal estimated commercial value, one of which shall be designated by the Authority as the reserved area and the other as the non-reserved area (contracted area) covered by the applicant's approved plan of work. The provisions regarding the reserved area are particularly important for ensuring the participation of the Enterprise as well as developing States and their entities in

the exploration and exploitation of the Area resources. Annex III, Article 9 of the Convention grants priority to the Enterprise as well as developing States and their entities to conduct activities in the reserved area. Article 9 also grants the Enterprise the authority to decide whether it intends to carry out activities in reserved areas and may decide to exploit such areas independently or in joint ventures with the interested State or entity. When considering entering into such joint ventures, the Enterprise shall offer developing States and their nationals the opportunity of effective participation; if the Enterprise does not intend to carry out activities in a reserved area, developing States and their entities may apply for the exploration and exploitation of the resources in that reserved area.

The Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, while preserving in form the reserved area system, also offer a new option for applicants: an applicant can choose to either fulfill its obligation to have half of the area covered by the application designated by the Authority as the reserved area or, as an exchange, offer the Enterprise a certain percentage of equity participation in a joint venture arrangement.²⁴ Since both polymetallic sulphides and cobalt-rich ferromanganese crusts are three-dimensional, if the applicant has chosen the former option, it is necessary to first find two mining sites of equal estimated commercial value, which involves a lot of costly explorations. Therefore, with the offer of a new option, many applicants will prefer the latter option to the former. In fact, since the adoption of the two Regulations, the Authority has received five applications in respect of polymetallic

24 The joint venture arrangement, which shall take effect at the time the applicant enters into a contract for exploitation, shall include the following: (a) The Enterprise shall obtain a minimum of 20 per cent of the equity participation in the joint venture arrangement on the following basis: (i) Half of such equity participation shall be obtained without payment, directly or indirectly, to the applicant and shall be treated *pari passu* for all purposes with the equity participation of the applicant; (ii) The remainder of such equity participation shall be treated *pari passu* for all purposes with the equity participation of the applicant except that the Enterprise shall not receive any profit distribution with respect to such participation until the applicant has recovered its total equity participation in the joint venture arrangement; (b) Notwithstanding subparagraph (a), the applicant shall nevertheless offer the Enterprise the opportunity to purchase a further thirty per cent of the equity in the joint venture arrangement, or such lesser percentage as the Enterprise may elect to purchase, on the basis of *pari passu* treatment with the applicant for all purposes; and (c)... See Article 19 of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area.

sulphides and three in respect of cobalt-rich ferromanganese crusts. Among the eight applications, seven chose the new option of offering the Enterprise equity participation in the joint venture arrangement; only the Russian Federation's application in February of 2013 in respect of cobalt-rich ferromanganese crusts opted for the old method.²⁵ The negative growth in the reserved areas will undoubtedly lead to a decrease in opportunities for developing States and their entities to participate in the exploration and exploitation of Area resources. It is submitted that developing States and their entities should be given preferential treatment with regard to anti-monopoly in the Area, enforcing relatively lenient rather than overly-rigid anti-monopoly restrictions.

Translator: ZHANG Zhiyun

Editor (English): Joshua Owens

25 The five applications for exploration of polymetallic sulphides are put forward respectively by the China Ocean Mineral Resources Research and Development Association, the Russian Federation, the South Korean government, the Institut Francais de Recherche pour l'Exploitation de la Mer (IFREMER), and the Government of India, while the three ones for cobalt-rich ferromanganese crusts are respectively by the China Ocean Mineral Resources Research and Development Association, the Japan Oil, Gas and Metals National Corporation, and the Russian Federation.

《联合国海洋法公约》“适当顾及”研究

张国斌*

内容摘要: 1982年《联合国海洋法公约》(以下简称“《海洋法公约》”)为海洋建立了一种法律秩序。在这种法律秩序中,海洋权利、自由纵横交错。“适当顾及”来源于国际习惯法、国际条约和一般法律原则,是《海洋法公约》的一项原则,用来解决《海洋法公约》中行使权利和自由冲突。“适当顾及”包含两个方面,一是“顾及”,即一国行使其海洋权利或自由时意识并考虑到其他国家的利益;二是“适当”的顾及,即国家在意识并考虑到其他国家的利益后,与自己行使权利或自由进行利益分析、平衡,以达到适当性标准。“适当性”标准是由国际的权威决策者依据国际共同标准在具体情况下进行的利益衡量。“适当顾及”在国际法实践中也有运用。

关键词: 适当顾及 法律秩序 公海自由 海洋权利

我们的问题要从《联合国海洋法公约》(以下简称“《海洋法公约》”)开始。寄托着缔约国“以互相谅解和合作的精神解决与海洋法有关的一切问题的愿望”的当代最权威的《海洋法公约》,为“海洋建立了一种法律秩序”。¹这种法律秩序并不是凭空而来,而是《海洋法公约》对过去“海洋法的编纂以及在此基础之上的逐步发展”。²在这种法律秩序中,广袤的海洋被人为地划分为多种海洋区域,既有国家行使主权的领海和群岛水域,也有具有独特法律地位的毗连区、专属经济区、大陆架,还有不属于任何国家的公海和人类共同遗产的国际海底。如此可见,海洋的法律秩序并不是清晰明白、一目了然的,而是高度抽象、模糊不清的。权利在这里纵横交错,利益在这里碰撞纠葛。尤其是作为利益妥协的产物,《海洋法公约》的内容还存在着大量的抽象不明确之处。这些都为权利(自由)行使者行使权利(自由)而造成冲突留下空间。所幸,维持着海洋秩序的、持续发展的、不断满足全体国际社会法律要求³的《海洋法公约》,存在着一种“润滑剂”——“due

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1 《海洋法公约》序言第4段。

2 《海洋法公约》序言第7段。

3 姜皇池著:《国际海洋法总论》,台北:学林文化事业有限公司2001年版,第18页。

regard”，国内学界一般翻译为“适当顾及”，它要求缔约国在行使《海洋法公约》认可的海洋权利和自由时，合理地照顾到其他国家的海洋权利和自由。那么，“适当顾及”在《海洋法公约》中处于什么地位呢？它是怎样达到其目标呢？笔者不揣浅陋，拟对《海洋法公约》中“适当顾及”作一分析，以求教于学界方家。

一、《海洋法公约》中“适当顾及”及其渊源

“适当顾及”出现在法律范畴中似乎多与权利的行使相关。行使权利固然有其界限，但是模糊、抽象或缺合理性的界限标准似乎让权利的行使在具体问题上通常没有详细的结果，所涉及的合理性和相互性问题，使人想起了“适当顾及”。⁴

《海洋法公约》中也存在“适当顾及”的表述，笔者研究的开始就以梳理《海洋法公约》中的“适当顾及”开始，这是为了首先了解“适当顾及”在《海洋法公约》中的状况，然后探究“适当顾及”的渊源，以梳理“适当顾及”的脉络。

（一）《海洋法公约》中的“适当顾及”

《海洋法公约》中共有 19 处出现了“适当顾及”的表述。笔者用表格的形式呈现如下：

范围	条款项	内容
领海	第 27 条 第 4 款	要求缔约国在其领海航线上逮捕外国船只时，应“适当顾及”（其他国家船只在领海上）航行的利益。
用于国际航行的海峡	第 39 条 第 3 款 a 项	要求缔约国的飞机在飞越海峡时，应“适当顾及”其他国家船只在海峡过境时的航行安全。
专属经济区	第 56 条 第 2 款	要求缔约国在其专属经济区内行使其权利和履行其义务时，应“适当顾及”其他国家的权利和义务。
	第 58 条 第 3 款	要求缔约国在一国专属经济区内根据本公约行使其权利和履行其义务时，应“适当顾及”该国的权利和义务。
	第 60 条 第 3 款	要求缔约国在撤除其在专属经济区内建造的人工岛屿、设施和结构时要“适当顾及”到捕鱼、海洋环境的保护和其他国家的权利和义务。
	第 66 条 第 3 款 a 项	要求缔约国在就捕捞溯河产卵种群鱼类达成协议时，要“适当顾及”鱼源国对这些种群加以养护的要求和需要。

4 伊恩·布朗利著，曾令良、余敏友等译：《国际公法原理》，北京：法律出版社 2007 年版，第 392 页。

(续表)

大陆架	第 79 条 第 5 款	要求缔约国在大陆架上铺设海底电缆和管道时,应当“适当顾及”已经铺设的电缆和管道。特别是,修理现有电缆或管道的可能性不应受妨害。
公海	第 87 条 第 2 款	要求缔约国在行使公海自由时须“适当顾及”其他国家行使公海自由的利益。
国际海底区域	第 142 条 第 1 款	要求缔约国在公约第 11 部分规定的“区域”内活动涉及跨越国家管辖范围的“区域”内资源矿床时,应“适当顾及”这种矿床跨越其管辖范围的任何沿海国的权利和合法利益。
国际海底区域	第 148 条	要求缔约国在按照公约第 11 部分的具体规定促进发展中国家有效参加“区域”内活动时,应“适当顾及”其特殊利益和需要。
国际海底区域	第 161 条 第 4 款	要求缔约国“适当顾及”国际海底管理局理事会成员轮流的可宜性。
国际海底区域	第 162 条 第 2 款 第 d 项	要求国际海底管理局理事会在设立其认为必要的附属机关时,“适当顾及”节约和效率。
国际海底区域	第 163 条 第 2 款	要求国际海底管理局理事会在“适当顾及”节约和效率的情形下,决定增加任何一个委员会的委员人数。
国际海底区域	第 167 条 第 2 款	要求在征聘和雇佣国际海底管理局的工作人员时,应“适当顾及”在最广泛的地区基础上征聘工作人员的重要性。
海洋环境的保护和保全	第 234 条	要求缔约国在冰封区域(该冰封区域属于该国专属经济区的一部分)制定和执行非歧视性的法律和规章,以防止、减少和控制船只对海洋的污染时,必须“适当顾及”航行和现有最可靠的科学证据为基础对海洋环境的保护和保全。
海洋技术的发展和转让	第 267 条	要求缔约国在促进海洋技术发展和转让的合作时,应“适当顾及”一切合法利益。
大陆架界限委员会	附件 2 第 2 条 第 1 款	要求在选举大陆架界限委员会时,应“适当顾及”确保公平地区代表制的必要。
企业部章程	附件 4 第 5 条 第 1 款	要求缔约国在选举企业部董事时,应“适当顾及”公平地区分配的原则。
企业部章程	附件 4 第 5 条 第 2 款	要求缔约国“适当顾及”企业部董事会董事席位轮流的原则。

从表格中可以看出,“适当顾及”频繁出现在《海洋法公约》中,并且分散在公约多个部分。关于领海、用于国际航行的海峡、专属经济区、大陆架、公海、国际海底区域的规定都有所涉及。另外,“适当顾及”还出现在一些程序性事项中,例如有关选举大陆架界限委员会以及征聘国际海底管理局工作人员的规定。

(二)“适当顾及”的国际法渊源

在古代和中世纪的前半叶,由于科学技术的落后,人类影响海洋的能力极其有限,对海洋提出的权利主张也仅限于沿海捕鱼以及基本的航海。海洋如同空气一样,是全人类共有的。在罗马法中,海洋自由就已经作为法律原则加以规定。然而自从 1493 年和 1506 年教皇谕旨将整个海洋世界分配给葡萄牙和西班牙后,英国、丹麦、威尼斯等国为了争夺海上霸权以及维护自身利益都不同程度提出闭海主张,因此,17 世纪是闭海的鼎盛时期。⁵ 这种情况在 18 世纪得到改变。荷兰著名国际法学家格老秀斯在其经典著作《论海洋自由或荷兰参与东印度贸易的权利》中提出了“海洋自由”的主张。⁶ 经过几个世纪的发展,虽然有许多变化,但是海洋自由仍然是近代法律中的一个原则。⁷

1958 年在瑞士日内瓦缔结的《公海公约》以国际条约的形式把海洋自由这一古老的国际法原则固定下来。《公海公约》第 2 条规定:

公海对所有国家开放,任何国家不得有效地声称将公海的任何部分置于其主权之下。公海自由是在本公约和其他国际法规则所规定的条件下行使的。公海自由对沿海国和非沿海国而言,除其他外,包括:(1)航行自由;(2)捕鱼自由;(3)铺设海底电缆和管道的自由;(4)公海上飞行自由。所有国家行使这些自由以及国际法的一般原则所承认的其他自由时,都应当合理顾及⁸其他国家行使公海自由的利益。

可以看出,《公海公约》中也有类似《海洋法公约》中“适当顾及”的表述,就是“合理顾及”。虽然从“合理顾及”到“适当顾及”,文字表述上略有变化,但其

5 伊恩·布朗利著,曾令良、余敏友等译:《国际公法原理》,北京:法律出版社 2007 年版,第 203 页。

6 格老秀斯认为,葡萄牙即使对荷兰航行经过的那部分海洋拥有主权,如果阻止荷兰人通往那些地方并禁止其在那里进行贸易的话,也不应该对荷兰人有任何损害行为。参见雨果·格老秀斯著,马忠法译:《论海洋自由或荷兰参加东印度贸易的权利》,上海:世纪出版集团、上海人民出版社 2013 年版,第 12 页。

7 詹宁斯、瓦茨修订,王铁崖等译:《奥本海国际法》(第一卷第二分册),北京:中国大百科全书出版社 1998 年版,第 156 页。

8 即 Reasonable regard。

意义相同。可见，“适当顾及”并不是《海洋法公约》创造出来的一个概念，其内容早已有之。詹宁斯和瓦茨也认为，关于公海的传统法律也要求各国在行使公海自由时，应“合理地照顾到”其他国家行使其公海自由的利益。⁹

时至今日，虽然公海的范围在逐步缩小，但是公海自由原则的实质却仍然未变。《海洋法公约》第 87 条第 1 款列举了各种公海自由的形式，如航行自由、飞越自由、铺设海底电缆和管道的自由、建造国际法所容许的人工岛屿和其他设施的自由、捕鱼自由和科学研究的自由。但是 87 条第 1 款所列举的公海自由并不是穷尽的，除这些列举出来的公海自由，还有其他形式的公海自由。基本上，各种形式的公海自由皆为公海自由原则所许可。¹⁰ 但是，各种公海自由之间不能有不合理的妨碍。行使公海自由一旦出现冲突或互相妨碍，就应该在各项自由之间进行协调，使得这种冲突或妨碍维持在合理的范围之内，¹¹ 这就产生了“适当顾及”的必要。

1958 年，国际法委员会进行草拟日内瓦海洋法草案时，“适当顾及”本来并未提及，但其后因英国提案而加入，不过英国代表当时称其为“合理顾及”。第三届海洋法会议时，类似“适当顾及”的表述出现在《非正式协商文本》中，当时称之为“适当考量”，最后在起草委员会的建议下，改为“适当顾及”。¹² 于是，《海洋法公约》第 87 条第 2 款规定：“这些自由应由所有国家行使，但须适当顾及其他国家行使公海自由的利益，并适当顾及本公约所规定的同‘区域’内活动的权利。”并且，“适当顾及”也同样扩展到了领海、专属经济区、大陆架等海洋区域。

此外，从国际习惯角度来看，我们也可以寻觅到“适当顾及”的身影。国际习惯是在国际交往中，经国家反复多次的实践，被世界各国公认为法律而逐渐形成的不成文的行为准则。¹³ 作为一种原始造法过程的方式，国际习惯是持续演进的，同时也无法有详细而周延的内容。¹⁴ 所以尽管国际习惯中没有“适当顾及”的精确表述，但是与其实质相同的内容不难找到。“有关公海的法律不是为了限制公海自由，而是保障整个国际社会享有公海自由”，这一观点已被国际法委员会确认为习惯国际法。¹⁵ “适当顾及”就是要求国家在行使公海自由时应当注意并考量其他国家使用公海之自由，并且避免进行会影响他国行使公海自由之行为。其基本理

9 詹宁斯、瓦茨修订，王铁崖等译：《奥本海国际法》（第一卷第二分册），北京：中国大百科全书出版社 1998 年版，第 216 页。

10 公海自由原则本身并未对公海使用方式设限，因此主张设限者需于公海自由原则之外去寻找限制。参见黄异著：《国际海洋法》，台北：渤海堂文化公司 2002 年版，第 80 页。

11 黄异著：《国际海洋法》，台北：渤海堂文化公司 2002 年版，第 80 页。

12 姜皇池著：《国际海洋法总论》，台北：学林文化事业有限公司 2001 年版，第 514 页。

13 王虎华主编：《国际公法学》，北京：北京大学出版社、上海：上海人民出版社 2008 年版，第 16 页。

14 马尔科姆·N·肖著，白桂梅等译：《国际法》，北京：北京大学出版社 2011 年版，第 58 页。

15 Report of the International Law Commission: Covering the Work of Its Eighth Session, *American Journal of International Law*, Vol. 51, 1957, pp. 154, 206.

念在于平衡各国使用海洋之利益与国际社会全体之利益。¹⁶ 在行使海洋权利和自由时加强合作,基于“和谐使用公海”的大原则,¹⁷ 行使本国海洋权利和自由。

二、“适当顾及”的国际法地位以及衡量标准

前文已经梳理了《海洋法公约》中的“适当顾及”以及“适当顾及”的渊源,我们对“适当顾及”有了一个初步的理解。本部分笔者将重点阐述“适当顾及”的国际法地位以及衡量标准。

(一)“适当顾及”的国际法地位

一个国家行使自己的权利,不能建立在蔑视其他国家权利的基础上,也就是权利行使者不能滥用自己的权利。这也是国际法上义务的一般基础。¹⁸ 《海洋法公约》对“合理顾及”没有规定善意、合理、正常行政等标准,此时,需借助“滥用权利”理论补充。¹⁹ 不存在不负担义务的权利,也不存在不受限制的自由。这样看来,“适当顾及”似乎是《海洋法公约》对国家行使海洋自由的限制以及行使海洋权利所必须负担的义务。确实,权利有其界限,自由有其边界。“适当顾及”似乎首先成为了一个对权利(自由)行使者正当行使权利(自由)的“软性”要求。但是,“适当顾及”的意义不止于此。这让笔者想到了另外一个词汇——国际礼让。国际礼让和“适当顾及”似乎经常被联系起来考虑。一个经常被引用的美国最高法院的案例表明:

国际礼让,从法律角度来讲,既不是一种绝对的义务……也不仅仅是出于礼貌和善意……它是一种承认(认可),一个国家出于国际礼让,在“适当顾及”²⁰ 到双方的国际义务和方便以及在其法律保护之下本国公民和其他国家公民的权利,允许在其领土内适用另一个国家的立法、行政或司法的行为。²¹

16 姜皇池著:《国际海洋法总论》,台北:学林文化事业有限公司2001年版,第515页。

17 陈荔彤著:《海洋法论》,台北:元照出版有限公司2002年版,第332页。

18 See B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London: Steven and Sons Ltd, 1953, pp. 121~136; Gutteridge, *Abuse of Rights*, *Cambridge Law Journal*, Vol. 5, 1933, p. 22; Schwarzenberger, *Uses and Abuses of the Abuse of Rights*, *Transactions of the Grotius Society*, Vol. 42, 1957, p. 147.

19 伊恩·布朗利著,曾令良、余敏友等译:《国际公法原理》,北京:法律出版社2007年版,第392页。

20 即 Due regard.

21 See *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

所以, 尽管对国际礼让的本质以及其与“适当顾及”的关系表述并不明朗, 但是不可否认, 《海洋法公约》把“适当顾及”提升到了一种积极的法律命令, 而不仅仅是停留在消极的义务阶段。因此, 尽管军舰在公海上可能出于礼貌和善意(国际礼让)而互相致敬, 但是他们必须“适当顾及”《海洋法公约》赋予每一艘船只的公海自由。²²

这样看来, 贯穿于《海洋法公约》的“适当顾及”似乎成为了一个对所有国家模糊的积极要求。言其模糊, 是因为“适当顾及”并没有给出明确的行为指引, 以及法律后果。这个带有“矛盾情感”²³的词汇, 与其说是《海洋法公约》的一项规则, 不如说“适当顾及”是贯穿于《海洋法公约》的一项原则,²⁴ 也就是适当顾及原则。正如姜皇池教授所言, 适当顾及原则是限制公海自由的基本原则, 任何公海自由权利之行使, 均应“适当顾及”其他国家利用公海之合法利益。²⁵ 但笔者异于姜皇池教授的观点是, “适当顾及”原则不仅仅是限制公海自由的基本原则, 也是限制海洋权利、自由的基本原则。因为它不仅仅出现在限制“公海自由”方面, 它还出现在规定领海、专属经济区、大陆架等方面。它保障了全体国际社会成员所得享受之权利, 以确保国际社会各成员分子可以享有各项海洋权利和利益。²⁶

(二) 对“适当顾及”的解释和衡量标准

“适当顾及”是出现在《海洋法公约》中的一个术语, 对其确切意义的明白剖析, 离不开对“适当顾及”的解释。《维也纳条约法公约》第31条和第32条规定了条约解释的一般规则。首先, 约文解释方法。即条约应该按照公约条文所使用词语的通常意义进行解释。《布莱克法律英语大辞典》中, “适当”是指合适的、通常的、合理的,²⁷ “顾及”是指注意、关心或者考虑到。²⁸ “适当顾及”按照通常意

22 International Law Association (American Branch) Law of the Sea Committee, Terms in the 1982 U.N. Convention on the Law of the Sea or in Convention Analysis that the Convention Does Not Define, in *2009-2010 Proceedings of the American Branch of the International Law Association*, p. 374.

23 詹宁斯、瓦茨修订, 王铁崖等译:《奥本海国际法》(第一卷第二分册), 北京: 中国大百科全书出版社 1998 年版, 第 237 页。

24 按照法理学一般理论, 法律规则内容明确具体, 具有假定、行为模式和法律后果 3 个因素, 一般适用于个案; 而法律原则内容比较抽象, 也没有规定具体的权利、义务和责任, 具有更大的覆盖面。显然, “适当顾及”不是法律规则, 而是法律原则。参见罗伯特·阿列克西著, 朱光、雷磊译:《法·理性·商谈》, 北京: 中国法制出版社 2011 年版, 第 176~199 页。

25 姜皇池著:《国际海洋法总论》, 台北: 学林文化事业有限公司 2001 年版, 第 514 页。

26 International Law Commission, Covering the Work of Its Eighth Session, *American Journal of International Law*, Vol. 51, 1957, pp. 154, 206.

27 *Black's Law Dictionary*, 9th ed., Minnesota: West Publishing Company, 2009, p. 1395.

28 *Black's Law Dictionary*, 9th ed., Minnesota: West Publishing Company, 2009, p. 1395.

义解释,就是“合理地考虑到”。其次,上下文解释方法。决定公约词语的通常意义,不应抽象地决定,而应该按照词语的上下文并参考条约的目的和宗旨予以决定。“适当顾及”多次出现在《海洋法公约》里,涉及到公海、领海、专属经济区、毗邻区、大陆架多个海洋区域,贯穿了《海洋法公约》的始终,实际上体现出了《海洋法公约》的宗旨,在纷繁复杂的海洋法体系中,保障各缔约国能够正常行使公约赋予的海洋权利。再次,善意解释方法。这要求对“适当顾及”的解释应该采取诚实信用立场,严格遵守公约的规定,不得任意进行解释。

“适当顾及”由两方面因素构成,首先是“顾及”,也就是,一国行使其海洋权利或自由时意识并考虑到其他国家的利益或其他因素。这是“适当顾及”原则的前提,没有“顾及”到,就谈不上“适当顾及”。其次是“适当”的顾及。如同规定海上武装冲突法的圣雷莫手册中采用了“适当顾及”一词,目的是平衡中立者的权利和义务一样,《海洋法公约》中的“适当顾及”也是旨在平衡国家间的利益。

简单来讲,适当顾及就是要求国家在意识并考虑到其他国家的利益或其他因素后,与自己的权利或自由进行利益分析、平衡,以达到适当的标准。²⁹这种利益的平衡可能发生在利益相关者的谈判程序中,可能会导致临时协定的达成,也可能导致达成《海洋法公约》的补充协议。³⁰例如,《海洋法公约》要求缔约国在行使公海自由时,须适当顾及其他国家行使公海自由的利益,³¹这意味着,国家在行使公海自由时,首先要意识并考虑到其他国家在行使公海自由时的利益,避免其行为干扰其他国家行使公海自由。要尽量避免任何可能造成其他国家使用公海时不利影响的行为。其次,缔约国应该在行使公海自由时平衡考虑所有国家在这方面的权利和利益。

但问题随之而来,“顾及”到其他缔约国的海洋权利和利益并不困难,但是如何做到“适当”的顾及却并不容易。换一种说法就是,“适当顾及”的“适当性”标准是什么?

让我们结合具体条文仔细分析。仍然以《海洋法公约》第78条为例。《海洋法公约》第87条内容如下:

1. 公海对所有国家开放,不论其为沿海国或内陆国。公海自由是在本公约和其他国际法规则所规定的条件下行使的。公海自由对沿海国和内陆国而言,除其他外,包括:

29 International Law Association (American Branch) Law of the Sea Committee, Terms in the 1982 U.N. Convention on the Law of the Sea or in Convention Analysis that the Convention Does Not Define, in *2009-2010 Proceedings of the American Branch of the Law Association*, p. 374.

30 《海洋法公约》第311条第2到6款。

31 《海洋法公约》第87条第2款。

- (a) 航行自由;
- (b) 飞越自由;
- (c) 铺设海底电缆和管道的自由, 但受第 6 部分的限制;
- (d) 建造国际法所容许的人工岛屿和其他设施的自由, 但受第 6 部分的限制;
- (e) 捕鱼自由, 但受第 2 节规定条件的限制;
- (f) 科学研究的自由, 但受第 6 和第 13 部分的限制。

2. 这些自由应由所有国家行使, 但须适当顾及其他国家行使公海自由的利益, 并适当顾及本公约所规定的同“区域”内活动有关的权利。

这意味着, 在行使公海自由时, 不仅须适当顾及其他国家享有该特定自由, 而且还必须适当顾及它们享有其他的自由; 现在看来确实还须顾及它们享有对一个地方的某些其他合法使用, 这些使用可能不是所有国家享有的自由, 而是一项专有权, 如专属经济区和大陆架资源的开发。³²

那么, 我们应该从什么角度来理解这种“适当性”呢? 谁来决定这种“适当性”? 首先, 一个国家不能单方面决定其行使公海自由的适当性, 也不能把其决定强加给国际社会。在决定国际法事务方面, 不是国家的单方面声明, 而是其他国家的接受——即使是在各国相互容忍的基础上——创造了统一和公正性。所以, 在具体案件中, 判断合理性要求需要 2 个要素, 第一是需要权威的决策者(在国际习惯法中是一般国际共同体)。第二是以国际标准决定。只有衡量和平衡了所有相关因素, 由权威决策者作出、依据“适当性”的国际共同标准, 才是统一、公正的标准。³³ 例如, 如果国家行使海洋权利(自由)之间发生冲突, 甚至当事国为此诉诸国际法院, 那么当事国自己宣称的“适当顾及”不能成为定案的标准。衡量“适当顾及”的“适当性”应该由国际法院决定。

其次, 预先规定何为合理调整相关国家利益的方式无疑很困难, 每一个案件都需要根据自身特点来决定。³⁴ 当不同公海自由有所冲突时, 必须对该等自由之重要性(包括对全体国际社会成员以及系争自由主张者之重要性)作具体比较与考量, 也就是“就个案所在环境为具体利益衡量”。³⁵ 例如, 在海上放置定置渔网捕鱼固是公海捕鱼自由, 但是却不可在繁忙的船舶通行航道上放置, 因为放置于

32 詹宁斯、瓦茨修订, 王铁崖等译:《奥本海国际法》(第一卷第二分册), 北京: 中国大百科全书出版社 1998 年版, 第 161 页。

33 McDougalt and Burke, *The Public Order of the Oceans*, The Hague: Martinus Nijhoff Publishers, 1965, p. 48.

34 Ruth Lapidoth, *Freedom of Navigation and the New Law of the Sea*, *Israel Law Review*, Vol. 10, 1975, p. 456.

35 姜皇池著:《国际海洋法总论》, 台北: 学林文化事业有限公司 2001 年版, 第 513 页。

该航道显然将妨害公海航行自由。³⁶就公海自由本身特点来讲,“适当顾及”还需考虑其他公海自由是否应区别对待。在公海各项自由中,对航行自由、捕鱼自由的保护是高度优先的,这在权威国际法论著中已经被充分强调。³⁷尽管有时不情愿承认,但一系列并行的决策确实保护了各种各样对公海权力和控制的主张,这是为了保护国家安全、健康、税法、经济福利等,而不是妨碍航行、捕鱼等自由。³⁸而对于解决这些冲突而言,“适当性”就是总被决策者用来检验的标准,虽然简单,却无处不在,而且不可缺少。

上述便是笔者结合《海洋法公约》具体条文来分析“适当顾及”原则的具体标准,它是由权威的决策者依据“适当性”的国际共同标准在具体情况下进行的具体利益衡量。

三、“适当顾及”原则在实践中的应用

接下来,笔者将结合国际法院和国际海洋法法庭案例具体说明“适当顾及”原则在国际实践中的应用。

案例一:澳大利亚、新西兰诉法国核试验案³⁹

该案事实如下:1966年到1972年间,法国在南太平洋的法属波利尼西亚进行了一系列的大气层核武器试验。1973年法国作出一个声明,计划在位于南太平洋的公海上进行进一步核试验。澳大利亚和新西兰于1973年5月9日分别在国际法院对法国提起诉讼。⁴⁰澳大利亚和新西兰认为,法国在南太平洋公海上占用一个巨大的区域进行核试验,禁止外国船舶进入该危险区,还使用武力阻止一艘抗议法国核试验的船舶进入该区域,这侵犯了公海自由原则。⁴¹

结合本文所谈主题,法国在公海上进行核试验是法国行使公海自由的体现,⁴²但是问题在于,法国在行使该种自由时是否“适当顾及”到了其他国家行使公海自

36 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, p. 206.

37 詹宁斯、瓦茨修订,王铁崖等译:《奥本海国际法》(第一卷第二分册),北京:中国大百科全书出版社1998年版,第237页。

38 Myres S. McDougal and Robert A. Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, *Yale Law Journal*, Vol. 64, 1954-1955, p. 648.

39 *ICJ Reports*, 1974, pp. 253-457.

40 案件事实参见中国政法大学国际法教研室编:《国际公法案例评析》,北京:中国政法大学出版社1995年版,第180-181页。

41 公海上核试验的问题还涉及到核裁军、海洋环境保护以及其他相关国际条约、国际习惯等内容,本文只讨论涉及到公海自由的事项。

42 1963年《禁止核试验》条约禁止在公海和陆地上试验核武器,但法国不是该条约的当事国,而且似乎该条约也不是一个对所有国家都有拘束力的习惯规则,而只是一个条约。参见马尔科姆·N·肖著,白桂梅等译:《国际法》,北京:北京大学出版社2011年版,第479页。

由的利益呢？

运用笔者上文所论述的“适当顾及”标准。首先，要确定的问题是法国是否“顾及”到了其他国家行使公海自由，也就是确定法国是否意识并考虑到其他国家行使公海自由及利益。法国进行核试验避开了渔区，也避开了海上繁忙航道，并做好安全警示措施以防止危及到其他国家船只，这些都说明法国确实顾及到了其他国家行使公海自由及利益。

其次，也是比较棘手的问题，法国是否“适当”顾及到了其他国家行使公海自由及利益呢？考量本案自身特性和相关因素，我们首先应该着重衡量以下相关因素：第一，在法国核试验以前，该公海海域污染的程度；第二，法国核试验把公海作为核试验场地的必要性；第三，进行核试验的危险区本身的范围以及它在多大程度上影响公海自由航行；第四，该片海域的捕鱼状况和飞越状况；第五，同一时期的核试验和采取的以减少或消除任何可能的危害性后果的防范措施。⁴³从本案特性来讲，不妨把法国核试验分为3个阶段来考察。第1个阶段是公海上大范围危险区的设置，第2个阶段是核试验本身，第3个阶段是核试验之后的影响。

在充分考虑了本案相关因素和特性后，笔者认为，很难说法国核试验的3个阶段都“适当顾及”到了其他国家的公海自由和利益。虽然核试验尽量顾及了其他国家的捕鱼自由和航行自由，但是核试验的安全进行，只能完全排除其他国家在该海域的使用之后才能进行。虽然禁止公海海域的独占使用不是一个绝对规则，要考虑到“程度”、“比例性”、“合理性”等问题，⁴⁴但是考虑到法国独占使用该公海面积之广、时间之长，很难说这种对公海的使用是适当的。

然而，“核试验”案并没有作出实体判决。国际法院认为法国宣布终止公海上核试验这一行为已经有效地解决了本案争端。尽管如此，在这样的案件中，法院用来决定是否“适当顾及”的标准会是衡量具体案件特性以及相关因素的“适当性”。⁴⁵

案例二：圣文森特及格林纳丁斯诉几内亚“塞加号”案⁴⁶

该案是国际海洋法法庭自成立以来的第2号案件，实际上也是法庭审理第1号案件的后续案件。“塞加号”是一艘在圣文森特及格林纳丁斯（以下简称“圣文森特”）登记、为塞浦路斯尼科西亚的塔博纳海运有限公司所有的油轮。1997年

43 J. W. L. Swan, *An Explosive Issue in International Law: The French Nuclear Tests*, *Melbourne University Law Review*, Vol. 9, 1973-1974, p. 296.

44 E. D. Brown, *Freedom of the High Seas versus the Common Heritage of Mankind: Fundamental Principles in Conflict*, *San Diego Law Review*, Vol. 20, 1982-1983, p. 521.

45 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, pp. 206-207.

46 See the *M/V 'SAIGA' (No 2), Saint Vincent and the Grenadines v. Guinea, Merits, Judgment*, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1 July 1999, International Tribunal for the Law of the Sea [ITLOS].

10月27日,“塞加号”越过几内亚比绍和几内亚之间的海洋边界,进入几内亚专属经济区,并向3艘渔船供应汽油。10月28日,“塞加号”跨过几内亚专属经济区的南界时被几内亚政府巡逻艇扣留。“塞加号”及其船员被带往科纳克里,船长被拘留。不久,几内亚政府在初审地方法院对“塞加号”船长提出刑事诉讼。1997年11月13日,圣文森特请求国际海洋法法庭按照《海洋法公约》第292条迅速释放“塞加号”及其船员。12月4日,法庭指定临时措施,命令几内亚在圣文森特提供合理的担保后迅速释放该船及其船员。1998年2月20日,圣文森特和几内亚协议将争端提交法庭解决。

圣文森特声称,几内亚扣押“塞加号”的行为侵犯了圣文森特的权利,尤其是,几内亚在其专属经济区内没有适当顾及圣文森特航行自由的权利。几内亚对此辩称,几内亚的各种行动没有违反《海洋法公约》第56条第2款的规定,适当顾及了圣文森特和悬挂其旗帜的船只享有航行自由及其他合法利用海洋的权利。这也成为本案的焦点之一,即几内亚在其专属经济区行使权利时到底有没有适当顾及圣文森特的航行自由权利。

圣文森特籍油船“塞加号”在几内亚的专属经济区内给渔船供应汽油,原被告双方对这一事实都予以承认。但原告圣文森特认为“塞加号”供应汽油属于行使航行自由的权利,而几内亚认为,几内亚对“塞加号”采取行动,并不是由于“塞加号”在其专属经济区内航行,而是由于“塞加号”从事“不正当的商业活动”。也就是说几内亚顾及到了“塞加号”航行自由的权利,但为了执行本国的法律,只能暂时扣押“塞加号”。在圣文森特看来,在船舶航行中供应汽油已经是普遍做法,虽然“塞加号”确实存在逃避几内亚关税的意图,但是几内亚为此就采取强制手段扣留“塞加号”无论如何都不能被认为是合理顾及到了圣文森特的航行自由权利。最后,法庭认为“根据可适用于本案特殊情况的法律已就这一问题作出判决,无需就沿海国及其他国家有关在专属经济区给渔船加油的广泛问题发表意见。”因而,法庭未对这一问题作出任何裁决。⁴⁷

笔者认为,几内亚是否适当顾及到了圣文森特的航行自由权利,应该从以下几个方面考虑,第一,船舶的航行权利在公海和沿海国专属经济区中并不相同,这是因为船舶在公海上拥有航行自由的权利,但在专属经济区中要接受沿海国一定范围的管辖。第二,一般来说,在公海上加油是船舶的权利以及船舶航行的必须,很少受到干涉。但是在沿海国经济区中加油,尤其是给外国渔船加油,应当遵守《海洋法公约》和沿海国法律制度的相关规定。第三,也要考虑“给渔船加油”这种行为是否属于航行自由的一个方面。本案的法官之一赵理海教授,在本案判决的个别意见中就认为国际法应将航行和航运的商务活动区别开来,“给渔船加油”这种

47 ITLOS, Judgment, Case No 2, ICGJ 336 (ITLOS 1999), 1 July 1999, paras. 136, 138.

行为在海洋法上没有地位。⁴⁸综合上述分析,笔者认为,几内亚为了防止“未经许可的出售汽油给其专属经济区内的渔船”这种行为而按照本国法律扣留“塞加号”,合理顾及到了圣文森特的权利。

案例三:英国诉冰岛渔业管辖权案⁴⁹

该案事实如下:冰岛是大西洋北部的一个岛国,位于格陵兰与挪威之间。冰岛周围是一个广阔的渔场,英国的渔船一向在该海域捕鱼。但冰岛于1971年7月14日发表了一项声明,声明从1972年9月1日开始,冰岛单方面将其渔业管辖范围扩大到50海里。英国表示反对,认为这个措施在国际法上是毫无根据的。在与冰岛协商仍无法解决争端的情况下,英国于1972年4月14日向国际法院提交请求书,指控冰岛把渔业管辖范围扩大到50海里的行为违反国际法。⁵⁰

虽然冰岛对此案没有出庭,但是国际法院认为根据事实,完全可以根据国际法进行裁判。根据《公海公约》第2条所规定的公海自由原则,一切国家有权在公海自由捕鱼,但必须考虑其他国家在公海自由捕鱼的利益。⁵¹英国几百年来一直在冰岛周围的水域捕鱼,其捕鱼方式50多年来都差不多,冰岛也承认英国在争议地区的特殊权利和利益。这说明冰岛“顾及”到了英国行使公海自由和利益。但是,问题在于,虽然冰岛在其12海里专属渔区享有优越权是毫无争议的,⁵²英国也承认冰岛的优越权,但是,冰岛的优越权不足以使冰岛有单方面禁止英国渔船在12海里范围外捕鱼的权利。这种把公海据为己有的行为无论如何都不会被认为是适当顾及他国的利益。所以,国际法院认为,最适当的解决方法是进行谈判,划分冰岛与英国双方的权利和利益,公平地调整捕捞范围、份额分配和相关限制等问题。⁵³

四、结 论

再次回到本文开篇提出的问题,奠定了现代海洋法体系的《海洋法公约》实际上存在着2组权利(自由)体系。第一组体系就是“公海自由”,它被《海洋法公约》以非穷尽列表方式明确表达出来,用来鼓励航行、捕鱼、铺设海底电缆和管道以及其它类似使用的单方面主张。另一组体系就是包括了各种各样技术术语的权利体

48 赵理海:《油轮“塞加号”案评介(续)——本案的实质问题》,载于《中外法学》1999年第6期,第105~117页。

49 *ICJ Reports*, 1974, pp. 8~175.

50 案件事实参见刘家琛主编,陈致中编著:《国际法案例》,北京:法律出版社1998年版,第198~200页。

51 当时《海洋法公约》并未生效,也没有专属经济区制度。

52 当时,在领海和公海之间的渔区,沿岸国享有专属性的渔业管辖权,并已获得公认为12海里。这已经形成了国际习惯法。参见刘家琛主编,陈致中编著:《国际法案例》,北京:法律出版社1998年版,第202页。

53 刘家琛主编,陈致中编著:《国际法案例》,北京:法律出版社1998年版,第203页。

系,例如领海、毗邻区、专属经济区、大陆架等。这些也被《海洋法公约》明确表达出来,用来鼓励各种各样的权利主张,既有综合性的,也有特殊性的,这或多或少地会干涉到第一组体系内的自由。⁵⁴而解决第一组自由体系内的冲突、第二组权利体系内的冲突、自由和权利之间的冲突的办法就是“适当顾及”原则。“适当顾及”原则是《海洋法公约》的一项原则,其认定的标准是“适当性”,而“适当性”确定的标准需要就个案事实特性和相关因素进行衡量。

五、需进一步研究的问题

上文便是笔者对本文主题的思考。但笔者学识有限,仍然对本文主题——“适当顾及”原则有诸多不甚明了之事项,愿列明一二,以求方家指教。

1. “适当顾及”原则是否形成国际习惯法?
2. 衡量“适当顾及”的标准是根据个案事实特性和相关因素进行衡量的“适当性”。这种“适当性”是否有规可循?⁵⁵
3. “适当顾及”下的权利和自由是否有先后之分?是否可以得出孰轻孰重的结论?

六、附录

本论文开篇讨论的就是《海洋法公约》所构建的海洋的国际法秩序,而本论文的主题“适当顾及”与其有着密切联系。“适当顾及”在每一个海洋区域都发挥着重要作用。所以笔者认为有必要在附录中以图表的形式进一步阐释2个问题:第一,《海洋法公约》构建的海洋国际法秩序是什么;第二,海洋权利和自由在《海洋法公约》中是如何相互“适当顾及”的。

54 Myres S. McDougalt and Robert A. Schle, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, *Yale Law Journal*, Vol. 64, 1954-1955, p. 648.

55 例如,美国《水污染控制法》规定,水域的“适当使用”被视为包含娱乐和审美的使用,为了公共消费的使用,鱼类、其他水生生物、野生动植物使用、农业使用、工业使用。See *Federal Water Pollution Control Act*, 33 U.S.C. § 1152 et seq. (1970).

表1 《海洋法公约》中各海洋区域权利来源表⁵⁶

海洋区域	性质	限制	权利的来源
海洋内水	具有类比领土主权的地位	一定条件下受到无害通过的限制 ⁵⁷	类比领土主权不但是领土主权, 类比领土主权的来源不是领土, 而是来源于沿海国家的控制力
领海		受无害通过的限制	
群岛水域		受无害通过和传统捕鱼等限制	
大陆架	国家对其具有主权权利		主权权利来源于国家领土的延伸
毗邻区	国家具有管制权		
专属经济区	国家具有特定的权利和管辖权		权利的来源不是主权, 而是为特定用益而设立的事务管辖权 ⁵⁸
公海	国家对其不得提出主权要求		公海、国际海底区域不得置于国家主权之下
国际海底区域			

注: 首先要对图表1作一必要阐释。在前文中, 笔者已经说明了, 在《海洋法公约》所构建的海洋法律秩序中, 各种海洋区域的法律地位是各不相同的, 其归属国际法主体的程度也各不相同。最大程度的归属就是将某个空间置于某个或者若干国家的领土主权之下。海洋中的领海、群岛水域无疑取得了国家主权的地位。⁵⁹ 然而, 在《海洋法公约》中, 还有“主权权利”、⁶¹ “管辖权”⁶² 或“管制”⁶³ 的表述, 这些权利尽管很广泛, 但仍然没有达到主权的标准。对于沿海国来说, 行使《海洋法公约》中对毗邻区、专属经济区的管辖权并不是基于领土, 而是基于功能, 也就是“为特定用益而设立的事务管辖权”, 沿海国并非拥有全面的、等同于主权的

56 表格来源: 自绘。表格的绘制参考了魏智通著, 吴越、毛晓飞译: 《国际法》, 北京: 法律出版社 2012 年版, 第 365~410 页。

57 《海洋法公约》第 8 条第 2 款规定, 如果采用正常基线时在基线之外, 而采取直线基线时在基线以内的海洋内水, 应允许外国船舶的无害通过。

58 魏智通著, 吴越、毛晓飞译: 《国际法》, 北京: 法律出版社 2012 年版, 第 370 页。

59 《海洋法公约》第 2 条第 1 款规定, 沿海国的主权及于其陆地领土、内水、群岛水域及领海。

60 实际上, 从空间秩序的视角来看, 主权的概念乃是一个陆地性的观念。它是一个大陆性国家的概念。主权朝向海洋获得进展在实践中和理论上获得一种确定性并成为一种明确的习惯, 是近 100 年的事情。参见 C. 施米特著, 林国基、周敏译: 《陆地与海洋——古今之“法”变》, 上海: 华东师范大学出版社 2006 年版, 第 75 页。

61 例如《海洋法公约》第 77 条第 1 款规定, 沿海国为勘探大陆架和开发其自然资源的目的, 对大陆架行使主权权利。

62 例如《海洋法公约》第 56 条第 1 款规定, 沿海国对工人岛屿、设施和结构的建造和使用、海洋科学研究、海洋环境的保护和保全等事项行使管辖权。

63 例如《海洋法公约》第 33 条第 1 款规定, 沿海国可在其毗邻区行使一定事项的管制。

权利,而仅仅是部分的利用垄断以获取部分海洋区域的价值,沿海国有权禁止别国行使属地管辖权并不改变其部分的事务管辖本质。⁶⁴这也就很好地理解了《海洋法公约》中对大陆架的表述:“沿海国…对大陆架行使主权权利。”这种主权权利的来源是沿海国陆地领土的延伸,这有别于事务管辖权,尽管主权权利还不能等同于主权。

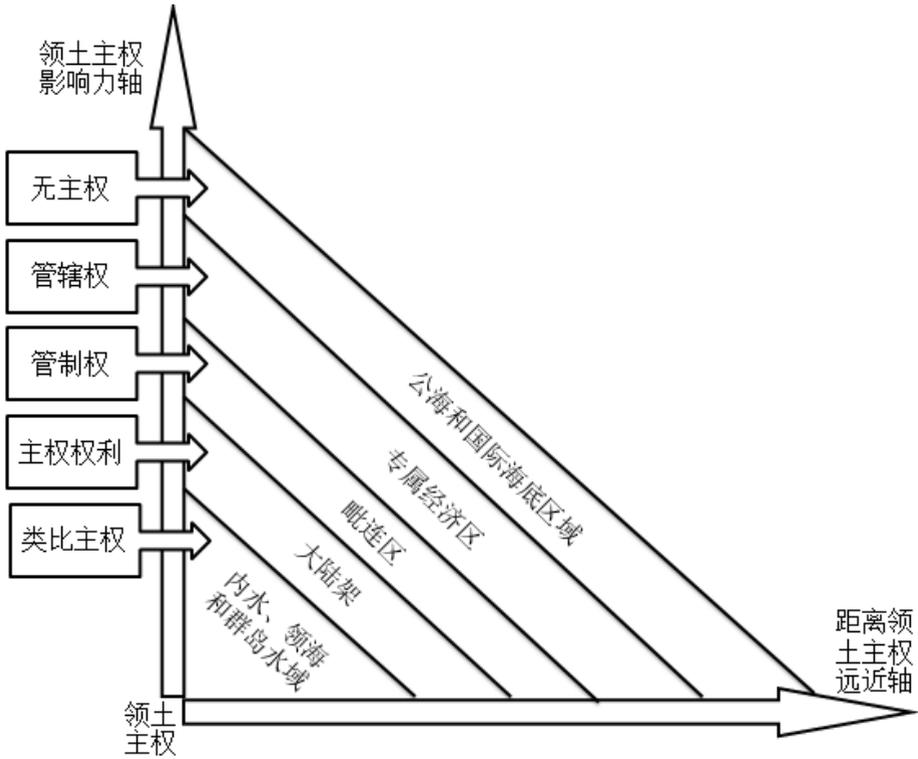


图 1 领土主权对海洋区域影响力随海洋区域距领土主权关系示意图⁶⁵

64 魏智通著,吴越、毛晓飞译:《国际法》,北京:法律出版社2012年版,第369页。

65 图表来源:自绘。

表2 《海洋法公约》“适当顾及”种类表⁶⁶

类型	所处《海洋法公约》位置	
行使公海自由“适当顾及”公海自由	第 87 条第 2 款	
行使海洋权利“适当顾及”公海自由	第 27 条第 4 款;第 60 条第 3 款 a 项	
行使公海自由“适当顾及”海洋权利	第 39 条第 3 款 a 项	
行使海洋权利“适当顾及”海洋权利	第 56 条第 2 款;第 58 条第 3 款;第 60 条第 3 款 a 项; 第 79 条第 5 款;第 142 条第 1 款	
其他“适当顾及”类型 ⁶⁷	为了保护海洋环境而“适当顾及”	第 234 条
	为了保护海洋鱼类或生物资源而“适当顾及”	第 66 条第 3 款 a 项
	为了地域公平性或照顾发展中国家利益而“适当顾及”	第 161 条第 4 款; 第 167 条第 2 款;附件 2 第 2 条第 1 款;附件 4 第 5 条第 1 款和第 2 款
	为了厉行节约或提高效率而“适当顾及”	第 162 条第 2 款;第 163 条第 2 款
	为了促进海洋科学技术发展和转让的合作而“适当顾及”	第 267 条

66 图表来源:自绘。

67 此种“适当顾及”由于基本不涉及《海洋法公约》权利或自由而不在本论文的讨论范围之内,故笔者统归为一类。

A Discussion on “Due Regard” in the United Nations Convention on the Law of the Sea

ZHANG Guobin*

Abstract: The 1982 United Nations Convention on the Law of the Sea (UNCLOS) has established a legal order for seas and oceans. In this legal order, rights and freedoms of the sea interact with each other. The term “due regard”, derived from customary international law, international treaties and general legal principles, is a principle of the UNCLOS, which is used to settle the conflict between the exercise of rights and freedoms. It is comprised of two components: 1) “regard”, meaning that a State should respect and take into account the interests of other States whilst exercising its maritime rights or freedoms; 2) “due” regard. A State analyzes and balances the interests between exercising its own rights or freedoms and realizing and taking into account the interests of other States, so as to meet the criteria of due regard. The criteria of due regard is the weighing of interests by authoritative policy-makers in the global community in accordance with internationally-accepted criteria and actual conditions. “Due regard” is also applied in international law practices.

Key Words: Due regard; Legal order; Freedom of the high seas; Maritime rights

Opening the present discussion with the United Nations Convention on the Law of Sea (UNCLOS), it is known that urged by “the desire to settle, in the spirit of mutual understanding and cooperation, all issues relating to the law of the sea”, the UNCLOS, the most authoritative convention in this field, establishes “a legal order for the seas and oceans.”¹ This legal order is not created in vacuum but

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1 United Nations Convention on the Law of Sea, Preamble, para. 4.

through “the codification and progressive development of the law of the sea”.² In this legal order, the seas and oceans are artificially divided into a variety of areas and zones, such as territorial sea and archipelagic waters, where the States exercise their sovereignty; contiguous zone, exclusive economic zone and continental shelf, which have special legal status; and the high seas and the common heritage of mankind – international seabed area, which do not belong to any State. In this sense, the legal order does not divide the marine areas clearly, but in an abstract and ambiguous manner. Rights and interests intertwine in these arenas. There are still quite a few abstract and indefinite contents in the UNCLOS, as the convention is a result of compromise between varying and disparate interests of States. Therefore, it is possible that there may be some conflicts when the States exercise their rights and freedoms. Fortunately, in the UNCLOS, which maintains the maritime order and meets the legal requirements of the global community on a continuous and sustainable basis, there is a lubricant – “due regard”,³ which is generally translated as “适当顾及” in Chinese academia. It requires that the States pay “due regard” to the rights and freedoms of other States when exercising their own UNCLOS endorsed maritime rights and freedoms. Question arises at this juncture as the status of “due regard” in the UNCLOS. How could its goals be achieved? This article analyzes the term “due regard” in the context of the UNCLOS.

I. “Due Regard” in the UNCLOS and Its Origins

The term “due regard” seems to be used mostly in the context of exercise of rights. The exercise of rights certainly has limits, but the scope of such limits is so obscure and abstract and lacks rationality, that there seems to be no answer to the specific issues concerning the exercise of rights; this is how one is reminded of the term “due regard”.⁴ In order to analyze as to how the term “due regard” is referenced in the UNCLOS, following is a table listing its appearances across the convention. It’s after this documentation that the origin and the development of the term will be discussed.

2 United Nations Convention on the Law of Sea, Preamble, para. 7.

3 Jiang Huangchi, *General Introduction to the International Law of the Sea*, Taipei: Sharing Publishing, 2001, p. 18. (in Chinese)

4 Ian Brownlie, translated by Zeng Lingliang and Yu Mingyou etc., *Principles of Public International Law*, Beijing: Law Press China, 2007, p. 392. (in Chinese)

A. “Due Regard” in the UNCLOS

There are altogether nineteen appearances of “due regard” in the UNCLOS, which are presented in the following table:

Scope	Article	Provisions
Territorial sea	Article 27(4)	In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation.
Straits used for international navigation	Article 39(3)(a)	State aircraft will at all times operate with due regard for the safety of navigation when in transit passage.
Exclusive economic zone	Article 56(2)	In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States.
	Article 58(3)	In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State.
	Article 60(3)	Removal of installations or structures constructed in the exclusive economic zone shall also have due regard to fishing, the protection of the marine environment and the rights and duties of other States.
	Article 66(3)(a)	The States, when achieving agreement on terms and conditions of fishing anadromous stocks, shall give due regard to the conservation requirements and the needs of the State of origin in respect of these stocks.
Continental shelf	Article 79(5)	When laying submarine cables or pipelines, States shall have due regard to cables or pipelines already in position. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.
High seas	Article 87(2)	The freedom of the high seas shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas.
International seabed area	Article 142(1)	Activities in the Area, as provided in the UNCLOS Part XI, with respect to resource deposits in the Area which lie across limits of national jurisdiction, shall be conducted with due regard to the rights and legitimate interests of any coastal State across whose jurisdiction such deposits lie.

(Continued from the previous page)

International seabed area	Article 148	The effective participation of developing States in activities in the Area shall be promoted as specifically provided for in this Part XI, having due regard to their special interests and needs.
International seabed area	Article 161(4)	Members of the Council shall be eligible for re-election, but due regard should be paid to the desirability of rotation of membership.
International seabed area	Article 162(2) (d)	The Council shall establish, as appropriate, and with due regard to economy and efficiency, such subsidiary organs as it finds necessary for the exercise of its functions.
International seabed area	Article 163(2)	If necessary, the Council may decide to increase the size of either Commission having due regard to economy and efficiency.
International seabed area	Article 167(2)	In the recruitment and employment of the staff of the Authority, due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.
Protection and preservation of the marine environment	Article 234	When adopting and enforcing non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, the States shall give due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.
Development and transfer of marine technology	Article 267	States, in promoting cooperation in the development and transfer of marine technology, shall have due regard for all legitimate interests.
Commission on the Limits of the Continental Shelf	Article 2(1), Annex II	In the election of the members of the Commission on the Limits of the Continental Shelf, due regard should be given to the need to ensure equitable geographical representation.
Statue of the Enterprise	Article 5(1), Annex IV	In the election of the members of the Enterprise’s Governing Board, due regard shall be paid to the principle of equitable geographical distribution.
Statue of the Enterprise	Article 5(2), Annex IV	Due regard shall be paid to the principle of rotation of membership in the Enterprise’s Governing Board.

As is indicated by the table, the term “due regard” is referred frequently in several parts of the UNCLOS, for example, in the provisions on territorial sea, straits used for international navigation, exclusive economic zone, continental shelf, high seas, and international seabed area. Moreover, the term also appears in some of the provisions laying out procedures such as the election of the members of the Commission on the Limits of the Continental Shelf and the recruitment and employment of the staff of the International Seabed Authority.

B. The Origins of “Due Regard” in International Law

In the ancient times and the first half of the medieval period, mankind had limited capability and impact on seas and oceans due to the backward science and technology and the claims for rights on oceans were confined to coastal fishing and navigation. Seas and oceans, like skies and air, were possessed by all. In Roman law, the freedom of the sea had been prescribed as a legal principle. However, in 1493, and later in 1506, after the Pope ordered that the oceans be partitioned between Portugal and Spain, other States such as Britain, Denmark, and Venice argued for “mare clausum” to contest for maritime supremacy and to safeguard their own interests. Therefore, the seventeenth century was the climax of mare clausum.⁵ Resultingly, the situation began to change in the eighteenth century. Hugo Grotius, the famous Dutch jurist, presented the concept of “the freedom of the seas” in his classical work – *The Freedom of the Seas, or, the Right Which Belongs to the Dutch to Take Part in the East Indian Trade*.⁶ Even though it evolved over the centuries, the freedom-of-the-seas is still identified as a foundational principle in modern law.⁷

The Convention on the High Seas, which was concluded in Geneva, Switzerland in 1958, has established the freedom-of-the-seas as a principle through

5 Ian Brownlie, translated by ZENG Lingliang and YU Mingyou etc., *Principles of Public International Law*, Beijing: Law Press China, 2007, p. 203. (in Chinese)

6 Hugo Grotius believed that, even if Portugal had sovereignty over the waters where the Dutch vessels were passing, and would like to block the passage of those vessels and prohibit their trading in the area, it should not take any actions that would be harmful to the Dutch. Hugo Grotius, translated by Ma Zhongfa, *The Freedom of the Seas, or, the Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, Shanghai: Century Publishing Group and Shanghai Renmin Press, 2013, p. 12. (in Chinese)

7 Robert Jennings and Arthur Watts eds., translated by Wang Tiejia etc., *Oppenheim's International Law (Volume 1 Part II)*, Beijing: Encyclopedia of China Publishing House, 1998, p. 156. (in Chinese)

codification in an international treaty. Article 2 of the Convention on the High Seas provides that:

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States: (1) Freedom of navigation; (2) Freedom of fishing; (3) Freedom to lay submarine cables and pipelines; (4) Freedom to fly over the high seas. These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

It can be seen that the Convention on the High Seas contains an expression similar to “due regard” as in the UNCLOS, namely, “reasonable regard”. These two different expressions, however, convey the same meaning. Thus, one can see that the term, “due regard” is not a concept created by the UNCLOS, and can be traced back to earlier times in terms of its meaning. Also, Robert Jennings and Arthur Watts believe that the customary international law governing the high seas requires that such freedom be exercised with “due regard” to that of other States.⁸

Up to now, although the total area of the high seas is narrowing gradually, the principle of the freedom of the high seas has not changed in essence. Article 87(1) of the UNCLOS lists a few freedoms in the high seas, including freedom of navigation; freedom of overflight; freedom to lay submarine cables and pipelines; freedom to construct artificial islands and other installations; freedom of fishing; freedom to conduct scientific research. However, Article 87(1) does not include all the freedoms of the high seas, and there are also other freedoms in addition to those listed. Basically, various freedoms of the high seas are permitted by the freedom-of-the-high-seas principle.⁹ But exercise of these freedoms shall not pose unreasonable hindrances to others. Once there is any conflict or hindrance between the States,

8 Robert Jennings and Arthur Watts eds., translated by Wang Tieya etc., *Oppenheim's International Law (Volume 1 Part II)*, Beijing: Encyclopedia of China Publishing House, 1998, p. 216. (in Chinese)

9 The principle of the freedom of the high seas does not *per se* set limits on the methods for the use of the high seas, so the advocates for setting the limits have to resort to other grounds. See Huang Yi, *International Law of the Sea*, Taipei: Bohaitang Culture Company, 2002, p. 80. (in Chinese)

they should coordinate to reduce the conflict or hindrance within reasonable limits.¹⁰ Hence, the “due regard” criteria becomes necessary.

In 1958, during the drafting of the Geneva conventions on the law of the sea by the International Law Commission of the United Nations, “due regard” was not mentioned at first, but was included upon the British proposal. The British delegates referred to it as “reasonable regard”. At the Third United Nations Conference on the Law of the Sea, a term similar to “due regard” appeared in the informal single negotiating text, and was originally referred to as “due consideration”; after the recommendations of the Drafting Committee, the term was changed to “due regard”.¹¹ Therefore, Article 87(2) of the UNCLOS provides that “[t]hese freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.” Moreover, the “due regard” criteria is extended to sea areas such as territorial sea, exclusive economic zone and continental shelf.

We may also trace “due regard” in State practice. State practice is an unwritten code of conduct, and is gradually formed through the continuous practices of the States in their international intercourse and is recognized as law by the global community.¹² As a primitive way of legislation, State practice evolves on a continuous basis and does not include detailed and definite contents.¹³ Although there are no exact expressions as “due regard” in State practice, it is easy to find other phrases or terms which essentially have the same meaning. The point of “the law of the high seas ... which are designed, not to limit or restrict the freedom of the high seas, but to safeguard its exercise in the interests of the entire international community” has been identified as customary international law by the International Law Commission of the United Nations.¹⁴ “Due regard” requires that the States shall note and take into account the interests of other States when exercising

10 Huang Yi, *International Law of the Sea*, Taipei: Bohaitang Culture Company, 2002, p. 80. (in Chinese)

11 Jiang Huangchi, *General Introduction to the International Law of Sea*, Taipei: Xuelin Culture Co., Ltd, 2001, p. 514. (in Chinese)

12 Wang Huhua ed., *Public International Law*, Beijing: Peking University Press, Shanghai: Shanghai Renmin Press, 2008, p. 16. (in Chinese)

13 Malcolm N. Shaw, translated by Bai Guimei, *International Law*, Beijing: Peking University Press, 2011, p. 58. (in Chinese)

14 Report of the International Law Commission: Covering the Work of Its Eighth Session, *American Journal of International Law*, Vol. 51, 1957, pp. 154, 206.

their own freedoms of the high seas, and refrain from such acts which may affect other States in the exercise of their own rights. Its basic concept is to balance the interests of the States in their use of the sea and those of the entire international community.¹⁵ A State should strengthen cooperation with other States according to the general principle of “using the high seas in a harmonious way”¹⁶ when exercising its maritime rights and freedoms.

II. The Status of “Due Regard” in International Law and the Criteria of Weighing

The earlier passages have discussed “due regard” in the UNCLOS along with the origins of the term, which has helped in forming the preliminary understanding of the term. The following part revolves around the status of “due regard” in international law and the criteria of weighing.

A. The Status of “Due Regard” in International Law

A State shall not ignore other State’s rights while exercising its own; it means that those who exercise their rights shall not abuse them. This is one of the basis of the obligations in international law.¹⁷ There are no criteria on good faith, rationality, and normal administration for “due regard” in the UNCLOS, which needs to be supplemented by the theory of “abuse of rights”.¹⁸ There are no rights without obligations, nor freedoms without restrictions. In this sense, “due regard” is provided by the UNCLOS as a restriction and an obligation when the States exercise their maritime freedoms and rights. Actually, rights and freedoms have their borders. “Due regard” seems to have become a flexible requirement for the States to exercise their rights or freedoms. But its significance extends beyond this.

15 Jiang Huangchi, *General Introduction to the International Law of Sea*, Taipei: Xuelin Culture Co., Ltd, 2001, p. 515. (in Chinese)

16 Chen Litong, *Discussion on the Law of the Sea*, Taipei: Yuanzhao Publishing Co., Ltd, 2002, p. 332. (in Chinese)

17 See B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London: Steven and Sons Ltd, 1953, pp. 121~136; Gutteridge, Abuse of Rights, *Cambridge Law Journal*, Vol. 5, 1933, p. 22; Schwarzenberger, Uses and Abuses of the Abuse of Rights, *Transactions of the Grotius Society*, Vol. 42, 1957, p. 147.

18 Ian Brownlie, translated by Zeng Lingliang and Yu Minyou etc., *Principles of Public International Law*, Beijing: Law Press China, 2007, p. 392. (in Chinese)

Another term – “comity”, which often seems to be discussed together with “due regard”, may be recalled here. A frequently-referenced case of U.S. Supreme Court indicates:

*Comity, in the legal sense, is neither a matter of absolute obligation ... nor of mere courtesy and goodwill ... it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons that are under the protection of its laws.*¹⁹

Therefore, although there are no clear descriptions on the meaning and essence of comity and on the relationship between comity and “due regard”, it cannot be denied that the UNCLOS has established “due regard” as an active legal directive instead of a merely passive obligation. In this sense, in the high seas, naval ships of a State may show respect and be courteous to those of other States for the goodwill (comity), and they shall have due regard to the freedom of high seas granted by the UNCLOS to every vessel.²⁰

In conclusion, “due regard” in the UNCLOS seems to be an obscure but an active requirement on the part of all the States. It is an “obscure” term because it does not provide explicit guidance for conduct, nor does it define the legal consequences; the “ambivalent”²¹ term is more a principle throughout the UNCLOS than a UNCLOS regulation.²² According to Professor Jiang Huangchi, the principle of due regard is a basic principle which restricts the freedom of the

19 See *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

20 International Law Association (American Branch) Law of the Sea Committee, Terms in the 1982 U. N. Convention on the Law of the Sea or in Convention Analysis that the Convention Does Not Define, in *2009-2010 Proceedings of the American Branch of the International Law Association*, p. 374.

21 Robert Jennings and Arthur Watts eds., translated by Wang Tiewa etc., *Oppenheim's International Law (Volume I Part II)*, Beijing: Encyclopedia of China Publishing House, 1998, p. 237. (in Chinese)

22 According to general theory on jurisprudence, the rules of law, which carry clear and specific contents and comprise of the three elements: assumption, behavior model and legal consequence, are commonly applied to cases; the principles of law, which are more abstract, and do not provide for specific rights, obligation and responsibility, have wider coverage. Obviously, “due regard” should be categorized as principles of law instead of rules of law. See Robert Alexy, translated by Zhu Guang and Lei Lei, *Law, Rationality and Discourse*, Beijing: China Legal Publishing House, 2011, pp. 176-199. (in Chinese)

high seas. States should take into account the legitimate interests of others whilst exercising their own freedoms and rights in the high seas.²³ However, this author differs with Professor Jiang Huangchi in that the principle of due regard is a basic principle to restrict or put limitations on not only the freedom of the high seas, but also other maritime rights and freedoms, because the term appears in the provisions on the “freedom of the high seas”, and also in the provisions on territorial sea, exclusive economic zone, continental shelf etc. It guarantees that the whole global community is entitled to their rights, and all the members enjoy their maritime rights and interests.²⁴

B. Interpretation of “Due Regard” and the Criteria of Weighing

It would be necessary to interpret the term “due regard” in the UNCLOS before analyzing its exact connotations. Articles 31 and 32 of the Vienna Convention on the Law of Treaties provides the general rules of interpretation of treaties. First, a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty. In *Black’s Law Dictionary*, “due” means appropriate, ordinary and reasonable,²⁵ and “regard” refers to notice, care or consideration.²⁶ “Due regard”, interpreted in its ordinary meaning, means “reasonable consideration”. Second, the ordinary meaning of a term in a treaty should not be defined in an abstract way, but shall be interpreted in its context and in the light of the treaty’s object and purpose. The term, “due regard”, has occurred quite a few times in the provisions concerning high seas, territorial sea, exclusive economic zone, contiguous zone, continental shelf etc. in the UNCLOS; it runs throughout the UNCLOS and manifests in essence the purpose of the UNCLOS; it helps to guarantee that the State Parties can exercise their maritime rights granted by the UNCLOS among the diverse and complex systems of the law of the sea. Moreover, interpretation has to be done in good faith – a treaty shall be interpreted in a honest and trustworthy way and in strict compliance with the provisions of the UNCLOS, instead of being done arbitrarily.

23 Jiang Huangchi, *General Introduction to the International Law of Sea*, Taipei: Xuelin Culture Co., Ltd, 2001, p. 514. (in Chinese)

24 International Law Commission, Covering the Work of Its Eighth Session, *American Journal of International Law*, Vol. 51, 1957, pp. 154, 206.

25 *Black’s Law Dictionary*, 9th ed., Minnesota: West Publishing Company, 2009, p. 1395.

26 *Black’s Law Dictionary*, 9th ed., Minnesota: West Publishing Company, 2009, p. 1395.

The term in question is comprised of two components: firstly, “regard”, namely, a State should realize and take into account the interests of other States and other factors whilst exercising its maritime rights or freedoms, which is the precondition for the principle of “due regard”. Without “regard”, there would be no “due regard”. Secondly, “due” regard. “Due regard” in the UNCLOS is intended to balance the interests among the States; just as in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, the term is used to balance the rights and obligations of the neutral States.

Simply speaking, it requires that the States, after realizing and taking into account the interests of other States and other factors, analyze and weigh their own rights or freedoms, and find appropriate course of actions.²⁷ This weighing of interests may take place during the negotiations between the stakeholders and may lead to conclusion of *ad hoc* agreements or supplementary agreements of the UNCLOS.²⁸ For example, the UNCLOS provides that the States shall have due regard for the interests of other States in their exercise of the freedom of the high seas.²⁹ It means that the States shall foremost realize and take into account the interests of other States in their exercise of the freedom of the high seas and not to act in a manner which hinders them. They shall also avoid to act in a way that adversely impacts other States to enjoy the freedoms of the high seas. Moreover, the Contracting States should evenly consider the freedoms and interests of all States when exercising their own freedoms at the high seas.

Here comes the question that, although, it would not be difficult to have regard to the maritime rights and interests of other Contracting States, but it is not an easy task to have “due” regard. In other words, what’s the criteria of “due” regard?

Let’s probe into the specific provisions and make further analysis. Taking Article 87 of the UNCLOS as an example:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia,

27 International Law Association (American Branch) Law of the Sea Committee, Terms in the 1982 U.N. Convention on the Law of the Sea or in Convention Analysis that the Convention Does Not Define, in *2009-2010 Proceedings of the American Branch of the Law Association*, p. 374.

28 UNCLOS Article 311(2) to (6).

29 UNCLOS Article 87(2).

both for coastal and land-locked States:

(a) freedom of navigation;

(b) freedom of overflight;

(c) freedom to lay submarine cables and pipelines, subject to Part VI;

(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;

(e) freedom of fishing, subject to the conditions laid down in section 2;

(f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

It means that, the States, while exercising their freedom of the high seas, shall have due regard not only to the same freedom which other States are entitled to, but also their entitlement to other freedoms. It seems that due regard should also be paid to their entitlement to other legitimate uses of an area. These uses may not be freedoms enjoyed by all States and may be some kind of exclusive rights, such as the development of the resources in the exclusive economic zone and continental shelf.³⁰

Then how should we understand “due”? Who would decide whether it is “due” or not? First of all, a State shall not decide unilaterally the appropriateness in its exercise of the freedom of the high seas, and shall not impose its decision on the international community. The workings and directions of international law should be based on the consent of and wide acceptance by the States even on the basis of compromise, which results in the unity and equity in the international legal order, instead of being favorable to any one State. Therefore, in specific cases, two elements are needed to judge the rationality of a claim: 1) authoritative decision-maker (generally international community in terms of customary international law); 2) internationally-accepted criteria. Unified and equitable criteria could only be made by authoritative decision-maker in accordance with internationally-

30 Robert Jennings and Arthur Watts eds., translated by Wang Tiewa etc., *Oppenheim's International Law (Volume 1 Part II)*, Beijing: Encyclopedia of China Publishing House, 1998, p. 161. (in Chinese)

accepted standards after weighing all the relevant factors.³¹ For example, if conflicts arise between the States while exercising their rights (freedoms), and the parties concerned resort to the International Court of Justice, the so-called “due regard” criteria claimed only by the parties concerned should not be the basis upon which the case will be decided. The discretion of the judge to determine the appropriateness of “due regard” should lie in the International Court of Justice.

Moreover, it would be difficult to lay down in advance what would be a reasonable accommodation of the interests of the States involved, and each case would have to be decided upon its own merits.³² In case of any conflicts between different freedoms of the high seas, importance of each freedom should be compared and weighed (including their importance to the whole global community and to the parties involved in the dispute of these freedoms), namely, case by case weighing of the actual interests involved in the circumstances in question.³³ For example, although placing fishing nets in the sea is allowed as a freedom of the high seas, it should be forbidden in busy sea routes, as the freedom of navigation in the high seas would obviously be jeopardized.³⁴ In view of the characteristics of the freedoms of the high seas, we should also consider whether other freedoms of the high seas should be dealt with differently when paying “due regard”. The protection of the freedoms of navigation and fishing is put on high priority, which has been fully reiterated in the authoritative works on international law.³⁵ It is equally common knowledge, however, though on occasion reluctantly admitted, that a parallel flow of decisions has protected a great variety of claims to authority and control on the high seas for the protection of security, health, revenue laws, economic welfare, and so on, even against protests that they interfere with navigation and fishing.³⁶ To resolve the conflicts over the claims, “appropriateness”

31 McDougalt and Burke, *The Public Order of the Oceans*, The Hague: Martinus Nijhoff Publishers, 1965, p. 48.

32 Ruth Lapidot, Freedom of Navigation and the New Law of the Sea, *Israel Law Review*, Vol. 10, 1975, p. 456.

33 Jiang Huangchi, *General Introduction to the International Law of Sea*, Taipei: Xuelin Culture Co., Ltd, 2001, p. 513. (in Chinese)

34 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, p. 206.

35 Robert Jennings and Arthur Watts eds., translated by Tiewa Wang etc., *Oppenheim's International Law (Volume I Part II)*, Beijing: Encyclopedia of China Publishing House, 1998, p. 237. (in Chinese)

36 Myres S. McDougal and Robert A. Schlei, The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security, *Yale Law Journal*, Vol. 64, 1954-1955, p. 648.

could be a simple yet universal and indispensable criterion for decision-makers to adjudge.

In the foregoing part, an analysis on specific criteria of “due regard” principle has been made by referring to specific provisions of the UNCLOS. These criteria are concerned with the weighing of the actual interests involved in the circumstances in question by authoritative decision-makers in accordance with the internationally-accepted standard – “appropriateness”.

III. The Practical Application of the “Due Regard” Principle

The following part elaborates upon the application of “due regard” principle in international practices by listing some cases from the International Court of Justice and the International Tribunal for the Law of the Sea.

Case I: Nuclear Tests Case (Australia & New Zealand v. France)³⁷

The facts are as follows: France carried out atmospheric nuclear tests in French Polynesia in the South Pacific during 1966 to 1972. France made a statement in 1973 that it plans to conduct further nuclear tests in the high seas area of the South Pacific. On May 9, 1973, Australia and New Zealand each filed an application against France to the International Court of Justice³⁸ contending that France violated the freedom of the high seas by occupying a large area in the high seas of the South Pacific for nuclear tests, prohibiting foreign vessels from entering the dangerous zone and using force to hinder the course of the vessel that had entered the zone to protest against the nuclear tests.³⁹

Coming back to the central focus of this paper, France’s nuclear tests in the

37 *ICJ Reports*, 1974, pp. 253~457.

