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厦门大学海洋政策与法律中心
上海交通大学海洋法律与政策研究中心
香港理工大学董浩云国际海事研究中心
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Xiamen University Center for Oceans Policy and Law
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(In Alphabetical Order of Surnames)

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DEPARTMENT OF EDITOR

(In Alphabetical Order of Surnames)

卷首语

《中国海洋法学评论》全面改版为中英双语全文对照学术期刊发行两期以来，得到了不少读者的肯定和支持，这也使我们坚定了朝着国际化方向迈进的脚步，继续努力为大中华区以及世界各地的学者搭建一个共同的海洋法学交流平台。本期八篇文章涉及的内容十分丰富，我们将一一呈现以飨读者。

日本针对冲之鸟礁的种种举措近年来已引起国际社会的广泛关注和争议。中国海洋大学薛桂芳教授的大作探讨了冲之鸟礁的自然地理条件、基于该条件所能够主张的海域及日本极端主张所引发的问题。

当今世界，因开发海上潜在油气矿藏而引起有关沿海国家纠纷的情形时有发生，特别是在亚太地区。马克斯·普朗克海洋事务研究所学者 Vasco Becker-Weinberg 通过考察帝汶海、中国东北部海域和泰国湾三个区域共同开发海上油气矿藏的法律制度情况，分析了在亚太地区制定联合开发海上油气矿藏协议的前景，为这一地区此类纠纷的解决提供了有价值的参考。

西安政治学院李广义教授关注的是专属经济区军事活动的权利和义务。经过深入的分析，他认为任何国家在沿海国专属经济区的军事活动都应当是受限制的，军事活动必须体现“和平目的”，驳斥了一些海洋大国对此项问题作出的自私性和扩大性解释。

海洋环境和海洋资源保护一直是海洋法律中的重要议题。福州

大学张相君副教授探讨了区域合作保护南海海洋环境法律制度的构建;国家信息中心桂静副研究员聚焦于国家管辖以外海洋保护区的法律问题;中国海洋大学梅宏副教授和福建龙海市林业局薛志勇高级工程师则针对中国红树林保护区管理与立法问题提出了宝贵的建议。相信对海洋环境和资源感兴趣的读者会从这三篇文章中获得一些启发。

本期评论中还收录了另外两篇论文。其中,山西大学李冰强讲师讨论了渤海特别法的执行体制,为渤海区域环境、资源与生态保护构建了一套新的管理体系。而 Francis Lansakara 船长的文章则侧重于评估相关国际公约对于船舶油污赔偿规定的适当性。

《中国海洋法学评论》已经走入第七个年头。我们能够一步一个脚印地走到现在,离不开各界专家学者给予我们的支持和帮助,在此一并表示衷心的感谢!同时,也正是因为你们的关心和鼓励,我们将克服困难,继续前行,成长为推动中国乃至世界海洋事业发展的一股不可或缺的力量。

编辑部 谨识

EDITOR'S NOTE

China Oceans Law Review has been receiving certain affirmation and support from the readers since its initiation of a bilingual version in 2010. This encourages us to make the journal more international, so as to provide a common academic platform on oceans law among the scholars in the Greater China Region and globally. This issue consists of the following eight wonderful writings.

All the moves aiming at the Okinotori Rocks Japan initiated recently have aroused a broad concern and controversy in the international community. Prof. Guifang (Julia) XUE at Ocean University of China provides a very detailed analysis on the geographic aspects of the Okinotori Rocks and the sea areas that Japan could claim accordingly. She also makes an observation of the problems arising from Japan's extreme claims.

The development of potential offshore petroleum and gas reserves occasionally gives rise to disputes among coastal States, as can be particularly exemplified in the Asia Pacific region. By observing the legal systems and practices in relation to the joint development of the offshore petroleum and gas reserves in the Timor Sea, the seas to Northeast China and the Gulf of Thailand, Vasco Becker-Weinberg, a scholar at the International Max Planck Research School for Maritime Affairs, analyzes the prospect for formulating an agreement to jointly develop the reserves and provides an invaluable reference for solving the related disputes in the region.

Prof. LI Guangyi at the PLA Xi'an College of Political Sciences focuses on the rights and obligations in the EEZ. Through a thorough study, he holds a view that the military activities in the EEZ of a coastal State should be duly confined and must be with due regard to peaceful purpose. This is a rebuttal to some selfish and arbitrary interpretation on this issue from some sea powers.

Marine environmental protection and marine resources conservation are always important issues in the oceans law. ZHANG Xiangjun, an associate professor at Fuzhou University, discusses framing a legal system for the marine

environmental protection in the South China Sea. GUI Jing, an associate research fellow at National Marine Data and Information Service, emphasizes the legal issues concerning the marine protected area beyond national jurisdiction. MEI Hong, an associate professor at Ocean University of China, and XUE Zhiyong, a senior engineer at Longhai Forestry Administration, Fujian Province, put forward very precious suggestions on the management and legislation of the mangrove natural reserves in China. Hopefully all the articles would have some implications to our readers who have interests therein.

Two other articles have also been included in this issue, among which LI Bingqiang, a lecturer at Shanxi University, discusses the enforcement system of the Bohai special law, in addition, captain Francis Lansakara takes an emphasis on evaluating the adequacy of the relevant international conventions on compensation for the vessel-sourced oil pollution.

Last but not the least, we would like to extend our most sincere gratitude to scholars and experts of various fields. Without the generous help and support from them, *China Oceans Law Review* would never have made a success of stepping into the 7th year since its inauguration. We would overcome difficulties and carry on to become an indispensable force of pushing forward the marine programs in China and the world.

COLR Editorial

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How Much Can a Rock Get?

——A Reflection from the Okinotorishima Rocks

Guifang (Julia) XUE*

Abstract: The paper examines the Okinotorishima Rocks and their entitlement in generating extended jurisdictional zones, together with issues aggravated by Japan's excessive national claims. Based on the Okinotorishima Rocks, Japan claims a 200 nautical mile Exclusive Economic Zone (EEZ) and an extended continental shelf (ECS). The practice has caused disagreement and concerns from the international community.

The paper starts with a brief introduction on the Okinotorishima Rocks and the maritime zone claims composed by Japan based on the tiny rocks against the island regime envisaged in the United Nations Convention on the Law of the Sea (UNCLOS). This is followed by a general review of the Japanese attempts to promote the Okinotorishima Rocks into legal islands (simplified as "islandisation") so as to support its national claims of multiple purposes. The paper continues with an illustration of the Japanese views and arguments in maintaining its claim and islandisation practice over the Okinotorishima Rocks. The paper raises some of the key questions associated with the Japanese islandisation attempts. These include whether or not rocks are distinguishable from islands based on the existing international law. How should the UNCLOS be implemented and how should the concerns of the international community be respected? How will the Commission on the Limits of the Continental Shelf accomplish its role with an applicable decision? After years of heavy, deliberate expansion, are the Okinotorishima Rocks still natural rocks or man-made artificial structures?

The paper concludes that the Okinotorishima Rocks do not qualify as legal

* Guifang (Julia) Xue, Director/Professor/Ph. D., Institute for the Law of the Sea, Ocean University of China. The views expressed in this paper are not representing that of any government agencies. E-mail: juliaxue@ouc. edu. cn.

islands, and are not entitled to extended jurisdictional zones. Moreover, what Japan has constructed around the rocks has changed their natural status and the expanded concrete structures have turned the rocks into artificial islands or artificial structures which deserve only a 500-meter safety zone.

Meanwhile, the paper points out the profound implications and far-reaching impact reflected from the Japanese claims based on the Okinotorishima Rocks. The rush by states to make ECS submissions has created a real crisis for international law and the deep seabed regime. The international community as a whole should work together to deal with this crisis.

Key Words: Rocks; Islands; Okinotorishima; Japan; Extended continental shelf

Ⅰ. Introduction: Japan's Claims on Okinotorishima Rocks and the Regime of Islands

Japan signed the United Nations Convention on the Law of the Sea (UNCLOS) on 7 February 1983 and ratified it on 20 June 1996. ① After years of preparation, Japan made a submission (the Submission) on 12 November 2008 to the Commission on the Limits of the Continental Shelf (hereinafter referred to as CLCS) regarding the outer limit of its continental shelves, which were calculated as 740,000 square kilometers, or about twice the size of its land territory (378,000). ②

According to the Japanese Executive Summary containing all charts and coordinates, seven regions are included, namely, Southern Kyushu-Palau Ridge Region (KPR), Minami-Io To Island Region (MIT), Minami-Tori Shima (MTS), Mogi Seamount Region (MGS), Ogasawara Plateau Region (OGP),

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① The UNCLOS was signed on December 10, 1982 and entered into force on November 16, 1994. For a list of ratifications, at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#, 30 December 2010. 160 States and the European Union had ratified or acceded to the UNCLOS. The Convention entered into force for Japan on 20 July 1996.

② Regarding the work of the CLCS, see its website at http://www.un.org/Depts/los/clcs_new/clcs_home.htm. Japan was the 13th country to submit the data and information to the CLCS in November 2008. The Commission began its examination of Japan's submission at the meeting in August 2009, at http://www.sof.or.jp/en/activities/index1.php, 20 June 2011.

Southern Oki-Daito Ridge Region (ODR), and Shikoku Basin Region (SKB). ① The extended continental shelf (ECS) claims of KPR, MIT, and SKB are based on a couple of Rocks called Okinotorishima, or more precisely, the Okinotorishima Rocks. ② This submission has intensified discussions and concerns from the international community.

Since the early 1980s, Japan has been putting enormous efforts into the islandisation of the Okinotorishima Rocks, and has claimed an Exclusive Economic Zone (EEZ) around these rocks up to 200 nm from all directions and even recently claimed an extended continental shelf beyond 200 nm. ③ Through this Submission, Japan expects to confirm its EEZ claims of 430,000 square kilometers in addition to 1,550 square kilometers of territorial sea, and an ECS in three regions based on the Okinotorishima Rocks. ④ The farthest areas based on the Okinotorishima Rocks extend up to 550 nautical miles, together with rights to enforce on maritime activities and resources within the claimed zones.

It may be recalled that the regime of islands is established by Article 121 of the UNCLOS. ⑤ In this article, Paragraph 1 repeats the definition of an island provided in Article 10 of the 1958 Convention on the Territorial Sea and Contiguous Zone. It also sets forth the primary criteria of an "island", namely, it must be a natural feature, an area of land, surrounded by water, and above water at high tide. It also disqualifies artificial islands and low-tide eleva-

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① For the Executive Summary of Japan's Submission, at http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf, 20 June 2011.

② "Shima" in Japanese means "island", but Japan called it "Okinotorishima Islands" in its Submission. To match this expression, "Okinotorishima Rocks" is adopted in this paper.

③ OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008 (Japanese), at http://www.sof.or.jp/jp/report/pdf/200903_ISBN978-4-88404-216-5.pdf, 20 June 2011.

④ Yukie Yoshikawa, Okinotorishima: Just the Tip of the Iceberg, *Harvard Asian Quarterly*, Vol. 9, No. 4, 2005, at http://asiaquarterly.com/2006/02/03/ii-131/, 15 January 2011.

⑤ Article 121 reads in full: (1) An island is a naturally formed area of land, surrounded by water, which is above water at high tide. (2) Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory. (3) Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf. *See* The United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3.

tions. ①

Paragraph 2 reflects the "land dominates the sea" principle and confirms the same treatment of island as continental land territory regarding its maritime zones, namely, territorial sea, contiguous zone, EEZ, and continental shelf. These zones are to be determined in accordance with the UNCLOS and in the same manner as applicable to land territory.

Paragraph 3 is a critical part of the Article. It excludes "rocks" which "cannot sustain human habitation or economic life of their own" from application in the determination of EEZ and ECS jurisdiction. The main purpose of Article 121 (3) is to guarantee that the regime of islands in paragraphs 1 and 2 is not applicable to tiny rocks and islets on the basis that they are essentially different in terms of the natural conditions necessary for supporting normal human life. In this respect, the UNCLOS differentiates between "islands" and "rocks". ②

Having understood the provision and its connotations, Japan tried in vain to delete Article 121 (3) during the negotiation of the UNCLOS. ③ To adjust the disadvantaged status of Okinotorishima as rocks, Japan has ventured to work over decades in turning them into islands. What Japan has achieved from these tiny rocks is beyond evaluation at the present stage. However, it is worth noting the impact of its islandisation and excessive EEZ and ECS claims on State Practice.

Ⅱ. Okinotorishima Rocks and the Japanese Islandisation Attempts

The Okinotorishima Rocks have come to international attention since the 1980s, and discussions have focused on the subject of legal status and the weight accorded to maritime zones. A brief introduction is provided below.

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① *See* Center for Ocean Law and Policy, University of Virginia School of Law, *United Nations Convention on the Law of the Sea* 1982, *a Commentary*, Vol. Ⅲ, The Hague: Martinus Nijhoff, 1995, p. 338.

② *See* Center for Ocean Law and Policy, University of Virginia School of Law, *United Nations Convention on the Law of the Sea* 1982, *a Commentary*, Vol. Ⅲ, The Hague: Martinus Nijhoff, 1995, p. 338.

③ *See* Center for Ocean Law and Policy, University of Virginia School of Law, *United Nations Convention on the Law of the Sea* 1982, *a Commentary*, Vol. Ⅲ, The Hague: Martinus Nijhoff, 1995, p. 337.

A. *The Okinotorishima Rocks*

Okinotorishima ("沖ノ鳥島:おきのとりしま" in Japanese), located in the western Pacific Ocean, 1,740 kilometers from the Japanese mainland, consists of 5 atoll reefs that were originally called "Parece Vela" by a Spanish sailor in 1565, as "it looks like a sail".[①] It was later called "Douglas Reef" after a British navigator William Douglas in 1789.[②] It is located on the Kyushu-Palau Ridge in the Philippine Sea at the coordinates of 20°25′N 136°05′E / 20.417, 136.083.[③] It is 534 kilometers SE of Oki Daitō, 567 kilometers WSW of Minami Iwo Jima of the Ogasawara Islands or 1,740 kilometers south of Tokyo, Japan.[④]

No official record exists in Japan about Okinotorishima prior to 1888. In 1922 and 1925, Japan investigated the area and confirmed in 1931 that no other countries had claims and thus declared the reefs its territory.[⑤] Administratively, Japan placed it under the jurisdiction of the Tokyo Metropolis as part of the Ogasawara Islands, and gave it a new Japanese name Okinotorishima ("remote

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① *See* Wikipedia, at http://en.wikipedia.org/wiki/Okinotorishima, 16 March 2011.

② *See* Wikipedia, at http://en.wikipedia.org/wiki/Okinotorishima, 16 February 2011. Both "Parece Vela" and "Douglass Reef" are still used today.

③ For relevant papers on this account, see Yann-huei Song, Okinotorishima: A "Rock" or an "Island"? Recent Maritime Boundary Controversy between Japan and Taiwan/China, in Seoug-Yong Hong and Jon M. Van Dyke ed., *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, Leiden: Martinus Nijhoff Publishers, 2009; J. I. CHARNEY, Rocks that cannot Sustain Human Habitation, *American Journal of International Law*, Vol. 93, 1999, pp. 863～878.

④ *See* Wikipedia, at http://en.wikipedia.org/wiki/Okinotorishima, 16 February 2011. Both "Parece Vela" and "Douglass Reef" are still used today.

⑤ Song is of the view that it was debatable Japan claimed the Okinotorishima coral reefs under its sovereignty from the international law viewpoint in the early 1930s. *See* Yann-huei Song, Okinotorishima: A "Rock" or an "Island"? Recent Maritime Boundary Controversy between Japan and Taiwan/China, in Seoug-Yong Hong and Jon M. Van Dyke ed., *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, Leiden: Martinus Nijhoff Publishers, 2009; Moreover, according to Paragraph 8 of the Potsdam Proclamation, Japan's sovereignty was limited to the islands of Honshu, Hokkaido, Kyushu, and Shikoku. Thus, Japanese sovereignty over the Okinotorishima is controversial and questionable. For details, *see* "Potsdam Declaration (United States, China, United Kingdom): A Statement of Terms for the Unconditional Surrender of Japan, 26 July 1945", at http://pwencycl.kgbudge.com/P/o/Potsdam_Declaration.htm, 20 June 2011.

bird islands" or "the southernmost islands of Japan"). [①]

The rocks are in the western part of a 3 to 4. 6 meter-deep lagoon surrounded by a submerged coral reef, and extend 4. 5 kilometers east-west and 1. 7 kilometers north-south, with an area of roughly 5 square kilometers within the rim of the reef, most of which are submerged even at low tide. [②] The fringing reef is pear-shaped in an east-west direction with its greatest width at the eastern end. A small boat channel into the lagoon was made in the southwest, about 15 meters wide and 6 meters deep, 250 meters southeast of the rocks.

Typhoons and erosion are constant threats to the reef's existence. A few decades ago, there were about five visible protrusions. Nowadays, only two tiny individual rocks may be traceable, namely: Higashikojima (Eastern Exposed Rock, Japan calls it "Eastern Islet") and Kitakojima (Northern Exposed Rock, Japan calls it "Northern Islet") located somewhat to the West. [③] At high tide, the Eastern Exposed Rock is roughly the size of a twin bed and pokes just 16 centimeters out of the ocean, and the Northern Exposed Rock is less than a small bedroom only 6 centimeters above water. [④] From satellite images, the two original rocks appear completely artificial, with no trace of the two natural rocks that still appeared on photographs of 1987.

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① Yukie Yoshikawa, Okinotorishima: Just the Tip of the Iceberg, *Harvard Asian Quarterly*, Vol. 9, No. 4, 2005, at http://asiaquarterly.com/2006/02/03/ii－131/, 9 February 2011.

② *See* Wikipedia, at http://en.wikipedia.org/wiki/Okinotorishima, 18 February 2011.

③ *See* Yann-huei Song, Okinotorishima: A "Rock" or an "Island"? Recent Maritime Boundary Controversy between Japan and Taiwan/China, in Seoug-Yong Hong and Jon M. Van Dyke ed., *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, Leiden: Martinus Nijhoff Publishers, 2009; *See* also Martin Fackler, A Reef or a Rock? Question Puts Japan In a Hard Place To Claim Disputed Waters, Charity Tries to Find Use For Okinotori Shima, *Wall Street Journal*, 16 February 2005, p. A1. It is not clear when Japan changed the name of those rocks; in the "Portrait of Okinotorishima" (http://www.nodaland.com/okitori/okitori.php) updated the last time in 2003, the "Eastern Exposed Rock" and "Northern Exposed Rock" were still used, but since 2005, the "Eastern Islet" and "Northern Islet" have been used in relevant discussions and documents. It is assumed that the names were changed in 2004.

④ *See* Yann-huei Song, Okinotorishima: A "Rock" or an "Island"? Recent Maritime Boundary Controversy between Japan and Taiwan/China, in Seoug-Yong Hong and Jon M. Van Dyke ed., *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, Leiden: Martinus Nijhoff Publishers, 2009.

B. Japan's Islandisation Attempts

To stop the rocks from disappearing and to keep them above water at all times and to use them to extend to the maximum of its EEZ and continental shelf, Japan has tried with great effort to make the Okinotorishima Rocks meet the minimum criteria of an "island" in legal terms. The Japanese attempts in this account can be divided into three periods (for specific details, see the attached Annex 1: Okinotorishima: History and Events).

Starting from the discovery of the rocks to the late 1970s, Japan claimed its sovereignty over the rocks and made some initial exploration on the nature and potential utilization of the rocks, including the construction of a Naval Base. ① In post-World War II, Japan lost its sovereignty over the rocks to the United States but regained it in the late 1960s. ② This enabled Japan to continue its investigation of the rocks.

The rocks did not attract much attention in the Japanese government until the late 1970s when coastal States started to claim their EEZs. Japan extended its fisheries jurisdiction in the surrounding waters of the rocks up to 200 nm from the territorial sea baselines in accordance with its Law on Provisional Measures Relating to the Fishing Zone that went into force on 1 July 1977. ③ The fishing zone covers an area of approximately 400,000 square kilometers, an area considerably larger than the total land of the country. ④ This stimulated Japanese enthusiasm over the gain generated by the little rocks. The action also signified the second period of Japan's islandisation actions till 2004.

In 1983, Japan signed the UNCLOS, concluded in the previous year, which

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① The construction of the Naval Base started in 1939, but was interrupted in 1941 by the outbreak of World War Ⅱ. As it seemed inappropriate to openly build a military facility in the international climate at that time, the government decided to refer to the base externally as "a lighthouse and a meteorological observation site." *See* Wikipedia, at http://en.wikipedia.org/wiki/Okinotorishima, 18 February 2011.

② Andrew L. Silverstein, Okinotorishima: Artificial Preservation of a Speck of Sovereignty, *Brooklyn Journal of International Law*, Vol. 12, No. 1, 2009, pp. 409～432, p. 410.

③ *See* Kiyofumi Nakauchi and Law of the Sea Institute, Japan, Emergy (sic) Measures for Protecting the "Oki-no-tori-Shima" Island from Waves in *Japan's Ocean Affairs—Ocean Regime, Policy and Development*, September 1989.

④ *See* Kiyofumi Nakauchi and Law of the Sea Institute, Japan, Emergy (sic) Measures for Protecting the "Oki-no-tori-Shima" Island from Waves in *Japan's Ocean Affairs—Ocean Regime, Policy and Development*, September 1989.

established the EEZ regime. Based on its possession of Okinotorishima, Japan could transfer its former fishing zone to an EEZ of the same size. However, the most serious issue the Japanese government feared was that the rocks could submerge and not lie above sea level. This would defeat exclusive jurisdiction related not only to a 200 nm EEZ in waters around them, but also a continental shelf claim beyond 200 nm. Since 1987, the Japanese government, represented by various governmental agencies and scientific institutions, undertook emergency measures leading to particularly noticeable islandisation movements.

In 1987, the sea level rise theory was employed and evidences were sought, and a proposal was raised to build constructions to prevent the physical erosion of the rock from submersion thereby keeping the rocks above water for making maritime claims. In the same year, the Japanese government launched an embankment building project.

During 1987—1993, the government of Tokyo and later the Central Government built steel breakwaters and concrete walls of 50 meters in diameter, and the original rocks (Higashikojima and Kitakojima) were completely covered by artificial concrete structures to stop the erosion. ① In 1998, a covering costing eight billion yen was placed on the eastern exposed rock.

In 1988, Japan's Marine Science and Technology Center erected a marine investigation facility, a platform on stilts located in the shallow part of the lagoon, which appeared as a rectangle of 100 meters by 50 meters. ② The platform supports a helicopter landing pad and a large, three-story building for marine investigations as well as a meteorological station.

On 8 February 2002, Japan modified its Coast Law adopted on 12 May 1956. ③ According to Article 37(2), the Central Government took over the administration tasks for the artificial structure. From 2004 onwards, the third period of national islandisation efforts started in a much enhanced manner with more comprehensive efforts. Repair work on the embankment was approved with significant funding and a series of research and observation projects began on the rocks and their surrounding waters. ④

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① In 1925, there were still five above-water rocks, which have eroded since. *See* Wikipedia, at http://en.wikipedia.org/wiki/Okinotorishima, 5 March 2011.

② In 1925, there were still five above-water rocks, which have eroded since. *See* Wikipedia, at http://en.wikipedia.org/wiki/Okinotorishima, 5 March 2011.

③ At http://law.e-gov.go.jp/htmldata/S31/S31HO101.html (Japanese), 5 March 2011.

④ Yukie Yoshikawa, Okinotorishima: Just the Tip of the Iceberg, *Harvard Asian Quarterly*, Vol. 9, No. 4, 2005, at http://asiaquarterly.com/2006/02/03/ii-131/, 5 March 2011.

In 2004, the 22nd Ocean Forum organized by the Ocean Policy Research Foundation (OPRF) was held focusing on the status and regeneration of Okinotorishima. ① A report was subsequently issued on the rehabilitation of the rocks and an electronic baseline coordinate was set up. ② Since 2004, conferences on Okinotorishima related issues have been arranged by the OPRF as regular forums. ③

In November 2004 and March 2005, the Nippon Foundation dispatched a mission to investigate how to utilize Okinotorishima and the surrounding EEZ, and mission members included experts in the fields of the international law, coral reef ecology and construction. ④ The suggestions in the report include: to build a lighthouse so as to add the name Okinotorishima in the charts around the globe and to enhance its presence; to expand the size of the rocks by coral breeding and various other ways to develop an artificial reef; to build an ocean-thermal energy conservation power plant to attract fish, which was said to be the first such experiment in the world; ⑤ to explore mineral resources in the adjacent seabed; to build social infrastructure such as a port and houses for human habitation, marine studies, and development; and to promote sightseeing. ⑥ In 2005, a second mission was conducted by the Nippon Foundation focusing on feasibility studies on the most promising fields of marine engineering, power generation, and lighthouse building. ⑦

Stimulated by the efforts and research outcomes of the Nippon Foundation and OPRF, Japanese officials and politicians have successfully attracted more

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① At http://www.sof.org.jp/jp/forum/22/php, 6 March 2011.

② Hajime Kayane, Submerged atolls and their regeneration-Territorial preservation of island states in the Pacific Ocean and islands along the Japanese border, *Newsletter*, No. 99, 2004, OPRF, at http://www.sof.or.jp/en/news/51－100/99_1.php＃01, 20 June 2011.

③ For more details on OPRF, at http://www.sof.or.jp/en/index.php, 20 June 2011; for activity reports, see OPRF, at http://www.sof.or.jp/en/report/index.php, 20 June 2011.

④ Nippon Foundation, The Report on Promoting Economic Activities in Okinotorishima (Japanese), 2005, at http://nippon.zaidan.info/seikabutsu/2004/00009/contents/0001.htm, 16 March 2011.

⑤ Shintaro Ishihara's website: http://www.citymayors.com/mayors/tokyo_mayor.html, 16 March 2011.

⑥ Nippon Foundation, The Report on Utilization of Okinotorishima (Japanese), 2005, at http://nippon.zaidan.info/seikabutsu/2004/00004/mokuji.htm, 16 March 2011.

⑦ Nippon Foundation, The Report on Promoting Economic Activities in Okinotorishima (Japanese), 2005, at http://nippon.zaidan.info/seikabutsu/2004/00009/contents/0001.htm, 17 March 2011.

attention from the Central Governmental to the rocks. ① In 2005, the Central Government decided to build a lighthouse, ② installed a 330 million yen radar system for round-the-clock surveillance to detect vessels approaching Okinotorishima, ③ repaired the heliport, and set up an official address plate at the "island" reading "1 Okinotori, Ogasawara Village, Tokyo". ④ Despite protests by environmentalists, Governor Ishihara of Tokyo decided to build a power station. ⑤ Fishing expeditions were also sent to demonstrate the existence of "economic life" on the rocks. ⑥ On 16 March 2007, a light beacon was installed by Japan's Coast Guard and started operation; later, the beacon was plotted on a hydrographic chart. Okinotorishima has become an intermittent rallying point for Japanese nationalists, and a hot-button political issue in Japan. ⑦

In addition to the concrete protection actions, Japan launched a series of campaigns to raise public awareness on the significance of Okinortorishima. ⑧ Such efforts include the production of a public-oriented movie "Okinotorishima: Miraculous Islands". ⑨ The 70-minute movie was released in December 2007 and was made widely available in cinemas, libraries, information centers etc.

In January 2010, the Japanese government during a regular Diet session submitted a new bill for the protection of Japan's southernmost Okinotori coastline to preserve their EEZ claims and interest. In May 2010, Japan adopt-

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① Martin Fackler, A Reef or a Rock? Question Puts Japan in a Hard Place; To Claim Disputed Waters, Charity Tries to Find Use for Okinotori Shima, *Wall Street Journal*, 16 February 2005.

② Japan plans to put lighthouse on disputed Pacific isle, *Kyodo News*, 24 August 2005.

③ Japan to establish surveillance system on Okinotori Island, *British Broadcasting Corporation*, 16 May 2005.

④ Japan sets up address plate on controversial reef in Pacific, *Xinhua News Agency*, 20 June 2005.

⑤ May 2005 Governor Visits Okinotori Islands, at http://www.sensenfukoku.net/mailmagazine/no36.html, 18 March 2011. *See* also the paper written by Governor Ishihara, Strategic Significance of Okinotorishima, at http://www.sankei.co.jp/, 6 June 2005.

⑥ Boat returns after fishing near disputed Okinotori Island, *Kyodo News*, 19 April 2005.

⑦ Yukie Yoshikawa, Okinotorishima: Just the Tip of the Iceberg, *Harvard Asian Quarterly*, Vol. 9, No. 4, 2005, at http://asiaquarterly.com/2006/02/03/ii－131/, 19 March 2011.

⑧ *See* PRF ocean forums and relevant activities, at http://www.sof.or.jp/en/index.php, 19 March 2011.

⑨ At http://www.metro.tokyo.jp/ENGLISH/TOPICS/2005/index.htm, 20 June 2011. The movie consists of six parts covering basically every aspect of Okinotorishima, such as location, history, weather, marine environment, resources, significance, and protection efforts.

ed the Law for the Reservation of Low Tide Line and Maintenance of Foothold Facilities. ① Through this piece of national legislation, the protection of Okinotorishima rocks is expected to be further enhanced to new record levels.

C. *Incentives of Japan's Okinotorishima Islandisation*

Japan has been investing money on the development of the Okinotorishima Rocks since 1932 with some intervals, including 85 billion yen (approximately 740 million US dollars) in building and maintaining a residence at the observation site. In 1987, Japan encased the reefs with $280 million worth of concrete to prevent them from being completely washed away and covered the smaller one with $50 million USD titanium net to shield it from debris thrown up by the ocean waves.

In 2005, Japan allocated 10 million yen for the light house and observation site. The following year another $7.55 million dollars was invested for the regeneration of coral reefs and 340 million yen for Japan's Coast Guard to install a solar-powered beacon. Since 2007, Japan has expanded the large scale regeneration of coral reefs and used sand-creating electrodes to save Okinotorishima. ② According to a media report on 9 April 2008, the Japanese Government planned to invest 770 million yen over three years to farm the coral reef around Okinotorishima. A long-term plan is being carried out to make full use of the rocks.

In 2010, the Japanese government developed a plan for Okinotorishima reef management and maintenance. This plan aims to upgrade the bank maintenance from annual visual inspection to more effective measures to ensure the survival of the concrete structures from harsh natural conditions such as erosion, typhoons and waves. ③

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① This is an abbreviated name of the Law. Its full name is: "Law concerning preservation of low tide line and maintenance and others of foothold facilities for protection and promotion of utilization of the exclusive economic zone and the continental shelf". *See* "Japan enacts law to preserve Japan's EEZ" (Japan Today, Kyodo, 26 May 2010); OPRF MARINT Monthly Report (May 2010), Diet enacts law to preserve Japan's EEZ, at http://www.japantoday.com/category/politics/view/diet-enacts-law-to-preserve-japans-eez, p. 12, 20 June 2011.

② Government will use sand-creating electrodes to save Okinotorishima, at http://www.japanprobe.com/2008/09/21/government-will-use-sand-creating-electrodes-to-save-okinotorishima/, 20 March 2011.

③ At http://news.sina.com.cn/w/2010-05-19/082117532724s.shtml, 20 March 2011.

Most recently, Japan announced in January 2011 a new plan to allocate 750 billion yen over six years to build a port to further reinforce its maritime claims on the Okinotorishima Rocks. They also plan to use it as a base to conduct marine resource surveys and to engage in other economic activities. ①

The question that might be asked is: what are the incentives for Japan to invest such heavy funding on these remote and tiny rocks? The answer may lie in the fact that the Okinotorishima Rocks carry enormous significance to Japan in many aspects. For example, the most obvious benefit to Japan is that these rocks are a major boost to Japan's offshore resource potential. In the resource field, Japan possesses state-of-art technology, and has a good reason to expect resources from its ocean and seas, especially marine natural resources, living and non-living, to sustain its national economic development. The seabed around the Okinotorishima Rocks is said to be potentially rich in oil and has already been found to be rich in manganese nodules and rare minerals.

From a national security point of view, Okinotorishima also has great weight. Sitting in the Mid-central Pacific Ocean with a perfect geographical location, these tiny rocks may serve as an unsinkable aircraft carrier. This function highlights their strategic value and military potential as a vital enhancement to Japan's ability to control the Pacific Ocean and the navigational activities. ②

The most significant and fundamental of the roles Okinotorishima could play fall into the category of generating substantial jurisdictional waters under sovereignty, sovereign rights and jurisdiction stemming from establishing an EEZ and ECS around the rocks. ③ In the age of the UNCLOS, small solitary islands in the seas distant from the mainland can make states into major sea powers due to the entitlement of maritime zones. ④ This is particularly the case with Japan and the Okinotorishima Rocks. Without these rocks, Japan would have to retreat its territorial sea to its southern-most tip of Minami-Io To-shi-

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① *See* Gus Lubin, China Stunned as Japan Makes Shock Island Announcement in Key Economic Zone, at http://www.businessinsider.com/chinese－angered－by－japan－island－grab－2010－1, 7 January 2010. *See* also Japan is to build base at the Okinotorishima (Chinese), at http://junshi.daqi.com/slide/2735790.html#t, 20 June 2011.

② Martin Fackler, A Reef or a Rock? Question Puts Japan in a Hard Place to Claim Disputed Waters, Charity Tries to Find Use for Okinotori Shima, *Wall Street Journal*, 16 February 2005, p. A1.

③ *See* Articles 55 and 77 of the UNCLOS.

④ Yasuhiko Kagami, Environmental Policy for Desert Islands: Beyond "Island or Rock?", in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 109.

ma, and suffer a loss of 1,550 square kilometers of territorial sea and sovereignty over the water column, seabed and airspace. Japan's EEZ would be pushed back to either Minami-Iwo Jima, an island almost 400 miles to the NE, or to Oki Daitojima, another island about the same distance to the NW, and suffer a loss of 430,000 square kilometers of EEZ,[①] plus an ECS claim in three regions.

From economic, political, and social perspectives, it is also apparent that Japan could benefit immensely from such an "islandisation" effort. To achieve the benefits, Japan is determined to hold the Okinotorishima Rocks and to establish effective control over the surrounding waters through economic activities.

Ⅲ. Japanese Views on the Okinotorishima Claims and Islandisation Practice

Japan has maintained its claims based on the Okinotorishima rocks and islandisation practice. On one hand, it claims firmly the island status of the rocks; on the other hand, it paves its way with concrete actions toward enabling the rocks to satisfy the criteria of a legal island. Meanwhile, Japanese scholars have conducted thorough and comprehensive research on Okinotorishima in the recent decades to justify national claims and practices. Some evolving views represent theoretical support and reflect Japan's motivation and determination over its islandisation effort.

A. To Assert "Island" Status of the Okinotorishima Rocks

Regarding the legal status of Okinotorishima, the Japanese views are by and large concentrated on a "self-constructed belief" that these rocks are "islands" under Article 121(1) and fit in the island criteria in Article 121 (1), that is, "a naturally formed area of land", "surrounded by water", "above water

① Yukie Yoshikawa, Okinotorishima: Just the Tip of the Iceberg, *Harvard Asian Quarterly*, Vol. 9, No. 4, 2005, at http://asiaquarterly.com/2006/02/03/ii－131/, 19 March 2011.

at high tide". [①] Moreover, Japan holds the position that as an Article 121(1) island, it should not be restricted by Article 121 (3). Based on such logic, Okinotorishima is therefore "qualified" and "entitled" to its extended maritime zones including EEZ and continental shelf. [②]

Still, views are divided within this panel regarding the "island" status of Okinotorishima. Tadao Kuribayashi, a law professor of Toyoeiwa University in Tokyo, argues in part that rocks and reefs differ in composition and structure. He believes that only rocks that cannot be inhabited or have no economic life have no claims for EEZ or continental shelf, and that the intent of Article 121 (3) was geared toward the former. [③] He adds that coral reefs and rocks (objects consisting of hard continental soil) are different, [④] thus the claim that Okinotorishima is not an islet but rocks does not make sense. Professor Kuribayashi insists that the Japanese claim is justifiable as there is no definition of a "rock" in international law, and a country can claim its own EEZ or continental shelf based on its possession of coral reefs. [⑤]

Another Japanese scholar, Kentaro Serita, argues that according to the Preamble of the UNCLOS, matters not regulated by the Convention continue

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① *The Open Report to the Construction Committee of the House of Representatives of Japan* by Oshima Shotaro, Director of the Economic Bureau, Ministry of Foreign Affairs on 16 April 1999, at http://www.shugiin.go.jp/index.nsf/htm/index_kaigiroku.htm, 20 June 2011. Cited from Akesato Nakayama, Island Definition and Related Issues in International Law p. 34, in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, pp. 26～38.

② *The Open Report to the Construction Committee of the House of Representatives of Japan* by Oshima Shotaro, Director of the Economic Bureau, Ministry of Foreign Affairs on 16 April 1999, at http://www.shugiin.go.jp/index.nsf/htm/index_kaigiroku.htm, 20 June 2011. Cited from Akesato Nakayama, Island Definition and Related Issues in International Law p. 34, in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, pp. 26～38.

③ Yukie Yoshikawa, Okinotorishima: Just the Tip of the Iceberg, *Harvard Asian Quarterly*, Vol. 9, No. 4, 2005, at http://asiaquarterly.com/2006/02/03/ii－131/, 19 March 2011.

④ According to Kazuhiko Fujita, University of the Ryukyus, "Reef islands, generally low-lying, flat, small islands formed on reef flats of atolls, are largely composed of unconsolidated bioclastic sands and gravels. Thus, the islands are highly subject to inundation, coastal erosion, catastrophic storms, and other coastal hazards. *See* Kazuhiko Fujita, Enhancing foraminiferal sand productivity for the maintenance of reef islands, in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 97.

⑤ Tadao Kuribayashi, The position of Okinotorishima in international law, in Nippon Foundation, *Report on Promoting Economic Activities in Okinotorishima*, at http://www.nippon－foundation.or.jp/eng/maritime/programsseas.html, 20 June 2011.

to be governed by the rules and principles of general international law. He believes that the 200 nm fishing zone is part of customary international law, and thus Okinotorishima is entitled to have a 200 nm fishing zone. ① He adds that the actions Japan adopted towards Okinotorishima through its national legislation since the entry into force of the UNCLOS have never been protested by any country. He concludes that this fact supports the Japanese position that the EEZ of Okinotorishima should be maintained. ②

Based on the two Okinotorishima rocks, Japan has claimed not only an EEZ up to 200 nm to all directions, but also an ECS at the SKB, MIT, and KPR regions based on the natural prolongation principle. According to the provision of UNCLOS Art. 76. 1, "[t]he continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its *land territory* (emphasis added) to the outer edge of the continental margin … ".

In a similar fashion to its argument about its EEZ claim on Okinotorishima, Japan asserts the natural prolongation principle to claim its outermost ECS based on the rocks. This is reflected in Paragraph 2 of Section 6. 2 of the Executive Summary of Japan's Submission that the Kyushu-Palau Ridge forms part of the natural prolongation of Japan's *land mass* (emphasis added) "represented by Okinotorishima Island" (so-called!). ③ Instead of admitting the fact that the submission areas extending down the ridge towards Palau was on the basis of the natural prolongation of Okinotorishima itself, Japan is trying to give the impression that it is the natural prolongation of Japan as a whole. Such a contention is associated with obvious problems, most notably, the remote nature of the seabed in question from the nearest Japanese mainland/main island territory.

B. To Facilitate the Condition of the Okinotorishima Rocks to Sustain Human Habitation or Economic Life

In addition to the arguments made over the legal status and geographical

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① Kentaro Serita, *Japan's Territory* (Japanese), C HUOKORON-SHINSYA, INC, 2002, pp. 182～189, pp. 224～245.

② Kentaro Serita, *Japan's Territory* (Japanese), C HUOKORON-SHINSYA, INC, 2002, pp. 182～189, pp. 224～245.

③ *See* the Executive Summary of Japan's Submission, at http://www. un. org/Depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary. pdf, 20 June 2011.

position of the Okinotorishima Rocks to support its claim to EEZ and ECS, Japan asserts the rocks maintain an economic life of their own.

A Japanese scholar believes the interpretation and application of Article 121(3) is problematic and criticizes it as follows:

"If 'rocks which can sustain human habitation or economic life of their own' is set as the condition for designation of an island without actually requiring such habitation in practice, then there are grounds for the interpretation that the possibility of meeting the condition alone is sufficient. If such is the case, the condition itself will evolve along with progress in science and technology, leading to uncertainty in the requirements to be met."①

This paragraph actually indicates the unsaid truth of how Japan has been creating the condition through evolving science and technology to keep Okinotorishima from being regarded as Article 121 (3) rocks.

To provide support for its claims and national islandisation attempts, Japanese scholars have also searched globally for relevant practices as evidence. One observation reports about other countries sending signals to show that scattered desert islands are (or will be) able to "sustain human habitation or economic life of their own"②. These signals include permanent posting of small military forces or meteorological observation station staff, etc., construction of lighthouses and other navigational aids, fishing activities, and in recent years, and establishment of protected areas to reserve ecosystems or biodiversity in the oceans surrounding islands.③ Recent examples employed by this scholar were the US establishment in 2006 of the then world's largest marine protected area (Papahānaumokuākea Marine National Monument) around the northwestern Hawaiian Islands where the US has had an EEZ around 10 uninhabited islands since the 1970s.④ A second example cited was a new Marine National

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① Hiroshi Terashima, The Need for a Comprehensive Study on the Problems of Islands and Management of Their Surrounding Waters, in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 113.

② Yasuhiko Kagami, Environmental Policy for Desert Islands: Beyond "Island or Rock?", in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 109.

③ Yasuhiko Kagami, Environmental Policy for Desert Islands: Beyond "Island or Rock?", in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 109.

④ According to an American expert in the law of the sea those "should not have EEZ" in light of UNCLOS Article 121. *See* Yasuhiko Kagami, Environmental Policy for Desert Islands: Beyond "Island or Rock?", in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 109.

Monuments established in January 2009 around remote islands in the Pacific Ocean. ①

This Japanese scholar observed that environmental measures such as establishing marine protected areas around desert islands are implemented not only by the US, but also by France, Australia, Kiribati, and other countries. He believes that these practices would have a positive significance for or impact on the "Island or Rock" dispute, in that "desert islands will not be positioned as a basis for enclosing the sea, but as bases for positive ocean management for sustainable development."②

These practices may be expected to cast new light on management of desert islands. However, the key point this scholar forgot to mention is that Japan is indeed a foremost pioneer with practices that have set an example of claiming extended maritime zones over rocks.

Aside from looking for evidence from other countries, other Japanese scholars have tried to justify Japan's claims and national practice by new developments of international law and State Practice. Hiroshi Terashima, the Executive Director of OPRF, argued to approach the Article 121(3) and Okinotorishima issue from the overall framework and spirit of the UNCLOS for comprehensive management of the ocean. ③ He indicated that discussions on the EEZ and the continental shelf focus primarily on coastal States' rights, rather than on their responsibilities and obligations to manage coastal areas in EEZs and continental shelves. Recent years have seen a large shift from the emphasis given to marine pollution responses at the time the UNCLOS was drafted, i. e. to conservation of marine biodiversity and other issues, such as to promote ecosystem-based management and marine spatial management of ocean areas around islands.

Professor Kuribayashi recommended not to talk about whether or not small islands are to be accorded EEZs and continental shelves, but to consider the problem from the perspective of who should manage the ocean areas around islands and how the management is to be carried out. Further, he argued that it

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① Yasuhiko Kagami, Environmental Policy for Desert Islands: Beyond "Island or Rock?", in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 109.

② Yasuhiko Kagami, Environmental Policy for Desert Islands: Beyond "Island or Rock?", in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 109.

③ Hiroshi Terashima, The Need for a Comprehensive Study on the Problems of Islands and Management of their Surrounding Waters, in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 114.

is advisable to clarify and reevaluate thinking about islands and the management of their surrounding waters. He called on States not only to address the question of how far the exercise of jurisdictional rights by small islands over resources in their surrounding waters is appropriate in distributing the common heritage of mankind, but also to answer the question of who is the most appropriate entity to fulfill the obligations and responsibilities for protecting the resources in the ocean areas around small islands, e. g. in protecting and conserving the marine environment. ① He also hopes for Japan to make its contribution to the adaptive development of the UNCLOS regime of islands. ②

Such views and arguments confirm the Japanese islandisation actions towards the Okinotorishima Rocks and its generation of jurisdictional zones. At the same time, these views have also encouraged Japan to stray further away from the UNCLOS regime.

Ⅳ. Questions to Ponder

The aforementioned Japanese views suggest that what Japan has done is to promote the conservation and protection of marine resources and environment through ecosystem-based management around these rocks. But questions have to be asked, including: will these arguments justify the Japanese claim and its islandisation attempts? May other States "do as the Romans do" with similar insular features? What are the implications for supporting excessive national claims? As States move forward with excessive claims and islandisation initiatives, what should be the guiding principle in interpretation and implementation of the UNCLOS? Will there be a potential danger of undermining the UNCLOS and further encroachment on the common heritage of mankind? Who should defend the interests of the international community, and how? These questions will be dealt with in this section.

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① Hiroshi Terashima, The Need for a Comprehensive Study on the Problems of Islands and Management of Their Surrounding Waters, in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 114.

② *See* Tadao Kuribayashi, Concluding Remarks: The Present Implications regarding "Island Regime from the Perspective of International Law of the Sea Order", in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, pp. 83～84.

A. *Are Rocks Distinguishable from Islands?*

What Japan calls Okinotorishima Island, some 1,740 kilometers south of Tokyo, is merely an atoll that cannot sustain human habitation or economic life of its own. Japan argues Okinotorishima are islands, not rocks. Is this because the differences between rocks and islands are not distinguishable? The truth is, despite the fact that no objective standard was established on how to distinguish Article 121(1) islands from Article 121(3) rocks, the provisions of UNCLOS Article 121 are clear and explicit.

In comparison with the "island" definition provided in Article 121(1), a "rock" may be simplified as a "naturally formed" "area of land", "surrounded by water", "above water at high tide"; that "cannot sustain human habitation or economic life of its own". This implies the following features: a "rock" is a disadvantaged type of island; the size (refers to "area of the land" above water at high tide) of a "rock" is usually small; ① and lastly, a "rock" is generally not able to provide the natural conditions necessary for supporting normal human life. In fact, the last feature is the determiner that differentiates rocks from islands. If an insular feature cannot fulfill this condition, it is only entitled to a territorial sea and a contiguous zone, but not an EEZ or continental shelf.

Many international law experts believe that an island must: sustain and maintain fresh water, be able to grow vegetation that can sustain human habitation, produce some material that can be used for human shelter, and be able to sustain a human community. ② Some experts suggest that an island must be able to sustain at least fifty people. ③ Indeed, food, fresh water, and living space

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① Dr. Hodgson, a geographer of the US State Department, proposed that a "rock" is an area of land less than 0.001 square miles, the area of land for an "islet" is between 0.001—1 square miles, the area of land for an "island" is larger than one square mile. *See* Robert. D. Hodgson, Islands: Normal and Special Circumstances, in John King Gamble, Jr. and Giulio Pontecorvo ed., *Law of the Sea: The Emerging Regime of the Oceans*, Cambridge, Massachusetts: Ballinger Publishing, 1974, p. 148.

② For relevant discussions on this account, see José Luis Jesus, Rocks, New-born Islands, Sea Level Rise and Maritime Space, in Jochen Abr. Frowein, Klaus Scharioth, Ingo Winkelmann and Rüdiger Wolfrum[ed.], *Verhandeln für den Frieden-Negotiating for Peace: Liber amicorum Tono Eitel*, 2003, pp. 587～592; Charney, Jonathan, Rocks That Cannot Sustain Human Habitation, *American Journal of International Law*, Vol. 93, 1999, pp. 864～871.

③ *See* International Seabed Authority Press Release, SB/15/10, p. 3, para. 18.

constitute the very fundamental criteria for human habitation on an island. With these three criteria, the island may be considered as being able to sustain human habitation, no matter how long it can "sustain", or if the "sustaining" of habitation is on a permanent or temporary basis.

To make these criteria more comprehensible, the Indonesian Ambassador and leading law of the sea expert, Hasjim Djalal, proposed three specific criteria: first, whether there is fresh water on the island or rocks; second, whether it is possible to grow food; third, whether there is material to build houses. Should all three criteria be met, the insular feature shall not only be a rock, but also an island able to "sustain" human habitation and reproduction; that is, it is entitled to its own jurisdiction regardless of its size. If the three conditions are not met, the feature is only entitled to a 12 nm territorial sea. ①

"The economic life of their own" criterion seems to appeal to the idea of the rock having the capacity or potential of bearing an independent, though not necessarily self-sufficient, economic life. This might imply the potential or capacity to develop its own sources of production, distribution and exchange in a way that, if it were to have human habitation, it would constitute a material basis that would justify the existence and development of a stable human habitation or community on the rock. ② It would seem that the criterion of economic life of their own is more than the existence of a given resource or the presence of a given installation of an economic nature, however important it might be. ③

If an area of "land" above water at high tide (no matter what it is called by tradition) satisfies either one of the two criteria to "sustain human habitation" or an "economic life of its own", it is entitled to its own EEZ and continental shelf. In the case of Okinotorishima, none of the reefs is large than one square

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① Ian Townsend-Gault, Preventive Diplomacy and Pro-activity in the South China Sea, *Contemporary Southeast Asia*, Vol. 20, No. 2, 1998, p. 179.

② *See* José Luis Jesus, Rocks, New-born Islands, Sea Level Rise and Maritime Space, in Jochen Abr. Frowein, Klaus Scharioth, Ingo Winkelmann and Rüdiger Wolfrum[ed.], *Verhandeln für den Frieden-Negotiating for Peace: Liber amicorum Tono Eitel*, 2003, p. 590.

③ *See* José Luis Jesus, Rocks, New-born Islands, Sea Level Rise and Maritime Space, in Jochen Abr. Frowein, Klaus Scharioth, Ingo Winkelmann and Rüdiger Wolfrum[ed.], *Verhandeln für den Frieden-Negotiating for Peace: Liber amicorum Tono Eitel*, 2003, p. 590.

meter and the total area is less than 10 square meters. ① Okinotorishima has no fresh water, nor soil; neither does it have any vegetation. More importantly, its size is too small to "sustain human habitation". Based on its natural conditions, it cannot be regarded as an island.

No consensus has been reached on the interpretation and application of Article 121. The treatment of islands/rocks has long generated international legal debates, and State Practice has remained somewhat diverse. Nonetheless, the understanding of international law experts on the text of the UNCLOS provisions, relevant jurisprudence by international judicial and arbitral courts and State Practices are consistent and identical. There are signs of a consistent trend emerging and, at the least, numerous examples exist which indicate how islands/rocks should be treated. No matter how Article 121 is interpreted, given its size and uninhabitable natural conditions, the Okinotorishima cannot be recognized as an island of legal nature. Japan's efforts confirm that it is trying to turn rocks into islands.

B. How should UNCLOS be Implemented and International Community Concerns be Respected?

Article 121 (3) of the UNCLOS expressly denies the right of a rock to support an EEZ and a continental shelf. However, Japan still claimed an EEZ to 200 nm and an adjoining continental shelf region beyond 200 nm using the Okinotorishima Rocks as a base-point in its submission. Japan's unilateral assertion is widely out of conformity with the intention and purpose of UNCLOS's "common heritage of mankind" concept. As the foremost advocate of "the Principle of the Common Heritage of Mankind", Ambassador Arvid Pardo of Malta pointed out, "[i]f a 200 mile limit of jurisdiction could be founded on the possession of uninhabited, remote or very small islands, the effectiveness of international administration of ocean space beyond national jurisdiction would be gravely impaired." ②

In 1988, having noticed the Japanese construction over the rocks, Professor Jon Von Dyke of the University of Hawaii expressed his view in the following terms: "Okinotorishima-which consists of two eroding protrusions no larger

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① At http://news.xinhuanet.com/world/2005 — 03/11/content_2681137.htm, 2 April 2011.

② United Nations Sea-Bed Committee, Doc. A/AC. 138/SR. 57, p. 167.

than king-size beds-certainly meets the description of an uninhabitable rock that cannot sustain economic life of its own. It is not, therefore, entitled to generate a 200[nautical]—mile exclusive economic zone."[①] He has further asserted that it is impossible to make "a plausible claim that Okinotori should be able to generate a 200 [nautical]—mile zone".[②] Professor Von Dyke made it clear again in 2005.[③]

Professor Von Dyke has also suggested that the situation is similar to the failed British attempt to claim an EEZ around Rockall. Rockall is a small, uninhabited, rocky islet within the EEZ of the United Kingdom (UK) in the North Atlantic Ocean.[④] Rockall is almost 200 nm from the Scottish coast, 25 meters above sea level and measures 624 square meters.[⑤] In 1977, the UK established a fishing zone using Rockall as a base point for an extension of 200 nm beyond the islet. The British claim was protested by Denmark, Iceland and Ireland.[⑥] The UK eventually abandoned its claim after its accession to the UNCLOS in 1997.[⑦]

No doubt, the case of Rockall has the closest similarity to the Okinotorishima situation but the UK rationale was presented on a different footing. Article 121 (3) denies the capacity of tiny rocks to generate unfairly and inequitably huge maritime entitlements e. g. an EEZ or a continental shelf, which could, in most cases, impinge upon other States maritime space or on the Inter-

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① *See* Martin Fackler, A Reef or a Rock? Question Puts Japan in a Hard Place to Claim Disputed Waters, Charity Tries to Find Use for Okinotori Shima, *Wall Street Journal*, 16 February 2005, p. A1.

② Speck in the Ocean Meets Law of the Sea, *New York Times*, 21 January 1988.

③ Martin Fackler, A Reef or a Rock? Question Puts Japan in a Hard Place to Claim Disputed Waters, Charity Tries to Find Use for Okinotori Shima, *Wall Street Journal*, 16 February 2005, p. A1.

④ *See* EEZ of the UK and Ireland at http://www.seaaroundus.org/eez/eez.aspx, 20 June 2011.

⑤ For details on Rockall, at http://en.wikipedia.org/wiki/Rockall, 20 June 2011. *See* also James Fisher, *Rockall*. *London*: *Geoffrey Bles*, 1956, pp. 12～13.

⑥ At http://www.opsi.gov.uk/SI/si1997/19971750.htm, 20 June 2011. For the Fishery Limits Order 1997, Statutory Instrument 1997 No. 1750.

⑦ The Foreign and Commonwealth Secretary of the United Kingdom expressed in a statement that "Rockall is not a valid base point for such limits under article 121(3)", and then the limit of the fishery zone was redefined accordingly through the Fishery Limits Order 1997. *See* Alex G. Oude Elferink, Clarifying Article 121(3) of the Law of the Sea Convention: the Limits Set by the Nature of International Legal Process, *IBRU Boundary and Security Bulletin*, Summer 1998, p. 59, p. 66. Editors' note: see also D. Anderson, "Islands and Rocks in the Modern Law of the Sea" in the present volume.

national Seabed Area which is reserved for the Common Heritage of Mankind. ①

Since 2004, as Japan's maritime neighbor, China has constantly objected to Japanese jurisdiction over marine scientific research around the Okinotorishima Rocks where Japan has claimed that it has the right to prescribe and enforce jurisdiction over the two rocks and surrounding waters up to 200 nm. ② China's position is that the legal status of these waters is high seas and traditional fishing grounds for the fishers from the mainland of China, Taiwan, and Korea. China firmly opposed the Japanese unilateral actions and considers such actions as a serious violation of the rights of other countries. ③

The dispute regarding whether Okinotorishima is a rock or an island has escalated and intensified. The issue has caught the attention of the rest of the world because of the Japanese submission of its proposed outer limit of the continental shelf to the CLCS, which stimulated a public reaction from China and Korea.

In February 2009, China and South Korea respectively submitted to the Secretary-General of the United Nations Note Verbales commenting on the issue of the Okinotorishima in the Japanese Submission. ④ Both China and South Korea objected to Japan's claim to an EEZ and ECS based on the Okinotorishima Rocks. ⑤

The international community has, for the most part, avoided involvement in the dispute. However, the Submission intensified the disagreement and raised concerns in the international community sparking varied comments. Concerns were articulated about Japan's duty not to infringe on the common space of the international community. On one occasion, Japan seemed to remember its duty and denied New Zealand's claims to the Antarctic. When New

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① UN Doc. A/CONF. 62/122, 7 October 1982.

② Japan hopes to build lighthouse on atoll disputed with China, *Xinhua News*, 25 August, 2005.

③ *See* Jia Yu and Li Mingjie, Not to accept the artificially constructed Okinotori, at http://news.sina.com.cn/c/2004-05-24/12103317063.shtml, 20 June 2011.

④ For China's Note, at http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf; for Korea's, at http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/kor_27feb09.pdf.

⑤ For China's Note, at http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf; for Korea's, at http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/kor_27feb09.pdf.

Zealand made its ECS submission to the CLCS,[①] Japan sent a Note Verbale to the UN concerning New Zealand's claims to the Antarctic region.[②] Japan emphasized that it does not recognize any State's "claim to territorial sovereignty in the Antarctic and consequently does not recognize any State's rights over or claims to the water, seabed and subsoil of the submarine areas adjacent to the continent of Antarctica."[③]

Views have also been expressed that the Okinotorishima Rocks are not entitled to any continental shelf, and that no entitlement should be granted on the portions related to the Okinotorishima Rocks in Japan's Submission. After Japan made its Submission to the CLCS concerning its extended continental shelf, at the 15th Session of the International Seabed Authority and at the 19th Meeting of the States Parties to the UNCLOS (the 19th Meeting), a thorough discussion ensued on relevant issues.[④] At these meetings, serious concerns were expressed by many countries regarding the possible encroachment on the international seabed area by using a rock as the base point for an extended continental shelf.[⑤] In addition to relevant discussions under current items in the agenda, it was also decided at the 19th meeting to consider the inclusion of a supplementary item entitled "International Seabed Area as the common herit-

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① For New Zealand's submission, at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nzl.htm, 20 June 2011.

② For Japan's note, at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nzl.htm, 28 June 2006. The Permanent Mission of Japan to the United Nations presented its compliments to the Secretariat of the UN with reference to the circular CLCS. 05.2006. LOS (Continental Shelf Notification) dated 21 April 2006, concerning the receipt of the submission made by New Zealand to the CLCS. Japan confirms the importance of keeping harmony between the Antarctic Treaty and the UNCLOS and thereby ensuring the continuing peaceful cooperation, security and stability in the Antarctic area. Recalling Article IV of the Antarctic Treaty, Japan does not recognize any State's right of or claim to territorial sovereignty in the Antarctic, and consequently does not recognize any State's rights over or claims to the water, seabed and subsoil of the submarine areas adjacent to the continent of Antarctica.

③ For Japan's note, at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nzl.htm, 28 June 2006.

④ The 19th Meeting of the States Parties to the UNCLOS, SPLOS/L.60, 22 May 2009, at http://daccess-dds-ny.un.org/doc/UNDOC/LTD/N09/346/55/PDF/N0934655.pdf, 20 June 2011. *See* also Yu Jia, Legal Issues Concerning the Oki-no-Tori (Chinese), *Ocean Development and Management*, Vol.8 (130), 2009.

⑤ The 19th Meeting of the States Parties to the UNCLOS, SPLOS/L.60, 22 May 2009, at http://daccess-dds-ny.un.org/doc/UNDOC/LTD/N09/346/55/PDF/N0934655.pdf, 20 June 2011. *See* also Yu Jia, Legal Issues Concerning the Oki-no-Tori (Chinese), *Ocean Development and Management*, Vol.8 (130), 2009.

age of the mankind and Article 121 of the United Nations Convention on the Law of the Sea" in a future meeting.

The EEZ and ECS policies and State practice are important for the future. It is not only a matter of economics and how ocean resources can be exploited from the continental shelf, but also the legal existence of the sovereign rights of a maritime nation. Japan's bid to extend its continental shelf based on rocks will not be supported. As a State Party to the UNCLOS, Japan is obligated not to violate the legal regime of the UNCLOS, and to respect the disagreement of its maritime neighbors as well as the concerns of the international community.

C. How will CLCS Accomplish Its Role with Applicable Recommendations?

Japan submitted the information on the limits of its ECS to the CLCS on 12 November 2008. ① Through this Submission, Japan set an example of claiming an EEZ and an excessive continental shelf based on rocks in the vast Pacific Ocean. Concerns have been voiced about the fact that Japan is using the CLCS as a forum to strengthen, maintain, or defend its claims concerning legal titles of rocks/islands, and EEZs, continental shelf and extended continental shelf thereof. Should Japan's submission be confirmed by the CLCS about the location of the outer limit of Japan's continental shelf in Okinotorishima and Japan's entitlement to large areas of continental shelf beyond 200 nm, Japan would have jurisdiction over an extra 740,000 square kilometers, which is about twice the size of its land territory.

Discussions have also been voiced about the applicable recommendations of the CLCS. As an international body established by the UNCLOS, the CLCS is neither a judicial nor a political body. ② It gives technical advice and guidance to States, and offers opinions on the data and analyses submitted by coastal States on the basis of the technical and objective criteria set out in the UNCLOS. As of 18 January 2011, there have been 59 Submissions delivered to the United Na-

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① At http://www.un.org/Depts/los/clcs_new/submissions_files/submission_jpn.htm, 20 August 2011.

② For discussions on CLCS, see Ted L. McDorman, The Entry into Force of the 1982 LOS Convention and the Article 76 Outer Continental Shelf Regime, *International Journal of Marine and Coastal Law*, Vol. 10 1995, pp. 165～187; Ted L. McDorman, The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World, *International Journal of Marine and Coastal Law*, Vol. 17, 2002, pp. 301～324.

tions for the CLCS to consider. ① Meanwhile, as of 19 October 2011, the CLCS has also received 45 Preliminary Information submissions indicative of the outer limits of the extended continental shelf. ② The job of the CLCS is to consider the documentation submitted by the coastal State and to recommend where the outer limits of the continental shelf should lie.

Japan's Submission complicates the clear provision about island regimes and the authorization of the CLCS in the UNCLOS. This may lead to an infringement of the completeness of the UNCLOS and an encroachment on the International Seabed Area. ③ The CLCS will have to deal with Japan's Submission and also third party notifications. ④ As mentioned earlier, the Notes Verbal of China and South Korea suggested that the CLCS should take no action on the portions related to the Okinotorishima Rocks in Japan's Submission. ⑤ How the CLCS will handle Japan's Submission regarding the regions generated based on the Okinotorishima Rocks continues to be an issue of general interest as well as a source of concern for many.

To consider Japan's Submission requires defining the legal status of Okinotorishima, but the CLCS is not in a position with authority to decide its legal status. To comply with the UNCLOS and not to affect the Common Heritage of Mankind, it is advisable for the CLCS not to consider the controversial parts in Japan's Submission. The Okinotorishima situation will be an entrée to a broader discussion on the role of the CLCS as regards the submissions and in-

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① For submissions, at http://www.un.org/Depts/los/clcs_new/commission_submissions.htm, 20 January 2012.

② At http://www.un.org/Depts/los/clcs_new/commission_preliminary.htm, 20 June 2011.

③ The CLCS has seen many different kinds of Submissions and third party notifications, coping with different situations that the coastal States face. Among the 59 Submissions, 22 Submissions have already encountered the comments, oppositions, disapproval, or approvals expressed by as many as 58 third party notifications. Among 45 Preliminary Information Submissions, four pieces have met communications from third States, expressing different ideas, at http://www.un.org/Depts/los/clcs_new/ commission_submissions.htm, 20 June 2011.

④ For relevant discussions, see Michael Sheng-ti Gau, Third Party Intervention in the Commission on the Limits of the Continental Shelf Regarding a Submission Involving a Dispute, *Ocean Development and International Law*, Vol. 40, 2009, pp. 61～79.

⑤ *See* Paragraphs 3－5 of the communication of China, Paragraphs 4－6 of the Korean communication to respond to the Japanese Submission. For China's Note, at http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf; for Korea's, at http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/kor_27feb09.pdf, 21 May 2011.

formation presented to it. One thing that is clear is that the CLCS shall not be used to infringe the UNCLOS, or to abuse its own responsibility.

D. Are Okinotorishima Still Natural Rocks or Artificial Structures?

The heart of this Okinotorishima rock/island issue is whether the feature can be used as a base point to claim an extended jurisdictional zone. According to Article 121, both islands and rocks have to be "naturally formed". Concerning what is "naturally formed", two views exist: the first view counts on whether or not there is deliberate construction, and insists that "naturally formed" means "no deliberate construction". ① This view may seem a bit extreme. The second view tolerates "deliberate construction" but differentiates the decision depending upon the purpose: ② if the deliberate construction is for the protection of the area of the "land", the legal status of the "land" remains unaffected: ③ if the deliberate construction is to expand the landmass of the area, the legal status of the original and additional new "land" will lose its legal status collectively with its territorial sea. ④ International law scholars seem to favor this view. ⑤ In particular, Diaz, Dubner, and Parent pointed out in their paper that to protect the island by using coral and other marine biotechnology to build it up creates an artificial island that is not entitled to its own maritime zones. ⑥

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① Clive R. Symmons, *The Maritime Zones of Islands in International Law*, The Hague: Martinus Nijhoff, 1979, p. 36.

② At http://www.seastead.org/localres, 20 June 2011.

③ *See* Andrew L. Silverstein, Okinotorishima: Artificial Preservation of a Speck of Sovereignty, *Brooklyn Journal of International Law*, Vol. 12, No. 1, 2009, pp. 409～432.

④ *See* Derek. W. Bowett, *The Legal Regime of Islands in International Law*, New York: Oceana Publications, 1979, p. 122.

⑤ *See* Leticia Diaz, Barry Hart Dubner, and Jason Parent, When is a "Rock" an "Island?": Another Unilateral Declaration Defies "Norms" of International Law, *Michigan State Journal of International Law*, Vol. 15, 2007, p. 547. *See* also Yasuhiko Kagami, Environmental Policy for Desert Islands: Beyond "Island or Rock?", in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 109.

⑥ Bin Bin Jia is of the view that if an island cannot continue its existence without a concrete structure or artificial installation, it is no longer a natural island, but an artificial island, not entitled to a maritime zone but to a 500—meter safety zone. *See* Bin Bin Jia, A Preliminary Study of the Problem of the Isle of Kolbeinsey, *Nordic Journal of International Law*, 66, 1997, p. 313. *See* also Leticia Diaz, Barry Hart Dubner and Jason Parent, When is a "Rock" an "Island?": Another Unilateral Declaration Defies "Norms" of International Law, *Michigan State Journal of International Law*, Vol. 15, 2007, p. 547.

In the case of the Okinotorishima Rocks, if the action Japan has taken is solely for the protection of the rocks, they will continue to be natural rocks with an entitlement to territorial sea and contiguous zone, but if Japan's purpose is to expand the physical size of the rocks, the situation will be different. ①

Japan rescued Okinotorishima with great efforts to make sure the rocks were not completely washed away. This was for the purpose of enabling them to generate vast maritime zones. To keep the rocks afloat and to fulfill the criteria of a legal "island", Japan has carried out ambitious projects to expand the "landmass" by artificially producing economic life there and planning to create a place that is actually livable. The "national construction" increased the rocks much beyond their original shapes. Its purpose is not for the protection of the rocks, but for "expansion of its territory". Given the size of the rocks, years of heavy, deliberate expansion, concrete encasing and building facilities have changed the character of the rocks. On detailed satellite images, each of the rocks appears as a circle with a diameter of 50 meters, but these are mostly artificial structures. The Okinotorishima Rocks have lost their natural character. Instead, they are an "artificially formed area of land" or "artificially constructed area of land". ②

Following Japan's logic, the rescuing construction was meant to "expand" the rocks to enable them to "sustain human habitation or economic life of its own" as an Article 121(1) island, and subsequently to generate extra maritime jurisdictional zones. Actually, this is an abusive interpretation of the UNLCOS, which aims at the conformity of the rights and interests of State Parties based on the existing ocean order. The Japanese practice is contrary to international law and to the UNCLOS regime, as it tries to modify the natural features for the purpose of enhancing claims to jurisdictional zones that should not be legitimately granted.

Should such logic and practice be permitted and encouraged to any extent, States could rely on their national capacity to "transform" any insular features

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① Silverstein agrees that artificial island is not entitled to a territorial sea, but he excluded the Okinotorishima as a special circumstance. *See* Andrew L. Silverstein, Okinotorishima: Artificial Preservation of a Speck of Sovereignty, *Brooklyn Journal of International Law*, Vol. 12, No. 1, 2009, pp. 429～430.

② *See* Leticia Diaz, Barry Hart Dubner, and Jason Parent, When is a "Rock" an "Island?": Another Unilateral Declaration Defies "Norms" of International Law, *Michigan State Journal of International Law*, Vol. 15, 2007, p. 519.

such as submerged rocks and sand bars into islands, and then claim large areas of waters and resources to which they are not entitled. This trend would lead to irreversible damage to the authority of the UNCLOS, and certainly would result in a new round of competing claims and chaos in the world's oceans. ① The UNCLOS endeavors to avoid situations of this kind by creating a framework based on customary international law and accepted State Practice.

Judging by what Japan has been doing with great determination, it is unfortunate that the result has turned out to be that Japan's islandisation attempts have transformed the legal status of Okinotorishima from Article 121 (3) rocks into artificial structures to which the law in Article 60 applies. ② The "Okinotorishima" have lost the very basic feature of rocks as they have been transformed into the "Okinotorishima artificial island" or "Okinotorishima artificial structures". Thus from an international law viewpoint, Japan is not entitled to any maritime zones but merely a 500-meter safety zone. Japan's expensive efforts have been counterproductive from a UNCLOS point of view.

Ⅴ. Concluding Remarks

It can be argued that the island regime of the UNCLOS has triggered enduring sovereignty disputes over islands, complexities for maritime claims, disputes over the legal weight accorded to insular features, and aggressive extended continental shelf claims. However, no country has so vigorously taken advantage of the UNCLOS as Japan has to the extreme in attempting to claim large areas of jurisdictional zones based on rocks.

According to international law, maritime features can be accorded maritime zones, but not all features are entitled to an EEZ and beyond. The Okinotorishima, which are indeed uninhabited, isolated rocks located in the Pacific Ocean, cannot sustain human habitation or economic life of their own at all. At high tide, the two rocks composing the Okinotorishima are barely above water and its total area is less than one sixtieth of Rockall. This is the clearest example of the rock provided for in Article 121(3) of the UNCLOS which is not to generate an EEZ or continental shelf, not to mention an extended continental

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① *See* Leticia Diaz, Barry Hart Dubner, and Jason Parent, When is a "Rock" an "Island?": Another Unilateral Declaration Defies "Norms" of International Law, *Michigan State Journal of International Law*, Vol. 15, 2007, p. 519, pp. 519～555.

② *See* UNCLOS Article 60(4); (5); (8); (11); (147), Subpara. 2 (e); and 259.

shelf.

Tempted by the vast ocean space and abundant resources therein, Japan has tried to use such small reef rocks to claim a huge 200 nm EEZ in all directions and even a continental shelf beyond 200 nm. Japan has also put into practice a series of manmade measures to enable the Okinotorishima Rocks to sustain human habitation or an economic life of its own obviously to increase the possibility for expanding otherwise unqualified maritime jurisdictional zones. From satellite images, the two original rocks now appear completely artificial, with no trace of the two natural rocks.

No matter how hard the Japanese have tried, it is doubtful that the Japanese effort can be successful due to the following factors: first, the Japanese islandisation campaign has violated the standards and undermined the authority of the UNCLOS framework; second, its excessive claims encroach on the International Seabed Area that is set aside for the international community as a whole; third, Japan has changed the legal status of the Okinotorishima Rocks from natural rocks into artificial structures. No matter how Japan tries to stretch the word "rock" or how it tries to twist the word "island", the history of the provision, the writings of various scholars, and the opinion of the international community squarely place the Japanese on the wrong side, legally and morally.

A questionable "island" may rate a 12 nm territorial sea but a full entitlement is not consistent with the object and purpose of the UNCLOS to limit excessive claims. With regard to the questionable natural status of Okinotorishima "artificial island, installation or structure", a 500-meter safety zone and exclusive jurisdiction is sufficient.

The problem with Japan's assertion over vast areas of waters based on the national building-up of artificial islands around rocks is rather obvious. It would be an example of greed, constituting a precedent on expanded maritime jurisdiction and of abusing the UNCLOS and would seriously encroach upon the international seabed area. Yet, the profound implications and far-reaching impact reflected from the Japanese claims is worth noting. If every state decided to make the same type of expansion as Japan has, there would be no use for international rule of law and the legal system of order set forth in the UNCLOS would be meaningless. There would be a real crisis brought along by the submission rush of ECS to the international law and International Seabed Area. The international community as a whole should work together to deal with this crisis.

Annex 1: Okinotorishima: History and Events

Year	Events
1543	Unconfirmed reports claimed that the atoll was first sighted by the Spanish ship San Juan and named Abre Ojos("Open your eyes, look!" in Spanish).
1565	The rocks were recorded as "Parece Vela" ("looks like a sail" in Spanish) by Spanish ship San Pedro. After that, it was named "Engels Rocks" by Dutch ship Engels and "Douglass Reef" by British ship Iphigenia. Douglass Reef and Parece Vela are still used as alternative names for Okinotorishima.
1922	The Japanese Navy surveillance ship "MANSHU" made an investigation to the atoll, and reported the status of it.
1929	Okinotorishima was marked in hydrographic charts published by Hydrographic Department of Japn.
1931	The Japanese Cabinet declared it Japanese territory under the jurisdiction of the Ogasawara-shicho of Tokyo Prefecture, and named it Okinotorishima.
1933	Surveillance ship "KOSHU" investigated the islands and found 4 islets in addition to the Eastern Islet (Higashikojima) and Northern Islet (Kitakojima). A hydrographic chart was made by the Hydrographic Department.
1938	Surveillance ship "SHINSHO MARU" investigated the area.
1939—1941	The southwest reefs of the atoll were blasted to open new sea routes. A lighthouse and a meteorological observation site were built using 900 concrete columns. The construction was interrupted by the start of the Pacific War.
1952. 4	The United States took over the Ogasawara islands
1968. 6	The United States returned the islands to Japan
1969	Surveillance ship "MEIYO" investigated the area.
1976	Japan Amateur Radio League (JARL) "DX Pedition" set up an amateur radio station based on the observation site and directed radio waves around the globe from Okinotorishima. Within 78 hours, they made communication with about 9000 other radio stations.
1978	Tokyo Metropolis fisheries research ship "Metropolis" investigated the area.
1982	Survey ship AA "TAKUYO" investigated the area.
1984	Two islets were marked in the topographical map published by the Geographical Survey Institute (GSI).
1987. 9	The Agricultural Aquatic Committee of Japanese Diet held the first meeting on Okinotorishima and the rising sea levels.
1987. 10	It was designated as a coastal protected area by Tokyo Metropolis.

Renewal table 1

Year	Events
1988	Japan Marine Science and Technology Center (JAMSTEC) built an unmanned marine investigation facility which it maintained, following meteorological observation until 1991.
1988—1989	The former Ministry of Construction started the protection project for the Eastern Islet and Northern Islet
1990—1993	The former Ministry of Construction started a base project for the observation station.
1993	JAMSTEC performed meteorological and marine meteorological observations at the working site (continuing now).
1998	The former Ministry of Construction installed a titanium metallic net to cover the Eastern Islet.
1999	According to the amended Coastal Act, the management was put under the National Government: the former Ministry of Construction: responsible for bank protection; the Coast Office of the River Bureau of the Ministry of Land, Infrastructure, Transport and Tourism and the Keihin Department of Engineering Affairs: responsible for protective measures; the degree of general concern is not high.
2004. 9	"Eco-engineering regeneration technology helps improve the regeneration capacity of the degraded coral reef ecosystem, contributes to the territory protection of island states in the Pacific Ocean, and avoids the flooding issues." Hajime Kayanne (Newsletter No. 99, Sep. 2004, OPRF)
2004. 10	"Association for Okinotorishima Research" was set up by OPRF and held its first meeting.
2004. 11	"Observation Group for Effective Utilization of Okinotorishima" established by the Nippon Foundation to centralize experts of different fields to investigate the status of the area from different perspectives, and discuss the possibility of effective utilization of the "island" and its surrounding waters.
2004. 12	The 22nd Ocean Forum was held by OPRF with the theme "Current status and regeneration of Okinotorishima", speakers: Terashima Hiroshi and Hajime Kayanne.
2004	The Ministry of Land, Infrastructure, Transport and Tourism (MLITT) installed video cameras on surveillance facilities.

Renewal table 2

Year	Events
2005.3	"Investigation Group for Promoting Economic Activities of Okinotorishima" funded by Nippon Foundation to strengthen and improve economic activities of Okinotorishima, investigate aquatic organisms' proliferation status that can help the island regeneration such as coral, and the status of island building and expansion, set up a beacon to insure marine traffic, and to investigate the feasibility of power generation by using ocean thermal energy conversion technology. Also, according to the contract between MLITT and Ministry of Agriculture, Forestry and Fisheries of Japan, some proposals were made such as the assumption that coral proliferation promotes the expansion of an island, and protection strategies and utilization programs of Okinotorishima were discussed from various perspectives.
2005.3	The 25th Ocean Forum was held by OPRF with the theme as "Wise use of Japan's exclusive economic zones, submarine mineral resources, and Okinotorishima", speakers: Yasuhiko Kakami, Takatoshi Matsuzawa, Tomohiko Fukushima.
2005.4	"Regeneration Plan of Okinotorishima" was announced by OPRF.
2005.6	Geographical Survey Institute (GSI) set up an electronic reference point
2005	OPRF released "Regeneration Investigation and Research on Okinotorishima": Analysis of boring core technology; Basic ecological investigation of Foraminifera; Discussion of the legal status
2005	Fisheries Association of Ogasawara-Shoto, Tokyo Metropolis provided operational support to Okinotorishima, released striped mackerel fish fries, and investigated fishing grounds in surrounding sea area.
2005	The MLITT set up ocean observation radar.
2005—2006	Tokyo Metropolis built the Instructional Ship for Fisheries Survey "KOYO".
2006—2008	OPRF carried out "Investigation and research on maintenance and regeneration of Okinotorishima": reorganized and analyzed the investigations on maintenance and regeneration of Okinotorishima; International comparative studies about islands status and management methods; Outreach investigations; Ecological investigations of Pacific island nations; Investigations on management implementation of different countries; and Others
2006—2008	The Ministry of Agriculture, Forestry and Fisheries carried out research on "The Development of the Proliferation Methods under Abominable Natural Conditions" and the development of the coral proliferation technology.

Renewal table 3

Year	Events
2006—	Tokyo Metropolis carried out a "Project to improve the utilization of Okinotorishima": to investigate fishing ground; to construct an artificial floating fish reef in mid-layer of deep water; to make a public-oriented movie "Okinotorishima: Miraculous Islands"(2008).
2007.3	The light beacon built by the MLITT started working.
2007.7	The "Basic Ocean Law" was put into force: Article 26 regulates offshore island protection.
2007.11	"Okinotorishima Forum 2007" was held in Tokyo Metropolis.
2008	White Paper II of the MLITT: Chapter 6 "Construct a safe and peaceful society", Section 4: Crisis management and safety guarantee countermeasure: Para. 4 Marine rights protection of Japan "(4) The protection of Okinotorishima: Okinotorishima is located at the south most of our country's territory, and is the most important island, based on which we can establish over 400,000 km^2 exclusive economic zone. It is important to territory protection and utilization, and it is necessary to discuss whether it should be directly managed by the national government and whether complete measures should be taken to make the best use of it".
* 2008.11	"Okinotorishima Forum 2008" was held in Tokyo Metropolis.
* 2010.5	Japan adopted Law for Reservation of the Low Tide Line and Maintenance of Foothold Facilities.
* 2011.1	A plan was announced to build a deep water port in the next 6 years with $10 billion US Dollars.

Source: Translated from OPRF, Research Report on the Okinotorishima Revival and Related Issues, 2008: http://www.sof.or.jp/jp/report/pdf/200903_ISBN978-4-88404-216-5.pdf.

Note: " * ": updates of this author from other sources cited in this paper.

(Editors: CAO Ni; CHEN Xiaoshuang)

岩礁应拥有多大的海域？

——以冲之鸟礁为例

薛桂芳*

内容摘要：日本以冲之鸟礁为基点主张200海里的专属经济区，而且向外延伸大陆架最远至550海里。该行为已引起了国际社会的广泛关注和争议。本文旨在探讨冲之鸟礁的自然地理条件、基于该条件所能够主张的海域及日本极端主张所引发的问题。

本文首先介绍冲之鸟礁的基本情况和日本基于该岩礁所提出的主张，指出该主张与《联合国海洋法公约》(以下简称《公约》)的岛屿制度相悖离的事实。进而概括了日本为满足其多重目的，试图将冲之鸟礁改造成为国际法意义上的岛屿(简称"岛屿化")的实践，并对日本支撑其国家主张所提出的所谓观点与理由进行了评述。最后，本文提出了与日本"岛屿化"行为相关的几个重要问题。例如，依照国际法，岩礁是否与岛屿有所不同？《公约》应当如何被实施及国际社会的意见是否应被尊重？"委员会"如何通过其所做出的决定履行职能？历经数年大规模、处心积虑的改造后，冲之鸟礁的法律地位是否依然是岩礁，还是应当被视为人工设施？

本文指出：冲之鸟礁不具备法律意义上的岛屿条件，因此无权主张专属经济区和大陆架。此外，日本在冲之鸟礁周围所进行的建构已经改变了冲之鸟礁的自然地理条件；这些混凝土结构和设施已事实上将冲之鸟礁改造为人工岛屿或人工设施，只应享有500米的安全区。

同时，本文阐明了日本基于冲之鸟礁提出的主张所产生的重大和深远影响。目前，各国不断提交外大陆架划界申请，已使国际法以及国际海底制度面临严峻的挑战，国际社会当共同努力以应对挑战。

关键词：岩礁　岛屿　冲之鸟礁　日本　外大陆架

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一、前言:日本对冲之鸟礁的主张及岛屿制度

日本于 1983 年 2 月 7 日签署《公约》,并于 1996 年 6 月 20 日批准。[①] 历经多年的准备,日本于 2008 年 11 月 12 日向"大陆架界限委员会"(以下简称"委员会")提交了外大陆架划界的勘定申请。其所申请的大陆架总面积为 74 万平方千米,为日本国土面积(378,000平方千米)的 2 倍。[②]

日本外大陆架划界提案的执行摘要提供了勘定界限所需的全部地图与坐标。该申请包括七个区域:九州南部帕劳岭地区、南硫黄岛地区、南鸟岛地区、茂木海山地区、小笠原海台地区、冲大东海岭南部地区、四国海盆地区。[③]其中,九州南部帕劳岭地区、南硫黄岛地区以及四国海盆地地区的外大陆架申请是以由几块礁石构成的冲之鸟岛(确切地说是冲之鸟礁)为基点提出的。[④]根据该申请,以冲之鸟礁为基础所主张的外大陆架最远的区域可延伸至 550 海里。日本的外大陆架划界申请引起了国际舆论的广泛关注,也加深了国际社会的忧虑。

自 20 世纪 80 年代起,日本就开始对冲之鸟礁进行"岛屿化"。日本以冲之鸟礁为中心向周边海域延伸,不仅主张 200 海里专属经济区,更提出外大陆架主张。[⑤]日本政府试图通过外大陆架划界申请,除确认其 1,550 平方千米的领海、43 万平方千米的专属经济区外,还力争实现以冲之鸟礁为基点的 3 块外大陆架区域的划界主张,同时包括日本对这些海域海洋活动及资源的管辖权。[⑥]

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① 《公约》于 1982 年通过,并于 1994 年 11 月 16 日生效。批准《公约》的国家名单,下载于 http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#,2011 年 6 月 20 日。截至 2011 年 6 月 3 日,共计 162 个国家和欧盟批准或加入《公约》。《公约》于 1996 年 7 月 20 日对日本正式生效。

② 关于大陆架界限委员会的职责,下载于 http://www.un.org/Depts/los/clcs_new/clcs_home.htm,2011 年 6 月 20 日。日本于 2008 年 11 月向大陆架界限委员会提交了相关申请,成为第 13 个向大陆架界限委员会提交相关申请的国家。该委员会在 2009 年 8 月的会议上对此申请做出了初步审查。下载于 http://www.sof.or.jp/en/activities/index1.php,2011 年 6 月 20 日。

③ 关于日本申请的执行摘要,下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf,2011 年 6 月 20 日。

④ "shima"是日语的"岛屿"。日本在其申请中称之为"冲之鸟岛"(Okinotorishima Islands),本文采用"冲之鸟礁"(Okinotorishima Rocks)。

⑤ 详细信息见:海洋政策基金会:《冲之鸟修复及相关问题研究报告》(日语),2008。下载于 http://www.sof.or.jp/jp/report/pdf/200903_ISBN978-4-88404-216-5.pdf,2011 年 6 月 20 日。

⑥ Yukie Yoshikawa, Okinotorishima: Just the Tip of the Iceberg, *Harvard Asian Quarterly*, Vol. 9, No. 4, 2005, at http://asiaquarterly.com/2006/02/03/ii-131/, 15 January 2011.

《公约》第 121 条对岛屿制度作出了相关规定。[①]该条第 1 款明确规定了岛屿的定义。该定义直接采用了 1958 年《领海及毗连区公约》第 10 条关于岛屿的定义。《公约》第 121 条还规定了“岛屿”的重要判定标准，即：四面环水并在高潮时高于水面的自然形成的陆地区域。该款规定将人工岛屿和低潮高地排除在岛屿范围之外。[②]

第 121 条第 2 款体现了“以陆定海”的原则。该款规定岛屿和其他陆地领土一样可以拥有领海、毗连区、专属经济区和大陆架。这些海域应按照《公约》适用于陆地领土的规定加以确定。

第 121 条第 3 款是本条的核心。该款规定“不能维持人类居住或其本身经济生活的”岩礁，不应有专属经济区或大陆架。该款的主要目的是为保证第 1、2 款所规定的岛屿制度不适用于那些缺乏维持人类正常生活所必需自然条件的小岛和岩礁。从这一角度看，《公约》将“岛屿”与“岩礁”进行了明确地区分。[③]

在了解了第 121 条及其内涵后，日本在《公约》协商期间曾提议取消第 121 条中第 3 款，但未能遂愿。[④]为了改变冲之鸟作为岩礁的不利的法律地位，日本花费了几十年的时间对其进行“岛屿化”建设。虽然当前尚无法对日本在冲之鸟礁“岛屿化”实践中收益做出准确的评估，但在国家实践中，日本对冲之鸟礁的“岛屿化”实践及其对过分的专属经济区和外大陆架的影响值得关注。

二、冲之鸟礁及日本的“岛屿化”企图

自从 20 世纪 80 年代，冲之鸟礁开始受到国际社会的关注。争论焦点主要集中在其法律地位及其是否有权主张专属经济区和大陆架。冲之鸟礁的基本情况简介如下。

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① 《公约》第 121 条全文如下：(1)岛屿是四面环水并在高潮时高于水面的自然形成的陆地区域。(2)除第 3 款另有规定外，岛屿的领海、毗连区、专属经济区和大陆架应按照公约适用于其他陆地领土的规定加以确定。(3)不能维持人类居住或其本身的经济生活的岩礁，不应有专属经济区或大陆架。参见：《联合国海洋法公约》，1982 年 12 月 10 日，1833 U. N. T. S. 3。

② 参见 Center for Ocean Law and Policy, University of Virginia School of Law, *United Nations Convention on the Law of the Sea* 1982, *a Commentary*, Vol. Ⅲ, The Hague: Martinus Nijhoff, 1995, p. 338.

③ 参见 Center for Ocean Law and Policy, University of Virginia School of Law, *United Nations Convention on the Law of the Sea* 1982, *a Commentary*, Vol. Ⅲ, The Hague: Martinus Nijhoff, 1995, p. 338.

④ 参见 Center for Ocean Law and Policy, University of Virginia School of Law, *United Nations Convention on the Law of the Sea* 1982, *a Commentary*, Vol. Ⅲ, The Hague: Martinus Nijhoff, 1995, p. 337.

(一)冲之鸟礁

冲之鸟礁(日本语:沖ノ鳥島、おきのとりしま),位于北纬 20°25′,东经 136°05′西太平洋菲律宾海的九州帕劳海脊上。[①]处于冲大东岛东南方 534 千米,小笠原群岛的美奈美硫黄岛的西南偏西 567 千米,距日本本土 1740 千米,由五个环礁组成。[②]这些珊瑚礁最初于 1565 年由一名西班牙水手命名为"帕里西维拉",因为"它看起来像船帆"。[③] 1789 年被以西班牙航海家威廉·道格拉斯的名字命名为"道格拉斯礁"。[④]

日本没有关于冲之鸟礁 1888 年以前的官方记载。1922 年至 1925 年日本发现了这些岩礁,1931 年在确定没有任何其他国家对该地区进行主张后,宣称这些珊瑚礁是日本领土。[⑤]在行政管理上,日本政府将冲之鸟礁作为小笠原群岛的一部分,置于东京都政府的管辖之下,并赋予其一个新的日本名字,即:冲之鸟("遥远的鸟状岛"或"日本最南端的岛")。[⑥]

这些岩礁位于环礁中水深 3～4.6 米的泻湖的西部,东西长 4.5 千米,南北长 1.7 千米,面积约 5 平方千米,其中大部分区域甚至低潮时也位于海平面以下。[⑦]其边缘的环礁呈梨形东西向分布,东端最宽。西南端距岩礁东南部 250 米,修建了一条约 15 米宽、6 米深的航道,以便小型船舶进出泻湖。

台风与海水的侵蚀一直威胁着冲之鸟礁的存在。几十年前,曾有 5 块礁石

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① 参见 Wikipedia,at http://en.wikipedia.org/wiki/Okinotorishima,16 March 2011.

② 参见 Wikipedia, at http://en.wikipedia.org/wiki/Okinotorishima, 16 February 2011. Both "Parece Vela" and "Douglass Reef" are still used today.

③ 相关著述见:宋燕辉:《冲之鸟:岩礁还是岛屿?中国台湾与日本之间的海洋划界争端》,载于 Jon M. Van Dyke 主编:《海洋划界争端、处理方法及海洋法》,2009 年版;J. I. CHARNEY, Rocks that cannot Sustain Human Habitation, *American Journal of International Law*, Vol. 93, 1999, pp. 863～878.

④ 参见 Wikipedia,下载于 http://en.wikipedia.org/wiki/Okinotorishima,2011 年 2 月 16 日,"帕里西维拉"与"道格拉斯"至今仍被沿用。

⑤ 宋燕辉认为,根据 20 世纪 30 年代早期的国际法,日本将冲之鸟置于其主权之下是有争议的。参见:宋燕辉:《冲之鸟:岩礁还是岛屿?中国台湾与日本之间的海洋划界争端》,载于 Jon M. Van Dyke 主编:《海洋划界争端、处理方法及海洋法》,2009 年版;J. I. CHARNEY, Rocks that cannot Sustain Human Habitation, *American Journal of International Law*, Vol. 93, 1999, pp. 863～878. 另外,根据《波茨坦公告》第 8 节,日本仅对本州岛、北海道岛、九州岛、四国岛拥有主权。因此,日本对于冲之鸟礁的主权是有争议的。详细信息见:《波茨坦公告》:日本无条件投降声明,下载于 http://pwencycl.kgbudge.com/P/o/Potsdam_Declaration.htm, 1945 年 7 月 26 日,2011 年 6 月 20 日。

⑥ Yukie Yoshikawa, Okinotorishima: Just the Tip of the Iceberg, *Harvard Asian Quarterly*, Vol. 9, No. 4, 2005, at http://asiaquarterly.com/2006/02/03/ii－131/, 9 February 2011.