38 The facts of the case can be referred to Teaching and Research Department of China University of Political Science and Law ed., *Comments on and Analysis of International Public Law Cases*, Beijing: CUPL Press, 1995, pp. 180~181. (in Chinese)

39 The issue of nuclear tests in the high seas is also discussed in the context of nuclear disarmament, marine environmental protection, other relevant international treaties and international customs. This paper limits its discussion to the impact on the freedom of the high seas.

high seas was a demonstration of its exercise of the freedom of the high seas,⁴⁰ but here comes a question: had France paid “due regard” to other States’ interests in their exercise of the freedom of the high seas when it exercised its freedom to conduct nuclear tests.

Now we may apply the above-mentioned criteria for “due regard”. Firstly, we should determine whether France had paid “regard” to other States’ exercise of the freedom of the high seas, namely whether France had realized and taken into account other States’ right to exercise such freedom and their interests. For its nuclear tests, France excluded the fishing areas and busy sea routes, and took safety warning measures, so as to prevent damages to the vessels of other States. This indicates that France did actually pay regard to other States’ right to exercise such freedom and their interests.

Moreover, a more tricky issue is whether France had paid “due” regard to other States’ right to exercise such freedom and their interests. Given the particular circumstances and relevant factors of the case, we should focus on the following aspects first and foremost: 1) the extent of pollution in the sea area before French nuclear tests; 2) the necessity for France to carry out nuclear tests in the sea area; 3) the area of the zone for nuclear tests marked as dangerous, and to what extent did it impact the navigation in the high seas; 4) fishing and overflight in that zone; 5) other nuclear tests in the same period, and preventive measures taken to reduce or eliminate any possible harmful consequences in those tests.⁴¹ As far as the case is concerned, we may divide the issue into three phases: 1) a wide zone demarcated as dangerous in the high seas before the nuclear tests; 2) nuclear tests; 3) impact after the nuclear tests.

After fully considering relevant factors and particular circumstances of the case, it’s hard to say that France paid “due regard” to other States’ freedoms and interests in the high seas during the three phases of its nuclear tests. Although it had paid regard to other States’ freedoms of fishing and navigation during its nuclear tests, these tests could be safely conducted only after completely preventing other States to use the sea area. It would never be an absolute rule to prohibit the

40 The 1963 Nuclear Test Ban Treaty prohibited nuclear weapon tests in the high seas and the lands, but France was not a State Party to the Treaty, and treaties, unless codifying customary international law, are not binding on all the States including the non-Party States. See Malcolm N. Shaw, translated by Bai Guimei, *International Law*, Beijing: Peking University Press, 2011, p. 479. (in Chinese)

41 J. W. L. Swan, *An Explosive Issue in International Law: The French Nuclear Tests*, *Melbourne University Law Review*, Vol. 9, 1973-1974, p. 296.

exclusive use of the high seas, we have to consider its “extent”, “proportion”, “rationality” etc.⁴² In view of the wide area and the long time span of France’s exclusive use of the high seas to conduct the tests, it would be difficult to say that its use of the high seas is appropriate.

However, the International Court of Justice ruled that since France announced subsequently that it had dropped the plans for conducting further nuclear tests in the high seas area of the South Pacific, the claim had lost its object and that the Court was not called upon to give any decision. In such case, the criteria for the Court to give decisions on “due regard” would be particular circumstances of the case and the appropriateness of relevant factors.⁴³

Case II: M/V “SAIGA” (No. 2), Saint Vincent and the Grenadines v. Guinea⁴⁴

The *M/V SAIGA* Cases (Nos. 1 & 2) are the first cases heard by the International Tribunal for the Law of the Sea since its establishment. The *M/V Saiga* was a tanker owned by Tabona Shipping Co. Ltd. (Nicosia, Cyprus), and registered in Saint Vincent and the Grenadines. On October 27, 1997, the *M/V Saiga* crossed the maritime boundary between Guinea-Bissau and Guinea, entered into the exclusive economic zone of Guinea and refueled three fishing vessels. On October 28, the *M/V Saiga* was detained by the patrol ship of Guinea government as it was found south of the southern limit of the EEZ of Guinea. The *M/V Saiga* and its crewmen were brought to Conakry, Guinea, and the shipmaster was detained. Soon after that, the Guinea government instituted criminal proceedings in its Tribunal of First Instance against the shipmaster of the *M/V Saiga*. On 13 November, 1997, Saint Vincent and the Grenadines filed an application to the International Tribunal for the Law of the Sea, under Article 292 of the United Nations Convention on the Law of the Sea, for the prompt release of the *M/V Saiga* and its crew. On December 4, the tribunal prescribed provisional measures, ordering that Guinea promptly release the crew and vessel upon the posting of reasonable bond by Saint Vincent and the Grenadines. On February 20, 1998, Saint Vincent and the Grenadines and Guinea reached an agreement to submit the dispute to the International Tribunal for the

42 E. D. Brown, Freedom of the High Seas versus the Common Heritage of Mankind: Fundamental Principles in Conflict, *San Diego Law Review*, Vol. 20, 1982-1983, p. 521.

43 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, pp. 206-207.

44 See the *M/V ‘SAIGA’ (No 2), Saint Vincent and the Grenadines v. Guinea, Merits, Judgment, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1 July 1999, International Tribunal for the Law of the Sea [ITLOS]*.

Law of the Sea again.

In the new application, Saint Vincent and the Grenadines claimed that detaining of *M/V Saiga* by Guinea violated its rights, and especially that Guinea did not pay due regard to the right of Saint Vincent and the Grenadines to enjoy freedom of navigation in Guinea's exclusive economic zone. Guinea argued that its actions did not violate the UNCLOS Article 56(2), and had paid due regard to the right of Saint Vincent and the Grenadines, and the vessels flying its flag, to enjoy freedom of navigation and other internationally lawful uses of the sea. It became one of the focuses of this case whether Guinea had paid due regard to the right of Saint Vincent and the Grenadines to enjoy freedom of navigation in Guinea's exercise of its rights in its exclusive economic zone.

Both the parties admitted that the *M/V Saiga* of Saint Vincent and the Grenadines refueled the fishing vessels in Guinea's exclusive economic zone. However, Saint Vincent and the Grenadines held that the *M/V Saiga* supplying the gas oil to fishing vessels constituted the exercise of the freedom of navigation. Guinea argued that Guinea's actions on the *M/V Saiga* were due to the vessel's "unwarranted commercial activities" instead of its navigation in Guinea's exclusive economic zone. In other words, Guinea had paid regard to the right of the *M/V Saiga* to enjoy the freedom of navigation, but it had to temporarily detain the vessel according to its own laws. Saint Vincent and the Grenadines believed that supply of gas oil during navigation had been a common practice; although the *M/V Saiga* had the intention to evade the customs, Guinea's detention of the vessel by using force can never in any case be a reasonable regard to the right of Saint Vincent and the Grenadines to enjoy the freedom of navigation. In the end, the Tribunal reached a decision on that issue on the basis of the law applicable to the particular circumstances of the case, without having to address the broader question of the rights of coastal States and other States with regard to bunkering in the exclusive economic zone. Consequently, it does not make any findings on that question.⁴⁵

In order to examine whether Guinea paid due regard to the right of Saint Vincent and the Grenadines to enjoy the freedom of navigation, the following aspects should be taken into consideration: 1) the right of navigation in the high seas is different from that in the exclusive economic zone of coastal States, because the vessels are subject to certain jurisdiction of the coastal States in their exclusive economic zones, while they are entitled to the freedom of navigation in the high

45 ITLOS, Judgment, Case No 2, ICGJ 336 (ITLOS 1999), 1 July 1999, paras. 136, 138.

seas; 2) generally, bunkering in the high seas is a right of the vessel and a necessity for navigation, which is seldom interfered with. But bunkering in the exclusive economic zone, especially supplying of gas oil to foreign fishing vessels, shall not violate the UNCLOS and the legal regime of the coastal State; 3) the question whether supply of gas oil to fishing vessels constitutes part of the freedom of navigation. Professor Zhao Lihai, also one of the judges of the case, appended his separate opinion in the judgment of the Tribunal, saying that “navigation” and “commercial activities during navigation” should be differentiated in international law, and that supply of gas oil to fishing vessels has no basis in the law of the sea.⁴⁶ To sum up, the author believes that Guinea, while detaining the *M/V Saiga* according to its laws to prevent the “unauthorized sale of gas oil to fishing vessels operating in its exclusive economic zone”, paid reasonable regard to the rights of Saint Vincent and the Grenadines.

Case III: Fisheries Jurisdiction (United Kingdom v. Iceland)⁴⁷

The facts of this case are as follows: Iceland is an island country located in north of the Atlantic Ocean and between Greenland and Norway. Iceland is surrounded by broad fishing areas. British fishing vessels had been traditionally fishing in this sea area but on July 14, 1971, Iceland announced that it would unilaterally extend its exclusive fisheries jurisdiction to a distance of 50 nautical miles from the baselines around its coasts, which would be effective from September 1, 1972. The United Kingdom opposed to the announcement and held that this measure has no basis in international law. Unable to solve the dispute through negotiations with Iceland, on April 14, 1972, the United Kingdom filed an application to the International Court of Justice, alleging that Iceland’s extension of its jurisdiction was against the international law.⁴⁸

Although Iceland did not appear in the court, the International Court of Justice considered that it had the necessary elements before itself to enable it to adjudicate in accordance with international law. Article 2 of the Convention on the High Seas declared the principle of the freedom of the high seas, saying that, all States are entitled to the freedom of fishing in the high seas, but it should be exercised with reasonable regard to the interests of other States in their exercise of the freedom

46 Zhao Lihai, Comments on M/V “SAIGA” Case (continued) – Essential Issues, *Peking University Law Journal*, No. 6, 1999, pp. 105~117. (in Chinese)

47 *ICJ Reports*, 1974, pp. 8~175.

48 The facts of the case can be referred to Liu Jiachen and Chen Zhizhong eds., *International Law Cases*, Beijing: Law Press China, 1998, pp. 198~200. (in Chinese)

of fishing in the high seas.⁴⁹ Vessels of the United Kingdom had been fishing in Icelandic waters for centuries, and they had done so in a manner comparable with their present activities for upwards of fifty years; Iceland had for its part admitted the existence of the United Kingdom's special rights and interests in fishing in the disputed waters. This indicated that Iceland had paid regard to the United Kingdom's freedoms and rights in the high seas. It is beyond doubt that Iceland had preferential rights in the exclusive fishery zone within the limit of 12 nautical miles,⁵⁰ and the United Kingdom had expressly recognized these rights. However, the fact that Iceland was entitled to such preferential rights was not sufficient to justify its claim unilaterally to exclude British fishing vessels from all fishing beyond the limit of 12 nautical miles. Keeping the high seas all for itself can never be considered as constituting reasonable regard for the interests of other States. The International Court of Justice considered that the most appropriate method to resolve the dispute was negotiation with an objective to delimit the rights and interests of the parties and determine on the basis of equity, questions such as those of catch-limitation, share allocations and related restrictions.⁵¹

IV. Conclusion

Coming back to the question at the beginning of the paper, there are actually two sets of rights and freedoms in the UNCLOS. One comprises of the freedoms associated with the high seas, which are listed unexhaustively in the UNCLOS to facilitate unilateral acts such as navigation, fishing, laying submarine cables or pipelines and other similar uses. The other set is comprised of rights with a variety of technical terms, such as territorial sea, contiguous zone, exclusive economic zone, continental shelf etc., which are clearly expressed in the UNCLOS to facilitate comprehensive or special claims. The rights belonging to the latter

49 At that time, the UNCLOS had not taken effect and there was no regime of exclusive economic zone.

50 At that time, within the fishery zone between the territorial sea and the high seas, the coastal States were entitled to exclusive jurisdiction over fisheries within the limit of 12 nautical miles. It is now considered to be customary international law. Please refer to Liu Jiachen and Chen Zhizhong eds., *International Law Cases*, Beijing: Law Press China, 1998, p. 202. (in Chinese)

51 Liu Jiachen and Chen Zhizhong eds., *International Law Cases*, Beijing: Law Press China, 1998, p. 203. (in Chinese)

would more or less interfere with the freedoms in the former.⁵² The principle of “due regard” should act as a catalyst to solve the conflicts within the first set of freedoms, within the second set of rights, and also among the freedoms & rights belonging to the two. The criteria for such a principle based on UNCLOS would be appropriateness, which should be the weighing of particular circumstances and relevant factors of cases.

V. Questions for Further Discussion

After a prolonged discussion on the topic, one is still riddled with the following questions:

1. Can the principle of “due regard” be said to have become part of the customary international law?
2. The criteria for “due regard” would be “appropriateness” considered with particular circumstances and relevant factors of cases. Are there rules about “appropriateness”?⁵³
3. Should the rights and freedoms under “due regard” considered in according to their sequence of priority or importance?

VI. Appendix

This article began with the discussion on the international legal regime for the sea created by the UNCLOS which has close relation to the topic - “due regard”. “Due regard” plays a significant role in every sea zone. As a continuation, it is necessary to discuss further two questions in the form of tables in the appendix: 1) what is the international legal regime created by the UNCLOS; 2) how the “due regard” is paid between the maritime rights and freedoms in the UNCLOS.

52 Myres S. McDougalt and Robert A. Schle, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, *Yale Law Journal*, Vol. 64, 1954-1955, p. 648.

53 For example, the U.S. Water Pollution Control Act provides that appropriate (proper) use of sea waters shall be deemed to include: the use for recreation and aesthetic, the use for public consumption, the use of fishes, other aquatic organisms and wild animals and plants, agricultural use and industrial use. See Federal Water Pollution Control Act, 33 U.S.C. § 1152 et seq. (1970).

Table 1 Source of the Rights in the Sea Areas in the UNCLOS⁵⁴

Sea areas	Nature	Limits	Sources of the rights
Internal waters	Status analogous to territorial sovereignty	Subject to the right of innocent passage under certain conditions ⁵⁷	Analogous to territorial sovereignty, but different from territorial sovereignty; derived from the control of coastal States instead of territory
Territorial sea		Subject to the right of innocent passage	
Archipelagic waters		Subject to the right of innocent passage and traditional fishing rights	
Continental shelf	The States have sovereign rights over it.		Sovereign rights, derived from the extension of the land territory
Contiguous zone	The States have limited control over it.		
Exclusive economic zone	The States have specific rights and jurisdiction in the area.		Derived from subject-matter jurisdiction created for specific purposes, instead of sovereignty ⁵⁸
High seas	The States do not have any rights or claims which allude to sovereignty over these areas.		They shall not be under the sovereignty of any State.
International seabed area			

Note: First, it is necessary to expound on Table 1. In the prior paragraphs, it

54 Sources of the table: self-drawn. See Wei Zhitong, translated by Wu Yue and Mao Xiaofei, *International Law*, Beijing: Law Press China, 2012, pp. 365~410. (in Chinese)

55 For example, Article 8(2) of the UNCLOS provides that where the establishment of a straight baseline has the effect of enclosing as internal waters areas which had not previously been considered as such by normal baseline, a right of innocent passage as provided in this Convention shall exist in those waters.

56 Wei Zhitong, translated by Wu Yue and Mao Xiaofei, *International Law*, Beijing: Law Press China, 2012, p. 370. (in Chinese)

has been noted that the sea areas have different legal statuses in the UNCLOS-created order of international law for the sea and the jurisdictions exercised upon them by the subjects of international law vary in extent. The jurisdiction of the greatest extent is the territorial sovereignty of a coastal State. Territorial sea and archipelagic waters undoubtedly come under the absolute sovereignty of the littoral State.^{57 58} Also, the UNCLOS contains expressions such as “sovereign rights”,⁵⁹ “jurisdiction”,⁶⁰ or “control”,⁶¹ these rights, though extensive, do not grant complete or absolute sovereignty. A coastal State’s jurisdiction over the contiguous zone and exclusive economic zone under the UNCLOS is not derived from its territorial holding, but is based on the functionality and utility, in other words it is a subject-matter jurisdiction created for specific purposes. The coastal State is entitled to have exclusive, but limited rights to exploit the resources in these sea areas, instead of possessing total ownership similar to sovereignty; the coastal States have the right to prohibit other States from exercising territorial jurisdiction, but this does not change its partial nature as subject-matter jurisdiction.⁶² Similarly, the expressions used in the UNCLOS, concerning the continental shelf, “the coastal State exercises over the continental shelf sovereign rights ... ” can be understood to mean that such sovereign rights are derived from the extension of the coastal States’ land territory, are different from subject-matter jurisdiction and do not equate to sovereignty.

57 Article 2(1) of the UNCLOS provides that a coastal State has sovereignty over its land territory, internal waters, archipelagic waters, and territorial sea.

58 In fact, from the perspective of spatial order, the concept of sovereignty is an idea on land and on continental countries. It is almost until the past century that the concept of sovereignty extends to seas and oceans and then become definite and clear both in practices and theories. See C. Schmidt, translated by Lin Guoji and Zhou Min, *Land and Sea*, Shanghai: East China Normal University Press, 2006, p. 75. (in Chinese)

59 For example, Article 77(1) of the UNCLOS provides that the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

60 For example, Article 56(1) of the UNCLOS provides that the coastal State has jurisdiction with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; the protection and preservation of the marine environment etc.

61 For example, Article 33(1) of the UNCLOS provides that in a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary.

62 Wei Zhitong, translated by Wu Yue and Mao Xiaofei, *International Law*, Beijing: Law Press China, 2012, p. 369. (in Chinese)

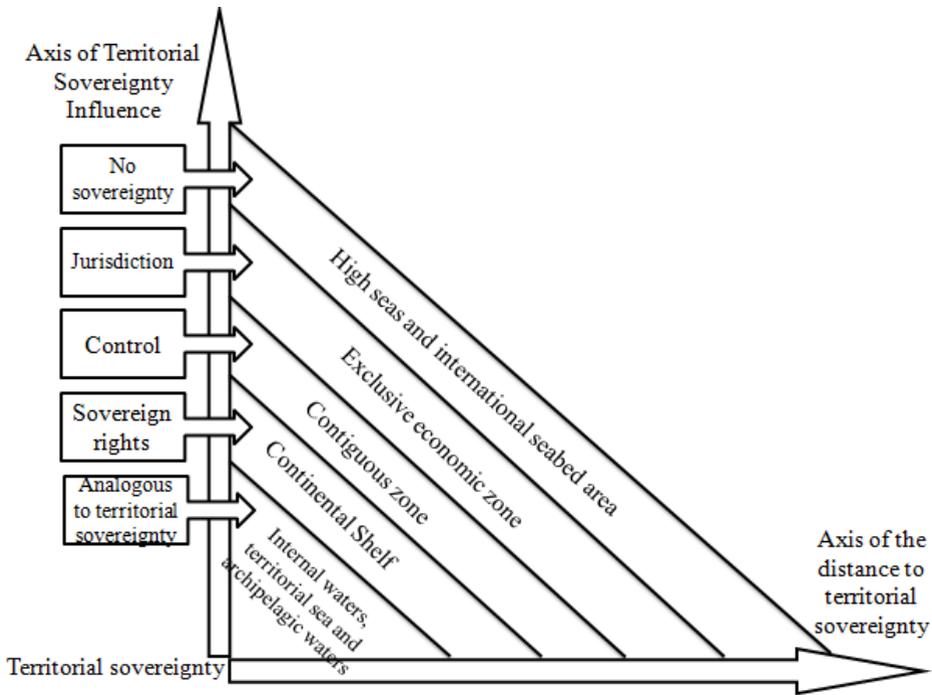


Fig. 1 The Relationship between the Influence of Territorial Sovereignty on Sea Areas and Sea Areas’ Distance to Territorial Sovereignty⁶³

Table 2 Categories of “due regard” in the UNCLOS⁶⁴

Category	Positions in the UNCLOS
Exercise the freedom of the high seas “due regard” to the freedom of the high seas	Article 87(2)
Exercise maritime rights “due regard” to the freedom of the high seas	Articles 27(4) and 60(3)(a)

63 Source of the figure: self-drawn.

64 Source of the table: self-drawn.

65 The other categories of “due regard” do not relate to the rights or freedoms given in the UNCLOS, and therefore are not discussed in this paper. For purpose of this paper, they have been grouped in only one category.

(Continued from the previous page)

Exercise the freedom of the high seas “due regard” to maritime rights	Article 39(3)(a)	
Exercise maritime rights “due regard” to maritime rights	Articles 56(2), 58(3), 60(3)(a), 79(5) and 142(1)	
Other categories of “due regard” ⁶⁷	“Due regard” to the protection of marine environment	Article 234
	“Due regard” to the protection of marine fishes or biological resources	Article 66(3)(a)
	“Due regard” to equitable geographical distribution or to particular consideration of the interests and needs of the developing States	Articles 161(4) and 167(2); Annex II Article 2(1); Annex IV Article 5(1) and (2)
	“Due regard” to economy and efficiency	Articles 162(2) and 163(2)
	“Due regard” for promoting cooperation of the development and transfer of marine science and technology	Article 267

Translator: YE Lin
Editor (English): Arpita Goswami

黎巴嫩与以色列海上油气争端与海洋划界方案

张维强* 郑凡**

内容摘要:自东地中海地区特别是黎凡特盆地发现油气资源以来,周边沿海国纷纷加速提出专属经济区主张。其中,黎巴嫩与以色列海上油气争端成为了影响地区安全的热点问题。本文从相关海域划界协议以及黎以双方的各自主张入手,指出黎以两国相邻海域划界包括领海划界和专属经济区划界两部分,尚未勘定陆上边界也是两国海域划界问题的关键。本文进一步考察了争端解决途径,指出合作开发是有效的解决方式,在考虑专属经济区的划界方案时,地理地质考量因素较少,而应充分顾及社会、经济等因素的考量,以获得公平的划界结果。

关键词:黎巴嫩与以色列 海上油气争端 海洋划界 衡平考量

1949年巴勒斯坦战争(又称第一次中东战争)后,黎巴嫩与以色列(以下简称“黎以两国”)只签订了停战协定,并未签署和平条约。在阿以冲突的背景下,黎以两国矛盾冲突不断。2000年联合国在两国之间勘定了一条“蓝线”,在“蓝线”的黎巴嫩一侧仍驻有联合国维和部队(联合国驻黎巴嫩临时部队)。¹2006年黎巴嫩战争平息后,黎以两国仍然未建立正式外交关系。自东地中海地区特别是黎凡特盆地发现油气资源以来,黎巴嫩与以色列关系进一步恶化。所发现的油气资源主要位于不同国家专属经济区的交界地带,引发塞浦路斯、黎巴嫩、以色列等国对油气资源的争夺。为明确资源归属,塞浦路斯率先与周边国家展开专属经济区划界谈判。而黎巴嫩与以色列作为海岸相邻国,至今未达成任何有关领海和专属经济区的划界协议。在油气资源开发前景的刺激下,黎以各自单方面向联合国提交了划定海上边界的坐标表,由此产生了海域划界的重叠主张。两国对重叠区域内油气资源的争夺一时剑拔弩张,成为影响地区安全的热点问题,受到国际社会的普遍关注。本文旨在分析黎以两国油气资源争端的产生,分析两国海洋划界

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1 联黎部队的背景资料与任务内容,下载于 <http://www.un.org/en/peacekeeping/missions/unifil/background.shtml>, 2014年8月20日。

问题的性质与症结，以及争端解决的机制，进而提出两国海域划界的方案。

一、黎巴嫩与以色列两国海上油气资源争端

(一) 黎凡特盆地地理地质概况

黎凡特盆地位于地中海东部，处于安那托利亚板块、阿拉伯板块和非洲板块的交界处。东临叙利亚、黎巴嫩和以色列海岸，西临埃拉托色尼海山，南临尼罗河

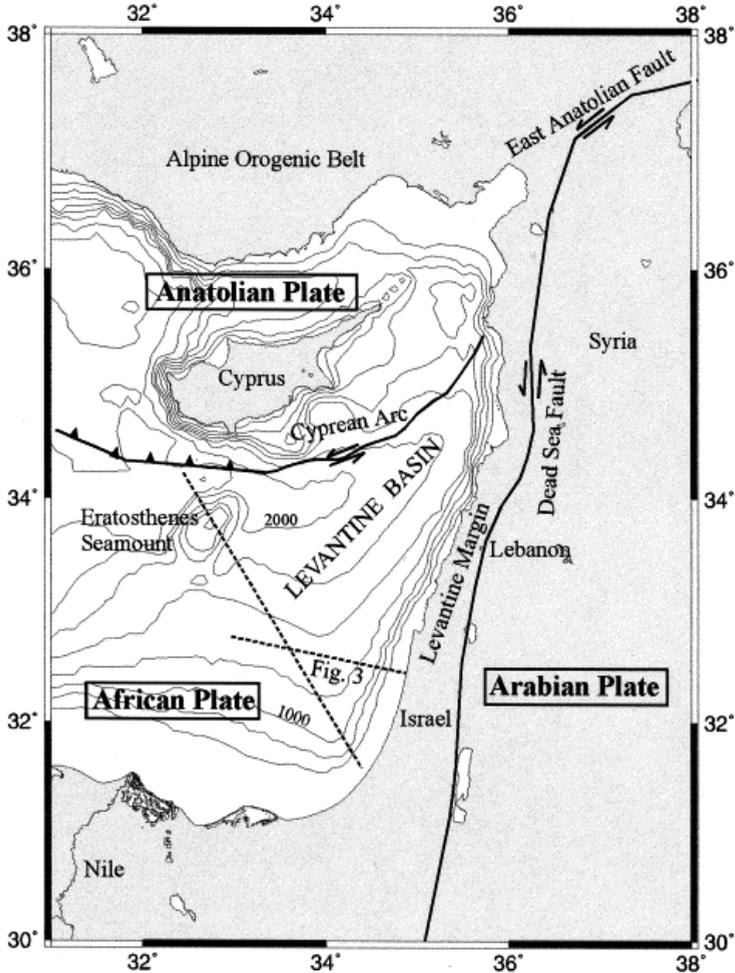


图 1 东地中海板块构造简图

(来源: N. Vidala, J. Alvarez-Marrón and D. Klaeschen, Internal Configuration of the Levantine Basin from seismic Reflection Data (Eastern Mediterranean), *Earth and Planetary Science Letters*, Vol. 180, 2000, p. 78.)

锥状三角洲,北临塞浦路斯和拉纳卡冲断层带(图 1)。²

黎凡特盆地地势呈东南—西北走向,由东向西逐渐加深,至埃拉托色尼海山附近达到海平面以下 2000 米;盆地东部边缘区域地势陡峭,向西逐渐平缓。³盆地南部由于尼罗河不断带来沉淀物,致使坡度平缓。虽然黎凡特盆地东部多褶皱,但是盆地大部分地区没有断层等地质构造,也不存在岛屿。

由于黎凡特盆地的地质条件,早在 2001 年,塞浦路斯沿海的初步探查已预计该区域蕴藏着油气资源。塞浦路斯因此在该地区率先与周边国家展开专属经济区划界以及合作开发的谈判。⁴2010 年 3 月,美国地质调查局公布一份报告,预计黎凡特盆地的油气储量分别为 17 亿桶和 3.45 万亿立方米。⁵该盆地所发现的油气资源占整个世界海底油气资源的 8.5%,是此前 10 年来世界上最大的油气资源发现。⁶

这一发现对该地区产生了巨大的影响,加速了包括黎以两国在内的周边沿海国提出专属经济区的主张。黎巴嫩和以色列均是能源进口国,陆上能源资源十分困乏,石油、天然气等能源的稳定供应是保证两国经济社会发展的关键。然而,近年来北非、西亚地区多国政局动荡,严重影响了两国能源进口的稳定。例如,由于 2011 年起埃及国内的动乱,以色列从埃及进口天然气一度中断,计划中的输气管道工程也前景堪忧。⁷因此,此次发现的油气资源对黎巴嫩与以色列的能源安全意义重大,两国均将其视为国家发展的新支柱。

然而,黎以两国并未建立外交关系,也未勘定两国边界,且存在萨巴农场等领土争端,这些原因都导致两国难以开展领海与专属经济区的划界谈判。于是两国均单方面提出海洋划界主张。黎巴嫩于 2011 年 10 月制定《第 6433 号法令—划定黎巴嫩专属经济区边界线》,在附件中列出了其与塞浦路斯、叙利亚、巴勒斯坦(即以色列,黎巴嫩不承认以色列,而承认巴勒斯坦)专属经济区之间的“中间线”

2 N. Vidala, J. Alvarez-Marrón and D. Klaeschen, Internal Configuration of the Levantine Basin from seismic Reflection Data (Eastern Mediterranean), *Earth and Planetary Science Letters*, Vol. 180, 2000, pp. 77~78.

3 N. Vidala, J. Alvarez-Marrón and D. Klaeschen, Internal Configuration of the Levantine Basin from seismic Reflection Data (Eastern Mediterranean), *Earth and Planetary Science Letters*, Vol. 180, 2000, pp. 79~80.

4 James Stocker, No EEZ Solution: The Politics of Oil and Gas in the Eastern Mediterranean, *The Middle East Journal*, Vol. 66, No.4, Autumn 2012, p. 584.

5 U.S. Geological Survey (World Petroleum Resources Project), Assessment of Undiscovered Oil and Gas Resources of the Levant Basin Province, Eastern Mediterranean, at <http://pubs.usgs.gov/fs/2010/3014/pdf/FS10-3014.pdf>, 20 August 2013.

6 Ethan Bronner, Gas Field Confirmed off Coast of Israel, *N.Y. Times*, 30 December 2010, at <http://www.nytimes.com/2010/12/31/world/middleeast/31leviathan.html>, 20 August 2013.

7 Abraham D. Sofaer, Securing Israel's Offshore Gas Resources, presentation at Lloyd's Conference in Tel Aviv: Specialist Solutions in the Face of Changing Risks, at <http://www.abesofaer.com/2011-pdfs/Offshore-Gas-Security-6-23-2011.pdf>, 20 August 2013.

坐标表。⁸ 以色列于 2011 年 7 月向联合国提交了《划定领海与专属经济区北部界限的坐标表》，给出了其与黎巴嫩之间的海域边界线。⁹ 正是因为两国对边界线的不同主张，导致重叠区域的产生。（见图 2）

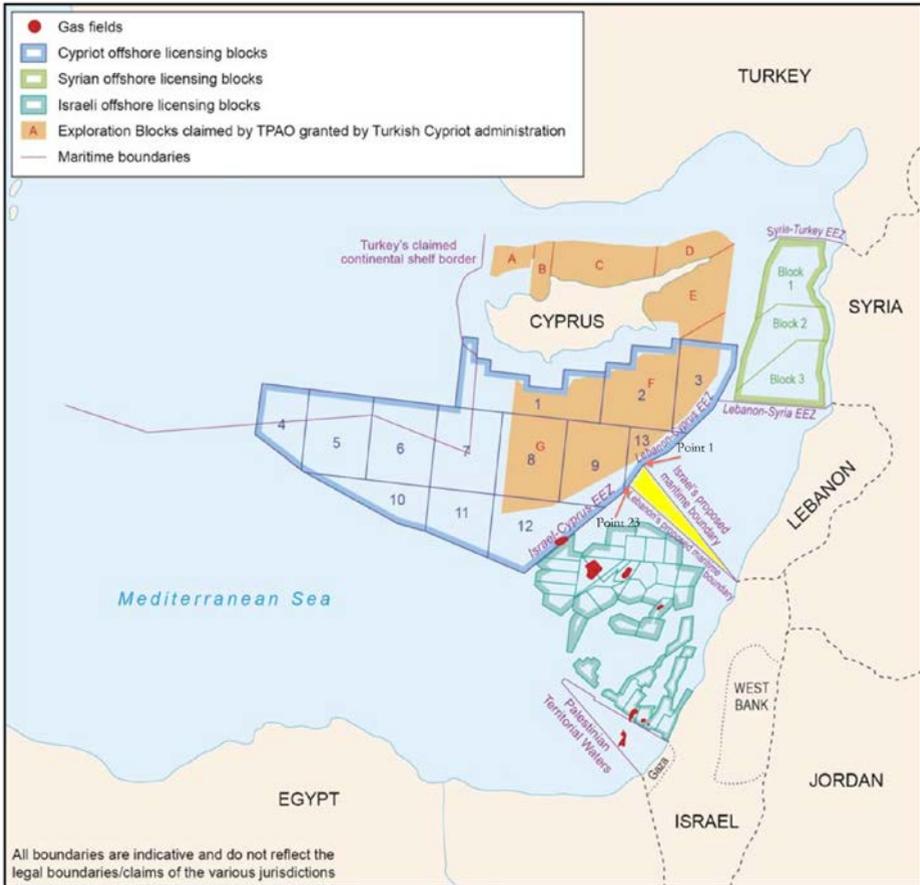


图 2 黎以两国主张重叠区，以及周边国家或地区海洋边界与油气开发区（至 2012 年底）示意图

（来源：Hakim Darbouche, Laura El-Katiri and Bassam Fattouh, *East Mediterranean Gas: What Kind of a Game-changer?*, *Oxford Institute for Energy Studies*, December 2012, p. 7.）

8 Decree No. 6433 - Delineation of the Boundaries of the Exclusive Economic Zone of Lebanon, 1 October 2011, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/lbn_2011decree6433.pdf, 20 August 2013.

9 List of Geographical Coordinates for the Delimitation of the Northern Limit of the Territorial Sea and Exclusive Economic Zone of the State of Israel, at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/isr_eez_northernlimit2011.pdf, 20 August 2013.

(二) 黎巴嫩与以色列之间的外交冲突

黎以两国均对重叠区域内的自然资源主张主权权利。为捍卫国家利益,黎以两国激烈的言辞交锋不断,引发国际社会的担忧。

黎巴嫩认为争议区域的能源资源位于黎巴嫩领海与专属经济区内,归其所有。黎巴嫩总统、¹⁰能源水利部部长¹¹以及真主党领导人¹²等重要人物都发表声明,指出黎巴嫩将会坚决维护其专属经济区的主权权利和经济权利,并警告以色列尊重黎巴嫩在其专属经济区的石油和天然气资源,如果以色列试图偷取黎巴嫩的资源,它将为付出代价。黎巴嫩采取相应地法律措施来维护其权益,例如1993年9月黎巴嫩公布了其有关领水和领海的第138号立法令,¹³2011年10月公布了划定黎巴嫩专属经济区边界线的第6433号法令。此外,黎巴嫩为开采黎凡特盆地油气资源进行公开招标,希望早日开采该区域的油气资源。¹⁴

以色列同样主张对重叠区域内的石油和天然气资源享有排他性的主权权利。以色列总理、¹⁵国家基础设施部部长¹⁶声明道,以色列是依据国际法规则对该区域的自然资源享有主权权利,必要时,以色列将毫不犹豫用武力保护该区域自然资源。以色列并非仅停留在口头争论上,为了保护海上气田,以色列海军使用无人机24小时监视着该区域。¹⁷以色列与许多能源公司签订开发协议以尽早开采该区域的自然资源。¹⁸

如果两国在主张重叠海域爆发武装冲突,甚至以海上油气设施作为攻击目

10 H. E. General Michel Sleiman, President of the Republic of Lebanon, at the Sixty-Sixth Session of the General Assembly of the United Nations (New York, 21 September 2011), at http://gadebate.un.org/sites/default/files/gastatements/66/LB_en.pdf, 20 August 2013.

11 Wassim Mroueh, Lebanon to Fight Israel at U.N., *The Daily Star Newspaper - Lebanon*, 11 July 2011, at <http://www.dailystar.com.lb/News/Politics/2011/Jul-11/Lebanon-to-fight-Israel-at-UN.ashx>, 20 August 2013.

12 Zeina Karam, Hezbollah Warns Israel Against "Stealing" Gas, *World News/The Guardian*, 23 January 2008, at <http://www.guardian.co.uk/world/feedarticle/9765255>, 20 August 2013.

13 Legislative Decree No. 138 Concerning Territorial Waters and Sea Areas of 7 September 1983, at https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/LBN_1983_Decree.pdf, 20 August 2013.

14 Lebanon opens bidding for East Med gas, *UPI*, 2 January 2013, at http://www.upi.com/Business_News/Energy-Resources/2013/01/02/Lebanon-opens-bidding-for-East-Med-gas/UPI-32481357161299/, 20 August 2013.

15 Netanyahu Vows to Defend Med Gas Fields, *Cumhuriyet*, 19 January 2011, at <http://www.cumhuriyet.com/?hn=209634>, 20 August 2013.

16 Landau: Israel Would Defend Off-shore Gas Find with Force, *Jerusalem Post*, 27 June 2010, at <http://www.jpost.com/Israel/Article.aspx?id=179620>, 20 August 2013.

17 Yaakov Katz, IDF Deploys Drones to Protect Gas Fields From Hezbollah, *Jerusalem Post*, 9 August 2011, at <http://www.jpost.com/Defense/Article.aspx?id=233002>, 20 August 2013.

18 Sharon Udasin, British Oil Field Company Wins \$27 m. Bid to Service Tamar, *Jerusalem Post*, 20 April 2011, at <http://www.jpost.com/Business/Business-News/British-oil-field-company-wins-27m-bid-to-service-Tamar>, 20 August 2013.

标,其后果不堪设想,对该地区海洋环境的危害将尤为严重。黎以两国均是1974年《保护地中海海洋环境和沿海地区公约》(《巴塞罗那公约》)缔约国,因而有义务采取措施防止因“开采大陆架、海床及其底土”造成的海洋污染。然而,在2006年黎巴嫩战争中,以色列攻击了一座黎巴嫩电站,给地中海造成了约15000吨石油泄漏的环境灾难。¹⁹

在下一部分中,我们将具体分析黎巴嫩与以色列重叠主张的产生,分析两国海洋划界问题的性质与核心问题。

二、黎巴嫩与以色列海洋划界问题

纵观黎巴嫩与以色列各自的海洋划界主张,可知两国的争议主要分为2个阶段,第一个阶段是两国之间专属经济区界限终点位置争议,第二个阶段是两国之间领海界限起始点位置的争议。

(一) 黎巴嫩与以色列专属经济区界限终点位置争议

在黎巴嫩与以色列海洋划界问题上,第一阶段的争论是围绕黎巴嫩、以色列和塞浦路斯三方专属经济区交界点展开的。虽然黎巴嫩与以色列之间未开展双边划界谈判,但两国分别与塞浦路斯签订过专属经济区划界协定,并且两国都单方面向联合国提交专属经济区界限坐标表,从这些文件中可知黎方和以方的不同主张。

1. 黎方主张

自2002年起,黎巴嫩与塞浦路斯就已开启专属经济区划界谈判,并于2007年1月签订了一份专属经济区划界协定(以下简称“黎塞协定”),²⁰塞浦路斯已经批准,但黎巴嫩尚未批准。²¹该协定明确了两国专属经济区界限的6个坐标点(表1),其中,最南端的坐标点为Point 1(北纬33°38'40",东经33°53'40")。

19 James Stocker, No EEZ Solution: The Politics of Oil and Gas in the Eastern Mediterranean, *The Middle East Journal*, Vol. 66, No. 4, Autumn 2012, p. 593.

20 Agreement between the Government of the State of Lebanon and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, at <http://www.mees.com/en/articles/6015-cyprus-lebanon-cyprus-israelofshore-delimitation>, 21 June 2013.

21 詹姆斯·斯托克指出,黎塞协定未获黎方批准,其原因与土耳其的反对有关,由于土耳其支持北塞浦路斯土耳其共和国,反对塞浦路斯“单方”主张专属经济区,由此可见该地区错综复杂的政治状况给海洋划界带来的困难。See James Stocker, No EEZ Solution: The Politics of Oil and Gas in the Eastern Mediterranean, *The Middle East Journal*, Vol. 66, No. 4, Autumn 2012, p. 586.

表1 2007年黎塞协定附录中的坐标表

(来源: Agreement Between the Government of the State of Lebanon and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, at <http://www.mees.com/en/articles/6015-cyprus-lebanon-cyprus-israelofshore-delimitation>, 20 August 2013.)

Number of Point	Latitude (North)	Longitude (East)
1	33°38'40"	33°53'40"
2	33°51'30"	34°02'50"
3	33°59'40"	34°18'00"
4	34°23'20"	34°44'00"
5	34°39'30"	34°53'50"
6	34°45'00"	34°56'00"

由于塞浦路斯与黎巴嫩专属经济区界限南端存在塞浦路斯、黎巴嫩、以色列三方划界问题,故 Point 1 是否具有三方专属经济区交界点的效力,成为了关注焦点。

一方面,黎塞协定第3条规定:“若双方中的任何一方与第三方开展以专属经济区划界为目的的谈判,并且若划界关系到 Point 1 或坐标 Point 6,那么该方应当在与第三方达成最终协议之前通知另一方并与之协商”。²²可见,黎塞协定考虑到了在北端存在塞浦路斯、黎巴嫩、叙利亚三方专属经济区争议,在南端存在塞浦路斯、黎巴嫩、以色列三方专属经济区争议。另一方面,依据该协议第5条,该协议须经双方批准并换文后才生效。由于黎巴嫩方面至今未批准,故该协议本身并未生效,对塞浦路斯与黎巴嫩均不具约束力。²³

22 Agreement between the Government of the State of Lebanon and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, at <http://www.mees.com/en/articles/6015-cyprus-lebanon-cyprus-israelofshore-delimitation>, 20 August 2013.

23 See E.S. Abu Gosh and R. Leal-Arcas, Gas and Oil Explorations in the Levant Basin: The Case of Lebanon and Israel, *OGEL*, Vol.11, Issue 3, April 2013, p. 15.

随后,黎巴嫩分别于2010年7月14日、²⁴2010年10月19日²⁵和2011年10月19日3次单方面向联合国提交了划定黎巴嫩西部、南部和北部的专属经济区坐标表,第三次提交的文件明确说明:“此次交存文件的效力优先于2010年7月14日和2010年10月19日交存的文件”,²⁶黎巴嫩第三次提交的文件明确了其与邻国专属经济区界限的位置,反映该国的官方立场。在2011年10月提交的坐标表中,黎巴嫩给出了其与塞浦路斯专属经济区的“西部中间线”,该表包括黎塞协定中的Point 1,但最南端的点并非Point 1,而是新出现的Point 23(北纬33°31'51.17",东经33°46'8.78")(表2),较之黎塞协定中的Point 1,黎巴嫩将专属经济区外部界限向西南推进了约17千米。并且,该表中列出了黎巴嫩与巴勒斯坦(以色列)专属经济区的“南端中间线”,²⁷其中所列出的6个坐标点,最南端的为Point 23。

**表2 黎巴嫩2011年10月向联合国提交的黎巴嫩与塞浦路斯
专属经济区界限地理坐标表**

(来源:下载于 http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/lbn_mzn85_2011.pdf, 2013年8月20日。)

Points	Degrees	Minutes	Seconds		Degrees	Minutes	Seconds	
23	33	46	8.78	E	33	31	51.17	N
24	33	51	30.31	E	33	37	13.10	N
25	33	50	25.30	E	33	36	8.01	N
1	33	53	40.00	E	33	38	40.00	N
2	34	2	50.00	E	33	51	30.00	N
3	34	18	0.00	E	33	59	40.00	N
4	34	44	0.00	E	34	23	20.00	N
5	34	53	50.00	E	34	39	30.00	N
6	34	56	0.00	E	34	45	0.00	N
7	34	58	13.92	E	34	50	42.00	N

24 M.Z.N.79.2010.LOS of 24 August 2010, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn79ef.pdf, 20 August 2013.

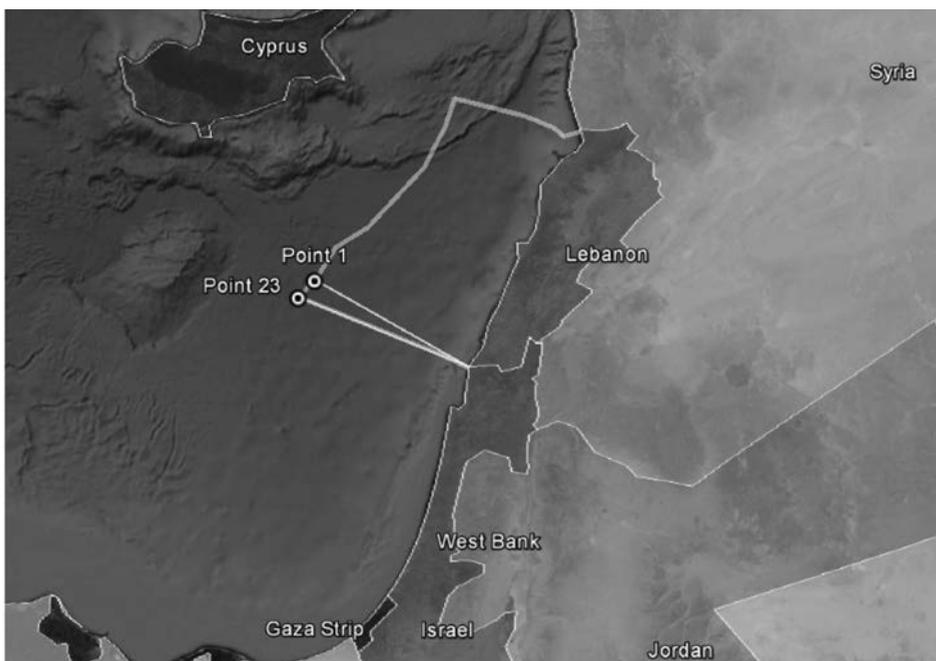
25 M.Z.N.79.2010.LOS.Add.1 of 9 November 2010, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn79add1ef.pdf, 20 August 2013.

26 M.Z.N.85.2011.LOS of 14 November 2011, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn85ef.pdf, 20 August 2013.

27 Deposit of a chart and lists of geographical coordinates of points defining the Western, Northern and Southern limits of Lebanon's exclusive economic zone, at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/lbn_mzn85_2011.pdf, 20 August 2013.

对此,黎巴嫩外交与移民部长在2011年6月20日致联合国秘书长的信中解释道,黎塞协定中最南端的 Point 1 并非最终的三方交界点;就 Point 1 而言,该坐标仅为塞黎双方专属经济区边界点;而黎方主张的 Point 23 为三国专属经济区的等距点。²⁸

综上,如图3所示,黎巴嫩方面主张的其与以色列之间专属经济区交界点为 Point 23,而非 Point 1。



Source: © 2012 Google, © 2012 DigitalGlobe, Data SIO, NOAA, US Navy, NGA, GEBCO, © 2012 Cnes/Spot Image, US Department of State Geographer

图3 黎巴嫩专属经济区主张示意图

(来源: James Stocker, No EEZ Solution: The Politics of Oil and Gas in the Eastern Mediterranean, *The Middle East Journal*, Vol. 66, No. 4, Autumn 2012, p. 586.)

2. 以方主张

2010年12月,以色列与塞浦路斯达成专属经济区划界协定(以下简称“以塞

28 A letter dated 20 June 2011 from the Minister for Foreign Affairs and Emigrants of Lebanon addressed to the Secretary-General of the United Nations concerning the Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, signed in Nicosia on 17 December 2010, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/lbn_re_cyp_isr_agreement2010.pdf, 20 August 2013.

协定”)。²⁹ 该协定于2011年2月分别获以色列³⁰和塞浦路斯³¹批准,协定对双方生效。以塞协定规定了两国专属经济区外部界限的12个坐标点,其中最北端的坐标点为Point 1(北纬33°38'40",东经33°53'40")。可见,以塞协定中选取的专属经济区外部界限最北端点与2007年黎塞协定选取的专属经济区外部界限最南端为同一个点。2011年7月,以色列单方面向联合国提交了“北部领海和专属经济区划界坐标表”,该表中仍然明确Point 1为其与黎巴嫩专属经济区的北端点。³² 由此可知,以色列主张与黎巴嫩之间专属经济区的终点位置为Point 1,而非Point 23。

以塞协定第1条(e)款规定:“考虑到关于国家间专属经济区划界的国际习惯法,根据相关三国将来达成的关于上述2点的专属经济区划界协议,必要时可以对Point 1或Point 12的地理坐标进行复核并且/或者修正”。以色列向联合国提交的北部领海和专属经济区划界坐标表也对Point 1作出同样解释。以色列也认识到了存在三方划界问题,并且为进一步协商修订三方专属经济区交界点预留了空间。但遗憾的是,对于三方交界点的争议,黎以双方未能展开对话,以达成合理修正,而是将产生重叠主张的原因归结于对方。

对于与黎巴嫩2010年7月与10月主张产生的重叠,以色列总理内塔尼亚胡在内阁批准以塞协定后说道:“黎巴嫩向联合国提交的海洋界线显然位于以色列主张界线以南,与以色列和塞浦路斯达成一致的界线相冲突,更为重要的是,与黎巴嫩自己于2007年与塞浦路斯达成的界线相冲突。我们的目的是依据国际海洋法确定以色列海洋界线的立场。”以色列指责黎巴嫩前后不一致的主张造成了两国专属经济区的重叠。³³

黎巴嫩则于2011年6月20日针对以塞协定向联合国提出抗议,黎方反对以塞协定中将Point 1作为三方专属经济区的交界点,认为该点根本没有考虑黎

29 Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, 17 December 2010, at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/cyp_isr_eez_2010.pdf, 20 August 2013.

30 The Government of Israel, Decision 2794 (3.2.2011): Ratification of the Israel-Cyprus Agreement on the Delimitation of the EEZ, at <http://www.pm.gov.il/PMO/Archive/Decisions/2011/02/des2794.htm>, 20 August 2013.

31 The Government of Cyprus: Ministry of Commerce, Industry and Tourism, at <http://www.mcit.gov.cy/mcit/mcit.nsf/All/A6D222B09D72E659C2257441002EE9BE?OpenDocument>, 20 August 2013.

32 List of Geographical Coordinates for the Delimitation of the Northern Limits of the Territorial Sea and Exclusive Economic Zone of the State of Israel (submitted to the UN by the Permanent Mission of Israel on 12 July 2011), at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/isr_eez_northernlimit2011.pdf, 20 August 2013.

33 Herb Keinon, Cabinet Approves Northern Maritime Border, *Jerusalem Post*, 10 July 2011, at <http://www.jpost.com/NationalNews/Article.aspx?id=228666>, 20 August 2013.

巴嫩的主张,是对黎巴嫩主权利利的公然侵犯,并且以塞协定是对黎巴嫩主权利利与经济权利的侵犯,并再一次主张黎巴嫩与塞浦路斯专属经济区边界的终点为 Point 23 而非 Point 1。³⁴

可见,黎以两国的不同主张导致了两国之间专属经济区终点位置的不一致,最终引发两国之间的外交风波。

(二) 黎巴嫩与以色列之间领海界限起始点位置争议

在双方第二阶段的争论中,双方提出的划界主张不再只涉及专属经济区外部界限,还包括领海的界限,而争执的焦点是围绕领海界限的“起始点”展开。对于这一问题,学者们的评述尚未予以充分关注。

2011年7月,以色列单方面向联合国提交了“北部领海和专属经济区划界坐标”。其中列出了6个坐标点(见表3),包括了 Point 1(北纬 33°38'40",东经 33°53'40"),对此,在注释1中以方解释道,该 Point 1 取自2010年以塞专属经济区划界协定。

**表3 以色列于2011年7月向联合国提交的
“北部领海和专属经济区划界坐标”**

(来源:下载于 http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/isr_eez_northernlimit2011.pdf, 2013年8月20日。)

POINTS	DEGRE ES	MINUTE S	SECOND S		DEGRE ES	MINUTE S	SECOND S	
31	35	6	13.0	E	33	5	39.5	N
32	35	4	10.0	E	33	6	23.0	N
33	35	3	3.0	E	33	6	39.0	N
34	34	53	11	E	33	10	33.5	N
35	34	46	38.0	E	33	13	9.0	N
1	33	53	40.0	E	33	38	40.0	N

在余下的5个坐标点中, Point 31 最靠近以色列与黎巴嫩的陆上“蓝线”,其

34 A letter dated 20 June 2011 from the Minister for Foreign Affairs and Emigrants of Lebanon addressed to the Secretary-General of the United Nations concerning the Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, signed in Nicosia on 17 December 2010, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/lbn_re_cyp_isr_agreement2010.pdf, 20 August 2013.

坐标为北纬 33°5'39.5"，东经 35°6'13.0"。

2011 年 9 月 3 日，黎巴嫩向联合国抗议以色列向联合国提交的划界主张，除再次抗议以方选取 Point 1 作为塞浦路斯、黎巴嫩、以色列三方专属经济区交界点外，更严正抗议了 Point 31：“以色列交存的坐标清楚地表明 Point 31 公然违背了国际法原则与规定，并对黎巴嫩主权构成侵犯。该点位于国际公认的由波利特—纽科姆协定以及 1949 年 3 月 23 日停战协定确定的黎巴嫩陆上边界以北，依据前述协定，黎巴嫩陆上边界从位于 Point B1 的纳古拉开始划定”。³⁵

在附件中，黎巴嫩给出了其主张的“正确”起始点 Point B1 的坐标（表 4）：

表 4 2011 年 9 月 3 日黎巴嫩主张的起始点 B1

（来源：下载于 http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/lbn_re_isr_listofcoordinates_e.pdf, 2013 年 8 月 20 日。）

(a) Initial point 31, delimited from the southern borders of Lebanon, the coordinates of which are, according to the Israeli side, as set forth below:

31	Degree	Minute	Second
Latitude	33	5	39.5
Longitude	35	6	13

(b) The correct point, namely, point B1, at Ra's Naqurah, the coordinates of which are as set forth below:

B1	Degree	Minute	Second
Latitude	33	5	38.801
Longitude	35	6	14.137

2011 年 10 月 1 日黎巴嫩出台《第 6433 号法令—划定黎巴嫩专属经济区边界线》，单方面公布了黎巴嫩与塞浦路斯、巴勒斯坦和叙利亚三国专属经济区

35 A letter dated 3 September 2011 from the Minister for Foreign Affairs and Emigrants of Lebanon addressed to the Secretary-General of the United Nations concerning the geographical coordinates of the northern limit of the territorial sea and the exclusive economic zone transmitted by Israel, at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/lbn_re_isr_listofcoordinates_e.pdf, 20 August 2013. 虽然黎巴嫩在这段话中没有用“蓝线”一词，但“国际公认的边界”这一表述也是联合国秘书长报告中的表述，见“Report of the Secretary-General on the Implementation of Security Council Resolutions 425 (1978) and 426 (1978)”。关于“蓝线”与波利特—纽科姆协定与 1949 年 3 月 23 日停战协定的关系见下文。

外部界限的坐标表。³⁶ 其中,附件I中给出了与巴基斯坦(以色列)的中间线坐标,列出了6个点,包括黎方主张的塞浦路斯、以色列、黎巴嫩专属经济区交界点 Point 23,而最接近黎以陆上“蓝线”的是 Point 18(北纬 $35^{\circ}5'38.94''$,东经 $33^{\circ}6'11.84''$)。³⁷

将黎方主张的 Point 18、“起始点” Point B1 以及以方主张的 Point 31 体现在地图上(见图4),我们可以看到以色列与黎巴嫩各自主张与联合国勘定的“蓝线”间的位置关系。

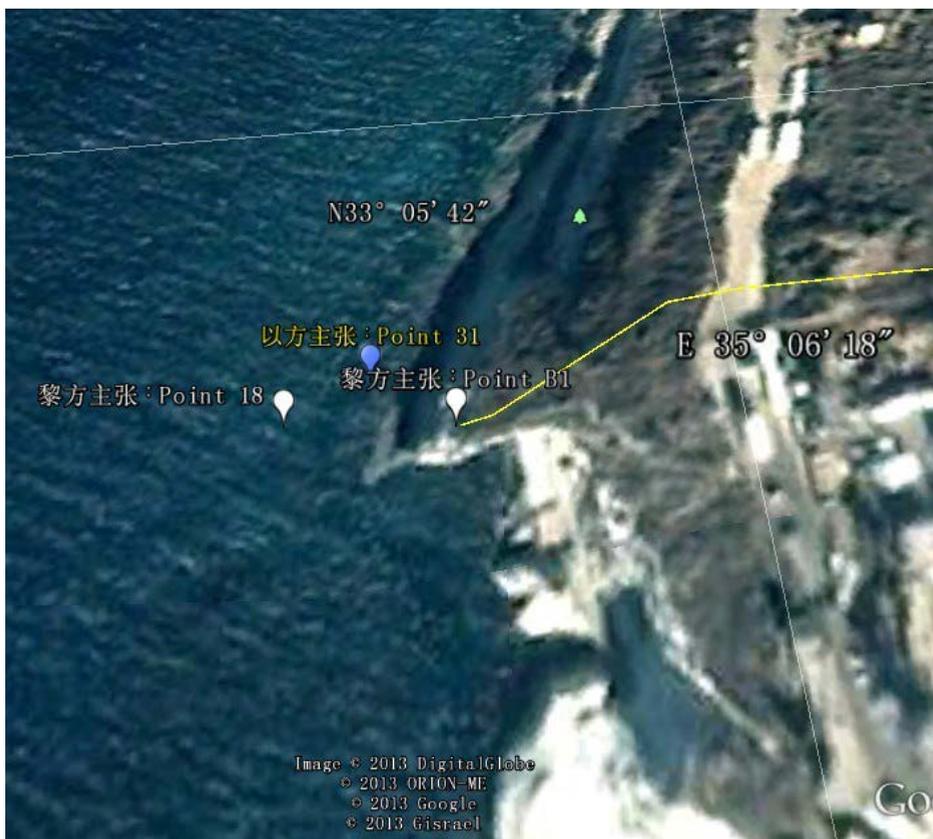


图4 以方主张 Point 31,黎方主张 Point 18、Point B1,与“蓝线”的位置关系(图中陆上分界线即黎以间的“蓝线”)

(来源:由笔者在谷歌地球基础上制作。)

36 Decree No. 6433 - Delineation of the boundaries of the exclusive economic zone of Lebanon, October 1st, 2011, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/lbn_2011decree6433.pdf, 20 August 2013.

37 Deposit of a chart and lists of geographical coordinates of points defining the Western, Northern and Southern limits of Lebanon's exclusive economic zone, at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/lbn_mzn85_2011.pdf, 20 August 2013.

可见,以色列主张的 Point 31 位于 Point B1 (即纳古拉)以北,以方并未对此作出解释;在黎方的主张中,其逻辑较为清楚,Point 18 是以陆上 Point B1 为“起始点”所取中间线上的一点。³⁸ 根据《联合国海洋法公约》(以下简称“《公约》”)³⁹ 第 4 条、第 57 条,要划定领海与专属经济区的外部界限,首先要明确的就是基线。黎巴嫩与以色列所采用的均为正常基线,即沿岸低潮线,且都主张 12 海里领海。⁴⁰ 因此,在海岸相邻国家划界时,两国的领海划界起始点尤为重要。

因此,我们有必要简要探讨“蓝线”的形成和 Point B1 的法律地位。黎以边界在历史上几经变化,是两国关系上的重要问题,与地区形势密切相关。第一次世界大战后,黎巴嫩与叙利亚由法国委任统治,巴勒斯坦由英国委任统治,法英两国于 1923 年达成波利特—纽科姆协定,划定巴勒斯坦与黎巴嫩、叙利亚间的边界起从地中海海岸的纳古拉东至耶尔穆克河的哈马村。⁴¹ 巴勒斯坦战争后,1949 年 3 月 23 日停战协定使以色列与黎巴嫩间的“停火线”取代了原来巴勒斯坦和黎巴嫩间的边界,但是其起始点与“1923 年国际边界”仍然一致,即在纳古拉。⁴² 2000 年,为了监督以色列军队从黎巴嫩南部领土撤离,联合国主持以“1923 年国际边界”与 1949 年“停火线”为基础勘定“蓝线”,即“国际公认的黎巴嫩边界”,其起始点仍为纳古拉。⁴³ 可见,虽然“蓝线”在法律地位上不是黎以两国间的国际边界,而是撤离线,但是纳古拉(即 Point B1)作为两国陆上边界线的起始点没有异议。而且该点也是位于两国之间的海岸,因此 Point B1 作为黎以两国海域分界线的起始点也无异议。由此,以色列选取的 Point 31 在 Point B1 以北,位于黎巴嫩的领土上,侵犯了黎巴嫩的领土主权,不可取。

因此,黎巴嫩选取的领海界限起始点仍然位于其领土内,并没有违反国际法。黎以海洋划界问题,包括专属经济区与领海划界两部分,在专属经济区划界问题上存在黎巴嫩与以色列两国专属经济区终点位置争议;而在两国领海界限的起始点问题方面,以色列选取 Point 31 点作为其北部领海界限的起始点的理由不能成立。

38 Deposit of a chart and lists of geographical coordinates of points defining the Western, Northern and Southern limits of Lebanon's exclusive economic zone, at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/lbn_mzn79_2010.pdf, 20 August 2013.

39 United Nations Convention on the Law of the Sea (UNCLOS), 1833 U.N.T.S. 397.

40 黎巴嫩方面,参见 Legislative Decree No. 138 concerning territorial waters and sea areas of 7 September 1983, Art.1; 以色列方面,参见 Territorial Waters Law, 5717/1956, as amended by the Territorial Waters (Amendment) Law, 5750-1990, of 5 February 1990.

41 Frederic C. Hof, A Practical Line: The Line of Withdrawal from Lebanon and Its Potential Applicability to the Golan Heights, *Middle East Journal*, Vol.55, No. 1, 2001, p. 25.

42 殷罡主编:《阿以冲突——问题与出路》,北京:国际文化出版公司 2002 年版,第 152 页。

43 Report of the Secretary-General on the Implementation of Security Council Resolutions 425 (1978) and 426 (1978), at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2000/460, 20 August 2013.

三、黎巴嫩与以色列海洋划界争端解决机制考察

海洋划界争端的解决方法主要有法律方法和外交方法。法律方法包括国际法院、国际海洋法法庭等国际司法机构根据《公约》等国际条约、国际法原则和规则来解决领土归属、海洋划界等争议;外交方法包括第三方调解等。

(一) 法律方法的考察

对于黎以两国海域划界争端,可以选择向国际海洋法法庭、国际法院、或仲裁法庭来提交此案。但是仔细考察这几种争端解决机制受理案件的条件可发现,无论通过海洋法法庭、⁴⁴ 国际法院,⁴⁵ 还是通过仲裁法庭,⁴⁶ 都需要黎以两国同意将海洋划界争端提交这些机构,它们才有权审理此案。然而,领土争端、历史、宗教等原因使黎巴嫩一直不承认以色列国,如果黎巴嫩同意将争端提交国际法院,⁴⁷ 事实上是间接地承认了以色列的国家地位,这与黎巴嫩的国家政策不符。此外,无论是通过法院判决、还是通过仲裁裁决,其时间成本、司法成本等都相对高昂。因此就目前情况而言,很难取得两国的同意,通过国际司法机构来解决两国之间的海洋划界争端。

(二) 外交方法的考察

在黎以海上油气争端即海洋划界问题上,有能力对双方施加影响的第三方主

44 《国际海洋法法庭规约》第20(2)条规定,“对于(《公约》)第十一部分明文规定的任何案件,或按照案件当事所有各方接受的将管辖权授予法庭的任何其他协定提交的任何案件,法庭应对缔约国以外的实体开放。”换言之,非《公约》缔约国只要同意将符合《公约》规定的海洋争端提交国际海洋法法庭,就可以成为国际海洋法法庭的当事方。所以只有以色列和黎巴嫩都同意将两国的专属经济区界限争端提交国际海洋法法庭,国际海洋法法庭才有权审理此案。See UNCLOS, Annex VI, the Statute of the International Tribunal for the Law of the Sea, Art. 20(2).

45 国际法院在审理当事国之间的争端时必须取得当事国的明确同意,而无论同意的形式为何。它是国际法院取得管辖权的前提。S. GozieOgbodo, An Overview of the Challenges Facing the International Court of Justice in the 21st Century, *Annual Survey of International & Comparative Law*, Vol. 18, 2012, pp. 101~102; Case East Timor (Portugal v. Australia), Judgment, *I.C.J. Reports*, 1995, para. 26.

46 无论是《公约》所提供的仲裁程序,还是当事国请求其他组织或个人来裁决黎以专属经济区争端案,也都需要黎以两国的明确同意。Troubled Waters Dispute between Lebanon, Israel Heats up, *Naharnet*, 3 August 2011, at <http://www.naharnet.com/stories/en/11866-troubled-waters-dispute-between-lebanon-israel-heatsup>, 20 August 2013.

47 UNCLOS, Annex VI: the Statute of the International Tribunal for the Law of the Sea, Art. 34(1).

要有联合国、欧盟和美国。

自 2011 年开始,黎巴嫩政府多次请求联合国保护海洋界限及海洋资源。联合国则认为黎黎部队 1701 决议并不包括海洋划界。⁴⁸但在 2011 年 7 月,联合国驻黎巴嫩的临时部队曾提议在黎巴嫩以色列海域划界中充当调解方,并创建一个海上安全区。⁴⁹联合国能否成为本案的调停或斡旋方仍有许多不确定性,一方面联合国内部需达成相关决议,另外也需黎以两国的合作态度。⁵⁰

由于临近地中海,黎凡特盆地的油气资源发现对欧盟国家的市场意义重大。另一方面,若黎以冲突升级,可能对地中海周边的欧盟国家造成严重的环境污染。因此欧盟与本案有较深的利害关系,然而就目前的情况而言,欧盟对黎以两国影响有限。⁵¹

相比联合国、欧盟,美国更有可能成为黎以海上油气争端与划界问题的调解方。近来美国提议一个在黎巴嫩与以色列专属经济区间的边界线,以帮助结束两国一直徘徊的争端,促进东地中海的石油开发。⁵²并且,美国在该地区有着重要的影响力,例如,美国曾成功劝说埃及与以色列以国际调停的方式解决在塔巴附近的海洋界限争端。⁵³然而,如果没有一个具体、能够为两国所接受的划界方案,黎以两国的划界争端不能得到根本解决。

综上所述,无论是采用法律方法还是外交方法,都需要黎以两国的合作,合作的关键在于有一个具体的、公平的、能为两国接受的海域划界方案。下面本文结合两国的历史背景、相关因素的考量试提出一个黎以两国的争议海域划界方案。

四、黎巴嫩与以色列领海和专属经济区划界方案

《公约》对海岸相向或相邻国家间的领海和专属经济区划界作出了不同规定。《公约》第 15 条给出了海岸相向或相邻国家间领海界限的划定规则:“如果两

48 UN to Shami: We Won't Delineate Lebanese-Israeli Maritime Border, *Naharnet*, 5 January 2011, at <http://old.naharnet.com/domino/tn/NewsDesk.nsf/getstory?openform&BCD85A1506C9E2CBC225780F001DA69B>, 20 August 2013.

49 U.N. Looking Into Helping Lebanon Draw Maritime Security Line, *Daily Star (Leb.)*, 21 July 2011, at <http://www.dailystar.com.lb/News/Middle-East/2011/Jul-21/UN-to-assist-Lebanon-drawmaritime-security-line.ashx#ixzz1a1GbrjmV>, 20 August 2013.

50 See Martin Wählisch, Israel-Lebanon Offshore Oil & Gas Dispute-Rules of International Maritime Law, *ASIL Insights*, Vol. 15, No. 31, 2011, p. 4.

51 See James Stocker, No EEZ Solution: The Politics of Oil and Gas in the Eastern Mediterranean, *The Middle East Journal*, Vol. 66, No.4, Autumn 2012, p. 596.

52 Nicholas Blanford, Lebanon, Israel Take Step toward Claiming Big Oil, Gas Deposits, *The Christian Science Monitor*, at <http://www.csmonitor.com/World/Middle-East/2012/1219/Lebanon-Israel-take-step-toward-claiming-big-oil-gas-deposits>, 20 August 2013.

53 James Stocker, No EEZ Solution: The Politics of Oil and Gas in the Eastern Mediterranean, *The Middle East Journal*, Vol. 66, No. 4, Autumn 2012, p. 596.

国海岸彼此相向或相邻,两国中任何一国在彼此没有相反协议的情形下,均无权将其领海伸延至一条其每一点都同测算两国中每一国领海宽度的基线上最近各点距离相等的中间线以外。但如因历史性所有权或其他特殊情况而有必要按照与上述规定不同的方法划定两国领海的界限,则不适用上述定”,可见,公约已经确定海岸相向或相邻国家领海的划界原则是中间线原则。对于海岸相向或相邻国家专属经济区的划界,《公约》第74条规定,“海岸相向或相邻的国家间专属经济区的界限,应在国际法院规约第38条所指国际法的基础上以协议划定,以便得到公平解决”,《公约》并没有确定海岸相向或相邻国家间专属经济区的划界原则是中间线原则,而是衡平原则,要求海岸相向或相邻国家应考虑相关因素,在两国专属经济区之间划定一条界限,以达到公平公正的结果。⁵⁴黎巴嫩于1995年批准加入《公约》,以色列至今尚未加入《公约》。然而,《公约》中有关专属经济区的规定已成为习惯国际法,⁵⁵因此,《公约》的有关规定将成为探究黎以两国海洋划界问题的法律依据。

黎以两国的海域争端不仅涉及到专属经济区划界争端,还涉及到两国领海划界争端,因此,两国的划界方案也应当分为二部分,即黎以两国领海划界方案和专属经济区划界方案。

(一) 黎巴嫩与以色列领海界限

无论是1958年的《领海和毗连区公约》还是1982年的《公约》都确定海岸相向或相邻的国家之间的领海划界原则是“中间线原则”,各国均以遵守。⁵⁶黎巴嫩与以色列对两国的领海划界也应当适用中间线原则。2010年10月黎巴嫩向联合国提交的专属经济区外部界限坐标表中有关其南部海域界限表和2011年7月以色列向联合国提交的“划定领海与专属经济区北部界限”坐标表都详细地给出了两国领海界限各点的坐标。但是,由于两国对领海界限起始点的不同选择,导致两国的领海界限的不一致。如前文所述,以色列选取的Point 31位于Point B1以北,以方也未给出任何解释,因此该点不可取。黎巴嫩主张Point B1作为两国

54 Ian Brownlie, *Principles of Public International Law*, 7th ed. London: Oxford University Press, 2008, pp. 216~217, p. 220.

55 Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, *I.C.J. Reports*, 1993, paras. 47~48; 在2010年12月以色列与塞浦路斯签订的专属经济区划界协定中,以色列承认《公约》专属经济区规则的可适用性, see Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/cyp_isr_eez_2010.pdf, 20 August 2013.

56 Yoshifumi Tanaka, *The International Law of the Sea*, Cambridge: Cambridge University Press, 2012, pp. 188~190.

的领土分界线位置符合两国的历史发展，也为国际社会承认和接受，应当成为两国领土边界线的分界点。黎以两国领海划界均采用沿岸低潮线，两国最终是选择 Point B1、Point 18 还是其他点作为两国领海界限的起始点，有待两国协商解决。在综合各种因素后，我们暂且选择 Point B1 为黎以两国领海界限的起始点，该起始点可在黎以两国协商之后予以适当调整，但应遵守国际法。

《公约》第 15 条明确规定了邻国之间领海划界采取中间线原则，领海宽度为 12 海里，依此原则，确定黎以两国领海界限终点位置 Point B2。由此，黎以两国领海分界线应是 Point B1 与 Point B2 的连接线，见图 5。

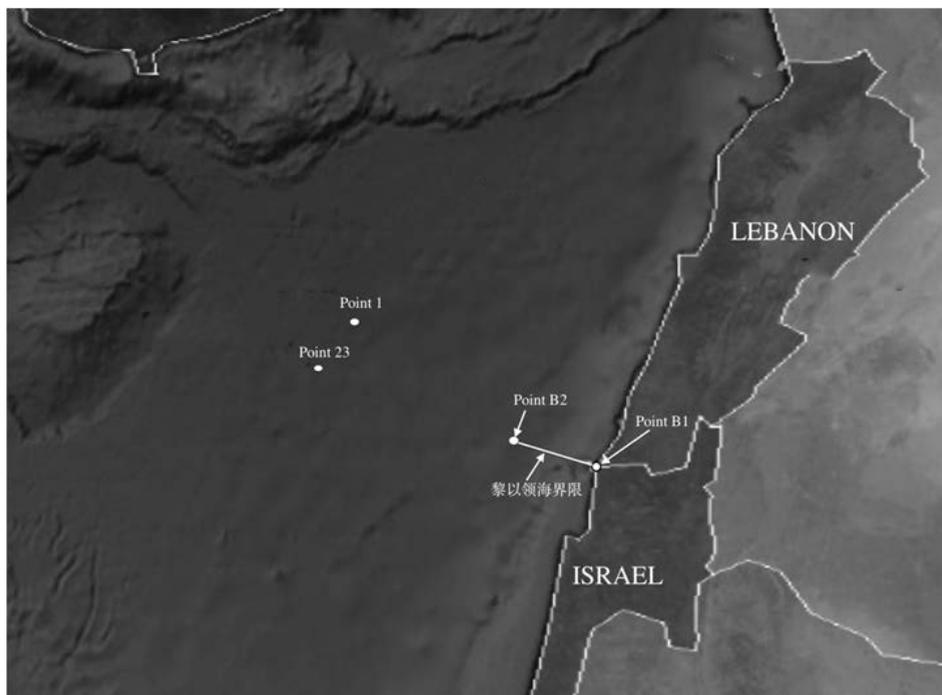


图 5 黎以两国领海界限

(来源:此图由笔者在图 3 的基础上制作。)

(二) 黎巴嫩与以色列专属经济区界限

《公约》第 74 条规定，海岸相邻国专属经济区的划界原则是衡平原则。为了取得公平结果，黎以两国专属经济区的划界应当适用“修正性衡平路径”，该路径在现今国际司法机构划定海岸相向或相邻国家重叠海域中取得主导型地位。⁵⁷ 例

57 Yoshifumi Tanaka, *The International Law of the Sea*, Cambridge: Cambridge University Press, 2012, pp. 192~198.

如利比亚诉马耳他大陆架划界案、⁵⁸ 罗马尼亚诉乌克兰黑海海域划界案、⁵⁹ 尼加拉瓜诉哥伦比亚领土和海洋划界案⁶⁰等。“修正性衡平路径”分为3阶段,第一,在当事国的领土(包括岛屿)之间划定一条临时界限(一般是中间线);第二,为了取得公平的结果,考虑各种相关因素调整或转移临时中间/等距离界限;第三,进行比例失调检验来评估依照第二阶段划定的海域界限使各方取得的海域领土是否存在明显的比例失调,以取得公平结果。⁶¹黎以两国专属经济区界限划定可按此路径进行。

1. 黎以专属经济区临时界限的确定

黎以专属经济区临时界限应当选取两国专属经济区重叠的中间线。如前所述,黎巴嫩与以色列的专属经济区界限起始点应当在 Point B2 处,又根据图 5 可知,两国专属经济区中间线的终点应位于 Point 1 与 Point 23 连线的中间点上,即 Point B3,则 Point B2 与 Point B3 的连接线为黎以专属经济区重叠区域的临时中间线。

2. 相关因素的考虑⁶²

黎巴嫩与以色列专属经济区划界的衡平考量因素主要包括地理因素、地质因素、社会经济因素等。

(1) 地质因素和地理因素

根据前文对黎凡特盆地地质因素的考量,在海平面下,黎凡特盆地由东向西逐渐加深,该区域不存在断层、隆起、海沟等地质构造。在海平面上,黎凡特盆地的东部海岸即黎巴嫩以色列两国边界区域,海岸形状比较平直,没有出现强烈的海岸弯曲或凹凸等形状,因此该区域的海岸形状不会对两国的专属经济区划界产生影响,更为重要的是,黎凡特盆地区域并不存在岛屿或岩礁,黎以专属经济区划界不必考虑此因素。因此,黎凡特盆地的地质因素和地理因素都不会对两国的专属经济区划界产生影响。

(2) 社会经济因素

社会经济因素主要包括自然资源、国防安全、经济依赖等要素。其中,自然资源是影响黎以两国专属经济区划界的关键。根据美国地质调查局报告,黎以相关

58 Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, *I.C.J. Reports*, 1985, p. 46, para. 60.

59 Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, *I.C.J. Reports*, 2009, p. 101, paras. 115~116.

60 Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, *I.C.J. Reports*, 2012, pp. 69~74, paras. 184~199.

61 Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, *I.C.J. Reports*, 2012, pp. 71~72, paras. 190~194.

62 Ian Brownlie, *Principles of Public International Law*, 7th ed., London: Oxford University Press, 2008, pp.216~217, p. 220; 傅崐成:《国际海洋划界案件中的衡平考量》,载于《海洋法专题研究》,厦门:厦门大学出版社 2004 年版,第 179~180 页。

专属经济区争议区域恰好处于黎凡特次盐层评估单元与上新世—更新世储层评估单元的交汇处,黎以任何一方争取到更多的专属经济区就意味着争取到更多的油气资源。黎以两国都是油气资源匮乏的国家,因此该区域的油气自然对两国的经济意义重大。

对黎巴嫩而言,黎巴嫩放弃 Point 1 选择 Point 23 的理由并不充分。第一,2007 年 1 月黎塞协定签订,2010 年 3 月美国地质调查局公布报告,2010 年 7 月黎巴嫩第一次向联合国提交南部专属经济区坐标表,并确定 Point 23 为其最南端坐标点,联系 3 个时间点可知黎巴嫩变更其专属经济区最南端坐标点是为争夺更多自然资源。2007 年黎巴嫩没有批准黎塞协定,其原因并不是黎巴嫩认为 Point 1 不能取得黎巴嫩与塞浦路斯海域划界的公正结果,而是出于对土耳其与塞浦路斯紧张关系的考虑。黎塞协定中两国协定的专属经济区边界线各点坐标位置在一定程度上反映了黎巴嫩的态度,如果黎巴嫩认为 Point 23 更能取得公平结果,早在 2007 年黎塞协定中应该体现出来。第二,黎方认为 Point 23 是黎巴嫩、以色列与塞浦路斯三国专属经济区等距离线点,即从 Point 23 分别到三国的海岸距离相等,因此应当选择此点作为三国专属经济区的分界点,但这并没有得到塞浦路斯和以色列的认可。塞浦路斯作为黎塞协定和以塞协定的当事方,在 2 个协定中均主张 Point 1 为专属经济区边界线的分界点。以色列认为黎巴嫩的行为前后的不一致,导致其不得不依据国际法确定其专属经济区的边界点。可见,黎巴嫩的单方面更改其专属经济区界限最南端点的行为不甚合理。

相较于黎巴嫩而言,以色列选取 Point 1 点理由更为充足,以塞协定和以方向联合国提交的以色列北部领海和专属经济区坐标表均一致选择 Point 1 作为以方专属经济区界限最北端点。此外,以方在以塞协定和向联合国提交的坐标表中均说明 Point 1 可在进一步调查和协商的基础上予以适当调整或修改,以达到三方都可接受的公平结果。⁶³然而,如果以以方主张的 Point 1 为黎以两国专属经济区的分界点,在分配黎凡特盆地油气资源方面,将会明显导致以色列的所获得的面积显著大于黎方所获得的面积。因此,本文认为,为取得公平结果,选择 Point 1 与 Point 23 的中间点 Point B3 作为两国专属经济区分界点更为适宜,该点的选择能够更为公平地分配该区域的自然资源。

3. 比例失调检验

在考虑相关因素后,连接 Point B2 与 Point B3 来划定黎以两国的专属经济区界限,不会造成两国各自专属经济区面积比例失调,也不会造成该区自然资源归

63 List of Geographical Coordinates for the Delimitation of the Northern Limits of the Territorial Sea and Exclusive Economic Zone of the State of Israel in WGS84 (submitted to the UN by the Permanent Mission of Israel on 12 July 2011), at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/isr_eez_northernlimit2011.pdf, 20 August 2013.

属的比例失调。因此,本文认为两国应当依照 Point B2 与 Point B3 的连线来划定两国专属经济区界限。黎巴嫩与以色列的海域分界线如图 6 所示。

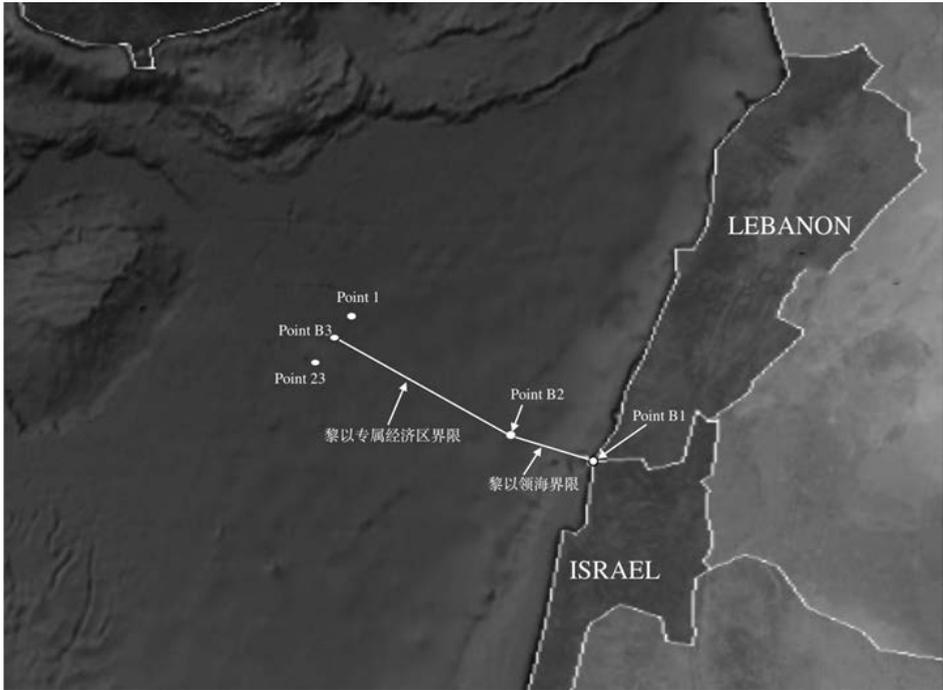


图 6 黎巴嫩与以色列领海与专属经济区分界线

(来源:此图由笔者在图 3 的基础上制作。)

本文在考虑各种因素后,为黎巴嫩与以色列领海和专属经济区的划界提出一个较为公平的划界方案,以供参考。然而,要想根本解决黎以海洋划界争端,则需要两国的真诚合作。事实上,合作开发是较为有效的解决方式。一方面,由于争议海域面积相对较小,即使完成划界,也可能存在跨越领海或专属经济区界限的油气资源。海洋中自然资源的重要特征是,比陆上的同类资源更富有流动性。就黎以争端的焦点油气资源而言同样如此,“在油田跨越一条国际疆界的那些地方,蕴藏的石油几乎可以从这条界线的另一边完全抽取出去”,⁶⁴或者,即使其中一方只开采位于己方一侧的资源,也不可避免地会对整体资源的开采条件造成影响。⁶⁵因此,在发现单一地质石油结构跨越了边界线的情况,在划界协定中也常常规定

64 [澳] J. R. V. 普雷斯科特,王铁崖、邵津译:《海洋政治地理》,北京:商务印书馆 1978 年版,第 22 页。

65 David M. Ong, Joint Development of Common Offshore Oil and Gas Deposits: “Mere” State Practice or Customary International Law?, *The American Journal of International Law*, Vol. 93, No. 4, 1999, p. 778.

“矿物资源条款”，以谋求共同开发。⁶⁶ 另一方面，在难以达成划界协议时，采取共同开发制度可避免争端恶化，成功案例如 20 世纪 60 年代科威特与沙特阿拉伯共同开发案。除了合作开发方式时常为人们所称道的经济性优势，由于合作开发主要由企业直接进行，它还尤其适用于像黎巴嫩与以色列这样未建立外交关系的国家之间。在科威特与沙特阿拉伯共同开发案中，双方主权国家并不直接参与油气资源的开发，而是签发许可证，由国际石油公司获取共同的许可后进行开发。⁶⁷

五、结 论

黎以海洋划界争端主要源于东地中海新油气田的发现。两国争端威胁着该地区的安全，不利于资源的开发利用。为了保证中东地区的和平，促进资源的开发利用，黎以海域划界的争端可用法律方法和外交方法加以解决。但无论采取哪种方法都需要得到两国的明确同意。此外，没有一个全面考虑两国历史、地理地质环境、国际社会的态度等因素的黎以两国海域划界方案，两国争端不可能得到解决。因此，在考虑各种因素后，本文给出了一个有关两国领海和专属经济区界限划界的参考方案。黎以两国应尽快达成共识，在协议的基础上公平划定两国相邻海域的界限，早日共同开发利用东地中海油气资源，以实现多赢的局面。

66 萧建国：《国际海洋边界石油的共同开发》，北京：海洋出版社 2006 年版，第 9 页。

67 萧建国：《国际海洋边界石油的共同开发》，北京：海洋出版社 2006 年版，第 33~34 页。

The Offshore Oil and Gas Dispute and the Maritime Delimitation Scheme between Israel and Lebanon

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Abstract: Since the discovery of oil and gas resources in the eastern Mediterranean region, especially in the Levantine Basin, exclusive economic zone (EEZ) claims in that region by surrounding coastal States have greatly increased, especially between Israel and Lebanon, whose offshore oil and gas dispute has become a hot issue affecting regional security. This article starts with an analysis of relevant maritime delimitation agreements and respective claims of the two States, and then comes to the conclusion that the maritime delimitation between the two States should include the delimitation of both adjacent territorial waters and EEZs, and that non-delimited land boundaries are the crux of the solution to the maritime delimitation. As for the solution to the dispute, this article makes the proposal that joint development can be an effective solution, and that in an effort to achieve equitable delimitation results, social and economic factors, rather than geographic and geological ones, should be given more importance in the development of the EEZ delimitation scheme.

Key Words: Israel and Lebanon; Offshore oil and gas dispute; Maritime delimitation; Equitable consideration

Because an armistice agreement, rather than a peace treaty, was forged between Lebanon and Israel after the 1949 Palestine War (also known as the first Middle East War), conflicts between the two States have been unrelenting, fueled by the underlying Arab-Israeli conflict. In 2000, the United Nations designated the

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“Blue Line” between the two States, on the Lebanese side of which was deployed a UN peacekeeping force called the United Nations Interim Force in Lebanon (UNIFIL).¹ However, formal diplomatic relations between the two States were not established even after the end of the 2006 Lebanon War. Ever since the discovery of oil and gas resources in the eastern Mediterranean region, especially in the Levantine Basin, relations between the two States have been deteriorating. Moreover, as these resources are mainly located on borders between the exclusive economic zones (EEZs) of various States, their discovery has triggered competition and fights for them between Cyprus, Lebanon, Israel, and other States. In order to resolve its dispute with other interested States over the ownership of these resources, Cyprus set a good example by being the first State to conduct EEZ delimitation negotiations with its neighboring States. However, Lebanon and Israel, as neighboring coastal States, have not reached any relevant agreement on the delimitation of the EEZ or territorial sea. Motivated by prospects of developing oil and gas resources, both States submitted their respective coordinates for their unilaterally claimed maritime boundaries, resulting in overlapping claims. The two States’ intense competition for oil and gas resources has given rise to a controversial issue affecting regional security and raising concern among the international community. Based on an introduction of the Lebanon-Israel oil and gas dispute and an analysis of the nature, the crux, and the potential settlement mechanisms of the maritime delimitation dispute between the two States, this article puts forward its proposal for possible solutions to the conflict.

I. The Israel-Lebanon Offshore Oil and Gas Dispute

A. A Brief Instruction to the Geographic and Geological Conditions in the Levantine Basin

Lying at the junction of the Anatolian, Arabian, and African Plates and located in the eastern Mediterranean, the Levantine Basin is bordered to the east by the coast of Syria, Lebanon, and the Israel; to the west by the Eratosthenes Seamount; to the south by the Nile Delta Cone; and to the north by the Larnaca Thrust Zone.

1 Relevant information on the background and responsibilities of the UNIFIL, at <http://www.un.org/en/peacekeeping/missions/unifil/background.shtml>, 20 August 2013.

(See Fig. 1).²

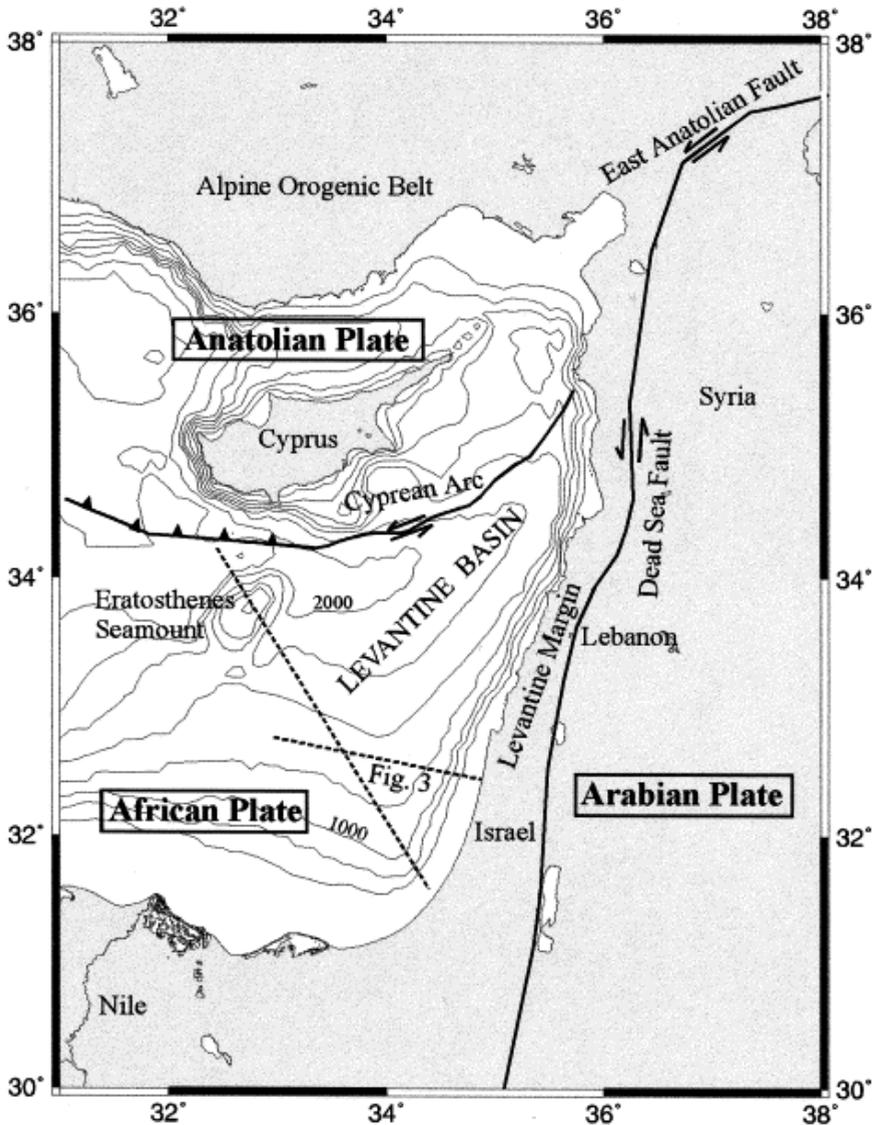


Fig. 1 The Tectonic Plate Model for the Eastern Mediterranean

(Source: N. Vidala, J. Alvarez-Marrón and D. Klaeschen, Internal Configuration of the Levantine Basin from seismic Reflection Data (Eastern Mediterranean), *Earth and Planetary Science Letters*, Vol. 180, 2000, p. 78.)

² N. Vidala, J. Alvarez-Marrón and D. Klaeschen, Internal Configuration of the Levantine Basin from seismic Reflection Data (Eastern Mediterranean), *Earth and Planetary Science Letters*, Vol. 180, 2000, pp. 77-78.

The Levantine Basin extends southeast-northwestward. From east to west, its depth gradually increases and reaches 2 km below sea level at the Eratosthenes Seamount; the eastern edge forms a steep terrain, while toward the west, it becomes gradually flat.³ The slope is gentle in the southern part of the Basin where sediments from the Nile constantly accumulate. Although there are many folds in the eastern part of the Basin, there is no geological fault, nor are there any islands.

As soon as it had been predicted during Cyprus's preliminary exploration in early 2001 along its coast that the Levantine Basin, which boasted favorable geological conditions, was rich with oil and gas reserves, Cyprus became the first to conduct negotiations with neighboring States on the EEZ delimitation and joint development of the region.⁴ In March 2010, a report from the United States Geological Survey (USGS) estimated that the oil and gas reserves in the Levantine Basin totaled 1.7 billion barrels and 3.45 trillion cubic meters⁵ respectively, accounting for 8.5% of the world's seabed oil and gas resources and representing the world's largest oil and gas discovery in the past decade.⁶

This discovery had a huge influence on the region, expediting EEZ claims in the basin made by surrounding coastal States including Lebanon and Israel. For Lebanon and Israel, both of which are oil importers with very limited reserves of onshore energy resources, the stable supply of oil, natural gas, and other energy sources has been the key to ensuring their economic and social development. However, the political turmoil in multiple States in North Africa and West Asia has seriously affected their stable supply of energy sources. For example, due to the Egyptian civil unrest that began in 2011, Israel's import of natural gas from Egypt was temporarily suspended, and the planned gas pipeline project faces dim prospects.⁷ Therefore, the discovery of oil and gas resources was of major

3 N. Vidala, J. Alvarez-Marrón and D. Klaeschen, Internal Configuration of the Levantine Basin from seismic Reflection Data (Eastern Mediterranean), *Earth and Planetary Science Letters*, Vol. 180, 2000, pp. 79~80.

4 James Stocker, No EEZ Solution: The Politics of Oil and Gas in the Eastern Mediterranean, *The Middle East Journal*, Vol. 66, No.4, Autumn 2012, p. 584.

5 U.S. Geological Survey (World Petroleum Resources Project), Assessment of Undiscovered Oil and Gas Resources of the Levant Basin Province, Eastern Mediterranean, at <http://pubs.usgs.gov/fs/2010/3014/pdf/FS10-3014.pdf>, 20 August 2013.

6 Ethan Bronner, Gas Field Confirmed off Coast of Israel, *N.Y. Times*, 30 December 2010, at <http://www.nytimes.com/2010/12/31/world/middleeast/31leviathan.html>, 20 August 2013.

7 Abraham D. Sofaer, Securing Israel's Offshore Gas Resources, presentation at Lloyd's Conference in Tel Aviv: Specialist Solutions in the Face of Changing Risks, at <http://www.abesofaer.com/2011-pdfs/Offshore-Gas-Security-6-23-2011.pdf>, 20 August 2013.

significance to the energy security in Lebanon and Israel, both of which regarded it as a new pillar of national development.

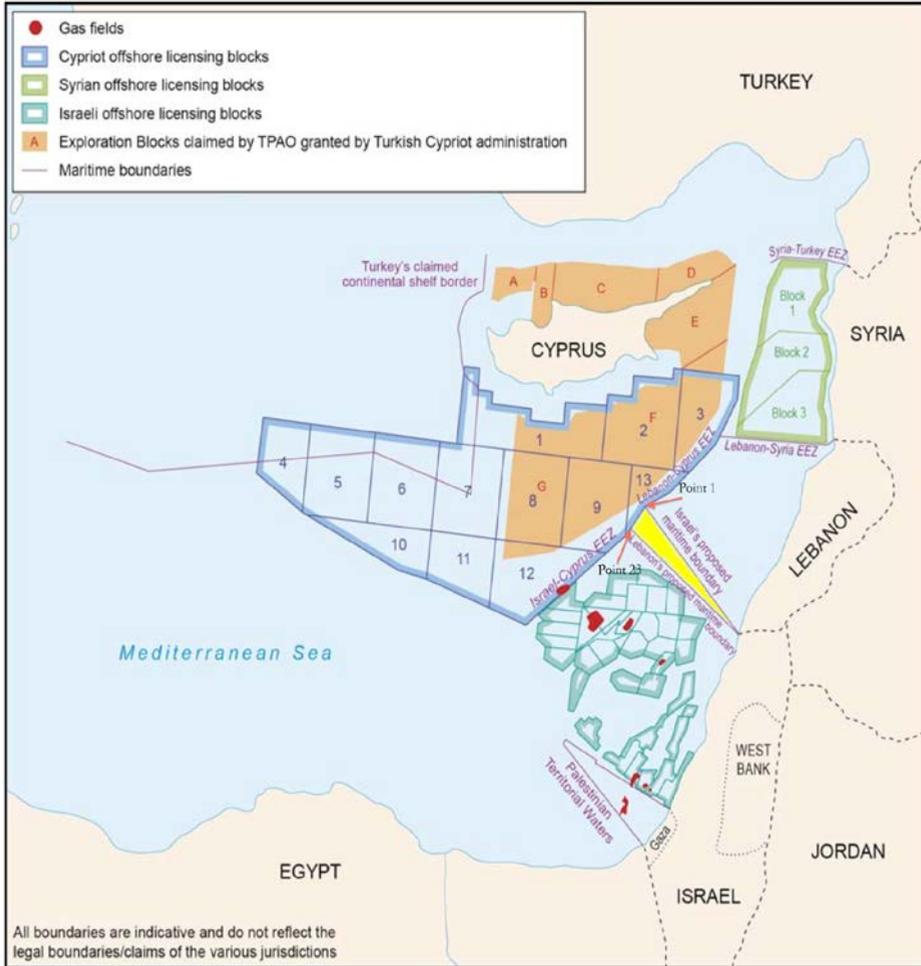


Fig. 2 The Overlapping EEZ claimed by both Lebanon and Israel, and the Maritime Boundaries and Oil and Gas Development Areas of Their Neighboring States or Districts (Updated in late 2012)

(Source: Hakim Darbouche, Laura El-Katiri and Bassam Fattouh, *East Mediterranean Gas: What Kind of a Game-changer?*, *Oxford Institute for Energy Studies*, December 2012, p. 7.)

However, as their diplomatic relations remain unestablished, their borders undelimited, and their territorial dispute over the Saba farms unsettled, Lebanon and Israel are confronted with great difficulties in conducting bilateral negotiations on the delimitation of territorial seas and EEZs, and both make unilateral maritime

claims. In Annex I to the Decree No. 6433 (Delineation of the Boundaries of the Exclusive Economic Zone of Lebanon) made in October 2011, Lebanon listed the coordinates of the Median Lines⁸ between its claimed EEZ and those respectively of Cyprus, Syria, and Palestine (Lebanon recognizes Palestine, but not Israel, as a sovereign State). In July 2011, Israel submitted to the United Nations the List of Geographical Coordinates for the Delimitation of the Northern Limit of the Territorial Sea and Exclusive Economic Zone of the State of Israel, unilaterally claiming its maritime boundaries with Lebanon.⁹ Therefore, the different claims on maritime boundaries resulted in overlapping claims on the EEZ. (See Fig. 2.)

B. Diplomatic Conflict between Lebanon and Israel

Both Lebanon and Israel claim sovereign rights over natural resources within the overlapping EEZ. To safeguard their national interests, the two States have frequently exchanged fierce rhetoric, drawing concern from the international community.

Lebanon claimed that energy resources in the disputed areas were located within its territorial sea and exclusive economic zone, and thus it was entitled to the right of ownership over these resources. The President,¹⁰ the Minister of Energy and Water,¹¹ and the Hezbollah leader of the Republic of Lebanon¹² have declared in statements that Lebanon would resolutely safeguard the sovereign right over and economic rights in its EEZ. They have demanded that Israel respect Lebanon's right of ownership over oil and gas resources in its EEZ, and warned that if Israel attempted to steal Lebanon's resources, it would suffer major

8 Decree No. 6433 - Delineation of the Boundaries of the Exclusive Economic Zone of Lebanon, 1 October 2011, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/lbn_2011decree6433.pdf, 20 August 2013.

9 List of Geographical Coordinates for the Delimitation of the Northern Limit of the Territorial Sea and Exclusive Economic Zone of the State of Israel, at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/isr_eez_northernlimit2011.pdf, 20 August 2013.

10 H. E. General Michel Sleiman, President of the Republic of Lebanon, at the Sixty-Sixth Session of the General Assembly of the United Nations (New York, 21 September 2011), at http://gadebate.un.org/sites/default/files/gastatements/66/LB_en.pdf, 20 August 2013.

11 Wassim Mroueh, Lebanon to Fight Israel at U.N., *The Daily Star Newspaper – Lebanon*, 11 July 2011, at <http://www.dailystar.com.lb/News/Politics/2011/Jul-11/Lebanon-to-fight-Israel-at-UN.ashx>, 20 August 2013.

12 Zeina Karam, Hezbollah Warns Israel Against “Stealing” Gas, *World News/The Guardian*, 23 January 2008, at <http://www.guardian.co.uk/world/feedarticle/9765255>, 20 August 2013.

consequences. Lebanon has also taken corresponding legal measures to protect its rights and interests. For instance, Lebanon passed the Legislative Decree No. 138 concerning Territorial Waters and Sea Areas in September 1983¹³ and Decree No. 6433 (Delineation of the boundaries of the exclusive economic zone of Lebanon) in October 2011. In addition, Lebanon has initiated a public bidding for the extraction of oil and gas resources in the Levantine Basin, in the hope that extraction of oil and gas resources in the region will begin soon.¹⁴

At the same time, Israel also claimed exclusive sovereign rights over oil and gas resources within the overlapping EEZ. Both the Prime Minister¹⁵ and the Minister of National Infrastructure¹⁶ of the State of Israel declared in their statements that Israel was entitled to sovereign rights over natural resources in the region in compliance with international law, and that if necessary it would not hesitate to resort to force to protect the region's natural resources. In addition to the exchanges of fierce rhetoric, in order to protect the offshore gas fields, Israel, while maintaining twenty-four-hour monitoring over the area through Israeli Navy UAVs,¹⁷ signed development agreements with many energy companies for the early extraction of natural resources in the region.¹⁸

If armed conflicts between the two States broke out in the overlapping claimed areas and, even worse, were aimed at attacking offshore oil and gas facilities, there would be disastrous consequences, and the marine environment of the region would suffer drastically. Both Israel and Lebanon are party to the 1974 Convention for the Protection of the Mediterranean Sea against Pollution (the Barcelona Convention), under which the two States shall be obligated to take measures to prevent marine pollution arising from "the exploitation of the continental shelf, the seabed and its

13 Legislative Decree No. 138 Concerning Territorial Waters and Sea Areas of 7 September 1983, at https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/LBN_1983_Decree.pdf, 20 August 2013.

14 Lebanon opens bidding for East Med gas, *UPI*, 2 January 2013, at http://www.upi.com/Business_News/Energy-Resources/2013/01/02/Lebanon-opens-bidding-for-East-Med-gas/UPI-32481357161299/, 20 August 2013.

15 Netanyahu Vows to Defend Med Gas Fields, *Cumhuriyet*, 19 January 2011, at <http://www.cumhuriyet.com/?hn=209634>, 20 August 2013.

16 Landau: Israel Would Defend Off-shore Gas Find with Force, *Jerusalem Post*, 27 June 2010, at <http://www.jpost.com/Israel/Article.aspx?id=179620>, 20 August 2013.

17 Yaakov Katz, IDF Deploys Drones to Protect Gas Fields From Hezbollah, *Jerusalem Post*, 9 August 2011, at <http://www.jpost.com/Defense/Article.aspx?id=233002>, 20 August 2013.

18 Sharon Udasin, British Oil Field Company Wins \$27 m. Bid to Service Tamar, *Jerusalem Post*, 20 April 2011, at <http://www.jpost.com/Business/Business-News/British-oil-field-company-wins-27m-bid-to-service-Tamar>, 20 August 2013.

subsoil.” However, in the 2006 Lebanon War, Israel attacked a Lebanese power plant, causing an environmental disaster in the Mediterranean when about 15,000 tons of oil were spilled into the sea.¹⁹

In the next section, this article will make a detailed analysis of the history of the overlapping claims made by Lebanon and Israel, as well as the nature and core issues of the bilateral maritime delimitation.

II. The Maritime Delimitation between Lebanon and Israel

From their respective claims, it can be seen that the Lebanon-Israel maritime delimitation dispute has undergone two respective phases, the first one centering on the end-point for their EEZ boundary, and the second one on the starting point for the territorial sea boundary.

A. The Dispute between Lebanon and Israel concerning the End-point of Their EEZ Boundary

The first phase of the Israel-Lebanon dispute on maritime delimitation centered on the shared dividing point of EEZs between Lebanon, Israel, and Cyprus. Although Lebanon and Israel have never conducted any delimitation negotiations with each other, both States have signed agreements with Cyprus on the delimitation of the EEZ. They also submitted to the United Nations lists of coordinates for their unilaterally claimed EEZs. From these documents, it is possible to gain some preliminary knowledge of the different claims made by the two States in this phase.

1. Lebanon’s Claim

Lebanon and Cyprus have been conducting negotiations on EEZ delimitation since 2002, and signed the Agreement between the Government of the State of Lebanon and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone (hereinafter “the Lebanon-Cyprus Agreement”) in

19 James Stocker, No EEZ Solution: The Politics of Oil and Gas in the Eastern Mediterranean, *The Middle East Journal*, Vol. 66, No. 4, Autumn 2012, p. 593.

January 2007,²⁰ which was ratified by Cyprus but not by Lebanon.²¹ The agreement has defined the six coordinates for the limits of both sides' EEZ boundaries (See Table 1), the southernmost of which is Point 1 (northern latitude 33°38'40", eastern longitude 33°53'40").

Table 1 List of Coordinates Annexed to the Lebanon-Cyprus Agreement

(Source: Agreement between the Government of the State of Lebanon and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, at <http://www.mees.com/en/articles/6015-cyprus-lebanon-cyprus-israelofshore-delimitation>, 20 August 2013)

Number of Point	Latitude (North)	Longitude (East)
1	33°38'40"	33°53'40"
2	33°51'30"	34°02'50"
3	33°59'40"	34°18'00"
4	34°23'20"	34°44'00"
5	34°39'30"	34°53'50"
6	34°45'00"	34°56'00"

Since the southern EEZ boundary between Cyprus and Lebanon involves tripartite delimitation between Israel, Cyprus, and Lebanon, the issue has arisen of whether Point 1 has the legal effect of being the common dividing point of the

20 Agreement between the Government of the State of Lebanon and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, at <http://www.mees.com/en/articles/6015-cyprus-lebanon-cyprus-israelofshore-delimitation>, 21 June 2013.

21 James Stocker pointed out that the reason why Lebanon failed to ratify the Lebanon-Cyprus Agreement had to do with the opposition of Turkey, which supported the "Turkish Republic of Northern Cyprus" and objected to Cyprus's unilateral claim of EEZ, and that this was just one example of how the complex political situation in the region has added difficulties to the maritime delimitation in the region. See James Stocker, No EEZ Solution: The Politics of Oil and Gas in the Eastern Mediterranean, *The Middle East Journal*, Vol. 66, No. 4, Autumn 2012, p. 586.

respective EEZs of the three States.

In line with Article 3 of the Lebanon-Cyprus Agreement, "...if either of the two States is engaged in negotiations aimed at the delimitation of its exclusive economic zone with another State, that Party, before reaching the final agreement with the other State, shall notify and consult the other Party, if such delimitation is in connection with coordinate 1 or 6."²² Thus, it can be concluded that the Lebanon-Cyprus Agreement has taken into consideration the fact that on their northern boundary there remain disputes on EEZ delimitation between Cyprus, Lebanon, and Syria, and on their southern boundary between Cyprus, Lebanon, and Israel. On the other hand, according to Article 5 of the Lebanon-Cyprus Agreement, this Agreement "is subject to ratification according to the constitutional procedures in each country" and "shall enter into force upon the exchange of instruments of ratification." As Lebanon failed to ratify this Agreement, it has not yet taken effect and is binding on neither Cyprus nor Lebanon.²³

Subsequently, Lebanon submitted three times to the United Nations lists of coordinates, on July 14, 2010,²⁴ October 19, 2010,²⁵ and October 19, 2010, for the western, southern, and northern boundaries of its unilaterally claimed EEZ, respectively. The document that Lebanon submitted the third time, which made clear that "this deposit takes precedence over the deposits made by Lebanon on July 14, 2010 and October 19, 2010,"²⁶ defined the boundary between its EEZ and those of its neighboring States, representing the official position of Lebanon. In the list of coordinates submitted on October 2011, in which Lebanon unilaterally designated the "Western Median Line" between its EEZ and that of Cyprus, though Point 1 was included as well, it was not Point 1 but instead the newly included Point 23 (northern latitude 33°31'51.17", eastern longitude 33°46'8.78") (See Table 2) that was designated as the southernmost coordinate. Compared with the Lebanon-

22 Agreement between the Government of the State of Lebanon and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, at <http://www.mees.com/en/articles/6015-cyprus-lebanon-cyprus-israelofshore-delimitation>, 20 August 2013.

23 See E. S. Abu Gosh and R. Leal-Arcas, Gas and Oil Explorations in the Levant Basin: The Case of Lebanon and Israel, *OGEL*, Vol. 11, Issue 3, April 2013, p. 15.

24 M.Z.N.79.2010.LOS of 24 August 2010, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn79ef.pdf, 20 August 2013.

25 M.Z.N.79.2010.LOS.Add.1 of 9 November 2010, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn79add1ef.pdf, 20 August 2013.

26 M.Z.N.85.2011.LOS of 14 November 2011, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn85ef.pdf, 20 August 2013.

Cyprus Agreement, under which Point 1 was designated as the southernmost coordinate, the outer limit of the EEZ of Lebanon had been unilaterally extended about 17 kilometers to the southwest. The list of coordinates also included six coordinates for the “Southern Median Line”²⁷ between the EEZs of Lebanon and Palestine (Israel), the southernmost of which is also Point 23.

Table 2 Lists of Coordinates for the Boundary between the Respective EEZ of Lebanon and Cyprus, Submitted by Lebanon to the United Nations in October 2011

(Source: At http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/lbn_mzn85_2011.pdf, 20 August 2013.)

Points	Degrees	Minutes	Seconds		Degrees	Minutes	Seconds	
23	33	46	8.78	E	33	31	51.17	N
24	33	51	30.31	E	33	37	13.10	N
25	33	50	25.30	E	33	36	8.01	N
1	33	53	40.00	E	33	38	40.00	N
2	34	2	50.00	E	33	51	30.00	N
3	34	18	0.00	E	33	59	40.00	N
4	34	44	0.00	E	34	23	20.00	N
5	34	53	50.00	E	34	39	30.00	N
6	34	56	0.00	E	34	45	0.00	N
7	34	58	13.92	E	34	50	42.00	N

Regarding the list of coordinates, the Minister for Foreign Affairs and Emigrants of Lebanon explained in his letter to the Secretary-General of the United Nations on 20 June 2011 that Point 1 (the southernmost coordinate) in the Lebanon-Cyprus Agreement was not a terminal point between the three States. He stated that Point 1 could only be viewed as a point that is shared by Lebanon and Cyprus, and that its proposed Point 23 was the equidistant point between the EEZs of the three

27 Deposit of a chart and lists of geographical coordinates of points defining the Western, Northern and Southern limits of Lebanon’s exclusive economic zone, at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/lbn_mzn85_2011.pdf, 20 August 2013.

States.²⁸

In summary, as shown in Fig. 3, Point 23, rather than Point 1, was one of the dividing points of the EEZs of Lebanon and Israel.



Source: © 2012 Google, © 2012 DigitalGlobe, Data SIO, NOAA, US Navy, NGA, GEBCO, © 2012 Cnes/Spot Image, US Department of State Geographer

Fig. 3 Map of the EEZ Claimed by Lebanon

(Source: James Stocker, No EEZ Solution: The Politics of Oil and Gas in the Eastern Mediterranean, *The Middle East Journal*, Vol. 66, No. 4, Autumn 2012, p. 586.)

28 A letter dated 20 June 2011 from the Minister for Foreign Affairs and Emigrants of Lebanon addressed to the Secretary-General of the United Nations concerning the Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, signed in Nicosia on 17 December 2010, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/lbn_re_cyp_isr_agreement2010.pdf, 20 August 2013.

2. Israel's Claim

In December 2010, the EEZ delimitation agreement reached between Israel and Cyprus (hereinafter “the Israel-Cyprus Agreement”)²⁹ was ratified respectively by Israel³⁰ and Cyprus,³¹ and thereupon became binding on both parties. The Israel-Cyprus Agreement provided the 12 coordinates for the outer limit of the EEZs between the two States, the northernmost of which was Point 1 (northern latitude 33°38'40", eastern longitude 33°53'40"). It is clear that the northernmost end of the EEZ boundary designated under the Israel-Cyprus Agreement was exactly the same as the southernmost end of the EEZ boundary designated under the Lebanon-Cyprus Agreement. In the list of coordinates for the northern boundary of territorial waters and the EEZ that Israel submitted unilaterally to the UN in July 2011, Point 1 remained explicitly designated as the northernmost end of its EEZ boundary with Lebanon.³² From the above, it can be seen that the end-point of the EEZ boundary between Lebanon and Israel claimed by Israel was not Point 23 but Point 1.

In accordance with Article 1(e) of the Israel-Cyprus Agreement, “taking into consideration of the principles of customary international law relating to the delimitation of the exclusive economic zone between States, the geographical coordinates Points 1 or 12 could be reviewed and/or modified as necessary in light of a future agreement regarding the delimitation of the exclusive economic zone to be reached by three States concerned with respect to each of the said points.” The same explanation was made with regard to Point 1 in the list of coordinates for the northern boundary of the territorial waters and the EEZ submitted to the UN by Israel. Israel had also been aware of the issue of tripartite delimitation, and left room for further tripartite negotiations and modification of the three States’ shared

29 Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, 17 December 2010, at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/cyp_isr_eez_2010.pdf, 20 August 2013.

30 The Government of Israel, Decision 2794 (3.2.2011): Ratification of the Israel-Cyprus Agreement on the Delimitation of the EEZ, at <http://www.pm.gov.il/PMO/Archive/Decisions/2011/02/des2794.htm>, 20 August 2013.

31 The Government of Cyprus: Ministry of Commerce, Industry and Tourism, at <http://www.mcit.gov.cy/mcit/mcit.nsf/All/A6D222B09D72E659C2257441002EE9BE?OpenDocument>, 20 August 2013.

32 List of Geographical Coordinates for the Delimitation of the Northern Limits of the Territorial Sea and Exclusive Economic Zone of the State of Israel (submitted to the UN by the Permanent Mission of Israel on 12 July 2011), at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/isr_eez_northernlimit2011.pdf, 20 August 2013.

dividing point of the EEZs. However, Lebanon and Israel have unfortunately not yet conducted dialogues on the dispute over the three States' shared dividing point with an aim to make reasonable modification, but instead have attributed the causes of overlapping claims to the other party.

As regards the overlapping claims arising from Lebanon's claims in July 2010 and October 2010, Israeli Prime Minister Benjamin Netanyahu commented, "[t]he maritime line that Lebanon presented to the UN is significantly south of the Israeli line. It contradicts the line Israel has agreed upon with Cyprus, and what is more significant to me is that it contradicts the line that Lebanon itself concluded with Cyprus in 2007. Our goal is to establish the position of Israel regarding its maritime boundary, according to international maritime law." Israel accused Lebanon of overlapping its own EEZ claims by making inconsistent claims in the two lists of coordinates.³³

On the other hand, however, Lebanon protested to the UN that the Israel-Cyprus Agreement, which completely disregarded Lebanon's claim by using Point 1 as a dividing point between Lebanon and Israel, constituted a flagrant attack on Lebanon's sovereign rights over that zone and the violation of the sovereign and economic rights of Lebanon. The country restated its claim that the end-point of the EEZ boundary between Lebanon and Cyprus should be Point 23 rather than Point 1.³⁴

We can see, then, that differing claims made by Lebanon and Israel resulted in the inconsistency between the proposed end-points of the EEZ boundary between the two States, and ultimately gave rise to a diplomatic crisis.

B The Dispute over the Starting Point of the Territorial Sea Boundary between Lebanon and Israel

In the second phase of the dispute, claims made by both States involved not only the outer limits of the EEZs, but also the territorial sea boundaries, with the

33 Herb Keinon, Cabinet Approves Northern Maritime Border, *Jerusalem Post*, 10 July 2011, at <http://www.jpost.com/NationalNews/Article.aspx?id=228666>, 20 August 2013.

34 A letter dated 20 June 2011 from the Minister for Foreign Affairs and Emigrants of Lebanon addressed to the Secretary-General of the United Nations concerning the Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, signed in Nicosia on 17 December 2010, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/lbn_re_cyp_isr_agreement2010.pdf, 20 August 2013.

debate focused on the starting point of the territorial sea boundary between the two States, something that scholars have failed to pay sufficient attention to in their commentaries.

In the list of coordinates for the northern boundaries of the territorial sea and the EEZ between the two States that Israel unilaterally submitted to the UN in July 2011, Point 1 (northern latitude 33°38'40", eastern longitude 33°53'40") was included among the six coordinates listed (see Table 3). Israel explained in Note 1 that Point 1 in the list was derived from the Point 1 of the Israel-Cyprus Agreement.

Table 3 List of Geographical Coordinates for the Delimitation of the Northern Limit of the Territorial Sea and Exclusive Economic Zone of the State of Israel in WGS84 Submitted to the UN by Israel in July 2011

(Source: At http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/isr_eez_northernlimit2011.pdf, 20 August 2013.)

POINTS	DEGRE ES	MINUTE S	SECOND S		DEGRE ES	MINUTE S	SECOND S	
31	35	6	13.0	E	33	5	39.5	N
32	35	4	10.0	E	33	6	23.0	N
33	35	3	3.0	E	33	6	39.0	N
34	34	53	11	E	33	10	33.5	N
35	34	46	38.0	E	33	13	9.0	N
1	33	53	40.0	E	33	38	40.0	N

Among the other five coordinates, Point 31 (northern latitude 33°5'39.5", eastern longitude 35°6'13.0") is closest to the Blue Line covering the Lebanese-Israeli territorial border.

On September 3, 2011, Lebanon protested to the UN against the claim submitted to the UN by Israel. Not only did it restate its protest against Israel's using Point 1 as a shared dividing point between the EEZs of Cyprus, Lebanon, and Israel in the claim, but what's more, it voiced its solemn protest against Israel's including Point 32 into the list of coordinates: "It is clear from the coordinates submitted by Israel that point 31 flagrantly violates the principles and rules of international law and constitutes an assault on Lebanese sovereignty. That point is north of the internationally recognized land borders of Lebanon that are set forth

in the Paulet-Newcombe Agreement and the Armistice Agreement signed on 23 March 1949, according to which the southern border of Lebanon is delimited from Ra's Naqurah at point B1, the coordinates of which are given in the attachment.”³⁵

In the attachment to the letter, Lebanon gave the coordinates for Point B1 (see Table 4), the point designated by Lebanon as the starting point for the boundary between the two States.

Table 4 The Starting Point (Point B1) Proposed by Lebanon

(Source: At http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/lbn_re_isr__listofcoordinates_e.pdf, 20 August 2013.)

(a) Initial point 31, delimited from the southern borders of Lebanon, the coordinates of which are, according to the Israeli side, as set forth below:

31	Degree	Minute	Second
Latitude	33	5	39.5
Longitude	35	6	13

(b) The correct point, namely, point B1, at Ra's Naqurah, the coordinates of which are as set forth below:

B1	Degree	Minute	Second
Latitude	33	5	38.801
Longitude	35	6	14.137

In its Decree No. 6433 (Delineation of the Boundaries of the Exclusive Economic Zone of Lebanon) promulgated on October 1, 2011, Lebanon released the list of the coordinates of the limits of the southern, western, and northern sides of its EEZ, i.e., the list of the coordinates for its EEZ boundaries with Cyprus,

35 A letter dated 3 September 2011 from the Minister for Foreign Affairs and Emigrants of Lebanon addressed to the Secretary-General of the United Nations concerning the geographical coordinates of the northern limit of the territorial sea and the exclusive economic zone transmitted by Israel, at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/lbn_re_isr__listofcoordinates_e.pdf, 20 August 2013. Though the term “Blue Line” was not explicitly mentioned in this letter, the wording “the internationally recognized border of Lebanon” was quoted from the report of Secretary-General of the United Nations. See Report of the Secretary-General on the Implementation of Security Council Resolutions 425 (1978) and 426 (1978). The relationship between the Blue Line, the 1923 Paulet-Newcombe Agreement, and the 1949 Armistice Agreements between Lebanon and Israel signed on March 23, 1949 will be discussed in the following sections.

Palestine, and Syria.³⁶ In Annex I of the Decree, Lebanon gave the six coordinates for the median line between its EEZ and that of Palestine (Israel), among which were included Point 23 (the shared dividing point between the EEZs of Cyprus, Israel, and Lebanon proposed by Lebanon) and Point 18 (northern latitude $35^{\circ}5'38.94''$, eastern longitude $33^{\circ}6'11.84''$), the closest point to the Blue Line covering the Lebanon-Israel territorial border.³⁷

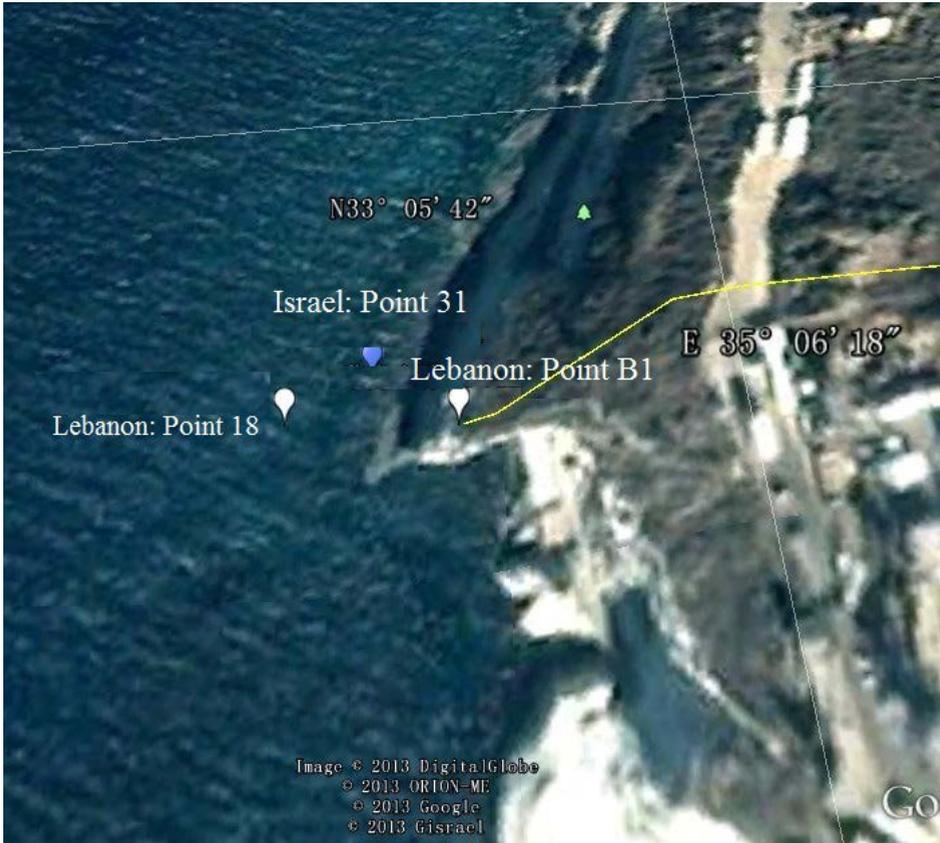


Fig. 4 The Positional Relationship between the Points Proposed by Israel and Lebanon and the Blue Line (i.e., the territorial border line marked in Fig. 4)

(Source: Created by the author of this article based on the original map downloaded at Google Earth)

36 Decree No. 6433 - Delineation of the boundaries of the exclusive economic zone of Lebanon, October 1st, 2011, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/lbn_2011decree6433.pdf, 20 August 2013.

37 Deposit of a chart and lists of geographical coordinates of points defining the Western, Northern and Southern limits of Lebanon's exclusive economic zone, at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/lbn_mzn85_2011.pdf, 20 August 2013.

Taking a bird's eye view on the map of Point 18 and Point B1 (the starting point) proposed by Lebanon as well as Point 31 proposed by Israel (See Fig. 4), one can clearly see the positional relationship between the points proposed respectively by Israel and Lebanon, and the Blue Line identified by the United Nations.

As shown in Fig. 4, Point 31 proposed by Israel is to the north of Point B1 (Naqoura), the reason for which Israel has not given, while the claim made by Lebanon follows relatively clear logic, that is, that Point 18 is a point on the median line whose starting point is Point B1.³⁸ According to Article 4 and Article 57 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"),³⁹ the baseline should first be defined before the outer limits of the territorial sea and the EEZ can be delimited. Moreover, both Lebanon and Israel claim that their territorial sea waters extend up to 12 nautical miles from their respective normal baselines (low-water line along the coast).⁴⁰ Thus, to define the starting point is of special significance to the maritime delimitation between States with adjacent coast.

Therefore, it is necessary to briefly discuss the history of the Blue Line and the legal status of Point B1. The Lebanon-Israel border, which has changed several times throughout history, affects bilateral relations between the two States and the regional situation. After World War I, Lebanon and Syria were under the French Mandate, while Palestine (Israel) was under the British Mandate. In 1923, France and Britain signed the Paulet–Newcombe Agreement, which fixed the line of the Syrian-Palestinian border (now the Syrian-Israeli border) between Ras al-Naqoura on the coast of the Mediterranean Sea and the town of Al-Hamma on the Yarmouk River.⁴¹ After the Palestine War, though the former Palestine-Lebanon border was replaced by the Armistice Demarcation Lines established between Israel and Lebanon in compliance with the Armistice Agreements reached on March 23, 1949, the starting point for the Armistice Demarcation Lines –

38 Deposit of a chart and lists of geographical coordinates of points defining the Western, Northern and Southern limits of Lebanon's exclusive economic zone, at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/lbn_mzn79_2010.pdf, 20 August 2013.

39 United Nations Convention on the Law of the Sea (UNCLOS), 1833 U.N.T.S. 397.

40 Lebanon's claim, see Legislative Decree No. 138 concerning territorial waters and sea areas of 7 September 1983, Art. 1; Israel's claim, see Territorial Waters Law, 5717/1956, as amended by the Territorial Waters (Amendment) Law, 5750-1990, of 5 February 1990.

41 Frederic C. Hof, A Practical Line: The Line of Withdrawal from Lebanon and Its Potential Applicability to the Golan Heights, *Middle East Journal*, Vol. 55(1), 2001, p. 25.

Ras al-Naqoura – remained unchanged.⁴² In 2000, in order to supervise Israel's withdrawal from southern Lebanon, the United Nations identified the Blue Line, i.e., the internationally recognized border of Lebanon, on the basis of the former 1923 international border and the former 1949 Armistice Demarcation Lines, with its starting point still being Ras al-Naqoura.⁴³ Thus, it is obvious that though the Blue Line, as only a withdrawal line, does not have the legal status of the international border between Lebanon and Israel, it is universally acknowledged that Ras al-Naqoura is the starting point for the territorial border between the two States. Moreover, Ras al-Naqoura is located on the coast between the two States. Therefore, the Point B1 should clearly be designated as the starting point for the Lebanon-Israel maritime boundary. Israel's claim that the border is at Point 31, which is to the north of Point B1 and within the territory of Lebanon, is thus a violation of the sovereignty of Lebanon and thus unreasonable.

Therefore, Lebanon's designation of the starting point for its territorial sea boundary, which is located within the territory of Lebanon, has not violated international law. The issue of Lebanon-Israel maritime delimitation can be divided into two sub-issues, namely, the issue of the EEZ delimitation and that of the territorial sea delimitation. As for the issue of the EEZ delimitation, there remains the dispute over the end point for the EEZ boundary between the two States, while coming to territorial sea boundary, Israel's claim, i.e., to designate Point 31 as the starting point for its northern territorial sea boundary with Lebanon, has no ground.

III. An Analysis of the Settlement Mechanism for the Israel-Lebanon Dispute on Maritime Delimitation

Disputes concerning maritime delimitation can usually be resolved either through legal approaches or diplomatic ones. Application of the former includes the solution of disputes such as territorial entitlement and maritime delimitation by international judicial bodies like the International Court of Justice and International Tribunal for the Law of the Sea, in compliance with international agreements including the Convention, as well as principles and rules under international law,

42 Yin Gang, *The Arab-Israeli Conflict: Problems and Solutions*, Beijing: International Cultural Publishing Company, 2002, p. 152. (in Chinese)

43 Report of the Secretary-General on the Implementation of Security Council Resolutions 425 (1978) and 426 (1978), at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2000/460, 20 August 2013.

while the latter includes third-party mediation.

A. An Analysis of Legal Approaches

One possible solution to the Lebanon-Israel dispute on maritime delimitation is to submit the dispute to the International Tribunal for the Law of the Sea,⁴⁴ the International Court of Justice,⁴⁵ or arbitration tribunals.⁴⁶ However, if we carefully study the conditions for the hearing and acceptance by these dispute settlement mechanisms, we may find that only when the two States have agreed to submit their dispute to the above institutions, can these institutions have the authority to hear the dispute. However, due to territorial disputes as well as historical and religious reasons, Lebanon has refused to recognize Israel as a sovereign State, and the consent of Lebanon to submit the dispute to the International Court of Justice⁴⁷ would amount to its indirect recognition of Israel as a sovereign State, which is inconsistent with Lebanon's national policy. Furthermore, the settlement of the dispute would take a long time and involve high judicial expenses, whether it is submitted for solution by the International Tribunal for the Law of the Sea, the International Court of Justice, or arbitration tribunals. Therefore, under the current circumstances, it is difficult to obtain the consent of both States to resolve their

44 According to Art. 20(2) of the Statute of the International Tribunal for the Law of the Sea, “[t]he Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI (of the UNCLOS) or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.” In other words, as long as non-contracting States agree to submit maritime disputes conforming with provisions under the UNCLOS to the International Tribunal for the Law of the Sea, they can become parties to the dispute in the Tribunal. Therefore, as long as Lebanon and Israel agree to submit their EEZ delimitation dispute to the Tribunal, the Tribunal will have the power to hear the dispute. See UNCLOS, Annex VI, the Statute of the International Tribunal for the Law of the Sea, Art. 20(2).

45 Explicit consent, no matter what form, from the parties to a dispute should be obtained before the dispute can be heard by the International Court of Justice, which is the precondition for the International Court of Justice to obtain jurisdiction over a dispute. S. Gozie Ogbodo, An Overview of the Challenges Facing the International Court of Justice in the 21st Century, *Annual Survey of International & Comparative Law*, Vol. 18, 2012, pp. 101~102; Case East Timor (Portugal v. Australia), Judgment, *I.C.J. Reports*, 1995, para. 26.

46 Both Israel and Lebanon should give explicit consent, whether they decide to submit the dispute to arbitration procedures provided for under the UNCLOS or to the settlement by any third-party organization or individuals. Troubled Waters Dispute between Lebanon, Israel Heats up, *Naharnet*, 3 August 2011, at <http://www.naharnet.com/stories/en/11866-troubled-waters-dispute-between-lebanon-israel-heatsup>, 20 August 2013.

47 UNCLOS, Annex VI: the Statute of the International Tribunal for the Law of the Sea, Art. 34(1).

maritime delimitation dispute by submitting it to international judicial institutions.

B. An Analysis of Diplomatic Approaches

The main third parties that have the ability to exert influence over the Lebanon-Israel offshore oil and gas dispute (or maritime delimitation dispute) are the United Nations, the European Union (EU), and the United States.

Since 2011, the Lebanese government has made repeated requests to the United Nations to protect its marine resources and maritime boundaries, in response to which the United Nations holds that the UNIFIL 1701 resolution does not include maritime delimitation.⁴⁸ However, in July 2011, the UNIFIL proposed that it could act as a mediator in the Lebanon-Israel maritime delimitation, and that a maritime security zone should be established.⁴⁹ Nevertheless, there remain many uncertainties as regards whether the United Nations can become a mediator or intervener in this dispute: on the one hand, members of the United Nations should reach relevant resolutions, while on the other hand, both Lebanon and Israel should take a cooperative attitude.⁵⁰

The EU has a significant stake in this dispute: to start with, due to the proximity of the Levantine Basin to the Mediterranean, the discovery of oil and gas resources in the region will have significant implications for EU members' markets. In addition, the escalation of the conflict between Lebanon and Israel could cause serious environmental pollution to EU States surrounding the Mediterranean. However, as the situation currently stands, the EU can exercise only a limited influence over Lebanon and Israel.⁵¹

Compared to the United Nations and the European Union, the United States is more likely to become the mediator in the Lebanon-Israel dispute over offshore oil and gas resources as well as over maritime delimitation. In order to end the

48 UN to Shami: We Won't Delineate Lebanese-Israeli Maritime Border, *Naharnet*, 5 January 2011, at <http://old.naharnet.com/domino/tn/NewsDesk.nsf/getstory?openform&BCD85A1506C9E2CBC225780F001DA69B>, 20 August 2013.

49 U.N. Looking Into Helping Lebanon Draw Maritime Security Line, *Daily Star (Leb.)*, 21 July 2011, at <http://www.dailystar.com.lb/News/Middle-East/2011/Jul-21/UN-to-assist-Lebanon-drawmaritime-security-line.ashx#ixzz1a1GbrjmV>, 20 August 2013.

50 See Martin Wählisch, Israel-Lebanon Offshore Oil & Gas Dispute-Rules of International Maritime Law, *ASIL Insights*, Vol. 15, No. 31, 2011, p. 4.

51 See James Stocker, No EEZ Solution: The Politics of Oil and Gas in the Eastern Mediterranean, *The Middle East Journal*, Vol. 66, No. 4, Autumn 2012, p. 596.

continuing dispute between the two States and to facilitate the extraction of oil in the Eastern Mediterranean, the United States has proposed that it define the boundary between EEZs of the two States.⁵² Though the United States has a significant influence over the region, which is best exemplified by its success in persuading Egypt and Israel to resolve their maritime dispute over the boundaries near Taba,⁵³ the maritime delimitation dispute between Lebanon and Israel cannot be resolved at its root without a detailed delimitation mechanism that is accepted by both States.

In sum, both legal approaches and diplomatic ones require cooperation between Lebanon and Israel, the crux of which is a detailed and equitable maritime delimitation mechanism that can be accepted by the two States. Thus, in the following section, this article will propose a mechanism for the delimitation of the disputed sea areas between the two States by taking into consideration both the historical background of the two States and other relevant factors.

IV. A Proposal on the Mechanism for the Delimitation of the Territorial Seas and the EEZ between Lebanon and Israel

The Convention has made differentiated provisions on the delimitation of territorial seas and that of the EEZs between States with opposite or adjacent coasts. As provided for under Article 15 of the Convention concerning the rules on the delimitation of territorial seas between States with opposite or adjacent coasts, “[w] here the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.” Thus,

52 Nicholas Blanford, Lebanon, Israel Take Step toward Claiming Big Oil, Gas Deposits, *The Christian Science Monitor*, at <http://www.csmonitor.com/World/Middle-East/2012/1219/Lebanon-Israel-take-step-toward-claiming-big-oil-gas-deposits>, 20 August 2013.

53 James Stocker, No EEZ Solution: The Politics of Oil and Gas in the Eastern Mediterranean, *The Middle East Journal*, Vol. 66, No. 4, Autumn 2012, p. 596.

it is obvious that the median line principle has been established as the principle for the delimitation of territorial sea between States with opposite or adjacent coasts. As for the delimitation of the EEZ, Article 74(1) provides, “[t]he delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.” It can be concluded that the principle established under the Convention for the delimitation of the EEZ between States with opposite or adjacent coast is not the median line principle, but rather the equitable principles, which require that a border be established between the EEZs of the two States by considering relevant factors so as to achieve equitable results.⁵⁴ Though Lebanon ratified its accession to the Convention in 1995 while Israel has not acceded to the Convention yet, relevant provisions relating to the EEZ, which have become part of customary international law,⁵⁵ can be applied as the legal basis for the resolution of the Lebanon-Israel dispute over maritime delimitation.

As the Lebanon-Israel maritime dispute includes both the delimitation dispute over the territorial sea and that over the EEZ, two differentiated delimitation mechanisms should be established, namely, the mechanism for territorial sea delimitation as well as that for the EEZ delimitation between Lebanon and Israel.

A. The Territorial Sea Delimitation between Lebanon and Israel

As the median line principle has been provided for as the principle for territorial sea delimitation between States with opposite or adjacent coast under both the 1958 Convention on the Territorial Sea and the Contiguous Zone and the 1982 Convention,⁵⁶ Lebanon and Israel should also comply with it regarding their territorial sea delimitation. Though both Lebanon and Israel submitted to the United

54 Ian Brownlie, *Principles of Public International Law*, 7th ed. London: Oxford University Press, 2008, pp. 216~217, p. 220.

55 Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, *I.C.J. Reports*, 1993, paras. 47~48. In the EEZ delimitation agreement concluded between Israel and Cyprus in December 2010, Israel recognized the applicability of relevant provisions on the EEZ under the Convention, see Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/cyp_isr_eez_2010.pdf, 20 August 2013.

56 Yoshifumi Tanaka, *The International Law of the Sea*, Cambridge: Cambridge University Press, 2012, pp. 188~190.

Nations their respective list of coordinates for their maritime boundary (Lebanon submitted its list of coordinates for the outer limits of its EEZ which include the coordinates for its southern boundary in October 2010, while Israel submitted the “List of Geographical Coordinates for the Delimitation of the Northern Limit of the Territorial Sea and Exclusive Economic Zone of the State of Israel in WGS84” in July 2011), their submitted coordinates for the starting point of their territorial sea were different. As mentioned in the previous section, Israel’s designation of Point 31 has no legal grounds because Point 31 is to the north of Point B1, and Israel has not explained the basis for its designation. On the other hand, Lebanon’s designation of Point B1 as the starting point for its boundary with Israel is not only in conformity with the history of the two States but also recognized and accepted by the international community, and thus Point B1 should be designated as the dividing point of the territorial boundary of the two States. Since both Lebanon and Israel use low-water lines as their baselines, it remains to be negotiated between the two States whether to adopt Point B1, Point 18 or a different point on their territorial seas boundary as the starting point. After taking into consideration various relevant factors, this article proposes to designate Point B1 as the starting point for the territorial sea boundary of the two States, which can be adjusted after bilateral negotiations in compliance with international law.

In accordance with Article 15 of the Convention, which has clearly provided that the median line principle shall be applied in the territorial sea delimitation between neighboring States and that a State’s territorial sea extends up to 12 nautical miles from its baseline, this article holds that Point B2 should be designated as the end-point for the territorial sea boundary between the two States. Therefore, the territorial sea boundary between the two States should be the straight line linking Point B1 and Point B2 (see Fig. 5).

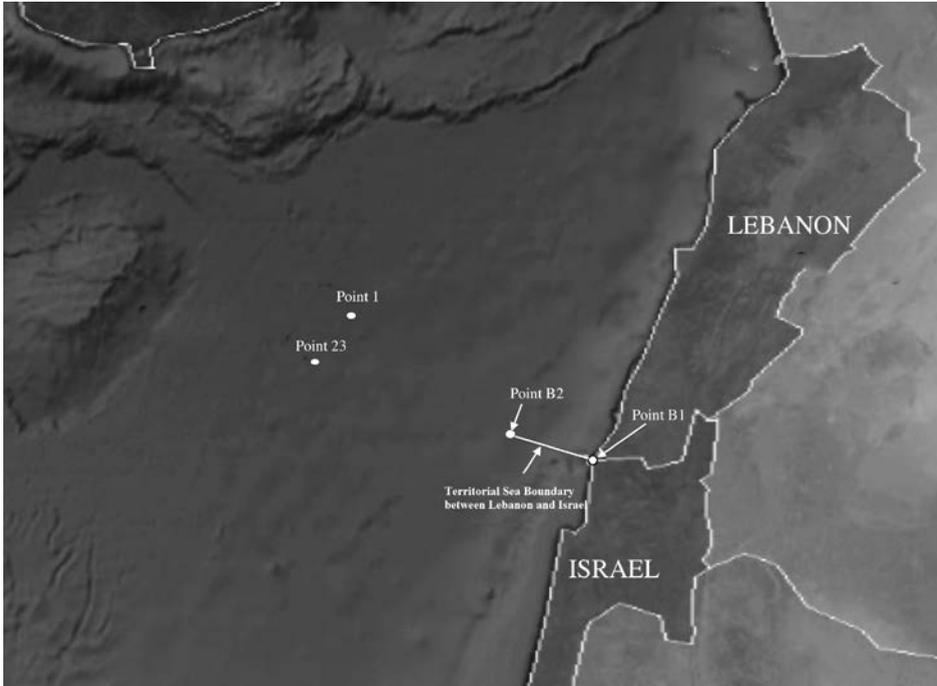


Fig. 5 Territorial Sea Boundary between Lebanon and Israel

(Source: Drawn by the author of this article on the basis of Fig. 3)

B. The EEZ boundary between Lebanon and Israel

As has been provided under Article 74 of the Convention, the EEZ delimitation between States with adjacent coasts should be conducted in compliance with the equitable principle. Therefore, in order to achieve equitable results in the delimitation of their EEZs, Lebanon and Israel should take the “corrective-equity approach,” which has currently become the predominant approach taken by international judicial institutions in the delimitation of overlapping sea areas between States with opposite or adjacent coast.⁵⁷ It has been applied in the cases concerning *Continental Shelf (Libyan Arab Jamahiriya/Malta)*,⁵⁸ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*,⁵⁹ and *Territorial and Maritime*

57 Yoshifumi Tanaka, *The International Law of the Sea*, Cambridge: Cambridge University Press, 2012, pp. 192~198.

58 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports*, 1985, p. 46, para. 60.

59 *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports*, 2009, p. 101, paras. 115~116.

*Dispute (Nicaragua v. Colombia)*⁶⁰ The “corrective-equity approach” should be taken in the following three phases: first, an interim boundary (usually the median line) should be designated between the territories (including the islands) of the interested States; second, the interim boundary should be adjusted or re-designated based on the consideration of various relevant factors so that equitable results can be achieved; and third, a disproportionality test should be applied to verify whether the delimitation line as modified in phase 2 is equitable.⁶¹ The “corrective-equity approach” can be also taken in the EEZ delimitation between Lebanon and Israel.

1. The Designation of the Interim Boundary between the EEZs of Lebanon and Israel

The median line of the EEZ to which Lebanon and Israel have made overlapping claims should be designated as the interim boundary between EEZs of Lebanon and Israel. As mentioned in earlier paragraphs, Point B2 should be designated as the starting point of the EEZ boundary between Lebanon and Israel. Besides, as has been illustrated in Fig. 5, Point B3, the intermediate point of the straight line connecting Point 1 and Point 23, should be designated as the end-point of the EEZ boundary between Lebanon and Israel. Therefore, we can come to the conclusion that the straight line connecting Point B2 and Point B3 should be designated as the interim boundary between EEZs of Lebanon and Israel.

2. The Consideration of Various Relevant Factors⁶²

Geographical, geological, socio-economic, and other relevant factors should also be taken into consideration in the EEZ delimitation between Lebanon and Israel so that equitable delimitation results can be achieved.

a. Geological and Geographical Factors

As has been discussed in previous paragraphs on the geological conditions of the Levantine Basin, below sea level, the depth of the basin gradually increases from east to west, and there is no such geological structure as a fault, nor is there any rise or trench in that region. As the eastern coast of the Levantine Basin, i.e., the coast of the border region between Lebanon and Israel, is relatively straight and

60 Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, *I.C.J. Reports*, 2012, pp. 69~74, paras. 184~199.

61 Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, *I.C.J. Reports*, 2012 pp. 71~72, paras. 190~194.

62 Ian Brownlie, *Principles of Public International Law*, 7th ed., London: Oxford University Press, 2008, pp. 216~217, p. 220; Kuen-chen Fu, Equitable Considerations in International Cases Concerning Maritime Delimitation, in *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004, pp. 179~180.

has no bends or bumps, the coastal shape of the region will not exert any influence on the EEZ delimitation between the two States. More importantly, as there are no islands or reefs in that region, such factors need not be taken into consideration in the delimitation. Therefore, neither geological nor geographical factors in the Levantine Basin can affect the EEZ delimitation between the two States.

b. Socio-economic Factors

Socio-economic factors mainly include such issues as natural resources, national defense security, and economic dependence, among which natural resources are the key factor that may affect the EEZ delimitation between Lebanon and Israel. According to a USGS report, as the disputed area of the EEZ between Lebanon and Israel is located right at the intersection of the Levant Sub-Salt Reservoirs Assessment Unit and the Plio-pleistocene Reservoirs Assessment Unit, either of the two parties that gets more share in the EEZ delimitation will gain more oil and gas resources, which are of great economic significance to both Lebanon and Israel, which are poor in oil and gas resources.

As for Lebanon, there are not sufficient reasons for it to choose Point 23 instead of Point 1 as the starting point of its EEZ boundary with Israel. First, it is speculated that Lebanon has changed its southernmost coordinate for its EEZ boundary with Cyprus for the purpose of acquiring more natural resources by considering three time points: in January 2007, when the Lebanon-Cyprus Agreement was signed; in March 2010 when the USGS report was released; and in July 2010, when it submitted the first list of coordinates for its southern EEZ to the United Nations, where Point 23 was designated as the southernmost point. The reason why Lebanon failed to ratify the Lebanon-Cyprus Agreement in 2007 is not that in its view it is not equitable to designate Point 1 as the southernmost coordinate for its EEZ boundary with Cyprus in the maritime delimitation, but because of the tension between Turkey and Cyprus. Since the coordinates for Lebanon's EEZ boundary with Cyprus provided for under the Lebanon-Cyprus Agreement reflect to some extent Lebanon's position, if Lebanon held that it was more equitable to designate Point 23 as the southernmost coordinate, its stance should have been reflected under the Agreement. Second, Lebanon proposed that Point 23, the equidistant point between the EEZs of Lebanon, Israel, and Cyprus, which was of equal distance to the coasts of the three States, be designated as the coordinate for the shared dividing point of the boundaries between the three States. However, Israel and Cyprus failed to recognize this proposal. On the one hand, Cyprus, as party to both the Lebanon-Cyprus Agreement and the Israel-

Cyprus Agreement, adhered to its position under both Agreements that Point 1 should be designated as one of the coordinates for its boundary with Lebanon and Israel. On the other hand, Israel, taking into consideration the inconsistent positions of Lebanon, held that the coordinates for its boundary with Lebanon should be designated in compliance with international law. From Cyprus and Israel's responses, it can be concluded that it was quite unreasonable for Lebanon to unilaterally change the southernmost coordinate for its EEZ limit.

Compared with Lebanon, Israel had sufficient reasons to designate Point 1 as the northernmost coordinate for its EEZ boundary. For one, this position has been reflected in both the Israel-Cyprus Agreement and the list of coordinates for its northern territorial sea and EEZ. For another, Israel had made it clear that Point 1 could be further adjusted and modified on the basis of further investigations and consultations in both the Israel-Cyprus Agreement and the list of coordinates for its northern territorial sea and EEZ, so as to achieve equitable results that can be accepted by all the three States.⁶³ However, if Point 1 is designated as one of the coordinates for the EEZ boundary between Israel and Lebanon, as Israel proposes, Israel will get a significantly larger share than Lebanon in the allocation of oil and gas resources in the Levantine Basin. In the view of this article based on the above considerations, it is more proper to designate Point B3, the intermediate point on the straight line connecting Point 1 and Point 23, as one of the coordinates for the EEZ boundary between the two States, so that natural resources in the region can be allocated in a more equitable manner.

c. The Application of the Disproportionality Test

This article holds that the straight line connecting Point B2 and Point B3 should be designated as the EEZ boundary between Lebanon and Israel based on due consideration of all relevant factors. Only in this way can disproportionality be avoided in terms of both the area of the EEZ and the allocation of natural resources in the region between the two States. The maritime boundaries between Lebanon and Israel are illustrated in Fig. 6.

63 List of Geographical Coordinates for the Delimitation of the Northern Limits of the Territorial Sea and Exclusive Economic Zone of the State of Israel in WGS84 (submitted to the UN by the Permanent Mission of Israel on 12 July 2011), at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/isr_eez_northernlimit2011.pdf, 20 August 2013.