⑦ 参见 Wikipedia, at http://en.wikipedia.org/wiki/Okinotorishima, 18 February 2011.

高出海平面。至今，仅有2块小岩礁依稀可见，即：东露岩（日本称为“东小岛”）和位于偏西方向的北露岩（日本称为“北小岛”）。[①]高潮时，东露岩大约仅有双人床大小，且只高出海平面16厘米，而北露岩不如一间小卧室大，只高出海平面6厘米。[②]通过卫星图片看，这两块岩礁完全为人工设施，与1987年卫星图片上所显示的自然性质的岩礁状态相去甚远。

（二）日本的“岛屿化”行动

为防止冲之鸟礁由于受侵蚀而消失，以使其高于海平面之上并获得最大范围的专属经济区和大陆架，日本政府采取多种举措使冲之鸟礁符合国际法意义上“岛屿”的最低标准。日本政府的实践可分为三个阶段（详细信息见附件1：冲之鸟礁：历史与事件）。

从冲之鸟礁被发现到20世纪70年代后期，日本政府对冲之鸟礁宣示主权并对其情况和潜在的利用价值进行了初步勘探，其中包括建立海军基地。[③]二战后，日本丧失了对冲之鸟礁的主权，交由美国行使。20世纪60年代后期，日本重获冲之鸟的主权，[④]得以继续对冲之鸟礁进行勘查。

直到20世纪70年代后期，由于各沿海国纷纷主张各自的专属经济区，日本政府才开始关注冲之鸟礁。根据其于1977年7月1日生效的《渔区临时措施法案》，日本政府将其对冲之鸟礁周边海域的渔业管辖权范围延伸至自领海基线起

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① 宋燕辉：《冲之鸟：岩礁还是岛屿？中国台湾与日本之间的海洋划界争端》，载于Jon M. Van Dyke主编：《海洋划界争端、处理方法及海洋法》，2009年版；也参见Martin Fackler, A Reef or a Rock? Question Puts Japan In a Hard Place To Claim Disputed Waters, Charity Tries to Find Use For Okinotori Shima, *Wall Street Journal*, 16 February 2005, p. A1. 对于日本何时更改了岩礁的名字尚不明确：在2003年更新的“冲之鸟特征”（http://www.nodaland.com/okitori/okitori.php）中，使用的还是“东露岩”与“北露岩”，但是自2005年开始，在相关的讨论与文件中使用的便是“东小岛”与“北小岛”。因此推测日本可能在2004年将名字做了更改。

② 宋燕辉：《冲之鸟：岩礁还是岛屿？中国台湾与日本之间的海洋划界争端》，载于Jon M. Van Dyke主编：《海洋划界争端、处理方法及海洋法》，2009年版；J. I. CHARNEY, Rocks that cannot Sustain Human Habitation, *American Journal of International Law*, Vol. 93, 1999, pp. 863～878.

③ 海军基地于1939年开始建设，但在1941年由于第二次世界大战的爆发被迫中断。由于在当时的国际环境下，不适于公开建设军用设施，所以日本政府决定对外称为“灯塔以及气象观测站”，参见Wikipedia, at http://en.wikipedia.org/wiki/Okinotorishima, 18 February 2011.

④ Andrew L, Silverstein, Okinotorishima: Artificial Preservation of a Speck of Sovereignty, *Brooklyn Journal of International Law*, Vol. 12, No. 1, 2009, pp. 409～432, p. 410.

200 海里。[①]该渔区面积约 400,000 平方千米,远远超过日本全部国土的面积。[②]这也进一步激发了日本政府对这些小岩礁的激情,对冲之鸟礁的"岛屿化"行动进入了新的阶段。

1983 年,日本政府签署了 1982 年通过的《公约》。《公约》确立了专属经济区制度。基于对冲之鸟礁的主权,日本将先前的渔区转化为面积相同的专属经济区。然而,日本政府最为担心的是冲之鸟礁可能被海水淹没。如果那样的话,日本不仅无法拥有对冲之鸟礁周边 200 海里专属经济区的专属管辖权,还无法主张 200 海里外的大陆架。因此,从 1987 年起,日本通过政府机关和科研机构采取了一系列紧急措施,以挽救冲之鸟礁,使其免于被侵蚀,标志着日本大规模"岛屿化"行动的正式开始。

1987 年,随着海平面上升理论的提出,并得到相关证据的支持。日本有关方面提议,为确保对岩礁周边海域的主张,应在冲之鸟礁及其周边建造人工设施和结构,防止该岩礁因受海水侵蚀而被淹没。同年,日本启动了为冲之鸟礁构筑防波堤的计划。

1987 年至 1993 年间,东京都政府及日本中央政府先后在冲之鸟礁周围建造了防波堤和直径 50 米的混凝土墙,使东露岩和北露岩完全被人工混凝土结构所覆盖,不再受到海水侵蚀。[③] 1998 年,日本政府斥资 8 亿日元为东露岩安装了网罩。

1988 年,日本海洋科学技术中心在冲之鸟礁建立了海洋观测平台,该平台为高脚屋式的长方形,长 100 米,宽 50 米,位于泻湖较浅部分。这个三层建筑物由一定数量的柱子支撑,[④]上面建有直升机停机坪,设有海洋观测设施,建立了无人值守气象观测站。

2002 年 2 月 8 日,日本政府修订了其制定于 1956 年 5 月 12 日的《海岸法》。[⑤]依据该法第 37 条第 2 款的规定,日本中央政府直接负责对冲之鸟礁的人工设施和结构进行管理。自 2004 年开始,日本政府采取了更为有力的综合举措,开始了其"岛屿化"实践的第三阶段。该阶段,政府拨付了大量资金对原有的

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① 参见 Kiyofumi Nakauchi and Law of the Sea Institute, Japan, Emergy(sic) Measures for Protecting the "Oki-no-tori-Shima" Island from Waves in *Japan's Ocean Affairs—Ocean Regime, Policy and Development*, September 1989.

② 参见 Kiyofumi Nakauchi and Law of the Sea Institute, Japan, Emergy(sic) Measures for Protecting the "Oki-no-tori-Shima" Island from Waves in *Japan's Ocean Affairs—Ocean Regime, Policy and Development*, September 1989.

③ 1925 年,尚有 5 块岩石位于海平面以上,并不断被海水侵蚀。参见 Wikipedia, at http://en.wikipedia.org/wiki/Okinotorishima, 5 March 2011.

④ 1925 年,尚有 5 块岩石位于海平面以上,并不断被海水侵蚀。参见 Wikipedia, at http://en.wikipedia.org/wiki/Okinotorishima, 5 March 2011.

⑤ 下载于 http://law.e-gov.go.jp/htmldata/S31/S31HO101.html(日语),2011 年 3 月 5 日。

防波堤进行加固，并在冲之鸟礁以及其周边海域开展了一系列的研究和观测项目。[①]

2004 年，日本海洋政策基金会举办了第 22 届海洋论坛，主题为冲之鸟的地位与重建。[②]其后发布了关于冲之鸟的修护等问题的报告，并确立了电子基线。[③]此后，海洋政策研究基金会以定期论坛的形式，举办了一系列有关冲之鸟问题的会议。[④]

2004 年 11 月和 2005 年 3 月，日本财团组建代表团，调研冲之鸟及周边专属经济区的利用问题。代表团成员包括国际法、珊瑚礁生态学和建筑的专家。[⑤]其后发布的报告提出的建议包括：在冲之鸟建造灯塔，使冲之鸟的名字能够被标注在各种海图上，以彰显其存在；通过培植珊瑚和其它方式建造个人工珊瑚礁以扩大冲之鸟的规模；建造海洋温差发电设备以吸引鱼群（据说这一方法是世界上的首次尝试）；[⑥]在周边海床勘探矿产资源；建造港口、房屋等供人类居住、从事海洋科研与开发等的基础设施，大力发展旅游业。[⑦] 2005 年，由日本财团派出的第二个代表团重点对最具开发前景的船舶工程、发电与灯塔建造等进行了可行性研究。[⑧]

在日本财团和海洋政策研究基金会的共同努力及其研究成果的刺激下，政府官员和政客们成功地促使中央政府加大了对冲之鸟几块礁石的关注。[⑨] 2005

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① Yukie Yoshikawa, Okinotorishima: Just the Tip of the Iceberg, *Harvard Asian Quarterly*, Vol. 9, No. 4, 2005, at http://asiaquarterly.com/2006/02/03/ii－131/, 5 March 2011.

② 下载于 http://www.sof.org.jp/jp/forum/22/php，2011 年 3 月 6 日。

③ Hajime Kayane, Submerged atolls and their regeneration－Territorial preservation of island states in the Pacific Ocean and islands along the Japanese border, *Newsletter* No. 99, 2004, OPRF, at http://www.sof.or.jp/en/news/51－100/99_1.php＃01, 20 June 2011.

④ Nippon Foundation, The Report on Promoting economic activities in Okinotorishima (Japanese), 2005, at http://nippon.zaidan.info/seikabutsu/2004/00009/contents/0001.htm, 16 March 2011.

⑤ 日本财团，促进冲之鸟礁经济活动的报告（日文），2005，下载于 http://nippon.zaidan.info/seikabutsu/2004/00009/contents/0001.htm，2011 年 3 月 16 日。

⑥ 石原慎太郎网站，下载于 http://www.citymayors.com/mayors/tokyo_mayor.html，2011 年 3 月 16 日。

⑦ 日本财团，促进冲之鸟礁经济活动的报告（日文），2005，下载于 http://nippon.zaidan.info/seikabutsu/2004/00009/contents/0001.htm，2011 年 3 月 16 日。

⑧ 日本财团，促进冲之鸟礁经济活动的报告（日文），2005，下载于 http://nippon.zaidan.info/seikabutsu/2004/00009/contents/0001.htm，2011 年 3 月 16 日。

⑨ 宋燕辉：《冲之鸟：岩礁还是岛屿？中国台湾与日本之间的海洋划界争端》，载于 Jon M. Van Dyke 主编：《海洋划界争端、处理方法及海洋法》，2009 年版；也参见 Martin Fackler, A Reef or a Rock? Question Puts Japan In a Hard Place To Claim Disputed Waters, Charity Tries to Find Use For Okinotori Shima, *Wall Street Journal*, 16 February 2005, p. A1. 对于日本何时更改了岩礁的名字尚不明确：在 2003 年更新的“冲之鸟特征”（http://www.nodaland.com/okitori/okitori.php）中，使用的还是“东露岩”与“北露岩”，但是自 2005 年开始，在相关的讨论与文件中使用的便是“东小岛”与“北小岛”。因此推测日本可能在 2004 年将名字做了更改。

年,日本政府决定在冲之鸟建灯塔,[①]安装了价值 3.3 亿日元的雷达系统以全天候监测进入岩礁周边的船只,[②]整修了直升机停机坪,在冲之鸟设立了正式的地址标牌,用日本语写着:"东京都小笠原村冲之鸟岛一番地"。[③]东京都知事石原慎太郎还不顾环保主义者的反对,决定在冲之鸟修建发电场。[④]捕鱼船队被派到冲之鸟,只为证明其礁石存在"经济生活"。[⑤]2007 年 3 月 16 日,日本海岸警卫队在冲之鸟建造了一座灯塔并已投入使用。随后,该灯塔便被标注在了航海图上。冲之鸟成为日本民族主义者爱国情怀的聚焦点和敏感的政治问题。[⑥]

除了对冲之鸟礁使用混凝土加固防护外,日本政府还启动了一系列宣传项目以提高公众对这几块礁石重要性的认识。[⑦]其中包括一部电影,名为《冲之鸟岛——神奇的岛》"[⑧]。这部长达 70 分钟的影片于 2007 年 12 月上映,并可以很方便地在电影院、图书馆、信息中心等公共场所观赏到。

2010 年 1 月,在一次常规的国会会议上,日本政府提交了一份新的法案,旨在保护最南端的冲之鸟海岸线,以巩固其专属经济区的主张与权益。2010 年 5 月,日本政府通过了《低潮线保全和基地设施整备法案》。[⑨]通过这一国家立法,日本对冲之鸟礁的保护有望提升到一个新的高度。

(三)日本对冲之鸟礁"岛屿化"的动因

从 1932 年开始,日本政府陆续投入资金,对冲之鸟礁进行建设,包括斥资 850 亿日元(约合 7.4 亿美元)在观测站建造住所和提供日常维护。1987 年,为

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① 日本共同社:《日本计划在太平洋争议岛屿上建造灯塔》, 2005 年 8 月 24 日。

② 英国广播公司:《日本将在冲之鸟岛设立监视系统》, 2005 年 5 月 16 日。

③ 新华社:《日本在太平洋争议暗礁上设立地址标牌》, 2005 年 6 月 20 日。

④ 《2005 年 5 月,政府官员视差冲之鸟岛》,下载于 http://www.sensenfukoku.net/mail-magazine/no36.html,2011 年 3 月 18 日。也参见政府官员石原的论文:《冲之鸟礁的战略意义》,下载于 http://www.sankei.co.jp,2005 年 6 月 6 日。

⑤ 日本共同社:《渔船在争议岛屿冲之鸟岛捕鱼后返回》, 2005 年 4 月 19 日。

⑥ Yukie Yoshikawa, Okinotorishima: Just the Tip of the Iceberg, *Harvard Asian Quarterly*, Vol. 9, No. 4, 2005, at http://asiaquarterly.com/2006/02/03/ii-131/, 19 March 2011.

⑦ 参见政策研究基金会海洋论坛及相关活动,下载于 http://www.sof.or.jp/en/index.php, 2011 年 3 月 19 日。

⑧ 下载于 http://www.metro.tokyo.jp/ENGLISH/TOPICS/2005/index.htm, 2011 年 6 月 20 日。该电影由六部分组成,包含冲之鸟礁每部分的基本情况,比如方位、历史、气候、海洋环境、资源、重要性以及保护活动。

⑨ 该法案全称为:"为保护并促进专属经济区和大陆架利用的低潮线保全和基地设施整备法案"。参见今日日本,日本共同社:《日本通过立法来保护其专属经济区》, 2010 年 5 月 26 日;《通过立法保护日本专属经济区》,载于《海洋政策研究基金会月报》,2010 年 5 月,下载于 http://www.japantoday.com/category/politics/view/diet-enacts-law-to-preserve-japans-eez,第 12 页, 2011 年 6 月 20 日。

防止这些岩礁被海水彻底侵蚀并消失，日本政府再斥资 2.8 亿美元，建造混凝土结构以保护它们，对于较小的岩礁，则斥资 5000 万美元建造了钛合金防护罩，保护岩礁使其免遭海浪的侵蚀。

2005 年，日本投入 1000 万日元建造灯塔和观测站。2006 年又斥资 755 万美元用于珊瑚礁的重建。同时，为日本海岸警卫队投资 3.4 亿日元建造了太阳能发电灯塔。2007 年以来，日本政府不断扩大对珊瑚礁的加固和维护规模，并使用电极造沙技术以保护冲之鸟。[①]据 2008 年 4 月 9 日的媒体报道：日本政府计划在其后的三年内，投资 7.7 亿日元对冲之鸟周边的珊瑚礁进行培植。日本还同时实施着一项旨在充分利用这些岩礁的长期开发计划。

2010 年，日本政府制定了一项对冲之鸟礁进行管理和养护的计划。根据该计划，日本政府进一步加强了对冲之鸟礁防波堤的维护力度。除了年度的外观检查外，日本还将采取一系列有效的措施，确保这些混凝土构造物免受诸如海水侵蚀、台风和风浪等恶劣的自然条件的破坏。[②]

2011 年的 1 月，日本政府宣布了一项新的计划，准备在未来 6 年内，拨款 7500 亿日元在冲之鸟礁建设港口，一方面进一步加强其基于冲之鸟礁的海洋权益主张。同时，还可以此为基地，开展海洋资源调查并拓展相关经济活动。[③]

就此人们不禁要问：日本在这些既远又小的礁石上不惜重金进行投入的动机究竟是什么？答案就隐藏在冲之鸟礁会为日本带来诸多方面的巨大利益。例如：日本政府从冲之鸟礁能够获取的最明显的利益在于，这些礁石可以显著提升日本海洋资源的潜力。在资源开发方面，日本拥有先进的技术，并且需要从海洋中获取资源，尤其是海洋生物和矿产资源，以维持其国民经济的发展。据称，冲之鸟礁周边海底蕴藏着丰富的油气资源，并发现储量丰富的锰结核和稀有金属。

从保障国家安全的角度考量，冲之鸟礁的地位同样举足轻重。位于太平洋中西部的冲之鸟礁具有无可比拟的地理位置，这些小礁石可以充当永不沉没的航母。这一功能凸显其重要的战略价值和军事潜能，将极大地提高日本控制太

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① 《政府将运用电极造沙技术拯救冲之鸟礁》，下载于 http://www.japanprobe.com/2008/09/21/government－will－use－sand－creating－electrodes－to－save－okinotorishima，2011 年 3 月 20 日。

② 参见《日本众议院通过保护'冲之鸟岛'法案》，载于《南方日报》2010 年 5 月 19 日。下载于 http://news.sina.com.cn/w/2010－05－19/082117532724s.shtml，2011 年 3 月 20 日。

③ 参见格斯卢宾：《中国对日本在关键的经济区制造岛屿感到震惊》，下载于 http://www.businessinsider.com/chinese－angered－by－japan－island－grab－2010－1，2010 年 1 月 7 日。也可参见：《日本将在冲之鸟礁建造基地（中文）》，下载于 http://junshi.daqi.com/slide/2735790.html#t，2011 年 6 月 20 日。

平洋及海上活动的能力。[①]

冲之鸟礁最重要、最根本的作用在于,日本基于该岩礁,通过在岩礁周围建立专属经济区和大陆架等海域,主张和建立具有主权、主权权利和管辖权等的大面积的管辖海域。[②]在《公约》的框架下,海洋上的一座孤立、微小、远离大陆的岛屿能够使其所属国凭借在其周边建立海域的权利而成为海上强国。[③]日本冲之鸟礁的情况尤为如此。若没有这些岩礁,日本领海最南端将回退到南硫磺岛,这将使其失去 1550 平方千米领海的水域、海底和上空的主权。日本的专属经济区也将退回到位于冲之鸟礁东北约 400 米远的硫磺岛,或退回到位于冲之鸟礁西北约相同距离的另一个岛——冲大东岛。这样日本将失去 430,000 平方千米的专属经济区和在三个区域所主张的外大陆架。[④]

从经济、政治或社会角度,日本政府显然也会从这项"岛屿化"建设中获益巨大。为获得这些利益,日本决定保护这些岩礁并通过经济活动对其周边海域加以有效的控制。

三、日本对冲之鸟礁的主张及"岛屿化"行动"理论"

一直以来,日本维持着对冲之鸟礁的主张和"岛屿化"实践。一方面,日本坚定不移地主张冲之鸟礁的岛屿法律地位;另一方面,日本政府处心积虑地通过"岛屿化"行动为使冲之鸟礁符合法律意义上的岛屿的标准铺平道路。同时,在近几十年的时间里,为论证日本政府的主张与实践的合法性,日本学者对冲之鸟礁进行了全面而系统的研究。其中一些代表性的"理论"和观点,反映了日本"岛屿化"行动的动机与决心。

(一)强调冲之鸟礁具有"岛屿"的法律地位

对于冲之鸟礁的法律地位,日本的观点一边倒地认可其"自我构建的信念",

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① 参见 Martin Fackler, A Reef or a Rock? Question Puts Japan In a Hard Place To Claim Disputed Waters, Charity Tries to Find Use For Okinotori Shima, *Wall Street Journal*, 16 February 2005, p. A1. 对于日本何时更改了岩礁的名字尚不明确:在 2003 年更新的"冲之鸟特征"(http://www.nodaland.com/okitori/okitori.php)中,使用的还是"东露岩"与"北露岩",但是自 2005 年开始,在相关的讨论与文件中使用的便是"东小岛"与"北小岛"。因此推测日本可能在 2004 年将名字做了更改。

② 参见《联合国海洋法公约》第 55 条和第 77 条。

③ Yasuhiko Kagami, Environmental Policy for Desert Islands: Beyond "Island or Rock?", in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 109.

④ Yukie Yoshikawa, Okinotorishima: Just the Tip of the Iceberg, *Harvard Asian Quarterly*, Vol. 9, No. 4, 2005, at http://asiaquarterly.com/2006/02/03/ii-131/, 19 March 2011.

即这些礁石适用于《公约》第121条，而且符合其所规定的“岛屿”标准，因为它们是“自然形成的陆地区域”、“四面环水”、“高潮时高出水面”。[①]此外，日本坚称《公约》第121条第1款中所指岛屿不应受到第121条第3款规定的限制。基于这一逻辑，冲之鸟礁“有资格”并且“有权”向外拓展海域，包括专属经济区和大陆架。[②]

即便如此，就冲之鸟礁的“岛屿”法律地位，日本国内的观点也不一致。东京东洋英和女学院大学法律教授栗林忠男认为岩礁和珊瑚礁在组成和结构方面存在差异。《公约》第121条第3款的含义仅适用于岩礁，即：不能维持人类居住或其本身经济生活的岩礁无权拥有专属经济区和大陆架。[③]此外，鉴于珊瑚礁和岩礁（由坚硬的陆源土壤构成）的差异，[④]认为冲之鸟礁是岩礁而不是小岛的说法毫无意义。栗林教授坚称日本的主张是正当的，因为国际法没有对“岩礁”进行准确的界定，一国可基于其所拥有的珊瑚礁主张专属经济区和大陆架。[⑤]

另一位日本学者芹田健太郎认为，根据《公约》序言中的规定：《公约》未予明确规定的事项应继续参照一般国际法的规定和原则，建立200海里的捕鱼区是习惯国际法，据此，冲之鸟礁有权享有200海里的捕鱼区。[⑥]他还认为：自《公约》生效以来日本政府根据其国内立法对冲之鸟礁所进行的各种实践，从未得到任何国家的抗议，基于这一事实，冲之鸟礁有权享有专属经济区。[⑦]

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① 外交部经济厅长官大岛太郎：《日本众议院建设委员会公开报告》，1999年4月16日。下载于 http://www.shugiin.go.jp/index.nsf/htm/index_kaigiroku.htm，2011年6月20日。Akesato Nakayama，Island Definition and related Issues in International Law p. 34，in OPRF，*Research Report on the Okinotorishima Revival and Related Issues*，2008，pp. 26～38.

② 外交部经济厅长官大岛太郎：《日本众议院建设委员会公开报告》，1999年4月16日。下载于 http://www.shugiin.go.jp/index.nsf/htm/index_kaigiroku.htm，2011年6月20日。Akesato Nakayama，Island Definition and related Issues in International Law p. 34，in OPRF，*Research Report on the Okinotorishima Revival and Related Issues*，2008，pp. 26～38.

③ Yukie Yoshikawa，Okinotorishima：Just the Tip of the Iceberg，*Harvard Asian Quarterly*，Vol. 9，No. 4，2005，at http://asiaquarterly.com/2006/02/03/ii－131/，19 March 2011。

④ 根据琉球大学藤田和彦的观点，珊瑚岛礁一般是指“低洼的平地和由小岛构成的礁坪环礁，其大部分由松散的生物碎屑和碎石构成。因此，岛屿易受洪水、海水腐蚀、风暴以及其他沿海灾害的侵袭。参见藤田和彦提高有孔虫沙的生产效率，维持珊瑚岛，载于OPRF，*Research Report on the Okinotorishima Revival and Related Issues*，2008，p. 97.

⑤ Tadao Kuribayashi，The position of Okinotorishima in international law，in Nippon Foundation，*Report on Promoting Economic Activities in Okinotorishima*，at http://www.nippon－foundation.or.jp/eng/maritime/programsseas.html，20 June 2011.

⑥ Kentaro Serita，*Japan's Territory*（Japanese），C HUOKORON-SHINSYA，INC，2002，pp. 182～189，pp. 224～245.

⑦ Kentaro Serita，*Japan's Territory*（Japanese），C HUOKORON－SHINSYA，INC，2002，pp. 182～189，pp. 224～245.

事实上,日本政府基于冲之鸟礁不仅主张了 200 海里的专属经济区,而且根据自然延伸原则,在四国海盆、南硫磺岛和九州南部帕劳海岭地区提出了外大陆架主张。根据《公约》第 76 条第 1 款规定:"沿海国的大陆架包括领海以外依其陆地领土(着重强调)的全部自然延伸,扩展到大陆边外缘的海底区域的海床和底土……"。

对于这一点,日本采用了与主张冲之鸟礁专属经济区类似的手段,利用自然延伸原则,基于几块岩礁,最大限度地主张其外大陆架。这一主张体现在日本政府所提交的执行摘要的第 6.2 部分的第二段中,即,九州—帕劳海岭构成"以'冲之鸟岛'(日本所谓的岛!)为代表"的区域是日本大陆(着重强调)自然延伸的一部分。[①]为了掩饰其向帕劳海岭延伸的外大陆架主张基于冲之鸟礁本身的事实,日本强调冲之鸟礁是日本大陆的自然延伸。这种难以自圆其说的说法显然是站不住脚的,因为事实显而易见,冲之鸟礁的海床离日本最近的大陆也非常遥远。

(二)采取措施使冲之鸟礁具备维持人类生存或其本身经济生活的条件

除了在冲之鸟礁的法律地位和地理位置方面寻找论据支撑其专属经济区和大陆架的主张外,日本政府还一直期盼能够使这些岩礁具备维持其自身经济生活的条件。

一位日本学者认为《公约》第 121 条第 3 款的解释和适用是有问题的,并且评论道:

"如果'能够维持人类居住或其本身经济生活的岩礁'是判断岛屿地位的必要条件,而并不要求对该岩礁实际居住,那么就有理由认为仅仅满足可能居住的条件这一标准就足够了。若果真如此,该标准本身将随科学技术发展而发展,从而导致满足岛屿条件的不确定性。"[②]

这一观点实际表明了一个未曾承认的事实:日本一直以来都在通过科技手段,使冲之鸟礁不被认为是《公约》第 121 条第 3 款所指的岩礁。

为了对日本的主张和"岛屿化"行动提供佐证,日本学者在世界范围内搜寻相关的实践。一份关于其他国家实践的调查报告称,现有的资料表明,分散在大洋中的荒岛可能(或将可能)"维持人类居住或其自身经济生活"。[③]其中包括:永

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① 参见关于日本申请的执行摘要,下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf, 2011 年 6 月 20 日。

② Hiroshi Terashima, The Need for a Comprehensive Study on the Problems of Islands and Management of their Surrounding Waters, in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 113.

③ Yasuhiko Kagami, Environmental Policy for Desert Islands: Beyond "Island or Rock?", in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 109.

久性小规模驻兵或气象观测人员、建造灯塔、配备其他助航设备、捕鱼活动、近年来在岛屿周边为保护海洋生态系统和生物多样性而设立的海洋保护区等。[①]该学者所列举出的最新实例是美国于 2006 年在夏威夷群岛西北部设立的当时全球最大的海洋自然保护区(帕帕哈瑙莫夸基亚国家海洋保护区),美国自 19 世纪 70 年代起就主张对上述地区的 10 个荒岛周边的专属经济区。[②] 2009 年 1 月,美国又在太平洋上的一些远岛建立了新的国家海洋纪念碑。[③]

该日本学者还注意到,采取诸如在荒岛周边设立海洋自然保护区的做法不仅被所美国采用,法国、澳大利亚、基里巴斯等国也均已采用。该学者希望这些实践对"岛屿或岩礁"争议产生积极的意义或影响,虽然"荒岛不能作为主张其周边海域的依据,但却可以作为海洋可持续发展管理的依据"。[④]

这些实践或许会对荒岛管理有所启迪。但是,这位学者忘记了关键的一点:就国家实践来说,日本事实上是首个基于岩礁向外拓展海域主张的国家。

从其他国家实践中寻找佐证之外,也有日本学者试图从国际法和国家实践发展的角度论证日本主张和国家实践的合理性。日本海洋政策研究财团执行理事寺岛弘士认为需要从《公约》的整体框架及其倡导的海洋综合管理的精神出发,看待《公约》第 121 条第 3 款与冲之鸟礁问题。[⑤]寺岛弘士指出:对于专属经济区和大陆架的争论主要集中在沿海国获得的权利方面,而没有考虑沿海国承担的管理这些海域的责任和义务。近年来的海洋管理的重心发生了重大转变,《公约》起草时所要求的海洋污染应对,如今已经转变为强调对海洋生物多样性养护及其它问题上,比如:提倡基于生态系统的管理及其对岛屿周边海域的功能区划管理。

寺岛弘士建议不必纠结于小岛是否有权主张专属经济区和大陆架的问题,而应当从关注谁应该管理岛屿周边海域以及如何进行管理的角度以解决相关问题。不仅如此,他还提出应重新思考并评估岛屿和其周边水域的管理问题。他呼吁各国在分配人类共同继承财产的时,不仅应当关注小岛及其周边海域的资

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① Yasuhiko Kagami, Environmental Policy for Desert Islands: Beyond "Island or Rock?", in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 109.

② 根据一位美国海洋法专家的说法,根据《公约》第 121 条的规定,那些不应该拥有专属经济区,参见 Yasuhiko Kagami, Environmental Policy for Desert Islands: Beyond "Island or Rock?", in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 109.

③ Yasuhiko Kagami, Environmental Policy for Desert Islands: Beyond "Island or Rock?", in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 109.

④ Yasuhiko Kagami, Environmental Policy for Desert Islands: Beyond "Island or Rock?", in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 109.

⑤ Hiroshi Terashima, The Need for a Comprehensive Study on the Problems of Islands and Management of their Surrounding Waters, in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 114.

源能够获得多大的管辖权利,还应当回答这样一个问题:在养护小岛及其周边海域的海洋资源、保护海洋环境等的责任与义务方面,谁是最合适的履行责任者?[①]他同时希望日本政府能够为《公约》岛屿制度的完善与发展做出自身的贡献。[②]

上述观点和论述印证了日本对冲之鸟礁的"岛屿化"实践及其对所辖海域的主张。同时,这些观点也使日本与《公约》法律制度渐行渐远。

四、冲之鸟礁"岛屿化"行为引发的思考

前面所述的日本学者的观点似乎表明,日本政府的所做的这一切都是为了养护岩礁周边海域的海洋资源,保护海洋环境,推行基于生态系统的管理。然而,对此不得不提出的问题是:上述观点能够使日本政府的主张及其"岛屿化"企图合理化吗? 如果其他国家效仿日本的作法,纷纷对类似的岩礁提出过度的主张,那么诠释和执行《公约》的基本原则又是什么? 这种情况是否会产生减损《公约》的权威性、损害人类共同财产的潜在危险? 国际社会的利益应该由谁来保护? 如何保护? 本部分将讨论这些问题。

(一)岩礁是否与岛屿有区别?

日本政府所称的"冲之鸟岛",位于东京南部 1740 千米,只是不能维持人类生存和自身经济生活的珊瑚礁。日本认为冲之鸟是岛屿而不是岩礁,是由于岛屿和岩礁无法区分吗? 显然不是。事实上,尽管《公约》没有对第 121 条第 1 款的岛屿和第 121 条第 3 款的岩礁提供客观的标准,但《公约》第 121 条的条款是清楚明确的。

对照《公约》第 121 条第 1 款关于岛屿的定义,"岩礁"可以简单概括为:"自然形成的"、"陆地区域"、"四周被水域覆盖的"、"在高潮时高出海面的"、"不能维持人类居住和本身的经济生活"。这包涵以下特征:"岩礁"是一种特殊类型的岛

① Hiroshi Terashima, The Need for a Comprehensive Study on the Problems of Islands and Management of Their Surrounding Waters, in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 114.

② 参见 Tadao Kuribayashi, Concluding Remarks: The Present Implications regarding "Island Regime from the Perspective of International Law of the Sea Order", in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, pp. 83～84.

屿；岩礁的面积（指在高潮时高出海面的“陆地区域面积”）一般很小；[①]岩礁一般不能为人类正常生活提供必要的条件。事实上，最后一项特征是岩礁区别于岛屿的根本特性。如果某一岛屿不能满足这个条件，则只能拥有领海和毗连区，而不能主张专属经济区和大陆架。

国际法专家一般认为岛屿必须保有淡水、能够种植维持人类生存的植物、可提供一些居住材料，并足以支撑一定数量人群的生活。[②]一些专家认为岛屿必须至少支撑 50 个人的生活所需。[③]事实上，食物、淡水和生存空间构成人类在岛屿上生存的最基本的条件。有了这三个条件，岛屿便可以被认定能够维持人类的生存，不管它能“维持”多久，也不管这些“维持”生存的条件只是暂时的或是永久的。

为了使这些标准易于理解，印度尼西亚大使哈西姆·贾拉尔对岛屿的判定提出如下三项标准：第一，岛屿或岩礁上面是否有淡水；第二，是否有种植农作物的可能；第三，是否有建造房屋的材料。只有当这三项标准都得到满足时，这个地理特征的法律地位才不是岩礁，而是一个可以维持人类生存和繁衍的岛屿。也就是说，该岛的法律地位与岛的面积无关，而与其是否适应人类生活有关。若这三项标准得不到满足，该岛就只能被赋予 12 海里的领海。[④]

“可维持其本身经济生活”的标准似乎暗示了岩礁拥有或有潜力满足其独立的、尽管不必满足其自给自足的经济生活的能力；也可以指其具有进行开发、分配以及交换自身资源的潜力或能力；从某种方式上看，如果有人类居住，则可构成满足在岩礁上生存和发展的相对稳定的人类居住或社区形成。[⑤]由此可见，岛屿的维持其本身经济生活的标准并非简单的拥有特定资源或者特定经济生活设

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① 霍奇森博士，美国国务院的地理学家建议“岩礁”是小于 0.001 平方英里的岛屿，“小岛”指面积在 0.001 至 1 平方英里的岛屿，而“岛屿”的面积则大于 1 平方英里。参见 Robert. D. Hodgson, Islands: Normal and Special Circumstances, in John King Gamble, Jr. and Giulio Pontecorvo ed., *Law of the Sea: The Emerging Regime of the Oceans*, Cambridge, Massachusetts: Ballinger Publishing, 1974, p. 148。

② 与此相似的观点，参见 José Luis Jesus, Rocks, New－born Islands, Sea Level Rise and Maritime Space, in Jochen Abr. Frowein, Klaus Scharioth, Ingo Winkelmann and Rüdiger Wolfrum ed., *Verhandeln für den Frieden－Negotiating for Peace: Liber amicorum Tono Eitel*, 2003, pp. 587～592; Charney, Jonathan, Rocks That Cannot Sustain Human Habitation, *American Journal of International Law*, Vol. 93, 1999, pp. 864～871.

③ 参见国际底管理局新闻稿，SB/15/10, p. 3, para. 18.

④ 参见 Ian Townsend－Gault, Preventive Diplomacy and Pro－activity in the South China Sea, *Contemporary Southeast Asia*, Vol. 20, No. 2, 1998, p. 179.

⑤ 参见 José Luis Jesus, Rocks, New－born Islands, Sea Level Rise and Maritime Space, in Jochen Abr. Frowein, Klaus Scharioth, Ingo Winkelmann and Rüdiger Wolfrum ed., *Verhandeln für den Frieden－Negotiating for Peace: Liber amicorum Tono Eitel*, 2003, p. 590.

施,无论该资源或设施多么重要。[①]

如果一块在高潮时高于海面的"陆地区域"(无论其在传统上被称作什么)满足"维持人类居住"或"维持其本身的经济生活"两个标准中的一个,该"陆地区域"就有资格拥有专属经济区和大陆架。就冲之鸟礁来说,没有一块岩礁超过1平方米且总面积小于10平方米。[②]冲之鸟礁上没有淡水,也没有土壤,更没有任何植被。更重要的是,其面积太小以至于不能"维持人类居住"。基于其自然条件,冲之鸟不能被当作岛屿。

尽管无法对《公约》第121条有关岛屿的解释和适用达成一致,对岛屿与岩礁的区别对待也是国际上持续已久的争议,各国的实践也多有不同,然而,国际法专家基于《公约》的释义及国际司法法庭和国际仲裁法庭就此问题作出的裁判都是一致的、清晰的。当前的趋势以及众多判例至少表明岛屿或岩礁应如何被区别对待。无论《公约》第121条被如何释义,鉴于冲之鸟礁的面积狭小并且无法提供人类生存的必要条件,它不应被赋予岛屿的法律地位。这其实也正是日本一直努力对其进行"岛屿化"的原因。

(二)如何执行《公约》及保护国际海底?

《公约》第121条第3款明确指出岩礁不应拥有专属经济区和大陆架。然而,日本依旧以冲之鸟礁为基点主张200海里的专属经济区,并在其划界提案中向周边海域扩展200海里外大陆架。日本政府的单方面主张与《公约》的"人类共同财产"原则背道而驰。作为"人类共同财产原则"的首倡者,马耳他大使阿维德·帕尔多指出:"如果200海里管辖权可以基于无人居住的、遥远的或者非常小的岛屿,那么国家管辖范围外海洋空间的国际管理效力将被严重破坏。"[③]

1988年,在注意到日本建造冲之鸟礁时,夏威夷大学的乔恩·范戴克教授表达其观点如下:"冲之鸟礁不过是两块遭受侵蚀的凸起物,不如一个特大号床大,当然符合不能维持其自身经济生活、不适合人类居住的岩礁的标准。因此,冲之鸟礁不应被赋予200海里专属经济区。"[④]他还进一步指出:"冲之鸟得到

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① 参见 José Luis Jesus, Rocks, New－born Islands, Sea Level Rise and Maritime Space, in Jochen Abr. Frowein, Klaus Scharioth, Ingo Winkelmann and Rüdiger Wolfrum ed., *Verhandeln für den Frieden－Negotiating for Peace; Liber amicorum Tono Eitel*, 2003, p. 590.

② 《硬说礁石是岛屿 日在'冲之鸟'建灯塔抢权益》,载于《新京报》2005年3月11日。下载于 http://news.xinhuanet.com/world/2005－03//11/content_2681137.htm, 2011年4月2日。

③ 国际海底管理局,文件 A/AC. 138/SR. 57, p. 167.

④ 参见 Martin Fackler, A Reef or a Rock? Question Puts Japan in a Hard Place to Claim Disputed Waters, Charity Tries to Find Use for Okinotori Shima, *Wall Street Journal*, 16 February 2005, p. A1.

200 海里海域的主张”不可能得到支持。[①] 2005 年，范戴克教授再次重申了他的观点。[②]

范戴克教授还建议冲之鸟礁的法律地位问题与英国罗科尔岛类似，而该岛的专属经济区主张最终以失败而告终。罗科尔岛是英国北大西洋专属经济区内一块无人居住的小岛。[③]罗科尔岛距离苏格兰海岸约 200 海里，高出水面 25 米，面积 624 平方米。[④] 1977 年，英国以罗科尔岛为基点在其周边海域主张 200 海里的渔区，受到丹麦、冰岛和爱尔兰的抗议。[⑤] 1997 年英国在加入《公约》后放弃了其主张。[⑥]

毫无疑问，英国罗科尔岛的案例跟冲之鸟礁的情况非常相似，但是立足点不同。《公约》第 121 条第 3 款否定了小的岛礁主张与之不相称的大面积海域（专属经济区和大陆架）管辖权的可能性，因为大多数情况下，这类不当主张侵害其他国家的海域或是侵蚀作为人类共同财产的国际海底区域。[⑦]

2004 年以来，作为日本的海上邻国，中国坚决反对日本对冲之鸟礁及其周围 200 海里水域实施管辖并对海洋科学研究加以限制。[⑧]中国认为这些水域的法律地位是公海，也是中国大陆、中国台湾和韩国渔民的传统渔场。中国坚决反对日本政府的单方面行动，因为这些行动是对其他国家权利的严重侵犯。[⑨]

在关于冲之鸟礁的法律地位是岛屿还是岩礁争论激烈的情况下，中国和韩国就日本向“委员会”所提交的基于冲之鸟礁的外大陆架申请的抗议，进一步引起了世界各国对这一问题的广泛关注。

2009 年 2 月，中国和韩国分别向联合国秘书处递交了照会，反对日本关于

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① 《海洋法会议上的污点》，载于《纽约时报》1988 年 1 月 21 日。

② 参见 Martin Fackler, A Reef or a Rock? Question Puts Japan in a Hard Place to Claim Disputed Waters, Charity Tries to Find Use for Okinotori Shima, *Wall Street Journal*, 16 February 2005, p. A1.

③ 《英国和爱尔兰专属经济区》，下载于 http://www.seaaroundus.org/eez/eez.aspx，2011 年 6 月 20 日。

④ 更多关于罗科尔岛信息，下载于 http://en.wikipedia.org/wiki/Rockall，2011 年 6 月 20 日。也可参见 James Fisher, *Rockall. London: Geoffrey Bles*, 1956, pp. 12～13.

⑤ 下载于 http://www.opsi.gov.uk/SI/si1997/19971750.htm，2011 年 6 月 20 日。1977 年渔业限制令，1977 年成文法令第 1750 号。

⑥ 英国外交和联邦事务局指出：“罗科尔岛并不是第 121 条第 3 款规定的有效的基点”，渔区的限制在 1997 年渔业限制令中被重新定义。参见 Alex G. Oude Elferink, Clarifying Article 121(3) of the Law of the Sea Convention: the Limits Set by the Nature of International Legal Process, *IBRU Boundary and Security Bulletin*, Summer 1998, p. 59, p. 66. 编者注：还可参见 D. D. Anderson, “Islands and Rocks in the Modern Law of the Sea” in the present volume.

⑦ 联合国文件 A/CONF. 62/122，1982 年 10 月 7 日。

⑧ 新华网：《日本希望在中日争议礁石上建立灯塔》，2005 年 8 月 25 日。

⑨ 参见于贾宇、李明杰：《不认可人造的冲之鸟》，下载于 http://news.sina.com.cn/c/2004－05－24/12103317063.shtml，2011 年 6 月 20 日。

冲之鸟礁外大陆架的申请。[①]中国和韩国均认为日本不应基于冲之鸟礁向外延伸专属经济区和大陆架,因为冲之鸟是岩礁而不是岛屿。[②]

尽管国际社会尽量避免卷入纷争,但日本的申请引起了国际社会愈发强烈的反对意见和忧虑。质疑日本这一主张的焦点主要集中在日本有义务维护、而不是损害国际社会的共同利益。曾几何时,日本似乎记得这项义务,并因此而否定了新西兰对南极的主张。当新西兰向联合国"委员会"提交其外大陆架主张时,[③]日本曾向联合国递交照会,反对新西兰对于南极洲的主张。[④]日本甚至强调,"不承认任何国家对南极主张领土主权,也不承认任何国家对于南极洲及其南极及其周边大陆架的周边海域、海床和底土的权利主张"。[⑤]

也有观点认为冲之鸟礁没有资格主张大陆架,基于冲之鸟礁的划界申请部分均不应被认可。在日本向"委员会"提交了外大陆架申请后,国际海底管理局第 15 次会议和《公约》缔约国第 19 次大议对该问题进行了认真的讨论。[⑥]会议期间,许多国家针对基于岩礁主张外大陆架侵占国际海底区域的行为提出了质疑和严重的忧虑。[⑦]第 19 次会议在原有议程的相关议题外,决定在后续会议中增加"作为人类共同财产的国际海底区域和《公约》第 121 条"的议题。

专属经济区与大陆架是国家对未来的一笔投资。它不仅仅是经济问题或如何在大陆架上开发海洋资源的问题,而且事关沿海国的法律存在及主权权力问题。日本政府试图基于岩礁扩张其大陆架的主张不会得到任何支持。作为《公约》的缔约国,日本有义务遵守《公约》,不违反其法律制度,尊重其邻国的不同意

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① 中国的照会,下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf, 2011 年 6 月 20 日,韩国照会,下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/kor_27feb09.pdf, 2011 年 6 月 20 日。

② 中国的照会,下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf, 2011 年 6 月 20 日,韩国照会,下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/kor_27feb09.pdf, 2011 年 6 月 20 日。

③ 新西兰的划界申请,下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nzl.htm, 2011 年 6 月 20 日。

④ 日本照会,下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nzl.htm, 2008 年 6 月 28 日。对于新西兰向大陆架界限委员会提交的主张,日本常驻联合国委员会向联合国秘书长以及大陆架界限委员会表达了其意见,05.2006 LOS(大陆架通知书)2006 年 4 月 21 日。日本指出在《南极条约》和《公约》中保持和谐的重要性,并在南极地区保证持续的合作、安全和稳定。依据《南极条约》的第 6 条,日本不承认任何国家对南极大陆周边水域、海床和底土的权利主张。

⑤ 日本照会,下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nzl.htm, 2008 年 6 月 28 日。

⑥ 《公约》参加国第 19 次会议,SPLOS/L.60,2009 年 5 月 22 日,下载于 http://daccess-dds-ny.un.org/doc/UNDOC/LTD/N09/346/55/PDF/N0934655.pdf, 2011 年 6 月 20 日。还可参见《冲之鸟的相关法律问题》,载于《海洋发展管理》,2009 年第 8 卷(130)。

⑦ 《公约》参加国第 19 次会议,SPLOS/L.60,2009 年 5 月 22 日,下载于 http://daccess-dds-ny.un.org/doc/UNDOC/LTD/N09/346/55/PDF/N0934655.pdf, 2011 年 6 月 20 日。还可参见《冲之鸟的相关法律问题》,载于《海洋发展管理》,2009 年第 8 卷(130)。

见及国际社会的反对意见。

（三）联合国大陆架界限委员会如何履行其职能？

2008 年 11 月 12 日，日本向“委员会”提交了其外大陆架划界申请的信息。[①] 日本的这一申请首开恶例，基于遥远太平洋上的几块岩礁主张专属经济区和外大陆架。国际舆论对日本利用“委员会”作为加强、维持和支撑其主张的平台深表忧虑，因为事关岛、礁的法律地位及其专属经济区、大陆架及外大陆架。日本基于冲之鸟礁的外大陆架界限及其大面积 200 海里外的大陆架如果得到“委员会”的确认，日本将会对超过 74 万平方千米的海域享有管辖权，这是其本土面积的两倍。

也有舆论对于“委员会”所提建议的适用性持怀疑态度。作为《公约》体制下一个国际机构，“委员会”既不是一个司法机构也不是一个政治团体。[②]其职能是为各沿海国提供技术建议和指导，对沿海国依据《公约》的技术要求和客观标准提交的数据进行审议并提出建议。截至 2012 年 1 月 18 日，“委员会”共收到了 59 份外大陆架划界申请。[③]同时，截至 2011 年 10 月 19 日，“委员会”还收到 45 份关于外大陆架划界意图的临时信息。[④] “委员会”的审核沿海国的申请材料并对其外大陆架界的界限提出建议。

日本向“委员会”提交的申请使得《公约》框架下的岛屿制度及“委员会”的职能变得复杂化，这将导致《公约》的完整性受到损害，并使得作为“人类共同继承财产”的国际海底区域受到侵害。[⑤] “委员会”在处理日本的申请时不得不考虑其他国家的意见。[⑥] 如前文所述，中国和韩国向联合国秘书处提出的照会均建

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① 下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_jpn.htm，2011 年 8 月 20 日。

② 对于大陆架界限委员会的讨论，参见 Ted L. McDorman, The Entry into Force of the 1982 LOS Convention and the Article 76 Outer Continental Shelf Regime, *International Journal of Marine and Coastal Law*, Vol. 10 1995, pp. 165～187; Ted L. McDorman, The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World, *International Journal of Marine and Coastal Law*, Vol. 17, 2002, pp. 301～324.

③ 关于主张，下载于 http://www.un.org/Depts/los/clcs_new/commission_submissions.htm，2012 年 1 月 20 日。

④ 下载于 http://www.un.org/Depts/los/clcs_new/commission_preliminary.htm，2011 年 10 月 19 日。

⑤ 大陆架界限委员会审核大量划界申请和其他国家的意见，平衡各方意见。提交的 59 份提案中，22 份意见受到第三方反对、不赞成或不建议。45 份初步信息中，4 件遭到第三方异议。下载于 http://www.un.org/Depts/los/clcs_new/ commission_submissions.htm，2011 年 6 月 20 日。

⑥ 相关讨论参见：Michael Sheng－ti Gau, Third Party Intervention in the Commission on the Limits of the Continental Shelf Regarding a Submission Involving a Dispute, *Ocean Development and International Law*, Vol. 40, 2009, pp. 61～79.

议“委员会”不应审理日本外大陆架申请中关于冲之鸟礁的部分。[①] “委员会”如何处理日本基于冲之鸟礁的外大陆架主张,势必将是一个备受关注并令许多国家忧虑的问题。

2009 年 9 月 11 日,“委员会”表示,其下的一个工作小组已经着手处理日本提出的外大陆架延伸申请。[②]讨论日本的提案,首先需要明确冲之鸟的法律地位。但“委员会”没有责任、也无权对冲之鸟的法律地位作出裁定。为遵守《公约》的规定,维护人类的共同财产,“委员会”的最佳选择是对日本的提案中具有争议性的部分不予审理。冲之鸟问题是引发关于“委员会”职责更深层次思考的前奏。有一点是明确的,“委员会”不会是被用作违反《公约》原则的工具,也不会是滥用其职权的机构。

(四)冲之鸟仍是自然岩礁还是人工构造物?

关于冲之鸟是岩礁还是岛屿问题的核心,在于它是否可以作为拓展管辖海域的基点。根据《公约》第 121 条的规定,无论岛屿或是岩礁都必须是“自然形成”的。关于“自然形成”的定义存在以下两种观点:一种观点着眼于是否存在人工建筑,并认为“自然形成”意味着“不存在任何人工建筑”。[③]这一观点看起来似乎有些偏激,另一种观点则允许存在“人工建筑”,但根据修建目的的不同而区别对待:[④]如果以保护“陆地”区域为目的而修建的人工建筑,则该“陆地”区域的法律地位不受影响。[⑤]如果人工建筑是为了拓展该区域的陆地面积,则其原有的和额外获得的新“陆地”将会失去其法律地位及其领海。[⑥]国际法学者赞成这一观点的居多。[⑦]值得一提的是迪亚兹,杜伯纳和帕略特在他们的文章中指出:通过利用珊瑚和其他海洋生物技术而扩大的岛屿将变成人工岛,而且无权享有其管

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① 参见:3—5 段 中国回应日本外大陆架申请照会,4—6 段 韩国回应日本外大陆架申请照会. 参见中国的照会,下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf, 2011 年 6 月 20 日,韩国照会,下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/kor_27feb09.pdf, 2011 年 6 月 20 日。

② 冲之鸟礁,下载于 http://baike.baidu.com/view/62702.htm, 2011 年 5 月 21 日。

③ Clive R. Symmons, *The Maritime Zones of Islands in International Law*, The Hague: Martinus Nijhoff, 1979, p. 36.

④ At http://www.seastead.org/localres, 20 June 2011.

⑤ Andrew L, Silverstein, Okinotorishima: Artificial Preservation of a Speck of Sovereignty, *Brooklyn Journal of International Law*, Vol. 12, No. 1, 2009, pp. 409～432.

⑥ Derek. W. Bowett, *The Legal Regime of Islands in International Law*, New York: Oceana Publications, 1979, p. 122.

⑦ 参见 Leticia Diaz, Barry Hart Dubner and Jason Parent, When is a “Rock” an “Island”?: Another Unilateral Declaration Defies “Norms” of International Law. *Michigan State Journal of International Law*, Vol. 15, 2007, p. 547. 也参见 Yasuhiko Kagami, Environmental Policy for Desert Islands: Beyond “Island or Rock?”, in OPRF, *Research Report on the Okinotorishima Revival and Related Issues*, 2008, p. 109.

辖海域。[①]

就冲之鸟礁而言，如果日本采取的措施完全是出于保护岩礁，则冲之鸟礁将保持自然岩礁的属性，可有权享有领海和毗连区；但如果日本的目的是为了扩大岩礁的面积，则结果将大为不同。[②]

为保护冲之鸟礁不被侵蚀殆尽，日本付出了极大的人力物力，但其目的在于通过保护岩礁进而得以主张大面积的海域。为确保岩礁高于海平面，并符合法律上的“岛屿”的标准，日本开展了一系列野心勃勃的工程，扩大岩礁的面积，人为地在冲之鸟礁上制造经济生活，并计划将其打造成为一个可以居住的地方。这种“国家建筑”所增加的面积远远超过了冲之鸟礁原有的规模，而且其根本目的并不在于保护岩礁、而是出于“扩张领土”的需要。鉴于这些岩礁原有的规模，经过多年大规模的蓄意扩建、混凝土浇铸、设施安装等，已经改变了这些岩礁的特征。从详细的卫星地图上看，每块岩石均呈现直径 50 米的圆形，而这些大多是人工构造物。冲之鸟礁早已失去了其自然特征，而成为“人工形成的陆地区域”或者“人工建筑的陆地区域”。[③]

按照日本的逻辑，这一挽救性的建筑是为了“扩大”岩礁的规模，使之成为《公约》第 121 条第 1 款规定的岛屿，能够“维持人类居住或本身的经济生活”，从而获得额外的管辖海域。事实上，这是对《公约》释义的滥用，破坏其基于现存海洋秩序的国家权利和利益保障机制。日本改变岩礁自然属性，企图获得不该得到法律认可的额外管辖海域的行为严重违反了国际法和《公约》。

如果允许该逻辑和行为的肆意妄为，则各国均可效仿日本的实践对本国的岛礁进行“变形”，如把暗礁和沙洲改造为岛屿，继而主张所不应享有的大面积的管辖海域及其资源。这种趋势将导致对《公约》权威性不可逆转的损害，导致对海域的新一轮争夺和海洋乱象。[④]《公约》多方面基于习惯国际法所构建的法律

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① 贾兵兵认为，如果一个岛屿在没有混凝土结构或人工设施的情况下不能继续存在，那么它就不再是一个自然岛屿，而是一个人工岛，除 500 米的安全区之外，不能享有任何海域。参见 Bin Bin Jia, A Preliminary Study of the Problem of the Isle of Kolbeinsey, *Nordic Journal of International Law*, 66, 1997, p. 313. 也参见 Leticia Diaz, Barry Hart Dubner and Jason Parent, When is a “Rock” an “Island?”: Another Unilateral Declaration Defies “Norms” of International Law, *Michigan State Journal of International Law*, Vol. 15, 2007, p. 547.

② Silverstein 也认为人工岛无权享有领海，但他把冲之鸟作为特殊情况排除在外。参见 Andrew L, Silverstein, Okinotorishima: Artificial Preservation of a Speck of Sovereignty, *Brooklyn Journal of International Law*, Vol. 12, No. 1, 2009, pp. 429～430.

③ 参见 Leticia Diaz, Barry Hart Dubner and Jason Parent, When is a “Rock” an “Island?”: Another Unilateral Declaration Defies “Norms” of International Law, *Michigan State Journal of International Law*, Vol. 15, 2007, p. 519.

④ 参见 Leticia Diaz, Barry Hart Dubner and Jason Parent, When is a “Rock” an “Island?”: Another Unilateral Declaration Defies “Norms” of International Law, *Michigan State Journal of International Law*, Vol. 15, 2007, pp. 519～555.

框架,正是为了避免上述情况的发生。

日本不惜重金为使冲之鸟礁"岛屿化"所做的一切努力,得到的却是适得其反的结果。日本的种种努力使冲之鸟礁的法律地位从《公约》第121条第3款规定的岩礁转变为适用《公约》第60条规定的人工构造物。[①]也就是说,冲之鸟礁已经丧失了其岩礁的基本特征,而成为"冲之鸟人工岛"或"冲之鸟人工构造物"。从国际法的角度,日本只能建立500米的安全地带,却无权享有除此之外的任何海域。

五、结 论

《公约》的岛屿制度引发了海洋主张、岛屿主权争端、岛屿的法律效力纷争以及过分主张外大陆架的划界提案。然而,没有任何国家像日本这样处心积虑地利用《公约》的不完善之处,试图基于岩礁主张大面积的管辖海域。

在国际法中,岛屿及岩礁可以依法享有相应的海洋区域,但并非所有的岛礁都能够享有专属经济区及外大陆架。位于太平洋上的冲之鸟礁事实上是无人居住的岩礁,根本无法维持人类居住或其本身的经济生活。高潮时,构成冲之鸟礁的两块岩礁仅仅能够略高出水面,其总面积还不及罗科尔岛的十六分之一。非常明显,冲之鸟礁完全符合《公约》第121条第3款的岩礁定义,不能拥有专属经济区或大陆架,更不用说外大陆架。

出于对广阔海洋空间和丰富资源的期冀,日本试图以小小的岩礁向周边拓展,主张面积巨大的专属经济区甚至200海里外大陆架。为此,日本实施了一系列人工建设项目,以确保冲之鸟礁能够适合人类居住或维持其本身的经济生活,进而提高获得周边海域的管辖权的可能性。从卫星照片上看,原有的两块岩礁已呈现完全人工的状态,难以寻觅两块自然岩礁的痕迹。

无论日本如何努力,恐怕都难以获得成功。首先,日本的"岛屿化"实践违反了《公约》框架的完整性和权威性。其次,日本的过分主张会侵蚀作为全人类共同继承财产的国际海底区域;再次,日本已经改变了冲之鸟礁的法律地位,使之从自然岩礁变成了人工构造物。无论日本如何扭曲"岩礁"的定义或偷换"岛屿"的概念,该条款的由来、学者的著作、国际社会的意见等,终将证明日本的"岛屿化"行动在法律和道义上都是错误的。

有争议"岛屿"可能享有12海里的领海,但主张其对周边海域享有完全的管辖权则违背了《公约》限制过分主张的目标和初衷。鉴于冲之鸟"人工岛屿、设施、结构"颇具争议的自然特征,赋予其500米的安全地带和专属管辖权就足够

① 参见《公约》第60条第4、5、8款,第147条第2款(e)项,第259条。

了。

日本基于以岩礁为中心、国家建设的人工岛向周边主张大面积海域的企图是显而易见的。作为贪婪的代表，日本的实践成为扩大海洋管辖权、滥用《公约》、严重侵蚀国际海底区域的恶例。然而，日本的主张所反映出的深刻含义和深远影响值得深思。如果各沿海国都如同日本一样进行扩张，则国际法和《公约》所构建的法律体系将变得毫无意义，外大陆架划界提案的提交热也将引发国际法和国际海底区域真正的危机。国际社会应携起手来，共同应对这一危机。

附件 1：冲之鸟礁：历史及事件

年份	事　　件
1543	未经证实的报告称该环礁由西班牙船舶圣・胡安号最先发现，并命名为 Abre Ojos（西班牙语中意为“睁开眼睛，看！”）
1565	西班牙商船圣・佩德罗号把它的名字记录为：“Parece Vela”（西班牙语意“看起来像帆”）。此后，荷兰船只恩格斯号把它命名为“恩格斯岩石”，而英国船舶伊菲戈尼亚号把它命名为“道格拉斯礁”。到目前为止，道格拉斯礁和 Parece Vela 仍然用作冲之鸟的别名。
1922	日本海军监测船“满洲”号对环礁进行了勘察后报告了它的状况。
1929	水路部公布的水文地理图中对冲之鸟进行了标示。
1931	日本内阁宣布冲之鸟为日本领土，置于东京都小笠原村管辖之下，并命名其为冲之鸟。
1933	“胶州”号监测船对冲之鸟进行了考察，发现除东小岛和北小岛之外的 4 个小岛。水路部在此基础上绘制了海图。
1938	测量船“神祥丸（SHINSHO MARU）”号对该海域进行勘测。
1939－1941	日本对环礁的西南礁采取了爆破从而打开了新的海上航线。用 900 根混凝土柱建造了灯塔和气象观测站。工程的建设因太平洋战争的爆发而中断。
1952.4	美国接管小笠原岛。
1968.6	美国归还小笠原岛。
1969	测量船“明洋”号对该海域进行勘察。
1976	日本业余无线电联盟（JARL）“DX Pedition”在观测站上设立电台，并从冲之鸟向全球发送无线电波。在 78 小时内，他们与 9000 多个广播站取得了联络。
1978	东京都渔业科研船“大都会”号对该区域进行了考查。
1982	测量船 AA“拓洋”号对该区域进行考察。
1984	国土地理院（GSI）发布的地形图中对冲之鸟礁两个小岛作了标记。
1987.9	众议院农林水产委员会初次对冲之鸟和海平面上升问题进行讨论。

续表1

年份	事　　件
1987.10	由东京都指定为海岸保护区域
1988	在日本海洋科学技术中心(JAMSTEC) 设立建造了无人气象观测塔,维持气象观测直到1991年。
1988－1989	原建设部启动了东小岛和北小岛的保护项目。
1990－1993	原建设部着手开展观测站的基础工程。
1993	日本海洋科学技术中心在工程现场进行气象与海洋气象观测(持续至今)。
1998	原建设部安装了覆盖东小岛的钛合金网罩。
1999	根据修订后的海岸法,冲之鸟礁的管理收归中央政府。前建设部负责护岸、土地、基础设施、运输;旅游部;河务局海岸办公室以及京滨工程事务办公室:负责保护措施。当时日本对冲之鸟的关注度不高。
2004.9	"生态工程再生技术有助于提高退化的珊瑚礁生态系统的再生能力,有助于太平洋岛屿国家的领土保护,避免水没之灾。"茅根创(简报第99期,2004年9月,海洋政策研究基金会)
2004.10	OPRF成立冲之鸟研究会并举办第一次会议。
2004.11	日本财团成立"有效利用冲之鸟考察团",集中各领域的专家从多角度勘察该海域的状况,讨论有效利用冲之鸟礁及其周边海域的可行性。
2004.12	OPRF举办的第22届海洋论坛,主题为"冲之鸟礁的现状与再生",发言人寺岛纮士和茅根创。
2004	国土交通省在观察设施上设置监视录像。
2005.3	日本财团成立"促进冲之鸟经济活动调查团",加强和改善冲之鸟的经济活动,对有助于环礁再生的造礁生物,例如:珊瑚的增殖状态,以及环礁建设与扩张状况进行调查。并设立了灯塔以确保海上交通。探讨通过利用海洋温差发电的可行性。另外,根据国土交通省和水产厅的协定,调查团还提出了一系列提案,比如:通过珊瑚增殖促进岛屿扩张的设想,并从不同的角度论证冲之鸟礁的保护战略和开发计划。
2005.3	海洋政策研究基金会举行的第25届海洋论坛。主题为"我国排他性经济水域和海底矿物资源、以及冲之鸟岛的活用",发言者:加加美康彦、松泽孝俊、福岛朋彦。
2005.4	海洋政策研究基金会公布"冲之鸟礁再生计划"。
2005.6	国土地理院/地理勘测研究所(GSI)设立电子参考点。
2005	海洋政策研究基金会发布"冲之鸟礁再生调查与研究":钻孔核心技术分析;有孔虫的基本生态调查;法律地位的探讨。

续表 2

年份	事　　件
2005	东京都小笠原诸岛的渔业协会向冲之鸟提供了营运支持，投放条纹鲹鱼鱼苗，并对周边海域的渔场进行了考察。
2005	国土交通省安装海洋观测雷达。
2005－2006	东京都建造了渔业调查指导船“兴洋”号
2006－2008	海洋政策研究基金会开展“冲之鸟礁的维护与再生的调查和研究”：重组和分析了冲之鸟的维护与再生性调查；关于冲之鸟礁岛屿地位和管理方法的国际比较研究；外延调查；太平洋岛国的生态调查；不同国家的管理实施调查；其他。
2006－2008	农林水产省开展了关于“恶劣自然条件下珊瑚增殖技术的开发”以及珊瑚增殖技术的发展的研究工作。
2006－	东京都实施“推进冲之鸟岛开发利用”的项目：调查渔场；建设深海中间层的人工浮鱼礁；并且拍摄了一部面纪录片：《冲之鸟：神奇的岛屿》(2008)。
2007.3	国土交通省在岛上设置的灯塔开始启用。
2007.7	《海洋基本法》生效：第 26 条规定离岛的保护等。
2007.11	“2007 年度冲之鸟论坛”在东京都举行。
2008	国土交通白皮书第 II 部，国土交通行政动向第 6 章“构建一个安全与和平的社会”，第四节：危机管理和安全保障对策：第 4 款日本海洋权益的保障“(4)冲之鸟的保护：冲之鸟位于我国领土的最南端，是非常重要的岛屿，基于冲之鸟我们可以划定/建立超过 40 万平方千米的专属经济区。鉴于其对国土保护和利用方面的重要性，应探讨由国家进行直接管辖并采取完备的措施，使其发挥最大的作用。
* 2008.11	“2008 年度冲之鸟论坛”在东京都举行。
* 2010.5	日本通过了《低潮线保全和基地设施整备法》
* 2011.1	宣布计划在今后 6 年内斥资 100 亿美元建造深水港。

资料来源：译自日本海洋政策研究基金会《冲之鸟礁复兴及相关问题的研究报告》，2008，<http://www.sof.or.jp/jp/report/pdf/200903_ISBN978－4－88404－216－5.pdf>

注：表中“*”处为笔者引用其它来源的补充资料。

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Joint Development Agreements of Offshore Hydrocarbon Deposits: An Alternative to Maritime Delimitation in the Asia-Pacific Region

Vasco Becker-Weinberg*

Abstract: In the past years, the availability of the technology that allows for the exploitation of offshore resources at depths that were recently unreachable to mankind and the desire to extend national jurisdiction in order to secure access to non-living marine natural resources, has resulted in an increase of coastal States' claims over maritime areas and in particular over the continental shelf.

Amongst the different regions of the planet, the Asia-Pacific region is a clear example of a situation where the potential development of offshore hydrocarbon deposits has been the cause of disputes between the relevant coastal States. In fact, considering on the one hand, the existing disputes and the number of maritime boundaries that have been delimitated in this region and, on the other hand, the growing need for energy sources, the right to develop offshore hydrocarbon deposits is a key issue for the States in the Asia-Pacific region.

Notwithstanding the fact that contemporary public international law, and in particular law of the sea, does not provide a straight forward solution for the settlement of such disputes, State practice and some international jurisprudence have considered interim measures pending maritime delimitation.

In some cases, interim measures such as joint development agreements have allowed for the development of common offshore resources that straddle a boundary line or are found in areas of overlapping sovereignty claims. This was the case of the legal regimes of joint development of offshore hydrocarbon deposits implemented in the Timor Sea, the Northeast China Sea and the Gulf of

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Thailand.

Therefore, despite the legal disparities of known joint development agreements of offshore hydrocarbon deposits and the fact that the respective concept and legal nature is far from being homogenous, it is possible, after a comprehensive legal analysis of the different agreements, to present a legal solution adapted to the specific circumstances of the Asia-Pacific region, that could ultimately lead to an economic, political and social improvement of this region.

Key Words: Maritime Delimitation; Development of Offshore Hydrocarbon Deposits; Asia-Pacific Region1

Ⅰ. Introduction

A. *Maritime Delimitation and Development of Offshore Hydrocarbon Deposits*

The location and nature of offshore hydrocarbon deposits, in particular their mobility through geological layers of the subsoil which allows these resources to move freely between the pore spaces of rock and the impossibility of their confinement to a certain area, raises important and particular legal questions regarding their common development by two or more States.

Under current law of the sea, States exercise different rights depending on the legal regime applicable to each maritime space, in particular regarding the development of living and non-living marine natural resources.

In the continental shelf, States have the exclusive and inalienable sovereign right to develop the resources found therein, regardless of prior proclamation or

occupation of this maritime space. ① Whereas, in the EEZ, States' rights depend on prior proclamation by the relevant coastal State and should be considered as mere rights of fruition when compared with the regime of the continental shelf, and in particular in what concerns States' sovereignty regarding the development of resources. ②

Under UNCLOS③ the criteria of distance were adopted for the purpose of delimitation of the continental shelf and in order to achieve an equitable result, contrary to the physical characteristics and the natural extension of the seabed which are considered irrelevant. ④

In situations of adjacent or opposite coasts, UNCLOS establishes that delimitation should be carried out with the use of a median line, safe for special circumstances that might justify its amendment, such as the presence of third

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① Article 77 (2) *in fine* (3) of UNCLOS. *See* Nguyen Quoc DINH, Patrick DAILLER and Alain PELLET, *Droit International Public*, 7th ed., Paris: Librairie Générale de Doit et de Jurisprudence/E. J. A., 2002, p. 1192; Victor PRESCOTT, National rights to hydrocarbon resources of the continental margin beyond 200 nautical miles, in Gerald BLAKE, Martin PRATT, Clive SCHOFIELD and Janet Allison BROWN ed., *Boundaries and Energy: Problems and Prospects*, London/The Hague/Boston: Kluwer Law International, 1998, pp. 51～52; Philip ALLOTT, Mare Nostrum: a new international Law of the Sea, *American Journal of International Law*, Vol. 4, 1992, pp. 767～768; René-Jean DUPUY and Daniel VIGNES, *A Handbook on the New Law of the Sea*, Vol. 1, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, pp. 315～381; Laurent LUCCHINI and Michel VOELCKEL, *Droit de la Mer, La Mer et son Droit. Les espaces maritimes* (t. 1), ed., Paris: Pedone, 1990, pp. 164～169; Jean COMBACAU, *Le Droit de la Mer*, ed., Paris: Presses Universitaires de France, 1985, pp. 58～67; Charles ROSSEAU, *Droit International Public. Les Relations Internationales* (t. 4), ed., Paris: Sirey, 1980, pp. 358～359.

② Article 56 UNCLOS. *See* International Law Association, *Report of the International Committee on the Principles Applicable to Living Resources Occurring Both within and without the Exclusive Economic Zone or in Zones of Overlapping Claims*, by Professor Dr. Rainer Lagoni (Cairo Conference 1992), pp. 1～32; René-Jean DUPUY and Daniel VIGNES, *A Handbook on the New Law of the Sea*, Vol. 1, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, pp. 275～307.

③ The United Nations Convention on the Law of the Sea, made in Montego Bay, on December 10th, 1982, published at 1833 UNTS 3.

④ Article 76 of UNCLOS. *See* ICJ Reports (1984), pp. 261～266, pp. 312～317, pp. 339～344 and (1981), p. 88, 127; E. D. BROWN, *Sea-bed Energy and Minerals: the International Legal Regime. The Continental Shelf*, Vol. 1, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1992, pp. 19～23; L. Dolliver M. NELSON, The roles of equity in the delimitation of maritime boundaries, *American Journal of International Law*, Vol. 84, No. 4, 1990, p. 846; Shigeru ODA, *The Law of the Sea in Our Time-I. New Developments* 1966－1975, 3 Publications in Ocean Development, Leyden: A. W. Sijthoff, 1977, p. 254.

States, despite the law of the sea convention preferring the use of equitable principles over the median line regarding the delimitation of the continental shelf and the EEZ. ①

There is a significant difference concerning the rights of third States in the continental shelf and in the EEZ, notwithstanding the substantive integration of both regimes in terms of States' rights in the seabed and subsoil. Even before the EEZ regime had been introduced by UNCLOS, it had become evident that it would be necessary to secure the compatibility between coastal States' sovereignty claims of the seabed and the rights of third States regarding the development of other resources found therein, such as fishing. ②

In fact, although both regimes include the seabed and subsoil and regard sovereign rights for the functional purpose of exploring and exploiting natural resources, only in the continental shelf is there exclusivity. ③ While in the EEZ coastal States must have due regard for the rights and duties of other States and act with respect for such rights, duties and freedoms, in the continental shelf only coastal States are entitled to exercise the inherent and exclusive sovereign right of exploring and exploiting the non-living marine natural resources and the sedentary species found therein, safe for coastal States' explicit consent that other States undertake similar operations. This means that, if a coastal State chooses not to explore and exploit the non-living marine natural resources and the sedentary species found in the continental shelf, no other State may do

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① Articles 74 and 83 of UNCLOS. *See* ICJ Reports (1985), pp. 41～43, pp. 56～57.

② Cecil J. B. HURST, Whose is the bed of the Sea? *British Yearbook of International Law*, Vol. 4, 1923－24, p. 43.

③ Articles 56(1), 57 and 76(1) of UNCLOS. *See* Francisco ORREGO VICUÑA, La zone économique exclusive dans la législation et la pratique des États, in *Droit de La Mer* (v. 2) (coord.) Jean COMBACAU /Pierre－Marie DUPUY ed., Paris: Pedone, 1990, pp. 44～45; *The Exclusive Economic Zone. Regime and Legal Nature under International Law*, Cambridge/New York/Port Chester/Melbourne/Sydney: Cambridge University Press, 1989, p. 71; Barbara KWIATKOWSKA, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, 2 Publications on Ocean Development, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1989, pp. 91～92; David Joseph ATTARD, *The Exclusive Economic Zone in International Law*, Oxford: Clarendon Press, 1987, pp. 192～210; Julio César LUPINACCI, The legal status of the exclusive economic zone in the 1982 Convention on the Law of the Sea, in Francisco ORREGO VICUÑA ed., *The Exclusive Economic Zone. A Latin American Perspective*, 1 Foreign Relations of the Third World, Boulder Colorado: Westview Press, 1984, pp. 105～111; Hugo CAMINOS, The regime of fisheries on the exclusive economic zone, in Francisco ORREGO VICUÑA ed., *The Exclusive Economic Zone. A Latin American Perspective*, 1 Foreign Relations of the Third World, Boulder Colorado: Westview Press, 1984, pp. 151～155.

so without the latter's consent. ①

However, coastal States' rights in the continental shelf do not have an absolute character, in the sense that they do not know any limits. UNCLOS clearly foresees that the rights of the coastal States over the continental shelf do not affect the legal status of the superjacent waters and air space above those waters, as well as the rights and freedoms of other States, such as the right to lay submarine cables and pipelines, the freedom of navigation or the activities regarding international cooperation and promotion of marine scientific research. ②

The EEZ assures the compatibility between these two regimes referring that in the seabed and subsoil coastal States shall act in conformity with the continental shelf regime without implying a merger of the two maritime spaces and simply complementing the delimitation between them. ③

In respect of the delimitation of boundaries in the continental shelf, UNCLOS includes rules applicable to the delimitation between States with adjacent boundaries extending 200nm or with opposite boundaries in the case of enclosed and semi-closed seas where claims of 200nm overlap, as well as to the delimitation of archipelagic States or when claims overlap with the Area, without prejudice of States' right not to enter into delimitation agreements. ④

It is mostly when sovereignty claims overlap and States fail to reach an agreement on delimitation that interim measures, such as joint development agreements, exert particular relevance as a pragmatic solution, in particular when the development of mineral resources hangs in the balance. ⑤ Should a hydrocarbon deposit straddle a boundary line between States and become exploitable from either side of that line, States may adopt a form of cooperative development of common offshore hydrocarbon deposits. Nonetheless, coastal

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① Articles 55, 56 77(2) (4) and 81 of UNCLOS.

② Articles 58, 78, 79 and 87(1) (a) and Part XIII of UNCLOS.

③ Article 56 (3) UNCLOS. *See* David Joseph ATTARD, *The Exclusive Economic Zone in International Law*, Oxford: Clarendon Press, 1987, p. 139.

④ Article 48, 76 (10), 83 and 134 (4) and article 9 of Annex II of UNCLOS.

⑤ Sun Pyo KIM, *Maritime Delimitation and Interim Arrangements in North East Asia*, Hague/London/New York: Martinus Nijhoff Publishers, 2004, p. 12; Rodman R. BUNDY, State practice in maritime delimitation, in Gerald H. BLAKE, ed., *World Boundaries. Maritime Boundaries* (v. 5), London/New York: Routledge, 1994, pp. 36 ~ 40; Mark J. VALENCIA, Joint jurisdiction and development in southeast Asia seas: factors and candidate areas, in Mark J. VALENCIA, ed., *Geology and Hydrocarbon Potential of the South China Sea and Possibilities of Joint Development*, New York/Oxford/Toronto/Sydney/Paris/Frankfurt: Pergamon Press, 1985, p. 575.

States are prevented from engaging in any conduct that could have an impact on a common hydrocarbon deposit should these States fail to agree on delimitation or a cooperative regime. ①

States' activities have to be undertaken so as not to represent an attempt or a *de facto* appropriation of the respective maritime area and must have due regard for the rights of third States. In fact, should two States agree on the joint development of offshore hydrocarbon deposits found in a maritime area also claimed by a third State, this agreement may not be implemented without the consent or participation of the latter, being the relevant States subject to international liability for damages caused. ②

Furthermore, the delineation of a joint development zone under a joint development agreement of offshore hydrocarbon deposits does not replace the delimitation of maritime boundaries, nor does a joint development zone constitute a provisional delimitation of maritime boundaries. The two subjects, joint development of marine natural resources and maritime delimitation, should not be confused, nor ought the correlation between these two to be considered as choosing one over the other. The assumption that delimitation is a precedent or a precondition for the development of common marine natural resources may prove to be precipitous, since it may very well happen that both coexist or even that States eventually agree on the delimitation of maritime boundaries when a joint development regime has been successfully implemented, given that States do not have to address the complex and strenuous issue of management of common resources, thus facilitating the settlement on the delimitation of maritime boundaries. In these cases, maritime boundaries disputes eventually cease to exist or become dormant as States look towards legal interim measures that allow for the development of marine resources.

In light of articles 74(3) and 83(3) of UNCLOS, any interim measure im-

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① Article 83(3) UNCLOS *in fine*.

② ICJ Reports 1997, p. 178, 152. *See* Betsy Baker Röben, Civil liability as a control mechanism for environmental protection at the international level, in Fred L. Morrison/Rüdiger Wolfrum ed., *International, Regional and National Environmental Law*, The Hague/London/Boston: Kluwer Law International, 2000, p. 836; Rüdiger WOLFRUM, Means of ensuring compliance with and enforcement of international environmental law, 272; The Hague/London/New York: Martinus Nijhoff Publishers, 1998, pp. 81～82; International Law Association, *Report of the International Committee on the Principles Applicable to Living Resources Occurring Both within and without the Exclusive Economic Zone or in Zones of Overlapping Claims*, by Professor Dr. Rainer Lagoni (Cairo Conference 1992), p. 24.

plemented by States shall have a practical nature and shall be without prejudice of final delimitation, which necessarily implies that final delimitation will always depend on the voluntary agreement between States, regardless of the interim measure adopted pending the delimitation of maritime boundaries. Furthermore, third States are entitled to exercise the freedom of the high seas in the joint development zone as established in Part Ⅶ of UNCLOS, despite States' control and management of these areas.

B. The Concept of Joint Development of Offshore Hydrocarbon Deposits

Joint development agreements of offshore hydrocarbon deposits are the result of States' creative and pragmatic legal approach towards hurdling the obstacles of maritime boundary delimitation procedures and development of common resources, even though such creativity and pragmatism in seeking a legal solution for the complex problems associated with the development of common offshore hydrocarbon deposits is often the result of an economic drive, rather than a legal one. In effect, States cooperation is the outcome of the correlation between economic interests and the need for a better and more efficient development of natural resources.

The number of joint development agreements of offshore hydrocarbon deposits has been small in respect of existing deadlock disputes on maritime boundary delimitation and in particular when considering that only few agreements have been implemented since the signing of the first agreement more than fifty years ago between Bahrain and Saudi Arabia,[①] despite the fact that this concept was also considered in respect of the common development of onshore resources.[②]

This may be due to the lack of awareness of the legal characteristics of joint development agreements of offshore hydrocarbon deposits and of the ad-

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① Bahrain-Saudi Arabia Frontier Agreement, made on February 22nd, 1958, published at UNTS 1733 (1993), pp. 3～13.

② Agreement between the Government of the Czechoslovak Republic and the Austrian Federal Government concerning the Principles of Geological Co-operation between the Czechoslovak Republic and the Republic of Austria, made in Prague, on January 23rd, 1960, published at 495 UNTS 7241 (1964), pp. 112～122. Agreement between the Government of the Czechoslovak Republic and the Austrian Federal Government Concerning the Working of Common Deposits of Natural Gas and Petroleum, made in Prague, on January 23rd, 1960, published at 495 UNTS 7242 (1964), pp. 134～140.

vantages of these regimes to forward a legal solution that could ultimately alter the geopolitical context of a certain region. In some circumstances, States have refused, rejected or ignored attempts by other States to settle such disputes due to political, social and economic differences, or even to the absence of diplomatic relations which prevented the necessary reliability and predisposition to settle these disputes at a bilateral, regional or multilateral level. ① On other occasions, States decided on different and sometimes radical solutions, including the military occupation of rocks and islands in order to reinforce the respective claims on the disputed and surrounding maritime area, thus securing the unlawful granting of development rights of the marine natural resources found

① Douglas M. JOHNSTON and Mark J. VALENCIA, *Pacific Ocean Boundary Problems. Status and Solutions*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1991, pp. 24～26.

therein, such as what has happened regarding the Spratly Islands. ①

Joint development agreements of offshore hydrocarbon deposits may also include the exploration and exploitation of living resources. Indeed, the concept of joint development was firstly applied to international fisheries management and was later used in the common development of offshore hydrocarbon deposits.

The concept of joint development is applicable in the continental shelf and or in the EEZ. In fact, the disputes regarding overlapping EEZs and continental

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① Jon M. VAN DYKE, Disputes over islands and maritime boundaries in East Asia, in Seoung-Yong HONG and Jon VAN DYKE ed., *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, Martinus Nijhoff Publishers, 2009, pp. 62～75; Alex G. Oude ELFERNIK, The Islands in the South China Sea: how does their presence limit the extent of the high seas and the Area and the maritime zones of the mainland coasts? *Ocean Development and International Law*, Vol. 32, No. 2, 2001, pp. 169～191; Monique CHEMILLER-GENDREAU, *Sovereignty over the Parcel and Spratly Islands*, The Hague/London/Boston: Kluwer Law International, 2000, pp. 141～143; ZOU Keyuan, The Chinese traditional maritime boundary line in the South China Sea and its legal consequences for the resolution of the dispute over the Spratly Islands, *The International Journal of Marine and Coastal Law*, Vol. 14, No. 1, 1999, pp. 27～55; Mark J. VALENCIA and Jon M. VAN DYKE, Comprehensive solutions to the South China Sea disputes: some options, in Gerald BLAKE, Martin PRATT, Clive SCHOFIELD and Janet Allison BROWN ed., *Boundaries and Energy: Problems and Prospects*. International Boundary Studies Series, London/The Hague/Boston: Kluwer Law International, 1998; Christopher C. JOYNER, The Spratly Islands dispute: rethinking the interplay of law, diplomacy, and geopolitics in the South China Sea, *The International Journal of Marine and Coastal Law*, Vol. 13, No. 2, 1998, pp. 193～236; Lian A. MITO, The Timor of Gap treaty as a model for joint development in the Spratly islands, *American University International Law Review*, Vol. 13, No. 3, 1998, p. 752; Daniel J. DZUREK, The Spratly Islands dispute: who's on first?, *Maritime Boundaries*, Vol. 2, No. 1, 1996, pp. 1～67; Brian K. MURPHY, Dangerous ground: the Spratly islands and international law, *Ocean and Coastal Law Journal*, 1994, pp. 187～212; Jon M. VAN DYKE and Dale L. BENNETT, Islands and the delimitation of the Ocean Space in the South China Sea, *Ocean Yearbook*, Vol. 10, 1993, pp. 54～89; Ted MCDORMAN, The South China Sea islands dispute in the 1990s-a new multilateral process and continuing friction, *The International Journal of Marine and Coastal Law*, Vol. 8, No. 2, May 1993, pp. 272～276; S. p. JAGOTA, Maritime boundary and joint development zones: emerging trends, *Ocean Yearbook*, Vol. 10, 1993, pp. 126～127; Hungdah CHIU and Choon-Ho PARK, Legal status of the Parcel and Spratly Islands, *Ocean Development and International Law Journal*, Vol. 3, No. 1, 1975, pp. 1～28; Mark J. VALENCIA, National marine interests in Southeast Asia, in George KENT/Mark J. VALENCIA ed., *Marine Policy in Southeast Asia*, Berkeley/Los Angeles/London: University of California Press, 1985, pp. 33～57; Jeanette GREENFIELD, China and the Law of the Sea, in James CRAWFORD and Donald R. ROTHWELL ed., *The Law of the Sea in the Asian Pacific Region*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1995, pp. 21～40.

shelves do not necessarily imply the delimitation of maritime boundaries, since States may decide to establish a joint development regime for the purpose of exploring and exploiting the respective marine natural resources. States may choose to develop both living and non-living marine natural resources in one or more joint development zones established under a certain legal framework, permitting States to simultaneously develop straddling hydrocarbon deposits and implementing a common policy of fish stocks management.

The legal characteristics of each joint development regime are unique, making it very difficult to pin-down or to reach a consensus regarding its key legal provisions or even the definition of the concept of joint development agreements of offshore hydrocarbon deposits.

Joint development agreements have been considered to represent an alternative to maritime boundary delimitation, allowing States to take part in a joint endeavour for the exploration and exploitation of hydrocarbon deposits, while equally sharing the resources found in a specific maritime area where States' sovereignty claims overlap. ① However, this perception of joint development agreements fails to include those agreements implemented after final maritime boundary delimitation or when States' claims do not overlap. Moreover, there is no rule-of-thumb when it comes to establishing revenue or cost sharing schemes, since States are free to define the content of joint development regimes in accordance with their interests and with the pragmatic nature of these regimes. ②

Another view of joint development agreements is that which considers that there is a convergence of sovereignty rights of two States towards the common development of non-living marine natural resources found in areas subject to

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① William T. ONORATO, Promoting foreign investment through international petroleum joint development regimes, *ICSID Review*, Vol. 1, No. 1, 1986, pp. 81～88; ZOU Keyuan, The Chinese traditional maritime boundary line in the South China Sea and its legal consequences for the resolution of the dispute over the Spratly Islands, *The International Journal of Marine and Coastal Law*, Vol. 14, No. 1, 1999, p. 157.

② Mark J. VALENCIA, Joint jurisdiction and development in southeast Asia seas: factors and candidate areas, in Mark J. VALENCIA, ed., *Geology and Hydrocarbon Potential of the South China Sea and Possibilities of Joint Development*, New York/Oxford/Toronto/Sydney/Paris/Frankfurt: Pergamon Press, 1985, p. 576.

national jurisdiction.[①] This perception fundamentally considers that in a joint development agreement intervening States are only summoned to exercise sovereign rights and that the scope of such joint development effort only considers the exploitation of non-living marine natural resources.[②] However, the preemptive dismissal of common development of living marine natural resources from the concept of joint development agreements of offshore hydrocarbon deposits may prove not to be a clear representation of State practice regarding the internationalization of marine natural resources.[③] Moreover, this conception of joint development agreements of offshore hydrocarbon deposits inevitably establishes a correlation between the latter and States' sovereignty rights which is contrary to the legal context of such cooperative efforts.

It may seem perplexing that under the concept of joint development of offshore hydrocarbon deposits, one would also include the development of living marine natural resources. However, practice has confirmed that States tend to take advantage of achieving an understanding on the difficult subject of development of common offshore hydrocarbon deposits, to also include provisions that address other relevant matters concerning sharing of control over a certain maritime area.[④] Moreover, States may expand their cooperation in order to include issues such as safety of navigation, marine scientific research or the protection of the marine environment. In fact, the reality of joint development a-

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① Mark J. VALENCIA, Taming troubled waters: joint development of oil and mineral resources in overlapping claim areas, *San Diego Law Review*, Vol. 23, No. 3, 1986, p. 683; Douglas M. JOHNSTON and Mark J. VALENCIA, *Pacific Ocean Boundary Problems. Status and Solutions*, Shigeru ODA ed., Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1991, p. 36. Ian TOWNSEND-GAULT and William G. STORMONT, Offshore petroleum joint development arrangements: functional instrument? Compromise? Obligation? In Gerald H. BLAKE, William J. HILDESLEY, Martin A. PRATT, Rebecca J. RIDLEY and Clive H. SCHOFIELD ed., *The Peaceful Management of Transboundary Resources*, London/Dordrecht/Boston: Graham & Trotman/Martinus Nijhoff, 1995, p. 51.

② David ONG, The legal status of the 1989 Australia-Indonesia Timor Gap Treaty following the end of Indonesian rule in East Timor, *Netherlands Yearbook of International Law*, Vol. 31, 2000, p. 121.

③ On the internationalization of marine natural resources, see Vasco BECKER-WEINBERG, The internationalization of marine natural resources in UNCLOS, in Rainer Lagoni, Peter Ehlers and Marian Paschke ed., *Recent Developments in the Law of the Sea*, Berlin/Munster/Vienna/Zurich/London: LIT Verlag, 2010, pp. 9～54.

④ Treaty between the Federal Republic of Nigeria and the Democratic Republic of Sao Tome and Principe on the Joint Development of Petroleum and Other Resources in Respect of Areas of the Exclusive Economic Zone of the Two States, made in Abuja, on February 21st, 2001, at www. nigeriasaotomejda. com, 5 March 2011.

greements demonstrates that they may also include the exercise of other rights which are not included in the sphere of States' sovereignty, despite the fact that some of these agreements fail to specify the nature of the rights that States accept to exercise in the joint development zone, enhancing even further the functional and pragmatic essence of these agreements *vis-à-vis* the exercise of sovereignty rights. ①

Although it is a fact that joint development agreements have only been implemented at a bilateral level, there have been attempts to establish multilateral joint development regimes, including within the frame of regional efforts towards the settlement of disputes on the delimitation of maritime boundaries. ②

Therefore, in a broader sense joint development agreements could be defined as arrangements implemented by two or more States for the purpose of exploration and exploitation of the natural resources found in the marine soil and subsoil. However, in view of current State practice a stricter legal characterization of joint development agreements of offshore hydrocarbon deposits would define the latter as self-regulating conventional instruments subject to international law, signed between two or more States holders of legal title, although independent of such rights as claimed by the intervening States, concerning the maritime areas where natural resources may be found, foreseeing essentially and without limitation the exploration and or exploitation activities and common management of the hydrocarbon deposits found in the seabed and marine subsoil, as well as the undertaking of all activities deemed necessary or relevant by the intervening States, without foregoing the rights and freedoms of third States granted under international law.

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① Hazel FOX, Paul MCDADE, Derek Rankin REID, Anastasia STRATI and Peter HUEY ed., *Joint Development of Offshore Oil and Gas: A Model Agreement for States for Joint Development with Explanatory Commentary*, London: The British Institute of International and Comparative Law, 1989, pp. 49～50.