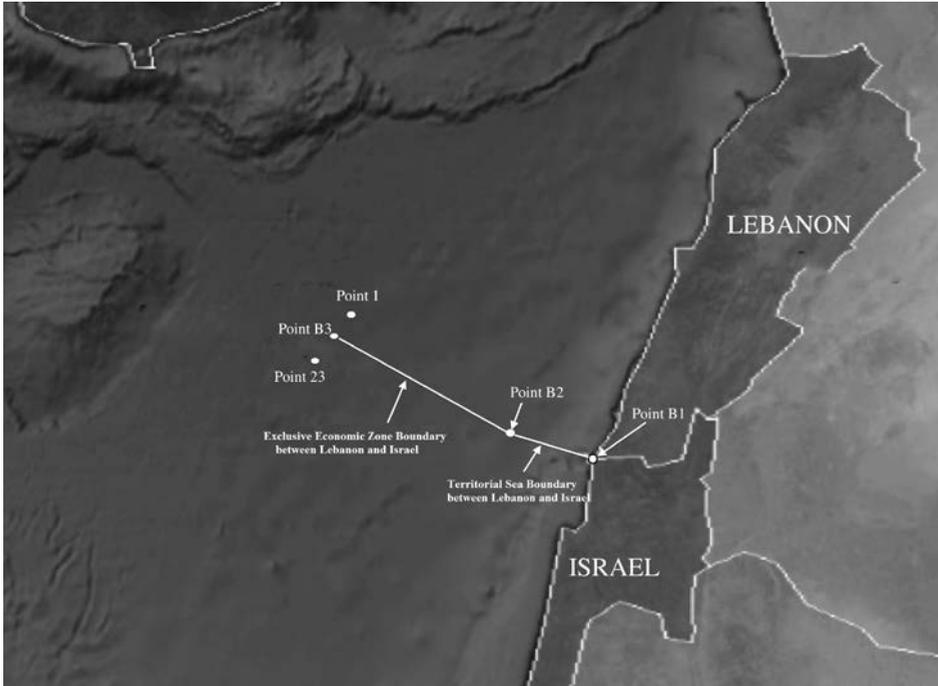


Fig. 6 The Boundary of the Territorial Sea and that of the EEZ between Lebanon and Israel

(Source: Drawn by the author of this article on the basis of Fig. 3)

Based on due consideration of various relevant factors, this article has proposed a relatively equitable delimitation method, which may provide certain reference for the resolution of the issue. However, only when the two States sincerely cooperate can the root issues of maritime delimitation be resolved. In fact, cooperative development is a relatively effective solution. On the one hand, the disputed sea is of such a relatively small area that even if it is delimited, there may exist oil and gas resources transcending the boundary of the territorial sea or the EEZ between the two States. Besides, as one of the important features of marine natural resources, they are of higher liquidity than those of the same kind on land. So it is the case with the oil and gas resources that have been the focus of the Lebanon-Israel delimitation dispute, for “where they are transcending an international boundary, almost all oil resources on one side of the boundary can be exploited on the other side of the boundary,”⁶⁴ and the exploitation of resources

64 J. R. V Prescott, translated by Wang Tieya and Shao Jin, *The Political Geography of the Oceans*, Beijing: Commercial Press, 1978, p. 22. (in Chinese)

by a State on its side of the boundary may exert some inevitable influence on the overall conditions for the exploitation of the oil reserve as a whole.⁶⁵ Therefore, under circumstances where a single geological petroleum structure was discovered that had transcended the boundaries between States, provisions relating to mineral resources were usually made under the delimitation agreements between these States, so as to achieve common development.⁶⁶ Meanwhile, when it is difficult to reach a delimitation agreement, the mechanism of joint development can be applied to avoid deterioration of the dispute; successful cases include the joint development of the Divided Zone by Kuwait and Saudi Arabia in the 1960s. The joint development approach, which is usually credited for its economic advantage and conducted by enterprises, is especially applicable to States that have not established diplomatic ties, such as Lebanon and Israel. During the joint development of Kuwait and Saudi Arabia, both sovereign States were not directly engaged in the exploitation of oil and gas resources, which was instead undertaken by international oil companies that had been issued license by two States.⁶⁷

V. Conclusion

The Lebanon-Israel dispute on maritime delimitation, arising mainly out of the discovery of new oil and gas fields in the eastern Mediterranean, has been not only a threat to the security of the region but also an obstacle to the development and utilization of resources there. In order to ensure peace in the Middle East and promote the development and utilization of resources, legal and diplomatic approaches can be taken in the resolution of the Lebanon-Israel dispute over maritime delimitation. However, the application of either kind of approach requires the explicit consent of both States. In addition, the delimitation dispute between the two States cannot be resolved without a delimitation scheme that has taken into consideration all relevant factors such the history, the geographical and geological conditions, and the attitude of the international community, among others. Based on

65 David M. Ong, Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?, *The American Journal of International Law*, Vol. 93, No. 4, 1999, p. 778.

66 Xiao Jianguo, *Joint Development of Offshore Oil and Gas Transcending International Boundaries*, Beijing: China Ocean Press, 2006, p. 9. (in Chinese)

67 Xiao Jianguo, *Joint Development of Offshore Oil and Gas Transcending International Boundaries*, Beijing: China Ocean Press, 2006, pp. 33-34. (in Chinese)

due consideration of all these factors, this article proposes a delimitation scheme, which may provide some reference for the delimitation of the territorial sea and the EEZ between the two States. Both Lebanon and Israel should reach a consensus based on agreements as soon as possible and realize an equitable delimitation of their adjacent sea areas and a early joint development of oil and gas resources in the eastern Mediterranean, so as to achieve a situation favorable to both States.

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论三步划界法的发展及法律地位

——其对中日东海大陆架划界的一些启示

江雨遥*

内容摘要: 1969年的北海大陆架案为国际海洋划界的具体方法抛下了一个疑问, 1985年利比亚/马耳他案使用的临时等距离线并根据特殊情况进行调整或移动的划界方法, 因其在多数情况下的客观、方便、公平, 在最近20多年的国际司法判例中日益受到推崇。2009年的黑海案中国际法院首次将其提升到三步划界方法论的地位上, 使之逐渐成为一种标准方法, 提升了划界法律的确定性。虽然通过国家实践与法律确信的 analysis, 三步法在理论上并未达到习惯法的要求, 但其不断得到巩固的事实在中日东海划界问题上无疑对中国愈加不利。中国应坚持一贯立场, 贯彻公平原则, 以协议方式争取最大的利益。

关键词: 国际海洋划界 三步法 等距离 标准方法 习惯法

一、引言

一般认为国际海洋划界的法律体系始于国际法院于1969年的北海大陆架案, 本案围绕丹麦、荷兰分别与联邦德国的大陆架争议, 否定了1958年《大陆架公约》第6条中规定的等距离方法的习惯法地位, 判决等距离方法的使用对于当事国之间并不具有强制力。国际法院进一步明确, 没有任何一项单一的划界方法在所有情形下都具有强制力, 适用于北海大陆架区域划界的国际法原则与规则应当是考虑了所有有关情况后的依公平原则的协议解决。¹ 然而, 公平原则并非划界的具体方法, 而仅是在决定划界时必须牢记的一个目标。² 方法论上处于空白, 极具主观性与不确定性, 使该案受到诸多批评。此外, 该案针对等距离方法进行论述, 而《大陆架公约》的第6条如今被称为等距离/特殊情况规则, 等距离与特殊情况结合

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1 North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark) (Federal Republic of Germany v. Netherlands), *ICJ Reports*, 1969, para. 101.

2 Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, *ICJ Reports*, 2002.

的意义显然已区别于单独使用等距离方法。

在2009年罗马尼亚/乌克兰的黑海案中,国际法院第一次明确提出了三步法这一概念。所谓三步法,即国际法院在划界过程中,按照确定的三项步骤或阶段进行,最终得到公平的结果。第一步,国际法院使用对划界区域的地理情况在几何学上客观且合适的方法,建立一条临时线。这条临时线根据海岸间的相邻或相向关系,分别表现为等距离线与中间线,其本质并无差别。第二步,为得到《海洋法公约》所要求的公平划界结果,国际法院考虑所有可能对上述临时线做出调整或移动的因素与情况。第三步,国际法院进行最后的成比例性验证,以确定上述划界方法得到的结果在当事方各自海岸线长度比例与海洋区域面积比例之间,是否存在显著的不成比例。³ 随后的判例亦表明,三步法已然成为国际法院对海洋划界方法最新的归纳总结,方法升格为方法论,划界确定性达到了一个新高度。本文试图对该方法的发展及法律地位进行阐述,并分析其可能对中日在东海的划界纠纷产生的影响。

二、三步法在国际司法机构的发展

(一) 适用三步法的海洋区域

黑海案中明确指出,三步法的适用范围包括专属经济区、大陆架的划界或是单一海洋划界,⁴并未涉及领海。

从国际法现有规则来说,《海洋法公约》第15条已经明确了领海划界的具体方法,其基本延续1958年《领海与毗连区公约》,若两国海岸彼此相向或相邻,任何一国在彼此没有相反协议的情形下均无权将其领海伸延至一条其每一点都同测算两国中每一国领海宽度的基线上最近各点距离相等的中间线以外,除非因历史性所有权或其他特殊情况而有必要采取不同的方法。对于非《海洋法公约》成员,国际法院在2001年的卡塔尔/巴林案中认定其第15条具有习惯法的性质,⁵从而使其得以适用。相反,《海洋法公约》第74条与第83条对专属经济区与大陆架的划界却只规定了“应在国际法院规约第38条所指国际法的基础上以协议划定,以便得到公平解决”。在《海洋法公约》规定模糊的情况下,国际司法机构才通过自己对个案的判断,诠释公平原则蕴含的具体方法,进而形成了三步法。

3 Maritime Delimitation in Black Sea (Romania v. Ukraine), *ICJ Reports*, 2009, paras. 115~122.

4 Maritime Delimitation in Black Sea (Romania v. Ukraine), *ICJ Reports*, 2009, para. 115.

5 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, *Merits, Judgment, ICJ Reports*, 2001, para. 176.

从国际法院实际判决来说,三步法作为划界方法的选择与确定是在专属经济区与大陆架划界的背景下展开论述的。近年来,国际法院的判决书增设了目录,使其逻辑结构更为一目了然,从中便不难发现这一问题。

然而,并不否认领海划界中也存在三步法,临时等距离线及根据特殊情况的调整曾被国际法院视为领海划界最具逻辑、最为广泛实践的方法。因此,三步法适用于专属经济区、大陆架划界或单一海洋划界,是从《海洋法公约》空白这一意义上来说的。

(二) 三步法的渊源及发展

事实上,三步法仅仅是一个新的提法,黑海案的一大变化在于将国际法院过去所确立的两步法与随后的成比例性检验合并称为三步法,是“将其在过去采用过的相同的海洋划界过程贴上一个新的、信息更多的标签”。⁶ 国际法院在该案中忆及1985年利比亚/马耳他案对该方法的详细论述,“为与海洋划界领域内已确定的法律制度保持一致”,⁷ 是为采用三步法之原因。除此之外,国际法院未给出采用三步法更详尽的理由。

回顾利比亚/马耳他案,马耳他以中间线作为划界请求而利比亚以自然延伸作为大陆架权利基础予以反驳。国际法院在等距离方法的取舍问题上,从公平原则出发,根据相关情形,意图按步骤进行划界——先划临时等距离线,再修正这一初步结果,即两步法。其考虑为:一方面,国际法院认可北海大陆架案中自己的观点,即相向海岸间的大陆架划界采用中间线方法具有合理性,并用其他手段以避免岛屿、礁石等的出现对划界所带来的不成比例的扭曲效果。⁸ 另一方面,国际法院不断强调等距离方法本身并不具有唯一的有强制性的方法之地位,也不是本案中唯一适用的方法,它甚至不享有被首先适用的推定。因而,划临时中间线并随之以其他操作调整,成为了“最终得到公平结果的最为明智的方法”。⁹ 本案进行了成比例性审查,以验证划界结果的公平性。¹⁰ 由此,利比亚/马耳他案成为了三步法真正的开端。通过对比晚近的划界判决,笔者归纳该案中的“三步法”总体有以下几个特点:第一,并非一整个方法,而是方法之集合,其中包括等距离方法作为第一步;第二,对于第一步等距离方法的选择慎之又慎,并仅给予其平等而无优

6 Pål Jakob Aasen, *The Law of Maritime Delimitation and the Russian-Norwegian Maritime Boundary Dispute*, Lysaker: Fridtjof Nansen Institute, 2010, p. 57.

7 *Maritime Delimitation in Black Sea (Romania v. Ukraine)*, *ICJ Reports*, 2009, paras. 116, 118.

8 *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark) (Federal Republic of Germany v. Netherlands)*, *ICJ Reports*, 1969, para. 57.

9 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *ICJ Reports*, 1985, paras. 62~63.

10 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *ICJ Reports*, 1985, paras. 74~75.

先的地位,可见在临时等距离线划定之前,其实有前置的一步,即国际法院综合考量有关情况认定以等距离方法为起点是恰当的;第三,成比例性检验并不被视为划界的方法,而是对方法产生的结果之检验。¹¹

由此,划界法律制度开始由公平原则的主观性、不确定性向对公平原则具体解释的三步划界法的客观性、确定性与可预见性转折发展。事实上的三步法(两步法+检验)在国际法院及仲裁庭的多个案件中不断被沿袭,如扬马延案、厄立特里亚/也门案、卡塔尔/巴林案、喀麦隆/尼日利亚案、巴巴多斯/特立尼达和多巴哥案、圭亚那/苏里南案。名义上的三步法在黑海案中诞生之后,又在尼加拉瓜/哥伦比亚案中得到确认,国际海洋法庭在其裁决的第一起案件——孟加拉湾案中,亦尊重并延续了国际法院的三步法。

这些案件呈现出一些新的趋势。首先,适用于领海划界的等距离/特殊情况规则与适用于专属经济区与大陆架的公平原则/有关情况规则呈现出了融合的趋势,¹²国际法院曾认定两者密切相关。¹³由此,专属经济区、大陆架划界及单一划界中,等距离线及特殊情况对其的修正将发挥更大的作用。

其次,对有关情况的考虑从扬马延案开始逐渐被纳入第二步,而非像利比亚/马耳他案一样作为临时等距离线之前的前置步骤。随后,黑海案明确指出,在第一阶段,国际法院尚未处理任何可能得到的有关情况,临时等距离线是由基于客观数据的严格的几何标准所确立的。¹⁴尼加拉瓜/哥伦比亚案中进一步阐述,大部分的相关划界区域在哥伦比亚基线的后方的罕见情形以及两国海岸线长度的悬殊差距应当在第二阶段予以考虑,它们不构成抛弃整个三步划界法的正当理由,通常作为第一步的临时等距离线绝不会预先裁判应当符合公平原则的最终划界结果。¹⁵这些均意味着,特殊的地理构造、海岸线长度的悬殊差别等曾经使等距离方法产生不公平结果以至于使等距离方法遭到放弃的有关情况,如今已难以动摇三步法。国际法院第一步将选择建立一条等距离线的方法成为了一种推定。

再次,三步划界法已被国际法院明确宣告为“标准方法”,¹⁶其确定性一目了然。曾任国际法院法官的史久镛先生提到,只有在极端情况下,国际法院才会使用另一种划界技术。¹⁷

11 事实上,成比例性审查可以作为各种划界方法中验证结果公平性的手段,并非专属于三步法。1982年的突尼斯/利比亚案角分线方法,同样进行了比例检验。

12 高健军著:《国际海洋划界论——有关等距离/特殊情况规则的研究》,北京:北京大学出版社2005年版,第129页。

13 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, ICJ Reports*, 2001, para. 231.

14 *Maritime Delimitation in Black Sea (Romania v. Ukraine), ICJ Reports*, 2009, para. 118.

15 *Territorial and Maritime Dispute (Nicaragua v. Columbia), ICJ Judgment*, 2012, para. 196.

16 *Territorial and Maritime Dispute (Nicaragua v. Columbia), ICJ Judgment*, 2012, para. 199.

17 史久镛著,高健军译:国际法院判例中的海洋划界,载于《法治研究》2011年第12期。

(三) 不一致的司法实践

在《海洋法公约》生效前的早期实践中,存在着较多背离等距离方法的判例,如突尼斯/利比亚案、缅因湾案、几内亚/几内亚比绍案、密克隆案,这主要是由于国际法院在这些案件中认为,既然等距离方法既非强制,也并无优先地位,则在其不能保证公平结果的前提下,自然可以选择角分线等替代方法。随后,国际法院倾向于认为,纵使有特殊情况,也可以通过修正得到公平结果,并不影响临时等距离线的构建,进而确保了司法实践的确定性。在此背景下,自扬马延案以来,仅出现一例不一致的判例,即2007年国际法院判决的尼加拉瓜/洪都拉斯案。

在尼加拉瓜/洪都拉斯案中,法院尽管认可等距离方法的固有价值,但考虑到当事双方均认为临时等距离线并非本案最合适的划界方法,进而认可了尼加拉瓜的主张:作为两国领土边界终点的可可河口的不稳定,结合离岸岛屿与珊瑚礁的细小的、不确定的特征,使得基点的固定与临时等距离线的构建存在严重的困难。¹⁸最终法院采取了角分线方法,等分了两条代表当事国整个海岸的直线夹角。

该案未采用三步法,理由在于法院通过借鉴前述缅因湾等案件,证明当等距离方法在特定情况下不可能或是不恰当时,角分线是其可行的替代方法,甚至可以被视为等距离的近似方法。¹⁹结合本案案情,河口三角洲冲击造成基点的不稳定,从而使得等距离线的构建在技术上存在障碍,最终背弃了三步法。

对此判决,褒贬不一。该案科罗马法官发表单独意见支持角分线法,称其为对相关先例的确认,而非对划界法律制度的背离。²⁰相反,兰杰瓦与托雷斯法官却反对这种背离,后者的论证与黑海案较为相近:尼加拉瓜指出的特殊的海岸地理情况确实应当被考虑,但却不能构成抛弃等距离方法而赞成角分线方法的正当理由,后者只会比前者带来更多严重的问题。托雷斯相信目前的技术发展、法律制度足以克服任何划界难题,《海洋法公约》规定的直线基线便能解决基点不稳定的问题。本案判决将近年来使海洋划界司法决定更具有客观性的努力搁置一旁,每个划界案件中自成一派的划界方法的观念重新回归,换言之,这是向实用主义与主观性的堕落。²¹

(四) 仅为确定性的追求?

18 Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, *ICJ Reports*, 2007, para. 273.

19 Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua/Honduras), Judgment, *ICJ Reports*, 2007, para. 287.

20 Nicaragua v. Honduras, (Separate Opinion of Judge Koroma, para. 2).

21 Nicaragua v. Honduras, (Dissenting Opinion of Judge Torres Bernárdez, paras. 122, 128, 129, 131).

国际法院的最新判决,即尼加拉瓜/哥伦比亚案判决,同样值得关注。本案中哥伦比亚主张法院近年来反复适用的三步法,而尼加拉瓜则基于本案的特殊地理情况,即大部分的相关划界区域都在哥伦比亚基线的后方的罕见情形以及两国海岸线长度的悬殊差距,主张三步法在本案的适用将是不合适的,即便是对等距离/中间线作出调整也无法得到公平的划界结果,尼加拉瓜援引了其于洪都拉斯的先例作为自己的依据。

国际法院当然地认为三步划界法并不能以一种机械的方式被适用,在每一个案件中都以临时等距离线/中间线作为划界的开始是不合适的,例如尼加拉瓜/洪都拉斯案。但是,国际法院解释了尼加拉瓜/洪都拉斯案背离三步法的原因:为基点的不固定导致等距离线构建上的技术困难,并称尼加拉瓜/哥伦比亚案并无这一困难,因而在完全不考虑该案特殊地理情况的前提下,首先建立临时等距离线。该案的特别地理情况应当在第二步予以考虑,其不构成抛弃作为标准方法的三步划界法的正当理由,第一步的临时等距离线绝不会预先裁判应当达到公平结果的最终划界结果。²²

随后,国际法院根据这些情况做出了复杂的“调整”,为其添加了“与临时等距离线无关的”两条水平线和四个边界点,这种武断的做法被亚伯拉罕法官视为是对调整临时等距离线的错误主张,等距离方法在本案的地理事实之下根本不该使用。²³

薛捍勤法官的观点着实中肯。她首先强调任何方法都无法事先被确定,《海洋法公约》第 74、83 条的指导原则并未改变。在本案中任何对西侧的临时等距离线事后的调整或移动,无论多具实质性,都无法克服海岸线长度比例与相关划分区域比例的严重不成比例。由此,她怀疑国际法院的第二步究竟是“调整或移动”还是重新划了一条界限,若是后者,国际法院是否有必要仅仅为了方法的标准化而坚持采纳三步法?²⁴

结合本案与先前的尼加拉瓜/洪都拉斯案,似乎只要构建等距离线在技术上是可行的、无困难的,临时等距离线就会被用作划界的第一步,没有背离三步划界法的可能。其他任何的特殊地理情况都只能在第二步得到考虑。

总结近来判决,笔者认为国际法院处于一种自我矛盾的境地。一方面,它否认唯一、绝对的方法存在,三步法“不是法律义务上的必须选择”。²⁵另一方面,它不愿意背离长期实践形成的较稳定的方法,甚至不顾任何有关情况首先划临时等

22 Territorial and Maritime Dispute (Nicaragua v. Columbia), *ICJ Judgment*, 2012, paras. 194-196, 199.

23 Nicaragua v. Columbia, (Separate Opinion of Judge Abraham, para. 32).

24 Nicaragua v. Columbia, (Declaration of Judge Xue, paras. 5, 9).

25 黄伟:《单一海洋划界的法律问题研究》,北京:社会科学文献出版社 2011 年版,第 204 页。

距离线,然后为了得到公平的结果宁愿做出夸张乃至令人难以理解的修正。偶尔背弃三步法则遭到严厉反对,例如前述托雷斯法官的偏激观点。这一切的主要原因便在于追求划界法律的确定性,作为三步中的第一步,构建等距离线无论在计算上还是实践中都有着确定性,因而得到司法机构及各国最广泛的使用,并在许多案件中构成了最终边界的基础。²⁶由此,三步法逐渐在获得一种“准强制力”,即虽非具有强制力的法律规则,但事实上很难有充分的理由不使用这种方法。

(五) 大同小异的国际海洋法庭

2012年的孟加拉国/缅甸案是国际海洋法庭的第一案。本案中,对于两国的专属经济区与200海里以内大陆架的划界争议,缅甸主张使用等距离/特殊情况的划界方法,并且认为该方法是一种通常能够得到公平结果的方法,在本案中也是完全可行的;孟加拉国则认为应当适用诸多先例中曾认可的角等分线方法,基于孟加拉湾北部的凹陷海岸构造,使用等距离/特殊情况规则将不能产生一个公平的结果。

国际海洋法庭在使用三步法时的论证似乎与国际法院略有不同。国际海洋法庭注意到根据国际法院与法庭的先例,角等分线方法在恰当情形下构成了等距离方法的替代,在效果上亦相近,故首先考察了孟加拉国主张的角分线方法,认定该方法有所不妥后,才选择了长期实践的三步法。²⁷相比国际法院对三步法的执着,国际海洋法庭的态度似乎少了些许强硬。

与此同时,国际海洋法庭也引用先例,对划界方法的选择做了一些澄清。首先,没有任何划界方法是具有强制力的;在这一前提下,国际法院和法庭发展出了海洋划界的案例法,即趋向于等距离/相关情况方法,其在大多数案件中被使用,从而减小了划界决定中、方法选择上的主观性与不确定性因素。然而,纵使划界方法的客观性与确定性得到提高,仍然需要受到主观性与灵活性的限制。²⁸

在第二步的调整中,国际海洋法庭认可当海岸构造的凹陷致使临时等距离线产生了截断效果时,这一凹陷可构成调整临时线的特殊情况,本案符合该情形。国际海洋法庭进而选择了215度方位角的测地线作为调整线,然而为何如此调整,

26 I Made Andi Arsana, Chris Rizos and Clive Schofield, *The Application of GIS in Maritime Boundary Delimitation*, in Alias Abdul-Rahman, Sisi Zlatanova and Volker Coors eds., *Innovations in 3D Geo Information System*, Berlin/Heidelberg: Springer, 2006.

27 Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar) 2012 Judgment, ITLOS Case No. 16, paras. 236~238.

28 Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar) 2012 Judgment, ITLOS Case No.16, paras. 226~227, 229, 231~232.

法庭似乎没有给出明确且有说服力的答案。对此,本案的高之国法官认为该调整线实质上与采用角分线方法无异。²⁹在笔者看来,也许这是国际海洋法庭为追求确定性使用三步法造成的尴尬局面。

综上,国际海洋法法庭总体上肯定了其他法院、法庭的先例与国家实践中所惯用的三步法,亦有明显的维护该方法的确定的意图,但仍强调该方法的非强制性、主观灵活性对其的限制,也认可角等分线等其他划界方法在适当情形下的可行性,并给予了适当考虑。可见,国际海洋法法庭所把握的三步法相比国际法院似乎有着更多的弹性。

三、三步法的习惯法地位

(一) 现有的习惯法地位表述

判例已明确,《海洋法公约》第15条已成为领海划界的习惯法。有关专属经济区、大陆架的划界或单一海洋划界,《海洋法公约》第74条与第83条第1款关于旨在得到公平结果的原则亦毫无争议,当属习惯法。³⁰作为划界的具体方法,三步法有无习惯法地位的认定似乎更为重要。

在扬马延案中,面对丹麦对于临时等距离线作为第一步的质疑,国际法院认可了1977年英法仲裁案的观点,认为《大陆架公约》第6条(等距离/特殊情况规则)事实上是依公平原则划界这一习惯法的具体表述,两者在效果上无实质差别,³¹由此认定了该规则的习惯法地位。等距离/特殊情况规则基本可以与两步法等同。³²

国际法院随后强调,相向海岸间“即使适用已决案件中发展而来的有关大陆架的习惯法,而非1958年大陆架公约第6条,将中间线作为临时线开始划界然后考察特殊情况是否需要对该线做任何调整或移动,也是符合先例的”。³³随后,国

29 Bangladesh v. Myanmar, (Separate Opinion of Judge Gao, p. 33).

30 David Anderson ed., *Modern Law of the Sea: Selected Essays*, Leiden: Martinus Nijhoff Publishers, 2008, p. 408; Territorial and Maritime Dispute (Nicaragua v. Columbia) 2012 ICJ Judgment, para. 139.

31 Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, *ICJ Reports*, 1993, p.61, para. 46.

32 虽然《大陆架公约》第6条表述为特殊情况能使(等距离线以外)另一条界限有正当理由,但主流观点似乎认为特殊情况仅是调整或移动等距离线的依据。

33 Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, *ICJ Reports*, 1993, p.61, para. 51.

际法院又将这一结论重申并扩展适用到相邻海岸间。³⁴

然而,两步法被视为大陆架划界判决中形成的习惯法,论证却过于薄弱。国际法院首先承认临时等距离线并非在每一案件中都是必要的或有义务的一步,回顾了缅因湾案与利比亚/马耳他案中,以临时等距离线开始划界完全恰当,继而得出了上述结论。³⁵这与北海大陆架案对等距离方法习惯法地位详细的否定论证大相径庭。扬马延案中,既无条约等国家实践的堆砌,又无法律确信的证明,只是因为临时等距离线曾在两则先例中被认为是合适的,就成为了习惯法,令人难以信服。对此,有学者给出了一种解释,习惯法名义上是由具有法律义务感的国际行为创造,实际上却是法院宣布的,这一意义上,习惯法是由法官创造的,是司法造法。³⁶不得不承认,这一论断在扬马延案中得到了证实。

另外,国际法院也曾认为适用于单一海洋划界的公平原则/有关情况规则与适用于领海划界的等距离/特殊情况规则(《海洋法公约》第15条)十分类似。³⁷这是对领海规则的借鉴,但若将其理解为具有第15条的习惯法地位而使得等距离/特殊情况规则也成为了专属经济区、大陆架划界或单一海洋划界的习惯法,则未免过于牵强。自黑海案以来,司法机构则没有使用“习惯法”的表述,仅仅是反复使用先前确定的方法,并称其为国际法院的标准方法。

综上,三步法(或原先的表述,两步法)确实尽管曾经被国际法院认定为大陆架划界的习惯法,但是这种表述一则不具有充分论证,二则在晚近的案例中未被延续,因而笔者认为尚未盖棺定论。

(二) 三步法的习惯法要素分析

考量三步法是否成为习惯法,仅从国际法院/法庭已做的判决探寻无疑是不够的,习惯法在本源上形成于各个国家,因而还需在理论上分析习惯法的形成要素。主流的观点认为,习惯法由两个要素组成,客观要素为国家实践,主观要素为法律确信,这是经过国际法院诸多判例所确认的。³⁸

34 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, *ICJ Reports*, 2001, para. 227; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, *ICJ Reports*, 2002, para. 289.

35 Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, *ICJ Reports*, 1993, p. 61.

36 姜世波著:《习惯国际法的司法确定》,北京:中国政法大学出版社2010年版,第209页

37 Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, *ICJ Reports*, 2002, para. 288.

38 Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th revised ed., London: Routledge, 1997, p. 39.

值得强调的是,考察三步法的国家实践,实则为考察等距离/特殊情况规则(或先前的两步法)的国家实践。理由如下:第一,作为第三步的成比例性检验带有一些中立判断的色彩,故其更多被第三方中立机构所采纳,如国际法院、国际海洋法庭,以为自己所做的划界把关,但是国家在订立划界条约的实践中则很少摆出这种姿态。第二,国际法院的三步法判决能够体现出逻辑过程,而国家的条约实践往往体现的是划界结果,不能够最为直观地表现出三步法,因为根据前两步得到的划界结果如果符合成比例性,所谓的第三步检验实则就是对两步法的结果保持沉默。第三,即便存在国家订立划界条约时检验成比例性的实践,其谈判的内容、过程在事实上也无从获知,具有学术研究的不可行性。

前两步的分析对于整个三步法的习惯法地位考察起到至关重要的作用,毕竟这两步通常是得到划界结果的主要手段。另外,如果前两步得到的划界结果造成比例失调,则无疑违背了作为习惯法的公平原则,故国家实践所欠缺的第三步其实在公平原则之下原本就能得到一定的解释。以下具体分析习惯法的两个要素。

1. 国家实践

国家实践表明,等距离方法在大多数情形下作为划界分析的基础被予以考虑,并以某种形式或其变体被使用,处于一个主导或中心地位。³⁹ 根据高健军教授的详细统计,151个沿海国或群岛国中大致可以判明划界倾向的有114个,有34个倾向或支持公平原则,80个倾向等距离/特殊情况规则。⁴⁰ 在划界领域的各类国家实践中,条约可以说是最为主要的,⁴¹ 原因在于划界本身是涉及两国或多国的行为。高教授进而列举了截至2002年6月的171个海洋划界条约(主要为双边),⁴² 据笔者统计,其中91个直接采用了等距离线(含仅部分界线使用),36个使用了经调整的等距离线,采用两步法的比例为74.3%。剩余条约中一部分划界方法不明,这一现象在2000年前后相对明显。

笔者进而收集、补充了最近十年所签订的一些划界条约:第一,明确采用等距离/中间线方法的5个:2002年以色列/约旦、2003年塞浦路斯/埃及、2003年毛里塔尼亚/佛得角、2010年以色列/塞浦路斯、2011年巴哈马群岛/古巴;第二,未明确提及划界方法或未采用(临时)等距离方法的有6个:2003年越南/印尼、

39 Don R. Rothwell and Tim Stephens, *The International Law of the Sea*, Oxford: Hart, 2010, p. 402; Legault and Hankey, Method, Oppositeness and Adjacency, and Proportionality, in Charney and Alexander eds., *International Maritime Boundaries*, Vol. I, p. 205.

40 高健军著:《国际海洋划界论——有关等距离/特殊情况规则的研究》,北京:北京大学出版社2005年版,第176页。

41 Gerard J. Tanja, *The Legal Determination of International Maritime Boundaries*, Deventer: Kluwer Law and Taxation Publishers, 1990, p.151. 转引自高健军著:《国际海洋划界论——有关等距离/特殊情况规则的研究》,北京:北京大学出版社2005年版,第176~177页。

42 高健军著:《国际海洋划界论——有关等距离/特殊情况规则的研究》,北京:北京大学出版社2005年版,第189~202页。

2004年澳大利亚/新西兰、2005年墨西哥/洪都拉斯、2006年密克罗尼西亚/马绍尔群岛、2007年沙特/约旦、2010年特立尼达和多巴哥/格林纳达。⁴³

2005年英国与荷兰协议修改了两国在1965年签订的《大陆架划界协议》，对1965年协议下的等距离线进行了微调。⁴⁴2008年南非/法国的大陆架划界争端也尘埃落定，南非在其1995年绘制的海洋区域图表中采用了等距离线的方法，随后同意了法国意图延伸其大陆架的一份声明，可以视为对先前的临时线所做的相关调整。⁴⁵2010年挪威与俄罗斯签订条约确定了专属经济区、大陆架及外部界限的单一海洋划界，是在俄罗斯主张的角分线与挪威主张的中间线的相互妥协下找到的这种办法。挪威首相拒绝承认挪威放弃了其长期坚持的等距离中间线的立场，中间线只是作为一个区分点随俄罗斯更长的海岸线做了适当调整。⁴⁶上述各例都是近年来两步法国家实践的优良典范。

综上，两步法（等距离方法可以视为无需第二步调整的两步法）的国家实践中，无论是国家数量还是条约数量及其在总数中所占比例，都是可观的、占大多数的，可以说两步法的国家实践是相当广泛的。采用两步法的条约可以最早追溯到1958年的巴林/沙特，因而从时间上来说，也无疑是长期的。从实践一致性来说，稍显欠缺，数十个国家仍然倾向于更为一般的公平原则（包括中国），同一个国家在与不同国家签订条约时也会有不一致的态度，下文将举例说明。可以说，两步法的国家实践与国际法院判决北海大陆架案时不可同日而语，但相比已确定成为习惯法的得到公平划界结果的原则，还远未达到公认。

2. 法律确信

国际法院在利比亚/马耳他案中指出两步法规则的存在“不能仅仅通过列举适用等距离或经修正的等距离划界的大量实例就得到支持，虽然在许多不同情况下产生公平结果是显而易见的”。⁴⁷习惯法的确立需要证明实践源自于一种有义务如此实践、所实践者即法律的信念，而这种确信往往并非独立存在，终究是通过国家行为来证明。

第一，条约在划界问题上虽是主要的国家实践，但其中不少如同前述俄罗斯/

43 Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, *Law of the Sea Bulletin*, No. 55, pp. 32~35, 40~46; *Law of the Sea Bulletin*, No. 65, pp. 33~35; *Law of the Sea Bulletin*, No. 67, pp. 39~41, at <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES>, 29 August 2013.

44 *Law of the Sea Bulletin*, No. 66, pp. 94~95. Original agreement, at <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/NLD-GBR1965CS.PDF>, 31 August 2013. 2005年英国与比利时亦协议调整了两国在1991年签订的大陆架划界协议确定的边界，但1991年协议未明确划界方法。

45 Patrick H.G. Vrancken, *South Africa and the Law of the Sea*, Leiden: Martinus Nijhoff Publishers, 2011, pp. 204~205.

46 匡增军：2010年俄挪北极海洋划界条约评析，载于《东北亚论坛》2011年第5期。

47 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *ICJ Reports*, 1985, para. 44.

挪威划界那样属于妥协折中的产物,而非该国一贯的主张,因而在一国是否确信两步法为法律义务的证明力上,并不如其国内法规定与在联合国第三次海洋法会议上的主张。在后两种场合下,上述 151 个国家中,56 个国家规定或支持采用等距离方法,仅占约 1/3,这一数字相比国家实践中的采用两步法有明显减少。

第二,同一国家在不同条约中采纳了不同的方法,例如英国在 1988 年与爱尔兰、1993 年与美国签订的条约中分别使用了经纬线与等距离线;美国在 1977 年与古巴、1990 年与前苏联签订的条约中也使用了不同的方法,⁴⁸而美国本身又是公平原则划界的积极倡导者。类似的例子还有很多,这些既构成了国家实践的不一致,也说明了两步法或其他方法的使用在许多条约中依具体情况而定,国家经济利益是一大驱动力,妥协让步是难免的,对两步法就是划界法律的确信可能是微乎其微的。

第三,国家在国际法院/法庭前的主张更不能视为确信。利比亚在利比亚/马耳他案中、丹麦在扬马延案中、尼加拉瓜在尼加拉瓜/洪都拉斯案、尼加拉瓜/哥伦比亚案中,孟加拉国在孟加拉湾案中等,虽不同程度承认两步法为通常方法且可能产生公平结果,但均主张在本案中不恰当,不应使用。请求使用两步法的国家也不尽然确信其为法律,如缅甸在孟加拉湾案中便主张两步法“恰当来说并非一个划界规则,而是一种通常能产生公平结果的方法”。⁴⁹再以丹麦为例,其在北海大陆架案中是等距离方法的支持者,而在扬马延中态度却截然相反。一定程度上,等距离方法或两步法有时只是国家在个案中的利益诉求。

综上,姑且将三步法舍去最后一步,国家实践尚属广泛,但不一致时有出现,在法律确信方面,则更是缺乏有力证明。理论分析层面上,三步法尚未形成习惯法。

四、三步法对中日东海大陆架划界的借鉴意义

(一) 三步法目前的地位

通过前文分析,即便认为三步法未形成习惯法,在国际法院/法庭的判决中地位依然举足轻重。诚然,《国际法院规约》第 59 条明确排除了前案对后案的约束力,但第 38 条又将司法判例作为确定法律原则之补助资料者。可见,先例在事实

48 Gerard J. Tanja, *The Legal Determination of International Maritime Boundaries*, Deventer: Kluwer Law and Taxation Publishers, 1990, p. 151. 转引自高健军著:《国际海洋划界论——有关等距离/特殊情况规则的研究》,北京:北京大学出版社 2005 年版,第 176~177 页。

49 Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar) 2012 Judgment, ITLOS Case No.16, para. 219.

上仍然影响着后案,并时常为后案引用、重申,劳特派克阐述了其原因:因为先例是方便遵循的法律经验之积累,是为何善法之体现,是有序法治之核心,是没有特殊理由时法官不愿自我否定的本能惰性。⁵⁰ 国际法院尽管不承认三步法作为唯一的、在每个案件中必须适用的强制性规则,但坚决拥护其先例,最大化确定性,赋予三步法标准方法之地位,不得不与上述分析有关。

(二) 中日东海大陆架划界

中国在国家实践、法律确信两个层面都未推动三步法的形成。无论是法律宣告,还是2000年与越南在北部湾的协议划界,中国始终坚持的都是公平原则。在中日东海大陆架问题上,中国亦极力反对日本的中间线方法,主张冲绳海槽构成两国大陆架间天然的界限,应适用自然延伸标准。中国于2012年向联合国提交的东海200海里以外大陆架划界案中坚持了中国的这一一贯立场。⁵¹

从国际法院/法庭的立场来看,海洋划界的法律制度似乎正在朝向不利于中国的态势发展。假定这一案件经由国际法院审理:首先,三步法将是推定使用的标准方法,中日之间并不存在技术上难以确定基点或难以划等距离线的极端情况,因而临时等距离线很可能成为划界第一步。其次,中国的一大地理优势在于有关海岸线长度明显大于日本,然而判例已证明海岸线长度显著差异作为有关情况只能在第二步考虑,起到将等距离线调整或移动至日本一侧的作用,必然难以达到中国所期望的程度。可以肯定的是,海岸线长度悬殊使国际法院背离三步法的主张无法实现。再次,在以往背弃三步法的司法实践中,大多选择了角等分线作为替代方法,其仅适用于相邻海岸国家间,而中日之间属于相向海岸的关系。最后,海槽确实在历史上的划界中产生过重要作用,如1972年澳大利亚/印度尼西亚间的帝汶海槽,然而海槽作为地质地貌特征在随后的诸多实践中未受重视,且不属于国际法院在考察有关情况时更倾向关注的海岸地理。

利比亚/马耳他案是值得吸取经验的一案,利比亚以自然延伸标准反对马耳他的距离标准,国际法院最终选择了距离标准下的两步法。这与中日的情形有所雷同,在中间线与中国海岸起算200海里以内的这一争议区域,距离标准与自然延伸标准都可以作为中国的权利基础,距离标准在中日两国间能够通用。但与利比亚/马耳他案不同的是,在中国海岸起算200海里以外至冲绳海槽这一区域,自然延伸是中国的唯一权利基础,这与日本的距离标准产生碰撞,使得采用(临时)等距离线出现障碍。

50 H. Lauterpacht, *The Development of International Law by the International Court*, London: Cambridge University Press, 1958, p. 14.

51 “中国向联合国提交东海200海里以外大陆架划界案”, 下载于 http://www.chinadaily.com.cn/hqgj/jryw/2020-12-15/content_7775527.html, 2013年8月30日。

通过分析三步法目前的地位,中国不宜将争议提交任何裁判机构。本着公平原则协议划界才是划界法律中亘古不变的真理,为坚守中国之利益,对于大陆架的现有主张中国不宜轻易放弃与妥协。

The Development and Legal Status of the Three-Stage Approach: Its Implications for the Sino-Japan Delimitation of the Continental Shelf in the East China Sea

JIANG Yuyao*

Abstract: The *North Sea Continental Shelf cases*, dated in 1969, left questions about the specific methods to be used in international maritime delimitations. The method used in the case between Libya and Malta (1985), namely the construction of a provisional equidistance line followed by adjustment or shifting based on special circumstances, has been widely accepted and adopted in the international judicial decisions in the last two decades, because of its objectiveness, convenience and equity most of the time. The International Court of Justice (ICJ) upgraded the method to the three-stage approach in the *Black Sea case* in 2009 for the first time, thus having developed a standard method and enhanced the certainty of the jurisprudence in maritime delimitation. Although the analysis of State practices and *opinio juris* embodied no customary nature of the method in theory, the fact that the method has gained continuous confirmations undoubtedly disfavors China in the Sino-Japan delimitation of the continental shelf in the East China Sea. China should stay firm in its position and fight for maximum benefits by agreement, based on the equitable principles.

Key Words: International maritime delimitation; Three-stage approach; Equidistance; Standard method; Customary law

I. Introduction

The jurisprudence in maritime delimitation is generally believed to originate

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from the *North Sea Continental Shelf cases* (Federal Republic of Germany v. Denmark and The Netherlands) that came to the International Court of Justice (hereinafter referred to as the ICJ or the Court) in 1969. The judgments in these cases refuted the consideration of the equidistance method as customary law as provided in Article 6 of the Convention on the Continental Shelf of 1958 and held that the application of this method should not be obligatory for the State parties. It was further determined that no single delimitation method should be obligatory in all circumstances, and the principles and rules of the international law applicable to the delimitation of the North Sea Continental Shelf should be effected by agreement in accordance with equitable principles and taking account of all relevant circumstances.¹ However, in delimitation decisions, the equitable principles are a goal that should be kept in mind, rather than a specific method.² The methodological vacancy, subjectivity and uncertainty have aroused widespread criticism on these cases. Furthermore, despite the discussion of the equidistance method in these cases, Article 6 of the Convention on the Continental Shelf is now deemed as the equidistance/special circumstance rule, and the significance of combining equidistance principle with special circumstances obviously differs from that of using the equidistance method alone.

The three-stage approach, which was explicitly proposed by the ICJ for the first time in the *Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine)* in 2009, includes three stages that are supposed to be followed by the Court in order to obtain fair results: first, the Court shall establish a provisional delimitation line using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place. So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn. So far as opposite coasts are concerned, the provisional delimitation line will consist of a median line between the two coasts. The equidistance and median lines are not essentially different. Second, the Court shall consider whether there are factors calling for the adjustment or shifting of the provisional line in order to achieve an equitable result under the United Nations Convention on the Law of the Sea (UNCLOS); and at the third stage, the Court shall conduct a final check to confirm whether there exist any marked disproportion between the ratio of

1 North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark) (Federal Republic of Germany v. Netherlands), *ICJ Reports*, 1969, para. 101.

2 Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, *ICJ Reports*, 2002.

the respective coastal lengths and the ratio between the relevant maritime area of each State by using the delimitation method above.³ Demonstrated in subsequent judicial practices, the three-stage approach has become the latest maritime delimitation method generalized by the ICJ and upgraded to methodology, whose certainty in delimitation is brought to a new height. This paper scrutinizes the developments and legal status of the three-stage approach and analyzes its potential impact upon Sino-Japan disputes over maritime delimitation in the East China Sea.

II. Developments of the Three-Stage Approach in International Judiciary

A. The Marine Areas Which the Three-Stage Approach is Applicable to

The *Black Sea case* explicitly held that the three-stage approach should be applicable to the delimitation of the exclusive economic zone, continental shelf or single maritime boundary,⁴ excluding the territorial sea.

Article 15 of the UNCLOS, the existing rule of the international law, explicitly provides specific methods for delimitating the territorial sea, which basically carries on the ideas of the Convention on the Territorial Sea and the Contiguous Zone of 1958. It states that where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured, except that it is necessary by reason of historic title or other special circumstances to delimit the territorial sea of the two States in a different way. As for any State that is not a party to the UNCLOS, the ICJ recognized Article 15 of the UNCLOS as customary law and thus should be applied in the 2001 *Case Concerning Maritime Delimitation and Territorial Questions (Qatar/Bahrain)*.⁵ In contrast, Articles 74 and 84 of the UNCLOS provide that the delimitation of the exclusive economic zone and the continental shelf “shall be effected by agreement on the basis of international law,

3 Maritime Delimitation in Black Sea (Romania v. Ukraine), *ICJ Reports*, 2009, paras. 115~122.

4 Maritime Delimitation in Black Sea (Romania v. Ukraine), *ICJ Reports*, 2009, para. 115.

5 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, *ICJ Reports*, 2001, para. 176.

as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.” In view of the absence of more explicit provisions under the UNCLOS, the international judiciary, based on its independent judgments in different cases, interpreted the specific methods implicit in the equitable principles, and thus developed the three-stage approach.

From the perspective of judicial judgments, the three-stage approach, as a delimitation method, was selected and determined for delimiting the exclusive economic zone and the continental shelf. Tables of contents have been inserted into the ICJ judgments during recent years, which may help readers to better understand their logical structure. And the issue mentioned above can be seen clearly in these tables of contents.

However, it can neither be denied that this approach has also been applied to the delimitation of the territorial sea, nor that the provisional equidistance line and special circumstances-based adjustments were once considered by the ICJ as the most logical and most widely applied method for delimiting the territorial sea. Therefore, the applicability of the three-stage approach to the delimitation of the exclusive economic zone, continental shelf or the single maritime boundary is actually based on a legal lacuna under the UNCLOS.

B. Origin and Developments of the Three-Stage Approach

The three-stage approach is the combination of the preceding two-stage approach previously established by the Court and the subsequent proportionality test, which was one of the most significant changes witnessed in the *Black Sea case*. In other words, it is a new and information-richer tag added to the identical maritime delimitation process previously adopted by the Court.⁶ The Court reviewed the detailed discussion on this approach in the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* in 1985, and considered that the three-stage approach should be adopted in view of “keeping with its settled jurisprudence on maritime delimitation”.⁷ However, the Court did not make any further argument to justify the three-stage approach.

In the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/*

6 Pål Jakob Aasen, *The Law of Maritime Delimitation and the Russian-Norwegian Maritime Boundary Dispute*, Lysaker: Fridtjof Nansen Institute, 2010, p. 57.

7 Maritime Delimitation in Black Sea (Romania v. Ukraine), *ICJ Reports*, 2009, paras. 116, 118.

Malta), the Court rejected both Malta's application of the median line delimitation method and Libya's argument that its title to the continental shelf should be based on natural prolongation. Regarding whether the equidistance method should be applicable to this case, the Court envisioned a two-stage delimitation process based on the equitable principles, taking into account the relevant circumstances, which required drawing a provisional equidistance line first, and then adjusting the line to achieve equitable results. On one hand, the Court recognized its considerations in the *Case Concerning the North Sea Continental Shelf* that it should be reasonable to use the median line method to delimit the continental shelf between two States with opposite coasts and ignore the presence of islets, rocks and other features, the disproportionately distorting effect of which can be eliminated by other means.⁸ On the other hand, the Court consistently stressed that the equidistance method should not be uniquely obligatory, nor should it be the unique applicable method in this case. Its preferential applicability had not yet been determined. Therefore, to construct a provisional median line, followed by necessary adjustments, becomes the most advisable method to achieve an equitable solution.⁹ The Court also carried out a test of proportionality to verify the equitableness of the delimitation results.¹⁰ Thus, the *Libyan Arab Jarnahiriya/Malta case* ushered in the applicability of the three-stage approach. By comparing recent delimitation judgments, the author contends that this approach is characterized by the following aspects: first, it consists of a set of methods, rather than a single method, including the equidistance method applied in the first stage. Second, the equidistance method in the first stage shall be given careful considerations and accorded with an equitable status rather than a priority, which indicates that there is actually another stage effected prior to the construction of the provisional equidistance line, that is to say, the Court should decide that starting from the equidistance method is appropriate after taking all relevant circumstances into considerations. Finally, the test of proportionality is not deemed as a delimitation method, but a verification of the delimitation results.¹¹

In the intervening time since the *Libyan Arab Jarnahiriya/Malta case*,

8 North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark) (Federal Republic of Germany v. Netherlands), *ICJ Reports*, 1969, para. 57.

9 Continental Shelf (Libyan Arab Jarnahiriya/Malta), *ICJ Reports*, 1985, paras. 62~63.

10 Continental Shelf (Libyan Arab Jarnahiriya/Malta), *ICJ Reports*, 1985, paras. 74~75.

11 In fact, the proportionality test may be deemed as a means for verifying the equitableness of results obtained via various delimitation methods, rather than exclusively for the three-stage approach. The angle bisector method used in the *Tunis/Libyan Arab Jarnahiriya case* (1982) also included a test of proportionality.

the delimitation jurisprudence has gradually turned from the subjectivity and uncertainty in implementing equitable principles to objectivity, certainty and predictability of the three-stage approach that specifically embodies the equitable principles. This three-stage approach (two-stage approach plus the proportionality test) is followed in a series of cases before the ICJ and the International Court of Arbitration (ICA). These cases include the *Jan Mayen case*, the *Eritea v. Yemen case*, the *Qatar v. Bahrain case*, the *Cameroon v. Nigeria case*, the *Barbados v. Trinidad and Tobago case*, the *Guyana v. Surinam case*, among others. The three-stage approach, after its introduction in the *Black Sea case*, was confirmed by the judgment in the *Nicaragua v. Columbia case*. Additionally, the International Tribunal for the Law of the Sea (ITLOS) respected and followed the ICJ's three-stage approach in the first case it accepted – the *Bay of Bengal case*.

These cases reflect new tendencies. First, the equidistance/special circumstance rule applicable to the delimitation of the territorial sea tends to integrate with the equitable principles/relevant circumstances rule applicable to the delimitation of the exclusive economic zone and continental shelf.¹² The ICJ recognized that these two rules were closely related.¹³ Therefore, the equidistance and special circumstances will play a more important role in adjusting the delimitation of the exclusive economic zone, continental shelf and single boundary.

Second, the consideration of relevant circumstances has been incorporated into the second stage in a progressive manner since the *Jan Mayen case*, rather than taken as a stage effected before constructing a provisional equidistance line as evidenced in the *Libya v. Malta case*. In the *Black Sea case*, the Court explicitly stressed that at the initial stage it was not yet concerned with any relevant circumstances that may obtain and the provisional equidistance line was plotted on strictly geometrical criteria on the basis of objective data.¹⁴ According to the judgment in the *Nicaragua v. Columbia case*, the unusual circumstance that a large part of the relevant area lies behind the base points on the Colombian side and considerable disparity of coastal lengths are factors that have to be considered in the second stage of the delimitation process; they do not justify discarding the entire methodology. The construction of a provisional equidistance line which is

12 Gao Jianjun, *International Maritime Delimitation - A Study on the Equidistance/Special Circumstances Rule*, Beijing: Beijing University Press, 2005, p. 129. (in Chinese)

13 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, *ICJ Reports*, 2001, para. 231.

14 Maritime Delimitation in Black Sea (Romania v. Ukraine), *ICJ Reports*, 2009, para. 118.

usually employed as a first step should in no way prejudice the ultimate solution which must be designed to achieve an equitable result.¹⁵ It implied that special geographical features, substantial disparity in lengths of relevant coastlines and other relevant circumstances that resulted in equitable results and even the refusal of the equidistance method can hardly shatter the three-stage approach now. It is presumed that the Court should choose and construct an equidistance line in the first stage.

Finally, the Court explicitly declared that the three-stage delimitation method should be the “standard method,”¹⁶ thereby according it an indubitable weight. As revealed by Shi Jiuyong, who served as the judge of the ICJ, the Court may only invoke other delimitation methods under extreme circumstances.¹⁷

C. Inconsistent Judicial Practice

Many judgments had deviated from the equidistance method before the UNCLOS entered into effect. These judgments are found in the *Tunisia/Libyan Arab Jarnahiriya case*, *Gulf of Maine case*, *Guinea/Guinea-Bissau case*, *Miquelon case*, among others. In these cases, the Court held that the angle bisector method might be an appropriate substitute to the equidistance method, as the latter had not been granted any priority, was not a mandatory rule and could not guarantee that equitable results would be achieved. The ICJ considered that even under special circumstances, adjustments could be made to achieve equitable results, thereby exempting the construction of a provisional equidistance line from any influence and guaranteeing the certainty of judicial practices. In such a context, only one judgment, the ICJ judgment on the *Nicaragua/Honduras case* in 2007, renounced the three-stage approach since the Jan Mayen decision.

In the *Nicaragua/Honduras case*, despite its recognition of the inherent value of the equidistance method, the Court observed that both parties did not consider the provisional equidistance line as the most appropriate. The Court accepted Nicaragua’s arguments that the instability of the mouth of the River Coco at the Nicaragua-Honduras land boundary terminus, combined with the small and uncertain nature of the offshore islands and cays, would make fixing base points

15 Territorial and Maritime Dispute (Nicaragua v. Columbia), *ICJ Judgment*, 2012, para. 196.

16 Territorial and Maritime Dispute (Nicaragua v. Columbia), *ICJ Judgment*, 2012, para. 199.

17 Shi Jiuyong, translated by Gao Jianjun, Maritime Delimitation in the Jurisprudence of the International Court of Justice, *Research on Rule of Law*, No. 12, 2011. (in Chinese)

and using them to construct a provisional equidistance line unduly problematic.¹⁸ Therefore, the Court turned to the angle bisector method by bisecting the angle created by lines representing the coastal fronts of the two States.

The *Nicaragua/Honduras case* did not follow three-stage approach. The Court, in referencing the aforementioned cases such as the *Gulf of Maine case*, proved that the angle bisector method might be a viable substitute method or even an approximation of the equidistance method under certain circumstances where the equidistance method was impossible or inappropriate.¹⁹ Based on the actual conditions of the case and the unstable base points under the impact at the estuarine delta, the construction of an equidistance line would possibly encounter technical barriers, which leads to the renunciation of the three-stage approach.

There was considerable disagreement in this judgment. In his separate opinion, Judge Koroma, in favor of the angle bisector method, noted that the angle bisector method was confirmed by relevant precedents, rather than a departure from the jurisprudence on maritime delimitation.²⁰ Judges Ranjeva and Torres rejected such departure. In a way similar to that in the *Black Sea case*, Torres argued that despite its deserved consideration, the special coastal configuration noted by Nicaragua could not justify the replacement of the equidistance method with the angle bisector method, which created far more serious problems than equidistance. Additionally, Torres believed that the current technology and the legal means were available to overcome any difficulties that might arise in delimitation, for example, the straight base lines under the UNCLOS would solve the problem caused by unstable base points. Consequently, the efforts of recent years to make judicial decisions on maritime delimitations more objective had thus been set aside. There was thus a return to the idea of *sui generis* solutions for each delimitation, in other words, a relapse into pragmatism and subjectivity.²¹

D. Is Certainty the Sole Goal to Be Pursued?

The latest ICJ judgment in the *Nicaragua/Columbia case* is also worth

18 Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, *ICJ Reports*, 2007, para. 273.

19 Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua/Honduras), Judgment, *ICJ Reports*, 2007, para. 287.

20 Nicaragua v. Honduras, (Separate Opinion of Judge Koroma, para. 2).

21 Nicaragua v. Honduras, (Dissenting Opinion of Judge Torres Bernárdez, paras. 122, 128, 129, 131).

attention. Columbia argued for the use of the three-stage approach that had been repeatedly employed by the Court. Nicaragua argued that the approach should not be applicable and that even adjusting the equidistance/median line would not warrant an equitable solution. Nicaragua's argument was based on the special geographical circumstances involved in the case, i.e., the unusual circumstance that a large part of the relevant area lies behind the base points on the Colombian side and the considerable disparity of coastal lengths. Nicaragua also invoked the judgment in the *Nicaragua/Honduras case* to support its arguments.

The Court held that the three-stage delimitation approach should not be followed in an inflexible manner, and it would be inappropriate to start the delimitation with a provisional equidistance/median line in each case. For example, in the *Nicaragua/Honduras case* the Court explained that the reason why the three-stage approach was not used was because of the technical difficulties in constructing an equidistance line due to unfixed base points. However, as the Court observed, such difficulties did not exist in the *Nicaragua/Columbia case*. Therefore, a provisional equidistance line should be first constructed without taking into account any special geographical circumstances. In the second stage, the Court should give due consideration to the said special geographical circumstances, which should not justify discarding the standard three-stage delimitation approach. The construction of a provisional equidistance line which was employed as a first step should in no way prejudice the ultimate solution which must be designed to achieve an equitable result.²²

The Court then made some complex adjustments based on these circumstances by adding four boundary points and two horizontal lines that were irrelevant with the provisional equidistance line. However, Judge Abraham considered that such arbitrary practice as faulty claims on the adjustment of the provisional equidistance line, and thus he held that the equidistance method should be inapplicable based on the actual geographical conditions in this case.²³

Judge Xue Hanqin's opinions in this case are quite reasonable. Judge Xue first stressed that any method could not be pre-determined, and the guideline provided in Articles 74 and 83 of the UNCLOS would remain its consistency. Any adjustment or shifting of the provisional equidistance line in the west, however substantial the

22 Territorial and Maritime Dispute (*Nicaragua v. Columbia*), *ICJ Judgment*, 2012, paras. 194-196, 199.

23 *Nicaragua v. Columbia*, (Separate Opinion of Judge Abraham, para. 32).

shift, cannot eliminate the severe disparity in the lengths of the relevant coasts and the overall geographical context. Therefore, she questioned whether the second stage was “adjusting/shifting” the provisional line or a reconstruction of a new line? She also questioned whether it was necessary for the Court to proceed with the three-stage approach merely for the sake of standardization of methodology.²⁴

Considering all the facts about the *Nicaragua/Columbia case* and the *Nicaragua/Honduras case*, it appears that the first stage shall be constructing the provisional equidistance line, but only if it is technically feasible and difficulty-free, eliminating any possibility to renounce the three-stage approach. Any special geographical conditions will be considered in the second stage.

Based on a review of the recent judgments, the author contends that the Court tends to contradict itself. On one hand, the Court denied the existence of a unique and absolute method, asserting that the Court “should not legally obliged to choose”²⁵ the three-stage approach. On the other hand, it was unwilling to depart from the relatively stable method that had developed based on long-term practices even by first constructing a provisional equidistance line in disregard of the relevant circumstances, and then making exaggerated and hardly understandable adjustments so as to achieve an equitable solution. An occasional departure from the three-stage approach incurred implacable objection. For example, Judge Torres expressed extreme views on this point. The use of the three-stage approach is mainly driven by the pursuit of certainty of jurisprudence on maritime delimitation. As the first of the three stages, constructing an equidistance line is widely employed by the judiciary or even worldwide as the basis of the final boundary in a number of cases due to its certainty in terms of calculations and operations in practice.²⁶ In such a context, the three-stage approach has gradually become “quasi-obligatory.” Though it is not compulsory, it would be difficult to justify not using this legal rule.

24 *Nicaragua v. Columbia*, (Declaration of Judge Xue, paras. 5, 9).

25 Huang Wei, *The Legal Issues of Single Maritime Delimitation*, Beijing: Social Sciences Academic Press, 2011, p. 204. (in Chinese)

26 I Made Andi Arsana, Chris Rizos and Clive Schofield, *The Application of GIS in Maritime Boundary Delimitation*, in Alias Abdul-Rahman, Sisi Zlatanova and Volker Coors eds., *Innovations in 3D Geo Information System*, Berlin/Heidelberg: Springer, 2006.

*E. International Tribunal for the Law of the Sea (ITLOS)
with Similar Functions and Responsibilities*

In the case concerning the dispute over delimitation of the exclusive economic zone and continental shelf within 200 nautical miles between Bangladesh and Myanmar in 2012 (the first case heard by the ITLOS), Burma stated that using the equidistance/special circumstance method could usually achieve equitable results and thereby argued for the use of this method in this case. However, Bangladesh asserted that the angle bisector method, which had been recognized in a number of cases, should be applicable based on the concave coasts in the northern Bay of Bengal, while the equidistance/special circumstance method would not provide an equitable solution.

ITLOS's argument for the three-stage approach was slightly different from the argument made by the ICJ. After examining the cases that had come before the international courts and tribunals, the ITLOS observed that under certain circumstances, the angle bisector method might constitute a substitute for the equidistance delimitation method that ensured similar effects. After reviewing the angle-bisector method claimed by Bangladesh, the ITLOS concluded that such method was inapplicable to this case before turning to the long-followed three-stage approach.²⁷ After all, the ITLOS did not insist on the three-stage approach as strictly as the ICJ.

Meanwhile, the ITLOS explained its selection of delimitation methods by referring to precedent decisions. After all, there is no mandatory delimitation method. Because of this, international courts and tribunals had developed a body of case law on maritime delimitation in favor of the equidistance/relevant circumstance method, which had reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries and in the choice of methods employed to that end. However, although the delimitation method becomes increasingly objective and certain, such method would need to combine its constraints on subjectivity with flexibility.²⁸

27 Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar) 2012 Judgment, ITLOS Case No. 16, paras. 236–238.

28 Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar) 2012 Judgment, ITLOS Case No.16, paras. 226–227, 229, 231–232.

At the second stage, the ITLOS recognized that when the concavity of the coast resulted in the provisional equidistance line as drawn producing a cut-off effect on that coast, such concavity might constitute a relevant circumstance requiring an adjustment of that line. The situation in the *Bangladesh/Myanmar case* just like the one mentioned above. Therefore, ITLOS determined that a line with a geodesic azimuth of 215° should be used for adjustment, despite its failure to explain such adjustments in an explicit and convincing manner. In this regard, Judge Gao Zhiguo considered there was no essential disparity between this adjustment line and the angle bisector method.²⁹ However, through observation, the author asserts that this situation might arise from the ITLOS's pursuit of certainty by employing the three-stage approach.

Based on these considerations, the ITLOS confirmed the three-stage approach that had long been followed in decisions of other courts and tribunals as well as national practices on the whole. Despite its obvious intent to maintain the certainty of this method, the ITLOS emphasized the constraints on the method imposed by its non-mandatory nature and subjective flexibility. Additionally, recognizing the feasibility of the angle bisector method and other methods under certain circumstances, it gave due consideration to such methods. It can be inferred that the ITLOS has probably accorded the three-stage approach with greater flexibility than the ICJ.

III. The Status of the Three-Stage Approach as Customary Law

A. Existing Representation of the Customary Law

Judicial precedents show that Article 15 of the UNCLOS has become the customary law governing the delimitation of territorial sea. In regards to the delimitation of the exclusive economic zone, continental shelf or the single maritime boundary, Articles 74 and 83(1) of the UNCLOS, which provide the relevant principles with a view to achieving equitable results, should fall in the

29 *Bangladesh v. Myanmar*, (Separate Opinion of Judge Gao, p. 33).

ambit of customary law indisputably.³⁰ The question whether the three-stage approach, as a specific delimitation method, has the status of customary law should be attached with greater importance.

In the *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen*, the ICJ, challenged by Denmark questioning of whether a provisional equidistance line should be constructed in the first stage, confirmed the 1977 decision in the *U.K./France* case. It considered that Article 6 of the Convention on the Continental Shelf (equidistance/special circumstance rule) was expressing a customary law which required delimitation based on equitable principles, and there was no material difference between the effect of Article 6 and the effect of the customary rule.³¹ Thus, this rule has the status of customary law. Additionally, the equidistance/special circumstance rule is almost identical to the two-stage approach.³²

In regards to opposite coasts, the ICJ stressed that “even if it were appropriate to apply, not Article 6 of the 1958 Convention, but customary law concerning the continental shelf as developed in the decided cases, it is in accord with precedents to begin with the median line as a provisional line and then to ask whether ‘special circumstances’ require any adjustment or shifting of that line.”³³ Subsequently, the ICJ reaffirmed and applied this conclusion to adjacent coasts.³⁴

However, the argument that the two-stage approach had developed into a customary law in the decisions on delimitation of the continental shelf is far from compelling. The ICJ first acknowledged that the provisional drawing of an equidistance line was not a necessary or obligatory step in each case; yet based on a review of the *Gulf of Maine* and the *Libyan Arab Jarnahiriya/Malta cases*, it

30 David Anderson ed., *Modern Law of the Sea: Selected Essays*, Leiden: Martinus Nijhoff Publishers, 2008, p. 408; Territorial and Maritime Dispute (Nicaragua v. Columbia) 2012 ICJ Judgment, para. 139.

31 Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, *ICJ Reports*, 1993, p.61, para. 46.

32 Although Article 6 of the Convention on the Continental Shelf provides that special circumstances (excluding equidistance line) may justify another boundary, the prevailing view is that such special circumstances shall only constitute the basis for adjusting/shifting the equidistance line.

33 Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, *ICJ Reports*, 1993, p.61, para. 51.

34 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, *ICJ Reports*, 2001, para. 227; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, *ICJ Reports*, 2002, para. 289.

believed that it was entirely appropriate to start the delimitation with a provisional equidistance line, thereby leading to the conclusion above.³⁵ This decision is in sharp contrast to the elaborated arguments against the recognition of the equidistance method as customary law made in the *North Sea Continental Shelf case*. In the *Jan Mayen case*, it was unconvincing to treat the equidistance method as customary law merely based on two prior decisions where the Court considered it appropriate to construct a provisional equidistance line, despite the absence of assuring arguments and enumeration of treaties or other national practices. In this regard, some scholars have explained that the customary law was nominally developed by international behaviors under legal obligations but was actually announced by courts. In a sense, the customary law may be seen as created by judges or judicial practice.³⁶ It is undeniable that such inference was confirmed by the *Jan Mayen case*.

Additionally, the ICJ observed that the equitable principles/relevant circumstances rule applicable to delimitation of the single maritime boundary was extremely similar to the equidistance/special circumstances rule applicable to delimitation of the territorial sea (Article 15 of the UNCLOS).³⁷ Despite its reference to the rule on the territorial sea, it would be too far-fetched if the equidistance/special circumstances rule is also treated as the customary law governing the delimitation of the exclusive economic zone, continental shelf or the single maritime boundary by granting the rule the status of customary law as Article 15 of the UNCLOS. Since the *Black Sea case*, the judiciary has repeatedly used the previously determined methods, which were referred to as the ICJ standard methods, rather than the term “customary law.”

In conclusion, the three-stage approach (previously referred to as the two-stage approach) was once considered by the ICJ as the customary law concerning delimitation of the continental shelf. However, this assertion was neither supported with convincing demonstration nor followed in later cases. Therefore, as observed by the author, this assertion has so far proved inconclusive.

35 Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, *ICJ Reports*, 1993, p. 61.

36 Jiang Shibo, *Judicial Determination of the Customary International Law*, Beijing: China Politics and Law University Press, 2010, p. 209. (in Chinese)

37 Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, *ICJ Reports*, 2002, para. 288.

B. Analysis of Customary Elements of the Three-Stage Approach

It is inadequate to determine whether the three-stage approach is a customary law based only on decisions previously made by international courts or tribunals. As the customary law originates from different States, the elements involved in its development process, should theoretically, be analyzed. The prevailing view is that a customary law consists of two elements, namely the objective State practices and the subjective *opinio juris*, as confirmed in a number of ICJ precedent decisions.³⁸

Notably, the review of State practices of the three-stage approach is essentially focused on those of the equidistance/special circumstances rule (or the previous two-stage approach). First, the proportionality test in the third stage can be considered as a neutral judgment, and thus should be more frequently adopted by third-party institutions, including the ICJ and the ITLOS, which are supposed to guarantee equitable delimitation results. However, such a neutral position is rarely held by State parties to any delimitation treaty. Second, although the three-stage approach used by the ICJ is logically arranged, it is usually the delimitation results that are implemented by State parties in practice, failing to directly reflect the three-stage approach. That is because no disagreement would arise in the third stage if the delimitation results of the first two stages are proportional. Finally, even if the proportionality test is conducted by State parties when a delimitation treaty is finalized, it is unknowable what and how the treaty is negotiated, which actually denies of the feasibility of academic studies.

The analysis of the first two stages will play a crucial role in the review whether the three-stage approach belongs to customary law, because the delimitation results are obtained mainly in the first two stages. Furthermore, in case where disproportionality is found with such results, the equitable principles as the customary law would be undoubtedly violated. Therefore, the third stage that is missing in State practices may be interpreted under the equitable principles. Analysis of the two elements of a customary law is as follows:

1. State Practices

State practices indicate that considered as the basis of delimitation analysis under most circumstances, the equidistance method, in a certain form, or its variant

38 Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th revised ed., London: Routledge, 1997, p. 39.

has been used and plays a dominant or central role in the delimitation process.³⁹ According to Professor Gao Jianjun's detailed statistics, among 151 coastal or archipelagic States, 114 States' attitudes towards delimitation can be roughly identified, including 34 in favor of equitable principles, and 80 favoring the equidistance/special circumstances rule.⁴⁰ Treaties constitute the major part of the various delimitation-related State practices,⁴¹ for delimitation itself is a bilateral or multinational behavior. Professor Gao enumerates 171 maritime delimitation treaties (mostly bilateral treaties) as of June 2002.⁴² Of these, 91 treaties directly use the equidistance line (including where it is used to delimit part of the boundary), and 36 use adjusted equidistance lines. Additionally, 74.3% followed the two-stage approach, while a part of the remainder did not have any indication of which delimitation method to use. The latter phenomenon is clearly shown in treaties concluded around 2000.

Of the delimitation-related treaties concluded in the past decade, there are five treaties that explicitly use the equidistance/median line. These treaties are: the State of Israel-the Hashemite Kingdom of Jordan treaty (2002), agreement between the Republic of Cyprus and the Arab Republic of Egypt (2003), the Islamic Republic of Mauritania-the Republic of Cape Verde treaty (2003), the State of Israel-the Republic of Cyprus treaty (2010), and the Commonwealth of the Bahamas-the Republic of Cuba treaty (2011). There are six treaties which do not specify the delimitation method or use the (provisional) equidistance method. These treaties are: the Socialist Republic of Vietnam-the Republic of Indonesia treaty (2003), the Commonwealth of Australia-New Zealand treaty (2004), Mexico-Honduras treaty (2005), the Federated States of Micronesia-the Republic of Marshall Island treaty (2006), the Kingdom of Saudi Arabia-the Hashemite Kingdom of Jordan treaty

39 Don R. Rothwell and Tim Stephens, *The International Law of the Sea*, Oxford: Hart, 2010, p. 402; Legault and Hankey, Method, Oppositeness and Adjacency, and Proportionality, in Charney and Alexander eds., *International Maritime Boundaries*, Vol. I, p. 205.

40 Gao Jianjun, *International Maritime Delimitation - A Study on the Equidistance/Special Circumstances Rule*, Beijing: Beijing University Press, 2005, p. 176. (in Chinese)

41 Gerard J. Tanja, *The Legal Determination of International Maritime Boundaries*, Deventer: Kluwer Law and Taxation Publishers, 1990, p. 151, quoted from Gao Jianjun, *International Maritime Delimitation - A Study on the Equidistance/Special Circumstances Rule*, Beijing: Beijing University Press, 2005, p. 176~177. (in Chinese).

42 Gao Jianjun, *International Maritime Delimitation - A Study on the Equidistance/Special Circumstances Rule*, Beijing: Beijing University Press, 2005, p. 189~202. (in Chinese).

(2007), and the Republic of Trinidad and Tobago-Grenada treaty (2010).⁴³

The following cases are models for State practices of the two-stage process during recent years. In 2005, the U.K. and the Netherlands amended their bilateral agreement of 1965 concerning delimitation of the continental shelf by effecting fine adjustments on the equidistance line.⁴⁴ In 2008, South Africa and France settled their dispute concerning the delimitation of the continental shelf. South Africa employed the equidistance method to draw a chart of marine areas in 1995, thereafter, it agreed with France's declaration intending to extend its continental shelf. This act may be considered as an adjustment on the previously constructed provisional equidistance line.⁴⁵ Under the 2010 Treaty between Norway and Russia, the exclusive economic zone, continental shelf, and the single maritime boundary of the outer limit, were delimited by devising a compromise of Russia's claim to the angle bisector method and Norway's claim to the median line. The Norwegian Prime Minister refused to acknowledge that Norway had renounced its long-standing claim to the equidistance/median line, and the median line was only adjusted in accordance with the longer coast of Russia as a differentiator.⁴⁶

In conclusion, State practice of the two-stage approach (the equidistance method may be considered as a two-stage approach without adjustment that is supposed to be effected in the second stage) accounts for a considerable proportion, and even the majority in terms of the number of either States or treaties, indicating that such process is widely practiced by States. The two-stage approach found in treaties was first introduced in 1958 *Bahrain/Saudi Arabia* case, which indicates that it has stood the test of time. However, in practice, the two-stage approach is not applied by States consistently. Dozens of States are still inclined to the more general norm based on the equitable principles (including China), and a given

43 Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, *Law of the Sea Bulletin*, No. 55, pp. 32~35, 40~46; *Law of the Sea Bulletin*, No. 65, pp. 33~35; *Law of the Sea Bulletin*, No. 67, pp. 39~41, at <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES>, 29 August 2013.

44 *Law of the Sea Bulletin*, No. 66, pp. 94~95. Original agreement, at <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/NLD-GBR1965CS.PDF>, 31 August 2013. In 2005, the U.K. and Belgium agreed to adjust the boundary mutually determined under the Continental Shelf Delimitation Agreement of 1991. However, delimitation methods are not provided under the Agreement of 1991.

45 Patrick H.G. Vrancken, *South Africa and the Law of the Sea*, Leiden: Martinus Nijhoff Publishers, 2011, pp. 204~205.

46 Kuang Zengjun, *An Analysis of Russia-Norway Arctic Ocean Delimitation Treaty of 2010*, *Northeast Asia Forum*, No. 5, 2011. (in Chinese)

State might take different approaches to formalizing treaties with different States (as illustrated below). State practices of the two-stage approach have evolved tremendously since the ICJ judgment in the *North Sea Continental Shelf case*. However, the recognition of the approach as a customary law ensuring equitable delimitation results seems a long way off.

2. *Opinio Juris*

The ICJ stated in the *Libya v. Malta case* that the existence of such a rule “cannot be supported solely by the production of numerous examples of delimitations using equidistance or modified equidistance, though it is impressive evidence that the equidistance method can in many different situations yield an equitable result”.⁴⁷ To establish a customary law, it is required to prove that practices are motivated by *opinio juris*, that it is an obligation to practice in such a way, and it is the *opinio juris* that is practiced which, dependent as it is in most cases, is proven through States’ behaviors.