② On the unsuccessful French proposal for a joint development regime with Spain and Italy as an alternative to maritime boundary delimitation, see Umberto LEANZA, The delimitation of the continental shelf of the Mediterranean Sea, *The International Journal of Marine and Coastal Law*, Vol. 8, No. 3, 1993, p. 388. Also see, Agreement between the Government of the Republic of Indonesia, the Government of Malaysia and the Government of the Kingdom of Thailand Relating to the Delimitation of the Continental Shelf Boundaries in the Northern Part of the Strait of Malacca, published at National Legislative Series, UN Doc. No. ST/LEG/SER. B/18, p. 429 (1976). This agreement provides that a hydrocarbon deposit that should straddle a boundary line will only be developed after consultation between the three States.

Nonetheless, this definition may prove to be inadequate when faced with the continuously evolving State practice and States' discretionary powers to negotiate and enter into international agreements.

Ⅱ. State Practice in the Asia-Pacific Region

A. Timor Sea

The distance between the coasts of East Timor and Australia is approximately 250nm, allowing for the occurrence of overlapping continental shelves between the two countries in the Timor Sea. ① Australia always defended the existence of two continental shelves based on the natural prolongation of its submerged land mass until the Timor Trough, at a distance of 150nm from its northern coast. ② Whereas East Timor has considered this position unacceptable, as did Portugal and Indonesia before, although in different historical periods.

In reference to a ruling of the ICJ in similar cases, East Timor considers that the delimitation in the Timor Sea should be made in accordance with a median line and that the geological characteristics of the Timor Trough should not be considered when confronted with other seabed depressions, given that these

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① Nuno MARQUES ANTUNES, *Towards the Conceptualisation of Maritime Delimitation-Legal and Technical Aspects of Political Process*, Leiven/Boston: Martinus Nijhoff Publishers, 2003, p. 358; Henry BURMESTER, Australia and the Law of the Sea, in James CRAWFORD and Donald R. ROTHWELL ed., *The Law of the Sea in the Asian Pacific Region*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1994, pp. 51～64.

② Nuno MARQUES ANTUNES, Spatial allocation of continental shelf rights in the Timor Sea: Reflections on maritime delimitation and joint development, in *Estudos em Direito Internacional Público*, ed., Coimbra: Almedina, 2004, pp. 274 ～ 275, 277; Victor PRESCOTT, National rights to hydrocarbon resources of the continental margin beyond 200 nautical miles, in Gerald BLAKE, Martin PRATT, Clive SCHOFIELD and Janet Allison BROWN ed., *Boundaries and Energy: Problems and Prospects*, London/The Hague/Boston: Kluwer Law International, 1998, pp. 71～72; Malcom EVANS, *Relevant Circumstances and Maritime Delimitation*, Oxford: Clarendon Press, 1989, pp. 99～118; John Robert Victor PRESCOTT, *Australia's Maritime Boundaries*, Canberra: Department of International Relations/The Australian National University Canberra, 1985, pp. 115～117; *The Political Geography of the Oceans. Problems in Modern Geography*, London/Vancouver: David & Charles Newton Abbot, 1975, pp. 191～192; C. COOK, Filling the gap-delimiting the Australia-Indonesia maritime boundary, *Australian Yearbook of International Law*, Vol. 10, 1981－1983, pp. 170～171.

depressions do not represent a break or fault of the continental shelf. ① In addition, the adoption of the natural prolongation criteria would not forego the consideration of other criteria, such as equity and the fairness of delimitation which are not present in Australia's position. ② In fact, should the latter be allowed to succeed, the larger part of the known hydrocarbon deposits laying in the seabed and subsoil of the Timor Sea would be in the Australian continental shelf, whereas the applicability of the median line would place East Timor in a very advantageous position since most known hydrocarbon deposits are located closer to the Timorese coast. ③ In this case, Australia would most probably petition the readjustment of the median line should the issue of delimitation of maritime boundaries be submitted to the appreciation of the ICJ, which would al-

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① ICJ Reports (1982), p. 18, pp. 54～58, p. 64, and (1985), p. 13, pp. 34～35. *See* Masahiro MIYOSHI, Some thoughts on maritime boundary delimitation, in Seoung-Yong HONG and Jon VAN DYKE ed., *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, Leiden/Boston: Martinus Nijhoff Publishers, 2009, pp. 108～113; Laurent LUCCHINI, La délimitation des frontières maritimes dans la jurisprudence internationale: vue d'ensemble, in Rainer LAGONI and Daniel VIGNES, ed., *Maritime Délimitation*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 4～5; David ONG, The legal status of the 1989 Australia-Indonesia Timor Gap Treaty following the end of Indonesian rule in East Timor, *Netherlands Yearbook of International Law*, Vol. 31, 2000, p. 79; William T. ONORATO and Mark J. VALENCIA, The new Timor Gap Treaty: legal and political implications, *ICSID Review*, Vol. 28, 2000, p. 62; Mark J. VALENCI and Masahiro MIYOSHI, Southeast Asia seas: joint development of hydrocarbons in overlapping claim areas, *Ocean Development and International Law Journal*, Vol. 16, No. 3, 1986, p. 228; E. D. BROWN, The Tunisia-Libya continental shelf case, *Marine Policy/International Journal Ocean Affairs*, Vol. 7, No. 3, 1983, pp. 145～148.

② ICJ Reports (1985), pp. 40～41.

③ Stuart KAYE, Negotiation and dispute resolution: a case study in international boundary making—the Australia-Indonesia boundary, in Alex G. Oude ELFERINK and Donald R. ROTHWELL ed., *Oceans Management in the 21st Century: Institutional Frameworks and Responses*, Leiden/Boston: Martinus Nijhoff Publishers, 2004, pp. 146～147; William T. ONORATO and Mark J. VALENCIA, International cooperation for petroleum development: the Timor Gap Treaty, *ICSID Review*, Vol. 5, No. 1, 1990, pp. 2～3; Jonathan I. CHARNEY, International maritime boundaries for the continental shelf: the relevance of natural prolongation, in Nisuke ANDO, Edward MCWHINNEY and Rüdiger WOLFRUM ed., *Liber Amicorum Judge Shigeru Oda* (Vol. 2), The Hague/London/New York: Kluwer Law International, 2002, p. 1029; Mark J. VALENCIA and Masahiro MIYOSHI, Southeast Asia seas: joint development of hydrocarbons in overlapping claim areas, *Ocean Development and International Law Journal*, Vol. 16, No. 3, 1986, p. 230.

most certainly provoke the intervention of Indonesia. ①

Australia, Indonesia and East Timor have on different occasions engaged in bilateral negotiations on the delimitation of maritime boundaries in the Timor Sea, having Australia and Indonesia signed two delimitation agreements despite other pending maritime disputes. ② One agreement in respect of the delimitation of maritime boundaries between Papua New Guinea and Indonesia, ③ and a second agreement regarding the delimitation of maritime boundaries in the Arafura Sea, which envisaged essentially settling States' sovereignty on the exploration and exploitation of the natural resources of the seabed and subsoil. ④

Both agreements included natural resources clauses according to which should any hydrocarbon deposit extend across a boundary line and consequently be recoverable wholly or in part from the either side of that line, both countries would seek to reach an agreement on the manner in which these resources should be most effectively exploited, as well as an equitable regime of allocation

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① ICJ Reports (1990/1992), (1985), pp. 41～43, pp. 56～57 and (1981), p. 21. *See* David ONG, The legal status of the 1989 Australia-Indonesia Timor Gap Treaty following the end of Indonesian rule in East Timor, *Netherlands Yearbook of International Law*, Vol. 31, 2000, p. 117; Nuno MARQUES ANTUNES, *Towards the Conceptualisation of Maritime Delimitation-Legal and Technical Aspects of Political Process*, Leiven/Boston: Martinus Nijhoff Publishers, 2003, p. 379.

② Indonesia and Australia have a boundary dispute since 1953 regarding the continental between the two countries in the Sahul Shelf.

③ Agreement between Australia and Indonesia Concerning Certain Boundaries between Papua New Guinea and Indonesia, made in Jakarta, on February 12th, 1973, published at 975 UNTS 4 (1975).

④ Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries, made in Canberra, on May 18th, 1971, and entered into force on November 7th, 1969, published at 974 UNTS 307 (1975). Also see Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the area between the Two Countries, including the area known as Torres Strait, and Related Matters, made in Sydney, on December 18th, 1978, at www. un. org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS－PNG1978TS. PDF, 1 February 2011; Treaty between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, made in Perth, on March 14th, 1997, at www. un. org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS－IDN1997EEZ. pdf, 1 February 2011; Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, Supplementary to the Agreement of 18 May 1971, made in Jakarta, on October 9th, 1972, published at 974 UNTS 319 (1957).

of benefits arising from said exploitation. ①

The agreement that established the boundaries between Papua New Guinea and Indonesia did not include the continental shelf of East Timor, since at that time this territory was still under Portuguese rule. ② Only with the Indonesian invasion and occupation of East Timor on December 7th, 1975, did this territory begin to be *de facto* controlled by Indonesia. ③

These two countries further agreed on a cooperative regime regarding their mutual interest in the rational management, conservation and optimum utilisation of the living resources of the sea. ④

After almost two decades of unsuccessful negotiations, Australia and Indonesia agreed to defer the divisive issue of maritime boundary delimitation and to jointly develop the natural resources of the Timor Sea under the legal frame-

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① Articles 6 and 7.

② Article 2 of the Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain seabed boundaries, made in Canberra, on May 18th, 1971. Also see Portuguese Law 7/75, July 17th, 1975.

③ Resolutions (UN Security Council) 384, December 22nd, 1975, 389, April 22nd, 1976, 1236, May 7th, 1999, 1246, June 11th, 1999, 1262, August 27th, 1999, 1264, September 15th, 1999, and 1272, October 25th, 1999. Also see Indonesian Law 7, July 17th, 1976, which recognizes the integration of East Timor in the State of Indonesia. This law was revoked on October 20th, 1999 by an Act of the Indonesian Popular Assembly.

④ Agreement between the Government of Australia and the Government of the Republic of Indonesia relating to cooperation in fisheries, made in Jakarta, on April 22nd, 1992, published at 1170 UNTS (1994), pp. 288～294. Memorandum of Understanding between the Government of Australia concerning the Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement, made in Jakarta, on October 29th, 1981, and entered into force on February 1st, 1982, published at Kriangsak KITTICHAISAREE, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia*, Oxford/New York: Oxford University Press, 1987, p. 198. Memorandum of Understanding between the Government of Australia and the Government of the Republic of Indonesia Regarding the Operations of Indonesian Traditional Fishermen in Areas of the Australian Exclusive Fishing Zone and Continental Shelf, made in Jakarta, on November 7th, 1974, and entered into force on February 28th, 1975, at http://epress.anu.edu.au/apem/boats/mobile_devices/apb.html, 1 February 2011.

work of the Timor Gap Treaty:[①]

The Timor Gap Treaty was the first wide-ranging joint development regime of offshore hydrocarbon deposits implemented by States and has been an example for other countries, such as the joint development regime existing between Sao Tome and Principe and Nigeria. It is an intricate and comprehensive legal regime and includes several legal provisions that go beyond what may be characterized as the essential legal content of joint development agreements of offshore hydrocarbon deposits, namely, the creation of a joint development zone and of an entity responsible for the management of the natural resources found therein and for granting the respective exploration rights, as well as the creation of a complete autonomous legal regime applicable to the development of resources.

The execution of this agreement sought to satisfy Australia's growing energy needs, as well as to legitimize the fact that it was, similar to Portugal until the Indonesian occupation, granting exploration licenses of blocks in the Timor Sea without being able to do so under international law. The Timor Gap Treaty created the necessary normative regime that allowed for the continuation of

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① Article 33(1) of the Timor Gap Treaty signed between Australia and Indonesia on December 11th, 1989, at www. austlii. edu. au, 1 February 2011. On the Timor Gap Treaty, see Masahiro MIYOSHI, The joint development of offshore oil and gas in relation to maritime boundary delimitation, 2－5 *Maritime Briefing / International Boundaries Research Unit*, Vol. 2, No. 5, 1999, pp. 17～21; Keith SUTER, Timor Gap treaty: The continuing controversy, *Marine Policy: the International Journal of Ocean Affairs*, Vol. 17, No. 4, July 1993, pp. 294～302; Francis M. AUBURN and Vivian L. FORBES, The Timor Gap treaty and the Law of the Sea Convention, *Ocean Yearbook*, Vol. 10, 1993, pp. 40～53; Henry BURMESTER, The zone of co-operation between Australia and Indonesia: a preliminary outline with particular reference to applicable law, in Hazel FOX ed., *Joint Development of Offshore Oil and Gas, Volume Ⅱ. The Institute's Revised Model Agreement. Conference Papers, The Australia / Indonesia Zone of Co-operation Treaty* 1989, London: The British Institute of International and Comparative Law, 1990, pp. 128～139; Ernst WILLHEIM, Australia-Indonesia sea-bed boundary negotiations: proposals for a joint development zone in the "Timor Gap", *Natural Resource Journal*, Vol. 29, 1989, pp. 821～842; Mochtar KUSUMA-ATMADJA, Joint development of oil and as by neighboring countries, in The Law of the Sea Institute, University of Hawaii, Mochtar KUSUMA-ATMADJA, Thomas A. MENSAH and Bernard H. OXMAN ed., *Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda* 21, 1983, pp. 592～609; John Robert Victor PRESCOTT, *Australia's Maritime Boundaries*, Canberra: Department of International Relations, The Australian National University, 1985, p. 117; Douglas M. JOHNSTON and Mark J. VALENCIA, *Pacific Ocean Boundary Problems. Status and Solutions*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1991, pp. 70～74.

exploration operations and the consolidation of operators' acquired rights. ①

On February 22nd, 1991, following the execution of the Timor Gap Treaty, Portugal initiated, although unsuccessfully, a procedure in the ICJ against Australia supported on the latter's liability before Portugal and the people of East Timor for the violation of the rights and duties of Portugal in the territory of East Timor, as well as the right of self-determination of the Timorese people. ②

With the end of the Indonesian occupation, the territory of East Timor was governed by UNTAET. ③ The latter succeeded to UNAMET which was responsible for organizing the popular consultation of October 19th, 1999 that started the legal independence procedure of East Timor. ④ UNTAET's judicial, political and legislative attributions included the responsibility for entering into international agreements in representation of the interests and economic viability of the future State of East Timor. ⑤

UNTAET and Australia began negotiations in view of adapting the Timor Gap Treaty to the new *status quo*, *i. e.* an independent East Timor, rinsing the Treaty of any potential illegitimacy in light of the internationally recognized right of self-determination of the East Timorese people and its sovereignty over

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① Nuno MARQUES ANTUNES, *Towards the Conceptualisation of Maritime Delimitation-Legal and Technical Aspects of Political Process*, Leiven/Boston: Martinus Nijhoff Publishers, 2003, pp. 393～396; William T. ONORATO and Mark J. VALENCIA, The new Timor Gap Treaty: legal and political implications, *ICSID Review*, Vol. 28, 2000, p. 61; Douglas M. JOHNSTON and Mark J. VALENCIA, *Pacific Ocean Boundary Problems. Status and Solutions*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1991, pp. 2～3.

② ICJ Reports (1995) 92. *See* Pierre-Marie DUPUY, A general stocktaking of the connections between the multilateral dimension of obligations and codification of the law of responsibility, *European Journal of International Law*, Vol. 13, No. 5, 2002, p. 1056; Christine M. CHINKIN, East Timor moves into the World Court, *European Journal of International Law*, 1993, Vol. 4, No. 2, pp. 208～218; Maria Clara MAFFEI, The case of East Timor before the International Court of Justice-some tentative comments, *European Journal of International Law*, Vol. 4, No. 2, 1993, p. 225, p. 227, p. 231; Stuart KAYE, Negotiation and dispute resolution: a case study in international boundary making-the Australia-Indonesia boundary, in Alex G. Oude ELFERINK and Donald R. ROTHWELL ed., *Oceans Management in the 21st Century: Institutional Frameworks and Responses*, Leiden/Boston: Martinus Nijhoff Publishers, 2004, pp. 2～3.

③ United Nations Transitional Administration in East Timor, Resolution (UN Security Council) 1272, October 25th, 1999.

④ United Nations Mission in East Timor, Resolution (UN Security Council) 1246, June 11th, 1999.

⑤ Secretary-General Report S/1999/1024, 35, October 4th, 1999.

the country's natural resources. ① These negotiations lead to the Exchange of Notes and subsequent signing on February 10th, 2000 of the Memorandum of Understanding ("MoU") concerning the revised Timor Gap Treaty. ②

The maintenance of the joint development model of the Timor Gap Treaty implied keeping in force the relevant Indonesia legislation and the decisions and directives issued by the Ministerial Council and the Joint Authority created under the Timor Gap Treaty, as well as to safeguard the rights acquired by operators under product sharing contracts entered into between the latter and said Joint Authority. As a result, UNTAET undertook all rights and obligations of Indonesia under the Timor Gap Treaty, with the exception of all those contrary to the interests of the people of East Timor. ③ These were either revoked or adapted when beneficial, such as the obligations regarding training and granting preference to the contracting of East Timorese nationals. Australia also had to adapt all national legislation contrary to the new arrangement. ④

On July 5th, 2001, UNTAET and Australia signed a second MoU which reaffirmed the joint development model initially adopted, but no longer under the auspices of the Timor Gap Treaty, rather instead of its revised version agreed on the MoU signed on February 10th, 2000, and from then onward referred to as the Timor Sea Treaty. ⑤

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① On the principle of peoples' permanent sovereignty over natural resources, see Vasco BECKER-WEINBERG, A nacionalização do petróleo e o princípio do aproveitamento conjunto entre Estados, *Estudos de Direito Internacional e Relações Internacionais*, Lisbon: AAFDL, 2008, pp. 373～398.

② Published at David ONG, The legal status of the 1989 Australia-Indonesia Timor Gap Treaty following the end of Indonesian rule in East Timor, *Netherlands Yearbook of International Law*, Vol. 31, 2000, p. 106.

③ Article 165 of the Constitution of the Democratic Republic of East Timor.

④ Petroleum (Timor Sea Treaty) / (Consequential Amendments) / Act 2003 n. 10/2003. The Petroleum (Submerged Lands) Act 1967 and the Continental Shelf (Living Natural Resources) / Amendment Act 1978.

⑤ Timor Sea Treaty, at www. un. org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS－TLS2002TST. PDF, 1 February 2011. Memorandum of Understanding between the Government of the Democratic Republic of East Timor and the Government of Australia Concerning an International Unitization Agreement for the Greater Sunrise field, made in Dili, on May 20th, 2002, at www. un. org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS－TLS2002SUN. PDF, 1 February 2011. Exchange of Notes Constituting an Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste Concerning Arrangements for Exploration and Exploitation of Petroleum in an Area of the Timor Sea between Australia And East Timor, Dili, 20 May 2002, at www. un. org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS－TLS2002EX. PDF, 1 February 2011.

B. Northeast China Sea

The Northeast China Sea is a region with significant precedents of cooperation on the protection of the marine environment, navigation and fishing. ① However, the existence of hydrocarbon deposits has proven to be a conflicting issue between the relevant States, in particular regarding the delimitation of maritime boundaries. ②

The strong hydrocarbon potential of the East China Sea became generally known with the publication in 1968 of a report prepared by a group of scientists from Japan, South Korea, Taiwan and the US and sponsored by the UN Com-

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① Fishery Agreement between the Governments of the People's Republic of China and the Republic of Korea, made on August 3rd, 2000. Sino-Japanese Agreement on Fishery, made in November 11th, 1997, entered into force on June 1st, 2000. Agreement between the Government of the Republic of Korea and the Government of the Russian Federation on Co-operation in the Field of the Environment, made in Moscow, on June 2nd, 1994. Agreement between the Government of the Republic of Korea and the Government of Japan on Co-operation in the Field of Environmental Protection, made in Seoul, on June 29th, 1993. Agreement on Environmental Co-operation between the Government of the Republic of Korea and the Government of the People's Republic of China, made in Beijing, October 28th, 1993. Agreement on Fishing between Japan and South Korea, made in Tokyo, on June 22nd, 1965. Also see Joint Statement on Sustainable Development among the People's Republic of China, Japan and the Republic of Korea and Joint Statement on the Tenth Anniversary of Trilateral Cooperation among the People's Republic of China, Japan and the Republic of Korea, both made in Beijing, on October 10th, 2009. Action Plan for Promoting Trilateral Cooperation among the People's Republic of China, Japan and the Republic of Korea, made in December 13th, 2008. The 2005—2006 Progress Report of the Trilateral Cooperation among the People's Republic of China, Japan and the Republic of Korea, adopted by the Three-Party Committee, made in Cebu, on January 12th, 2007. The Action Strategy on Trilateral Cooperation among the People's Republic of China, Japan and the Republic of Korea, made on November 27th, 2004. Joint Declaration on the Promotion of Tripartite Cooperation among the People's Republic of China, Japan and the Republic of Korea, made in Bali, on October 7th, 2003.

② On cooperation in the Northeast and Southeast Asian seas, see Mark J. VALENCIA, Relevance of lessons learned to Northeast Asia, in Mark J. VALENCIA, *Maritime Regime Building. Lessons Learned and Their Relevance for Northeast Asia*, Hague/Boston/London: Martinus Nijhoff Publioshers, 2001, p. 145; Yoshio OTANI, Les problèmes actuels de la mer du Japon et la coopération future, in *La Méditerranée et le Droit de la Mer à l'aube du 21e siècle/The Mediterranean and the Law of the Sea at the dawn of the 21st century* (dir.) Giuseppe CATALDI, Actes du colloque inaugural de la Association Internationale du Droit de la Mer (Naples, 22 et 23 Mars 2001) ed. Bruylant (Brussels: 2002), p. 313; ZOU Keyuan, The establishment of a marine legal system in China, *The International Journal of Marine and Coastal Law*, Vol. 13, No. 1, 1998, pp. 44～45.

mission for Asia and the Far East. In the year following the publication of the aforementioned report, Japan, South Korea and Taiwan claimed sovereignty over greater part of the continental shelf where hydrocarbon deposits were thought to be found and swiftly entered into operating agreements with oil companies in view of its development. In fact, already in 1968 South Korea had proceeded with the division of an area of the East China Sea also claimed by Japan in seven blocks, granting its exploitation to four companies. In return, Japan also granted exploitation rights on areas where both States' sovereignty claims overlapped.

In 1970, in the absence of an agreement on the delimitation of maritime boundaries in the continental shelf, the three States or regions attempted to enter into a joint development agreement of offshore hydrocarbon deposits and defer the maritime delimitation dispute. ①

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① ZOU Keyuan, The Chinese traditional maritime boundary line in the South China Sea and its legal consequences for the resolution of the dispute over the Spratly Islands, *The International Journal of Marine and Coastal Law*, Vol. 14, No. 1, 1999, pp. 161～168; Hong NONG and Wu SHICUN, The energy security of China and oil and gas exploitation in the South China Sea, in Myron H. NORDQUIST, John Norton MOORE and Kuen-chen FU ed., *Recent Developments in the Law of the Sean and China*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 145; Jon M. VAN DYKE, The Republic of Korea's maritime boundaries, *The International Journal of Marine and Coastal Law*, Vol. 18, No. 4, 2003, pp. 509～540; Mark J. VALENCIA, Regional maritime regime building: prospects in northeast and southeast Asia, *Ocean Development and International Law Journal*, Vol. 31, No. 3, 2000, pp. 223～247; Relevance of lessons learned to Northeast Asia, in Mark J. VALENCIA ed., *Maritime Regime Building: Lessons Learned and Their Relevance for Northeast Asia*, The Hague/Boston/London: Martinus Nijhoff Publioshers, 2001, p. 143; Mark J. VALENCIA and Jon M. VAN DYKE, Comprehensive solutions to the South China Sea disputes: some options, Gerald BLAKE, Martin PRATT, Clive SCHOFIELD and Janet Allison BROWN ed., *Boundaries and Energy: Problems and Prospects*. London/The Hague/Boston: Kluwer Law International, 1998, pp. 85～115; Jonathan CHARNEY, Central East Asian maritime boundaries and the Law of the Sea, *American Journal of International Law*, Vol. 89, No. 4, 1995, pp. 746～748; Zhiguo GAO, The South China Sea: from conflict to cooperation? *Ocean Development and International Law Journal*, Vol. 25, No. 3, 1994, p. 352; Masahiro MIYOSHI, The Japan/South Korea joint development agreement 1974, in Hazel FOX ed., *Joint Development of Offshore Oil and Gas. Volume Ⅱ. The Institute's Revised Model Agreement. Conference Papers. The Australia/Indonesia Zone of Co-operation Treaty* 1989, London: The British Institute of International and Comparative Law, 1990, pp. 89～97; Choon-ho PARK, Joint development of mineral resources in disputed waters: the case of Japan and South Korea in the East China Sea, in Mark J. VALENCIA ed., *The South China Sea. Hydrocarbon Potential & Possibilities of Joint Development*, Oxford/New York /Toronto/Sydney/Paris/Frankfurt: Pergamon Press, 1981, p. 1335.

This attempt met with the objection of China based on its sovereignty claim over part of the continental shelf to be included in said joint development agreement, which in turn lead to the US undertaking efforts to protect the rights of its oil companies who had signed operating agreements with Japan, South Korea and Taiwan. As a result, Taiwan eventually withdrew from this trilateral model of joint development regime, allowing Japan and South Korea to negotiate a bilateral joint development agreement. ①

In 1974, Japan and South Korea signed two agreements that ended the maritime dispute on the delimitation of the continental shelf between the two countries in the East China Sea, after nearly three years of consultations and more than twenty years of disagreement regarding the relevance of the bay of Okinawa for the purpose of delimitation. ② South Korea perceived that the Japanese continental shelf in the East China Sea should end in the bay and that part of the latter's boundaries should be delimitated between South Korea and China. Whereas Japan considered that delimitation should be made according to the principle of equidistance foreseen in the 1958 Geneva Convention on the Continental Shelf, instead of considering the bay of Okinawa a decisive feature for the purpose of delimitation. ③

The two agreements were the result of States' achievement in differentiating between the delimitation of maritime boundaries and the development of marine natural resources, permitting reaching an agreement on the delimitation of maritime boundaries where States' claims did not overlap and to implement a joint development regime of offshore hydrocarbon deposits found in areas

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① Paul C. YUAN, China's offshore oil development policy and legislation: an overall analysis, *The International Journal of Estuary and Coastal Law*, Vol. 3, No. 2, 1988, pp. 101～137.

② Seo-Hang LEE, Korea's claims to maritime jurisdiction, *Korean Journal of Comparative Law*, Vol. 18 1990, p. 70; Choon-hPARK, *East Asia and the Law of the Sea*, 4th ed, Seoul: Seoul National University Press, 1988, pp. 131～132.

③ Convention on the Continental Shelf, made in Geneva, on April 29th, 1958, published at 499 UNTS (1964), p. 311.

where claims did overlap, despite China's objection to such a cooperative effort. ① In addition, States agreed not to consider the island of Takeshima in the Sea of Japan for the purpose of delimitation of maritime boundaries as initially claimed by both countries, as well as that the continental shelf delimitation agreement would not affect the legal status of the superjacent waters and air space. ② This agreement also included a natural resources clause according to which States would endeavour to reach an agreement regarding the development of a hydrocarbon deposits that extended across a boundary line or in the absence of an agreement, an arbitrator appointed at the request of either State shall determine the most effective way to develop said hydrocarbon deposit. ③

The implementation of the joint development of offshore hydrocarbon deposits agreement was delayed due to Japan's need to adapt its domestic legislation to the obligations established in the agreement, as well as States' concern for the preservation of traditional fishing in the joint development zone and the fact that the latter is located in an area prone to the occurrence of hurricanes and cyclones. ④

The joint development of offshore hydrocarbon deposits agreement signed between Japan and South Korea created a joint development zone in the southern part of the continental shelf of both countries, immediately after the respec-

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① Agreement between Japan and the Republic of Korea Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries, made in Seoul, on February 5th, 1974, published at 1225 UNTS (1981), pp. 104～105. Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, made in Seoul, on January 30th, 1974, published at 1225 UNTS (1981), pp. 114～126. *See* Masahiro MIYOSHI, The Japan-South Korea agreement on joint development of the continental shelf, in Mark J. VALENCIA ed., *Geology and Hydrocarbon of the South China Sea and Possibilities of Joint Development, Proceedings of the Second EAPI/CCOP Workshop. East-West Center, Honolulu, Hawaii*, 22－26 *August* 1983, New York/Oxford/Toronto/Sydney/Paris/ Frankfurt: Pergamon Press, 1985, pp. 551～552.

② Article 3 of the 1974 Maritime Delimitation Agreement between Japan and the Republic of Korea.

③ Article 2 of the 1974 Maritime Delimitation Agreement between Japan and the Republic of Korea.

④ South Korea ratified the agreement on December 1974, while Japan only in June 1978. The joint development agreement entered into force on June 22nd, 1978 and the first development operation took place only in May 1979. *See* Masahiro MIYOSHI, The Japan/South Korea joint development agreement 1974, in Hazel FOX ed., *Joint Development of Offshore Oil and Gas. Volume* Ⅱ. *The Institute's Revised Model Agreement. Conference Papers. The Australia/Indonesia Zone of Co-operation Treaty* 1989, London: The British Institute of International and Comparative Law, 1990, pp. 545, 549～550.

tive delimitation line in the Korean Strait.

The joint development zone may be divided into subzones for the purpose of exploration and exploitation activities by Japanese and South Korean concessionaires duly authorized by the States. The concessionaires shall in turn enter into operating agreements, subject to States' approval, for the purpose of jointly undertaking such activities, being entitled to an equal share of the natural resources extracted in the joint development zone and sharing in equal proportions the respective expenses. In this case, the applicable law shall be that of the country of the relevant concessionaire, being these resources considered as extracted in the continental shelf of that State, such as for the purpose of taxation.

A relevant detail of such operating agreements is that concessionaires shall have to agree on a mechanism for the settlement of disputes, as well as adjust said exploration and exploitation activities with fisheries interests. In this case, it would have been preferable that States had agreed on a mandatory mechanism in order to assure that such disputes would not be enduring and consequentially have an impact on exploration and exploitation activities.

The agreement established a direct relation between States and the concessionaires authorized by the latter, being subject to the domestic law applicable in that State. This is exemplified in the possibility of one State canceling the rights of exploration or exploitation of concessionaires in accordance with its laws and regulations and after consultations with the other State. For the purpose of dealing with all operational aspects of the respective exploration and exploitation activities, the concessionaries shall designate an operator under the respective operating agreement.

The Japan-Republic of Korea Joint Commission created under the joint development agreement serves merely as a consultation body between the two countries on matters concerning the implementation of this agreement. This body has the obligation of meeting once a year and its recommendations are not binding for the States.

Japan and South Korea failed to provide a common regime applicable to the protection of the marine environment, merely establishing that both States shall agree on measures to be taken to prevent collisions at sea and to prevent and remove pollution of the sea resulting from activities relating to the exploration and exploitation activities in the joint development zone. The only common measures are those referred to in the Exchange of Notes following the signing of the joint development of offshore hydrocarbon deposits agreement.

This agreement also includes a natural resources clause which foresees that concessionaires shall seek to reach an agreement through consultation and subject to States approval, on the most effective means to develop a hydrocarbon deposit that may extend across the lines of the joint development zone. In the event that concessionaires fail to reach an agreement, both States shall present a joint proposal following the necessary consultations.

In what concerns other States of Northeast Asia, there is also report that China and North Korea have agreed on implementing a regime of joint development of offshore hydrocarbon deposits in the Yellow Sea. Additionally, China and Japan have yet to agree on a concept of joint development of offshore hydrocarbon deposits in the East China Sea, despite long acceptance by both countries that only such a cooperative effort may offer a way forward in light of the existing dispute on maritime delimitation. ①

In 1997, China and Japan signed a new agreement on cooperative fishing applicable to the EEZs of both countries, whereby each State shall issue permits and allow the fishing vessels of the other State to carry out fishing activities in the respective EEZ. According to this agreement, both countries shall undertake consultations within the Japan-China Joint Fisheries Committee created by the fisheries agreement, in order to determine the operational conditions for the purpose of issuance of said permits. This agreement further established that each State shall adopt and inform the other State of the conservation measures applicable in the respective EEZ. States shall additionally cooperate in scientific research on fisheries and conservation of marine living resources, as well as in providing assistance and protection to the extent possible in the event that a national or fishing vessel of one State should suffer maritime casualties in the EEZ of the other State.

This agreement also establishes a provisional measures zone regarding parts of the EEZs where States' claims overlap and where there is no accord on

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① GAO Jianjun, A note on the 2008 cooperation consensus between China and Japan in the East China Sea, in *Ocean Development and International Law Journal*, Vol. 40. 2009, pp. 291～296; ZOU Keyuan, Implementing the United Nations Convention on the Law of the Sea in East Asia: issues and trends, *Singapore Year Book of International Law*, Vol. 9, 2005, p. 6; DENG Xiaoping, Speech at the third plenary session of the Central Advisory Commission of the Communist Party of China, October 22, 1984, in 3 *Selected Works of DENG Xiaoping*, Beijing: Foreign Languages Press, 1984. Also see Communiqué by the Ministry of Foreign Affairs of the People's Republic of China "China's Path of Peaceful Development and Its View of Regional Security", Speech by Ambassador Zhang Junsai, at www. fmprc. gov. cn/eng/wjb/zwjg/zwbd/t520658. htm, 1 March 2011.

final maritime delimitation. [①] In this case, being the agreement only enforceable between China and Japan, South Korean nationals and fishing vessels that also carry out fishing activities in this area will not be subject to the regime established under the fisheries agreement, raising concerns on the utilization of living resources.

The following year, South Korea and Japan signed a second agreement on fisheries applicable to the EEZ of both countries, excluding the maritime areas which are still to be delimitated and that partly overlap with the 1974 joint development zone.

This fisheries agreement also created the Korea-Japan Joint Fisheries Committee for the purpose of recommending to the States the species allowed for harvesting, quotas of catch, areas of fishing and other conditions applicable to nationals and fishing vessels of one State in the EEZ of the other State. States shall further cooperate on the conservation of marine living resources. [②]

Also, in the same year, China and South Korea signed a new fisheries agreement applicable to EEZs of both countries in the Yellow Sea, also including provisional measures zones and transitional zones. This fisheries agreement establishes that nationals and fishing vessel of one State would carry out fishing activities in the EEZ of the other State in accordance with the permits issued by the latter and the recommendations made by the China-South Korea Joint Fisheries Committee created by this agreement. [③]

C. Gulf of Thailand

In 1979, Thailand and Malaysia signed a MoU establishing a joint authority for the purpose of developing the resources of the seabed of the continental

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① On cooperative fishing agreements between China and Japan, see Park Hee KWON, *The Law of the Sea and Northeast Asia*, The Hague/London/Boston: Kluwer Law International, 2000, pp. 51～57. An unofficial translation of the text of the agreement is published at pp. 208～213.

② On cooperative fishing agreement between South Korea and Japan, see Park Hee KWON, *The Law of the Sea and Northeast Asia*, The Hague/London/Boston: Kluwer Law International, 2000, pp. 57～66. An unofficial translation of the text of the agreement is published at pp. 215～223.

③ On cooperative fishing between China and South Korea, see Park Hee KWON, *The Law of the Sea and Northeast Asia*, The Hague/London/Boston: Kluwer Law International, 2000, pp. 66～72.

shelf of the Gulf of Thailand where these States' sovereignty claims overlapped. ① Simultaneously, both countries were engaged in negotiations regarding the delimitation of the continental shelf where the joint development area had been located under the aforementioned MoU, following the guidelines approved in the Agreed Minutes of the Malaysia-Thailand Official's Meeting on Delimitation of the Continental Shelf Boundary between Malaysia and Thailand in the Gulf of Thailand and in the South China Sea, that took place between February 27th and March 1st, 1978. ②

That same year, the two States signed a second MoU identifying the points to be considered for the purpose of delimitating the continental shelf boundary between the two countries in the Gulf of Thailand, while further undertaking to

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① Memorandum of Understanding between the Kingdom of Thailand and Malaysia in the Establishment of a Joint Authority for the Exploitation of the Resources of the Sea-bed in a defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand, made in Chiang Mai, on February 21st, 1979, published at Phiphat TANGSUBKUL, *ASEAN and the Law of the Sea*, Singapore: Institute of Southeast Asian Studies, 1982, pp. 130～133. *See* Clive SCHOFIELD and May TAN-MULLINS, Maritime claims, conflicts and cooperation in the Gulf of Thailand, *Ocean Yearbook*, Vol. 22, 2008, pp. 75～116; David ONG, Thailand/Malaysia. Joint development agreement 1990, *International Journal of Estuary and Coastal Law*, Vol. 6, No. 1, 1991, pp. 61～63; Ian TOWNSEND-GAULT, The Malaysia/Thailand Joint Development Arrangement, in Hazel FOX ed., *Joint Development of Offshore Oil and Gas. Volume Ⅱ. The Institute's Revised Model Agreement. Conference Papers. The Australia/Indonesia Zone of Co-operation Treaty* 1989, London: The British Institute of International and Comparative Law, 1990, pp. 102～107. The joint development area established under this MoU has been duly considered when establishing the maritime boundaries between Thailand and Vietnam. *See* Agreement between the Government of the Kingdom of Thailand and the government of the Socialist Republic of Vietnam on the Delimitation of the Maritime Boundary between the Two Countries in the Gulf of Thailand, made in Bangkok, on August 9th, 1997, published at Jonathan I. CHARNEY and Robert W. SMITH, The American Society of International Law ed., *International Maritime Boundaries* (Vol. 4), The Hague/London/New York: Martinus Nijhoff Publishers, 2002, pp. 2692～2694.

② R. HALLER-TROST, *The Contested Maritime and Territorial Boundaries of Malaysia. An International Law Perspective*, London/The Hague/Boston: Kluwer Law International, 1998, pp. 350～359; Ted MCDORMAN, Malaysia-Vietnam, in Jonathan I. CHARNEY and Lewis M. ALEXANDER, The American Society of International Law ed., *International Maritime Boundaries* (Vol. 3), Report Number 5－19, The Hague/Boston/London: Martinus Nijhoff Publishers, 2004, pp. 2335～2344.

continue negotiations towards final delimitation. ① This second MoU also included a natural resources clause establishing that both States shall cooperate to seek an agreement on the efficient development of hydrocarbon deposits that may straddle a boundary line, even-handedly partaking in all incurred expenses and benefits. ②

The MoU that established the Joint Authority predicts that in the event that States achieve an agreement on the delimitation of the continental shelf of the Gulf of Thailand before the end of its term, this entity would be extinct and its gains and assets, as well as its losses and debts, equally shared by both countries. In the event that States should fail to agree on delimitation, the joint development regime would be automatically renewed for the same period of time, as no reference establishing otherwise is included in the MoU. ③

Additionally, this MoU established that States may eventually agree to renegotiate and enter into a new joint development agreement should the common development of resources reveal to be more cost-effective, rather than each State carrying out neighbouring offshore development activities, in particular when considering the likelihood that hydrocarbon deposits may straddle a boundary line. ④

Nonetheless, States failed to agree on the extent of the autonomy of the Joint Authority partly due to the inexperience of Thailand in implementing a joint development regime and the difficulty that both countries had in harmonizing the relevant domestic oil legislation, as well as on how exploration rights should be granted to operators in the joint development zone. ⑤ Thailand pro-

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① Articles 1 and 3 of the Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Delimitation of the Continental Shelf Boundary between the Two Countries in the Gulf of Thailand, made in Kuala Lumpur, on October 24th, 1979, at www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/THA-MYS1979CS.PDF, 1 March 2011.

② Article 4 of the 1979 MoU between Thailand and Malaysia on the Delimitation of the Continental Shelf Boundary.

③ Article 6 (2) of the 1979 MoU between Thailand and Malaysia in the Establishment of a Joint Authority.

④ Article 6 (1) of the 1979 MoU between Thailand and Malaysia in the Establishment of a Joint Authority.

⑤ D. H. ARIFFIN, The Malaysian philosophy of joint development, in Mark J. VALENCIA ed., *Geology and Hydrocarbon of the South China Sea and Possibilities of Joint Development, Proceedings of the Second EAPI/CCOP Workshop, East-West Center, Honolulu, Hawaii, August 22nd to 26th*, 1983, New York/Oxford/Toronto/Sydney/Paris/Frankfort: Pergamon Press, 1985, p. 534.

posed applying the classic model of concession for that purpose, whereas Malaysia considered product sharing contracts to be more suitable in light of its acquired experience in offshore oil development. ①

These countries would only reach an agreement on this matter in 1990 with the implementation of a second joint development regime for the purpose of activating and regulating in detail the powers of the Joint Authority, whereby States chose to limit the powers and autonomy of this entity as granted under the first MoU, giving the latter a representative rather than an executive role. ② In fact, while initially the Joint Authority had the necessary powers to execute the actions necessary to maximize the revenue of the joint development zone, the second MoU States sought only to grant the Joint Authority the power to control the exploration and exploitation activities of non-living natural resources in the joint development zone, perhaps as a result of States' concern with the excessive executive character of the Joint Authority. ③

Thailand and Malaysia further agreed in this second MoU to use product sharing contracts for the purpose of granting operators exploration and exploitation rights in the joint development zone, as well as to introduce tax and fiscal regulations. ④

In 1992, Malaysia and Vietnam signed a MoU that established a straightforward joint development arrangement of offshore hydrocarbon deposits found in the Defined Area of continental shelf of the Gulf of Thailand appropriately i-

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① David ONG, The 1979 and 1990 Malaysia-Thailand joint development agreements: a model for international legal co-operation in common offshore petroleum deposits? *The International Journal of Marine and Coastal Law*, Vol. 14, No. 2, May 1999, pp. 228～230; Zhiguo GAO, *International Petroleum Contracts. Current Trends and New Directions*, London: Grahm&Trotman/Martinus Nijhoff, 1994, pp. 23～57.

② Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand on the Constitution and Other Matters Relating to the Establishment of the Malaysia-Thailand Joint Authority, made in Kuala Lumpur, on May 30th, 1990, published at Jonathan I. CHARNEY and Lewis M. ALEXANDER, The American Society of International Law ed., *International Maritime Boundaries* (Vol. 1), Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993, pp. 1111～1123.

③ Article 3(2) of the 1979 MoU between Thailand and Malaysia in the Establishment of a Joint Authority.

④ Articles 8, 9 to 12, 16, 17 of the 1979 MoU between Thailand and Malaysia in the Establishment of a Joint Authority.

dentified in the MoU. ① According to this MoU, both States agreed that the respective national oil companies would cooperate in undertaking exploration and exploitation activities in the Defined Area, being all costs incurred and benefits derived equally borne and shared between both countries. Moreover, the aforementioned MoU further established that should a petroleum field be located partly in the Defined Area and partly in the continental shelf of Malaysia or Vietnam, these States would arrive at mutually acceptable terms and conditions for the development of such resources. ②

In 2001, Cambodia and Thailand signed a MoU regarding the maritime area where States' claims overlap in the continental shelf of the Gulf of Thailand, ③ whereby both countries agreed to conclude an agreement for the joint development of offshore hydrocarbon deposits found therein and on the delimitation of the territorial sea, continental shelf and the EEZ in a maritime area identified in the MoU. ④ These States further agreed to create a Joint Technical Committee for the purpose of preparing the joint development regime to be implemented, as well as to settle the delimitation of said maritime boundaries. ⑤

Lastly, it should also be mentioned that Cambodia and Vietnam signed an agreement on the creation of joint historic waters by means of which both States agreed that the exploitation of natural resources found in the joint development historical waters zone would be decided by common agreement. ⑥

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① Memorandum of Understanding between Malaysia and the Socialist Republic of Vietnam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf Involving the Two Countries, made in Kuala Lumpur, June 5th, 1992, published at Jonathan I. CHARNEY and Lewis M. ALEXANDER ed., The American Society of International Law, *International Maritime Boundaries* (Vol. 3), The Hague/Boston/London: Martinus Nijhoff Publishers, 2004, pp. 2341～2344.

② Articles 2, 3 and 8(d) (e) of the MoU between Malaysia and Vietnam.

③ Memorandum of Understanding between the Royal Government of Cambodia and the Royal Thai Government regarding the Area of Their Overlapping Maritime Claims to the Continental Shelf, made in Phnom Penh, on June 18th, 2001, published at David A. COLSON and Robert W. SMITH, The American Society of International Law ed., *International Maritime Boundaries* (Vol. 5), Leiden/Boston: Martinus Nijhoff Publishers, 2005, pp. 3745～3746.

④ 1 and 2 of the MoU between Cambodia and Thailand.

⑤ 3 of the MoU between Cambodia and Thailand.

⑥ Agreement on Historic Waters of Vietnam and Kampuchea, made in Ho Chi Minh City, on July 7th, 1982, published at Jonathan I. CHARNEY and Lewis M. ALEXANDER, The American Society of International Law ed., *International Maritime Boundaries* (Vol. 3), The Hague/Boston/London: Martinus Nijhoff Publishers, 2004, pp. 2364～2365.

Ⅲ. Prerequisites and Principles of Joint Development Agreements of Offshore Hydrocarbon Deposits

In the three regions previously referred it is possible to identify the circumstances that led States to adopt and implement a legal model of common development of offshore hydrocarbon deposits. The recognition of these situations is extremely relevant for the purpose of understanding the nature of States' rights in the joint development zone, especially in the case of overlapping claims, as well as identifying the legal nature of the concept of joint development of offshore hydrocarbon deposits and its implications under international law.

The different disputes regarding delimitation of maritime boundaries in the Asia-Pacific region mostly concern overlapping claims based on geomorphological and geological aspects, in addition to territorial disputes regarding islands and other features upon which claimant coastal States upheld their sovereign rights over the respective maritime area. In fact, States opted for the implementation of joint development regimes in the case of the aforementioned regions as a means to surpass a deadlock situation caused by the existence of opposing maritime claims and territorial disputes, in particular when considering that the settlement of these disputes by negotiation and eventually by an agreement or the intervention of a third party, would ultimately lead to a long-lasting procedure incompatible, at least, with States energy ambitions. Moreover, the relevant Sates needed to establish a legal framework consistent with the fact that operating rights had been unlawfully granted, without coastal States being entitled to do so under international law.

The inherent and exclusive character of the continental shelf is the result of the recognition that the "*land dominates the sea*"[①] and that there is a clear association between the sovereign right of a State to exploit and explore the resources of the continental shelf as that of a State in land, as long as a coastal State's claim is unopposed or consistent with other States' claims in view of the distance criteria applicable to the delimitation of the continental shelf. In the event that there are overlapping claims resulting, for example, from opposite or adjacent continental shelves, States may not explore the subsoil and submarine

① ICJ Reports (1978) 37, 86.

areas, nor grant drilling rights for that matter. ①

When considering the different circumstances that led States to enter into joint development agreements of offshore hydrocarbon deposits, a necessary conclusion is that States cooperated in this common endeavor for the reason that there was a need for cooperation rather than an obligation, nor had States been compelled by a third party to do so. Moreover, States negotiated and agreed on the content of such agreements according to their discretionary powers and not to a hypothetical duty to enter into provisional agreements resulting from a particular interpretation of articles 74(3) and 83 (3) of UNCLOS.

The existence of precedents of cooperation between States that implemented joint development agreements should not be considered a relevant factor for the purpose of establishing an obligation of cooperation manifested in the form of a joint development agreement, nor for that matter to determine the success of the latter. There are situations where joint development agreements were successfully implemented without there having been any cooperative precedent, as well as other situations where having existed such precedents, namely regarding the management of living marine natural resources, States failed to implement a joint development agreement of offshore hydrocarbon deposits.

However, the existence of cooperation between two or more countries or within a regional framework as UNCLOS envisages in many of its provisions, necessarily provides the setting for States to interact and willingly establish the legal regimes that may eventually defer a dispute on the delimitation of maritime boundaries. ② Nonetheless, there is no such obligation regarding the development of common non-living marine natural resources and in particular in the event of disputes on the delimitation of maritime boundaries. ③ In fact, a number of joint development agreements have been implemented regardless of pending maritime boundaries or of the fact that States were simultaneously attempting to settle the dispute on the delimitation of maritime boundaries while undertaking offshore development activities under the umbrella of a joint de-

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① Article 81 of UNCLOS.

② Articles 63(3), 64(1), 65, 66(2)(4), 69(3), 74(3), 83(3), 100, 117, 118, 119, 123, 194(1), 197, 200, 242, 266, 270 and 273 of UNCLOS.

③ ICJ Reports 1982, Judge Evensen's Dissenting Opinion, 320～321. *See* Vasco BECKER-WEINBERG, The internationalization of marine natural resources in UNCLOS, in Rainer Lagoni, Peter Ehlers and Marian Paschke ed., *Recent Developments in the Law of the Sea*, Berlin/Munster/Vienna/Zurich/London: LIT Verlag, 2010, pp. 29～40.

velopment regime. ①

The detachment between joint development of offshore hydrocarbon deposits and maritime delimitation is also evidenced in the fact that the latter does not envisage the obligation for States to enter into joint development agreements in the event of straddling hydrocarbon deposits, nor have States entered into such agreements in respect of a natural resources clause included in a maritime delimitation agreement.

Similar to any other international agreement concluded between States, under a joint development agreement of offshore hydrocarbon deposits States are required to act in accordance with general treaty law, in the fulfillment of the applicable principles of international law, such as the principles of *pacta sunt servanda*, cooperation and *bona fide*. International doctrine and jurisprudence have generally accepted that in this case, the principle of cooperation translates in two neighbouring coastal States sharing information on the existence of common resources, including the obligation to inform on the intent to develop a certain resource when such development activities may affect the interests of the other State. ② Accordingly, the principle of cooperation is not the legal source of a States' obligation to adopt and implement a regime of joint development of a common hydrocarbon deposit, without foregoing States' duty to negotiate and to peacefully settle their disputes. ③ In fact, although UNCLOS does not foresee a *pactum de contrahendo*, it does nonetheless envisage a *pactum de negotiando*, the scope of which may be summarized as follows: States are bound to negotiate in good faith even when an agreement has not been

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① In a different view, see Zhiguo GAO, The legal concept and aspects of joint development in international law, in *Ocean Yearbook*, Vol. 13, 1998, pp. 112～113; Legal aspects of joint development in international law, in Mochtar KUSUMA-ATMADJA, Thomas A. MENSAH and Bernard H. OXMAN, ed. *Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda* 21, The Law of the Sea Institute, University of Hawaii, 1983, p. 633.

② Mark J. Valencia, Regional maritime regime building: prospects in northeast and southeast Asia, *Ocean Development and International Law*, Vol. 31, No. 3, 2000, p. 224; Rodman R. Bundy, Natural resource development (oil and gas) and boundary disputes, in Gerald H. Blake, William J. Hildesley, Martin A. Pratt, Rebecca J. Ridley and Clive H. Schofield ed., *The Peaceful Management of Transboundary Resources*, London/Dordrecht/Boston: Graham & Trotman, 1995, pp. 36, 39; ICJ Reports 1974, pp. 35～36.

③ Articles 279 and 299 UNCLOS. *See* ICJ Reports 1974, p. 33, 74 and 75, pp. 35～36.

reached. ①

In what concerns the principle of *bona fide*, States are bound to act and negotiate in good faith in order to achieve an acceptable result, engaging in meaningful and lawful negotiations under international law, without being subject to executing an agreement. ②

States are further bound to an obligation of mutual restraint which implies that States may not practice or abstain from practicing any act that may be susceptible of damaging or making any solution or the means selected to achieve such a solution unviable. ③ As a result, States may not continue or engage in the development of a common hydrocarbon deposits during negotiations without the consent of all relevant States.

One other aspect to consider regarding the applicability of the principle of *bona fide* is the right of every State to be informed on the existence and location of resources that might be susceptible of being found in an area subject to the latter' sovereignty or jurisdiction or where claims overlap, naturally without prejudice of sensible information. ④ The principle reason for this *ratio* is self-evident. If such obligation was not to exist, it would be disadvantageous

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① Articles 63(1), 74(3), 83(3), 117, 118 and 123 of UNCLOS. *See* Rainer Lagoni, Report of the International Committee on the EEZ, in International Law Association ed., *Report of the Sixty-Fifth Conference: Cairo* (1992), p. 5.

② Article 2(2) of the Charter of the United Nations. Articles 74(3) and 83(3) of UNCLOS. *See*, ICJ Reports 1982, Judge Gros' Dissenting Opinion, 3 and 4; *ICJ Reports* 1974, pp. 35～36 and 1969, 48 and 85; *ICJ Reports* 1969, 48 and Judge Jessup' Separate Opinion, 80. Also see Peter D. Cameron, The rules of engagement: developing cross-border petroleum deposits in the North Sea and the Caribbean, *International and Comparative Law Quarterly*, Vol. 55, 2006, p. 567; Jon M. Van Dyke, Sharing Ocean Resources: In a Time or Scarcity and Selfishness, in Harry N. Scheiber ed., *Law of the Sea: The Common Heritage and Emerging Challenges*, The Hague/London/Boston 2000, pp. 26～35; E. D. Brown, *The International Law of the Sea*, *V*. 1 *Introductory Manual*, Aldershot/Brookfield USA/Singapore/Sydney: Dartmouth Publishing Company, 1994, pp. 158～159; René-Jean DUPUY and Daniel VIGNES, *A Handbook on the New Law of the Sea*, Vol. 1, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, pp. 477～486; Rainer Lagoni, Interim measures pending maritime delimitation agreements, *American Journal of International Law*, Vol. 78, No. 2, 1984, pp. 355～358; also see International Law Association, *Report of the International Committee on the Principles Applicable to Living Resources Occurring Both within and without the Exclusive Economic Zone or in Zones of Overlapping Claims*, by Professor Dr. Rainer Lagoni (Cairo Conference 1992), p. 29.

③ Juraj Andrassy, Les relations internationales de voisinage, 79 *Recueil des Cours* (1951—II), p. 110.

④ Article 302 of UNCLOS. *See* Rainer Lagoni, Oil and gas deposits across national frontiers, *American Journal of International Law*, Vol. 73, No. 1, 1979, p. 237.

for the State unaware of the said information and cause negotiations to have an inequitable outcome.

Ⅳ. Prospects for Joint Development Agreements of Offshore Hydrocarbon Deposits in the Asia-Pacific Region

International law does not provide enforceable solutions regarding the development of common hydrocarbon deposits nor does it direct in a particular outcome, referring instead to a general obligation of cooperation in the terms previously described. Consequently, it will always depend on States intervention at a bilateral, multilateral or regional level to seek and agree on a legal solution that will allow for the lawful development of the marine riches of the seabed and subsoil of the Asia-Pacific region, having in the background that it is preferable to seek a sensible and pragmatic outcome that may ultimately provide for reasonable prosperity, instead of upholding divisive positions and perpetuating deadlock situations in view of unrealistic exclusive takings.

Considering that the delimitation of the greater part of maritime boundaries in the Asia-Pacific region is a difficult and perhaps an unattainable task, joint development agreements of offshore hydrocarbon deposits may provide the necessary legal framework by means of which States may benefit from the development of hydrocarbon deposits, without prejudice to the respective sovereignty claims while upholding States' respect for the independence and territorial integrity of all States in this region. ①

ASEAN could provide the necessary embodiment of such regional efforts for a growing awareness in Southeast Asia of the benefits resulting from joint development regimes of offshore hydrocarbon deposits, as well as establishing a

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① On the difficulties facing maritime delimitation in the South China Sea and in particular regarding the delimitation of boundaries between South Pacific States and between East Asian States, see Steven Kuan-Tsyh YU, The law of EEZ/Shelf boundary delimitation: the practice of States in the South China Sea, in Chinese Society of International Law ed., *Proceedings of the International Law Association (ILA) First Asian-Pacific Regional Conference*, 1996, pp. 45～48; Donald R. ROTHWELL, The law of the sea in the Asian-Pacific region: an overview of trends and developments, in Chinese Society of International Law ed., *Proceedings of the International Law Association (ILA) First Asian-Pacific Regional Conference*, 1996, p. 58. Both these Authors recognize the innovative character of joint development agreements regarding maritime delimitation disputes. Also see Victor PRESCOTT and Clive SCHOFIELD, Undelimited maritime boundaries of the Asian Rim in the Pacific Ocean, *Maritime Boundaries*, Vol. 3, No. 1, 2001, pp. 1～68.

high-level interaction between States which could be further enhanced with the adherence of East Timor to this organization, thus increasing the number of States with experience and understanding of the advantages represented by this form of internationalization of non-living marine natural resources. In fact, the establishment of an ASEAN joint development cooperation committee or an intergovernmental organization on the development of common offshore hydrocarbon deposits could result in the encouragement of the exercise of self-restraint and consequently bring stability to the region regarding the development of these resources,① in the same way as the Southeast Asian Fisheries Development Center established in December 1967 encourages sustainable fisheries development in the Asia-Pacific region.②

At a bilateral level, efforts between China and Vietnam in the Gulf of Tonkin③ and between the former and the Philippines in the South China Sea④ to introduce a joint development regime should be rightfully acknowledged as

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① The ASEAN Charter; The Declaration on the Conduct of Parties in the South China Sea, made on November 4th, 2002. The Philippines Proposal dated August 16th, 1999 of the ASEAN-China Code of Conduct in the South China Sea. The Joint Statement of the Meeting of Heads of State/Government of the Member States of ASEAN and the President of the People's Republic of China, made on December 16th, 1997. The Joint Declaration by the Republic of the Philippines-Peoples Republic of China Consultations on the South China Sea and on Other Areas of Cooperation and the Joint Declaration on the Fourth Annual Bilateral Consultations between the Socialist Republic of Vietnam and the Republic of Philippines, both made on August 10th, 1995. The ASEAN Declaration on the South China Sea, made on July 22nd, 1992. The Manila Declaration on the South China Sea, made on July 1992. The Principles of Bandung of 1991. The Treaty of Amity and Cooperation in Southeast Asia, made on February 24th, 1976. The Declaration of Bangkok, made on August 8th, 1967.

② On the Southeast Asian Fisheries Development Center, at www. seafdec. org, 1 February 2011.

③ Statement by the Ministry of Foreign Affairs of the People's Republic of China "Chinese Premier Meets with His Vietnamese Counterpart", made on April 17th, 2009, at www. fmprc. gov. cn/eng/wjb/zzjg/yzs/gjlb/2792/2794/t558266. htm, 1 March 2011. China-Viet Nam Joint Statement, made on October 25th, 2008, at www. fmprc. gov. cn/eng/wjdt/2649/t520438. htm, 1 March 2011. Joint Communiqué between the People's Republic of China and the Socialist Republic of Vietnam, made on October 8th, 2004, at www. fmprc. gov. cn/eng/wjdt/2649/t163759. htm, 1 March 2011.

④ "*China will uphold the principle of shelving disputes and seeking joint development, continue to step up cooperation in the South China Sea with the Philippines and other pertinent parties*" in *Communiqué by the Ministry of Foreign Affairs of the People's Republic of China "Ambassador Liu Jianchao pays Courtesy call on Philippine Foreign Affairs Secretary Romulo"*, made on March 13th, 2009, at www. fmprc. gov. cn/eng/wjb/zwjg/zwbd/t542281. htm, 1 March 2011.

representative of China's acceptance of the adoption of interim measures pending maritime delimitation.

In what regards the Northeast Asia region, cooperation should not be expected to increase in the Yellow Sea due to recent military escalation in the Korean peninsula, despite recent efforts by China and South Korea on maritime delimitation. ① Nonetheless, States in the East China Sea have made significant progress in the past years by recognizing the benefits and necessity of regional cooperation. ② In addition, China and Japan have reached an understanding on a possible joint development regime to be implemented in the East China Sea. ③

The main goal should not be to compel or forcibly crystallize an emerging State practice susceptible of constituting the necessary legal customary rule for the enforcement of a joint development obligation of common offshore hydrocarbon deposits, but instead to underline the benefits resulting from implementing such a legal regime. In fact, there is no evidence at a regional or universal level that such obligation has materialized or is emergent based on current State practice. This is also the case of the Asia-Pacific region.

On this subject, some scholars have considered the probable materialization of a regional customary rule in regions with precedents of cooperative regimes between States bordering enclosed or semi-enclosed seas that could offer a good composition for the applicability of a joint development model, providing

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① China-ROK Joint Communiqué, made on September 17th, 2008, at www. fmprc. gov. cn/eng/wjdt/2649/ t513632. htm, 1 March 2011. China-ROK Joint Statement, made on May 26th, 2008, at www. fmprc. gov. cn/eng/wjdt/2649/t469103. htm, 1 March 2011. Also see Mark J. VALENCIA, Conclusions and the way forward, *Marine Policy: International Journal Ocean Affairs*, Vol. 29, No. 2, 2005, pp. 185～187; Conclusions, regime building and the way forward, *Marine Policy: International Journal Ocean Affairs*, Vol. 28, No. 1, 2004, pp. 89～96; Regime building in the East China Sea, *Ocean Development and International Law Journal*, Vol. 34, No. 1, 2003, p. 199; Yann-huei SONG and ZOU Keyuan, Maritime legislation of mainland China and Taiwan: developments, comparison, implications, and potential challenges for the United States, *Ocean Development and International Law Journal*, Vol. 31, No. 4, 2000, pp. 303～345.

② China-Japan Joint Statement on All-round Promotion of Strategic Relationship of Mutual Benefit May 22nd, 2008 at www. fmprc. gov. cn/eng/wjdt/2649/t458431. htm, 1 March 2011.

③ Communiqué by the Ministry of Foreign Affairs of the People's Republic of China, "China's Path of Peaceful Development and Its View of Regional Security", Speech by Ambassador Zhang Junsai, at www. fmprc. gov. cn/eng/wjb/zwjg/zwbd/t520658. htm, 1 March 2011. Also see GAO Jianjun, A note on the 2008 cooperation consensus between China and Japan in the East China Sea, in *Ocean Development and International Law Journal*, Vol. 40. 2009, pp. 291～294.

a solution for the predicament of delimitation of maritime boundaries and the development of non-living resources. These regions would include the North Sea, the Persian Gulf and the East and South China Seas. ①

The existence of such a regional custom applicable to enclosed or semi-enclosed seas where States' sovereignty claims overlap would have the advantage of overcoming the problem of compatibility between the principle of cooperation established in article 123 of UNCLOS and States' rights set out in article 56 of UNCLOS, without amending current law of the sea. However, the obligation of States to cooperate under article 123 of UNCLOS should not be understood as an obligation of result, in particular when considering coastal States' rights in the different maritime areas, rather instead an obligation of means in the specific case of States bordering enclosed or semi-enclosed seas. In fact, UNCLOS failed to regulate States' rights in enclosed and semi-enclosed seas, despite promoting cooperation between States in these maritime spaces. Therefore, unless States agree to grant such rights to a regional entity, article 123 of UNCLOS would represent an obstacle to regional cooperation. ② Moreover, article 123 of UNCLOS makes no reference to non-living marine natural resources.

Should such regional obligation exist it would be nearly impossible to identify the circumstances that ought to be considered in each case for the purpose of implementing a mandatory obligation of joint development agreement of offshore hydrocarbon deposits, as well as what would be the legal framework of such a joint development effort considering that there is no model of agreement that could be applicable indiscriminately.

In essence, States remain free to implement a bilateral or multilateral effort regarding the development of common hydrocarbon deposits, which may include establishing a joint development regime, or any other form of internationalization of marine natural resources, such as taking part in regional organizations and adopting rules of conduct regarding, for example, the exchange of information between the relevant States on the existence and location of common hydrocarbon deposits or adopting preventive and cooperative measures on

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① David ONG, Joint development of common offshore oil and gas deposits: "mere" state practice or customary International Law? *American Journal of International Law*, Vol. 93, No. 4, 1999, p. 795, p. 804.

② VALENCIA, Regional maritime regime building: prospects in northeast and southeast Asia, *Ocean Development and International Law Journal*, Vol. 31, No. 3, 2000, p. 237.

transboundary pollution in conformity with international law. ①

Ⅴ. Provisions of Joint Development Agreements of Offshore Hydrocarbon Deposits

The joint development agreements of offshore hydrocarbon deposits that have been implemented in the Asia-Pacific region adopt different legal frameworks and include different legal provisions. This is not a characteristic only common to these agreements but also of other joint development agreements of offshore hydrocarbon deposits that have been executed in the past fifty years in different regions of the world.

The dissimilarity between the content of known joint development agreements of offshore hydrocarbon deposits is the result of the specific, lengthy and complex negotiations of each agreement due to the different concerns and expectations of the relevant States.

The most comprehensive joint development agreements of offshore hydrocarbon deposits are those that establish a legal regime which is fairly independent from States' direct intervention in the management of resources by creating an entity existing under international law to which these States grant the competence and autonomy established in the respective agreement for the purpose of managing the development of resources, including granting operators the necessary development rights, collecting revenues and taxes and settling disputes, amongst other attributions. In such cases, States establish the necessary mechanism of control of these entities activities, for example, by creating a committee or body hierarchically superior to the latter where States are represented for the purpose of appointing the members of the entity or approving its budget. ② Alternatively, States may choose to maintain an active role by resorting to the relevant national authorities or State-owned companies for the purpose of managing or developing the resources found in the joint development

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① Resolutions UN (GA) 2996 (XXVII), 2997 (XXVII) and 2295 (XXVII), all dated December 15th, 1972, and specially Resolution UN (GA) 3129 (XXVIII), December 13th, 1973 regarding environmental cooperation on joint development of natural resources; UNEP Doc. GC. 6/CRP. 2 May 19th, 1978. See Charles Robson, Transboundary petroleum reservoirs: legal issues and solutions, in Gerald H. Blake, William J. Hildesley, Martin A. Pratt, Rebecca J. Ridley and Clive H. Schofield ed., *The Peaceful Management of Transboundary Resources*, London/Dordrecht/Boston: Trotman & Martinus Nijhoff, 1995, pp. 3～4.

② Timor Gap Treaty and Timor Sea Treaty.

zone created in the respective agreement. ①

There are different layers of legal interaction that may be established under the umbrella of a joint development agreement of offshore hydrocarbon deposits. These include the rights and obligations between States, among States and operators or entities created by the relevant States and operators, as well as the rights and obligations between different operators in the event that two or more operators might develop a common hydrocarbon deposit. This would be the case, for example, if two or more operators would be made to implement a unitization regime of a common hydrocarbon deposit in order to secure its efficient development. ②

The intricacy of the regime of a particular joint development agreement will depend on the level of trust between the intervening States and its acceptance of the matters to be included, as well as the latter's commitment to implement a relatively comprehensive legal regime that may regulate the use of a joint development zone by intervening and third States, such as concerning the prevention of pollution and protection of the marine environment or the delineation of the course for the laying of pipelines and submarine cables.

Traditionally, some legal provisions have been considered as representing the essential legal content of joint development agreements of offshore hydrocarbon deposits, despite the diversity of known joint development agreements of offshore hydrocarbon deposits and States' discretionary powers. These are the designation of a joint development zone, the identification of the natural resources to be developed, the establishment of a jurisdictional and legal framework applicable in the joint development zone and the terms and conditions under which the operations are to take place, including the regulation of the access to operations and the means chosen for the purpose of granting such operating

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① MoU between Malaysia and Vietnam.

② Unitization may be characterized as a coordinated effort by two or more parties to develop a common hydrocarbon deposit as if it was one single unit, regardless of overlapping claims or of international boundaries that they cross, while preserving its geological characteristics combined with the purpose to retrieve as much of its content as possible.

rights. ①

Nonetheless, States have included other matters in recent joint development agreements of offshore hydrocarbon deposits due to the growing awareness of the potential represented by these regimes as a means to regulate the control and management of a joint development zone during a substantial period of time, such as the development of living marine natural resources, the implementation of health and safety and employment regulations, or the approval of a common tax regime applicable to the activities developed in the joint development zone.

Ⅳ. Conclusion

The entry into force of UNCLOS did not provide an answer or guidelines in respect of the development of offshore hydrocarbon deposits shared by two or more States or found in areas of overlapping sovereignty claims. UNCLOS merely foresees a reinforced obligation resulting from the principle of cooperation established under international law, which consists of States undertaking meaningful efforts towards reaching an understanding on maritime delimitation or interim measures whenever States fail to agree on the delimitation of maritime boundaries. However, this reinforced obligation does not imply that States shall cooperate on the conservation and management of non-living marine natural resources or enter into maritime delimitation agreements or implement interim measures, such as joint development agreements of offshore hydrocarbon deposits.

There is no correlation between joint development agreements of offshore hydrocarbon deposits and the delimitation of maritime boundaries, nor should the former be perceived as an alternative to the latter or a replacement of the same, given that these agreements have been implemented before, after and

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① Rainer LAGONI, Festlandsockel und Ausschließliche Wirtschaftszone, in Wolfgang Graf VITZTHUM (colabs.) Gerhard HAFNER, Wolff Heintschel VON HEINEGG, Rainer LAGONI, Alexander PROELβ, Wolfgang Graf VITZTHUM and Rüdiger WOFRUM ed., *Handbuch des Seerechts*, Verlag Munich: C. H. Beck, 2006, p. 281; Hazel FOX, Paul MCDADE, Derek Rankin REID, Anastasia STRATI and Peter HUEY ed., *Joint Development of Offshore Oil and Gas. A Model Agreement for States for Joint Development with Explanatory Commentary*, London: The British Institute of International and Comparative Law, 1989, pp. 333～372; Nuno MARQUES ANTUNES, *Towards the Conceptualisation of Maritime Delimitation-Legal and Technical Aspects of Political Process*, Leiven/Boston: Martinus Nijhoff Publishers, 2003, pp. 292～293.

concurrently with the delimitation of maritime boundaries.

The purpose of joint development agreements of offshore hydrocarbon deposits is not to achieve the internationalization of maritime areas or alter the legal regime applicable to the spatial organization of the seas and oceans which ultimately defines the legal nature and content of States' rights and obligations in each maritime area. In fact, when entering into joint development agreements of offshore hydrocarbon deposits, States are mainly considering the respective national interests, instead of any collective or universal welfare consistent with a holistic approach to the development of non-living marine natural resources.

Nonetheless, the absence of a joint development obligation of offshore hydrocarbon deposits shared by two or more States or found in areas of overlapping sovereignty claims does not imply that States are not bound to certain obligations under international law regarding these resources. These obligations include principally the duty to inform the relevant States on shared offshore hydrocarbon deposits and not to practice or abstain from practicing any act that may be susceptible of damaging or making unattainable any solution concerning such resources or the means selected to achieve a particular solution.

The presence of offshore hydrocarbon deposits has been and continues to be an impediment to maritime delimitation in the Asia-Pacific region and an important source of conflict between the relevant States. The strengthening of regional efforts and the continuing awareness of the advantages of joint development agreements of offshore hydrocarbon deposits as a pragmatic and reliable legal option to overcome such deadlock situations could be the key to open an era of cooperation and ultimately provide an economic, political and social improvement of the Asia-Pacific region.

(Editors: HUANG Haiqi; CHEN Xiaoshuang)

海洋油气矿藏共同开发协议：亚太地区海洋划界的替代方案

Vasco Becker-Weinberg*

内容摘要：在过去的几年里，开发人类近期难以企及的深海资源的技术可行性，以及扩大国家管辖以确保对非生物海洋自然资源之占有的渴望，已经使得沿海国对海洋领域尤其是对大陆架领域的主张增多。

纵观地球上的不同区域，亚太地区就是一个因对海洋油气矿藏的潜在开发引发有关沿海国家之争端的明显例证。事实上，一方面考虑到现有的争端以及该区域已划定的海洋边界数量，另一方面考虑到对能源需求的不断增长，海洋油气矿藏的开发权对亚太地区国家而言无疑已成为了一个关键议题。

虽然当代国际公法尤其是海洋法对此类争端的解决没有规定一个直截了当的做法，但是国家实践以及一些国际判例都就未决的海洋划界问题考虑了一些临时措施。

在某些情况下，例如共同开发协议这样的临时方案，已经允许对跨界的或在主权要求重叠区域发现的共同海洋资源的共同开发。在帝汶海、中国东北部海域和泰国湾实施的共同开发机制即是如此。

因此，虽然已知的海洋油气矿藏共同开发协议在法律上存在差异，各自概念和法律性质远未统一，但是经全面分析这些殊异的协议，提出一个适合于亚太地区具体情况并能最终改善该地区的经济、政治和社会状况的法律解决方案还是可能的。

关键词：海洋划界　海洋油气矿藏开发　亚太地区

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一、引 言

(一)海洋划界和海洋油气矿藏开发

海洋油气矿藏的位置和性质,尤其是允许它们在岩石间隙自由流动这一在底土地质层间的流动性以及它们不可能停留在特定区域的性质,提出了两个或两个以上国家共同开发这一重要且独特的法律问题。

根据当前的海洋法,各国行使适用于各自海域的法律制度,尤其是有关生物海洋与非生物自然资源的开发法律制度项下的权利。

就大陆架而言,各国对开发在此发现的资源享有专属且不可剥夺的权利,无论有无事先宣告或占有这一海域。[①]然而,就专属经济区而言,有关沿海国的权利取决于该国的事先宣告并应被视为纯粹的结果权利(相比大陆架制度而言),有关资源开发的主权权利尤其如此。[②]

根据《联合国海洋法公约》,[③]距离标准的采纳是为了划分大陆架边界,也是为了实现一个公平的结果,而非为了顺应海床的物理特性以及自然延伸(它们被

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① Article 77 (2) *in fine*(3) of UNCLOS. *See* Nguyen Quoc DINH, Patrick DAILLER and Alain PELLET, *Droit International Public*, 7th ed., Paris: Librairie Générale de Doit et de Jurisprudence/E. J. A., 2002, p. 1192; Victor PRESCOTT, National rights to hydrocarbon resources of the continental margin beyond 200 nautical miles, in Gerald BLAKE, Martin PRATT, Clive SCHOFIELD and Janet Allison BROWN ed., *Boundaries and Energy: Problems and Prospects*, London/The Hague/Boston: Kluwer Law International, 1998, pp. 51～52; Philip ALLOTT, Mare Nostrum: a new international Law of the Sea, *American Journal of International Law*, Vol. 4, 1992, pp. 767～768; René-Jean DUPUY and Daniel VIGNES, *A Handbook on the New Law of the Sea*, Vol. 1, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, pp. 315～381; Laurent LUCCHINI and Michel VOELCKEL, *Droit de la Mer, La Mer et son Droit. Les espaces maritimes* (t. 1), ed., Paris: Pedone, 1990, pp. 164～169; Jean COMBACAU, *Le Droit de la Mer*, ed., Paris: Presses Universitaires de France, 1985, pp. 58～67; Charles ROSSEAU, *Droit International Public. Les Relations Internationales* (t. 4), ed., Paris: Sirey, 1980, pp. 358～359.

② Article 56 UNCLOS. *See* International Law Association, *Report of the International Committee on the Principles Applicable to Living Resources Occurring Both within and without the Exclusive Economic Zone or in Zones of Overlapping Claims*, by Professor Dr. Rainer Lagoni (Cairo Conference 1992), pp. 1～32; René-Jean DUPUY and Daniel VIGNES, *A Handbook on the New Law of the Sea*, Vol. 1, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, pp. 275～307.

③ The United Nations Convention on the Law of the Sea, made in Montego Bay, on December 10th, 1982, published at 1833 UNTS 3.

认为是无关的)。[①]

在海岸相邻或相对的情况下,《联合国海洋法公约》规定划界应使用一条中间线,为诸如第三国出现等可能证明其修改正当的特殊情况留下余地,尽管海洋法公约在大陆架和专属经济区划界上倾向于使用公平原则而非中间线。[②]

第三国对大陆架和对专属经济区的权利有着明显的区别,尽管这两种制度在国家对海床和底土的权利规定上有许多重合。即便在《联合国海洋法公约》引进专属经济区制度前,已经非常明显的是,为了确保沿海国对海床的主权要求与第三国开发在此发现的其他资源如渔业资源的权利兼容,[③]这一区别还是有必要的。

事实上,虽然两种制度都包含对海床和底土的规定,并注重以勘探及开发自然资源为目的的主权权利,但只有大陆架制度下的权利才具有专属性。[④]在专属经济区内,沿海国必须适当顾及其他国家的权利和义务,并且以符合这些权利、义务和自由的方式行动,但在大陆架上,只有沿海国才有权行使勘探和开发在此发现的非生物海洋自然资源及定居物种这一固有的、排他的主权权利,只有沿岸国明确表示同意,其他国家才能从事类似行为。这就意味着,如果沿海国选择不勘探和开发在大陆架内发现的非生物海洋自然资源及定居物种,其他任何国家

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① Article 76 of UNCLOS. *See* ICJ Reports (1984), pp. 261～266, pp. 312～317, pp. 339～344 and (1981), p. 88, 127; E. D. BROWN, *Sea-bed Energy and Minerals: the International Legal Regime. The Continental Shelf*, Vol. 1, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1992, pp. 19～23; L. Dolliver M. NELSON, The roles of equity in the delimitation of maritime boundaries, *American Journal of International Law*, Vol. 84, No. 4, 1990, p. 846; Shigeru ODA, *The Law of the Sea in Our Time-I. New Developments* 1966－1975, 3 Publications in Ocean Development, Leyden: A. W. Sijthoff, 1977, p. 254.

② Articles 74 and 83 of UNCLOS. *See* ICJ Reports (1985), pp. 41～43, pp. 56～57.

③ Cecil J. B. HURST, Whose is the bed of the Sea? *British Yearbook of International Law*, Vol. 4, 1923－24, p. 43.

④ Articles 56(1), 57 and 76(1) of UNCLOS. *See* Francisco ORREGO VICUÑA, La zone économique exclusive dans la législation et la pratique des États, in *Droit de La Mer* (v. 2) (coord.) Jean COMBACAU /Pierre-Marie DUPUY ed., Paris: Pedone, 1990, pp. 44～45; *The Exclusive Economic Zone. Regime and Legal Nature under International Law*, Cambridge/New York/Port Chester/Melbourne/Sydney: Cambridge University Press, 1989, p. 71; Barbara KWIATKOWSKA, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, 2 Publications on Ocean Development, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1989, pp. 91～92; David Joseph ATTARD, *The Exclusive Economic Zone in International Law*, Oxford: Clarendon Press, 1987, pp. 192～210; Julio César LUPINACCI, The legal status of the exclusive economic zone in the 1982 Convention on the Law of the Sea, in Francisco ORREGO VICUÑA ed., *The Exclusive Economic Zone. A Latin American Perspective*, 1 Foreign Relations of the Third World, Boulder Colorado: Westview Press, 1984, pp. 105～111; Hugo CAMINOS, The regime of fisheries on the exclusive economic zone, in Francisco ORREGO VICUÑA ed., *The Exclusive Economic Zone. A Latin American Perspective*, 1 Foreign Relations of the Third World, Boulder Colorado: Westview Press, 1984, pp. 151～155.

未经允许都不能这么做。①

沿海国在大陆架的权利并不具有绝对性,在这个意义上,他们不知道任何限制。《联合国海洋法公约》明确规定,沿海国对大陆架的权利不影响上覆水域以及这些水域之上的大气空间的法律地位,也不影响其他国家诸如铺设海底电缆和管道、航行以及开展国际合作促进海洋科学研究活动等的权利与自由。②

专属经济区保证了这两种制度之间的兼容性,沿海国在海床和底土上应以符合大陆架制度规定的方式行动,不统摄这两个海洋空间和简单地补足它们之间的划界。③

在大陆架划界方面,《联合国海洋法公约》包括了适用于在对 200 海里的主张发生重合的封闭及半封闭海域中具有(延伸的)200 海里相邻边界或具有相对边界国家之间划界的规则,以及适用于群岛国家之间或对该海域的主张发生重合的情况划界,且不损害未参与划界协议的国家的权利的规则。④

当主权要求产生重叠而各国未能对划界达成协议时,通常诸如共同开发协议这样的临时措施就发挥着充当一个务实的解决办法的作用,尤其是在开发归属不明的矿藏资源时。⑤如果油气矿藏横跨两国边界,可被界线双方开发,那么这些国家可以采取一种共同开发的方式开发共同海洋油气矿藏。然而,如果它们未能就划界或合作协议的达成一致,沿海国都不能从事任何对共同海洋油气矿藏产生影响的行为。⑥

各国的活动不能是为了试图占有或事实占有各自海域且必须适当顾及第三国的权利。事实上,如果两个国家同意共同开发在某一海域发现的海洋油气矿藏,而第三国也对此主张权利,那么若无后者的同意或参与,有关国家不得实施

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① Articles 55,56 77(2) (4) and 81 of UNCLOS.

② Articles 58,78,79 and 87(1) (a) and Part XIII of UNCLOS.

③ Article 56 (3) UNCLOS. *See* David Joseph ATTARD, *The Exclusive Economic Zone in International Law*, Oxford: Clarendon Press, 1987, p. 139.

④ Article 48,76 (10),83 and 134 (4) and article 9 of Annex Ⅱ of UNCLOS.

⑤ Sun Pyo KIM, *Maritime Delimitation and Interim Arrangements in North East Asia*, Hague/London/New York: Martinus Nijhoff Publishers, 2004, p. 12; Rodman R. BUNDY, State practice in maritime delimitation, in Gerald H. BLAKE, ed., *World Boundaries. Maritime Boundaries* (v. 5), London/New York: Routledge, 1994, pp. 36 ~ 40; Mark J. VALENCIA, Joint jurisdiction and development in southeast Asia seas: factors and candidate areas, in Mark J. VALENCIA, ed., *Geology and Hydrocarbon Potential of the South China Sea and Possibilities of Joint Development*, New York/Oxford/Toronto/Sydney/Paris/Frankfurt: Pergamon Press, 1985, p. 575.

⑥ Article 83(3) UNCLOS *in fine*.

该协议,否则对导致的损失需承担国际责任。[①]

此外,海洋油气矿藏共同开发协议项下共同开发区的划定并不取代海洋划界,共同开发区也不构成对海洋边界的临时划界。共同开发海洋自然资源和海洋划界这两个议题不应被混淆,这两者之间的关联性也不应被认为是两者择其一的关系。认为划界是开发共同海洋自然资源的先前程序或者前提条件的假设很可能被证明是武断的,因为它们很可能共存,甚至当合作开发协议已经得以成功实施,只要各国不必处理共同资源管理这一复杂而费力的问题,从而利于对海洋划界的解决,各国最终还是会对海洋划界达成一致。在这些情况下,各国均期待一个允许开发海洋资源的临时措施,海洋边界争端最终将不复存在或不再突显。

根据《联合国海洋法公约》第74条第3款和第83条第3款,各国实施的任何临时措施都应具有可操作性且不得妨害最终划界,这必然意味着无论对争议的海洋划界采取何种临时措施,最终划界始终取决于国家之间的自愿协议。此外,第三国在共同开发区内有权行使《联合国海洋法公约》第七编规定的公海自由,尽管有国家控制并管理着这些地区。

(二)海洋油气矿藏共同开发协议的概念

海洋油气矿藏共同开发协议是各国为克服海洋划界程序和共同资源开发的障碍探索出来的兼具创造性和实用性的法律途径,尽管寻求一个解决共同海洋油气矿藏开发难题的法律方法的创造性和实用主义往往是经济驱动的结果,而非法律驱动的结果。因此,各国的合作是整合经济利益和更好更有效开发自然资源之需的成果。

考虑到现有对海洋划界僵持不下的争端数量,以及尤其考虑到巴林和沙特阿拉伯在五十多年前签署首份协议而只有很少的协议得到实施,[②]尽管它们以

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① ICJ Reports 1997, p. 178, 152. *See* Betsy Baker Röben, Civil liability as a control mechanism for environmental protection at the international level, in Fred L. Morrison/Rüdiger Wolfrum ed., *International, Regional and National Environmental Law*, The Hague/London/Boston: Kluwer Law International, 2000, p. 836; Rüdiger WOLFRUM, Means of ensuring compliance with and enforcement of international environmental law, 272; The Hague/London/New York: Martinus Nijhoff Publishers, 1998, pp. 81～82; International Law Association, *Report of the International Committee on the Principles Applicable to Living Resources Occurring Both within and without the Exclusive Economic Zone or in Zones of Overlapping Claims*, by Professor Dr. Rainer Lagoni (Cairo Conference 1992), p. 24.

② Bahrain-Saudi Arabia Frontier Agreement, made on February 22nd, 1958, published at UNTS 1733 (1993), pp. 3～13.

前也就陆上资源共同开发考虑过这个做法,[①]海洋油气矿藏共同开发协议的数量甚少。

这可能是由于对海洋油气矿藏共同开发协议的法律特点,以及这些协议促成一个可能最终改变某一地区地缘政治环境的法律方案的优点缺乏了解。在某些情况下,各国由于政治、社会和经济上的差异,甚至是由于缺乏促进必要互依互靠进而从双边、区域或多边层面解决这些争端的外交关系,拒绝、反对或不予理会其他国家解决这类争端的尝试。[②]在其他场合,国家会采取不同的有时是激进的解决方案,包括军事占领岩礁和岛屿以强化各自对争议海域及周边区域的要求,从而确保对在此区域发现的海洋自然资源的开发权的非法授予,南沙群岛

① Agreement between the Government of the Czechoslovak Republic and the Austrian Federal Government concerning the Principles of Geological Co-operation between the Czechoslovak Republic and the Republic of Austria, made in Prague, on January 23rd, 1960, published at 495 UNTS 7241 (1964), pp. 112～122. Agreement between the Government of the Czechoslovak Republic and the Austrian Federal Government Concerning the Working of Common Deposits of Natural Gas and Petroleum, made in Prague, on January 23rd, 1960, published at 495 UNTS 7242 (1964), pp. 134～140.

② Douglas M. JOHNSTON and Mark J. VALENCIA, *Pacific Ocean Boundary Problems. Status and Solutions*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1991, pp. 24～26.

的情况即为一例。[①]

海洋油气矿藏共同开发协议还可能包括生物资源的勘探和开发。事实上，共同开发的概念最初即用于国际渔业管理，之后才用于海洋油气矿藏共同开发。

共同开发这一概念适用于大陆架和专属经济区。事实上，有关专属经济区和大陆架重叠的争端并不一定指向海洋划界，因为国家可能为了勘探和开发各自的海洋自然资源而决定建立合作开发机制。各国可以选择在某一特定法律框架下建立的一个或多个共同开发区里开发生物与非生物海洋自然资源，允许各国同时开发跨界油气矿藏并实施共同的渔业储备管理政策。

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① Jon M. VAN DYKE, Disputes over islands and maritime boundaries in East Asia, in Seoung-Yong HONG and Jon VAN DYKE ed., *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, Martinus Nijhoff Publishers, 2009, pp. 62～75; Alex G. Oude ELFERNIK, The Islands in the South China Sea: how does their presence limit the extent of the high seas and the Area and the maritime zones of the mainland coasts? *Ocean Development and International Law*, Vol. 32, No. 2, 2001, pp. 169～191; Monique CHEMILLER-GENDREAU, *Sovereignty over the Parcel and Spratly Islands*, The Hague/London/Boston: Kluwer Law International, 2000, pp. 141～143; ZOU Keyuan, The Chinese traditional maritime boundary line in the South China Sea and its legal consequences for the resolution of the dispute over the Spratly Islands, *The International Journal of Marine and Coastal Law*, Vol. 14, No. 1, 1999, pp. 27～55; Mark J. VALENCIA and Jon M. VAN DYKE, Comprehensive solutions to the South China Sea disputes: some options, in Gerald BLAKE, Martin PRATT, Clive SCHOFIELD and Janet Allison BROWN ed., *Boundaries and Energy: Problems and Prospects*. International Boundary Studies Series, London/The Hague/Boston: Kluwer Law International, 1998; Christopher C. JOYNER, The Spratly Islands dispute: rethinking the interplay of law, diplomacy, and geopolitics in the South China Sea, *The International Journal of Marine and Coastal Law*, Vol. 13, No. 2, 1998, pp. 193～236; Lian A. MITO, The Timor Gap treaty as a model for joint development in the Spratly islands, *American University International Law Review*, Vol. 13, No. 3, 1998, p. 752; Daniel J. DZUREK, The Spratly Islands dispute: who's on first?, *Maritime Boundaries*, Vol. 2, No. 1, 1996, pp. 1～67; Brian K. MURPHY, Dangerous ground: the Spratly islands and international law, *Ocean and Coastal Law Journal*, 1994, pp. 187～212; Jon M. VAN DYKE and Dale L. BENNETT, Islands and the delimitation of the Ocean Space in the South China Sea, *Ocean Yearbook*, Vol. 10, 1993, pp. 54～89; Ted MCDORMAN, The South China Sea islands dispute in the 1990s-a new multilateral process and continuing friction, *The International Journal of Marine and Coastal Law*, Vol. 8, No. 2, May 1993, pp. 272～276; S. p. JAGOTA, Maritime boundary and joint development zones: emerging trends, *Ocean Yearbook*, Vol. 10, 1993, pp. 126～127; Hungdah CHIU and Choon-Ho PARK, Legal status of the Parcel and Spratly Islands, *Ocean Development and International Law Journal*, Vol. 3, No. 1, 1975, pp. 1～28; Mark J. VALENCIA, National marine interests in Southeast Asia, in George KENT/Mark J. VALENCIA ed., *Marine Policy in Southeast Asia*, Berkeley/Los Angeles/London: University of California Press, 1985, pp. 33～57; Jeanette GREENFIELD, China and the Law of the Sea, in James CRAWFORD and Donald R. ROTHWELL ed., *The Law of the Sea in the Asian Pacific Region*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1995, pp. 21～40.

每个共同开发协议的法律特性都是独特的,这使得确定或就其关键条款甚至是海洋油气矿藏共同开发协议这一概念的定义达成共识非常困难。

共同开发协议已被认为是海洋划界的一种替代选择,允许各国在平等享有国家主权要求重叠的特定海域里发现的资源的同时,共同参与勘探和开发油气矿藏。[①]然而,这种共同开发协议的范围并不包括最终的海洋划界后以及当国家要求不发生重叠时实施的那些协定。此外,当谈到建立收入或成本分担计划时,还没有可以参考的经验,因为国家可以根据自身的利益及这些协议的实用性自行定义合作开发协议的内容。[②]

对共同开发协议的另一个看法是,两国共同开发在国家管辖区域内发现的非生物海洋自然资源的主权权利存在重合。[③]这种观点从根本上认为介入国只能行使共同开发协议中的主权权利,这种共同开发行为的范围只限于开发非生物海洋自然资源。[④]然而,从共同开发海洋油气矿藏协议概念而来的共同开发生物海洋自然资源之撤销,可能会被证明无法完全代表国家在海洋自然资源国际化方面的实践。[⑤]此外,共同开发海洋油气矿藏协议的设想不可避免地在后者与有违此种合作的法律环境的国家主权权利之间建立起了联系。

在共同开发海洋油气矿藏的概念下,包括开发生物海洋自然资源看来可能

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① William T. ONORATO, Promoting foreign investment through international petroleum joint development regimes, *ICSID Review*, Vol. 1, No. 1, 1986, pp. 81～88; ZOU Keyuan, The Chinese traditional maritime boundary line in the South China Sea and its legal consequences for the resolution of the dispute over the Spratly Islands, *The International Journal of Marine and Coastal Law*, Vol. 14, No. 1, 1999, p. 157.

② Mark J. VALENCIA, Joint jurisdiction and development in southeast Asia seas: factors and candidate areas, in Mark J. VALENCIA, ed., *Geology and Hydrocarbon Potential of the South China Sea and Possibilities of Joint Development*, New York/Oxford/Toronto/Sydney/Paris/Frankfurt: Pergamon Press, 1985, p. 576.

③ Mark J. VALENCIA, Taming troubled waters: joint development of oil and mineral resources in overlapping claim areas, *San Diego Law Review*, Vol. 23, No. 3, 1986, p. 683; Douglas M. JOHNSTON and Mark J. VALENCIA, *Pacific Ocean Boundary Problems. Status and Solutions*, Shigeru ODA ed., Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1991, p. 36. Ian TOWNSEND-GAULT and William G. STORMONT, Offshore petroleum joint development arrangements: functional instrument? Compromise? Obligation? In Gerald H. BLAKE, William J. HILDESLEY, Martin A. PRATT, Rebecca J. RIDLEY and Clive H. SCHOFIELD ed., *The Peaceful Management of Transboundary Resources*, London/Dordrecht/Boston: Graham & Trotman/Martinus Nijhoff, 1995, p. 51.

④ David ONG, The legal status of the 1989 Australia-Indonesia Timor Gap Treaty following the end of Indonesian rule in East Timor, *Netherlands Yearbook of International Law*, Vol. 31, 2000, p. 121.

⑤ On the internationalization of marine natural resources, see Vasco BECKER-WEINBERG, The internationalization of marine natural resources in UNCLOS, in Rainer Lagoni, Peter Ehlers and Marian Paschke ed., *Recent Developments in the Law of the Sea*, Berlin/Munster/Vienna/Zurich/London: LIT Verlag, 2010, pp. 9～54.

令人费解。然而,实践已经证实,国家愿意利用在开发共同海洋油气矿藏这一棘手问题上达成的共识,从而将那些处理共同控制某一特定海域的其他相关事项的规定也囊括进来。[①]此外,各国可能会扩大合作以包括诸如航行安全、海洋科学研究或海洋环境保护等问题。事实上,共同开发协议的现状表明,它们可能还包括不属于国家主权范围内的其他权利的行使,尽管其中一些协议未能明确各国同意在共同开发区内行使的这些权利的性质,加强乃至推进这些协议相比于主权权利行使在功能与实用上的意义。[②]

虽然共同开发协议还只在双边层面实施,但是对建立多边合作开发协议已有很多尝试,包括在区域的框架下解决海洋划界争端的尝试。[③]

因此从一个更广的意义上看,共同开发协议可以被定义为:两个或两个以上的国家为勘探和开发在海洋土壤和底土中发现的自然资源而实施的安排。然而,鉴于当前的国家实践,对海洋油气矿藏共同开发协议更严格的法律描述将定义后者为:涉及自然资源可能被发现的海域,主要但不限于规定勘探和(或)开发活动及共同管理在海床和海洋底土中发现的油气矿藏,以及实施介入国认为必要或有关的所有活动,且不损害国际法授予的第三国在先的权利和自由,由两个或两个以上有权(尽管不依赖于介入国主张的此类权利)国家签署的、由国际法调整的、可以自我调节的合约性文件。

然而,面对不断发展的国家实践以及谈判及加入国际协议的国家自由裁量权,这个定义可能会被证明是不恰当的。

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① Treaty between the Federal Republic of Nigeria and the Democratic Republic of Sao Tome and Principe on the Joint Development of Petroleum and Other Resources in Respect of Areas of the Exclusive Economic Zone of the Two States, made in Abuja, on February 21st, 2001, at www. nigeriasaotomejda. com, 5 March 2011.

② Hazel FOX, Paul MCDADE, Derek Rankin REID, Anastasia STRATI and Peter HUEY ed., *Joint Development of Offshore Oil and Gas: A Model Agreement for States for Joint Development with Explanatory Commentary*, London: The British Institute of International and Comparative Law, 1989, pp. 49～50.

③ On the unsuccessful French proposal for a joint development regime with Spain and Italy as an alternative to maritime boundary delimitation, see Umberto LEANZA, The delimitation of the continental shelf of the Mediterranean Sea, *The International Journal of Marine and Coastal Law*, Vol. 8, No. 3, 1993, p. 388. Also see, Agreement between the Government of the Republic of Indonesia, the Government of Malaysia and the Government of the Kingdom of Thailand Relating to the Delimitation of the Continental Shelf Boundaries in the Northern Part of the Strait of Malacca, published at National Legislative Series, UN Doc. No. ST/LEG/SER. B/18, p. 429 (1976). This agreement provides that a hydrocarbon deposit that should straddle a boundary line will only be developed after consultation between the three States.

二、亚太地区的国家实践

(一)帝汶海

东帝汶和澳大利亚的海岸间距离大概为 250 海里,[①]这就使得两国的大陆架会发生重叠。

澳大利亚根据被淹没的陆地至东帝汶海槽的自然延伸,对距其北部海岸 150 海里始终坚持两个大陆架的存在。[②]然而东帝汶认为这种主张是无法接受的,正如葡萄牙和印度尼西亚之前认为的,虽然时期不同。

参照国际法院对类似案件的裁决,东帝汶认为帝汶海的划界应根据中间线,当面临其他海床洼地时,不应该考虑东帝汶海槽的地质特征,因为这些洼地并不

① Nuno MARQUES ANTUNES, *Towards the Conceptualisation of Maritime Delimitation-Legal and Technical Aspects of Political Process*, Leiven/Boston: Martinus Nijhoff Publishers, 2003, p. 358; Henry BURMESTER, Australia and the Law of the Sea, in James CRAWFORD and Donald R. ROTHWELL ed., *The Law of the Sea in the Asian Pacific Region*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1994, pp. 51～64.

② Nuno MARQUES ANTUNES, Spatial allocation of continental shelf rights in the Timor Sea: Reflections on maritime delimitation and joint development, in *Estudos em Direito Internacional Público*, ed., Coimbra: Almedina, 2004, pp. 274 ～ 275, 277; Victor PRESCOTT, National rights to hydrocarbon resources of the continental margin beyond 200 nautical miles, in Gerald BLAKE, Martin PRATT, Clive SCHOFIELD and Janet Allison BROWN ed., *Boundaries and Energy: Problems and Prospects*, London/The Hague/Boston: Kluwer Law International, 1998, pp. 71 ～ 72; Malcom EVANS, *Relevant Circumstances and Maritime Delimitation*, Oxford: Clarendon Press, 1989, pp. 99 ～ 118; John Robert Victor PRESCOTT, *Australia's Maritime Boundaries*, Canberra: Department of International Relations/The Australian National University Canberra, 1985, pp. 115～117; *The Political Geography of the Oceans. Problems in Modern Geography*, London/Vancouver: David & Charles Newton Abbot, 1975, pp. 191～192; C. COOK, Filling the gap-delimiting the Australia-Indonesia maritime boundary, *Australian Yearbook of International Law*, Vol. 10, 1981－1983, pp. 170～171.

代表大陆架的断裂或错位。[①]此外,对自然延伸标准的采用也不应放弃对其他标准的考虑,诸如澳大利亚的主张中没有提出的划界平等和划界公平。[②]事实上,如果后者得以被成功主张,已知的帝汶海海床和底土油气矿藏的大部份将处于澳大利亚的大陆架内,而适用中间线则将东帝汶置于非常有利的地位,因为大部分已知的油气矿藏都靠近东帝汶海岸。[③]在这种情况下,如果海洋划界问题被提交至国际法院审理,澳大利亚很可能请求重新调整中间线,上述情况也几乎肯定会引发印度尼西亚的干预。[④]

澳大利亚、印度尼西亚和东帝汶对帝汶海的海洋划界,在不同的场合进行了双边谈判,尽管澳大利亚和印度尼西亚还有其他悬而未决的海洋争端,它们已签

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① ICJ Reports (1982), p. 18, pp. 54～58, p. 64, and (1985), p. 13, pp. 34～35. *See* Masahiro MIYOSHI, Some thoughts on maritime boundary delimitation, in Seoung-Yong HONG and Jon VAN DYKE ed., *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, Leiden/Boston: Martinus Nijhoff Publishers, 2009, pp. 108～113; Laurent LUCCHINI, La délimitation des frontières maritimes dans la jurisprudence internationale: vue d'ensemble, in Rainer LAGONI and Daniel VIGNES, ed., *Maritime Délimitation*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 4～5; David ONG, The legal status of the 1989 Australia-Indonesia Timor Gap Treaty following the end of Indonesian rule in East Timor, *Netherlands Yearbook of International Law*, Vol. 31, 2000, p. 79; William T. ONORATO and Mark J. VALENCIA, The new Timor Gap Treaty: legal and political implications, *ICSID Review*, Vol. 28, 2000, p. 62; Mark J. VALENCI and Masahiro MIYOSHI, Southeast Asia seas: joint development of hydrocarbons in overlapping claim areas, *Ocean Development and International Law Journal*, Vol. 16, No. 3, 1986, p. 228; E. D. BROWN, The Tunisia-Libya continental shelf case, *Marine Policy/International Journal Ocean Affairs*, Vol. 7, No. 3, 1983, pp. 145～148.

② ICJ Reports (1985), pp. 40～41.

③ Stuart KAYE, Negotiation and dispute resolution: a case study in international boundary making—the Australia-Indonesia boundary, in Alex G. Oude ELFERINK and Donald R. ROTHWELL ed., *Oceans Management in the 21st Century: Institutional Frameworks and Responses*, Leiden/Boston: Martinus Nijhoff Publishers, 2004, pp. 146～147; William T. ONORATO and Mark J. VALENCIA, International cooperation for petroleum development: the Timor Gap Treaty, *ICSID Review*, Vol. 5, No. 1, 1990, pp. 2～3; Jonathan I. CHARNEY, International maritime boundaries for the continental shelf: the relevance of natural prolongation, in Nisuke ANDO, Edward MCWHINNEY and Rüdiger WOLFRUM ed., *Liber Amicorum Judge Shigeru Oda* (Vol. 2), The Hague/London/New York: Kluwer Law International, 2002, p. 1029; Mark J. VALENCIA and Masahiro MIYOSHI, Southeast Asia seas: joint development of hydrocarbons in overlapping claim areas, *Ocean Development and International Law Journal*, Vol. 16, No. 3, 1986, p. 230.

④ ICJ Reports (1990/1992), (1985), pp. 41～43, pp. 56～57 and (1981), p. 21. *See* David ONG, The legal status of the 1989 Australia-Indonesia Timor Gap Treaty following the end of Indonesian rule in East Timor, *Netherlands Yearbook of International Law*, Vol. 31, 2000, p. 117; Nuno MARQUES ANTUNES, *Towards the Conceptualisation of Maritime Delimitation-Legal and Technical Aspects of Political Process*, Leiven/Boston: Martinus Nijhoff Publishers, 2003, p. 379.

署了两份划界协定。[①]第一份协议针对了巴布亚新几内亚和印度尼西亚的海洋划界,[②]第二份协议针对了阿拉弗拉海的海洋划界,设想从根本上解决海床和底土自然资源勘探和开发中的国家主权问题。[③]

这两份协议都包括自然资源条款,根据这些条款,如果任何油气矿藏的延伸横跨了边界并因此能全部或部分被边界的任一方所开采,那么两国将就最有效开发这些资源的方式以及公平分配上述开发取得的利益的制度谋求达成协议。[④]

确立巴布亚新几内亚和印度尼西亚之间边界的协议不包括东帝汶的大陆架,因为当时这片领土仍由葡萄牙统治。[⑤]只有在 1975 年 12 月 7 日印度尼西亚入侵和占领东帝汶后,这片领土才开始在事实上受印度尼西亚控制。[⑥]

为了在合理管理、生物海洋资源保持和最佳利用的共同利益,这两国还进一

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① Indonesia and Australia have a boundary dispute since 1953 regarding the continental between the two countries in the Sahul Shelf.

② Agreement between Australia and Indonesia Concerning Certain Boundaries between Papua New Guinea and Indonesia, made in Jakarta, on February 12th, 1973, published at 975 UNTS 4 (1975).

③ Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries, made in Canberra, on May 18th, 1971, and entered into force on November 7th, 1969, published at 974 UNTS 307 (1975). Also see Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the area between the Two Countries, including the area known as Torres Strait, and Related Matters, made in Sydney, on December 18th, 1978, at www. un. org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS－PNG1978TS. PDF, 1 February 2011; Treaty between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, made in Perth, on March 14th, 1997, at www. un. org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS－IDN1997EEZ. pdf, 1 February 2011; Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, Supplementary to the Agreement of 18 May 1971, made in Jakarta, on October 9th, 1972, published at 974 UNTS 319 (1957).

④ Articles 6 and 7.

⑤ Article 2 of the Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain seabed boundaries, made in Canberra, on May 18th, 1971. Also see Portuguese Law 7/75, July 17th, 1975.

⑥ Resolutions (UN Security Council) 384, December 22nd, 1975, 389, April 22nd, 1976, 1236, May 7th, 1999, 1246, June 11th, 1999, 1262, August 27th, 1999, 1264, September 15th, 1999, and 1272, October 25th, 1999. Also see Indonesian Law 7, July 17th, 1976, which recognizes the integration of East Timor in the State of Indonesia. This law was revoked on October 20th, 1999 by an Act of the Indonesian Popular Assembly.

步在合作机制上达成协议。[①] 在近二十年的谈判未果后,澳大利亚和印度尼西亚同意推迟海洋划界这一分歧问题并在《帝汶沟条约》的法律框架下共同开发帝汶海的自然资源。[②]

《帝汶沟条约》是第一个由国家实施的广泛共同开发海洋油气矿藏的协议,并已成为一个其他国家所效仿的范例,如圣多美和普林西比民主共和国与尼日利亚之间存在的共同开发协议。这是一个复杂而全面的法律协议,包括了多条超出作为海洋油气矿藏共同开发协议核心内容的规定,即建立共同开发区和负

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① Agreement between the Government of Australia and the Government of the Republic of Indonesia relating to cooperation in fisheries, made in Jakarta, on April 22nd, 1992, published at 1170 UNTS (1994), pp. 288～294. Memorandum of Understanding between the Government of Australia concerning the Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement, made in Jakarta, on October 29th, 1981, and entered into force on February 1st, 1982, published at Kriangsak KITTICHAISAREE, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia*, Oxford/New York: Oxford University Press, 1987, p. 198. Memorandum of Understanding between the Government of Australia and the Government of the Republic of Indonesia Regarding the Operations of Indonesian Traditional Fishermen in Areas of the Australian Exclusive Fishing Zone and Continental Shelf, made in Jakarta, on November 7th, 1974, and entered into force on February 28th, 1975, at http://epress.anu.edu.au/apem/boats/mobile_devices/apb.html, 1 February 2011.

② Article 33(1) of the Timor Gap Treaty signed between Australia and Indonesia on December 11th, 1989, at www.austlii.edu.au, 1 February 2011. On the Timor Gap Treaty, see Masahiro MIYOSHI, The joint development of offshore oil and gas in relation to maritime boundary delimitation, 2－5 *Maritime Briefing/International Boundaries Research Unit*, Vol. 2, No. 5, 1999, pp. 17～21; Keith SUTER, Timor Gap treaty: The continuing controversy, *Marine Policy: the International Journal of Ocean Affairs*, Vol. 17, No. 4, July 1993, pp. 294～302; Francis M. AUBURN and Vivian L. FORBES, The Timor Gap treaty and the Law of the Sea Convention, *Ocean Yearbook*, Vol. 10, 1993, pp. 40～53; Henry BURMESTER, The zone of co-operation between Australia and Indonesia: a preliminary outline with particular reference to applicable law, in Hazel FOX ed., *Joint Development of Offshore Oil and Gas, Volume Ⅱ. The Institute's Revised Model Agreement. Conference Papers, The Australia/Indonesia Zone of Co-operation Treaty* 1989, London: The British Institute of International and Comparative Law, 1990, pp. 128～139; Ernst WILLHEIM, Australia-Indonesia sea-bed boundary negotiations: proposals for a joint development zone in the "Timor Gap", *Natural Resource Journal*, Vol. 29, 1989, pp. 821～842; Mochtar KUSUMA-ATMADJA, Joint development of oil and as by neighboring countries, in The Law of the Sea Institute, University of Hawaii, Mochtar KUSUMA-ATMADJA, Thomas A. MENSAH and Bernard H. OXMAN ed., *Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda* 21, 1983, pp. 592～609; John Robert Victor PRESCOTT, *Australia's Maritime Boundaries*, Canberra: Department of International Relations, The Australian National University, 1985, p. 117; Douglas M. JOHNSTON and Mark J. VALENCIA, *Pacific Ocean Boundary Problems. Status and Solutions*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1991, pp. 70～74.

责管理在此发现的自然资源、授予各项开发权的实体,以及建立一个适用于开发资源的完全自主的法律协议。

该协议的执行是为了满足澳大利亚不断增长的能源需求,以及使在国际法项下无法实现的颁发勘探帝汶海区域许可证行为合法化,类似于印度尼西亚占领前对于葡萄牙那样。《帝汶沟条约》创设了必要的顾及勘探作业之延续及运营者既得权利之巩固的规范制度。①

1991 年 2 月 22 日,《帝汶沟条约》一生效,葡萄牙就在国际法院对澳大利亚提起了诉讼,指责后者就侵犯葡萄牙在东帝汶的权利和义务、东帝汶人民的自决权向葡萄牙和东帝汶人民承担责任,虽然这在后来未能成功。②

随着印度尼西亚占领的结束,东帝汶的领土由联合国驻东帝汶过渡政府管辖。③后者由联合国驻东帝汶特派团接续,该特派团组织负责组织了 1999 年 10 月 19 日开启了东帝汶独立进程的广泛谘商。④东帝汶过渡政府的司法、政治和立法职能包括了代表未来东帝汶这一国利益和经济活力加入国际协定的职责。⑤

东帝汶过渡政府和澳大利亚为使《帝汶沟条约》适应新的现状而开始谈判,即一个独立的东帝汶,通过国际公认的东帝汶人民自决权以及对国家自然资源

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① Nuno MARQUES ANTUNES, *Towards the Conceptualisation of Maritime Delimitation-Legal and Technical Aspects of Political Process*, Leiven/Boston: Martinus Nijhoff Publishers, 2003, pp. 393～396; William T. ONORATO and Mark J. VALENCIA, The new Timor Gap Treaty: legal and political implications, *ICSID Review*, Vol. 28, 2000, p. 61; Douglas M. JOHNSTON and Mark J. VALENCIA, *Pacific Ocean Boundary Problems. Status and Solutions*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1991, pp. 2～3.

② ICJ Reports (1995) 92. *See* Pierre-Marie DUPUY, A general stocktaking of the connections between the multilateral dimension of obligations and codification of the law of responsibility, *European Journal of International Law*, Vol. 13, No. 5, 2002, p. 1056; Christine M. CHINKIN, East Timor moves into the World Court, *European Journal of International Law*, 1993, Vol. 4, No. 2, pp. 208～218; Maria Clara MAFFEI, The case of East Timor before the International Court of Justice-some tentative comments, *European Journal of International Law*, Vol. 4, No. 2, 1993, p. 225, p. 227, p. 231; Stuart KAYE, Negotiation and dispute resolution: a case study in international boundary making-the Australia-Indonesia boundary, in Alex G. Oude ELFERINK and Donald R. ROTHWELL ed., *Oceans Management in the 21st Century: Institutional Frameworks and Responses*, Leiden/Boston: Martinus Nijhoff Publishers, 2004, pp. 2～3.

③ United Nations Transitional Administration in East Timor, Resolution (UN Security Council) 1272, October 25th, 1999.

④ United Nations Mission in East Timor, Resolution (UN Security Council) 1246, June 11th, 1999.

⑤ Secretary-General Report S/1999/1024, 35, October 4th, 1999.

的主权,消除了该条约中任何潜在的非法性。[①]这些谈判促成了《意见交换书》及随后于2010年2月10日签署的关于修订的《帝汶沟条约》的《谅解备忘录》。[②]

《帝汶沟条约》的共同开发模式的维持,意味着保持印度尼西亚相关立法以及根据《帝汶沟条约》设立的部长理事会和联合管理局发布的决定和指令的效力,并保护运营者与上述联合管理局订立的成果分成协议项下运营者取得的权利。因此,联合国东帝汶过渡政府承担了印度尼西亚在《帝汶沟条约》下的一切权利和义务,除了有违东帝汶人民利益的规定。[③]这些条款或者被撤销,或者被修改以适合情势(当这种情况有利时),如关于培训东帝汶国民并赋予东帝汶国民合同优先权的义务。澳大利亚也不得不修改所有与这一新安排相反的国家立法。[④]

2001年7月5日,联合国驻东帝汶过渡政府和澳大利亚签署了第二份《谅解备忘录》,再次确认了最初采用的共同开发模式,但不再依据《帝汶沟条约》,而是2000年2月10日签署的《谅解备忘录》中协议的《帝汶沟条约》的修订版本,并从那时起称之为《帝汶海条约》。[⑤]

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① On the principle of peoples' permanent sovereignty over natural resources, see Vasco BECKER-WEINBERG, A nacionalização do petróleo e o princípio do aproveitamento conjunto entre Estados, *Estudos de Direito Internacional e Relações Internacionais*, Lisbon: AAFDL, 2008, pp. 373～398.

② Published at David ONG, The legal status of the 1989 Australia-Indonesia Timor Gap Treaty following the end of Indonesian rule in East Timor, *Netherlands Yearbook of International Law*, Vol. 31, 2000, p. 106.

③ Article 165 of the Constitution of the Democratic Republic of East Timor.

④ Petroleum (Timor Sea Treaty) / (Consequential Amendments) / Act 2003 n. 10/2003. The Petroleum (Submerged Lands) Act 1967 and the Continental Shelf (Living Natural Resources) / Amendment Act 1978.

⑤ Timor Sea Treaty, at www. un. org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS－TLS2002TST. PDF, 1 February 2011. Memorandum of Understanding between the Government of the Democratic Republic of East Timor and the Government of Australia Concerning an International Unitization Agreement for the Greater Sunrise field, made in Dili, on May 20th, 2002, at www. un. org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS－TLS2002SUN. PDF, 1 February 2011. Exchange of Notes Constituting an Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste Concerning Arrangements for Exploration and Exploitation of Petroleum in an Area of the Timor Sea between Australia And East Timor, Dili, 20 May 2002, at www. un. org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS－TLS2002EX. PDF, 1 February 2011.

(二)中国东北海

中国东北海是一个在海洋环境保护、航海和渔业合作上具有重要先例的区域。[①]然而,油气矿藏的存在已经被证明是一个相关国家间争议的焦点,尤其在有关海洋划界方面。[②]

随着1968年一份由一群来自日本、韩国、台湾和美国的科学家们起草的、由联合国亚洲及远东委员会赞助的报告的发布,中国东海巨大的油气潜力广为人知。在上述报告公布后的一年内,日本、韩国和台湾宣称对发现油气矿藏的大陆架的更多部分拥有主权,并且就其开发迅速与石油公司达成运营协议。事实上,早在1968年,韩国已着手划分日本也宣称在七个地块上拥有主权的中国东海的

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① Fishery Agreement between the Governments of the People's Republic of China and the Republic of Korea, made on August 3rd, 2000. Sino-Japanese Agreement on Fishery, made in November 11th, 1997, entered into force on June 1st, 2000. Agreement between the Government of the Republic of Korea and the Government of the Russian Federation on Co-operation in the Field of the Environment, made in Moscow, on June 2nd, 1994. Agreement between the Government of the Republic of Korea and the Government of Japan on Co-operation in the Field of Environmental Protection, made in Seoul, on June 29th, 1993. Agreement on Environmental Co-operation between the Government of the Republic of Korea and the Government of the People's Republic of China, made in Beijing, October 28th, 1993. Agreement on Fishing between Japan and South Korea, made in Tokyo, on June 22nd, 1965. Also see Joint Statement on Sustainable Development among the People's Republic of China, Japan and the Republic of Korea and Joint Statement on the Tenth Anniversary of Trilateral Cooperation among the People's Republic of China, Japan and the Republic of Korea, both made in Beijing, on October 10th, 2009. Action Plan for Promoting Trilateral Cooperation among the People's Republic of China, Japan and the Republic of Korea, made in December 13th, 2008. The 2005—2006 Progress Report of the Trilateral Cooperation among the People's Republic of China, Japan and the Republic of Korea, adopted by the Three-Party Committee, made in Cebu, on January 12th, 2007. The Action Strategy on Trilateral Cooperation among the People's Republic of China, Japan and the Republic of Korea, made on November 27th, 2004. Joint Declaration on the Promotion of Tripartite Cooperation among the People's Republic of China, Japan and the Republic of Korea, made in Bali, on October 7th, 2003.

② On cooperation in the Northeast and Southeast Asian seas, see Mark J. VALENCIA, Relevance of lessons learned to Northeast Asia, in Mark J. VALENCIA, *Maritime Regime Building. Lessons Learned and Their Relevance for Northeast Asia*, Hague/Boston/London: Martinus Nijhoff Publioshers, 2001, p. 145; Yoshio OTANI, Les problèmes actuels de la mer du Japon et la coopération future, in *La Méditerranée et le Droit de la Mer à l'aube du 21e siècle/The Mediterranean and the Law of the Sea at the dawn of the 21st century* (dir.) Giuseppe CATALDI, Actes du colloque inaugural de la Association Internationale du Droit de la Mer (Naples, 22 et 23 Mars 2001) ed. Bruylant (Brussels: 2002), p. 313; ZOU Keyuan, The establishment of a marine legal system in China, *The International Journal of Marine and Coastal Law*, Vol. 13, No. 1, 1998, pp. 44～45.

一块区域,并将开发权授予四家公司。作为回报,日本也将对两国主权要求重叠的区域的开发权授予韩国。

1970年,在缺少一个大陆架海洋划界协议的情况下,这三个国家或地区试图达成一个海洋油气矿藏共同开发协议,搁置海洋划界争端。①

由于上述共同开发协议包括了中国主张主权的部分大陆架,此举遭到了中国的反对,这反过来又导致美国要努力保护其已与日本、韩国和台湾签订运营协议的石油公司的权利。结果,台湾最终退出了这一共同开发协议的三方模式,使得日本和韩国就双边共同开发协议进行谈判。②

经过近三年的划界磋商和对有关冲绳湾问题二十多年的划界分歧后,在1974年,日本和韩国签署了两项协议,结束了两国在中国东海大陆架划界上的

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① ZOU Keyuan, The Chinese traditional maritime boundary line in the South China Sea and its legal consequences for the resolution of the dispute over the Spratly Islands, *The International Journal of Marine and Coastal Law*, Vol. 14, No. 1, 1999, pp. 161～168; Hong NONG and Wu SHICUN, The energy security of China and oil and gas exploitation in the South China Sea, in Myron H. NORDQUIST, John Norton MOORE and Kuen-chen FU ed., *Recent Developments in the Law of the Sean and China*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 145; Jon M. VAN DYKE, The Republic of Korea's maritime boundaries, *The International Journal of Marine and Coastal Law*, Vol. 18, No. 4, 2003, pp. 509～540; Mark J. VALENCIA, Regional maritime regime building: prospects in northeast and southeast Asia, *Ocean Development and International Law Journal*, Vol. 31, No. 3, 2000, pp. 223～247; Relevance of lessons learned to Northeast Asia, in Mark J. VALENCIA ed., *Maritime Regime Building: Lessons Learned and Their Relevance for Northeast Asia*, The Hague/Boston/London: Martinus Nijhoff Publioshers, 2001, p. 143; Mark J. VALENCIA and Jon M. VAN DYKE, Comprehensive solutions to the South China Sea disputes: some options, Gerald BLAKE, Martin PRATT, Clive SCHOFIELD and Janet Allison BROWN ed., *Boundaries and Energy: Problems and Prospects*. London/The Hague/Boston: Kluwer Law International, 1998, pp. 85～115; Jonathan CHARNEY, Central East Asian maritime boundaries and the Law of the Sea, *American Journal of International Law*, Vol. 89, No. 4, 1995, pp. 746～748; Zhiguo GAO, The South China Sea: from conflict to cooperation? *Ocean Development and International Law Journal*, Vol. 25, No. 3, 1994, p. 352; Masahiro MIYOSHI, The Japan/South Korea joint development agreement 1974, in Hazel FOX ed., *Joint Development of Offshore Oil and Gas. Volume Ⅱ. The Institute's Revised Model Agreement. Conference Papers. The Australia/Indonesia Zone of Co-operation Treaty* 1989, London: The British Institute of International and Comparative Law, 1990, pp. 89～97; Choon-ho PARK, Joint development of mineral resources in disputed waters: the case of Japan and South Korea in the East China Sea, in Mark J. VALENCIA ed., *The South China Sea. Hydrocarbon Potential & Possibilities of Joint Development*, Oxford/New York /Toronto/Sydney/Paris/Frankfurt: Pergamon Press, 1981, p. 1335.

② Paul C. YUAN, China's offshore oil development policy and legislation: an overall analysis, *The International Journal of Estuary and Coastal Law*, Vol. 3, No. 2, 1988, pp. 101～137.

海洋争端。[①]韩国认为,日本在中国东海的大陆架应该止于海湾,后者边界的一部分应划于韩国和中国之间。但日本认为,应按照 1958 年《日内瓦大陆架公约》规定的等距离原则,不应把冲绳湾作为划界的一个决定性因素。[②]

这两项协议是各国在区分对待海洋划界和海洋自然资源开发上达到的结果,使得能够在国家主张没有重叠的区域就海洋划界、在主权宣称重叠的地区对已发现的海洋油气矿藏实施共同开发达成协议,尽管中国反对这一合作。[③]此外,两国同意不将最初宣称的把日本海内的竹岛考虑在海洋划界内,同时大陆架划界协定不影响上覆水域和大气空间的法律地位。[④]这份协议也包括一个自然资源条款,根据该条款,各国将努力就跨界油气矿藏开发达成协议,在协议未能达成的情况下,根据任一国的要求,受命的仲裁员将对最有效开发上述油气矿藏的方法做出裁决。[⑤]

由于日本需要修改其国内立法以适应协议规定的义务,同时各国担忧在共同开发区内的传统渔业的保护问题以及后者位于台风和热带气旋易发生区域这一事实,海洋油气矿藏共同开发协议的实施被推迟了。[⑥]

日本和韩国在朝鲜海峡的界线各自划定后,双方签署的海洋油气矿藏共同

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① Seo-Hang LEE, Korea's claims to maritime jurisdiction, *Korean Journal of Comparative Law*, Vol. 18 1990, p. 70; Choon-hPARK, *East Asia and the Law of the Sea*, 4th ed, Seoul: Seoul National University Press, 1988, pp. 131～132.

② Convention on the Continental Shelf, made in Geneva, on April 29th, 1958, published at 499 UNTS (1964), p. 311.

③ Agreement between Japan and the Republic of Korea Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries, made in Seoul, on February 5th, 1974, published at 1225 UNTS (1981), pp. 104～105. Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, made in Seoul, on January 30th, 1974, published at 1225 UNTS (1981), pp. 114～126. *See* Masahiro MIYOSHI, The Japan-South Korea agreement on joint development of the continental shelf, in Mark J. VALENCIA ed., *Geology and Hydrocarbon of the South China Sea and Possibilities of Joint Development, Proceedings of the Second EAPI/CCOP Workshop. East-West Center, Honolulu, Hawaii, 22－26 August* 1983, New York/Oxford/Toronto/Sydney/Paris/ Frankfurt: Pergamon Press, 1985, pp. 551～552.

④ Article 3 of the 1974 Maritime Delimitation Agreement between Japan and the Republic of Korea.

⑤ Article 2 of the 1974 Maritime Delimitation Agreement between Japan and the Republic of Korea.

⑥ South Korea ratified the agreement on December 1974, while Japan only in June 1978. The joint development agreement entered into force on June 22nd, 1978 and the first development operation took place only in May 1979. *See* Masahiro MIYOSHI, The Japan/South Korea joint development agreement 1974, in Hazel FOX ed., *Joint Development of Offshore Oil and Gas. Volume Ⅱ. The Institute's Revised Model Agreement. Conference Papers. The Australia/Indonesia Zone of Co-operation Treaty* 1989, London: The British Institute of International and Comparative Law, 1990, pp. 545, 549～550.

开发协议立即在两国大陆架南部创建了一个共同开发区。

为便日本和韩国授权的特许运营者的勘探和开发活动,共同开发区可能被划分为亚区。特许运营者们经国家批准依次加入运营协议,以便共同开展这些活动,有权平等分享共同开发区内提取的自然资源,并按相同比例承担各项费用。在这种情况下,这些资源被认为是在特许运营者本国大陆架提取的,为了譬如税收的目的,适用的法律为该国法律。

与这样的运营协议有关的一个细节是,特许运营者不得不同意一个争端解决机制,并调整勘探和开发活动以适应渔业利益。在这种情况下,为保证这样的争议不会持久并且最终不会对勘探和开发活动产生影响,各国达成一种强制性机制是更有利的。

该协议在国家和由后者授权的特许运营者间建立了直接的关系,适用该国可以适用的国内法。例如一国可能依照其法律法规并与其他国家协商取缔特许运营者的勘探或开发权。为处理好各自勘探和开发活动的一切运作,特许运营者应根据各自的运营协议中指定操作人员。

根据共同开发协议设立的日本—大韩民国联合委员会只是充任两国在履行该协议上的咨询机构。该机构每年召开一次会议,其建议对各国不具有约束力。

日本和韩国并没有规定一个适用于海洋环境保护的共同协议,只是规定两国同意采取措施防止海洋碰撞及防止和消除共同开发区的勘探和开发活动造成的海洋污染。在海洋油气矿藏共同开发协议后签署的意见交换书提及的措施是仅有的共同措施。

该协议还包括一个自然资源条款,规定特许运营者们应通过协商并经国家批准,就最有效开发可能超过共同开发区边界的油气矿藏的方法谋求达成一项协议。如果特许运营者们不能达成协议,两国在必要的协商后提出一个共同的建议。

其他东北亚国家关心的一个问题是,据报告,中国和朝鲜已同意在黄海实施海洋油气矿藏共同开发协议。此外,中国和日本就共同开发中国东海海洋油气矿藏尚未达成一致意见,尽管两国长期认可只有合作才有可能为现有海洋划界争端提供一个解决办法。①

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① GAO Jianjun, A note on the 2008 cooperation consensus between China and Japan in the East China Sea, in *Ocean Development and International Law Journal*, Vol. 40. 2009, pp. 291～296; ZOU Keyuan, Implementing the United Nations Convention on the Law of the Sea in East Asia: issues and trends, *Singapore Year Book of International Law*, Vol. 9, 2005, p. 6; DENG Xiaoping, Speech at the third plenary session of the Central Advisory Commission of the Communist Party of China, October 22, 1984, in 3 *Selected Works of DENG Xiaoping*, Beijing: Foreign Languages Press, 1984. Also see Communiqué by the Ministry of Foreign Affairs of the People's Republic of China "China's Path of Peaceful Development and Its View of Regional Security", Speech by Ambassador Zhang Junsai, at www.fmprc.gov.cn/eng/wjb/zwjg/zwbd/t520658.htm, 1 March 2011.

1997 年,中国和日本签署了一份适用于两国专属经济区内合作捕鱼的新协议,据此每个国家签发许可证允许对方国家的渔船在各自专属经济区开展捕鱼活动。根据这项协议,两国应在根据渔业协定设立的日中联合渔业委员会上进行协商,以确定许可证的签发的条件。这项协议进一步规定,每个国家应采纳并告知对方国家适用于各自专属经济区的保护措施。此外,各国合作开展渔业和海洋生物资源保护科学研究,以及在一国国民或渔船在对方国家专属经济区内遭受海难时尽可能提供援助和保护。

该协议还在专属经济区内国家主张重叠以及没有最终达成划界协议的地方建立一个临时措施区。[①]在这种情况下,由于协议只对中国和日本有强制力,也在该区域开展捕鱼活动的韩国国民和渔船将不适用渔业协定的规定,引发对生物资源利用的担心。

次年,韩国和日本签署了适用于两国专属经济区但不包括待划界的以及与 1974 年共同开发区部分重叠的海域的第二项渔业协议。

为让各国了解可捕的物种、捕捞的配额、可捕鱼的区域以及其他适用于一国国民和渔船在对方专属经济区的情况,此渔业协定还建立了韩日联合渔业委员会。各国应进一步合作保护海洋生物资源。[②]

此外,在同一年,中国和韩国签署了一个适用于两国在黄海专属经济区以及临时措施区和过渡区的新渔业协定。此渔业协议规定,一国的国民和渔船在对方专属经济区开展捕鱼活动,要遵循后者签发的许可证和由该协议建立的中韩联合渔业委员会提出的建议。[③]

(三)泰国湾

1979 年,泰国和马来西亚签署了一项《谅解备忘录》,为开发国家主权要求

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① On cooperative fishing agreements between China and Japan, see Park Hee KWON, *The Law of the Sea and Northeast Asia*, The Hague/London/Boston: Kluwer Law International, 2000, pp. 51～57. An unofficial translation of the text of the agreement is published at pp. 208～213.

② On cooperative fishing agreement between South Korea and Japan, see Park Hee KWON, *The Law of the Sea and Northeast Asia*, The Hague/London/Boston: Kluwer Law International, 2000, pp. 57～66. An unofficial translation of the text of the agreement is published at pp. 215～223.

③ On cooperative fishing between China and South Korea, see Park Hee KWON, *The Law of the Sea and Northeast Asia*, The Hague/London/Boston: Kluwer Law International, 2000, pp. 66～72.

重叠的泰国湾大陆架海床资源建立了一个联合管理局。[①]同时,两国根据1978年2月27日至3月1日召开的"泰国湾和中国南海大陆架马泰划界会议"通过的指导方针,就上述《谅解备忘录》项下的共同开发区大陆架划界展开谈判。[②]

同年,两国签署了第二份《谅解备忘录》,在进一步承诺继续谈判达成最终划界的同时,确定了两国在泰国湾大陆架划界上还需要考虑的问题。[③]第二份《谅解备忘录》还包括一个自然资源条款,规定这两国应合寻求达成有效开发可能跨界的油气矿藏协议,公平分担一切招致的费用和收益。[④]

设立的联合管理局的《谅解备忘录》规定,如果各国在其期限届满之前就泰国湾大陆架的划界达成协议,这个机构将终止,其收益和资产以及其亏损和债务由两国均分。如果各国不能就划界达成一致,合作开发协议将自动接续相同期

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① Memorandum of Understanding between the Kingdom of Thailand and Malaysia in the Establishment of a Joint Authority for the Exploitation of the Resources of the Sea-bed in a defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand, made in Chiang Mai, on February 21st, 1979, published at Phiphat TANGSUBKUL, *ASEAN and the Law of the Sea*, Singapore: Institute of Southeast Asian Studies, 1982, pp. 130～133. *See* Clive SCHOFIELD and May TAN-MULLINS, Maritime claims, conflicts and cooperation in the Gulf of Thailand, *Ocean Yearbook*, Vol. 22, 2008, pp. 75～116; David ONG, Thailand/Malaysia. Joint development agreement 1990, *The International Journal of Estuary and Coastal Law*, Vol. 6, No. 1, 1991, pp. 61～63; Ian TOWNSEND-GAULT, The Malaysia/Thailand Joint Development Arrangement, in Hazel FOX ed., *Joint Development of Offshore Oil and Gas. Volume Ⅱ. The Institute's Revised Model Agreement. Conference Papers. The Australia/Indonesia Zone of Co-operation Treaty* 1989, London: The British Institute of International and Comparative Law, 1990, pp. 102～107. The joint development area established under this MoU has been duly considered when establishing the maritime boundaries between Thailand and Vietnam. *See* Agreement between the Government of the Kingdom of Thailand and the government of the Socialist Republic of Vietnam on the Delimitation of the Maritime Boundary between the Two Countries in the Gulf of Thailand, made in Bangkok, on August 9th, 1997, published at Jonathan I. CHARNEY and Robert W. SMITH, The American Society of International Law ed., *International Maritime Boundaries* (Vol. 4), The Hague/London/New York: Martinus Nijhoff Publishers, 2002, pp. 2692～2694.

② R. HALLER-TROST, *The Contested Maritime and Territorial Boundaries of Malaysia. An International Law Perspective*, London/The Hague/Boston: Kluwer Law International, 1998, pp. 350～359; Ted MCDORMAN, Malaysia-Vietnam, in Jonathan I. CHARNEY and Lewis M. ALEXANDER, The American Society of International Law ed., *International Maritime Boundaries* (Vol. 3), Report Number 5－19, The Hague/Boston/London: Martinus Nijhoff Publishers, 2004, pp. 2335～2344.

③ Articles 1 and 3 of the Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Delimitation of the Continental Shelf Boundary between the Two Countries in the Gulf of Thailand, made in Kuala Lumpur, on October 24th, 1979, at www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/THA－MYS1979CS.PDF, 1 March 2011.

④ Article 4 of the 1979 MoU between Thailand and Malaysia on the Delimitation of the Continental Shelf Boundary.

限,如果《谅解备忘录》中没有另行规定。①

此外,该《谅解备忘录》规定,如果资源的共同开发表明将更具成本效益,各国可能最终同意重新谈判并订立一个新的共同开发协议,而非各自开展近岸开发活动,尤其考虑到油气矿藏跨界这一可能。②

然而,由于泰国在实施合作开发协议上经验不足以及两国在协调有关国内油立法、共同开发区的开发权应当如何授予运营者上的困难,各国未能就联合管理局的自治程度达成一致。③泰国为此提议运用传统的特许运营模式,但马来西亚鉴于其海洋石油开发上已获得的经验则认为成果分成协议更加适合。④

随着启动并详细规定了联合管理局权力的第二个共同开发协议的实施,这些国家在 1990 年将只在这个问题上达成协议,但各国选择对第一份《谅解备忘录》授予这个实体的权力和自治权进行限制,使得后者成为一个只具有象征性而非执行性的角色。⑤事实上,虽然最初的联合管理局具有必要之职权以采取必要之最大化共同开发区收益的行动,但是根据第二个《谅解备忘录》,只寻求授予联合管理局管理勘探和开发共同开发区非生物自然资源活动的权力,这可能是各国担忧联合管理局行政色彩过浓的结果。⑥

泰国和马来西亚在第二份《谅解备忘录》中就授予运营者在共同开发区的勘探和开发权采用成果分成合同,及采用的税收和财政法规达成了协议。⑦

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① Article 6 (2) of the 1979 MoU between Thailand and Malaysia in the Establishment of a Joint Authority.

② Article 6 (1) of the 1979 MoU between Thailand and Malaysia in the Establishment of a Joint Authority.

③ D. H. ARIFFIN, The Malaysian philosophy of joint development, in Mark J. VALENCIA ed., *Geology and Hydrocarbon of the South China Sea and Possibilities of Joint Development, Proceedings of the Second EAPI/CCOP Workshop, East-West Center, Honolulu, Hawaii, August 22nd to 26th*, 1983, New York/Oxford/Toronto/Sydney/Paris/Frankfort: Pergamon Press, 1985, p. 534.

④ David ONG, The 1979 and 1990 Malaysia-Thailand joint development agreements: a model for international legal co-operation in common offshore petroleum deposits? *The International Journal of Marine and Coastal Law*, Vol. 14, No. 2, May 1999, pp. 228～230; Zhiguo GAO, *International Petroleum Contracts. Current Trends and New Directions*, London: Grahm&Trotman/Martinus Nijhoff, 1994, pp. 23～57.

⑤ Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand on the Constitution and Other Matters Relating to the Establishment of the Malaysia-Thailand Joint Authority, made in Kuala Lumpur, on May 30th, 1990, published at Jonathan I. CHARNEY and Lewis M. ALEXANDER, The American Society of International Law ed., *International Maritime Boundaries* (Vol. 1), Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993, pp. 1111～1123.

⑥ Article 3(2) of the 1979 MoU between Thailand and Malaysia in the Establishment of a Joint Authority.

⑦ Articles 8, 9 to 12, 16, 17 of the 1979 MoU between Thailand and Malaysia in the Establishment of a Joint Authority.

1992年,马来西亚和越南签署了一项《谅解备忘录》,就共同开发《谅解备忘录》中相应确认的在泰国湾大陆架指定区域发现的海洋油气矿藏确立了一个简单的安排。[①]根据这一《谅解备忘录》,两国同意各国的石油公司在指定区域合作从事勘探和开发活动,产生的一切费用及获得的一切收益由两国平等承担和分享。此外,上述《谅解备忘录》进一步规定,如果一个油田部分位于指定区域、部分位于马来西亚或越南的大陆架,那么这些国家将达成双方都能接受的开发这些资源的条款。[②]

2001年,柬埔寨和泰国就主张重叠的泰国湾大陆架海域签署了一项《谅解备忘录》,[③]然而两国后来就共同开发此区域发现的海洋油气矿藏以及《谅解备忘录》中确定的领海、大陆架、专属经济区海域划界达成协议。[④]为了起草实施合作开发协议以及解决上述海域划界问题,这些国家进一步同意建立一个联合技术委员会。[⑤]

最后,还应提到的是,柬埔寨和越南签署了协议建立共同的历史性水域,两国借此同意共同开发区历史水域中发现的自然资源的开发由共同协议确定。[⑥]

三、海洋油气矿藏共同开发协议的前提和原则

在前面提到的这三个地区,我们可以确定导致各国通过和实施海洋油气矿藏共同开发协议的各种情况。认识这些情况与了解各国在共同开发区的权利性质以及确定海洋油气矿藏共同开发这一概念的法律性质及其在国际法下的意义

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① Memorandum of Understanding between Malaysia and the Socialist Republic of Vietnam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf Involving the Two Countries, made in Kuala Lumpur, June 5th, 1992, published at Jonathan I. CHARNEY and Lewis M. ALEXANDER ed., The American Society of International Law, *International Maritime Boundaries* (Vol. 3), The Hague/Boston/London: Martinus Nijhoff Publishers, 2004, pp. 2341～2344.

② Articles 2, 3 and 8(d) (e) of the MoU between Malaysia and Vietnam.

③ Memorandum of Understanding between the Royal Government of Cambodia and the Royal Thai Government regarding the Area of Their Overlapping Maritime Claims to the Continental Shelf, made in Phnom Penh, on June 18th, 2001, published at David A. COLSON and Robert W. SMITH, The American Society of International Law ed., *International Maritime Boundaries* (Vol. 5), Leiden/Boston: Martinus Nijhoff Publishers, 2005, pp. 3745～3746.

④ 1 and 2 of the MoU between Cambodia and Thailand.

⑤ 3 of the MoU between Cambodia and Thailand.

⑥ Agreement on Historic Waters of Vietnam and Kampuchea, made in Ho Chi Minh City, on July 7th, 1982, published at Jonathan I. CHARNEY and Lewis M. ALEXANDER, The American Society of International Law ed., *International Maritime Boundaries* (Vol. 3), The Hague/Boston/London: Martinus Nijhoff Publishers, 2004, pp. 2364～2365.

密切相关,特别是在主张重叠的情况下。

亚太地区海洋划界的不同争端,除了与岛屿和其他以沿海国对各自海域主张主权权利为特征的领土争端,大多与基于地貌和地质方面的重叠主张有关。事实上,各国倾向在上述区域将实施共同开发协议作为超越冲突的海洋主张和领土争端之存在而导致的僵局的办法,尤其考虑到这些争端解决可以通过谈判以及最终通过第三国的同意或介入,将最终导致与具有能源野心的国家(至少)长期不容的过程。此外,有关国家需要建立一个法律框架解决运营权的非法授予这一事实,使得沿海国无需根据国际法就有权这样做。

大陆架的固有性和专属性是"土地主导海洋"[①]这种认识的结果,只要沿海国与其他国家在适用于大陆架划界的距离标准的主张不相悖或是相符的,一国开发与勘探大陆架自然资源的主权权利与其在陆地上的权利明显相关联。如果重叠的主张源于,例如大陆架相对或相邻各国可能无法勘探底土和海底区域,也不能为此授予钻探权。[②]

当考虑到导致各国订立海洋油气矿藏共同开发协议的不同情况,一个必然的结论是,各国需共同努力加强合作,因为合作是一种需要而不是义务,也没有第三方迫使国家这样做。此外,各国根据他们的自由裁量权,而非对《联合国海洋法公约》第 74(3)和 83(3)的某种解释假设的订立临时协议的责任,进行谈判并就这些协议的内容达成一致。

实施共同开发协议的国家间合作先例的存在不应该被视为确立了一项以共同开发协议形式规定的合作义务,也不应该被视为一个为此决定后者成功与否的因素。存在共同开发协议在没有任何合作先例的情况下得以成功实施的例子,也存在共同开发协议在有这样的先例无法成功实施的例子,即有生物海洋自然资源的共同管理的先例,各国也未能实施海洋油气矿藏共同开发协议。

然而,两个或两个以上国家或在《联合国海洋法公约》中许多条款规定的区域框架内的合作的存在,必然提供了国家间互动并愿意建立可能最终搁置海洋划界争端的解决路径。[③]然而,并没有共同非生物自然资源开发的义务,在海洋划界发生争端的情况下尤其如此。[④]事实上,尽管很多海洋边界悬而未决,很多共同开发协议已经被实施了,很多国家在合作开发协议的保障下进行海洋开发

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① ICJ Reports (1978) 37,86.

② Article 81 of UNCLOS.

③ Articles 63(3),64(1),65,66(2)(4),69(3),74(3),83(3),100,117,118,119,123,194(1),197,200,242,266,270 and 273 of UNCLOS.

④ ICJ Reports 1982,Judge Evensen's Dissenting Opinion,320～321. *See* Vasco BECKER-WEINBERG,The internationalization of marine natural resources in UNCLOS,in Rainer Lagoni,Peter Ehlers and Marian Paschke ed.,*Recent Developments in the Law of the Sea*,Berlin/Munster/Vienna/Zurich/London:LIT Verlag,2010,pp. 29～40.

活动的同时试图解决海洋划界争端。[①]

共同开发海洋油气矿藏和海洋划界的差异也由这一事实佐证:后者并不确立国家在油气矿藏横跨界限时有订立共同开发协议的义务,也不确立国家有订立包括自然资源条款的海洋划界协议的义务。

与国家之间缔结的任何其他国际协定类似,海洋油气矿藏共同开发协议要求各国按照一般的条约法采取行动,践行可适用的国际法原则,如条约必须遵守,合作和善意等原则。国际法理论一般认为,在这种情况下,合作原则对于两个沿海邻国的要求具体为共享共同资源的存在信息,包括当开发某种资源的活动可能会影响对方国家的利益时,有义务告知此类开发活动的意图。[②]因此,在没有规定各国谈判及和平解决争端的义务的情况下,合作原则并不是一国通过并实施共同油气矿藏共同开发协议之义务的法律渊源。[③]事实上,虽然《联合国海洋法公约》没有规定缔约义务,但是它规定了谈判义务,其范围可概括如下:国家必须秉持善意参与谈判直至达成协议。[④]

在善意原则之下,各国必须秉持善意采取行动和参与谈判,以达成一个可以

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① In a different view, see Zhiguo GAO, The legal concept and aspects of joint development in international law, in *Ocean Yearbook*, Vol. 13, 1998, pp. 112～113; Legal aspects of joint development in international law, in Mochtar KUSUMA-ATMADJA, Thomas A. MENSAH and Bernard H. OXMAN, ed. *Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda* 21, The Law of the Sea Institute, University of Hawaii, 1983, p. 633.

② Mark J. Valencia, Regional maritime regime building: prospects in northeast and southeast Asia, *Ocean Development and International Law*, Vol. 31, No. 3, 2000, p. 224; Rodman R. Bundy, Natural resource development (oil and gas) and boundary disputes, in Gerald H. Blake, William J. Hildesley, Martin A. Pratt, Rebecca J. Ridley and Clive H. Schofield ed., *The Peaceful Management of Transboundary Resources*, London/Dordrecht/Boston: Graham & Trotman, 1995, pp. 36, 39; ICJ Reports 1974, pp. 35～36.

③ Articles 279 and 299 UNCLOS. *See* ICJ Reports 1974, p. 33, 74 and 75, pp. 35～36.

④ Articles 63(1), 74(3), 83(3), 117, 118 and 123 of UNCLOS. *See* Rainer Lagoni, Report of the International Committee on the EEZ, in International Law Association ed., *Report of the Sixty-Fifth Conference: Cairo* (1992), p. 5.

接受的结果,在非为执行一项协议的情况下,进行国际法项下有意义而合法的谈判。①

各国进一步承担着相互制约的义务,这意味着不得实施或放弃实施任何可能破坏或使任何开发此类资源的解决方案不可能、不得实施或放弃实施任何可能破坏或使选定达成一个具体解决方案之方法不可能的责任。②因此,未经所有有关国家同意,各国不得在谈判期间继续或从事共有油气矿藏开发。

适用善意原则另一个需要考虑的方面是,每个国家都有权被告知在后者主权或管辖权或主张重叠的区域可能发现的资源的存在和位置,当然秘密信息除外。③比例原则的主要原因不言自明。如果这样的义务不存在,这对不了解上述信息的国家来说将非常不利,使得谈判结果不公平。

四、海洋油气矿藏共同开发协议在亚太地区的的前景

国际法就共同油气矿藏开发没有规定可行的解决方案,也没有指明特定的后果,而是在前面所述的条款中规定了合作的一般义务。因此,在寻求一个可能最终会实现理性繁荣的明智而务实的成果更可取的情况下,它将始终取决于国家双边、多边或区域层面寻求并对亚太地区海床和底土的海洋财富共同开发达成一致这一法律解决方案,而不是坚持分裂的立场,并用不切实际的独占来延续僵局。

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① Article 2(2) of the Charter of the United Nations. Articles 74(3) and 83(3) of UNCLOS. *See*, ICJ Reports 1982, Judge Gros' Dissenting Opinion, 3 and 4; ICJ Reports 1974, pp. 35～36 and 1969, 48 and 85; ICJ Reports 1969, 48 and Judge Jessup' Separate Opinion, 80. Also see Peter D. Cameron, The rules of engagement: developing cross-border petroleum deposits in the North Sea and the Caribbean, *International and Comparative Law Quarterly*, Vol. 55, 2006, p. 567; Jon M. Van Dyke, Sharing Ocean Resources: In a Time or Scarcity and Selfishness, in Harry N. Scheiber ed., *Law of the Sea: The Common Heritage and Emerging Challenges*, The Hague/London/Boston 2000, pp. 26～35; E. D. Brown, *The International Law of the Sea*, *V. 1 Introductory Manual*, Aldershot/Brookfield USA/Singapore/Sydney: Dartmouth Publishing Company, 1994, pp. 158～159; René-Jean DUPUY and Daniel VIGNES, *A Handbook on the New Law of the Sea*, Vol. 1, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, pp. 477～486; Rainer Lagoni, Interim measures pending maritime delimitation agreements, *American Journal of International Law*, Vol. 78, No. 2, 1984, pp. 355～358; also see International Law Association, *Report of the International Committee on the Principles Applicable to Living Resources Occurring Both within and without the Exclusive Economic Zone or in Zones of Overlapping Claims*, by Professor Dr. Rainer Lagoni (Cairo Conference 1992), p. 29.

② Juraj Andrassy, Les relations internationales de voisinage, 79 *Recueil des Cours* (1951－Ⅱ), p. 110.

③ Article 302 of UNCLOS. *See* Rainer Lagoni, Oil and gas deposits across national frontiers, *American Journal of International Law*, Vol. 73, No. 1, 1979, p. 237.

考虑到亚太地区大部分的海洋划界都很困难,也许是一个无法完成的任务,海洋油气矿藏共同开发协议可以规定必要的法律框架,借此在坚持尊重这一地区所有国家的独立和领土完整的同时,国家可以从油气矿藏开发中获益,又不损害各自的主权要求。①

东盟是此种区域努力的必要示范,东南亚地区越来越多的人意识到海洋油气矿藏共同开发协议的好处,建立可以进一步加强东帝汶与该组织的联系的国家间高层次互动,从而增加了富有经验的国家数量,增强了对以非生物海洋自然资源国际化这种形式为代表的优势的理解。事实上,建立一个东盟共同发展合作委员会或开发共同的海洋油气矿藏的政府间组织,可能会促进自我约束并因此带来资源开发地区的稳定,②这与1967年12月建立的东南亚渔业发展中心促进亚太地区渔业的可持续发展如出一辙。③

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① On the difficulties facing maritime delimitation in the South China Sea and in particular regarding the delimitation of boundaries between South Pacific States and between East Asian States, see Steven Kuan-Tsyh YU, The law of EEZ/Shelf boundary delimitation: the practice of States in the South China Sea, in Chinese Society of International Law ed., *Proceedings of the International Law Association (ILA) First Asian-Pacific Regional Conference*, 1996, pp. 45～48; Donald R. ROTHWELL, The law of the sea in the Asian-Pacific region: an overview of trends and developments, in Chinese Society of International Law ed., *Proceedings of the International Law Association (ILA) First Asian-Pacific Regional Conference*, 1996, p. 58. Both these Authors recognize the innovative character of joint development agreements regarding maritime delimitation disputes. Also see Victor PRESCOTT and Clive SCHOFIELD, Undelimited maritime boundaries of the Asian Rim in the Pacific Ocean, *Maritime Boundaries*, Vol. 3, No. 1, 2001, pp. 1～68.

② The ASEAN Charter; The Declaration on the Conduct of Parties in the South China Sea, made on November 4th, 2002. The Philippines Proposal dated August 16th, 1999 of the ASEAN-China Code of Conduct in the South China Sea. The Joint Statement of the Meeting of Heads of State/Government of the Member States of ASEAN and the President of the People's Republic of China, made on December 16th, 1997. The Joint Declaration by the Republic of the Philippines-Peoples Republic of China Consultations on the South China Sea and on Other Areas of Cooperation and the Joint Declaration on the Fourth Annual Bilateral Consultations between the Socialist Republic of Vietnam and the Republic of Philippines, both made on August 10th, 1995. The ASEAN Declaration on the South China Sea, made on July 22nd, 1992. The Manila Declaration on the South China Sea, made on July 1992. The Principles of Bandung of 1991. The Treaty of Amity and Cooperation in Southeast Asia, made on February 24th, 1976. The Declaration of Bangkok, made on August 8th, 1967.

③ On the Southeast Asian Fisheries Development Center, at www.seafdec.org, 1 February 2011.

在双边层面,中国和越南在北部湾[①]以及前者和菲律宾在中国南海[②]引入共同开发所做出的努力,应被理所当然地认为是中国接受临时措施解决海洋划界的例子。

在东北亚地区,由于最近朝鲜半岛军事升级,我们不应该期望在黄海上的合作增加,尽管中韩就海洋划界最近也作出了努力。[③]然而,通过承认区域合作的好处和必要性,各国过去几年已在中国东海取得了显著进展。[④]此外,中国和日本已经达成了可能会在中国东海实施合作开发的谅解。[⑤]

主要目标不应是强迫或强行要求新兴国家的实践构成必要的法律习惯规则履行共同开发共同海洋油气矿藏的义务,而是应该强调实施这样的法律协议所带来的好处。事实上,并没有区域或全球层面的证据表明这种义务已经形成或

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① Statement by the Ministry of Foreign Affairs of the People's Republic of China "Chinese Premier Meets with His Vietnamese Counterpart", made on April 17th, 2009, at www.fmprc.gov.cn/eng/wjb/zzjg/yzs/gjlb/2792/2794/t558266.htm, 1 March 2011. China-Viet Nam Joint Statement, made on October 25th, 2008, at www.fmprc.gov.cn/eng/wjdt/2649/t520438.htm, 1 March 2011. Joint Communiqué between the People's Republic of China and the Socialist Republic of Vietnam, made on October 8th, 2004, at www.fmprc.gov.cn/eng/wjdt/2649/t163759.htm, 1 March 2011.

② "*China will uphold the principle of shelving disputes and seeking joint development, continue to step up cooperation in the South China Sea with the Philippines and other pertinent parties*" in *Communiqué by the Ministry of Foreign Affairs of the People's Republic of China "Ambassador Liu Jianchao pays Courtesy call on Philippine Foreign Affairs Secretary Romulo"*, made on March 13th, 2009, at www.fmprc.gov.cn/eng/wjb/zwjg/zwbd/t542281.htm, 1 March 2011.

③ China-ROK Joint Communiqué, made on September 17th, 2008, at www.fmprc.gov.cn/eng/wjdt/2649/ t513632.htm, 1 March 2011. China-ROK Joint Statement, made on May 26th, 2008, at www.fmprc.gov.cn/eng/wjdt/2649/t469103.htm, 1 March 2011. Also see Mark J. VALENCIA, Conclusions and the way forward, *Marine Policy: International Journal Ocean Affairs*, Vol. 29, No. 2, 2005, pp. 185～187; Conclusions, regime building and the way forward, *Marine Policy: International Journal Ocean Affairs*, Vol. 28, No. 1, 2004, pp. 89～96; Regime building in the East China Sea, *Ocean Development and International Law Journal*, Vol. 34, No. 1, 2003, p. 199; Yann-huei SONG and ZOU Keyuan, Maritime legislation of mainland China and Taiwan: developments, comparison, implications, and potential challenges for the United States, *Ocean Development and International Law Journal*, Vol. 31, No. 4, 2000, pp. 303～345.

④ China-Japan Joint Statement on All-round Promotion of Strategic Relationship of Mutual Benefit May 22nd, 2008 at www.fmprc.gov.cn/eng/wjdt/2649/t458431.htm, 1 March 2011.

⑤ Communiqué by the Ministry of Foreign Affairs of the People's Republic of China, "China's Path of Peaceful Development and Its View of Regional Security", Speech by Ambassador Zhang Junsai, at www.fmprc.gov.cn/eng/wjb/zwjg/zwbd/t520658.htm, 1 March 2011. Also see GAO Jianjun, A note on the 2008 cooperation consensus between China and Japan in the East China Sea, in *Ocean Development and International Law Journal*, Vol. 40. 2009, pp. 291～294.

鉴于现今国家实践是紧急的。这也是亚太地区的情况。

在这个问题上,有学者认为,在与可以为适用共同开发协议提供一个良好基础的封闭或半封闭海接壤的国家之间存在合作协议先例的区域,区域性习惯规则有可能形成,这可以为模式的适用提供一个良好的组成部分,为海洋划界和非生物资源开发困境规定一个解决方案。这些地区包括了北海、波斯湾、中国东海和中国南海。①

这样一个适用于国家主权要求重叠的封闭海或半封闭海的区域的习惯的存在,将有利于克服《联合国海洋法公约》第 123 条确立的合作原则与《联合国海洋法公约》第 56 条规定的国家权利之间的兼容问题,而不修改现行的海洋法律。然而,各国在《联合国海洋法公约》第 123 条项下的合作义务,不应被理解为一种结果性的义务,尤其是当考虑到沿海国在不同海洋区域的权利时,而应被理解为与封闭海或半封闭海洋接壤国家这一特定情况下的一种手段性的义务。事实上,虽然《联合国海洋法公约》推动了各国在封闭和半封闭海上的合作,但是没有规定各国在这些海洋空间上的权利。因此,除非各国同意将这种权利授予一个区域实体,否则《联合国海洋法公约》第 123 条对区域合作将会是一个障碍。②此外,《联合国海洋法公约》第 123 条没有提及非生物海洋自然资源。

如果这些区域义务存在,那么我们将几乎不可能确定每种实施海洋油气矿藏共同开发协议的强制性义务情况应该考虑的情形以及这样的共同开发法律框架应该如何(如果没有可以任意适用的协议模式)。

从本质上讲,国家仍然可以就共同油气矿藏的开发自由做出双边或多边的努力,其中可能包括建立一个合作开发机制,或任何其他海洋自然资源国际化的形式,诸如加入区域组织并通过如国家间就共同油气矿藏的存在和位置或采取符合国际法的跨界污染预防和合作措施进行信息交流的行为规则。③

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① David ONG, Joint development of common offshore oil and gas deposits: "mere" state practice or customary International Law? *American Journal of International Law*, Vol. 93, No. 4, 1999, p. 795, p. 804.

② VALENCIA, Regional maritime regime building: prospects in northeast and southeast Asia, *Ocean Development and International Law Journal*, Vol. 31, No. 3, 2000, p. 237.

③ Resolutions UN (GA) 2996 (XXVII), 2997 (XXVII) and 2295 (XXVII), all dated December 15th, 1972, and specially Resolution UN (GA) 3129 (XXVIII), December 13th, 1973 regarding environmental cooperation on joint development of natural resources; UNEP Doc. GC. 6/CRP. 2 May 19th, 1978. See Charles Robson, Transboundary petroleum reservoirs: legal issues and solutions, in Gerald H. Blake, William J. Hildesley, Martin A. Pratt, Rebecca J. Ridley and Clive H. Schofield ed., *The Peaceful Management of Transboundary Resources*, London/Dordrecht/Boston: Trotman & Martinus Nijhoff, 1995, pp. 3~4.

五、海洋油气矿藏共同开发协议规定

已在亚太地区实施的海洋油气矿藏共同开发协议规定了不同的法律框架,并包含不同的法律规定。这不仅是这些协定的共同特点,而且也是过去 50 年其他已在世界不同地区履行的海洋油气矿藏共同开发协议的共同特点。

那些已知的海洋油气矿藏共同开发协议的内容之间的差异,是每个协议由于关国家关注不同、期待不一带来的特定、漫长而复杂的谈判导致之结果。

最全面的海洋油气矿藏共同开发协议是那些通过设立一个这些国家在各自管理资源开发协议规定授予权限及自治(包括授予运营者以必要的开发权、征税和争端解决等的职权)的国家法项下的实体,建立了在资源管理上相当程度上免受各国直接干预的法律制度的协议。在这些情况下,各国建立必要的机制控制这些实体的活动,例如,通过创建一个委员会或机构(其等级高于代表国家而受指派委员会或机构成员或者通过预算的委员会或机构)。[①]另外,国家可能通过诉诸有关国家主管部门或国有公司以管理或开发在各协议创建的共同开发区里发现的资源而选择扮演一个积极的角色。[②]

在海洋油气矿藏共同开发协议的保障下,各国可能会建立不同层级的法律互动。这些包括国家间的、国家和运营者或由有关国家和运营者创造的实体之间的权利和义务,以及当两个或两个以上的运营者可能开发同一共同的油气矿藏时不同运营者之间的权利和义务。它可能是这种情况,例如,两个或两个以上的运营商为确保有效开发而要求共同油气矿藏实施了一个联合开发机制。[③]

一个具体的共同开发协议的复杂性取决于介入国之间的信任程度和其对将被列入事项的接受程度,以及后者对实施一个比较全面的、可规制介入国和第三国对共同开发区如防止污染和保护海洋环境或规定管道和海底电缆的铺设路线之使用的法律协议的承诺。

传统上,尽管已知的海洋油气矿藏共同开发协议和各国的自由裁量权千差万别,一些法律规定被认为是代表了海洋油气矿藏共同开发协议的必要内容。这些规定有共同开发区的指定,待开发自然资源的确定,适用于共同开发区的司法和法律框架的建立以及未来运营项下的规定,包括对运营许可和选定授予运

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① Timor Gap Treaty and Timor Sea Treaty.

② MoU between Malaysia and Vietnam.

③ Unitization may be characterized as a coordinated effort by two or more parties to develop a common hydrocarbon deposit as if it was one single unit, regardless of overlapping claims or of international boundaries that they cross, while preserving its geological characteristics combined with the purpose to retrieve as much of its content as possible.

营权的方法的规定。[①]

然而,由于各国日益认识到海洋油气矿藏共同开发协议表明在规定相当长时期内共同开发区的控制和管理上的潜力,各国在近来的协议中包括了其他对诸如开发生物海洋自然资源,执行健康、安全和就业法规,或批准适用于共同开发区内开发活动的共同税制等事项规定。

六、结 论

《联合国海洋法公约》的生效并没有就两个或两个以上国家共享的或在主权要求重叠的地区发现的海洋油气矿藏的开发规定一个答案或指导方针。《联合国海洋法公约》仅规定了一个国际法项下确立的合作原则而来的强化的义务,包括各国为海洋划界达成谅解或采取临时措施(当各国未能就海洋划界达成共识)而做出富有意义的努力。然而,这种强化的义务并不意味着各国应在非生物海洋自然资源的保护和管理或订立海洋划界协定或采取如海洋油气矿藏共同开发协议这样的临时措施上进行合作。

考虑到海洋油气矿藏共同开发协议有在海洋边界划界之前、之后以及之中实施的情况,这些协议和海洋划界之间是没有相关性的,前者也不应被视为后者的替代选择或后者的取代方案。

海洋油气矿藏共同开发协议的目的并非为了实现海洋区域国际化,或改变适用于不同海洋空间、最终确定各国在各自海域的权利义务之法律性质和内容的法律协议。事实上,一旦订立海洋油气矿藏共同开发协定,各国主要考虑的是各自的国家利益,而不是任何与历史上开发非生物海洋自然资源的办法谋求一致的、集体的或共同的福利。

尽管如此,没有一个由两个或两个以上国家共享或在主权要求重叠的区域发现的海洋油气矿藏共同开发的义务,并不意味着国家不承担一些国际法项下就这些资源规定的义务。这些义务主要包括告知有关国家共享的海洋油气矿藏、不实施或放弃实施任何可能破坏或使任何开发此类资源的解决方案不可能、

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① Rainer LAGONI, Festlandsockel und Ausschließliche Wirtschaftszone, in Wolfgang Graf VITZTHUM (colabs.) Gerhard HAFNER, Wolff Heintschel VON HEINEGG, Rainer LAGONI, Alexander PROELβ, Wolfgang Graf VITZTHUM and Rüdiger WOFRUM ed., *Handbuch des Seerechts*, Verlag Munich: C. H. Beck, 2006, p. 281; Hazel FOX, Paul MCDADE, Derek Rankin REID, Anastasia STRATI and Peter HUEY ed., *Joint Development of Offshore Oil and Gas. A Model Agreement for States for Joint Development with Explanatory Commentary*, London: The British Institute of International and Comparative Law, 1989, pp. 333～372; Nuno MARQUES ANTUNES, *Towards the Conceptualisation of Maritime Delimitation-Legal and Technical Aspects of Political Process*, Leiven/Boston: Martinus Nijhoff Publishers, 2003, pp. 292～293.

不实施或放弃实施任何可能破坏或使选定达成一个具体解决方案之方法不可能的责任。

海洋油气矿藏的存在一直是并将继续是对亚太地区海洋划界的一个障碍和有关国家冲突的重要根源。对海洋油气矿藏共同开发协议作为克服这种僵局的一个务实可靠的法律选择,加强区域努力、不断增强认识其优点可能是开启一个合作时代并最终促进亚太地区经济、政治和社会进步的关键。

(中译:余芮,黄海奇;责任编辑:黄海奇)

论专属经济区军事活动的权利与义务

李广义* 万彬华** 朱宏杰***

内容摘要:世界主要海洋国为拓展其在沿海国专属经济区军事活动的自由空间,对《联合国海洋法公约》专属经济区有关规定,做出了自私性和扩大性解释。这是违背海洋法公约本意的。任何国家在沿海国专属经济区的军事活动,都是受限制的;军事活动必须体现"和平目的"和相互尊重合法权利;军事活动必须优先"适当顾及"沿海国的权利;在"剩余权利"的分配上,沿海国处于主导和优先地位。

关键词:海洋法公约 专属经济区 军事活动

专属经济区是《联合国海洋法公约》(以下简称海洋法公约)新创设的一种制度。围绕专属经济区军事活动、军事利用的权利与义务,世界主要海洋强国与广大发展中海洋国家近年来发生了一系列愈演愈烈的军事危机及冲突。为正确解读海洋法公约关于专属经济区军事活动的权利与义务,维护其良法本质,维护包括我国在内的广大发展中海洋国家在专属经济区的合法权益,非常有必要对专属经济区军事活动的权利和义务进行深入探讨。

一、专属经济区"航行和飞越自由"是受限制的自由

(一)"航行和飞越自由"与"公海自由"并不等质

虽然海洋法公约赋予了非沿海国军事舰机在沿海国专属经济区享有第87条所规定的"航行和飞越自由",但是这种自由与"公海自由"并不等质。

专属经济区是自成一类的海域,它不属于领海,也不属于公海。因此,从法

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律上讲,“自由”本身应是一种法律状态,它是受到法律因素制约的。[①]海洋法公约第 87 条第 1 款规定,所有国家在享有“航行和飞越”自由的前提是符合“公约和其他国际法规则所规定的条件”。第 58 条第 3 款规定“各国在专属经济区内根据本公约行使其权利和履行其义务时,应遵守沿海国按照本公约的规定和其他国际法规则所制定的与本部分不相抵触的法律和规章”。公约 58 条指出,专属经济区的“航行和飞越自由”是“经恰当修正”后,并在“适当顾及”沿海国的各项权益的基础上才适用于专属经济区。因此这种“自由”是受国际法有关规则约束和限制的。它必须适当顾及沿海国的权利和义务,遵守沿海国制订的有关法律和规章。从另一方面讲,即使是在公海中行使“航行和飞越自由”,也必须出于“和平目的”,不得进行任何威胁到国家主权完整和地区安全利益的活动。因此,其他国家在沿岸国专属经济区享有的“自由”,并不意味着滥用,也不能随意扩大,它是受严格限制的。非沿海国的船舶和飞机在沿海国专属经济区只是享有“借道通过”的自由,自然没有权利在未经沿海国许可的情况下进行武器试射和军事情报搜集等威胁到国家主权完整和安全利益的军事活动。

(二)非沿海国在专属经济区享有“限制下”的自由

海军是在海洋上活动的军种,在广阔的海域机动是其特有的军事属性之一。它必须保持海上机动,保有海上“航行自由”的权利。但由于海军舰艇和战机具有军事作战能力,其本身具有的军事属性和所代表的国家意志,都不能不使沿海国尤其是与大国存在矛盾的广大中小沿海国忧心重重。为保障国家主权安全和海洋权益,沿海国根据海洋法公约关于专属经济区军事活动某些限止的规定,合理地限制其它国家海空力量可能有害国家安全利益的某些活动,既符合国际法的一般原则,也符合海洋法公约的有关规定,并没有也不是要否定“航行和飞越自由”。海洋的自然属性决定了它不能被占领和分割,只能作为联系世界各国的通道。专属经济区也因此必须为沿海国和其他国家的海空力量共享。

根据国际海洋法,海域中的航行方式主要有“许可通过制”、“无害通过制”、“过境通过制”及“自由通过制”等几种形式。“许可通过制”主要适用于国家控制的内水范围内(包括“内陆水”及“海洋内水”两部分),因此,非沿海国船舶要通过沿海国内水均须事先请求并得到批准才行。“无害通过制”主要适用于沿海国领海、群岛水域及部分不适用于过境通过制的“用于国际航行的海峡”。其特点是:非沿海国船舶在不损害沿海国和平、良好秩序或安全的前提下,可以继续不停地迅速通过沿海国的领海,而无须事先请求得到批准。但无害通过制度也有某些严格的限制因素,比如,外国潜水器通过时必须“上浮水面、展示国旗”,飞机不得

① 秦晓程:《中美撞击事件中的若干国际法问题》,载于《外交学院学报》2001 年第 2 期,第 27 页。

做"无害飞越"。"过境通过制"主要适用于"用于国际航行的海峡"及群岛水域中的航道。其特点是:非沿海国船舶、飞机在不损害沿海国的主权及利益的前提下,可以在有关水域"毫不迟延的"迅速通过或飞越,而无须事先请求得到批准。它与"无害通过制"所不同的是,它不限制飞机的飞越,也不要求外国潜水器必须"上浮水面、展示国旗"。"自由通过制"主要适用于公海及沿海国所控制的"专属经济区"及"毗连区"等水域内。其特点是,它不存在"事先请求并得到批准"、"继续不停地迅速通过"或者"毫不迟延地迅速通过",潜水器必须"上浮水面、展示国旗"等限制性因素。①

海洋法公约第58条规定在本公约"有关规定的限制"下,非沿海国在沿海国专属经济区内享有第87条所指的"航行和飞越的自由"。公约第87条第1款规定所有国家在遵守"公约和其他国际法规则所规定的条件下"享有航行和飞越自由。由于海洋法公约没有对船舶的性质和种类加以明确限制,因此这就意味着包括军用船舶和飞机在内的所有船舶,都是可以在专属经济区内享有自由航行权利的。②从理论上说,非沿海国的军事舰机享有海洋法公约赋予的在沿海国专属经济区内的"航行自由权"。当然,这种"自由"是受"限制"的自由。

(三)专属经济区空域不是公空,沿海国享有有限管辖权

虽然海洋法公约确立了专属经济区制度,但专属经济区上空的法律地位并未得到足够重视,属于第三次海洋法会议上"被忽略的问题"。关于专属经济区上空的法律地位,存在着三种主张。一种观点是"主权观",即国家在专属经济区上空享有主权权利,航行和飞越仅仅是主权原则的例外。另也有观点认为专属经济区上空应维持公空的法律地位。③如果是公空的话,那么非沿海国就有权进行包括侦察、输送兵源、装备、设置报警系统、进行战术演习、测试导弹或其他一些武器等军事活动。澳大利亚在其空军指挥官操作法中认为,专属经济区上空是国际性空域,在专属经济区内,非沿海国享有进行包括飞行操作、武器试射、情报搜集和监视等活动的自由,且这种自由权利不应受到其他国家的干涉。④还有

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① 丁成耀:《从国际法角度看美国测量船闯入中国专属经济区事件》,载于《华东政法学院学报》2003年第2期,第80页。

② 张海文主编:《联合国海洋法公约释义集》,海洋出版社2006年4月第1版,第108页。

③ 秦淑明:《试论沿海国对专属经济区的管辖与其他国家的自由关系》,载于《广西政法管理干部学院学报》2002年6月第2期,第25页。

④ International airspace is that airspace over the high seas, EEZs … Accordingly; military aircraft are free to operate in international airspace without interference from any other state. While in international airspace, military aircraft are free to engage in flight operations, including weapons testing and firing, surveillance, intelligence gathering, and support of naval activities. ——参见澳大利亚空军指挥官操作法(Operations Law For RAAF Commanders)第2部分2.13节。

一种观点认为专属经济区上空应根据“地位一致”原则，即空气空间总是与其之下的地面取得一致的法律地位，并受地面法律制度的约束。美国航空法教授库珀认为，“如果地球表面的任何地方，不管是陆地还是水面，都被当作一个国家的领土而得到认可的话，那么该表面的空间也应当是该国领土的一部分。相反，如果地球表面的任何地方不是任何国家领土的一部分，如公海所包括的水域，那么该表面上面的空间也就不应当受任何国家的主权控制，而可以由任何国家自由地使用。”① “地球表面与其上空是不能加以区别对待的，必须把它们看作是单一的政治实体。”他认为，空气空间的法律地位取决于其地面，这是“国际航空法的基本规则”。因而专属经济区上空具有与专属经济区相同的法律地位，它既不是“国际空域”，也不是“领空”，它是一个特殊的空域，沿海国对专属经济区上空具有管辖权。

笔者认为，专属经济区上空应当根据“地位一致”原则来确立其法律地位，有充分理由来支持专属经济区上空是一个与专属经济区相一致的特殊的空域，沿海国对其享有管辖权。远在航空时代到来之前，罗马法已经把国家主权延伸到领土上空，使空气空间具有与地面相同的法律地位。第一次世界大战后，处理空中交通的 1919 年的《巴黎公约》、1928 年的《哈瓦那公约》、以及 1944 年的《芝加哥公约》。三个公约都认可空间应当服从于其下方国家的主权。②因此，空间的法律性质决定于毗邻陆地或水域的法律性质。由于沿海国在专属经济区享有主权权利和管辖权，因而专属经济区上空的自由与公海自由是不同的。公约的起草者，在保留某些公海自由条款的同时，并没有忘记插入诸如“在本公约有关规定的限制下”、“只要与本部分不相抵触”等限制性条款。海洋法公约第 58 条第 3 款也要求各国“应适当顾及沿海国的权利和义务”、“并应遵守沿海国按照本公约的规定和其他国际法规则所制定的与本部分不相抵触的法律和规章”。这些都构成了对专属经济区上空自由的限制。

又需要明确，沿海国对专属经济区上空的管辖权是有限的，不能绝对禁止军机的飞越行为，否则就增加了专属经济区的专属性，扩大了管辖权。与领海相比，非沿海国在专属经济区上空行使“飞越自由”时，沿海国对其的管辖权要比“航行自由”范围小一些。首先，沿海国在专属经济区内建造人工岛屿、设施和结构的权利，会影响外国飞机在这些建筑上空附近低飞的权利。其次，沿海国对于其他国家的飞机在专属经济区内倾倒垃圾等对于海洋环境产生影响的行为有管辖权。在实践中，有关建立防空识别区在理论上的争论被抛在一边，各国普遍认为，防空识别区的建立并不被认为是领空范围的扩大，也不意味着领空权向外延伸，而建立这种空域能有效地将来犯飞机在进入领空之前予以识别，对于加强国

① Cooper, Airspace Rights over the Arctic, *Air Affairs*, No. 3, 1950, p. 517.

② 《芝加哥公约》第 1,2 条是关于认可空间主权的规定：第 1 条缔约国承认，每个国家都对其领土以上的空间享有完全和排他性主权。第 2 条就本公约的目的而言，一国之领土应当被视为包括与其主权、宗主权、对该国的保护或托管相毗邻的陆地和领水。

防监控,保卫国家领空安全具有重大意义。

(四)军事舰机在沿海国专属经济区航行和飞越时应承担相应的法律义务

有观点认为海洋法公约赋予非沿海国的军事舰机在沿海国专属经济区内不受沿海国管辖的完全豁免权。[①]这种观点是缺乏国际法支持的。根据公约第58条,外国军事舰机在沿海国专属经济区航行和飞越时,必须尊重沿海国的权利,至少是不损害沿海国的权利。尽管公约对"沿海国的权利"没有作出详细的解释,但是有学者认为,这里所称的"权利",首先是指沿海国依据国际习惯法而享有的一般权利,比如沿海国主权、安全及国家利益不受侵犯的权利等;其次是指海洋法公约所赋予沿海国的特定权利。因此,未经沿海国同意和许可,他国在专属经济区进行诸如军事情报搜集、军事测量、武器试射和军事演习等影响和威胁到沿海国主权、安全利益的活动,以及影响到沿海国对专属经济区的渔业、自然资源、人工岛屿、设施结构等国家资源行使主权权利和管辖权相关的军事活动都是违法的,是严格受到限制或禁止的。

根据公约第56条规定,沿海国军事舰机在专属经济区航行和飞越时,应以符合本公约规定的方式行事,适当顾及其他国家的权利和义务。这是对沿海国权利与义务的限制性规定。也就是说,沿海国在本国的专属经济区军事活动的"方式",也是应当遵守和符合海洋法公约规定的,是不能随意限制别国军事活动的,要"适当顾及"非沿海国军事利用活动。沿海国尊重他国在专属经济区的合法权利是有前提的,即沿海国的主权完整和安全利益等不受侵害的权利,优于别国符合海洋法公约规定的权利,应当在沿海国的权利首先得到他国尊重的情况下,沿海国才应尽自己的义务尊重别国行使符合海洋法公约赋予的权利。

二、沿海国对属于"海洋科学研究"的"军事测量"享有管辖权

(一)"军事测量"属于"海洋科学研究"

沿海国享有在其专属经济区"海洋科学研究"的权利,非沿海国不享有这种权利。问题在于,如何界定"海洋科学研究"与"军事测量"的规定性及其相互关

① 参见海洋法公约第58条第2款,赋予非沿海国享有第88至第115条以及其他国际法有关规则规定的权利,即海洋法公约第95条规定"军舰在公海上有不受船旗国以外任何其他国家管辖的完全豁免权。"

系。美国海军海洋测量船“鲍迪奇”号曾多次闯入我国黄海水域进行情报搜集活动。2001 年 3 月 24 日,“鲍迪奇”号在黄海搜集数据时,被我国护卫舰强行制止并驱逐出中国专属经济区。2002 年 9 月 19 日,“鲍迪奇”号再次在黄海搜集数据,中国战机和军舰对正在专属经济区内从事情报搜集活动的美国间谍船提出严正警告,最终将间谍船逼出了中国专属经济区。中国外交部向美国国务院提出外交照会,抗议美国海洋测量船“鲍迪奇”号侵入中国黄海专属经济区海域,从事监听、侦查等“活动”。而美国国防部则认为,军事情报搜集活动与海洋科学研究是截然不同的,因此不应当受到海洋法公约的限制。中国认为“鲍迪奇”号是一艘装满侦察设备的测量船,是美国 27 艘“特种任务”舰船之一。(所谓的“特种任务”舰船指的是为美国国防部和其它美国政府机构提供情报支援的海军舰只,即海军间谍船。)[①]它在中国黄海所进行的不是一般的探测活动,而是进行“拖拽式声纳探测”及其他水下监听活动,对中国的国家安全构成了严重的威胁。[②]海洋法公约赋予沿海国对其专属经济区内的海洋科学研究享有专属管辖权,我国《专属经济区和大陆架法》第 9 条规定:“任何国际组织、外国的组织或者个人在中华人民共和国的专属经济区和大陆架进行海洋科学研究,必须经中华人民共和国主管机关批准,并遵守中华人民共和国的法律、法规”。而“鲍迪奇”号在中国专属经济区内进行“军事测量”活动没有得到中国政府主管机关的批准,严重地侵害了中国政府在该区域的专属管辖权。而就在同月,印度政府也对“鲍迪奇”号在距离印度尼科巴岛 30 海里海域进行“军事测量”活动表示抗议,认为其侵害了印度的合法权益。2001 年 1 月,印度政府还对英国斯科特号在距离第乌 190 海里处海域进行测量活动表示抗议。

海洋法公约中并没有形成和出现“军事测量”这个概念,它在很大程度上是英美等海洋强国创造出来的。[③]海洋强国之所以这样做,是因为根据海洋法公约第 56 条第 1 款,沿海国对在其专属经济区进行的海洋科学研究活动享有管辖权,而一旦将“军事测量”活动划归海洋科学研究,则“军事测量”活动所得数据和成果需要与沿海国分享。这显然不符合非沿海国的本意和利益,因此它们便自造了一个海洋法公约中不存在的概念,据此宣称沿海国没有明确的权利管辖“军事测量”活动。美英出于本国利益需要,对概念进行偷梁换柱,既不符合海洋法公约,也违背了国际社会的广泛共识。

广大发展中国家的海洋认为,“军事测量”是应属于“海洋科学研究范畴”。“海洋科学研究”是对在海洋进行的对海洋环境研究活动的统称,其中就包括水

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① 美国的海军间谍船任务分得很细,既有海洋地理勘测舰、海洋侦察船、缉毒情报船、潜艇支援舰,又有导弹测量船、声纳研究船、海底电缆修复舰、潜艇导航实验舰和弹道导弹实验船。

② 丁成耀:《从国际法角度看美国测量船闯入中国专属经济区事件》,载于《华东政法学院学报》2003 年第 2 期,第 80 页。

③ 美国使用的是“军事测量”,英国使用的是军事数据搜集(MDG)。

文测量。[①]水文测量得出的资料数据主要用于制作为航行提供便利和保证航行安全的文件和档案等,供与海洋环境相关的人员诸如海洋学家、生物学家和环境学家等使用。“军事测量”指在海洋进行的用于军事目的海洋数据搜集活动,[②]实质上“军事测量”就是用于军事用途的海洋水文测量,两者都是通过测量船舶或飞行器上的各种仪器对海道情况、海水流量、海洋水质、海域气候特征、海洋生物和海底矿产资源等海洋数据的探测和搜集活动,内容涉及海洋学、海洋地质学、物理学、化学、生物学以及声学,设备包括音响测深仪、扫描声纳、海底抓斗、水流仪和靠模工具机。“军事测量”的特别之处是出于军事安全因素考虑,具有军事利用价值的信息和数据将不会用于普通海洋科学,而主要应用于潜艇操作和反潜、布置水雷和排除水雷等军事活动。因此,由于将水文测量得出数据资料作军事用途,海洋强国所谓的“军事测量”显得较为特殊,但实质上仍然属于海洋法公约规定的“海洋科学研究”的范围,只是用途不同罢了。“民事测量”与“军事测量”都属于水文测量,而且两者在一定条件下也是可以相互转化和相互利用的。

(二)沿海国对“军事测量”享有管辖权

根据海洋法公约第 245 条,沿海国有权制定法律和规章来管辖其专属经济区的“海洋科学研究”和水文测量活动,非沿海国的“军事测量”活动,“应经沿海国明示同意并在沿海国规定的条件下,才可进行”;非沿海国船舶在过境通行时,非经沿海国事前准许,不得进行任何研究或测量活动。非沿海国在沿海国专属经济区内进行的“军事测量”活动,也必须得到沿海国同意,并且接受沿海国的管辖。沿海国有权按照有关条款规定,准许在其专属经济区内或大陆架上的“军事测量”活动;“在专属经济区内和大陆架上进行‘海洋科学研究’,应经沿海国同意”。沿海国对其专属经济区的“军事测量”活动享有管辖权;有权拒绝他国在其专属经济区内进行“军事测量”活动。即使沿海国同意非沿海国进行“军事测量”活动,并且该活动正在进行,但是如果违反了应当遵守的义务,沿海国有权要求这些活动停止。

沿海国不仅对专属经济区享有“渔业”和“微生物”等“资源主权”,“军事测量”属于对海洋的军事利用活动,所搜集的数据资料不仅仅运用于军事,构成对沿海国“资源主权”的侵犯,应受到管辖。一是由于进行“军事测量”的船舶和飞行器可能是民用的,不能仅仅通过其外观来判断其所进行活动的性质;二是“军事测量”诸如“开采大陆架、使用炸药或者对海洋环境造成了损害的活动当然会

① 丁成耀:《从国际法角度看美国测量船闯入中国专属经济区事件》,载于《华东政法学院学报》2003 年第 2 期,第 81 页。

② Ashley Roach and Robert W. Smith, Excessive Maritime Claims, *International Law Studies*, Vol. 66, 1994, p. 248.