First, although treaties constitute the major part of State practices for delimitation, not a few of them are based on compromise (see, for example, the Russia-Norway treaty mentioned above), rather than consistent claims. In this connection, treaties entail lower conviction that a State is legally obliged to follow the two-stage approach compared with the State’s domestic laws and regulations as well as its claims made on the Third UN Conference on the Law of the Sea. Of the above-mentioned 151 States, 56 provide or support the use of the equidistance delimitation method, accounting only for approximately one-third of States, a quantity obviously less than those following the two-stage approach in State practices.

Second, a State may resort to different methods in different treaties. For example, the U.K. used the longitude/latitude line and the equidistance line in the treaties concluded with Ireland (1988) and the U.S. (1993), respectively; the U.S., vigorously advocating delimitation based on equitable principles, also used different methods in the treaties concluded with Cuba (1977) and the former Soviet Union (1990), respectively.⁴⁸ Similar cases, too numerous to discuss, not only prove inconsistency in State practices, but also demonstrate that the use of the two-

47 Continental Shelf (Libyan Arab Jarnahiriya/Malta), *ICJ Reports*, 1985, para. 44.

48 Gerard J. Tanja, *The Legal Determination of International Maritime Boundaries*, Deventer: Kluwer Law and Taxation Publishers, 1990, p. 151., quoted from Gao Jianjun, *International Maritime Delimitation - A Study on the Equidistance/Special Circumstances Rule*, Beijing: Beijing University Press, 2005, p. 176~177. (in Chinese).

stage approach or other methods depends on specific conditions under the various treaties. It also demonstrates that States will inevitably resort to compromise driven by economic interests, leading to a negligible conviction that the two-stage approach should be the delimitation law.

Third, the claims made by States before international courts/tribunals are far from convincing. These unconvincing claims include those made by Libya (*Libyan Arab Jarnahiriya/Malta case*), Denmark (*Jan Mayen case*), Nicaragua (*Nicaragua/Honduras case*; *Nicaragua/Columbia case*), and Bangladesh (*Bay of Bengal case*), among others. These States all assert that the use of the two-stage approach is inappropriate and should not be used in their cases despite their acknowledgement to different degrees that the two-stage process is a commonly used method and may produce equitable results. States requesting the use of the two-stage approach are also not necessarily convinced that the approach is a law. For example, in the *Bay of Bengal case*, Burma argued that the two-stage approach “is not as such a rule of delimitation properly said, but a method, usually producing an equitable result”.⁴⁹ In another example, Denmark was a proponent of the equidistance method in the *North Sea Continental Shelf case*, which sharply contrasts with its stance taken in the *Jan Mayen case*. To some extent, the selection between the equidistance method and the two-stage approach depends on a State’s interests in a particular case.

In conclusion, the first two stages of the three-stage approach (with the final stage renounced) are widely practiced by States, but it may also lead to inconsistency in certain circumstances. In respect of *opinio juris*, this approach falls short of convincing evidence. A theoretical analysis of the three-stage approach indicates that this approach is not yet recognized as a customary law.

IV. Reference of the Three-Stage Approach to Sino-Japan Delimitation of the Continental Shelf in the East China Sea

A. The Current Status of the Three-Stage Approach

As mentioned above, recognition of the three-stage approach as a customary

49 Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar) 2012 Judgment, ITLOS Case No.16, para. 219.

law is still some way off, however, it does play a crucial role in the decision-making by international courts/tribunals. Indeed, Article 59 of the Statute of the International Court of Justice explicitly provides that the decisions of the Court shall have no binding force on new cases, while its Article 38 stipulates that judicial decisions should serve as subsidiary means for the determination of rules of law. Judicial decisions are perceivably still influential on, and frequently referred to and reiterated in, new cases. In fact, as H. Lauterpacht expounded, decisions are a repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because what the Court has considered in the past makes for certainty and stability, which are of the essence of the orderly administration of justice. He also noted that judges are naturally reluctant, in the absence of compelling reasons to the contrary, to admit that they were previously in the wrong.⁵⁰ Despite its rejection to acknowledge the three-stage approach as the exclusive and mandatory rule that should be applied in each case, the ICJ firmly advocates its previous decisions so as to maximize the certainty of the approach and to achieve unanimous recognition of the approach as a standard method, which is undeniably related to the circumstances as analyzed above.

B. Sino-Japan Delimitation of the Continental Shelf in the East China Sea

China has made no effort toward promoting the development of the three-stage approach in terms of either State practice or *opinio juris*. Rather, China has consistently adhered to equitable principles in legal claims and also in the 2000 Sino-Vietnam agreement on the delimitation of the Beibu Gulf. In the Sino-Japan delimitation of the continental shelf in the East China Sea, China, with strenuous objection against Japan's application of the median line, claimed that the Okinawa trough should constitute a natural boundary between the continental shelves of the two States. Thus, it insisted on the natural prolongation principle, for example, in its submission to the U.N. in 2012 for the delimitation of the continental shelf

50 H. Lauterpacht, *The Development of International Law by the International Court*, London: Cambridge University Press, 1958, p. 14.

beyond 200 nautical miles in the East China Sea.⁵¹

As the international courts/tribunal observed, the jurisprudence on maritime delimitation is seemingly going against China. Suppose this case is heard before the ICJ. First, the three-stage approach will be presumed as the standard method, as there is no extreme circumstance where technical difficulties exist in determining base points or constructing an equidistance line between China and Japan. Therefore, constructing a provisional equidistance line might be first step of delimitation. Second, China's coastline length obviously exceeds that of Japan's, which is one of China's geographical advantages. Precedents prove that great disparity in coastline length may be a relevant circumstance, and shall be considered in the second stage. Such disparity will require adjusting or shifting the equidistance line closer to Japan. This would definitely fall short of China's expectations. And the disparity in coastline length would not drive the ICJ to depart from its insistence on the three-stage approach. Third, of the previous judicial practices renouncing the three-stage approach, most decisions selected the angle bisector method as an alternative, which is only applicable to States with adjacent coasts, rather than those with opposite coasts, as the case between China and Japan. Finally, troughs did play a crucial role in delimitations in the history, such as Timor trough between Australia and Indonesia (1977); however, as geological and geomorphological feature, troughs were neither properly valued in subsequent practices nor included in the ambit of coastal geography that has drawn greater attention of the ICJ when investigating relevant circumstances.

The *Libyan Arab Jarnahiriya/Malta case* deserves our exploring. Libya resorted to natural prolongation standard, as opposed to the distance standard claimed by Malta. The Court eventually adopted the two-stage approach under the distance standard. This case is to some extent similar to the Sino-Japan delimitation case. In the disputed area between the median line and the area within 200 nautical miles measured from China's coast, China may claim that it is entitled to the disputed area based on either the distance or natural prolongation standard, and the distance standard shall be acceptable to both China and Japan. However, contrasted with the circumstances in the *Libyan Arab Jarnahiriya/Malta case*, China's entitlement to the area beyond 200 nautical miles measured from its coast to the

51 China Filed Its Submission Concerning the Outer Limits of Continental Shelf beyond 200 Nautical Miles in the East China Sea to the U.N., at http://www.chinadaily.com.cn/hqgj/jryw/2012-12-15/content_7775527.html, 30 August 2013. (in Chinese)

Okinawa trough shall be exclusively based on natural prolongation, which causes conflict with Japan's claim to the distance standard. It should be noted that such conflict is a barrier to the adoption of the (provisional) equidistance line.

An analysis of the current status of the three-stage approach reveals that it is inappropriate for China to submit such disputes to any arbitration bodies. Priorities should be given to delimitation by agreement based on equitable principles, which is a timeless truth in the jurisprudence on delimitation. In order to safeguard its rights and interests, China should never easily renounce or compromise its existing claims to the continental shelf.

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美国在《联合国海洋法公约》之外 塑造海洋秩序的战略

牟文富*

内容摘要:《联合国海洋法公约》为海洋制定了法律秩序,但作为世界最强大的海权国家,美国至今没有加入该公约。尽管现在美国政府积极推动加入公约,但其复杂的国内政治、高度分化的国内舆论使得其在很长时间内难以完成这个任务,这就使美国在公约之外塑造对其有利的海洋秩序,为美国享有海洋权益寻找一种法律基础。美国主要通过三种策略来塑造海洋秩序:习惯法主张、航行自由计划、在“防扩散安全倡议”框架下签订双边船舶登临协议去超越传统的海上管辖权,三者分别对应着权利基础、显示武装力量去维护和强化该权利基础的国家实践、重建对海上船舶管辖权制度的企图。美国实施的“航行自由计划”还导致其与中国发生了争端。如果说促使美国试图塑造新的海洋秩序的主导动机有什么特点的话,那首先是它反映了美国在世界总体权力结构中的主导地位,其次是它以海洋自由为核心,不过还融合了反恐、防扩散领域中的美国利益。

关键词:《海洋法公约》 海洋秩序 习惯法 航行自由计划 登临协议

一、引言

1982年《联合国海洋法公约》(以下简称“《公约》”)开放供签署后不久,飞利浦·阿洛特于1983年发表了一篇谈论该《公约》之理念及总体结构的文章,其中他用了这样一个比喻:“如果一个飞翔的荷兰人在世界各大洋上漂泊,随身带着《公约》,他总是能够用法律术语回答这样的问题:我是谁?那边又是谁?我在哪

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儿？我可以做什么？我必须做什么？《公约》不会让他失望。”¹

阿洛特认为《公约》的主要结构特点在于其全面性，它涉及到整个世界的非陆地区域，在法律上也面面俱到。“对每样事物都有规则。”²所以他倾向认为《公约》能为每个问题提供答案。然而，当2001年美国“EP-3”军事侦察飞机在中国南海专属经济区内从事军事侦察的时候，若飞机上的军人拿着《公约》，也面临着那位假想的荷兰人所面临的问题，他们又能找到什么答案呢？或者他们有资格从《公约》中寻找答案吗？³2009年美国海军监测船“无暇号”在南海中国专属经济区内从事军事测量活动，⁴面对同样的问题，答案又是什么呢？要寻找答案，两个有关美国的重要事实必须考虑：

第一，美国是一个超级海权国家，这不单是因为美国总体国力雄踞世界首位，而且还因为其海军力量远远超过世界其它国家海军力量的总和，这不仅包括军舰的数量，也包括海军的军费数量。美国的这种身份对于理解美国行为是一把重要的钥匙。

第二，海权国家的身份往往体现它在海洋上的行为、活动，而现在存在一种海洋法律秩序，就是《公约》所塑造的秩序。⁵从海洋权益分配的角度出发，海洋法律秩序可以定义为：通过有约束力的方式对所有国家在利用海洋过程中的权利、权力、特权、豁免这些利益进行分配，体现这种分配安排的国际法规则就是海洋秩

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- 1 Philip Allott, *Power Sharing in the Law of the Sea*, *The American Journal of International Law*, Vol. 77, 1983, p. 8. “飞翔的荷兰人”指永远无法返航的鬼船，注定在海上漂泊，它是欧洲一个古老的海上传奇，其母题可能源于地理大发现之后的航海壮举，有些作家写过“飞翔的荷兰人”的故事传奇。R·瓦格纳的歌剧《漂泊的荷兰人》也以“飞翔的荷兰人”作为人物背景。
 - 2 Philip Allott, *Power Sharing in the Law of the Sea*, *The American Journal of International Law*, Vol. 77, 1983, p. 8.
 - 3 关于2001年美国军用侦察飞机“EP-3”在中国南海从事军事侦察所引发的事件，参见中国外交部：《发言人谈美国军用侦察机撞毁中国军用飞机事件真相和中方有关立场》，下载于 http://www.fmprc.gov.cn/mfa_chn/fyrbt_602243/t11175.shtml，2014年1月23日。
 - 4 关于2009年美国海军监测船“无暇号”在南海中国专属经济区内从事所谓军事测量活动所引发的外交纠纷，参见中国外交部：《外交部发言人马朝旭就美海军监测船在中国专属经济区活动事答记者问》，下载于 <http://www.fmprc.gov.cn/zflt/chn/fyrth/t541674.htm>，2014年1月23日。
 - 5 《联合国海洋法公约》(A/CONF.62/122)序言第4条表示，“通过本公约……为海洋建立一种法律秩序，以便利用国际交通和促进海洋的和平用途，海洋资源的公平而有效的利用，海洋生物资源的养护及研究、保护和保全海洋环境。”就此而言，《公约》所建立的法律秩序主要着眼于“海洋的和平用途”。《联合国海洋法公约》的中文，参见中华人民共和国外交部条约法律司编：《中华人民共和国多边条约集》第四卷，北京：法律出版社1987年版，第241~441页。

序。⁶无论是假想的荷兰人,还是美国的“EP-3”侦察飞机、“无瑕号”海军监测船,它们的行为、活动的法律依据,本应当在这种海洋法律秩序中来判断,它们所面临的问题也应当在这种秩序中来回答。然而,虽然美国参加了《公约》的谈判,但并没有签署该公约,从《公约》于1994年11月6日生效到现在,美国也没有加入该公约,一直身处《公约》之外。所以美国无法以《公约》缔约国的身份从《公约》中寻找答案。

然而,从历史经验来看,海权国家一方面在国际性谈判中突出自己海军方面的利益需求,而且也利用海军力量使国际海洋法反映其国家主张,这深深地影响了海洋法的发展,⁷美国自然也不例外。美国没有加入《公约》并不意味着美国没有塑造有利于它的海洋秩序,事实上这个过程一直在进行着,为此它有一套持之以恒的海洋战略。这是美国为自己的各种海上行动寻找合法性的基础。因此,探究美国对海洋秩序的塑造、相关的海洋战略对理解美国的海上活动、行为是必要的。本文的主题是考察美国塑造海洋秩序的战略,这是一种专注动态过程的方法。

关于“战略”,这里采用了美国“政策导向学派”所使用的战略概念:在利用海洋的互动社会过程中,参与的行为主体单独或混合使用的外交、意识形态、经济、军事性质的手段,目的是为了最大化地达成自己的目标。晚近最令人瞩目的战略包括诉诸意识形态情绪,如海洋环境保护、海洋哺乳动物保护等。此外,第三次海洋法大会是各国诉诸外交手段的主要场合。行为主体自由地选择其战略,可能并不参照其他行为主体的战略选择,它们可能包括说服、胁迫之类的单方行为。⁸本文之所以选择“政策定向学派”下的“战略”概念,是因为该学派专注于决策过程而非法律规则本身,而本文试图考察美国通过各种战略去塑造海洋秩序,这也是一种专注过程的方法。但是“战略”在本文中的范围更狭窄一些,即美国试图用来展现海洋秩序乃是它所倡导、解释、维护的那种海洋秩序的手段,如果现有的规则不敷其所用或不符合其国家利益,则诉诸某种手段去创设、变更它们。美国有可能是在单边、双边或多边意义上使用这些战略。例如,美国一直实施的“航行自由计划”就是一种单边性的战略,其中还带有胁迫性因素,而美国主导签订的一系列防扩散、海上登临协议,则是双边、多边行动的混合体。

6 飞利浦·阿洛特提到《海洋法公约》不断使用霍菲尔德的八种法律关系形式。Philip Allott, *Power Sharing in the Law of the Sea*, *The American Journal of International Law*, Vol. 77, 1983, p. 9. 霍菲尔德的八种法律关系分别为:相关关系:权利 - 义务、特权 - 无权利、权力 - 责任、豁免 - 无权力;相反关系:权利 - 无权利、特权 - 义务、权力 - 无权力、豁免 - 责任。参见霍菲尔德著,张书友译:《法律基本概念》,北京:中国法制出版社2009年版。

7 Mark Janis, *Sea Power and the Law of the Sea*, Lexington: D.C. Heath and Company, 1976, p. 17.

8 McDougal and Turke, *Public Order of the Oceans - A Contemporary Law of the Sea* (“*Public Order of the Oceans*”), New Haven: New Haven Press, 1987, pp. 42~44, 25~26, 40.

本文内容安排如下。第一部分从海洋权益分配角度简要论述《公约》所构建的海洋法律秩序。第二部分考察美国对《公约》的立场。尽管现在美国政府积极推动加入《公约》，但复杂的国会参议院运作机制、高度分化的国内舆论使得它在很长时间内难以完成这个任务，这就使美国需要在《公约》之外去塑造对其有利的海洋秩序，为美国享有海洋权益寻找一种法律基础。第三部分主要从3个方面阐述美国塑造海洋秩序的海洋战略：习惯法主张、航行自由计划、“防扩散安全倡议”框架下的双边登临协议。第四部分分析美国实施“航行自由计划”所产生的一个后果——中美双方因专属经济区内军事活动立场差异而发生的冲突。第五部分说明美国的这些战略中的权力因素与美国作为超级海权国家的地位是相关的。

二、《公约》下的海洋法律秩序

(一)《公约》下的海洋法律秩序

当代国际海洋法律秩序集中体现在1982年《公约》对海洋的和平利用所作的制度安排。《公约》于1994年生效，到2014年1月为止共有157个国家签署了该公约，总的缔约国共计166个，但不包括美国。⁹另一方面，海洋作为武装冲突的场所，规范海上武装冲突中各交战方的行为也是海洋秩序的一部分，目前相当一部分内容是习惯规则。¹⁰但海上武装冲突规范并不主要涉及对海洋的和平利用，本文主要强调海洋秩序的第一个层面，因为美国正倾力塑造的也是海洋秩序的第一个层面。

1. 海洋利益的分配秩序

第三次海洋法大会是联合国主持的规模最大、最复杂、也是最困难的全球性谈判，其间充斥着各种各样的冲突，涉及国际经济结构、国际关系、国际层面的决策以及资源分配。复杂性还体现在参与谈判的国家在谈判结束之际多达155个，涉及的各类问题达400多个。¹¹大会的最后成果《公约》乃是隐含的一揽子交易的

9 《联合国海洋法公约》的生效状态、签署、批准、保留等情况，参见 United Nations, United Nations Treaty Collection, at <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf>, 23 Jan 2014.

10 *San Remo Manual on International Law Applied to Armed Conflicts at Sea*, Cambridge: Cambridge University Press, 1995.

11 Edward Miles, *Global Ocean Politics: The Decision Process at the Third United Nations Conference on the Law of the Sea 1973-1982*, Leiden: Martinus Nijhoff Publishers, 1997, pp. 3~4.

结果。¹²

首先,《公约》将整个海洋分割为各种海洋区域:内水、领海、毗连区、群岛水域、大陆架、专属经济区、公海、国际海底区域。其次,根据各种海洋区域内权利主体不同,将国家划分为沿海国、其他国家、所有国家,后两类国家中包括内陆国。¹³其三,对海洋利用的规定是在三个层面展开的:作为资源产出地的海洋、作为交通/运输媒介的海洋、作为战场的海洋,¹⁴与此相对应的权益包括航行(包括无害通过)、海峡与群岛水域的过境通行、铺设电缆和管道、渔业与生物资源、海洋科学研究、海洋环境保护、国际海底区域矿物开发、海洋技术转让、海洋的和平利用与军事利用(非武装冲突行动)等内容。《公约》的核心宗旨就是要分配这些权益。然而,《公约》的宗旨在于促进海洋的和平利用,因此并不规范武装冲突意义上的军事利用,但在公约框架下存在“军事活动”(没有对其界定),因此海洋法与海上武装冲突法之间存在一个灰色地带,¹⁵这是目前最具争议的问题之一。

《公约》在不同类型的国家与不同的海洋区域以及其中的物、行为之间建立起法律关系。简而言之,在上述海洋区域中,在国际海底区域、公海,由所有国家平等地享有权利,内水则由沿海国享有完全的主权。在国家管辖海域如领海、毗连区、群岛水域、大陆架、专属经济区中,则是在沿海国与其他国家之间分配利益。所以,在国家管辖海域中,权利的分配模式就是在沿海国与其他国家之间设定各自的权利、义务。

2. 地理上的形式主义特征

如前所述,《公约》主要是通过一种地理上的概念来划分国家类型:沿海国、群岛、内陆国、地理上不利的国家,同时内水、领海、专属经济区制度也完全建立在领海基线概念——也是建立在地理坐标上的,这样做就抹去了国家在其他方面的特征。尽管《公约》中的权利主体包括“发展中国家”,但在国家管辖海域中的权利、特权、权力及豁免主要是在沿海国与其他国家之间分配,只是出于考虑“发

12 这种“一揽子交易”被总结为航行利益与资源利益的交易。Edward Miles, *Global Ocean Politics: The Decision Process at the Third United Nations Conference on the Law of the Sea 1973-1982*, Leiden: Martinus Nijhoff Publishers, 1997, p. 4; James Harrison, *Making the Law of the Sea—A Study in the Development of International Law*, Cambridge: Cambridge University Press, 2011, pp. 44~46.

13 这是在国家之间分配利益意义上的分类。事实上《公约》对国家的分类更为复杂,如外国、第三国、海岸相邻或相向国家、港口国家,飞利浦·阿洛特统计了包括国家在内的共57个权利和义务主体。同样,《公约》中使用的具有法律意义的“区域/场所”多达58种,除了领海、专属经济区等之外,另外有海湾、历史性海湾、港口、岛、低潮高地等等。Philip Allott, *Power Sharing in the Law of the Sea*, *The American Journal of International Law*, Vol. 77, 1983, pp. 28~30.

14 Philip E. Steinberg, *The Social Construction of the Ocean*, Cambridge: Cambridge University Press, 2001, pp. 11~18.

15 Dupuy-Vignes, *A Handbook on the New Law of the Sea*, Vol. 2, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, pp. 1321~1329.

展中国家的特殊利益和需要”，《公约》提到了需考虑其利益（第61、62、69、70、82条等）。在公海与国际海底区域中发展中国家作为平等成员参与利益的分配，仍然考虑到它们的特殊利益和需要（第119、140、143、144条等）。但是在原则上，《公约》是基于一种地理上的形式主义来分配利益。沿海国对大陆架、专属经济区享有的权利基于“陆地支配海洋”这个原则。在不考虑海岸相邻、相向国家因素的情况下，衡量利益分配的数量取决于海岸线/领海基线的长短，海岸线越长，其领海、专属经济区甚至大陆架的面积也可能越大。在海洋划界时，在考虑特定海洋面积的分配过程中，海岸线的长度是衡量分配比例的重要因素。¹⁶就此来看，在《公约》下获益最多的国家是那些拥有较长海岸线的国家或岛国，美国就是其中之一。¹⁷美国被认为是一个巨大的赢家。¹⁸然而，除了利益分配之得失外，美国最为关注的还是其超强的海军如何在《公约》下发挥最大的优势，即它的优势力量不至于因受到《公约》影响而被削弱。

（二）美国与海洋秩序

从建国伊始，美国就显示了建立一个海洋强国的抱负，亚历山大汉密尔顿呼吁支持新宪法，一个重要的理由就是根据新宪法建立的联邦有助于开展国际贸易和建立强大的海军。¹⁹美国在第二次世界大战结束时成了世界上唯一的海洋超级大国，其海军力量远远超过任何其他国家。理解美国海洋战略的一个出发点就是要认识到美国是一个强大的海权国家这个事实，这决定了美国追求其国家利益的内容。²⁰从历史上来看，海洋强国主张的“海洋自由”，一方面倡导、主张和维护最狭窄的领海宽度，另一方面是适用范围最广的航行自由。²¹这种“海洋自由”适用

16 Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation*, Oxford: Hart Publishing, 2006, p. 161.

17 美国、澳大利亚、新西兰、印度尼西亚、加拿大和前苏联的专属经济区面积占了全球专属经济区面积的40%，其中只有印度尼西亚属于发展中国家。Dupuy-Vignes, *A Handbook on the New Law of the Sea ("A Handbook")*, Vol. 2, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, p. 281.

18 McDougal and Turke, *Public Order of the Oceans – A Contemporary Law of the Sea*, New Haven: New Haven Press, 1987, p. 72.

19 亚历山大·汉密尔顿等著，程逢如等译：《联邦党人文集》，北京：商务印书馆1995年版，第18、54、122页。

20 Mark Janis, *Sea Power and the Law of the Sea*, Lexington: D. C. Heath and Company, 1976, pp. 1~18.

21 罗伯特·基欧汉、约瑟夫·奈著，门红华译：《权力与相互依赖》，北京：北京大学出版社2002年版，第95~97页；Scott G. Borgerson, *The National Interest and the Law of the Sea*, *Council on Foreign Relations Inc., Council Special Report No. 46*, 2009, pp. 22~23；Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2002, pp. 740~742, 754~755.

于军事战略的意义在于它有助于保持海军、空军的最大行动自由，它就是海洋大国利益的核心。乔治·W·布什政府的助理国务卿内格罗蓬特曾经表示，“作为世界上最大的海权国家，我们的安全利益同航海自由内在联系在一起。我们比任何其他国家从世界大洋的法律确定性和公共秩序中获得的利益都多。”²²

根据《公约》中的利益分配方式来衡量，美国是《公约》的最大赢家之一。然而美国至今仍未加入该公约，所谓获益最大的法律基础是什么呢？这涉及美国如何在《公约》之外主张自己的权利、如何塑造有利于自己的海洋秩序。美国全程参与第三次海洋法大会，在谈判过程中全力以赴，让拟议中的公约能确保其海权优势得以发挥。事实上，自卡特政府末期开始，《公约》谈判尚未完结，美国就启动了“航行自由计划”，旗帜鲜明地主张自己的海洋利益，多少有些对即将在公约中出现的制度进行制衡的味道，该计划一直持续到今天。另一方面，21世纪伊始，美国为了维护其国家安全利益，通过一系列多边行动、双边协议力图调整海洋法中有关海上管辖权的传统规则。可以断言，在过去及今后相当长一段时间内，美国游离在《公约》之外，根据自己对国家利益的判断试图在《公约》体系之外并超越该公约塑造一种海洋秩序，在此过程中美国也严重依赖其海军力量。从历史经验、也从现实主义的视角来看，海权国家对海洋秩序的塑造是一种现实。²³

三、美国国内政治对其加入《公约》的影响

（一）《公约》与美国国家利益的大辩论

美国带着保护其三个优先利益的目的参加第三次海洋法大会：首先是保证其航行、飞越自由，以对抗沿海国咄咄逼人的管辖权扩张；第二，保护被远洋加工船舶过度捕捞所破坏的渔业资源；第三，保护海洋环境、控制美国大陆架上蕴藏的油气资源。²⁴随着谈判的进行，美国开始重视保护其深海海底开发方面的利益，到谈判的后期，尤其是里根政府时期，美国将深海海底矿物的勘探、开采视为重要的利

22 2007年参议院外交委员会听证会讨论加入《公约》，助理国务卿约翰·内格罗蓬特的书面证词。Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, pp. 616-617.

23 英国学者希金斯、哥仑伯斯在上个世纪谈到英国、美国两个海洋大国对海洋法之形成所起的主要作用时说，“任何海上国际法的新原则，除非经这两个国家接受，不能被认为是一个普遍适用的原则。”希金斯、哥仑伯斯著，王强生译：《海上国际法》，北京：法律出版社1957年版，第25页。尽管这种说法略显夸张，但也基本上是一个历史事实。

24 Galdorisi and Vienna, *Beyond the Law of the Sea: New Directives for US Oceans Policy*, London: Preager, 1997, p. 27.

益,在这方面美国及其他发达国家与发展中国家之间的利益出现了巨大的分歧。美国尤其反对发展中国家倡导的对海底矿物开采进行集中控制的机制,因为在这种机制中美国的海洋开发技术和资金实力优势并无体现,所以美国倡导海底开发的自由市场、自由企业机制,抵制分享技术和利润的要求。²⁵在第三次海洋法大会临近结束之际,美国曾努力让海底开发制度反映自己的利益要求,但未能成功。²⁶

1982年《公约》向所有国家开放签署时,时任美国总统里根于1982年7月宣布美国不会签署《公约》,原因在于《公约》有关海底开发的规定与工业化国家的利益不符。²⁷1983年3月10日里根在“海洋政策的总统声明”提出了美国对《公约》的态度以及一般性的海洋政策。首先,美国准备根据对海洋传统利用的利益平衡去接受《公约》中诸如航行、飞越方面的规定,并以此行动。在这方面,美国将承认其他国家在美国沿海水域中的权利,只要其他沿海国家承认国际法下美国和其他国家的权利和自由。第二,美国按照《公约》中所反映的利益平衡原则在全球范围内主张并行使其航行、飞越权利和自由。美国不会默许其他国家旨在限制国际社会在航行和飞越、有关对公海的其它利用方面的权利和自由的单方行为。第三,在美国200海里的专属经济区内,美国对生物和非生物资源行使主权权利,其他国家仍然享有与资源无关的公海权利和自由。美国不主张对其中的海洋科学研究行使管辖权,但美国承认其他国家对在各自的专属经济区内的海洋科研享有管辖权。里根同时也承认,《公约》也包括了有关对海洋的传统利用方面的某些规定,它们一般地确认了现有的海洋法律和实践,很好地平衡了所有国家的利益。²⁸

里根的声明似乎表现了美国根据其对利益的判断而对《公约》规定的选择性接受,被批评为与《公约》的“一揽子交易”精神背道而驰。²⁹此后相当长一段时间内,乃至今日,里根声明一直是美国海洋政策的基础。1994年《公约》及《〈公约〉第十一部分执行协定》生效后,克林顿政府开始推动美国加入《公约》,但直到2003年美国国会参议院对外关系委员会才开始考虑加入《公约》而举行公开听证,这激发了美国国内各界对《公约》是否符合美国利益的大辩论。争论围绕着两个方面的问题:第一,《公约》是否会限制美国海军的行动自由,从而损害其海军战略、战

25 Galdorisi and Vienna, *Beyond the Law of the Sea: New Directives for US Oceans Policy*, London: Preager, 1997, pp. 47-48.

26 Galdorisi and Vienna, *Beyond the Law of the Sea: New Directives for US Oceans Policy*, London: Preager, 1997, pp. 50-51.

27 Presidential Statement, at <http://www.reagan.utexas.edu/archives/speeches/1982/12982b.htm>, 30 May 2014; Presidential Statement, at <http://www.reagan.utexas.edu/archives/speeches/1982/70982b.htm>, 30 May 2014.

28 J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive National Maritime Claims*, Newport: Navy War College, 1994, pp. 275-276.

29 Galdorisi and Vienna, *Beyond the Law of the Sea: New Directives for US Oceans Policy*, London: Preager, 1997, pp. 53, 62-63; McDougal and Turke, *Public Order of the Oceans - Contemporary Law of the Sea*, New Haven: New Haven Press, 1987, p. 65.

术行动;第二,在联合国框架内建立有关海底开发和争端解决的机构,是否会危及美国的主权。辩论的阵营大致可分为《公约》的支持派和反对派。《公约》的支持者认为《公约》所体现的原则是美国海军战略的基石,而对《公约》持怀疑态度的人认为《公约》确实没有赋予美国海军霸权性的力量。³⁰目前美国没有加入《公约》,最主要的原因一方面在于美国宪法对缔结国际条约的制度性要求,另一方面在于美国国内舆论对《公约》的立场高度分化。

1. 美国宪法对缔结国际条约的规定

美国《宪法》规定的缔约权涉及美国总统与参议院之间的权力分配。美国《宪法》第2条第2款中规定,“总统根据或征得参议院之意见并取得其同意有权缔结条约,惟需有该院出席议员三分之二之赞同。”³¹总统的缔约权是清晰的,“总统任命谈判人员,对其做出指示,跟踪谈判进程。若他同意谈判达成的内容,只要有参议院的意见和同意,就可以批准、‘缔结’条约。”³²然而,在实际的美国政治生活中,宪法中“征得参议院之意见并取得其同意”的措辞演变成复杂异常的政治和法律问题。“在美国总统通过条约制定外交政策方面,该要求成了参议院对总统权力的一种重要制衡。”³³参议院主导着条约的批准,“这一进程常常充满浓厚的政治色彩”。³⁴在批准条约时,参议院的同意往往附有“意见”,从美国国内法来看,这种意见可能起到对条约的保留、解释、单方修正、对条约后果进行限制的作用,³⁵因此是否给与同意、提出什么样的意见,这无不是党派政治、利益集团博弈的产物。从1994年开始到现在,美国批准《公约》的历史正可以说明这种批准条约方面的复杂政治。

2. 美国行政部门支持加入《公约》

自从《〈公约〉第十一部分执行协定》对海底开发制度进行调整后,美国政府方面开始以积极的态度看待《公约》,甚至认为经修改的《公约》是美国外交的胜

30 Scott Gerald Borgerson, *The National Interest and the Law of the Sea*, No. 46, New York: Council on Foreign Relations, 2009, pp. 4~5.

31 美国《宪法》中文文本,参见亚历山大·汉密尔顿等著,程逢如等译:《联邦党人文集》,北京:商务印书馆1995年版,第459页。

32 Louis Henkin, *Foreign Affairs and the Constitution*, New York: Foundation Press, 1972, p. 130.

33 Louis Henkin, *Foreign Affairs and the Constitution*, New York: Foundation Press, 1972, p. 132.

34 罗伯特·弗里德兰德著,刘先鸣译:《美国参议院条约批准程序及其对海洋法公约可能的影响》,载于《弗吉尼亚大学海洋法论文三十年精选(第一卷)》,厦门:厦门大学出版社2010年版,第273页。

35 Louis Henkin, *Foreign Affairs and the Constitution*, New York: Foundation Press, 1972, p. 133.

利。³⁶克林顿总统在1994年致参议院的信函中表示“《公约》谨慎地平衡了国家对其沿海的活动进行控制的利益和所有其他国家保护海洋空间自由不受干涉的利益”，同时认为《公约》增进了美国作为一个全球性海洋大国的利益。对于原来美国一直不满意的“区域”开发制度，克林顿政府认为《〈公约〉第十一部分执行协定》所规定的“管理局”的决策结构保护了美国利益，尤其是“理事会”确保有美国的席位、一致同意的决策原则，另一方面还取消了关于强制转让技术的规定，因此建议参议院同意加入《公约》。³⁷此后无论是共和党的布什政府还是民主党的奥巴马政府都一再推动参议院考虑美国加入《公约》，美国国务院曾多次在国会力陈加入《公约》的必要性和好处。2004年美国国务院法律顾问塔夫脱在众议院国际关系委员会听证会上说，加入《公约》将推进美国的军事利益，《公约》保留、深化了美国军队使用世界海洋的权利以便维护国家安全，美国从《公约》有关航行的规定中获取的利益比任何其他国家都大。³⁸他表示目前美国的外交和行动是依赖于《公约》的习惯国际法性质，但美国正式加入《公约》会获得的好处在于其能够援引《公约》作为行动的法律依据、能全面参与《公约》下各种机构的运作、在《公约》框架内维护美国的利益。³⁹塔夫脱也提到不加入《公约》的不利风险：随着时间推移，国家实践可以改变习惯国际法。⁴⁰

2007年美国助理国务卿内格罗蓬特向美国参议院对外关系委员会听证会提交的书面证词表示美国加入《公约》有紧迫的理由。他认为《公约》已经生效，《公

36 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, p. 613.

37 克林顿总统在1994年10月7日致美国参议院的信函做出了这样的评估。See Treaty Doc. 103-39: United Nations Convention on the Law of the Sea, at <http://www.foreign.senate.gov/download/?id=8AB76600-4590-4931-8BAE-2658AD093C80>, 24 January 2014; also see Galdorisi and Vienna, *Beyond the Law of the Sea: New Directives for US Oceans Policy*, London: Preager, 1997, pp. 195~197; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1991~1999, p. 1559.

38 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2004, p. 674.

39 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2004, pp. 678~679.

40 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2003, pp. 723~724; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2004, p. 679.

约》设立的组织和机构已经在顺利运转,而美国这个最大的海洋国家却是旁观者。⁴¹美国需要现在加入《公约》,以便锁定美国在《公约》谈判过程中获得的对其有利的规定。他认为不能设想美国现在所依赖的习惯国际法能无限期地持续,那有风险。他还担心有一种日益增加的来自沿海国的压力,它们增强了自己力量,在一定意义上会更改《公约》中的利益平衡。⁴²

奥巴马执政后继续推进美国加入《公约》的工作。国务卿希拉里克林顿分别于2009年、2010年、2011年在参议院对外关系委员会等多种正式场合支持美国加入公约。⁴³她表示,美国在《公约》中有一席之地可使美国更有效地参与《公约》的解释、发展进程,也能正式参与根据《公约》设立的各种机构。⁴⁴她认为《公约》在美国国内获得了广泛的支持:美国海军、海岸警卫队、自里根以来的历任国务卿都支持加入。⁴⁵2012年5月23日在参议院对外关系委员会听证会上,希拉里克林顿也强调了加入《公约》具有紧迫性:现在《公约》各缔约国都在主张200海里之外大陆架,美国不是《公约》缔约国妨碍美国利用《公约》规定的程序;只有美国是《公约》缔约国的时候才能主持美国企业进行海底采矿;美国不加入《公约》,当初在区域管理局的理事会中为美国争取的席位会一直空着。她还表示基于安全、主权等方面的担忧而反对加入《公约》是错误的。⁴⁶

3. 美国参议院、参议院对外关系委员会批准《公约》的情况

如前所述,美国参议院主导着条约的批准,但在程序上,这个工作首先由参

41 例如,内格罗蓬特提到,“大陆架界限委员会”已经收到9个国家提交的大陆架主张的说明,已经作出了2项建议,都没有美国专家参与。该委员会作出的建议很有可能为未来美国大陆架外部界限创立先例,无论是积极性的还是消极的。See Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, p. 620.

42 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, p. 617.

43 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2009, pp. 457~458; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2010, pp. 511~512; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2011, p. 405.

44 *Digest*, 2009, p.458 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2009, p. 458.

45 Myron H. Nordquist et al eds., *The Law of the Sea Convention – US Accession and Globalization*, The Hague: Martinus Nijhoff Publishers, 2012, p. 17.

46 Secretary of State, Testimony of Hillary Clinton, at http://www.foreign.senate.gov/imo/media/doc/REVISED_Secretary_Clinton_Testimony.pdf, 24 January 2014.

议院对外关系委员会来启动。批准条约的条件、可能涉及的保留和修正案等事项,都先在对外关系委员会中完成,然后才由整个参议院投票。参议院对外关系委员会是批准条约的起点,事实上起着更重要的作用,其中的“政治关切总是占了上风”。⁴⁷在美国加入《公约》过程中对外关系委员会显示了它的巨大影响。在保守派参议员杰西赫尔姆斯担任参议院对外关系委员会主席期间,由于对多边性国际合作行动,联合国等国际组织持有一种强烈的敌视态度,他根本拒绝讨论《公约》。直到他于2002年年底退休,卢加尔任主席后的2003年,对外关系委员会才对《公约》显示出一种积极的态度,举行听证会。⁴⁸不过,即使过了对外关系委员会这一关,参议院仍可能一直搁置条约。⁴⁹从参议院对《公约》的处理历史来看,克林顿总统在1994年就要求参议院同意批准《公约》,但直到2004年、2007年,美国参议院对外关系委员会才分别通过议案,建议参议院同意美国加入《公约》并批准1994年《〈公约〉第十一部分执行协定》,⁵⁰但2004年、2007年参议院都没有投票。根据《参议院议事规则》第30条第2款,⁵¹两次议案又都回到对外关系委员会。目前的状态是2012年6月28日该委员会举行了最后的公开听证会,之后没有任何行动。

4. 高度分化的美国国内舆论

与美国行政部门的积极态度相比,美国国内舆论对《公约》的立场高度分化,其中支持者有之,而批评《公约》的也大有人在。虽然美国加入《公约》的进程在参议院受阻,但美国国内舆论、气氛对此的影响也不可忽视。

47 罗伯特·弗里德兰德著,刘先鸣译:《美国参议院条约批准程序及其对海洋法公约可能的影响》,载于《弗吉尼亚大学海洋法论文三十年精选(第一卷)》,厦门:厦门大学出版社2010年版,第273页。关于美国参议院外交关系委员会,参见李期铿:《台前幕后:参议院外交关系委员会主席与美国外交》,北京:世界知识出版社2008年版。

48 James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics*, Oxford: Oxford University Press, 2011, pp. 154~156; John A. Duff, *The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification*, *Ocean and Coastal Law Journal*, Vol.11, 2005, No. 1, pp. 1~36.

49 罗伯特·弗里德兰德著,刘先鸣译:《美国参议院条约批准程序及其对海洋法公约可能的影响》,载于《弗吉尼亚大学海洋法论文三十年精选(第一卷)》,厦门:厦门大学出版社2010年版,第273页。

50 See Executive Report 108-10, at <http://www.foreign.senate.gov/download/?id=564DC8D7-F536-4CCB-B0CE-3FD8A1C7CC6C>, 24 January 2014; Executive Report 110-09, at <http://www.foreign.senate.gov/download/?id=AF77EAB3-DEB5-4DCA-8DBD-ABB3CB082264>, 24 January 2014.

51 The Standing Rules of the United States Senate, Rule 30, Section 2 reads as: "Treaties transmitted by the President to the Senate for ratification shall be resumed at the second or any subsequent session of the same Congress at the stage in which they were left at the final adjournment of the session at which they were transmitted; but all proceedings on treaties shall terminate with the Congress, and they shall be resumed at the commencement of the next Congress as if no proceedings had previously been had thereon." Rules of the Senate, at <http://www.rules.senate.gov/public/index.cfm?p=RuleXXX>, 24 January 2014.

对海洋法颇有了解的政界、商业界、军方人士对加入《公约》持相当的肯定态度。⁵² 例如, 2012年6月28日参议院对外关系委员会召集了美国商会主席、首席执行官托马斯·J·多诺霍、美国石油学会主席、首席执行官杰克·N杰勒德、弗莱森电讯主席、首席执行官洛厄尔·C·麦克亚当、美国全国制造商协会主席、首席执行官杰伊蒂蒙斯这些商界巨头举行了公开听证会。他们都表示支持美国加入《公约》, 认为加入《公约》符合美国的安全与经济利益, 能够为美国公司的投资提供稳定、确定的法律基础, 只有加入《公约》才能收获《公约》赋予的安全及经济利益;⁵³ 加入《公约》有利于美国开发海洋石油、确保美国能源运输, 确保美国在海底开发方面应得的收益, 为美国提供一个发挥领导作用的机会;⁵⁴ 《公约》规定了铺设、保护、维护海底电缆的自由, 加入《公约》有利于美国保护这些通讯设施, 维护相关权利;⁵⁵ 加入《公约》可以提供勘探能源的新机会, 可以获取制造业中关键的原材料, 这样可以降低美国制造业的成本。⁵⁶

2012年6月14日, 来自美国军方的巨头参加了参议院对外关系委员会举行的听证会, 参加的6位军界高级军官被称为“24星证人”。⁵⁷ 他们总的立场是加入《公约》能确保美国海军在世界大洋上的航行、飞越自由, 提高美国在海洋事务中发言的分量, 有助于美国抵制其它国家试图改变公认的海洋法的企图。⁵⁸

但也有相当多的人认为《公约》不符合、或者不能保障美国的利益, 如担心国际海洋法法庭可能拥有对美国海上行动的强制管辖权, 担心《公约》会对美国海军部署自由予以限制, 在《公约》框架中实施“防扩散安全倡议”会存在障碍, 等等。而这些被认为是美国至关重要的国家利益。“《公约》对美国不但是一个糟糕的交易, 而且是一个糟糕的先例。在其它国家渴望向国际组织让渡一部分主权以期待

52 Myron H. Nordquist, et al, eds., *The Law of the Sea Convention – US Accession and Globalization*, The Hague: Martinus Nijhoff Publishers, 2012, pp. 24~29, 41~60.

53 Chamber of Commerce, Testimony from Thomas J. Donohue, President and CEO of U.S. at <http://www.foreign.senate.gov/imo/media/doc/Donohue%20Testimony.pdf>, 24 January 2014.

54 Testimony from Jack N. Gerard, President and CEO of American Petroleum Institute, at http://www.foreign.senate.gov/imo/media/doc/REVISED_Gerard_Testimony.pdf, 24 January 2014.

55 Testimony of Lowell C. Mcadam, Chairman and CEO of Verizon Communications Inc., at <http://www.foreign.senate.gov/imo/media/doc/McAdamTestimony2.pdf>, 24 January 2014.

56 Testimony of Jay Timmons, President & CEO of National Association of Manufacturers, at <http://www.foreign.senate.gov/imo/media/doc/McAdamTestimony2.pdf>, 24 January 2014.

57 “24 Star” Military Witnesses Voice Strong Support for Law of the Sea Treaty, at <http://www.foreign.senate.gov/press/chair/release/24-star-military-witnesses-voice-strong-support-for-law-of-the-sea-treaty>, 24 January 2014.

58 The Law of the Sea Convention (Treaty Doc. 103-39): Perspectives from the U.S. Military, at <http://www.foreign.senate.gov/hearings/hearing/?id=e07caca7-5056-a032-52a8-20ed788ca773>, 24 January 2014.

限制美国的主权的情况下,《公约》就是一个危险的先例。”⁵⁹甚至有些担心仍然延续了里根政府对《公约》的负面看法。⁶⁰还有一部分人强烈反对加入《公约》,其理由也是意识形态挂帅,例如对联合国的敌视及不信任,不管联合国与《公约》是否有实质性的联系,因《公约》是联合国主导下谈判达成的,这也成了反对的理由。⁶¹

另一种反对意见认为美国不需要加入《公约》也能够维护航行自由、飞越自由由这些关键的国家利益,因为美国已经通过“航行自由计划”享有这些权利,加入《公约》并不能保证美国的这些权利。⁶²有些反对人士有相当大的影响,许多人来自于有影响的智库,掌握了相当的话语权,其狙击力不可小视。

(二) 在《公约》以外寻找权利的依据

尽管美国政府当局做出诸多加入《公约》的努力,但参议院始终没有进行过正式的投票,议程往往止于参议院对外关系委员会,原因正是整个美国国内对《公约》的立场高度分化。其实相当一部分反对意见并不合理,甚至不符合《公约》的本意。但相当多的议员对《公约》这部技术性很高的国际公约并不了解,行政部门也很难动用大部分政治资源去说服参议院同意加入《公约》。如果美国总统的其他日程占据优先地位的话,那么成功推动加入《公约》的前景就渺茫了。

就美国行政部门的立场来看,它认为美国的利益在《公约》中能够充分得到保障,这说明美国政府认可的海洋秩序与《公约》基本一致,如果美国加入《公约》,《公约》制定的海洋秩序也就是美国要塑造的秩序的内核。但就目前美国国内政治气氛以及政治议题来看,奥巴马总统在余下的任期内不可能调动资源去推动美国加入《公约》,所以今后相当长一段时间内美国加入《公约》的可能性不大。这就引出另外的问题:在美国加入《公约》之前,美国享有这一系列的权利、特权、权力及豁免的法律依据何在?这涉及到美国如何在《公约》之外塑造对其有利的海洋秩序。

四、美国塑造海洋法律秩序的战略

59 Jeremy Rabkin, *The Law of the Sea Treaty: A Bad Deal for America*, at <http://cei.org/pdf/5352.pdf>, 15 November 2013.

60 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2004, pp. 680-686.

61 David Weigel and White Whale, *Why the Black Helicopter Crowd Goes Crazy over the Law of the Sea Treaty*, at http://www.foreignpolicy.com/articles/2012/05/25/white_whale, 24 January 2014.

62 Steven Groves, *Accession to the U.N. Convention on the Law of the Sea Is Unnecessary to Secure U.S. Navigational Rights and Freedoms*, at https://thf_media.s3.amazonaws.com/2011/pdf/bg2599.pdf, 7 December 2012.

以国家管辖海域的面积来计算,美国属于获益最大的国家之一,但这种获益的法律基础在相当程度上仍是源于《公约》,但美国并不是《公约》缔约国。然而美国在其外交照会中动辄引用《公约》,暗示将《公约》作为其享有权利的基础,这说明美国确实对《公约》内容有一定程度的接受。总的来看,美国通过下述三种战略来倡导和维护对其有利的海洋法律秩序。第一是主张《公约》的许多规定属于习惯国际法,即使美国不是《公约》当事方,这些习惯规则也约束美国,同时美国根据这些规则也享有相关权利。第二,美国通过一种“航行自由计划”的国家实践来强化自己的海洋政策、海洋主张,尤其是涉及“航行/飞越自由”的权利时。⁶³第三,为了追求美国在反恐、防止大规模杀伤性武器扩散领域中的国家利益,美国通过一系列双边协议,获得了对公海上悬挂其它国家旗帜的船舶的管辖权,试图突破“海洋自由”原则下船旗国管辖习惯规则的约束。

(一) 习惯法主张

《公约》序言第7条提到《公约》中所达成的条款包括对现有习惯规则的编纂,也包括属于渐进发展范畴的规则。但《公约》本身并不指明哪些规则具有习惯国际法的地位,要界定它们颇难,这就需要在特定场合去识别、解释有关规则。⁶⁴

反映了美国国际法学术界主流观点的《美国对外关系法重述(第三次)》认为,1982年的《公约》中的许多规定与《1958年日内瓦海洋法公约》规定相同,后者反映了当时的有关习惯国际法,而且美国也是公约当事国。1958年尚不是习惯国际法的某些规定,在1982年之后也成了习惯国际法,因为它们为第三次海洋法大会所接受,而且影响和反映了国家实践。⁶⁵但该《重述》也只是谨慎地认为船舶制度、领海的无害通过、国际海峡和群岛水域的过境通行、专属经济区制度、大陆架制度本身属于习惯国际法。⁶⁶对于某些细节,如专属经济区制度下的某些具体规定,并

63 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2004, p. 678.

64 Dupuy Vignes, *A Handbook on the New Law of the Sea, Vol. 1*, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, p. 81.

65 The American Law Institute, *Restatement of the Law – The Foreign Relations Law of the United States, Third (“The Restatement, Third”)*, Vol. 2, St. Paul: The American Law Institute Publishers, 1987, p. 5.

66 The American Law Institute, *Restatement of the Law – The Foreign Relations Law of the United States, Third (“The Restatement, Third”)*, Vol. 2, St. Paul: The American Law Institute Publishers, 1987, pp. 6, 34, 37, 38, 51, 56, 58, 69.

不是习惯国际法的反映。⁶⁷

对美国政府而言,它提出正式权利主张的时候一方面肯定某些规则属于习惯国际法,另一方面也根据特定情况的需要而否认某些规则属于习惯法。自《公约》于1982年开放供签署以后,对于《公约》中哪些规定是习惯法、哪些不是,美国官方的主要立场如下:

1. 《公约》之第24条的无害通过权、第42、44条的海峡过境通行权、第54条的群岛水道通行权、第56条的沿海国在专属经济区中的权利和义务属于习惯国际法。⁶⁸

2. 领海内的科学研究:根据习惯国际法,沿海国有权控制领海内的科研,外国人要在此从事科研需获得批准。⁶⁹

3. 沿海国的安全利益:为了安全目的,沿海国执行其法律的范围不得超过领海。《公约》所反映的习惯国际法不承认沿海国有权去执行国内的安全法律,或限制领海之外航行和飞越自由;⁷⁰习惯国际法不承认沿海国在和平时代为了安全目的而在领海之外主张那些会限制公海航行、飞越自由的权力、权利。⁷¹

4. 沿海国在毗连区的权利:1982年《公约》第33、56条所反映的习惯国际法承认,沿海国在领海之外执行有关财政、卫生、海关、移民的法律的权利,不超过领海基线起的24海里的范围。⁷²

5. 海峡的过境通行制度反映了习惯国际法。⁷³美国否认习惯国际法允许一个国家单方面、未经国际上的同意就在许多情况下在唯一的属于深水航道的国际海峡上建设一座固定桥梁。⁷⁴

6. 群岛制度:1982年《公约》关于群岛的规定反映了习惯国际法。⁷⁵这种习惯

67 The American Law Institute, *Restatement of the Law – The Foreign Relations Law of the United States, Third (“The Restatement, Third”), Vol. 2*, St. Paul: The American Law Institute Publishers, 1987, p. 56.

68 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2001, p. 700.

69 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1991~1999, pp. 1585~1592.

70 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1989~1990, pp. 465~466.

71 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1989~1990, p. 467.

72 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1989~1990, p. 470.

73 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1991~1999, p. 1586.

74 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1991~1999, p. 1591.

75 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1989~1990, p. 473.

国际法所承认的群岛国并不包括丹麦、美国这些不拥有沿海群岛的大陆国家。因此，不能围绕大陆国家的沿海群岛划直线基线。⁷⁶

7. 沿海国在专属经济区内主张优先的、与开发利用自然资源相关的权利和管辖权属于习惯国际法。⁷⁷

8. 专属经济区内的航行自由属于习惯国际法，包括军事调查活动、情报收集活动。⁷⁸

专属经济区内航行、飞越自由的内涵是目前引起最大争议的问题。《公约》第58条规定了其他国家的航行和飞越自由，美国认为它与《公约》第56条第2款规定的沿海国行使权利时要适当顾及其他国家的权利和义务一道属于习惯国际法。⁷⁹然而，专属经济区内的“航行”、“飞越”这些术语的含义到底是什么，在适用的时候都需要解释，而解释本身则反映了美国和其他一部分国家的分歧。⁸⁰美国认为这种“航行自由”、“飞越自由”属于对公海的传统利用的自由，包括停锚、飞机的起降、军事设备的运作、情报收集、军事演习、军事调查等军事活动。⁸¹

在上述习惯法主张中，那些肯定性的主张赋予美国和其他国家在海洋中应享的权利，这当然是美国在不是《公约》缔约国的情况下所享有权利的基础。对于那些否定的主张而言，其法律后果在于它否认了有关国家声称所享有权利的法律基础，对美国而言则享有某些行动的自由——尤其是它最关心的航行自由，这相当于美国为自己能够享有的某些权利、权力、特权、豁免找到了法律基础。

美国所主张的习惯国际法规则的效果在于它具有压缩沿海国权利的后果，那么美国作为一个超级海权国家所享有的自由就越多，这也越能发挥其强大海军的优势。例如，美国新近部署到东南亚、亚太地区的“濒海战斗舰”在和平时期完全

76 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1991-1999, p. 1598.

77 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, p. 647.

78 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2001, pp. 698-699; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2004, p. 688.

79 The American Law Institute, *Restatement of the Law – The Foreign Relations Law of the United States, Third, Vol. 2*, St. Paul: The American Law Institute Publishers, 1987, p. 58.

80 Jing Geng, The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS, *Utrecht Journal of International and European Law*, Vol. 28, 2012, pp. 22-30.

81 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2001, pp. 704-706; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, p. 648.

可以在其他国家的近海自由活动,发挥其侦查、情报搜集的功能。

(二)“航行自由计划”

“航行自由计划”是美国在不准备加入《公约》的情况下制订、实施的一项维护其海洋强国地位及国家利益的海洋战略,其主要用来宣示以航行自由为核心的美国海洋立场,同时应对其他国家提出的在美国看来是“过度”(宋明辉老师建议将 *excessive* 翻译为越权)的海洋权利要求。⁸² 该计划始于1979年,卡特政府的最后一年,经过里根政府、布什政府的强化,后来成为指导美国海军和平时期的行动的重要指导原则。⁸³ 该计划在下面三个层面上展开:第一,由武装力量通过行动来宣示其主张,即美国的海军、空军在相关海域行使“航行自由”、“飞越自由”方面的权利。第二,如果前述行为受到其他国家的限制,则由美国国务院对外国的“过度主张”提出外交抗议,前面所说的美国对习惯法的主张大多是在其外交照会中向有关国家表述出来的。⁸⁴ 第三是美国国务院或国防部同其他国家进行磋商以促进稳定并同海洋法规定保持一致。“航行自由计划”的核心主要是前两项。将航行自由作为习惯国际法加以主张和强化,这种战略并非仅作抽象和孤立地宣示,而是使自己的主张寓于行动之中,从表面上看,体现了习惯国际法的“物质”和“心理”两种要素。

“航行自由计划”的实质是美国通过强大的海、空军力量,以实际行动去强化美国的海洋主张,其行动范围包括其他国家的领海(行使公约第17条下的“无害通过权”)、专属经济区(行使《公约》第58条(1)下的“航行自由”和“飞越自由”)、国际海峡(行使《公约》第38条的“过境通行权”)、群岛水域(行使《公约》第52、53条下的“无害通过权”、“群岛水道通行权”)。如果遇到对航行和飞越自由的解释有分歧,或沿海国通过直线基线将大片海域纳入内水范围,或沿海国

82 Michael N. Schmitt ed., *Law of Military Operations – Liber Amicorum Professor Jack Grunawalt*, New Port: Navy War College, 1998, pp. 113~127; J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive National Maritime Claims*, Newport: Navy War College, 1994, pp. 255~256; Steven Groves, *Accession to the U.N. Convention on the Law of the Sea Is Unnecessary to Secure U.S. Navigational Rights and Freedoms*, at https://thf_media.s3.amazonaws.com/2011/pdf/bg2599.pdf, 12 December 2012.

83 关于美国的“航行自由计划”的官方文件,参见里根时代的“国家安全指令”第72、83、265号,乔治·布什时代的“国家安全指令”第49号,下载于 <http://www.fas.org/irp/offdocs/direct.htm>, 2012年12月7日。Also See Galdorisi and Vienna, *Beyond the Law of the Sea: New Directives for US Oceans Policy*, London: Preager, 1997, pp. 81~85.

84 这方面的情况可参见J·阿什利·罗奇、罗伯特·W·斯密斯所编辑的《美国对过度海洋主张的回应》,该书收集了1994年以前美国行使自己权利、抗议其他国家的情况。See J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive National Maritime Claims*, Washington D.C.: U.S. Department of State, Office of Ocean Affairs, 1994.

以国家安全理由限制美国军舰等船舶的行动范围时,则美国针锋相对地以其海空军的实际行动表明不接受其他国家的限制。以专属经济区内的情报收集活动为例,美国认为《公约》不禁止、规制,或者说不授权沿海国家去规制专属经济区内的情报收集活动。相反,《公约》确保了航行和飞越的公海自由,包括涉及收集情报的权利。但这种立场明显地与许多其他公约当事国的立场冲突,如孟加拉、巴西、佛得角、印度、马来西亚、马尔代夫、毛里求斯、巴基斯坦、乌拉圭等国家在签署、批准、加入《公约》时提出了保留,旨在一般性地禁止其他国家在其专属经济区内从事军事活动。⁸⁵如前所述,在不具有《公约》缔约国地位的情况下,美国在其外交照会中主张自己行使的是习惯国际法规则下的权利。2004年美国国务院法律顾问塔夫脱对参议院情报委员会表示,如果美国成为《公约》的当事国就会使其处于有力的地位去抗议沿海国的这种非法主张。⁸⁶

从1979年开始,美国武装部队在所有大洋上行使它所理解、界定的航行权、飞越权,针对其他国家提出的海洋主张进行质疑,每年有大约30~40起这样的质疑冲突。⁸⁷美国宣示自己立场的对象既包括自己的军事盟国如韩国,⁸⁸也包括在军事上属于与之竞争的国家如中国,⁸⁹还包括美国力图要发展为战略伙伴的国家如印度。⁹⁰这说明美国专注于倡导、维护有利于自己的海洋秩序,这是其行动的首要目标,而并非根据其他国家与之关系的友好程度而有所变通。

(三) 通过双边协议突破海上管辖的传统原则

长期以来,贩运毒品、海盗行为是海上安全考虑中的重要因素,冷战后又增添了大规模杀伤性武器(包括核、生物、化学、放射性材料)通过海运途径扩散这个突出问题。“9·11”事件之后,通过海上途径进行的大规模杀伤性武器的扩散被

85 Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, pp. 908~969.

86 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2004, p. 688.

87 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2002, pp. 740~742.

88 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2001, pp. 698~699.

89 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, pp. 647~648.

90 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, pp. 649~650.

美国认为是危及其国土安全的一个重要因素。⁹¹ 尽管美国拥有压倒性优势的海上力量,但也无法全凭一己之力来遏制这些危及其安全的因素。此外,要遏制发生在海上的扩散行为,还面临国际法上的若干难题,其中最重要的就是海上管辖权问题。

1. “船旗国管辖”原则的限制

人类在海上从事开发、利用海洋的工具主要是船舶,而在海上从事贩卖毒品、海盗行为、扩散大规模杀伤性武器的工具也主要是船舶。但对海上船舶管辖的最重要原则是船旗国管辖原则,这主要体现在《公约》第92条。只有特定的情况下港口国、沿海国才对位于其港口、领海、毗连区、专属经济区内的外国船舶行使管辖权。而在公海上,除非具有《公约》第110条所规定的能够行使“登临权”的情形,也不得对外国船舶行使管辖权,这说明行使“登临权”的范围比较窄。这些规定就是航行自由的精髓,但这种航行自由也为从事非法行为的国家或非国家行为者所利用。⁹² 因此美国凭借自己优势的海军力量预防、打击大规模杀伤性武器问题的权利、权力的法律基础要受到很大限制。《公约》的许多条款被认为是限制沿海国干涉航行自由,但另一方面,《公约》中也有许多规定是允许沿海国等《公约》缔约方行使管辖权,制定、实施《公约》所允许的法律、法规。⁹³ 但是《公约》并不处理扩散大规模杀伤性武器问题,要从《公约》中寻找可依赖的习惯国际法亦无可能,⁹⁴ 因此《公约》并不是可以依赖的充分工具,相反还起到一定的限制作用。

正如《公约》第92条第1款所言,要突破船旗国管辖原则,必须有国际条约的规定。初期国际社会在应对上述海上安全威胁时主要强调国家之间的合作,强调国家采取国内立法等措施的义务,但并没有做出对外国船舶行使“登临权”的安排。⁹⁵ 最早的国际努力是1988年的《制止危及海上航行安全非法行为公约》,⁹⁶ 但它并没有超出传统的海上管辖权和执法权的国际法范围。美国着力推动在一些多边条约、双边条约中做出安排以便对在海上的外国船舶行使“登临权”、管辖权,⁹⁷

91 Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford: Oxford University Press, 2011, p. 149.

92 Michael A. Becker, The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea, *Harvard International Law Journal*, Vol. 46, 2005, p. 134.

93 Michael A. Becker, The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea, *Harvard International Law Journal*, Vol. 46, 2005, pp. 172~175.

94 Michael Byers, Policing the High Seas: The Proliferation Security Initiative, *American Journal of International Law*, Vol. 526, 2004.

95 Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford: Oxford University Press, 2011, p. 172.

96 该公约中文文本, 参见中华人民共和国外交部条约法律司编:《中华人民共和国多边条约集》, 北京:法律出版社1994年版, 第414~423页。

97 Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford: Oxford University Press, 2011, p. 174.

例如,在美国的推动下,《〈制止危及海上航行安全非法行为公约〉2005年议定书》修正后的第8条就纳入了拦截、登临涉嫌外国船舶的条款,⁹⁸但这种拦截、登临权仍然需要船旗国的同意或授权,而船旗国/被请求国可以拒绝同意和授权,即使在签署议定书时同意授权,仍可在任何时候撤回。⁹⁹而且船旗国同意请求国拦截、登临涉嫌船舶并不当然授权请求国对船舶、人员、货物等行使进一步的管辖权,如起诉,除非根据第6条规定的情形能对非法行为及嫌犯确立管辖权,但此类管辖权的基础仍然基于船旗国国籍、属人、属地、受害国等传统要素。¹⁰⁰2005年《议定书》第8条也考虑要求船旗国同意请求国对被扣留船舶、货物、人员行使管辖权,但基础仍在于船旗国的同意。¹⁰¹所以原1988年《制止危及海上航行安全非法行为公约》第9条的规定——“……公约的任何规定……不影响关于各国有权对非悬挂其国旗的船舶行使调查权或强制管辖权的国际法规则”——其实是对拦截、登临权的限制。

受“9·11事件”的影响,美国越来越担心恐怖分子利用核爆炸装置、核原料对其本土发动恐怖攻击,在一定程度上,2003年主要由美国推动的“防扩散安全倡议”就是对这种担心所做出的回应。“防扩散安全倡议”主要包括若干条“拦截原则”,是一种政治性的协议。参与倡议的国家承诺自愿在现有法律框架内采取措施防止大规模杀伤性武器、相关材料在国家与非国家行为者之间的转移。¹⁰²早期参与“防扩散安全倡议”的国家有15个所谓的“核心国家”,后来表示支持的有60个国家。¹⁰³

在涉及对海上涉嫌从事扩散活动的船舶进行拦截、登临的问题上,“防扩散安全倡议”提出的原则之一是参与国承诺自己采取措施对悬挂其旗帜的涉嫌船舶行使登临、搜查权,或者参与国家“认真考虑在适当情况下同意其它国家对悬挂其

98 Lowe and Talmon eds., *The Legal Order of the Oceans-Basic Documents on the Law of the Sea* (“*The Legal Order of the Oceans*”), Oxford: Hart Publishing, 2009, pp. 843~844.

99 该条约的英文文本, See Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, p. 844.

100 Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea* (“*The Legal Order of the Oceans*”), Oxford: Hart Publishing, 2009, pp. 841~842.

101 Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea* (“*The Legal Order of the Oceans*”), Oxford: Hart Publishing, 2009, p. 844.

102 “扩散安全倡议”的文本, See Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, pp. 801~802. 对该倡议的评价, See Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford: Oxford University Press, 2011, p. 172; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge: Cambridge University Press, 2009, pp. 235~238.

103 这十五个核心国家是澳大利亚、加拿大、法国、德国、意大利、日本、荷兰、挪威、波兰、葡萄牙、新加坡、西班牙、俄罗斯、英国及美国。See Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford: Oxford University Press, pp. 195~196.

旗帜的船舶进行登临、搜查,并没收其装载的与大规模杀伤性武器有关的货物”。¹⁰⁴

“防扩散安全倡议”要求参与国拦截、搜查位于其内水、领海或毗连区的涉嫌船舶,并规定涉嫌船舶驶入/驶离港口、内水、领海的条件,例如对它们进行登临、搜查,在驶入前将涉嫌货物没收。¹⁰⁵类似的规定也适用于涉嫌飞机。¹⁰⁶这类行动、措施也可以由船旗国同意其他国家行使,但该倡议并不有意地确立一种在公海上拦截外国船舶的权利。“防扩散安全倡议”参加国无论是作为港口国还是沿海国的身份,根据《公约》有关规定,其对海上船舶的管辖权是有条件的。如果参与“防扩散安全倡议”的国家根据自己的判断对涉嫌的外国船舶行使登临、搜索权,这样做就有可能与“无害通过”以及“船旗国管辖”的一般国际法原则相冲突。例如,严格地讲,在非无害通过的情形中,仅仅属于运载大规模杀伤性武器的行为并不在其中。¹⁰⁷

2. 通过双边“登临协议”对船旗国管辖原则的突围

美国在“防扩散安全倡议”框架下与世界上最大的11个船舶注册国家签订了“防扩散安全倡议船舶登临协议”来解决法律困境,¹⁰⁸它们是安提瓜和巴布达、巴哈马、伯利兹、塞浦路斯、利比里亚、马绍尔群岛、马耳他、蒙古、巴拿马、圣文森特和格林纳丁斯、克罗地亚。¹⁰⁹仅在利比里亚、巴拿马两个国家注册的大型货船就占全世界5万艘中的50%以上,再加上马绍尔群岛,登临协议涉及的总载重吨位超过全世界商业性航运船舶的50%。这类协议所涵盖的法律授权局限于拦截涉嫌运输大规模杀伤性武器、投掷系统或有关原料的船舶。它们允许协议当事方请求另一方确认涉嫌船舶的国籍,若经过确认,则要求授予行使登临、搜查乃至可能扣押船舶及其货物的权力。¹¹⁰

值得注意的是,美国与利比里亚、巴拿马之间的防扩散登临协议还特别规定,若协议一方在提出请求的2个小时后未收到另一方明确同意,则提出请求的一方被视为获得了授权,可以对涉嫌船舶进行拦截、搜查、没收等行为。与马绍尔群岛

104 Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, p. 804.

105 《防扩散安全倡议》第4(b)–(d), See Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, p. 804.

106 《防扩散安全倡议》第4(e), See Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, p. 804.

107 Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford: Oxford University Press, 2011, pp. 200–201.

108 美国起草的这类协议的范本, See Roach, J. Ashley, Proliferation Security Initiative (PSI): Countering Proliferation by Sea, in Nordquist Myron H. et al. eds., *Recent Developments in the Law of the Sea and China*, Leiden: Martinus Nijhoff Publishers, 2006, pp. 360–415.

109 美国与11个国家签订的这类协议, 下载于 <http://www.state.gov/t/isn/c27733.htm>, 2013年5月1日。

110 Michael A. Becker, The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea, *Harvard International Law Journal*, Vol. 46, 2005, p. 182.

的协议则规定了4个小时的等待期。这种安排将船旗国根据个案进行授权的登临协议转变成一种默示同意的空白、概括性授权,而要撤回授权的话,船旗国只能根据个案逐一撤回同意登临的授权。¹¹¹

这种规定的效果在于,如果被请求的一方拒绝登临的授权,则需要明示。就实际情况来看,鉴于发达国家有能力影响这些开放式登记国家的国内政策,很难想象利比里亚、巴拿马和马绍尔群岛这些国家如何拒绝美国的登临请求,因为前者对后者的船东、港口、商业利益有严重的依赖。¹¹²

另一种效果在于,对涉嫌船舶进行登临之后,请求国可以根据双边协议规定,对被扣留的嫌疑人、船舶、涉嫌货物进一步行使管辖权。¹¹³此外,这类双边“防扩散安全倡议船舶登临协议”还授权请求国处置涉嫌货物。¹¹⁴尽管世界上主要的核供应国家的国内法禁止非法买卖、运载与大规模杀伤性武器相关的货物,而那些最大的开放式船舶登记国家的国内法可能并不如此,这意味着美国可以根据“防扩散安全倡议船舶登临协议”的明示或默示授权去没收船旗国国内法未禁止的有关大规模杀伤性武器的货物。¹¹⁵

尽管美国希望藉此建立一套防扩散的警察制度,但对于没有参与“防扩散安全倡议”,或没有与美国签订登临协议的其它国家,美国并不能对这些非协议方的船舶行使登临权。因为存在船旗国管辖、航行自由一类的习惯国际法规则,所以除非船旗国同意,否则美国主导的“防扩散安全倡议”仍然缺乏坚实、充分的法律基础。就此而言,船旗国管辖、公海航行自由原则仍然是对美国任意行使登临权的约束。但是美国的登临行为可能影响、干扰到其它非协议国家在海运方面的利益,如非协议国的货物买方、卖方的财产权益可能受到损害。对于无国籍船舶,美国倒是可以在“防扩散安全倡议”的框架下对其实施登临、搜查,因为该船舶无法

111 参见《美国与利比里亚防扩散倡议船舶登临协议》的第4条第3款d项,下载于<http://www.state.gov/t/isn/trty/32403.htm>, 2013年11月15日;《美国与巴拿马防扩散倡议船舶登临协议》(2004年)是对双方于2002年签订的“U.S.-Panama Supplementary Arrangement on U.S. Coast Guard Assistance”的修订,后者第10条第6款就是一个默示同意的空白授权条款,下载于<http://www.state.gov/t/isn/trty/32859.htm>, 2013年11月15日;美国与马绍尔群岛协议的第4条第3款d项,下载于<http://www.state.gov/t/isn/trty/35237.htm>, 2013年11月15日。

112 Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, *Harvard International Law Journal*, Vol. 46, 2005, p. 184, footnote No. 248.

113 例如美国与马绍尔群岛之间的协议第5条。See Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, p. 806.

114 例如美国与马绍尔群岛之间的协议第12条。See Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, p. 806.

115 Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, *Harvard International Law Journal*, Vol. 46, 2005, p. 185.

寻求有关国家的保护。

除了与马绍尔群岛的登临协议将授权授予第三方以外,以美国为核心的一系列双边协议并没有在“防扩散安全倡议”参与国之间创造一种相互授权的多边执行机制。另一方面,尽管登临协议是对等的,但对于像美国与利比里亚、巴拿马和马绍尔群岛签订的这类协议而言,有足够的资源使用这种授权的国家恐怕只有美国,实际的效果是美国能够对其他协议当事国的船舶行使登临权,而后者没有实际的能力那样做。因此,这些双边“登临协议”的实施就差不多是美国唱独角戏的领域。有充足的海军上武装力量去维护自己的利益,这就是海权国家与非海权国家的区别。

五、“航行自由计划”与专属经济区内 “军事活动”:中美冲突

本文一开始提到2001年美国侦察飞机“EP-3”、2009年海军监测船“无瑕号”在中国南海专属经济区从事军事活动曾一度酿成中美两国之间激烈的外交纠纷。美国军用飞机、船舶从事的行为在性质上属于“军事活动”,然而,《公约》除了在第298条第1款(b)中提到一国在签署、批准或加入《公约》之时通过书面方式宣布涉及“军事活动”之类的争端不接受《公约》规定的争端解决程序,《公约》其他地方并没有界定“军事活动”。¹¹⁶目前,这方面的争端涉及在专属经济区内“航行自由”、“飞越自由”的解释、适用范围。从美国的角度来看,有关的军事活动与“航行自由计划”密不可分,前者就是后者的核心内容。

(一) 军事活动与“航行自由计划”

对其他国家在沿海国专属经济区享有的权利和自由,美国一直持一种宽泛的解释,而且使用了“国际水域”这个用法来统称公海、专属经济区和毗连区,实施“航行自由计划”的地理位置就是美国所主张的“国际水域”。当然,“国际水域”只不过是美国倡导的一种用法,用来描述那些美国认为具有公海航行自由地位的

116 Dupuy-Vignes, *A Handbook on the New Law of the Sea, Vol. 2*, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, pp. 1247~1249, 1251~1253.

海洋区域。《公约》中并没有“国际水域”这样的概念。¹¹⁷ 美国把专属经济区定位于“国际水域”，进而主张专属经济区内所有与资源无关的公海活动都不应受到专属经济区制度的限制，这些活动包括特种部队部署、飞行活动、军事演习、通讯与空间活动、情报收集和侦查活动、海洋数据收集、武器测试和开火。就此而言，美国所主张的专属经济区内的公海自由是全方位的，是一种“剩余公海论”的立场。¹¹⁸ 今后，中美双方还有发生更大争议的可能性，¹¹⁹ 随着美国将战略目标转向亚洲，中美两国的争执将愈见明显。¹²⁰ 下面两个问题尤其将导致很大的争端。

1. 军事调查

主要争议之一是专属经济区中的“海洋科学研究”和“军事调查”之间的关系。规范海洋科学研究的《公约》第十三部分并没有专门界定“海洋科学研究”术语，《公约》中也没有出现“军事调查”这个术语。美国始终坚持认为军事调查不属于海洋

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- 117 一位学者评论道，“尽管‘国际水域’可能是描述美国认为存在公海航行自由的那些海域的方面之辞，但它明显地是用词不当。专属经济区并不是国际水域。沿海国在专属经济区内享有的某些权利和承担某些义务，使得这片区域同国际水域区分开来。” See Sam Bateman, *The Regime of the Exclusive Economic Zone: Military Activities and the Need for Compromise?*, in Ndiaye and Wolfrum eds., *Law of the Sea, Environmental Law and Settlement of Disputes*, Leiden/Boston: Martinus Nijhoff Publishers, 2007, pp. 570-571; also see Yu Zhirong, *Jurisprudential Analysis of the U.S. Navy's Military Surveys in the Exclusive Economic Zones of Coastal Countries*, in Peter Dutton ed., *Military Activities in the EEZ - A U.S.-China Dialogue on Security and International Law in the Maritime Commons*, New Port: U.S. Naval War College, 2010, pp. 39-41.
- 118 关于专属经济区的法律地位是一个争论已久的问题。奥康奈尔认为，如果争论始终围绕专属经济区同公海的关系，那并不会产生结果，专属经济区地位可能取决于政治力量的对比结果：如果海洋自由的内容仍然相对广大，可以说专属经济区具有剩余性的公海地位；另一方面，如果优先性颠倒过来，则可以说专属经济区是自成一类概念。See D.P.O'Connell, *International Law of the Sea, Vol. 1*, Oxford: Oxford University Press, 1982, p. 576-579. 约三十年后，国际学术界大致认为专属经济区具有“自成一类”的法律地位：Dupuy-Vignes, *A Handbook on the New Law of the Sea, Vol. 1*, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, pp. 275-288; Satya N. Nandan, et al eds., *UNCLOS 1982: A Commentary, Vol. 2*, Leiden: Martinus Nijhoff Publishers, 2002, p. 563; Sam Bateman, *The Regime of the Exclusive Economic Zone: Military Activities and the Need for Compromise?*, in Ndiaye and Wolfrum eds., *Law of the Sea, Environmental Law and Settlement of Disputes*, Leiden/Boston: Martinus Nijhoff Publishers, 2007, p. 570; Churchill and Lowe, *The Law of The Sea*, Manchester: Manchester University Press, 1988, pp. 136-137; Nordquist, et al eds., *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2009, pp. 54 & 108. 也有学者认为《海洋法公约》排除了专属经济区为领海法律地位的可能性，但有明显证据表明其具有公海的地位，See Bárbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the Law of the Sea*, Leiden: Martinus Nijhoff Publishers, 1989, pp. 230-231.
- 119 Yann-huei Song, *Declarations and Statements with Respect to the 1982 UNCLOS: Potential Legal Disputes between the United States and China after U.S. Accession to the Convention, Ocean Development & International Law*, Vol. 36, 2005, pp. 261-289.
- 120 朱利安·巴恩斯，《美国试图通过公约挤压中国海洋权利》，载于《参考消息》2012年5月10日第14版。

科学研究,不受沿海国管辖。¹²¹“军事调查”很大程度上是美国塑造的一种表达。“军事调查”主要指为了军事目的而收集海洋数据。¹²²这类数据对有效的潜艇行动、反潜作战、水雷战和反水雷战很重要。军事调查可以包括海洋学、海洋地质、地球物理、化学、生物学及声学方面的数据。用于军事调查所使用的数据收集方法有时候与用于海洋科学研究的方法相同。美国的立场是保留在外国领海之外和群岛水域之外从事军事调查的权利,它担心提前通知或寻求批准将造成一种限制军事调查行动之机动性和灵活性的有害先例。¹²³因而美国主张沿海国对军事调查没有管辖权,而且反对沿海国对军事调查进行规制。

另一种争议涉及“水文调查”,美国认为其目的是绘制海图,有利于航行,无论其是否用于军事目的,都不属于《公约》下的海洋科学研究,不属于沿海国管辖。¹²⁴鉴于其数据具有双重用途,若干亚太地区学者为此曾草拟了《专属经济区航行与飞越指南》,将水文调查从军事调查中分离出来,建议此类调查应当经过沿海国同意,但一般情况下应当同意,除非属于《公约》第246(5)条规定的情形。¹²⁵

至于中国对海洋科学研究的一般立场,有两部行政法规作了相应规定,一是1996年制定的《中华人民共和国涉外海洋科学研究管理规定》,二是2012年通过的《海洋观测预报管理条例》,目的是对在中华人民共和国管辖海域内进行涉外海洋科学研究活动进行管理,这其中自然包括在专属经济区从事的任何研究、调查活动。核心的精神是任何海洋科研活动应当经过中国有关部门的批准,并遵守中

121 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, pp. 647-648.

122 参见 J·阿什利·罗奇著,褚晓琳译:《对科学研究的界定:海洋数据收集》,载于傅岷成编译:《弗吉尼亚大学海洋法论文三十年精选》(1977—2007),厦门:厦门大学出版社2010年版,第1725-1739页。

123 Sam Bateman, *The Regime of the Exclusive Economic Zone: Military Activities and the Need for Compromise?*, in Ndiaye and Wolfrum eds., *Law of the Sea, Environmental Law and Settlement of Disputes*, Leiden/Boston: Martinus Nijhoff Publishers, 2007, p. 577.

124 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1989-1990, pp. 478-480; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2008, pp. 653-656.

125 Sam Bateman, *The Regime of the Exclusive Economic Zone: Military Activities and the Need for Compromise?*, in Ndiaye and Wolfrum eds., *Law of the Sea, Environmental Law and Settlement of Disputes*, Leiden/Boston: Martinus Nijhoff Publishers, 2007, p. 579. 该“指南”对军事调查和水文调查的界定, See *Guidelines for Navigation and Overflight in the Exclusive Economic Zone*, at <http://nippon.zaidan.info/seikabutsu/2005/00816/pdf/0001.pdf>, 3 March 2012.

国的相关法律和法规，而不应当危害国家。¹²⁶ 至于在专属经济区内从事军用水文调查，中国认为它是军事意义上的备战，是针对沿海国的威胁，故违反了对海洋的和平利用原则，¹²⁷ 而且，美国所谓的“军事调查”在技术上与《公约》下的海洋科学研究并无不同。¹²⁸

2. 军事侦察

这里的“军事侦察”指利用军用飞机、船舶在海上进行军事情报收集的行为。美国主张在他国专属经济区内的军事侦察活动属于“航行自由”、“飞越自由”。¹²⁹ 自从在南海发生中美两国的撞机事件后，中国在这方面的立场逐渐清晰。中美两国于 2001 年 4 月 18 日至 19 日在北京就美军侦察机撞毁中方军用飞机事件及其它相关问题举行谈判过程中，中方代表团团长、外交部北美洲大洋洲司司长卢树民表达的立场为：“根据《联合国海洋法公约》有关规定，一国在他国专属经济区内的飞越活动，不应违反包括国家主权与领土完整不受侵犯等在内的一般国际法规则，必须尊重该国的国家主权和领土完整，不得危害该国的国家安全与和平秩序。美方在中国近海上空的活动严重地损害了中国的国家安全和国防利益，早已超出了《公约》中的飞越自由的范畴，是对飞越自由的滥用。美方飞机在中国近海所从事的并不是一般的飞行，而是收集中国情报的侦察活动。在和平时期，美国从事这类军事活动是对中国的国家安全与和平秩序的威胁，是对中国国家主权的挑衅，违反了国家间相互尊重主权和领土完整的国际法基本原则。”¹³⁰

126 相应条款如下：《中华人民共和国涉外海洋科学研究管理规定》第 4 条第 2 款“外方单独或者与中方合作进行海洋科学研究活动，须经国家海洋行政主管部门批准或者由国家海洋行政主管部门报请国务院批准，并遵守中华人民共和国的有关法律、法规。”《海洋观测预报管理条例》第 19 条第 2 款“国际组织、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海洋观测活动，应当遵守中华人民共和国的法律、法规，不得危害中华人民共和国的国家安全。”

127 Gao Zhiguo, *China and the Law of the Sea*, in Nordquist, et al eds., *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2009, pp. 289 & 294.

128 中国学者认为，就美国从事所谓“军事调查”的方式以及使用的船舶来看，将“海洋科学研究”和“军事调查”分开并没有多大的说服力，因此美国所主张的“军事调查”应属于“海洋科学研究”。See Yu Zhirong, *Jurisprudential Analysis of the U.S. Navy's Military Surveys in the Exclusive Economic Zones of Coastal Countries*, in Peter Dutton ed., *Military Activities in the EEZ – A U.S.-China Dialogue on Security and International Law in the Maritime Commons*, New Port: U.S. Naval War College, 2010, pp. 41-44.

129 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2001, pp. 704-706.

130 中国外交部公告：《中美就美军侦察机撞毁中方军用飞机事件举行谈判》，下载于 http://www.fmprc.gov.cn/mfa_chn/zyxw_602251/t11192.shtml, 2014 年 1 月 24 日。另参见中国外交部发言人就撞机事件所表达的相关立场：《发言人谈美国军用侦察机撞毁中国军用飞机事件真相和中方有关立场》，下载于 http://www.fmprc.gov.cn/mfa_chn/fyrbt_602243/t11175.shtml, 2014 年 1 月 24 日；《中方就美军侦察机撞毁我军用飞机事向美方表明中方严正立场》，下载于 <http://wcm.fmprc.gov.cn/pub/chn/pds/ziliao/zt/ywzt/2355/2379/t11176.htm>, 2014 年 1 月 24 日。

从中国立场来看,中国并不否认外国军用飞机在沿海国专属经济区单纯的一般性飞行活动,一个合理的推论是中国也不否认军舰一般的航行自由。然而,如果专属经济区内航行的军舰、飞越的飞机从事的是有目的地针对沿海国的军事活动,包括针对特定对象的侦查活动,中国认为这“并不是一般的飞行”,该行为“超出了《公约》中的飞越自由的范畴,是对飞越自由的滥用”。

当然,双方争论的焦点并不专门针对专属经济区的法律地位这一抽象问题,中国针对的是美国实施的具体、非善意的并危及中国军事安全的行动。然而,这又确实涉及到专属经济区的法律地位、沿海国和其他国家在专属经济区的权利义务性质和内容、航行与飞越自由同军事活动之间的关系、军事侦查同“和平利用”及“和平目的”之间的冲突、海洋科研的范围等问题,中美两国对此的立场相去甚远。¹³¹

军事活动引发的冲突不独发生在中国与美国之间,也发生在印度与美国之间。2004年美国海军“鲍迪奇”号调查船在印度孟加拉湾附近专属经济区内从事军事调查,印度海军人士指责“美国船舶超越了它在印度专属经济区内由《联合国海洋法公约》规定的权利,明显违反了印度法律和国际法”,印度议会上议员还发出了美国在印度专属经济区进行间谍活动的言论。¹³²2007年美国海军“玛丽·西尔斯”号调查船在印度专属经济区的活动引发了印度的抗议,美国在照会中表示美国没有从事海洋科学研究,而是在国际水域从事合法军事活动,美国行为符合习惯国际法,不需要获得沿海国批准,要求印度尊重航海自由和权利。¹³³

(二)“航行自由计划”与作为习惯国际法的“海洋自由”： 法律地位分析

美国在中国专属经济区内从事军事活动所导致的中美两国的冲突,与美国通过两种战略塑造有利于自己的海洋秩序有关:第一是主张美国所从事的军事活动

131 See Erik Franckx, American and Chinese Views on Navigational Rights of Warships, *Chinese Journal of International Law*, Vol. 10, 2011, No. 1, pp. 187~206; Gao Zhiguo, China and the Law of the Sea, in Myron H. Nordquist et al eds., *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2009, pp. 293~294.

132 K. K. Agnihotri and S. K. Agarwal, Legal Aspects of Marine Scientific Research in Exclusive Economic Zones: Implications of the Impeccable Incident, *Maritime Affairs*, Vol. 5, 2009, p. 145.

133 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, pp. 649~650.

属于公海自由的范畴,符合习惯国际法,¹³⁴二是实施“航行自由计划”,其实质是美国通过强大的海、空军力量,以实际行动去强化美国的以“航行自由”为核心海洋主张。

一个相当复杂的问题是,按照习惯国际法的要素来检验,习惯国际法允许在专属经济区中从事各种军事活动的主张是否成立。原则上,“公海自由”的核心包括“航行自由”、“飞越自由”,其具有习惯国际法地位,这没有疑问。然而,对于专属经济区中“航行自由”、“飞越自由”的具体内容,尤其是涉及到军事活动的时候,国家之间的主张就出现了巨大的分化。这种争议的法律后果可能有3种。

一是美国所主张的包括军事活动在内的航行自由确实是习惯国际法,那么其他国家在签署、加入《公约》时所作出的内容相反的保留、解释性声明以及相应的国内立法就属于不符合习惯法的行为。如果考虑专属经济区制度是妥协的结果,¹³⁵而且从加入或批准《公约》时的保留或解释性声明来看,有相当数量的国家确实没有放弃其立场,因此很难断定那些对专属经济区内军事活动有保留的國家的主张是违法的。尤其不能忽略的是,《公约》签订和生效后的国家实践呈现多样性,巴西、乌拉圭和佛得角等国家在签署或批准《公约》时声明反对外国在其专属经济区内从事军事活动。¹³⁶早在1990年,就有30多个国家通过国内立法对外外国军舰进入本国专属经济区进行活动做出限制。印度、巴基斯坦和马来西亚等一些国家要求外国军舰进入本国专属经济区进行军事活动要事先征得其同意。¹³⁷

第二种情况是其他国家的行为反映了习惯国际法,或者反映了一种正在形成的新习惯法,而美国的行为属于持续反对,对美国而言这样能够阻止习惯的形成。如同第一种情况,考虑到海洋法立法过程中的争议和妥协,海洋大国也从未放弃

134 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2001, pp. 704-706; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, p. 648.

135 Dupuy-Vignes, *A Handbook on the New Law of the Sea, Vol. 1*, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, pp. 275-288.

136 Lowe and Talmon eds., *The Legal Order of the Oceans-Basic Documents on the Law of the Sea ("The Legal Order of the Oceans")*, Oxford: Hart Publishing, 2009, pp. 908-969; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2004, p. 688.

137 段洁龙主编:《中国国际法实践与案例》,北京:法律出版社2011年版,第123页。

过自己的主张,¹³⁸ 断定沿海国的主张反映了一种新的、禁止专属经济区内外国军事活动的习惯国际法的立场是不现实的。

第三种情况是将古老的“航行自由”放在新的《公约》中来解释,要考虑领海的宽度普遍地扩大到12海里、专属经济区属于“自成一类”的海域等新的海洋制度的产生,而且还要考虑《公约》本身的目的和宗旨。因此,专属经济区内与军事活动有关的“航行自由”的实际内容还属于有待国家实践充分发展的领域。最后一种解释可能更符合实情。所以有学者断言,对武装冲突以外的军事活动的规制仍然具有争议性,是海洋法中一个尚未解决的领域。“《海洋法公约》对此问题没有明确的条款进行规定,主要原因在于谈判人员设法在条约中吸纳了足够的模糊性以便允许有不同的解释。”¹³⁹

除非有关国家今后能通过某种形式就上述问题达成一致,今后的发展趋势既可能是自说自话、因而极可能爆发危险的冲突,当然也可能通过一致的国家实践而形成习惯国际法得以解决。这里不考虑形成习惯国际法的实际可能性有多大,但结局若是形成习惯国际法,这背后的动力值得注意,尤其是立场分歧如此尖锐的国家之间怎么可能具有一致的国家实践和法律确信?或法律概念?这个问题构成了中国海洋政策选择的背景之一。如果专属经济区内航行自由的最终法律地位属于第三种情况,那么对中国的实践也将具有关键的形成作用,这就给中国参与塑造海洋法律秩序提供了机遇。这取决于中国决策者的偏好,以及根据此种偏好所决定的国家利益是什么。¹⁴⁰

六、美国的海权与塑造海洋秩序的主导动机

(一) 美国行为中的海权因素

对海洋法中习惯国际法的识别、主张旨在为美国提供一种享有海洋利益的法

138 奥克斯曼教授有一个观点:“海洋大国一直致力于在和平时期确保最大限度地从事海上军事行动的自由,其活动力度强度大、也颇为成功,倘若认为海洋大国设想出一种新的海洋法律制度以对其战时行动自由施加新的限制,这是错误的。”现实地看,奥克斯曼的观点有其合理之处。转引自: Dupuy-Vignes, *A Handbook on the New Law of the Sea*, Vol. 2, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, pp. 1323~1324.

139 Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford: Oxford University Press, 2011, p. 44.

140 牟文富:《互动背景下中国对专属经济区内军事活动的政策选择》,载于《太平洋学报》2013年第11期,第45~58页。该文主张,倘若随着中国海军力量变得强大、决策者的偏好就是中国的远洋海军在海洋上享有广泛的行动自由,那么对于专属经济区内军事活动的立场将不同于一个纯粹陆地国家的立场,如果根据多方博弈的收益来决定政策选择,那么中国可能采取与美国相似的法律立场。

律基础,而“航行自由计划”则将这种习惯法主张置于其行动之中,从习惯国际法的形成过程来看,其反过来又可以强化美国的习惯法主张。所有这一切的目的在于发挥其海军优势,确保其军事部署不受其它国家的海洋权利要求的约束,至少将这种约束降低到最低限度。执行“航行自由计划”的工具主要是美国的军用船舶、军用飞机,实施“防扩散安全倡议船舶登临协议”是美国海岸警卫队、美国海军,从现实主义的标准来衡量,这些力量都是一国权力的体现。

“航行自由计划”无疑是一种单边行动,在其具体实践过程中所体现的胁迫因素极为明显,因为美国对抗其它国家的海洋权利要求所诉诸的军事手段对于海上实力弱小的国家来说并无有效的反制措施。同样,围绕“防扩散安全倡议”的是一系列松散的双边条约组合,一种实际的效果是美国能以此采取单边行动。¹⁴¹而国际法中的单边行动,就其消极意义而言,要么是违法行为,要么可能构成持续反对,可以阻却对行为国有约束力的习惯法的产生。就积极意义而言,从国际法的发展历史来看,某些大国的单边行为引发一系列连锁反应,成为新国际机制形成的源头,这种现象在海洋法的历史中颇为常见。¹⁴²有时这类单边行动是刻意的背离、乃至违反既有的法律,目的是为了改变当前的法律体系。¹⁴³但是要成功地做到这一点,奉行单边主义行动的国家必须拥有对结果进行控制的能力,按照罗伯特基欧汉与约瑟夫奈的说法,这种能力就是权力,但对它却难以衡量,在复合相互依存条件下军事力量起着次要作用更是如此。¹⁴⁴在考察二战以后的海洋冲突问题时,基欧汉、奈二人注意到大国的武力起到的作用并不很大。¹⁴⁵从海洋秩序的构造进程来看,尽管这种结论总体上是成立的,但仍需要辩证地看待。“航行自由计划”即便不是使用武力,至少也是直白的武力炫耀,这当然是权力的体现。基欧汉、奈还提到权力的另一个维度,即“非对称相互依赖可以是权力的来源时,权力被视

141 Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, *Harvard International Law Journal*, Vol. 46, 2005, pp. 221~223.

142 一个经典的例子是美国于1945年发表的有关大陆架主张的“杜鲁门公告”,从长期看它激发了世界上沿海国对邻近一带海域提出了各种权利要求的竞赛,包括后来的“两百海里领海”、“专属经济区”的主张都可以追溯到美国的那次公告。See Galdorisi and Vienna, *Beyond the Law of the Sea: New Directives for US Oceans Policy*, London: Praeger, 1997, p. 22; David Attard, *The Exclusive Economic Zone in International Law*, Oxford: Clarendon Press, 1987, pp. 1~3.

143 Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, *Harvard International Law Journal*, Vol. 46, 2005, p. 221; McDougal and Burke, *Public Order of The Oceans-A Contemporary Law of the Sea*, New Haven: New Haven Press, 1987, p. 1047; O'Connell, *The International Law of the Sea, Vol. 1*, Oxford: Oxford University Press, 1982, p. 9.

144 罗伯特·基欧汉、约瑟夫·奈著,门红华译:《权力与相互依赖》,北京:北京大学出版社2002年版,第12、28~31页。

145 罗伯特·基欧汉、约瑟夫·奈著,门红华译:《权力与相互依赖》,北京:北京大学出版社2002年版,第105~111页。

为对资源的控制或对结果的潜在的影响”。“在某种关系中,依赖性较小的行为体常常拥有较强的权力来源,该行为体有能力促动变化或以变化相威胁,而一旦该关系发生变化,则相比较而言,该行为体方付出的代价小于他方。”¹⁴⁶《公约》中国际海底开发制度的修订原因就可以放在这种权力概念中来解释。在国际海底开发制度中所形成的相互依赖关系中,美国属于不敏感、不脆弱的一方,它就此获得了非对称的权力,所以它凭借其开发技术实力、雄厚的资本、巨大的市场促动了变化。

另一方面,就在海上实施“防扩散安全倡议”而言,美国所主导的“登临协议”在表面上具有双边、多边行动特征,而且有安理会第1540号决议的支持,但到目前为止仍然局限于一小部分国家之间的双边协议。但这些双边“登临协议”反映了美国作为一个海权国家的本质,因为要成功地根据双边登临协议去实施公海上的临检权,其前提条件就在于请求国收集信息、对涉嫌船舶进行地理定位和跟踪、在海上快速行动的能力,这一切都离不开强大的海上武装力量的支持。相反,那些力量极为有限甚至没有海上力量的船舶注册国家根本无法去实施这类条约。

(二) 塑造海洋秩序的主导动机:“海洋自由”

德国著名国际法学家威尔海姆格鲁提出了一种关于国际法历史分期的形态学分类模型。格鲁认为国际法的历史纪元与近现代国家体系是不可分割的,国家体系是国际法律秩序的深层土壤。每一种国家体系都有其调整国家之间互动的规则和原则。他认为,近代伊始,每一种国家体系都产生了一种独特的、自足的国际法律秩序,每一种法律秩序都受到主导大国特定思想和政治风格的主导。这个大国的领导地位越是强大,那么它就越能够给这个时代留下其思想特征。它的思想、观念越是强势,它就越能使其国家扩张意识形态表达的效力更加普遍化、绝对化。¹⁴⁷从地理大发现开始,先后出现了国际法的西班牙时代、法国时代、英国时代、美苏对抗与第三世界兴起的时代,冷战结束后单一超级大国的国际社会。每一个时代都有关于“海洋法与海洋统治权”的原则和规则:在中世纪,海洋被视为共有物,但一些沿海国对某特定海域主张权利;在西班牙时代则是“海洋自由论”与“闭海论”两种主张之间的对抗;法国时代的海洋秩序是关于战时中立权的原则;英国时代则是英国统治下的海洋自由原则;两次世界大战之间的时期则体现了中立权利的衰落;美苏对抗时代则是“人类共同遗产”观念的兴起;冷战后的海洋秩序就

146 罗伯特·基欧汉、约瑟夫·奈著,门红华译:《权力与相互依赖》,北京:北京大学出版社2002年版,第12页。

147 Wilhelm G. Grewe, translated and revised by Michael Byers, *The Epochs of International Law*, Berlin: Walter De Gruyter, 2000, pp. 6, 23.

是1982年的《公约》。¹⁴⁸ 格鲁的概念化工作相当于给每个时代的“海洋法与海洋统治权”寻找了一种由主导大国塑造的主导动机。他对冷战后海洋秩序的定位似乎暗示,尽管存在美国这样的单一超级大国,但已经没有主导大国可以塑造海洋秩序的主导动机了。格鲁于2000年去世,他没有机会观察之后的国际关系的现实,无法预见到美国长期以来一直没有加入《公约》这个事实,也没有看到美国在《公约》体系之外塑造海洋秩序的努力。从他诉诸的国际法历史分期的辩证方法来看,美国还是对我们这个时代的国际法打上了深深的烙印,无论是接受还是对抗美国的观念、强权,在当代国际法中,有关人权、人道干预、反恐、防扩散、使用武力的正当性等争论中,美国的影响显而易见。¹⁴⁹ 就海洋秩序而言,作为海洋超级大国的美国的立场仍然是主导动机,那就是维护、强化海洋自由,不过还融合了反恐、防扩散领域中的美国利益。

“海洋自由”对美国为何重要? 格鲁在评论19世纪英国时代“海洋自由”时认为,只有在英国支配海洋的背景中才能正确地理解“海洋自由”的口号,“海洋自由并不仅仅是海上交通和贸易自由,它还意味着自由地为海战选择战场。后一种自由在很大程度上与海上交通及贸易自由相抵触,它只能从英国海权的视角才可以理解。”¹⁵⁰ 今天美国的海权远远超过当年的英国,同样的逻辑也适用于美国。美国所实施的“航行自由计划”其实也是为了确保自由地选择海洋战场。美国担心《公约》限制它的航行自由,而且因国内政治的原因一时难以加入,所以实施“航行自由计划”,以强大的海军力量宣示自己的海洋秩序观念。然而海权并非权利本身。卢梭在《社会契约论》中说,“即使最强者也绝不会强得足以永远做主人,除非他把自己的强力转化为权利,把服从转化为义务。”¹⁵¹ 美国的实践就是将强力(海权)转化为其海军自由地在海上航行的权利,让其他国家承担尊重这种权利的义务。关于海洋强国与海洋法的关系,在上个世纪20年代,波特所下的结论正好反映出今天美国塑造海洋秩序的情况:

主要是海军力量有发言权……拥有强大海军的国家目标单一、手段也单一。它知道自己想要的,相信自己知道如何得到它。它用强大的海军谱写了

148 Wilhelm G. Grewe, translated and revised by Michael Byers, *The Epochs of International Law*, Berlin: Walter De Gruyter, 2000, pp. 129, 257, 274, 403, 412, 551, 572, 689, 693, 723, 725.

149 这里引出了美国霸权与国际法之间的关系问题。对这个问题的讨论可参见 Foot, Rosemary, S. Neil MacFarlane and Michael Mastanduno, *US Hegemony and International Organizations: the United States and Multilateral Institutions*, Oxford: Oxford University Press, 2003; Byers, Michael and Georg Nolte eds., *United States Hegemony and the Foundations of International Law*, Cambridge: Cambridge University Press, 2003.

150 Wilhelm G. Grewe, translated and revised by Michael Byers, *The Epochs of International Law*, Berlin: Walter De Gruyter, 2000, p. 551.

151 卢梭著,何兆武译:《社会契约论》,北京:商务印书馆2005年版,第9页。

海战法,用庞大的商船队谱写了航海法。它绝少向共同同意原则让步。海军力量统治海洋,而且完全是有意而为之的。¹⁵²

七、结束语

到目前为止,本文讨论的是在美国不是《公约》缔约国的情况下,其海洋战略是在《公约》之外塑造海洋秩序。倘若美国加入《公约》,那么美国极有可能设法在《公约》框架之内来贯彻此前的长期主张,而且支持美国加入《公约》的政治家也多次强调说,加入《公约》的好处之一就是美国可以影响《公约》的发展。从技术层面来看,美国参议院在批准加入《公约》时所附“意见”中会有若干声明、谅解和条件,事实上2004年、2007年参议院对外关系委员会通过的决议中都已经提供了若干意见供参议院全院表决。如果今后没有太大的变化,这些建议的核心可能就是参议院批准加入《公约》时通过的法案所附的意见,但它可能造成的影响值得我们注意。中美之间可能会产生一些法律乃至外交上的争端。

《公约》第309条规定:“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”,但第310条规定可以作出“声明或说明”,“目的在于除其它外使该国国内法律和规章同本公约规定取得协调”。美国参议院对外关系委员会2004、2007年两次在其决议中都提出了包括下面内容的保留、声明或说明。

1、在《公约》第298条第1款下作出了保留,对于“军事活动”等争端不接受《公约》第287条下的争端解决程序。另外,还声明《公约》缔约国有排他性权利去决定其活动是否属于“军事活动”,而且该决定不受审查。

2、在《公约》第310条下作出了23项广泛的“声明或说明”。例如:《公约》中的“和平利用”、“和平目的”规定不妨碍在武装冲突时行使单独或集体自卫权;第19条第2款规定的非无害通过的清单是穷尽性质的、无害通过不需要事先批准;“海洋科学研究”范围的说明将大量的与军事活动有关的研究排除在外;国际航行海峡与群岛水域的过境通行包括有关军事必要性的“正常方式”、“用于国际航行的海峡”包括所有能够用于国际航行的海峡;所有国家在沿海国专属经济区内享有航行、飞越自由,包括从事内容广泛的军事活动。¹⁵³

这些声明或说明不过是重复了美国一贯的主张,如果中美两国都坚持其一贯

152 Pitman B. Potter, *Freedom of the Seas in History, Law and Politics*, London: Longmans, Green and Co., 1924, reprinted by William S. Hein & Co., Inc., 2002, p. 193.

153 Executive Report 110-09, at <http://www.foreign.senate.gov/download/?id=AF77EAB3-DEB5-4DCA-8DBD-ABB3CB082264>, 24 January 2014.

的立场,确实发生争端的可能较大。¹⁵⁴此外,军事技术上的创新、快速发展也可能产生《公约》的适用、解释问题。例如,假设像美国所主张的那样,《公约》第19条第2款规定的非无害通过的清单是穷尽性质的,那么在领海使用一些前所未有的新型武器、军事装备的行为在第19条第2款下的法律地位就可能导致争端。又如,全新的武器、军事装备会带来全新的作战理念、使用方式,这就为“军事活动”的内容增添了变化,这同样可能产生另类的有关“军事活动”的争端。

中国制定海洋政策首先遇到的外部大环境是以《公约》为核心的海洋法律秩序,它具有宪法般的地位,¹⁵⁵中国是缔约国之一,它是制定中国海洋政策的首要法律基础,这不言而喻,但另有一个隐性的约束条件是中国制定海洋政策不能不考虑的,即美国的海权因素和它目前在《公约》之外塑造海洋秩序的现实。中美之间可能的共同点是《公约》,但二者对“航行/飞越自由”的适用范围、解释有很大分歧,主要体现在它是否包括和平时期的军事活动。引起该问题的原因主要在于双方的国家利益偏好有很大的差异,但偏好可能发生变化,未来双方的分歧如何发展并不清楚。中国、美国应该尝试建立新型大国关系设法处理这样的问题。不过这个问题不在《公约》框架之内。

154 Yann-huei Song, *Declarations and Statements with Respect to the 1982 UNCLOS: Potential Legal Disputes between the United States and China after U.S. Accession to the Convention*, *Ocean Development & International Law*, Vol. 36, 2005, p. 278.

155 Myron H. Nordquist ed., *United Nations Convention on the Law of the Sea 1982 - A Commentary*, Vol. 1, The Hague: Martinus Nijhoff Publishers, 1985, p. 461.

The United States' Strategies in Shaping a Legal Order for the Seas outside the United Nations Convention on the Law of the Sea

MOU Wenfu*

Abstract: The United Nations Convention on the Law of the Sea has established a legal order for the seas. The U.S. however, as a major maritime power, is not a party to the Convention. Though the current U.S. government has been positively promoting its accession to the Convention, due to the complexity of its domestic politics and highly divided domestic opinions on the accession, it is difficult for the U.S. to join the Convention in the foreseeable future. It is, therefore, necessary for the U.S., taking consideration of its national interests, to shape a favorable legal order for the seas outside the Convention, in order to have a solid legal ground to justify its maritime rights and interests. Generally speaking, the U.S. has employed three strategies in pursuing this goal: making claims based on customary international law, enforcing the Freedom of Navigation Program (FNP), and concluding bilateral ship-boarding agreements with other States under the framework of the Proliferation Security Initiative in order to go beyond the traditional jurisdictions at seas. Correspondingly, these strategies represent the legal basis of its rights, State practices where such basis of rights is maintained and rein-

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forced through a display of armed forces and the attempt to reshape the regime of jurisdiction over ships at sea. Consequently, the U.S.'s FNP has led to the Sino-U.S. disputes. Regarding the leading motives driving the United States to shape a legal order for the sea, one can notice that: first, such motives are a reflection of its leading status in the overall power structure of the world. Second, having the freedom of the sea as its core belief, the U.S. has also considered its national interests in the field of anti-terrorism and the prevention of proliferation of massive destructive weapons.

Key Words: United Nations Convention on the Law of the Sea; Order for the seas; Customary law; Freedom of Navigation Program; Ship-boarding agreements

I. Introduction

The United Nations Convention on the Law of the Sea (hereinafter referred to as the “UNCLOS” or the “Convention”) was open for signature in 1982. Not long after that, Phillip Allot published an article discussing its idea and structure through a metaphor: “the flying Dutchman wandering the sea areas of the world, carrying his copy of the Convention, would always be able to answer in legal terms the questions: who am I? who is that over there? where am I? what may I do now? what must I do now? The Convention would never fail him.”¹

In Allot's view, the Convention's main structural feature is its comprehensiveness in dealing with the whole non-land area of the world. It is also legally comprehensive: “It has a rule for everything.”² He tends to believe that the Convention could offer answers to all questions. Considering this, when “EP-3”, an U.S. military surveillance aircraft, was performing a reconnaissance mission above the exclusive economic zone (EEZ) of South China Sea, if the crew on board was carrying a copy of the Convention what kind of answers would they have reached when asking the same questions as the “flying Dutchman”? Or were they qualified

1 Philip Allott, Power Sharing in the Law of the Sea, *The American Journal of International Law*, Vol. 77, 1983, p. 8. The “flying Dutchman” is a ghost ship that could never return and is doomed to sail the oceans forever. It is an ancient legend of the sea in Europe. The myth is likely to have originated from sailings after the geographical discovery. Some authors who wrote stories about the legend of “flying Dutchman”, such as Richard Wagner's opera, *The Flying Dutchman*, took the “flying Dutchman” as its figure.

2 Philip Allott, Power Sharing in the Law of the Sea, *The American Journal of International Law*, Vol. 77, 1983, p. 8.

to seek answers from the Convention?³ Similarly, what were the answers supposed to be for the exact same questions, when “Impeccable”, the U.S. navy surveillance ship engaged in military measurement activities in the South China Sea EEZ in 2009?⁴ Two vital facts concerning the U.S. have to be considered in seeking answers to the questions stated above:

First, the U.S. has earned its status as a major maritime power, not only through its comprehensive national power that ranks the first throughout the world, but also through its naval power that overweighs that of the rest of the world. With respect to its great naval power, it does not simply refer to the number of warships, but also includes the amount of military spending. The U.S. identity, as a major maritime power, is the key to understanding this country’s behavior.

Second, a State’s identity as a maritime power has always been reflected in its maritime actions or activities. The current existing legal order for the seas has been shaped by UNCLOS.⁵ The legal order for the sea is to allocate rights, power, privileges and immunities among States that make use of the seas in a binding manner. The rules of international law that reflect such a distribution are the legal

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- 3 For news relating to “EP-3”, the U.S. military reconnaissance aircraft that was doing reconnaissance above the South China Sea EEZ, see the Chinese Foreign Ministry, Foreign Ministry Spokesman Remarks on the Truth of the U.S. Military Reconnaissance Plane Crashing into the Chinese Military Aircraft and the Position of the Chinese Government, at http://www.fmprc.gov.cn/mfa_chn/fyrbt_602243/t11175.shtml, 23 January 2014. (in Chinese)
 - 4 For diplomatic disputes relating to “Impeccable” (the US navy surveillance ship) engaged in military measurement activities in the South China Sea EEZ, see the Chinese Foreign Ministry, Foreign Ministry Spokesperson Ma Zhaoxu’s Answers to the Press on U.S. Navy Surveillance Vessel’s Activities in Chinese Exclusive Economic Zone, at <http://www.fmprc.gov.cn/zflt/chn/fyrth/t541674.htm>, 23 January 2014. (in Chinese)
 - 5 UNCLOS (A/CONF.62/122), the Preamble, Para. 4 states that “... establishing through this Convention, ... a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.” In this regard, the legal order for the seas established by the Convention mainly focuses on “the peaceful uses of the seas and oceans”. For the Chinese translation of the Convention, see the People’s Republic of China Foreign Ministry Department of Treaty and Law ed., *The People’s Republic of China Multilateral Treaty Series, Volume IV*, Beijing: Law Press, 1987, pp. 241~441. (in Chinese)

order for the sea.⁶ Regardless of whom or what one is, either a “Dutchman”, an “EP-3” aircraft or the “Impeccable” ship, the legal basis for their acts and activities should have been reviewed in this legal order for the sea, and the relevant questions should have also been answered within this order. However, the U.S. has not joined the UNCLOS and has been acting outside its regulation since it came into effect on 6 November 1994. Although the U.S. did join the negotiations, it never actually signed the Convention. Therefore, the U.S. is unable to seek answers from the UNCLOS as a party State thereto.

However, looking at the history of international negotiations, countries have, on one hand emphasized their interests for more naval power, while on the other hand they have used their power to make the international law of the sea reflect their own interests, which consequently had a deep influence on the development of the law of the sea.⁷ The U.S. is certainly not an exception. Not joining the UNCLOS does not mean it is not attempting to shape a favorable legal order for the sea. Actually, the U.S. has been doing so progressively and it has also built a set of persistent strategies to serve this purpose. These strategies became the foundation for the U.S. to seek legalities for all of its types of maritime operations. Therefore, it is necessary to research how the U.S. is shaping the order of the seas and its related maritime strategies in order to understand its maritime activities and operations. Using a methodology that is concentrating on the process, this article focuses on the United States' strategies to shape the legal order for the seas.

Regarding “strategy”, this article accepts the definition from school of the U.S. “policy orientation”: in the exploitation of the oceans, participants may employ diplomatic, ideological, economic or military strategies solely or use different combinations of such strategies with an aim to reach their goals to the maximum extent. In recent years, the most remarkable strategies proved ideologically complex, such as those regarding the marine environment and the mammal

6 As Philip Allott mentions, the Convention makes constant use of the eight fundamental Hohfeldian forms of legal relation. Philip Allott, *Power Sharing in the Law of the Sea*, *The American Journal of International Law*, Vol. 77, 1983, p. 9. The eight fundamental Hohfeldian forms of legal relation are as followed. The related relation: right - duty, privilege - no-right, power - liability, immunity - disability; the opposite relations: right - no-right, privilege - duty; power - disability, and immunity - liability. See Wesley Newcomb Hohfeld, translated by Zhang Shuyou, *Fundamental Legal Conceptions*, Beijing: China Legal Publishing House, 2009. (in Chinese)

7 Mark Janis, *Sea Power and the Law of the Sea*, Lexington: D. C. Heath and Company, 1976, p. 17.

protection. The Third United Nations Conference on the Law of the Sea was the main occasion where all States resorted to diplomatic means. Actors generally have a free choice of their strategies, possibly without referring to strategies employed by others. Strategies may include unilateral actions such as persuasion or coercion.⁸ As mentioned earlier, this article employs the concept of strategy under the school of “policy orientation”. The reason is that this school focuses on the process of decision-making instead of the rule of law itself. This article is focusing on the process and it attempts to research various types of strategies that the U.S. employs in shaping the legal order of the oceans. Being slightly different, the concept of “strategy” in this article has a narrower scope and looks at how the U.S. shapes the legal order of the oceans initiated, interpreted and maintained by itself. If certain rules do not conform to its national interest, the U.S. might resort to initiating new rules or altering existing ones. The U.S. may employ these strategies in a unilateral, bilateral or multi-lateral manner. For example, the U.S. Freedom of Navigation Program (FNP) is a unilateral strategy with a coercion factor, while a series of ship boarding agreements and nonproliferation agreements concluded under the initiative of the U.S., are a combination of bilateral and multi-lateral agreements.

This article is organized in five parts. The first part is a brief introduction of the legal order for the oceans structured by the UNCLOS from the perspective of the allocation of maritime rights and interests. The second part looks into the United States’ position on the Convention. Although the current U.S. administration has positively engaged in promoting access to it, the operational complexity of the U.S. Senate and the highly divided domestic opinions prove to be a difficult obstacle for U.S. accession to the Convention. In this regard, it is necessary for the U.S. to attempt to shape a favorable legal order for the oceans outside the Convention in order to seek legal grounds for its rights and interests. The third part is an exposition of the United States’ strategies to shape the legal order of the oceans from three perspectives: making claims based on customary international law, enforcing the FNP, and concluding bilateral ship-boarding agreements with other States under the framework of the Proliferation Security Initiative (PSI). The fourth part is an analysis of the consequence of carrying out the FNP. That is to say, China and the U.S. come into conflict due to their different positions on military activity inside the EEZ. The fifth or final part is an illustration of correlations between

8 McDougal and Turke, *Public Order of the Oceans – A Contemporary Law of the Sea*, New Haven: New Haven Press, 1987, pp. 42~44, 25~26, 40.

power as a factor in the United States' strategies and its status as a major maritime power.

II. The Legal Order for the Sea under the UNCLOS

A. The Legal Order for the Sea under UNCLOS

The current international legal order for the seas has reflected the system of peaceful use of the seas under the 1982 UNCLOS. The Convention came into effect in 1994. By January 2014, there have been 157 countries that signed the Convention. In total, 166 countries are parties to the Convention, not including the U.S.⁹ However, when considering seas as battlefields, the legal order for the seas is supposed to include norms to regulate all parties in armed conflicts at sea, with most of these norms as part of customary rules.¹⁰ The rules governing armed conflicts at sea are not mainly concerned with the peaceful use of the sea. This article focuses on the first aspect of the legal order for the sea which is peaceful use. That is exactly what the U.S. puts great efforts to shape by all means.

1. Allocation Order for Maritime Interests

The Third United Nations Conference on the Law of the Sea was one of the largest, most difficult, and most complicated negotiations at global level led by the UN. Looking at different types of conflicts, the conference covered issues concerning the international economic structure, international relations, decision-making at an international level, and resource distribution. The vast number of countries (155 States) participating in negotiations and the vast number of issues it covered (over 400 issues) also reflected the complexity of the negotiations.¹¹ The UNCLOS, as the achievement of the conference, was a result containing implicit

9 For effectiveness, signature and ratification of and reservation about the UNCLOS, see United Nations, United Nations Treaty Collection, at <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf>, 23 January 2014.

10 *San Remo Manual on International Law Applied to Armed Conflicts at Sea*, Cambridge: Cambridge University Press, 1995.

11 Edward Miles, *Global Ocean Politics: The Decision Process at the Third United Nations Conference on the Law of the Sea 1973-1982*, Leiden: Martinus Nijhoff Publishers, 1997, pp. 3~4.

package deals.¹²

Firstly, the UNCLOS has divided the seas into different marine areas: internal waters, territorial seas, contiguous zones, archipelagic waters, continental shelf, EEZ, high seas, and international seabed areas. Secondly, based on the different right holders in different marine areas, States are divided into coastal States, other States, and all States. The latter two types of States include land-locked States.¹³ Thirdly, the use of the sea is regulated from three perspectives: 1) as a place for exploiting maritime resources; 2) as a venue bearing transportations; 3) as a battlefield.¹⁴ Correspondingly, rights and interests are established: freedom of navigation (including innocent passage), transit passage in straits and archipelagic waters, the right to lay submarine cables and pipelines, fishing and the living resources, marine scientific research, marine environment protection, mineral exploitation in international seabed areas, transfer of technology, peaceful use and military use (non-armed conflicts act) of the seas, etc. The purpose of the Convention is to allocate such rights and interests. The Convention aims at promoting peaceful use of the sea, but not at regulating military use of the sea in terms of armed conflicts. However, there is a possibility that “military activities (undefined under the Convention) take place under the Convention. Thus, there is a twilight zone between the law of the seas and the law of armed conflicts at sea.¹⁵ Presently, this is a very controversial issue.

The Convention has built legal relations between different types of States and different marine areas, as well as between objects and acts among such States and marine areas. In short, of the marine areas as stated above, all States share equal

12 The type of “package deal” is concluded to be a deal of navigation and resource interests. Edward Miles, *Global Ocean Politics: The Decision Process at the Third United Nations Conference on the Law of the Sea 1973-1982*, Leiden: Martinus Nijhoff Publishers, 1997, p. 4; James Harrison, *Making the Law of the Sea – A Study in the Development of International Law*, Cambridge: Cambridge University Press, 2011, pp. 44~46.

13 This classification is based on the distribution of interests among States. Actually, the Convention has a more complicated way to categorize States, such as foreign States, the third State, States with opposite or adjacent coasts, and port State. Philip Allott calculated 57 subjects of rights and duties including States. There are 58 types of the legal sea “areas” in the Convention. In addition to territorial seas and EEZ, such sea areas include bays, historic bays, port, island, and low-tide elevations. See Philip Allott, Power Sharing in the Law of the Sea, *The American Journal of International Law*, Vol. 77, 1983, pp. 28~30.

14 Philip E. Steinberg, *The Social Construction of the Ocean*, Cambridge: Cambridge University Press, 2001, pp. 11~18.

15 Dupuy-Vignes, *A Handbook on the New Law of the Sea*, Vol. 2, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, pp. 1321~1329.

rights to high seas and international seabed areas; coastal States have complete sovereignty over their own internal waters; coastal States share their interests with other States in territorial waters, contiguous zones, archipelagic waters, continental shelves, EEZs and other marine areas within national jurisdiction. Therefore, with respect to marine areas within national jurisdiction, the allocation of rights refers to defining rights and obligations between coastal States and other States respectively.

2. Formalism in Geography

As stated above, the UNCLOS has divided States mainly by using geographical concepts: coastal States, archipelagic State, land-locked States, and geographically disadvantaged States. The regimes of internal waters, territorial waters, and EEZs are established on the basis of the baseline of territorial sea, a concept based on geographical locations. Such a practice removes other features of States. In the Convention, though State actors include “developing States”, most rights, privileges, powers, and immunities related to marine areas within national jurisdiction are allocated between coastal States and other States. The consideration of the interests of developing States have been mentioned in the Convention, such as provided in Articles 61, 62, 69, 70 & 82, but only for the consideration of “their special interests and needs”. Their special interests and needs should be taken into consideration when developing States, as equal States parties, share the benefits arising out of the utilization of the high seas and international seabed areas (Articles 119, 140, 143 & 144 of the UNCLOS). But, in principle, formalism in geography determines the division of interests under the Convention. The coastal States' rights to continental shelves and EEZs are established following the principle of “land dominates the sea”. Excluding States with opposite or adjacent coasts, interests among States are divided by mainly taking into consideration the length of their baselines/coastlines. Generally speaking, areas of the territorial waters, EEZ, and even the continental shelf of States are larger if their baselines are longer. This length is a vital factor in determining the distribution proportions, when considering the distribution of marine areas in the delimitation of maritime boundaries.¹⁶ In this view, States that get the most benefits from the Convention are

16 Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation*, Oxford: Hart Publishing, 2006, p. 161.

States or islands States who own the longest baselines. The U.S. is one example.¹⁷ As such, the U.S. is deemed to be a potential winner.¹⁸ However, besides interest distribution, what the U.S. cares most about is how its superpower navy could take the most advantage under the Convention. In other words, the Convention should not weaken its advantages in any way.

B. The U.S. and the Legal Order for the Seas

Since it was founded, the U.S. has always had an ambition of building itself to be a strong maritime power. Alexander Hamilton called for support of the new constitution. The rationale behind his request was that the federal government established on the new constitution would make a better contribution to international trade and the building of a stronger navy.¹⁹ Thus, the U.S. became the only major maritime power at the end of World War II. It has got a naval power much stronger than that of any other States. Recognizing its status would therefore be a good starting point in understanding its marine strategies. A State's identity determines the type of national interest it is seeking.²⁰ Looking at history, by claiming "freedom of the seas", maritime powers have initiated, asserted and maintained even the narrowest breadth of the territorial seas on one hand, and have applied the freedom of navigation at the largest area on the other hand.²¹ Its military strategic significance lied with its capacity to offer extensive freedom of operations to air forces and navy, which constitutes the core interest of any maritime power. John Dimitri Negroponte, the U.S. Assistant Secretary of State in the George W.

17 The U.S., Australia, New Zealand, Indonesia, Canada, and the Former Soviet Union have occupied 40% of the world EEZs. Among them, Indonesia is the only developing country. Dupuy-Vignes, *A Handbook on the New Law of the Sea*, Vol. 2, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, p. 281.

18 McDougal and Turke, *Public Order of the Oceans – A Contemporary Law of the Sea*, New Haven: New Haven Press, 1987, p. 72.

19 Alexander Hamilton et al, translated by Cheng Fengru et al, *The Federalist*, Beijing: Commercial Press, 1995, pp. 18, 54 & 122. (in Chinese)

20 Mark Janis, *Sea Power and the Law of the Sea*, Lexington: D. C. Heath and Company, 1976, pp. 1~18.

21 Robert Keohan and Joseph Nye, translated by Men Honghua, *Power and Interdependence*, Beijing: Peking University Press, 2002, pp. 95~97 (in Chinese); Scott G. Borgerson, *The National Interest and the Law of the Sea*, Council on Foreign Relations Inc., Council Special Report, No. 46, 2009, pp. 22~23; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2002, pp. 740~742, 754~755.

Bush administration, once stated that “[a]s the world’s foremost maritime power, our security interests are intrinsically linked to freedom of navigation. We have more to gain from legal certainty and public order in the world’s oceans than any other country.”²²

If we evaluate benefits according to the interest distribution pattern of the UNCLOS, the U.S. would be one of the biggest winners of the Convention. However, it is not a party to the Convention. The question would then be what is the legal basis to claim that the U.S. is gaining the most benefits from the Convention. The answer relates to how the U.S. is claiming its rights outside the Convention, and how it shapes a legal order for the sea that favors its interests. The U.S. has fully participated in the Third United Nations Conference on the Law of the Sea. It conducted its negotiations in a manner that would ensure that it takes maximum advantage of its sea power. In fact, since the end of the Carter administration, at a time when the UNCLOS was not completed, the U.S. had made clear claims of its maritime interests by carrying out the FNP. More or less, the program seemed to be used to create a balance with the coming system structured by the Convention. It is still in effect. At the beginning of the 21st century, the U.S. sought to change traditional rules concerning jurisdiction at seas under the law of the sea through a series of multi-operations and bilateral agreements in the pursuit of its national safety interests. It can be asserted that, existing in the past and continuing for a long period of time in the future, the U.S. has been and will go on walking away from the UNCLOS, attempting to shape a type of legal order for the sea outside or beyond the UNCLOS system in accordance with its national interests. In doing so, it shows a serious dependence on naval power. Looking at both history and present times, it is a reality that States as sea powers are shaping the legal order for the seas.²³

22 The written testimony of John Dimitri Negroponte, the U.S. Assistant Secretary of State, at the hearing held by the U.S. Senate Committee on Foreign Relations in 2007 to discuss United States’ accession to the UNCLOS. Office of the Legal Adviser of U.S. State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, pp. 616-617.

23 British scholars Higgins and Colombos, when discussing the roles of the UK and the U.S. as major maritime sea powers in forming the law of the sea in the 20th century, stated that, any new principle of international law of the seas, unless accepted by the UK and the U.S., cannot be recognized as a principle that applies to all. Higgins and Colombos, translated by Wang Qiangsheng, *The International Law of the Sea*, Beijing: Law Press, 1957, p. 25 (in Chinese). Though it is an exaggerated saying, it is basically a fact in history.

III. The Impact of the U.S. Domestic Politics on U.S. Accession to the UNCLOS

A. Major Debate on the UNCLOS and the U.S. National Interests

The U.S. participated in the Third United Nations Conference on the Law of the Sea, with the intention of protecting three priorities of national interests: a. to ensure the freedom of navigation and overflight against the aggressive extension of coastal States' jurisdictions over sea areas; b. to protect resources from overfishing by ocean processing vessels; c. to protect the marine environment and to control oil and gas contained in the United States' continental shelf.²⁴ With negotiations continuing, the U.S. began to care about the protection of its interests in the exploitation of deep seabed. In the later stage of the negotiations, especially during President Reagan's administration, the U.S. saw the exploration and exploitation of minerals from deep seabed as an important national interest. In this regard, the U.S., as well as other developed countries, had a considerable disagreement with developing countries. The U.S. strongly opposed the regime for integrated control of seabed minerals that was initiated by developing countries. The rationale behind this was that the U.S. was unable to take advantage of its exploitation technologies and financial supporting power under the framework of such a regime. Thus, the U.S. has initiated and supported a course of action to develop a free market of exploitation of seabed resources and a free enterprise mechanism, against demands of sharing technologies and interests.²⁵ At the end of the conference, the U.S. attempted to create a regulating system for the exploitation of seabed resources that reflected its own interests, but finally failed.²⁶

When the UNCLOS was open for signature in 1982, the U.S. President Reagan made an announcement in July of the same year, stating that the U.S. would not sign the Convention. The reason, he explained, was that certain provisions of the Convention regarding the exploitation of deep seabed were not conforming

24 Galdorisi and Vienna, *Beyond the Law of the Sea: New Directives for US Oceans Policy*, London: Preager, 1997, p. 27.

25 Galdorisi and Vienna, *Beyond the Law of the Sea: New Directives for US Oceans Policy*, London: Preager, 1997, pp. 47~48.

26 Galdorisi and Vienna, *Beyond the Law of the Sea: New Directives for US Oceans Policy*, London: Preager, 1997, pp. 50~51.

to national interests of industrialized countries.²⁷ President Reagan published a “Statement on U.S. Oceans Policy” on the 10 March 1983, clarifying the U.S.’s general oceans policies and its views towards the Convention. First of all, the U.S. was prepared to accept and act in accordance with the provisions of the Convention regarding navigation and overflight for the balance of interests arising from the traditional uses of the oceans. In this respect, the U.S. would recognize the rights of other States in the waters off its coasts, as reflected in the Convention, so long as the rights and freedoms of the U.S. and other States under international law were recognized by such coastal States. Secondly, the U.S. will exercise and assert its rights and freedoms of navigation and overflight on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention. The U.S. would not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses. Thirdly, the U.S. would exercise sovereign rights to living and non-living resources within 200 nautical miles of its EEZ. Other States would still enjoy the high seas rights and freedoms that are unrelated with resources. The U.S. did not assert jurisdiction over marine scientific research within its EEZ, while it did recognize such jurisdiction asserted by other States within their own EEZs. However, President Reagan admitted that the Convention also contained provisions with respect to traditional uses of the oceans which generally confirm the existing maritime law and practice and fairly balance the interests of all States.²⁸

The Reagan statement seemed to show that the U.S. had a selective acceptance of the provisions of the UNCLOS on the basis of its interests. It has been criticized as departing from the concept of “package deals” under the Convention.²⁹ Since then, the Reagan statement has become the basis of the United States’ oceans policy. The Clinton administration began to promote the idea that the U.S. should join the Convention since the UNCLOS and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of

27 Presidential Statement, at <http://www.reagan.utexas.edu/archives/speeches/1982/12982b.htm>, 30 May 2014; Presidential Statement, at <http://www.reagan.utexas.edu/archives/speeches/1982/70982b.htm>, 30 May 2014.

28 J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive National Maritime Claims*, Newport: Navy War College, 1994, pp. 275~276.

29 Galdorisi and Vienna, *Beyond the Law of the Sea: New Directives for US Oceans Policy*, London: Preager, 1997, pp. 53, 62~63; McDougal and Turke, *Public Order of the Oceans - A Contemporary Law of the Sea*, New Haven: New Haven Press, 1987, p. 65.

the Sea (“Agreement on Part XI”) came into effect in 1994. However, the U.S. Senate Committee on Foreign Relations (“Foreign Relations Committee”) began to consider joining the Convention and held a public hearing for this purpose until 2003, which launched a domestic debate on whether the Convention was in accordance with its national interest. The debate was concerned with two issues: a. whether the Convention would restrict the U.S. navy’s freedom of actions, so as to impair its strategic and tactical operations; b. whether the Convention would impair the U.S. sovereignty if an entity in charge of seabed exploitation and dispute resolution was established within the U.N. framework. The debate groups were mainly divided into those supporting accession and those opposing it. The supporting group believed that principles reflected in the Convention were the foundation of the U.S.’s naval strategies, while the opposing group thought the convention did not give the U.S. navy hegemonic power.³⁰ Currently, the main reasons for not joining the Convention are that the United States’ Constitution has imposed some rigid requirements on the signing of international conventions on one hand, and that domestic opinions on accession are highly divided on the other hand.

1. The U.S. Constitution Provisions on Concluding International Treaties

Under the U.S. Constitution, the power to create treaties is shared between the President and the Senate. Art. 2 (2) of the U.S. Constitution provides that “[the president] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”.³¹ The U.S. President clearly has the power to make treaties. “He appoints and instructs the negotiators and follows their progress in negotiation. If he approves what they have negotiated, if he has the advice and consent of the Senate, he can ratify, “make” the treaty.”³² However, in real American political life, the term of “by and with the Advice and Consent of the Senate” became a very complicated political and legal issue. “The requirement of Senate consent is an important ‘check’ on Presidential

30 Scott Gerald Borgerson, *The National Interest and the Law of the Sea*, No. 46, New York: Council on Foreign Relations, 2009, pp. 4~5.

31 The Chinese version of the U.S. Constitution, see Alexandra Hamilton et al, translated by Cheng Fengru et al, *The Federalist*, Beijing: Commercial Press, 1995, p. 459. (in Chinese)

32 Louis Henkin, *Foreign Affairs and the Constitution*, New York: Foundation Press, 1972, p. 130.

power to create foreign policy through treaties.”³³ The Senate leads the approval of treaties. It is full of political overtones.³⁴ In the approval of treaties, the Senate always offers its recommendations that may have an impact on the reservation, interpretation, unilateral amendment, and the limitation on treaty consequences.³⁵ Thus, both approvals and recommendations are outcomes of games played by political parties and interest groups. The U.S.’s efforts throughout history in attempting to obtain accession to the Convention show the complexity of its domestic politics relating to the ratification of treaties.

2. The U.S. Executive Branch Supports Accession to the UNCLOS

Since the Agreement on Part XI made a change in the seabed exploitation regime, the U.S. government started to have a positive attitude towards signing the Convention. It had even considered the change as a victory of American diplomacy.³⁶ President Clinton expressed that, as stated in a letter to the Senate in 1994, “[t]he Convention carefully balances the interests of States in controlling activities off their own coasts with those of all States in protecting the freedom to use ocean spaces without undue interference.” He also believed that the Convention advanced the U.S. national interest in maintaining its global maritime power. The U.S. government had a negative attitude towards the regime for the development of the “Area under the Convention for quite some time. Nevertheless, the Clinton administration asserted that the “International Seabed Authority”, as described in the Agreement on Part XI, had a decision-making structure to protect U.S. interests. Furthermore, the Council of the International Seabed Authority ensured the United States’ seat and followed the principle of unanimous agreement. In addition, it cancelled the provisions relating to the mandatory transfer of technology. Therefore, President Clinton recommended that the Senate should

33 Louis Henkin, *Foreign Affairs and the Constitution*, New York: Foundation Press, 1972, p. 132.

34 Robert Friedlander, translated by Liu Xianming, The U.S. Senate Treaty Ratification and its Potential Influence on the Convention on the Law of the Sea, in *University of Virginia the Law of the Sea Papers, A Collection of Selected COLP Annual Conference Forum 1977-2007*, Xiamen: Xiamen University Press, 2010, p. 273. (in Chinese)

35 Louis Henkin, *Foreign Affairs and the Constitution*, New York: Foundation Press, 1972, p. 133.

36 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, p. 613.

give advice and consent for accession to the Convention.³⁷ Ever since, during both Bush's republican administration and Obama's democrat administration, the U.S. government consistently pushed the Senate to accept the accession to the Convention. The U.S. State Council has firmly and repeatedly expressed the necessities and benefits of joining the Convention to the Congress. William Howard Taft IV, Chief Legal Advisor to the U.S. Department of State, stated on the hearings held by the U.S. House Committee on Foreign Affairs of the U.S. House of Representatives that joining the Convention will advance the interests of the U.S. military, that it will preserve and elaborate the rights of the U.S. military to use the world's oceans to meet national security requirement, and that the U.S. benefits more than any other nation from the navigational provisions of the Convention."³⁸ He said that, at the time he made his speech, the U.S. had worked both diplomatically and operationally to promote the provisions of the Convention as reflective of customary international law. The U.S. would be in a stronger position invoking a treaty's provisions as legal reference for actions, participating in all the Convention's institutions, and defending its national interest if it were a party to the Convention.³⁹ Mr. Taft also mentioned certain risks of not acceding to the Convention, such as the fact that customary international law may be changed by State practices over time.⁴⁰

John Negroponte, the U.S. Assistant Secretary of State, provided a written testimony to the hearings held by the U.S. House Committee on Foreign Affairs of the U.S. House of Representatives in 2007. He listed urgent reasons for the U.S.

37 President Clinton made such an evaluation in the letter to the U.S. Senate on 7 October 1997. See Treaty Doc. 103-39: United Nations Convention on the Law of the Sea, at <http://www.foreign.senate.gov/download/?id=8AB76600-4590-4931-8BAE-2658AD093C80>, 24 January 2014; also see Galdorisi and Vienna, *Beyond the Law of the Sea: New Directives for US Oceans Policy*, London: Preager, 1997, pp. 195~197; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1991~1999, p. 1559.

38 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2004, p. 674.

39 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2004, pp. 678~679.

40 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2003, pp. 723~724; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2004, p. 679.

accession to the Convention. He stated that “the Convention has been in force for thirteen years... The Convention’s institutions are up and running, and we – the country with the most to gain and lose on law of the sea issues – were sitting on the sidelines”.⁴¹ He claimed that it was necessary for the U.S. to join the Convention immediately to lock in the very favorable provisions it achieved in negotiating the Convention. He believed that it would be risky to assume that they could preserve *ad infinitum* the situation upon which the U.S. relied at that time. His concern was that there was an increasing pressure from coastal States to augment their authority in a manner that would alter the balance of interests struck in the Convention.⁴²

After President Obama served as the U.S. president, he continued promoting the U.S. to join the Convention. Hillary Clinton, the U.S. Secretary of State, offered strong support for the U.S. accession to the Convention at many formal occasions, such as at the Senate Committee on Foreign Relations in 2009, 2010, and 2011.⁴³ She expressed that, having a seat at the table as a party would allow the U.S. to participate more effectively in the interpretation and development of the Convention and the ability to participate formally in its institutions.⁴⁴ She believed that the Convention had already gained wide domestic support, such as from the U.S. navy, Coast Guard, and the former succeeding Secretaries of State since the

41 For example, John Negroponte mentioned, “Commission on the Limits of the Continental Shelf” had received statements of claims to continental shelf from 9 States, and had made two recommendations, neither of which the U.S. had been involved in. The Recommendations made by the Commission were highly likely to create a precedent to the limits of the U.S. continental shelf in the future, either in a positive or negative manner. See Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, p. 620.

42 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, p. 617.

43 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2009, pp. 457~458; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2010, pp. 511~512; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2011, p. 405.

44 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2009, p. 458.

Reagan administration.⁴⁵ She emphasized on an urgent need to join the Convention in the hearings held by the Senate Committee on Foreign Relations on 23 May 2012. The compelling reasons are as follows: a. under the Convention, a State party to the Convention was able to claim sovereignty over its continental shelf far out into the ocean beyond 200 nautical miles from shore. As a non-party to the Convention, however, the U.S. was unable to use the procedure in the Convention; b. Only when the U.S. becomes a party to the Convention can it enable its companies to engage in deep seabed mining; c. The reserved seat in the Council of International Seabed Authority remained vacant unless the U.S. occupied it. She also found as unfounded critics that accession to the convention would impair U.S. security and surrender its sovereignty.⁴⁶

3. Situations Relating to U.S. Senate's and the Senate Committee on Foreign Relations' Ratification of the Convention

As stated above, the U.S. Senate dominates the treaty approval process. In practice, however, it is the Senate Committee on Foreign Relations that initiates this procedure and deals with the conditions under which a treaty is approved, and reservations or amendments are made. Then it arrives to the Senate for vote. As a matter of fact, the Senate Committee on Foreign Relations, where political relations are always predominant,⁴⁷ plays more important role in the approval of treaties. It also had considerable influence on the U.S. accession to the Convention. When serving as the chairman of the Committee, Conservative Senator Jesse Helms firmly refused to discuss the Convention due to his strong hostile attitude towards multinational cooperation and international organizations such as the UN. After Jesse Helms retired in 2002 and Richard G. Lugar served as chairman, the Committee switched to a positive attitude towards accession to the Convention and

45 Myron H. Nordquist et al eds., *The Law of the Sea Convention – US Accession and Globalization*, Hague: Martinus Nijhoff Publishers, 2012, p. 17.

46 Secretary of State, Testimony of Hillary Clinton, at http://www.foreign.senate.gov/imo/media/doc/REVISED_Secretary_Clinton_Testimony.pdf, 24 January 2014.

47 Robert Friedlander, LIU Xianming ed., *The U.S. Senate Treaty Ratification and its Potential Influence on the Convention on the Law of the Sea*, in *University of Virginia the Law of the Sea Papers, A Collection of Selected COLP Annual Conference Forum 1977-2007*, Xiamen University Press, 2010, p. 273 (in Chinese). For the U.S. Senate Foreign Relations Committee, see Li Qikeng, *Stage and Backstage: the U.S. Senate Foreign Relations Committee Chairman and the U.S. Diplomacy*, Beijing: World Knowledge Press, 2008. (in Chinese)

held a hearing in 2003.⁴⁸ However, even though it was passed in the Committee, the Senate could still shelve the treaty.⁴⁹ Looking at the Senate's history in dealing with the Convention, one can see that President Clinton proposed that the Senate should consent to the approval of the Convention in 1994. Yet, it was not until 2004 and 2007 that the Committee adopted the proposals respectively, advising the Senate to approve the Convention and the Agreement of Part XI.⁵⁰ However, the Senate neither voted for the 2004 proposal or the 2007 proposal. According to the Standing Rules of the Senate, Art. 30 (2)⁵¹, the proposals were returned to the Committee. There is, *status quo*, no further action taken after the last public hearing held by the Committee on 28 June 2012.

4. Highly Divided Domestic Opinions

In contrast with the U.S. administration that held a positive attitude towards accession to the UNCLOS, the U.S. domestic opinions have been highly divided. Both the supporting group and the opposing faction have a considerable number of followers and although progress has been blocked in the Senate, such divergent domestic opinions could not be neglected.

Those from the U.S. political, commercial, and military circles, who have much knowledge of the law of the sea, have a quite positive attitude towards accession to the Convention.⁵² For example, the Senate Committee on Foreign Relations called the U.S. business giants for a public hearing on 28 June 2012.

48 James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics*, Oxford: Oxford University Press, 2011, pp. 154~156; John A. Duff, The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification, *Ocean and Coastal Law Journal*, Vol.11, 2005, No. 1, pp. 1~36.

49 Robert Friedlander, translated by Liu Xianming, The U.S. Senate Treaty Ratification and its Potential Influence on the Convention on the Law of the Sea, in *University of Virginia the Law of the Sea Papers, A Collection of Selected COLP Annual Conference Forum 1977-2007*, Xiamen University Press, 2010, p. 273. (in Chinese)

50 See Executive Report 108-10, at <http://www.foreign.senate.gov/download/?id=564DC8D7-F536-4CCB-B0CE-3FD8A1C7CC6C>, 24 January 2014; Executive Report 110-09, at <http://www.foreign.senate.gov/download/?id=AF77EAB3-DEB5-4DCA-8DBD-ABB3CB082264>, 24 January 2014.

51 The Standing Rules of the United States Senate, Rule 30, Section 2 reads as: "Treaties transmitted by the President to the Senate for ratification shall be resumed at the second or any subsequent session of the same Congress at the stage in which they were left at the final adjournment of the session at which they were transmitted; but all proceedings on treaties shall terminate with the Congress, and they shall be resumed at the commencement of the next Congress as if no proceedings had previously been had thereon." Rules of the Senate, at <http://www.rules.senate.gov/public/index.cfm?p=RuleXXX>, 24 January 2014.

52 Myron H. Nordquist, et al, eds., *The Law of the Sea Convention - US Accession and Globalization*, Hague: Martinus Nijhoff Publishers, 2012, pp. 24~29, 41~60.

Those who participated were Thomas J. Donohue (the President and CEO of U.S. Chamber of Commerce), Jack N. Gerard (President and CEO of American Petroleum Institute), Lowell C. Mcadam (Chairman and CEO of Verizon Communications Incorporation), Jay Timmons (President & CEO of National Association of Manufacturers). They were all supporters. They believed that: a. joining the Convention would fit into the U.S. security and economic interests and could provide a stable and certain legal basis for investment of American companies. Security and economic interests under the Convention could be given only when accession to UNCLOS is completed;⁵³ b. It would advance the U.S. in exploiting maritime petroleum, ensure transportation of U.S. energies, ensure deserved profits from seabed exploitation, and offer an opportunity to hold a leading role;⁵⁴ c. The Convention regulated the freedoms of laying, protection, and maintenance of submarine cables. Accordingly, accession to the Convention would help the U.S. protect these communication utilities and protect related rights;⁵⁵ d. It would provide new opportunities to exploit energies and get raw materials that were the key to manufacture, so as to reduce the cost of American manufacture.⁵⁶

The U.S. military giants attended the hearings held by the Senate Committee on Foreign Relations on 14 June 2012. The six military senior officers attended the hearings were called “24 Star Military Witnesses”.⁵⁷ Generally speaking, they believed that accession to the Convention could ensure the U.S. navy’s freedoms of navigation and overflight at oceans, gain a more prominent voice in maritime affairs, and help to prevent other States from changing the well-established and recognized law of the sea.⁵⁸

53 Testimony from Thomas J. Donohue, President and CEO of U.S. Chamber of Commerce, at <http://www.foreign.senate.gov/imo/media/doc/Donohue%20Testimony.pdf>, 24 January 2014.

54 Testimony from Jack N. Gerard, President and CEO of American Petroleum Institute, at http://www.foreign.senate.gov/imo/media/doc/REVISED_Gerard_Testimony.pdf, 24 January 2014.

55 Testimony of Lowell C. Mcadam, Chairman and CEO of Verizon Communications Inc., at <http://www.foreign.senate.gov/imo/media/doc/McAdamTestimony2.pdf>, 24 January 2014.

56 Testimony of Jay Timmons, President & CEO of National Association of Manufacturers, at <http://www.foreign.senate.gov/imo/media/doc/McAdamTestimony2.pdf>, 24 January 2014.

57 “24 Star” Military Witnesses Voice Strong Support for Law of the Sea Treaty, at <http://www.foreign.senate.gov/press/chair/release/24-star-military-witnesses-voice-strong-support-for-law-of-the-sea-treaty>, 24 January 2014.

58 The Law of the Sea Convention (Treaty Doc. 103-39): Perspectives from the U.S. Military, at <http://www.foreign.senate.gov/hearings/hearing/?id=e07caca7-5056-a032-52a8-20ed788ca773>, 24 January 2014.

However, there are a considerable number of people believing that the Convention does not meet or guarantee American interests. Some of them are concerned that the International Tribunal for the Law of the Sea may have compulsory jurisdiction over the U.S. operations at sea, that the Convention may place restrictions on its navy deployment, and that it may prove to be an obstacle in enforcing the “PSI” within the framework of the Convention, which are all important national interests of the U.S. “The U.N. Convention on the Law of the Sea is not simply a bad deal for the U.S. It is a very bad precedent. It is a dangerous precedent at a time when other countries are eager to hand over their own sovereignty to international institutions, in the hope of constraining American sovereignty.”⁵⁹ Some concerns even represent the continuation of the negative opinions that the Reagan administration held towards the Convention.⁶⁰ Some strongly oppose to the accession due to ideology. For example, when they hold a hostile and distrustful attitude towards the UN, they oppose accession to the Convention merely because negotiations were led under the UN.⁶¹

Other opponents believe that it is not necessary for the U.S. to join the Convention to maintain its key national interests, such as freedoms of navigation and overflight. As a matter of fact, the U.S. has already gained these rights through “FNP”, while accession to the Convention would not guarantee these rights.⁶² Some opponents have a considerable influence and many of them come from influential think tanks with strong voices. Thus, their voices cannot be ignored.

B. Seeking Legal Basis of Rights outside the UNCLOS

Though the current U.S. administration has made a couple of efforts towards accession to the Convention, the Senate has never held a formal vote for approval, and the agenda always remains at the Senate Committee on Foreign Relations.

59 Jeremy Rabkin, *The Law of the Sea Treaty: A Bad Deal for America*, at <http://cei.org/pdf/5352.pdf>, 15 November 2013.

60 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2004, pp. 680~686.

61 David Weigel and White Whale, *Why the Black Helicopter Crowd Goes Crazy over the Law of the Sea Treaty*, at http://www.foreignpolicy.com/articles/2012/05/25/white_whale, 24 January 2014.

62 Steven Groves, *Accession to the U.N. Convention on the Law of the Sea Is Unnecessary to Secure U.S. Navigational Rights and Freedoms*, at https://thf_media.s3.amazonaws.com/2011/pdf/bg2599.pdf, 7 December 2012.

The complexity behind this issue is the highly divided domestic opinions towards accession. Actually, a fair proportion of opposing views are deemed to be unreasonable and even inconsistent with the essence of the Convention. However, a considerable part of congressmen do not have a good understanding of this very highly technical Convention. It is difficult for the administration to use the majority of its political resources to convince the Senate to consent to join the Convention. If priority is given to other issues on the U.S. president's agenda, then there will be little hope of promoting the accession to the Convention.

The U.S. administration believes that the Convention is sufficient to ensure its national interests. It shows that the order for the seas recognized by the U.S. administration is in consistent with that established by the Convention. If the U.S. joined the Convention, then the order for the seas under the Convention would become the core of the order shaped by the US. But looking into the United States' current political atmosphere and issues, President Obama would probably not use resources to promote accession to the Convention in the remainder of his term. Therefore, it is unlikely that the United States will join the Convention in the foreseeable future. This would raise another question: what is the legal basis for the U.S. to have a set of rights, privileges, powers, and immunities before it joins the Convention? The answer relates to how the U.S. attempts to shape a favorable legal order for the seas outside the UNCLOS.

IV. The United States' Strategies to Shape the Legal Order for the Seas

If considering the areas of seas within national jurisdiction, the United States is in a very profitable position. The UNCLOS constitutes the source where the U.S. gains benefits; notwithstanding that it is not a party to the Convention. The U.S. has frequently quoted the Convention in its diplomatic notes, implying that it has taken the Convention as the legal basis for its rights. It shows its acceptance of the Convention to some degree. Generally speaking, the U.S. has employed three strategies to initiate and maintain a favorable legal order for the seas. First of all, it has been asserted by the U.S. that many provisions of the Convention are parts of customary international law. As a non-party to the Convention, the U.S. is still bound by customary international law and has rights derived from it. Secondly, the U.S. has strengthened its ocean policies and claims through its State practice

of “FNP”, especially with respect to “freedoms of navigation and overflight”.⁶³ Thirdly, to seek national interests in anti-terrorist and in preventing proliferation of WMD, the U.S. has asserted its jurisdiction over vessels flying flags of other States at high seas through a series of bilateral agreements, in an attempt to break the principle of “freedom of the seas” under customary international law.