引起沿海国的关注，因此应当取得沿海国的同意”；三是所得的资料和数据不可避免会涉及到对沿海国诸如石油或天然气等自然资源的探测和开采，因此沿海国对其享有管辖权。不仅如此，沿海国还有权对他国在其专属经济区妨碍其行使主权和管辖权的军事活动进行阻挠或限制。因此，无论是“海洋科学研究”，还是对海洋的“军事利用”、“军事测量”等都必须得到沿海国同意，尊重沿海国的主权和管辖权，并接受沿海国管辖。

（三）非沿海国“军事测量”的信息应与沿海国共享

根据海洋法公约第 248 条和 249 条的有关规定，经沿海国批准或允许后，非沿海国在沿海国专属经济区进行“军事测量”活动，应在预定开始日期至少六个月前，向沿海国提供关于测量活动的性质和目标、使用的方法和工具、活动的精确地理区域、活动的具体时限和沿海国参加的程度等信息的说明。如果沿海国愿意，有权参加或派代表参与该“军事测量”活动。沿海国还有权利要求非沿海国提供“军事测量”的最后成果和结论、研究所取得的资料和样品，协助沿海国对所得情报和信息加以评价或解释。

三、军事活动必须体现“和平目的”和“适当顾及”各方合法权利

（一）“和平目的”不排除一般意义上的军事活动，但要相互尊重合法权利

作为国际法基本原则的运用和重大发展的海洋法公约，在其序言、第 88 条、第 301 条、第 10 部分、第 13 部分中，都载明并要求海洋的“和平利用”。序言特别强调，本公约的历史意义就在于“维护和平、正义和全世界人民的进步”，“意识到各海洋区域的种种问题都是彼此密切相关的，有必要作为一个整体来加以考虑”，以“促进海洋的和平用途”。其第 88 条规定公海也应用于“和平目的”，这是 1958 年《大陆架公约》没有的一条崭新规定。[①]海洋法公约的目的是能够有助于按照《联合国宪章》所载的联合国的宗旨和原则巩固和平安全与友好。“维护国际和平及安全”，是联合国宪章第一项宗旨和首要目标。因此“和平目的”并不禁止沿海国和非沿海国在专属经济区的所有军事利用活动。

从沿海国的角度来讲，根据海洋法公约的规定和现实情况，应该说海军在平

① 邵津：《专属经济区和大陆架军事利用的法律问题》，载于《中国国际法年刊》1985 年卷，第 192 页。

时主要是执行警察任务,为政府提供服务和其他用途。主要是:在国家管辖的水域行使主权权利;担负在公海上进行军事和武器实验的任务;执行国际法上的普遍管辖权;海军外交。另外,海军在平时还要担负保护海上采油平台和有关设施、海上人工岛屿,执行"和平封锁",以及监督污染和倾倒核垃圾等任务。随着国家资源主权向远洋的延伸,国家的海事执法力量必须借助军队来行使和维护自己的主权权利和管辖权。从非沿海国的角度来讲,其国家利益也可能会延伸到非沿海国的专属经济区内。比如说为了本国的商业船队免遭海盗或恐怖主义袭击,军队需要提供护航保护。本国的船舶由于自然灾害等原因而需要救援,军队需要提供帮助。海湾战争后,在联合国安理会的授权下,军舰可以用于执行经济封锁任务。而且集体安全当事国在行使集体自卫时可以在国际法规定的限制下,在公海上使用武力,以保护集体军事力量、公务船舶和飞机。

虽然"和平目的"原则上不禁止非沿海国在沿海国专属经济区从事一般意义的军事活动,但是什么样的军事活动是"一般意义"的?对此有学者指出:"和平利用"意味着,非沿海国在专属经济区内的活动是沿海国同意的、不至于引发紧张、疑虑甚至冲突的活动。因此检验一种军事活动是否是为了"和平目的"或方式是否是"和平"的,既要看其行为是否符合《联合国宪章》的要求,是否与其依国际法所承担的国际义务、国际承诺相一致,诸如不能与在其他场合关于裁军、非热核化和海底非军事化的谈判相分离;[①]还要关注的是军事活动是否对沿海国造成了威胁、危险的态势。在一国管辖的海域内出现外国海军有可能是合法,也有可能是非法的。它们的行为必须符合当代国际法和联合国宪章的基本宗旨,不能对沿海国的主权安全造成威胁和影响,否则即为非法的。

无论是沿海国还是非沿海国,在专属经济区都有各自合法的权利,也有其应当承担的义务。"和平目的"原则要求各方在专属经济区的军事活动都应适当顾及对方的合法权利。根据海洋法公约的规定,沿海国在其专属经济区享有资源主权权利和相应的管辖权;非沿海国在专属经济区享有航行和飞越、铺设海底电缆和管道的自由等权利。由于两种权利在同一空间里行使,它们之间肯定会有交集。"和平目的"的军事活动,要求沿海国进行军事活动时以符合本公约规定的方式,适当顾及其他国家的合法权利。而非沿海国在专属经济区进行军事活动时,应适当顾及沿海国的权利,遵守沿海国按照本公约的规定和其他国际法规则所制定的与海洋法专属经济区部分不相抵触的法律和规章。比如非沿海国海军在军用舰机航行和飞越专属经济区的同时,进行情报搜集活动,就不能认为是"无害的",而是"损害沿海国的和平、良好秩序或安全的"。

当沿海国和非沿海国在专属经济区军事活动发生矛盾和冲突时,根据国际

① 在第三次海洋法会议第4期会议的大会上,对海洋的和平利用进行了专题辩论。大会主席阿麦拉·辛格指出,海洋的和平用不能与在其他场合关于裁军、非热核化和海底非军事化的谈判分离。

法,沿海国的权利应高于非沿海国,得到优先顾及和尊重。

(二)军事活动必须优先"适当顾及"沿海国的合法权利

当沿海国行使管辖权和其他国家行使航行自由权发生冲突的时候,应当赋予沿海国以优先权利来解决冲突。在中美撞机事件中,美国侦察机违反了海洋法公约在他国专属经济区上空飞越行为应适当顾及沿海国权利的规定,对中国国家安全造成了威胁,中国有权派遣军机对美军的间谍飞机进行监督。美军飞机违反飞行规则,导致了撞机,应当承担此次事件的全部责任。中国承认各国在专属经济区内享有飞越自由权,但是这些权利必须顾及沿海国的国家安全。

沿海国对专属经济区的自然资源拥有主权权利,既是由于专属经济区与其领海邻接而产生和获得的,又是公约以具有约束力法律条文明确规定的。按照国家权利归类,应属于国家基本权利的一部分。[①]这种主权是排他的,是全面的和优于一般权利的,是不可否认的,也是不得以任何方式侵犯的。[②]沿海国为了保护本国在专属经济区的合法权益,排除外来的干扰和影响,在军事利用法律地位方面应当是优先的,在内容方面应当是更加广泛的,其他国家的权利应当是退居其次的。当沿海国和其他国家在专属经济区军事利用活动发生矛盾或冲突时,不应是沿海国首先要"顾及"其他国家的军事利用,而应是其他国家首先要"顾及"沿海国的主权权利。在争端的解决中,沿海国理应处于优先地位。两个"适当顾及"的法律限制也是不同的。公约在序言中明确规定,为了和平、公平和有效地利用海洋资源,既要照顾到所有方面的利益,更要"特别"照顾到"发展中国家的特殊利益和需要"。而且公约对其他国家除"适当顾及沿海国的权利和义务"之外,还要求"应遵守沿海国按照本公约的规定和其他国际法规则所制定的与本部分不相抵触的法律和规章"。

(三)交战国在中立国专属经济区进行军事活动应适当顾及沿海国的权利

专属经济区是对沿海国有重要经济利益的区域,交战国在其中进行军事行动,必然会给区域内的海洋资源和环境带来影响,很可能中止或破坏沿海国的权利,侵犯中立国特定的主权权利。因而有专家建议不允许将中立国的专属经济区作为海上作战区域,而对于此区域内的敌对行动或其他军事行动,更应严格禁止。但有学者认为,将中立国专属经济区作为海战区域并不违反各国际公约的

① 《国际条约集》(1924－1933),北京:世界知识出版社 1961 年版,第 545 页。

② 周鲠生著:《国际法》上册,北京:商务印书馆 1976 版,第 77 页;《国际条约集》(1924－1933),北京:世界知识出版社 1961 年版,第 545 页。

有关规定。[①]虽然海洋法公约被认为是和平时期的海洋法律制度,但它所界定的受沿海国主权或其他形式管辖权限制的海域对交战国和中立国在武装冲突期间行使交战权和中立权都有重大影响。虽然《圣雷莫海上武装冲突国际法手册》[②]没有规定交战国能否在中立国的专属经济区设置封锁区,但是它认为交战国可在中立国的专属经济区内进行敌对行动。当然,军事活动必须要适当顾及沿海国作为中立国的权利,特别是要顾及在专属经济区和大陆架的经济资源勘探与开发,以及海洋环境的保护与保存。因此交战国不得为满足"军事必要"原则而攻击中立国专属经济区内的人工岛屿、设施和设备,不得为实现军事利益而采用大规模破坏或改变海洋环境的作战方法和手段,不得损害沿海国的资源主权。如果交战国在中立国专属经济区铺设水雷,不仅需要遵守前述原则,而且必须通知沿海国和其他第三国,以确保专属经济区的航行自由不受影响。

(四)沿海国在专属经济区"剩余权利"分配上处于主导和优先地位

根据海洋法公约第56条的规定,沿海国对专属经济区的权利除开发、利用、养护和管理自然资源外,还享有该海洋法公约所规定的其他权利。"其他权利"主要是指通常所说的"剩余权利"。海洋法中的"剩余权利",即《联合国海洋法公约》中没有明确规定或没有明令禁止的那部分权利。如专属经济区捕鱼可捕量剩余部分、海洋污染执行的剩余权利等。公约第58条第1款也赋予非沿海国进行"与自由相关的海洋其他国际合法用途……以及符合本公约其他规定的那些用途"。尽管公约该条款的本意是说这些权力必须"与其他国际法相符",但仍有学者认为这句话有隐含意思,包含允许军舰不受限制地在其他国家的专属经济区内活动。[③]也有学者认为军舰必须适当顾及沿海国在专属经济区的利益,"对于专属经济区军事利用的限制要远远比在公海上进行类似活动的限制严格",如果军舰不遵守沿海国的规定,沿海国有权要求军舰离开专属经济区。[④]

非沿海国未经允许无权进行训练、演习等军事活动。当军舰穿越他国专属经济区时,海军的日常训练会继续进行。如果一国用于军事用途的火箭或者导

① 相敏:《中立国专属经济区作为海战区域的战争法思考》,载于《西安政治学院学报》2003年10月第5期,第74页。

② 1987年,根据国际人道主义法研究院的倡议,在比萨大学和美国锡拉丘兹大学的协助下,重述适用于海上武装冲突的国际人道主义法圆桌会议预备会议在圣雷莫举行。1988年—1994年国际人道主义法研究院召集一系列圆桌会议,起草制定了《圣雷莫海上武装冲突国际法手册》。

③ Oxman Bernard, The Regime of Warships Under the United Nations Convention on the Law of the Sea, *Virginia Journal of International Law*, Vol. 24, 1984, p. 809.

④ Orrego Vicuna Francisco, *The Exclusive Economic Zone*, Cambridge: Cambridge University Press, 1989, p. 111.

弹在试射中飞过或者落入他国的专属经济区，那么这是否是合法的飞越自由？有些学者认为，如果军事训练是没有威胁性的，并且能够符合“本公约其他规定的那些用途”，那么偶尔的飞机发射升空、直升机从军舰上起飞都应当是允许的。如果从字面意义理解“以及与这些自由有关的海洋其他国际合法用途，诸如船舶和飞机的操作。”即意味着军舰可以在任何地方进行活动。它可以在他国的专属经济区内进行包括导弹发射和武器测试等活动。这种观点曲解了专属经济区作为一个特定区域的法律概念，它的本身即为平衡权力和利益的产物。因此有学者认为：“想要把在专属经济区内进行的诸如发射鱼雷和大炮、非法藏匿武器等武器测试等同于舰船、飞行器和海底电缆的使用将会是不现实的。”[①]由于进行任何的武器试射都会对沿海国的渔业和其他利益造成威胁，因此应得到沿海国的预先授权和批准，并受到沿海国的管辖和限制。

非沿海国无权建立临时军事区。1982 年初爆发的英阿马岛武装冲突，阿根廷试图用武力手段解决与英国的主权之争，对马岛进行了军事占领。英国迅速做出了反应，宣布对马岛周围 200 海里海域实行海上封锁，禁止所有国家的船只进入此区域。所有进入马岛周围 200 海里禁区的飞机和舰只都将遭到攻击，并且威胁要击沉所有在此区域内的阿根廷船只。英国的上述做法，实质是将马岛周围的专属经济区转化为一个专属军事区，扩大了在专属经济区的管辖权和主权权利。因此有国家认为英国的宣告是一个“海域管辖权方面严重的错误”，因为它使得“建立距海岸基线 200 海里军事区域成为事实并且具有了法律效力。”[②]作为回应，阿根廷也建立了 200 海里专属军事区域。1979 年，针对格林纳达政变后成亲苏政权，美国策划了一场所谓的国际性行动，[③]以建立和扶植一个亲美的傀儡政权。“独立”号航空母舰编队和“关岛”号两栖攻击舰编队于 1983 年 10 月到达格林纳达周围海域，并在格岛周围建立了半径为 50 海里的海空封锁区，对格林纳达实施全面封锁，切断了该岛与外界的一切联系。海洋法公约并没有明确的条款规定非沿海国可在沿海国专属经济区设立军事封锁区域，根据海洋法公约第 19、25、40 条，沿海国在本国的领海和内水设置封锁区是合法的，但能否在专属经济区和公海设置封锁区则无明文规定。根据公海自由原则的精神，在公海设立封锁区应是合理的，但不得封锁用于国际航行的海峡。关于海上

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① Scovazzi Tullio, *The Evolution of International Law of the Sea: New Issues, New Challenges*, The Hague: Martinus Nijhoff Publishers, 2001, p. 162. (reprinted from Volume 286 of Recueil des Cours)

② 达尔顿认为：在福克兰群岛冲突中，一个临时性的非军事区变成了一个完全的专属区。有观点认为公约国对公海通过和飞越自由权的干涉是违反国际法的行为。我认为，这种观点是对国际法的片面理解。人们应该考虑交战国在公海上享有的自卫权和进行其他活动的权利。

③ 牙买加、多米尼加、巴巴多斯、安提瓜、圣文森特、圣卢西亚、圣克里斯托弗—尼维斯 7 个加勒比海国家的警察部队也在“演习”的名义下集结巴巴多斯。

封锁,海战法中制定了详尽的专门规则,为了避免受制于这些规则,在历次战争和武装冲突中,许多国家都尽力避免使用封锁、封锁区这些术语而使用诸如军事区域、军事禁区等术语。[①]有学者认为,由于海军在进行武器试射和军事训练时可能会影响到周边海域,尤其对沿海国的渔业及其它涉及资源主权的利益造成负面影响,因此非沿海国可以在沿海国专属经济区内划定一个临时军事区,在该区域内进行军事训练和演习活动符合国际习惯法。"一直以来,在公海的临时区域进行军事目的的活动被国际习惯法实践看作是国家自卫的权利。因此可以认定,临时军事区的建立以及在其中进行的合理活动是合法的"。[②]这种观点遭到了沿海国的强烈反对,因为不合时宜的军事活动会干扰和影响该海域的渔业活动和沿海国行使其他资源主权相关的权利。因此沿海国会毫不犹豫地采取措施来保护和保存其专属经济区内的资源而对其专属经济区进行限制,这使临时军事区的合法性就站不住脚了。[③]

沿海国对专属经济区的防扩散活动享有主导权。2002 年 12 月 9 日,据美国的情报,西班牙军舰在公海上截获了一艘运往也门的朝鲜货船,在装有水泥的货物下搜出了 15 枚"飞毛腿"战术弹道导弹以及火箭推进剂,而在该船的货单上只记载了水泥。经过一系列高级磋商,美国不得不对此船放行,12 月 11 日该船舶得以继续驶往也门。[④] 2002 年 12 月美国公布反对大规模杀伤性武器国家战略,宣称反对大规模杀伤性武器对美国而言是首位的国家安全事项,号召加强包括外交、军事、执法等方面的海上"阻禁"能力。于是,美国总统布什于 2003 年 5 月 31 日,在波兰克拉科夫的一次会议上发起了"防扩散安全倡议"(简称 PSI),[⑤]建议在海上对"疑似"向这些国家运载大规模杀伤性武器及其运载工具的任何船舶和飞机进行拦截。

传统国际法规定登临权只能在公海行使,而"防扩散安全倡议"将实施登临的"国际海域"定义为不包括一国的内水领海以及群岛水域的全部海域。也就是说沿海国的专属经济区被包括在合理使用登临权的海域之内,这种行动在实施的过程中将不可避免的侵害到沿海国的主权权利。它严重侵害了当代国际关系的基本准则和国际法基本原则,破坏了专属经济区制度和船旗国专属管辖制度,

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① 李莉、林奥:《海上封锁作战中的法律问题》,载于《政工学刊》2003 年第 12 期,第 47 页。

② Van Dyke Jon M, Military Exclusion and Warning Zones on the High Seas, *Marine Policy*, Vol. 15, 1991, p. 147.

③ Orrego Vicuna Francisco, *The Exclusive Economic Zone*, Cambridge: Cambridge University Press, 1989, p. 111.

④ 俄罗期加入"防扩散安全倡仪"中国将何去何从,下载于 http://www.china.com.cn/chinese/junshi/583050.htm,2011 年 6 月 20 日。

⑤ 该倡议的最初参与国包括澳大利亚、法国、德国、意大利、日本、荷兰、波兰、葡萄牙、西班牙、英国和美国,加拿大、丹麦、挪威、新加坡和土耳其于 2003 年 12 月加入。2004 年 5 月 31 日,俄罗斯外交部发表声明,宣布加入由美国主导的"防扩散安全倡议",成为其第 17 个参与国。

将导致现行国际海洋法秩序的混乱。联合国安理会在第1540(2004)号决议中声明,“欢迎多边安排在防扩散领域所作的努力”,要求各国“按照本国程序,通过和实施适当、有效的法律,禁止任何非国家行为者,尤其是为恐怖主义目的而制造、获取、拥有、开发、运输、转移或使用核生化武器及其运载工具”,“制订和保持适当、有效的边境管制和执法努力,以便按照本国法律授权和立法,并遵循国际法,包括必要时通过国际合作,查明、阻止、防止和打击这种物项的非法贩运和中间商交易”,吁请所有国家“按照本国法律授权和立法,并遵循国际法,采取合作行动,防止非法贩运核生化武器及其运载工具和相关材料”,登临检查权、命令改航、押解回港和武力攻击等海上执法措施不得滥用。

四、结 论

专属经济区不具公海的性质,也不同于领海,是海洋法公约所确立的一项新的、自成一类的海洋法制度。由于公约用语模糊,给各个国家提供了解释的空间。从国际法一般原则和公约立法本意来看,专属经济区“航行和飞越自由”是受到限制的;沿海国对属于“海洋科学研究”的“军事测量”享有管辖权;军事活动必须体现“和平目的”和适当顾及各方合法权利;沿海国在“剩余权利”的分配上处于主导和优先地位。对公约的任何解释和运用,均不应超出这些原则。

(责任编辑:余 芮)

On the Rights and Obligations of Military Activities in the Exclusive Economic Zone

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Abstract: To justify the expansion of military activities onto the exclusive economic zone of coastal States, some of the world's major maritime powers have adopted one-sided, extended interpretations over relevant provisions on the exclusive economic zone in UNCLOS, which go against the original intention of the Convention. According to this document, any military activity of any State in any exclusive economic zone of any coastal State shall be subject to restriction; any military activity must reflect "peaceful purposes" and mutual respect of legitimate rights; any military activity shall give "due regard" to the rights of coastal States; and in terms of allocating "residual rights", coastal States shall occupy the dominant and preferential position.

Key Words: UNCLOS; Exclusive economic zone; Military activity

The exclusive economic zone (EEZ) is a regime newly established by the United Nations Convention on the Law of the Sea (UNCLOS). In recent years a series of increasingly intense military crises and conflicts centering on the rights and duties regarding military activities in the exclusive economic zone have arisen between major maritime powers and many developing maritime States. In order to correctly interpret the rights and duties regarding military activities in the EEZ under UNCLOS, to maintain this convention's status as authoritative law, and to safeguard the legitimate rights and interests of develo-

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ping maritime States—such as China—in their EEZs, it is imperative to hold in-depth discussions on the rights and duties regarding military activities in the exclusive economic zone.

Ⅰ. "Freedoms of Navigation and Overflight" in the Exclusive Economic Zone Are Freedoms Subject to Restriction

A. "*Freedoms of Navigation and Overflight*" *Are Not Equivalent to* "*Freedom of the High Seas*"

Though article 87 of UNCLOS grants warships and military aircraft of non-coastal States the "freedoms of navigation and overflight" in the EEZs of coastal States, such freedoms are not equivalent to "freedom of the high seas".

The exclusive economic zone is a unique sea territory, not classified as either territorial waters or high seas. Therefore, in legal terms, "freedom" itself should denote a kind of legal state, subject to restrictions of legal factors. ① Paragraph 1 of article 87 of UNCLOS provides that the freedoms of "navigation and overflight" shall be exercised by all States "under the conditions laid down by this Convention and by other rules of international law". Dovetailing off this principle, paragraph 3 of article 58 provides:

> *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 and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.*

Article 58 points out that the "freedoms of navigation and overflight" in the EEZ are applicable to exclusive economic zones only "with due regard" to the rights and interests of coastal States. Therefore, such "freedoms" are subject to the constraints of relevant provisions of international law. Due regard must be given to the rights and duties of coastal States, and the relevant laws and regulations formulated by these States must be observed. On the other hand,

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① Qin Xiaocheng, Several Issues of International Law in the Sino-US Collision Incident, *Journal of the China Foreign Affairs University*, No. 2, 2001, p. 27.

even the exercise of "freedoms of navigation and overflight" in the high seas must also be "peaceful" in nature, and any activity threatening the sovereignty of any State or regional safety and interests is prohibited. Therefore, the "freedom" enjoyed by other States in the EEZ of any coastal State does not embrace indiscriminate or encroaching use at will, but rather should be subject to strict restriction. The ships and aircraft of non-coastal States only enjoy the freedom of "passage" through the coastal State's EEZ, naturally without the right to conduct military activities threatening the integrity of national sovereignty or safety interests, such as weapons testing and military intelligence gathering, without prior consent of the coastal State.

B. Non-coastal States Enjoy Freedom "Subject to Restriction" in the Exclusive Economic Zone

The navy is the sea-based branch of the military force, and maneuvering on vast sea areas is one of its specific military functions. Through maritime maneuvers, navies maintain and exercise their right of "freedom of navigation" on the high seas. However, the fact remains that navy vessels and warplanes are government property. They are militarily operational and battle ready, and dispatched abroad to represent the will of the State. This cannot but make coastal States exceedingly anxious, especially small and medium-sized coastal States not strongly allied with major powers. To safeguard their sovereignty, security and maritime rights and interests, coastal States have, in accordance with the UNCLOS provisions on restricting military activities in the EEZ, reasonably limited certain activities of foreign navies and air forces that could compromise their domestic security or interests. Such restrictions not only conform to the general provisions of international law, but also the relevant provisions of UNCLOS, all without unduly denying the "freedoms of navigation and overflight".

Under international law of the sea, there are several regimes of passage through sea areas, such as "licensed passage", "innocent passage", "transit passage" and "free passage". "Licensed passage" mainly applies to a State's internal waters (including "inland waters" and "ocean internal waters"). As the name suggests, to navigate in the internal waters of a coastal State, foreign vessels must first request permission and obtain approval.

"Innocent passage" applies within the territorial sea or archipelagic waters of coastal States, as well as certain "straits used for international navigation" in which transit passage does not apply. The regime of innocent passage provides

that vessels of non-coastal States, as long as they are not prejudicial to the peace, good order or security of a given coastal State, may continuously and expeditiously pass through the territorial waters of said coastal State without having to obtain approval through prior request. But this regime also carries some strict restrictions; for example, foreign submarines and other similar vessels that are submerged in their normal mode of operation are required to "navigate on the surface and to show their flag". Furthermore, aircraft are not granted the freedom of "innocent overflight".

The regime of transit passage is mainly applicable to "straits used for international navigation" and sea-routes through archipelagic waters. Under this regime, foreign vessels and aircraft may, provided they do not jeopardize the sovereignty or interests of the coastal State, proceed "without any delay" and expeditiously along the route in question, without first having to request or obtain approval. Unlike "innocent passage", the transit passage regime does not restrict the overflight of aircraft or require that foreign submarines and other underwater vehicles "navigate on the surface and show their flag".

"Free passage" applies to the high seas and waters such as the EEZ and contiguous zone. Though not areas over which coastal States enjoy complete sovereignty, they nonetheless possess certain sovereign rights in these zones. "Free passage" is not subject to restrictions such as obtaining approval through prior request, continuous and expeditious transit or transit without delay and expeditious navigation, and naturally it is not expected that foreign submarines and other underwater vehicles navigate on the surface and show their flag. ①

Article 58 of UNCLOS provides that in the EEZ, non-coastal States enjoy the freedoms referred to in article 87 of navigation and overflight, subject to the relevant provisions of the Convention. Paragraph 1 of article 87 of the Convention provides that all States enjoy the freedom of navigation and overflight, subject to "the conditions laid down by this Convention and by other rules of international law". As UNCLOS does not qualify the nature or category of vessels that may exercise these rights, it follows that all vessels, including military vessels and aircraft, enjoy the right to free navigation in the EEZ. ② So, al-

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① Ding Chengyao, On the Incident of US Survey Vessel Intruding into China's EEZ from the Perspective of International Law, *Journal of East China College of Political Science and Law*, No. 2, 2003, p. 80.

② Zhang Haiwen ed., *Collection of Interpretation of the United National Convention on the Law of the Sea*, Beijing: Maritime Press, 2006, p. 108.

though the military ships and aircraft of non-coastal States enjoy the freedom of navigation in the EEZ of the coastal State as recognized by UNCLOS, this "freedom" is subject to reasonable and lawful restrictions.

C. The Airspace of the Exclusive Economic Zone Is Not Open Airspace, and the Coastal State Has Limited Jurisdiction

When UNCLOS established the new EEZ regime, the legal status of the superjacent airspace did not receive adequate attention at the 3rd Conference on the Law of the Sea. Lack of clarity on this neglected issue has led to the formation of three distinct interpretations regarding the legal status of EEZ airspace. The first may be called the "sovereignty view", namely the stance that a state enjoys the sovereign right over the EEZ, with the only exceptions being foreign vessels' right to navigation and overflight. Some commentators have also asserted that the EEZ airspace should maintain the legal status of open airspace. ① In open airspace, non-coastal States have the right to conduct military activities such as reconnaissance, conveyance of manpower resources and equipment, setup of warning systems, tactical maneuvers, testing guided missiles and other weapons, among others. Australia, in its Operations Law for RAAF Commanders, holds that the EEZ airspace comprises international airspace, and that within the EEZ, non-coastal States enjoy the freedom to conduct activities such as flight operation ("overflight"), weapons exercises, intelligence gathering and monitoring; moreover, such freedoms and rights shall not be impinged upon by other States. ②

Another view contends that the EEZ airspace should conform to the principle of "consistent status", that is, the legal status of the airspace should be consistent with the ground beneath it and subject to the constraints of land law. US Air Law Professor Cooper maintains that "[i]f any place on the sur-

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① Qin Shuming, A Tentative Discussion on the Jurisdiction of the Coastal State over Its Exclusive Economic Zone and Free Relationship with Other States, *Journal of the Guangxi Administrative Cadre Institute of Politics and Law*, No. 2, 2002, p. 25.

② International airspace is that airspace over the high seas [and] EEZs … Accordingly; military aircraft are free to operate in international airspace without interference from any other State. While in international airspace, military aircraft are free to engage in flight operations, including weapons testing and firing, surveillance, intelligence gathering, and support of naval activities. ——*See* Section 2. 13 of Part Ⅱ of Australian Operations Law For RAAF Commanders.

face of the earth, whether on land or water, is recognized as the territory of a state, the airspace of that surface shall also be part of the territory of that state. On the contrary, if any place on the surface of the earth is not part of the territory of any state, such as the waters included by the high seas, the space above that surface shall not be subject to the sovereignty control of any state, but may be freely used by any state."① Cooper has also argued that "[t]he surface of the earth and the airspace above it shall not be treated separately, but must be regarded as a single political entity." He believes that the legal status of airspace is determined by the ground beneath it; this is to him the "basic principle of the law of international navigation". According to this line of thinking, the airspace above the exclusive economic zone would be vested with the same legal status as the EEZ itself, meaning it would constitute neither international nor territorial airspace. It rather would be a special airspace over which the coastal state in question enjoys jurisdiction.

The authors are of the opinion that the legal status of the EEZ airspace should be established according to the principle of "consistent status" and that there is sufficient historical evidence to support the position that the EEZ airspace constitutes a special zone whose status is consistent with the EEZ itself, meaning that the coastal State has jurisdiction over it. Long before the advent of the aviation age, Roman law had extended state sovereignty to include the airspace above its territory, conferring upon it the same legal status as the land. After the First World War, three conventions dealing with air traffic, the Paris Convention of 1919, the Havana Convention of 1928 and the Chicago Convention of 1944, all held that the sovereignty of airspace should accord with the sovereignty of the State beneath it.② Therefore, the legal status of airspace is determined by the legal status of the land or waters beneath it. Since coastal States enjoy sovereign rights and jurisdiction in its EEZ(s), the freedom of the airspace above the exclusive economic zone is different from the freedom of the high seas. Drafters of the conventions, while preserving the freedoms of the high seas, did not neglect to insert qualifying clauses such as "under the restriction of relevant regulations in this Convention", and "so long as it does not con-

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① Cooper, Airspace Rights over the Arctic, *Air Affairs*, No. 3, 1950, p. 517.

② Articles 1 and 2 of the Chicago Convention recognize State sovereignty over its airspace: Article 1 The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory. Article 2 For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

flict with this section". Article 58, paragraph 3 of UNCLOS provides that all states "shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part." These terms substantively restrict the freedoms enjoyed by foreign aircraft in the EEZ airspace.

It should also be noted that a coastal State's jurisdiction over EEZ airspace is limited. The overflight behavior of foreign military aircraft cannot be absolutely forbidden; otherwise, the exclusiveness of the exclusive economic zone would be enhanced and jurisdiction expanded. Compared with the territorial seas, while the non-coastal state exercises the "freedom of overflight" in the airspace above the exclusive economic zone, the jurisdiction of the coastal State over the "freedom of overflight" will be smaller than that over the "freedom of navigation". Firstly, the coastal State's right to construct artificial islands and installations in the EEZ may affect the right of foreign aircraft to fly at a low altitude near the airspace above such structures. Secondly, the coastal State has jurisdiction over the behavior of foreign aircraft in the EEZ that could impact the marine environment, such as dumping. For the present discussion, the theoretical dispute over the legality of establishing air defense identification zones (ADIZs) will be set aside; most countries generally do not perceive the establishment of an ADIZ as an expansion of territorial air space or extension of sovereignty over airspace. ADIZs can effectively identify intruding aircraft before their entry into the territorial airspace, which bolsters national defense and helps safeguard the integrity of territorial air space.

D. Legal Obligations that Warships and Warplanes Should Undertake While Navigating and Flying over the Exclusive Economic Zone of the Coastal State

One view has it that UNCLOS endows warships and warplanes of non-coastal States with complete immunity from the jurisdiction of coastal States within their EEZs. [①] This view runs counter to the precepts of international law. According to article 58 of UNCLOS, in navigation and overflight through

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① To support this argument, advocates might quote article 95 of the UNCLOS, which states that "warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State."

a coastal State's EEZ waters or airspace, foreign warships and warplanes must pay due regard to the rights of the coastal State and at minimum shall not infringe on the rights of the coastal State. Though there is no detailed explanation of the "rights of the coastal State" in the Convention, some scholars interpret "rights" here to refer first and foremost to the general rights that coastal States are entitled to under customary international law, for example, the sovereignty, safety and national interest of the coastal State should not be obstructed, etc.; secondly, "rights" refers to the specific rights endowed by UNCLOS on the coastal State. Therefore, activities of other States that take place in the EEZ and affect or threaten the sovereignty, safety or interests of a coastal State —including military intelligence gathering, military surveying, weapons testing, military exercises, plus activities that affect the coastal State's exercise of sovereign rights and jurisdiction over its national resources, such as fishery, exploitation of natural resources, and construction of artificial islands or other structures—are all illegal.

According to article 56 of UNCLOS, when a warship or warplane of a coastal State navigates or overflies an EEZ, the coastal State shall give due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of the Convention. This provision illuminates the rights and duties of the coastal State, namely, that the "manner" in which a coastal State conducts military activities in its EEZ shall also comply with the provisions of UNCLOS. In addition, it cannot arbitrarily restrict the military activities of other States but shall pay "due regard" to the military activities of non-coastal States. The coastal State's respect of other States' legal rights in the EEZ has a precondition: the right of the coastal State to protect its sovereignty, safety and interests from infringement supersedes the freedoms of foreign States therein. Only under the condition that the coastal State's rights are respected by other States can the coastal State fulfill its duty of allowing other States to exercise rights of free navigation and overflight compatible with UNCLOS.

Ⅱ. The Coastal State Has Jurisdiction over "Military Surveying" Belonging to "Marine Scientific Research"

A. "Military Surveying" Is Part of "Marine Scientific Research"

The coastal State has the right to conduct marine scientific research

(MSR) in its exclusive economic zone, while the non-coastal State does not. Yet a problem exists of how to distinguish between "marine scientific research" and "military surveying". A US Navy ocean survey ship, USNS *Bowditch*, has intruded several times into China's Yellow Sea waters to gather intelligence. On March 24, 2001, when it was gathering data on the Yellow Sea, *Bowditch* was forced to stop by a Chinese frigate and escorted out of China's EEZ. On September 19, 2002, *Bowditch* returned to the Yellow Sea to gather data once again. Chinese warplanes and warships issued stern warnings to the US spy vessel gathering intelligence in the EEZ, and finally forced the vessel out of Chinese waters. In response, the Chinese Ministry of Foreign Affairs of China sent a diplomatic note to the US Department of State, protesting the intrusion of the US ocean survey ship *Bowditch* into the Yellow Sea EEZ as well as its monitoring and spying "activities". However the US Department of Defense took the position that military intelligence gathering activities were distinct from MSR and thus not subject to UNCLOS restrictions. China identified *Bowditch*, a survey vessel equipped with reconnaissance technology, as one of the US's 27 "special duty" vessels. This description refers to navy vessels providing intelligence support to the US Department of State and other US government agencies, or in other words, navy spy vessels. [①] It was not conducting ordinary exploratory activities in China's Yellow Sea, but conducting "dragging sonar detection" and other underwater monitoring activities that posed a serious threat to China's national safety. [②] UNCLOS endows coastal States with exclusive jurisdiction over MSR within their EEZ. Article 9 of China's Law on Exclusive Economic Zone and the Continental Shelf provides that "Marine scientific research conducted by any international organization, foreign organization or individual in the exclusive economic zone and continental shelf of the People's Republic of China must be subject to the approval of the competent department of the People's Republic of China and observe laws and regulations of the People's Republic of China". The military surveying activities conducted

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① The roles of US Navy spy vessels of the United States are very carefully divided: they include not only marine geographic survey vessels, ocean surveillance vessels, drug intelligence vessels and submarine support vessels, but also missile survey vessels, sonar research vessels, submarine cable repair vessels, submarine navigation experiment vessels and ballistic missile experiment vessels.

② Ding Chengyao, On the Incident of US Survey Vessel Intruding into China's EEZ from the Perspective of International Law, *Journal of East China College of Political Science and Law*, No. 2, 2003, p. 80.

by *Bowditch* in China's EEZ had not been approved by the competent department of Chinese government and thus seriously infringed upon the Chinese government's exclusive jurisdiction over this area. In the same month, the Indian government also formally protested military surveying activities that *Bowditch* carried out in the sea area 30 nautical miles (nm) away from Nicobar Island, alleging that it had infringed upon India's legitimate rights and interests. In January 2001, the Indian government also protested the activities of the UK Royal Navy vessel HMS *Scott*, which had been surveying roughly 190 nm off the coast of Diu.

UNCLOS does not specifically address "military surveying", a term of convenience apparently created by maritime powers such as the UK and the US to serve their own interests. ① This subterfuge has arisen as a result of the contents of UNCLOS article 56, paragraph 1(b)(ii), which provides that coastal States enjoy jurisdiction over MSR activities in its EEZ. If "military surveying" were merely considered a form of MSR, then any data obtained from "military surveying" activities would have to be shared with the coastal State. This would obviously clash with the interests of non-coastal States. For this reason they have fabricated a concept not existing in UNCLOS, and on this basis declare that the coastal State has no explicit right to govern "military surveying" activities. The UK and the US, in order to further their own interests, have resorted to a form of fraudulence, which is not only inconsistent with the spirit of UNCLOS, but also goes against the consensus of the international community.

The developing countries insist that "military surveying" should be grouped together with MSR, a general term that encompasses various marine environmental research activities conducted at sea, including hydrographic surveying. ② The data from hydrographic surveys are mainly used to draft documents and archives that facilitate navigation and enhance navigational safety. These resources are useful to a wide range of professionals, including oceanologists, biologists and environmental scientists. "Military surveying" refers to activities of marine data gathering for military purposes. ③ In essence, "military

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① The United States uses the term "military surveying"; the United Kingdom uses the term "military data gathering" (MDG).

② Ding Chengyao, On the Incident of US Survey Vessel Intruding into China's EEZ from the Perspective of International Law, *Journal of East China College of Political Science and Law*, Vol. 2, 2003, p. 81.

③ Ashley Roach and Robert W. Smith, Excessive Maritime Claims, *International Law Studies*, Vol. 66, 1994, p. 248.

surveying" involves the carrying out of marine hydrographic surveying, a traditionally civilian endeavor, for military ends. Civilian and military marine hydrographic surveying are both activities that detect and compile marine data such as seaway conditions, seawater flow rate, sea water quality, sea area climatic characteristics, marine organisms and seabed mineral resources. Both are conducted with the help of various technical instruments aboard survey vessels or aircraft. Their contents involve oceanography, marine geology, physics, chemistry, biology and acoustics, and the equipment used includes sonic fathometers, scanning sonars, benthic seabed grabs, flow meters and model-profiling machines. According to the maritime powers that advocate unrestricted freedoms of military surveying, what sets "military surveying" apart from MSR is the underlying motivation to use data for military purposes like submarine operation and antisubmarine response, laying and removing mines, etc., rather than for the benefit of general marine science. Since the data obtained from military hydrographic surveying is used for military purposes, the so-called "military surveying" endorsed by maritime powers may seem special, but it still falls within the scope of MSR as stipulated by UNCLOS, only with a different underlying purpose.

B. The Coastal State Has Jurisdiction over "Military Surveying"

According to UNCLOS article 245, the coastal State may enact laws and regulations governing MSR and hydrographic surveying activities within its EEZ, and any "military surveying" activities of non-coastal States "shall be conducted only with the express consent of and under the conditions set forth by the coastal State"; when a foreign ship passes through the EEZ, it shall not conduct any research or surveying activities without prior approval of the coastal State. Any "military surveying" activities conducted by a non-coastal State in the EEZ of a coastal State must be subject to the approval and jurisdiction of the coastal State. A coastal State has the right to approve of the "military surveying" activities in its EEZ or on its continental shelf according to relevant provisions; and "marine scientific research in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State." (UNCLOS, article 246) The coastal State has jurisdiction over "military surveying" activities in its EEZ; furthermore, it may withhold approval of any "military surveying activity" to be conducted by a foreign State in its EEZ. Even if the coastal State has approved of a foreign State's "military surveying"

activities and the activity is already underway, if the activity violates any obligation attached to the initial approval, then the coastal State maintains the right to halt the activity.

Coastal States enjoy sovereignty over mineral resources, fisheries and microorganisms in their EEZ. "Military surveying" may be a military function, however the data gathered is not necessarily used only in military affairs, so it infringes upon the "resource sovereignty" of the coastal State and should be regulated. Firstly, vessels and aircraft used for "military surveying" may be civil, and the nature of activities they are capable of conducting cannot be ascertained by outward appearance alone; secondly, "military surveying" such as those "involving drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment" will of course arouse the coastal State's concern and should therefore be subject to its approval; thirdly, the information and data obtained will likely involve the detection and even exploitation of the coastal State's natural resources, such as oil or natural gas, and therefore the coastal State should maintain jurisdiction over these activities and be granted full access to said information and data. In addition, the coastal State may disallow or restrict any military activity of other States in its EEZ that obstructs its sovereignty or jurisdiction. No matter if it goes by the name of MSR, "military surveying" or some other term, such activities should all be subject to the approval of the coastal State, and the foreign States conducting them should proceed in a way that respects the sovereignty and jurisdiction of the coastal State and also submit to the jurisdiction of the coastal State in the event a conflict arises.

C. The Information of "Military Surveying" of the Non-coastal State Shall Be Shared with the Coastal State

According to the relevant provisions of UNCLOS articles 248 and 249, States and competent international organizations which intend to undertake "military surveying" activities in a coastal State's EEZ shall, not less than six months in advance of the expected starting date of the MSR project, provide that State with a full description of the nature and objectives of the surveying activities; the methods and means to be used; the precise geographical area(s) in which the project will be conducted; a specific timeline; and the extent to which the coastal State is expected to participate or how it will be represented in the project. If the coastal State desires, it has the right to participate or be

represented in such "military surveying" activities. The coastal State may also require the non-coastal State to provide the final results and conclusions of the "military surveying" as well as information and samples acquired during research and to assist the coastal State in interpreting the intelligence and information acquired.

Ⅲ. Military Activities Must Reflect "Peaceful Purposes" and Give "Due Regard" to the Legitimate Rights of Various Parties

A. "Peaceful Purpose" Does Not Exclude Military Activities in the Usual Sense, but Legitimate Rights Must Be Respected

UNCLOS, the codification of the fundamental principles of the international law of the sea, refers to the "peaceful use" of the seas and oceans in its preamble, articles 88 and 301, and parts 10 and 13. The preamble sets forth the Convention's objective of maintaining "peace, justice and progress for all peoples of the world". It further states that "the problems of ocean space are closely interrelated and need to be considered as a whole", and expresses the intention to "promote the peaceful use of the seas and oceans." Article 88 also provides that the high seas shall be reserved for "peaceful purposes", which is a new requirement absent in the 1958 Convention on the Continental Shelf. ① The purpose of UNCLOS is to foster peace, safety and friendship in line with the tenets and principles of the United Nations as stated in the UN Charter. "Maintenance of international peace and safety" is the first tenet and primary purpose in the UN Charter. Even so, the "peaceful purpose" proviso does not necessarily preclude all military activities by coastal or non-coastal States in the EEZ.

From a coastal State perspective, according to the provisions of UNCLOS and current practice, the navy, in peacetime, mainly implements police tasks and provides services to the government. These services include exercising sovereignty and rights in the waters governed by the State; carrying out military tasks and weapon experiments on the high seas; exercising the universal jurisdiction principle of the international law; and naval diplomacy. In peace-

① Shao Jin, Legal Problem of Military Use of Exclusive Economic Zone and Continental Shelf, *Chinese Yearbook of International Law*, 1985, p. 192.

time the navy is also charged with protecting offshore production platforms, artificial islands and other installations, performing "pacific blockade", and monitoring pollution and dumping of nuclear wastes. With the extension of national resource sovereignty to include marine resources, the need for maritime law enforcement has led coastal States to resort to the use of armed forces to exercise and maintain their sovereign rights and jurisdiction. From the perspective of non-coastal States, their domestic interests may also be intertwined with the freedoms of activity in the EEZ of a coastal State. For example, a State may choose to protect its commercial fleets from pirate or terrorist attack by dispatching the armed forces to provide escort protection. If and when a State's vessel requires emergency rescue due to causes such as natural disaster, it is the responsibility of the armed forces to provide assistance. Since the close of the Gulf War, the UN Security Council has authorized the use of warships in imposing economic blockades. In addition, a state party in a collective security treaty, when exercising collective self defense, may use military force on the high seas for the purpose of protecting collective military forces, business vessels and aircraft, subject to the constraints of international law.

Though the "peaceful purpose" requirement does not, in principle, preclude non-coastal States from engaging in ordinary military activities in the EEZ of coastal States, the question remains as to what kind of military activities constitute "ordinary" ones. On this topic, one scholar has pointed out that in order to be considered "peaceful use" of the EEZ, the activities of non-coastal States must have been approved by the coastal State and not give rise to tensions, doubt or conflict. Therefore, to verify if a military activity is for "peaceful purpose" or if its method is "peaceful", one should not only judge whether its behavior is consistent with the requirements of the UN Charter and its international duties and commitments under international law,[①] but also take into account whether the military activity constitutes a threat or dangerous situation to the coastal State. The presence of foreign naval forces in the sea areas governed by a state may be either legal or illegal: Their behavior must comply with the basic tenets of contemporary international law and the UN Charter

① During the fourth session of the Third Maritime Law Conference, a debate was conducted on the topic of peaceful use of the seas and oceans. Amera Singe, the conference president, pointed out that the peaceful use of the seas and oceans cannot be separated from negotiations on other occasions concerning disarmament, denuclearization and seabed demilitarization.

and must not threaten or affect the sovereignty safety of the coastal State—otherwise, such activity is illegal.

Both coastal and non-coastal States have their respective rights as well as obligatory duties in the EEZ. The principle of "peaceful purposes" requires that all parties shall pay due regard to other parties' legitimate rights regarding military activities in the EEZ. According to UNCLOS (article 56), the coastal State enjoys exclusive sovereignty and jurisdiction over its EEZ resources; non-coastal States' rights include the freedom of navigation and overflight and laying submarine cables and pipelines. As two kinds of rights are exercised in the same space, occasional conflict between them is inevitable. In conducting military activities for "peaceful purposes", coastal States must comply with the provisions of UNCLOS and give due regard to the legitimate rights of other States. Non-coastal States, in conducting military activities in the EEZ, shall give due regard to the rights of coastal States and observe the relevant laws and regulations not in conflict with statutory and customary rules concerning the EEZ. In light of these principles, if for example a foreign State's navy engages in intelligence gathering activities while its warships or warplanes navigate or overfly a coastal State's EEZ, this should not be deemed as "harmless", but rather as "damaging the peace, good order or safety of the coastal State".

In case of any conflict or dispute between a coastal and non-coastal State regarding military activity in the EEZ, according to international law, the rights of the coastal State shall prevail.

B. Military Activities Must Give "Due Regard" to the Legitimate Rights of the Coastal State

In the event a conflict arises between the exercise of jurisdiction by a coastal State and the exercise by any other State of its navigational freedoms in the EEZ, the coastal State shall be given priority rights to settle the conflict. One such instance was the 2001 Hainan Incident, in which a US spy plane violated the UNCLOS provision that overflight by non-coastal States through the EEZ airspace of a coastal State give due regard to the rights of the coastal State. This action threatened China's national security. In response China dispatched fighter jets to supervise the US spy plane. The US plane violated flight rules and caused a collision, and from the Chinese perspective should be held fully accountable for this incident. China acknowledges that all States have the freedom of overflight in the EEZ, but exercise of these rights must not

jeopardize the national security of the coastal State.

Coastal State enjoys sovereignty over the natural resources in their EEZ, as UNCLOS plainly states. Classified as a national right, this constitutes one of states' most basic rights. ① Such sovereignty is exclusive, comprehensive and incontrovertible; moreover, infringement of any sort on this right is unacceptable. ② To protect its legitimate rights and interests in the EEZ and prevent undue external interference and influence, a coastal State's rights concerning military activity in the EEZ prevail over those of foreign States. In case of any conflict between a coastal and non-coastal State over military activity in the EEZ, the coastal State's sovereignty takes precedence over non-coastal States' right to conduct military activities in the EEZ. Furthermore, in the settlement of any dispute, the coastal State shall be given a preferential status. Adding another layer of complexity to the mix, the legal restrictions espoused by two separate "due regard" clauses are also distinct. The preamble of UNCLOS clearly provides that to peacefully, equitably and effectively use marine resources, the interests of all parties must be considered, but especially the "special interests and needs of developing countries". Elsewhere, as noted above, UNCLOS stipulates that non-coastal States shall pay "due regard to the rights and duties of the coastal State" and "comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part." (UNCLOS article 58)

C. *The Military Activities of Belligerent States in the EEZ of the Neutral States Shall Pay Due Regard to the Rights of the Coastal States*

The EEZ is vital to the economic interests of coastal States. For belligerent States to conduct military activities therein would surely exert a negative influence on the zone's marine resources and environment, not to mention infringe on the rights and sovereignty of coastal States, specifically those wishing

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① *Collection of International Treaties* (1924—1933), Beijing: World Knowledge Publishing House, 1961, p. 545.

② Zhou Gengsheng, *International Law*, Volume I, Commercial Press, 1976, p. 77; *Collection of International Treaties* (1924—1933), Beijing: World Knowledge Publishing House, 1961, p. 545.

to remain neutral. Therefore, some experts recommend that maritime clashes, hostile operations or other military actions be strictly forbidden in the EEZs of neutral States. In contrast, some scholars argue that waging war within the EEZs of neutral States does not violate the relevant provisions of international conventions. [①] UNCLOS was designed to function as a framework of maritime governance during times of peace. Even so, UNCLOS effectively divided up the sea into different areas, each with their accompanying rights and duties, and this compartmentalization has a major impact on the exercise of the right of belligerency or neutrality during a period of armed conflict. Though the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* [②] has not provided whether belligerent States may go so far as to set up a blocked area in the EEZ of neutral States, it does concede that belligerent States may engage in hostile operations in these areas. Of course, military activities must give due regard to the right of coastal States to choose neutrality. Also, belligerents must not hinder coastal State activities such as economic resource exploration and development in the EEZ and on the continental shelf; at the same time, the protection and preservation of the marine environment should not be compromised. Therefore, a belligerent State may not attack any artificial island, installation or equipment within the EEZ of neutral States to satisfy its principle of "military necessity", destroy or change the marine environment on a large scale to realize military interests, or undermine the coastal State's sovereignty over its resources. If any belligerent State desires to lay underwater mines in the EEZ of a neutral State, it must not only observe the above principle, but must also notify the coastal State and other third-party States to ensure that the freedom of navigation in the EEZ is not affected.

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① Xiang Min, Reflection on the War Law on the Exclusive Economic Zone of the Neutral States as Naval Battle Area, *Journal of the Xi'an College of Political Science*, No. 5, 2003, p. 74.

② In 1987, pursuant to a proposal by the Research Institute of International Humanitarian Law, with the assistance of Italy's Pisa University and Syracuse University of the United States, a preliminary Round Table on International Humanitarian Law Applicable to Armed Conflicts at Sea was convened in San Remo, Italy. From 1988 to 1994, the Research Institute of International Humanitarian Law held a series of round tables to draft and formulate the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*.

D. The Coastal State is in a Dominant and Preferential Position in the Distribution of "Residual Rights" of the Exclusive Economic Zone

According to article 56 of UNCLOS, besides developing, using, conserving and managing natural resources, the rights of the coastal State in the EEZ also include "other rights". This term refers to "residual rights", as they are often called. The "residual rights" under the law of the sea, that is, the rights not expressly granted or forbidden in UNCLOS, such as allowable fish catch residue in the EEZ and the residual right of marine pollution. UNCLOS article 58 (1) also allows "other internationally lawful uses of the sea related to these freedoms … and uses compatible with the other provisions of this Convention". Though the original text of this paragraph makes explicit that these rights must "be compatible with other international laws", some scholars assert that this sentence carries certain implications, including allowing warships to act in the EEZ of other States without restriction. ① Still others contend that warships must maintain due regard for the interests of the coastal State in its EEZ. "Restrictions on the military use of the exclusive economic zone are far stricter than restrictions on similar activities on the high seas". ② If any warship fails to observe the regulations of the coastal State, the coastal State shall have the right to require the warship to leave the exclusive economic zone.

Without permission, non-coastal States shall not have the right to conduct military activities such as training and drilling. When a warship passes through the EEZ of another State, the daily training of the navy may continue. If any rocket or guided missile for military use flies over or falls into the EEZ of another State, does this count as an exercise of legitimate overflight freedom? Some scholars insist that if the military training is not threatening in nature and complies with "those other uses provided in the Convention", occasional aircraft launching and helicopter liftoff from a warship are permissible. If the clause "and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships [and] aircrafts"

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① Oxman Bernard, The Regime of Warships Under the United Nations Convention on the Law of the Sea, *Virginia Journal of International Law*, Vol. 24, 1984, p. 809.

② Orrego Vicuna Francisco, *The Exclusive Economic Zone*, Cambridge: Cambridge University Press, 1989, p. 111.

(UNCLOS, article 58) is taken literally, it means that a warship may operate in any place whatsoever. It may conduct activities such as missile launching and weapons testing in other States' EEZs. This view misinterprets the legal concept of the EEZ as a unique area and a product of the balance between maritime State power and coastal State interests. Therefore, as one scholar observes: It would be unrealistic to equate weapon testing such as launching torpedo and cannon and illegal weapon hiding in the exclusive economic zone to the uses of vessels, aircrafts and submarine cables. ① As any weapons testing could threaten coastal States' fishery-related and other interests, such operations must obtain prior authorization and approval from the coastal State in question and submit to its jurisdiction and lawful restrictions.

Non-coastal States do not have the right to set up temporary military zones in the EEZ. In the Malvinas Island Armed Conflict of early 1982, Argentina resorted to the use of military force to resolve a sovereignty dispute with the United Kingdom. After imposing a military occupation over the Malvinas Island, the United Kingdom rapidly responded by announcing its intention to install a naval blockade around the sea area extending 200 nautical miles from the island — boundaries that incidentally overlap with those of the EEZ — and forbid all foreign ships from entering this area. All aircraft and ships entering the forbidden area would be attacked, and the United Kingdom threatened to bombard and sink any Argentine ships it encountered in this area. The above practices of the United Kingdom would substantively transform the EEZ surrounding the Malvinas Island into an exclusive military zone, expanding the jurisdiction and sovereign rights ascribed to the area under the UNCLOS regime. Therefore, some States labeled the UK's announcement as a "serious error in sea area jurisdiction", as it made "it a fact to establish a military zone 200 nautical miles away from the coast baseline, with legal effect." ② As response, Argentina also established an exclusive military zone of 200 nautical miles around

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① Scovazzi Tullio, *The Evolution of International Law of the Sea: New Issues, New Challenges*, The Hague: Martinus Nijhoff Publishers, 2001, p. 162. (reprinted from Volume 286 of Recueil des Cours)

② Dalton has observed that in the wake of the Falkland Islands conflict, a temporary non-military zone essentially became a completely sealed-off, exclusive zone. One view has it that for UNCLOS States Parties to interrupt foreign States' freedoms of navigation and overflight through the high seas constituted a violation of international law. Such a view is based in a one-sided understanding of international law. Belligerent States still have the right to undertake self-defense and other such operations on the high seas.

the same island. In 1979, once Grenada's pro-Soviet regime took power following a coup d'etat, the United States planned a so-called international action[①] to establish and support a pro-US puppet regime. The *Independent* carrier group and the *USS Guam* amphibious assault ships reached the sea area adjacent to Grenada in October 1983 and promptly established an aeronaval blockade with a radius of 50 nm. To implement a comprehensive blockade of Grenada, all the island's navigational links with the external world were severed. UNCLOS contains no express permission for non-coastal States to install military blockades coterminous with a coastal State's EEZ. According to UNCLOS articles 19, 25 and 40, it is legal for a coastal State to impose a blocked area in its territorial or internal waters, but there is no reference to whether a blocked area may be set up in the EEZ or on the high seas. In line with the principle of freedom on the high seas, setting up a blocked area on the high seas is permissible, however any strait used for international navigation must not be blocked. Concerning naval blockades, detailed special rules have been promulgated in the *Manual of the Laws of Naval Wars* (Oxford 1913). To bypass these rules, in past wars and other armed conflicts, many States avoided using terms like blockade or blocked area, opting instead for less regulated ones such as military zone and military forbidden area.[②] One scholar has argued that since weapons testing and military training of the navy may affect the surrounding sea areas, particularly by inflicting a negative impact on the fishery or resource-related interests of coastal States, a non-coastal State may set a temporary military zone in the coastal State's EEZ for the purpose of conducting such activities; this is fully in conformity with customary international law. "To conduct activities for military purpose in a temporary zone of the high seas has always been regarded by the practice of customary international law as the right for national self defense. Therefore, it can be ascertained that the establishment of a temporary military zone and reasonable activities conducted therein are legitimate."[③] This view has been strongly opposed by some coastal States, who argue that inappropriate military activities may interfere with and affect fishery

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① Following this call to action, police forces of seven Caribbean countries—Jamaica, Dominica, Barbados, Antigua, St. Vincent, Saint Lucia, and Saint Christopher and Nevis—were assembled off the coast of Barbados to carry out "drilling" activities.

② Li Li and Lin Ao, Legal Issues in Naval Blockade Wars, *Journal of Political Work*, No. 12, 2003, p. 47.

③ Van Dyke Jon M, Military Exclusion and Warning Zones on the High Seas, *Marine Policy*, Vol. 15, 1991, p. 147.

activities in this sea area as well as coastal States' sovereign rights over the resources in their EEZ. Therefore coastal States can be expected to unhesitatingly adopt measures to protect and preserve their resources and impose reasonable restrictions on foreign States' military activities within their EEZs. Such steps will challenge the legitimacy of foreign States' temporary military zones. ①

The coastal State occupies a priority position when it comes to nonproliferation activities in its EEZ. According to US intelligence, on December 9, 2002, a Spanish warship intercepted and captured a North Korean cargo ship bound for Yemen on the high seas and subsequently uncovered 15 "Scud" tactical ballistic missiles and rocket propellant stowed under the cement cargo, whereas the ship's shipping list recorded only cement. Through a series of high-level negotiations, the United States agreed to let the ship pass, and on December 11, this ship resumed its journey to Yemen. ② In December 2002, the United States released the national strategy for opposing weapons of mass destruction, declared that opposing weapons of mass destruction was the top national security issue for the United States, and called for the strengthening of offshore "resistance and banning" capabilities, including diplomacy, military and law enforcement. Consequently, then-president George W. Bush issued the "Proliferation Security Initiative" (PSI) during a convocation in Krakow, Poland, ③ proposing to intercept any ship or aircraft "suspected of" carrying weapons of mass destruction and prevent delivery to their intended recipient countries.

Traditionally, international law provides that the right of visit may only be exercised on the high seas, while the PSI defines the "international sea areas" for exercising the right of visit as all sea areas apart from the internal, territorial and archipelagic waters of a State. That is to say, under the PSI, a coastal State's EEZ is numbered among the sea areas in which the right of visit may be reasonably exercised. The implementation of such actions inevitably infringes

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① Orrego Vicuna Francisco, *The Exclusive Economic Zone*, Cambridge: Cambridge University Press, 1989, p. 111.

② At http://www.china.com.cn/chinese/junshi/583050.htm, 20 June 2011.

③ The initial participating States of this proposal included Australia, France, Germany, Italy, Japan, Holland, Poland, Portugal, Spain, the United Kingdom and the United States; Canada, Denmark, Norway, Singapore and Turkey joined it in December 2003. On May 31, 2004, the Ministry of Foreign Affairs of Russia announced that it too would participate in the US-led PSI and became the 17th participating State.

upon the sovereignty and rights of coastal States. It flouts the basic principles of contemporary international relations and those of international law. Further, it erodes the integrity of the EEZ and flag state exclusive jurisdiction regimes, which introduces disorder into the current international framework for law of the sea.

The United Nations Security Council declared in Resolution 1540 (2004) that it "welcomes efforts in this context [i. e., proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security] by multilateral arrangements which contribute to non-proliferation"; requires that "all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes"; aims to "develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law"; and finally calls upon all States, "in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials". Marine law enforcement measures such as the right of visit, order to divert, escort back to port and armed attack may not be abused.

Ⅳ. Conclusion

Lacking equally broad freedoms as the high seas and differing also from the territorial waters, the exclusive economic zone is a new and sui generis regime under maritime law. The ambiguous wordings of the Convention leave room for various interpretations among States. Judging from the general principles of international law and the legislative intent behind UNCLOS, the "freedoms of navigation and overflight" in the EEZ are subject to certain restrictions; the coastal States enjoy jurisdiction over "military surveying", a form of "marine scientific research"; military activities must reflect "peaceful purposes" and pay due regard to the legitimate rights of various parties; and coastal States occupy a dominant and preferential position regarding the alloca-

tion and exercise of "residual rights". Any reasonable interpretation or application of the Convention should not go beyond these principles.

(Translator: CHEN Xiaoshuang;
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区域合作保护南海海洋环境法律制度构建研究

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内容摘要:随着区域经济的快速发展,南(中国)海这一半闭海的重要性越来越为各沿海国所承认。但和其他闭海和半闭海相比,南(中国)海却是得到保护最少的一个区域。防范区域海洋环境恶化的法律制度发展历程表明,区域合作是解决此类问题的最适宜途径。南(中国)海和其他区域海洋实际状况的比较分析亦表明,此区域亟需确立合作对抗海洋污染的应急机制。在确立该机制的过程中,中国应意识到它在此区域内不可或缺的地位并积极推进此项机制的确立。

关键词:区域合作 南海 海洋环境

中国—东盟自由贸易区的建成为东南亚区域经济发展注入了新动力。伴随区域经济的蓬勃发展,为区域内各国提供重要资源以及交通便利的南(中国)海也越发凸显出其重要性,无论是经济上、政治上,还是在环境方面。对于中国而言,南(中国)海的重要性更甚。无论从无可争辩的岛屿主权到九段线形成的U形线内的历史性权利以至在整个南海内具有的基础性利益看,中国都应该对此海域的海洋环境给予更大的关注。然而,区域周边各沿海国在主权和管辖权上的纠纷,阻碍了各方防范海洋污染的合作意愿,也凝滞了保护海洋的实践步伐。基于东亚海协调机构的请求,联合国环境规划署与全球环境基金于2002年发起了一个项目,"扭转南中国海及泰国湾环境退化趋势"。项目研究结果表明,南海作为西太平洋具有最丰富物种的一个区域,沿岸各国经济以及人口的快速增长为本区域带来持续增长的污染物排放,海洋环境遭遇强大的压力。这些问题将很可能导致严重的后果,即在未来世纪,全球最具生物多样性的一个区域将会消失。①

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① UNEP, SCS Project Terminal Evaluation Terms of Reference, p. 1, at http://www.unep.org/eou/Portals/52/Reports/South%20China%20Sea%20Annexes.pdf, 15 June 2012.

在南海所面临的诸多环境威胁中,海洋污染无疑是最为明显的一个;在造成海洋污染的诸多因素中,大型溢油事故所带来的威胁则是最具破坏性的。关于这一点,历史上发生于其他闭海半闭海的多起溢油事故均可佐证,诸如托雷坎永号事故、艾瑞克号事故以及威望号事故等。这些事故警示着此区域所有的沿海国,包括中国,有关合作保护海洋环境的必要性。

一、保护南海海洋环境的必要性分析

(一)南海区域的特征及油轮运输概况

南海是一个半封闭的海域,也是联合国环境规划署主导下的区域海洋项目中东亚海区域下的一个次区域海洋。其特征包括:邻接陆地、水域界限明确、航线密集、沿岸多港口、周边各国对海洋高度依赖、经济发展水平不高且政治利益多样化,这些让此海域面临着巨大污染事故的威胁、包括溢油事故的威胁,且各方合作防范污染障碍重重。然而,无论沿海各国的差异性有多大,一旦发生污染事故,沿海各国毋庸置疑将是直接遭受污染以及巨大环境破坏后果的主体。

作为南海的沿岸国,中国是世界上的第二大石油消耗国并且是纯石油进口国;另外日本和韩国虽不是此海域的沿海国,但其进口所需石油也需航经此海域。油轮频繁地进出各大港口导致海域内航线密集,交通状况复杂。即便不需要进出沿岸港口,出于安全和经济航行考虑,油轮以及其他船舶也通常会选择近岸海域航行,以便使用沿岸港口设施并在发生危机时及时获得救助。这些都会导致事故发生后的破坏性尤为严重。历史上发生的多起重大溢油事故,均是在各国的近海区域发生,所产生的环境后果也都相当严重。[①]毕竟,近岸的封闭或半封闭海域,其水体交换速度远远低于公海上的海水交换速度,自净能力也远远低于公海。而对于各沿海国来说,近岸海域往往是其交通、渔业、旅游以及其他各项海洋利用用途的重要支柱,一旦发生重大事故,沿海各国所受到的影响也就不仅仅是环境上的后果。也正是基于此,其他区域海洋的各沿岸国在区域合作中,都将如何防范突发性溢油或其他物质泄露事故作为首要问题之一,并以附录或议定书的形式予以具体规定。

在南海区域,溢油事故也并非不曾造访。1975年以来,紧邻南海的马六甲

① 这些事故包括 Exxon Valdez, Hawaiian Patriot, Torrey Canyon, Amoco Cadiz, Odyssey, Aegean Sea, Urquiola, Prestige, Jakob Maersk, Khark's Atlantic Empress, Abt Summer, Castillo De Bellver, Katinap, Braer, Sea Empress, Haven, Independenta, Irenes Serenade, Sea Star. *See* ITOPF, Major Oil Spills(figure 7), at http://www.itopf.com/information-services/data-and-statistics/statistics/, 29 March 2011.

海峡就见证了数次溢油事故。[①]只是很幸运地，这些溢油事故发生的地点是邻接开阔海域的一端，未在封闭区域内造成灾难性后果。然而，区域内的事故隐患仍在不断增加：其一，除了油轮的频繁进出之外，其他运输危险和有害物质的船舶，也会航经该区域；其二，由于南（中国）海蕴涵丰富的石油资源，已经在进行的海底石油开发也是另一个突发事故的来源；其三，还有濒临该区域的核电站。这些足以构成事故隐患的因素叠加起来，一旦爆发，在缺乏相应规范制度的背景下，其后果可谓不堪设想。

（二）南海区域合作对抗突发性污染事故的实践

南海区域对周边各国具有重要的环境、经济和政治利益。周边各国依凭南海实现其利益的同时，也让此区域海面临着诸多突发性污染事故风险。与此形成对照的，则是区域内规范体制构建的滞后、甚至是缺失。

南海区域作为联合国环境规划署主持的区域海洋项目——东亚海区域下的一个亚区域海洋，其规范构建当然也受到了东亚海区域整体的影响。作为隶属于 UNEP 管理下的区域海洋项目，东亚海区域的海洋环境保护实践也同样参照了地中海区域的许多做法。该区域的海洋环境保护，其实开始颇早，只是进程十分缓慢。截至目前，各方的合作基础只是一份不具有任何拘束力的区域行动计划。在海洋环境保护问题上，则完全仰仗各方的良好意愿，没有区域公约予以约束和保障。而且，目前也没有迹象表明各方有缔结公约的意愿。在这种背景下，南海区域的合作也同样无所依凭。

真正可以称得上有所进展的，则是南海沿岸各国在 2002 年缔结的《南海各方行为宣言》，东亚海大会于 2006 年所提出的区域内石油和化学物泄漏应急计划与响应议题，以及 2011 年中国东盟之间的落实《南海各方行为宣言》指导方针。但这些，也只是表明各方的合作意愿。在缺乏内在推动的前提下，及至该意愿落实还有一个漫长的过程。

（三）南海区域合作防范突发性污染事故法律制度缺失引发的问题

从历史经验以及南海实际海洋环境来看，区域内防范突发性污染事故所可能引发的问题主要有如下几个方面：

其一，各方的合作实践难以进行，甚至停滞。防范海上突发性污染事故的国际法律制度发展表明，在缺乏规范机制约束的前提下，沿海各国只会各自为政。

① Zhengdi Wang and Scott A. Stout, *Oil Spill Environmental Forensics: Fingerprinting and Source Identification*, Boston, MA: Academic Press, 2007, p. 491.

甚至会有些国家单方面地以国内法规范限制可供国际社会使用的海域。二十世纪前半期英美等国的海洋环境保护法律制度构建已经证实了这一点。[①]

其二,国内法与国际法的规范适用空间上出现难以衔接的断层。托雷坎永号事故所暴露出的最大问题就是这一点,即单纯依凭国内法或未考虑区域特点的国际法,使得区域合作应急对抗大规模溢油或其他污染事故,而导致情况的进一步恶化。

其三,与船舶或其货物虽无直接的利害关系,但领土可能因船舶事故而受到影响的国家,其利益应当如何保护的问题。

概言之,在区域内发生污染事故风险日增的情形下,区域内的合作以及对此类合作的规范付诸阙如,必将引发严重的环境、经济以及法律问题。

二、区域合作保护南海海洋环境的适当性

(一)区域海洋的界定

在海洋环境保护上,所有的区域海洋都有一个共同的特征,即自净能力有限。所谓区域海洋,事实上并没有一个广为接受的统一概念。联合国环境规划署所使用的"区域海洋"一词或许对界定其概念有所启发,即含义等同于联合国《海洋法公约》所使用的"闭海和半闭海":两个或两个以上国家所环绕并由一个狭窄的出口连接到另一个海或洋,或全部或主要由两个或两个以上沿海国的领海和专属经济区构成的海湾、海盆或海域。[②]

对此定义加以解读可以看出,区域海洋的特点就是具有明确的地理边界、因为被陆地包围而造成水体自净能力受限,并因此更易受污染事故的威胁。这些特点,使得区域海洋的环境完全依赖于沿海各国的合作保护得宜与否。《海洋法公约》确认了这一点,并就闭海或半闭海沿海各国的合作事宜予以明文规定。[③]

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① 国际社会当时普遍接受的领海宽度为3海里,而美国出于控制油污的考虑,将自己的管辖权拓宽至50海里,甚至还有100海里的做法。*See* Sonia Zaide Pritchard, *Oil Pollution Control*, London: Routledge Kegan & Paul, 1987, pp. 62~63.

② 联合国《海洋法公约》第122条规定:基于本公约之目的,"闭海或半闭海"是指两个或两个以上国家所环绕并由一个狭窄的出口连接到另一个海或洋,或全部或主要由两个或两个以上沿海国的领海或专属经济区构成的海湾、海盆或海域。

③ 《联合国海洋法公约》第123条规定:闭海或半闭海沿岸国的合作闭海或半闭海沿岸国在行使和履行本公约所规定的权利和义务时,应互相合作。为此目的,这些国家应尽力直接或通过适当区域组织:(a)协调海洋生物资源的管理、养护、勘探和开发;(b)协调行使和履行其在保护和保全海洋环境方面的权利和义务;(c)协调其科学研究政策,并在适当情形下在该地区进行联合的科学研究方案;(d)在适当情形下,邀请其他有关国家或国际组织与其合作以推行本条的规定。

籍由对国际海洋环境法律制度发展历史考察可知,《海洋法公约》的这些规定,受启发于此前的诸多区域性海洋环境保护公约的相关条款。[①]这些区域性公约之所以成功,很大程度上是基于公约对区域性特点的尊重。亦即区域海洋明确的地理界限天然地使其成为一个适合规范的单位,不会太小而使得管理规范价值不够,也不会太宏大而难以规范。[②]晚近所达成的数项区域性海洋环境保护公约,也证实了区域合作途径解决海洋环境、尤其是闭海半闭海环境问题的适当性。[③]

(二)区域合作途径的适宜性

与开阔广宏的公海相比,闭海或半闭海更易受到污染事故的破坏,也更容易受到沿海各国经济活动的影响。正是基于此,与闭海或半闭海所形成的区域海洋相适宜的法律制度,有别于国际公约为全球海洋所确立的规范体系,也有别于各主权国家为确保本国海洋环境所确立的国内法律制度。联合国《海洋法公约》所确立的海洋活动规则是以国际社会为规范适用范围,更注重对全体利益的平衡和国际社会共同问题的考虑;对特定区域的具体情形则难免会有所疏漏。基于区域内的明确地理边界、区域内各方通常所共有的相似历史背景、具有共同利益的开发活动以及面临同样的环境问题,区域合作途径则具有更明确的适用性。而区域途径对解决问题的适用性,以及对区域内各方利益更切实的保障和实现,则可以敦促各方履行公约所规定的义务。

反观区域合作保护海洋环境的发展历史,也可以看出区域合作途径的适宜性。1967 年,托雷坎永号事故[④]引发的环境后果震动了整个国际社会,也因此推

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① 包括:1969 年《应对北海油污合作协议》前言以及第 3 条,1974 年《波罗的海区域地区海洋环境保护公约》;1976 年《保护地中海免受污染公约》(后被 1995 年《保护地中海海洋环境和沿海区域公约》所取代);1978 年《合作保护海洋环境防止污染的科威特地区公约》;1981 年《合作保护和开发中西非洲地区海洋和海岸环境的阿比让公约》和议定书;1981 年《保护东南太平洋海岸地区海洋环境的利马公约》和协定。*See* Agreement for Co-operation in Dealing With Pollution of the North Sea by Oil, at http://sedac.ciesin.org/entri/texts/pollution.north.sea.by.oil.1969.html, 15 June 2012; UNEP, The Regional Seas Programmes, at http://www.unep.org/regionalseas/, 30 February 2011.

② Veronca Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea: Implementing Global Obligations at the Regional Level*, Leiden, Boston: Martinus Nijhoff Publishers, 2007. p. 31.

③ U. N. General Assembly. Report on the work of the United Nations Open-ended Informal Consultative Process established by the General Assembly in its resolution 54/33 in order to facilitate the annual review by the Assembly of Developments in Ocean Affairs (Third Meeting, April 8－15, 2002). 5－7, at http://daccess－dds－ny.un.org/doc/UNDOC/GEN/N02/395/80/PDF/N0239580.pdf? OpenElement, 29 March 2011.

④ Davod Axford and Colin Davies, The Breaking-up of the oil tanker Torrey Canyon, at http://www.axfordsabode.org.uk/torreycn.htm, 15 June 2011.

动了此后 20 年内国际环境法律制度、尤其是海洋环境保护法律制度的发展。海洋环境保护由此进入国际社会的视野,并成为国际法发展最为引人注目的一个领域。[①]托雷坎永号事故发生之后,北海各沿岸国积极行动,并确立了以区域合作途径解决突发性溢油事故带来的环境问题。最终,北海各沿岸国于 1969 年缔结了《应对北海油污合作协议》。此项公约当时是、现在也仍然是国际法发展历史中一项独特的法律文件,从公约缔结到最终生效只用了两个月。

在国际层面上,此次事故也促成了联合国人类环境大会的召开。基于大会所通过的人类环境行动计划,[②]联合国环境规划署得以成立并成为负责协调国际环境保护行动的机构。联合国环境规划署通过 3 个步骤来处理其所需重点解决的问题。三步骤的做法,也被称为"项目方法"。[③]项目方法在海洋环境保护上的应用,体现为区域海洋项目的设立。区域海洋项目的设立,无疑受到了北海各国合作实践的启发。而这种区域合作的途径,很快也影响到了其他闭海和半闭海区域,包括:波罗的海、地中海等。尤其是地中海区域,甚至成为了"区域合作协议的原型,以及区域合作协议的最好工作样本"。[④]以致于其后的区域海洋项目和应急制度,均深受其影响。

(三)区域合作途径的广泛实践

20 世纪 70 年代以来,在国际社会以及区域层次上,多项海洋环境保护公约得以达成。在联合国环境规划署的推动下,全球的闭海和半闭海被划分为 18 个区域海洋,其中 14 个区域缔结了此类公约,并就特定问题制定了相应的议定书。有关泄露事故的应急议定书,包括油类泄露和其他化学以及有害物质泄露,则是各区域所首要解决的一个问题。在国际上现有的区域海洋项目中,除了南北极区域外,其余的 16 个区域中,有 14 个区域确立了应对突发性污染事故的应急制度(东北太平洋区域和南亚海区域的应急制度尚处于建立过程中)。两个没有确立应急制度的区域,正是中国所在的两个区域海洋:东亚海区域和西北太平洋区域。南海则是属于东亚海区域的一个重要亚区域海。

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① Alexandre Charles Kiss and Dinah Shelton, *Guide to International Environmental Law*, Leiden; Boston: BRILL, 2007, p. 33.

② UNEP, Report of the United Nations Conference on Human Environment, Stockholm, at http://www.unep.org/Documents.multilingual/Default.asp? DocumentID=97&ArticleID=, 27 February 2011.

③ Essam, El-Hinnawi: *Two Decades of Achievement and Challenge*, Nairobi: UNEP, 1992. p. 9.

④ Maria Gavouneli, New Forms of Cooperation in the Mediterranean System of Environmental Protection, in Myron H. Nordquist, John Norton Moore & Said Mahmoudi Nordquist ed., *The Stockholm Declaration and Law of the Marine Environment*. Leiden; Boston: Martinus Nijhoff Publishers, 2003, p. 223.

三、区域合作保护南海海洋环境的路径分析

(一)其他区域的合作经验借鉴

全球其他十四个区域海洋规范合作实践的经验表明,区域海洋在环境上、经济上的重要性,足以平衡区域内其他方面的利益分歧,其价值也足以让区域内各方为解决问题而竭尽自己的才能和智慧。对于南海来说,其他区域的合作经验具有充分的可适用性和可复制性。简言之,区域合作虽然可能因为区域内经济、政治利益分歧被延后,却不可能因此而被否定;南海的海洋环境实际以及海洋环境利益、经济利益状态,决定了区域内合作的必然性。

在区域合作防范突发性污染事故的已有实践中,可充当范例的有北海/东北大西洋区域、波罗的海区域,以及地中海区域。北海/东北大西洋区域的合作经验主要可归结为:海洋环境具有的基础利益短期之内可能会被忽视,[①]长期来看它决定了合作的实现;经由较小区域合作实践推广至更大范围是促成合作的一条有益途径;法律规范和政治措施并行将会发挥更大的作用;区域内是否存在主导力量,也会加速或延缓应急制度的形成。波罗的海的经验,最为突出的就是一点:海洋环境利益的重要性可以超越区域内政治利益的分歧甚至对抗。[②]除此之外,外部推动力量的存在可以使合作进程更为顺利。被誉为"区域合作协议最好样本"的地中海区域,历经三十余年的发展,可资借鉴的则有:区域内经济发展水平的差异是可以在公约体系内予以协调的,即以必须同时批准的区域公约解决区域内的共同问题,以可以根据国内发展实际为决定何时批准的议定书解决具体问题并适应不同国家的不同履约能力。另外,则是区域内的推动力量对实现区域合作具有重要的促进作用。[③]

(二)区域合作保护南海海洋环境的模式选择

从南海海洋环境实际以及其他区域规范合作的法律制度经验看,南海区域

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① 一战后,英国即已注重有关海洋环境的国内立法,并积极推进了国际社会层次上的合作,但最终并未成功。*See* Sonia Zaide Pritchard, *Oil Pollution Control*, London: Routledge Kegan & Paul, 1987, p. 6.

② Fitzmauurice, *Malgosina International Legal Problems of the Environmental Protection of the Baltic Sea*. The Hague: Kluwer Academic Publishers, 1992, p. 15.

③ Chung, Suh-Yong, Is the Mediterranean Regional Cooperation Model Applicable to Northeast Asia?, *Georgetown International Environmental Law Review*, Winter 1999, p. 364; Andrew T. Guzman and A. O. Sykes. *Research Handbook in International Economic Law*, Cheltenham, Camberley: Edward Elgar Publishing, 2007, p. 484.

防范突发性污染事故的法律制度构建,可以选择的路径有如下两种:

以地中海模式为参考,缔结区域保护海洋环境的公约,在公约的框架内,达成防范突发性污染事故的具体议定书。这种公约议定书的模式具有明确的优点,即适应区域内各方履约能力差异的现状。而其不足之处在于缔约过程耗时,并需要区域内一方积极推动。

另外,可以参照北海以及此后由北海拓展至整个东北大西洋的经验,以具体的突发性污染事故为解决对象缔结公约;并在此后的国际合作中,针对其他具体海洋环境问题缔结其他公约。当各具体公约逐渐成熟之后,再缔结综合的海洋环境保护公约。这种模式的优点在于,缔约目标明确,内容具体,而且在具体公约的达成上需要耗费的缔约成本较低。各方也可以在缔约经验日渐成熟的基础上,再解决更大层面上的问题。但这种模式的缺点在于,长期来看其缔约成本较大,毕竟要为具体海洋环境问题一一缔约,而后再进行综合,是一件需要各方积极投入的一个长期项目。对于当前的南海区域来说,此路径的全面实现可能性较低。

综合来看,要在南海区域构建防范突发性污染事故的法律制度,最具可行性的方法就是以北海/东北大西洋区域的模式开始,为解决突发性污染事故而单独缔结一项公约。但在此项公约达成之后,应积极推动区域内海洋环境保护公约的实现,吸收地中海模式的经验,转入公约和议定书结合的模式。由此,可适应区域内各方因经济发展水平不一致而造成的履约水平差异。而更为重要的,则是区域内海洋环境利益明显的一方,譬如中国,积极推动此进程。毕竟,国际法的发展历史表明,积极推进国际法律文件达成的国家,大多是在此事项上具有明显利益的国家;而国际法律文件的内容也表明,积极推进国际法发展的国家,其利益也能在相关法律规范中得到更好的维护和保障。这对中国这一海洋大国但同时是海洋地理不利的国家而言,具有很好的启示意义。

(三)中国应推进构建南海区域防范突发性污染事故法律制度进程

南海这一半闭海对于周边沿海各国都具有重要的意义,对于中国而言尤甚。无论从海洋渔业、海上交通、离岸油气资源、海洋环境还是地缘看,中国在此区域的利益都值得付诸更大的关注和努力,以维护和实现自身的利益。在上述利益中,海洋渔业、海上交通以及离岸油气资源等方面利益的实现以海洋环境利益的维护和实现为基础;加之前者由于涉及敏感的经济以及政治利益,容易招致外来力量的干涉,这就昭示了中国在此区域维护和实现自身利益的途径:即籍由对低政治领域的合作保护海洋环境的推进,逐渐实现在区域内的经济、交通、资源以及政治利益。加之前文对区域海洋特点以及南海海洋环境风险的分析,更加佐证了这种区域合作的正当性与适当性。

在推进区域合作保护海洋环境上，有必要揭示随着区域内各沿海国经济的进一步发展，区域内突发性污染事故的风险与日俱增。这就要求沿海各国在以其他区域经验为参照的同时，明确南海区域防范突发性污染事故的法律制度构建应以解决该区域实际问题为首义。

其一，明确公约目标，即通过各方合作防范突发性污染事故，防止船源污染。而各方的合作，是有效处理此类事故的关键因素；明确各方的合作范围以及公约适用的地理范围，以避免出现管辖权冲突或疏漏，并且避免任何一方任意单边扩大管辖权范围。

其二，确立公约的基本原则，应包括风险预警原则，合作原则，以及污染方承担损失等。而这之中，区域内各成员方的合作尤为重要，具体可包括信息共享，技术援助，协调机构的职责等。以此明确此条约的作用，是在区域层次上协调各方的相关行动。

其三，界定公约所使用的关键概念，包括何谓污染事故，何谓突发性污染事故、油类、有害物质、海洋利益以及相关利益等。此类关键概念应与国际法中以及各沿海国内国法使用的概念保持一致，以避免法律之间的冲突。

其四，公约的具体条文应包括对各国国内应急能力的要求，各国为防范突发性污染事故所应履行的义务，具体的应急措施，赔偿和费用返还，港口接收设备以及危急船舶的避难等。

最后，则是有关程序上的具体规定，诸如成员国大会，公约与其他公约的关系，签字，批准，加入以及履行等。

无论是从理论的还是实际的立场出发，南海区域，甚至其所隶属的整个东亚海区域，海洋环境保护法律制度的构建对于区域内各方利益的实现都是不可或缺的。区域内海洋环境问题的性质决定了最适合的解决途径是区域合作，而该区域合作的实现要避免仅仅是一纸空文就要以有约束力的法律文件作为保障。

南海区域虽然各方经济利益以及政治利益有所差异，但在海洋环境保护上存在一致的利益是不容否认的事实。自 20 世纪 60 年代末，国际社会即开始关注海洋环境对沿海各国的利益一致性，这种关注直接促成了区域海洋项目的诞生。历经多年实践，区域合作已取得了良好的、可借鉴的经验，并经由国际法律文书毫无例外一再地强调和重复。南海区域合作防范突发性污染事故的法律制度构建，在以其他区域已有经验为借鉴，以防范本海域突发性污染事故风险为基础的前提下，并非是一个不能实现的任务。随着区域内中国和东盟各方经济利益的融合，各方在其他领域的合作基础也会越来越坚实；而海洋环境利益的一致性，也将促成各方的合作；中国作为区域内海洋环境利益明显的一个国家，更应积极推进区域内的合作。

（责任编辑：钟洪彬）

On Framing a Legal Regime for Marine Environmental Protection through Regional Cooperation in the South China Sea

ZHANG Xiangjun*

Abstract: With the recent economic boom in Southeast Asia, the South China Sea has been growing steadily in importance, especially to its coastal States. Even so, the South China Sea remains one of the least protected of the world's enclosed and semi-enclosed seas. After researching the practices in other regional seas and those of the South China Sea, a potential solution has been devised of establishing a regime of cooperation in combating pollution in this critical sea area. When constructing such a legal regime, China should recognize its role and act more positively and actively during the process.

Key Words: Regional cooperation; South China Sea; Marine environment

The establishment of the China-ASEAN Free Trade Area has stimulated regional economic development in Southeast Asia. In step with this economic development, the importance of the South China Sea has been on the rise for its coastal States due to its rich resources and crucial role in navigation, the economy, politics and the environment. This is particularly true for China, which has claimed indisputable territorial sovereignty over the islands as well as certain rights in the historic waters within the "U-shaped line." This innovative delimitation corresponds to the traditional Chinese maritime boundary line dating

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back several centuries. Considering its long history in the area, it seems natural that China should focus more attention and energy on the South China Sea. Some of the coastal States do not accept China's claims, and disputes over sovereignty rights and jurisdiction among the coastal States have impeded cooperation and brought marine environmental protection to a standstill. Following a request from the Coordinating Body on the Seas of East Asia (COBSEA), the Global Environment Facility (GEF) launched a project called Reversing Environmental Degradation Trends in the South China Sea and Gulf of Thailand. The results of the project indicated that the environment of the South China Sea, one of the biologically richest areas of the west Pacific, has been under tremendous pressure. This is due to the dramatic increase in pollutants being introduced into the sea, a byproduct of the coastal States' recent rapid growth in economy and population. The consequences could be dire: in short, the living resources of one of the world's most bio-diversified areas could practically vanish. ①

The South China Sea, as with all semi-enclosed seas, is especially vulnerable to pollution. Of the various forms of marine pollution, accidents by massive oil spills are perhaps the most destructive. Oil spillages in other enclosed and semi-enclosed seas have attested to this, such as the *Torrey Canyon*, *Erika* and *Prestige* incidents which took place in 1967, 1999 and 2002, respectively. Such accidents also sounded the alarm for states bordering the South China Sea, including China, underscoring the significance of marine environmental protection.

Ⅰ. The Necessity of Marine Environmental Protection in the South China Sea

A. *Overview of Features of the Sea and Oil Tanker Navigation Wherein*

A semi-enclosed sea, the South China Sea is also designated as a sub-region of the East Asian Seas Region, a regional sea as defined by the United Nations Environment Programme (UNEP). Prominent features of the South China Sea

① UNEP. SCS Project Terminal Evaluation Terms of Reference [EB/OL] 28 August 2008, p. 1, at http://www.unep.org/eou/Portals/52/Reports/South%20China%20Sea%20Annexes.pdf, 3 July 2011.

include its contiguity to the continental land, defined maritime boundary lines, high-traffic navigational routes, a number of ports crucial to the coastal States' interests, bordering states having diversified political interests and undeveloped economies. Such features make this sea region markedly susceptible to pollution accidents, a problem exacerbated by its lack of cooperative efforts to protect the environment. Though up to the present regional cooperation has proven elusive, coastal States will be certainly not be spared the grave aftermath of pollution accidents if and when they occur in the future.

China has become the world's second largest consumer and importer of oil, much of which arrives via the South China Sea. Moreover, although Japan and Korea are not among the coastal States, oil tankers bound for these two countries also pass through the South China Sea. Consequently, tankers frequently sail in and out of the region's ports, causing navigational routes to become crowded, hazardous and complicated. Even for those oil tankers solely navigating through this region without calling at port, they tend to sail near coastlines for safety and costs. This method facilitates rescue service and increases access to port facilities in case of emergency. According to the International Tanker Owners Pollution Federation (ITOPF), serious oil spills generally occur in the vicinity of coasts, bringing severe environmental disasters to both land and sea. ① In enclosed and semi—enclosed seas, the rate of water exchange— highly correlated with the rate of decontamination— is much lower than that in the high seas. The likelihood of accumulating persistent pollution is therefore much higher in these seas. Enclosed and semi-enclosed seas play a critical role in transportation, fishery, tourism and other marine activities for coastal and non-coastal States alike, yet due to their geography, should a massive spill occur, what the coastal States would suffer would be more than environmental consequences. In other regional seas, with the exception of the two (South China Sea and East China Sea) appurtenant to China, coastal States are cooperating to prevent pollution by oil and other hazardous substances through agreed regulations or a specific annex or protocol to a general legal regime for protecting the marine environment.

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① Some of the more high-profile incidents include Exxon Valdez, Hawaiian Patriot, Torrey Canyon, Amoco Cadiz, Odyssey, Aegean Sea, Urquiola, Prestige, Jakob Maersk, Khark's Atlantic Empress, Abt Summer, Castillo De Bellver, Katinap, Braer, Sea Empress, Haven, Independenta, Irenes Serenade, and Sea Star. *See* ITOPF, Major Oil Spills (figure 7), at http://www. itopf. com/information — services/data — and — statistics/statistics/, 29 March 2011.

In the South China Sea, oil spills are not a rare occurrence. Since 1975, the Malacca Strait has witnessed several such accidents. ① Fortunately the accidents took place on the side facing the high seas and not within the semi-enclosed sea. The same luck may not hold in the future, as the risk of accidents in the region continues to increase. Firstly, vessels carrying dangerous and hazardous substances other than oil are now also navigating this sea region, which makes navigation even more congested/risky. Secondly, offshore oil exploration and exploitation could also give rise to oil spills. Thirdly, coastal nuclear plants also pose a significant risk. Without a regulatory instrument in place [to prevent negligent practices, phase out substandard vessels, and enable cooperative rescue and salvage efforts], the likelihood of a major accident would increase dramatically, and the results could be catastrophic.

B. Regional Cooperation Practice in Combating Sudden Pollution in the South China Sea

The South China Sea is integral to the coastal States' environmental, economic and political interests. In using the advantage that the Sea offers as a means to fulfill their domestic interests, the coastal States inadvertently expose it to the threat of serious pollution incidents. In spite of this ever-present risk, there is still no regional legal regime for regulating marine activities in the South China Sea.

The legal regime of the East Asian Seas, a regional sea programme under the auspices of UNEP, is like other regional seas under the direct administration of UNEP, in that the method for achieving regional cooperation in marine environmental protection in the East Asian Seas follows the convention-protocol approach first observed in the Mediterranean region. In the East Asian Seas region, marine environmental protection was taken into consideration decades ago, but progress was astonishingly slow. Currently the coastal States utilize a non-binding regional action plan as a basis for cooperation. In other words, marine environmental protection depends entirely on the "good will" of the plan's member states. Cooperation in the South China Sea is essentially voluntary and non-binding.

Two events over the past decade might be considered promising: the De-

① Zhengdi Wang and Scott A. Stout, *Oil Spill Environmental Forensics: Fingerprinting and Source Identification*, Boston, MA: Academic Press, 2007, p. 491.

claration on the Conduct of Parties in the South China Sea, concluded at the second East Asian Seas Congress 2002, which elaborates response plans to spillages of oil and chemical substances at sea; and the 2011 Guidelines of Implementing the Declaration on the Conduct of Parties in the South China Sea. Nevertheless, these documents solely demonstrate the shared intention among the coastal States to cooperate. Without legally binding status, such expressions of good will are, in practical terms, unenforceable.