A. Claims on the Basis of Customary International Law

The Preamble of the Convention, Para. 7, mentions that provisions in the Convention are aimed at the codification and progressive development of the law of the sea. However, the Convention itself does not make a clear expression of which provision belong to customary international law. It is quite difficult to define it and it requires identifying and interpreting related rules on certain occasions.⁶⁴

Restatement of the Law – The Foreign Relations Law of the U.S., Third (“the Restatement”), which reflects the major view of the United States’ international law academic community, found that the 1982 UNCLOS has many provisions identical with those of the 1958 Geneva Conventions on the Law of the Sea (“the 1958 Conventions”). The U.S. was a party to the 1958 Convention that contained a multitude of rules of customary international law. Provisions of the 1958 Convention that were not customary international law at that time became customary international law later in the 1982 UNCLOS, for these provisions had been accepted by the United Nations Third Conference on the Law of the Sea, and had an impact on and reflected State practice.⁶⁵ However, the Restatement had a cautious view that the regime for ships, innocent passage in territorial seas, transit passage in straits and archipelagic waters, the regime for EEZ, and the regime for continental shelf were customary international law.⁶⁶ As for other details such as special provisions under the regime for EEZ, they were not reflections of customary

63 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2004, p. 678.

64 Dupuy Vignes, *A Handbook on the New Law of the Sea, Vol. 1*, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, p. 81.

65 The American Law Institute, *Restatement of the Law – The Foreign Relations Law of the United States, Third, Vol. 2*, St. Paul: The American Law Institute Publishers, 1987, p. 5.

66 The American Law Institute, *Restatement of the Law – The Foreign Relations Law of the United States, Third, Vol. 2*, St. Paul: The American Law Institute Publishers, 1987, p. 6, 34, 37, 38, 51, 56, 58, 69.

international law.⁶⁷

In the U.S. State practice, when it asserts a right, it admits that some provisions are part of customary international law while others are not, depending on circumstances. Since the UNCLOS was open for signature in 1982, the U.S. has had an official opinion on which provisions of the Convention are part of customary international law, as stated below:

1. Innocent passage under Art. 24 of the Convention, transit passage in straits as stated in its Art. 42 and Art. 44, transit passage in archipelagic waters as prescribed in its Art. 54, and rights and obligations of coastal States in EEZ as provided in its Art. 56.⁶⁸

2. Scientific research within territorial seas: according to customary international law, coastal States have the power to control the scientific research conducted within their territorial seas. Foreigners are required to obtain permission to perform scientific research in these areas.⁶⁹

3. Security interests of coastal States: in pursuing security, coastal States are not allowed to enforce their laws beyond the limits of their territorial seas. Customary international law as reflected in the Convention does not recognize coastal States as having the power to enforce their domestic security laws or to restrict freedoms of navigation and overflight beyond the limits of their territorial seas.⁷⁰ In times of peace, customary international law does not recognize coastal States' claim for power or rights to restrict freedoms of navigation and overflight beyond the limits of their territorial seas for security reasons.⁷¹

4. Rights of coastal States within contiguous zones: the customary international law envisaged by Articles 33 and 56 of the Convention accept the idea that coastal States may not enforce their fiscal, sanitary, customs, and immigration laws and regulations beyond 24 nautical miles from the baselines from which the breadth of

67 The American Law Institute, *Restatement of the Law – The Foreign Relations Law of the United States, Third*, St. Paul: The American Law Institute Publishers, Vol. 2, 1987, p. 56.

68 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2001, p. 700.

69 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1991-1999, pp. 1585~1592.

70 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1989-1990, pp. 465~466.

71 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1989-1990, p. 467.

the territorial sea is measured.⁷²

5. Transit passage in straits reflects customary international law.⁷³ The U.S. does not believe that customary international law permits a State to unilaterally and without prior international approval construct a fixed bridge over an international strait in which passage, in many instances is only available through a deep water route.⁷⁴

6. The regime for archipelagic waters: provisions relating to the regime for archipelagic waters under the UNCLOS reflect customary international law.⁷⁵ Archipelagic States recognized by the customary international law do not include mainland States without coastal archipelagos such as Denmark and the U.S. Thus, straight baselines cannot be drawn around mainland States' coastal archipelagos.⁷⁶

7. The stipulations authorize coastal States to claim priority rights and jurisdiction of exploration and exploitation of natural resources in the EEZ belong to customary international law.⁷⁷

8. Freedoms of navigation in the EEZ, including military survey activities and intelligence gatherings, are part of customary international law.⁷⁸

One of the most controversial issues is how to define freedoms of navigation and overflight in the EEZ. The U.S. believes that freedoms of navigation and overflight of other States, as provided in the UNCLOS, Art. 58, as well as the provision that the coastal State shall have due regard to the rights and duties of other States under Art. 56(2), are both customary international law.⁷⁹ However,

72 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1989-1990, p. 470.

73 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1991-1999, p. 1586.

74 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1991-1999, p. 1591.

75 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1989-1990, p. 473.

76 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1991-1999, p. 1598.

77 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, p. 647.

78 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2001, pp. 698-699; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2004, p. 688.

79 *The American Law Institute, Restatement of the Law – The Foreign Relations Law of the United States, Third, Vol. 2*, St. Paul: The American Law Institute Publishers, 1987, p. 58.

what are the definitions of “navigation” and “overflight” in the EEZ? One needs to interpret such terms when applying them, and the interpretation itself shows a disagreement between the U.S. and other States.⁸⁰ The U.S. defines “freedom of navigation” and “freedom of overflight” as part of the freedom of using the high seas in a traditional manner, including, anchoring, landing or taking off of any aircraft, the operation of any military devices, intelligence gatherings, military exercises, military surveys and other military activities.⁸¹

Among customary international law claims as described above, positive claims give the U.S. and other States the rights to the seas they deserve, which constitute the basis for the U.S. to assert rights as a non-party to the Convention. On the opposite, negative claims deny the legal basis for some countries to assert rights, which grants the US certain freedom of operations, especially for the freedom of navigation that has drawn most of its attention. It means that the U.S. has found a legal basis for the rights, powers, privileges and immunities that it intends to have.

The U.S. claims based on customary international law have an effect on constraining the rights of coastal States. As such, the U.S. will enjoy more freedom, as a major maritime power, and will be able to take more advantage of its powerful navy. For example, Littoral Combat Ship, placed by the U.S. navy in Southeast Asia and Asia-Pacific areas, has the capacity to freely conduct offshore activities in other countries as well as to perform investigations and intelligence gatherings in peacetime.

B. Freedom of Navigation Program (FNP)

The FNP is a U.S. maritime strategy that is made and implemented to maintain American status as a major maritime power and pursue its national interests, under the circumstance that the U.S. would not join the UNCLOS. The main idea is to declare its position of treating the freedom of navigation as the core of the U.S. maritime policy. At the same time, it is also a defense against “excessive” maritime

80 Jing Geng, *The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS*, *Utrecht Journal of International and European Law*, Vol. 28, 2012, pp. 22~30.

81 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2001, pp. 704~706; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, p. 648.

rights raised by other countries (in the view of the U.S.).⁸² The Program began in the final year of the Carter administration in 1979. Advanced by the Reagan administration and the Bush administration, it turned out to be one of the most important principles to guide the U.S. navy in peacetime.⁸³ The Program has been conducted from three dimensions. Firstly, the U.S. asserts its sovereignty by armed operations. In other words, the U.S. navy and air forces exercise their “freedoms of navigation and overflight” in related areas of the seas. Secondly, if the operations, as stated in the first dimension, are restricted, then the U.S. State Council will object through diplomatic protests against “excessive claims” raised by other States. The U.S. claims on the basis of customary international law, as described above, have been mostly raised in diplomatic notes delivered to the other relevant States.⁸⁴ Thirdly, the U.S. State Council or Department of Defense will have consultations with other countries in order to promote stability and to keep consistent with the Convention. The first two dimensions constitute the key of the Program. Claiming and strengthening freedom of navigation as customary international law is not a mere abstract and isolated declaration but real actions through practices. Under customary international law theory State Practice is seen as a “material element” and *opinio juris* as a “mental factor”.

The FNP, in essence, aims to strengthen the United States’ maritime claims through the actions of its powerful navy and air forces. The scope of these actions includes territorial seas (performance of “innocent passage” as stated in the UNCLOS, Art. 17), EEZs (exercise of “Freedoms of navigation and overflight” under the UNCLOS, Art. 58 (1)), international straits (exercise of “transit passage” as stated in the UNCLOS, Art. 38), and archipelagic waters (exercise of “innocent

82 Michael N. Schmitt ed., *Law of Military Operations- Liber Amicorum Professor Jack Grunawalt*, New Port: Navy War College, 1998, pp. 113~127; J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive National Maritime Claims*, Newport: Navy War College, 1994, pp. 255~256; Steven Groves, Accession to the U.N. Convention on the Law of the Sea Is Unnecessary to Secure U.S. Navigational Rights and Freedoms, at https://thf_media.s3.amazonaws.com/2011/pdf/bg2599.pdf, 12 December 2012.

83 For the official document of the U.S. FNP, see National Security Presidential Directives 72, 83, 265 issued by the Reagan administration and National Security Presidential Directives 49 issued by the Bush administration, at <http://www.fas.org/irp/offdocs/direct.htm>, 7 December 2012. Also see Galdorisi and Vienna, *Beyond the Law of the Sea: New Directives for US Oceans Policy*, London: Praeger, 1997, pp. 81~85.

84 For information on the United States’ exercising of its rights and protesting against other States before 1994, see J. Ashley Roach and Robert W. Smith eds., *United States Responses to Excessive National Maritime Claims*, Washington D.C.: U.S. Department of State, Office of Ocean Affairs, 1994.

passage” and “transit passage in archipelagic waters” as provided in the UNCLOS, Art. 52 and Art. 53) of other countries. Through actions of its navy and air forces, the U.S. fought a pitched battle to clarify its stand of not accepting any restrictions that other countries place on, when there are divided interpretations to freedoms of navigation and overflight, or when coastal States incorporate large areas of water into the areas of their internal waters by drawing straight baselines, or when coastal States attempt to place restrictions on the scope of actions of the U.S. warships for the security reasons. Take an example of intelligence gatherings within the EEZ, the U.S. does not believe that the Convention prohibits, regulates, or empowers coastal States to regulate intelligence gatherings within the EEZ. On the opposite, it claims that the Convention ensures freedoms of navigation and overflight as freedoms of high seas, including the right of intelligence gathering. However, such a position is clearly in contrast with that of other States, such as Bangladesh, Brazil, Cape Verde, India, Malaysia, Maldives, Mauritius, Pakistan and Uruguay, who have made reservations in the signature, ratification, and accession to the Convention, aiming at generally prohibiting other States from conducting military activities in the EEZ.⁸⁵ As stated above, when it is a non-party to the Convention, the U.S. claims in its diplomatic notes that the rights it exercises are derived from customary international law. In 2004, Chief Legal Advisor Taft stated to the U.S. Senate Select Committee on Intelligence, that the U.S. would earn a good position against illegal claims by coastal States if it became a party to the Convention.⁸⁶

Since 1979, the United States’ armed forces began to exercise freedoms of navigation and overflight at its definition and understanding, and questioned the maritime claims raised by other countries. Around 30~40 conflicts relating to such questioning occur each year.⁸⁷ The U.S. declared its position not only against its military allies, such as South Korea,⁸⁸ but also against military competitors, such as

85 See Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, pp. 908~969.

86 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2004, p. 688.

87 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2002, pp. 740~742.

88 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2001, pp. 698~699.

China,⁸⁹ and also against potential strategic partners, such as India.⁹⁰ It shows that the U.S. concentrates on the initiation and maintenance of a legal order for the seas in its favor. It is the primary purpose of its actions, which will not be altered due to its friendly relationships with other countries.

C. Going beyond the Limits of the Traditional Principle of Jurisdiction at Seas through Bilateral Agreements

Drug trafficking and piracy have been for a long period of time two important factors that impact on maritime security. The proliferation of WMD, such as nuclear, biological, chemical, and radioactive materials, through ocean shipping, has become a new factor since the end of the Cold War. It has been later considered to be an important factor endangering the United States' national security after the "9/11" attacks.⁹¹ Although it has overwhelming maritime power, the U.S. is not able to prevent such issues on its own. Besides, preventing the proliferation of WMD that can happen at sea is confronted with a couple of tough issues under the international law, of which the maritime jurisdiction is one.

1. Restrictions on the Principle of Flag State Jurisdiction

Vessels are considered the main tools that are used to exploit and use the seas. However, they are also main tools for drug trafficking, piracy, and proliferation of WMD. The most important principle with regard to jurisdiction over vessels at seas is the flag State jurisdiction principle, as mainly reflected in the UNCLOS, Art. 92. Only in special situations could port States or coastal States exercise their jurisdiction over foreign vessels in their ports, territorial seas, contiguous zones, and EEZs. At high seas, States are not allowed to exercise their jurisdiction over foreign vessels, unless under the circumstance that boarding is justified as stated in the UNCLOS Art. 110. That is to say, the right of boarding may only be exercised in a limited scope. Articles 92 and 110 are the essence of the freedom of navigation. However, State actors or non-State actors who conduct illegal

89 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, pp. 647~648.

90 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, pp. 649~650.

91 Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford: Oxford University Press, 2011, p. 149.

activities are also able to make use of such freedom.⁹² Considerable restraints have been made on the legal basis for the U.S. to prevent and fight against the proliferation of WMD through its powerful navy. A number of provisions in the UNCLOS are deemed to be the restrictions on coastal States to interfere with the freedom of navigation. However, on the other hand, many other provisions allow party-States to the UNCLOS, such as coastal States, to exercise their jurisdictions to regulate and enforce the laws and regulations allowed by the Convention.⁹³ However, the UNCLOS does not deal with the issue of proliferation of WMD. It is also impossible to seek customary international law from the UNCLOS as a legal basis.⁹⁴ In this regard, the Convention could not offer a sufficient legal basis, but places some restrictions instead.

UNCLOS, Art. 92(1) stated that only international treaties could alter the exclusive jurisdiction of the flag State. At first, the international community concentrated on cooperation between States when dealing with threats to maritime safety, as mentioned above. It emphasized the obligations of States to take actions through their domestic legislations. However, it did not make an arrangement for foreign vessels to “justify in boarding”.⁹⁵ The earliest effort from the international community was the Convention for Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (hereinafter “the 1988 Convention”).⁹⁶ But it fails to go beyond the traditional maritime jurisdiction and law enforcement power under international law. The U.S. has made great efforts to make arrangements in multinational and bilateral treaties in order to exercise its jurisdiction over and “justify in boarding” foreign vessels on seas.⁹⁷ For example, the 2005 Protocol to the Convention for Suppression of Unlawful Acts against the Safety of Maritime Navigation (hereinafter “the Protocol of 2005”), Art. 8, as amended, has a new

92 Michael A. Becker, The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea, *Harvard International Law Journal*, Vol. 46, 2005, p. 134.

93 Michael A. Becker, The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea, *Harvard International Law Journal*, Vol. 46, 2005, pp. 172~175.

94 Michael Byers, Policing the High Seas: The Proliferation Security Initiative, *American Journal of International Law*, Vol. 526, 2004.

95 Natalie Klein, Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford: Oxford University Press, 2011, p. 172.

96 For the Chinese version of the convention, see the People's Republic of China Foreign Ministry Department of Treaty and Law ed., *the People's Republic of China Multilateral Treaty Series*, Beijing: Law Press, 1994, pp. 414~423. (in Chinese)

97 Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford: Oxford University Press, 2011, p. 174.

clause regarding the intercepting and boarding of a suspect ship.⁹⁸ However, such intercepting or boarding still requires the consent or authorization of the flag State. The flag State or the requested State may refuse to grant such authorization or consent. Even if it agrees to authorize when signing the protocol, the flag State or the requested State is still entitled to withdraw the authorization at any time.⁹⁹ Furthermore, authorizations given by the flag State to the requesting State to stop and board the suspect ship do not necessarily allow the requesting State to exercise further jurisdiction over the ship, the crew, and its cargos. Taking as an example a prosecution case, it could not proceed unless the requesting State is able to establish its jurisdiction over the offences and the alleged offender in accordance with the situation as stated in Art. 6, which refers to the fact that the jurisdiction still reflects basic traditional elements, such as the nationality of the flag States, personal jurisdiction, territorial jurisdiction, and the injured State jurisdiction.¹⁰⁰ The Protocol of 2005, Art. 8 also considers the flag State to authorize the requesting State to exercise its jurisdiction over the arrested ship, cargos, and the crew. However, the consideration is still on the basis of the authorization of the flag State.¹⁰¹ Therefore, as stated in the 1988 Convention, Art. 9, "...nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag" is, actually, a restriction on intercepting and boarding suspect ships at seas.

Due to 9/11 attacks, terrorist attacks using nuclear explosive devices and nuclear materials upon the mainland is a growing concern in the U.S. The PSI, mostly driven by the U.S. in 2003, was, to some extent, a response to such a concern. "PSI" has a set of "interception rules" as a political agreement. Participating States willingly accept to take actions within their current legal regimes to prevent the transfer of WMD and related materials among State actors

98 Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, pp. 843–844.

99 For the English version of the convention, see Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, p. 844.

100 Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, pp. 841–842.

101 Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, p. 844.

and non-State actors.¹⁰² Initially, the PSI included 15 “core States”, and later expanded to over 60 supporting States.¹⁰³

On the issue of intercepting and boarding ships that are suspected of involvement in the proliferation of WMD, the PSI provides the principle that the participating State consents to take actions to board and search its own flag vessel, or to “seriously consider providing consent ... to boarding and searching of its own flag vessels by other States and to seize massive destructive weapons-related cargos.”¹⁰⁴

The PSI requires the participating States to intercept and search the suspect ships in their internal waters, territorial seas or contiguous zones. It also enforces conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.¹⁰⁵ Similar provisions also apply to suspect aircrafts.¹⁰⁶ The flag State could authorize other States to take such actions. However, it is not aiming at creating a right of intercepting foreign vessels on high seas. In accordance with the UNCLOS, the PSI participating States, whether as port States or coastal States, exercise their jurisdiction over vessels at sea on certain conditions. If the participating States take actions to board and search the suspect foreign vessels on the basis of their own judgments, it may conflict with general principles of international law, such as the innocent passage and the flag State jurisdiction. Strictly speaking, only shipping of WMD is not included in the situation of non-innocent passage.¹⁰⁷

102 For the PSI document, see Lowe and Talmon eds., *The Legal Order of the Oceans - Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, pp. 801~802. For the comments on PSI, see Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford: Oxford University Press, 2011, p. 172; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge: Cambridge University Press, 2009, pp. 235~238.

103 The 15 core States are Australia, Canada, France, Germany, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Singapore, Spain, Russia, the UK, and the U.S. See Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford: Oxford University Press, pp. 195~196.

104 Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, p. 804.

105 Art. 4(b) - (d) of the PSI document, see Lowe and Talmon eds., *The Legal Order of the Oceans - Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, p. 804.

106 Art. 4(e) of the PSI document, see Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, p. 804.

107 Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford: Oxford University Press, 2011, pp. 200~201.

2. Going beyond the Limits of the Flag State Jurisdiction through the Bilateral Ship Boarding Agreement

Under the umbrella of the PSI, the U.S. has signed PSI ship-boarding agreements with eleven “flags of convenience” countries in order to escape this legal dilemma.¹⁰⁸ These countries include Antigua and Barbuda, Bahamas, Belize, Cyprus, Liberia, the Marshall Islands, Malta, Mongolia, Panama, St. Vincent and the Grenadines, and Croatia.¹⁰⁹ Large cargo ships that are registered in Liberia and Panama occupy fifty percent of 50,000 vessels in the world. If adding the Marshall Islands, the total dead weight tonnage of the commercial shipping fleet of the three countries represents more than fifty percent of the world’s total. The legal authority granted under the boarding agreement is limited to intercepting vessels suspected of transporting WMD, their delivery systems, or related materials. It also allows one party to request the other party to confirm the nationality of the suspect vessel and, upon confirmation, to authorize boarding, searching and possible detention of the vessel and its cargo.¹¹⁰

One can notice that the US-Liberia and the US-Panama PSI ship-boarding agreements have special provisions that if one party has not received explicit consent from the other party after two hours of sending a request, then the requesting party will be deemed to have received the authorization to intercept, search, and seize the vessel and its cargo. Differently, the US-Marshall Islands ship-boarding agreement allows four hours as a waiting period. Such arrangements turn authorization of the flag State case by case into a blank and general authorization on the basis of an implicit consent. The flag State has to withdraw the authorization case by case if it intends to do so.¹¹¹

108 For the U.S. model of such agreement, see Roach, J. Ashley, Proliferation Security Initiative (PSI): Countering Proliferation by Sea, in Nordquist Myron H. et al. eds., *Recent Developments in the Law of the Sea and China*, Leiden: Martinus Nijhoff Publishers, 2006, pp. 360-415.

109 PSI ship-boarding agreements signed by the U.S. and other eleven countries, at <http://www.state.gov/t/isn/c27733.htm>, 1 May 2013.

110 Michael A. Becker, The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea, *Harvard International Law Journal*, Vol. 46, 2005, p. 182.

111 The U.S.-Liberia PSI Ship Boarding Agreement, Art. 4(3)(d), at <http://www.state.gov/t/isn/trty/32403.htm>, 15 November 2013; The U.S.-Panama PSI Ship Boarding Agreement (2004) is a revision of the U.S.-Panama Supplementary Arrangement on U.S. Coast Guard Assistance signed in 2002, whose Art. 10(6) is a blank authorization on the basis of an implied consent, at <http://www.state.gov/t/isn/trty/32859.htm>, 15 November 2013; The U.S. - Marshall PSI Ship Boarding Agreement, Art. 4(3)(d), at <http://www.state.gov/t/isn/trty/35237.htm>, 15 November 2013.

As for its effect, the requested party is required to expressly decline the authorization if it intends to decline. In practice, developed countries have the capacity to pose an influence on domestic policies of States that are open for the registration of vessels. It is hard to imagine how countries, such as Liberia, Panama, or the Marshall Islands, could decline the U.S. requests for authorization. It is obvious that such countries severely depend on American shipowners and ports, as well as the commercial interests provided by the U.S.¹¹²

Another effect is to further exercise jurisdiction over the detained people, vessel, and cargos in accordance with the bilateral agreement after boarding the suspect vessel.¹¹³ In addition, this type of bilateral PSI ship boarding agreement authorizes the requesting State to dispose of suspect cargos.¹¹⁴ Though domestic laws of the main nuclear supplier States prohibit illegal purchase and selling, and transport WMD-related cargos, the largest States that are open for registration of vessels may not have such prohibitions in their domestic legal systems. It means that the U.S. is able to seize WMD-related cargos that are not prohibited by domestic laws of the flag State based on the explicit or implicit consent under the PSI ship-boarding agreements.¹¹⁵

Although it intends to establish a police system of non-proliferation relying on the PSI ship-boarding agreements, the U.S. could not justify its boarding of vessels of those States that are not PSI participants or those who have not signed ship-boarding agreements with the U.S. Due to rules of customary international law, such as the flag State's jurisdiction and freedom of navigation, the PSI initiated by the U.S. lacks a firm and sufficient legal basis unless authorization has been made by the flag State. In this regard, the flag State jurisdiction and freedom of navigation on high seas still restrict the boarding exercised by the U.S. at its will. Besides, the ship boarding by the U.S. may have an influence on and interference in the maritime interests of other non-party States, for instance, it may impair the

112 Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, *Harvard International Law Journal*, Vol. 46, 2005, p. 184, footnote No. 248.

113 For example, Art. 5 of the US-Marshall Agreement; see Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, p. 806.

114 For example, Art. 12 of the US-Marshall Agreement; see Lowe and Talmon eds., *The Legal Order of the Oceans – Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, p. 806.

115 Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, *Harvard International Law Journal*, Vol. 46, 2005, p. 185.

property interests of the purchasers and sellers of cargos. As for stateless vessels, the U.S. could justify its boarding and searching under the umbrella of the PSI since the vessel is not entitled to seek State protection.

Except the US-Marshall Islands Ship Boarding Agreement which empowers a third party to give authorization, a series of bilateral agreements with the U.S. as the core do not create a multi-enforcement system on the basis of mutual authorizations among the PSI participants. Generally speaking, the ship boarding agreements are reciprocal. However, it is probably only the U.S. which has sufficient resources to make use of authorizations under the US - Liberia, the US - Panama, and the US - Marshall Islands ship boarding agreements. In practice, only the U.S. has actual capacity of boarding the vessels of party States under their ship boarding agreements, while the latter are unable to do the same. In summary, enforcements of bilateral ship boarding agreements become the stage where the U.S. plays a monologue. Whether a State has sufficient naval power to maintain its interests is the distinction between a maritime power and a non-maritime power.

V. FNP and Military Activities in EEZ: Sino-US Conflicts

As mentioned at the start of this article, the United States' "EP-3" reconnaissance aircraft and the "Impeccable" surveillance ship conducted military activities in the South China Sea EEZ in 2001, which led to Sino-US severe diplomatic clashes. What the U.S. military aircraft and the surveillance ship had done were military activities in nature. Yet there is no definition of "military activity" in the UNCLOS except as mentioned in Art. 298(1)(b) that when signing, ratifying, or acceding to this Convention one State shall declare in writing that disputes concerning military activities shall be excluded from the jurisdiction of a court or tribunal under the Convention.¹¹⁶ So far, disputes relating to this area concern the interpretation and the scope of "freedom of navigation" and "freedom of overflight". From the United States' perspective, military activities are closely linked to the FNP, in other words, the former is at the very core of the latter.

A. Military Activities and FNP

116 Dupuy-Vignes, *A Handbook on the New Law of the Sea, Vol. 2*, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, pp. 1247~1249, 1251~1253.

The U.S. has continuously had a broad interpretation to the rights and freedoms exercised by other States in the EEZs of coastal States, using the term international waters to include high seas, EEZs, and contiguous zones. The geographic scope where the FNP is intended to carry out lies in “international waters”, as asserted by the U.S. “International waters” is a mere term initiated by the U.S., which is used to describe the sea areas that the U.S. believes should have the same freedom of navigation as the high seas. This term does not appear in the UNCLOS.¹¹⁷ The U.S. categorizes the EEZs into international waters in order to further claim that the regime for EEZs should not place any restriction on non-resources related activities at EEZs, such as special forces deployment, flight activities, military exercises, communications and space activities, intelligence gathering and investigation activities, marine data collection, weapon testing and firing. In this sense, the U.S. has a comprehensive claim to the freedom of high seas in the EEZ, being a part

117 A scholar comments, it is quite obvious that the term of “international waters” is inappropriate though it is likely used to describe areas where the U.S. believes to have freedom of navigation on high seas. EEZs are not international waters. Coastal States have certain rights and obligations with regard to EEZs, which makes these areas different from international waters. See Sam Bateman, *The Regime of the Exclusive Economic Zone: Military Activities and the Need for Compromise?*, in Ndiaye and Wolfrum eds., *Law of the Sea, Environmental Law and Settlement of Disputes*, Leiden/Boston: Martinus Nijhoff Publishers, 2007, pp. 570–571; also see Yu Zhirong, *Jurisprudential Analysis of the U.S. Navy’s Military Surveys in the Exclusive Economic Zones of Coastal Countries*, in Peter Dutton ed., *Military Activities in the EEZ – A U.S.-China Dialogue on Security and International Law in the Maritime Commons*, New Port: U.S. Naval War College, 2010, pp. 39–41.

of the theory relating to “residual high sea”.¹¹⁸ A more serious dispute is likely to occur between China and the U.S. in the future.¹¹⁹ Sino - US disputes are becoming increasingly obvious, with the U.S. diverting its strategic objectives to Asia.¹²⁰ The two issues below, especially, will cause great conflict.

1. Military Survey

One of the most controversial issues is the relation between “marine scientific research” and “military survey” in the EEZs. There is neither a definition of marine scientific research in the UNCLOS Part XIII which regulates “marine scientific research”, nor a definition of “military survey” in the whole Convention. The U.S. has a firm belief that military survey is not marine scientific research, so military surveys should not be subject to the jurisdiction of coastal States.¹²¹ “Military survey” is, to a great extent an expression employed by the U.S. It

118 The legal status of EEZ has been a debating issue for quite a long time. O’Connell believes that, it won’t come to any conclusion if the debate is always connecting to the relations between EEZ and high seas. The status of EEZ may be determined by comparison between political forces: if it still has a broad freedom of the sea, then it is fair to say the EEZ has the status of residual high seas. On the other hand, if priorities are reversed, then it can be also concluded that the EEZ is a concept *sui generis*. See D.P.O’Connell, *International Law of the Sea, Vol. 1*, Oxford: Oxford University Press, 1982, pp. 576-579. After around three decades, international academia generally thought that the EEZ had the legal status of *sui generis*. See Dupuy-Vignes, *A Handbook on the New Law of the Sea, Vol. 1*, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, pp. 275-288; Satya N. Nandan, et al eds., *UNCLOS 1982: A Commentary, Vol. 2*, Leiden: Martinus Nijhoff Publishers, 2002, p. 563; Sam Bateman, The Regime of the Exclusive Economic Zone: Military Activities and the Need for Compromise?, in Ndiaye and Wolfrum eds., *Law of the Sea, Environmental Law and Settlement of Disputes*, Leiden/Boston: Martinus Nijhoff Publishers, 2007, p. 570; Churchill and Lowe, *The Law of The Sea*, Manchester: Manchester University Press, 1988, pp. 136-137; Nordquist, et al eds., *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2009, pp. 54, 108. Some scholars also believe that, UNCLOS excludes the possibility of EEZ having the status of territorial seas, but there is clear evidence to show it has the same status as high seas. See Bárbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the Law of the Sea*, Leiden: Martinus Nijhoff Publishers, 1989, pp. 230-231.

119 Yann-huei Song, Declarations and Statements with Respect to the 1982 UNCLOS: Potential Legal Disputes between the United States and China after U.S. Accession to the Convention, *Ocean Development & International Law*, Vol. 36, 2005, pp. 261-289.

120 Julian Barnes, U.S. Tries to Reduce China Maritime Rights by the Convention, *News for Reference*, 10 May 2012, p. A14. (in Chinese)

121 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, pp. 647-648.

basically means to collect marine data for military purposes.¹²² The data collected is vital to submarine operations, anti-submarine warfare, mine warfare, and mine warfare detection. It includes data in the field of oceanography, marine geology, geophysics, chemistry, biology, and acoustics. The methodology to collect data used in military surveys is sometimes similar to that used in the marine scientific research. The U.S. takes this position to reserve the rights of conducting military surveys in areas outside of territorial seas and archipelagic waters of foreign States. The U.S. is concerned that the practice of giving notice or seeking for authorization in advance would offer a bad precedent that places restrictions on flexible and mobile military surveys.¹²³ In this regard, the U.S. claims that coastal States do not have jurisdiction over military surveys. Furthermore, it opposes any regulations by coastal States over military surveys.

Another controversial issue is in regard to “hydrographic surveys”. In the United States’ view, the objective of hydrographic surveys is to draw a marine map that would facilitate navigation. The U.S. believes that it should not be categorized as marine scientific research under the UNCLOS, whether it is used for military purposes or not. In this connection, it is not subject to the jurisdiction of coastal States.¹²⁴ Due to the dual purposes of data, a couple of Asia-Pacific scholars have drafted the Guidelines for Navigation and Overflight in the Exclusive Economic Zone, which separates hydrographic surveys from military surveys and offers as a suggestion that an authorization should be acquired before the investigation, and such authorization should be not refused unless it is in the cases described in the

122 J. Ashley Roach, translated by Chu Xiaolin, Defining Scientific Research: Marine Data Collection, in *University of Virginia the Law of the Sea Papers, A Collection of Selected COLP Annual Conference Forum 1977-2007*, Xiamen: Xiamen University Press, 2010, pp. 1725~1739. (in Chinese)

123 Sam Bateman, The Regime of the Exclusive Economic Zone: Military Activities and the Need for Compromise?, in Ndiaye and Wolfrum eds., *Law of the Sea, Environmental Law and Settlement of Disputes*, Leiden/Boston: Martinus Nijhoff Publishers, 2007, p. 577.

124 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 1989-1990, pp. 478~480; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2008, pp. 653~656.

UNCLOS, Art. 246(5).¹²⁵

There are two regulations to show the Chinese government's general position on marine scientific research. One is the Provisions on the Administration of Foreign-Related Maritime Scientific Research of the People's Republic of China drafted in 1996, and the other is the Ocean Observing Forecast Management Ordinance promulgated in 2012. Both regulations have the purpose of managing any foreign-related marine scientific research conducted within the areas that are subject to China's jurisdiction. It naturally includes any research and investigation made in China's EEZ. The regulations are, in essence, that any marine scientific research shall be subject to authorization of the related department of China, shall comply with related laws and regulations of China, and shall not endanger China.¹²⁶ As for conducting hydrographic surveys for military purposes in the EEZ, the Chinese government believes that it is an act of preparation for war against the coastal State and therefore a threat. Thus, it violates the principle of peaceful use of the oceans.¹²⁷ Technically, "military survey" of the U.S. version is not different from marine scientific research under the Convention.¹²⁸

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- 125 Sam Bateman, *The Regime of the Exclusive Economic Zone: Military Activities and the Need for Compromise?*, in Ndiaye and Wolfrum eds., *Law of the Sea, Environmental Law and Settlement of Disputes*, Leiden/Boston: Martinus Nijhoff Publishers, 2007, p. 579. For definitions of military survey and hydrographic survey, see *Guidelines for Navigation and Overflight in the Exclusive Economic Zone*, at <http://nippon.zaidan.info/seikabutsu/2005/00816/pdf/0001.pdf>, 3 March 2012.
- 126 Provisions on the Administration of Foreign-Related Maritime Scientific Research, Art. 4 (2), foreign party with the intention of conducting marine scientific research, working alone or together with Chinese party, shall gain the approval from Chinese Oceanic Administration Authorities, or gain approval of the State Council through Chinese Oceanic Administration Authorities, in accordance with related laws and regulations of the P.R.C.; Ocean Observing Forecast Management Ordinance, Art. 19 (2), international organizations, foreign organizations, or individuals, conducting ocean observing activities within the territories of the P.R.C. or other areas of sea that are subject to the jurisdiction of the P.R.C., shall abide by laws and regulations of the P.R.C. and shall not endanger national safety of the P.R.C. (in Chinese)
- 127 Gao Zhiguo, China and the Law of the Sea, in Nordquist, et al eds., *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2009, pp. 289, 294.
- 128 Chinese scholars believe that it makes no sense to separate "military survey" from "marine scientific research" in terms of methodology of conducting "military survey" as well as the vessels used to do so. Thus, "military survey" by the claim of the U.S. is supposed to belong to "marine scientific research". See Yu Zhirong, *Jurisprudential Analysis of the U.S. Navy's Military Surveys in the Exclusive Economic Zones of Coastal Countries*, in Peter Dutton ed., *Military Activities in the EEZ – A U.S.-China Dialogue on Security and International Law in the Maritime Commons*, New Port: U.S. Naval War College, 2010, pp. 41~44.

2. Military Reconnaissance

“Military reconnaissance”, as stated in this article, refers to the collection of military intelligence through military aircraft or vessels at sea. The U.S. labels military reconnaissance in EEZs of foreign States as “freedoms of navigation and overflight”.¹²⁹ Since the China-US air collision incident that happened in the South China Sea EEZ, the Chinese government gradually developed a clear picture of its position in this regard. The two governments held a negotiation concerning the U.S. reconnaissance aircraft that crashed into the Chinese military aircraft and related issues from 18 to 19 April in 2001 in Beijing, China. Lu Shumin, the head of the Chinese delegation and Director-General of North America and Oceania of Ministry of Foreign Affairs, expressed the Chinese government position. He stated, according to the provisions of the UNCLOS, overflight by one State in the EEZ of another State should not violate general rules of international law, such as the principles of sovereignty and inviolability of territorial integrity, should respect the sovereignty and territorial integrity of that State, and should not impair the national safety and peace order of that State. He further stated that, the activities conducted by the U.S. above China’s EEZ had severely impaired China’s interests of national safety and security, which had extended the limits of freedom of overflight, as stated in the Convention, and constituted an abuse of freedom of overflight. As he stated, the overflight activity conducted by the American aircraft over the coastal waters of China was not a regular overflight, but a reconnaissance to collect intelligence concerning China. In peacetime, as he believed, such activity constituted a threat to the national safety and peaceful order of China, constituted a challenge to Chinese sovereignty, and violated mutual respect for sovereignty and territorial integrity as general principles of international law.¹³⁰

129 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2001, pp. 704-706.

130 Chinese Foreign Ministry Post: China and the U.S. Hold Negotiations Concerning the Event that the U.S. Reconnaissance Aircraft Crashed into the Chinese Military Aircraft, at http://www.fmprc.gov.cn/mfa_chn/zyxw_602251/t11192.shtml, 24 January 2014. See also Chinese Foreign Ministry Spokesman Expressed the Chinese Government’s Position Concerning the Event: Foreign Ministry Spokesman Remarks on the Truth of the U.S. Military Reconnaissance Plane Crashing into the Chinese Military Aircraft and the Position of the Chinese Government, at http://www.fmprc.gov.cn/mfa_chn/fyrbt_602243/t11175.shtml, 24 January 2014; The Chinese Government Expresses Its Stern Stand to the U.S. Government Concerning the U.S. Military Reconnaissance Plane Crashing into the Chinese Military Aircraft, at <http://wcm.fmprc.gov.cn/pub/chn/pds/ziliao/zt/ywzt/2355/2379/t11176.htm>, 24 January 2014. (in Chinese)

From its perspective, the Chinese government does not deny that foreign military aircrafts are entitled to regular overflight above the EEZs of coastal States. As a reasonable deduction, the Chinese government does not deny regular navigation of foreign warships within China's EEZs, either. However, if the foreign warship or military aircraft is conducting a purposeful military activity against the coastal State, including reconnaissance targeted at a particular object, and then the Chinese government will assert that it is "not a regular overflight", but "an abuse of freedom of overflight that is beyond its scope as prescribed in the Convention".

Certainly, the contention does not focus on an abstract issue of the legal status of the EEZ. The Chinese government emphasizes the United States' specific and non-bona-fide activities that intend to impair Chinese military safety. However, as a matter of international law, it involves the legal status of EEZ, rights and obligations of coastal States and other States in the EEZ, as well as their nature and contents, the relation between freedoms of overflight and navigation and military activities, the conflicts between military reconnaissance and "peaceful use" as well as "peaceful purpose", and the scope of marine scientific research. In this regard, China and the U.S. have greatly different positions.¹³¹

Conflicts caused by military activities were not merely occurring between China and the U.S., but also between the U.S. and India. In 2004, "USS Bowditch", an American naval research vessel, conducted naval surveillance within India's EEZ around the Bay of Bengal. An Indian naval officer complained that the U.S. vessel went beyond the limitations of its rights at EEZ of a foreign State as stated in the UNCLOS, which clearly violated Indian laws and international law. An Indian member of Parliament gave a speech at Indian Parliament that the U.S. conducted spy activities within the Indian EEZ.¹³² In 2007, "Mary Sears", an American naval surveillance vessel, conducted activities again within India's EEZ, which raised a protest from India. The U.S. declared in its diplomatic note that it did not conduct any marine scientific research but conducted legal military activities in international waters, which conformed to customary international law and did not need to

131 See Erik Franckx, American and Chinese Views on Navigational Rights of Warships, *Chinese Journal of International Law*, Vol. 10, No. 1, 2011, pp. 187-206; Gao Zhiguo, China and the Law of the Sea, in Myron H. Nordquist et al eds., *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2009, pp. 293-294.

132 K. K. Agnihotri and S. K. Agarwal, Legal Aspects of Marine Scientific Research in Exclusive Economic Zones: Implications of the Impeccable Incident, *Maritime Affairs*, Vol. 5, 2009, p. 145.

acquire the authorization of the coastal State. In America's views, it was India that should show respect to freedoms of navigation and overflight of the U.S.¹³³

*B. Legal Status Analysis: the FNP and "Freedom of the Sea"
as Customary International Law*

The Sino-U.S. conflicts that arose from the U.S. military activities in China's EEZ are related to two strategies favorable to the U.S. that it has employed to shape a legal order for the seas. The first strategy is to claim that U.S. military activities are part of the freedom of high seas in accordance with customary international law.¹³⁴ The second strategy is to carry out the FNP, which, in essence, is to strengthen the United States' maritime claims with the "freedom of navigation" as core, through actions taken by its strong naval and air forces.

A rather complicated issue is, looking into elements of customary international law, whether an assertion can be established that customary international law allows States to conduct military activities in the EEZs of foreign States. In principle, the core of "freedoms of high seas" includes "freedoms of navigation and overflight". There is no doubt that such freedoms are part of customary international law. However, there is a major argument between States on what "freedoms of navigation and overflight" contain, especially when they concern military activities. Such an argument may lead to three legal consequences.

First, freedom of navigation including military activities, as asserted by the U.S. constitutes customary international law. In this case reservations or statements made by States when signing or acceding to the Convention and their related domestic legislations, which is against the U.S. assertion, turn out to be inconsistent with customary international law. It is difficult to conclude that the claims made by the States who have reservations on military activities in EEZs are illegal,

133 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, pp. 649~650.

134 Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute, 2001, pp. 704~706; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2007, p. 648.

considering the regime for EEZ as a result of compromise¹³⁵ and looking into the number of States who made reservations or statements when signing or acceding to the Convention have not changed their positions as a matter of fact. It should not be ignored that State practices after the signature or effectiveness of the Convention turn out to be diverse. Brazil, Uruguay, Cape Verde and other States made statements when signing or ratifying the Convention to oppose any military activity of other States in their EEZs.¹³⁶ In 1990, there were over 30 countries that created legislation to place restrictions on activities carried out by foreign warships in their EEZs. Countries, such as India, Pakistan, and Malaysia, request that military activities of foreign warships in their EEZs should obtain their prior consent.¹³⁷

Second, American actions constitute a persistent objector to customary international law or a budding customary international law as reflected in other States' actions, with an effect of preventing such actions from being incorporated into the customary international law. As similar to the first situation mentioned above, taking into account the disputes and compromise arising from the process of formulating the law of the sea, States as sea powers have never renounced their claims as a matter of fact.¹³⁸ It is unrealistic to reach the conclusion that the coastal State's claim reflects a new customary international law that prohibits foreign States from conducting any military activities in its EEZs.

Third, putting the traditional theory of "freedom of navigation" in UNCLOS as a new convention for interpretation, one has to consider that the breadth of territorial seas generally extends to 12 nautical miles, and that new ocean regimes have been formed, such as the one holding the EEZ as an independent sea area. Additionally, one should consider the aims and purposes of the UNCLOS itself.

135 Dupuy-Vignes, *A Handbook on the New Law of the Sea, Vol. 1*, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, pp. 275~288.

136 Lowe and Talmon eds., *The Legal Order of the Oceans - Basic Documents on the Law of the Sea*, Oxford: Hart Publishing, 2009, pp. 908~969; Office of the Legal Adviser of US State Department, *Digest of United States Practice in International Law*, Washington D.C.: International Law Institute and Oxford: Oxford University Press, 2004, p. 688.

137 Duan Jielong ed., *China International Law Practices and Cases*, Beijing: Law Press, 2011, p. 123. (in Chinese)

138 Prof. Oxman believes that strong maritime powers have always been pursuing their maximum freedom of military activity at seas during peacetime. Their activity is intense and is deemed to be successful. It is a mistake to assume that maritime powers design new legal orders for the seas that would place new restrictions on the freedom of action during war. Prof. Oxman's view is reasonable from a realistic perspective. Quoted from Dupuy-Vignes, *A Handbook on the New Law of the Sea, Vol. 2*, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, pp. 1323~1324.

In this connection, there is a wait for State practice to clarify what is the core of “freedom of navigation” with respect to military activity in the EEZ. The third legal consequence is probably more apposite to the case. Some scholars made the assertion that it remained controversial to regulate any military activities except armed conflicts, which became an unresolved area in the law of the sea. Furthermore, the main reason why there were no explicit provisions in UNCLOS in this respect was that negotiators attempted to add sufficient vagueness to the provisions to give way for different interpretations.¹³⁹

Unless countries involved could in some way reach an agreement, the trend is likely to be a dangerous conflict among States that all act on their own, or to form a new rule of customary international law through State practice in order to solve the problem. This paper does not focus on how possible it is to form a new rule of customary international law. However, it is worth wondering that if a new rule of customary international law is formed, how can States with highly divided opinions have the same State practice and hold the same *opinio juris*? This question constitutes one aspect in the background of China’s ocean policy choice. Provided the legal status of freedom of navigation in EEZ finally belongs to the third situation, it has key significance to the forming of China’s practice, which would offer an opportunity for China to participate in shaping the legal order for the seas. It will be determined by the preference of the Chinese policy makers and national interests selected on the basis of such preference.¹⁴⁰

VI. The U.S. Maritime Power and Its Leading Motive for Shaping the Legal Order for the Seas

A. Factor of Maritime Power in the U.S. Actions

In order to exploit its ocean interests, the United States is searching for a legal

139 Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford: Oxford University Press, 2011, p. 44.

140 Mou Wenfu, China’s Policy Choice regarding Military Activity in Economic Exclusive Zones against Interactive Background, *Pacific Journal*, Vol. 11, 2013, pp. 45~58 (in Chinese). This article claims that, if having broad freedom of actions for Chinese navy at seas becomes the preference of decision-makers, as China develops into a naval force powerhouse, then China’s position on military activity in the EEZ would vary from that of a land-locked State. It is possible that China takes a similar position to that of the U.S., provided policy choice is made on the basis of profits of a multi-player game.

basis by identifying and claiming customary international law under the law of the sea. The FNP puts such claims into practice and it also strengthens its claims based on international law from the perspective of forming customary international law. All these actions have the purpose of taking advantage of its great naval power and ensuring that other States' claims for maritime rights shall not place any restrictions on United States' military dispositions or at least they would be able to reduce these restrictions to a minimum. The U.S. mainly uses its military ships and aircrafts to carry out the FNP, and uses its coast guards and navy to enforce PSI ship boarding agreements. From a realist perspective, all of these powers are a reflection of State power.

In practice, the "FNP", as a unilateral action, has been carried out in a coercive manner. This is mainly so because countries with a weak maritime power have no effective anti-actions against the United States' military actions. Treaties concerning PSI are a composition of a series of loose bilateral treaties, whose effect is that the U.S. is able to take unilateral actions based on them.¹⁴¹ Unilateral action, in terms of its negative effect in international law, is either illegal, or it constitutes a persistent objector that has an effect of stopping a customary international law from becoming binding to the State actor. As for its positive effect, a historical analysis of the development of international law reveals that unilateral actions of some large countries gave rise to a series of chain reactions and became a source of forming a new international regime, which were quite common in the history of the law of the sea.¹⁴² Sometimes, such unilateral actions were in the form of walking away from existing laws or even blatantly violating such laws with the intention of making a change in the existing legal system.¹⁴³ However, the unilateralist

141 Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, *Harvard International Law Journal*, Vol. 46, 2005, pp. 221~223.

142 A classic example would be the U.S. Truman Announcement concerning its claim of continental shelf in 1945. In the long term, it raised contests among coastal States to raise different kinds of rights over sea areas nearby. The later assertions of "200-nautical-miles territorial seas" and "EEZ" could date back to that announcement. See Galdorisi and Vienna, *Beyond the Law of the Sea: New Directives for US Oceans Policy*, London: Preager, 1997, p. 22; David Attard, *The Exclusive Economic Zone in International Law*, Oxford: Clarendon Press, 1987, pp. 1~3.

143 Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, *Harvard International Law Journal*, Vol. 46, 2005, p. 221; McDougal and Burke, *Public Order of The Oceans – A Contemporary Law of the Sea*, New Haven: New Haven Press, 1987, p. 1047; O'Connell, *The International Law of the Sea, Vol. 1*, Oxford: Oxford University Press, 1982, p. 9.

country had to occupy a controlling position in the decision making process in order to make the change. According to Robert Keohane and Joseph Nye, such a capacity was power, but it was hard to calculate it, especially when military forces played a secondary role in a complex, mutually dependent system.¹⁴⁴ When researching sea conflict issues after WWII, Keohane and Nye had noticed that armed forces of powerful countries were not as significant as they were deemed to be.¹⁴⁵ Looking into the development of the structure composition of the order for the sea, generally speaking such a conclusion is reasonable, but it needs to be seen in a dialectical way. Even if it was not an armed force itself, the FNP was a display of armed forces, which was certainly a reflection of power. Keohane and Nye also highlighted another way to view power. When an asymmetric mutual dependence became a source of power, power was deemed to be a control of resources or a potential impact on results. In some relationships, actors with less dependence always occupied a stronger position of power. Such actors had the capacity to promote change or use it as a threat. Once there was a change in the relationship, such actors paid a lower price than the other party did by comparison.¹⁴⁶ In this sense, the concept of power can be used to interpret the reason why the regime of development of international seabed under the UNCLOS has been revised. In the mutually dependent relationship that resulted from the seabed development regime, the U.S. gained asymmetric power as an insensitive and invulnerable country, and affected change by making use of its technological force, strong financial position, and huge market.

On the other hand, in terms of enforcement of the PSI at seas, the ship boarding agreements, initiated by the U.S., have the feature of bilateral and multilateral actions on the surface, with the support of the UN Security Council's No.1540 Resolution. However, up until now, such agreements are still only limited to bilateral agreements among a small number of countries. They reflect the U.S. as a maritime power in essence. Because a State could only make a successful enforcement of boarding and searching of vessels at high seas in accordance with bilateral ship boarding agreements, on the premise of the requesting State's

144 Robert Keohan and Joseph Nye, translated by Men Honghua, *Power and Interdependence*, Beijing: Peking University Press, 2002, pp. 12, 28~31. (in Chinese)

145 Robert Keohan and Joseph Nye, translated by Men Honghua, *Power and Interdependence*, Beijing: Peking University Press, 2002, pp.105~111. (in Chinese)

146 Robert Keohan and Joseph Nye, translated by Men Honghua, *Power and Interdependence*, Beijing: Peking University Press, 2002, p. 12. (in Chinese)

capacity to collect information, geo-locate and track suspect vessels, and conduct a quick action at seas, all of which could not be done without the support of powerful armed forces at seas. On the opposite, the vessel-registered countries who have very limited or no power will have no capacity to enforce this type of agreements.

*B. The Leading Motive of Shaping the Legal Order for the Seas:
“Freedom of the Sea”*

Wilhelm G. Grewe, a famous German international jurist, raised a morphology classification model relating to the periodization of the history of international law. Grewe believed that the historical epochs of international law were inseparable from the modern State system which was the foundation of the international legal order. Each State system had its own rules and principles to adjust interactions between States. He argued that since the beginning of modern times, each State system had produced its unique and self-contained international legal order, and each legal order had been led by specific ideology and political style of leading power. If the leading position is stronger, then it has more capacity to leave its ideological characteristics to this epoch. If it had ideas and concepts that prevailed more prevailed, then it conferred more general and absolute effect on its expressions of national ideologies expansion.¹⁴⁷ Since the first major geographical discoveries, the history of international law can be categorized in the Spanish predominance, the France predominance, the British predominance, the U.S.-Soviet confrontation as well as the rise of the Third World, and a single superpower country existing in the international community after the end of the Cold War. There were principles and rules relating to the “law and dominion of the sea” in each epoch. In medieval times, the ocean was deemed to be common possession of all nations with an exception that some coastal States asserted rights over certain areas of the sea. In Spanish predominance, it was the confrontation between *Mare liberum* (“freedom of oceans”) and *Mare clausum* (“closed sea”). In France predominance, the legal order for the sea was concerned with the principle of neutrality in war. In British predominance, it was the principle of freedom of the sea under the dominion of the UK. The epoch between the two world wars reflected the downside of the neutrality right. The U.S.-Soviet confrontation epoch was the

147 Wilhelm G. Grewe, translated and revised by Michael Byers, *The Epochs of International Law*, Berlin: Walter De Gruyter, 2000, pp. 6 & 23.

rising time of the concept of “human common heritage”. The legal order for the sea after the Cold War was the 1982 UNCLOS.¹⁴⁸ The conceptualization made by Grewe was equal to seeking out the leading motives behind the leading powers’ attempts to shape the law and dominion of the sea in each epoch. Yet, the views he presented for the legal order for the sea after the Cold War seem to indicate that, although the system was dominated by a single superpower country like the U.S., there were no leading motives to shape a legal order for the seas by the leading power. Since he passed away in 2000, Grewe did not have a chance to observe the reality of international relations after that, and therefore could not foresee that the U.S. will not join UNCLOS for a long period of time, and did not see the United States’ efforts to shape a legal order for the seas outside the UNCLOS. The U.S. has left a deep mark on the international law of our epoch, considering the dialectical methodology of periodization of international law history Grewe used. Regardless of whether we choose to accept or to confront the American concept and power, in modern international law, the U.S. has had an obvious influence on human rights, humanitarian intervention, counter-terrorism, non-proliferation, and justification for the use of forces, etc.¹⁴⁹ In terms of the legal order for the sea, the United States’ position as a super maritime power remains a leading motive, that is to say, to maintain and to strengthen freedom of the sea in combination with maintaining American interests in counter-terrorism and non-proliferation.

Why “freedom of the seas” is so important to the U.S.? When giving comments to “freedom of the seas” at the British predominance of 19th century, Grewe believed that it was only against the background of the UK dominating the oceans that “freedom of the seas” could be well understood. It did not merely mean freedoms of marine transportation and trade, but also meant freedom of choice in the field of battle for war at seas. The latter freedom was contrary to the former one to a large extent, which could only be understood from the perspective of the

148 Wilhelm G. Grewe, translated and revised by Michael Byers, *The Epochs of International Law*, Berlin: Walter De Gruyter, 2000, pp. 129, 257, 274, 403, 412, 551, 572, 689, 693, 723 & 725.

149 It raises the issue of the relations between U.S. hegemony and international law. For discussion of this issue, see Foot, Rosemary, S. Neil MacFarlane and Michael Mastanduno, *US Hegemony and International Organizations: the United States and Multilateral Institutions*, Oxford: Oxford University Press, 2003; Byers, Michael and Georg Nolte eds., *United States Hegemony and the Foundations of International Law*, Cambridge: Cambridge University Press, 2003.

British maritime power.¹⁵⁰ Presently, the maritime power of the U.S. has largely exceeded what the UK had at its time. In this sense, the same logic also applied to the United States. Actually, the U.S. FNP, in essence, is to ensure it having a free choice of battlefield at seas. America is concerned that the UNCLOS will place restrictions on its freedom of navigation. Also, it is aware of the difficulty of joining the Convention soon due to its domestic political factors. Thus, the FNP is carried out to declare its idea of legal order for the seas through its great naval power. However, maritime power is not a right in itself. Jean-Jacques Rousseau stated in *The Social Contract* that even the most powerful person cannot be a master for ever, unless he could turn his strength into right and turn obedience into obligation.¹⁵¹ In practice, the U.S. turns its strength (maritime power) into the right of freedom of navigation of its navy at seas, and forces other States to be obligated to respect such right. With regard to the relationship between maritime power and the law of the sea, Pitman B. Potter made a conclusion in the 1920s, which reflects exactly the current situation of the United States' shaping of the legal order of the sea:

*But the great naval power always speaks in the same role. For the great naval State has a single aim and a single method. It knows what it wants and it believes that it knows how to get it. With a great navy, it writes the law of naval war; with a great merchant marine, it writes the law of navigation. Concessions to the principle of common consent it makes few. The naval power rules the sea and fully intends to do so.*¹⁵²

VII. Conclusion

So far, this article discussed how the United States, although not a member of UNCLOS, runs a strategy to shape the legal order of the seas outside the Convention. Provided that it joins the Convention, the U.S. is highly likely to attempt to carry out its long-term assertions within the framework of the

150 Wilhelm G. Grewe, translated and revised by Michael Byers, *The Epochs of International Law*, Berlin: Walter De Gruyter, 2000, p. 551,

151 Jean-Jacques Rousseau, translated by He Zhaowu, *The Social Contract*, Beijing: Commercial Press, 2005, p. 9. (in Chinese)

152 Pitman B. Potter, *Freedom of the Seas in History, Law and Politics*, London: Longmans, Green and Co., 1924, reprinted by William S. Hein & Co., Inc., 2002, p. 193.

Convention. Furthermore, politicians who support accession to the Convention also repeatedly emphasized that one advantage of joining is that the U.S. would be able to assert an influence on the development of the Convention. Technically, the U.S. Senate adds a couple of statements, understandings, and conditions attached to his approval comments of accession. In fact, the U.S. Senate Committee on Foreign Relations has already provided opinions through the 2004 and 2007 resolutions for the Senate to vote. If there is no significant change in the near future, the core of these recommendations will probably remain a simple opinion attached to the approval comments of accession to the Convention by the Senate. Its potential influence is worth our attention. It is possible that in the future legal or even diplomatic disputes will continue to arise between the U.S. and China.

UNCLOS, Art. 309 states that, “[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.” However, Art. 310 allows a State to “mak[e] declarations or statements ... with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention.” The U.S. Senate Committee on Foreign Relations made reservations, declarations, or statements in its resolutions both in 2004 and 2007 as below.

1. A reservation has been made under Art. 298(1) of the Convention, that disputes concerning military activities will not be subject to dispute resolution procedures as provided for in Art. 287 of the Convention. In addition, a declaration has been made that the party to the Convention has an exclusive right to determine whether its activity is military in nature and the determination is excluded from examination.

2. 23 declarations or statements covering broad areas have been made under Art. 310 of the Convention. For example, provisions relating to peaceful use and peaceful purpose under the Convention shall not impede the application of individual or collective self-defense actions in armed conflicts; the non-innocent passage list as stated in Art. 19(2) shall be exhaustive and it is not necessary to obtain prior consent for innocent passage; statements concerning the scope of marine scientific research largely exclude research related to military activities; transit passage in straits used for international navigation and archipelagic waters shall include “normal mode” relating to military necessity, and straits used for international navigation shall include all of the straits that could be used for international navigation; all States shall have freedoms of navigation and overflight in the EEZs of coastal States, including conducting military activities in a broad

manner.¹⁵³

These declarations or statements were just repeating the United States' consistent claim. It is highly probable that a serious Sino-US dispute will occur if both countries adhere to their longstanding positions.¹⁵⁴ Besides, innovation and fast development of military techniques may also give rise to issues of application and interpretation of the UNCLOS. For example, if the non-innocent passage list as stated in Article 19(2) is exhaustive, as what the U.S. argued, then the legal status of unprecedented new-type weapons and military equipment used in territorial seas under Article 19(2) may lead to disputes. Take another example, brand new weapons and military equipment will bring brand new operation concepts and usage, which brings changes in military activities and may lead to different types of disputes related to military activities.

The legal order for the oceans represented by the UNCLOS has set the external environment where China develops its ocean policy. Having the status as the constitution,¹⁵⁵ it is self-evident that the UNCLOS constitutes the primary legal basis for China, as party to the Convention, to make its ocean policy. However, there is an implied condition that, when doing so, China has to consider American maritime power and its attempt to shape a new legal order of the oceans outside the Convention. Though the Convention could represent a Sino-U.S. common ground, the two sides have a different understanding of the scope and interpretation of "freedoms of overflight and navigation", particularly on whether military activity at peacetime should be included. The rationale behind this lies in the considerable gap between national interest preferences of both sides, but such preferences can be altered. It is not clear how these distinctions will progress in the future. One solution would be for China and the United States to attempt to build a new type of big power relations, even if it is not within the framework of the Convention.

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Russian Strategy of the Development of the Arctic Zone and the Provision of National Security until 2020

(adopted by the President of the Russian Federation on February 8, 2013, № Pr-232)

I. General provisions

1. The development strategy of the Arctic zone of the Russian Federation and national security for the period up to 2020 (hereinafter - the Strategy) was developed in response to the Fundamentals of the State Policy of the Russian Federation in the Arctic for the period up to 2020 and Beyond, adopted by the President of the Russian Federation, September 18, 2008 № Pr -1969 (hereinafter - the basics), and subject to the provisions of the basic documents of the state of the strategic planning of the Russian Federation.

2. The strategy defines the basic mechanisms, ways and means to achieve the strategic goals and priorities for the sustainable development of the Arctic zone of the Russian Federation and the national security. The strategy aims to implement the sovereignty and national interests of the Russian Federation in the Arctic and contributes to the solution of the main tasks of the state policy of the Russian Federation in the Arctic as defined in the Principles.

3. As part of the strategy for consolidating the resources and efforts of all stakeholders of the state policy of the Russian Federation in the Arctic (the federal bodies of state power, bodies of state power of subjects of the Russian Federation, whose territory includes all or part of the Arctic zone of the Russian Federation, local authorities and organizations) to address key issues of the Arctic zone of the Russian Federation and the national security in the Arctic.

II. The main risks and threats, the objective of the Strategy

4. The key factors that influence the socio-economic development of the Arctic zone of the Russian Federation are:

a) extreme climatic conditions, including low temperatures, strong winds and the presence of ice in the waters of the Arctic seas;

b) the localized nature of industrial and economic development of the areas and low population density;

c) the distance from the main industrial centers, high resource use and associated economic activities and livelihoods on supplies from other regions of Russia of fuel, food and essential commodities;

d) low stability of ecological systems, defining the biological balance and climate, and their dependence even from minor anthropogenic influences.

5. The current state of social and economic development of the Arctic zone of the Russian Federation is characterized by the following risks and threats:

a) in the social sphere:

negative demographic trends in most of the Arctic regions of the Russian Federation, the outflow of labor (especially skilled) in the southern regions of Russia and abroad;

Discrepancy network of social services and the nature of the dynamics of settlement, including in education, health, culture, physical education and sport;

- the critical state of housing and communal services, inadequate supply of clean drinking water;

- lack of effective training, the imbalance between supply and demand of labor in the territorial and professionally (shortage of workers and engineering professions and a surplus of unneeded specialists, as well as people with no vocational training);

- Poor quality of life of the indigenous peoples of the North, Siberia and Far East of the Russian Federation living in the Arctic zone of the Russian Federation;

b) in the economic sphere:

- lack of Russian modern equipment and technologies for exploration and development of offshore hydrocarbon fields in the Arctic;

- depreciation of fixed assets, in particular transport, industrial and energy infrastructure;

- underdevelopment of basic transport infrastructure, its marine and continental components, aging icebreaker fleet, lack of small aircraft;

- high energy consumption and low efficiency of extraction of natural resources, the costs of production in the northern no effective compensatory

mechanisms, low productivity;

- imbalance in economic development between the individual priarkticheskimi territories and regions, a significant gap between the leading and depressed areas in terms of development;

- Insufficient development of navigation and hydrographic and hydrometeorological support of navigation;

- Lack of a comprehensive permanent space monitoring of the Arctic territories and water areas, dependence on foreign sources of funds and information management of all activities in the Arctic (including interaction with aircraft and vessels);

- Lack of modern information and telecommunications infrastructure that permits the provision of services to the population and economic entities across the Arctic zone of the Russian Federation;

- lack of development of the energy system, and the irrational structure of generating capacity, high cost of electricity generation and transportation;

c) in the field of science and technology are scarce technical resources and technological capabilities to the study, development and use of the Arctic areas and resources, lack of readiness for the transition to innovative development of the Arctic zone of the Russian Federation;

d) in the sphere of nature and the environment stands increase technological and human impact on the environment with increased probability of reaching its limits in some areas adjacent to the Russian Federation the Arctic Ocean, as well as in certain regions of the Arctic zone of the Russian Federation, particularly characterized by the presence of adverse areas, potential sources of contamination, high levels of accumulated environmental damage.

6. The Strategy is the implementation of national interests and to achieve the main objectives of the national policy of the Russian Federation in the Arctic by solving the basic problems with the strategic priorities set out in the Principles, the national security and sustainable socio-economic development of the Arctic zone of the Russian Federation.

III. Development Priorities and key activities

7. Priority areas of the Arctic zone of the Russian Federation and national security are:

a) integrated socio-economic development of the Arctic zone of the Russian

Federation;

- b) the development of science and technology;
- c) the establishment of a modern information and telecommunications infrastructure;
- g) environmental security;
- d) international cooperation in the Arctic;
- e) provision of military security, protection, and protection of the state border of the Russian Federation in the Arctic.

8. Comprehensive socio-economic development of the Arctic zone of the Russian Federation in accordance with the Fundamental to improving the system of government social and economic development of the Arctic zone of the Russian Federation, the quality of life of the indigenous population and social conditions, economic activity in the Arctic, the development of the resource base of the Arctic zone of the Russian Federation through the use of promising technologies, modernization and infrastructure development of the Arctic transport system, modern information and telecommunication infrastructure and fishing industry.

9. In order to improve the system of state management of social and economic development of the Arctic zone of the Russian Federation shall provide for:

a) Development and implementation of a system of state support and stimulation of economic entities operating in the Arctic zone of the Russian Federation, particularly in the development of hydrocarbon resources, other minerals and water resources, through the introduction of innovative technologies, the development of transport and energy infrastructure, modern information and telecommunication infrastructure, improvement of customs tariff and tax regulations;

b) promotion of new projects of economic development of the Arctic territories through their co-financing from the budgets of the various levels of the budget system of the Russian Federation and extrabudgetary sources;

c) optimization of economic mechanisms of the “northern delivery” through the use of renewable and alternative, including local energy sources, reconstruction and modernization of exhausted power plants, the introduction of energy-saving materials and technologies;

d) the development and testing of models of integrated coastal zone management in the Arctic regions;

e) development of Arctic tourism and expansion of environmentally friendly tourism activities in the Arctic. Improving the regulatory framework of tourism,

establishment of its financial support on the basis of public-private partnerships, promotion of regional tourism clusters Arctic tourism promotion at the national and international markets;

e) power differentiation schemes, including the construction of nuclear power plants, including floating;

g) improving energy efficiency, increasing the use of renewable energy sources, as well as providing non-volatility of small remote communities, the development and implementation of projects in the field of energy conservation and efficiency, including through international cooperation;

h) the establishment and development of an effective waste management system of production and consumption in the Arctic zone of the Russian Federation, their maximum into the commercial production, the restriction of import of the Arctic zone of the Russian Federation, production, packaging, recycling is economically and technologically is not ensured;

i) the establishment of integrated security system for the protection of territory, population and critical facilities Arctic zone of the Russian Federation of emergency situations of natural and man-made, including the development and implementation of projects in the exploration and development of the Arctic continental shelf and coastal areas, and other major infrastructure projects in the Arctic zone of the Russian Federation;

a) Promoting sustainable consumer demand for high-tech products, innovative technologies, materials and services in the Arctic zone of the Russian Federation with regard to the need to create the infrastructure for production of hydrocarbons, including by improving the system of public procurement and purchasing state-owned companies and natural monopolies;

l) the development of a system for monitoring geophysical conditions in the Arctic zone of the Russian Federation in order to minimize the impact of extreme geophysical processes (natural and artificial) on the human environment, including communications, navigation, transport and energy infrastructure, as well as the operation of the Northern Sea Route and safety transit and transpolar air routes in the Arctic.

10. In order to improve the quality of life of people living and working in the Arctic zone of the Russian Federation, including indigenous peoples, improving their social and cultural services, as well as providing positive demographic processes and the necessary social conditions for economic activities are provided:

a) the modernization of social infrastructure, including educational institutions,

healthcare and culture, as well as the development of housing, including within the framework of the implementation of priority national projects;

b) the updating and upgrading of the housing stock, fixed assets Housing on the basis of energy saving technologies;

c) ensuring access throughout the Arctic zone of the Russian Federation to the modern information and telecommunication services;

d) ensuring the availability and quality of medical care to the population, including through improved primary care and primary health care in places of traditional residence and traditional economic activities of the population of the Arctic zone of the Russian Federation, the use of country vehicles and aircraft for sanitary -Air evacuation of patients, the development of technologies for remote panel of doctors;

e) the development of health care, to preserve and promote the health of the population, eliminating the harmful effects of environmental factors, preventing the occurrence and spread of diseases, early detection of the causes and circumstances, as well as the formation and implementation of health promotion programs;

e) the development of education, provision of training, retraining and advanced training in higher and secondary education to work in the Arctic with the existing and projected need for specialists in the field of marine geology, hydrocarbon production and processing, marine biotechnology, information and communication technology and other specialties;

f) improving educational programs for indigenous Arctic zone of the Russian Federation, especially as it relates to preparing children for life in a modern society with a full mastery of skills policies for extreme environments, including equipping of educational institutions and remote areas means of distance learning;

h) a balanced labor market, updating social guarantees and compensation for people working and living in the Arctic zone of the Russian Federation;

i) provision of employment on the basis of re bodied unemployed, government support of various forms of self-employment and entrepreneurship, particularly in single-industry towns and villages of the Arctic zone of the Russian Federation and of the indigenous peoples;

a) Differential regulation of migration by age and qualifications of migrants, as well as increased survival skills and reduce the social costs of external migration in shifts;

l) active formation in cities, small villages and towns new affordable for all segments of the population, and mobile multi cultural institutions (socio-cultural

centers, cultural and sports facilities, information intelligence centers, mobile library);

m) improving the regulatory framework that promotes the rationalization of property relations in the sphere of culture and promotion of business through the development of a system of grants, sponsoring institutions, copyright, sponsorship, insurance, tax, and other specific sources of funding of social and cultural projects, including in the framework of the concession practice , a system of regional charities, investment and venture capital funds in the field of culture;

n) ensuring ethno-cultural development of indigenous peoples, protection of their original environment and traditional way of life;

a) sound environmental management and development of environmentally friendly tourism in places of traditional residence and traditional economic activities of indigenous peoples;

n) Develop a set of measures to develop the traditional economy that strengthen employment and self-employment of indigenous peoples through the mobilization of domestic resources of households and communities, and their active support from the government, business and non-profit organizations, including the use of public procurement of products of traditional economic Indigenous peoples.

11. For effective use and development of the resource base of the Arctic zone of the Russian Federation, could do much to meet the needs of Russia in the hydrocarbon resources and water resources, and other types of strategic raw materials, comprising:

a) the formation of the integrated project study of the continental shelf and coastal areas, the preparation of hydrocarbon resources to develop them on the basis of the state program of exploration of the continental shelf and the development of its mineral resources, providing a significant increase in the balance of mineral resources of the Arctic offshore fields;

b) the reserve fund deposits in the Arctic zone of the Russian Federation to guarantee energy security and sustainable development of the energy sector in the long term, the period of substitution of declining production in traditional areas of development after 2020;

c) organization in order to provide medium-and long-term domestic and export needs of the Russian Federation in the non-ferrous, precious metals and precious and scarce types of mineral raw materials, effective mining of chrome, manganese, tin, bauxite, uranium, titanium, zinc islands in the Arctic Ocean, the Kola Peninsula, in the mountains of the Polar Urals, Native gold deposits of the eastern regions of

the Arctic zone of the Russian Federation on the basis of large investment projects using the latest technologies and services;

d) implementation of large infrastructure projects, which integrate the Arctic zone of the Russian Federation with the developed regions of Russia, the development of the Timan-Pechora and hydrocarbon deposits on the continental shelf of the Barents, Pechora and Kara seas, the Yamal Peninsula and Gydan;

e) development projects in order to ensure the development of hydrocarbon deposits on the continental shelf of the Russian Federation, science-based marine service complex, including the marine exploration, the use of fiber-optic and satellite communication systems, and monitoring systems, mobile radio communications and wireless access to information and telecommunications network “Internet”, means to hydrometeorological and environmental safety;

e) expanding the range, quality and competitiveness of the mining complex, the development of promising new fields, new processing facilities on the principles of comprehensive utilization of mineral resources and the introduction of energy saving technologies;

g) ensure the protection of public interest in the development of hydrocarbon deposits on the continental shelf of the Russian Federation in the Arctic;

h) the provision of training materials submitted to the Commission on the Limits of the Continental Shelf, to validate the outer limit of the continental shelf of the Russian Federation in the Arctic.

12. In order to modernize and develop infrastructure Arctic transport system to retain the Northern Sea Route as a single national transmission backbone of the Russian Federation, provided:

a) the development of an integrated transport system of the Arctic Russian Federation as a national marine highway-oriented year-round operation, which includes the Northern Sea Route and gravitating toward it meridional river and railway communications and airport network;

b) the improvement of the transport infrastructure in the regions of Arctic continental shelf in order to diversify the main supply routes for Russian hydrocarbons to world markets;

c) the restructuring and growth of freight traffic along the Northern Sea Route, including through government support icebreaking ship construction, rescue and auxiliary vessels, as well as the development of coastal infrastructure;

d) improvement of the legal framework of the Russian Federation in the state regulation of navigation on the waters of the Northern Sea Route, its security, tariff

regulation services for icebreaking and other types of support, and the development of mechanisms of insurance, including compulsory;

e) the improvement of the organizational structure of management and the safety of navigation in the Arctic zone of the Russian Federation, including through the development of an integrated Arctic transport and technological systems, including a development of the maritime and other transport, as well as supporting infrastructure;

e) the establishment and development of complex safety of Arctic shipping traffic control in areas of heavy traffic of ships, including navigational and hydrographic, hydrometeorological, icebreaking and other types of support, the creation of complex rescue centers;

g) the development of the Russian icebreaker fleet using modern technologies in the framework of the state program of icebreakers, including nuclear power plants;

h) the modernization of Arctic ports and new port and industrial complexes in the Arctic zone of the Russian Federation, the implementation of dredging the main thoroughfares of the Arctic river;

and) state support of the “northern delivery” of goods and export of products in transport schemes “river - sea”, including the construction of transport of the vessels’ northern delivery ;

a) the development of the railway network in the Arctic zone of the Russian Federation, providing increased capacity of existing and creation of new lines;

l) forming a support network of roads in the Arctic zone of the Russian Federation and members of the international transport corridors, ensuring their compliance with international standards in order to integrate with the Eurasian transport systems;

m) the development of an effective system of air service the Arctic, including the reconstruction and modernization of the airport network along the Northern Sea Route;

n) the development of small aircraft to meet the needs of air traffic and to ensure their availability in the Arctic zone of the Russian Federation;

a) formation of modern transport and logistics hubs provide backbone and international transport on the basis of federal airports and regional airports in low-intensity operations;

n) technical equipment and arrangement of items across the state border of the Russian Federation in the Arctic;

p) the development and introduction of new vehicles adapted for use in arctic conditions.

13. To modernize the fishing industry in the Arctic zone of the Russian Federation shall provide for:

a) the preservation and development of the resource potential of fisheries and implementation of technical upgrading and commissioning of new capacities for deep processing of aquatic biological resources and the development of marine biotechnology;

b) the effective use of key species of marine biological resources and the involvement of non-traditional fishing sites;

c) preventing and combating illicit production and trafficking of water biological resources.