C. Potential Problems incurred by Lack of a Legal Regime for Cooperation in Combating Pollutions in Emergency

In light of historical pollution incidents in and the current non-regulated state of the South China Sea, future discharges of pollutants in this region might encounter the following complications:

Firstly, cooperation among the coastal States will be virtually nonexistent. The typical pattern of international legal regime development indicates that coastal States tend to act on their own interests without considering common environmental concerns when there is no legally binding instrument in place. Moreover, some states may unilaterally regulate and enforce their domestic rules in an international sea area. In the first half of the 20th century, legal regimes for marine environmental protection in the United Kingdom and the United States were characterized by this practice. ①

Secondly, a gap difficult to bridge may appear between the applicable spaces of domestic rules and international rules. The Torrey Canyon incident called the international community's attention to a similar gap between these two sets of rules. Briefly put, by relying strictly on domestic or international laws without considering features particular to a regional sea, cooperative attempts to combat spills of oil or other hazardous substances could worsen rather than ameliorate the situation.

Thirdly, the possibility of sustaining damage from an accidental release might be overshadowed by an unwillingness of states to offer assistance to vessels when there is no direct link to a given vessel or its cargo.

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① At that time the width of territorial seas was generally accepted as 3 nautical miles (nm), yet the United States claimed a 50 nm-wide belt for the enforcement of its oil pollution control measures, which in practice was even widened to 100 miles. *See* Sonia Zaide Pritchard, *Oil Pollution Control*, London: Routledge Kegan & Paul, 1987, pp. 62～63.

In conclusion, the latent risk of serious pollution incidents occurring is becoming ever greater in the South China Sea. Due to the lack of a functional legal regime for regional cooperation, serious environmental, economic and political problems could assail the coastal States at any time.

Ⅱ. The Possibility of Regional Cooperation to Protect the Marine Environment in the South China Sea

A. *Definition of a Regional Sea*

One characteristic shared by all regional seas is a limited capacity for decontamination. Incidentally, there is no universal agreement concerning the precise definition of this type of sea. The designation "regional sea" used by UNEP is defined the same as the term enclosed or semi-enclosed sea, introduced by the 1982 United Nations Convention on the Law of the Sea (the Convention).

Enclosed or semi-enclosed sea means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States. ①

According to this definition, regional seas are clearly defined geographical entities. Due to being mostly surrounded by land these bodies of water have very limited decontamination capacity and are therefore particularly susceptible to the effects of pollution. The health of a regional sea's marine environment depends heavily upon the degree and effectiveness of cooperation among coastal States, as article 123 of the Convention confirms. This article was inspired by a number of regional marine environmental protection conventions concluded in

① *See* article 122 of the UNCLOS.

pre-Convention years. ① Such conventions have been successful in large part because of their consideration of regional features. These agreements clearly spell out geographical boundaries of a given regional sea, which lends itself to effective regulation as these seas are neither too small to deserve attention nor too large to be regulated in actual practice. ② A few regional conventions concluded in recent years also emphasize the feasibility and suitability of regional cooperation for marine protection, especially marine protection in enclosed and semi-enclosed seas. ③

B. Suitability of Regional Cooperation for Marine Environmental Protection

Compared with the vast, open high seas, enclosed and semi-enclosed seas are much more vulnerable to accidental pollution and sensitive to the maritime activities of coastal States. Consequently, a legal regime suitable for an enclosed or semi-enclosed sea is different from an international convention governing all the world's seas and oceans, and also different from domestic laws of a sovereign state that regulate the waters under its jurisdiction. Since the Convention is to be uniformly applied to the whole international community, a delicate balance of heterogeneous interests on common international issues is required, and at times the exact specifications of tangential concepts such as re-

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① These include the Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil in 1969; the 1974 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area; the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution; the 1978 Kuwait Regional Convention for Co-operation on Protection of the Marine Environment from Pollution; the 1981 Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region; and the 1981 Convention for the Protection of the Marine Environment and Coastal Areas of the South-East Pacific. *See* Agreement for Co-operation in Dealing With Pollution of the North Sea by Oil, at http://sedac.ciesin.org/entri/texts/pollution.north.sea.by.oil.1969.html, 15 June 2012; UNEP, The Regional Seas Programmes, at http://www.unep.org/regionalseas/, 30 February 2011.

② Veronca Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea: Implementing Global Obligations at the Regional Level*, Leiden/Boston: Martinus Nijhoff Publishers, 2007. p. 31

③ U. N. General Assembly. Report on the work of the United Nations Open-ended Informal Consultative Process established by the General Assembly in its resolution 54/33 in order to facilitate the annual review by the Assembly of Developments in Ocean Affairs (Third Meeting, April 8－15, 2002). 5－7, at http://daccess－dds－ny.un.org/doc/UNDOC/GEN/N02/395/80/PDF/N0239580.pdf? OpenElement, 29 March 2011.

gional seas inevitably fall to the wayside. However, in a regional sea based on clearly defined geographical boundaries, common or similar historical backgrounds of coastal States, common interests concerning exploration and exploitation of resources as well as shared environmental issues, regional cooperation is a more suitable and feasible way to effectively protect the marine environment. The coastal States will be more prone to fulfill their environmental protection obligations under a regional Convention.

The historical record of regional cooperation in marine environmental protection testifies to the suitability of such an approach. The 1967 Torrey Canyon incident① shocked the international community due to its disastrous impact on the marine environment. Over the following 20 years, various international legal regimes on marine environmental protection were rebuilt from the ground up. ② In the aftermath of the accident, the North Sea coastal States took efficient action, mustering an unprecedented degree of regional cooperation to confront the environmental problems caused by the spill. In 1969, the Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil was concluded. This was and remains a very unique international legal instrument due to the rapid two-month transition from the date of conclusion to its entry into force.

In the international arena, this accident led to the United Nations Conference on the Human Environment, at which an Action Plan for the Human Environment was promulgated③ and the UNEP established to take charge of coordinating international environmental protection. To deal with key environmental protection issues, UNEP took a three-step approach known as a "programmatic approach". ④ This programmatic approach was later implemented as the Regional Seas Programme. Undoubtedly, the Regional Seas Programme took its inspiration from the close cooperation of North Sea coastal States following the Torrey Canyon incident. Soon enough, this method of regional cooperation in marine environmental protection was also utilized in other enclosed and

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① Davod Axford and Colin Davies, The Breaking-up of the oil tanker Torrey Canyon, at http://www.axfordsabode.org.uk/torreycn.htm, 15 June 2011.

② Alexandre Charles Kiss and Dinah Shelton, *Guide to International Environmental Law*, Leiden; Boston: BRILL, 2007, p. 33.

③ UNEP, Report of the United Nations Conference on Human Environment, Stockholm, at http://www.unep.org/Documents.multilingual/Default.asp? DocumentID=97&ArticleID=, 27 February 2011.

④ Essam, El-Hinnawi: *Two Decades of Achievement and Challenge*, Nairobi: UNEP, 1992. p. 9.

semi-enclosed seas, including the Baltic, Mediterranean and others. Notably, the Mediterranean regional cooperation legal instrument became "both the archetype and the best working specimen of a regional cooperation agreement",[①] greatly influencing the development of legal regimes in other regional seas.

C. General Practice of Regional Cooperation

Since the 1970s, a wide array of international conventions for marine environmental protection have been concluded. Altogether there are 13 UNEP regional seas programmes comprising 143 member countries—plus 5 more partner programmes, also known as independent programmes—in place to manage the world's enclosed and semi-enclosed seas. Of the 18 regions, 14 have concluded their own regional conventions to facilitate cooperation, complete with protocols or annexes that address specific issues of marine environmental protection, including but not limited to pollution from land-based sources; specially-protected areas; biodiversity; vessel-source pollution; cases of emergency; pollution from exploration and exploitation of resources on or beneath the continental shelf; pollution by transboundary movement of hazardous wastes and their disposal, etc. Four regions are left without regional cooperation conventions: two are the exceptional polar areas of the Arctic and Antarctic, and the other two are the East Asian Seas Region and Northwest Pacific Region, precisely the two regions of which China is a coastal state. As for the South China Sea, it is considered a sub-region of the East Asian Seas Region.

Ⅲ. Application of Regional Cooperation for Marine Environmental Protection in the South China Sea

A. Experiences of Cooperation in Other Regional Seas

Precedents in the other 14 regional seas demonstrate that the environmental and economic benefits of maintaining a healthy regional sea provide enough impetus for bordering States to negotiate past their diverging interests. These

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① Maria Gavouneli, New Forms of Cooperation in the Mediterranean System of Environmental Protection. Nordquist, Myron H. & Moore, John Norton. The Stockholm Declaration and Law of the Marine Environment. Leiden/Boston: Martinus Nijhoff Publishers, 2003. p. 223.

seas are important to the wellbeing of coastal States and therefore deserve genuine efforts and ample foresight to resolve the problems they face. The models of legal regimes governing other regional seas are of great value in forming an analogous system in the South China Sea. Simply put, regional cooperation might be delayed due to conflicting economic and political interests, but it is not impossible. Marine environmental protection goes hand in hand with coastal States' economic interests in the South China Sea, and acceptance of this fact will pave the way to future cooperation.

Some instructive examples of regional cooperation in marine environmental protection include the North Sea/Northeast Atlantic region, the Baltic, and the Mediterranean Sea. Experiences in the North Sea/Northeast Atlantic region shed light on the following aspects of cooperation: Firstly, the basic benefit of the marine environment may be overlooked in the short term;[①] nonetheless, with a long-term vision, it's the significance which is decisive for cooperation. Secondly, cooperation in a sub-region can lay a sound basis for cooperation in an entire region. Thirdly, legal rules with political mechanisms attached will promote cooperation more efficiently than those without. Fourthly, if one or more states take a proactive stance, regional cooperation will be accelerated. In the Baltic, the most salient lesson is that the importance of a well-maintained marine environment can be sufficient to overcome dissimilar or even opposing political interests.[②] Except for that, the presence of an external driving force will facilitate cooperation. As "the best working specimen of a regional cooperation agreement", the Mediterranean Sea is inspiring for the following reasons: Divergences in economic and political circumstances among the bordering states were well accommodated by a clever convention-protocol regime. The centerpiece of such an arrangement is a convention that addresses common problems in the region, whereas protocols play a supplementary role and state members retain the right to accept them or not, depending on their domestic situation and practical capacity to fulfill the subsequent obligations. Apart from that, the development of the Mediterranean's legal regime showed the necessity of having a state or states in the region agitating for regional coopera-

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① After World War I, the United Kingdom focused on its domestic marine environmental law and made efforts to stimulate international cooperation, but with little success. *See* Sonia Zaide Pritchard, *Oil Pollution Control*, London: Routledge Kegan & Paul, 1987, p. 6.

② Fitzmauurice, *Malgosina International Legal Problems of the Environmental Protection of the Baltic Sea*, The Hague: Kluwer Academic Publishers, 1992, p. 15.

tion in order for it to be realized. ①

B. A Specific Mode for Regional Cooperation in Marine Environmental Protection in the South China Sea

Based on the marine environment in the South China Sea and experiences in other regional seas, it is submitted that a legal regime for marine environmental protection in the South China Sea could, with some modifications, be established on the basis of two successful regimes already in place: those of the Mediterranean and North Seas.

The Mediterranean Sea's convention-protocol framework consists of a regional convention for general marine environmental protection drafted and approved by all member states, with protocols for tackling specific issues, such as accidental spillages, to be concluded and approved according to need and each country's capacity for obligation fulfillment. Member states are obliged to approve at least two specific protocols. Under such a framework, discrepancies among member states in their capacities for fulfilling conventional obligations are taken into consideration. But it has a shortcoming, that is, it takes a long time to construct such a convention-protocol framework, which requires an active inside party in the region to promote the construction.

Certain aspects of the North Sea/Northeast Atlantic regime that may smoothen the course of developing a legal regime for the South China Sea also merit discussion. At first, bordering states in this regional sea concentrated on the specific issue of marine environmental protection, particularly the prevention of oil spills in the North Sea, as the core of a multilateral convention. Later modifications were appended to this initial agreement to address other specific issues. This region utilized a divide-and-conquer strategy, adopting quite a few specific conventions, then on the basis of these concluding a general convention for marine environmental protection. This strategy results in conventions with a specific, even narrow focus, allowing for greater cost and time efficiency. Moreover, through undergoing this process, member states gain much valuable skill and experience in cooperating to enhance marine environmental protection and draft regional legislation. Nonetheless, such an approach is rela-

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① Chung, Suh-Yong, Is the Mediterranean Regional Cooperation Model Applicable to Northeast Asia?, *Georgetown International Environmental Law Review*, Winter 1999, p. 364; Andrew T. Guzman and A. O. Sykes. *Research Handbook in International Economic Law*, Cheltenham, Camberley: Edward Elgar Publishing, 2007, p. 484.

tively ad hoc in nature and could neglect to address long-term issues. Member states must devote themselves to and expend great efforts for the conclusion of a comprehensive convention, since as a prerequisite several specific conventions are needed. For the South China Sea, this approach is not very practical in all respects, though it may prove useful in some.

To frame a legal regime in the South China Sea for marine environmental protection, a suitable and feasible start would be to conclude a regional convention on a specific issue then afterward tack on modifications, as was done in the North Sea region. Later on, the Mediterranean Sea approach could be utilized to conclude an umbrella convention for marine environmental protection, including protocols for specific needs. Adding protocols helps cope with discrepancies among coastal States that may affect their ability to fulfill conventional obligations. In the South China Sea, the most conspicuously lacking element is an active insider State, such as China, to push forward such a process. The history of international legislation shows that when a state promotes and takes substantive action to conclude a regional convention, that state does so to preserve and realize its own significant interests in that area. In addition, after the convention's conclusion those interests can be more effectively maintained and safeguarded. This fact is important and inspiring for China, a prominent though disadvantaged maritime state.

C. A Positive Role for China to Take in Convention Conclusion for Marine Environmental Protection in the South China Sea

The semi-enclosed South China Sea is of great value and significance to its coastal States. This includes China, which relies heavily on the Sea to conduct various activities: fishery; transportation; offshore oil and gas exploration and exploitation; marine environmental protection; and even geo-politics. China must not take efforts to establish a functional legal regime in the South China Sea lightly and should devote more efforts to the process. Among the above-mentioned aspects of maritime activities, marine environmental protection is the most promising one. For one, the other aspects touch on rather sensitive political issues, and focusing on them could invite outside interference in regional affairs. Perhaps the best approach for China to maintain and preserve her interests in the region is to promote regional cooperation in a relatively a-political way by honing in on the marine environment. Considering the environmental risks and regional features of the South China Sea analyzed above,

one may conclude that regional cooperation in marine environmental protection is both flexible enough for future modification and suitable for present needs.

To maximize the effectiveness of marine environmental protection measures, it is imperative that all bordering states in the South China Sea be aware that the risk of serious pollution incidents occurring increases day by day. Therefore, when framing a regional legal regime for marine environmental protection in the South China Sea, it will be necessary to take practical needs, current circumstances and the region's individual characteristics into consideration, all the while benefiting from the experiences of other regions.

When framing such a regional legal regime in the South China Sea, the following aspects should be considered:

Firstly, the objective of a future convention should be clearly defined, namely, to prevent the discharge of pollutants at sea through cooperation among member states. Cooperation is key to effective pollution prevention. It will also be necessary to delimit regional boundaries between the member states to head off jurisdictional conflicts or the unilateral enlargement of jurisdiction by any member.

Secondly, certain principles should ideally be incorporated into a convention on marine environmental protection. The precautionary and "polluter pays" principles should be observed, and a mechanism for cooperation among member states should be set forth in detail. Of the three, making a cooperative mechanism available to the member states is of foremost significance. This would entail the creation of avenues for information exchange, technical assistance and inter-party coordination through a competent central organization.

Thirdly, key terms used in the convention, such as accidental pollution, oily substance, hazardous substance, and maritime interests, should be clearly defined. These terms should be consistent with corresponding terms found in international law statutes and the domestic laws of member states.

Fourthly, a convention should promote capacity building to help member states meet their obligations, such as preventing accidental pollution through enforcing specific measures; installing a fair payment and reimbursement system in case an accident occurs; and providing adequate port facilities for commercial activity and safe haven for vessels in case of emergency.

Finally, a convention must contain some procedural rules relating to the nature and frequency of member states' conferences, the relationship between the convention and other related international legal instruments, signatures, approval, accession requirements, etc.

In theoretical and practical terms, a sound legal regime of marine environmental protection is indispensable for protecting and realizing the interests of coastal States within the South China Sea and indeed the entire East Asian Sea Region. Due to the regional nature of outstanding environmental protection issues in the South China Sea, utilizing the motor of regional cooperation is obviously the most suitable approach to solving these problems. It will be necessary to construct a binding legal instrument to realize such cooperation.

Undoubtedly there are discrepancies in economic and political interests among the South China Sea's coastal States. Nevertheless, the fact that they share a surpassing interest in marine environmental protection is undeniable. In the 1960s the international community began to perceive this common interest, resulting in the formation of the Regional Seas Programme under the auspices of UNEP. With a fruitful history spanning several decades, there now exists an abundance of instructive and potentially repeatable experiences from other regional seas. These can help guide the formation of new regional legal regimes of marine environmental protection in other areas, such as the South China Sea.

For the South China Sea, a fitting system may be forged through gleaning from existing regional conventions. Ideally, this framework will provide a basis for the adequate prevention of accidental pollution incidents at sea and protection of the marine environment for the common benefit of the coastal States (This does not appear to include land-based pollution, which is the largest source of maritime pollution). Framing a legal regime for the South China Sea is neither impossible nor beyond the capabilities of its coastal States. With deepening economic ties between ASEAN countries and China, the prospect of cooperation in other fields is becoming brighter. As a common interest for the whole region, marine environmental protection is sure to be recognized as an issue to be cooperatively tackled. China has significant interests in this region, and should therefore assume a proactive, positive stance to enhance cooperation in marine environmental protection in the South China Sea.

(Editor: ZHONG Hongbin;
English Editor: Joshua Owens)

国家管辖以外海洋保护区的现状及对策分析

桂 静* 范晓婷 王 琦

内容摘要:近年来,国家管辖以外海域的管理越来越受到国际社会的重视。作为新的管理手段,国家管辖范围以外海洋保护区有其产生的现实基础和法律基础,因此有其存在的积极意义。目前,国际社会对国家管辖范围以外海洋保护区进行了一定程度的规范,但依然存在着诸如没有成形的法律框架、科学研究明显滞后于实践等问题。可以预见,今后国际社会将加强对相关海域的国际法律框架研究、继续加大相关海域生物多样性的科学研究并且更加强调国际合作。

关键词:国家管辖以外海洋保护区 公海 深海底 海洋生物多样性

一、国家管辖范围以外海洋保护区辨析

近几年来,生物多样性不断遭到破坏的现实使人类越来越认识到生物多样性的保护已经刻不容缓。随着对生态系统科学认识的发展,生态系统管理已经成为许多政府部门、公众及私人资源管理机构明确的目标,并成为关注可持续发展的新方法。以渔业捕捞为例,自上个世纪90年代以来的捕捞作业和激烈的资源掠夺已经证明,人为划定界限并不适合跨界自然生物资源的管理,因此为了合理地管理和养护海洋生物资源,任何管理的法规、行动应该建立在海洋生态系统的功能、物种之间的竞争和合作以及海洋生态发展等最准确的科学研究基础之上。[①]而海洋保护区是实施生态系统管理的有效工具,不仅能够完整地保存海洋资源和自然环境的本来面貌,还能保护、恢复、发展、引种、繁殖物种群落,保存生物物种的多样性,消除和减少人为的不利影响。

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① 陈作志、邱永松、黄硕琳:《海洋生物资源的养护和管理:当前国际法律体制及其进展》,载于《湖北农学院学报》2002年第22卷第4期,第334~337页。

(一)概念

海洋保护区分为国家管辖范围以外海域的自然保护区和国家管辖范围以内海域的自然保护区。在国家管辖范围以内海域建立自然保护区,受沿海国的主权或主权权利支配,属于国内法问题;在国家管辖范围以外海域建立自然保护区则需要国际社会达成共识,属于国际法问题。依照现有国际海洋法律框架,国家管辖以外海域包括公海和国际海底区域。同时笔者注意到,一些国际组织(如世界自然基金会)将海洋保护区的管理划分为"公海"和"深海"两个部分。[①]因此,从理论与实践看,国家管辖范围以外海洋自然保护区应包括公海自然保护区和国际海底区域自然保护区两种。后者可简称"区域"自然保护区或深海底自然保护区。[②]

公海是不包括在国家的专属经济区、领海或内水或群岛国的群岛水域内的全部海域(《联合国海洋法公约》第 86 条),占据全球海洋面积(20200 万平方公里)的 64%。公海保护区主要针对海水水体中的生物资源及其多样性,如鱼类、海鸟等资源的保护。从过去几年出版和发布的国际会议文集、报告的数量来看,公海生物多样性保护受到了国际社会的普遍关注。[③]作为公海生物多样性保护的工具之一,公海保护区(也有的称公海保护地)一词也频频见于国际文件中,目前也有这方面的实例。公海建立自然保护区,应由《联合国海洋法公约》缔约国大会、《生物多样性公约》缔约国大会或联合国环境规划署、国际海事组织、联合国粮食及农业组织或其他由主权国家参加的政府间组织召开的外交大会建立,由有关协定规定的专门机构进行管理,按照保护对象的不同,规定国家在保护区内的权利和义务。深海底保护区则主要针对深海海底的生物资源及其多样性,如深海基因资源的保护。"区域"自然保护区按照《联合国海洋法公约》第 145 条和第 162 条的规定,应由国际海底管理局建立和管理。在该区域内,任何国家不得进行探矿,从事其他活动亦应受到限制。

(二)国际法依据

国家管辖范围以外海洋保护区的建立与管理,都需要以国际法依据作为背景。国际社会于 20 世纪 80 年代初才意识到海洋保护区的重要性。第一个提及

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① 下载于 http://www.panda.org/what_we_do/how_we_work/conservation/marine/our_solutions/protected_areas,2009 年 5 月 13 日。

② 华敬炘著:《海洋法学教程》,青岛:中国海洋大学出版社 2009 年版,第 267 页。

③ 下载于 http://wwz.ifremer.fr/institut_en/actualites/colloques_manifestations, 2009 年 5 月 13 日。

建立真正意义上的海洋保护区的国际条约,是1980年签署的《南极生物资源保护公约》,规定建立海洋保护区以保护有关种类的重要生态环境。[①] 1990年《大加勒比海区海洋环境开发和保护公约》和2001年《养护和管理东南大西洋渔业资源条约》也有这样的倾向。进入20世纪90年代以后,许多国家已完成国家管辖海域的立法和划界事务,开始转向对国家管辖以外海域制度的修改和调整,包括国家管辖范围以外海洋生物多样性的保护问题。同时,因为海洋勘探技术的发展,在资源利用方面,各国互相渗透,互相影响的趋势日益明显。在这一背景下,资源立法的国际化趋势逐步加强。[②]包括1982年《联合国海洋法公约》、《生物多样性公约》在内的大量的全球性和区域性的相关法律文书总体上构成了规范超出国家管辖范围以外的海洋地区生物多样性的现行国际法律框架,在此框架内有相当多的机会可促进在超出国家管辖范围以外的海洋地区建立海洋保护区,并且可以通过加强各文书之间的协调促进这些保护区的建立。[③]

1982年《联合国海洋法公约》(以下简称"公约")是一个最全面的涵盖国际海洋事务的国际公约,其第十二部分对海洋环境保护作了专章规定。但是对海洋生态环境的总体保护以及保护区的作用却未见有所涉及。但《公约》中并不是没有反映海洋生态保护的内容。例如,在其关于海洋环境的保护和保全的第十二部分规定,按照本部分采取的措施,应包括为保护和保全稀有或脆弱的生态系统以及衰竭、受威胁或有灭绝危险的物种和其他形式的海洋生物的生存环境而有必要的措施。(第194条第5款)又如,在关于区域内活动的政策方面规定,对区域内资源进行有秩序、安全和合理的管理,包括有效地进行区域内活动,并按照健全的养护原则,避免不必要的浪费。(第150条)国际海底管理局大会每五年还对本公约设立的"区域"的国际制度的实际实施情况进行一次全面和系统的审查,审查应确保继续维持关于保护海洋环境方面的各项原则。(第155条第2款)而《公约》针对"区域"海洋环境保护方面规定,管理局应制定适当的规则、规章和程序,保护和养护"区域"的自然资源,并防止对海洋环境中的动植物造成损害。(第145条2项)由此可见,虽然这一条款没有直接规定建立海洋保护区,但为所有海域,包括国家管辖海域和国家管辖以外海域建立海洋保护区奠定了法律基础。

《生物多样性公约》于1984年由世界自然保护联盟起草制定,并于1993年

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① 而在此之前的用于管理海洋生物资源开发的国际公约,包括《国际捕鲸公约》、《保护南极海豹公约》,一般都忽略生态环境的保护,即使有这方面的意识,也只是规定临时性地关闭一定的开发区。参见R. V. 萨尔姆著,国家海洋局海洋管理监测司编译:《海洋与海岸自然保护区—规划与管理人员指南》,1993年版,第23页。

② 甘藏春:《当代资源立法的发展趋势与我国的资源立法革命》,下载于 http://www.mlr.gov.cn/ggfw/wskt/wskt_dqkt/200503/t20050307_65576.htm, 2008年10月23日。

③ UNEP/CBD/WG—PA/1/2,20 April 2005. at Para8 (4),at www.cbd.int/doc/meetings/pa/pawg—01/official/pawg—01—02—zh.pdf,20 June 2011.

生效。其中有很大一部分规定在于对生物多样性的保护。公约对概念做出界定，规定了相应的措施，包括制定有关保护和持续利用生物多样性的国家战略、计划或方案，或是监测保护生物多样性组成部分，或是持久使用、宣传教育、环境影响评价等，此外它也涉及到就地保护，这部分包括建立保护区系统和就地保护，向发展中国家提供财务和其他资助。因而，它也是一份宏观性的条约。

二、国际社会管理实践

20 世纪 90 年代以后，许多国家在完成专属经济区和大陆架的立法和划界等事务之后，开始转向对国家管辖以外海域制度的修改和调整，要求进一步协调国家管辖以外海域资源开发与资源环境保护之间的利益冲突。具体表现之一就是公海保护区方面。[①]一方面，海洋保护区问题在许多国际组织及其会议上进行了讨论，这些组织及会议主要有联合国、《生物多样性公约》缔约国大会、联合国环境规划署、世界自然保护同盟、世界自然基金会等。《生物多样性公约》还专门设立特设工作组，就海洋保护区问题开展工作。这些会议产生了大量的全球性和区域性相关法律文书，形成了国际社会的有关海洋保护区的管理原则、目标和标准。另一方面，一些主要海洋国家对于国家管辖以外海洋保护区的态度是积极的，但是就如何管理存在分歧。

(一)已经确认的管理原则、目标和标准

确立的原则。联合国大会在处理有关国家管辖范围以外区域海洋生物多样性的养护和可持续利用的问题方面起着核心作用。2002 年，联合国大会呼吁“发展各种方法和工具，包括生态系统方法，建立符合国际法并以科学知识为基础的海洋保护区”(第 57/141 号决议)，并“邀请有关的全球和区域机构根据其任务规定，紧急调查如何在科学基础上，更好地处理国家管辖范围以外区域内脆弱的和受威胁的海洋生态系统和生物多样性所面对的威胁和危险；研究如何能够在这个过程中利用现有的条约和其他有关文书，而又符合国际法，特别是符合公约，并且符合基于生态系统的综合管理办法的原则，包括确定应予优先注意的海洋生态系统类型；并且探讨保护和管理这些生态系统的各种可能办法和手段。”(第 58/240 号决议)可以看到，现行国家管辖以外海洋保护区的管理原则包括符合国际法的原则、符合基于生态系统的综合管理办法的原则、以科学为基础的原则。

① 王翰灵：《国际海洋法发展的趋向》，下载于 http://lunwen.5law.cn/news/guoji/2008－9－28－cs/155EC1KB99J9.html，2008 年 6 月 18 日。

确立的目标和标准。2002年世界可持续发展峰会达成一项重要协议,即在2012年以前建立一个具有代表性的海洋保护区网络。联大不限成员名额非正式特设工作组于2006年,围绕世界可持续发展峰会确定的这一目标,就是否应建立多功能的海洋保护区,以及界定、设立和管理海洋保护区的标准等问题展开讨论。2004年《生物多样性公约》缔约方第7次会议通过了《关于保护区、海洋和沿海区域以及森林生物多样性的工作纲领》(第Ⅶ/28号决议),其中将"在大型的、未分割的、完整的、不可替代的或高危地区建立并扩展保护区范围"列为关键目标(目标1.1.2—重点关注区域)。2005年《生物多样性公约》保护区问题不限成员名额特设工作组召开第一次会议,指出"应当迅速制定标准,划定、标示并建立海洋保护区,全部保护区面积应达到世界海洋总面积的40%,才能实现至2012年建立一个全球海洋保护区网络的目标。"① 2008年5月《生物多样性公约》缔约方大会第9次会议上,各国代表就选择划分海洋保护区的标准上达成一致,首次草拟了建立国际海洋保护区的标准,并计划于2012年前公布正式规章。②

(二)主要国家的态度

欧盟、澳大利亚对于公海保护区问题的态度也是积极的。欧盟主张应制订《联合国海洋法公约》的第三部执行协定,重点是在公海建立海洋保护区。一些非政府间组织如绿色和平组织支持欧盟的提议,重点是制止破坏性捕鱼和建立监督机构。他们还主张基于预先环境评估、预警原则及生态系统方式,设立公海保护区并且积极开展相关科研活动。③

澳大利亚是将海洋保护区作为综合管理的一种手段加以利用的坚决拥护者。它认为,海洋保护区是一种能够以可持续的方式具体体现生物多样性保护、负责任的渔业、矿物勘探与开采、特别敏感的海区、旅游以及科学研究的综合管理制度和极好的手段。2000年5月,在联合国海洋事务非正式磋商机制第一次会议上,澳大利亚代表团提交一份非正式文件提请会议审议。该文件指出,尽管对公海内资源的了解有限,但越来越多的具有重大多样性价值的地区被发现,这些地区应当得到保护和持续利用。建议基于大洋中的鱼类生境、深海海沟、洋脊、海山、热液喷口生物多样性的重要性应当建立公海海洋保护区。

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① 参见 UNEP/CBD/COP/8/31, Decision Ⅷ/24, para. 11, at http://www.cbd.int/decision/cop/? id=11038, 20 June 2011.

② 参见 UNEP/CBD/COP/9, Decision IX/20, para. 18, at http://www.cbd.int/doc/decisions/cop-09/full/ cop-09-dec-en. Doc, 20 June 2011.

③ 2008年12月9日至11日在法国举行的名为"2012海洋目标"的欧盟会议将公海保护区问题列为讨论的核心议题,下载于 http://wwz.ifremer.fr/institut_en/actualites/colloques_manifestations, 2008年11月23日。

美国则存在着一个态度的转变过程。一直以来,美国以海洋法公约有关海底开发的条款对发展中国家有利为由推迟批准公约。2004 年,美国参议院外交关系委员会首次投票赞成批准公约,但未能提交全院表决。自此以后,美国转而支持联合国有关公海海洋保护区的协议。分析认为,这一转变是由于美国企图控制太平洋公海水域和通航。因为,近几年来,美国试图对毗邻其专属经济区的公海渔业进行实际限制。但美国明确反对制订《公约》的新协定来管理公海海洋保护区的提议,认为就深海生物多样性保护而言,充分有效地执行现有协定与利用现有机制完全可以解决当前面临的最紧迫问题。强调海洋保护区应是对环境影响有明确定义的区域,反对将海洋保护区设定成禁止一切活动的区域,主张应发挥区域渔业管理组织等机制的作用。日本、韩国、挪威、冰岛等国也主张利用现有机制管理公海海洋保护区。

此外,一些发展中国家由于技术等条件的限制而对于保护区的建立保持低调,认为在深海和远海上执行海洋保护区的规定存在着相当的困难。

(三)实例概况

到目前为止,全球陆地超过 12%被列为保护区,海洋却只有不到 1%的面积受到保护,而公海和深海比例则更小。[①]世界自然基金会在帮助建立公海保护区以及合作建立海洋保护区网络等方面作了大量工作。[②] 2003 年,世界自然基金会与世界自然保护联盟及世界保护区委员会一起制定了"公海海洋保护区 10 年战略:促进全球有代表性的公海海洋保护区网络体系建立的 10 年战略"。[③] 2003 年 9 月 9 日,第 5 届世界公园大会在南非德班召开。大会发表了《2003 年联合国保护区名单》报告,并宣称在 2008 年以前至少建立 5 个在全球具有代表性的公海海洋保护地。大会还通过了"公海海洋保护区 10 年战略"。从实例来看,由世界自然基金会帮助建立的并与法国、摩纳哥、意大利合作管理的利古里亚海洋鲸类保护区是世界上较为成功的公海保护区实例。这个公海特别保护区内,意大利、摩纳哥和法国三国协调对该海域的监管,并加强了对污染源的控制,对捕

① ISBA/14/LTC/5. para. 10,下载于 http://www.isa.org.jm/files/documents/EN/14Sess/LTC/ISBA-14LTC-5.pdf,2011 年 6 月 20 日。

② 世界自然基金会官方网站,下载于 http://www.panda.org/what_we_do/how_we_work/conservation/marine/protected _areas/increasing_protection/high seas,2008 年 11 月 23 日。

③ IUCN/WWF/WCPA. TEN-YEAR HIGH SEAS MARINE PROTECTED AREA STRATEGY:A ten-year strategy to promote the development of a global representative system of high seas marine protected area networks. Summary Version,September,2003, at http://cmsdata.iucn.org/downloads/10ystrat.pdf,23 November 2008.

鱼业更是严加规制,尤其是禁止使用拖网。[①]第一个深海海洋保护区也是由世界自然基金会在大西洋亚述尔群岛附近的两个热液喷口周围帮助建立的,除此之外,该基金将继续在西北大西洋的海山、喷口、冷水珊瑚和其他深海生境进一步建立保护区。[②]

就笔者了解,到目前为止,已经建立起来的真正意义上的公海海洋保护区是南极生物资源养护委员会设立的南奥克尼群岛南大陆架海洋保护区。2009 年 11 月在澳大利亚召开的第 28 届南极生物资源养护委员会大会上通过了一项措施,设立南奥克尼群岛南大陆架海洋保护区。这是在公海上设立的第一个海洋保护区。采取的保护措施包括:禁止一切捕鱼活动;为监测或其他目的,参考科学委员会的意见,经委员会同意的前提下,与渔业有关的科研活动才能实施。同时,该科研活动必须符合规定的保护措施;禁止一切渔业船只(包括渔船、对渔船进行支撑的船只、渔业加工船只、渔业运输船只等)在该区进行任何形式的倾废排污;禁止实施与任何渔业船只有关的转运活动;为监测保护区内的交通情况,鼓励渔业船只在途径该区前将其船旗国、船只大小、IMO 编号、途径路线等信息通知南极生物资源养护委员会秘书处;涉及海上人员安全的紧急情况时,保护措施不适用。[③]

三、国家管辖范围以外海洋保护区的意义、存在问题及趋势分析

从产生背景和现状及其本身的固有属性分析,这里暂且不对它是否是海洋生物多样性保护的最佳手段作出评价。不难得出结论,国家管辖范围外建立海洋保护区存在诸多优势,作为用来保护大范围区域海洋生物多样性的海洋保护区的积极意义应当肯定,它也将会是国际社会的一种发展趋势。但由于目前在实际的操作过程中已经遇到诸多方面的问题,包括法律、自然科学、海洋管理等层面存在不同程度的缺陷,因此在此类海洋区域建立保护区还存在着一些必然也是必需研究的问题。

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① 刘惠荣、韩洋:《特别保护区:公海生物多样性保护的新视域》,载于《华东政法大学学报》2009 年第 66 卷第 5 期,第 141～145 页。

② 世界自然基金会网站,下载于 http://www.panda.org/what_we_do/how_we_work/conservation/marine/protected_areas/increasing_protection/deep_seas/#deepsea_mpa,2008 年 11 月 23 日。.

③ 南极海洋生物资源养护委员会(CCAMLR)网站,下载于 http://www.ccamlr.org,2009 年 11 月 23 日。

(一)积极意义和存在的问题

国家管辖范围以外海洋保护区的积极意义,主要体现在以下三个方面:1. 有利于海洋可持续发展,有利于保护全人类的共同财产——高生物多样性地区,符合以生态为基础的海洋综合管理趋势,并具有一定的可操作性和科学性。2. 使国家管辖以外海域生物多样性的保护具有实际操作性。以往国际社会对于国家管辖范围外海域的生物多样性的关注和解决对策,主要停留在国际舆论或是各类国际民间环保组织的呼吁上,而在实际行动上少有建树。海洋保护区的建立则打破了这种困境,可以将国家管辖范围外海域生物多样性的保护进行实际有效的管理,同时使国际社会对所谓的保护有了具体化认识。3. 国家管辖以外海域生物多样性的保护的科学手段。在国家管辖外特定区域内划定特别保护区能够体现地域特点,有针对性地保护特定区域的生物多样性。不仅有益于对海中珍稀生物物种或是其他高价值种群的保护,而且有增进资源效益的成效,凸显出保护公海生物多样性手段的科学性。

目前存在的主要问题体现在以下四个方面:1. 相关的国际法律框架尚未建立起来。上文提及,大量的国际文件为国家管辖外海洋保护区的管理提供了机会,但目前来看,有关规制公海特别保护区的国际法,包括《联合国海洋法公约》、《生物多样性公约》,仅是普遍性国际公约,所提供的仅是核心性精神导向,而没有对国家管辖外海洋保护区进行直接规制的国际法存在。因此,相关的国际法律框架尚未建立起来。2. 与现行海洋法律制度存在冲突,使海洋秩序现有格局受到影响。目前明显地表现在公海制度上。例如理论上讲公海保护区的建立会使公海航行、捕鱼、科研等自由受到限制。国际上现有的法律和机制应寻求协调它们之间关系的途径。3. 国际社会的态度不一致。有些国家担心保护区的建立可能排除区域内资源的开发利用,一些发展中国家由于技术等条件的限制而对于保护区的建立保持低调。4. 海洋保护区的建立,其科学研究明显滞后于实践的需要。到目前为止,相关的建立保护区的标准、评估标准等还未制定出来。

(二)趋势及对策

1. 相关法律框架的研究将成为必然。由于国家管辖范围外海洋保护区的相关国际法律框架尚未建立起来,并且与现行海洋法律制度存在冲突,因此,有必要研究海洋保护区管理与相关国际条约的协调问题,探讨促进在《联合国海洋法公约》、《生物多样性公约》、《联合国鱼类协议》以及其他相关协议基础上的全球框架或途径,用以推动符合国际法的国家管辖以外海洋保护区网络研究体系的建立。

2. 各国有望达成共识,区域性合作将得到加强。国际社会包括以美国为代

表的发达国家,还有一些发展中国家也对海洋保护区持不同的立场,但相关讨论已经开启,并且今后对这一问题的理论方面的研究会更加深入。2008 年 5 月《生物多样性公约》缔约方大会第 9 次会议上,各国代表承诺到 2012 年建立一个全球海洋保护区网络的目标。由于国家管辖以外海洋保护区的建立要求具备较高的科学技术力量,一般发展中国家不具备这样的技术水平而产生顾虑,因此加强国际合作是推动公海保护区的必需途径。

3. 相关的科学研究将继续并不断深入。2004 年世界自然保护联盟出版了题为《海洋保护区现状如何?评估海洋保护区管理效果的自然和社会指标指南》一书。该指南为规划和评估海洋保护区的管理效果提供了经过实地检验的、分步进行的程序。[①]其他的相关研究还将包括:包括确认优先关注的海洋热点区域;制定界定、设立和管理海洋保护区的相关标准和指导方针、原则;生态系统和预防性背景下这些区域生物多样性的情况、趋势和面临的多重威胁的信息;[②]海山、冷水珊瑚礁和其他生态系统的分布、机能和相关物种生态情况的信息;通过信息中心机制进行信息共享;[③]在科学分析的基础上,探讨能否以生态上可持续发展的方式来管理深海资源;哪些生态系统/生态区域需要考虑优先保护?[④]是否建立多功能的海洋保护区等问题。

综上,国家管辖以外海洋保护区的设立与管理是否可行在国际层面上应当已经有了答案,现在的问题是着眼于我国的具体情况,是否有其可行性,如果可行又如何建立和管理等。笔者认为应从四个方面入手:第一,国家管辖以外海洋保护区的设立与管理不能脱离国际社会,因此应当密切跟踪国际上相关的管理现状,包括法律层面、科学层面;第二,在此基础上加强相关法律、理论和科研研究力度,使我们对问题的认识建立在科学的基础上;第三,积极参加国际社会相关立法、规章和标准的制定,扩大我国在国际社会上的影响;第四,加强国际合作,履行我国承担的国际义务的同时实现我国合法利益。为此,现阶段应着重就以下问题进行研究:

1. 与公海制度的协调。公海上建立保护区势必对包括我国远洋渔业在内的公海捕鱼造成影响。但应当看到,这种影响本就已经因为国际海洋法的发展而产生。类似 1995 年《跨界和高度洄游鱼类种群协定》这样的对公约的实质性

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① UNEP/CBD/SBSTTA/10/2,第 6 页,下载于 https://www.cbd.int/doc/meetings/sbstta/sbstta-10/official/sbstta-10-02-en.pdf, 2004 年 11 月 29 日。

② CBD 保护区不设名额特设工作组第一次会议,2005 年 6 月 13 至 17 日,《在超出国家管辖范围以外的海洋地区建立海洋保护区方面开展合作的选项》执行秘书的说明,第 8 段第 5 条。

③ 参见 UNEP/CBD/COP/8/31,Decision Ⅷ/24,第 44 段第 8 项,下载于 http://www.cbd.int/decision/cop/?id=11038, 2011 年 6 月 20 日。

④ 王文革:《生态环境建设立法问题研究》,载于《环境保护》2005 年第 8 期,第 20~23 页。

修改已使公海捕鱼自由受到了较大的限制，公海捕鱼自由实际上已不可能。[①]几十年来的实践证明，无限制的自由只能带来公海生物资源毁灭性的打击，公海上的自由是要以承担相应的国际义务为前提的，各国在公海捕鱼必须承担其养护与管理公海生物资源的义务。海洋保护区只是对于不合理的人类活动进行了合理地限制。况且，国家管辖范围以外海洋保护区都是建立在生物多样性高丰富性地区，而这样的地区多是在有特殊动物区系的独特深海环境（如热液喷口和海山），其面积有限，不会对捕鱼等海洋资源利用活动造成大的影响。

2. 保护与开发利用的关系。热液喷口、海山等具有地方性强的特点，从长远角度讲，它们的生物、矿物及碳氢化合物有被开发的可能性。因此建立这类海洋保护区并不排除合理的开发利用。其实，世界自然保护联盟规定了从高度保护到提供多种利用的各种不同类别的海洋保护区，而且现有的国内海洋保护区管理实践也提供了将保护和开发二者协调起来，在保护海洋环境和生物的同时促进当地经济发展的海洋保护区实例。如澳大利亚大堡礁海洋公园就支持一系列多种多样的利用，从生物多样性保护、科学研究到产值达几十亿澳元的渔业及旅游娱乐业。有关研究显示，澳大利亚海洋公园的建立不但没有阻碍反而增加了当地渔民的收入，达到经济与环境的可持续发展。[②]

3. 类似保护区实例的研究。目前，一些国内或国家合作建立的海洋保护区有的或在位置、地质或在保护类型方面与国家管辖以外海洋保护区类似，可以提供非常有益的经验。例如，由自然基金会帮助建立的葡萄牙彩虹喷口区域保护区，就是沿海国大陆架上的第一个海洋保护区，自然基金会参与建立的加拿大大西洋沿岸大型水下峡谷保护区被作为深海海洋保护区试点，该峡谷深达 2000 米以上，[③]加拿大、葡萄牙还都尝试在海山建立海洋保护区。[④]

（责任编辑：苏宝清）

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① 王翰灵：《国际海洋法发展的趋向》，下载于 http://lunwen.5law.cn/news/guoji/2008－9－28－cs/155EC1KB99J9.html，2008 年 6 月 18 日。

② 赵领娣、张燕：《澳大利亚海洋公园对我国渔民增收的启示》，载于《渔业经济研究》2008 年第 2 期，第 51～56 页。

③ 下载于 http://www.panda.org./what_we_do/how_we_work/conservation/marine/our_solutions/protected_areas/increasing_protection/high_seas，2009 年 5 月 13 日。

④ 下载于 www.dfo－mpo.gc.ca/CanOceans/INDEX.HTM；www.joel.ist.utl.pt/dsor/Projects/Asimov，2009 年 11 月 21 日。

Analysis on the Current Issues of Marine Protected Areas beyond National Jurisdiction and Countermeasures

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Abstract: In recent years, the management of sea areas beyond national jurisdiction has been drawing more and more attention from the international community. As new management tools, marine protected areas (MPAs) beyond national jurisdiction have both a scientific and legal basis, and therefore their existence is likely to have a positive impact. Currently, the international community regulates marine protected areas beyond the limits of national jurisdiction to a certain extent, but has not yet formed a complete/comprehensive legal framework. What is more, research on MPAs has lagged far behind, making it difficult for policymakers to make informed decisions. In the future, the international community should promote the implementation and improvement of the international legal framework for these MPAs and continue scientific research on marine biodiversity. In addition, international cooperation should also be emphasized to a greater degree.

Key Words: Marine protected areas beyond national jurisdiction; High seas; Deep seabed; Marine biodiversity

With the gradual consumption of natural resources and growing scientific understanding regarding ecosystems, ecosystem management has become a clear objective for many government departments, public and private resource management agencies; in short, the goal is to achieve sustainable development. Take fishing, for example: since the 1990s, fishing activities and intense resource exploitation worldwide have proved that artificial delimitation is not suitable for the management of trans-boundary biological resources. To better conserve marine living resources, any management regulations and actions

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should be based on the best available scientific knowledge with respect to the dynamics of marine ecosystems, competition and cooperation among species, marine ecological development and so on. ① MPAs are an effective tool for the implementation of ecosystem management, which can not only preserve the integrity of marine resources and the original appearance of the natural environment, but also aid in conservation, restoration, development, introduction, breeding of species communities, and therefore the conservation of biological diversity of species, thus reducing or even eliminating the adverse effects of human activities.

Ⅰ. Analysis on Marine Protected Areas beyond National Jurisdiction

A. Concept

There are two kinds of marine protected areas: nature reserves within national jurisdiction and those beyond national jurisdiction. The establishment of nature reserves under national jurisdiction is subject to the sovereignty or sovereign rights of a given coastal State. These are domestic law issues. On the other hand, establishment of nature reserves in areas beyond national jurisdiction requires the consensus of the international community and is thus a matter of international law. In accordance with the existing international legal framework for oceans, seas beyond national jurisdiction include high seas and international seabed areas. Some international organizations (such as the World Wildlife Fund (WWF)) classify MPAs as either "high seas" or "deep seas". ② So, in theory and in practice, nature reserves in marine areas beyond national jurisdiction are one of two types, depending on their being located either on the high seas or in international seabed areas. The former may be referred to as an "Area" nature reserve and the latter a deep seabed nature reserve. ③

The high seas are not included in the national exclusive economic zone, ter-

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① CHEN Zuozhi, QIU Yongsong and HUANG Shuolinm, Conservation and Management of Marine Living Creature Resources: Current International Legal Regime and Recent Developments, *Journal of Hubei Agricultural College*, Vol. 22, No. 4, 2002, pp. 334～337.

② At http://www.panda.org/what_we_do/how_we_work/conservation/marine/our_solutions/protected_areas, 13 May, 2009.

③ HUA Jingxin, *The Course of the Law of Sea*, Qingdao: Ocean University of China Press, 2009, p. 267.

ritorial sea, internal waters or archipelagic waters of an archipelagic State (UNCLOS, Article 86), accounting for 64% of the global ocean area (361 million square kilometers). [①] The goal of establishing high seas protected areas, also referred to as high seas protected zones, is mainly to protect marine biological resources, particularly the diversity of marine species, including fish, seabirds and other living resources. Over the past few years, international awareness of this issue has been growing, as demonstrated by the great number of related publications and international conferences, collected works, and reports. [②] The establishment of nature reserves in the high seas should be effected through the assembly of states parties to UNCLOS and the Convention on Biological Diversity, or through the diplomatic conferences convened by the United Nations Environment Programme (UNEP), the International Maritime Organization (IMO), the Food and Agriculture Organization (FAO) or other intergovernmental organizations in which sovereign states participate. Such reserves should be managed by specialized agencies through provisions of the related agreements. National rights and obligations in these reserves will ideally be stipulated according to the nature of the objects a given reserve is designed to protect. Deep seabed nature reserves mainly address biological resources and their diversity in the deep seabed, and they should be established and managed by the International Seabed Authority (ISA) in accordance with the provisions of articles 145 and 162 of UNCLOS. In these reserves, no state is allowed to conduct any exploration activity.

B. Analysis of International Law Basis

The establishment and management of marine protected areas beyond national jurisdiction need the corresponding basis in the international law as a background. The international community did not realize the importance of marine protected areas until the early 1980s. The international convention which first mentioned the establishment of marine protected area in its true sense is the Convention for the Conservation of Antarctic Marine Living Re-

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① 19 Tips on Domestic Marine Management from an Australian Think Tank—Focus on the Indian Ocean (Chinese), at http://www.china.com.cn/military/txt/2010-06/11/content_20237393_2.htm, 18 March, 2010.

② At http://wwz.ifremer.fr/institut_en/actualites/colloques_manifestations, 13 May, 2009.

sources, signed in 1980, which provides for the establishment of marine protected areas to protect the important habitats of related species. ① The 1990 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region and the 2001 Convention on the Conservation and Management of Fishery Resources of the South-East Atlantic Ocean also have this tendency. In the 1990s, many countries basically completed the legislation for the waters under their own jurisdiction and turned to modify and adjust the legal regime for waters beyond their national jurisdiction, including the protection of marine biodiversity in the sea areas beyond national jurisdiction. Meanwhile, with the advancement of ocean exploration technology, the interpenetration and interaction among various countries in the use of resources have become increasingly evident. In this context, the internationalization trend of legislation for resources has been gradually strengthened. ② A large number of global and regional legal instruments, including the 1982 UNCLOS and the Convention on Biological Diversity, constitute the existing international legal framework for the regional marine biodiversity beyond national jurisdiction, Under such a framework, there are significant opportunities for promoting the establishment of marine protected areas beyond national jurisdiction, and the coordination between various instruments may be strengthened to promote the establishment of such protected areas. ③

The 1982 UNCLOS is the most comprehensive international convention governing/dealing with international maritime affairs. Part Ⅻ of this Convention includes articles on marine environmental protection, yet does not specifically refer to the overall protection of the marine ecology and the role of protected areas. Nonetheless, UNCLOS does indeed reflect the needs of marine ecosystems, if only in a cursory way. For example, article 194, paragraph 5 reads:

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① Before, the international conventions for the management of the development of marine living resources, including the "International Whaling Convention", "Convention on the Conservation of Antarctic Seals" generally ignored ecological and environmental protection, even if there is awareness of such issues, they only provide temporary shut down for some of the zones. *See* R. V. Salm, translated by the Supervision Department of State Ocean Administration, *Guidebook for the Planners and Managers of Ocean and Coast Natural Protection Area*, August 1993, p. 23.

② GAN Zangchun, Developmental Trend of Current Legislation for the Sources and its Legislation Revolution in China, Ministry of Land and Resources Website, at http://www.mlr.gov.cn/ggfw/wskt/wskt_dqkt/200503/t20050307_65576.htm, 23 October 2008.

③ UNEP/CBD/WG－PA/1/2, 20 April 2005, paragraph 8(4), at http://www.cbd.int/doc/meetings/pa/pawg－01/official/pawg－01－02－zh.pdf, 20 June 2011.

The measures taken in accordance with this section shall include necessary measures for the protection and preservation of rare or fragile ecosystems as well as depleted, threatened or endangered species and other forms of marine life environment.

Article 150 provides for the "orderly, safe and rational management of the resources of the Area, including the efficient conduct of activities in the Area and, in accordance with sound principles of conservation, the avoidance of unnecessary waste". Every five years, the Conference of the ISA conducts a comprehensive and systematic review of the practical implementation of the Area's international regime established by UNCLOS. This is meant to ensure the continued application of various principles concerning protection of the marine environment. Article 145 (2) of the Convention touches on marine environmental protection in the Area:

The Authority shall adopt appropriate rules, regulations and procedures for protection and conservation of the "Area" of the natural resources and prevent damage to flora and fauna of the marine environment. (Article 145, paragraph 2).

Clearly, although this provision does not directly address the establishment of marine protected areas, it does provide the legal basis for their being established in all waters, including waters of national jurisdiction and those beyond national jurisdiction, namely the high seas and deep seabed area.

The Convention on Biological Diversity (CBD), drafted by the International Union for Conservation of Nature (IUCN) and amended several times, was adopted in Nairobi on May 22, 1992. Many of its provisions focus on the protection of biological diversity. The Convention defined the relevant concepts pertaining to the protection of bio-diversity and called for national action to protect and sustainably use biological resources. The CBD suggested concrete ways of doing so, such as installing monitoring mechanisms that oversee the conservation of biological diversity and assess the degree to which resources are being used sustainably, education, and environmental impact assessments. In addition, the Convention also makes mention of *in situ* conservation, outlines the establishment of protected area systems and makes provision for granting developing countries monetary or other subsidies in kind. Thus, like UN-

CLOS, it is also a treaty with far-reaching implications.

Ⅱ. International Management Practice

After 1990, the issue of deep seabed biodiversity has become increasingly prominent. The international community has recognized the importance of maintaining biological diversity in sea areas beyond national jurisdiction, promoting further dialogue on the interest conflict between marine resources development beyond national jurisdiction and protection of environmental resources. One tangible manifestation of this phenomenon is the advent of high sea protected areas. ① MPAs have been an important topic of discussion for various international organizations, including the United Nations (UN), Assembly of States Parties to the Convention on Biological Diversity, UNEP, IUCN and WWF, among others. The Convention on Biological Diversity also set up an *ad hoc* working group that specifically deals with MPAs. Meetings from this group have generated a wealth of global and regional legal documents. These instruments have helped reinforce emerging principles of MPA management and led the international community to set its priorities in a new, more environmentally friendly way.

A. Management Principles, Objectives and Standards

Established principles: The UN General Assembly plays a central role in handling marine biodiversity conservation and sustainable use issues in areas beyond national jurisdiction. In 2002, the UN General Assembly called for "the development of methodologies and tools, including the ecosystem approach and establishing marine protected areas in accordance with international laws and based on scientific knowledge" (Resolution 57/141). Resolution 58/240 aims to "[i]nvite the relevant global and regional institutions in accordance with its mandate to investigate urgently how to better address threats and risks faced by vulnerable and threatened marine ecosystems and biodiversity in areas beyond national jurisdiction, on a scientific basis; to investigate how in this process to make use of existing treaties and other instruments and be consistent with international law, in particular with the United Nations Convention on

① WANG Hanling, Developmental Trend of International Law of the Sea, at http://lunwen.5law.cn/news/guoji/2008-9-28-cs/155EC1KB99J9.html, 18 June 2008.

Law of the Sea, and in line with the principle of an ecosystem-based integrated management approach, including the identification of the marine ecosystem types that should be given priority attention; and discuss the possible ways and means for the protection and management of these ecosystems." These resolutions indicate a desire on the part of the UN to incorporate into existing regimes of MPAs beyond national jurisdiction principles of management that accord with international law and align with an integrated scientific, ecosystem-based approach.

Established goals and standards: In 2002 the World Summit on Sustainable Development (WSSD) reached an important agreement that aimed to establish a representative network of MPAs by 2012. In keeping with this goal, in 2006 the UN General Assembly Ad Hoc Open-ended Informal Working Group discussed whether to establish multi-functional MPAs, and fleshed out the standards and other issues related to the definition, establishment and management of MPAs. In 2004, the 7th Meeting of the State Parties for Convention on Biological Diversity (CBD) adopted the "Program on protected areas, ocean and coastal areas and forest biological diversity" (Decision Ⅶ/28). Its key objective is to: "[e]stablish and expand protected areas in large, undivided, complete, irreplaceable or high-risk areas. "In 2005 the Protected Areas Open-ended Ad Hoc Working Group—formed under the auspices of the CBD—held its first meeting, at which it was declared that "development of standards should be completed rapidly to delineate, mark and establish marine protected areas, and only if all protected areas should reach 40% of the total world's oceans area, the goal to establish a global network of marine protected areas can be achieved by 2012."[①] In May 2008, during the 9th Meeting of the State Parties to the CBD, the delegates agreed on the methodology of delineating MPAs, drafted the standards for the establishment of international marine protected areas, and made known their intention to announce the formal regulations for the establishment of MPAs by 2012.[②]

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① Refer to UNEP/CBD/COP/8/31, Decision Ⅷ/24, para. 11, at http://www.cbd.int/decision/cop/?id=11038, 20 June 2011.

② Refer to UNEP/CBD/COP/9, Decision IX/20, para. 18, at http://www.cbd.int/doc/decisions/cop-09/full/cop-09-dec-en.doc, 20 June 2011.

B. Attitudes of Various Parties in the International Community

The attitudes of the European Union and Australia vis-à-vis high seas protected areas are positive. The EU advocates the negotiation of a third implementation agreement to UNCLOS with a focus on high seas MPAs. Some NGOs, such as Greenpeace, support the EU proposal, with the focus being to stop destructive fishing and the establishment of supervisory organs. They also advocate the establishment of high seas protected areas based on the environmental pre-assessment, the precautionary principle and ecosystem approach, and actively conduct relevant research activities.

Australia strongly advocates regarding MPAs as a means of integrated management of the marine environment. In its view, the marine protected area comprises an ideal platform for showcasing concrete, sustainable biodiversity conservation methods and responsible fisheries, advances in mineral exploration and mining technologies, particularly in sensitive sea areas, as well as information on tourism and scientific research. In May 2000, during the first meeting of the informal consultation mechanism created by the UN's Ocean Affairs Division, the Australian delegation submitted an informal paper indicating that despite a limited understanding of high seas resources, more and more areas of great diversity and value were being discovered there, and these areas should be conserved and used in a sustainable way, and recommending that high seas MPAs should be established in order to protect and conserve biodiversity in vital marine habitats, including deep-sea trenches, ridges, seamounts, and hydrothermal vents.

There has been a recent change of attitude concerning UNCLOS in the United States. Originally, the U. S. perpetually postponed ratification of UNCLOS because it perceived the Convention's provisions relating to deep seabed development as unfairly beneficial to developing countries. In 2004, the U. S. Senate Foreign Relations Committee voted in favor of ratifying the Convention for the first time but failed to submit it for an official vote. Since then, the U. S. has supported UN agreements on high seas MPAs. Some analysts suspect that this shift serves the U. S. interest in controlling the Pacific high seas and navigable waters. As further support of this claim one might adduce the fact that in recent years, the U. S. attempted to set total allowable catch (TAC) limits within high sea fisheries adjacent to its exclusive economic zone. How-

ever, the U. S. specifically opposes the development of a new UNCLOS implementation agreement that addresses high seas MPAs, and further believes that in terms of deep-sea biodiversity conservation, the full and effective implementation of existing agreements and mechanisms should be more than enough to solve the most urgent problems currently being faced. According to the U. S., MPAs should be well-defined areas designed to control environmental impact, not areas banning all activities, and regional fisheries management organizations (RFMOs) and other existing mechanisms should be allowed to play an important role. Japan, Korea, Norway, Iceland and other countries have also advocated the use of existing mechanisms for managing high seas MPAs.

However, the path to reaching these ideals is not without challenges, such as technological limitations, sufficient know-how concerning management of high seas protected areas, and logistical difficulties arising from the remoteness of deep sea areas, to name a few. These obstacles would be even harder to overcome for developing countries.

C. The Practice of Marine Protected Areas beyond National Jurisdiction

To date, more than 12% of the land area in the world is classified as protected areas, but less than 1% of the ocean area is protected, and even a smaller proportion of ocean areas classified as high seas or deep sea is protected.. [①] Even so, some successful models do exist: the Ligurian Sea Cetacean Sanctuary in the Mediterranean—built by the WWF with the help of the governments of France, Monaco and Italy—is the world's foremost example of a high seas protected area. In the said Sanctuary, Italy, Monaco and France cooperate to tightly control incoming pollution and strictly regulate the fishing industry, in particular by banning trawling within the Sanctuary. [②] The first deep-sea MPA was established/founded by the WWF in the Atlantic Azores around two hydrothermal vents, and more protected areas will be established in the Northwest

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① ISBA/14/LTC/5, para. 10, at http://www.isa.org.jm/files/documents/EN/14Sess/LTC/ISBA-14LTC-5.pdf, 20 June 2011.

② LIU Huirong, HAN Yang, Special Protection Areas: A New Perspective on High Seas Biodiversity, *Journal of Hua Dong Politic and Law University*, Vol. 66, No. 5, 2009, pp. 141～145.

Atlantic seamounts, vents, cold water corals and other deep-sea habitats. ①

Perhaps the high seas MPA that best represents the ideals of the MPA concept is the one located in the southern continental shelf of the South Orkney Islands. This MPA was established by the Commission for the Conservation of Antarctic Living Resources (CCAMLR) in November of 2009 during the 28th CCAMLR General Assembly meeting in Australia. The South Orkney Islands MPA is the first one established in the high seas. Protective measures include banning all fishing activities; monitoring; the creation of a scientific committee, under the auspices of which fisheries-related research activities may be carried out. Such research activities must comply with the provisions of protective measures. In addition, all fishing vessels (including fishing vessels, support vessels for fishing vessels, fish processing vessels, fishing transport vessels and others) passing through the protected area are prohibited from dumping; schemes for monitoring traffic conditions in the protected area were introduced; and fishing vessels intending to enter the area are required to inform the CCAMLR Secretariat of the vessel's flag state, vessel size, IMO number, route and other information as necessary. The above protection measures do not apply under certain circumstances, such as when the safety of vessel personnel is at risk. ②

Ⅲ. Analysis on Significance, Problems and Trends of Marine Protected Areas beyond National Jurisdiction

Through examining the background and qualities of the MPA concept, it is easy to conclude that there are many advantages to the establishment of MPAs beyond national jurisdiction. They will help protect marine biodiversity across large areas, and thus are likely to become more commonly utilized among the international community. In spite of the numerous and obvious benefits that the MPA regime offers, in practice certain problems still remain to be solved. They have arisen in such domains as the law, natural science, ocean management and others, and these must be adequately researched and resolved to ensure the MPA regime reaches its full potential.

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① At http://www.panda.org/what_we_do/how_we_work/conservation/marine/protected_areas/increasing_protection/deep_seas/#deepsea_mpa, 23 November 2008.

② Commission for the Conservation of Antarctic Living Resources website, at http://www.ccamlr.org, 23 November 2009.

A. *Positive Significance and Existing Problems*

MPAs beyond national jurisdiction can be expected to contribute positively in at least the following three main aspects:

1. Fostering sustainable marine development and helping protect the common property of mankind, including genetic and special biodiversity. High-degree biodiversity areas are consistent with an ecosystem-based integrated marine management approach.

2. Expanding the protection of marine biodiversity to waters beyond national jurisdiction. In the past, concerns and countermeasures from the international community regarding biodiversity in waters beyond national jurisdiction responded primarily to international public opinion or calls from various international environmental protection NGOs, and the actions taken were relatively ineffective. The establishment of MPAs can break this cycle and provide real and effective protection of biodiversity in waters beyond national jurisdiction, all the while contributing to the international community's knowledge base on biodiversity protection.

3. Incorporating scientific methodology into the protection of biodiversity in the waters beyond national jurisdiction. Having adequate scientific data helps properly designate special protection areas in zones outside national jurisdiction on the basis of geographical features, targeted species (including rare or other high-value species), and also enhances cost-effectiveness.

At present there are four main problems that need addressing:

1. A relevant international legal framework has not yet been established. The current trend of adopting internationalized ecological resource legislation provides the necessary backdrop for MPAs beyond national jurisdiction. There are a large number of international legal documents that provide opportunities for the management of MPAs outside national jurisdiction, but currently international laws regulating high seas special protected areas, including the relevant provisions of UNCLOS and the CBD, belong to the comprehensive international conventions, thus only a guiding principle is provided. To date, international laws providing direct regulation for MPAs beyond national jurisdiction do not exist.

2. There is a potential conflict with the existing marine legal system that might affect the existing patterns of ocean order. This issue is most evident in the high seas and deep seabed regimes; in theory, the establishment of high seas

protected areas will set certain restrictions on freedom of navigation in the high seas, fishing and scientific research, etc. The intricacies of how existing international laws and mechanisms interrelate and how newly-established MPAs will affect them must be adequately researched and negotiated among the relevant parties.

3. The international community's attitudes are inconsistent. Some countries fear that the establishment of protected areas may preclude development and utilization of resources within the region, and some developing countries maintain a "wait and see" attitude due to technical or pecuniary limitations.

4. Regarding the establishment of MPAs, relevant researches have lagged far behind the needs of present-day practice. So far, the concrete details on the establishment of protected areas have not yet been developed.

B. Trend Analysis and Countermeasures

1. It will become inevitable to conduct ample research on the relevant legal framework. Since no international legal framework of MPAs outside national jurisdiction has yet been established, there are naturally no conflicts with the existing maritime legal system. To ensure it remains that way, it will be necessary to adequately study the coordination between the management of MPAs and relevant international treaties and discuss ways to promote a global MPA framework on the basis of UNCLOS, the CBD, the 1995 UN Fish Stocks Agreement (this probably needs a full citation) and other related agreements in order to establish a network of MPAs beyond national jurisdiction that fully comply with international law.

2. Implementation of the MPA regime will be most effective if the countries involved are able to reach consensus on the details of management; this would also serve to strengthen regional cooperation on MPAs. Although a group of developed countries led by the United States and some developing countries have different ideas on MPAs, there has been much dialogue between the two camps recently, and future theoretical research and collaboration on this issue will certainly only expand from these humble beginnings. In May 2008, during the 9th meeting of States Parties to the CBD, the delegates undertook to establish a global network of MPAs by 2012. MPAs beyond national jurisdiction require high-tech equipment and sophisticated scientific expertise, both of which are lacking in developing countries, so enhancing international cooperation is essential to the successful implementation of the high seas pro-

tected area regime.

3. Scientific research on MPAs is only at its initial stages. In 2004 the International Union for Conservation of Nature published a work entitled "How is your MPA doing? A Guidebook of Natural and Social Indicators for Evaluating Marine Protected Area Management Effectiveness". The guide provides a field-tested, methodical process for planning and evaluating management effectiveness of MPAs. ① Other future research should also be directed toward the identification of priority marine areas most suited to the establishment of MPAs; the development of standards, guidelines and principles for the definition, establishment and subsequent management of MPAs; obtaining a deeper understanding of the threats to biodiversity in MPAs and seeking to apply the precautionary principle; ② surveying and charting out seafloor topography and the various oceanographic functions of seamounts, cold-water coral reefs and other ecosystems and the ecological importance of associated species; ascertaining how best to share information through a centralized information mechanism; ③ on the basis of scientific analysis, exploring the possibility of managing deep-sea resources in an ecologically sustainable way; and defining which ecosystems or eco-regions should be considered conservation priorities. ④ Another issue that could be investigated is the potential role and practicability of so-called "multi-purpose" MPAs.

Four kinds of countermeasures warrant discussion in the present contribution: First, the establishment and management of MPAs beyond national jurisdiction must be carried out through the international community, and therefore the related international developments should be closely followed, including both legal and scientific aspects; second, on the basis of these observations, the relevant research on international and domestic laws should be strengthened, both theoretical and practical research, thereby enhancing awareness of high seas biodiversity problems from a scientific perspective; third, active participa-

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① UNEP/CBD/SBSTTA/10/2, Page6, 29 November 2004, at https://www.cbd.int/doc/meetings/sbstta/sbstta-10/official/sbstta-10-02-en.pdf, 20 June 2011.

② The 1st meeting of the Open-ended Ad Hoc Working Group for CBD protected areas, 13-17 June 2005, "Options for cooperation for the establishment of marine protected areas in marine areas beyond the limits of national jurisdiction", explained by the Executive Secretary, para. 8(5).

③ Refer to UNEP/CBD/COP/8/31, Decision Ⅷ/24, para. 44 (a), at http://www.cbd.int/decision/cop/? id=11038, 20 June 2011.

④ WANG Wenge, Study on the Legislative Issure on the Ecological Environment Building, *Environmental Protection*, Issue 8, 2005, pp. 20～23.

tion in drafting relevant legislation should be encouraged among the international community; fourth, greater international cooperation should be sought to both achieve China's legitimate interests while also fulfilling its international obligations.

To this end, at this stage it is recommended to focus future research on the following issues:

1. Harmonization with the existing high seas system. The establishment of protected areas is bound to affect the freedom of fishing in high seas, including China's offshore fishing. It should be noted that this impact has been generated by the development of international law of the sea. Substantive changes to UNCLOS, such as the 1995 Straddling and Highly Migratory Fish Stocks Agreement, have placed greater restrictions on fishing freedoms in the high seas. The past few decades have proved that unrestricted fishing can ravage living resources in the high seas; consequently, the exercise of fishery freedom in the high seas should be tempered by the international obligations to conserve biodiversity. In particular, countries must fulfill their obligations of conservation and management of high seas living resources when fishing in the high seas. MPAs set reasonable limits on excessive or harmful human activities. Moreover, MPAs beyond national jurisdiction are more likely to be established in areas of rich biodiversity. Such areas may possess unique environments with special deep-sea fauna (such as hydrothermal vents and seamounts), and their area is limited, thus they do not impinge upon the use of marine resources, through fishing or other activities, in non-protected areas.

2. The relationship between protection and development. Hydrothermal vents, seamounts and other features have a high degree of endemism. They contain biological, mineral and hydrocarbon resources that could be profitably developed. Indeed, the establishment of MPAs does not preclude reasonable development and utilization. In fact, the IUCN outlines different types of MPAs, ranging from areas with a high degree of protection to those with somewhat less stringent protection standards and greater flexibility for use. Existing national MPAs confirm the idea of coordinating protection and development, allowing MPAs to simultaneously protect the marine environment and also act as a platform to promote local economic development. The Australian Great Barrier Reef Marine Park, for instance, serves a wide range of functions from biodiversity protection and scientific research to robust fisheries and tourism/entertainment industries that generate billions of Australian dollars annually. The relevant studies have shown that the establishment of

Australia's Marine Park has not thwarted economic interests but actually increased the income of local fishermen. Achieving sustainable economic development and environmental protection in this way truly creates a win-win situation. ①

3. Comparison between similar protected areas. Many domestic or co-created MPAs have similarities with marine protected areas beyond national jurisdiction in their location, geology, targed species, or protection methods, which can provide very useful first-hand knowledge. For example, the protected area established with the help of WWF in the Portuguese Rainbow vent area is the first coastal MPA located on the continental shelf of coastal States. Another pilot deep-sea MPA is underway with the participation of WWF along Canada's Atlantic coast, which encompasses a large underwater canyon with depths of more than 2000 meters. ② Canada and Portugal are both attempting to establish their respective marine protected areas around seamounts③

(Editor: SU Baoqing;
English Editor: Joshua Owens)

① ZHAO Lingdi, ZHANG Yan, Lesson from Australian Marine Parks for Promoting the Income of Our Fisher Folk, *Fisheries Economy Research*, Issue 2, 2008, pp. 51～56.

② At http://www.panda.org./what_we_do/how_we_work/conservation/marine/our_solutions/protected_areas/increasing_protection/high_seas, 13 May 2009.

③ At http://www.dfo－mpo.gc.ca/CanOceans/INDEX.HTM, http://www.joel.ist.utl.pt/dsor/Projects/Asimov, 21 November 2009.

中国红树林保护区管理与立法研究

梅 宏* 薛志勇**

内容摘要:红树林系指红树林湿地中的林地,其仅为红树林湿地生态系统的一部分。区分红树林和红树林湿地,应考虑它们不同的特点对其加以保护。然而,在中国,红树林被认为属于"森林"范畴,有关红树林的法律法规多由林业部门制定,且远远不能满足实践的要求;在保护和管理红树林湿地方面,人们多效仿和沿用陆地森林的标准。忽视湿地生态系统的完整性,是中国红树林保护存在的又一主要问题。国内大部分红树林保护区的保护方式还停留在"看林子"水平,而非视其为一个整体的生态系统来保护。更糟的是,缺少一个特别机构协调林业部门、海洋部门以及其他监管部门在红树林保护工作中的权利义务关系,由此,难以避免各部门之间的法律冲突。针对中国红树林保护区管理与立法的问题,提出如下建议:其一,非政府监督机制应被引入红树林保护与管理;其二,完善公众参与机制,积极保护生态利益;其三,为了更有效地保护红树林,各红树林保护区应制定自己的条例。

关键词:红树林保护 红树林保护区 红树林湿地 非政府监督机制

一、前 言

近几年,中国海南东寨港国家级自然保护区内一片片的红树林开始枯萎、死亡,越来越多的红树倒在了水面上。面对这一情况,有着强烈生态意识的当地百姓痛心疾首。他们强烈呼吁:"我们能够填海造一个万绿园,怎么反过来我们不珍惜大自然给我们的红树林。""上万年、几千年形成的自然风光,不能在我们这一代人手里毁了!"[①] 在全球范围内,红树林区变得越来越小,支离破碎,其长期

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① 袁兰、刘孙谋:《痛!东寨港红树林成片枯死》,载于《南国都市报》2010年8月13日第4版。

生存面临很大的风险。[①]

红树林为自然分布于热带、亚热带海岸潮间带的木本植物群落,通常生长在港湾河口的淤泥滩涂上,形成奇特的"海滩森林"景观。红树植物可以分为两大类群,即东方类群和西方类群。中国红树林的种类属于东方类群,从植物区系来说,与马来西亚、菲律宾、印度尼西亚及澳大利亚北部的关系特别密切。20世纪50年代,中国红树林的面积超过50,000公顷,之后的30多年间,中国红树林面积锐少了61%。[②]以海南东寨港红树林自然保护区为例,海南东寨港红树林自然保护区位于海南省海口市境内、海南岛东北侧(19°51′～20°01′N,110°32′～110°55′E),绵延50公里,面积4000多公顷,是1980年中国建立的第一个红树林保护区。1986年7月9日,经国务院审定,东寨港红树林自然保护区升级为国家级自然保护区。世界上红树林有23科81种,东寨港红树林只有其中39.5%的树种。然而,近些年来受过度捕捞、滩涂水产养殖、鸭养殖和工程建设等开发活动的严重影响,东寨港红树林的生态状况日趋恶化。最近的五十年,几近半数的红树林植被破坏。

东寨港红树林保护区目前面临的问题在中国红树林保护中并非个例。在对福建九龙江河口红树林省级保护区、广东福田红树林鸟类自然保护区、广西山口红树林生态国家级自然保护区实地调研时,我们发现,中国各地红树林保护区的管理与法制普遍落后于当前的社会发展形势,这一状况反过来影响了红树林的保护与管理。

导致上述后果的一个实质原因在于,在中国,很多人未理解红树林是红树林湿地的一部分,未意识到我们应着眼于整个生态系统的完整性,把红树林湿地生态系统当成一个整体加以保护。有鉴于此,政府应当制定新的政策,考虑协调红树林保护与沿海经济发展的关系。本文分析与红树林保护有关的管理与立法问题,并提出建议。

二、中国红树林保护区管理与立法问题

(一)中国红树林保护区管理中存在的问题

20世纪60年代,在"向大海要粮食"的口号号召下,中国南方各省盲目的围海造田运动,造成对中国红树林第一次较大规模的破坏。20世纪80年代以来,

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① N. C. Duke, J. －O. Meynecke, S. Dittmann, A. M. Ellison, K. Anger, U. Berger, S. Cannicci, K. Diele, K. C. Ewel, C. D. Field, N. Koedam, S. Y. Lee, C. Marchand, I. Nordhaus, and F. Dahdouh-Guebas, A world without mangroves?, *Science*, Vol. 317, 2007, pp. 41～42.

② 王文卿、王瑁著:《中国红树林》,北京:科学出版社2007年版,第159页。

在红树林滩涂上大规模地开塘养殖，造成对中国红树林第二次大面积破坏。20世纪90年代以来，城市扩展和海岸工业交通设施的建设，使得一些城市附近的红树林又一次遭受破坏。例如，日益繁忙的水上运输给红树林带来威胁。运输船只尤其是客运快艇通过时兴起的巨大波浪对红树植物赖以生长的滩涂的冲刷作用导致红树植物根系裸露，进而倒伏死亡。每天，经过九龙江红树林保护区的客运快艇有100多趟，时速30～40公里，日复一日地冲刷红树林滩涂，导致外侧红树林大量倒伏死亡，影响了海堤的安全。[①]海南东寨港保护区也曾发生因快艇的兴波作用导致红树植物倒伏死亡的情况，改用人力船后情况得以改善。

2001年国家林业局公布的《全国红树林资源调查报告》显示，全国红树林面积约2.2万公顷。这些红树林大部分被纳入了保护区范围，得到了良好的保护，尤其是对红树林直接的、大规模的破坏已经很少发生。[②]但是，长远来看，目前中国红树林保护现状不容乐观。

由于缺乏科学理论对实践的指导，中国的红树林保护还处于摸索阶段。例如，红树林被认为属于“森林”范畴，有关红树林的法律法规多由林业部门制定，且远远不能满足实践的要求。在管理和保护红树林湿地方面，人们多效仿和沿用陆地森林的标准，更重要的是，国内对红树林的定义尚未涵盖整个红树林湿地生态系统。

与陆地森林相比，红树林多了“海”的因素。红树林这个名称来自林学。严格地界定，红树林应指红树林湿地中的有林地（即有红树植物生长的滩涂），而有林地只是红树林湿地的一部分。目前，人们多用“红树林”一词来指代红树林湿地（或生态系统），造成概念上的模糊。在中国，说到红树林保护，大多数人的概念就是保护红树植物而已。概念不清晰，导致实践中将红树林与红树林湿地的保护混为一谈。许多人，甚至有些红树林保护区的工作人员，也讲不清红树林与红树林湿地的区别。

忽视湿地生态系统的完整性，是中国红树林保护存在的又一主要问题。在忽视整个湿地生态系统完整性的前提下单纯地保护有林地，国内大部分红树林保护区的保护方式还停留在“看林子”水平。[③]上述问题的根本原因在于，红树林与红树林湿地的概念被混淆，红树林湿地的整体结构未得到清楚的认识。有的地区甚至没有把林外滩涂和浅水水域纳入保护范围。例如，深圳福田的红树林，90年代保护区内有林地面积保持稳定，但是，自从周边的大片灌丛林和数百公顷的基围鱼塘被城市建设占用，生态急剧恶化，致使1992－1997年间，陆鸟多样性指数和密度的最高值分别降低了19％和39.1％；鹭科鸟类数量减少了近

① 薛志勇：《福建九龙江口红树林生存现状分析》，载于《福建林业科技》2005年第3期，第191页。

② 国家林业局森林资源管理司：《全国红树林资源调查报告》，2002年。

③ 王文卿、王瑁著：《中国红树林》，北京：科学出版社2007年版，第145页、第165页。

70%,因为那些被破坏的地方正是鸟类觅食和活动场所。[①]类似的情况也存在于中国其他地方的红树林保护区。

红树林湿地是一个不可分割的有机整体,单纯的有林地保护是不够的。如何保护生态系统,保护范围多大,这应由红树林湿地本身的性质来决定。

再有,在红树林内缘建立标准海堤,而这些海堤多建在红树植物繁茂的海岸中潮带。海堤截断了红树林的发展后路,阻断海陆之间的物质、能量和信息交流,加速了红树后期树种的濒危和灭绝。在中国,建立红树林保护区并制定本区的管理制度,几乎没有切实可行的国家政策、法律可循。自从1975年米埔湿地被命名为自然保护区,1980年东寨港省级自然保护区建立,红树林保护在中国逐渐发展。至今,我国建立了以红树林为主要保护对象的自然保护区20个(不包括台湾淡水河口、关渡和香港米埔的红树林保护区),其中国家级6个,省级5个,县市级9个。保护区总面积约6.50万公顷,其中红树林面积约1.65万公顷,占中国现有红树林74.8%。

表1 中国红树林保护区[②]

保护区名称	所在地	面积(公顷)	红树林面积(公顷)	级别	成立时间	主管部门
海南东寨港国家级自然保护区	海南海口	3337	1733	国家级	1980(省级) 1986(国家级)	林业
福田红树林鸟类自然保护区(为广东内伶仃—福田国家级自然保护区的一部分)	广东深圳	304	82	国家级	1988	林业
广西山口红树林生态国家级自然保护区	广西合浦	8000	806.2	国家级	1990	海洋
广东湛江红树林鸟类国家级自然保护区	广东湛江	20278.8	7256.5	国家级	1997	林业
广西北仑河口国家级自然保护区	广西防城港	2680	1131.3	国家级	2000	海洋
福建漳江口国家级红树林湿地自然保护区	福建云霄	2360	83.3	省级 国家级	1997(省级) 2003(国家级)	林业
海南清澜省级自然保护区	海南文昌	2948	1223.3	省级	1988/1981 (1981设立时为县级保护区,1988升级为省级)	林业

① 王勇军、咎启杰、常弘:《深圳福田红树林湿地鹭科鸟类群落生态研究》,载于《中山大学学报(自然科学版)》1999年第2期,第85~89页。

② 王文卿、王瑁著:《中国红树林》,北京:科学出版社2007年版,第163页。

续表 1

保护区名称	所在地	面积（公顷）	红树林面积（公顷）	级别	成立时间	主管部门
福建九龙江口红树林省级自然保护区	福建龙海	600	297.3	省级	1988	林业
福建泉州湾河口湿地省级自然保护区	福建泉州	7039	17	省级	2003	林业
广东珠海淇澳－担杆岛自然保护区	广东珠海	7363	193.3	省级	2002	林业
广西钦州市茅尾海红树林自然保护	广西钦州	2784	1892.7	省级	2005	林业
海南儋州东场红树林保护区	海南儋州	696	478.4	县市级	1986	林业
海南澄迈花场湾红树林自然保护区	海南澄迈	150	150	县市级	1995	海洋
海南儋州新英红树林自然保护区	海南儋州	115	79.1	县市级	1992	林业
海南临高彩桥红树林自然保护区	海南临高	350	85.8	县市级	1986	林业
海南三亚市红树林保护区	海南三亚	923.7	59.7	县市级	1989	林业
广东电白县红树林自然保护区	广东电白	1905	150.9	县市级	1999	林业
广东茂名市水东湾红树林自然保护区	广东电白	1999	607	县市级	1999	林业
广东惠州市惠东红树林自然保护区	广东惠东	533.3	136	县市级	2000	林业
广东恩平市镇海湾红树林自然保护区	广东恩平	666.7	134.3	县市级	2005	林业
	合计	65032.5	16579.1			

由上表可知，由中国林业部门管理的红树林保护区 17 个，保护面积 54202.5 公顷，其中红树林面积 14509.6 公顷。海洋部门管理的保护区 3 个，保护面积 10830.0 公顷，其中红树林面积 2087.5 公顷。林业部门与海洋部门两种管理体制各自为政，是我国红树林管理中的一大弊端。多部门的分散管理体制严重影响了红树林湿地生态系统中的自然资源权属管理。

此外,中国红树林保护存在的保护区人员管理问题已直接影响了管理的成效。人员结构不合理影响着东寨港红树林保护的成效。在中国,红树林保护区管理人员科技力量的欠缺是阻碍红树林保护发展的因素之一。

(二)中国红树林保护立法存在的问题

《中华人民共和国海域使用管理法》第3条规定:"海域属于国家所有,国务院代表国家行使海域所有权。"

由此可以推断,每个行政区域内的海域应由该行政区域的海洋管理部门代表国家进行管理。众所周知,红树林赖以生长的滨海湿地界于陆地与海洋之间,涉及土地、水、动物、植物等多种资源要素。红树林湿地管理与保护的权利与责任在海洋部门、林业部门以及当地村委会之间如何分配,中国现行法规对此尚无清晰界定。

目前,中国对滨海湿地资源管理仍采取按资源类型进行部门分类管理的体制,导致能够参与红树林湿地资源管理的部门众多,包括林业、环保、农业、土地、海洋、渔业、水利、城建、航运、旅游等多个行政管理部门。分散的管理势必造成各自为政,难以实现保护的一致性。尽管从传统意义上讲,滨海湿地生态系统中诸项资源分类管理有利于部门分工、发挥部门优势,但由于没有专门机构协调上述部门的权力,造成诸部门管理权冲突,亦导致不同行政管理部门从本部门利益出发,"有经济效益就抢着管,没有利益和要承担责任就往外推"的现象。

在这几年的调研中,我们在不同的红树林保护区了解到,多头管理,各自为政,出现问题又互相推诿扯皮,是红树林保护区管理中的常见问题。此外,红树林林地所涉滩涂权属不明确,也是中国红树林保护面临的普遍问题。

对于红树林湿地全面而系统的保护与管理,中国现行法律法规难以提供充分、有效的支持。目前与红树林湿地保护相关的中国法律、法规有20多部,如《中华人民共和国宪法》《中华人民共和国环境保护法》《中华人民共和国森林法》《中华人民共和国土地管理法》《中华人民共和国野生动物保护法》《中华人民共和国水污染防治法》《中华人民共和国水法》《中华人民共和国水土保持法》《中华人民共和国渔业法》《中华人民共和国海洋环境保护法》等等。这些法律涉及资源的权属关系、资源的利用与保护、破坏资源行为的法律责任等方面的内容。中国政府已加入的《生物多样性公约》《关于特别是作为水禽栖息地的国际重要湿地公约》也成为法的渊源。

此外,一些沿海省份制定了本地红树林管理规定。广东省制定了《广东省森林和野生动物类型自然保护区管理实施细则》,广西省制定了《广西壮族自治区森林和野生动物类型自然保护区管理条例》、《广西壮族自治区山口红树林生态自然保护区管理办法》,海南省制定了《海南省森林保护管理条例》和《海南省红树林保护规定》。其中《海南省红树林保护规定》是我国第一个有关红树林的地

方性立法。但是,由于红树林湿地的特殊性,上述法律针对性不强、存在法律空白或冲突多。以九龙江口红树林自然保护区为例,福建省由于没有专门为保护红树林进行立法,仅在其他法规中有保护红树林的规定,如《福建省沿海防护林条例》(1995 年)、《福建省九龙江流域水污染防治与生态保护办法》(2001 年)、《福建省海洋环境保护条例》(2003 年)。九龙江口红树林省级自然保护区的管理只能在众多的法律、法规条文中寻求法律保障,而这些众多的法律、法规中仅有部分条款原则性地涉及红树林生态系,有些只能通过类推解释勉强适用,而且不同的部门对法律条文可能有不同的理解。事实上,九龙江口红树林自然保护区的管理基本上处于"有法可依,少章可循"的状态。

国家林业局起草的《中华人民共和国湿地保护条例》已于 2008 年 10 月 20 日经国家林业局局务会议通过,征求相关部门意见后,报国务院法制办。[①]不过,即使该条例获得通过,也仅仅是个部门规章,它的法律效力远远低于《森林法》等单行法。再者,湿地保护有其特有的保护对象、立法目的和基本原则,无法被其他有关资源保护法或污染防治法(如森林法、水污染防治法等)所包含。由于湿地生态系统的脆弱性,对其污染控制要较其他地方更加严格。湿地中的红树林不同于一般的树木,因此,当前采用相关单行法来保护红树林湿地的做法无法达到对红树林湿地进行综合生态系统管理的目的,也无法体现红树林湿地的生态价值。

由于滨海湿地上生长的红树林不同于一般的树种,对红树林湿地生态系统的结构、功能、红树林周边社区民情的充分了解,是立法工作的基础。红树林湿地与其他类型的湿地比较,有其特别之处,故而红树林保护的法律法规应当更加具体而全面。

三、中国红树林保护区的管理与立法建议

(一)非政府监督机制应被引入红树林保护与管理

由政府或政府部门主导的湿地保护管理缺乏必要的监督机制,导致滨海湿地管理法律、法规形同虚设。一个公司的体系,有了经理这一执行机构,还要有一个监事机构才算完整。同理,湿地的管理机构理所当然地包括监督机构,才算得上一套完整的湿地管理机构。

湿地监督机关和湿地管理机关都是政府的职能机关,有着密切的关系,甚至有共同的上级机关。在这种情况下,我们很难想象,监督机关能对管理机关真正

① 刘伟平、阮云秋、张健华、周冬良:《湿地保护调查与立法思考》,载于《湿地科学与管理》2006 年第 1 期,第 26~29 页。

起到监督的作用。监督机制,意味着管理人员的行为要接受上级主管部门和公众的监督。监督机制的缺失,作为政府职能机关下属的湿地管理机构,无力阻止以追求经济发展为首要目标的地方政府不断破坏红树林生态系统的行为。

以福建省九龙江口红树林自然保护区为例,1997年福建省龙海市政府决定投资2500万元,在紫泥镇甘文尾围垦6900亩滩涂,发展养殖业,并增加土地。该项目投资少、效益高,被列为市委市政府"为民办实事"的重要项目。然而,由于围垦区内生长着490多亩的红树林,还有大量的红树林宜林地,以中科院院士、厦门大学教授林鹏为主的专家学者坚决反对这种只图眼前经济利益、不惜毁灭海岸红树林湿地生态系统的行为,及时向上级有关单位反映。福建省环保局、林业厅在听取了林鹏等专家的意见后指出,这项围垦工程违反了国家和省有关自然保护的法规,应立即停工。1998年9月,福建省计委正式下文取消了该危及九龙江口红树林生态系统的工程。有关部门终于认识到红树林保护及湿地生态保护的重要性。试想,如果没有监督机制的存在、没有权威专家的意见,这片令龙海人引以为豪的红树林不知是怎样悲惨的结局!可见,湿地管理引入非政府机构的第三方监督机制是非常有必要的。而从另一方面考虑,湿地保护管理引入非政府的监督机制,也是实现政府民主决策的一项有益举措。

(二)完善公众参与机制,积极保护生态利益

如果没有一个有效的公众参与机制,红树林湿地保护与管理肯定不完善。在我国,由于各方面的原因,公众在环保方面的意识还不够。我国在公众参与滨海湿地保护方面,虽然有一定的意识,但是由于种种原因,参与程度还不高,涉及面比较窄。这种状况阻碍了红树林湿地保护的不断发展。

当前,随着我国"小政府、大社会"改革目标的实施,加上人们高涨的环保热情,正是推进公众参与滨海湿地保护的大好时机,应通过立法赋予公众环境知情权和参与权。提高公众对滨海湿地保护的关注程度,可以更有效地监督红树林湿地保护管理部门。

滨海湿地对于社会公众具有两方面的利益:一是生态利益,即滨海湿地生态系统对人的有用性或满足人的环境需要的属性,其为生态系统提供给所有人的客观利益;二是经济利益,即滨海湿地能提供给人们的经济上的利益。我国立法应明确规定保护人们的生态利益。这样,当滨海湿地遭受生态损害时,公众才有可能运用法律手段进行生态损害司法救济。同时,也应对那些依靠滨海湿地资源为生的人们遭受的经济损失进行补偿。

滨海湿地的开发和利用应有相关的科学制度,保护滨海湿地上所凝载的生态利益。这些内容都需有一部湿地保护法使其制度化,以便指导下位法。

目前,公众对滨海湿地的重要性认识还不够,有必要加强公众保护滨海湿地的足够认识。公众不仅是滨海湿地资源的保护者,也是滨海湿地资源的利用者。

公众参与管理的重要性已经被越来越多国家政府所认可，例如，美国、日本和德国。公众参与的广度和深度在很大程度上决定着滨海湿地保护的水平。

(三)各红树林保护区应制定自己的条例

众所周知，我国疆域辽阔、地形复杂、气候多样、资源丰富、人口众多。国家一级的环境资源立法只能针对整个国家的环境与自然资源保护管理，它们只对具有共同性、基本性、原则性的内容予以规定，而不可能对每一个地区的具体事项作出规定。[①]因此，每个湿地保护区有必要制定一套专门的法规。

首先，从立法程序上看，“一区一法”的立法模式有明显的层次性，符合《宪法》和《立法法》的相关精神；其次，对于像中国这样有较广阔地域分布和具有复杂生态特性的湿地生态系统，“一区一法”可以更灵活地、有针对性、因地制宜地管理、保护好不同地域的湿地保护区；最后，从现有法律基础上看，“一区一法”的立法模式是完全可行而且是有益的。

我们知道，我国的红树林自然分布于海南、广东、广西、福建、浙江、香港、澳门、台湾等 8 个省(自治区)。各地的地理条件、经济条件、社会条件不一，不同的红树林自然保护区管理的重点不一样，需要通过法律手段予以调节的重点就不一样。环境状况相对好一些或自然资源相对丰富一些的地方，在环境与资源政策的把握上可能会宽松一些，而环境状况差或自然资源贫乏的地方在环境与资源政策的把握上则会严格一些，所有这些实际情况都可能影响到环境与资源立法。不同地区的红树林自然保护区需要不同的有针对性的管理措施，为一个红树林自然保护区量身定制一套专门的管理机制，不失为比较明智的选择。必须强调的是，“一区一法”是由审批设立保护区的权力机关立法。

四、结　论

在今后的研究中，有必要区分红树林和红树林湿地。尤为重要的是，为保护红树林湿地，我们要改变传统的管理体制，实行综合生态系统管理。为此，应及时开展相关立法，构建统一负责红树林保护与开发的管理机构。

(责任编辑：黄海奇)

① 参见金瑞林、汪劲著：《中国环境与自然资源立法若干问题研究》，北京：北京大学出版社 1999 年版，第 18 页。

On the Management and Legislation of Mangrove Natural Reserves in China

MEI Hong* XUE Zhiyong**

Abstract: Mangroves refer to the forested land in the mangrove wetland, and are only part of the ecosystem of the mangrove wetland. As mangroves and mangrove wetlands are two distinct entities, the practices of protecting them should accordingly take into consideration their unique features. However, in China, mangroves are classified as simply "forest", thus the Mangrove Protection Laws and Regulations, which are far from sufficient, are drafted and implemented by the government's forestry department/division. As a result, mangroves are managed and protected in the same way as forest land. Ignoring the integrity of the wetland ecosystem is another obstacle to protecting mangroves in China. The typical approach to protecting mangroves in China is "nursing only the woods", rather than the ecosystem as a whole. To make matters worse, there is no special agency to coordinate the authorities under different departments, such as the forestry department, marine department, and the other departments that oversee the mangroves in some way. As a result, it is very difficult to avoid juridical conflicts among various departments. This paper provides some suggestions on the management and legislation of mangrove natural reserves in China. Firstly, non-governmental monitoring mechanisms should be incorporated into the management and protection of mangrove wetlands. Secondly, we need to improve public participation and to protect the ecological interest actively. Thirdly, each mangrove natural reserve should have its own regulations in order to protect mangroves more effectively.

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Key Words: Mangrove protection; Mangrove natural reserve; Mangrove wetland; Non-governmental monitoring mechanism

Ⅰ. Introduction

In recent years, a large number of mangroves in the Hainan Dong-zhai-gang National natural reserve have withered and died. More and more mangroves in the Reserve have been succumbing to the same fate. The situation breaks local residents' hearts. "Why don't we cherish the mangroves endowed by nature, while reclaiming green land from the sea?" The local residents who have strong ecological consciousness appealed to the news media. ① On the global scale, mangrove areas are becoming smaller or fragmented and their long-term survival is at great risk. ②

Mangrove species in China belong to the Indo-Malaysia Northeast subgroup of East group and covered >50000 hectares in the 1950s. ③ Currently there are 23 families and 81 species of mangroves in the world, and 39.5% of them can be found in Hainan. The Hainan Dong-zhai-gang Mangrove National natural reserve is located in northeastern Hainan Province (19°51′~20°01′N, 110°32′~110°55′E). Established in 1980, it was the first mangrove natural reserve in China. In 1986 it was upgraded to the status of national natural reserve, and in 1992 enrolled in the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*. However, sacrificed for economic development, Dong-zhai-gang has been negatively affected by over-fishing, mudflat aquaculture, duck breeding, and engineering construction in recent years. In the past 50 years, nearly 50% mangrove forests have been destroyed.

The Hainan Dong-zhai-gang Mangrove National Natural Reserve is not the only one that faces problems in managing its wetlands. Through the surveys and research in the Jiu-long River Estuary Mangrove Natural Reserve in Fujian, Shenzhen Futian Mangrove Reserve in Guangdong, and Shankou Man-

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① Yuan Lan and Liu Sunmou, Sorrow! Many Mangroves Wither to Die in Dong Zhai-gang, *Southern Metropolis Daily*, 13 August 2010 (04).

② N. C. Duke, J. —O. Meynecke, S. Dittmann, A. M. Ellison, K. Anger, U. Berger, S. Cannicci, K. Diele, K. C. Ewel, C. D. Field, N. Koedam, S. Y. Lee, C. Marchand, I. Nordhaus, and F. Dahdouh-Guebas, A world without mangroves?, *Science*, Vol. 317, 2007, pp. 41~42.

③ Wang Wenqing and Wang Mao, *The Mangroves of China*, Beijing: Science Press, 2007, p. 143.

groves National Natural Reserve in Guangxi, as well as other reserves in China, we have found that the management and legislation of mangrove natural reserves in China have been outstripped by recent economic development, which has adversely affected mangrove protection and conservation.

One of the main causes of these consequences is that people, especially policymakers, in China fail to understand "mangroves" compose only a part of "mangrove wetlands" and we should focus on the integrity of the whole ecosystem to adequately protect mangrove wetlands. It is necessary for the government to adopt new policies that take into account mangrove protection in addition to coastal economic development. On this account, the paper aims/intends to state clearly the problems related to the management and legislation governing mangrove protection and to propose some feasible suggestions.

Ⅱ. Problems on the Management and Legislation of Mangrove Natural Reserves in China

A. Problems in Managing Mangrove Natural Reserves in China

In the 1960s, to answer the call "get food from the sea", a large sea area was hastily reclaimed as land in southern China. That was the first time that mangroves suffered large-scale damage. Since the 1980s, a great number of newly built fishponds in mangrove areas delivered a second deadly blow. In 1990, mangroves surrounding some cities suffered damage once again due to urbanization, coastal industrial development, and transport infrastructures. ① For instance, the increasingly busy waterway transportation threatens mangroves with waves produced by ships, especially speed boats. The speed boats destroy the roots of mangroves as they zip by, and this will eventually kill the mangroves. Roughly 100 speed boats per day pass by the Jiu-long River Estuary Natural Reserve, and the speed of these boats averages 30—40 km/h. Scouring out the mudflat of mangroves day after day leads to the destruction/devastation of large expanses of mangroves, and the integrity of seawalls has also been compromised by these speed boats. Similar problems also exist in the Hainan Dong-zhai-gang Natural Reserve, but the situation has been improved in recent years by replacing motorboats with man-powered ships.

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① Wang Wenqing and Wang Mao, *The Mangroves of China*, Beijing: Science Press, 2007, pp. 145～146, p. 153.

Investigation of mangrove resources in China, published by the State Forestry Bureau in 2001, estimates that Chinese mangroves cover some 22,000 hectares, the majority of which is located in protected areas. Mangroves are now well protected, and direct, large-scale damage has been reduced in recent years. Even so, in the long run, the prospect of mangrove protection in China fraught with challenges/difficulties. ①

Due to the lack of scientific theory to guide the practice, mangrove protection in China is still at an exploratory stage. For example, mangroves are classified as "forest". Laws and regulations on mangrove protection are enacted by the Ministry of Forest and are far from adequate. More often than not, the standards of forest land are adopted and followed in managing and protecting the mangrove wetlands. More importantly, the definition of mangroves in China does not encompass the whole of the mangrove wetland ecosystem.

Compared with terrestrial forests, mangroves possess many more characteristics of marine organisms. "Mangrove" is a term used in forestry that, strictly speaking, refers to the forested land of a mangrove wetland. This forested portion constitutes only part of the greater/entire mangrove wetland. At present, many people mistakenly consider mangroves and mangrove wetlands to be one and the same. In China, it is the former that is being primarily studied and protected. The failure to have a clear concept has led to confusion in the practice of protecting mangroves and mangrove wetlands. As a result, many people, including the staff working in mangrove natural reserves, are unaware of how to distinguish between mangroves and mangrove wetlands.

The main problem in protecting mangroves in China is that the holistic integrity of the wetland ecosystem has been ignored. The method of conserving mangroves in most mangrove reserves of China remains still at the level of "nursing the woods". ② This misunderstanding is caused in part by the tendency to blur together the two concepts of mangroves and mangrove wetlands, and also by the unawareness of the basic and integral structure of mangrove wetlands. Protection in some areas even does not include inter-tidal zones and shallow waters. For instance, in the Shenzhen Futian Mangrove Reserve, the forested land remained stable under the protection regime of the 1990s, but the ecosystem has deteriorated quickly due to an onslaught of urban sprawling and

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① State Forestry Administration, *Investigation of mangrove resources in China*, 2002.

② Wang Wenqing and Wang Mao, *The Mangroves of China*, Beijing: Science Press, 2007, p. 145, p. 165.

construction of boscages and fishponds. Most of the affected sites are areas where birds used to forage and build nests. The highest diversity index and density of ostards dropped by 19% and 39.1%, respectively, and the number of the ardeidaes fell by nearly 70%, because the sites subject to destruction used to be places where birds forage and have other activities. ① Similar things have happened all over China's mangrove natural reserves.

Mangrove wetlands are an integral and indivisible ecosystem. It is not enough to merely protect the forested land alone. How would the entire ecosystem be best protected? The approach should be attuned to the nature of mangrove wetland itself.

Moreover, constructing standard seawalls along the inner edge of mangroves in middle inter-tidal zones, cutting off the flourishing mangroves, stops the sea and the land from exchanging substances, energy, and information. This practice accelerates the extinction of mangroves. Since there are few feasible laws and regulations to follow, establishing natural reserves with the capacity to make their own regulations is a solution to protect mangroves in China. Ever since 1975 when the Hong Kong Mipu Mangrove Wetland was named as a natural reserve and in 1980 when the Dong-Zhai-gang provincial mangrove natural reserve was established, the protection of mangroves in China has been improving gradually. Until now, China has set up 20 natural reserves for mangrove protection, including six national ones, five provincial ones, and nine city-level ones. The total protection area amounts to about 65,000 hectares, of which 16,500 hectares are areas of mangroves. They represent 74.8% of China's mangroves.

Table 1 Mangrove Natural Reserves in China ②

Name of protected zone	Location	Area (hm^2)	Area of man-groves (hm^2)	Level	Year of establish-ment	Authority
Hainan Dong-zhai-gang National Natural Reserve	Haikou Hainan	3337	1733	National	1980(p) 1986(n)	Forestry

① WANG Yongjun, ZAN Qijie and CHANG Hong, The Community Ecology of Herons(Ardeidae) in Futian Mangrove Wetland, Shenzhen, *Acta Scientiarum Naturalium Universitatis Sunyaseni*, Vol. 38, No. 2, 1999, pp. 85～89.

② Wang Wenqing and Wang Mao, *The Mangroves of China*, Beijing: Science Press, 2007, p. 163.

Renewal table 1

Name of protected zone	Location	Area (hm^2)	Area of man-groves (hm^2)	Level	Year of establish-ment	Authority
Shenzhen Futian Mangrove Reserve (part of Guangdong Nei-Ling-Ding & Futian Natural Reserve	Shenzhen Guangdong	304	82	National	1988	Forestry
Guangxi Shankou National Natural Reserve	Hepu Guangxi	8000	806.2	National	1990	Marine
Guangdong Zhanjiang National Natural Reserve	Zhanjiang Guangdong	20278.8	7256.5	National	1997	Forestry
Guangxi Beilun Estuary National Natural Reserve	Fangchenggang Guangxi	2680	1131.3	National	2000	Marine
Fujian Zhang River Estuary National Natural Reserve	Yunxiao Fujian	2360	83.3	Provincial National	1997(p) 2003(n)	Forestry
Hainan Qing lan Provincial Natural Reserve	Wenchang Hainan	2948	1223.3	Provincial	1988/1981	Forestry
Fujian Jiu long River Estuary Provincial Natural Reserve	Longhai Fujian	600	297.3	Provincial	1988	Forestry
Fujian Quan zhou wan Estuary Provincial Natural Reserve	Quanzhou Fujian	7039	17	Provincial	2003	Forestry
Guangdong Zhuhai Qi-ao & Dan-gan Island Natural Reserve	Zhuhai Guangdong	7363	193.3	Provincial	2002	Forestry
Guangxi Qinzhou Mao-wei-hai Mangrove Natural Reserve	Qinzhou Guangxi	2784	1892.7	Provincial	2005	Forestry
Hainan Zhanzhou Dong-chang Mangrove Natural Reserve	Zhanzhou Hainan	696	478.4	City-level	1986	Forestry
Hainan Chengmai Hua-changwan Mangrove Natural Reserve	Chengmai Hainan	150	150	City-level	1995	Forestry
Hainan Zhanzhou Xinying Mangrove Natural Reserve	Zhanzhou Hainan	115	79.1	City-level	1992	Forestry
Hainan Lingao Caihong Mangrove Natural Reserve	Lingao Hainan	350	85.8	City-level	1986	Forestry
Hainan Sanya mangrove Natural Reserve	Sanya Hainan	923.7	59.7	City-level	1989	Forestry
Guangdong Dian-bai-xian Mangrove Natural Reserve	Diaobai Guangdong	1905	150.9	City-level	1999	Forestry
Guangdong Maoming Dongwan Mangrove Natural Reserve	Maoming Guangdong	1999	607	City-level	1999	Forestry

Renewal table 2

Name of protected zone	Location	Area (hm^2)	Area of man-groves (hm^2)	Level	Year of establish-ment	Authority
Guangdong Huizhou Huidong Mangrove Natural Reserve	Huidong Guangdong	533.3	136	City-level	2000	Forestry
Guangdong Enping Zhen-hai-wan Mangrove Natural Re-serve	Enping Guangdong	666.7	134.3	City-level	2005	Forestry
	Total	65032.5	16579.1			

From the table, we can see that there are 17 mangrove natural reserves, which means that 14509.6 hm^2 of the total area 54202.5 hm^2 are under the control of the Ministry of Forestry in China. There are three zones under the government of marine sector, an area of 10830.0 hm^2 with the area of mangroves being 2087.5 hm^2. Which organ, the Ministry of Forestry or the National Bureau of Oceanography, should be in charge of governing and protecting mangrove wetlands? This dilemma has yet to be resolved, and this uncertainty has substantively hindered the protection of mangrove wetland ecosystems.

In addition, the problems on the personnel administration of Chinese mangrove protection have directly influenced the outcome of the management. The shortage of the infrastructure keeps the mangrove protection in Dong-zhai-gang far from an effective one. The lack of technical strength of the managers in most mangrove natural reserves in China is one of the bottlenecks for the development of Chinese mangrove protection.

B. Problems on the Legislation of Mangrove Protection in China

Article 3 of the *Law of the People's Republic of China on the Management of Sea Areas Use* provides that, "*The sea areas shall belong to the State, and the State Council shall exercise ownership over the sea areas on behalf of the State.*" It can be understood to mean that all sea areas should be governed by the local branch of the National Bureau of Oceanography on behalf of the State. As we know, the coastal wetland, in which the mangroves grow, is located between the land and the sea areas. As such, it contains land, sea-water, animals, plants, and other natural resources. It is unclear who wields the power and responsibility to manage and protect mangroves on the coastal wetlands. Is it the National Bureau of Oceanography, or the Ministry of Forestry, or the lo-

cal village-level committee? There is no answer to be found in current Chinese laws.

Nowadays, the management of the coastal wetland resources in China takes place in accordance with the types of resources. Different departments govern different resources, and all of them protect the mangroves on the basis of their own specialties. In practice, this managing system grants overseeing capacity over the mangrove wetlands to several departments, such as the Ministry of Forestry, National Bureau of Oceanography, Ministry of Environmental Protection, Ministry of Agriculture, Ministry of Land and Resources, Ministry of Maritime, Ministry of Fishery, Ministry of Water Resources, Ministry of Housing and Urban-Rural Development, and Ministry of Transport, among others. There is no single agency tasked with coordinating cooperation or resolving conflicts among the above-mentioned departments; as a result, the conflicts of jurisdiction among various sectors are difficult to avoid.

During our investigations over the past year, we were told that the inefficient management practice has plagued efforts to protect mangroves. The ambiguous ownership of the mangrove forestry land and mudflats leads to confusion on many fronts, ultimately leading to various difficulties concerning mangrove protection and the development of natural reserves. The problem of uncertainty over land ownership also affects mangrove natural reserves in China.

The protection that Chinese legal system provides for the comprehensive and systemic management of the mangrove wetlands is limited. There are over 20 laws and regulations on the protection of mangrove wetlands, including the *Constitution of the People's Republic of China*, *Law of the People's Republic of China on Environmental Protection Law*, *Law of the People's Republic of China on Forests'Law of the People's Republic of China on Land Administration*, *Law of the People's Republic of China on the Protection of Wildlife*, *Law of the People's Republic of China on Prevention and Control of Water Pollution*, *Law of the People's Republic of China on Water*, *Law of the People's Republic of China on Water and Soil Conservation*, *Law of the People's Republic of China on Fishery*, and *Law of the People's Republic of China on Marine Environment Protection*, among others. These laws address the authority relationships among departments managing resources, the use and protection of resources, and the legal liabilities for damage to resources and so on. The *Convention on Biological Diversity* and *Convention on Wetlands of International Importance Especially as Waterfowl Habitat* may also be considered legal sources since China has acceded to these international conven-

tions.

On the regional level, some coastal provinces have formulated their own management rules. Guangdong province has issued the *Forestry and Wildlife Type Natural Reserve Management Rules of Guangdong Province*. Guangxi province has formulated the *Forestry and Wildlife Type Natural Reserve Management Rules of Guangxi Zhuang Autonomous Region* and *Shankou Mangrove Ecosystem Natural Reserve Management Measures of Guangxi Zhuang Autonomous Region*. Hainan province in turn has enacted/adopted the *Forestry Protection Management Regulations of Hainan Province* and *Mangrove Protection Rules of Hainan Province*, the latter representing the first piece of provincial legislation on mangrove protection in China. However, the above-mentioned laws only address their local mangroves, and there are still an abundance of legal gaps and conflicts. Take the Jiu-long River Estuary Mangrove Natural Reserve for example: There is no special legislation for the protection of mangroves in Fujian province, so other laws and regulations are used instead, such as the *Coastal Protection Forests Regulations of Fujian Province* (1995), *Preventive Treatments and Ecological Protection Measures of Jiulong River of Fujian Province* (2001) and *Marine Environment Protection Rules of Fujian Province* (2003). These laws and regulations only contain a few scattered articles touching on the mangrove ecosystem. Moreover, some articles can only be used, after a fashion, by analogical interpretation, and naturally, different government departments often interpret the relevant articles differently. Laws without feasible articles to follow — that is the unfortunate situation of the management of the Jiu-long River Mangrove Natural Reserve.

The Wetland Protection Regulations of the People's Republic of China, which was drafted by the State Forestry Bureau of China, was adopted in the conference of State Forestry Bureau on Oct. 20, 2008. It was then proposed to the Legal Affairs Office of the State Council of China, seeking the opinions of relevant departments. ① However, the legal status/force of the regulations is much weaker than that of the *Law of the People's Republic of China on Forests* or other laws. What is more, the law on mangrove wetlands protection has its own special objectives, purposes, and basic principles, so it cannot be encompassed by the other resource laws or pollution prevention laws. The laws con-

① Liu Weiping, Yuan Yunqiu, Zhang Jianhua and Zhou Dongliang, The Investigation and Thinking on the Legislation of Wetland Protection, *Wetland Science and Management*, No. 1, 2006, pp. 26～32.

cerning various kinds of resources aim at the protection of said resources and do not specifically target wetland ecosystems. Such laws cannot meet the requirement of managing the mangrove ecosystem by means of Integrated Ecosystem Management, and cannot reflect the ecological value of mangrove wetlands, either.

A full understanding of the structure and function of the mangrove wetland ecosystem, as well as the sentiments of the communities that surround the mangroves, should be the basis of future legislation since the mangroves within coastal wetlands are different from ordinary trees. The water of a mangrove wetland is not ordinary water, either. The laws and regulations on mangrove protection should be much more specific and comprehensive.

Ⅲ. Suggestions on Management and Legislation of Mangrove natural reserves in China

A. Non-governmental Monitoring Mechanisms should be Utilized in the Management and Protection of Mangroves

The lack of mechanisms to monitor the management of mangrove protection strips the laws and regulations of mangrove management of any real vitality/efficacy. A company needs a board of directors/trustees to supervise the executive organization. Similarly, monitoring mechanisms should be utilized in the management of mangrove natural reserves.

Both the supervisory authority and management authority for mangrove protection are functional departments of the government, which are closely related and even share the same higher authorities. Under the circumstances, we wonder whether the supervisory authority for mangrove protection can play an important role in the monitoring or not. If there is no effective supervisory mechanism in place (which would better enable the actions of officials to be reviewed by higher authorities and civilians), the management authorities of mangrove natural reserves, as a subsidiary organ of government functions, would be powerless to stop the actions of the local government pursuing economic development at the expense of destroyed mangroves.

Let's take the Jiu-long River Estuary Mangrove Natural Protection Zone as an example. In 1997, the city government of Longhai in Fujian province invested some 25 million RMB to reclaim 6900 acres of mudflats in Zini Town in order to develop a fish breeding industry and to gain more real property. The

project, listed by the municipal government as one of important projects that "Do Practical Things that Benefit Local Residents," conferred many benefits for little investment, by reclaiming 6900 acres of mud flat to develop aquaculture and increase land area. However, 490 acres of mangroves and large expanses of suitable land for more mangroves were inside the area reclaimed. Some experts and scholars, like Professor Lin Peng (a member of the Chinese Academy of Sciences and professor at Xiamen University), unequivocally opposed the act, since it would destroy large expanses of mangrove wetlands. Lin Peng reported the situation to the appropriate authorities. Fujian Provincial Environmental Protection Bureau and Fujian Provincial Forestry Department accepted the suggestions from the experts and scholars, and consequently in September 1998, the Planning Commission of Fujian Province published the official documents stating that the project would be abandoned. The related departments eventually realized the importance of mangrove protection. Hypothetically, if there had been no such supervisory mechanism available, then there would have been no opportunity for experts and scholars to express their concerns and the mangroves would have suffered a massive loss. It is thus vital to involve non-government organizations in the oversight mechanisms of wetlands management. Furthermore, the involvement of non-governmental supervisory mechanisms in the management and protection of mangroves also enables the government to make decisions democratically.

B. Improve Public Participating Mechanism to Protect the Ecological Interests Actively

Without an effective public participating mechanism, the management of mangrove wetlands protection is by no means complete. For various reasons, the awareness of the public in China regarding mangrove protection is still insufficient. Although to an extent the public supports protecting mangroves, public participation is minimal and the scope of participation very limited. This disconnect hinders the development of the mangrove wetland protection.

In concert with the nascent policy referred to as "little government, big society" and the increasing enthusiasm of the public to protect mangrove wetlands, it is high time to enhance the mechanism for public participation. The public should be granted the right to know in environment (RKE) and to participate in the formulation of legislation that deals with mangrove protection. Besides, by drawing civilians' attention, we can supervise the departments in

charge of mangrove wetland protection more effectively.

Mangrove wetlands serve two major interests for human beings: one is an ecological interest, namely its usefulness to people as an intact ecosystem; the other is economic interest, or the financial benefit provided to people living near the mangrove wetlands. It should be made explicit in China's legislations that we protect the ecological interest for our people. Only in this way can the public turn to judicial relief to protect mangrove wetlands from suffering ecological damage. In the meantime, people whose livelihood depends on a healthy mangrove ecosystem would doubtless suffer great economic loss if the mangrove wetlands are destroyed.

A scientific regime should be developed for the exploitation and utilization of mangrove wetlands to protect the ecological interests in the coastal wetlands. A wetland protection law is required to institutionalize such contents, and to guide the lower-level regulations.

Nowadays, the public lacks full awareness of the importance of mangrove wetlands. It is imperative to make citizens fully aware of the wetlands' vital ecological and economic role. The public should act not only as consumers of mangrove wetland resources but also as stewards. The importance of a dynamic public participating mechanism has already been realized and adopted by several countries, such as America, Japan and Germany. It can be said that to a large extent, the overall effectiveness of mangrove wetland protection measures is contingent upon the level of public participation.

C. *Each Natural Reserve Should Have Its Own Regulations on Mangrove Natural Reserve*

China is a vast country with complex landforms, various climates, abundant resources, and a large population. It is therefore necessary that fundamental issues be regulated by national laws and regulations. Yet in a nation so vast and diverse, oftentimes within national laws there are no specific laws attuned to the unique features of various regions. [①] For this reason, each natural reserve should be able to enact its own regulations for the management and protection of mangroves under its jurisdiction.

Firstly, such an autonomous legislative method should have clear and dis-

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① Jin Ruilin and Wang Jin, *The Study of Certain Problems of Chinese Environment and Natural Resources Legislation*, Beijing: Peking University Press, 1999, p. 18.

tinct legislative standards, and all regional or local laws enacted should be consistent with the spirit of "the Constitution" and "Legislation Law". Secondly, this approach should have greater flexibility and must address each mangrove natural reserve individually because of the wide-reaching and complex character of the wetlands ecosystem. Thirdly, the legislation mode should be completely feasible and beneficial to mangrove protection.

As we know, there are mangroves in many provinces and areas in China, including Hainan, Guangdong, Guangxi, Fujian, Zhejiang, Hong Kong, Macao, and Taiwan. Geographic, economic, and social conditions differ significantly from one province to another. Environmental and resource management policies should be developed with each area's unique circumstances in mind. The places that have better environmental conditions or richer resources may have more hands-off policies, while places with less ideal conditions should have more stringent ones. Such realities may affect environmental and resource-management legislation. It is prudent to adopt specific management measures suitable to each mangrove natural reserve, and prepare a specific management mechanism for each mangrove natural reserve. It must be stressed that the regulations that a natural reserve promulgates for itself should be guided by the department that originally approved the establishment of the reserve.

Ⅳ. Conclusion

In future scientific and other studies, it is necessary to differentiate between mangroves and mangrove wetlands. It is vital for us to modify the traditional management system and to apply integrated ecosystem management to better protect mangrove wetlands. Legislative activities should be launched as soon as possible. An official agency in charge of both the development and conservation of mangroves should be established.

(Editor: HUANG Haiqi;
English Editor: Joshua Owens)

略论渤海特别法的执行体制

李冰强*

内容摘要:法的执行体制模式有三种:集中执行体制、分散执行体制和集中与分散相结合的执行体制。渤海特别法执行体制的设置,应基于渤海区域的自然基础、渤海区域生态环境问题的客观现实以及在吸取以往渤海环境治理经验与教训的基础上,予以合理确立。渤海特别法执行机构的设置,应以渤海综合管理委员会作为决策机构,以渤海综合管理执行委员会作为其常设执行机构,并建立流域联席会,对总体决策提供咨询意见。通过各机构的分工合作,实现对渤海区域环境、资源与生态保护的治理目标。

关键词:渤海 特别法 执行体制 设置

法的生命在于施行。只有通过法的有效实施,才能实现法的目的。渤海特别法的实施,不仅有赖于特别法本身制度设计的科学性、合理性以及民众对该法的普遍认同,而且离不开一个良好的执行体制。通过专门的、具有高度权威性的机构或部门来执法,才能对人们的行为产生影响和拘束力,从而达到法的调整目的。因此,如何对渤海特别法的执行体制进行科学、合理的设置,对渤海特别法的实施具有重要意义,是实现特别法立法目的的重要保证。

一、法的执行体制基本模式

一般来说,有关法的执行体制模式有三种:一是集中执行体制;二是分散执行体制;三是集中与分散相结合的执行体制。

集中执行体制,是指在执行权的配置上,以特定的管理事务为中心,建立一个层级单一、区域范围特定、运行独立的执行机构,由该机构对特定事务实施全面、统一管理的执行体制。其主要特点为统一事务,统一机关,一统到底的执行模式。这种执行体制优点在于能够从整体和全局对特定事务进行全面规划、统

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筹管理,提高决策与执行效率。

分散执行体制,是指在执行权的配置上,基于特定事务管理上的部门分工和专业化管理之需要,将该项事务交由不同层级、不同部门分别管理的执行体制。实践中,这种分散执行主要表现为两种情况:一是层级分散,即执行权由同一部门在不同层级所对应的管理机关来分别行使。目前,我国绝大多数立法都确立这样的一种执行体制。二是部门分散,即执行权由不同的部门分别行使,并各自形成独立的执法机关体系,如《海洋环境保护法》、《水污染防治法》等所确立的执行体制。由于中国地域辽阔,各地情况千差万别,以这样的方式来设置执行机构与配置执法权,符合中国的国情与实际,有利于调动各部门、各地区的积极性,齐抓共管,参与对某一事务的管理。但是,对于某些特定事务,如流域或区域内的水污染防治问题,由于污染问题本身的特殊复杂性,如果分由不同的部门或同一部门的不同层级管理部门去执法,往往难以达到理想的防治效果。

集中与分散相结合的执行体制,是指在执行权的配置上,既有集中执行体制的特点,又有分散执行体制的特点。以我国水资源保护与水环境管理为例,在水资源的开发、利用与保护上,实行以流域管理为特点的集中执行体制;而在水污染防治与水环境保护上,又存在分散执行体制的特征。这种管理方式,与单纯的分散执行体制相比较,因其以流域为基本单元,对水资源进行管理,因而具有其优越性。但是由于没有注意到水资源与水环境之间的内在关联性,将二者人为分割,由不同的部门来实施管理和保护,无法实现对水资源与水环境的一体化保护与管理。

二、确立渤海特别法的执行体制应考量的因素

对渤海特别法执行体制的设置,既不是基于已有执行机构强烈的扩权动机,也不是基于研究者的个人偏好,而是应基于渤海特别法的立法目的、渤海区域整体的自然基础、渤海区域生态环境问题的客观现实以及在吸取以往渤海环境治理经验与教训的基础上,予以合理确立。具体而言,渤海特别法执行体制的设置应重点考虑以下几个方面的因素:

(一)渤海特别法的立法目的

渤海以及与渤海有关的环境污染防治、资源可持续利用、生态保护等方面不是没有法,我国早已有适用于渤海的法,据统计,包括《海洋环境法》在内的涉及渤海环境资源与生态保护的立法,至少有75部。在已经具备大量立法的情况下,为什么还要对渤海这一区域进行单独立法?一个重要的原因就在于,已有的立法无法有效应对日趋严重的渤海环境污染与资源生态破坏的现实,无法有效

缓解和克服渤海环境、资源与生态危机。也就是说,现有法律法规体系在渤海实施上有极大的不适应性。这种不适应性主要表现在:现有立法主要是以部门或行政区域为基础并以此来确立渤海管理体制,这种条块分割式的管理体制,与渤海生态系统整体管理的要求相背离。拟议中的渤海特别法,就是要将渤海作为一个独特的地理区域进行单独立法,把渤海作为一个生态环境整体来对待,克服渤海环境管理上的"公地悲剧"和"搭便车"等现象,解决不同区域、不同部门在渤海环境保护目标导向上不一致等问题,以实现对整体渤海区域环境的一体化管理。

(二)渤海区域整体的自然属性

从地理环境上看,渤海作为太平洋西岸、中国大陆边缘地区唯一的半闭海,它与其他海域之间相对隔离,具有环境和生态上的相对完整性,构成一个独立的环境单位,或者说是一个独立的大生态系统。"环境的整体性,决定了环境事务的整体性。不管这种事务是保护环境,还是经营环境。……都必须由一个统一的机构来完成。"[①]但是,由于历史、经济、文化或者军事上的原因,国家往往把一定地理区域划分为不同行政辖区,而这种辖区与自然形成的环境区域又不是一一对应的。如在渤海这一特定的环境区域内,其所涉及行政辖区不仅包括辽宁、河北、天津、山东等省区、还包括辽河、海河、黄河三大流域所涉及的各个省区在内。这就导致了对渤海区域事务的管理,由这些省、市、区分别执法、分散管理。但是,"环境的自然属性决定了,人为的行政辖区在环境保护方面的意义不是十分重要的。环境问题所反映的人与自然的关系,要求我们打破行政区划的界限,以自然形成的一定流域、海域或者其它环境区域为一个环境单位,同时也就是一个保护单位。"[②]渤海这种跨流域、跨行政区域的自然特性要求在渤海特别法执行体制的选择上,必须设立一个统一的、具有高度权威性的、跨部门、跨行政区域、跨流域的执行机构,才能防止地方保护的弊端,实现对渤海区域生态环境的整体保护。

(三)渤海区域生态环境问题的客观现实

近些年来,环渤海地区一直是中国经济发展的热点区域,沿海城市化与临海工业发展迅猛,对渤海海洋环境造成巨大压力,近岸海域环境污染形势十分严峻,海洋资源开发与环境保护的矛盾日趋凸显。根据《2009 年渤海海洋环境公报》数据,2009 年渤海严重污染海域面积较上年有所减小,但近岸海域污染依然

① 徐祥民:《关于排污权转让制度的几点思考》,载于《环境保护》2002 年第 12 期,第 8 页。
② 徐祥民:《关于排污权转让制度的几点思考》,载于《环境保护》2002 年第 12 期,第 8 页。

较重。特别是陆源污染源超标排放现象不容乐观。2009 年渤海沿岸排污口超标排放现象依然严重,75%的监测排污口存在超标排放现象,超标排放污染物主要为悬浮物、五日生化需氧量、总磷和化学需氧量。在重点监测的排污口中,73%的排污口邻近海域水质不能满足海洋功能区要求,其中劣于第四类海水水质标准的占到 40%。2009 年监测的渤海主要河流入海污染物为化学需氧量、油类、氨氮、磷酸盐、重金属等,其入海总量为 94 万吨。

从这些数据可以看出,陆源污染是造成渤海环境污染的重要原因。渤海陆源污染物来源以区域为标准可以划分为两方面:一是来自环渤海沿海十三市的污染排放;二是来自环渤海地区上游城市污染排放。其中,上游城市排放的污染物主要是通过辽河、海河、黄河三大水系进入渤海。渤海海域环境污染的这种特性,决定了对渤海环境治理必须克服传统"头疼医头,脚疼医脚,就渤海治理渤海"这种局部的、被动的、事后补救的环境治理模式,不能将渤海的治理范围仅局限于渤海本身以及渤海周边的省区,而忽视事实上会对渤海环境、资源与生态产生直接影响的上游省区和城市在渤海治理中的角色与作用。正如有学者所指出的,"通过入海河口进入海域中的陆源污染物,涉及整个流域,它已构成一个十分复杂的天然流域水环境系统。……要控制污染物入海量必须对全流域的污染源进行综合管理,必须建立我国入海河流全流域水环境综合管理体制。"[①]因此,必须将渤海区域的环境与生态作为一个整体来对待,建立一个跨部门、跨行政区域、跨流域的渤海特别法执行体制,方能达到渤海生态环境治理的良好效果。

(四)传统渤海环境治理的困境及克服

如前所述,渤海区域作为一个完整的自然地理单元和独特的人文地理单元,其在资源、环境与生态上相互影响,相互制约,形成一个有机统一的整体,这种整体性要求对渤海实施跨部门和跨行政区的综合管理。但现行的渤海管理体制无法有效解决区域性、流域性问题。一是,目前渤海资源与环境管理实行以行业管理和部门管理为特点的单项管理,环保、海洋、交通、农业、国土资源、军队等涉海部门在地位上互不隶属,在职能上相互独立,在涉及渤海事务管理上往往是各自单独执法,缺乏统一协调与整体配合,难以满足渤海综合管理的需求。二是,渤海海域、近岸陆域以及流域内各地方政府依各自职能对渤海整体事务实施分散执法,海域、陆域分而治之,环境、资源与生态事务分散管理,相关基础设施重复建设,基础数据、相关标准无法有效对接,法律、法规之间缺乏协调等等。

渤海特别立法就是要打破陆海界限、流域界限、行政区划界限和各部门职能划分的界限,实行跨部门和跨行政区的综合管理,建立渤海区域高层决策和管理

① 赵章元、孔令辉:《渤海海域环境现状及保护对策》,载于《环境科学研究》2000 年第 2 期,第 27 页。

机构，统一协调管理渤海区域经济发展和环境保护活动。实行“以海定陆、河海统筹、海陆一体”的原则，以生态系统为基础，打破过去注意工程的、单一部门的、单要素的、以行政手段为主的条块管理模式。[①]正如环保部副部长潘岳所说，“不建立一个跨地区、跨部门的流域管理机制，就不可能执行有效的水污染防治措施……这是解决当前水污染危机的迫在眉睫之事。”[②] 在渤海区域事务管理中，只有建立统一的、具有足够权威的、跨部门、跨行政区域、跨流域的渤海特别法执行体制，统筹渤海区域整体事务，才能有效克服传统渤海环境治理上的弊端。

（五）渤海区域管理中权、责、利的配置与实现

渤海现行的资源与环境管理，主要是以部门管理与行政区域管理相结合的一种管理体制，这种管理方式导致部门、地区之间条块分割，在环境、资源与生态保护问题上往往各自为政，争权不断，推责有余。其根源在于对渤海事务管理上，管理机构权、责、利不统一。由于这种不统一，使得我国现行行政区划下的环境管理机关对跨不同行政辖区的环境不负责，也负不了责，因为这些机关依照法律或上级政府交给的任务，不对超出自己所在辖区之外的环境负责，也不具备对超出辖区的环境质量负责任的条件。它们的权力仅限于其管辖的行政辖区，但它们面对的环境又超出了其所在的辖区。如果让这些机关也对这些环境负责的话，那么，对这些机关来说，权力与责任是不统一的。因此，在目前这种管理体制下，任何一个单个的机构或部门都不对整体渤海区域的环境污染、资源与生态破坏负责，也没有办法负责，从而导致渤海治理的效果大打折扣。我们所要确立的渤海特别法的执行机构，不仅是对渤海资源、环境和生态事务负责的机构，而且是对整个渤海资源、环境和生态负得了责的机构。因为，该执行机构在区域事务范围上与渤海区域这一环境单位相对应，由其统一规划和管理区域内的环境、资源与生态保护事务，并对实施后果承担责任，实现了权力与责任的统一，有利于保障渤海区域治理目标的真正实现。

三、渤海特别法的执行体制的设置

基于渤海生态环境管理的现实情况，建立跨部门、跨行政区域、跨流域的执行体制已是大势所趋。但是，对于作为执行体制中最为核心的要素——执行机构如何设置，是我们不得不做的思考。笔者认为，成立一个以渤海区域范围内的

① 张海文、刘岩等著：《渤海区域环境管理立法研究》，海洋出版社 2009 年版，第 184～185 页。

② 潘岳：《有些地方政府挂牌保护污染大户》，载于《新京报》2007 年 7 月 4 日。

各行政区域为主体的渤海综合管理委员会,由该委员会行使对整体渤海区域综合事务的管理与保护职能,是确立渤海特别法执行机构一种相对合理,也较为可行的制度选择。说其合理,是因为渤海区域管理涉及国家利益和地方利益,涉及中央权力和地方权力的划分,也涉及流域内各行政区域人民的切身利益,只有把各利益相关方吸纳到决策制定过程中来,决策的内容才易于为各方所认可并得到普遍执行。说其可行,是因为该委员会的设立,既不需要在现有行政体制范围之外新设机构或部门,与国家政府体制改革的基本精神相一致;同时,又能够避免出现我国现有流域管理体制存在的问题与弊端。

渤海综合管理委员会是整个渤海区域环境与资源管理的决策中心,以实现渤海特别法立法目的为宗旨,对整体渤海区域资源、环境与生态保护等事务享有统一决策权、管理权和监督权,并对整个渤海区域管理事务的实施结果承担责任。渤海综合管理委员会的活动遵循以下原则:(1)政治民主;委员会由主席、副主席和若干委员组成,委员会成员地位完全平等,都有权发表意见,并且遵循少数服从多数的原则,实行平等协商、共同决策,委员的参与权和知情权得到充分保障。(2)行政统一;委员会由渤海各行政区域的主要领导组成,享有最高权力,负有全面责任,权力、义务、责任三者统一,委员会的决议具有强制力和权威性。(3)法律授权;委员会依渤海特别法的规定设立,其权限范围也是由特别法作出明确规,其决议和决定对整个渤海区域具有法律约束力,必须依法行政。渤海综合管理委员会的基本职能主要侧重于对渤海区域整体事务进行管理决策,包括环境、资源与生态保护政策与法规的制定、治理目标的确立、目标任务的分解、实施的手段与方式的选择、目标责任的监督检查以及环境问责制的落实等。

渤海综合管理执行委员会是渤海综合管理委员会下设日常执行机构,向委员会负责并报告工作。执行委员会的组成人员应当由渤海各行政区域环保、海洋、农业、交通、国土资源、水利等部门主要领导组成。在委员会闭会期间代表委员会行使职权,负责监督和保证委员会决议、决定的贯彻执行,并在委员会授权范围内制定政策、做出决议。

流域联席会是渤海综合管理委员会的咨询议事机构,它是整个渤海区域的各河流流域(主要包括辽河流域、海河流域、黄河流域)以流域地理范围为单元,由流域内的各利益相关方推选代表所组成。流域联席会的职能主要是:就流域范围内与整个渤海区域环境、资源与生态保护有关的问题进行沟通、交流、协商和协调。流域联席会在渤海区域治理中的作用主要体现在两个方面:一是在渤海综合管理委员会及其执行委员会做出的决议、决定时,提供决策咨询,给流域内各利益相关方充分的决策参与和利益表达的机会,使委员会的决策更符合、更能体现区域内各方的利益与要求,是各方利益平衡的结果;二是对渤海综合管理委员会及其执行委员会的决议、决定的实施进行协调,确保决议、决定的真正贯彻与落实。

四、渤海特别法执行体制与现行渤海管理体制之间的关系及协调

渤海综合管理委员会的设立,势必会给我们带来这样一些问题:渤海特别法的执行体制与现行渤海管理相关法所确立的执行体制是什么关系?二者在对渤海事务进行管理时是否存在权力冲突?如果有冲突,如何协调等问题。笔者认为,以渤海综合管理委员会为核心的渤海特别法执行机构,它的设置,既不是对现行渤海管理体制的完全颠覆和取代,也不是对现行渤海管理体制的简单固守与复制,而是对现行渤海管理体制所进行的一种合理的扬弃与适度的超越。

首先,它是对现行渤海管理体制的合理扬弃。所谓"扬",是指在渤海事务管理上,仍需要尊重现行管理体制所确立的以行业管理和职能管理为主、体现专业化与社会分工的管理优势。因为,这些行业或职能管理部门经过长期的海洋管理实践,具有丰富的海洋管理经验,它的存在,有其合理性依据。渤海综合管理委员会对渤海整体事务的管理,需要以它们的大量执法实践为基础,需要它们的充分理解和支持,以及在此基础上的合作与协调,才能顺利进行。这里所说的"协调"主要是决策过程的协调,具体表现为在污染防治、资源可持续利用、生态保护、海洋自然形态维护、各项海洋产业的开发与管理等事务领域的决策上的协调,区域内省市及其所属市县相关利益和义务分配上的协调等。在此过程中,要坚决避免以往协调中"协而不调,协调机制形同虚设"的困境,使协调机制真正成为渤海区域内各相关利益主体在渤海管理事务决策中,实现民主决策与科学决策的有效工具。所谓"弃",是指在渤海事务管理中,要坚决禁止和杜绝管理中的部门本位、地方保护,要彻底肃清现行渤海事务管理中部门、地方政府各自为政,以本部门、本地区利益为本位的狭隘与短视,确立以整体渤海环境、资源与生态利益的全面改善和提高为终极目标。这就需要加大对政策、决定的执行力,特别是通过环境问责制的严格执行与落实,方能实现。

其次,它是对现行渤海管理体制的适度超越。这种超越主要体现在两个方面:

一是,渤海综合管理委员会对渤海所实施的管理,不是现行渤海管理中的行业管理、职能管理为基本模式的单个行业管理或者单项事务管理,而是一种整体性管理和综合性管理。说其是整体性管理,是因为渤海综合管理委员会所实施的管理涉及整个渤海区域范围,即这种管理不仅包括渤海海域本身和环渤海的三省一市等行政区域,还包括辽河、海河、黄河三大流域在内的整体渤海生态区域。说其是综合性管理,是因为渤海综合管理委员会对渤海的管理事务,不仅包括渤海环境污染防治、还包括资源可持续利用和生态保护等事务。渤海综合管理委员会对渤海所实施的整体性管理和综合性管理,符合区域海洋管理的基本

理念与要求,是一种科学的区域海洋管理模式,是对传统行业管理或者单项事务管理的合理超越。

二是,渤海综合管理委员会对渤海所实施的管理,是一种权责一致,能负责,且负得了责的管理。现行渤海管理相关法所确立的执行体制,是以传统行政法上"消极行政"为基本理论依据来设定执行机构的权限范围及程序要求。也就是说,对执行机构在实施渤海相关法律,对渤海事务进行管理时,只是规定了执行机构的权力来源、权力内容、权力行使的边界与要求以及权力不正当行使所应当承担的法律责任等,但是,对执行机构在实施相关法律时,能否达到立法目的或立法者所想要实现的目标,在所不问。而且,在事实上,执行机构对职权行使能否达到或实现立法所确立的目标,也没有任何保障。其根源在于,现行渤海管理机构在对渤海事务实施管理时,权责利不统一。渤海综合管理委员会是与渤海区域这一环境单位相对应的独立的环境、资源与生态保护机构,由该委员会统筹规划和管理区域内的环境、资源与生态保护,并对实施后果承担责任,实现了权限与责任的统一。这是现行渤海管理机构所无法比拟的。

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Some Remarks on a Proposed Special Legislation for Law Enforcement in the Bohai Area

LI Bingqiang*

Abstract: There are three types of law enforcement systems: enforcement-centralized systems, enforcement-decentralized systems, and systems that combine the centralized and decentralized enforcement systems. The establishment of an enforcement system for the Special Law of the Bohai Sea should be based on the natural characteristics of the Bohai Sea, the objective reality of environmental problems, as well as experiences and lessons drawn from past environmental governance of the Bohai Sea. As the enforcement authorities of Special Law, the Integrated Management Committee of Bohai Sea is the primary decision-making body; meanwhile the Integrated Management Executive Committee carries out the duties of a permanent enforcement body; the Joint Council of the River Basin provides advice during the decision-making process. Each organ plays its own important role in protecting the environment, resources and ecology of the Bohai Sea.

Key Words: Bohai; Special law; Enforcement system; Establishment

The life of law is in enforcement. Only through effective law enforcement can the objective of a law be realized. The enforcement of the Special Law of the Bohai Sea not only relies on a scientifically-sound framework within the Special Law itself and the general recognition of the Law by the public, but also cannot do without a good enforcement system. Only law enforcement by a special and highly authoritative agency or department can influence people's thinking and prevent unwanted behaviors, thus achieving the regulatory purpose of the law. Therefore, how to scientifically and reasonably establish the enforce-

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ment system of the Special Law of the Bohai Sea is of great significance to the effective enforcement of said law and an important guarantee for realizing the legislative purpose of the Special Law.

Ⅰ. Basic Modes of Law Enforcement Systems

Generally there are three types of law enforcement systems: enforcement-centralized systems, enforcement-decentralized systems, and those that combine centralized and decentralized characteristics.

The term "enforcement-centralized system" refers to a one-tiered enforcement authority with specific area coverage and independent operations centering on specific administrative affairs. Enforcement power is centralized, and in like manner, such an authority implements a comprehensive enforcement system with centralized management. The distinguishing characteristic of this system is its centralized enforcement mode and one unitary authority covering all affairs. The advantage of this enforcement system lies in its ability to conduct overall planning and coordinated management over specific affairs in view of the overall situation, so as to improve decision-making and enforcement efficiency.

The enforcement-decentralized system refers to an enforcement system based on the needs of departmental division and specialized management of specific affairs. Enforcement powers are decentralized through the assignment of various affairs to different levels and different departments for management. In practice, decentralized enforcement occurs in two ways: firstly, decentralization of levels, that is, the enforcement power is executed respectively by corresponding management authorities of different authority levels. Currently, the far majority of legislation in China speaks to such an enforcement system. Secondly, decentralization of departments, or in other words, the enforcement power is executed by different departments, each of which forms its own independent law enforcement system. The enforcement system established by the Marine Environment Protection Law and the Water Pollution Prevention Law may be cited as one example of this process in action. As China has a vast territory and conditions vary from place to place, establishing localized law enforcement agencies and allocating law enforcement power in such a manner meets the national conditions and present reality of China. This method also allows for the concerted mobilization across numerous departments and regions, producing rather broad-based participation in the management of a certain affair. Howev-

er, for some isolated issues, such as water pollution control within a river basin or region, due to the special nature and complexity of the pollution problem itself, it is often difficult to achieve ideal prevention and control if law enforcement is executed by different departments or different levels of the same department.

The combined centralized/decentralized enforcement system incorporates allocation of enforcement power features from both the enforcement-centralized and enforcement-decentralized systems. One example of this type of system has arisen out of China's efforts to protect and manage its water resources and marine habitats. In terms of water resource development, utilization and protection, the enforcement-centralized system characterized by watershed management is implemented; in terms of water pollution prevention and control and protection of the marine environment, it is the decentralized enforcement system that prevails. This management method, compared with the pure decentralized enforcement system, has its advantage in that it manages water resources of whole river basins as basic units. However, the intrinsic interrelation between water resources and the marine environment is in effect ignored; the two are artificially separated and, consequently, managed and protected by different departments. In this way integrated protection and management of water resources and the marine environment cannot be realized.

Ⅱ. Factors to be Considered in Establishing the Execution System for the Special Law of Bohai Sea

The establishment of the enforcement system of the Special Law of the Bohai Sea should not be based on the prevailing bureaucrat-expansionist tendency of the existing enforcement authority nor on the personal preference of the researcher, but should be based on the legislative purpose of the Special Law of the Bohai Sea, the natural and geographic circumstances of the Bohai Sea region, the objective reality of the ecological and environmental problems facing the Bohai Sea region, and should draw on the accumulation of past experience and lessons of environmental governance in the Bohai Sea. Specifically, the establishment of the enforcement system of the Special Law of the Bohai Sea should focus on the following factors:

A. The Legislative Purpose of Special Law of the Bohai Sea

It is not that no law exists for environmental pollution prevention and control, sustainable utilization of resources, and ecological protection in the Bohai Sea: China has already passed laws applicable to Bohai Sea. According to statistics, there are at least 75 pieces of legislation involving environmental resources and ecological protection of the Bohai Sea, including the Marine Environment Law. Provided that much legislation is already available, why should a separate law be formulated specially for the Bohai Sea? An important reason is that the existing legislation cannot effectively cope with the increasingly urgent environmental pollution and ecological destruction within the Bohai Sea. That is to say, the existing laws and regulatory system are seriously ill-suited to addressing the crisis facing the Bohai Sea. This weakness arises from various causes: first, existing legislation is mainly based on departmental or administrative regions, and the Bohai Sea management system is no exception. Such a fragmented management system undermines the implementation of an integrated management approach over the ecological system of the Bohai Sea. The Special Law of the Bohai Sea defines the Bohai Sea as a unique geographical region, for which a separate law shall be formulated, treating Bohai Sea as an integrated ecological entity. The Special Law aims both to overcome the "Tragedy of the Commons" and "the Hitchhiking Effect" that currently beleaguer the Bohai environmental management system and to resolve inconsistencies between different regions and departments concerning environmental protection policy and objectives in the Bohai Sea. These measures will aid in realizing integrated management over the environment of the entire Bohai Sea region.

B. The Overall Natural Attributes of the Bohai Sea Area

In terms of geographical environment, as the only semi-enclosed sea on the west bank of the Pacific Ocean and the continental margin of China, the Bohai Sea is, relatively speaking, isolated from other sea areas. It features relative completeness in terms of environment and ecology, constituting an independent environmental unit, or macro-ecosystem. According to one commentator, "Environmental integrity determines the integrity of environmental affairs, whether this kind of affair is to protect the environment or to manage the environ-

ment … all must be completed by a centralized institution."[①] However, due to historical, economic, cultural or military causes, a nation tends to divide geographical regions into different administrative jurisdictions, which often do not perfectly correspond to the naturally developed environmental areas. For example, the administrative jurisdictions attached to the specific environmental area of the Bohai Sea not only include provinces such as Liaoning, Hebei, Tianjin and Shandong, but also provinces located in three distinct major river basins, the Liaohe, Haihe and Yellow River basins, which has led to the situation that law enforcement and affair management of the Bohai Sea Area are conducted by provincial, municipal and regional authorities in a decentralized manner. However, "the natural attributes of the environment determine that the significance of artificial administrative jurisdiction in terms of environmental protection is not very important. The relationship between man and nature reflected by environmental problems requires us to break the bounds of administrative division and to take certain river basins, sea areas or other environmental areas developed naturally as an environmental unit, which is at the same time a protection unit."[②] The trans-basin and trans-administrative-region attributes of the Bohai Sea require that in selecting an enforcement system for the Special Law of the Bohai Sea, we establish a centralized, highly authoritative, trans-departmental, trans-administrative and trans-basin enforcement institution. Only in this way can the hurdle of local protectionism be overcome and holistic, comprehensive protection of the Bohai Sea area's ecological environment be realized.

C. *The Objective Reality of the Ecological and Environmental Problems of the Bohai Sea Area*

In recent years, the Bohai Sea coastal area has been a hot spot for economic development in China, and the rapid industrial development of urbanization along the coastal area has exerted huge pressure on the marine environment of the Bohai Sea. The environmental pollution of the near-shore sea area is very serious and the conflict between marine resource development and environmen-

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① Xu Xiangmin, Several Thoughts on Transfer System of Pollution Discharge Right (Chinese), *Environmental Protection*, Vol. 12, 2002, p. 8.

② Xu Xiangmin, Several Thoughts on Transfer System of Pollution Discharge Right (Chinese), *Environmental Protection*, Vol. 12, 2002, p. 8.

tal protection has been increasingly salient. According to the data of the "2009 Bohai Sea Marine Environment Bulletin", the total marine area of the Bohai Sea that sustained serious pollution in 2009 was reduced from that of the previous year, but near-shore sea area pollution remained heavy. In particular, the land-based pollutant emissions from riparian industries continue to far exceed the stipulated standards. In 2009, 75% of the monitored pollutant-discharge outlets along the coast of the Bohai Sea exceeded stipulated emission standards. The offending pollutants were mainly suspended solids, BOD5, total phosphorus and CODCr. In the vicinity of pollutant-discharge outlets under intensive monitoring, the water quality of some 73% of the surrounding sea area did not meet the requirements of marine functional area, and roughly 40% was classified as below Class IV sea water quality (Class IV quality is suitable for marine port waters and marine development operation zone). The main pollutants entering the Bohai Sea from rivers as monitored in 2009 were CODCr, oils, ammonia nitrogen, phosphate salt and heavy metals etc., totaling 940 thousand tons.

From such data, we can see that land-based pollution is a major cause of environmental pollution in the Bohai Sea. The sources of terrestrial pollutants of the Bohai Sea fall into two categories according to location: firstly, pollutant discharge from 13 cities along the coast of the Bohai Sea; secondly, pollutant discharge from the upstream cities of the Bohai Sea coastal area. The latter, more inland sources discharge pollutants into the Bohai Sea via three major water systems: the Liaohe, Haihe and Yellow Rivers. This being the case, it is obvious that to mitigate pollution in the Bohai Sea Area one must overcome the local, passive, reactionary traditional environmental governance model that tends to treat only symptoms but never gets to the root of the problem. Efforts to improve environmental protection in the Bohai Sea should not be limited in scope to the Bohai Sea only, or to the Bohai Sea itself as well as its surrounding provinces, yet pay no heed to upstream provinces and cities that may actually exert direct impact on the environment, resources and ecology of the Bohai Sea. Just as a scholar has observed: "The land-based pollutants entering a sea area from river mouths involve the whole river basin, which has resulted in a very complicated natural basin water environment system…. To control the amount of pollutants entering a sea, we must conduct comprehensive management over basin-wide pollutant sources and must establish an integrated management system for basin-wide water environment of rivers flowing into

seas in China."[①] Therefore, we must take the environment and ecology of the Bohai Sea Area as a whole, and establish a trans-departmental, trans-administrative-region, and trans-river basin enforcement system for the Bohai Special Law, in order to achieve satisfactory results in the ecological and environmental management of the Bohai Sea.

D. The Predicament of Traditional Bohai Environmental Governance and How to Overcome It

As mentioned above, as a complete natural geographical unit and unique cultural geographical unit, the Bohai Sea Area has developed an organic and unified wholeness from the interaction and balance between factors of resources, environment and ecology. Such integrity requires trans-departmental and trans-administrative-area integrated management over the Bohai Sea. The current Bohai management system cannot effectively address the regional and river basin problems. Firstly, in the current regime of resource and environmental management in the Bohai Sea, a complex array of departments exercise authority: the separate organs for industry management, sea-related departments such as environmental protection, marine management, transportation, those that deal with agriculture and land resources, and even military branches are all unaffiliated with each other and act independently in practice. Moreover, they tend to independently interpret and enforce laws that bear on Bohai Sea management, lacking centralized coordination and overall cooperation, making it all but impossible to implement a comprehensive management scheme in the Bohai Sea. Secondly, the government organizations of various localities within the Bohai Sea area, coastal land areas and river basins implement decentralized law enforcement over the overall affairs of the Bohai Sea according to their respective functions. They often govern sea area and land area separately and also manage environmental, resource and ecological affairs separately. As a result, some useful infrastructures are repeatedly constructed, basic data and relevant standards cannot be effectively connected, and coordination is lacking among regulations and laws.

The special legislation for the Bohai Sea is designed to break the boundary

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① Zhao Zhangyuan and Kong Linghui, Environmental Status Quo and Protection Countermeasures in Bohai Marine Areas (Chinese), *Research of Environmental Science*, Vol. 2, 2000, p. 27.

between land and sea, the boundaries between river basins, and the boundaries between administrative areas and the division of functions among different departments. In this way trans-departmental and trans-administrative-area comprehensive management may be realized and a high-level organ capable of decision-making and administrative organization established over the Bohai area to manage economic development and environmental protection activities in a centralized and coordinated manner. This would be most readily achieved through following the principle of "determining the land according to the sea, coordinated development of rivers and seas and integrating sea and land" according to a proposal to the NPC, and, proceeding based on Bohai's ecological characteristics, breaking away from the past project-oriented fragmented management model under which a single department deals with a single issue, mainly relying on administrative measures. ① Just as Pan Yue, vice minister of Environmental Protection, has pointed out, "Without a trans-regional and trans-departmental basin management mechanism, it will be impossible for us to enforce effective water pollution prevention and treatment measures … This is an imperative matter for solving the current water pollution crisis." ② In managing the Bohai Sea area, it is necessary to establish a centralized, authoritative, trans-departmental, trans-administrative-area and trans-basin system for the enforcement of the Bohai Special Law. Only when this has been achieved can we effectively overcome the disadvantages inherent in traditional environmental governance in the Bohai Sea.

E. Allocation and Realization of Power, Responsibilities and Interests in Management of the Bohai Area

The current system of resource and environment management in the Bohai Sea essentially combines features of departmental management and administrative area management, leading to the segmentation of departments and areas. This causes a lack of coordination and can also give rise to uncertainty over where authority lies, or even result in the shirking of responsibilities concerning issues of environment, resources and ecological protection. The problem

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① Zhang Haiwen and Liu Yan et al, *Research on Legislation of Environmental Management of Bohai Areas*, Ocean Press, 2009, p. 184～185.

② Pan Yue, Some Local Governments Protect Publicly Polluters, *Xinjing News*, July 4, 2007.

lies in the disunity of power, responsibilities and interests of administrative authorities in the management of Bohai Sea affairs. As a result of such disunity, environmental management authorities under the current administrative area division in China are not responsible for the environment of different administrative jurisdictions and are not authorized to take action in areas outside their own jurisdiction. These authorities' roles and responsibilities are defined by laws or the upper echelons of the central government, and their functions do not include managing the environment beyond their jurisdiction, therefore these authorities do not have the qualifications to assume responsibility for environmental quality beyond their jurisdiction. Their power is limited to the administrative areas under their jurisdiction, yet the environment surpasses man-made jurisdictional delimitations. If such authorities are also required to be responsible for such environment (beyond their jurisdiction), power and responsibilities are not concerted for these authorities. Therefore, under the current management system, no one authority or department takes responsible for the environmental pollution or destruction of resources and ecology in the Bohai Sea area; neither could they legitimately assume responsibility if they tried, due to the nature of current laws and regulations. As a result, the effectiveness of Bohai Sea governance is substantially marginalized. It would be best to establish enforcement authorities for the Bohai Special Law that are not only responsible for the resources, environmental and ecological affairs of the coastal Bohai Sea, but also for the overall resource, environment and ecology of the Greater Bohai Sea area. The enforcement authorities' jurisdiction should correspond to the whole environmental unit of the Bohai Sea area. In this way they can plan and manage environmental, resource and ecological protection affairs within the area and at the same time bear responsibility for the results of their policies. Such a unity of power and responsibility would be integral to the realization of effective governance of the Bohai Sea area.

Ⅲ. Setup of the Enforcement System of the Bohai Special Law

To achieve a comprehensive system of governance in the Bohai region, there is no real choice but to establish a trans-departmental, trans-administrative-area. Furthermore, this area should be subject to a trans-basin enforcement system based on the realities of the ecological and environmental situation in and around the Bohai Sea. However, how to set up the enforcement au-

thorities, the most essential element in the enforcement system, is what we must reflect on. Setting up an Integrated Management Executive Committee that oversees various administrative areas within the Bohai area and exercises management and environmental protection powers over the macro-affairs of the greater Bohai Sea area would be a reasonable and feasible choice for establishing an enforcement authority in accordance with the Bohai Special Law. It is reasonable, because the management of the Bohai Sea area involves both national and local interests, touches on the division of central and local authority, and also impacts the immediate interests of the people inhabiting the various administrative areas within the basins. Only when the various stakeholders are incorporated into the decision-making process can relevant policy decisions be easily accepted and generally enforced by the parties concerned. It is feasible, because with the establishment of a central committee, it would not be necessary to set up yet another authority or department beyond the current administrative system, consistent with the spirit of the reform of the national government system (aiming at downsizing departments and personnel); at the same time, problems and disadvantages in the current fragmented system of basin management in China can be better avoided.

The Integrated Management Committee of Bohai Sea, the decision-making center for the environmental and resource management of the entire Bohai Sea area, would embody the legislative purpose of the Bohai Special Law. It would enjoy centralized decision-making, management and supervisory powers over the resources, environment and ecological protection of the entire Bohai Sea area and be responsible for the effectiveness of its policies pertaining to the management affairs of the entire Bohai Sea. The activities of the Integrated Management Committee of Bohai Sea would conform with the following principles:

(1) Political democracy: the committee consists of a president, vice president and several committee members. The members of the committee enjoy equal status; all have the right to share their opinions. In making decisions the majority rule is followed. Other features of this committee include consultation on the basis of equality and making joint decisions. The members' rights to participate and right to know are fully safeguarded.

(2) Unified administration: the committee consists of major leaders of various administrative areas of the Bohai Sea. Imbued with both the highest authority and full accountability, the resolutions of the committee are both influential and authoritative.

(3) Legal authorization: the committee was set up according to the provi-

sions of the Bohai Special Law, and the extent of its authority is specified by the Special Law. Its resolutions and decisions are legally binding over the entire Bohai Area and must be executed according to law. The basic functions of the Integrated Management Executive Committee pertain to management and decision-making over the affairs of the Bohai Sea area, including the preparation of policies, laws and regulations on the environment, resources and ecological protection; prioritization of governance objectives; breakdown of target-tasks, selection of implementation measures and methods; supervision and check of responsibility fulfillment of target-tasks; and fulfillment of the environment accountability system.

The Integrated Management Executive Committee would see to the day-to-day operations of the Integrated Management Committee (IMC) of the Bohai Sea. It would be accountable and report its progress to the IMC. The Executive Committee would consist of the main leaders of various departments such as environmental protection, marine affairs, agriculture, transportation, national land resource and water conservancy located in various administrative areas of the Bohai Sea. The Executive Committee would exercise authority on behalf of the IMC while it is out of session. It would be responsible for supervising and guaranteeing the implementation of the resolutions and decisions of the Committee, and regularly prepare its own policies and independently make decisions within the scope of authorization conferred by the Committee.

The Joint Council of River Basins would be the consultative and deliberative organ of the Integrated Management Committee of the Bohai Sea, consisting of representatives elected by various stakeholders within the river basins of the whole Bohai Sea area (including the Liaohe, Haihe and Yellow River basins), with the geographical range of each river basin as the basic unit. The main functions of the Joint Council of River Basin would be communication, exchange, consultation and coordination of the issues relevant to the environment, resources and ecological protection of the entire Bohai Sea area within the limits of the Bohai river basins. The primary functions of the Joint Council of River Basin in the governance of the Bohai Sea area would be manifested in two ways: firstly, the Joint Council would provide decision-making consultation for resolutions and decisions made by the Integrated Management Committee of the Bohai Sea and its Executive Committee, and give various stakeholders in the river basin ample opportunity to participate in decision making and express their interests. This way the decisions of the committees would be more consistent with and better reflect the interests and requirements of various parties

within the Bohai area and also manage to strike a balance between potentially conflicting interests. Secondly, the Council would coordinate the implementation of the resolutions and decisions of the IMC and its Executive Committee, ensuring their satisfactory implementation.

Ⅳ. The Relationship Between and Coordination of the Bohai Special Law Enforcement System and the Current Bohai Management System

The establishment of the Integrated Management Committee of the Bohai Sea would inevitably bring the following problems: for starters, how will the relationship be between the enforcement system of the Bohai Special Law and the enforcement systems established by the relevant current laws on the management of the Bohai Sea? Will there be a power conflict between the two in managing affairs of the Bohai Sea? If conflicts do arise, how should they be resolved? The setup of enforcement authorities in accordance with the Bohai Special Law will center on the IMC of the Bohai Sea. This does not constitute a replacement of the current Bohai management system, nor will it be a simple adhesion to and replication of the current Bohai management system, but rather a kind of reasonable step forward that appropriately transcends and discards extraneous features of the current Bohai management system.

Taking such a "step forward" would still allow for retaining certain advantages of the current Bohai management system. Some of its strong points would include a solid capacity for industrial and functional management and a high degree of specialization. Industry and functional management departments, having overseen long-term marine management practices, have accumulated a rich repository of experience in marine management and they serve a valuable function. The comprehensive management of Bohai Sea affairs by the IMC will proceed smoothly only if it takes full account of these departments' significant law enforcement expertise and receives their full support, cooperation and coordination. "Coordination" means inter-departmental coordination in the course of decision making. Such coordination would be most crucial in areas such as pollution prevention and treatment; sustainable utilization of resources; ecological protection; maintenance of the natural marine topography; development and management of various marine industries; in addition to the weighing of relevant interests and allocation of obligations to provincial, municipal and county authorities, among others. In this period of transition to IMC-

centered governance, one must resolutely avoid the predicament that has been the hallmark of past coordination efforts, namely being "coordinated" but not harmonized, or of having a coordination mechanism that, for all practical purposes, exists in name only. The coordination mechanism should serve as an effective tool for the various stakeholders in the Bohai Sea area, helping to realize democratic and scientific decision making for better Bohai governance. The term "discard" refers to the resolute eradication of departmentalism and local protectionism in Bohai management. It is necessary to thoroughly root out the parochialism and nearsightedness of uncoordinated departments and local governments driven almost exclusively by the interests of their own constituency. This would pave the way for installing a comprehensive framework of governance throughout the whole Bohai region that holistically manages the environment, resources and ecological interests. This can only be realized through reinforcement of a centralized executive force for policies and decisions that is kept in check by the strict application of the environmental accountability system, an accountability mechanism for environmentally related work, statements and actions of governments, government departments in charge of environment and government officials at various levels.

As mentioned above, the new IMC-centered approach would appropriately transcend the current Bohai Sea management system. This would be most apparent in the following two aspects:

Firstly, an IMC-centered approach to management over the Bohai Sea would not take narrow issues such as the management of a single industry as a primary concern, but would act as a vehicle for macroscopic, integrated management. Macroscopic management executed by the Integrated Management Committee of the Bohai Sea would involve the entire extent of the Bohai Sea area. This area not only includes the Bohai Sea marine area and its surrounding coastal administrative areas, i. e. , three provinces and one city, but also encompasses the greater Bohai ecological area partitioned into the three major river basins that empty into the Bohai: the Liaohe, Haihe and Yellow River basins. It is called integrated management because the Bohai affairs under the scope of IMC authority would not only include environmental pollution prevention and rehabilitation of the Bohai Sea, but also issues such as sustainable utilization of resources and ecological protection. The IMC's macroscopic, integrated management over the Bohai Sea should be consistent with the basic concepts and requirements of regional marine management. This kind of scientific regional marine management model will reasonably transcend traditional industry man-

agement and outdated single affair management techniques.

Secondly, the management over the Bohai Sea by the IMC would strike a balance between power and responsibility, authority and accountability. The basic theoretical basis behind the enforcement system established by the current laws relevant to Bohai Sea management is perhaps best described as a form of "passive administration". That is to say, the laws prescribing Bohai Sea governance provide enforcement authorities with only bare bones—only the source and nature of the authority granted to the various departments, boundaries and requirements for the execution of authority as well as the legal liabilities for improper execution of authority are listed in the current set of laws and regulations. In effect, this fosters little to no consideration of whether these laws' legislative purpose can be realized through the present enforcement system. In fact, to all appearances the enforcement authorities have practically no guarantee that the legislative purpose of these laws can even come to fruition in actual practice. The root cause lies in the fact that the current Bohai management authorities have no consistent, comprehensive power, responsibilities and interests in the management of Bohai Sea affairs. The Integrated Management Committee of Bohai Sea, an independent authority for protecting the environment, resources and ecology of the environmental unit known as the Bohai Sea area, would cohesively/synergistically plan and manage the environment, resource and ecological protection of the area, and would also be responsible for the effectiveness of its policies. Such a cycle would create a stable unity of authority and responsibility. These functions would be a notable improvement over the current system of Bohai management.

(Translator: CHEN Xiaoshuang;
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Oil Pollution by Ships and the Adequacy of International Conventions on Compensation

Francis Lansakara *

Abstract: Compensation for ship base pollution is covered under Civil Liability Conventions and Fund Conventions. There are also other civil liability instruments such as EU's Environmental Liability Directive (ELD) and Oil Pollution Act of USA 1990 (OPA). Most maritime nations are signatory to international conventions developed since 1969 with amendments and protocols.

Under the 1992 Civil Liability Convention (1992 CLC) compensation is limited to costs incurred for reasonable measures to reinstate the damaged environment, excluding loss of profits. 1992 CLC also gives the owner the right to limit in most cases. Economic damages are being considered under Fund Convention and the Fund was set up to facilitate those unable to get any compensation or adequate compensation from the 1992 CLC. The 1992 Fund and 2003 Supplementary Fund contributed by oil receivers of the contracting states are also limited to maximum of 750 million Special Drawing Rights including claims under 1992 CLC. Other than limitation in funds there are certain legal principles considered when admitting whether a claim is "reasonable" and "not too remote"; therefore economic losses not directly connected to an oil spill area are not admissible. However European Environmental Directive (ELD) and OPA explain the compensation in a much broader manner. Right to limit liability which is difficult to break, available defense options and, limited definition given in identifying the owner may also affect the admissibility of the claim under the conventions. Review of several cases in the past shows funds available under the Conventions and how claims were admitted under the International Oil Pollution Convention (IOPC) guidelines.

This paper discusses related conventions' development, limits imposed, available legal principles on compensation and lessons learnt from past cases and

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based on their outcome it assesses the adequacy of these conventions on compensation.

Key Words: Oil Pollution by Ships; Compensation; International Conventions

Ⅰ. Introduction

Oil pollution damages caused by ships are compensated under various civil liability conventions. The acceptable method of compensation is to restore the damaged environment and the affected to its previous position or baseline condition; however it is not always being possible under the existing civil liability compensation instruments available to ship base pollution because, there are limitation as to what extent restoration of the damaged environment and compensation for losses are admitted.

The discussion centers on adequacy of the international civil liability instruments which are measured by taking into account extent of cover, comparison with existing legal principles recognized by civilized nations as well as regional and state acts or directives.

Ⅱ. Legal Instruments and Their Development

There are international, regional and national laws covering oil pollution compensation. Due to international nature of shipping, save for few, many rely on international conventions when claims arise on ship base pollution.

1992 Civil Liability Convention (1992 CLC) and 1992 Fund Convention (1992 Fund) in force since 1996 have been ratified by more than 90% of maritime nations. ① They have since developed further by ratification of new amendments and protocols. Under the 1992 CLC ship owners are required to have sufficient financial security and the amount of security required varies with the gross tonnage of the ship; for example a ship of more than 140000 gross tonnage required security limit is about 90 million Special Drawing

① CLC 1992 Protocol number of contracting states 123, world shipping tonnage 96.7% covered. 1992 Fund number of contracting states 105, world shipping tonnage 94.5% covered. 2001 Civil Liabilities For Bunker Oil Pollution contracting states 58, world shipping tonnage 88.6% covered.

Rights (SDR)[①]. Those unable to obtain adequate or any compensation from the 1992 CLC may claim against the 1992 Fund. The contributors to the fund are all persons who receive oil by sea in contracting states and the fund is obliged to pay compensation to those claimants from the contracting states.[②] Subject to conditions laid down by International Oil Pollution Compensation (IOPC) Funds[③] from 203 million to maximum of 300.74million SDR available for claims including claims under 1992 CLC. Those eligible claimants under 2003 Supplementary Fund have a limit up to 750 million SDR.[④]

International conventions on civil liability developed since 1969 include new amendments and protocols.[⑤] Developments from 1969 to 1992 CLC include among other things clarification of nature of damage such as "impairment of environment exclude loss of profits",[⑥] expansion of the area of compensation from territorial sea to exclusive economic zone,[⑦] application of the convention also to unloaded tankers with cargo residue on board,[⑧] allowing the claims possible on preventive measures taken when there is an imminent threat but without occurrence of a real pollution,[⑨] increasing the limits of liability, departure from "actual fault" or "privity"[⑩] rule and inclusion of "personnel act

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① The Convention applies to all seagoing ships carrying oil as cargo, but only ships carrying more than 2,000 tons of oil are required to maintain insurance in respect of oil pollution damage. Compensation limits under 1992 Protocol amended in 2000 to higher limits. Exchange rate of Special Drawing Rights (SDR) decided by International Monetary Fund. 1 SDR = 15.1 Gold Francs; 1SDR= 1.27 USD.

② 1992 Fund Convention Article 4 (4) 203 million SDR or 300.74 Million SDR; 2003 Protocol Supplementary Fund 750 million SDR.

③ Conditions for compensation base on IOPC guidelines see case review.

④ Eligible only those from contracting states of 2003 Supplementary Fund, limited to EU and Japan.

⑤ 1969 Civil Liability Convention 1971 Fund Convention compensation limited about 60 million SDR. They were replaced by 1992 CLC and 1992 Fund & 2003 Supplementary Fund.

⑥ 1992 CLC Article 1 paragraph 6(a) changes from 1969 CLC definition.

⑦ 1992 CLC Article 2 include exclusive economic zone up to 200nm, changes from 1969 definition limited to territorial waters only up to 12 nm.

⑧ 1992 CLC Article 1 (1) an improved version to 1969 CLC.

⑨ 1992 CLC Article ll (b) an improved version to 1969 CLC.

⑩ 1969 CLS Article 5 (2) If the incident occurred as a result of the actual fault or privity of the owner, he shall not be entitled to avail himself of the limitation provided.

of omission". ①

There are other civil liability instruments such as Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 (ELD), implemented since 30th April 2007② and applied to all the 27 EU nations and, Oil Pollution Act of USA 1990 (OPA 1990) and Trust Fund applied under the US jurisdiction .

Under the ELD recovery③ or reinstation of the damaged environment to baseline condition is required and it also encourages the development of financial security mechanism. ④ Since it is relatively new and these developments are still in progress, ship base pollution covered under international conventions is expressly excluded from ELD. ⑤

Oil Pollution Act 1990 of USA⑥(OPA 1990), which came into force after the major oil spill in Alaska,⑦ applies to United States jurisdiction and allows large tankers carrying oil to limit their liabilities to $1900 per gross ton or 16 million whichever greater⑧. It also contains a Trust Fund⑨ of one billion US dollars paid by petroleum taxes to compensate for those unable to obtain adequate or any compensation from the OPA 1990.

International conventions maximum compensation is limited to 750 million SDR, which only apply to those from contracting states signatory to supplementary fund, while others will be limited to about 300 million SDR. Limitation is difficult to break because owner's personnel act of omission cases is very rare and most of the shipping accidents are caused by the servant of the owners unless there is a failure in the senior management which is also a contributing factor. Large oil pollution claims which exceed SDR 750 million will not receive full compensation.

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① 1969 Civil Liability Convention 1971 Fund Convention compensation limited about 60 million SDR. They were replaced by 1992 CLC and 1992 Fund ; 2003 Supplementary Fund limits to 750 million SDR compare to 1971 Fund 60 million SDR; 1992 Article 5 (2) "personnel act of omission" liability limits difficult to break compare to 1969 CLC. Article 5 paragraph 2 "privity of the owner" easier to break the limits.

② Directive 2004/35/CE Article 19—Implementation; Article 20—Entry into force; In force in UK 1 March 2009.

③ Directive 2004/35/CE Article 2 (14) (15)—Definitions.

④ Article 14—Financial Security.

⑤ Directive 2004/35/CE Article 4 paragraph 2; Annex IV.

⑥ Section 2702 Oil Pollution Act 1990 USA.

⑦ 1989 Exxon Valdez.

⑧ 33 USC 2704.

⑨ 26 USC 9509.

Ⅲ. Interpretation of Pollution Damages

How these provisions are interpreted legally plays an important role in terms of claims satisfaction. Under the common law principles reasonable measures for reinstatement has limited effect excluding those too remote.[①] Under the 1992 CLC environmental damage compensation is limited to costs incurred for reasonable measures to reinstate the contaminated environment, excluding economic losses,.[②] Those unable to obtain adequate or any compensation under civil liability compensation regimes are covered by Fund Convention[③] subject to given provisions and limits[④]. The type or amount of compensation will be based on legal principles of "reasonableness" and "not too remote", which will cover loss or damages to fishing industry, tourism and property damage such as mariculture[⑤] and oyster farming; shellfish gathering; fishing boats; fish and shellfish processors.

Although the European Environmental Directive (ELD) has adopted the principle of restoration, liabilities that arise from International Civil Liability and Fund Conventions are excluded[⑥] as long as the member states are party to those conventions. Although ELD has broadly explained the definition of "restoration of the damaged environment" the member states will not be able to enjoy benefit in case of a ship base pollution.

ELD elaborates damages inclusive of protective species, natural habitat, water damage and land damage recoverable to the extent that it satisfies the base line condition; and US Oil Pollution Act 1990 also has explained the com-

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① Since 1961 the general rule is that the remoteness of the damage is that the defendant would only be liable if he could reasonably have foreseen the kind of damage suffered by the claimant—case Wagon Mount No. 1 [1961] AC. 388 (PC).

② 1992 Civil Liability Convention Article 1 paragraph 6 (a) Loss of damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, whichever such escape or discharge may occur, provided that compensation of impairment of the environment other than loss of profit from such impairment shall be limited to cost of reasonable measures of reinstatement actually undertaken or to be undertaken.

③ 1992 Fund Convention & 2003 Supplementary Fund.

④ 1992 Fund Convention. Article 4 paragraph 1 (a) because no liability arises under the 1992 Civil Liability Convention; (b) because owner liable for the damage under the 1992 civil liability convention is financially incapable of meeting his financial obligations in full.

⑤ Mariculture is a specialized branch of aquaculture involving the cultivation of marine organisms for food and other products in the open ocean.

⑥ Directive 2004/35/CE Article 4 paragraph 2; Annex IV.

pensation in a much broader manner, including removal cost in accordance with national emergency plan and the damages consisting of natural resources, property, revenue losses to government or authority, profits and earning capacity, which are some of the key areas a claimant can recover. ①

Interpretation of the pollution damages under the 1992 CLC and Fund are limited by their provisions to restore the damaged environment; fishing and tourism industry directly affected are compensated subject to limitation of the fund, without taking into account damages to marine ecosystem.

Ⅳ. Other Issues Under 1992 CLC Affecting Oil Pollution Claims

Under the 1992 CLC the ship owner has the right to limit liability. If a party wishes to break the limit the burden of proof lies with him to prove owners personnel act② or omission with intent or that the owner had knowledge that this accident would result. Most shipping cases are due to fault of the servant of the owner; however it is also known the failure in the senior management may be a contributing factor. Safety management system such as ISM could be proof of management failure that can be ascribed to owners. The person allowed to limit under these conventions is the registered owner③ of the ship only, demise charter or manager excluded therefore. Those excluded parties if become liable will use lower limits available under tonnage limitation (1976 LLMC④). The owner also has the exception if he could prove that the accident was solely caused intentionally by a third party,⑤ which is likely to

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① 33 USC 2702.

② 1992 CLC Article 5 paragraph 2 The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. UK ratified the convention under MSA 1995 S157 (3).

③ 1992 article 1 paragraph (2) (3) "Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions. The "owner" means the person or persons registered as the owner of the ship or in the absence of registration, the person or persons owning the ship. However in the case of a ship owned by a State and operated by a company which in that state registered as ships operator, "owner" shall mean such company.

④ Article 3(b) 1976 LLMC Claims excepted－Oil Pollution damage within the meaning of the International Conventions on Civil Liability for Oil Pollution .

⑤ In the Prestige case ABS relied on this option court decision still pending (IOPC annual report 2008 page 102 of 213).

improve his defense since third parties are not specified[①] under the 1992 CLC.

OPA 1990 uses the term responsible person[②] instead of the owner, which gives the claimant a wider choice and right to a higher claim limit. The third party option is much limited[③] and gross negligence[④] of lower category will lose the right to limit, all of which are in favor of the claimant.

All the known cases of major oil pollutions compensated under IOPC owners were allowed to limit liabilities, including large pollution by "Prestige" and the available defense options including limited definition given in identifying the owner affect the admissibility of the claim.

Ⅴ. Review of Cases

Since the development of international conventions claims were made against owners and the Fund, unless covered under USA laws. Due to lengthy procedure of maritime claims most cases may still have pending claims.

Amoco Cadiz
Date 16. 3. 1978
Oil spill quantity 240 000 MT
Ship owners were not allowed to limit liability[⑤]
Amount paid: 200 million US dollars
Claim: more than 2 billion US dollars

USA Jurisdiction
Exxon Valdez
Date 24. 3. 1989
Oil spill quantity 107 000MT
Amount paid: 3. 0 billion US Dollars
Claim: 5 billion US Dollars

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① 1992 CLC Article 3 (2) (b) Act of third party but, who are the third parties not defined.
② 33USC2701 (32) "responsible party" means in the case of a vessel, any person owning, operating, or demise chartering the vessel.
③ 33 USC 2703(a) (3) third parties excluding owners' servants and agents.
④ 33 USC 2704 (c) Exceptions to limitation of liability in case of gross negligence or willful misconduct; violations of applicable federal laws.
⑤ 1851 Limitation of Liability Act 46 USC section 183.

IOPC 1992 Convention
Erika
Date 12. 12. 1999
Oil spill quantity about 20 000 MT
Ship owners were allowed to limit liability
Amount paid:129 million Euros.
Claim:400 million Euros

Prestige
13. 11. 2002
Ship owners were allowed to limit liability
Oil spill quantity about 63000 MT
Amount paid:142. 4 million Euros.
Claims:Spain 1. 02 billion;France 109 million and;Portugal 2 million Euros

Hebei Spirit
7. 12. 2007
Ship owners were allowed to limit liability
Amount paid:17 billion Korean Won
Amount claim:329 billion Korean Won

All the cases were decided under the 1992 CLC;it was common ships owners were allowed to limit their liabilities, not all the claims were satisfied subject to admissibility of the claims, and therefore actual damages were much higher. Ship owners and responsible parties settlements outside the IOPC Fund and others were not taken as part of the paid amount. Punitive damages[①] were not included as compensation.

Ⅵ. Summary and Conclusion

The development of international conventions have made progress in increasing the limits of liability, extending the area of damage from 12 nautical mile zone to 200 nautical mile zone. They have also made the liabilities difficult

① Exxon Valdez case punitive damages were reduced to $ 507 million.

to break, which will give advantage to the polluter. Existing provisions do not address issues of damage to marine ecosystem and restoration of the damaged environment to base line condition.

OPA and ELD address the similar issues to a greater extent, although ELD cannot be applied to ship base oil pollution covered under the international conventions.

Existing supplementary fund limitation of 750 million SDR applies to most EU nations and Japan and claimants from other contracting states are limited to 300 million SDR. Except EU, Japan and USA, claimants from all other contracting states suffer to a greater extent in the case of large scale oil pollution. The issue of restoration of the damaged environment is not fully addressed by these conventions.

The question of adequacy shall base on restoration of the damaged environment to base line condition and, to pay reasonable compensation on economic losses. Polluter pays principle, precautionary measures and restitution are some of the fundamental instruments available under the international law and recognized by many civilized nations including EU and United States. These consist of protecting species of natural habitats, water damages, land damages and reinstating them to baseline condition base on best available information.

To sum up the discussion on the adequacy of international conventions on compensation, we have the following findings:

Progress has been made in development of international conventions and funds, but there is difficulty in adopting international conventions and international laws.

Difficulty in breaking the liability limits in case of gross negligence.

The introduction of new measures and repetition of the same: introduction of protocols and amendments still fails to compensate fully.

Not in line with internationally recognized principles: principle of restoration, polluter pays principle and precautionary measures are not fully addressed.

Adaptation of ELD to counter previous pollution incidents but repetition is still possible: EU countries affected by international conventions unable to enjoy the benefits of ELD provisions.

Comparing compensation methods of OPA and IOPC, we can see there is a considerable gap of about 20 years: OPA 1990 broader concept is still not adopted by international conventions to this date.

With the above assessment it is reasonable to conclude that international

civil liability conventions on oil pollution are inadequate in their available funds and provisions to fully reinstate the damaged environment and to allow broader compensation for economical losses in the case of ship base oil pollution of considerable scale.