14. In order to promote science and technology are provided:

a) the pooling of resources and capabilities of the state, business, science and education to build a competitive scientific and technological sector in the development and implementation of advanced technologies, including the development of new or adapting existing in Arctic conditions on the basis of relevant technology platforms;

b) Development of materials adapted to the climatic conditions of the Arctic, as well as introduction of means and equipment base, adapted for the polar research;

c) Development and implementation of new techniques and technologies in the field of environmental management, the development of offshore mineral resources and water resources, as well as the prevention and elimination of oil spills in ice conditions;

g) the implementation of a program of scientific research fleet of the Russian Federation, including deep research, including the use of deep-robotic systems;

e) The scientific basis of long-term prospects and the main directions of development of the various activities in the Arctic;

e) promote comprehensive research on the study of natural hazards, the development and introduction of new technologies and methods to predict in a changing climate;

g) the prediction and assessment of the impact of global climate changes in the Arctic zone of the Russian Federation under the influence of natural and anthropogenic factors in the medium and long term, more sustainable infrastructure;

h) To conduct research on the history, culture and economy of the region, as

well as the legal regulation of economic and other activities in the Arctic, including the purpose of documenting the presence of the Russian Federation has historical rights to individual waters of the Arctic seas;

i) to study the effect on health of environmental hazards, scientific evidence set of measures aimed at improving the living environment of the population and disease prevention;

a) the development of expeditionary activities for large-scale and complex research projects in the Arctic, including through international cooperation;

l) use of the opportunities for international scientific and technological cooperation, ensuring the participation of Russian scientific and educational organizations in the global and regional technology and research projects in the Arctic.

15. In the development of information technology and communication and the formation of a common information space in the Arctic zone of the Russian Federation shall provide for:

a) the introduction of modern information and communication technologies and systems (including mobile) communications, broadcasting, traffic management and aviation, remote sensing of sea ice areal surveys, as well as the system of hydrometeorological and hydrographic support and provide scientific field research;

b) creation of a reliable system of communications services, navigation, meteorological and information services, including coverage of the ice conditions, providing prediction and prevention of natural and man-made disasters, response, effective control of economic and other activities in the Arctic, including through use of global navigation satellite system GLONASS and multipurpose space system “Arctica” modernization loran “RSDN-20” (“Route”);

c) the establishment of a modern information and telecommunication infrastructure that enables the provision of services to the population and economic entities across the Arctic zone of the Russian Federation, including by laying underwater fiber-optic communication lines along the Northern Sea Route, and integration with networks of other countries.

16. In order to protect the environment and environmental security in the Arctic zone of the Russian Federation shall provide for:

a) to ensure the conservation of biological diversity of Arctic Flora and Fauna in the expansion of economic activities and global climate change, including:

- The development and expansion of the Arctic protected areas and federal waters;

- The development and expansion of the Arctic protected areas of regional significance;

- monitoring of ecosystems and flora;

- b) the development and expansion of the network of protected areas and water areas of the federal and regional level;

- a) Elimination of the environmental damage caused by past economic, military and other activities in the Arctic zone of the Russian Federation, including the assessment of environmental damage caused and the implementation of measures to clean up the Arctic seas and lands from pollution;

- d) minimize negative human impact on the environment of the Arctic zone of the Russian Federation due to the current economic and other activities, including:

- The development, validation and implementation of measures to reduce threats to the environment caused by the expansion of economic activity in the Arctic, including the continental shelf (with the need to increase the responsibility of companies that use natural resources for environmental pollution, promote the development and adoption of new technologies that reduce the negative impact on the environment, reduce risk and minimize the consequences of technogenic emergencies);

- Measures to improve the efficiency of the federal state of environmental control on the objects of economic and other activities, located in the Arctic zone of the Russian Federation;

- e) improving public environmental monitoring in the Arctic zone of the Russian Federation, based on the use of objective and measurable indicators of the environmental assessment, the formation of surveillance systems and environmental pollution, using modern techniques for monitoring land-, air- and space-based, integrated with existing and Build international observing systems of the environment and ensuring the detection and prediction of dangerous and extreme natural phenomena in the Arctic zone of the Russian Federation, including the adverse climate change, as well as early detection and prediction of natural and man-made disasters;

- e) Development and implementation of economic mechanisms to encourage reproduction and rational use of mineral and biological resources, energy and resource conservation, utilization of associated gas in oil-producing regions.

17. In order to promote international cooperation and the preservation of the Arctic as a zone of peace are provided:

- a) providing a mutually beneficial bilateral and multilateral cooperation

between the Russian Federation and the Arctic states on the basis of international treaties and agreements to which the Russian Federation is increasing the efficiency of foreign economic activity;

b) reaction of the Russian Federation with the Arctic states in order to protect Russia's national interests and implementing acts under international rights of the coastal states in the Arctic region, including issues relating to the exploration and exploitation of the resources of the continental shelf and the establishment of its external borders;

c) combining the efforts of the Arctic states to create a single regional system for search and rescue, and to prevent man-made disasters and elimination of their consequences, including the coordination of rescue forces;

d) enhancing bilateral and regional organizations in the good neighborly relations between the Russian Federation and the Arctic states, the intensification of economic, scientific, technical and cultural cooperation as well as cross-border cooperation, including in the effective management of natural resources, preservation of the environment in the Arctic;

e) to ensure a mutually beneficial Russian presence, economic, and scientific activities on the Norwegian archipelago of Svalbard;

e) To assist in the organization and efficient use of transit and cross-polar air routes in the Arctic, the use of the Northern Sea Route for international shipping under the jurisdiction of the Russian Federation and in accordance with international treaties of the Russian Federation;

g) Enhancing the participation of Russian state organizations and associations in international forums on Arctic issues;

h) the implementation of the regular exchange of information on the environment, as well as data on the Arctic climate and its dynamics, the development of international cooperation in improving systems for meteorological observations in the Arctic climate, including from space;

i) organization of complex international research expeditions to study the environment (ice, pollution of marine waters, marine) and the influence of observed and projected climate change;

a) the development of the dialogue between the regions and the municipalities of northern countries to exchange experiences in the field of climate and energy policy;

l) the development of international tourism, including recreational, scientific, cultural, educational, environmental.

18. In order to ensure military security, defense and protection of the state border of the Russian Federation shall provide for:

a) providing a favorable operating conditions in the Arctic zone of the Russian Federation, including the maintenance of the necessary level of combat readiness of troops (forces) of the total of the Armed Forces, other troops, military formations and bodies, in accordance with existing and predictable military dangers and military threats to the Russian Federation in the Arctic;

b) to ensure comprehensive combat and mobilization readiness level required and sufficient for solving non-military pressure and aggression against the Russian Federation and its allies, to ensure the sovereign rights of Russia's Arctic and features the smooth implementation of all of its activities, including the exclusive economic zone and the continental shelf of the Russian Federation in the Arctic, to neutralize internal and external military dangers and military threats in peacetime, providing strategic deterrence, and in the event of armed conflict - repel aggression and cessation of hostilities on terms that meet the interests of the Russian Federation;

c) to improve the structure, composition, military, economic, and logistical support to the Armed Forces, other troops, military formations and bodies, the development of the infrastructure of their home in the Arctic zone of the Russian Federation, as well as a system of operational equipment in the area for the deployment of troops (forces) designed to perform tasks in the Arctic;

d) improvement of control of air space and surface conditions;

e) use of dual-use technologies for the benefit of a comprehensive approach to defense, security and sustainable socio-economic development of the Arctic zone of the Russian Federation;

e) a hydrographic work in order to determine the need for changes in the list of geographical coordinates of points defining the position of the baseline for measuring the breadth of the territorial waters and economic zone and the continental shelf.

IV. Mechanisms for the implementation of the Strategy

19. Sustainable socio-economic development of the Arctic zone of the Russian Federation on the basis of systems of interaction between government, business and non-profit organizations and civil society through public-private partnership in the implementation of key investment projects, the state's participation in the

infrastructural limitations of economic development, solving social problems, and also create economic incentives business.

20. The main mechanisms for the implementation of the strategy are:

a) State program of social and economic development of the Arctic zone of the Russian Federation for the period up to 2020;

b) other public programs of the Russian Federation, federal and departmental target programs and sectoral strategies, regional and municipal programs, programs of large companies, with activities aimed at the comprehensive development of the territory of the Arctic zone of the Russian Federation.

21. Priorities in the field of military security, defense and protection of the state border of the Russian Federation to ensure the realization of the State Program of arms for 2011 - 2020 years, the state defense order, public programs of the Russian Federation, federal and departmental target programs and plans for implementation of the state policy of the Russian Federation Arctic.

22. The scope of work and the volume of their funding from the federal budget is determined by the development of state programs of the Russian Federation, federal and departmental target programs as well as in the preparation of non-program nature of activities that implement the Strategy within the budget provided for the interested federal bodies of executive power in the federal budget for the financial year and the planning period.

23. Extra-budgetary financial support of the Strategy is a public-private partnership, with the resources of development institutions, international financial institutions and foreign investments into the future of infrastructure, social, innovation, environmental and other projects.

24. Expected to improve the legal framework in the area of developing the foundations of governance of the Arctic zone of the Russian Federation, the legislative recognition of its status as a special object of state regulation, specifying the list of municipalities whose territories are included in its composition, as well as in the establishment of special modes of nature and environmental protection, regulation of shipping along the Northern Sea Route.

25. Task of preserving the traditional way of living and ethno-cultural development of the indigenous inhabitants of the Arctic will be decided on the basis of the Russian Government approved the Concept of Sustainable Development of Indigenous Peoples of the North, Siberia and Far East of the Russian Federation. Steps will be taken to improve the regulatory order of the traditional fishery, establishment and operation of indigenous communities, land use and protection in

places of traditional residence and economic activity.

26. Improving the efficiency of the public administration of the Russian Federation in the Arctic will provide better coordination of public authorities at all levels, and the inclusion of social development of the Arctic zone of the Russian Federation in the long-term strategy of socio-economic development of the federal districts and regions of the Russian Federation, as well as sector strategies and programs.

27. The implementation of activities under the Strategy provides for a system for monitoring and analysis of national security and the level of socio-economic development of the Arctic zone of the Russian Federation, with the release of her self as an object of state statistical observations.

V. Stages of Implementation Strategy

28. Strategy implementation is carried out in two stages.

29. The first phase of the Strategy (2015) provides:

a) the creation of the necessary conditions for strengthening national security through the integrated development of the Arctic zone of the Russian Federation, including the improvement of the legal framework and improving governance, coordination of all stakeholders of the state policy of the Russian Federation in the Arctic, the development and implementation of economic incentives, active state development institutions;

b) the formation and implementation of the state's social and economic development of the Arctic zone of the Russian Federation for the period up to 2020;

a) completion of hydrographic and formation on the basis of the results of proposals on the need to amend or revise the list of geographical coordinates of points defining the position of the baseline for measuring the breadth of the territorial waters and economic zone and the continental shelf;

d) providing international legal registration outer limit of the continental shelf of the Russian Federation in the Arctic Ocean, to prevent the loss of spatial and worst compared to other Arctic coastal states legal environment in the Russian Federation in the Arctic;

d) the establishment and development of the Coast Guard of the Federal Security Service of the Russian Federation in the Arctic zone of the Russian Federation;

e) The establishment of an integrated information and telecommunications

infrastructure (central processing, transmission and storage of data, and mobile networks, wireless and satellite communications and data) to provide services (the network “Internet”, television, communication, etc.) to public authorities, individuals and legal entities;

f) the development of the rescue preparedness, including the establishment of integrated rescue centers;

h) the development of a unified national system of monitoring and pollution of the Arctic zone of the Russian Federation, in sync with similar international systems;

i) provision of basic, problem-oriented and applied research in the Arctic zone of the Russian Federation, including those based on core technology platforms, creation of modern scientific and geographic information management framework Arctic territories, including the development of tools to meet the challenges of defense and security, and reliable operation life support systems and production activities in the climatic conditions of the Arctic;

a) the implementation of measures to ensure environmental security in the Arctic zone of the Russian Federation, including the priority projects for the environmental consequences of past economic and other activities, as well as the rehabilitation of the Arctic seas of nuclear and radioactive facilities;

l) the identification of measures of state support for traditional economy of indigenous peoples in the Arctic.

30. In the second phase (2020), a transition to a sustainable innovative socio-economic development of the Arctic zone of the Russian Federation.

31. In the second stage provided by:

a) implementation of the competitive advantages of the Russian Federation in the field of the development of mineral resources of the continental shelf of the Russian Federation in the Arctic;

b) the development of border infrastructure Arctic zone of the Russian Federation and the retooling of federal border security;

c) The creation and development of a unified system of integrated control surface situation involving federal executive authorities, exercising their powers in the field of national security of the Russian Federation in the Arctic;

d) development of integrated security system for the protection of territory, population and critical facilities Arctic zone of the Russian Federation from the threats of natural and man-made disasters;

d) the establishment and development of multipurpose space system “Arctic”,

the modernization of loran “RSDN-20” (“Route”);

e) development of infrastructure of the Northern Sea Route and the Navy, including icebreakers, for solving the transport of arctic areas, and Eurasian transit;

g) the implementation of measures to ensure the long-term sustainable use of marine biological resources of the Arctic zone of the Russian Federation, including the more efficient use of the capacity of water biological resources of the Arctic seas;

h) the reduction and prevention of adverse effects on the environment of the Arctic zone of the Russian Federation;

i) the completion of a modern information and telecommunications infrastructure for the formation of a single information space of the Russian Federation.

32. Implementation of the Strategy will provide a comprehensive building competitive advantages of the Arctic zone of the Russian Federation in order to strengthen the position of the Russian Federation in the Arctic and greater international security, peace and stability, as well as increased international cooperation.

33. At all stages of implementation of the Strategy includes measures aimed at the rational use of resources and the preservation of the natural environment of the Arctic zone of the Russian Federation, based on its systematic comprehensive research study.

VI. The main characteristics of social and economic development of the Arctic zone of the Russian Federation and the national security

34. The main characteristics of social and economic development of the Arctic zone of the Russian Federation and the national security include:

a) The ratio of additional financial resources (including foreign investment) for projects in the Arctic zone of the Russian Federation due to the development of public-private partnership, the intensification of international cooperation and the total allocation of the federal budget for these purposes;

b) the ratio of the incomes of 10 percent and the richest 10 percent of the least well Arctic zone of the Russian Federation (regional decile coefficient);

c) the share of renewable sources of reproduction of the resource base

(including electricity) in the total resource base (including in the energy and power consumption) of the Arctic zone of the Russian Federation;

d) turnover along the Northern Sea Route;

e) the availability of air ratio in the Arctic zone of the Russian Federation;

e) The rate of natural increase of the population of the Arctic zone of the Russian Federation (1000);

g) the proportion of the population of the Arctic zone of the Russian Federation, with access to meet sanitary and epidemiological norms drinking water supply, the total population of the Arctic zone of the Russian Federation;

h) the proportion of contaminated (no treatment) and insufficiently treated wastewater from the total amount of wastewater discharged into surface water bodies;

i) the proportion of reclaimed land of the total area of land affected by the breach, including the land, exposed to radioactive and chemical contamination in the Arctic zone of the Russian Federation;

a) the number of rare and endangered species of animals listed in the Red Book of Russia, living in the Arctic zone of the Russian Federation;

l) the proportion of the population using the network “Internet”, the total population of the Arctic zone of the Russian Federation;

m) the amount of economic loss avoided as a result of the search and rescue operations;

n) the share of high-tech and knowledge-intensive sectors of the economy of the Arctic zone of the Russian Federation in the gross domestic product of the Russian Federation;

a) the number of expeditions to marine research, marine resource studies (living and non-living resources) in the Arctic zone of the Russian Federation;

n) the share of modern weapons, military and special equipment in the Arctic zone of the Russian Federation, of the total number of weapons, military and special equipment in the Arctic zone of the Russian Federation.

35. The values of the main characteristics are defined in the development of the state’s social and economic development of the Arctic zone of the Russian Federation for the period up to 2020, and are calculated after isolation of the Arctic zone of the Russian Federation as an independent object of statistical observation.

36. The level of socio-economic development and the national security of the Arctic zone of the Russian Federation is characterized by the following indicative macroeconomic indicators:

a) increasing the share of the Arctic zone of the Russian Federation in the gross domestic product of the Russian Federation and in the structure of the country's exports;

b) increase in the share of the regional high-tech innovative products (and services) in total sales in the Russian Federation and export;

c) an increase in labor productivity growth in the enterprises of the Arctic zone of the Russian Federation;

d) increase the balance of mineral reserves through exploration in the Arctic zone of the Russian Federation;

d) an increase in the life expectancy of Indigenous Peoples of the North, Siberia and Far East of the Russian Federation living in the Arctic zone of the Russian Federation.

VII. Monitoring the implementation of the Strategy

37. Monitoring the implementation of the Strategy by the Government of the Russian Federation.

38. Government of the Russian Federation, federal executive authorities and executive authorities of the Russian Federation shall provide system monitoring and analysis of the implementation of the state policy of the Russian Federation in the Arctic. According to the decision of the Russian Government coordination to oversee the implementation of the Strategy by the authorized federal executive body or working body formed by the Government of the Russian Federation.

39. The Russian Federation is an annual report to the President of the Russian Federation on the progress and results of the Strategy.

东盟地区论坛发表关于加强 海空搜救协调与合作声明

2014年8月10日,东盟地区论坛发表《关于加强海空搜救协调与合作声明》,全文如下:

对2014年3月马来西亚失联航班MH370上的失踪人员以及2014年4月韩国“世越号”客轮遇难者家属表示同情;对参与上述两起事件搜救合作的国家所做出的努力表示赞赏;

认识到海空事故给地区人民生命和财产安全带来风险;

忆及论坛在推动各成员加强搜救协调与合作方面所做出的努力;

认可《国际民用航空公约》及其关于搜救的第12附件、《国际海上人命安全公约》(SOLAS 1974/88)、《国际海上搜寻救助公约》(SAR 1979)、《联合国海洋法公约》(UNCLOS 1982)、《国际航空及海上搜寻救助手册》(IAMSAR Manual)和《国际海上避免碰撞规则》(COLREGs 1972)等有关国际海空搜救规定的重要性;

认识到地区国家搜救能力以及搜救合作的有效性和效率需要进一步加强;

主张地区国家进一步加强双边和多边层面的搜救协调与合作,包括在ARF框架内加强对话和协作;

论坛各成员方重申在地区海空搜救协调与合作中应遵循以下原则:

—以救助生命为宗旨,应以快捷和适宜的方式提供搜救服务;

—对海上遇险人员实施无差别对待,不论人员国籍和身份及其被发现时的处境;

—除非另有安排,各成员应自行承担参与搜救行动的费用;

—《国际海上搜寻救助公约》和《国际民用航空公约》框架下规定的海空搜救合作应促进加强地区国家的能力建设和推进建立信任进程,并推动地区救灾合作;

论坛各成员应努力采取以下措施加强地区搜救合作:

—鼓励各成员积极参与地区重大海空搜救行动;在相关国家请求或同意的情况下,根据国际法并在尊重相关国家国内法的基础上,为开展有效搜救行动提供协助;

—共同推动加强各成员搜救能力,在信息共享、经验交流、能力建设、先进理念和技术设备交流等方面加强交流与合作;

—鼓励召开搜救合作研讨会和会商，开展地区联合搜救桌面推演和实兵演练；

—根据相关公约和机制中有关合作条款采取适当措施加强各成员国家搜救中心之间的交流与协调；

—鼓励各成员在包括国际民航组织、国际海事组织等机制下，探讨在国家和地区两个层面加强信息共享、开展搜救行动等方面的军民协作；

—深化地区国家对包括《国际民用航空公约》、《国际海上搜寻救助公约》等在内的现有国际机制的认知，更好利用地区现有的搜救协调中心，探讨建立更有效、快捷的亚太搜救合作协调模式；

—支持根据《国际民用航空公约》及其关于搜救的第 12 附件和《国际海上搜寻救助公约》的规定，不断完善《国际航空及海上搜寻救助手册》及其在地区搜救行动中的实践；

—考虑视情在必要情况下采取进一步措施，加强对《国际海上避免碰撞规则》和其他相关国际文件的贯彻落实，遵循良好船艺，避免搜救行动中的碰撞事件。

第四届 APEC 海洋部长会议厦门宣言 ——构建亚太海洋合作新型伙伴关系

我们,亚太经合组织各成员海洋部长,2014年8月28日相聚在中国厦门,出席亚太经合组织第四届海洋部长会议。会议主题“构建亚太海洋合作新型伙伴关系”。

认识到全球经济复苏仍面临不确定因素,APEC领导人关于增长战略的目标远未实现。多数成员仍在探索寻求实现经济增长、应对金融危机负面影响的机遇。考虑到APEC区域在世界经济中的关键性作用,APEC成员在促进经济增长方面的努力对于当地、次区域、区域和全球的经济繁荣至关重要。

考虑到APEC各成员共享一个海洋,水产养殖量占全球的80%以上,捕捞量和水产品加工量占全球的65%以上。海洋承载着国际贸易总量的90%,联系着人们、市场和生存环境,提供生态系统服务,在实现亚太地区经济复苏和繁荣方面发挥着重要的作用。

进一步考虑到保护海洋和实现海洋可持续发展以使其能够在满足当代人民需求的同时又不损害子孙后代的利益,意识到自然和人为因素导致的与日俱增的挑战,例如为应对人类需求增长而导致的资源过度开发、污染加剧,生物多样性的丧失,全球气候变化以及自然灾害的影响。

牢记APEC领导人宣言、APEC领导人关于增长战略、2013 APEC部长级会议联合声明以及2002年《首尔海洋宣言》、2005年《巴厘行动计划》、2010年《帕拉卡斯宣言》和《帕拉卡斯行动议程》中的承诺。

肯定“APEC海洋和渔业工作组为实现APEC的目标和促进经济增长将蓝色经济视为推动海洋及海岸带资源和生态系统可持续管理和保护、实现可持续发展的一种有效途径”。

认识到《APEC海洋可持续发展报告》的重要性,它使各成员能够藉此回顾APEC范围内海洋可持续发展方面的各项活动。

进一步认识到世界的海洋需要更深刻的了解和协调一致的行动,考虑到海洋和海岸带事务及其所面临的挑战具有复杂性和跨界性的特点,这使海洋合作变得非常紧迫。

鉴此,我们,APEC各成员的海洋部长,要求通过各成员间的海洋合作,建立更全面的、可持续的、包容的和互利的伙伴关系,在下列四个重点领域执行上述承诺以及开展协调与一致的行动,即:(一)沿海和海洋生态环境保护与防灾减灾;

(二)海洋在粮食安全及其相关贸易中的作用;(三)海洋科技与创新;(四)蓝色

经济。

沿海和海洋生态环境保护与防灾减灾

1. 认识到沿海和海洋生态系统为可持续的经济增长提供了基础。健康的沿海和海洋生态系统在通过降低脆弱性以减缓海洋灾害的过程中发挥了至关重要的作用，从而提升了沿海社区应对气候变化和海洋自然灾害影响的恢复力。我们进一步认识到，由于自然系统的相互关联，有必要采取全面的措施，通过建立综合的伙伴关系，应对和消除在海洋环境、生物和非生物资源方面日益积累的影响。

2. 重申我们对加强包括跨区域在内的成员内和地区沿海和海洋生物多样性保护的强烈支持，通过保护濒危物种、对海岸湿地、红树林、海草、滩涂、珊瑚礁和其他包括渔业恢复在内的关键生境的修复，以及加强区域内大海洋生态系的保护等措施。鼓励加强区域合作，为实现保护沿海和海洋环境的全球目标作出贡献，包括通过有效管理海洋保护区和其它基于区域的保护措施，实现到 2020 年至少将 10% 的沿海和海洋得到保护的目标。

3. 通过实施保护和管理的措施和手段，包括海洋保护区网络、海洋空间规划、综合水资源管理，陆海统筹和海岸带综合管理等，达到恢复海洋健康的同时实现沿海和海洋可持续利用的利益最大化，在成员和区域层面推广以生态系统为基础的海洋管理的方法和规划。

4. 鼓励在减少和减缓海洋污染包括陆源污染和海上溢油领域开展合作，并通过持续的和不间断的努力，包括通过海漂垃圾联合虚拟工作组与 APEC 化学对话(项目)携手，赞同 APEC 地区在项目一期提出的“海上溢油的应急响应和评估”项目。

5. 鼓励 APEC 成员，如适当的话，加大参与全球及区域与海洋相关计划以及实施的力度，如履行包括社会经济情况在内的全球海洋环境状况报告和评估经常性程序计划(联合国全球海洋评估计划)。

6. 认识到，通过实施提高社区意识的项目、能力建设、公共宣传、早期预警系统、基于沿海和海洋生态环境的管理方法、通过海洋相关数据和信息共享与其他 APEC 工作组合作推动搜索救援合作，以及鼓励私营部门和社区积极参与应急计划的制定，通过灾害应对、灾后恢复与重建等行动加强沿海社区应对海洋灾害能力的重要性。

7. 鼓励通过与 APEC 相关工作组分享数据、信息以及最佳实践，在 APEC 框架内加强识别、监测、消除和应对气候变化、海洋酸化和生境变化对渔业和水产养殖等海洋资源的影响等领域的合作，欢迎“APEC 气候变化对海洋和渔业影响研讨会”项目。

8. 鼓励 APEC 成员参加以气候变化和海洋酸化为主的相关合作网络。

9. 鼓励 APEC 海洋和渔业工作组与 APEC 备灾工作组加强合作，应对渔业、

养殖业、沿海社区受气候变化影响的相关问题,包括通过教育宣传项目,制定 APEC 范围内防灾减灾、紧急应对和相关信息共享工作计划等。

海洋在粮食安全及其相关贸易中的作用

10. 重申加强在双边和多边基础上的伙伴关系对打击非法的、不报告和不管制捕捞(IUU)的重要性,包括如适当的话,禁止 IUU 的捕获产品进入市场,消除破坏性捕捞作业,改进捕捞渔业的管理和开展可持续养殖实践,推动实施以生态系统为基础的管理等措施,加强对兼捕,特别是对受保护或濒危物种兼捕的管理,减少过剩的捕捞能力,促进渔业法规的透明度,促进小型渔业和养殖业对粮食安全的贡献等;重申《2010 新泻粮食安全宣言》、《2012 喀山粮食安全宣言》,以及《2013 粮食安全政策伙伴关系路线图》。

11. 鼓励 APEC 海洋和渔业工作组与 APEC 粮食安全政策伙伴关系加强合作,密切协调,确保所有 APEC 在保障粮食安全方面的努力要考虑从农作物到海产品在内的整个的粮食系统,包括通过完成粮食安全行动计划的起草、将本宣言的成果纳入 2014 年 9 月于中国召开的第三届 APEC 粮食安全部长会议。

12. 鼓励 APEC 各成员迅速采取必要措施,包括通过区域渔业管理组织或机构,在适当的时候,根据生物资源属性,在可行的最短期限内,将现有鱼类种群维持或恢复到至少能够获得最大可持续产量的水平。

13. 鼓励应用不对环境产生损害的综合多种类养殖技术,以减少富营养化污染,推动养殖业可持续发展,促进粮食安全。

14. 呼吁 APEC 相关成员批准,或加入,或有效实施国际粮农组织港口国措施协议,并改进对渔船的跟踪,包括通过扩大监测、控制和监视网络的覆盖范围、实施《2012 喀山粮食安全宣言》等措施。

15. 欢迎“加强 APEC 成员伙伴关系,在防止方便旗扩散方面采取自愿行动,打击 IUU 捕捞和相关贸易”项目。

16. 鼓励支持可持续的小规模渔业和水产养殖,包括为小规模渔业就业人员从事渔业和市场的进入提供便利,并为此欢迎粮农组织完成审议并通过“在粮食安全和减贫框架下确保可持续的小规模渔业发展的自愿性指导手册”,以解决发展中国家的特别需求,并注意到国际粮农组织有意主办指导手册的实施计划研讨会。

17. 认可 APEC 各经济体为支持小规模渔业和水产养殖并提高在该领域的生活水平所提出的政策。

18. 注意到“渔业及其对 APEC 经济体可持续发展贡献工作组:小规模渔业确保粮食安全”的有关成果。

19. 鼓励 APEC 成员为鱼类和渔业产品的贸易提供方便,以实现可恢复的、包容的和可持续的经济增长,为实现粮食安全的提供支持。

20. 鼓励 APEC 各成员在捕捞收获后处理和加工过程中减少损失和废弃物方

面开展最佳实践经验交流,尤其是支持“APEC 关于加强公、私合作伙伴关系以减少在粮食供应链中减少流失的多年期项目”,该项目 2015 年将致力于解决渔业产品方面的问题。号召 APEC 各成员为该项目在发展数据收集方法、工具包和最佳实践方面做出贡献。

21. 按照里约+20 成果文件,尤其是第 173 段,我们鼓励 APEC 各成员,在不影响世贸组织多哈回合谈判情况下,进一步通过世贸组织提升现有渔业补贴制度的透明度,消除助长产生捕捞能力过剩和过度捕捞的渔业补贴,限制引入新的类似的补贴或扩大和增加现行补贴。

22. 鼓励 APEC 各成员积极为中小企业加强能力建设,分享最佳实践,提升中小企业对粮食安全的贡献能力。

海洋科技与创新

23. 认识到科学、技术与创新对了解海洋至关重要,同时也是科学决策、适应性管理、传统海洋产业的升级、培育新兴产业及鼓励创新的关键。我们必须注意到不同的经济体和社区的能力差异。

24. 根据相互同意的条件,鼓励 APEC 各成员采取措施,推动实施联合海洋科学研究,并通过数据、信息与科学知识的分享,技术传播以及能力建设项目,推动科学技术创新。

25. 通过提升对海啸、热带气旋及其他灾害的及时预报与预警发布能力,建立和协调亚太区域海啸预警中心,以及在 APEC 成员间分享海洋灾害及其潜在影响的信息和知识等,支持在海洋减灾和灾害应对领域开展科学、技术与创新合作。

26. 适当时与 APEC 科学技术与创新政策伙伴关系(PPSTI),以及 APEC 能源工作组(EWG)合作,鼓励促进在环境友好型的海洋技术领域开展科学技术与创新合作,包括开展海洋可再生能源领域的合作等。

27. 鼓励探讨促进海洋研究人员和学生的交流的可行方式,鼓励本地区涉海大学及学院参与 APEC 在教育领域的合作,赞赏中国政府海洋奖学金计划。

28. 通过将海洋教育纳入中学课程,在 APEC 各经济体通过科学博物馆、水族馆和开展生态旅游,以及设立 APEC 海洋日等倡议,鼓励 APEC 成员采取行动提高公众特别是年轻和未来一代的海洋意识。

29. 承认年轻人和妇女是构成社区的主体,也是我们开展能力建设活动的重要对象,应为他们提供早期参与海洋资源与可持续渔业管理活动的机会。

30. 根据相互同意的条件和条款,通过数据与信息分享、技术传播和能力建设项目,鼓励 APEC 各成员采取步骤,缩小各个成员之间在科技和创新方面的差距。

蓝色经济

31. 进一步认识到蓝色经济与可持续发展和经济增长之间,特别是与沿海和海洋生态保护,及其与 2014 年 APEC 三大优先议题之一的“创新发展,经济改革与

增长”之间的潜在关系。

32. 认识到 APEC 作为区域经济一体化和增长重要平台的关键作用, 并且认识到在最近讨论和开展的与蓝色经济相关倡议以及 APEC 各成员在挖掘这一潜力方面的努力, 我们呼吁亚太地区就蓝色经济开展合作。

33. 重申我们强烈支持为促进 APEC 各成员间的互联互通, 从而为物品、服务、贸易和投资的流通提供便利所采取的行动。

34. 鼓励 APEC 各成员促进对实施以生态系统为基础的海洋管理在政策和制度上的支持, 在适当的时候利用经济刺激和市场化手段高效和最大化地实现海洋的可持续经济产出。

35. 注意到发展蓝色经济要求加深对海洋的认识和了解以及通过创新提高开发和利用海洋资源的技术能力这一事实。

36. 根据 APEC 的方针和优先领域, 重视私营部门参与蓝色经济发展与合作, 鼓励 APEC 各成员通过政策对话和公私合作伙伴关系就私营部门, 包括中小企业关于与蓝色经济相关活动的需求和想法征求意见。

37. 鼓励通过 APEC 成员提出的相关活动, 包括蓝色经济示范项目, 探讨加强和方便蓝色经济发展的相关措施的可能性, 开展与蓝色经济合作相关的信息和最佳实践经验共享和经验交流。

38. 鼓励 APEC 成员举办环境友好的与海洋相关的经济活动, 根据 APEC 海洋和渔业工作组的蓝色经济理念, 通过创新方式, 利用海洋可再生能源、可持续的捕鱼和水产养殖, 促进海洋可再生能源的可持续管理。

39. 指示 APEC 海洋和渔业工作组定期更新 APEC 海洋可持续发展报告, 并鼓励 APEC 成员定期更新他们各自的经济体报告的第二部分。

40. 认识到中国主办的蓝色经济论坛所产出的成果。鼓励各成员在自愿的基础上为论坛做出贡献。

41. 鼓励 APEC 海洋和渔业工作组对 APEC 框架下海洋相关合作清单定期更新以反映有关 APEC 海洋相关合作的情况。

42. 认可 APEC 海洋和渔业工作组的蓝色经济理念, 鼓励海洋和渔业工作组与有关的 APEC 分论坛共同推进蓝色经济合作。认识到上述段落中有关倡议已经为这一合作的提供了实例。

43. 牢记 APEC 领导人关于在 APEC 海洋相关合作主流化倡议的框架下推动跨部门工作的有关指示, 鼓励各成员在适宜的情况下, 根据各自的情况和优先议题把发展蓝色经济纳入各成员规划和决策过程。

合作与感谢

44. 鼓励 APEC 相关工作组之间就海洋相关问题开展交叉合作, 这些工作组包括海洋和渔业工作组、粮食安全政策伙伴关系、能源工作组、交通运输工作组、

旅游工作组、标准化分委会等，以及其他相关国际组织。

45. 对韩国 APEC 海洋环境培训与教育中心、中国 APEC 海洋可持续发展中心多年来的贡献表示赞赏，支持印尼建立 APEC 海洋和渔业信息中心，鼓励这些中心未来在能力建设方面做出更多的贡献，并鼓励加强它们彼此之间的协作以促进 APEC 与海洋相关的合作并避免重复劳动。

46. 对中国为主办 APEC 第四届海洋部长会议所付出的辛勤劳动及其所给予的盛情款待表示感谢。

47. 最后，我们会将本次会议的成果提交于今年 11 月在北京召开的领导人非正式会议。

Progress of Work in the Commission on the Limits of the Continental Shelf

(Thirty-fifth session, New York, 21 July -5 September 2014)

Summary

The present statement provides information on the work carried out by the Commission on the Limits of the Continental Shelf and its subcommissions during its thirty-fifth session. In particular, it contains an overview of the progress made in the examination of the submissions made by the following: Uruguay; Cook Islands, in respect of the Manihiki Plateau; Argentina; Ghana; Iceland, in respect of the Ægir Basin area and the western and southern parts of Reykjanes Ridge; Pakistan; Norway, in respect of Bouvetøya and Dronning Maud Land; South Africa, in respect of the mainland of the territory of the Republic of South Africa; Federated States of Micronesia, Papua New Guinea and Solomon Islands, concerning the Ontong Java Plateau; France and South Africa, in the area of the Crozet Archipelago and the Prince Edward Islands; and Mauritius, in the region of Rodrigues Island. The statement also contains information about a presentation made by Kenya to the Commission. In addition, the statement addresses the following issues: conditions of service and attendance of the members of the Commission; and future sessions of the Commission.

1. Pursuant to the decision adopted at its thirty-second session (see CLCS/80, para. 89), as endorsed by the General Assembly in paragraph 79 of its resolution 68/70, the Commission on the Limits of the Continental Shelf held its thirty-fifth session at United Nations Headquarters from 21 July to 5 September 2014. The plenary parts of the session were held from 4 to 8 August and from 2 to 5 September. The other parts of the session were used for the technical examination of submissions at the geographic information systems (GIS) laboratories of the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs of the

Secretariat (“the Division”).

2. The following members of the Commission attended the session: Muhammad Arshad, Lawrence Folajimi Awosika, Galo Carrera, Francis L. Charles, Ivan F. Glumov, Richard Thomas Haworth, Martin Vang Heinesen, George Jaoshvili, Emmanuel Kalngui, Wenzheng Lu, Mazlan Bin Madon, Estevao Stefane Mahanjane, Jair Alberto Ribas Marques, Simon Njuguna, Isaac Owusu Oduro, Yong Ahn Park, Carlos Marcelo Paterlini, Rasik Ravindra,¹ Walter R. Roest, Tetsuro Urabe and Szymon Uściniowicz. Some members of the Commission attended only parts of the session. Two members of the Commission could attend only part of the session owing to family emergencies. Mr. Jaoshvili attended the session from 2 to 5 September 2014, indicating that he had been unable to attend the entire session owing to a lack of adequate financial support. Mr. Uściniowicz attended the session from 11 August to 5 September, indicating that he had not been able to attend the earlier part of the session owing to a lack of adequate financial support. Mr. Glumov attended the session from 18 August to 5 September.

3. The Commission had before it the following documents and communications:

- (a) Provisional agenda (CLCS/L.37);
- (b) Statement by the Chair on the progress of work in the Commission at its thirty-fourth session (CLCS/83);
- (c) Submissions made by coastal States² pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea;
- (d) Report of the twenty-fourth Meeting of States Parties to the United Nations Convention on the Law of the Sea (SPLOS/277);
- (e) General Assembly resolution 68/70;
- (f) Communications received from the Federated States of Micronesia (28 July and 22 August 2014), Ghana (21 January 2014), Japan (22 July 2014), Kenya (7 July and 28 August 2014) and Somalia (2 September 2014).

Item 1

Opening of the thirty-fifth session

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- 1 Elected at the twenty-fourth Meeting of States Parties to the United Nations Convention on the Law of the Sea held in June 2014 to fill the vacancy resulting from the resignation of Sivaramakrishnan Rajan, for the remainder of Mr. Rajan’s term.
 - 2 For a full list of the submissions made to the Commission, see www.un.org/Depts/los/clcs_new/commission_submissions.htm.

4. The Chair of the Commission, Mr. Awosika, opened the plenary of the thirty-fifth session of the Commission.

Statement by the Director

5. The Director of the Division made a statement. She informed the Commission, with reference to the decision adopted by the twenty-fourth Meeting of States Parties held in June 2014 (see SPLOS/276), about the ongoing efforts of the Secretariat to explore options for providing access to medical insurance coverage to members of the Commission with a view to communicating any updated information to the General Assembly. The Director expressed the continued commitment of the Division to support the Commission in the discharge of its functions.

Item 2

Adoption of the agenda

6. The Commission considered the provisional agenda (CLCS/L.37) and adopted it, as amended (CLCS/84).³

Item 3

Solemn declaration by a member of the Commission

7. Pursuant to rule 10 of the rules of procedure of the Commission (CLCS/40/Rev.1), Mr. Ravindra made the solemn declaration and handed over a signed copy thereof to the Secretary of the Commission.

Item 4

Organization of work

8. The Commission approved its programme of work and the schedule for

3 In response to an invitation by the Chair to present their submissions to the Commission at its thirty-fifth session, the following indicated their preference to make presentations at a future session: Sri Lanka; Denmark, in respect of the southern continental shelf of Greenland; Angola; Canada, in respect of the Atlantic Ocean; Bahamas; and France, in respect of the area of Saint- Pierre-et-Miquelon. It was understood that the deferrals would not affect the position of the submissions in the queue.

deliberations, as outlined by the Chair.

Item 5

Workload of the Commission

Conditions of service of the members of the Commission

9. The Commission took note of the decision regarding the conditions of service of the members of the Commission on the Limits of the Continental Shelf, adopted by the twenty-fourth Meeting of States Parties to the United Nations Convention on the Law of the Sea (see SPLOS/276).

10. The Commission recognized the efforts made by States parties, the General Assembly of the United Nations and the Secretariat, as they related to the consideration of the conditions of service of members of the Commission. The Commission observed, however, that according to decision of the twenty-fourth Meeting of States Parties (see SPLOS/276), current proposals focused specifically on options for providing medical coverage for members of the Commission from developing States.

11. The Commission reiterated its view, unanimously supported by members of the Commission from developing and developed States, that no such distinction should be made and that all members should be treated the same way. Furthermore, the concerns of the Commission in that regard went well beyond adequate medical coverage.

12. In the light of the current conditions of service of its members, the Commission decided to keep under review its working arrangements, as well as the measures taken by the Meeting of States Parties to address the whole range of issues related to the workload of the Commission.

13. The Chair informed the Commission about an informal meeting that had been held on the margins of the thirty-fifth session between the two coordinators of the open-ended working group established by the Meeting of States Parties on the conditions of service of the Commission (see SPLOS/263, para. 77) and the Bureau of the Commission. During the meeting, the Bureau conveyed the above view to the coordinators.

Item 6**Consideration of the submission made by Uruguay⁴**

14. The Commission appointed Mr. Ravindra as the seventh member of the subcommission (see para. 81 below).

Report of the subcommission

15. The Chair of the subcommission, Mr. Charles, reported on the progress of its work during the intersessional period and at the thirty-fifth session of the Commission, noting that the subcommission had met from 28 July to 1 August and from 18 to 22 August.

16. Mr. Charles informed the Commission that during the week of 28 July to 1 August, the subcommission had held three meetings with the delegation of Uruguay, during which the delegation had provided responses to additional questions and requests for clarification that had been raised by the subcommission at the thirty-fourth session.

17. The subcommission decided that its members would continue to work on the submission during the intersessional period and that it would resume its consideration of the submission during the thirty-sixth session.

18. The Commission subsequently decided that the meetings of the subcommission during the thirty-sixth session would be held from 27 to 31 October and from 24 to 28 November 2014. The subcommission invited the delegation to meet during the latter week, during which it planned to prepare and deliver its presentation, pursuant to paragraph 10.3 of annex III to the rules of procedure of the Commission, and subsequently start the preparation of its draft recommendations.

Item 7**Consideration of the submission made by the Cook Islands in respect of the Manihiki Plateau⁵****Report of the subcommission**

19. The Chair of the subcommission, Mr. Carrera, reported on the progress

4 Submission made on 7 April 2009; see www.un.org/Depts/los/clcs_new/submissions_files/submission_ury_21_2009.htm

5 Submission made on 16 April 2009; see www.un.org/Depts/los/clcs_new/submissions_files/submission_cok_23_2009.htm.

of its work during the intersessional period and at the thirty-fifth session of the Commission, noting that the subcommission had met from 28 July to 1 August and from 25 to 29 August. During that period, it had held three meetings with the delegation. The subcommission had given a comprehensive presentation to the delegation on its consideration of the submission, in response to the presentation made by the delegation at the thirty-fourth session, which was the second preliminary response of the delegation to the presentation made by the subcommission, pursuant to paragraph 10.3 of annex III to the rules of procedure of the Commission. The presentation by the subcommission had also included a response to a written reply provided by the delegation to the statement that had been made by the Chair of the subcommission at the thirty-fourth session. The delegation had given two additional presentations as part of its preliminary response to the presentation made by the subcommission, pursuant to paragraph 10.3 of annex III to the rules of procedure of the Commission and presented additional data and information.

20. The subcommission decided that its members would continue to work on the submission individually during the intersessional period and that it would resume its consideration of the submission during the thirty-sixth session. The subcommission would consider the additional data and information presented by the delegation and provide its response by way of a presentation to the delegation at that session. The subcommission would then work on the preparation of its recommendations and, pending the receipt of any new data and information, might be in a position to submit draft recommendations to the Commission at the thirty-seventh session.

21. The Commission subsequently decided that the meetings of the subcommission during the thirty-sixth session would be held from 20 to 31 October 2014.

Item 8

Consideration of the submission made by Argentina⁶

Report of the subcommission

22. The Chair of the subcommission, Mr. Carrera, reported on the progress

6 Submission made on 21 April 2009; see www.un.org/Depts/los/clcs_new/submissions_files/submission_arg_25_2009.htm.

of its work during the intersessional period and at the thirty-fifth session of the Commission, noting that the subcommission had met from 11 to 22 August. During that period, it held four meetings with the delegation and received presentations on new information and data, which had been provided by the delegation during the intersessional period. As a result of those meetings, the subcommission had made requests for additional data and information from the delegation. The subcommission had also begun to organize and prepare the presentation it would make in accordance with paragraph 10.3 of annex III to the rules of procedure in the areas of the submission where no additional requests for information from the delegation had been made.

23. The subcommission decided that its members would continue to work on the submission individually during the intersessional period and that it would resume its consideration of the submission during the thirty-sixth session. Pending the receipt and consideration of additional data and information, the subcommission might be in a position to make its presentation to the delegation in accordance with paragraph 10.3 of annex III to the rules of procedure during the thirty-sixth session. It might also be in a position to submit draft recommendations to the Commission at its thirty-seventh session, to be held in 2015.

24. The Commission subsequently decided that the meetings of the subcommission during the thirty-sixth session would be held from 17 to 28 November 2014.

Item 9

Consideration of the submission made by Ghana⁷

Consideration of draft recommendations

25. The Commission resumed its consideration of the draft recommendations, which had been introduced to it by the subcommission at the thirty-fourth session of the Commission (see CLCS/83, paras. 56-58).

Adoption of recommendations

26. On 5 September 2014, the Commission adopted by consensus the recommendations of the Commission on the Limits of the Continental Shelf in

7 Submission made on 28 April 2009; see www.un.org/Depts/los/clcs_new/submissions_files/submission_gha_26_2009.htm

regard to the submission made by Ghana on 28 April 2009, as amended.

27. Pursuant to article 6, paragraph 3, of annex II to the Convention, the recommendations, including a summary thereof, were submitted in writing to the coastal State and to the Secretary-General on the same day.

Item 10

Consideration of the submission made by Iceland in respect of the Ægir Basin area and the western and southern parts of Reykjanes Ridge⁸

Consideration of draft recommendations

28. The Commission resumed its consideration of the draft recommendations, which had been introduced to it by the subcommission at the thirty-fourth session of the Commission (see CLCS/83, paras. 64-66). The Commission engaged in a detailed discussion of the draft recommendations, and decided to continue the discussion during the forthcoming session, with a view to reverting to the item at the plenary level during the thirty-seventh session, to be held in 2015.

Item 11

Consideration of the submission made by Pakistan

Report of the subcommission

29. The Chair of the subcommission, Mr. Urabe, reported on the progress of its work during the intersessional period and at the thirty-fifth session of the Commission, noting that the subcommission had met from 21 July to 1 August. It had held three meetings with the delegation of Pakistan. During those meetings, the delegation had made two presentations on its response to the questions and requests for clarifications from the subcommission, which Pakistan had provided during the intersessional period. The subcommission had made a presentation in response to the presentations. The subcommission had made a final request for additional data and information, which was provided by the delegation during the thirty-fifth session.

30. The subcommission decided that, during the intersessional period, its

8 Submission made on 29 April 2009; see www.un.org/Depts/los/clcs_new/submissions_files/submission_isl_27_2009.htm.

members would consider Pakistan's response to the final request for additional data and information and that it would resume its consideration of the submission during the thirty-sixth session. The subcommission planned to prepare and deliver its presentation pursuant to paragraph 10.3 of annex III to the rules of procedure during the thirty-sixth session, following which it would prepare its draft recommendations.

31. The Commission subsequently decided that the meetings of the subcommission during the thirty-sixth session would be held from 3 to 14 November 2014.

Item 12

Consideration of the submission made by Norway in respect of Bouvetøya and Dronning Maud Land

32. The Commission appointed Mr. Ravindra as the seventh member of the subcommission.

Report of the subcommission

33. In the absence of the Chair of the subcommission, one of the Vice-Chairs, Mr. Oduro, reported on the progress of its work during the intersessional period and at the thirty-fifth session of the Commission, noting that the subcommission had met from 21 to 25 July. During that period, it had held four meetings with the delegation of Norway, in the course of which the delegation had made presentations on material that had been supplied intersessionally and had responded to questions and requests for clarification made by the subcommission.

34. The subcommission decided that its members would continue to work on the submission individually during the intersessional period and that it would resume its consideration of the submission during the thirty-sixth session.

35. The Commission subsequently decided that the meetings of the subcommission during the thirty-sixth session would be held from 3 to 14 November 2014.

Item 13

Consideration of the submission made by South Africa in respect of the mainland of the territory of the Republic of South Africa

36. The Commission appointed Mr. Ravindra as the seventh member of the

subcommission.

Report of the subcommission

37. In the absence of the Chair of the subcommission, one of the Vice-Chairs, Mr. Charles, reported on the progress of its work during the intersessional period and at the thirty-fifth session of the Commission, noting that the subcommission had met from 11 to 15 August and from 25 to 29 August. During that period, it had commenced the main scientific and technical examination of the submission. In the first week, the subcommission had held four meetings with the delegation of South Africa, in the course of which the delegation had given another detailed presentation on its submission to the subcommission, and the subcommission had presented its preliminary views and requested clarifications from the delegation on a number of issues. During the second week, the subcommission had continued with its examination of the submission.

38. The subcommission had decided that its members would continue to work on the submission individually during the intersessional period and that it would resume its consideration of the submission during the thirty-sixth session.

39. The Commission subsequently decided that the meetings of the subcommission during the thirty-sixth session would be held from 20 to 24 October and from 17 to 21 November 2014. The subcommission had invited the delegation to meet during the latter week.

Item 14

Consideration of the joint submission made by the Federated States of Micronesia, Papua New Guinea and Solomon Islands in respect of the Ontong Java Plateau

Report of the subcommission

40. The Chair of the subcommission, Mr. Roest, reported on the progress of its work during the intersessional period and at the thirty-fifth session of the Commission, noting that the subcommission had met from 11 to 15 August and from 25 to 29 August. During that period, the subcommission had commenced the initial examination of the joint submission pursuant to section III of annex III to the rules of procedure.

41. On 28 July, the joint delegation had transmitted to the Commission, through the Secretary-General, an addendum to the executive summary of the

joint submission, which, on 22 August, had been followed by amendments to the main body of that submission and by updated supporting documents. After having received the complete amendment to the joint submission, the subcommission had verified the format and completeness of the joint submission and had commenced its preliminary analysis.

42. The subcommission had held two meetings with the joint delegation in the second week of deliberations, in the course of which the joint delegation had made a presentation on key elements of the joint submission and the subcommission had made a presentation of its preliminary views and posed a number of questions to seek clarification on certain issues.

43. The subcommission had also concluded that it was not necessary to recommend seeking the advice of specialists, in accordance with rule 57 of the rules of procedure, or cooperation with relevant international organizations, in accordance with rule 56. The subcommission had further concluded that more time would be required to examine all the data and prepare recommendations for transmittal to the Commission.

44. The subcommission had decided that its members would continue to work individually on the submission during the intersessional period and that it would resume its consideration of the submission during the thirty-sixth session.

45. The Commission subsequently decided that the meetings of the subcommission during the thirty-sixth session would be held from 20 to 24 October and from 17 to 21 November 2014. The subcommission had decided that the first week would be allocated to the analysis of all additional data and information received and had invited the joint delegation to meet during the latter week. The subcommission had also transmitted to the joint delegation a request for further clarification and for additional data and information.

Item 15

Consideration of the joint submission made by France and South Africa in respect of the area of the Crozet Archipelago and the Prince Edward Islands

Report of the subcommission

46. The Chair of the subcommission, Mr. Njuguna, reported on the progress of its work at the thirty-fifty session of the Commission, noting that the subcommission had met from 18 to 22 August. During that period, it had

commenced an initial examination of the joint submission pursuant to section III of annex III to the rules of procedure of the Commission.

47. The subcommission had verified the format and completeness of the joint submission and had commenced its preliminary analysis. It had held two meetings with the joint delegation, on 19 and 21 August, during which the joint delegation had made a presentation on key aspects of the joint submission and the subcommission had made a presentation of its preliminary views and an initial request for clarification and additional data and information.

48. On 22 August, the subcommission had transmitted a communication to the joint delegation seeking clarifications and posing questions, to be possibly answered during the intersessional period, in order, inter alia, to evaluate if the test of appurtenance had been satisfied. It had also concluded that it was not necessary to recommend seeking the advice of specialists, in accordance with rule 57 of the rules of procedure, or cooperation with relevant international organizations, in accordance with rule 56. The subcommission had also concluded that further time would be required to examine all the data and prepare recommendations for transmittal to the Commission.

49. The subcommission had decided that its members would continue to work individually on the joint submission during the intersessional period and that it would resume its consideration of the joint submission at the thirty-sixth session.

50. The Commission subsequently decided that the meetings of the subcommission during the thirty-sixth session would be held from 27 to 31 October and from 24 to 28 November 2014. The subcommission had invited the delegation to meet during the latter week.

Item 16

Consideration of the submission made by Mauritius in respect of the region of Rodrigues Island

Report of the subcommission

51. The Chair of the subcommission, Mr. Madon, reported on the progress of its work at the thirty-fifth session of the Commission, noting that the subcommission had met from 21 to 25 July. During that period, it had carried out an initial examination of the submission, pursuant to section III of annex III to the rules of procedure of the Commission.

52. The subcommission had verified the format and completeness of the

submission and had commenced its preliminary analysis. The subcommission had held two meetings with the delegation on 22 and 24 July, during which the delegation had made a presentation on key elements of its submission, and the subcommission had made a presentation of its preliminary views, which had been transmitted to the delegation in written format following the meeting.

53. The subcommission had also concluded that it was not necessary to recommend seeking the advice of specialists, in accordance with rule 57 of the rules of procedure, or cooperation with relevant international organizations, in accordance with rule 56. The subcommission had also concluded that further time would be required to examine all the data and prepare recommendations for transmittal to the Commission.

54. The subcommission had decided that its members would continue to work on the submission individually during the intersessional period and at the thirty-sixth session, particularly its consideration under annex III to the rules of procedure, with the aim of making a detailed presentation of its preliminary analysis to the delegation at the next session.

55. The Commission subsequently decided that the meetings of the subcommission during the thirty-sixth session would be held from 3 to 14 November 2014. The subcommission had invited the delegation to meet during the second of those two weeks.

Item 17

Presentation of the submission made by Kenya⁹

56. In a note verbale dated 7 July 2014, the Government of Kenya requested the opportunity to make another presentation of its submission of 6 May 2009 to the Commission in view of the partial change in the latter's membership that had occurred since the twenty-fourth session of the Commission held in August and September 2009, at which Kenya had originally presented its submission (see CLCS/64, paras. 93-97).

57. The presentation of the submission of Kenya was made on 3 September 2014, by the Head of the delegation, Githu Muigai, Attorney General, and by Michael Gikuhi, Geophysicist and member of the task force on delineation

9 Submission made on 6 May 2009; see www.un.org/depts/los/clcs_new/submissions_files/submission_ken_35_2009.htm.

of Kenya's outer continental shelf. The delegation of Kenya also included the Permanent Representative of Kenya to the United Nations, Macharia Kamau, and the Deputy Permanent Representative of Kenya to the United Nations, Koki Muli Grignon, as well as a number of scientific, legal and technical advisers.

58. In addition to elaborating on substantive points of the submission, Mr. Muigai noted that one member of the Commission, Mr. Njuguna, had provided Kenya with advice and assistance concerning the submission.

59. In reference to paragraph 2 (a) of annex I to the rules of procedure, Mr. Muigai indicated that Kenya had entered into a maritime boundary agreement with the United Republic of Tanzania on 23 June 2009, which applied to the territorial sea, exclusive economic zone and continental shelf, including the continental shelf beyond 200 nautical miles upon the finalization of its delineation.

60. Mr. Muigai observed that Kenya had yet to conclude a maritime boundary agreement with Somalia, although negotiations were ongoing. He noted that provisional arrangements of a practical nature had been entered into, in accordance with article 83, paragraph 3, of the Convention, as contained in a memorandum of understanding signed on 7 April 2009, whereby the parties had undertaken not to object to the examination of their respective submissions. Mr. Muigai noted that the note verbale from Somalia dated 19 August 2009 affirmed the position mutually agreed upon by the two States in the memorandum of understanding. Mr. Muigai also referred to communications from Somalia, dated 10 October 2009 (see CLCS/66, para. 48) and 4 February 2014, in which Somalia had respectively, requested that the memorandum of understanding be treated as "non-actionable" and had objected to the consideration of Kenya's submission. In addition, Mr. Muigai noted that Somalia had instituted proceedings against Kenya at the International Court of Justice with regard to a dispute concerning maritime delimitation in the Indian Ocean. In that respect, Mr. Muigai observed that, pursuant to the Convention and the rules of procedure of the Commission, the actions of the Commission would not prejudice matters relating to the delimitation of boundaries between States. Mr. Muigai submitted that the Commission was not stopped from considering Kenya's submission, notwithstanding paragraph 5(a) of annex I to the rules of procedure; otherwise, Kenya would be prejudiced with respect to time and resources and its rights under the Convention.

61. In respect of the communication from Sri Lanka dated 22 July 2009 (see CLCS/64, paras. 3(d) and 96), in which Sri Lanka had indicated that "the principal State referred to in paragraph 3 of the statement of understanding is Sri Lanka", Mr.

Muigai emphasized that neither the Convention nor the statement of understanding had made any reference to a “principal State”. He further affirmed that, in the view of the Government of Kenya, the principles contained in the statement of understanding could apply whenever a State was able to demonstrate the existence of the special conditions envisaged in the statement. Mr. Muigai also noted that in the note verbale, Sri Lanka had not raised any objection to the consideration of the submission made by Kenya in terms of annex I to the rules of procedure.

62. In respect of the legal basis for delineation of the continental shelf beyond 200 nautical miles, Mr. Muigai emphasized that Kenya’s continental margin had exhibited special characteristics similar to those stipulated in paragraph 1 of the statement of understanding and that the application of article 76, paragraph 4(a), of the Convention would give rise to an inequity, as specified in paragraph 2 of the statement of understanding. He indicated that Kenya, therefore, had applied that exception in establishing the outer edge of its continental margin.

63. Mr. Muigai subsequently urged the Commission to establish a subcommission when the submission was next in line for consideration, as queued in the order in which it was received.

64. The Commission subsequently continued its meeting in private. Recalling the decision taken at its thirty-fourth session (see CLCS/83, para. 18), and taking note of the presentation made by Kenya on 3 September 2014, the Commission, in keeping with its practice, reiterated its decision to defer further consideration of the submission and the communications from Kenya and Somalia.

65. Following that decision, the Commission received a note verbale dated 2 September 2014 from Somalia. The Commission took note of it and determined that no change in the aforementioned decision would be required.

Item 18

Report of the Chair of the Commission on the twenty-fourth Meeting of States Parties to the United Nations Convention on the Law of the Sea

66. The Chair of the Commission provided an overview of the proceedings of the twenty-fourth Meeting of States Parties to the United Nations Convention on the Law of the Sea held in June 2014, which were deemed of relevance to the Commission (see SPLOS/270 and SPLOS/277, sect. VII). In particular, he drew the attention of the members to the decision of the Meeting of States Parties regarding

the conditions of service of the members of the Commission (see SPLOS/276).

67. The Commission took note of the information reported by the Chair and, in particular, of the decision of the twenty-fourth Meeting of States Parties (see also paras. 9-12 above).

Item 19

Report of the Chair of the Committee on Confidentiality

Referral of a matter to the Committee

68. On 4 August 2014, the Commission was informed by its Chair of a potential breach of confidentiality that had allegedly taken place during the international workshop on the new developments on the Law of the Sea, which was held at the University of Xiamen, China, from 24 to 25 April 2014. The allegations concerned the potential disclosure of internal procedures of the Commission and the disclosure of information contained in a note verbale from a State, which was not in the public domain.

69. In accordance with the rules of procedure of the Commission (CLCS/40/Rev.1) related to an alleged breach of confidentiality by a member of the Commission, and considering the nature of the allegation, the Commission decided to refer the matter to the Committee on Confidentiality in order to establish the facts. The Committee constituted an investigating body comprising all five of its members (Messrs. Park (Chair), Heinesen, Kalngui, Marques and Uścińowicz).

Report by the Chairman of the Committee

70. The Chair of the Committee on Confidentiality, Mr. Park, reported that the Committee and its investigating body had held meetings to consider the case referred to the Committee and to investigate the allegations. He presented to the Commission a report providing information on the work carried out by the Investigating Body to ascertain whether any behaviour contrary to annex II to the rules of procedure had occurred during the international workshop. The Chair informed the Commission that, after a thorough examination of the report of the investigating body, the Committee had endorsed it by consensus, on 2 September 2014, and had subsequently reached the conclusions set out below.

Divulging of information pertaining to the internal proceedings of the Commission

71. The Committee on Confidentiality endorsed the conclusion reached by the investigating body that the available evidence had not been sufficient to conclude that a breach of confidentiality had taken place in that regard at the international workshop.

Divulging of information pertaining to confidential correspondence (note verbale not in the public domain)

72. The Committee on Confidentiality endorsed the conclusion reached by the investigating body that the available evidence was sufficient to conclude that a breach of confidentiality had taken place in that regard at the international workshop.

73. The report of the Committee included:

- (a) The allegations of a breach of confidentiality;
- (b) The statement of the member of the Commission concerned;
- (c) A synopsis of the evidence and the evaluation of it by the investigating body;
- (d) The findings, indicating that one of the two allegations was supported by the evidence.

74. The work of the investigating body was conducted in strict confidentiality and followed established procedures with regard to due process. The report did not contain any dissenting or separate opinions.

75. The Chair of the Committee reported that he had been re-elected as Chair; He also reported that Messrs. Kalngui and Marques had been re-elected as Vice-Chairs of the Committee, for a term of office that would commence in December 2014 and expire on 15 June 2017.

Deliberations of the Commission on the matter

76. The Commission took note of the report of the investigating body, endorsed by the Committee on Confidentiality. Following a thorough examination of the matter, in accordance with paragraph 5.2 of annex II to the rules of procedure, the Commission decided to inform the Meeting of States Parties to the Convention of the following:

The Commission,

Concerned about the integrity of the work carried out by the Commission for coastal States and the international community as a whole,

Mindful of the need to preserve the confidentiality of all the materials marked

as confidential by States,

Notes the general interest of States Members of the United Nations, as well as States parties to the Convention, in the transparency of the work of the Commission,

Takes note, with appreciation, of the report prepared by the investigating body, as adopted by the Standing Committee on Confidentiality,

Notes that insufficient evidence exists to support the first allegation, which relates to disclosure of internal procedures of the Commission,

Accepts the conclusion that the evidence supports the second allegation that information contained in a note verbale that is not in the public domain was disclosed during the meeting,

Notes the willingness of the member to cooperate to clarify a complex question in the interest of transparency and accepts his apology,

Reminds all members of the high standard of conduct that is expected of them in discharging their duties,

Reiterates the need for all members of the Commission to perform their duties honourably, faithfully, impartially and conscientiously,

Recommends the arrangement of a meeting with the State Party affected by the breach of confidentiality in order to ensure full transparency,

Recommends that the States Parties consider the results of the investigation and take action, if required.

Item 20

Report of the Chair of the Editorial Committee

77. The Acting Chair of the Editorial Committee, Mr. Charles, reported that the Committee had held several meetings. He presented to the Commission draft paragraphs to be reflected in the present statement with respect to the position of the Commission concerning the decision regarding the conditions of service of the members of the Commission on the Limits of the Continental Shelf, adopted by the twenty-fourth Meeting of States Parties to the Convention (see SPLOS/276; see also above paras. 10-12).

78. Mr. Charles also reported that Mr. Haworth had been re-elected as Chair and that Messrs. Charles and Paterlini had been re-elected as Vice-Chairs of the Editorial Committee.

Item 21**Report of the Chair of the Scientific and Technical Advice Committee**

79. The Chair of the Scientific and Technical Advice Committee, Mr. Urabe, reported that the Committee had held one meeting. He informed the Commission that he had been re-elected as Chair. He also reported that Messrs. Haworth and Paterlini had been re-elected as Vice-Chairs, for a term of office that would commence in December 2014 and expire on 15 June 2017. He reiterated the proposal described in paragraph 94 below, concerning issues of a scientific and technical nature.

Item 22**Report of the Chair of the Training Committee and other training issues**

80. The Chair of the Training Committee, Mr. Carrera, reported that, following consultations, he had been re-elected Chair of the Committee. He also reported that Messrs. Park and Roest had been re-elected as Vice-Chairs, for a term of office that would commence in December 2014 and expire on 15 June 2017. He informed the Commission that members of the Commission had, in their individual capacity, given lectures at the Summer Academy on the Continental Shelf, held in the Faroe Islands, Denmark, from 21 to 28 June 2014.

Item 23**Other matters****Appointment of members of subcommissions and other subsidiary bodies**

81. In addition to his appointment to the subcommissions (see paras. 14, 32 and 36 above), Mr. Ravindra was appointed as a member of both the Editorial Committee and the Training Committee. The Commission also decided to appoint Mr. Uściniowicz as a member of the Committee on Confidentiality to replace Mr. Jaoshvili.

Election of the officers of the Commission

82. In conformity with rule 13 of the rules of procedure, the officers of

the Commission are elected for a term of two-and-a-half years and are eligible for re-election. Considering that the current term of office of the officers of the Commission would expire in December 2014 and that no plenary meetings with full conference services had been scheduled for the thirty-sixth session, the Commission decided to proceed with the election of the officers at the thirty-fifth session.

83. Following consultations, Mr. Awosika was re-nominated as Chair and Messrs. Carrera, Glumov, Park and Roest as Vice-Chairs. In the absence of any other nominations, the Commission re-elected them as the officers of the Commission by acclamation, for a term of office that would commence in December 2014 and expire on 15 June 2017.

Future sessions of the Commission

84. The Commission adopted the programme of work for its thirty-sixth session, which had originally been scheduled to be held from 13 October to 28 November 2014 (see CLCS/80, para. 89). In that regard, the Commission noted that the Chairs of the subcommissions had requested that no more than two weeks of work be allocated to each subcommission during the session, given that responses to questions and requests for clarification from submitting States were likely to be submitted late in October. The Commission also noted that a number of submitting States had requested to meet with the respective subcommissions towards the end of the session in November. In that regard, the Commission decided that the thirty-sixth session would be held from 20 October to 28 November 2014.

85. The following items would be on the programme of work of the Commission at its thirty-sixth session:

1. Consideration of the submission made by Uruguay;
2. Consideration of the submission made by the Cook Islands in respect of the Manihiki Plateau;
3. Consideration of the submission made by Argentina;
4. Consideration of the submission made by Iceland in respect of the Ægir Basin area and the western and southern parts of Reykjanes Ridge;
5. Consideration of the submission made by Pakistan;
6. Consideration of the submission made by Norway in respect of Bouvetøya and Dronning Maud Land;
7. Consideration of the submission made by South Africa in respect of the mainland of the territory of the Republic of South Africa;

8. Consideration of the joint submission made by the Federated States of Micronesia, Papua New Guinea and Solomon Islands in respect of the Ontong Java Plateau;

9. Consideration of the joint submission made by France and South Africa in respect of the area of the Crozet Archipelago and the Prince Edward Islands;

10. Consideration of the submission made by Mauritius in respect of the region of Rodrigues Island;

11. Other matters.

86. Under item 11, the Commission may, *inter alia*, address matters pertaining to the participation by members in international conferences and to the referral by subcommissions of issues of a general nature encountered during the examination of submissions to the plenary of the Commission.

87. The Commission also decided that, in 2015, it would hold three sessions of seven weeks each, including plenary meetings, for a total of 21 weeks of meetings of the Commission and its subcommissions. It also decided that four of the 21 weeks would be devoted to plenary meetings. The decision was taken on the understanding that it could be revisited during the thirty-seventh session, in the light of the progress made in the work of the subcommissions and other developments related to both the workload of the Commission and the conditions of service of its members. The decision was as follows:

(a) The thirty-seventh session would be held from 2 February to 20 March 2015. The plenary parts of the session would be held, subject to the approval of the General Assembly, from 9 to 13 February and from 9 to 13 March 2015;

(b) The thirty-eighth session would be held from 20 July to 4 September 2015. The plenary parts of the session would be held, subject to the approval of the General Assembly, from 3 to 7 and from 24 to 28 August 2015;

(c) The thirty-ninth session would be held from 12 October to 27 November 2015, with no plans for plenary meetings.

Attendance of members

88. The Commission addressed the issue of the attendance of its members and re-emphasized that it was important for all members of the Commission to attend its meetings in full and to participate in the work of the subcommissions. It was recalled that the Chair, at the request of the Commission, had brought the absence of members who had not attended two consecutive sessions of the Commission to the attention of the twenty-fourth Meeting of States Parties (see CLCS/83, para.96).

89. In that regard, the Commission also took note of the pattern of absences of Mr. Jaoshvili.¹⁰ It was recalled that the Chair had met with the Permanent Representative of the nominating State, who had been apprised of the fact that the member had been unable to participate fully in the work of the Commission owing to an alleged lack of financial support. The Permanent Representative was also informed about the repercussions of such an absence on the work of the Commission (see CLCS/83, paras.2 and 97). The Commission concluded that Mr. Jaoshvili was no longer able to perform his duties owing to his pattern of absences, including for two consecutive sessions.

90. The Commission consequently proposed that the member's seat be considered vacant, pursuant to rule 8 of the rules of procedure of the Commission, and that it would request the Meeting of State Parties to declare such a vacancy and to elect a new member for the remainder of the Mr. Jaoshvili's term.

91. The Commission also took note of the information provided by the Chair about other similar meetings he had held with representatives from the permanent missions of other States in relation to members nominated by those States who had not attended the thirty-fifth session in full.

Trust funds

92. The Commission was informed by the Secretariat about the status of the trust fund for the purpose of defraying the cost of the participation in its meetings of the members of the Commission from developing States. For the thirty-fourth session, assistance had been provided to eight members of the Commission, in the amount of approximately \$170,000. For its thirty-fifth session, an estimated total of \$172,000 in financial assistance was being provided to eight members. The Commission was also informed that since the issuance of the latest statement of the Chair, contributions had been received from Iceland and Ireland. At the twenty-fourth Meeting of States Parties, one State had indicated its intention to make a contribution to the trust fund. As at the end of July 2014, the trust fund had an

10 From his first election to the Commission in 2007, the member did not attend the following sessions: twentieth (see CLCS/56, para. 3), twenty-first (see CLCS/58, para. 3), twenty-third (see CLCS/62, para. 2), twenty-fifth (see CLCS/66, para. 2), twenty-sixth (see CLCS/68, para.2), twenty-seventh (see CLCS/70, para. 2),twenty-eighth (CLCS/72, para. 3),thirty-second (CLCS/80, para. 2) and thirty-third(see CLCS/81, para. 2).He attended, only in part, the following sessions: twenty-second(CLCS/60), twenty-fourth (CLCS/64), twenty-ninth (CLCS/74), thirtieth(CLCS/76), thirty-first (CLCS/78, para. 2), and thirty-fourth (CLCS/83, para. 2).

approximate balance of \$670,000.

93. An overview was also provided by the Secretariat on the status of the trust fund for the purpose of facilitating the preparation of submissions to the Commission by developing States, in particular the least developed countries and small island developing States, and compliance with article 76 of the Convention. The Commission was also informed that, since the issuance of the most recent statement of the Chair, a contribution had been received from Costa Rica. As at the end of July 2014, the trust fund had an approximate balance of \$1,306,000.

Communication dated 22 July 2014 from Japan

94. On 22 July 2014, Japan addressed a communication to the Commission concerning the recommendations in respect of the submission made by Japan on 12 November 2008. The Commission took note of the communication and the views expressed therein.

Issues of scientific and technical nature

95. The Commission considered again the possibility of devoting time to internal discussions of topics of a scientific and technical nature during a future session. In view of the heavy workload of the thirty-fifth session related to the consideration of submissions, it was decided that such internal discussions might be held at future sessions, when the workload so permitted.

Acknowledgements

96. The Commission noted with appreciation and gratitude the high standard of Secretariat services rendered to it by the Division.

97. The Commission expressed its appreciation to other members of the Secretariat for the assistance they had provided to the Commission and, in particular, noted the high professional standard of interpretation in the official languages of the United Nations and the assistance provided by the conference officers.

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短期访问学者招聘

上海交通大学凯原法学院 CMT 国际海事研究中心设立研究课题,面向境内外公开招聘短期访问学者。

一、应聘条件

访问学者应具有海洋、海事专业背景。

二、聘期要求

1. 聘期二至四周;
2. 聘期内撰写一篇 8000 字以上的论文,题目须经双方书面协议,作者须保证无著作权问题,并愿发表于《中国海洋法学评论》;
3. 工作地点为上海交通大学凯原法学院 CMT 国际海事研究中心。

三、工作条件及待遇

1. 中心为访问学者提供必要的办公空间;
2. 中心为访问学者提供一定的经费支持,具体数额另议;
3. 访问学者在沪期间生活自理,中心可提供部分协助。

四、申请材料

1. 个人简历;
2. 拟研究的题目;
3. 详细的联络方式。

联系人: 田明、谢月红

电话: 021-34204740

电子邮箱: tianmingeve@163.com

联系地址: 上海市闵行区东川路 800 号上海交通大学凯原法学院 503 室

Short-term Visiting Scholar Recruitment

The CMT Center for International Maritime Research of KoGuan Law School of Shanghai Jiao Tong University has set up a research project, which is now recruiting short-term visiting scholars from both home and abroad.

I. Qualification for application

The visiting scholar shall have professional background of ocean and maritime affairs.

II. Requirements for the employment duration

1. The employment duration will last two to four weeks;
2. During the employment, the scholar is required to finish a paper of 8,000 words, the topic of which is to be decided through a written agreement between the two parties. The paper should be free from any copyright issue and might be published in *China Oceans Law Review*;
3. The work place will be at the CMT Center for International Maritime Research of KoGuan Law School of Shanghai Jiao Tong University.

III. Working conditions and compensation.

1. The Center will provide the visiting scholar with a necessary office space;
2. The Center will provide the visiting scholar with some financial support, the amount to be arranged;
3. The visiting scholar's living expenses during stay in Shanghai will be borne by himself/herself, and the Center may provide some assistance.

IV. Application materials

1. Curriculum Vitae;
2. The topic proposed for research;
3. Detailed contact information.

Contacts: TIAN Ming and XIE Yuehong

Tel.: 021-34204740

Email: tianmingeve@163.com

Address: Room 503, KoGuan Law School, Shanghai Jiao Tong University
800 Dongchuan Rd., Minhang District,
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