(Editor:SU Baoqing)

论船舶油污及国际公约对油污赔偿的适当性

Francis Lansakara *

内容摘要:船舶污染的赔偿问题由民事责任公约与基金公约调整。此外,诸如欧盟环境责任指令及美国1990年油污法案等其他民事责任规范也对此问题予以调整。公约自1969年制定以来,不断通过修正案和议定书进一步发展,目前大多数航海国家都是公约的签署国。

根据1992年民事责任公约,赔偿覆盖范围仅包括为恢复受损环境而采取的合理措施所产生之费用,不包含因船舶污染事故而产生的利润损失。1992年民事责任公约还在许多情况下赋予船舶所有人免责的权利。直到基金公约经济性损失的赔偿问题才开始被考虑,基金的设立目的即在于帮助那些根据1992年民事责任公约无法获得赔偿或无法获得充分赔偿的受损方。由缔约国的石油买方缴纳摊款所设立的1992年基金和后来的2003年补充基金也对1992年民事责任公约项下的诉求作了赔偿额最高为7.5亿特别提款权的限制。此外,通过一项赔偿请求还需要符合其他相关法律原则,如"合理"与"近因"原则,因而与漏油区域没有直接关联的经济损失无法获得赔偿。欧盟环境责任指令和美国油污法案对赔偿范围的解释倒是采取较为宽松的方式。但是就整体而言,难以突破的船舶所有人责任限制、船舶所有人享有的抗辩权利以及对船舶所有人身份的狭义定义等,都可能影响对依据公约所提起的赔偿请求的认定。通过研究过去的几个案例,可以察知公约项下可能获得的资金以及赔偿请求如何在国际油污公约的指导下获得认可。

本文探讨了公约的相关发展、公约对船舶所有人责任的限制、油污赔偿所适用的法律原则以及相关案例的经验与启示,并基于这些探讨的结果,来评估相关国际公约对于船舶油污赔偿规定的适当性。

关键词:船舶油污　赔偿　国际公约

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一、引 言

船舶油污的损害赔偿由各民事责任公约进行调整,人们接受的赔偿的普遍做法之一就是将受损环境或者受影响环境恢复至损害发生前的状态或基线水平。但是,根据现行的调整船舶污染问题的民事责任公约,这种赔偿方法也并非一直可行,因为公约往往对受损环境的恢复程度以及所应赔偿的损失的认定等进行限制。本文通过考量国际民事责任规范对油污赔偿的覆盖程度,并将这些国际规范与各文明国家和地区的现存法律原则进行对比,从而探讨国际民事责任规范在油污赔偿规定上的适当性。

二、法律规范及其发展

由于航运的国际属性,调整油污赔偿的法律有国际性的、区域性的以及内国法,除少数情况外,基于船舶污染产生的争端都由国际公约调整。

1992年民事责任公约和1992年基金公约于1996年生效,目前已为超过90%的航海国家所批准。[①]这两个公约随后通过各种修正案和议定书不断发展。根据1992年民事责任公约,船舶所有人需要提供充足的资金担保,担保数额根据船舶吨位而有所不同。例如,一艘140000总吨位以上的船舶的最低担保限额是9千万特别提款权。[②]那些根据1992年民事责任公约无法获得充分赔偿或无法获得赔偿的受损方可以向1992年基金提出请求。基金由各缔约国境内通过海运获得石油的个人或团体缴纳摊款组成,基金有义务向来自缔约国的请求者支付赔偿金。[③]根据国际油污赔偿基金[④]设定的条件,基金有2.03亿到3.0074亿特别提款权可用于处理赔偿请求,其中包含向1992年民事责任公约提起的请求。此外有7.5亿特别提款权的可用资金专项针对2003补充基金的适格申请

① 1992年国际民事责任公约议定书,缔约国数123,占世界航运总吨位96.7%。1992年基金公约缔约国数105,占世界航运总吨位94.5%。2001燃油污染民事责任公约缔约国数58,占世界航运总吨位88.6%。

② 该公约适用于所有承载石油的航海船舶,但只有载油量在2000吨以上的船舶被要求投保石油污染损害保险。根据2000年修改的1992年议定书,赔偿限额数量有所提升。特别提款权的汇率由国际货币基金组织决定。1特别提款权=15.1金法郎;1特别提款权=1.27美元。

③ 1992年基金公约第四条第4款规定2.03亿特别提款权或3.0074亿特别提款权;2003年补充基金议定书规定为7.5亿特别提款权。

④ 国际石油污染公约的赔偿条件参见案例回顾部分。

者。[①]

有关民事责任的国际公约,包括新的修正案和议定书,自 1969 年以来不断获得发展。[②] 国际民事责任公约从 1969 到 1992 年的发展包括如下几方面:对损害性质的阐述,即"环境损害不包含利润损失";[③]赔偿区域由领海延伸至专属经济区;[④]公约适用于已卸载但仍残留货物的油轮;[⑤]允许在存在严重威胁的情况下采取预防措施而无需等到污染实际发生[⑥];提高责任限额;摒弃"实际过失"或"相关性"[⑦]规则,引入"个人行为过失"[⑧]原则。

除此之外,调整船舶油污及赔偿的民事责任规范还有,如自 2007 年 4 月 30 日[⑨]起对欧盟 27 国适用的欧盟议会 2004/35/CE 指令与欧盟理事会 2004 年 4 月 21 日通过的环境责任指令,以及适用于美国的 1990 年油污法案和信托基金法案。

欧盟环境指令要求回复[⑩]或恢复受损环境至基线水平,并且鼓励对金融担保机制进行改进。[⑪]由于欧盟环境指令相对较新,仍在发展之中,因而已由国际公约调整的船舶污染问题被明确排除在欧盟环境指令之外。[⑫]

1990 年美国油污法案[⑬]在阿拉斯加重大漏油事件[⑭]之后于美国法律管辖区域生效,该法案将大型油轮的责任限额限制在 1900 美元每吨或一次性赔偿一千六百万,[⑮]取其中大者。该法案还建立了一个由石油税收组成的 10 亿美元的信托基金[⑯]以帮助那些无法根据 1990 年油污法案获得充足赔偿的受损方。国际

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① 仅对来自 2003 年补充基金公约的缔约国的请求有效,限于欧盟和日本。

② 1969 年民事责任公约和 1971 年基金公约的赔偿限额为 0.6 亿特别提款权左右。这些限额被后来的 1992 年民事责任公约和 1992 年基金公约和 2003 补充基金公约的规定所替代。

③ 1992 年国际民事责任公约第 1 条第 6 款 a 项自 1969 年民事责任公约的定义演变而来。

④ 1992 年国际民事责任公约包括 200 海里的专属经济区,1969 公约仅适用于 12 海里内的领海区。

⑤ 1992 年国际民事责任公约第 1 条第 1 款,为 1969 年公约的改进版。

⑥ 1992 年国际民事责任公约第 2 条 b 款,为 1969 年公约的改进版。

⑦ 1969 年公约第 5 条第 2 款,如果事故的发生是由于船舶所有人的过错或过失造成的,则船舶所有人不能享受责任限制。

⑧ 1969 年民事责任公约和 1971 年基金公约对赔偿额的限制为 0.6 亿特别提款权,这一限额为 1992 民事责任公约和基金公约所取代;2003 年补充基金公约将限额提升至 7.5 亿;1992 年民事责任公约第 5 条第 2 款的"个人失职过失"责任限制相较 1969 年公约更难以被突破。

⑨ 2004/35/CE 指令第 19 条－执行;第 20 条－生效;于 2009 年 3 月 1 日在英国生效。

⑩ 2004/35/CE 指令第 2 条第 14 第 15 项－定义。

⑪ 第 14 条－金融担保。

⑫ 2004/35/CE 指令第 4 条第 2 款;附件 4。

⑬ 1990 美国石油污染法案 2702 部分。

⑭ 1989 Exxon Valdez。

⑮ 33 USC 2704。

⑯ 26USC 9509。

公约的最高赔偿额为 7.5 亿特别提款权,这一限额只适用于那些来签订补充基金的公约缔约国的受损方,至于其他受损方则只能适用 3 亿特别提款权的限额。责任限额很难被突破,因为船舶所有人自身失职的案例非常少有,多数船运事故都是由于船员的过失引起,或者是管船失误。大型油污事件中超过 7.5 亿特别提款权的请求将无法获得足额赔偿。

三、污染损害的含义解释

如何对这些条款进行依法解释对于清偿请求的认定具有重要意义。为恢复环境所采取的合理措施应是有限的,根据普通法原则,那些没有直接关系的措施不能被认定为合理措施。[①]根据 1992 年民事责任公约,环境损害赔偿仅限于那些为恢复环境而采取的合理措施所产生的费用,不包含经济损失。[②]那些无法从民事责任赔偿体制中获得任何或足额赔偿的受损方将在现有相关规定和限额之内[③]由基金公约[④]进行补偿。赔偿的种类或数量根据合理原则和近因原则决定。赔偿覆盖以下损失或损害,包括渔业、旅游业和财产损失,如海产[⑤]和贝类养殖场、贝类捕捞、渔船、鱼贝加工厂等的损失。

尽管欧盟环境指令也采纳恢复原则,根据国际民事公约和基金公约而产生的责任还是被欧盟环境指令排除了,[⑥]虽然该指令的成员国也是这些公约的参与方。此外,虽然欧盟环境指令对于"恢复受损环境"的定义作较为宽泛的解释,其成员国依然无法据此在船舶污染案件中获益。欧盟环境指令阐述的损害包括保护物种、栖息地、水体和陆地等的损害,并且该损害应该恢复到基线水平程度。美国 1990 年石油污染法案也同样宽泛地解释赔偿范围,其中包括根据国家紧急方案所产生的迁移费用,以及自然资源、财产损失,政府或相关机构的收入损失,以及利润和营利能力损失等,都是请求者可以要求赔偿的。[⑦]

1992 年民事责任和基金公约对于污染损害赔偿金的解释限于恢复受损环

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① 自 1961 年以来的通用原则是,远因不赔,即被告仅仅对他可以合理预见的可能引起的请求方的损害负责—1961 Wagon Mount No. 1[1961] AC. 388(PC)。

② 1992 年民事责任公约第一条第六款第一项,由于船舶漏油引起的外部污染损害,只有对环境损害的赔偿而不包含预期利润的赔偿受到实际采取恢复措施引发的费用限制。

③ 1992 年基金公约,根据第四条第一款第一项,基于 1992 年民事责任公约没有责任产生;第二项,由于船舶所有人没有足够的资金能力完全承担其基于 1992 年民事责任公约所需承担的责任。

④ 1992 年基金公约和 2003 年补充基金公约。

⑤ 海产养殖是水产养殖的一种,是指在开放的海洋上养殖可供食用的海洋生物或其他产品。

⑥ 2004/35/CE 指令,第四条第二款;附件 4。

⑦ 33 USC 2702。

境以及直接受影响的渔业和旅游业的费用，对这些损害的赔偿适用基金所设的限额，海洋生态系统的损害则不计入。

四、1992 年民事责任公约项下其他影响石油污染请求的事项

根据 1992 年民事责任公约，船舶所有人享有责任限额，如一方希望突破此限制则需证明船舶所有人自身行为存在主观故意[①]或失职，或者对于应该预见的事故因疏忽大意没有预见。多数航运事故是由船舶所有人雇员的过错引起的，而管船失误也是一个主要原因，安全管理系统如 ISM 也可用于证明可归责于船舶所有人的管理失误。但是，根据上述公约可以获得责任限制的仅仅为船舶的登记所有人，[②]光船承租人和管理者都不包含在内，当责任由这些不被公约包含在内的主体承担时，对其将根据吨位限制（1976LLMC[③]）适用更低的限制额度。船舶所有人如能证明事故完全由第三方[④]故意造成的则可以免责，但 1992 年民事责任公约并未规定第三方的范围。[⑤]

1990 年石油污染法案使用责任人[⑥]来替代船舶所有人，这就给予请求方更为宽泛的选择，并且可以要求更高的赔偿，由于第三方的抗辩受到更多限制并且对第三方的重大过失的认定标准更低，[⑦]将导致责任限制的放宽，[⑧]从而有利于请求方。

目前已知的根据国际油污公约获得赔偿的主要污染事件中，船舶所有人责任都得到了限制，其中包括“威望号”轮大型污染事件，而赔偿方用以抗辩的理由之一就是对船舶所有人的认定所存在的限制，这也是影响诉求能否被认可的因素之一。

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① 1992 年民事责任公约第 5 条第 2 款，如果有证据证明污染损害的发生是由于船舶所有人的主观故意或失职，或者疏忽大意而没有预见损害的发生，则船舶所有人不能享有其基于公约所应享有的责任限额。英国基于 MSA 1995 S157(3)文件批准了该公约。

② 1992 年公约第一条第二款第三项，“个人”是指任何个人或合伙方或公私机构，不论是否是一个团体，包括一个国家或该国的任一选区。“船舶所有人”是指那些登记为船舶所有人的个人或团体，或者是那些并未注册登记，但实际拥有船舶的个人或团体。然而在一艘船舶的拥有者为国家，运营者登记为公司的时候，“船舶所有人”应该指该运营的公司。

③ 除了包含在国际民事责任公约的油污损害，其他损害适用 1976 年 LLMC 第三条第二款。

④ 在 Prestige 案中，ABS 依据该款抗辩，法庭尚未作出裁决。（IOPC2008 年报告，第 102 页）。

⑤ 1992 民事责任公约第三条第二款第二项关于第三方行为的规定，但该公约为明确定义“第三方”范围。

⑥ 33USC2701(32)，责任人是指在船舶案件中，实际拥有、运营者，或者光船承租人。

⑦ 33USC2704(c)，免责的例外情形，包括疏忽大意过失或故意行为、违反联邦法律。

⑧ 33USC2703(a)(3)，第三方不包括船舶所有人雇员和代理人。

五、案例回顾

由于国际公约的发展,除了基于美国法项下提出的索赔请求外,其他请求都可针对船舶所有人和基金提出。由于海事请求审理的冗长程序,多数案件的最终判决仍然待定。

卡迪兹号
日期:1978 年 3 月 16 日
漏油量:240 000 吨
船舶所有人不能限制责任[①]
赔偿数额:2 亿美元
诉求数额:超过 20 亿美元

美国管辖
瓦尔迪兹号
日期:1989 年 3 月 24 日
漏油量:107 000 吨
赔偿数额:30 亿美元
诉求数额:50 亿美元

1992 年国际石油污染公约
埃里卡号
日期:1999 年 12 月 12 日
漏油量:20 000 吨
船舶所有人被允许限制其责任
赔偿金额:1.29 亿欧元
诉求金额:4 亿欧元

威望号
2002 年 11 月 13 日
船舶所有人被允许限制其责任
漏油量:63 000 吨

① 1851 年美国责任限制法案 46 第 183 节。

赔偿数额:1.424 亿欧元
诉求金额:1 西班牙 10.2 亿欧元;法国 1.09 亿欧元;葡萄牙 2 百万欧元

海博灵魂号
日期:2007 年 12 月 7 日
船舶所有人被允许限制其责任
赔偿数额:170 亿韩元
诉求数额:3290 亿韩元

通过上述案件回顾,可见根据 1992 年民事责任公约裁判的案件,船舶所有人通常都成功获得责任限制,并不是所有被通过的诉求都可以得到彻底清偿,因而实际的损失可能更高。至于那些在国际石油污染基金公约之外处理和解决的油污争议,船舶所有人和责任者所支付的赔偿金不算入本部分的赔偿数额。惩罚性赔偿金[①]也不计入赔偿数额。

六、总结和结论

国际公约的发展使得船舶所有人的责任限额不断提高,赔偿范围从 12 海里的领海区延伸至 200 海里的专属经济区。它们还使得船舶所有人的责任限制难以被突破,从而有利于污染者。现存法规并未将海洋生态系统的损害以及恢复受损环境至基线水平的费用归为船舶所有人应当赔偿的损害范围内。油污法案和欧盟环境指令给予相似问题更为广泛的外延,尽管欧盟环境指令不能适用于那些由国际公约调整的船舶石油污染事件。

现有的补充基金的 7.5 亿特别提款权限额适用于多数欧盟国家和日本,对其他缔约国的请求者的限额则为 3 亿特别提款权。因而,非欧盟、日本和美国的缔约国请求者在大型石油污染事件中将遭遇更多损失。此外,恢复受损环境事项并不完全归入这些公约。

补偿的适当,应综合考虑恢复受损环境到基线水平以及对经济损失进行合理赔偿两方面。“污染者支付”原则,采取合理预防措施以及恢复受损环境的费用,是基于国际法而产生的基本规范,并为包括欧盟和美国在内的多数文明国家所承认。污染者所需支付的费用包括保护物种、自然栖息地、水体损害、陆地损害和将这些受损方面恢复到基线水平的费用。

最终,本文对国际公约赔偿规定的适当性的探讨结论如下:

① Exxon Valdez 案中,惩罚性赔偿金被减至 5.07 亿美元。

(1)国际公约和基金在不停地发展进步,但采用国际公约和国际法存在一定困难。

(2)在重大过失情况下,船舶所有人的责任限制很难突破。

(3)新措施的引入以及既存措施的重复:议定书和修正案的引入依然不能充分赔偿。

(4)与一些国际上被广为认可的原则不符:恢复原状原则,污染者买单原则,以及采取预防措施原则。

(5)虽然存在欧盟环境责任指令以应对当前的污染事件,但仍可能适用国际公约:受国际公约影响的欧盟国家无法从ELD条款中获益。

(6)比较美国石油污染法案和国际石油污染公约的赔偿机制,可以认定其间存在20年的差距:1990年石油污染法案中比较宽泛的概念迄今仍未能为国际公约所采用。

通过以上探讨,可以合理得出结论,关于石油污染的国际民事责任公约的可用基金和条款规定在船舶石油污染案件中无法完全恢复受损环境并对经济损失进行充足赔偿。

(中译、责任编辑:苏宝清)

中华人民共和国水上水下活动通航安全管理规定

第一条 为了维护水上交通秩序，保障船舶航行、停泊和作业安全，保护水域环境，依据《中华人民共和国海上交通安全法》、《中华人民共和国内河交通安全管理条例》等法律法规，制定本规定。

第二条 公民、法人或者其他组织在中华人民共和国内河通航水域或者岸线上和国家管辖海域从事下列可能影响通航安全的水上水下活动，适用本规定：

（一）勘探、采掘、爆破；

（二）构筑、设置、维修、拆除水上水下构筑物或者设施；

（三）架设桥梁、索道；

（四）铺设、检修、拆除水上水下电缆或者管道；

（五）设置系船浮筒、浮趸、缆桩等设施；

（六）航道建设，航道、码头前沿水域疏浚；

（七）举行大型群众性活动、体育比赛；

（八）打捞沉船、沉物；

（九）在国家管辖海域内进行调查、测量、过驳、大型设施和移动式平台拖带、捕捞、养殖、科学试验等水上水下施工活动以及在港区、锚地、航道、通航密集区进行的其他有碍航行安全的活动；

（十）在内河通航水域进行的气象观测、测量、地质调查，航道日常养护、大面积清除水面垃圾和可能影响内河通航水域交通安全的其他行为。

第三条 水上水下活动通航安全管理应当遵循安全第一、预防为主、方便群众、依法管理的原则。

第四条 国务院交通运输主管部门主管全国水上水下活动通航安全管理工作。

国家海事管理机构在国务院交通运输主管部门的领导下，负责全国水上水下活动通航安全监督管理工作。

各级海事管理机构依照各自的职责权限，负责本辖区水上水下活动通航安全监督管理工作。

第五条 从事本规定第二条第（一）项至第（九）项的水上水下活动的建设单位、主办单位或者对工程总负责的施工作业者，应当按照《中华人民共和国海事行政许可条件规定》明确的相应条件向活动地的海事管理机构提出申请并报送

相应的材料。在取得海事管理机构颁发的《中华人民共和国水上水下活动许可证》(以下简称许可证)后,方可进行相应的水上水下活动。

第六条 水上水下活动水域涉及两个以上海事管理机构的,许可证的申请应当向其共同的上一级海事管理机构或者共同的上一级海事管理机构指定的海事管理机构提出。

第七条 从事水上水下活动需要设置安全作业区的,应当经海事管理机构核准公告。

建设单位或者主办单位申请设置安全作业区,可以在向海事管理机构申请许可证时一并提出。

第八条 遇有紧急情况,需要对航道进行修复或者对航道、码头前沿水域进行疏浚的,作业单位可以边申请边施工。

第九条 许可证应当注明允许从事水上水下活动的单位名称、船名、时间、水域、活动内容、有效期等事项。

第十条 许可证的有效期由海事管理机构根据活动的期限及水域环境的特点确定,最长不得超过三年。许可证有效期届满不能结束施工作业的,申请人应当于许可证有效期届满20日前到海事管理机构办理延期手续,由海事管理机构在原证上签注延期期限后方能继续从事相应活动。

第十一条 许可证上注明的船舶在水上水下活动期间发生变更的,建设单位或者主办单位应当及时到作出许可决定的海事管理机构办理变更手续。在变更手续未办妥前,变更的船舶不得从事相应的水上水下活动。

许可证上注明的实施施工作业的单位、活动内容、水域发生变更的,建设单位或者主办单位应当重新申请许可证。

第十二条 有下列情形之一的,许可证的申请者应当及时向原发证的海事管理机构报告,并办理许可证注销手续:

(一)涉水工程及其设施中止的;

(二)三个月以上不开工的;

(三)提前完工的;

(四)因许可事项变更而重新办理了新的许可证的;

(五)因不可抗力导致批准的水上水下活动无法实施的;

(六)法律、行政法规规定的应当注销行政许可的其他情形。

第十三条 从事本规定第二条第(十)项列明的活动的,应当在活动前将作业或者活动方案报海事管理机构备案。

第十四条 从事按规定需要发布航行警告、航行通告的水上水下活动,应当在活动开始前办妥相关手续。

第十五条 按照国家规定需要立项的对通航安全可能产生影响的涉水工程,在工程立项前交通运输主管部门应当按照职责组织通航安全影响论证审查,论证审查意见作为工程立项审批的条件。

水上水下活动在建设期间或者活动期间对通航安全、防治船舶污染可能构成重大影响的，建设单位或者主办单位应当在申请海事管理机构水上水下活动许可之前进行通航安全评估。

第十六条 涉水工程建设单位、施工单位、业主单位和经营管理单位应当按照《中华人民共和国安全生产法》的要求，建立健全涉水工程水上交通安全制度和管理体系，严格履行涉水工程建设期和使用期水上交通安全有关职责。

第十七条 涉水工程建设单位应当在工程招投标前对参与施工作业的船舶、浮动设施明确应具备的安全标准和条件，在工程招投标后督促施工单位落实施工过程中各项安全保障措施，将施工作业船舶、浮动设施及人员和为施工作业或者活动服务的所有船舶纳入水上交通安全管理体系，并与其签订安全协议。

第十八条 涉水工程建设单位、业主单位应当加强安全生产管理，落实安全生产主体责任。根据国家有关法律、法规及规章要求，明确本单位和施工单位、经营管理单位安全责任人。督促施工单位落实水上交通安全和防治船舶污染的各项要求，并落实通航安全评估以及活动方案中提出的各项安全和防污染的措施。

第十九条 涉水工程建设单位、业主单位应当确保水上交通安全设施与主体工程同时设计、同时施工、同时投入生产和使用。

第二十条 涉水工程勘察设计单位、施工单位应当具备法律、法规规定的资质。

第二十一条 涉水工程施工单位应当落实国家安全作业和防火、防爆、防污染等有关法律法规，制定施工安全保障方案，完善安全生产条件，采取有效安全防范措施，制定水上应急预案，保障涉水工程的水域通航安全。

第二十二条 涉水工程业主单位、经营管理单位，应当采取有效安全措施，保证涉水工程试运行期、竣工后的水上交通安全。

第二十三条 在水上水下活动进行过程中，施工单位和作业人员应当遵守以下规定：

（一）按照海事管理机构批准的作业内容、核定的水域范围和使用核准的船舶进行作业，不得妨碍其他船舶的正常航行；

（二）及时向海事管理机构通报施工进度及计划，并保持工程水域良好的通航环境；

（三）使船舶、浮动设施保持在适于安全航行、停泊或者从事有关活动的状态；

（四）实施施工作业或者活动的船舶、设施应当按照有关规定在明显处昼夜显示规定的号灯号型。在现场作业船舶或者警戒船上配备有效的通信设备，施工作业或者活动期间指派专人警戒，并在指定的频道上守听；

（五）制定、落实有效的防范措施，禁止随意倾倒废弃物，禁止违章向水体投弃施工建筑垃圾、船舶垃圾、排放船舶污染物、生活污水和其它有害物质；

（六）遵守有关水上交通安全和防治污染的相关规定，不得有超载等违法行为。

第二十四条 水上水下活动经海事管理机构核准公告设置安全作业区的,建设单位或者主办单位应当设置相关的安全警示标志和配备必要的安全设施或者警戒船,切实落实通航安全评估中提出的各项安全防范措施和对策,并做好施工与通航及其它有关水上交通安全的协调工作。

第二十五条 与批准的水上水下活动无关的船舶、设施不得进入安全作业区。

建设单位、主办单位或者施工单位不得擅自改变施工作业安全作业区的范围。需要改变的,应当报经海事管理机构重新核准公告。

第二十六条 对水上水下活动产生的可能影响航行安全的障碍物,建设单位或者主办单位应当将形状、尺寸、位置和深度准确地报告海事管理机构,按照海事管理机构的要求设置标志,并按照通航要求及有关规定的要求及时清除遗留物。

第二十七条 水上水下活动完成后,建设单位或者主办单位不得遗留任何妨碍航行的物体,并应当向海事管理机构提交通航安全报告。

海事管理机构收到通航安全报告后,应当及时予以核查。核查中发现存在有碍航行和作业的安全隐患的,海事管理机构有权暂停或者限制涉水工程投入使用。

第二十八条 海事管理机构应当建立涉水工程施工作业或活动现场监督检查制度,依法检查有关建设单位和施工作业单位所属船舶、设施、人员水上通航安全作业条件和采取的通航保障措施落实情况。有关单位和人员应当予以配合。

第二十九条 有下列情形之一的,海事管理机构应当责令建设单位、施工单位立即停止施工作业,并采取安全防范措施。

(一)因恶劣自然条件严重影响安全的;

(二)施工作业水域内发生水上交通事故,危及周围人命、财产安全的;

(三)其他严重影响施工作业安全或通航安全的情形。

第三十条 有下列情形之一的,海事管理机构应当责令改正,拒不改正的,海事管理机构应当责令其停止作业:

(一)建设单位或者业主单位未履行安全管理主体责任的;

(二)未落实通航安全评估提出的安全防范措施的;

(三)未经批准擅自更换或者增加施工作业船舶的;

(四)未按规定采取安全和防污染措施进行水上水下活动的;

(五)雇佣不符合安全标准的船舶和设施进行水上水下活动的;

(六)其它不满足安全生产的情形。

第三十一条 海事管理机构应当建立涉水工程施工单位水上交通安全诚信制度和奖惩机制。在监督检查过程中对发生的下列情形予以通告:

(一)施工过程中发生水上交通事故和船舶污染事故,造成人员伤亡和重大

水域污染的；

（二）以不正当手段取得许可证并违法施工的；

（三）不服从管理、未按规定落实水上交通安全保障措施或者存在重大通航安全隐患，拒不改正而强行施工的。

第三十二条 违反本规定，隐瞒有关情况或者提供虚假材料，以欺骗或其他不正当手段取得许可证的，由海事管理机构撤销其水上水下施工作业许可，注销其许可证，并处5000元以上3万元以下的罚款。

第三十三条 有下列行为或者情形之一的，海事管理机构应当责令施工作业单位、施工作业的船舶和设施立即停止施工作业，责令限期改正，并处5000元以上3万元以下的罚款。属于内河通航水域水上水下活动的，处5000元以上5万元以下的罚款：

（一）应申请许可证而未取得，擅自进行水上水下活动的；

（二）许可证失效后仍进行水上水下活动的；

（三）使用涂改或者非法受让的许可证进行水上水下活动的；

（四）未按本规定报备水上水下活动的。

第三十四条 有下列行为或者情形之一的，海事管理机构应当责令改正，并可以处以2000元以下的罚款；拒不改正的，海事管理机构应当责令施工作业单位、施工作业的船舶和设施停止作业。

（一）未按有关规定申请发布航行警告、航行通告即行实施水上水下活动的；

（二）水上水下活动与航行警告、航行通告中公告的内容不符的。

第三十五条 未按本规定取得许可证，擅自构筑、设置水上水下建筑物或设施的，禁止任何船舶进行靠泊作业。影响通航环境的，应当责令构筑、设置者限期搬迁或拆除，搬迁或拆除的有关费用由构筑、设置者自行承担。

第三十六条 违反本规定，未妥善处理有碍航行和作业安全隐患并按照海事管理机构的要求采取清除、设置标志、显示信号等措施的，由海事管理机构责令改正，并处5000元以上3万元以下的罚款。

第三十七条 海事管理机构工作人员不按法定的条件进行海事行政许可或者不依法履行职责进行监督检查，有滥用职权、徇私舞弊、玩忽职守等行为的，由其所在机构或上级机构依法给予行政处分；构成犯罪的，由司法机关依法追究刑事责任。

第三十八条 在军港、渔港内从事相关水上水下活动，按照国家有关规定执行。

第三十九条 本规定自2011年3月1日起施行。1999年10月8日原交通部发布的《中华人民共和国水上水下施工作业通航安全管理规定》（交通部令1999年第4号）同时废止。

（责任编辑：江晓筠）

中华人民共和国船舶污染海洋环境应急防备和应急处置管理规定

第一章 总 则

第一条 为提高船舶污染事故应急处置能力,控制、减轻、消除船舶污染事故造成的海洋环境污染损害,依据《中华人民共和国防治船舶污染海洋环境管理条例》等有关法律、行政法规和中华人民共和国缔结或者加入的有关国际条约,制定本规定。

第二条 在中华人民共和国管辖海域内,防治船舶及其有关作业活动污染海洋环境的应急防备和应急处置,适用本规定。

船舶在中华人民共和国管辖海域外发生污染事故,造成或者可能造成中华人民共和国管辖海域污染的,其应急防备和应急处置,也适用本规定。

本规定所称"应急处置"是指在发生或者可能发生船舶污染事故时,为控制、减轻、消除船舶造成海洋环境污染损害而采取的响应行动;"应急防备"是指为应急处置的有效开展而预先采取的相关准备工作。

第三条 交通运输部主管全国防治船舶及其有关作业活动污染海洋环境的应急防备和应急处置工作。

国家海事管理机构负责统一实施船舶及其有关作业活动污染海洋环境应急防备和应急处置工作。

沿海各级海事管理机构依照各自职责负责具体实施防治船舶及其有关作业活动污染海洋环境的应急防备和应急处置工作。

第四条 船舶及其有关作业活动污染海洋环境应急防备和应急处置工作应当遵循统一领导、综合协调、分级负责、属地管理、责任共担的原则。

第二章 应急能力建设和应急预案

第五条 国家防治船舶及其有关作业活动污染海洋环境应急能力建设规划,应当根据全国防治船舶及其有关作业活动污染海洋环境的需要,由国务院交

通运输主管部门组织编制，报国务院批准后公布实施。

沿海省级防治船舶及其有关作业活动污染海洋环境应急能力建设规划，应当根据国家防治船舶及其有关作业活动污染海洋环境应急能力建设规划和本地实际情况，由沿海省、自治区、直辖市人民政府组织编制并公布实施。

沿海市级防治船舶及其有关作业活动污染海洋环境应急能力建设规划，应当根据所在地省级人民政府防治船舶及其有关作业活动污染海洋环境应急能力建设规划和本地实际情况，由沿海设区的市级人民政府组织编制并公布实施。

编制防治船舶及其有关作业活动污染海洋环境应急能力建设规划，应当对污染风险和应急防备需求进行评估，合理规划应急力量建设布局。

沿海各级海事管理机构应当积极协助、配合相关地方人民政府完成应急能力建设规划的编制工作。

第六条 交通运输部、沿海设区的市级以上地方人民政府应当根据相应的防治船舶及其有关作业活动污染海洋环境应急能力建设规划，建立健全船舶污染事故应急防备和应急反应机制，建立专业应急队伍，建设船舶污染应急专用设施、设备和器材储备库。

第七条 沿海各级海事管理机构应当根据防治船舶及其有关作业活动污染海洋环境的需要，会同海洋主管部门建立健全船舶及其有关作业活动污染海洋环境的监测、监视机制，加强对船舶及其有关作业活动污染海洋环境的监测、监视。

港口、码头、装卸站以及从事船舶修造的单位应当配备与其装卸货物种类和吞吐能力或者修造船舶能力相适应的污染监视设施和污染物接收设施，并使其处于良好状态。

第八条 交通运输部应当根据国家突发公共事件总体应急预案，制定国家防治船舶及其有关作业活动污染海洋环境的专项应急预案。

沿海省、自治区、直辖市人民政府应当根据国家防治船舶及其有关作业活动污染海洋环境的专项应急预案，制定省级防治船舶及其有关作业活动污染海洋环境应急预案。

沿海设区的市级人民政府应当根据所在地省级防治船舶及其有关作业活动污染海洋环境的应急预案，制定市级防治船舶及其有关作业活动污染海洋环境应急预案。

交通运输部、沿海设区的市级以上地方人民政府应当定期组织防治船舶及其有关作业活动污染海洋环境应急预案的演练。

第九条 中国籍船舶所有人、经营人、管理人以及有关作业单位应当按照国家海事管理机构制定的应急预案编制指南，制定或者修订防治船舶及其有关作业活动污染海洋环境的应急预案，并报海事管理机构批准。

港口、码头、装卸站的经营人应当制定防治船舶及其有关作业活动污染海洋环境的应急预案，并报海事管理机构备案。

船舶以及有关作业单位应当按照制定的应急预案定期组织应急演练，根据

演练情况对应急预案进行评估,按照实际需要和情势变化,适时修订应急预案,并对应急预案的演练情况、评估结果和修订情况如实记录。

第十条 中国籍船舶防治污染设施、设备和器材应当符合国家有关标准,并按照国家有关要求通过型式和使用性能检验,其生产、供应单位应当将其所生产、销售的设施、设备和器材的种类及其检验证书向国家海事管理机构备案。

国家海事管理机构应当及时将符合国家有关标准的船舶防治污染设施、设备和器材及其生产单位向社会公布。

第三章 专项验收

第十一条 港口、码头、装卸站以及从事船舶修造、打捞、拆解等作业活动的单位应当按照交通运输部的要求制定有关安全营运和防治污染的管理制度,按照国家有关防治船舶及其有关作业活动污染海洋环境的规范和标准,配备必须的防治污染设备和器材,确保防治污染设备和器材符合防治船舶及其有关作业活动污染海洋环境的要求,并通过海事管理机构的专项验收。

前款所称防治污染设备和器材符合防治船舶及其有关作业活动污染海洋环境的要求,是指港口、码头、装卸站以及船舶修造、打捞、拆解等有关作业活动单位所配备的防治污染设备和器材,应当能够与其装卸货物种类、吞吐能力或者修造、打捞、拆解活动所必须的污染监视、监测能力,船舶污染物接收处理能力以及船舶污染事故应急处置能力相适应。

第十二条 港口、码头、装卸站以及从事船舶修造、打捞、拆解等作业活动的单位申请专项验收应当具备以下条件:

(一)已经按照交通运输部的要求制定并实施了有关安全营运和防治污染管理制度;

(二)已经按照交通运输部颁布的有关技术规范和标准配备了相应的防治船舶污染设备和器材,并完成主要防治船舶污染设备和器材的调试工作;

(三)提供配备的防治船舶污染设备和器材符合防治船舶及其有关作业活动污染海洋环境要求并能够正常运行的说明材料;

(四)已经完成专项验收申请报告,有关资料齐全。

第十三条 申请专项验收的单位应当向当地直属海事管理机构提出专项验收申请,并提交证明符合第十二条规定条件的申请材料。

第十四条 负责专项验收的海事管理机构应当在专项验收工作过程中征求港口、环保、设计等单位的意见。

专项验收应当对防治船舶污染设备和器材的配备情况进行全面检查,对其是否符合防治船舶及其有关作业活动污染海洋环境的要求做出评价。

第十五条 海事管理机构组织的专项验收应当自受理申请之日起20日内

完成，并做出是否通过专项验收的决定；20 日内不能完成的，经海事管理机构负责人批准，可以延长 10 日。

海事管理机构应当及时向社会公布通过专项验收的港口、码头、装卸站以及船舶修造、打捞、拆解单位。

专项验收不合格的，其申请单位应当按照海事管理机构提出的处理意见进行限期整改，并应当按照本规定重新提出专项验收申请。

第十六条 通过专项验收的单位发生以下情况应当按照本规定的要求重新申请专项验收：

（一）港口、码头、装卸站等工程建设项目发生改建、扩建重大变化的；

（二）船舶修造、打捞、拆解单位从事的作业活动发生重大改变的。

第四章 船舶污染清除单位

第十七条 船舶污染清除单位是指按照本规定取得相应资质并与船舶签订污染清除协议，为船舶提供污染事故应急防备和应急处置服务的单位。

根据服务区域和污染清除能力的不同，船舶污染清除单位的能力等级由高到低分为四级，其中：

（一）一级单位能够在我国管辖海域为船舶提供溢油和其它散装液体污染危害性货物泄漏污染事故应急服务；

（二）二级单位能够在距岸 20 海里以内的我国管辖海域为船舶提供溢油和其它散装液体污染危害性货物泄漏污染事故应急服务；

（三）三级单位能够在港区水域为船舶提供溢油应急服务；

（四）四级单位能够在港区水域内的一个作业区、独立码头附近水域为船舶提供溢油应急服务。

第十八条 从事船舶污染清除的单位应当具备以下条件，并经海事管理机构批准：

（一）应急清污能力符合《船舶污染清除单位应急清污能力要求》（附件）的规定；

（二）制定的污染清除作业方案符合防治船舶及其有关作业活动污染海洋环境的要求；

（三）污染物处理方案符合国家有关防治污染规定。

第十九条 申请取得船舶污染清除作业资质的单位应当向当地直属海事管理机构提交证明符合第十八条规定条件的申请材料。

直属海事管理机构受理申请后，应当对申请单位是否具备本规定第十八条规定的条件进行现场核验。

对申请等级为二级、三级、四级的单位，直属海事管理机构应当自受理之日

起30日内作出批准或者不予批准的决定,并将能力等级为二级的单位,向国家海事管理机构备案。

对申请等级为一级的单位,直属海事管理机构应当将现场核验报告报国家海事管理机构。国家海事管理机构应当自直属海事管理机构受理申请之日起30日内作出批准或者不予批准的决定。

对予以批准的船舶污染清除单位,海事管理机构应当发给《船舶污染清除单位资质证书》;对不予批准的,应当书面通知申请人并说明理由。

第二十条 《船舶污染清除单位资质证书》应当载明船舶污染清除单位的名称、法定代表人姓名、地址、能力等级、服务区域、有效期限以及其他有关事项。《船舶污染清除单位资质证书》的有效期为3年。

船舶污染清除单位应当在资质证书载明的能力等级和服务区域内提供服务。

直属海事管理机构应当及时将本辖区内取得资质的船舶污染清除单位的名称、等级和服务区域向社会公布。

第二十一条 《船舶污染清除单位资质证书》记载事项发生变更的,船舶污染清除单位应当向原发证海事管理机构申请办理变更手续。

变更能力等级和服务区域的,应当按照本规定重新提出申请。

第二十二条 船舶污染清除单位应当在《船舶污染清除单位资质证书》有效期届满之日30日以前,向原发证海事管理机构申请办理《船舶污染清除单位资质证书》延续手续。相关海事管理机构应当自受理延续申请之日起30日内,做出批准或者不予批准的决定。

第二十三条 有下列情形之一的,相关海事管理机构应当办理《船舶污染清除单位资质证书》注销手续:

(一)船舶污染清除单位自行申请注销的;

(二)法人依法终止的;

(三)《船舶污染清除单位资质证书》被依法撤销或者吊销的。

第二十四条 船舶污染清除单位应当于每年1月31日前将下列情况向发证海事管理机构备案:

(一)上一年度参与船舶污染事故应急处置工作情况;

(二)船舶污染清除设施、设备、器材和应急人员情况;

(三)上年度船舶污染清除协议的签订和履行情况;

(四)船舶污染应急演习情况。

第五章 船舶污染清除协议的签订

第二十五条 载运散装油类货物的船舶,其经营人应当在船舶进港前或者

港外装卸、过驳作业前，按照以下要求与相应的船舶污染清除单位签订船舶污染清除协议：

（一）600 总吨以下仅在港区水域航行或作业的船舶，应当与四级以上等级的船舶污染清除单位签订船舶污染清除协议；

（二）600 总吨以上 2000 总吨以下仅在港区水域航行或作业的船舶，应当与三级以上等级的船舶污染清除单位签订船舶污染清除协议；

（三）2000 总吨以上仅在港区水域航行或作业的船舶以及所有进出港口和从事过驳作业的船舶应当与二级以上等级的船舶污染清除单位签订船舶污染清除协议。

第二十六条 载运油类之外的其他散装液体污染危害性货物的船舶，其经营人应当在船舶进港前或者港外装卸、过驳作业前，按照以下要求与相应的船舶污染清除单位签订船舶污染清除协议：

（一）进出港口的船舶以及在距岸 20 海里之内的我国管辖水域从事过驳作业的船舶应当与二级以上等级的船舶污染清除单位签订船舶污染清除协议；

（二）在距岸 20 海里以外的我国管辖水域从事过驳作业的载运其他散装液体污染危害性货物的船舶应当与一级船舶污染清除单位签订船舶污染清除协议。

第二十七条 1 万总吨以上的载运非散装液体污染危害性货物的船舶，其经营人应当在船舶进港前或者港外装卸、过驳作业前，按照以下要求与相应的船舶污染清除单位签订船舶污染清除协议：

（一）进出港口的 2 万总吨以下的船舶应当与四级以上等级的船舶污染清除单位签订船舶污染清除协议；

（二）进出港口的 2 万总吨以上 3 万总吨以下的船舶应当与三级以上等级的船舶污染清除单位签订船舶污染清除协议；

（三）进出港口的 3 万总吨以上的船舶以及在我国管辖水域从事过驳作业的船舶应当与二级以上等级的船舶污染清除单位签订船舶污染清除协议。

第二十八条 与一级、二级船舶污染清除单位签订污染清除协议的船舶划分标准由国家海事管理机构确定。

第二十九条 国家海事管理机构应当制定并公布船舶污染清除协议样本，明确协议双方的权利和义务。

船舶和污染清除单位应当按照国家海事管理机构公布的协议样本签订船舶污染清除协议。

第三十条 船舶应当将所签订的船舶污染清除协议留船备查，并在办理船舶进出港口手续或者作业申请时向海事管理机构出示。

船舶发现船舶污染清除单位存在违反本规定的行为，或者未履行船舶污染清除协议的，应当向船舶污染清除单位所在地的直属海事管理机构报告。

第六章 应急处置

第三十一条 船舶发生污染事故或者可能造成海洋环境污染的,船舶及有关作业单位应当立即启动相应的应急预案,按照有关规定的要求就近向海事管理机构报告,通知签订船舶污染清除协议的船舶污染清除单位,并根据应急预案采取污染控制和清除措施。

船舶在终止清污行动前应当向海事管理机构报告,经海事管理机构同意后方可停止应急处置措施。

第三十二条 船舶污染清除单位接到船舶污染事故通知后,应当根据船舶污染清除协议及时开展污染控制和清除作业,并及时向海事管理机构报告污染控制和清除工作的进展情况。

第三十三条 接到船舶造成或者可能造成海洋环境污染的报告后,海事管理机构应当立即核实有关情况,并加强监测、监视。

发生船舶污染事故的,海事管理机构应当立即组织对船舶污染事故的等级进行评估,并按照应急预案的要求进行报告和通报。

第三十四条 发生船舶污染事故后,应当根据《中华人民共和国防治船舶污染海洋环境管理条例》的规定,成立事故应急指挥机构。事故应急指挥机构应当根据船舶污染事故的等级和特点,启动相应的应急预案,有关部门、单位应当在事故应急指挥机构的统一组织和指挥下,按照应急预案的分工,开展相应的应急处置工作。

第三十五条 发生船舶污染事故或者船舶沉没,可能造成中华人民共和国管辖海域污染的,有关沿海设区的市级以上地方人民政府、海事管理机构根据应急处置的需要,可以征用有关单位和个人的船舶、防治污染设施、设备、器材以及其他物资。有关单位和个人应当予以配合。

有关单位和个人所提供的船舶和防治污染设施、设备、器材应当处于良好可用状态,有关物资质量符合国家有关技术标准、规范的要求。

被征用的船舶和防治污染设施、设备、器材以及其他物资使用完毕或者应急处置工作结束,应当及时返还。船舶和防治污染设施、设备、器材以及其他物资被征用或者征用后毁损、灭失的,应当给予补偿。

第三十六条 发生船舶污染事故,海事管理机构可以组织并采取海上交通管制、清除、打捞、拖航、引航、护航、过驳、水下抽油、爆破等必要措施。采取上述措施的相关费用由造成海洋环境污染的船舶、有关作业单位承担。

需要承担前款规定费用的船舶,应当在开航前缴清有关费用或者提供相应的财务担保。

本条规定的财务担保应由境内银行或者境内保险机构出具。

第三十七条 船舶发生事故有沉没危险时，船员离船前，应当按照规定采取防止溢油措施，尽可能关闭所有货舱（柜）、油舱（柜）管系的阀门，堵塞货舱（柜）、油舱（柜）通气孔。

船舶沉没的，其所有人、经营人或者管理人应当及时向海事管理机构报告船舶燃油、污染危害性货物以及其他污染物的性质、数量、种类及装载位置等情况，委托具有资质的船舶污染清除单位采取污染监视和控制措施，并在必要的时候采取抽出、打捞等措施。

第三十八条 船舶应当在污染事故清除作业结束后，对污染清除行动进行评估，并将评估报告报送当地直属海事管理机构，评估报告至少应包括下列内容：

（一）事故概况和应急处置情况；

（二）设施、设备、器材以及人员的使用情况；

（三）回收污染物的种类、数量以及处置情况；

（四）污染损害情况；

（五）船舶污染应急预案存在的问题和修改情况。

事故应急指挥机构应当在污染事故清除作业结束后，组织对污染清除作业的总体效果和污染损害情况进行评估，并根据评估结果和实际需要修订相应的应急预案。

第七章 法律责任

第三十九条 海事管理机构应当建立、健全防治船舶污染应急防备和处置的监督检查制度，对船舶以及有关作业单位的防治船舶污染能力以及污染清除作业实施监督检查，并对监督检查情况予以记录。

海事管理机构实施监督检查时，有关单位和个人应当予以协助和配合，不得拒绝、妨碍或者阻挠。

第四十条 海事管理机构发现船舶及其有关作业单位和个人存在违反本规定行为的，应当责令改正；拒不改正的，海事管理机构可以责令停止作业、强制卸载，禁止船舶进出港口、靠泊、过境停留，或者责令停航、改航、离境、驶向指定地点。

第四十一条 违反本规定的规定，船舶未制定防治船舶及其有关作业活动污染海洋环境应急预案，或者应急预案未报海事管理机构批准的，由海事管理机构处2万元以下的罚款；港口、码头、装卸站的经营人未制定防治船舶及其有关作业活动污染海洋环境应急预案的，由海事管理机构予以警告，或者责令限期改正。

第四十二条 违反本规定的规定，船舶和有关作业单位未配备防污设施、设

备、器材的,或者配备的防污设施、设备、器材不符合国家有关规定和标准的,由海事管理机构予以警告,或者处2万元以上10万元以下的罚款。

第四十三条 违反本规定的规定,有下列情形之一的,由海事管理机构处1万元以上5万元以下的罚款:

(一)载运散装液体污染危害性货物的船舶和1万总吨以上的其他船舶,其经营人未按照规定签订污染清除作业协议的;

(二)未取得污染清除作业资质的单位擅自签订污染清除作业协议并从事污染清除作业的。

第四十四条 违反本规定的规定,有下列情形之一的,由海事管理机构处2万元以上10万元以下的罚款:

(一)船舶沉没后,其所有人、经营人未及时向海事管理机构报告船舶燃油、污染危害性货物以及其他污染物的性质、数量、种类及装载位置等情况的;

(二)船舶沉没后,其所有人、经营人未及时采取措施清除船舶燃油、污染危害性货物以及其他污染物的。

第四十五条 违反本规定的规定,发生船舶污染事故,船舶、有关作业单位迟报、漏报事故的,对船舶、有关作业单位,由海事管理机构处5万元以上25万元以下的罚款;对直接负责的主管人员和其他直接责任人员,由海事管理机构处1万元以上5万元以下的罚款;直接负责的主管人员和其他直接责任人员属于船员的,给予暂扣适任证书或者其他有关证件3个月至6个月的处罚。瞒报、谎报事故的,对船舶、有关作业单位,由海事管理机构处25万元以上50万元以下的罚款;对直接负责的主管人员和其他直接责任人员,由海事管理机构处5万元以上10万元以下的罚款;直接负责的主管人员和其他直接责任人员属于船员的,并处给予吊销适任证书或者其他有关证件的处罚。

第四十六条 违反本规定的规定,发生船舶污染事故,船舶、有关作业单位未立即启动应急预案的,对船舶、有关作业单位,由海事管理机构处2万元以上10万元以下的罚款;对直接负责的主管人员和其他直接责任人员,由海事管理机构处1万元以上2万元以下的罚款;直接负责的主管人员和其他直接责任人员属于船员的,并处给予暂扣适任证书或者其他适任证件1个月至3个月的处罚。

第八章 附 则

第四十七条 本规定所称"以上"、"以内"包括本数,"以下"、"以外"不包括本数。

第四十八条 本规定自2011年6月1日起施行。

(责任编辑:江晓筠)

中华人民共和国海员外派管理规定

第一章 总 则

第一条 为规范海员外派管理，提高我国外派海员的整体素质和国际形象，维护外派海员的合法权益，促进海员外派事业的健康发展，根据《中华人民共和国船员条例》和对外劳务合作等法律法规，制定本规定。

第二条 在中华人民共和国境内依法设立的机构从事海员外派活动，适用本规定。

第三条 交通运输部主管全国海员外派工作。

国家海事管理机构负责统一实施全国海员外派的监督管理工作。

交通运输部直属海事管理机构依照各自职责负责具体实施海员外派的监督管理工作。

第四条 海员外派遵循“谁派出，谁负责”的原则。从事海员外派的机构应当对其派出的外派海员负责，做好外派海员在船工作期间及登、离船过程中的各项保障工作。

第二章 海员外派机构资质

第五条 从事海员外派的机构，应当符合下列条件：

（一）在中华人民共和国境内依法设立的法人；

（二）有与外派规模相适应的固定办公场所；

（三）有至少 2 名具有国际航行海船管理级船员任职资历的专职管理人员和至少 3 名具有两年以上海员外派相关从业经历的管理人员；

（四）具有进行外派海员任职前培训和岗位技能训练及处理海员外派相关法律事务的能力；

（五）按照国家海事管理机构的规定，建立船员服务质量管理制度、人员和资源保障制度、教育培训制度、应急处理制度和服务业务报告制度等海员外派管理制度；

(六)具有自有外派海员100人以上;

(七)注册资本不低于500万元人民币,且为实缴货币资本。本规定实施后,对外劳务合作法规另有规定的,从其规定;

(八)具有足额交纳100万元人民币海员外派备用金的能力;

(九)机构及其法定代表人具有良好的商业信誉,最近3年内没有重大违约行为和重大违法记录。

第六条 申请从事海员外派的机构,应当提交下列材料:

(一)从事海员外派活动的申请文书;

(二)企业法人营业执照或者事业单位法人证书、组织机构代码证;

(三)经营场所产权证明或者固定场所租赁证明;

(四)具有处理海员外派相关法律事务能力、进行外派海员任职前培训和岗位技能训练能力的证明材料;

(五)专职管理人员任职资格证书复印件及专职业务人员相关从业经历的证明材料;

(六)机构的组织结构、人员组成、职责等情况的说明文件;

(七)海员外派相关管理制度文件;

(八)自有外派海员的名册及劳动合同、缴纳社会保险等证明材料;

(九)已按照海事管理机构要求足额缴纳海员外派备用金的有效证明;

(十)其他相关证明材料。

经批准设立的外商投资职业介绍机构或者中外合资人才中介机构拟开展招聘海员出境业务,应当按照本规定申请从事海员外派。除提交前款规定的材料外,还应当提交外商投资企业批准证书和外商投资企业营业执照复印件。

第七条 机构申请从事海员外派,应当向其工商注册地的交通运输部直属海事管理机构提出,工商注册地没有交通运输部直属海事管理机构的,应当向国家海事管理机构指定的交通运输部直属海事管理机构提出。

第八条 直属海事管理机构自受理申请之日起15个工作日内完成申请材料的书面审核和现场核验,并将审核意见和核验情况连同申请材料一并报国家海事管理机构审批。

第九条 国家海事管理机构收到报送材料后,根据直属海事管理机构的审核意见、核验情况以及机构申请材料,于15个工作日内作出批准或者不予批准的决定。

第十条 国家海事管理机构作出准予从事海员外派决定的,向申请机构颁发海员外派机构资质证书;海员外派机构资质证书的有效期最长不超过5年。

第十一条 海员外派机构资质证书上记载的机构名称、地址、法定代表人等发生变更的,海员外派机构应当自变更发生之日起30个工作日内到海事管理机构办理变更手续。

第十二条 已按《中华人民共和国船员服务管理规定》取得甲级海船船员服

务机构资质的机构，应当按本规定申请海员外派机构资质，方可从事海员外派。

第十三条 境外企业、机构在中国境内招收外派海员，应当委托海员外派机构进行。

外国驻华代表机构不得在境内开展海员外派业务。

第十四条 海员外派机构资质实施年审制度。

年审主要审查海员外派机构的资质条件符合情况及合法经营、规范运作情况。

交通运输部直属海事管理机构应当于每年度的2月份至4月份负责组织实施所属辖区的海员外派机构资质年审工作。

第十五条 海员外派机构应当于每年的2月1日前向所在辖区的海事管理机构申请进行年审，并提交下列材料：

（一）年审申请文书；

（二）年审报告书，包含海员外派机构资质条件符合情况、各项制度有效运行以及本规定执行情况。

第十六条 海员外派机构通过年审的，海事管理机构应当在其海员外派机构资质证书的年审情况栏中予以签注。

第十七条 海员外派机构年审不合格的，海事管理机构责令限期改正；如期改正的，海事管理机构应当在海员外派机构资质证书的年审情况栏中注明情况，予以通过年审；逾期未改正的，应当及时报请国家海事管理机构撤销其海员外派机构资质并依法办理注销手续。

第十八条 年审中被海事管理机构责令限期改正的，海员外派机构在改正期内不得继续选派船员及对外签订新的船舶配员协议，但仍应当承担对已派出外派海员的管理责任。

第十九条 海员外派机构应当在海员外派机构资质证书有效期届满之日60日以前向所在辖区的海事管理机构申请办理海员外派机构资质证书延续手续。申请办理海员外派机构资质证书延续手续，应当提交下列材料：

（一）海员外派机构资质证书延续申请；

（二）本规定第六条（二）至（九）项规定的材料。

第二十条 有下列情形之一的，海员外派机构应当到核发证书的海事管理机构办理资质证书注销手续：

（一）海员外派机构自行申请注销的；

（二）法人依法终止的；

（三）海员外派机构资质证书被依法撤销或者吊销的。

第二十一条 海员外派备用金实行专户存储，专款专用。

备用金的使用管理应当遵守国家关于对外劳务合作备用金管理制度。

第三章 海员外派机构的责任与义务

第二十二条 海员外派机构应当遵守国家船员管理、船员服务管理、船员证件管理、劳动和社会保障及对外劳务合作等有关规定,遵守中华人民共和国缔结或加入的国际公约,履行诚实守信义务。

第二十三条 海员外派机构应当保证本规定第五条第(五)项所规定的各项海员外派管理制度的有效运行。

第二十四条 海员外派机构为海员提供海员外派服务,应当保证外派海员与下列单位之一签订有劳动合同:

(一)本机构;

(二)境外船东;

(三)我国的航运公司或者其他相关行业单位。

外派海员与我国的航运公司或者其他相关行业单位签订劳动合同的,海员外派机构在外派该海员时,应当事先经过外派海员用人单位同意。

外派海员与境外船东签订劳动合同的,海员外派机构应当负责审查劳动合同的内容,发现劳动合同内容不符合法律法规、相关国际公约规定或者存在侵害外派海员利益条款的,应当要求境外船东及时予以纠正。

第二十五条 海员外派机构应当为外派海员购买境外人身意外伤害保险。

第二十六条 海员外派机构应当在充分了解并确保境外船东资信和运营情况良好的前提下,方可与境外船东签订船舶配员服务协议。

第二十七条 海员外派机构与境外船东签订的船舶配员服务协议,应当符合国内法律、法规和相关国际公约要求,并至少包括以下内容:

(一)海员外派机构及境外船东的责任、权利和义务。包括外派船员的数量、素质要求,派出频率,培训责任,外派机构对船员违规行为的责任分担等;

(二)外派海员的工作、生活条件;

(三)协议期限和外派海员上下船安排;

(四)工资福利待遇及其支付方式;

(五)正常工作时间、加班、额外劳动和休息休假;

(六)船舶适航状况及船舶航行区域;

(七)境外船东为外派海员购买的人身意外、疾病保险和处理标准;

(八)社会保险的缴纳;

(九)外派海员跟踪管理;

(十)突发事件处理;

(十一)外派海员遣返;

(十二)外派海员伤病亡处理;

(十三)外派海员免责条款;

(十四)特殊情况及争议的处理;

(十五)违约责任。

海员外派机构应当将船舶配员服务协议中与外派海员利益有关的内容如实告知外派海员。

第二十八条 海员外派机构应当根据派往船舶的船旗国和公司情况对外派海员进行相关法律法规、管理制度、风俗习惯和注意事项等任职前培训,并根据海员外派实际需要对外派海员进行必要的岗位技能训练。

第二十九条 海员外派机构应当在外派海员上船工作前,与其签订上船协议,协议内容应当至少包括下列内容:

(一)船舶配员服务协议中涉及外派海员利益的所有条款;

(二)海员外派机构对外派海员工作期间的管理和服务责任;

(三)外派海员在境外发生紧急情况时海员外派机构对其的安置责任;

(四)违约责任。

第三十条 海员外派机构应当建立与境外船东、外派海员的沟通机制,及时核查并妥善处理各种投诉。

海员外派机构应当对外派海员工作期间有关人身安全、身体健康、工作技能及职业发展等方面进行跟踪管理,为外派海员履行船舶配员服务合同提供必要支持。

第三十一条 海员外派机构不得因提供就业机会而向外派海员收取费用。

海员外派机构不得克扣外派海员的劳动报酬。

海员外派机构不得要求外派海员提供抵押金或担保金等。

第三十二条 海员外派机构应当为所服务的每名外派海员建立信息档案,主要包括:

(一)外派海员船上任职资历(包括所服务的船公司和船舶的名称、船籍港、所属国家、上船工作起始时间等情况);

(二)外派海员基本安全培训、适任培训和特殊培训情况;

(三)外派海员适任状况、安全记录和健康情况;

(四)外派海员劳动合同、船舶配员服务协议、上船协议等。

海员外派机构应当按有关规定报送统计数据,并将自有外派海员名册、非自有外派海员名册及上述档案信息按要求定期报海事管理机构备案。

第三十三条 海员外派机构不得把海员外派到下列公司或者船舶:

(一)被港口国监督检查中列入黑名单的船舶;

(二)非经中国境内保险机构或者国际保赔协会成员保险的船舶;

(三)未建立安全营运和防治船舶污染管理体系的公司或者船舶。

第三十四条 海员外派机构资质被暂停、吊销、撤销的,应当继续履行已签订的合同及协议。

第四章 突发事件处理

第三十五条 突发事件发生时,海员外派机构应当按照应急处理制度的规定,立即启动应急预案,并及时向海事管理机构报告。

第三十六条 海员外派机构应当与境外船东共同做好突发事件的处置工作。当境外船东未能及时全面履行突发事件责任时,海员外派机构应妥善处理突发事件,避免外派海员利益受损。

第三十七条 当海员外派机构拒绝承担或者无力承担发生突发事件责任时,可以动用海员外派备用金,用于支付外派海员回国或者接受其他紧急救助所需费用。

第三十八条 海员外派备用金动用后,海员外派机构应当于30日内补齐备用金。

第三十九条 境外突发事件的处理按对外劳务合作有关规定执行。

第五章 监督检查

第四十条 海事管理机构应当建立健全辖区内海员外派机构的管理档案,加强对海员外派机构的监督检查。

第四十一条 海事管理机构实施监督检查,可以询问当事人,向有关海员外派机构或者个人了解情况,查阅、复制有关资料,并保守被调查海员外派机构的商业秘密或者个人隐私。

接受海事管理机构监督检查的海员外派机构或者个人,应当如实反映情况和提供资料,不得以任何理由拒绝或阻扰检查。

第四十二条 海事管理机构实施监督检查时发现海员外派机构不再具备规定条件的,由海事管理机构责令限期改正。

海员外派机构在规定期限内未能改正的,应当依法撤销海员外派机构资质,并依法办理海员外派机构资质证书的注销手续。

第四十三条 海事管理机构应当定期向社会公布海员外派机构名单及机构概况,以及依法履行相应职责和承担法律义务、维护外派海员合法权益、诚实守信等情况。

第六章 法律责任

第四十四条 违反本规定，未经批准擅自从事海员外派活动，有下列情形之一的，由海事管理机构责令改正，处5万元以上25万元以下罚款；有违法所得的，应当没收违法所得；使用非法证件的，收缴非法证件：

（一）未取得海员外派机构资质擅自开展海员外派的；

（二）以欺骗、贿赂、提供虚假材料等非法手段取得海员外派机构资质的；

（三）超出海员外派机构资质证书有效期擅自开展海员外派的；

（四）海员外派机构资质被依法暂停期间擅自开展海员外派的；

（五）伪造或者变造海员外派机构资质证书擅自开展海员外派的。

第四十五条 海员外派机构在提供外派服务时，提供虚假信息，欺诈外派海员，有下列情形之一的，由海事管理机构给予相应处罚：

（一）重复或者超过标准收取费用，或者在公布的收费项目之外收取费用的；

（二）未将船舶配员服务协议的相关内容如实告知外派海员的；

（三）伪造或者提供虚假船舶配员服务协议信息的；

（四）与外派海员签订的上船协议内容与船舶配员服务协议的内容不符并损害外派海员利益的；

（五）倒卖、出租、出借海员外派机构资质证书，或者以其他形式非法转让海员外派机构资质证书的；

（六）有其他提供虚假信息，欺诈外派海员行为的。

有前款第（一）、（二）项情形之一的，处3万元以上10万元以下罚款，情节严重的，给予暂停海员外派机构资质证书6个月以上2年以下处罚；有前款第（三）、（四）、（五）、（六）项情形之一的，处10万元以上15万元以下罚款，情节严重的，吊销海员外派机构资质证书。

第四十六条 违反本规定，在外派海员未与海员外派机构、境外船东、我国的航运公司或其他相关行业单位签订劳动合同的情况下，提供海员外派服务的，由海事管理机构责令改正，处5万元以上25万元以下罚款；情节严重的，给予暂停海员外派机构资质证书6个月以上2年以下直至吊销的处罚。

第四十七条 海事管理机构工作人员有下列情形之一的，依法给予行政处分：

（一）违反规定批准海员外派机构资质；

（二）不依法履行监督检查职责；

（三）不依法实施行政强制或者行政处罚；

（四）滥用职权、玩忽职守的其他行为。

第七章 附 则

第四十八条 本规定中下列用语的含义是:

(一)海员外派,指为外国籍或者港澳台地区籍船舶提供配员的船员服务活动。

(二)境外船东,指外国籍或港澳台地区籍船舶的所有人、经营人或管理人。

(三)自有外派海员,指仅与本海员外派机构签订劳动合同的船员。

(四)突发事件,指外派海员所在船舶或其本人突然发生意外情况,造成或者可能对外派海员造成危害,需要采取应急处置措施予以应对的事件。

第四十九条 我国与有关国家或地区签订有对外劳务合作相关协议的,按照协议规定执行。

第五十条 本规定自2011年7月1日起施行。

(责任编辑:江晓筠)

最高人民法院关于审理船舶油污损害赔偿纠纷案件若干问题的规定

（2011 年 1 月 10 日最高人民法院审判委员会第 1509 次会议通过）

为正确审理船舶油污损害赔偿纠纷案件，依照《中华人民共和国民法通则》、《中华人民共和国侵权责任法》、《中华人民共和国海洋环境保护法》、《中华人民共和国海商法》、《中华人民共和国民事诉讼法》、《中华人民共和国海事诉讼特别程序法》等法律法规以及中华人民共和国缔结或者参加的有关国际条约，结合审判实践，制定本规定。

第一条 船舶发生油污事故，对中华人民共和国领域和管辖的其他海域造成油污损害或者形成油污损害威胁，人民法院审理相关船舶油污损害赔偿纠纷案件，适用本规定。

第二条 当事人就油轮装载持久性油类造成的油污损害提起诉讼、申请设立油污损害赔偿责任限制基金，由船舶油污事故发生地海事法院管辖。

油轮装载持久性油类引起的船舶油污事故，发生在中华人民共和国领域和管辖的其他海域外，对中华人民共和国领域和管辖的其他海域造成油污损害或者形成油污损害威胁，当事人就船舶油污事故造成的损害提起诉讼、申请设立油污损害赔偿责任限制基金，由油污损害结果地或者采取预防油污措施地海事法院管辖。

第三条 两艘或者两艘以上船舶泄漏油类造成油污损害，受损害人请求各泄漏油船舶所有人承担赔偿责任，按照泄漏油数量及泄漏油类对环境的危害性等因素能够合理分开各自造成的损害，由各泄漏油船舶所有人分别承担责任；不能合理分开各自造成的损害，各泄漏油船舶所有人承担连带责任。但泄漏油船舶所有人依法免予承担责任的除外。

各泄漏油船舶所有人对受损害人承担连带责任的，相互之间根据各自责任大小确定相应的赔偿数额；难以确定责任大小的，平均承担赔偿责任。泄漏油船舶所有人支付超出自己应赔偿的数额，有权向其他泄漏油船舶所有人追偿。

第四条 船舶互有过失碰撞引起油类泄漏造成油污损害的，受损害人可以请求泄漏油船舶所有人承担全部赔偿责任。

第五条 油轮装载的持久性油类造成油污损害的，应依照《防治船舶污染海洋环境管理条例》、《1992 年国际油污损害民事责任公约》的规定确定赔偿限额。

油轮装载的非持久性燃油或者非油轮装载的燃油造成油污损害的,应依照海商法关于海事赔偿责任限制的规定确定赔偿限额。

第六条 经证明油污损害是由于船舶所有人的故意或者明知可能造成此种损害而轻率地作为或者不作为造成的,船舶所有人主张限制赔偿责任,人民法院不予支持。

第七条 油污损害是由于船舶所有人故意造成的,受损害人请求船舶油污损害责任保险人或者财务保证人赔偿,人民法院不予支持。

第八条 受损害人直接向船舶油污损害责任保险人或者财务保证人提起诉讼,船舶油污损害责任保险人或者财务保证人可以对受损害人主张船舶所有人的抗辩。

除船舶所有人故意造成油污损害外,船舶油污损害责任保险人或者财务保证人向受损害人主张其对船舶所有人的抗辩,人民法院不予支持。

第九条 船舶油污损害赔偿范围包括:(一)为防止或者减轻船舶油污损害采取预防措施所发生的费用,以及预防措施造成的进一步灭失或者损害;(二)船舶油污事故造成该船舶之外的财产损害以及由此引起的收入损失;(三)因油污造成环境损害所引起的收入损失;(四)对受污染的环境已采取或将要采取合理恢复措施的费用。

第十条 对预防措施费用以及预防措施造成的进一步灭失或者损害,人民法院应当结合污染范围、污染程度、油类泄漏量、预防措施的合理性、参与清除油污人员及投入使用设备的费用等因素合理认定。

第十一条 对遇险船舶实施防污措施,作业开始时的主要目的仅是为防止、减轻油污损害的,所发生的费用应认定为预防措施费用。

作业具有救助遇险船舶、其他财产和防止、减轻油污损害的双重目的,应根据目的的主次比例合理划分预防措施费用与救助措施费用;无合理依据区分主次目的的,相关费用应平均分摊。但污染危险消除后发生的费用不应列为预防措施费用。

第十二条 船舶泄漏油类污染其他船舶、渔具、养殖设施等财产,受损害人请求油污责任人赔偿因清洗、修复受污染财产支付的合理费用,人民法院应予支持。

受污染财产无法清洗、修复,或者清洗、修复成本超过其价值的,受损害人请求油污责任人赔偿合理的更换费用,人民法院应予支持,但应参照受污染财产实际使用年限与预期使用年限的比例作合理扣除。

第十三条 受损害人因其财产遭受船舶油污,不能正常生产经营的,其收入损失应以财产清洗、修复或者更换所需合理期间为限进行计算。

第十四条 海洋渔业、滨海旅游业及其他用海、临海经营单位或者个人请求因环境污染所遭受的收入损失,具备下列全部条件,由此证明收入损失与环境污染之间具有直接因果关系的,人民法院应予支持:(一)请求人的生产经营活动位

于或者接近污染区域;(二)请求人的生产经营活动主要依赖受污染资源或者海岸线;(三)请求人难以找到其他替代资源或者商业机会;(四)请求人的生产经营业务属于当地相对稳定的产业。

第十五条 未经相关行政主管部门许可,受损害人从事海上养殖、海洋捕捞,主张收入损失的,人民法院不予支持;但请求赔偿清洗、修复、更换养殖或者捕捞设施的合理费用,人民法院应予支持。

第十六条 受损害人主张因其财产受污染或者因环境污染造成的收入损失,应以其前三年同期平均净收入扣减受损期间的实际净收入计算,并适当考虑影响收入的其他相关因素予以合理确定。

按照前款规定无法认定收入损失的,可以参考政府部门的相关统计数据和信息,或者同区域同类生产经营者的同期平均收入合理认定。

受损害人采取合理措施避免收入损失,请求赔偿合理措施的费用,人民法院应予支持,但以其避免发生的收入损失数额为限。

第十七条 船舶油污事故造成环境损害的,对环境损害的赔偿应限于已实际采取或者将要采取的合理恢复措施的费用。恢复措施的费用包括合理的监测、评估、研究费用。

第十八条 船舶取得有效的油污损害民事责任保险或者具有相应财务保证的,油污受损害人主张船舶优先权的,人民法院不予支持。

第十九条 对油轮装载的非持久性燃油、非油轮装载的燃油造成油污损害的赔偿请求,适用海商法关于海事赔偿责任限制的规定。

同一海事事故造成前款规定的油污损害和海商法第二百零七条规定的可以限制赔偿责任的其他损害,船舶所有人依照海商法第十一章的规定主张在同一赔偿限额内限制赔偿责任的,人民法院应予支持。

第二十条 为避免油轮装载的非持久性燃油、非油轮装载的燃油造成油污损害,对沉没、搁浅、遇难船舶采取起浮、清除或者使之无害措施,船舶所有人对由此发生的费用主张依照海商法第十一章的规定限制赔偿责任的,人民法院不予支持。

第二十一条 对油轮装载持久性油类造成的油污损害,船舶所有人,或者船舶油污责任保险人、财务保证人主张责任限制的,应当设立油污损害赔偿责任限制基金。

油污损害赔偿责任限制基金以现金方式设立的,基金数额为《防治船舶污染海洋环境管理条例》、《1992 年国际油污损害民事责任公约》规定的赔偿限额。以担保方式设立基金的,担保数额为基金数额及其在基金设立期间的利息。

第二十二条 船舶所有人、船舶油污损害责任保险人或者财务保证人申请设立油污损害赔偿责任限制基金,利害关系人对船舶所有人主张限制赔偿责任有异议的,应当在海事诉讼特别程序法第一百零六条第一款规定的异议期内以书面形式提出,但提出该异议不影响基金的设立。

第二十三条 对油轮装载持久性油类造成的油污损害,利害关系人没有在异议期内对船舶所有人主张限制赔偿责任提出异议,油污损害赔偿责任限制基金设立后,海事法院应当解除对船舶所有人的财产采取的保全措施或者发还为解除保全措施而提供的担保。

第二十四条 对油轮装载持久性油类造成的油污损害,利害关系人在异议期内对船舶所有人主张限制赔偿责任提出异议的,人民法院在认定船舶所有人有权限制赔偿责任的裁决生效后,应当解除对船舶所有人的财产采取的保全措施或者发还为解除保全措施而提供的担保。

第二十五条 对油轮装载持久性油类造成的油污损害,受损害人提起诉讼时主张船舶所有人无权限制赔偿责任的,海事法院对船舶所有人是否有权限制赔偿责任的争议,可以先行审理并作出判决。

第二十六条 对油轮装载持久性油类造成的油污损害,受损害人没有在规定的债权登记期间申请债权登记的,视为放弃在油污损害赔偿责任限制基金中受偿的权利。

第二十七条 油污损害赔偿责任限制基金不足以清偿有关油污损害的,应根据确认的赔偿数额依法按比例分配。

第二十八条 对油轮装载持久性油类造成的油污损害,船舶所有人、船舶油污损害责任保险人或者财务保证人申请设立油污损害赔偿责任限制基金、受损害人申请债权登记与受偿,本规定没有规定的,适用海事诉讼特别程序法及相关司法解释的规定。

第二十九条 在油污损害赔偿责任限制基金分配以前,船舶所有人、船舶油污损害责任保险人或者财务保证人,已先行赔付油污损害的,可以书面申请从基金中代位受偿。代位受偿应限于赔付的范围,并不超过接受赔付的人依法可获得的赔偿数额。

海事法院受理代位受偿申请后,应书面通知所有对油污损害赔偿责任限制基金提出主张的利害关系人。利害关系人对申请人主张代位受偿的权利有异议的,应在收到通知之日起十五日内书面提出。

海事法院经审查认定申请人代位受偿权利成立,应裁定予以确认;申请人主张代位受偿的权利缺乏事实或者法律依据的,裁定驳回其申请。当事人对裁定不服的,可以在收到裁定书之日起十日内提起上诉。

第三十条 船舶所有人为主动防止、减轻油污损害而支出的合理费用或者所作的合理牺牲,请求参与油污损害赔偿责任限制基金分配的,人民法院应予支持,比照本规定第二十九条第二款、第三款的规定处理。

第三十一条 本规定中下列用语的含义是:

(一)船舶,是指非用于军事或者政府公务的海船和其他海上移动式装置,包括航行于国际航线和国内航线的油轮和非油轮。其中,油轮是指为运输散装持久性货油而建造或者改建的船舶,以及实际装载散装持久性货油的其他船舶。

（二）油类，是指烃类矿物油及其残余物，限于装载于船上作为货物运输的持久性货油、装载用于本船运行的持久性和非持久性燃油，不包括装载于船上作为货物运输的非持久性货油。

（三）船舶油污事故，是指船舶泄漏油类造成油污损害，或者虽未泄漏油类但形成严重和紧迫油污损害威胁的一个或者一系列事件。一系列事件因同一原因而发生的，视为同一事故。

（四）船舶油污损害责任保险人或者财务保证人，是指海事事故中泄漏油类或者直接形成油污损害威胁的船舶一方的油污责任保险人或者财务保证人。

（五）油污损害赔偿责任限制基金，是指船舶所有人、船舶油污损害责任保险人或者财务保证人，对油轮装载持久性油类造成的油污损害申请设立的赔偿责任限制基金。

第三十二条 本规定实施前本院发布的司法解释与本规定不一致的，以本规定为准。

本规定施行前已经终审的案件，人民法院进行再审时，不适用本规定。

（责任编辑：江晓筠）

中华人民共和国政府和印度尼西亚共和国政府关于进一步加强战略伙伴关系的联合公报

2011年4月29日,雅加达

一、应印度尼西亚共和国总统苏西洛·班邦·尤多约诺邀请,中华人民共和国国务院总理温家宝于2011年4月28日至30日对印度尼西亚共和国进行正式访问。

二、访问期间,温家宝总理和苏西洛总统在亲切友好的气氛中举行会谈,就双边关系及共同关心的国际和地区问题深入交换了意见,达成重要共识。双方对访问成果感到满意,认为访问将成为中印尼战略伙伴关系发展的重要里程碑。

三、双方回顾了两国友好互利合作关系取得的新进展,一致认为,中印尼关系已进入全面发展的新阶段,具有地区和全球战略意义。双方同意在中印尼战略伙伴关系框架下,进一步增进在政治领域业已存在的紧密关系,深化和扩大经贸往来,促进文化交流和民间交往,扩大国际合作。

政 治

四、双方重申将继续奉行相互尊重独立、主权和领土完整的原则。苏西洛总统重申印尼坚持一个中国政策的一贯立场,支持中国和平统一进程。温家宝总理对印尼方这一立场表示赞赏,并重申中国坚定支持和尊重印尼的国家统一、领土完整和主权。

五、双方对2010年1月21日签订的《中华人民共和国政府与印度尼西亚共和国政府关于落实战略伙伴关系联合宣言的行动计划》感到满意,一致同意采取具体措施落实好行动计划,推进两国各领域务实合作。

六、双方认识到加强两国领导人互访和完善高级别战略对话机制的重要性。双方同意进一步加强印尼政治、法律、安全统筹部长和中国国务院国务委员之间的双边磋商,责成两国外长联委会每年召开一次会议,履行监督、评估各领域现有双边合作,并寻找新的合作机遇的机制职能以加强两国战略伙伴关系。同时,双方同意保持在两国防务与安全磋商、经贸和技术合作联委会等机制下的对话

与合作。

七、双方欢迎签署《中华人民共和国外交部和印度尼西亚共和国外交部关于共同行动的谅解备忘录》,以加强两国外交部合作,包括开展相互交流、外交官培训、政策规划研究以及建立两国外交部各级别官员间热线电话等。

八、中方欢迎印尼即将在上海开设总领馆。双方认为,这将有利于进一步深化两国关系。

经济、贸易和投资

九、双方重申海上合作对发展两国战略伙伴关系的重要意义,承诺继续加强在航行安全、海上安全、海军合作、渔业开发活动、打击非法、不报告及不受管制的渔业捕捞活动、海洋科研环保等领域的交流与合作。双方欢迎签署《关于修订〈中华人民共和国国家海洋局和印度尼西亚共和国海洋渔业部关于海洋领域合作谅解备忘录〉的议定书》。

十、双方对双边经济关系的积极发展表示满意。双方相信,两国贸易额达到500亿美元的目标有望提前实现,同意努力实现2015年两国贸易额达到800亿美元的新目标。双方强调和重申以平衡和可持续发展的方式实现上述目标。

十一、为此,温家宝总理重申中方坚定致力于扩大从印尼进口并为此提供便利,通过增加中国在印尼工业领域的投资等措施提高印尼工业能力。

十二、双方欢迎两国政府签署《中华人民共和国政府和印度尼西亚共和国政府关于扩大和深化双边经济贸易合作的协定》,并决心通过互利互惠的方式落实好上述协定。

十三、双方同意积极鼓励和支持两国企业增加和扩大双向投资,包括推动双方相关协会间建立直接对话。印尼欢迎中国增加对印尼制造业、高新技术、农业、林业、渔业、清洁能源和旅游业等领域的投资。

十四、印尼欢迎中国企业在平等互利基础上,特别是在公私伙伴合作框架下,参与印尼公路、桥梁、港口、电站和水资源开发等基础设施发展。双方同意就印尼经济走廊的发展加强合作。中方也希望就经济合作区的发展同印尼方加强合作。

十五、双方再次承诺将推进两国农业领域合作,特别是在技术转让、能力建设、粮食储备管理、杂交水稻、共同研发以及应对粮食安全相关问题方面的合作。

十六、双方强调,将巩固扩大两国在油气、煤炭、电力领域的合作,并积极探索新能源和可再生能源领域的合作机会。为此,双方强调,充分利用中国—印尼能源论坛,加快实现两国在能源领域的合作目标。

防务和安全

十七、双方一致认为,为应对二十一世纪传统和非传统安全挑战,两国应进一步加强战略防务合作。为此,双方承诺,进一步加强包括联合演习、海上安全、国防工业在内的防务及其能力建设领域的合作,并加强在非传统安全领域的交流与合作。

社会和文化

十八、双方一致认为,建立双边合作机制,加强防灾、减灾领域协商与协调非常重要,其中包括信息、经验共享及相关人员培训。

十九、双方强调相互尊重对方的传统文化,同意进一步加强艺术、电影、媒体、展览以及双方达成一致的其他领域的交流与合作。

二十、双方同意进一步推动两国教育领域合作,在教育及相关机构鼓励语言教学,促进学生交流和学者交流,扩大奖学金规模,推进互相承认学历学位工作。

二十一、双方同意加强两国青年和青年组织间互访,加强体育合作。

二十二、双方同意推动旅游合作,鼓励联合宣传推广,鼓励两国游客互访。

二十三、双方同意促进两国学术界交流,加深两国国民间业已存在的友好关系,增进双方相互理解与信任。双方进一步鼓励双方智库加强交流。

地区和国际问题

二十四、双方强调中国和印尼在促进亚太地区和平与稳定方面拥有广泛共同利益,为此,双方支持构建和完善开放、包容、互利的合作框架。双方重申,将坚定致力于在中国—东盟、东盟与中日韩、东亚峰会(EAS)、东盟地区论坛(ARF)、亚太经合组织、亚欧会议等多边框架下加强协调与合作,共同应对国际和地区问题。双方致力于促进区域贸易和投资自由化与便利化、区域经济一体化和经济技术合作以及为本地区的稳定和发展作出贡献。

二十五、双方高度评价中国与东盟二十年来始终保持密切合作关系。温家宝总理表示相信,在印尼担任东盟主席国期间,中国—东盟关系将得到进一步提升。

二十六、双方承诺将继续支持东盟在东亚峰会中的主导作用。双方相信,2011年11月在巴厘举行的东亚峰会将进一步推动各成员国密切合作,以进一

步实现本地区的共同稳定、共同安全和共同繁荣。

二十七、双方一致认为，中印尼在多边领域中的合作是两国战略伙伴关系的重要组成部分。作为主要发展中国家，中印尼加强对话与合作将为国际社会应对重大挑战作出贡献。中国和印尼愿在联合国、二十国集团和世界贸易组织框架下保持密切磋商。同时，双方将加强与其他发展中国家的协调，在重大国际问题上维护发展中国家的主张和利益，推动建立持久和平、共同繁荣的和谐世界。

二十八、双方强调，应对气候变化应在可持续发展框架下进行，应基于《联合国气候变化框架公约》及其《京都议定书》的原则和规定，应在坎昆会议成果的基础上继续落实“巴厘路线图”授权，推动南非德班气候变化会议取得积极成果。

二十九、双方满意地看到，中国和印尼在应对国际金融危机带来的挑战中采取了积极有效措施，保持了各自经济增长，并为全球经济复苏作出了重要贡献。双方支持加快落实和深化国际货币基金组织和世界银行的改革，实现二十国集团匹兹堡峰会确定的量化改革目标，将就此保持密切磋商与协调。

三十、温家宝总理对苏西洛总统以及印尼政府和人民在此次正式访问期间给予他本人和代表团的热情款待表示衷心感谢，这充分体现了两国和两国人民间长久的友谊和互利合作关系。

（责任编辑：江晓筠）

NUUK DECLARATION
On the occasion of the Seventh Ministerial Meeting of The Arctic Council

12 May 2011, Nuuk, Greenland

Ministers representing the eight Arctic States, convening in Nuuk, Greenland, for the Seventh Ministerial meeting of the Arctic Council, joined by the representatives of the six Permanent Participant organizations of the Arctic Council,

Recognizing the importance of maintaining peace, stability and constructive cooperation in the Arctic,

Reconfirming the commitment of the Arctic Council to promote environmental protection and sustainable development of the Arctic,

Welcoming the increased cooperation among the Arctic States and peoples in order to address the new challenges and opportunities,

Recognizing that the Arctic is first and foremost an inhabited region with diverse economies and societies and the importance of continued sustainable development of Arctic communities, **recognizing** the rights of indigenous peoples and interests of all Arctic residents, and **emphasizing** the continued engagement of indigenous peoples and communities as a fundamental strength of the Council,

Recognizing that rapidly changing circumstances, in particular the changing climate, have increased the challenges and opportunities facing the Arctic in both volume and complexity, and **underscoring** the importance of strengthening the Arctic Council to address this change,

Hereby:

STRENGTHENING THE ARCTIC COUNCIL

Announce the Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic, as the first legally binding agreement negotiated un-

der the auspices of the Arctic Council,

Decide that the Arctic Council should continue to work towards solutions to address emerging challenges in the Arctic utilizing a wide range of approaches,

Decide to strengthen the capacity of the Arctic Council to respond to the challenges and opportunities facing the Arctic by establishing a standing Arctic Council secretariat, hereinafter the Secretariat, in Troms ϕ, Norway to be operational no later than at the beginning of the Canadian Chairmanship of the Arctic Council in 2013,

Decide to establish a task force to implement the decisions to strengthen the Arctic Council, including any necessary arrangements to establish the Secretariat, and **approve** the composition and mandate of the task force as set out in the Senior Arctic Officials' Report to Ministers 2011 (SAO Report),

Adopt the recommendations of the Senior Arctic Officials (SAOs) on the role and criteria for observers to the Arctic Council as set out in Annexes to the SAO Report, and **decide** to apply these criteria to evaluate pending applicants for observer status,

Adopt the Communication and Outreach Guidelines as set out in the SAO Report and **instruct** the SAOs to develop a Strategic Communications Plan for the Arctic Council,

MAJOR ACCOMPLISHMENTS AND FUTURE WORK

Human Dimension

Note with appreciation and welcome the priority placed on human health issues during the Danish chairmanship, **take note** of the Arctic Health Ministers' Meeting held in Nuuk in February 2011, **recognize** the continued health challenges and **note** the need to improve physical and mental health and well-being and empowerment of indigenous peoples and residents of Arctic communities,

Note the need for a comprehensive overview of human development in the Arctic and **call** for an assessment of the current state of human development in the Arctic and its relationship with climate change and other factors affecting Arctic communities,

Climate Change and Environmental Protection

Recognize that substantial cuts in emissions of Carbon dioxide and other greenhouse gases are the backbone of meaningful global climate change mitigation efforts,

Welcome with appreciation the full report on the assessment of the Arctic Cryosphere entitled "Snow, Water, Ice and Permafrost in the Arctic" (SWIPA), **note with concern** the accelerated change in major components of the cryosphere and the profound local, regional and global effects of observed and expected changes, **emphasize** the need for forward looking Arctic cooperation with a view to increase Arctic resilience and to enhance Arctic Council leadership to minimize the human and environmental impacts of climate change, and **instruct** Senior Arctic Officials to consider how best to follow up on the SWIPA recommendations in the future work of the Arctic Council,

Welcome the Arctic Council reports on Short-Lived Climate Forcers (SLCF), that have significantly enhanced understanding of black carbon, **encourage** Arctic states to implement, as appropriate in their national circumstances, relevant recommendations for reducing emissions of black carbon, and **request** the Task Force and the AMAP expert group to continue their work by

focusing on methane and tropospheric ozone, as well as further black carbon work where necessary and provide a report to the next Ministerial meeting in 2013,

Decide to establish a Short-Lived Climate Forcer Contaminants project steering group that will undertake circumpolar demonstration projects to reduce black carbon and other SLCF emissions,

Note with concern that mercury levels continue to rise and present risks to the health of the human population and the wildlife in parts of the Arctic as reported in the 2011 AMAP assessment on mercury in the Arctic, and **support** the ongoing intergovernmental negotiations under the United Nations Environment Programme (UNEP) to conclude a global agreement on mercury that will significantly reduce global mercury use and emissions,

Appreciate actions in support of the implementation of the Stockholm Convention and the Persistent Organic Pollutants (POPs) and Heavy metals protocol of the UNECE Convention on Long-Range Transboundary Air Pollution (LRTAP), and **encourage** countries to continue work to reduce emissions and sign,

ratify and enhance the implementation of these Conventions and Protocols,

Reiterate the importance of the use of Arctic Indigenous Peoples' traditional knowledge and capacity-building initiatives in the planning and implementation of measures to adapt to climate change, **recognize** that climate change and other negative factors have impacted the traditional livelihoods and food safety and security of Arctic Indigenous Peoples and other Arctic residents and communities,

Confirm the commitment of all Arctic states to work together and with other countries to implement the agreements reached in Cancun by the time of the climate talks this year in Durban, South Africa, and in this context **urge** all Parties to the UNFCCC to take urgent action to meet the long-term goal of holding the increase in global average temperature below 2 degrees Celsius above pre-industrial levels,

Decide to establish an expert group on Arctic ecosystem-based management (EBM) for the Arctic environment to recommend further activities in this field for possible consideration by the SAOs before the end of the Swedish chairmanship,

Direct SAOs to review the need for an integrated assessment of multiple drivers of Arctic change as a tool for Indigenous Peoples, Arctic residents, governments and industry to prepare for the future, and, based on that review, to make recommendations for consideration by Arctic Council Deputy Ministers at their next meeting of a possible Arctic Change Assessment, including an Arctic Resilience report,

Arctic marine environment

Decide to establish a Task Force, reporting to the SAOs, to develop an international instrument on Arctic marine oil pollution preparedness and response, and call for the Emergency Prevention, Preparedness and Response (EPPR) and other relevant working groups to develop recommendations and/or best practices in the prevention of marine oil pollution; the preliminary or final results of both to be presented jointly at the next Ministerial meeting in 2013,

Welcome EPPR's report "Behavior of Oil and Other Hazardous Substances in Arctic Waters" (BoHaSa) and its contribution to knowledge of the behaviour of oil and other hazardous substances in the Arctic and **encourage** the Senior

Arctic Officials to consider the conclusions and recommendations for future Arctic Council activities,

Recognize the important role of the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic for safe transport and enhancing cooperation in assisting people in distress in the Arctic,

Urge the completion as soon as possible of work at the International Maritime Organization to develop a mandatory polar code for ships,

Welcome the progress achieved with the Arctic Ocean Review (AOR) project which considers existing global and regional measures that are relevant for the Arctic marine environment, and **look forward** to the delivery of the final report of the AOR project in 2013, in particular the options and opportunities for strengthening global and regional efforts for the conservation and sustainable use of the Arctic marine environment,

Science and Monitoring

Recognize the importance of the Sustaining Arctic Observing Networks (SAON) process as a major legacy of the International Polar Year for enhancing scientific observations and data-sharing and **accept** the recommendations of the Senior Arctic Officials as contained in the SAO report for the ongoing management of SAON,

Recognize that the International Polar Year (IPY) was the largest circumpolar program on scientific research to date, and **welcome** in 2012 the "Knowledge to Action Conference" in Montreal as the concluding event of IPY and the opportunity it presents to transform knowledge and scientific results into policies that will guide our future actions related to the environment and well-being of Arctic communities,

Decide to task the Senior Arctic Officials to consider maximizing the legacy of the IPY by supporting a proposal to arrange an International Polar Decade in light of the rapid climate change of the Arctic and the need for further coordinated research of the Arctic environment and its human dimension,

Welcome the contributions of the Arctic Biodiversity Trends 2010 Report toward understanding the adaptability of nature and living resources in the Arctic to global and regional stressors, and **await** the scientific assessment and policy

recommendations from the Arctic Biodiversity Assessment (ABA) scheduled to be completed in 2013,

Congratulate the University of the Arctic (UArctic) on its 10tri anniversary, **recognize** its contribution in developing specialized education aimed at building capacity and fostering traditional and scientific knowledge relevant to Indigenous Peoples, Arctic communities and policy-makers, and **encourage** continuous support for the UArctic,

OTHER ISSUES

Adopt the recommendations in the SAO Report to Ministers and **instruct** SAOs to review and adjust, if needed, the mandates of the Arctic Council working groups and task forces and their work plans for 2011—2013,

Reiterate the need to finance circumpolar cooperation, as well as the importance of providing adequate funding to Permanent Participants to support their preparations for, and participation in, the Arctic Council, the working groups, task forces and Arctic Council projects,

Note the Arctic Environment Ministers Meeting in June 2010, and the Arctic Health Ministers meeting in February 2011, and **welcome** further high-level meetings,

Welcome continued cooperation with other relevant bodies,

Thank the kingdom of Denmark for its Chairmanship of the Arctic Council during the period 2009—2011, and **welcome** the offer of the Kingdom of Sweden to chair the Arctic Council during the period 2011—2013 and to host the Eighth Ministerial meeting in 2013.

Signed by the representatives of the Arctic Council
12 May 2011 in Nuuk, Greenland

(Editor: JIANG Xiaojun)

《中国海洋法学评论》稿约

《中国海洋法学评论》(*China Oceans Law Review*),ISSN:1813－7350,是由上海交通大学凯原法学院海洋法律与政策研究中心、台湾中山大学海洋事务研究所、香港理工大学董浩云国际海事研究中心以及厦门大学海洋政策与法律研究中心两岸三地四校联合主办,(香港)中国评论文化有限公司出版的海洋法领域中英双语对照的优秀国际学术期刊。《中国海洋法学评论》秉承"海纳百川,有容乃大"的精神,力求刊发海内外与海洋法律、海洋政策相关的一切研究成果,热忱欢迎专家学者不吝赐稿,兹立稿约如下:

一、鼓励英文著述,同一学术水准稿件,英文著述将优先录用。

二、来稿形式不限,学术专论、评论、判解研究、译作等均可,篇幅长短不拘,不考虑稿件作者的身份和以往学术经历,只有学术水准和学术规范的要求。关于引证规范,请具体参见尾页所附之引证体例。

三、来稿须同一语言下未曾在任何纸质和电子媒介上发表。稿件请附中英文注明作者姓名、学位、工作单位及职务、职称、研究领域和通讯方式等。来稿必复,编辑部在收到来稿两个月内将安排匿名审稿。届时未接到录用通知者,作者可自做他用。来稿一律不退,请作者自留底稿。

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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。

1、应聘条件

访问学者应具有海洋、海事专业背景。

2、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。

3、工作条件及待遇

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4、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

Email: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 Jiaotong 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
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中国海洋法学评论

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